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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Cynthia Graham-Howe, Special Master-In-Equity

Case No. 2016-CP-26-07190
Appellate Case No. 2022-000721

In the Matter of Edith Cox Soles, Deceased,

Marcia Soles Anderson and Michael W. Soles,
Individually and as Interested Parties,.....Appellants,

v.

Jimmy R. Soles,.....Respondent.

FINAL REPLY BRIEF OF APPELLANTS

CLARKE, JOHNSON, PETERSON & McLEAN, P.A.

Brown W. Johnson
Post Office Box 1865
Florence, South Carolina 29503
(843) 669-2401
Attorney for Appellants

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STATEMENT OF ISSUES ON APPEAL

I. Did the court below err, according to this Court's de novo review of the record according to its own view of the evidence, in failing to rescind the deed in question on the ground of lack of mental capacity to contract, that deed being dated July 21, 2015 from Edith Soles to Jimmy R. Soles? [The deed is for 55 acres and recorded in Deed Book 3839, page 3468 in the Horry County Register of Deeds].

STATEMENT OF THE CASE

This action was brought by the Plaintiffs-Appellants brother and sister, Marcia Soiles Anderson and Michael W. Soles, against their remaining brother, Jimmy R. Soles, to set aside and void a deed executed on July 21, 2015, and recorded in Deed Book 3837 at page 3468 in the records of the Register of Deeds for Horry County. Plaintiff's complaint is couched upon the assertion that Edith Cox Soles, their mother, was substantially impaired and did not have mental capacity to execute this deed. A Summons and Complaint was filed on November 16, 2016. The matter was referred to the Honorable Cynthia Graham Howe, Horry County Special Master-in-Equity, by a consent order of reference filed on May 9, 2018 by the parties. This matter was heard nonjury by Judge Howe for the Court of Common Pleas of the 15th Judicial Circuit with direct appeal to the South Carolina Court of Appeals.

On April 28, 2022, the Court below ruled in favor of the Defendant-Respondent. Notice of Appeal has been timely filed by the Plaintiffs-Appellants Marcia Soles Anderson and Michael W. Soles.

The Defendant-Respondent denies the allegation of the Plaintiffs-Appellants and alleges that the deceased Edith Cox Soles did have the capacity to execute the deed in question. What the Plaintiffs-Appellants seek upon appeal is to set aside the above-referenced deed.

STATEMENT OF FACTS

On July 21, 2015, Edith Soles, deceased, executed a deed transferring a 55-are tract of land to her son, Defendant-Respondent Jimmy R. Soles. The deed was prepared by a real estate attorney in Conway, South Carolina. Defendant Jimmy Soles made arrangements for the preparation of the deed, drove his mother to the attorney's office, and remained in the attorney's office during the signing. In addition, Defendant Jimmy Soles paid the attorney for preparing the deed which was described by the closing attorney as a "gift deed." The defendant paid either nothing or $5 for the property. Neither her lifelong attorney William Phipps nor any other member of the family were aware of the deed transferring the property to the defendant.

On January 29, 2013, Edith Soles executed a will leaving her estate to her four adult children with instructions to sell property and divide the proceeds among her children. **R. pp. 488-491.** The Will was prepared by Attorney William Phipps of Tabor City, North Carolina, who had done work for the family since he started practicing law in 1978. Prior to the death of Ms. Soles in 2016, her four (4) children had received real estate from their parents (with Jimmy Soles receiving at least as much as and most likely more in value than the other siblings). The 55-acre tract of land transferred to the defendant was the only real estate that Edith Soles had left by 2015.

At the time of the execution of the deed, Ms. Soles was approximately five weeks away from her 89th birthday. She was suffering from Alzheimer's dementia first diagnosed in 2008. She was no longer capable of managing her affairs and was under the constant care of Dr. Gary Barrett and the surveillance of family members and hired caregivers.

The plaintiffs lived near their mother. Both plaintiffs saw her every day for the last several years of her life and served as her primary caregivers managing her affairs, providing food,

clothing, bathing, and housekeeping. In addition, the plaintiffs hired and scheduled other caregivers.

The defendant lived in High Point, North Carolina, over 160 miles away from the deceased's home in Tabor City, North Carolina.

Both plaintiffs testified about their mother's physical and mental condition when she signed the deed on July 21, 2015. The plaintiffs also called Dr. Gary Barrett, a Board-certified specialist in Internal Medicine. Dr. Barrett treated Ms. Soles for at least twenty (20) years prior to her death and saw her on a regular basis. Dr. Barrett even saw the deceased the day before she executed the deed in question. Dr. Barrett testified that Edith Soles was not competent to execute the deed in question.

Plaintiffs also called caregiver Angela Fowler, who is a CNA and has experience working with dementia patients. Ms. Fowler agreed that the deceased Edith Soles was not competent to execute this deed.

The defendant testified and called two caregivers, both of whom stated Ms. Soles was mentally competent when she signed the deed. Defendant also called two attorneys as witnesses, the attorney who handled the deed and a North Carolina attorney who prepared and executed a codicil for Ms. Soles. The codicil which was also executed in July of 2015 is not part of this case.

The question presented is whether Edith Soles had sufficient mental capacity to execute a deed on July 21, 2015.

STANDARD OF REVIEW

This case involves an action to rescind a deed on the ground of lack of mental competence and lack of contractual capacity. This is an action to set aside the deed of July 21, 2015, on the ground of lack of mental capacity to contract. South Carolina case law is clear that an action to set aside a deed is an action in equity. An action in equity allows the appellate court to review the record according to its own view of the evidence, which is *de novo*.

Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005) was an action to set aside a deed. The Court held:

> "An action to rescind a contract lies in equity...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)." 362 S.C.388, 395, 608 S.E.2d 849.

While it is correct that an appellate court is not required to accept medical testimony over lay testimony on the issue of mental competence, this is not the issue. The issue is whether a reasonable review of the preponderance of the evidence should accord controlling weight in this particular case to the uncontradicted medical testimony by the Internal Medicine specialist who has treated the deceased for at least 20 years and saw the deceased regularly during the time period in question. In this context, the detail of the treating physician's treatment notes, and the specificity of his testimony are matters which Appellants contend should be accorded the greatest weight in this Court's own *de novo* review of the preponderance of the evidence.

