

IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Spartanburg County Court of Common Pleas

J. MARK HAYES, II CIRCUIT COURT JUDGE

2011-ES-42-00162

Case No.: 2012-CP-42-3705

Willie A. Rogers and Vennie Rogers.....Appellants.

vs.

**Charles Carr, in his Individual and Official Capacity as the Personal Representative
of the Estate of Thurman L. Bomar, Deceased, Katherine Christian and Joyce
King.....Respondents.**

FINAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I.

WAS THE DECISION OF THE LOWER COURT BIASED BECAUSE THE LOWER COURT COMMENTED UPON THE REPUTATION FOR VERACITY OF VARIOUS NOTARIES AND WITNESSES TO LEGAL DOCUMENTS THAT WERE INTRODUCED FOR SIGNATURE COMPARISON?

DID THE LOWER COURT ERR IN ADMITTING THE WILL TO PROBATE BECAUSE THE ATTORNEY WHO PREPARED THE WILL AND A WITNESS TO THE WILL DID NOT REMEMBER THE EVENT AND DID NOT RECOGNIZE A PHOTOGRAPH OF THE TESTATOR?

II.

WAS IT ERROR FOR THE LOWER COURT TO FAIL TO FIND FRAUD AND TO FAIL TO DISQUALIFY THE RESPONDENTS FROM INHERITING BECAUSE THE PERSONAL REPRESENTATIVE, AT THE TIME OF THE PERSONAL REPRESENTATIVE'S PETITION TO THE PROBATE COURT, DELAYED SUPPLYING THE NAMES OF ADDITIONAL HEIRS?

III.

WAS IT ERROR FOR THE LOWER COURT TO FAIL TO FIND CIVIL CONSPIRACY AND FAIL TO DISQUALIFY THE RESPONDENTS FROM INHERITING BECAUSE THE PERSONAL REPRESENTATIVE, AT THE TIME OF THE PERSONAL REPRESENTATIVE'S PETITION TO THE PROBATE COURT, DELAYED SUPPLYING THE NAMES OF ADDITIONAL HEIRS?

IV.

ADDITIONAL SUSTAINING GROUND

THE APPELLANTS DO NOT HAVE STANDING TO CHALLENGE THE COURT'S FINDINGS BECAUSE THEY ARE NOT HEIRS OF THURMAN BOMAR AND THE DECISION OF THE COURTS BELOW SHOULD BE AFFIRMED ON THAT GROUND.

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STATEMENT OF THE CASE

On March 8, 2011, the Defendant/Respondent Charles Carr presented to the Probate Court a document entitled Last Will and Testament of Thurman Lawrence Bomar. (Thurman Bomar's Last Will and Testament) (R. pp. 209-210). The Will nominated Charles Edward Carr as personal representative. Mr. Carr petitioned for informal probate of the Will and informal appointment as personal representative. (Petition for Informal Probate and Informal Appointment) (R. pp. 18-23).

Following informal appointment, this formal proceeding was commenced on June 10, 2001. In their Complaint, Plaintiffs/Appellants alleged that they and others were nieces and nephews of the late Thurman Bomar and were his sole heirs. Appellants alleged that the Will offered for informal Probate was the product of a forgery and/or undue influence and requested that the Will be declared null and void, that Charles Carr be removed as personal representative and that Willie A. Rogers, the Plaintiff, be appointed in his place. (Appellants Complaint to Contest Authenticity of Last Will and Testament) (R. pp. 31-36). In their Answer the Respondents denied that the Appellants were interested parties and challenged their standing to present their Complaint. Respondents interposed a general denial to the allegations of forgery and undue influence. (Respondents' Answer) (R. pp. 37-39).

The Respondents filed a Motion for Summary Judgment on the ground that the Appellants were not heirs of the deceased. The Respondents maintained that the

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Appellants failed to qualify as heirs due to the operation of S.C.Code Ann. 62-2-109 (2009).

The Respondents maintained that the Appellants could not establish lawful paternity in one of the links through which they alleged kinship to Thurman L. Bomar.

The Appellants filed a Motion for Summary Judgment on the ground that the Respondents were guilty of fraud by failing to list the Plaintiffs as on their Petition for informal Probate.

