

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Aug 11 2025

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Honorable Perry H. Gravely

Case No. 2022-CP-23-003796
Appellant Case No. 2025-000558

Joan Macatee and Jennifer Browning, as Guardian for Joan Macatee, ... Respondents,

v.

Innes T. Mather, as Personal Representative of The Estate of Michael R. Macatee, and Innes T. Mather, as Trustee of the Michael R. Macatee Revocable Living Trust dated November 2, 2016, as amended and restated, Mary Ann McNutt, Michael J. Macatee, Katlyn Auzier, and Michaela McNutt, ... Appellants.

of whom Innes T. Mather, as Personal Representative of The Estate of Michael R. Macatee, and Innes T. Mather, as Trustee of the Michael R. Macatee Revocable Living Trust dated November 2, 2016, as amended and restated, are the Appellants.

INITIAL BRIEF OF APPELLANTS

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill (SC Bar #68337)
One North Main, 2nd Floor
Greenville, SC 29601
(864) 240-3200
sspruill@hsblawfirm.com

Attorneys for Innes T. Mather, as Personal Representative of the Estate of Michael R. Macatee, and Innes T. Mather, as Trustee of the Michael R. Macatee Revocable Living Trust dated November 2, 2016, as amended and restated

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
FACTS	8
I. THE PETITIONERS.....	8
II. THE ESTATE PLANNING DOCUMENTS.	9
III. THE EVIDENCE RELATING TO THE EXECUTION OF THE ESTATE PLANNING DOCUMENTS... ..	10
STANDARD OF REVIEW	15
ARGUMENT	16
I. PETITIONERS DID NOT PRESENT A GENUINE ISSUE FOR TRIAL AS TO MR. MACATEE’S TESTAMENTARY CAPACITY AT THE TIME HE EXECUTED THE 2017 WILL AND THE 2017 TRUST AMENDMENTS.....	16
II. PETITIONERS DID NOT PRESENT A GENUINE ISSUE FOR TRIAL THAT McNUTT WIELDED AN UNDUE INFLUENCE OVER MR. MACATEE WITH RESPECT TO THE 2017 WILL OR THE 2017 TRUST AMENDMENTS.....	23
CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases

<i>Baughman v. Am. Tel. & Tel. Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991)	19
<i>Belton v. Cincinnati Ins. Co.</i> , 360 S.C. 575, 602 S.E.2d 389 (2004)	15
<i>Black v. Ellis</i> , 3 Hill (1836).....	18
<i>David v. McLeod Reg'l Med. Ctr.</i> , 367 S.C. 242, 626 S.E.2d 1 (2006)	15
<i>Estate of O'Neill v. Tobias</i> , 259 S.C. 55, 190 S.E.2d 754 (1972)	16
<i>Gibson v. Epting</i> , 426 S.C. 346, 827 S.E.2d 178 (Ct. App. 2019).....	23
<i>Hairston v. McMillan</i> , 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010).....	16, 17, 18, 25
<i>Hall v. Fedor</i> , 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002).....	15, 27
<i>Hansson v. Scalise Builders of S.C.</i> , 374 S.C. 352, 650 S.E.2d 68 (2007)	15
<i>Havird v. Schissell</i> , 252 S.C. 404, 166 S.E.2d 801 (1969)	18
<i>Hellams v. Ross</i> , 268 S.C. 284, 233 S.E.2d 98 (1977)	17, 18
<i>Hembree v. Est. of Hembree</i> , 311 S.C. 192, 428 S.E.2d 3 (Ct. App. 1993).....	17, 25
<i>Henkel v. Winn</i> , 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001).....	16
<i>Howard v. Nasser</i> , 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005).....	25, 28, 29
<i>In re Est. of Weeks</i> , 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997).....	17
<i>In re Last Will & Testament of Smoak</i> , 286 S.C. 419, 334 S.E.2d 806 (1985)	16
<i>In re Washington's Est.</i> , 212 S.C. 379, 46 S.E.2d 287 (1948)	17
<i>Kirkwood v. Gordon</i> , 41 S.C.L. 474 (S.C. App. L. 1854)	21, 22
<i>Lee's Heirs v. Lee's Ex'r</i> , 15 S.C.L. 183 (S.C. App. L. & Eq. 1827).....	18
<i>Main v. Corley</i> , 281 S.C. 525, 316 S.E.2d 406 (1984)	15
<i>Matheson v. Matheson</i> , 125 S.C. 165, 118 S.E. 312 (1923)	18

<i>McCollum v. Banks</i> , 213 S.C. 476, 50 S.E.2d 199 (1948)	17
<i>ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche</i> , 327 S.C. 238, 489 S.E.2d 470 (1997)	8
<i>Mock v. Dowling</i> , 266 S.C. 274, 222 S.E.2d 773 (1976)	25, 26
<i>Richardson v. State-Record Co.</i> , 330 S.C. 562, 499 S.E.2d 822 (Ct. App. 1998).....	15
<i>Russell v. Wachovia Bank, N.A.</i> , 353 S.C. 208, 578 S.E.2d 329 (2003)	23, 28
<i>Staubes v. City of Folly Beach</i> , 339 S.C. 406, 529 S.E.2d 543 (2000)	8
<i>Swiger by & through DeHaven v. Smith</i> , 426 S.C. 408, 827 S.E.2d 200 (Ct. App. 2019).....	23
<i>Thomas v. Waters</i> , 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994).....	15
<i>Town of Hollywood v. Floyd</i> , 403 S.C. 466, 744 S.E.2d 161 (2013)	16
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998)	16
<i>Wilson v. Dallas</i> , 403 S.C. 411, 743 S.E.2d 746 (2013)	26

Statutes

S.C. Code Ann. § 62-1-308.....	16
S.C. Code Ann. § 62-3-407.....	16
S.C. Code Ann. § 62-7-601.....	17

Rules

Rule 407, SCACR.....	20
Rule 56, SCRCF.....	7, 8, 15, 19

Other Authorities

32 S.C. Jur. Wills § 37	24
32 S.C. Jur. Wills § 38	24
Ross & Reed, <i>Will Contests</i> §6.13 (1992)	18

STATEMENT OF ISSUES ON APPEAL

1. Did the probate court correctly grant summary judgment on the claims of Joan Macatee and Jennifer Browning, as Guardian for Joan Macatee (collectively, “Petitioners”) relating to testamentary capacity and undue influence as to estate planning documents executed by Michael R. Macatee?

STATEMENT OF THE CASE

Joan Macatee (“Mrs. Macatee”) and her court-appointed guardian, Jennifer Browning, challenge a will executed by Michael R. Macatee (“Mr. Macatee” or the “Decedent”) on May 10, 2017 (“2017 Will”) and amendments dated March 23, 2017 and May 10, 2017 (“2017 Amendments”) to a restated, revocable trust executed earlier in 2017 (“Restated Trust”) on grounds of lack of capacity and an allegation that Mr. Macatee’s children, Mary Ann McNutt and Michael J. Macatee (the “Macatee Children”), exerted an undue influence over him at the time of execution. (Amended Petition ¶ 7-8, 10-12, 14-15, 17-19, 21-22, R. at ____). Petitioners also alleged that the 2017 Amendments are technically invalid because they were not “signed by one of the Co-Trustees of the Trust and failed to meet the requirements under South Carolina law.” (*Id.* ¶ 24, R. at ____). Mr. Macatee died on June 18, 2017, and this action has been pending since April 20, 2018. (*Id.* ¶ 4, R. at ____).

Innes T. Mather, Mr. Macatee’s long-time business partner, was chosen by Mr. Macatee to serve as personal representative and trustee under the 2017 Will and the 2017 Trust Amendments. In those capacities, he was named a respondent in the underlying action. (*Id.* ¶ 3,4, R. at ____).

