

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

Brian M. Gibbons Circuit Court Judge

Case No. 2012-CP-29-00127

Janice Gregory, Grady Martin, Jr., Kevin Martin, Teresa B. Martin, and Williams D. Martin, Appellants,

v.

The Estate of Janice Broughton and Jill Gainey, as Personal Representative of the Estate of Janice L. Broughton, Respondent.

INITIAL BRIEF OF APPELLANTS

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Facts 2

Standard of Review 4

ARGUMENTS

1. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER JILL GAINNEY EXERTED UNDUE INFLUENCE UPON JANICE L. BROUGHTON 5

2. THE LOWER ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER DECEDENT WAS COMPETENT ON DECEMBER 6, 2007, THE DAY SHE SIGNED THE WILL 8

Conclusion 9

TABLE OF AUTHORITIES

CASES

Jackson v. John Doe, 342 SC 552, 537 SE 2d 567, 554 (Ct. App. 2000) 4

Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991) 4

Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991) 4

Baughman v. American Tel. Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ... 5

Watson v. Southern Ry Co., 420 F. Supp. 483, 486 (D.S.C. 1975) 5

In Re: Estate of Cumbee 333 SC 664, 511 SE 2nd 390 (Ct. Rpp.1998) 6

Havind v. Schissell, 252 S.C. 404, 410-411, 166 S.E. 2d 801, 804 (1969) 6

Byrd v. Byrd, 7

Id. 279 SC 425, 427, 308 SE 2d 788, 789 (1983)..... 7

Matheson v. Matheson, 125 S.C. 165 (1923) 8

STATUTE

S.C. Code Ann. § 62-2-501 (1976)..... 8

STATEMENT OF ISSUES ON APPEAL

- I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER JILL GANEY EXERTED UNDUE INFLUENCE UPON JANICE L. BROUGHTON.

- II. THE LOWER ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER DECEDENT WAS COMPETENT ON DECEMBER 6, 2007, THE DAY SHE SIGNED THE WILL.

STATEMENT OF THE CASE

Appellants¹ filed this action April 6, 2011, in the Probate Court of Lancaster County seeking to invalidate the Last Will and Testament of Janice L. Broughton. By consent of the parties, the matter was properly moved to the Court of Common Pleas for Lancaster County. Appellants alleged that Janice L. Broughton lacked the requisite capacity to execute a valid will and/or the contested Will was a product of undue influence and therefore should be overturned. After several depositions, but before trial, Appellees moved for Summary Judgment. The Honorable Brian M. Gibbons granted Appellees' motion and the case was dismissed. Appellants served their Notice of Appeal on April 16, 2014.

FACTS

This litigation arises from a Will executed by Janice L. Broughton (decedent). Ms. Broughton executed the said contested Will on December 6, 2007, and died on October 28, 2010, at the age of seventy-six (76). During her life time, Ms. Broughton had five² children with her first husband. She later remarried and her second husband, James H. Broughton, passed away four years before her death. Jill Gainey served as attorney in fact for the decedent³.

Decedent executed the contested Will, naming Jill Gainey⁴ as the Personal Representative of the contested Will. The contested Will devised and bequeath all property both real and personal to Jill Gainey. If Jill Gainey predeceased the Testatrix, then all such property was left to Macie Gainey⁵. The contested Will specified that the decedent "plans to execute a memorandum

¹ Appellants are the natural children of decedent Janice L. Broughton.

² The children are: Janice Gregory, Grady L. Martin, Jr., Kevin Martin, Teresa B. Martin, and William D. Martin.

³ See Deposition of Kathy Knight, pp. 19-20.

⁴ Personal Representative Jill Gainey is the cousin of decedent's second husband, James H. Broughton, and is a beneficiary of the contested Will.

⁵ Macie Gainey is the daughter of Jill B. Gainey.

directing the Personal Representative to distribute certain items of personal property to selected persons.”(Will, P.1, Paragraph 2). No such Memorandum was filed with the Probate Court. Appellants are omitted from the contested Will.

Appellant Janice Gregory visited the decedent in 2007, after the death of decedent’s husband James H. Broughton. The decedent had many medical conditions, including a brain tumor (Dep. Kathy Knight, pp. 42-44), and heavily depended upon her husband, prior to his death. In her Affidavit, Appellant Janice Gregory testified that she observed her mother, the decedent, in a depressed state and that, after Mother’s Day, in 2007, she observed: a blank stare on the decedent’s face; decedent sitting in a regular chair, rocking with her body, back and forth; and decedent talking to her dead husband. (Affidavit of Janice Gregory, P. 1).

