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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
BENTLEY PRICE, CIRCUIT COURT JUDGE

Appellate Case No. 2021-000837

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton B. Luzak, ... Appellant

v.

Merrill B. Light, Merrill U. Barringer as Personal Representative of the Estate of Paul Brandon Barringer II, J. Randolph Light, Jr., Merrill B. Light as putative trustee of the Paul B. Barringer II Revocable Trust dated December 4, 1998, and Merrill B. Light as Trustee of the Merrill Barringer Light Revocable Trust, ... Respondents

--and--

Hampton B. Luzak, ... Appellant,

v.

Merrill U. Barringer, ... Respondent,

Coastal Forest Resources Company ("CFRC")........................ Intervenor/Respondent.

FINAL REPLY BRIEF OF APPELLANT TO RESPONDENTS

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Appellant ("Ms. Luzak") submits this Reply to Respondents' Initial Brief, which deals with the summary judgment order as to the purported February 28, 2012, will and trust of decedent Paul Barringer, and the order bifurcating the trial of the case into separate trials. Ms. Luzak will simultaneously submit a separate reply to the separate Initial Brief of Intervenor Coastal Forest Resources Company ("CFRC").

I. REPLY TO RESPONDENTS' INTRODUCTION

Respondents contend that the bifurcation of the second and third causes of action of 2019-CP-07-01253 and 2019-CP-07-01294 dealing with power of appointment issues results in a simple trial without repetition of a trial for the remaining causes of action. The opposite is the case, as discussed in Ms. Luzak's Initial Brief and below.

In the Introduction to Respondents' Initial brief, Respondents[1] mischaracterize Judge Price's summary judgment order as "granting summary judgment on [Ms.] Luzak's claims that a February 28, 2012 revocable trust amendment executed by her father, Paul B. Barringer ("Mr. Barringer") was invalid… ." As discussed more thoroughly below and in Ms. Luzak's Initial Brief, Respondents sought a summary judgment that a will and a trust purportedly executed on February 28, 2012, were valid, which Judge Price granted. Despite Respondents' contention, the motion asked for and that summary judgment order held that the will and trust were valid, without limiting their validity depending on whether subsequent documents were valid.[2] In that Introduction,

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[1] Respondents' brief asserts that Defendant Light's husband, also a party defendant, died during the pendency of this litigation but that Ms. Luzak has not yet sought to substitute his estate as a party. Neither have Respondents, including Respondent Light, who is the personal representative of his estate. *See* SCRCP 17(a).

[2] Respondents contend that the order did not consider other wills. However, the only way to determine that the February 28, 2012 will and trust were valid (as requested by the motion and ordered by Judge Price) is for these documents to be unrevoked by subsequent documents, meaning that there were no subsequent valid documents. The putative subsequent documents and the arguments against their validity were in the record of the case before Judge Price. The validity of one will in a series cannot be determined in a vacuum, so necessarily his order means that any post-February 28, 2012 documents, which would have revoked the February 28, 2012 documents, were invalid.

Respondents also mischaracterize the bases on which Ms. Luzak sought to set aside those February 28, 2012 documents. According to Respondents, Ms. Luzak "seeks to set aside the February 2012 Documents *entirely* on the basis that Mr. Barringer allegedly lacked testamentary capacity, was under undue influence, and was mistaken when he executed these documents in 2012" (emphasis added). Ms. Luzak asserted additional grounds for setting aside those documents: fraud and intentional interference with an inheritance.

Respondents' Introduction also describes Ms. Luzak's claims that Respondent Barringer does not have a testamentary power of appointment over any voting control stock in CFRC as "contract-based claims" seeking to enforce a "secret" agreement or promise not to exercise any such power of appointment. As discussed more thoroughly below and in her separate appellate briefs,[3] Ms. Luzak does not purport to enforce any "secret" agreement or promise. Rather, Ms. Luzak asserts several arguments about any power of appointment: (1) That Mr. Barringer did not give Respondent Barringer a power of appointment over voting control stock; (2) that, to the extent that Respondent Barringer might have any such power of appointment, she entered into a binding contract not to revoke her agreement to not exercise such a power of appointment; (3) that Respondent Barringer made a binding non-contractual promise not to exercise any such power of appointment; and/or (4) that Respondent Barringer was precluded from exercising any such power of appointment because of promissory estoppel. Respondents' Initial Brief also continues to limit the focus of the power of appointment issue to wills and trusts executed in 1998, yet Respondents continue to assert that the February 28, 2012 will and trust are valid, as determined by Judge Price in his summary judgment order. Respondents take exactly contrary positions — arguing that the

[3] Judge Bonds granted Respondent Barringer's summary judgment motion on the second and third causes of action in 2019-CP-07-01253 and 2019-CP-07-01294 dealing with the power of appointment issues, which is on separate appeal at 2021-001337.

power of appointment was granted in the 1998 documents while asserting the validity of the February 28, 2012 documents, which revoked the 1998 documents. If the February 28, 2012 documents are valid, then the 1998 documents are not and thus cannot possibly create a power of appointment in Respondent Barringer.[4]

II. REPLY AS TO THE BIFURCATION ORDER

Respondents challenge Ms. Luzak's appeal of the Order Granting Defendants' Motion to Bifurcate filed on December 30, 2020 ("Bifurcation Order"), as they have challenged every step of every appeal of that Order. They know that Bifurcation Order was wrong, and they throw every argument and procedural device they can to shield it from the light of appellate review.

