THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

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 RESPONDENT MIKELL R. SCARBOROUGH, individually and as Personal Representative of the Estate of Mary Ross Hanahan

---

Shirrese B. Brockington, Esq.
SC Bar No. 956
P.O. Box 31312
Charleston, SC 29417
(843) 737-5278

Attorney for Respondent, Individually

Joseph Mendelsohn, Esq.
SC Bar No. 3935
P.O. Box 250
Charleston, SC 29402-0250
(843) 577-7210

Attorney for Respondent as Personal Representative for the Estate of Mary Ross Hanahan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

I. STATEMENT OF ISSUES ON APPEAL

1. The trial court applied the correct 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. The trial court correctly held that no genuine issue of material fact remained for trial on Henderson's claim that Hanahan lacked capacity to execute document creating and transferring property to the MRH Family LLC.
3. The trial court applied the correct 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. The trial court correctly held that no genuine issue of material fact remained for trial on Henderson's claim that Scarborough unduly influenced Hanahan to execute document creating and transferring property to the MRH Family LLC.

II. STATEMENT OF THE CASE

Respondent agrees with the majority of the case history as set forth in Appellant's Statement of the Case but would add that Respondent denied Appellant's allegations in his Answers and Counterclaims filed by Respondent individually and as Personal Representative of the Estate of Mary Ross Hanahan.

Towards the end of her life, Mrs. Hanahan sought to do estate planning. The creation and transfer of real estate into the MRH Family LLC in 2012 by Mrs. Hanahan resulted in Appellant receiving over $4,000,000 of his mother's assets prior to her death (68% of $6 million). Between the creation of the LLC in 2012 and prior to the death of Mrs. Hanahan in October 2014, Appellant

received and retained cash distributions of almost $20,000 from the LLC. These cash distributions were accepted and properly reported on a K-1 tax return. No challenge to the validity of the LLC was made by Appellant during his mother's lifetime. This action commenced in September 2015.

While Appellant now challenges the creation of the LLC, an action in which he joined by executing the LLC Operating Agreement, and the transfer of certain real estate to it by his mother, Respondent does not challenge a Deed, executed the same day as the transfer of real property to the LLC, which conveyed two different tracts of real property to his brother, Joseph Ross Henderson. (See Title to Real Estate dated December 30, 2012; Respondent's Supplemental Memorandum submitted in Support of Motion For Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 6(1). Nor does Appellant challenge a Durable Power of Attorney also executed by his mother on December 6, 2012. (See Durable Power of Attorney dated December 6, 2012; Respondent's Supplemental Memorandum submitted in Support of Motion For Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 2(1).

The full history of this case includes the fact the appeal was dismissed by this Court on December 14, 2017; however, Appellant filed a Motion to Reinstate which was granted by the Court on February 9, 2018 over Respondent's objection.

III. ARGUMENT

A. The Trial Court Applied the Correct Standard of Review to Henderson's Incapacity Claim.

1. The Estate Plan & $4,000,000+ Gift.

On December 30, 2012, Appellant received a gift from his mother, Mary Ross Hanahan, worth over $4,000,000. This gift was a result of her formation and funding of the MRH Family

LLC. Mrs. Hanahan's purpose was to reduce the burden of estate taxes on her estate. Appellant received a 68% interest in the LLC. Between 2012 and 2014, Appellant received Eighteen thousand dollars ($18,000) in distributions from the LLC. Schedule K-1s were issued to him personally as part of the LLC tax returns; Appellant used those in preparation of his own personal tax returns. Appellant did not express any concern to his CPA about his mother's capacity regarding the creation and funding of the LLC. (Henderson Tr. p. 151, line 5 - p. 152, line 10; Respondent's Supplemental Memorandum submitted in Support of Motion For Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 9)

Appellant made no complaint as to his mother's mental capacity to make the 2012 gift until one (1) year after her death, in September 2015. Now, Appellant seeks to have the LLC rendered void *ab initio*. If successful, Appellant would inherit all the land transferred to the LLC under his mother's 1998 Last Will and Testament. This result would have Mrs. Hanahan's estate pay substantial estate taxes, the exact result she took significant steps to avoid by her estate planning.

2. Trial Court used the correct standard in granting Summary Judgment to Respondent.

Summary Judgment is a drastic remedy to be "cautiously invoked" so that no person will be improperly deprived of a trial of the disputed factual issues, *Baughman v. American Telephone & Telegraph Co.*, 306 S.C 101, 410 S.E.2d 537 (1991), and should be cautiously granted only when it is shown that there exists "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; See also *McNair v. Rainsford,* 330 S.C. 332, 342, 499 S.E.2d 488, 493, (Ct. App. 1998). "The Court must construe all ambiguities, conclusions and inferences arising from the evidence against the moving party; however, the opposing party may not rest upon mere allegations or denials, but must respond with specific facts

showing a genuine issue." *City of Columbia v. Town of Irmo,* 316 S.C. 193, 195, 447 S.E.2d 855, 857 (1994).

Appellant argues (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, 673 S.E.2d 801 (2009) and *Turner v. Milliman,* 392 S.C. 116, 708 S.E.2d 766 (S.C. 2011). These are the two cases cited in the trial court's Order of May 30, 2017. Appellant now contends that the trial court referenced both the "mere scintilla" standard and the "heightened burden of proof" standard but then failed to specify whether it deemed it appropriate to apply either of those two standards to the claim of incapacity and, if so, which one.

3. Trial Court Ruling based on Elements in *Turner v. Milliman.*

Respondent submits that the trial court did apply the correct standard (a mere scintilla of evidence) to the issue of alleged lack of capacity which requires proof by a preponderance of the evidence and also correctly considered all evidence before it in accordance with the clear holding in *Turner v. Milliman* which states that summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.;* Rule 56(c), SCRCP.

Appellant's argument that the trial court's Order identified more than a "trace" of evidence that Mrs. Hanahan lacked the ability to understand the nature and effect of the documents she signed is misleading. The court, on Pages 4 and 5 of the Order, simply recites the contentions and arguments of Appellant as to why he believed his mother lacked the requisite capacity to understand the LLC documents and deeds she signed on December 30, 2012.

