THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-21-1334 and Case No. 2013-ES-21-190
Appellate Case No.: 2013-002810

In the Matter of the Estate of Eris Singletary Smith

In re:

Eris Gail Smith,.....Appellant,

v.

Judy Smith Jones, Jacqueline Brown, James Ervin Smith
Timothy David Smith, Jamie Smith and Mikie Smith, Defendants

Of whom Judy Smith Jones is the.....Respondent.

AMENDED[1] MOTION TO STRIKE APPELLANT'S DESIGNATION OF MATTER NOT IN THE RECORD

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ATTORNEYS FOR THE RESPONDENT

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[1] Respondent's initial Motion to Strike was prepared prior to Respondent's receipt of Appellant's amended designation of matter which added a couple more objectionable items. This slightly amended motion addresses those additional objectionable items in addition to the original items of concern. ***This amended motion is intended to replace the original Motion to Strike which may be considered withdrawn.***

In her Designation of Matter to be included in the Record on Appeal, the Appellant has designated numerous belated and unilateral "Examinations Under Oath" (hereinafter "EUO" for convenience) and a belated Supplemental Memorandum with attached affidavit of counsel which were not presented to the trial court prior to its decision to grant summary judgment against the Appellant's unsupported claim of undue influence. This Memorandum with its new affidavit and these EUO's were not before the Court prior to its ruling and were not considered by the Court in the closed record existing upon his reconsideration of summary judgment. Thus, these items are not proper for inclusion here and the Respondent makes this motion to strike them from any Record submitted in this appeal and strike any corresponding reference to them found in the Appellant's Initial Brief.[2]

Respondent has consulted with Appellant seeking agreement to a corrected designation and corrected initial Appellant's Brief but such agreement was not secured. See Letter and e-mail attached as Exhibit A.

NATURE OF THIS CASE

This case involves a challenge to the will of the decedent Eris Singletary Smith, the mother and grandmother of the parties to this action. The challenge, based upon an allegation of undue influence, is made by the Appellant Eris Gail Smith, one of the decedent's daughters. Appellant challenges a will prepared and executed in the law offices of Robert E. Lee on October 18, 2011 (reasonably referred to in the Appellant's Initial Brief as the "Lee Will").[3] An earlier

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[2] SCACR 210(c) provides in part "The Record shall not, however, include matter which was not presented to the lower court or tribunal." While the matter here was filed and was presented, it was not filed and not presented in a timely manner consistent with the purposes of the SCRCP and was not filed or presented before the ruling on appeal.

[3] The Lee Will met all the statutory formality requirements necessary for a self-proving Will entitled to the corresponding presumptions of validity. Specifically, wills must be signed by two

will for the decedent was prepared by attorney Frederick Hoefer, II and dated March 30, 2011 (reasonably referred to in the Appellant's Initial Brief as the "Hoefer Will"[4]).

By the Appellant's own admission, the differences between the Hoefer Will and the Lee Will "are not significant."[5] One difference is that the Lee Will replaces Appellant as the Personal Representative of the Estate in favor of Respondent Judy Smith Jones.[6]

CLAIM OF UNDUE INFLUENCE UNSUPPORTED

The decedent died on March 11, 2013 – approximately 17 months after execution of the Lee Will challenged by Appellant. Less than a month later, apparently without any basis, the Appellant filed her challenge to the Lee Will and sought to block her sister's (the Respondent) appointment to her designated position as the Personal Representative.

Within two months of the Appellant's groundless claim, the Appellant has secured affirmative evidence confirming the lack of undue influence on her mother's execution of the Lee Will (although it was not her burden to affirmatively disprove the unsupported claim of undue influence). This affirmative evidence included a detailed affidavit by Attorney Lee describing the preparation and subsequent execution of the Lee Will. This evidence also

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witnesses to the testator's execution of the document. S.C. Code § 62-2-502. In addition, Wills become self-proved when attested to by one of the witnesses before a person authorized to administer oaths. S.C. Code § 62-2-503.

[4] Respondent has corrected the misspelling of Mr. Hoefer's name.

[5] See "Objections to Order and Supplemental Memorandum in Opposition to Summary Judgment", filed August 29, 2013, at page 2. (Exhibit B hereto).

[6] Ironically, the Lee Will that Respondent seeks to uphold and enforce as the Personal Representative designated therein actually bequeaths less property to the Respondent than the previous Hoefer Will in that the Lee Will divides the Estate in 6 equal parts rather than 5 such shares. In both wills, the 5 living children of the decedent receive equal shares. In the Lee Will, however, the Estate is divided in 6 parts instead of 5 with 2 grandchildren (notably not Respondent's children) sharing a $1/6^{th}$ share in addition to the $1/6^{th}$ given to each of the decedent's children.

included an outline of the provisions of the Lee Will – *prepared in the decedent's own handwriting* at Mr. Lee's request. This outline serves as direct evidence of the decedent's awareness of what she was doing and what she desired; those written desires did not change in the subsequent 17 months.

In addition to the affidavit of Mr. Lee, depositions of persons actually present for the execution of the Lee Will were taken in the first two months of this claim with full notice to and participation by the Appellant; this included the depositions of attorney Russ Sloan and law office employee Brittany Hooks. In addition, the parties deposed the decedent's granddaughter Pam Jordan – also an employee of the Lee law office.

After all these expensive depositions and discovery, the Respondent was satisfied that everything was in order and the claim of undue influence was without merit and was only serving to delay probate of the estate and inflate legal fees. Accordingly, the Respondent moved for summary judgment and sought a prompt disposition of the claim.[7]

SUMMARY JUDGMENT

On May 31, 2013, the Respondent filed a motion for summary judgment pursuant to SCRCP 56 supported by the three depositions described above and the affidavit of Attorney Lee. Subsequently the matter was set for hearing in the trial court on August 7, 2013. No depositions were taken in the 60 plus days that the motion was pending. Likewise, no opposing affidavits were secured.

At the hearing on August 7, 2013, over 120 days since the filing of the claim of undue influence, the trial court granted the Respondent summary judgment and directed the preparation of a written order. Appellant, through counsel, sought to stall or delay the Court's ruling so that

[7] In the interim, on May 14, 2013, the claim was actually removed from the Probate Court to the Circuit Court.

more discovery could be conducted but the trial court expressly denied any delay and determined the matter was ripe under the procedural rules for a determination.

On page 35 of the transcript of the hearing beginning at line 5 and continuing through page 36 line 4, Judge McMahon made it clear that he was granting summary judgment and that he was specifically not continuing consideration of the summary judgment order as requested by Appellant's counsel. In fact, the Court specifically directed that the order address the failure to present affidavits within the timeframe provided. His subsequent written order merely confirmed the ruling previously announced from the bench – based upon the record presented to him *at the time of that ruling from the bench.* What the subsequent confirming written order *did not do* was reopen the record for consideration of any belated attempts to create an issue of fact.

The following transcript excerpt captures the Court's ruling and the basis for it:

pg 35

THE COURT: I've looked at the written document that is handwritten by -- by Granny and it compares to the -- to the will itself. Given the fact that there are no affidavits presented from healthcare workers or otherwise that there was some type of undue influence that overcome Granny's will on October 11th -- October 18th of 2011, I find no genuine issue of any material fact and I'm granting the motion for summary judgment.

MR. PAYNE: Thank you, Your Honor.

THE COURT: Please prepare me a formal order.

MR. FINKLEA: Thank you, Your Honor.

THE COURT: Prepare it and I would say this. I want you to address the discovery issue in there, too. I am generally very lenient in the continuation of discovery, but in listening to -- and Mr. you both are very fine attorneys that's been before me before, but in listening to those that he may want to -- to depose doesn't -- doesn't -- from what I hear him saying, it would not change my opinion. Now, that -- that's almost an anticipatory ruling in that regard, but from what was presented today and I heard -- you

25 objected to it. You objected to me hearing it, but even if I
pg 36 1 assume that in there -- so address the discovery issue, both
2 as far as a failure to present affidavits and the timeframe of
3 this. If you'll prepare an order, give it to opposing
4 counsel, email first, and then email to my law clerk.

(The entire hearing transcript is provided as Exhibit C hereto).

AFTER COURT'S RULING — BELATED EFFORT TO CREATE FACTUAL ISSUES

After failing to garner evidence to support her hurriedly asserted claim in the more than 120 days between filing that claim and having it considered for summary judgment, the Appellant rushed out after the Court's ruling from the bench, without notice or participation by the Respondent (or any other sibling), and secured "Examinations Under Oath" from various persons seeking to belatedly support a claim that she filed without evidentiary support (as the trial court obviously concluded in granting summary judgment).

These EUO's were filed with the Court prior to the execution of the formal written order – but not without objection from Respondent's counsel. (See Objection email of October 9, 2013 attached as Exhibit D). Ultimately, the Court issued its written order of summary judgment restating the determination previously made based upon the record previously made – the Court did not address the belated EUO's.

In addition to the EUO's, the Appellant submitted a supplemental memorandum opposing summary judgment – judgment that had already been granted from the bench. This supplemental memorandum (item 13 on the Appellant's amended designation) was accompanied by an affidavit of counsel (item 14 of the Appellant's amended designation). This affidavit represents another belated evidentiary submission not considered by the Court prior to its ruling and not part of the record prior to its ruling.

the Judge's order denying reconsideration did not consider these belated EUO's or the belated Memorandum with counsel's affidavit. It reconsidered the initial ruling based upon the record existing at the time of that initial ruling. Of course, that is in accord with South Carolina law. "Generally, a party cannot use a motion . . . to alter or amend a judgment to present an issue that could have been raised prior to judgment but was not." Brailsford v. Brailsford, 380 S.C. 443, 448, 669 S.E.2d 342, 344 (Ct. App. 2008) (citation and internal quotation marks omitted). "An issue may not be raised for the first time in a motion to reconsider." Johnson v. Sonoco Products Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2008). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hospital, Inc. v. Hagen, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994); see also C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2D 268, 270 (1993) ("party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not."); MailSource, LLC v. Bailey & Assoc., Inc., 356 S.C. 370 374, 588 S.E.2d 639, 641 (Ct. App. 2003). Moreover, in West v. Gladney, 341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000), this Court specifically affirmed a trial court's non-consideration of a late affidavit filed outside of the "time required by Rule 56" and without "any good excuse for that failure." See also Black v. Lexington School District No. 2, 327 S.C. 55, 488 S.E.2d 327 (1997) (our Supreme Court also affirming trial court's rejection of a late affidavit). [8]

SCRCP SEEK "JUST, SPEEDY, AND INEXPENSIVE DETERMINATION"

As Rule 1 of the South Carolina Rules of Civil Procedure provides, "[t]hese rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as

[8] An unpublished opinion of this Court arising from this same county has affirmed the non-consideration of new exhibits submitted for the first time with a Rule 59(e) motion. Respondent is aware that SCACR 268(d)(2) provides that unpublished opinions should not be cited as precedent and only mentions it, without citation, because of its unique facts similar to those at bar.

cases at law or in equity, with the exceptions stated in Rule 81. *They shall be construed to secure the just, speedy, and inexpensive determination of every action.*" (emphasis added). Disappointed with the "just, speedy, and inexpensive determination" of this matter, the Appellant has sought to alter that determination by reaching beyond the evidentiary record fairly presented and considered by the trial court at the summary judgment hearing pursuant to the directives of Rule 56 SCRCP.

