

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

Case Nos. 2013-CP-21-1334 and 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, Jacquelyn Brown, James Ervin
Smith, Timothy David Smith, Jamie Smith, and Mikie
Smith, Defendants

Of whom Judy Smith Jones is the Respondent.

**APPELLANT'S RETURN TO RESPONDENT'S AMENDED MOTION TO STRIKE
CERTAIN MATTERS FROM APPELLANT'S DESIGNATION AND BRIEF**

C. Mitchell Brown
William C. Wood, Jr.
Miles E. Coleman
NELSON MULLINS RILEY & SCARBOROUGH, LLP
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Attorneys for Appellant

Pursuant to Rule 240, SCACR, Appellant hereby submits her Return to Respondent's Amended Motion to Strike certain matters from Appellant's Amended Designation of Matter and Initial Brief.¹ As explained below, because the items to which Respondent objects are "relevant to the appeal" and were "presented to the lower court," they satisfy the only two criteria required of matters designated for inclusion in the Record on Appeal. *See* Rules 209(b) and 210(c), SCACR. Furthermore, the fact that these items were presented to the lower court after its *oral* ruling on the motion for summary judgment is irrelevant because they were presented to the trial court before its *written* order granting summary judgment. Accordingly, this Court should deny Respondent's Amended Motion to Strike.

BACKGROUND²

This appeal arises from the trial court's grant of summary judgment in a dispute alleging fraud and undue influence relating to the assets and estate of Eris Singletary Smith (hereinafter "the decedent"). On April 1, 2013, Eris Gail Smith ("Ms. Smith") filed a petition in probate court challenging the purported will brought forward by Judy Jones (Ms. Jones"). Ms. Smith alleged the purported will was a product of fraudulent inducement and undue influence and that the decedent was unaware she had signed the supposed will. The matter was subsequently removed to the circuit court.

¹ Respondent's initial Motion to Strike was filed and served on August 4, 2014, and her Amended Motion to Strike was filed and served on August 8, 2014. Pursuant to Rule 240(e), SCACR, Appellant had ten days in which to file and serve this Return. As noted in a letter from Appellant's counsel to the Clerk of Court on August 13, 2014, Appellant's understanding is that this ten-day period is measured from the date of the *amended* motion. Under this calculus, this Return is timely filed on August 18, 2014.

² This section summarizes only the background relevant to the disposition of the pending Motion to Strike and does not repeat the comprehensive statement of the facts and procedural history as set out in her Initial Brief. *See* Initial Brief of Appellant at 2-9.

Respondent sets forth numerous impertinent characterizations and allegations regarding the facts in this case with which the Appellant disagrees, but which are not relevant to the amended motion before the Court. The sequence of the *pertinent* events to this amended motion is simple yet significant. Ms. Jones moved for summary judgment on May 31, 2013. The circuit court held a hearing on August 7, 2013, at which Ms. Smith's attorney argued that summary judgment was inappropriate in part because Ms. Smith had not had the opportunity to complete the scheduled depositions of witnesses whose testimony would further demonstrate the existence of genuine issues of material fact. *See* Hearing Transcript at 5, 14-15 (Attached as Exhibit C to Respondent's Motion to Strike.). At the conclusion of the summary judgment hearing, the trial judge refused the request for further discovery and orally stated, "I'm granting the motion for summary judgment." *Id.* at 35:5-36:3.

After that hearing, Respondent submitted a proposed order to the trial judge for consideration. Ms. Smith submitted objections to the proposed order and a Supplemental Memorandum in Opposition to Summary Judgment on August 29, 2012. Attached to the Supplemental Memorandum was the affidavit of Ms. Smith's trial counsel explaining that another round of depositions was scheduled, the reasons those depositions could not have been conducted earlier, and the expected impact of those depositions. In addition, after the summary judgment hearing, Ms. Smith's counsel conducted certain examinations under oath ("EOUs") of a number of the decedent's relatives, healthcare providers, and friends. On October 8, 2013, Ms. Smith submitted the transcripts of those EOUs to the circuit court in further opposition to the motion for summary judgment.

In an order signed on October 22, 2013, the trial court granted Ms. Jones' motion for summary judgment and ordered the probate of the purported will and the appointment of Ms. Jones as personal representative. Ms. Smith filed a motion for reconsideration on November 11, 2013, which the court denied on December 4, 2013. This appeal followed.

ARGUMENT

The determination of what may be designated for inclusion in the Record on Appeal is governed by Rules 209(b) and 210(c), SCACR.³ These rules set forth two requirements on what may be designated and included in the Record: (1) it must be relevant to the appeal and (2) it must have been presented to the lower court. *See* Rule 209(b), SCACR (“A party shall not include any matter in his Designation which is not relevant to the appeal.”); Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”). As explained below, the designated items to which Respondent objects satisfy these two requirements.

