

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

RECEIVED

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SC Court of Appeals

THE HONORABLE BROOKS P. GOLDSMITH, CIRCUIT JUDGE

Case No. 2017-001775

Mikell M. Henderson,Appellant,

vs.

Mikell R. Scarborough, individually and as Personal Representative of the Estate of Mary Ross Hanahan and Joseph Ross Henderson, Defendants,

Of whom Mikell R. Scarborough, individually and as Personal Representative of the Estate of Mary Ross Hanahan, is the Respondent.

BRIEF OF APPELLANT MIKELL M. HENDERSON

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I. STATEMENT OF ISSUES ON APPEAL

1. Did the trial court apply the wrong standard of review when it granted Scarborough's motion for summary judgment on Henderson's claim that Hanahan lacked capacity to execute documents creating and transferring property to the MRH Family LLC?

2. Did the trial court commit error in holding that no genuine dispute of material fact remained for trial on Henderson's claim that Hanahan lacked capacity to execute documents creating and transferring property to the MRH Family LLC?

3. Did the trial court apply the wrong standard of review when it granted Scarborough's motion for summary judgment on Henderson's claim that Scarborough unduly influenced Hanahan to execute documents creating and transferring property to the MRH Family LLC?

4. Did the trial court commit error in holding that no genuine dispute of material fact remained for trial on Henderson's claim that Scarborough unduly influenced Hanahan to execute documents creating and transferring property to the MRH Family LLC?

II. STATEMENT OF THE CASE

This case concerns the estate of Mary Ross Hanahan ("Hanahan"), who died on October 23, 2014 at the age of 74. (Petition, para. 1). Appellant Mikell M. Henderson ("Henderson") is Hanahan's son and Respondent Mikell R. Scarborough ("Scarborough") is Hanahan's nephew. (Petition, paras. 2, 5) Henderson initiated this case with a Petition filed in Charleston County Probate Court on September 2, 2015 (the "Petition"). (Petition, p. 1). Scarborough filed a motion to remove the case to the Charleston County Circuit Court on November 15, 2015, which was granted by the Probate Judge and filed in the Circuit Court on December 2, 2015. (Orders Granting Motion for Removal). Motions in this case have been heard by visiting judges given Scarborough's position as the Master-in-Equity for Charleston County.

Most relevant to this appeal, Henderson's Petition alleges that Hanahan lacked capacity, as of December 2012, to execute (i) an operating agreement that created the LLC and granted a 30% interest in the LLC to Scarborough, (ii) a deed that transferred approximately \$6 million of Hanahan's real property to the LLC, and (iii) an accompanying "Statement Regarding Land Transfers" in which Hanahan purported to profess her own competency and the independence of her decision to sign the deed. (Petition, para. 44; Transcript of Record ("Tr."), p. 43; Plaintiff's Memorandum in Opposition to Respondent's Motion for Summary Judgment, pp. 6-7). Additionally, Henderson contends that Scarborough, who, together with Henderson, handled Hanahan's financial and business affairs, exercised undue influence over Hanahan in arranging for her to execute the aforementioned documents, which had the net effect of transferring approximately \$1.8 million of Hanahan's assets to Scarborough (30% of \$6 million). (Petition, paras. 18-22, 45-46; Tr. pp. 40-43). These claims are embodied in Henderson's third cause of action: "Action to Try Title to Real Estate." (Petition, paras. 44-46).

On September 13, 2016, Scarborough filed a motion for summary judgment directed at Henderson's third cause of action. (Respondent's Notice of Motion and Motion for Summary Judgment, pp. 1-4). On February 15, 2017, Scarborough also filed a motion for summary judgment directed at Henderson's first and second causes of action, which challenge a purported Codicil to Hanahan's Last Will and Testament dated October 19, 2012 (the "Codicil"), also on grounds of capacity and undue influence. (Respondent's Notice of Motion and Motion for Summary Judgment, pp. 1-3). Scarborough filed one memorandum in support of both of his motions, dated April 19, 2017, to which he attached certain exhibits and affidavits. (Memorandum Submitted on Behalf of Respondent in Support of Motions for Summary Judgment). Henderson submitted a memorandum in opposition to Scarborough's motions, dated

May 16, 2017, which likewise attached certain exhibits and affidavits. (Plaintiff's Memorandum in Opposition to Respondents' Motion for Summary Judgment). Scarborough filed a supplemental memorandum on May 16, 2017. (Supplemental Memorandum Submitted on Behalf of Respondent in Support of Motion for Summary Judgment as to Creation of MRH Family, LLC and Related Documents).

