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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-805

Filed: 7 April 2020

New Hanover County, No. 16 CVS 002633

PAUL ALLAN COBB, JON ALLAN COBB, MARC ALLAN COBB, and MERIE COBB MIROSAVICH, Grandchildren of John Bruce Day, Plaintiffs,

v.

ARLEY ANDREW DAY, Defendant.

Appeal by defendant from judgment and order entered 20 March 2019 and cross-appeal by plaintiffs from order entered 22 March 2019 by Judge Eric C. Morgan in New Hanover County Superior Court. Heard in the Court of Appeals 4 February 2020.

*Richardson Plowden & Robinson, P.A., by Payton D. Hoover, for plaintiffs.*

*Hogue Hill, LLP, by Brian A. Geschickter, for defendant.*

BERGER, Judge.

On November 22, 2004, John Bruce Day (“Mr. Day”) and his wife, Agnes, executed their last will and testament, which established a revocable living trust for the benefit of six beneficiaries (the “Trust”). Mr. Day amended the Trust and made his son, Arley Andrew Day (“Defendant”), the sole beneficiary under the Trust on

## COBB V. DAY

### *Opinion of the Court*

June 21, 2012 (the “Amended Trust”). Mr. Day’s grandchildren, Paul Allan Cobb (“Paul”), Jon Allan Cobb (“Jon”), Marc Allan Cobb (“Marc”), and Merie Cobb Mirosavich (“Merie”) (collectively, “Plaintiffs”), who would have been beneficiaries under the Trust had he not amended it, filed suit against Defendant alleging several causes of action.

Ultimately, Plaintiffs’ claim for undue influence was the sole issue before the jury. The jury returned a verdict finding Mr. Day’s execution of the Amended Trust was procured through Defendant’s undue influence. Defendant appeals, arguing the trial court erred when it denied his motion for directed verdict and motion for judgment notwithstanding the verdict on the issue of undue influence. Plaintiffs cross-appeal, contending the trial court erred when it granted directed verdict on Defendant’s claims for constructive fraud and lack of testamentary capacity. We affirm the trial court.

### Factual and Procedural Background

Plaintiffs are the grandchildren of Mr. Day, and the nephews and niece of Defendant. Plaintiffs and Defendant were named beneficiaries under the Trust executed on November 22, 2004. The Trust was to provide 50% to Defendant, 10% to each of the four Plaintiffs, and 10% to Defendant’s daughter, Tara Day (“Tara”). On June 21, 2012, Mr. Day executed the Amended Trust, which named Defendant as the sole beneficiary.

COBB V. DAY

*Opinion of the Court*

On August 3, 2016, Plaintiffs commenced this action asserting causes of action against Defendant and Mr. Day's insurance agent, Judy Shaw ("Shaw"),<sup>1</sup> for (1) fraud; (2) unjust enrichment; (3) breach of fiduciary duty; (4) constructive fraud; (5) wrongful conversion; (6) undue influence; and although not specifically pled, (7) lack of testamentary capacity.<sup>2</sup>

Defendant filed a motion for summary judgment as to all of Plaintiffs' claims. In an order dated August 14, 2018, the trial court granted summary judgment in Defendant's favor on the issues of fraud, unjust enrichment, breach of fiduciary duty, and wrongful conversion.

At trial on the issues of constructive fraud, lack of testamentary capacity, and undue influence, the evidence tended to show that Mr. Day was diagnosed with dementia in September 2004. Mr. Day began taking Aricept, a medication commonly used to treat dementia. In November 2004, Mr. Day executed his last will and testament, which established the Trust. Plaintiffs testified that Mr. Day repeatedly told them they would be provided for through the Trust.

Following his wife's death in 2008, Mr. Day occasionally fainted and suffered from intermittent episodes of confusion. Mr. Day would tell his family that his deceased wife had just left, or that he believed she was alive and getting remarried.

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<sup>1</sup> Prior to trial, Plaintiffs voluntarily dismissed all claims against Shaw.

