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Division II  
State of Washington  
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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**IN THE MATTER OF  
THE ESTATE OF LAWRENCE D. GOLDBERG,  
  
Deceased.**

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**Consolidated With:**  
  
**RACHAEL LAUREEN GOLDBERG AND COLE GOLDBERG,  
  
Respondents,  
  
v.  
  
JENNIFER ALLEN  
  
Appellant.**

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**BRIEF OF RESPONDENTS**

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## **I. Introduction**

This case involves a will contest in which the validity of the will hinges on the credibility of one witness, Tracy Potter. The will in question is that of Dr. Lawrence Goldberg, and the sole beneficiary of that will is the appellant Jennifer Allen. Tracy Potter is the only surviving person who purportedly witnessed the will.

If the trial court believed Mr. Potter's testimony—that Dr. Goldberg requested Mr. Potter to sign his will in his presence—then the will would be upheld as valid. If, however, the trial court did not believe Mr. Potter's testimony, then the inexorable conclusion would be that the Dr. Goldberg did request Mr. Potter to sign the will in his presence, and the will would be rejected as invalid.

The evidence included the recording and transcript of the statement Tracy Potter had given to an investigator, John Visser. Based on this evidence, and the further testimony of John Visser, the trial made the following finding of fact:

John Visser showed Tracy Potter a copy of the Will which John Visser had downloaded on his laptop. In response to a direct question as to who brought the Will to Tracy Potter to sign, Tracy Potter indicated that Jennifer Allen brought the Will to him and his mother. Tracy Potter also indicated that Lawrence Goldberg was not present when Tracy Potter signed the Will as a purported witness.<sup>1</sup>

Mr. Potter tried to testify to the contrary at trial, but after listening to all the testimony and reviewing all the exhibits, the trial court found that “Jennifer Allen sought to influence and coach Tracy Potter’s testimony to comport with her version of the events.”<sup>2</sup> Along these same lines, the trial court did “not find credible Jennifer Allen’s testimony in her Declarations and at trial that she did not have anything to do with executing the Will.”<sup>3</sup> Based on the evidence and all reasonable inferences that could be drawn from the evidence, the court ultimately

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<sup>1</sup> CP 313 (Para. 3.11)

<sup>2</sup> CP 315 (Para. 3.25)

<sup>3</sup> CP 315 (Para. 3.26)

found that “Jennifer Allen brought the will to Tracy Potter and Betty Jo Potter, and not Lawrence Goldberg.”<sup>4</sup>

Based on these findings, the trial court rejected the will and awarded attorney’s fees against Ms. Allen. Ms. Allen appeals, and her appeal raises three dispositive issues

**1. Preservation of Error?** Hearsay objections are waived if they are not timely made during the trial.

Respondents offered into evidence, without limitation, a transcript of the interview that Mr. Potter gave to an investigator. No objection was raised by Ms. Allen’s counsel, and the exhibit was admitted by stipulation.<sup>5</sup> Has Ms. Allen failed to preserve this error for appeal?

**2. Substantial Evidence?** This appeal fails if there is any substantial evidence to support the trial court’s findings that are essential to the judgment. During trial, Tracy Potter testified that he had told the investigator John Visser the truth during his interview. Ms. Allen also chimed in during the

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<sup>4</sup> CP 317 (Para. 4.8)

<sup>5</sup> CP 311 (Para 2.5)

recorded interview that the document she brought over for Mr. Potter to sign was Dr. Goldberg's Will. Finally, if the court disbelieved Mr. Potter's testimony, then it could draw the reasonable inference that the will was not properly witnessed. Was there any substantial evidence to support the findings?

**3. Effect of Impeachment?** Ms. Allen's appeal hinges on her argument that Mr. Potter's interview could only be used for impeachment, not as substantive evidence. Under Washington law, however, the effect of impeachment is to "destroy the effect of his testimony as to purported facts to which he does testify."<sup>6</sup> As a result, the impeachment of Mr. Potter nullified his attestation to the will. Did the court correctly reject the will due to its failure to meet the statutory requirement of two witnesses?

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<sup>6</sup> *Puget Sound Nat. Bk. Of Tacoma v. Moore*, 159 Wash. 5, 291 Pac. 1081, 1084 (1930)

## II. Statement of the Case

Dr. Lawrence Goldberg passed away on September 22, 2018.<sup>7</sup> On October 12, 2018, his daughter Rachael Goldberg filed a petition for letters of administration, indicating that Dr. Goldberg left two other children, Cole and Grant Goldberg, but no will.<sup>8</sup> The trial court entered an order appointing Rachael Goldberg as the Personal Representative of the Estate.<sup>9</sup>

On October 23, 2018, Jennifer Allen filed a motion to revoke the court's actions.<sup>10</sup> In her declaration, Ms. Allen swore that Dr. Goldberg signed his will "in front of our neighbors, Tracy and Betty Jo Potter," (even though she has consistently maintained that she was not present at this alleged signing.) Ms. Allen also swore that she "had nothing to do with creating the will."<sup>11</sup> Ms. Allen even challenged Rachael

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<sup>7</sup> CP 1

<sup>8</sup> CP 2

<sup>9</sup> CP 7, 14

<sup>10</sup> CP 25

<sup>11</sup> CP 17

Goldberg’s “assertion that she is a daughter of Mr. [sic] Goldberg.”<sup>12</sup>

In her motion, Ms. Allen asked the court to uphold the purported will.

