STATE OF SOUTH CAROLINA

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SC Court of Appeals

In the Court of Appeals

APPEAL FROM YORK COUNTY
Circuit Court

Case Number 2016-000096

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.

INTITIAL 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 Decedent's siblings as intestate heirs, Appellants and other family members were not immediately notified of Decedent'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 the trial court had viewed 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 PROBATE COURT 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.2.d 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 (TR, page 46 lines 8 and 9; page 45 lines 1-4). Respondents argued that "if there was indeed restricted visitation while Decedent was in the hospital in Charlotte ... that was a restriction imposed by the hospital and not by anybody in Decedent's family and particularly not by the two Respondents in this case, either Margaret Kelly or Ben Smith" (TR, page 10, lines 21-25; page 11, line 1).

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

instructions to restrictBrenda Snow from visiting Decedent (Marcy Thomas' deposition, page 58 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" (Marcy Thomas' deposition, page 58 lines 8-12). The lower courts dismissed the fact that Respondents' restricted Decedent's visitation, and found that there was "no evidence of any attempted visitation by Snow in South Carolina or any other visitation prior to, or simultaneous with, the execution of the disputed will." (Order Affirming Decision of Probate Court, page 5). By dismissing the fact that the Respondents restricted visitation, the lower Courts have erred. When people restrict visitation, this is an attempt to control another individual and removes and isolates the individual from any outside or alternate influences. Here, the Respondents specifically restricted Decedent from any access to not just all outside persons, but it was the Respondent's intent to restrict visitation from Decedent's object of affection – Brenda Snow. It is significant that Brenda Snow's visitation was restricted because it is undisputed by the testimony of the Respondents that Decedent cared for Ms. Snow and that he wanted to take care of her financially (Margaret Kelly's Deposition, page 34, lines 15 – 21; Ben Smith's Deposition, page 19, lines 6-14; Marcy Thomas' deposition, page 40, lines 9-16). In fact, Decedent, with the assistance of his attorney, Edward Knox, drafted a will devising his entire estate to Brenda Snow.

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 Decedent'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" (Respondents' Answers to Petitioner's First Set of Continuing Interrogatories, 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 Decedent's visitation. However, this alleged reasoning does not give rise to a statement of veracity because, Respondents continue to deny that they restricted Decedent's visitation. This denial is inconsistent with the record and the testimony. As such, whether Respondents restricted visitation is a material issue of genuine fact and 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, summary judgment is not appropriate *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 Brenda Snow, but Decedent continued to express his desire to leave his estate to Ms. Snow (TR page 48, lines 5-12).

In re Estate of Cumbee, 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 re Estate of Cumbee, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct.App.1999). 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, Vinton Tucker expressed his desire to leave his estate to Brenda Snow in a conversation that he had with Margaret Kelly (Margaret Kelly's deposition, page 36 lines 18 – 21). Respondent Ben Smith was also aware of the Decedent's desire to leave his estate to Brenda Snow (Ben Smith's deposition page 19, lines 6-14).

On February 5, 2012, weeks after the purported signing of 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." (Marcy Thomas' deposition, pages 39 lines 10 – 19). The record reflects that Marcy Thomas also testified 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" (Marcy Thomas' deposition, page 40 lines 3 – 16). The social worker at Westminster Towers, Marcy Thomas, who stated that she spent a considerable amount of time with Decedent, determined that on this day, February 5, 2014, Decedent "was having a very cognitively clear afternoon" and "talked a lot about his will" (Marcy Thomas' deposition, page 63 lines 23 – 25 and page 64 lines 1-6). Despite talking a lot about his will, Decedent only reaffirmed his intent to leave his estate to Brenda Snow. No one, including the Respondents, ever testified that Decedent ever expressed his intent to devise his estate to anyone other than Brenda Snow.

