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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Judge

Appellate Case No. 2022-001665

James Marshall Shoemaker, III……………………………………………………………Appellant

v.

Lesley R. Moore, Esq. as Personal Representative and Trustee,
Edward Sloan Shoemaker and Jonathan Evans Shoemaker…………………………Respondents

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INITIAL BRIEF OF RESPONDENT

June 13, 2023

Respectfully submitted,

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STATEMENT OF ISSUES ON APPEAL

I. Is the appeal untimely?

II. Was Judge Jennings' separate order dated December 15, 2021 denying Appellant's motion to vacate the court's prior order granting summary judgment but recusing himself from future matters ever appealed and therefore properly heard by the Circuit Court?

III. Was Judge Jennings required to recuse himself based on the lack of evidence of judicial prejudice?

IV. Did the circuit court err in affirming summary judgment?

STATEMENT OF THE CASE

Appellant, Marshall Shoemaker, is the eldest of three sons of James M. (Shoe) Shoemaker, Jr. and Mary Hunter Sloan (Polly) Shoemaker. The decedent, James Marshall Shoemaker, Jr., was a long-time attorney in Greenville, South Carolina with Wyche Law Firm.

Appellant Marshall Shoemaker was estranged, off and on, from his parents and two brothers for decades. Before finishing high school, Appellant began abusing substances. After graduating from Princeton University, Appellant ultimately spent twenty-eight (28) days in a program at Marshall Hall Hospital in San Francisco, California, followed by six months in Henry Ohlhoff House, a half-way house. James Marshall Shoemaker Dep. 55:18-57:11. Appellant's obsession with alcohol and recovery pervaded his relationship with his parents and other family and strained their relationships for decades.

Finally, in May of 2018, Marshall's brother, Sloan Shoemaker, was making plans to fly to Atlanta to attend his nephew Peter's graduation (Peter is Appellant's son). Sloan planned to visit his parents in Greenville on the Sunday or Monday following the graduation events. During email communication regarding the plans, Appellant wrote to his brother Sloan "I am contemplating, strike that, I am going to rip your fucking heart out if you show up…I am going

to fucking kill you if you show up." James Marshall Shoemaker Dep. 117:25-118:14. Understandably, Sloan did not attend his nephew's graduation, instead flying to Atlanta and driving straight to visit his parents in Greenville who, of course, inquired as to the change of plans and why he had not attended the graduation. Sloan Shoemaker Dep. 20:8-21:1. His father asked about the email Appellant had sent and asked to see it. Sloan Shoemaker Dep. 25:1-12. Appellant admits in his deposition that "I think its common knowledge that my brother showing some e-mail communications to him really pissed him off and he took this action." James Marshall Shoemaker Dep. 28:21 – 29:25. Appellant also testified in his deposition that "Sloan's passing on e-mail, which would obviously distress my parents, to my parents, which were not addressed to my parents, **directly resulted in my father writing me out of his Will."** (emphasis added). James Marshall Shoemaker Dep. 49:21 – 50:3.

The Decedent passed away on July 14, 2018. Appellant initiated this action pro se on June 27, 2019, before eventually retaining counsel. A Motion for Summary Judgment was filed by Respondents and heard by Judge Clayton Jennings in probate court on April 7, 2021. Judge Jennings granted summary judgment on June 15, 2021. Appellant appealed to Circuit Court, and a hearing was held by Judge McCaslin on September 8, 2022. Judge McCaslin issued an order affirming summary judgment in favor of Respondents and dismissing Petitioner's appeal on October 28, 2022.

Appellant claims that he was left destitute by the Decedent, but in fact he was left approximately $900,000.00 in a lifetime trust with Appellant's two children as remainder beneficiaries. Moore Dep. 7:3-18. Both of Appellant's two children received an additional $250,000.00 each. James Marshall Shoemaker Dep. 112:18 – 113:9. Moore Dep. 7:3-18 and 20:25-21:7. Appellant also argues that his father always treated him and his two brothers

equally, but in reality, Marshall was disinherited previously, including one time approximately twenty-seven years ago. James Marshall Shoemaker Dep. 165:22 – 167:13. Moore Dep. 50:19-51:21. The relationship between the Decedent and Appellant has been strained since Appellant left for college in approximately 1978. After years of strained family relationships and heated conflicts, Appellant sent his brother an email threatening to kill him. James Marshall Shoemaker Dep. 117:25-118:14. That email was eventually seen by the Decedent and is believed to be the proverbial straw that broke the camel's back. Appellant describes his family in an email dated May 1, 2018: "The sad part is that the Shoemaker assholes that I grew up with have an incredible methodology of holding out the promise of love, and more importantly money, and never delivering. The only thing you assholes deliver is withholding and judgment and delusional scapegoating…you and Jonathan and mom and dad are a tribe of mean drunks. I highly recommend you stay the fuck away." James Marshall Shoemaker Dep. 109:23 – 111:7. There can be no more clear evidence of the strained and hostile relationship between Appellant and his family than Appellant's own words.

