FILED
Court of Appeals
Division II
State of Washington
9/14/2022 4:05 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
9/15/2022
BY ERIN L. LENNON
CLERK

No. 55461-5-II

101286-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner Dr. AMELIA BESOLA, individually,

Appellant,

v.

BRANDON GUNWALL individually,

Respondent/Cross-Appellant.

PETITION FOR SUPREME COURT REVIEW

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I. INTRODUCTION

This is an appeal from a Summary Judgment Order in favor of a Respondent in a consolidated TEDRA action, in which the Respondent admits to no evidence of a material fact. The Respondent, Mr. Brandon Gunwall ("Gunwall"), claims that the deceased in the underlying TEDRA action, Mark Besola ("Mark"), made him the beneficiary of two non-probate assets: an investment account with Fidelity Investments (the "Fidelity Account"); and a life insurance policy. Gunwall claimed that he became the beneficiary of these two accounts by virtue of "Apps" on Mark's cell-phone which did not require Mark's signature, presentation of photographic Id, or a notary to confirm the identity of the one making the beneficiary changes on the cell-phone app.

On April 10, 2020, the trial court consolidated all matters stemming from Mark's death in the TEDRA matter. The Petitioner is Mark's older sister, Dr. Amy Besola ("Dr. Amy" or "Petitioner.") The Petitioner's general position before the trial

court was that the disputed will and non-probate transfers were the result of fraud, undue influence, or some other type of bad acts. Most all of the beneficiaries of Mark's filed will and non-probate assets had only known Mark for less than a year. Collectively, they stood to gain between $5M-$6.5M from Mark's death.

Prior to the 2021 trial in this matter, Gunwall moved for Summary Judgment on the question of whether the Petitioner could show sufficient facts to go to trial on Petitioner's claims of fraud, undue influence, and other bad acts with respect to Mark's Fidelity Account. Gunwall prevailed on his Motion for Summary Judgment despite the fact he had and presented no evidence that Mark made the change to his Fidelity Account that made him the primary beneficiary of Mark's Fidelity Account. In motions before the Court of Appeals, Gunwall admitted that he had no evidence that Mark made the changes that made him the Fidelity Account beneficiary, rather he only had evidence that "someone" made the account changes that made him the Fidelity

Account beneficiary. The trial court's Order on Gunwall's Motion for Summary Judgment is at the heart of this Petition for Review: is an Order granting summary judgment to a moving party proper when the moving party lacks any evidence on a necessary material question of fact; and are ID-free cellphone App transfers of non-probate assets proper without authenticating safeguards in Washington.

Trial in this matter, on the remaining issues unrelated to Gunwall, was held in February 2021 and the evidence closed—except for one thread of evidence to an on-line legal document company. Records were subpoenaed. When the evidence came back from this company, it revealed that the will at the heart of the TEDRA litigation was created more than 4 months after Mark's death. The evidence showed that the will filed in the underlying matter on May 8, 2019, was fake. The fake will evidenced a sophisticated mind behind the fraud—it included UC Davis and Kitsap Animal Shelter as institutional beneficiaries, excluded out of state half-siblings as beneficiaries,

and incorporated other recent events to bolster its creditability from anticipated attacks. The participants in the fake will were found in November 2021 to be participants in a group effort to commit fraud based via the fake will.

Unfortunately for the Petitioner, the trial court sealed a portion of the records returned from the online legal document company—despite the fact that all counsel in the underlying matter signed a GR 15 Stipulation to unseal the documents. Petitioner believes that the sealed documents contain evidence the demonstrate Gunwall's inclusion in the group using the fake will to commit fraud. In Gunwall's case, the fraud relates to his claim to Mark's life insurance policy proceeds. The issue of the sealed documents is currently on Appeal with Division II of the Court Appeal (#56205-7-II). Petitioner raises this issue now because Gunwall's underlying Motion for Summary Judgement occurred in a universe of false facts and facts tainted by the conspiracy to commit fraud. This taint of fraud to the factual universe before the trial court on Gunwall's Motion for Summary

Judgment only adds to the problems created by Gunwall's lack of evidence that Mark intentionally effectuated that the cellphone App change that made Gunwall the Fidelity Account beneficiary. This is especially true when the sealed evidence may likely demonstrate Gunwall's direct involvement in the group committing the fraud. Should not Gunwall's Motion for Summary Judgment be considered on the facts that actually existed at the time of Gunwall's Motion and not on the facts manufactured by the group committing fraud? Should not the Washington Court system strive to reach a just determination in every action?

II. IDENTITY OF PETITIONER

Petitioner, Dr. Amelia Besola, ("Dr. Amy" or "Petitioner") respectfully moves for the relief set forth below.

III. DECISION

Petitioner respectfully requests this Court to accept review of the decision entered by Division II of Washington Court of Appeals on July 6, 2022 (Court of Appeals No. 5546-5-II) (the

"Decision" or "Opinion"). Attached hereto as **Appendix A**. Petitioner filed a Motion for Reconsideration and Publication. Attached hereto as **Appendix B**. The Court of Appeals Division II denied this Motion on August 15, 2022. Denying decision attached hereto as **Appendix C**.

IV. ISSUES PRESENTED FOR REVIEW

The Opinion gives the Supreme Court an opportunity to do the following:

A. Whether a party moving for summary judgment on whether they are entitled to a non-probate asset, as a primary beneficiary on an investment account, in a consolidated TEDRA action is required to have favorable evidence on all material facts (as opposed to no facts on who made them the primary account beneficiary) when the underlying will was fake because it was created more than 4 months after the decedent's' death, when the fake will resulted from a group effort to commit fraud, and when there is evidence (currently sealed by a trial court order) that the party moving for summary judgment on the question of

ownership of the non-probate investment account is a member of the group committing fraud to take the decedent's estate.

B. Whether changes to account beneficiary designations should require an affirmative ID confirmation when made by cellphone Apps for accounts and account holders located in Washington State.

V. STATEMENT OF THE CASE

Gunwall claimed that Mark transferred his Fidelity Investment Account to him by changing the beneficiary designation on the account via a cellphone app on May 4, 2018. This changed designation and Mark's death combined to transfer the Fidelity Investment account to Gunwall upon Mark's death. Petitioner asserted and continues to assert that the claimed transfer of the Fidelity Account must fail because it results from undue influence or fraud. Petitioner also assets that the claimed transfer fails because Gunwall admits to lacking evidence that Mark effectuated the beneficiary designation change that led to the transfer to Gunwall.

Gunwall moved for summary judgment to dismiss Petitioner's claims and to affirm his ownership of Mark's Fidelity Account. Gunwall's claim to the Fidelity Investment account was predicated on the May 4, 2018 change to the primary beneficiary designation for Mark's Fidelity Investment account via a cellphone App. Gunwall presented no evidence that Mark Besola, in fact, made the change to the account's primary beneficiary designation—only that "someone" made the change. CP. 2116 Ln. 15. The Court Appeals even noted that the trial court made no written findings that Mark effectuated the beneficiary designation change. See FN 17 on P. 19 of *Besola v. Pul*a, Unpublished Slip Opinion, Court Appeals Cause No. 55461-5-II filed on July 6, 2022.

The absence of written findings by the trial court that Mark changed the beneficiary designation on his Fidelity Account does not mean that the trial court made no such finding—it only means that the trial court failed to put an affirmative or negative findings in writing. The trial court's finding of fact that "Mark made the

change to the beneficiary designations on his Fidelity account" is implicit. The finding of fact was made manifest by the fact that the trial court granted Gunwall ownership of the Fidelity Account at the end of the motion. After all, neither the Petitioner nor Gunwall presented evidence to the trial court as to who made the beneficiary change for Mark's Fidelity Account. This means that the trial court decided, without evidence from either party, that Mark made the designation change and not "someone other than Mark." Even implicit trial court findings of material fact are improper on a summary judgment motion.

Gunwall's Motion for Summary Judgment happened in the midst of a flurry of motions by the various parties to the TEDRA action. The facts before the trial court during these motions, which included Gunwall's Motion, were tainted by a false narrative spun by the conspiracy to commit fraud. ***See*** attached hereto as ***Appendix D*** the trial Court's November 17, 2021 ***Findings of Fact and Conclusions of Law*** that find and describe at pages 8-12 the effort by a group of parties and

witnesses to commit fraud via a fake will**.** At the time of these motions, the Petitioner, her lawyers, and the trial court lacked any knowledge about the conspiracy to take about $5 million in real estate assets from Mark's estate via a fake narrative and a fake Will. (CP 115-127 in the related Court of Appeals No. 56725-3)[1]. Also at the time of the cross motions for summary judgment, it could not be known if the sealed documents (CP 387-405 in the related Court of Appeals No. 56725-3) contained evidence of revisions to the original fake will created on April 19, 2019 (CP 122 in the related Court of Appeals No. 56725-3) that implicated Gunwall in the conspiracy to commit fraud. At this time and without discovery on the issues raised by such revisions to the fake will documents, it is not possible to determine the true scope of the fraud that tried to take Mark's estate. We can only know that even as of this writing the scope of the conspiracy to take Mark's Estate is unknown but will

[1] This and the next two cites cite the Clerk's Papers in the closely related appeal before the Division II of the Court of Appeals No. 56725-3 because none of these cited facts existed at the time of summary judgment hearing yet all cited facts evidence the true state of affairs at the time of Gunwall's Motions for Summary Judgment.

likely grow if and after the currently sealed documents are unsealed. Petitioner's fear is that the final fate of Mark's Fidelity Account may be decided before the courts consider the evidence that Gunwall was a member of the group who tried to take Mark's Estate by fraud, before she has an opportunity to conduct discovery on such possibility based on this new potential evidence, and before the courts have a chance to revisit Gunwall's Motion for Summary Judgment on the true state of facts that existed at the time of Gunwall's initial Motion.

VI. GROUNDS FOR RELIEF REQUESTED

1. Facts manifested after Gunwall's Motion for Summary Judgment move this matter well beyond the simple question of whether the transfer of the Fidelity Account to Gunwall resulted from undue influence.

On Gunwall's Motion for Summary Judgment, the question before the trial court was whether the transfer of the Fidelity Account to Gunwall resulted from undue influence. At the time of the Gunwall hearing, no one but the coconspirators knew about their fraudulent conduct, the members of their group,

the true extent of their efforts to commit fraud, and the fake will. Even now, the true extent of their group and the group's efforts to commit fraud are unknown.

Even at the time of Gunwall's Motion, the question of the propriety of transferring the Fidelity Account to Gunwall seemed not to fit the mold of Washington's undue influence cases. In this case there was a legitimate question of whether the transfer resulted from an intentional act by Mark Besola. While in the cases cited by the parties, there was substantial if not overwhelming evidence that the various decedents, in fact, made the transfer at issue in each particular case.