In its ruling, the trial court correctly relied on *Mathias v. Mathias*, 206 S.C. 276, 33 S.E.2d 626 (S.C. 1945) which states a grantor with sufficient mental ability to comprehend what he is doing and understands the nature of the act and its consequences, has the legal capacity to make a deed. This holding is similar to that recited by Appellant under *Macaulay v. Wachovia Bank of S.C. N.A.*, 351 S.C. 287, 569 S.E.2d 371 (S.C. App. 2002) which discusses the mental capacity required to execute a trust and life insurance contract.

4. Appellant's Conduct. In December 2012, Appellant was silent as to any concerns about his Mother's mental capacity; No "mere scintilla" of evidence presented by Appellant.

The trial court, in its ruling, correctly considered that Appellant produced no evidence under the "mere scintilla" standard. In December 2012, Appellant raised no concern about his mother's mental capacity to create and fund the LLC at issue, to his mother, his cousin, or either one of the two (2) professionals involved in the preparation of the transactional and legal documents. In fact, all evidence supports that Mrs. Hanahan expressed what she wanted, understood the nature of her actions, and the beneficial consequences for her estate and her family.

A look at the history of this case is illuminating.

a. Appellant's Discussions with his Mother; the Email; the Power of Attorney; Appellant did not doubt his Mother's Capacity.

Appellant's active participation in the LLC formation was correctly considered by the trial court. It began with an email between Appellant and Respondent dated December 5, 2012, where Appellant states that he had just spoken with his mother and confirmed that she "wanted to go ahead with creating the LLC" and "that she would agree to me or her signing a limited or durable POA for Mikell Scarborough to take care of the deeds to her properties." See Order of May 30, 2017, p.6; Respondent's Supplemental Memorandum submitted in Support of Motion For

Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 1(1); Henderson Tr. p. 118, line 2 - p. 119, line 2; Ex. 13.

In his deposition, Appellant admits that when he spoke with his mother on December 5, 2012, the day before she signed a new Power of Attorney appointing Respondent as her agent, he "did not doubt her capacity" and that "I can't point to anything that changed during that three week period of time," [between December 5, 2012 and December 30, 2012]. Henderson Tr. p. 136, lines 4-24. Appellant further admits that he had no written statements regarding his mother's mental status in December 2012. Henderson Tr. p. 85, lines 2-7. Notably, Appellant has not challenged the validity of the Power of Attorney.

5. The Professionals; Appellant actively involved in the formation of the LLC; Mother Confirmed her Understanding; Appellant signed the LLC Operating Agreement.

Appellant spoke with his mother in early December 2012 about the LLC's purpose and formation and was actively involved in the month long process. Appellant communicated with Respondent, his Mother and Mr. Moss about the need for the LLC and its required documents.

Appellant also engaged in telephone conversations and email communications with Christopher Moss, Esq., the CPA-attorney, who prepared the Power of Attorney (POA) for Mrs. Hanahan on December 6, 2012, which POA is not being challenged by Appellant. (Henderson Tr. p.109, line 23 - p. 112, line 21; p. 113, lines 1-25; p. 114, line 15 - p. 115, line 9; p. 123, line 13 - p. 125, line 9; Ex. 14; Respondent's Supplemental Memorandum submitted in Support of Motion For Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 2(1);

Mr. Moss also prepared the MRH Family LLC Operating Agreement which Appellant signed as the majority (68%) member as well as by the other two (2) LLC members; to wit, Mrs. Hanahan (2%) and Respondent on behalf of his single member LLC, (30%). Appellant did not seek independent advice as to the LLC and had no questions about the Operating Agreement. Henderson Tr. p.127, line 9 - p. 128, line 14; p. 133, line 15 - p. 134, line 10; p. 147, line 10 - p. 148, line 24; Ex. 15 and 16; Respondent's Supplemental Memorandum submitted in Support of Motion For Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 3(1)

a. Testimony of Christopher Moss, CPA-Attorney; His Meetings with Mrs. Hanahan. His Interactions with Appellant; Appellant Happy and No Concerns as to Mother's Capacity.

The trial court correctly considered Mr. Moss's uncontroverted testimony that he met with Mrs. Hanahan on December 6, 2012, and reviewed with her by PowerPoint the Summary 5 Action Steps that same date. Respondent's Supplemental Memorandum submitted in Support of Motion For Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 11(1). Mr. Moss testified that Mrs. Hanahan understood the concept of putting assets into a family LLC, the limitation on its marketability, the discount allowed by the government and the ability to gift more assets than you would be able to without forming the LLC. (Moss Tr. p. 14, line 13 through p. 15, line 8). Mrs. Hanahan told Mr. Moss that she wanted to benefit her son, Appellant, and her nephew, Respondent, but that she did not want to include her other son, Joseph Ross Henderson. Further, Mrs. Hanahan was adamant that Respondent receive a 30% interest and "there was no talking her out of it". (Moss Tr. p. 17, line 17 - p. 19, line 8).

Mr. Moss described his first conversation with Appellant on December 5, 2012, about the LLC stating that "he was very happy about it. Very excited." (Moss Tr. 21, line 3 through p. 23, line 4) Mr. Moss further testified that when Appellant got the Operating Agreement, Appellant did not

question the percentages of ownership which were 68% for Appellant, 30% for Respondent's LLC, and 2% for Mrs. Hanahan. (Moss Tr. p. 67, line 10 - p. 68, line 2; p. 30, line 4-24). Appellant signed the Operating Agreement on December 30, 2012, knowing that his mother and Respondent were also signing that same day. (Henderson Tr. p. 127, line 9 - p. 128, line 14; p. 133, line 15 - p. 134, line 10; p. 147, line 10 - p. 148, line 24; Ex. 15 and 16); Hearing Tr. pp. 33-34.

During Mr. Moss's deposition, Appellant's attorney asked Mr. Moss these important questions in regard to Mrs. Hanahan's capacity:

> "Did Mikell Henderson ever communicate to you he was concerned about his mother's ability to understand what was going on? Answer: No."
>
> "Did he ever voice any concerns about her capacity to you regarding the formation of the LLC? Answer: No." (Moss Tr. p. 68, line 3-10).

