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.

INITIAL BRIEF OF RESPONDENT

J. René Josey, Esquire
Jeffrey L. Payne, Esquire
TURNER, PADGET, GRAHAM & LANEY, P. A.
319 S. Irby Street
Post Office Box 5478 (29502)
Florence, South Carolina 29501
(843) 662-9008
(843) 667-0828 fax
Email: RJosey@turnerpadget.com

ATTORNEYS FOR THE RESPONDENT

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SHOULD THIS COURT CONSIDER THE LATE MEMORANDUM, AFFIDAVIT, AND "STATEMENTS UNDER OATH" SUBMITTED BY APPELLANT AFTER THE SUMMARY JUDGMENT RECORD WAS CLOSED?

STATEMENT OF THE CASE

This case involves a challenge to the October 18, 2011 will (the "Lee will")[1] of the decedent Eris Singletary Smith (the "decedent"). Following the decedent's death on March 11, 2013, the Lee will was submitted to the Probate Court by Respondent Judy Jones, daughter of the decedent. The challenge, based upon allegations of undue influence and fraudulent inducement, was made by the Appellant Eris Gail Smith, another daughter of the decedent, who submitted a different will for probate – one dated March 30, 2011 (the "Hoefer will").[2]

The Appellant's challenge to the Lee will was filed as a Petition in Probate Court on April 1, 2013. The Respondent answered the Petition on April 19, 2013. On May 14, 2013, the claim was removed from the Probate Court to the Circuit Court. On May 31, 2013, the Respondent moved for summary judgment with regard to the Appellant's Petition. Argument on the summary judgment motion was heard on August 7, 2013. At this August 7th hearing, the Circuit Court announced its decision to grant summary judgment and expressly rejected the Appellant's plea for additional time to try and create an issue of fact. The trial court signed its written order of summary judgment on October 22, 2013 and it was filed two days later.

On November 11, 2013, the Appellant filed her motion to reconsider the summary judgment order and that motion was denied by the Court on December 4, 2013. Appellant filed her notice of appeal from the summary judgment on December 30, 2013.

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[1] This will was prepared and executed in the law offices of Robert E. Lee. To avoid confusion, the Respondent has also adopted the same shorthand for this will as found in the Appellant's Initial Brief.

[2] This will was prepared and executed in the law offices of Frederick A. Hoefer, II. Again, to avoid confusion, the Respondent has also adopted the same shorthand for this will as found in the Appellant's Initial Brief.

STATEMENT OF THE FACTS

Decedent Was Competent And Free From Any Duress When The Lee Will Was Executed

First and foremost, it is worth noting that Appellant's Petition did not challenge the competence of the decedent to make and execute the Lee will. Not only is there the absence of a legal challenge to the decedent's competence, the facts in the record clearly support the decedent's competence. Attorney Russ Sloan of Marion, who witnessed the execution of the Lee will, testified that the decedent was "affable," "easy to talk to," and under no coercion to stay. R.p. 26 line 19 – p. 27 line 5 (Sloan Deposition). He specifically testified that he found her to be competent and not under any undue influence. R. p. 28 line 18 – p. 29 line 2 (Sloan Deposition). While discussing her will with Russ Sloan, the decedent named each of her children and she listed her major assets for him. R.p. 5 line 2 – p.6 line 23 (Sloan deposition). She knew her devisees and understood her intended division of her property. R.p. 29 lines 3-14 (Sloan deposition). She even corrected attorney Sloan's mistaken assumption about the lineage of the grandchildren she sought to address in her new will. R.p. 27 line 23 – p.28 line 17 (Sloan deposition).

Attorney Sloan testified that during his meeting with the Decedent, she was relaxed and under no duress or stress. R.p. 26 line 19- p.27 line 14 (Sloan Deposition). Russ Sloan further testified, that no one was threatening her and she was under no undue influence that affected her ability to sign the Will. R.p. 28 line 21-p. 29 line 2 (Sloan Deposition). Russ Sloan's testimony is consistent with that of attorney Robert Lee who also stated that the Decedent was under no undue influence that would have affected her ability to freely sign the Will. R.pp._____ (Affidavit of Robert Lee ¶ 9). Likewise, Brittany Hooks, an employee of Robert Lee's testified that when she met with the Decedent on October 11, 2011 that the Decedent was very relaxed

and that she was under no stress at all. R. p. 9 lines 22- p. 10 line 4 (Brittany Hooks Deposition). In her deposition, the Appellant acknowledged that, at the time of the Lee will, the decedent was "predominantly" independent (R.p.12 lines 9-16) and competent to manage her own affairs (R.p.31 lines 16-21) *including authorizing and signing checks to Appellant* to reimburse her for requested shopping items. R.p. 17 line 12 to R.p. 21 line 6 and R.p. 30 line 10 to R.p.37 line 24. The decedent's granddaughter described the decedent as mentally alert until the end of her life.[3] R.pp. 39 line 18 – p.40 line 20 (Jordan deposition).