In fact, Respondent Smith testified that Decedent gave him the original will wherein Decedent devised his entire estate to Brenda Snow. (Respondent Ben Smith's deposition, page 19, lines 11-14). When asked the location of Decedent's will, Respondent Smith testified that he tore up Decedent's prior will where Decedent willed his estate to Brenda Snow (Respondent Ben Smith's deposition, page 15 line 19 and page 16 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 Respondent Ben Smith's deposition, page 15, 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 (Respondent Ben Smith's deposition, page 16, 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." (Probate Court's order granting summary judgment, page7). 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" and Decedent also executed a will that comported with his expressed intentions. In ruling on this issue, the Circuit Court ruled that "The "'little girl'" was never positively identified, although there is an assumption on the part of the witness that the Decedent was referring to Snow" (Order Affirming Probate Court's Ruling, p. 5). The Circuit Court's ruling is inconsistent with the record. The record reflects that Respondent Smith, Marcy Thomas and

Respondent Kelly all testified that when Decedent talked about his "little girl" that he was referring to Brenda Snow. (Respondent's Ben Smith's deposition, page 19, lines 6-10, Marcy Thomas' deposition, page 40, lines 9-16, Margaret Kelly's Deposition, page 34, lines 15 – 21). The Circuit got it wrong. The Probate Court got it wrong. Appellants are asking for this Court to right that wrong.

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 (Dr. Jane Bondurant's deposition. p. 16, 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 (Margaret Kelly's deposition, page 19, line 4; page 24, line 25 and Ben Smith's deposition. page 7, line 18; page 8, 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" (Dr. Menes' deposition page 27, line 25; page 28, line 5).

Respondent Kelly testified that upon her arrival to the hospital at approximately 8:00 p.m., that she learned that the emergency room doctors determined that Decedent

had a potentially deadly aneurism. Respondent Kelly then testified that immediately after learning that Decedent had an aneurysm that may result in his death that the Decedent was "happy and cheerful" (Margaret Kelly's deposition, page 51, 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" (Dr. Menes' deposition, page 32, lines 10 - 15). Margaret 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 will that was executed on January 14, 2012 (Margaret Kelly's deposition, page 41, line 18; page 46, lines 14 - page 47, line 23). This testimony is not only in stark contrast to the testimony, but also is not very believable.

Margaret Kelly testified that Decedent dictated the will to her within the span of approximately 30 minutes. Dr. Jewell testified that dementia patients often experience sun downing which affects patients more in the evening and when the patient is in unfamiliar situations, such as being admitted to the hospital, in that the patient is more agitated and confused (Dr. Jewell's deposition, page 12, line 1 to page 13, line 15). Upon reading the will that was executed on January 14, 2014, Dr. Jewell testified that it he would be surprised that the words on the will "would be his words on this paper" (Dr. Jewell's deposition, page 19, lines 2 – 21). Dr. Jewell testified that he would be surprised that a man that was 92 years old, a man that had no legal background, a man that had just been rushed to the hospital because he was found unconscious merely minutes before, a man that not only had been diagnosed with mild dementia, but also immediately before had been diagnosed as having a brain aneurism that may result in his death, that Dr. Jewel

would be surprised if that same man would be able to dictate word for word the two page will that was submitted to probate.

The Supreme Court recognizes 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). In Nasser, the Appellants in support of their claim of undue influence showed that 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 Howard v. Nasser, 364 S.C. 279, 287, 613 S.E.2d 64, 68 (Ct.App.2005). Here, the lower Court got it wrong when it confused testamentary capacity with the concept of how a person's age, health, and physical state, can make a person susceptible to undue influence. As such, the Court erred when it ruled, "Each party acknowledges that the Decedent's cognizance varied on a daily basis. The unchallenged of the Probate Court was that the Decedent had testamentary capacity ..." (Order Affirming Probate Court's ruling, page 5 and 6). Decedent's diagnosis of dementia and his mental state after being diagnosed with a potentially fatal aneurysm is significant not just to the issue of testamentary capacity, but is also significant to the issue of undue influence.

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).

