Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Nov 30 2010, 9:17 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

RICHARD D. MARTIN
Martin Stuard & Douglas
Frankfort, Indiana

ATTORNEY FOR APPELLEES:

STEPHEN R. PENNELL
Stuart & Branigin, LLP
Lafayette, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARY E. MCKINNEY,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 08A02-1001-CC-71
	)	
WINDY LANE FARMS, INC., BY AND THROUGH ITS RESIDENT AGENT, TY W. BROWN, HAL G. BROWN, SUE M. BROWN, TY W. BROWN and SACHA L. BROWN,	)	
	)	
Appellees.	)	

APPEAL FROM THE CARROLL CIRCUIT COURT
The Honorable Donald E. Currie, Judge
Cause No. 08C01-0806-CC-102

November 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Mary E. McKinney ("McKinney") appeals the trial court's dismissal of her third-party complaint and its grant of summary judgment in favor of third-party defendants Windy Lane Farms, Inc. ("WLF"), by and through its resident agent, Ty W. Brown, Hal G. Brown, Sue M. Brown, Ty. W. Brown ("Brown"), and Sacha L. Brown (hereinafter referred to collectively as "the Browns.")

We reverse and remand.

ISSUE

> Whether the designated evidence raises genuine issues of material fact regarding McKinney's claims of undue influence and conflict of interest.

FACTS

The following facts are undisputed: McKinney was born in 1919. She and her now-deceased husband[1] owned 101.26 acres of real estate in Carroll County. The McKinneys' real property consisted of a farm house and garage on approximately 3.0 acres; a Bedford stone house on approximately 3.26 acres; and 98 acres of farmland. The McKinneys had two adult children: Susan Crum and William McKinney. From 1986 until 2003, William lived with and cared for his parents in the farmhouse.

[1] McKinney's husband died in November of 2002.

Brown is the director and vice-president of WLF.[2] In approximately 1997, Brown and the McKinneys entered into an agreement wherein Brown and WLF tenant-farmed the McKinneys' 98 acres of farmland.

In 2003, McKinney evicted her son, William, from the farmhouse, and later became estranged from her daughter, Susan, accusing her of theft. During this period of estrangement from her children, the Browns assisted McKinney with household chores and errands, performed snow removal, and drove her to medical appointments.

From late 2003 through mid-2004, McKinney paid approximately $72,000.00 for repairs, remodeling and/or maintenance for the farmhouse.[3] *See* Farm House Expenses Prepared by Ty Brown, Ex. 21 at 257.

Also, in late 2003 or early 2004, Brown proposed to buy McKinney's real property. At the time, he personally estimated the value of the real estate to be approximately $400,000.00, but only offered to purchase it for $200,000.00. In his initial offer, however, he was willing to buy McKinney's 98 acres of farmland and the farm house for $100,000.00, and he would perform maintenance on the property even though at the time of his offer, McKinney had already or was in the process of paying approximately $72,000 of repairs and renovations to the farmhouse. *See* October 15,

[2] WLF "is an Indiana corporation located in Clinton County, Indiana." (McKinney's App. 8). Ty W. Brown is listed in Indiana Secretary of State office records as WLF's registered agent. WLF and Brown "own approximately 600 acres of farmland located in Clinton County, Indiana. WLF and [Brown] farm approximately 3,500 acres in Clinton, Carroll and Tippecanoe Counties." (Tr. 238).

[3] These repair/remodeling costs included $8,500.00 in "general repairs," $2,900.00 for a new furnace, $15,000.00 to Cooper Construction, $3,194.00 for new garage doors, $7,327.00 of "basement work," approximately $18,500.00 to contractor Larry Jenkins, and approximately $30,000.00 to contractor Tony Bowlin etc. (McKinney's App. 257).

2004 email from Brown to Bennett at 66, ("A number that [McKinney and I] had talked about a while back for the farmhouse and the farm was $100,000.00"); *see also* Mary McKinney Farm Proposal, Ex. 4 at 165, ("Mary, if you would want to sell for less I would buy for less, but $200,000 is about the most I think I could afford for this year.").

As of February 18, 2004, attorney Roger Bennett of Bennett, Boehning & Clary ("BB&C") commenced representing McKinney. The parties dispute the circumstances that led to McKinney's retention of Bennett's legal services. On one hand, McKinney contends that Brown referred her to the law firm that represented him -- BB&C -- and facilitated McKinney's hiring of Bennett by driving her to BB&C's offices in order that she could meet with Bennett. Brown and Bennett, on the other hand, deny that BB&C has ever represented either Brown or WLF. Bennett contends that on February 23, 2004, McKinney was referred to him by Fred Thompson, a mutual acquaintance of both McKinney and Brown; and that Thompson accompanied McKinney to the first consultation.[4] Brown, however, admitted that he did drive McKinney to an appointment to meet with Bennett, but denies participation in the consultation.

