

FORM 13

BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2013-000457

Nancy Elizabeth Schaffer Turner, as Personal
Representative of the Estate of
Martha L. Schaffer

Appellant,

v.

Susan Linda Schaffer Sawadske,

Respondent

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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2. DID THE PROBATE JUDGE ERRED WHEN NOT PROVIDING A RELIEF FOR THE RETURN OF PERSONNEL PROPERTY ABSENT A RETURN OF PROPERTY SHOULD DAMAGES HAVE BEEN AWARDED?
3. DID THE PROBATE JUDGE ERR IN BARRING THIS ACTION BY STATUE OF LIMITATION WHEN STATUTES OF LIMITATION ARE GENERALLY NOT APPLICABLE IN EQUITABLE ACTIONS?

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STATEMENT OF THE CASE

On January 7, 2011 Nancy S. Turner brought this action alleging undue influence and or fraud against her sister, Susan S. Sawadske. This action was unopposed by the respondent Susan S. Sawadske.

After repeated unsuccessful effort to have the summons and petition served upon Susan S. Sawadske A Summons and Petition was put in The James Island Messenger 4-27-2011, 5-4-2011 and 5-11-2011 asking Susan S. Sawadske to answer the petition.

June 29, 2011 Probate Hearing Susan S. Sawadske did not come.

July 13, 2011 Judge of Probate, Keith W. Kornahrens signed an order that the petitioner, Nancy S. Turner is entitled to her personal property if she can locate it,

appointed Nancy S. Turner as Personal Representative, barred by Statute of Limitation setting aside the deed to Folly Beach property. There was no defense Susan S. Sawadske did not appear for the hearing.

Aug. 11, 2011 Nancy S. Turner sent Notice of Appeal to Susan S. Sawadske the Notice was filed Aug. 24, 2011.

February 1, 2013 Circuit Court Judge, Kristi L. Harrington signed Statement of Judgment by the Court affirming the Honorable Keith Kornahren ruling on all matters raised on appeal by Nancy S. Turner, Susan S. Sawadske did not attend the hearing.

FACTS

This appeal is from Berkeley County, South Carolina The Court of Common Pleas. It involves the estate of Martha Leanora Edgar Schaffer, who left three adult surviving children at the time of her death: Susan Schaffer Sawadske, Nancy Schaffer Turner and Mark David Schaffer. In April of 1989 she devised a will that would leave the balance of her estate to her children in equal shares. At no time in the course of her life did she change her will. She acquired property through a deed of distribution from the death of her husband and father of her children, in February of 1989. That deed of distribution gave Martha L.E. Schaffer 1224 Raymond Way, Charleston S.C. There was a provision that should that property be sold in Martha L.E. Schaffers' life time one third of the proceeds would be equally divided between the siblings, later that provisions was quit claimed to Martha L.E. Schaffer with the understanding her children would receive and split in equal shares that property upon Martha L.E. Schaffer's death. A second parcel of property was also granted in the deed of distribution in its entirety, Lot No. 202 West Huron Ave., Folly Beach, South Carolina.

After the death of her husband in 1989, Martha L.E. Schaffer put her local daughter on her Wachovia Account number 101291789. This account received direct deposits for surviving spousal benefits than later Social Security for Martha L.E. Schaffer. Following a massive stroke in Nov. 1996 Susan S. Sawadske exclusively withdrew money from this account up until Martha L. E. Schaffer death in July, 2001. But, Susan S. Sawadske did not use the monies to pay Martha L.E. Schaffer's debts including the assisted living center bill. On Jan. 8, 2000 Martha L.E. Schaffer was placed in an assisted living center, yet Susan continued to use the money in the join bank account. In 1997 accoring to The Social Security Administration Martha L.E. Schaffer meet both the A and B criteria of organic mental disorders and she received money from the date of her stroke. Martha L. Schaffer received \$828.00 12/09/1997 for mental component summary.