The Lee Will Met All Statutory Requirements

The Lee will met all the statutory formality requirements necessary for a self-proving will entitled to the corresponding presumptions[4] of validity. Specifically, wills must be signed by two witnesses to the testator's execution of the document. S.C. Code § 62-2-502. In this case, both attorney Russ Sloan and Brittany Hooks executed the Lee will as witnesses. In fact, the decedent and each of these two witnesses executed every page of the Lee will.[5] R.pp. _____ (Lee will). In addition, wills become self-proved when attested to by one of the

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[3] The decedent died on March 11, 2013 – approximately 17 months after execution of the Lee will. There is no evidence in the record that the decedent sought to alter or change her will although the record from Appellant and others confirms that she remained competent to do so.

[4] "It is the established law that when the formal execution of a will is admitted -- or proved, a prima facie case in favor of the will is made out, and the burden is then on the contestants to prove undue influence, incapacity or other basis of invalidation. The contestants continue to bear the burden of proof throughout the will contest." Byrd, v. Byrd, 279 S.C. 425, 308 S.E.2d 788 (1983) (citing Calhoun v. Calhoun, 277 S.C. 527, 290 S.E. (2d) 415 (1982); Havird v. Schissell, 252 S.C. 404, 166 S.E. (2d) 801 (1969); Smith v. Whetstone, 209 S.C. 78, 39 S.E. (2d) 127 (1946)).

[5] While Appellant's Brief (page 12) points out that witness Hooks could not recall at her deposition over 18 months later whether she actually observed the decedent execute the will or had the decedent acknowledge her execution of the will, either is acceptable under the Probate Code. Specifically, S.C. Code § 62-2-502 provides that each witness must have "witnessed either the signing or the testator's acknowledgement of the signature or of the will."

witnesses before a person authorized to administer oaths. S.C. Code § 62-2-503. Again, in this case, the decedent and two witnesses also executed an attestation before notary public Sarah Carlson. R.pp. _____ (Lee will).

Evidence of The Decedent's Intent Was Direct & Abundant

The Decedent signed the Lee will on October 18, 2011 in Marion South Carolina at the law office of Robert Lee. On that day the Decedent travelled to Marion to meet with attorneys to discuss her will. Ultimately, she met that day with two attorneys, Robert Lee and Cyrus "Russ" Sloan. During an initial conference with attorney Robert Lee, the Decedent wrote down exactly who she wanted to inherit her assets and that she wanted Judy Jones to serve as the personal representative of her estate. R.pp. _____ (Lee affidavit). She dated and signed her written instructions and gave them to Robert Lee.[6] R.pp. _____ (Exhibit A to Lee affidavit).

After Robert Lee drafted the will,[7] he provided it to attorney Russ Sloan who then met with the decedent. Mr. Sloan then carefully reviewed the new will with the Decedent. R.p. 6 line 9 to p.8 line 15 (Sloan deposition). Attorney Sloan prepared notes of his meeting with the

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[6] While Appellant has not challenged the Lee will based upon forgery, she was reluctant to recognize or acknowledge her mother's handwriting on the will and related documents of October 18, 2011. R.p. 74 line 7 to p.75 line 16 ("I'm not a hand[writing] expert."); R.p.112 line 22 –p.113 line 19; R.p. 124 line 23 – p.125 line 1. Indeed, even her Brief (page 2) only admits that the Lee will was "purportedly" executed by decedent. At the same time, however, Appellant adamantly declared "I know my mother" (R.p. 129 line 19) and testified that checks signed *to her* during the same time frame did have her mother's signature. R.p. 31 line 3 to R.p.37 line 24.

[7] Appellant's Brief (page 6) seems to suggest that decedent's granddaughter drafted the will. Actually, Mr. Lee took the decedent's 2001 will (prepared by him long before the Hoefer will), which was saved on his office computer system and printed out (R. p.6 lines 6-19)(Jordan deposition), and made notations thereon based upon the decedent's new handwritten instructions; then, Mr. Lee had Pam Jordan of his staff (the decedent's granddaughter) type up the revisions and return the revised document. R.pp._____ (Lee affidavit¶ 4).

decedent. R.p. _____ (Exhibit B to Lee affidavit and Sloan Deposition Exhibit 1). Thereafter, the decedent executed the new will.