On September 16, 2004, at Bennett's request, McKinney's farmland, two houses and surrounding acreage were appraised by Halderman Real Estate Services. The total appraised value of McKinney's real property was $553,000.00. The farm house and farmland appraised for approximately $456,000.00. On October 1, 2004, Bennett presented McKinney with the appraisal and a draft purchase agreement. Pursuant to the

[4] Thompson was not called to testify at the hearing on Brown's motion for summary judgment; nor did he tender an affidavit to the trial court.

purchase agreement, McKinney would sell her property to WLF for $200,000.00; and WLF and Brown would grant McKinney a life estate in the farm house, provide her with limited maintenance services, pay McKinney's utility expenses, and provide up to $1,000.00 in maintenance repairs each year.

On October 1, 2004, Bennett wrote McKinney a letter wherein he advised her to undergo a psychiatric evaluation to establish her mental competence at the time of the transaction in the event that her children contested the sale. Despite initially agreeing to undergo the psychiatric examination, McKinney later expressed reservations to Brown about it.

On October 15, 2004, Brown sent an email to Bennett, stating that McKinney had proposed modifying the agreement to reflect her decision to live in the Bedford stone house instead of the farmhouse. On October 20, 2004, McKinney informed Bennett that she wanted to live in the Bedford stone house. On November 5, 2004, apparently, it was decided that Brown and WLF would purchase the farmland and farmhouse for $200,000.00; McKinney would retain ownership of the Bedford stone house; and WLF would not provide any personal care or maintenance services to McKinney.

On November 16, 2004, Brown emailed Bennett that McKinney no longer wanted to undergo the psychiatric evaluation. Brown advised Bennett that he supported McKinney's decision and was willing to assume the risk should McKinney's children contest the transaction. McKinney canceled her appointment and never underwent the psychiatric examination.

On November 19, 2004, Brown sent an email to Bennett purporting to contain the contractual terms he and McKinney had agreed upon. He asked Bennett to prepare the relevant documents. Later that day, Bennett mailed a copy of the finalized purchase agreement to McKinney as well as the appraisal results. On November 23, 2004, eighty-five year old McKinney and Brown executed the sale of her property. McKinney and Brown attended the closing on December 16, 2004. Bennett was also present to attest to McKinney's mental competency at closing.[5]

After the closing, Brown anticipated that McKinney's children would challenge the transaction. He asked McKinney to "[w]rite a letter to [him]," and provided her with several possible reasons that she should include in the letter explaining why she had sold the property to him below the appraised value. (McKinney's App. 181). On December 30, 2004, Bennett sent a letter to McKinney stating, "[I]t would be a very good idea if you would write a letter to Ty Brown explaining, in your own words, why you sold [Brown] the farm at a bargain price." (McKinney's App. 75). Soon thereafter, on January 5, 2005, McKinney gave Brown her power of attorney. On October 13, 2005, she revoked Brown's appointment. On December 2, 2006, McKinney appointed Beverly R. Strain as her power attorney. On December 2, 2006, she revoked Strain's appointment and named Mellissa J. Knop as her power of attorney. On February 22, 2008, she revoked Knop's appointment.

[5] McKinney executed a warranty deed conveying and warranting the farmhouse and 98 acres of farmland to WLF.

On June 20, 2008, BB&C sued McKinney for nonpayment of attorney fees.[6] On August 14, 2008, McKinney filed an answer and counter claim alleging conflict of interest and legal malpractice by BB&C when it represented her in the sale of her real property to Brown and WLF. She also filed a third-party complaint against Brown and WLF, wherein she sought to rescind the sale of her real property on grounds of undue influence and conflict of interest. Specifically, McKinney alleged that: (1) she was mentally incompetent when she executed the real estate purchase agreement and subsequent sale of her real property; (2) Brown exerted undue influence over her regarding the sale of her real property below the appraised value; and (3) a conflict of interest existed because Brown had encouraged McKinney to hire BB&C, counsel of Brown's choosing, to represent her in the real estate transaction when WLF and Brown already had a contractual agreement with BB&C.

On April 27, 2009, BB&C filed a motion for summary judgment. On June 30, 2009, Brown and WLF filed a motion for summary judgment and a memorandum of law. On July 30, 2009, McKinney filed her designation of evidence and response to Brown and WLF's motion for summary judgment. On August 11, 2009, WLF filed a reply in support of its motion for summary judgment and motion to strike. McKinney filed a reply on August 31, 2009. On September 10, 2009, the trial court conducted a hearing on BB&C and WLF's motions for summary judgment and took the matter under advisement. On October 6, 2009, the trial court issued an order granting Brown and

[6] The lawsuit pertained to legal representation wholly independent of the instant real estate transaction.

WLF's motion for summary judgment and dismissing McKinney's counterclaim. The trial court did not rule on BB&C's motion for summary judgment. McKinney now appeals.

Additional facts will be provided as necessary.

