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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF BEAUFORT<br><br>IN THE MATTER OF ESTATE OF PAUL BRANDON BARRINGER, II<br><br>HAMPTON BARRINGER LUZAK,<br><br>Plaintiff,<br><br>v.<br><br>MERRILL B. LIGHT, MERRILL U. BARRINGER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PAUL BRANDON BARRINGER, II, J. RANDOLPH LIGHT, JR., MERRILL B. LIGHT AS PUTATIVE TRUSTEE OF THE PAUL B. BARRINGER, II REVOCABLE TRUST DATED DECEMBER 4, 1998, AND MERRILL B. LIGHT AS TRUSTEE OF THE MERRILL BARRINGER LIGHT REVOCABLE TRUST,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br>CIVIL ACTION NO: 2016-CP-07-01919<br><br>**ORDER GRANTING DEFENDANT MERRILL LIGHT SUMMARY JUDGMENT AS TO FEBRUARY 8, 2012, WILL AND FIRST AMENDMENT TO THE PAUL B. BARRINGER, II, REVOCABLE TRUST, DATED DECEMBER 4, 1998** |



This matter came before me for a hearing on May 27, 2021, on Defendant Merrill Light's Motion for Summary Judgment as to the validity of the Will and First Amendment to the Paul B. Barringer, II, Revocable Trust, dated December 4, 1998, executed by Paul B. Barringer, II, on February 28, 2012 (hereinafter "February 2012 Testamentary Documents"). I hereby grant Defendant's motion and, for the reasons set forth below, find as a matter of law that Mr. Barringer had testamentary capacity, was not subject to undue influence and was not mistaken when he executed the February 2012 Testamentary Documents, and that the February 2012 Testamentary Documents are valid.

**PROCEDURAL OBJECTION TO MOTION**

Plaintiff argues that this Court could not consider this motion because Judge Mullen denied a previously moved for summary judgment as to all causes of action and on the basis of judicial estoppel. The Court rejects these arguments.

First, the prior order denying summary judgment as to all causes of action does not preclude consideration of this motion. Defendant has the benefit of additional testimony and evidence in support of her new motion and a prior denial of summary judgment by a different judge does not preclude renewal of the motion later in the proceedings. *See Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) ("[A] judge deciding a case on the merits is not bound by a prior order of another judge denying summary judgment."); *Smith v. Breedlove,* 377 S.C. 415, 662 S.E.2d 67 (2008) ("The fact that different trial judge previously denied a motion for summary judgment does not preclude the moving party from renewing its motion once new evidence is gathered.").

Second, Defendants are not estopped from bringing this motion. Plaintiff claims that Defendant Merrill Light is "estopped" from asserting that the February 2012 Testamentary Documents "are valid for purposes of this summary judgment motion" because Plaintiff "inconsistently assert[s] the validity of a prior will and trust in 1998 and subsequent amendments to the will and trust which were executed after February 2012." Defendants' motion "seeks summary judgment as to the Seventh, Eighth, and Ninth causes of action as they apply to the February 28, 2012, will and trust."[1] Defendants' summary judgment motion seeks no relief as to

[1] The Court notes that two different complaints were filed in this consolidated action. One version (2016-CP-07-01919) asserted nineteen causes of action and was filed in probate court and then removed to circuit court. A second complaint (2016-CP-07-1961) asserting sixteen causes of action was filed directly in circuit court. The Court consolidated these actions under Case No. 2016-CP-07-1919 with consent of the parties in Orders dated May 19, 2017. No new consolidated complaint was filed and the Consolidation Orders do not designate which version of the complaint is the consolidated complaint. This motion addresses the Seventh, Eighth and Ninth causes of action as designated in the complaint filed originally in probate court and removed to circuit court (1919). That complaint also

any other version of Mr. Barringer's wills or trusts. Although Plaintiff cites no authority in support of her estoppel argument, presumably she intends to assert judicial estoppel.

