IN THE SATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No. 2018-000615

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S.C. SUPREME COURT

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

Emily Nichols Felder, Executor of the Estate of Mamie F. Nichols, Petitioner,

v.

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

APPENDIX FOR THE SUPREME COURT (amended)

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Index

Certificate of Counsel

The undersigned hereby certify that the Appendix for the Supreme Court contains all material proposed to be included by any of the parties and not any other material.

Dated: April 24, 2018,

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The South Carolina Court of Appeals

Emily Nichols Felder, Executor of the Estate of Mamie F. Nichols, Appellant,

v.

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

Appellate Case No. 2015-001752

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Short, J. J.

J.

J.

Columbia, South Carolina

cc:
Precious Felder, Esquire
Eduardo Kelvin Curry, Esquire
Louis S. Moore, Esquire

FILED
March 22, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Unpublished Opinion No. 2018-UP-038

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, and ASIA RACHAL,

Respondent.

REPLY ON PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

Appellant, Mamie F. Nichols, respectfully submits this Reply on this Petition for Rehearing of this appeal, which was decided by opinion filed on January 31, 2018, and in support thereof respectfully shows:

REPLY

Respondent did not file a brief on the appeal. In accordance with SCACR 208(4), "Upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper." Such action may include reversal. *Turner v. Santee Cement Carriers, Inc.*, 277 S.C. 91, 96, 282 S.E.2d 858, 860 (1981); *Robinson v. Hassiotis*, 364 S.C. 92, 93 n.2, 610 S.E.2d 858, 859 n.2 (Ct. App. 2005); see also *Wierszewski v. Tokarick*, 308 S.C. 441, 444 n.2, 418 S.E.2d 557, 559 n.2 (Ct. App. 1992) (stating where respondent failed to file a brief, "it [was] proper to reverse on the points presented rather than to search the record for reasons to affirm."). *Cf.* Fed.R.App.P. 31(c) ("appellee who fails to file a brief will not be heard at oral argument unless the court grants permission[.]").

Certainly, at this stage, it is "proper" to ignore the response, which is based upon numerous factual errors. It is sufficient to show just a few:

Just to name a few in the order that they are presented:

(1) At "A," para 4, counsel says that Russell Brown is just a notary. There is absolutely no support for this in the record. The testimony at trial and all the evidence in the record show that Russell Brown was the attorney. Mamie Nichols' s affidavits show her desires.

(2) At "A," para 6, counsel states that Barbara Gilliard was Ms. Nichols daughter. He is new counsel and apparently failed to read the record of appeal. (The court's ruling mainly addressed the daughters as "Daughter 1" and "Daughter 2").

(3) The entire argument at "B" is disjointed and shows a fundamental error as to what this case is about. For example, at the last paragraph it states there was "no evidence of confidential relationship existed to make the deed invalid." There clearly was such evidence and the core issue was whether it was a pure question of fact or a question of law for the Court to resolve.

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)

For the reasons stated, rehearing should be granted.

Dated: March 6, 2018

Respectfully submitted,

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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

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

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

Mamie F. Nichols.....Appellant,

vs.

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

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

Respondents submit this Return to Appellants' Petition for Rehearing pursuant to Rule 240, SCACR and respectfully requests that the Court's opinion in this matter be left intact without further proceedings.

A. **The Court correctly ascertained that the deed which was filed by an unlicensed attorney was irrelevant in the Court's decision**

On April 22, 2006, a Title to Real Estate was filed transferring a life in the property (TMS #460-04-04-079) to Mamie F. Nichols for and during her natural life, and the remainderment to her daughter Donna Thompson. There were no property transfers prepared after this deed was filed. Upon the death of Donna Thompson, her children, as her heirs, are then granted possession

of this property. Following the death of Donna Thompson, at no time did Ms. Nichols transfer her own interest in any other way. When Ms. Nichols died, property was automatically titled exclusively to the Respondents who are Donna Thompson's heirs.

On a number of occasions, the Appellant's have consistently misstated that the preparer of the deed in question, Russell Brown, was disbarred. Respondents would like to clarify that this attorney was not disbarred as stated by the Appellant. Pursuant to the Order of the Supreme Court Disciplinary Counsel, Mr. Brown resigned his license and received a public reprimand. He was given the option to regain his license at a later time.

Appellant argues that because he was an unlicensed attorney, that he gave incorrect advice when the deed was prepared. Unfortunately, Mamie Nichols is deceased and no one can testify on her behalf. The deed was prepared as instructed by the late Ms. Nichols and she signed the deed on her own free will, it was properly witnessed, notarized and filed with the court.