It is also correct that even in an action in equity, an appellate court may accord deference to the credibility findings of the trier of fact. However, without a finding of credibility, or without any rationale explaining why a particular witness is entitled to greater or lesser credibility, a general inference of credibility or lack thereof would seem to be illogical. In this case, Dr. Barrett's

testimony was merely noted in two sentences. Any credibility assessment, such as it was, was just as vague for Dr. Barrett as it was for the other witnesses:

> "Dr. Barrett has long provided medical care for Ms. Soles and testified as to dementia, and I find his testimony insightful and thorough as to his medical position on the condition of Ms. Soles." **R. p. 2.**

There was no discussion of the credibility or lack thereof of Dr. Barrett, so this Court may evaluate it *de novo*. Even though medical testimony does not automatically trump lay testimony, if Dr. Barrett's testimony is actually found to be credible, it would appear to be more persuasive in this case than the lay testimony.

I. Dr. Gary Barrett was Persuasive.

The only medical testimony in this case is from the deceased's long-time treating physician, Internal Medicine specialist Dr. Gary Barrett. Dr. Barrett regularly treated the deceased for over 20 or 30 years [possible typographical error] prior to the deed in question. **R. p. 107, lines 125-15.** Dr. Barrett is Board Certified in Internal Medicine and attended medical school at the Medical College of Pennsylvania. **R. p. 106, lines 12-17.** Dr. Barrett saw the deceased the very day before she signed the deed in question, and concluded she was mentally incompetent at that time.

As noted in the Standard of Review section, while medical testimony is not automatically controlling, the court below never analyzed Dr. Barrett's testimony nor explained why it was not adopted. Indeed, the court endorsed Dr. Barrett's testimony as "insightful and thorough." **R. p. 2.**

Dr. Barrett testified that he first had concerns with the deceased's Alzheimer's dementia in approximately 2008, which was seven (7) years before the deed in question. **R. p. 107, lines 16-19.** Dr. Barrett's treatment notes were marked as Exhibits at the hearing. They are also a part of this record. **R. pp. 406-455.**

Dr. Barrett testified that in 2008, he referred the deceased to a neurologist because he was concerned about her memory loss. He stated that based upon his referral to the neurologist, the two doctors came to a "working diagnosis" of Alzheimer's dementia. **R. p. 109, lines 12-15.** Dr. Barrett testified that at that time in 2008, a number of causes of the dementia still needed to be worked up, but he was still dealing with what he termed "medical and other causes of dementia." **R. p. 109, lines 17-18.** Dr. Barrett stated that the prognosis for a patient with Alzheimer's dementia is "progressive decline." **R. p. 109, lines 19-21.**

On September 10, 2012, Dr. Barrett's notes stated:

> "Patient is reluctant historian due to her anxiety and recent demise of her spouse and secondary to her Alzheimer's dementia." **R. p. 108, lines 20-22.**

Dr. Barrett read this note into the record at the hearing and he testified that this was not the first time that he had diagnosed the deceased with Alzheimer's dementia. **R. p. 108, lines 23-25.** Dr. Barrett also explained what he meant when he stated that the deceased was a "reluctant historian." He testified that this was a euphemism for a "poor historian." **R. p. 110, lines 1-9.**

Dr. Barrett testified that for a number of years prior to her death, the deceased was accompanied by someone else and "always needed continual assistance." **R. p. 111, line 3.** Dr. Barrett confirmed that on the September 10, 2012 visit, one of her sons was with her for that visit. **R. p. 111, lines 8-10.**

Dr. Barrett testified that as to the next treatment note of October 8, 2012, in which he stated that the deceased had "extreme volatility". **R. p. 111, line 15.** Dr. Barrett stated that this could go along with the deceased's emotional problems and mental problems from Alzheimer's disease. **R. p.111, lines 21-23.** In that same visit, Dr. Barrett used the term "emotionally labile." **R. p. 111, line 25.** Dr. Barrett testified that this meant the deceased's affect can change quickly on a regular basis and it is also associated with hostility, anger, and quick loss of temper. **R. p. 112, lines 3-8.** Dr. Barrett testified that these symptoms are common with Alzheimer's dementia. **R. p. 112, lines 9-12.** Dr. Barrett also testified that by the October 8, 2012 visit, the deceased was "profoundly deaf," and this only exacerbated the situation. At this point, she was 86 years old. **R. p. 112, lines 17-25.**

Dr. Barrett was seeing the deceased on almost a monthly basis at this point. There were further visits of November 26, 2012, and December 5, 2012. **R. p. 113, lines 1-6.** On the December 5, 2012 report, Dr. Barrett noted:

"Poor historian, partially complicated by dementia." **R. p. 113, lines 18-19.**

Dr. Barrett noted during this period of time, the deceased was a "difficult patient." Dr. Barrett explained that she was becoming increasingly difficult to mobilize, fixed in her own routine, and just does not desire to reach out of her own niche. **R. p. 114, lines 11-17.**

Dr. Barrett noted that during this period of time (late 2012), the deceased's condition was changing:

> "It was becoming increasingly difficult to maintain her hygiene, increasingly difficult to move out of the home and come to the office for even a reasonable presentation." **R. p. 114, line 25-p. 115, line 3.**

On February 20, 2013, the deceased returned to Dr. Barrett. The family was complaining of increasing difficulty with memory and tremor. **R. p. 115, lines 21-23.** Dr. Barrett stated that as of February 20, 2013, the deceased had been seeing a neurologist for approximately 5 years. **R. p. 116, line 15.** Dr. Barrett again testified that the reason he had referred the deceased to the neurologist in 2008 was because he suspected Alzheimer's dementia. **R. p. 116, lines 19-22.**

Dr. Barrett testified that in 2013 he saw the deceased in February, March, June, August, and November and that he noticed a change in her mental state during this time:

> "Unfortunately, you don't get better, Sir. It's a progressive decline." **R. p. 117, lines 2-3.**

Dr. Barrett testified that as of late 2013, the deceased could not be left alone for any duration. **R. p. 118, lines 7-9.**

In the March 5, 2014 treatment note of Dr. Barrett, there was a reference to one of her medications, Namenda. Dr. Barrett testified that this medication is prescribed for Alzheimer's dementia. **R. p. 119, lines 11-17.**

