THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
COURT OF COMMON PLEAS

J.C. Nicholson, Jr., Circuit Court Judge
Stephanie P. McDonald, Circuit Court Judge at Trial
Case No. 2012-CP-10-3421

Mamie F. Nichols, Appellant,

v.

ALBERT NAPOLEON THOMPSON, JR.,
AL THADDEUS THOMPSON,
TITUS SHEROD THOMPSON, and
ASIA RACHAL THOMPSON, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the preparation of a deeds, mortgages and other legal instruments related to transfers of real estate falls within the practice of law, such that a deed prepared by an individual who is no longer an attorney, and who had a conflict of interest, and should thus be deemed void as a matter of law.

2. Whether a fiduciary or confidential relationship existed as a matter of law, such, as raised in the motion for a directed verdict, that the question should not have been given to the jury as a question of fact.

3. Whether the plaintiff was entitled to a directed verdict, or judgment notwithstanding the verdict, as the evidence showed that the donee of the deed was in a confidential relationship with the plaintiff, as her daughter upon whom she relied and the holder of a power of attorney, plaintiff was influenced by her old age, hearing and eyesight, disabilities, and threats of living alone, so that a presumption of undue influence arose and was not rebutted as a matter of law.

STATEMENT OF THE CASE

In a complaint filed on or about May 25, 2012, Plaintiff, Ms. Mamie F. Nichols (Ms. Nichols") brought this action to Set Aside Deed for Unilateral Mistake, Set Aside Deed for Undue Influence and to Set Aside Deed for Lack of Consideration. Defendants filed an answer and counterclaim on July 5, 2012. Plaintiff filed a reply on August 3, 2012.

On August 03, 2012, Plaintiff also filed a Motion for Summary Judgment on the Second Cause of Action of Undue Influence. Counsel for Defendants, Demal Mattson was granted two continuances to respond to Plaintiff's motion, once on November 16, 2012 and

February 15, 2013. On March 4, 2013, Defense counsel responded to the motion and filed a cross-motion to amend the answer.

Following oral argument on March 13, 2013, Judge Nicholson denied Plaintiff s motion, finding genuine issues of material facts for a jury.

On May 10, 2013, Plaintiff sought leave to file an amended complaint. By order filed June 5, 2013, leave to file amended pleadings was granted. An amended complaint was filed on June 20, 2013. The answer and amended counterclaim was filed on July 3, 2013.

Defendants then made a motion for summary judgment on January 7, 2014. Plaintiff filed opposition and the reply to the counterclaims on February 27, 2014. The motion was not decided prior to trial.

The matter was then set down for trial before Judge McDonald at the conclusion of which the jury returned a verdict for the defendants on March 7, 2014. A motion for judgment notwithstanding the verdict was denied on July 20, 2015. Plaintiff filed a timely notice of appeal.

STATEMENT OF FACTS

This litigation concerns real property located at 84 Sheppard Street in Charleston, South Carolina. See Amended Complaint, p. 1. The property was initially owned by the Plaintiff-Appellant Mamie Nichols ("Ms. Nichols"), but later deeded to one of her daughters, Donna Thompson ("Mrs. Thompson" or "Thompson"), on April 22, 2006. Original Complaint, exhibit. Thompson later died of breast cancer. Transcript, pp. 47, 61, 117, 193. Ms. Nichols had three other children, Emily Colette Nichols Felder ("Colette Felder"), Allen Nichols and

another son, now deceased. Transcript, pp. 57, 60,123; Affidavit of Mamie F. Nichols in support of summary judgment, p. 1.

The deceased Mrs. Thompson, along with her entire family, namely husband, Albert Napoleon Thompson Jr. ("Al Thompson") and her three children, Thaddeus Thompson ("Thaddeus"), Titus Sherod Thompson ("Titus") and Asia Rachal Thompson ("Asia") resided with her mother, Ms. Nichols. Transcript, p. 189. Mrs. Thompson's children are her heirs and defendants in this action.

Ms. Nichols is an elderly woman and has a long history of hearing disabilities. Transcriprt, pp.138-142. Around the time she conveyed the property to Mrs. Thompson in 2006, she suffered from 71 decibels of hearing loss, only 19 decibels away from "profound deafness." *Id.* Even with the support of an analog hearing aid, at her level of decibel loss, she would still suffer from speech reception problems. Id Thus, in order to communicate with Ms. Nichols, her daughter would occasionally write her letters. Plaintiff's Exh. 3, Letter from Donna Thompson.

