

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

JUN 10 2019

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2019-000764

William Rice Cook, III, .....Petitioner,

v.

Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,  
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

REPLY TO RETURN TO PETITION FOR  
WRIT OF CERTIORARI TO THE COURT OF APPEALS

Andrew S. Radeker  
S.C. Bar No. 73743  
Harrison, Radeker & Smith, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
(803) 779-2211

Michael F. Mullinax  
S.C. Bar No. 4133  
Mullinax Law Firm, P.A.  
Post Office Box 2665  
Anderson, South Carolina 29622  
(864) 261-6242

Daniel L. Draisen  
S.C. Bar No. 13536  
Krause, Moorhead & Draisen, PA  
207 E. Calhoun Street  
Anderson, South Carolina 29621  
(864) 225-4000

Attorney for Respondent

Attorneys for Petitioner

Petitioner William Rice Cook, III, who is hereinafter referred to as “Cook,” submits this reply to Respondent Benny Richard Phillips, Jr. (hereinafter “Phillips”)'s return to Cook’s petition for a writ of certiorari. This reply will try to avoid rehashing the petition.

**I. This is a proper case for certiorari.**

Phillips contends that Cook’s petition does not fall within the scope of what constitutes a proper case for certiorari. As noted at several points in the petition, Cook seeks this Court’s review of a decision of the Court of Appeals that was not only inconsistent with the Court of Appeals’ own precedent but also inconsistent with this Court’s decision in Briggs v. Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979).

Rule 242(b)(3), SCACR, contemplates certiorari “[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.” This is such a case.

Further, not only is the Court of Appeals’ decision in conflict with this Court’s binding precedent in Briggs, the Court of Appeals rigidly applied the analysis of whether an element of a constructive trust was met – an element that had never before been determined to exist – in conflict with the flexible analytical approach traditionally used in this state’s jurisprudence about constructive trusts. See, e.g., Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979) (“equity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust”). That, too, is in conflict with this Court’s decisions. See id.

This is a proper case for certiorari.

**II. Phillips' attempt to imply that he has committed no wrongful act in the circumstances of his holding this property is not supported by the record.**

Phillips implies in his return that the record does not indicate that he has held the property in connection with his commission of any wrongful act. Nothing could be further from the truth of the record. The record amply shows that Phillips promised Cook that the subject property would be sold and that Cook would be paid for his labor and improvements to the property, and the record also shows that Cook has refused to honor that promise. (Appx. pp. 134-137, 208-10.)

**III. A confidential relation existed between the parties, and Phillips had a duty to Cook.**

Phillips seems to contend now that there was no confidential relation between him and Cook and that he owed no duty to Cook. Again, these conclusions are not supported by the record.

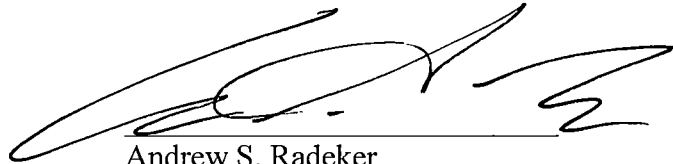
Situations in which a confidential or fiduciary relationship exists include the relation of "executors or administrators and creditors[.]" Chapman v. Citizens & S. Nat. Bank of S.C., 302 S.C. 469, 475-76, 395 S.E.2d 446 (Ct. App. 1990) (quoting Black's Law Dictionary 270). While Phillips served as personal representative of Claudia Harden's estate, the parties were in that relation.

Further, by promising Cook that the property would be sold and Cook would get paid, Phillips undertook a duty to Cook anyway. "At common law, when there is no duty to act, but an act is voluntarily undertaken, the actor assumes a duty to use due care." Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847 (Ct. App. 1997). "While the law imposes this duty on a volunteer, the question whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues

regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder.” Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813 (1997).

WHEREFORE Cook prays for an order granting his petition for a writ of certiorari in this case.

Respectfully submitted,



Andrew S. Radeker  
S.C. Bar No. 73743  
Harrison, Radeker & Smith, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
(803) 779-2211

Daniel L. Draisen  
S.C. Bar No. 13536  
Krause, Moorhead & Draisen, PA  
207 E. Calhoun Street  
Anderson, South Carolina 29621  
(864) 225-4000

Attorneys for Petitioner

June 10, 2019

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**  
JUN 10 2019  
S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2019-000764

William Rice Cook, III, .....Petitioner,

v.

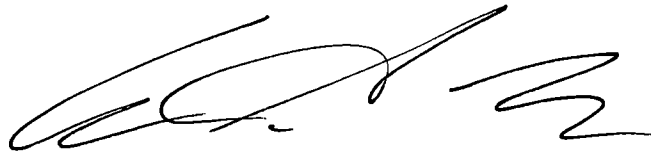
Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,  
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

PROOF OF SERVICE

I certify that I served the foregoing reply to return to petition for writ of certiorari by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Michael F. Mullinax, Esq.  
Mullinax Law Firm, P.A.  
P.O. Box 2665  
Anderson, SC 29622

June 10, 2019



Andrew S. Radeker