STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court
Judge for Common Pleas

Appellate Case No. 2023-001842

Dorthea Ryles.....Appellant,

v.

Leon Ryles, Willie N. Ryles, and Theresa Williams, Respondents.....Respondents.
IN RE: The Estate of Edith W. Ryles, Estate File: 2018-ES-21-00899

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

On August 10, 2018, Edith W. Ryles died leaving a purported Will and Testament dated December 15, 2017, and naming Dorthea Ryles as Personal Representative of her Estate.

The Respondent Leon Ryles, by way of his Attorney, Brown Johnson, filed a Summons and Complaint regarding the Estate of Edith Ryles against Dorthea Ryles on April 30, 2019. The complaint alleged that the Decedent was in poor health, both mentally and physically, and that, due to her sickness and infirmities, she was in a condition of great mental weakness and unable to understand and comprehend both a June 29, 2016 Power of Attorney, and purported Last Will and Testament dated December 15, 2017. The Complaint alleged that the Decedent lacked sufficient mental capacity to execute a will and power of attorney. Additionally, the Complaint claimed that through undue influence by Appellant, the Decedent executed the Will and earlier Power of Attorney on June 29, 2016.

The Appellant, by way of her Attorney, Charlie Blake, filed an Answer on May 17, 2019 with Florence County Probate Court. Brown Johnson, Attorney for Respondent Leon Ryles, then filed a Notice and Motion to Amend Complaint and a Proposed Amended Summons and Amended Complaint on February 3, 2020 to add as Plaintiffs the current Respondents Willie N. Ryles and Theresa Williams. In the Amended Complaint, the Respondents requested that (1) the Will be declared void and be set aside and that the title to the property in question be distributed to the intestate heirs of the Decedent; (2) the Power of Attorney be set aside and the title to all property both real and personal, be distributed to the intestate heirs of the Decedent; (3) the Respondents Leon Ryles, Willie Ryles, and Theresa Williams, be awarded actual damages, punitive damages, attorney's fees, and the costs of this action; (4) and all other relief that is just and proper. The

Appellant failed to respond to Respondents' Second Request for Admissions regarding her spending which was filed in March 2020. The Probate Court deemed these to be admitted.

Appellant's Attorney then filed an Affidavit on June 25, 2020 wherein the Appellant denied all claims and stated the Appellant was not interested in Mediation nor a settlement. On July 10, 2020, Respondents' Attorney Brown Johnson filed an Affidavit on his behalf to verify the Affidavit of Appellant's Attorney. On May 14, 2021, Proof of ADR was filed by Attorney for the Respondents, wherein Mediation had been held on May 14, 2021 but it ended in an impasse.

A Final Hearing/Trial was held on July 22, 2021 in front of the Honorable Judge Jesse Cartrette of the Florence County Probate Court. The Court issued its Order on November 2, 2021, holding that the Last Will and Testament and Power of Attorney of Edith Ryles are set aside based on the evidence and lay testimony presented to the Court proving that Edith Rules lacked the necessary capacity to execute such documents. The Court found that Dorthea Ryles exercised undue influence over her mother to execute both these documents and that she breached her fiduciary duties regarding the funds of the Estate of Edith Ryles in the amount of $212,866.12. The Probate Court further ordered that Ms. Dorthea Ryles pay damages in the above amount to Respondents, as well as attorney's fees and court costs in the amount of $25,987.24.

Appellant timely filed her Notice of Appeal on November 11, 2021 by way of her counsel, James R. Snell, Jr.

STATEMENT OF FACTS

This matter includes an action alleging that Edith Ryles, deceased, was mentally incompetent when she executed both a power of attorney and will. It is also alleged that Dorthea Ryles procured both the will and power of attorney by undue influence. Under the purported will, the one child who procured the will, Dorthea Ryles, inherited virtually her mother's entire estate

consisting of two (2) properties in New Jersey (including a home) and three (3) bank accounts. The other children were left with virtually nothing. In addition, through the contested POA, Dorthea (Appellant herein) misappropriated her mother's money in breach of her fiduciary duties, and in general breached her fiduciary duties to the decedent.

The Probate Court found that the will and power of attorney were invalid. The Probate Court found that the decedent did not have the mental capacity to execute either document. Additionally, the Probate Court found Appellant Dorthea unduly influenced the decedent in the execution of both the power of attorney and will. The Appellant withdrew and spent $105,373.39 from a money market account for her own purposes. Using her POA, the Appellant spent an additional $42,805.07 for her personal expenses. Appellant also made cash withdrawals from the decedent's accounts totaling $48,750.29, and in some not even bothering to use the pretext of the power of attorney. The Appellant further withdrew $15,937.42 in ATM withdrawals from decedent's account. Appellant has failed to account for this money, and therefore, these amounts should be awarded in actual damages.

