THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Bentley Price, Circuit Court Judge

Appellate Case No. 2021-000837
Circuit Court Case Nos.: 2016-CP-07-01919, 2019-CP-07-01253 and 2019-CP-07-01294

In Re: IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton B. Luzak .....Appellant

vs.

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 .....Respondents

--and--

Coastal Forest Resources Company ("CFRC") .....Intervenor/Respondent

--and--

Hampton B. Luzak .....Appellant

vs.

Merrill U. Barringer .....Respondent

RESPONDENTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. **Did the circuit court properly grant summary judgment to Respondents on Luzak's claims that the February 28, 2012 revocable trust amendment executed by Paul Barringer was invalid where Luzak failed to identify any evidence that Mr. Barringer lacked capacity, was under undue influence or was mistaken?**

II. **Did the trial court's order granting summary judgment on Luzak's Contract-Based Claims render her appeal of the Bifurcation Order moot?**

III. **Should the Court decline to review the Bifurcation Order where the Court dismissed Luzak's prior appeal of the Bifurcation Order because the Order is not immediately appealable and where the Order is not closely related to the other orders properly on appeal?**

IV. **Did the trial court properly exercise its discretion in bifurcating Luzak's Contract-Based Claims because they present discrete issues that are factually and legally separate and distinct from her remaining claims?**

INTRODUCTION

In this appeal, Appellant Hampton Luzak ("Luzak") challenges three orders from the trial court, each of which should be affirmed: (1) an Order granting summary judgment on Luzak's claims that a February 28, 2012 revocable trust amendment executed by her father, Paul B. Barringer ("Mr. Barringer") was invalid (the "Summary Judgment Order"); (2) an Order bifurcating certain unrelated claims for an initial trial (the "Bifurcation Order"); and (3) an Order granting Coastal Forest Resource Company's ("CFRC") motion to intervene and striking certain claims and categories of damages that are derivative (the "Derivative Damages Order"). This brief asks the Court to affirm the Summary Judgment Order and the Bifurcation Order. CFRC has filed a separate brief asking the Court to affirm the Derivative Damages Order, and Respondents join and incorporate that brief herein by reference.

Two key events gave rise to the issues addressed in this brief. First, in 1998, Mr. Barringer executed a will and the Paul B. Barringer, II, Revocable Trust, dated December 4, 1998 ("1998

Trust"), and, at the same time, his wife, Merrill Barringer ("Mrs. Barringer") executed estate planning documents that mirrored those of her husband. Luzak does not seek to set aside Mr. Barringer's 1998 Trust, but she seeks to prevent Mrs. Barringer from exercising a power of appointment, granted to Mrs. Barringer by Mr. Barringer in the 1998 Trust, which empowers Mrs. Barringer to decide how the assets remaining in Mr. Barringer's trust will be distributed to the Barringer children upon Mrs. Barringer's death.[1] To this end, Luzak alleges that when her parents executed their estate plans in 1998, Mrs. Barringer made a contract or promise never to exercise this power of appointment in a manner that would treat the Barringer children unequally.

Second, on February 12, 2012, 13 years after he executed the 1998 Trust, Mr. Barringer executed an updated will and the First Amendment to the 1998 Trust (the "February 2012 Documents"). Luzak seeks to set aside the February 2012 Documents entirely on the basis that Mr. Barringer allegedly lacked testamentary capacity, was under undue influence, and was mistaken when he executed these documents in 2012.

The first section of this brief concerns the Summary Judgment Order, in which the circuit court properly granted summary judgment on Luzak's claims to set aside the February 2012 Documents. The Summary Judgment Order should be affirmed because no evidence in the record supports Luzak's claims that Mr. Barringer lacked testamentary capacity, was under undue influence, and was mistaken when he executed the February 2012 Documents.

The second section of this brief addresses the Bifurcation Order in which the trial court severed and set for an initial, separate trial the two claims in which Luzak seeks to enforce the

[1] A testamentary power of appointment is commonly included in estate planning documents to authorize the holder of the power (Mrs. Barringer) to "appoint" assets in the grantor's (Mr. Barringer's) estate at the time of the holder's death.

secret contract or promise that Mrs. Barringer allegedly made with Mr. Barringer never to exercise her power of appointment ("the Contract-Based Claims").[2] The two Contract-Based Claims have nothing to do with Luzak's claims that her father lacked capacity and was under undue influence beginning in 2012. Rather, these claims relate only to the allegation that Mrs. Barringer allegedly promised Mr. Barringer not to do exactly what the 1998 Trust expressly gives her the right to do—namely, exercise the power of appointment. Luzak alleged that this contract or promise was made no later than December 4, 1998—more than 13 years before her father allegedly lacked capacity and was unduly influenced. Because the Contract-Based Claims are legally, factually, and temporally distinct from Luzak's remaining claims, the Bifurcation Order appropriately severed these claims and set an initial trial to determine whether any such secret contract or promise existed.[3]

This is not the first time that Luzak has appealed the Bifurcation Order. Luzak initially appealed the Bifurcation Order in a Notice of Appeal dated February 12, 2021 (App. Case No. 2021-000159, the "First Appeal"). In the First Appeal, Luzak claimed that the Bifurcation Order was immediately appealable under S.C. Code Ann. § 14-3-330(2) because the Order may deprive her of a mode of trial to which she is entitled.[4] This Court found that the Bifurcation Order was not immediately appealable and dismissed the First Appeal.

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[2] Every version of Mr. Barringer's estate planning documents grants a power of appointment to Mrs. Barringer, so it makes no difference, for purposes of the Contract-Based Claims, which version of Mr. Barringer's estate planning documents control.

[3] After entering the Bifurcation Order and setting a trial on the Contract-Based Claims, the trial court granted Mrs. Barringer summary judgment on the Contract-Based Claims because no evidence exists that Mrs. Barringer secretly agreed not to exercise her power of appointment.

[4] S.C. Code Ann. § 14-3-330(2) provides:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

With this current appeal, Luzak seeks to bootstrap appellate review of the Bifurcation Order to her appeals of the Summary Judgment Order and the Derivative Damages Order. The Court should dismiss this second appeal of the Bifurcation Order for the same reasons it dismissed the first one—namely, the Bifurcation Order is not immediately appealable, and Luzak cannot make it immediately appealable by bootstrapping it to her appeal of the unrelated Derivative Damages Order and Summary Judgment Order. In the alternative, Luzak's second appeal of the Bifurcation Order should be dismissed because it is moot. The bifurcated trial never took place and is not scheduled to occur because the trial court granted summary judgment on the claims set to be tried in the initial, bifurcated trial. Finally, if the Court chooses to review the merits of the Bifurcation Order, it should affirm because the circuit court did not abuse its discretion and bifurcation was proper.

STATEMENT OF THE CASE

Mr. Barringer died on May 30, 2016. In August of 2016, Luzak filed the first of four civil lawsuits in Beaufort County. The two 2016 actions are against Mr. Barringer's widow (who is also Luzak's 89-year-old mother), Mrs. Barringer, as personal representative of Mr. Barringer's estate, and against Luzak's sister, Merrill Light, individually and as trustee of Mr. Barringer's revocable trust. These cases have civil action numbers 2016-CP-07-1919 and 2016-CP-07-1961 and are referred to herein as "Barringer I." The two 2019 actions, which name Mrs. Barringer individually as the sole defendant, have civil action numbers 2019-CP-07-01253 and 2019-CP-07-01294 and are referred to herein as "Barringer II."

> (2) an order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

A. Barringer I

In Barringer I, Luzak alleges 19 causes of action against Light.[5] (Am. Compl., Case No. 2016-CP-07-1919, R. pp.__.) Luzak claims that, beginning in 2012, Mr. Barringer lacked the mental capacity to execute various wills, trust amendments and transfers, and that his family members and others unduly influenced him for their own financial gain. (*Id*. ¶ 119, R. p.__.) Specifically, Luzak challenges Mr. Barringer's 2012, 2014, and 2015 estate planning documents, and a 2012 transfer of stock from Mr. Barringer to Light, on incapacity, undue influence, and mistake grounds (the "Incapacity/Undue Influence Claims"). (*Id*. ¶¶ 118-154, R. pp.__.)[6]

Luzak also asserts tort claims against Light, including intentional interference with inheritance, civil conspiracy, breach of fiduciary duty, fraud, and conversion, as well as equitable claims for unjust enrichment (the "Tort-Based Claims"). (*Id*. ¶¶ 155-193, R. pp.__.) These claims also seek to invalidate Mr. Barringer's 2012-2015 estate planning documents, as well as the 2012 transfer of stock from Mr. Barringer to Light, and to recover money damages from Light.[7]

B. Barringer II

In Barringer II, Luzak sued only her mother, Mrs. Barringer. (Compl., Case No. 2019-CP-07-01253 (hereinafter, "Compl."), R. pp.__.) Barringer II's First Cause of Action ("Intentional Interference with Inheritance") and Fifth Cause of Action ("Civil Conspiracy") add Mrs. Barringer

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[5] Merrill Barringer is named in Barringer I only in her capacity as Personal Representative of the Estate, and no direct relief is sought against Merrill Barringer in Barringer I.

