THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Honorable R. Knox McMahon

Case Nos. 2013-CP-21-1334 and 2013-ES-21-190
Court of Appeals Case No. 2013-002810

In the Matter of the Estate of Eris Singletary Smith

In re:

Eris Gail Smith, ... Petitioner,

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.

APPENDIX
VOLUME TWO

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VOLUME ONE

VOLUME TWO

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

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

FINAL BRIEF OF 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. 215 (Sloan Deposition p.26 line 19 – p. 27 line 5). He specifically testified that he found her to be competent and not under any undue influence. R.p. 215 (Sloan Deposition p. 28 line 18 – p. 29 line 2). While discussing her will with Russ Sloan, the decedent named each of her children and she listed her major assets for him. R.pp. 209-210 (Sloan Deposition p. 5 line 2 – p.6 line 23). She knew her devisees and understood her intended division of her property. R.p. 215 (Sloan Deposition p. 29 lines 3-14). She even corrected attorney Sloan's mistaken assumption about the lineage of the grandchildren she sought to address in her new will. R.p. 215 (Sloan Deposition p. 27 line 23 – p.28 line 17).

Attorney Sloan testified that during his meeting with the Decedent, she was relaxed and under no duress or stress. R.p. 215 (Sloan Deposition p. 26 line 19- p.27 line 14). 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. 215 (Sloan Deposition p. 28 line 21-p. 29 line 2). 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.p. 81 (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. 220-221 (Brittany Hooks Deposition p.

9 lines 22- p. 10 line 4). In her deposition, the Appellant acknowledged that, at the time of the Lee will, the decedent was "predominantly" independent R.p. 245 (Appellant deposition p.12 lines 9-16) and competent to manage her own affairs R.p. 250 (Appellant deposition p.31 lines 16-21) *including authorizing and signing checks to Appellant* to reimburse her for requested shopping items. R.pp. 246-247, pp.250-251 (Appellant deposition p. 17 line 12 -- p. 21 line 6 and p. 30 line 10 -- p. 37 line 24). The decedent's granddaughter described the decedent as mentally alert until the end of her life.[3] R.p. 206 (Jordan deposition p. 39 line 18 – p.40 line 20).

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. 85- 89 or pp.180-184 (Lee will). In addition, wills become self-proved when attested to by one of the witnesses before a person authorized to administer oaths. S.C. Code § 62-2-503. Again, in this

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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."

case, the decedent and two witnesses also executed an attestation before notary public Sarah Carlson. R.pp. 85- 89 or pp.180-184 (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. 80 (Lee affidavit ¶ 2). She dated and signed her written instructions and gave them to Robert Lee.[6] R.pp. 83 (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. 210 (Sloan Deposition R.p. 6 line 9 to p.8 line 15). Attorney Sloan prepared notes of his meeting with the decedent. R.p. 84 (Exhibit B to Lee affidavit and Sloan Deposition Exhibit 1). Thereafter, the decedent executed the new will.

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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. 261 (Appellant deposition p. 74 line 7 to p.75 line 16 ("I'm not a hand[writing] expert.")); R.p. 270 (Appellant deposition p.112 line 22 –p.113 line 19; R.p. 273 (Appellant deposition 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. 274 (Appellant deposition p. 129 line 19) and testified that checks signed *to her* during the same time frame did have her mother's signature. R.pp. 250-251 (Appellant deposition p. 31 line 3 to 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. 198 (Jordan deposition p.6 lines 6-19)), 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.p. 81 (Lee affidavit¶ 4).

In addition to executing her new will, the Decedent also reviewed and updated a personal memorandum on October 18, 2011. R.p. 81 (Lee affidavit ¶ 7). 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. 206 (Jordan deposition p. 40 line 21 to p.41 line 21), these minor adjustments appear to be one of the primary factors in the Appellant's discontent. R.pp. 276 - 277 (Appellant's deposition 135 line 7 –p. 138 line 3).

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. 275 (Appellant's deposition p. 132 lines 20-21).

[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. 232-236 (Respondent's Deposition p.61 line 15 –p.75 line 25); R.pp. 204-205 (Jordan deposition p. 30 line 10 – p. 34 line 3).

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. 262 (Appellant's Deposition p. 78 lines 4-24). Ultimately, other than vague assertions that inventory was taken from the store, the Appellant could not point to any specific missing item. R. p. 267 (Appellant's Deposition p. 99 line 4 -- p. 100 line 3).