Mather, as Personal Representative of the Estate of Michael R. Macatee and as Trustee of the Michael R. Macatee Revocable Living Trust dated November 2, 2016, as amended and restated (collectively, the “Estate”), filed a motion for summary judgment on January 10, 2022 on the grounds that Petitioners had not identified any evidence that would show undue influence or lack of capacity at the time the documents in question were executed, that the Petitioners lacked legal authority to bring this action, and that the amendments to the Restated Trust were made in accordance with the language of the trust. (Motion (“MSJ”), R. at ____). Among other things, the Estate presented Petitioners’ supplemental interrogatory responses, which included the following:

Interrogatory #6: Describe in detail all facts supporting your allegation that “[a]t the time the Decedent executed the 2017 Will, the Decedent did not, due to his lack of testamentary capacity, know his estate, the objects of his affection and to whom he wished to give his property,” as set forth in Paragraph 11 of the Petition.

Response to Interrogatory #6: Upon information and belief, the Decedent lacked the requisite capacity to execute the 2017 Will and the 2017 Amendments (as defined in Petitioner’s Petition) due to debilitating medical complications suffered by the Decedent at the time of the execution of the documents, and Decedent lacked the testamentary capacity, as required under South Carolina law, to understand and execute the documents. Additionally, upon information and belief, the Decedent’s children, Mary Ann McNutt and Michael J. Macatee, exerted their will over the Decedent to such an undue extent that the documents should be invalidated because of such undue influence.

On or about March 21, 2017, the decedent was certified for hospice care based on terminal diagnosis of chronic pulmonary obstructive disease (COPD) and a prognosis of less than six months to live by Dr. Laurie Theriot Roley. The decedent was diagnosed at this time with the following co-morbidities that affected his prognosis: acute kidney failure, essential hypertension, unsteadiness on feet, difficulty in walking, repeated falls, generalized muscle weakness, bronchitis, acute cystitis without hematuria, gastroesophageal reflux disease, long term use of aspirin, hyperlipidemia, chronic gingivitis plaque induced, anxiety disorder, other unspecified anxiety disorders, major depressive disorder, and scoliosis. According to family members, the decedent had significantly declined within the last six months. The decedent and family were expected to understand changes in mental status with disease progression and develop personally acceptable coping mechanisms per Dr. Roley’s expected outcomes in her plan of care.

At the time of admission to hospice, the decedent was prescribed several mood-altering medications including haloperidol, lorazepam, and Xanax with side effects including lightheadedness, drowsiness, sleep disturbances, anxiety, mental/mood changes, hallucinations, memory problems, etc. Decedent was also prescribed two opioid/narcotic medications: morphine and norco (a combination of hydrocodone and acetaminophen) whose side effects include lightheadedness, dizziness, drowsiness, mental/mood changes, agitation, confusion, hallucinations, etc.

On or about March 21, 2017, the decedent was seen by Julie Gilstrap, RN, in his home for an initial hospice visit. During this visit, the decedent’s mental status was determined to be lethargic and his appearance disheveled. The decedent was assessed to have a decline in functional status, impaired nutritional status, pain requiring increasing doses of major analgesics more than briefly, change in level of consciousness, and cognitive decline with confusion at times including talking to people who were not there and reaching out to unknown people. In clinical notes from the same day by Julie Gilstrap, RN, the decedent had told a caregiver “someone will knock on his bedroom door that wears white and has a red headband” despite no such person being in the home.

On or about March 22, 2017, the decedent received an initial social work visit from LaSurma Pippins, LMSW. Mary Ann McNutt was identified as healthcare Power of Attorney and legal Power of Attorney for the decedent. Ms. McNutt also had access to the decedent's finances. In clinical notes from the visit, Ms. Pippins states the decedent was living with Ms. McNutt, Mr. McNutt, and Ms. McNutt's daughter, Katlyn Auxier. Mr. and Ms. McNutt moved from Florida to live with the decedent when his health began to decline.

On or about March 24, 2017, the decedent was seen by Christa Tompkins, RN, in his home. Ms. McNutt stated the decedent was declining and had not moved for over 5 hours. Ms. McNutt also stated the decedent had been seeing deceased people and reaching out to them.

On or about March 25, 2017, the decedent was seen by James E. Frost, chaplain, in his home for an initial spiritual care assessment visit. The decedent was asleep throughout the visit. Ms. McNutt and Ms. Auxier's boyfriend, Chris (full legal name unknown at this time), were present. According to Ms. McNutt, Chris had been providing a lot of care to the decedent. Ms. McNutt spoke about a stepbrother (Michael Macatee, Jr.) who had been raised as the decedent's son. She said he was a "drug seeker" who had tried to obtain money from the decedent many times and threatened to commit suicide if he did not receive the money. She said he was dangerous, and she was concerned about him showing up at the home.

On or about March 28, 2017, the decedent was seen by Christa Tompkins, RN, in his home for a routine visit. Assessment revealed increasing disorientation/agitation. On or about March 29, 2017, the decedent was seen by Christa Tompkins, RN, in his home. Ms. McNutt greeted Ms. Tompkins at the door to explain the events of the night before—the patient had been saying "goodbyes" when police showed up around 1:30 A.M. at the home. The decedent stated today has not been a good day and spoke about the stress with his son extensively.

On or about March 29, 2017, Ms. McNutt placed a call to LaSurma Pippins, LMSW. She stated the decedent's son had sent the police to the home at 1:45 A.M. because he claimed the decedent was being abused.

On or about April 8, 2017, Jillian Storm, MT, spoke with Ms. McNutt over the phone to introduce her to bereavement services. Ms. McNutt told Ms. Storm she feared Michael Macatee Jr. (who she claimed is a drug addict) had been asking the decedent for large sums of money. The decedent did not want to see him due to this, and Ms. McNutt was afraid more drama would ensure after the decedent's death because of money and "bad feelings."

On or about April 10, 2017, LaSurma Pippins, LMSW, returned a call to Ms. McNutt. Ms. Pippins states Ms. McNutt was seeking education and advice regarding decedent's last will and Power of Attorney.

On or about May 8, 2017, the decedent was seen by Jillian Storm, MT-BC, in his home. Decedent stated he missed his wife Joan and is still adjusting to her not being around. He also spoke about the complexities and interpersonal dilemmas in relation to his will.

On or about May 9, 2017, the decedent was seen by Nancy Sheriff, RN, in his home for an on-call/unscheduled visit. Assessment revealed increasing disorientation/agitation and confusion. The decedent was also using morphine for increased pain.

On or about May 12, 2017, the decedent was seen by Nancy Sheriff, RN, in his home. Ms. Sheriff asked the decedent if he felt tired, and he had difficulty finding words to answer. After Ms. McNutt left the room, the decedent opened up and told Ms. Sheriff he was out of pain medications. Decedent stated he handles most of his own medications and get refills through Dr. DeGarmo who is a family friend.

On or about May 16, 2017, the decedent was seen by Nancy Sheriff, RN, in his home. The decedent was instructed not to exceed four tablets per day of Xanax, norco, and soma or shortness of breath and fainting may occur. Decedent received a call from Dr. DeGarmo while Ms. Sheriff was present. Brian followed Ms. Sheriff out of the house and told her there was a “little blow up” the previous night because Chris had not filled the decedent’s medication and had not returned home.

On or about May 31, 2017, the decedent was seen by Nancy Sheriff, RN, in his home. The decedent was given the opportunity to speak freely about the events happening around him, and he was very upset about them according to Ms. Sheriff. The decedent told Ms. Sheriff that Ms. McNutt was upstairs in bed and had not spoken to him all day because she had been emotionally distraught about having to stay in South Carolina to care for him when she would rather be in Florida. Decedent said he had been dealing with her “bipolar behavior” and that she was ungrateful. Decedent stated he financially supported Mr. and Mrs. McNutt and their daughter, but they do not care about him. He also stated that he is very rarely offered food or talked to meal time. At 3 P.M. during this visit, the decedent had not had lunch or seen any of his family members for hours.