In their Initial Brief, they start their challenge by reminding the Court that the courts only consider cases that present a justifiable controversy. Of course, that is the law; it is the opening class of every Civil Procedure course in law school, and it is also Civil Procedure 101 that issues can be rendered moot and the justiciability removed, but the scope of the law on mootness cannot be reduced to such simple terms without understanding the contours of that law. Respondents cite and quote the case of *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). The quoted

[4] As discussed more thoroughly in Ms. Luzak's appellate briefs and below, Respondents declare that it does not matter which documents are valid in order to deal with the power of appointment issue. Respondents are mistaken: a court has to determine which document is valid and binding as to the creation of any power of appointment issue, and only one document can be valid and binding at Mr. Barringer's death. Any power of appointment must be construed as to the donor's intent related to the facts and circumstances at the time of the execution of any valid document that created any power of appointment. For example, if it is determined that a revocable trust purportedly executed in 2015 is valid —which Ms. Luzak disputes — then only that 2015 document creates a power of appointment and all prior documents are invalid and meaningless. The extent and meaning of the power of appointment created by the alleged 2015 document would have to be determined according to the donor's intent related to the facts and circumstances at the time of the execution of the 2015 document. This also refutes Respondents' argument that the separate trial on the second and third causes of action in 2019-CP-07-01253 and 2019-CP-07-01294 will be simple and non-repetitive as to the rest of the cases: rather, the second and third causes of action require a determination as to which, if any, is the valid document creating any power of appointment and require the same evidence as to testamentary capacity, undue influence, etc., as to each and every purported document —the power of appointment trial will replicate the trial of the remaining causes of action, which focus on the question of any post-1998 document's validity.

sentence is indeed in *Curtis,* but the quote has been stripped of the facts and further statements of the law in *Curtis* so that the quote stands naked and deceptively simple. The *Curtis* Court held that a final judgment in the trial court on the underlying merits of the case mooted a pending appeal of the denial of a temporary injunction. That is understandable since a final adjudication on the underlying merits in that case resolved the same issues that were the basis for the appeal of the denial of the temporary injunction. The appeal of the denial of the temporary injunction depended on the validity of the appellant's case in the underlying action, and the remedy of a temporary injunction was predicated upon the same facts that were finally and adversely adjudicated (and without appeal) in the underlying case.

In the appeal of Ms. Luzak, the Bifurcation Order is a procedural order affecting the sequencing and hence the mode of trial of the merits, and it is false to assert or even imply that the granting of summary judgment to Ms. Barringer on the Second and Third Causes of Action *forever* moots the Bifurcation Order. Ms. Luzak's appeal of that Bifurcation Order remains a justiciable controversy as long as there is justiciable controversy with regard to the granting of summary judgment to Ms. Barringer.

Additionally, the trial court's "final judgment" on the merits in *Curtis* was not appealed, unlike the present appeal where the granting of summary judgment is not final.

The inquiry into the mootness of the Bifurcation Order can end with the very simple observation that there is a justiciable controversy with the Bifurcation Order as long as there is justiciable controversy in the summary judgment order, but the inquiry can also go further, if necessary. The *Curtis* opinion went further beyond the simple, generic statement on mootness and explained the exceptions to the mootness doctrine:

> In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. *See generally Byrd v. Irmo High Sch.,* 321 S.C. 426, 468 S.E.2d 861 (1996); *Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc.,* 185 W.Va. 168, 406 S.E.2d 65 (1991) (holding an appellate court could consider newspaper's appeal from trial court's injunction compelling newspaper to publish political action advertisement even though case was moot because issue was capable of repetition yet evaded review). Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. *See generally Berry v. Zahler,* 220 S.C. 86, 66 S.E.2d 459 (1951) (the court recognized that questions of public interest originally encompassed in an action should be decided for future guidance however abstract or moot they may have become in the immediate contest). ***Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.*** *See* 5 Am.Jur.2d *Appellate Review* § 649 (1995).

Id. at 568, 549 S.E.2d at 596 (emphasis added). This has been briefed several times over in this case, but the simple fact remains that the decision of the trial court to bifurcate the trial and try the equitable causes of actions before the legal causes of action clearly "affects future events [in the trial of these cases] [and has] collateral consequences for the parties."

