THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Pamela Richey

Appellant,

vs.

Shirley W. Booth, Thomas J. Booth and
Estate of Lee C. Williams,

Respondents.

APPELATE CASE NO. 2015-001056

FINAL BRIEF OF RESPONDENT ESTATE OF LEE C. WILLIAMS

Respectfully submitted,
Bacot & Padgett, LLC

James Graham Padgett, III (SC Bar #69354)
414 Monument Street, Suite C
Greenwood, South Carolina 29646
(864) 227-1570

Attorneys for the Respondent Sam Jeans, as Personal Representative of the Estate of Lee C. Williams

at Greenwood, South Carolina
February 20, 2016

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

Statutes

Rules

Federal Cases

Other Authorities

Counter Statement of Issue on Appeal

The Court properly granted summary judgment because Appellant failed to plead allegations, or for relief, to compel the Respondent to act based upon the pleadings and evidence before it. The Appellant's case is barred -whether or not the Last Will issues are preserved- because of a written release and stipulation with prejudice; collateral estoppel; *res judicata*; and Appellant's own failure to file a Rule 60, SCRCP, motion, or a claim in Probate Court.

Statement of the Case

The Respondent accepts the "Statement of the Case" identified by the Appellant in her brief.

Statement of Facts

Before the filing of the case subject to this appeal, Abbeville County cases 2006-ES-01-169 and 2007-CP-01-188 concerned Appellant and Lee C. Williams ("Lee"), now deceased and whose estate is currently the Respondent, alleging the existence and conversion of $628,000, more or less, in cash, by Lee from his brother, Hugh, also the father of Appellant. (R.100-101 ¶6, ¶11, R. 109 ¶56, ¶ 61). Cases 2006-ES-01-169 and 2007-CP-01-188 were consolidated[1] into 2007-CP-01-188.

Thereafter, Lee and Appellant resolved the claims on a stipulation of dismissal with prejudice and with terms more specifically set forth in a "mutual release and settlement agreement" (the "Release") (Release R.117). As consideration for the Release and stipulation of dismissal with prejudice, Lee paid Appellant $32,500, and they signed a:

> "Mutual Release in settlement of all claims, disputes and differences from the beginning of time to the present relating to or arising out of the allegations and causes of action more specifically described in the pleadings [2007-CP-01-188]. Accordingly, [Lee] and [Penny], for themselves, and their heirs, legal representatives, successors, and assigns, expressly releases, acquits and forever discharges the other party and their heirs, legal representatives, successors, and assigns from all liability for claims, demands and causes of action, known or unknown, heretofore existing, relating to or arising out of the allegations and causes of action more specifically described in the pleadings [2007-CP-01-188]." (R 115-116)

As additional consideration, Respondent also released all right, title and interest in certain motor vehicles in favor of Appellant and her sister, Sandra Pettigru; and resigned as the personal representative of the estate of Hugh Williams. (Id.)

[1] There is no formal Order of consolidation; however, the identical issues pled in the Probate case 2006-ES-01-169 were alleged in the Common Pleas case 2007-CP-01-188 by way of counterclaim. (2006-ES-01-169 ¶10-24 R 101-103 and 2007-CP-01-188 ¶55-74 and R 108-111).

Over 2 years later in 2013-CP-01-284, the focus of this appeal, Appellant filed an action for conversion of $400,000 against the Estate of Lee Williams and others. This is a portion of the same $628,000, more or less, litigated and resolved in the 2007-CP-01-188 consolidated action. (R. 64 L17-22; R. 119).

Respondent answered alleging these facts and issues have previously been actually litigated. (R 19-20 ¶¶12-19). Thereafter, Respondent filed its motion for summary judgment arguing that it was entitled to a grant of summary judgment based on the Release and stipulation of dismissal; collateral estoppel; res judicata and Rule 60, SCRCP. (R. 29-30). The Circuit Court granted Respondent summary judgment. (R. 1-12). Appellant moved the Court to alter or amend, and at the same time filed a petition in Probate Court seeking to compel the Personal Representative to pursue the same funds sought in the previous, and settled, actions. (R. 37-39). The Court denied Appellant's motion to alter or amend its grant of summary judgment in favor of Respondent. (R. 13).