[6] In the Seventh Cause of Action in her Amended Complaint, Luzak alleged that "Paul Barringer was mentally incompetent and suffering from Alzheimer's disease and/or other dementia and lacked the requisite mental capacity to make valid amendments to his Revocable Trust" on February 28, 2012. The Eighth Cause of action asserted that this trust amendment was invalid, because Mr. Barringer was under undue influence, and the Ninth Cause of Action asserted that this trust amendment was invalid, because Mr. Barringer was "mistaken."

[7] Luzak also named Randolph Light, Merrill Light's husband, as a Defendant in Barringer I. However, Mr. Light passed away on March 16, 2020, and Luzak never substituted his estate as a party.

as an individual defendant to the Barringer I Tort-Based Claims. (*Id*. ¶¶ 123-133, 147-150, R. pp.__.) These two Barringer II claims raise the same factual allegations and legal claims as Barringer I.

The other two causes of action in Barringer II are Luzak's Contract-Based Claims—namely, her second cause of action ("Constructive Trust and Injunction") and third cause of action ("Enforcement of Contract Not to Revoke and Injunction"). Luzak's Contract-Based Claims—brought for the first time after three years of litigation related to her father's estate—are not based on alleged incapacity of, or undue influence exerted on, Mr. Barringer. Rather, Luzak's Contract-Based Claims are based on the theory that—in or before 1998, long before Mr. Barringer allegedly became mentally incapacitated and/or subject to undue influence in 2012—Mr. Barringer purportedly entered into a contract with Mrs. Barringer in which Mrs. Barringer promised never to exercise the power of appointment that she holds over Mr. Barringer's remaining estate. (*Id*. ¶¶ 134-43, R. pp.__.) With her Contract-Based Claims, Luzak seeks to prevent Mrs. Barringer from executing a new will and exercising her power of appointment to Luzak's detriment based on the allegation that Mrs. Barringer secretly contracted with (or promised) her husband never to change her December 4, 1998 will and exercise the power of appointment, regardless of changed circumstances in the future. Luzak alleges that this contract or promise was made no later than December 4, 1998 (*see* Pl's. Responses to Mrs. Barringer's First Set of Interrogatories, p. 18, R. p.__), and that Mr. Barringer "relied" on the contract or promise when he gave Mrs. Barringer the power of appointment in his December 4, 1998 revocable trust. (Compl. ¶ 138, R. p. __.) The relief that Luzak requests in the Contract-Based Claims is an injunction prohibiting Mrs. Barringer from executing a new will and exercising her power of appointment, and a constructive trust for the Luzak's benefit in accordance with the terms of the alleged contract. (*Id*. ¶¶ 140, 143, R. p.__.)

C. The Bifurcation Order

On October 23, 2020, Respondents filed a Joint Motion to Bifurcate Trial, pursuant to Rule 42, SCRCP, in which Respondents requested that the Court first conduct a narrow trial on Luzak's factually and legally distinct Contract-Based Claims, and subsequently try the remaining causes of action in the consolidated actions. (Mot. to Bifurcate, R. pp.__.) Respondents argued that Luzak's Contract-Based Claims present a discrete, threshold issue whether Mrs. Barringer made an enforceable contract not to change her 1998 will and Revocable Trust. (R. pp.___.) Respondents argued that the evidence and legal issues to be decided in this initial trial would be distinct from that for the remaining claims related to the transactions between 2012 and Mr. Barringer's death in 2016. (R. pp.___.) Respondents further argued that the proof required to determine the Contract-Based Claims is relatively simple when compared to the evidence that would be required to try all of Luzak's twenty-plus claims, and that the evidence in the two trials would not overlap. (R. pp.___.) Respondents also argued that a judgment in their favor in the initial trial could potentially obviate the need for a trial on Luzak's remaining claims, and that trying the Contract-Based Claims first would promote efficiency and judicial economy and would prejudice no one. (R. pp.___.)

On December 30, 2020, circuit court granted Respondents' motion to bifurcate in the Bifurcation Order. The circuit court stated that, "[i]n accordance with SCRCP Rule 42(b), this Court has determined that a separate trial of the Second and Third Causes of Action set forth in [Barringer II], shall proceed first and prior to any separate and subsequent trial(s) of the remaining causes of action alleged in [Barringer I and Barringer II]." (Bifurcation Order, R. pp.___.)

After the circuit court denied Luzak's motion for reconsideration of the Bifurcation Order, Luzak commenced the First Appeal. Luzak's sole ground for appeal was that, by requiring that the Contract-Based Claims, which are equitable causes of action, be tried before her legal claims, the

Bifurcation Order "may" deprive her of her right to a jury trial on unspecified factual issues that Luzak alleges are common to the Contract-Based Claims and the remaining claims. (R. pp.___.) After requesting and receiving briefing on whether the Bifurcation Order was immediately appealable, this Court dismissed the First Appeal on May 4, 2021. (R. pp.___.) Luzak filed a Petition for Writ of Certiorari, which has been fully briefed and remains pending before the Supreme Court.[8]

D. The Summary Judgment Order

On May 14, 2021, Merrill Light filed a motion for summary judgement on the Incapacity/Undue Influence Claims as to the February 2012 Documents. (Light Mot. Summ. J., R. pp. __.) The circuit court held a hearing on this and other motions on May 27, 2021. On July 6, 2021, the circuit court granted Light summary judgment on the Capacity/Undue Influence Claims as to the February 2012 Documents (Summary Judgment Order, R. pp. __.) The circuit court found that Mr. Barringer executed the February 2012 Documents on the advice of, and in the presence of, his estate planning lawyer, who testified that he had no concerns about Mr. Barringer's mental capacity. (R. p. __.) The court also found that the February 2012 Documents did not change the beneficiary of Mr. Barringer's estate, but instead merely made Light co-trustee of Mr. Barringer's revocable trust, and that there was no evidence that Light influenced this decision, or that she even wanted to become co-trustee. (R. p. __.) The court found no evidence in the record that Mr. Barringer lacked testamentary capacity or was unduly influenced or mistaken. (R. p. __.)

[8] On June 14, 2021, before the initial trial on the Contract-Based Claims, which was scheduled to begin on August 30, 2021, Mrs. Barringer filed a motion for partial summary judgment on the Contract-Based Claims. (6/07/2021 Order, R. pp.___.) On August 20, 2021, the court issued an Order granting Mrs. Barringer's motion. (Order dated August 20, 2021, R. pp.__.) On November 8, 2021, Luzak appealed this Order. (App. Case No. 2021-001337 the "Third Appeal"). The Third Appeal is currently in the briefing stage.

Accordingly, the court concluded "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." (Summary Judgment Order, R. pp. __.) The circuit court denied Luzak's motion to reconsider the Summary Judgment Order on August 4, 2021. (R. pp. __.) This appeal followed.

STANDARD OF REVIEW

A. Summary Judgment Order

An appellate court reviews the grant of a summary judgment motion under the same standard applied by the circuit court. *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 270, 826 S.E.2d 609, 614 (2019). Under Rule 56(c), a motion for summary judgment shall be granted "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 a judgment as a matter of law." Rule 56(c), SCRCP. The Court must view the facts in the light most favorable to the non-moving party. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

A plaintiff faces a heightened burden in opposing a defendant's motion for summary judgment, however, where, as here, the motion seeks summary judgment on claims for which the plaintiff would have a heightened burden of proof at trial. *See id.*, 345 S.C. at 452-54, 548 S.E.2d at 874-75; *see also Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009). The reason for this rule is that, when deciding a motion for summary judgment, the court must determine whether the trier of fact reasonably may resolve the dispute in favor of either party and this analysis "necessarily implicates the substantive evidentiary standard of proof that

would apply at the trial on the merits." *George*, 345 S.C. at 452-54, 548, S.E.2d at 874-75. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

The summary judgment standard applicable to Luzak's undue influence claim seeking to invalidate the February 2012 Documents is heightened. "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." *Swiger by & through DeHaven v. Smith*, 426 S.C. 408, 415, 827 S.E.2d 200, 203 (Ct. App. 2019). Thus, Luzak's appeal of summary judgment on her undue influence claim is not subject to the "mere scintilla of evidence" standard. Rather, the circuit court's Order granting summary judgment on the undue influence claim as to the February 2012 Documents should be affirmed, unless this Court determines that Luzak has presented unmistakable and convincing evidence in support of that claim. Nonetheless, Luzak has not identified any evidence, not even a scintilla.

