

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Comon Pleas

Maite Murphy, Circuit Court Judge

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Case No.: 2022-CP-40-05570  
Appellate Case No. : 2023-001423

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APR 01 2024  
SC Court of Appeals

Alisha Baity, Aaron Baity, and Nolan Ambrose Baity.....Appellants,

v.

Geraldine Vanessa Myers-Moore.....Respondent.

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FINAL BRIEF OF RESPONDENT

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## **STATEMENT OF THE ISSUE ON APPEAL**

**BECAUSE APPELLANTS FAILED TO SERVE A COPY OF THE FILED AND DATE-STAMPED SUMMONS AND PETITION WITHIN THE STATUTE OF LIMITATIONS, THE CIRCUIT COURT DID NOT ERR WHEN IT AFFIRMED THE DECISION OF THE PROBATE COURT HOLDING THAT APPELLANTS FAILED TO PROPERLY COMMENCE THE ACTION AND DISMISSING THE ACTION WITH PREJUDICE.**

### **STATEMENT OF THE CASE/FACTS (Proceedings Below)**

Decedent Isaac Eldridge Julian (Decedent) died on February 6, 2021. On March 26, 2021, Respondent Geraldine Myers-Moore (Respondent) applied for informal appointment and probate of Decedent's will, executed on June 13, 2014, and naming Respondent as Personal Representative (PR). The probate court appointed Respondent as PR on April 19, 2021. (R.p.12, 09/26/22 Order)

On April 22, 2021, Appellant Alisha Baity, simultaneously mailed to the probate court and Respondent's counsel an un-filed "Answer to the Informal Application and Petition to Challenge Validity of Will and For Appointment of Special Administrator" (R.p.187, Answer and Petition) The probate court received this Answer and Petition on April 26, 2021, and on April 28, 2021, the court notified Appellant's counsel that "[t]here is no pending action for this case. The estate was opened as an informal application. If you are challenging the Will, you must file a Summons and petition (along with the required filing fee of \$150.00)." (R.p.201, E-mail from Probate Court)

By cover letter dated April 28, 2021, Appellant mailed to the court and Respondent's counsel an un-filed copy of a "Summons and Petition to Challenge Validity of Will and for Appointment of Special Administrator and Answer to Petition for Appointment of Geraldine Vanessa Myers-Moore (Summons and Petition)." (R.p.193) By cover letter dated May 5, 2021, Appellant mailed to the court and Respondent's counsel an un-filed amended copy of the Summons and Petition correcting the scrivener's error of the spelling of Appellant's name on the

Summons. (R.p.202) The court filed the Appellant's amended Summons and Petition on May 10, 2021. (R.p.210)

On June 10, 2021, Respondent moved to dismiss the May 10, 2021 amended Summons and Petition pursuant to S.C.R.C.P. 12(b)(4), (5), and (6), arguing, among other things, that Appellant failed to properly commence the action because Appellant served the Summons and Petition before filing and attempted to serve the un-filed amended Summons and Petition on Respondent's counsel without said counsel's consent to accept service on behalf of Respondent. (R.p.216)

On July 22, 2021, Appellant made a fourth attempt to serve Respondent via certified mail with a filed copy of the May 10, 2021 amended Summons and Petition mailed to Respondent's counsel. (R.p.215) However, Appellant failed to restrict delivery to the addressee, failed to obtain the consent of Respondent's counsel to accept service on Respondent's behalf, and failed to serve Respondent directly. Appellant filed an amended motion to dismiss on July 19, 2021, and then again on August 26, 2021. (R. pp 223-238)

On September 7, 2021, Appellant attempted to serve Respondent for the fifth time by personal delivery of a copy of the filed May 10, 2021 amended Summons and Petition to Respondent's counsel, again without obtaining the consent of Respondent's counsel and without serving Respondent directly.

The Probate Court heard Respondent's motion to dismiss on September 22, 2021. By order dated October 27, 2021, the probate court dismissed Appellant's Petition without prejudice due to (1) insufficiency of service of process, and (2) failure to state a cause of action. (R.p.17)

On January 24, 2022, Appellant Alisha Baity, now joined by her siblings (Appellants), mailed to the probate court for filing a new Summons and Petition to Challenge Validity of Will and for Appointment of Special Administrator and Answer to Petition for Appointment of

