IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

TANIA NICOLE DRAPP,
MICHAEL ROLAND STREIFF,
and SOUTH FLORIDA LENDING CORP.,

Appellants,

vs.

EDWARD REID MCDANIEL,

Appellee.

CASE NO.: 2D19-1949

L.T. CASE NO.: 2017CA002092

APPELLANT'S/INTERVENOR'S INITIAL BRIEF

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Standard of Review

Portions of the court's ruling involve interrelationships between mixed findings of fact and conclusions of law, thus requiring mixed standards of review. *Jarrard v. Jarrard*, 157 So. 3d 332, 337–38 (Fla. 2d DCA 2015).

Argument 1 – this argument involves the application of law to the factual findings, which is subject to the *de novo* standard. *Id.*

Argument 2 – this argument involves factual findings, which are subject to the standard of support by competent, substantial evidence. *Id.*

Argument 3 – this argument involves mixed issues of fact and discretion, which are subject to the standards of support by competent, substantial evidence and abuse of discretion. *See*, *Peatenlane v. State*, 240 So.3d 17, 19 (Fla. 4th DCA 2018)(applying these standards to issues of fact and discretion) and *Murphy v.* Murphy, 201 So.3d 18, 21-22 (Fla. 3rd DCA 2013)(same).

Argument 4 – this argument involves the application of law to the factual findings, which is subject to the *de novo* standard of review. *Jarrard, supra*.

Statement of the Case

(Note: All citations labeled "Record" are to the record on appeal, and all citations labeled "Transcript" are to the trial transcript)

This case involves eight claims[1] by Edward Reid McDaniel against Tania Nicole Drapp (his daughter) and Michael Streiff (her ex-boyfriend, Record, p. 53, l. 12—54, l. 14, p. 58, l. 4-6). These claims stemmed from his Power of Attorney and several quitclaim deeds which transferred title to his two properties (the "12th Ave. property" and the "48th Ave. property," collectively, the "Properties") to Drapp, Streiff, and South Florida Lending Corporation ("South Florida Lending"). The relevant documents (all admitted into evidence) are:

a) Property tax statement (Record, p. 577, **defendant's trial exhibit 1**);
b) Power of Attorney from McDaniel to Drapp, 10/13/14 (Record, pp. 578-586, **plaintiff's trial exhibit A**);
c) Revocation of the Power of attorney, 5/6/15 (Record, pp. 587-588, **plaintiff's trial exhibit B**)
d) Quitclaim Deed of 12th Ave. Property from Drapp to Streiff, dated and recorded 1/13/17 (Record, pp. 589-592, **plaintiff's trial exhibit C**);
e) Quitclaim Deed of 48th Ave. Property from Drapp to Streiff, dated and recorded 2/22/17 (Record, pp. 593-596, **plaintiff's trial exhibit D**);
f) Quitclaim Deed of both the 12th Ave. Property and the 48th Ave. Property from McDaniel to Drapp, dated 8/4/16 and recorded 9/25/17 (Record, pp. 597-600, **plaintiff's trial exhibit E**);
g) Quitclaim Deed of both the 12th Ave. Property and the 48th Ave. Property from Drapp to South Florida Lending, dated 2/25/17 and recorded 9/25/17 (Record, p. 601, **plaintiff's trial exhibit F**); and
h) Quitclaim Deed of both the 12th Ave. Property and the 48th Ave. Property from Streiff to South Florida Lending, dated 2/25/17 and recorded 9/25/17 (Record, p. 602, **plaintiff's trial exhibit G**).

[1] The Amended Complaint (Record, pp. 166-179) pled seven claims, and the Second Amended Complaint (Record, pp. 281-282) pled one.

