

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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AUG 28 2024

SC Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Circuit Court

Maite Murphy, Circuit Court Judge

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

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

v.

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

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**FINAL BRIEF OF APPELLANTS**

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August 28, 2024

**TABLE OF CONTENTS**

Table of Authorities ..... ii

Statement of Issues on Appeal..... 1

Statement of the Case..... 2

Statement of Facts..... 2

Standard of Review..... 3

Argument ..... 4

    I.     The Circuit Court erred as a matter of law in affirming the Probate Court’s  
          Finding that Appellants have not properly commenced its case when all in  
          The South Carolina Rules of Civil Procedure relating to the  
          Commencement of an action had been followed by Appellants.....4

Conclusion ..... 7

**TABLE OF AUTHORITIES**

**CASES**

Matter of Estate of Tollison, 320 S.C. 132 (S.C. App. 1995).....4

McLain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994).....4,5,6,7

University of Southern California v. Moran, 365 S.C.270 (S.C. App. 2005).....3

**OTHER AUTHORITIES**

South Carolina Rules of Civil Procedure, Rule 12(b)(4).....4

South Carolina Rules of Civil Procedure, Rule 12(b)(5).....4

South Carolina Rules of Civil Procedure, Rule 5(d).....4,5,7

South Carolina Rules of Civil Procedure, Rule 26(g)(1).....5

South Carolina Rules of Civil Procedure, Rule 3(a).....5

South Carolina Rules of Civil Procedure, Rule 4(b).....5,6,7

**STATEMENT OF ISSUES ON APPEAL**

- I. **Did the Circuit Court err as a matter of law in affirming the Probate Court's finding that Appellants had not properly commenced its case when all of the rules relating to the commencement of an action in the South Carolina Rules of Civil Procedure had been abided by.**

## **STATEMENT OF THE CASE**

This case involves the appeal of decision by the Probate Court to dismiss Appellants' Petition to Challenge Validity of Will and for Appointment of Special Administrator and Answer to Petition for Appointment of Geraldine Vanessa Myers-Moore in the Estate of Isaac Eldridge Julian finding that Appellants did not properly commence its action under the South Carolina Rules of Civil Procedure. Respondent filed a petition for informal probate of his will and to be appointed to be named the personal representative of his estate on April 19, 2021. Appellants originally filed their petition May 10, 2021. (R. p. 209). This action was dismissed without prejudice due to insufficiency of service of process, and for failure to state a cause of action. (R. p. 17). Appellants refiled the action on January 28, 2022. (R. p. 173). Since the Estate had been opened and the prior petition had been filed, a case number was already established. Appellants included this case number on the petition they filed. The petition was then served January 31, 2022. (R. p. 13). After a hearing on August 17, 2022, the Probate Court dismissed the action holding Appellants had not complied with the S.C.R.C.P. relating to the commencement of an action (R. p. 12). Appellants filed a timely motion to reconsider which was denied on October 5, 2022. (R. p. 11). Appellant filed a timely Notice of Appeal to the Circuit Court which affirmed the Probate Court's order with an order dated September 1, 2023. (R. p. 1). This appeal follows.

## **STATEMENT OF FACTS**

The decedent, Isaac Eldridge Julian died February 6, 2021. Respondent was the caregiver for Decedent during the final years of his life and filed a petition for informal probate of his will and to be appointed to be named the personal representative of his estate

on April 19, 2021. Appellants are the nieces and nephews of decedent and his intestate heirs. Appellants have bank records and other evidence suggesting that money was mismanaged and/or stolen from decedent during the final years of his life and filed a Petition to Challenge Validity of Will and for Appointment of Special Administrator and Answer to Petition for Appointment of Geraldine Vanessa Myers-Moore on January 28, 2022. This action was initially dismissed without prejudice due to insufficiency of service of process, and for failure to state a cause of action. (R. p. 17). Plaintiffs refiled the action on January 28, 2022. (R. p. 173). Since the informal petition to probate the will had been filed, the estate had been opened and a case number was already established. Appellants included this case number on the summons and petition they filed. (R. p. 173). This Summons and Petition was filed January 28, 2022. (R. p. 173). The summons and petition were then served January 31, 2022. (R. p. 128). Respondent filed a motion to dismiss based on an alleged insufficiency of service of process. (R. p. 118). After a hearing on August 17, 2022, the Probate Court dismissed the action ruling that Appellants had not complied with the S.C.R.C.P. related to the commencement of an action. (R. p. 12). Appellants filed a timely motion to reconsider which was denied on October 14, 2022. (R. p. 11). Appellant filed a timely Notice of Appeal to the Circuit Court which affirmed the Probate Court's order with an order dated September 1, 2023. (R. p. 1). This appeal followed.

### **STANDARD OF REVIEW**

The standard of review applicable to cases originating in the Probate Court depends upon whether the underlying cause of action is at law or in equity. *University of Southern California v. Moran*, 365 S.C. 270 (S.C. App. 2005). In the absence of a statute or rule prescribing a different standard of review in the appeal of a probate matter to the Circuit

Court, the Circuit Court must apply the same standard the Court of Appeals would apply on direct appeal. *Matter of Estate of Tollison*, 320 S.C. 132 (S.C. App. 1995). An issue relating the proper commencement of an action as it relates to the statute of limitations is a matter of law for the court to determine. *McLain v. Ingram*, 314 S.C. 359, 444 S.E.2d 512 (1994).

