

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable Craig D. Brown, Circuit Court Judge

Case No. 2013-CP-21-01408

Elizabeth J. Langley Appellant,

v.

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

Of Whom Wendy J. Lynch is the Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Issues of Appeal.....1

Statement of the Case.....2

Statement of Facts.....3

Argument.....10

I. Was the circuit court’s grant of summary judgment on the issue of incompetence proper where, in the light most favorable to Appellant, Appellant offered no reasonable evidence of incompetence *at the time the testator executed the will?*10

II. Was the circuit court’s grant of summary judgment on the issue of undue influence proper where, in the light most favorable to Appellant, Appellant did not put forth unmistakable and convincing evidence of undue influence and where the testator had ample opportunities to change his will?.....16

Conclusion.....21

TABLE OF AUTHORITIES

Cases

Baughman v. American Telephone & Telegraph Co.
306 S.C. 101, 410 S.E.2d 537 (1991).....10

Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982).....15, 17-18

Hairston v. McMillan, 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010)11-12, 14

Havird v. Schissell, 252 S.C. 404, 166 S.E.2d 801 (1969).....15

Hellams v. Ross, 268 S.C. 284, 233 S.E.2d 98 (1977).....11, 13

Hembree v. Hembree, 311 S.C. 192, 428 S.E.2d 3 (Ct. App. 1993).....11, 16

Howard v. Nasser, 354 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005)20

In re Estate of Anderson, 381 S.C. 568, 674 S.E.2d 176 (Ct. App. 2009).....17

Matheson v. Matheson, 125 S.C. 165, 118 S.E.2d 312 (1923).....11

Mock v. Dowling, 266 S.C. 274, 222 S.E.2d 773 (1976).....15-16

Russell v. Wachovia Bank, N.A.,
353 S.C. 208, 578 S.E.2d 329 (2003).....11, 16-17

Smith v. Whetstone, 209 S.C. 78, 39 S.E.2d 127 (1946).....15

Sumter Trust Co. v. Holman, 134 S.C. 412, 132 S.E.2d 811 (1926).....11

Todd v. Woodard, 297 S.C. 264, 376 S.E.2d 276 (1989).....15

Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011).....10

Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286 (2005).....20

South Carolina Rules of Civil Procedure

South Carolina Rules of Civil Procedure 56(c).....2

STATEMENT OF ISSUES ON APPEAL

- I. Was the circuit court's grant of summary judgment on the issue of incompetence proper where, in the light most favorable to Appellant, Appellant offered no reasonable evidence of incompetence *at the time the testator executed the will*?

- II. Was the circuit court's grant of summary grant on the issue of undue influence proper where, in the light most favorable to Appellant, Appellant did not put forth unmistakable and convincing evidence of undue influence and the testator had ample opportunities to change his will?

STATEMENT OF THE CASE

This matter involves a will contest and the issue of whether the testator, James M. Lynch (hereinafter "Judge Lynch") was competent at the time he executed his will and whether any undue influence existed. Appellant filed the will contest on April 30, 2013 challenging the will of Judge Lynch on the basis of incompetence and undue influence. (R. Summary Judgment Order, §2). There are no challenges to the form of the Will. Respondent Wendy Lynch timely filed an Answer. No other defendants filed responses.

More than a year and a half after the filing of the lawsuit, Respondent on December 29, 2014 filed a Motion for Summary Judgment and included numerous affidavits in support (approximately 20), including the affidavits of Rick Hoefler, the attorney who drafted the will, a witness to the will, medical providers who physically and mentally examined the testator around the time of the will execution, and numerous other witnesses addressing the testator's competency and lack of undue influence. (R. Id., §3).

The Respondent's motion was heard on June 17, 2015. (R. Id., p. 1). At the hearing, Appellant for the first time served a Memorandum in Opposition to the Motion for Summary Judgment which contained affidavits and other documents, many of which were new with some of the materials provided to defense counsel the day before. (R. Id., §§4-5). At the hearing, Respondent moved under Rule 56(c), SCRCP, for the exclusion of those affidavits not timely served, including the statements/affidavits of Drs. Healy and Gamble. (R. Id.) It is undisputed that neither Dr. Healy nor Dr. Gamble was included in Appellant's witness list provided to Respondent during the discovery process, and were not

named when Appellant was specifically asked about expert witnesses. (R. Id., § 5). The Court found the affidavits untimely and provided in violation of Rule 56(c). However, the Court “in consideration of the motion in the light most favorable to the Plaintiff,” reviewed the late filed affidavits and other materials provided to it. (R. Id., §§6, 9, 11).

