IN THE SUPREME COURT OF MISSISSIPPI

THE ESTATE OF SAMUEL A. FARR,
DECEASED — APPELLANT

VS. — CAUSE NUMBER 2010-TS-01438

NANCY WIRICK — APPELLEE

APPEAL
FROM THE CHANCERY COURT OF CHICKASAW COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEE, NANCY WIRICK

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Honorable Kenneth Burns, Chancery Court Judge, Chickasaw County, Mississippi;
2. Estate of Samuel A. Farr, deceased, Appellant;
3. Nancy Wirick, Appellee;
4. Stephen T. Bailey, Evans & Bailey, PLLC, Attorney for Appellee;
5. Mark N. Halbert, J. Andrew Hughes, P.A., Attorney for Appellant;
6. John P. Fox, Fox Law Firm, Attorney for Appellant;
7. Prospect Methodist Church, c/o Bishop Hope Morgan Ward, Contingent Beneficiary under the purported Codicil to the Last Will and Testament of decedent Samuel A. Farr.

STEPHEN T. BAILEY (Miss. Bar No. 9938)
Attorney of Record for Appellee, Nancy Wirick

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INTRODUCTION

This case consists of an estate matter which involves the contest of a purported Will and purported Codicil and is currently on appeal from the Chancery Court of Chickasaw County, Mississippi, First Judicial District. At the trial court level, summary judgment was granted in favor of the Appellee, Nancy Wirick (hereinafter "Nancy"), based upon the finding of the trial court that the purported Will and purported Codicil of her father, Samuel A. Farr, both type-written, non-holographic documents, were not properly attested by at least two (2) or more credible witnesses as required and mandated by both Mississippi Code Annotated Section 91-5-1 (1972, as amended) and long-standing Mississippi case law. As such, the purported Will and purported Codicil at issue were deemed by the trial court to be invalid, as a matter of law.

At the time of his death, Samuel A. Farr had only one (1) child, Nancy, and was not married. Therefore, after service of process was obtained on all interested parties, Nancy was adjudicated to be the sole heir at law of the decedent. The ruling of the trial court should be affirmed due to the facts that the purported Will and purported Codicil at issue were not properly attested as required by statute and case law; the arguments presented on appeal by the estate are largely based upon documents which were properly excluded by the trial court; and because neither the estate, nor the executrix, possess sufficient legal standing in which to prosecute this appeal.

STATEMENT OF THE ISSUES

(1) Whether summary judgment was appropriate where the purported Will and purported Codicil at issue were not properly attested by at least two (2) credible witnesses according to Mississippi law.

(2) Whether the estate is prohibited from presenting arguments on appeal based upon documents which were properly excluded by the trial court.

(3) Whether the estate and/or the executrix of the estate, with no direct pecuniary interest in the outcome of this case, possess sufficient legal standing in which to prosecute this appeal.

STATEMENT OF THE CASE

I. The Purported Will.

The purported Last Will and Testament of Samuel A. Farr is a two-page, type-written, non-holographic document which is allegedly dated April 1, 2009.[1] At the bottom of the first page, the following language prominently appears: **"Page One of Two Pages of the Last Will and Testament of Samuel A. Farr."**[2] The purported signature of Samuel A. Farr is located near the bottom, right-hand corner of the first page.[3] Two signature lines, which are labeled "Witnesses," are located near the bottom, left-hand corner of the first page.[4] The purported signature of Roger McGrew is contained on one of the two required witness signature lines, and the remaining signature line for the second attesting witness is completely blank.[5] Roger McGrew was the only purported attesting witness to allegedly execute the first page of the

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[1] Record Excerpts of Appellee, Tab C, Pages 7-8.

[2] Record Excerpts of Appellee, Tab C, Page 7. (Emphasis added).

[3] Id.

[4] Id.

[5] Id.

purported Will.[6]

At the bottom of the second page of the purported Will, the following language prominently appears: **"Page Two and the Last Page of the Last Will and Testament of Samuel A. Farr."**[7] Toward the bottom of the second page, a paragraph is entitled "Attestation Clause," and under said paragraph, two signature lines are labeled "Witnesses," one for each attesting witness, along with a corresponding line labeled "addresses" for each attesting witness.[8] The language contained in the "Attestation Clause" is, as follows: "[t]he foregoing instrument was, on the day of year therein set forth, published and declared by Samuel A. Farr to be his Last Will and Testament in our presence and we, at his request, have subscribed our names as witnesses in his presence and in the presence of each other."[9] The purported signature of Roger McGrew is contained on one of the two required attesting witness signature lines, along with his purported address on the corresponding address line.[10] The remaining signature line and corresponding address line for the second attesting witness are completely blank.[11] In summary, the only two names allegedly signed on the entire self-described, two-page purported Will are that of the deceased, Samuel A. Farr, and one (1) purported attesting witness, Roger McGrew.[12]

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[6] Id.

[7] Record Excerpts of Appellee, Tab C, Page 7. (Emphasis added).

[8] Id.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

According to the general terms of his purported Will, Samuel A. Farr devised and bequeathed all of his property, whatsoever kind, to his executrix or executor to hold in a private trust for the exclusive use and benefit of his only child, Nancy.[13] From this property, he further directed that the executrix or executor was to pay unto Nancy the sum of two thousand dollars ($2,000.00) per month, plus an annual increase for cost of living, where applicable.[14] Nancy is the sole and only beneficiary indicated in any way whatsoever in this purported Will.[15]

There is a separate and distinct document which was filed with the purported Will at the time of probate by the estate which is entitled "Affidavit of Witnesses" and which, for purposes of clarity only, is further described in this section.[16] This document has two lines in the body of the single paragraph wherein the identity of the two required attesting witnesses for the separate and distinct purported Will are to be indicated, along with the standard language normally incorporated in such a witness affidavit as prescribed by Mississippi Code Annotated Section 91-7-9 (1972, as amended).[17] No such attesting witness names are listed in the body of this document; but instead, the words "Chickasaw" and "Mississippi" have been hand-written on the aforementioned lines.[18] Next, similar to that as described previously in the purported Will, toward the middle of the document, two signature lines are labeled "Witnesses," one for each

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[13] Record Excerpts of Appellee, Tab C, Page 7-8.

[14] Id.

[15] Id.

[16] Record Excerpts of Appellee, Tab D, Page 9.

[17] Id.

[18] Id.

attesting witness, along with a corresponding line labeled "addresses" for each attesting witness.[19] Again, as with the purported Will, the alleged signature of Roger McGrew is contained on one of the two witness signature lines, along with his purported address on the corresponding address line. The remaining signature line and corresponding address line for the second attesting witness are completely blank.[20] The purported signature of alleged attesting witness Roger McGrew appears to have been notarized at the bottom of the page by Carolyn Davis on April 1, 2009.[21] No purported subscribing witness, other than Roger McGrew, is indicated on either the two-page purported Will or the corresponding, yet separate and distinct, one-page "Affidavit of Witnesses," as previously described herein.[22]

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[19] Id.

