

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 15 2018
SC 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 theRespondent.

SUPPLEMENTAL RECORD ON APPEAL

HUNTER, MACLEAN, EXLEY & DUNN, P.C.
David M. Burkoff
South Carolina Bar No. 100339
Kate L. Smith
South Carolina Bar No. 101959
Post Office Box 9848
Savannah, Georgia 31412
Ph: (912) 236-0261

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 theRespondent.

SUPPLEMENTAL RECORD ON APPEAL

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

David M. Burkoff

South Carolina Bar No. 100339

Kate L. Smith

South Carolina Bar No. 101959

Post Office Box 9848

Savannah, Georgia 31412

Ph: (912) 236-0261

INDEX

ORDERS:..... 876

 Order Granting Motion for Removal of Mikell R. Scarborough, Personal Representative of the Estate of Mary Ross Hanahan, dated November 9, 2015, filed December 2, 2015. 876

 Order Granting Motion for Removal of Mikell R. Scarborough, Individually, dated November 23, 2017, filed December 2, 2015..... 877

PLEADINGS: 878

 Plaintiff’s Memorandum in Opposition to Respondents’ Motion for Summary Judgment. .. 878

OTHER MATERIALS: 911

 Durable Power of Attorney, dated December 6, 2012..... 911

Consent of All Counsel of Record 915

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE MATTER OF:
MARY ROSS HANAHAN (Decedent)

FILED
15 NOV - 4 AM 11:01
PROBATE COURT
CHARLESTON COUNTY

IN THE PROBATE COURT

MOTION FOR REMOVAL

CASE NUMBER: 2015ES10-0351

2015 CP-10-6502

FILED
2015 DEC - 2 PM 2:03
JULIE J. STRONG
CLERK PROBATE COURT

A formal proceeding concerning the above matter was commenced on SEPTEMBER 2, 2015. The undersigned hereby moves for removal of this action to the Circuit Court and asserts that this action is removable because it involves the following:

- Probate of Will
- Appointment of Personal Representative
- Construction of Will
- Title to property in which the Estate of a decedent asserts an interest
- Internal or external matter involving a trust (excluding "special needs trusts")
- Action in which there is a right to trial by jury and in which the amount in controversy is at least \$5,000
- Action concerning gifts under the SC Uniform Gifts to Minors Act

This Motion is made no later than ten (10) days from OCTOBER 30, 2015, the date on which all responsive pleadings were filed. By copy of this Motion, the undersigned is giving notice to interested persons as required by law.

Signature: *Joseph S. Mendelsohn*

Print Name: JOSEPH S. MENDELSON, ESQ.

Address: P.O. BOX 250

CHARLESTON, SC 29402

Telephone (Work): (843) 577-7210

(Home): _____

(Cell): (843) 696-1615

Email: JOEM250@GMAIL.COM

Relationship to Decedent/Estate: ATTORNEY FOR MIKELL R. SCARBOROUGH,
PERSONAL REPRESENTATIVE OF THE
ESTATE OF MARY ROSS HANAHAN

ORDER FOR REMOVAL

- It is hereby ORDERED on the Court's own Motion that this action be removed to the Circuit Court.
- Jurisdiction is retained as to all other matters involving this case.
- The related matters of _____ are also removed to serve the best interest of the Estate and/or the interest of judicial economy.
- The Motion for Removal is hereby GRANTED. This action shall be removed to the Circuit Court.
- Jurisdiction is retained as to all other matters involving this case.
- The related matters of _____ are also removed to serve the best interest of the Estate and/or the interest of judicial economy.
- It is hereby ORDERED that the Motion for Removal is DENIED because _____.

Executed this 9th day of November 2015.

Attest: A True Copy
Joseph S. Mendelsohn

Julie J. Strong, Probate Court Judge

Clerk Probate Court

Charleston County, South Carolina

2015-CP-10-6502

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
IN THE MATTER OF:)
MARY ROSS HANAHAN)
(Decedent))

IN THE PROBATE COURT

MOTION FOR REMOVAL

CASE NUMBER: 2015ES10-0351

FILED
15 NOV 2 2015 DEC -2 PM 2:03
JULIE J. ARMSTRONG
CLERK OF COURT

A formal proceeding concerning the above matter was commenced on SEPTEMBER 2, 2015. The undersigned hereby moves for removal of this action to the Circuit Court and asserts that this action is removable because it involves the following:

- Probate of Will
- Appointment of Personal Representative
- Construction of Will
- Title to property in which the Estate of a decedent asserts an interest
- Internal or external matter involving a trust (excluding "special needs trusts")
- Action in which there is a right to trial by jury and in which the amount in controversy is at least \$10,000
- Action concerning gifts under the SC Uniform Gifts to Minors Act

This Motion is made no later than ten (10) days from RESPONDENT'S ANSWER AND COUNTERCLAIM FILED OCTOBER 30, 2015; REPLY NOT YET FILED BY PETITIONER, the date on which all responsive pleadings were filed. By copy of this Motion, the undersigned is giving notice to interested persons as required by law.

Signature: *Shirrese B. Brockington*

Print Name: SHIRRESE B. BROCKINGTON, ESQ.

Address: P.O. BOX 31312
CHARLESTON, SC 29417

Telephone (Work): (843) 571-5000

(Home): _____

(Cell): _____

Email: SBB@BONLLC.NET

Relationship to Decedent/Estate: ATTORNEY FOR RESPONDENT MIKELL R. SCARBOROUGH, INDIVIDUALLY

ORDER FOR REMOVAL

- It is hereby ORDERED on the Court's own Motion that this action be removed to the Circuit Court.
 - Jurisdiction is retained as to all other matters involving this case.
 - The related matters of _____ are also removed to serve the best interest of the Estate and/or the interest of judicial economy.
- The Motion for Removal is hereby GRANTED. This action shall be removed to the Circuit Court.
 - Jurisdiction is retained as to all other matters involving this case.
 - The related matters of _____ are also removed to serve the best interest of the Estate and/or the interest of judicial economy.
- It is hereby ORDERED that the Motion for Removal is DENIED because _____

Executed this 23rd day of November, 2015

Attest: A True Copy
[Signature] Probate Court Judge
95502

Clerk Probate Court
Charleston County, South Carolina

STATE OF SOUTH CAROLINA)	IN THE CIRCUIT COURT
)	
COUNTY OF CHARLESTON)	CASE NO. 2015-CP-10-6502
)	
Mikell M. Henderson,)	
)	
Petitioner,)	PLAINTIFF'S MEMORANDUM
)	IN OPPOSITION TO RESPONDENTS'
vs.)	MOTION FOR SUMMARY JUDGMENT
)	
Mikell R. Scarborough, individually and)	
as Personal Representative of the Estate)	
of Mary Ross Hanahan, and Joseph Ross)	
Henderson,)	
)	
Respondents.)	
IN RE: Estate of Mary Ross Hanahan)	
_____)	

To: Shirrese B. Brockington, Esquire and Joseph S. Mendelsohn, Esquire, as counsel for Defendant Mikell R. Scarborough, individually and as Personal Representative of the Estate of Mary Ross Hanahan.

Plaintiff Mikell M. Henderson submits this memorandum of law and fact in opposition to the pending motions for summary judgment filed by Respondent Mikell R. Scarborough herein. For the reasons set forth below, Plaintiff respectfully submits that the motions for summary judgment should be denied in their entirety, and this matter should proceed to a trial on the merits.