In 2006, Ms. Nichols also suffered from diminished mental capacity and eyesight, although not incapacitated. Transcript, pp.. 106-107. Mrs. Thompson's husband had a long-standing criminal history and a very prevalent substance abuse issue. Transcript pp. 116, 123. When the husband would reside with his wife and Ms. Nichols, the family's relationship would become tumultuous. *Id.*

On one occasion, shortly before the deed was executed, Ms. Nichols called her other daughter and her husband, who reside in Atlanta, to come to her home because she was having problems with Al Thompson. Transcript, pp.116-117. There was a physical altercation between

Al Thompson and Colette Felder's husband, which led to Al's arrest *Id.* Al was then prohibited from residing with Ms. Nichols. *Id.*

In the meantime, Mrs. Thompson hired Russell Brown to advise Ms. Nichols and prepare the documents to effect a transfer of the property. Transcript, pp. 84, 93, 218. Brown purported to be an attorney, but had been disbarred on consent by order of the Supreme Court. See *Matter of Brown*, 356 S.C. 10, 587 S.E.2d 110 (2003); Rule 201, SCRE. Soon thereafter, on April 22, 2006, Ms. Nichols conveyed a remainder interest in her property to Mrs. Thompson and her heirs for an amount of five dollars ($5.00), reserving a life estate to herself. Plaintiffs Exh. 6, Title of Real Estate; Deed, Original Complaint, Attachment. She was almost 81 years old at the time. Transcript, p. 59.

After the property was conveyed, Colette Felder, during one of her visits to Charleston, received a copy of a letter written by Mrs. Thompson to their mother suggesting that she would leave Ms. Nichols to live alone if she did not agree to convey interest in the property to her. Plaintiffs Exh. 3, Letter from Donna Thompson; Transcript, pp. 56-59. In the letter, Mrs. Thompson also suggested that Plaintiff seek legal counsel of Russell Brown to draft the conveyance. Plaintiff's Exh. 3, Letter from Donna Thompson. Ms. Nichols relied on Donna's communication with Mr. Brown rather than communicating with him herself. See Plaintiff's Exh. 5, Handwritten Letter from Ms. Thompson.

Three days previous to the signing of the deed, on April 19, 2006, Ms. Nichols gave Mrs. Thompson a Power of Attorney over her. Plaintiff's Exh.7, Power of Attorney. Finally, Donna sent a letter to Colette Felder prohibiting her from future visitation. Plaintiff's Exh. 4, Letter of Representation; Transcript, p. 63.

ARGUMENTS

I. BECAUSE A DEED PREPARED BY AN INDIVIDUAL WHO IS NO LONGER AN ATTORNEY CONSTITUTES THE ILLEGAL PRACTICE OF LAW, AND WHO HAD A CONFLICT OF INTEREST, AND WHO GAVE PLAINTIFF ERRONEOUS ADVICE, THE DEED SHOULD BE DEEMED VOID AS A MATTER OF LAW

The trial court limited testimony concerning the fact of Russell Brown's disbarment on the grounds of hearsay as well as the impact of that disbarment. Transcript, pp. 74-77, 217-218. Of course, the fact that a witness obtained knowledge through hearsay does not make that knowledge inadmissible. Obviously, one's knowledge of one's date of birth is obtained through hearsay, yet there is no question that one may testify to it. In any event, the disbarment and its date is clearly a matter of which judicial notice may be taken pursuant to Rule 201, SCRE.

There can be no question that Brown was disbarred. *Matter of Brown*, 356 S.C. 10, 587 S.E.2d 110 (2003) There also can be no question that his preparation of a deed by one who is not an attorney constitutes the unlawful practice of law. See *State v. Buyers Service*, 292 S.C. 426, 357 S.E.2d 15 (1987). "The attorney's role pursuant to this policy, therefore, is to protect the participants in real estate transactions from the numerous potential problems that may arise. When an attorney is aware of such a potential problem, it is the responsibility of the attorney to ensure that the potential never materializes." *Inglese v. Beal*, 403 S.C. 290, 296, 742 S.E.2d 687 (S.C. App. 2013).

Since Mrs. Thompson hired Brown and Brown gave Appellant incorrect advice that she relied upon, the deed should be declared invalid as a matter of law.

Although we have found no case directly on point, we believe that the principles enunciated in *Matrix Financial Services Corp. v. Frazer,* 394 S.C. 134, 714 S.E.2d 532 (2011)

and *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct.App.2010) call for that result. In both cases, it was held that engaging in the unlawful practice of law by the plaintiffs precluded the Plaintiffs from obtaining equitable relief in a court of law.

