IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
DEC 20 2021
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
CIRCUIT COURT

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5859
(S.C. Ct. App. Filed September 1, 2021)
Court of Appeals Case No. 2018-000562

Mary P. Smith, Maezell Mitchell Jefferson, individually and as Personal Representative of the Estate of Annabelle Thornton, Shirrese B. Brockington, as Special Administrator of the Estate of Janine Gourdine, Emma Smalls, Viola Pringle, Cephus Thornton, Arthur Graddick, III, an imprisoned person, Venetra Watson, and any known or unknown persons or entities claiming any interest in the Estates of Lucinda Pringle, Odessa Graddick, Arthur Graddick, Jr., Annabelle Thornton and Janine Gourdine.....Appellants,

v.

Angus M. Lawton, Personal Representative of the Estate of Lucinda Pringle, Evelina Brown Moses, Thomas P. Brown, Jr.., and Unknown PR Rebecca Patricia Brown.....Respondents.

PETITION FOR WRIT OF CERTIORARI

T. Jeff Goodwyn, Jr., Esquire (73789)
Goodwyn Law Firm, LLC
2309 Devine Street
Columbia, South Carolina 29205
(803) 251-4517

Attorney for Petitioner/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

OTHER AUTHORITIES

Pursuant to Rule 242, SCACR, Petitioners, Mary P. Smith, et. al., files this Petition for a Writ of Certiorari to review MARY P. SMITH, Maezell Mitchell Jefferson, individually and as Personal Representative of the ESTATE OF ANNABELLE THORNTON, SHIRRESE B. BROCKINGTON, as Special Administrator of the ESTATE OF JANINE GOURDINE, EMMA SMALLS, VIOLA PRINGLE, CEPHUS THORNTON, ARTHUR GRADDICK, III, an imprisoned person, VENETRA WATSON, and any known or unknown persons or entities claiming any interest in the ESTATES OF LUCINDA PRINGLE, ODESSA GRADDICK, ARTHUR GRADDICK, Jr., ANNABELLE THORNTON and JANINE GOURDINE, Appellants, v. ANGUS M. LAWTON, Personal Representative of the Estate of Lucinda Pringle, EVELINA BROWN MOSES, THOMAS P. BROWN, JR., and Unknown PR REBECCA PATRICIA BROWN, Respondents, Opinion No. 5859, 2018-000562 (S.C. Ct. App. filed September 1, 2021).

CERTIFICATE OF COUNSEL

Counsel certifies that the petition for rehearing was made on September 13, 2021 and denied by the Court of Appeals on November 19, 2021.

QUESTIONS PRESENTED FOR REVIEW

I. Were Respondents denied due process at the November 9, 2016 evidentiary hearing that would justify a remand for a second evidentiary hearing?

II. Was the Court of Appeals bound by the law of the case doctrine related to issues surrounding the intent of the testator based on language in the 2011 Court of Appeals opinion indicating who the testator wanted to inherit when the intent of the testator had not previously been raised and ruled on and was not before the Court of Appeals at that time?

A. The Court of Appeals' 2011 opinion stating who the testator wanted to inherit from was dicta since both parties agree and have argued that this

issue had never previously been raised by either party prior to the 2011 Court of Appeals opinion.

B. Even if the language in the 2011 Court of Appeals opinion related to who the testator intended to take is not dicta, there is no language in the 2011 Court of Appeals opinion as to what the intent of the testator was as it relates to what property is to be devised. As a result, the Court of Appeals and the Supreme Court should make a ruling on whether the will can be probated with both parties conceding that the property being devised portion was whited out and altered by Emma Smalls.

STATEMENT OF THE CASE

The decedent in this case died October 11, 1989 and was vested with an undivided fifty percent (50%) interest in a 10½ acre tract of land located on or near U.S. Highway 17 North in Mount Pleasant, South Carolina (the "Property"). No formal attempt to probate Decedent's estate was made until an application for informal appointment was filed May 5, 1999. The estate was probated and a Deed of Distribution for the Property was filed April 17, 2000. The court issued a Certificate of Discharge on June 26, 2001.