PROCEDURAL BACKGROUND

This matter was commenced by the filing and service of a Summons and Petition for Formal Testacy and other relief on September 2, 2015. Respondent Mikell R. Scarborough, individually and as Personal Representative of the Estate of Mary Ross Hanahan, filed answers in each capacity.

The parties undertook certain discovery thereafter and mediated the case on September 15, 2016. Although a tentative settlement was reached at mediation, the settlement agreement was not carried out. The parties resumed discovery in early 2017, and

several fact witnesses have now been deposed.

Respondents have moved for summary judgment on the causes of action challenging the validity of the alleged October 19, 2012 Codicil to the Last Will and Testament of Mary Ross Hanahan and the formation and funding of MRH Family, LLC. Plaintiff notes that Respondents have not sought summary judgment on the initial causes of action for removal and appointment of Personal Representative; for appointment of a Special Administrator; for an accounting by the former Attorney-in-Fact; and/or for attorneys' fees and costs under S.C. Code Ann. §62-1-111.

FACTUAL BACKGROUND

Plaintiff is one of the children of the late Mary Ross Hanahan ("DeDe"), who was descended from J. Ross Hanahan. Respondent Mikell R. Scarborough is one of DeDe's nephews. As a result of her lineage, DeDe had inherited substantial real estate during her lifetime. Prior to October 19, 2012, Plaintiff was named as the devisee of substantially all DeDe's property (other than two tracts of land, devised to her other son) under her Last Will and Testament, dated November 2, 1998 (Depos. Plaintiff, Ex. 1).

In or about 1990, Respondent Scarborough began assisting DeDe with management of her property and business affairs. At the time Respondent Scarborough undertook to assist DeDe with her affairs, she owned substantial property but was having cash flow issues. (Depos. Scarborough, p. 17, ll. 9-21). In the years which followed, Respondent Scarborough was successful in promoting DeDe's liquidity and overseeing payment of her obligations. (*Id.* at 22, l. 114 - 23, l. 16) Management of DeDe's property and business affairs had always been handled substantially by other family members, and she did not take an active interest in her own business affairs. (*Id.* at 21, ll. 9-25; Depos. Joseph Henderson, p. 12, ll. 10-23)

DeDe endured a life-long struggle with mental illness, including bipolar disorder,

which led to periods of depression and inaction. (Depos. Scarborough, p. 27, l. 21—p. 28, l. 18) In late 2005, DeDe was seen by Dr. Scott Hughes, who diagnosed her with dementia. (Notes of 12/29/05 appointment, attached as **Exhibit A**) After 2008, DeDe had been hospitalized for lithium toxicity, which had grave effects for her. Although she rebounded, she continued in declining physical and mental health. (Depos. Plaintiff, p. 21, ll. 2-24; Depos. Joseph Henderson, p. 11, l. 18 – 12, l. 9) During the last five (5) years before her October 2014 death, DeDe had become unable to handle routine tasks for herself, such as retrieving her phone messages and managing her medication. Despite having been an avid reader, DeDe also stopped reading books several years before her death. (Depos. Joseph Henderson, p. 10, l. 18 – p. 12, l. 9; pp. 13, l. 13 – 14, l. 17; Depos. Plaintiff, p.135, l. 6 – p. 136, l. 3) Even Respondent Scarborough acknowledges that DeDe had been diagnosed with dementia during her lifetime; was “forgetful;” and would most often accede to whatever suggestion he made about how to handle her business and property. (Depos. Scarborough, p. 127, l. 13 – 128, l. 18)

By March 2012, Plaintiff received a returned check from DeDe’s home security alarm servicer, which was sent back after the recipient was unable to deposit the check. This resulted from DeDe’s having filled nonsensical information into both the date line and the amount line. Partly as a result of seeing this check, Plaintiff believed by that time that DeDe could not manage her own checking account or carry checks. (Depos. Plaintiff, pp. 182, l. 7 – 183, l. 21) By June of 2012, both Plaintiff and Respondent Scarborough agreed that DeDe should not be driving her own car, as she posed a danger to herself and others. Scarborough confirmed that month that if DeDe were still driving, the family would need to “take the car.” Plaintiff had clearly expressed to Scarborough at this time that DeDe’s “continued confusion regarding her whereabouts and other confusion” led him to believe that DeDe should not

drive herself. (Depos. Scarborough, Ex. 7)

On September 6, 2012, DeDe saw Dr. Kay Durst, her regular physician. Dr. Durst noted, “[t]he dementia is reported to have been present for several months. Her mental status appears to be gradually deteriorating.” (MRH Medicals 00285, produced by Respondent, attached as **Exhibit B**)

Despite DeDe’s declining mental and physical health, Respondent Scarborough asserts that DeDe validly executed a Codicil to her then-fourteen-year-old Will on October 19, 2012. One day prior to that, DeDe’s caretaker had noted in a daily report that DeDe was forgetful and did not note that DeDe was oriented. (Depos. Plaintiff, Ex. 9) Although DeDe had for years expressed her intention that her home and adjacent lot in the Old Village of Mount Pleasant would be received by one of her sons (Depos. Plaintiff, p. 165, ll. 10-16), the Codicil devises these assets (worth an aggregate of over \$1 million) to Respondent Scarborough. (Depos. Scarborough, Ex. 6)

The Codicil is unusual in that no party or witness has been able to suggest who might have drafted the document. Because of that, no witness has been able to testify that DeDe read the Codicil or that it was in line with any instruction or stated desire from DeDe to the drafter. Plaintiff spent several months after DeDe’s death trying to receive from Respondent information regarding the circumstances of the Codicil’s execution and/or the identity of the drafting attorney. Although Respondent initially indicated that he was trying to remember, he now says that he never knew who DeDe allegedly commissioned to draft the Codicil. (Emails between Scarborough and Henderson, dtd. 2/20/15 and 2/26/15, attached as **Exhibit C**; Depos. Scarborough p. 114, ll. 1-23)

The Codicil was executed at a restaurant in Mount Pleasant, after Respondent Scarborough and DeDe had a regular lunch there. (Depos. Scarborough, pp. 101, l. 17 – 102,

l. 10) Respondent Scarborough, the sitting Master-in-Equity for Charleston County, called his Court secretary to come from the courthouse downtown to Sette VII restaurant in Mount Pleasant. (Depos. O'Neale, pp. 13, l. 17 – 14, l. 25) At the time O'Neale arrived, the Codicil was already on the table. (*Id.*) O'Neale did not have any substantive conversation with DeDe, nor did she see DeDe have any exchange with anyone regarding its content. O'Neale further could only testify that she saw DeDe “scan” the Codicil. (*Id.* at 15, l. 9 – 17, l. 12) Respondent Scarborough was the only attorney present at the execution of the Codicil, and he testified that he does not believe he ever saw DeDe read the document. (Depos. Scarborough, p. 108, ll. 20-22)

After the Codicil was signed, Respondent Scarborough took possession of the original, and DeDe did not take a copy of the document. According to Respondent Scarborough, DeDe and he never discussed the Codicil after this date, and he never told Plaintiff of its existence. (Depos. Scarborough, pp. 108, l. 3 – 112, l. 8) After DeDe's death, Respondent Scarborough expressed to Plaintiff in an email his belief that he had expected DeDe would later change the Codicil and was “feeling lonely” when it was executed. (Email, Scarborough to Henderson, dtd. 2/26/15) Being without the original or a copy, however, DeDe could not review or revoke the document.