[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 listening to -- and Mr. you both are very fine attorneys that's been before me before, but in listening to those that he may want to -- to depose doesn't -- doesn't -- from what I hear him saying, it would not change my opinion. Now, that -- that's almost an anticipatory ruling in that 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.pp. 75-76. 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.p. 11 (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. 6 (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. 56 line 25 – R. p. 60 line 13), it was met with an objection

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

sustained by the Court. R. p. 60 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 probably done affidavits. There is nothing physically preventing me from that...."***[12] R. p. 55 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. 46 lines 12 – p. 47 line 9. Indeed, it would have been harsh or inequitable to continue this costly power struggle, without required Rule 56 evidence, as counsel pointed out to the trial court (R.p. 72 lines 17-18 and p.73 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. 276 -- 277(Appellant's Deposition p. 136 line 25 -- p.138 line 3)(a television that Appellant disapprovingly opined was too big for her brother's "235 home").

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[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. 248 (Appellant's Deposition p. 22 lines 2-8). 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.

[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.

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. 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]

[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 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.

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* fighting cancer (discussed *infra* page 25), 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. 261 (Appellant's Deposition p. 76 lines 1-20) ("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. 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."). 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.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).

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. 150 (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. 5 – 10 (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, R.pp. 131 – 144 (item 13 on the Appellant's amended designation), was accompanied by an affidavit of counsel. R.pp. 145 – 147 (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. 55 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.

[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.

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 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

[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 addition, Respondent asked the Court to order Appellant to amend her brief to remove any reference to such materials and any argument based upon such materials.

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 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 suggests 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 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,

[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. 259 (Appellant's deposition p. 67 line 6 – p.68 line 8).

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. 261 (Appellant's deposition p. 76 lines 1-20). 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. 202 (Jordan deposition p. 25 lines 3-11)) – was that decedent was also planning to update her will. Of course, the decedent had every right to keep her testamentary plans confidential. When asked what actual evidence

[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. 248 (Appellant's deposition p. 22 lines 2-8). Moreover, they were regular borrowers from Appellant through the years. R.p. 248 (Appellant's deposition p. 22 line 9 – p. 25 line 10).

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.pp. 278-280 (Appellant's deposition p.142 line 12 – p.153 line 10).

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.

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December 17th, 2014

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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:
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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.

SCACR 211(b) CERTIFICATION

Pursuant to SCACR 211(b), Respondent certifies that her Final Brief complies with SCACR 211(b) with regard to its content.

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December 18, 2014

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PROOF OF SERVICE

I certify that I have served Respondent's Final Brief and SCACR 211(b) certification by depositing one (1) copy of it in the United States Mail, postage prepaid, on December 18, 2014, 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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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 (R. 45); *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 (R. 56-60, 62-67). Ms. Jones, however, ignores the numerous, significant factual issues existing and asserts there was

[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.

no genuine issue of material fact. *See* Resp. Brief at 14-18. As explained below, she is incorrect.

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 (R. 80); Dep. of Cyrus Sloan at 4-6 (R. 209-10); Dep. of Pam. Jordan at 4-5 (R. 197). In contrast, other testimony was the *opposite*. *See*, *e.g.*, Dep. of Eris Smith at 106:20-24 (R. 269); *id.* at 112:10-12 (R. 270); *id.* at 147:12-20 (R. 279); *id.* at 149:9-15 (R. 279). 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 (R. 265, 268, 279-80 and 228). 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

[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.

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) (R. 212-13 and 202-03).[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 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

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[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.

[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.

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. *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

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[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") (R. 245).

[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 (R. 245, 246, 252-53); EUO of Sharon Graham at 3-4 (R. 303-04); EUO of Rachell Pringle at 3-4 (R. 369-70).

[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 (r. 80-81); Dep. of Pam Jordan at 6:16-19 (r. 198); Dep. of Cyrus Sloan at 16-17 (R. 212).

[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) (R. 318); 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) (R. 402-04).

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 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) (R. 272); *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) (R. 261); 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) (R. 323). 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 (R. 75-76). 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

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

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:

> 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 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

[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.

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.

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THE STATE OF SOUTH CAROLINA
In The 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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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 email and by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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THE STATE OF SOUTH CAROLINA
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In the Matter of the Estate of Eris Singletary Smith

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Of whom Judy Smith Jones is the Respondent.

Appellate Case No. 2013-002810

Appeal From Florence County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5462
Heard October 15, 2015 – Filed December 21, 2016

AFFIRMED

C. Mitchell Brown and William C. Wood, Jr., both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, and Gary Ivan Finklea, of Finklea Law Firm, of Florence, for Appellant.

Jon Rene Josey and Jeffrey L. Payne, both of Turner Padget Graham & Laney, PA, of Florence; and Robert E. Lee, of Robert E. Lee, LLC, of Marion, for Respondent.

