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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

ON WRIT OF CERTIORARI FROM THE SOUTH CAROLINA COURT OF APPEALS

Supreme Court Appellate Case No. 2019-001808
Lower Court Case 2018-CP-10-03889

IN RE: THE ESTATE OF HAZEL NORTH

GRADY NORTH AND JEAN CORBETT.....Respondents

v.

LINDA NORTH AND JAMES NORTH.....Petitioners

BRIEF OF RESPONDENTS

Michael W. Sautter, Esquire (SC Bar # 4944)
Nicholas J. Brausch, Esquire (SC Bar # 104083)
Query Sautter & Associates, LLC
147 Wappoo Creek, Ste. 202
Charleston, SC 29412
843-795-9500
Attorneys for Respondents

Other Counsel of Record:

M. Richardson Hyman, Jr., Esquire
PO Box 127
Charleston, SC 29402
Attorney for Petitioner James North

Peter G. McGrath, Esquire
802 Johnnie Dodds Boulevard
Mt. Pleasant, SC 29464
Attorney for Petitioner Linda North

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STATEMENT OF ISSUES ON APPEAL

1. SHOULD THE SOUTH CAROLINA SUPREME COURT AFFIRM THE DECISION THE APPELLATE CIRCUIT COURT, THE DISMISSAL OF THE APPEAL AND DENIAL OF PETITIONERS PETITION FOR REHEARING BY THE SOUTH CAROLINA COURT APPEALS, WHEN PETITIONERS ELECTED NOT TO FORMALLY CONTEST THE INFORMAL PROBATE OF THE 2008 WILL OF HAZEL NORTH IN THE PROBATE COURT WITHIN THE TIME PERIOD AND IN THE MANNER MANDATED BY THE SOUTH CAROLINA PROBATE CODE?
2. DID PETITIONERS ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS PROPERLY PRESERVE FOR SUPREME COURT REVIEW THE ISSUE THAT THE ORDER OF THE APPELLATE CIRCUIT COURT IS NOT A FINAL ORDER WHEN THEY RAISED THE QUESTION FOR THE FIRST TIME TO THE COURT OF APPEALS IN THEIR BRIEF ON APPEALABILITY?

STATEMENT OF CASE AND APPEALS

Hazel North was born on November 14, 1921, and passed away on March 19, 2016, at the age of 94 while domiciled in Charleston County, South Carolina. Hazel North is the mother of the Petitioners and Respondents.

IN THE CHARLESTON COUNTY PROBATE COURT

This case concerns a will contest in the Estate of Hazel North between a 2008 Will submitted for informal application by Respondent Grady North and informally admitted into Probate on March 29, 2016 (App. 56-61), and a 2014 Will submitted for informal application by Petitioner James North and informally admitted into probate on March 30, 2016. (App. 50-55).

Respondent Grady North filed an Application for Informal Probate of Will and Appointment in the Charleston County Probate Court to have the 12-23-2008 will of his mother, decedent Hazel North, informally probated. (App. 56-59). On March 29, 2016, the Probate Court issued an Order of Informal Probate which granted the application for informal probate of the

will executed 12-23-2008 and appointed Grady North as Personal Representative of the Estate of Hazel North. (App. 60). Grady North accepted the appointment as Personal Representative to the Estate. (App. 61).

One day later, on March 30, 2016, Petitioner James North filed an Application for Informal Probate of Will and Appointment in the Charleston County Probate Court to have a will of decedent Hazel North, also his mother, dated 12-9-2014, informally probated and to be appointed Personal Representative of her Estate per the 2014 will. (App. 50-53).

On that same day, March 30, 2016, the Charleston County Probate Court issued an Order of Informal Probate which granted the application for informal probate of the will executed 12-9-2014, and appointed Petitioner James North as Personal Representative of the Estate of Hazel North. (App. 54). James North accepted the appointment as Personal Representative to the Estate. (App. 55). Also on March 30, 2016, the Charleston County Probate Court, issued an Order, terminating the appointment of Grady North as the Personal Representative of the Estate of Hazel North effective this 30th of March 2018, for the following reason:

X A Last Will and Testament dated December 19, 2014 was filed with this Court which names James Allen North as the personal Representative of the Estate. (App. 48).

