

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY  
Circuit Court

Case Number 2016-000096

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JUN 15 2016

SC Court of Appeals

Estate of Mary Jean Tucker Swiger,

Appellant,

Vs.

Ben R. Smith and Margaret P. Kelly as Personal Representatives of the Estate of Vinton  
Tucker

Respondents.

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**INITIAL BRIEF OF APPELLANT**

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**STATEMENT OF ISSUES ON APPEAL**

- 1. THE PROBATE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS.**
- 2. THE PROBATE COURT ERRED IN NOT FINDING THE EXISTANCE OF UNDUE INFLUENCE.**
  - i. Respondents restricted Decedent' visitation.**
  - ii. Decedent's will did not comport with the Decedent's expressed wishes nor did Decedent's will comport with his first will.**
  - iii. Decedent was physically infirm and his will did not comport with the prior will or with prior expressed wishes.**
- 3. THE PROBATE COURT ERRED IN NOT FINDING THE EXISTANCE OF A CONFIDENTIAL RELATIONSHIP.**

## STATEMENT OF CASE

Decedent, Vinton Tucker, died in York County, South Carolina on May 12, 2012. Decedent was 93 years old at the time of his death and had resided in Mecklenburg County, North Carolina for all of his life until December 2011 when he entered Westminster Towers. At the time of his death, Decedent was a patient at Westminster Towers located in York County, South Carolina.

On May 17, 2012, 5 days after Decedent's death, Respondents, Ben Smith and Margaret Kelly applied for Informal Probate of Will. The will that was submitted as the Last Will and Testament for Decedent was a will purportedly executed on February 14, 2012. Judge Carolyn Rogers of the York County Probate Court, approved Respondents' application for Informal Probate of Will and Appointment of Personal Representative on the same day, May 17, 2012.

At the time of Decedent's death, he had two living siblings, no living parents and no children. In fact, Decedent never had any children. In the Application for Informal Probate of Will, Respondents did not include Decedent's siblings as intestate heirs. Because of Respondents failure to include Mr. Tucker's siblings as intestate heirs, Appellants and other family members were not immediately notified of Mr. Tucker's death. On June 7, 2012, Respondent's filed an Inventory and Appraisement with the York County Probate Court indicating that the total net worth of Decedent's estate was \$2,854,408.00.

On May 10, 2013, Appellants filed a Summons and Petition for Formal Testacy and To Set Aside Informal Probate wherein Appellants argued that the court lacked jurisdiction over Decedent's estate, that the document did not comply with S.C. Probate Code, that Respondents exerted undue influence over Decedent, fraud, and lack of

testamentary capacity. Thereafter, on January 22, 2014 Appellants filed a Notice of Motion and Motion for Temporary Restraining Order. Respondents filed a Return and Memorandum in Opposition to Petitioner's Motion for Temporary Restraining Order. The hearing was held on March 26, 2014 with the Honorable Carolyn Rogers presiding. By order of the York County Probate Court filed on April 14, 2014, the Court denied Appellant's motion for Temporary restraining order, but issued an order granting the Appellant's motion for a restricted account.

Respondents filed a Motion to Compel Appellant Mary Jean Swiger's attendance for depositions in York County South Carolina. Appellants argued that at the time of the scheduling of the depositions, Ms. Swiger's fragile and deteriorating health condition prevented her from traveling from Virginia to South Carolina to participate in depositions. Appellants further argued that Respondent's attorney had been notified of Ms. Swiger's inability to attend the scheduled deposition. The York County Probate Court by order filed August 21, 2014 granted Respondents' motion to compel and awarded costs to Respondents.

Respondents filed a Motion for Summary Judgment and an Amended Motion for Summary Judgment wherein they sought an order of the court granting the Respondents summary judgment on all causes of action filed by Appellants. The summary judgment hearing was scheduled for December 30, 2014 before Judge Rogers. Respondents delivered their Memorandum of Law in support of the motion for summary judgment via Federal Express to Appellant's attorney on December 23, 2015. On December 29, 2015, Appellant served Respondents' attorney and the court with a Memorandum of Law in Opposition to Respondents' Motion for Summary Judgment. By order of the Court filed

on February 2, 2015, Respondents' were granted Respondents' motion for summary judgment.

