

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal From York County
Court of Common Pleas, as an Appellate Court
R. Scott Sprouse, Circuit Court Judge

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' Reply to Appellant's Return to
Respondents' Second Motion to Dismiss Appeal

Respondents first moved to dismiss this appeal on two grounds: (1) that Ms. DeHaven, a nonlawyer who is not a party to this proceeding in her personal capacity, filed and served the Notice of Appeal and was thereby engaged in the unauthorized practice of law, making the Notice of Appeal

a nullity; and (2) that the Notice of Appeal did not identify the probate court's February 2, 2015 Order as the order being appealed. By Order dated April 1, 2016, this Court acknowledged the merits of Respondents' motion to dismiss appeal in ruling that Ms. DeHaven could not act pro se to represent the estate of Mary Jean Tucker Swiger; however, this court decided not to dismiss the appeal and to allow Ms. DeHaven 30 days to retain counsel. The April 1, 2016 Order did not address the second ground for the motion to dismiss.

Upon receiving the notice of appearance filed by attorney Anderson on or about April 28, 2016 which did not indicate that Ms. DeHaven was authorized by law to speak and act on behalf of the Swiger estate, Respondents filed and served a second motion to dismiss appeal challenging this Court's jurisdiction on the ground that Ms. DeHaven was not a party to the proceedings below individually and in her own right and that pursuant to Asbury v. South Carolina Nat. Bank, 268 S.C. 40, 231 S.E.2d 306 (1977) "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. This is a ground not raised and decided in the first motion to dismiss appeal. A court's jurisdiction can be challenged at any time in the proceedings. State v. Johnston, 327 S.C. 435, 489 S.E.2d 228 (Ct. App., 1997) (subject matter jurisdiction may be raised at any time because it is the duty of the court to assure that it renders no decision in a matter when it has no authority to act). This has been the law for long time. Whetstone v. Livingston, 54 S.C. 539, 32 S.E. 561 (1899) (question of jurisdiction may be raised at any time by the parties or by the court of its own motion).

1. The Return is untimely. The Motion to Dismiss now at issue was served on May 4, 2016. Appellant had ten days from the date of service to file and serve a Return. Rule 240(e), SCACR. The tenth day after service was May 14, 2016, a Saturday. Consequently, the last day for filing and

serving the Return was moved to Monday, May 16, 2016. Rule 263(a), SCACR. On May 10, 2016, Appellant served a Motion for Extension of Time for Appellant's Return. Appellant's motion did not include a motion to stay or toll the running of the appeal process pending a decision on the motion for extension. Respondents objected to the requested extension by a Return dated and served on May 11, 2016. The motion for extension was not decided prior to the Appellant's Return dated and served on May 17, 2016, and to the undersigned's knowledge has not been decided as of the date of this Reply.

2. Appellant's argument is premised on the apparent belief that being named in decedent Swiger's last will to serve as personal representative, or as stated in the Return being the "designated" personal representative, makes Ms. DeHaven the personal representative with all legal authority of the office without regard to whether an estate has actually been opened, or if the particular last will has actually been accepted by the court for probate, or if the court has actually appointed Ms. DeHaven to serve as personal representative. Additionally, the Return argues that Ms. DeHaven's status as sole heir is the functional equivalent of being judicially appointed as personal representative. Both of these contentions were addressed in Asbury v. South Carolina Nat. Bank, 268 S.C. 40, 231 S.E.2d 306 (1977) and decided contrary to Ms. DeHaven's position herein. In Asbury the appeal was dismissed 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); and 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.”

Ms. Asbury’s status as sole devisee, in lieu of being judicially appointed, was of no relevance and did not preclude dismissal of the appeal. The Notice of Appeal was held to be a nullity because it was filed in a name that is not a legal entity. In addition to Asbury, supra., it is noted that the South Carolina Probate Code contemplates that a personal representative or special administrator, each being a judicially appointed person, is to represent the probate estate: §62-3-104 (no proceeding to enforce a claim against the estate of a decedent may be revived or commenced before the appointment of personal representative); § 62-3-617 (a special administrator appointed by order of the court in any formal proceeding power of a general personal representative); § 62-3-715 (20) (a personal representative may properly prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate).