Decedent died testate, having duly executed his Last Will and Testament, which is dated December 18, 2014, before Tracy Potter and Betty Jo Potter, competent witnesses. The testimony of said witnesses was reduced to writing at the time of the execution of the Will and is attached to the Will. Said testimony is supplemented by a declaration. Petitioner requests that the testimony of said witnesses be accepted as sufficient testimony in proof of the Will.<sup>13</sup>

Ms. Allen submitted the purported will to the court. The document lists only Cole and Grant Goldberg as Dr. Goldberg’s children but makes no mention of Rachael Goldberg.<sup>14</sup> The will contained a separate “Testation Clause” that is signed by Tracy and Betty Jo Potter, indicating that they signed in Dr. Goldberg’s presence and at his direction.<sup>15</sup> Appended to the

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<sup>12</sup> CP 18

<sup>13</sup> CP 26

<sup>14</sup> CP 28

<sup>15</sup> CP 34

will was a separate “Schedule-Beneficiary Designations,” designating Ms. Allen as the sole beneficiary of the estate.<sup>16</sup> Also appended was a “DisinheritsSchedule” [sic] disinheriting the two sons, but saying nothing about Rachael Goldberg.<sup>17</sup>

In addition to the will, Ms. Allen also submitted to the court a “Declaration of Attesting Witnesses.”<sup>18</sup> This declaration, which was signed by both Tracy and Betty Jo Potter, states: “On December 18, 2014, the date of the attached will of Lawrence David Goldberg, we heard Lawrence David Goldberg declare the attached will to be his will, we saw Lawrence David Goldberg sign it and Lawrence David Goldberg requested that we act as witnesses.”<sup>19</sup> No will, however, was attached to the declaration filed with the court. Moreover, after the trial, the trial court found that “[b]oth Jennifer Allen and Tracy Potter testified that Jennifer Allen only brought the Declaration with her on October 22, 2018; and

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<sup>16</sup> CP 35

<sup>17</sup> CP 36

<sup>18</sup> CP 37

<sup>19</sup> CP 37

that the Will was not attached to the Declaration.”<sup>20</sup> As a result, the trial court found the “[o]mission of the Will contradicts the testimony in the Declaration.”<sup>21</sup>

On November 16, 2018, the court entered an order admitting the “presumptive” will to probate. The court, however, denied Ms. Allen’s request to be appointed Personal Representative; instead the court appointed an independent PR, Jennifer Davison.<sup>22</sup> The court also entered an order freezing all assets associated with Dr. Goldberg.<sup>23</sup> This order required Ms. Allen to “to prepare and submit an inventory of probate assets held in the Decedent’s name in whole or in part within one week of entry of this order to the Petitioner.”<sup>24</sup> Ms. Allen never submitted such an inventory.

Thereafter, Rachael and Cole Goldberg filed a TEDRA petition challenging the validity of the will. That matter was

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<sup>20</sup> CP 312 (Para. 3.4)

<sup>21</sup> Ibid. Appellant does not challenge this finding. Thus, it is a verity for purposes of this appeal.

<sup>22</sup> CP 132.

<sup>23</sup> CP 129-131.

<sup>24</sup> CP 131.

consolidated with the probate matter, and a first amended petition was filed on March 12, 2019.<sup>25</sup> The petitioners challenged the will on the grounds, among others, that “the Will was not signed and witnessed according to the requirements of RCW 11.12.020.”<sup>26</sup> As the petitioners further alleged: “Specifically, one of the purported witnesses of the Will, Tracy Potter, confirmed Jennifer brought the Will to him, outside of Lawrence’s presence, and asked him to sign as a witness—which he did.”<sup>27</sup>

The matter was set for a hearing on this limited ground for invalidating the will. The trial court defined the scope of the hearing as follows:

The Petition alleged multiple grounds to challenge the validity of the Will, but, by design, Petitioners scheduled a hearing on April 26, 2019 at 1 :30 p.m. to try a discrete and determinative issue that could render moot the additional objections to the Will’s validity. The Petitioners asked the Court to consider whether the Will met the formalities of execution contained in Wash.

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<sup>25</sup> CP 147.

