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SC Court of Appeals

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY
Circuit Court

Case Number 2016-000096

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 Tucker
Respondents.

APPELLANT'S RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL

Appellant submits this Return to Respondent's Motion to Dismiss Appeal for the foregoing reasons:

By motion signed and dated February 1, 2016, Respondents filed a Motion to Dismiss the Appellant's appeal arguing in part that "*Respondents submit that the Notice to Appeal is a nullity and that a proper appeal has not been timely perfected, thereby calling for the appeal to be dismissed.*" (See Respondents' Motion to Dismiss signed on February 1, 2016, page 3, paragraph 2). This Court considered Respondents' Motion to Dismiss filed on February 1, 2016 and by Order of this Court filed on April 1, 2016, denied Respondents' request to dismiss Appellant's appeal. Respondents did not file a Rule 59€, motion for consideration of this Court's April 1, 2016 Order. That order is now the law of this case.

By motion signed and dated May 4, 2016, Respondents' **again** filed a Motion to Dismiss Appellant's appeal arguing the very same argument in that Respondents' argued that "*Respondents submit that the Notice to Appeal is a nullity and that a proper appeal has not been timely perfected, thereby calling for the appeal to be dismissed.*" (See Respondents' Motion to Dismiss signed on May 4, 2016, page 2, paragraph 4).

As previously noted, Respondents did not file a Rule 59€, motion for consideration of this Court's April 1, 2016 Order. That order is now the law of this case, and Respondents' cannot attempt to seek further consideration of the same argument.

In Respondents first (1st) Motion to Dismiss signed on February 1, 2016, Respondents' also argued that "*... this Court lacks subject matter jurisdiction, the probate court summary judgment is now the law of this case, and the appeal must be dismissed.*" (See Respondents' Motion to Dismiss signed on February 1, 2016, page 5, paragraph 3). After considering this argument from Respondents', this Court denied Respondents' request to dismiss Appellant's appeal. Once again, Respondents did not file a Rule 59€, motion for consideration of this Court's April 1, 2016 Order. That order is now the law of this case.

Despite having made the same argument in the 1st Motion to Dismiss, and despite the fact that this Court already denied Respondents' February 1, 2016, Motion to Dismiss, Respondents' again made the same argument in the 2nd Motion to Dismiss signed on May 4, 2016, in that Respondents' set forth that "*... this Court lacks subject matter jurisdiction, the probate court summary judgment is now the law of this case, and the appeal must be dismissed.*" (See Respondents' Motion to Dismiss signed on May 4, 2016, page 4, paragraph 3).

Respondents' attempt to rephrase their original argument where the Court has previously ruled and argues that Ms. DeHaven lacks standing to appeal. Ms. Carol DeHaven is the daughter of the deceased Appellant, Mary Jean Tucker Swiger. Ms. DeHaven was the attorney-in-fact for Ms. Swiger. Upon her death, in her will, Ms. Swiger named her daughter as personal representative of Ms. Swiger's estate. Ms. Swiger set forth in her Last Will and Testament that gave to her Executor and her Trustee "the power to designate any individual or corporation with trust powers to serve with my Executor or my Trustee or in my Executor's or my Trustee's stead." Relying on this authority, Carol Dehaven, was designated as personal representative.

In accordance with S.C. Code Ann. §62-3-703 (c), (2012), a personal representative, has the right, *"Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this State at his death has the same* ***standing*** *to sue (*emphasis added) *and be sued* ***in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death.*** (emphasis added).

As set forth by this Section, this proceeding did in fact survive the death of the decedent, Mary Ann Tucker Swiger who died on October 6, 2015. In addition, as the sole living heir of Mr. Tucker at the time of her death, Ms. Swiger had standing *immediately prior to death* to sue in the courts of this State as it relates to the contesting the validity of the probated will, and as Ms. Swiger had this right to sue, as does her personal representative.

Respondents' ignore the case law which is replete with authority that establishes Ms. Dehaven has standing. Respondents' even conveniently ignore the South Carolina

statutes the clearly indicated that personal representatives have standing. Instead, Respondents rely heavily on Asbury v. South Carolina Nat. Bank, 268 S.C. 40, 231 S.E.2d 206 (1977). After a diligent search, it appears the Asbury case that was heard by the Court in 1977, has never been cited as authority on any case on the issue of standing. (See Exhibit A, Authority Check Report Generated on May 17, 2016). However, what the Court has ruled upon on many cases since 1977 is the issue of standing. *"To have standing ... one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action."* Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999) (quoting Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)); see also Henry v. Horry County, 334 S.C. 461, 463 n. 1, 514 S.E.2d 122, 123 n. 1 (1999). As an heir, Ms. Dehaven would definitely have a substantial interest in the subject matter of this action. As personal representative, Ms. Dehaven not only has a substantial interest in the subject matter of this action, but has a fiduciary obligation to protect the interests of the estate, in addition to having standing. As such, Ms. Dehaven has standing and Respondents' Motion to Dismiss should be denied.

In further support of Appellants' position that Respondents' Motion to Dismiss should be denied, Appellants set forth that the parties were before the Circuit Court on December 8, 2015 on appeal from the Probate Court. At the time of this hearing, Ms. Mary Jean Tucker Swiger was already deceased. Ms. Mary Jean Tucker Swiger died on October 6, 2015. Respondents' did not address the issue of standing during the December 8, 2015 hearing, the Order from that hearing did not address the issue of

standing, and Respondents' failed to file a Rule 59€, motion for consideration of the Circuit Court's Order. That order is now the law of this case.