[20] Id.

[21] Id.

[22] Record Excerpts of Appellee, Tab C, Pages 7-8; Tab D, Page 9.

Last Will and Testament

OF

SAMUEL A. FARR

I, Samuel A. Farr, being an adult resident citizen of the First Judicial District of Chickasaw County, Houston, Mississippi, being above the age of twenty-one years and of sound and disposing mind and memory, do hereby make, publish and declare this to be my Last Will and Testament, and I do hereby revoke any and all other Wills and Codicils heretofore made by me.

ARTICLE I: I do hereby constitute and appoint Ramona Walls, Certified Public Accountant, of Houston, Mississippi, as Executrix of this my Last Will and Testament and I further direct that no bond be required of said Executrix. I hereby expressly give and grant unto my said Executrix all the rights, powers and discretions herein given to her as Trustee of the Trust hereinafter created.

In the event that the said Ramona Walls is unable or unwilling to serve in the capacity as Executrix, I hereby constitute and appoint Dr. Rex Collins to be the Executor of my estate.

ARTICLE II: I hereby direct that my Executrix or Executor shall pay all my just debts which may be probated, registered and allowed against my estate.

ARTICLE III: I hereby will, devise and bequeath all of my property, of whatsoever kind or character and wheresoever situated, which I own at the time of my death, to my Executrix or Executor in Trust for the use and benefit of my child, Nancy.

ARTICLE IV: I direct that my Executrix or Executor pay unto my daughter, Nancy, the sum of $2,000 per month. This sum may be increased annually based on the annual cost of living increase as published each year by the federal government.

ARTICLE V: The Executrix/Trustee shall have full power and authority to sell, transfer, convey, lease and dispose of Trust property upon such terms and in such manner and for such prices as the Trustee may deem proper. The said Executrix/Trustee may manage and control Trust property with power to invest and reinvest the same in such property as she/he shall in her/his sole discretion,

Samuel A. Farr
SAMUEL A. FARR

Witnesses

Last Will and Testament

OF

SAMUEL A. FARR

seem proper, and to do all things necessary or incidental to the investment or reinvestment of the Trust property of the estate and the collection of income therefrom. The Trustee may continue to hold such property as I have and retain any and all of the investments, securities and property which may come into the hands of the Trustee by virtue of this Will.

ARTICLE VI: The Trust for the use and benefit of my daughter, Nancy, is a private Trust and the Trustee shall not be required to obtain orders or approval of any court for the exercise of any power or discretion herein contained. The Trustee shall not be required to enter into any bond as Trustee or to return to any court any periodic formal accounting of the administration of the Trust but, upon request, from my daughter, the Trustee shall render an annual account to said daughter.

IN WITNESS WHEREOF, I have subscribed my name, this the 1st day of April ____ 2009

Samuel A. Farr
SAMUEL A. FARR

ATTESTATION CLAUSE

The foregoing instrument was, on the day of year therein set forth, published and declared by Samuel A. Farr to be his Last Will and Testament in our presence and we, at his request, have subscribed our names as witnesses in his presence and in the presence of each other.

Roger [illegible] ____ 101 CR 97 Hesson, MS
Witnesses Address

Page Two and the Last Page of the Last Will and Testament of Samuel A. Farr

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II. The Purported Codicil.

The purported Codicil to the Last Will and Testament of Samuel A. Farr is a one-page, type-written, non-holographic document which is allegedly dated April 23, 2009. At the bottom of the single page, the following language prominently appears: **"Page One and the Last Page of the Codicil to the Last Will and Testament of Samuel A. Farr".**[23] The plain language of the purported Codicil clearly indicates that the previous purported Will was witnessed by only one (1) attesting witness, as follows: **"[w]hereas, I, Samuel A. Farr, on the 1st day of April, 2009, executed my Last Will and Testament in the presence of Roger McGrew, who signed said Will and Testament as witness, and I am desirous of adding an additional provision in said Will and, I therefore, make and publish this Codicil to the Last Will and Testament, and I also republish all the terms of said Will not in conflict with this Codicil."**[24]

The purported signature of Samuel A. Farr is located toward the middle of the single-page document.[25] Additionally, two signature lines which are labeled "Witnesses" are located on the left side of the page.[26] The purported signature of John P. Fox is contained on one of the two required attesting witness signature lines, and, as with the purported Will, the remaining signature line for the second attesting witness is completely blank.[27] Toward the bottom of the page, a paragraph is entitled "Attestation Clause," and under said paragraph, two signature lines

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[23] Record Excerpts of Appellee, Tab E, Page 10. (Emphasis added).

[24] Id (Emphasis added).

[25] Id.

[26] Id.

[27] Id.

are labeled "Witnesses," one for each attesting witness, along with a corresponding line labeled "addresses" for each attesting witness.[28] The language contained in the "Attestation Clause" is, as follows: "[t]he foregoing instrument was, on the day of year therein set forth, published and declared by Samuel A. Farr to be the Codicil to his Last Will and Testament in our presence and we, at his request, have subscribed our names as witnesses in his presence and in the presence of each other."[29] The purported signature of John P. Fox is contained on one of the two witness signature lines, along with his purported address on the corresponding address line.[30] The remaining signature line and corresponding address line for the second attesting witness, as with the purported Will, are completely blank.[31] In summary, the only two names allegedly signed on the entire self-described, one-page purported Codicil are that of the deceased, Samuel A. Farr, and one (1) purported attesting witness, John P. Fox.[32]

According to the general terms of the purported Codicil, in the event that Nancy, the sole beneficiary of the original purported Will, should die with funds still remaining in her private trust, then those such funds, if any, should pass equally to Prospect Methodist Church and Prospect Methodist Church Cemetery Fund.[33]

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[28] Id.

[29] Id.

[30] Id.

[31] Id.

[32] Id.

[33] Id.

There is a separate and distinct document which was filed with the purported Codicil by the estate at the time of probate which is entitled "Affidavit of Witnesses" and which, for purposes of clarity only, is further described in this section.[34] This document has two lines in the body of the single paragraph wherein the identity of the two required subscribing witnesses to the separate and distinct purported Codicil are to be indicated, along with the standard language normally incorporated in such a witness affidavit as prescribed by Mississippi Code Annotated Section 91-7-9 (1972, as amended).[35] The name of John P. Fox has been hand-written in the blank for the identity of first alleged attesting witness and the line for the identity of the second attesting witness is completely blank.[36] Next, toward the middle of the document, two signature lines are labeled "Witnesses," one for each attesting witness, along with a corresponding line for each attesting witness labeled "addresses".[37] Similar to the witness affidavit for the purported Will, the alleged signature of John P. Fox is contained on one of the two witness signature lines, along with his purported address on the corresponding address line.[38] The remaining signature line and corresponding address line for the second attesting witness are completely blank.[39] The purported signature of alleged attesting witness John P. Fox appears to have been notarized at the

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[34] Record Excerpts of Appellee, Tab F, Page 11.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id.

bottom of the page by Carmen O. Booth on April 23, 2009.[40] No purported subscribing witness, other than John P. Fox, is indicated on either the one-page purported codicil or the corresponding, yet separate and distinct, one-page "Affidavit of Witnesses", as previously described herein.[41]

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[40] Id.