John Johnson, DeDe's son-in-law, has testified that only weeks before the Codicil was allegedly executed, DeDe told him that he and her son Ross would receive the house (Johnson Aff., attached as **Exhibit D**, ¶10). She continued to express that intention between then and her death. (*Id.* at ¶11) In September 2012, DeDe also expressed to Johnson that Plaintiff and his wife would receive all her other real estate. (*Id.* at ¶12)

Nonetheless, on December 30, 2012, DeDe allegedly executed the MRH Family, LLC Operating Agreement, which gave 30% of most of her real estate (totaling about \$6 million

in value) to Respondent Scarborough. (Depos. Plaintiff, Ex. 15)

The idea of the LLC came from Respondent Scarborough, whose mother – DeDe's sister – was already involved with H. Christopher Moss, CPA in putting together her own LLC. (Depos. Scarborough, pp. 15, l. 18 – 16, l. 5) Moss' first contact regarding DeDe's affairs was with Respondent Scarborough (*Id.*; Depos. Moss, p. 5, ll. 13-24) Moss and Respondent Scarborough were longtime social acquaintances, and Moss had performed work for Scarborough, personally, and for other Hanahan family members prior to Respondent Scarborough asking Moss to work on DeDe's estate planning. (Depos. Moss, p. 6, ll. 9-25)

When Moss met DeDe for the first time on December 6, 2012, he had already prepared a PowerPoint presentation stressing the tax benefits and general structure of the LLC he would form for her. (Depos. Moss, pp. 72, l. 24 – 73, l. 2) During that meeting, at which Scarborough was present, DeDe did not tell Moss that she had an existing estate plan (in her 1998 Will and/or the alleged 2012 Codicil), and Moss had no discussion about her other estate planning documents. (*Id.* at 6, ll. 6-15) Scarborough testified that he was never involved in or present for any discussion of the ownership proportions of the LLC (Depos. Scarborough, p. 63, l. 4 – p. 64, l. 3) However, Moss testified that the ownership percentages of the LLC were discussed and adjusted on December 6, 2012, in the meeting which Respondent Scarborough attended. (Depos. Moss, pp. 17, l. 17 – 18, l. 22) Plaintiff was not a participant in that meeting.

The result of DeDe's meeting with Respondent Scarborough and Moss was the MRH Family, LLC Operating Agreement, which provided that MRSMIE, LLC would own 30% of MRH Family, LLC and be its manager. MRSMIE, LLC has at all relevant times been owned at least partially by Scarborough (MRS stands for Mikell R. Scarborough). Moss could not testify that he had ever discussed MRSMIE, LLC with DeDe (once he refused to answer based on an

alleged privilege with another client, other times he indicated he did not remember), and he confirmed that she never asked him about MRSMIE, LLC. (*Id.* at 35, l. 8 – 36, l. 19)

Despite the fundamental change to DeDe's estate plan which was posed by the LLC, Moss did not undertake any inquiry into her health or capacity. In fact, he testified that he would not have proceeded with the transactions if he had been aware of DeDe's prior dementia diagnosis. (*Id.* at 72, ll. 1-8)

December 30, 2012, the day on which both the MRH Family, LLC Operating Agreement and the deed transferring most of DeDe's real property into the LLC were signed, remains a bit of a mystery. Respondent Scarborough testified that he was not certain where or when the deed was discussed with DeDe (Depos. Scarborough, pp. 68, l. 24 – 69, l. 25), but Howard Yates, Esquire, who drafted the deed; advised DeDe on the deed; and oversaw the execution of the deed, testified that Respondent Scarborough had in fact driven Yates to DeDe's house to discuss the deed. (Depos. Yates, p. 6, ll. 13-24) Yates further testified that he considered Respondent Scarborough his client in preparing the deed, which had first been discussed with Yates "[s]everal months" before its execution. Yates had never met or spoken with DeDe prior to December 30, 2012, when he appeared with Scarborough (his purported client) at her home and presented the prepared deed to her (*Id.* at 4, l. 17 – 6, l. 12)

The deed transferring property to the LLC was thus prepared before DeDe ever saw it, and Yates' only contact on the matter beforehand had been with Respondent Scarborough. Yates had prepared the deed to convey the tracts of DeDe's land which Respondent Scarborough directed him to include. (*Id.* at 9, ll. 6-16) For reasons which appear unknown to any witness, several tracts of land with an approximate value of \$2 million were not placed into MRH Family, LLC, despite Respondent Scarborough and CPA Moss' suggestion that the LLC was created primarily to shield DeDe from the potential reduction in the estate tax

exemption to \$1 million on January 1, 2013. (Depos. Scarborough, pp. 67, l. 1 – 68, l. 16) Among these properties were the house and lot allegedly given to Respondent Scarborough under the 2012 Codicil. When asked why that property might have been excluded from the LLC, Respondent Scarborough testified that leaving it in DeDe's name would allow a "step-up" in basis at her death. (*Id.*) The result of leaving the house out of the LLC was thus that Respondent Scarborough would avoid capital gain taxes in the event he inherited this property – as he expected to do under the then-two-month-old 2012 Codicil.

Although the creation of the LLC was discussed with Plaintiff, he was made only to generally understand that his mother was engaging in estate planning which could minimize her substantial estate tax liability. Both Respondent Scarborough and CPA Moss advised Plaintiff that creation and funding of the LLC would reduce taxes. (Depos. Plaintiff, pp. 110, l. 8 – 111, l. 21) Although Plaintiff was supportive of tax planning being done on his mother's behalf, he was unaware until December 30, 2012, when the Operating Agreement was first provided to him, that MRSMIE, LLC (Respondent Scarborough's own LLC) would take on management and a 30% ownership interest in the LLC. (*Id.* at 116, ll. 1-20) Although Plaintiff was surprised by the ownership proportions, he proceeded with signing the Operating Agreement. He did so in light of the potential tax changes which, he was told, could have taken effect less than 48 hours after he first received the document. (*Id.* at 117, l. 5 – 118, l. 1)

When Plaintiff was presented with the Operating Agreement on December 30, 2012, it included two pages numbered 5, which were identical except that one provided for MRSMIE, LLC to manage MRH Family, LLC for two years, and the other provided that management would last five years. Plaintiff signed the document as it was presented to him, initialed each of the eleven (11) pages (including the two conflicting pages 5) and returned

it to Moss in its entirety. (*Id.* at 126, l. 4 – 128, l. 4)

During the time between the LLC's creation and DeDe's October 2014 death, Scarborough managed the LLC and devoted most or all income of it to DeDe's care. Although DeDe never expressed to anyone an intent to give property to Respondent Scarborough's wife and children, he has since given them ownership interests in MRSMIE, LLC. His wife is also now a manager of that entity, meaning that she has management authority for MRH Family, LLC as well. (Depos. Scarborough, pp. 72, l. 19 – 76, l. 4)

