

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2009-CP-24-180

Adam Hill, Jr.,.....Appellant,

v.

Henrietta Norman and Primerica Life Insurance Company Defendants,

Of Whom Henrietta Norman is..... Respondent.

FINAL REPLY BRIEF OF APPELLANT

October 16, 2012.

Adam Hill, Jr.
Post Office Box 10104
Anniston, AL 36202
(256) 435-8719
Appellant/Pro Se

Edward S. McCallum, III
340A Oak & Main Street
Post Office Box 148
Greenwood, SC 29648
(864) 223-8546
Attorney for Respondent

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ARGUMENT IN REPLY

Respondent Norman's contention that the Circuit Court properly granted summary judgment because no genuine issue of material fact exists and appellant's arguments are based solely on speculation and conjecture is contrary to documented South Carolina case law and Rule 704 of the South Carolina Rules of Evidence.

Page four of the Respondent's initial brief makes reference to numerous hypothetical situations in Appellant's initial brief. Respondent views these as hypothetical situations when in fact these are inferences derived from circumstantial evidence. Under the "any evidence" or "mere scintilla" standard, Appellant's Initial Brief has provided sufficient circumstantial evidence to negate a summary judgment ruling on this cause of action.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact; it is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not personal knowledge or observation. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001). Circumstantial evidence does not actually establish the fact in question, but it asserts or describes something else from which the jury may reasonably infer the truth of the fact or at least reasonably infer an increase in the probability that the fact is true. Gastineau v. Murphy, 323 S.C. 168, 473 S.E.2d 819 (Ct.App. 1996), rev'd on other grounds, 331 S.C. 565, 503 S.E.2d 712 (1998). For circumstantial evidence to be sufficient to warrant a finding of fact, the circumstances must lead to the fact with reasonable certainty. The facts and circumstances should be considered in light of ordinary experience and common

sense, and the existence of a fact cannot be based on speculation, surmise, or conjecture. Holland v. Georgia Harwood Lumber Co., 214 S.C. 195, 51 S.E.2d 744 (1949). The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Circumstantial evidence is held on equal footing as direct evidence under the “any evidence” standard.

According to Rule 704 of the South Carolina Rules of Evidence testimony in the form of an inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

As pointed out in the Appellant’s initial brief the facts within the Priamerica claim file are documented and not speculation or conjecture. The facts within the sworn deposition of Defendant Norman are not speculation or conjecture.

Respondent Norman’s contention that Appellant relies on documents not relevant to this action from a previous litigation and an Affidavit of no probative value will cause prejudice if Appellant is not allowed to submit and have these documents reviewed by the Court.

Appellant’s complaint alleges Respondent Norman fraudulently induced the deceased to change the beneficiary on her insurance policy. Two fundamental elements to prove fraud in the inducement are: (1) a false statement of material fact; (2) that the Defendant knew or should have known was false. Johnson v. Davis, 480 So.2d 625 (Fla. 1985). Appellant’s complaint also alleges Respondent Norman asked the decedent for a power of attorney in order to admit her to the nursing home.

Respondent Norman denies having asked the decedent for a power of attorney. (See R. p. 135, lines 22 thru 25 & R. p. 137, lines 1 thru 24). The fact as

to whether Respondent Norman asked for a power of attorney is addressed in the transcript of the hearing held on July 10, 2010. (See R. p 57, lines 19 thru 25, R. p. 58, lines 1 thru 3, R. p. 59, lines 10 thru 15, R. p. 61, lines 8 thru 25, R. p. 64, lines 23 thru 25 & R. p. 65, line 2 thru 24)..

The sworn affidavit of the decedent's Pastor, Clara O. Barnes, along with the testimony of the Appellant dispute the fact that Respondent Norman denies asking for a power of attorney. Therefore; to deny admittance of Pastor Clara O. Barnes' sworn affidavit will cause prejudice to the Appellant. This affidavit is of considerable probative value because it addresses the primary issue of fraud. This affidavit creates an issue of material fact which is disputed.

Respondent Norman requests all probate pleadings, filings and orders be stricken from the Record on Appeal. These documents are of probative value in that during the Circuit court hearing held on July 10, 2010 the probate matter was addressed. (See R. p 61, lines 8 thru 12). The documents from the probate hearing to be presented in the Record on Appeal are instrumental in proving the motive for Respondent Norman's actions.

According to the Respondent's brief Appellant has no genuine issues of material fact and has based this frivolous appeal on conjecture, speculation and hypothetical situations. A claim or appeal is frivolous under § 1915 if it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). The Supreme Court addressed the issue of how the court should apply the frivolity test in Neitzke v. Williams. The Court began its analysis by stating that the lower courts should keep in mind the purpose of the frivolity provision. The Court

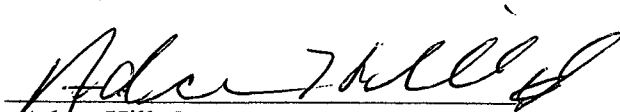
held that a case is frivolous if “it lacks an arguable basis either in law or in fact.” Id. At 325, 109 S.Ct. at 1831. The Court’s decision was predicated on the notion that our procedural rules structure the adversarial process in a way designed to minimize decisional error. The Court therefore noted that only a limited class of cases should be deemed frivolous. Appellant request Respondent with specificity demonstrates and clarifies the frivolousness of this appeal.

CONCLUSION

Based on the above and facts presented in the Initial Brief, Appellant requests that the South Carolina Court of Appeal reverse the Circuit Court’s Order and remand the case for further fact finding. Appellant Hill also requests the Court to permit a change of venue if this case is remanded for further fact finding.

Respectfully submitted,

October 16, 2012



Adam Hill, Jr.
Post Office. Box 1014
Anniston, AL 36202
(256) 435-8719
Appellant/Pro Se

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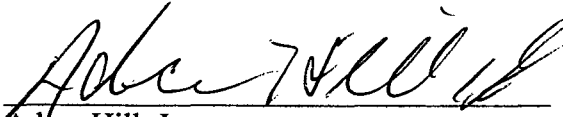
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CERTIFICATE OF COUNSEL IN FINAL REPLY BRIEF

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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Appellant/Pro Se

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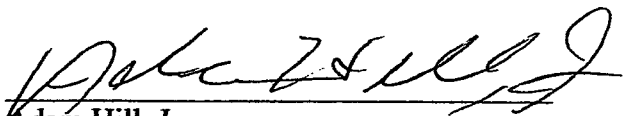
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PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellate on Henrietta Norman by depositing a copy of it in the United States mail, postage prepaid, on October 16, 2012, addressed to her attorney of record Edward S. McCallum, III, 340A Oak & Main Street, P. O. Box 148, Greenwood, SC 29648.

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Adam Hill, Jr..
Post Office Box 1014
Anniston, AL 36202
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Appellant/Pro Se