[41] Record Excerpts of Appellee, Tab E, Page 10; Tab F, Page 11.

[illegible]

CODICIL TO LAST WILL AND TESTAMENT OF SAMUEL A. FARR

STATE OF MISSISSIPPI
COUNTY OF CHICKASAW

Whereas, I, Samuel A. Farr, on the 1st day of April, 2009, executed my Last Will and Testament in the presence of Roger McGrew, who signed said Will and Testament as witness, and I am desirous of adding an additional provision in said Will and, I therefore, make and publish this Codicil, to be Last Will and Testament, and I also republish all the items of said Will not in conflict with this Codicil.

I.

In my Will, I have made provisions for my daughter to be paid, after my death, the sum of $2,000 per month, by the Executor, together with cost of living increase annually.

In the event my daughter, Nancy, dies and there are still funds left in the Trust for her use and benefit, I specify that these funds shall be divided equally between Prospect Methodist Church and Prospect Methodist Church Cemetery Fund.

WITNESS MY SIGNATURE, this the 23rd day of April, 2009.

Samuel A. Farr
SAMUEL A. FARR

Witnesses

ATTESTATION CLAUSE

The foregoing instrument was, on the day of year therein set forth, published and declared by Samuel A. Farr to be the Codicil to his Last Will and Testament in our presence and we, at his request, have subscribed our names as witnesses in his presence and in the presence of each other.

Houston, MS 38851

Witnesses Addresses

Page One and the Last Page of the Codicil to Last Will and Testament of Samuel A. Farr

AFFIDAVIT OF WITNESSES

STATE OF MISSISSIPPI
COUNTY OF CHICKASAW

This day personally appeared before me, the undersigned authority in and for said State and County, John P. Fox and ________, respectively, whose names appear as subscribing witnesses to the foregoing and attached instrument of writing, who after having been duly sworn, say on oath that on the 23rd day of April, 2009, in their presence, Samuel A. Farr signed his name thereto, and in their presence declared the same to be the Codicil to his Last Will and Testament; that at his request, in their presence, and in the presence of each other, the said affiants subscribed their names thereto as witnesses to its execution and publication; that the said Samuel A. Farr, on the 23rd day of April, 2009, was of lawful age, was of sound and disposing mind and memory, and there was no evidence of undue influence.

John P. Fox — Houston, Ms 38851

Witnesses — Addresses

Sworn to and subscribed before me, this the 23rd day of April, 2009

Carmen O. Boot
NOTARY PUBLIC

My commission expires: ________

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III. The Underlying Proceedings.

Samuel A. Farr died of natural causes on December 29, 2009 with a fixed place of residence in Chickasaw County, Mississippi.[42] Subsequently, a Petition for Probate of Will and for Letters Testamentary was filed by Ramona Walls, who was named as executrix of the estate in the purported Last Will and Testament of Samuel A. Farr.[43] According to the said petition, the decedent executed his purported Last Will and Testament on April 1, 2009 "...in the presence of Roger McGrew..."[44] Additionally, the petition alleges that the decedent also executed a purported Codicil to the Will on April 23, 2009 "...in the presence of John P. Fox..."[45] The petition then repeats the allegations concerning the purported Codicil, as follows: "...[t]hat on April 23, 2009, the said Samuel A. Farr executed a Codicil to Last Will and Testament in the presence of John P. Fox, Houston, Mississippi 38851, attesting witness."[46] This petition, which was prepared by the Fox Law Firm and reviewed and signed by the purported executrix, does not mention the name of any other person or individual as a potential attesting witness to either the purported Will or purported Codicil, other than that of Roger McGrew, as an alleged attesting witness of the purported Will and John P. Fox, as an alleged attesting witness of the purported Codicil.[47]

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[42] Record Excerpts of Appellee, Tab G, Page 12.

[43] Record Excerpts of Appellee, Tab G, Pages 12-16.

[44] Record Excerpts of Appellee, Tab G, Page 12. (Emphasis added).

[45] Id.

[46] Record Excerpts of Appellee, Tab G, Pages 12-13.

[47] Record Excerpts of Appellee, Tab C, Pages 7-8; Tab E, Page 10; Tab G, Pages 12-16.

Based upon the foregoing petition, an Order of Probate and Letters Testamentary were issued by the trial court on January 13, 2010.[48] On or about January 21, 2010, Nancy, by and through her undersigned legal counsel, filed a Petition to Contest the Purported Last Will and Testament of Samuel A. Farr and the Purported Codicil to the Last Will and Testament of Samuel A. Farr, and for Other Relief.[49] The said petition was filed based upon the fact that neither the purported Will, nor the purported Codicil, were properly attested by two (2) or more credible witnesses as required and mandated by both Mississippi Code Annotated Section 91-5-1 (1972, as amended) and the long-standing case law in this state and, further, because it was the position of the petitioner that, at the time of the alleged execution of the purported Will and purported Codicil, Samuel A. Farr was suffering from various mental and physical ailments which prevented him from forming the requisite testamentary capacity and was the subject of undue influence (based upon the ruling of the trial court, for purposes of this appeal, the issues of testamentary capacity and undue influence are not germane).[50] The petition requested that the trial court find that the purported Will and purported Codicil, for the reasons set forth previously, were invalid, as a matter of law, and that Nancy, as the only child of the unmarried decedent, be adjudicated, at the appropriate time, to be the sole heir at law of her father and his estate.[51]

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[48] Record Excerpts of Appellee, Tab H, Page 17-18 and Clerk's papers, Page 13.

[49] Record Excerpts of Appellee, Tab I, Pages 19-25.

[50] Id.

[51] Id.