Appellants filed an appeal with the Circuit Court for the Sixteenth Judicial Circuit. A hearing was held before the Honorable R. Scott Sprouse on December 8, 2015. Judge Sprouse affirmed the ruling of the Probate Court granting the Respondents' Motion for Summary Judgment.

This appeal follows.

## ARGUMENT

### 1. THE PROBATE COURT ERRED IN GRANTING SUMMARY

#### JUDGMENT TO APPELLANTS.

Summary judgment is a drastic remedy. Thus, it “should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues.” Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003). “Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed.” McClanahan v. Richland County Council, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002). Summary judgment is inappropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law. Carolina Alliance for Fair Employment v. South Carolina Dep’t of Labor, Licensing & Regulation, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm’n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998).

The courts remain extremely careful to not grant summary judgment where any “... triable issues exist.” In these instances, “those issues must be submitted to the jury.” Young v. S.C. Dep’t of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999). Even where no dispute as to evidentiary facts exists, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. Hall v. Fedor, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002). Where the courts have found the existence of a conflict in evidence, thus creating a genuine issue of

material fact, the courts have found that summary judgment is not proper. Byrd v. Byrd, 279 S.C. 425, 431, 308 S.E.2d 788, 791-92 (1983).

Here, there were several issues of material facts that if considering the issues in the light most favorable to nonmoving party, the Appellants, then the Court would have denied Respondents motion for summary judgment.

**2. THE LOWER COURTS ERRED IN NOT FINDING THE EXISTANCE OF UNDUE INFLUENCE.**

**i. Respondents restricted Decedent' visitation.**

"A will contest based on alleged undue influence is most often adjudicated on the basis of circumstantial evidence" In re Last Will and Testament of Smoak, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985). "Generally in cases where a will has been set aside for undue influence, there has been the evidence **either** (emphasis added) of threats, force and/or restricted visitation or of an existing fiduciary relationship" Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). First, Appellants argued that upon being admitted into Westminster Towers in late 2011, any contact that decedent had with any family member other than the Respondents' family was monitored by Respondents (R. p.167 lines 8 and 9; p. 166 lines 1-4). Respondents argued that "if there was indeed restricted visitation while Mr. Tucker was in the hospital in Charlotte ... that was a restriction imposed by the hospital and not by anybody in Mr. Tucker's family and particularly not by the two Respondents in this case, either Margaret Kelly or Ben Smith" (R. p.158, lines 21-25; page 159, line 1).

The record includes deposition testimony from Marcy Thomas, a social worker at Westminster Towers, who spent a considerable amount of time with Mr. Tucker. Ms. Thomas testified that included in Decedent's file was a picture of Brenda Snow and a

note that that Brenda Snow is not allowed to visit (R. p. 185, lines 20-25). In addition, Ms. Thomas indicated that this information was “given probably from Margaret and Ben (indicating the Respondents Margaret Kelly and Ben Smith). Because Ms. Thomas was aware “that they had concerns about Brenda” (R. p. 185 lines 8-12). It is significant that Brenda Snow’s visitation was restricted because it is undisputed by the testimony of the Respondents that Decedent cared very deeply for Ms. Snow and that he wanted to take care of her financially (R. p. 208, lines 15 – 21; R. p. 230, lines 6-14; R. p. 184, lines 9-16). In fact, with the help of his attorney, Edward Knox, Decedent drafted a will devising his entire estate to Brenda Snow. Decedent gave this executed original will to Respondent Ben Smith. Ben Smith testified that he tore up this will.