Following the completion of discovery and depositions, and after due notice the matter was called for hearing on June 11, 2012.

The Court heard the Motions for Summary Judgment, took them under consideration without reaching a decision, and moved forward with the trial. (R. pp. 59-60). The parties agreed that notwithstanding the shifting burdens of proof that the Respondent would present his entire case, first proving the Will and second defending against the allegations contained in the Complaint, followed by presentation of the Appellants' case challenging the Will. (R. p. 60).

On August 24, 2012, the Probate Court ruled that the Last Will and Testament offered by the Respondents was valid, free of undue influence, and not the product of forgery, and that the Appellants failed to establish kinship by blood to Thurman Bomar and were not his heirs. (R. p. 6).

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Appellants appealed the decision of the Probate Court to the Circuit Court. The Circuit Court affirmed the decision of the Probate Court by Order dated April 19, 2013. (R. p. 3)

FACTS

Thurman Bomar was born in Spartanburg County, South Carolina on January 18, 1922. (Petition for Informal Probate) (R. pp. 18-23). He left Spartanburg to attend college at Voorhees. (R. p. 128 and p. 162). He went into the service. (Obituary of Thurman Bomar) (R. p. 214). He settled in Brooklyn, New York. (R. p. 164). He never had natural children. (R. p. 167, Obituary of Thurman Bomar, (R. p. 214). In 1975 at the age of 53 he married Mary Bomar, mother of Respondents. (R. pp. 18-23; R. p. 73) (Petition for Informal Probate). About 1987 he and Mary Bomar moved to Spartanburg County to assist Mr. Bomar's parents during their old age and decline. (R. p. 77). On July 27, 1988 Thurman Bomar and Mary Bomar prepared Last Wills and Testament. Both wills were mirror image type wills. (Last Will and Testament of Thurman Bomar and Mary Bomar) (R. pp. 209-210 and R. pp. 223-224).

On January 21, 2011, Thurman Bomar died. (Petition for Informal Probate) (R. pp. 18-23).

The Respondents, as proponents of the Will, offered testimony from Charles J. Hodge, attorney. (R. p. 61). He identified a Will cover that the Defendants state was found with the Will. The Will cover was printed with the name,

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Hodge & Devine

Attorneys at Law

Attorney Hodge stated this was the firm name under which he practiced on July 27, 1988, the date on which the Will was signed and witnessed. (R. p. 65). He identified the witnesses to the Will as Mary Kunak and Gayle C. Hawkins. (Last Will and Testament of Thurman Bomar) R. pp. 209-210). (R. pp. 64-65). He testified that Mrs. Kunak was a nurse in his father's medical office. (R. p. 64). At the time the Will was executed, Mr. Hodge's law office was next door to his father's medical practice. (R. p. 64). From time to time he would ask Mrs. Kunak to serve as a witness to the execution of legal documents if needed. (R. p. 64). He stated that Ms. Hawkins worked for his law office at the time in question. (R. p. 65). He stated that the Notary, Vickie Wing also worked for him at that time. (R. p. 65). He stated that he did not remember Thurman Bomar or Mary Bomar personally and could not recognize them from a photograph that he was shown. (R. p. 66). He stated his father treated a number of Bomars as patients. (R. p. 66). He indicated that it was likely he, and not his partner Mr. Devine, who had prepared the Will although he had no independent memory or records twenty five years after the fact to establish that. (R. p. 66). He stated that he often prepared simple Wills during that time. (R. p. 67). The Will in question is a simple Will. (Thurman Bomar's Last Will and Testament) (R. pp. 209-210).

The Defendants next offered Ms. Mary Kunak, one of the witnesses to the Will. She identified her signature on the Will as being from her hand. (R. p. 69).

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Charles Carr testified that he is the stepson of Thurman Bomar. (R. p. 71). He testified that Thurman Bomar began calling on his mother, Mary, around 1958. (R. pp. 71-72) At that time, Charles was a young teenager living with his mother and his two sisters in Brooklyn, New York. (R. p. 72). During this time Thurman Bomar would take the family on outings and took an interest in the welfare of Charles and his sisters. (R. p. 73).