Subsequently, a response was filed in behalf of the estate by Attorney John P. Fox and certain discovery was conducted by both parties.[52] Thereafter, an Order Setting Cause for Hearing, Enjoining Disposal of Estate Assets and Granting Other Relief was entered by the trial court on February 18, 2010.[53] In addition to the obvious relief indicated, a primary purpose of the order was to set a return date in order that service of process could be obtained on the contingent beneficiary under the purported Codicil, Prospect Methodist Church, and any potential unknown heirs of the decedent.[54] As such, the return date indicated in the order was "...for the purpose of having all necessary parties before the Court."[55] Nancy, by and through her legal counsel, as admitted in the Brief of Appellant, then perfected service of process on Prospect Methodist Church, and, through publication, on all potential unknown heirs of the decedent.[56] On the hearing date of April 21, 2010, neither Prospect Methodist Church, nor any potential unknown heirs at law of the decedent, either appeared or filed any written response and, therefore, an order was subsequently entered by the trial court finding that all such persons or entities were precluded from making a claim to be an heir at law of the estate and that Nancy was adjudicated to be the sole heir at law of her father and his estate.[57]

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[52] Clerk's Papers, Pages 37-48, 51-57, 63-64, 70-76 and 79-80.

[53] Record Excerpts of Appellee, Tab J, Pages 26-27.

[54] Id.

[55] Id.

[56] Brief of Appellant Samuel A. Farr, Page 10.

[57] Record Excerpts of Appellee, Tab K, Pages 28-29.

All motions in the case at bar were set for hearing by the trial court on July 16, 2010 and all motions were ordered to be filed no later than ten (10) days prior to the hearing date.[58] On or about June 25, 2010, Nancy, by and through her legal counsel, filed her Consolidated Motion for Summary Judgment and Memorandum Brief in Support of Summary Judgment.[59] The summary judgment motion was primarily based upon the fact that neither the purported Will, nor the purported Codicil, were properly witnessed by at least two (2) attesting witnesses as required and mandated by both Mississippi Code Annotated Section 91-5-1 (1972, as amended) and by long-standing Mississippi case law.[60]

As indicated on the Trial Docket Entries provided by the clerk of the trial court, prior to the hearing date of July 16, 2010, no written response or any supporting affidavits concerning the outstanding summary judgment motion had been filed on behalf of the estate, the executrix of the estate, Prospect Methodist Church, or any other potential heir at law.[61] At the hearing on the summary judgment motion, during oral argument, John P. Fox, attorney for the estate, attempted to introduce an affidavit from each of the notaries public which allegedly notarized the separate "Affidavit of Witnesses" for both the purported Will and the purported Codicil.[62] Although both documents had apparently been signed, only one such affidavit had been notarized.[63] Upon

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[58] Record Excerpts of Appellee, Tab K, Pages 28-29.

[59] Record Excerpts of Appellee, Tab L, Pages 30-38.

[60] Id.

[61] Record Excerpts of Appellee, Tab A, Pages 1-4.

[62] Court Reporter's Transcript, Pages 10-15.

[63] Id.

timely objection by the undersigned legal counsel that the aforementioned affidavits had not been filed or produced prior to the date and time of the hearing, the trial court properly refused to allow the documents to be introduced as evidence and, instead, simply allowed the same to be received, for purposes of the record, for identification only.[64] It is important to note that the estate did not argue in its brief that the trial court committed error in excluding the proposed affidavits of the notaries public at the hearing in this matter.[65] At the close of the hearing, the trial court correctly ruled that there were no genuine issues of material fact present in the case at bar and that Nancy was entitled to summary judgment as a matter of law.[66] The trial court concluded that the purported Will and purported Codicil at issue had not been properly attested as mandated by Mississippi Code Annotated Section 91-5-1 (1972, as amended) and were, therefore, invalid as a matter of law; that, as a result, Samuel A. Farr died intestate; and that Nancy was the sole heir at law of her father and his estate.[67] After various post-judgment motions filed by the estate were overruled, the appeal which is currently before the Court was perfected.[68]

SUMMARY OF THE ARGUMENT

At the close of the hearing on the summary judgment motion filed by Nancy, the trial court correctly concluded that there were no genuine issues of material fact present in the case and that Nancy was, therefore, entitled to a judgment, as a matter of law. A complete *de novo*

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[64] Court Reporter's Transcript, Pages 13-15.

[65] Brief of Appellant Samuel A. Farr, Pages 1-25.

[66] Record Excerpts of Appellee, Tab B, Pages 5-6.

[67] Id.

[68] Clerk's Papers, Pages 164-166.

review of the record will indicate that the purported Will and purported Codicil at issue in this matter clearly were not properly attested by at least two (2) credible witnesses as required by both Mississippi Code Annotated Section 91-5-1 (1972, as amended) and long-standing Mississippi case law. As such, both the purported Will and purported Codicil are invalid, as a matter of law. As a result, the trial court correctly further found that the decedent, therefore, died intestate and that Nancy was the sole heir at law of her father and his estate. Based upon the foregoing, the rulings of the trial court should be affirmed.

ARGUMENT

I. Standard of Review.

The Mississippi Supreme Court and the Mississippi Court of Appeals apply a *de novo* standard of review concerning an appeal resulting from either the granting or denial of summary judgment by the lower court. *McMillan v. Rodriguez*, 823 So.2d 1173 (Miss. 2002); *O.W.O. Investments, Inc. v. Stone Investment Co.*, 32 So.3d 439 (Miss. 2010); and *Kulper v. Turnabine*, 20 So.3d 658 (Miss. 2009). A trial court must grant a motion for summary judgment "...if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the nonmoving party is entitled to judgment as a matter of law." *M.R.C.P. 56(c).*

In determining whether the trial court properly granted summary judgment, the appellate courts in Mississippi will view the facts and evidence before the lower court in the light most favorable to the nonmoving party. *McMillan v. Rodriguez*, 823 So.2d 1173 (Miss. 2002); *O.W.O. Investments, Inc. v. Stone Investment Co.*, 32 So.3d 439 (Miss. 2010); and *Kulper v. Turnabine*, 20 So.3d 658 (Miss. 2009). Summary judgment is appropriate where the nonmoving

party has failed to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Id.* Further, in order to withstand summary judgment, the nonmoving party must rebut such motion for the same with significant probative evidence showing that there are genuine issues for trial. *Borne v. Dunlop Tire Corp.*, 12 So.3d 565 (Miss. Ct. App. 2009). Lastly, in reviewing the granting or denial of a summary judgment, the appellate court may only examine and analyze the evidence which was properly before the trial court at the time of the said motion and resulting decision. *Mitchell v. Nelson*, 830 So.2d 635 (Miss. 2002); and *Brocato v. Mississippi Publishers Corp.*, 503 So.2d (Miss. 1987).

Despite the stated *de novo* standard of review applicable in summary judgment appeals, it would also be important to note that in reviewing cases involving the contest of a purported Will or purported Codicil, it has long been established that chancellors have broad discretion and their findings should only be disturbed on appeal if the actions were "...manifestly wrong, constituted an abuse of discretion, or represented the application of an erroneous legal standard". *Estate of Grantham v. Roberts*, 609 So.2d 1220 (Miss. 1992); *In re: Estate of McQueen*, 918 So.2d 864 (Miss. Ct. App. 2005). In those such cases, when a chancellor's findings are supported by substantial, credible evidence, a reversal should not be warranted. *Estate of Grubbs*, 753 So.2d 1043 (Miss. 2000). Therefore, even though the case at bar, as stated above, primarily surrounds the review of the granting of summary judgment, it is the position of the Appellee that this Court should also be mindful of the latitude normally granted to chancellors in making findings in the contest of a purported Will or purported Codicil.