A June 2014 treatment note of Dr. Barrett notes that one of the reasons the deceased was brought to his office was for dementia. **R. p. 120, line 1.**

In the Spring of 2014, one of the deceased's sons, Charlie, himself died. Charlie had been described as the deceased's "constant caregiver." Dr. Barrett testified that Charlie was a stable influence in her environment and his removal from that environment was very destabilizing for the patient emotionally. Dr. Barrett testified that the deceased had declined after the loss of her son. **R. p. 120, lines 14-20.**

On November 5, 2014, the deceased returned to Dr. Barrett. There is description of her behavior by both the caregiver and Dr. Barrett. Dr. Barrett's note reads:

> "She presents to the office at that time for chaotic behavior...She was expressing anger, rudeness, jealousy, yelling, mischievousness, profanity, veracity issues, vengeful, spitefulness, balefulness, mischievousness, mental and physical abuse against persons in the environment." **R. p. 121, lines 5-15.**

Dr. Barrett testified that these records reflect that the deceased was at times hostile and violent with her caregivers and there is a reference to a sitter that came in with a black eye. **R. p. 121, lines 16-23.** Dr. Barrett testified that on this date, the deceased's affect was changing and what he meant by that was that the deceased was being emotionally labile. **R. p. 122, lines 1-7.** Dr. Barrett testified that it was extremely burdensome for families and caretakers to take care of someone like Edith Soles at this point, around 2014. Dr. Barrett stated that the reason for that is their lack of ability to reason and their lack of ability to accept normal routine in adult life. Dr. Barrett stated that the deceased was "definitely" having difficulty with her reasoning at that time. **R. p. 122, lines 8-18.**

Dr. Barrett added that there is a comment in his report that he sometimes felt that he was not in fact treating the deceased, but instead her family or caregivers. Dr. Barrett stated that because of the deceased's affect had become so volatile, there was no medication that one could really offer that will be effective. **R. p. 122, line 23-p. 123, line 2.**

Dr. Barrett actually saw the deceased the day before the deed in question. Dr. Barrett's note of July 20, 2015 states:

> "Patient is brought to the office by her family in that her behavior had been extremely volatile. Patient has struck out against her caretakers and family. Patient has been very uncooperative in reference to her hygiene." **R. p. 123, lines 9-13.**

Dr. Barrett testified regarding this visit that the deceased had actually hit or struck out at her caregivers. **R. p. 123, lines 18-20.** Dr. Barrett was asked to describe in general conditions the deceased's physical and mental condition in July of 2015. Dr. Barrett responded that the deceased was mentally incompetent and that she had advanced Alzheimer's dementia. Dr. Barrett testified that "advanced" is the most severe of the three categories of dementia. Dr. Barrett added that her physical condition was also very frail and fragile. Dr. Barrett also added that the deceased's appetite was failing. Her nutrition was failing and her overall condition was very frail and fragile. **R. p. 124.**

Dr. Barrett was asked with regard to her mental condition in July 2014 whether he had an opinion based on a reasonable degree of medical certainty as to whether Edith Soles had sufficient mental capacity to understand in a reasonable manner the nature of a legal document such as a deed or the nature of the transaction. Would he have sufficient mental capacity to understand the consequences and effects of a document such as a deed? Dr. Barrett responded:

"No Sir."

The next question was is there any question in your mind? He responded:

"Not at all." **R. p. 125, lines 6-8.**

Dr. Barrett was asked about any legal document: could she understand the significance of any legal document? Dr. Barrett responded: "Not at all, Sir." **R. p. 125, lines 9-12.** Dr. Barrett was asked whether the deceased could have had a lucid interval. Dr. Barrett stated at this point, she

could not. **R. p. 125, lines 17-23.** Dr. Barrett finally discussed a letter which he had written both attorneys after his deposition. The note involved the distinction between lucid intervals and what amounts to contractual capacity:

> "Dear Sirs: After contemplation and review of the deposition, I felt obligated to further elaborate on Ms. Edith Soles' mental situation. As stated, even with advanced Alzheimer's/vascular dementia, there could possibly be episodes of lucidity. It is extremely doubtful that the person could comprehend the profundity of decisions or their ultimate consequences. In that this is not included in the deposition, if required to testify, I would be amenable if agreed by you gentlemen." **R. p. 126, lines 10-19.**

On cross-examination, Dr. Barrett further discussed episodes of lucidity:

> "I don't mean to digress, but my father had severe Alzheimer's disease and one day he would recognize me as his son and the next day not. And whether that was a profound decision to make, that was not really germane." R. p. 128, lines 19-23.

Dr. Barrett confirmed that even during periods of lucidity, a person with severe Alzheimer's would not be competent to make pragmatic decisions. **R. p. 129, lines 1-3.** Dr. Barrett repeated this at **R. p. 130, lines 2-6.** Dr. Barrett explained that when his deposition was taken that what he meant by pragmatic decisions was:

> "I mean if I'm hungry today, can I get lunch? Yes. That sounds practical." **R. p. 131, lines 23-24.**

His definition of "pragmatic" would not be to the extent of executing a legal document. **R. p. 132, lines 1-4.** Dr. Barrett further elaborated on cross-examination on the difference between a pragmatic decision and a legal decision:

> "If I can digress again, even in the nursing home where there is plenty of people with Alzheimer's and dementia, a caretaker can come in and say: That is a pretty ring. And Ms. Soles says: Oh, thank you dear, you can have it. Now that sounds lucid to me, but it's totally inappropriate. And those occasions occur many, many, times." **R. p. 133, line 19-p. 134, line 1.**

Dr. Barrett, again on cross-examination, summarized why Ms. Soles could have had no ability to execute a deed in her condition at the time:

> "Well, the condition-again when someone is diagnosed with Alzheimer's disease, there is a progressive decline in their mental deterioration.
> Ms. Soles, to live ten years after that initial diagnosis was extraordinary. Most people cannot have that longevity, especially when you affiliate it with all these other problems that she had: respiratory disease, multiple infections, hypertension, volatility, and blood pressure. I could go on and on, she had twenty diagnoses.
> Now she was also deprived of sensations because of profound deafness. You need all of our faculties valid to try and keep [attention] with the world. And also, she also had arteriosclerosis, which is another form of dementia, and had some long outstanding hypertension and cigarette use. So for her to be 8 years after that diagnosis to have really any mental capacity would be just not appropriate." **R. p. 134, line 12-p. 135, line 7.**