DECISION

McKinney argues that the trial court erred in granting Brown's motion for summary judgment and in dismissing her third-party complaint against WLF seeking to rescind the real estate contract. Specifically, she argues that she designated sufficient evidence to establish that genuine issues of material fact exist regarding whether: (1) Brown exerted undue influence over her to induce her to sell her property for less than its appraised value; and (2) whether Brown and Bennett had a conflict of interest which operated to her detriment in the underlying real estate transaction.[7]

The well-settled standard of review for a summary judgment ruling is as follows:

> A party is entitled to summary judgment if no material facts are in dispute and as the facts stand, under the law, the party is entitled to a judgment in its favor. Ind. Trial Rule 56(C) ("The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). When reviewing the propriety of a ruling on a motion for summary judgment, this Court applies the same standard as the trial court. Review is limited to those materials designated to the trial court. The Court accepts as true those facts alleged by the nonmoving party, construes the evidence in favor of the nonmoving party, and resolves all doubts against the moving party.

[7] McKinney also argues that a genuine issue of material fact exists regarding whether Bennett's answers to interrogatories violated attorney-client privilege with respect to his representation of McKinney. We do not reach this claim inasmuch as we find her initial contentions to be dispositive.

Estate of Mintz v. Connecticut General Life Ins. Co., 905 N.E.2d 994, 998 (Ind. 2009) (some internal citations omitted). The party seeking summary judgment bears the burden of making a *prima facie* showing, by specifically designated evidence, that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Splittorff v. Fehn*, 810 N.E.2d 385 (Ind. Ct. App. 2004). Finally, the party appealing from a summary judgment decision bears the burden of persuading this court that the ruling was erroneous. *Id.* If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. *Trent v. National City Bank of Indiana*, 918 N.E.2d 646, 651 (Ind. Ct. App. 2009).

1. Legal Background

a. Undue Influence

McKinney argues that the designated evidence creates a genuine issue of material fact as to whether Brown exerted undue influence over her in the real estate transaction. Undue influence is essentially a question of fact that should rarely be disposed of via summary judgment. *Gast v. Hall*, 858 N.E.2d 154, 166 (Ind. Ct. App. 2006). It has been defined as the "exercise of sufficient control over the person, the validity of whose act is brought into question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised." *Carlson v. Warren*, 878 N.E.2d 844, 851 (Ind. Ct. App. 2007). "It may flow from the abuse of a confidential relationship in which 'confidence is reposed by one party in another with resulting superiority and

influence exercised by the other.'" *Barkwill v. Cornelia H. Barkwill Revocable Trust*, 902 N.E.2d 836, 839 (Ind. Ct. App. 2009).

> [Undue influence] is an intangible thing that only in the rarest instances is susceptible of what may be termed direct or positive proof. McCartney v. Rex, 127 Ind.App. 702, 706, 145 N.E.2d 400, 402 (1957) ("The difficulty is also enhanced by the fact universally recognized that he who seeks to use undue influence does so in privacy."). As such, undue influence may be proven by circumstantial evidence, and the only positive and direct proof required is of facts and circumstances from which undue influence may reasonably be inferred. "As circumstances tending in a slight degree to furnish ground for inference of fraud or undue influence, it is proper to consider the character of the proponents and beneficiaries, and interest or motive on their part to unduly influence the testator, and facts and surroundings giving them an opportunity to exercise such influence."

Gast, 858 N.E.2d at 166 (some internal citations omitted).

"[A] confidential relationship sufficient to allow for a successful undue influence claim may arise either as a matter of law or can be shown on the particular facts of a case."[8] *Carlson*, 878 N.E.2d at 851. In analyzing confidential relationships in fact, we employ the following analysis:

> Instead of creating a rebuttable presumption of undue influence, the burden in such a situation rests with the plaintiff to establish not only the existence of a confidential relationship in fact between the parties but also to prove that "the parties to the questioned transaction did not deal on terms of equality." The plaintiff "must prove either the dominant party dealt with superior knowledge of the matter derived from a fiduciary relationship, or dealt from a position of overpowering influence as to the subordinate party." Only when the plaintiff has shown this and that "the result was an unfair advantage to the dominant party" will the burden of proof shift to the defendant. The defendant then has an affirmative duty to show that "no deception was practiced, no undue influence was used, and all was fair, open, voluntary, and well understood."

[8] Neither party contends that the instant facts involve a confidential relationship as a matter of law.

Id. at 852 (internal citations omitted).

Here, we are tasked with determining if the designated evidence reveals that a genuine issue of material fact exists as to whether: (1) McKinney and Brown had a confidential relationship that gave rise to McKinney's sense of trust and confidence in Brown; (2) whether McKinney relied upon said sense of trust and confidence in the real estate transaction; (3) whether Brown gained "resulting superiority and influence"; and (4) whether Brown exerted said influence in a manner that "destroy[ed] [McKinney's] free agency and constrain[ed] h[er] to do what [s]he would not have done if such control had not been exercised," resulting in an unfair advantage to Brown. *Barkwill,* 902 N.E.2d at 839; *Carlson,* 878 N.E.2d at 851.

b. Conflict of Interest

Next, with regard to conflicts of interest in legal representation, Rule 1.7 of the Rules of Professional Conduct provides that

> a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) The representation of one client will be directly adverse to another client; or
>
> (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Prof. Cond. R. 1.7.