Respondents filed a Motion to Void Orders on the Setting Aside of the 2008 Will, Terminating the Appointment of Grady North as Personal Representative and Granting of Application for Probate of the 2014 Will of Decedent Hazel North Pursuant to Rule 60(b)(4), SCRCPP. (App. 44-55).

On July 2, 2018, a hearing was conducted on Respondents' Rule 60(b)(4) SCRCPP Motion. The transcript of the hearing was not included in the matters designated by Petitioners to be included in the Appendix.

On July 27, 2018, the Probate Court issued an Order (App. 36-43), which framed the issues for consideration holding, “Therefore the sole issue before this Court is whether or not the judgment¹ is void.” And, “Based upon the (Probate) Code, the Court determines there was no procedural defect.” *Id.* at 39. The Court concluded, “The failure of Mr. (Grady) North to take advantage of the procedures available to him, whether by timely motion to this Court, a formal proceeding under the Probate Code, or an appeal to the Circuit Court, “is a result of (his) own inaction and not a denial of due process.” Based upon the foregoing the Court denied Respondents’ Rule 60(b)4 SCRCF Motion. *Id.* at 42.

IN THE CHARLESTON COUNTY COURT OF COMMON PLEAS

Respondent timely appealed the Order denying his Rule 60(b)4 SCRCF Motion to the Charleston County Court of Common Pleas or appellate Circuit Court. On March 14, 2019, a hearing was conducted by Circuit Court Judge William H. Seals, Jr. A Record on Appeal was prepared and submitted for the Court’s consideration, which was referenced extensively in the appellate Circuit Court Order² that is the subject of this stage of the appellate process. *See*, Appeal to Circuit Court section, App. at 30. Neither the Record on Appeal nor the transcript of the hearing before Judge Seals was designated to be included by the Petitioners in the Appendix.

On April 29, 2019, Judge Seals issued the subject Order of Reversal and Remand to Charleston County Probate Court to Informally Probate 2008 Will. (App. 27-34). The appellate Circuit Court Order included discussion of the following matters germane to this stage of the appellate process; Respondents’ Rule 60(b)4 SCRCF Motion, Petitioner’s Memorandum in Opposition, the Appeal, and the Decision on the Merits of the Appeal. (App. 27-34).

¹ Probate Order of the March 30, 2016, which granted the application for informal probate of the will executed 12-9-2014, and appointed Petitioner James North as Personal Representative of the Estate of Hazel North. App. 37. (emphasis added).

² (App. 27-34.),

In the Decision on Merits section, the appellate Circuit Court made six detailed findings of fact and conclusions of law to include the following specific findings and conclusions:

- 2) That the trial court erred in denying (Respondents’) Rule 60(b)4 Motion to vacate or void *ab initio* the March 30, 2016 Orders of the Probate Court;
- 3) That the trial court erred in finding that, “The Court has the absolute right to act administratively upon the applications it receives.” “It was proper for the court to make administrative corrections in the absence of a filing for formal testacy.” This finding is contrary to the mandate of the Probate Code to commence a formal proceeding to set aside the informal probate of the 2008 Will;
- 4) James North did not commence an action for formal probate within the court’s general subject matter jurisdiction to contest the 2008 Will by filing and serving a summons and petition as mandated by S.C.Code § 62-3-401;
- 5) The Court did not have subject matter jurisdiction to set aside the 2008 Will and grant application of informal probate of the 2014 Will as an action for formal probate was never commenced by (James North);
- 6) (Grady North) was not afforded substantive due process of notice and a hearing before he was terminated as Personal Representative of the Estate of Hazel North as mandated by the S.C. Probate Code as set forth herein, and guaranteed by Article 1, § 3 of the South Carolina Constitution and the 14th Amendment to the United States Constitution. *Id.* at 31.

The appellate Circuit Court then **ORDERED**, germane to this appellate process, as follows:

- The July 27, 2018, Order of the Charleston County Probate Court is hereby **REVERSED**.
- This case is **REMANDED** back to the Charleston County Probate Court for the informal probate of the 2008 Will of decedent Hazel North.