For instance, in ***Dean***, the transfer at issue was a will and there were numerous witnesses to the transfer, including a lawyer. ***Dean v. Jorden***, 194 Wn. 661, 79 P.2d 331 (Wn. 1938). In ***Mitchell***, the transfer at issue was a will and again there were numerous witnesses to the transfer, including a lawyer. ***Mitchell v Daling***, 41 Wn. 2d 326, 249 P.2d 385 (Wn. 1952). In ***Kitsap Bank***, the transfer at issues was a check for $360,000 and a POD

account designation, and there were a number of witnesses, including a bank manager, a lawyer, and others to the transfer. ***Kitsap Bank v. Denley***, 177 Wn.App559, 312 P.3d 711 (Div. II 2013). In ***Estate of Jones***, the transfer at issue was a will, and there were numerous witnesses to the transfer, including a lawyer, an estate planner, and others. ***Estate of Jones***, 170 Wn.App 594, 287 P.3d 610 (Div.3 2012). In ***Mumby***, the transfer at issue was a will and there were numerous witnesses to the transfer, including a lawyer, an estate planner, and others. ***Estate of Mumby v. Caldwell***, 97 Wn.App. 385, 982 P.2d 1219 (Div. 2 1999). In ***Melter***, the transfer at issue was a will and there were a number of witnesses to the transfer, including a lawyer. ***Estate of Melter***, 167 Wn.App. 285, 273 P.3d 991 (Div.3 2012). In ***Lint***, the transfer at issue was a will and there were a number of witnesses to the transfer, including a lawyers, doctors, and others. ***Estate of Lint***, 135 Wn.2d 518, 957 P.2d 755 (Wn. 1998). And last in ***Lennon***, the transfers at issue were stock certificates, joint accounts, and a power of attorney and there were a number

of witnesses to the transfer(s), including a lawyer, bankers, and others. ***Estate of Lennon***, 108 Wn.App. 167, 29 P.3d 1258 (Div. 1 2001). Here, unlike the eight cases cited above there are no witnesses to the transfer at issue nor is there evidence that Mark even effectuated the transfer of the Fidelity Account to Gunwall—we only know that "someone" caused the account beneficiaries to change. CP. 2116 Ln.

Here, Gunwall had the initial burden of showing the absence of an issue of material fact as to him being entitled to Mark's Fidelity Investment account funds upon Mark's death. ***Zonnebloem, LLC v. Blue Bay Holdings, LLC***, 200 Wn. App. 178, 183, 401 P. 3d 468 (2017). Gunwall admits that "at best, the records show that the account was accessed by someone – that is all." CP 2116, ln 15.

Gunwall's admission, the distorting effect of the group then before the trial court to further their collective effort to commit fraud, and the likelihood that Gunwall was a member of the group trying to take Mark's estate by fraud move this matter

to its own, separate category. In fact, Gunwall's involvement with the conspiracy to commit fraud is only really knowable to Petitioner and the courts if the currently sealed documents are unsealed and made available to Petitioner. Here we have judicially suppressed evidence that was not before the trial court as part of the record on which it decided the summary judgment motion, but which evidence was existing and known to some at the time of the hearing. Thus, the question becomes if the propriety of the transfer of Mark's Fidelity Account should be assessed and decided on the full set of existing facts, including on whether Gunwall is a member of the group trying to take Mark's estate by collective acts of fraud.

The only case remotely close to this matter is ***Keck v. Collins***, 184 Wash.2d 358 357 P.3d 1080 (Wash. 2015). In ***Keck***, the trial granted a defendant's motion for summary judgment after it suppressed one of three declarations submitted by the plaintiff to oppose the defendant's summary judgment motion. ***Id***. This Court noted in ***Keck*** that a decision to exclude evidence

that would affect a party's ability to present its case amounts to a severe sanction. ***Id***. at 184 Wash.2d at 368. The ***Keck*** Court went on to state that this Court's "overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action. ***Id***. at 369. The result in ***Keck*** was that the evidence suppressed by the trial court was unsuppressed and the matter decided on the full evidence available to the trial court and parties at the time of defendant's summary judgment motion hearing. ***Id***.

The Petitioner seeks the basic result here as this Court made possible in ***Keck v. Collins***, 184 Wash.2d 358 357 P.3d 1080 (Wash. 2015). The Petitioner seeks the release of the suppressed or sealed evidence from the online legal document company and the opportunity to conduct discovery limited to the facts set forth in and related to the facts in the currently sealed documents. This will enable a consideration of Gunwall's Motion for Summary Judgment on the full set of facts known to the coconspirators and likely Gunwall at the time of his initial

hearing for Summary Judgment. The Petitioner wants a just result to Gunwall's Motion for Summary Judgment based on the facts that existed and were known to conspiracy members at the time of Gunwall's hearing, especially when Gunwall very likely knew at the time of the hearing about the group committing fraud and if he was involved with the group. Considering Gunwall's Motion on facts known to but not disclosed by Gunwall prior to his Motion for Summary Judgment would not unfairly prejudice Gunwall.

2. Washington Citizens Need Safeguards that Require ID Confirmation to Make Testamentary Transfers of Non-Probate Assets, like Financial Accounts and Insurance Policies, via Cellphone Apps.

In the coming age of managing one's financial affairs by cellphone apps, the rule needs to be established or affirmed that such transfers and transactions are effective or not without signatures or other evidence that the decedent or account owner, in fact, made the transfer or transaction. As noted by the trial

court and Court of Appeals, the transfer here was effectuated by a cellphone App that required no confirming act that the account owner was the one who in fact made the transfer to the transferee.

Transfers like the one that occurred here seem designed to be vulnerable to fraudulent transfers. Anyone with access to another's cellphone and financial records could cause the type of transfer that occurred here. The opportunity for fraud and other bad acts would only increase if the transferor was in a confidential or dependent relationship with the transferee. Historically, such transfers required confirmation that the account owner made the transfer or account changes by notarized or in-office ID confirmed signatures. But now these types of transfers appear to be possible by a few key strokes on an account owner's cellphone.

An opinion on such cellphone transfers would provide notice to practitioners, professionals, and citizens that such app based transfers will be enforced either subject to specific rules or in the absence of such rules regardless of whether there is

evidence that the account holder made the transaction. The transferor could then either follow the new rules or knowingly accept the risk of no such rules. A transferor could even opt out of the risk by insisting that such app based transfers of their accounts require an authenticating wet signature within so many days of an App based transfer or a contemporaneous photograph of the transferor taken by the device being used for the transfer that is then sent to the app maker, account owner, or financial institution for later confirmation of the transferor effectuating the transaction in question. App based financial transactions are likely on the rise, yet they need security or options for the transferor to guard against fraud. An opinion here will put all on notice that such app based transactions will be enforced regardless of evidence or the lack of evidence that the account holder or decedent made such a transfer or will be made in accord with the rules announced by this Court.

VII. WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review because the

Opinion of the Court of Appeals is in conflict with this Court's decision in ***Keck v. Collins***, 184 Wash.2d 358 357 P.3d 1080 (Wash. 2015) and because the Opinion touches on issues of substantial public interest in the safety of having cellphone Apps that can transfer financial accounts and insurance policy proceeds upon the account or policy owner's death without any type of confirmation that it was the account or policy owner that made the change or transfer of the account or policy in the first instance.

The Court of Appeal's decision in this matter is in conflict with this Court's Decision in ***Keck v. Collins***, 184 Wash.2d 358 357 P.3d 1080 (Wash. 2015). Here, the Court of Appeals affirmed the trial court's Order on Gunwall's Motion for Summary Judgment despite the fact that the trial court has now found that, unknown to it and Petitioner, a group of those involved in this litigation were trying to take Mark Besola's estate by fraud at the time of the hearing on Gunwall's Motion for Summary Judgment and that currently sealed evidence may

likely provide direct evidence that Gunwall was and is a member of the group trying to take Mark's estate by fraud. The effect of the Court of Appeal's decision is to exclude or suppress evidence that would affect the Petitioner's ability to present its case that the transfer of Mark's Fidelity Account is the result of fraud or part of the conspiracy to commit fraud. To avoid this result, Petitioner respectfully requests this Court to interpret the rules for summary judgment hearings in a way that reaches a just determination of Gunwall's claim to the Fidelity Account funds on all the facts available to the trial court and parties related to Gunwall's claim. The Petitioner needs access to the sealed documents to determine if Gunwall or affirm that Gunwall is part of the conspiracy to comment fraud and if so, does his participation in this group render his lack of evidence that Mark made the change to his Fidelity Account fatal to his effort to obtain the Fidelity Account funds by a Motion for Summary Judgment.

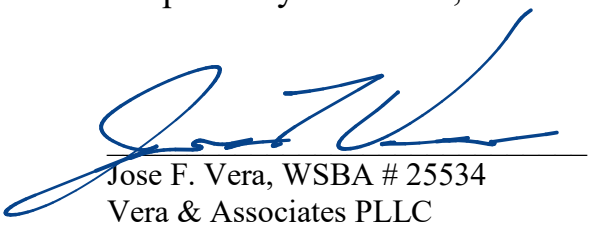
Finally, the Supreme Court should accept review because the Opinion of the Court of Appeals touches on matters of substantial public interest because the decision touches on the security of cellphone App transfers of financial accounts and insurance policy proceeds. The Washington public needs to understand that these types of transfers can be made without safety protocols to ensure that the account or policy owner actually made the transfer or account change in the first instance. Given the relatively new nature of such transfers or changes being able to be made by cellphone Apps, the general public may not yet understand that these types of account and policy transfers are vulnerable to being made by housemates, family members, and in-home caregivers. This Court's Opinion on the use of such cellphone Apps would alert the Washington Public to such risks or announce new rules for such transfers. Either way, the Washington public would benefit.

VII. Conclusion

Based on the foregoing, Petitioner respectfully requests the Supreme Court to accept review of this matter.

Submitted September 14, 2022.

Respectfully submitted,



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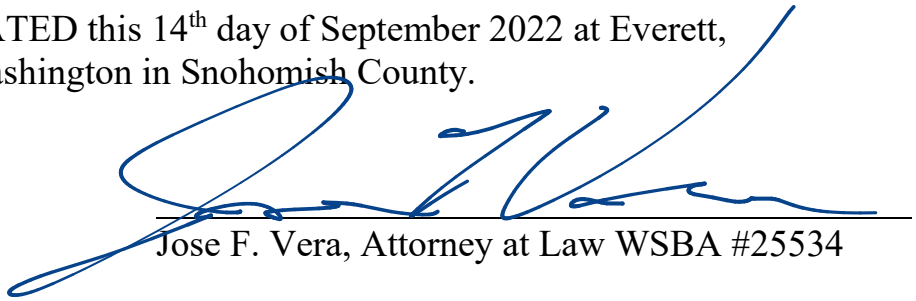
CERTIFICATE OF WORD COUNT

The undersigned certifies that the foregoing Reply is 14 point, New Times Roman font and contains 3,849 words.

