FORM 1
NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

RECEIVED
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SC SUPREME COURT

APPEAL FROM YORK COUNTY
In the Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2015-CP-46-00466

Mary Jean Tucker Swiger, by and through her
Attorney-in-Fact, Carol DeHaven

Appellant

v.

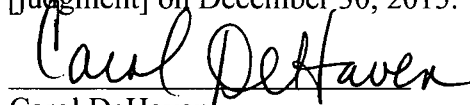
Ben R. Smith and Margaret P. Kelly, as
Personal Representatives of
Vinton Willis Tucker

Respondents.

NOTICE OF APPEAL

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven appeals the order [judgment] of the Honorable R. Scott Sprouse dated December 22, 2015. Appellant received written notice of entry of this order [judgment] on December 30, 2015.

January 19, 2016



Carol DeHaven
6600 Hawkins Gate Rd
LaPlata, MD 20646
(240) 687-0220
Appellant Representing Self

Other Counsel of Record:
Michael Brackett, Bar No. 838
PO Box 100261
Columbia, SC 29202 Fax (803) 461-2309
Attorney for Respondent

Form 7
PROOF OF SERVICE OF A NOTICE OF APPEAL
THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

R. Scott Sprouse. Circuit Court Judge

Case No. 2015-CP-46-00466

Mary Jean Tucker Swiger, by and through her
Attorney in Fact, Carol DeHaven (daughter) Appellant

v.

Ben R. Smith and Margaret Kelly, as Personal Representatives of
Vinton Willis Tucker Respondents

PROOF OF SERVICE

I certify that I have served the Notice of appeal on Ben Smith and Margaret Kelly by depositing a copy of it in the United States Mail, postage prepaid, on January 15, 2016, addressed to their attorney of record, Michael Brackett, Post Office Box 100261, Columbia, South Carolina 29202 and faxed to 803-461-2309 on January 15, 2016.

January 15, 2016

____
Carol DeHaven
6600 Hawkins Gate Road
La Plata, Maryland 20646
240-687-0220
Appellant Representing Self

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-46-00466

Mary Jean Tucker Swiger, by and through her
Attorney-in-Fact, Carol DeHaven
PLAINTIFF(S)

Ben R. Smith and Margaret P. Kelly, as
Personal Representatives of the Estate of
Vinton Willis Tucker
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☒ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☒ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

FILED-RECEIVED 2015 DEC 29 PM 1:59 DAVID HAMILTON C.C.P. & G.S. YORK COUNTY, SC

ORDER INFORMATION

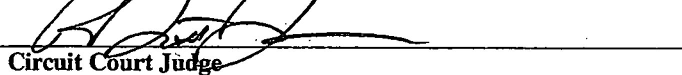
This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**



Circuit Court Judge | 2752 **Judge Code** | 12-22-15 **Date**

For Clerk of Court Office Use Only

This judgment was entered on **December 29, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **December 29, 2015**, to attorneys of record or to parties (when appearing pro se) as follows:

Syretta R. Anderson 124 Oakland Avenue Rock Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

B. Michael Brackett PO Box 100261 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton /JB

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
(Non-Jury)

Mary Jean Tucker Swiger, by and through her Attorney-in-Fact, Carol DeHaven,

Appellant,

vs.

Ben R. Smith and Margaret P. Kelly, as Personal Representatives of the Estate of Vinton Willis Tucker,

Respondents.

ORDER AFFIRMING DECISION OF PROBATE COURT

C.A. No. 2015-CP-46-00466

FILED-RECEIVED
2015 DEC 29 PM 1:53
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

PRESIDING JUDGE: R. SCOTT SPROUSE
DATE OF HEARING: DECEMBER 08, 2015
APPELLANT'S ATTORNEY: SYRETTA R. ANDERSON
RESPONDENTS' ATTORNEY: B. MICHAEL BRACKETT

This matter was before the Court pursuant to an appeal of the Order of Probate Judge Carolyn W. Rogers of the York County Probate Court, dated February 2, 2015. The Appellant argues that the Probate Court erred when granting summary judgment to the Respondents because there was sufficient evidence in the record to create a genuine issue of material fact. I affirm.

FACTS

The Appellant, Mary Jean Tucker Swiger, is the sister of Vinton Willis Tucker (Decedent). The Respondents, Ben R. Smith and Margaret P. Kelly, are a nephew and niece (by marriage) of the Decedent. The Decedent was a longtime resident of North Carolina and was predeceased by his wife. When his health began to fail, he moved to an assisted living facility in York County, South Carolina in November of 2011. He remained a resident of York County, South Carolina until his death in May of 2012.