Thurman Bomar took a paternal interest in Mr. Carr and his sisters. He assisted Mr. Carr with some of the costs necessary for his graduation and attended his graduation. (R. pp. 74-75). In 1975 Thurman Bomar and Mary were married in New York. (R. p. 75). They resided in Mary's apartment in Brooklyn until Mr. Bomar's retirement in the mid 1980's. (R. pp. 76-77). After Mr. Bomar's retirement he and Mary Bomar moved to Spartanburg, the birthplace of Thurman Bomar. Thurman Bomar's mother and father were still living in Spartanburg County at that time. (R. p. 77). Over the years, Charles Carr, together with his children, would visit with Thurman and Mary Bomar in Spartanburg County for extended periods, usually twice a year, and took family vacations with them. (R. pp. 77-78).

Mr. Carr testified that Mary Louise Bomar, his mother and wife of Thurman Bomar, died testate in December of 2010. (R. p. 81).

After Thurman Bomar's death Mr. Carr took the Will to the Probate Court and met with a clerk. He completed the Petition for Informal Probate in the presence of and with assistance of the Probate clerk. (R. pp. 97-99). He did not know the complete names

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of all of the persons claiming to be nieces, nephews, and heirs of Thurman Bomar. (R. p. 97). Instead of naming all additional heirs at the place indicated on the form for such, a notation was made on the Petition to the effect that the Personal Representative would try to find out additional intestate heirs before closing. (R. pp. 98-99). Mr. Carr did not make the notation, the clerk made the notation. (R. p. 93) Mr. Carr is sure he mentioned Mr. Rogers and his siblings as intestate heirs to the Court. (R. p. 99). He testified that when he got to the Probate Court there was already something in the file from Mr. Rogers and his attorney. (R. p. 99).

Katherine Christian testified that she was a daughter of Mary Bomar and step daughter of Thurman Bomar. She attended their wedding in New York in 1975, (R. p. 103). Attended Mr. Bomar's retirement party in the mid 1980's, (R. pp. 103-104) and would visit with them with her children in Spartanburg most years thereafter. (R. p. 105).

In 1997, Mrs. Christian and her husband moved from Brooklyn to Spartanburg at the request of her mother who stated that she was becoming lonely and wanted them near to her. (R. pp. 106-107). She cared for her mother during her mother's terminal illness in 2009 and following her mother's death she continued to care for Thurman Bomar during his terminal illness until his death, seven weeks after her mother's. (R. pp. 109-110).

She testified that she attended the meeting at the Probate Court with Charles Carr when the Petition was completed. (R. p. 116). She stated that the Appellant and his

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brothers and sisters were not placed on the Petition at that time because Charles Carr and she could not name all the brothers and sisters. (R. pp. 116-117).

Respondents presented several publicly recorded Deeds and Court documents containing the signatures of Thurman Bomar for comparison with the signature on the Will.

The Appellants presented Ms. Thelma Thompson. Ms. Thompson and Thurman Bomar were friends growing up as children and corresponded during their college years. (R. pp. 125-127). She presented a photograph that Mr. Bomar sent to her during their college years on which he signed his name. The signed photograph was offered on the forgery issue, for signature comparison purposes.

Appellant Willie Rogers testified that he was a nephew of Thurman Bomar. He testified that Charles Carr and Katherine Christian knew the names of Thurman Bomar's would-be heirs because he assumed they had prepared the obituary and had called his sister and asked her about the nieces and nephews. (R. p. 145). Mr. Rogers testified that the signature on the Will was a forgery. He testified that the signatures on the various Deeds and Court documents offered by the Respondents were also forgeries. (R. pp 145-149).

Mr. Rogers testified that Charlie Bomar, through whom he claimed consanguinity with Thurman Bomar, never married Mr. Roger's grandmother. (R. p. 153.

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ARGUMENT

I.

WAS THE DECISION OF THE LOWER COURT BIASED BECAUSE THE LOWER COURT COMMENTED UPON THE REPUTATION FOR VERACITY OF VARIOUS NOTARIES AND WITNESSES TO LEGAL DOCUMENTS THAT WERE INTRODUCED FOR SIGNATURE COMPARISON?

