

70136-3

70136-3

NO. 70136-3

---

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

---

In re the Estate of  
Stuart Rippee

---

Appellant's Reply Brief

---

FILED  
COURT OF APPEALS, DIV I  
STATE OF WASHINGTON  
2014 JAN - 6 PM 3: 26

Michael L. Olver, WSBA #7031  
Christopher C. Lee, WSBA #26516  
Kameron L. Kirkevold, WSBA #40829  
Attorneys for Appellant  
Hellsell Fetterman LLP  
1001 4<sup>th</sup> Avenue, Suite 4200  
Seattle, WA 98154  
(206) 292-1144

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 2

A. The Trial Court Erred in Granting Summary Judgment ..... 2

1. The 2005 Will and Community Property Agreement was a radical change in Stuart’s estate planning. ..... 2

2. The facts and circumstances surrounding the execution of the Will and Community Property Agreement weigh against the validity of the documents. ..... 5

a. *All the Dean v. Jordan factors are present.* .....5

b. Significant circumstantial evidence supports the invalidity of the will and community property agreement .....7

B. Denise Misrepresented that Disputes Do Not Exist ..... 8

1. Denise’s explanation for Stuart’s change in his estate planning is unlikely and suspect ..... 8

2. There are significant disputes in fact ..... 9

a. *Animosity between Denise and Laura is a relevant question of material fact* ..... 11

b. *There was opportunity for Denise to exert undue influence* ..... 12

c. *Stuart’s cognitive impairment and undue influence are ultimate questions of fact that are disputed* ..... 12

C.	In Addition to Raising More Questions of Fact, New Facts Cannot, Without Being Weighed, Resolve Existing Questions of Fact .....	13
1.	<u>Conflicts in Laura Burwash’s testimony must be considered in relationship with her multiple sclerosis.</u> .....	14
2.	<u>The attorney who prepared the 2005 estate planning documents cannot explain Stuart’s radical departure from his 1999 will</u> .....	15
3.	<u>The change in Denise Rippee’s admission her credibility at issue.</u> .....	16
4.	<u>Significant evidence in Stuart’s medical records support findings of decreased cognition and increased susceptibility to undue influence</u> .....	17
D.	Admissible Statements of John Fewel and Dean Running Present Facts and Support Inferences Questioning the Validity of the Will and Community Property Agreement .....	19
E.	It was Unreasonable to Continue the Trial, but Not Properly Note the Motion for Summary Judgment .....	20
F.	Dr. Lily Jung Henson’s Declaration Was Properly Submitted for the Motion for Reconsideration .....	22
G.	Attorney Fees and Costs Should Not Be Awarded to Denise .....	23
III.	CONCLUSION .....	24

## TABLE OF AUTHORITIES

### **Case Law**

<i>Balise v. Underwood</i> , 62 Wn.2d 195, 381 P.2d 966 (1963) .....	16
<i>Barker v. Advanced Silicon Materials, LLC, (ASIMI)</i> , 131 Wn. App. 616, 128 P.3d 633 (2006) .....	13, 14
<i>Dean v. Jordan</i> , 194 Wash. 661, 79 P.2d 331 (1938) .....	5
<i>Del Guzzi Cont. Co., Inc. v. Global Northwest, Ltd., Inc.</i> 105 Wn.2d 878, 719 P.2d 120 (1986) .....	17
<i>Herron v. Tribune Publ'g Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987) .....	2
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002) .....	8
<i>In re Beck's Estate</i> , 79 Wash. 331, 140 P. 340 (1914) .....	5
<i>In re Melter</i> , 167 Wn. App. 285, 273 P.3d 991 (2012) .....	1, 15
<i>In re Estate of Bottger</i> , 14 Wn.2d 676, 129 P.2d 518 (1942) .....	1
<i>In re Estate of Lint</i> , 135 Wn.2d 518, 957 P.2d 755 (1998) .....	7, 12
<i>In re Estate of Miller</i> , 10 Wn. 2d 258, 116 P.2d 526 (1941) .....	19
<i>In re Estate of Rippee</i> , 149 Wn. App. 1009, 2009 WL 502400 (Wn. App. Div. 1).....	6, 13, 16, 19
<i>Matter of Esala's Estate</i> , 16 Wn. App. 764, 559 P.2d 592 (1977) .....	7
<i>Matter of Estate of Eubank</i> , 50 Wn. App. 611, 749 P.2d 691 (1988) .....	17
<i>McCutcheon v. Brownfield</i> , 2 Wn. App. 348, 467 P.2d 868, review denied, 78 Wn.2d 993 (1970) .....	5
<i>Vasquez v. Hawthorne</i> , 145 Wn.2d 103, 33 P.3d 735 (2001) .....	9, 10

