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.

INITIAL REPLY BRIEF OF APPELLANT

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

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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"). As explained by Appellant Eris Gail Smith ("Ms. Smith") in her primary brief, the trial court's grant of summary judgment was premature and erroneous in light of the glaring factual disputes over the critical questions of whether the decedent wished to execute a new will, whether she was tricked into signing the purported will, whether she even knew what she had signed, and whether the document she signed actually reflected her wishes. Each of Judy Smith Jones' ("Ms. Jones") arguments in response is rebutted below.

ARGUMENT

As explained in Ms. Smith's primary brief, summary judgment is a drastic remedy which should be cautiously invoked and which is not appropriate where, as here, there is conflicting evidence or testimony regarding the influence exerted on the testator or the circumstances surrounding the will. In response, Ms. Jones' argues that (1) there were no genuine issues of material fact or unfinished discovery preventing a grant of summary judgment, and (2) this Court should ignore much of the evidence raising numerous factual disputes surrounding the decedent's will. As explained in more detail below, both of Ms. Jones' arguments are unavailing.

I. The trial court erred in granting summary judgment because such a ruling was premature and was precluded by genuine issues of material fact.

As explained in Ms. Smith's primary brief, the trial court erred by granting the drastic remedy of summary judgment despite the numerous material factual disputes presented to the trial court, and despite the fact that Ms. Smith's counsel explained that further discovery was needed to flesh out these factual disputes. *See* App.'s Brief at 10-

15. Ms. Jones' arguments in response do nothing to alter the conclusion that the trial court's grant of summary judgment was, as a matter of law, premature and impermissible.

A. Summary judgment was premature in light of the unfinished discovery at the time of the summary judgment hearing.

At the summary judgment hearing, Ms. Smith's counsel 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, 14-16; *see also Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery."). Ms. Jones, however, argues that the issue of summary judgment was "ripe for determination" despite the outstanding discovery. *See* Resp. Brief at 9-14. As explained below, her arguments on this point are without merit.

First, Ms. Jones argues that Rule 56, SCRCP requires a party opposing summary judgment to serve any opposing affidavits at least two days before the hearing. *See* Resp. Brief at 9. On this basis, she wrongly concludes that because Ms. Smith did not submit any affidavits the motion was "ripe" for disposition. *Id.* Ms. Smith, however, was not required to submit any affidavits,[1] and her choice not do so does not somehow render the motion ready for determination, particularly where her counsel's argument in opposition

[1] Rule 56 states in part that a "party *may* serve opposing affidavits" and that summary judgment is permissible "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, *if any*, show that there is no genuine issue as to any material fact." Rule 56(c), SCRCP (emphasis added). *See also Klippel v. Mid–Carolina Oil, Inc.*, 303 S.C. 127, 129, 399 S.E.2d 163, 164 (Ct. App. 1990) (noting that under Rule 56, a party opposing summary judgment may "respond by affidavits *or other evidence* demonstrating a genuine issue of material fact") (emphasis added).

to the motion expressly informed the court of scheduled depositions that would further develop the factual disputes already evident in the then-existing depositions.

Indeed, this Court has specifically held that Rule 56's two-day rule does not apply to requests for continuance made at the summary judgment hearing, particularly where, like here, counsel explains to the court the need for further discovery and summarizes what that discovery is expected to reveal. *See Schmidt v. Courtney,* 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (reversing trial court's premature grant of summary judgment which had denied the non-moving party the chance to complete full and fair discovery); *see also Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112 n.4, 410 S.E.2d 537, 544 n.4 (1991) (noting that a party seeking more time to complete discovery before summary judgment need not file a Rule 56(f) affidavit in support of the request so long as the need for further discovery is otherwise made known to the trial court). In short, contrary to Ms. Jones' argument, the language of Rule 56 does not control the question of whether summary judgment was ready for determination, and a reversal of the trial court's premature ruling would not contradict the SCRCP.