Appellant, now unhappy with the events of 2012, contends his mother lacked the legal capacity needed for the transaction. He did not raise this issue to any one of those involved at the time. In fact, Appellant's signature on the LLC Operating Agreement confirms his assent to the transaction at the time of its creation. There was no "mere scintilla" of evidence presented by Appellant that contradicted Appellant's own testimony or that of Mr. Moss. The trial court committed no error in considering Appellant's own statements that he never communicated to the professional assisting his mother any concern regarding her mental capacity. The trial court's ruling was correct.

6. Trial Court Did Not Err. Based on the above evidence, the trial court did not apply the heightened standard of review as contended by Appellant and did not err in its application of the "mere scintilla" standard in granting summary judgment for Respondent.

B. The Trial Court Did Not Err in Finding No Genuine Dispute of Material Fact Related to Henderson's Incapacity Claim.

1. Doctor's Reports.

Appellant focuses extensively on Respondent's testimony regarding his aunt's medical diagnoses of dementia and bipolar disorder and family concerns which included Mrs. Hanahan's driving ability and the need for caregiver help at home. Appellant also cites the medical reports of Drs. Durst and Lake. Further inquiry into these medical reports follows.

a. Reports of Kay Durst, M.D. regarding Mrs. Hanahan.

In accordance with *Turner v. Milliman*, the trial court correctly considered the medical evidence that was part of the record and which was undisputed by Appellant. There are two (2) reports by Dr. Kay Durst, Mrs. Hanahan's primary care physician, who was well aware of Mrs. Hanahan's dementia diagnosis, that are of utmost importance regarding Mrs. Hanahan's mental capacity. On September 6, 2012, three (3) months before the LLC meetings began, Dr. Durst reports her psychiatric observations of Ms. Hanahan 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." A second report on October 16, 2012, about seven (7) weeks before the LLC meetings began, Dr. Durst, 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." (See Order of May 30, 2017, pp. 9 and 10; Memorandum Submitted on Behalf of Respondent in Support of Motions For Summary Judgment with Attachments dated April 19, 2017)

b. Report of Piave Lake, M.D. regarding Mrs. Hanahan. The trial court also correctly considered the medical report of October 18, 2012, by Dr. Piave Lake, Mrs. Hanahan's

psychiatrist, who was familiar with bipolar disorder. Dr. Lake states 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. (See Order of May 30, 2017, p. 10; Memorandum Submitted on Behalf of Respondent in Support of Motions For Summary Judgment with Attachments dated April 19, 2017)

Neither doctor's reports are disputed by Appellant in his deposition testimony and he had no reason to doubt them. (Henderson Tr. p. 71, line 18 - p.79, line 10; Ex. 6 and 8); Further, Appellant admitted to the contents of the reports in his Responses to Respondent's First Requests to Admit. (Memorandum Submitted on Behalf of Respondent in Support of Motions for Summary Judgment with Attachments dated April 19, 2017)

On the issue of contractual capacity the Appellants offered nothing more to the trial court than medical notes with generalized references to Mrs. Hanahan's diagnoses of dementia, bi-polar illness and depression, and lay affidavits concerning her ability to drive and use a telephone answering machine. This is not evidence upon the critical question, that is Mrs. Hanahan's ability to understand the LLC operating agreement and deeds **at the time the documents were executed, or their nature and effect.** See *In re Thames,* 344 S.C. 564, 570, 544 S.E. 2nd 854 (S.C. App. 2001).

As stated in *Thames:*

> "[A] mere infirmity of mind, if it does not amount to an incapacity to understand, at the time of the execution of a contract, the nature of the act done and the effect thereof, ...does not render a person incapable of executing a valid and binding contract") Citation Omitted. ("The test for lack of [contractual] capacity is generally said to be whether an individual lacks sufficient mental capacity to understand in a reasonable manner the nature of the transaction in which he or she

> is engaging, and to understand its consequences and effect upon his or her rights and interests" Id. at 344 S.C. 570.

It has even been held that a judicial finding of lunacy is not conclusive as to a person's contractual capacity. In *Fielder & Brown v. Jennings*, 131 S.C. 26, 126 S.E. 448 (S.C. 1925), the Supreme Court held:

> "The Defendants allege insanity and mental incapacity to avoid the debt. The burden of proving insanity rests on him who alleges it and seeks to avoid and act on account of it, and it devolves on him to establish the fact of insanity by a preponderance of the evidence. The fact that he had been at one time adjudged a lunatic and committed to the asylum is not conclusive of his mental incapacity, but the question is: What was his mental condition at the time he purchased the goods from the Respondent?" (Citations omitted.) Id. at 126 S.E. 449.

In opposing summary judgment, it is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine. *Evans v. Stewart*, 370 S.C. 522, 636 S.E. 2nd 632 (Ct. App. 2006). The fact that Mrs. Hanahan no longer drove herself nor used her answering machine and hired in-home companions is no evidence of any element of proof of Appellant's claims. Appellants have presented not even a scintilla evidence of Mrs. Hanahan's alleged incapacity at the time of execution of the questioned documents.

The evidence before the trial court did not reflect a genuine dispute of material fact regarding Mrs. Hanahan's capacity as of December 2012. Under South Carolina case law, summary judgment requires that there be some genuine dispute of material fact. Respondent submits that the trial court correctly found that there was no such dispute as to Mrs. Hanahan's mental capacity on December 30, 2012. See Order of May 30, 2017, pp. 10 and 11.

2. Legal Professionals.

Two (2) retained professionals (Messrs. Moss & Yates) were engaged to assist Mrs. Hanahan with the documents needed to set up and fund the family LLC. The process took a month. On December 30, 2012, Appellant was not present when the documents were signed. Both the CPA-

Attorney (Moss) and second attorney (Yates) were adamant in their deposition testimony that Mrs. Hanahan clearly understood what she was doing.

a. Testimony of Howard Yates, Esq.; Preparation of Deeds and Statement regarding Land Transfers.

The trial court considered the uncontroverted deposition testimony of Howard Yates, Esq., who prepared three (3) pivotal documents, which underscore Mrs. Hanahan's mental status in December 2012.