Edith Ryles died at the age of 88. For the last several years of her life, she was in poor and failing health. Edith had lived in Florence for approximately ten years after she and her husband, who died in 2010, moved from New Jersey to Florence. Two of Edith's five children, Willie Ryles and Theresa Williams, lived in Florence and helped their mother with her case and the management of her affairs. By 2016, Edith Ryles was no longer driving a car and needed assistance with day-to-day activities. She could no longer take care of her home, prepare meals, or manage her finances. Edith was often confused to the point of believing her husband who died in 2010 was still alive, and she thought she had a new baby.

Appellant Dorthea Ryles is a retired schoolteacher who lived in New Jersey during most of the time at issue. Dorthea essentially admitted that Willie Ryles and Theresa Williams did the majority of the care for Edith. Tr-76, 78. Dorthea came to Florence and stayed with her mother from time to time and did assist with Edith's care. However, in 2016, Appellant took over her mother's finances and misappropriated her money. Appellant did not inform her siblings she planned to have her mother sign a POA appointing Dorthea as her mother's attorney-in-fact giving Respondent full access to her mother's finances (Tr-88), and this was not known until Edith's death.

On April 9, 2016, Edith was found walking in the street in her bathrobe on a walker. She was disoriented and lost even though she was in front of her own house. Police were called, and the incident report described the event as "altered mental status" (Exhibit 1). The reporting officer was able to locate Edith's family, and Willie Ryles came to her assistance. Respondents were unaware Dorthea had returned to New Jersey and left their mother alone.

Just two months after Edith Ryles was found wandering in the street disoriented, Appellant made arrangements and took her mother to Hawkins Tax Service which prepared a POA appointing Respondent as her mother's attorney-in-fact. The POA is dated June 29, 2016 (Exhibit 2). The POA gave Appellant complete access to her mother's finances. The two individuals who own and operate Hawkins Tax Service are not attorneys and the South Carolina Attorney General investigated and issued a Cease and Desist letter informing them they were practicing law without a license and would be criminally prosecuted if they continued to prepare legal documents.

On December 15, 2017, the Appellant took her mother back to Hawkins Tax Service which prepared a will by which Edith left two properties and three bank accounts to Appellant (Exhibit 3). Respondents Willie Ryles and Theresa Williams, received $100.00 and $50.00 respectively.

Respondent Leon Ryles received an old car. This was not disclosed by Appellant in advance to the other siblings either.

In Appellant's testimony at the hearing, she first testified she did not use her mother's money for her own personal use. However, when confronted with the checks and withdrawals from the above accounts, she admitted she used the money for her own personal use. Appellant lived in New Jersey, and her mother lived in Florence. The disbursements made by Appellant include checks and payments made in New Jersey. Noteworthy are the following:

a) Mickey Finn's Wine Store;

b) Amtrak;

c) Newark Municipal Court (traffic tickets);

d) Dente Bros. Towing (NJ);

e) Chateau of Spain (restaurant);

f) NJ Nails;

g) Toys R Us;

h) Yankee Stadium (tickets);

i) Grammy Museum Experience;

j) Shoprite (NJ Grocery Store); and

k) Realstar Life Insurance.

At the time of her death, Edith owned two properties in New Jersey, a house and a vacant lot. Dorthea lived in Edith's house which consisted of three floors. Dorthea lived on the first floor rent-free and rented out the other floors, with the rent proceeds being kept by Appellant Dorthea.

The first issue in controversy is whether Edith Ryles had sufficient mental capacity to execute a POA and will. The Probate Court found she did not and cited the lay testimony of a

police officer, a niece who is not an intestate heir, and the son Willie Ryles. Edith's lack of mental capacity included her inability to manage her day-to-day activities such as preparing meals, taking care of her house, and her confusion to the extent of believing her late husband was alive. She even thought she had a new baby at 85. Edith was found in the street on her walker in an altered mental state not knowing where she was or what she was doing. This incident occurred only two months before signing the POA. The two individuals who prepared both the POA and the will were later investigated and cited by the S.C. Attorney General for practicing law without a license.

STANDARD OF REVIEW

Appeals from the Probate Court are governed by S.C. Code Ann. § 62-1-308 and the South Carolina Appellate Court Rules. The South Carolina Supreme Court has held that appeals taken from the probate court are governed by the provisions of the Probate Code. *Howard v. Mutz*, 315 S.C. 356, 434 S.E. 2d 254 (1993). Pursuant to S.C. Code Ann. § 62-1-308(a) (Supp.1994), an order or decree of the probate court shall be appealed to the circuit court. The circuit court must hear and determine the appeal "according to the rules of law." S.C. Code Ann. §62-2-308(d) (1987). The phrase "according to the rules of law" means according to the rules governing appeals. *Howard*, supra. In the absence of a statute or rule prescribing a different standard of review, the circuit court must apply the same standard any appellate court would on direct appeal. *Id; Matter of Estate of Tollison*, 320 S.C. 132, 135, 463 S.E. 2d 611, 613 (Ct. App. 1995). The standard of review applicable to cases originating in the probate court is controlled by whether the underlying cause of action is at law or in equity. *Howard* 315 S.C. 356, 361-62, 434 S.E.2d 254, 257-58 (1993) (noting the circuit court may not disturb the probate court's findings of fact on appeal in an action at law unless there is no evidence to support them).