### **Court Rules**

CR 15 (a).....	17
CR 56 (f).....	13
CR 59 .....	22

### **Statutes**

RCW 11.96A.150 .....	23
----------------------	----

•  
•  
**Other Authority**

Mark Reutlinger & William C. Oltman, Washington Law of Wills & Intestate  
Succession 95 (1985) .....5

## I. INTRODUCTION

Whether a person has capacity or was subject to undue influence in the execution of a will is a mixed question of law and fact that ultimately requires the trial court to consider and weigh all the evidence particularly the credibility of the witnesses. *In re Melter*, 167 Wn. App. 285, 273 P.3d 991 (2012) (undue influence and capacity are mixed questions of law and fact); *see also In re Estate of Bottger*, 14 Wn.2d 676, 703, 129 P.2d 518 (1942) (“a charge of undue influence can rarely be proven by direct evidence and must be established, if at all, by circumstantial evidence.”)

In this matter, one fact alone is sufficient to raise a substantial question of material fact to avoid summary judgment – Stuart Rippee did not provide for his grandsons in his 2005 will although he had provided for them in his 1999 will.

Stuart Rippee had executed a complex will in 1999, just after being diagnosed with prostate cancer that provided for his wife, daughter and grandsons in a fair and unique manner. It is undisputed by all the parties that Stuart shared a loving and affectionate relationship with his grandsons until the day he died and that he loved his daughter and grandsons. Yet, after a six year battle with prostate cancer, following two months of isolation with his wife, during which time his pain medications were increased and Stuart was particularly vulnerable, and Denise did not like

Stuart having a relationship with his daughter or grandsons, Stuart abandoned his 1999 estate plan simply to leave everything to his second wife Denise Rippee.

However, there is more than this one fact that weighs against the validity of Stuart's 2005 will and community property agreement. For the trial court to have granted summary judgment it must have impermissibly weighed the evidence and decided issues of credibility. The trial court's order should be reversed and the matter remanded for trial.

## II. ARGUMENT

### A. The Trial Court Erred in Granting Summary Judgment

On summary judgment the trial court does not weight the evidence, to the extent possible all evidence and reasonable inferences are taken in the non-moving party's favor. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987).

1. The 2005 Will and Community Property Agreement was a radical change in Stuart's estate planning.

In 1987, Stuart Rippee married Denise Rippee. Stuart had just been divorced from his first wife in a contentious divorce. CP 6. Following his divorce, Stuart did not have the substantial estate that he did at the time of his death 20 years later. In 1988, Stuart executed a will that named his second wife Denise Rippee as his sole heir if she survived him

for 30 days, and named the Lorna Rippee Trust, which had been created by Stuart's mother Lorna Rippee for Laura Rippee's benefit, as the alternate beneficiary. Stuart's only child was Laura Burwash (née Rippee). CP 5.

Since 1988, significant events occurred in Stuart's family life. In 1991, Laura gave birth to her first son, Michael. CP 7. And then in 1994, Laura gave birth to her second son, Jeffrey. *Id.* It is undisputed that Stuart loved and adored his grandsons. During this time, Laura was also diagnosed with multiple sclerosis, a disease that ran in Stuart's family. CP 7. Stuart had known at least one family member to die from multiple sclerosis. CP 9.

In 1999, Stuart was diagnosed with prostate cancer. CP 9. By this time, Stuart had more than ample opportunity to see how his family – Denise, Laura and his two grandsons – related to one another. Denise and Laura agreed that they had a contentious relationship.

In the same year that he was diagnosed with cancer, on August 31, 1999, Stuart executed a complex will that provided as follows<sup>1</sup>:

- \$100,000 to Laura to pay for a house.
- \$10,000 to each of his grandsons in trust.

---

<sup>1</sup> The disposition is based on Denise having survived Stuart. Had Denise pre-deceased Stuart, 50 percent of his estate would have gone to Laura and 50 percent would have gone to his grandchildren in trust. CR 401-402.