So, a more accurate and thorough statement of the law is that an issue (and an appeal of that issue) can become moot if the trial court enters a judgment that renders the issue/appeal irrelevant to the outcome of the case **and that judgment is final** and becomes the law of the case; that is, when final judgment becomes the law of the case and removes any justiciable controversy. The effect of Respondents' argument is that they want the appeal of the Bifurcation Order dismissed or denied on its merits before the granting of summary judgment actually becomes the law of the case.[5]

[5] Respondents have advanced this same argument with the Supreme Court and that issue is presently before the Supreme Court. Ms. Luzak had immediately appealed the Bifurcation Order (and the Order denying the Motion to

Respondents also take the tack that the Bifurcation Order is interlocutory and not immediately appealable. The Court of Appeals has already dismissed the February 2021 appeal of the Bifurcation order on the grounds that it was interlocutory, and that is now subject to the pending Petition for a Writ of Certiorari. That appeal stood by itself without other Orders being part of the appeal.

Ms. Luzak appealed that same Bifurcation Order as part of this current appeal given the possibility that the Petition for a Writ of Certiorari could conceivably be denied and to ensure that no rights were waived.

Respondents recognize that this Court has the discretion to review the Bifurcation Order, but they urge the Court not to exercise that discretion unless there is a sufficient nexus between the Bifurcation Order and the other Orders also under this appeal, but their Brief omits any discussion of the principle enunciated by *Woods v. Rock Hill Fertilizer Co*., 102 S.C. 442, 86 S.E. 817, 819 (1915), in which the Court stated: "Appellee objects to the consideration of the appeal from the refusal of the court to strike out certain allegations of the complaint and to grant the motions for nonsuit and direction of the verdict, on the ground that the rulings and orders as to those matters are not appealable, until after final judgment. Ordinarily, that is so, and the objection would be well taken, if the appeal were based solely upon such matters. ***The reason of the rule is to prevent unnecessary delay in the trial of causes by appeals from interlocutory orders which may have no prejudicial effect upon the final judgment***. But, as the order overruling the demurrer

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Reconsider) on February 12, 2021, and the Court of Appeals dismissed the appeal as interlocutory on May 4, 2021 and denied the Motion for Rehearing on August 19, 2021. Ms. Luzak then petitioned the Supreme Court for a Writ of Certiorari, which is presently pending. On October 20, 2021, Respondents filed their Respondents' Motion to Dismiss the Petition for Certiorari As Moot And Return. In fact, not only did they raise the very same issue of mootness, they even used the verbatim language before the Supreme Court that they now present to the Court of Appeals. The opening paragraph of their Initial Brief in the present appeal is a verbatim cut and paste from the Respondents' Motion to Dismiss the Petition for Certiorari As Moot And Return. There is nothing wrong with that, but Ms. Luzak simply points out that this same issue is before the Supreme Court in its consideration of her Petition for a Writ of certiorari.

is appealable, the reason for the rule does not apply, and it will be better for both parties in the further progress of the case to have these questions decided." 86 S.E. at 819.

Beyond the issues of mootness, the simple question before the Court on appealability is why it is not "better for both parties [and the trial court] in further progress of the case to have these question [on bifurcation] decided."

Any concern over the need for the non-appealable interlocutory orders to be closely related to the appealable orders was assuaged, albeit indirectly, in *Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502, 544 S.E.2d 285 (Ct. App. 2001), (*aff'd as modified sub nom. Ferguson v. Charleston Lincoln Mercury, Inc*., 349 S.C. 558, 564 S.E.2d 94 (2002)). The Court of Appeals was asked to determine the clearly appealable issue of whether the trial court erred in concluding that a claim brought under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act did not survive the death of the plaintiff. After affirming the trial court, the Court of Appeals stated the exception to the rule that "we may review an interlocutory order when, as now, it contains other appealable issues" and went on to address the otherwise non-appealable order of the trial court denying class certification and a discovery order relating to payment of costs associated with the production of documents." *Id.* at 469, 556 S.E.2d at 402. *See also Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001) (after reversing the trial court's order refusing to compel arbitration, the court stated the exception on considering non-appealable orders and proceeded to rule on the trial court's otherwise non-appealable order denying defendant's motion to dismiss under Rule 12(b)(8) (other action pending involving same parties/subject matter)).