Here, we must determine whether the designated materials support the finding that genuine issues of material fact exist as to whether: (1) Brown and WLF had a pre-existing contractual relationship with Bennett and/or BB&C; (2) whether Brown encouraged McKinney to hire Bennett to represent her in the real property transaction to sell her farm house and farmland to Brown; and (3) whether Brown and Bennett's shared interests were inconsistent with Bennett's proper representation of McKinney's interests in the real property transaction.

2. McKinney's Designated Evidence

a. Susan Crum's Affidavit

In support of her contentions that she was mentally incompetent when she entered the underlying real estate transaction and that Brown knowingly took advantage of her physical vulnerability and diminished mental capacity, McKinney first designates the affidavit of her daughter, Susan. *See* Susan Crum Affidavit, Ex. 1 at 108.

Susan avers that Brown has a history of interfering in McKinney's household affairs as follows. After Mr. McKinney died, Susan and her brother, William, "saw to [McKinney's] needs as [McKinney] was incapable [of] run[ning] a household on her own." *Id*. McKinney decided to move into the farm house -- a decision opposed by her children as "potentially dangerous," "not in her best interest," "not a safe living arrangement situation," and impractical "for an 85 year old woman with [her] physical limitations" to maintain, "due to [her] health and mental state," and given living conditions that made the farm house unsuitable to McKinney's needs. *Id*. Susan avers

that over the objections of McKinney's children, "Brown assisted [ ] McKinney with moving back into the 'farm house'"; however, the move "was short-lived as [ ] McKinney was not able to properly care for herself" there. *Id*.

Susan also avers that McKinney has a history of memory loss and diminished capacity -- particularly regarding financial matters -- and attributes McKinney's prior estrangement from her children to said impairment. Specifically, she avers that McKinney "is often unaware of decisions she has made in the past, is easily confused and suffers from many physical and mental ailments," which she "suffered from at the time of [Mr. McKinney]'s death in November 2002." *Id*. at 110. She avers that in December 2001, McKinney liquidated several financial instruments, but "due to [her] memory loss and diminished capacity, [McKinney] was unable to remember this transaction and wrongly[9] accused [Susan] of theft." *Id*. at 109. She also avers that in July 2003, McKinney withdrew funds from a money market account, opened a certificate of deposit, deposited the balance into her checking account, and subsequently "cashed" the certificate of deposit; however, "the whereabouts of these funds" is unknown. *Id*.

In addition, Susan avers that McKinney has a history of making erratic judgments relating to the disposition of her estate and her choices of representatives to handle her estate and business matters. She avers that McKinney has previously appointed and revoked numerous powers of attorney, including the granting of a power of attorney to Brown in January 2005. She also avers that "[w]ithin nine months of that appointment,

[9] The addendum to Susan's affidavit contains the paper trail of McKinney's December 2001 transaction.

Ty Brown . . . had [McKinney] admitted to Wesley Manor Assisted Living," *id.* at 108; that McKinney "accused Ty Brown and his family of stealing jewelry and silverware from her residence while she resided in Wesley Manor," *id.* at 109; that McKinney was "very upset" and revoked Brown's power of attorney on October 13, 2005, (McKinney's app. 108); and that "on December 26, 2006, Ty Brown visited [ ] McKinney to discuss her Will," which "visit upset Mrs. McKinney greatly."[10] *Id*. at 108.

In their respective designated affidavits, as discussed below, Brown and Bennett deny that McKinney was of unsound mind during the negotiation, execution, or closing stages of the underlying real estate transaction. Rather, they argue that at all times relevant, McKinney displayed mental acuity, lucidity and indicated that her discounted sale of her farmhouse and farmland was "her own free and voluntary act." (McKinney's App. 56-57).

b. Appraisal

Next, McKinney argues that the significantly discounted purchase price raises genuine issues of material fact as to her mental competency with regard to the valuation of her real estate and whether Brown secured such favorable pricing terms by exercising undue influence over her. She designates the appraisal report (*see* Appraisal of Farm Real Estate, Ex. 3 at 128-163), which states the market value of McKinney's farm house

[10] In Bennett's affidavit, cited below, he avers that McKinney executed a will wherein she devised the residue of her estate to Brown. McKinney's designated materials include wills that McKinney executed on October 18, 2005; October 11, 2006; March 13, 2007; March 3, 2008. *See* Prior Wills Executed by Mary E. McKinney, Ex. 2 at 203-219.

and farmland as $456,000.00. Here, Brown and WLF purchased the farmhouse and farmland for $200,000.00 -- $256,000.00 below appraised value.

In their designated affidavits, Brown and Bennett counter that McKinney sold her property for less than appraised value because of her deep appreciation for the Brown family, her desire to disinherit her children and grandchildren, and her belief that Brown would prevent her children or grandchildren from gaining ownership of her real estate.

c. Brown's Farm Proposal

In further support of her claim that Brown exerted undue influence over her, McKinney designated the following written documentation of Brown's proposal to buy her farmhouse and farmland:

> Proposal to purchase house and farm:
>
> Estimated value of farm and house: $400,000[.]
>
> My offer is $200,000 for farm and house.
>
> I require that an attorney represent you. I can recommend one from the law firm that I will use.
>
> An attorney will represent me.
>
> It shall be written in the contract that you can live in the house of the rest of your lifetime rent-free. I will pay all utilities and will pay up to $1000 per year in repairs to [the] house.
>
> I would think that we could get this done within the next few weeks if you want.
>
> Let me know what you think and I can have a purchase agreement drawn up.