B. The Bifurcation Order

The Court reviews an order granting bifurcation for abuse of discretion. *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED MERRILL LIGHT SUMMARY JUDGMENT ON LUZAK'S CLAIM THAT THE FEBRUARY 2012 DOCUMENTS WERE INVALID.

The trial court properly granted summary judgment because there is no evidence that Mr. Barringer lacked testamentary capacity or was under undue influence or mistaken when he executed the February 2012 Documents.

A. Luzak failed to create a genuine issue of material fact that Mr. Barringer lacked capacity to execute the February 2012 Documents.

1. Standard for Testamentary Capacity

Testamentary capacity requires only that the testator know: (1) his estate; (2) the objects of his affection; and (3) the persons to whom he wished to give his property. *Matheson v. Matheson*, 125 S.C. 165, 118 S.E. 312, 313 (1923) ("In making a will, if the testator had capacity enough to know his estate, the object of his affections, and to whom he wished to give it, that would be enough."); *In re Estate of Weeks*, 329 S.C. 251, 263, 495 S.E.2d 454, 461 (Ct. App. 1997). "[T]he *capacity to know* or understand, rather than the actual knowledge or understanding, is sufficient." *Id*. (quoting 94 C.J.S. Wills § 15(c) (1956)) (emphasis added). The capacity required to create, amend or revoke a revocable trust is the same as for a will. S.C. Code Ann. § 62-7-601 (2019).

The degree of capacity necessary for the execution of a will is less than that needed for the execution of a contract. *Weeks*, 329 S.C. at 264, 495 S.E.2d at 461 (*citing McCollum v. Banks*, 213 S.C. 476, 50 S.E.2d 199 (1948)) ("The rule generally adopted is that a lower degree of capacity than is necessary for the execution of a deed or contract will suffice for the making of a will."). Moreover, this Court has made clear that a decline in mental faculties, typical of aging, is insufficient standing alone to invalidate a will for lack of capacity. As the Court explained in *Weeks*:

> Not every weakness incident to the ravages of age unfits a person for making a will. So, an aged person is not incapacitated by failing or defective memory, or partial loss of memory, absent-mindedness, nervousness, failure to recognize old friends, relatives, or members of the testator's family, inability to recognize acquaintances, a liking for dwelling on happenings of the past, pain and suffering, vacillating judgment, childishness, untidy habits, slovenliness or untidyness [sic] in dress, eccentricities or peculiarities, as in habit or speech, even though they may indicate a failing mentality, or even delusions or hallucinations if they do not affect the execution of the will . . ..

Id. at 265, 495 S.E.2d at 462 (quoting 94 C.J.S. Wills § 20 (1956)). "Indeed, even an insane person may execute a will if it is done during a sane interval, and a prior determination of insanity is not conclusive." *Id*. at 264, 495 S.E.2d at 461.

The reasonableness of the testator's decisions plays no part in the test for testamentary capacity. *Weeks*, 329 S.C. at 263, 495 S.E.2d at 461 ("[T]he legal test for determining whether or not a person has sufficient mental capacity to dispose of her property by will does not include the proviso that she must have a reasonable basis on which to found her like or dislike of the natural objects of her bounty.") A testator may make an unjust or unreasonable distribution of his estate if he wishes and may discriminate against and exclude members of his own family who normally might be objects of his affection. *In re Last Will and Testament of Smoak*, 286 S.C. 419, 425, 334 S.E.2d 806, 810 (1985). A disposition of property will not be avoided on that ground alone. *Id.*; *see also Calhoun v. Calhoun*, 277 S.C. 527, 531, 290 S.E.2d 415, 418 (1982).

Luzak argues that the applicable standard for testamentary capacity is higher than that articulated in the case law. She argues the testator must be able to understand "the disposition that he or she is making of [] property, and must also be capable of [] relating these elements one to another and forming an orderly desire regarding the disposition of the property." (App. Br. p. 47) (quoting Restatement (Third) of Property: Wills and Other Donative Transfers ¶ 8.1(b)). No South Carolina decision has adopted the test cited by Luzak, and the quoted language appears in no South Carolina reported decision. In South Carolina, testamentary capacity requires nothing more than that the "testator knew his estate, the objects of his affections and to whom he wished to give his property." *Hembree v. Est. of Hembree*, 311 S.C. 192, 195, 428 S.E.2d 3, 4 (Ct. App. 1993) (rejecting plaintiff's claim that the testator lacked sufficient capacity to understand the full extent of his estate and the complex distribution scheme contained in the will). As this Court has

explained, the "[a]bility to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will." *Hairston v. McMillan*, 387 S.C. 439, 446, 692 S.E.2d 549, 552 (Ct. App. 2010) (citations omitted).[9]

Luzak also argues that "[m]erely having the ability to know one's property and the objects of one's bounty is not sufficient" and that the testator must have actual knowledge "that he or she is making a Will, what it does (including its legal significance), and how it operates." (App. Br. p. 47). But South Carolina law requires no proof of actual knowledge. As this Court has emphasized, the mere *ability* to know one's property and the objects of one's bounty is sufficient to establish testamentary capacity. *Weeks*, 329 S.C. at 264, 495 S.E.2d at 461 ("[T]he *capacity to know* or understand, rather than the actual knowledge or understanding, is sufficient.") (emphasis added).

2. Burden of Proof for a Challenge to Testamentary Capacity

The contestant of a will "bears the burden of proving incapacity ***at the time of the transaction*** by a preponderance of the evidence." *Hairston*, 387 S.C. at 445-47, 692 S.E.2d at 553 (emphasis added). Luzak therefore bears the burden to prove that Mr. Barringer lacked testamentary capacity when he executed the February 2012 Documents on February 28, 2012. *See id*.

i. Fiduciary Relationship

Seeking to shift her burden of proof, Luzak argues that Merrill Light was in a fiduciary relationship with Mr. Barringer as of February 28, 2012, and that "places a presumption against

[9] There is no evidence Mr. Barringer lacked testamentary capacity even under the incorrect standard that Luzak asks the Court to apply.

the validity of a revocable instrument . . . and requires the proponent of a revocable instrument to rebut the presumption." (Luzak. Br. at 45.) But this presumption exists only for claims of undue influence, not lack of capacity. *Swiger v. Smith*, 426 S.C. 408, 418, 827 S.E.2d 200, 205 (Ct. App. 2019) ("The existence of a fiduciary relationship between a testator and beneficiary raises a presumption of *undue influence*. If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence.") (emphasis added).

For testamentary capacity, "the presumption arises upon proof of due execution of the will that the testator knew its contents and this is sufficient to establish testator knowledge thereof." *Hembree*, 311 S.C. at 195, 428 S.E.2d at 4. In other words, the law presumes from a duly executed will that the testator had capacity. *Id*. Because the February 2012 Documents were duly executed—Luzak does not contend otherwise—the law presumes that Mr. Barringer had capacity to execute them. *Id*. Thus, the burden remains with Luzak to prove that he lacked capacity when he executed the documents. *Hairston*, 387 S.C. at 445-47, 692 S.E.2d at 553.

ii. Chronic Incapacity

Because Luzak has no evidence that Mr. Barringer lacked testamentary capacity when he executed the February 2012 Documents, she relies largely on evidence from ***after*** February 28, 2012. Luzak argues that the law allows her to use such evidence to prove incapacity at the time of execution. (App. Br. 48, n. 48) ("The law allows evidence, including circumstantial evidence, both before and after the time of execution, to determine whether the testator had capacity at the time of execution.") But the cases Luzak cites for this principle do not support her position. Both cases involved *contractual* capacity, not testamentary capacity. *Gaddy v. Douglass*, 359 S.C. 329, 345, 597 S.E.2d 12, 20 (Ct. App. 2004) (analyzing evidence of contractual capacity and declining to address testamentary capacity because plaintiff failed to plead a challenge to testamentary

capacity); *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) ("The parties agree that the relevant standard for capacity is a contractual standard.") Because the capacity required to make a contract in South Carolina is different (and higher) than the capacity required to make a will, *Gaddy* and *Macaulay* are inapposite.