Appellants continued to argue that in addition to restricting Brenda Snow’s visitation that Respondents’ also limited Appellants’ visitation. Although Respondents deny restricting Brenda Snow or Appellants’ visits, in Respondents’ Answers to Petitioner’s First Set of Continuing Interrogatories, Respondents’ response to Interrogatory number 10, wherein Appellants ask, “Set forth in detail the reasons why Respondent(s) friends or family members of the Respondent(s) refused to leave Decedent alone with Petitioner’s family during the Petitioner’s family’s visit to Westminster Towers. Identify, describe and produce the evidence relied upon by the Respondent(s) to answer this Interrogatory,” Respondents respond as follows: “When Vinton (received notice from Margaret Dudley (who is Mr. Tucker’s niece on Appellants side of the family) that she and others were planning to visit during their travel from Florida, Vinton requested that he not be left alone with them because they were only interested in his money” (R. p. 149, Interrogatory number 10). It was for this alleged reason that Respondents would not leave the room when Appellants’ family members visited with

Decedent. If true, and Decedent did in fact make this statement, this statement would provide some valid reason as to why Respondents limited Mr. Tucker's visitation. However, this alleged reasoning does not give rise to a statement of veracity because, Respondents continue to deny that they restricted Mr. Tucker's visitation. This denial is inconsistent with the record and the testimony. Respondents deny that they restricted Decedent's visitation. This is a material issue of genuine fact. In determining whether any triable issue of fact exists so as to preclude summary judgment and drawing all inferences in the light most favorable to the non-moving party, the Appellants, then the Court should have denied Respondents' motion for summary judgment. *id.*

**2. THE PROBATE COURT ERRED IN NOT FINDING THE EXISTANCE OF UNDUE INFLUENCE.**

**ii. Decedent's will did not comport with the Decedent's expressed wishes nor did Decedent's will comport with his first will.**

The second issue of material fact of dispute that exists thus warranting the lower court's denial of Respondent's motion for summary judgment, is the fact that the will submitted to probate by Respondents is inconsistent with the wishes of Decedent. Appellants argued that not only did Decedent execute a will devising his estate to Ms. Snow, but Decedent continued to express his desire to devise his estate to Ms. Snow (R. p. 168, lines 5-12).

In re Estate of Cumbee, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct.App.1999). the Court found evidence which indicates the disposition of the decedents' estate in the 1994 will did not comport with her expressed intentions. Five months before Mrs. Cumbee died she told her sister-in-law and best friend, that she wanted her children to

sell her belongings after she died and to divide the proceeds equally. In Cumbee, Mrs. Cumbee told her sister-in-law that her son had asked her to give him the home she owned, but she refused. Mrs. Cumbee executed the 1994 will in February of 1994, approximately seven months before her death and, two months before this conversation which indicated that the disposition of Mrs. Cumbee's estate in her will did not comport with her expressed intentions because five months before Mrs. Cumbee died she told her sister-in-law her desires that were in contrast to the will actually probated.

Similarly to In re Estate of Cumbee, Decedent, Mr. Vinton Tucker expressed his desire to leave his estate to Brenda Snow in a conversation that he had with Margaret Kelly (R. p. 209, lines 18 – 21). Respondent Ben Smith was also aware of Decedent's desire to leave his estate to Brenda Snow (R. p. 230, lines 6-14).

In addition, on February 5, 2012, weeks after signing the will on January 14, 2012, Marcy Thomas testified that the decedent told her that his nieces and nephews “want(ed) to be included in his will” and that “this is why they are not in the will.” (R. p.183, lines 10 – 19). The record reflects that Marcy Thomas continued to testify that decedent was upset when his nephew approached him about leaving the contents of his will to his nieces and nephews. On this day when speaking about his desire to leave Brenda Snow his estate, decedent again stated that he “loved his little girl very much, and she took care of him and wanted her to have the money he designated for her to have” (R. p.184, lines 3 – 16). The social worker at Westminster Towers, Marcy Thomas, who stated that she spent a considerable amount of time with Mr. Tucker, determined that on this day, February 5, 2014, decedent “was having a very cognitively clear afternoon” and “talked a lot about his will” (R. p.186, lines 23 – 25 and p.187, lines 1-6). During this

conversation that Decedent had with Marcy Thomas wherein he “talked a lot about his will, Decedent merely reaffirmed his intent to devise his estate to Brenda Snow.

