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

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' Amended Initial Brief

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Cases

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(None)

Other

Statement of Issues on Appeal

1. Appellant's Notice of Appeal dated January 19, 2016 and served January 15, 2016 [sic] is a nullity, which deprives this court of jurisdiction to entertain this appeal, because it was filed and served by a person (DeHaven, acting pro se) who has no standing or authority to prosecute the appeal. (All Issues on Appeal)

2. Appellant's January 19, 2016 Notice of Appeal identified only the Circuit Court's Order Affirming Decision of Probate Court as being the subject of the appeal, and did not identify the Probate Court's Summary Judgment Order as being a subject of the appeal, to the result that Appellant has not timely perfected an appeal from the trial court's final order, and that order is now the law of the case. (All Issues on Appeal)

3. Appellant's Issue on Appeal number 1 violates Rule 208(b)(1)(B), SCACR, in that it is a "[b]road general statement" that is conclusory in nature and does not identify a "concise and direct" issue for review, and said issue can, and should, disregarded by the Court. (Appellant's Issue on Appeal No. 1)

4. Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation of restricted visitation. (Appellant's Issue on Appeal No. 2(i))

5. Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation that the challenged last will did not comport with the testator's expressed wishes. (Appellant's Issue on Appeal No. 2(ii) and (iii))

6. Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding the changes made from prior wills. (Appellant's Issue on Appeal No. 2(ii) and (iii))

7. Appellant's argument with respect to evidence of the testator's physical infirmity is not preserved for appellate review because it was not presented to and/or decided by the trial court. (Appellant's Issue on Appeal No. 2(iii))

8. Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding that the testator was physically infirm. (Appellant's Issue on Appeal No. 2(iii))

9. Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because it was not presented to and/or decided by the trial court. (Appellant's Issue on Appeal No. 3)

10. Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because even if sufficient evidence of a confidential relationship was presented to give rise to a presumption of undue influence, the circuit court's ruling that said presumption was rebutted by Respondents' evidence was not appealed and is the law of the case. (Appellant's Issue on Appeal No. 3)

11. The mere existence of a confidential relationship is not, standing alone, determinative of a summary judgment motion with respect to evidence of undue influence where the evidence also shows that the presumption of undue influence raised by a confidential relationship has been rebutted and that ruling has not ben appealed. (Appellant's Issue on Appeal No. 3)

Statement of the Case

Vinton Tucker executed a last will on January 14, 2012 in the Piedmont Hospital emergency room. (Last Will). Several days later he was discharged from the hospital and returned to Westminister Towers, an assisted living facility. He died on May 12, 2012. Pursuant to the terms of the January 14, 2012 last will, Respondents were appointed by the York County Probate Court to serve as co-personal representatives. On or about May 10, 2013, Appellant filed a Petition for Formal Testacy and Appointment in the York County Probate Court in which Appellant challenged

the validity of the January 14, 2012 last will. (Petition). Appellant alleged five cause of action:

1. that the York County Probate Court lacked the requisite territorial jurisdiction to probate the Decedent's January 14, 2012 last will; (attachment to Petition, p. 2-3);
2. that the January 14, 2012 last will was invalid due to deficiencies in will execution formalities; (attachment to Petition, p. 3)
3. that the January 14, 2012 last will was invalid because it was the product of undue influence; (attachment to Petition, p. 3-4)
4. that the January 14, 2012 last will was invalid because the Decedent lacked the requisite testamentary capacity; (attachment to Petition, p. 4)
5. that the January 14, 2012 last will was invalid due to fraud. (attachment to Petition, p. 4)

Respondents served their Answer and Counterclaim on May 30, 2013. (Answer and Counterclaim). Appellant served her Reply on June 28, 2013. (Reply).

Following pretrial discovery, Respondents moved for summary judgment on all causes of action. (Motion and Amended Motion for Summary Judgment). Respondents' amended motion for summary judgment was heard by the Probate Court on December 30, 2014. At the hearing, Appellant withdrew her second cause of action. (Summary Judgment Order, p. 2). By Order dated February 2, 2015 the Probate Court granted summary judgment in favor of the Respondents on the remaining four causes of action and formally admitted the January 14, 2012 last will to probate. (Order). Appellant did not file a Rule 59(e), SCRCP, motion for reconsideration.

Appellant filed and served her Notice of Appeal on February 12, 2015. On March 27, 2015 Respondents moved to dismiss the appeal on the ground that Appellant had not by then filed and served the statutorily mandated Statement of Issues on Appeal. On April 2, 2015 Appellant filed and

served a Motion for Extension of Time to File Statement of Issues on Appeal accompanied by her Statement of Issues on Appeal. By Order dated June 22, 2015, the Circuit Court denied Appellant's motion for extension and dismissed the appeal. On July 10, 2015, Appellant filed and served a Motion to Reinstate Appeal. By Order dated July 27, 2015 the Circuit Court granted the Appellant's motion and restored the appeal to active status.

Appellant's appeal to Circuit Court related solely to her third cause of action alleging undue influence. (Page 1 [statement of issues on appeal] from Appellant's Brief to Circuit Court). She did not appeal the other three causes of action decided adversely to her by the summary judgment order. **Significantly, Appellant did not appeal the finding and conclusion of the Probate Court that the decedent possessed the requisite testamentary capacity when his January 14, 2012 last will was written, executed and witnessed.**

By Order dated December 22, 2015 the Circuit Court, Judge Scott Sprouse presiding, affirmed the Probate Court's Summary Judgment Order. (Order). No Rule 59(e), SCRCP, motion was made.

