STATE OF SOUTH CAROLINA

In the Court of Appeals
[In the Circuit Court]

APPEAL FROM YORK COUNTY
Probate Court

Case Number 2015CP460466

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

Appellants,

Vs.

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

Respondents.

APPELLANTS' REPLY TO RESPONDENTS' FINAL BRIEF

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As to not restate the issues set forth in Appellants' brief or to make redundant arguments which have been set forth in the opening brief, Appellants submit the following points below as clarification and rebuttal to the Respondents' Initial Brief.

I. Appellants' have standing to and/or authority to prosecute this appeal.

By motion signed and dated February 1, 2016, Respondents filed a Motion to Dismiss the Appellants' appeal arguing in part that "*Respondents submit that the Notice to Appeal is a nullity and that a proper appeal has not been timely perfected, thereby calling for the appeal to be dismissed.*" (R. page 170, paragraph 2). This Court considered Respondents' Motion to Dismiss filed on February 1, 2016 and by Order of this Court filed on April 1, 2016, denied Respondents' request to dismiss Appellant's appeal. Respondents did not file a Rule 59€, motion for reconsideration of this Court's April 1, 2016 Order. That order is now the law of this case.

By motion signed and dated May 4, 2016, Respondents **again** filed a Motion to Dismiss Appellants' appeal arguing the very same argument in that Respondents argued that "*Respondents submit that the Notice to Appeal is a nullity and that a proper appeal has not been timely perfected, thereby calling for the appeal to be dismissed.*" (R. page 175, paragraph 4).

As previously noted, Respondents did not file a Rule 59€, motion for consideration of this Court's April 1, 2016 Order. That order is now the law of this case, and Respondents cannot attempt to seek further consideration of the same argument.

In Respondents first (1st) Motion to Dismiss signed on February 1, 2016, Respondents' also argued that "*... this Court lacks subject matter jurisdiction, the probate court summary*

judgment is now the law of this case, and the appeal must be dismissed." (R. page 172 paragraph 3). After considering this argument from Respondents, this Court denied Respondents' request to dismiss Appellants' appeal. Once again, Respondents did not file a Rule 59€, motion for reconsideration of this Court's April 1, 2016 Order. That order is now the law of this case.

Despite having made the same argument in the 1st Motion to Dismiss, and despite the fact that this Court already denied Respondents' February 1, 2016, Motion to Dismiss, Respondents again made the same argument in the 2nd Motion to Dismiss signed on May 4, 2016, in that Respondents set forth that *"... this Court lacks subject matter jurisdiction, the probate court summary judgment is now the law of this case, and the appeal must be dismissed."* (See R. page 177, paragraph 3).

Respondents' attempt to rephrase their original argument where the Court has previously ruled and argue that Ms. DeHaven lacks standing to appeal. Ms. Carol DeHaven is the daughter of the deceased Appellant, Mary Jean Tucker Swiger. Ms. DeHaven was the attorney-in-fact for Ms. Swiger. Upon her death, in her will, Ms. Swiger named her daughter as personal representative of Ms. Swiger's estate. Ms. Swiger set forth in her Last Will and Testament that gave to her Executor and her Trustee "the power to designate any individual or corporation with trust powers to serve with my Executor or my Trustee or in my Executor's or my Trustee's stead." Relying on this authority, Carol Dehaven, was designated as personal representative.

In accordance with S.C. Code Ann. §62-3-703 (c), (2012), a personal representative, has the right, *"Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this State at his death has the same*

standing *to sue* (emphasis added) *and be sued* ***in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death.*** (emphasis added).

As set forth by this Section, this proceeding did in fact survive the death of the Appellant, Mary Ann Tucker Swiger, who died on October 6, 2015. In addition, as the closest blood relative at the time of her death, Ms. Swiger had standing *immediately prior to death* to sue in the courts of this State as it relates to the contesting the validity of the probated will, and as Ms. Swiger had this right to sue, as does her personal representative.

Respondents ignore the case law which is replete with authority that establishes Ms. Dehaven has standing. Respondents even conveniently ignore the South Carolina statutes the clearly indicated that personal representatives have standing. Instead, Respondents rely heavily on Asbury v. South Carolina Nat. Bank, 268 S.C. 40, 231 S.E.2d 206 (1977). After a diligent search, it appears the Asbury case that was heard by the Court in 1977, has never been cited as authority on any case on the issue of standing. (R. Supp., page 9). However, what the Court has ruled upon on many cases since 1977 is the issue of standing. *"To have standing ... one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action."* Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999) (quoting Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)); see also Henry v. Horry County, 334 S.C. 461, 463 n. 1, 514 S.E.2d 122, 123 n. 1 (1999). As an heir, Ms. Dehaven would definitely have a substantial interest in the subject matter of this action. As personal representative, Ms. Dehaven not only has a substantial interest in the subject matter of this action, but has a fiduciary obligation to protect the

interests of the estate, in addition to having standing. As such, Ms. Dehaven has standing and Respondents' Motion to Dismiss should be denied.