Finally, Respondents argue that the trial court did not abuse its discretion when it ordered the bifurcation. Respondents' argument fails to appreciate that all of the causes of action in the

consolidated cases arise out of the same common core of facts: Mr. and Ms. Barringer had a common and mutual estate plan and agreement to treat their children (ultimately the daughters) equally, especially with regard to the family business, but then Respondents combined for Respondent Light to wrest the voting stock of Mr. Barringer from him during his dementia and use that voting control to financially harm Ms. Luzak. Each cause of action arises from that core of facts, and those same facts permeate every cause of action. The remedies and the particular elements may vary from cause of action to cause of action, but each one of them depends upon this common nucleus of facts. The different causes of action may create distinct and separate issues of law and remedies, but the common facts give rise to each cause of action.

Respondents cite the case of *Fortune v. Gibson*, 304 S.C. 279, 403 S.E.2d 674 (Ct. App. 1991) allowing for different juries to decide facts of a case, but Ms. Luzak's case involves common facts among all causes of action, and multiple trials of common facts can have detrimental and prejudicial preclusive effects, all aggravated by one trial that is equitable in nature and another, subsequent trial that is legal in nature.

Critically problematic about Respondents' position is their assertion that the separate trial on the second and third causes of action dealing with the power of appointment issues — that would result from maintaining the Bifurcation Order — would be a simple trial and not involve repetition. Moreover, Respondents contend that Ms. Luzak has failed to explain how the power of appointment issues relate to issues involving Ms. Luzak's present appeal of the summary judgments on the damages order and the February 28, 2012 will and trust. Despite Respondents' contentions, Ms. Luzak has explained the connection between those present appeals as well as the needless, wasteful, and extensive repetition that will result from conducting a separate trial on the power of appointment issues. As a necessary precedent to any determination about whether

Respondent Barringer has a power of appointment and, if so, whether she has agreed by contract or is bound by a noncontractual promise not to exercise such a power of appointment, a trial court will have to determine which, if any, of Mr. Barringer's putative revocable trusts is valid and provides her with any such power of appointment. Ms. Luzak agrees with Respondent that the 1998 documents were not the subject of undue influence, lack of capacity, etc., but if those documents were revoked by subsequent valid documents, then the 1998 documents are not valid and cannot create a power of appointment in Respondent Barringer. Thus, a trial court will have to determine which, if any, of the putative subsequent estate planning documents is valid and creates any power of appointment. Much of Ms. Luzak's remaining case disputes the validity of any post-1998 document, so the same lengthy and extensive trial, with the same witnesses and evidence, examining the validity of any post-1998 document would be needed for both the power of appointment trial and the trial of the remaining issues.

Moreover, Respondents sought and obtained a summary judgment order that the February 28, 2012 will and trust are valid. Ms. Luzak's appeal of that order is part of this overall appeal. There, of course, is the connection between that summary judgment order and the bifurcation order that Respondents disavow. How can a court determine which, if any, document provided a power of appointment without first determining, at least, the validity of the February 28, 2012 will and trust that is part of this same appeal? Similarly, a determination that post-1998 documents are invalid for tortious interference with an inheritance will necessarily require a determination of damages, and of course the damages order is part of this same appeal. Hence, there is a clear nexus and relation between the bifurcation order and the other summary judgment orders that are part of this appeal.

The trial court abused any discretion it had when it ordered the bifurcation for the reason

cited in this appeal and as stated succinctly in Ms. Luzak's Initial Brief: "The intent to simplify the resolution of these cases by bifurcation actually creates a procedural morass that will essentially double the total trial time and will result in two different fact finders each finding their own facts from the same evidence and will violate Ms. Luzak's right to a trial by jury, a single jury."

III. REPLY AS TO FEBRUARY 28, 2012 WILL AND TRUST ORDER

A. Burden of Proof

1. Testamentary Capacity and Mistake

Respondents do not dispute that Ms. Luzak must present only a mere scintilla of evidence to avoid summary judgment as to her contention that the February 28, 2012 will and trust were invalid for mistake and/or lack of testamentary capacity. Ms. Luzak certainly cleared that hurdle, as determined by Judge Mullen in her prior denial of Respondent Light's summary judgment motion as to all post-1998 wills and trusts, including the February 28, 2012 will and trust. As discussed more fully in Ms. Luzak's Initial Brief and below, Ms. Luzak had no less evidence supporting her claim of mistake and lack of testamentary capacity in the summary judgment motion before Judge Price than she had in the summary judgment motion before Judge Mullen. In fact, the intervening discovery between Judge Mullen's order denying Respondent Light's summary judgment motion and Judge Price's granting of Respondent Light's summary judgment motion produced additional evidence supporting Ms. Luzak's contention. Importantly, John Jolley, the drafting attorney for the 2012 will and trust, testified that Mr. Barringer's capacity never changed from the time of the 2012 will and trust through the purported February 2015 will and trust, when Mr. Barringer clearly lacked testamentary capacity after continuing to devolve from his Alzheimer's. (R. Vol. XIII, pp. 6091-6095). Months before the purported execution of the 2015 will and trust, Mr. Barringer scored a 13, and within months after that date, he scored a zero,

a four, and a ten on a simple mini-mental test — certainly demonstrating a chronic lack of capacity. Either Mr. Jolley was a bad judge of capacity in February 2012 or his statement proves that Mr. Barringer lacked capacity in February 2012 because, according to Mr. Jolley, it was the same as in 2015 or, at least, there is a question about the credibility of the testimony. Even Mr. Jolley, who represented Mr. Barringer and Respondent Barringer for estate planning purposes beginning with the documents purportedly executed in 2012, indicated in a conversation with CFRC independent board director Michael Hagler in June 2012 that sometimes Mr. Barringer was "not [there]" when he met with Mr. Barringer. [6]