On October 20, 2005, Respondents filed a Petition for Recovery of Improper Distribution based on their claim that a will had been discovered that left the Property to Respondents. This Petition was amended by consent on October 2, 2007 to properly reflect the parties to the action. On January 8, 2007, Respondents filed a Motion to Vacate the Order of June 25, 2001. A hearing on this motion was held April 8, 2008 where the Appellants took the position that the will could be considered by the Probate Court since the 10 year statute of repose set forth in §62-3-108 prevented the court from any such consideration. The Probate Court found that the 10 year statute of repose did apply to this case and denied Respondent's request for relief in an order dated October 20, 2008.

Respondents appealed this decision to the Court of Appeals arguing that the statute of repose should be tolled if the will was fraudulently concealed as alleged in this case. The Court

of Appeals issued an Order filed August 9, 2011 that reversed the Probate Court's ruling that the 10 year statute of repose set forth in §62-3-108 prevented the court from considering the will in cases where there is evidence that a fraudulent concealment of the will has taken place and remanded the case to the Probate Court for further findings consistent with its opinion.

Between the date the Court of Appeals issued its decision in 2011 and 2015, the will was not offered to the Probate Court for consideration. During this period, Appellants filed multiple motions to dismiss on jurisdictional grounds and pursuant to §62-3-108 that were denied. The Probate Court issued an Order dated June 25, 2015 ordering Angus Lawton, the Special Administrator of the estate, to file a petition to probate the will. Mr. Lawton filed a Petition for Appointment and for the Informal Probate of a Will on September 4, 2015. Appellants filed a Petition for Formal Testacy February 9, 2016 challenging the validity of the will and requesting that the court address all issues on remand from the Court of Appeals order filed August 9, 2011.

A hearing on this petition was held November 9, 2016. The Probate Court issued an Order dated January 18, 2017 denying Appellants' Petition and finding that the will had been properly proved, that the intent of the testator had been ruled on in the 2011 Court of Appeals order and was law of the case, and that the 2011 Court of Appeals ruling on the 10 year statute of repose in §62-3-108 was law of the case. Appellant timely filed a Notice of Appeal to the Circuit Court which issued an Order dated March 16, 2018 affirming the Order of the Probate Court. Appellant timely filed a Notice of Appeal to the Court of Appeals which partially affirmed and partially reversed and remanded the decisions of the Probate Court as affirmed by the Circuit Court. Specifically, the Court of Appeals reversed the Probate Court as affirmed by the Circuit Court finding that Appellants did timely file its objections to the validity of the will and that Respondents failed to produce any evidence to prove the will at the November 9, 2016 hearing. The Court of

Appeals went on to remand the case back to the Probate Court for another hearing to prove the validity of the will. The Court of Appeals affirmed the Probate Court as affirmed by the Circuit Court that the intent of the testator and the §62-3-108 10 year statute of repose issues had be ruled on in the 2011 Court of Appeals decision and were now law of the case. Appellant timely filed a Petition for Rehearing with the Court of Appeals which was denied on November 19, 2021. This Petition for Writ of Certiorari followed.

STATEMENT OF THE FACTS

The decedent in this case died October 11, 1989 and was vested with an undivided fifty percent (50%) interest in a 10½ acre tract of land located on or near U.S. Highway 17 North in Mount Pleasant, South Carolina (the "Property"). Lucinda Pringle's surviving heirs were three daughters, Mary Smith, Annebelle Thornton, and Janine Gourdine and three children of a deceased daughter, Evelina Brown Moses, Thomas P. Brown, Jr. and Rebecca Patricia Brown. The estate was originally administered as an intestate estate in 1999 and the Property was deeded to all of the children of Decedent per stirpes by way of deed of distribution on April 6, 2000. The court issued a Certificate of Discharge on June 26, 2001.

In October or November 1989, the parties acknowledged the awareness of at least one copy of the alleged will within several days after the death of Lucinda Pringle but with no information as to the content of the will. On another occasion about three years later,

Thomas Brown, Jr. acknowledged in his testimony that he had a copy of the will and made various attempts to file the copy of the will with the Probate Court of Charleston County with no success.