Moreover, this Court in *Gaddy* held that evidence of a person's condition before or after execution is probative only where the mental condition is established as a chronic condition by competent medical testimony. *Gaddy*, 359 S.C. at 345, 597 S.E.2d 20. In *Gaddy*, a neurologist and expert in the field of dementia diagnosed the allegedly incapacitated person ("Ms. M") with "senile dementia of the Alzheimer's type," and concluded that she lacked the ability to handle her financial affairs, *three years before* Ms. M executed the subject documents. *Id.* at 337, 597 S.E.2d at 16. Another neurologist examined Ms. M nine days after she executed the subject documents and found that she was "very demented," that her level of dementia from Alzheimer's disease was "severe" and in "advanced stages," and that she "was mentally incompetent to manage any of her business affairs or manage her daily activities of living" *Id*. at 339, 597 S.E.2d at 17-18. The Court concluded that the testimony from three neurologists "established Ms. M's history of debilitating dementia dating back to 1996, as well as the progressive, chronic, organic, and irreversible nature of the disease." *Id*. at 345, 597 S.E.2d at 21. This "compelling" evidence of insanity "of a permanent or chronic nature'" led this Court to presume the incapacity was continuing when the subject documents were executed. *Id*.

This Court emphasized the limits of its holding in *Gaddy*:

> 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 [the victim'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.

Unlike in *Gaddy*, Luzak provides no medical testimony that Mr. Barringer suffered from chronic or permanent disease affecting his mental capacity on February 28, 2012. No doctor—not even Luzak's hired medical expert—testified that Mr. Barringer suffered from chronic incapacity in February of 2012 or that he lacked capacity at any time before that date. Rather, as discussed below, the two treating physicians who examined Mr. Barringer in the two months before execution of the February 2012 documents opined that he did not have significant dementia. Thus, Luzak cannot rely on *Gaddy* to avoid her obligation to produce evidence that Mr. Barringer lacked testamentary capacity "at the time of the transaction"—i.e., on February 28, 2012.

3. Evidence Regarding Testamentary Capacity

Luzak points to no evidence from any witness present when Mr. Barringer executed the February 2012 Documents. Nor does she cite to any medical evidence that, on February 28, 2012, Mr. Barringer lacked the ability to know his estate, the objects of his affection, and the persons to whom he wished to give his property. Thus, Luzak can point to no evidence that Mr. Barringer lacked testamentary capacity "at the time of the transaction." *See Hairston*, 387 S.C. at 445-47, 692 S.E.2d at 553.

Instead, Luzak points to her own testimony that Mr. Barringer was having "memory problems" and "trouble speaking" when she saw him around Christmas of 2011. (H. Luzak Dep. 169:8-19, R. pp. __.) She also cites to testimony by Kevin Luzak that, in early 2011, Mr. Barringer "needed [Kevin Luzak's] help understanding numbers related to the business" and that Mr.

Barringer's "memory also began to deteriorate." (K. Luzak Aff. ¶ 12, R. p. __.) But neither Luzak nor her husband saw Mr. Barringer on or near February 28, 2012, so they have no personal knowledge regarding his capacity to execute estate planning documents on February 28, 2012.[10] (H. Luzak Dep., 222:9-17, R. p. __; K. Luzak Dep. 21:22-25, R. p. __.) Regardless, Kevin Luzak has no expertise in assessing capacity and testified that he relied on Mr. Barringer's doctors for determinations regarding his capacity. (*Id.* 279:11-16, R. p. __.)

Luzak also relies on comments about Mr. Barringer's condition in emails dated well before February 2012. She points to an email dated September 9, 2011, in which Tom Evans, COO for CFRC, stated that Mr. Barringer seemed confused and not himself. (App. Br. p. 51.) She also cites an email from February of 2011, in which Randy Light expressed concern that Mr. Barringer was "experienc[ing] different health issues that effect [sic] his judgement regarding everyday decisions personally and business wise," (R. Light Dep. Vol. 2 173:16-174:17, R. p. __), and an email from January of 2012, in which Mr. Light stated that Mr. Barringer was exhibiting "irrational behavior." (*Id.* 185:3-186:22.) However, Mr. Light testified that his reference to "different health issues" and "irrational behavior" concerned Mr. Barringer's prostate cancer and the stress he suffered due to the failure of his son Victor's business. (*Id.* 174:18-176:5; 185:10-187:19.) In any event, this evidence pre-dates Mr. Barringer's execution of the February 2012 Documents and does not remotely establish chronic, irreversible incapacity. The evidence cited by Luzak fails to create a genuine issue of fact regarding Mr. Barringer's alleged lack of capacity at the time he executed the February 2012 Documents.

[10] In fact, Kevin Luzak acknowledged that Mr. Barringer was able to know and recognize his children in 2012. (K. Luzak Dep. 23:7-13, R. p. __.)

The record contains substantial evidence that Mr. Barringer *did* have the requisite capacity when he executed the February 2012 Documents. The individuals who prepared the February 2012 documents, and who were present when Mr. Barringer executed the documents, testified that they saw no evidence he lacked capacity. John Jolley was the attorney who prepared the February 2012 Documents and witnessed Mr. Barringer execute them at his office. (R. pp. ___.) He met Mr. and Mrs. Barringer several times in late 2011 and early 2012 regarding proposed changes to the Barringers' estate plans. (Jolley Dep. Vol 1 33:24-35:6, R. pp. __.) During these meetings, Jolley and Mr. Barringer identified Mr. Barringer's assets, discussed his estate planning objectives and reviewed draft documents. (*Id.*, 33:24-34:14, R. pp. __.) Jolley confirmed that, throughout this period, he had no concern that Mr. Barringer lacked testamentary capacity. (*Id.*, 27:16-22, R. pp. __; 36:4-8, R. pp. __.)

Jolley's paralegal, Rebecca Bostick, was also present when Mr. Barringer executed the February 2012 Documents. She testified that Mr. Barringer "was a very engaging gentleman. There was – there was no issue there. . . . There was no doubt that there was – he was fully competent and had no issues whatsoever from my standpoint." (Bostick Dep. 47:4-16, R. p. __.)

Robert Slane, Mr. Barringer's financial advisor, also observed Mr. Barringer several times in the months before he executed the February 2012 Documents. Slane spoke with Mr. Barringer three times about his estate planning between July 2011 and February 28, 2012. (*Id.,* 41:18-42:6; 120:22-121:20, R. pp. __.) He testified Mr. Barringer asked appropriate questions and was able to respond to Slane's questions during their conversations. (*Id.)* Slane met with Mr. Barringer in person in early 2012 for about an hour. (Slane Dep. 41:18-42:6, 138:06-138:17, R. pp. __.) They discussed Mr. Barringer's "complicated estate planning issues." (*Id.*) During this meeting, Mr. Barringer appeared to be "in good health, aware of what he was doing[] and what he wanted to do,

and [to] have the capacity to execute an estate planning document." (*Id.*) Slane testified that, throughout his interactions with Mr. Barringer in connection with the upcoming changes to his estate plan, Slane had no concerns about whether Mr. Barringer "was in the position to sign estate planning documents." (*Id.*)

Mr. Barringer's medical records contain no evidence that he lacked testamentary capacity on February 28, 2012. Mr. Barringer first self-reported short-term memory problems to his treating physician, Dr. Paul Long, on November 23, 2011. (Long Dep. 22:21-23:7, R. pp. __; Memorandum from Dr. Long to Medical File (November 23, 2011) R. pp. __.) Although a note created by Dr. Long stated that initial computer testing predicted that Mr. Barringer had a 60% chance of *developing* significant dementia, Dr. Long testified that he gave very little weight to this test because it does not test for *existing* dementia, but instead predicts the likelihood of the patient developing dementia *in the future*. (Long Dep. 26:2-18, R. pp. __.) Dr. Long also explained that he "miscalculated" the results of the test, which actually indicated that Mr. Barringer had a 30% likelihood of developing impaired executive function and a 30% chance of developing impaired cognitive function.[11] (Long Dep. 26:24-27:17; 28:3-7, R. pp. __.) Dr. Long also referred Mr. Barringer to a neurologist, Dr. William Garrett who reported in December 2011 that Mr. Barringer did not "have any significant dementia." (*Id.*, 33:5-10, R. pp. __; Letter from Dr. Garrett to Dr. Long (December 27, 2011) R. pp. __.)