In addition to executing her new will, the Decedent also reviewed and updated a personal memorandum on October 18, 2011. R.pp. ___ (Lee affidavit). This act also serves to demonstrate the decedent's competence at the time of executing these testamentary documents. This personal memorandum listed numerous items of tangible personal property and identified a recipient for the disposition of each such item. Article II of the Lee will incorporated such memorandum and directed that the personal representative of the decedent's estate abide by that memorandum. While this memorandum only made minor adjustments in the intended distribution of personal effects, particularly as they related to previous designations for the decedent's pre-deceased son, R.p. 40 line 21 to p.41 line 21 (Jordan deposition), these minor adjustments appear to be one of the primary factors in the Appellant's discontent. R.p. 135 line 7 –p. 138 line 3. (Appellant deposition).

The Lee Will Bequeaths Less to Appellant And Respondent

Ironically, the Lee will that Respondent seeks to uphold and enforce (as the Personal Representative designated therein) actually bequeaths less property to her than the previous Hoefer will – hardly a motive to assert undue influence. However, it also bequeaths less to Appellant – perhaps a motive for her legal pursuits although she professes that she is "not fighting for material things."[8] R.p. 132 lines 10-21.

[8] 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 sharing a 1/6th share in addition to the 1/6th given to each of the decedent's living children. In addition to providing for these grandchildren, the newer Lee will replaced Appellant as personal representative with the Respondent – not really a benefit, but a burdensome privilege she accepts.

The Store Entry

Appellant's statement of facts (Brief p. 8-9) includes a recitation of her version of events surrounding the Respondent's entry into the decedent's closed store to properly inventory and secure the personal property therein. While the robbery-like description may serve to illustrate the Appellant's unfortunate mental misperceptions and sibling distrust, it hardly seems relevant to any issue in the case. *Moreover, the accuracy of Appellant's sinister description is belied by the Respondent's decision to notify law enforcement and have the store entry immediately video-taped, photographed, and witnessed by non-family. The Respondent also provided that photographic documentation and an inventory to the court-appointed estate administrator, attorney Mike Abbott, for his confirmation.*[9] R.pp. 61 line 15 –p.75 line 25 (Respondent's Deposition); R.p. 30 line 10 – p. 34 line 3 (Jordan deposition).

Inexplicably, while in one breath suggesting the boarding up of the store was to stop the Respondent from "hauling off" decedent's property, in a subsequent breath the Appellant suggests Respondent was also involved in boarding up the store. R. p. 78 lines 4-24 (Appellant's Deposition). Ultimately, other than vague assertions that inventory was taken from the store, the Appellant could not point to any specific missing item. R. p. 99 line 4-p. 100 line 3 (Appellant's Deposition).

[9] Notably, the Respondent's disclosed inventory includes cash found in the store.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT WHEN THE ISSUE WAS RIPE FOR DETERMINATION AND THERE WAS NO GENUINE ISSUES OF MATERIAL FACT.

The Respondent's petition to challenge the Lee will is based on claims of undue influence and fraudulent inducement. Our case law is clear that "[a] mere showing of opportunity and even of a motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized. General influence is not enough. A contestant must show that the influence was brought directly to bear upon the testamentary act." Mock v. Dowling, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976). Moreover, the "mere existence of influence is not enough to void a will as all influences are not unlawful. For influence to vitiate a will, it must destroy free agency and amount for force and coercion." Hairston v. McMillan, 692 S.E.2d 549 (S.C. Ct.App. 2010) (citing Hembree v. Estate of Hembree, 428 S.E.2d, 3, 5 (S.C. Ct.App. 1993)). "Circumstances must unmistakably and convincingly point to the substitution of another's will for that of the testator." *Id.* "Evidence of undue influence may include threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution." *Id.* ; accord Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003) ("Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship.").

"The influence must be of such a degree that it dominated the testator's will, took away his free agency, and prevented the exercise of judgment and choice by him. ***If the testator had the testamentary capacity to dispose of his property and was free and unrestrained in his volition at the time of making the will, the influence that may have inspired it or some***

provision of it will not be 'undue influence.'" In re Last Will and Testament of Smoak, 286 S.C. at 424, 334 S.E.2d at 809 (emphasis added). As noted above, the decedent's capacity has not been challenged and Appellant admitted that decedent was free to just say no and not execute any new testamentary documents. She was also free and healthy enough to change them again if that was her true intent – and not something she simply hinted to pacify Appellant and others.

The Issue Was Ripe For Determination

As Rule 1 of the South Carolina Rules of Civil Procedure provides, "These rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as 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).

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).

These are not Respondent's rules, or rules created just for this case, or even new rules; they are fundamental court rules that serve as part of the framework for the rule of law. The rules balance both the guarantees of procedural due process and the goals of dispositive efficiency and finality. We can hardly re-write the rules for this case.

