THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
In the Court of Common Pleas

The Honorable Craig D. Brown, Presiding Judge

Case No. 2013-CP-21-01408

Elizabeth J. Langley .... Appellant,

v.

Wendy J. Lynch, Rebecca M. Lynch, James M. Lynch, II, Donald Jordon, III, Jimmy White and S. Porter Stewart, II, as Personal Representative of the Estate of James M. Lynch,

Of Whom Wendy J. Lynch is the ....Respondent.

INITIAL BRIEF OF THE APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by summarily dismissing detailed evidence presented by the Appellant, that raised genuine issues of material fact regarding undue influence and lack of capacity with regard to the decedent's execution of a purported will, and err by then granting the drastic remedy of summary judgment?

STATEMENT OF THE CASE

This matter involves a daughter's allegations of incapacity and undue influence with regard to the testimentary disposition of her deceased father's estate. The Appellant is that daughter and her father was James M. Lynch (hereinafter "the decedent"). This appeal arises from the trial court's entry of summary judgment against her claims.

On April 30, 2013, the Appellant Elizabeth Langley filed a complaint challenging the purported will of the decedent from May of 2012. The Respondent moved for summary judgment on December 29, 2014. The circuit court held a hearing on June 17, 2015, during which Appellant submitted a memorandum in opposition to summary judgment together with numerous affidavits and other documents.

In an order signed on June 22, 2015 and filed that same day, the trial court granted the Respondent's motion for summary judgment and ordered the action of the Appellant dismissed. The Appellant filed a motion for reconsideration on July 1, 2015. See Motion to Reconsider (R. ____). The Respondent filed a Response in Opposition to Reconsideration dated July 6, 2015. (R. ____). The court denied the motion on August 14, 2015. See Order Denying Motion to Reconsider (R. _____)(filed on on August 17, 2015). The Appellant then filed her notice of appeal. No cross-appeal has been made by the Respondent.

STATEMENT OF THE FACTS[1]

The decedent was a resident of Timmonsville, South Carolina. The decedent was diagnosed in April of 2012 with glioblastoma – brain cancer with multiple lesions in the frontal lobes and frontal regions of the brain.[2] This diagnosis was confirmed by MRI scan and subsequent biopsy.[3] Before his biopsy, the decedent executed a healthcare power of attorney and a general durable power of attorney naming the Respondent and the Appellant as his fiduciary agents. R.____ (Powers of Attorney)(Exhibit B to Memorandum in Opposition to Summary Judgment).

Even before the diagnostic evaluation by MRI scan and biopsy, the decedent had been suffering with vertigo, left-sided weakness, and "memory alteration."[4] Despite these symptoms and the disabling cognitive implications[5] of his diagnosis, the decedent executed the challenged will in mid-May 2012. On February 9, 2013, the decedent succumbed to this terminal illness.

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[1] While many facts are disputed, the Appellant presents the facts as developed by her in opposition to the motion for summary judgment – *with all inferences and evidence construed in the light most favorable to her as the non-moving party.* This statement of facts is presented as allowed by SCRAP 208(b)(1)(D) since these facts are relevant to the issues on appeals. The Appellant recognizes that there is contrary evidence – hence the existence of questions of fact inappropriate for summary judgment.

[2] R.______ (Affidavit of Florence Neurologist R. Joseph Healy at Paragraphs 3-7).

[3] R.______ (Affidavit of Florence Neurologist R. Joseph Healy at Paragraphs 4 and 7).

[4] R. ___ (April 13, 2012 Pre-biopsy records of Florence Neurosurgery and Spine Center).

[5] R.______. (Affidavit of Williamsburg Regional Hospital Chief Medical Officer Troy B. Gamble, Jr.)("***damage to this part of the brain…can impair mental flexibility, reasoning, hypothesis formation, abstract thinking, foresight, judgment, the attentive holding of information, and the ability to inhibit inappropriate responses … patients with evidence of significant frontal lobe lesions…should not be deemed competent to make good decisions despite appearing normal without first being given a battery of …tests***").