Geraldine Vanessa Myers-Moore (2022 Petition) along with filing fees. (R.pp.86, 103, 159) Appellants attached to the un-filed 2022 Petition their counsel's sworn Proof of Delivery attesting that they served a copy of the (un-filed) 2022 Petition on January 21, 2022 on Respondent's counsel by certified mail and on Respondent by personal delivery. (R.pp.100-101, 115-116) Respondent's counsel received the mailed copy of the un-filed 2022 Petition on January 28, 2022. The probate court received and filed the un-filed 2022 Petition on January 28, 2022. Respondent received the un-filed copy of the 2022 Petition delivered by the process server three days later on January 31, 2022. (R.p.156) Appellants never served a copy of the filed 2022 Petition on Respondent nor on Respondent's counsel. (Br. App. p.4)

Respondent again moved to dismiss the action pursuant to SCRCP 12(b)(4) and 12(b)(5) for insufficiency of process and service of process, respectively, and 12(b)(6) for failure to state a cause of action. (R.p.118) Respondent again argued that Appellants failed to properly commence the action because they failed to serve Respondent with a copy of the filed 2022 Petition. The Probate Court heard the motion to dismiss on August 17, 2022. (R. pp. 251-271, Transcript) Following arguments on the service issue, the Probate Court dismissed the action with prejudice, and issued its order on September 26, 2022, holding that Appellants failed to properly commence the action because they failed to timely serve Appellant with a copy of the filed and date-stamped 2022 Petition. (R.p.12) The order further held that a new action was time-barred because Appellants failed to serve the 2022 Summons and Petition before the statute of limitations expired on February 6, 2022 (i.e., one year from the decedent's death, pursuant to §62-3-108(A)(2)(c) of the South Carolina Code). (R.p.15, 9/26/2022 Order)

Appellant timely moved for reconsideration. The Probate Court denied the motion for reconsideration by Order dated October 14, 2022. (R.p.11) Appellants appealed to the Circuit

Court, which affirmed the Probate Court by Order dated September 1, 2023. (R.p.l) This appeal followed.

### STANDARD OF REVIEW

“An appellate court’s determination of the standard of review for matters originating in the probate court is controlled by whether the cause of action is at law or in equity.” *Rider v. Estate of Rider (In re Estate of Rider)*, 407 S.C. 386, 391, 756 S.E.2d 136, 139 (2014) “An action to contest a will is an action at law. If a proceeding in the probate court is in the nature of an action at law, review by this court extends merely to the correction of legal errors. In such cases, this [c]ourt may not disturb the probate [court’s] findings of fact unless a review of the record discloses there is no evidence to support them. *Smith v. Lawton*, 435 S.C. 179, 186, 865 S.E.2d 782, 786 (Ct. App. 2021), reh’g denied (Nov. 19, 2021), cert. denied (Sept. 7, 2022) (quotations and citations omitted); *Golini v. Bolton*, 326 S.C. 333, 339, 482 S.E.2d 784, 787 (Ct. App. 1997) (citations omitted). Thus, “[a] finding of fact by the . . . Judge as to service will be sustained unless it is totally unsupported by the evidence.” *Forbes v. Kingan & Co.*, 174 S.C. 24, 31, 176 S.E. 880, 882 (1934).

### ARGUMENT

#### **The Circuit Court Did Not Err When It Affirmed the Probate Court’s September 26, 2022 “Order Dismissing Petition To Challenge Validity Of Will” Holding That Appellants Failed to Properly Commence the Action Because They Failed to Serve a Copy of the Filed and Date-Stamped 2022 Summons and Petition**

Respondent challenged Appellants’ process and service pursuant to S. C. R. Civ. P 12(b) (4) and 12(b)(5), arguing that Appellants failed to properly commence this action because (1) Appellants’ process server delivered to her a copy of an un-filed summons and petition which did not bear the recording date and stamp of the clerk of court; and, (2) Petitioners failed to subsequently serve her with a copy of the filed 2022 Summons and Petition before the expiration of the statute of limitations.

The Circuit Court affirmed the Probate Court's decision and dismissed Appellants' will contest action. In reaching its decision, the Circuit Court held that:

"In probate court, "formal proceedings means actions commenced by the filing of a summons and petition with the probate court and service of the summons and petition upon the interested persons. Formal proceedings are governed by and subject to the rules of civil procedure adopted for circuit courts and other rules of procedure in this title." SC Code Ann. §62-1-201(17). "A formal proceeding is a "civil action" as defined in Rule 2, SCRCPP, and must be commenced as provided in Rule 3, SCRCPP." SC Code Ann. §62-1-304.