A will contest is an action at law. *Estate of Cumbee v . Cumbee*, 333 S.C. 664, 670, 511 S.E. 2d 390, 393 (Ct. App. 1999). This general principle applies also when the ground for setting aside the will is lack of mental capacity. *Estate of Weeks v. Drawdy*, 329 S.C. 251, 262, 495 S.E. 2d 454, 460 (Ct. App. 1997) (applying a legal standard of review of requiring affirmation of the findings of the probate court if there is any evidence in the record to support those findings on appeal of an action to set aside a will on the sole ground of lack of capacity).

"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." *Estate of Hyman v. Gugliotti, et. al.*, 362 S.C. 20, 25, 606 S.E. 2d 205, 208 (Ct. App. 2004).

Appellant's brief argues this case is a proceeding at law, and at page 7 sets out the standard of review:

> "If the proceeding in the probate court is in the nature of an action at law, the circuit court and this Court may not disturb the probate judge's finding of fact unless a review of the record discloses there is no evidence to support them…" *In Re Estate of Cumbee*, 333 S.C. 664, 670, 511 S.E. 2d 390, 393 (Ct. App. 1999).

Here, one of the grounds under which the probate court set aside the will was the probate court's factual finding that the deceased lacked testamentary capacity at the time she executed the will which is the subject of this appeal. The probate court's factual finding of undue influence was an additional reason for setting aside the will.

"The degree of capacity necessary for the execution of will is less than that needed for the execution of a contract." *Estate of Weeks*, 329 S.C. 251, 264, 495 S.E. 2d 454, 461 (Ct. App. 1997). The principal must have the mental capacity to contract in order to establish an agency relationship that would authorize the agent to act on her behalf pursuant to a power of attorney. *In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 856-57 (Ct. App. 2001). Thus, in this case, the standard of review for reviewing the probate court's factual findings regarding the will contest is effectively dispositive of the entire appeal.[1]

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[1] *Thames* involved only a power of attorney, not a putative power of attorney and a will. *Thames* concluded that the applicable standard of review for an action setting aside a determination of mental capacity to execute a power of attorney was equitable rather than legal, but that under even an equitable standard of review, the findings of the trier of fact should not be ignored where the trial court was in a better position to evaluate the witnesses.

ARGUMENT

I. The Probate Court did not abuse its discretion in allowing the testimony of lay witnesses to give opinions as to the confusion of the decedent at the time of the signing of the last will and testament and power of attorney.

The Appellant argues that the decedent's niece, Vera Askins, did not have the right to testify regarding such matters. The son of the decedent, Willie Ryles, also testified at length as to the same proposition. While Appellant does cite the fact that she objected to the testimony of the witnesses who testified at trial that the decedent lacked mental capacity, the brief does not really argue that a witness may not provide such testimony, even if not qualified as an expert. Appellant's brief, after citing the objections at trial, then simply moves on to arguments that the factual conclusions of the Probate Judge were wrong when he found that the decedent lacked mental capacity to execute the will and power of attorney.

Because Appellant did not argue in her brief that a lay witness does not have the right to give opinions as to the confusion of the decedent at the time of the signing of the last will and testament and power of attorney, this ground for appeal should be rejected and converted into what Appellant actually argued: there was no factual evidence to support the factual findings of the Probate Court that the decedent lacked capacity to execute the power of attorney and will. This is what Appellant has really argued.

In the event that it is concluded that the Appellant actually argued that a lay witness is not competent to testify as to testamentary capacity or the capacity to execute a power of attorney, case law clearly disagrees. Testimony of lay witnesses is competent on the issue of whether a purported testatrix possesses testamentary capacity. *Garbade v. Garbade*, 260 S.C. 58, 198 S.E.2d 186 (1973). In *Garbade*, the Court held that witnesses who knew the testatrix well and were closely

connected with her by blood or marriage, or long friendship, could express their opinions regarding the mental capacity to execute a will. In *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985), the Court held that a lay person may testify as to his impressions of another person's conduct, demeanor, manner of speech, or appearance as being rational or irrational.

Appellant cites the case of *Estate of Hicks*, 327 S.C. 564, 284 S.E.2d 462 (1985), for the proposition that in a factual setting allegedly similar to the case at bar, an appellate court may set aside a probate court's reliance on the testimony of family members. However, *Hicks* was decided in 1985, and the Probate Code changed in 1987. *Hicks* involved the old code wherein the circuit court was trying the case *de novo*. In *Hicks*, the circuit court, using the *de novo* standard, overruled the probate court, and then the Supreme Court upheld the circuit court because the circuit court's *de novo* finding was supported by "any evidence." In the case at bar, however, the Probate Court heard the case with finality and no other court has the authority to hear the facts *de novo*. S.C. Code § 62-1-308(i): no new evidence may be presented and the circuit court only has appellate jurisdiction. The standard of review is whether any evidence supports the factual findings of the Probate Court. When one considers the procedural setting of *Hicks*, *Hicks* actually supports the Respondents in this case.