Decedent was Confused and Infirmed

Following the decedent's diagnosis, his health rapidly declined and along with it, the decedent's mental capacity.[6] By May 2nd of 2012, he had become unable to tandem walk and his gait was ataxic.[7] He failed to recall his son when speaking with physicians that same day[8] and apparently failed to recall assets of his estate when the challenged will was executed a week later.[9] His friends and family members confirmed his confusion with familiar surroundings[10] and simple tasks.[11] In short, the decedent was unable to

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[6] In his affidavit, George McClam describes his interaction with the decedent in late April 2012 and early May 2012 – the same time period when the questioned will was executed. McClam says that the decedent's "train of thought was incoherent" and that his "behavior was a little out of order." Dennis Hill also reported "odd behavior" to McClam during the same time. R. ____ (McClam Affidavit paragraph 6).

McClam knew the decedent for almost five decades – as an employee, as a fellow divorcee, and as a trusted confidant. R. ____ (McClam Affidavit paragraphs 1 and 2).Because of his lengthy experience with the decedent, McClam was perfectly positioned to observe changes in the decedent's behavior and cognition and reflect on those changes with the objectivity of a person outside the family and outside the benefits of any will.

The affidavit of nephew Donald Campbell also confirms the decedent's confusion and unsteadiness following his diagnosis. R. ____ (Campbell Affidavit paragraph 11).

[7] R. _____ (Records of Duke University Hospital)(Exhibit D to Memorandum in Opposition to Summary Judgment).

[8] R. _____ (Records of Duke University Hospital)(Exhibit D to Memorandum in Opposition to Summary Judgment).

[9] R. _____(Affidavit of Daughter Rebecca M. White at Paragraph 15) (noting that despite the will's inclusion of some specific assets, anticipated others were ommitted).

[10] McClam also describes a specific incident occurring *only days before the date of the new will* where the decedent became disoriented and confused in a most familiar place – the local grocery in his small hometown of Timmonsville. Not being a medical professional, McClam did not know whether to attribute this mental incompetence to Lynch's progressive brain disease or the medications therefore –but that is of no consequence as it is still evidence of the decedent's lack of capacity.

[11] The decedent's daughter Rebecca White describes her father's failing competence corresponding to his diagnosis of brain tumors including loss of memory and inability to

independently function.

Respondent Concedes Decedent's Lack of Capacity

In a candid text message captured by the decedent's friend Rae White Wilkerson, the Respondent herself confirmed the decedent's incompetence "since his brain tumors [diagnosis] due to damage [from] seizure [and] memory loss." [12] Respondent also candidly admitted the decedent's lack of capacity to his daughter Rebecca. R.____ (White Affidavit paragraph 5)(quoted in footnote __ *infra*).

Expert Opinions Confirm Decedent's Lack of Capacity

In affidavits submitted in opposition to summary judgment, two South Carolina physicians – one a Board Certified Family Physician and the other a Neurologist – both opine that the decedent's diagnosis and objective/radiological findings would not have the "cognitive ability to understand the complexities of a will"[13] and should not have been allowed to execute a will without "first being given a battery of complex mental and psychological testing."[14]

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perform simple tasks – like dialing calls on his cell phone. R. ____ (White Affidavit paragraph 13).

[12] R.______(Wilkerson Affidavit and attached text message). Of course, it was a seizure and vertigo occurring before execution of the Hoefer will that led to the decedent's diagnosis. R._____ (McClam Affidavit at Paragraph 3).

[13] R._____ (Affidavit of Florence Neurologist R. Joseph Healy at Paragraph 10).

[14] R._____. (Affidavit of Williamsburg Regional Hospital Chief Medical Officer Troy B. Gamble, Jr.).

Decedent was Restricted and Controlled

As the decedent's health was failing, the Respondent grew increasingly obsessed with the decedent's estate and her desire to control his entire situation.[15] Respondent limited the decedent's access to other visitors[16] and took steps to supervise ("police")[17] and discourage any access by others. Respondent took over occupancy of the decedent's home and even changed his cell phone number (discussed below) so as to prevent his contact from others.[18]

Perhaps the most detailed and haunting description of the Respondent's efforts at restriction and control of the decedent is found in the affidavit of Tracey Frazier – a niece

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15 For example, daughter Rebecca White's affidavit documents the Respondent's obsession with the decedent's estate and the need to "divide everything" before his death because of the candid conclusion *by the Respondent* that the decedent was *not* competent "to do so." R.____ (White Affidavit paragraph 5). When such estate discussions were initiated by Respondent by phone, White would ask to speak to her father and Respondent would refuse such contact and again suggest that such conversations were beyond the decedent's cognition because of his gioblastoma. R.____ (White Affidavit paragraph 4).