This case involves different facts, the principle should be the same. Mrs. Thompson hired Brown. She was responsible for his actions because she reaped a benefit from his unlawful practice of law. *Cf. Keels v. Powell*, 207 S.C. 97, 34 S.E.2d 482 (1945) (recognizing action for wrongful interference with an attorney-client relationship). And, Brown gave Plaintiff incorrect advice.

Brown's conduct constituted a contempt of court. See *Matter of Easter*, 275 S.C. 400, 272 S.E.2d 32 (1980) (disbarred attorney "accused of engaging in the practice of law by preparing a deed, having it executed, and filing it in the Spartanburg County Courthouse for a small fee" found in contempt and sentenced to jail for 30 days.) In such an instance, to allow the fruits of the unlawful practice to stand would contravene this State's strong public policy,, especially where one party has been misled.

II. BECAUSE A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP EXISTED AS A MATTER OF LAW, SUCH, AS RAISED IN THE MOTION FOR A DIRECTED VERDICT, THAT THE QUESTION SHOULD NOT HAVE BEEN GIVEN TO THE JURY AS A QUESTION OF FACT

In her motion for a directed verdict, and in the motion for summary judgment, Plaintiff requested, among other things, that there be a finding of a confidential relationship as a matter of law, thus raising a presumption of undue influence. Transcript, p. 219; Memorandum in Support of Motion for Summary Judgment, p. 4; Affidavit of Mamie F. Nichols, p. 8 ("Donna Thompson maintained communications with Attorney Russell Brown for me."). The trial court "respectfully disagree[d]" and submitted the issue as one of fact to the jury. Transcript, p. 220. This was error.

There is no dispute that three days prior to the signing of the deed, on April 19, 2006, Ms. Nichols gave Mrs. Thompson a Power of Attorney over her. Plaintiff's Exh.7, Power of Attorney. Irrefutable documentary evidence also establishes that Mrs. Thompson also suggested that Plaintiff seek legal counsel of Russell Brown to draft the conveyance. Plaintiff's Exh. 3, Letter from Donna Thompson. Ms. Nichols relied on Donna's communication with Mr. Brown rather than communicating with him herself. See Plaintiff's Exh. 5, Handwritten Letter from Ms. Thompson.

In accordance with *Loftis v. Eck*, 288 S.C. 154, 157, 341 S.E.2d 641, 642 (S.C. App. 1986), once a power of attorney is given "a fiduciary relationship exists under such a power of attorney as a matter of law." (Citing S.C. Code Ann. § 32-13-10 recodified at S.C. Code Ann. § 62-5-501). And the fiduciary relationship is not limited to transactions involving the power itself. See *In re Estate of Cumbee*, 333 S.C. 664, 672-73, 511 S.E.2d 390, 394 (S.C. App. 1999)

("A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence.").

"A fiduciary relationship between the grantor and grantee may give rise to a presumption of undue influence, thus shifting the burden of proof to the grantee to rebut the presumption." *Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986); see also *Middleton v. Suber*, 300 S.C. 402, 405, 388 S.E.2d 639, 641 (1990) (recognizing that where a "confidential relationship" exists between a grantor and a grantee, the deed is presumed invalid and the burden is upon the grantee to establish the absence of undue influence); *Bullard v. Crawley*, 294 S.C. 276, 280-81, 363 S.E.2d 897, 900 (1987) ("Undue influence in the procurement of a deed may be shown in two ways. The party challenging the deed may show the existence of a confidential relationship between the grantor and the grantee. Once a confidential relationship is shown, the deed is presumed invalid. The burden then shifts to the grantee to affirmatively show the absence of undue influence.").

"'A confidential relationship exists between grantor and grantee wherever there is a trust reposed by the former and dominant influence obtained by the latter, irrespective of the formal fiduciary character of their relationship. The existence of a confidential relationship between the parties demands close scrutiny of a deed executed by the subservient grantor and may render it invalid for presumed undue influence when otherwise it would be sustained, although deeds between those in a confidential relationship will be upheld if fair and expressive of the free will of the grantor.'" *Page v. Lewis,* 209 S.C. 212, 39 S.E.2d 787, 799 (1946) (quoting 26 C.J.S. Deeds § 63).

