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.

PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Appellant Eris Gail Smith ("Ms. Smith") petitions this Court to issue a writ of certiorari to review a final decision of the Court of Appeals, captioned Op. No. 5462 (S.C. Ct. App. filed December 21, 2016) (Shearouse Adv. Sh. No. 48 at p. 74) (Appendix ("App.") 526). As explained more fully below, certiorari is warranted because, as noted by the Court of Appeals' dissenting opinion, the Court of Appeals' majority opinion conflicts with prior decisions of this Court regarding the standard for summary judgment. In addition, as explained more fully below, the Court of Appeals' majority and concurring opinion deviate from this Court's precedent by applying incorrect legal standards and by improperly evaluating the weight and credibility of the competing testimony and disputed facts.

CERTIFICATION BY COUNSEL

The Court of Appeals ruled finally on Appellants' Petition for Rehearing on February 24, 2017. Judge Konduros and Acting Judge Few voted to deny the petition for rehearing. Chief Judge Lockemy would have granted the petition.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by applying the wrong legal standard to evaluate a claim of undue influence in the execution of decedent's will?

2. Did the Court of Appeals err by ignoring record evidence demonstrating genuine issues of material fact related to the undue influence surrounding the execution of decedent's will?

3. Did the Court of Appeals err by improperly evaluating the veracity and weight of record evidence demonstrating genuine issues of material fact related to the fraud in the inducement of decedent's will?

4. Did the Court of Appeals' concurring judge err by applying the wrong legal standard to evaluate a litigant's request for more time to conduct discovery to oppose summary judgment?

STATEMENT OF THE CASE AND FACTS[1]

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"). The decedent had lived in Effingham, South Carolina, a town located about ten miles from Florence, South Carolina. Several of her children—including Ms. Smith and Ms. Jones—and grandchildren lived and worked nearby. In 2001, the decedent executed a will drafted by Robert E. Lee, an attorney in the nearby town of Marion. *See* Will dated May 30, 2001 (App. 161).[2] At the same time, she executed a power of attorney and a healthcare power of attorney, both of which appointed her son—Almon Wayne Smith—as her agent to manage her affairs and to make health care decisions. (App. 169 and 175).

The decedent's son, Wayne, died in July, 2010. *See* Dep. of Eris Smith at 12 (App. 248). The decedent questioned the validity of Wayne's will, which was also drafted by Robert E. Lee, and which differed from what Wayne had told the decedent about the disposition of his assets and the appointment of his personal representative. *Id.* at 48, 51 (App. 257–58); *see also* EUO of Mary Tompkins at 18 (noting the appointment of Ms. Jones as Wayne's personal representative was a "stickler point" to the decedent, who knew that Ms. Jones "was not the one that was supposed to be the personal representative") (App. 298); EUO of Sharon Graham at 8–12 (App. 311–15); EUO of Rachell Pringle at 16, 18–19 (App. 385, 387–88).

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[1] Many of the underlying facts are disputed by the parties. Accordingly, the following recounting of the relevant background information sets forth both sides' views on any matters where the witnesses' accounts diverge. Of course, the court should construe the facts in the light most favorable to the non-movant, Petitioner Smith.

[2] This is the first of three wills executed by the decedent: May 30, 2001, March 30, 2011, and October 18, 2011. It is the latter two that are in dispute in this proceeding.

As a result, the decedent harbored suspicions of and animosity toward Robert E. Lee; views she did not change prior to her passing. *See* Dep. of Eris Smith at 92, 102, and 149–50 (discussing the decedent's dislike for Robert E. Lee and quoting the decedent as saying she would not use him for legal work) (App. 268, 271, 282–83); EUO of Mary Tompkins at 11–14 (noting the decedent thought Robert E. Lee had something to do with Wayne's will being changed and that Lee did not deal properly with clients) (App. 291–94); *id.* at 20 (stating the decedent thought that "conniving people" had changed Wayne's will and that, as a result, the decedent would never have relied on Robert E. Lee to prepare her own will) (App. 300); EUO of Sharon Graham at 17 ("You couldn't even say Robert Lee's name around Granny.") (App. 320); *id.* at 19 (noting the decedent harbored suspicion of Robert E. Lee until her death) (App. 322); EUO of Rachell Pringle at 23 (quoting decedent as having said "that she would never get Robert Lee's crooked ass to ever do anything for her" and noting that "[s]he couldn't stand him") (App. 392); *id.* at 24 (noting the decedent did not change her view of Robert E. Lee prior to her death) (App. 393); EUO of Janet Altman at 6-7 (App. 429-30); EUO of Hoyt Smith at 7 (App. 440).[3]