After hearing argument, the lower court granted the Motion for Summary Judgment by order dated June 22, 2015. Appellant filed a motion for reconsideration which was denied by Order dated August 14, 2015. This appeal followed.

STATEMENT OF FACTS

The testator, Judge Lynch, was a magistrate who served in Florence County, South Carolina for over two decades. (R. Aff. Lt. Fulehan). He was described as "tough," not easily swayed, "independent" and "strong willed." (R. Affs. Lt. Fulehan, Mancill, K. White, and Hampton). It is undisputed he had four children - Elizabeth Langley ("Appellant,"), Wendy Lynch ("Respondent"), Rebecca White, and James M. Lynch, II.

In early to mid-April 2012, Judge Lynch was diagnosed with cancer. (Id.) On April 17, 2012, he was examined by his treating physician, Dr. Naso, who conducted "a physical and cognitive evaluation." (R. Aff. Dr. Naso). Based on this examination, Dr. Naso found Judge Lynch quite competent to make important decisions on April 17, 2012 to a reasonable degree of medical certainty. (R. Id.). *On this same day*, Judge Lynch's clerk of court contacted Judge Lynch's longtime attorney and friend, Rick Hoefler ("Attorney Hoefler"), informed him of the illness and at the direction of Judge Lynch, requested Attorney Hoefler prepare both a

"temporary" power of attorney and a healthcare power of attorney. Attorney Hoefler then spoke to Judge Lynch to clarify what was meant by "temporary" power of attorney. (R. Aff. Hoefler § 6).¹

Per Judge Lynch's instructions, Attorney Hoefler prepared the documents and delivered them to Judge Lynch's court the very next day, April 18, 2012. (R. Id. § 7). These documents were signed by Judge Lynch and witnessed by Attorney Hoefler, Gerald Vause (court staff), and April Pettigrew who all attested to Judge Lynch's competence. (R. Id. §9-11; POAs). During this same meeting, Judge Lynch asked Attorney Hoefler to prepare his will. Judge Lynch at that time gave Attorney Hoefler a handwritten list of assets. (R. Id. § 14). There is no evidence of any family members being present at this meeting.

On April 24, 2012, a few days later, Judge Lynch was examined by another physician, Dr. Rao, who similarly found him competent to make important decisions and specifically found him competent on April 24, 2012. (R. Aff. Rao). The next day, April 25, 2012, Attorney Hoefler and Judge Lynch spoke by phone about his condition, treatment, and his will. (R. Aff. Hoefler §15). At that time, Judge Lynch instructed Attorney Hoefler as to specific devises of certain assets as well as instructions for his residual estate. (R. Id.) At or around the same time, Judge Lynch, who was still serving as magistrate and holding court, met with Senator John Land to discuss Judge Lynch retiring and appointing Respondent. (R. Summary Judgment Order, §1; Affs. Land and Lt. Fulehan). During this meeting, Senator Land found Judge Lynch "totally competent, quite

¹ As stated by Attorney Hoefler, "I then spoke to [Judge Lynch] and determined that he wanted to have general power of attorney available to him but that would not be put into effect unless he determined that it was needed." (R. Aff. Hoefler, §6).

capable and we interactively discussed all the issues of his judgeship and his health. There is no question in my mind he was mentally competent.” (R. Aff. Land, §6).

On May 2, 2012, Tulika Ranjan, M.D., a physician at Duke Cancer Center, conducted a “physical and mental examination” of Judge Lynch. (R. Aff. Ranjan). Based on that examination, Dr. Ranjan stated: “I believe James Lynch was quite competent to make important decisions and I am of this opinion to a reasonable degree of medical certainty to the extent of my contact with him.” (R. Id.).²

On May 11, 2012, Judge Lynch went to Attorney Hoefer’s office to review and execute the will he had instructed Attorney Hoefer to prepare. (R. Aff. Hoefer, §§17-18). This meeting occurred in the privacy of his law office and no evidence exists showing any family members were present when the will was signed. It should be noted as Attorney Hoefer does in the second paragraph below from his Affidavit, that after the will signing, the testator was picked up from Hoefer’s office by the Appellant. As Attorney Hoefer testified in his