The trial court (Hon. Brooks Goldsmith) heard argument on the motions on May 18, 2017. (Tr., p. 1). At the hearing, the trial court orally granted Scarborough's motion for summary judgment on Henderson's third cause of action and directed Scarborough's counsel to prepare an order memorializing that ruling. (Tr., p. 50, lines 18-21). The trial court signed that order (the "LLC Order") on May 30, 2017. (Order Granting Respondent's Motion for Summary Judgment as to Petitioner's Action to Try Title to Real Estate). The trial court took Scarborough's motion for summary judgment on Henderson's first and second causes of action under advisement at the hearing (Tr., p. 71, lines 3-6), and subsequently issued an order dated May 30, 2017 (the "Codicil Order") denying that motion. (Order Denying Motion for Summary Judgment).¹

In the LLC Order, the trial court explained its reasoning for granting Scarborough's motion for summary judgment on Henderson's third cause of action. First, as to Henderson's claim that Hanahan lacked **capacity** to execute documents creating and transferring property to the LLC, the LLC Order states in pertinent part:

.... I find that Mr. Moss [an accountant affiliated with Scarborough] prepared the MRH Family, LLC Operating Agreement and went over it

¹ Henderson's claims that the Codicil was the product of undue influence and that Hanahan lacked capacity to sign that document are currently proceeding towards trial. Scarborough filed another motion for summary judgment directed at those claims on January 26, 2018. The trial court (Hyman, J.) denied that second motion from the bench, just as Judge Goldsmith had denied the earlier motion directed at the same claims.

extensively with Ms. Hanahan on December 30, 2012, and, significantly, that she understood the provisions. Further, Ms. Hanahan was aware that, by creating the estate plan, her estate would save a substantial amount on paying very high estate taxes.

Attorney Yates also prepared a separate Statement of Intent as to Land Transfers signed by Ms. Hanahan by which she acknowledged that she was making the transfers to the LLC to save on estate taxes. Further, the document stated that Ms. Hanahan understood that her nephew, Mikell Scarborough, would benefit from the creation of the LLC.

Petitioner acknowledges that he did not raise the issue of his mother's alleged lack of mental capacity to sign the documents at the time they were executed in December 2012.

I further find that while Petitioner cites his mother's dementia, mental illness and declining physical health as grounds for lack of capacity, the September 6, 2012, report of Dr. Kay Durst states that as to Dr. Durst's psychiatric observations of Ms. Hanahan on that day that she (Ms. Hanahan) was "negative for anxiety, depression, and sleep disturbances" and has "appropriate affect and demeanor, normal speech pattern and grossly normal memory."

Of further note, in Petitioner's Responses to Respondent's First Requests to Admit dated June 13, 2016, Petitioner admits that on October 16, 2012, well after the report of September 6, 2012, that Kay Durst, MD, treating physician of Ms. Hanahan states in her medical records that "she (Ms. Hanahan) is doing well overall" and Ms. Hanahan "states that she feels no issue" and is "in no apparent distress." Petitioner did not dispute Dr. Durst's report in his deposition testimony.

Additionally, I find that in his Responses to Respondent's First Requests to Admit dated June 13, 2016, Petitioner admits that on October 18, 2012, that Piave Pitisci Lake, MD, treating psychiatrist of Ms. Hanahan, states in her medical records that "she (Ms. Hanahan) has a neat appearance; her thought process is "normal", her thought content is "normal", she has "full orientation as to place, time, person", her speech is "normal"; her memory is "wnl (within normal limits); she shows "no gross deficit" in either insight or judgment. Petitioner did not dispute Dr. Lake's report in his deposition testimony.