<sup>2</sup> At trial, the issue of testamentary capacity was tried through the consent of the parties pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(b).

According to Plaintiffs, there were periods of time where Mr. Day could not recognize his grandchildren or his great-grandchildren.

Jon first learned of the Trust and Mr. Day's dementia in 2006. Jon testified that Mr. Day regularly spoke about it. Even after the Amended Trust was executed, Mr. Day continued to "reaffirm" the Trust distribution by thanking Jon for visiting him. By Jon's own testimony, he never discussed the terms of the Trust with Defendant until after Mr. Day was admitted to an assisted living facility.

Jon testified that he began having concerns over Mr. Day's ability to live by himself in 2010. Jon kept Defendant informed as to the grandchildren's concerns by calling him after every visit with Mr. Day. Defendant testified that he did not recall speaking with Jon after every visit or remember the specifics of every call from his nephew. Jon noticed that Mr. Day needed help with daily chores, "partly because of his mental decline and the other part was because he had fallen several times."

According to Jon, Mr. Day began suffering from intermittent episodes of confusion around 2010. Jon testified that during these episodes Mr. Day believed that his deceased wife was still alive, nor could he recognize his grandchildren. These episodes did not occur at every visit Jon had with Mr. Day. Jon testified that Mr. Day would always "come out of that state" of confusion within a few moments and resume their previous conversations.

Jon also recounted an incident during Memorial Day weekend in 2012 when Mr. Day looked “bewildered” and did not recognize his great-grandchildren. Jon, however, did not witness this episode, but stated that his wife was having a conversation with Mr. Day at the time. Mr. Day recognized Jon’s family before and after the episode of confusion occurred.

Jon further testified that he was the only grandchild who regularly spoke with Defendant. Defendant did not associate with Paul, Marc, and Merie. Although Paul occasionally reached out to Defendant, Jon effectively acted as spokesperson for any of the grandchildren’s concerns as to Mr. Day’s well-being. However, Plaintiffs trusted Defendant to care for Mr. Day.

Katherine, Jon’s wife, testified that Mr. Day’s home was “disgusting,” and that they would clean for Mr. Day whenever they visited. Katherine also described Mr. Day’s episodes of confusion, and his belief that his late wife had been visiting him. According to Katherine, there were instances where Mr. Day had soiled himself and that he seemed unaware that he had done so.

Katherine stated that they had never asked Mr. Day about the Trust. However, Mr. Day would repeatedly describe the distribution, which was 50% to Defendant and 10% to each of Mr. Day’s grandchildren. Katherine testified that Mr. Day described the Trust as being “locked up,” however, she could not explain what he meant by that phrase.

Merie admitted that she and Defendant did not speak after 2006. However, Merie “trusted [Defendant] to make [Mr. Day’s] decisions . . . [She] knew he had the power and the capability of doing that.” She corroborated Jon’s testimony about Mr. Day’s occasional episodes of confusion, by detailing how, on one occasion, Mr. Day spoke to her as if she were his sister. In December 2011, Merie was so concerned for Mr. Day’s well-being that she wanted him to move into her South Carolina home. However, Jon dissuaded her not to force Mr. Day out of his home, and neither could recall if they informed Defendant of their concerns for Mr. Day’s well-being at that time.

Merie never asked Mr. Day about the Trust or any of his other financial assets. However, she was under the impression that the Trust was “locked up” and that the distribution was 50% to Defendant and 10% to each of the grandchildren.

Marc also testified that Mr. Day regularly discussed distribution of the Trust assets. Marc did not visit Mr. Day as often as Merie and Jon, as he was deployed to Afghanistan in 2012. However, Marc testified that he tried to call Mr. Day as often as he could.

Paul learned of the Trust in 2005. However, he admitted he never asked Mr. Day about his financial situation, or whether the Trust had been amended. Six to seven months after Mr. Day’s death, Paul reached out to Defendant to ask about the

Trust. At that time, Defendant would not answer any questions about the distributions.