Emma Smalls, in the aftermath of Hurricane Hugo in late 1989, processed a claim with the Public Savings Fire and Casualty Insurance Company with reference to damages which resulted to the house she resided in on the decedent's property. As a result of the claim, the insurance

company issued a check naming as payees the Respondents and Emma Smalls as the "executors of the estate" of the decedent on January 15, 1990. The payees on the insurance check match in order and number the apparent nomination of the executors listed in Item 4 in the alleged will of Lucinda Pringle.

On October 20, 2005, Respondents filed a Petition for Recovery of Improper Distribution based on their claim that a will had been discovered that left the Property to Respondents. This Petition was amended by consent on October 2, 2007 to properly reflect the parties to the action. On January 8, 2007, Respondents filed a Motion to Vacate the Order of June 25, 2001. A hearing on this motion was held April 8, 2008 where the Appellants took the position that the will could be considered by the Probate Court since the 10 year statute of repose set forth in §62-3-108 prevented the court from any such consideration. No challenge to the validity of the will was raised at that time. The Probate Court found that the 10 year statute of repose did apply to this case and denied Respondent's request for relief in an order dated October 20, 2008.

Respondents appealed this decision to the Court of Appeals arguing that the statute of repose should be tolled if the will was fraudulently concealed as alleged in this case. The issues raised in this appeal related to the validity of the Will were not raised in that appeal as shown by the statement of issues on appeal (R. p. 197). The Court of Appeals issued an Order filed August 9, 2011 that reversed the Probate Court's ruling that the 10 year statute of repose set forth in §62-3-108 prevented the court from considering the will in cases where there is evidence that a fraudulent concealment of the will has taken place and remanded the case to the Probate Court for further findings consistent with its opinion. In the dicta of this ruling, the Court of Appeals opinion states that "Decedent intended Appellants to inherit from her last will and testament." (R. p. 26). This order was not appealed.

Between the date the Court of Appeals issued its decision in 2011 and 2015, the will was not offered to the Probate Court for consideration. During this period, Appellants filed multiple motions to dismiss on jurisdictional grounds and pursuant to §62-3-108 that were denied. The Probate Court issued an Order dated June 25, 2015 ordering Angus Lawton, the Special Administrator of the estate, to file a Petition to Probate the will. Mr. Lawton filed a Petition for Appointment and for the Informal Probate of a Will on September 4, 2015. Appellants filed a Petition for Formal Testacy February 9, 2016 challenging the validity of the will and requesting that the court address all issues on remand from the Court of Appeals order filed August 9, 2011.

A hearing on this petition was held November 9, 2016. The Probate Court issued an Order dated January 18, 2017 denying Appellants Petition and finding that the will had been properly proved, that the intent of the testator had been ruled on in the 2011 Court of Appeals order and was law of the case, and that the 2011 Court of Appeals ruling on the 10 year statute of repose in §62-3-108 was law of the case.

ARGUMENT

I. It was an error of law for the Court of Appeals to remand the case for a second evidentiary hearing after ruling that the Respondents did not present any evidence of due execution at the November 9, 2016 hearing. The Grandchildren were not denied due process at this hearing that would have given them a right to a second evidentiary hearing[1].

Grandchildren filed an application for informal probate on September 4, 2015. Children filed a petition for formal testacy challenging, in part, the validity of the will on February 4, 2016.

[1] The Court of Appeals refers to Respondents as "Grandchildren" and Appellants as "Children" in its 2021 opinion and these names will be used throughout this argument.

A properly noticed hearing was noticed and held on November 9, 2016. One of the issues raised at this hearing was the validity of and the due execution of decedent's will.

At the hearing, the Probate Court received testimony and evidence, made no rulings from the bench, and asked both parties to submit proposed orders. (R. pp. 528 – 547). The Probate Court also inquired into whether the two witnesses to the will were living and counsel for Children indicated that all parties believed that they were both no longer living. (R. p. 534, ll. 20-24). The court did not indicate that this fact in any way relieved Grandchildren from their requirement to present the prima facie case as to due execution or otherwise limited the evidence the court would receive at the hearing related to due execution. (R. pp. 528 – 547).