² Appellant appears to rely on two random pages from Judge Lynch’s medical records. It should be noted that these two pages are associated with physicians who determined Judge Lynch to be competent at the time they examined him. Moreover, Appellant argues that the observation in the isolated medical note that “[h]e can name his three daughters,” is evidence that he forgot his son. Appellant Brief, footnote 8. Even in the light most favorable to Appellant, this is a strained interpretation that is not reasonable or fair and is simply a factual stretch. Appellant made no attempt to depose the treating physician(s). As the court observed in Martin v. Smoak, 286 S.C. 419, 428, 334 S.E.2d 806, 811 (1985), “A jury issue is not created by an inference--only by a reasonable inference. To reach the conclusion that the evidence is susceptible of more than one reasonable inference, one must supplement the record with his imagination.” Id. (emphasis added).

affidavit – an affidavit provided to Appellant months in advance of the summary judgment hearing:

I next met with [Judge Lynch] on May 11, 2012, in my office. I gave him a copy of the will, which I had prepared, and reviewed the same with him. In that same conversation, we again discussed his assets, children and grandchildren. We again discussed his bequests, the reasons for his specific bequests and the reason for not including his son, Jim [James Lynch], by way of specific bequest.

I was fully aware of [Judge Lynch's] diagnosis and wanted to be certain that he was aware of what we were undertaking. Because of that, along with the fact that [Judge Lynch] was a personal friend, I took substantially longer to talk with him than I would normally spend. . . We laughed about my getting to put him under oath and whether [he] was indeed over the age of eighteen and whether he was signing freely and voluntarily. He assured us that he was. He then signed his will in my presence and in the presence of Christie Graves and Ashley Coleman who are, both, still employed by my firm. . . . **I walked with him to our reception area where his daughter, Beth [Appellant], was waiting. They left together. ¶23**

(R. Id., §18, 19, 21, 23)(emphasis added). As Attorney Hoefler further testified:

During my discussions of that day [May 11th] with [Judge Lynch], as with all of my other discussions with him relating to his affairs, he was clearly of sound mind, was acutely aware of his mortality, his assets and, most importantly, his family. At no time did I observe any evidence that would cause me to question either his competence or the voluntariness of his actions. [Judge Lynch's] exact estate plans, as directed by him, are memorialized in his Last Will and Testament dated May 11, 2012. . . . It is my firm conviction that, in all our conversations about his will, estate, family, assets, debts and his plan of distribution, [Judge Lynch] was of sound mind, used calm and deliberate reflection and was free from any undue influence.

(R. Id., §§18-23; 25-29)(emphasis added).

Christina Graves, a paralegal in Attorney Hoefler's office who knew Judge Lynch, witnessed him sign the will and observed nothing that would lead her to question his mental competence or the voluntariness of his actions. (R. Aff. Graves).

After signing the will, Judge Lynch continued to work and hold court in his capacity as Florence County Magistrate resigning from that position sometime in late June 2012. (R. Summary Judgment Order, §1). The undisputed affidavits of those who observed him in court during this period found his “mental powers and demeanor remained the same as before his diagnosis and continued after his retirement.” (R. Aff. Lt. Fulehan; see also Affs. Mancill and J. White)(“In May and June 2012, he continued his duties as judge, even riding his motorcycle to work some days.”) Attorney Michael Ballenger who practices with Attorney Hoefer similarly found Judge Lynch to be competent in his interactions with him. (Aff. Ballenger, § 8). This is far from Appellant’s unsupported assertion in her brief that in May 2012 “decedent was unable to independently function.” Appellant’s Brief at 4-5.

At the time of the execution of the will, it is undisputed *Appellant* was living at the home of Mr. Lynch. (R. Memo. In Opp. p. 6). In the summer of 2012, a month or so after the will execution, it is undisputed that Judge Lynch moved into his girlfriend’s home and lived exclusively with her. (R. Order §10; Aff. McClam). The Affidavit of George McClam offered by *Appellant* alleged:

He [Judge Lynch] did not spend every night at his residence during the early period of his treatment and I assume he was at the residence of this [female] friend. By early fall his health and mobility had failed. At some point during this time relationship with his female friend seemed to have cooled and **his daughter Beth [Appellant]** took up residence in the home This arrangement continued till [Judge Lynch] went to Duke Hospital in November. At that time, another daughter, Wendy [Respondent] took up residence in the home.