In further support of Appellants' position that Respondents' Motion to Dismiss should be denied, Appellants set forth that the parties were before the Circuit Court on December 8, 2015 on appeal from the Probate Court. At the time of this hearing, Ms. Mary Jean Tucker Swiger was already deceased. Ms. Mary Jean Tucker Swiger died on October 6, 2015. Respondents' did not address the issue of standing during the December 8, 2015 hearing, the Order from that hearing did not address the issue of standing, and Respondents' failed to file a Rule 59€, motion for reconsideration of the Circuit Court's Order. That order is now the law of this case.

In Wilson v. Dallas, "where there was no specific ruling discussing Appellants' standing in the circuit court's order of May 2009, and the matter was not raised in a Rule 59 motion... [t]his Court has previously declined to consider standing where the matter was not both raised to and ruled upon by the trial court, and it is questionable whether the issue was properly preserved here, although it was briefed. (S.C., 2013) See, e.g., James v. Anne's Inc., 390 S.C. 188, 193, 701 S.E.2d 730, 732-33 (2010) (observing this Court has the inherent authority to consider justiciability, but when a party raises the issue, our courts have applied error preservation principles and have held the issue was not preserved where the trial court did not first rule on the issue).

Wilson is analogous to the case herein. The Court in Wilson declined to consider the issue of standing because Respondents failed to raise this issue timely. For the same reasoning, this Court should decline to consider this as a viable argument and find that Appellants have standing and are properly before this Court.

II. Undue Influence – Material Facts Exist Which Would Preclude Summary Judgment.

Respondents' brief incorrectly states that Appellants did not make a sufficient showing to the probate court to overcome Respondents' motion for summary judgment as it relates to Appellants claim for undue influence. Respondents inescapably ignore that the record is replete with evidence that Respondents restricted visitation from Brenda Snow. The evidence before the probate court was that Respondents restricted Brenda Snow from visiting Decedent in Charlotte, North Carolina and Respondents restricted Brenda Snow from visiting Decedent at Westminster Towers in South Carolina. All of *this* restriction occurred prior to January 14, 2012. Respondents transported Decedent to South Carolina in December 2011 - merely weeks before the purported will was executed on January 14, 2012. Upon transporting Decedent from North Carolina to South Carolina and admitting him into Westminster Towers in December 2011, Respondents actually provided Westminster Towers with a picture of Brenda Snow and instructed Westminster Towers to not allow Brenda Snow to visit Decedent. As set forth previously, restricting Brenda Snow's visitation is significant because it is clear from the evidence in the record that the Decedent cared deeply for Brenda Snow and that Decedent had expressed his feelings about Brenda Snow to Respondents and to workers at Westminster Towers. Contrary to Respondents' argument, there is no evidence in the record, no hospital notes, no hospital records, no doctor statements – no other evidence to indicate that the hospital in Charlotte, North Carolina ever restricted Brenda Snow's visitation. There is no evidence in the record, with the exception of statements from Respondents, no hospital records, no doctor's notes, no police report, no reports from social workers – no evidence in the record to support that hospital staff suspected ill

treatment by Brenda Snow toward Decedent. And as such, the probate court erred when it agreed with Respondents and stated:

> The only evidence of restricted visitation was the restricted visitation for Brenda Snow, a care giver with whom Mr. Tucker had a short term relationship and whom the family and hospital staff suspected ill treatment of Mr. Tucker. The restricted visitation occurred in a Charlotte, North Carolina hospital; was implemented by the hospital staff; all happening during Mr. Tucker' hospitalization – approximately one and one-half months prior to the execution of the January 14, 2012 last will.

(R. page 24, l. 19 to page. 25, 1. 2). There is even no evidence that Decedent's relationship with Brenda Snow was "short term." However, the probate court clearly reaches that conclusion also on its own without supporting evidence (R. page 24, 1. 20). All the evidence points directly to the Respondents – that they were the only persons responsible for restricting Brenda Snow's visitation with Decedent and that the restricted visitation occurred in North Carolina and South Carolina.