DATED this 14th day of September 2022 at Everett, Washington in Snohomish County.



Jose F. Vera, Attorney at Law WSBA #25534

CERTIFICATE OF SERVICE

I hereby certify that on 14th day of September, 2022, I served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

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DATED this 14th day of September, 2022.

/s/ Lisa Lefebvre
Lisa Lefebvre, Legal Assistant

Appendix A

Filed
Washington State
Court of Appeals
Division Two

July 6, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Estate of:

MARK LESTER BESOLA,

Deceased.

AMELIA BESOLA, individually,

Plaintiff,,

v.

ERIC PULA, individually and as Personal Representative of the Estate of Mark L. Besola; KELLY MCGRAW, individually; JULIA BESOLA-ROBINGSON, individually, UC DAVIS VERTERINARY CATASTROPHIC NEED FUND; KARE KITSAP ANIMAL RESCUE AND EDUCATION; BRANDON GUNWALL, individually,

Defendants.

AMELIA BESOLA,

Appellant,

v.

BRANDON GUNWALL,

Respondent,

No. 55461-5-II

UNPUBLISHED OPINION

JOHN DOES 1-20, FIDELITY BROKERAGE SERVICES, LLC,

Defendants.

CRUSER, J. – On April 4, 2018, the primary beneficiary designations on Mark Besola's Fidelity investment accounts were changed electronically from Mark's former boyfriend Jeffrey Swenson to Brandon Gunwall, a man whom Mark[1] had only known for a very short period of time. Mark died on January 1, 2019. Mark's sister Amelia Besola, who purchased Swenson's right to sue as a prior beneficiary, filed a petition seeking to overturn the April 4 Fidelity beneficiary designations.[2] The superior court granted Gunwall's motion for summary judgment and dismissed Amelia's purchased claims against Gunwall.

Amelia appeals the superior court order granting Gunwall's motion for summary judgment. She argues that the superior court erred when it concluded that there were no questions of fact as to (1) whether Gunwall exercised undue influence over Mark when Mark changed the designated primary beneficiary of the Fidelity accounts from Swenson to Gunwall, thus invalidating the beneficiary changes under contract principles, and (2) whether Mark was a vulnerable person

[1] We refer to Mark, Amelia Besola, and their sister Julia Besola-Robinson, by their first names for clarity.

[2] Beneficiary designations are part of the investment account contracts. *See* 26B CHERYL C. MITCHELL & FERD H. MITCHELL, WASHINGTON PRACTICE: PROBATE LAW AND PRACTICE § 1:9 (2d ed. 2015). The parties do not dispute that Swenson, as the prior primary beneficiary to these contractual accounts, had standing to challenge the beneficiary changes or that Amelia, as the purchaser of Swenson's rights, has standing to challenge the April 4 beneficiary designations.

under the slayer/abuser statute, RCW 11.84.020.[3] She also argues that certain evidence should not be considered under the dead man's statute, RCW 5.60.030. We affirm the superior court's order granting Gunwall's summary judgment motion and deny Gunwall's request for attorney fees and costs.

FACTS

I. BACKGROUND FACTS[4]

A. MARK'S RELATIONSHIPS WITH HIS SISTERS

Throughout their lives, Mark had contentious relationships with his sisters Amelia and Julia. Following their mother's death, all three siblings were partners in a family business, Besola Realty Enterprises. Mark and Amelia, who were both veterinarians, also worked together in a veterinary practice from 2000 to 2015. The ownership of the veterinary practice was later highly disputed.

By 2018, the family relationships had become so strained that the siblings were exploring ways to break up the family business. Mark was also claiming a partnership interest in the veterinary practice that he asserted Amelia had unilaterally terminated, and he was in the process of filing a lawsuit against Amelia.

Mark met with attorney Thomas Gates in March 2018 regarding the lawsuit against Amelia. Gates later filed a declaration stating that when they met, he believed that Mark had the

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[3] Amelia also presents argument addressing orders related to a will contest. Because only the orders related to Gunwall's motion for summary judgment are properly before us, we do not address any arguments related to the will contest.

[4] Because we are addressing a summary judgment motion, unless otherwise noted, these facts are taken in the light most favorable to the nonmoving party, Amelia. *Sartin v. Estate of McPike*, 15 Wn. App. 2d 163, 172, 475 P.3d 522 (2020), *review denied*, 196 Wn.2d 1046 (2021).

capacity to file the lawsuit and that no one else was present when they met. On August 31 and December 12, Mark also met with attorney Gregory Lucas to draft the complaint against Amelia. No one accompanied Mark to these meetings. Lucas later filed a declaration stating that it was his belief that Mark had the capacity to verify the complaint and that he was competent when he signed the verification.

Although the siblings' relationships had always been contentious, the disputes became more difficult in 2018. During 2018, Mark threatened to disinherit his sisters. According to Amelia, Mark had made such threats numerous times before, perhaps 20 to 30 times since 1984, but Amelia asserted that he had never followed through on this threat. Julia believed that Mark was making such threats to increase his leverage in the dissolution of the family business.

Starting in March, Mark engaged in a series of highly vitriolic email, text, and telephone exchanges with Amelia. Mark's statements became concerning enough to Amelia that she obtained a protection order in August.

By September, the sisters sought to engage in a mediation to divide the family business properties. Although Amelia was skeptical that Mark would attend the mediation, a mediation was scheduled for January 2019. Amelia, who believed that Mark had substance abuse issues, later stated that she had hoped the mediation would operate, in part, as some type of intervention with Mark by removing him from his current environment. But Amelia did not recall if she communicated this to the mediator or told the mediator that Mark lacked the capacity to participate in the mediation to divide their shared assets.

Although primarily restricted to a wheelchair due to "[i]mpaired mobility," possibly due to vascular and edema issues in his legs,[5] Mark came to Julia's house for a family gathering to celebrate Julia's daughter's birthday in March 2018; and he attended a Mother's Day event at Amelia's house in May 2018. Clerk's Papers (CP) at 69. He drove himself to these events. According to Julia, at the March gathering, they talked about Mark's health issues, and he said he was fatigued and his legs hurt. Neither Amelia nor Julia came to Mark's Lake Tapps residence in 2018.

B. MARK'S PERSONAL RELATIONSHIPS AND THE APRIL 4, 2018 BENEFICIARY CHANGE

2018 was also a tumultuous year for Mark personally. In addition to his issues with his sisters, Mark experienced several serious incidents at his home and with some of the individuals who were living with him.

In 2018 Mark lived in his Lake Tapps residence with several unrelated individuals, including Jimi Hansen, Mark's former boyfriend Swenson, Bradley Bouton, Eric Pula, and James Garrett. Others, including Kelly McGraw, rented two apartments located on the premises.

Mark met Gunwall in early 2018. Mark quickly invited Gunwall to move in and to assist him with caring for the residence, the yard, and Mark's several dogs. Gunwall did not pay rent. When Gunwall moved in, Swenson, Hansen, and others were living in the residence.

According to Gunwall, "[s]hortly after [he] moved in" Mark "had a falling out" with Swenson, and Swenson refused to leave when Mark asked him to. *Id.* at 1256. Gunwall "stood up for Mark and was able to get [Swenson] to leave the house." *Id.* Gunwall stated that Swenson had

[5] Mark's hospital records from 2016 noted that although he used a wheelchair he was capable of self-transfer and that he would walk without assistance.

been "able to take advantage of Mark and his financial resources." *Id.* Gunwall also asserted that Mark had, at some point, also asked him to for help removing others from the residence because they had damaged the residence and had stolen from Mark.

On April 4, just months after Gunwall moved into Mark's home, the primary beneficiary designations on certain Fidelity investment accounts were changed from Swenson to Gunwall.[6] These beneficiary designation changes were made electronically.

Documentation that Fidelity later provided, which appears to cover electronic transactions in Mark's accounts from May 2017 to August 2018, showed that on April 4, 2018 someone had attempted to access Mark's Fidelity account four times.[7] Two attempts to access the account, one at 4:15:15 and the other at 8:11:40, appear to have been successful. Two of the attempts, one at 19:16:44 and the other at 23:33:40, failed. Both of the failed attempts appear to have been from a Samsung Android phone. The successful attempts appear to have been made from a different device. This record also showed frequent failed attempts to access the accounts over the entire period of the report, many of which predated Mark's acquaintance with Gunwall.

On June 11, Hansen forced Mark, Gunwall, and Bouton into Mark's car; drove Mark around; threatened Mark; and took Mark's phone away from him after Mark was discovered texting one of his sisters for help. When they returned to the Lake Tapps residence, Gunwall helped

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[6] The secondary beneficiary designations to Amelia and Julia were not changed on April 4, 2018. Based on the record before us, it appears that as of September 30, 2019, these accounts were valued at $629,880.17. Although Amelia asserts in her opening brief that the non-probate assets that would go to Gunwall amount to $1.4 million, she does not cite to anything in the record establishing this amount, and she appears to be referring to both the Fidelity accounts and the life insurance benefits, which are not at issue in this appeal.

[7] These accounts appear to be both brokerage accounts and retirement accounts.

Mark into his wheelchair and back into the house. Once inside the house, Hansen "head-butted" Mark. *Id.* at 1478. Gunwall stated in later deposition testimony that after this event Mark seemed scared, and at some point he told Gunwall that he needed to get Hansen out of the house, and Hansen moved out. Sometime before December, Bouton also moved out of the residence.

At some point in June, after Hansen had moved out, Mark met Eric Pula, and Pula began living at Mark's residence. In lieu of rent, Pula provided "security" for Mark and occasionally drove Mark places and provided other assistance. *Id.* 434. At Mark's request, Pula and Gunwall evicted some individuals from the residence.

In October, Mark fell into the lake and was unable to get out. Gunwall, Bouton, and a guest pulled Mark out of the lake. On October 15, the beneficiary designations for Mark's life insurance policy were changed from Swenson to Gunwall.[8]

On December 1, Mark's former housemate Bouton and his brother broke into Mark's house and struck Mark with a baseball bat. When Bouton and his brother then approached Pula, Pula shot them, killing Bouton's brother. Bouton later pled guilty to residential burglary, second degree robbery, and third degree assault.

When the police investigated the December 1 shooting, they found the residence in total "disarray." *Id.* at 900. They noted that there was drug paraphernalia and dog feces throughout the residence and that there was a five-gallon bucket that was "3/4 full of an unknown liquid-type substance" with a strong odor near the couch where Mark primarily stayed. *Id.* Some of the people who lived in the Lake Tapps residence verified that Mark lived mainly on the couch and that he

[8] The life insurance is not at issue in this appeal.

would use various containers to relieve himself when he was unwilling or unable to get to the bathroom.

