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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal From York County  
Court of Common Pleas, as an Appellate Court

R. Scott Sprouse, Circuit Court Judge

**RECEIVED**  
MAY 05 2016  
SC Court of Appeals

Circuit Court Case No. 2015-CP-46-00466  
On Appeal From the York County Probate Court

Appellate Case No. 2016-000096

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 the Estate  
of Vinton Willis Tucker ..... Respondents.

Respondents' Motion to Dismiss Appeal

Please take notice that Respondents, through their undersigned counsel, move the Court to dismiss the appeal herein on the ground that the purported Appellant has no standing or authority to prosecute the appeal thereby rendering the Notice of Appeal a nullity and depriving this Court of jurisdiction to entertain an appeal.

Respondents previously moved to dismiss the appeal because the purported Appellant was the former attorney-in-fact for the Petitioner below and is now trying to prosecute the appeal as a pro se party and was thereby engaging in the unauthorized practice of law. (See Respondents' Motion to Dismiss Appeal filed on February 1, 2016, incorporated herein by reference). The February 1, 2016 Motion to dismiss Appeal disclosed the situation regarding Mrs. Swiger's death and the absence of a duly appointed personal representative or executor. By Order dated April 1, 2016, the Court acknowledged that Ms. DeHaven was not authorized to prosecute the appeal pro se but nevertheless allowed her 30 days to retain counsel. (See Order dated and filed April 1, 2016, incorporated herein by reference).

On April 28, 2016 attorney Syretta R. Anderson notified the Court that she had been retained "to represent the Appellant, Mary Jean Tucker Swiger, by and through her Attorney-in-fact, Carol DeHaven." This cannot be because (1) Mrs. Swiger is deceased, and (2) Ms. DeHaven is no longer attorney-in-fact for Ms. Swiger.

Ms. DeHaven represented to the Court in her Return to the Motion to Dismiss, filed February 12, 2016, that Mrs. Swiger died on October 6, 2015. This had the effect of terminating Ms. DeHaven's status as attorney-in-fact, a consequence expressly noted in the April 1, 2016 Order. There has been nothing filed with any Court related to this case indicating that a probable estate has been opened to administer Mrs. Swiger's estate and that a personal representative or executor or executrix has been appointed by the appropriate court to act on behalf of the estate.

The Notice of Appeal herein, filed on January 20, 2016, was not signed and/or filed and/or served by a person having authority at law or standing to do so. Respondents submit that the Notice of Appeal is a nullity and that a proper appeal has not been timely perfected, thereby calling for the

appeal to be dismissed. A notice of appeal is a critical legal document that is the very foundation for perfecting an appeal as illustrated by the facts that the 30-day deadline for serving the Notice of Appeal is fixed and definite and cannot be extended by the court. Rules 203(a) and (b)(1), and 263(b), SCACR, and that without a properly filed and served notice of appeal, the appellate court has no jurisdiction to entertain the appeal, and the appeal should be dismissed. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008), rehearing denied.

This issue is controlled by Asbury v. South Carolina Nat. Bank, 268 S.C. 40, 231 S.E.2d 306 (1977). In Asbury, Mr. Walker petitioned the probate court that the last will be proved in solemn form, what is now known as a formal proceeding. Mr. Walker died ten months later, prior to a solemn form trial having been held. Approximately six months after Mr. Walker's death, the executor, now the personal representative, petitioned the probate court to revoke its order requiring proof of the will in solemn form on the ground that no "qualified contestant" existed. The probate court issued an order granting the executor's petition.

A Notice of Appeal was filed by "Ann Walker Asbury as Executrix of the Will and Estate of Hugh V. Walker and as sole heir under the will of Hugh V. Walker." However, at the time the Notice of Appeal was filed and served, no probate estate had been opened for Mr. Walker and Ms. Asbury had not been appointed as executrix. A hearing was held in circuit court, sitting as an appellate court, on the motion for dismissal of appeal, and at the time of the motion hearing an estate still had not been opened, and Mr. Walker's last will had not been filed for probate, and Ms. Asbury had not been appointed as executrix. The circuit court dismissed the appeal holding that Ms. Asbury had no standing to pursue the appeal. Six days after the circuit court hearing, Mr. Walker's will was accepted for probate, in which Ms. Asbury was named as executrix and sole devisee.