Petitioners did not file a Motion for Reconsideration or to alter or amend judgment pursuant to Rule 59 SCRPC.

IN THE SOUTH CAROLINA COURT OF APPEALS

Petitioners then appealed to the South Carolina Court of Appeals the April 29, 2019, Order of the appellate Circuit Court.

By letter of May 14, 2019, the Court of Appeals requested that the parties serve and file memoranda addressing the issue of appealability. (App. 26). Petitioners then had the opportunity to submit anything they felt was material and relevant for consideration by the Court of Appeals

on the issue of appealability. Petitioner filed a Brief on Appealability (App. 19-22). In his brief of May 21, 2019, Petitioner addressed for the first time that, “The circuit’s court’s order on appeal is a final order.” (App. 21)

Respondent filed a Memorandum as to Appealability. (App. 23-25). Respondents continued to maintain that to challenge the informal probate of the 2008 Will, it was incumbent upon (Petitioners) to commence a formal proceeding within the mandates of the probate code within 1 year. That (Petitioners) admit that they are past the one year challenge time to file a formal testacy proceeding. That (Petitioners) failure to timely commence a formal action to set aside the 2008 Will deprived Respondents to their fundamental rights to due process as guaranteed by the Constitutions of South Carolina and the United States.

Respondents’ Conclusion was as follows:

CONCLUSION

The underlying March 30, 2016 Orders are void *ab initio*. The Appellate Circuit Court remanded the case to the Charleston County Probate Court to informally Probate the 2008 Will. Via this appeal to the South Carolina Court of Appeals, (Petitioners) are seeking relief in a manner that is contrary to their arguments and legal filings since the filing of their informal application of March 30, 2016.

(App. 24).

By Order filed June 28, 2019, The Court of Appeals dismissed the appeal, as “... the order on appeal is not a final order, *See* S.C. Code Ann § 62-1-308 (2009) (providing probate appeals must be from final orders).” (App. 18).

Petitioners then filed a Motion to Reinstate the Appeal, dated July 10, 2019. (App. 1-14) Petitioners’ Motion to Reinstate provides in part, “... that the order in effect prevents any further action from being taken on the trial level.” (App. 1).

Respondent filed a Return. (App. 15-17) which included the following: “On appeal the Circuit Court reversed and remanded, or sent the case back to the Charleston County Probate Court to take the further action of informally probating decedents 2008 Will. The Order sought to be appealed by (Petitioners) is therefore not a final order.” (Id. at 16). And, “That Appellants, in their Motion to Reinstate, now concede that they are time barred from contesting the informal probate of the 2008 Will, does not extend the appellate jurisdiction of this (Court of Appeals). (Id., at 17).

In their Order of September 27, 2019 Order, the South Carolina Court of Appeals construed Appellants’ Motion to Reinstate as a Petition to Re-hear the dismissal of the appeal; and stated as follows:

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly the petition for rehearing is denied. (App. 00).

IN THE SOUTH CAROLINA SUPREME COURT

On October 23, 2019, Petitioners filed their Petition for Writ of Certiorari to the South Carolina Supreme Court.

Contemporaneously Petitioners filed an Appendix. The Appendix did not include, the Record on Appeal filed in the appellate Circuit Court. Petitioner did include certain pages of the Record on Appeal in the Appendix but did not include the transcript of the hearing in the Probate Court which was included in the Record on Appeal. Petitioner also failed to include the transcript of the hearing in the appellate Circuit Court. Nor did Petitioner include within the Appendix, his Memorandum in Opposition to SCRCP 60(b)4 Motion filed in the Probate Court.

Respondent filed a Return. (App. 15-17). By Order of February 13, 2020 this Supreme Court, based on the vote of the Court granted the petition for writ of certiorari.

Respondents timely submit this brief for consideration of this Honorable Supreme Court of South Carolina.

STANDARD OF REVIEW

The underlying subject of the appeal of Order of the Probate Court is that the Probate Court erred in failing to grant (Petitioners) Rule 60(b)4 SCRCP Motion to vacate the March 30, 2016 Orders of the Court as an error of law.

The South Carolina Court of Appeals determined that, “Because the order on appeal is not a final order, this appeal is dismissed. (App. 18).