Because the decedent's will executed in 2001 named Wayne as her personal representative, his death necessitated a new will. Accordingly, on March 30, 2011, the decedent executed a new will. *See* Will dated March 30, 2011 (App. 178). This will named the decedent's daughter, Ms. Smith, as personal representative. *Id.* The will was the product of a lengthy and deliberate process in which the decedent paid several visits over a period of weeks to the offices of Rick Hoefer, an attorney in Florence, South Carolina, who drafted the will. *See* Dep. of Eris Smith at 157 (App. 284); EUO of Sharon Graham at 20–21 (App. 323–24); EUO of Hoyt Smith

[3] Ms. Jones' testimony stands in stark contrast to the testimony of the witnesses cited above. *See* Dep. of Judy Jones at 43–45 (stating the decedent considered Robert E. Lee to be her attorney and was never was angry about him) (App. 231).

at 15:19–25 (App. 442). The decedent kept her copy of this will hidden under her mattress. *See* EUO of Sharon Graham at 42–43 (App. 345–46).[4]

About six months later, on October 18, 2011, decedent's granddaughter, Becky, took her to Marion, South Carolina, ostensibly for brunch. *See* Dep. of Eris Smith at 76 (App. 264); Dep. of Pam Jordan at 7 (App. 201); EUO of Sharon Graham at 23 (App. 326). The decedent had been recently diagnosed with cancer.[5] *See* Dep. of Eris Smith at 12 (noting that the diagnosis was made in "the early fall of 2011") (App. 248). While in Marion, Becky suggested they visit the law office of Robert E. Lee, where Becky's sister, Pam—another of the decedent's granddaughters[6]—worked as a paralegal, so the decedent could execute a healthcare power of attorney. *See* Dep. of Eris Smith at 119–20 (App. 275); EUO of Rachell Pringle at 29–30, 34 (App. 398–99, 403). While the decedent was at Robert Lee's law office, Becky was allegedly called back to work, so she left the decedent—with no independent means of transportation—at Robert E. Lee's office, for Pam, the paralegal granddaughter, to take home. Dep. of Pam Jordan at 7–8 (App. 201).

The parties' and witnesses' testimony differs as to what happened next. According to Ms. Jones, after being left at Robert E. Lee's office, the decedent supposedly prepared and executed a new will naming Ms. Jones as personal representative, and executed a new healthcare power of

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[4] The decedent's copy of the March 30, 2011 will disappeared several weeks prior to her death, right around the time Ms. Jones and her associates dismantled the decedent's bed, ostensibly to make way for a hospital bed. *See* EUO of Sharon Graham at 42–43 (App. 345–48).

[5] The decedent, who at this time was in her 80s, was dependent on the assistance of paid local caregivers. *See* EUO of Sharon Graham at 3–4 (App. 306–07); EUO of Rachell Pringle at 3–4 (App. 372–73). After her diagnosis with cancer, this in-home care continued until the time of her death and was supplemented by the in-home private nursing company Nightingale's Nursing and Attendants in the final few months of decedent's life. *See* Dep. of Eris Smith at 13, 16–17 (App. 248, 249).

[6] Both Becky and Pam are Ms. Jones' daughters.

attorney naming Ms. Jones as the decedent's agent to make healthcare decisions. *See* Will dated October 18, 2011 (App. 183); Health Care Power of Attorney dated October 18, 2011 (App. 188–97). According to Ms. Jones and the witnesses she relies upon, the decedent knowingly and intentionally executed this will. For example, Robert E. Lee testified that he spoke with the decedent, had her write down her wishes for the disposition of her assets, and then had his staff—namely, Pam, the daughter of the newly named personal representative—prepare the will. *See* Affidavit of Robert E. Lee at ¶¶ 2–6 (App. 83–84); Dep. of Pam Jordan at 6 (App. 201); Dep. of Cyrus Sloan at 16–17 (App. 215). Similarly, Ms. Jones testified she had a discussion with the decedent in which the decedent stated she was confident in her choice of Ms. Jones as personal representatives. *See* Dep. of Judy Jones at 40 (App. 230).

