

THE STATE OF SOUTH CAROLINA
In Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Circuit Court

The Honorable Roger E. Henderson

Appellate Case No. 2020-000327

RECEIVED

Sep 18 2020

SC Court of Appeals

Mary Uptagrafft, on behalf of
Joshua B Hopkins, Jacob T. Hopkins,
Jensen M. Hopkins and Johanna S. Hopkins _____ Appellant,

vs.

Rodney Brock Hopkins _____ Respondent

INITIAL BRIEF OF RESPONDENT

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Table of Contents

TABLE OF AUTHORITIES	3
CASES	3
SOUTH CAROLINA COURT RULES	3
SOUTH CAROLINA CODE OF LAWS	3
OTHER AUTHORITIES	4
STATEMENT OF ISSUES ON APPEAL	5
STATEMENT OF THE CASE	5
STANDARD OF REVIEW	5
STATEMENT OF THE FACTS	5
ARGUMENT	8
WHETHER THE CIRCUIT COURT, SITTING IN APPELLATE JURISDICTION, ERRED IN DENYING THE APPELLANT’S MOTION TO EXTEND TIME TO FILE HER INITIAL BRIEF. ...	8
ARGUMENT	11
WHETHER THE CIRCUIT COURT, SITTING IN APPELLATE JURISDICTION, ERRED IN GRANTING THE RESPONDENT’S MOTION FOR DEFAULT WHICH EFFECTIVELY GRANTED THE RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS.	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

Auto-Owners Ins. Co. v Rhodes 405 S.C. 584, 748 S.E.2d 781 (2013).....	8
Doe v Bishop of Charleston 407 S.C. 128 754 S.E. 2d 494 (2014).....	5
Durham v. United Cos. Fin. Corp., 326 S.C. 403, 404, 483 S.E.2d 786 (Ct.App.1997).....	9
Fulbright v Spinnaker Resorts, Inc. Supreme Court of South Carolina, 420 S.C 265802 S.E. 2d 794 (2017).....	7
Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).....	7
In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998).....	6
Kennedy v. S.C. Retirement Sys., 345 S.C. 339, 352–53, 549 S.E.2d 243, 250 (2001)	6
State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015).....	7
State v. Sweat, 379 S.C. 367, 373, 665 S.E.2d 645, 648 (Ct. App. 2008).....	6
Turner v. Santee Cement Carriers, Inc., 277 S.C. 91, 96, 282 S.E.2d 858, 860 (1981)	9
Uptagrafft v Hopkins 2019-CP-16-00634 Order dated 13 February 2020	9
Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002).....	7

SOUTH CAROLINA COURT RULES

Rule 101(a) ,SCAR.....	8
Rule 208(a)(4) SCACR.....	7, 9
Rule 240(a) SCACR	7
Rule 240(b) SCACR	7
Rule 263(b) SCACR	9
Rule 267 SCACR.....	6
Rule 268 SCACR.....	6

SOUTH CAROLINA CODE OF LAWS

§62-1-103.....	7
§62-1-304.....	7
§62-1-308.....	6

§ 62-1-308(e) 5
§62-1-308(g) 6

OTHER AUTHORITIES

Appellants’ Petition for Removal of Personal Representative filed 6 December 2017..... 4
Appellant’s Initial Brief filed 19 August 2020 7
Black’s Law Dictionary 581 (6th ed. 1990)..... 6
Uptagrafft v Hopkins Initial Brief of Appellant filed 19 August 2020..... 8

STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court, sitting in appellate jurisdiction, erred in denying the appellant's motion to extend time to file her initial brief.
2. Whether the circuit court, sitting in appellate jurisdiction, erred in granting the respondent's motion for default which effectively granted the respondent's motion for summary judgment and judgment on the pleadings.

STATEMENT OF THE CASE

This action results from an appeal by Mary Uptagrafft, et al, (Appellant) of a 13 February 2020 Order from the Honorable Roger E. Henderson of the Fourth Judicial Circuit sitting in appellate jurisdiction. The hearing which produced this Order was held on 14 November 2019.