KONDUROS, J.: Eris Gail Smith (Smith) appeals the circuit court's order granting summary judgment to her sister, Judy Jones (Jones), in this dispute over the will of their deceased mother, Eris Singletary Smith (the Testator). On appeal, Smith argues (1) the circuit court prematurely granted summary judgment before the parties had a full and fair opportunity to complete discovery and (2) summary judgment was improper because genuine issues of material fact existed regarding the presence of undue influence and fraudulent inducement in the execution of the Testator's purported will. We affirm.

FACTS/PROCEDURAL HISTORY

The Testator died on March 11, 2013. On March 13, 2013, Jones submitted a petition to be appointed as the Testator's personal representative (PR) and to probate the Testator's October 18, 2011 will (the Lee Will), which the Testator executed with the assistance of attorney Robert E. Lee. The Lee Will appointed Jones as the PR of the Testator's estate and Rebecca Jones Cain (Becky), the Testator's granddaughter and Jones's daughter, as the alternate PR. The Lee Will divided the residue of the Testator's estate into six equal shares—a share for each of the Testator's five surviving children and a share to be inherited and split by two of her grandsons, Jamie and Mikie Smith. Two witnesses, attorney Cyrus Sloan and receptionist Brittany Hooks, and the Testator signed the Lee Will and a self-proving affidavit on October 18, 2011.

On April 1, 2013, Smith filed with the probate court a petition challenging the Lee Will as the product of undue influence and fraudulent inducement. Smith also submitted a petition to be appointed as the PR of the Testator's estate and to probate a different will the Testator had executed with the assistance attorney Frederick A. Hoefer, II, on March 30, 2011 (the Hoefer Will). The Hoefer Will appointed Smith as the PR of the Testator's estate, appointed Hoefer as the alternate PR, and divided the Testator's home and the residue of the estate equally between the Testator's five surviving children. On May 14, 2013, the claim was removed from the probate court to the circuit court.

On May 31, 2013, Jones moved for summary judgment on Smith's petition, arguing Smith failed to produce any evidence the Testator was unduly influenced or fraudulently induced into signing the Lee will. In support of her motion, Jones submitted a memorandum, the Lee will, a sworn affidavit from Lee, and the depositions of Hooks and Sloan. In opposition, Smith submitted the Hoefer will,

Smith's deposition, and the deposition of Pam Jordan, Lee's paralegal, who was also Jones's daughter and the Testator's granddaughter.

On August 7, 2013, the circuit court held a hearing on the summary judgment motion. At the hearing, Smith informed the circuit court she had scheduled several depositions for September 11, 2013, and asked the circuit court to grant a continuance and defer summary judgment until she had an opportunity to conduct them. Smith argued the depositions of several of the Testator's caregivers would demonstrate the Testator thought she was going to Lee's office to execute only a healthcare power of attorney and was taken there by Jones's daughter, Becky, "under the guise of a brunch." According to Smith, the evidence would show the Testator would not have allowed Lee to draft a will for her, because she believed Lee improperly handled the will of her deceased son, Wayne. Smith also contended the Testator did not realize she was executing a will, and the Testator told people the Hoefer Will was her will.

The circuit court rejected Smith's request for additional time to conduct depositions, orally granted Jones's summary judgment motion, and requested Jones prepare an order. The circuit court determined no genuine issue of material fact existed because no affidavits were submitted from caregivers or others demonstrating "there was some type of influence that overcame [the Testator's] will" when she executed the Lee Will.

On August 29, 2013, Smith filed a supplemental memorandum in opposition to summary judgement and an affidavit from her counsel concerning the need for a continuance. In the affidavit, Smith's counsel asserted summary judgement was premature because the parties had not had a full and fair opportunity to complete discovery. According to counsel, the parties initiated discovery as soon as the matter was filed and everyone involved had been diligent in prosecuting the case. Counsel stated the case was filed on April 1, 2013; the first round of depositions was held on May 1, 2013; the second round of depositions was held on May 17, 2013; and the third round of depositions was scheduled for September 11, 2013. Counsel explained that before the September 11, 2013 depositions, he "wanted to have an opportunity to thoroughly review the depositions taken in May and analyze the elements of proof, applicable law[,] and other issues prior to the next round of fact witness [depositions]." Counsel listed the testimony he expected the September 11, 2013 depositions to elicit and explained he expected the scheduled depositions to support Smith's fraudulent inducement claims.