> For the doctrine of judicial estoppel to apply, the following elements must be satisfied: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

*Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013). Further, "[j]udicial estoppel generally applies only to inconsistent statements of fact." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

Plaintiff alleges in the Seventh, Eighth and Ninth Causes of Action in her Amended Complaint that the trust amendments in 2012 "and/or" 2015 are invalid, because Mr. Barringer lacked testamentary capacity (Seventh) and was under undue influence (Eighth), and due to a mistake (Ninth). Here, although the pending motion for partial summary judgment relates only to the February 2012 Testamentary Documents, the Court understands that Defendants contend that all of Mr. Barringer's trusts and amendments were executed when Mr. Barringer had testamentary capacity and was not under undue influence. Thus, Defendants deny these causes of action in their entirety and put Plaintiff to her proof as to her claims that the trust amendments in 2012 "and/or" 2015 are invalid. If Plaintiff is unable to meet her burden of proving that some or all of the trust amendments are void on the basis that Mr. Barringer lacked capacity or was under undue influence when he executed the documents, then the Court will determine which, if any, amendment of the trust is controlling. Merely arguing that the February 2012 Testamentary

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bears the consolidated case number. These same causes of action are designated as the Fourth, Fifth, and Sixth causes of action in the complaint filed directly in circuit court (1961). For clarity, this Order applies to the Fourth, Fifth and Sixth causes of action in 1961, as well as the Seventh, Eighth, and Ninth causes of action in the complaint filed in 1919.

Documents are not void due to lack of capacity, undue influence, or mistake does not contradict taking the same position as to subsequent trust amendments.

Thus, Plaintiff establishes none of the elements required to establish judicial estoppel (nor did Plaintiff even attempt to do so in her opposition brief or at the hearing on this motion). Defendants' position that none of the trust amendments are void due to a lack of testamentary capacity, undue influence or mistake is perfectly consistent with filing a motion for summary judgment as to only the February 2012 Testamentary Documents. The Court perceives no inconsistency at all, much less a "total inconsistency," as to any factual issue. Further, Defendants have not "been successful" in maintaining any prior factually inconsistent position, and nothing in Defendants' summary judgment motion appears to be a part of an intentional effort to mislead the Court.

Accordingly, Defendants are not estopped from bringing this motion for partial summary judgment.

**STANDARD FOR SUMMARY JUDGMENT**

The standard for summary judgment is set forth in Rule 56(c), SCRCP, which states that "summary judgment is appropriate if 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 judgment as a matter of law." In cases with a higher burden of proof, such as will contests, "the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." *Hancock v. Mis-South Mgmt. Co., Inc.,* 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009). "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 v. Wachovia Bank, N.A.,* 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003*).*

"Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." S.C. Code Ann. § 62-3-407. As our Supreme Court has said:

> When the formal execution of a will is admitted or proved, a prima facie case in favor of the will is made out, and the burden is then on the contestants to prove undue influence, incapacity or other basis of invalidation. The contestants continue to bear the burden of proof throughout the will contest. In determining whether the contestants sustained such burden, the evidence has to be viewed in the light most favorable to the contestants.

*Calhoun v. Calhoun*, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982).

**FINDING OF FACTS**

After a careful review of the briefs, exhibits and extensive oral argument, the Court finds that the following facts are in evidence, are undisputed and are relevant to Defendant's motion:

On December 4, 1998, Paul Barringer and his wife Merrill Barringer executed wills and revocable trusts, each of which, on the death of a spouse, left all the decedent's assets to the surviving spouse, who had a power of appointment to designate which of their direct descendants would receive the assets at his/her death. If the surviving spouse did not exercise the power of appointment in a subsequent will, the remaining assets at the surviving spouse's death were to be distributed equally to the Barringers' three children, Defendant Merrill Light, nonparty Victor Barringer and Plaintiff Hampton Luzak. These wills and trusts were prepared by a lawyer in Charlotte, North Carolina.

In 2011, the Barringers, residents of South Carolina, retained Hilton Head lawyer John Jolley to prepare updated wills and trusts. In addition to Mr. Jolley, Mr. Barringer brought in his

estate planning insurance agent, Robert Slane, to assist in the estate planning. Mr. Barringer met with Mr. Jolley and Mr. Slane on multiple occasions and had numerous telephone conversations with them. Mr. and Mrs. Barringer executed their updated wills and trusts at the offices of Mr. Jolley on February 28, 2012.