Appellant's Notice of Appeal was served on January 15, 2016. Respondents' two motions to dismiss the appeal were denied. The first motion to dismiss was grounded on the fact that in filing and serving the Notice of Appeal *pro se*, Ms. DeHaven was engaged in the unauthorized practice of law. (Motion to Dismiss Appeal dated February 1, 2016). By Order dated April 1, 2016 the Court agreed that Dehaven could not prosecute the appeal *pro se*, but declined to dismiss the appeal and granted Appellant 30 days to retain counsel. (Order).

The second motion to dismiss appeal was grounded on a challenge to the Court's jurisdiction to entertain the appeal because DeHaven has no legal standing and authority to prosecute the appeal,

thereby rendering the Notice of Appeal a nullity, thereby depriving this Court of appellate jurisdiction. (Motion to Dismiss Appeal dated May 4, 2016). By Order dated July 1, 2016, the Court denied the motion, but invited the Respondents to address the standing issue in their appellate brief. (Order).

Standard of Review

An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. Bass v. Gopal, Inc., 395 S. C. 129, 133, 716 S.E.2d 910, 912 (2011). Summary judgment law as applied in undue influence situations is addressed hereinbelow.

Statement of the Facts

The evidence before the Probate Court for the summary judgment hearing included:

1. There was no evidence before the probate court that either the Appellant or anyone related to her or to her side of this case was present when the will was written, signed and witnessed on January 14, 2012.
2. The decedent was transported to the Piedmont Hospital Emergency Room on January 14, 2012 after having a syncopal episode (temporary loss of consciousness). He actually regained consciousness at Westminister Towers prior to being placed in the ambulance. (Jane Bondurant, therapist at Westminister Towers, deposition p. 8, l. 13 to p. 12, l. 19).
3. Upon arrival at the ER, Dr. Ratterree was assigned to evaluate the decedent. (J. Ratterree, MD deposition, p.5, l. 7-13).
4. During the evening of January 14, 2012, when the will was executed, those who were

involved in one way or another with the decedent's medical care and the will's execution, the doctors, the scrivener and the witnesses to the will, have testified that the decedent was mentally competent. (particular citations to the record appear below).

5. The therapist at Westminister Towers who, a few hours before the will was signed, discovered the decedent was unconscious testified at deposition that by the time the ambulance arrived to transport the decedent to the ER (approximately three hours before the will was signed), he had regained consciousness and was "awake, alert and answering appropriately." (J. Bondurant deposition p. 18, l. 10 to p. 19, l. 18).

6. Also, the two physicians who treated and interacted with the decedent at the hospital have testified at deposition that, based on the content of their medical records, the decedent was then and there mentally competent. Dr. Ratterree was the ER doctor who was trying to find an explanation for decedent's loss of consciousness and who ordered the CT scan, discovered the abdominal aneurysm and who explained the aneurysm **to the decedent**. (J. Ratterree, MD deposition p. 12, l. 10 to p. 13, l. 14; and p. 8, l. 4 to p. 13, l. 14).

7. Dr. Ratterree testified that his first assessment of Mr. Tucker's mental status was that he was "oriented in time, place, and person. Grossly appropriate mood and affect. . . he was totally normal." (J. Ratterree, MD deposition p. 9, l. 15 to p. 10, l. 25).

8. Dr. Magdaline Marfo, a hospitalist at Piedmont Hospital, interviewed the decedent on January 14, 2012 at approximately 10:38 pm when he was in the process of being discharged from the ER and being admitted to the hospital. She was discussing directly with Mr. Tucker his medical history and she testified at deposition that in her opinion, the decedent was then mentally competent. " (M. Marfo, MD deposition p. 12, l. 2 to p. 20, l. 4).

9. Decedent did not know of this serious condition prior to January 14, 2012. (M. Kelly deposition, p. 29, l. 20 to p. 30, l. 13 and p. 40, l. 15 to p. 42, l. 3; p. 51, l. 2- 10).

10. The decision was made to admit the decedent to the hospital, and those arrangements took some period of time during which decedent remained in the small ER examination room. (J. Ratterree MD deposition, p. 14, l. 2 - 20).

11. During this interval, the decedent expressed his wish to prepare a last will because his life expectancy was suddenly in question. (M. Kelly deposition, p. 29, l. 20 to p. 30, l. 13 and p. 40, l. 15 to p. 42, l. 3).

12. The will was handwritten by Margaret Kelly according to the oral directions of the decedent. (M. Kelly deposition, p. 41, l. 22 to p. 45, l. 18).

13. It was read to the decedent more than once, and the decedent expressed his approval of the will. (M. Kelly deposition, p. 53, l. 4-15).

14. The will was signed by the decedent in the Piedmont Hospital emergency room while he was on his back in a reclined position. (M. Kelly deposition, p. 50, l. 7 to p. 51, l. 1).

15. The decedent's execution of the will was witnessed by three witnesses: Ronald (Steve) Kelly, Danny Kelly and Rebecca Kelly. (M. Kelly deposition, p. 54, l. 9 -15, and Rebecca Kelly deposition, Exhibit 4).

16. Ronald (Steve) Kelly is the husband of Margaret Kelly (Steve Kelly deposition, p. 6, l. 21-23) who is one of the devisees named in the will.