On January 3, 2012, Dr. Long again evaluated Mr. Barringer's complaint of "short term memory loss." (Long Dep. 31:22-32:9, R. pp. __.) On this visit, Mr. Barringer attained a perfect

[11] Long testified that he mistakenly added these percentages together, which is why his note incorrectly stated that the test predicted Mr. Barringer had a 60% of developing dementia. (Long Dep. 27:3-10, R. p. __) ("[O]ne was 30 and the other was 30 and I think I added them together. Well, you can't do that.").

score on the Mini Mental Exam. (*Id.*) Dr. Long testified, "[i]f you have any significant dementia, [you cannot] score a perfect 30 [on the Mini Mental Exam]." (*Id.*, 35:9-10, R. pp. __.) On January 26, 2012, Dr. Long wrote that Mr. Barringer's cognition was improved and that Dr. Long agreed with Dr. Garrett's assessment that Mr. Barringer did not have significant dementia. (*Id.*, 33:19-34:11, R. pp. __; Memorandum from Dr. Long to Medical File (January 26, 2012), R. pp. __.) Dr. Long's record of Mr. Barringer's office visit on February 16, 2012, contains no mention of dementia or cognitive issues. (Dr. Long Dep. 36:2-15, R. pp. __; Memorandum from Dr. Long to Medical File (February 16, 2012), R. pp. __.) On February 27, 2012, the day before Mr. Barringer executed the February 2012 Documents, he again visited Dr. Long, who wrote that Mr. Barringer "has dementia but it is mild according to the test that we give." (Dr. Long Dep. 37:14-38:1, R. pp. __; Memorandum from Dr. Long to Medical File (February 27, 2012), R. pp. __.) Thus, no medical evidence supports Luzak's claim that Mr. Barringer lacked testamentary capacity to execute the February 2012 Documents.

The Court should affirm summary judgment as to the February 2012 Documents because the trial court correctly concluded that Luzak failed to create a genuine issue of fact that Mr. Barringer lacked testamentary capacity to execute the February 2012 Documents.

B. Luzak failed to create a genuine issue of material fact that Mr. Barringer was unduly influenced to execute the February 2012 Documents.

1. Standard for Undue Influence

The threshold for proving undue influence in South Carolina is extremely high. For a testamentary instrument to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). The mere existence of influence is not enough to vitiate a testamentary document.

Id.; see also Calhoun, 277 S.C. at 531, 290 S.E.2d at 418. Not all influences are unlawful, and "perhaps no man has ever existed who was entirely so self-willed as to be whole uninfluenced by the opinions and wishes with whom he was connected." *Calhoun*, 277 S.C. at 531–32, 290 S.E.2d at 418; *see also Hairston,* 387 S.C. at 446, 692 S.E.2d at 552. The mere influence of attachment or affection is not undue influence. *Calhoun*, 277 S.C. at 531, 290 S.E.2d at 418; *see also In re Estate of Anderson*, 381 S.C. at 574, 674 S.E.2d at 179. The desire to gratify the wishes of another is not undue influence. *Id.* Rather, the evidence must show that the free will of the testator was overtaken. *Russell*, 353 S.C. at 217, 578 S.E.2d at 333; *see also Howard v. Nasser*, 364 S.C. 279, 286 S.E.2d 64, 67 (Ct. App. 2005).

Moreover, for a testamentary instrument to be void due to undue influence, the contestant must show that the influence was *brought directly to bear upon the testamentary act*. *Wilson v. Dallas*, 403 S.C. 411, 437, 743 S.E.2d 746 (2013); *Russell*, 353 S.C. at 219, 578 S.E.2d at 335; *First Citizens Bank & Trust Co. v. Inman*, 296 S.C. 8, 10, 370 S.E.2d 99, 100 (Ct. App. 1988). This requirement of a direct causal connection between the alleged influence and the testamentary act was recently reiterated by this Court. *Swiger*, 426 S.C. at 417, 827 S.E.2d at 204 (affirming grant of summary judgment and noting contestant "failed to provide more than a scintilla of evidence to establish undue influence was exerted upon Decedent *when he executed the Will*") (emphasis in original).

A mere showing of opportunity or motive does not create an issue of fact surrounding undue influence. *In re Estate of Smith*, 419 S.C. 111, 117 796 S.E.2d 158, 161 (Ct. App. 2016). Motive or opportunity alone, if proved, does not justify submitting a question of undue influence to a jury unless there is additional evidence that such influence was actually utilized to procure the testamentary act in question. *In re Last Will and Testament of Smoak*, 286 S.C. 424, 334 S.E.2d at

809; *Howard*, 364 S.C. at 289, 613 S.E.2d at 69. As this Court stated in *Swiger*, "[t]o send the issue of undue influence to the jury, the contestant must show more than general influence – there must be additional evidence that such influence was actually utilized." *Swiger* 426 S.C. at 417, 827 S.E.2d at 204 (citing *Howard*, 364 S.C. at 289, 613 S.E.2d at 69) (internal quotations omitted).

Moreover, where the testator had an unhampered opportunity to revoke or modify a testamentary instrument, but did not change it, the effect of any influence which may have existed earlier is destroyed. *Russell*, 353 S.C. at 217, 578 S.E.2d at 333– 34; *see also Calhoun v. Calhoun*, 277 S.C. at 533, 290 S.E.2d at 419; *Hembree*, 311 S.C. at 197, 428 S.E.2d at 7. For example, where a decedent met with his social worker outside of the presence of his niece, the alleged influencer, but did not attempt to change the will that he dictated in the presence of the niece, the court concluded that any effect of the alleged undue influence was destroyed. *Swiger* 426 S.C. at 417, 827 S.E.2d at 204. Similarly, no undue influence existed where a testator had an opportunity to express concern about being left in the care of proponents of a will during a private meeting with his counsel, where the will proponents were not present. *Hairston*, 387 S.C. at 447, 629 S.E.2d at 553. The court reached the same conclusion where a testator met alone with his attorney when executing the challenged will and also had several other opportunities thereafter to revise or revoke the same when executing other modifications to his estate plan. *Russell*, 353 S.C. at 220, 578 S.E.2d at 335.

2. The Burden of Proof for a Challenge Alleging Undue Influence

The contestant to a testamentary document bears the burden of proving undue influence by "unmistakable and convincing evidence." *Smoak*, 286 S.C. at 424, 334 S.E.2d at 809. At summary judgment, "[s]ince 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." *Id.* 426 S.C. 415, 827 S.E.2d, 203 (citing *Russell*, 353 S.C. at 218, 578 S.E.2d at 334).

Certain facts may create a presumption of undue influence, such as the existence of a confidential or fiduciary relationship. *Russell* 353 S.C. at 217, 578 S.E.2d at 333. "However, even if a contestant does establish an inference of undue influence, the unhampered opportunity of the testator to change the will after the operation of undue influence destroys this conclusion." *Hembree*, 311 S.C. at 196-197, 428 S.E.2d at 5. If a testator had capacity to dispose of his property and was free and unrestrained in his volition at the time of making his will, the influence that may have inspired it or some provision of it will not be undue influence. *Smoak*, 286 S.C. at 424, 334 S.E.2d at 809; *Swiger* 426 S.C. at 417, 827 S.E.2d at 204. Moreover, the presumption of undue influence is overcome where the facts giving rise to the presumption are shown not to have borne upon the testamentary act in question. *Hairston*, 387 S.C. at 446, 692 S.E.2d at 553, *Macaulay v. Wachovia Bank, N.A.*, 351 S.C. at 299, 569 S.E.2d at 378. Where the presumption of undue influence does apply, the proponents of the will must simply offer rebuttal evidence. *Hairston.*, 387 S.C. at 447, 692 S.E.2d at 553. The proponents do not have to affirmatively disprove the existence of undue influence, and the contestants of the will retain the ultimate burden of proving undue influence by unmistakable and convincing evidence *Id*.; *Swiger,* 426 S.C. 408, 418, 827 S.E.2d 200, 205.