- Creation and funding of the Stuart C. Rippee Trust with the largest amount possible without increasing taxes to the estate.<sup>2</sup>
- The rest and residue to Denise Rippee.

CR 401.

The Trust created by Stuart in his 1999 will was complex and intended to address the conflict between his wife and daughter. The Trust provided that Denise received the income from the Trust, but that Denise would have the power to determine as between Laura and Stuart's grandsons who would receive the principal of the trust upon Denise's death. CR 402.

This complex estate planning existed until sometime in September 2005 when Stuart called his estate planning attorney Don Running and told him that he wanted to make sure to leave everything to Denise.<sup>3</sup> CP 416.

---

<sup>2</sup> Surprisingly, or not, Denise does not mention this provision of the 1999 will in her brief, but only mentions the \$100,000 to Laura, the \$10,000 in trust to the grandsons, and that the rest and remainder going to Denise. (Respondent's Brief, p.14.)

<sup>3</sup> Denise characterizes Stuart's call to Don Running as Stuart "saying he wanted to change his Will back to essentially his 1988 will," which mischaracterizes what Stuart did in fact say. (Respondent's brief, p.26.) Stuart stated he wanted to make sure Denise got everything. The phrasing and lack of discussion of other family members creates inferences that the 2005 estate planning is not valid.

2. The facts and circumstances surrounding the execution of the Will and Community Property Agreement weigh against the validity of the documents.

a. *All the Dean v. Jordan factors are present.*

Nevertheless certain facts and circumstances bearing upon the execution of a will may be of such nature and force as to raise a suspicion, varying in its strength, against the validity of the testamentary instrument. The most important of such facts are: (1) That the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as 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 an undue influence, and the naturalness or unnaturalness of the will....

The combination of facts shown by the evidence in a particular case may be of such suspicious nature as to raise a presumption of fraud or undue influence and, in the absence of rebuttal evidence, may even be sufficient to overthrow the will. *In re Beck's Estate*, 79 Wash. 331, 140 P. 340 [(1914)].

*Dean v. Jordan*, 194 Wash. 661,671-72, 79 P.2d 331 (1938).

A quick survey of the evidence before the trial court shows facts and circumstances that satisfy the most important factors for questioning the validity of the 2005 will and community property agreement:

- a) *Opportunity to influence*: Denise was Stuart's wife and caretaker. They took a two month vacation just before the will and community property agreement were signed. *See*

*McCutcheon v. Brownfield*, 2 Wn. App. 348, 357, 467 P.2d 868, review denied, 78 Wn.2d 993 (1970) (a confidential relationship is more likely where there is a family relationship).

- b) *Involvement in procurement of will*: Denise took Stuart to have the will and community property agreement executed. Mark Reutlinger & William C. Oltman, Washington Law of Wills & Intestate Succession 95 (1985) (“If a beneficiary has taken some active part in the preparation of procurement of the testator’s will, it is strong circumstantial evidence of the exercise of undue influence, especially when combined with a confidential or fiduciary relationship.”)
- c) *Unnatural disposition*: Denise received all of Stuart’s estate where Stuart had previously also provided for his daughter and grandsons in his 1999 will.
- d) *Weakened health of testator*: Stuart had been battling prostate cancer for six years when he signed his 2005 will. Before his two month vacation with Denise, Stuart exhibited helplessness, and complained of anxiety, worry and depression to his doctor.
- e) *Relationship of omitted persons*: Stuart omitted his daughter and two grandsons whom he had provided for in his 1999 will and had a loving relationship. Denise admitted to having a contentious relationship with Laura.

In 2009, the Court of Appeals held “the evidence presented by Burwash raises, at the very least, a rebuttable presumption of undue influence.” *Estate of Rippee*, 149 Wn. App. 1009, 2009 WL 502400,\*6 (Wn. App. Div. 1). Without weighing the evidence, it is impossible to once have had sufficient evidence to raise a rebuttal presumption on undue influence and then on subsequent motion have the trial court grant summary judgment.

- b. *Significant circumstantial evidence supports the invalidity of the will and community property agreement.*

Isolation of the testator is an important factor in determining the presence of undue influence. *Matter of Estate of Lint*, 135 Wn.2d 518, 538, 957 P.2d 755 (1998); *Matter of Esala's Estate*, 16 Wn. App. 764, 772, 559 P.2d 592 (1977) (circumstantial evidence of undue influence relates to “motive, opportunity, the disposition contrary to the testator’s prior intent, and his execution of the will in a weakened condition.”)