> Mary, <u>if you would want to sell for less I would buy for less</u>, but $200,000 is about the most I think I could afford for this year.
> Ty Brown

See Mary E. McKinney Farm Proposal Prepared by Ty Brown, Ex. 4 at 165 (emphasis added).

In summary, McKinney contends that her designated evidentiary materials raise genuine issues of material fact exist as to whether Brown exercised undue influence over her in the underlying real estate transaction," to-wit: (1) Brown's offer to pay $256,000.00 below the appraised value of her farmhouse and farmland; (2) Brown's insistence that she be represented by counsel and his offer to recommend an attorney to her "from the law firm that [he] w[ould] use" to represent his interests; (3) Brown's alleged referral to attorney Bennett for McKinney's legal representation; (4) Brown's proposal to close the transaction on an expedited basis; (5) Brown's offer to buy the real property for a price lower than $200,000.00, "if [McKinney] would want to sell for less"; and (6) Brown's failure to be represented by counsel in the transaction as he had initially indicated.[11] *Id.*

---

[11] The record indicates that on numerous occasions via email or other correspondence, Brown -- and not an attorney representing him -- communicated his preferences directly to Bennett. *See* November 16, 2004 letter from Bennett to McKinney, stating in pertinent part, the following:

> On November 5, Mr. Brown e-mailed me and said that he had spoken with you [McKinney] about an adjustment of the terms. He said the price was to be $200,000 for the farm and the farm house, and that you would keep the Bedford stone house. He also said that there would be no personal services included in the contract, but just a standard real estate purchase agreement. He also said he was willing to take the risk of entering into this transaction without [the psychiatric evaluation] and expressing his opinion on your competency because he (Ty Brown) knows full well how competent you are and thinks he can produce a number of witnesses to corroborate that if it becomes necessary.

(McKinney's App. 172).

d. Correspondences between Brown and Bennett

Next, McKinney designates the following correspondences to her from Bennett and Brown in support of her claims of undue influence, conflict of interest, and that during his representation of McKinney, Bennett took certain action that arguably furthered Brown's interests over her own. In a December 30, 2004 letter from Bennett to McKinney, Bennett advises McKinney to

> **write a letter to Ty Brown** explaining, in your own words, why you sold him the farm at a bargain price and why you are leaving things to him in your Will instead of leaving it to [McKinney's children,] Susan Crum and William John McKinney. You don't need to go into a lot of detail about what you told me, but pointing out that they have been inattentive to your needs and that they took you to court to try to meddle in your affairs would be helpful to explain the motivation for doing that you're doing, and even more important, to show that you are of sound mind as you make the decision and are not acting as Ty's [Brown's] puppet somehow. The letter probably should be sent after you have signed your Will, but it could be very helpful to Ty if your children come in and challenge your Will or challenge the bargain sale of real estate.
>
> Very truly yours,
>
> [BB&C]
>
> Roger Wm. Bennett

See Correspondence from Roger W. Bennett to Mary E. McKinney, Ex. 5 at 174.

McKinney also designated Brown's post-closing letter to her, wherein he directs her to "[w]rite a letter to [him]." *See* Ty Brown's "Write a Letter to Me," Ex. 8 at 181. In that letter, Brown suggests how McKinney should address questions pertaining to the transaction as follows:

> **Write a letter to me**. Might want to include some of the following information:
>
> Why did you sell it to me instead of giving family first chance?
>
> a.) family has not been considerate of my needs
> b.) family just wanted to boss me around
> c.) family was more interested in my money than me
> d.) Family refused to leave farm house when asked and had to go to court
> e.) I had known Ty since 1996 and he has always been honest with me.
> f.) [Mr. McKinney] thought it was time that [William] and his family leave the house and selling it to Ty was one way to see that that happened.
> g.) Since [Mr. McKinney]'s death my kids have NOT treated me at all like a mother. They have shown me no respect.
>
> Why did you sell it below market value?
>
> a.) I did not need the money.
> b.) As a way of paying Ty for his time spent to help me as my needs increase as I get older.
> c.) So that he would feel obligated to honor my wishes and not sell the farm to any of my family.
> d.) To help out a young farm family[.]

Id. (emphasis added).