STANDARD OF REVIEW

In a probate appeal, the circuit court, court of appeals, or supreme court shall hear and determine the appeal according to the rules of law. S.C. Code Ann. § 62-1-308(i) (Supp. 2018). "[I]f the action is at law, the circuit court should uphold the findings of the probate court if there is any evidence to support them." In re Estate of Weeks, 329 S.C. 251, 260, 495 S.E.2d 454, 459 (Ct. App. 1997). Respondents submit that this is an action at law and as such, the findings of the probate court and circuit court must be upheld if there is any evidence to support them.

"In reviewing the grant of summary judgment motion, the [appellate court] applies the same standard as the trial court under Rule 56(c), SCRCP. Dawkins v. Fields, 354 S.C. 58, 59,

580 S.E.2d 433, 438-39 (2003). Rule 56(c), SCRCP states summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inference which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Grimsley v. S.C. Law Enf't Div., 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015). "Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" Id. (quoting Town of Hollywood v. Floyd, 403 S.C. 455, 477, 744 S.E.2d 161, 166 (2013)). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Bennett v. Inv'rs Title Ins. Co., 370 S.C. 578, 588-89, 635 S.E.2d 649, 654 (Ct. App. 2006). If the moving party is successful, the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial. Id.

ARGUMENT

I. Appellant failed to timely appeal and therefore the circuit court lacked jurisdiction to hear the appeal.

Pursuant to S.C. Code Ann. § 62-1-308(a), Appellant was required to file and serve his Notice of Appeal within ten (10) days after written notice of the underlying decision. The probate court filed its Order on December 15, 2021 and written notice was provided to the parties on December 16, 2021. Petitioner's Notice of Appeal was due by December 27, 2021, but was not filed until January 10, 2022. Since Petitioner failed to comply with the statute, his appeal must be dismissed.

The courts have repeatedly strictly construed the statutory ten-day requirement. "We decline Appellant's invitation to construe the statute in a manner inconsistent with its unambiguous terms. Our settled rules of statutory construction mandate the result we reach, for the statute is clear that the notice of appeal "must be filed" in the circuit court within the ten-day period. In re Estate of Cretzmeyer, 365 S.C. 12, 615 S.E.2d 116, 116 (2005) (citing Gary v. State, 347 S.C. 382, 387, 596 S.E.2d 39, 41 (2004)). Appellant's failure to comply with the ten-day requirement divested the circuit court of appellate jurisdiction. *See* State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004).

Appellant may not make an argument for failure to comply with S.C. App. Ct. R. 260 for the first time at the Appellate Court because he failed to make that argument to the circuit court. "It is axiomatic that an issue cannot be raised for the first time on appeal." State v. Haygood, 409 S.C. 420, 762 S.E.2d 69, 74 (Ct. App. 2014) (quoting State v. Cope, 405 S.C. 317, 338-339, 748 S.E.2d 194, 205 (2013)). "For an issue to be properly preserved it has to be raised and ruled on by the trial court." State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). "An argument advanced on appeal but not raised and ruled on below is not preserved." State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005). Appellant's counsel fails to acknowledge the fact that he did not raise the issue of compliance with Rule 260, SCACR or the "good cause analysis" with the circuit court. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." In re Estate of Combis, Appellate Case No. 2020-000021 (Ct. App. May 3, 2023) (quoting State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed

abandoned on appeal and therefore not presented for review." Id. (quoting Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)).

Neither Appellant's Statement of Issues on Appeal nor Apellant's arguments in the September 8, 2022 hearing in front of Judge McCaslin made any mention of South Carolina Appellate Court Rule 260 or a "good cause analysis." Judge McCaslin ruled that "(e)ven were the Court to overlook Petitioner's failure to properly perfect his appeal, Petitioner's appeal is also foreclosed on the merits." In re Estate of Shoemaker, S.C. Cir. Ct. Order dated Oct. 27, 2022.