Moreover, when a testator suffers from chronic incapacity, the burden is on the proponent to prove that the will was executed during a lucid interval. [7] Voluminous medical and other evidence demonstrate that the testator, Paul Barringer, was suffering from chronic incapacity beginning no later than November 2011 and perhaps as far back as 2010, as discussed below and in Ms. Luzak's Initial Brief at 45-50.

2. Undue influence

Respondents would be correct that prevailing South Carolina law ordinarily imposes a clear and convincing evidentiary burden on a contestant alleging undue influence. However, the presumption is reversed when a proponent is in a fiduciary or confidential relationship with the testator, as was the case with Respondent Light and Mr. Barringer. Because of that confidential/fiduciary relationship, South Carolina law places a presumption against the validity of a revocable instrument, such as a will or revocable trust, and requires the proponent of a

[6] R. Vol. VII, p. 2983, lines 13-15.

[7] *See Wright v. Lewis*, 5 Rich. 212, 39 S.C.L. 212, 1851 WL 2638, 55 Am.Dec. 714; *Lee v. Lee's Heirs*, 4 McCord 183 (S.C. App. 1827); *Keely v. Moore*, 196 U.S. 38 (1904); *Haghart v. Cooley*, 278 Ala. 354, 178 So.2d 226 (1965).

revocable instrument to rebut the presumption.[8] Respondents argue that Respondent Light rebutted that presumption, but that is not a determination for summary judgment. At most, Ms. Luzak had to produce "more than a mere scintilla of evidence" as to undue influence, which she did. However, Respondents contend that Ms. Luzak must present unmistakable and convincing evidence to this Court to satisfy her burden. Once again, Respondents inflate the burden of proof for a summary judgment for undue influence to a requirement that she satisfy the standard needed to prevail at trial, not merely to avoid summary judgment. Judge Price similarly weighed the evidence as if at trial rather than applying the proper standard for summary judgment. As with testamentary capacity and mistake, Ms. Luzak clearly satisfied her burden at the summary judgment stage.

Respondents cite *Smith v. Breedlove*, 377 S.C. 415, 662 S.E.2d 67 (2008), and *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004), as authority for the ability of a different trial judge to hear a previously denied motion for summary judgment if new evidence is discovered. What is significantly different in this case is that the intervening discovery bolstered Ms. Luzak's evidence that had already passed muster with Judge Mullen in her denial of Respondent Light's previous summary judgment motion.

Respondents nevertheless assert that Ms. Luzak failed to produce any evidence of undue influence, mistake, and testamentary capacity — which again contradicts Judge Mullen's prior order because the evidence did not disappear in the meantime. As discussed in Ms. Luzak's Initial

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[8] *See Swiger by & through DeHaven v. Smith*, 426 S.C. 408, 827 S.E.2d 200 (Ct. App. 2019) citing *Hairston v. McMillan*, 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010); *Howard v. Nasser*, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005); *In re Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999); *Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983). If the presumption is rebutted in a will contest, then the ultimate burden of proof falls on the contestant. S.C. Code Ann. §62-7-112 applies the same construction rules to trusts as to wills.

Brief and below, Ms. Luzak presented substantial evidence as to undue influence, mistake, and lack of testamentary capacity.

B. Testamentary Capacity

Respondents assert that "[t]estamentary capacity requires only that the testator know: (1) his estate; (2) the objects of his affection; and (3) the persons to whom he wished to give his property." Resp. In. Br. at 11. Respondents reject the notion that a foundational black letter law requirement for the capacity to make a will is for the testator to also understand what a will is and does.[9] Thus, according to Respondents, a testator who knows what she owns and to whom she is related has the capacity to make a will *even if the testator does not understand what her will is and what it does*. In making that assertion, Respondents contend that no South Carolina case law requires a testator to understand the concept of what a will does —that is, the nature of the act — but Respondents are wrong. [10]

Even if Respondents were correct in their statement of the test for capacity, Ms. Luzak has certainly shown more than a mere scintilla of evidence that Mr. Barringer was lacking in his ability to know whom he was related to and what he owned. According to Respondent Barringer, Mr. Barringer had no love for his innocent grandson, and there is evidence that he forgot he owned an expensive building and had ordered the sale of an airplane nor did he know how much stock he owned in his legacy company (according to the affidavit of Kevin Luzak (R. Vol. IV, p. 1590 ¶38), Mr. Barringer proclaimed that he owned double the voting stock as anyone else, which was

[9] See Ms. Luzak's Initial Brief at 47.