Two months prior to signing the 2005 will and community property agreement, in September 2005, Stuart went to the Seattle Cancer Care Alliance complaining of depression; feeling overwhelmed; exhibiting signs of helplessness; exhibiting worry, sadness and anxiety; exhibiting psychomotor retardation. CR 296, 337. The records for the hospital indicate that he and Denise were going to their vacation home in Arizona by themselves for two months. CR 338.

On November 21, 2005, Stuart returned to the Cancer Care Alliance; he indicated he and Denise had been vacationing by themselves. CP 332-336. During his vacation with Denise, Stuart had increased his pain medication of OxyContin from two to three times a day. *Id.* (During July 2005 through August 2005, Stuart had received enough OxyCodone to take an average of 20 OxyCodone a day, in addition to his OxyContin.

CP 316, 421-425.) Stuart had previously testified that OxyContin made him feel “fuzzy.” CP 345. He had also lost 8 pounds during the past two months. CP 332. He reported he had been sleeping a lot, sometimes for half a day. CP 333.

When considering the radical change in Stuart’s estate planning, and the facts and circumstances surrounding the execution of the questioned documents, it was error for the trial court to find that there was no question of fact as to incapacity and undue influence.

**B. Denise Misrepresented that Disputes Do Not Exist**

1. Denise’s explanation for Stuart’s change in his estate planning is unlikely and suspect.

The sole explanation that Denise provided for Stuart’s change in his estate planning is remarkable and illogical. The disinheritance of Laura and her children is perplexing given that even Denise concedes that Stuart loved his daughter and grandsons. (Respondent’s brief, p.21, “the undisputed evidence establishes that [ ] Stuart loved his daughter and grandsons.”) See *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002) (summary judgment should be granted if from all the evidence, reasonable persons could reach but one conclusion.)

Denise presented that in 1999 Laura and her family had failed to pay rent on a home owned by Stuart and Denise; that Laura and her family had to be evicted; and that they left the home trashed when they moved

out. Michael would have been 8 years old at the time and Jeffrey would have been five years old. Denise then argued that Laura voluntarily ceased having a relationship with her father. However no one disputed that Stuart continued to have a loving relationship with his grandsons.

The conditions that existed between 2000 (Laura's eviction) to 2005 (the new will) does not explain Stuart's change in estate planning. During this period Stuart was maintaining a relationship with his grandsons. Although there is a dispute as to why Stuart and Laura did not meet during this period, it is undisputed that Laura loved her father, and that Stuart loved his daughter. Yet despite the lack of contact and the feeling of love for his daughter, Denise argued that Stuart suddenly changed his estate plan in 2005 because he was upset from when Laura and her family had moved out in 2000 and left the house in shambles. Stuart's displeasure with a rental issue, apart from providing only the thinnest reason for Stuart disinheriting his only daughter Laura, provides zero reason why Stuart disinherited his grandsons.

2. There are significant disputes in fact

Denise argued that *Vasquez v. Hawthorne*, 145 Wn.2d 103, 108, 33 P.3d 735 (2001) was inapplicable as authority because in *Vasquez* the nature of the relationship of two individuals was disputed. Denise stated: "The case at hand has no such disputed material facts." (Respondent's

brief, p. 20.) Yet *Vasquez* is instructive, especially when the language cited is expanded upon:

[E]quitable claims must be analyzed under the specific facts presented in each case. Even when we recognize “factors” to guide the court’s determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence. In a situation where the relationship between the parties is both complicated and contested, the determination of which equitable theories apply should seldom be decided by the court on summary judgment. In this case, the trial court must weigh the evidence to determine whether Vasquez has established his claim for equitable relief.

*Vasquez*, 145 Wn.2d at 107-108. The Washington Supreme Court directed that equitable claims require an analysis of all facts. Even identified “factors” in determining equitable claims are not exclusive considerations.

Given the complexity of equitable cases, for the trial court to have granted summary judgment the trial court must necessarily have found that there was (1) no evidence to support Laura Burwash’s claims of undue influence and lack of capacity or (2) impermissibly weighed the evidence and credibility.