As stated in the Opinion of the Court, there is no evidence that the parties were not aware of the unauthorized practice of law being committed. In addition, there is no evidence that Mr. Brown actually prepared the deed. The only evidence that was provided in the trial of this case is that the deed was signed, witnessed, notarized by Mr. Brown (his notary was active at the time), and filed by Mr. Brown. There was no evidence that the deed was invalid, improperly executed, that Mamie Nichols was not of sound mind and disposing memory, was under constraints and/or undue influence, or under the influence of alcohol and narcotics at the time the deed was executed.

Matrix Finanical Services Corp. v. Frazier, 394.S.C. 134, 714 S.E.2d 532 (2011) finds that the court did not need to reach the issue of whether the bank's unauthorized practice of law barred equitable and legal relief because the bank could not foreclose on an invalid mortgage obtain by the deceased husband on property titled exclusively to the wife. No evidence has been given in

the lower court by the Appellant that Ms. Nichols was aware of any unauthorized practice of law. Only evidence that Ms. Nichols signed the deed on her own free will and desire. Testimony of her daughter, Barbara Gillard confirmed Ms. Nichols' desires that upon the death of Donna Thompson, she wanted the property to go to Ms. Thompson's children.

Mr. Brown's license to practice law has no effect, influence or relevance in the signing of the deed. Therefore, Appellant's request for a rehearing should be denied.

B. Appellant Waived Right to Appeal Issue of Confidential Relationship

During trial, a Motion for Directed Verdict was made by the Appellant arguing that a confidential relationship existed making the deed invalid. The Trial Court ruled that there was a factual issue and that it would be presented to the jury to rule on a verdict form. The jury ruled that there was no evidence a confidential relationship existed.

The Opinion states that the issue is not reversible as there was not an error and that the Appellant waived the issue of submitting the question of the existence of a confidential relationship to the jury. Appellant argues in their Motion for Renewal that they did not waive the issue and that the error is reversible.

During trial, after close of all evidence, the parties are given the opportunity to submit motions, and they have a right to renew their motion for directed verdict. The Trial Judge holds a charging conference in which the parties each present jury instructions and the Court determines which instructions will be presented to the jury. The parties have a duty to object or add any charges during the conference. In addition, after a jury has presented their verdict form, should a party believe that an error occurred, they must submit a motion for judgment not withstanding the verdict. Appellant did not renew her motion for directed verdict, object to the jury instructions or submit a Motion for Judgment Not Withstanding the Verdict. Her failure to do so means she failed

to preserve the issue regarding the confidential relationship and jury verdict form. *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908, 912 (Ct. App. 1995). ("Because they did not raise the alleged error at the first opportunity, we hold the landowners failed to preserve any issue regarding the court's exhibit and verdict form."). *Howard v. Kirton*, 144 S.C. 89, 101, 142 S.E. 39, 43 (1928)("If the appellant thought there was confusion in the wording of the verdict, he should have called the attention of the court to the matter at the time the verdict was rendered; and, then any seeming confusion in the language of the verdict could have been easily cleared up).

In addition, any issues on appeal must be presented in the Record on Appeal. It cannot be issued after a decision has been rendered. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339-40, 611 S.E.2d 485, 488 (2005).

Despite the absence of Appellant's objection to this issue, there was no evidence that a confidential relationship existed that would make the deed invalid. The deed was signed and filed in 2006, more than eleven years ago. Discussions made with other family members, even after her daughter, Donna Thompson, died, clearly determined her intent for Ms. Thompson's children to keep the property.

Conclusion

For the reasons set forth above, Appellant respectfully asks this Honorable Court to deny Appellant's request for a rehearing and affirm its opinion in this matter.

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March 2, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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, and ASIA RACHAL,

Respondent.

PETITION FOR REHEARING

PRECIOUS FELDER, LLC
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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:

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*), 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 motion for a directed verdict, made before the submission of the case to the jury, preserved the issue for appellate review. See *Allegro, Inc. v. Scully*, 409 S.C. 392, 413, 762 S.E.2d 54 (S.C. App. 2014).

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 5, 2018

Respectfully submitted,

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

*. 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.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Emily Nichols Felder, Executor of the Estate of Mamie F. Nichols, Appellant,

v.

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

Appellate Case No. 2015-001752

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge
Stephanie P. McDonald, Circuit Court Judge

Unpublished Opinion No. 2018-UP-038
Submitted September 1, 2017 – Filed January 31, 2018

AFFIRMED

Precious Felder, of Atlanta, Georgia, and Louis S. Moore, of Charleston, for Appellant.

Eduardo Kelvin Curry, of The Curry Law Firm, LLC, of North Charleston, for Respondents.