(R. Aff. McClam)(emphasis added).³

The fact of testator's residence with the girlfriend, thereby removed the testator for much of the summer of 2012 from any opportunity from undue influence from beneficiaries, a fact firmly established in the Affidavits submitted in Support of Summary Judgment.

In December 2012, more than six months after the will execution, Judge Lynch announced his decision to leave a skilled nursing facility where he was being treated and return home which was against medical advice. (R. Affs. Dersch and Barnes-Young). As there was a family disagreement over the issue, Stephen A. Dersch, a treating physician, ordered a competency evaluation and based on the evaluation, found Judge Lynch competent to make the decision, even in light of other family members who did not want him to leave. (R. Id.). As Dr. Dersch stated:

I believe Mr. Lynch was competent and considered the opinions of family members, resisted the efforts of family members who wished for him to remain in the skilled nursing facility, and made a competent decision. Based upon my treatment and interaction with Mr. James Lynch, and my training and experience as a medical doctor, I believe James Lynch was competent to make basic medical decisions and I am of this opinion to a reasonable degree of medical certainty.

(R. Id.).

Dr. Leslie Barnes-Young, a psychologist at Carolina Hospital who assisted in the competency evaluation, stated in her affidavit that Judge Lynch was "quite

³ Appellant's assertion in her brief that Respondent caused this relationship to "cool" and was a "friendship ultimately infected by the Respondent," (Appellant Brief, pages 7 and 18) is wholly unsupported by the record, is not a fair inference, but even if true, does not support a claim of undue influence.

competent” based on her evaluation. (R. Aff. Barnes-Young). “I saw no evidence that Mr. Lynch was being influenced in this decision-making process, nor did I believe that his physical or mental state would have made him mentally susceptible to undue influence to do anything against his judgment.” (R. Id., §3). This is consistent with Attorney Ballenger's recollection who visited Judge Lynch in the hospital in October or November 2012, found his daughter Rebecca sitting with him, and observed Judge Lynch to be "completely aware of his condition and totally lucid and competent." (R. Aff. Ballenger, §9-11).

On February 9, 2013, Judge Lynch passed away. (R. Summary Judgment Order, §1). His will left substantial portions of real and personal property to each of his daughters but judiciously excluded his son, who is disabled and receiving government support, a fact not disputed. (R. T. 16, lines 1-14; Will; Aff. Hoefler, §18). As stated in the Will, “[b]ecause of circumstance, well known to my family, I make no direct provision for my son, James M. Lynch, II, in this Last Will and Testament.” (R. Will, p. 3, Item XIV). There has been no evidence presented that the will is unfair in its disposition between the daughters. As Respondent’s counsel stated at argument, which statement was not disputed, “I will represent to the Court that the will itself distributes in equal shares most of his assets to the plaintiff, to Wendy Lynch, and to Rebecca White, the third sister.” (R. T. p. 15, lines 22-25).⁴ The will specifically listed most assets and properties but left the residue of his’ estate to his three daughters to share equally. (R. Will Item XIII). It also appears, based on Appellant’s own submission, that

⁴ Appellant’s counsel at the hearing appeared to agree. He stated Appellant was “fighting the will for her brother” and that “[i]t’s more beneficial to her personally if it goes this way but we are asking the court to deny the motion.” (R. T, p. 17, lines 18-22).

Judge Lynch was making gifts of property before his death, giving daughter Rebecca White \$50,000. (R. Aff. Wilkerson, §2-7).

At no time during the two years that this matter was pending has Appellant noticed the depositions of Attorney Hoefer, Christina Graves, or anyone who witnessed Judge Lynch execute the will on May 11, 2012 and have offered no evidence to refute their observations at the time the will was executed by Judge Lynch. Similarly, at no time during this litigation has Appellant sought to depose any of the court personnel who observed Judge Lynch on the bench following his execution of the Will or the physicians who actually examined Judge Lynch. Although Appellant (and her sister, Rebecca White) was present for the hearing, her testimony was not proffered. Appellant now challenges the grant of summary judgment by the lower court.

ARGUMENT

I. Was the circuit court's grant of summary judgment on the issue of incompetence proper where, in the light most favorable to Appellant, Appellant offered no reasonable evidence of incompetence at the time the testator executed the will?