On October 8, 2013, Smith submitted to the circuit court copies of the September 11, 2013 examinations under oath (EOUs) of Mary Alice Tompkins, Sharon Graham, Rachell Pringle, Janet Altman, Hoyt Leggette Smith, and Karen Deas McCall. With the EUOs, Smith's attorney submitted a letter explaining his client requested he depose the witnesses even though the circuit court granted Jones's summary judgment motion. The letter stated the EUOs supported the arguments Smith made at the summary judgment hearing. Jones objected to the EUOs.

On October 22, 2013, the circuit court signed a written order granting summary judgment to Jones and appointing Jones as PR of the Testator's estate. The written order states Jones offered Lee's affidavit and Sloan's and Hooks's depositions in opposition to the motion. The order does not mention the submission of the EUOs and does not say whether the circuit court considered the EUOs in rendering its decision. Smith filed a motion to reconsider which was denied. This appeal followed.

STANDARD OF REVIEW

"In reviewing the grant of summary judgment motion, the [appellate court] applies the same standard as the trial court under Rule 56(c), SCRCP . . . ." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438-39 (2003). Rule 56(c) states summary judgment is appropriate 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 and that the moving party is entitled to a judgement as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can *reasonably* be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Grimsley v. S.C. Law Enf't Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015). "Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" *Id.* (quoting *Town of Hollywood v. Floyd,* 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 588–89, 635 S.E.2d 649, 654 (Ct. App. 2006). If the moving party is successful, the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial. *Id.*

LAW/ANALYSIS

Smith argues the circuit court erred in granted Jones's motion for summary judgment because genuine issues of material fact existed regarding the propriety of the making of the Lee will. We disagree.

"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." *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). "For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition." *Id.* "Where the testator has an unhampered opportunity to revoke a will or codicil subsequent to the operation of undue influence upon him, but does not change it, the court as a general rule considers the effect of undue influence destroyed." *Id.* at 217, 578 S.E.2d at 333-34. Furthermore, the "mere showing of opportunity or motive does not create an issue of fact regarding undue influence." *Wilson v. Dallas*, 403 S.C. 411, 437, 743 S.E.2d 746, 760 (2013).

No evidence in the record, including information contained in the EUOs, indicate the Testator was the victim of threats, force, or restricted visitation.[1] Smith indicated she was the primary caregiver for the Testator in October of 2011 as Jones was frequently busy caring for her young grandchildren. While our courts have found a parent and child may have a fiduciary relationship with one another, Jones was not with the Testator when she made the Lee Will and no allegations were made that Jones coerced the Testator or substituted her judgment for that of the Testator. Lee and Sloan both attest to the Testator's willingness and capacity to execute the Lee will, and both attorneys indicate they met privately with the Testator when discussing her will. Additionally, Smith admits the Testator had the opportunity to change the Lee Will had she so desired. Accordingly, we conclude Jones demonstrated the absence of a genuine issue of material fact as to Smith's undue influence claim, and Smith failed to produce contrary evidence beyond mere allegations.

"To recover on a claim for fraud in the inducement, the plaintiff must show the defendant made a false representation relating to a present or preexisting fact, the

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[1] Smith conceded at oral argument any additional discovery information she hoped obtain was essentially contained in the EUOs, which were before the court when summary judgment was granted.

defendant intended to deceive the plaintiff, and the plaintiff had a right to rely on the false representation." *Smith v. Hastie*, 367 S.C. 410, 416, 626 S.E.2d 13, 16 (Ct. App. 2005). "Similarly, the intent to deceive is an essential element of an action for fraud." *Id.*

Lee's affidavit indicates the Testator came to his office on October 18, 2011 to discuss her will. He asked the Testator to write down what she wanted in her will and to sign and date those notes. Her handwritten notes, attached to Lee's affidavit, indicate the Testator wanted her estate to be divided into sixths with one share going to each of her surviving children and one share to be divided between her grandsons, Jamie and Mikie. She also wrote her personal representative should be Judy Jones with Pam Jordan as a secondary alternate. These changes were made to the will previously on file with Lee's office and given back to the Testator for her to review with attorney Sloan. Sloan's handwritten notes from his meeting with the Testator, also attached to Lee's affidavit, indicate they discussed her medications, her deceased husband, the identity of her six children and her two grandsons, Jamie and Mikie. The notes also generally outline the larger items in her estate. The Testator signed the will before witnesses Sloan and Hooks.

Finally, Lee's office made some revisions, at the Testator's request, to a memorandum previously on file with them regarding the distribution of her personal property. She reviewed the changes and the memorandum is initialed by her on each page and signed and dated at the end, October 18, 2011.