It is also clear from the record that the purported will is significantly different than Decedent's testamentary wishes. Respondents state, however, incorrectly that no evidence exists that indicates that the probate court overlooked any issues. To this argument, Appellants restate that the probate court improperly granted summary judgment because the probate court overlooked that when 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*** (emphasis added). Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). 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). As previously set forth in Appellants' brief, the record

reflects that Decedent told both Respondents Margaret Kelly and Ben Smith that he wanted to leave his entire estate to Brenda Snow. The record reflects that Decedent, with the assistance of his North Carolina attorney, actually drafted a will devising his estate to Brenda Snow; that Decedent gave the will to Ben Smith as his attorney-in-fact, and that Ben Smith took the will to his home. The record reflects that Ben Smith destroyed the Decedent's will and that Ben Smith told Margaret Kelly that he destroyed Decedent's will. The record also reflects that both Ben Smith and Margaret Kelly admitted that they never told Decedent that the will that Decedent drafted devising his estate to Brenda Snow had been destroyed. The record also sets forth that in addition to telling Respondents Ben Smith and Margaret Kelly that he was leaving his estate to Brenda Snow, Decedent also told the social worker at Westminster Towers that he loved Brenda Snow, who he referred to as his little girl, and wanted her to have his money. The record reflects that when asked did Marcy Thomas, the social worker know who Decedent was talking about when he state "little girl," the social worker stated, "Brenda." (R. page 384, lines 3 – 13). The social worker also stated, as set forth by the record, that Decedent was upset that his nephew approached him about leaving the contents of his will to his nieces and nephews. As to this statement, Respondents argued, and the probate court agreed, that "[n]either the little girl nor the nieces and nephews were identified by name or by a description to definitively identify who was being referred to." (R. page 20, l. 1-3; R., page 245, l. 4-25). With this statement, the probate court, improperly agreed with Respondents' argument, surmised that since the "little girl" wasn't identified by name and the nieces and nephews weren't identified by name, that these persons could have been anyone. This is completely unsupported by the evidence.

In their brief, Respondents argue that it is this statement that indicates that the probate court addressed Appellant's arguments that the purported will is inconsistent with the testamentary

wishes of Decedent. What Respondents' conveniently ignore, and where the probate court errs is that the record is clear, that Decedent referred to Brenda Snow as his "little girl". (R. page 384, l. 3 – 13; R. page 430, l. 6-10). As to the nephew that asked for all the nieces and nephews to share equally in the will, Respondents' argue that this nephew could just have easily have been the Appellants. However, Respondents quickly point out that Appellants had not seen Decedent since 2004, that the Appellants' "side of the family had a much more sporadic, tenuous sort of relationship" (R., page 305 l. 10-18). The evidence in the record indicates that the only family, the only nieces and nephews that had any access to Decedent were the Respondents. When considering whether any triable issue 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*** (emphasis added). *Strother* at 121. In cases 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* at 656. Because the probate court failed to see at the very least that there is a dispute as to the conclusions or the inferences that can be drawn here, the probate court got it wrong. The probate court improperly granted summary judgment.

III. Error Preservation – The Issue of Mental Infirmity was Raised and Ruled upon by the Probate Court.

Respondents argued that the issue of Decedent's infirmity is not properly before this Court. Respondents ae wrong, yet again. In arguing that Decedent was unduly influenced by Respondents, the transcript reflects that at the hearing for summary judgment, Appellants' properly argued that although the testimony reflected that *"Decedent's mental status fluctuated from time to time. What doesn't fluctuate is the fact he is 92 years old ..., he (Decedent) just had episodes of*

passing out, that he had just been diagnosed with a condition that may lead to his death, that he was in the hospital, within minutes of hearing" his fate, the Respondents allege that the Decedent then, dictated a will devising his entire estate to Respondents. (R. page 280, lines 14-20.) The Appellants argued that it was these factors that made Decedent more susceptible to undue influence. Not only did the Appellants argue this issue before the trial Court, but the trial court ruled on this issue as it relates to undue influence; albeit improperly when the Court ruled:

"The Court finds and concludes that the evidence and inferences therefrom do not clearly and convincingly create an issue of fact with respect to undue influence. "...[N]o evidence was presented of mental infirmity other than a vague and general diagnosis of mild dementia ..." (R. page 25). Appellants point out to this Court that the section of the Summary Judgment Order that addresses mental infirmity is ruled on by the lower court in the section for Undue Influence. The section of the Order that addresses Testamentary Capacity is in a separate section that begins on page 11 of the Summary Judgment Order. As such, Appellants set forth that the issue of the Decedents' infirmity due to his age, dementia, unknown environment of the hospital emergency room, the fact that prior to being rushed to the hospital Decedent experienced episodes of passing out, and Decedent's recent diagnosis of a potential life threatening medical condition, made him more susceptible to undue influence as the court in *Nasser* found, Appellants will not indulge, but merely briefly state that in *Nasser*, the Court found that where the 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).