I find that while alleging Ms. Hanahan lacked capacity, it is notable that during the course of this case, Petitioner has not produced, by affidavit or by deposition testimony of any medical provider or caregiver, any evidence that Ms. Hanahan suffered from any mental deficiency or mental or physical defect that would affect her ability to understand the nature of the creation of the MRH Family, LLC, the Operating

Agreement, the pertinent deeds, or the Statement regarding Land Transfers. Conversely, Ms. Hanahan's mental status is stated to be within normal limits as set forth in the two doctors' reports of October 2012, just weeks before the creation and funding of the LLC.

(LLC Order at 7-11 (emphasis omitted); *see generally id.* at 4-12).

Second, as to Henderson's claim that Scarborough exercised **undue influence** over Hanahan in connection with the formation and transfer of property to the LLC, the trial court reasoned:

The Court rejects Petitioner's assertion that Respondent exercised any undue influence on his aunt with regard to the creation and funding of MRH Family, LLC because Respondent was not present when the relevant deeds and Statement of Mary Ross Hanahan Concerning 2012 Land Transfers was [sic] signed by his aunt before Mr. Moss and Attorney Yates. I find that Attorney Yates accompanied Respondent to Ms. Hanahan's house on December 30, 2012. Attorney Yates had tax maps with him that day, which are drawings that depict where the properties were located, as was his custom. Mr. Yates met with Ms. Hanahan at the residence and

"had Mikell go out or go away from earshot or sight so that I could talk to her about this and to make sure that I felt comfortable that she had an intent to sign these documents. ...and she was adamant that this is what she wanted."

Ms. Hanahan, Respondent and Attorney Yates then travelled to Mr. Moss's office for the documents to be executed and Attorney Yates again asked Respondent "to leave the room and Mikell went in to the hallway outside of the office completely. I ... wanted to make sure that this was what she wanted to do and that she understood what she was doing ... Nobody is pushing you ... she was adamant. I detected no evidence of incapacity or forgetfulness at all."

I find that Attorney Yates, as well as Mr. Moss, were with Ms. Hanahan a little over 2 hours during these various discussions and execution of the documents in question. Ms. Hanahan signed the deeds and Statement before Mr. Moss and Attorney Yates. In the Statement, Ms. Hanahan acknowledges that she has had the opportunity to consult with Mr. Moss and her nephew, that she wishes to avoid substantial estate taxes, that her nephew would have an interest in the MRH Family, LLC and that she would retain a 2% interest. ... More importantly, Ms. Hanahan states that she has not been placed under any duress or influence by any one and that she was free or not free to sign the document.

Further, Attorney Yates “was of the opinion that she was under no disability or constraint or any undue influence. I made doggone certain that; Mikell is not here, this is between us, you don’t have to do this if you don’t want to.”

(LLC Order at 12-14 (emphasis omitted; some ellipses in the original); *see generally id.* at 12-19).

On June 19, 2017, Henderson filed a Motion to Alter, Amend and/or Reconsider the Court’s Order Granting Respondent’s Motion for Summary Judgment as to the Action to Try Title to Real Estate. (Plaintiff’s Motion to Alter, Amend and/or Reconsider Order Granting Respondent’s Motion for Summary Judgment as to Petitioner’s Action to Try Title to Real Estate). The Court denied Plaintiff’s Motion by Order filed on July 21, 2017 (the “Reconsideration Order”). On August 23, 2017, Henderson filed and served Scarborough with his notice of appeal of the LLC Order and the Reconsideration Order (Notice of Appeal), and this appeal followed.