17. The two disinterested witnesses to the will, Danny Kelly and Rebecca Kelly, are husband and wife, and they are neither related to the decedent nor named as devisees in the will (Danny Kelly deposition, p. 6, l. 17-24).

18. Ronald Kelly and Danny Kelly signed as witnesses, and Rebecca Kelly signed as a notary public. (Last Will).

19. Margaret Kelly, the scrivener, was related to the decedent by marriage (decedent's predeceased spouse was Margaret Kelly's aunt) (Margaret Kelly deposition p. 5, l. 17 - 23) and is named as a devisee in the will; however, her interest under the will is exactly the same as the other eleven devisees who are all nieces and nephews. (Last Will). There is no evidence that the Appellant was ever named a devisee in any last will executed by the decedent.

Argument

Summary Judgment Law Re Undue Influence

Summary judgment is not a "disfavored procedural shortcut, but rather ... an integral part of the Federal Rules as a whole, which are designed `to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. at 2548, 91 L.Ed.2d 265 (1986). The policy as expressed in South Carolina cases is that the purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Curiel v. Hampton County E.M.S., 401 S.C. 636, 737 S.E.2d 854 (Ct.App. 2012). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001); South Carolina Elec. & Gas v. Town of Awendaw, 351 S.C. 491, 570 S.E.2d 542 (Ct. App. 2002). The Court may consider pleadings, pretrial discovery and affidavits in deciding summary judgment motions. Bryant v. Babcock Center, Inc., 353 S.C. 208, 638 S.E.2d 650 (2006).

In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Bass v. Gopol, Inc., supra.

In Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329 (S.C. 2003) the law of summary judgment is explained: "When opposing a summary judgment motion, the nonmoving party [Plaintiff herein] must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial,'" citing Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 410 S.E.2d 537 (1991). The party responding to a summary judgment motion may not rest on the allegations in his pleadings, but must set forth specific facts showing a genuine issue for trial. Burry & Son Homebuilders, Inc., v. Ford, 310 S.C. 529, 426 S.E.2d 313 (1992). To be considered by the Court in deciding a summary judgment motion, submissions must contain specific probative facts and not just conclusory allegations. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) ("The object of [Rule 56] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946) (stating speculation and conjecture are not a substitute for probative facts); Zarecki v. Nat'l R.R. Passenger Corp., 914 F.Supp. 1566, 1574 (N.D.Ill. 1996) ("An affidavit that does not set forth the facts and reasoning used in making a conclusion amounts to nothing more than a denial of the adverse party's pleading."). In this case, substitute sworn deposition testimony for affidavit.

Where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a scintilla of evidence to withstand a motion for summary judgment. Bass v.

Gopal, Inc., 395 S. C. 129, 716 S.E.2d 910 (2011). However, where a heightened burden of proof is required, there must be more than a scintilla of evidence presented to defeat a motion for summary judgment. Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011); Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009).

In that class of cases where plaintiff must demonstrate his right to relief by clear and convincing evidence, courts have more discretion to treat nonmovant's submissions as too insubstantial to resist summary judgment. This significant gatekeeping role requires the trial court to determine if a prima facie case has been presented by the nonmoving Plaintiff in opposing a defendant's motion for summary judgment. AJG Holdings, LLC v. Dunn, 392 S.C. 160, 708 S.E.2d 218 (Ct.App. 2011).[1]

Appellant's Burden of Proof. The burden of proof for an undue influence challenge is clear and convincing evidence. Russell v. Wachovia Bank, 353 S.C. 208, 578 S.E.2d 329 (2003). For a contestant to meet the burden of proof for undue influence with only circumstantial evidence, the circumstances must point unmistakenly 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. Byrd v. Byrd, 279 S.C. 425, 308 S.E.2d 788 (1983); Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct.App. 2005).

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confession as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

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[1] This standard was expressly acknowledged and applied in the lower courts' orders.

Anonymous (M-156-90) v. State Bd. of Medical Examiners, 323 S.C. 260, 473 S.E.2d 870 (Ct. App. 1996), rev'd on other grounds, 496 S.E.2d 17 (S.C. 1998). The South Carolina Supreme Court has similarly defined clear and convincing evidence as " that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Clear and convincing evidence is required in civil cases where the wisdom of experience has demonstrated the need for greater certainty; where there is a special danger of deception; where the interests at stake are deemed more significant than ordinary. 32A C.J.S. Evidence § 1306 (1996).

Policies Underlying Law's Requirements for Will Execution

Freedom of Testation. The very purpose for which freedom of testation is given is to facilitate a departure from inflexible laws of inheritance. 1 William J. Bowe & Douglas H. Parker, Page on the Law of Wills § 3.11 (Bowe-Parker rev. 1960). The power to make a will is a power that belongs to the testator, and there is no veto power of the court or jury. Id.