On November 18, 1996 Susan took her mother, Martha L.E. Schaffer to John Abess, M.D., P.A., a psychiatrist, from a referral of Dr. Damasi, a cardiologist, for confusion and according to Susan ongoing memory issues for two years prior. At that time Martha L.E. Schaffer was diagnosed with dementia and " a physical disorder affecting her mind such as Alzheimer's, TIA's, Diabetic Small Vessel Ischemia, Hypoxia". On November 19, 1996 Martha L.E. Schaffer was admitted to the hospital with a massive stroke. Martha L. E. Schaffer never fully recovered from that stroke and became more and more dependent on Susan. Susan moved in with her mother, Martha L.E. Schaffer, in December of 1997 to be the primary care giver, take her to doctors' appointments, pay bills, conduct financial transactions, administer medications and satisfy her daily needs. When Martha L.E. Schaffer was difficult to manage Susan, a Register Nurse would administer Haldol. On March 12, 1997 Susan took her mother to Dr. Damasi, cardiologist, he told Susan her

mother would not be capable of returning to work. At that time Martha L.E. Schaffer had not worked in two years the same time frame is when the difficulties with memory began. The next day March 13, 1997 Susan took her mother to an attorney to sign a Title to Real Estate for Lot No. 202 West Huron Ave., Folly Beach. From March to June of 1997 Martha L.E. Schaffer was admitted to Roper Hospital with delusional behavior and paranoid behavior. Was being seen by a neurologist, was being administered Haldol by Susan as a means to manage her mother. Sometime prior to Oct. 16, 1997 Martha L.E. Schaffer was a patient of the Institute of Psychiatry at the Medical University of South Carolina. Yet, this is avoided on question 6 of The Application for Probate of Will and Appointment dated Nov. 6, 2001.

The Title To Real Estate for the property known as Lot 202 on West Huron Avenue, Folly Beach, transferring the property to two children Susan Sawadske and Mark Schaffer for ten dollars and love and affection. This is the first time the children do not share substantially. This transfer was made under suspicious circumstances. The signature of Mark Schaffer is not his signature as admitted in the original probate hearing to determine an administrator in 2001. Mark admits he was not present during the time Susan took their mother to an attorney to sign the Title To Real Estate. No affidavit accompanies the transfer giving permission for the signing of his name. Yet his signature is notarized by an attorney. In the 2001 hearing Mark offers no reason why this was done. Susan did not show up for the hearing.

In April 1998 Martha L.E. Schaffer signature is notarized on a deed to sell her home, 1224 Raymond Way, Charleston S.C. That home is sold to a friend of Susan S. Sawadske, for 83,000.00 dollars below market value of 127,000.00. Susan then takes the

money and builds a home in Coosaw Creek, Dorchester County, (40,000 dollars for the land 190,000.00 for the house) a room is incorporated into the design for Martha L.E. Schaffer. With the understanding that this money is to help Susan buy and build the house, Martha L.E. Schaffer money and will be return and any profit will be returned upon the sale of Coosaw Creek. Martha L.E. Schaffer died in an assisted living center July 28, 2001. This money is not recorded as an asset in the inventory and appraisal filed by Mark Schaffer, son and Personal Representative, as jointly owned property. Susan sold Coosaw Creek in June of 2004 with a profit of 190,000.00 dollars one third of that (63,333.00) should have been return to Martha L.E. Schaffer Estate. A second daughter Nancy Schaffer Turner living outside of Raleigh N.C. was never made privy to the liquation of everything she had left in her mother home, 1224 Raymond Way, was being disposed of at Susans' will. Nancy S. Turner was not able to retrieve items in her mothers' home. That include Nancy S. Turner sons' clothing when an infant, a collection of Mercury Dimes, silver dollars, Liberty Dollars, vintage unopened Barbie Dolls and unopened vintage Barbie clothes and Le Creuset cookware. Susan S. Sawadske never showed up for any hearing to rebut anything.