The standard is whether there is any evidence or any reasonable evidence in the record which supports the findings of the Probate Judge. With regard to Appellant's argument on this point, the following evidence supports the findings of the Probate Court that the decedent did not have capacity to execute the will or power of attorney:

- **The testimony of the niece, Vera Askins, who is not a beneficiary under the purported will of the decedent:**

Vera Askins testified that she has lived in Florence her entire life and that she was close to the decedent for the last 10 years during which the decedent had resumed living in Florence, SC before her death. Ms. Askins testified that she saw the decedent regularly and that her health began failing in 2014 and 2015. Tr-38-39. Ms. Askins testified that it was obvious in 2014 that the decedent needed help with her daily activities and that she needed help with her bills and finances. She testified that Willie Ryles, the son of the decedent, began helping the decedent with her bills beginning in 2012. Tr-39. Ms. Askins testified that from the beginning of 2016, Willie Ryles and Theresa Williams, the decedent's children, began helping the decedent by spending alternate nights with her, and that the decedent could not cook and needed help with her care. Ms. Askins testified that she also helped with the decedent's care. Tr-40. Ms. Askins testified that she would not allow the decedent alone to cook, and that the decedent had personal hygiene issues and required adult diapers. Tr-41.

Ms. Askins testified that in addition to the 2016 incident wherein the decedent was found wandering and confused in the street by the police, she also had other episodes of confusion during this general time. For example, the decedent thought that her husband was still alive (he died in 2010). Ms. Askins testified that the decedent was always confused (initially, upon questioning, she thought the word "oriented" meant confused, but this was later corrected). Tr-42. Ms. Askins testified that the decedent did not have the capacity to understand the power of attorney or the will, and that she did not improve between the date the power of attorney was executed in 2016, and the date that she executed the will in 2017. Ms. Askins testified that the decedent did not have the capacity to call Hawkins Tax Service and schedule an appointment. Ms. Askins testified that the decedent did not have the mental capacity to know her estate, the objects of her affection, or to whom she wished to give her estate. Tr-43-45. Upon cross-examination, Ms. Askins was asked if

the decedent was lucid and Ms. Askins responded that she had dementia, and that her own parents had had dementia. Tr-48. It can hardly be argued that there was no evidence presented by Ms. Askins that the Probate Court had the right to rely on.

- **The testimony of the decedent's son, Willie Ryles:**

Willie testified that he had lived in Florence, SC, for 18 years preceding trial and that the decedent had lived in Florence for the 10 years prior to her death. Tr-51.

Willie testified that he saw the decedent daily and lived near her. He testified that she stopped driving in 2012 or 2013, but he drove her places even before then. Willie testified that he was very close to her. Tr-52. Willie further testified that he and his sister, Theresa, helped care for the decedent and that she had needed help with her finances and bills since 2012 or 2013. He testified that he did the majority of taking care of the house in Florence for the decedent. Willie testified that the decedent had issues with hygiene and bathing, and had had them since 2013 or 2014. Tr-53-54.

Willie testified that in April 2016, the decedent did not have the mental capacity to call Hawkins Tax Service and set up an appointment. Tr-55, 59. He testified that the decedent would not have known what a power of attorney was at the time that she executed it. Tr-59-60. Willie testified about the 2016 incident, wherein the decedent was found confused in the street by the Florence Police. Willie testified that she thought that she was at a funeral because she was watching something on television involving a funeral and that she followed the party out of the door into the street. Tr-55-56. Willie testified that in 2016, when the power of attorney was executed, the decedent would frequently get confused. She even thought that she had a new baby and would be looking for it. Tr-56. Willie testified that normally, he and Theresa split time watching their mother. Tr-57-58.

Obviously, two months before she executed the power of attorney, the decedent did not know the objects of her affection, because the new baby would be an object of her affection. She thus certainly could not have executed a power of attorney in 2016 because greater mental capacity is required to execute a power of attorney than a will. Please see Exception III for further discussion of the mental capacity needed for a contract as opposed to a will.

Willie testified that the Appellant never informed him that she had taken the decedent to sign the power of attorney. Tr-61. The Appellant admitted she kept this secret. Tr-88. Willie testified that at the time of the signing of the power of attorney, the decedent would not have understood or have had the mental capacity to sign. Tr-60. He further testified that in December 2017, the decedent did not have the mental capacity to understand the will and had not gotten better since 2016. Tr-60-61. Willie testified that Appellant never told him that she took the decedent to sign the will either. Tr-61.

Willie testified that at the time that she signed the will, the decedent did not know her estate and the objects of her affection and to whom she wished to give her estate. Tr-61. While Appellant makes much of the fact that some statements were made that she was physically able to sign the will, Willie testified that she would have signed anything anyone asked her to sign. Tr-61-62. The capacity to move one's wrist does not equate to understanding. Willie testified that after the 2016 incident wherein she was found wandering in the street, someone in the family stayed with the decedent every night. Tr-66.