II. The Purported Will and Purported Codicil were not Properly Executed.

As stated above, this case involves the review of the granting of summary judgment by the Chancery Court of Chickasaw County, Mississippi in finding that the purported Last Will and Testament of Samuel A. Farr and the purported Codicil to the Last Will and Testament of Samuel A. Farr, both of which are type-written, non-holographic documents, were not properly executed and were, therefore, invalid as a matter of law.[69] It is the position of the Appellee that this appeal and the review of the decision of the trial court for summary judgment, while certainly involving issues of law, will be largely fact-driven. In other words, the purported Will and purported Codicil are of primary importance in this matter and will, in effect, speak for themselves.

The long-standing case law in Mississippi is clear that a type-written, non-holographic purported Will or purported Codicil, in order to be valid, must be signed by the testator and must be attested by two (2) or more credible witnesses. *Batchelor v. Powers*, 348 So.2d 776 (Miss. 1977); and *In re: Estate of Thomas*, 962 So.2d 141 (Miss. Ct. App. 2007). To that end, Mississippi Code Annotated Section 91-5-1 (1972, as amended) also provides, as follows:

> Every person eighteen (18) years of age or older, being of sound and disposing minds, shall have power, by last will and testament, or codicil in writing, to devise all the estate, right, title, and interest in possession, reversion, or remainder, which he or she hath, or at the tie of his or her death shall have, of, in, or to lands, tenements, hereditaments, or annuities, or rents charged upon issuing out of then, or goods and chattels, and personal state of any description whatever, provided such last will and testament, or codicil, be signed by the testator or testatrix, or by some other person in his or her presence and by his or her express direction. **Moreover, if not wholly written and subscribed by himself or herself, it shall be attested by two (2) or more credible witnesses in the presence of the testator or testatrix. (Emphasis added).**

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[69] Record Excerpts of Appellee, Tab B, Pages 5-6.

The Mississippi Supreme Court has examined the statutory meaning of "attestation," as contemplated in Mississippi Code Annotated Section 91-5-1, to include "...not only the mental act of observation, **but also the manual one of subscription**". *Batchelor v. Powers*, 348 So.2d 776 (Miss. 1977); *In re: Estate of Thomas*, 962 So.2d 141 (Miss. Ct. App. 2007); and *In re: Estate of Griffith*, 2008-IA-01557-SCT (MSSC) (emphasis added). Therefore, in order for a purported Will or purported Codicil to be valid, it must not only be witnessed by two (2) or more credible persons, but those witnesses must also attest to the Will or Codicil in the presence of the testator. *Id.* Otherwise, as in the case at bar, the purported Will or purported Codicil is invalid, as a matter of law. *Id.*

As stated previously herein, the purported Will and purported Codicil at issue in this case clearly state the length of each such document at the bottom each page, the purported Will being two (2) total pages in length and the purported Codicil being one (1) total page in length.[70] The first page of the purported Will, which is titled at the bottom as "Page One of Two Pages of the Last Will and Testament of Samuel A. Farr," contains the alleged signature of Roger McGrew on one of two lines labeled "Witnesses."[71] The second line labeled "Witnesses" is blank.[72] Other than the purported signatures of Roger McGrew and the decedent, Samuel A. Farr, no other signatures or any other mention or notation of any other purported attesting witness is contained on this page.[73]

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[70] Record Excerpts of Appellee, Tab C, Pages 7-8; Tab E, Page 10.

[71] Record Excerpts of Appellee, Tab C, Page 7.

[72] Id.

[73] Record Excerpts of Appellee, Tab C, Page 8.

The second page of the purported Will, which is titled at the bottom as "Page Two and the Last Page of the Last Will and Testament of Samuel A. Farr," contains the alleged signature of Roger McGrew on one of two lines labeled "Witnesses" as contained under the paragraph heading "Attestation Clause."[74] The second line labeled "Witnesses" is blank.[75] Other than the purported signatures of Roger McGrew and the decedent, Samuel A. Farr, no other signatures or any other mention or notation of any other purported attesting witness is contained on this page.[76]

The purported Codicil, as stated previously, is one (1) page in length and is titled at the bottom as "Page One and the Last Page of the Codicil to the Last Will and Testament of Samuel A. Farr."[77] The document contains two (2) signature lines which are labeled "Witnesses," one of which has been signed by John P. Fox and the other of which is blank.[78] Similarly, the document contains a labeled "attestation clause" which has two (2) signature lines labeled "Witnesses" and two (2) corresponding lines labeled "Addresses."[79] Again, only the signature of John P. Fox and his corresponding address have been completed, with the remaining witness signature line and corresponding address line both being blank.[80] Other than the purported signatures of John P. Fox and the decedent, Samuel A. Farr, no other signatures or any other mention or notation of

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[74] Id.

[75] Id.

[76] Id.

[77] Record Excerpts of Appellee, Tab E, Page 10.

[78] Id.

[79] Id.

[80] Id.

any other purported attesting witness is contained on this page.[81]

Although these documents will certainly speak for themselves, the fact that the purported Will and purported Codicil were each only attested by one (1) witness is confirmed on at least two (2) other independent occasions, as follow:

(1) The Petition for Probate of Will and for Letters Testamentary provides as follows: "That on April 1, 2009, the said Samuel A. Farr executed a Last Will and Testament in the presence of Roger McGrew, 101 CR 97, Houston, MS; and on April 23, 2009, the said Samuel A. Farr executed a Codicil to Last Will and Testament in the presence of John P. Fox, Houston, Mississippi 38851, attesting witnesses."[82]

(2) The wording of the purported Codicil itself provides as follows: "Whereas, I, Samuel A. Farr, on the 1st day of April, 2009, executed my Last Will and Testament in the presence of Roger McGrew, who signed said Will and Testament as witness..."[83]

Clearly, the documents purporting to be the Last Will and Testament of Samuel A. Farr and the Codicil to the Last Will and Testament of Samuel A. Farr were only attested by one (1) witness. As such, both documents fail to meet the minimum requirements of Mississippi Code Annotated Section 91-5-1 (1972, as amended) and long-standing Mississippi case law that the documents must be attested by two (2) or more credible witnesses in the presence of the testator or testatrix. Therefore, the ruling of the trial court that the purported Will and purported Codicil were invalid, as matter of law, should be affirmed by this Court on appeal.

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[81] Id.

[82] Record Excerpts of Appellee, Tab G, Page 12.