When asked about the location of Decedent’s will that was drafted by his attorney, Edward Knox, and properly executed in the presence of Decedent’s former attorney, Mr. Knox, Respondent Smith testified that he tore up Decedent’s prior will where Decedent willed his estate to Brenda Snow (R. p. 228, line 19 - 229, line 2). The record reflects that Respondent Smith testified that he tore up the will at the direction of Decedent’s former attorney, Edward Knox, because according to Ben Smith, Mr. Knox allegedly instructed Ben Smith to tear up the will because Mr. Knox stated that a conflict of interest existed when Mr. Knox prepared the will for decedent because Mr. Knox had accepted money from Brenda Snow to assist her with her divorce (R. p. 228, lines 3-18). Respondent Smith also testified that he never told Decedent about the alleged conversation with Mr. Knox nor did Respondent Smith inform Decedent that he destroyed the will. Respondent Smith did, however testify that within one week of destroying the original will that he informed Respondent Kelly that he destroyed Decedent’s will (R. p. 229, lines 22-25). So, it is clear that Respondent Kelly had knowledge that Respondent Smith destroyed Decedent’s will, but she also did not inform Decedent.

In ruling on this issue that Decedent’s will did not comport with his prior will or to his expressed wishes, the Probate Court held that the Decedent’s “wishes may not be thwarted by disappointed relatives.” (R. p. 8). The Court, In re Estate of Cumbee, ruled otherwise. In Cumbee, when Decedent’s probated will was significantly different from Decedent’s expressed wishes and where there was clear evidence that the Decedent

drafted a will prior to her death that comported with her expressed wishes, the Court in Cumbee got it right, and determined that the probated will was the subject of undue influence. The Decedent herein made expressed wishes to a number of persons that it was his desire to devise his estate to Brenda Snow, who Decedent affectionately referred to as “little girl”. Decedent also executed a will that comported with his expressed wishes, and for the same reasoning as the court in Cumbee, the lower courts in this case got it wrong – granting summary judgement in favor of Respondents was improper.

**2. THE PROBATE COURT ERRED IN NOT FINDING THE EXISTANCE OF UNDUE INFLUENCE.**

**iii. Decedent was physically infirm and his will did not comport with the prior will or with prior expressed wishes.**

On January 14, 2012, at approximately 6:30 p.m. Decedent was found unresponsive at Westminster Towers. At approximately 6:50 p.m. EMS arrived at Westminster to transport Decedent to the hospital (R. p. 234, lines 11 – 13). The record reflects that both Ben Smith and Margaret Kelly, the Respondents, both consistently testified and responded to the pleadings that they had no knowledge that Decedent had dementia (R. p.204, line 4; p. 205, line 25 and R. p. 226, line 18; p. 227, line 2). However, upon being admitted to Piedmont Medical Center on January 14, 2014, the record reflects that Dr. Menes testified that his notes reflected that the family stated that the Decedent had “intermittent dementia ranging from focal something and alert and oriented times one” (R. p. 238, line 25; p. 239, line 5). At approximately 8:00 p.m. about the same time that Respondent Kelly arrived at the hospital, which would have been about an hour after the Decedent was transported by ambulance to PMC, Respondent

Kelly testified that Dr. Ratterree came into the emergency room and stated that he had ran tests and would return within minutes with the results.