Denise shockingly argued in her respondent’s brief that there is no evidence to support questions of fact. Denise claimed that Laura “presented no evidence that: Denise participated in the procurement of the

will; received an unusually or unnaturally large part of the estate; or occupied a confidential or fiduciary relationship with Stuart.”

(Respondent’s brief, p. 24.) It is incomprehensible that Denise would even argue that Laura had presented no evidence that Denise received an unusually or unnaturally large part of Stuart’s estate. Even though Stuart had planned to provide for his daughter and grandsons in his 1999 will, his 2005 will devised everything to his second wife. It is unnecessary to argue beyond the fact that Denise received everything to establish that Denise received an unusual or unnatural part of Stuart’s estate.

Denise listed, among others, the following facts as undisputed when clearly such is not the case:

- a) *Animosity between Denise and Laura is a relevant question of material fact.*

Denise posits that “Denise never prevented or discouraged Stuart’s relationship with Laura and her sons.” (Respondent’s brief, p.15.) Denise claimed that Laura did not maintain a relationship with her own father from 2000 as a result of her own choice. Laura, however, claimed that Denise had been antagonistic to Laura; Denise objected to Stuart maintaining a relationship with Laura; Denise objected to Stuart’s relationship with his grandsons; and that such objections increased over the course of Denise’s marriage to Stuart. CR 7.

Whether Denise was antagonistic to Laura was a material question of fact that went to whether Denise would have attempted to unduly influence Stuart into changing his estate plan. Given that (1) Denise admitted that she objected to Stuart's relationship with his daughter and grandsons; (2) that she amended this admission 5 years later in concert with her for summary judgment; and (3) provided no admissible evidence that the admission 5 years earlier was the result of an error (the prior attorney is blamed for some error, but no declaration of such an error is ever provided), the trial court should have made favorable inferences for Laura that there existed questions of fact or at least credibility sufficient to resist a motion for summary judgment.

*b) There was opportunity for Denise to exert undue influence.*

Denise claimed as undisputed that "Denise did not participate or influence Stuart's estate planning at any time." *Id.* However, just before the execution of the 2005 will, Stuart was along with Denise at their Arizona vacation home for two months. *See Estate of Lint, supra* (isolation is key element in determining existence of undue influence). This is a disputed fact that must be examined at trial with the presentation of evidence and weighing of credibility of witnesses.

*c) Stuart's cognitive impairment and undue influence are ultimate questions of fact that are disputed.*

Remarkably Denise presents as an undisputed fact that Stuart "was

not cognitively impaired at the time he executed his Will and CPA, and had testamentary capacity at the time.” *Id.* How the very dispute at issue can be undisputed is incomprehensible.

As will be further explained below, medical records evidenced impairment.

**C. In Addition to Raising More Questions of Fact, New Facts Cannot, Without Being Weighed, Resolve Existing Questions of Fact**

Denise argued that summary judgment was appropriate the second time because the record had grown and more information had been revealed. However, more information does not resolve questions of fact unless the evidence is weighed. The trial court, however, may not weigh evidence on summary judgment. *Barker v. Advanced Silicon Materials, LLC, (ASIMI)*, 131 Wash. App. 616, 624, 128 P.3d 633 (2006) (“On motion for summary judgment the trial court does not weigh evidence or assess witness credibility. Neither do we do so on appeal.”)

This Court found in 2009 that questions of fact existed with respect to undue influence and lack of capacity. CP 236-242; *Estate of Rippee*, 149 Wn. App. 1009, 2009 WL 502400 (Wn. App. Div. 1). Although a CR 56 (f) issue had been raised on appeal in 2009, the Court of Appeals stated that it was unnecessary to consider this issue because of the existence of questions of material fact sufficient to defeat summary judgment.

New evidence since 2009 did not resolve any questions of fact, but raised further issues with respect to capacity and undue influence.

1. Conflicts in Laura Burwash's testimony must be considered in relationship with her multiple sclerosis.

Denise argued that because Laura testified contrary at her deposition to her verified petition with respect to her isolation from her father that Laura's verified petition should be disregarded. It is not sufficient that Laura may have testified differently at her deposition to certain facts. Conflicting statements raise issues of credibility which require consideration of Laura's multiple sclerosis and the degree to which it impairs Laura. In response to Denise's motion for summary judgment, Laura showed that Dr. Lily Jung Henson opined at her deposition that cognitive limitations associated with Laura's multiple sclerosis would prevent her from consciously trying to manipulate the truth, but that the cognitive limitations may make it difficult for her to recall and accurately describe past events, and that stressful circumstances such as a deposition, may exacerbate this difficulty. CR 262-263.