Thus, if the jury were instructed that Mrs. Thompson was a fiduciary as a matter of law, as effectively requested in the motion for a directed verdict, the jury might very well have come to a different verdict. After all, they could have concluded, albeit erroneously, that, because a fiduciary duty is not implicated from a family relationship by itself, Mrs. Thompson was not in a confidential relationship. The presumption remained in the case, even if contrary evidence was adduced, in accordance with Rule 301, SCRE, which, as the commentators note, is the same as Fed.R.Evid. 301. See Wright & Graham, Federal Practice & Procedure: Evidence § 5126.

Moreover, had Mrs. Thompson employed the power of attorney, there is no question that the deed would have been void. See *Loftis v. Eck*, 288 S.C. at 156, 341 S.E.2d at 642 ("An agent acting for a principal pursuant to a power of attorney may not make a substantially gratuitous conveyance of the property of the principal to himself unless the power to do so is expressly granted by the instrument itself.") (citing *Fender v. Fender*, 285 S.C. 260, 329 S.E. 2d 430 (1985)). In *Loftis*, an almost identical deed was voided on $5.00 consideration. Mrs. Thompson should not be in any better position because she enlisted the assistance of a disbarred attorney to carry out the scheme.

III. BECAUSE THE EVIDENCE SHOWED THAT THE DONEE OF THE DEED WAS IN A CONFIDENTIAL RELATIONSHIP WITH THE PLAINTIFF, AS HER DAUGHTER UPON WHOM SHE RELIED AND THE HOLDER OF A POWER OF ATTORNEY, PLAINTIFF WAS INFLUENCED BY HER OLD AGE, HEARING AND EYESIGHT, DISABILITIES, AND THREATS OF LIVING ALONE, SO THAT A PRESUMPTION OF UNDUE INFLUENCE AROSE AND WAS NOT REBUTTED AS A MATTER OF LAW. PLAINTIFF WAS ENTITLED TO A DIRECTED VERDICT, OR JUDGMENT NOTWITHSTANDING THE VERDICT.

As noted above, Plaintiff established a confidential relationship, thus raising the presumption of undue influence and review of the record shows that there was no evidence rebutting that presumption. Indeed, the evidence confirmed it. Thus, Plaintiff is entitled to judgment as a matter of law.

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). Generally, on appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence. *Buffington v. T.O.E. Enter.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009). Under the rule set forth *in Johnstone v. Matthews*, 183 S.C. 360, 366, 191 S.E. 223, 225 (1937), however, when issues of fact in equity cases are tried to a jury and findings of fact are made, they must be sustained if there is any evidence to support them. See *North American Rescue Prods., Inc. v. Richardson*, 396 S.C. 124, 720 S.E.2d 53 (S.C. App. 2012). Even as to that there is a caveat. Where an advisory jury is impaneled, this Court "review[s] the evidence as if the trial judge sat without a jury and thus find facts in accordance with [its] view of the preponderance of the evidence." *Neal v. Darby*, 282 S.C. 277, 284, 318 S.E.2d 18 (S.C. App.1984).

Inasmuch as a motion for summary judgment was made and denied, it may be that independent review of the facts. No matter, the verdict cannot stand under either standard. *Cf. Neal.*

To prove undue influence, it is not necessary to show insanity or a state of mental imbecility. See *Zeigler v. Shuler*, 87 S.C. 1, 68 S.E. 817, 819 (1910). It is only necessary to show that the grantor was susceptible to undue influence as a result of old age, mental weakness, or some other cause. *Atkinson v. Belser*, 273 S.C. 296, 255 S.E.2d 852, 854 (1979).

Thus, where an aged, weak-minded mother conveyed her property to her son, who she wished to live with her and take care of her, the Court held the mother was unduly influenced. *Wille v. Wille*, 57 S. C. 413, 35 S.E. 804, 807 (1900). The mother, with little regard for business transactions and without an independent adviser conveyed the property to her son for $5.00. *Id.* at 804. Said the Court:

> A court of equity ought not to be, and is not, a shield or refuge for those who make improvident, or even reckless, contracts, but it would not deserve respect if it had not both power and willingness to shield an infirm helpless mother from her grasping son, who would take her all for nothing.

Id. at 809.