Other testimony, however, on which Ms. Smith relies, reveals the decedent had no intent to sign yet another will and did not realize she had done so. For example, when the decedent returned home, she was extremely agitated, and the next day stated she had signed lots of papers but was unsure what she had signed. *See* Dep. of Eris Smith at 112 ("She didn't know she had signed a will. My mother never said she went to Marion to sign a will.") (App. 273); EUO of Sharon Graham at 25–26 (App. 328–29); EUO of Janet Altman at 5 ("She had no idea what she signed.") (App. 428). The decedent's confusion and agitation was exacerbated by the fact that Robert E. Lee's office had not and would not provide her with a copy of any of the documents she had signed. *See* EUO of Janet Altman at 5 ("[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.") (App. 428).

Yet again, the witnesses' testimony differs as to why no copies had been provided or were forthcoming after the decedent requested them. The decedent's caretaker testified the decedent called Robert E. Lee's office to request copies of any documents she had signed and

that Pam—who worked at that law office—promised, but failed, to provide copies of the documents. *See* EUO of Sharon Graham at 27–30, 59–60 (App. 330–33, 359–60). In contrast, Pam—who drafted the will naming her mother as personal representative—testified that the decedent did not take a copy of the will when she left because she did not want anyone to know about the will. *See* Dep. of Pam Jordan at 25 (App. 205). In addition, Pam denied that the decedent had called to request a copy of any documents, testifying that the decedent had called to be sure Robert E. Lee's office had a copy of her will and that the disposition of her assets included distribution to two particular grandchildren. *Id.* at 25–26 (App. 205–06).

Over the course of the next year, the decedent made numerous statements indicating her belief that her true and effective will was the March 30, 2011 will drafted by Rick Hoefer. *See* Dep. of Eris Smith at 106:20–24 (App. 272); EUO of Janet Altman at 8–10 (App. 431–33); *see also* EUO of Mary Tompkins at 8–9 (stating that in October of 2012, when the decedent explained to all the beneficiaries how her house would be disposed of, that explanation mirrored the March 30, 2011 will, not the October 18, 2011 will, and that the decedent had stated she did *not* intend for the two grandchildren to be included) (App. 288–89).

Similarly, the testimony indicates the decedent did not intend for Ms. Jones to be the personal representative of her estate and did not think that was the case. *See* Dep. of Eris Smith at 86–87 (noting that in February of 2013, when the decedent heard that Judy was claiming to be "over her estate," the decedent was furious) (App. 267); EUO of Sharon Graham at 19 (noting that when the decedent heard that Judy was claiming to be "over everything," the decedent stated "the H you is") (App. 322); EUO of Rachell Pringle at 42 (quoting the decedent as telling Judy "I wouldn't dare put you . . . over anything with me" and "I wouldn't put you over—any damn thing over me") (App. 406); *id.* at 46–47 (noting that the decedent told others that when she died,

Ms. Smith was to be over her affairs) (App. 410–11); EUO of Janet Altman at 12–14 (App. 435–36). Likewise, in January of 2013, when the decedent learned that Ms. Jones and Ms. Jones' daughter, Becky, were named in her healthcare power of attorney, she became extremely upset. *See* Dep. of Eris Smith at 64–65 (App. 261).

The decedent passed away on March 11, 2013. Immediately thereafter, Ms. Jones recruited several friends to go into the store adjacent to the decedent's home, which was previously operated by the decedent and her late husband. *Id.* at 66–67 (App. 262). This group did not call Ms. Smith—the only person with a key to the store—but instead went to great lengths to remove the store's security measures and to gain access into locked containers within the store.[7] *Id.* at 69–71 (App. 262–63). Ms. Jones conducted this operation without calling Ms. Smith because Ms. Jones wished "to show her that I'm in charge now." *Id.* at 71 (App. 263). This store contained a large number of valuable objects, including numerous old Federal Reserve notes and other items. *See* Dep. of Eris Smith at 96–97 (App. 269); *see also id.* at 51–52 (App. 258); Dep. of Judy Jones at 74–82 (App. 239–41); EUO of Hoyt Smith at 13–15 (App. 441–42).

On March 13, 2013, two days after the decedent's death, Petitioner Eris Gail Smith filed a petition to probate the decedent's March 30, 2011 will and to be appointed as personal representative. (App. 15.) Later that day, Respondent Judy Jones filed a petition to probate the October 18, 2011 will purportedly executed by the decedent and to appoint herself as personal representative of the estate. (App. 26).