3. Evidence of Undue Influence

Luzak presented no evidence that anyone unduly influenced Mr. Barringer to execute the February 2012 Documents. Importantly, the February 2012 Documents did not change the beneficiary of Mr. Barringer's estate. (*Compare* Paul B. Barringer, II Revocable Trust, Item V (December 4, 1998) ("December 1998 Trust"); and McBride Dep. Vol 1 18:11-19:8 (explaining

Mr. Barringer set up a QTIP Trust for Mrs. Barringer in the December 1998 Trust) and 27:13-28:1, R. pp. __ (explaining "virtually all of the net property coming in" to the Trust for Mrs. Barringer's benefit and providing her with a power of appointment), R. pp. __; *with* First Amendment and Restatement of Trust Agreement of Paul B. Barringer, II (February 28, 2012) ("February 2012 Amended Trust") Art. VI, R. pp. ___; and Jolley Dep. 42:19-43:8, R. pp. __ (explaining if Mrs. Barringer survived Mr. Barringer, the trust estate would be held for Mrs. Barringer's benefit for her life). Mrs. Barringer remained the sole distributive beneficiary with a power of appointment and Merrill Light, the alleged influencer, gained no additional inheritance from these amendments. (*Compare* December 1998 Trust, Item 5 *with* February 2012 Amended Trust, Art. VI, R. pp. __; *see also* McBride Dep. 32:4-15 (explaining that under the December 1998 Trust, the assets are "held in trust for the benefit of Mrs. Barringer.") and 34:17-35:5 (explaining that upon her death, Mrs. Barringer "has full authority to slice and dice and distribute" the trust assets among the descendants of Mr. Barringer); Jolley Dep. Vol. 1 43:9-44:8 (explaining in February 2012 Amended Trust Mrs. Barringer had a power of appointment over the trust assets and if she did not exercise it, then the assets of the trust would be divided equally amongst their three children). The February 2012 Documents merely named Merrill Light as a co-trustee of Mr. Barringer's Revocable Trust. (February 2012 Amended Trust, Introductory clause, R. pp. ___.) Mr. Barringer made this change on the advice of Slane and Jolley. (Jolley Dep. 33:24-35:6, R. pp. ___.) Luzak points to no evidence that Merrill Light even wanted to become co-trustee, much less that she influenced her father to make that decision. The record contains no evidence of threats, isolation or mental coercion by Merrill Light in connection with the February 2012 Documents.

Luzak points to a number of actions which occurred *after* February 28, 2012, and which she submits showed undue influence by Mrs. Light. But none of that evidence is relevant to Mr.

Barringer's condition on February 28, 2012, when he executed the February 2012 Documents. Indeed, Luzak's reliance on evidence from later time periods only underscores the absence of proof needed to meet her burden as to the February 2012 Documents.

Luzak alleges Randy Light's businesses were failing in 2012 in an effort to show that Merrill Light had a *motive* to unduly influence her father, but the law is clear that a mere showing of opportunity or motive does not create an issue of fact regarding undue influence. *In re Estate of Smith*, 419 S.C. at 117, 796 S.E.2d at 161. Luzak fails to allege even a single act by Merrill Light that allegedly caused Mr. Barringer to execute the February 2012 Documents, much less facts showing that her influence was brought directly to bear on his execution of the documents.[12] Thus, the circuit court correctly concluded that Luzak failed to create a genuine issue of fact regarding undue influence.

Moreover, assuming (without conceding) that Merrill Light was in a fiduciary relationship with Mr. Barringer as of February 28, 2012, the circuit court correctly concluded that Light rebutted any presumption of undue influence. Light offered unrebutted testimony from Jolley and Slane, both of whom denied that Mr. Barringer was unduly influenced. Jolley testified that he met with Mr. Barringer alone to ensure that the planning reflected Mr. Barringer's wishes. (*Id.*, 24:2-25:16, R. p. __.) He never had trouble getting access to Mr. Barringer. (*Id.*, 24:2-25:16, 26:1-7, R. pp. __.) He met with Mr. Barringer privately at the office and at Mr. Barringer's home, he emailed with him directly, and he spoke with him on the telephone. (*Id.*, 26:8-20, R. p. __) Jolley testified

[12] In her deposition, Luzak could not identify evidence of undue influence exerted on Mr. Barringer when he executed the February 2012 Documents. (R. pp. __.) Kevin Luzak also testified he never witnessed anyone attempt to exert undue influence to get Mr. Barringer to sign any of his testamentary documents. (K. Luzak Dep. 23:4-7, R. p. __.)

he was never concerned that Mr. Barringer was being unduly influenced in any way. (*Id.*, 27:23-28:1, R. p. __.)

Slane also saw no evidence of undue influence. Slane had private conversations with Mr. Barringer, and no one restricted his ability to speak with Mr. Barringer alone regarding his estate planning. (Slane Dep. 121:25-122:6, R. pp. __.) Slane recalled that Merrill Light brought her father to one meeting either in February or April 2012. (*Id.*, 120:12-18, R. pp. __.)[13] He confirmed, however, that Light played no role in the meeting. (*Id.,* 120:12-21, R. p. __.) Moreover, he testified that no one tried to influence Slane to have Light designated as co-trustee in February 2012. (*Id.,* 130:15-22, R. p. __.) Mr. Barringer "select[ed] Merrill Light freely and voluntarily." (*Id.*, 130:23-131:1, R. pp. __.) And Mr. Barringer chose Merrill Light to be his co-trustee because she "was the closest local person." (*Id.* 89:5-6, R. p. __.) In short, Slane testified he never had a "concern that someone was influencing [Mr. Barringer] to do something with respect to his estate plan that he did not want to do." (*Id.* 121:21-24, R. p. __.)

Further, 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. There is thus no evidence that he was susceptible to undue influence at this time. *See Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 219–20, 578 S.E.2d 329, 335 (2003) (relying in part on absence of "an opinion that Testator was mentally incompetent and therefore more susceptible to undue influence").

Because Luzak failed to present any evidence of undue influence, much less evidence that a reasonable finder of fact could determine to be "unmistakable and convincing" and bearing upon

[13] At one point Slane testified he thought the February meeting was at Jolley's office, and Light drove Mr. Barringer to that meeting from a doctor's appointment. (Slane Dep. 42:2-6, R. p. __.)

the testamentary act on February 28, 2012, the circuit court correctly granted Respondents summary judgment on this issue.

Luzak fails even to identify the "mistake" that Mr. Barringer allegedly made in executing the February 2012 Documents. (App. Br. p. 58.) She argues that "if a testator or settlor does not know that he or he [sic] is making a Will, what it does, and how it operates, the Will is also the result of a mistake and is thus invalid." (*Id*.) This is nothing more than restatement of her claim that Mr. Barringer lacked the mental capacity to understand the February 2012 Documents. But that allegation does not state a claim under South Carolina law for a challenge on the basis of mistake. *Hanahan v. Simpson*, 326 S.C. 140, 148–49, 485 S.E.2d 903, 907–08 (1997) ("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.").

C. Luzak failed to create a genuine issue of material fact that Mr. Barringer executed the February 2012 Documents by mistake.

In *Simpson*, the testator's daughter alleged that the testator lacked capacity to understand a power of appointment in his will. In addition to alleging lack of capacity, the daughter challenged the will on the basis of mistake. *Id*. at 147, 485 S.E.2d at 907. The trial court granted a directed verdict against the daughter on the mistake claim. The South Carolina Supreme Court affirmed, reasoning as follows:

> Although Hanahan's evidence may be susceptible of the inference that Simpson did not have a very good understanding of the provision, or that he was unlikely to remember it for any length of time, there is simply no evidence he was "mistaken" about it. ***Simpson's allegedly declining competency is simply insufficient grounds upon which to invalidate the provision***.

Id. at 150, 326 S.E.2d at 908 (emphasis added).

Like the will contestant in *Hanahan*, Luzak does not even allege that the February 2012 Documents contained any mistake that goes to the identity of the document. She merely alleges Mr. Barringer did not understand the document due to alleged diminished capacity. Accordingly, the circuit court properly granted summary judgment.

D. The circuit court properly held that the denial of Respondents' previous motion for summary judgment on all claims did not require it to deny their later-filed motion for partial summary judgment as to the validity of the February 2012 Documents.

Next, Luzak incorrectly contends the circuit court lacked the authority to grant summary judgment merely because a prior judge had denied it. On December 30, 2020, Judge Carmen Mullen denied Defendant Merrill Light's motion for summary judgment as to all causes of action in Civ. Action No. 2016-CP-07-1919 in a one-paragraph order. (12/20/2020 Order, R. pp. __.) Judge Mullen's Order does not discuss the facts of the case, identify any genuine issues of material fact that existed with respect to Luzak's claims, or otherwise provide any substantive analysis. (*See id.*) After Judge Mullen issued this Order, the parties conducted extensive additional discovery, including taking several depositions. On February 19, 2021, Judge Mullen recused herself from this litigation.