Appellant Janice Gregory testified in her Affidavit that decedent was prescribed Darvocet-N for pain and Trazodone for pain and depression. Mrs. Gregory also testified in her Affidavit that Robert Broughton, the uncle-in-law of decedent, saw a decrease in his contact with decedent and that decedent appeared to have totally withdrawn from people with the exception of Personal Representative and beneficiary Jill Gainey⁶. Terry Gilbert Gregory, the husband of Appellant Janice Gregory testified in his Affidavit that in 2007, he observed decedent and that she appeared confused, nervous, and depressed. He also observed her rocking back and forth and talking to her dead husband. He testified that he heard the decedent say, “Howard, what you going to do?” and “you said you were going to help me.” (Affidavit of Terry Gilbert Gregory, Pg. 1).

The contested Will was drafted by Lancaster attorney Phillip Wright. Staff for Attorney

⁶ Robert Broughton also indicated that the decedent was withdrawn from everyone except Jill Gainey and Kathy Knight, Jill Gainey’s cousin.

Wright testified in deposition that Personal Representative and beneficiary Jill Gainey referred decedent to his office. (Dep. Jennifer Collins, pp.17-18). Attorney Wright testified that all on the same day: the decedent came into his office, was interviewed, and her Will was drafted and executed. (Dep. Phillip E. Wright, pp.10-11).

Attorney Wright also testified in deposition that he was not familiar with decedent's medical history and, in reference to decedent's brain tumor, he testified, "I have been told that she had some kind of medical conditions at some point in her life. Now, I don't, I'm not sure when it was, how serious it was." (Dep. Phillip E. Wright, p.12, lines 5-8). Attorney Wright also testified in deposition that the entire process of interviewing, preparing, and signing the will took thirty to thirty-five minutes. (Dep. Phillip E. Wright, p.11, lines 12-13).

Most importantly, in deposition Attorney Wright testified that he did not question decedent as to the extent of her estate. Attorney Wright was asked, "What did she tell you was the extent of her estate?" to which Attorney Wright testified, "I didn't ask her the extent of her estate." (Dep. Phillip E. Wright, p. 28, lines 18-19).

STANDARD OF REVIEW

A case should not be summarily dismissed unless there is no issue of material facts considering evidence in the light most favorable to the non-moving party. As this Court stated in Jackson v. John Doe, 342 SC 552, 537 SE 2d 567, 554 (Ct. App. 2000), "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). "Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the

nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991). Moreover, summary judgment is a drastic remedy which "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. American Tel. Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting Watson v. Southern Ry Co., 420 F. Supp. 483, 486 (D.S.C. 1975)).

Thus, this Court must decide whether, when considering the evidence in the light most favorable to the Appellants, the Circuit Court erred in granting summary judgment.

ARGUMENTS

I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER JILL GAINNEY EXERTED UNDUE INFLUENCE UPON JANICE L. BROUGHTON.

In this case, the decedent's husband predeceased her. It is undisputed that, upon the decedent's husband's death, Personal Representative and beneficiary Jill Gainey became a major person in the life of the decedent. There is evidence that when the uncle-in-law of the decedent visited the decedent following decedent's husband's death, the decedent advised that she did not want to have anything to do with anyone. The decedent appeared to have totally withdrawn from everyone except Personal Representative and beneficiary Jill Gainey. Evidence also shows that the decedent suffered from and had a history of a brain tumor and was prescribed medications for depression and pain. The drafting Attorney's staff testified in deposition that Personal Representative and beneficiary Jill Gainey referred the decedent for the appointment in the drafting Attorney's office to make the contested Will. Specifically, Jennifer Collins responded

to, "Are you aware of how Ms. Broughton came to Mr. Wright's office for a will? Do you know whether she was referred by anyone?" (Dep. Jennifer Collins, p.17, lines 24-25) by testifying, "She was referred." (Dep. Jennifer Collins, p.18, line 2). In follow up to the question, "[d]o you know by whom?" (Dep. Jennifer Collins, p.18, line 3) Jennifer Collins testified, "[b]y Jill Gainey." (Dep. Jennifer Collins, p.18, line 4).