On or about June 6, 2017, the decedent was seen by Gloria Munro, RN, in his home. Ms. McNutt stated to Ms. Munro that the decedent was addicted to pain medications and Xanax and was possibly taking too many. Ms. McNutt stated the decedent was obtaining these medications from Dr. DeGarmo.

On or about June 7, 2017, the decedent was seen by Nancy Sheriff, RN, in his home. Ms. McNutt stated to Ms. Sheriff that the decedent had been dependent on narcotics for many years as well as having been an alcoholic for many years. Ms. McNutt stated she planned to sue Dr. DeGarmo after the decedent’s passing because of her belief that Dr. DeGarmo had prescribed too many narcotics to her father and mother-in-law (Joan Macatee). She further stated: “That is the reason they are both in the state they are in.”

Upon information and belief, on or about June 10, 2017, Michael Macatee Jr. showed up to decedent's home at approximately **11:30 P.M.** According to Ms. McNutt, he was drunk, smelt of marijuana and had driven to the house with his three-year-old daughter in the backseat. Michael Macatee Jr. then passed out on the decedent's couch and left his daughter with a saturated diaper and no food for a period of time. The diaper bag he had brought with him only had a bottle of vodka in it.

On or about June 12, 2017, Ms. McNutt had reason to believe Michael Macatee Jr. had given pills to the decedent. She was encouraged by others in the home to call the Sheriff's office. A deputy came to the house and a No Trespassing order was given to Michael Macatee Jr.

Interrogatory #10: Describe in detail all facts supporting your allegation that "[a]t the time the Decedent executed the 2017 Will, the Decedent's children exerted influence and mental coercion over Decedent that destroyed the free agency of the Decedent and constrained him to do things which were against his free will, and that he would not have done if he had been left to his own judgment and volition," as set forth in Paragraph 14 of the Petition.

Response to Interrogatory #10: The response to this interrogatory is identical to the responses provided to Interrogatory #6.

Interrogatory #14: Describe in detail all facts supporting your allegation that "[alt the time the Decedent executed [the] 2017 Amendments, the Decedent did not, due to his lack of testamentary capacity, know his estate, the objects of his affection and to whom he wished to give his property," as set forth in Paragraph 18 of the Petition.

Response to Interrogatory #14: The response to this interrogatory is identical to the responses provided to Interrogatory #6.

Interrogatory #18: Describe in detail all facts supporting your allegation that "[a]t the time the Decedent executed the 2017 Amendments, the Decedent's children exerted influence and mental coercion over Decedent that destroyed the free agency of the Decedent and constrained him to do things which were against his free will, and that he would not have done if he had been left to his own judgment and volition," as set forth in Paragraph 21 of the Petition.

Response to Interrogatory #18: The response to this interrogatory is identical to the responses provided to Interrogatory #6.

(Supp. Responses, R. at ____).

Petitioners submitted a memorandum that tracked the facts recited in their interrogatory responses. (Memorandum, R. at ____). The argument section was brief and argued that undue influence may be proved by circumstantial evidence and that because McNutt had a power of attorney, there was a rebuttable presumption of undue influence. With respect to capacity, Petitioners argued only that the medical records “show that he was confused, disoriented, experiencing hallucinations and extremely medicated at and around the time of the execution of the 2017 Will and the 2017 Trust Amendments[.]” (*Id.*).

The probate court heard the MSJ on May 4, 2022.¹ Petitioners’ counsel essentially read his memorandum to the Court. (Transcript at 22-34, R. at ____). Petitioners did not present any evidence or make any argument with respect to whether Mr. Macatee knew his estate, knew the objects of his affection, or knew to whom he wished to give his property at the time of execution. Nor did they present any evidence suggesting Mr. Macatee’s will was overborne by another. The Estate objected to the use of the medical records as inadmissible hearsay. (Transcript at 35, 40, R. at ____).

By order dated July 14, 2022, the probate court granted the Estate’s MSJ on the grounds that Petitioners had not met their burden under Rule 56(e), SCRCF of showing a genuine issue of fact for trial as to capacity and undue influence. (Order, R. at ____). The probate court further found, based on its review of the Restated Trust, that there was no technical issue with the execution of the 2017 Trust Amendments. (*Id.*).

Petitioners appealed to the circuit court. In their brief, Petitioners identified different evidence and different arguments than those presented in their interrogatory responses and to the

¹ This case had been pending more than four years at the time of the hearing. Petitioners did not invoke Rule 56(f), SCRCF, nor did they claim at any time that additional discovery was needed prior to a ruling on the Estate’s motion for summary judgment.

probate court. (Compare Memorandum with Appellant’s Brief, R. at ____). After a hearing, the circuit court solicited a proposed order from Petitioners. (2/3/2025 Email, R. at ____). After receiving the proposed order and correspondence from the Estate’s counsel, the circuit court issued an order on March 11, 2025, reversing the probate court based on its own view of the record and without considering the arguments and evidence presented to the probate court². (Correspondence, Order, R. at ____). This appeal followed.

FACTS

For purposes of this briefing, the facts are those identified by the parties in connection with the MSJ. Petitioners were not entitled to identify any other facts in their appeal from the probate court. *See* Rule 56(e), SCRPC; *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (applying general error preservation rules in a summary judgment context).

I. The Petitioners.

Mrs. Macatee is the widow of the Decedent, stepmother to Mary Ann McNutt, and mother to Michael J. Macatee. By order dated December 9, 2016, the Greenville County probate court declared Mrs. Macatee to be an incapacitated person. (Order, R. at ____). Jennifer Browning was appointed to be the guardian for Mrs. Macatee. (*Id.*). Under that appointment, Browning has been charged with “full power and authority needed for the protection and assistance of Joan C. Macatee as they relate to her person, including, but not limited to, medical treatment, placement or residency.” (*Id.*) Mrs. Macatee has resided in an assisted living facility since 2016, and her guardian testified that assisted living is the appropriate setting for Mrs. Macatee and has been since Browning’s appointment in 2016. (Browning Dep. 22:22-23:4, R. at ____). Mrs. Macatee did not

² The order affirmed the portion of the probate court’s ruling finding that there was no technical issue with the execution of the 2017 Trust Amendments. That ruling has not been appealed and is the law of the case. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding unappealed ruling is law of the case).

have any contact with her husband in the last six months of his life (Macatee Dep. 116:20-23, R. at ____), nor did she visit the Macatee home between December 9, 2016 and Mr. Macatee's death on June 18, 2017 (Browning Dep. 21:4-6, R. at ____).

II. The Estate Planning Documents.

The Restated Trust was dated January 2017 and provided the following distribution scheme, after the payment of taxes and expenses, upon Mr. Macatee's death: (1) 50% to the Joan C. Macatee Trust to provide for her "health, support, maintenance, and education in order to maintain the Wife liberally and in accordance with the standard of living to which the Wife was accustomed at the time of the Settlor's death[.]"; and (2) 50% to the Children's Trust, which allocated 25% to each of the Macatee Children. (Restated Trust at 2-6, R. at ____).³ Petitioners do not challenge the Restated Trust.

Petitioners challenge the 2017 Will and the 2017 Amendments to the Restated Trust. Each is signed by Mr. Macatee and witnessed by Arthur F. McLean III ("Mac McLean" or "McLean") and Paige B. Franklin. (Instruments, R. at ____). The 2017 Will includes a contemporaneous attestation from McLean and Franklin that "the Testator signs and executes this instrument as his Last Will and that he signs it willingly, and that each of us, in the presence and hearing of the Testator hereby signs this Will as witness to the Testator's signing, and that to the best of our knowledge the Testator is eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence." (2017 Will, R. at ____).