Under Rule 56, SCRPC, summary judgment is appropriate when "no genuine issue as to any *material fact*" exists. Id. (emphasis added); Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "When determining if any triable issues of fact exist, the evidence and all *reasonable* inferences must be viewed in the light most favorable to the non-moving party." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011)(internal citations omitted)(emphasis added). "When opposing a summary judgment motion, the nonmoving party must do more than simply show that there is a metaphysical doubt as to the material facts but must come forward with

specific facts showing that there is a genuine issue for trial.” Russell v. Wachovia Bank, N.A., 353 S.C. 208, 221, 578 S.E.2d 329, 335 (2003)(internal citations omitted). Where a verdict is not reasonably possible under the facts presented, summary judgment is appropriate. Id.

Generally, when the formal execution of a will is admitted or proven, a prima facie case in favor of the will is made out. Hembree v. Hembree, 311 S.C. 192, 428 S.E.2d 3 (S.C. App. 1993). The burden of proof then is upon the contestant to show the testator’s lack of mental capacity *at the time of the execution of the will*. Hairston v. McMillan, 387 S.C. 439, 445, 692 S.E.2d 549, 552 (Ct. App. 2010). The mere fact that the testator disposed of property contrary to what others consider fair is not sufficient to declare a will void. Matheson v. Matheson, 125 S.C. 165, 171, 118 S.E.2d 312, 313 (1923); see also Hellams v. Ross, 268 S.C. 284, 233 S.E.2d 98, 100 (1977). The standard for capacity to make a will is whether at the time of the will execution the testator knew his estate, the objects of his affection, and to whom he wished to give his property. Sumter Trust Co. v. Holman, 134 S.C. 412, 132 S.E.2d 811 (1926).

Here, the evidence is overwhelming that Judge Lynch at the time he executed the will knew his estate, the objects of his affection, and to whom he wished to give his property.

Judge Lynch knew his estate. Judge Lynch personally provided to Attorney Hoefler a list of assets and thereafter discussed his will over the phone before meeting privately with Attorney Hoefler to finalize and execute the document. (R. Aff. Hoefler, §14-18). As evident in the Will itself, Judge Lynch had extensive property and assets and made arrangements not only to list

individual items in the will but also discussed with Attorney Hoefer how the *residual* of the estate would be handled. (R. Will; Aff. Hoefer §15). The complexity of the allocations and specific bequests made in the will demonstrate his lucid awareness of his assets. (R. Will). This was at a time when Judge Lynch was holding court (R. Summary Judgment Order, §1), conducting his business, handling his rental property and determining his finances (R. Affs. Mancill, K. White, J. White, Lt. Fulehan, and Denham; Thompson) including the decision to make a sizeable cash gift to daughter Rebeca White. (R. Aff. Wilkerson, §2-7.)⁵ He was *physically and mentally examined* by his treating physicians in *April and May 2012* and found competent. (R. Aff. Naso, Rao, Ranjan). The overwhelming evidence demonstrates Judge Lynch was highly functional at the time of the will execution. Even if this were not the case, which it is, "the degree of capacity necessary to execute a will is less than that needed to execute a contract. Even an insane person may execute a will if it is done during a sane interval." Hairston, 387 S.C. at 439, 692 S.E.2d at 552 (internal citations omitted). In contrast to the above, Appellant has not set forth any material fact to show that Judge Lynch was incapable of knowing his estate when the will was executed.

The objects of his affection and to whom he wished to give his property.

Judge Lynch had multiple discussions with Attorney Hoefer about his estate, his family (the objects of his affection) and to whom he wished to give his property. (R. Aff Hoefer) Judge Lynch was well aware of the disabled status of his son and at the time of the will execution specifically and judiciously excluded him from

⁵ Affidavit provided by Appellant in Opposition to Summary Judgment.

the will disbursements so as not to jeopardize the government medical benefits he knew his son would need for the rest of his life. (R. Aff. Hoefer; Will, p. 3, Item XIV; Motion A-3). This exclusion is explained in the Will itself. (R. Will, p. 3, Item XIV).

Moreover, although Appellant asserts the will was favorable to Respondent⁶, there is no evidence that the Will was unfair and all four children (including his son) were mentioned in the Will.⁷ (R. Will) Even if the Will were unfair, “[t]hat a will is unjust to one’s relations is no legal reason that it should be considered an irrational act. The law puts no restrictions upon a man’s right to dispose of his property in any way his partialities, or pride, or caprice may prompt him.” Hellams v. Ross, 268 S.C. 284, 233 S.E.2d 98, 101 (1977)(internal citations omitted)(“We find no evidence of probative value to counter the positive testimony of the attesting witnesses that the testator was possessed of testamentary capacity when he signed the instrument.”)

