

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

RECEIVED
APR 30 2018
SC Court of Appeals

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.

REPLY BRIEF OF APPELLANT MIKELL M. HENDERSON

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I. ARGUMENT

A. INTRODUCTION

Appellant Mikell M. Henderson (“Henderson”) respectfully submits this reply brief in support of his appeal of the trial court’s order dated May 30, 2017 (the “LLC Order”), in which the trial court granted Respondent Mikell R. Scarborough’s (“Scarborough”) motion for summary judgment on Henderson’s claim that the decedent, Mary Ross Hanahan (“Hanahan”), lacked capacity to execute documents concerning the MRH Family LLC and that Scarborough exercised undue influence over Hanahan leading to her execution of those documents.

In Henderson’s initial brief, he showed that the trial court, in granting Scarborough’s motion for summary judgment, applied the wrong standard of review to both prongs of Henderson’s claim. First, on the issue of Hanahan’s incapacity, rather than apply the “mere scintilla of evidence” standard, the trial court imposed a higher burden on Henderson. (Appellant’s Brief, Section III.A). Second, on the issue of Scarborough’s undue influence over Hanahan, rather than engage in the appropriate burden-shifting analysis, the trial court applied a “clear and convincing” standard of review. (*Id.*, Section III.C). Additionally, regardless of these errors, the trial court reached the wrong result in finding no genuine dispute of material fact on either aspect of the claim. (*Id.*, Sections III.B, III.D).

As shown below, Scarborough’s arguments in rebuttal lack merit.

B. SCARBOROUGH’S CAPACITY ARGUMENT FAILS

Scarborough skips over any real discussion or analysis of whether the trial court applied the proper standard to Henderson’s incapacity claim, even though that question is dispositive. In other words, Scarborough fails to contend with the fact that the LLC Order *refers* to the “mere scintilla” standard but then in the next sentence refers to a “heightened burden of proof” requiring “something more,” without specifying which standard should apply in *this case*.

(Appellant’s Brief at 7-8; LLC Order at 3-4). Instead, Scarborough presupposes the trial court applied the correct standard and then spends ten pages describing the evidence *he* relied on in the trial court, which he then uses as the basis for his conclusion that Henderson must not have adduced even a “mere scintilla” of evidence. (Appellee’s Brief at 4-14). However, this ignores the extensive evidence of Hanahan’s incapacity cited by Henderson in his brief. (Appellant’s Brief at 8-10 (discussing, *inter alia*, record evidence of Hanahan’s “deteriorating” mental condition and “cognitive impairment”)). Scarborough may think the *weight* of the evidence favors him, but even if the trial court shared that view, the weight of the evidence should have had no bearing on whether there was a *scintilla* of evidence in the record.

C. **SCARBOROUGH’S UNDUE INFLUENCE ARGUMENT FAILS**

As to Henderson’s undue influence claim, Scarborough’s argument appears to be that the burden-shifting prescribed by the South Carolina Supreme Court in Bullard v. Crawley, 294 S.C. 276 (1987), was not called for and thus was appropriately “rejected by the trial court.” (Appellee’s Brief at 14-15). However, Scarborough and the trial court were wrong in this regard, as explained in Henderson’s initial brief. (Appellant’s Brief at 10-11). Scarborough’s reliance on an earlier Court of Appeals decision that says nothing at all about the proper standard to be applied to an undue influence claim at the summary judgment stage can be quickly disregarded. (Appellee’s Brief at 14-15, *citing* Smith v. McClam, 280 S.C. 398 (S.C. App. 1984)).

Scarborough’s argument is confusing because, although he argues that the burden-shifting standard set forth in Bullard is inapplicable, he then proceeds to rely on the facts of the Bullard case (*id.* at 15-16, Section III.C.1 (“As in Bullard, ...”)), as well as other cases discussing the burden-shifting requirement (*id.* at 16-18). Scarborough also discusses *this* case

as if it were a will contest, which it is not (at least, not the part of the case currently on appeal).¹ (*E.g.*, *Id.* at 16 (“unequal or unjust division of assets alone is not sufficient to set aside a will for undue influence”), 18 (“if the contestants of a duly executed will provide evidence that a confidential/fiduciary relationship existed sufficient to raise the presumption [of undue influence], the proponents of the will must offer evidence in rebuttal”). In any event, as there appears to be no dispute that the appropriate burden-shifting did not occur in the trial court, the LLC Order must be reversed on that basis alone.