While Appellant argues that the witnesses were not with her every second of every day and therefore cannot swear that she did not have a lucid moment when they were not physically present with her, that is not the standard for upholding a factual finding of the Probate Court. Based on the testimony of Willie Ryles, the Probate Court had a right to consider this evidence and rely upon it.

- **Officer Justin Chatlosh was called to investigate a report about an elderly female walking in the road in her bathrobe:**

Officer Chatlosh found the decedent in her bathrobe in 2016, two months before the power of attorney was executed. She knew her address but she did not know where she was, even though she was standing right in front of her own house. Officer Chatlosh marked the report as "altered mental status" and he stated that Ms. Ryles was mentally disoriented and confused. Officer Chatlosh felt it necessary to call Willie Ryles to the scene to assist his mother because she was not capable of helping herself. Tr-11-14. This constitutes some evidence that the Probate Court properly relied on.

Appellant argues the failure of the Probate Court to inquire about the possibility of any prior will, and cites *Hicks* to that effect. This issue was never raised by the Appellant to the Probate Court and cannot be argued now on appeal. *Creech v. SC Wildlife and Marine Resources Dept.*, 328 S.C. 24, 491 S.E. 2d 571 (1997). Additionally, as noted above, *Hicks* is inapplicable because *Hicks* involved an appeal under a prior statute wherein the circuit court had the right to retry the case *de novo*. The final sentence in *Hicks* states:

> "It is the duty of the trier of facts to evaluate witness testimony and assign to it such weight as he determines proper" [where the evidence conflicts]. 284 S.C. 462, 466.

In *Hicks*, the circuit court was the trier of facts; in the case at bar, the Probate Court is the trier of fact. Therefore, the standard of review is the same, because this Court is acting as an appellate court, not a trier of fact.

II. The Probate Court did not err in allegedly selectively applying credibility to those witnesses who testified in support of the Respondents, but then disregarding the testimony made regarding the decedent's testamentary capacity by the Appellant.

This really is a repeat of the issues argued above and of the standard of review set out above. As acknowledged by Appellant in her statement of the standard of review, if there is any evidence in support of the findings by the trier of fact, the decision of the Probate Court will not be set aside. Appellant again cites *Hicks* erroneously as detailed above. Appellant does properly cite the last sentence in *Hicks* to the effect that "it is the duty of the trier of facts to evaluate witness testimony and assign to it such weight as he determines proper." Page 12 of Brief of Appellant.

Of significance is the admission by Appellant that the two siblings, Theresa Williams and Willie Ryles, spent more time caring for the decedent than the Appellant herself did. Tr-76, 78.

III. The Probate Court did not err in ruling that the decedent did not meet the standard for mental capacity to execute the last will and testament and power of attorney.

Appellant argues that the degree of capacity necessary to execute a will is less than that needed to execute a contract. While a correct statement of the law, this argument does not aid Appellant because the decedent did not even have testamentary capacity when she signed the power of attorney. Appellant has acknowledged that the standard of review for evaluating a will challenge is based upon the standard for a legal issue—whether there is any evidence in the record to support the finding of the Probate Court. There is extensive evidence in the record which was believed by the finder of fact that the decedent did not have the mental capacity to execute a will. If she did not have the capacity to execute the will, she certainly did not have the mental capacity to execute a power of attorney because a power of attorney is a contract and requires a higher mental standard.

Appellant argues that the decedent may have had lucid intervals at times when none of the witnesses were present or when she actually executed the power of attorney and will. This is simply speculation and although it may have been a valid argument to the Probate Court, the Probate

Court had the right to accept the evidence which he cited in the Order, which is the evidence from the police officer, the niece, and the son, Willie Ryles. The Probate Court had the right to reject the rank speculation that she may have had a lucid moment when signing the documents. We are not here to consider whether the Probate Court could have adopted such rank speculation because it did not.

There is an additional consideration which the Probate Court had the right to rely on and which may be considered by a reviewing court as grounds in support, even though not cited by the Probate Court. [Rule 220(c) of S.C. Rules of Appellate Practice allows an appellate court to affirm on any ground appearing in the record]. That is the fact that Hawkins Tax Service employees took the Fifth Amendment in response to every question by the attorney for Respondents as to whether the Appellant told them what to put in these documents, and whether the decedent had the mental capacity to execute the power of attorney and will. As it turned out, the employees of Hawkins Tax Service were not attorneys and have been issued a Cease and Desist Order to stop practicing law without a license. Catherine McWhite is the owner of Hawkins Tax Service and admitted the same. Tr-25.

Ms. McWhite took the Fifth Amendment as to whether the Appellant was the one who called and scheduled the appointment for the decedent. Tr-26. Ms. McWhite took the Fifth Amendment as to whether the Appellant dictated or told her what she wanted in the power of attorney and whether Appellant paid the bill herself. Tr-28. Ms. McWhite took the Fifth Amendment as to whether the decedent was feeble, had memory problems, and that Ms. McWhite had no medical records or information about her mental status. Tr-29. Ms. McWhite took the Fifth Amendment as to whether the will she prepared for the decedent was dictated by Appellant and whether the Appellant scheduled the appointment and told her what she wanted in the will, and

that Ms. McWhite had no medical information regarding her mental status. Tr-30. Another employee of Hawkins Tax Service, Vera Lewis, took the Fifth Amendment to the same questions. Tr-33-38.