Here, Respondent Smith testified that he destroyed Decedent's will that Decedent gave to him for safe keeping. Respondent Smith testified that in this will Decedent devised his entire estate to Brenda Snow (Ben Smith's deposition, page 15, line 19 - page 16, line 2). The record reflects that Ben Smith testified that he destroyed 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 (Ben Smith's deposition, page 15, lines 3-18). Ben Smith also testified that he never told Decedent about the alleged conversation with Mr. Knox nor did Ben Smith inform Decedent that he destroyed the will. Ben Smith did, however testify that within one week of destroying the original will that he informed Margaret Kelly that he destroyed Decedent's will (Ben Smith's deposition, page 16, lines 22-25). So, it is clear that Respondent Kelly knew that Respondent Smith destroyed Decedent's will without the consent of Decedent, but Respondent Kelly also chose not to inform Decedent. These facts provide that mind set of

Respondents and shows the lengths that they are willing to go to deceive Decedent and to comport their desires onto that of Decedent.

Decedent's diagnosis of dementia and his mental state after being diagnosed with a potentially fatal aneurysm is significant not just to the issue of testamentary capacity, but it also significant to the issue of undue influence. The Supreme Court recognizes 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). In Nasser, the Appellants in support of their claim of undue influence showed that 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 Howard v. Nasser, 364 S.C. 279, 287, 613 S.E.2d 64, 68 (Ct.App.2005).

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.

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 Decedent. "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 Smith and 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 Decedent's finances was in a fiduciary relationship with Decedent.

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. 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 unmistakenly 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.

Counsel for Respondents states that "there's no evidence that Margaret Kelly was in a confidential relationship" with Decedent (TR. Page 20 lines 1-3). Counsel continued to argue that "the allegation is that Margaret Kelly was in what the law calls a confidential relationship with Decedent 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 (TR. Page 19 lines 1-5). When testifying that Decedent talked to Margaret Kelly about his finances, Ms. 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 (Margaret Kelly's Deposition,

page 38 lines 20-25). Ronald Steven Kelly, Margaret Kelly's husband, also recognized that Decedent placed a special confidence in Ms. Kelly. When asked whom Westminster Towers called to notify that Decedent 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" (Ronald Steven Kelly's deposition, page 23 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 ..." (Ronald Steven Kelly's deposition, page 26 lines 17-20).

In fact because of the close relationship shared between Decedent and Margaret 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). Relying on Dixon and reviewing precedent from other jurisdictions, in In re Estate of Todd, the Supreme Court of Iowa found that four elements must exist to properly rebut the presumption of the existence of undue influence where a confidential relationship is present: 1) lack of susceptibility of the grantor to undue influence; 2) lack of the opportunity to exercise such influence; 3) lack of disposition to influence unduly for the purpose of procuring an improper favor; and 4) a result unaffected by influence.

The Supreme Court also ruled that the very nature of a confidential relationship presumes the existence of the first two element of susceptibility and opportunity. In re Estate of Todd, 585 N.W.2d 273 (Iowa 1998). However, if this were not the case, and each element needed to be established individually, it is clear from the record that Decedent was susceptible to undue influence to meet the first element in that Decedent trusted Respondents, Decedent was 92 years old, Decedent was diagnosed with mild dementia, and Decedent, at the time of the purported signing of the will had been rushed by ambulance to the emergency room and diagnosed with a life threatening aneurism. The second element, sets forth that to rebut the presumption of undue influence where there exists a confidential relationship is whether Respondents had the opportunity to exercise undue influence. Appellants set forth the record is replete with opportunity to exercise influence over Decedent in that Respondent Smith was Decedent's power of attorney, Respondent Kelly was designated as Decedent's health care power of attorney, Respondent Kelly was listed as the contact person Decedent's record, and both Respondents spent a significant time alone with Decedent.