Rule 56 provides that once a summary judgment motion is made and scheduled for hearing, the "adverse party may serve opposing affidavits *not later than two days before the hearing.*" (emphasis added). Moreover, when a summary judgment motion is "made and supported as provided in this Rule, an adverse party *may not rest* upon the mere allegations...of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." SCRCP 56(e) (emphasis added).

In this case, the Respondent's motion was made and well-supported as provided by the Rule – it was supported *at the time of filing* (May 31, 2013) by affidavit of attorney Robert E. Lee, the deposition testimony of attorney Russ Sloan, and the deposition testimony of witnesses Brittany Hooks and Pam Jordan. Moreover, the motion was supported by the decedent's own handwriting – in her signed and dated notes indicating her desire to have Respondent serve as personal representative of her estate. Thus, the Respondent could not rest upon her mere allegations but she did – apparently hoping her mere suspicions and sibling distrust were enough to defeat the sound purposes of the SCRCP.

SUBMISSIONS ARE NOT NEWLY DISCOVERED EVIDENCE

If the Appellant wanted these new submissions to be considered by the trial judge, the appropriate motion would have been one made pursuant to Rule 60(b)(2) seeking relief from the Court's August 7th announced order (formalized on October 22, 2013). The trial court could then directly address whether the "newly discovered evidence" was such that it "could not have been discovered in time" for proper procedural consideration at the scheduled summary judgment hearing and whether such submission was "made within a reasonable time" as required by all Rule 60 motions. Of course Respondent would have objected to a Rule 60(b) (2) effort as untimely and unwarranted, but this would have been the direct, candid approach to trying to supplement the record. Appellant instead chose to try and make these statements part of the Record on Appeal – knowing that they are not truly "newly discovered" but rather only "freshly sought" following her trial court loss. Accordingly, counsel's affidavit, memorandum, and the examinations under oath are not properly part of the record.

CONCLUSION

Respondent asks this Court to strike the items 13, 14, 24, 25, 26, 27 (an Exhibit to Item 26), 28, and 29 from the Appellant's *amended* designation of the Record on Appeal. In addition, Respondent asks the Court to order Appellant to amend her brief to remove any reference to such materials and any argument based upon such materials. This solution is that suggested by the Chief Justice in her book, Appellate Practice in South Carolina, (Second Edition) page 141 ("the appropriate solution is to make a motion to strike") and page 261 ("if the opposing party includes matter not [timely] presented below, it would be appropriate to make a motion to strike that matter."). By separate consent motion, the Respondent asks that briefing be delayed pending resolution of this motion.

Florence, South Carolina

August 8, 2014

TURNER, PADGET, GRAHAM & LANEY, P. A.

By: _____

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Other Counsel of Record:

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Miles E. Coleman, Esquire
Attorneys for Appellant

Josey, J. Rene

From: Josey, J. Rene
Sent: Wednesday, July 30, 2014 12:02 PM
To: Miles Coleman; Bill Wood; Mitch Brown
Cc: Payne, Jeff L.; Josey, J. Rene
Subject: RE: Eris Smith: Letter re: Record on Appeal

Thanks – I will file 2 separate motions so that it is clear.

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From: Miles Coleman [mailto:Miles.Coleman@nelsonmullins.com]
Sent: Wednesday, July 30, 2014 12:00 PM
To: Josey, J. Rene; Bill Wood; Mitch Brown
Cc: Payne, Jeff L.
Subject: RE: Eris Smith: Letter re: Record on Appeal

We consent.

From: Josey, J. Rene [mailto:JJosey@TurnerPadget.com]
Sent: Wednesday, July 30, 2014 11:53 AM
To: Miles Coleman; Bill Wood; Mitch Brown
Cc: Payne, Jeff L.; Josey, J. Rene
Subject: RE: Eris Smith: Letter re: Record on Appeal

Understood – just fulfilling our duty to consult.

Will you agree that the due date for our initial brief can be extended until any motion regarding the Record on Appeal is determined?

TURNER PADGET
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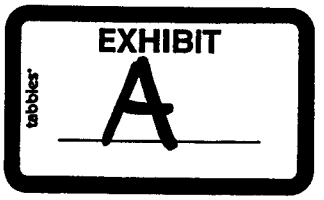
From: Miles Coleman [mailto:Miles.Coleman@nelsonmullins.com]
Sent: Wednesday, July 30, 2014 11:44 AM
To: Josey, J. Rene; Bill Wood; Mitch Brown
Cc: Payne, Jeff L.
Subject: RE: Eris Smith: Letter re: Record on Appeal



Rene',

We have reviewed your letter concerning the contents of the Record on Appeal. We respectfully disagree with your contention that the Examinations Under Oath are not properly part of the Record. Accordingly, we will not be removing those items from the Designation nor will we be eliminating any reference to them from Appellant's Initial Brief.

Miles

From: Josey, J. Rene [mailto:JJosey@TurnerPadget.com]
Sent: Wednesday, July 30, 2014 11:11 AM
To: Miles Coleman; Bill Wood; Mitch Brown
Cc: Payne, Jeff L.; Josey, J. Rene
Subject: Eris Smith: Letter re: Record on Appeal

Gentlemen – please see the attached letter regarding concerns with the Record on Appeal. I do not plan to snail-mail this letter too unless requested.

Rene'

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CHARLESTON
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FLORENCE
GREENVILLE
MYRTLE BEACH

J. René Josey

REPLY TO:

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Writer's Direct Dial: (843) 656-4451
Direct Fax: (843) 413-5818

July 30, 2014

C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Miles E. Coleman, Esquire
Nelson, Mullins, Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211

Re: In the matter of the Estate of Eris Singletary Smith
Appellate Case No. 2013-002810
TPGL File No.: 12331.101

Gentlemen:

As you may know from my emails to Miles regarding the court reporter, I am assisting Jeff Payne with the appeal of this matter on behalf of the Respondent. In that regard, I am writing today to object to the inclusion of the numerous examinations under oath as part of the proposed record on appeal in this matter.

While these examinations under oath may have been filed prior to the issuance of Judge McMahon's formal written order of summary judgment, they were clearly not part of the record considered by him when he determined to grant summary judgment at the hearing on August 7, 2014. The record in that regard is clear. On page 35 of the transcript of the hearing beginning at line 5 and continuing through page 36 line 4, Judge McMahon made it clear that he was granting summary judgment and that he was specifically not continuing consideration of the summary judgment order as requested by Mr. Finklea. In fact, he specifically directed that the order address the failure to present affidavits within the timeframe provided. His subsequent written order merely confirmed the ruling previously announced from the bench – based upon the record presented to him at the time of that ruling from the bench – the subsequent confirming written order did not reopen the record for consideration of these belated attempts to create an issue of fact.

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Likewise, the Judge's order denying reconsideration did not consider these belated examinations under oath. It reconsidered the initial ruling based upon the record existing at the time of that initial ruling.

The examinations under oath are not properly part of the record. If the Appellant wanted these new submissions to be considered by the trial judge, the appropriate motion would have been one made pursuant to Rule 60(b)(2) *seeking relief from the judge's August 7th announced order* (formalized on October 22, 2013). The trial court could then directly address whether the "newly discovered evidence" was such that it "could not have been discovered in time" for proper procedural consideration at the scheduled summary judgment hearing and whether such submission was "made within a reasonable time" as required by all Rule 60 motions.

We are convinced that the proper resolution of this objection is to have the Appellant delete these materials from its designation of matter and amend her brief to remove any reference to such materials and any argument based upon such materials. We will, of course, consent to these corrected measures and amendments if done immediately. If these corrected measures are not taken, "the appropriate solution is to make a motion to strike." Toal, Appellate Practice in South Carolina, (Second Edition) page 141. Accordingly, we are prepared to make a motion to strike next week together with a corresponding motion to extend the time for filing Respondents' brief (until the Motion to Strike is resolved). Please let us know your position on these matters at your earliest convenience.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ:pam

cc: Jeffrey L. Payne

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE) C/A #: 2013-CP-21-1334
) PROBATE CASE# 2013-ES-21-190

Eris Gail Smith,

Plaintiff,

Vs.

Judy Smith Jones,

Defendant.

OBJECTIONS TO ORDER AND SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT

In response to the Proposed Order of Judy Smith Jones, Eris Gail Smith hereby submits these Objections to Order and further submits this document as a Supplemental Memorandum in Opposition to Summary Judgment. This matter is an action to contest the Last Will and Testament of Eris Singletary Smith (hereafter "Decedent") dated October 18, 2011. It appears from the record that the decedent's daughter, Eris Gail Smith (hereafter "Plaintiff"), was in the Probate Court in Florence County on March 13, 2013, completing the necessary paperwork to probate what many believed to be the decedent's Last Will and Testament dated March 30, 2011, which was prepared by Attorney Rick Hoeffer (hereafter "Hoeffer Will"). While in the offices of the Probate Court, Attorney Robert Lee entered to file a Petition to Probate a Will that he prepared on October 18, 2011 (hereafter "Lee Will"). Following the filing of those two Petitions, the Plaintiff filed a Summons and Petition to Challenge the Lee Will. The record consists of the Affidavit of Attorney Robert E. Lee and the depositions of Attorney Cyrus Sloan, Britanny Hooks, Pam Jordan, Eris Gail Smith, and Judy Smith Jones[1]. Additionally, the

[1] The Smith and Jones depositions were taken May 17, 2013. Both deponents requested to read and sign. The originals were delivered August 7, 2013 after the hearing. Counsel for both parties submitted copies of the depositions in their "read and sign" form without objection for the Court's consideration.