Plaintiff learned about the alleged 2012 Codicil only after DeDe's death, and he immediately expressed concern to Scarborough about the document. (Depos. Plaintiff, pp. 178, l. 17 – 180, l. 15, Ex. P1) Scarborough responded with a veiled threat regarding potential exposure to a multi-million dollar judgment against DeDe, Plaintiff and Respondent Scarborough in environmental litigation. That judgment was not joint and several, and DeDe's exposure had already been set by Federal Court Order. Plaintiff sought and received clarification of this point from the attorney representing all Defendants in the environmental litigation. (Emails between Henderson and Walker, dtd. 4/12/15, attached as **Exhibit E**)

APPLICABLE LEGAL STANDARD

a. Summary Judgment Standard

Rule 56 of the S.C.R.C.P. and the law surrounding it are fairly straightforward. If there are material issues of fact, the moving party must not prevail. And the party opposing the motion is entitled to have the evidence of record viewed in a light most favorable to his position. It is not the duty of the Court to resolve the factual differences. Rather it is the Court's duty on Motion for Summary Judgment to consider the evidence to see if there are triable issues, or if there are reasonable inferences from the evidence which raise triable issues. Baird v. Charleston County, 511 S.E. 2d 69 (S.C. 1999); Spencer v. Miller, 192 S.E. 2d

863 (1972). Baird goes on to state that if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matters is presented, which is certainly not the case here. To the contrary, the supporting evidentiary matter submitted by Plaintiff shows numerous factual issues in dispute. In addition, the Court is required to closely scrutinize paper supporting the moving party's Motion, while the adverse party is entitled to have its supporting paper "indulgently treated." Dyer v. Moss, 325 S.E. 2d 69 (S.C. App. 1985); Spencer, supra, at page 865. Looking at this record, it cannot be argued persuasively that no material facts or reasonable inferences from the facts are in dispute.

The South Carolina law is replete, especially in recent years, with cases that hold summary judgment is not proper when there are disputable facts involved. In Hammond v. Scott, 232 S.E. 2d 336, 268 S.C. 137 (1977), it was held that the Court should never attempt to determine contested material factual issues on a Motion for Summary Judgment, and must give the party against whom summary judgment is sought the benefits of all inferences that may be drawn from the facts under consideration. In the cases of Byerly v. Connor, 415 S.E. 2d 799 (S.C. 1992) and Williams v. Chesterfield Lumber Company, 230 S.E. 2d 447, 267 S.C. 607 (1976), the Court stated that summary judgment can only be granted in those cases where plain, palpable and indisputable facts exist on which reasonable minds cannot differ, and all ambiguities, conclusions and inferences arising in and from evidence must be construed most strongly against the moving party. Two additional cases exhibit our State Supreme Court's disfavor toward summary judgment when there is a dispute as to the facts and the conclusions which can be drawn therefrom. The case of Hudson v. Zenith Engraving Company, Inc., 259 S.E. 2d 812, (1979), states that summary judgment is not proper unless it is perfectly clear (emphasis added) that no issue of fact is involved and inquiry into the

facts is not desirable to clarify the application of the law. McFarlane v. Manley, 264 S.E. 2d 838, (1980), holds that summary judgment should be granted only where it is perfectly clear (again, emphasis ours) that no issue of fact is involved and inquiry into the facts is not desirable. The Court goes on to say that this is true even (emphasis ours) when there is no dispute as to evidentiary facts if there is dispute as to the conclusions to be drawn therefrom. The case of Tanner v. Florence City-County Building Commission, 511 S.E. 2nd 369, 333 S.C. 549 (S.C. App. 1992) goes further to say that at the summary judgment stage of the proceedings, it is only necessary for the non-moving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied. As stated previously, Plaintiff has demonstrated substantial differences as to the evidentiary facts, in addition to the conclusions to be drawn therefrom, certainly much more than a scintilla. The Courts and Black's Law Dictionary have defined "scintilla" as being a trace or a spark of evidence.

Clearly the South Carolina law does not favor summary judgment where there is dispute as to the facts and/or the conclusions that can be drawn therefrom. It 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., 10 S.E.2d 537 (1991). Indeed, the law prohibits this method of disposing of a case where this situation exists and requires that the matters in dispute be submitted to the province of the finders of fact for resolution. All inferences, ambiguities, and the benefit of any doubts must be resolved in favor of the party against whom summary judgment is sought.

b. Undue Influence

All parties acknowledge that Scarborough had a confidential relationship with DeDe at the time the Codicil and LLC documents were executed. The Codicil and LLC ownership

result in Scarborough, a nephew of DeDe's receiving over 40% of her assets and a stark departure from her long-standing estate plan. A confidential relationship and unnatural disposition of property (which exist here under either the alleged Codicil or LLC, but certainly under the combination of the two) raises a presumption of undue influence, such that the alleged influencer must show evidence to rebut the presumption. Will Contests § 7:10, Presumptions of Undue Influence (2d ed.). *See also Byrd v. Byrd*, 279 S.C. 425, 430, 308 S.E.2d 788, 791 (1983) (finding that when a confidential relationship and unnatural disposition are shown by the contestant, the presumption of undue influence is raised and the issue should be submitted to a jury). A plaintiff in a will contest may use circumstantial evidence to prove undue influence. *Havird v. Schissell*, 252 S.C. 404, 410, 166 S.E.2d 801, 804 (1969).

Evidence of the testator's physical infirmities may support a claim of undue influence, including the testator's inability to drive or care for herself. *Byrd*, 279 S.C. at 427, 308 S.E.2d at 789. Mental condition of the testator, even short of actual incapacity, is also important evidence in an undue influence claim. *Moorer v. Bull*, 212 S.C. 146, 148, 46 S.E.2d 681, 681-2 (1948) (finding that, even though the testator had adequate capacity to make a will, her mental weakness supported the finding of undue influence). *Moorer* further supports a finding of undue influence where the alleged influencer handled the testator's business affairs, as Scarborough did in this case. *Id.* at 149, 46 S.E.2d at 682.

Additionally, the level of involvement which the alleged influencer has in the execution of the will is an important factor in considering a claim of undue influence. *In re Estate of Cumbee*, 333 S.C. 664, 673, 511 S.E.2d 390, 394 (Ct. App. 1999). *Cumbee* also makes findings that a disposition incongruous with the testator's stated desires (such as DeDe's

statements prior to and after the Codicil that one of her sons would have her home, and her statement that Plaintiff would receive her other property) were evidence of undue influence.

The lack of opportunity to change a will supports a claim of undue influence. *Byrd*, 279 S.C. If the testator is not in possession of the will, she is unable to review, amend or revoke the document.

c. Testamentary Capacity

Testamentary capacity requires a finding that the testator knew her estate, the objects of her affection, and to whom she wished to give her property at the time the will is executed. *See Finley v. Gravelly*, 302 S.C. 220, 221-2, 394 S.E.2d 847, 848 (Ct. App. 1990).

In more detailed terms, our Courts have found:

The mental capacity requisite to the valid execution of a will would include knowledge and understanding by the testatrix of its contents and of the meaning and consequences of her act. She must have at the time of the execution mentality and memory sufficient to understand intelligently the nature and purpose of the transaction, to comprehend generally the nature and extent of the property to pass by the will and her relationship to the objects of her bounty, and to understand the manner and effect of the desired disposition.

In re Washington's Estate, 212 S.C. 379, 385-6, 46 S.E.2d 287, 289 (1948).

FACTS IN DISPUTE

Respondents seek summary judgment on claims related to the validity of the alleged 2012 Codicil and the creation and funding of MRH Family, LLC. As to each, material facts are in dispute on the evidence currently available.