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 the 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. Given the Respondent's evidentiary showing, Appellant 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 ("just, speedy, and inexpensive determination"). No *additional* depositions were taken in the 60 plus days that the motion was pending. Likewise, no opposing affidavits were secured before the hearing.

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 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.

In fact, the Court specifically directed that the order address the failure to present affidavits within the timeframe provided. The following transcript excerpt captures the Court's ruling and the basis for it:

> **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

19 listening to -- and Mr. you both are very fine attorneys
20 that's been before me before, but in listening to those that
21 he may want to -- to depose doesn't -- doesn't -- from what I
22 hear him saying, it would not change my opinion.
23 Now, that -- that's almost an anticipatory ruling in that
24 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
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.

R.p._____ (Hearing Transcript pp. 35-36). The Court's 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. R.pp. _____ (Order of December 4, 2013).

This case is quite distinguishable from the case of Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) cited by the Appellant in her brief (page 15) which warns of premature summary judgment decisions where there has not been "a full and fair opportunity to complete discovery." Baughman involved a complex chemical exposure personal injury and property damage claim where the Plaintiffs had worked diligently on developing appropriate expert analysis and testimony for their claim but had more work to do.

The case here is not a complex toxic tort but rather a simple case of the decedent's free will. The trial court's decision here was not based upon an inadequate development of needed expert testimony. Rather, the decision was simply based upon eyewitness testimony met with the failure of Plaintiff to show any evidence creating an issue of fact regarding alleged undue influence or fraud. While counsel wistfully suggested that further discovery *might* create an

issue of fact, it was incumbent upon the Appellant to offer actual evidence when provided with notice and an opportunity to be heard pursuant to the Rules of Civil Procedure.

In her Brief (pages 13-14) the Appellant also suggests that the summary judgment decision was premature because the trial court deemed potential additional witnesses irrelevant because they were not "present at the time of the Will was signed." R. p._____ (October Order at 2). To undermine this supposed erroneous implication of the trial court's order, the Appellant cites a string of cases, most from out-of-state, that support the admissibility of evidence from both before and after the will's execution including, under some circumstances, declarations by the testator after the will's execution. When read in context, however, the trial court here did not necessarily deem the proffered testimony wholly irrelevant but rather not sufficiently persuasive to overcome the failure to comply with Rule 56(e) requiring a timely and admissible response to a well-supported motion. In that paragraph of the Order, the trial court stated.:

> Prior to the hearing, the attorney for Eris Gail Smith requested that the hearing be continued so that he could take additional depositions that had been noticed for September 11, 2013. I held the request in abeyance until I listened to the arguments of counsel and reviewed the evidence presented to me. After listening to counsel's recitation of the purported testimony to be offered by such witnesses, it was obvious that none of them were present when the Will was signed on October 18, 2011 and they would be unable to offer any additional testimony that would affect my decision. Consequently, at the conclusion of the hearing I denied the request.

Obviously, this paragraph is addressed to the trial court's equitable consideration of a possible continuance – it isn't a ruling on the admissibility of evidence; *indeed, no actual evidence was offered.* This is also reflected in the Judge's comments at the hearing as excerpted above.

Notably, Rule 56 requires that submissions relating to summary judgment must be made in such form "as would be admissible in evidence...." SCRCP 56(e). Clearly counsel's proffered summary of potential witnesses was not in the required admissible form (and neither are the unilateral "Examinations Under Oath" (sometimes referenced herein as "EUO"s) discussed in the next argument[10]). Accordingly, when Appellant's counsel began to summarize anticipated testimony at the hearing (R. p. 16 line 25 – R. p. 20 line 13), it was met with an objection sustained by the Court. R. p. 20 lines 14-24 (Hearing transcript). That Rule 56 based evidentiary ruling has not been appealed. [11]

There is nothing rushed or harsh about the trial court's ruling. Obviously counsel had spoken to the proffered witnesses in order to ethically represent their anticipated testimony at the hearing. ***At the hearing, Appellant's counsel conceded that "there is no doubt I could have***

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[10] The proffered summary given by counsel is generally consistent with the EUO's submitted which really create no issue of fact.

