THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

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SC Court of Appeals

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.

RESPONDENT'S RETURN TO THE PETITION FOR REHEARING

J. René Josey, Esquire
Jeffrey L. Payne, Esquire
TURNER, PADGET, GRAHAM & LANEY, P. A.
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ATTORNEYS FOR THE RESPONDENT

Other Counsel of Record:
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
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ARGUMENT

I. THE MAJORITY OPINION PROPERLY CONSIDERED THE RECORD EVIDENCE, EVEN OBJECTIONABLE EVIDENCE SUBMITTED TOO LATE[1], AND PROPERLY CONCLUDED THERE WAS NO GENUINE ISSUES OF MATERIAL FACT.

Appellant's Evidence Was Considered, Not Overlooked.

The Majority opinion actually considered the objectionable evidence that was the subject of the Respondent's Motion to Strike in this Court. The Majority opinion is clear, "No evidence in the record, *including the information contained in the EUOs*, indicate that the Testator was the victim of threats, force, or restricted visitation." Opinion at 4 (emphasis added). Despite her submission of hollow statements suggestive of her own isolated suspicions, "Smith failed to produce contrary evidence beyond *mere* allegations." Id. (emphasis added).

Court Understood And Properly Applied The Law

Appellant suggest that the Majority misapprehended or overlooked the law – either by not equating Appellant's self-serving allegations into material evidence or by not finding a confidential or fiduciary relationship. The Majority's opinion, however, is clear. The direct testimony of the those involved with the will's execution and the decedent's own admitted handwriting provide a backdrop of legitimacy that is not contradicted by Appellant's mere suggestions that the matter is suspicious or that a pre-existing fiduciary relationship exists.

The Majority Did Not Improperly Weigh The Evidence

Appellant suggest that the Majority improperly weighed the evidence because it concluded the conflicting evidence was unreasonable and illogical. Appellant would prefer a

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[1] Nothing in this Return is intended to waive the objections raised at trial and in this Court to the Appellant's evidentiary submissions. As previously briefed, 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 were the unilateral "Examinations Under Oath."

summary judgment standard that requires a court to accept any evidentiary response no matter how far-fetched or internally inconsistent – but this is not the applicable standard. First, the burden in a case of undue influence with a person of unchallenged capacity[2] is steep. "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).

Contrary to the Appellant's desire that any submissions *alleging* a disputed fact be considered as *creating* a disputed fact, the Court is not required to single out some small piece of evidence and attach to it a great significance when that evidence is introduced solely to create an issue of fact that is not genuine. Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)(Court is not "required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine."). A party must present more than a mere scintilla of evidence to overcome a Defendant's Motion for Summary Judgment. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). Where a defendant establishes an entitlement to judgment as a matter of law, the court *must* grant summary judgment. Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); Dyer v. Moss, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). ***The purpose of summary judgment is to expedite the disposition of cases***

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[2] As previously briefed, 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.

not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

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.

As previously briefed, without proof of any *actual* undue influence, Appellant seeks to somehow create a presumption of undue influence so that Appellant may avoid facing her burden of proof. Again, no such facts exist in this case and the present petition *still* identifies no such facts. 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. And none of these alleged wrongdoers benefitted from the updated Lee will. Moreover, 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. 273 (Appellant's Deposition 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.").

Although the present petition *again* submits that the scintillas suggest that the decedent was infirmed and dependent upon others, but the Appellant's own testimony belies these

disingenuous suggestions. 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. 261 (Appellant's Deposition p. 76 lines 1-20) ("You got a car. Sharon's there. Go get it done."). Moreover, the Appellant's belated evidence suggest that she – the Appellant, not the Respondent – had the most contact with the decedent (perhaps explaining the decedent's desire for confidentiality and choice of a different personal representative).

The suspicions 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.pp. 197-198 (Jordan deposition p. 4 line 13 to p. 6 line 2)), *but the Appellant herself admitted knowing of a plan to visit Mr. Lee's office.* R.p. 261 (Appellant's deposition p. 76 lines 1-20). 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.p. 278 (Appellant's deposition p. 142 lines 12 – 17). 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. 278 (Appellant's deposition 142 line 12 to p. 145 line 5).

II. THE CONCURRING OPINION PROPERLY RECOGNIZES THE TRIAL COURT'S DISCRETION AND GIVES MEANING TO SCRCP 56(F).

Appellant's present petition suggest the concurring opinion of now Supreme Court Justice Few misapprehends the applicable law and rules related to a request for more discovery time. Both Justice Few and the Chief Judge's dissent, however, recognize that continuing a summary judgment hearing to allow for additional discovery is in the sound discretion of the trial court. In addition, both Justice Few and the Chief Judge's dissent recognized the role of a Rule 56(f) affidavit in supporting a request for a hearing continuance.[3] But as Justice Few notes (footnote 3 in his concurring opinion), the affidavit here was submitted more than three weeks *after* the summary judgment hearing. As Justice Few explains, the mechanism provided by the SCRCP allows for the submission of such an affidavit "in advance of a scheduled hearing." The majority was appropriately "hesistant to say the trial court abused its discretion"[4] when the Appellant failed to provide a timely Rule 56(f) affidavit at or before the hearing. In further support of the trial court's refusal to continue the hearing, the Appellant conceded at the hearing itself that *"there is no doubt I could have probably done affidavits. There is nothing physically preventing me from that...."*[5] R. p. 55 lines 1-3.

