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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE WALTON J. MCLEOD, IV
CIRCUIT COURT JUDGE

CASE NO. 2018-CP-32-00315

IN RE: The Estate of Leroy Fulmer

Mattie Lou Fulmer, Respondent

v.

Elizabeth S. Gainey as Personal
Representative; Elizabeth S. Gainey,
individually; and Dennis C. Gainey,

Of Which Elizabeth S. Gainey as Personal
Representative is the Appellant.

RECEIVED
NOV 28 2018
SC Court of Appeals

MOTION FOR LIMITED REMAND

Elizabeth S. Gainey, as Personal Representative of the Estate of Leroy Fulmer, requests this court issue a limited remand to the Court of Common Pleas for Lexington County for the sole purpose of ruling on Appellant's pending motion for reconsideration.

Appellant was the personal representative of Leroy Fulmer's estate. Appellant was Fulmer's granddaughter and cared for her grandfather in the months preceding his death. Pursuant to Fulmer's will, Appellant was named personal representative of his estate after his passing.

Respondent, Appellant's grandmother, filed a motion to remove Appellant as personal representative, asserting Appellant breached a fiduciary duty by selling certain pieces of real estate. The circuit court issued an order removing Appellant as personal representative on October 12, 2018. *See* Exhibit A. Appellant filed a timely motion to reconsider pursuant to Rule 59(e). *See*

Exhibit C. The circuit court then issued an amended order which made factual and legal findings not expressed in the October 12 order and not raised in any pleading filed by Respondent. See Exhibit B.

Appellant has filed a second motion for reconsideration. See Exhibit D; *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) (noting "a second motion for reconsideration under Rule 59(e) is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration"). The circuit court has scheduled a hearing on the motion for December 18, 2018. See Exhibit E. Appellant believes this second motion for reconsideration is proper pursuant to *Elam* and the time for filing the notice of appeal is currently tolled. However, out of an abundance of caution, Appellant filed her notice of appeal prior to the circuit court's ruling on the motion. Doing so has divested the circuit court of jurisdiction to consider the second motion to reconsider. See Rule 205, SCAR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal.").

Depending on the circuit court's decision on the second motion for reconsideration, the issues raised by this appeal may become moot. Accordingly, Appellant requests this court stay any appellate deadlines and issue a limited remand to the circuit court to allow the court to consider Appellant's motion at the December 18, 2018 motion hearing. Appellant requests this court expedite consideration of this motion due to the upcoming hearing.

November 28, 2018



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*Attorneys for Defendant Elizabeth S. Gainey as
Personal Representative of the Estate of Leroy
Fulmer*

STATE OF SOUTH CAROLINA
 COUNTY OF LEXINGTON
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-32-00315

Leroy Fulmer et al
 PLAINTIFFS

Elizabeth S Gainey et al
 DEFENDANTS

Submitted by: Walton J. McLeod, IV, Presiding Judge

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This matter came before the Court on October 10, 2018, on the Plaintiff's Expedited Motion to Remove Defendant Elizabeth S. Gainey as Personal Representative, to Disqualify Dennis C. Gainey from Acting as Personal Representative, and to Appoint a Special Administrator for the Estate of Leroy Fulmer. Present at the hearing were attorney Robert Wood for the current Personal Representative in her capacity as such, attorney Carrie Warner for the Defendants individually, and attorney Amy Hill for Plaintiff. The parties indicated that if the motion were to be granted, they would approve the appointment of attorney Carlos Gibbons as Special Administrator. Dennis C. Gainey also provided on the record that he would not dispose of the burial plots without approval by this Court.

Based on the documents on file and the testimony given during the hearing, the Court determined that good cause exists for the removal of Elizabeth S. Gainey as the Personal Representative and the disqualification of Dennis C. Gainey as the same. The Court also concluded that attorney Carlos Gibbons is an appropriate person to carry on the administration of the Estate during the pendency of the litigation in this matter.

Therefore, it is hereby ordered that Elizabeth S. Gainey is removed as the Personal Representative and Dennis C. Gainey is disqualified to serve as Personal Representative. It is further ordered that attorney Carlos Gibbons shall be appointed as the Special Administrator of the Estate of Leroy Fulmer to administrate the Estate with the same powers of a personal representative pursuant to the Probate Code.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

ELECTRONICALLY FILED - 2018 Oct 17 9:14 AM - LEXINGTON - COMMON PLEAS - CASE#2018CP3200315



INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	Date
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For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.