Earlier, Dr. Barrett had also made it clear in his deposition that it would be very doubtful that the deceased would have been able to make pragmatic decisions, even during periods of lucidity. **R. p. 136, lines 8-16.**

Dr. Barrett also testified that it is possible that when the deed was executed in the presence of other witnesses and an attorney, she may have appeared lucid to those witnesses, even with her advanced dementia. This testimony was actually elicited by Defendant-Respondent upon cross-examination. **R. p. 132, line 22-p. 133, line 4.** Dr. Barrett emphasized that such an episode of lucidity nevertheless would not have given her the mental capacity to execute a deed. **R. p. 133, lines 5-12.**

In *Gaddy v. Douglass*, 359 S.C. 329, 597 S.E.2d 12 (S.C. App. 2004), plaintiff sought to void a Power of Attorney executed by a grantor whose neurologist noted that "senile dementia of the Alzheimer's type...that had progressed beyond the point when he saw her previously and that she had...clearly shown progression of this disease..." 359 S.C. 329, 338.

The decision included the following:

> "When asked whether Ms. M may have had a 'lucid moment' in her stage of dementia, Dr. Carnes responded, 'No...[a] lucid moment is...a term that doesn't fit well with...Alzheimer's disease.' He then distinguished a psychiatric disease from Alzheimer's disease, noting the former involves treatable chemical defects while the latter involves the 'progressive death of brain cells.' Dr. Carnes further

> observed that dementia results in a 'faulty rational process' or an 'intellectual process that is impaired.' He stated that dementia sufferers do not 'fully understand the nature of what they [are] doing and they [do] not fully understand the ramifications of what [is] there." 359 S.C. 329, 338, 339.

In the case at hand, Ms. Soles was diagnosed with Alzheimer's dementia in 2008, seven years before the deed in question. She not only had senile dementia of the Alzheimer's type, but her Alzheimer's disease was advanced.

Gaddy also held that a testator's insanity, in order to invalidate a Will, should be established at the time of execution, unless the insanity is "of a permanent or chronic nature." See also *In re: Brazman's Will*, 172 S.C. 188, 194, 173 S.E. 623, 625 (1934) (stating if the evidence shows the insanity is chronic, it is presumed to continue). *Gaddy* included a good description of Alzheimer's disease. The court endorsed the description of the disease by Dr. Robert R. Taylor, Jr. as follows:

> "He described Alzheimer's disease as a cerebral degenerative disease that is organic, rather than chemical, in nature. He added that the Alzheimer's is a 'primary' disease, resulting in the destruction of brain cells. As the brain disease progresses, according to Dr. Taylor, patients have increased memory problems until they are 'unable to perform the daily activities of living adequately and have to have caregivers.'" 359 S.C. 329, 339.

In the case at hand, Dr. Barrett described Ms. Soles' Alzheimer's disease as permanent, progressive, and advanced.

II. Kevin Rochford's Testimony Was Not Credible.

Defendant-Respondent called Kevin Rochford as a witness because Mr. Rochford as attorney prepared a codicil for the deceased 13 days prior to the deed in question. Mr. Rochford testified that he followed North Carolina law in ensuring that the deceased was not subject to undue influence, and was of sound mind and understood what she was doing. Mr. Rochford asked the deceased why she wanted to execute the codicil, and he stated that the deceased told him that her

son Jimmy, Defendant-Respondent, had considerably less real property than the other children and she wanted to equalize the property distributions as much as possible.

Mr. Rochford acknowledged that his employee who was heavily involved in this matter, Jill Harris, is the wife of the Defendant-Respondent, Jimmy Soles. **R. p. 374, lines 16-23.** Mr. Rochford testified that Jill Harris had for previous 7 or 8 years worked for him part-time while being married to Jimmy Soles. **R. p. 374, line 25-p. 375, line 5.**

Mr. Rochford acknowledged that the deceased was driven to his office by Jimmy Soles. **R. p. 375, lines 9-10; p. 26, lines 2-4.**

Mr. Rochford's office is in High Point, North Carolina, which is 172 miles from the deceased's home in Tabor City, North Carolina. Mr. Rochford testified that the reason the deceased came to him was that someone who worked in her regular attorney's office in Tabor City had an employee who was a friend of one of her children and she was concerned about the confidentiality of what she wanted to do. **R. p. 377, lines 5-12.**

However, eventually Mr. Rochford conceded that either "he did or she did" express concerns about confidentiality, with the "he" being the Defendant-Respondent, Jimmy Soles. Mr. Rochford was not even sure of this detail. **R. p. 399, lines 2-5.**

This purported concern for confidentiality is in spite of the fact that Mr. Rochford's own employee, Jill Harris, has been married to the Defendant-Respondent, Jimmy Soles at all times relevant. While it is not alleged nor is it necessary to this case that Mr. Rochford was not being forthright, the circumstances of Mr. Rochford's retention as an attorney are at least subject to question, whereas no one has questioned the impartiality of Dr. Barrett. The deceased's regular attorney in Tabor City had been William Phipps, who is both a member of the North Carolina and South Carolina Bars. **R. p. 377, lines 19-22.**

Mr. Rochford acknowledged that he was aware that the deceased's children did not get along. **R. p. 380, lines 14-15.** Nevertheless, Mr. Rochford made no medical inquiry into the medical condition of the deceased, even though he acknowledged that his standard operating procedure under North Carolina law requires that all the witnesses to a will must be willing to state that the testator is of sound mind. **R. p. 380, lines 7-13; p. 15, lines 15-20.** Mr. Rochford further testified:

> "You know, as an estate attorney or an estate planning attorney, you always have to be cognizant and aware so I can make my own determination is one, is someone competent. Two, if they are competent, are they possibly subject to undue influence. Until I get satisfaction that yes, they're competent, and two, they're not being subject to undue influence, then I'm not going to proceed with having any documents signed in my presence." **R. p. 386, lines 3-11.**

Knowing the deceased's age of 88 and the fact that the children did not get along, Mr. Rochford made no medical inquiry into the matter, but simply relied on his own one-shot nonmedical hunch.