In her Brief, Luzak argues that, even if Judge Price determined that Respondents are entitled to summary judgment on Luzak's claims to set aside the February 2012 Documents, the circuit court was not allowed to grant Respondents summary judgment, and instead was required to hold a trial on these claims, because of Judge Mullen's one paragraph Order. This is the opposite of the law. The test in South Carolina to decide whether one circuit judge may change a ruling made by a prior circuit judge in the same case and on the same issue is whether the original determination constitutes the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). Because denials of motions to dismiss and summary

judgment are not the law of the case, this rule does not apply to a denial of summary judgment. That is precisely why this Court has ruled, "[A] judge deciding a case on the merits is not bound by a prior order of another judge denying summary judgment. If the law were otherwise, a party could never obtain relief from an erroneous order denying summary judgment since orders denying summary judgment are never appealable, not even after final judgment." *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989).

Further, even under Rule 43(l), a denial of summary judgment may be revisited by a subsequent circuit judge when the state of facts has changed. *See* Rule 43(l), SCRCP (providing that "no subsequent motion upon the same state of facts shall be made to any other judge in that action."); *see, e.g., Smith v. Breedlove*, 377 S.C. 415, 662 S.E.2d 67 (2008) ("The fact that a 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."); *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) ("That a different trial judge previously denied the motion did not preclude [Defendant] from renewing its motion once new evidence came to light."); *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988) (rejecting the argument that a trial judge erred by granting summary judgment after previously denying summary judgment and holding: "A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree.").

Here, the parties conducted significant additional discovery between Judge Mullen's Order denying summary judgment and the Summary Judgment Order. This additional discovery included the depositions of the following witnesses: Neill McBryde, who represented Mr. and

Mrs. Barringer in the preparation and execution of their 1998 Wills and Trusts; John Jolley, who represented Mr. and Mrs. Barringer in the preparation and execution of their subsequent wills and trust amendments; two additional former McNair employees; Luzak's husband, Kevin Luzak, whom Luzak identified as a witness who has evidence of the alleged promise made by Mrs. Barringer to Mr. Barringer; several Coastal Forest Resources Company (CFRC) employees, including Tom Evans, Stephanie Chapman and Travis Bryant; a Rule 30(b)(6) deposition of CFRC; Robert Scully, another attorney who represented Mr. Barringer; Mr. Barringer's former secretary, Pat Harrell; and Mr. Barringer's primary physician for decades, Dr. Paul Long. Thus, Light's motion for summary judgment on the Lack of Capacity/Undue Influence Claims, was made based on a different underlying record of depositions and other available evidence than the previously denied motion, and the circuit court therefore properly considered Light's motions on the merits.

E. The circuit court properly held that Respondents were not estopped from requesting summary judgment on the February 2012 Documents merely because Respondents also assert that Mr. Barringer's subsequent wills and trusts are valid.

Luzak argues that Respondents are "estopped" from asserting that the February 2012 Documents are valid because the documents were expressly revoked by subsequent versions of Mr. Barringer's estate planning documents that Respondents also contend are valid. (App. Br. 41-42). The circuit court properly rejected this argument.

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).

The circuit court correctly found that judicial estoppel does not apply because, among other reasons, Respondents have not taken inconsistent factual positions. Luzak asserted that every testamentary document executed by Mr. Barringer, beginning with the February 2012 Documents, is invalid due to incapacity, undue influence and/or mistake. Merrill Light's position in her motion for summary judgment was that, although Mr. Barringer's final will and revocable trust revoked prior versions, each prior version was valid when executed. (Light Mot. Summ. J., R. pp. __.) There is nothing inconsistent about this position.[14] Further, Respondents have not "been successful" in maintaining any prior factually inconsistent position, and nothing in Light's summary judgment motion was part of an effort to mislead the Court. Accordingly, the circuit court correctly found that Respondents were not judicially estopped.

[14] Nor does the Summary Judgment Order state that the February 2012 Documents were not revoked by subsequent versions of Mr. Barringer's will and trust. The circuit court ruled only that the February 2012 Documents are not invalid due to lack of testamentary capacity, undue influence or mistake. (Summary Judgment Order p. 1.) Although the Order states that the February 2012 Documents are "valid," the circuit court was not ruling on the impact of any subsequent versions of Mr. Barringer's will and trust because that issue was not before the court.

II. THE COURT SHOULD DISMISS THE BIFURCATION ORDER AS MOOT OR BECAUSE IT IS NOT IMMEDIATELY APPEALABLE OR, IN THE ALTERNATIVE, THE BIFURCATION ORDER SHOULD BE AFFIRMED.

A. The circuit court's Order granting Mrs. Barringer summary judgment on the Contract-Based Claims rendered Luzak's appeal of the Bifurcation Order moot.

"Generally, this Court only considers cases presenting a justiciable controversy." *Sloan v. Friends of the Hunley, Inc*., 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006). "An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." *Sloan*, 369 S.C. at 26, 630 S.E.2d at 477.

Here, subsequent events rendered Luzak's appeal of the Bifurcation Order moot. Before the scheduled date for a trial on the Contract-Based Claims, the circuit court granted Mrs. Barringer's motions for summary judgment on the Contract-Based Claims and subsequently denied Luzak's motion to reconsider that decision. Accordingly, Luzak's appeal of the Bifurcation Order is now moot.

B. The Bifurcation Order is not immediately appealable.

This Court has already ruled that the Bifurcation Order, standing alone, is not immediately appealable, and this Court dismissed Luzak's prior appeal of that Order. (5/4/2021 Order, Case No. 2021-000159.)[15] The issue presented by this portion of the current appeal is therefore whether

[15] This Court properly dismissed the First Appeal because bifurcation orders ordinarily are not appealable prior to entry of final judgment. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (order bifurcating the issue of exclusion under an insurance policy from the issue of occurrence was not immediately appealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77–78, 533 S.E.2d 575, 577 (2000) (order denying bifurcation of trial on issues

Luzak can bootstrap an appeal of the Bifurcation Order to the instant appeal of the Derivative Damages Order and the Summary Judgment Order.

Although the appellate courts have discretion to review an order that is not immediately appealable in conjunction with a closely related order that is properly on appeal, the Supreme Court has held that the appellate courts should exercise that discretion only where the former order is sufficiently related to the latter. *Brown v. County of Berkeley*, 366 S.C. 354, 362, 622 S.E.2d 533, 538 n.5 (2005) (refusing to accept appeal of interlocutory order denying motion to dismiss on the ground that it lacked sufficient nexus to or companionship with immediately appealable order denying plaintiff's request for preliminary injunction); *Smith v. Tiffany*, 419 S.C. 548, 552, 799 S.E.2d 479, 481 n.1 (2017) (declining to review interlocutory discovery order along with appeal of properly appealable order because of an insufficient nexus between the orders).

Here, the Bifurcation Order is not reviewable with the appeal of the Derivative Damages Order and the Summary Judgment Order because the Bifurcation Order is not closely related to those Orders. The Bifurcation Order merely severed the discrete Contract-Based Claims for a separate trial, while the latter Orders disposed of unrelated claims that would not even come into

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of liability and damages in personal injury case is not immediately appealable as affecting a substantial right). In *Flagstar Corp.*, the Supreme Court held that an order merely bifurcating issues for a separate trial does not "affect a substantial right" under S.C. Code § 14-3-330(2). The court reasoned that "trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right. Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence." *Id.* at 72-73, 533 S.E.2d 331, 333. Any such error can be corrected, the court concluded, by ordering a new trial. *Id.* (citing *Breland v. Love Chevrolet*, 339 S.C. 89, 529 S.E.2d 11 (2000) (immediate appeals under § 14-3-330(2) are permitted only where the alleged error cannot be corrected by a new trial); s*ee also Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (holding the "mode of trial" exception in S.C. Code § 14-3-330(2) to the general rule that only final orders are appealable is confined to orders which abridge a party's right to trial by jury.)

play until the second trial.[16] Luzak does not even argue that the Bifurcation Order is closely related to the Derivative Damages Order and the Summary Judgment Order, nor does she otherwise explain why this Court should review the Bifurcation Order now, after the Court already decided that the Order is not immediately appealable. Although Luzak makes conclusory statements to the effect that the issues related to the Contract-Based Claims "almost completely overlap" with the claims at issue in the Derivative Damages Order and the Summary Judgment Order, she never even attempts to demonstrate how this is so.[17] Because Luzak fails to demonstrate a sufficient nexus between the Bifurcation Order and the Orders properly on appeal, the Court should not review the Bifurcation Order at this time. *Brown*, 366 S.C. 354, 362, 622 S.E.2d 533, 538 n.5; *Smith*, 419 S.C. 548, 552, 799 S.E.2d 479, 481 n.1.