Rule 3, SCRCPP, provides that "[a] civil action is commenced when the summons and complaint are filed with the clerk of court if (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Rule 5(d) SCRCPP, provides that "the summons and complaint shall be filed before service... Upon failure to serve the summons and complaint, the action may be dismissed by the court on the court's own initiative or upon application of any party.

Thus, to properly commence a formal proceeding in probate court, the plaintiff must first file the summons and complaint with the court **and must also serve a copy of the filed pleadings on the defendant.** Rule 5(d), SCRCPP." (R.p.5, 9/1/2023 Order)

**(Emphasis added.)** Appellants argue in their Brief that the lower courts erred in dismissing the action because "serving a filed copy of the Summons and Petition is not required by South Carolina Rules of Procedure, Rule 5(d), or any other rule of civil procedure or the relevant case law." (App. Br. p.4-5) Appellants contend that they complied with all relevant rules, including Rules (3), (4), and 5(d), SCRCPP, and the court therefore committed reversible error.

It is well settled that "[t]he construction of a statute is a judicial function and responsibility." *Anderson v. S.C. Election Commission*, 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012). If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning.

*Williams v. Williams*, 436 S.C. 550, 595, 873 S.E.2d 785, 810 (Ct. App. 2022) (quotations and citation omitted).

In reaching their decision, the lower courts cited *McLain v. Ingram*, 314 S.C. 359, 360, 444 S.E. 2d 512, 513 (1994), quoting the South Carolina Supreme Court, and stating:

The language of Rule 5(d) is clear: the summons and complaint must be filed prior to **their** service. Here, service preceded filing and thus this action was not properly commenced before expiration of the statute of limitations. We recognize the harsh result reached in this case, and take this opportunity to remind practitioners that the interrelationships between various court rules are not always readily apparent.

**(Emphasis added.)** The Circuit Court held that “[t]he Supreme Court’s holding in *McClain* that the summons and complaint must be filed prior to *‘their’* service clearly refers to a filed summons and complaint, and supports Respondent’s position that a plaintiff must serve a copy of the filed summons and complaint to properly commence an action.” (R.p.7) *See*, James F. Flanagan, *South Carolina Civil Procedure*, at 10 (4th ed. 2020). (“A civil action in South Carolina begins with the filing and service of a summons and complaint, and Rule 5(d) requires the filing of the summons and complaint with the clerk of court **before serving them** on the defendant.”) **(Emphasis added)**.

The Probate Court, after addressing the interrelationship between the applicable rules of procedure, reached the only reasonable conclusion, i.e., that to properly commence a formal proceeding in probate court, just as in circuit court, the Appellant must first file the Summons and Petition with the court and must also serve a copy of the filed pleadings on the Respondent. *See*, SC Code Ann. §62-1-201(17) (“Formal proceedings are governed by and subject to the rules of civil procedure adopted for circuit courts and other rules of procedure in this title.”). The Probate Court stated at the hearing, “it’s so basic this is silly.” (R. p.262, lines 5-6, Tr., p12)

It is undisputed that Appellants served copies of the un-filed 2022 Summons and Petition on Respondent and on Respondent’s counsel without consent, and failed to ever serve copies of the filed 2022 Petition. As stated by the probate court judge “[t]his is such a simple thing. You

clock it in, you then serve it... That is a technical piece that is basic in our law that should not even be a mistake—that kind of mistake should not be made at this point on [Appellant's] fifth filing... This is not a new issue..." (R. p.258, lines 4-6, 16-19, R.p.261, lines 22-23)

Appellants further argue, without any authority, that the informal appointment process of the probate court distinguishes the formal probate court requirements from the circuit court rules because formal probate proceedings use the same case number as the associated informal proceeding. Therefore, Appellant was not required to serve a copy of the filed 2022 Summons and Petition because the un-filed copy contained all the requirements of Rule 4(b), including the case number. The Circuit Court held that "[t]his issue is not preserved for review by this Court because it was neither raised to nor ruled upon by the Probate Court... However, even if the issue was properly before this Court, it would have no bearing on this Court's decision affirming the Order of the Probate Court." (R.p.8, 09/01/2023 Order) Appellants' brief does not contest this issue preservation determination.

Accordingly, the lower court correctly found and concluded that Appellants failed to serve Respondent with a copy of the filed 2022 Summons and Petition containing the official court stamp and thereby failed to properly commence their action before the expiration of the statute of limitations or within 120 days of filing the Summons and Complaint.

### **CONCLUSION**

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted,

By: /s/ Joyce Farr Cheeks

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**Dated: April 1, 2024**

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CERTIFICATE OF COUNSEL

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

April 1, 2024

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