IV. **Error Preservation – The Issue of Confidential Relationship was Raised and Ruled upon by the Probate Court.**

Appellants maintain that the issue was raised in Appellants' Memorandum of Law and more fully to the Court at the hearing for Summary Judgment (R. page 117-119; R. page 259-262). Appellants argue that Respondents shared a fiduciary relationship with Decedent by virtue of the special confidence that Decedent placed in both Ben Smith as evidenced not just by the evidence in the record but also by the simple fact that Decedent appointed Ben Smith as his attorney-in-fact and by Decedent's appointment of Margaret Kelly as his health care power of attorney. In ruling on this issue that was properly before the court, the probate court stated:

> It is to be expected that a testator will leave his estate to those in whom he ***trust*** (emphasis added) and who he infers will dispose of it wisely. It is also natural that when he requires assistance in the preparation of his will he may consult those very persons, that is, those in whom he has ***confidence*** (emphasis added). To impose upon beneficiaries who occupy such a position of trust the burden of proving an absence of improper influence would in many instances defeat the will rather than probate it.
>
> Additionally, and alternatively, if such an evidentiary presumption was a rebuttable presumption that was more than sufficiently rebutted by the Respondents' evidentiary showing. (R. page 24, l. 3-11).

The crutch of Appellants' argument as it relates to the confidential relationship is that because Respondents Ben Smith and Margaret Kelly where in a special relationship, one where Decedent placed trust in the Respondents, as was the case here, then the presumption of undue influence arises thereby shifting the burden to Respondents. Contrary to the mistaken assertion of Respondents, this issue was properly before the probate court. The probate court also ruled on the issue of confidential relationship. However, the probate court improperly ruled on the issue when it stated that "if such an evidentiary presumption was a rebuttable presumption that was more than sufficiently rebutted by the Respondents' evidentiary showing. (R. page 24, l. 9-

11). So, as the issue of the confidential relationship was properly before the court and the probate court ruled upon this issue, there was no reason to file a Rule 59(e) motion to ask the court to address an issue already addressed by the court. The probate court had an opportunity to rule on this issue, and this Court has a sufficient platform for meaningful appellate review.

V. Confidential Relationship – Existed Between Respondents and Decedent and Respondents Failed to Effectively Rebut the Presumption of Undue Influence.

Respondents ignore and argue against the wealth of evidence in the record that Respondents, both Ben Smith, appointed as attorney-in-fact and Margaret Kelly, appointed as the health care power of attorney, and both of whom are beneficiaries under the January 14, 2012 will, were in a confidential relationship with Decedent. "'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). 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 Decedent.

Respondents argument concerning confidential relationship, was to argue that "there's no evidence that Margaret Kelly was in a confidential relationship" with Decedent (R. page 246, l. 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 (R. page 245, lines 1-5). This is simply not true – there is a wealth of evidence that Decedent was in a confidential relationship with Respondents, and there is also a wealth of evidence that Respondents merely denied the existence of the confidential relationship rather than making an attempt to rebut the presumption of the existence of undue influence.

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. Dixon, 362 S.C. at 398 n.7, 608 S.E.2d at 854 n.7 (2005); In re Estate of Todd, 585 N.W.2d 273 (Iowa 1998).

This issue is ripe for appeal as the issue was argued before the court and ruled upon. The lower court, however, improperly found that "if such an evidentiary presumption was triggered, it was a rebuttable presumption that was more than sufficiently rebutted ..." (R. page 25). Respondents did not sufficiently rebut the presumption that a confidential relationship existed. The Respondents merely consistently argued that a confidential relationship did not exist. The evidence is lacking. However, what the evidence is lacking, is the evidence that the probate court relied on to find that a special confidential relationship did not exist.

CONCLUSION

Based on the foregoing, in addition to the arguments set forth in Appellants initial brief, Appellants maintain that the probate court erred in granting summary judgment to Respondents.

Wherefore, based on the foregoing, Appellants request that the summary judgment order be reversed.

Respectfully submitted:

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STATE OF SOUTH CAROLINA
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R. Scott Sprouse, Circuit Court Judge

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellants' Reply to Respondents' Final Brief contains all material proposed to be included by any of the parties and not any other material.

October 5, 2016

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