Second, Ms. Jones argues that the summary judgment motion was ripe for disposition because Ms. Smith's counsel failed to accelerate or complete the scheduled discovery during the "60 plus days that the motion was pending." *See* Resp. Brief at 10. However, there is no requirement (or even a reasonable expectation) that a party opposing summary judgment must complete the discovery needed to oppose the motion within a mere nine weeks after the motion is filed.,[2] and Ms. Jones points to no authority

[2] Ms. Jones filed her motion for summary judgment on May 31, 2013, and the hearing on that motion occurred on August 7, 2013. Indeed, Ms. Smith's petition challenging the

requiring a party opposing summary judgment to complete discovery in such a short period. In contrast, South Carolina's appellate courts permit a much more realistic timeframe to complete the discovery needed to oppose summary judgment. Specifically, our appellate courts have indicated that a trial court should deny a request for further discovery only where the request came a year or more after the case was filed, where the request came after the expiration of the discovery deadline, and/or where the court had already granted several extensions of time for discovery. *See, e.g., Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012); *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009); *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (Ct. App. 2004); *Robertson v. First Union Nat. Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002); *Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999).[3] Where, as here, these factors were not present, our courts have reversed a trial court's refusal to continue summary judgment

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Lee will was filed on April 1, 2013, and thus at the time of the summary judgment hearing, the entire dispute had been pending for a mere four months.

[3] The only cases with shorter timelines involve facts that make them easily distinguishable from the case at bar. In *Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479-80, 465 S.E.2d 765, 771-72 (Ct. App. 1995), this Court noted that summary judgment was not premature where the non-moving party failed to request a continuance, failed to explain how it would be prejudiced by the inability to conduct discovery, and failed to explain why four months was insufficient time to develop the necessary discovery to oppose summary judgment. Here, in contrast, Ms. Smith's counsel *did* request a continuance, *did* explain the prejudice caused by incomplete discovery, and, in any event, was afforded little more than *two* months to complete the necessary discovery.

Similarly, in *Dawkins v. Fields*, 354 S.C. 58, 69-71, 580 S.E.2d 433, 438-40 (2003), the Supreme Court held it was not premature to hold a summary judgment hearing four months after the case was filed because, under the "unusual circumstances" of that case, there was no reason to think that further discovery would create any genuine issue of material fact. Here, in contrast, Ms. Smith's counsel explained the issues of fact that further discovery would reveal—an explanation that was proven right when the subsequent Examinations Under Oath *did*, in fact, reveal such factual issues.

until discovery is complete. *See, e.g., Schmidt v. Courtney,* 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003); *Doe ex rel. Doe v. Batson,* 345 S.C. 316, 548 S.E.2d 854 (2001).

Third, Ms. Jones notes that the trial court denied Ms. Smith's request for a continuance because she did not submit affidavits from the various people she wished to depose. *See* Resp. Brief at 10-11. Ms. Smith's choice to request further discovery rather than submitting affidavits, however, provides no basis upon which to deny the request. As noted above, Rule 56(c) permits, but does not require, a party opposing summary judgment to submit affidavits, and similarly there is no requirement that a party seeking more time to complete discovery file an affidavit pursuant to Rule 56(f) so long as the request and need for further discovery is otherwise made clear to the court. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112 n.4, 410 S.E.2d 537, 544 n.4 (1991); *see also Schmidt v. Courtney,* 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (noting that Rule 56(c)'s affidavit requirements do not apply to a request for a continuance made at the summary judgment hearing, particularly where counsel explains to the court the need for further discovery and summarizes what that discovery is expected to reveal). Stated simply, the absence of affidavits in support of the request for a continuance did not provide any basis upon which to deny the request or to determine the issue of summary judgment was ripe for determination.

Next, Ms. Jones attempts to distinguish this case from *Baughman*, arguing that this case involves a different type of claim (probate versus toxic tort) and a different type of discovery (fact witnesses rather than expert witnesses). *See* Resp. Brief at 11-12. These distinctions make no difference. The rule set out in *Baugham*—"that summary judgment must not be granted until the opposing party has had a full and fair opportunity to

complete discovery"—applies with equal force to suits regardless of the type of claim asserted or the type of discovery requested. Similarly, Ms. Jones' unsupported assertion that "it was incumbent upon the Appellant to offer actual evidence" at the summary judgment hearing, *see* Resp. Brief at 12, is exactly the *opposite* of *Baughman's* holding that summary judgment was premature where it deprived the non-moving party of the ability to offer such actual evidence.