[11] Obviously, the entirety of Appellant's claim now rest on the untested out-of-court summaries and opinions of the Appellant and others, including the decedent's sitters who owe Appellant money. R.p. 22 lines 2-8 (Appellant's deposition). Most of these summaries and opinions include alleged comments by the decedent to these declarants – untested hearsay within untested hearsay. Even if these alleged comments weren't barred by the formality required by Rule 56(e), and weren't barred by the Rule against hearsay (SCRE 802), they would likely be barred by the South Carolina Dead Man Statute, codified in South Carolina at S.C. Code § 19-11-20. This statute codifies an evidentiary rule that relates to the competency of a witness to testify about certain matters. The statute exists to prevent interested parties from offering self-serving, incontrovertible testimony that may be unreliable. Harris v Berry, 231 S.C. 201, 98 S.E.2d 251 (1957)(in a will contest case, the trial court improperly excluded non-testamonial letters of decedent pursuant to dead man's statute but indicating that "had any of the letters in question been lost, the witness could not have testified, over objection, to its contents.") ; Trimmier v Thomson, 41 S.C. 125, 19 S.E. 291(1894). Specifically, a competency objection may be raised by the decedent's representatives to prohibit a person or party with an interest in the matter from testifying about communications or transactions with another person who is deceased at the time of such testimony.

probably done affidavits. There is nothing physically preventing me from that...."[12] R. p. 15 lines 1-3. As noted in argument before the trial court, the additional depositions were not even sought by Appellant until the Summary Judgment hearing was scheduled. p. 6 lines 12 – p. 7 line 9. Indeed, it would have been harsh or inequitableto continue this costly power struggle, without required Rule 56 evidence, as counsel pointed out to the trial court (R.p. 32 lines 17-18 and p.33 lines 18-23 (Hearing transcript))– and particularly when the only identified property devise of concern is the disposition of the decedent's second-hand television. R.p. 136 line 25 -- p.138 line 3 (a television that Appellant disapprovingly opined was too big for her brother's "235 home").

There Was No Genuine Issue of Material Fact

In the instant case, the Appellant has provided no evidence of any acts of undue influence exerted upon the decedent. That is because there were no such acts. There were no acts that destroyed the decedent's free agency or that amounted to force and coercion upon her. In contrast, the Respondent has offered the testimony of the two attorneys who meticulously reviewed with the decedent, her estate plan and her will. Respondent has also offered the testimony of the employees who met with the decedent when she came to their office to sign the will. All of the attorneys have testified that no such undue influence existed, and the other parties who observed and spoke with the decedent on October 18, 2011 testified that the decedent was relaxed and under no duress to sign the Lee will.

Without proof of any *actual* undue influence, Appellant's Brief seeks to somehow create a presumption of undue influence so that Appellant may avoid facing her burden of proof.

[12] This concession renders the protections of Rule 56(f) (for justifiably unavailable witnesses) not applicable – and indeed, this provision has not been argued by the Appellant.

Appellant cites the case of Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct. App.2005) wherein this Court recognized a presumption for the first time in the context of a will where the alleged wrongdoer is in a confidential relationship with the testator; previous cases had recognized such a presumption with regard to claims of undue influence over real estate conveyances (deeds).[13]

In Nasser, the new presumption resulted in the reversal of summary judgment for the decedent's spouse who held decedent's power of attorney. That fiduciary spouse was also the primary beneficiary under the decedent's challenged will. No such facts exist in this case.

First, it is unclear whether the Appellant suggests the undue influence came from the Respondent or from the Respondent's daughters who provided the decedent transportation to the execution of the Lee will. Regardless, there is no evidence in the record that either the Respondent or her daughters served as any kind of general fiduciary or attorney-in-fact for the decedent prior to the execution of the Lee will. More importantly, none of these alleged wrongdoers benefitted from the updated Lee will – the Respondent received less as acknowledged by the Appellant and the transporting granddaughters are not in the Lee will at all. Rather than receive any benefit, the Respondent received the administrative burden of carrying out her mother's intentions.

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[13] Notably, the presumption recognized by Nasser does not remove the burden of proof from the party challenging the will but rather only shifts the intermediate burden of going forward to the party offering the will if the presumption is triggered. 364 S.C. at 288-289, 613 S.E.2d at 68-69 (noting that this is consistent with statutory provisions and previous case law)(S.C. Code Ann. § 62-3-407 (Supp. 2004) ("Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof."); Calhoun v. Calhoun, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982)("The contestants continue to bear the burden of proof throughout the will contest."); Smith v. Whetstone, 209 S.C. 78, 84, 39 S.E.2d 127, 129 (1946) (stating in case where will is formally executed the burden of proof is on the contestant to prove undue influence "and this burden remains on him to the end")).

In addition to a confidential relationship, Nasser requires some "suspicious circumstances" in the "preparation, formulation, or execution" of the relevant documents. In Nasser, these circumstances included (1) physical infirmity as a result of a terminal illness; (2) a significant difference from his two prior wills; (3) the wrongdoer wife was present at the meetings with the attorneys to discuss the contents of the new will; (4) Nasser's relationships and visits with family were limited after remarriage to the alleged wrongdoer; (5) someone was suspected of monitoring Nasser's telephone conversations; and (6) an attorney refused to draft Nasser's new will because he believed Nasser was troubled by the changes.