At some point after the December 1 incident, Mark asked Gunwall, Pula, and McGraw to marry him in order for them to inherit his property. They all declined.

C. MARK'S HEALTH ISSUES AND DEATH

Mark suffered from several chronic health issues and made regular visits to the doctor and hospital, sometimes with the assistance of those living in the Lake Tapps residence. Mark was hospitalized in February 2018 with vascular issues and cellulitis and on May 17 with renal failure, anemia, chronic heart failure, and an ulceration on his leg. But the medical records before us do not show any indication that Mark was experiencing any cognitive or mental health issues around the time of the April 4 beneficiary change.

On December 30, Gunwall drove Mark to the hospital because Mark had been "dry heaving and he wasn't . . . feeling good." *Id.* at 1505. Although Mark initially improved, he died on January 1, 2019, at the age of 52. His cause of death was listed as "hepatic encephalopathy" and "chronic ethanolism with steatosis." *Id.* at 279 (capitalization omitted). The hospital records showed that Mark had methamphetamine in his system when he arrived at the hospital.

Mark's prior medical records from a March 12, 2016 admission noted that Mark had a history of narcotic/opioid use and had overdosed "in the past and refused offers for detox." *Id.* at 67. Although this same record also notes that Mark "went to and finished rehab" in 2007, it also noted a narcotic overdose in 2013. *Id.* at 68. No other hospital records mention narcotic or opioid abuse.

During the 2016 admission, Mark presented as confused and had suffered "multiple falls over [the] past few days." *Id.* at 79. This record also states that Mark had a history of deep venous thrombosis and superficial thrombophlebitis in 2013. Other records show that Mark had a history of "diastolic heart failure, obstructive sleep apnea, and extensive aortocaval DVT with chronic lower extremity edema."[9] *Id.* at 89.

II. PROBATE, DISCOVERY OF WILL, AND LITIGATION

Days after Mark's death, Amelia opened an intestate probate for Mark's estate and was appointed as the administrator. A short time later she contacted Fidelity and requested that Fidelity withhold payment to the beneficiary of Mark's accounts to allow her time to investigate the circumstances of Mark's death and whether the estate or Amelia could bring an action under the slayer/abuser statute.

Amelia also obtained a court order granting her access to the Lake Tapps property to remove the dogs. While at the property on February 2, Amelia and the people helping her found it littered with hypodermic needles and meth pipes and full of debris and dog feces.

On May 8, Pula filed a will that Mark purportedly drafted on December 6, 2018 (the Pula will). The Pula will expressly disinherited Amelia and Swenson; excluded Amelia as the personal representative; and left substantial assets to Pula, McGraw, Julia, and two animal-related charities. The Pula will also left Mark's dogs to Gunwall on the condition that he care for the dogs, and it provided that if Gunwall took the dogs he would also be the beneficiary of Mark's life insurance policies. This will did not mention the Fidelity accounts. Amelia was removed as personal

[9] Other records characterized this as lymphedema.

representative, and Pula was appointed in her place.[10] Amelia filed a petition contesting the Pula will.

In October 2019, Amelia filed a petition seeking to overturn the beneficiary designations that changed the primary beneficiary from Swenson to Gunwall on Mark's Fidelity investment accounts. Although the October 2019 petition is not in our record, it appears that Amelia argued that Gunwall could not be the beneficiary of the Fidelity investment accounts because (1) he exercised undue influence over Mark in obtaining the beneficiary designations, which invalidated the designations under contract principles, and (2) he was precluded from benefiting from the Fidelity accounts under the slayer/abuser statute, RCW 11.84.020, because Mark was a vulnerable person.

On October 9, 2020, Gunwall moved to dismiss Amelia's petition seeking to invalidate the beneficiary designations on Mark's Fidelity investment accounts and for an order directing Fidelity to release the funds for which he was the designated primary beneficiary. Gunwall asserted that because he was not claiming anything under the will, the only claims against him related to the beneficiary designations on the Fidelity accounts and were based on alleged financial exploitation of a vulnerable adult under chapter 11.84 RCW and alleged undue influence. He argued that there was no admissible evidence establishing by clear, cogent, and convincing evidence that Mark was a vulnerable adult or that he (Gunwall) exercised undue influence over Mark when Mark changed his beneficiary designations from Swenson to Gunwall on the Fidelity accounts.

[10] It appears that Pula was removed as the personal representative in December 2020, and that Amelia was again appointed as the personal representative of Mark's estate.

That same day, Pula moved to dismiss Amelia's will challenge, and Amelia filed a motion for summary judgment regarding her motion to invalidate the Pula will. Amelia later filed a motion to continue the summary judgment motions.

On November 6, the superior court heard all three October 9, 2020 motions and Amelia's motion to continue the summary judgment motions. The superior court granted Amelia's motion to continue Pula's motion to dismiss Amelia's will challenge and Amelia's motion for summary judgment, but it denied the motion to continue Gunwall's summary judgment motion.

After hearing argument on Gunwall's summary judgment motion and considering 39 documents submitted with his motion for summary judgment and the responsive pleadings, the superior court granted the summary judgment motion and dismissed the claims against Gunwall with prejudice. The superior court ordered Fidelity to transfer the funds to the court registry. The superior court subsequently denied Amelia's motion for reconsideration.

The superior court later directed the entry of a final judgment as to these claims pursuant to CR 54(b). Our commissioner subsequently ruled that this appeal was limited to the review of the order granting Gunwall's summary judgment motion.

ANALYSIS

Amelia appeals from the order granting Gunwall's summary judgment motion.[11] She argues that the superior court erred when it concluded that there were no questions of fact as to (1) whether Gunwall exercised undue influence over Mark when Mark replaced Swenson with Gunwall as the primary beneficiary to the Fidelity accounts, thus invalidating the beneficiary changes under contract principles, and (2) whether Mark was a vulnerable person under the slayer/abuser statute, RCW 11.84.020. She also argues that certain evidence should not be considered under the dead man's statute, RCW 5.60.030.

I. DEAD MAN'S STATUTE

Because it potentially affects what evidence we may consider, we first address Amelia's evidentiary argument. Amelia argues that the superior court erred in relying on statements of parties of interest, Pula, McGraw, and Gunwall about statements made by Mark. She contends that those statements should have been excluded under the dead man's statute, RCW 5.60.030. Without attributing any statement to any specific person, Amelia challenges the following statements by Pula, McGraw, and Gunwall: "Mark wanted to marry me or asked me to marry him; Mark told me I was his best friend; Mark wanted me to take care of his dogs if he died; Mark's family could not

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[11] Amelia also assigns error to the superior court's denial of her motion for reconsideration of the summary judgment order. But Amelia does not present any argument related to that assignment of error, so we do not address it. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Amelia also argues that the superior court erred in granting Pula's motion for summary judgment dismissing all claims and denying Amelia's motion for summary judgment. These arguments are outside of the scope of this appeal, so we do not address them.

We note that Amelia has also attached more than 200 pages of attachments to her opening brief, many of which are not part of the appellate record. All documents attached to a party's brief must be a part of this court's record. RAP 10.3(a)(8). Thus, we have not considered any document that is not part of the official appellate record.

accept him as gay; and Amy stole money and assets from Mark, including his veterinarian clinic." Br. of Appellant at 42.

The dead man's statute, RCW 5.60.030, bars evidence presented by a party in interest regarding "any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased." "A 'party in interest' under RCW 5.60.030 is one who 'stands to gain or lose in the action in question.' " *In re Estate of Lennon*, 108 Wn. App. 167, 174, 29 P.3d 1258 (2001) (quoting *Bentzen v. Demmons*, 68 Wn. App. 339, 344, 842 P.2d 1015 (1993)). "The [dead man's] statute may be waived when the protected party introduces evidence concerning a transaction with the deceased." *Id.* at 175.

Although Amelia argues that any evidence from Pula, McGraw, and Gunwall about statements Mark made to them are inadmissible under the dead man's statute, the only interested parties in relation to the Fidelity beneficiary designation are Gunwall and, due to her purchase of Swenson's interest, Amelia. Thus, any statements related to the Fidelity beneficiary designation made by Pula and McGraw are not excluded under the dead man's statute for purposes of Gunwall's motion for summary judgment.

Amelia states broadly that there was evidence from Gunwall that was inadmissible, but the only statements she identifies that were not testified to by other sources was Gunwall's statement that Mark wanted Gunwall to care for the dogs if Mark died and Gunwall's statement that Mark had asked him (Gunwall) to marry him in order to inherit his property and keep Amelia and Julia from inheriting. Thus, we limit our review of this issue to those particular statements.

Although Gunwall's statement that Mark wanted him to care for the dogs if Mark died could fall under the dead man's statute, the record also contains an email from Amelia to her

attorneys stating, "Mark left clues and repeatedly told everyone why he was leaving the investment income to [Gunwall]. Mark had six dogs and he had this fantasy that [Gunwall] would keep his dog family, consisting of those 6 dogs intact."[12] CP at 1353. Amelia characterized the plan to keep the dogs together as unreasonable and suggested that this evidence could be used as evidence that Mark was not of sound mind. Because Amelia herself presented evidence that Mark wanted Gunwall to care for the dogs if he died, she has waived any objection to this evidence under the dead man's statute.

As to Gunwall's testimony about Mark proposing that they marry to avoid Mark's sisters from inheriting, that statement likely falls under the dead man statute. But since Pula also provided evidence that Mark proposed marriage to Pula and to McGraw to ensure they inherited from him, demonstrating that Mark did not want his sisters to inherit, the omission of that specific statement has no impact on our summary judgment analysis.

[12] Amelia produced this email in response to a discovery request.