<sup>26</sup> CP 149.

<sup>27</sup> CP 149.

Rev. Code§ 11.12.020. Specifically, Petitioners alleged the two (2) witnesses, Tracy Potter and Betty Jo Potter, signed the Will as attempted witnesses, but they did so outside of the presence of the decedent in violation of the statute. Betty Jo Potted died before Petitioners filed their Amended TEDRA Petition. Therefore, the April 26, 2019 hearing focused on the testimony of the second witness, Tracy Potter.<sup>28</sup>

Several months before the hearing, on January 19, 2019,

Mr. Potter gave a recorded interview to investigator John Visser.<sup>29</sup> The recording of the interview was played for the court, without objection. In addition, a transcript of that interview was offered *and admitted by stipulation* as Exhibit 4.<sup>30</sup>

During the interview, Mr. Visser showed Mr. Potter an image of the will on his laptop computer and asked Mr. Potter who brought the will to him for signature. Mr. Potter clearly and unequivocally told Mr. Visser that it was Jennifer Allen who brought him the will to sign.

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<sup>28</sup> CP 310 (Para. 1.4)

<sup>29</sup> RT 56:10-18

<sup>30</sup> CP 311 (Para. 2.5)

MR. VISSER: So we'll put that on the record.

MR. POTTER: Yeah.

MR. VISSER: Today is January 19, 2019, and it is about -- I'm going to go with about 4:25 p.m. My name is John Visser. I am here at the residence of 36216 N.E. 119th Avenue. I'm outside, putting a laptop on my car.

I'm out here with Tracy Potter. Tracy Potter's outside with me looking at some signature that's a testation clause that indicates something about a last will and testament. And it's a signature that has Tracy's signature and Betty's signature.

MR. POTTER: Yeah. Oh, here, here comes Jennifer. Yeah, go ahead. Yeah, that is my signature.

[Mr. Potter than consented to Mr. Visser's recording of the interview, and the questioning continued, in the presence of Ms. Allen, who had just arrived on the scene.]

MR. VISSER: Who brought you this form to sign?

MR. POTTER: Jennifer.

MR. VISSER: Okay. And did you sign it in front of anybody else?

MR. POTTER: I don't remember. She's here, ask—no, I think it was just—just her. She brought it over. And my mom—

MR. VISSER: Okay.

MR. POTTER: --was there. So yeah.

MR. VISSER: Okay. So it was you and your mom that were here?

MR. POTTER: Yeah.

MR. VISSER: Okay. And Jennifer?

MR. POTTER: Yeah.

MR. VISSER: And what was it that you were signing, do you think?

MR. POTTER: Well, I asked Jennifer, but I asked her what was the thing I was signing for Larry?

***MS. ALLEN: Oh, that was his will.***

MR. POTTER: What's this guy's -- huh? Well, it was his will or whatever.<sup>31</sup>

Later on, outside the presence of Ms. Allen, Mr. Potter reaffirmed his statement that it was the will that he signed and that it was Ms. Allen who brought it to him to sign.

MR. VISSER: And so do you remember— do you remember what it was that you were signing? Did you read the whole document or did you just look at it?

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<sup>31</sup> Exhibit 4, 2:4-3:22

MR. POTTER: No, I didn't read the whole god-damned document, no. Yeah it was a will—

MR. VISSER: Okay

MR. POTTER: --or something, yeah.

MR. VISSER: Okay.

MR. POTTER: It was the will.

MR. VISSER: And so who asked you to sign it?

MR. POTTER: Jennifer did.<sup>32</sup>

In addition the foregoing, Mr. Potter also said that he had never had a conversation with Dr. Goldberg about his will.

MR. VISSER: ...Okay. And did you ever have a conversation with Larry about his will?

MR. POTTER: No. No, not really. Like I say, he'd come around here once in a while and ride the horse.<sup>33</sup>

Similarly, Mr. Potter also said that he did not see Dr. Goldberg sign the will.

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<sup>32</sup> Exhibit 4, 8:23-9:8

<sup>33</sup> Exhibit 4, 9:24-10:3

MR. VISSER: 12/18/14. And so did you ever see—did you ever see Larry sign this?

MR. POTTER: No, not that I recall.<sup>34</sup>

Mr. Potter testified at trial. On cross-examination, he admitted that he was telling Mr. Visser the truth.

Q Did you change your—did you tell him something different from the truth because you were intimidated by him?

A No.

Q You told him the truth?

A Yeah. Well, what I thought was the truth.

Q Right. You told him what you thought was the truth?