ARGUMENT

1. BECAUSE THE GRANTOR, MARTHA L. E. SCHAFFER HAD RECENTLY SUFFER A STROKE AND WAS SUFFERING FROM DEMENTIA SHE DID NOT HAVE THE WHERE WITH ALL TO UNDERSTAND THAT SHE WAS SIGNING A DEED AND WHAT THE EFFECTS OF THAT TRANSACTION WOULD BE UNDER UNDUE INFLUENCE OF HER DAUGHTER.

Martha L.E. Schaffer had a massive stroke in November of 1996. As a result she could no longer care for herself. Her daughter Susan S. Sawadske moved in with her to take care of her and her affairs. On March 13, 1997 Susan S. Sawadske took her mother Martha L. E. Schaffer to an attorney had a deed drawn up for ten dollars and love and affection, and then signed her name and her brother's name to that deed without authorization to sign her brothers signature both signature were notarized as their own signatures. Throughout the course of her life Martha L. E. Schaffer did not make any distinctions about her children the signing of this deed was the first time. Martha could not have known the significant of signing the deed with lack of consideration as opposed to selling the property to a true buyer or leave the property to her children. By Oct. 1997 Susan S. Sawadske had admitted her mother, Martha L.E. Schaffer into the Institute of Psychiatry at the Medical University of South Carolina.

In *Brooks v. Kay* 339S.C. 479, 490, 530 S.E.2d. 120, 125-126 (2000) The Supreme Court holds an inference of undue influence will arise upon showing a great mental weakness of the grantor and gross inadequacy of consideration.

"If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best-settled principles. Harding v. Handy, 11 Wheat, 103, 125, 6L Ed. 429.

In 1993, South Carolina's General Assembly enacted the Omnibus Adult Protection Act ("the Act") to protect vulnerable adults from abuse, neglect, and exploitation. 1993 Act No. 110, § 1, codified as S.C. Code Ann. §§ 43-35-5 to -595 (Supp. 2007).

S.C. Code Ann. § 43-35-10 (Supp. 2007).

If the elements necessary to set aside a transfer for fraud are shown, the legality in other respects of the means by which the design is accomplished affords no defense. It is the fraudulent purpose and the injurious result, not the form of the transaction nor the illegality or irregularity of the instrument, or the means used for its accomplishment, which render such transactions voidable at the instance of a person injured thereby.

In an action in equity tried by the judge alone, on appeal the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005); Campbell v. Carr, 361 S.C. 258, 263, 603 S.E.2d

625, 627 (Ct. App. 2004). Thus, an appellate court in an appeal of an equity case tried without a jury may find facts in accord with its view of the preponderance or greater weight of the evidence and may reverse a factual finding by the trial judge in such cases where the appellant satisfies this court that the finding is against the preponderance of the evidence. Campbell, 361 S.C. at 263, 603 S.E.2d at 627

"Even absent a confidential relationship, this court has several times approved the principle . . . that imposition or undue influence upon the grantor will be inferred from proof of great mental weakness, not amounting to incapacity to execute a valid deed, accompanied by gross inadequacy of consideration." *Hodge v. Shea*, 252 S.C. 601, 608-09, 168 S.E.2d 82, 85 (1969).

Whenever there is great weakness of mind, though not amounting to absolute disqualification, arising from age, sickness, or any other cause in a person executing a conveyance, and the consideration given for the land is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representatives or heirs interfere and set the conveyance aside. *Allore v. Jewell*, 94 U.S. 506, 24 L.Ed. 260

A valid contract consists of contractual intent, followed by an actual meeting of the minds of the parties, accompanied by valid consideration. Cobb v. Gross, 291 S.C. 550, 553, 354 S.E.2d 573, 575 (Ct. App. 1987). Furthermore, consideration must be legally sufficient.

It is an established principle of equity that the acts and contracts of persons who are of weak understanding, and thereby subject to imposition, will be closely scrutinized by the courts to discover whether or not undue influence was exerted or any confidence betrayed to the prejudice of the weaker party or of the one reposing such trust and confidence. *Baynard v. Ulmer*, 153 S.C. 100, 150 S.E. 610 (1929).