South Carolina appellate courts have remained vigilant in protecting citizens' freedom of testation by strictly enforcing the governing laws and exercising a healthy skepticism of efforts to second guess a testator's testamentary directions. Only in the most obvious and egregious cases have South Carolina appellate courts approved of a jury or trial judge setting aside a properly executed will. Any effort to invalidate a will must be viewed with suspicion and be judged according to the following considerations:

> A person has the right ordinarily to leave his property to whom he pleases. He has a right any time to make a will disposing of his property, and later on he can revoke this will in toto or change or modify the same by new will or codicil. . . He can show

> gratitude, affection or charity or he can be capricious with his own. . . As persons advance in life they change their views as to a number of things, and it frequently happens that a wealth of affections and favors have been wasted on persons, and the recipient he favors proves weak, unresponsive, unworthy or ungrateful. A young person it has been said regards everyone as his friend, but as he grows older, he is wiser, more cynical, and his judgment more clarified, and he frequently finds that his judgment as to men and things has been inaccurate and erroneous. Some he has judged as being worthy he finds unworthy, or unsympathetic or uncongenial; others that he judged as unworthy he finds worthy and congenial.

Dicks v. Cassels. 100 S.C. 341, 84 S.E. 878 (1915)

> In this day of a complex society, individuals must sacrifice much and give up individual rights because of the interests of others. The government imposes many restrictions and requirements, but one of the basic rights known to our civilization is the privilege of disposing of property by Will as one elects. The right to make a will is the right to make it according to the testator's pleasure - judiciously or capriciously - justly or unjustly - at absolute discretion, subject only to the restraints upon the power of disposition which the law has imposed.

In Re Last Will and Testament of Smoak, 286 S.C. 419, 334 S.E.2d 806 (1985).

The right to make a will carries with it the right to disregard what the world considers a fair disposition of property. Hellams v. Ross, 268 S.C. 284, 233 S.E.2d 98 (1977). It is elementary that the statutory right of a competent person to dispose of his property as he wishes may not be thwarted by disappointed relatives or by one who thinks the testator used bad judgment or was misled. Mock v. Dowling, 266 S.C. 274, 222 S.E.2d 773 (1976).

Issues on Appeal

1. **Appellant's Notice of Appeal dated January 19, 2016 and served January 15, 2016 [sic] is a nullity, which deprives this court of jurisdiction to entertain this appeal, because it was filed and served by a person (DeHaven, acting pro se) who has no standing or authority to prosecute the appeal.** (All Issues on Appeal)

This issue was the ground for Respondents' second motion to dismiss appeal. By Order dated July 1, 2016, the Court denied the motion, but invited the Respondents to address the standing issue in their appellate brief. Respondents hereby do so.

Respondents first 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. (Respondents' Motion to Dismiss Appeal filed on February 1, 2016). 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. (Order).

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." (Notice of Appearance). This could not be because (1) Mrs. Swiger was deceased, having died in October, 2015, and (2) Ms. DeHaven was no longer attorney-in-fact for Ms. Swiger. The Notice of Appearance does not identify Ms. DeHaven as personal representative of the Mary Swiger probate estate and does not identify the attorney as representing Ms. DeHaven in the capacity of personal representative.

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. (Return) This had the effect of terminating Ms. DeHaven's status as attorney-in-fact, a consequence expressly noted in the April 1, 2016 Order. (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 decedent's 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 known as a 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, Mr. Walker's last will had not been filed or accepted 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) (emphasis added);
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 defects exist 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.

2. **Appellant's January 19, 2016 Notice of Appeal identified only the Circuit Court's Order Affirming Decision of Probate Court as being the subject of the appeal, and did not identify the Probate Court's Summary Judgment Order as being a subject of the appeal, to the result that Appellant has not timely perfected an appeal from the trial court's final order, and that order is now the law of the case.** (All issues on Appeal).

Appellant's Notice of Appeal dated January 19, 2016, but purportedly served on January 15, 2016, expressly referred to the Order being appealed as "the order [judgment] of the Honorable R. Scott Sprouse dated December 22, 2015." The Notice of Appeal filed with this Court and served on the undersigned was accompanied by only one Order - a copy of Judge Sprouse's December 22, 2016 Order Affirming Decision of Probate Court. See Rule 203(d)(1)(B)(ii), SCACR. The Order of the York County Probate Court dated February 2, 2015, being the order that is the subject of the appeal to circuit court that was decided by Judge Sprouse's Order dated December 22, 2015, was neither identified in the Notice of Appeal nor submitted with the Notice of Appeal. Admittedly, a copy of the probate judge's letter directing the preparation of the summary judgment order was attached to the Notice of Appeal, but this does not comply with requirements of the appellate rules. Consequently, the Appellant has not timely perfected an appeal from the **trial court's final order** that granted summary judgment in favor of the Respondents. That order is now the law of the case.

A closely analogous issue was considered in Weatherford v. Price, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000). In Weatherford, the appellant's Notice of Appeal referred only to the order that denied the appellant's motion for reconsideration. However, this Court was lenient to the appellant in Weatherford and did not dismiss the appeal only because the underlying judgment order, although not referred to in the Notice of Appeal, was nevertheless attached to the Notice of Appeal that was

submitted to the Court for filing. The circumstance that saved the appellant in Weatherford is not present in the above-captioned case. Failure to refer to the summary judgment order in the Notice of Appeal and failure to file with the Notice of Appeal a copy of the trial court's summary judgment order, as required by rule, cannot fairly be labeled as a mere clerical error.

The failure to timely serve and file a proper Notice of Appeal, meaning in this case to serve a Notice of Appeal from the probate court's February 2, 2015 summary judgment order, divests the appellate court of subject-matter jurisdiction and results in dismissal of the appeal. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008), rehearing denied. Likewise, Rule 203(d)(3), SCACR, provides that if the Notice of Appeal, and by implication all required attachments to the Notice of Appeal, are not timely filed, "the appeal shall be dismissed. . ." (Emphasis added.)