Scarborough ultimately rests on his argument that, regardless, “[a]bsolutely no evidence has been submitted to show force and coercion sufficient to overcome Mrs. Hanahan’s stated desires regarding the creation of the LLC and her estate plans.” (*Id.* at 21; *see id.* at 27 (“no specific facts”). To the contrary, Henderson relied on significant evidence that Scarborough unduly influenced his aunt to effectively transfer millions of dollars of property to himself. (Appellant’s Brief at 13-14). Indeed, the evidence presented by Henderson in the trial court rises to the level of the “unmistakable and convincing evidence” that Scarborough (wrongly) claims Henderson had an up-front obligation to adduce (*i.e.*, without the burden-shifting in which the court should have, but did not, engage). (*See* Appellee’s Brief at 26).

D. SCARBOROUGH’S OTHER ARGUMENTS ARE UNCONVINCING

Scarborough raises a litany of other points in his brief that fail to address the ultimate issues, and in any event are unconvincing. For example, Scarborough contends that Henderson did not express any capacity or undue influence concerns until after Hanahan’s death. (Appellee’s Brief at 3, 23). But it was not until after Hanahan’s death that Scarborough informed

¹ As noted in his initial Brief, Henderson’s claims that Scarborough exercised undue influence over Hanahan related to a Codicil signed just weeks before the LLC documents, and that Hanahan lacked capacity to execute the Codicil, are still pending in the trial court. (Appellant’s Brief at 2 & n.3). Notably, the trial court has twice denied Scarborough’s motion for summary judgment on the Codicil claims, finding that genuine issues of material fact exist.

Henderson of the Codicil that forms the basis of the remainder of this lawsuit (*see* note 1, *supra*), leading Henderson to suspect, investigate and ultimately pursue claims related to Scarborough's role in Hanahan's affairs. Scarborough also emphasizes that Henderson never challenged a second deed conveying certain real property to Hanahan's other son, Henderson's brother Ross. (Appellee's Brief at 15-16). But Scarborough neglects to mention that Hanahan had expressed her desire that the parcels in question go to Ross in her Last Will and Testament dated November 2, 1998, *i.e.*, prior to any incapacity or undue influence concerns. (Henderson Deposition, p. 31; Last Will and Testament of Mary Ross Hanahan dated November 2, 1998). In other words, Henderson had no reason to challenge the deed to Ross. Scarborough also states, falsely, that Henderson "has not challenged the validity of the Power of Attorney" (Appellee's Brief at 6), even though Henderson's Seventh Cause of Action (which is still pending) seeks an accounting from Scarborough of his acts ostensibly on Hanahan's behalf based on the Power of Attorney which "was purportedly executed during a time when [Hanahan] lacked contractual capacity and/or was subject to undue influence." (Petition at ¶¶ 64-69). Finally, Scarborough chides Henderson for supposedly "fail[ing] to cite any testimony of the two professionals germane to the issue of undue influence" (one of whom was *Scarborough's* lawyer, not Hanahan's, and the other of whom was Scarborough's friend and business associate), (Appellee's Brief at 23; *see also id.* at 25 ("Appellant conveniently omits ...")), when in fact Henderson quoted the trial court's discussion of that testimony at length (Appellant's Brief at 5-6).

II. CONCLUSION

For the reasons stated above and in Henderson's initial Brief, the LLC Order should be reversed and this case should be remanded for further proceedings.

This 27th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **REPLY 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:

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This 27th day of April, 2018.

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Re: Mikell M. Henderson v. Mikell R. Scarborough
Appellate Case No. 2017-001775
Initial Reply Brief

Dear Ms. Allen:

Enclosed please find our Initial Reply Brief in the above matter. Please send us a file stamped copy in the enclosed self-address, stamped envelope.

Sincerely,

Kate Lawson Smith

KLS/mh

Enclosures

cc: Shirrese Brown Brockington, Esq.
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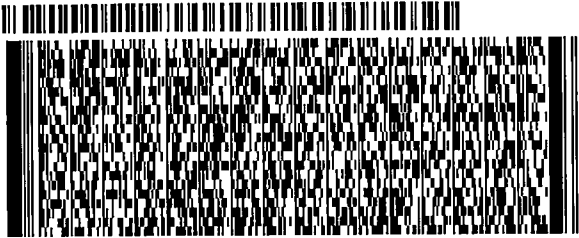
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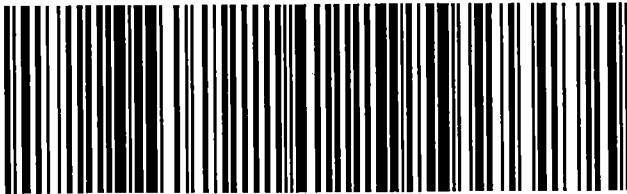
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