Prior to Mr. Day's death in 2014, Plaintiffs completely trusted Defendant. In 2011, Paul stopped calling Mr. Day because Mr. Day "did not know who [Paul] was anymore." According to Paul, Mr. Day would frequently forget that he was on the phone and would not return to the phone when he put the receiver down.

Mr. Day's financial planner, Herb Ormond ("Ormond"), corroborated Plaintiffs' testimony concerning the original distribution of the Trust. In early 2012, Mr. Day instructed Ormond that he should deal primarily with Defendant. On March 16, 2012, Defendant instructed Ormond to send \$23,000.00 from the Trust to a State Employee's Credit Union money market account. However, Mr. Day's power of attorney did not authorize such a transfer by Defendant.

A Meals on Wheels employee testified that they delivered meals to Mr. Day four to five times a week beginning in 2010. The employee saw Mr. Day fall at least once and observed his declining physical and mental state.

In 2011, Mr. Day expressed concerns over his physical well-being to his physician, Dr. Rallis. Mr. Day had issues with his balance and had fallen a few times. He left the stove on and was unable to remember where he had put things, like his glasses. Defendant, who attended Mr. Day's doctors' appointments, requested an increased dosage of Aricept during one of the appointments in 2011. Although

Defendant attended Mr. Day's appointments, he did not inform Dr. Rallis about Mr. Day's periodic episodes of confusion.

Defendant visited Mr. Day up to four times a week and would call daily. In early 2012, Mr. Day allegedly allowed Defendant to begin borrowing from the Trust in order to write checks for personal expenses. Both Jon and Merie were aware that Defendant had been appointed as Mr. Day's attorney-in-fact, and that Defendant was assisting Mr. Day with his finances. At a pre-trial deposition, Defendant stated that he was paying Mr. Day's bills and taxes. However, at trial, Defendant claimed not to know the scope of Mr. Day's financial affairs.

In early 2012, Mr. Day instructed Defendant to take a copy of the Trust and to become familiar with it. At this time, Mr. Day also allegedly told Defendant that he was interested in changing the beneficiaries. In June 2012, Mr. Day instructed Defendant to contact his insurance agent, Shaw, so he could update the beneficiaries of the Trust.

On June 14, 2012, Shaw notarized a written directive for Mr. Day to amend the Trust. Pursuant to the directive, attorney Patrick Neighbors ("Neighbors") drafted the Amended Trust. The terms of the Amended Trust made Defendant the sole beneficiary. At this time, neither Shaw nor Neighbors were aware that Mr. Day had been diagnosed with dementia.



On June 21, 2012, Defendant went to visit Mr. Day around 11:00 a.m. and found that he could not get up from his recliner chair. While Defendant was attempting to contact Mr. Day's physician, Shaw arrived at Mr. Day's residence around 1:00 p.m., and Mr. Day executed the Amended Trust. A few hours later, Mr. Day was transported to Pender Memorial Hospital by ambulance and never returned to his home. After June 21, 2012, Mr. Day resided in an assisted living facility.

Mr. Day served as trustee of the Amended Trust until October 1, 2012. According to Ormond, Mr. Day resigned as trustee because he "was tired of dealing with his stuff." Defendant became trustee. Mr. Day died on June 30, 2014, at age 97.

At the close of Plaintiffs' evidence, Defendant made a motion for directed verdict and motion to dismiss all of Plaintiffs' remaining claims. The trial court granted a directed verdict in Defendant's favor as to the claims of constructive fraud and lack of testamentary capacity, leaving only the claim of undue influence to be determined by the jury.

Mr. Day's neighbor, Becky Williams ("Williams") testified for Defendant that Mr. Day called her prior to June 21, 2012, and asked her to serve as a witness to the signing of the Amended Trust. When asked if Mr. Day appeared confused on June 21, she replied, "He didn't seem to be confused to me. He seemed his normal self at that time." The following exchange occurred:

[Defendant's Attorney]. Okay. Did he read the document in your presence?