Furthermore, Appellant is not denied due process by the fact that the clerk did not dismiss his appeal as untimely since the result of the clerk's "failure" was that Appellant's case was *not* dismissed as untimely, but rather was heard and ruled on by the circuit court. Rule 260, SCACR governs reinstatement of an appeal that has been dismissed as untimely for good cause shown. If Judge McCaslin was persuaded by Appellant's excuses for his late appeal, then she would have denied Respondent's motion to dismiss. Appellant wrongly confuses Judge McCaslin's ruling in Respondent's favor as a failure to consider the facts and applicable law. Additionally, Appellant could have moved for rehearing, reconsideration, or to for the appeal to be reinstated based on Appellant's failure to mention Rule 260, SCACR and the "good cause analysis." Appellant failed to raise these issues to the circuit court and is foreclosed for raising the issues for the first time at the court of appeals.

II. Appellant never appealed Judge Jennings' separate order dated December 15, 2021 denying Appellant's motion to vacate the court's prior order granting summary judgment but recusing himself from future matters ever appealed. Therefore, it was not properly heard by the Circuit Court.

In Appellant's statement of issues on appeal, Issue 1 is stated to be "[d]id the Lower Court err in refusing to vacate its Order while granting Appellant's Motion to Recuse made on

the same grounds?" However, Appellant's notice of appeal only attached an order dated December 15, 2021 and titled "Amended Order Granting Summary Judgment to Respondents." Judge Jennings issued a separate order titled "Order" also dated December 15, 2021, which denied Appellant's motion to vacate the court's prior order granting summary judgment but recusing himself from future matters. Appellant filed a second appeal on February 21, 2022, even more untimely than the appeal filed on January 10, 2022, but Appellant again only attached the December 15, 2021 Amended Order Granting Summary Judgment to Respondents, not the Order of December 15, 2021 addressing recusal.

The appeal filed on January 10, 2022 was filed under case number 2021-CP-23-02955 which originated when Appellant's prior attorney attempted to appeal the initial granting of summary judgment prior to a final order being issued by the probate court. The appeal filed on February 21, 2022 was given case number 2022-CP-23-00933 and appealed the final order of the probate court. While both case numbers were cited and considered by the circuit court, and Appellant's attorney confirmed he represented Appellant in both matters, the December 15, 2021 order denying Appellant's motion to vacate the court's prior order granting summary judgment but recusing himself in future matters **was never appealed**. Therefore, the December 15, 2021 order where Judge Jennings declined to retroactively recuse himself and vacate prior orders was not validly in front of the circuit court and is not validly in front of this court. No arguments relative to the issue of recusal should have been heard by the circuit court or should be considered by this court.

III. There is no evidence of judicial prejudice which required Judge Jennings to recuse himself.

Judge Jennings was a part-time probate court judge in Greenville County. In April of 2021, Judge Jennings agreed to serve as co-counsel in an unrelated matter with Stanley McLeod,

a law partner of Knox Haynsworth, attorney for Respondents. In re Estate of Shoemaker, S.C. Probate Ct. Order dated Dec. 15, 2021. Judge Jennings was a private practicing attorney while a part-time probate court judge. He agreed to assist a friend, Jeff Gaafary, in litigation involving him and a limited liability company in which he is a member. Id. As of December 15, 2021, the date of Judge Jennings order denying Appellant's motion to vacate prior Orders and recuse himself retroactively, Judge Jennings had never appeared in court, received a retainer or fee, billed or recorded any time for the representation, and the representation was not subject to a contingency fee agreement. Id.

The standard for recusal is judicial prejudice. "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014) (quoting Lyvers v. Lyvers, 280 S.C. 361, 367, 213 S.E.2d 590, 594). "Appellate courts accord great weight to the trial judge's assurance of his own impartiality. Id. "The party seeking disqualification must do **more than merely allege bias on the judge's behalf;** the party must present some evidence of judicial prejudice or bias." Simpson v. Simpson, 660 S.E.2d 274, 277, 377 S.C. 519 (Ct. App. 2008) (quoting Patel v. Patel, 359 S.C. 515, 599 S.E.2d 114 (2004). The law of South Carolina requires both a reasonable basis for questioning a judge's impartiality and evidence of actual prejudice.