Having not timely appealed from the final summary judgment order (including both service and filing of a notice of appeal with required accompanying documents), this Court lacks subject-matter jurisdiction, the probate court summary judgment is now the law of the case, and the appeal must be dismissed.

3. **Appellant's Issue on Appeal number 1 violates Rule 208(b)(1)(B), SCACR, in that it is a "[b]road general statement" that is conclusory in nature and does not identify a "concise and direct" issue for review, and said issue can, and should, disregarded by the Court.** (Appellant's Issue on Appeal No. 1).

Appellant's issue on appeal no. 1 reads: "[t]he Probate Court erred in granting summary judgment to Respondents." Broad general statements may be disregarded by the appellate court.

Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 209 (2d ed.2002), citing Sullivan Co. v. New Swirl, Inc, 313 S.C. 34, 437 S.E.2d 30 (1993) for the principle that broad general statements of issues made by an appellant seeking to overturn a grant of summary judgment may be disregarded by the reviewing court.

4. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation of restricted visitation.** (Appellant's Issues on Appeal No. 2(i))

Appellant argues that there was evidence in the record that Respondents restricted visitation with the Decedent by Brenda Snow and by the Petitioner and her family, and that the evidence was sufficient to overcome summary judgment. The evidence before the probate court was that Brenda Snow was a former care giver for the Decedent who was suspected of physically abusing the Decedent. The hospital in Charlotte, NC first restricted Brenda Snow's visitation in November and December, 2011 because of the evidence of abuse.

The probate court addressed the Brenda Snow situation on page 10 of the Order. (Summary Judgment Order, p. 10 - 11). The Order finds that there was no evidence of pre-will execution restricted visitation with respect to anyone other than Brenda Snow. (Summary Judgment Order, R. p. 10-11).

In response to a question from the probate judge asking the Appellant's attorney to identify "factual evidence in the record that any visitation was restricted to other heirs of the estate," and

without citing any particular evidence in the record, Appellant argued that there was restricted visitation for Petitioner's family (not a denial of visitation but a refusal to allow visitation with the Decedent outside the presence of the Respondents) in March, 2012, two months after the last will was executed. (SJ hearing transcript, p. 44, 1. 21 to p. 46, 1.2). No evidence was ever called to the probate court's attention. In Appellant's Initial Brief, she cites to her attorney's argument to the court at the summary judgment hearing. (Appellant's Brief, p. 6, l. 14-17). Arguments of counsel are not evidence. Law Firm of Paul L. Erickson v. Boykin, 375 S.C. 204, 651 S.E.2d 606 (Ct.App. 2007).

Appellant refers to Respondents' answer to Appellant's interrogatory no. 10 as being inconsistent with Respondent's denial that they restricted visitation with Petitioner's family. (Appellant's Initial Brief, p. 7, l. 20 to p. 8, l. 18). All of this misses the point. The restricted visitation being argued by the Appellant with respect to Appellant's family occurred, if at all, after the January 14, 2012 will was executed. Appellant admitted such at the summary judgment hearing. (SJ hearing transcript, p. 44, 1. 21 to p. 45, 1.5). Evidence of undue influence, whether in the form of restricted visitation, threats, coercion, etc. necessarily must occur before the will is executed because the basis of the charge of undue influence is that the exercise of undue influence resulted in the contested will being executed. Stated another way, the contested will must be the product of the alleged undue influence. Appellant's allegation in her Petition is that "Respondents are attempting to probate a will created under undue influence." (Petition, ¶ 31) (emphasis added). A contestant must show that the undue influence was brought directly to bear upon the testamentary act. Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013). Alleged influence exercised after the act of will execution cannot meet the requirement that the influence was brought to bear on the

testamentary act. There was no evidence in the record before the probate court that the Petitioners' family was either denied visitation outright or was denied private visitation with the Decedent before the January 14, 2012 will was executed.

The probate court found that the Brenda Snow restricted visitation occurred in a Charlotte, North Carolina hospital; was implemented by the hospital staff; all happening during Mr. Tucker's hospitalization - approximately one and one-half months prior to the execution of the January 14, 2012 last will." (Summary Judgment Order, p. 10, 1.17 to p. 11, 1.2). None of these particular findings have been appealed. There having been no evidence of restricted visitation for the Appellant's family prior to the execution of the will, the Probate Court's and the Circuit Court's rulings on restricted visitation were correct.

5. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding Appellant's allegation that the challenged last will did not comport with the testator's expressed wishes.** (Appellant's Issue on Appeal No. 2(ii) and (iii)).

The subject of a testator's intentions must begin with the principle of law that "[I]n the case of the execution of a will by a testator of sound mind, there is a presumption from the fact of execution in accordance with the legal formalities that the testator knew and understood the contents thereof (notwithstanding prior declarations). In re King's Will, 132 S.C. 63, 67, 128 S.E. 850, 851 (1925). The testator herein has been found to have had testamentary capacity.

Pre-will execution statements of the decedent regarding his testamentary intentions. A will

is revocable, and a testator has the power to revoke a will and to execute a new will which disposes of his property in a manner entirely different from his intention as manifest in his former will(s). 3 Bowe-Parker: Page on Wills § 29.109 (Rev. ed. 2004). A change in intention does not create a presumption of undue influence and does not prove undue influence. Id. The fact that the testator's disposition of his property was different from that which he had mentioned in a previous expression of purpose is insufficient of itself to raise an inference of undue influence. Grahlman's Will, 81 N.W.2d 673 (Iowa 1957). Where prior declarations of intent are inconsistent with a subsequent last will, there is always the danger that testator's earlier declarations were intentionally false on his part for the purpose of misleading someone.