Lexington Common Pleas

Case Caption: Leroy Fulmer , plaintiff, et al VS Elizabeth S Gainey , defendant, et al
Case Number: 2018CP3200315
Type: Order/Form 4

So Ordered

s/Walton J. McLeod, 2765

FORM 4

**STATE OF SOUTH CAROLINA
 COUNTY OF LEXINGTON
 IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
 CASE NO. 2018-CP-32-00315**

Leroy Fulmer et al
 PLAINTIFFS

Elizabeth S Gainey et al
 DEFENDANTS

Submitted by: Walton J. McLeod, IV, Presiding Judge	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

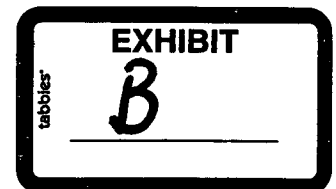
IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Defendant Elizabeth Gainey as Personal Representative of the Estate of Leroy Fulmer filed an Amended Motion to Alter or Amend Order Removing Personal Representative pursuant to Rule 59(e), SCRPC on October 26, 2018.

The former Personal Representative, Ms. Gainey, argues that there was no evidence in the record to support a finding that Ms. Gainey should be removed or that Ms. Gainey’s husband, Dennis Gainey, should be disqualified as an alternate personal representative. The court disagrees.

A court may remove a personal representative for good cause pursuant to S.C. Code Ann. § 62-3-611(a) (2017). Good cause exists when the removal would be in the best interest of the estate or if the personal representative has failed to perform any duty pertaining to the office. S.C. Code Ann. § 62-3-611(b) (2017).

A personal representative is a fiduciary. S.C. Code Ann. §§ 62-3-703 and 62-1-201 (2017): “That a fiduciary relationship exists between each heir or beneficiary of an estate and the administratrix thereof is fundamental.” Witherspoon v. Stogner, 182 S.C. 413, 414, 189 S.E. 758, 759 (1937); Ex parte Wheeler v. Estate of Green, 381 S.C. 548, 555–56, 673 S.E.2d 836, 840 (Ct. App. 2009).



A personal representative owes a fiduciary duty to all beneficiaries of the estate. S.C. Code Ann. § 62-3-703(a) (2017) (stating “[a] personal representative is a fiduciary” and must “use the authority conferred upon him . . . for the best interests of successors to the estate”); see also Turpin v. Lowther, 404 S.C. 581, 589-90, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for the court. Turpin, at 589, 745 S.E.2d at 401. The court in Turpin determined that this duty required the personal representative to disclose information affecting the value of the beneficiaries’ interests in the estate before he could negotiate those interests. Id. at 590-91, 745 S.E.2d at 402; see also Moore v. Moore, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) (providing that a fiduciary must fully disclose to a beneficiary all known information that is significant and material and that when the duty to disclose is triggered, silence may constitute a breach of that duty).

During the hearing on the Expedited Motion to Remove Personal Representative on October 10, 2018, the court asked Ms. Gainey, in her capacity as the Personal Representative of the Estate, if she had communicated with Ms. Fulmer after Mr. Fulmer’s death to which Ms. Gainey replied, “no”. The court declines to determine that Ms. Gainey violated her fiduciary duties based on this response; however, the court determines that because the former Personal Representative had not been communicating with a beneficiary of the Estate regarding the Estate’s administration, the Personal Representative had not been performing her duty. Due to this lack of performance, the court also believes that removing the Personal Representative is in the best interest of the Estate. Additionally, given the close relationship of the former Personal Representative and Mr. Gainey, it is not in the best interest of the Estate for Mr. Gainey to serve as the alternate Personal Representative. Having Special Administrator Carlos Gibbons is in the best interest of the Estate at this time.

Ms. Gainey also argues that Smith v. Heyward, 116 S.C. 145, 105 S.E. 275 (1920) and Blackmon v. Weaver, 366 S.C. 245, 621 S.E.2d 42 (Ct. App. 2005) provide that a court may not remove a personal representative named in a testator’s will based on hostility among the personal representative and other heirs. Ms. Gainey’s argument is misplaced. The court did not remove the former Personal Representative based on mere hostility or the mere existence of conflict between the parties.

