THE STATE OF SOUTH CAROLINA
In The 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

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SC Court of Appeals

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 REPLY BRIEF OF THE APPELLANT

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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.

Simply put, this is a case of strongly disputed factual issues and such cases are just not appropriate for the "drastic"[1] remedy of summary judgment. As outlined in the Appellant's initial Brief under the Standard of Review (pages 9-10), a trial court is not free to simply ignore evidence[2] or make its own wholesale credibility determinations. Indeed, the credibility of the non-moving party's witnesses and evidence is to be *given* every reasonable inference.[3] And specifically, where there is 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

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[1] ***"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).

[2] "***A court must consider everything*** in the record, pleadings, depositions, interrogatories, admissions on file, affidavits, etc." Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986)(emphasis added).

[3] "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)).

S.E.2d 64, 70 (Ct. App. 2005).

Understandably, the Respondent's Brief focuses on that evidence supportive of the decedent's capacity and supportive of the decedent's freedom from influence. The Respondent's myopic focus and blissful disregard of contrary evidence does not, however, erase the factual issues created by that contrary evidence requiring more than summary disposition.

Decedent's Capacity And Susceptibility: The Conflicting Evidence Here

Obviously, one cannot easily reconcile the image of a dizzy, seizure-suffering,[4] ataxic-gait non-walking patient[5] suffering from non-operable brain tumors with the contrary claim of a motorcycle-driving[6] active[7] jurist; indeed, such contrast is the nature of questions of fact. Thus, questions of conflicting facts are reserved for jury determination and not the simplified disposition of summary judgment which is reserved

[4] R._____ (Affidavit of George McClam).

[5] R._____ (Records of Duke University Hospital).

[6] Respondent's Brief (pages 7 and 18) repeatedly suggests that the decedent continued to ride his motorcycle to work up until his formal retirement in June. Notably, this vehicular-claim does not come from one of the decedent's actual co-workers, some of whom provided affidavits, but only from the statement of Jimmy White – the ex-husband of Respondent's sister Rebecca. Unlike the decedent who lived and worked in Timmonsville, Mr. White provided a Florence home address; thus, he was neither a co-worker nor a neighbor of the decedent. R._____. Tellingly, even Mr. White's current spouse confirms in her statement that the decedent "had people take him places." R._____. Likewise, one of Respondent's affidavits confirms that the alleged motorcycle riding decedent had a driver waiting to transport him from the attorney's office where the will was executed. R._____ (Hoefer affidavit ¶ 23).

[7] The fact that the Timmonsville Magistrate's office remained open and operational from the time of his diagnosis until his accelerated formal retirement approximately two months later despite his need to be absent while at Duke University Hospital and other healthcare events is not alone any indication of the decedent's testamentary capacity; it is more indicative of the office staff's commitment. Notably, the decedent's clerk of court, Wanda Mouzon (identified in the Hoefer affidavit ¶ 6, R. _____), does not have an affidavit in the record.

for those cases lacking in such factual disputes.

Respondent's Brief suggest that the Appellant's assertion (found in Appellant's Brief at 4-5) of decedent's inability to "independently function" is "unsupported." This factual conclusion of the Appellant's Brief, however, follows citation to the sworn affidavits of family (R. _____, daughter Rebecca and nephew Donald Campbell) and friends (R. _____, George McClam) describing the pre-diagnosis history of seizures and vertigo as well as specific incidents of disorientation, confusion (in the Timmonsville grocery store), and failure to function (inability to dial cell phone). Witnesses described the decedent with terms such as "confusion", "odd behavior", and "incoherent train of thought." R._____ (McClam Affidavit and Campbell Affidavit).

Appellant's lack of independent function conclusion also follows references to treating physician records from Duke University Hospital which document the decedent's ataxia and inability to tandem walk. R._____. Notably, the Respondent's Brief does not deny or address the Respondent's own text message in the record confirming her father's incompetence since his brain tumors with related seizures and memory loss. R._____. Thus, although controverted, Appellant's position is supported thereby creating an issue of fact.