[Williams]. I don't think he read the documents. I think [Shaw] read something. You know, [Shaw] didn't go over the entire whatever it was, that they were doing, but [Shaw] asked him certain questions and asked him if he knew what she was talking about, and he would respond to her sort of. He may have read them. I just don't remember if he read them but I remember [Shaw] asking him questions about him understanding it and him answering her.

[Defendant's Attorney]. And did he answer that he did understand it?

[Williams]. Yes, he did. Yes, he did.

[Defendant's Attorney]. Okay. Did he ever indicate that in your presence that he didn't want to sign the document?

[Williams]. No.

[Defendant's Attorney]. Did he ever indicate in your presence that he was being forced to sign the document?

[Williams]. No.

On cross-examination, Williams admitted, towards the end of 2011, Mr. Day was confused, talked about his deceased wife, and began forgetting names. She testified that these episodes did not happen every conversation, but that "some days he was okay and some days he was not." She also stated that on one occasion between the end of 2011 and beginning of 2012, she had to escort Mr. Day back to his home after finding him at a neighbor's home trying to locate his deceased wife.

Shaw testified that prior to June 2012, Mr. Day informed her that he wanted to amend the Trust. On June 14, 2012, she went to Mr. Day's home so that Mr. Day could execute a document that would direct Neighbors to draft the Amended Trust. On June 21, 2012, Shaw arrived at Mr. Day's home around 1:00 p.m. and was made aware that Mr. Day could not move from his chair. Shaw further testified that Mr. Day did not appear confused or show any indication that he did not understand the terms of the Amended Trust or the effect of executing the Amended Trust. According to her testimony, Mr. Day informed her that he was amending the Trust because "the four grandchildren were not paying much attention to him, [Defendant] was there taking care of all of his needs and whether -- whatever he had to have done, and that he wanted to change the trust document to go totally to [Defendant]."

At the conclusion of all the evidence, the trial court denied Defendant's renewed motion for directed verdict as to the sole issue of undue influence. On October 2, 2018, the jury returned a verdict in favor of the Plaintiffs. Defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Both motions were denied by the trial court in an order filed March 22, 2019.<sup>3</sup> Defendant appeals and Plaintiffs cross-appeal.

On appeal, Defendant asserts that the trial court erred when it denied his motions for directed verdict and judgment notwithstanding the verdict on the issue

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<sup>3</sup> On appeal, Defendant does not challenge the trial court's ruling on his motion for a new trial.

of undue influence. Plaintiffs challenge the trial court's order that granted directed verdict in Defendant's favor on the issues of constructive fraud and lack of testamentary capacity.

Standards of Review

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991).

The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict. A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict. A motion for directed verdict tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the nonmovant.

*Scarborough v. Dillard's Inc.*, 363 N.C. 715, 719-20, 693 S.E.2d 640, 643 (2009) (*purgandum*).

To survive a motion for directed verdict or JNOV, the non-movant must present more than a scintilla of evidence to support its claim. While a scintilla is very slight evidence, the non-movant's evidence must still do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury. The trial court must construe the evidence in the light most favorable to the non-movant and resolve all evidentiary conflicts in the non-movant's favor. We review this question of law de novo.

*Morris v. Scenera Research, LLC*, 368 N.C. 857, 861, 788 S.E.2d 154, 157-58 (2016) (citations and quotation marks omitted). “A directed verdict and judgment notwithstanding the verdict are therefore not properly allowed unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish.” *Scarborough*, 363 N.C. at 720, 693 S.E.2d at 643 (citations and quotation marks omitted).

### Analysis

#### I. Defendant’s Appeal

Defendant contends the trial court erred when it denied his motion for directed verdict and his motion for judgment notwithstanding the verdict on the issue of undue influence. We disagree.