1. The first (1st) document is the Statement of Intent as to Land Transfers signed by Ms. Hanahan on December 30, 2012, in which she acknowledged, in part, that she was making the transfers to the LLC to save on estate taxes, that she understood that her nephew, Mikell Scarborough, would benefit from the creation of the LLC, that she was signing the deed conveying certain real properties to the LLC and was making a gift of other real estate to her son, Ross, and was signing all documents freely and without duress or undue influence by anyone;
2. The second (2nd) document is the deed conveying the property to the LLC, which deed is being challenged, and

3. The third (3rd) document is the deed conveying two other parcels of real estate to Mrs. Hanahan's son, Joseph Ross Henderson, which deed is not being challenged by Appellant although both deeds were signed by Mrs. Hanahan at the same time on the same day before the same witnesses.

(Yates Tr. p. 6, line 3 - p. 11, line 25; p.12, line 11 - p. 14, line 7; Ex. 5 and D2; Respondent's Supplemental Memorandum submitted in Support of Motion For Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 5(2), Ex. 5(1), and Ex. 6(1).

b. Admission by Appellant regarding Execution of the Deeds; Attorney "Doggone Certain" as to Mrs. Hanahan's Mental Capacity.

Appellant admits he does not have any knowledge about the circumstances under which the deeds, prepared by Attorney Yates, were signed by his mother. (Henderson Tr. p. 140, line 19 - p. 141, line 24). This would also include the Statement of Intent as to Land Transfers.

Attorney Yates accompanied Respondent to Ms. Hanahan's house on December 30, 2012. He met with Ms. Hanahan at the residence and:

"I 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." They then travelled to Mr. Moss's office 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"

Attorney Yates was with Ms. Hanahan over 2 hours during these various discussions and execution of the documents in question. Yates Tr. p. 7, line 13 through p. 8, line 10

As was his custom, Attorney Yates had tax maps with him that day which drawings depict where the properties were located. Ms. Hanahan signed both the deeds and Statement before Mr. Moss and Attorney Yates and Mr. Yates "detected no evidence of incapacity or forgetfulness at all," and "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." Yates Tr. p. 8, lines 9 - 23

Attorney Yates testified that he was unaware of any diagnosis of dementia of Ms. Hanahan or history of mental illness; however, he found Ms. Hanahan to be "vibrant and very congenial" Yates Tr. p. 17, lines 4 – 10.

Mr. Moss corroborates Mr. Yates' testimony and testified that the meeting on December 30, 2012 took place at his office and lasted between 2-3 hours. He was present, along with Ms. Hanahan and Howard Yates, Esq. At no point did Mr. Moss question Ms. Hanahan's mental capacity and ability to comprehend and understand the documents that she was signing. "She was very sharp that day." Moss Tr. p. 70, lines 19-20

5. Trial Court Did Not Err. Appellant has provided no evidence to contradict the testimony of either Howard Yates, Esq. or Christopher Moss as to what transpired on December 30, 2012. The acknowledgments expressed by Mrs. Hanahan in the Statement of Intent as to Land Transfers that she signed are also uncontroverted.

In opposing summary judgment, it is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine. See *Russell v. Wachovia Bank*, infra, citing to *Baughman v. AT&T*, supra). The fact that Mrs. Hanahan no longer drove herself nor used her answering machine and hired in-home companions is no evidence of any element of proof of Appellant's claims. Appellants have not presented even a scintilla of evidence of Mrs. Hanahan's alleged incapacity at the time of execution of the questioned documents. Accordingly, the trial court made the correct ruling to grant summary judgment based on the evidence before it.

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

As to the undue influence claim, Appellant contends that Respondent did not identify the proper standard to the trial court and that the trial court failed to use the proper standard under *Bullard v. Crawley,* 294 S.C. 276, 363 S.E.2d 897 (1987). Appellant further argues that the deed executed by Mrs. Hanahan should be presumed invalid because of the existence of a confidential relationship between the grantor (Mrs. Hanahan) and the grantee (Respondent), thus the burden shifts to the grantee "to affirmatively show the absence of undue influence."

This argument was rejected by the trial court in its Order Granting Summary Judgment of May 30, 2017, and a second time under the Order denying Appellant's Motion to Alter Amend and/or Reconsider filed July 17, 2017. See Orders of May 30, 2017 and July 17, 2017. An action to set aside deeds is a matter in equity. *Smith v. McClam*, 280 S.C. 398, 312 S.E.2d 260 (S.C. App.

1984). Appellant's reliance on the 1987 case of *Bullard v. Crawley,* is misleading as it does not apply to the facts in this case.

In *Bullard,* Mrs. Bullard was the grantor of two deeds which conveyed fee simple title in two parcels to Steve and Karen Crawley individually, and reserving a life estate interest to herself. Ms. Crawley was Mrs. Bullard's caregiver. The day before the deeds were signed, Mrs. Bullard left all her real and personal property to the Crawleys under a new Last Will and Testament. According to two witnesses [to the Will], Mrs. Bullard was of sound mind and knew what she was doing at the time. Also, all the witnesses concluded Mrs. Bullard understood what she was doing when the deeds were executed, and was under no duress. Thereafter, however, Mrs. Bullard had a change of heart and became upset over what she had done. She asked the Crawleys to reconvey the property but they refused. Mrs. Bullard then brought the action to set aside the deeds.

Although Mrs. Crawley was a caregiver for Mrs. Bullard, the court found there was no confidential relationship between Mrs. Bullard (the grantor) and Mrs. Crawley (the caregiver). The burden, therefore, was on appellants to establish undue influence.

1. Two Deeds: One to Respondent is Challenged; One to Brother is not Challenged.

As in *Bullard,* there are two (2) deeds executed by Mrs. Hanahan. Under the first one, Mrs. Hanahan conveyed real property to an entity, the MRH Family LLC, an entity to which she retained an interest, but not to Respondent individually. This is the deed being challenged by Appellant. Appellant fails to state he **is not** seeking to have the second deed signed by Mrs. Hanahan on the same day, at the same time, before the same witnesses, in which she conveys two separate parcels of real estate to her other son, Appellant's brother, Joseph Ross Henderson, declared null and void. (Henderson Tr. p. 143, line 23 through p. 144, line 16; Respondent's Supplemental Memorandum

submitted in Support of Motion For Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 6(1)). The claim by Appellant that one deed is invalid (because his cousin has an interest in the entity which is the grantee) and that the other deed (in which his brother as grantee received fee simple title individually) is valid when both were signed at the same time, same place and before the same witnesses is neither logical nor reasonable under either the law or any common sense approach to reality.

