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.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Eris Gail Smith ("Ms. Smith") petitions for rehearing of the Court's opinion in *In the Matter of the Estate of Eris Singletary Smith*, Op. No. 5462 (S.C. Ct. App. filed Dec. 21, 2016) (Shearouse Adv. Sh. No. 48 at 74). As explained below, rehearing is warranted because the majority opinion and concurring opinion overlook and misapprehend points of fact and law and are in conflict with precedent of the Supreme Court and this Court.

I. The majority opinion overlooks or improperly discounts the veracity of record evidence demonstrating genuine issues of material fact.

Rehearing of this appeal is warranted because the majority opinion rests on two erroneous conclusions, one of which involves the overlooking of record evidence and one of which involves the improper evaluation of the veracity, persuasiveness, and credibility of the

testimony. In addition, the majority opinion appears to rest in some part on a supposed concession made by Ms. Smith, when it should not.[1] *See* Op. at 5, fn 1. In short, as explained more fully below, and for all of the reasons, arguments and points asserted by Ms. Smith in her appeal briefs, all of which are expressly incorporated herein, the majority opinion overlooks and misapprehends points of fact and law, thus rehearing is warranted.

A. The majority opinion's ruling regarding the claim of undue influence overlooks record evidence and misapprehends the legal test for the claim.

The majority opinion rejecting Ms. Smith's claim of undue influence overlooks the suspicious facts surrounding the execution of the Lee Will and misapprehends the proper legal test to evaluate the claim. *See* Op. at 5 (stating "[n]o evidence in the record . . . indicate[s] the Testator was the victim of threats, force, or restricted visitation," and thus concluding there is no issue of fact to support a claim for undue influence). The law is clear that a will can be set aside for undue influence if there is "evidence *either* of [1] threats, force, and/or restricted visitation, *or* [2] of an existing fiduciary relationship" that enables another to impose her wishes on the testator. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003); *see also Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999) ("'In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution.'") (citation omitted). Here, contrary to the majority opinion's conclusion, these factors are present, and summary judgment was thus inappropriate.

First, the evidence regarding the Testator's execution of the Lee Will is conflicting and raises unavoidable questions of material fact regarding whether the will was coerced.

[1] There is no video of the oral argument. Due to the holidays, Ms. Smith has had no time as yet to attempt to obtain a voice recording to again listen to the oral argument. As a result, Ms. Smith contests that a concession was made. It is noted the majority opinion uses the phrase "in essence" when describing the "concession" which is not terminology consistent with a concession.

Specifically, the Testator—who had no desire to execute a new will and who thought Ms. Jones' daughter was taking her into town merely to attend a brunch[2]—was instead taken to an attorney's office where she was left with no means of departure other than a firm employee who happened to be another of Ms. Jones' daughters. *See* Dep. of Pam Jordan at 7–8 (R. 198). The suspicious nature of the transaction is reinforced by evidence of the Testator's subsequent uncertainty regarding what had occurred and by the Lee law office's subsequent refusal to provide the Testator with a copy of the papers she had signed.[3] *See generally* App. Brief at 10–13 (explaining 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). These circumstances give rise to, at minimum, a genuine issue of material fact and arguably a *presumption* of undue influence. *See Howard v. Nasser*, 364 S.C. 279, 286, 613 S.E.2d 64, 67 (Ct. App. 2005) ("'A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer.'") (citation omitted).

In addition, the majority opinion overlooks the second circumstance in which the *Russell* Court stated a will would be set aside for undue influence, namely the existence of a fiduciary relationship that enables a person—even in the absence of threats, force, or restricted visitation—

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[2] *See* Dep. of Eris Smith at 76 (R. 261) (noting Ms. Jones' daughter offered to estator to take her to Marion, SC for brunch); *id.* at 106:20-24 (stating the Testator had no intent to execute a new will) (R. 269); *id.* at 112 (R. 270) ("My mother never said she went to Marion to sign a will."); EUO of Sharon Graham at 23 (R. 323) (stating Testator was taken to Marion for a brunch).