As the first two elements are met with the very nature of the confidential relationship, that leaves only prong three and four. The first element, "lack of susceptibility of the grantor to undue influence" deals specifically with the susceptibility of the Decedent. To rebut the presumption of the existence of undue influence in the presence of a confidential relationship, the Respondents must establish that they lacked the disposition to unduly influence for the purpose of procuring an improper favor. The third element, deals with disposition of Respondents. Here, the Respondents admitted that they restricted the visitation of the object of the Decedent's affection, Brenda Snow; Respondents admitted that they restricted the visitation of Decedent's blood relatives (albeit after the purported signing of the probated will); and Respondents admitted that they destroyed Decedent's will without permission from Decedent. All of these facts indicate that Respondents were disposed to unduly influence Decedent for the purpose of procuring improper favor.

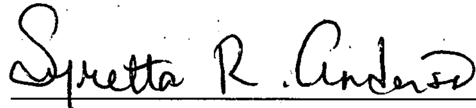
To meet the fourth prong, a result unaffected by influence, Appellants argue that as Decedent continuously expressed his desire to devise his entire estate to Brenda Snow, as Decedent did in fact execute a will doing just that – devising his entire estate to Brenda Snow, and as Decedent expressed his anger that his nephew kept asking him to draft a will devising his estate equally between his late wife's nieces and nephews, coupled with the fact that the probated will, in contrast to Decedent's expressed wishes and in contrast to Decedent's prior will, devised Decedent's estate equally between Decedent's late wife's nieces and nephews, that facts exist to meet the fourth prong that the result was in fact affected by the influence of Respondents.

The lower courts got it wrong when it ruled that, "[e]ven if the Court had reached the conclusion that a confidential/fiduciary relationship existed, there was ample evidence in the record rebutting the presumption of invalidity" (Circuit Court's order Affirming Probate Court's order, page 6). On the contrary, the record is not only replete with evidence of the existence of a confidential and/or fiduciary relationship, but the record is also full of evidence that the Respondents have not rebutted the presumption of the existence of undue influence.

CONCLUSION

Appellants set forth that there are several issues of material facts that if the trial courts 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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STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY
Circuit Court

Case Number 2016--000096

RECEIVED
JUL 18 2016
SC Court of Appeals

Mary Jean Tucker Swiger, by and through her Attorney-in-fact, Carol DeHaven
Appellant,

Vs.

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

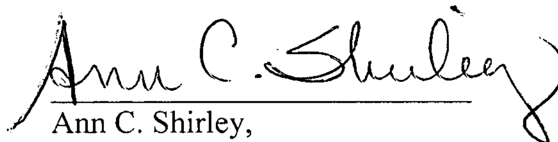
Respondents.

PROOF OF SERVICE

I certify that I have served the Designation of the Matter to Include in the Record on Appeal and Initial Brief of Appellant on the Respondents, Ben R. Smith and Margaret P. Kelly as Personal Representatives of the Estate of Vinton Tucker by delivering a copy to their counsel, Michael Brackett via electronic and United States Mail, postage prepaid, addressed as follows:

Michael Brackett, Esquire,
Post Office Box 100261,
Columbia, South Carolina 29202

Respectfully Submitted,



Ann C. Shirley,
Paralegal to
Syretta R. Anderson, Esquire
Attorney for Appellant

July 14, 2016

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July 14, 2016

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V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
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Columbia, SC 29211

Re: Swiger vs. Smit and Kelly
2016-000096

Dear Ms. Allen:

Enclosed please find the original and one copy each of the Designation of Matter to be Included in the Record on Appeal and the Initial Brief of Appellant and Proof of Service in connection with the above referenced matter.

Please return a clocked copy of these documents to me in the enclosed envelope.

I am copying Mr. Brackett as the attorney for the Respondents on this correspondence.

Should you have any questions, please do not hesitate to contact me.

Respectfully,

Syretta R. Anderson /acs

Syretta R. Anderson, Esq.
Attorney for Appellant
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cc: Michael Brackett, Esq.

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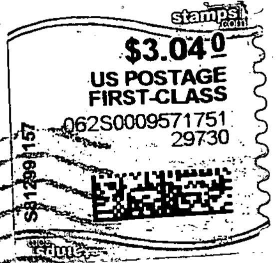

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