To grant summary judgment, the trial court would have had to make a decision between contradictory evidence based on credibility as to which sworn statements of Laura's to believe. The weighing of credibility on summary judgment is not allowed. *Barker v. Advanced Silicon*

*Materials, LLC, (ASIMI)*, 131 Wash. App. 616.

2. The attorney who prepared the 2005 estate planning documents cannot explain Stuart's radical departure from his 1999 will.

In 2010, Don Running testified that he received a brief call from Stuart wherein Stuart did not ask for any specific estate planning documents. Instead, Stuart simply told Don Running that he wanted to leave everything to Denise. CP 416. There was no discussion of Stuart's grandsons. CP 417. Apart from this brief conversation, Don Running never met with Stuart in the preparation of a will and community property agreement that radically altered Stuart's estate planning. CP 418. Don Running did not perform any checks to see if Stuart was fully capacitated and not under any undue influence simply because Stuart sounded like he normally did. Don Running cannot explain why Stuart would have suddenly radically altered his estate plan. Compare, *In re Melter*, 167 Wn. App. at 308 (testatrix clearly explained to her attorney reason for change in will).

Taking all reasonable inferences in Laura's favor, which significantly includes Stuart's love for his grandchildren and that he had specifically planned for his grandchildren in a prior will, the circumstances under which the will that disinherited them was procured would tend to support the possibility of undue influence rather than to

argue against it.

3. The change in Denise Rippee's admissions places her credibility at issue.

If credibility is ever an issue on summary judgment, then the motion for summary judgment should be denied. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 900 (1963) (“The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion [for summary judgment] should be denied.”)

In 2008, Denise admitted to animosity against Laura and objection to Laura's relationship with her father. CR 27. However, in 2013, for the summary judgment, Denise moved to amend her answer to deny these admissions. Denise argued and the trial court apparently accepted as a fact that Denise never objected to Laura's relationship with her father, despite having admitted otherwise in 2008.

Because Denise's 11<sup>th</sup> hour amendment of her answer to deny any objections to Stuart's relationship with Laura and his grandsons, Denise's credibility is placed at issue, which raises as a material issue of fact whether Denise contributed to Stuart's isolation.

During the last appeal, Laura, and this court, relied on the fact that Denise had admitted to having animosity to Laura. *Estate of Rippee*, 149 Wn. App. 1009, 2009 WL 502400, \*1, fn. 2 (Wn. App. Div. 1). At the

time Denise filed her motion for summary judgment she filed a motion to amend her answer to change that prior admission to a denial. The trial court granted the motion, but having amended the answer it now only raises the issue for trial why was the admission unchanged for five years. As Denise admits “credibility determinations should not be made by the court in granting a motion on summary judgment.” (Respondent’s brief, p.19.)

If “prejudice to the nonmoving party” is the touchstone of whether the court should allow a pleading to be amended, then it was clearly prejudicial for the trial court to have allowed the amendment because (1) there being no evidence that an error occurred as Denise alleged, (2) there was no opportunity to conduct discovery into the changed admission, such as taking the deposition of the attorney who allegedly made the mistake, and (3) the trial court must necessarily have made a factual determination in granting summary judgment. See CR 15 (a); *Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986).

4. Significant evidence in Stuart’s medical records support findings of decreased cognition and increased susceptibility to undue influence.

“[W]ith respect to medical testimony, it has been held that special consideration should be given to the opinion of the attending physician.” *Matter of Estate of Eubank*, 50 Wn. App. 611, 618, 749 P.2d 691 (1988)

(underline added).

Evidence of Stuart's medical condition and cognition. In this aspect, Denise skirts over the "over 1200 pages of medical records" and submits only that Dr. Henson testified at her deposition that there was no indication that Stuart lacked testamentary capacity or was subject to undue influence. Denise ignores Dr. Henson's declaration, however, that stated Stuart was diminished in health from his baseline; that pain medications will affect a person's cognition; the ingestion of alcohol and pain medications can also decrease a person's cognition; the ingestion of alcohol and pain medication can increase a person's susceptibility to influence and coercion; and that there was evidence in the medical records that medication influenced Stuart's cognition. CR 305-309.