Respondent Kelly then testified that after learning that Decedent had an aneurysm that may result in death that the Decedent was “happy and cheerful” (R. p.220, line 4). In contrast, Dr. Menes described Decedent as “oriented times two, meaning that he knew who he was, he knew where he was. Beyond that, I really couldn’t say that he knew much” (R .p. 240, lines 10 - 15). Respondent Kelly testified that the Decedent within minutes of hearing that he had an aneurysm the “size of a large orange” dictated word for word every single word that was written in the purported will that was executed on January 14, 2012 (R. p. 212, line 18; p.217, line 14 – p.218, line 23).

In Byrd v. Byrd, the court found where there existed a conflict in the evidence, it created a genuine issue of material fact, therefore summary judgment in favor of respondent was not proper. 279 S.C. 425, 431, 308 S.E.2d 788, 791-92 (1983) (finding in will contest case that issue of undue influence was properly submitted to the jury where: testator was physically and mentally infirm prior to and contemporaneous with the execution of the will; son, who was the principal beneficiary of the will and in a confidential/fiduciary relationship with testator, threatened to place testator in a nursing home and attempted to restrict visits between testator and his other children; and the will was executed less than six months prior to testator’s death); Moorer v. Bull, 212 S.C. at 149, 46 S.E.2d at 681-82 (holding issue of undue influence in contested will case was properly submitted to the jury where there was evidence that testator’s son was in a confidential/fiduciary relationship with his mother, mother was in fear of him, and he indicated an intention to procure for himself her estate).

On January 14, 2012, after having been found unresponsive by personnel at Westminster Towers in Rock Hill, South Carolina, Decedent was rushed by ambulance to the Emergency room at Piedmont Medical Center at approximately 6:50 p.m. Decedent had previously been diagnosed with mild dementia and had been diagnosed with possible sun downing that typically affects patients in the evening, especially when those persons are in unfamiliar settings – such as an emergency room. By approximately 8:00 p.m., an hour later, while still in the emergency room, Decedent was diagnosed with a potentially fatal aneurism. By 8:30 p.m., Respondent Kelly testified that Decedent dictated to her a 2-page document, word for word, perfectly executed in the language of a person with some level of legal knowledge, the last will and testament that was ultimately filed with the Probate Court 5 days after Decedent's death. It is important to know that Decedent worked on the railroad and had no legal experience. The testimony also reflects that while in the emergency room, Respondent Smith stated that they had to physically support Decedent so that he could lift up to sign documents in the hospital. This same person that Respondent Kelly said was happy and cheerful after his life threatening diagnoses.

The Court in Nasser got it right – where Decedent was physically infirm as a result of a terminal illness prior to the execution of the will and the disposition of the Decedent's estate was significantly different from the Decedent's prior will, the Court found that sufficient evidence existed to give rise to the presumption of invalidity. The Lower courts in this case got it wrong. Appellants are pleading for this Court to right that wrong.

### 3. THE PROBATE COURT ERRED IN NOT FINDING THE EXISTANCE OF A CONFIDENTIAL RELATIONSHIP.

The third issue of material fact of dispute that existed thus warranting the lower court's denial of Respondent's motion for summary judgment, is the fact that the Respondents were in a confidential relationship with Mr. Tucker. "Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). "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." In re Estate of Cumbee, 333 S.C. at 672, 511 S.E.2d at 394 (quoting Brown v. Pearson, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997)). Respondents, Ben R. Smith and Margaret Kelly, possessed a confidential or fiduciary relationship with Decedent. The Petitioner asserts that the Decedent's will was a product of undue influence in that Respondents who were in an existing fiduciary relationship with decedent restricted his visitation and substituted influencer's wishes onto the decedent. On November 17, 2011, the Decedent appointed Respondent, Ben Smith, as his durable power of attorney. Decedent executed the durable power of attorney in his state of domicile, North Carolina. Decedent's North Carolina attorney prepared the power of attorney documents. Within one month, on December 12, 2011, Ben Smith, removed Decedent from North Carolina to Westminster Towers in South Carolina where Decedent died five months later. As power of attorney, Ben R. Smith, had control over the Decedent's financial transactions and medical decisions. Where the son was the mother's power of attorney with the authority to

manage all of her finances, the circuit court found the son to have been in a fiduciary relationship. In re Estate of Cumbee, 333 S.C. 664, 511 S.E.2d 390 (S.C. App., 1999). Relying on the court's analysis in Cumbee, Ben Smith, as power of attorney over Mr. Tucker's finances was in a fiduciary relationship with Mr. Tucker.