This Supreme Court considered and granted Petitioners’ Petition for Writ of Certiorari. Pursuant to Rule 242(d)(2) SCACR, only those questions raised in the court of appeals (appellate Circuit Court) and in the petition for rehearing (motion for reconsideration to the appellate circuit court) shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.

ARGUMENTS

1. SHOULD THE SOUTH CAROLINA SUPREME COURT AFFIRM THE DECISION OF THE APPELLATE CIRCUIT COURT, THE DISMISSAL OF THE APPEAL AND DENIAL OF PETITIONERS’ PETITION FOR REHEARING BY THE SOUTH CAROLINA COURT APPEALS, WHEN PETITIONERS DID NOT FORMALLY CONTEST THE INFORMAL PROBATE OF THE 2008 WILL OF HAZEL NORTH IN THE PROBATE COURT WITHIN THE TIME PERIOD AND IN THE MANNER MANDATED BY THE SOUTH CAROLINA PROBATE CODE.

The decision of the appellate Circuit Court, which remains under further appellate review, correctly and properly, sent the case back to the Probate Court to re-commence proceedings to informally probate the 2008 will of Hazel North. This case started in the

Charleston County Probate Court and is now in its fourth tier of appellate process before the Supreme Court of South Carolina. (*See*, Statement of Case and Appeals).

Petitioners' Motion to Reinstate is included within the Appendix as 1-14, and states, "... that the order in effect prevents any further action from being taken on the trial level. (App. 1). Further, that "The order of the circuit court in appeals is both a *de facto* and a *de jure* final Order."³ Petitioners' argument that the appellate Circuit Court's Order is a *de facto* Final Order is misplaced. "This phrase, (de-facto) is used to characterize ... a past action or state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate. *Black's Law Dictionary*, 5th Ed., p. 375. Petitioners' argument that the appellate Circuit Court's Order is a *de jure* Final Order is similarly misplaced. *Black's Law Dictionary* defines *de jure* as, "Description of a condition where there has been total compliance with all requirements of law." *Id.*, at 382.

Petitioners are now time barred from contesting the informal probate of the 2008 Will, by their own wrongs, *de injuria*, and not by the orders of the appellate Circuit Court. Petitioners' arguments, as to potential prospective effects of the appellate Circuit Court's Order to reverse and remand are contrary and in direct conflict with their strategy to not commence a formal proceeding to contest the informal probate of the 2008 Will. Petitioners failed to comply with the mandates of the Probate Code. Petitioners' present challenge to the informal probate of the 2008 Will, is time barred and could have only been raised, heard and determined by Petitioners' timely commencing a formal action in the Probate Court; by serving a summons and petition, in which they request that the Probate Court, after notice and a hearing enter an Order setting aside the informal probate of the 2008 Will.

³ See, Discussion Section of Motion to Reinstate Appeal, App. at 4.

In their brief Petitioner's concede that, "If one wishes to establish or contest testacy, one must file a petition pursuant to S.C.Code Annotated § 62-3-401." "If one wishes to file an action to remove a personal representative, one must file a petition pursuant to § 62-3-761.

It is undisputed that Petitioners never commenced a formal proceeding, never filed and served a summons and complaint, never provided notice and never even attempted to schedule a hearing to set aside the informal probate of the 2008 will of decedent Hazel North, and to terminate Respondent Grady North as Personal Representative of the Estate of Hazel North.

It was incumbent upon Petitioners to commence a formal proceeding pursuant to the mandates of S.C.Code Ann. §§ 62-3-401, 62-3-402, 62-3-108 and 62-3-203(b) within 1 year, if they sought to challenge the informal probate of the 2008 will. If Petitioners were not satisfied with the outcome of a formal challenge to the probate of the 2008 Will, at that juncture they could certainly request the Probate Court reconsider their position and then proceed with appellate proceedings if deemed necessary.

3. DID PETITIONERS ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS PROPERLY PRESERVE FOR SUPREME COURT REVIEW THE ISSUE THAT THE ORDER OF THE APPELLATE CIRCUIT COURT IS NOT A FINAL ORDER WHEN THEY RAISED THE QUESTION FOR THE FIRST TIME TO THE COURT OF APPEALS IN THEIR BRIEF ON APPEALABILITY?