Undue influence is “more than *mere* influence or persuasion because a person can be influenced to perform an act that is nevertheless his voluntary action.” *In re Andrews*, 299 N.C. 52, 53, 261 S.E.2d 198, 199 (1980) (emphasis in original). “There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence.” *Griffin v. Baucom*, 74 N.C. App. 282, 286, 328 S.E.2d 38, 41 (1985). For the influence to be undue,

there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an

expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.

*In re Andrews*, 299 N.C. at 54, 261 S.E.2d at 199 (citation and quotation marks omitted).

Undue influence is often difficult to prove as typically only circumstantial evidence will exist. *Id.* at 54, 261 S.E.2d at 199. Relevant factors for the issue of undue influence include:

1. Old age and physical and mental weakness;
2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision;
3. That others have little or no opportunity to see him;
4. That the will is different from and revokes a prior will;
5. That it is made in favor of one with whom there are no ties of blood;
6. That it disinherits the natural objects of his bounty;
7. That the beneficiary has procured its execution.

*Id.* at 55, 261 S.E.2d at 200 (*purgandum*). “The list does not purport to contain all facts and circumstances which might suggest the existence of undue influence, and the caveator need not prove the existence of every factor.” *In re Forrest*, 66 N.C. App. 222, 225, 311 S.E.2d 341, 343 (1984).

In *In re Prince*, this Court held that the following evidence produced by the caveator did not support instructing the jury on undue influence:

Evidence that testatrix was old and at times suffered with memory loss; that propounder, testatrix's brother, assisted testatrix with some of her affairs after testatrix's husband's death; that propounder's former daughter-in-law at testatrix's request made the appointment with the attorney; that propounder drove testatrix to see her attorney and sat in the conference she had with her attorney; that testatrix did not make provisions in her will for her illegitimate son and her two grandchildren; that on occasions testatrix has expressed to others that she was afraid of propounder; and that propounder was a beneficiary under the will.

*In re Prince*, 109 N.C. App. 58, 63, 425 S.E.2d 711, 714-15 (1993).

In *In re Will of Dupree*, this Court held that the trial court properly denied the propounders' motion for a directed verdict at the close of the caveators' evidence and again at the close of all the evidence because the caveators "produced sufficient evidence to establish a *prima facie* case of undue influence." *In re Will of Dupree*, 80 N.C. App. 519, 522, 343 S.E.2d 9, 10 (1986). The caveators showed that the testatrix was hospitalized in the days immediately preceding and following the making of the will; was confused and not mentally clear; was physically and mentally incapable of managing her affairs; was "totally out of her head," "grasping at objects in the air," "living in the past," "disoriented and paranoid," and dependent on the propounders, who did not inform testatrix's neighbors or attorney of her deteriorating physical and mental state. *Id.* at 522, 343 S.E.2d at 10-11. Moreover, the caveators presented

evidence that the propounders utilized a new attorney unfamiliar with the testatrix in executing the new will, and that the new attorney was unaware of the testatrix's deteriorating condition but had he known, he would have inquired into her mental state. *Id.* at 522-23, 343 S.E.2d at 11.

In the present case, taking the evidence in the light most favorable to the non-movant, there was more than a scintilla of evidence to support Plaintiffs' claim of undue influence.

In reviewing the factors from *Andrews*, the evidence tended to show that Mr. Day was 95 years old and suffered from dementia. He intermittently experienced episodes of confusion and occasionally fainted. Although Mr. Day lived alone, his family visited multiple times each week to bring him groceries and to clean his residence. Meals on Wheels delivered meals to Mr. Day four to five times each week. Mr. Day had issues with his balance, and an employee of Meals on Wheels saw him fall. On the day the Amended Trust was executed, Mr. Day could not get out of his recliner chair and was briefly hospitalized. He later moved into an assisted-living facility.