2. SHOULD DAMAGES HAVE BEEN AWARDED SINCE LIVING IN ANOTHER STATE AND THE TIME SPAN BETWEEN THE EVENTS AND THE JUDGEMENT MADE IT UNACHIEVABLE FOR APPELLANT TO LOCATE HER PROPERTY?

SECTION 15-69-210. Judgment.

In an action to recover the possession of personal property judgment for the plaintiff may be for the possession, for the recovery of possession or for the value thereof in case a delivery cannot be had and for damages, both punitive and actual, for the detention. If the property has been delivered to the plaintiff and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages, both actual and punitive, for taking and withholding the property.

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. See Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). Actual damages are awarded to a litigant in compensation for his actual loss or injury. Actual damages

are such as will compensate the party for injuries suffered or losses sustained.

Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. Clark, 339 S.C. at 378, 529 S.E.2d at 533.

Punitive damages, also known as exemplary damages, are imposed as punishment. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. Id. Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party.

3. STATUTE OF LIMITATION ARE NOT A MATTER IN EQUITY THE DEED IS A MATTER OF EQUITY.

An action to set aside a deed is a matter in equity. Bullard v. Crawley, 294 S.C. 276, 278, 363 S.E.2d 897, 898 (1987).

Anderson v. Purvis, 211 S.C. 255, 44 S.E.2d 611 (1947); Anderson v. Purvis, 220 S.C. 259, 67 S.E.2d 80 (1951) (holding that the Court's power to do equity transcends the limitations of the statute of limitations).

Fox v. Moultrie, 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008) ("An action to quiet title is one in equity.")

"An action to rescind a contract lies in equity." *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). When reviewing an equitable action, this Court may determine the facts in accordance with its own view of the preponderance of the evidence. *Thornton v. Thornton*, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997); *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

Parr v. Parr, 268 S.C. 58, 67, 231 S.E.2d 695, 699 (1977) (stating statutes of limitation are generally not applicable in equitable actions).

SECTION 15-3-340. Action by individual for recovery of real property.

No action for the recovery of real property or for the recovery of the possession of real property may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action.

SECTION 15-3-380. Effect of forty-year lapse.

No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the

commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.

SINCE THE RESPONDENT NEVER SHOWED UP FOR ANY HEARING SHOULD THE APPELLANT BE GRANTED A DEFAULT JUDGEMENT?

RULE 11 DEFAULT JUDGMENT; DISMISSAL OF ACTION; DAMAGES

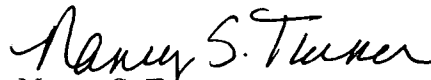
(a) If the defendant does not answer the complaint within the time period specified by these rules or answers within the specified time period but fails to appear at the time set for trial, judgment may be given for the plaintiff by default if the amount of the claim is liquidated. If the claim is unliquidated, and the defendant fails to answer within the time period specified by these rules or answers within the specified time period but then fails to appear at the time set for trial, judgment may be given to the plaintiff by default as in the case of liquidated claims if (1) the plaintiff itemizes the account and attaches an affidavit that it is true and correct and that no part of the sum sued for has been paid by discount or otherwise and (2) a copy of the account and affidavit was served with the summons on the defendant. In all other cases when the defendant fails to appear or answer, the plaintiff cannot recover without proving damages.

CONCLUSION

For the reasons stated, this Court should reverse the judge of the circuit court. Award Nancy S. Turner damages in the amount of \$11,500.00 for the property she left in her mother's home and her sister disposed of. Set aside the deed to Folly Beach or award Nancy S. Turner \$200,000.00 as her share of the property and \$21,111.00 her one third share of the profits from her mothers' money used to build Susan S. Sawadske home in Coosaw Creek. In addition Nancy S. Turner asks for any punitive damages and interest she may be entitled to.

Respectfully submitted,

May 18, 2013


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