As to the alleged 2012 Codicil, a fundamental question remains as to who drafted the document; what direction was given to the drafter; and whether DeDe understood the document and intended to execute it. Neither Scarborough nor O'Neale, who were present at the execution of the document, observed anyone counseling DeDe on the effect of the document. Scarborough admits that he took possession of the document, and later suggested

that DeDe may not have remembered it at all. She was thus deprived of the opportunity to review, revise and/or revoke the alleged 2012 Codicil for the approximately two (2) years she was alive after its execution.

Although Respondent Scarborough has testified that DeDe previously expressed her intent to leave him her home and adjacent lot and, further, that she somehow commissioned and obtained the Codicil without his involvement, he is the only witness who has given testimony to that effect. Because Scarborough's testimony on other matters, including his presence at the time the deed funding the LLC was presented to DeDe, is in conflict with the testimony given by the disinterested witnesses deposed so far, his testimony alone is insufficient to allay the dispute and uncertainty about the Codicil's origins or whether DeDe was properly advised on the effect of the document prior to signing it.

As to the LLC, all witnesses agree that Respondent Scarborough made the first contact regarding the LLC with DeDe and Chris Moss (who already represented Scarborough on personal matters; was a social acquaintance of Scarborough; and had done planning for other Hanahan family members which resulted in Scarborough being placed in charge of their property).

Further, the selection of property to be placed in the LLC (excluding the house and lot which Scarborough already expected to inherit under the alleged 2012 Codicil, and which he would have received only a partial interest in had it been transferred to the LLC) was dictated by Scarborough, who Yates testified he was representing in preparing the deed for DeDe. Although Respondent Scarborough and Moss advocated to both DeDe and Plaintiff for creation of the LLC to save taxes, the record contains no indication that either of them had actually quantified the taxes at issue.

The LLC gives management powers to Respondent Scarborough's company MRSMIE, LLC, as well as a 30% ownership interest. Moss, the CPA who prepared the LLC documents, never discussed the fact that MRSMIE, LLC and Scarborough were not necessarily one and the same, and Scarborough later changed the management and makeup of MRSMIE, LLC. There is thus insufficient evidence in the record to demonstrate that the LLC documents carried out DeDe's alleged intent, even if she had sufficient capacity to form such intent and understand the documents presented to her.

As to both the alleged 2012 Codicil and the LLC documents, DeDe executed them years after being diagnosed with dementia, and during a time when she had ceased to be able to do tasks (such as reading books, retrieving phone messages and managing her own medications) which she had been previously able to do. Although Scarborough was aware of DeDe's diagnosis of dementia, Moss was not made aware of her condition and admits that he would not have proceeded if he had been made so aware.

All witnesses who saw DeDe regularly during 2012 have agreed that she had endured a substantial decline in mental ability, and she was unable to do many things she had previously been able to do. The medical records show that DeDe's mental status had declined, and she had been diagnosed with both dementia and other mental illnesses. There is far more than a scintilla of evidence that DeDe lacked mental capacity on both October 19, 2012 and December 30, 2012, when the challenged documents were executed.

Respondent Scarborough focuses heavily on Plaintiff's own signing of the LLC Operating Agreement, but there remains a dispute over Plaintiff's real knowledge at the time. In the light most favorable to Plaintiff, the Court must accept Plaintiff's testimony that he was advised by both Respondent Scarborough and by Moss that the LLC transactions were primarily intended to minimize taxes, and Plaintiff was made aware of MRSMIE, LLC's

substantial ownership only when presented with the documents a day and a half before what he was told was an important deadline.

For the foregoing reasons, summary judgment is inappropriate on any cause of action in this matter, and Plaintiff respectfully submits that Respondents' motions must be denied. This memorandum is based on the deposition excerpts and affidavits attached hereto; the entire original depositions of Plaintiff, Respondent Scarborough, January E. O'Neale, Joseph Henderson, H. Christopher Moss, and Howard Yates, Esquire, which have been filed with this Court, as well as the entire record herein and any additional law or evidence submitted prior to the Court's ruling on this matter.

Respectfully submitted,

B. Michael Brackett, Esquire
Moses & Brackett, PC
P.O. Box 100261
Columbia, SC 29202
803.461.2312 (T)
803.461.2309 (F)
mbrackett@mkb-law.com



Adam T. Silvernail
Law Office of Adam T. Silvernail, LLC
1905 Marion Street (29201)
Post Office Box 7995
Columbia, South Carolina 29202
803.779.1770
adam@silvernailfirm.com

Attorneys for Plaintiff

May 16, 2017

Exhibit A



12.29.5

Mary Hunsman

Dis

Scott Thompson

Hx

In restaurant, slurred speech, words were
distorted, difficulty finding words
about in steady. This occurred early December.
Tremulous handwriting came + handwriting was
gotter worse, emotional lability. Still with
some difficulties in speech. Forgetful after
later. Tasks were easy.
Balance ok, may repeat ~~some~~ level of
loose things.
Had been very busy but had stopped it.
now on Prozac (not ASA).
Son recently took over paying bills
Difficulty in managing household.

used to
read
no longer
interested in

Lab

CT was done. "no evidence of acute
changes" u.s. "45-75"
ECG normal.

pt had ST
0.3 ST
white cell count

Imp

- ① RENEW LCA
- ② MRI - WASH vs. Olanzapine
- ③ Venor -> Lith + Prozac
- ④ Consider Prozac on Prozac, Lith

Plan

- ① MRI
- ② BID, Olanzapine, VSH, Prozac
- ③ Short ASA 8ly, Card Plan
- ④ D/W 3-4 weeks
- ⑤ Consider Prozac.

Thomas S. Hughes, M.D.

Brooke L. Monroe, PA-C

*FMR, FHS, ALLG, MEDS, ROS, EXAM IN CHART

Exhibit B

HANAHAN, MARY 10/10/1940

Office/Outpatient Visit

Visit Date: Thu, Sep 6, 2012 11:13 am

Provider: Kay Durst, MD (Assistant: Jennifer Bachofner)

Location: Carolina Family Care

Electronically signed by Kay Durst, MD on 09/06/2012 06:36:46 PM

Printed on 01/02/2016 at 1:36 pm.

SUBJECTIVE:

CC:

Ms. HANAHAN is a 71 year old White female. This is a follow-up visit. She presents with pelvic pain.

HPI:

pt had four radiation treatments, and seeing the dr next week.

With regard to the dementia, the history is obtained from the patient, her son, and a relative. The dementia is reported to have been present for several months. Her mental status appears to be gradually deteriorating. In regard to grooming, her overall appearance is clean and well-groomed. Behavior problems have not been an issue. There have been no associated symptoms.

Patient complains of intermittent RUE and RLE numbness x one year and intermittent LLE numbness x one month. Numbness begins on the soles of her feet and then gradually moves below the patellar. The numbness does not worsen with sleep and is self-resolving. Patient has taken no medications to relieve symptoms. Patient denies any weakness in any extremities.

Sensation in lower abdomen started one year ago, is intermittent in nature, and is described as pressure and a "pulling" sensation. Pulling sensation is not associated with voiding. There is no associated constipation, although the patient admits to constipation in the past. Patient had hysterectomy years ago.

ROS:

CONSTITUTIONAL: Negative for chills, fatigue, fever and night sweats.

EYES: Negative for blurred vision.