Appellant confuses evidence of actual prejudice with his own unfounded standard of "any evidence." Appellant spends fifteen (15) pages of his brief merely alleging bias on the judge's behalf. Nothing in Appellant's brief amounts to **evidence** of actual prejudice or bias. "The fact that a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if

it is later held the judge committed error in his rulings." Mallet v. Mallett, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996).

The very definition of a part-time probate judge is a practicing attorney who is also a part-time probate judge. Part-time judges are contemplated by the South Carolina Appellate Court Rules and are explicitly allowed to practice law while also acting as a part-time judge. Rule 501 (B)-(D), SCACR. As a practicing attorney, one will inevitably have associations with other lawyers and law firms, sometimes on the same side and sometimes in opposition to one another. A mere association with another attorney or law firm does not rise to the level of evidence of actual prejudice or bias, especially in a case such as this where no money was received, no time was billed, and no court appearances occurred. *See* Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535 (2014). In this case, like in *Davis*, Appellant has failed to prove he suffered any prejudice due to Judge Jennings' failure to recuse himself. "Other than adverse rulings, Appellants have not presented any evidence of prejudice or bias against them." Id. The Record in this case supports all the rulings that were made both in probate and circuit court.

On February 1, 2022, Chief Justice Beatty issued an order excusing the entire Greenville County Probate Court from hearing the matters of James Shoemaker, Jr. and Polly Shoemaker. Appellant argues that conflicting the case out of Greenville County Probate Court means that Chief Justice Beatty agrees that there was a conflict or the appearance of impropriety. Appellant's interpretation of Chief Justice Beatty's order is nothing more than gross speculation with no support in the record whatsoever. Appellant goes on to state that Chief Justice Beatty's order is a "highly unusual injection into a case." This is again not grounded in fact or the record.

In addition, where recusal is not required, a judge is explicitly required to hear the summary judgment motion assigned to him. When disqualification is not required, the Code states "A judge **shall** hear and decide matters assigned to the judge…" Cannon 3(B)(1) of the Code of Judicial Conduct, Rule 501, SCACR. Judge Jennings made extensive findings regarding the issue of recusal and afforded Appellant the opportunity to show evidence of actual prejudice, which to this day Appellant has failed to produce. In re Estate of Shoemaker, S.C. Probate Ct. Order dated Dec. 15, 2021. Judge Jennings recused himself in the case going forward to avoid Appellant renewing his objection or filing additional motions for recusal to vacate prior Orders. Id. Judge Jennings also acknowledged that the parties have expended a great deal of time and expense on these proceedings, and it would be a colossal injustice to relitigate matters that were already decided impartially. Id.

IV. The circuit court properly affirmed summary judgment. The affidavit of Dr. Hughes is fatally defective because it fails to state that the Decedent lacked testamentary capacity and therefore does not create a genuine issue of material fact.

a. The Decedent had the requisite testamentary capacity on June 24, 2018 when the Will and Trust were executed.

Appellant relies primarily on an affidavit of Dr. Thomas Hughes to attempt to establish a question of material fact related to the alleged mental capacity of the Decedent, James Marshall Shoemaker, Jr. The affidavit was submitted to opposing counsel just one day prior to the summary judgment hearing, in violation of Rule 5(d), SCRCP. Probate Ct. Tr. 4 (April 7, 2021). The affidavit was not notarized but Appellant's prior attorney, John Blincow, represented that he saw Dr. Hughes execute the affidavit and Mr. Blincow notarized the affidavit after the hearing. Id. at 12, 24. Not only was Rule 5(d), SCRCP violated by producing the affidavit the night before the hearing, but Rule 33, SCRCP was also violated when Appellant failed to uphold his

continuing duty to answer a standard interrogatory, in this case the one asking the party to list any expert witness whom the party proposes to use as a witness. Id. at 25. Bensch v. Davidson, 354 S.C. 173, 182, 580 S.E.2d 128, 132 (2003). The last minute filing of the unnotarized affidavit prejudiced the Respondents who were never able to depose Dr. Hughes.