[10] *See, e.g.*, *Matheson v. Matheson*, 125 S.C. 165 (1923); *In re Washington's Estate*, 212 S.C. 379 (1948). It is beyond debate that, to have capacity to make a will, a testator must understand the concept of a will. *See also* Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1(b), recognizing this black letter concept.

incorrect because he owned significantly less than Ms. Luzak or Respondent Light). Mr. Barringer himself complained of short-term memory loss before the execution date, as the medical evidence confirms. If one cannot remember what he has just discussed or considered with respect to a will, or can forget recently ordering the sale of an airplane,[11] one cannot have testamentary capacity.

As discussed in Ms. Luzak's Initial Brief, there is substantial evidence that Mr. Barringer lacked testamentary capacity. For example, his doctors prescribed Alzheimer's medication as early as 2011, when he was first diagnosed with dementia. Presumably, his doctors believed that he had Alzheimer's or they were carelessly prescribing unnecessary medications. As noted in *Gaddy v. Douglass*, 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004), Alzheimer's is a disease that progressively worsens.[12] In December 2011, having gone to the doctor with "difficulty with cognition," he had difficulty comparing a watch and a ruler. In January 2012 he went to the doctor for short-term memory loss. Within a few weeks of the purported execution, he called his neurologist but, when asked the purpose of his call, could not recall why. Within 10 weeks of the purported execution, Mr. Barringer had difficulty following a medical command to touch his ear with his finger and to show two fingers; he was diagnosed with expressive aphasia; and his doctor reported "a dramatic decline in memory in the last several weeks." Ms. Luzak presented email evidence from Respondent Randall Light showing his concern about Mr. Barringer's capacity as early as 2011 and in January and May of 2012.[13] Ms. Luzak presented evidence from a company

[11] Forgetting about an airplane is not akin to misplacing one's car keys.

[12] Gaddy provides a roadmap from testimony by neurologists about dementia/Alzheimer's and chronic incapacity: "Based on this first examination, Dr. Carnes determined Ms. M had moderate `senile dementia of the Alzheimer's type' and was `not capable of handling financial affairs.' He concluded that she was not able to make rational decisions or exercise proper judgment." …. "He stated that dementia sufferers do not `fully understand the nature of what they [are] doing and they [do] not fully understand the ramifications of what [is] there.'" …. "No, [a] lucid moment is a term that doesn't fit well with Alzheimer's Disease."

[13] For example, Respondent Randy Light's January 2012 email expressed concern about Mr. Barringer's "irrational behavior." Respondents argue that Randall Light explained away those emails in his deposition, as if somehow a self-

executive who worked closely with Mr. Barringer expressing concern about his mental state as early as September 2011. Ms. Luzak presented evidence Mr. Barringer was incoherent and aphasic at a board meeting shortly before the purported February 28, 2012 will and trust were executed; within two months of the purported execution, he was incoherent and confused at another board meeting, falsely accusing Kevin Luzak of throwing a book at Respondent Light and throwing Respondent Light and Mr. Barringer out of the meeting, which of course did not occur.[14] Other examples include Mr. Barringer discussing his speech problems at a family meeting in 2011 (aphasia classically being caused by damage to the brain); he had trouble communicating and forming words at a family meeting on February 18, 2012; in the spring of 2012 he could not remember board presentations from previous board meetings which, when those presentations were given to him by Respondent Light, confused him into thinking Kevin Luzak was "trying to steal the company," even though he had previously commented favorably on the presentations; in the spring of 2012 Mr. Barringer talked about restructuring the company and ultimately giving his share to Kevin Luzak, who thought the proposal was irrational and who talked to Ms. Luzak and Respondent Light about the proposal and his concern about Mr. Barringer's compromised reasoning.[15]

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serving explanation made the emails disappear and not serve as evidence. His explanations were unconvincing, in any event. This is an example of why a finder of fact should determine which, if either version, is correct.

[14] See, e.g., R. Vol. IV, p. 1584 ¶19. Mr. Barringer's mental health difficulties at this meeting were confirmed by independent board director Michael Hagler. See R. Vol. VII, pp. 2922-2930 in the documents referenced in footnote 15, *infra*.