Sloan's deposition reflects he met with the Testator on October 18 at Lee's request to review her will. The two of them sat in a room and went through the will paragraph by paragraph. Sloan testified she appeared competent and under no duress. Additionally, Sloan testified the Testator corrected his assumption that Jamie and Mikie were the children of her deceased son, Wayne. His notes reflect this information that Jamie and Mikie are the children of James Ervin Smith.

Smith submitted her deposition indicating the Testator had stated on numerous occasions that she would never use attorney Lee to prepare a will because she believed something about Wayne's will had been handled improperly. She also testified the Testator said she was a "nervous jerk" after having been to Lee's office and indicated she did not know what she had done or signed. Smith stated the Testator thought she was going to Lee's office to execute a healthcare power of attorney and was tricked into executing the Lee Will. Smith also stated the Testator called Lee's office to obtain a copy of the will but was never provided

with one. The EOUs submitted by Smith essentially state the same or similar information.

The record demonstrates the Testator changed her will to provide for two of her grandchildren to whom she had been particularly close after their father's divorce. Smith admits this was something the Testator had considered doing in the past. Lee's affidavit and Sloan's testimony indicate the Testator knew and understood she was creating a will, not simply signing a healthcare power of attorney as Smith maintains. The Testator's handwritten notes from that day indicate creating a will was her desire and she desired to appoint Jones as her personal representative. Additionally, Sloan's notes reflect his discussion with her was about the distribution of her estate, not a healthcare power of attorney, she was competent, and she knew she was allotting one-sixth of her estate to Jamie and Mikie. Furthermore, Smith maintains the Testator disliked and distrusted Lee. Yet Smith maintains the Testator went to him for a healthcare power of attorney and not a will. If the Testator's dislike was so intense, it is illogical to believe she would go to him for either legal document.

The evidence presented by Jones regarding the propriety of the making of the Lee Will demonstrates the absence of a genuine issue of material fact as to Smith's fraudulent inducement claim. Against that backdrop, the inferences Smith 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.

Accordingly, we affirm the circuit court's grant of summary judgment in Jones's favor as to Smith's claims for undue influence and fraud in the inducement.[2]

AFFIRMED.

FEW, A.J., concurring in a separate opinion, and LOCKEMY, C.J., dissenting in a separate opinion.

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[2] I decline to address Smith's argument regarding the prematurity of summary judgment based on a lack of time to complete discovery. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when decision regarding a prior issue is dispositive).

FEW, A.J., concurring: I concur in the majority opinion. I write separately to explain my position that the circuit court acted within its discretion to refuse to continue the summary judgment hearing to allow for additional discovery. The summary judgment order should also be affirmed on this basis.

Rule 56(f) of the South Carolina Rules of Civil Procedure provides parties an easy mechanism for notifying the circuit court in advance of a scheduled hearing of the party's need for additional time in which to complete discovery before defending a motion for summary judgment. Pursuant to Rule 56(f), the non-moving party or counsel may submit an affidavit stating the reasons "he cannot . . . present by affidavit facts essential to justify his opposition" to the motion. In this case, Appellant did not comply with Rule 56(f).[3] When a party seeks additional time, but fails to comply with the Rule setting forth the procedure for requesting additional time, an appellate court should be very hesitant to say the trial court abused its discretion in denying the request.

When the defendants in *Baughman v. American Telephone and Telegraph Company* filed motions for summary judgment, the plaintiffs sought additional time to locate "a medical expert who could testify to the necessary degree of medical certainty." 306 S.C. 101, 104, 410 S.E.2d 537, 539 (1991). After the circuit court granted a motion for partial summary judgment as to medical causation, the plaintiffs submitted a letter from "a recently-discovered expert witness . . . in which she made a preliminary assessment of the case and recommended further study." 306 S.C. at 105, 410 S.E.2d at 539. The supreme court characterized a subsequent letter from the same expert as "highlight[ing] the need for further testing and analysis of Plaintiffs' medical conditions." 306 S.C. at 113, 410 S.E.2d at 544. In finding the circuit courts' order granting "partial summary judgment on the personal injury claims was premature," 306 S.C. at 112, 410 S.E.2d at 544, the supreme court made several other observations about *Baughman* that clearly distinguish it from this case. First, the court noted "the complexity of these cases" and that "proof of causation is especially difficult in

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[3]Rule 56(f) contemplates an affidavit will be filed at or before the hearing. *See Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 856–57 (2001) ("disagree[ing] . . . with the Court of Appeals' conclusion that the trial court abused its discretion in refusing to permit Doe's attorney to file Rule 56(f), SCRCP affidavits after the hearing" and stating, "Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery"). Here, Appellant filed an affidavit explaining why further discovery was needed more than three weeks *after* the summary judgment hearing.

actions seeking recovery for prolonged exposure to toxic substances." 306 S.C. at 113, 410 S.E.2d at 544. Second, relying on the defendants' exclusive possession of certain information, the court stated, "Plaintiffs had not yet received satisfactory responses to their interrogatories regarding the substances emitted from the Nassau plant, information critical to their obtaining expert opinion evidence concerning causation." *Id.* Finally, the court found, "Plaintiffs have demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue of medical causation." 306 S.C. at 112, 410 S.E.2d at 544.