As to whether Mr. Barringer had testamentary capacity to execute the Testamentary Documents and whether he was being unduly influenced at the time, Mr. Jolley testified as follows:

> Q. At any point in time prior to Mr. Barringer signing this February 28, 2012 will and trust, did you ever have any concern that Mr. Barringer was being unduly influenced or forced to sign these documents against his will?
>
> A. I had no reservations about Mr. Barringer.
>
> Q. Did you ever have any concern that he lacked the capacity to understand and sign the documents?
>
> A. I did not.[2]

In addition, Rebecca Bostick, Mr. Jolley's paralegal, testified that, during the entire period in which Mr. Jolley represented Mr. Barringer (2011-2015), Mr. Barringer "was fully competent and had no issues whatsoever from my standpoint . . . He certainly could make

[2] Plaintiffs argue that Mr. Jolley is subject to impeachment because he failed to notice a decline in Mr. Barringer's cognitive functioning in later months and years after February 28, 2012, and that Mr. Jolley's opinion "is not gospel." Plaintiff also complains that Mr. Jolley represented the Lights in their estate planning for many years and that he later became general counsel to the family timber business. Plaintiff has presented no proof to undermine the credibility of the observations made by Mr. Jolley on February 28, 2012, and indeed, Plaintiff's counsel stated at the hearing on this motion that Mr. Jolley had an ethical duty not to allow the documents to be executed if he did not believe that his client had capacity or was under undue influence. The Court finds Mr. Jolley's observations of Mr. Barringer at the execution of the Testamentary Documents and in the preceding months to be relevant, but not conclusive on the question of whether Mr. Barringer had testamentary capacity or was under undue influence when he executed the Testamentary Documents. Plaintiff has presented no evidence to indicate that either Mr. Jolley, or any other witness to the execution of the Testamentary Documents, was untruthful in their assessment of Mr. Barringer's condition on that day. Further, Plaintiff offered no evidence to prove the Mr. Jolley had an actual conflict of interest on the basis of his representation of both the Lights and the Barringers, and the Court notes no such conflict based on the record. Also, Plaintiff presented no evidence to prove that any of his observations relevant to this motion were influenced by any duties he owed to the Lights as their estate planning counsel. For the Court to conclude he was improperly influenced would require pure speculation. His later retention as general counsel to the family business also does not seem relevant to the signing of the February 2012 Testamentary Documents.]

decisions." Mr. Slane was not present at the execution, but he testified that, based on his interactions with Mr. Barringer in close proximity to the execution, he had no concerns about Mr. Barringer's capacity or being unduly influenced.

Although counsel at the hearing stated that Merrill Light "admitted she was involved in her father's estate planning" and that she was present at the execution of the documents, Plaintiff has presented no testimony or documentary evidence from Mrs. Light admitting she was involved with the February 2012 Testamentary Documents or that she was present at the execution of the documents. To the contrary, Mr. Slane testified that, although Mrs. Light drove her father to one estate planning meeting on February 23, 2012, she "played no role" in the meeting. Further, Mrs. Light signed the amended trust document as the co-trustee on March 2, 2012, indicating she was not in attendance when her parents signed the amended will and trust on February 28.

In 2011, Paul Barringer suffered from prostate cancer and had radioactive seeds implanted in his prostate. That procedure caused multiple issues for Mr. Barringer, including frequent urinary tract infections and increased frequency of urination. He visited with his treating physician, Dr. Paul Long, on a frequent basis. Dr. Long's testimony and medical records from 2011 through February 28, 2012, show:

a. Mr. Barringer first complained of cognitive issues on November 23, 2011.

b. Dr. Long referred Mr. Barringer to the Mind Center which gave Mr. Barringer a test that was a "predictor" of future significant dementia, and it gave a 60% chance that the patient might have significant dementia in the future. The test said nothing about his current abilities.