STANDARD OF REVIEW

The Appeal here is not based on the facts of the underlying case, but upon the Circuit Court's judgments in a Motions Hearing. "As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety. If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct.App.1989) (citations and internal quotation marks omitted). *Doe v Bishop of Charleston* 407 S.C. 128 754 S.E. 2d 494 (2014).

STATEMENT OF THE FACTS

There are elements of the Appellant's asserted facts which Respondent considers incomplete or inaccurate. Respondent believes such elements are useful for providing a context upon which this matter arises.

1. Appellant and Respondent were formerly married. Four children were produced from the marriage which lasted 17 years and ended by divorce on the grounds of adultery in 2012. Based on documents entered into the Family Court record, it appears all four children have reached the age of majority.

2. In 2006, Decedent was in the hospital due to the pain and suffering resulting from spinal cord compression. During this stay the records indicate Decedent received intravenous morphine, as among other medications and pain treatments. Also, the records indicate Decedent was then suffering from dementia and forgetfulness.
3. In February 2008, Appellant filed for divorce from Respondent. As an element of the divorce proceedings, Appellant included Decedent as a defendant claiming property rights in the house she and Respondent lived in which was owned by Decedent. The Court rejected Appellant's claim.
4. Multiple Petitions to the Family Court have been initiated by Appellant following the original Order dated May 2012.
5. Decedent passed away 6 September 2016 leaving Respondent as his only heir.
6. On 19 October 2016, Respondent submitted his Application for Appointment as Personal Representative of his father's intestate estate. The Inventory and Appraisement for the estate was timely filed which document indicated Decedent's gross probate estate was valued at \$31,549.00.

7. On 19 April 2017, Appellant herein filed her Petition for Formal Testacy and Appointment on behalf of the four children born of Appellant's marriage to Respondent. The foundation of her action rests in a handwritten document purported to have been Decedent's Last Will and Testament. This document was to have been written while Decedent was in the hospital in 2006.
8. Appellant had purportedly been holding this document for Decedent's benefit since 2006 which time included the period that saw Appellant sue Decedent for the earlier referenced property rights. The document was submitted to the Probate Court of Darlington County in the seventh month following Decedent's death. Respondent's Answer saw him refute the legitimacy of the document and her Appellant's right to sue on behalf of others where no agency relationship was asserted.
9. Two months later, on 28 June 2017, Appellant submitted a second Petition in this estate for Removal of Personal Representative. This Petition, which cited Appellant as Petitioner on behalf of the same four children cited as the foundation for this Petition the following:
 - a. *The Personal Representative has mismanaged the estate (no additional information having been submitted supporting this cause of action);*

- b. *The Personal Representative failed to perform a required duty (no additional information was submitted informing what required duty had not been performed); and*
- c. *Removal is in the best interest of the estate because; the Personal Representative has committed fraud, misrepresentation and misappropriation of assets (no additional information was submitted which supported the claims). Appellants' Petition for Removal of Personal Representative s filed 6 December 2017 at p 2.*

To these, Respondent Answered by citing Appellant's failure to provide her foundation for authority to act on behalf of the parties whose interests she sought to promote, and her failure to provide a short and plain statement of facts sufficient to support a claim for relief as required in Rule 8(a)(2) SCRPC. Along with these and founded upon them and other relevant rules and statutes, Respondent filed Motions for Judgment on the Pleadings, Summary Judgment, Award of Attorney Fees and Abuse of Process.

10. All Respondent's actions leading to the Order now appealed were timely filed as established by § 62-1-308 of the South Carolina Probate Code.
11. Though Respondent's Statement of Issues included several matters for consideration, the decision of the Court rested almost entirely upon the failure of Appellant herein to observe the rules of appeals to the Circuit Court. More specifically, § 62-1-308(e) offers a respondent 30 days within which to file his responsive brief.
12. Based on the timeline of events Respondent's e-filing on 14 August 2019 of his Initial Brief and Designation of Matter saw Appellant required to file her brief as of Friday 13 September 2019. However, nothing in this matter was filed on behalf of Appellant until 18 September 2019 when her counsel submitted his Notice of Appearance. On 20 September 2019 Appellant filed a Motion to Extend Time for Initial Brief which filing was seven days following the deadline for submission of a responsive brief. Two weeks later, 14 October 2019, Respondent submitted his Affidavit of Default and Motion for Order of Default.
13. A hearing upon the Motions was had on 14 November 2019. Ten days following the hearing, which produced no ruling from the bench, 102 days following the filing of Respondent's Initial Brief, Appellant filed her Responsive Brief.