In this case, on the other hand, the issues are simple, Appellant had within her control all of the information she needed to defend the motion, and the time requested for more discovery was not necessary to "uncover additional evidence," but rather only to document existing evidence. While there were depositions set for shortly after the hearing, it would have been a routine task for Appellant to obtain and file affidavits from the same witnesses setting forth the evidence Appellant wished to present in defense of the motion. Nevertheless, Appellant chose to proceed in the hope the circuit court would not enforce the Rules of Civil Procedure. The Rules, however, are designed to be enforced, *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) ("If a rule's language is plain, unambiguous, and conveys a clear meaning, . . . the stated meaning should be enforced."), and we have repeatedly stated we allow trial judges the discretion in which to do so, *see, e.g.*, *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012) ("A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion.").

The circuit court correctly enforced a plainly-written rule, and therefore, its decision to deny additional time in which to complete discovery was within its discretion.

LOCKEMY, C.J., dissenting: I respectfully dissent and would reverse the order granting summary judgment and remand this case for trial on both issues.

"A motion for a continuance is addressed to the sound discretion of the trial [court], whose judgment will be reversed only on showing an abuse of discretion." *Crout v. S.C. Nat. Bank*, 278 S.C. 120, 123, 293 S.E.2d 422, 423 (1982).

"Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)

(quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C.1975)). "This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Id.*; *see also Robertson v. First Union Nat. Bank*, 350 S.C. 339, 346-47, 565 S.E.2d 309, 313 (Ct. App. 2002) ("Generally, it is not premature for the trial court to grant summary judgment after all relevant parties have been deposed because the litigants have had a full and fair opportunity to develop the record in the case."). "The non-moving party in a motion for summary judgment must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." *Schmidt v. Courtney*, 357 S.C. 310, 322, 592 S.E.2d 326, 333 (Ct. App. 2003) (internal quotation marks omitted).

> Should it appear from the affidavits of a party opposing the [summary judgment] motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56(f), SCRCP. "Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery. The rule does not apply in the situation . . . where no affidavits [are] filed whatsoever." *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001); *but see Baughman*, 306 S.C. at 112 n.4, 410 S.E.2d at 544 n.4 (stating although the plaintiffs "did not file an affidavit invoking [Rule 56(f)], other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where . . . the need for further discovery is otherwise made known to the trial court").

Our appellate courts have indicated a trial court should deny a request for further discovery before granting summary judgment where the request came a year or more after the case was filed, where the request came after the expiration of the discovery deadline, or where the opposing party failed to demonstrate further discovery would create a genuine issue of material fact. *See e.g.*, *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 55, 677 S.E.2d 32, 36 (Ct. App. 2009) (finding the trial court did not err in hearing the defendants' summary judgment motion because the discovery deadlines had expired and the plaintiff was afforded a full and fair opportunity to conduct discovery; and noting the plaintiff

failed to demonstrate further discovery would uncover additional relevant evidence or create a genuine issue of material fact); *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 131, 591 S.E.2d 643, 646 (Ct. App. 2004) (finding the plaintiff was not entitled to further discovery before the trial court granted summary judgment to the defendant where the plaintiff failed to demonstrate further discovery would be beneficial, the case was approximately twenty-one months old when the defendant filed its summary judgment motion, and the plaintiff's ability to sustain her claims should not have hinged upon speculative deposition evidence that might be obtained).

However, the *Batson* court held the circuit court abused its discretion by granting summary judgment before the plaintiff had a full and fair opportunity to complete discovery. 345 S.C. at 322, 548 S.E.2d at 857. In *Batson*, the parent of a child who was sexually molested filed a lawsuit against the child's abuser and the abuser's mother. *Id.* at 318, 548 S.E.2d at 855. In determining the trial court abused its discretion, our supreme court noted the plaintiff was not dilatory in pursuing discovery; several depositions—including the depositions of the abuser and his mother—were scheduled for the week following the hearing; and even though the delay was not attributable to the defendant, it was not solely attributable to the plaintiff. *Id.* at 322, 548 S.E.2d at 857.