Therefore, the Defendant’s aforementioned motion is DENIED. The Court’s Form 4 Order dated October 16, 2018 stands.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate “N/A” in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$

		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	Judge Code	Date
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For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Lexington Common Pleas

Case Caption: Leroy Fulmer , plaintiff, et al VS Elizabeth S Gainey , defendant, et al
Case Number: 2018CP3200315
Type: Order/Form 4

So Ordered

s/Walton J. McLeod, 2765

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN RE: The Estate of Leroy Fulmer,
Mattie Lou Fulmer,

Plaintiff,

v.

Elizabeth S. Gainey as Personal
Representative; Elizabeth S. Gainey,
individually; and Dennis C. Gainey,

Defendants.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Case No. 2017-ES-32-00286
2018-CP-32-315

**MOTION TO ALTER OR AMEND
ORDER REMOVING PERSONAL
REPRESENTATIVE
PURSUANT TO SCRPC 59(e)**

TO: Amy L.B. Hill, Esquire and Jonathan E. Spitz, Esquire, Attorneys for Mattie Lou Fulmer:

YOU WILL PLEASE TAKE NOTICE that Elizabeth S. Gainey as Personal Representative and Dennis C. Gainey, as proposed substitute Personal Representative, hereby move to alter or amend this Court's Order Removing Elizabeth S. Gainey as Personal Representative, Disqualifying Dennis C. Gainey from Acting as Personal Representative, and Appointing a Special Administrator for the Estate of Leroy Fulmer (hereinafter referred to as the "Removal Order"), attached as Exhibit A, which was filed on October 17, 2018. Specifically, Elizabeth S. Gainey as Personal Representative and Dennis C. Gainey seek to have the order reformed to deny the Plaintiff's motion *in toto*.

This motion is based upon the fact that there is no evidence in the record to support a finding that Elizabeth S. Gainey should be removed as Personal Representative or that Dennis C. Gainey should be disqualified as an alternate. In fact, our courts abhor the removal of a personal representative and, instead, seek to protect the wishes of the testator. *See Smith v. Heyward*, 116 S.C. 145, 164, 105 S.E. 275, 282 (1920), a copy of which is attached hereto as Exhibit B.

The recent case of *Blackmon v. Weaver*, 366 S.C. 245, 621 S.E.2d 42 (Ct. App. 2005) is analogous to the facts here. A copy of this case is attached hereto as Exhibit C. In *Blackmon*, the circuit court removed the personal representative based on hostility among the personal representative and other heirs. Like in this matter, there was no evidence of the personal



representative failing to perform any duties pertaining to the office, misrepresenting material facts leading to her appointment, or disregarding any order of the court, these being the only valid causes for removal pursuant to S.C. Code Ann. § 62-3-611(b), a copy of which is attached as Exhibit D. The Court of Appeals in *Blackmon* reversed the circuit court, holding that there is a “strong deference shown to the personal representative chosen by the testator,” and the “mere existence of conflict between personal representative and a beneficiary is an inadequate reason for removal of the personal representative. Without a showing of fault, the court will not remove a personal representative simply because the parties do not get along.” *Blackmon*, 366 S.C. at 251, 621 S.E.2d at 45. The *Blackmon* court further held that even where a personal representative favors her own interests, there is no basis for removal. *See id.*

Plaintiff offered no evidence that Elizabeth S. Gainey or Dennis C. Gainey conducted themselves in any way that would be cause for removal as required by S.C. Code Ann. § 62-3-611(b). In his Last Will and Testament, Leroy Fulmer expressed his intention for Elizabeth S. Gainey to serve as the Personal Representative of his estate and for Dennis C. Gainey to serve in the event that Elizabeth Gainey was unable to perform the necessary duties. Deference must be given to this intent.

Therefore, Elizabeth S. Gainey as Personal Representative and Dennis C. Gainey respectfully move for an order amending the Removal Order so as to deny Plaintiff Mattie Lou Fulmer’s Motion to Remove Elizabeth S. Gainey as Personal Representative, to Disqualify Dennis C. Gainey and to Appoint a Special Administrator *in toto*.

Respectfully submitted,

s/ Robert P. Wood

Robert P. Wood (6206)

Verne McGough (74972)

Rogers Townsend & Thomas, PC

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Columbia, SC 29202

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*Attorneys for Defendant Elizabeth S. Gainey as
Personal Representative of the Estate of Leroy
Fulmer and Dennis C. Gainey*

October 22, 2018

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN RE: The Estate of Leroy Fulmer,
Mattie Lou Fulmer,

Plaintiff,

v.