A Yeah.<sup>35</sup>

Based on the exhibits and testimony, the trial court found that Mr. Potter was being truthful when he was being interviewed by Mr. Visser:

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<sup>34</sup> Exhibit 4. 17:13-15

<sup>35</sup> RT 85:23-86:4

The Court also finds Tracy Potter's responses to John Visser's questions credible for the following reasons: i.) John Visser clearly defined what the purpose of his visit and interview questions were; ii.) he obtained Tracy Potter's express permission to record the interview; iii.) Tracy Potter did not have advance warning of John Visser's visit; iv.) Tracy Potter recognized John Visser as a former Clark County Deputy Sheriff; and v.) there is no evidence Tracy Potter felt intimidated or otherwise felt compelled to give specific answers to John Visser's questions.<sup>36</sup>

After the interview had been completed, and after Mr. Visser drove away, he received a frantic telephone call from Mr. Potter, in which Mr. Potter sought to disavow his earlier statements regarding the will. Mr. Potter told Mr. Visser that he was "fucked" and that he "just fucked myself."<sup>37</sup> Mr. Visser interpreted this statement to mean that Mr. Potter had "told me something that he wasn't supposed to or that he shouldn't have."<sup>38</sup>

Based on this testimony, the trial court found:

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<sup>36</sup> CP 314 (Para. 3.18)

<sup>37</sup> RT 66:2-67:5

<sup>38</sup> RT 67:6-10

John Visser interpreted Tracy Potter's comment of "I fucked up" as an admission that Tracy Potter did not say what Jennifer Allen wanted him to say.<sup>39</sup>

Moreover, Mr. Potter testified at trial that he made this call after speaking with Ms. Allen and at her behest. As Mr. Potter testified on direct examination:

Q Did Jennifer instruct you to call him?

A She said it might be good.<sup>40</sup>

Based on this testimony, the court found:

During trial, counsel asked Tracy Potter if he had spoken to Jennifer Allen on January 19, 2019 immediately after John Visser left Tracy Potter's property, but before Tracy Potter called John Visser to change his interview responses. After initially denying such contact, Tracy Potter admitted he talked to Jennifer Allen before placing the call to John Visser in which Tracy Potter attempted to change his testimony.<sup>41</sup>

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<sup>39</sup> CP 314 (Para. 3.17)

<sup>40</sup> RT 83:24-25

<sup>41</sup> CP 314 (Para. 3.19)

Connecting the dots, the trial court also found:

The Court finds that Tracy Potter attempted to change the truthful testimony he provided to John Visser only after he was persuaded by Jennifer Allen to give a false version of events; and the Court finds Tracy Potter was susceptible to Jennifer Allen's influence. The Court finds that after John Visser left the premises, Tracy Potter went to the barn area of the property where Jennifer Allen or her husband claimed that a horse was loose. It is clear to the Court that Tracy Potter had a conversation about the John Visser interview with Jennifer Allen and her husband; and, as a result of that conversation, Tracy Potter called John Visser to change his responses.<sup>42</sup>

Mr. Potter was subsequently deposed by Cole Goldberg's attorney, Charles Isely. The deposition transcript was admitted as Exhibit 3 at trial. Ms. Allen attended the deposition, along with her attorney Brian Wolfe, and she openly expressed her displeasure with Mr. Potter's testimony. Mr. Potter was in the process of testifying that Dr. Goldberg had brought him the subsequent declaration to sign, *in October of 2018*, even though

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<sup>42</sup> CP 314-15 (Para. 3.20)

Dr. Goldberg had passed away a month earlier.<sup>43</sup> Ms. Allen then launched into an extended tirade.

JENNIFER ALLEN: Tracy, you should put your glasses on.

MR. ISELY: Stop. Okay. Inappropriate.

JENNIFER ALLEN: Okay. Well, he can't read.

THE WITNESS: I can read.

JENNIFER ALLEN: I mean, you're trying to trick him.

MR. ISLEY: Okay. Can we take a break?

MR. WOLFE: No, you don't need to.

MR. ISELY: Okay. I'm going to ask you not to interrupt when I'm asking questions.

JENNIFER ALLEN: Whatever.

MR. ISELY: You have to--

JENNIFER ALLEN: You're a fricken liar. And I know it.

MR. ISELY: You have an attorney.

JENNIFER ALLEN: You're full of shit.

MR. WOLFE: Hey.

MR. ISELY: You have an --

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<sup>43</sup> Exhibit 3, 19:13-25.

JENNIFER ALLEN: I'm sorry. But I'm tired of this shit.

MR. WOLFE: Hey, this is all--

JENNIFER ALLEN: I am tired of this.

MR. WOLFE: Jennifer, this is all on the record.

JENNIFER ALLEN: I don't care. I'm tired of it.

MR. ISELY: Yeah, let the record --

JENNIFER ALLEN: These fuckers have been badgering me for months. Fuck you. This is all true. This is bullshit. I don't care if it's on the record. It's true.

MR. WOLFE: Stop.

JENNIFER ALLEN: They deserve it.

THE WITNESS: Come on, Jennifer.