[15] These and numerous other facts showing lack of capacity were contained in a voluminous set of doctor's reports, depositions, and in the affidavits of Ms. Luzak and her husband Kevin Luzak, who spent more time with Mr. Barringer back then than anyone, except perhaps Respondent Barringer when Mr. Barringer went home. See Ms. Luzak's Initial Brief at notes 34, 52 (26 doctor reports are contained in Vol. VII, pp. 2931-2976 included therein). Ms. Luzak testified that Respondent Light told her about Mr. Barringer's incoherence at the February 2012 board meeting. Respondents contend that Kevin Luzak is not an expert, but of course he does not need to be to offer his observations.

Respondents appear to contend that only evidence from the actual execution of documents can serve to show lack of testamentary capacity. Their brief at page 14 argues that the cases cited by Ms. Luzak for the proposition that courts consider relevant evidence of capacity before and after execution involve only contractual capacity rather than testamentary capacity — as if that makes a logical difference — but Respondents cite only two cases,[16] whereas Ms. Luzak cited numerous cases in her Initial Brief: The law allows evidence, including circumstantial evidence, both before and after the time of execution, to determine whether the testator had capacity at the time of execution.[17] As noted in Ms. Luzak's Initial Brief, even cases cited by Respondent allow evidence of capacity before and after execution.[18]

Although Respondents continue to apparently require Ms. Luzak to prove her case at the summary judgment stage, even they admit that all she has to provide is a mere scintilla of evidence that could show a lack of testamentary capacity.[19] She has clearly done so. The trial judge weighed the evidence rather than applying the correct summary judgment analysis. Ms. Luzak has produced enough evidence about Mr. Barringer's lack of testamentary capacity to prevail at trial, and she certainly has produced at least a mere scintilla of evidence to deny summary judgment. Yet Respondents contend that Mz. Luzak has produced no evidence that could show lack of testamentary capacity.

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[16] One case cited by Respondents as dealing with contractual capacity is Gaddy, *supra*. Although the appellate court declined to address testamentary capacity because it was not properly pleaded, the trial court did address testamentary capacity.

[17] See, e.g., *In re Washington's Estate*, 212 S.C. 379, 46 S.E.2d 287 (1948). *See also*, *Swiger; Cumbee; Lee;* and *Byrd*, *supra*.

[18] See, e.g., *Lee*, *supra*, *Hembree*, 311 S.C. 192, 428 S.E.2d 3 (Ct. App. 1993); *Hairston v. McMillan*, 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010) (cases cited by defendant dealing with capacity).

[19] For example, Respondents assert that the emails "do not establish chronic, irreversible incapacity," again demonstrating that Respondents fail to properly differentiate between proof required at trial and that required to withstand summary judgment. Resp. In. Brief at 17.

C. Undue Influence

Respondents continue their refrain that Ms. Luzak offered no evidence showing undue influence and argue that motive alone is not sufficient proof of undue influence. Although the Light Respondents had millions of motives — Randall Light was in the throes of bankruptcies with tens of millions of dollars at stake —Ms. Luzak also demonstrated evidence of all the factors a court might consider when determining the existence of undue influence. By its very nature, evidence of undue influence is circumstantial. [20] As noted in Ms. Luzak's Initial Brief, the factors typically considered by courts, although proof of all the factors is not necessary because every case is unique, are as follows: (1) the susceptibility of the testator or settlor/donor to being influenced, such as being of weakened mental capacity; (2) the opportunity of the perpetrator to practice the influence; (3) the motive of the perpetrator; (4) the disposition or the propensity of the perpetrator to practice undue influence; (5) a change in the pattern of the dispositive plan; and (6) secrecy.[21] Ms. Luzak produced evidence that (1) Paul Barringer was suffering from mental deficiencies and thus susceptible to undue influence as early as 2011; (2) Respondents had ample opportunity to practice undue influence on Paul Barringer because of proximity and confidential/fiduciary relationships;[22] (3) Respondents had ample motive to influence Paul Barringer, including Respondent Randy Light's involvement around that time in bankruptcies involving tens of millions of dollars, with potential substantial personal liability;[23] (4) Respondents had the

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[20] See e.g., *Macaulay, Swiger, Cumbee, Byrd*, *supra*.

[21] See, e.g., *Russell*, *supra*; *Matter of Ferrill*, 97 N.M. 383, 640 P.2d 489 (N.M.C.A. 1981); Ex. AA - Restatement (Third) Of Prop.: Wills & Donative Transfers § 8.3, cmt h.

[22] Judge Price states that Respondent Light had no role in the planning of the will and trust, yet recognizes that she drove him to the meeting (which of course, gives her the opportunity to influence him). This is a classic factor in many undue influence cases. A perpetrator does not overtly practice influence at meetings with counsel (although mere presence can create influence), but rather outside the meetings with counsel. The Court errs in assuming that no opportunity existed because of Respondent Light driving Mr. Barringer to such a meeting.