[3] *See* EUO of Sharon Graham at 26:12-20 (R. 326) (noting that upon Testator's return from Robert E. Lee's office, she was confused about what she had signed); EUO of Janet Altman at 5 (R. 425) ("She had no idea what she signed."); *id.* at 8:25-9:11 (R. 428–29) ("She just told me, I don't know what documents I signed . . . She just knowed that—that her will was in Mr. Hoefer's office."); *id.* at 5 (R. 425) ("[S]he was highly upset. Because she could not get a copy of it or anything for her peace of mind to know what she had signed.").

to impose her will on the testator. *Russell*, 353 S.C. at 217, 578 S.E.2d at 333. Here, the Respondent Ms. Jones had such a relationship with her mother, the Testator. *See generally Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999) (noting that "Calvin had a fiduciary relationship with his mother" that "created a presumption of undue influence"); *see also Nasser*, 364 S.C. at 287-88, 613 S.E.2d at 68 (noting that South Carolina precedent discussing donative transfers has held that an elderly parent and her adult child have a "confidential relationship") (citing *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005)).[4]

In addition to the foregoing oversights of fact and law, the majority opinion incorrectly asserts that "Smith admits the Testator had the opportunity to change the Lee Will had she so desired." *See* Op. at 5. To the contrary, Ms. Smith clearly and repeatedly stated that the Testator was unaware of what she had signed, her requests for a copy of any papers she signed went unanswered, and her subsequent conversations with family and friends regarding the contents of her will reflected her *prior* will (the Hoeffer Will), not the Lee Will. *See* App Brief at 7–8, 11–12; App. Reply Brief at 8–9. In sum, the majority opinion rejecting Ms. Smith's claim of undue influence overlooks and misapprehends points of fact and law, and rehearing is warranted.

B. The majority opinion's ruling on the claim of fraud in the inducement improperly attempts to weigh the evidence's veracity and persuasiveness.

The majority opinion rejecting Ms. Smith's claim of undue influence summarizes the conflicting evidence but concludes that Ms. Jones' witnesses and narrative seem more truthful and persuasive than Ms. Smith's testimony and that of the witnesses on whom she relies. *See* Op. at 6–7 (analyzing the conflicting evidence and testimony and concluding "the inferences Smith

[4] There are a number of other similarities between *Cumbee*, *Nasser*, and the case at bar including physical infirmity as a result of illness, differences from the prior will, the alleged wrongdoers' wish to limit the testator's relationships with others, and the alleged wrongdoers' presence when the new will was created. *See* App. Reply Brief at 10. As to the latter, the fact that Ms. Jones acted through the proxy of her daughters and was not herself physically present at the signing of the Lee Will is a distinction without a difference.

asks us to draw are not reasonable and the alleged conduct or statements she relies upon do not create a *genuine* issue of material fact to support her fraudulent inducement claim.") (emphasis in original).[5] The majority opinion concludes that it would be "illogical to believe" the evidence provided by Smith. *See* Op. at 7. Such credibility determinations, however, are inappropriate for an appellate court to make when reviewing an order granting summary judgment:

> The Court of Appeals ignored petitioner's testimony and found Monteith's testimony on the agency and disclosure issues to be persuasive. However, because both the agency and the disclosure issues hinge on the credibility of Monteith and petitioner, summary judgment was inappropriate. *See Hiers by Hiers v. Mullens*, 310 S.C. 63, 425 S.E.2d 57 (Ct. App. 1992) (matters of credibility should not be determined at the summary judgment stage).

True v. Monteith, 327 S.C. 116, 120–21, 489 S.E.2d 615, 617 (1997) (reversing Court of Appeals ruling). So long as Ms. Smith presented genuine issues of material fact (which she has done), she has a statutory right to have a *jury* determine which of the conflicting witnesses' testimony is most credible and persuasive. *See* S.C. Code Ann. § 62-1-306(a) ("The right to trial by jury exists in, but is not limited to, formal proceedings in favor of the probate of a will or contesting the probate of a will."). This Court's majority opinion misapprehends this rule and improperly usurps the jury's role, and this error warrants rehearing and reversal of the case.

II. The concurring opinion misapprehends the applicable law and rules related to a request for more time to conduct discovery to oppose summary judgment.