The medical records set forth facts and circumstances that prevent the grant of summary judgment. Stuart testified to pain medications making him feel "fuzzy." CP 345. Stuart presented as particularly vulnerable just two months before the 2005 will was signed. CP 296, 337. Stuart complained of depression, anxiety and worry, and displayed helplessness. *Id.* Following that hospital visit he went on a secluded two month vacation with Denise. CP 338. During the isolated vacation his pain medications were increased and he lost weight. CP 332. On his return he signed the new will and community property agreement.

**D. Admissible Statements of John Fewel and Dean Running Present Facts and Support Inferences Invalidating the Will and Community Property Agreement**

Statements regarding one's existing mental or emotional condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health) are admissible exceptions to hearsay. ER 803. "A will may be unnatural when it is contrary to what the testator or, from his known views, feelings, and intentions, would have been expected to make. *In re Estate of Miller*, 10 Wash.2d 258, 267, 116 P.2d 526 (1941)." *Estate of Rippee*, 149 Wn. App. 1009, 2009 WL 502400, \*5 (Wn. App. Div. 1) (underline added).

John Fewel executed a declaration attesting to:

- Stuart talked often of his love and affection for his daughter and grandsons. CR 160.
- Stuart stated he "should" provide for his grandchildren. *Id.*
- Stuart stated Denise did not like Laura. CP 161.
- Stuart stated that Denise did not like Dean Running and did not like Stuart spending time with Dean. *Id.*

Denise's attack that Mr. Fewel's statements lack appropriate foundation is nonsensical. Mr. Fewel's declarations set forth that he knew Stuart for 15 years, worked with him, and during Stuart's final years of life, talked to Stuart on the telephone. CP 160. Mr. Fewel testified that Stuart stated certain things to him; that is sufficient foundation for

admissibility. Denise does not present how this is insufficient foundation for Mr. Fewel to testify.

Dean Running was Stuart's close friend since childhood. Dean Running testified in deposition:

- Stuart was overwhelmed with his disease during the last two years, 2005 through 2007, of his life and was not in a good position to make decisions. CP 184.

Denise does not present any legal argument why the deposition testimony of Dean Running is inadmissible other than to conclusory state that it is inadmissible.

The admissible statements of Mr. Fewel and Mr. Running add weight to fact and inferences that support Stuart's 2005 will and community property agreement was not consistent with his known preferences and attitudes as set forth in his 1999 will.

**E. It was Unreasonable to Continue the Trial, but Not Properly Note the Motion for Summary Judgment**

The question before the court of appeals was did the trial court manifest unreasonable discretion or exercised on untenable grounds or for untenable reasons when it granted the motion to shorten time to hear Denise's motion for summary judgment.

The lack of reasonableness in the trial court's decision is exemplified by the simple fact that Denise filed a motion to continue the

trial date solely for the purpose of properly setting the motion for summary judgment.

The trial court granted both the motion to shorten time to hear the motion for summary judgment and continued the trial date. It is unreasonable to continue the trial date, which provided for sufficient time to properly note that motion for summary judgment, and then grant the motion to shorten time.

The circumstance of filing a motion for summary judgment just months before trial and after the dispositive motion deadline cannot be reasonably justified. Counsel for Denise claimed difficulty identifying the trial judge to hear the motion for summary judgment. As of August 2012, the trial date was December 3, 2012. All evidence necessary for Denise to have brought her motion for summary judgment was available to her. Parties were not even notified of the transfer in judge until December 20, 2012.

There would have been no reason before December 20, 2012, to be concerned about which judge would be handling the trial because parties were not aware that there would be a transfer of the matter.

A motion for summary judgment is used to avoid an unnecessary trial. Accordingly it is best filed when all the necessary discovery has been done but the parties have not engaged in trial preparation. Denise

waited until two months before trial to file her motion for summary judgment despite having all the necessary evidence presented in her motion for summary judgment as early as August 2011, when no trial date was set, but no later than October 2012 (when additional, redundant declarations were obtained from the witnesses to Stuart's signing of the will), at which time the trial date was December 3, 2012.