The provisions of the challenged documents are similar to those of the Restated Trust (and its general 50% / 25% / 25% distribution) with the exception of the addition of certain specific

³ At the time of the execution of the Restated Trust, Mr. Macatee also executed a Durable Power of Attorney ("POA") naming Innes Mather and Mary Ann McNutt as attorneys in fact. (POA, R. at ____).

bequests of tangible personal property and two parcels of real property that were left to the Macatee Children (and, in small part, to Katlyn Auxier and Michaela McNutt). (Restated Trust, 2017 Will, 2017 Trust Amendments, R. at ____). These are all logical changes when one considers that Mrs. Macatee had recently been deemed incapacitated and was in an assisted living facility. As such, and as Browning acknowledged, Mrs. Macatee had no use for cars, boats, or houses. (Browning Dep. 30:15-18, R. at ____). No evidence was presented as to the value of these items, whether they were subject to mortgages, or the income generated by the assets held in trust, and the undisputed testimony is that the Trust provides ample support for Mrs. Macatee. (Browning Dep. 28:21-25; Macatee Dep. 48:3-5, 50:3-6, 54:5-7, R. at ____).

In all versions of any will or trust executed by Mr. Macatee, the residue of the assets passed one-half to or for the benefit of the Macatee Children and one-half to be held in trust to generate income for the benefit of Mrs. Macatee. (Instruments, R. at ____). The general distribution scheme is consistent with Mrs. Macatee's testimony that her husband once told her "he was going to leave half of everything to me and the rest of it to Michael and Mary." (Macatee Dep. at 56:17-21, R. at ____).

III. The Evidence Relating to the Execution of the Estate Planning Documents.

With respect to the execution of the 2017 Will and the 2017 Amendments, and as set forth in the Estate's memorandum in support of the MSJ, the evidence is as follows:

1. Jennifer Browning Deposition. Browning testified that she was not involved in the decision to file this action. (9:23-25, R. at ____). She testified that she only met Mr. Macatee twice, once soon after her appointment and once on or around April 1, 2017 (between the execution of the March and May estate planning documents). She testified that Mr. Macatee was able to telephone her on occasion, that he was able to have a conversation with her at both meetings, and that he seemed in control of his mental faculties and concerned for his wife's well-being. (10:24-13:19; 39:23-40:2, R. at ____). She further testified that Mr. Macatee knew "who his wife was and who his children were," "wanted to make sure that Ms. Macatee was provided for," and had "knowledge of his assets and his business" at the April 1, 2017 meeting. (*Id.*). In fact, the purpose of the April 1, 2017 meeting was to discuss retaining Don Watson to serve as a professional durable power of attorney for Mrs. Macatee at Browning's recommendation. (*Id.*).

With respect to the specific allegations in this lawsuit, Browning testified:

Q Do you have any personal knowledge about Mr. Macatee's capacity at the time he signed the estate planning documents Mrs. Macatee is challenging?

A I do not.

Q Do you have any personal knowledge about whether there may have been any undue influence with respect to Mr. Macatee's decision to execute estate planning documents in the last few months of his life?

A I do not.

(33:7-17, R. at ____). She did not have any knowledge of Mr. Macatee's estate planning documents over time, and she did not have any specific knowledge about Mr. Macatee's condition on the dates the estate planning documents in question were signed. (17:4-9; 18:7-12, R. at ____).

With respect to Mary Ann McNutt, Browning testified that she did not have any knowledge that McNutt was restricting access to Mr. Macatee. (16:17-17:3, R. at ____). Browning also testified that she had a "good relationship with Mary Ann and communication with her" and that she did not see any signs that "Mary Ann wished her stepmother ill" and that McNutt wanted to be sure Mrs. Macatee was taken care of. (25:19-26:1, R. at ____).

2. Joan Macatee Deposition. Much of the deposition is inadmissible hearsay because Mrs. Macatee did not see her husband or visit the Macatee home within the last six months of Mr. Macatee's life. (116:13-117:14, R. at ____). With respect to the specific issues surrounding the execution of the 2017 Will and the 2017 Amendments, her personal knowledge is set forth in the following exchange:

Q Just to follow up, first question: You don't have any knowledge about when your husband signed any will or trust document, do you?

A That is correct, I do not know when he signed it, other than the dates that I've seen. But I didn't see it, I didn't witness it, so I don't know.

Q And next question: You had no direct contact with your husband in the last six months of his life, did you?

A That's correct, I did not.

Q And you have no firsthand knowledge of what was going on in the house in the last six months of his life, correct?

A Other than what I heard from – there again, it's hearsay – Michael or my sister. I did not talk to the nurses, I did not talk to Mary. All I knew was he was fading very quickly.

Q So to ask the question again, you don't have any firsthand personal knowledge of what was going on in the house in the last six months of your husband's life.

A That is correct.

Q And do you have any firsthand personal knowledge about any power of attorney your husband may have signed at any point?

A I do not. I don't know.

(116:13-117:14, R. at ____). Browning confirmed that Mrs. Macatee was not in the Macatee home after Browning's appointment on December 9, 2016. (Browning Dep. 21:4-6, R. at ____).

3. Mac McLean Deposition. McLean was the attorney assisting Mr. Macatee with his estate planning documents and was a witness to the execution of those documents. (9:2-3, R. at ____). He testified in no uncertain terms that Mr. Macatee "was completely mentally competent; completely knowledgeable of his surroundings, his assets, his friends, and family. But of course, the last few times I saw him he was pretty severely physically impaired." "...[a]s I spoke to him, it was just as clear that his mind was as sharp as it could be." (8:17-23; 17:16-18:23, R. at ____). McLean testified that he met with Mr. Macatee for about an hour at the time of the execution of each of the March and May documents and that he did not witness any confusion or disorientation on Mr. Macatee's part. (16:21-23; 20:12-15, R. at ____). He further testified that he did not have the impression that Mary Ann McNutt was influencing or trying to control Mr. Macatee. (22:7-20, R. at ____). He also testified that he did not see Michael J. Macatee and that he had no indication the son was trying to influence Mr. Macatee's estate plan. (25:2-9, R. at ____).

4. Mary Ann McNutt Deposition. McNutt came to live with her father when Mrs. Macatee was hospitalized. (9:8-15; Macatee Dep. 80:1-14, R. at ____). She testified that she made an appointment with McLean at her father's request but did not know why her father was seeking legal advice. (26:1-11; 29:11-30:3). She testified that she did not remain in the room while her father met with McLean, and she was not aware of what her father discussed with McLean. (26:12-17; 31:7-10; 33:1-7, R. at ____).

5. Hospice Employee Depositions.

a. Christa Tompkins, RN. Tompkins was Mr. Macatee's case manager with Interim Hospice until she transitioned the patient to Nancy Sheriff around April 18, 2017. She was not present on any date in which estate planning documents were executed and would not be able to testify to Mr. Macatee's condition on those dates. (23:1-7, R. at ____).

Her first meeting with Mr. Macatee was on March 22, 2017. (9:1-5, R. at ____). She reported that he was alert and talkative, that he answered questions appropriately, and that he discussed his business and his family with her. (9:9-11:19; 15:19-16:5; 18:22-19:1, R. at ____). She indicated that Mr. Macatee was aware of his family, his business, and his property in her conversations with him. (19:22-20:24, R. at ____). She was not aware of his estate planning goals and did not witness anyone trying to coerce or force Mr. Macatee to do anything, did not witness anyone threatening Mr. Macatee, and did not witness

anyone attempting to restrict access to Mr. Macatee. (21:3-24, R. at ____). She believed he retained free will. (21:22-24, R. at ____). She assessed his cognitive abilities as a nine on a scale of zero to ten. (33:21-34:5, R. at ____).

b. Nancy Sheriff, RN. Sheriff was Mr. Macatee's case manager after Christa Tompkins, beginning on April 18, 2017. She was not present in the home on any date in which Mr. Macatee executed estate planning documents. (33:13-23, R. at ____).