Argument

A. Any obligation of the Personal Representative to obtain money for Appellant is not preserved for review.

1. An obligation of the Personal Representative to obtain money for Appellant was not pled in the complaint pursuant to Rule 8, SCRCP, nor was it tried by consent pursuant to Rule 15(b), SCRCP.

In her complaint, Appellant pled only the tort of conversion against Respondent. (R 15-16 ¶¶11-13). "It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013) (internal citation omitted); *see also Langston v. Niles,* 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are.") Unless

"[F]or such other and further relief as the Court deems just, equitable, and proper" (R.17 ¶4) is enough to notice Respondent, Appellant's complaint made no allegation for the Personal Representative of the Estate to take any action to pursue funds for her. The complaint allegations were that the Estate was responsible to Appellant.

The trial court denied the motion to alter or amend Appellant's SCRCP 59(e) motion. (R. 13). Amendment to a complaint may be impliedly consented to in a summary judgment hearing where the trial judge fails to expressly rule on the motion to amend, but the parties and trial judge treat the complaint as if amended. *See Murray v. Holnam, Inc.*; 344 S.C. 129, 136, 542 S.E.2d 743, 747 (Ct. App. 2001) citing *Staubes v. City of Folly Beach,* 339 S.C. 406, 529 S.E.2d 543 (2000); *See also* Rule 15(b), SCRCP (issues not raised by the pleadings but tried by consent of the parties shall be treated as if they had been raised in the pleadings). Appellant requested for the first time at the summary judgment oral argument, that the Personal Representative "has a duty to pursue this money [for the Appellant] (R.70 L25 - R.71 L15) and discussing the contents of the Last Will (R.68 L11-14 and R.71 L7-9). There was no further discussion of this "duty." Other than Appellant's mere responses to the trial court why this matter was even in Common Pleas (R.68 L4 – R.73 L22), there was nothing for the Respondent to object to or discuss with the Court. The remainder of the hearing concerned why the suit was barred based upon a written release, a filed stipulation of dismissal with prejudice, collateral estoppel, res judicata and the Appellant's failure to file a timely motion pursuant to SCRCP 60(b). No motion was made to amend the complaint to conform to the evidence, nor was such consented to by Respondent, expressly or impliedly.

Furthermore, the Last Will relied upon by Appellant in this appeal was not even before the Court. The first time the Last Will even became before the Court was with the filing of the

SCRCP 59(e) motion. (R. 37-44). Therefore, there was no evidence concerning the Last Will to conform to, expressly or impliedly, when the Court heard the motion for summary judgment.

2. Appellant explored -for the first time- the allegations of an obligation of the Personal Representative to obtain money for Appellant at her SCRCP 59(e) motion.

Appellant raised new evidence, causes of action and requests for relief not before the Court at the hearing for summary judgment, although such could have been raised. This should not be permitted.

Appellant seeks new relief using the Last Will and two new causes of action: 1) a declaratory judgment and 2) a theory of third party beneficiary. (R. 38-39). A Rule 59, SCRCP, motion is not the place for new information. The Last Will was not an exhibit before the Court at the hearing, and allegations concerning the Last Will are not in Appellant's Complaint.

A party cannot use Rule 59(e) [SCRCP] to present to the court an issue the party could have raised prior to judgment but did not. See *Hickman v. Hickman*, 301 S.C. 455, 456-57, 392 S.E.2d 481, 482 (Ct. App. 1990), citing *Natural Resources Defense Council v. U.S. E.P.A.*, 705 F.Supp. 698, 701 (D.D.C.1989), vacated on other grounds, 707 F.Supp. 3 (D.D.C.1989) ("Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier."); *Smith v. Stoner*, 594 F.Supp. 1091, 1118 (N.D.Ind.1984) ("Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived."); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (E.D.Va.1984) ("I do not conceive of Fed.R.Civ.P. 59(e) as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment."); see also Rule 59, SCRCP, comments (This rule 59 is substantially the Federal Rule.) Appellant waived any issues concerning the Last Will because

the Last Will itself was not before the Court and because she could have brought it before the Court in the normal course, but did not.