Post-will execution declarations. Appellant argues that statements made by the Decedent after the January 14, 2012 will was executed demonstrate that the will was not consistent with his testamentary wishes. (Appellant's Initial Brief, p. 10, l. 1-17). The probate court's Order addressed this issue.

> In opposition to the motion for summary judgment, Petitioner offered deposition testimony of a Westminister Towers social worker who stated that on February 5, 2012 that 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. Neither the little girl nor the nieces and nephews were identified by name or by a description to definitively identify who was being referred to.

(Summary Judgment Order, p. 5. l. 20 to p. 6, l. 3). Appellant's Brief does not identify any evidence in the record that the probate court overlooked that makes the probate court's findings on the issue reversible error. Further, the Circuit Court's Order addressed the subject to say that the testator's testamentary capacity on the date of the will's execution and evidence that his mental capacity fluctuated, on a daily basis, made post-execution statements or declarations unreliable for purposes

of overcoming the clear and convincing evidence standard. (Order, p. 5, l. 9 to p. 6, l. 2.)

6. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding the changes made from prior wills.** (Appellant's Issue on Apeal No. 2(ii) and (iii))

A will is revocable, and a testator has the power to revoke a will and to execute a new will which disposes of his property in a manner entirely different from his intention as manifest in his former will(s). 3 Bowe-Parker: Page on Wills § 29.109 (Rev. ed. 2004). A change in intention does not create a presumption of undue influence and does not prove undue influence. Id. The fact that the testator's disposition of his property was different from that which he had mentioned in a previous expression of purpose is insufficient of itself to raise an inference of undue influence. Grahlman's Will, 81 N.W.2d 673 (Iowa 1957).

> A person has the right ordinarily to leave his property to whom he pleases. He has a right any time to make a will disposing of his property, and later on he can revoke this will in toto or change or modify the same by new will or codicil. He can show gratitude, affection or charity or he can be capricious with his own . As persons advance in life they change their views as to a number of things, and it frequently happens that a wealth of affections and favors have been wasted on persons, and the recipient he favors proves weak, unresponsive, unworthy or ungrateful. A young person it has been said regards everyone as his friend, but as he grows older, he is wiser, more cynical, and his judgment as to men and things has been inaccurate and erroneous. Some he has judged as being worthy he finds unworthy, or unsympathetic or uncongenial; others that he judged as unworthy he finds worthy and congenial.

Dicks v. Cassels, 100 S.C. 341, 84 S.E. 878 (1915).

The whole purpose of executing a new will or codicil is to make a change to the existing will.

The fact that a new will changes a prior will, standing alone, says nothing about the existence or absence of undue influence. It must be remembered that it is an unappealed conclusion of the probate court that the Decedent possessed testamentary capacity on January 14, 2012.

7. **Appellant's argument with respect to evidence of the testator's physical infirmity is not preserved for appellate review because it was not presented to and/or decided by the trial court.** (Appellant's Issue on Appeal No. 2(iii)).

Appellant did not allege physical infirmity as a factor at issue in the case to establish undue influence. Appellant's third cause of action alleges that the will is the product of undue influence as evidenced by three specific facts: that the decedent did not draft the document (Petition ¶ 31 a); that the document's author and the witnesses will benefit from the decedent's estate (Petition ¶ 31 b) and that the document's author and witnesses coerced the decedent to sign the will by threatening to block or withhold visitation if he did not execute the will. (Petition ¶ 31 c). Accordingly, the Probate Court's Summary Judgment Order does not expressly address or decide the issue of physical infirmity. Of course, the issue was impliedly considered because of the circumstances of the testator being in the emergency room at the relevant time. The Probate Court's summary of the undue influence factors considered in deciding the summary judgment motion as it did does not mention physical infirmity. (SJ Order, p. 11, l. 3-17). No Rule 59(e) motion was made to have the Probate Court to specifically address the impact, if any, of the testator's physical condition, as opposed to his mental condition.

There are four requirements to preserve an issue for appellate review. The issue must have been raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely

manner, and (4) raised to the trial court with sufficient specificity. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 57 (2d ed. 2002). If a party raises an issue to the trial court but the issue is never ruled upon by the trial court, and the party fails to file a Rule 59(e) motion to alter or amend, the issue is not preserved for appeal. Id. at 58.

8. **Appellant (Petitioner below) failed to make a sufficient showing to the probate court to satisfy the heightened burden of proof required to overcome Respondents' motion for summary judgment with respect to the cause of action alleging undue influence, notwithstanding that the testator was physically infirm.** (Appellant's Issue on Appeal No. 2(iii)).

If the testator's physical condition had been raised and considered, it would not have changed the Probate Court's grant of summary judgment for the reasons given by the court. (SJ Order, p. 5, l. 15 to p. 11, l. 17).

9. **Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because it was not presented to and/or decided by the trial court.** (Appellant's Issue on Appeal).