PER CURIAM: Emily Felder (Daughter 1), executor of the estate of Mamie Nichols (Mother),[1] appeals the jury verdict in favor of Albert Thompson, Thaddeus Thompson, Titus Thompson, and Asia Thompson (collectively, Respondents). On appeal, Daughter 1 argues the circuit court erred in (1) failing to find the deed was void as a matter of law because it was prepared by an unlicensed attorney, (2) submitting to the jury the question of whether a confidential relationship existed, and (3) denying Mother's motion for a directed verdict on her claim of undue influence. We affirm.

1. Daughter 1 argues the circuit court erred in failing to find the deed was void as a matter of law because it was prepared by an unlicensed attorney. We disagree. Daughter 1 relies on *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), and *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 24 (Ct. App. 2010) (finding this court did not need to reach the issue of whether the bank's unauthorized practice of law barred equitable and legal relief because the bank could not foreclose on an invalid mortgage obtained by the deceased husband on property titled exclusively to the wife), *aff'd as modified*, 404 S.C. 421, 746 S.E.2d 35 (2013). In *Matrix*, our supreme court stated that *a lender* "may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law." 394 S.C. at 140, 714 S.E.2d at 535. In *Coffey*, this court similarly found *a lender* may not enjoy the benefits of equitable remedies when that lender committed the unauthorized practice of law. 389 S.C. at 74, 698 S.E.2d at 247. These cases prohibited recovery to the entities that committed the unauthorized practice of law under equitable doctrines disallowing parties from benefitting from their own misconduct. *See generally* Vitauts M. Gulbis, J.D., Annotation, *Right of Party Litigant to Defend or Counterclaim on Ground that Opposing Party or His Attorney is Engaged in Unauthorized Practice of Law*, 7 A.L.R.4th 1146 §2[a] (1981) ("Generally, courts have distinguished between cases in which a party has engaged in the unauthorized practice of law in an underlying transaction, and cases in which the party's representative has engaged in unauthorized practice in the course of litigation."). In this case, the closing attorney had been disbarred, but no evidence was presented indicating any of the parties were aware of it at the time the unauthorized practice of law was committed. We find no application of these cases to Respondents.

2. Daughter 1 next argues the circuit court erred in submitting to the jury the question of whether a confidential relationship existed and denying her motion for

[1] Mother filed this appeal, but she subsequently died. Daughter 1 was substituted as the named appellant after being appointed as executor of Mother's estate.

a directed verdict on her undue influence claim.[2] We find no reversible error. The existence of a fiduciary relationship is a question for the court; however, whether a breach of the fiduciary duty has occurred may be a question of fact. *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926-27 (2011). Here, the circuit court agreed on the record that a confidential relationship existed. Although the jury verdict form includes the question of the Mother's capability of being unduly influenced, Daughter 1 neither objected to the verdict form nor included the jury charge in the Record on Appeal. Therefore, she has waived the issue of submitting the question of the existence of a confidential relationship to the jury. *See Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339-40, 611 S.E.2d 485, 488 (2005) (declining to address a challenge to the trial court's jury charge because the charge was not included in the Record on Appeal); *Howard v. Kirton*, 144 S.C. 89, 101, 142 S.E. 39, 43 (1928) ("If the appellant thought there was confusion in the wording of the verdict, he should have called the attention of the court to the matter at the time the verdict was rendered; and, then any seeming confusion in the language of the verdict could have been easily cleared up."); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) ("Because they did not raise the alleged error at the first opportunity, we hold the landowners failed to preserve any issue regarding the court's exhibit and verdict form.").

As to the denial of Daughter 1's motion for a directed verdict on her undue influence claim, we find there was evidence to submit the issue to the jury. *See Middleton v. Suber*, 300 S.C. 402, 405, 388 S.E.2d 639, 641 (1990) ("Where . . . a 'confidential relationship' exists between the grantor and grantee, the deed is presumed invalid and the burden is upon the grantee to establish absence of undue influence."). Barbara Gillard testified Mother told her she wanted Donna Thompson (Daughter 2) to have the property after she died because Daughter 2 was already living at the property. Gillard also claimed that after Daughter 2 died, Mother again stated she wanted Daughter 2's children to have the property. Additionally, Gillard stated it was not in Daughter 2's nature to put pressure on Mother and Mother never mentioned Daughter 2 putting pressure on her. Because Respondents provided evidence that refutes the presumption of invalidity of the deed, we find this cause of action was properly submitted to the jury. *See Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998) ("If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.").

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[2] We combine Daughter 1's second and third issues because both are related to her undue influence claim.

AFFIRMED.[3]

SHORT, KONDUROS, and GEATHERS, JJ., concur.

[3] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
COURT OF COMMON PLEAS

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

Mamie F. Nichols,

Appellant,

v.