In his Amended Complaint (Record, pp. 166-179), McDaniel alleged Drapp used the Power of Attorney (trial exhibit A, Record, pp. 578-586,) to execute two quitclaim deeds (trial exhibits C & D, Record, pp. 589-596) transferring the Properties to Streiff for no value (Record, p. 168, paras. 1-13). He further alleged Drapp and Strieff told the Properties' tenants to pay the rent to them (Record, p. 169, para. 15). After revoking the Power of Attorney, he signed another quitclaim deed to the Properties (trial exhibit E, Record, pp. 597-600), giving title to Drapp, though he claimed to not recall having done so (Record, p. 170, paras. 18 & 19).

At trial, McDaniel said he had been "desperately ill," and he entrusted Drapp to pay the Properties' taxes (Transcript, p. 14, l. 9-18). Drapp said when she went to the property appraiser's office to pay the taxes, she was told they hadn't been paid for three years and $11,665.76 was owed (trial exhibit 1, Record, p. 577), and, if not paid, the Properties would very soon be auctioned to pay them (Transcript, p. 14, l. 19-25 – 15, l. 4; 45, l. 14 – 46, l. 12; 48, l. 2-11). Drapp said she did not have the money, so she asked McDaniel to execute a quitclaim deed to the Properties (the "McDaniel-to-Drapp Deed," trial exhibit E, Record, p. 597-600), so she could, in turn, execute a quitclaim deed to Streiff as security for loaning her the money (Transcript, pp. 15, l. 5-13; 60, l. 20 – 61, l. 6; 62, l. 10-17; 68, l. 5-16; 125, l. 2-4; 129, l. 10 – 130, l. 5). Drapp then paid the taxes immediately upon getting the money from Streiff (Record, pp. 68, l. 5-16, and 1439).

Drapp testified that the McDaniel-to-Drapp Deed had an issue with the signature line which prevented it from being recorded (Record, p. 88, l. 10 – 95, l. 10).[2] Because of this issue, she used the Power of Attorney (trial exhibit A, Record, pp. 578-586) to execute two other quitclaim deeds for each of the Properties (trial exhibits C&D, Record, pp. 589-596). She then executed a quitclaim deed for the Properties to Streiff (trial exhibit F, Record, p. 601), who, in turn, executed a quitclaim deed for the Properties to South Florida Lending (trial exhibit G, Record, p. 602).

Based on these facts, McDaniel alleged these claims: breach of fiduciary duty (Count I); civil conspiracy (Count II); conversion (Count III); declaratory judgment as to the deeds' validity (Count IV); violation of §817.535, *Fla. Stat.* (Count V); constructive trust (Count VI); violation of §772.11, *Fla. Stat.* (Count VII); and violation of §415.11, *Fla. Stat.* (Count VIII). At trial, he proceeded only on his claim for a declaratory judgment (Record, pp. 143, l. 15 -- 144, l. 6; and p. 572), and the court ruled he had never lost his interest in the Properties, and Drapp, Streiff, and South Florida Lending had no interest in them (Record, pp. 575-576).[3]

[2]This error was corrected and the McDaniel-to-Drapp Deed was recorded on 9/25/17 (Record, pp. 597-600).

[3] The trial judge said "it does not appear that South Florida Lending is a good-faith purchaser, but more likely some additional arm of Drapp and Strieff" (Record, p. 569). This statement was pure speculation, with no record evidence to support it.

Summary of the Argument

The central issue at trial was whether McDaniel had the capacity to execute the McDaniel-to-Drapp Deed. In ruling he did not have this capacity, the trial judge made the following reversible errors: shifting the burden of proving he lacked the mental capacity to sign the deed; setting the deed aside because of his mental weakness, instead of his alleged mental incapacity; ignoring his testimony which showed he had the ability to comprehend the effect and nature of signing the deed; ignoring the complete lack of evidence showing any undue influence; and misstating and misinterpreting critical statements on core issues by the most credible witness (according to the trial judge herself) which directly contradicted her findings on those issues.

These errors show the trial judge based her finding of McDaniel's incompetence not on his mental state when he signed the deed, but on his mental state when he signed the power of attorney and its revocation, which was another reversible error. Finally, the trial judge also abused her discretion in finding Drapp's reason for wanting McDaniel to execute the deed was not reasonable, because that finding was based on a disregard of Drapp's situation and certain basic realities about the residential lending process.