On April 1, 2013, Ms. Smith filed a petition challenging the purported will brought forward by Ms. Jones, alleging the purported will was a product of fraudulent inducement and

[7] Ms. Smith had previously installed those security measures at the decedent's request, because the decedent did not wish for the Joneses and Browns to have access to the store. *See* EUO of Mary Tompkins at 19–20 (App. 299–300); *see also* EUO of Hoyt Smith at 10 (App. 441).

undue influence and that the decedent was unaware she had signed the supposed will. (App. 36). Ms. Jones answered the petition on April 19, 2013. (App. 42). The same day, the probate court temporarily appointed a special administrator to serve until the resolution of the parties' petitions for probate of the wills and for appointment of a personal administrator. (App. 4). On May 14, 2013, the probate court removed the matter to the Circuit Court. (App. 7).

Ms. Jones moved for summary judgment on May 31, 2013, arguing Ms. Smith had failed to produce any evidence that the decedent was subject to any undue influence or was fraudulently induced to sign the purported will. (App. 81). The circuit court held a hearing on August 7, 2013, at which Ms. Smith's attorney argued 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, 14–15 (App. 57–58). After the hearing, Ms. Smith's counsel conducted examinations under oath ("EUOs") of a number of the decedent's relatives, healthcare providers, and friends. On October 8, 2013, Ms. Smith submitted the transcripts of those EUOs to the circuit court in further opposition to the motion for summary judgment. (App. 151).

In an order signed on October 22, 2013 and filed two days later, the trial court granted Ms. Jones' motion for summary judgment and ordered the probate of the purported will and the appointment of Ms. Jones as personal representative. Ms. Smith filed a motion for reconsideration on November 11, 2013 (App. 156), which the trial court denied on December 4, 2013 (App. 14).

Ms. Smith appealed the trial court's ruling. The Court of Appeals received briefing, heard arguments on October 15, 2015, and in a divided opinion issued on December 21, 2016,

affirmed the trial court's ruling. Ms. Smith's subsequent petition for rehearing was denied by a divided panel the Court of Appeals' panel. This Petition for Certiorari followed.

SUMMARY OF GROUNDS FOR CERTIORARI

Summary judgment is a "drastic remedy" that should not be used to deprive a litigant of his or her day in court to resolve disputed factual issues. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006) (citation omitted). In the case at bar, however, the trial court erred by doing exactly that, granting summary judgment despite the existence of numerous material factual disputes and despite Ms. Smith's request for further discovery to flesh out these factual disputes. The Court of Appeals' majority compounded this error and further diverged from this Court's precedent by likewise ignoring and/or improperly weighing the credibility and veracity of record evidence demonstrating genuine issues of material fact, and by applying the wrong legal standard to evaluate a claim of undue influence in the execution of a decedent's will. The Court of Appeals' concurring opinion likewise contains error and diverges from this Court's precedent by applying the wrong legal standard to evaluate a litigant's request for more time to conduct discovery to oppose summary judgment. In light of these conflicts with binding precedent, and in light of the well-reasoned and persuasive dissenting opinion at the Court of Appeals, certiorari is warranted. *See* Rule 242(b)(2)–(3).

ARGUMENT

I. The Court of Appeals erred in its analysis of undue influence by applying the wrong legal standard.

The trial court's Order granting summary judgment concluded there were no issues of material fact as to whether any acts exerted on the decedent destroyed her free will, amounted to force or coercion, or fraudulently induced her to sign the supposed will. *See* Order at 4–5 (App.

11–12). This ruling—as well as the Court of Appeals' opinion affirming it—conflicts with this Court's precedent by applying only half of the legal test used to evaluate a claim of undue influence. The law is clear that a will can be set aside for undue influence in two ways: 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) (emphasis added).

The Court of Appeals' majority, however, analyzed only the first of the two ways in which an undue influence may be exerted over a testator. *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) (App. 530).[8] The majority's analysis, however, fails to account for the second circumstance in which a will should 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—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 the testator, who was her aging and feeble mother. *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 Howard v. Nasser*, 364 S.C. 279, 287–88, 613 S.E.2d 64, 68 (noting South Carolina precedent discussing donative transfers has held that an elderly parent and her adult child have a

[8] As explained below, the majority's conclusion on this factor is also erroneous.

"confidential relationship") (citing *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005));[9] Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. g (2003) (noting "an adult child and an ill or feeble parent"[10] are in a confidential relationship).

If the Court of Appeals' majority had acknowledged and analyzed the proper legal standard for a claim of undue influence, it would necessarily have concluded there were disputed issues of material fact (and a presumption) regarding the existence of a confidential and/or fiduciary relationships that could give rise to an 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).[11]

Indeed, there are a number of striking parallels between the facts of the case at bar and the facts in *Cumbee* and *Nasser*, which the Court found sufficient to give rise to a presumption of undue influence due to the fiduciary or confidential relationship. Here, for example, the

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[9] 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.