McKinney also designated correspondence between Brown and Bennett, wherein Brown communicated information to Bennett that ordinarily would be conveyed by Brown's counsel and relayed McKinney's instructions regarding the structuring of the real estate transaction to Bennett, McKinney's purported counsel. The designated letters and/or emails provide as follows:

October 15, 2004 Email from Brown to Bennett

> An update: I did call [McKinney], she mentioned to me she had something from you and wanted me to look at it. I told her I preferred not to. I told her I did not want to be seen as influencing her decision. She said she would call you.
>
> We did move her to the farmhouse over one month ago. She said the house was too open for her and she did not feel safe walking around. The plans now are to get the Bedford [stone house] cleaned up and to move her back to the Bedford after harvest. My Mom has been running her around and helping her clean. I felt this might happen and [that] is why I suggested in the paper I gave you that she should live in the house of her choice.
>
> For her protection it might be best if she kept ownership of the Bedford [stone house] since she wants to move back and for her to just sell the farmhouse and the farm to me. She had also mentioned that to me a while back.
> A number that we had talked about a while back for the farmhouse and the farm was $100,000. If she were to keep ownership of one house I think that would make this deal less complicated.

See E-Mail from Ty Brown to Roger Bennett, Ex. 14 at 229.

Next, McKinney designated the following November 5, 2004 email from Brown to Bennett:

> Roger,
>
> Spoke with Mary this morning.
>
> Purchase price of $200,000 for farm and farm house. She will keep the Bedford [stone house]. No personal care services to be included in the contract. Just a standard purchase agreement. <u>I told her you would prepare a new agreement to reflect the changes</u> and would mail it to her for her review. $5000.00 earnest money is fine – <u>she showed me your letter</u>.
>
> She called the dotor [sic] yesterday. Was not in and she left a message.

> M[cKinney] asked how long this would take. I told her I suspected that things could go fairly quick now. I said it probably mostly depended on how soon she got into [sic] to see the doctor and how soon he/she got his/her report done. I said 30 days was a possibility to close. She said she wanted it done by the first of the year.
>
> <u>If you need her to call you to make the changes let me know</u>, but I said I could easily email the changes to you.
>
> Thanks
> Ty

See E-Mail from Ty Brown to Roger Bennett, Ex. 16 at 233.

Additionally, McKinney designated an internal BB&C memorandum, dated October 20, 2004, prepared by Bennett for McKinney's case file. The memorandum provides,

> I [Bennett] spoke to Mary McKinney [on] October 20. She was calling in response to my letter[s] of October 1 and October 15.
>
> <u>Since she and Ty Brown first came in</u>, M[cKinney] has had some cost overruns on what it cost to fix up the farmhouse. She's a little less aggressive on wanting to discount the farm at this point. She expressed willingness to undergo a psychological examination to prove her legal capacity, but I said we needed to work out the details of the agreement first.

(McKinney's App. 68) (emphasis added). Arguably, the above-emphasized language could be construed to mean that Brown referred McKinney to Bennett and accompanied her to the initial consultation with Bennett, a question of fact to be resolved by the trier of fact.

e. McKinney's interrogatory answers

Next, McKinney designates her answers to interrogatories, (McKinney's app. 259-270), in support of her claim that she was not mentally competent at the time she executed the underlying purchase agreement. Therein, McKinney responded as follows:

> **1. Regarding your contention that [Brown and WLF] had a conflict of interest because the[y] had a contractual agreement with the firm of [BB&C], yet they encouraged Mary McKinney to seek advice from the same law firm, please [state each fact which supports your claim]:**
>
> A: I remember that Ty Brown took me to see Mr. Bennett. I don't remember when or where we went, but I remember him taking me to see him.
>
> **2. Regarding your contention that Mary McKinney was incompetent at the time she executed the purchase agreement on November 23, 2004, please state [each fact, name and address of persons with knowledge, identify each document that shows any such fact]:**
>
> A: I don't remember anything about what happened on November 23, 2004.
>
> **3. Regarding your contention that Ty Brown exerted undue influence and pressure on Mary McKinney at the time she executed the purchase agreement on November 23, 2004, please state [any supporting facts, each act or statement by Brown and the date thereof that supports the claim, identify any persons having knowledge of any such fact or any documentation showing such a fact]:**
>
> A: It was not my idea to sell the farm, it was Ty's idea.
>
> **4. Regarding the attorney-client relationship between Mary McKinney and the firm of [BB&C], please state [when McKinney first became a client, identify any BB&C employee who has assisted or advised McKinney, legal projects done for McKinney by BB&C and dates thereof, identity of any documentation showing that BB&C worked for McKinney]:**

> A: Ty Brown took me to see Mr. Bennett. I don't remember when and I don't remember if I saw anyone else at that office or if any other legal work was done.
>
> * * *
>
> **17. [D]o you know of any other person who may have any knowledge of any facts relevant to the claims asserted by you in your Third-Party Complaint? If so, please state the name and address of each such person.**
>
> A: This whole deal was so undercover that no other person could have known about it.