EXHIBIT
B

record consists of all of the pleadings filed in Probate Court to date. A hearing was held before the undersigned on August 7, 2013.

The decedent expired March 11, 2013 at the age 86. Prior to her death, she seemingly was of sound mind and able to manage her affairs, although she was hindered by physical limitations. The first will appearing in the record in this case was prepared by Attorney Robert E. Lee on May 30, 2001. For purposes of background, Pam Jordan, Attorney Lee's Paralegal, is the granddaughter of the decedent and the daughter of Judy Smith Jones, who was named as the Personal Representative in the Lee Will. Jordan worked with Lee when the 2001 will was executed and continuously since. The next will was prepared by Attorney Rick Hoeffer being dated March 30, 2011. Finally, the Lee Will dated October 18, 2011. While there are some differences in the Hoeffer and Lee Wills, they are not significant. The primary changes relate to the disposition of personal property, which are itemized in the Hoeffer Will and attached as a memorandum to the Lee Will; the Personal Representative in the Hoeffer Will is Eris Gail Smith and the alternate Attorney Rick Hoeffer and the Personal Representative in the Lee Will is Judy Smith Jones and the alternate is Rebecca Jones Cain, Judy's daughter. In regard to the disposition of the majority of the estate in the Hoeffer Will, the estate is divided among the five living children, whereas the Lee Will divides the Estate into six portions with each of the five living children receiving a 1/6 share and another 1/6 being divided between Jamie Smith and Mikie Smith[2]. There are other obvious changes, but these appear to be the most significant.

[2] These grandchildren are not the children of Wayne Smith, the Decedent's son who predeceased, but actually the children of James Smith, the Decedent's living son who receives a 1/6 interest under the Lee Will.

Eris Gail Smith challenges the Lee Will on the grounds it was executed under undue influence, the decedent was fraudulently induced into executing the will, or alternatively, that the Lee Will should be deemed revoked as a result of the post-execution concealment of the existence of that will precluding the testator from revoking that will or discovering that the Hoeffer Will was not her Last Will and Testament.

Prior to the hearing, the Plaintiff requested that the hearing be continued so that he could take additional depositions that were noticed for September 11, 2013,[3] and conduct other discovery to adequately investigate the facts in the case. The Plaintiff contends the Motion for Summary Judgment is premature and that the depositions and other evidence sought to be elicited would provide factual support to establish her claims. The Court held the request in abeyance until discovering the issues and arguments of counsel[4]. After listening to counsel's recitation of the purported testimony to be offered

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[3] The deponents noticed on this date and time were Fran Hawley (the decedent's longtime friend), Mary Alice Thompkins (family friend and cousin of decedent), Sharon Graham and Rachel Pringle (decedent's care providers/sitters for over six years), Janet Altman (family friend), and Hoyt Smith (decedent's brother-in-law).

[4] Although the reasons more particularly appear on the record, the non-moving party argued that these depositions would show that the decedent thought she was being taken to execute a Healthcare Power of Attorney; that the testator did not realize she executed a will any time after she returned from Marion; that she would have never used Attorney Robert Lee to participate in drafting a will because she believed he had some part in wrongfully altering her son's will; that the testator did not receive a copy of the will though she requested copies of the documents she executed; that the testator believed the will prepared by Attorney Rick Hoeffer was her Last Will and Testament; that the testator became suspicious in regard to the documents she signed in Marion and therefore called Attorney Sloan who in the first phone call denied knowing her; in a subsequent call initiated by Attorney Sloan to the testator, along with Pam Jordan on speakerphone, clarified that he did play a limited role in the execution of her documents, but that he did not have a copy, did not prepare the documents, and asked Pam to provide copies of the documents; Pam never did so; that the will made at Attorney Hoeffer's office was knowing, intentional, and deliberate, because she made at least three visits to his office over a couple of weeks with her "notebook", instead of making one random and quick visit to a lawyer's office; that the testator's "notebook", where she kept all of the details of her personal business recorded, has allegedly been taken by the Personal Representative; that the purported documents produced in Robert Lee's affidavit were not written by the testator with the exception of one page of Exhibit 4 expressing her health care needs; that the document marked as Exhibit A to Robert Lee's Affidavit purported to be the testator's writing, is not hers, as she would never misspell the name of her grandson, Mikie (not Mickie); that Pam and Attorney Lee claimed to have received a copy of the Hoeffer will on October 18, 2011, but that will was not in their file at their office when the original file was inspected during the depositions on May 17th, and Russ Sloan never testified that the Decedent brought that will to the meeting.

by such witnesses, it was obvious to the Court that none of the witnesses were present when the Will was signed on October 18, 2011 and they would be unable to offer any additional testimony that would affect the Court's decision which was based upon the Decedent's capacity, competence and state of mind on the date of the execution of the will. Consequently, at the conclusion of the hearing, the Court denied the request to continue the case to complete discovery[5].

After listening to the arguments of counsel and reviewing the evidence presented, the Court granted Judy Smith Jones' motion for Summary Judgment and directed that her attorney prepare a proposed Order. A proposed Order was submitted and although both attorneys had input in to the language of the proposed Order, there were a few issues counsel could not resolve and which Plaintiff desired to present to the Court prior to executing a Final Order. The Court graciously allowed Plaintiff to state those objections for the record.

OBJECTIONS

I. Fraudulent Inducement

The first objection relates to language in the last paragraph of the Analysis that states fraudulent inducement is not a recognized cause of action in a dispute to challenge a will. That was not a ground stated in the movant's Motion or one which was relied upon by the Court in reaching its conclusion. The ground for relief stated in the motion was purely related to the "failure to produce evidence" not the legal sufficiency or existence of such ground.

[5] The pertinent dates relating to the procedural posture of the case are as follows: March 11, 2013 – Decedent's date of death; April 1 – date of filing this Complaint/Petition; April 19 – Order from Probate Judge appointing a Special Administrator; May 1 – First Round of depositions for Sloan, Jordan and Hooks; May 17 – Second Round of Depositions of Smith and Jones; August 7 – Date of Hearing; August 7 – Date of Delivering Smith and Jones final depositions; September 11 – Third Round of Depositions.

Nonetheless, South Carolina Courts have indicated, though not expressly stated, that a cause of action exists for fraudulent inducement to alter a will. The courts of other jurisdictions as well as legal encyclopedias expressly recognize such a cause of action.

South Carolina Law

Although South Carolina's courts have not recently discussed the cause of action for fraudulently inducing another to change his will, in several older cases the Supreme Court indicated that this claim was a permissible cause of action. In *Johnson v. Johnson*, 160 S.C. 158, 158 S.E. 264, 264-65 (1931), the plaintiff alleged that the decedent's will was "the result of fraudulent representations made to her as to the subject and contents and effects of the instrument." The probate judge ruled that the evidence did not support this claim but that the will was invalid for other reasons. The executor appealed to the trial court. At the trial court, the underlying plaintiff again raised the claim that the decedent signed the will "as a result of fraudulent representations made to her . . . for the purpose of inducing her against her will" to devise all her property to someone else. *Id.* at _, 158 S.E. at 265. The trial court allowed this issue and several others to proceed to the jury. On appeal, the Supreme Court held that the trial court had not erred in submitting these issues to the jury.

In *In re Huntley's Will*, 67 S.C. 55, 45 S.E. 132 (1903), the parties opposing the validity of the decedent's will alleged that the will's beneficiaries had "fraudulently conspired together to induce, and did induce" the decedent to sign the will. After the probate court ruled that the will was valid, the parties contesting the will's validity appealed to the trial court. The trial court intended to submit the various claims to a jury. The parties opposing the will appealed, arguing that the trial court should not conduct a

trial de novo of the issues. The Supreme Court disagreed and remanded to the trial court for trial. The Supreme Court did not expressly discuss the fraudulent inducement cause of action, though by remanding that claim and others for trial, it implicitly recognized the cause of action's validity.

In addition, several more recent South Carolina cases have mentioned, though not discussed or relied upon, a party's claim that a decedent was fraudulently induced to create or not alter his will. In *Truluck v. Snyder*, 362 S.C. 108, 111 n.2, 606 S.E.2d 792 n.2 (Ct. App. 2004), abrogated on other grounds by *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008), the court noted that a party seeking to intervene had alleged, among other things, fraudulent or reckless inducement in the creation of the decedent's will. The court made no other mention of this claim. Similarly, in *Madden v. Madden*, 237 S.C. 629, 118 S.E.2d 443 (1961), the plaintiffs alleged that the defendant—their step-mother—had made the decedent a fraudulent promise for the purpose of inducing him not to revoke or change his will. The Supreme Court, however, did no more than simply mention this claim. There is no discussion of it, and the case was decided on other grounds.

South Carolina Statutes

Certain sections of the South Carolina probate code provide some tangential support for the idea of a cause of action for fraudulent inducement of a will. For example, the probate code's statute of limitations expressly does not apply to a claim that a will was fraudulently induced:

> The last sentence of this section, however, excepts from this section actions "relating to fraud practiced on a decedent during his lifetime which affect the succession of his estate"

> such as fraud inducing the execution or revocation of a will. *There is some general authority for the proposition that one who is damaged by fraud which interferes with the making of a will may maintain an action for damages against the person who commits the fraud*, 79 Am. Jur. 2d, Wills Section 414. In such a case, the six-year limitation provided by Section 15-3-530(7) of the 1976 Code should continue to apply. In cases involving direct contest of wills which are allegedly the result of fraud, however, the provisions of Section 62-3-108 would be applicable and a formal probate proceeding would have to be commenced within the later of twelve months from the informal probate or three years from the decedent's death, at which time the allegations of fraud would be considered.

S.C. Code Ann. § 62-1-106 Reporter's Comment (emphasis added). Another code section notes that "[a] trust is voidable to the extent its creation was induced by fraud, duress, or undue influence." S.C. Code Ann. § 62-7-406. Yet another section of the probate code notes that a person who fraudulently induces another to execute a health care power of attorney is liable to criminal prosecution. *See* S.C. Code Ann. § 62-5-504.