[83] Record Excerpts of Appellee, Tab E, Page 10.

III. Summary Judgment is Appropriate in this Case.

Nancy filed her Consolidated Motion for Summary Judgment and Memorandum Brief in Support of Summary Judgment on or about June 28, 2010.[84] The said motion was based upon the fact that the purported Will and purported Codicil did not have at least two (2) attesting witnesses as required by law.[85] By order of the trial court, the summary judgment motion was set for hearing on July 16, 2010.[86]

The estate failed to file a formal written response to the summary judgment motion.[87] Instead, legal counsel for the estate simply appeared at the hearing and provided oral argument, while untimely attempting to introduce two (2) affidavits from the notaries public who allegedly witnessed the two "Affidavit of Witnesses," both separate and distinct documents from the purported Will and purported Codicil.[88] Upon timely objection by legal counsel for Nancy, the trial court correctly excluded the said affidavits as evidence and, instead, received them for identification purposes only.[89] As stated earlier, a simple review of the purported Will and Codicil clearly indicates that each had only one (1) attesting witness, thus creating the presumption that summary judgment was appropriate in that Nancy had met her burden of production, persuasion and proof that no genuine issues of material fact as to due execution were

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[84] Record Excerpts of Appellee, Tab L, Pages 30-38.

[85] Id.

[86] Record Excerpts of Appellee, Tab K, Pages 28-29.

[87] Record Excerpts of Appellee, Tab A, Pages 1-4.

[88] Court Reporter's Transcript, Pages 10-15.

[89] Court Reporter's Transcript, Pages 13-15.

in existence.[90] However, instead of attempting to rebut this presumption, as stated earlier, the estate failed to file any formal written response whatsoever.[91] The Mississippi Appellate Courts have been clear in the past that the nonmoving party in a summary judgment motion may not simply rest upon the mere allegations or denials of his pleadings, but must file a response to the summary judgment motion, by affidavits or otherwise, setting forth specific facts showing that there are genuine issues for trial. *Travis v. Stewart*, 680 So.2d 214 (Miss. 1996); *Milligan v. Milligan*, 956 So.2d 1066 (Miss. Ct. App. 2007); and *Magee v. Transcontinental Gas*, 551 So.2d 182 (Miss. 1989). Similarly, the Mississippi Supreme Court has stated that where nothing is furnished in opposition to a summary judgment motion which provides merit to the claims of the nonmoving party, then summary judgment is proper, as provided in Mississippi Rule of Civil Procedure 56(e). *Starnes v. City of Vardaman*, 580 So.2d 733 (Miss. 1991); *MISS CAL 204, Ltd. v. Upchurch*, 465 So.2d 326 (Miss. 1985); *Mississippi Rule of Civil Procedure 56(e)*. Based upon the showing of Nancy in her summary judgment motion that the said motion was warranted and the failure of the estate to file a written response or to produce any specific facts or evidence which would demonstrate genuine issues for trial, summary judgment was appropriate in the case at bar.

The estate, in its appeal brief, has argued that the proposed affidavits of Carmen O. Booth and Carolyn A. Davis, both entitled "Certificate of Subscribing Witness" (one of which had not even been notarized), somehow demonstrate triable issues of fact in this case which would defeat

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[90] Record Excerpts of Appellee, Tab C, Pages 7-8; Tab E, Page 10.

[91] Record Excerpts of Appellee, Tab A, Pages 1-4.

summary judgment.[92] The estate argues that these notaries public, who allegedly notarized the two Affidavit of Witnesses, which are separate and distinct documents from that of the purported Will and purported Codicil as clearly and specifically provided for in Section 91-7-9 of the Mississippi Code Annotated (1972, as amended), could somehow be construed as serving as the second attesting witness for each document as required by statute and case law as discussed previously herein.[93] However, this argument does not hold merit because the affidavits were not received by the trial court as evidence and, further, because the said affidavits would not be sufficient even if they had been timely produced and received by the trial court.

As stated previously, the proposed affidavits of the notaries public were not filed with the trial court or otherwise produced until the actual date and time of the hearing on the summary judgment motion.[94] Upon timely objection by legal counsel for Nancy, the trial court correctly ruled that the proposed affidavits could not be received as evidence but, instead, would be received for purposes of identification only.[95] Even though the estate does not appear to argue that the refusal of the trial court to receive the proposed affidavits as evidence constituted error, or that the documents should have otherwise been received, Mississippi law is clear that proposed affidavits which are not timely filed should not be considered by the trial court in a summary judgment analysis, nor should they be considered on appeal. *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143 (Miss. 1994); *Biggers v. Fox*, 456 So.2d 761 (Miss. 1984); and

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[92] Brief of Appellant Samuel A. Farr, Page 19.

[93] Id.

[94] Court Reporter's Transcript, Pages 10-15.

[95] Court Reporter's Transcript, Pages 13-15.

Mississippi Rule of Civil Procedure 56(c). Therefore, due to the fact that the proposed affidavits constituted the only form of written response to the summary judgment motion filed by the estate in this matter, and that such documents were not filed until the date and time of the said hearing, the trial court was correct in excluding these documents, thus leaving the estate with no response to the outstanding motion.

Secondly, even if the separate affidavits of the notaries public had been received by the trial court, they would not have been sufficient to withstand summary judgment because Mississippi law is clear, as stated earlier herein, that an attesting witness must not only observe the execution of the proposed Will or Codicil, but **must also perform the manual act of subscribing the said document as well**. *Batchelor v. Powers*, 348 So.2d 776 (Miss. 1977); *In re: Estate of Thomas*, 962 So.2d 141 (Miss. Ct. App. 2007); and *In re: Estate of Griffith*, 2008-IA-01557-SCT (MSSC) (emphasis added). Clearly, even though the affidavits at issue were properly excluded by the trial court, the notaries public cannot now attempt to testify that they were, in fact, attesting witnesses to the purported Will and purported Codicil when they clearly did not subscribe their name to either of the same at the time in question. This situation was very aptly described by Professor Robert A. Weems, a leading authority in Mississippi concerning estate matters, when he noted, as follows: "Section 91-5-1 establishes as a rule of substantive law that a non-holographic will is not valid unless it is 'attested by two (2) or more credible witnesses in the presence of the testator or testatrix.' Because of this rule of substantive law, a non-holographic will which is not attested by at least two credible witnesses is not a valid will, no matter how many credible witnesses actually heard and saw the testator publish and sign the will." *Mississippi Wills and Estates: Cases, Statutes and Materials*, Second Edition, Section 4-4,

Pages 138-139 (1990). As a final note on this issue, it appears to be very telling that there was never any mention of the two notaries public as having allegedly served as an attesting witness to either the purported Will or purported Codicil in either the language of the purported Codicil itself or in any pleading filed by the estate until such time as Nancy filed her petition with the trial court to hold that the purported Will and purported Codicil were not properly attested. For the reasons stated herein, summary judgment was appropriate in this case and should, therefore, be affirmed in this appeal.