See Mary E. McKinney's Answers to Interrogatories, Ex. 22 at 259, 260, 261, 262, 268.

f. Criminal Records of Mark Grammer and Steve Purple

As evidence of her diminished mental capacity, questionable judgment, and susceptibility to financial fraud, McKinney also designates court documents from criminal charges filed in October 2004 against two construction workers who worked on her farm house and manipulated her into paying them for construction services for which they had already received compensation from their employer. *See* Criminal Charges Against Mark Grammer and Steve Purple, Ex. 23 at 273-278.

g. Bennett's affidavit

In his designated affidavit, Bennett contradicted McKinney's claims of mental incompetence, undue influence, and conflict of interest. Specifically, he denies that his representation of McKinney was compromised by any pre-existing relationship with WLF or Brown, or that his representation of McKinney's interests fell below professional standards. Rather, he averred, after an extensive internal audit of BB&C's billing

statements, that BB&C has never represented any of the Browns or WLF. He also denies that Brown referred McKinney as a client and attributes the referral to his and McKinney's mutual acquaintance, Fred Thompson.[12] Bennett does not dispute that Brown did drive McKinney to a legal consultation at BB&C, but denies that Brown participated in his consultation with McKinney.

Bennett also averred that he never saw any indication that McKinney was mentally incompetent, "that it was Ms. McKinney's desire and intent to sell the property to [WLF and Mr. Brown] for less than its appraised value"; that

> McKinney wished for Mr. Brown to have the property for less than its appraised value because she liked and trusted him. Mr. Brown had been farming this property for Ms. McKinney as her tenant for several years. Mr. Brown had been kind to Ms. McKinney and had provided care and assistance to her. Ms. McKinney also told me that she had not wanted her children or other family members to have this property. Ms. McKinney did not appreciate the manner which she had been treated by her children. * * * Ms. McKinney was certainly mentally competent when she signed the purchase agreement to convey her real estate to Mr. Brown in November 2004. She had a clear understanding as to what property she owned, what property she intended to convey to Mr. Brown, what property she intended to retain for her own maintenance and use, and the reasons why she intended to sell the property to Mr. Brown for less than its appraised value. Ms. McKinney intended to sell the property to [WLF] and Ty Brown as her own free and voluntary act.

(McKinney's App. 56-57).

Bennett further averred that in recognition of the fact that McKinney's children would likely contest the transaction, he advised her to undergo a forensic psychiatric

[12] In McKinney's designated "Farm House Expenses Prepared by Ty Brown," Fred Thompson's name appears as one of the individuals paid by McKinney. *See* Farm House Expenses Prepared by Ty Brown, Ex. 21 at 257.

evaluation, and urged her to write a letter to Brown expressing her reasons for selling the property "at a bargain price." *Id*. at 57. Later, when McKinney decided to forgo the psychiatric evaluation, Bennett appeared at the closing to be able to attest in the future that McKinney was mentally competent at the time of execution of all documents. Bennett avers that his chief aim in representing McKinney was to "assist her in implementing her wishes with respect to the sale of the real estate and to protect her from her decision from [sic] later being challenged." *Id*. at 58.

h. Brown's affidavit

Likewise, in his designated affidavit, Brown contradicts McKinney's claims of mental incompetence, undue influence, and conflict of interest. Specifically, he avers that "McKinney offered to sell her entire property to [WLF] and [Brown] if [the Browns] would agree to provide certain services and assistance to her such as shoveling the snow at the farmhouse." (McKinney's App. 42). He avers that McKinney wanted to sell her real estate to him because of "how grateful she was for the many acts of service and kindness which I and my family had provided to her over the years"; because McKinney "was very upset at the manner which she had been treated by her children, Susan Crum and William McKinney"; because McKinney "did not want to have either her children or grandchildren to inherit her property after her death." *Id*. at 41. He further avers,

> 9. Mary McKinney told me that she wanted to sell the property to me for $200,000 even though she knew it was worth more. She told me that she wished for me to have the property even though I would be paying less than what the property was worth because she had appreciated the work which I had done for her over the years as her tenant farmer as well as the

> assistance which I had provided to her. Mary McKinney told me that she did not want her property to go to her children or grandchildren. She said I was the only person she could trust to make sure her property did not go to her children or grandchildren.

Id. at 44. He avers that he had no doubts as to McKinney's mental competency, but "Mr. Bennett and I both anticipated it would be likely that this transaction would be contested"; hence, Bennett's recommendation that McKinney be evaluated by a psychiatrist. *Id*. Brown avers that McKinney "told me she was concerned about the expense for having this evaluation" and

> told me that she would be willing to proceed with the evaluation if it was necessary to defeat any anticipated challenges to the sale of the property. I advised Ms. McKinney that I thought she had already done enough. I told her I was willing to assume the risk if I had to defend the transaction some day because I knew we should have a good case. There was no question that Ms. McKinney was mentally competent and that we would be able to produce many witnesses who could vouch for her mental competency if that ever became necessary.

Id. Brown avers, that McKinney "was clearly mentally competent at the time the purchase agreement was executed as well as at the time of the closing. She fully understood and appreciated the fact that she was selling the farm and farmhouse to [WLF] and me, that the purchase price was less than its appraised value, that she would be keeping ownership of the Bedford stone house . . . , and she did not want her children or grandchildren to have her property." *Id*. at 45. Lastly, he avers that neither he nor his family nor WLF has ever employed BB&C at any time.