Fifth, Ms. Jones attempts to defend the trial court's erroneous ruling that the testimony of witnesses not present at the execution of the disputed will was irrelevant to the suit. *See* Resp. Brief at 12. As explained in Ms. Smith's primary brief, South Carolina's courts, as well as those of our sister states, have relied on testimony regarding events remote from the will's execution and have held that such testimony is relevant to the suit. *See* App. Brief at 13-14. Ms. Jones now argues that what the trial court meant was that the testimony was not "sufficiently persuasive," rather than that it was "wholly irrelevant." Resp. Brief at 12. This argument is wrong because (1) the testimony had not yet been taken and thus was impossible for the trial court to evaluate its persuasiveness, and (2) the trial court's order specifically stated that these witnesses "would be *unable*" to offer testimony that would affect his decision. *See* Order at 2 (emphasis added). Clearly, the trial court wrongly believed that the testimony was irrelevant, and thus wrongly deprived Ms. Smith of the opportunity for full and fair discovery.

Lastly, Ms. Jones argues that submissions relating to summary judgment must be made in a form admissible as evidence. *See* Resp. Brief at 13. Even assuming this is

correct,[4] this requirement applies to evidence presented in opposition to summary judgment, not an explanation of why that evidence is unavailable. A party seeking more time to complete discovery will never be able to present the yet-undiscovered information in an admissible form, nor is that party required to do so.

In sum, Ms. Jones has failed to rebut the argument laid out in Ms. Smith's primary brief that the trial court's grant of summary judgment was premature and contrary to South Carolina precedent in light of the remaining discovery which was relevant to the claims and defenses in this suit. Accordingly, the denial of a full and fair opportunity for discovery warrants reversal and remand.

B. Summary judgment was impermissible in light of the factual disputes presented to the trial court both before and after the summary judgment hearing.

Even assuming *arguendo* that the summary judgment motion was ripe for determination, the trial court nevertheless erred by granting the motion despite the existence of genuine issues of material fact. At the summary judgment hearing, Ms. Smith's counsel argued that summary judgment was impermissible because there was conflicting evidence of whether the decedent intended to execute a new will, whether she was aware she had done so, whether the new will accurately reflected her wishes, and whether she thereafter believed and stated that her will was the prior will prepared by Rick Hoefer. *See* Hearing Transcript at 16-20, 22-27. Ms. Jones, however, ignores the numerous, significant factual issues existing and asserts there was no genuine issue of material fact. *See* Resp. Brief at 14-18. As explained below, she is incorrect.

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[4] The Rule upon which Ms. Jones relies, Rule 56(e), SCRCP, merely states that an affidavit supporting or opposing summary judgment "shall set forth such facts as would be admissible in evidence." It does not require that everything submitted or argued in relation to summary judgment be admissible as evidence.

Even looking solely at the evidence before the trial court at the time of the hearing—a myopic view that, as explained in Part II, *infra*, is not required—there were factual issues that, as a matter of law, precluded the grant of summary judgment.[5] For example, witnesses supporting Ms. Jones' view testified that the decedent intended to execute a will and was aware she had done so. *See* Affidavit of Robert E. Lee at 1-2; Dep. of Cyrus Sloan at 4-6; Dep. of Pam. Jordan at 4-5. In contrast, other testimony was the *opposite*. *See*, *e.g.*, Dep. of Eris Smith at 106:20-24; *id.* at 112:10-12; *id.* at 147:12-20; *id.* at 149:9-15. Similarly, the testimony was starkly conflicting as to whether the decedent would have ever willingly and knowingly allowed attorney Robert E. Lee to prepare her will. *Compare* Dep. of Eris Smith at 92, 102, and 149-50 *with* Dep. of Judy Jones at 43-45. Likewise, the testimony available at the time of the hearing was conflicting as to whether the decedent, unsure of what she had signed, had called Robert E. Lee's office to request a copy of the documents. *Compare* Dep. of Cyrus Sloan at 16:5-18:20 (testifying that the decedent called him at the office and requested a copy of the documents and that he assumed Pam Jordan, who participated in the call, would provide the requested copies) *with* Dep. of Pam Jordan at 25:12-15, 26:22-24 (denying the decedent had called to request a copy of any documents).[6]

These factual disputes are material here because, in a dispute alleging that a will was the product of fraud or undue influence, summary judgment is not appropriate if there is conflicting evidence or testimony regarding the influence exerted on the testator

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[5] Ms. Jones is simply incorrect when she states that "the entirety of Appellant's claim now rest [sic] on the untested out-of-court summaries and opinions of the Appellant and others." Resp. Brief at 13 n.11.