[23] See Ms. Luzak's Initial Brief footnote 89, and accompanying text.

disposition/propensity to practice undue influence, as demonstrated by Respondents' situation involving Randy Light's company bankruptcies and Respondents' propensity to usurp fiduciary property for their own uses;[24] (5) there was a change in the dispositive plan, giving Respondent Merrill Light unprecedented power as a co-trustee with the ability to act alone, which was especially powerful given Paul Barringer's undisputed weakened mental state; and (6) Respondents' long-term concerted effort to keep these actions secret (this latter fact alone is enough to constitute undue influence).[25] Respondents do not refute these facts.

Respondents argue that, even if undue influence existed, an unhampered opportunity to cure the undue influence weakens the case for undue influence. Resp. In. Br. at 22-23. But Respondents miss the point here: Mr. Barringer was the continuing victim of undue influence. If one is never free from the undue influence, one does not have an "unhampered opportunity." Moreover, even if Mr. Barringer had testamentary capacity, he certainly was in a weakened mental state, which made him more susceptible to undue influence.

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[24] The Light Respondents were also motivated by the opportunity to use the company as their personal purse. For example, 9 days after the purported transfer of the voting stock on September 11, 2012, Randy Light sent an email to Travis Bryant, who replaced Kevin Luzak as CEO, suggesting that they defraud the company by conjuring up a way to distribute to Mr. Barringer $5 million net from the company, so that Mr. Barringer could then turn around and gift $5 million to defendants -- $5 million at that time being the exemption amount from federal gift taxation. (R. Vol. VII, p. 2915). Tellingly, Randy Light did not copy Mr. Barringer on the email. There is good reason why Respondents fought long and hard to keep this email secret. It shows the motivation for the undue influence to take control of the company to use as Respondents' personal purse.

[25] In addition to keeping secret her involvement in the estate plan, Respondent Merrill Light testified that Respondents never told Mr. Barringer about Respondent Randy Light's bankruptcies and business failures. This was an intentional omission and part of the undue influence and deception. If Mr. Barringer knew of this intentional omission and deception, it is questionable whether he would have appointed Respondent Merrill Light as a trustee with independent powers over his property, and even more so while he was alive.

D. Mistake

As discussed in her Initial Brief, Ms. Luzak challenges the validity of the February 2012 will and trust[26] in her complaints on the basis of mistake. South Carolina law allows the challenge of a will, or its reformation, based on mistake.[27] Because Mr. Barringer was incapable of understanding that he was making a will or a trust, those documents were the result of a mistake. Moreover, because he lacked testamentary capacity, the will and trust were the result of a mistake. Also, as the victim of fraud, undue influence, etc., the will and trust were the result of a mistake — he was mistaken about what he intended to do.

E. Estoppel

Respondents continue to take contrary positions in this litigation. They argue that the power of appointment issue can be discerned from 1998 estate planning documents. Yet they sought and obtained a summary judgment that the February 28, 2012 documents, which would revoke the 1998 documents, are valid. Thus, Respondents asserted inconsistent facts that resulted in the trial court issuing orders granting a summary judgment for two power of appointment causes of action (based on Respondents' assertion of the validity of the 1998 documents) and a summary judgment finding that the February 28, 2012 will and trust were valid (based on Respondents' assertions of their validity, even though that resulted in the revocation of the 1998 documents, and was therefore total inconsistent with their position about the 1998 documents for the power of appointment issues) —Respondents obtained the benefit of the trial court granting both summary judgment motions.

[26] A revocable trust is subject to the rule of construction applicable to wills. South Carolina Code Ann. § 62-7-112.

[27] See Ms. Luzak's Initial Brief at 58.

CONCLUSION

This is not a summary judgment case or one that should be bifurcated into multiple trials. For all the reasons stated above and in Ms. Luzak's Initial Brief, the trial court erred in entering the aforesaid orders. Ms. Luzak respectfully asks this Court to vacate and reverse the aforesaid orders and remand to the trial court with instructions to try all of Ms. Luzak's causes of action and claims for damages in case numbers 2016-CP-07-1919, 2019-CP-07-1253, and 2019-CP-07-1294 in one consolidated trial.

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November 2, 2022

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
BENTLEY PRICE, CIRCUIT COURT JUDGE

Appellate Case No. 2021-000837

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton B. Luzak, ... Appellant

v.

Merrill B. Light, Merrill U. Barringer as Personal Representative of the Estate of Paul Brandon Barringer II, J. Randolph Light, Jr., Merrill B. Light as putative trustee of the Paul B. Barringer II Revocable Trust dated December 4, 1998, and Merrill B. Light as Trustee of the Merrill Barringer Light Revocable Trust, ... Respondents

--and--

Hampton B. Luzak, ... Appellant,

v.

Merrill U. Barringer, ... Respondent,

Coastal Forest Resources Company ("CFRC")……………………Intervenor/Respondent.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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