CARDIOVASCULAR: Negative for chest pain, palpitations, paroxysmal nocturnal dyspnea and pedal edema.

GASTROINTESTINAL: Positive for **abdominal pain**. Negative for abdominal bloating, dysphagia, constipation, diarrhea, heartburn, nausea or vomiting.

GENITOURINARY: Negative for dysuria and hematuria.

MUSCULOSKELETAL: Positive for **arthralgias, back pain and joint stiffness**. Negative for limb pain.

NEUROLOGICAL: Positive for **paresthesia (right upper extremity; right lower extremity; left lower extremity; negative for weakness and pain in extremities)**. Negative for dizziness, fainting, headaches or weakness.

PSYCHIATRIC: Negative for anxiety, depression, and sleep disturbances.

PMH/FMH/SH:

Past Medical History: bi-polar, demntia. right hip broken four and 1/2 years ago, left upper lobe lung cancer lesion. seeing oncology at musc

Surgical History: hysterectomy- bleeding, tonsills,

Family History: brother with esposhgeal cancer, gf- with lung cancer- 90s.

Social History: lives alone and son- and daughter in low- lives in brunswick., she has two children.

Tobacco/Alcohol/Supplements:

Tobacco: She has a past history of cigarette smoking; quit date: 15. Non-drinker

Current Problems:

Acquired hypothyroidism

COPD

Dementia

Hyperlipidemia

Lung cancer

Immunizations:

None

Allergies:

Last Reviewed on 6/19/2012 11:33:52 AM by Durst, Kay
Codeine Phosphate:

Current Medications:

Oxybutynin Chloride 5mg Tablet Take 1 tablet(s) by mouth bid
Depakote
Effexor
Lipitor
Lorazepam 0.5mg Tablet Take 1 tab(s) by mouth bid prn
Symbicort
Synthroid

OBJECTIVE:

Vitals:

Current: 9/6/2012 11:13:53 AM
Ht: 5 ft, 3 in; Wt: 148 lbs; BMI: 26.2
T: 98.4 F; BP: 128/69 mm Hg; P: 81 bpm

Exams:

PHYSICAL EXAM:

GENERAL: ok.

RESPIRATORY: lungs clear to auscultation and percussion; symmetric expansion; no dyspnea;

CARDIOVASCULAR: regular rate and rhythm; normal S1, S2; no murmur, rub, or gallop; normal PMI; 2+ carotid, radial, femoral, and pedal pulses; no aortic or femoral bruits;

GASTROINTESTINAL: nontender, nondistended; no hepatosplenomegaly or masses; no bruits;

MUSCULOSKELETAL: gait: **shuffling** and with walker; **decreased range of motion noted in:** right hip;

NEUROLOGICAL: cranial nerves, motor and sensory function, reflexes, gait and coordination are all intact;

PSYCHIATRIC: appropriate affect and demeanor; normal speech pattern; grossly normal memory;

Lab/Test Results: unable to urinate.

LABORATORY RESULTS:

CBC: WBC is 7.7; Hgb is 14.6; Hct is 43.2; Platelet count is 280.; Glucose 90

ASSESSMENT:

162.8	Lung cancer
290.0	Dementia
782.0	Numbness
625.9	abdominal pain
788.30	Urinary incontinence

ORDERS:

Meds Prescribed:

Refill of: Oxybutynin Chloride 5mg Tablet Take 1 tablet(s) by mouth bid #60 (Sixty) tablet(s) Refills: 0

Lab Orders:

Complete blood count (CBC), automated (Hgb, Hct, RBC, WBC, platelets) and automated differential WBC (In-House)

Glucose, blood, by reagent strip (In-House)

Comprehensive metabolic panel (Send-Out)

Urinalysis, automated, without microscopy (In-House)

Vitamin B-12 (Send-Out)

Serum folic acid (Send-Out)

Thyroxine, free (Send-Out)

Thyroid stimulating hormone (TSH) (Send-Out)
Free triiodothyronine T3 (Send-Out)

Procedures Ordered:

Pulmonologist Referral (Send-Out)

PLAN:

Lung cancer also seen with Katie Logan RN, NP student will follow up and check and go to urologist and take metformin if worse.

REFERRALS: Referral initiated to a pulmonologist.

Orders:

Complete blood count (CBC), automated (Hgb, Hct, RBC, WBC, platelets) and automated differential WBC (In-House)

Pulmonologist Referral (Send-Out)

Numbness may need further work up and call if worse,

RADIOLOGY: I have ordered to be done today. x-ray of l-s spine.

Orders:

Comprehensive metabolic panel (Send-Out)

Urinalysis, automated, without microscopy (In-House)

Vitamin B-12 (Send-Out)

Serum folic acid (Send-Out)

Thyroxine, free (Send-Out)

Thyroid stimulating hormone (TSH) (Send-Out)

Free triiodothyronine T3 (Send-Out)

Patient Education Handouts:

Pt Provided Education Material

abdominal pain

Orders:

Glucose, blood, by reagent strip (In-House)

Urinary Incontinence

Prescriptions:

Refill of: Oxybutynin Chloride 5mg Tablet Take 1 tablet(s) by mouth bid #60 (Sixty) tablet(s) Refills: 0

CPT © is a registered trademark of the American Medical Association

Exhibit C

Mikell Scarborough

From: Mikell Scarborough
Sent: Friday, February 20, 2015 12:10 PM
To: Mike Henderson
Subject: Re: Estate of Mary Ross Hanahan

Mike,
Sorry but I have been out of town this week. Fly back tonite.
I've not yet filed but did speak briefly w/ Joe to set up an apptmt. Will verify when that is set.
I'm still trying to locate recall the codicil info.

Mikell R Scarborough
Master in Equity
Charleston County
100 Broad St, Ste. 266
Charleston, SC 29401
843 958 5070

Sent from my iPhone

> On Feb 20, 2015, at 9:24 AM, Mike Henderson <mikellhenderson@att.net> wrote:

>

> Mikell,

> I have not heard from you since early last week when you rescheduled the phone call with Mr. Mendelsohn to act as the estate attorney. Unfortunately, I did not see a call from you last Friday and have not heard about rescheduling. Have the documents for the Estate been submitted to probate court?

> Ross or John went by Mom's house to make sure the water faucets were dropped and the heat was set due to the current cold weather. I have not contacted USAA about Mom's death yet because I wanted to make sure the probate process was initiated. However, I think I need to do that soon. Please let me know what you intend to do with Mom's original Will or when it is submitted. I would still like to get the name of the attorney that prepared and executed the codicil. I will continue to monitor and pay any bills for Mom.

>

> Mike

>

> Sent from Mike Henderson's iPhone

Mikell Scarborough

From: Mike Henderson <mikellhenderson@att.net>
Sent: Wednesday, March 11, 2015 8:47 AM
To: Mikell Scarborough
Subject: Re: Estate of Mary Ross Hanahan

I did not check the mail yesterday for registration on the Mercedes. When I get it I will forward it to you. Which estate documents were filed?? I expressed concerns regarding the codicil.

Sent from Mike Henderson's iPhone

> On Mar 10, 2015, at 6:00 PM, Mikell Scarborough <master@charlestoncounty.org> wrote:

>

> Mike,

> the estate documents are filed and I have requested current appraisals from Tommy Hartnett. I will get you this information as soon as I have it. Joe M is atty.