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

Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

STATEMENT OF THE ISSUES ON APPEAL

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

On one occasion, shortly before the deed was executed, Ms. Nichols called her other daughter and her husband, who reside in Atlanta, to come to her home because she was having

problems with Al Thompson. Transcript, pp.116-117. There was a physical altercation between Al Thompson and Colette Felder's husband, which led to Al's arrest *Id.* Al was then prohibited from residing with Ms. Nichols. *Id.*

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

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

Three days previous to the signing of the deed, on April 19, 2006, Ms. Nichols gave Mrs. Thompson a Power of Attorney over her. Plaintiff's Exh.7, Power of Attorney. Finally,

Donna sent a letter to Colette Felder prohibiting her from future visitation. Plaintiff's Exh. 4, Letter of Representation; Transcript, p. 63.

ARGUMENTS

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

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

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

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

Although we have found no case directly on point, we believe that the principles enunciated in *Matrix Financial Services Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011) and *Wachovia Bank v. Coffey*, 389 S.C. 68, 698 S.E.2d 244 (Ct.App.2010) call for that result. In both cases, it was held that engaging in the unlawful practice of law by the plaintiffs precluded the Plaintiffs from obtaining equitable relief in a court of law.

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

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

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

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

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

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

itself. See *In re Estate of Cumbee*, 333 S.C. 664, 672-73, 511 S.E.2d 390, 394 (S.C. App. 1999) ("A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence.").

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

"A confidential relationship exists between grantor and grantee wherever there is a trust reposed by the former and dominant influence obtained by the latter, irrespective of the formal fiduciary character of their relationship. The existence of a confidential relationship between the parties demands close scrutiny of a deed executed by the subservient grantor and may render it invalid for presumed undue influence when otherwise it would be sustained, although deeds between those in a confidential relationship will be upheld if fair and expressive of the

free will of the grantor." *Page v. Lewis*, 209 S.C. 212, 39 S.E.2d 787, 799 (1946) (quoting 26 C.J.S. Deeds § 63).

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

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

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

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

An action to set aside a deed is a matter in equity. *Bullard v. Crawley*, 294 S.C. 276, 278, 363 S.E.2d 897, 898 (1987). Generally, on appeal from an equitable action, an appellate court may find facts in accordance with its own view of the evidence. *Buffington v. T.O.E. Enter.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009). Under the rule set forth *in Johnstone v. Matthews*, 183 S.C. 360, 366, 191 S.E. 223, 225 (1937), however, when issues of fact in equity cases are tried to a jury and findings of fact are made, they must be sustained if there is any evidence to support them. See *North American Rescue Prods., Inc. v. Richardson*, 396 S.C. 124, 720 S.E.2d 53 (S.C. App. 2012). Even as to that there is a caveat. Where an advisory jury is impaneled, this Court "review[s] the evidence as if the trial judge sat without a jury and thus find facts in accordance with [its] view of the preponderance of the evidence." *Neal v. Darby*, 282 S.C. 277, 284, 318 S.E.2d 18 (S.C. App.1984).

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

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

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

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

Id. at 809.

As discussed above, Plaintiff adduced the following evidence: (1) Mrs. Thompson's letter to Ms. Nichols, influencing her to give her interest in the property and threatening that if she does not, Mrs. Thompson would leave her to live alone, (2) Ms. Nichols was 80 years old at the time the deed was executed; (3) Ms. Nichols was hard of hearing, more specifically, that

she was only 19 decibels away from being deaf; (4) Mrs. Thompson's letter to her sister, informing her that she could not visit anymore; (5) Mrs.. Thompson's notes from communications with "Attorney Russell Brown," the disbarred attorney who drafted the deed; (6) testimony from Ms. Nichols's son that Ms. Nichols's health went"downhill" after a vehicular accident; and (7) testimony from Ms. Nichols's son-in-law Mrs. Thompson had been ordered by a South Carolina judge to never bring her husband back to Ms. Nichols' home, thus showing Mrs. Thompson's possible motive to want an interest in the property.

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

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

More important, the documents admitted from the Guardianship action did not address the deed or influence and only addressed competence a year after the deed had already been

executed. Competence is at issue in this case as the Plaintiff was not trying to prove incapacitation.

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

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

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

Significantly, Ms. Gilliard did not testify as to any facts surrounding the execution of the deed or its purpose. Ms. Nichols simply told Ms. Gilliard what she had already done. Thus, because the Defendants did not present any evidence demonstrating Ms. Nichols' intentions, or

evidence of communications between Mrs. Thompson and Ms. Nichols they did not refute the presumption of undue influence.

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

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

CONCLUSION

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

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Respectfully submitted,

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