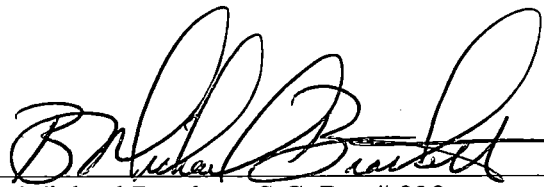
Asbury appealed the circuit court's order dismissing the appeal. The South Carolina Supreme court affirmed the dismissal because:

1. Asbury was never a contestant or party to the probate court solemn form proceeding and has no individual right to appeal (the same is true with respect to Ms. DeHaven in the above-captioned appeal);
2. Neither Asbury nor anyone else had been appointed as executor of Mr. Walker's estate **"when the Notice of Appeal was filed;"** (also true with respect to the Notice of Appeal filed herein);
3. the failure to offer Mr. Walker's last will to probate and to thereby make its terms effectual with respect to the appointment of an executrix and the disposition of property to heirs or devisees was "fatal to this appeal." The Notice of Appeal was held to be a nullity because it was filed in a name that is not a legal entity.

The same defect exists herein. The Notice of Appeal filed on January 20, 2016 was filed by Carol DeHaven, identified therein as "Appellant Representing Self." (See signature block on Notice of Appeal.) Just as in Asbury, Ms. DeHaven was not a party to the proceedings below individually and in her own right. Consequently, and pursuant to Asbury, "she has no individual right to appeal," and at the time the Notice of Appeal was served and filed she had no derivative right to appeal.

#### Conclusion

For the reasons stated hereinabove, the purported Appellant has no standing to appeal; the Notice of Appeal is and was a nullity; this Court lacks appellate subject-matter jurisdiction; the probate court summary judgment, affirmed by the circuit court, is now the law of the case; and the appeal must be dismissed.



B. Michael Brackett, S.C. Bar # 838

Adam T. Silvernail, S.C. Bar # 80219

Moses & Brackett, PC

P.O. Box 100261

Columbia, SC 29202

803.461.2312

Attorneys for Respondents

May 4, 2016

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal From York County  
Court of Common Pleas, as an Appellate Court

R. Scott Sprouse, Circuit Court Judge

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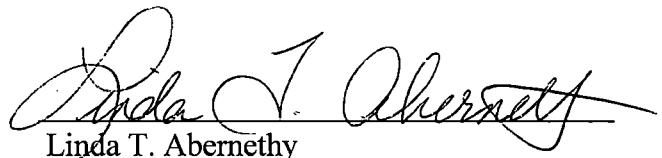
v.

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

Respondent's Certificate of Service

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Respondents in the above-captioned matter, do hereby certify that I have served the Appellant's attorney of record, with a copy of **Respondents' Motion to Dismiss Appeal** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 4<sup>th</sup> day of May, 2016 at the following address:

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

  
Linda T. Abernethy

# MOSES & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

1333 Main Street, Suite 260 (29201)  
Post Office Box 100261  
Columbia, South Carolina 29202-3261

Telephone (803) 461-2300  
Facsimile (803) 461-2309

B. Michael Brackett, Of Counsel  
Direct Dial: (803) 461-2312  
Email: mbrackett@mkb-law.com

May 4, 2016

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**SC Court of Appeals**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
S.C. Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Swiger v. Smith and Kelly, as Personal Representatives  
Appellate Case No. 2016-000096

Dear Ms. Kitchings:

Enclosed for filing please find the original (unbound) and six copies of Respondents' Motion to Dismiss Appeal, together with the customary Certificate of Service.

By copy of this letter, copies of the enclosed motion and certificate are being mailed to the purported Appellant's attorney at her address of record.

My check in the amount of \$25.00 is enclosed for the motion fee. Please return a clocked copy of the face page of the motion using the envelope provided.

Very truly yours,



B. Michael Brackett

Enclosures

cc: Margaret Kelly  
Ben Smith  
Syretta R. Anderson, Esquire

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OSES & BRACKETT, PC  
Attorneys & Counselors-At-Law  
O. Box 100261  
Columbia, SC 29202-3261

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
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