In addition, although Mr. Day executed the Amended Trust in his own residence, Defendant was present when Mr. Day executed the Amended Trust. Defendant was in contact with Mr. Day far more frequently than Plaintiffs. While Jon and Merie visited Mr. Day on the weekends, Defendant called Mr. Day daily and



visited Mr. Day's residence up to four times each week. Defendant also accompanied Mr. Day to his doctors' appointments, and he took care of Mr. Day's daily affairs. Defendant had Mr. Day's prescriptions filled, filed his taxes, and paid his monthly bills.

Further, it was a significant deviation from the terms of the original Trust to name Defendant as the sole beneficiary under the Amended Trust. Even though Defendant was Mr. Day's only living child, the terms of the Amended Trust essentially disinherited his grandchildren. Defendant assisted in ensuring that the Amended Trust was executed, and failed to inform Shaw or Neighbors of Mr. Day's dementia diagnosis. Neighbors testified that he would not have drafted the Amended Trust had he known Mr. Day had dementia. Also, Mr. Day had to be transported by ambulance to a local hospital following the execution of the Amended Trust. Defendant, who was supposed to follow the ambulance to the hospital, did not arrive until at least "an hour or so later."

In addition to the evidence supporting the enumerated factors from *Andrews*, the evidence also demonstrated that, although Defendant paid Mr. Day's monthly bills, he claimed not to know the scope of Mr. Day's financial affairs. Ormand testified that he became aware of the Amended Trust after its execution. He testified this surprised him because Mr. Day had never amended anything without going through him, but the Amended Trust was taken care of by the insurance company. Ormand

also testified that on one occasion in March 2012, Defendant attempted to use his status as attorney-in-fact to transfer \$23,000.00 from the Trust to a State Employee's Credit Union money market account. The power of attorney did not authorize Defendant to make such a transfer. However, Defendant's status as attorney-in-fact did allow him to write personal checks, which he started doing to pay for his personal expenses starting in January 2012.

Regarding Mr. Day's health, Defendant was present when Mr. Day disclosed concerns about his well-being to Dr. Rallis. Defendant was aware of Mr. Day's episodes of confusion but did not disclose that his father was suffering from intermittent episodes of confusion because he "was never asked."

The test for determining the sufficiency of the evidence of undue influence is "generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence." *In re Prince*, 109 N.C. App. at 63, 425 S.E.2d at 714 (*purgandum*). Taken collectively, Plaintiffs' evidence was sufficient to warrant submission of the issue of undue influence to the jury. Moreover, even though Defendant presented contradictory evidence, when taken in the light most favorable to Plaintiffs, it supported submission of the issue at the close of all the evidence. *See In re Will of Dupree*, 80 N.C. App. at 523, 343 S.E.2d at 11 ("Although propounders produced some contradictory evidence, caveators' evidence was sufficient to go to the jury, and the

verdict was not so against the greater weight of the evidence as to require its being set aside.”); *Henry v. Knudsen*, 203 N.C. App. 510, 520, 692 S.E.2d 878, 884 (2010) (emphasizing it is the jury’s function to weigh the evidence and determine the credibility of witnesses).

Because Plaintiffs presented more than a scintilla of evidence on their claim of undue influence, the trial court did not err when it denied Defendant’s motion for directed verdict or motion for judgment notwithstanding the verdict.

## II. Plaintiffs’ Cross-Appeals

Plaintiffs’ cross-appeal from an order that granted directed verdict in Defendant’s favor on the issues of constructive fraud and testamentary capacity. We address each issue in turn.

### A. Constructive Fraud

Plaintiffs argue that they presented more than a scintilla of evidence on the issue of constructive fraud. We disagree.

The elements of a claim of constructive fraud require: “(1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured.” *White v. Consol. Planning, Inc.*, 166 N.C.App. 283, 294, 603 S.E.2d 147, 156 (2004) (citation omitted). “Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less exacting than that required for actual fraud.” *Cash v.*

*State Farm Mut. Auto. Ins. Co.*, 137 N.C.App. 192, 206, 528 S.E.2d 372, 380 (2000) (citation and quotation marks omitted).