Appellant's third cause of action alleges that the will is the product of undue influence as evidenced by three specific facts: that the decedent did not draft the document (Petition ¶ 31 a) [not raised in this appeal]; that the document's author and the witnesses will benefit from the decedent's estate (Petition ¶ 31 b) and that the document's author and witnesses coerced the decedent to sign the will by threatening to block or withhold visitation if he did not execute the will. (Petition ¶ 31

c). [visitation has been addressed hereinabove]. It is the second allegation that Appellant is arguing. What ¶ 31 (b) alleges is not a cause of action; it is an evidentiary presumption of undue influence. (hereafter the beneficiary presumption). Appellant made no allegation about either or both of the Respondents being in a confidential relationship with the decedent, which, if true, would also trigger an evidentiary presumption. (hereafter the confidential relationship presumption).

The probate court's Order addressed the facts with respect to the beneficiary presumption of undue influence. (Summary Judgment Order, p. 8, l. 22 to p. 10, l. 16). Actually, only the scrivener, Respondent Kelly, is a beneficiary of the will. The witnesses and notary on the will are not beneficiaries.

Appellant apparently confuses the status of someone involved in the drafting of the will being a beneficiary of that will with the status of someone in a confidential relationship with the testator also being named as a beneficiary in a will. They are both evidentiary presumptions, but they arise on different facts. Obviously, a person who is not in a confidential relationship with a testator can nevertheless be involved in the drafting and/or execution of a will in which the person is named as a beneficiary. That was the issue that was presented to the probate court by the Petitioner and which was addressed and decided by the probate court. The issue of a confidential relationship was not alleged in the pleading and was not mentioned in or decided in and by the summary judgment order. In fact, the term "confidential relationship" does not appear in the Summary Judgment Order. (Order).

Appellant did not file a Rule 59(e) motion to ask the probate court to address and decide the matter of an alleged confidential relationship between the scrivener (Margaret Kelly individually) and the testator and the related matter of the confidential relationship presumption.

There are four requirements to preserve an issue for appellate review. The issue must have been raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 57 (2d ed. 2002). If a party raises an issue to the trial court but the issue is never ruled upon by the trial court, and the party fails to file a Rule 59(e) motion to alter or amend, the issue is not preserved for appeal. Id. at 58.

That is the situation here. Even if it is conceded for the sake of argument that the issue of a confidential relationship presumption was raised to the probate court in the attorney's arguments at the summary judgment hearing, the court ruled only on the issue that had been raised by the Petition - the beneficiary presumption. Consequently, any issue related to a confidential relationship presumption is not preserved for further appellate court review.

10. Appellant's argument with respect to evidence of the existence of a confidential relationship is not preserved for appellate review because even if sufficient evidence of a confidential relationship was presented to give rise to a presumption of undue influence, the circuit court's ruling that said presumption was rebutted by Respondents' evidence was not appealed and is the law of the case. (Appellant's Issue on Appeal No. 3).

As addressed in issue no. 7 above, the trial court did not decide the issue of confidential relationship. Nevertheless, the circuit court, as an appellate court, did address the issue and decided it adversely to Appellant on two grounds: (1) that Appellant's evidence failed to satisfy the required burden of proof, and (2) that even if a confidential/fiduciary relationship existed, the "presumption

of invalidity " was rebutted by Respondents' summary judgment showing. (Order, p.2, 1.11-16 and p.6, 1.3-16). Appellant has appealed the first ruling, but not the second. Where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 80 (2d ed. 2002), citing Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996).

11. Alternatively, had the Probate Court considered the rebuttable confidential relationship evidentiary presumption, it would not have been sufficient to withstand the summary judgment motion, and the Circuit Court was correct in so holding.

The two evidentiary presumptions relied on by the Appellant are each rebuttable. The Probate Court ruled that the beneficiary presumption is a rebuttable presumption. (Summary Judgment Order, p. 9, l. 1-5). The Order goes on to say that the beneficiary presumption was not triggered in this case. (Summary Judgment Order, p. 9, l. 6 to p. 10, l. 8). And, the Order went one step further to say that even if triggered, the beneficiary presumption was effectively rebutted. (Summary Judgment Order, p. 10, l. 9-16). The key citations in the Order that support the probate court's ruling that rebuttable presumptions raised by the summary judgment motion's opponent can be rebutted by evidence offered by the motion's proponent are Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 757 S.E.2d 399 (2014), and Kitsap Bank v. Denley, 312 P.3d 711 (Wash.App. 2013) in which the Washington Court of Appeals held that a presumption of undue influence standing alone cannot defeat a summary judgment motion where undue influence must be proven by clear and convincing evidence. These facts and rulings with respect to the beneficiary presumption were not

appealed by the Appellant and are now the law of the case.

The existence of a fiduciary or confidential relationship between a testator and beneficiary raises a presumption of undue influence. Hairston v. McMillan, 387 S.C. 439, 692 S.E.2d 549 (Ct.App. 2010). If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence. Id.; Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct.App. 2005); Rule 301, SCRE. The presumption merely shifts the burden of going forward with the evidence, not the burden of ultimate persuasion. Id. The proponent does not have to affirmatively disprove the existence of undue influence; the contestant always retains and bears the burden of proof to invalidate the will . Id. In discussing the operation of burden shifting per Howard v. Nasser, the Court of Appeals described the proponents' burden of going forward as having to "offer some evidence to establish the lack of undue influence." Gordon v. Busbee, 397 S.C. 119, 723 S.E.2d 822 (Ct.App. 2011.) "Some evidence" appears to be the functional equivalent of a scintilla of evidence. "Scintilla" is defined as a spark or trace. Black's Law Dictionary 1347 (7th ed. 1999). The presumption of undue influence seeks to correct the situation where,

> "in addition to the factor of confidential relations, there also appear the further facts of an **unnatural disposition making the person charged with the undue influence chief beneficiary**, and that such person generally dominated the testatrix."