I would find the circuit court abused its discretion by denying Smith's motion for a continuance and prematurely granting summary judgment to Jones in its first and only order in this case. Although I recognize the circuit court had discretion to grant or deny the motion for a continuance, I believe the court should have given Smith time to conduct the depositions scheduled the month after the date of the hearing. The circuit court granted summary judgment to Jones merely five months after the case was filed, three months after the case was removed from the probate court, and two months after Jones filed her summary judgment motion. Further, nothing in the record suggests that a scheduling order was in place, that the circuit court previously ordered the parties to complete discovery within a certain time period, or that the circuit court had granted discovery extensions.

In addition, Smith's counsel explained further discovery would show the existence of a genuine issue of material fact, and he submitted a Rule 56(f) affidavit explaining the need for further discovery. In the affidavit, Smith's counsel asserted summary judgment was premature because the parties had not had a full and fair opportunity to complete discovery, the parties initiated discovery as soon as the matter was filed, and everyone involved had been diligent in prosecuting the case. Counsel explained the case was filed on April 1, 2013; the first round of

depositions was held on May 1, 2013; the second round of depositions was held on May 17, 2013; and the third round of depositions was scheduled for September 11, 2013. Counsel stated he wanted an opportunity to thoroughly review the May depositions and analyze the applicable law before conducting the September 11, 2013 depositions. In the affidavit, Smith's counsel stated he expected the witnesses' testimony to support Smith's claims, and he listed the testimony he expected the depositions to elicit.

Like the plaintiff in *Batson*, Smith was not dilatory in pursuing discovery. Also, as in *Batson*, the depositions of several witnesses—including the Testator's caregivers—were scheduled to be conducted soon after the summary judgment hearing. Neither of these two facts is disputed. Accordingly, I believe Smith demonstrated she did not have a full and fair opportunity for discovery and the circuit court abused its discretion by denying her motion for a continuance and prematurely granting summary judgment to Jones.

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—

[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

[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

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By: [signature] by MBA w/ permission

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January 5, 2017

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM FLORENCE COUNTY
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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,

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

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January 5, 2017

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
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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

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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

[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***

[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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ATTORNEYS FOR THE RESPONDENT

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.

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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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
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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.

REPLY IN SUPPORT OF THE PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Eris Gail Smith ("Ms. Smith") files this Reply in support of her Petition 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). Most of the arguments raised in Ms. Jones' Return have been previously addressed and rebutted fully in Ms. Smith's prior briefing or in the Petition itself, and thus no further rebuttal is warranted here.

Ms. Jones does, however, assert an argument which requires rebuttal. Specifically, she erroneously asserts that Ms. Smith knew the decedent intended to visit the law office of Robert E. Lee to obtain a healthcare power of attorney:

> 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*.

See Respondent's Return at 4 (emphasis in original).[1] According to Ms. Jones (and the Court's majority opinion), this fact—assuming it were true—seems to undercut Ms. Smith's arguments on appeal. The evidence relied on by Ms. Jones, however, hardly stands for the propositions that (1) Ms. Smith knew the decedent planned to visit Mr. Lee's office at all, much less on the day in question, or (2) that the decedent herself knew or wished for her trip to town on the day in question to include a stop at Mr. Lee's office.

Rather, Ms. Smith's deposition testimony merely states she was aware (1) that Pam Jordan (Ms. Jones' daughter) had *offered* to prepare a free healthcare power of attorney for the decedent at Lee's office, (2) that Ms. Smith had discouraged the decedent from taking advantage of that offer, (3) that the decedent went into town that day believing she was headed only to a brunch, and (4) that when the decedent returned from town she was confused, upset, and unsure what she had signed. *See* R. 261 (Smith's deposition page 76). This evidence, when rightly understood, demonstrates the inappropriateness of summary judgment and thus the need for rehearing.

In short, Ms. Jones' continued misapprehension of the evidence does not excuse the Court's misapprehension of the evidence nor does it dispel the need for rehearing. Accordingly,

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[1] The Court's majority opinion similarly misapprehended the evidence, as explained by Ms. Smith in her Petition for Rehearing. *See* Pet. for Rehearing at 2–3; *see also* Op. at 6 ("Smith stated the Testator thought she was going to Lee's office to execute a healthcare power of attorney . . . .").

Ms. 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 in her Petition, and adopt the cogent and correct reasoning and holding espoused by the Chief Judge's dissent.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

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January 30, 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: Reply to Return to 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
Lisa P. Whitehurst
Administrative Assistant

January 30, 2017

The South Carolina Court of Appeals

In the Matter of the Estate of Eris Singletary Smith

In re:

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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.