[10] 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") (App. 248).

[11] The suspicious circumstances, regarding which the Court of Appeals' majority failed to account, are discussed in detail in Part I.B, *infra*.

decedent was physically infirm as a result of illness,[12] the purported new will differed from the prior will,[13] the alleged wrongdoers were present when the new will was created,[14] and the alleged wrongdoers wished to limit the testator's relationships with others.[15] In short, had the Court of Appeals' majority applied the proper legal test for undue influence, these facts establish, at minimum, a genuine issue of material fact of a confidential or fiduciary relationship that gives rise to *Nasser's* presumption of undue influence. The Court of Appeals' application of the wrong legal test conflicts with this Court's precedent, thus certiorari is warranted.

II. The Court of Appeals erred in its analysis of undue influence by ignoring evidence demonstrating the existence of genuine issues of material fact.

Both the trial court's Order granting summary judgment and the Court of Appeals' majority opinion affirming that Order are in error due to failure to account for the record evidence demonstrating the abundant factual disputes over the "suspicious circumstances" and critical questions of whether the decedent was tricked or coerced into signing the purported will. *See Nasser*, 364 S.C. at 286, 613 S.E.2d at 67. Contrary to the lower courts' conclusions, the

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[12] As noted above, the decedent had been diagnosed with cancer, *see* n.10 *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 (App. 248, 249, 255–56); EUO of Sharon Graham at 3–4 (App. 306–07); EUO of Rachell Pringle at 3–4 (App. 372–73).

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

[14] Indeed, Ms. Jones' daughter Pam *prepared* the will. *See* Affidavit of Robert E. Lee at ¶¶ 2–6 (App. 83–84); Dep. of Pam Jordan at 6:16–19 (App. 201); Dep. of Cyrus Sloan at 16–17 (App. 215). 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.

[15] *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) (App. 321); 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) (App. 405–07).

evidence regarding the decedent's execution of the Lee Will raises unavoidable questions of material fact regarding whether the will was coerced. For example, the decedent—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[16]—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 (App. 201). Likewise, numerous witnesses testified the decedent had no intention to execute a new will, was unaware she had signed a will, and thought that her prior will from March 30, 2011 was still in effect.[17] Similarly, the testimony is hopelessly divided on the question of whether the purported Lee Will actually reflected the decedent's wishes for the disposition of her assets and the administration of her estate.[18] The

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[16] *See* Dep. of Eris Smith at 76 (App. 264) (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) (App. 272); *id.* at 112 (App. 273) ("My mother never said she went to Marion to sign a will."); EUO of Sharon Graham at 23 (App. 326) (stating Testator was taken to Marion for a brunch).

[17] *See, e.g.*, Dep. of Eris Smith at 106:20–24 ("Granny had kept telling me and Sharon since January . . . Granny says, oh, no. My – my will is at Mr. Hoefer's office.") (App. 272); *id.* at 112 ("She didn't know she had signed a will. My mother never said she went to Marion to sign a will.") (App. 273); *id.* at 147:12–20 (testifying that the decedent did not know what she signed) (App. 282); *id.* at 149:9–15 (recounting decedent's insistence that Ms. Jones was not, in fact, the personal representative named in her will) (App. 282); EUO of Sharon Graham at 26:12–20 (recounting conversation with decedent immediately after she returned from Robert E. Lee's office and was confused about what papers she had signed) (App. 329); EUO of Janet Altman at 5 ("She had no idea what she signed.") (App. 428); *id.* at 8:25–9:11 ("[B]ottom line was, she didn't know what she'd signed. . . . She did not know that it was a will or what document. 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.") (App. 431–32).

[18] *See* EUO of Mary Tompkins at 8–9 (stating that in October of 2012, when the decedent explained to all the beneficiaries how her assets would be disposed of, that explanation mirrored the March 30, 2011 will) (App. 288–89); Dep. of Eris Smith at 86–87 (noting that when the decedent heard that Ms. Jones was claiming to have been named personal representative, the decedent was furious) (App. 267); EUO of Sharon Graham at 19 (same) (App. 322); EUO of

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.[19]

In addition to the foregoing oversights, the Court of Appeals' majority also incorrectly asserts that "Smith admits the Testator had the opportunity to change the Lee Will had she so desired." *See* Op. at 5 (App. 530). 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* Appellant's Brief at 7–8, 11–12 (App. 456–57, 460–61); Appellant's Reply Brief at 8–9 (App. 513–14). In sum, the Court of Appeals' majority wrongly ignored numerous disputed facts and "suspicious circumstances" surrounding the execution of the Lee Will that give rise to a genuine issue of material fact, if not a presumption, of undue influence. The opinion conflicts with this Court's prior rulings, and therefore certiorari is warranted.