She testified that she immediately took steps to make sure Mr. Macatee's medication was properly managed. (11:4-24, R. at ____). She recalled that Mr. Macatee was "awake and alert and talkative about past business and his status now" at their first meeting. (15:15-20, R. at ____). She also remembered he discussed his wife, his children, his grandchildren, his business, and his boat and car with her. (16:5-18:15; 55:17-56:7, R. at ____). She testified that he remained aware of his family and his property and that "he always seemed pretty aware until the very end. He was always pretty alert on what was going on in the home even though he didn't like it a lot of times or he just was very frustrated." (20:16-25, R. at ____). She testified that he maintained free will and that she did not see any real confusion from him until June 5, 2017. (26:12-19; 58:20-59:6, R. at ____).

She testified that she believed that she had a conversation with Mr. Macatee on May 24, 2017 in which he expressed concern about his estate because he believed that his family would fight over it. (22:10-23:16, R. at ____). She testified that she was often alone with Mr. Macatee and that the only person she knew McNutt did not want to see Mr. Macatee was Michael J. Macatee. (25:18-26:11, R. at ____). She was unaware of any threats or abuse. (28:8-14, R. at ____).

c. Jillian Storm. Storm served as a music therapist and bereavement counselor for Interim Hospice. (8:3-8, R. at ____). She only met with Mr. Macatee twice. (9:3-5, R. at ____). She did not meet with him on any date in which estate planning documents were executed. (25:9-25, R. at ____).

She did not believe anyone was denied access to Mr. Macatee. (17:3-6, R. at ____). In her meeting with him on May 8, they discussed his wife and his business, and she believed he knew what he was talking about with no confusion. (19:23-20:23; 24:8-15, R. at ____). When asked, "At the time of your May 8th meeting with him, did Mr. Macatee seem in control of his faculties and to possess free will?" Storm replied, "I would say so. As much as I can answer that as a nonmedical professional. I mean, he seemed to have the wherewithal to have an appropriate conversation with me, and he communicated effectively. There was no sign of confusion." (24:8-15, R. at ____).

At her second visit on June 16, 2017, she reported he was closer to death and mostly asleep. (21:16-23:8, R. at ____).

d. Lasurma Pippins. Pippins was the Interim Health Social Worker assigned to Mr. Macatee's case. She had no information specific to the dates that Mr. Macatee executed estate planning documents. (33:15-21, R. at ____).

She assessed him on March 22, 2017. (11:17-22, R. at ____). They discussed his business, his boat, and his desire to remain at home. (14:7-15:11; 15:20-24, R. at ____). She found him to be lucid, oriented as to place, person, and time, and responding appropriately to questions. (16:18-17:10, R. at ____). He was not hallucinating and was able to convey his wants and needs and did not seem to lack free will. (19:17-20:6; 32:1-3, R. at ____). She believed him to be capable of making his own decisions about his health and his possessions. (22:15-19, R. at ____). She also testified that he knew who his family members were and seemed to understand what he owned and what his business was. (22:20-25, R. at ____). He remained lucid at her next visit on March 28, 2017 (23:11-13, R. at ____). Mr. Macatee continued to be alert and oriented at her next meeting with him on May 12, 2017. (29:2-17, R. at ____). Only at her next visit in June 2017 was Mr. Macatee less alert and responsive. (30:9-13, R. at ____). Pippins did not witness any threats, restricted access, or efforts to control Mr. Macatee. (31:3-32:3, R. at ____).

In response to this recitation at the summary judgment stage, Petitioners pointed to general deposition testimony from caregivers that was not specific to the execution of the estate planning documents at issue and to hearsay medical records that did not pertain to the specific dates of execution of the 2017 Will or the 2017 Trust Amendments. (Petitioners' Memo and Hearing Transcript, R. at ____). There was no discussion or argument relating to the execution of the Restated Trust, the lawyers that prepared it, or any emails exchanged with those lawyers, nor was there any reference to Mather's deposition testimony. (*Id.*). The only reference to Mather's deposition exhibit was a citation to certain hospice records (Petitioners' Memo at ¶¶ 11-28, 37-50; Mather Ex. 1 at 69-128 (cited by the Interim Hospice Bates numbers)), and emails from Mac McLean beginning in March 2017 (Petitioners' Memo at ¶ 51-52; Mather Ex. 1 at 323, 341-43, 390-93, 401-05, R. at ____).⁴

⁴ The Facts section of Petitioners' brief to the circuit court—beginning with the last paragraph of page 4 through the bottom of page 7—strayed outside the arguments presented to the probate court in response to the motion for summary judgment and should not have been considered by the circuit court. (Brief, R. at ____).

STANDARD OF REVIEW

On appeal from a grant of summary judgment, this Court's standard of review is the same as that of the court that heard the motion. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRPC. "Summary judgment is appropriate in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ." *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984).

This Court must view the facts and inferences in the light most favorable to the nonmoving party. *See, e.g., Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct. App. 1994). When the nonmoving party bears the burden of proof on an issue, the moving party is entitled to summary judgment if "there is an absence of evidence to support the nonmoving party's case." *Richardson v. State-Record Co.*, 330 S.C. 562, 566, 499 S.E.2d 822, 825 (Ct. App. 1998). "[W]hen ruling on a summary judgment motion, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim...." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). If a plaintiff cannot establish facts on each element of the cause of action asserted, summary judgment is mandated by Rule 56(c). *Id.*

If a motion has been properly made and supported, the nonmoving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRPC; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). This showing must be based on evidence that would be admissible at trial. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). A nonmoving party cannot evade summary judgment by creating and relying on "an inference that is not reasonable or an issue of

fact that is not genuine.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

The circuit court’s and this Court’s jurisdiction in this matter is solely in an appellate capacity. S.C. Code Ann. § 62-1-308(i). As such, the appeal to the circuit court was not an opportunity for a second bite at the apple for the Petitioners. *See id.* (“The circuit court . . . shall hear and determine the appeal according to the rules of law. The hearing must be strictly on appeal and no new evidence may be presented.”). They could not raise new arguments and point to different evidence than what was presented to the probate court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998).

ARGUMENT

By statute, “[c]ontestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.” S.C. Code Ann. § 62-3-407.

I. Petitioners did not present a genuine issue for trial as to Mr. Macatee’s testamentary capacity at the time he executed the 2017 Will and the 2017 Trust Amendments.

Petitioners have the burden of proof as to this claim and must establish every element by the preponderance of evidence. *Hairston v. McMillan*, 387 S.C. 439, 445, 692 S.E.2d 549, 552 (Ct. App. 2010). The mental capacity required to make a valid will is minimal, and thus the burden of proof as to lack of capacity is significant. *Estate of O’Neill v. Tobias*, 259 S.C. 55, 62–63, 190 S.E.2d 754, 757 (1972). If a will is duly executed, it is presumed that the testator had the requisite capacity to make the will, and a testator who signs a will is presumed to understand its nature and content. *Henkel v. Winn*, 346 S.C. 14, 18, 550 S.E.2d 577, 579 (Ct. App. 2001); *see also In re Last Will & Testament of Smoak*, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985) (holding that when

formal execution of a will is admitted or proved, the burden is on the contestants “to prove undue influence, incapacity or other basis of invalidation, and such burden remains” on contestants “throughout”).

The test for whether Mr. Macatee had the requisite capacity to execute the 2017 Will and the 2017 Trust Amendments is whether he knew (1) his estate, (2) the objects of his affections, and (3) to whom he wished to give his property at the time the instruments were executed. *Hellams v. Ross*, 268 S.C. 284, 288, 233 S.E.2d 98, 100 (1977); *In re Washington’s Est.*, 212 S.C. 379, 385-86, 46 S.E.2d 287, 289 (1948); *Hairston*, 387 S.C. at 445–46, 692 S.E.2d at 552; *Hembree v. Est. of Hembree*, 311 S.C. 192, 195, 428 S.E.2d 3, 4 (Ct. App. 1993); S.C. Code Ann. § 62-7-601 (“The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.”). The degree of capacity needed to satisfy this test is slight—less than that needed to execute a contract. *See McCollum v. Banks*, 213 S.C. 476, 483–84, 50 S.E.2d 199, 202 (1948); *In re Est. of Weeks*, 329 S.C. 251, 264, 495 S.E.2d 454, 461-62 (Ct. App. 1997).