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While living in North Carolina, Decedent had a relationship at one point with a woman named Brenda Snow. He had his attorney in Charlotte prepare a will leaving his entire estate to Snow. This will was destroyed by Respondent Ben Smith per the instructions of the attorney who prepared it. Decedent executed a new will on January 14, 2012, during a brief stay at the Piedmont Medical Center in Rock Hill. It was handwritten by Respondent Margaret P. Kelly at the instruction of Decedent. The will in question leaves the estate in equal shares to Decedent's nieces and nephews on his deceased wife's side of the family.

The Appellant filed suit challenging the validity of the new will. The Probate Court considered four causes of action in the summary judgment hearing. The Probate Court granted summary judgment to the Respondents.

ISSUES

Did the Probate Court err in granting summary judgment because a genuine issue of material fact existed concerning the allegation of undue influence over the Decedent in the execution of his will?

A. Did the Probate Court err in not finding the existence of a confidential relationship?

B. Did the Probate Court err in not finding the existence of undue influence?

APPLICABLE LAW

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and that the conclusions and inferences to be drawn from the facts are undisputed." *McClanahan v. Richland County Council* 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002). In considering whether summary judgment should be granted, the Court must consider the evidence in a light most favorable to the non-moving party. *Id.* at 438, 567 S.E.2d at 242. If the Court

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finds evidence that creates a genuine issue of material fact, summary judgment should not be granted. Ordinarily, the Court considering the motion looks for the existence of evidence and does not go far into any analysis regarding the likelihood of success of the claim.

Our present case involves a challenge to a will on the ground of undue influence. For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition. Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an undue existing fiduciary relationship. *Russell v. Wachovia Bank, N.A.*, 353S.C.208, 578 S.E.2d 329 (2003).

The claimant in this type of case has a heightened standard of proof which, accordingly, changes the standard to be applied by the Court considering summary judgment. The standard of proof in an undue influence case is *unmistakable and convincing evidence*. There must be more than a scintilla of evidence to defeat a motion for summary judgment. The analysis required of the Court at the summary judgment hearing with the heightened standard of proof "necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits." *George v. Fabri*, 345 S.C.440, 548 S.E.2d 868 (2001); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct.2505, 91L.Ed.2d 202 (1986); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003).

In *Russell*, the Court reiterated that summary judgment is proper where a verdict is not "reasonably possible." See *Bloom v. Ravoira*, 339 S.C. 101, 529 S.E.2d 710 (2000). Where the evidentiary standard is clear and convincing, as it is in our present case, the Court has much

greater discretion to evaluate the sufficiency of the non-moving party's factual submissions as too insubstantial to overcome summary judgment. *Hancock v. Mid-South Management Co.*, 673 S.E.2d 801 (2009).

Historically, South Carolina courts have held that there is a presumption of invalidity in the preparation of deeds if there was a confidential relationship between the grantor and grantee. Once a confidential relationship is shown, the deed is presumed invalid. The burden shifts to the grantee to affirmatively show the absence of undue influence. This principle of law has been applied to will cases. *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005); *Calhoun v. Calhoun*, 277, 290 S.E.2d 415 (1982). However, the challenger to a will never loses his ultimate burden of proof. If the proponent of the will comes forward with evidence to rebut the presumption, then said presumption is not a bar to summary judgment. *Howard v. Nasser*, 364 S.C. 279, 613 S.E.2d 64 (SC App. 2005).

DISCUSSION

The Order sets out the applicable law and facts in great detail. The Appellant's arguments center around three factual areas:

1. Restricted visitation.

   The Order finds that there "was deposition testimony that family members restricted visitation with Brenda Snow...The restricted visitation occurred in a Charlotte, North Carolina hospital approximately one and one-half months prior to the execution of the January 14, 2012 last will." (Order, page 6).

   The Appellant argues that the Order ignores evidence of restricted visitation in South Carolina. The pieces of evidence used to further this argument are the facility

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in South Carolina being given a picture of Snow and being informed that the hospital in North Carolina had restricted Brenda Snow from visiting the Decedent. There is no evidence of any attempted visitation by Snow in South Carolina or any other visitation prior to, or simultaneous with, the execution of a disputed will.