14. The Order found the Court unable to grant Appellant's Motion for Extension and found also that Appellant's delays and lack of preparation amounted to an abandonment of her defense against the appeal. In addition to these findings, the Court also found there was no foundation for Appellant's standing and no facts upon which the Court could grant relief and, therefore, no jurisdiction for the court to hear the matter.
15. Though Respondent would argue the Circuit Court's Order should influence the decision of the Probate Court as to the Appellant's original Petition, the Order of the Court was applicable only to the second Petition as the original hearing was limited only to this second Petition. As a result, the question of testacy remains to be determined.

ARGUMENT

WHETHER THE CIRCUIT COURT, SITTING IN APPELLATE JURISDICTION, ERRED IN DENYING THE APPELLANT'S MOTION TO EXTEND TIME TO FILE HER INITIAL BRIEF.

Appellant argues that S.C. Code Ann §62-1-308(g) absolves her of the duty to comply with the procedure established in that code section. Thus, she argues, a request for extension submitted a week after the date her brief was due should have been granted. Respondent disagrees.

There does not appear to be any case law rendering explicit just what this code section is authorizing to be excluded. However, a quick review of the South Carolina Appellate Court Rules suggests requirements such as those contained in Rule 267 or, perhaps, those of Rule 268 , for example, may be excluded. Regardless, the Circuit Court and its Order in this case focused upon what Appellant here failed to accomplish.

A review of §62-1-308 informs as follows:

Except as provided in subsection (1), appeals from the probate court *must* be to the circuit court and are governed by the following rules:

(e)... Within thirty days after service of the appellant's brief, the respondent *shall* serve one copy of his brief on all parties to the appeal, and file with the clerk of the circuit court one copy of the brief with proof of service.

While the section focused upon in this matter provides procedures for appeal from the Probate Courts, the section is a statute and would fall under the rules for statutory construction. A basic

rule of statutory construction is that words in a statute must be given their plain and ordinary meaning. *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993). The issue of interpretation of a statute is a question of law for the court.” *State v. Sweat*, 379 S.C. 367, 373, 665 S.E.2d 645, 648 (Ct. App. 2008). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) The use of the word ‘may’ signifies permission and generally means that the action spoken of is optional or discretionary unless it appears to require that it be given any other meaning...” *Kennedy v. S.C. Retirement Sys.*, 345 S.C. 339, 352–53, 549 S.E.2d 243, 250 (2001). While Respondent believes the terms utilized are clearly stated, the canon of construction “*expressio unius est exclusio alterius*” is a maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. Black’s Law Dictionary 581 (6th ed. 1990), sees too *Hodges v Rainey* 341 S.C., 341 S.E. 2d 578 2000 Here, the use of the term “shall” in the statute indicates a requirement or mandatory act. Appellant herein failed to comply with the plainly stated and unambiguous directives of the statute. The statute, however, provides little guidance where a failure of compliance is realized.

Appellant seems to indicate that the omission in §62-1-308(g) of any express penalty for failure to adhere to the procedures of that section indicates none should apply. Respondent disagrees.