Argument

The overriding issue at trial was whether McDaniel had the capacity to execute the McDaniel-to-Drapp Deed **at the time he did so**.[4] *Parks v. Harden*, 130 So. 2d 626, 628 (Fla. 2d DCA 1961)(grantor's incapacity is determined at the time the instrument is executed, and his subsequent incapacity will not affect the deed) and *Marcinkewicz v. Quattrocchi*, 199 So.3d 513, 515 (Fla. 3rd DCA 2016)(when challenging a grantor's mental capacity, the focus is on his capacity at the time the deed is executed). If he did have that capacity, then that deed gave her good and marketable title to the Properties, allowing her to transfer them -- or not – to whomever she wanted -- and on any terms she wanted. In ruling McDaniel did not have this capacity, the trial judge made the following reversible errors:

1. <u>The trial judge improperly shifted the burden of proof.</u>

Once a grantee establishes possession of a deed, the grantor is presumed to have had the mental capacity to sign it. *Marcinkewicz, supra.* Therefore, the party challenging a deed's validity has the burden of proving the grantor lacked the mental capacity to sign the deed. *Id.* (where grantor was grantee's mother). *Accord, Parks, supra* (the burden rests on those seeking to set aside a deed on the ground of incapacity of the grantor at the time the instrument was executed); and *Ballard v. Ballard*, 549 So.2d 1176, 1177 (Fla. 2nd DCA 1989)(a plaintiff who

[4] McDaniel also acknowledges this deed's significance (Transcript, p. 18, l.14-19).

contests a conveyance on the grounds of undue influence bears the burden of proof throughout the proceedings). *See also, Thrasher v. Arida*, 858 So.2d 1173, 1175 (Fla. 2nd DCA 2003)(deeds have a strong presumption in favor of being correct).

Despite this case authority, the trial judge nevertheless evaluated the evidence as though the appellants had to prove McDaniel was competent, rather than McDaniel having to prove he was incompetent. This point is clearly proven by the judge's statement that "the defendants failed to present any credible explanation or reason why plaintiff would voluntarily and knowingly transfer his interest in these properties under the facts as alleged." (Record, p. 567). Thus, the trial judge had improperly shifted onto Drapp an additional evidentiary burden (*i.e.*, McDaniel's mental capacity), which was clear error.[5] *See, Marcinkewicz, supra* (court erred when it shifted to the party challenging deed's validity the additional requirement of proving the mother's mental capacity).

2. <u>The appellee failed to meet his evidentiary burden</u>.

The presumption of being competent to sign a deed is overcome only by a preponderance of the evidence – and evidence which is clear, strong, and convincing. *Id.*, and *Howell v. Fiore*, 210 So.2d 253, 256 (Fla. 2nd DCA 1968).

[5] There was also no prior adjudication of McDaniel's incompetency, which would have shifted this burden. *See, American Red Cross v. Haynsworth*, 708 So.2d 602, 606 (Fla. 3rd DCA 1998)(an adjudication of incompetency shifts the burden of going forward with the evidence on testamentary capacity to the will's proponent).

Undue influence must amount to over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such a degree that there is a destruction of free agency and willpower. *Ballard, supra*, at 1178; and *Williamson v. Kirby*, 379 So.2d 693, 697 (Fla. 2nd DCA 1980). Mere mental weakness will not authorize the setting aside of a deed if that weakness does not amount to an inability to comprehend the effect and nature of the transaction and is not accompanied by evidence of imposition or undue influence. *Parks, supra*.