Mr. Rochford acknowledged that he cooperated with Jill Harris in keeping her hours down in order to maintain her eligibility for Social Security. **R. p. 389, lines 12-17.** Mr. Rochford acknowledged that he has known Jill Harris for 10 or 12 years. **R. p. 390, lines 2-9.**

Mr. Rochford acknowledged that he has done other legal work for Defendant-Respondent Jimmy Soles, including his will. **R. p. 390, lines 10-1.**

Mr. Rochford acknowledged that the reason he asked so many specific questions to independently determine if the deceased was competent was because he knew she was 89 years old and was hard of hearing. He said that he made no specific notation as to whether or not she was frail. **R. p. 393, lines 17-24.** In fact, after first stating that he did not make any notation that she was frail, Mr. Rochford acknowledged that the deceased was "somewhat infirm." **R. p. 394, lines 14-15.** He further acknowledged that she had some age-related issues that people get as they

get older. **R. p. 394, lines 16-18.** Given this, Mr. Rochford's nonmedical assessment may be called into question given that no medical referral was made.

Mr. Rochford admitted that he did not ask the deceased about her health and only left it open to his own determination. **R. p. 394, lines 10-23; p. 395, lines 20-25**

Mr. Rochford agreed that he did not review any medical records. **R. p. 394, lines 24-p. 395, line 1.** Mr. Rochford agreed that he was unaware that she had memory problems as early as 2008 and that she had stopped driving in 2008. **R. p. 395, lines 2-7.**

Mr. Rochford acknowledged that he knew at the time that deed was executed that the Defendant-Respondent, Jimmy Soles, was acting as the deceased's power of attorney because she was no longer managing her affairs and paying her bills, etc. **R. p. 395, lines 8-14.**

Mr. Rochford agreed that since the deceased lived in Tabor City and Jimmy Soles lived in High Point, he had no information about the deceased's day-to-day affairs. **R. p. 395, lines 15-19.**

Incredibly, in response to the question that Dr. Barrett's records showed she had Alzheimer's dementia, Mr. Rochford stated that that's not that unusual for somebody that's 89 to come in and have something like that, but that does not mean that they're not competent. **R. p. 396, lines 1-12.** The point is while nothing is automatic, Mr. Rochford made no medical inquiry and relied upon his own nonmedical hunch.

Mr. Rochford admitted that on August 9, 2011, he had prepared a Health Care Power of Attorney for the deceased, Ms. Soles, when the deceased's husband was still alive. **R. p. 401, lines 14-21; R. p. 30.** Mr. Rochford acknowledged that although the power of attorney was never recorded, that was not necessary under North Carolina law. **R. p. 402, lines 2-7.**

In light of all the above, it is noteworthy that Mr. Rochford did not even need to refer Ms. Soles to a doctor; all he needed to do was obtain Dr. Barrett's existing voluminous records. This is aggravated by the fact that the Health Care Power of Attorney, which Mr. Rochford himself prepared, emphasized that it would only become effective when Dr. Gary Barrett himself stated it was necessary. **R. p. 467.** Mr. Rochford knew the importance of Dr. Barrett and knew his records existed, yet chose to remain ignorant of their contents.

In any event, Dr. Barrett noted that a one-shot viewing of Ms. Soles by a layman might not disclose advanced dementia during the execution of a deed. **R. p. 132, line 2-p. 133, line 5.**

III. Catherine Dingle's Testimony Was Not Significant.

Catherine Dingle was the attorney who prepared the deed in question. Ms. Dingle prepared the deed in question notwithstanding the fact that Attorney Kevin Rochford prepared a codicil for the deceased 13 days earlier. The preparation of the deed was referred to Ms. Dingle by someone in Kevin Rochford's office. Ms. Dingle practices law in Conway, South Carolina. Ms. Dingle testified that she did not really recall a lot of the specifics. **R. p. 344, lines 21-22.**

All Ms. Dingle could testify to was her protocol as to what she normally goes through when executing a deed. Ms. Dingle did have some notes which she referred to. Ms. Dingle had no recollection as to whether the deceased was hard of hearing. **R. p. 348, lines 11-12.**

Even though she admitted she did not really remember the situation, Ms. Dingle testified that she was absolutely certain that the deceased made an informed decision on the execution of the deed and that she had an understanding of what property she was conveying. **R. p. 349, p. 162.** However, on cross-examination, Ms. Dingle admitted that she had no personal recollection of the individuals involved. **R. p. 352, lines 10-13.**

Ms. Dingle did testify that she wrote down that the deceased was deeding the property to Jimmy Soles because she wanted to make the distributions even to all of her children. However, Ms. Dingle admitted that she did not do any checking to see whether this was actually accurate. **R. pp. 170, 171.**

Ms. Dingle admitted that the Defendant-Respondent, Jimmy Soles, may have been the one who was paying for the legal work, but he was "not necessarily" her client. **R. p. 353, line 23-p. 354, line 2.** The intake employee for Ms. Dingle's office had written down that the referral had come from "J. Harris Soles," who of course would have been Jill Harris, the Defendant-Respondent's wife. **R. p. 354, lines 7-13.** There was also a reference in the intake file which Ms. Dingle admitted "could possibly" be the referral from the Rochford law firm. **R. p. 354, lines 7-10.** Ms. Dingle admitted that she had no idea whether Jill Harris Soles from High Point contacted her office requesting the deed. **R. p. 355, lines 1-4.**

In Ms. Dingle's file, there was a phone number for Jimmy Soles of High Point and then there is another telephone number from his wife's office at the Rochford law firm. Ms. Dingle agreed that that was not her handwriting and it was probably her secretary's. **R. p. 355, lines 5-10.** Ms. Dingle agreed that the first time she had any contact with Jimmy Soles and the deceased was at the closing. **R. p. 355, lines 14-18.**

Interestingly, the deceased Edith Soles' name is not on the intake sheet except as a reference in the body of her secretary's notes. This is consistent with Jimmy Soles' being the actual client. **R. p. 355, lines 19-24.** Ms. Dingle again testified that she did not take the initial phone call and she really had no idea how the referral occurred. **R. p. 356.**