Other Authorities

The courts of other jurisdictions have recognized that "a will is invalid if anything destroys the testator's freedom of volition, such as fraudulent practices upon the testator's fears, affections, or sympathies; misrepresentations; . . . or undue influence." *Harper v. Harper*, 554 S.E.2d 454, 455 (Ga. 2001) (citing O.C.G.A. § 53-4-12); *see also In re Roblin's Estate*, 311 P.2d 459, 463 (Or. 1957) ("Courts set aside wills whose provisions reflect the testator's belief in false data arising from fraudulent misrepresentations made to him by a beneficiary.") (citation omitted); *In re Estate of Hoover*, 615 N.E.2d 736 (Ill. 1993) (holding that trial court in will contest action erred by refusing to allow plaintiffs' motion to amend complaint to allege fraud in the inducement).

Courts discussing the cause of action have both recognized it and have set out tests for determining whether a will is invalid because it was fraudulently induced. *See, e.g., In re Estate of Mumby*, 982 P.2d 1219, 1223-34 (Wash. Ct. App. 1999); *In re Grahlman's Will*, 81 N.W.2d 673, 684 (Iowa 1957) ("'The issue of fraud should not be submitted to the jury in the absence of substantial evidence that the alleged fraud induced the making of the will, or that the fraudulent representations were relied on by the testator, or that the fraudulent [sic] representations caused the testator to make a disposition different from what otherwise would have been made.'") (quoting 95 C.J.S., Wills, § 463).

In addition, treatises have recognized that "'[f]alse representations . . . constitute fraud if it can be shown that they were designed to and did deceive the testator into making a will different in its terms from that which he would have made had he not been misled.'" Scoles, et al., *Problems & Materials on Decedents' Estates and Trusts* at 679 (4th ed. 1987) (quoting *In re Newhall's Estate*, 214 P. 231 (Cal. 1923)). In *Newhall's Estate*, the California Supreme Court held that there was not sufficient evidence to support an inference of undue influence but there *was* sufficient evidence to present a jury question of whether the decedent was fraudulently induced to disinherit her daughter. 214 P. at 235.

Other treatises recognize that "[i]f it can be shown that a will was induced by the fraudulent representation made by a person benefiting from the will, the will may be set aside." 79 Am. Jur. 2d Wills § 381; *see also id.* at § 379 ("A will procured by a fraud may be deemed invalid.") (citations omitted); CJS Wills § 354 ("A will can be invalidated, either in whole or in part, on the ground of fraud, whether it is fraud in the execution or

fraud in the inducement.") (citations omitted); CJS Wills § 499 ("The probate of a will may be opposed or contested on various grounds including . . . that it was induced by fraud or undue influence.") (citation omitted).

Jurisdictions differ as to whether fraudulent inducement and undue influence are distinct causes of action:

> Fraud in the procurement of a will is generally considered a species of undue influence though the two are not exactly synonymous; that is, undue influence may result from a fraud, as well as from coercion, the fraud being employed as a means of securing that influence over the testator which compels the testator to the testamentary act. However, some jurisdictions consider fraud and undue influence as distinct though both are equally destructive of the will.

19 Am. Jur. 2d § 380 (citations omitted). In Georgia, for example, "'[f]raud is a distinct head of objection to the validity of a will, from importunity and undue influence; usually they are the very opposites of each other. Both are equally destructive of the validity of a will.'" *Edwards v. Shumate*, 468 S.E.2d 23, 25 (Ga. 1996) (citations omitted).

See also Sianis v. Jensen, 294 F.3d 994 (8th Cir. 2002) (holding that the district court did not have jurisdiction over claim that beneficiary fraudulently induced testator to execute a will because that claim was cognizable only in Nebraska probate court); *In re Estate of Coleman*, 360 S.W.3d 606, 611 (Tex. Ct. App. 2011) (holding that affidavit of party contesting will's validity was insufficient to raise issue of fact as to fraudulent inducement of executor); *In re Estate of Kessler*, 977 P.2d 591 (Wash. Ct. App. 1999) (holding that parties contesting validity of will failed to show sufficient evidence of fraudulent inducement).

Based upon the foregoing authorities, the Plaintiff believes it improper to grant the Motion for Summary Judgment on the basis that allegations of fraudulent inducement are not recognizable grounds to contest a will. At most this is a novel issue since there is not a South Carolina case directly on point and summary judgment is therefore not proper. It is also improper since this was not a ground stated in the motion. Finally, the motion is premature in light of the pending depositions and additional discovery relating to the fraudulent inducement claim, among other claims.[6]

II. Revocation based on a Fraudulent Concealment

South Carolina Code Section 62-2-506 lists the following methods to revoke a will:

> A will or any part thereof is revoked: (1) by a subsequent will which revokes the prior will or part expressly or by inconsistency; or (2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

In the event the will was originally executed without undue influence or sufficient evidence of fraudulent influence, at some point in time the Decedent questioned whether she executed a will at Robert Lee's office. There is no dispute that she contacted Attorney Sloan to inquire in that regard and Sloan advised he would have Pam Jordan provide her a copy of the documents she executed. There is no dispute Jordan never provided these documents. The testimony to be taken in September would reflect that the Decedent on multiple occasions professed that attorney Rick Hoeffer prepared her last Will, that she did not desire the service of attorney Robert Lee based on believed improprieties with her son's will and that she was under the belief she had only executed

[6] Counsel has prepared an affidavit and attached the same to this pleading which recites the grounds for the Motion to Continue which was made in open Court.

a Health Care Power of Attorney at Lee's office. This evidence is just a portion of that anticipated from the case witnesses.

This issue is one that developed after the filing of the original Petition and has evolved as more facts have been discovered. Although there are multiple authorities suggesting a cause of action exists for fraudulent inducement to alter a will, there are few to none that could be found for this ground as it is truly novel based on the unique facts of this particular case.

Pitts v. Jackson Nat. Life Ins. Co., 574 S.E.2d 502, 352 S.C. 319 (S.C.App. 2002) provides a review of fraudulent concealment as it relates to contract law:

> "Nondisclosure is fraudulent when there is a duty to speak." Ardis, 314 S.C. at 517, 431 S.E.2d at 270. Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction. Lawson v. Citizens S. Natl. Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972). Thus, the issue is whether Jackson National had a duty to disclose facts which it did not disclose. In Ardis, this Court stated: The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties[352 S.C. 336]. Ardis, 314 S.C. at 517, 431 S.E.2d at 270 (quoting Jacobson v. Yaschik, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967)).

In reviewing indicia of fraudulent concealment in Holly Hill Lumber Co. v. McCoy, 23 S.E.2d 372, 201 S.C. 427 (S.C. 1942) the Supreme Court observed the following as important factors weighing heavily toward finding concealment:

> "When the accompanying incidents are inequitable and show bad faith, such as concealment, misrepresentations, undue advantage, oppression on

> the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other,--these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative." Pom.Eq.Jur., Vol. 2, Sec. 928.

In this case, we have an 82-year-old lady who is cared for around the clock by sitters. She was being taken from Florence to Marion by one of Judy Jones' daughters to meet another daughter of Judy Jones to purportedly prepare her Health Care Power of Attorney. In the end she ended up changing her will made with the assistance of a lawyer detached to the family, even though she made another months before after many consultations. Further, the changes in the new challenged will favor Judy Jones and her daughters and the documents which she the decedent purportedly executed were never provided to the decedent even though she requested the same and even though she was advised by Attorney Sloan that copies would be provided.

While these facts may not necessary reflect competency issues generally at the time of the execution of the will, they do reflect a plot to prevent the Decent from discovering if she executed another will or if the Hoeffer remained her last testamentary disposition and to trick her in this regard. Had the decedent known that the Hoeffer will was not her last, the witnesses proclaim that the decedent would have taken action to revive the Hoeffer will. The overriding issue in will construction is the intent of the testator and the Plaintiff believes sufficient evidence exists that the Testator did not intend that the Lee Will be her last will. Additionally, "[r]evocation is a question of intention." Charles Library Soc. v. Citizens & Southern Nat. Bank, 20 S.E.2d 623, 200 S.C. 96 (S.C. 1942). Had others not fraudulently concealed the existence of the Lee Will, the Testator would have revoked the Lee Will. Because a copy of the Lee Will was never

provided to the Testator, she could not revoke that will although she did in fact reaffirm the Hoeffer will.

Like the issue raised in the first objection, this too is at most a novel issue as applied to wills and therefore should not be decided on summary judgment. Further, the motion is premature in light of the pending depositions and additional discovery relating to the Plaintiff's claims.

III. Appointment of Smith

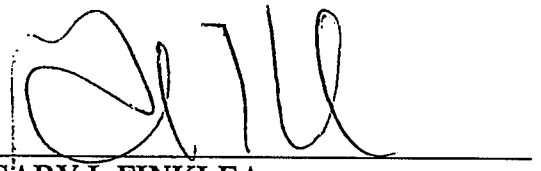
The conclusion of the Order mandates that the Probate Judge appoint Judy Smith Jones as personal representative. The Court never ordered this appointment from the bench but merely indicated that the will of October 18, 2011 should be probated. All issues of administration, including the appointment of the Personal Representative, were and are retained with the Probate Judge. In fact, Judge Eaton's Order of May 14, 2013, states "Pursuant to Section 62-1-302, paragraph 6 D of the South Carolina Probate Code of Laws the undersigned removes this case to the Circuit Court and the Circuit Court shall proceed upon the matter de novo. All other administrative matters shall be under the jurisdiction of the Probate Court." Although the Court has indicated the will should be probated, there are other factors to appointment not raised before the Circuit Court. South Carolina Code Section 62-3-203 recites not only the priorities for appointment but the qualifications for appointment. The statute provides that the Court must find any appointee "suitable" and other statutes such as Sections 62-3-103, 414, 611 and 614 imply the appointment must be in the best interest of the Estate. In the Plaintiff's opinion, neither she nor Judy Jones' appointment is in the best interest of the estate based upon the distrust and acrimony existing between each other and among other family

members. As a result, the Plaintiff will request the Court not terminate the appointment of the Special Administrator (*see* S.C. Code Section 62-3-614) and that his continued service is in the best interest of the estate.

CONCLUSION

Based on the above, the undersigned requests that this Court not sign the Order proposed and instead deny the motion for summary judgment at this time.