The Probate Code at §62-1-103 provides that, “[u]nless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.” More specifically, §62-1-304 provides, “The South Carolina Rules of Civil Procedure (SCRCP) adopted for the circuit court and other rules of procedure in this title govern formal proceedings pursuant to this title. A formal proceeding is a “civil action” as defined in Rule 2, SCRCP, and must be commenced as provided in Rule 3, SCRCP.” Through these, the legislature directed parties to look elsewhere to augment any procedural insufficiencies in the Probate Code. “If a statute's language is plain, unambiguous, and conveys a clear meaning ‘the rules of statutory interpretation are not needed, and the court has no right to impose another meaning.’” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). On the other hand, where a statute is ambiguous, the Court must construe the terms of the statute.” *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). In applying this standard “[a] statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.” *State v. Henkel*, 413 S.C. 9, 14,

774 S.E.2d 458, 461 (2015) “Moreover, it is well settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result.” *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). as cited in *Fulbright v Spinnaker Resorts, Inc.* Supreme Court of South Carolina, 420 S.C 265802 S.E. 2d 794 (2017). Finally, there is the reference to default in subsection (i) of the statute indicating that within the context of appeals from the Probate Court the possibility of default exists.

As a formal matter, the Probate Court is governed by South Carolina Rules of Civil Procedure with principles of law and equity supplementing the South Carolina Probate Code; the above cited necessarily calls parties to the South Carolina Rules of Appellate Procedure to supplement §62-1-308 where ambiguities or omissions are realized.

Rule 240(a) SCACR makes clear that a motion for expansion is contemplated within the Rules. However Rule 240(b) SCACR informs that the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition. Further, Rule 208(a)(4) SCACR states, “Upon the failure of respondent to timely file a brief, the appellate court may take such action as it deems proper.” Appellant, in her Initial Brief to the South Carolina Court of Appeals asserts she did, “timely file a motion with the Circuit Court requesting an extension to file the initial brief.” *Uptagrafft v Hopkins* Initial Brief of Appellant filed 19 August 2020 at page 7. But the record does not indicate this. Rather, the record indicates the Motion was filed one week after the deadline for filing the initial brief. Since the record indicates the Motion was filed late, and since the filing of a Motion does not stay the time limit for filing the initial brief, the Court had no authority upon which to grant that which was being requested or accept the brief which was ultimately filed some 72 days following the deadline and 11 days following the hearing. *Uptagrafft v Hopkins* 2019-CP-10-00634, 13 February 2020 at page 4.

Finally, the record indicates Appellant herein relied upon provisions of the South Carolina Appellate Court Rules to support her request for an expansion and should therefore be judicially estopped from now arguing the rules does not apply. Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.” *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). “The purpose of the doctrine is to ensure the integrity of the judicial

process, not to protect the parties from allegedly dishonest conduct by their adversary.” *Auto-Owners Ins. Co. v Rhodes* 405 S.C. 584, 748 S.E.2d 781 (2013).

For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Id.* at 215–16, 592 S.E.2d at 632. as cited in *Auto-Owners Ins. Co. v Rhodes* 405 S.C. 584, 748 S.E.2d 781 (2013).

Here, Appellant relied upon the South Carolina Appellate Court Rules to justify her Motion for Expansion for which Respondent herein was successful. Her now current denial of the applicability of the Rules indicates a preference that the Court of Appeals not take notice of her earlier reliance upon the Rules and therefore is misleading. *Uptagrafft v Hopkins* Initial Brief of Appellant filed 19 August 2020 at page 9. Finally, that the Rules might, in one appeal apply to her benefit but the same set of rules not apply in its second appeal appear to be totally inconsistent.

Finally, Appellant asserts a belief that the span of time between the hearing and the Order would have easily permitted the filing of a brief and that to have allowed such would not have been prejudicial to the interests of Respondent herein. In so doing, Appellant relies upon concepts of trial procedure which, based on the statutes, cases and rules cited above do not apply in appellate procedure.

ARGUMENT

WHETHER THE CIRCUIT COURT, SITTING IN APPELLATE JURISDICTION, ERRED IN GRANTING THE RESPONDENT’S MOTION FOR DEFAULT WHICH EFFECTIVELY GRANTED THE RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS.

Appellant believes the Circuit Court, sitting in appellate jurisdiction, erred when it applied the South Carolina Appellate Court Rules to the exclusion of South Carolina Rules of Civil Procedure

where it resulted in an Order of Default and ultimate dismissal upon the grounds of abandonment. Respondent disagrees.