II. SUMMARY JUDGMENT

A. SUMMARY JUDGMENT STANDARDS

We review an order granting summary judgment de novo.[13] *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends in whole or in part. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

In a summary judgment motion, the moving party, here Gunwall, bears the initial burden of showing the absence of an issue of material fact. *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 183, 401 P.3d 468 (2017). If the moving party meets this initial burden, then the burden shifts to the plaintiff, here Amelia, to show a genuine issue of material fact. *Portmann v. Herard*, 2 Wn. App. 2d 452, 460, 409 P.3d 1199 (2018). The "nonmoving party cannot rely on conclusory statements or conjecture." *Id.* "If, at this point, the [nonmoving party] 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

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[13] Amelia argues that the superior court applied the wrong evidentiary standard when reviewing Gunwall's summary judgment motion by applying the clear, cogent, and convincing burden of proof and, therefore, failing to consider the evidence in the light most favorable to her. We review an order granting summary judgment de novo, so whether the superior court applied the correct review standard is irrelevant. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). We note, however, that Amelia's argument conflates the burden of proof with the fact we consider the evidence in the light most favorable to the nonmoving party when reviewing a summary judgment motion. We can consider the evidence in the light most favorable to the nonmoving party and still determine that no rational trier of fact could find this evidence would be sufficient to meet the relevant burden of proof. And, to the extent Amelia is arguing that the clear, cogent, and convincing burden proof is irrelevant to the summary judgment determination in this case, her citation to *Lennon*, 108 Wn. App. at 181, is not persuasive because that case does not address an undue influence claim.

which that party will bear the burden of proof at trial,' then the trial court should grant the motion." *Young v. Key Pharm. Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (footnote omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

In addition, "[t]he general principles of summary judgment are supplemented by additional principles when a party claims undue influence." *Kitsap Bank v. Denley*, 177 Wn. App. 559, 569, 312 P.3d 711 (2013). In this context, "the party bearing the burden to prove the undue influence claim at trial must present sufficient evidence to make it highly probable that the undue influence claim will prevail at trial." *Id.* Thus, the superior court "may grant a summary judgment motion to dismiss if no rational trier of fact, viewing the evidence in the light most favorable to the nonmoving party, could find clear, cogent, and convincing evidence on each element." *Id.* at 569-70; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.").

B. UNDUE INFLUENCE

Beneficiary designations are part of the investment account contracts. *See* 26B CHERYL C MITCHELL & FERD H. MITCHELL, WASHINGTON PRACTICE: PROBATE LAW AND PRACTICE, § 1:9 (2d ed. 2015). Undue influence is a contract principle. *Denley*, 177 Wn. App. at 570; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. LAW. INST. 1981); 6 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 301.11 cmt. (7th ed. 2019). When examining undue influence claims, we apply the rules for undue influence articulated in the RESTATEMENT (SECOND) OF CONTRACTS § 177 in will and gifts situations. *Denley*, 177 Wn. App. at 570; *In re Estates of Jones*, 170 Wn. App. 594, 606, 287 P.3d 610 (2012).

"Undue influence involves unfair persuasion that seriously impairs the free and competent exercise of judgment." *Jones*, 170 Wn. App. at 606. Generally, Amelia would have the burden of proving the elements of undue influence, but under certain circumstances, there is a presumption of undue influence. *In re Estate of Knowles*, 135 Wn. App. 351, 357, 143 P.3d 864 (2006). Amelia argues that Gunwall failed to overcome this presumption. To determine whether this presumption applies, we examine the *Dean*[14] factors and other contributing factors.[15] *Id.*

The primary *Dean* factors are "(1) a fiduciary or confidential relationship between the testator and the beneficiary, (2) active participation by the beneficiary in preparing or procuring the will, and (3) the beneficiary's receipt of an unusually or unnaturally large part of the estate." *Id.* In addition, we consider " 'the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting undue influence, and the naturalness or unnaturalness of the will.' " *Id.* (internal quotation marks omitted) (quoting *In re Estate of Reilly*, 78 Wn.2d 623, 647, 479 P.2d 1 (1970)). "The weight of any of such facts will, of course, vary according to the circumstances of the particular case." *Dean*, 194 Wash. at 672. The existence of these factors will not automatically invalidate the action, but they may "raise a presumption of undue influence" that may be sufficient to establish undue influence if not rebutted. *Knowles*, 135 Wn. App. at 357. "[T]he existence of the presumption does not[, however] relieve the . . . challengers of proving undue influence by clear, cogent, and convincing evidence." *Id.*

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[14] *Dean v Jordan*, 194 Wash. 661, 79 P.2d 331 (1938).

[15] Both parties presume that the *Dean* factors apply here.

The parties do not assert that there was a fiduciary relationship between Mark and Gunwall. Thus, our focus is on whether there was a confidential relationship that would weigh in favor of a presumption of undue influence.

Confidential relationships exist when one person has gained confidence of the other and purports to act or advise with the other's interest in mind. *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356-57, 467 P.2d 868 (1970). At best, the evidence here shows that as of April 4, 2018, Gunwall was living in Mark's residence, caring for Mark's dogs, and possibly assisting Mark by helping him expel Swenson and others. There was absolutely no evidence that Gunwall advised Mark about his finances or any other matters. Thus, this factor does not weigh in favor of the existence of or presumption of undue influence.

We next examine the evidence related to whether Gunwall was an active participant in preparing the beneficiary designation changes. We recognize that there was evidence of failed password attempts on the Fidelity accounts from May 2017 to August 2018, and that Julia testified in her deposition that Mark had told her that, at some unspecified time, other people had his computer passwords and he did not know where his computer was. But there was no evidence that other people, even Gunwall, potentially having access to Mark's computer or attempting to obtain access to Mark's Fidelity accounts influenced Mark's decision to change his Fidelity beneficiary designations from Swenson to Gunwall or that Gunwall was an active participant in that change.[16]

[16] We note that if this was a fraud claim rather than an undue influence claim, this evidence would have different significance.

[17] Because there was no evidence that Gunwall was an active participant in the beneficiary changes, this factor does not weigh in favor of the existence of or a presumption of undue influence.

The third *Dean* factor is whether the beneficiary received an unusually or unnaturally large part of the estate. *Knowles*, 135 Wn. App. at 357. " 'Unusualness' or 'unnaturalness' can be measured by comparison to the [testator's] previous . . . bequests to other beneficiaries." *Mueller v. Wells*, 185 Wn.2d 1, 13, 367 P.3d 580 (2016). It is undisputed that Gunwall, a relative stranger to Mark, would receive a considerable amount of money as the primary beneficiary of the Fidelity accounts. But there is nothing in the record establishing the size of Mark's estate as a whole, so we cannot determine if this is an unusually large part of the estate. *Denley*, 177 Wn. App. at 577-78 (holding that the Estate's failure to present evidence of the value of the entire estate prevented a determination of whether $400,000 was a disproportionally large portion of the estate). Accordingly, this factor does not weigh in favor of a presumption of undue influence.

Additionally, although Mark had health issues that may have placed him in a position of reliance on others more than he otherwise would have been, there was no evidence in the record that Mark relied on Gunwall for anything other than caring for the dogs and premises and assisting Mark by ensuring that Swenson and perhaps others left the premises at Mark's request when the

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[17] Amelia argues that the superior court erred when it found that Mark "made the 'key strokes' on the respective electronic devices when the best the evidence could show was that such transfers happened by 'someone' making key strokes on the electronic devices in question." Br. of Appellant at 7-8. But this case was decided on summary judgment and the superior court made no such finding.

To the extent Amelia may also be asserting fraud, based on the record before us she did not argue fraud below. This court only considers issues raised on summary judgment before the superior court "to ensure that we engage in the same inquiry as the trial court." *Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 823, 394 P.3d 446 (2017). Accordingly, we will not consider this argument in the context of a fraud claim.

beneficiary was changed from Swenson to Gunwall. Later evidence suggests that Mark gradually became more and more dependent on or subject to the whims of those living in his home, including Gunwall, but there is no evidence that this level of reliance influenced Mark's decision to remove Swenson as the primary beneficiary and to replace Swenson with Gunwall, or that Mark did not have the mental capacity to make the beneficiary changes. We note that none of the attorneys Mark met with in March, August, and December 2018, expressed concern about Mark's capacity. Furthermore, even though his sisters expressed concern about Mark, they had no first-hand knowledge of Mark's relationships with the others in his household, especially as early as April 2018. Thus, these factors do not weigh in favor of a presumption of undue influence.

In sum, the evidence presented would not allow a rational trier of fact to find a presumption of undue influence by clear, cogent, and convincing evidence. Nor does the evidence establish a question of fact as to whether Gunwall interfered with Mark's free will, preventing Mark from exercising his own judgment and choice in removing Swenson as the primary beneficiary after Swenson was no longer part of his life and then designating Gunwall as the primary beneficiary of the Fidelity accounts. Accordingly, the superior court did not err when it granted summary judgment and dismissed Amelia's undue influence claim.

C. SLAYER/ABUSER STATUTE

Amelia further argues that the superior court erred in granting Gunwall's summary judgment on the slayer/abuser statute issue. We disagree.

Under RCW 11.84.020, "[n]o slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent."[18] Under RCW 11.84.160(1), an "abuser" cannot benefit if there is clear, cogent, and convincing evidence that a "decedent was a *vulnerable adult at the time the alleged financial exploitation took place*," and that "[t]he conduct constituting financial exploitation was willful action or willful inaction causing injury to the property of the vulnerable adult."[19] (Emphasis added.) We hold that Amelia does not show that the evidence established a question of fact as to whether Mark was a vulnerable adult at the time of the alleged financial exploitation or as to whether Gunwall engaged in conduct constituting financial exploitation in obtaining the beneficiary designation changes.

1. VULNERABLE ADULT

For purposes of the slayer/abuser statute, the term "[v]ulnerable adult" has "the same meaning as provided in RCW 74.34.020." RCW 11.84.010(6). Former RCW 74.34.020(22) (2018) defined vulnerable adult as follows:

> "Vulnerable adult" includes a person:
> (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
> (b) Found incapacitated under chapter 11.88 RCW; or
> (c) Who has a developmental disability as defined under RCW 71A.10.020; or
> (d) Admitted to any facility; or
> (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
> (f) Receiving services from an *individual provider*; or
> (g) Who self-directs his or her own care and receives services from a *personal aide* under chapter 74.39 RCW.

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[18] This includes assets that pass outside of probate. *In re Estate of Haviland*, 177 Wn.2d 68, 76, 301 P.3d 31 (2013).

[19] We note that unlike the abuser determination, the slayer determination does not require that the killing be at the time of the alleged financial exploitation. RCW 11.84.140.

(Emphasis added.) The parties agree that Mark did not qualify as a vulnerable adult under (22)(a) through (e). And we hold that there was similarly no question of fact as to whether Mark qualified as a vulnerable adult under (22)(f) or (g).

To qualify as a vulnerable adult under subsection (f), there must be evidence sufficient to create a question of fact as to whether Gunwall was an "individual provider." Former RCW 74.34.020(22). An individual provider is defined as "a person under contract with the [Department of Social and Health Services] to provide services in the home under chapter 74.09 or 74.39A RCW." Former RCW 74.34.020(11). And there is no evidence establishing a question of fact regarding whether Gunwall was under contract with the department to provide any kind of services to Mark, so Mark cannot qualify as a vulnerable adult under subsection (f).