[6] These and other factual disputes were further developed in the then-unfinished discovery that was summarized by Ms. Smith's counsel at the hearing and which was submitted to the trial court after the hearing. *See generally* App. Brief at 3-9.

or the circumstances surrounding the will. *See Howard v. Nasser*, 354 S.C. 279, 291, 613 S.E.2d 64, 70 (Ct. App. 2005) (quoting Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003)). Ms. Jones attempts to distinguish *Nasser* from the case at bar, arguing that neither Ms. Jones nor her daughters were in a confidential relationship with the decedent (who was their mother and grandmother, respectively), and that there were no suspicious circumstances surrounding the preparation, formulation, or execution of the Lee will. *See* Resp. Brief at 15-17. Ms. Jones' attempts to distinguish *Nasser*, however, fall flat.

First, *Nasser* expressly recognizes that South Carolina precedent discussing donative transfers has held that an elderly parent and her adult child have a "confidential relationship." *See Nasser*, 364 S.C. at 287-88, 613 S.E.2d at 68 (citing *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005)).[7] Similarly, *Nasser* quotes and relies on the Restatement (Third) of Property § 8.3, which notes that "an adult child and an ill or feeble parent"[8] is an example of a confidential relationship. *See* Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. g (2003)).

Second, contrary to Ms. Jones' assertions, there is ample evidence of suspicious circumstances surrounding the preparation, formulation, or execution of the disputed will.

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[7] Indeed, the facts of *Dixon* on this point are analogous to the facts of this suit. In *Dixon*, at the same time the elderly parent made the challenged conveyance to her son, she also signed an agreement whereby the son was to care for her and maintain her residence. Similarly, in the case at bar, at the same time the decedent supposedly executed the will naming Ms. Jones as a beneficiary and personal representative, she also executed a healthcare power of attorney whereby Ms. Jones was authorized and obligated to make decisions concerning the decedent's care. This healthcare power of attorney is further evidence of the confidential relationship between the decedent and Ms. Jones.

[8] Here, at the time the decedent supposedly executed the Lee will on October 18, 2011, she had been diagnosed with cancer. *See* Dep. of Eris Smith at 12 (noting that the diagnosis was made in "the early fall of 2011").

See App. Brief at 10-13 (explaining the significance of the numerous factual disputes regarding whether the decedent wished to execute a new will, whether she was tricked into signing the purported will, whether she even knew what she had signed, and whether the document she signed actually reflected her wishes). In addition, several of the factors in *Nasser* are also present here: physical infirmity as a result of illness,[9] differences from the prior will,[10] the alleged wrongdoers were present when the new will was created,[11] and the alleged wrongdoers wished to limit the testator's relationships with others.[12] In short, the facts here present a confidential relationship and sufficiently suspicious circumstances to give rise to *Nasser's* presumption of undue influence.

Next, Ms. Jones argues there is insufficient evidence that any fraudulent representation was used to procure the Lee will. *See* Resp. Brief at 17-18. This argument incorrectly imposes a higher standard than should apply here. For purposes of summary judgment, it does not matter whether Ms. Smith's evidence is so strong that she will or is likely to prevail on her fraudulent inducement claim. Rather, all she must show is the existence of genuine issues of material fact that the will was procured by fraud or

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[9] As noted above, the decedent had been diagnosed with cancer, *see* n.9 *supra*, and at the time the Lee will was supposedly executed, the decedent (who was in her 80s) was dependent on the assistance and transportation provided by paid local caregivers, which continued until the time of her death. *See* Dep. of Eris Smith at 13, 16-17, 41-42; EUO of Sharon Graham at 3-4; EUO of Rachell Pringle at 3-4.

[10] The Lee will included new beneficiaries, a different personal representative, and a different codicil disposing of certain items.

[11] Indeed, Ms. Jones' daughter Pam *prepared* the will. *See* Affidavit of Robert E. Lee at ¶¶ 2-6; Dep. of Pam Jordan at 6:16-19; Dep. of Cyrus Sloan at 16-17.

