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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No. 2015-001752
Unpublished Opinion No. 2018-UP-038

RECEIVED

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SC Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
COURT OF COMMON PLEAS

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

Mamie F. Nichols,

Appellant,

v.

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

Respondent.

PETITION FOR REHEARING

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Appellant, Mamie F. Nichols, respectfully petitions this Court for rehearing of this appeal, which was decided by opinion filed on January 31, 2018, and in support thereof respectfully shows:

PETITION FOR REHEARING

1. The Decision Fails to Address that the Trial Court Precluded Testimony Concerning Russell's Disbarment

The Court failed to completely address the circumstances concerning the preparation of the deed by a disbarred attorney. In essence, the Court concluded that because the Respondents did not engage in the unlicensed practice of law, this did not taint the deed.

With due respect, this misses the point. Appellant argued, at page 5 of the final brief, that “The trial court limited testimony concerning the fact of Russell Brown’s disbarment on the grounds of hearsay as well as the impact of that disbarment. R. 53-55, 87-88.” It was not just that Russell Brown had been disbarred. Rather, it was that “Brown gave Appellant incorrect advice that she relied upon. . . .” (Final Brief. p. 5).

For these reasons, the jury should have been permitted to hear testimony concerning Russell Brown’s disbarment as several other state courts have held. See, e.g. *In re Thorman's Estate*, 162 Iowa 237, 144 N.W. 7, 9 (1913); *ECCO Limited v. Balimoy Manufacturing Company*, 179 Mich.App. 748, 446 N.W.2d 546, 549 (1989); *Fuschetti v. Bierman*, 128 N.J.Super. 290, 319 A.2d 781, 786 (App.Div.1974); *State v. Pearson*, 39 N.J.Super. 50, 120 A.2d 468, 473 (App.Div.1956); *People v. Roth*, 139 A.D.2d 605, 527 N.Y.S.2d 97 (N.Y.App.Div.1988); *Hyman v. Dworsky*, 239 A.D. 413, 267 N.Y.S. 539 (N.Y.App.Div.1933).

2. There was No Waiver of the Issue of the Error in Submitting the Issue of Confidential Relationship to the Jury as a Question of Fact Since Appellant Made a Motion for a Directed Verdict.

The decision states that Appellant “has waived the issue of submitting the question of the existence of a confidential relationship to the jury” because she did not object to the verdict form or the jury charge.

In her motion for a directed verdict (and in the motion for summary judgment^{1*}), Appellant requested, among other things, that there be a finding of a confidential relationship as a matter of law, thus raising a presumption of undue influence. R. 89, 97, 101 (“Donna Thompson maintained communications with Attorney Russell Brown for me.”). The trial court “respectfully disagree[d]” and submitted the issue as one of fact to the jury. R. 90

On appeal from a judgment denying a directed verdict or judgment NOV, reversal is required “where there is no evidence to support the rulings *or where the rulings are controlled by an error of law.*” *Hinkle v. National Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616 (S.C. 2003) (citing *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002)) (emphasis added).

The directed verdict preserves the issue for appeal and there is no need to object to the verdict form. See *Allegro, Inc. v. Scully*, 409 S.C. 392, 413, 762 S.E.2d 54 (S.C. App. 2014). Since no evidence was received following the trial court's ruling, it was “not preliminary, but instead [was] clearly a final ruling, there [was] no need to renew the objection.” *State v. Kromah*,

^{1*}. Appellant agrees that the order denying summary judgment is not reviewable on appeal, *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986), but cites it to show that the argument was consistently raised before the trial court.

401 S.C. 340, 352-53, 737 S.E.2d 490, 496 (2013); see *State v. Mueller*, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995).

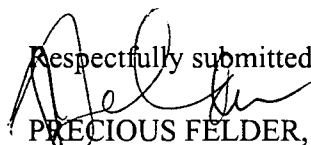
In accordance with *Loftis v. Eck*, 288 S.C. 154, 157, 341 S.E.2d 641, 642 (S.C. App. 1986), once a power of attorney is given “a fiduciary relationship exists under such a power of attorney as a matter of law.” (Citing S.C. Code Ann. § 32-13-10 recodified at S.C. Code Ann. § 62-5-501). And the fiduciary relationship is not limited to transactions involving the power itself. See *In re Estate of Cumbee*, 333 S.C. 664, 672-73, 511 S.E.2d 390, 394 (S.C. App. 1999) (“A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence.”).

“Undue influence in the procurement of a deed may be shown in two ways. The party challenging the deed may show the existence of a confidential relationship between the grantor and the grantee. Once a confidential relationship is shown, the deed is presumed invalid. The burden then shifts to the grantee to affirmatively show the absence of undue influence.” *Bullard v. Crawley*, 294 S.C. 276, 280-81, 363 S.E.2d 897, 900 (1987).

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

Fed.R.Evid. 301. See Wright & Graham, Federal Practice & Procedure: Evidence § 5126. For the reasons stated, rehearing should be granted.

Dated: February 8, 2018

Respectfully submitted,

PRECIOUS FELDER, LLC
/s/ Precious Felder
Attorney for Plaintiff-Appellant (Pro Hac Vice)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas, Ninth Judicial Circuit

J.C. Nicholson, Jr., Circuit Court Judge
Stephanie P. McDonald, Circuit Court Judge at Trial

Case No. 2012-CP-10-3421

Albert Napoleon Thompson,
Jr., Al Thaddeus Thompson,
Titus Sherod Thompson, Asia
Rachal Thompson,

Respondents,

v.

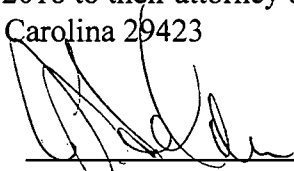
Mamie F. Nichols,

Appellant.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Albert Napoleon Thompson, Jr., Al Thaddeus Thompson, Titus Sherod Thompson and Asia Rachal Thompson by depositing a copy of it in the United States mail on February 8, 2018 to their attorney on record, Louis S. Moore at PO Box 42270, North Charleston, South Carolina 29423

February 8, 2018


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