McDaniel's only evidence to support his claim of being incompetent to sign the McDaniel-to-Drapp Deed was his own testimony.[6] Aside its obviously self-serving nature, this testimony actually *supported* the presumption that he was competent, because he specifically said he knew and understood the legal significance of deeds and a power of attorney (Transcript, pp. 67, l. 20-25; 230, l. 13-22; and 237, l. 11-19). Also, there was no evidence that he was prevented from reading the McDaniel-to-Drapp Deed or induced to sign it without reading it. *See, Berry v. Berry* 992 So.2d 898, 900 (Fla. 2nd DCA 2008)(parties to a written instrument have a duty to learn and understand its contents before signing it, or to prove they were prevented from reading it or induced to sign it before reading it).

Apart from her own testimony, Drapp also offered testimony from the only

[6]**McDaniel offered no expert testimony to support this claim** (Record, pp. 232, l. 20 – 234, l. 10).

disinterested witness; specifically, the notary to McDaniel's signature on the McDaniel-to-Drapp Deed -- and whose testimony the trial judge said was "highly credible" (Record, p. 570). The notary said McDaniel did not appear to be impaired or under any undue influence (Transcript, p. 195, l. 2-8, Record p. 599, para. 6); however, the trial judge ignored this testimony, instead saying there was strong evidence McDaniel "did not know the nature of the document he was being told to sign" due to his signature being "in an odd location: on the line where the notary was to fill in information" (Record, p. 570). **The notary directly contradicted this statement, saying (in both his testimony and his affidavit) he specifically told McDaniel to sign the McDaniel-to-Drapp Deed on that line** (Transcript, pp. 194, l. 19-25; p. 197, l. 24-p. 198, l. 8; Record, p. 599, para. 5).

The trial judge made another reversible error, by placing significant emphasis on the notary's comment that "he regrets having notarized the document" (Record, p. 571), implying he had doubts about McDaniel's competence; however, **the notary never made this comment!** What he actually said was that he "hated being in the middle of something like this … [because] it was a family matter." (Transcript, p. 199, l. 17-22). In other words, **his "regret" was about the matter having become a family dispute, not about McDaniel's mental capacity to sign the McDaniel-to-Drapp Deed**.[7]

[7] Had the notary in fact said he "regretted" notarizing the deed, that statement

These errors show the trial judge's basis for finding McDaniel incompetent to execute the McDaniel-to-Drapp Deed was not his mental state when he signed it, but his mental state when he signed the power of attorney and its revocation (which took place prior to execution of the McDaniel-to-Drapp Deed). This was another reversible error, because the only basis for deciding McDaniel's competency when signing the McDaniel-to-Drapp Deed had to be evidence of his state of mind **at that time** – not at any time before or after. *See, Marcinkewicz, supra*, at 516 (episodes of a grantor's incapacity at different times do not extend forward from or backward to a deed's execution).

3. Drapp's reason for wanting the McDaniel-to-Drapp Deed was unreasonably rejected.

If the plaintiff establishes a confidential relationship with the beneficiary who actively procured the deed, then a presumption of undue influence arises, burdening the beneficiary with providing a reasonable explanation for taking an active role in the grantor's affairs. *Ballard, supra,* at 1178; and *Williamson, supra* at 695. If the beneficiary's explanation is reasonable, the presumption vanishes and the trial judge must then determine whether the greater weight of the evidence has established undue influence. *Id.* Drapp had an entirely reasonable explanation for

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would have been off the record – and beyond consideration on appeal. *See*, *Cohen v. Sushan*, 212 So.3d 1113, 1129 (Fla. 2nd DCA 2017)(an appellate court will not consider evidence not presented to the trial judge, because its function is to decide if the lower court committed error based on the issues and evidence before it).

wanting McDaniel to execute the McDaniel-to-Drapp Deed, and the trial judge abused her discretion in finding otherwise.