The Appellant admitted that she paid the bill to Hawkins Tax Service for the power of attorney. Tr-85.

The Probate Court had the right to draw a negative inference by the assertion of the Fifth Amendment in a civil case by the witnesses of Hawkins Tax Service. The Probate Court had the right to draw a negative inference against the interests of the Appellant because the witnesses of Hawkins Tax Service were acting in furthermore of Appellant's wrongdoing, if the court believed the other witnesses of the Respondents.

It is proper for the Court to find a negative inference against a party in a civil case due to the assertion of the Fifth Amendment by a nonparty or non-agent of a party. In *FDIC v. Fidelity and Deposit Company of Maryland*, 45 F.3d 969 (5th Cir. 1995), the court held:

> "In this case, a jury could determine that a witness who colluded with Pogue took the Fifth Amendment to avoid disclosing that collusion." 45 F.3d 969, 977.

It was further noted that "a non-party's silence in a civil proceeding implicates Fifth Amendment concerns to an even lesser degree." 45 F.3d 969, 977. *FDIC* involved a case where a corrupt loan officer caused the insolvency of a bank, resulting in a suit by the FDIC against Fidelity, the bond insurer of the insolvent bank. The question was whether other non-parties who received loans in exchange for bribes who took the Fifth Amendment could have their assertion of privilege used against the defendant in the case. The court found that a jury could determine that a witness who colluded with the corrupt loan officer took the Fifth Amendment to avoid disclosing that collusion. Similarly, in the case at bar, the finder of fact could properly find that a witness for Hawkins Tax Service, who colluded with the Appellant in preparing the power of attorney and will, took the

Fifth Amendment to avoid disclosing that collusion. This doctrine has also been applied in a case from South Carolina. In *U.S. v. Mallory*, 988 F.3d 730 (4th Cir. 2021), the Court held:

> "The Supreme Court has long recognized that there exists a prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them…and a non-party's silence in a civil proceeding implicates Fifth Amendment concerns to an even lesser degree than a party's invocation of the privilege." 988 F.3d 730, 740.

The court noted that in determining whether a trier of fact may permit adverse inferences, one engages in a case-specific analysis. The factors in such analysis include the nature of the relevant relationships; the degree of control of any party over the non-party witness; the compatibility of the interest of the party and non-party witnesses in the outcome of the litigation; and the role of the non-party witness in the litigation. 988 F.3d 730, 740. The court noted that in *U.S. v. Mallory*, a contractor played a substantial role in defendant's scheme and therefore the contractor's assertion of the Fifth Amendment could be used to draw an adverse inference against the civil defendant. Similarly, in the case at bar, Hawkins Tax Service contracted with the Appellant to draw up the allegedly bogus power of attorney and bogus will; that was the nature of the relationship. One can infer that the Appellant dictated and Hawkins agreed to comply regarding the execution of the power of attorney and the terms of the will. Hawkins Tax Service and the Appellant have a compatibility of interest in the outcome of the validity of these documents; and it is unquestioned that the role of the non-party witnesses at Hawkins Tax Services in the litigation was crucial and substantial.

Another case within the Fourth Circuit is *Cargill Inc. v. WDS Inc.*, 2018 W.L.1525352 (WDNC March 28, 2018, **unreported**). In this case again, a negative inference against a non-party was found to be properly invoked against a party. Defendants had argued that the inference was

not relevant because the negative inference should be against the witness who asserted the privilege, not the defendants. The court replied:

> "To the contrary, silence in the face of accusation is a relevant fact…Invoking the Fifth Amendment privilege when questioned about accepting bribes from defendants and their actions in furtherance of Defendants' overcharging of plaintiffs is relevant: it has a tendency to make a fact of consequence more or less probable than it would be without the evidence…Further, other testimony and evidence reflecting Nguyen's and Milacki's relationship and dealings with defendants was presented, so the jury could determine that a witness who colluded with defendants took the Fifth Amendment to avoid disclosing that collusion." *Id* at page 12.

The court concluded that the non-parties' assertion of the Fifth Amendment was properly allowed into evidence and could be used against a party:

> "They held positions of great responsibility and authority that could be and, as suggested by the evidence, were misused to further the conspiracy."

While it is true that the Appellant on cross-examination of the Hawkins Tax Service witnesses asked questions which could help the Appellant if answered her way, and the witnesses took the Fifth Amendment to those questions as well, this simply presented a question of fact for the Probate Court. The Probate Court had the right to resolve conflicting inferences and this cannot be disturbed upon appeal.

IV. The Probate Court did not err and did not fail to require the Respondents to show the decedent's lack of capacity to understand the nature of her estate, the natural objects of her bounty, and to whom she wished to give her property; the Probate Court did not improperly shift this burden to the Appellant.