III. The Court of Appeals erred by improperly evaluating the veracity and weight of record evidence demonstrating genuine issues of material fact related to the fraud in the inducement of decedent's will.

The Court of Appeals' majority rejected Ms. Smith's claim of undue influence on an impermissible basis, namely by evaluating the credibility and weight of the testimony and

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Rachell Pringle at 42 (same) (App. 406); *id.* at 46–47 (noting that the decedent told others that when she died, Ms. Smith was to be over her affairs) (App. 410–11).

[19] *See* EUO of Sharon Graham at 26:12–20 (App. 329) (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 (App. 428) ("She had no idea what she signed."); *id.* at 8:25–9:11 (App. 431–32) ("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 (App. 428) ("[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.").

concluding that Ms. Jones' witnesses and narrative seem more truthful and persuasive than the testimony of Ms. Smith's and the witnesses on whom she relies. *See* Op. at 6–7 (analyzing the conflicting evidence and testimony and concluding "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.") (emphasis in original) (App. 531–32).[20] The majority concludes that it would be "illogical to believe" the evidence provided by Ms. Smith. *See* Op. at 7 (App. 532). 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, 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.").

Ms. Smith presented genuine issues of material fact regarding whether the decedent was fraudulently induced to sign the Lee Will. *See* Dep. of Eris Smith at 119:23-120:23 (noting that,

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[20] 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* Appellant's Brief at 13–15 (App. 462–64); Appellant's Reply Brief at 11 (App. 516).

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) (App. 275); *see also* 79 Am. Jur. 2d Wills § 379 ("The elements of fraud in the procurement of a testamentary instrument are the same as those required to vitiate a contract. The fraud sufficient to invalidate a will exists only when it is shown that a testator relied on a misrepresentation and was deceived.") (citations omitted).

This evidence raises factual questions about whether fraudulent representations were used to induce the decedent to sign the Lee will, and the Court of Appeals' majority erred by substituting its own credibility and weight determinations for those of a jury. Because the majority's holding conflicts with this Court's precedent, certiorari is warranted.

IV. The Court of Appeals' concurring judge erred by applying the wrong legal standard to evaluate a litigant's request for more time to conduct discovery to oppose summary judgment.

In addition to the errors by the Court of Appeals' majority discussed above, the concurring opinion rests on an erroneous interpretation of the law and the 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 summary judgment. Specifically, the concurring judge 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) (App. 533). 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 judge attempts to distinguish the holding of one of the foregoing authorities, namely *Baughman. See* Op. at 8–9 (Few, J., concurring) (App. 533–34). The concurrence correctly points out that the *Baughman* Court's conclusion that summary judgment was premature in that suit was based on the fact that (1) the plaintiff had demonstrated a likelihood that further discovery would uncover additional relevant evidence, (2) the plaintiff's delay (of 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 concurrence misapprehends the holding 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 is well stated by the points made by the Chief Judge in his dissent, 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* Appellant's Brief at 13–15 (App. 462–64); Appellant's Reply Brief at 2–7 (App. 507–12). Accordingly, contrary to the conclusion of the concurring opinion, the trial court's grant of summary judgment was premature, and certiorari is thus warranted.

CONCLUSION

For the foregoing reasons, and for the reasons articulated by the Court of Appeals' dissenting opinion, the majority and concurring opinions of the Court of Appeals conflict with this Court's precedent by applying incorrect standards of law and by ignoring or improperly evaluating the weight and credibility of record evidence. Certiorari is thus warranted.

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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
Appellate 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.

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):

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March 27, 2017

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

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

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a Petition for Writ of Certiorari and the original and three copies of the Appendix in regard to the above-referenced matter. We would ask that you file the originals and return clocked-in copies to us via our courier. Also enclosed is our check in the amount of $100.00 as the required filing fee.

By copy of this letter to counsel of record, we are serving them with a copy of the Petition and Appendix.

Sincerely,

William C. Wood, Jr.

WCWJR:lpw
Enclosures
cc: The Honorable Jenny Abbott Kitchings, SC Court of Appeals (Petition only)
J. Rene Josey, Esquire
Jeffrey L. Payne, Esquire