2. 68% + 2% for Appellant; Deed to the LLC. Appellant has a 68% interest in the MRH Family, LLC; Respondent through another LLC, has a 30% interest; Mrs. Hanahan retained a 2% interest which was inherited by Appellant upon the death of his mother. Respondent had a close and loving relationship with his aunt. Respondent does not deny there existed a confidential relationship between himself and his aunt just as Appellant had such a relationship.

Case law establishes that the unequal or unjust division of assets alone is not sufficient to set aside a will for undue influence. *Smith v. Whetstone,* infra. This is further supported when the fiduciary does not become the primary beneficiary of the Decedent's largess. See *Calhoun,* supra and its progeny.

a. *Howard v. Nassar* Analysis. Respondent refers the court to *Howard v. Nassar,* 364 S.C. 279, 613 S.E.2d 64 (S.C. 2005) which discusses the burden in regard to contested deeds when there is a confidential relationship and an allegation of undue influence. A presumption of invalidity arises if the contestants of the deed present evidence that a confidential or fiduciary relationship existed between the grantor and the grantee. *See Middleton v. Suber,* 300 S.C. 402, 405, 388 S.E.2d 639, 641 (1990) (recognizing that where a "confidential relationship" exists between a grantor and grantee, the deed is presumed invalid and the burden is upon the grantee to

establish the absence of undue influence). Once a confidential relationship is shown, the deed is presumed invalid. The burden then shifts to the grantee to affirmatively show the 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.").

Discussions in *Howard* center on *Dixon v. Dixon,* 362 S.C. 388, 608 S.E.2d 849 (2005) where our supreme court implicitly recognized that the presumption of invalidity in deed cases applies to will cases. In *Dixon,* an elderly Mother, conveyed property to her Son. At the same time the deed was executed, Mother signed an agreement prepared by Son whereby he agreed to care for Mother and maintain her residence. Following a confrontation approximately three years later, Mother asked Son to leave her home, changed the locks on the home, and requested that Son re-convey the title to the property to her. When Son refused, Mother filed an action to set aside the deed. [as in *Bullard*] Mother claimed undue influence as one of her grounds challenging the deed. Specifically, she asserted that because she and Son were in a confidential relationship, Son had the burden of proving that he did not unduly influence her and he failed to meet that burden.

As a threshold matter, our supreme court found a confidential relationship existed between the parties. The court ultimately concluded that Son proved that he did not unduly influence Mother. In reaching this decision, the court utilized the principles of undue influence applicable in contested will cases. The court relied on precedent from other jurisdictions which found "the analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the plaintiff was unduly influenced is a will or a deed." *Dixon,* 362 S.C. at 398 n. 7, 608 S.E.2d at 854 n. 7. Based on these cases, the court recognized "[m]ost of our jurisprudence on

the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed ..., nonetheless, we find no reason why this discrepancy should change our analysis." *Id.*

Further, the *Howard* court states, "...the Restatement of Property provides in relevant part:

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, *will,* will substitute, or a donative transfer of any other type. "The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption."
>
> Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003).

We interpret the foregoing to mean that if the contestants of a duly executed will provide evidence that a confidential/fiduciary relationship existed sufficient to raise the presumption, the proponents of the will must offer evidence in rebuttal. We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will. *See* S.C.Code Ann. § 62-3-407 (Supp.2004) ("Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof."); *Calhoun,* 277 S.C. at 530, 290 S.E.2d at 417 ("The contestants continue to bear the burden of proof throughout the will contest."); *Smith v. Whetstone,* 209 S.C. 78, 84, 39 S.E.2d 127, 129 (1946) (where will is formally executed, the burden of proof is on the contestant to prove undue influence "and this burden remains on him to the end").

However, "[a] mere showing of opportunity and even of a motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized. General influence is not enough. A contestant must show that the influence was brought directly to bear upon the testamentary act." *Mock v. Dowling,* 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976).

"The influence must be of such a degree that it dominated the testators will, took away his free agency, and prevented the exercise of judgment and choice by him. If the testator had the testamentary capacity to dispose of his property and was free and unrestrained in his volition at the time of making the will, the influence that may have inspired it or some provision of it will not be undue influence." *In re Last Will and Testament of Smoak,* 286 S.C. at 424, 334 S.E.2d at 809.

No such evidence exists in the record in this case. Here the Yates' deposition and Mrs. Hanahan's own signed Statement Regarding Land Transfers more than adequately rebut the presumption so that the burden of proof remains with the Appellant.

b. *Russell v. Wachovia Bank, NA.* Analysis. A similar discussion in *Russell v. Wachovia Bank, NA,* 353 S.C. 208, 578 S.E.2d 329 (S.C. 2003) is cited by Respondent and relied upon by the trial court. Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship. *Hembree v. Estate of Hembree,* 311 S.C. 192, 428 S.E.2d 3 (Ct.App.1993). The "mere existence of influence is not enough to vitiate a Will ... A mere showing of opportunity and even a showing of motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized." *Last Will and Testament of Smoak, supra,* at 424, 334 S.E.2d at 809.

Under *Russell,* since the standard of proof in an undue influence case is unmistakable and convincing evidence, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment. *Id.* A heightened standard for summary judgment is required where "the inquiry involved in a ruling on a motion for summary judgment ... necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits." *George v. Fabri,* 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) quoting *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S. Ct. 2505, 91 S.E.2d 202 (1986).

Taking the facts in the light most favorable to the Appellants, we agree with the trial judge that there is no genuine issue of material fact to preclude the grant of summary judgment as to the validity of the will. Appellants have not presented unmistakable and convincing evidence that the Williams Children or Thad utilized their relationship with Testator to substitute their will for his. The evidence presented points to the conclusion that the Williams Children were churlish, spoiled children, who took advantage of Testator's generosity. While unattractive, such conduct and demeanor does not amount to undue influence.