Elizabeth S. Gainey as Personal
Representative; Elizabeth S. Gainey,
individually; and Dennis C. Gainey,

Defendants.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Case No. 2017-ES-32-00286
2018-CP-32-315

**MOTION TO ALTER OR AMEND
ORDER REMOVING PERSONAL
REPRESENTATIVE
PURSUANT TO SCRPC 59(e)**

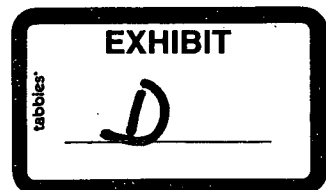
TO: Amy L.B. Hill, Esquire and Jonathan E. Spitz, Esquire, Attorneys for Mattie Lou Fulmer:

YOU WILL PLEASE TAKE NOTICE that Elizabeth S. Gainey as Personal Representative and Dennis C. Gainey, as proposed substitute Personal Representative, hereby move to alter or amend this court’s November 13, 2018 order clarifying the grounds for removing Elizabeth S. Gainey as Personal Representative, disqualifying Dennis C. Gainey from acting as Personal Representative, and appointing a special administrator for the Estate of Leroy Fulmer (hereinafter referred to as the “November 13 Order”) (attached as Exhibit A). Specifically, Elizabeth S. Gainey as Personal Representative and Dennis C. Gainey seek to have the order reformed to deny Plaintiff’s motion *in toto*.

PROCEDURAL HISTORY

On July 5, 2018, Plaintiff filed her expedited motion seeking to remove Mrs. Gainey as personal representative. (Attached as Exhibit B). Plaintiff requested “(1) Defendant Elizabeth Gainey (“Elizabeth”) be removed as the Personal Representative because she gave away the Estate owned burial plots to her husband Defendant Dennis Gainey.” Plaintiff also requested the court disqualify Mr. Gainey from serving as alternate personal representative.

This court held a hearing on Plaintiff’s motion on October 10, 2018 and removed Ms. Gainey as personal representative of Mr. Fuller’s estate by Form 4 order on October 17, 2018. (Attached as Exhibit C). In its order, the court found “Based on the documents on file and the



testimony given during the hearing, the [c]ourt determined that good cause exists for the removal of Elizabeth S. Gainey as the Personal Representative.”

The court did not indicate the grounds for finding good cause existed in this case. Accordingly, Mrs. Gainey filed a motion pursuant to Rule 59(e), SCRPC, requesting this court reconsider, alter, and/or amend its order. (Attached as Exhibit D). In that motion, Mrs. Gainey asserted, “Plaintiff offered no evidence that Elizabeth S. Gainey or Dennis C. Gainey conducted themselves in any way that would be cause for removal as required by S.C. Code Ann. § 62-3-611(b).”

The court denied the motion in its order filed November 13, 2018. For the first time, this court found “because the former Personal Representative of the Estate ha[s] not been communicating with a beneficiary of the Estate regarding the Estate’s administration, the Personal Representative has not been performing her duty.” Accordingly, the court removed Ms. Gainey as the personal representative of Mr. Fuller’s estate, noting “[d]ue to this lack of performance, the court also believes that removing the Personal Representative is in the best interest of the Estate.”

Mrs. Gainey recognizes the general rule that multiple motions pursuant to Rule 59 are disfavored. However, “a second motion for reconsideration under Rule 59(e) is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004). This court’s October 17 order made factual findings not included in the initial order and that were not based on grounds argued in Plaintiff’s motion. Accordingly, this subsequent Rule 59 motion is proper.

ARGUMENT

“A person interested in the estate may petition for removal of a personal representative for cause at any time.” S.C. Code Ann. 62-3-611(a).

Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

S.C. Code Ann. 62-3-611(b). Respectfully, the court misapprehended the facts, the law applicable to those facts, and should reconsider its original order.