Contrary to a “rush to judgment,” (App. brief at 11), the lower court carefully considered the entire record before the parties even arrived for the hearing (R. T. p. 4, lines 20-25) and thereafter carefully considered even Appellant’s late submissions that the lower court found to be untimely. (R. Summary Judgment Order, §4-6). This included Appellant’s Hail Mary pass of two physician affidavits – neither of whom had ever been named as a witness nor

⁶ In fact, under the Will, Respondent was not given any property in her name alone. Under the Will, property is either given to Respondent to share equally with her son or she must share the assets with her sisters. to share. (R. Will).

⁷ As set forth in the Affidavit of Dennis Hill, Judge Lynch did not want his house sold and informed Dennis Hill that he was giving it to Respondent because she would never sell it. Dennis Hill is not a beneficiary under the Will. (R. Aff. Hill; Will).

examined Judge Lynch for competency⁸. (R. Id.) There is simply no evidence that either Gamble or Healy physically or mentally examined Judge Lynch for competence (unlike doctors Naso, Rao, Ranjan, Barnes-Young, and Dersch) but even if they had, there is no evidence they examined Judge Lynch *at or near the time of the will execution*. As Judge Brown found:

In my review of the affidavit of Dr. Healy and purported affidavit of Dr. Gamble, I find that **neither examined the testator for competency at the time the will was made** and neither can offer an opinion to a reasonable degree of medical certainty as to the testator's competency at the time the will was made on May 11, 2012. The doctors who did examine the testator in May of 2012, including Dr. Ranjan, found him to be competent to handle his affairs.

(R. Summary Judgment Order, §8).

"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." Hairston, 387 S.C. at 439, 692 S.E.2d at 552 (court unpersuaded by physician who testified Decedent was not competent at the time of executing the Will but did not examine the Decedent personally).

Moreover, as set forth in the affidavits of Attorney Hoefler and Christina Graves, the actual witnesses to the will execution, Judge Lynch was of sound

⁸ The day before the hearing, Appellant produced an affidavit from Dr. Healy that is different and/or conflicts with the Healy affidavit submitted to the court at the hearing. (R. T. p. 19, lines 1-11; p. 22, line 20; p. 22, line 20 – p. 23, line 17). Regardless, the Healy Affidavit appears to be based on a review of "the records" with no indication of time periods. There is no evidence to establish that Healy ever examined or treated Judge Lynch and even if he did, there is nothing in the record to establish when such treatment or examination might have occurred. The other submission, the Gamble document, does not appear to be in proper affidavit form and even if it were, clearly involved no examination of Judge Lynch, unlike the affidavits of Drs. Naso, Rao, Ranjan, Barnes-Young, and Dersch who were treating physicians and specifically performed mental and physical examinations on Judge Lynch on specific dates relative to this action.

mind and capacity to execute his will. (R. Affs. Hoefler and Graves). As this Court has stated:

A person may execute a valid will, even if he or she is *not* competent to transact ordinary, everyday affairs. . . . Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will.

Id. (internal citations omitted). The case law is consistent and repetitive that the role of the attorney who drew and supervised the execution of the will is a core factor to be applied. *See generally* Mock v. Dowling, 266 S.C. 274, 222 S.E.2d 773 (1976); Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982) ("The unquestionably reputable attorney who drafted the Will was satisfied that Testator was sane when he *executed* the Will)(emphasis added); Smith v. Whetstone, 209 S.C. 78, 39 S.E.2d 127 (1946); Havird v. Schissell, 252 S.C. 404, 166 S.E.2d 801 (1969); and Todd v. Woodard, 297 S.C. 264, 376 S.E.2d 276 (1989).

When a testator retains an attorney to prepare a will for him, the role of the attorney is broader than merely drafting and supervising the execution of the document. The attorney must be convinced that the testator's act is voluntary and competent. Otherwise, the attorney will have violated his moral and ethical duties to the client and the legal justice system. *See generally* Id. This is especially true where, as here, Judge Lynch was serving as a judge during the time period when the will was executed.

Based on the above, this Court should affirm the lower court's grant of summary judgment on the issue of incompetence.

II. Was the circuit court's grant of summary judgment on the issue of undue influence proper where, even in the light most favorable to Appellant, Appellant did not put forth unmistakable and convincing evidence of undue influence and where the testator had ample opportunities to change his will?