To qualify as a "personal aid under chapter 74.39 RCW," there must be evidence that Gunwall was someone who provided Mark with "*health care services* that a person without a functional disability can perform." RCW 74.39.007(2) (emphasis added). "Health care tasks" include "medical, nursing, or home health services that enable the person to maintain independence, personal hygiene, and safety in his or her own home." Former RCW 74.39.050(2)(a) (1999). And although a personal aid can provide additional "home care services," "[t]he role of the personal aid in self-directed care is limited to performing the physical aspect of *health care tasks* under the direction of the person for whom the tasks are being done." Former RCW 74.39.050(2)(c) (emphasis added). Although there is evidence that could establish a question of fact as to whether Gunwall may have been providing some home care services as of April 4, 2018, and that Gunwall may have been performing some health care tasks, such as helping Mark get to medical appointments or providing or removing receptacles in which Mark could relieve

himself when he was unwilling or unable to make it to the restroom later that year, there was no evidence that "at the time the alleged financial exploitation took place" Gunwall was providing any *health care* services to Mark. RCW 11.84.160(1). Accordingly, there is no question of fact as to whether Mark could qualify as a vulnerable victim under subsection (g).

2. FINANCIAL EXPLOITATION

In addition to the requirement that Mark be a vulnerable victim, Amelia would also have to prove that there was a question of fact as to whether Gunwall engaged in "conduct constituting financial exploitation" in order for the slayer/abuse statute to apply. *Id.* "Financial exploitation" is "the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's profit or advantage. Former RCW 74.34.020(7); RCW 11.84.010(3). Former RCW 74.34.020(7)(a) provides a non-exclusive list of examples of financial exploitation, including

> [t]he use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence *with a vulnerable adult* to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult.

(Emphasis added.)

As discussed above, and for the same reasons, there is no evidence establishing that Mark was a vulnerable adult for purposes of the slayer/abuser statute. And, as discussed above, there is no evidence establishing a question of fact as to whether Gunwall was an active participant in preparing the beneficiary designation change, so there is no evidence establishing a question of fact as to whether Gunwall used deception, intimidation, or undue influence in obtaining the beneficiary designation change.

Amelia does not show that there are questions of fact as to whether Mark was a vulnerable adult or whether Gunwall engaged in financial exploitation, so the superior court did not err when it granted Gunwall's summary judgment motion on the slayer/abuser statute issue. Accordingly, we affirm the superior court order granting Gunwall's summary judgment motion.

III. ATTORNEY FEES AND COSTS ON APPEAL

Gunwall asks for attorney fees and costs under RCW 11.96A.150 and RAP 18.1.

RAP 18.1 allows us to award reasonable attorney fees or expenses "[i]f applicable law grants to a party the right to recover" such attorney fees or expenses. RCW 11.96A.150(1) gives us discretion to award "costs, including reasonable attorneys' fees" to any party from any party to the proceeding. "The statute allows a court considering a fee award to consider any relevant factor," and to award costs and fees " 'in such amount . . . as the court determines to be equitable.' " *In re Guardianship of Lamb*, 173 Wn.2d 173, 197-98, 265 P.3d 876 (2011) (quoting RCW 11.96A.150(1)); RCW 11.96A.150(1). Although Gunwall has prevailed on this appeal, we deny his request for appellate attorney fees and costs given the disparate benefit to Gunwall and the equities of the case.

Accordingly, we affirm the superior court's order granting Gunwall's summary judgment motion and deny Gunwall's request for attorneys' fees and costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

GLASGOW, C.J.

PRICE, J.

Appendix B

FILED
Court of Appeals
Division II
State of Washington
7/26/2022 3:45 PM

IN THE COURT OF APPEALS, DIVISION II, OF THE STATE OF WASHINGTON

Petitioner Dr. AMELIA BESOLA, individually,

Appellant,

v.

BRANDON GUNWALL individually,

Respondent/Cross-Appellant.

PETITIONER'S MOTION FOR RECONSIDERATION AND PUBLICATION

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A. Identity of Moving Party.

Petitioner, Dr. Amelia Besola, ("Dr. Amy" or "Petitioner") respectfully moves for the relief set forth below.

B. Statement of Relief Requested.

Petitioner respectfully requests the Court to reconsider its decision on this Appeal because Mr. Brandon Gunwall ("Gunwall") admits that he did not and could not provide any court with evidence that Mark Besola ("Mark") changed the beneficiary designation, at issue, on this Appeal. As Gunwall concedes. "At best, the records show that the account was accessed by someone – that is all." CP 2116, ln 15. Without this key evidence, Gunwall may not meet his burden under Washington's summary Judgment standard of establishing his right to take ownership of Mark's Fidelity Investment Account upon Mark's death.

Petitioner also respectfully requests the Court to publish its decision in this Appeal because of the rise of managing financial, investment, and insurance policy changes by cellphone apps without required signatures for such app transfers. This rise

in app based changes to financial related accounts means there is a growing need for a generalized rule in Washington as to what makes a valid probate-related financial transfer: does a probate-related transfer require evidence that the decedent actually made the change on the app to render the transfer valid.

C. Statement of Material Facts.

The facts material to this motion to reconsider are few. Gunwall claimed that Mark transferred his Fidelity Investment Account to him by changing the beneficiary designation on the account via a cellphone app on May 4, 2018. This changed designation and Mark's death combined to transfer the Fidelity Investment account to Gunwall upon Mark's death. Petitioner asserted and continues to assert that the claimed transfer of the Fidelity Account must fail because it results from undue influence. Petitioner also assets that the claimed transfer fails because of the lack of evidence that Mark effectuated the beneficiary designation change that led to the transfer to Gunwall.

Gunwall moved for summary judgment to dismiss Petitioner's claims of and related to undue influence and to

affirm his ownership of Mark's Fidelity Investment account. Gunwall's claim to the Fidelity Investment account was predicated on the May 4, 2018 change to the primary beneficiary designation for Mark's Fidelity Investment account via a cell phone app. Gunwall presented no evidence that Mark Besola, in fact, made the change to the account's primary beneficiary designation—only that "someone" made the change. CP. 2116 Ln. 15. As this Court noted, the trial court made no written findings that Mark effectuated the beneficiary designation change. See FN 17 on P. 19 of ***Besola v. Pul***a, Unpublished Slip Opinion, Court Appeals Cause No. 55461-5-II filed on July 6, 2022.

To reach the question of whether Gunwall was entitled to the transfer of the Fidelity Investment account in the first instance, the trial court was required to conclude that Mark (as opposed to someone other than Mark) changed the account's beneficiary designation. This is correct because if the trial court had found that anyone but Mark changed the beneficiary designations—the matter would have ended promptly in Petitioner's favor.

The absence of written findings by the trial court that Mark changed the beneficiary designation on his investment account does not change the underlying analysis. The trial court's silent, implicit finding of fact that "Mark made the change to the beneficiary designations on his Fidelity account" is made manifest by the fact that the trial court granted Gunwall ownership of the Fidelity Account at the end of the motion. Gunwall presented no evidence to the trial court as to who made the beneficiary change for Mark's Fidelity Investment account. Yet, trial court held that Gunwall owned the Fidelity account. This means that the trial court decided, without evidence from either party, that Mark made the designation change and not "someone other than Mark." This finding was improper on a summary judgment motion.

It must also be recognized that the facts before the trial court during the cross motions for summary judgment were tainted by a false narrative spun by a conspiracy to commit fraud. At the time of the parties' cross motions for summary judgment, the Petitioner, her lawyers, and the trial court did not know of the conspiracy to commit fraud to take about $5 million in real estate

assets from Mark's estate via a fake Will. (CP 115-127 in the related Court of Appeals No. 56725-3)[1]. Also at the time of the cross motions for summary judgment, it could not be known if the sealed Formswift documents (CP 387-405 in the related Court of Appeals No. 56725-3) contained evidence of revisions to the original fake will created on April 19, 2019 (CP 122 in the related Court of Appeals No. 56725-3) that changed it to the Pula Will filed with the Pierce County Clerk's Office on May 8, 2019 (CP 123-124 in the related Court of Appeals No. 56725-3). No one but Gunwall could know if these possible changes to the fake will implicated Gunwall in the larger conspiracy to commit fraud. If the trial court knew about the conspiracy to commit fraud and knew whether Gunwall was part of the conspiracy, would the trial court have held for Gunwall or would it have denied all motions and set the matter for trial. Instead, the trial court unknowingly faced a false narrative during the various motions presented and supported by Mr. Pula's personal lawyer,

[1] This and the next three cites cite the Clerk's Papers in the closely related appeal before this Court in the matter of Court of Appeals No. 56725-3 because none of these four cites existed at the time of summary judgment hearing yet all four evidence the true state of affairs at the time of the underlying Motions for Summary Judgment.

and Mr. Pula's estate lawyer, and Mr. Gunwall's lawyer. None of the lawyers for the fake estate, Mr. Pula, and Mr. Gunwall informed the trial court that their clients were or might be parties to a collective effort to defraud Mark's estate of its assets. Thus, any analysis of the evidence presented to the trial court at the summary judgment motions ought to account for the false narrative and assertions made and not made to the trial court as part of the motions. Would the trial court have sent the matter to trial (as opposed to granting Gunwall's Motion for Summary Judgment), if the motion presentations had started with the Estate's lawyer, Mr. Pula's personal lawyer, and Mr. Gunwall's lawyer informing the trial court about the existence and scope of the conspiracy to commit fraud to take the assets of Mark's estate?

D. Grounds for Relief Requested

1. Gunwall's failure to establish that Mark designated him to be his primary account beneficiary distinguishes this matter from the cases cited by the parties on appeal and preempts the traditional undue influence analysis.

In the cases cited by the parties on appeal on the issue of undue influence, there was substantial if not overwhelming

evidence that the various decedents made the transfer at issue in each particular case. In ***Dean***, the transfer at issue was a will and there were a number of witnesses to the transfer, including a lawyer. ***Dean v. Jorden***, 194 Wn. 661, 79 P.2d 331 (Wn. 1938). In ***Mitchell***, the transfer at issue was a will and there were a number of witnesses to the transfer, including a lawyer. ***Mitchell v Daling***, 41 Wn. 2d 326, 249 P.2d 385 (Wn. 1952). In ***Kitsap Bank***, the transfer at issues was a check for $360,000 and POD account designation, and there were a number of witnesses, including a bank manager, a lawyer, and others to the transfer. ***Kitsap Bank v. Denley***, 177 Wn.App559, 312 P.3d 711(Div. II 2013). In ***Estate of Jones***, the transfer at issue was a will, and there were a number of witnesses to the transfer, including a lawyer, an estate planner, and others. ***Estate of Jones***, 170 Wn.App 594, 287 P.3d 610 (Div.3 2012). In ***Mumby***, the transfer at issue was a will and there were a number of witnesses to the transfer, including a lawyer, an estate planner, and others. ***Estate of Mumby v. Caldwell***, 97 Wn.App. 385, 982 P.2d 1219 (Div. 2 1999). In ***Melter***, the transfer at issue was a will and there were a number of witnesses to the transfer, including a lawyer.