The Supreme Court found it significant that none of the contestants was present when the Will was discussed or when the Will was executed; this fact, along with application of the cited legal principles, prompted the holding that the Will was the product of the free and unfettered act of the testator. *Id.* at 219.

The South Carolina Supreme Court's holding in *Russell* was that the trial judge was correct in ruling that the contestants had not presented unmistakable and convincing evidence that the parties, who had allegedly exercised influence, had indeed utilized their relationship with the testator to substitute their will for his. *Id.* at 220. The South Carolina Supreme Court affirmed the trial court's granting of summary judgment. *Id.*

c. *Hairston v. McMillan* Analysis. Respondent further refers the court to *Hairston v. McMillan,* 387 S.C. 439, 692 S.E.2d 549, (S.C. 2010), citing *Howard,* which discusses the burden of proof in cases alleging existence of undue influence. The existence of a fiduciary relationship between a testator and beneficiary raises a presumption of undue influence. *Howard v. Nasser,* 364 S.C. 279, 288, 613 S.E.2d 64, 68-69 (Ct.App.2005). If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence. *Id.* "*We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will.*" *Id.* (emphasis added)

Respondent submits that facts of this case are closer to those in *Hairston*. The record shows McMillan and Hairston both held powers of attorney for Decedent and the court found that both parties were in a fiduciary relationship with the decedent. Similar to the facts of this case, the court found that, while the proponent must present evidence in rebuttal, she was not required to affirmatively disprove the existence of undue influence. As here, the court made the following findings to show evidence of rebuttal and a lack of undue influence over the testator:

1. Decedent expressed no concern with her care by her fiduciary;
2. Decedent had the opportunity to share any concerns about her fiduciary;
3. At the time of the execution of the will, the beneficiary was out of the house;
4. Decedent had informed appellant that she had plans to change her will; and
5. No evidence of threats or force against Decedent was shown by appellant.

Accordingly, Respondent submits that any presumption of undue influence from the existence of the Power of Attorney was rebutted by the actual evidence in the record. Absolutely no evidence has been submitted to show force and coercion sufficient to overcome Mrs. Hanahan's stated desires regard the creation of the LLC and her estate plans.

Respondent would also point out that Hairston argued the special referee failed to view the evidence in the light most favorable to her as the contestant to the Will. The court disagreed stating:

"While we acknowledge the special referee should have viewed the evidence in this fashion, Hairston's only argument is that the order did not contain a statement indicating the evidence was so considered. *Calhoun v. Calhoun,* 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982) (finding whether the contestants of a will met the required burden of proof must be determined by viewing evidence in the light most favorable to the contestants). Nothing in the record suggests the special referee did not view the evidence properly and the lack of an affirmative statement to that effect is not enough to warrant a reversal in light of the evidence in the record."

Respondent further submits that the trial court correctly considered the legal principles as set out in *Russell, Howard,* and *Hairston* as well as *Smith v. Jones (In re Estate of Smith),* 419 S.C. 111, 796 S.E.2d 158 (S.C. App., 2016) as to summary judgment which is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When reviewing a summary judgment order, an appellate court applies the same standard as the trial court. *Fleming v. Rose,* 350 S.C. 488, 567 S.E.2d 857 (2002). "The evidence, and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id.* at 494, 567 S.E.2d at 860.

3. Trial Court Did Not Err. Under the above analysis, assuming that Respondent, as a member of the LLC and as proponent of the [deed] must present evidence in rebuttal, Respondent did not have to affirmatively disprove the existence of undue influence. Appellant still retained the ultimate burden of proof to invalidate the [deed] by unmistakable and convincing evidence. The trial court did not side step the question of whether or not Respondent was a fiduciary to Mrs. Hanahan but properly considered all applicable legal principles in its analysis. As shown by the testimony of witnesses Moss and Yates, and even the testimony of Appellant, Mrs. Hanahan wanted to create the LLC and include Respondent as a member therein. See Order of May 30, 2017, pp. 12-19.

The trial court did not commit error and the Order granting summary judgment should be upheld.

D. The Trial Court Did Not Err in Finding No Genuine Dispute of Material Fact Related to Henderson's Undue Influence Claim.

Appellant contends there is a question of fact on the issue of undue influence and cites numerous references to deposition testimony only of Respondent in its Brief. This is false and misleading. Appellant fails to cite any testimony of the two professionals germane to the issue of undue influence and, instead, seeks to create an inference that is neither reasonable nor a genuine issue of material fact. See *Town of Hollywood v. Floyd,* 403 S.C. 466, 744 S.E.2d 161 (2013).

1. Questions by the Trial Court. After argument by Appellant's counsel at the hearing, the trial court asked if Appellant knew, beginning December 6 or shortly thereafter, that Mrs. Hanahan was going to do tax planning for her estate. The answer was "yes." (See Hearing Tr. p. 43, lines 19 - p. 44, line 3.)

Appellant's attorney confirmed that Appellant knew Mr. Moss was involved; that Mr. Moss made contact with Appellant; and what Appellant received from Mr. Moss on December 30, was the Operating Agreement "which described how the company would be managed and who would own the company." (See Hearing Tr. p. 44, lines 7-24) This is the same Operating Agreement that Appellant signed on December 30, the same day his mother and Respondent also signed. Appellant knew the percentages of ownership when he signed it, but Appellant "never asked me (Mr. Moss) any questions about it" nor did Appellant voice any concern to Mr. Moss about his mother's mental capacity. Moss Tr. p. 67, line 10 through p. 68, line 10. Appellant sent his signed page back to Mr. Moss by fax on December 31, 2012. Moss Tr. p. 29, line 3 - p. 30, line 24; Ex. 2

2. Testimony of Christopher Moss; the 30% Interest; the House; the Operating Agreement.

Appellant insinuates the Codicil signed by Mrs. Hanahan in favor of Respondent which leaves him her house and adjacent lot in October 2012 was deliberately not included in the list of real property that was transferred into the LLC. However, Mr. Moss testified that the home "would not have been [put in the LLC] because the best practice is not to include your home in the family LLC because then it sounds like you're trying to just do your will a little early before you die. And it – so, nobody in my business would put your home in the family LLC." (Moss Tr. p. 27, line 21 - p. 28, line 4). [Summary judgment on the codicil was denied. This issue is pending.]