Respectfully Submitted,



August 29, 2013

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	CASE NO. 2013-CP-21-1334
	)	
ERIS GAIL SMITH,	)	
IN RE: ESTATE OF ERIS	)	
SINGLETARY SMITH,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	
	)	
JUDY SMITH JONES,	)	
	)	
Defendant.	)	
	)	

August 7, 2013
Florence, South Carolina

B E F O R E:

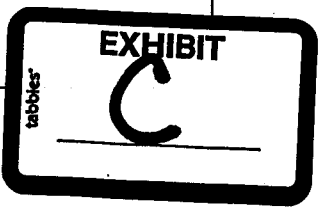
THE HONORABLE R. KNOX MCMAHON, Judge

A P P E A R A N C E S:

GARY FINKLEA, Esquire
Attorney for the Plaintiff

JEFFREY L. PAYNE, Esquire
Attorney for the Defendant

KRYSTAL J. SMITH
Court Reporter



I N D E X

E X H I B I T S

NO.	DESCRIPTION	ID.	EV.
C-1	Last Will and Testament		16
C-2	Deposition		16

(WHEREAS this matter was scheduled for a non-jury motion hearing, the parties appeared with counsel of record. The hearing began at 11:17 a.m.)

THE COURT: This is 2013-CP-21-1334, Estate of Eris Singletary Smith. Eris Gail Smith, petitioner, versus Judy Smith Jones. Let's see, 1334. All right. Mr. Finklea, you represent the plaintiffs?

MR. FINKLEA: I do, Your Honor.

THE COURT: Mr. -- is this Mr. Lee or Mr. Payne?

MR. PAYNE: Yes, sir, Your Honor. Jeff Payne here. There's actually dueling petitions here, Your Honor. There's one estate number. Two petitions to probate wills were filed with the Court. My client is Judy Jones. So we're petitioner on one and respondent on one, and my motion was on behalf of my client, Judy Jones, but Mr. Finklea had something he wanted to ask before we start here today.

THE COURT: All right. Give me just a moment. All right. And what -- what I have on the roster is a motion for summary judgment.

MR. PAYNE: That's correct, Your Honor.

THE COURT: All right. All right, Mr. Finklea.

MR. FINKLEA: Thank you, Your Honor. May it please the Court. I appreciate Mr. Payne allowing me just to briefly make a remark to the Court even though it's Mr. Payne's

motion. This is essentially a will contest. Both parties presented a will to the Probate Court and petitions to be appointed.

THE COURT: Both parties submitted ---

MR. FINKLEA: Different wills.

THE COURT: --- different wills?

MR. FINKLEA: That is correct, Your Honor, to the Probate Court and then subsequently we filed a summons and complaint for a petition to challenge the purported last will and I think Mr. Payne and I had some concern whether or not that actually reached your file, but I've got an extra copy regardless.

But this is a will contest, Judge. The decedent passed March. These pleadings were filed in April and I wanted to let the Court know to some extent what my position was in regard to the motion so we could listen to that while Mr. Payne was presenting his argument, but we have additional witnesses lined up in this case. Depositions are scheduled on September the 11th. This is a -- in my opinion, a very unique and even novel issue of law that we addressed and for those reasons I'm just going to ask the Court to defer summary judgment until we have a full and fair opportunity to conduct these depositions. So if I could ask at least the Court to listen to that issue while Mr. Payne proceeds.

THE COURT: All right. Mr. Payne?

MR. PAYNE: Thank you, Your Honor. Your Honor, we have had -- this is not any novel issue. It's a -- it's a claim. It's actually a little unusual. There's no claim that the decedent lacked the capacity to make a will. It is simply a claim of undue influence. The will is not a deathbed will. It was a will signed a year before she died and we've taken numerous depositions. They know every party that is -- was there the day the will was signed. They have -- we've deposed most of them. I've submitted the Court the affidavits from them. I've got the deposition from one of the lawyers. We've got an affidavit from one of the lawyers.

This motion was filed in May. I don't hear one word for two months about depositions until last Friday. They want to take some depositions and they call my paralegal and then I tell Mr. Finklea no way we're stopping on this thing. This is a clear -- they've got no evidence of any undue influence. They've talked to everybody who has been there. There's no affidavit before the Court as to what they couldn't do to get an affidavit and we're tired of it and we're ready to move forward on this thing.

It's just nothing but an attempt to stall the inevitable, and my client is named as the PR in this will. She actually -- unlike every other will fight I get into, she comes out worse financially under the will she wants to probate. She gets a sixth under this will. Under her will, she gets a

fourth. But it's all because she's named as the PR in this will that we're getting this thing drug out and we're getting money-whipped with them. They actually started out they wanted to take twenty more depositions. Now it's down to eight or ten.

So we're ready to go forward today. I've got a memo. I've got some depositions I'd like to give Your Honor and we're ready to go. We're ready to get this -- get this issue before the Court and get it resolved.

THE COURT: All right. All right.

MR. FINKLEA: We're ready.

MR. PAYNE: All right. May it please the Court. Your Honor, we've got a little memo here with a deposition of two of the parties and the affidavit of Mr. Lee, Robert Lee, who is -- his affidavit is actually attached to the -- the motion, Your Honor, but just for simplicity's sake, I was going to -- excuse me.

MR. FINKLEA: Your Honor, I just received a copy of the memorandum also.

MR. PAYNE: The -- attached to it is Mr. Lee's affidavit and then Mr. Sloan's deposition. Those were the two attorneys that were involved who reviewed the will and went over it with the decedent, but let me start here a little bit. I represent Ms. Judy Jones, who is the named personal representative in the last will and testament of Mrs. Eris Singletary Smith.

The respondent here is Eris Gail Smith. So I'm going to just call the decedent the decedent for simplicity's sake here, Your Honor.

Ms. Jones, my client, is the decedent's daughter. She's one of six people that are named in the most recent will that is looking to have this will probated. And as I mentioned earlier, we're dealing with dual petitions. My client filed a petition. The other side has filed a petition with an earlier signed will and they've also filed a petition to challenge the most recent will, which was dated October 18th, 2011, Your Honor.

As I also mentioned, this is not a lack of capacity case. Both sides acknowledge the decedent was very competent. She handled her own business affairs. Ms. Smith acknowledged all these checks that were written to her, that she said her mother knew what she was doing when she wrote those checks to her. This is not your typical case where it's a deathbed will. This will was signed a year and a half before the decedent died. She could have changed it. She could have gone and gotten another lawyer. She could have done anything in that year and a half. Not a deathbed will.

And lastly, it's not a situation where my client is trying to come in here with a brand new will and she wants to get the whole estate to the detriment of her brothers and sisters. This is a case where she wants to do what her

mother's last wishes were and that was to give all these six people the estate. She was going to act as the PR and that's all it is.

Now, I've submitted Your Honor some of the law that governs undue influence and I'm sure you're aware of those. There's a recent case called Hairston v. McMillan, as well as a more frequently cited case that's called Hembree v. the Estate of Hembree. And in those cases, Your Honor, they outline what's required to prove undue influence and they say the influence that you're complaining about must be such that it destroys the free agency and amount to force and coercion.

They go on in the case -- in the McMillan case, which cites Hembree, and says the evidence of undue influence includes threats, force, restricted visitation, an existing fiduciary relationship. All of those things would relate to undue influence.

And it says the contestant of a will -- we have the most recent will. Ms. Smith, the contestant, she's got to show that that influence brought directly to bear upon the testamentary act. There has been no evidence from depositions, no affidavits submitted to this Court that shows any kind of undue influence and, to the contrary, the date that Ms. -- the decedent wanted her will changed, she goes to Marion, South Carolina, and she meets with attorney Russ Sloan and Robert Lee, who are in Marion. The deposition of Mr.

Sloan is attached in the little booklet I gave you. The affidavit of Mr. Lee is attached to my motion.

They state in their -- and Robert Lee states in his affidavit that the decedent met with him. He had her to write down who her beneficiaries were that she wanted of her will, who she wanted to be the PR. She signed it and dated it, and that's attached to his affidavit. Then she goes over after they've typed up the will -- they actually had on their system an earlier will from 2001. They changed it, which the only change was to add two of her grandchildren to the world -- to the -- to the -- to the will. Before, she had had five children. One of those had died so she kept her four children in the will and she added two grandchildren that she had helped raised, and those six people are named in the will. She wrote them down in the notes.

The will is prepared. She goes and meets with Mr. Russ Sloan. Attorney Sloan sits down with her. He says he went over it in great detail with her. He took notes of that meeting. Those notes are attached to his deposition.

They then testify. Both of them said she was under no stress, no duress. She was relaxed. She came over there. She was in good spirits. She signed it. One of the office workers -- her deposition is in the little folder I gave you -- she said the same thing. Nobody forcing her to do one thing. She met with these attorneys individually.

THE COURT: Who -- who was the office worker?

MR. PAYNE: Her name was Brittany Hooks I believe, Your Honor.

THE COURT: Thank you.

MR. PAYNE: She was one of the people who escorted her into the conference room. She said the decedent was sitting there, wanted to watch TV. She said I remember she wanted to watch ---

THE COURT: What age was the ---

MR. PAYNE: The decedent?

THE COURT: Yes, sir.

MR. PAYNE: She was -- at the time the will was signed, eighty-four to eighty-five. She was eighty-six when she died, I know that.

THE COURT: Thank you.

MR. PAYNE: And so, Your Honor, based on the evidence that we've presented to the Court, there's no genuine issue of material fact as to the undue influence claim. In addition, in the petition that they filed to challenge the October 2011 will, they make a claim of fraudulent inducement as one of the causes of action.

Now, I did some research last night. I've never seen fraudulent inducement. I couldn't find any cases that dealt with it in the will context. As you know, that's normally a defense to a contractual claim. So I don't think such a cause

of action exists, but even if it did, there's been no evidence here before the Court that would rise to the level of some kind of undue influence.

And we would ask that you grant our motion, probate the will -- the October 18th, 2011, will, the decedent's last will and testament, and that you appoint Ms. Judy Jones the personal representative, who is specifically stated in there, and fulfill the decedent's wishes. Thank you.

THE COURT: And this -- this will is the most recent will?