JENNIFER ALLEN: Whatever. I'm turning you in to the bar. I don't care. This is fraud. I'm sorry, but they have it coming.

MR. ISELY. Are you done?

JENNIFER ALLEN: No, I'm not. There will be more later.

MR. ISLEY: Okay. Please continue. Here is what I need you to do, either you need to --

JENNIFER ALLEN: I don't care. I'm right and you're wrong. And you're trying to trick him, and that's bullshit. It's true.

MR. WOLFE: Please, stop.

MR. ISELY: We're going to take a break. Okay.  
And I'm going to allow you to have a conversation  
with Ms. Allen.

JENNIFER ALLEN: No, I'm good. Please  
continue on. This is fascinating.

MR. ISELY: No. I'm going to take a break. Okay.

JENNIFER ALLEN: Snake.<sup>44</sup>

Ms. Allen's interruptions and attempts to influence  
Mr. Potter's testimony did not end there. Later on in the  
deposition, Mr. Isely was asking Mr. Potter about Ms. Allen's  
attempts to interrupt Mr. Potter's interview by Mr. Visser,  
including pretending that a horse had gotten loose. Ms. Allen  
inserted herself as follows:

Q. Isn't it true that she attempted to interrupt the  
conversation when she initially pulled up in her  
vehicle?

A. She just came down. She didn't try to interrupt  
anything. He could have kept going.

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<sup>44</sup> Exhibit 3, 20:6-22:7

Q. Isn't it true that after Mr. Visser asked her to give you some distance to complete the interview that she then concocted some story about a horse escaping and --

JENNIFER ALLEN: Liar.

BY MR. ISELY: --she needed your assistance?

JENNIFER ALLEN: I'm sure.

A. Yeah -- no. Nuh-uh. There.

MR. ISELY: Again, I would ask Ms. Allen if she could please refrain.

JENNIFER ALLEN: That's such bullshit. I'm sorry. It's stupid.

MR. ISELY: You know, why don't you just, for the record, maybe, tell us what you think about this line of questioning. That's okay.

JENNIFER ALLEN: No, please. I mean, this is fascinating.

MR. ISELY: If you want to continue.

JENNIFER ALLEN: Please continue. I love it.

MR. WOLFE: Quit. Don't interrupt him. Just let him continue.

JENNIFER ALLEN: It's just so stupid. I'm sorry.<sup>45</sup>

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<sup>45</sup> Exhibit 3, 32:7-33:7

Based on her conduct during Mr. Potter's deposition, the court made the following finding:

The Court finds Jennifer Allen sought to influence and coach Tracy Potter's testimony to comport with her false version of the events. The Court finds that Tracy Potter changed his testimony after she asserted herself (both at the time of the John Visser interview on January 19, 2019 and during the deposition on April 24, 2019).<sup>46</sup>

Moreover, based on the totality of the evidence, including the testimony by Mr. Potter and Ms. Allen at trial, Mr. Potter's deposition, and Mr. Potter's interview, the court summed up its credibility determinations as follows:

The Court does not find credible Jennifer Allen's testimony in her Declarations and at trial that she did not have anything to do with creating the Will.<sup>47</sup>

The Tracy Potter testimony the Court finds persuasive and compelling is limited to Tracy

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<sup>46</sup> CP 315 (Para. 3.25)

<sup>47</sup> CP 315 (Para 3.26)

Potter's responses to John Visser's interview questions.<sup>48</sup>

Based on all its findings, the trial court entered its Conclusions of Law. They include the following two conclusions.

The Court has an abiding belief in the Findings of Fact contained in Article III of this Order. The Court holds, by more than clear, cogent, and convincing evidence, that Petitioners presented evidence which gives this Court an abiding belief that Jennifer Allen brought the Will to Tracy Potter and Betty Jo Potter and not Lawrence Goldberg. Therefore, the Will does not comport with the requirements of Wash. Rev. Code §11.12.020(1).<sup>49</sup>

Based on its findings and conclusions, the trial court found the purported will to be invalid, awarded attorney's fees to Rachael and Cole Goldberg, and re-appointed Rachael Goldberg as the Administrator of the estate.<sup>50</sup> Judgment was

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<sup>48</sup> CP 316 (Para 3.27)

<sup>49</sup> CP 317 (Para. 4.8)

<sup>50</sup> CP 318

entered against Ms. Allen and in favor of Rachael and Cole Goldberg. This appeal ensued.