Moreover, review of the Bifurcation Order as part of the instant appeal would not avoid unnecessary litigation or more efficiently resolve this dispute. Because the trial court granted Mrs. Barringer summary judgment on the Contract-Based Claims, and denied Luzak's motion to

[16] The Derivative Damages Order dismissed only the civil conspiracy claim and struck all derivative damages that Luzak is seeking related to the conduct that allegedly occurred beginning in 2012. The Summary Judgment Order decided only that Luzak failed to establish a genuine issue of material fact that certain estate planning documents executed on February 28, 2012, should be invalidated because Mr. Barringer lacked capacity, was under undue influence, or due to mistake.

[17] In fact, this Court implicitly found that Luzak failed to demonstrate the claims overlap by denying Luzak's emergency petition for a declaration of an automatic stay. (8/19/2021 Order.) Luzak asked this Court to declare that this appeal triggered an automatic stay, which should prevent the trial court from proceeding with a bifurcated trial on the Contract-Based Claims. Respondents argued that no stay prevented the trial from going forward because the Court had already determined the Bifurcation Order was not immediately appealable and a trial of the Contract-Based Claim was not "affected by the appeal" of the CFRC Order and Summary Judgment Order for purposes of Rule 205, SCACR. The Court denied Luzak's petition presumably because the Court agreed with Respondents that the Contract-Based Claims were sufficiently distinct from the matters decided in the CFRC Order and Summary Judgment Order that appeal of those orders should not prevent the trial on the Contract-Based Claims from going forward.

reconsider, no bifurcated trial on the Contract-Based Claims is scheduled. Indeed, the trial court's subsequent summary judgment rulings rendered Luzak's appeal of the Bifurcation Order moot. *See* Section II.A, *supra*; *see also Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.") Accordingly, this Court need not address the issue because there is no longer a pending dispute related to bifurcation. *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.").

C. The circuit court did not abuse its discretion in bifurcating the Contract-Based Claims.

Rule 42 of the South Carolina Rules of Civil Procedure provides that, "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any … separate issue … or issues…." Rule 42(b), SCRCP. The question of whether to bifurcate issues is left to the trial court's sound discretion. *See, e.g., Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72-73, 533 S.E.2d 331 (2000). Bifurcation of issues may be appropriate where a "critical, threshold issue in [the] case" is separate and distinct from the rest of the case and can be decided as a preliminary issue. *Id.* at 70 (noting trial court's determination that bifurcation was appropriate to address "a critical, threshold issue" in the case). Bifurcation is appropriate "if the issues are so distinct that trial of each alone would not result in injustice." *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 516, 698 S.E.2d 822 (Ct. App. 2010) (citing *Creighton v. Coligny Plaza Ltd. P'ship.*, 334 S.C. 96, 108, 512 S.E.2d 510 (Ct. App. 1998)). The South Carolina Supreme Court has encouraged trial courts to bifurcate trials in complex cases. *See Durham v. Vinson,* 360 S.C. 639, 644, 602 S.E.2d 760, 762 n.2 (2004).

The circuit court's decision to bifurcate was proper because the evidence and legal issues in the initial trial on the Contract-Based Claims are separate and distinct from the remainder of the trial, which will determine whether Mr. Barringer had testamentary capacity and/or was unduly influenced when he amended his estate plan over a decade later. Luzak has not demonstrated that the limited issues to be decided in the first phase (whether a contract/promise was made by "no later than December 4, 1998") overlap with any issue to be decided in the subsequent trial (whether Mr. Barringer lacked mental capacity or was unduly influenced between 2012 and 2016). Luzak states repeatedly that the facts for the two trials overlap, but she never explains which facts overlap and why evidence related to Mr. Barringer's alleged lack of capacity between 2012 and 2016 is relevant to a trial to decide whether Mr. and Mrs. Barringer made a secret contract or promise not to change their wills in 1998.

Nor must the trial court determine which version of Mr. Barringer's estate planning documents control to decide the Contract-Based Claims. First, every version of Mr. Barringer's estate planning documents grants Mrs. Barringer a power of appointment, including the 1998 versions that Luzak maintains are the last instruments that her father executed with full testamentary capacity. More importantly, with the Contract-Based Claims, Luzak does not seek to enforce *any* version of Mr. Barringer's estate plan. Rather, with the Contract-Based Claims, Luzak asks the Court to *ignore* the terms of the 1998 estate planning documents and to enforce the alleged contract or promise between her parents in which her mother allegedly promised her father not to exercise the power of appointment. It therefore makes no difference which version of Mr. Barringer's estate planning documents control for purposes of deciding the Contract-Based Claims.

Furthermore, Luzak was not prejudiced by the Bifurcation Order. She argues that she would have been prejudiced by a separate trial on the Contract-Based Claims because the Bifurcation Order required one jury to decide the Contract-Based Claims and a different jury to decide her remaining claims in a subsequent trial. But Luzak has no right to have the *same* jury for both trials. *Fortune v. Gibson*, 304 S.C. 279, 281, 403 S.E.2d 674, 675 (Ct. App. 1991) ("We hold there is no per se rule that the same jury must decide both issues. To hold otherwise would be to ignore a fundamental principle underlying bifurcation: a trial may be bifurcated only if the issues are so distinct that a trial of each alone would not result in injustice.") Accordingly, no rule prevents one jury from deciding the narrow factual issues underlying Luzak's Contract-Based Claims and a different jury from deciding the separate and distinct issues related to her remaining claims. *See id*.

Luzak also argues that she was prejudiced because the Bifurcation Order inappropriately carved out equitable claims for an initial trial. Luzak made this argument in the First Appeal, and this Court rejected the argument and dismissed the appeal because Luzak has no right, under S.C. Code § 14-3-330(2) or otherwise, to have legal and equitable claims tried together. *Flagstar Corp.*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 ("In short, trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right."). Moreover, the circuit court did not bifurcate *all* of Luzak's equitable claims from her legal claims. Although the Contract-Based Claims are equitable claims, Luzak's remaining claims also include equitable claims and requests for equitable relief as well. The circuit court made no attempt to separate claims on that basis. Rather, the circuit court severed the Contract-Based Claims because they involve narrow, discrete issues factually and legally distinct from the remaining claims, and the court concluded that Respondents satisfied the requirements for bifurcation under Rule 42, SCRCP.

Luzak also argues, as she did in the First Appeal, that the circuit court failed to follow sequencing rules that require legal claims to be tried before equitable claims. This Court correctly rejected that argument in the First Appeal because these rules apply only where the equitable claims and legal claims are based on common facts. *See Johnson v. South Carolina National Bank,* 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) ("Moreover, ***when issues common to both legal and equitable claims are to be tried in a single proceeding***, legal issues are to be determined first, and the findings of the jury are binding on the sitting judge, as trier of the equitable claims.") (emphasis added). Here, had the circuit court not granted summary judgment on the Contract-Based Claims, the bifurcated trials would not have determined a single common question of fact. Luzak's Contract-Based Claims present a discrete, threshold issue of whether Mrs. Barringer made an enforceable contract or promise never to change her 1998 will and Revocable Trust. Luzak alleges that the promise was made by Mrs. Barringer "no later than December 4, 1998." (R. p.__.) Luzak's remaining claims are based on events that allegedly occurred beginning in 2012. Thus, the sequencing rules set forth in *Johnson* do not apply here.[18]

CONCLUSION

For the above reasons, the Orders on appeal should be affirmed in all respects.

[18] Luzak also appears to argue that Respondents' prior consent to consolidation of the various lawsuits filed by Luzak somehow constitutes an admission that the facts related to every cause of action in every suit overlap. Respondents merely consented to consolidation of the actions for convenience and efficient discovery. Respondents' consent does not mean they agree that all 22 causes of action share common factual issues necessary for their resolution, or that there can be no severance of issues for trial.

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