III. ARGUMENT

A. The Trial Court Applied the Incorrect Standard of Review to Henderson’s Incapacity Claim.

“The party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence.” *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 294–95, 569 S.E.2d 371, 375–76 (Ct. App. 2002) (citing *Grapner v. Atl. Land Title Co.*, 307 S.C. 549, 551, 416 S.E.2d 617, 618 (1992)); *see Morris Fertilizer Co. v. Bonner*, 126 S.C. 284, 119 S.E. 826, 827 (1923) (“That a party alleging insanity or want of mental capacity is bound to establish it by the preponderance of the evidence is elementary.”).

At the summary judgment stage, “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit *a mere scintilla of evidence* in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co.*,

Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (emphasis added); *see Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Thus, Henderson’s burden in the trial court was to submit a mere scintilla of evidence that Hanahan lacked capacity to execute the LLC operating agreement and the deed transferring property to the LLC.

“South Carolina has defined contractual capacity as a person’s ability to understand, at the time the contract is executed, the nature of the contract and its effect.” *In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 857 (Ct. App. 2001) (citations omitted); *see, e.g., Macaulay*, 351 S.C. at 294, 569 S.E.2d at 375 (“[I]n order to have the mental capacity required to execute the Second Trust and life insurance contract, Dusenberry must have had the mental capacity to understand or comprehend the subject of the contract, its nature, and its probable consequences.”). Thus, what the trial court *should have* done in the LLC Order is evaluate whether Henderson had offered at least a mere scintilla of evidence that Hanahan could not understand the nature and effect of the operating agreement and the deed. In other words, did Henderson supply at least “a trace of evidence”? *Rogers v. Norfolk S. Corp.*, 356 S.C. 85, 95, 588 S.E.2d 87, 92 (2003) (Burnett, J., dissenting on other grounds) (“A scintilla is defined as ‘a trace’ of evidence.” (quoting Black’s Law Dictionary 1347 (7th ed.1999))).

The trial court failed to ask, much less answer, this question. Instead, the trial court *referenced* the “mere scintilla” standard but then, in the next sentence, *also referenced* the more onerous standard that applies where the burden of proof is greater than a preponderance of the evidence:

Where the underlying burden of proof is by a preponderance of the evidence, South Carolina courts are clear that the non-moving party need only produce a ‘mere scintilla’ of evidence to withstand summary judgment. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); *Hancock v. Mid-South Management Co.*, 381 S.C. 326, 330-331, 673 S.E.2d 801, 802-803 (2009). However, *in cases involving a*

heightened burden of proof, something more is required. Turner, 392 S.C. at 122, 708 S.E.2d at 769; *Hancock*, 381 S.C. at 331, 708 S.E.2d at 803.

(LLC Order at 3-4 (emphasis added)). The trial court then failed to specify whether it deemed it appropriate to apply either of those two standards to Henderson's claim and, if so, which one.

Regardless, from the trial court's discussion of the capacity issue, it is apparent that it *did not* apply the "mere scintilla" standard, as *the LLC Order itself* identified more than a "trace" of evidence that Hanahan lacked the ability to understand the nature and effect of the documents she signed. (See LLC Order at 5 ("On September 6, 2012, Dr. Durst, Ms. Hanahan's regular physician[,] noted 'the dementia is reported to have been present for several months. Her mental status appears to be gradually deteriorating.'"); *id.* at 4-5 ("As evidence, Petitioner contends that, for a period of about five (5) years before her death in 2014, Ms. Hanahan was unable to retrieve phone messages, manage her medications, had stopped reading books, was forgetful, and had written a check ... that was 'nonsensical.'"). The fact that the trial court nevertheless granted Scarborough's motion reflects that the trial court improperly applied a heightened standard of review and required Henderson to offer more than a "mere scintilla" of evidence to survive summary judgment. (See also Part II, below). This was error.

B. The Trial Court Erred in Finding No Genuine Dispute of Material Fact Related to Henderson's Incapacity Claim.

Under any standard, and certainly under the applicable "mere scintilla" standard, the evidence before the trial court reflected a genuine dispute of material fact regarding Hanahan's incapacity as of December 30, 2012. Scarborough himself admitted that Hanahan was first diagnosed with dementia in 2005, *seven years* prior to signing the documents in question. (Tr. p. 6, line 14). Scarborough also admitted that Hanahan suffered from bipolar disorder. (Tr. p. 19, line 1).