DID THE LOWER COURT ERR IN ADMITTING THE WILL TO PROBATE BECAUSE THE ATTORNEY WHO PREPARED THE WILL AND A WITNESS TO THE WILL DID NOT REMEMBER THE EVENT AND DID NOT RECOGNIZE A PHOTOGRAPH OF THE TESTATOR?

The determination of the standard of review by an Appellant Court of matters originating in Probate Court is controlled by whether the cause of action is at law or in equity. If the essential nature of the cause of action is legal, the action to be taken by the Appellant Court is controlled by its determination of whether or not there is any evidence to support the factual findings of the Trial Court. Dean vs. Kilgore, 313 S. C. 257, 437 S. E. 2d 154, (Ct.App. 1993). An action to set aside a Will is an action at law. In re. Estate of Cumbee, 333 S. C. 664, 511 S. E. 2d 390 (Ct.App. 1999).

The Trial Court's determination that the Will was not the product of forgery was supported by evidence. The attorney who prepared and supervised the execution of the Will testified. He identified one of the witnesses and the Notary as employees of his. He

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identified the other witness, Ms. Kunak, as an employee of his father, Dr. Joseph Hodge. He stated that his office was next door to his father's office and he occasionally called on Ms. Kunak when he needed a witness. (R. p. 64).

The Appellant argues that Ms. Kunak testified that she worked for Dr. Hodge from 1991 and 1995 and thus could not have witnessed the 1988 Will. Ms. Kunak testified that she worked for Dr. Joseph Hodge for fourteen years. (R. p. 68). She stated that she was working for Dr. Joseph Hodge at the time the Will was drawn. (R. pp. 68-69). The transcript indicates that she stated that she worked for Dr. Joseph Hodge from 1991 to 1995 when he passed away. (R. p. 69). (The writer believes this is a scrivener's error of the court reporter. The writer believes that the testimony was from 1981, rather than from 1991. That would amount to fourteen years). She corroborated that the offices of Dr. Hodge and attorney Hodge were located next door to each other and that occasionally attorney Hodge would ask her to assist in witnessing legal documents. (R. p. 69). Although she did not remember having witnessed this Will, nor did she recognize Thurman or Mary Bomar, she identified her signature on the Will as being from her hand. (R. p. 69).

Appellant argues that because the attorney and witness had no memory of the Will signing event and could not recognize photos of the Testator that their testimony should not be considered in support of the Will. Respondents would submit that the fact that the attorney and witness did not specifically remember the event and could not

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recognize a photograph of the Testator is not unusual given that preparation and execution of a Will for an attorney's client is often a one-time encounter and the attorney often has no other contact with the client. Further, in this case, twenty years had passed.

The Appellants offered signature comparisons of earlier writings of the Testator to the signature on the Last Will and Testament. The signatures offered by the Appellants were quite old and not contemporaneous with the Will. (Photograph of Thurman Bomar with signature) (R. p. 211). (R. pp. 145-149). (R. pp. 154-155). The photograph and signature introduced through the testimony of Ms. Thompson dates from sometime in the 1940's when Mr. Bomar was in his 20's or 30's. (R. p. 132). The writer would submit that one's signature may change in appearance with the passing of time and signatures that are contemporaneous are more useful for comparison.

The Respondents offered signatures for comparison to the Will that were on publicly recorded documents, witnessed by multiple different witnesses and notarized by multiple different Notaries Public on multiple different occasions. (DB 44V, Page 559, DB 44V, Page 560, DB 66P, Page 431, DB 82N, Page 826) (R. pp. 215- 219). (Document from Spartanburg County Probate file number 93-417) (R. p. 221) (Document from Spartanburg County Probate file number 90-531). (R. p. 222). The signatures on these documents closely resembled the signature on the Will. (Thurman Bomar's Last Will and Testament) (R. pp. 209-210). The Appellant argues that these signatures should not be

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acceptable for comparison because all of them are forgeries. The writer would submit that multiple forgeries are less likely than an isolated single forgery. The writer would further submit that where multiple executions are observed by different witnesses and different notaries the chance they are all forgeries grows less likely. The Appellants allegation that all of the documents are forgeries is not credible.