Decedent's Unawareness of His Family and Assets: The Conflicting Evidence Here

Respondent's Brief suggest in a footnote (number 2) that it is a "factual stretch" to infer that decedent forgot his son in an encounter with his physicians when he only named his three daughters as children. To the contrary, this is a reasonable (and thus legally required) inference. As Respondent's footnote further concedes, all reasonable inferences must be made in favor of the non-moving party. Accordingly, it is the

Respondent who stretches to characterize this forgotten child inference as unreasonable rather than the clear indication of parental oversight it reasonably represents. Of course, the decedent's challenged lawyer-prepared will does address the son and the lack of any devise thereto; this documentation, however, does not erase the question of fact with regard to capacity created by the also documented forgotten child incident occurring less than two weeks before the will's execution.

Respondent's Brief (pages 11-12) suggests that the decedent knew his assets because he reportedly provided a list of such assets to Attorney Hoefer. The Brief (at 12) also suggests that the alleged "complexity" of the will itself demonstrates lucidity. The will is not complex and it wasn't prepared by the decedent but by Attorney Hoefer. Moreover, even Mr. Hoefer could not attribute preparation of the list to the decedent. [8] R._____ (Hoefer Affidavit, ¶ 14). Finally, the Respondent fails to address the absence of specific anticipated assets in the will despite the presence of others – a fact placed in controversy by the affidavit of daughter Rebecca White. R._____. These controverted facts with regard to the decedent's capacity preclude summary judgment on that issue.

Decedent's Isolation: The Conflicting Evidence Here

Again in a footnote (number 3), the Respondent seeks to minimize the severity of the hostile influence surrounding the decedent and poisoning his healthy relationships. Respondent asserts that it is "wholly unsupported" and not "not a fair inference" to observe that decedent's life-line relationship with a female friend was "cooled" and

[8] While the origin of this list may not have been known to Mr. Hoefer, the decedent's niece and care-giver Tracey Frazier described how the Respondent was constantly "bombarding" the decedent with questions about his assets and his well" – "so much that it rose to the level of verbal assault." R. _____ (Affidavit ¶¶ 6 and 7).

infected by the Respondent. It was friend and independent witness George McClam who observed that the relationship was cooled. R._____. Moreover, it was caregiver and niece Tracey Frazier who described the Respondent's vicious and unrelenting efforts to isolate decedent from this relationship and others through outright harassment and repeated phone number changes. R._____. Contrary to Respondent's other casual claim (also in footnote 3) that this evidence of isolation fails to relate to the claim of undue influence, it directly relates to the atmosphere surrounding the decedent during this time of testamentary decision making and the subsequent time when the decedent might have the opportunity to modify the questioned will – if he had capacity (again, not conceded by this argument).

Expert Opinions: The Conflicting Evidence Here

As did the trial court, Respondent (Brief pages 13-14) seeks to discredit the opinions of Appellant's medical experts based upon their lack of contemporaneous examination of the decedent – but as noted in Appellant's Brief (footnote 35), this goes to the weight of the evidence not its admissibility. Again, factual issues such as the weight to be given to any particular witness's testimony is for the jury, not a summary decision by the Court. In addition, even the Hairston v. McMillan, 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010), language used by the Respondent's Brief (page 14) notes that the need for contemporaneous personal expert examination might be negated by disabling conditions which are permanent or chronic in nature. It is undisputed that the decedent's condition was chronic and his brain tumors ultimately proved fatal. Expert opinions regarding the impact of a chronic brain disease on human function in a case of disputed capacity and susceptible influence are to be expected and can hardly be

considered a "Hail Mary" as Respondent suggest (Brief at 13).[9]

Confidential Relationship Here Triggers *Nasser*-Presumption of Undue Influence

As argued in the Appellant's Brief (pages 15-18), the Respondent was a fiduciary[10] to the decedent and therefore exposed to the possible presumption of undue influence recognized in Nasser. In her Brief, the Respondent seeks to avoid this presumption by suggesting that the Respondent was not really a fiduciary because the Power of Attorney appointing her was not filed and not used until months after the execution of the questioned Will. The Respondent also seeks to avoid her fiduciary status by arguing that "Respondent and Appellant had joint powers." (Respondent's Brief at pp. 19-20). These arguments miss the point. The presumption recognized in Nasser arises not from any use of or exclusivity of the fiduciary appointment but from the existence of the "confidential relationship" itself.[11] The point is that the decedent trusted Respondent thereby enhancing her opportunity to unduly influence him.