The trial court appeared to agree with Scarborough that: “the facts that she had dementia, she was bipolar, so what? She had the ability to understand the value of her estate, what she was doing, what she wanted to accomplish, [and] who she wanted to benefit with her generosity.” (Tr. p. 19, line 1). But that *ipse dixit* is not borne out by the actual evidence.

For example, the LLC Order cites the October 18, 2012 report of Dr. Piave Pitisci Lake, Ms. Hanahan’s psychiatrist. (LLC Order, p. 10). Dr. Lake’s impressions (“IP”) during that visit included not only “Bipolar DO” and “depr[ession]” but also “cognitive impairment.” (Report of Piave Pitisci Lake, M.D., attached as an Exhibit to Respondent’s Summary Judgment Memorandum). Similarly, as noted above, the LLC Order cites to the September 6, 2012 report of Dr. Kay Durst, wherein Dr. Durst noted that Hanahan’s “dementia is reported to have been present for several months. *Her mental status appears to be gradually deteriorating.*” (LLC Order p. 5 (emphasis added)). Moss, the associate of Scarborough who prepared and witnessed Hanahan’s signature on the operating agreement, testified that “he wouldn’t have done any of it if [he] knew she had dementia.” (Moss Deposition Transcript, p. 72, lines 7-8; Tr. p. 31, lines 23-25).

Scarborough himself was aware of his aunt’s failing mental and physical health, as he had discussions with Henderson prior to the execution of the LLC documents about their shared concerns with her continuing to drive her own car. (Tr., p. 41, lines 4-14). Scarborough was also aware that Hanahan required in-home caretakers to assist her with basic tasks, like dressing herself. (Tr., p. 49, lines 9-14). Scarborough admits that there were concerns about her failing condition. (Tr. p. 47, lines 19-24).

Nevertheless, the trial court concluded that Henderson failed to produce “**any evidence** that Ms. Hanahan suffered from any mental deficiency or mental or physical defect that would

affect her ability to understand the nature of the creation of the MRH Family, LLC, the Operating Agreement, the pertinent deeds, or the Statement regarding Land Transfers.” (LLC Order at 10-11 (emphasis in the original)). This conclusion was clearly incorrect. As reflected above, the trial court had more than a “mere scintilla” or “trace” of evidence suggesting that Hanahan lacked the ability to understand the consequences of what she was signing, and the LLC Order must accordingly be reversed. *See, e.g., Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (“An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56, SCRPC.”).

C. The Trial Court Applied the Incorrect Standard of Review to Henderson’s Undue Influence Claim.

“The party challenging [a] deed” – here Henderson – may show the existence of a confidential relationship between the grantor and the grantee,” in which case “the deed is presumed invalid” based on undue influence. *Bullard v. Crawley*, 294 S.C. 276, 281, 363 S.E.2d 897, 900 (1987). “The burden then shifts to the grantee” – here represented by Scarborough, who received a 30% interest in the LLC as a result of Hanahan’s signatures on the documents in question – “to affirmatively show the absence of undue influence.” *Id.*; *see Middleton v. Suber*, 300 S.C. 402, 405, 388 S.E.2d 639, 641 (1990) (where “confidential relationship” exists between grantor and grantee, deed is presumed invalid and burden is on grantee to establish absence of undue influence); *Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986) (“A fiduciary relationship between the grantor and grantee may give rise to a presumption of undue influence, thus shifting the burden of proof to the grantee to rebut the presumption.”). “Thus, the determination of whether a confidential relationship existed also determines which party has the burden of proof on the issue of undue influence.” *Bullard*, 294 S.C. at 281.

Henderson identified this standard of review to the trial court in his memorandum.