In addition to the untimeliness and inadmissibility of the affidavit of Dr. Hughes, the affidavit still does not create a material issue of fact. Dr. Hughes affidavit is fatally defective because it fails to state that Decedent lacked testamentary capacity at **any time**. Dr. Hughes does not state an opinion, to a reasonable degree of medical certainty, that Decedent did not possess the requisite mental capacity to execute a will, either on the day of execution or on any day for that matter. Dr. Hughes reviewed some of the Decedent's medical records around the time of the execution of his Will and Trust. However, Dr. Hughes does not conclude that the Decedent lacked testamentary capacity in that he was unaware of his estate, the objects of his affection, and to whom he wished to give his property, which is the test for mental capacity set forth under *Hellams v. Ross*. Hellams v. Ross, 268 S.C. 284, 288, 233 S.E.2d 98 (1977). By never affirmatively stating that Decedent lacked mental capacity to execute the will, Dr. Hughes' affidavit has not raised a genuine issue of material fact. Dr. Hughes affidavit merely noted that it was his opinion that the Decedent had "some level of cognitive impairment." Probate Ct. Tr. 14 (April 7, 2021). Dr. Hughes fails to opine that Decedent lacked testamentary capacity at any point in time, much less on June 24, 2018, the date of the execution of the Will and Trust at issue.

By contrast to the vague affidavit by Dr. Hughes, Respondents submitted seven (7) affidavits establishing Decedent had testamentary capacity on June 24, 2018. The record is replete with personal knowledge evidence as to the competency of the Decedent at the time he executed his testamentary documents. In re Estate of Shoemaker, S.C. Cir. Ct. Order dated Oct.

27, 2022 at 6. The Decedent initiated the changes to his estate plan by calling his former law partner and long-time friend to revise his Will and Trust, Lesley Moore. Moore Dep. 42:18-22, 43:9-44:19. Ms. Moore met with the Decedent on June 28, 2018, prepared drafts based on the Decedent's instructions, and later supervised the execution of those documents. Moore Dep. 39:21-41:15. The Decedent also consulted with his long-time accountant regarding the changes to his estate plan. This long time accountant, Martha Louise Ramage Lewis, spoke with the Decedent on June 24, 2018, the day the Will and Trust were executed and he told her of his wishes to remove his son, the Appellant, from his estate plan. Lewis Aff. 3. Ms. Lewis saw the Decedent again at his home on July 12, 2018, and she noted that he was "totally lucid" and he confirmed to her that "Marshall is out." Id. In addition, both witnesses to the execution of the Decedent's Will and Trust, Amos A. Workman and Carl F. Muller, confirm that the Decedent possessed testamentary capacity on June 24, 2018. Workman Aff. 2. Muller Aff. 3. Both Mr. Workman and Mr. Muller are current or retired practicing attorneys and well aware of the requirements of testamentary capacity. The Respondents also submitted an affidavit from Dr. Grover, the Decedent's personal physician. Dr. Grover's affidavit confirmed that he could state unequivocally that the Decedent possessed testamentary capacity. Grover Aff. 3.

Appellant spends a lot of time arguing that the circuit court incorrectly discounted Dr. Hughes affidavit because Dr. Hughes never personally examined the Decedent. However, Appellant misunderstands the circuit court's point. The circuit court is merely pointing out that Dr. Hughes only reviewed medical records, but more importantly Dr. Hughes never affirmatively opines that the Decedent lacked testamentary capacity at any time. Dr. Hughes only states that he likely had cognitive impairment and he even states "that a factfinder will need to consider all the evidence…". The circuit court goes on to discuss what else Dr. Hughes could have done to

formulate a concrete opinion: speak with the Decedent's physician, speak with witnesses to the changes of his estate plan or the witnesses to the execution of the Will and Trust. By contrast, the affidavits submitted by Respondents are the people who were intimately involved with the Decedent, who worked with him, were familiar with and assisted in his estate plans over decades and were actually present at the time of the execution of the Will and Trust and have personal knowledge of his testamentary capacity.

b. There is no evidence whatsoever that the Decedent was subject to undue influence.

Appellant failed to provide any evidence or establish any material issue of fact whatsoever regarding undue influence. Appellant makes a baseless claim that his two brothers and mother unduly influenced the Decedent. While the two brothers and mother did receive more than Appellant under the Will and Trust, that fact alone is insufficient to prove undue influence.