c. Dr. Long also referred Mr. Barringer to Dr. William Garrett, a neurologist. In a December 27, 2011, letter to Dr. Long, Dr. Garrett stated that Mr. Barringer had some difficulty with abstract reasoning but he did not believe that Mr. Barringer had Alzheimer's Disease or significant dementia. Dr. Garrett wrote in a letter to Dr. Long that Mr. Barringer had "excellently preserved short-term memory and visual spatial difficulty, which would make the diagnosis of a primary degenerative dementia unlikely."

d. On January 3, 2012, Mr. Barringer self-complained to Dr. Long of "short term memory loss." Dr. Long gave Mr. Barringer the Mini Mental Status Exam ("Mini Mental") on that date, and Mr. Barringer had a perfect score, 30 out of 30. Dr. Long testified that he was not worried about Mr. Barringer's cognition at that time.

e. Mr. Barringer visited Dr. Long again on January 16, 2012. Dr. Long testified that on this visit, Mr. Barringer's cognition was improved and that Dr. Long agreed with Dr. Garrett's assessment. Dr. Long did not believe Mr. Barringer was suffering from Alzheimer's disease as of this date.

f. On February 16 and 27, 2012, Mr. Barringer visited Dr. Long complaining about urinary issues. Dr. Long noted on the February 27 visit, just one day before Mr. Barringer signed the February 2012 Testamentary Documents, "he has dementia but it is mild according to the test we give." The record of that visit makes no other reference to Mr. Barringer experiencing any cognitive impairment.

Plaintiff's evidence included these and other medical records, as well as various medical records relating to Mr. Barringer's condition in the months and years after the relevant date, February 28, 2012.

Plaintiff also submitted evidence from lay witnesses reflecting observations about Mr. Barringer's mental state in the time leading up to execution of the February 2012 Testamentary Documents. The record contains emails sent by Mrs. Light's late husband Randy Light and by Tom Evans, a CFRC employee, in February of 2011, September of 2011, and January of 2012, in which the author expressed concern that Mr. Barringer was "confused and not himself," was "experiencing different health issues that affect his judgment regarding everyday decisions personally and business wise," and was exhibiting "irrational behavior." More specifically, Plaintiff referenced an email from Mr. Light on January 3, 2012, in which Mr. Light stated Mrs. Light "is concerned that PBB is starting to show more Irrational [sic] behavior on certain family issues which is disturbing to all siblings. A close friend of hers had a similar situation with her older parents and before power of attorney could be transferred they were declared unsound and the State took took [sic] control which was devastating." Notably, as noted above, Mr. Barringer achieved a perfect score on a Mini Mental examination administered by Dr. Long on that same day.

Plaintiff stated in her affidavit that Mr. Barringer "began having speech and processing problems, and he became unusually quiet, beginning in 2011." She testified that at Christmas in 2011, Mr. Barringer "was having trouble with his memory and he was having trouble speaking." She also testified that he exhibited "erratic behavior."

Plaintiffs also submitted an affidavit of Mr. Luzak, which largely overlaps with her own sworn statement. In pertinent part, as summarized in Plaintiff's brief, Mr. Luzak testified in his affidavit that:

> starting in early 2011, Mr. Barringer needed help with numbers and that his memory started to deteriorate, while his behavior became erratic; that Mr. Barringer had difficulty following the bidding at an auction in February 2012; that Mr. Barringer had trouble communicating and forming words at a family meeting on February 18, 2012.

Mr. Luzak further stated in his affidavit that Mr. Barringer was "completely confused and incoherent and had tremendous difficulty speaking" at a board of directors meeting in February 2018. Mr. Luzak also repeated nearly verbatim testimony in Mrs. Luzak's affidavit that following the February 2012 board of directors meeting, Mr. Barringer "made completely unfounded accusations that [Mr. Luzak] was trying in effect to steal the company." Neither of the Luzak affidavits, however, places any statement to this effect in February 2012 or otherwise relates the timing of that statement to the execution of the Testamentary Documents on February 28, 2012. Further, Mr. Luzak testified in his affidavit that as of May 2012, Mr. Barringer's "relationship with Hampton Luzak and with me was on good terms as it had always been." Neither Mr. nor Mrs. Luzak provides a specific example of Mr. Barringer falsely believing Mr. Luzak was stealing from him before spring 2012 at the earliest.