In order for the allegations of undue influence to be successful, there must be evidence of threat, force, restriction of visitation, or an existence of a fiduciary relationship at the time or before the instrument's execution. In Re: Estate of Cumbee 333 SC 664, 511 SE 2nd 390 (Ct. Rpp.1998).

In this case the facts clearly show that the decedent had become withdrawn and whom could visit her was restricted. The decedent depended upon Personal Representative and beneficiary Jill Gainey. This confidential relationship developed and Personal Representative and beneficiary Jill Gainey's control within the relationship grew as can be seen in the making of the decedent's contested Will. In the contested Will, all of decedent's property, both real and personal, is given to Personal Representative and beneficiary Jill Gainey, who the decedent called her cousin. If Personal Representative and beneficiary Jill Gainey predeceased the decedent, the contested Will gave the said property to Personal Representative and beneficiary Jill Gainey's daughter, Macie Gainey, and assigned Personal Representative and beneficiary Jill Gainey's husband, Charles Gainey, as successor Personal Representative.

Undue influence may be proven by circumstantial evidence, but the circumstances relied on as to show it must be such that taken together point unmistakably and convincingly to the fact that the mind of the testator was subjected to that of some other person, so that the will is

that of the latter and not of the former, Havind v. Schissell, 252 S.C. 404, 410-411, 166 S.E. 2d 801, 804 (1969). Indeed, the contested Will mirrored more of the will and desires of Personal Representative and beneficiary Jill Gainey than that of the decedent. Personal Representative and beneficiary Jill Gainey, her husband, and her daughter all gained much under decedent's contested Will in certain circumstances.

It is recognized by the nature of the case that the evidence of undue influence will be mainly circumstantial. The decision of the appellate courts of this state recognize that in undue influence cases there are rarely "smoking guns." As was stated by the Supreme Court in Byrd v. Byrd, "by the very nature of the case, evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." Id. 279 SC 425, 427, 308 SE 2d 788, 789 (1983).

In this case, it is undisputed that Personal Representative and beneficiary Jill Gainey was in a confidential relationship with the decedent and there are questionable and suspicious circumstances surrounding the preparation and formulation of the contested Will as well as its contents. Personal Representative and beneficiary Jill Gainey referred the decedent to the drafting attorney's office. Only Personal Representative and beneficiary Jill Gainey and her immediate family are named as beneficiaries in portions of the contested Will although the decedent did not know those members of Jill Gainey's family. The decedent was interviewed, the contested Will was drafted and executed all in one sitting. (Dep. Phillip E. Wright, p.11, lines 12-13). It was not determined whether the decedent could read the contested Will that was drafted on her behalf. (Dep. Phillip E. Wright, p. 11, lines 14-24).

All of these circumstances clearly point to evidence of undue influence which should

have been allowed to have been presented to a jury. These circumstances, taken in the light most favorable to Appellants, put forward at least that mere scintilla of evidence required to defeat a motion for summary judgment on the issue of undue influence. As such the Circuit Court erred in granting Summary Judgment to Personal Representative and beneficiary Jill Gainey on this issue.

II. THE LOWER COURT ERRED IN RULING THAT THERE WAS NO GENUINE ISSUE OF A MATERIAL FACT AS TO WHETHER THE DECEASED, JANICE L. BROUGHTON WAS COMPETENT ON DECEMBER 6, 2007, THE DAY SHE SIGNED THE WILL.

Attorney Wright, the drafting attorney of the contested Will, testified in deposition that he did not determine whether the decedent knew either the nature and/or extent of her estate. (Dep. Phillip E. Wright; p. 28, lines 18-25). It is well established in South Carolina that a sound mind is required to execute a will. S.C. Code Ann. § 62-2-501 (1976). Moreover, well established South Carolina case law establishes that in order to demonstrate a sound mind, a testatrix must, in addition to other requirements, know the nature and extent of her property. Matheson v. Matheson, 125 S.C. 165 (1923). Despite hearing argument and depositional testimony of Attorney Wright, as read aloud in court, that the decedent was not questioned to determine whether she understood the nature and extent of her estate, (SJ Hearing Transcript, p. 10) the Circuit Court granted summary judgment to Personal Representative and beneficiary Jill Gainey on the issue on decedent's competency at the time the contested Will was executed. In light of the testamentary capacity requirements in Matheson, this ruling is clearly erroneous in that if the drafting Attorney cannot say whether the decedent knew the extent of her estate at the time of execution because of a failure to question her concerning the same, it cannot be said with

a legal certainty that the decedent was so aware. It follows then that it cannot be maintained that the decedent was competent when she signed the contested Will and as such the contested Will must fail.