16 The affidavit of nephew Donald Campbell confirms the control of the Respondent in discouraging the access of the decedent to others R.____ (Campbell Affidavit paragraph 10). Likewise, the decedent's daughter Rebecca White was repeatedly told by Respondent that the decedent was not available, not at home, or too tired for White to visit. R.____ (White Affidavit paragraph 9). When White did visit the decedent's home, Respondent would prevent her from taking the decedent out on rides alone or spending the night alone with her father. R.____ (White Affidavit paragraph 11). White also verified the Respondents general and arbitrary restriction of visitors wanting to see the decedent. R.____ (White Affidavit paragraph 8).

17 The affidavit provided by the decedent's daughter Rebecca White also describes the Respondent's use of her son to "police" the decedent even at the cost of giving up his employment and relocating. R.____ (White Affidavit paragraph 6). White also describes the Respondent's use of baby monitors and direct conversational intrusion to prevent the decedent from having any private conversations. R. ____ (White Affidavit paragraph 7).

18 A long-term friend of the decedent, George McClam, also describes the Respondent's efforts to control and isolate the decedent by moving in to his residence and restricting visitation at a time when his mobility had failed. McClam also confirms the oddity of the Respondent's occupation of the decedent's home in this terminal period since Respondent had never before resided there. R.______ (McClam affidavit).

of the decedent who helped care for the terminally ill decedent in his Timmonsville home. Frazier describes the Respondent's manipulations including limiting the decedent's visitors (paragraph 10), changing his telephone number multiple times (paragraph 15), and harassing the decedent's female friend until she would no longer visit (paragraph 13).[19] In fact, the Respondent apparently succeeded with that harassment as the decedent's relationship with that female friend was "cooled."[20]

Most disturbing is Frazier's description of the Respondent's direct and unrelenting pressure on the frail decedent – "bombarding" him with questions about his assets and his will" -- "so much that it rose to the level of verbal assault." R.______ (Frazier affidavit paragraphs 6 and 7). Frazier describes this "pestering" as "constant harping" including daily arguments "until somebody would make her stop." R.______ (Frazier affidavit paragraphs 7, 8, and 9).

Decedent's New Will Prepared Favorable To Controlling Party

As the decedent's health was failing, the Respondent, already serving as decedent's fiduciary agent, transported him to her son's soccer coach and her friend for the preparation of a will.[21] The will produced by her efforts differs significantly from the intended equitable division described by the decedent to others. The challenged will left both the decedent's lake house and a 103 acre tract of premium land to the Respondent. R.______ (May 2012 will, attached to underlying motion). In contrast, the decedent had advised others that "he would leave everything split equally to his daughters." In particular, he wanted the lake house left to the three because he "wanted the family to see

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19 R.______ (Frazier affidavit).

20 R. ____ (McClam Affidavit paragraph 8).

21 R.____ (White Affidavit paragraph 10).

each other at the lake."[22] The decedent had advised nephew Donald Campbell of a desire to give a home to each of his girls (his residence, the lake house, and the Hill Street house). R.______ (Campbell Affidavit paragraph 9). Of course, the disposition as represented to White and the disposition as represented to Campbell do not exactly match – a fact itself indicative of the decedent's confusion and uncertainty (when inferences are drawn in favor of the non-moving party as discussed below). Moreover, neither of these described dispositions matches the provisions of the challenged will.

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22 R. _______ (Affidavit of decedent's long-term friend Rae White Wilkerson).

STANDARD OF REVIEW

On appeal from an order of summary judgment, the appellate court reviews the granting of the motion under the same standard applied by the trial court pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608, 610 (Ct. App. 1999). That standard is, of course, well established in the law of our state.

"Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues." Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006) (citing Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)); see also McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488, 493 (Ct. App. 1998). A trial court may properly grant a motion for summary judgment ***only when*** "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; see also Madison, 371 S.C. at 134, 638 S.E.2d at 655 (2006). Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001); Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991).

"In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Madison, 371 S.C. at 134, 638 S.E.2d at 655 (citing Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988)). Moreover, ***"a court***

must consider everything in the record, pleadings, depositions, interrogatories, admissions on file, affidavits, etc."[23] Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986)(emphasis added). ***When considering a motion for summary judgment, a Court is not free to make wholesale credibility determinations and is not free to disregard the content of submissions once accepted by the court. Instead, the credibility of affiants and witnesses offered in opposition to summary judgment is to be presumed.*** Accordingly, in a dispute alleging that a will was the product of undue influence, summary judgment is *not* appropriate if there is conflicting evidence or testimony regarding the influence exerted on the testator or the circumstances surrounding the will. See Howard v. Nasser, 354 S.C. 279, 291, 613 S.E.2d 64, 70 (Ct. App. 2005).

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[23] The Court here did exercise its discretion, as allowed by its discretion under Rules 6 and 56 of the South Carolina Rules of Civil Procedure, to consider these late submissions from the non-moving party. Such discretion lies with the trial court. Accord Jernigan v. King, 312 S.C. 331, 334, 440 S.E.2d 379, 380 (Ct. App. 1993)(in *dicta* indicating willingness to affirm trial court's exclusion of late affidavit had the issue been appealed). Here the trial court's exercise of that broad discretion has understandably not been cross-appealed by the Respondent under SCRAP 203(c). Thus, the trial court's exercise of that discretion is now the law of the case.

ARGUMENT

The Trial Court Erred By Summarily Dismissing Detailed Evidence Presented By The Appellant, That Raised Genuine Issues Of Material Fact Regarding Undue Influence And Lack Of Capacity With Regard To The Decedent's Execution Of A Purported Will, And Thus The Trial Court Erred By Then Granting The Drastic Remedy Of Summary Judgment.

Summary judgment is a "drastic remedy" that should not be used to deprive a litigant of his or her day in court to resolve disputed factual issues. Madison, 371 S.C. at 134, 638 S.E.2d at 655. Despite this cautionary prohibition, the trial court here nevertheless imposed the "drastic remedy" of summary judgment depriving Appellant of the opportunity to have a jury determine whether the May 2012 will was a product of an incapacitated testator and/or one under undue influence. This rush to judgment conveniently ignored significant evidence from multiple sources which clearly created and identified issues of fact requiring a trial for resolution.

Because Rule 56(e) of the SCRCP does not allow a party to "rest upon the mere allegations or denials of his pleadings" but instead requires the non-moving party to "set forth specific facts showing that there is a genuine issue for trial", it is important to review the factual showing made by the non-movant Appellant in this case. In opposition to the Respondent's motion for summary judgment, the Appellant submitted the following: Exhibit A which included the affidavit with expert opinion of Dr. Troy B. Gamble, Jr.[24] and affidavit with expert opinion of Dr. Joseph Healy[25]; Exhibit B which included the April 18, 2012 Healthcare Power of Attorney[26] and April 18, 2012 Durable Power of Attorney[27] – each appointing the Respondent as

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[24] R. _____.

[25] R. _____.

[26] R. _____.

a fiduciary (and the Appellant) before the challenged will was executed; Exhibit C which included the April 13, 2012 Pre-biopsy records of Florence Neurosurgery and Spine Center[28]; Exhibit D which included the May 4, 2012 Medical Records of Duke University Hospital[29]; and Exhibit E which included the affidavits of lay observers Rebecca Lynch White (decedent's daughter)[30], Tracey Frazier (decedent's niece and care giver)[31], Donald Campbell (decedent's nephew and employee)[32], Rae White Wilkerson (decedent's friend)[33], and George David McClam (decedent's long-time confidant).[34]

While the trial court determined to consider affidavits it deemed late, thereby obviating any needed effort by Appellant's counsel to seek a continuance, the trial court did not truly consider these affidavits in the light most favorable to the non-moving party *as required by our case law*. Considering the evidence in the light most favorable to the non-moving party *means* all ambiguities, conclusions, and inferences from the evidence must be construed most strongly against the movant.