Moorer v. Bull, 212 S.C. 146, 46 S.E.2d 681 (1948). (emphasis added.).

The unappealed evidence in the record that Mr. Tucker had testamentary capacity at the time of will execution is some evidence showing a lack of undue influence. The evidence that Margaret Kelly is not the "chief beneficiary" of the will is some evidence showing a lack of undue influence. The will leaves the estate assets to "the twelve first generation nieces and nephews of my late wife." (Last Will). Margaret Kelly is to receive a share equal to the other eleven shares. The unappealed

finding of the probate court that "the decedent first raised the subject of his will and that Margaret Kelly wrote the will at the decedent's request and according to what decedent said he wanted in it" is some evidence showing a lack of undue influence. The lack of any evidence of force or coercion on the part of the Respondents is some evidence showing a lack of undue influence.

In addressing the presumption of undue influence arising from the fact that a person who benefits from a will also engages in drafting the will, the probate court held that "if such an evidentiary presumption was triggered, it was a rebuttable presumption that was more than sufficiently rebutted by the Respondents' evidentiary showing." (Summary Judgment Order, p. 10, l. 9-16). The same applies to the rebuttable presumption raised by the existence of a confidential relationship. **The same evidence that rebutted the benefits-from-the-will presumption also serves to rebut the confidential relationship presumption**. If such an evidentiary presumption was triggered, it was a rebuttable presumption that was more than sufficiently rebutted by the Respondents' evidentiary showing. In a summary judgment context, a rebuttable presumption raised by the motion's opponent can be rebutted by evidence offered by the motion's proponent. Bell v. Progressive Direct Ins. Co., 407 S.C. 565, 757 S.E.2d 399 (S.C. 2014). In Kitsap Bank v. Denley, 312 P.3d 711 (Wash. App. 2013) the Washington Court of Appeals held that a presumption of undue influence standing alone cannot defeat a summary judgment motion where undue influence must be proven by clear and convincing evidence.

Conclusion

Russell v. Wachovia Bank, supra. is very instructive with respect to applying summary judgment law to a cause of action for undue influence. In Russell, the trial court's grant of summary judgment in favor of the will's validity and against the contestants was affirmed on appeal

notwithstanding evidence in the record that at times the testator was confused; he could not regulate his own medication; the alleged influencers were disrespectful to testator; one of the alleged influencers monitored testator's telephone calls; they told testator what clothes to wear and would not allow testator to regulate the thermostat in his house. Nevertheless, because of the heightened burden of proof required for undue influence cases, summary judgment in favor of the will was affirmed because the contestants did not present unmistakable and convincing evidence that the alleged influencers utilized their relationship with the testator to substitute their will for his with respect to the content of his last will. The evidence relied on by the Appellant herein on the issue of undue influence is far less in quantity and quality than the evidence in Russell that was found to be deficient to overcome summary judgment. The Probate Court was thorough in its analysis. (SJ Order, p. 5, l. 15 to p. 11, l. 17).

No reversible error has been shown. The Probate Court's Summary Judgment Order, and the Circuit Court's order affirming the Probate Court on appeal, should be affirmed and the matter remitted to the probate court for completion of estate administration.

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Attorney for Respondents

July 22, 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

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,

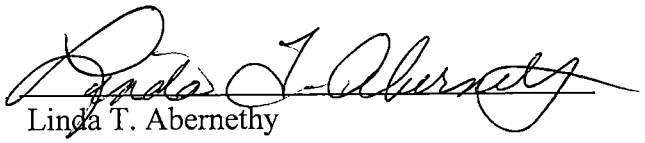
v.

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

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 copies of **Respondents' Amended Initial Brief** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 22nd day of July, 2016 at the following address:

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



Linda T. Abernethy

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July 22, 2016

VIA HAND DELIVERY

The Honorable V. Claire Allen
Deputy Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

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

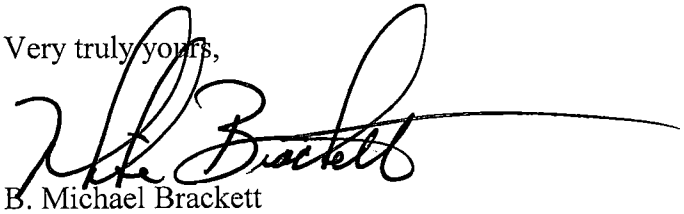
Dear Ms. Allen:

This will confirm our telephone conversation this morning in which I explained I mailed Respondents' Initial Brief and Designation of Matter to the Court yesterday, and served copies of same on opposing counsel, by mail. I discovered last evening that I had failed to include a paragraph in the Initial Brief.

Accordingly, I enclose for filing, in lieu of the original Initial Brief, the enclosed Respondents' Amended Initial Brief. The only change is reflected in the "Conclusion" portion of the Brief.

By copy of this letter, a copy of the Respondents' Amended Initial Brief is being served on opposing counsel. Thank you for your courtesy and assistance.

Very truly yours,



B. Michael Brackett

Enclosures

cc: Margaret Kelly
Ben Smith
Carol DeHaven