Appellant's assertion is simply incorrect. The Probate Court stated the very opposite in the summation of the law in its Order. In the very first sentence under the law on testamentary capacity, the Probate Judge states that the party alleging incompetence bears the burden of proving incapacity at the time of the transaction by the preponderance of the evidence. The Court continues

by stating the test as to whether a testator had the capacity to make a will is whether he knew his estate, knew the objects of his affections, and to whom he wished to give his property. The Probate Court added that the testator need not have a reasonable basis on which to found his like or dislike of the natural objects of his bounty. The Probate Court added that the capacity to know or understand rather than actual knowledge or understanding is sufficient. Page 6 of Order. The Probate Judge did not shift the burden of proof.

Appellant argues in her brief that the Court shifted the burden of proof to Appellant on this issue at page 9 of the Order. As noted above, in page 6 of the Order, the Probate Court set out the proper standard. Page 9 of the Order does not discuss the standard of review; it simply states why the Court is believing that the decedent did not have the capacity to execute the will or power of attorney. The bulk of Appellant's argument on this issue is that the Probate Judge simply interpreted the facts wrong; it does not have anything to do with the standard of review.

Appellant argues that under her version of the facts, the decedent made the appointments with the tax service herself to prepare the will and power of attorney. That was merely the testimony of the Appellant, but it was not believed by the Probate Court and the surrounding circumstances were disputed by numerous witnesses as set out above. This was a question of fact for the Probate Court. One point which is apparently made at least indirectly by Appellant is that the decedent had the physical ability to sign the documents. However, it is a different question as to whether she understood them or was improperly influenced to sign them.

V. The Probate Court did not err in ruling that undue influence existed.

The Appellant's entire argument assumes the decedent scheduled both of the appointments with the tax service and the Appellant was merely the taxi driver. The Probate Court had the right to disbelieve that in light of the testimony of all of the witnesses discussed above.

Significantly, the Appellant agrees in her brief that a fiduciary relationship between the testator and the beneficiary creates a presumption of undue influence. Appellant also admits that evidence of undue influence will always be mainly circumstantial. Page 22 of Appellant's Brief. Appellant properly notes that undue influence is not usually exercised openly so that it can be directly proved. Appellant properly argues further that the circumstances must point unmistakably and convincingly to the fact that the mind of the testator was subjected to that of some other person, so that the will is that of the latter and not of the former. However, once the finder of fact has made a finding, the question is whether there is evidence in the record to support it, as set out in detail above. There is massive evidence to this effect.

An ironic point is that if, as the Appellant alleges, the power of attorney is valid, then that obviously created a fiduciary relationship. This fiduciary relationship could then be properly used to strike down the will. Therefore, even if the power of attorney were valid, the Appellant violated it because she simply used the money of the decedent as her own. The existence of even a valid power of attorney is further evidence that the will was procured by undue influence. Appellant agrees by citing *Howard v. Nasser*, 364 S.C.279, 288, 613 S.E. 2d. 64, 68-69 (Ct. App. 2005), for the proposition that the existence of a fiduciary relationship between a testator and beneficiary raises a presumption of undue influence. *Howard* also cites another case to this effect, *Dixon v. Dixon*, 362 S.C. 388, 608 S.E. 2d. 849 (2005).

VI. The Probate Court did not abuse its discretion in ordering the Appellant to pay attorney's fees.

Appellant basically argues that she should not have been found liable on the merits and therefore attorney's fees should not have been granted. However, assuming the underlying award was proper, the statute provides for attorney's fees. S.C. Code § 62-1-111. There has been no

independent argument that the award of attorney's fees itself was improper. While there is a brief conclusory statement that the amount of attorney's fees should be reduced, this is not detailed in any respect. This ground for appeal should be dismissed assuming the underlying award is supported.

VII. The Probate Court did not err in finding that the Appellant breached her fiduciary duty. The Appellant violated her duty to keep records.

The Appellant admits that she used numerous funds for personal matters. These included spending for things such as wine, going to Yankees games, traffic tickets, towing fees, groceries, and numerous ATM withdrawals. However, Appellant then alleges, without providing a single document or accounting, that she used some of the money for the estate.

A party who has a power of attorney is a fiduciary and has a duty to "keep a record of all receipts, disbursement and transactions…" S.C. Code § 62-8-114(b)(4).

This statute became effective January 1, 2017, and no doubt some of the Appellant's purchases of wine and other misdeeds occurred before that date. However, this statute merely restates the common law rule in South Carolina. In *Kerr v. Carolina Bank and Trust Co.*, 303 S.C. 518, 402 S.E. 2d 185 (Ct. App. 1991), it was held that the trial judge erred in failing to give the following jury charge:

> "An agent is subject to the duty to keep records and render to his principal an account of all transactions within the scope of the agency as to which a fiduciary duty, in addition to the bare relationship of principal and agent, exists." 303 S.C. 518, 520, 402 S.E. 2d 185, 187.