The Court of Appeals opinion in this case reads in relevant part, "Nevertheless, the witnesses death did not relieve Grandchildren, as the proponents of the will, from establishing a prima facie case of due execution. *See* § 62-3-407 ('Proponents of a will have the burden of establishing prima facie proof of due execution in *all* cases.' (emphasis added)). As a result of the Probate Court's conclusion, Grandchildren were not required to present any evidence to support the prima facie case." This portion of the Court of Appeals' ruling is error as the court misapprehended the requirement to present evidence of due execution at the November 9, 2016 hearing. A review of the hearing transcript shows that the Probate Court did not conclude at the hearing that no proof to support the prima facie case was required. In fact, counsel for Grandchildren made no arguments at the hearing that his clients should be relieved of the requirement to make the prima facie case due to the fact that the witnesses were dead and the court made no such rulings. With respect to the Children's challenge to the validity of the will, Counsel for Grandchildren only made the timeliness argument which was also not ruled on at the hearing.

Only in the Probate Court's order from this hearing did the issue arise relating to no further inquiry being necessary because the witnesses to the will had died.

In support of this its ruling, the Court of Appeals cites *In re Estate of King*, a similar case in Massachusetts case involving the interpretation of a Massachusetts statute similar to S.C. Code §62-3-406 which is based on the Uniform Probate Code that both states have adopted. See *In Re King*, 156 N.E.3d 220, 98 Mass.App.Ct. 332 (Mass. App. 2020). In *In re Estate of King*, the court found, as this court found, that a prima facie case of due execution must be presented. *Id.* The court in *In re Estate of King* went onto remand the case for a new evidentiary hearing because the Probate Court improperly excluded much of the evidence the proponents of the will offered as to the authenticity of the testator's signature at the Probate Court hearing. *Id.* This improperly excluded evidence included opinion testimony of a handwriting expert, testimony of witnesses familiar with the testator's signature, and samples of the testator's signature for the court to review. *Id.* The court in *In re Estate of King* asks the reader to contrast *In re Estate of King* with *Matter of Moran,* 479 Mass. 1016, 1020-1021, 95 N.E.3d 226 (2018) (respondent provided fair hearing when no limitation was placed on testimony and he was allowed full access to copious pages of notes during testimony). *Id.* The question of whether or not to remand in these cases was based on whether or not the party had been given a fair hearing, or said another way, had been denied due process. Based on the reasons recited in these cases and for fundamental due process reasons, the present case should only be remanded for another evidentiary hearing *only if* the Grandchildren were denied due process at the November 9, 2016 hearing. *Id.* There was nothing unfair about the Probate Court's handling of the November 9, 2016 hearing in this case. The Probate Court did not exclude any evidence at the hearing as to due execution or did it make any rulings that no

evidence of due execution was required. As a result, a remand for additional evidence to be taken is not appropriate and would give the Grandchildren a second bite at the apple to prove the will.

A review of the hearing transcript from the November 9, 2016 hearing shows that counsel for both parties agreed that all of the evidence in the record from the prior hearing(s) would remain part of the record for the purposes of the hearing. These depositions and exhibits are what composes the vast majority of the record in this case. Counsel for Children actually offered into evidence one additional original deposition transcript he found in his file taken prior to his involvement in the case, that of Evaline Moses. Counsel for Grandchildren did not object to its admission and the court accepted it. (R. p. 544, l.25 – p. 545, l. 18). No other evidence was offered by either party at the November 9, 2016 hearing.