IV. The Facts in *Tyson v. Utterback* are not Analogous to those in the Case at Bar.

The estate, in its appeal brief, has argued that the case of *Tyson v. Utterback* is relevant as to whether one witness to the execution of a purported Will or purported Codicil is sufficient to make a jury question in each and every such case, and as to whether the alleged signature of a notary public can be considered that of an attesting witness.[96] *Tyson v. Utterback*, 122 So. 496 (Miss. 1929). First, it is important to note that the primary focus of the *Tyson* case was whether or not a purported Will must be published by the testator in the presence of the attesting witnesses for due execution. *Id.* In fact, the *Tyson* Court found that publication was not necessary for due execution, a premise which had not been followed in previous decisions and which was later specifically overruled in *Estate of Griffith v. Griffith*, 30 So.3d 1190 (Miss. 2010). *Id*; and *Estate of Griffith v. Griffith*, 30 So.3d 1190 (Miss. 2010).

[96] Brief of Appellant Samuel A. Farr, Pages 22-23.

As, apparently, a side issue, the *Tyson* Court observed that a notary public, who had notarized the purported Will and had inquired of the testator as to her current health and the fact that the proposed document was, in fact, her intended last will and testament, could suffice, under those facts, as an attesting witness. *Id.* As such, the estate in the case at bar has similarly argued that the alleged notaries public to the separate Affidavit of Witnesses for the purported Will and purported Codicil can likewise serve as an attesting witness for each such purported document.[97] However, the facts in *Tyson* are in sharp contrast from those in the case at bar, primarily due to the fact that, in *Tyson*, as stated above, the notary public actually signed and notarized the purported Will itself, after a thorough *voir dire*, if you will, of the testator at the time of execution. *Id.* Conversely, the purported Will and purported Codicil in the case at bar are very specific as to the self-described length of each, the purported Will being two (2) total pages in length and the purported Codicil being one (1) total page in length.[98] Neither such self-described document has been signed by a notary public, or by any other person in addition to the single attesting witness for each, as previously described on numerous occasions throughout this brief.[99] Instead, the alleged signatures of the notaries public which have been argued in the brief of the estate are contained only in the two (2) separate and distinct Affidavit of Witness documents and are not contained in either the purported Will or purported Codicil.[100] Additionally, the two Certificate of Subscribing Witness documents which attempt to explain

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[97] Id.

[98] Record Excerpts of Appellee, Tab C, Pages 7-8; Tab E, Page 10.

[99] Id..

[100] Id; and Record Excerpts of Appellee, Tab D, Page 9; Tab F, Page 11.

otherwise, one of which had not even been notarized, were properly excluded by the trial court and should not be considered in this appeal, thus leaving the estate with mere unfounded supposition, if anything at all.[101]

Further, the estate has argued that the *Tyson* case, which was decided in 1929, stands alone for the premise that one witness to the execution of a purported Will was sufficient to make a jury question.[102] As a side note, this would appear to be an idea similar to that as provided in Sections 91-7-9 and 91-7-10 of the Mississippi Code Annotated which provide for the substitution of a duly notarized affidavit of a subscribing witness for the live testimony of such witness in probating a Will. *Sections 91-7-9 and 91-7-10 of the Mississippi Code Annotated (1972, as amended).* However, in the case of a Will contest, such as that in the case at bar, the affidavit of a subscribing witness, by statute, is clearly not admissible. *Id.* Further, as to this portion of the *Tyson* argument, conspicuously absent in the brief of the estate is the remainder of the exact sentence which was paraphrased above concerning the existence of a jury question with only one attesting witness, as the entire sentence, excluding citations, reads, as follows: "Although it is the rule that all witnesses who are alive must be produced, if possible, one of these witnesses is sufficient to take the case to the jury if he can and does testify to the facts necessary to show due execution under the statute, **although the statute requires two attesting witnesses**." *Tyson v. Utterback*, 122 So. 496, 505 (Miss. 1929) (emphasis added).

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[101] Court Reporter's Transcript, Pages 11-15.

[102] Brief of Appellant Samuel A. Farr, Page 22.

As stated earlier, the record is crystal clear that the estate failed to produce any testimony or evidence whatsoever, by live witness or affidavit or otherwise, which would provide the facts necessary to show a genuine issue of material fact as to due execution of the purported Will or purported Codicil. As provided by statute and as indicated in the *Tyson* case itself, due execution requires two attesting witnesses. *Id.* Not one single witness has provided any admissible proof that there was more than one attesting witness to the purported Will and/or purported Codicil, that fact having been confirmed by the initial pleadings filed by the estate and in the clear and plain language of the purported Codicil itself.[103] Again, at best, the estate appears to be implicitly arguing that the proposed affidavits of the notaries public as contained in the Certificate of Subscribing Witness documents which, again, were properly excluded by the trial court, should somehow assist them in overcoming summary judgment. However, the record which is currently before this Court, and which was before the trial court at the summary judgment motion, clearly demonstrates that the estate wholly failed to produce even a scintilla of evidence which would demonstrate that there was any genuine issue of material fact concerning the due execution of the purported Will and purported Codicil and the failure of each such document to have at least two attesting witnesses..

In summary, the facts of *Tyson*, a case from 1929 which has been reversed and which primarily focused on an unrelated issue than that presently before this Court on appeal, are not at all analogous to the facts in the case currently before the Court because the notary public in *Tyson* actually executed and notarized the Will in question, as opposed to the case at bar where,

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[103] Record Excerpts of Appellee, Tab C, Pages 7-8; Tab E, Page 10; Tab H, Pages 17-18; Tab G, Pages 12-16.

at best, the notaries public notarized the signature of the attesting witness in the two separate and distinct Affidavit of Witness documents which were clearly not part of either the purported Will or purported Codicil. There has been no admissible proof demonstrated by the estate that can or would show that either the purported Will or purported Codicil had more than one attesting witness. Again, at the risk of being repetitive, it is important to continue to note that the estate pleadings and the language of the purported Codicil itself had never attempted to name either of the notaries public for either of the Affidavit of Witness documents as being an alleged attesting witness to either the purported Will or purported Codicil until after such time as Nancy alleged in her pleadings that the purported Will and purported Codicil had not been duly executed with two (2) or more attesting witnesses.