I. The Court of Appeals Decision in *Turpin* is Not Applicable in This Case.

This court relied upon *Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397 (Ct. App. 2013), as authority supporting its decision to remove Mrs. Gainey as Personal Representative for failing to communicate with the beneficiaries of Fulmer's Estate. However, *Turpin* is factually distinct from this case. In *Turpin*, a personal representative negotiated a deal for property that was specifically devised to beneficiaries. Simultaneously, the personal representative negotiated a deal with outside investors to purchase the property from the personal representative. The court of appeals found the fiduciary duty imposed on a personal representative "required him to disclose information affecting the value of the beneficiaries' interests in the estate before he could negotiate to purchase those interests." *Id.* at 590, 745 S.E.2d at 402. None of the property in *Turpin* was part of the general estate, as is the case here.

Furthermore, Mr. Fulmer granted to Mrs. Gainey "absolute discretion with respect to any property, real or personal, at any time held under any provisions of [Fulmer's] Will and without authorization by any court" to "sell or dispose of or grant options to purchase any property, real or personal, constituting a part of [Leroy's] Estate." There is no evidence Mrs. Gainey sold the property Plaintiff seeks to have returned at a discount to the fair market value. There is also no evidence that Mrs. Gainey had any negotiations with a third party about selling the property for a premium. Put simply, Mrs. Gainey sold a portion of the Estate and placed the funds from the sale in an Estate account, as she was allowed under the terms of the Will. Accordingly, any reliance on *Turpin* is in error.

II. The Personal Representative's Attorney Kept Plaintiff's Attorney Well Apprised of the Estate's Administration.

During the hearing on Plaintiff's motion to remove Mrs. Gainey as Personal Representative, the court asked Mrs. Gainey "if she had communicated with Ms. Fulmer after Mr. Fulmer's death to which [Mrs.] Gainey replied, 'no'." Mrs. Gainey testified truthfully. After retaining an attorney to handle the administration of the estate, and recognizing Plaintiff had also retained an attorney, Mrs. Gainey did not communicate with Mrs. Fulmer directly. However, Mrs. Gainey's previous agent, Henrietta Gill, Esq., communicated with Mrs. Fulmer's agent, Katherine Gettys, Esq., as Mrs. Gill proceeded through the administration of Mr. Fulmer's estate. *See Exhibit E*;¹ *see also*

¹ This evidence was not presented at the hearing on Plaintiff's because Plaintiff did not allege lack of communication as grounds for her motion, and Mrs. Gainey could not anticipate this court removing her on that basis. Therefore, Mrs. Gainey is entitled to present evidence to

BB&T v. Fleming, 360 S.C. 341, 345, 601 S.E.2d 540, 542 (2004). (finding an attorney of record is an agent of the client). Furthermore, Verne McGough, Esq. and Robert Wood, Esq. have communicated extensively with both Attorney Gettys, Jonathan Spitz, Esq., and Amy Hill, Esq. See Exhibit E (List of Communications between Counsel). In fact, through her agent, Plaintiff has requested and received an amended and restated inventory and appraisal and a non-probate property inventory. Furthermore, Mrs. Gainey's counsel has asked for input on issues relating to the estate from Plaintiff's counsel as evidenced by the February 26, 2018 letter from Verne McGough regarding tax issues. In total, there have been at least 17 letters, phone calls and meetings and dozens of emails exchanged between counsel for the persona representative and counsel for Mrs. Fulmer since Mrs. Gainey opened this estate.

Given the evidence of communication between Mrs. Gainey's agents and Mrs. Fulmer's agents, the facts do not support this court's finding that Mrs. Gainey failed to communicate with the beneficiaries of Mr. Fulmer's estate. Accordingly, Mrs. Gainey requests this court reconsider its prior orders.

III. This Court is Without Authority to Grant Plaintiff's Motion on Grounds and Facts not Argued or Pled.

Plaintiffs did not request the circuit court remove Mrs. Gainey as personal representative based on her failure to communicate with beneficiaries of the estate. The only ground Plaintiff argued in her expedited motion to remove Mrs. Gainey as personal representative was an allegation Mrs. Gainey breached her fiduciary duty to Plaintiff by "giving away valuable and sentimental Estate property and further misrepresenting ownership of the same to the [c]ourt and beneficiaries." This court expressly declined to make such a finding. See Exhibit A ("The court declines to determine that Ms. Gainey violated her fiduciary duties . . ."). The court then granted Plaintiff's motion based on a new theory, not mentioned in any of Plaintiff's pleadings.