**F. Dr. Lily Jung Henson's Declaration Was Properly Submitted for the Motion for Reconsideration**

When Denise filed her motion for summary judgment on January 17, 2013, Denise was not relying upon any evidence from Dr. Lily Jung Henson. While the motion for summary judgment was pending, Denise's counsel took the deposition of Dr. Henson on February 6, 2013, just two days before the hearing on motion for summary judgment. Laura had no opportunity to address the declaration of Denise's counsel presented to the trial court regarding testimony given by Dr. Henson at her deposition. See CR 59 (1) (procedural irregularity) and (4) (newly discovered evidence).

Denise originally filed her motion for summary judgment on January 17, 2013, without any evidence from Dr. Henson. After the response date for the motion for summary judgment, Denise chose to submit evidence regarding Dr. Henson to further support her motion for summary judgment.

The declaration of Dr. Henson submitted with Laura's motion for reconsideration set forth additional evidence that pointed to the necessity of a trial.

Denise attempts to recharacterize the circumstances arguing that Laura strategically timed the presentation of Dr. Henson's testimony so that the trial court acted within its discretion to deny the motion for reconsideration. Laura had no involvement in setting the motion for summary judgment so it is hard to determine how Laura strategically timed the testimony of Dr. Henson.

**G. Attorney Fees and Costs Should Not Be Awarded to Denise**

Despite the fact that RCW 11.96A.150 directs the court to award attorneys' fees and costs "in such amount and in such manner as the court determines to be equitable," Denise argues that the Court should reject Laura's request to award fees and costs based on "equity".

Denise reduces the factors that the court should consider in equity to Laura's multiple sclerosis and lack of financial resources. The court is statutorily instructed to consider "any and all factors that it deems to be relevant and appropriate." RCW 11.96A.150 (1). Laura's lack of financial resources and multiple sclerosis should be considered as factors as well as Laura's good faith in her petition, and that the interest of all interested in the estate would be resolved. The court should also consider

that this is the second time on appeal, that the new evidence could not alter the Court of Appeals' prior findings of questions of fact sufficient to resist summary judgment, and that the trial court erred by weighing evidence.

Denise does not set forth any basis for her argument that she be awarded attorneys' fees and cost other than to conclusory state that "there is no basis to further penalize his widow." Even if this appeal is denied, there is no equitable basis for an award of attorneys' fees against Laura and in favor of Denise when Laura is financially unable even to support herself and Denise inherited all of Stuart's significant estate.

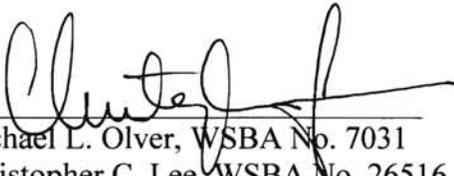
### **III. CONCLUSION**

It would be impossible for this court or any other court to responsibly and appropriately judge this case without having the opportunity to see and hear each witness and to review each document, to hear each witness examined and cross-examined. The trial court relies heavily on the credibility of the witnesses in assessing the weight to be given to each witness and to the testimony. The reason for this is that the trial court observes the demeanor of the witnesses and the manner of the witnesses while testifying in order to assess the credibility of each.

There were genuine questions of material fact in 2009 when the Court of Appeals reversed the trial court's grant of summary judgment. After three years of discovery, the addition of new evidence increased the

questions of material fact and added facts and circumstances that questioned the validity of the will and community property agreement. The trial court committed error in granting summary judgment. It is respectfully requested that the trial court's decision be reversed and the matter remanded for trial.

HELSELL FETTERMAN LLP

By:   
Michael L. Olver, WSBA No. 7031  
Christopher C. Lee, WSBA No. 26516  
Kameron L. Kirkevold, WSBA No. 408291  
Attorneys for Laura Burwash

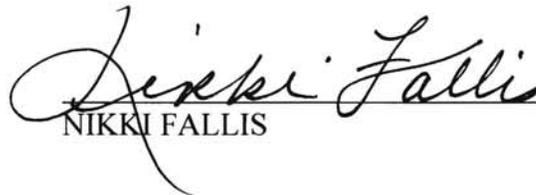
**CERTIFICATE OF SERVICE**

I, NIKKI FALLIS, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.
2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4<sup>th</sup> Avenue, Suite 4200, Seattle, WA 98154.
3. In the appellate matter of Estate of Rippee I did on the date listed below (1) cause to be filed with this Court the Appellant's Reply Brief; (2) caused the same to be delivered via email to Terri Luken, Attorney for the Denise Rippee.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: January 6, 2014

  
NIKKI FALLIS