Indeed, South Carolina law requires only that the testator have the “*capacity to know or understand*” the nature of his estate and objects of his affection, “*rather than the actual knowledge or understanding*,” for testamentary capacity to be found. *Weeks*, 329 S.C. at 263, 495 S.E.2d at 461 (emphasis added). “The degree of capacity necessary to execute a will is less than that needed to execute a contract. [E]ven an insane person may execute a will if it is done during a sane interval[.]” *Hairston*, 387 S.C. at 445, 692 S.E.2d at 552 (internal citations and quotations omitted). “In order to invalidate a will, a testator’s insanity should be established at the time of execution, unless the insanity is of a permanent or chronic nature.” *Id.* (citations and quotations omitted).

South Carolina law also distinguishes mental capacity from physical well-being. *See Havird v. Schissell*, 252 S.C. 404, 409, 166 S.E.2d 801, 804 (1969). Consistent with general law, a South Carolina testator may be ill, physically incapacitated, and near death, and still have capacity to make a will. *Id.* In such cases, evidence of illness or other physical disability is not sufficient to prove lack of capacity; rather, the party alleging lack of capacity must present evidence sufficient to prove that the testator did not know, *at the time the will was made*, his estate, the objects of his affection, and to whom he wished to give his property. *Hellams*, 268 S.C. at 288, 233 S.E.2d at 100.

In making this determination, courts must look to whether there was capacity “at the time of the execution of the will[.]” *Matheson v. Matheson*, 125 S.C. 165, 118 S.E. 312, 313 (1923) (quoting *Black v. Ellis*, 3 Hill 74 (1836)); *Hairston*, 387 S.C. at 445–46, 692 S.E.2d at 552. Whether a testator lacked capacity before or after the will was executed is not dispositive, so long as he had the requisite capacity at the time the document was signed. *Lee’s Heirs v. Lee’s Ex’r*, 15 S.C.L. 183 (S.C. App. L. & Eq. 1827); *Hellams*, 268 S.C. at 288, 233 S.E.2d at 100. In this regard, it has been stated that, where there is evidence of lack of capacity before or after a will was signed, American courts are generally “adamant in the respect they give to the actual moment of execution itself,” which is a concept that gives rise to a rule in certain jurisdictions that “attesting witnesses are entitled to greater credibility than other witnesses on the issue of testamentary capacity because they were present at the holy moment when the testator signed the will.” Ross & Reed, *Will Contests* §6.13 (1992).

The only evidence as to time of execution and whether Mr. Macatee at that time knew (1) the contents of his estate, (2) the objects of his affections, and (3) to whom he wished to give his property comes from Mac McLean and the face of the 2017 Will itself. McLean testified and

attested that Mr. Macatee met the requisite standard at the time the instruments in question were signed. Petitioners and the circuit court have not identified any other evidence as to the time of execution. Instead, they rely on general information about his health in the months leading up to his death.

Contrary to the order of the probate court which recited the evidence as to the relevant period and the case law regarding testamentary capacity (Order, R. at ____), the order of the circuit court cites no cases and finds as follows:

Viewing the evidence and the inferences from the evidence in the light most favorable to Wife as required in the summary judgment context, the evidence suggests that Decedent was confused, disoriented, experiencing hallucinations, extremely medicated, and not of sound mind leading up to *and including* the time of the execution of the Disputed Documents. The evidence further suggests that Daughter knew of Decedent's deteriorating mental condition and hallucinations and still facilitated and scheduled the execution of the Disputed Documents without disclosing Decedent's condition to the drafting attorney. The evidence also suggests that Daughter communicated all of the information included in the Disputed Documents to the drafting attorney without even discussing the issue with Decedent. Genuine issues of material fact exist as to Decedent's capacity and the services of a fact finder are necessary.

(Order, R. at ____). There is no discussion of any evidence identified before the probate court that would tend to show Mr. Macatee did not know the contents of his estate, the objects of his affection, or to whom he wished to give his property. In addition, the order is in error where it suggests there was medical evidence specifically pertaining to the time of execution. There is no such evidence, much less admissible evidence. The remainder of the paragraph is irrelevant to the issue of capacity. It is for this reason that Petitioner failed to meet its burden under Rule 56(e), SCRPC of showing, based on admissible evidence, that there was a question of fact for trial, and the circuit court erred in reversing the probate court's grant of summary judgment. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) ("Once moving party carries its initial burden, opposing party must, under Rule 56(e), do more than simply show that there is

some metaphysical doubt as to the material facts” but “must come forward with specific facts showing that there is a *genuine issue for trial*.” (citation and quotation omitted).

Contrary to Petitioners’ arguments on appeal to the circuit court, there is no basis for discounting McLean’s unequivocal testimony.⁵ He was not testifying about capacity as a medical expert. Instead, he was testifying to testamentary capacity based on his observations of the decedent at the critical moment, the time of execution. McLean stated, “I thought he was completely mentally competent; completely knowledgeable of his surroundings, his assets, his friends, and family. But of course, the last few times I saw him he was pretty physically impaired.” (McLean Dep. 8:17-23; *see also* McLean Dep. 17:17-18:22, R. at ____). There is nothing inadmissible about testimony of this type concerning McLean’s personal knowledge and observations of Mr. Macatee.

McLean’s testimony is bolstered by that of the Interim Hospice employees that were deposed. As discussed above, although the hospice employees were not present on the days when Mr. Macatee signed the documents, each employee testified that Mr. Macatee remained alert and aware until very close to the time of his death in June 2017 and that he knew his business and his family throughout that period. Similarly, Browning admitted that Mr. Macatee was alert, aware, and competent to sign a contract when she met with him to discuss the appointment of professional

⁵ McLean’s testimony is not rendered inadmissible simply because he is listed as counsel on the pleadings in the probate court together with other attorneys from his law firm. This issue was not raised to the probate court, nor should it have been, as Rule 3.7, RPC, Rule 407, SCACR, provides that “[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness . . .” McLean’s testimony would therefore be allowed as long as another lawyer was trying the case. At no time has McLean been the sole lawyer for the Estate in this litigation, and the motion for summary judgment was signed and argued by an attorney other than McLean.

durable power of attorney for Mrs. Macatee in April 2017, between the time of the execution of the March and May estate planning documents. (Browning Dep. 10:24-13:19, R. at ____).

Mrs. Macatee had no contact with Mr. Macatee in the months leading up to his death and has no first-hand knowledge as to his capacity at the time the documents were executed. (Macatee Dep. 116:13-117:14, 116:13-117:14, R. at ____). Petitioners' discovery responses on the issue of capacity rely primarily on the hearsay records obtained from Interim Hospice and do not provide any evidence as of the time of execution. (*See* Petitioners' Supplemental Answers to Respondent's First Set of Interrogatories at Response 6, R. at ____ (detailing facts related to Petitioners' capacity claims but identifying no evidence as to either March 23, 2017 or May 10, 2017)). Similarly, Petitioners' brief before the circuit court made no mention of the elements of testamentary capacity as of the time of execution, but rather relies on general allegations as to Mr. Macatee's condition, hearsay reports from Mr. Macatee's medical records, and out of context citations to McLean's deposition. (Brief, R. at ____). Petitioners did not presented any evidence that Mr. Macatee did not know (1) the contents of his estate, (2) the objects of his affections, and (3) to whom he wished to give his property at the time the instruments were executed.

Mr. Macatee was old and sick in the spring of 2017. Being old and sick, however, does not preclude a person from executing estate planning documents. Moreover, it does not matter if the decedent was taking medications and may have had good days and bad days. The case of *Kirkwood v. Gordon*, 41 S.C.L. 474 (S.C. App. L. 1854) is illustrative here. In that case, the testator was "a very aged man more than eighty years of age[.]" *Id.* at 474. At the time the will was signed, its scrivener "read it carefully to the testator, who said it was what he wanted" *Id.* The testator executed the will, and he died days later. *Id.* at 475.