V. The Finding of Nancy as the Sole Heir at Law Should Not Be Set Aside.

The estate has argued that the finding by the trial court that Nancy is the sole heir at law of her father should be set aside because the order was allegedly entered without sufficient notice.[104] Inexplicably, the estate appears to argue that, in the event that this Court should reverse the trial court as to its finding that the purported Will and purported Codicil were not duly executed, then "...Prospect Methodist Church should be afforded a reasonable opportunity to appear at a trial on the merits."[105]

First, the trial court entered an Order Setting Cause for Hearing, Enjoining Disposal of Estate Assets and Granting Other Relief on February 18, 2010 wherein, among other things, it was ordered that a return date of April 21, 2010 was set "...for the purpose of having all

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[104] Brief of Appellant Samuel A. Farr, Page 23.

[105] Id.

interested parties before the Court."[106] The order further directed that process should be issued for all interested parties for the date and time of the hearing, including, in the discretion of counsel, the publication for any unknown heirs, as well.[107] As such, a clear purpose of the aforementioned trial court order and hearing date was to have process served on all interested parties, as well as for any unknown heirs, in order to require all such parties to make an appearance before the Court. Prospect Methodist Church and any unknown heirs, as the record reflects and as has been admitted by the estate in its brief, were duly served with legal process concerning the April 21, 2010 hearing.[108] Neither Prospect Methodist Church, nor any unknown heir, appeared in this matter either at or prior to the hearing in question, or at any time thereafter, including at any time during the pendency of this appeal. Since, after valid service of process, no other party appeared at the hearing scheduled specifically in order to determine which parties were before the trial court, an order was entered on that date finding that no other party had appeared and that Nancy was, therefore, the sole heir at law of her father.[109] The fact that Nancy was adjudicated to be the sole heir at law of her father was again properly confirmed and reiterated by the trial court in its summary judgment order dated July 19, 2010, as well.[110] The finding of the trial court that Nancy was and is the sole heir at law of Samuel A. Farr was entered after appropriate notice of the hearing was provided to the estate and after service of process was

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[106] Record Excerpts of Appellee, Tab J, Pages 26-27.

[107] Id.

[108] Brief of Appellant Samuel A. Farr, Page 10.

[109] Record Excerpts of Appellee, Tab K, Pages 28-29.

[110] Record Excerpts of Appellee, Tab B, Pages 5-6.

completed on all interested parties, both known and unknown, all of which failed or refused to appear, and, as such, this appropriate finding should be affirmed on appeal.

VI. Neither the Estate, Nor the Executrix, Have Appropriate Legal Standing.

It is the position of Nancy that neither the estate, nor the executrix of the estate, have the appropriate legal standing in which to prosecute this appeal. The Mississippi Supreme Court, in the case of *Hoskins v. Holmes County Community Hospital,* 99 So.2d 570 (Miss. 1924), held that an "interested party" in a Will contest was a person with a direct pecuniary interest in the subject of the contest and that an executor was not a necessary party to the contest of any such Will. Further, in the case of *Cajoles v. Attaya*, 145 Miss. 436 (Miss. 1920), the Mississippi Supreme Court held that an administrator (or executor) is not an interested party for purposes of a Will contest; but instead, that the duty of the administrator (or executor) in the instance of a Will contest was simply **"...to notify the beneficiaries under the will so that they may take appropriate action to protect their interest."** (Emphasis added).

Pursuant to *Hoskins* and *Cajoles*, the test to determine legal standing in a Will contest in Mississippi became whether a party had a "direct pecuniary interest" in the validity of the Will. *Hoskins v. Holmes County Community Hospital,* 99 So.2d 570 (Miss. 1924); and *Cajoles v. Attaya*, 145 Miss. 436 (Miss. 1920). Thus, a person or entity which does not have a direct pecuniary interest in the validity or invalidity of the purported Will and purported Codicil in this case does not have legal standing to take part in this litigation or appeal.

Professor Robert A. Weems, as stated previously, a leading authority in Mississippi on estate matters, has also noted this following:

> **Thus the policy of Mississippi clearly appears to be that executors and administrators should not on their own initiate contest or defend wills, but should only notify those who have a direct pecuniary interest in the contesting or defending so that they may take appropriate action to protect their interests.**

Mississippi Wills and Estates: Cases, Statutes and Materials, Second Edition, Section 8-4, Page 235 (1990).

It is undisputed that the executrix in the case at bar is not the recipient of any bequest pursuant to either the purported Will or purported Codicil at issue in this case. Said executrix will not take more, or less, regardless of whether the purported Will and purported Codicil are deemed to be valid or invalid. As such, the executrix in this case has no "direct pecuniary interest" in the validity or invalidity of the purported Will and purported Codicil and, therefore, pursuant to the clear case law in Mississippi, she does not have the requisite legal standing in which to participate in these proceedings.

Nonetheless, the primary duty of the executrix in the contest of the purported Will and purported Codicil in this case, as stated above, was simply to notify those who had a direct pecuniary interest in the contesting or defending of said purported Will and purported Codicil. As stated above, with the exception of Nancy, who was the primary beneficiary under the purported Will and purported Codicil and was also adjudicated to be the sole heir at law of the deceased, the only other persons or entities who possibly had a direct pecuniary interest in the contest of the purported Will and purported Codicil were Prospect United Methodist Church and Prospect United Methodist Church Cemetery Fund. After perfection of service of process, neither entity officially appeared in this matter at the trial court level and, likewise, neither entity has filed any notice to appeal the decision of the lower court. Therefore, the only possible other persons or entities which

had a direct pecuniary interest in the contest of the purported Will and purported Codicil, thus having the requisite legal standing to take part in this litigation, have wholly failed to appear or to assert any such claims or defenses. For these reasons, it is the position of Nancy that neither the estate, nor the executrix, have legal standing under the applicable law in Mississippi in which to participate in this appeal.

CONCLUSION

The trial court correctly found that there were no genuine issues of material fact concerning the failure of due execution of the purported Will and purported Codicil in the case at bar because neither such document contained at least two (2) attesting witnesses as required by statute and the clear case law in this state. The documents in this case speak for themselves and are clear and unambiguous in the fact that neither was properly witnessed as required by law. A complete *de novo* review of the record in this matter will reveal that Nancy was entitled to summary judgment as to this issue and that the estate wholly failed to produce even a scintilla of admissible testimony or evidence which would, in any way, suggest otherwise. For these reasons, the Judgment entered by the trial court on July 19, 2010 should be affirmed.

Respectfully submitted, on this the 26th day of April, 2011.

NANCY WYRICK, APPELLEE

BY: _____

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

This will certify that I, Stephen T. Bailey, attorney for the Appellee, have this day filed the original Brief of the Appellee and three copies thereof by placing the original brief and the copies in the United States Mail, postage prepaid addressed to Ms. Kathy Gillis, Clerk of the Supreme Court, at her customary mailing address of Post Office Box 249, Jackson, Mississippi 39205-0249.

This will further certify that I have on this date served a true and correct copy of the Brief of the Appellee by United States mail, postage prepaid, on the following individuals at the following addresses:

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THIS the 26th day of April, 2011.

BY: _____
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