2. Caselaw

In *Deckard v. Kleindorfer*, 29 N.E.2d 997 (Ind. Ct. App. 1940), we cited the well-settled premise that "if the appellant was a person of sound mind when she made the deed[,] she had a right to convey [her] land to [anyone] for any lawful consideration or as a gift if she so desired." Indiana law requires a grantor to "have sufficient mind and memory to comprehend the nature and extent of h[er] act and to understand the nature of the business in which [s]he is engaged and to exercise h[er] own will with reference thereto." 29 N.E.2d at 999. We further held that a person is not deemed to lack capacity to "make and execute a deed merely because of advanced years or by reason of physical infirmities unless such age and the infirmities resulting therefrom impair [his or her] mental faculties until he [or she] is unable to properly, intelligently, and fairly protect and preserve his [or her] property rights. *Id*. at 1000. We opined further,

> Contracts by which aged and infirm persons convey all or a substantial part of their property to others in consideration of an agreement for support, maintenance and care during their declining years are with practical uniformity recognized by the courts as constituting a class by themselves in matters pertaining to their interpretation and enforcement. There is in such transactions an element of confidence reposed by the old people in their grantee, sacred in its nature, a breach of which, and retention of the benefits, no court should tolerate by a refinement upon technical rules and principles of law. By the modern trend of authority these transactions are placed in a class by themselves, and enforced without reference to the form or phraseology of the writing by which they are expressed, or whether by the strict letter of the law a forfeiture of the estate is expressly provided for.
>
> * * *
>
> Mere improvidence is not enough . . . to compel a setting aside of the conveyance. Neither is lack of consideration alone sufficient cause for setting aside a deed. Neither is a combination of age, improvidence and

> lack of consideration sufficient grounds for relief in equity. There must also be present some wrongful act on the part of the grantee, such as fraud, or **undue influence**, to warrant the setting aside of such conveyance."

Id. (emphasis added) (internal citation omitted).

3. Analysis

Our review of the designated materials reveals the following: At the time of the underlying real estate transaction, eighty-five year old McKinney appears to have been estranged from her family, and deeply dependent upon the Browns for household support/property maintenance, care giving, and transportation. McKinney has a documented history of vulnerability to financial fraud, inability to manage her household and finances, and poor recall of her prior financial decisions. She developed a relationship of trust and confidence with Brown and his family.

From November 2003 through July 2004, and during McKinney's estrangement from her children, Brown acted in a supervisory capacity to oversee approximately $72,000.00 in repairs/renovations to McKinney's farm house. All associated costs were borne by McKinney. *See* Farm House Expenses Prepared by Ty Brown, Ex. 21 at 257. In late 2003 or early 2004, Brown engaged in discussions or offered to buy McKinney's farmhouse and farmland for a significantly-discounted price, well below fair market value. Ultimately, Brown purchased the property for $200,000.00, despite the appraisal value of over $450,000.00.

The designated materials further reveal the following: Brown offered to recommend an attorney to represent McKinney from the law firm that he intended to use

and drove McKinney to her first consultation with Bennett at BB&C. Brown dealt closely with Bennett during the structuring of the transaction, ostensibly eschewing his own legal representation and corresponding directly with Bennett. Moreover, Brown and Bennett may have communicated in a manner that was inconsistent with Bennett's representation and fiduciary obligations to McKinney. After Brown purchased the farmland and farm house at a price that was $256,000.00 below appraised value, Bennett and Brown anticipated that McKinney's children might challenge the transaction and each asked McKinney, after closing, to "write a letter" wherein she explained her reasons for selling the farmhouse and farmland to Brown and WLF at such a significant discount. (McKinney's App. 174, 180). Lastly, although Bennett and Brown later averred that McKinney was intent on discounting her real estate by over $250,000.00, the designated materials reveal that she apparently balked at the psychiatrist's relatively nominal fee and decided, with Brown's consent, to forgo the examination.

After a thorough review of the designated materials, we find that various assertions in McKinney's designated materials are contradicted by the sworn statements of Brown and Bennett. Specifically, McKinney's designated materials have given rise to genuine issues of material fact as to: (1) whether McKinney relied upon her relationship with the Browns in a manner that made her vulnerable to suggestion and/or pressure in the transaction; (2) whether Brown made the referral or otherwise arranged for McKinney to be represented by attorney Bennett; (3) why both Bennett and Brown prevailed upon

McKinney to write the explanatory letter; and (4) why McKinney sold her real property at such a significant discount that was over 50% below appraised value.

The trier of fact must ultimately resolve these conflicts in the evidence and questions of material fact. *See Dickerson v. Strand*, 904 N.E.2d 711, 714 (Ind. Ct. App. 2009) ("Where the evidence is in conflict, or undisputed facts lead to conflicting inferences, summary judgment should not be granted, even if it appears that the nonmovant will not succeed at trial."). We are bound "to ensure that a party was not improperly denied its day in court." *Mangold v. Ind. Dep't of Natural Resources,* 756 N.E.2d 970, 973 (Ind. 2001).

We therefore conclude that the trial court erred in granting summary judgment in favor of Brown and WLF. Accordingly, we reverse the trial court's grant of summary judgment and dismissal of McKinney's third-party complaint, and we remand for further proceedings.

Reversed and remanded.

BAKER, C.J., and CRONE, J., concur.