MR. PAYNE: Yes, sir. October the 28th [sic] 2011, the will that -- the other will that they're attempting to probate was a March 2011 will and as I said, she died, Your Honor, in March of 2013. So a year and a half passes, and if you look at some of these cases, Your Honor, that's an important fact on these undue influence cases. In fact, the two that I cite you, the Court goes this person got around, they're independent. They were doing this stuff. What kept them from going and making another will? And there's -- there's no evidence that we enslaved her so that she couldn't go do that before, that anybody did anything to keep her from going to get another will. We deny that there's any ---

THE COURT: Prior to -- prior to the March 11th will, there would have been in ---

MR. PAYNE: 2001.

THE COURT: In Mr. Lee and Mr. Sloan's system that was 2001?

MR. PAYNE: That's correct.

THE COURT: Okay.

MR. PAYNE: And the evidence is there's another -- I didn't give you the deposition of one of the other workers for Mr. Lee. Ms. Jordan is here, but she testified ---

THE COURT: What's her name?

MR. PAYNE: Ms. Pam Jordan. She said it was in their system and they made some changes. To add the two grandchildren to the will was the major change.

THE COURT: The only reason I keep asking those names is I have a cousin that works in the law community in Marion, Renee Burch, and I want to make sure that Renee was not involved in -- and I didn't know what ---

MR. PAYNE: I don't have any Renees.

THE COURT: --- firm or firms she works with.

MR. PAYNE: She's not, Your Honor.

THE COURT: All right. That's why -- that's the only reason I asked is I ---

MR. PAYNE: Okay.

THE COURT: --- keep making -- making sure of that. All right. Yes, sir.

MR. FINKLEA: May it please the Court, Your Honor. Good morning.

THE COURT: Hold on just a minute.

MR. FINKLEA: Yes, sir.

THE COURT: Now, you fully addressed the issue of additional discovery at the beginning you think?

MR. PAYNE: Yes, sir. Your Honor, Rule 56(f) is quite clear. It says, look, if you need more time, you tell the Court in an affidavit why you can't get an affidavit from somebody that you think matters, but the deal is they know everybody who was there the day the will was signed and I don't know what they're -- why they can't get an affidavit from somebody, but that's not here now and we've spent a ton of money. We've taken six depositions. I don't know if that many. Five or six and all over nothing. That's the thing. It's just a waste of time and money and we're ready to move on with the estate.

THE COURT: I just wanted to make sure you had covered it to your satisfaction. Thank you very much. I didn't mean to interrupt as I interrupted.

MR. PAYNE: No, you didn't, Your Honor. Thank you.

MR. FINKLEA: Thank you very much.

THE COURT: Yes, sir. Certainly.

MR. FINKLEA: Your Honor, first, I don't have control over the witnesses that are deposed. I have spoken with two of the witnesses who are or were Ms. Smith's -- the decedent's healthcare providers at her last days, and they are anxious to

give a deposition and, you know, there is no doubt I could have probably done affidavits. There's nothing physically preventing me from that, but I've got the deposition scheduled, which in my opinion is a lot better than affidavits. We're willing to go through the cost of the deposition to do it. Opposing counsel doesn't have to get a copy. I'm paying for the depositions because I want to know not only what the healthcare workers say, but the others. But -- so for that reason, Your Honor, we need more time for that. We believe -- and I'll allude to what we believe the testimony will reflect.

Also, Your Honor, this is a novel issue. I spent four hours last night trying to look at issues from all around the country and I'm going to tell you the best law I found was from Great Britain dating back to the 17- 1800s it seemed like, some old treatises that were copied. And this is a novel issue and for that reason we at least want the facts to be fleshed out.

I'll tell the Court, too, this is an important matter. You know, despite -- and I know counsel didn't mean this in a -- in a rude manner, but, you know, Ms. Smith -- this is why we're here and her last wishes and what she wanted is why we're here today and that's the purpose. My client wants to appeal this and so we need to develop a factual record if she doesn't prevail.

Now, she, too -- I think Mr. Payne referenced the difference. I think in one will the difference would be a five sixths, and the other will it would be six sixths. So one-fifth split and the other will one-sixth. So it is not a lot of money that we're talking about. It is principle that we're talking about, but principle is just as important in the eyes of the law as money.

With that being said, Your Honor, we do request a continuance to conduct the depositions. Outside of that, Your Honor, I would like to please pass forward the original deposition of Pam Jordan, as well as mark as an exhibit Ms. Smith's we believe her last will and testament.

THE COURT: All right.

(Whereupon, the Last Will and Testament is marked as Court's Exhibit Number 1 and the deposition is marked as Court's Exhibit Number 2.)

MR. FINKLEA: Your Honor, also let the record reflect I have no objection to the copies of the other two exhibits being admitted into evidence in lieu of originals. I would also let the Court know that I don't think we've even received the originals yet of the last depositions that we took and that's just -- that, quite frankly, was another reason for waiting on lining up more witnesses so I could compare deposition transcripts of each testimony.

Your Honor, we believe the facts in this case will show,

particularly when viewing those in the light most favorable to us, that the decedent -- if it please the Court, I'm going to refer to her as Granny because that's what I think she was affectionately known as by the family. Granny believed she was going to Marion to execute a healthcare power of attorney. She was taken there by the -- the purported personal representative's daughter for a brunch -- under the guise of a brunch.

She went to Marion and the personal representative's daughter works at the law firm there and the attorney of the law firm, Robert Lee -- I don't know if it's a two-way street, but I think Mr. Lee thought he was a part of the family or I know he's part of the family at least to some part of the family. I don't know about the decedent, but I know to some members he's a very close, personal friend to many of them.

She went over there and she thought that she was merely executing a healthcare power of attorney. The evidence will show that if she executed a will, she did not know that it was a will that she was executing, but a healthcare power of attorney. We also think the facts will show that she would have never used Attorney Lee to draft a will for her because she had a belief that her brother's will was manipulated or forged who died years before.

THE COURT: Now, who ---

MR. FINKLEA: The witnesses will ---

THE COURT: Who -- who -- who had drafted her 2001 will?

MR. FINKLEA: Robert Lee did and then in 2004, '05 or '06 -- when did her brother die?

UNKNOWN FEMALE: 2010.

MR. FINKLEA: 2010 her brother died and that's when they discovered a will that was not what the brother reflected to Granny his wishes were and that last will was done by Mr. Lee's office. That's what the witnesses are going to say and they will testify that's what Granny believed. I'm not saying it's true, but Granny held that belief and it was well-known among the witnesses that we'll call.

That the biggest issue, Your Honor, is that she -- that she never received a copy of any of the documents that she executed in Marion. Never and that is borne out by the deposition testimony of Mr. Sloan and Ms. Jordan. The testimony will reflect that she came -- became suspicious of what she executed in Marion and therefore called Attorney Sloan on the phone, called him at his house on Saturday, and he said I don't know who you are. I never did any legal work for you. And we'll have a witness to that -- to that conversation. Mr. Sloan verified it as well in his deposition.

Mr. Sloan testified and the witnesses will also bear out that Mr. Sloan began to think about it and he discovered, oh yeah, that was Pam's grandmother, Ms. Jordan's grandmother,

and I did do something for her. I witnessed. I was a witness for her to the document, but I did not prepare her will. Robert Lee and Pam prepared the will. I didn't prepare the will.

The evidence will reflect that in that -- that in that conversation, Mr. Sloan called Granny and it's my understanding that conversation was recorded by Granny's healthcare worker and she's got a tape of that, and that will bear out in the conversation where Mr. Sloan said I didn't prepare your will, Robert Lee did, but I did witness some documents for you. When he made that call, he called Ms. Jordan into his office, put it on speakerphone, and Ms. Jordan overheard that call.

In that call, Mr. Sloan said it was obvious that -- and Mr. Sloan never used the word will in that call. Neither did -- will Sharon. She always referred to it as documents. I want those documents I signed at Robert Lee's office. I want those documents. It was obvious to Mr. Sloan as borne out in his deposition that she never had any of those documents and he said, okay -- well, he didn't say this exactly, but he left it with Pam to provide her copies of those documents. Pam admitted in her deposition that she never delivered copies of those documents to her grandmother.

Next, there were a multitude of representations from Granny that -- not only that she had never used Robert Lee to

do her will, but a number of representations that her will was at Rick Hoefer's office. Rick Hoefer is a well-known, well-respected lawyer in Florence. He never did any work for Granny before. He will testify that she came to his office by herself. In other words, I guess he met with her by himself. A caretaker probably took her there, but she came two, three, four times to get her will straight. She was very methodical, very meticulous on what she wanted.

He also confirmed the fact that Granny did nothing without a book, a black book. She kept copious notes on her daily activities, exactly what she did. Surprisingly, that book is missing and the healthcare worker will testify that -- that ---

MR. PAYNE: Your Honor?

MR. FINKLEA: --- the personal ---

THE COURT: Yes, sir?

MR. FINKLEA: --- representative took that book.

MR PAYNE: I object to what she's going to testify to and all this.

THE COURT: All right.

MR PAYNE: They can ---

THE COURT: I'll sustain --- I'll sustain the objection.

MR. PAYNE: They can go up there and get those affidavits.

MR. FINKLEA: Well, that's not ---

THE COURT: I'll sustain the objection.

MR. FINKLEA: In my opinion, Your Honor, to grant summary judgment, we've got to assume all those things are true because that's what these depositions will bear out we believe, and if counsel is not willing to stipulate to those facts, then I don't think summary judgment is appropriate because these are the factual basis for which I'm going to ask the judge to apply law that's really not very well developed in this area.

THE COURT: Well, let me ask you something. What -- besides what healthcare workers are going to testify to, do you disagree to these other statements that Mr. Finklea has stated?

MR. PAYNE: Your Honor, I -- there's so many that he's rambled, I don't know exactly what he ---

THE COURT: I'll let you ---

MR. PAYNE: All I know is ---

THE COURT: I didn't notice him rambling. I mean he was talking about Granny calling the lawyer whose office she was at, Mr. Sloan, at home and saying I don't even know you. I don't know what you're talking about.

MR. PAYNE: Judge, you need to read his deposition.

THE COURT: Thank you for ---

MR. PAYNE: He's got ---

THE COURT: --- giving me that suggestion.