Estate of Melter, 167 Wn.App. 285, 273 P.3d 991 (Div.3 2012). In ***Lint***, the transfer at issue was a will and there were a number of witnesses to the transfer, including a lawyers, doctors, and others. ***Estate of Lint***, 135 Wn.2d 518, 957 P.2d 755 (Wn. 1998). And last in ***Lennon***, the transfers at issue were stock certificates, joint accounts, and a power of attorney and there were a number of witnesses to the transfer, including a lawyer, bankers, and others. ***Estate of Lennon***, 108 Wn.App. 167, 29 P.3d 1258 (Div. 1 2001). Here, unlike the eight cases cited above there are no witnesses to the transfer at issue nor is there evidence that Mark even effectuated the transfer at issue—we only know that "someone" caused the account beneficiaries to change. CP. 2116 Ln.

Here, Gunwall had the initial burden of showing the absence of an issue of material fact as to him being entitled to Mark's Fidelity Investment account funds upon Mark's death. ***Zonnebloem, LLC v. Blue Bay Holdings, LLC***, 200 Wn. App. 178, 183, 401 P. 3d 468 (2017). Gunwall admits that "at best, the records show that the account was accessed by someone – that is all." CP 2116, ln 15. Thus, Gunwall had no evidence that

Mark made the change to his account's designated primary beneficiary. Gunwall also had no evidence that a party to the underlying investment account contract made the change to the account beneficiary designation that made him the primary account beneficiary. In fact, Gunwall presented no evidence that the underlying investment account contract allowed anyone other than Mark to make changes to the beneficiary designations. Gunwall's failure to provide evidence that Mark, in fact, personally changed his beneficiary designation left open the question: who made the change to the account's beneficiary designation. This question could only be answered here by the fact finder at trial.

Resolving the matter at trial would have the benefit of addressing the facts here in the full daylight of the now acknowledged conspiracy to commit fraud and allow the parties the benefit of the currently sealed documents to assess whether evidence from the sealed documents place Gunwall as a party to the conspiracy to commit fraud or clear him completely from such a possibility.

2. Publishing this Opinion will put all on notice that app based financial transactions will be enforced regardless of evidence or lack of evidence about who effectuated the transaction.

In the coming age of managing one's financial affairs by cellphone apps, the rule needs to be established or affirmed that such transfers and transactions are effective without signatures or other evidence that the decedent or account owner, in fact, made the transfer or transaction. Here, the court has enforced the transaction despite the trial court entering findings of fact that the matter is infected with a conspiracy to commit fraud to take the decedent's assets and despite the possibility that the recipient of the transfer at issue might be directly involved or implicated in the conspiracy to commit fraud—depending on the contents of the currently sealed documents.[2]

Publishing this Opinion would provide notice to practitioners, financial professionals, and citizens that such app based transfers will be enforced regardless of whether there is evidence that the account holder, purported transferor, or

[2] The parties urgently need this Court's decision on the sealed documents to confirm or dismiss Gunwall's involvement in the conspiracy to commit fraud to take Mark's assets after his death. The question is whether the sealed documents evidence revisions between the April 19, 2019 documents and those filed on May 8, 2019 that are specific to and only benefit Gunwall. If such evidence exists, why would anyone but Gunwall make such changes only for Gunwall's benefit months after Mark's death?

decedent made the transaction. The transferor could then knowingly accept this risk or opt out of the risk by insisting that such app based transfers of their accounts require an authenticating wet signature within so many days or a contemporaneous photograph of the transferor taken on the device being used for the transfer that is sent to the app maker or financial institution for later confirmation of the transferor effectuating the transaction in question. App based financial transactions are likely on the rise, yet they need security or options for the transferor to guard against fraud. Publishing this Opinion will put all on notice that such app based transactions will be enforced regardless of evidence or the lack of evidence that the account holder or decedent made such a transfer.

E. CONCLUSION

The Court's Opinion in this matter addresses a fact pattern unlike those cited by the parties' and Court in this matter. In the eight cases cited above, the issue was not whether the underlying transaction occurred, it was whether the underlying transaction resulted from undue influence. Here, a discreet, material issue was whether the underlying

transaction occurred as a result of the decedent's actions or the actions of someone other than the decedent. Here, the nature of the underlying app based transfer of the investment account to Gunwall and lack of evidence as to who effectuated the transfer created an unavoidable question of fact as to whether the transfer resulted from Mark's intentions or the intentions of someone other than Mark. To the extent its material, the determination of who changed the designation of beneficiaries to the Fidelity Investment account should be made by the fact finder at trial.

If this Court affirms that who made the changes to the beneficiary designations is immaterial to the enforceability of the app based beneficiary changes, then this Court ought to publish the Opinion. Publishing the Opinion would put all on notice of such enforceability so that the public and professionals could knowingly accept the risk presented by the enforceability of app based changes to financial accounts, especially when the changes are enforceable in the absence of evidence as to

who made the app change in the first place. This last aspect reveals the risk of fraud or accidental transfers. Publishing the Opinion would give all the opportunity to mitigate this risk in their respective financial dealings and estate planning.

DATED this 26th day of July, 2022.

VERA & ASSOCIATES PLLC

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on 26th day of July, 2022, I served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

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DATED this 26th day of July, 2022.

/s/ Lisa Lefebvre
Lisa Lefebvre, Legal Assistant

SMITH ALLING, P.S.

July 26, 2022 - 3:45 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	55461-5
Appellate Court Case Title:	Estate of Mark L. Besola; Amelia Besola, Appellant v. Eric Pula & Brandon Gunwall, Respondents
Superior Court Case Number:	19-4-01902-9

The following documents have been uploaded:

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Appendix C

Filed
Washington State
Court of Appeals
Division Two

August 15, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Estate of:

MARK LESTER BESOLA,

Deceased.

AMELIA BESOLA, individually,

Plaintiff,,

v.

ERIC PULA, individually and as Personal Representative of the Estate of Mark L. Besola; KELLY MCGRAW, individually; JULIA BESOLA-ROBINGSON, individually, UC DAVIS VERTERINARY CATASTROPHIC NEED FUND; KARE KITSAP ANIMAL RESCUE AND EDUCATION; BRANDON GUNWALL, individually,

Defendants.

AMELIA BESOLA,

Appellant,

v.

BRANDON GUNWALL,

Respondent,

JOHN DOES 1-20, FIDELITY BROKERAGE SERVICES, LLC,

Defendants.

No. 55461-5-II

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION FOR PUBLICATION

Appellant Amelia Besola moves for reconsideration and publication of the Court's unpublished opinion filed on July 6, 2022. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Glasgow, Cruser, Price

FOR THE COURT:

CRUSER, A.C.J.

Appendix D

FILED
DEPT. 4
IN OPEN COURT
NOV 17 2021
PIERCE COUNTY, Clerk
By
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

In the matter of the Estate of MARK LESTER BESOLA, Deceased.	No. 19-4-01902-9 CONSOLIDATED WITH No. 19-4-01945-2
AMELIA BESOLA, individually, Petitioner, v. ERIC PULA, individually and as Personal Representative of the Estate of Mark L. Besola; et al., Respondents.	FINDINGS OF FACT AND CONCLUSIONS OF LAW
AMELIA BESOLA, Petitioner, v. BRANDON GUNWALL, et al., Respondents.	

1) TRIAL

Date: Petitioner Amelia Besola's will contest claim was adjudicated at a bench trial on February 22, 2021 – March 2, 2021, and November 1 - 2, 2021.

Appearances: Petitioner Amelia Besola was represented by her attorneys C. Tyler Shillito, Andrea H. Brewer, Stuart Morgan, and Jose Vera. Respondent Michal B. Smith, as Personal Representative of the Estate of Mark Besola was represented by his attorneys Kathleen Pierce and Daniel Walk during the February through March portion of the trial, and Neil Dial and Samuel Dart during the November portion of the trial. Respondent Eric Pula was represented by his attorney, Kevin Steinecker, Respondent Kelly McGraw was represented by her attorney, Elizabeth Thompson. Respondent Julia Besola-Robinson was represented by her attorney Quentin Wildsmith. Respondents UC Davis Veterinary Catastrophic Need Fund and KARE Kitsap Animal Rescue & Education were represented by their attorney, Karen Bertram, although they did not participate in the November portion of the trial.

Presiding Judge: The Honorable Bryan Chushcoff.

The Court has reviewed all the exhibits admitted at trial, heard the arguments of counsel, and heard the testimony of the following witness on behalf of the parties:

1. Brandon Gunwall
2. Robyn Peterson
3. James Garrett
4. Eric Pula
5. Kelly McGraw
6. Brett Bishop

7. James Tarver

8. Amber Allen

9. Amelia Besola

10. Julia Besola-Robinson

11. Robert Floberg

12. Randall Karstetter

13. Lynda Allen

A compilation of the Exhibits admitted at trial is contained on the Court's Exhibit Record, which is incorporated by this reference. Being duly advised, the Court makes the following:

2) FINDINGS OF FACT

1. This matter arises under the Trust and Estate Dispute Resolution Act (TEDRA) RCW 11.96A. The Court has personal and subject matter jurisdiction over the parties and issues in this case.

2. Decedent Mark Besola is the younger brother of Julia Besola-Robinson and Amelia Besola.

3. Mark Besola, Julia Besola-Robinson, and Amelia Besola had a close relationship for most of their lives however near the time of his death Mark Besola had a strained relationship with his sisters and they with him.

4. Mark Besola had no children and was not married at the time of his death on January 1, 2019.

5. In September 2013, Mark Besola employed attorney Richard Perednia to draft a will. That Will is not the subject of these proceedings.

6. At the time of his death, Mark Besola's estate was worth approximately $5,000,000 and Mark Besola was aware of the extent of his wealth.

7. Mark Besola had significant health problems. By 2018 he often depended on a wheelchair for mobility.

8. For some time prior to his death, Mark Besola surrounded himself with people who moved into his home located on Lake Tapps in Pierce County and who relied on Mark Besola for their housing and other financial needs.

9. Kelly McGraw lived in one of the two mother-in-law units at Mark Besola's Lake Tapps home in 2018. She had been living there since 2015. She regularly paid rent to Mark Besola.

10. Brandon Gunwall, James Garrett (also a renter at the house) and Eric Pula moved into Mark Besola's Lake Tapps house during 2018.

11. Eric Pula agreed to be a caregiver to Mark Besola in exchange for room and board in Mark Besola's Lake Tapps house.

12. Brandon Gunwall agreed to do landscaping, clean cars and other chores at the Lake Tapps house for Mark Besola and his dogs, in exchange for room and board in Mark Besola's Lake Tapps home.