On April 29, 2019, Judge Seals issued the subject Order of Reversal and Remand to Charleston County Probate Court to Informally Probate 2008 Will. (App. 27-34.). Although the appellate process in this case began with the Circuit Court review of the Order of the Probate Court, the appellate Circuit Court was not asked by Petitioners to rule on whether or not the Order of April 29, 2019 was a Final Order. Petitioners did not file a Motion for Reconsideration

or to alter or amend judgment pursuant to Rule 59 SCRPC of the subject appellate Circuit Court Order under further appellate review by this Supreme Court.

By letter of May 14, 2019, in the case at bar on the third tier of 60(b)4 review and appellate process in this case, the Court of Appeals requested that the parties serve and file memoranda addressing the issue of appealability. (App. 26). Petitioners then had the opportunity to submit anything they felt was material and relevant for consideration by the Court of Appeals on the issue of appealability. Petitioner filed a Brief on Appealability (App. 19-22). In his brief of May 21, 2019, Petitioner addressed for the first time that, “The circuit’s court’s order on appeal is a final order.” (App. 21)

As set forth above by Order filed June 28, 2019, The Court of Appeals dismissed the appeal, as “... the order on appeal is not a final order, *See* S.C. Code Ann § 62-1-308 (2009) (providing probate appeals must be from final orders).” (App. 18). Petitioners then filed a Motion to Reinstate the Appeal, dated July 10, 2019. (App. 1-14) Petitioners’ Motion to Reinstate provides in part, “... that the order in effect prevents any further action from being taken on the trial level.” (App. 1). Generally where an issue was not raised and the appellant makes no motion to obtain a ruling, the appellate court may not address the issue. Rule 59(e) SCRPC, *Smith v. NCI, Inc.*, 369 S.C. 236, 631 S.E.2d 268, rehearing denied. (S.C.Ct.App.).

In *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (S.Ct. 2000), the issue of whether slip and fall victim had standing to sue premises owner’s insurer for negligence was not preserved for review where issue was raised for the first time in victim’s petition for rehearing and was not addressed by trial court or the appellate court. Generally where an issue was not raised and the appellant makes no motion to obtain a ruling, the appellate court may not address the issue.

Finally, Respondents request that this Court affirm the decisions of the South Carolina Court of Appeals and the Orders of the Court of Appeals for any ground appearing in the Record as provided by Rules 208(b)(2) and 220(c) SCACR.

CONCLUSION


Petitioners assign error to the subject appellate Circuit Court Order and the Orders of the Court of Appeals based on their strategy and election to never commence a formal proceeding to contest the informal probate of the 2008 will of decedent Hazel North.

The appellate Circuit Court was correct in the decision to reverse the probate court and remand the case to informally probate the 2008 Will. The South Carolina Court of Appeals was correct in dismissing this appeal and in denying the petition for rehearing by determining, “after careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has either been overlooked or disregarded, and hence there is no basis for granting a rehearing.” (Id.).

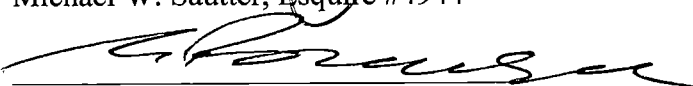
Respondents submit that Petitioners did not preserve for this Court’s review on Petition for Writ of Certiorari to the Court of Appeals the question of the effect as to finality of the appellate Circuit Court Order.

Respondents respectfully request that the April 29, 2019, Circuit Court Order of Reversal and Remand to Charleston County Probate Court to Informally Probate the 2008 Will of Hazel North be affirmed and that this Court affirm the decisions of the South Carolina Court of Appeals for any ground appearing in the Record as provided by Rules 208(b)(2) and 220(c) SCACR; and after careful consideration, dismiss this writ.

Respectfully submitted,



Michael W. Sautter, Esquire #4944



Nicholas J. Brausch, Esquire # 104083
ATTORNEYS FOR RESPONDENTS
Query Sautter & Associates, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, SC 29412
(843) 795-9500

June 12, 2020
Charleston, South Carolina