Respondents state that "there's no evidence that Margaret Kelly was in a confidential relationship" with Mr. Tucker (R.p.161 lines 1-3). Respondent continued to argue that "the allegation is that Margaret Kelly was in what the law calls a confidential relationship with Mr. Tucker and that he placed great trust and confidence in her and she did all this stuff for him. There's nothing in the record to show that (R. p. 160, lines 1-5). When testifying that Decedent talked to Respondent Kelly about his finances, Respondent Kelly acknowledges that she and Decedent were close and that is the reason why it did not seem odd that he spoke to her about his finances (R. p. 210, lines 20-25). Ronald Steven Kelly, Respondent Kelly's husband, also recognized that Decedent placed a special confidence in Ms. Kelly. When asked whom Westminster Towers called to notify that Mr. Tucker was taken to the hospital on January 14, 2012, Ronald Steven Kelly stated "Margaret, because she's the one that they usually call about him" (R. p. 254, lines 16-18). In describing Margaret Kelly's special relationship with Decedent, Mr. Kelly testified that "He kind of was real close to Margaret, and he depended on her to kind of help her with things. She's done a lot of different things for him ..." (R. p. 256, lines 17-20).

In fact because of the close relationship shared between Decedent and Respondent Kelly, Decedent executed a Health Care Durable Power of Attorney designating Margaret Kelly as his agent. As such, Appellants argue that both Ben Smith and Margaret Kelly,

the Respondents, were in a fiduciary relationship with Decedent. As Respondents argue that neither Ben Smith nor Margaret Kelly were in a fiduciary relationship with Decedent, at the very least “there exists a conflict in the evidence, thus creating a genuine issue of material fact” and where there exists a genuine issue of material fact, Appellants argue that the probate court “improperly granted summary judgment in favor of Respondent(s)” Howard v. Nasser, 364 S.C. 279, 287, 613 S.E.2d 64, 68 (Ct.App.2005). The circuit court also found a fiduciary relationship created a presumption of undue influence. See Byrd, 279 S.C. 425, 308 S.E.2d 788; Moorer v. Bull, 212 S.C. 146, 46 S.E.2d 681 (1948); Hembree, 311 S.C. 192, 428 S.E.2d 3. The court relied on precedent from other jurisdictions which has found that “the analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the plaintiff was unduly influenced is a will or a deed.” Dixon, 362 S.C. at 398 n.7, 608 S.E.2d at 854 n.7 (2005). Based on these cases, the court recognized “[m]ost of our jurisprudence on the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed . . . , nonetheless, we find no reason why this discrepancy should change our analysis.” Id. In addition to Dixon, the court found secondary authority supports the application of the presumption to contested will cases. Concerning this issue, the Restatement of Property provides in relevant part:

**A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. 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.**

Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3  
cmt. f (2003) (emphasis added).

The Supreme Court has recognized that "by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved." Byrd v. Byrd, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983). However, the circumstantial evidence must point unmistakably and convincingly to the fact that the mind of the maker was subject to that of some other person so the will is that of the latter and not of the former. *Id.* Appellants would assert that as there is the existence of a fiduciary relationship, the burden shifts to Respondents to show that undue influence does not exist. As such, Appellants set forth that the lower Courts got it wrong.

#### CONCLUSION

Appellants set forth that there are several issues of material facts that if the trial court had viewed the issues in the light most favorable to nonmoving party, the Appellants, then the lower courts would have denied Respondents motion for summary judgment. For the reasons set forth more fully herein, Appellants argue that the lower courts erred in granting summary judgment to Respondents.

Respectfully submitted:



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