There is generally a presumption that a will was executed without undue influence. Hembree v. Hembree, 311 S.C. at 194, 428 S.E.2d at 4. "For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition." Russell, 353 S.C. at 217, 578 S.E.2d at 333. "A contestant must show that the **influence was brought directly to bear upon the testamentary act.**" Mock v. Dowling, 266 S.C. at 277, 222 S.E.2d at 774 (emphasis added). Moreover, a will contestant carries the burden of proving undue influence by "**unmistakable and convincing evidence.**" Russell, 353 S.C. at 218, 578 S.E.2d at 334 (emphasis added). The mere existence of influence is not enough to void a will but rather the influence must "destroy the free agency and amount to force and coercion." Hembree, 311 S.C. at 196, 428 S.E.2d at 5.

"Since 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, 353 S.C. at 218, 578 S.E.2d at 334 (emphasis added). "A heightened standard for summary judgment is required where the inquiry involved in a ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits." Id. (internal citations omitted). "The issue of undue influence should be resolved in the light of the proposition that a

sane testator has the right to dispose of his property as he chooses." In re Estate of Anderson, 381 S.C. 568, 674 S.E.2d 176, 179 (Ct. App. 2009)(internal citations omitted).

In Russell, the South Carolina Supreme Court found the grant of summary judgment as to undue influence appropriate where the testator continued to work as a judge, met with friends, and testator met with his attorney alone on most occasions but where there was evidence the testator was sometimes "confused," two physicians testified he could have been susceptible to undue influence, he was yelled at by his children for money, the children spent large amounts of his money, and one grandchild monitored the testator's telephone calls while in his home and would not let the testator control the thermostat. Id. Similarly, in Calhoun, the court found the matter should not have gone to the jury where the testator was feeble and confined to nursing home yet continued to conduct business affairs post will execution and the beneficiary was not present when the will was signed. Id., 277 S.C. at 527, 290 S.E.2d at 415.

Here, taking the facts in the light most favorable to Appellant, Appellant has presented no unmistakable and convincing evidence that Respondent utilized influence that directly related to the testamentary act. As Judge Brown observed, "the only affidavit or other evidence provided by Plaintiff that even touches on the subject [undue influence related to the testamentary act] is that of Rebecca White, and I find that it contains a bald assertion of undue influence with nothing more." (R. Summary Judgment Order, §11).

In order for the will to be void due to undue influence, a contestant must show that the influence was brought *directly to bear upon the testamentary act*.

There is no such evidence here. Judge Lynch had his clerk of court call and set-up the original meeting with Attorney Hoefler where Judge Lynch provided a list of assets to his chosen attorney. (R. Aff. Hoefler §6-14). Respondent was not present. Judge Lynch then met alone with Attorney Hoefler and his paralegals to execute the will and then Judge Lynch was driven home by Appellant. (R. Id., §18-23).

Further, even if there were an inference of undue influence and even if that inference were not rebutted, **where the testator has an unhampered opportunity to revoke the will subsequent to the operation of any undue influence and does not change it, undue influence is destroyed.** Calhoun, 277 S.C. at 533, 290 S.E.2d at 419. Here, the undisputed evidence shows only that Judge Lynch had numerous unhampered opportunities to revoke or change the will. After executing the will, he continued to serve as a magistrate court judge “even riding his motorcycle” to work until his retirement in late June 2012. (R. Affs. J. White, Mancill, Lt. Fulehan; Summary Judgment Order, § 1). He interacted with court staff. Id. He met with his other long-time friend and attorney, Mike Ballenger, both in the summer of 2012 and again in the fall of 2012 and made no mention of changing his will. (R. Aff. Ballenger) He entertained frequent visitors at his home and carried on private conversations with them. (R. Affs. Wilkerson §11, Ballenger §8; Mancill, Smith §§2-3, Turner, Vause; Rhet Garner Dep. 10, line 10 - p.11 line 8.) He carried on his usual business. (R. Affs. Mancill, K. White; Thompson; Garner Dep. 14, lines 1 - 17). He lived with Appellant but did not stay every night at his residence, and it is undisputed that he made the independent decision – after the will execution - to

live with his girlfriend for several months. (R. Affs. Denham, §8; Vause, §5; J. White, Whitaker Dep p. 111, lines 14-25). An affidavit produced by Appellant establishes that **Appellant** lived with Judge Lynch until his hospitalization in November 2012 – more than six months after the will execution. (R. Aff. McClam). Further, it is undisputed that Judge Lynch had numerous visitors at the hospital during a time when he was judged to be competent. (R. Affs. Ballenger, Turner, Denham, Dr. Dersch, Dr. Barnes-Young). These were all opportunities where Judge Lynch could have revoked or changed his will had he chosen to do so.