In *Kirkwood*, the testator's eldest daughter challenged the will on the grounds her father was not mentally competent. *Id.* at 475-76. Her evidence came from various lay witnesses who testified as to factors which they deemed rendered the testator incapable of making a will. For instance, the Rev. McNeill Turner visited with the testator later in the day *on the date the Will was signed*, and expressed in Court his opinion the testator was incapable of making a will. *Id.* Other witnesses for the opponent were William Gordon and his wife, described as "casual visitors" by the Court, who were neighbors and not relatives of the Decedent, and *who saw him on the morning of the date the Will was signed and prior to its execution.* *Id.* at 480. They also "thought his mind wrong[.]" because of the illogical statements which were made to them at that time by the testator. *Id.* at 476. Nevertheless, the Court in *Kirkwood* found that testamentary capacity at the time of execution was proved, *the subscribing witnesses and the scrivener of the will having testified to the testator's approval of the contents of the will after its having been read to him.* *Id.* at 478.

There is little reason to distinguish the facts of *Kirkwood* from those of the instant case. As in *Kirkwood*, this case involves an aged, infirm testator. And here, as in *Kirkwood*, the Petitioners have presented no evidence to contradict that of the subscribing witnesses that the testator was of sound mind *at the time Mr. Macatee executed the documents*. If there is any substantive difference between this case and *Kirkwood*, it is that in *Kirkwood* there was testimony from witnesses who *did not* observe the execution of the will that the testator's "mind" was "wrong" on the day the will was executed. Even with that testimony, however, the *Kirkwood* court found the subscribing witnesses' testimony established the testator's capacity and, thus, rejected the challenge to the will's validity.

Given the above, Petitioners did not meet their burden of showing a genuine issue for trial as to Mr. Macatee's testamentary capacity when he executed the 2017 Will and the 2017 Trust

Amendments. The probate court correctly considered the arguments before it and the evidence identified by the Petitioners and ruled based on the question before it—was there a genuine issue of fact as to whether Mr. Macatee knew (1) the contents of his estate, (2) the objects of his affections, and (3) to whom he wished to give his property at the time he executed the challenged documents? The answer is no. The circuit court erred in reversing this ruling.

If Petitioners presented a case that could survive summary judgment on capacity here, there is no case involving a will signed by someone old, sick, and medicated that would not present a genuine issue for trial. Our case law imposes a heavy burden for will contests and places the inquiry on the time of execution. In the absence of any evidence relating to Mr. Macatee’s capacity for testamentary purposes when executing the documents, Petitioners’ arguments do nothing more than “conjure[] by shadows” and do not create a genuine issue for trial. *See Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019).

II. Petitioners did not present a genuine issue for trial that McNutt wielded an undue influence over Mr. Macatee with respect to the 2017 Will or the 2017 Trust Amendments.

With respect to undue influence, “[s]ince the standard of proof in an undue influence case is unmistakable and convincing evidence, *there must be more than a scintilla of evidence in order to defeat a motion for summary judgment.*” *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003) (emphasis added); *Swiger by & through DeHaven v. Smith*, 426 S.C. 408, 415, 827 S.E.2d 200, 203 (Ct. App. 2019). As summarized in *South Carolina Jurisprudence*,

The mere existence of influence is not enough to void a will, as not all influences are unlawful. Thus, it is not unlawful for a person, by honest intercessions and modest persuasions, to procure a will to be made in his or her behalf.

Undue influence sufficient to vitiate a will must be of such a degree that it dominated the testator’s will, took away his or her free agency, and prevented his or her exercise of judgment and choice. For influence to vitiate a will, it must destroy free agency and amount to force and coercion. It must not be the influence of affection and attachment, nor the mere desire of gratifying the wishes of another,

for that would be a very strong ground in support of a testamentary act; nor by importunity which could not be resisted, or that it was done merely for the sake of peace. The motive must be tantamount to force and fear. If a testator had the testamentary capacity to dispose of his or her property and was free and unrestrained in his or her volition at time of making the will, the influence that may have inspired the will or some provision therein will not be undue influence. Thus, the circumstances must unmistakably and convincingly point to the substitution of another's will for that of the testator in order for influence to vitiate the will.

The issue of undue influence should be resolved in light of the proposition that a sane testator has the right to dispose of the testator's property as he or she chooses, since the privilege of disposing of property by will according to a testator's pleasure, whether judicious or capricious, just or unjust, is one of the basic rights known to our civilization.

32 S.C. Jur. Wills § 37 (footnotes omitted).

The Estate presented considerable evidence that Mr. Macatee had numerous communications and free interactions with others during the months of March through May of 2017 and retained free will during that period as discussed above. This is important because undue influence must be unrelenting to invalidate a will. Again, as summarized in *South Carolina Jurisprudence*,

Even if a will contestant establishes an inference of undue influence, an unhampered opportunity of a testator to change the will after the operation of undue influence destroys that conclusion.

32 S.C. Jur. Wills § 38 (footnotes omitted). Here, the evidence shows that Browning sought to have the Decedent sign paperwork in April 2017 and believed he was competent to do so. (Browning Dep. 10:24-13:19, R. at ____). The evidence further shows that he did, in fact, change his mind about the disposition of certain items as reflected in the 2017 Will and the May 2017 Trust Amendments, which were executed after the March 2017 Trust Amendments. Nothing in this record suggests that Mr. Macatee did not take advantage of opportunities to make sure his estate plan provided for his wife and children.

A petitioner is not excused from this burden of proof if a beneficiary is also a fiduciary. As set forth by the Court of Appeals,

“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 to force and coercion.” *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (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.* 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). “General influence is not enough.” *Id.*

The existence of a fiduciary relationship between a testator and beneficiary raises a presumption of undue influence. *Howard v. Nasser*, 364 S.C. 279, 288, 613 S.E.2d 64, 68–69 (Ct. App. 2005). If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence. *Id.* “We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will.” *Id.*

Hairston, 387 S.C. at 446–47, 692 S.E.2d at 553.

Given the existence of the POA in Mary Ann McNutt’s favor, the Estate proffered the depositions cited above as rebuttal evidence. Mac McLean testified that he spoke with Mr. Macatee outside the presence of McNutt and that he never suspected that “Mary Ann was trying to influence or control Mr. Macatee to do anything that was not his own—of his own wishes or desires.” (McLean Dep. 22:7-20, R. at ____).⁶ All witnesses that saw Mr. Macatee in 2017 testified that he retained free will and was not threatened or forced to do anything as set forth above. The witnesses testified that they were given free access to Mr. Macatee and were able to be alone with him also as detailed above.

⁶ He testified similarly as to Michael J. Macatee. (*Id.* at 25:6-12, R. at ____).

Given this abundance of rebuttal evidence, the Petitioners were required to present evidence establishing a question of fact as to undue influence. They failed to do so before the probate court.

As with capacity, “[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). The Petitioners have adduced no evidence relating to influence that goes to the execution of the documents in question. There is simply no evidence of any force or coercion as required to invalidate a will. *See Wilson v. Dallas*, 403 S.C. 411, 437, 743 S.E.2d 746, 760 (2013).

The Petitioners’ discovery responses and memorandum in opposition to the motion for summary judgment relied primarily on the paper records obtained from Interim Hospice and do not provide any evidence as of the time of execution. (*See* Ex. 13 to Respondent’s Memo at Response 10, 18 (referencing Response which details facts supporting Petitioners’ capacity claims but includes no evidence as to either March 23, 2017 or May 10, 2017); Petitioners’ Memo, R. at ____). Again, Petitioners did not point to any evidence at the summary judgment stage as to the specific conditions surrounding the execution of the documents at issue to refute McLean’s testimony. Nor did they point to any sort of threats, fear, or coercion in this period.