As the trial judge noted, Drapp wanted the McDaniel-to-Drapp Deed as security for the money she borrowed to pay the overdue property taxes (Record, p. 566).[8] The trial judge was highly critical of her for this, saying she did not try raising the money "in any conventional way, such as a home-equity loan, credit-card cash advance, or any other traditional means" (Record, p. 566). This statement shows **the trial judge ignored the obvious fact that Drapp was not legally responsible for the taxes, and therefore by expecting her to assume this responsibility, the trial judge was herself being unreasonable.** Also, as a practical matter, the trial judge disregarded the near-impossibility of obtaining a home-equity loan with just collateral, even if that collateral exceeds the loan amount and is owned free and clear – and even then the closing still takes at least a month.[9] These facts show Drapp's reasons for wanting the McDaniel-to-Drapp Deed were quite sensible, thus dispelling any presumption of undue influence. *Id.*

Finally, the trial judge again abused her discretion in regarding the loan as heavily overcollateralized because of its loan-to-value ratio (*i.e.*, $12,000.00 to approx. $500,000.00)(Record p. 567), which she said made forfeiture of the

[8] Drapp also testified that she did not profit at all from selling the Properties (Record, p. 130, l. 3-5)

[9] As stated on p. 3, the taxes had to be paid immediately, to avoid a forced sale.

Properties an "absurd" penalty (Record, p. 572).[10] What the trial judge ignored was that Drapp wanted McDaniel to sign the McDaniel-to-Drapp Deed because he had a history of failing to repay loans (Record, pp. 127, l. 20 – 130, l. 6, Transcript, p.p. 238, l. 21-239, l. 12) and that the Properties had other mortgages and liens for code violations, some of them serious (Record, p. l. 1-14; 182, l. 5-16; and 734, l. 12-14, Transcript, p. 133, l. 1-23 and p. 239, l. 15-19) – and she didn't want to become liable for his debts and obligations (Transcript, p. 133, l. 13-15).[11] **Furthermore, McDaniel was about to lose the Properties anyway at a tax-deed sale – and for the same amount of money.** This fact means there was no difference between Drapp encumbering the Properties for a small amount and the county selling them for the same amount at a tax-deed sale, yet the county's sale would be valid.

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[10] The trial judge also overstepped her authority in making this finding, because determining whether consideration is fair or unfair, rather than merely extant, is not the trial court's proper province. *Diaz v. Rood*, 851 So. 2d 843, 846 (Fla. 2d DCA 2003). *See also, Chase Fed. Sav. & Loan Ass'n v. Schreiber*, 479 So. 2d 90, 101 (Fla. 1985)(a deed, sufficient in form, voluntarily executed by a competent grantor, is effective to convey the grantor's legal title regardless of whether the grantor receives a contractual consideration).

[11] These liens and mortgages were the obvious reason why South Florida Lending had Drapp sign a confidentiality clause (Record, pp. 68, l. 17-22; 108, l. 14 – 109, l. 21), which was to avoid triggering a foreclosure, because title to the Properties was being transferred without the mortgagee's approval.

4. The appellee was unjustly enriched.

This conclusion is obvious, because McDaniel was awarded title to the Properties – and with all the taxes paid by Drapp. **This fact, along with his history of failing to repay loans (as stated *supra*) demonstrates his real motive for executing the McDaniel-to-Drapp Deed: he wanted to con her into paying the taxes, and then claim he was mentally incapacitated so that he could get the Properties back free and clear of the tax lien.** Upholding the trial judge's ruling would serve only to reward him for conning Drapp – and for perpetrating a fraud upon the court.

Conclusion

Not only did McDaniel fail to meet his evidentiary burden, the trial judge's findings on key issues were based on misinterpretations and misstatements of the Appellants' evidence, and on abusing her discretion. As a result, the judge did not use the proper legal criteria for finding McDaniel was not competent to sign the McDaniel-to-Drapp Deed, and therefore her finding should be reversed.

Certificate of Service

I hereby certify having e-mailed copies of this brief on October 14, 2019 to: Matt Weidner, Esq., Weidner Law, PA, at service@mattweidnerlaw.com; and Ann Allison, Esq., Allison Law Group, at ann@allisonlaws.com.

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Certificate of Compliance with Rule 9.210(a)(2)

I certify this Brief was prepared using Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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