[12] *See* EUO of Sharon Graham at 18:16-21 (noting that Ms. Jones did not like Ms. Graham to be around the decedent and, in the months prior to the decedent's death, tried to limit their interaction); EOU of Rachell Pringle at 41:7-43:18 (detailing instances in which Ms. Jones sought—against the decedent's wishes—to replace her trusted, local caregivers with a professional nursing service or a nursing home).

misrepresentation. Ms. Smith has done so. *See* Dep. of Eris Smith at 119:23-120:23 (noting that, upon returning from Robert E. Lee's office, the decedent thought she had completed a healthcare power of attorney and paperwork relating to a wheelchair); *id.* at 75:24-77:3 (noting that after being ostensibly taken to brunch, the decedent returned from Robert E. Lee's office flustered, upset, and confused); EUO of Sharon Graham at 23 (noting the decedent thought her granddaughter was taking her to brunch and thus invited Ms. Graham to accompany them). This evidence raises factual questions about whether fraudulent representations were used to induce the decedent to sign the Lee will, which is all that is needed to survive summary judgment.

Because of the existence of numerous issues of material fact concerning the execution of the Lee will, the trial court erred by granting summary judgment.

II. This Court can and should consider all arguments and supporting materials submitted to the trial court prior to its written order granting summary judgment.

Ms. Jones erroneously argues this Court should ignore the arguments and supporting materials Ms. Smith submitted to the trial court after the summary judgment hearing but *before* the trial court issued a written ruling on the motion. *See* Resp. Brief at 19-26. As explained below, these materials were properly before the trial court and are properly part of the Record on Appeal for this Court's consideration.

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." Hearing Transcript at 35:5-36:3. After that hearing, Ms. Jones 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 stating that another round of depositions was scheduled, explaining the reasons those depositions could not have been conducted earlier, and summarizing 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.

These materials were properly before the trial court and thus are properly before this Court. The determination of what may be designated for inclusion in the Record on Appeal is governed by Rules 209(b) and 210(c), SCACR.[13] 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 to the requirement of relevance, the challenged items are unquestionably relevant to this appeal. 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:

[13] In contrast, Ms. Jones' arguments rely on Rules 1, 56, 59, and 60, SCRCP. *See* Resp. Brief at 19-26.

> 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*?

See App. Brief 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 Ms. Jones objects were presented to the lower court prior to its written ruling granting summary judgment.[14] Ms. Jones does not dispute this. Rather, her argument 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.

The fatal flaw in Ms. Jones' 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

[14] The language of Rule 210(c) simply requires that the items in the Record were "presented to the lower court." It does not contain a requirement that they were presented to the lower court prior to its final ruling or judgment.

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 supposedly "belated" items 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 Ms. Smith's Supplemental Memorandum makes no difference. It is irrelevant for purposes of compiling the Record on Appeal 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.

Ms. Jones' arguments to the contrary are simply misdirections. For example, she asserts that Ms. Smith's post-hearing materials should have been submitted as "newly discovered evidence" or by way of a Rule 59 or Rule 60 motion. However, Ms. Smith did not need to file—indeed, she *could not* have filed—a motion to alter or amend or a motion for relief from judgment *prior* to the court's written, final ruling. Similarly, Ms. Jones' insertion of the word "[timely]" into the quotation from the Chief Justice's book, *see* Resp. Brief at 22, is a significant and unwarranted alteration to the language and meaning of that treatise. Likewise, Ms. Jones' deploys another red herring by suggesting

that allowing litigants to submit arguments and supporting material after a hearing but prior to a final ruling would "render the . . . SCRCP meaningless and would invite litigants to sandbag evidence" and "such submissions could continue . . . up until a notice of appeal." Resp. Brief at 23-24. This parade of horribles reflects no actual danger, particularly where, as here, both the court and opposing counsel were expressly advised of the desired evidence *at the hearing* and were informed of the need for more time to complete discovery. There was no sandbagging, trickery, or prejudice, and the allowance of evidence like the EOUs submitted here would not pave the way for other litigants to submit additional materials after a trial court's final, written ruling. Simply put, nothing in the rules prevents the submission of arguments and materials after a hearing and prior to judgment, nor would a ruling permitting such submissions lead to a flood of impermissible submissions in other suits.

Finally, Ms. Jones argues that the EUOs and arguments submitted after the hearing create no genuine issue of material fact. *See* Resp. Brief at 24-26. She is incorrect. As is amply and repeatedly demonstrated in Ms. Smith's primary brief, the Record is replete with examples and explanations of how the statements in the EUOs (like the conflicting statements in the depositions and affidavits) reveal disputed factual issues that affect nearly every aspect of the preparation, formulation, or execution of the disputed will. Accordingly, this Court should consider all the materials in the Record and, in light of the factual issues contained therein, should reverse the trial court's order.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse the trial court's Order granting summary judgment.

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

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