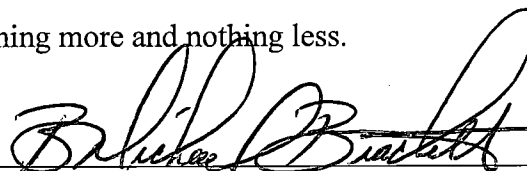
3. Finally, Appellant argues that Ms. Swiger died prior to the December 8, 2015 appeal argument in circuit court and that Respondents did not object to proceeding with the argument. The short answer to that assertion is that neither the circuit court nor the Respondents knew at the time that Ms. Swiger had died two months prior. The transcript of the December 8, 2015 appeal hearing will confirm that Ms. DeHaven, including her attorney, did not advise the Court or Respondents’ attorney of Ms. Swiger’s death. That is why the circuit court’s Order affirming the probate court’s summary judgment is silent on the subject of Ms. Swiger’s death. Respondents learned of Ms. Swiger’s death when Ms. DeHaven disclosed it to this Court in her February 18, 2016 “Appellant’s Response.” Also see the undersigned’s letter to this Court dated February 19, 2016.

When the probate court issued its summary judgment order, Ms. Swiger was living, and Ms. Dehaven was her attorney-in-fact. When the appeal to circuit court was filed, Ms. Swiger was living,

and Ms. Dehaven was her attorney-in-fact. Ms. Swiger died after the appeal to circuit court was filed and approximately two months before the appeal was argued in circuit court. Choosing not to disclose Ms. Swiger's death to the circuit court or to the Respondents, Ms. DeHaven, then acting personally because her status as attorney-in-fact had ended upon Ms. Swiger's death, allowed the appeal arguments to go forward in circuit court with Ms. Swiger's attorney [Ms. Dehaven's attorney] appearing and fully participating in the appeal hearing. Only after receiving an unfavorable ruling in the circuit court and facing a motion to dismiss in this appeal proceeding, Ms. Dehaven now seeks to renounce her silence and constructive consent to the outcome of the appeal to circuit court.

Conclusion

All that is before this Court is the Respondents' motion to dismiss appeal on the ground that the appeal was commenced by someone who was not a proper party and who lacked legal authority to commence the appeal. As Judge Sanders, the former Chief Judge of this Court, explained it, ". . . appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." Langley v. Boyter, 284 S.C. 162, 325 S.E.2d 550 (Ct. App., 1984). Ms. Dehaven is not and never has been the judicially appointed personal representative of the Mary Swiger estate and therefore had no authority to sign, file or serve the Notice of Appeal herein. The appeal should be dismissed, nothing more and nothing less.



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803.461.2312
Attorney for Respondents

May 19, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal From York County
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R. Scott Sprouse, Circuit Court Judge

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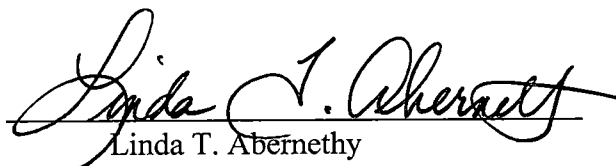
v.

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 Attorney for Appellant with a copy of **Respondents' Reply to Appellant's Return to Respondents' Second Motion to Dismiss Appeal** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 19th day of May, 2016 at the following address:

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


Linda T. Abernethy

MOSES & BRACKETT, PC

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May 19, 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

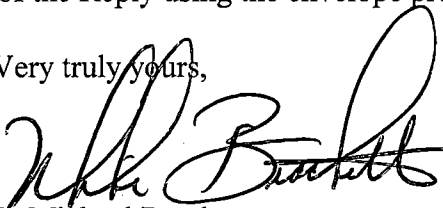
Dear Ms. Kitchings:

Enclosed for filing please find the original (unbound) and six copies of Respondents' Reply to Appellant's Return to Respondents' Second Motion to Dismiss Appeal. Also enclosed is the customary certificate of service.

By copy of this letter, a copy of the enclosed Reply is being served by mail to Appellant's attorney of record.

Please return a clocked copy of the face page of the Reply using the envelope provided.

Very truly yours,



B. Michael Brackett

BMB/lta
Enclosures

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

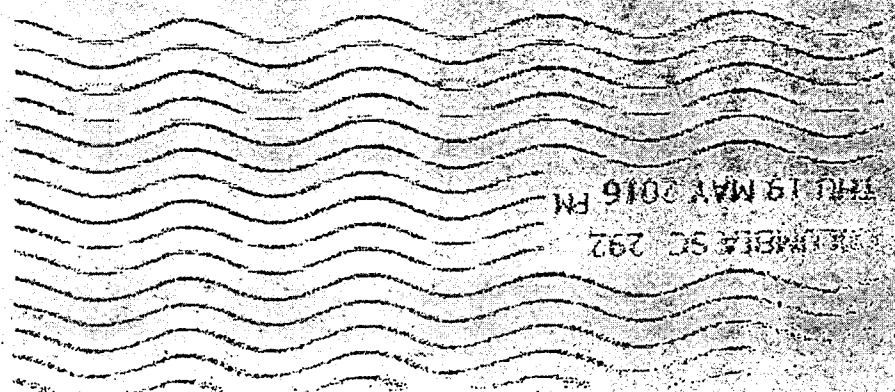
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