As a general matter, our courts have been reluctant to define what constitutes a “confidential relationship.” *See Terry v. Terry*, 302 N.C. 77, 84, 273 S.E.2d 674, 677-78 (1981). This intentional reluctance represents a concerted effort to avoid the exclusion of “any relation that may exist between two or more persons with respect to the rights of persons or the property of either.” *Id.* at 84, 273 S.E.2d at 677-78. Accordingly, our courts may find that a confidential relationship exists “under a variety of circumstances,” including “cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Id.* at 84, 273 S.E.2d at 678.

In the instant case, the evidence does not support the existence of a confidential relationship between Plaintiffs and Defendant.<sup>4</sup> Plaintiffs presented no evidence of the facts and circumstances “which created the relation of trust and confidence” or “led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust” to Plaintiffs’ detriment.

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<sup>4</sup> We note that prior to trial, the trial court entered an order granting Defendant’s motion for summary judgment on the issue of breach of fiduciary duty. Plaintiffs do not challenge this ruling on appeal.

*Brisson v. Williams*, 82 N.C. App. 53, 58, 345 S.E.2d 432, 435-36 (1986) (citation and quotation marks omitted).

Instead, the evidence supports that a relationship of trust and confidence existed between Mr. Day and Defendant. Mr. Day executed a general power of attorney naming Defendant his attorney-in-fact. This relationship was created by a power of attorney between the principal and the attorney-in-fact, which is fiduciary in nature. *Albert v. Cowart*, 219 N.C. App. 546, 554, 727 S.E.2d 564, 570 (2012).

Plaintiffs contend that Defendant's status as Mr. Day's attorney-in-fact established a relationship of trust and confidence between Plaintiffs and Defendant. This argument is without merit. Plaintiffs are required by our precedent to allege facts and circumstances that evidence their own relation of trust and confidence with Defendant. *Brisson*, 82 N.C. App. at 58, 345 S.E.2d at 435-36. They are not permitted to assert a relationship of trust and confidence between themselves and Defendant based solely on the existence of such a relationship between Defendant and another who is not a party to this suit. *See id.* at 58, 345 S.E.2d at 436.

Moreover, even if a confidential relationship existed between Plaintiffs and Defendant, "the mere family relationship and general allegations of consultations among family members" are not particular enough to support a relation of trust and confidence. *Terry*, 302 N.C. at 86, 273 S.E.2d at 679. Plaintiffs' testimony revealed that only Jon regularly spoke with Defendant to discuss Plaintiffs' concerns with Mr.

Day's physical well-being. None of the Plaintiffs, including Jon, stated they were concerned with Mr. Day's financial well-being. Moreover, none of the Plaintiffs, including Jon, claimed to have raised concerns with their status as beneficiaries until six or seven months after Mr. Day's death. Plaintiffs cannot contend that they all had a relationship of trust and confidence with Defendant when only Jon spoke to Defendant about Mr. Day's physical well-being.

Plaintiffs' evidence, even when considered in the light most favorable to them, failed to show they had a relationship of trust and confidence with Defendant. Because Plaintiffs failed to satisfy a necessary element of any constructive fraud claim, the trial court did not err when it entered a directed verdict on the issue in Defendant's favor.

**B. Testamentary Capacity**

Plaintiffs next contend the trial court erred in granting a directed verdict in Defendant's favor on their lack of testamentary capacity claim. We disagree.

"The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will." N.C. Gen. Stat. § 36C-6-601 (2019).

An individual possesses testamentary capacity—the capacity to make a will—if the following is true: She (1) comprehends the natural objects of her bounty, (2) understands the kind, nature and extent of her property, (3) knows the manner in which she desires her act to take

effect, and (4) realizes the effect her act will have upon her estate.

The presumption is that every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting.