Appellant admits the she cannot succeed on the merits of the case when her counsel conceded, " [. . .] the dispute between [Appellant] and [Respondent] is res judicata and [subject to] collateral estoppel." (R. 38). Appellant asked the Court to compel the Respondent to continue in the litigation against the Defendants Booth. This request for a declaratory judgment "that the Estate must pursue these funds" was explored in some depth in Appellant's 59(e) motion for the first time, as well as, in a Petition in Probate Court (R. 46-50) dated 15 days (dated March 9, 2015) after the Court issued its Order granting summary judgment to the Respondent (filed February 24, 2015) (R. 1-12). This is beyond the scope of the pleadings and record.

Appellant could have sought this course of action in its complaint or, timely, in the Probate Court. See *Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not. (internal citations omitted.)) Appellant chose not to.

B. Assuming Appellant preserved for review the concept that the terms of the Last Will compel the Personal Representative to act, this Court should still deny relief.

1. The Personal Representative has discretion.

The Personal Representative's refusal "to pursue funds" is discretionary under the Last Will. The testator declared "[. . .] my executor is specifically authorized and empowered [. . .] [to act] [. . .] upon such terms and conditions as to my executor may deem best [. . .]." (R. 41). Unless restricted by the Last Will, the Personal Representative must act reasonably for the benefit of the Estate. See S.C. Code Ann. § 62-3-715 (emphasis added). A reasonable action

under the circumstances of this litigation is a refusal to "obtain funds for Appellant." See *Id.* ("Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the restrictions imposed in Section [concerning the sale of real and personal property] and to the priorities stated in Section [for the order of abatement], a personal representative, acting reasonably for the benefit of the interested persons, may properly: [. . .] (3) [. . .] **refuse** performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances.")(emphasis added.).

The Personal Representative has a proper basis for his refusal to "pursue funds" based on four legal principles.

a. The Release and Stipulation of Dismissal, with prejudice, bars the re-litigation of this money.

The Court dismissed the previous cases upon agreement of the parties, with prejudice. (R. 117). A dismissal with prejudice is a final adjudication of the case. *Freeman v. McBee*, 280 S.C. 490, 493, 313 S.E.2d 325, 327 (Ct. App. 1984) ("Here, the complaint was dismissed *with* prejudice. In that situation, the dismissal operates as an adjudication on the merits terminating the action and concluding the rights of the parties." (Citation omitted)).

The document entitled "Mutual Release and Settlement Agreement" is a release. (R. 115-116). See *Bowers v. Dep't of Transp.*, 360 S.C. 149, 153-154, 600 S.E.2d 543, 545 (Ct. App. 2004) ("The Release is a contract. See *Hyman v. Ford Motor Co.*, 142 F.Supp.2d 735 (D.S.C.2001) (applying South Carolina law, contract principles invoked to determine validity of a release); *Lowery v. Callahan*, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947) (noting that the "same principles of adequacy of consideration which apply to other contracts, govern as to releases"); 18 S.C. Jur. *Release* § 2 (2003) ("Because a release is a contract, principles of law applicable to contracts generally are also applicable to releases."). "In construing terms in

contracts, this Court must first look at the language of the contract to determine the intentions of the parties." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

Appellant was a party to previous actions seeking to recover the same money from Respondent she now seeks to recover from in the 2013 Common Pleas case. (R. 14-17, R. 99-104, R. 105-112, R. 64 L9-21 and R.119-123.) Appellant authorized the filing of a stipulation of dismissal with prejudice for the previous cases and accepted $32,500 from Respondent, as well as other consideration, in exchange for the release of all claims, known and unknown arising out of the same facts and circumstances alleged in the 2013 Common Pleas case. (R. 117). The stipulation of dismissal pursuant to Rule 41, SCRCP, is a final adjudication and was not appealed.

The Release unambiguously sets forth the contracting parties' intent. Therefore, the Court is bound by that clearly expressed intent without resort to extrinsic evidence. "Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm'n* 373 S.E.2d at 586. Appellant admitted in her requests to admit that the release was genuine. (R. 118). Appellant alleged no ambiguity in the Release in any pleading or affidavit.

b. Collateral Estoppel and Res Judicata bar the re-litigation of this money.

Collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App.2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was:

(1) actually litigated in the prior action;
(2) directly determined in the prior action; and
(3) necessary to support the prior judgment.
Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct.App.1984).

However, the doctrine of collateral estoppel should not be rigidly or mechanically applied. *Carrigg v. Cannon*, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct.App.2001). Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998). Application of this doctrine is not unfair or unjust in this case.

"The doctrine of collateral estoppel [. . .] rests generally on equitable principles." *S. Carolina Pub. Interest Found. v. Greenville Cnty.*, 401 S.C. 377, 386-387, 737 S.E.2d 502, 507 (Ct. App. 2013), reh'g denied (Jan. 23, 2013), cert. denied (May 7, 2014) (citations omitted). In *Watson v. Goldsmith, 205 S.C. 215, 31 S.E.2d 317 (1944)*, our supreme court contrasted the origin of the doctrine of collateral estoppel with the origin of res judicata:

> Estoppel rests generally on equitable principles, which res judicata does not, but upon the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and *interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation[ ])[.] ... Res judicata is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (citation omitted). "Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Id.* (citation and quotation marks omitted).

"Res judicata bars re-litigation of the same cause of action while collateral estoppel bars

re-litigation of the same facts or issues necessarily determined in the former proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct.App.1997). In *Beall v. Doe*, this court distinguished the two concepts as follows:

> "The doctrines of res judicata and collateral estoppel are, of course, two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit. 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 190 n. 1 (Ct.App.1984) (citations and quotation marks omitted)."

Appellant and Respondent litigated the identical issues in previous cases as are set forth in the 2013 Common Pleas case. Essentially, Appellant sued Respondent again over the same money. Appellant's counsel conceded to the Court at oral argument both cases involved the same money. (R. 64 P17-22; R. 69 L22 – R. 70 P8). Appellant's counsel further conceded collateral estoppel and res judicata prevent Appellant's success. (R. 38 ¶2 and R.69 L22 – R. 70 L8).

c. Failure to file a motion under Rule 60(b), SCRCP, bars the re-litigation of this money.

Rule 60, SCRCP, provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> **(3) fraud, misrepresentation, or other misconduct of an adverse party**;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
> **The motion shall be made within a reasonable time, and for reasons (1), (2),**

> **and (3) not more than one year after the judgment, order or proceeding was entered or taken**. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. [. . .]" (emphasis added).

The burden of proof under Rule 60(b), SCRCP, is clear and convincing evidence. *Gainey v. Gainey*, 382 S.C. 414, 427, 675 S.E.2d 792, 799 (Ct. App. 2009) (When a party asserts grounds for relief because of fraud, misrepresentation, or other misconduct of an adverse party under Rule 60(b)(3), SCRCP, the movant must prove her entitlement by clear and convincing evidence.") (citation omitted).

In *Chewning v. Ford Motor Company*, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003), the South Carolina Supreme Court discussed the rule that extrinsic fraud is necessary to set aside a judgment based on fraud under Rule 60(b), SCRCP. The court explained the difference between intrinsic and extrinsic fraud:

> "Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.'
>
> Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud."

Id. at 81, 579 S.E.2d 605, 579 S.E.2d at 610 (quoting *Hilton Head Ctr. of S.C. v. Pub. Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). Perjury by a party or a witness, use of forged documents, or failure to disclose documents by a party or witness are examples of intrinsic fraud. *Id.*; *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 21 n. 5, 594 S.E.2d 478, 483 n. 5 (2004). However, the subornation of perjury by an attorney and/or the intentional concealment of

documents by an attorney are actions which constitute extrinsic fraud amounting to fraud on the court. *Chewning*, 354 S.C. at 82–84, 579 S.E.2d at 610–11. Any claim of fraud on the court must be accompanied by particularized allegations. *Id.* at 86, 579 S.E.2d 605, 579 S.E.2d at 613.