(Plaintiff's Memorandum in Opposition to Respondents' Motion for Summary Judgment, p. 12). Scarborough, on the other hand, failed to identify the proper standard to the trial court and instead argued that Henderson, as "the nonmoving party for the summary judgment must present more evidence than is ordinarily required [...] It has to be clear and convincing." (Tr. at 49, lines 16-21). Scarborough thus proposed that the trial court should apply the ultimate burden *at trial* when there is *no* confidential relationship, rather than (as would have been appropriate) the burden *at summary judgment* when there *is* a confidential relationship. *See Bullard*, 294 S.C. at 281 ("When no confidential relationship is alleged, the party challenging the deed must present evidence which 'unmistakenly and convincingly' shows the grantor's will was overborne by the grantee or someone acting on his behalf." (citation omitted)).

Following Scarborough's lead, the trial court failed to recite the proper standard of review in the LLC Order much less give any indication that it had attempted to apply it. To the contrary, the LLC Order identifies *Russell v. Wachovia Bank*, 252 S.C. 208, 578 S.E.2d 329 (2003), a case relied on by Scarborough, as "remarkably on all fours with the issues relative to the granting of summary judgment in this case" because, in *Russell*, "the trial judge was correct in ruling that the contestants had not presented *unmistakable and convincing* evidence that the parties who had allegedly exercised undue influence had indeed utilized their relationship with the testator to substitute their will for his." (LLC Order, pp. 14-15 (emphasis added)). Thus, rather than engage in the appropriate burden shifting analysis, the trial court jumped to the ultimate burden of proof of the contestant at trial in cases where *no* confidential or fiduciary relationship is shown, sidestepping the threshold question of whether Scarborough was a fiduciary to Hanahan, in which case the inquiry should have shifted to whether *Scarborough* had "affirmatively show[n] the absence of undue influence." *Bullard*, 294 S.C. at 281. This was

error.

D. The Trial Court Erred in Finding No Genuine Dispute of Material Fact Related to Henderson's Undue Influence Claim.

The trial court's application of the incorrect standard is sufficient to reverse the grant of Scarborough's motion for summary judgment on Henderson's third cause of action. Additionally, under any standard, there remains a sufficient question of fact on the issue of undue influence such that the grant of summary judgment was improper.

First, had the trial court conducted the proper analysis under South Carolina law, it would have determined that Scarborough stood in a confidential or fiduciary position relative to Hanahan, a fact even Scarborough does not seem to deny. (*See* Tr. at 21 (“there was a confidential relationship between Mikell Scarborough” and Hanahan); *id.* at 7 (Scarborough “manage[d] his aunt’s investments, which on occasions [sic], would require the sale of real estate. And with those proceeds, he would ensure that they were invested properly and that she had enough income and liquidity to meet her financial needs.”); *see also* Scarborough Deposition Transcript at p. 17 (“I was working with [Hanahan], I had been working with [Hanahan] to keep her solvent since I moved here in 1991”), pp. 22-24 (testimony that he “put her on a budget” by “creat[ing] an account which we were jointly on ... and then there was a separate account ... [a]nd what I would do was periodically, ... I’d move money into the – in the individual account” for Hanahan to access for spending money), p. 132 (“I took care of making sure that there were funds in the account to take care of bills”), pp. 33-34 (testimony that he arranged caretakers for Hanahan in 2012), p. 44 (testimony that he communicated with Hanahan’s caretakers about her treatment), pp. 49, 58 (testimony that he arranged a meeting with a CPA to create the MRH Family LLC as a tax shelter for some of Hanahan’s assets), p. 66 (testimony that he “paid the taxes every year” for the LLC), p. 79 (testimony that he was “effectively” the manager of the

LLC). *See also, e.g., In re Estate of Cumbee*, 333 S.C. 664, 672, 511 S.E.2d 390, 394 (Ct. App. 1999) (“A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence.”).