Abundant evidence supports the Trial Judge's decision that the Will was not forged.

The Appellant argues that the Court's stated familiarity with witnesses to the various documents for signature comparisons indicates bias. The statement by the Trial Judge of his familiarity with the Court employees and attorneys who witnessed the documents, if error, is harmless, given the abundant evidence that the Will was not forged. Where evidence is so conclusive on a point that no other rational conclusion could be reached, a decision will not be set aside. State v. Gillian, 360 S. C. 433, 602 S. E. 2d 62 (Ct.App. 2004).

However, there was no error. In a law case tried without a jury, questions regarding the credibility and weight of evidence are exclusively for the Trial Judge. Golini v. Bolton, 326 S. C. 333, 482 S. E. 2d 748 (Ct.App. 1997).

The reputation for truthfulness of a witness is something that the factfinder is entitled to and should consider. A factfinder's personal knowledge of a witness's

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reputation is something the factfinder may ground his opinion upon so long as this does not rise to the level of bias. There was no bias of the Court as factfinder in this case.

It is important that these were witnesses to documents, not testimonial witnesses. Possible bias would seem to be more likely if the witness was personally involved in the proceeding and testifying or appearing before the Court.

It is also important that the documents were witnessed long before the controversy arose that is the subject of this litigation. The witnesses themselves could not have been biased or affiliated with one or the other parties because the controversy had not yet arisen.

II.

WAS IT ERROR FOR THE LOWER COURT TO FAIL TO FIND FRAUD AND TO FAIL TO DISQUALIFY THE RESPONDENTS FROM INHERITING BECAUSE THE PERSONAL REPRESENTATIVE, AT THE TIME OF THE PERSONAL REPRESENTATIVE'S PETITION TO THE PROBATE COURT, DELAYED SUPPLYING THE NAMES OF ADDITIONAL HEIRS?

Chewning v. Ford Motor Company, 354 S. C. 72, 579 S. E. 2d 605 (2003)

concerns fraud upon the Court. It cites cases from other jurisdictions that have defined fraud upon the Court. It distinguishes between intrinsic fraud and extrinsic fraud.

Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Fraud on the court requires a showing that one has acted with an intent to deceive or defraud the court, a showing of conscious wrong doing, what can properly be characterized as a deliberate scheme to defraud. When there is no intent to

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deceive, the fact that misrepresentations were made to a Court is not of itself sufficient basis for setting aside a judgment for fraud on the Court.

In the case at bar, there was evidence from which the Court could find that Mr. Carr's delay in-naming heirs was not fraud. His testimony was that he did not list the Appellant or his brothers or sisters, at that time, because he did not know all of their full names. The clerk indicated on the form that "*PR to try and find out addt'l intestate heirs to before closing". (R. p. 92-96). (Petition for Informal Probate and Informal Appointment). (R. pp. 18-23). Mr. Carr was not related by blood or marriage to the Appellants and it is not unreasonable that he would not know all of their proper names. Based on this, the Trial Court could find that fraud was not committed.

The normal remedy sought for fraud upon the Court is a request to set aside judgment. Even if fraud upon the Court had been proven in this case, this would not necessarily disqualify the Respondents as beneficiaries under the Will, nor render the Decedent intestate and entitle the Appellants to the Decedent's estate. Presumably, there would be other penalties. SC Code Ann. 62-1-106 (2009) cited by Appellants provides for appropriate relief against the perpetrator, but does not identify the appropriate relief.

Even if a fraud upon the Court had been committed, there was no damage to the Appellants. SC Code Ann. 62-1-106 (2009) provides relief to persons injured thereby. Although they were not initially listed as heirs or notified that the estate had been opened,

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their Complaint was filed shortly after Mr. Carr's Petition for Informal Probate. (Petition for Informal Probate (R. p. 18) Complaint (R. p. 25). The Appellants have certainly not been deprived of fully exhibiting and trying their case. They suffered no loss by reason of not being named as heirs.