A court is without authority to grant judgment to a party based on evidence and argument not included in the movant's pleadings. *Rushing v. Intex Products, Inc.*, 285 S.C. 595, 599-600, 330 S.E.2d 555, 557-58 (Ct. App. 1985). *Rushing*, an employee, and *Intex*, the employer, created a new technology for use by *Sonoco* in keeping papermaking machines clean. *Id.* at 596-97, 330

contradict this court's factual findings. See *Lafaye v. Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1995) (citing *Godfrey v. Heller*, 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993) (where theory of relief was first raised in lower court's order, appellant must challenge this theory with a Rule 59, SCRPC motion)).

S.E.2d at 556. Rushing's 1971 Agreement with Intex indicated Intex would own all inventions conceived while Rushing was employed. *Id.* at 597, 330 S.E.2d at 556. However, a 1976 employment agreement, which contained no provision regarding ownership of inventions conceived by Rushing, included a clause stating "all other noncompetitive and employment agreements were canceled." *Id.* Further, a 1978 letter from Intex's president suggested Rushing negotiate with Sonoco to form a holding company that would own the patent, and that Rushing be included in the ownership of that holding company. *Id.*

After Rushing left his employment with Intex, Intex requested he execute an assignment of the patents based on the 1971 Agreement. *Id.* Rushing refused. *Id.* Intex then brought a declaratory judgment action asking the court to "(1) determine the rights and obligations of the parties under the 1971 Patent Agreement, (2) declare under the Patent Agreement that Intex is the sole owner of the patents, (3) order Rushing to assign the patents to Intex, and (4) grant such other relief as deemed proper." *Id.* at 597-98, 330 S.E.2d at 556. "Rushing answered and counterclaimed for (1) a declaration that the 1971 Patent Agreement is null and void based on the later 1976 Agreement, (2) a declaration that he owns the patents and (3) other relief deemed just." *Id.* at 598, 330 S.E.2d at 556.

After a bench trial, the circuit court found, based on the 1978 letters between Rushing and Intex, "Intex had agreed to give Rushing one-third of its share of the ultrasonics project" and ordered Rushing to assign title to the patents to Intex. *Id.* at 598, 330 S.E.2d at 556-57. Both Intex and Rushing appealed, and the court of appeals reversed.

The *Rushing* court noted, "Neither party alleged the existence of a contract based on the January 1978 letters, the duties or obligations imposed by it, or its subsequent breach. The court therefore had no authority to determine the rights of the parties under the purported 1978 agreement." *Id.* at 599, 330 S.E.2d at 557. The court found

the only issue tendered by the parties was whether the 1971 Patent Agreement was still valid or whether it had been cancelled by the 1976 Agreement. Rushing did not allege that the 1978 letters either modified the Patent Agreement or superseded it. In fact, the pleadings contain no reference to the letters. *The court therefore erred in considering them and in granting Rushing relief based on them.*

Id. (emphasis added).

Similarly, Plaintiff in this case has never alleged Mrs. Gainey failed to communicate with her or her counsel. Plaintiff's complaint does not raise this issue, and Plaintiff's expedited motion did not allege such facts. "The court therefore erred in considering them and in granting [Plaintiff] relief based on them." Accordingly, Mrs. Gainey requests the court reconsider its order finding her lack of communication with the beneficiaries of the estate constituted good cause to remove her as personal representative.

CONCLUSION

"There is a strong deference shown to the personal representative chosen by the testator." *Blackmon v. Weaver*, 366 S.C. 245, 251, 621 S.E.2d 42, 45 (Ct. App. 2004). "The courts have ever been reluctant to take the management of an estate from those to whom it has been confided by the testator, for to that extent the intention expressed in his will would be defeated." *Id.* (quoting *Smith v. Heyward*, 115 S.C. 145, 164, 105 S.E. 275, 282 (1920)). "The power to remove a personal representative 'should be executed with great caution, and not at all, unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud.'" *Id.* (quoting *Smith*, 115 S.C. at 164-65, 105 S.E. at 282). No such showing has been established here. Based on the foregoing, Elizabeth S. Gainey as Personal Representative and Dennis C. Gainey respectfully move for an order amending the Removal Order so as to deny Plaintiff Mattie Lou Fulmer's Motion to Remove Elizabeth S. Gainey as Personal Representative, to Disqualify Dennis C. Gainey and to Appoint a Special Administrator *in toto*.