> Meanwhile, have you seen the registration for the Mercedes? The current sticker is now out of date.

>

> Mikell R Scarborough

> Master in Equity

> Charleston County

> 100 Broad St, Ste. 266

> Charleston, SC 29401

> 843 958 5070

>

> Sent from my iPhone

>

>> On Feb 27, 2015, at 12:11 PM, Mike Henderson <mikellhenderson@att.net> wrote:

>>

>> Mikell,

>> I have not notified USAA about Mom's death yet, although I should notify them. USAA will not cover losses if Mom has been deceased this long. I would anticipate the Personal Representative might continue the home and auto insurance. I wrote a check for the Mercedes registration and plates a couple of weeks ago. However, I am not sure the State of South Carolina will send the registration or license information to me since I live out-of-state. If I receive any documents on the car I will send them to you asap.

>> If the home phone is not disconnected you may need to go back to the AT&T store. If there is a government shutdown I may come to Charleston next week. If you send me Joe Mendelsohn's phone number I can contact him next week. I do not know that I can attend the Ross Development meeting on Tuesday.

>> The codicil troubles me because Mom never spoke of it. I have no information regarding the attorney that prepared the document or anything about the circumstances or witnesses to its execution. In the weeks prior to Mom's death we discussed gathering all of Mom's estate documents and specifically the original of her Last Will and Testament. We both looked for the original Will without knowing Mom had it at her house, where I would think she would put a codicil to the Will. You and I never discussed a codicil until after Mom's death.

>> I am planning for a DHS shutdown to last for a few days next week unless the House passes a Continuing Resolution. Hope all is well in Charleston.

>>

>> Mike

>>

>>

>> Sent from Mike Henderson's iPhone

>>

>>> On Feb 26, 2015, at 2:41 PM, Mikell Scarborough <master@charlestoncounty.org> wrote:

>>>

>>> Mike,

>>> I have submitted the documents to Joe's office. They have been in touch with Chris Moss about the values. We should be getting close to filing the estate.

>>>

>>> I have still not had any confirmation on who drafted the codicil. I recall giving DD some names of lawyers in Mt. P but I don't recall who she saw or who she said drafted it.

>>> She handed it to me and asked that I keep it. Frankly, I assumed that she was going to change her mind as she was sometimes wont to do. I think at the time she handed it to me she was feeling pretty lonely.

>>>

>>> As for the bills, I have taken documents requested to ATT, but noticed when last there, that the phone was still working. I got a call from Sonitrol telling me they were getting a signal that it was not working right, but when I went in last Sat, they said all was working well.

>>> Where do you stand with the home and car insurance with USAA? I noticed that the car registration ends on Feb 28 so that bill should get paid. I found out- the hard way -that if the car sits for more than 7-10 days, it just shuts down. I had to call AAA to get me into the car and then take it to Black Forest who informed me of this.

>>>

>>> I will keep you in the loop. When I meet face to face with Joe Mendelsohn, I will give you the details.

>>> Meanwhile, we are meeting about Ross Development next week, Tue March 3 at 5 pm with Trenholm et al.

>>>

>>> I hope this pending DHS shut down does not affect you.

>>> Mikell

>>>

>>>

>>> -----Original Message-----

>>> From: Mike Henderson [mailto:mikellhenderson@att.net]

>>> Sent: Friday, February 20, 2015 11:25 AM

>>> To: Scarborough Mikell; Mikell Scarborough

>>> Subject: Estate of Mary Ross Hanahan

>>>

>>> Mikell,

>>> I have not heard from you since early last week when you rescheduled the phone call with Mr. Mendelsohn to act as the estate attorney. Unfortunately, I did not see a call from you last Friday and have not heard about rescheduling. Have the documents for the Estate been submitted to probate court?

>>> Ross or John went by Mom's house to make sure the water faucets were dropped and the heat was set due to the current cold weather. I have not contacted USAA about Mom's death yet because I wanted to make sure the probate process was initiated. However, I think I need to do that soon. Please let me know what you intend to do with Mom's original Will or when it is submitted. I would still like to get the name of the attorney that prepared and executed the codicil. I will continue to monitor and pay any bills for Mom.

>>>

>>> Mike

>>>

>>> Sent from Mike Henderson's iPhone

Exhibit D

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Mikell M. Henderson,

Petitioner,

vs.

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

Respondents.

IN RE: Estate of Mary Ross Hanahan.

IN THE CIRCUIT COURT

CASE NO. 2015-CP-10-6502

AFFIDAVIT OF JOHN JOHNSON

PERSONALLY APPEARED BEFORE ME John Johnson, who, being duly sworn,

deposes and says:

1. I am over eighteen (18) years of age, competent to testify, and make this affidavit of my own personal knowledge.
2. I am the son-in-law of the late Mary Ross Hanahan, who I knew as Dede.
3. I had a close relationship with Dede for many years before she died, and during the last several years I saw her more than once each week.
4. In the last several years of Dede's life, I performed various tasks around her home, including mowing the grass and small home repairs as she needed them.
5. During the last few years of Dede's life, I observed a decline in her ability to understand and handle routine matters.
6. For example, Dede became unable to properly use her home phone. Although she had been able to do so at some point, Dede eventually became unable to retrieve messages left on her home phone.

7. Additionally, Dede could not keep up with her medications, so family members had to organize them for her to ensure she was not overmedicated or undermedicated.
8. Around my 55th birthday in September 2012, Dede wanted to take me to lunch for my birthday.
9. At that time, I commented that she should consider having her gravel driveway paved, to make it safer for her to get into and out of her car. In response, she told me to contact someone about having it done.
10. During that conversation, Dede told me that I should consider what else I would want updated around her home, as it would go to her son J. Ross Henderson and me at her death.
11. Between September 2012 and Dede's death, she would occasionally repeat that comment to me, usually in the context of letting me know that I should choose replacement items (such as light fixtures, when they needed replacing), as Ross and I would have the house after she was gone.
12. In the conversation on or around my 55th birthday, Dede also told me that Ross's brother Mikell Henderson and his wife Kat would receive the rest of her real estate when she died.
13. Dede never mentioned to me any intent that her nephew Mikell Scarborough would receive her home or any other real estate.
14. On the day Dede died, Mikell Scarborough called me to let me know of her passing. I went to her house after his call.
15. Upon my arrival, Mikell Scarborough told me that Dede had already been taken away, but he added that he had found her Will. I was surprised by his comment, since she had passed away no more than a couple of hours before.

16. Mike Henderson was not at Dede's home during this conversation, and he did not arrive before I left that day.

FURTHER DEPONENT SAYETH NOT.

John S Johnson
John Johnson

SWORN TO BEFORE ME this 20th
Day of April, 2017

[Signature]
Notary Public for South Carolina
My Commission Expires: 12/31/26



Exhibit E

HENDERSON, MIKELL M

From: Trenholm Walker <gtw@p-tw.com>
Sent: Sunday, April 12, 2015 10:50 PM
To: HENDERSON, MIKELL M
Subject: RE: PCS Nitrogen v. Ross Development Corp.

Hi, Mike,

I can't envision any scenario where litigation over the will or codicil would have any effect on the amount of the judgment against your deceased mother. The judgment was individual to your mother, not joint. The amount is fixed, subject only to reduction depending on what PCS proves in terms of payment of response costs and collects from the directors.