As discussed above, Plaintiff adduced the following evidence: (1) Mrs. Thompson's letter to Ms. Nichols, influencing her to give her interest in the property and threatening that if she does not, Mrs. Thompson would leave her to live alone, (2) Ms. Nichols was 80 years old at the time the deed was executed; (3) Ms. Nichols was hard of hearing, more specifically, that she was only 19 decibels away from being deaf; (4) Mrs. Thompson's letter to her sister, informing her that she could not visit anymore; (5) Mrs.. Thompson's notes from

communications with "Attorney Russell Brown," the disbarred attorney who drafted the deed; (6) testimony from Ms. Nichols's son that Ms. Nichols's health went"downhill" after a vehicular accident; and (7) testimony from Ms. Nichols's son-in-law Mrs. Thompson had been ordered by a South Carolina judge to never bring her husband back to Ms. Nichols' home, thus showing Mrs. Thompson's possible motive to want an interest in the property.

At this point, given that a confidential relationship has been proved and evidence has been provided to show "suspicious circumstances" surrounding the preparation of the deed, there is a presumption of undue influence and the burden then shifted to the Defendants to provide evidence that the deed was not procured by undue influence to rebut the presumption. See *Bullard*, 294 S.C. at 280.

The defendants did not present any evidence to rebut the presumption of undue influence. First, they offered a Petition for Conservatorship/Guardianship action in Probate Court, purportedly to prove "competence." As anyone in a will contest knows, "competence" and "undue influence" are quite different concepts. One may have "competence" and yet be the subject of "undue influence." *Owens v. Sweat*, 227 S.C. 112, 86 S.E.2d 886 (S.C.1955) discusses these two concepts in an action to set aside a deed. The concepts are again discussed in *Blanford v. Mauterer*, 252 S.C. 146, 165 S.E.2d 633 (1969), a will proceeding.

More important, the documents admitted from the Guardianship action did not address the deed or influence and only addressed competence a year after the deed had already been executed. Competence is at issue in this case as the Plaintiff was not trying to prove incapacitation.

Next, the defendants elicited the testimony of Mrs. Thompson's son, who testified that his mother did not discuss the home and business affairs with him and that the deed, power of attorney and medical power of attorney was a result of his *mother's* concern, not his grandmother's, Ms. Nichols. Transcript, pp. 213-215: Then the defendants called Barbara Gilliard who testified that Ms. Nichols wanted Mrs. Thompson to have the property and that she (Ms. Nichols) would live there until she died. Transcript, pp. 161-162. Ms. Gilliard testified that she only talked to her about the property *after* Mrs. Thompson died. Transcript, p. 174.

It bears emphasis that Ms. Gilliard testified that Ms. Nichols wanted to distribute *all of her properties to all of her children*, soon after her husband passed. Transcript, pp. 161-162, 172-176. Then, after the death of Mrs. Thompson, also long after 84 Sheppard Street had already been deeded over to her, Ms. Gilliard claims that Ms. Nichols discussed her thoughts concerning 84 Sheppard Street with her *for the first time*. Transcript, pp. 186-187.

The evidence admitted by Defendants did not address influence at all. Ms. Gilliard admitted that she did not know about the letters from Mrs. Thompson nor did she know that Mrs. Thompson even asked for the property. Transcript, p. 175.

Significantly, Ms. Gilliard did not testify as to any facts surrounding the execution of the deed or its purpose. Ms. Nichols simply told Ms. Gilliard what she had already done. Thus, because the Defendants did not present any evidence demonstrating Ms. Nichols' intentions, or evidence of communications between Mrs. Thompson and Ms. Nichols they did not refute the presumption of undue influence.

According to South Carolina law, the presumption justifies a judgment for Ms. Nichols as a matter of law since the Defendants did not come forward with evidence to rebut a presumption of undue influence. See *Gordon v. Busbee,* 397 S.C. 119, 140, 723 S.E.2d 822, 834 (S.C. App. 2012) (In will contest predicated on undue influence, the "presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.").

Not a single inference regarding influence or non-influence could be drawn from Ms. Gilliard's testimony because she did not know and could not testify as to any facts relevant to the procurement of the deed. Because Defendants failed to present evidence to rebut a presumption of undue influence, Plaintiff is entitled to a judgment as a matter of law and a judgment notwithstanding the verdict in accordance with *Gordon.*

CONCLUSION

For the reasons stated, the judgment should be reversed and the cause remitted for entry of judgment in Plaintiff's favor.

October 21, 2015

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served a copy of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on Albert Napoleon Thompson, Jr., Al Thaddeus Thompson, Titus Sherod Thompson and Asia Rachal Thompson by depositing a copy of it in the United States Mail on October 20, 2015, to their attorney of record, Demal I. Mattson, Jr. at 1156 Bowman Road, Suite 200, Mt. Pleasant, South Carolina 29464 and 804 St. Dennis Drive, Charleston, SC 29407.

October 21, 2015

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