Respectfully submitted,

s/ Robert P. Wood

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 robert.wood@rtt-law.com
 Attorneys for Defendant Elizabeth S. Gainey as
 Personal Representative of the Estate of Leroy
 Fulmer and Dennis C. Gainey

November 26, 2018

32	12/17/2018	2:00 PM	Motion/Other	First National Bank of Pennsylvania-PLT	11/19/2018	2017CP3202904 First National Bank of Pennsylvania, plaintiff, et al VS Jason W Gordon, defendant, et al	Debt Collection 110	John Sanford Kay (803) 726-2700	Ward E Hacklen Claude Dylan Huff
33	12/17/2018	2:00 PM	Motion/Summary Judgment	Harold Moore MD -DEF	10/24/2018	2017CP3203230 Terni Vick Phillips VS Harold Moore MD	Medical Malpract 220	Nettie ElizaBeth Branham (803) 227-3552	Kay Gaffney Crowe (803) 799-1111 William Curry McDow (803) 576-3719
34	12/17/2018	2:00 PM	Motion/Exempt from ADR	Nathaniel Wingard-DEF	08/16/2018	2017CP3203248 Russell M. Taylor VS Nathaniel Wingard	Real Prop/Other 499	Spencer Andrew Syrett (803) 765-2110	Vicki D Koutsogiannis (803) 359-3301 James Ross Snell Jr. (803) 359-3301
35	12/17/2018	2:00 PM	Motion/Summary Judgment	Ten Z Sc Bowling Inc-DEF	09/10/2018	2017CP3203348 Shirley Amick VS Ten Z Sc Bowling Inc, defendant, et al	Premises Liab 330	S. Jahue Moore Jr. (803) 796-9160	Christian Stegmaier (803) 256-2660
36	12/17/2018	2:00 PM	Motion/Strike	Alloyce Kressler-PLT	10/18/2018	2017CP3203448 Alloyce Kressler VS Southern Charm Healthcare Inc, defendant, et al	Medical Malpract 220	Stefan Bjorn Feidler (843) 614-8888	Kevin Richard Horton (843) 606-5635 Nicholas Clarence Chapman Stewart (843) 606-8355 Joshua Steven Whitley (843) 606-5635
37	12/17/2018	2:00 PM	Motion/Compel	Easy Coin Laundry Inc-PLT	10/19/2018	2017CP3203601 Blair H Monroe, plaintiff, et al VS Old Mill Lc, defendant, et al	Real Prop/Other 499	Benjamin C. Bruner (803) 252-7693 James L. Bruner (803) 609-3282 Chelsea Jaqueline Clark (803) 252-7693	Alice Price Adams (803) 779-1833 Joseph Kenneth Carter Jr. (803) 227-4279 Robert Gerald Chambers Jr. (803) 227-4201 Bradford T. Cunningham (803) 951-2232 Thomas M. Kennaday (803) 614-8888
38	12/17/2018	2:00 PM	Motion/Protection from Discovery	Town Of Lexington Sc-PLT	10/23/2018	2017CP3203693 Town Of Lexington Sc VS Carolina Water Service Inc, defendant, et al	Condemnation 410	J. David Black (803) 771-8900 x2072 Bradford T. Cunningham- (803) 951-2232 Chase Caleb Keibler (803) 540-2187 Clifford O. Koon Jr. (803) 358-1572	Joe Albert Conner (423) 209-4131 John Marion S. Hoefler (803) 252-3300 x44 Elizabeth S. Mabry (803) 609-9217 Adam C Sanders (423) 209-4131
39	12/17/2018	2:00 PM	Appeal Hearing	Kevin P Wilson-APL	09/18/2018	2017CP3203857 Kevin P Wilson, plaintiff, et al VS Lexington County Board Of Zoning Appeals	Zoning Board 970	Drake Hunter Kaiser (833) 575-2972 x1	Jeffrey M. Anderson (803) 359-2512
40	12/17/2018	2:00 PM	Motion/Alter and/or Amend Complaint	Alice Nichols-PLT	11/08/2018	2017CP3203967 Alice Nichols, plaintiff, et al VS Vitality Medical Centers Inc, defendant, et al	Wrongful Death 360	Francis M. Hinson IV (803) 748-1365	Shelton W. Halle (803) 771-4400 William Curry McDow (803) 576-3719