However, to establish testamentary incapacity, a caveator need only show that one of the essential elements of testamentary capacity is lacking. It is not sufficient for a caveator to present only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which a caveator based her opinion as to the testator's mental capacity. A caveator needs to present specific evidence relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made.

*Seagraves v. Seagraves*, 206 N.C. App. 333, 349, 698 S.E.2d 155, 167 (2010) (*purgandum*). "The point of time to be looked to in determining the competency of the maker is the date when the instrument was executed, but the condition of his mind both before and after is proper to be considered in determining what his mental condition was when the instrument was executed." *Burns v. Burns*, 175 N.C. 475, 477, 95 S.E. 899, 899 (1918) (citations omitted).

Here, Plaintiffs rely on Mr. Day's dementia diagnosis and intermittent episodes of confusion to demonstrate his lack of appropriate mental capacity. Plaintiffs presented evidence showing that Mr. Day had regularly forgotten to take his daily medications, his physical health had deteriorated, he would forget being on the phone, and he suffered from intermittent episodes of confusion. However,

Plaintiffs failed to present evidence that, *at the time the Amended Trust was executed*, Mr. Day lacked the requisite testamentary capacity. Plaintiffs have not presented any evidence that suggests Mr. Day did not comprehend the Amended Trust or the effect it would have on his estate at the time of its execution.

Plaintiffs failed to show that Mr. Day did not know who his relatives were. In fact, Plaintiffs testified that Mr. Day recognized them upon their arrival of each visit, and that he would usually “come out of” an episode of confusion within a few moments of seeing them. Although Mr. Day suffered from “delusions” where he did not recognize his grandchildren, Plaintiffs did not show that the delusions were actually operative at the time of the Amended Trust’s execution. *See Seagraves*, 206 N.C. App. at 352-53, 698 S.E.2d at 168 (recognizing testimony or medical records detailing intermittent delusions may not establish mental incapacity if not shown to have existed at the time of execution). That Mr. Day may not have recognized his grandchildren at various times does not prove that he did not know of their existence when he executed the Amended Trust.

Further, Plaintiffs failed to present evidence which showed that Mr. Day did not understand the kind, nature, or extent of his property. Nor did Plaintiffs present evidence that suggests that Mr. Day did not know the manner in which he desired his act to take effect, or the effect his act would have upon his estate. Although Mr. Day was transferred to an assisted living facility that specialized in caring for



## COBB V. DAY

### *Opinion of the Court*

dementia patients after the Amended Trust's execution, Plaintiffs' testimony revealed that Mr. Day no longer discussed the Amended Trust's distribution after June 21, 2012. Mr. Day would thank Jon for visiting him; however, Mr. Day no longer described the Trust's distribution. This is not evidence that Mr. Day did not know the manner in which he desired his act to take effect. One could argue that this is some evidence that Mr. Day knew precisely the effect his act would have upon his estate, and that is why he ceased discussing the distribution.

Although Plaintiffs presented evidence concerning Mr. Day's intermittent episodes of confusion, none of Plaintiffs' witnesses claimed Mr. Day was experiencing such a "delusion" at the time he executed the Amended Trust. None of Plaintiffs nor their witnesses were present at the time Mr. Day amended the Trust beneficiaries and could not describe Mr. Day's mental state on the day in question.

Plaintiffs' general testimony concerning Mr. Day's deteriorating health and mental confusion in the months before and after he executed the Amended Trust was insufficient to show that he lacked testamentary capacity at the time he executed the Amended Trust. Therefore, the trial court did not err in granting a directed verdict in Defendant's favor on the issue of testamentary capacity.

### Conclusion

The trial court did not err when it denied Defendant's motion for directed verdict and motion for judgment notwithstanding the verdict on the issue of undue

COBB V. DAY

*Opinion of the Court*

influence. The trial court did not err when it granted Defendant's motion for directed verdict on the issues of constructive fraud and testamentary capacity.

AFFIRMED.

Judges STROUD and COLLINS concur.

Report per Rule 30(e).