Rehearing of this appeal is warranted because the concurring opinion rests on a misapprehension of the law and rules that apply when a party seeks to postpone a summary judgment hearing or ruling to allow more time to conduct discovery for purposes of opposing

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[5] The majority opinion details the testimony that supports Ms. Jones' position but gives short shrift to the testimony that supports Ms. Smith's position. That testimony and evidence can be found more fully explained in Ms. Smith's prior briefing. *See* App. Brief at 13–15; App. Reply Brief at 11.

summary judgment[6]. Specifically, the concurring opinion concluded that generally a party seeking more time for discovery to oppose summary judgment must file an affidavit of counsel pursuant to Rule 56(f), SCRCP at the time of the hearing, explaining the need for more time. *See* Op. at 8 (Few, J., concurring). This conclusion misapprehends Rule 56 as well as the case law interpreting that rule. A party in Ms. Smith's shoes is *not* required to submit any affidavits. *See* Rule 56(c) (stating in part that a "party *may* serve opposing affidavits"); *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); *Schmidt v. Courtney,* 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (noting that Rule 56's reference to the pre-hearing service of affidavits does not apply to requests for continuance made at the summary judgment hearing, particularly where counsel explains to the court the need for further discovery and summarizes what the discovery is expected to reveal, and thus reversing the trial court's premature grant of summary judgment which had denied the non-moving party the chance to complete full and fair discovery); *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).

In addition, the concurring opinion attempts to distinguish the holding of one of the foregoing authorities, namely *Baughman*. *See* Op. at 8–9 (Few, J., concurring). The concurrence correctly points out that the *Baughman* Court's conclusion that summary judgment was premature in that suit was based on the facts that (1) the plaintiff had demonstrated a likelihood that further discovery would uncover additional relevant evidence, (2) the plaintiff's delay (of

[6] It should be noted that the Judge Konduros declined to address the concurring opinion ground.

three years) was excused by the fact that the defendant had "exclusive possession of certain information," and (3) the case presented complex issues of medical causation. *See Baughman*, 306 S.C. at 112–13, 410 S.E.2d at 544. However, the concurring opinion misapprehends the rule of *Baughman* by extrapolating from the discussion there that summary judgment is premature *only* when these three factors are present. Such is not the case and summary judgment is premature—even in a case involving "simple" issues and facts more easily ascertained than in *Baughman*—anytime a party is denied a full and fair opportunity to conduct discovery needed to support its case. As explained in prior briefing, and as is well stated by the points made by the Chief Judge in his dissent, which Ms. Smith here adopts, Ms. Smith did not unduly delay her discovery and she demonstrated to the trial court that the discovery she sought was relevant to uncovering additional evidence to oppose summary judgment. *See* App. Brief at 13–15; App. Reply Brief at 2–7. Accordingly, contrary to the conclusion of the concurring opinion, the trial court's grant of summary judgment was premature, and rehearing is thus warranted.

CONCLUSION

Here, summary judgment, a drastic remedy, was prematurely granted in the face of conflicting evidence. To permit the opinion to stand as is will create issues with precedent for the reasons set forth herein. Thus, Smith respectfully requests this Court grant rehearing of the case, correct the points of fact and law is overlooked or misapprehended as set forth herein, and adopt the cogent and correct reasoning and holding espoused by the Chief Judge's dissent.

Signature page attached

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____ by WGA w/ permission

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
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant

Columbia, South Carolina

January 5, 2017

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Petition for Rehearing

Counsel Served:

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

Lisa P. Whitehurst
Administrative Assistant

January 5, 2017

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9025
www.nelsonmullins.com

C. Mitchell Brown
Tel: 803.255.9595
Fax: 803.255.9025
mitch.brown@nelsonmullins.com

January 6, 2017

Hand Delivered

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia SC 29211

RE: In the Matter of the Estate of Eris Singletary Smith
Probate Roll No.: 2013-ES-21-190
Appellate Case No. 2013-002810
Our File No. 42246/01500

Dear Ms. Kitchings:

Please find enclosed the original and six copies of the Petition for Rehearing that was received via facsimile by the Court on January 5, 2017. Also find enclosed a courtesy copy of a motion for a one day extension that was filed by mail on January 5, 2017.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:lpw
Enclosures
cc: J. Rene Josey, Esquire

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9025
www.nelsonmullins.com

C. Mitchell Brown
Tel: 803.255.9595
Fax: 803.255.9025
mitch.brown@nelsonmullins.com

January 5, 2017

Via Facsimile (803) 734-1839

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia SC 29211

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SC Court of Appeals

RE: In the Matter of the Estate of Eris Singletary Smith
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Dear Ms. Kitchings:

Enclosed please find a Petition for Rehearing in regard to the above-referenced matter with the requisite filing fee.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:lpw
Enclosures
cc: J. René Josey, Esquire