Respondent incorporates the arguments set forth above which sees the South Carolina Appellate Court Rules as being the only reasonable source to guide parties and the courts where, in this instance, statutory procedures for appeals from the Probate Court are insufficient to respond to insufficiencies discovered. Appellant, however, bases her entire argument against the Circuit Court's Order upon the South Carolina Rules of Civil Procedure. Rule 101(a), SCAR provides, "...Part II governs practice and procedure in appeals, petitions, and motions in the Supreme Court and the Court of Appeals." "Upon failure of a respondent to timely file a brief, the appellate court may take such action as it deems proper." Rule 208(a)(4) SCACR. Where a party fails to timely file a brief, the failure allows the Court to, "take such action as it deems proper and such failure alone would justify reversal of Order." *Turner v. Santee Cement Carriers, Inc.*, 277 S.C. 91, 96, 282 S.E.2d 858, 860 (1981). A court sitting in appeals may, "address issues as presented in Appellant's brief in case in which respondent's did not file brief with appellate court." *Durham v. United Cos. Fin. Corp.*, 326 S.C. 403, 404, 483 S.E.2d 786 (Ct.App.1997). Upon this foundation the Circuit Court found it had no authority to grant an expansion of time to file the brief when the motion for such was submitted a week after the deadline for submitting said brief had passed, but that it did have authority to take such action as it deemed proper to include reversal of the Order. It is noteworthy too that the Rules do not permit the parties to agree to an expansion. Rule 263(b) SCACR. Thus, no one had the authority to grant that which Appellant then sought.

Appellant also appears to believe the appeal was to have been a trial de novo. Though this would be inaccurate, the hearing which produced the Order being appealed was based upon Motions before the Court. The Circuit Court, on page 5 of its Order made clear the foundations for denying Appellant's Motion. *Uptagrafft v Hopkins* 2019-CP-16-00634 Order dated 13 February 2020. The Court also made clear on page 6 its foundation for deeming Appellant's failure to file an abandonment of her defense, resulting in overturning the trial court's Order. *Id.* In its conclusion, the Court referenced the shortcomings of Appellant's actions from the filing of the Petition to the Motions hearing. In doing so, it did take into consideration the undisputed facts associated with the matter. However, contrary to Appellant's understanding, the Circuit Court's Order did not apply to any element of Appellant's original Petition for Probate of Decedent's purported Last

Will and Testament and appointment of Appellant as Personal Representative of the estate filed prior to the Petition which resulted, ultimately, in the Order being appealed.

CONCLUSION

Appellant alleges in her initial brief that, “the trial court completely failed to take into consideration anything regarding the law or issues presented at the Probate Court hearing in its order.” This is correct. The Circuit Court was sitting in appellate jurisdiction and the hearing which produced its Order was a motions hearing. Where Appellant alleges the Circuit Court abused discretion, it must be recognized that the Rules did not provide the Court with authority to grant the relief Appellant then sought – she had missed her deadline, then moved for an expansion and in so doing asked the Circuit Court, and now the Court of Appeals, to disregard appellate procedure. In granting Respondent’s motion for default and reversing the Probate Court’s Order, the Circuit Court relied upon Rules of Appellate procedure, case law and the facts of the case, from initial hearing until the appellate level motions hearing in making its decision. But doing so did not see the Circuit Court touch upon whether the purported Last Will and Testament of Decedent is valid, to assert such would be to expand the Order beyond anything associated with the original appeal.

As a result of the forgoing, Respondent prays this Court will affirm the Circuit Court’s Order.

Respectfully Submitted,

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PROOF OF SERVICE

I CERTIFY THAT I have served the Initial Brief of Respondent, Designation of Matter to be Included in the Record on Appeal, and Proof of Service dated 18 September 2020 on the above referenced case on Mary Uptagrafft by depositing a copy of it in the United States Mail, postage prepaid, on 18 September 2020 addressed to her attorney of record, John S. Keffer, Keffer Law Firm, 10 Law Range, Sumter South Carolina 29150 and also by sending to the following email address her attorney of record: jkeffer@kefferlawfirm.com and fpollard@kefferlawfirm.com and cheryl@kefferlawfirm.com.

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