Respondent further suggest in footnote 9 of her Brief that Appellant's argument of a Nasser – presumption is a concession of the validity of the fiduciary appointment itself and the decedent's capacity to make such an appointment – not at all. Again,

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[9] Respondent's gratuitous comments regarding the form of Dr. Gamble's statement and the timeliness of Appellant's submissions (Brief at 2-3 and footnote 8) are of no moment now – since they were procedurally accepted and considered by the trial court – and that consideration has not been appealed by Respondent.

[10] This fiduciary relationship was also raised by the Appellant in the trial court where the Appellant submitted the fiduciary documents as Exhibit B (R._____) to her memorandum in opposition to summary judgment (R._____) and repeatedly referenced that relationship in that memorandum (third page and fifth page, R._____).

[11] The Restatement Third of Property § 8.3, relied upon by the Court in Nasser, specifically provides that "an adult child and an ill or feeble parent" can be an example of such a confidential relationship.

regardless of the actual validity and use of the appointment, the appointment represents the decedent's confidential relationship with Respondent even if the placement of such trust was not a competent decision. Moreover, the Power of Attorney was executed almost a month prior to the challenged will and weeks before the health declines documented in the Duke University Hospital records.

The presumption recognized in Nasser also requires suspicious circumstances or factors to be triggered. In addition to the decedent's obviously failing health and dependence upon others, there is affirmative evidence of the Respondent's unrelenting efforts to isolate the decedent as previously briefed and reviewed above. Moreover, the actual disposition of property found in the challenged will is suspiciously different from express representations made by decedent regarding his testamentary intent to both friends and family. R._____ (Rae White Wilkerson and Donald Campbell).

As outlined in the Appellant's Brief (pages, 17, 7-8), the challenged will does not make identical and equal bequests to the decedent's four children or even the three daughters. The will devised specific and unique real properties, for example, to each daughter and there is no evidence these properties are equivalent in anyway. Although counsel's casual assertion of equivalence made at the trial court hearing was not interrupted, it most certainly was not conceded as suggested in Respondent's Brief (footnote 4 and accompanying text). Moreover, while Appellant's trial counsel did observe that defeat of the challenged will would benefit the parties' brother to the theoretical detriment of the sisters, this observation also does not concede the equality or legitimacy of the unique real property devises made by the will.

Ultimately, even if the Nasser-presumption of undue influence by the fiduciary

Respondent is not somehow triggered by the combination of suspicious factors and circumstances seen here – in the light most favorable to Appellant, then these controverted facts at a minimum give rise to issues of material fact regarding such undue influence. Clearly the trial court here erred in using the short-cut of summary judgment to avoid issues of material fact.

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,

December 3rd, 2015

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PROOF OF SERVICE

I certify that I have served Appellant's Initial Reply Brief by depositing one (1) copy of it in the United States Mail, postage prepaid, on December 3d, 2015, addressed to:

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December 3, 2015

The Honorable Jenny Abbott Kitchings
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Re: Elizabeth J. Langley v. Wendy J. Lynch
Appellate Case No.: 2015-001941
TPGL File No.: 13799.101

Dear Ms. Kitchings:

Enclosed please find the following documents for filing on behalf of the *Appellant* (Elizabeth J. Langley),

1. Appellant's Initial Reply Brief with Proof of Service
(unbound original and one copy for return)

Please file the originals in your office and return a clocked copy of each to us in the self-addressed stamped envelope provided. By copy of this letter to counsel for the Respondent, Joseph M. McCulloch, Jr., Esquire I am herewith serving him with copies of the same.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

J. René Josey

JRJ:vlb

Enclosures

Cc: Elizabeth Langley (w/enclosures)(by e-mail only)
Joseph M. McCulloch, Jr., Esquire (w/enclosures)

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