At the initial meeting of December 6, 2012, Mr. Moss prepared a Summary 5 Action Steps Power Point presentation and reviewed it with Ms. Hanahan which explained what steps could be taken to reduce her estate tax liability. As part of the presentation, Mr. Moss had initially suggested a 75%-80% ownership by her son, Mikell Henderson. However, Ms. Hanahan stated that "Mikell Scarborough is my son...Mikell Scarborough is my son along with Mikell Henderson. They're the ones that will be part of this family." Moss Tr. p. 39, lines 13-18. Mrs. Hanahan insisted that Mikell Scarborough receive a 30% interest and "there was no talking her out of it." Moss Tr. p. 19, lines 3-8.

Appellant also casts aspersions on the purpose of the LLC which was to save on estate taxes for Mrs. Hanahan's estate. The conference surrounding the signing of the deeds and Operating Agreement lasted almost 3 hours. Mr. Moss testified that "The only discussion we had was that whatever assets she had that was not in this LLC would be taxed, would be fully taxed as part of her estate and she understood that." (Moss Tr. p. 38, lines 1-3; p. 31, lines 13-24) Mr. Moss further testified that Mary Ross Hanahan "got very upset with this other son of hers and said she

doesn't want anything to do with him" and further said "Mikell Scarborough is my son.... Mikell Scarborough is my son along with Mikell Henderson." (Moss Tr. p. 39, line 10-18)

3. Respondent advocates for his cousin, Joseph Ross Henderson, Appellant's brother.

Nowhere in Mr. Moss' testimony is there any evidence that Respondent Scarborough exercised any behaviors on his own behalf that are associated with the warning signs of undue influence as set forth in South Carolina case law. Indeed, Mr. Moss made it clear that Respondent was an advocate for his other cousin, Joseph Ross Henderson, and insisted to his aunt that she must give him [Ross] something. (See Moss Tr. p. 43, line 11 through p. 44, line 16) This insistence was the genesis of the deed to Appellant's brother, again a document which he is not contesting.

4. Testimony of Howard Yates, Esq.; Attorney "Doggone Certain" as to No Undue Influence Exercised by Scarborough.

Appellant conveniently omits any reference to the testimony of Howard Yates, Esq., the attorney who prepared the two deeds and the Statement in regards to Land Transfers as to any evidence of undue influence exhibited by Respondent over his aunt. Ms. Hanahan acknowledged that she had the opportunity to consult with Mr. Moss and her nephew, that she wished to avoid substantial estate taxes, that her nephew (Respondent) would have an interest in the MRH Family, LLC and that she would retain a 2% interest. Ms. Hanahan also acknowledged that she desires to convey certain property to her son, Ross Henderson. 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. (See Yates Tr. p. 10, line 16 through p. 11, line 17; Ex. 5; Respondent's Supplemental Memorandum submitted in Support of Motion for Summary Judgment as to Creation of MRH Family, LLC and Related Documents, Ex. 5(2).

The trial court recognized the significance of Mr. Yates' uncontroverted testimony in its finding. 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." (Yates, Tr. p. 8, line 12 - p. 9, line 5)

Attorney Yates was unaware of any diagnosis of dementia of Ms. Hanahan or history of mental illness and saw no evidence of this in his meeting with her. He found Ms. Hanahan to be "vibrant and very congenial." (Yates, Tr. p. 17, lines 4-11) Mr. Yates had no communication with Appellant at all. See Order of May 30, 2017, p. 14

As stated in the Order, not all influences are undue, the contestants must show that the influencer has overcome the testator's free will and judgment. See *Calhoun v. Calhoun*, 277 S.C. 527, 531-32, 290 S.E.2d 415, 418 (1982); *In Re: Estate of Anderson*, 381 S.C. 568, 573, 674 S.E.2d 176, (Ct. App. 2009). See Order, p. 18

As required under *Russell,* an issue of fact would exist only if Appellant presented unmistakable and convincing evidence that Respondent brought undue influence directly to bear upon his aunt's acts in signing the documents needed to create the LLC. Two independent witnesses, both professionals with either a legal and/or accounting background, are clear in their testimony that Ms. Hanahan understood what she was signing on December 30, 2012 (the MRH Family, LLC Operating Agreement, two deeds, one (1) to the LLC and one (1) to her other son, and the Statement concerning the 2012 Land Transfers), all outside the presence of Respondent.

5. Appellant has not submitted any affidavits in contradiction of Moss or Yates testimony.

The trial court noted that Appellant has not submitted any affidavits which contradict or refute the affidavit or deposition testimony of Mr. Moss or of Attorney Yates. Appellant produced no evidence of any act or action by Respondent that demonstrates Mrs. Hanahan was coerced by him, that Respondent destroyed the free agency of his aunt or overtook her free will, or that Respondent otherwise exerted improper influence to get his aunt to sign the LLC documents.

Under *Dixon,* as cited in *Howard,* in order to survive summary judgment, the law requires Appellant to produce something more than a scintilla of evidence in support of his allegations of undue influence. However, Appellant was unable to carry this burden, citing no specific facts, contested or otherwise, giving rise to a reasonable inference that Respondent overcame his aunt's desire and intention as to the utilization of an LLC for estate tax savings purposes and including Respondent as a member of the entity.

The trial court concluded that, even when viewed in the light most favorably to Appellant, Appellant's arguments are supported by little more than his own suspicions and beliefs, and would require the Court to supplant the record with its own speculations. Appellant failed to create a genuine issue of any material fact as to the exercise of any undue influence by Respondent on Ms. Hanahan relative to the creation of the MRH Family, LLC and its related documents in December 2012.

6. Trial Court Did Not Err. The trial court concluded that there existed no triable issue of material fact and Respondent was entitled to judgment as a matter of law. Summary Judgment was granted in favor of Respondent on the legal cause of Action to Try Title to Real

Estate which was the correct ruling. The trial court committed no error and the Order should be Affirmed.