The existing case offers no circumstances remotely close to those of Nasser. While aging and *successfully* (discussed *infra* page ____) fighting cancer, the decedent was not so physically limited like Mr. Nasser – in fact, Appellant testified that she told her mother to drive up to Mr. Hoefer's office rather than rely on attorney Lee for a free Healthcare Power Of Attorney. R. p. 76 lines 1-20 (Appellant's deposition) ("You got a car. Sharon's there. Go get it done."). Also unlike Nasser, the new will here was not significantly different from the prior wills – the most significant change – the addition of two specific grandchildren – was something that Appellant knew her mother had considered and Appellant had expressed no objection to such change. R.p.122 lines 5-20 (Appellant's deposition) ("I don't have a problem with that, Granny. It's your money. You do what you want with it."). Unlike Mr. Nasser's new wife, the Respondent was not present for the discussion or execution of the decedent's new will. There is also no proof that the decedent's contact with Appellant or others was cut-off or monitored; to the contrary, the Appellant's belated EUO's suggest that she – the Appellant – had the most contact with the decedent (perhaps explaining the decedent's desire for confidentiality and choice of a different personal representative). Finally, unlike Nasser, no attorney was

uncomfortable with the decedent's desire to update her will; to the contrary, two different attorneys verified her desire to do so.

The suspicious circumstances suggested by Appellant's Brief (page 12) are not unusual at all. First, the Appellant suggests that the decedent was "lured" away to Mr. Lee's office and then abandoned there. *Not one of the actual participants in the trip and visit to Mr. Lee's office describe the events so diabolically.* Moreover, it simply isn't accurate to say that decedent had no plan to visit an attorney's office – not only did Pam Jordan testify that her grandmother requested the opportunity to update her will with Mr. Lee (R.p. 4 line 13 to p. 6 line 2 (Jordan deposition)), but the Appellant herself admitted knowing of a plan to visit Mr. Lee's office. R.p. 76 lines 1-20 (Appellant's deposition). Whether the decedent chose to withhold the true purpose (or full purpose) of the meeting from her ever-present daughter (the Appellant) is of no moment, the point is that she wasn't "lured" away – and Appellant knew it.

Appellant also confirmed she had no evidence that the decedent was forced. R.pp. 142 lines 12 – 17 (Appellant's deposition). Furthermore, the decedent was not abandoned or forced to participate in the will update when she arrived at Mr. Lee's office – she freely chose to participate – even writing out detailed instructions in her own handwriting; not only did the witnesses advise that decedent was under no coercion, the Appellant admitted that decedent was capable of saying "no" or refusing to even go. R.p. 142 line 12 to p. 145 line 5 (Appellant's deposition).

As for Appellant's claim that the decedent was "fraudulently induced" to execute the Lee will, Appellant again failed to provide any evidence of such fraudulent inducement. Moreover, there are no known decisions in South Carolina that support such a claim with regard to a last

will and testament. Such a claim is a contractual claim. See generally, Baeza v. Robert E. Lee Chrysler Plymouth, 309 S.E.2d 363 (S.C. Ct.App. 1983).

In her Brief (page 13), the Appellant quotes from a secondary legal source in support of the existence of such claim "if it can be shown that a will was induced by the fraudulent representation made by a person benefiting from the will...." Appellant suggests that the fraudulent representation was the indication that the decedent was being taken to brunch, but that representation, if made, hardly serves as an "inducement" to do anything other than eat. Given the overwhelming evidence of the decedent's intent demonstrated at Mr. Lee's office, the "misrepresentation" of brunch seems more likely to have been used, if at all, by the decedent to distract officious relatives and caregivers. Finally, as noted above, the Respondent and her daughters are not benefitted by the updated Lee will but rather burdened by it. Accordingly, the trial court's summary judgment with regard to the fraudulent inducement claim is fully supported in the actual record of this matter – or the expanded record urged by Appellant and discussed below.

II. ALTHOUGH THEY CREATE NO GENUINE ISSUE OF MATERIAL FACT, THIS COURT SHOULD NOT CONSIDER THE LATE MEMORANDUM, AFFIDAVIT, AND "STATEMENTS UNDER OATH" SUBMITTED BY APPELLANT AFTER THE SUMMARY JUDGMENT RECORD WAS CLOSED.

Disappointed with the "just, speedy, and inexpensive determination"[14] 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. Specifically, after failing to garner evidence to support her hurriedly[15] 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 hearing, without notice or participation by the Respondent (or any other sibling), and secured "Examinations Under Oath" (again "EUO") from various persons seeking to belatedly support the will challenge that she filed without evidentiary support – as the trial court properly concluded in granting summary judgment.