As to the first requirement, the challenged items are unquestionably relevant to this appeal, and Respondent has not alleged otherwise. The issue on appeal expressly involves the question of whether summary judgment was premature in light of the outstanding discovery that would have revealed additional issues of fact surrounding the undue influence and fraudulent inducement claims. The Issue on Appeal is:

Did the trial court err by granting the drastic remedy of summary judgment because there existed genuine issues of material fact regarding undue influence and fraudulent inducement surrounding the decedent's execution of a purported will, and *because it was premature to grant the motion before an opportunity for full and fair discovery had been had?*

³ In contrast, the arguments in Respondent's Amended Motion to Strike rely on Rules 1, 56, 59, and 60, SCRCF. *See* Resp.'s Amend. Mot. to Strike at 7-9.

Initial Brief of Appellant at 1 (emphasis added). The EOUs to which Respondent objects are relevant to this appeal because they show the prematurity of the trial court's order and they reveal some of the factual issues that would have been revealed or further demonstrated if the summary judgment hearing had been postponed until after all scheduled depositions had taken place. Similarly, Ms. Smith's Supplemental Memorandum in Opposition to Summary Judgment, accompanied by her trial counsel's affidavit, is certainly relevant to this appeal because the Order it opposed is the very same Order now being appealed.

As to the second requirement for inclusion in the Record, it is beyond dispute that the items to which Respondent objects were presented to the lower court prior to its written ruling granting summary judgment.⁴ Respondent does not dispute this. Rather, Respondent's Motion to Strike is based her incorrect belief that because the items in question were presented to the trial court after its oral ruling at the summary judgment hearing, those items were not "timely" presented to the lower court. *See* Resp.'s Amend. Mot. to Strike at 2 n.2 ("While the matter here was filed and was presented, it was not filed and presented in a timely manner . . . and was not filed or presented before the ruling on appeal," *i.e.*, the ruling that is now being appealed); *id.* at 2 ("Appellant has designated numerous [EOUs and a Supplemental Memorandum] . . . which were not presented to the trial court prior to its decision to grant summary judgment. . . ."); *id.* at 6

⁴ The language of Rule 210(c) simply requires that the items in the Record were "presented to the lower court." It does not contain an explicit requirement that they were presented to the lower court prior to its final ruling or judgment. Here, however, a determination of the full breadth of Rule 210(c) is unnecessary because the items in Appellant's Designation were presented to the trial court prior to its written ruling.

("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 fatal flaw in Respondent's argument, however, is that it overlooks or misunderstands the well-settled rule that a court's oral ruling is not a final ruling until written and entered. "Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly." *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001). "The written order is the trial judge's final order and as such constitutes the final judgment of the court." *Id.* "Judgments in general . . . are not final until written and entered." *Doe v. Doe*, 324 S.C. 492, 501, 478 S.E.2d 854, 859 (Ct. App. 1996).

Here, the trial court's written order granting summary judgment was not issued until two-and-a-half months after the hearing, during which time the court would have had a greater opportunity to review the parties' submissions. Each of the items Respondent seeks to strike were submitted to the trial court during that two-and-a-half month period while the ruling was not yet final. The fact that the final written order did not expressly mention the EOUs or the Ms. Smith's Supplemental Memorandum makes no difference. It is irrelevant for purposes of resolving this motion whether the trial court *did* consider and rely on these items. All that matters is the court *could* (and should) have considered and relied on them before issuing the written ruling granting summary judgment.

In sum, because each of the items Respondent seeks to strike from Appellant's Amended Designation and Initial Brief is relevant to the appeal and was presented to the trial court prior to its dispositive written ruling granting summary judgment, these items

satisfy the only two requirements for inclusion in the Record. Accordingly, this Court should deny Respondent's Amended Motion to Strike.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court deny Respondent's Amended Motion to Strike certain matters from Appellant's Amended Designation and Initial Brief.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

C. Mitchell Brown

SC Bar No. 012872

E-Mail: mitch.brown@nelsonmullins.com

William C. Wood, Jr.

SC Bar No. 015111

E-Mail: bill.wood@nelsonmullins.com

Miles E. Coleman

SC Bar No. 78264

E-Mail: miles.coleman@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

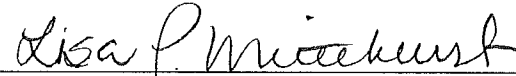
Attorneys for Appellant

Columbia, South Carolina

August 18, 2014

Robert E. Lee, Esquire
P.O. Box 1096
Marion, SC 29571

J. René Josey, Esquire
Jeffrey L. Payne, Esquire
Turner Padgett Graham & Laney
P.O. Box 5478
Florence SC 29502



Lisa P. Whitehurst
Administrative Assistant

August 18, 2014