There was evidence of the Appellant's side of the family visiting with the Decedent over a month later while under the watch and supervision of the Respondents but this evidence is not relevant to the issue of whether the Decedent was under the undue influence of the Respondents on January 14, 2012.

2. Mistake by the Decedent.

There was some evidence in record that the Decedent made comments about providing for his "little girl." The Order discusses the testimony of a social worker who heard the comment on February 5, 2012. The "little girl" was never positively identified, although there is an assumption on the part of the witness that the Decedent was referring to Snow. The issue of testamentary capacity was not raised by the Appellant. The Order's finding that the Decedent had testamentary capacity on January 14, 2012 is not challenged.

The Appellant attempts to use the statements about the "little girl" to show that the Respondents tricked or coerced the Decedent into executing a will that was against his true intentions. While this evidence may raise suspicions when considered in the light most favorable to the Appellant, it falls far short of meeting her burden of proof, especially when considering the Decedent's dementia diagnosis. Each party acknowledges that the Decedent's cognizance varied on a daily basis. The

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unchallenged finding of the Probate Court was that Decedent had testamentary capacity on the day the will in question was executed.

3. Confidential Relationship.

The Appellant argues that the Respondents were in a confidential relationship that raised the presumption of invalidity of the will. The evidence that the Appellant uses to further her argument is that the Respondent Margaret Kelly acted as the scrivener for the Decedent regarding the will in question, that the Respondent Ben Smith had been given a Durable Power of Attorney by the Decedent while he was still in North Carolina, and that the Respondent Margaret Kelly was given a Health Care Power of Attorney by the Decedent afterwards (February 8, 2012). There also was some testimony that Kelly was close to the Decedent and did things for him. The Order embarks on a thorough analysis of the applicable law considered in light of the evidence, ultimately rejecting this argument. The evidence in the record falls short of the Appellant's burden of proof in this case. Even if the Court had reached the conclusion that a confidential/fiduciary relationship existed, there was ample evidence in the record rebutting the presumption of invalidity.

CONCLUSION

Certainly, there is some circumstantial evidence in the present case. However, after reviewing the evidence presented to the Probate Court for the summary judgment motion, I find it impossible to reach the conclusion that there is sufficient evidence in the record to create a

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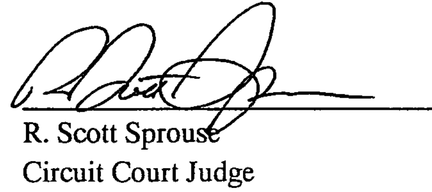
genuine issue of material fact in light of the clear and convincing standard that exists in these type cases. Accordingly, the Order of Probate Court of York County is AFFIRMED.



December 22, 2015

Walhalla, South Carolina

R. Scott Sprouse
Circuit Court Judge

YORK COUNTY PROBATE COURT

Carolyn Woodruff Rogers, Judge of Probate
Post Office Box 219
York, South Carolina 29745
Tel: (803) 684-8513 Fax: (803)684-8536

Kelly J. Arwood
Associate Judge

Linda L. Rhodes
Associate Judge

January 12, 2015

B. Michael Brackett, Esquire
P. O. Box 100261
Columbia, SC 29202

Re: Estate of Vinton Tucker
Case Number 2012ES4600579

Dear Mr. Brackett:

Please draft a proposed order granting summary judgment on the first, third, fourth and fifth causes of action in the Petition for Formal Testacy and to Set Aside Informal Probate filed on May 10, 2013. Note in the order that the second cause of action was withdrawn by the Petitioner at the hearing on December 30, 2014. Also include that the Respondents' motion to substitute the Petitioner's agent under the Petitioner's durable power of attorney was granted at the hearing.

As to the first cause of action (lack of jurisdiction), there is no dispute about the facts – Mr. Tucker's move from his home in Mecklenburg County to Westminster Towers in December 2011, his receipt of mail in York County, the York County residency of his agent under his durable power of attorney, the location of his financial assets and his expressed desire to return to his home. No counter affidavits as to the York County location of his tangible personal property were submitted. Although South Carolina courts seek precedent from South Carolina cases, South Carolina will look to the law of other jurisdictions for guidance when its case law is nonexistent or minimally helpful. Aside from the fact that the probate court had good cause to accept jurisdiction of the estate based on the sworn statement submitted in May 2012 and the facts presented therein and in the death certificate, the Montana case cited by Respondents' counsel, Estate of Strange, is sufficiently analogous to the Tucker circumstances so the reasoning of the Montana Supreme Court applied to the facts presented at the hearing supports a determination that South Carolina has territorial jurisdiction of this case pursuant to S. C. Code Section 62-1-301.