There is also question regarding whether the decedent knew to whom she desired to leave certain property. In Matheson, it is also required that the testatrix knows to whom she wishes to leave property. A reading of the contested Will establishes that the decedent indicated she wanted to leave certain personal property to "selected persons" but also in the contested Will the decedent expressed the desire to leave everything she owned to Personal Representative and beneficiary Jill Gainey. Specifically, Paragraph Two of the contested Will indicates "I plan to execute a Memorandum directing my personal representative to distribute certain items of personal property to selected persons. The Memorandum shall be kept with my will." There was no such a Memorandum left with the contested Will. Paragraph Three of the contested Will, which is a conflict, states "I hereby leave all of my property, both real and personal where ever situated to my cousin, Jill B. Gainey." For the same reasoning as argued above, summary judgment should not have been granted on this issue as it cannot be established that the decedent knew to whom she desired to leave certain items of property and without such establishment, competency cannot be established. The Circuit Court erred in granting summary judgment in this instance to Personal Representative and beneficiary Jill Gainey. Evidence taken in the light most favorable to the Appellants show the existence of at least that mere scintilla of material fact which was sufficient to not only avoid summary judgment but also to, as a matter of law, void the contested Will.

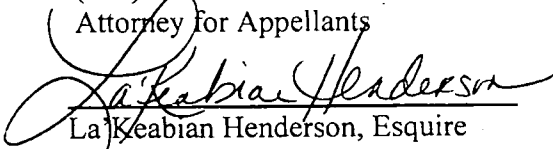
CONCLUSION

It is indisputable that Personal Representative Jill Gainey had a fiduciary relationship with the decedent. Jill Gainey was named as the primary heir in the contested Will and the daughter and husband of Jill Gainey were named as successor beneficiary and Personal Representative in the contested Will respectively. Jill Gainey directed the decedent to Attorney Phil Wright and at the time the contested Will was written, the decedent 1) not only been diagnosed with a brain tumor but also had undergone brain surgery, 2) was very depressed, and 3) was prescribed medicine for pain and depression. This weakened mental and physical state of the decedent made her particularly susceptible to undue influence by Jill Gainey.

The drafting attorney, Attorney Wright, did not inquire of the decedent to satisfy the test used in South Carolina to determine whether a testatrix has the requisite capacity to execute a Will. Specifically, Attorney Wright failed to question the decedent as to the nature and extent of her estate as well as failed to clear the decedent's confusion when she attempted to leave the same property to different selected persons. As a result the legal requirements for capacity were not met and as a matter of law, not only should summary judgment not have been granted on this issue of competency but also as a matter of law the contested Will would have to fail.

All of the foregoing, lead to the conclusion that the Court erred in granting summary judgment. Therefore, the ruling of the Circuit Court must be overturned and the case allowed to proceed.

Respectfully Submitted,
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APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

Brian M. Gibbons Circuit Court Judge

Appellate Case No. 2014-000936

Janice Gregory, Grady Martin, Jr., Appellants,
Kevin Martin, Teresa B. Martin
and Williams D. Martin

vs.

The Estate of Janice Broughton and Jill Gainey, as Personal Respondent
Representative of the Estate of Janice L. Broughton

PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter on Francis L. Bell, Jr. and William C. Tindal, attorneys for the Respondents, P.O. Box 867 Lancaster, SC 29721-0867 by depositing a copy of it in the United States Mail, postage prepared on the 21st day of September, 2014.

September 21, 2014.



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September 21, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court for South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Janice Gregory, et. al. vs. The Estate of Janice L. Broughton, et. al.
Appellate Case No. 2014-000936

Dear Madam Clerk:

Please find enclosed the Appellants' Initial Brief, Designation of Matter, and Proof of Service along with one copy of each, in reference to the above captioned matter. Please file the same and return the clocked copies to me in the enclosed self-addressed stamped envelope. Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Tommy L. Stanford". To the right of the signature is a circular stamp containing the letters "T" and "S".

Tommy L. Stanford
Attorney for the Appellants

Enclosures

CC: La'Keabian Henderson, Esquire, Attorney for the Appellants
Francis L. Bell, Jr., Esquire, Attorney for the Respondents
William C. Tindal, Esquire, Attorney for the Respondents

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