### **III. Argument**

#### **A. Appellant Failed to Preserve the Alleged Error**

Ms. Allen’s entire appeal hinges on a single question: did the trial court err by treating the transcript of Mr. Potter’s interview by Mr. Visser as substantive evidence. As Ms. Allen puts it in her summary of argument, “The findings of fact reveal that the court erroneously adopted the out of court statements of the non-party witness as substantive evidence in arriving at its judgment in this case.”<sup>51</sup>

What is perhaps most remarkable about Appellant’s forty-nine page brief is that she never even mentions the elephant in the room—her failure to preserve this alleged error either by objecting to the admission of the recording and transcript as hearsay or by asking the trial court to limit its

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<sup>51</sup> Appellant’s Brief, p. 39

consideration of that recording and transcript solely for impeachment and not as substantive evidence. The fundamental problem with Ms. Allen's appeal is that she did not object to the admission of the interview recording or the transcript; in fact, as the trial court noted in its findings, the transcript was admitted as an exhibit by stipulation.

The law on preservation of error is clear.

In order to preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it. [...] Under most circumstances, we are simply unwilling to permit a defendant to go to trial before a trier of fact acceptable to him, speculate on the outcome and after receiving an adverse result, claim error for the first time on appeal which, assuming it exists, could have been cured or otherwise ameliorated by the trial court.<sup>52</sup>

This general rule applies to alleged errors based on the improper admission of hearsay evidence. For example, in *State v. Wixon*, the Court of Appeals rejected an appeal based on hearsay because no objection had been raised when the

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<sup>52</sup> *State v. Wicke*, 91 Wn.2d 638, 642-43, 591 P.2d 452 (1979) (citations omitted).

evidence was offered and admitted; as a result, “no hearsay objection was preserved for appeal.”<sup>53</sup>

*In re Young* is to the same effect. On appeal, the appellant argued that a witness’s testimony was hearsay, but “[n]o objection was made on hearsay grounds.”<sup>54</sup> The court rejected appellant’s argument due to her failure to preserve the error: “To preserve error for consideration on appeal, the general rule requires that the alleged error first be brought to the trial court’s attention at a time that will afford that court an opportunity to correct it. *State v. Wicke*, 91 Wash.2d 638, 591 P.2d 452 (1979).”<sup>55</sup>

Even an objection to a piece of evidence on a different ground is not sufficient to preserve a hearsay objection for appeal. In *State v. Smith*, the appellant objected to an exhibit for “foundation” but not for hearsay. The appellant first raised

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<sup>53</sup> *State v. Wixon*, 30 Wn. App. 63, 78, 631 P.2d 1033 (1981)

<sup>54</sup> *In re Young*, 24 Wn. App. 392, 396, 600 P.2d 1312 (1979)

<sup>55</sup> *Ibid.*

the hearsay objection on appeal, but the Supreme Court refused to consider it.

However, we do not reach the merits of Smith's hearsay argument because the issue was not properly preserved at trial.

When the State moved to admit exhibit two into evidence, Smith's counsel merely objected to "foundation." This is insufficient to preserve a hearsay objection for appeal.<sup>56</sup>

The requirement to preserve error is also embodied in this Court's rules. RAP 2.5(a) provides that the "appellate court may refuse to review any claim of error which was not raised in the trial court." Ms. Allen never raised to the trial court the argument she makes on this appeal.

Because she did not preserve her hearsay objection, and she never asked the court to consider the admitted evidence only for purposes of impeachment but not as substantive evidence, Ms. Allen's appeal should be rejected on this basis alone. Ms. Allen may attempt to argue that the trial court

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<sup>56</sup> *State v. Smith*, 155 Wn.2d 496, 120 P.3d 559, 562 (2005)

should not have needed Ms. Allen to object, but this argument would ignore the Supreme Court's decision in *Smith v. Shannon*.<sup>57</sup> After a bench trial, the appellant argued for the first time on appeal that the trial court applied the wrong standard to measure the defendant's conduct.

Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.[,,] The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials.

The same rationale requires parties to inform a court acting as trier of fact of the rules of law they wish the court to apply. While a party has the right to assume that the trial court knows and will properly apply the law, this does not excuse failure to seek correction of an error once the complaining party becomes aware of it. If by no other means, this can be done by a motion for a new trial. Failure to make such a motion when it would enable the trial court to correct its error precludes raising the error on appeal, unless the error was pointed out at some other point during the proceedings.<sup>58</sup>

Ms. Allen did not file a motion for a new trial. She did file a motion for reconsideration, but she never argued in that

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<sup>57</sup> *Smith v Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983)

<sup>58</sup> *Smith v. Shannon*, 100 Wn.2d 26, 37-38, 666 P.2d 351 (1983)

motion that the trial court had erroneously considered the interview as substantive evidence rather than purely impeachment evidence. In sum, Ms. Allen failed to preserve this alleged error, and she should not be allowed to raise it for the first time on appeal.

**B. The Trial Court's Findings are Subject to a Substantial Evidence Standard of Review**

If this Court exercises its discretion to consider the argument that Ms. Allen has raised for the first time on appeal, then the next issue is the proper standard of review to be applied.. Appellant does not address the proper standard of review in her brief. Nevertheless, the proper standard of review from the trial court's judgment is well established.