As to the third cause of action (undue influence), the non-moving party must present more than a scintilla of evidence to withstand a motion for summary judgment. In opposition to summary judgment, the Petitioner offered the deposition testimony of a

Westminster Towers social worker who stated that on February 5, 2012, Mr. Tucker was "cognitively clear" and talked about a will and leaving money to a "little girl who he loved very much" and about not including unidentified nieces and nephews in his will. There was also deposition testimony that family members restricted visitation with Brenda Snow, a caregiver with whom Mr. Tucker had a short term relationship and whom they suspected of ill treatment of Mr. Tucker. Ben Smith testified that on the advice of Mr.Tucker's attorney he tore up a different will of Mr. Tucker's and couldn't remember if he so informed Mr. Tucker. The scrivener who drafted the will, Margaret Kelly, was named Mr. Tucker's agent in regard to health care decisions.

The evidence and the inferences to be drawn from it do not clearly and convincingly create an issue of fact in regard to undue influence. No evidence was presented by the contestants as to the restriction of visitation other than of Snow, mental infirmity other than a vague and general diagnosis of mild dementia, any requests by Mr. Tucker to revise his will, or any concerns expressed by Mr. Tucker to disinterested third parties, who apparently had unfettered access to Mr. Tucker, about the Respondents' treatment of him or the powers of attorney he executed naming Respondents as his agents. No evidence was presented by the Petitioner of force or threat by the Respondents which substituted the judgment of the proponents of the will for Mr. Tucker's and overbore his testamentary intent, either at the time of execution of the will or any other time.

Please include the cases cited in your Memorandum of Law to support the necessity for circumstances to point unmistakably and convincingly to the fact that the mind of the testator was subject to that of some other person so that the last will is that of the latter and not of the former. Note that any exercise of influence in Mr. Tucker's circumstances appears to be within legal boundaries and does not constitute the coercion determined by the courts to constitute undue influence. Please cite the rationale explained in *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009) that where the evidentiary standard is clear and convincing, the courts have greater discretion to treat the non-moving party's submissions as too insubstantial to overcome summary judgment.

As to the fourth cause of action (capacity), there is no genuine issue of fact as to Mr. Tucker's capacity to make a will. There is no dispute about the facts that Mr. Tucker may have been suffering from mild dementia, or that he mentioned the disposition of his estate in a previous will, or that he dictated a handwritten will. The Respondents offered the deposition testimony of Dr. Ratterree and Dr. Marfo, Mr. Tucker's treating physicians on the date the will was executed, which support a finding that Mr. Tucker had testamentary capacity on January 14, 2012. Please cite specific lines from each of their depositions to that effect.

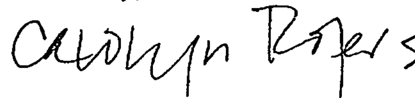
The Petitioner offered the fact that Mr. Tucker's will was drafted by a family member in the hospital emergency room after he received news of a potentially fatal aneurysm. Neither side contested the facts proffered by the other. Under South Carolina law, the threshold standard for testamentary capacity is low. Please cite the *Hellams*,

Weeks, *Hairston*, and *McCollum* cases and note that South Carolina case law is replete with courts' determinations that a testator has capacity in situations much more egregious than Mr. Tucker's.

As to the fifth cause of action (fraud), no facts clearly and convincingly supporting the elements of fraud were presented by the non-moving party. No facts supporting the allegation that Mr. Tucker was mistaken as to what he was signing were presented by the non-moving party. Again, cite the *Hancock* case.

Please send the proposed order to Ms. Anderson for review before submitting to the court. Thank you.

Sincerely,



Carolyn W. Rogers

Cc: Syretta Anderson, Esquire
1373 Ebenezer Road
Rock Hill, SC 29732

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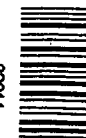

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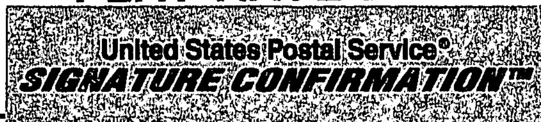

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