These EUO's were filed with the Clerk and e-mailed to the Court prior to the execution of the formal written order – but not without objection from Respondent's counsel. R.p. _____ (Objection email of October 9, 2013). Ultimately, the Court issued its written order of summary judgment restating the determination previously made (at the hearing) based upon the record previously made – the Court did not address the belated EUO's. R.pp. ___ (Order of October 2013). Notably, the trial court's order denying the Motion to Reconsider did not even consider the Appellant's belated submissions which were not submitted pursuant to Rule 60(b)(2) as

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[14] Again, this bedrock principle is found in Rule 1, SCRCP.

[15] As outlined in the Statement of the Case above, the Appellant's claim was asserted a little more than two weeks after mother's death.

newly discovered evidence and are not allowed under the extensive case law prohibiting a party from raising new matter in the context of a Rule 59(e) motion.[16]

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. While the affidavit summarizes witness interviews (much as counsel had attempted at the hearing), it offered no justification for failing to comply with Rule 56; of course, counsel had already conceded the lack of any justifiable unavailability (per Rule 56(e), at the hearing. R. p. 15 lines 1-3 (Hearing transcript).

The supplemental 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

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[16] 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). Again, Respondent notes that 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).

upon his reconsideration of summary judgment. Thus, these items are not proper for consideration here and the Respondent asks this Court to disregard them as not properly part of the Record submitted in this appeal and disregard any argument dependent upon them found in the Appellant's Initial Brief.[17]

SUBMISSIONS ARE NOT NEWLY DISCOVERED EVIDENCE

Barred by her own concessions from making a continuance request based on Rule 56(e) unavailiblity, the Appellant could have moved 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 have then directly addressed 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.

THE DEFERRED MOTION TO STRIKE IN THIS COURT

Because they are not "newly discovered" evidence, counsel's affidavit, memorandum, and the examinations under oath are not properly part of the record and are the subject of the

[17] 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 objectionable materials here were filed and were presented, they were 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.

Respondent's deferred Motion to Strike in this Court.[18] 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."). ***Counsel characterizes the motion as "deferred" and not simply denied because in an Order filed September 19, 2014, this Court expressly provided that "Nothing in this order [denying the motion] prevents Respondent from raising the issue of whether the items were properly submitted to the trial court in her brief."***

In her Return to the Motion to Strike, the Appellant focused on one phrase of SCACR 210(c) ("presented to the lower court") which appears as part of a prohibition not to include matter in the Record on Appeal that was not "presented to the lower court or tribunal." Appellant wishes for the Court to conclude that the converse must be allowable – that is, *anything* "presented to the lower court" is fair for inclusion in the Record on Appeal *regardless of when it was submitted or what creative form it may take*. Clearly that is not what the rule provides and with good reason.

Appellant's argument further suggests that the objectionable designations are "relevant" as required by SCACR 209(b). Respondent argues that the material is relevant to the question presented of "Did the trial court err by granting ... summary judgment ... because it was premature to grant the motion before an opportunity for full and fair discovery had been had?" Appellant's argument asks this Court to second guess the fairness or ripeness of the summary judgment motion – not based upon the procedural protections and framework provided by Rule

[18] Respondent had asked 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

56 and the SCRCP but rather based upon unchallenged unilateral witness statements taken outside of the framework of the discovery rules and "presented" to the Court after the Court had rendered its decision. Respondent suggest that SCACR 209 and 210 must be read in conjunction with (*in pari materia*) the more specific procedural context and framework provided by the SCRCP.

In support of her interpretation of the appellate court rules, Appellant cites Ford v. State Ethics Comm'n, 344 S.C.642, 545 S.E.2d 821 (2001) and Doe v. Doe, 324 S.C. 492, 478 S.E.2d 584 (Ct. App. 1996). Both cases stand for the sound proposition that a trial court can change its mind between the issuance of an oral ruling and the preparation of a final written order. Respondent does not dispute or challenge such inherent authority of the trial judge. *That does not mean, however, that the record remains open outside the parameters of the SCRCP.* Nothing suggested by the Respondent's Motion To Strike would prohibit a trial judge from having second thoughts and either denying summary judgment in writing – based upon a record presented in conformity with the SCRCP – and nothing would prohibit a trial judge from having second thoughts and requesting additional evidentiary submissions within a fair procedural framework. Of course, that is *not* what happened here. Here, the trial judge made up his mind, announced his ruling, and then issued a written order based upon the record made through the summary judgment hearing.