Neither Plaintiff nor her husband were present when Mr. Barringer executed his estate planning documents on February 28, 2012. Plaintiff testified that she is unaware of any evidence of lack of testamentary capacity at the time of the execution or around that time. At her deposition, Plaintiff testified that she "did not know" of any wrongdoing by any Defendants prior to February of 2012.

The remaining evidence referenced by Plaintiff in her argument was months to years after the execution on February 28, 2012, and not relevant to the issues presently before the Court.

## I. TESTAMENTARY CAPACITY (SEVENTH CAUSE OF ACTION)

"The party alleging incompetence bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence." *In re Thames,* 344 S.C. 564, 572, 544 S.E.2d 854, 858 (Ct. App. 2001).

"The test of whether a testator had the capacity to make a will is whether he knew (1) his estate, (2) the objects of his affections, and (3) to whom he wished to give his property." *Hairston v. McMillan,* 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010). "The legal test for determining whether or not a person has sufficient mental capacity to dispose of his property by will does not include the proviso that he must have a reasonable basis on which to found his like or dislike of the natural objects of his bounty . . . . Further, the capacity to know or understand, rather than the actual knowledge or understanding, is sufficient." *In re Estate of Weeks,* 329 S.C. 251, 263, 495 S.E.2d 454, 461 (Ct. App. 1997).

Plaintiff has failed to present evidence sufficient to create a genuine issue of material fact on any of the three elements of testamentary capacity as to the February 2012 Testamentary Documents. Specifically, none of the documents or testimony before the Court creates a dispute over whether Mr. Barringer had the capacity to understand his estate, the objects of his affection or to whom he wished to leave his property at the time that he executed the Testamentary Documents on February 28, 2012. In fact, Plaintiff presented no witness to testify that Mr. Barringer did not have the capacity to meet these elements on that date. Not even Plaintiff or her husband's affidavits state that Mr. Barringer's cognitive condition was such that he did not know (1) his estate, (2) the objects of his affections, and (3) to whom he wished to give his property on February 28, 2012.

The Court has carefully considered the circumstantial evidence put forth by Plaintiff, but at most, Plaintiff has painted the picture of an elderly person who in the several months preceding execution of the Testamentary Documents sought medical attention as a result of having some memory problems and confusion. The treating physicians have testified that in this time frame Mr. Barringer did not have "any significant dementia," he had not been diagnosed

with Alzheimer's Disease, and in his most recent Mini Mental examination, he scored a perfect 30.[3] On the day before he executed the Testamentary Documents, Mr. Barringer visited his doctor who noted only "mild" dementia. This is simply not sufficient evidence that Mr. Barringer was incapable of understanding his assets, his beneficiaries or to whom he wished to leave his estate. Accordingly, this evidence is insufficient to create a genuine issue of material fact as to the claim the Mr. Barringer lacked testamentary capacity at the time of the execution of the February 2012 Testamentary Documents.

Instead of addressing the three requirements to show the absence of testamentary capacity, Plaintiff instead argues that Mr. Barringer was "chronically incapacitated" beginning in 2011 in general. Plaintiff's reliance on *Gaddy v. Douglass*, 359 S.C. 329, 597 S.E.2d 12 (Ct. App. 2004), is misplaced. That case involved contractual capacity and not testamentary capacity of an elderly woman whose treating physician said she had the mind of a five to six year old. Importantly, in *Gaddy*, the Court pointed out in Footnote 12 that:

> We in no way suggest that all people suffering some degree of dementia, from Alzheimer's disease or otherwise, invariably lack contractual capacity. We hold that the subject of contractual capacity of one suffering dementia should be decided in a fact-driven, individualized manner. There may well be situations where an individual at the onset of Alzheimer's disease, or in the early stages of dementia, may retain sufficient capacity to contract. This, however, is not such a case, for Ms. M's capacity to contract had long since passed when her previously absent family members entered her life and attempted to gain control of her assets.