Appellant filed the 2013 Common Pleas case after a year of "newly discovered evidence" and alleged no fraud upon the court. Actual discovery occurred and depositions were taken of Respondent and Defendant Shirley Booth. Appellant did not make her motion in a reasonable amount of time as to Respondent. See Rule 60(b), SCRCP. Therefore, Appellant may not pursue the 2013 Common Pleas Case as her 60(b) motion should have been brought to potentially relieve her previous case adjudication.

d. No cause to remove personal representative.

Finally, no justification exists to remove the Personal Representative for failure to "pursue funds" for Appellant. There has been no showing that there has been any intentional misrepresentation of material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. See S.C. Code Ann. § 62-3-611(b). The refusal of the Personal Representative to act, contrary to Appellant's demand, is in the best interests of the Estate in the face of the overwhelming legal authority discussed above.

2. The Last Will does not direct the Personal Representative to take any action for Appellant.

Assuming the Last Will is properly in evidence or in the record on appeal, which submission is objected to by Respondent, by its own terms does not direct the Personal Representative to pursue any money. "I give and bequeath the proceeds, *if any*, from a lawsuit *filed by me* against the [Defendants Booth] for the recovery of money which belonged to Hugh

A. Williams taken from me to [Appellant]." (emphasis added.) (R. 41 Item II.) As used in the Last Will, "if any" is not the equivalent of certainty, and the Last Will lacks any direction for the Personal Representative to "pursue funds" or sue anyone. (Id.) Furthermore, the Last Will clearly indicates that this lawsuit was to be filed by the deceased against the Defendants Booth. (Id.) This also did not occur.

3. South Carolina Probate nonclaim statute bars the filing of a claim.

Appellant filed her complaint a year and a month after the death of Lee C. Williams. (R. 14 and R.69 L22 – R.70 L8). She filed no claim filed in probate court. (R. 68 L14 – R. 69 L10). Appellant is now barred from filing a claim in Probate Court. See S.C. Code Ann. § 62-3-803; see also *In re Estate of Hover*, 407 S.C. 194, 203, 754 S.E.2d 875, 879-80 (2014)("Pursuant to the general statutory scheme of the Probate Code, all claims against a decedent's estate and his successors must be presented after a personal representative is appointed and within the time limits prescribed by section 62–3–803, which our appellate courts have designated as a 'nonclaim statute;'" S.C. Code Ann. § 62–3–104 (2009) ("No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article [§§ 62–3–101 et seq.]."); *In re Estate of Tollison,* 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct.App.1995) ("Section 62–3–803 is a nonclaim statute.").

Conclusion

Appellant and Respondent settled the claim for this same money in 2011. The law favors certainty. It is in the interests of these parties, and those similarly situated wishing to forever end litigation, that this litigation come to an end. The claim for this money was ended before with a

stipulation of dismissal, with prejudice, and a release and settlement agreement with good and valuable consideration paid. Also, Appellant failed to timely and properly raise the matters of declaratory judgment and third party beneficiary in its pleadings. This Court should finally end this litigation and affirm the grant of summary judgement entered by the trial court.

Respectfully submitted,
Bacot & Padgett, LLC

James Graham Padgett, III (SC Bar #69354)
414 Monument Street, Suite C
Greenwood, South Carolina 29646
(864) 227-1570

Attorneys for the Respondent Sam Jeans, as Personal Representative of the Estate of Lee C. Williams

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CERTIFICATE OF SERVICE

The undersigned of the law firm of Bacot & Padgett, LLC, does hereby certify that on the 19 day of February, 2016, she served the Final Brief of Respondent Estate of Lee C. Williams via First Class U. S. Mail to:

SERVED:

V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

R. Jamison Tinsley
212 Oak Avenue
Greenwood, South Carolina 29646

Jane H. Merrill
410 Main Street
Greenwood, South Carolina 29646

BACOT & PADGETT, LLC
Attorneys for Respondent
Estate of Lee C. Williams

Eileen Lane

BY: Eileen Lane, Paralegal
414 Monument Street, Suite C
Greenwood, SC 29646
Phone: (864) 227-1570
Fax: (864) 227-2610

Greenwood, South Carolina
February 19, 2016

cc.client