Further, Appellant argues for the first time on appeal that the trial court ignored “the presumption that arises as a matter of law in situations where an existing fiduciary is suspected on undue influence.” Appellant Brief at 15. Specifically, Appellant appears to argue that the Powers of Attorney (one never filed and another POA signed in April 2012 but not filed until December 2012) created a fiduciary duty.⁹ *Id.* First, this was not argued by Appellant in the court below and was not raised in her opposition motion or motion for reconsideration. “[T]o preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court.” Whaley v. CSX Transp., Inc., 362 S.C. 456, 482, 609 S.E.2d 286, 299 (2005). Second, even if it were argued which it was not, there is nothing in the record establishing that Respondent had a fiduciary relationship that was ever utilized, did any act as a fiduciary, or that she was even

⁹ It is interesting to note that Appellant relies on a POA signed by Judge Lynch on April 18, 2012, the same date that Judge Lynch provided his written list of assets to Attorney Hoefler. (R. Aff. Hoefler, §11-14). It appears Appellant is conceding that Judge Lynch was competent when he signed the POA.

aware of being a fiduciary prior to December 2012 when, in the light most favorable to Appellant, it appears the POA was filed. (R. POAs; Aff. Hoefer §6-9, 11).¹⁰ There is nothing in the record to support when the POA became active, if at all. Even if the POAs were active, which evidence has not been presented for consideration, Respondent and Appellant had joint powers, and Respondent has presented sufficient evidence to rebut any presumption.

Moreover, unlike Nasser, there are no “suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer.” Howard v. Nasser, 354 S.C. 279, 613 S.E.2d 64, 68 (Ct. App. 2005). Judge Lynch chose the attorney. Judge Lynch initiated the contact with his chosen attorney, initially using his longtime clerk of court. (R. Aff. Hoefer, §6). There is no evidence Respondent was present when the Will was signed, and it was Appellant who lived with Judge Lynch during the time of the will execution and drove him home from the will execution. (R. Memorandum in Opposition, p. 6; R. Aff. Hoefer, §23). Simply put, Appellant has failed to carry her burden of unmistakable and convincing evidence of undue influence.

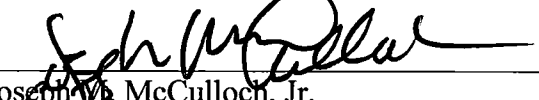
Based on the above, this Court should affirm the lower court's grant of summary judgment as to undue influence.

CONCLUSION

In consideration of the arguments and facts set forth above, this Court should affirm the lower court's grant of summary judgment.

¹⁰ As Attorney Hoefer states: “I then spoke to [Judge Lynch] and determine that he wanted to have a general power of attorney available to him but that would not be put into effect unless he determined that it was needed.” (R. Aff. Hoefer, §6). There is nothing in the record below to support the use of those documents.

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November 24, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

NOV 24 2015

SC Court of Appeals

The Honorable Craig D. Brown, Circuit Court Judge

Case No. 2013-CP-21-01408

Elizabeth J. Langley Appellant,

v.

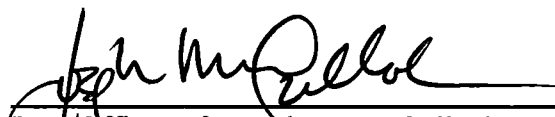
Wendy J. Lynch, Rebecca M. Lynch,
James M. Lynch, II, Donald Jordan, III,
Jimmy White and S. Porter Stewart, II, as
Personal Representative of the Estate of
James M. Lynch Defendants

Of Whom Wendy J. Lynch is the Respondent.

PROOF OF SERVICE

I certify that I have served the **RESPONDENTS' INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** by depositing one copy of it in the United States Mail, first-class mail, postage prepaid, on November 24, 2015, addressed to J. Rene Josey, Esquire, Turner, Padgett, Graham & Laney, P.A., 319 S. Irby Street, Post Office Box 5478, Florence, SC 29501

November 24, 2015



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