*Id.* at 346, 597 S.E.2d at 21 n.12. The undisputed evidence in this record, even when viewed in the light most favorable to Plaintiff, shows that in the time leading up to and including February 28, 2012, Mr. Barringer experienced some intermittent short-term memory issues, some

[3] Plaintiff argues that Mr. Barringer achieved very low scores on the Mini Mental exam at times, including a four, a twenty-four, and even a zero. But all of these scores were months or even years after the date in question and only tend to prove that Mr. Barringer did not have chronic incapacity in February 2012, which was shortly after he scored a perfect 30.

confusion, some difficulty formulating words, and unspecified "irrational" behavior. Plaintiff's counsel argued at the hearing that "[i]f you can't remember what you do short-term, you can't know what you're doing when you are signing a will. You don't have the capacity to understand what the will does." These arguments and opinions of counsel, however, are not admissible evidence and no fact or expert witness testimony to this effect has been proffered. None of Mr. Barringer's treating physicians or others testified that his short-term memory was as advanced at this point as Plaintiff's counsel suggests. The record simply does not support a finding that as of February 28, 2012, Mr. Barringer was experiencing anything like the "chronic incapacity" at issue in the *Gaddy* decision. Further, the statements relied on by Plaintiff are not connected to Mr. Barringer's condition on the date of execution of the documents. No witness or document is in the record to indicate that Mr. Barringer was not aware of what he was signing on February 28, 2012, or that his short-term memory issues prevented him from understanding the three key elements required for capacity.

Plaintiff has failed to submit any evidence in opposition to this motion for summary judgment to indicate that Mr. Barringer did not know who his children were, that he did not know what his assets were, or that he did not know to whom he wanted to leave his assets. Accordingly, Plaintiff has failed to create a genuine issue of material fact as to whether Mr. Barringer lacked Testamentary Capacity on February 28, 2012. As a result, Defendants are entitled to summary judgment as a matter of law as to the Seventh Cause of Action as it applies to the February 2012 Testamentary Documents.

## II. UNDUE INFLUENCE (EIGHTH CAUSE OF ACTION)

Plaintiff admits that she has no direct evidence of undue influence of Paul Barringer at the time of his execution of the Testamentary Documents. Instead, she argues that she has sufficient circumstantial evidence to prove undue influence.

In *Byrd v. Byrd*, 279 S.C. 425, 308 S.E.2d 788 (1983), the Supreme Court discussed the sufficiency of evidence needed to submit an undue influence claim to a jury and held that "the circumstances must point unmistakenly and convincingly to the fact that the mind of the testator was subject to that of some other person so the will is that of the latter and not of the former." *Id.* at 427, 308 S.E.2d at 789. [4] Further, under South Carolina law:

> Undue influence, the influence necessary to void a will, "must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act . . .."

*Calhoun v. Calhoun, 277 S.C. 527, 532, 290 S.E.2d 415, 418 (1982)* (quoting *Floyd v. Floyd*, 3 Strob. 44, 34 S.C.L. 23 (1848)). "A mere showing of opportunity and even of a motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized. It is not unlawful for a person, by honest intercessions and modest persuasions, to procure a will to be made in his behalf." *Id.* at 531, 290 S.E.2d at 418 (citations omitted).

Plaintiff argues the burden of proof on undue influence is on the proponents of the February 2012 Testamentary Documents because Mrs. Light owed fiduciary duties to her father.

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[4] In that case, the evidence showed that the alleged undue influencer son had threatened the testator father with placement in a nursing home if the testator father did not do what the influencer son wanted him to do, that the undue influencer restricted the testator from talking to the influencer's brothers and sisters, and that the undue influencer was "calming down" the testator by giving him Valium. In addition, the influencer told his sister, when she volunteered to stay with the testator, that the influencer son had already gotten the testator to change his will and he could hire nurses to look out for the testator father, which was evidence that the alleged undue influencer son had made himself the chief beneficiary of the will executed by the testator.

Plaintiff maintains Mrs. Light owed her father fiduciary duties because she was Mr. Barringer's daughter in whom he reposed trust and confidence, because she was on the board of directors of the family corporation in which Mr. Barringer was a shareholder, and because they were partners in a partnership. The Court makes no determination based upon the current record of whether Mrs. Light owed her father a fiduciary duty on February 28, 2012, but will nonetheless apply the burden-shifting that would be required if Mrs. Light was a fiduciary.