MR. PAYNE: He's got in there that they call him at home and he doesn't remember who she is, doesn't know who she is, but the deposition, Your Honor, is clear. He said I went over it in excruciating detail with her. I went over every paragraph with her. He knew she knew she was signing a will and so that -- that's why I haven't -- I mean his -- his deposition. Now, he talks about phone calls and this where they called back and that kind of stuff, but just -- his deposition is clear she knew, she was under no duress, and ---

MR. FINKLEA: His deposition is clear, Your Honor. At page 16 to 18, he discusses that conversation and, in fact, confirms what I just reflected -- which I just reported to the Court. So that's why Pam Jordan's deposition also confirms that fact on page 25, line 3, through page 27, line 4. This is a known fact. This -- these aspects of it.

And in regard to Mr. Sloan's deposition, on page 16, it actually begins at line 10 that he got a call from somebody at my house on Saturday morning and it ends up saying I may have told them at the time I didn't know who she was and didn't even do a will, and then somebody called later here at the office and Pam came in and we had it on speakerphone and they were talking about it and I told the person that time I did not prepare the will. I think I told them I thought that Pam had prepared the will. I think she did that. I don't know how much input Robert had, but as I found out later, he had

more input than I knew about about the will. And if anybody asked for copies, I was going to leave that to Pam and Robert because I didn't know. I didn't consider myself -- consider this my client or my case and I wasn't going to be involved with it any more than I had to be. I didn't want to get in the middle of a family feud.

And then there was -- and then I asked him to confirm that on line 18, page 17. So there was another call at the office? I think it was -- I wouldn't swear to it, but I think at that time somebody mentioned something about copies and Pam was standing there and I just assumed she would take care of whatever she -- it was her -- her grandmother. I think there was somebody called on behalf of Ms. Smith and then Ms. Smith got on the phone.

And then down to line 15, page 18. Based upon that conversation, were you left with the belief that Ms. Smith didn't have a copy of the documents that were executed? I would assume that would be why she would ask the question, but I didn't -- I didn't know whether she did or not. Do you know if the documents were ever subsequently delivered to her? I have no idea. Ms. Jordan's deposition bears that fact out, too, that she never delivered copies to her grandmother.

But there's more inconsistencies and questions and what I consider to be fraudulent conduct, Your Honor, and fraudulent conduct can always defeat the statute of frauds. What we

believe in this case and our argument would be that, first, if -- if she knew she was executing a will -- we don't think she did, that it was a mistake if she executed a will -- that she didn't know or didn't believe that she executed it later on. When she got home when she started getting suspicious about what happened, nobody could produce for her a copy of the will. She asked for a copy of the will. They couldn't produce a copy of the will. She repeatedly told people that my will is Rick Hoefer's will and that's the only will that she had and that she knew that she had.

There's no case out there, Your Honor, that I could find where it said how do you revoke by physical act a will which you don't have a copy of. You can't tear it. You can't mutilate it. You can't write on it. You can't do any of those things if you don't have a copy of it.

My position is, Your Honor, that she revoked that will. First, she mistakenly made it. Second, that fraud kept her from revoking a will or confirming the Rick Hoefer will in writing. That is in essence our argument and the facts, Your Honor, would bear that out.

Now, there's a number of inconsistencies which I think reflect some -- some fraud and some inconsistencies with what went on. First of all, the Rick Hoefer will was stolen from Granny's at some time or another. Pam testified that Granny took the Rick Hoefer will to Robert Lee's office. That's not

what Sharon is going to testify to. Sharon is going to say the only thing that Granny took was this piece of paper that related to healthcare that said I don't want to be put in a nursing home. She didn't take any will. Despite that, Pam testified that she knew about the Rick Hoefer will. That will was not anywhere in Robert Lee's file despite the existence of notes of other wills and other documents.

Exhibit Number 6, Your Honor, to Pam Jordan's deposition is a will that appears out of nowhere, but quite frankly -- and this will was prepared by Robert Lee's office. Robert Lee and Pam basically said all we did was switch some names out in an '01 will. Well, that's not what Exhibit Number 6 to Pam Jordan's deposition is. This will is completely different, not in regard necessarily to the disposition of the items percentage-wise, but the method of distribution, including that Eris has the first right to purchase, and that proviso comes from Rick Hoefer's will. That is the first note in there of Rick Hoefer's will of that fact.

Now, another unique issue is -- and I've got to look at my notes, Judge, because there's a lot of inconsistencies -- that Robert Lee and Russ Sloan both testified by way of affidavit of what they did. None of them mentioned having the Rick Hoefer will to go by for the question and I find that very odd that neither of those lawyers testified to that, although Pam stated that Granny allegedly brought that will.

Our belief is that will was stolen, taken from Granny's home.

Ms. Jordan testified later in her deposition that she knew where that will was and knew that it was between the mattresses. So she -- she at least knew where it was, which would provide her notice of what that will said and therefore why it needed to be changed because it did, in fact, favor Eris to some extent more than her mother.

Another inconsistency is, Your Honor, in the handwritten notes that Robert Lee swore that Ms. Smith made, Exhibit Number 2. She misspelled the names of one of her grandchildren and she would never misspell Nicky's name, yet it is misspelled on Exhibit Number 2, which raises a red flag as -- was that exhibit really written by Ms. Smith or was that a document that was created to support what allegedly occurred at that time?

The other issue was Mr. Sloan made no reference to any discussion of inventory, what we generally refer to as the memorandum that is attached to a will regarding personal property. In '01, a detailed memorandum was done. Mr. Sloan didn't make any reference to any details in regard to that memorandum. Ms. Jordan, however, testified that that memorandum, all it did basically was give the grandchildren the items that the deceased son had. Well, that's not the case. The new memorandum purportedly gives over fifty percent of the items to her mother, not anyone else, again evidence of

-- or at least a reason for some fraudulent conduct.

Now, I would also point out, Your Honor, that the big surprise in all this is that Eris was the one who knew her mother's details. It is clear, Your Honor, that everyone -- all these siblings loved the mother and vice versa. So this is not about who loved each other more. All of them did what they could for their mother, but it's clear that Eris did the most and it's because she could. She had the ability to do that. She knew all the details of her funeral arrangement, where the keys to everything were, all of her intricate details, and yet the purported will by Robert Lee's office appoints the mother of the legal assistant.

There's interesting things in Robert Lee's affidavit. In addition to the name being misspelled, in addition to the Hoefer will not being included, he says that she didn't want to keep the originals. Well, if she didn't want the originals or any copies, why did she call Russ Sloan's office twice trying to get it?

Things just don't add up, Your Honor, and the biggest thing that we're missing is the book, Granny's book. It contains everything and attorney Rick Hoefer will testify that that book is the Bible. That book is just as good as a will because that reflects what she wants and what she doesn't want.

From a practical standpoint, Your Honor, there's no

reason not to at least let us flesh these issues out through discovery. The estate is, in fact, being probated. Judge Eaton appointed a special administrator, local competent attorney in town, Mike Abbott, who, quite frankly, can probably do a better job than both of these ladies right here and can do it without ruffling anybody's feathers and without any problems with any other family members. He is probating the estate or administrating the estate and there's no reason that there's an urgent need that this be done now. No distributions will be made until four or five months. There is -- so there's no urgency to this, Your Honor.

Second, the -- I want to point out that the relief requested if the Court does get to this is -- and I'll admit to the Court this is the first one that I've had waived up and Judge Eaton, the probate judge, didn't bat an eye in waiving this one up to let the Court deal with these tough factual issues. But it's my understanding that the only issue before this Court would be whether or not -- which will is valid or which will should be probated, and the administration, the appointment of a PR, and all those administrative details should be handled by the Probate Court, and I think that's reflected in Judge Eaton's order waiving this case up where it says this Court retains administration -- jurisdiction over administration. So I point that out.

And, Judge, I will -- I will -- you know, I'll admit to

the Court I've told my client that the -- the case law, you know, supports, you know, written documents. They don't like parole evidence. That we have a strong burden, but we believe that we can meet that burden in this particular case based upon the fraudulent conduct, the fact that it was -- it was mistakenly made and she didn't know she made it. She didn't have an opportunity to revoke it because they -- they fraudulently didn't give her a copy of the will.

But we at least want to see what these -- these witnesses confirm these facts and finally, Your Honor, I think there's case law out there also that when we've got novel issues, summary judgment isn't important as well. Thank you, Your Honor.

THE COURT: Thank you. Yes, sir?

MR. PAYNE: Thank you, Your Honor. Just a few things, Your Honor. If -- if you look at Mr. Sloan's -- he was very careful when he gave his deposition. In fact, the first question from Mr. Finklea says I'm here today to discuss the will that you prepared for Ms. Smith and, of course, you -- and then his answer was let me back up. I didn't prepare it. That's his first question. So he is the witness and reviewed it with her, and I think that distinction needs to be in there somewhere with some of his later testimony about the phone calls and all that.

Mr. Lee typed the will, made the corrections, had her --

his affidavit is clear, Your Honor, she's sitting in his office and I've attached the notes that she signed and dated the day of what she wanted and who she wanted to be the personal representatives. And Mr. Sloan goes through and he talks about how he did review the will with her.

Mr. Lee's affidavit is quite clear as to how he went through the will with her and he attaches Mr. Sloan's notes, which are also in Mr. Sloan's deposition, and in those notes he goes over it. He goes over who she wants to be the PR, who are her children, what are her assets, what does she have. In fact, Ms. -- the decedent actually corrected Mr. Sloan one time. Mr. Sloan assumed the two grandchildren being added were the children of her deceased child and, in fact, that was not the case. She was adding two grandchildren of one of her children who was still alive. So he said she noted that to him and she corrected that with him. But his notes are attached to his deposition.

Mr. Lee's affidavit is before the Court and he goes through. She knew what she was doing. There's just no dispute that the day she signed it, they've talked to everybody involved on that particular day, she knew what she was doing and there's no influence upon her that would have changed it. This is not somebody that's dying and is sitting there under the effects of morphine or some other drugs that would have affected her. It's just not the case.

Now, a couple of interesting things. The Rick Hoefer will, somehow she's ended up with the -- the original because that's what's gotten probated. I wasn't aware of missing or stolen Rick Hoefer wills and Ms. -- Mr. Hoefer's firm is actually -- Ms. Smith has used them before in another will contest that I happened to defend. So she takes them over there to her own lawyer to do that will. Now, she used Kevin Barth in that other case, but this is not just her grandmother deciding -- or her mother deciding to go over to the Barth Hoefer firm to get a will done.