Later in her testimony, Ms. Dingle agreed that her file did disclose that the "billing name" on the file was noted as Jimmy Soles. **R. p. 353, lines 19-24.** Ms.Dingle testified that she thought

that she sent both the bill and the deed to Jimmy Soles. **R. p. 358, lines 8-12.** Ms. Dingle was unable to dispute the contention that Jimmy Soles or the Rochford law firm scheduled the appointment, made arrangements to have the deed prepared, got the information that was needed to prepare the deed, and Jimmy Soles was billed for it. **R. p. 359, lines 1-10.** Ms. Dingle agreed that there was no indication that Edith Soles (the deceased) was involved at all in the transaction other than to sign the deed. **R. p. 360, lines 1-4.**

Ms. Dingle did not even remember if there was anyone else in the room with the deceased when the deed was signed. **R. p. 360, lines 18-21.** Ms. Dingle also admitted that her protocol would not have required Jimmy Soles to leave the room when the deceased was signing the deed and that she had no recollection of what actually happened. **R. p. 360, line 24-p. 361, line 10.**

Ms. Dingle also admitted that she had no reason to know anything about the deceased's health. **R. p. 361, lines 6-17.** She admitted that she asked the deceased no questions about her health, her medical records, or anything of that nature. **R. p. 361, lines 18-20.**

IV. The Testimony of the Plaintiffs' Witnesses is Far More Credible than Defendant's.

The testimony of Dr. Barrett is expert, professional, and detailed. It is supported by contemporaneous written notes, unlike the other witnesses' testimony. Caregiver Angela Fowler has significant professional qualifications. Angela Fowler and Plaintiffs-Appellants Marcia Anderson and Michael Soles testified cogently and respectfully as to the deceased's lack of capacity. By contrast, the hostility of the Defendant-Respondent and his supporting witnesses is evident simply by a reading of their testimony; they insulted the attorney and they were not respectful of the process; they exhibited extreme personal animus in their testimony. This is particularly true of Lovanda Hyatt and Jimmy Soles, but it is also true of Judy Platt. Ms. Hyatt

referred to Mrs. Anderson as a "whore," and called the attorney an "idiot" and ordered him to "shut up."

A. Marcia Anderson.

The Plaintiff-Appellant Marcia Anderson was Ms. Soles' caretaker for many years after 2014. **R. p. 63, line 20-p. 371.** Mrs. Anderson testified that her mother, Edith Soles, did not have the mental capacity to sign the deed in question. **R. pp. 66-68.** Mrs. Anderson testified that the deceased, Edith Soles, told her that when Jimmy Soles took her to Conway to sign the deed, she actually thought she was being taken there to have a bank account started; as it turned out, on the bottom floor of attorney Catherine Dingle's office, there is in fact a bank. **R. p. 68, lines 3-25.** Jimmy Soles did not tell Marcia Anderson that he was having his mother sign a deed. **R. p. 68, lines 19-21.** Mrs. Anderson was respectful of the Court and the process.

B. Michael Soles.

Michael Soles is the son of the deceased Edith Soles and is the brother of Plaintiff Marcia Anderson. Michael Soles testified that in the last 10 years of Edith Soles life, he saw her on just about a daily basis. **R. p. 140, lines 18-20.** He testified that she had stopped driving a car in 2010, and she stopped preparing meals and doing housework between 2008 and 2010. She was unable to go to the doctor on her own from 2010 and thereafter. **R. p. 141.**

Michael Soles testified that during the last few years of his father's life (he passed away in 2012), Edith Soles was not even able to care for him and caregivers had to be hired for both his father and his mother. **R. p. 142, lines 18-25.** Michael Soles hired outside caregivers beginning 2008 and 2009 for his mother and father. **R. p. 143, lines 1-12.** Michael Soles testified that he had to start taking care of his mother's financial affairs beginning in 2010. **R. p. 144, lines 9-13.** He testified that after his brother Charlie's death in 2014, the deceased, Edith Soles, was never left

alone and since 2012, she had never spent the night by herself. **R. p. 146.** She had caregivers during the day and at night, with either Marcia Anderson or Michael Soles spending the night with her. **R. pp. 145-146.**

Michael Soles testified that his mother had had confusion since 2014, and misrecognized people, as well as had anger problems. **R. p. 147, line 17-p. 148, line 6.** Mr. Michael Soles testified on cross-examination that in 2015, the deceased, Edith Soles, could not really carry on an effective conversation. **R. p. 158, lines 8-16.** Mr. Soles testified that in 2015 she was going downhill "in progression real fast." **R. 158, line 20.**

C. Caregiver Angela Fowler.

The only caregiver whose testimony was respectful to the Court and presented in a logical fashion was that of Angela Fowler. This testimony strongly supported the lack of mental capacity on the party of the deceased Edith Soles. Ms. Fowler's testimony is found in the April 16, 2019 transcript beginning at page 3. Ms. Fowler is a high school graduate and obtained a Certified Nursing Assistant degree at Tech. **R. p. 191.** She has experience working in the Alzheimer's dementia unit of Conway Nursing Home and then another nursing home, the Loris Extended Care Center. **R. p. 191, line 24-p. 192, line 13.** Her total experience working with dementia patients was about 5 years before she began working with Edith Soles. This began in 2008. **R. p. 192, lines 12-13.**

Ms. Fowler testified that after 2008, Ms. Soles' mind slowly diminished, and she could not cook or do housework. **R. p. 193.** She testified that between 2008 and 2012, she could tell a difference; by 2012 she was misplacing things, and she was slowly declining. She testified that by 2014, the deceased, Edith Soles' condition had declined substantially. She recalled that year because it was the year Edith Soles' son, Charlie, died. **R. p. 196, lines 5-8.** Ms. Fowler testified

that by 2014, Edith Soles was not able to spend the night by herself. **R. p. 196, lines 20-23.** Ms. Fowler testified that after Edith's son Charlie's death in 2014, Ms. Edith Soles never spent the night alone. **R. p. 197, lines 8-11.** Ms. Fowler testified specifically as to the deceased Edith Soles' mental state in 2015, which was the time of the deed in question. Ms. Fowler stated:

> "In my opinion, she was in full-blown dementia by that time because she couldn't remember things. She would love to look out the front window, and if Mike was over there cutting grass, she thought it was Euclid [her deceased husband] cutting grass. You couldn't tell her it wasn't him. You would have to take her out and take her over there and show her it wasn't Euclid and then she would call Marcia, Retha, which was her sister that had passed away years ago...At times she did not know who I was and at times she did not know who Marcia was. There would have been times where people would come and she couldn't remember them, and they would have to remind her who they were." **R. p. 198, lines 8-24.**