At the November 9, 2016 hearing, Counsel for Grandchildren argued the evidence in record he had submitted including "affidavits of our client that lay out the facts as to what transpired. There's deposition testimony from all the relevant parties in this case." (R. p. 543, ll. 1-4). Counsel for Children did not object to any of this evidence and the Probate Court excluded none of it. At no time did Counsel for Grandchildren offer any evidence that was excluded or even objected to. At no time did Counsel for Grandchildren raise an issue about wanting to submit additional evidence or that he needed more time to prepare evidence for the hearing. In addition, Grandchildren did not argue in their brief to the Court of Appeals that they were denied due process or a fair trial at the November 9, 2016 hearing as it was argued in *In re Estate of King*. See *In re Estate of King*, 156 N.E.3d 220, 98 Mass. App. Ct. 332 (Mass. App. 2020). The proponents of the will in *In re Estate of King* had a reasonable argument for claiming a denial of due process at the hearing in that case. *Id.* In contrast, the proponents of the will in this case have no such argument.

The fact that there is no evidence in the record of due execution is not the result of any ruling by the Probate Court excluding evidence or any other action by the Probate Court or due to any objections by Children. Grandchildren simply made a strategic decision to rely on the timeliness argument. Perhaps Grandchildren realized that no handwriting expert could give them a favorable opinion given the fact that the testator signed her name on the will with simply an "X" mark. Perhaps Grandchildren could find no witnesses familiar with the testator's signature or could find no signature samples to compare to the "X" mark on the will. Regardless of the reasons for not choosing to present any evidence of due execution at the hearing, Grandchildren made a strategic decision to rely solely on arguments related to the timeliness of the filing of the petition challenging the will.

With the timeliness arguments having not been successful, being granted a second hearing to present evidence of due execution is not proper since Grandchildren have already had a fair hearing to do so. As a result, this court should accept this case and reverse the Court of Appeals ruling determining that Grandchildren should be granted a new evidentiary hearing to present evidence of due execution and hold that Grandchildren failed to present evidence of due execution when required at the November 9, 2016 hearing and that as a result, the will was not properly proved, and the estate shall proceed as an intestate estate.

It is also important to note that there is little to no case law in South Carolina on this issue as evidenced by the fact that the Court of Appeals was forced to find Massachusetts law to rely upon in its decision. Being a novel issue in South Carolina, this is a good opportunity for the Supreme Court to establish case law in South Carolina on this issue.

II. The Court of Appeals erred in finding that the 2011 Court of Appeals opinion stating that Decedent intended Evelina Brown Moses, Thomas Brown, and Rebecca Patricia Brown to inherit from her will was binding on the Probate Court when this language was by definition dicta and not binding on the parties.

A. The language in the 2011 Court of Appeals decision relating to the testator's intent as to who the beneficiaries are is dicta, and not binding.

Judicial dicta is "not essential to the decision." *Black's Law Dictionary* 465 (7th ed.1999). Dicta or, as it is also known, dictum "is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision." 21 C.J.S. *Courts* § 227 (2006). See *Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81 (S.C. App. 2007).* Dicta and is neither binding nor illuminating. *See Drummond v. Beasley,* 331 S.C. 559, 503 S.E.2d 455 (1998) (characterizing as dicta certain language in a case concerning a subject not within the question before the court); *Hampton v. Richland County Council,* 296 S.C. 72, 72, 370 S.E.2d 714, 714 (1988) (concluding discussion of a legal principle in an opinion was dicta where it was "clearly unnecessary to a resolution of the issue before the court"); *Welborn v. Dixon,* 70 S.C. 108, 49 S.E. 232 (1904) (dicta is not binding as precedent); *Dennis v. South Carolina Nat'l Bank,* 299 S.C. 34, 39, 382 S.E.2d 237, 240 (Ct.App.1988) (construing language in a case as dicta because it was "an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof"). See *State v. Addison,* 338 S.C. 277, 525 S.E.2d 901 (S.C. App. 1999).

In this case, any opinion issued by the Court of Appeals in its 2011 order related to the testator's intent relating to what beneficiaries were to take under the will can only fairly be characterized as dicta. This is true because issues involving the testator's intent not only were not

before the court, but they could not possibly have been before the court, and therefore, these were issues not necessarily involved in the case nor necessary to a decision thereof.