Appellant has breached her fiduciary duty absolutely and with complete abandon. Appellant admits this in her brief:

> "The Appellant does not dispute her personal spending…" Page 25 of Brief.

A criminal cannot defend his conduct on the ground that he was not a criminal at every minute of every day. Similarly, one who has a fiduciary duty, who clearly breaches that duty, cannot defend by arguing she did not breach that duty every minute of every day. That in essence is what Appellant argues. This is completely without merit.

Appellant also argues that the amount of the actual damages was too high, but does not present any accounting to determine why it was too high.

Initially it must be noted that the power of attorney contains no authority to make gifts. Trial Exhibit 2. The authority to make gifts must be expressly stated in the instrument. *Fender v. Fender*, 285 S.C. 260, 329 S.E. 2d 430 (1985). All the profligate spending discussed by the Probate Court was in essence a gift by Appellant to herself. Even the purported oral authorization which Appellant testified to would be invalid, even if the decedent had been competent at the time. *Fender*, 285 S.C. 260, 262, 329 S.E. 2d 430, 431.

Even Appellant's alleged payment of taxes on the house in New Jersey after the decedent had moved to South Carolina would have benefited Appellant because she was living in the house rent-free and renting out part of the house to others and keeping the proceeds. Tr-133-134. In any event, we do not know what Appellant spent for this, if anything, because she kept no records. Appellant at times claimed she spent money to remodel the house, but she finally admitted there was "not a lot of remodeling." Tr-93.

It is not possible to detail what the Appellant spent or whether she even spent anything for her principal. She asserted that she spent certain money properly in her testimony, but she did not present any copies of checks or any true accounting. Indeed, the Respondents sent Appellant a Second Set of Requests to Admit which she absolutely refused to respond to and the Probate Court

deemed them admitted. The Second Set of Requests for Admissions establishes, and the Probate Court found at pages 5-6, that the following was misappropriated:

1.	ATM Withdrawals	$ 15,937.42
2.	Money Market Account	$ 105,373.39
3.	Transfers as POA	$ 42,805.07
4.	Money from mother's checking account	$ 48,750.29
	TOTAL:	$ 212,866.17

At trial, Appellant first attempted to deny the spending until confronted. Tr-92. The Appellant did not even see fit to answer these Requests for Admissions and presented no documents whatsoever. Appellant cannot now be heard to question the award.

An additional misappropriation involved one of the properties in New Jersey which was not a part of the estate. This was the property owned by the Appellant's brother, Alonzo. Regarding Alonzo's house, the Appellant admits that Alonzo owned one of the houses (Tr-96). The Court stated at Tr-98 that that one house was not a part of the estate and the Appellant did not dispute that. Nevertheless, the Appellant admitted that both houses were in foreclosure—these were the house owned by the decedent and the house owned by Alonzo (the third property was a vacant lot). Tr-96. The Appellant admitted to paying the taxes on Alonzo's house. Tr-93 ("the houses"), Tr-136. The Appellant further claimed that she paid "all of the back taxes." Tr-94. Therefore, the Appellant has admitted that she has used a significant part of the decedent's money, for which she had a fiduciary duty, for property which was not part of the estate—Alonzo's house.

Adding to the overall outrageous nature of this case is the fact that the Appellant clearly used the money of the decedent and the power of attorney as if it were her own money. At the time in question, the decedent lived in Florence, SC and the Appellant lived in Newark, NJ. The Appellant admitted that she used money for Mickey Finns Wine store; Amtrak train service in Newark, NJ; Newark municipal traffic tickets; Dente Brother's Towing; Chateau of Spain

Restaurant, New Jersey nails, Costco, Yankee Stadium tickets, Shoprite Grocery Store, and other

personal accounts. There could hardly be a more outrageous display of violation of fiduciary duty.

VIII. The Court did not err in failing to ask for a prior last will or testament or power of attorney.

This was not argued before the Probate Court and cannot now be considered. *Wilder Corporation v. Wilke*, 330 S.C. 71, 497 S.E. 2d 731 (1998).

CONCLUSION

The findings of fact by the Probate Court should be upheld because there was some evidence in the record to support them. Even if the power of attorney had been valid, a fiduciary duty would have been created which in turn created a presumption that the will was procured by undue influence.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit
Court Judge for Common Pleas

Appellate Case No.: 2023-001842

Dorthea Ryles.....Appellant,

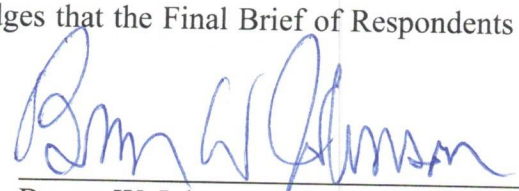
v.

Leon Ryles, Willie N. Ryles, and Theresa Williams, Respondents.....Respondents.

IN RE: The Estate of Edith W. Ryles, Estate File: 2018-ES-21-00899

RULE 211 CERTIFICATION

The undersigned hereby acknowledges that the Final Brief of Respondents complies with Rules 211 SCACR.



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