Ms. Fowler also testified that in 2015 there was an incident when Ms. Soles actually cut one of her caregivers. **R. p. 199, lines 15-16**. Ms. Fowler was actually working at the same time as Lovanda Hyatt was working as a caregiver, so the deceased, Ms. Soles, actually had two caregivers at one time at the time of the deed in question. **R. p. 199, lines 23-25.** Ms. Fowler again testified specifically that in July 2105, the deceased, Edith Soles, did not have sufficient mental capacity to understand the consequences or effect of signing a deed. Ms. Fowler testified that Ms. Soles could not even sign checks. **R. p. 200, lines 7-12.** Ms. Fowler added that in July 2015, the deceased, Edith Soles, was not of sound mind. **R. p. 200, lines 22-24.** She concluded that at that time, she was mentally incompetent. **R. p. 201, lines 3-7.**

On cross-examination, Ms. Fowler demonstrated through her testimony that she was very familiar with dementia. She testified that there are three stages of dementia and that when she came back in 2014, the deceased, Edith Soles, was in the advanced stage of dementia because she did not know who people were. **R. p. 202, lines 3-9.** Ms. Fowler acknowledged that the afternoon, when she would generally work, is generally the worst period of time for dementia patients and

she was able to clarify to the attorney on cross-examination that dementia and "sundown" are not the same thing. **R. pp. 203, 204.** This knowledge of dementia actually strengthens her testimony. It is in stark contrast to the essentially non-medical testimony of the other two caregivers, who were hostile and confrontational, and were just basically friends of Jimmy Soles.

The other caregivers clearly did not employ any significant medical terminology in their testimony, in sharp contrast to Ms. Fowler. Indeed, they displayed their ignorance by becoming hostile at any use of the term "dementia."

Ms. Fowler testified that even before she would begin work in the afternoon, she was getting daily reports of things that had happened during the day from the other caregivers, which demonstrated dementia at that time. Included in these were striking out and striking the other caregivers, etc. **R. pp. 207, 208.** Ms. Fowler testified that in healthcare, one is supposed to give reports of what happened during the day, so this was a reason for asking the caregivers who had worked earlier in the day, what had happened during the day. This bolsters Ms. Fowler's testimony. **R. p. 208, lines 10-20.** One can see that at all times, Ms. Fowler was polite and respectful to the Court.

D. Lovanda Hyatt.

Lovanda Hyatt was so confrontational, abusive, and hostile that it is clear that she was virtually an agent of Jimmy Soles. She admitted that Marcia Anderson reduced her work hours, and this may be another source of her hostility to Marcia Anderson. Ms. Hyatt admitted that she had an employment dispute with Marcia Anderson. **R. p. 334.** Again, later in her testimony, Ms. Hyatt noted that she was upset about her pay and her hours. **R. p. 338, lines 4-7.**

During her testimony, Lovanda Hyatt told the attorney to "shut up." **R. p. 325, line 1.** In the trial, Ms. Hyatt, after telling the attorney to shut up, later called him "an idiot." **R. p. 336, line**

17. Lovanda Hyatt was clearly a confrontational witness. **R. p. 138.** She admitted she was in court to help the Defendant-Respondent, Jimmy Soles. **R. p. 323, lines 23-24.** She called the Plaintiff Mrs. Anderson a "whore." **R. p. 330, line 21.**

Ms. Hyatt's own notes contradict her testimony about the deceased's mental capacity. In fact, Lovanda Hyatt admitted that on June 9, 2014, when she took Edith Soles to Dr. Barrett that she, Ms. Hyatt, wrote down on a piece of paper that Ms. Soles was erratic, hostile, and was hitting people; she was out of her mind and was engaged in combative behavior. **R. p. 332.** She tried to accuse Marcia Anderson of telling her to write that down, but the fact is she wrote it down; the transcript makes evident that Ms. Hyatt's demeanor is abrasive with a will of iron, and Mrs. Anderson is passive, so it is unlikely that Ms. Hyatt did anything she did not wish to do.

Ms. Hyatt was involved in a police call with Edith Soles allegedly because Ms. Hyatt was screaming at Ms. Soles. She clearly was engaged in the same behavior in the court and the Court had to tell her to calm down. **R. pp. 336-337.**

E. Judy Platt.

The Court below erred in essentially supporting Ms. Platt's testimony on the ground that "the only medicine she [Ms. Soles] took was ½ Xanax pill." **R. p. 4.** In fact this is clearly erroneous. Although Ms. Platt testified that only Xanax was taken, Dr. Barrett's records and his testimony show that multiple additional medications were taken.

Indeed, the day before the deed in question, Ms. Soles saw Dr. Barrett. On that day of July 20, 2015, Dr. Barrett noted 12 different medications, some taken as many as three times per day. **R. p. 447.** Dr. Barrett's records show most of these same medications were also taken for all of 2014 and 2015.

Thus, it can be seen that a substantial basis for the Court's decision-lack of medication- is clearly erroneous.

Judy Platt was the other caregiver who testified in favor of the Defendant-Respondent, Jimmy Soles. At the very beginning of her cross-examination, Ms. Platt accused the attorney of trying to make her lie. **R. p. 290, line 16.** Later she accused him of trying to make her say something bad about the deceased. **R. p. 295, lines 10-11.** Ms. Platt has no medical education. **R. p. 277, lines 12-14.** This is evident by her obvious viewpoint that "dementia" is a character weakness rather than a medical condition.