Prior to the will first being offered for probate on September 4, 2015, the only issue before the Probate Court and the Circuit Court and Court of Appeals was the Children's argument that the Probate Court could not even consider accepting the will because it was more than 10 years after the Decedent's death based on S.C. Code § 62-3-108. Because of the fraudulent concealment of the will, the court found that good cause existed to re-open the estate and that the 10 year bar in § 62-3-108 didn't apply[2]. The issue of who the testator wanted to take under her will was not at issue. Questions about who the actual beneficiaries were under the whited out portion of the will were never litigated or argued before the Probate Court nor was this issue argued or discussed in the briefs or opinions in the Circuit Court and the Court of Appeals leading up to the 2011 Court of Appeals order.

Generally speaking, the question of the testator's intent doesn't arise until a will has been accepted as genuine by the Probate Court. This is because the testator's intent would be irrelevant if a will is not even accepted by the Probate Court. Until September 4, 2015, the will had never previously been offered for probate. As a result, the Children had never before had the ability to challenge its validity or to raise issues concerning the testator's intent. This was one factor in the Court of Appeals' 2021 ruling that the Children had timely filed a petition for formal probate challenging the validity of the will. (See 2021 Court of Appeals order).

At the November 9, 2016 hearing, *both* counsel for Children and counsel for Grandchildren argued that this was the first time the validity of the will had been raised. In support of his

[2] Appellants are not asking the Supreme Court to consider its arguments related to §62-3-108. Appellants concede that argument related to §62-3-108 was before the court for the 2011 Court of Appeals decision and having been unappealed, is now law of the case.

timeliness argument, Counsel for *Grandchildren* states, "This is the first time that there's been any suggestion or challenge as to the validity or acceptability of this particular Last Will and Testament." (R. p. 538, ll. 11-14). He goes on to state, "And I will – I will note for the record at no point in the 11-and-a-half year history of this case has anyone challenged what transpired. The issues have always been legal issues, as to whether or not the respondents, or now the petitioners, are barred by time, by the sequence of events. *But at no time has there been any argument that the Will isn't the Last Will and Testament of Lucinda Pringle...*". (emphasis added) (R. p. 541, ll. 8-15). In an effort to make his timeliness argument, opposing counsel is essentially making the Children's case for why the testator's intent was not before the Court of Appeals in 2011 and that the statements in that opinion on that subject must be dicta.

In addition, to find that the 2011 opinion determined who the rightful heirs are would mean that the Children never had the opportunity to present evidence and argue that issue thereby depriving them of their due process rights on that issue. See *In re Estate of King*, 156 N.E.3d 220, 98 Mass.App.Ct. 332 (Mass. App. 2020). The Children have never had their day in court on this issue.

This finding is also inconsistent with the Court of Appeals' ruling on the timeliness issue. The only way the court in 2011 could have ruled on these issues and it not be dicta is if these issues had been previously raised and ruled on. While the Children agree with the Court of Appeals' ruling that their February 4, 2016 petition was timely, if it was filed timely, then it is logically inconsistent to rule that the same issues raised in that petition had previously been raised, ruled on, appealed and ruled on by the Court of Appeals in 2011.

In conclusion, the issue of the testator's intent was not and could not have been before the Court of Appeals in 2011 as the will had not even been offered, much less proved and accepted by

the court prior to 2011. Counsel for *both parties* have argued the issue of the validity of the will and the testator's intent had not been raised prior to the filing of the February 4, 2016 petition. As a result, these issues were not necessary to the Court of Appeals decision in the 2011 opinion and therefore, dicta. With this language being dicta, this court should accept this case, reverse the Court of Appeals on this issue and find that the will cannot be probated since the identity of the beneficiaries in the will has been altered from its original state and the testator's true intent as to who is to inherit is unknown. Because the will cannot be probated, the Supreme Court should find that the estate should proceed as an intestate estate.

B. Even if the 2011 Court of Appeals opinion related to who should take is considered law of the case, the 2011 Court of Appeals opinion is silent on what property is to be devised meaning that the law of the case doctrine did not prevent the Court of Appeals from ruling on this issue in its 2021 opinion.