On page 12 of the Facts section of the Petitioner’s brief before the circuit court, there were two paragraphs relating to restricted access. (Brief, R. at ____). One concerns Mrs. Macatee’s access to her husband, and the other cited Wife’s testimony that McNutt “fired everybody that worked for Decedent” and “was attempting to keep decedent from seeing other people.” Mrs. Macatee, by her own admission, had no firsthand knowledge of what was going on in the Macatee house during the period in question. (Macatee Dep. at 116:13-117:14, R. at ____). Any testimony on her part was either hearsay or not based on personal knowledge. As a result, this testimony is

not admissible evidence and cannot create a genuine issue for trial. *Hall*, 349 S.C. at 175, 561 S.E.2d at 657. With respect to Mrs. Macatee, Browning was asked, “Did you get any sense that Mary Ann was trying to restrict access to her father?” and responded, “I wouldn’t say she was restricting access. I would say, as far as Ms. Macatee—I mean, all I can say is that she said that Mr. Macatee did not want to see Ms. Macatee. I don’t know about restricting access.” (Browning Dep. 17-24, R. at ____). All other witnesses, including Browning, testified that they had ready access to Mr. Macatee.

On appeal, Petitioners pointed to new and different pieces of evidence on this issue relating to the history of Mr. Macatee’s estate planning documents. (Brief, R. at ____). These new pieces of evidence should not have been considered by the circuit court on appeal, but highly influenced its order as reflected in the following: “Given the arguably suspicious circumstances surrounding the preparation, formulation, and execution of the Disputed Documents, the confidential fiduciary relationship between the Decedent and Daughter would have created the legal presumption of undue influence by Daughter, when viewed in the lens of the standard for Summary Judgment.” (Order at 8, R. at ____). The order goes on to recite the new arguments made on appeal as the basis for reversing the probate court’s grant of summary judgment. (*Id.*). This was error. An appeal is not a “do over” of the summary judgment arguments. Instead, it is a review of whether the trial court properly considered the summary judgment arguments before it, including any identified questions of material fact proffered by the non-moving party.

Moreover, Petitioners still failed to present any evidence that goes to the testamentary acts themselves. By all admissible accounts, Mr. Macatee retained free will and capacity until very shortly before his death in June 2017. Contrary to the findings in the circuit court’s order, Petitioners did not identify evidence to the probate court that would “suggest[] that Decedent had

no meaningful involvement in the changes made to his estate plan in 2017 because Daughter's influence completely eliminated Decedent's free agency and prevented him from exercising his own judgment and free choice." To the contrary, all witnesses who had personal knowledge of Mr. Macatee's condition in this period maintained that he retained free will.

The probate court relied heavily on *Russell*, finding as follows:

Although mindful that the evidence must be viewed in the light most favorable to the non-moving party, the Court takes direction from *Russell*, a case affirming a grant of summary judgment in a will contest alleging undue influence. The *Russell* court noted the burden of proof and stressed that the existence of influence alone is not enough to survive summary judgment. As set forth there,

Taking the facts in the light most favorable to the Appellants, we agree with the trial judge that there is no genuine issue of material fact to preclude the grant of summary judgment as to the validity of the will. Appellants have not presented unmistakable and convincing evidence that the Williams Children or Thad utilized their relationship with Testator to substitute their will for his. The evidence presented points to the conclusion that the Williams Children were churlish, spoiled children, who took advantage of Testator's generosity. While unattractive, such conduct and demeanor does not amount to undue influence. . . .

Where undue influence has been found, the facts have been far more egregious than those in this situation. . . .

Here, it is undisputed that Testator was independent, and physically mobile until a few days before his death. Testator, while elderly, was not infirm, mentally or physically, and was not prevented from seeing relatives, friends or business associates.

353 S.C. at 218–19, 578 S.E.2d at 334–35. Similarly in this case, Petitioners have not "presented unmistakable and convincing evidence that [the Macatee Children] utilized their relationship with Testator to substitute their will for his."

(Order at 12, R. at ____).

Petitioners and the circuit court instead focused on *Howard*, 364 S.C. 279, 613 S.E.2d 64.

There, the Court of Appeals found that the petitioners had presented adequate evidence to avoid summary judgment on an undue influence claim based on the following:

(1) [Decedent] was physically infirm as a result of a terminal illness prior to the execution of the will; (2) the disposition of [Decedent]’s estate was significantly different from his two prior wills; (3) [Party alleged to have exerted undue influence] was present at the meetings with the attorneys to discuss the contents of the new will; (4) [Decedent]’s relationship with his nephews became strained and the frequency of family visits was limited after [Decedent]’s remarriage; (5) [] a member of the extended family, noticed a change in [Decedent]’s disposition and believed someone was monitoring [Decedent]’s telephone conversations; and (6) [] an attorney who discussed estate planning with [Decedent] and Respondent, refused to draft [Decedent]’s will because he believed [Decedent] was troubled by the changes.

Id. at 290, 613 S.E.2d at 69–70.⁷

The facts here are easily distinguishable. Yes, Mr. Macatee was old and sick. Here, however, all of Mr. Macatee’s estate planning documents reflect a similar plan of distribution (50% to Mrs. Macatee and 25% to each of the Macatee Children). This plan is consistent with Mrs. Macatee’s testimony about what she believed Mr. Macatee wished. (Macatee Dep. at 56:17-21, R. at ____). Mr. Macatee adequately provided for his wife and did not disinherit any member of his immediate family. Counsel was able to discuss Mr. Macatee’s wishes with him while they were alone, and counsel had no qualms with the plan Mr. Macatee had made. Mrs. Macatee’s absence from the home was as a result of her own health challenges, which resulted in the appointment of a guardian who was put into place to protect Mrs. Macatee with “full power and authority needed for the protection and assistance of Joan C. Macatee as they relate to her person, including, but not limited to, medical treatment, placement or residency.” (Order, R. at ____). There is no admissible testimony here as to any change in Mr. Macatee’s personality, that Mr. Macatee’s communications were being monitored, or to a general exclusion of access to Mr. Macatee. The witnesses who

⁷ The Court of Appeals in *Howard* further cautioned, “we emphasize that the burden of proof as to undue influence remains on Appellants throughout the will contest. In reversing the circuit court, we offer no opinion regarding Appellants’ success on the merits. We merely find that Appellants offered sufficient evidence to survive summary judgment.” *Id.* at 291, 613 S.E.2d at 70.

interacted with Mr. Macatee confirmed that he retained free will until very close to the time of his death. These distinctions all render this case much closer to *Russell*, in which the grant of summary judgment was upheld, than to *Howard*. Once again, Petitioner sought to “conjure[] shadows” as to the circumstances surrounding the execution of the documents in question, which does not create a genuine issue for trial.

For these reasons, the Petitioners have failed to show any genuine issue for trial with respect to their claim of undue influence.

CONCLUSION

Quite simply, the strained relationship here is between Mrs. Macatee and McNutt, her stepdaughter. Mrs. Macatee cannot abide the idea of McNutt receiving anything from Mr. Macatee’s estate, so she has challenged the 2017 Will and the 2017 Trust Amendments, notwithstanding the lack of evidence supporting those claims. The probate court correctly considered the facts presented by the parties and arguments before it and the applicable law with respect to testamentary capacity and undue influence in granting summary judgment. That ruling should have been affirmed by the circuit court.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/Sarah P. Spruill

Sarah P. Spruill (SC Bar #68337)

One North Main, 2nd Floor

Greenville, SC 29601

(864) 240-3200

sspruill@hsblawfirm.com

Attorney for Innes T. Mather, as Personal Representative of the Estate of Michael R. Macatee, and Innes T. Mather, as Trustee of the Michael R. Macatee Revocable Living Trust dated November 2, 2016, as amended and restated

August 11, 2025