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27 R. _____.

28 R. _____.

29 R. _____.

30 R. _____.

31 R. _____.

32 R. _____.

33 R. _____.

34 R. _____.

Here, A Question Of Fact Exists Regarding The Decedent's Capacity

Notwithstanding its obligation to construe the evidence in the light most favorable to the non-movant, the trial court did exactly the opposite in this case. For example, the trial court concluded that the opinions provided the Appellant's two medical experts would not be considered because the Court opined that these experts could not "offer an opinion to a reasonable degree of medical certainty" *despite the expert's specific opinions expressed in exactly those terms*. The Court reached this conclusion because "neither examined the testator for competency at the time the will was made ..." (Order at 3). Certainly this factor might impact the weight of such evidence as evaluated by the ultimate fact-finder, but these opinions are still relevant and admissible[35] – and as such, must be considered, at this preliminary stage, in the light most favorable to the Appellant and not simply disregarded.

Though admissible and legally sufficient to alone create a triable issue of fact, expert opinions of the decedent's failing capacity were not the only evidence presented to the trial court. Numerous lay witnesses also provided specific observations supporting the decedent's lack of capacity. The affidavits of George David McClam, Donald Campbell, and Rebecca Lynch White provide evidence of the decedent's lack of capacity both before and after the will's execution – and in close approximity to that execution. As noted in the factual summary, specific instances from these witnesses range from the decedent's confusion in his hometown

[35] "'An expert's specific knowledge is neither determinative of his qualifications as an expert nor of the admissibility of his opinion into evidence, but bears on the weight to be given his testimony.'" Hundley v. Rite Aid of S.C., Inc., 339 S.C. 285, 296, 529 S.E.2d 45, 51 (Ct. App. 2000) (citing State v. Franklin, 318 S.C. 47, 58, 456 S.E.2d 357, 363 (1995). See also State v. Cain, 2015 S.C. App. LEXIS 229 (September 2, 2015) (Disputed factual basis of expert opinions goes to weight not admissibility). Accord Lee v. Suess, 318 S.C. 283, 286, 457 S.E.2d 344, 346 (1995) ("Generally, defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility.")

grocery store to his failed ability to operate a cell phone.[36] Ignoring these instances, and these witnesses' descriptions of "confusion", "odd behavior", and "incoherent train of thought",[37] the trial court concluded there was "no evidence" to support the claim for lack of capacity. R. _____ (Order at page 3 ¶ 9). Perhaps most indicative of the rush to judgment here, the trial court chose to ignore the Respondent's own admission of the decedent's lack of capacity.[38]

In addition to the expert opinions, the specific instances of incapacity, and the lay observations of general confusion and odd behavior, there was even more evidence presented in this case – evidence directly touching upon the elements of estate planning capacity. The test of whether a testator had the capacity to make a will is whether he knew (1) his estate, (2) the objects of his affections, and (3) to whom he wished to give his property. In re Estate of Weeks, 329 S.C. 251, 263, 495 S.E.2d 454, 461 (Ct. App. 1997). Although controverted (therefore requiring trial resolution), there was specific evidence presented that the decedent (1) did not recognize or know all of his estate,[39] (2) that the decedent did not recall his son as one of his children,[40] and (3) was confused as to whom he wished to give his property.[41]

Clearly, a question of fact exists regarding the decedent's capacity to make a will in May of 2012.

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[36] See footnote 10-11 *supra.*

[37] See footnotes 6 and 10 *supra.*

[38] See footnote 12 *supra* and accompanying text.

[39] See footnote 9 *supra.*

[40] See footnote 8 *supra.*

[41] See footnote 22 *supra* and footnote 45 *infra* and accompanying texts.

A Question Of Fact Exists Regarding Respondent's Undue Influence Over The Decedent

Even if there is insufficient evidence of the decedent's lack of capacity to raise a question of fact, the Appellant also alleged undue influence as grounds to find the Will invalid. Evidence supporting an issue of fact on this claim is overwhelming.