Finally, the delay in naming the Appellants heirs was not a fraud upon the Court because the Appellants are not heirs of Thurman Bomar. The Appellants' grandmother was not married to Thurman Bomar's father and the Appellants entitlement to inherit from Thurman Bomar was not timely established under S.C.Code Ann. 62-2-109 (2009). (R. p. 153). Even if Mr. Carr believed the Appellants were heirs, was aware of their full names and intentionally omitted the Appellants from the Petition, a fraud on the Court would not have been committed because the Appellants are not heirs of Thurman Bomar.

III.

WAS IT ERROR FOR THE LOWER COURT TO FAIL TO FIND CIVIL CONSPIRACY AND FAIL TO DISQUALIFY THE RESPONDENTS FROM INHERITING BECAUSE THE PERSONAL REPRESENTATIVE, AT THE TIME OF THE PERSONAL REPRESENTATIVE'S PETITION TO THE PROBATE COURT, DELAYED SUPPLYING THE NAMES OF ADDITIONAL HEIRS?

The Appellants did not plead civil conspiracy and this issue has never been brought before the Court until now. An issue not raised in the lower Court cannot be

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raised for the first time on appeal. White v. Wilbanks, 298 S.C. 225, 379 S. E. 2d 298 (Ct.App. 1989). The Court should not consider this ground of appeal for that reason.

The alleged facts cited by Appellant in support of the civil conspiracy claim in Argument III are identical to the alleged facts cited by the Appellant in support of the fraud on the Court claim in argument II. The Trial Court did not find these facts. There was evidence to support the decision of the Trial Court in its factual finding.

IV.

ADDITIONAL SUSTAINING GROUND

THE APPELLANTS DO NOT HAVE STANDING TO CHALLENGE THE COURT'S FINDINGS BECAUSE THEY ARE NOT HEIRS OF THURMAN BOMAR AND THE DECISION OF THE COURTS BELOW SHOULD BE AFFIRMED ON THAT GROUND.

Charlie Bomar was the father of Thurman Bomar. (R. pp. 145-146). The Appellant's mother was Laura Burgan. (R. p. 140). Laura Burgan's mother and the Appellants' grandmother was Lizzie Burgan. (R. p. 137). Although it was accepted in the community that Laura Burgan was the daughter of Charlie Bomar, her mother Lizzie Burgan, was never married to Charlie Bomar. (R. pp. 140-141). (R. pp. 152-153).

S.C.Code Ann. 62-2-109 (2009) makes provision for intestate succession by children born out-of-wedlock and those within their line. Children born out-of-wedlock and their decedents are entitled to inherit through the paternal line only if certain conditions set forth within that statute are met. The Appellants did not present any

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evidence that those conditions had been met. The time period within which to comply with the statute has expired. Thus, the Appellants are not heirs of Thurman Bomar.

Generally, to have standing, a litigant must have a personal stake in the subject matter of the litigation. Michael P. v. Greenville County DSS, 385 S. C. 407, 684 S. E. 2d 211 (Ct.App 2009). Because the Appellants do not have a personal stake in the litigation, they do not have standing to challenge the Court's findings. The decisions of the Courts below should be affirmed because the Appellants do not have standing to present their claims.

CONCLUSION

The decision of the Courts below should be affirmed because there was evidence that the Last Will and Testament had not been forged, there was no evidence of bias in the Court below, there was no evidence that a fraud had been committed on the Court, and because civil conspiracy cannot be raised for the first time on appeal.

Even if there was reversible error in the Court below, the Appellants do not have standing to present their claims because they are not heirs of Thurman Bomar.

For the above reasons the decisions of the Court below should be affirmed.

Respectfully Submitted,

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vs.

Charles Carr, in his Individual and Official Capacity as the Personal Representative
of the Estate of Thurman L. Bomar, Deceased, Katherine Christian and Joyce
King.....Respondents.

PROOF OF SERVICE

I certify that I, as the Respondents' undersigned attorney, have served a copy of
the Respondents' Final Brief upon the Appellants, Willie A. Rogers and Vennie Rogers,
by depositing a copy of same in the United State Mail, postage pre-paid on October 15,
2013, addressed to the Appellants' attorney of record, Mr. Michael F. Talley, 206 Green
Avenue, P.O. Box 10081, Greenville, SC 29601.

*I certify the brief complies
with Rule 211 b.*

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October 15, 2013

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