Appellate Case No. 2013-002810

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ A.J.

I would grant the petition for rehearing.

_____ C.J.

Columbia, South Carolina

FILED

February 24, 2017

cc:
C. Mitchell Brown, Esquire
William C. Wood, Jr., Esquire
Jeffrey L. Payne, Esquire
Robert E. Lee, Esquire
Gary Ivan Finklea, Esquire
Jon Rene Josey, Esquire
The Honorable R. Knox McMahon

Operations Center COLUMBIA

From: Chad Boykin
Sent: Friday, March 24, 2017 11:47 AM
To: Operations Center COLUMBIA; Bo Murphy; Shacara Parson; Sarah Whitehead; Frank Knox; Jason Skipper; Delores Hunter; Robert Faircloth; Jeff Brown; Diane Marion; Stephanie James; Donna Smalls; justine.allinger@ricoh-usa.com
Cc: Kenneth.Lacey@ricoh-usa.com; Jada Bannen
Subject: Updated Coverage Schedule 3/27-3/31 & Monday 4/3
Attachments: VAC Calendar.xlsx

Morning Team,

Please take a moment to review the updated coverage areas for the week of 3/27-3/31 & Monday 4/03. If your name is not listed on a particular day, then your normal schedule has not been affected. Of course, this is subject to change-as you can see we have many areas to plan around. If you have any questions or see any omissions, please let us know.

Also attached is a copy of the vacation calendar, which will go out each week with the updated schedules. Please take a moment to look over this calendar as it contains important information concerning scheduled time off and holidays.

Monday 3/27
Jeff--OUT
Frank--OUT
Nikolay--7:00-4:00 Open Center
Anna Marie--10:00-7:00 Evening Mail
Woody--10:00-7:00 Evening Mail (5:00-6:00 Switchboard)
Robert--15/16 Pick Up Papers
Delores--12/14
Jason--8/11 (4:45--5:30 Operations Support)
Chad--9:30-6:30
Jada--8:00-5:00
Justine--Copy Center

Tuesday 3/28
Frank--OUT
Nikolay--7:00-4:00 Open Center
Woody—10:00-7:00 Evening Mail (5:00-6:00 Switchboard)
Anna Marie--10:00-7:00 Evening Mail
Jeff--14/16
Jason--8/11 (4:45--5:30 Operations Support)
Chad—9:30-6:30
Jada--8:00-5:00
Justine--Copy Center

Wednesday 3/29
Frank—OUT

Bo—OUT
Jason—12:00-5:30 (4:00--5:30 Copy Center/Operations Support)
Jeff--7:30-4:30 (14/16)
Delores--12 (8:00-12:00, 4:00-5:00 8/11/12)
Nikolay--7:00-4:00 Open Center
Woody--10:00-7:00 Evening Mail (5:00-6:00 Switchboard)
Anna Marie--10:00-7:00 Evening Mail
Chad—9:30-6:30
Jada--8:00-5:00
Justine--Copy Center

Thursday 3/30
Jeff—OUT
Frank--OUT
Nikolay--7:00-4:00 Open Center
Anna Marie--10:00-7:00 Evening Mail
Woody--10:00-7:00 Evening Mail (5:00-6:00 Switchboard)
Robert--15/16 Pick Up Papers
Delores--12/14
Jason—8/11 (4:45-5:30 Operations Support)
Chad--9:30-6:30
Jada--8:00-5:00
Justine--Copy Center

Friday 3/31
Jeff—OUT
Frank--OUT
Donna--OUT
Sarah--9:30-6:30 (17 Desk)
Nikolay--7:00-4:00 Open Center
Anna Marie--10:00-7:00 evening Mail
Woody--10:00-7:00 Evening Mail (12:00-1:00, 5:00-6:00 Switchboard)
Robert--15/16 Pick Up Papers
Jason--8/11/14 (4:45-5:30 Operations Support)
Chad--9:30-6:30
Jada--8:00-5:00 (8:00-9:30, 2:00-3:00 17 Desk)
Justine--Copy Center

Monday 4/03
Diane—OUT
Delores--OUT
Nikolay--7:00-4:00 Open Center
Anna Marie--10:00-7:00 Evening Mail
Frank--10:00-7:00 Evening Mail (10:00-4:30 Hospitality) (5:00-6:00 Switchboard)
Woody—9:00-6:00
Jeff—14/16
Jason--8/11/12
Chad--9:30-6:30
Jada--8:00-5:00 (Open Hospitality)
Justine--Copy Center

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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: Appendix to Petition for Writ of Certiorari

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

March 27, 2017