In the Order granting summary judgment, the trial court concluded "The only affidavit or other evidence provided by Plaintiff that even touches on the subject is that of Rebecca White, and I find that it contains a bald assertion of undue influence and nothing else." . R. _____ (Order at page 4 ¶ 11). Once again, the trial court overlooked other evidence and mischaracterized the White affidavit as only a bald assertion. Moreover, the trial court ignored the presumption that arises as a matter of law in situations where an existing fiduciary is suspected of undue influence.

In the case of Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct. App.2005), this Court recognized a presumption for the first time in the context of a will where the alleged wrongdoer is in a confidential relationship with the testator; previous cases had recognized such a presumption with regard to claims of undue influence over real estate conveyances (deeds). In *Nasser*, the Court stated a "presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer . . . ." 364 S.C. at 286, 613 S.E.2d at 67 (quoting Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003)).

In Nasser, the presumption resulted in the reversal of summary judgment for the decedent's spouse who held decedent's power of attorney. That fiduciary spouse was also the primary beneficiary under the decedent's challenged will. Similiar facts exist in this case.

In this case, it is uncontroverted that the Respondent was in a confidential relationship

with the decedent having been appointed as his attorney-in-fact prior to the execution of this will.[42] Moreover, it is this fiduciary who benefitted from the challenged will – the Respondent and her son would receive the valuable lake house and large tract of land near the Honda plant.[43] And as noted in the factual summary above, it was the Respondent who delivered the decedent to the attorney's office for the execution of a will after he had exhibited confusion, incoherent train of thought, ataxic gait, inability to walk heel to toe, and failure to recall his son.[44] Moreover, the dispositive "formulation" found in the will as executed differed from the testator's varied accounts[45] of intended estate plans.[46] Thus, these circumstances alone give rise to a presumption regarding undue influence.

Of course, even if the trial court had properly addressed these factors, there was

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[42] R.____ (Powers of Attorney)(Exhibit B to Memorandum in Opposition to Summary Judgment).

[43] R.______ (May 2012 will, attached to underlying motion).

[44] *See* footnotes 6-11 *supra.*

[45] *See* footnote 22 *supra* and accompanying text. Not only do the inconsistent variations described by the testator suggest his incapacity, the variance from the attorney- prepared formulation are part of the circumstances giving rise to the presumption ignored by the trial court here. Of course, such circumstantial evidence is to be expected with claims of undue influence and not simply disregarded. 79 Am. Jur. 2d Wills § 411 ("An attack on a will as having been obtained by undue influence may be supported by a wide range of evidence and testimony. Indeed, any evidence which shows opportunity or a result indicative of undue influence is relevant or admissible in a will contest. Circumstantial evidence may be admissible; since fraud and undue influence are subtle things, ordinarily operating in secrecy, they can rarely be established by direct proof and must necessarily be susceptible of proof by circumstances from which they may be inferred.") (citations omitted). See also Byrd v. Byrd, 279 S.C. 425, 308 S.E.2d 788 (1983) (relying on testimony of witnesses not present at execution of will regarding facts and statements made long before and after execution of will and holding there was sufficient evidence of undue influence to submit question to the jury)

[46] 79 Am. Jur. 2d Wills § 422 ("The rule that a testator's declarations are admissible where undue influence is in issue to show a state of mind and susceptibility to influence is applicable *whether the declarations were made before or subsequent to the execution of the will* for the purpose of showing the state of the testator's mind.")

overwhelming *additional* evidence presented to support the claim of undue influence. As our appellate courts have noted, "Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003); Hembree v. Estate of Hembree, 311 S.C. 192, 428 S.E.2d 3 (Ct. App. 1993). While not an exhaustive list or a specific list of required components, the circumstances from *Nasser* are illustrative: (1) physical infirmity as a result of a terminal illness; (2) a significant difference from prior wills; (3) the wrongdoer was present at the meetings with the attorneys to discuss the contents of the new will; (4) the decedent's relationships and visits with family were limited after remarriage to the alleged wrongdoer; (5) someone was suspected of monitoring decedent's telephone conversations; and (6) professionals refused to participate in the new will.