1	12/18/2018	9:30 AM	Motion/Compel	Stancel E Kirkland Sr -PLT	11/15/2018	2017CP3204039 Stancel E Kirkland Sr VS Wesley Blake Coffee	Motor Veh Accid 320	S. Jahue Moore (803) 796-9160	Heather Alicia Chiovaro (843) 722-3400 Matthew Tillman (843) 722-3400
2	12/18/2018	9:30 AM	Motion/Compel	Lana H Crabtree-PLT	11/05/2018	2017CP3204260 Lana H Crabtree VS Donald M Borchers	Assault/Battery 370	G. Robin Alley (803) 252-6323 x102	
3	12/18/2018	9:30 AM	Motion/Relieve As Counsel	Joseph A Davis-PLT	11/13/2018	2017CP3204452 Joseph A Davis VS Angela Brown Chastain, defendant, et al	Motor Veh Accid 320	Mary Nell Degenhart (803) 771-6050 Paul V. Degenhart (803) 771-6050	Christopher Shannon Leonard (803) 667-3186
4	12/18/2018	9:30 AM	Motion/Summary Judgment	Ty Haigler-DEF	11/21/2018	2017CP3204521 Kelly Pierce VS Ty Haigler	Personal Injury 350	Skyler Bradley Hutto (803) 534-5218	Stephen D Porter (803) 256-1268 x119
5	12/18/2018	9:30 AM	Motion/Compel	Christopher Oljeskie-DEF	11/09/2018	2017CP3204566 Mcguinn Homes Llc, plaintiff, et al VS Christopher Oljeskie, defendant, et al	Breach of Cont 140	S. Jahue Moore (803) 796-9160	Matthew Elliott Cox (803) 999-1273 Eugene Ford Rash (704) 335-5019
6	12/18/2018	9:30 AM	Motion/Summary Judgment	Lexington County Solicitor-DEF	10/05/2018	2018CP3200047 Charles F Burton VS Lexington County Solicitor	Special-Comp/Oth 699	Charles Thomas Brooks III (803) 418-5708	Harley Littleton Kirkland (803) 734-0406 Wesley Aaron Vorberger (803) 734-3177
7	12/18/2018	9:30 AM	Motion/Summary Judgment	Flint Equipment Company-PLT	10/26/2018	2018CP3200079 Flint Equipment Company VS North Edisto Logging Inc, defendant, et al	Breach of Cont 140	Matthew Drew DeMott (912) 234-0995	David Randolph Whitt (803) 422-2176
8	12/18/2018	9:30 AM	Motion/Enlarge Time	Elizabeth S Gainey Personal Representative-DEF	10/09/2018	2018CP3200315 Leroy Fulmer, plaintiff, et al VS Elizabeth S Gainey, defendant, et al	Special-Comp/Oth 699	Amy L.B. Hill (803) 724-1716	Carrie Ann Warner (803) 799-3074 Robert P. Wood (803) 771-7900 x1275
9	12/18/2018	9:30 AM	Motion/Alter and/or Amend	Elizabeth S Gainey Personal Representative-DEF	11/26/2018	2018CP3200315 Leroy Fulmer, plaintiff, et al VS Elizabeth S Gainey, defendant, et al	Special-Comp/Oth 699	Amy L.B. Hill (803) 724-1716	Carrie Ann Warner (803) 799-3074 Robert P. Wood (803) 771-7900

EXHIBIT

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tabbles

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE WALTON J. MCLEOD, IV
CIRCUIT COURT JUDGE

CASE NO. 2018-CP-32-00315

IN RE: The Estate of Leroy Fulmer

Mattie Lou Fulmer, Respondent

v.

Elizabeth S. Gainey as Personal
Representative; Elizabeth S. Gainey,
individually; and Dennis C. Gainey,

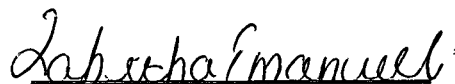
Of Which Elizabeth S. Gainey as Personal
Representative is the Appellant.

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SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Motion for Limited Remand on Mattie Lou Fulmer by depositing a copy of it in the United States Mail, postage prepaid, on November 28, 2018, addressed to her attorney of record, Amy Hill, Esq., P.O Box 7368, Columbia, South Carolina 29202.

November 28, 2018



Tabitha Emanuelli
Paralegal to Robert P. Wood

cc:

Carrie A. Warner, Esquire
Amy L.B. Hill, Esquire
Jonathan E. Spitz, Esquire
Carlos W. Gibbons, Jr., Esquire