> The fact alone that the testator disposed of property contrary to what others usually consider fair is not sufficient to declare his will void. This principle is thus stated in Matheson v. Matheson, 125 S.C. 165, 171, 118 S.E. 312, 313: "The right to make a will carries with it the right to disregard what the world considers a fair disposition of property. In the case of Lee's Heirs v. Lee's Executors, 4 McCord 183, 17 Am. Dec. 722, we find: 'That a will is unjust to one's relations is no legal reason that it should be considered an irrational act. The law puts no restrictions upon a man's right to dispose of his property in any way his partialities, or pride, or caprice may prompt him.'"

Hellams v. Ross, 268 S.C. 284, 290, 233 S.E.2d 98 (1977).

"In order for the will to be void due to undue influence, '[a] contestant must show that the influence was brought directly to bear upon the testamentary act.'" Russell v. Wachovia Bank N.A., 353 S.C. 208, 219, 578 S.E.2d 329, 335 (2003) (quoting Mock v. Dowling, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976)). "A mere showing of opportunity or motive does not create an issue of fact regarding undue influence." In re Estate of Cumbee, 333 S.C. 664, 671, 511 S.E.2d 390, 394 (Ct. App. 1999). To send the issue of undue influence to the jury, the contestant must show more than general influence – "there [must be] additional evidence that such influence was actually utilized." Howard v. Nasser, 364 S.C. 279, 289, 613 S.E.2d 64, 69 (Ct. App. 2005) (quoting *Mock*, 266 S.C. at 277, 222 S.E.2d at 774).

"The influence necessary to void a will must amount to force and coercion." Wilson v. Dallas, 403 S.C. 411, 437, 743 S.E.2d 746, 760 (2013). "The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf." Russell, 353 S.C. at 217, 578 S.E.2d at 333. "In order to void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker's exercise of judgment and free choice." In re Estate of Cumbee, 333 S.C. at 671, 511 S.E.2d at 394.

As to undue influence, Petitioner failed to provide any evidence or establish any material issue of fact whatsoever. In fact, Appellant was excluded from the Wills and Trusts of his parents at various times throughout his life. Appellant has been estranged off and on from his parents since leaving for college in 1978. Therefore, the exclusion of Appellant from the most recent testamentary documents does not suggest undue influence or lack of capacity. The Decedent's final changes to his estate plan were not the result of undue influence or lack of capacity, but rather were the result of decades of discord and turmoil in the family caused by Appellant. Additionally, Appellant readily admits he has no information concerning his father's

capacity **at the time of the transaction**. James Marshall Shoemaker Dep. 26:7-24. Appellant was not present that day, or even a week before. Id. at 127: 8-16. Appellant had not spoken with the witnesses to the will or anyone else who was present at the time of the execution. Id. at 127:17-128:6.

CONCLUSION

Appellant failed to timely appeal pursuant to S.C. Code Ann. § 62-1-308(a) and therefore his appeal should be dismissed. In addition, Appellant failed to appeal Judge Jennings' separate order dated December 15, 2021 which affirmed summary judgment but recused himself from future matters. Since this order was never appealed, it was not properly heard by the circuit court and has been abandoned on appeal. Even if Appellant had properly preserved this issue for appeal, there is no evidence of judicial prejudice which required Judge Jennings to recuse himself. Appellant is required to do more than merely allege bias on the judge's behalf and nothing in the record or Appellant's brief amounts to evidence of actual prejudice or bias.

Even though the appeal to circuit court was not timely, the circuit court still ruled on the merits of the case and affirmed Judge Jennings' grant of summary judgment. The record clearly establishes that the Decedent had the requisite testamentary capacity on June 24, 2018 when his Will and Trust were executed. Appellant's only evidence was an untimely and inadmissible affidavit of Dr. Hughes which does not affirmatively state that the Decedent lacked testamentary capacity at any time, much less at the time the Will and Trust were executed. Dr. Hughes fails to opine that the Decedent was unaware of his estate, the objects of his affection, and to whom he wished to give his property. Furthermore, there is no evidence whatsoever that the Decedent was subject to undue influence.

The Respondents have attempted to close their late father's estate in accordance with his wishes for over four years now and have expended a great deal of time and expense on these proceedings. It would be a colossal injustice to relitigate matters that were already decided impartially. Appellant continues to argue the same issues when those issues have already twice been decided against him. There is also a separate pending action wherein Appellant is asserting the same baseless claims against his late mother's estate, illustrating the lengths Appellant will go. The court should summarily end such conduct and fully affirm the previous orders of the probate court and circuit court dismissing the appeal.

June 13, 2023

Respectfully submitted,

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