### ARGUMENT

**I. The Circuit Court erred as a matter of law in affirming the Probate Court's finding that Appellants have not properly commenced its case when all of the rules in the South Carolina Rules of Civil Procedure relating to the commencement of an action had been followed by Appellants.**

The Circuit Court affirmed the Probate Court's granting of Respondent's Motion to Dismiss pursuant to S.C.R.C.P. 12(b)(4) and 12(b)(5) on the basis that Appellants did not comply with the South Carolina Rules of Civil Procedure, particularly S.C.R.C.P. Rule 5(d). The court found that S.C.R.C.P. Rule 5(d) requires a plaintiff to "serve a copy of the filed pleadings on the defendant" and that "Petitioners failed to serve a true and authentic copy of the filed 2022 Summons and Petition and therefore failed to properly commence the action." (See Order dated September 26, 2022, R. p. 12).

It is undisputed that Appellants filed the Summons and Petition on January 28, 2022 and served an unfiled copy of the Summons, including the case number, and Petition on Respondent after this date on January 31, 2022 (See affidavit of service, R. p. 128 and unappealed order dated September 26, 2022, R. p. 13). Appellants contend that the Court erred in finding this was not proper service and dismissing the case. Appellants show that this is proper service under the South Carolina Rules of Civil Procedure and would show that serving a *filed copy* of the Summons and Petition is not required by South Carolina

Rules of Civil Procedure, Rule 5(d), or any other rule of civil procedure or the relevant case law. Rule 5(d) states the following:

**5 (d) Filing.** All papers required to be served upon a party except as provided in Rule 26(g)(1), shall be filed with the court within five (5) days after service thereof. *The summons and complaint shall be filed before service.* Proof of service shall be filed within ten (10) days after service of the summons and complaint. 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. Upon failure of a party to file other pleadings, motions, or papers, the court may permit filing or proceed as though the same had not been served. (emphasis added).

The Court also relies on McLain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994) in support of its argument that Appellants didn't comply with the SCRCF relating to the commencement of an action. *McLain* references SCRCF Rule 3(a) and 4(b) as well. These rules state the following:

**3(a) Commencement of Civil Action.** 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 limitation, actual service must be accomplished within 120 days after filing.

**4 (b) Same: Form.** The summons shall be signed by the plaintiff or his attorney, contain the name of the State and county, the name of the court, the file number of the action, and the names of the parties, be directed to the defendant, state the name and address

of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

Appellants would show that they complied fully with the South Carolina Rules of Civil Procedure relating to the commencement of the action. With respect to SCRCPP, Rule 3, the Court appears to take no issue with this rule being complied with. The Summons and Petition were filed with the Clerk of Court and served within 120 days. (See unappealed order dated September 26, 2022, R. p. 13, trial transcript, R. p. 264, ll. 21-22, and affidavit of service, R. p. 128).

With respect to SCRCPP, Rule 4, Appellants submit that they have complied with the provisions of this rule. The Summons contains all of the requirements set forth in Rule 4(b) including the case number (R. p. 173). The Court takes issue with the fact that the Summons and Petition were sent to the process server and/or mailed to be served prior to the date the Summons and Petition were filed with the Clerk's office. In *McLain*, the plaintiff would not have been able to include a case number on the summons because it was sent to be served prior to being filed.

Appellants did not have that issue in this case. Once the estate was opened with the filing of Respondent's petition for informal probate of a will and for the appointment of a personal representative, the case number is established. Answers, counterclaims and petitions such as the one Appellants filed use this same case number even if these subsequent actions are brought as formal actions. This is a subtle but significant difference

between Probate Court and Circuit Court. Circuit Court does not allow informal filings as Probate Court does.

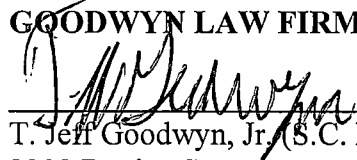
While Appellants' petition may have been the first formal action filed by any party requiring formal service, the case number for this estate had already been established by the filing of the informal action. This means Appellants' attorney was able to include the case number on the summons as required by Rule 4(b). The Court's ruling ignores this point and simply states that because a filed Summons and Complaint were not served on the Defendant, the rules were not complied with. There is simply no requirement in S.C.R.C.P. that a *filed* Summons and Complaint be served on a defendant.

With respect to the requirements of SCRCPP, Rule 5(d), this rule does not require the service of a filed copy of the Summons and Complaint, just that, "the summons and complaint shall be filed before service." Since Vanessa Myers Moore was served personally on January 31, 2022, three days after the Summons and Complaint were filed on January 28, 2022, Appellants have complied with Rule 5(d). In addition, nothing in *McLain* suggests that a filed complaint must be served, just the case number be included on the summons as required by SCRCPP Rule 4(b), which was done in this case. *Id.*

### **CONCLUSION**

As a result, Appellants have fully complied with all of the South Carolina Rules of Civil Procedure related to the service of the Summons and Petition and this Court should reverse the Circuit Court's affirmation of the Probate Court's ruling on this issue, reinstate the case and remand to Probate Court.

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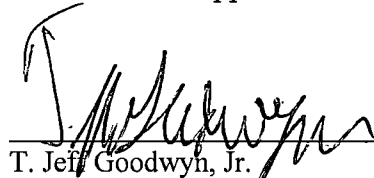
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**CERTIFICATE OF COUNSEL**

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The undersigned counsel certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.



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