In Wilson v. Dallas, "where there was no specific ruling discussing Appellants' standing in the circuit court's order of May 2009, and the matter was not raised in a Rule 59 motion… [t]his Court has previously declined to consider standing where the matter was not both raised to and ruled upon by the trial court, and it is questionable whether the issue was properly preserved here, although it was briefed. (S.C., 2013) See, e.g., James v. Anne's Inc., 390 S.C. 188, 193, 701 S.E.2d 730, 732-33 (2010) (observing this Court has the inherent authority to consider justiciability, but when a party raises the issue, our courts have applied error preservation principles and have held the issue was not preserved where the trial court did not first rule on the issue).

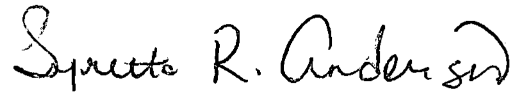
Wilson is analogous to the case herein. The Court in Wilson declined to consider the issue of standing because Respondents' failed to raise this issue timely. For the same reasoning, this Court should decline to consider this as a viable argument and should deny Respondents' Motion to Dismiss.

Conclusion

For the reasons set forth herein, this Court should deny Respondents' Motion to Dismiss. Respondents' have continued to place great weight in the fact that "Two courts have ruled in Respondent' favor." Respondents continued that … "it is not fair that Appellant be allowed to continually string this along." What the Respondents have failed to consider is that this is the legal process for which parties can address their grievances. The law is designed to allow parties an avenue of appeal for cases just like this one – where lower courts have ruled unfavorably. To now accuse Appellants of "stringing this

along" because the Appellant has chosen avail herself to the laws of this State, not only are Respondents' gravely mistaken by this statement, but the statement is completely unfair.

Respectfully Submitted,



Syretta R. Anderson
124 Oakland Avenue
Rock Hill, SC 29730
(803) 980-5252

May 17, 2016

EXHIBIT A

fastcase
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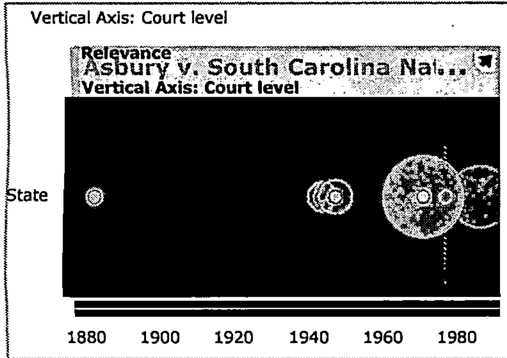
Authority Check Report Generated on May 17, 2016

Asbury v. South Carolina Nat. Bank, 231 S.E.2d 306, 268 S.C. 40 (S.C., 1977)

Authority Check is an automated system that identifies later-citing cases, but it is not a citator, and does not include editorial information telling you whether your case is still good law.

Interactive Timeline



Citation Summary

Total number of times this case has
Cited by federal appellate cases:
Cited by state cases:
Cited by district court cases:
Cited by bankruptcy court cases:
Decision date of most recent cite:

All Citing Cases

1 to 1 of 1 results

1. Ex parte Whetstone, 347 S.E.2d 881, 289 S.C. 580 (S.C., 1986) May 22, 1986

... Moreover, this rule is consistent with S.C. Code Ann. § 18-1-30 (1976), which limits appellate review to parties aggrieved by a judgment or order below. Brode v. Brode, 278 S.C. 457, 298 S.E.2d 443 (1982); Asbury v. South Carolina, **268 S.C. 40, 231 S.E.2d 306** (1977). This Court has defined an aggrieved party as one who is injured in a legal sense or one who has suffered an injury to person or property. Dunson v. Dunson, 278 S.C. 210, 294 S.E.2d 39 (1982); Cisson v. McWhorter, 255 S.C. 174, 177 S.E.2d 603 (1970); ...

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PROOF OF SERVICE

I certify that I have served the Appellant's Return to Respondents' Motion to Dismiss on the Respondents, Ben R. Smith and Margaret P. Kelly as Personal Representatives of the Estate of Vinton Tucker by delivering a copy to their counsel, Michael Brackett via electronic and United States Mail, postage prepaid, addressed as follows:

Michael Brackett, Esquire,
Post Office Box 100261,
Columbia, South Carolina 29202

Respectfully Submitted,

Syretta R. Anderson, Esquire
Attorney for Appellant

May 17, 2016

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SC Court of Appeals

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May 17, 2016

VIA ELECTRONIC AND US MAIL
V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
P. O. Box 1629
Columbia, SC 29211

Re: Swiger vs. Smit and Kelly
2016-000096

Dear Ms. Allen:

Enclosed please find the original and one copy of Appellant's Return to Respondents' Motion to Dismiss Appeal and Proof of Service in connection with the above referenced matter.

Please return a clocked copy of the Motion and Proof of Delivery to me in the enclosed envelope.

I am copying Mr. Brackett as the attorney for the Respondents on this correspondence.

Should you have any questions, please do not hesitate to contact me.

Respectfully,

Syretta R. Anderson/ocs

Syretta R. Anderson, Esq.
Attorney for Appellant
Anderson Law Firm, PC

cc: Michael Brackett, Esq.

ANDERSON LAW FIRM, PC
124 OAKLAND AVENUE
ROCK HILL, SOUTH CAROLINA 29730

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