If you look at the cases that I submitted, Your Honor, the -- the Hembree case, the facts are pretty interesting there. In that case, the -- one of the children, her name was Carolyn, she worked at an attorney -- worked for an attorney. Carolyn's husband takes the decedent over to where Carolyn works to meet with an attorney in that office. At that time, Carolyn was there. She met with the testator. She didn't go into the room with them, but she obviously worked at that law firm. So I don't think the fact that one of the family members worked for Mr. Lee has any bearing whatsoever, especially when you read through the rest of this -- this case.

And the Court goes on to just -- tell me what unduly influenced the testator in this decision. There's nothing here that rises to that level that is something that she

couldn't do. They say they weren't in the room when the will was executed. My client doesn't even know about this will, as she testified to, until a year later. She has no idea that she's been named the PR of this particular will. She's not there. She's not in the room. She doesn't drive her over there. She doesn't do any of this stuff, but her mother writes down notes and gives them to Robert Lee as to what she wants to happen and is very clear.

So even in -- with all of those facts facing the Court in the Hembree case, they said there's no -- there's just no evidence of undue influence. The testator had plenty of time in that case to change or revoke his will if there had been. His death was not until almost a year after the will's execution. During this time, he remained active. Our client was the same way, Your Honor. She was active. She had the capacity.

This is nothing more than a power struggle that's going on and we're ready to put an end to it, Your Honor. I don't think there's any evidence that's been presented today if you focus on the issue, which is the undue influence, that says what was the undue influence on the day she signed this will. What is it? Was there coercion? Is there threats? Is there anything that affected her as to why she signed this will?

And I asked Ms. Smith this in her deposition. You know, they have a nice, loving family. The mothers or the

decedents, they're always under a lot of pressure and they tell one person one thing and they tell one person the other thing, and you've seen it, too. They all tell every -- trying to keep everybody happy because they don't want anybody mad at them and fussing with them.

I don't know what all she's telling all these people, but when she got behind those doors and it was her and the lawyers, one one time and she met with Mr. Sloan and they review it and she writes down -- that was when she was at peace and she wrote down her wishes and she did them on that day. What she tells people and all this other stuff they want to bring up, the caregiver this or -- I've got eight people here on a notice of deposition, none of which were there the day the will was signed, nobody. I don't think -- there may have been one that saw her that day, but everybody else has got nothing to do with the day and it's just all this drama and just constantly keeping this going.

And for the sake of this family, Your Honor, I just request you grant the motion for summary judgment and let's get the will going. We don't need to be paying another lawyer $200 an hour to help us do this thing. It's ridiculous and we ask that you grant this motion for summary judgment. Thank you.

THE COURT: Thank you. Any response?

MR. FINKLEA: Your Honor, the Rick Hoefer will, Rick kept

the original, but, of course, he gave Ms. Smith, the decedent Granny, a copy. So that's the copy that we believe that was stolen. Granny chose that will where Sharon will bear out the fact that that -- of that fact Eris had nothing to do to it. I'm sure Carolyn in the case referenced got a copy of her will and had an opportunity to review it after the fact and revoke it if she deemed it appropriate.

I encourage the Court not just to focus on the date of execution, but the fraudulent conduct which occurred after that event, Ms. Smith from knowing what she did and having the opportunity to take action to undo that if it had, in fact, happened. Thank you, Your Honor.

THE COURT: I think the focus should be on 18 October, 2011, on the day she executed the most recent will. That was a year and a half prior to her death March of 2013?

MR. PAYNE: That's correct, Your Honor.

THE COURT: March what.

MR. PAYNE: March 11th.

THE COURT: March 11th of 2013. In reviewing the documents you signed up here, although there may be inconsistencies within those documents, that's not unusual to find inconsistencies that are not necessarily material. She goes to a law office. She's familiar with the individuals at the law office, one of whom is a relative of hers?

MR. PAYNE: The paralegal in that office, Your Honor.

MR. FINKLEA: Her granddaughter.

MR. PAYNE: It was a granddaughter.

THE COURT: Granddaughter.

MR. FINKLEA: Daughter of the PR.

THE COURT: I've looked at the written document that is handwritten by -- by Granny and it compares to the -- to the will itself. Given the fact that there are no affidavits presented from healthcare workers or otherwise that there was some type of undue influence that overcome Granny's will on October 11th -- October 18th of 2011, I find no genuine issue of any material fact and I'm granting the motion for summary judgment.

MR. PAYNE: Thank you, Your Honor.

THE COURT: Please prepare me a formal order.

MR. FINKLEA: Thank you, Your Honor.

THE COURT: Prepare it and I would say this. I want you to address the discovery issue in there, too. I am generally very lenient in the continuation of discovery, but in listening to -- and Mr. -- you both are very fine attorneys that's been before me before, but in listening to those that he may want to -- to depose doesn't -- doesn't -- from what I hear him saying, it would not change my opinion.

Now, that -- that's almost an anticipatory ruling in that regard, but from what was presented today and I heard -- you objected to it. You objected to me hearing it, but even if I

assume that in there -- so address the discovery issue, both as far as a failure to present affidavits and the timeframe of this. If you'll prepare an order, give it to opposing counsel, email first, and then email to my law clerk.

MR. PAYNE: All right, sir.

THE COURT: All right.

MR. PAYNE: Thank you.

THE COURT: Thank you very much. Good luck to you. Thank you.

MR. FINKLEA: Thank you, sir.

THE COURT: Good luck.

(Whereupon, the proceedings end at 12:07 p.m.)

--- END REQUESTED TRANSCRIPT ---

STATE OF SOUTH CAROLINA)

) CERTIFICATE

COUNTY OF FLORENCE)

I, the undersigned, Krystal J. Smith, Official Court Reporter for the Twelfth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and evidence introduced in the hearing of the above captioned case, relative to appeal, in the Court of Common Pleas for Florence County, South Carolina, on the 7th day of August, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Krystal Smith

Court Reporter

Florence, South Carolina

March 11, 2014

From: Payne, Jeff L.
Sent: Wednesday, October 09, 2013 10:53 AM
To: kmcmahonj@sccourts.org
Cc: kmcmahonlc@scourts.org; gfinklea@finklealaw.com
Subject: Judy Jones v. Eris Smith (Florence County Action 2013-CP-21-1334).

Judge McMahon, I just received a copy of a letter from opposing counsel Gary Finklea in which he has now forwarded statements from witnesses to your honor for consideration for a hearing that was held in August in Florence. Obviously, I object to these statements being submitted to your honor. As you will remember this matter was heard in August and your honor ruled that based on the deposition testimony and affidavits from the attorneys present on the date the will was signed, that no undue influence was exerted upon the decedent. We are simply waiting on the signed order. The defendants failed to submit any affidavits of any type such as they are now trying to submit to the court and I therefore object to their last grasp attempts to alter the court's ruling. Thank you.

TURNER PADGET
TURNER PADGET GRAHAM & LANEY PA
BUSINESS·LITIGATION·SOLUTIONS

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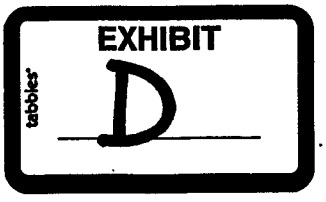

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-21-1334 and Case No. 2013-ES-21-190
Appellate Case No.: 2013-002810

In the Matter of the Estate of Eris Singletary Smith

In re:

Eris Gail Smith,.....Appellant,

v.

Judy Smith Jones, Jacqueline Brown, James Ervin Smith
Timothy David Smith, Jamie Smith and Mikie Smith, Defendants

Of whom Judy Smith Jones is the.....Respondent.

PROOF OF SERVICE

I certify that I have served the *Amended* Motion To Strike Appellant's Designation Of Matter Not In The Record, by depositing copies of the same in the United States mail, postage prepaid, on August 8th, 2014, to the attorneys of record, C. Mitchell Brown, William C. Wood, Jr. and Miles E. Coleman, Nelson, Mullins Riley & Scarborough, LLP, P.O. Box 11070, Columbia, SC 29211.

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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-21-1334 and Case No. 2013-ES-21-190
Appellate Case No.: 2013-002810

In the Matter of the Estate of Eris Singletary Smith

In re:

Eris Gail Smith,.....Appellant,

v.

Judy Smith Jones, Jacqueline Brown, James Ervin Smith
Timothy David Smith, Jamie Smith and Mikie Smith, Defendants

Of whom Judy Smith Jones is the.....Respondent.

PROOF OF SERVICE

I certify that I have served the *Amended* Motion To Strike Appellant's Designation Of Matter Not In The Record, by depositing copies of the same in the United States mail, postage prepaid, on August 8th, 2014, to the attorneys of record, C. Mitchell Brown, William C. Wood, Jr. and Miles E. Coleman, Nelson, Mullins Riley & Scarborough, LLP, P.O. Box 11070, Columbia, SC 29211.

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August 8, 2014

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Estate of Eris Singletary Smith: In re: Eris Gail Smith v. Judy Jones Smith
Civil Action No.: 2013-CP-21-1334 and Case No. 2013-ES-21-190
Tracking Number: 2013-002810
TPGL File No.: 12331.101

Dear Ms. Kitchings:

Enclosed please find the original and seven copies each of an Amended Motion to Strike Appellant's designation of what should be included as part of the Record in this matter. This Amended Motion is being submitted without a new filing fee pursuant to my conversation with Elizabeth in your office. The previous Motion to Strike may be withdrawn. This Amended version simply corresponds to and addresses the Appellant's Amended Designation of matter which added a few new items. The prior Motion to Strike was submitted prior to the Respondent's receipt of the Appellant's Amended Designation. While Appellant does not consent to this motion, I understand that Appellant has no objection to the substitution of this Amended Motion to Strike for the original Motion to Strike.

Also enclosed for this Amended motion is the original and one copy of the Proof of Service. Again, another filing fee is not enclosed or anticipated. Please file the original documents and return clocked copies to me via the stamped self-addressed envelope provided.

Thank you for your assistance with this matter, and please contact me if you have any questions. I appreciate your consideration.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ:vlb
Enclosures
Cc: Judy Smith Jones (w/enclosures)
C. Mitchell Brown, Esquire (w/enclosures)
William C. Wood, Jr., Esquire (w/enclosures)
Miles E. Coleman, Esquire (w/enclosures)