When the proponent of a will owes fiduciary duties to the testator, the proponent must offer evidence to rebut a presumption of undue influence, but the proponent of the will is not required to affirmatively disprove undue influence, and the contestant of the will retains the ultimate burden of proof. *Swiger by & through DeHaven v. Smith*, 426 S.C. 408, 418, 827 S.E.2d 200, 205 (Ct. App. 2019). As outlined above, the medical evidence from Dr. Long and Dr. Garrett indicates that although Mr. Barringer had some signs of dementia at this time, he scored a perfect score on the Mini Mental exam and did not demonstrate the type of vulnerability to undue influence that might exist in other cases, such as *Gaddy*. Mr. Barringer was represented by Mr. Jolley, who drafted the February 2012 Testamentary Documents in consultation with Mr. Barringer and his wife over several months. Mr. Slane, an insurance adviser, was also very involved in the preparation of the February 2012 Testamentary Documents. Mr. Jolley, Mr. Slane and a paralegal all testified that they had no concerns about undue influence being exercised over Mr. Barringer in the weeks leading up to, or on the day of, the execution of the February 2012 Testamentary Documents. Mrs. Light was not present when the February 2012 Testamentary Documents were executed and, according to Mr. Slane, she played no role in a meeting between Mr. Barringer, Mr. Jolley and Mr. Slane, although she may have driven her father to that meeting. Further, no record evidence indicates that Mrs. Light used any authority as

a fiduciary to facilitate or influence the preparation or execution of the Testamentary Documents. This evidence is even more compelling than the proof the court in *Swiger* found "sufficient . . . to rebut any presumption of undue influence created by the existence of these fiduciary relationships." *Id*. at 421, 827 S.E.2d at 207.

Accordingly, Plaintiff has the burden to establish convincingly and unmistakably that Mr. Barringer's mind was overtaken by his daughter Mrs. Light when he executed the Testamentary Documents on February 28, 2012. Further, "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.' " *Swiger*, 426 S.C. at 417, 827 S.E.2d at 204 (citations omitted). In *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003), the South Carolina Supreme Court affirmed the granting of summary judgment finding insufficient evidence to establish a genuine issue of material fact supporting a claim for undue influence. That court held that "when opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is metaphysical doubt as to the material fact but must come forward with 'specific facts showing that there is a genuine issue for trial . . . . A judgment for Appellants was not reasonably possible under the facts presented when measured against the level of unmistakable and convincing proof." *Id.* at 220, 578 S.E.2d at 335.

As in the *Russell* and *Swiger* cases, Plaintiff fails to meet her summary judgment burden. Here, at the outset, it is undisputed that the February 2012 Testamentary Documents did not change the beneficiary of Mr. Barringer's estate. His wife remained the sole beneficiary with a power of appointment and Mrs. Light, the alleged perpetrator of undue influence, gained no additional inheritance from these amendments. Although Mr. Barringer, in his previous will and trust, had named his son Victor as his first successor trustee, he changed that designation in the

February 2012 Testamentary Documents and named Mrs. Light as a co-trustee. It is undisputed that this change was on the advice of Mr. Slane and Mr. Jolley. Plaintiff has provided the Court with no evidence that Mrs. Light unduly influenced -- or even attempted to influence -- her father in any way to name her as co-trustee, or that she even wanted to be in that position. Rather, testimony in the record from Mr. Jolley and Mr. Slane indicates that Mr. Barringer chose Mrs. Light, his oldest daughter, because she lived near him and was available if he needed anything. Last, although Plaintiff argues that Mrs. Light's now deceased husband Randy Light "was desperate for money" as a result of his own failed business ventures, Plaintiff fails to raise an inference beyond mere speculation that Mr. Light's financial difficulties had any effect on Mrs. Light's conduct, or that by becoming co-trustee she could have done, or did do, anything to assist her husband in his financial affairs. In short, the record is devoid of evidence indicating Mrs. Light had a motive or intention to influence her father into executing the February 2012 Testamentary Documents at all, much less through improper means.