We review *de novo* questions of law and a trial court's conclusions of law. And we review findings of fact under a substantial evidence standard. Substantial evidence is evidence that

would persuade a fair-minded person of the truth of the statement asserted.<sup>59</sup>

Moreover, when applying the substantial evidence standard, the appellate courts view the evidence, and all reasonable inferences from the evidence, in the light most favorable to the prevailing party. “We defer to the fact finder and consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.”<sup>60</sup>

### **C. Substantial Evidence Supports the Trial Court’s Findings of Fact**

RCW 11.12.020 provides that in order to be valid it “shall be attested by two or more competent witnesses, by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the *presence of the testator* and at the *testator’s direction or request.*”

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<sup>59</sup> *Mitchell v. Washington State Institute*, 153 Wn. App. 803, 225 P.3d 280, 284 (2009) (citations omitted)

<sup>60</sup> *Id.* at 285

(Emphasis added.) As a result, the dispositive factual question is whether Tracy Potter signed Dr. Goldberg's will while in his presence and at his direction or request. If he did not, then the will is invalid, and the trial court's judgment should be affirmed.

There is more than substantial evidence in the record that Tracy Potter did not sign the will in Dr. Goldberg's presence or at his direction or request. This is made abundantly clear by Mr. Potter in his interview with Mr. Visser, in which Mr. Potter repeatedly stated that it was Ms. Allen who brought the will and asked him to sign it. Mr. Potter also stated that he did not discuss any will with Dr. Goldberg. Under cross-examination, Mr. Potter testified under oath that he had told Mr. Visser the truth, thereby elevating the level of that evidence from mere impeachment to substantive evidence.

Further evidence comes straight from Ms. Allen's mouth. Early in the recorded interview, Ms. Allen came over and listened to what was being said. Mr. Potter makes several

references to this, noting “here comes Jennifer,” and “[s]he’s here.” It is during this portion of the interview that Mr. Visser asks Mr. Potter what document Ms. Allen was bringing and asking him to sign. The following exchange ensues:

MR. VISSER: And what was it that you were signing, do you think?

MR. POTTER: Well, I asked Jennifer, but I asked her what was the thing I was signing for Larry?

***MS. ALLEN: Oh, that was his will.***<sup>61</sup>

This admission by Ms. Allen is significant because, unlike Mr. Potter, Ms. Allen is a party to this action. As a result, her out-of-court statements are not excludable as hearsay; they are admissions of a party, and they can be considered as substantive evidence. Ms. Allen will surely argue that this exchange does not mean what it seems to mean. But under the substantial evidence standard of review, the evidence must be viewed in the light most favorable to the respondents.

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<sup>61</sup> Exhibit 3, 3:16-20.

Viewed in this light, there is substantial evidence that Ms. Allen brought the will to Mr. Potter to sign.

In addition to the foregoing, there was also enough evidence for the trial court to form the reasonable inference that Dr. Goldberg was not present when Tracy Potter signed the will and Dr. Goldberg did not direct or request that he do so. The fact that the will fails to mention his daughter, Rachael, while it does mention his sons Cole and Grant, raises a reasonable inference that this will was not prepared by Dr. Goldberg. The fact that the will disinherits all his children and leaves everything to his “friend” Jennifer Allen raises an inference that Ms. Allen was not being truthful when she said she had nothing to do with the preparation of the will. Ms. Allen’s interference with Mr. Potter’s deposition, as well as her attempt to interfere with Mr. Potter’s interview, raises a reasonable inference that she sought to change and control Mr. Potter’s testimony.

In sum, the totality of the evidence must be viewed in the light most favorable to the respondents, and all reasonable

inferences should be drawn in their favor. Applying this standard to the evidence calls for affirming the judgment on this basis, as well.

**D. Even if the Potter Interview Were Considered Only for Impeachment, The Judgment Should be Affirmed**

Even if this Court agrees to consider Ms. Allen's appeal, despite her failure to preserve the alleged error, and even if this Court finds that the trial court should only have considered the interview for purposes of impeachment, the judgment should still be affirmed.

Under RCW 11.12.020 a will must be properly attested to by at least two witnesses. The only two potential witnesses are Betty Jo Potter and Tracy Potter. Ms. Potter has since died, leaving Tracy Potter as the sole surviving witness. In her appeal, Ms. Allen underestimates the consequences of impeaching Mr. Potter's testimony, which is to negate his attestation, leaving the will one witness short.