Sorry for the delay in responding,

Trenholm

From: HENDERSON, MIKELL M [mailto:mikell.m.henderson@cbp.dhs.gov]
Sent: Thursday, April 9, 2015 12:30 PM
To: Trenholm Walker
Subject: PCS Nitrogen v. Ross Development Corp.

Trenholm:

As you know, my mother was Mary Ross Hanahan and her estate was submitted to the Charleston County Probate Court in March 2015. It may be necessary to mount a legal challenge to a codicil to my mother's last will and testament, which could affect other parts of her estate. While I do not want to go into detail regarding the challenge to the codicil or other related matters, I was cautioned by a family member against challenging her estate. The family member indicated that if the entire estate process is undone, my mother's estate would be exposed to the full joint and several \$4.4 M judgment by PCS? Unfortunately, Mikell Scarborough is the Personal Representative of my mother's estate at this time so I do not feel comfortable asking his legal advice.

I need to know if it is possible or likely that any challenge to a codicil or my mother's estate would expose her to the full PCS judgment? I do not want to avoid my mother's share of any judgment, but I likewise do not want to unnecessarily expose her estate to additional costs. I do not want to put you in a compromising position but as attorney for the Ross Development Corporation you are the best person to ask about the exposure of my mother's estate. I would appreciate your discretion in this matter.

Thank you for your efforts on our behalf.

With kind regards,

Mike Henderson
U.S. Customs and Border Protection
1131 Chapel Crossing Road
FLETC TH 397
Glynco, GA 31524

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 16, 2017 he has served the foregoing document on all parties by depositing a copy of same in the U.S. Mail, first-class postage prepaid, to their counsel addressed as follows:

Shirrese B. Brockington, Esquire
4 Carriage Lane, Ste. 304
Charleston, SC 29407

Joseph S. Mendelsohn, Esquire
PO Box 250
Charleston, SC 29402



Adam T. Silvernail

acknowledge such deeds, leases and assignment of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, certificates of deposit and other negotiable instruments, receipts, evidences of debts, and such other instruments in writing of whatsoever kind or nature as may be necessary or proper in the premises, giving and granting unto my said Attorney(s) and his/her/their substitute or substitutes, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as I might or could do if personally present. I hereby ratify and confirm all that my said Attorney(s), or his/her/their substitute or substitutes, shall lawfully do or cause to be done by virtue of these premises. **This Power hereby revokes any previous Power of Attorney granted.**

THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY PHYSICAL DISABILITY OR MENTAL INCOMPETENCE OF THE PRINCIPAL WHICH RENDERS THE PRINCIPAL INCAPABLE OF MANAGING HIS/HER OWN ESTATE.

Only one (1) signature shall be required to execute any and all necessary documents under this Power of Attorney.

IN WITNESS WHEREOF, I have hereunto set my Hand and Seal this 6th day of December, 2012, A.D.

Mary Ross Hanahan {L.S.}

MARY ROSS HANAHAN

SIGNED, SEALED, PUBLISHED AND DECLARED by the above named Mary Ross Hanahan as and for HIS/HER POWER OF ATTORNEY, in the presence of us, who, at her request and in her presence and in the presence of each other, all present together, have hereunto subscribed our names as witnesses hereto.

Christy Mass of Mt Pleasant SC
(Witness #1)

W Blume of Mt. Pleasant SC
(Witness #2 or Notary)

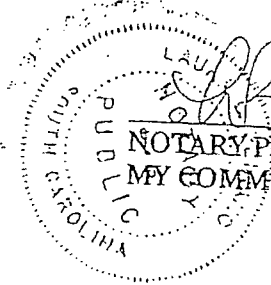
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named Mary Ross Hanahan sign, seal, and as her act and deed, deliver the within Power of Attorney, and that (s)he with the other witness above witnessed the execution thereof.

Christy Mass
Witness #1

SWORN to before me this 6 day of December, 2012

W Blume
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: May 30, 2016



RECORDER'S PAGE

NOTE: This page MUST remain with the original document



CMT
AKC

Filed By:
MIKELL R SCARBOROUGH

RECORDED		
Date:	December 6, 2012	
Time:	12:28:54 PM	
Book	Page	Doc Type
0295	614	PIAtty
Charlie Lybrand, Register Charleston County, SC		

RMC BK 0295 Pg 614 : pg 4 *

MAKER:
HANAHAN MARY R

of Sats: # of Pages:
of References:

RECIPIENT:
SCARBOROUGH MIKELL R

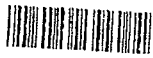
Note:

Recording Fee	\$ 15.00
Extra Reference Cost	\$ -
Extra Pages	\$ -
Postage	\$ -
Chattel	\$ -
TOTAL	\$ 15.00

Original Book:

Original Page:

DRAWER
CLERK



0295
Book



614
Page



12/06/2012
Recorded Date



4
Pgs



Original Book



Original Page



D
Doc Type



12:28:54
Recorded Time

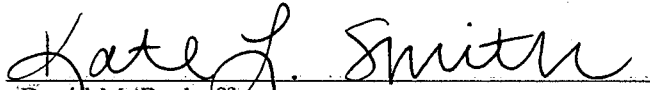
RECEIVED
JUN 15 2018
SC Court of Appeals

Consent of All Counsel of Record

Pursuant to Rule 212 of the Appellate Court Rules, all attorneys of record in this matter consent to this supplement to the Record on Appeal.

This 14th day of June, 2018.

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

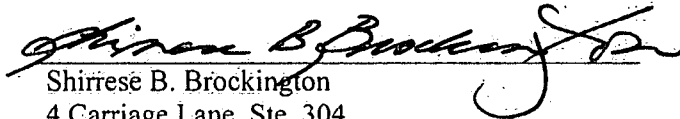


David M. Burkoff
South Carolina Bar No. 100339
Kate L. Smith
South Carolina Bar No. 101959

200 East Saint Julian Street
Post Office Box 9848
Savannah, GA 31412
(912) 236-0261

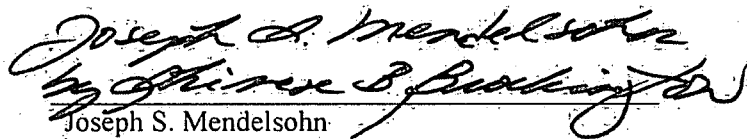
Attorneys for Appellant Mikell M. Henderson

We consent:



Shirrese B. Brockington
4 Carriage Lane, Ste. 304
Post Office Box 31312
Charleston, SC 29417
Attorney for Mikell Scarborough, Individually

We consent:



Joseph S. Mendelsohn
P.O. Box 250
Charleston, SC 29402
Attorney for Mikell Scarborough as Personal
Representative of the Estate of Mary Ross
Hanahan

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 15 2018
SC 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 theRespondent.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **SUPPLEMENTAL RECORD ON APPEAL** 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 29407

Joseph S. Mendelsohn, Esq.
P.O. Box 250
Charleston, SC 29402-0250

This 14th day of June, 2018.

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

A handwritten signature in cursive script that reads "Kate L. Smith". The signature is written in black ink and is positioned above a horizontal line.

200 East Saint Julian Street
Post Office Box 9848
Savannah, GA 31412
(912) 236-0261

David M. Burkoff
South Carolina Bar No. 100339
Kate L. Smith
South Carolina Bar No. 101959

Attorneys for Appellant Mikell M. Henderson