6. CONCLUSION

For the reasons stated above, the LLC Order should be upheld and the appeal dismissed.

This 9th day of April, 2018

Shirrese B. Brockington, Esq
SC Bar No. 956
Attorney for Respondent, Individually

4 Carriage Ln., Ste. 304
P.O. Box 31312
Charleston, SC 29417
(843) 737-5278

Joseph S. Mendelsohn, Esq.
SC Bar No. 3935
Attorney for Respondent as Personal Representative
for the Estate of Mary Ross Hanahan

P.O. Box 250
Charleston, SC 29202
(843) 577-7210

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2018, I emailed or mailed with first class postage affixed, or mailed by certified mail, return receipt requested, with first class postage affixed or by Federal Express, the **Brief of Respondent Mikell R. Scarborough, individually and as Personal Representative of the Estate of Mary Ross Hanahan** to the below listed:

David M. Burkoff, Esq.
Kate L. Smith, Esq.
Attorneys for Appellant Mikell M. Henderson

200 East Saint Julian Street
Savannah, SC 31412

Adam T. Silvernail, Esq.
Attorney for Appellant Mikell M. Henderson

1905 Marion St.
Columbia, SC 29201

SHIRRESE B. BROCKINGTON, ESQ.
Attorney for Respondent Mikell R. Scarborough, Individually

and

JOSEPH S. MENDELSOHN, ESQ.
Attorney for Respondent as Personal Representative for the Estate of Mary Ross Hanahan

Charleston, South Carolina
Dated: April 9, 2018

SHIRRESE B. BROCKINGTON, ESQ.
ATTORNEY AT LAW
CERTIFIED MEDIATOR

4 CARRIAGE LANE, SUITE 304
POST OFFICE BOX 31312
CHARLESTON, SOUTH CAROLINA 29407
sbb@bonllc.net

TELEPHONE (843) 737-5278

FACSIMILE (854) 444-3145

April 9, 2018

The South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

Re: **MIKELL M. HENDERSON v. MIKELL R. SCARBOROUGH, et al.**
Appellate Case No. 2017-001775

Dear Clerk:

Enclosed is the following:

- ✓ *Original & 1 copy of the Brief of Respondent Mikell R. Scarborough*
- ✓ *Original & 1 copy of the Designation of Matter to be Included in Record on Appeal*
- ✓ *Certificate of Service*

Please file the same and return clocked copies to me. Thank you.

Very truly yours,

Shirrese B. Brockington

SBB/loh

Enclosure(s)

cc: Mikell R. Scarborough
David M. Burkoff, Esq.; Kate Lawson Smith, Esq.
Adam T. Silvernail, Esq.
Joseph S. Mendelsohn, Esq.

FedEx® US Airbill

FedEx Express

FedEx Tracking Number 8750 6718 2654

0200 Form ID No.

FedEx Retrieval Copy

fedex.com 1.800.GoFedEx 1.800.463.3339

1 From

Date 4.9.18 Sender's FedEx Account Number 1940-4851-5

Sender's Name S. Brockington Phone 843 737.5276

Company

Address 4 Carriage Ln, Suite 304

City Charleston State SC ZIP 29407 Dept/Floor/Suite/Room

2 Your Internal Billing Reference

3 To

Recipient's Name Phone

Company South Carolina Court of Appeals

Address We cannot deliver to P.O. boxes or P.O. ZIP codes. Dept/Floor/Suite/Room

Address 1220 Senate St

Use this line for the HOLD location address or for continuation of your shipping address.

City Columbia State SC ZIP 29201

01 ☐ HOLD Weekday FedEx location address REQUIRED. NOT available for FedEx First Overnight.

31 ☐ HOLD Saturday FedEx location address REQUIRED. Available ONLY for FedEx Priority Overnight and FedEx 2Day to select locations.

8750 6718 2654

4a Express Package Service * To most locations. *Packages up to 150 lbs.*

01 ☐ FedEx Priority Overnight — Next business morning.* Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

05 ☐ FedEx Standard Overnight — Next business afternoon.* Saturday Delivery NOT available.

06 ☐ FedEx First Overnight — Earliest next business morning delivery to select locations.* RECEIVED APR 10 2018 Court of Appeals

03 ☐ FedEx 2Day — Second business day.* Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

20 ☐ FedEx Express Saver — Third business day.* Saturday Delivery NOT available.

4b Express Freight Service ** To most locations. *Packages over 150 lbs.*

70 ☐ FedEx 1Day Freight — Next business day.** Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

FedEx 1Day Freight Box Qty

80 ☐ FedEx 2Day Freight — Second business day.** Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

83 ☐ FedEx 3Day Freight — Third business day.** Saturday Delivery NOT available.

5 Packaging * Declared value limit $500.

06 ☑ FedEx Envelope* 02 ☐ FedEx Pak* — Includes FedEx Small Pak and FedEx Large Pak. 03 ☐ FedEx Box 04 ☐ FedEx Tube 01 ☐ Other

6 Special Handling and Delivery Signature Options

03 ☐ **SATURDAY DELIVERY**

☐ No Signature Required — Package may be left without obtaining a signature for delivery.

10 ☐ Direct Signature — Someone at recipient's address may sign for delivery. *Fee applies.*

34 ☐ Indirect Signature — If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. *Fee applies.*

Does this shipment contain dangerous goods?

One box must be checked.

☑ No 04 ☐ Yes As per attached Shipper's Declaration. ☐ Yes Shipper's Declaration not required. 06 ☐ Dry Ice Dry Ice, 9, UN 1845 ____ x ____ kg

Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box. ☐ Cargo Aircraft Only

7 Payment *Bill to:*

1 ☑ Sender Acct. No. in Section 1 will be billed. 2 ☐ Recipient 3 ☐ Third Party 4 ☐ Credit Card 5 ☐ Cash/Check

Enter FedEx Acct. No. or Credit Card No. below. Obtain recip. Acct. No. ☐

Total Packages ____ Total Weight ____ lbs. Credit Card Auth. ____

†Our liability is limited to $100 unless you declare a higher value. See the current FedEx Service Guide for details.

606

Rev. Date 2/10 • Part #158281 • ©1994–2010 FedEx • PRINTED IN U.S.A. SRY