The existing case offers many circumstances like those of Nasser. The decedent was fighting terminal brain cancer that left him unstable, immobile, confused, and incoherent. He was dependent upon the Respondent and others for transportation and mobility assistance. Dr. Healy recalled that the decedent "had problems with directions and problems with two step commands… [And] typically did what was directed by people who were with him." R._____ (Affidavit of Florence Neurologist R. Joseph Healy at Paragraphs 8 and 9).

Also like Nasser, the will here represented a significant departure from the decedent's prior indications of equitable division between his children and in particular, a shared lake house. In addition, like Mr. Nasser's new wife, it was the Respondent who presented the decedent to the attorney's office for the execution of the will. *There is also haunting and repeated evidence that the decedent's contact with Appellant or others was cut-off or monitored* – just as in the Nasser

case. Finally, like Nasser, there are professional opinions here that indicate they would not be comfortable with the decedent's execution of a will absent cognitive testing.

In addition to ignoring the substantial evidence of undue influence presented by the Appellant, the trial court also reached the factual conclusion that the decedent had an unhampered opportunity to revoke or change the challenged will after its execution. R. ______ (Order at page 4 ¶ 10). This fact is also controverted by the significant circumstances presented by the Appellant – again, which should have been viewed in the light most favorable to the Appellant. Viewing the presentation of circumstances in the light most favorable to the Appellant, the decedent's capacity – if it existed at all when the will was executed – continued to decline such that he would be incapable of revoking or changing any will. Moreover, viewed in the light most favorable to the Appellant, the Respondent's control of the decedent was persistent and continuous – to the point that the decedent was not "beyond the influence of the [Respondent]" even when staying with a friend – a friendship ultimately infected by the Respondent. Again, as noted in the factual summary, this friend was "harassed" until the relationship was "cooled" – hardly a safe-haven as inferred by the trial court.[47]

Clearly, a question of fact exists regarding the Respondent's undue influence upon the decedent's alleged will of May 2012.

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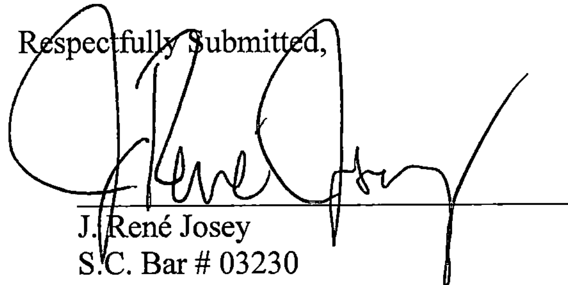
[47] See *supra* notes 19 and 20 and accompanying text.

CONCLUSION

Here, the trial court ignored relevant evidence, failed to interpret the evidence that it did consider in the light most favorable to the Appellant as the non-moving party, improperly weighed evidence, failed to apply applicable legal presumptions, and ultimately failed to acknowledge the existence of genuine issues of material fact. The "drastic step" of summary judgment was thus improperly taken by the trial court to deprive the Appellant of her day in court. This Court must reverse the trial court's Order granting summary judgment and remand the matter for trial.

Respectfully Submitted,



October 28th, 2015

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In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
In the Court of Common Pleas

The Honorable Craig D. Brown, Presiding Judge

Case No. 2013-CP-21-01408
(Appeal Tracking Number 2015-001941)

Elizabeth J. Langley..Appellant,

v.

Wendy J. Lynch, Rebecca M. Lynch, James M. Lynch, II, Donald Jordon, III, Jimmy White and S. Porter Stewart, II, as Personal Representative of the Estate of James M. Lynch,

Of Whom Wendy J. Lynch is the ....Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief by depositing one (1) copy of it in the United States Mail, postage prepaid, on October 28th, 2015, addressed to:

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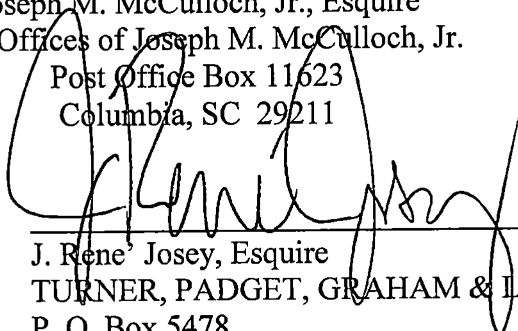

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