Ms. Allen’s brief is replete with examples of court pronouncements regarding the error of treating out-of-court statements of non-parties as substantive evidence, but Ms. Allen turns a blind eye to the consequences of impeaching a witness with an out-of-court statement. Ms. Allen quotes extensively from the case of *Puget Sound Nat. Bk. Of Tacoma v. Moore*, but she elides the following highlighted portion. “But be this as it may, impeaching evidence never tends to prove a fact. Its only purpose is to show the unreliability of the witness, and *thus destroy the effect of his testimony as to purported facts to which he does testify...*”<sup>62</sup>

In other words, once a witness has been successfully impeached by his or her out-of-court statements, any testimony by that witness to the contrary is negated. Here, Tracy Potter was impeached with his statements to Mr. Visser, in which he said Ms. Allen had brought him the will to sign and he had never discussed it with Dr. Goldberg. That means that any

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<sup>62</sup> *Puget Sound, supra*, 291 Pac. at 1084.

testimony by Mr. Potter to the contrary has been “destroyed” and has no effect. Thus, his statement in the “Testation Clause, that he signed the will “at the Testator’s request and in such Testator’s presence” has been nullified. The impeachment has the legal effect of striking Mr. Potter’s signature from the will, rendering it invalid.

The impeachment had the same effect on Mr. Potter’s trial testimony, wherein he tried to testify that Dr. Goldberg did bring him the will and ask him to sign it. If the court disbelieves this testimony, which it clearly did, then the only remaining reasonable inference is that Dr. Goldberg did not bring Mr. Potter the will and ask him to sign it. And under that inference, the will is invalid.

The declaration signed by Mr. Potter, in an effort to validate the will under the procedure allowed by RCW 11.20.020, was similarly nullified. There is no way that the declaration can be reconciled with the impeachment. In the declaration, Mr. Potter states that he and his mother “heard

Lawrence David Goldberg declare the attached will to be his will, we saw Lawrence David Goldberg sign it and Lawrence David Goldberg requested that we act as witnesses.” The court clearly disbelieved this statement, which leads again to the inexorable conclusion that these events did not take place.

Ms. Allen tried to testify that it was Dr. Goldberg who brought Mr. Potter the will and asked him to sign it, but the Court rightfully chose to disbelieve this testimony, as well. First, there is no evidence in the record showing how Ms. Allen would know this, given her staunch position that she had nothing to do with the preparation of the will and was not present when Mr. Potter signed it. And second, the trial court was free to make its own determination regarding Ms. Allen’s credibility, and it found her to be not credible. Worse yet, the court found that she had pressured Mr. Potter into giving false testimony, too.

If the issue in a case boils down to whether a coin landed on heads or tails, and the only witness says it was tails, and the

trial court judge chooses not to believe that witness, then the only reasonable inference is that the coin landed heads. They are mutually exclusive possibilities, just like the case here; either Dr. Goldberg brought Mr. Potter the will and asked him to sign it, or he didn't. If Mr. Potter, who is the only surviving witness, testifies that Dr. Goldberg did, and the trial court believes that statement is untrue, then the only reasonable inference from the evidence is that someone other than Dr. Goldberg brought Mr. Potter the will and ask him to sign it. Because she is the sole beneficiary under the will, there is also a reasonable inference that the person who did so was Ms. Allen.

In sum, even if the impeachment evidence were not used as substantive evidence and were only given the effect of nullifying all of Mr. Potter's testimony to the contrary, the trial court's decision would still meet the substantial evidence standard.

**E. The Court Should not Reverse the Attorney Fee Award**

Ms. Allen asks this Court to reverse the award of attorney's fees against her. She does not claim that the award is excessive. She merely argues the award should be reversed because the trial court's judgment was erroneous. Because the judgment was not erroneous, this Court should affirm the attorney fee award against Mr. Allen

**F. The Court Should Award Fees Against Ms. Allen**

Under RAP 18.1, the respondents respectfully request an award of all of their attorney's fees and costs on this appeal. Such an award is warranted by RCW 11.96A.150, which provides that the "court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings..." Moreover, "[i]n exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not

include whether the litigation benefits the estate or trust involved.”

This litigation did not provide any benefit to the estate. If Ms. Allen had prevailed, she would be the only beneficiary of her efforts. Because of her conduct, Dr. Goldberg’s three children will inherit substantially less than they would have, had Ms. Allen not tried to foist an invalid will upon the court. It would therefore be equitable if Ms. Allen were required to reimburse the estate for the fees and costs incurred on this appeal.

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#### IV. Conclusion

For the foregoing reasons, Respondents Rachael and Cole Goldberg respectfully request that this Court reject Ms. Allen's appeal and award additional attorney's fees and costs against Ms. Allen and to the estate.

Respectfully submitted August 3, 2020

*s/ Steven E. Turner*

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## CERTIFICATE OF SERVICE

I hereby certify that on **August 3, 2020**, I served the foregoing **Brief of Respondents** on:

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**August 03, 2020 - 6:01 PM**

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