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[3] As noted in Respondent's previous Brief, the Appellant chose to not even argue for the protections of Rule 56(f) in her prior briefings.

[4] Concurring Opinion of Justice Few (last sentence, second paragraph).

[5] Obviously counsel had spoken to the proffered witnesses in order to ethically represent their anticipated testimony at the hearing. Nevertheless, 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. 46 lines 12 – p. 47 line 9. Respondent argued that it would have been harsh or inequitable to continue this costly power struggle, without required Rule 56 evidence. R.p. 72 lines 17-18 and p.73 lines 18-23 (Hearing transcript). As previously briefed by Respondent, Rule 1, SCRCP identifies a core principal for all litigants -- the "just, speedy, and inexpensive determination" of their matters.

III. THE MAJORITY'S CONSIDERATION OF EXCLUDABLE EVIDENCE RENDERS THE TRIAL COURT'S DISCRETIONARY REFUSAL TO CONTINUE THE HEARING *MOOT* ANYWAY.

As discussed in the first Argument, the Majority's opinion actually considered the Appellant's late evidence – over the Respondent's objection in the trial court and the subsequent Motion to Strike in this Court. This consideration of the non-procedural Examinations Under Oath provided the Appellant far more benefit than a continuance; it provided the Appellant the evidentiary benefit of unilateral statements gathered from persons of unknown and untested backgrounds, unknown and untested motivations, and unknown and untested biases. Despite this benefit, and the consideration of these statements, this Court properly concluded there was an absence of material fact needed to defeat summary judgment. Thus, the failure of the trial court to continue the summary judgment hearing is of no consequence – it is a moot point.

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 reaffirm the Majority opinion sustaining summary judgment in this matter.

Florence, South Carolina

January 23, 2017

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

By: ______________________

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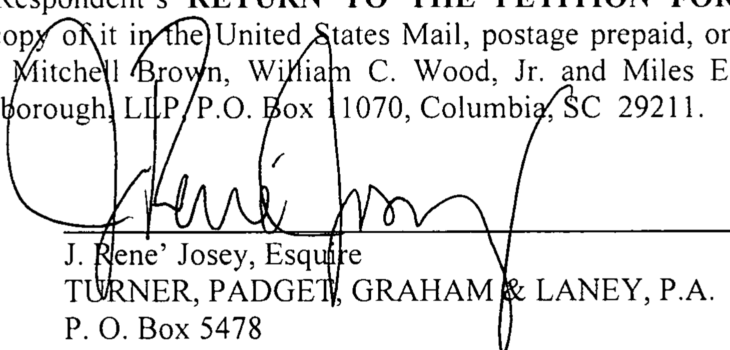
Of whom Judy Smith Jones is the..Respondent.

PROOF OF SERVICE

I certify that I have served Respondent's **RETURN TO THE PETITION FOR REHEARING** by depositing one (1) copy of it in the United States Mail, postage prepaid, on January 23, 2017, addressed to: C. Mitchell Brown, William C. Wood, Jr. and Miles E. Coleman, Nelson, Mullins Riley & Scarborough, LLP, P.O. Box 11070, Columbia, SC 29211.



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Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, SC 29211

Re: In the Matter of the Estate of Smith: Eris Gail Smith, Appellant v. Judy Smith Jones, Respondent
Case No. 2013-CP-21-1334 and Case No. 2013-ES-21-190
Tracking No.: 2013-002810
TPGL File No.: 12331.101

Dear Ms. Kitchings:

On behalf of the Respondent Judy Smith Jones, please find the original and seven copies each of our Return to the Petition for Rehearing and the original and one copy of a Proof of Service of the same on all counsel. We would appreciate your returning a filed copy of each document to us in the envelope provided. Thank you for your assistance in this matter.

By copy of this letter to counsel for the Appellant (C. Mitchell Brown, William C. Wood, Jr. and Miles E. Coleman, Nelson, Mullins Riley & Scarborough, LLP) we are herewith serving them with copies of all of these items as well. If you have any questions, please give us a call.

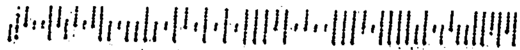
Sincerely,

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

J. René Josey

JRJ/dhb
Enclosures

Cc: C. Mitchell Brown, Esquire (w/enclosures)
William C. Wood, Jr., Esquire (w/enclosures)
Miles E. Coleman, Esquire (w/enclosures)
Jeff L. Payne, Esquire (e-mail only)
Judy Smith Jones (w/enclosures)



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