However, Ms. Platt admitted that the deceased, Edith Soles, never spent the night alone and at times was difficult, and even hostile, including when she threw a cup at Ms. Platt. **R. p. 293.** Ms. Platt knew that Edith Soles could not be left alone. She admitted that Edith got confused at times. Ms. Platt finally admitted that "something wasn't right" with Edith Soles. **R. p. 296, lines 4-8.** Ms. Platt admitted that Marcia Anderson would spend the night with Edith Soles. Ms. Platt admitted that Edith Soles, the deceased, could not be left alone and needed to be watched. **R. p. 292, lines 8-12.** Ms. Soles would even try to get out of the door and had to be prevented from doing that. **R. p. 292, lines 13-20.** Ms. Platt admitted that Edith Soles got confused at times. **R. p. 295, lines 16-17.**

There is some question about the detail of Ms. Platt's relationship with the deceased, Ms. Soles because she testified that the only medicine that she saw Ms. Soles take was Xanax. However, it is clear from Dr. Barrett's testimony that she was also taking a great deal of additional medicine. **R. p. 298, lines 12-18; R. p. 447.**

V. The Distribution to the Children Was Not Equal.

It is of course true that the issue of contractual capacity is not controlled by whether each child was treated equally. This would be true whether Jimmy Soles had previously received less, the same, or more than the other children. The reason this issue is being addressed is that it has been contended by the Defendant-Respondent, Jimmy Soles, that the sole reason for the deed in question was to equalize the distributions between all of the children. In fact, the effect of this particular deed was to give Jimmy Soles more than the other children received. Thus, the attempt of the Defendant-Respondent Jimmy Soles to demonstrate the mental competence of the decedent b the allegation that this deed simply equalized everything is found to demonstrate lack of knowledge of her estate (which would even suffice to invalidate a will, for which less mental competence is needed than for a deed).

Evidence of this is that attorney Bill Phipps testified that all four of the children were to receive basically the same type of properties pursuant to the last will and testament of decedent Edith Soles. **R. pp. 168-171, specifically p. 170, lines 19-24.**

Beyond this roughly equal division, the deed of the decedent's husband, Euclid W. Soles, to Jimmy Ray Soles of property in Little River Township, Horry County, dated November 11, 2006 involved property worth a substantial amount, as shown by several factors. **R. pp. 492-495.** First, Jimmy Soles mortgaged the property to BB&T in the amount of $139,700 on March 15, 2016. **R. pp. 496-515.**

Mr. Phipps testified that beyond the above roughly equal distribution to the children, he did not know anything about the above 2006 deed. **R. p. 171, lines 5-6.** Mr. Phipps was then shown this deed and he identified it as a deed from Euclid Soles to Jimmy Soles for two tracts of land in Little River Township, in the Oceanview Estates area of Little River Neck. **R. p. 171, lines**

7-15. Mr. Phipps testified that since the consideration was approximately $5, he would construe it to be a gift from Euclid Soles to Jimmy Soles. **R. p. 171, lines 16-21.** Mr. Phipps testified that the Little River Neck section of town is "a very nice area" which is "right there on the Waterway." **R. p. 171, line 22-p. 171, line 7.**

In addition, Marcia Andreson, the decedent's daughter, testified that prior to Jimmy Soles' receipt of the land in Little River, the distribution had been roughly even. Jimmy Soles acknowledged that his mother sometimes had confusion. **R. p. 243, lines 19-21.**

Jimmy Soles received this deed from Euclid Soles to the property in Little River Township on November 11, 2006. In 2013, he received property from his mother that was roughly the same as the property received by the other siblings, according to Mr. Phipps' testimony. Then on July 21, 2015, there was an additional deed by Edith Soles to Jimmy Soles, which is the deed in question in this case. Thus, even if it is true the property that Jimmy Soles received from his mother in 2013 was not quite equal to the value of land received by the other siblings, the deed from his father in 2006 more than compensated for the difference, as it was quite valuable property in Little River on the Waterway. Finally, the 2015 deed in question massively exacerbates the difference in property received by Jimmy Soles as opposed to the other siblings.

The standard for competency to execute a will is lower than that for executing a contract such as a deed. Nevertheless, even for a will, the testator must know the nature of his or her estate, etc. *Hairston v. McMillan*, 387 S.C. 439, 692 S.E. 2d 549 (Ct. App. 2010); *In re Estate of Weeks*, 329 S.C. 251, 263, 495 S.E.2d 454, 461 (Ct. App. 1997). It is well established in South Carolina that "the degree of capacity necessary to execute a will is less than that needed to execute a contract."

The above demonstrates that the deceased was incorrect as to the nature of her estate, at least in so far as whether all of the children had been treated equally. There would thus be some argument as to whether she even had the capacity to execute a will. However, the greater competence required to execute a deed is convincingly shown to be absent due to her erroneous impression as to the nature of her estate, in addition to all of the medical testimony.

The testimony of Marcia Soles Anderson, the daughter of Edith Soles, is contained in the April 15, 2019 transcript; Mrs. Anderson is the plaintiff in this case. Mrs. Anderson testified as to the lack of equality of the distributions. With regard to the property, Marcia Anderson testified that in fact Jimmy Soles did receive the Little River Township property in South Carolina that was quite valuable, and if her mother was under the impression that he did not receive any property from the family, that would be incorrect. **R. p. 227.**

After the deed in question on July 21, 2015, the deceased Edith Soles owned no other real estate. This was in spite of the fact that her will dated January 29, 2013 left her property to her four adult children with instructions to sell it and divide the proceeds among all four children.

CONCLUSION

Even if one believes that Kevin Rochford was an impartial witness and was justified in failing to review the voluminous records of Dr. Barrett which he had deemed to be crucial in the Power of Attorney he prepared, Dr. Barrett explained that a one-shot viewing of an advanced dementia patient by a layman may not reveal the dementia.

The testimony of Marcia Anderson and Michael Soles is credible as to Edith Soles' condition because they lived in the same town, saw her daily and alternated spending nights with

her. By contrast, Jimmy Soles lived over 160 miles away and had only intermittent contact with Edith Soles. The manner in which he snuck his mother to the attorney without telling anyone, under the guise of going to the bank, demonstrates the dishonorable overall context.

Dr. Barrett's testimony is compelling. It is respectfully submitted that the Court below did not adequately analyze Dr. Barrett's testimony, and did not explain why it was not accepted. This is especially true since the Court noted his testimony was "insightful and thorough."

It is respectfully submitted that the decedent did not have the mental capacity to execute this deed. It is rare indeed that one has the benefit of a medical evaluation by a longtime treating physician the day before the deed in question.

CLARKE, JOHNSON, PETERSON & McLEAN, P.A.

By: _____

Brown W. Johnson
Post Office Box 1865
Florence, South Carolina 29503
(843) 669-2401
Attorney for Plaintiffs/Appellants

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