Appellant's interpretation would render the procedural protections and framework of the SCRCP meaningless and invite litigants to sandbag evidence until after a Court's ruling knowing that a second bite at the apple was always available. It would also encourage disappointed litigants to rush out following every announced ruling and seek information outside of the

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addition, Respondent asked the Court to order Appellant to amend her brief to remove any

discovery process to cast after-the-fact suspicions on a trial court's ruling. The trial judges of this State would never be able to achieve the finality needed in legal process and promised in Rule 1 of the SCRCP ("just, speedy, and inexpensive determination"), but instead would be subjected to never-ending submissions and counter-submissions without invitation and interrupting the reflective time needed to prepare and review written orders. In theory, such submissions could continue even after a trial court's ruling – perhaps even up until a notice of appeal deprived the Court of jurisdiction – thus rendering the SCRCP provisions for post-judgment motions equally meaningless.

LATE SUBMISSIONS CREATE NO GENUINE ISSUE OF MATERIAL FACT

Without waiving her strong and well-founded objection to the consideration of these late submissions, Respondent notes that they fail to create any genuine issue of fact. This observation and argument is included in this Brief because of this Court's deferment of a final ruling on the consideration of such submissions as part of the Record on Appeal; again, *Respondent does not waive its objections by making this argument but merely seeks to address all possible issues as a result of the temporary nature of the Court's September 19,' 2014 ruling with regard to the Record on Appeal.*

Through the creative use of the non-procedural Examinations Under Oath, the Appellant's Brief attempts to create a smoke screen of suspicion and doubt.[19] By selective use of excerpts from these rambling statements by persons of unknown and untested backgrounds,

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reference to such materials and any argument based upon such materials.

[19] Appellant footnotes the general rule, which Respondent does not dispute, that evidence – *properly in the record* – is to be construed in the light most favorable to the non-moving party. *Again, most of Appellant's evidence is not properly part of the record.*

motivations, and biases,[20] the Appellant suggests: that she was always decedent's chosen personal representative; that decedent was confused later about what she had executed; that decedent later indicated an intent consistent with the Hoefer will; that decedent totally mistrusted attorney Lee after revelation of her son Wayne's choice of Respondent as his personal representative; and that decedent continued to assert that the Hoefer will governed her estate.

Despite carefully crafted suggestions of confusion and manipulation, however, the Appellant herself testified that the decedent was fully competent to understand and execute checks reimbursing the Appellant for numerous travel and shopping expenditures performed on the decedent's behalf during the same time the Lee will was executed. And despite the impression that the decedent was weakened by cancer, the Appellant confirmed that the decedent's MUSC cancer treatments were successful such that she rang the cancer-free bell at the conclusion of her treatments. R.p. 67 line 6 – p.68 line 8 (Appellant's deposition).

Moreover, despite trying to create the impression of a transportation dependent elder susceptible to manipulation, the Appellant herself suggested that decedent *could drive* or be driven to Mr. Hoefer's office for the preparation of a needed Healthcare power of attorney and any other testamentary documents. R.p. 76 lines 1-20 (Appellant's deposition). In fact, Appellant knew in advance that decedent planned on getting a free Healthcare power of attorney done at Mr. Lee's office where her granddaughter was employed. What Appellant did not know – because the decedent understandably chose to keep it private (R.p. 25 lines 3-11 (Jordan deposition)) – was that decedent was also planning to update her will. Of course, the decedent

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[20] As a non-exhaustive example of such biases not explored with the trial court because of the inappropriate submission of these unilateral self-serving documents, the Respondent would point out that both Sharon Graham and Rachell Pringle, who contributed EUO's to the Appellant's cause also owe the Appellant money in the hundreds of dollars. R.p. 22 lines 2-8 (Appellant's

had every right to keep her testamentary plans confidential. When asked what actual evidence she had of actual undue influence or fraud, the Appellant conceded that the decedent had the capacity to refuse any trip to Mr. Lee's office. R.p.142 line 12 – p.153 line 10 (Appellant's deposition).

deposition). Moreover, they were regular borrowers from Appellant through the years. R.p. 22 line9 – p. 25 line 10 (Appellant's deposition).

CONCLUSION

All of the parties admit that the Decedent had the capacity to make the Lee will. The uncontroverted evidence before the court is that the Decedent was under no undue influence when she signed the Lee will. The Appellant has failed to submit any timely or credible evidence of undue influence or fraud to support her claims. Consequently, this Court should affirm the trial court's decision to grant summary judgment in this matter. The Court should also affirm the trial court's application of Rule 56 of the SCRCP and principles of timeliness found in all the governing Court rules.

Florence, South Carolina

October 20, 2014

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

By: _____

Jeffrey L. Payne, Esquire
J. René Josey, Esquire
319 S. Irby Street
Post Office Box 5478 (29502)
Florence, South Carolina 29501
(843) 662-9008
(843) 667-0828 fax
Email: jpayne@turnerpadget.com
rjosey@turnerpadget.com

ATTORNEYS FOR THE RESPONDENT

Other Counsel of Record:

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