Due to her residing in Hilton Head, Mrs. Light appears to have had the opportunity to have more access to her father at this time, but " 'a mere showing of opportunity or motive does not create an issue of fact regarding undue influence.' " *Swiger* , 426 S.C. at 417, 827 S.E.2d at 204 (Quoting *In re Estate of Cumbee*, 333 S.C. 664, 671, 511 S.E.2d 390, 394 (Ct. App. 1999)). Here, Plaintiff has presented no facts showing threats, coercion, isolation, or even general influence bearing upon the February 2012 Testamentary Documents. Rather, Plaintiff herself testified under oath that she had no knowledge of any wrong that occurred prior to February of 2012.

Instead of addressing facts showing that some act of undue influence was brought to bear upon Mr. Barringer in the weeks leading up to, and at the actual time that he executed the

February 2012 Testamentary Documents, Plaintiff points to a number of actions which occurred after February 28, 2012, and which Plaintiff submits showed undue influence by Mrs. Light. The Court need not recount the documents and testimony relating to the alleged deterioration of Mr. Barringer's cognitive functioning after February 28, 2012, as none of that evidence is relevant to his condition when he executed the February 2012 Testamentary Document. Indeed, Plaintiff's excessive reliance on evidence from later time periods only underscores the absence of proof needed to meet her burden as to the February 2012 Testamentary Documents. Of course, the Court will continue to carefully consider the arguments and proof on both sides of this case, and nothing in this Order will preclude Plaintiff from having every opportunity to meet her burden of proving Mr. Barringer lacked testamentary capacity and/or that he was unduly influenced when he executed other documents after February 28, 2012.

Plaintiff, however, has failed to create a genuine issue of material fact as to the motion before the Court, and Defendant Merrill Light is entitled to summary judgment as to the Eighth Cause of Action as to the claim for undue influence about the February 28, 2012, Testamentary Documents.

## III. MISTAKE (NINTH CAUSE OF ACTION)

Plaintiff's Ninth Cause of Action alleges that certain testamentary documents, including those executed by Mr. Barringer on February 28, 2012, are invalid due to mistake. Although Plaintiff stated that she would explain what constituted the alleged mistake in her legal memorandum, she never did. The only "mistake" that she argued was that Mr. Barringer did not intend to sign the February 2012 Testamentary Documents. Plaintiff did not present any evidence in support of this contention and did not even explain what Mr. Barringer supposedly intended to otherwise do in these documents. Plaintiff's only complaint is that Defendant Merrill

Light was named as co-trustee. There is no evidence that Mr. Barringer did not want to name Mrs. Light as his co-trustee. In fact, he named Plaintiff as Mrs. Light's successor co-trustee.

*Hanahan v. Simpson*, 326 S.C. 140, 148, 485 S.E.2d 903, 907 (1997), discussed "mistake" under South Carolina law:

> It is the general rule that the validity of a will is not affected by a mistake of either law or fact unless a mistake goes to the identity of the instrument or to fundamental error, as where, for example, two wills are drafted for different persons and one party signs that intended for another . . .. Where a testator is mistaken as to the contents of his will, the will may be invalidated in part . . .. The contestant has the burden of proof as to any alleged invalidity once due execution of the challenged will is proved.

Plaintiff has failed to create a genuine issue of material fact, and Defendant Merrill Light is entitled to summary judgment as to the Ninth Cause of Action as to Plaintiff's claim for invalidity due to mistake as to the February 28, 2012 Testamentary Documents.

IT IS, THEREFORE, ORDERED that Defendant Merrill Light's Motion for Summary Judgment as to the validity of the February 28, 2012 Will and First Amendment to the Revocable Trust of Paul Barringer, II, is hereby granted.

AND IT IS SO ORDERED.

The Honorable Bentley Price
Presiding Judge

Beaufort Common Pleas

**Case Caption:** Hampton B Luzak VS Merrill B Light , defendant, et al

**Case Number:** 2016CP0701919

**Type:** Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766