13. People living at the home would have had access to Mark Besola's electronic devices and financial information throughout 2018 and early 2019.

14. In the last year of his life, Mark Besola became increasingly isolated from his family and became increasingly hostile toward his sisters and they toward him. In late 2018, Mark Besola instituted legal proceedings against his sister.

15. In August 2018, Amelia Besola obtained a temporary restraining order to protect herself and her child from Mark Besola.

16. Julia Besola-Robinson blocked Mark Besola from contacting her electronically.

17. On December 1, 2018, two men entered Mark's Lake Tapps home and battered Mark Besola and other residents with a baseball bat. Eric Pula shot and killed one of the intruders and wounded the other.

18. Mark Besola experienced a medical emergency. Mr. Gunwall transported Mr. Besola to the Auburn Medical Center where he was admitted on December 30, 2018. He remained in the hospital until his death on January 1, 2019. Despite his history of medical conditions, Mark Besola's death was not expected.

19. Eric Pula, Eric Pula's girlfriend Lisa Herrera, Brandon Gunwall, James Garrett and Kelly McGraw continued to occupy Mark Besola's Lake Tapps home for some time after Mark Besola's death.

20. Among other things, Mark Besola owned a large safe that was in his Lake Tapps home at the time of his death. Amelia Besola had the combination for the safe's lock.

21. Amelia Besola was appointed personal representative of Mark Besola's estate on January 3, 2019.

22. Amelia Besola, as personal representative, sought access to Mark Besola's Lake Tapps house in January and February 2019 to gather the Estate's financial information and records.

23. When Amelia Besola, as Personal Representative of Mark Besola's estate, attempted to access the Lake Tapps home in January and February of 2019, neither James Garrett nor any other resident indicated that Mark Besola had a will or that James Garrett had ever witnessed Mark Besola sign a will disinheriting Amelia Besola.

24. On February 16, 2019, Amelia Besola accessed, by a court order, Mark Besola's Lake Tapps House for a second time. Mark Besola's safe was present during this visit, but someone had already cut an opening in the back of the safe and removed its contents. The opened safe did not contain a will.

25. Amelia Besola, as personal representative of Mark Besola's estate, served eviction notices to the occupants of Mark Besola's Lake Tapps house on or about April 4, 2019.

26. The Court issued an Order to Show Cause Why Writ of Restitution Should not be Issued on April 9, 2019, ordering Kelly McGraw, Eric Pula, and Brandon Gunwall to appear and show cause on April 24, 2019 why the court should not deliver possession of Mark Besola's Lake Tapps House to the personal representative of his estate (the "Order to Show Cause").

27. Eric Pula and Kelly McGraw were present in court when the April 9, 2019 Order to Show Cause was issued.

28. The Order to Show Cause was mailed to Brandon Gunwall, Kelly McGraw, Eric Pula, Sarah Martin, Megan Doe, and all other occupants at the Lake Tapps address, and to Kelly McGraw's North Mullen Street address on April 10, 2019.

29. www.formswift.com is a legal forms website on which customers can purchase customized estate planning materials, including Last Wills and Testaments ("FormSwift").

30. FormSwift's templates are personalized based on the user's response to questions. FormSwift provides a PDF and Word version of the document created based on the user's answers that may be exported to and edited by the user.

31. FormSwift stores the initial form created based on the user's response to the questions. FormSwift's system identifies and tracks such created legal forms by the date and time such forms are created, by the type of form created, and the user account id and email that created the form.

32. An account was created on the website www.formswift.com through the use of Robyn Peterson's email, sugarbelle7774@gmail.com on April 19, 2019 at 07:57 Greenwich Mean Time ("GMT") (the "FormSwift Account").

33. Robyn Peterson's Visa card was used to pay for the FormSwift Account on April 19, 2019 at 10:10 GMT which required both Ms. Peterson's

credit card number and also the CVV number on the back of her card. Creation of the account resulted in a charge of $1.95 to Robyn Peterson's Visa card.

34. A document titled Last Will and Testament of Mark Lester Besola was created on the FormSwift Account on April 19, 2019 at 10:23 GMT, (the "April 2019 Will").

35. A document titled Living Will of Mark Lester Besola was created on the FormSwift Account on April 24, 2019 at 13:57 GMT. This document list both Eric Pula's name and his cell number active in late April 2019, including on April 24, 2019.

36. The eviction hearing was held on the afternoon of April 24, 2019 to evict Eric Pula, Brandon Gunwall, and Kelly McGraw from Mark Besola's Lake Tapps home.

37. After speaking with James Garrett on the telephone, Eric Pula met Robyn Peterson at the Pierce County Superior Court to file a will dated December 6, 2018 with the Superior Court Clerk's office on May 8, 2019 (the "December 2018 Will").

38. Eric Pula represented to the court at a May 14, 2019 hearing regarding his continued residency that he was still residing at the Lake Tapps house. If true, he could not have found the December 2018 Will on his "last day at the Lake Tapps house" because he had already filed it on May 8, 2019.

39. On September 16, 2019 Brandon Gunwall, as the beneficiary of Mark Besola's dogs, petitioned for the December 2018 Will to be admitted to probate.

40. On September 26, 2019, the December 2018 Will was admitted to probate.

41. The signatures appearing on the December 2018 Will purporting to be witnesses are those of James Garrett and Robyn Peterson.

42. The substantive contents of the December 2018 Will are strikingly similar to the April 2019 Will from the FormSwift Account including the name "Mark Besola."

43. No innocent explanation has been offered for why Ms. Peterson would attempt to "recreate" Mark Besola's Will after his death. It is unlikely Ms. Peterson would have been able to recreate it in such detail given her testimony of being relatively unfamiliar with Mark Besola or his private affairs and of having cursorily looked at the Will. Nor has an explanation by provided for who, why or how someone in April 2019 would have been able or motivated to impersonate Ms. Peterson's email and credit card accounts to discredit the December 2018 Will.

44. The December 2018 Will has two different sets of font types and has a variety of formatting inconsistencies. Different pages of the December 2018 Will were printed using two different printers.

45. The April 2019 Will had the same spelling error of a dog's name which belonged to Mark Besola, misspelling the name as Angle instead of Angel. This misspelling was carried over to the December 2018 Will.

46. The April 2019 Will listed Lisa Herrera as a witness, however, her name was removed and replaced with Robyn Peterson on the December 2018 Will.

47. Lisa Herrera was the live-in girlfriend of Eric Pula and, in April 2019, was 8 months pregnant with his child.

48. The April 2019 Will appears to be a draft of the December 2018 Will.

49. Eric Pula claims to have found the December 2018 Will in Mark Besola's safe on the last day he was at Mark Besola's Lake Tapps home before he was evicted (between April 24, 2019 and May 8, 2019), then waited several days before filing the December 2018 Will.

50. Eric Pula referenced the December 2018 Will at the eviction hearing on May 14, 2019 to stop the eviction and retain possession of the Lake Tapps house, claiming he was still residing at the Lake Tapp's home.

51. At least one pen stroke of the signature on the Beneficiary Schedule is inconsistent with Mark Besola's genuine signature. This is either evidence of someone other than Mark Besola having applied the signature or possibly the product of a known phenomenon – an optical illusion – observed in 2 dimensional photos of three-dimensional objects (here the object is the ink applied to the paper) in which case a mistake is made in determining which of crossing lines of aqueous ink has crossed over/under the other line.

52. A "ghost" L appears on the December 2018 Will. This is evidence of a tracing of the alleged signature of Mark Besola.

53. The alleged signature of Mark Besola on the December 2018 Will is better than other of his contemporary exemplar known signatures. That is, less degeneration or tremor related to health or age infirmities is apparent in the pen strokes of the alleged signature. This is an indicator of a simulated signature.

54. The alleged signature of Mark Besola on the December 2018 Will is simulated and was not made by Mark Besola.

55. The December 2018 Will could not have been signed by Mark Besola because it was created more than four months after Mark Besola died and backdated.

56. The December 2018 Will and its Beneficiary Schedule is not a valid testamentary document.

57. Robyn Peterson (possibly with the aid of others) created the April 2019 Will and the December 2018 Will.

58. Eric Pula, James Garrett, and Robyn Peterson who created, signed, or filed the December 2018 Will knew it was a false, simulated document and created, signed, or filed the December 2018 Will with an intention to deceive.

59. The testimony of Eric Pula, James Garrett, and Robyn Peterson was not credible, especially with respect to James Garrett and Robyn Peterson being execution witnesses to the December 2018 Will.

60. Eric Pula's representation that he found the December 2018 Will in Mark Besola's safe is false. That fact was material to this case because it made credible the claim that the December 2018 Will had been executed during Mark

Besola's lifetime. Eric Pula knew that the fact was false and intended for the court to act on that fact.

61. The December 2018 Will did in fact deceive this Court as evidenced by the Order admitting it to probate.

62. The December 2018 Will harmed the true beneficiaries of the estate of Mark Besola as well as the innocent beneficiaries of the December 2018 Will.

63. The original TEDRA Petition contesting the December 2018 Will sought to invalidate the will based upon (1) lack of mental capacity, (2) undue influence, (3) insane delusion, (4) Fraud, (5) Unauthorized practice of law, (6) that Mark Besola had not signed the December 2018 Will, (7) certain beneficiaries were disinherited for financial exploitation, and (8) the imposition of a constructive trust. Most of these claims were dismissed on summary judgment.

64. Any conclusion of law in this section shall be properly treated as such.

3) CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action; venue is proper in Pierce County, Washington.

2. The burden of proof in this matter is by clear, cogent, and convincing evidence.

3. Petitioner has established by clear, cogent, and convincing evidence that the December 2018 Will is invalid because it is not signed by Mark

Besola or anyone else at his direction and the December 2018 Will is the product of fraudulent conduct.

4. Any Finding of Fact in this section shall be properly treated as such.

5. The Order Admitting the December 2018 Will to Probate should be vacated, the letters testamentary issued in favor of Michael Smith shall be revoked upon proper application to the court, and Michael Smith shall make an accounting and final report to the court of his affairs prior to his discharge.

6. The Pleadings should be/are amended to conform to the proof offered at trial.

DATED: November 16, 2021.

Judge BRYAN CHUSHCOFF

cc: Pierce County Clerk for filing under above cause number

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Neil Dial
Samuel Dart
Quentin Wildsmith
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C. Tyler Shillito
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September 14, 2022 - 4:05 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	55461-5
Appellate Court Case Title:	Estate of Mark L. Besola; Amelia Besola, Appellant v. Eric Pula & Brandon Gunwall, Respondents
Superior Court Case Number:	19-4-01902-9

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