Even if the 2011 Court of Appeals opinion is found to be law of the case, as the court notes in its 2011 decision, the 2011 opinion is limited. It only holds that Decedent intended Evelina Brown Moses, Thomas Brown, and Rebecca Patricia Brown to inherit from her will. There is no reference in the 2011 Court of Appeals opinion as to what property the Decedent intended these three heirs to inherit. (*See 2011* Opinion Court of Appeals, R. pp. 24-28). This is of critical importance since the portion of the will indicating the property to be devised was admitted by all parties to have been whited out and typed over. In other words, the property the decedent wanted to be inherited was not shown on the will presented to the court – it showed the property Emma Smalls wanted to be inherited. Since Emma Smalls needed the real property to be devised to her to make a claim on the property insurance, it is unknown if the original will devised the real property or if Emma Smalls added the real property to suit her insurance needs. Since the portion

of the will devising Decedent's property was altered, it would be pure speculation as to what property, real or personal, the Decedent intended to devise, which is prohibited by *Cornelson v. Vance*, 220 S.C. 47, 66 S.E.2d. 421 (1951).

Since there is no residuary clause in Decedent's will, this is determinative of who will take the Property. Even if the heirs that take under the will have been determined, the property they receive has not and the Court of Appeals did not rule on this issue in its 2011 opinion or in its 2021 opinion. If it can't be determined that the Property was part of the original will in the whited out section, then the Property does not pass to the beneficiaries of the will, but passes under the law of intestate succession pursuant to S.C. Code § 62-2-101.

Since there have been no prior court rulings on the issue of what property was devised, the Court of Appeals erred in failing to reach a decision on this issue and the Supreme Court should accept this case to correct this error. The Supreme Court should reverse the Court of Appeals on its holding that the 2011 Court of Appeals decision found that the property to be devised was decided in the 2011 opinion and rule that the issue of what property is being devised had never been previously ruled on by the Court of Appeals and is ripe for ruling. The Supreme Court should rule that because both parties agree that the property being devised in the will is not the original writing of testator, but that of Emma Smalls, the will cannot be probated and the Property must pass through the terms of intestate succession pursuant to S.C. Code § 62-2-101.

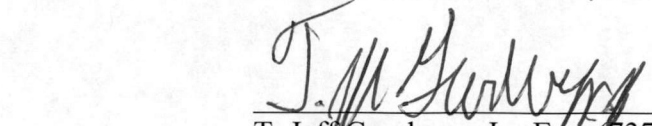
In addition, another reason the Supreme Court should accept this case for consideration is the novelty of this issues involved. There is no known case law in South Carolina on the issue of allowing a will that all parties agree the parties the property being devised to and the identification of the property being devised was altered being allowed for probate. In fact, there is little case law on what wills can be accepted, the manner in which to challenge the will and the proper manner to

prove a will. This case has many aspects of the proper way to probate and challenge a will that there is no case law addressing. The case has been described as a classic law school exam question making it the perfect case to get direction from the Supreme Court on.

CONCLUSION

The Court of Appeals erred as a matter of law in granting a new evidentiary hearing to Respondents when Respondents were not denied due process at the November 9, 2016 evidentiary hearing. The Court of Appeals erred as a matter of law in finding that the language in the 2011 Court of Appeals decision related to the intent of the testator acted as law of the case when this language can only be fairly characterized as dicta. Even if the language in the 2011 Court of Appeals case is not considered dicta, nothing in the 2011 Court of Appeals decision addresses the issue of what property the testator intended to devise meaning this issue had not yet been ruled on. The Supreme Court should accept this case and rule that the will cannot be probated because the property to be devised section of the will has been whited out and typed over. In addition, due to the novelty of these issues and the lack of case law on these issues in South Carolina, the Supreme Court should take this opportunity to judicially address these issues.

GOODWYN LAW FIRM, LLC



T. Jeff Goodwyn, Jr., Esq. (73789)
2309 Devine Street
Columbia, S.C. 29205
(803) 251-4517
JGoodwyn@Goodwynlaw.com
Attorney for Petitioner/Appellant

Dated: December 17, 2021