Second, and regardless of the trial court’s failure to appropriately shift the burden, Henderson offered evidence sufficient to create a genuine issue of material fact with respect to Scarborough’s exercise of undue influence. For example, the parties agree that Scarborough arranged for Hanahan to sign the documents in question; Scarborough engaged Moss to draft the operating agreement and for Yates to draft the deed. (Tr. at 24-25; Plaintiff’s Memorandum, pp. 6-7). Indeed, Yates believed that Scarborough, not Hanahan, was his client. (Tr., p. 25, lines 2-4). Scarborough drove Yates to Hanahan’s house to have Hanahan sign the deed on December 30, 2012. (Plaintiff’s Memorandum, p. 7). Scarborough did not disclose to Moss or Yates at the time (or Henderson) the fact that Hanahan had signed the Codicil several months earlier, nor the fact that the Codicil devised property worth about \$1.1 million to Scarborough. (Tr. 26, lines 1-14). Scarborough also did not disclose the fact that Hanahan suffered from dementia – as noted above, leading Moss to testify at his deposition that he “wouldn’t have done any of it if [he] knew she had dementia.” (Moss deposition Tr., p. 72; Hearing Tr. p. 31, lines 23-25).

Further, Scarborough’s litigation position is that the transfers were for the purpose of avoiding estate taxes on any property in Hanahan’s estate over \$1 million. (Tr., p. 8, lines 19-21; p. 9, lines 2-19). But Scarborough admits that the list of properties to be transferred to the LLC – *which he himself drafted* (Tr. p. 12, lines 5-10) – excluded approximately \$2 million in assets, including the approximately \$1.1 million in real property that Scarborough had previously arranged for Hanahan to bequest to him in the Codicil (Tr. p. 31, lines 1-8; p. 26, lines 1-14).

Hanahan's supposed motivation in signing the documents on December 30, 2014 is thus called into question.

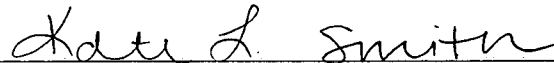
All of this evidence, and more, was before the trial court. (*See generally* Tr., pp. 24-43). Nevertheless, the trial court concluded that Henderson "ha[d] produced *no evidence* of any act or action by Respondent that demonstrates Ms. Hanahan was coerced by him, that Respondent destroyed the free agency of his aunt or overtook her free will, or that Respondent exerted improper influence to get his aunt to sign the LLC documents in question." (*Id.* at 19 (emphasis added)). This was patently wrong, based on the evidence just described, and warrants reversal.

IV. CONCLUSION

For the reasons stated above, the LLC Order should be reversed and this case should be remanded for further proceedings.

This 9th day of March, 2018.

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CERTIFICATE OF SERVICE

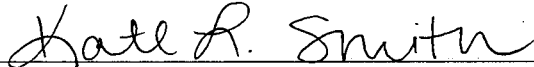
I hereby certify that I have this day served a copy of the within and foregoing **BRIEF OF APPELLANT MIKELL M. HENDERSON** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

Shirrese Brown Brockington, Esq.
4 Carriage Ln, Ste. 304
Charleston, SC 29202

Joseph S. Mendelsohn, Esq.
P.O. Box 250
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This 9th day of March, 2018.

HUNTER, MACLEAN, EXLEY & DUNN, P.C.



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SC Court of Appeals



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March 9, 2018

VIA FEDEX

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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SC Court of Appeals

RE: *Mikell M. Henderson v. Mikell R. Scarborough, et al.*
Case No. 2017-001775

Dear Ms. Kitchings:

Enclosed please find Brief of Appellant Mikell M. Henderson and Designation of Matter to be Included in the Record on Appeal. Please file these documents with the court and return file-stamped copies to me in the envelope provided.

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

Sincerely,

Kate Lawson Smith

KLS/kj

Enclosure

cc: All Counsel of Record (via U.S. Mail)

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UNITED STATES US

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TO JENNY ABBOTT KITCHINGS
S.C. COURT OF APPEALS
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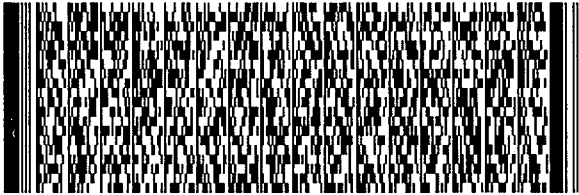
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