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COURT OF APPEALS DIV 1
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COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF
STUART RIPPEE

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE	4
A. Procedural History	4
1. <u>In 2009, the Court of Appeals reversed the trial court’s grant of summary judgment</u>	4
2. <u>The Trial court grants a second motion for summary judgment</u>	6
i. <i>Numerous procedural irregularities occurred in the noting of the motion for summary judgment</i>	6
ii. <i>The trial court erroneously allowed Denise to amend her Reply to Laura’s Petition</i>	9
iii. <i>The trial court erroneously denied Laura’s motion for reconsideration</i>	9
B. Substantive History	10
1. <u>Minimal facts were presented to the Court of Appeals in the 2008 appeal, but such facts were sufficient to create genuine issues of material fact</u>	10
2. <u>Additional facts presented in 2013 establish more questions of fact such that undue influence and capacity cannot be decided on summary judgment</u>	12
i. <i>Stuart had prepared a complex will in 1999 that provided for all his beneficiaries – Denise, Laura and his grandsons</i>	12
ii. <i>In 2005, Stuart was medically frail and taking significant pain medications</i>	13
iii. <i>After two months seclusion with Denise and an increase in narcotic intake, Stuart signs a will that disinherits the nature objects of his bounty, his daughter with MS and his two grandsons</i>	15
iv. <i>There are significant suspicious facts and circumstances in the procurement of the will and community property agreement</i>	15

v. <i>Expert testimony confirms that pain medications can affect cognition</i>	16
vi. <i>Stuart's friends are surprised Laura and Stuart's grandson's disinheritance given Stuart's known love and affection for his daughter and grandsons</i>	17
IV. ARGUMENT	19
A. The Trial Court Improperly Granted Denise's Motion for Summary Judgment	19
1. <u>The Court of Appeals Reviews the Summary Judgment De Novo</u>	19
2. <u>The trial court improperly required Laura to meet her burden of proof for trial to defeat the motion for summary judgment</u>	20
3. <u>Equitable issues presents hosts of questions of fact and are not susceptible to summary judgment</u>	22
4. <u>The trial court erred by not finding that questions of fact existed as to Stuart's capacity</u>	23
B. The Trial court Abused Its Discretion In Granting Denise's Motion to Amend Her Reply to the Petition	29
1. <u>Summary of procedural history</u>	29
2. <u>The Court of Appeals review the trial court's decision for an abuse of discretion</u>	31
3. <u>The trial court's grant of Denise's motion to amend her reply was prejudicial to Laura</u>	31
4. <u>If the trial court did not abuse its discretion, the amendment just prior to hearing a motion for summary judgment should have presented a question of credibility that would prevent the grant of summary judgment</u>	34
C. The Trial Court Abused Its Discretion in Denying Laura's Motion for Reconsideration	36
1. <u>Summary of Procedural History</u>	36
2. <u>The Court of Appeals reviews the trial court's decision for an abuse of discretion</u>	36

3.	<u>The granting of Denise’s motion to shorten time to hear motion for summary judgment was not based on tenable grounds or reason</u>	37
	<i>i. Laura was prejudiced by the procedural irregularities</i>	37
	<i>ii. Delay in bringing the motion for summary judgment, which necessitated noting the motion for summary judgment in an untimely manner, was entirely due to Denise’s own delay</i>	39
4.	<u>Laura provided evidence in her motion for reconsideration that she did not have the opportunity to present initially</u>	41
	<i>i. Denise introduced evidence in reply that Laura did not have an opportunity to address prior to the hearing</i>	41
	<i>ii. The trial court should not have considered the Declaration of Terri Luken regarding the deposition testimony of Dr. Jung Hanson</i>	44
	<i>iii. Medical testimony is not dispositive on the issue of capacity and undue influence</i>	45
	D. Attorneys’ Fees and Costs Should Be Awarded on Appeal	47
V.	CONCLUSION	48

TABLE OF AUTHORITIES

Case Law

<i>Balise v. Underwood</i> , 62 Wn.2d 195, 381 P.2d 966 (1963)	35
<i>Barker v. Advanced Silicon Materials, LLC, (ASIMI)</i> , 131 Wash. App. 616, 128 P.3d 633 (2006)	22
<i>Blomster v. Nordstrom, Inc.</i> , 103 Wn. App. 252, 11 P.3d 883 (2000)	44
<i>Caruso v. Local Union 690 of Int'l Bhd. Of Teamsters</i> , 100 Wash.2d 343, 670 P.2d 240 (1983)	31
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (1990)	2
<i>Dean v. Jordan</i> , 194 Wash. 661, 79 P.2d 331 (1938)	24, 25, 26, 27, 28, 32
<i>Del Guzzi Cont. Co., Inc. v. Global Northwest, Ltd., Inc.</i> 105 Wn.2d 878, 719 P.2d 120 (1986)	2, 31
<i>Endicott v. Saul</i> , 142 Wn. App. 899, 176 P.3d 560 (2008)	45
<i>Estate of Randmel</i> , 38 Wn. App. 401, 685 P.2d 638 (1984)	22
<i>Fischer-McReynolds v. Quasim</i> , 101 Wn. App. 801, 6 P.3d 30 (2000)	20
<i>Gossett v. Farmers Ins. Co. of Wash.</i> , 133 Wn.2d 954, 948 P.2d 1264 (1997).....	21
<i>Hartley v. State</i> , 103 Wn.2d 768, 689 P.2d 77 (1985)	20
<i>Herron v. Tribune Publ'g Co.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987)	20
<i>Hill v. Department of Labor and Industries</i> , 90 Wn.2d 276, 580 P.2d 636 (1978)	33
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)	19
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004)	48
<i>In re Estate of Kessler</i> , 95 Wash. App. 358, 28, 977 P.2d 591 (1999)	23, 27, 28
<i>In re Estate of Lint</i> , 135 Wash.2d 518, 957 P.2d 755 (1998)	27, 28, 32
<i>In re Estate of Miller</i> , 10 Wash. 2d 258, 116 P.2d 526 (1941)	24
<i>In re Estate of Rippee</i> , 149 Wn. App. 1009, 2009 WL 502400 (Wn. App. Div. 1).....	1, 5, 10, 22, 29
<i>In re Guardianship of Stamm</i> , 121 Wn. App. 830, 91 P.3d 126 (2004)	45
<i>In re Melter</i> , 167 Wn. App. 285, 273 P.3d 991 (2012)	45
<i>McDonald v. State Farm Fire and Cas. Co.</i> , 199 Wn.2d 724, 837 P.2d 1000 (1992)	31
<i>Nielson v. Eisenhower & Carlson</i> , 100 Wn. App. 584, 999 P.2d 42 (2000)	2
<i>Right-Price Recreation, LLC v. Connells Prairie Cmty. Counsel</i> , 146 Wn. 2d 370, P.3d 789 (2002)	20
<i>Selvig v. Caryl</i> , 97 Wn. App. 220, 983 P.2d 1141 (1999)	35
<i>Sjogren v. Props. Of Pacific NW, LLC</i> , 118 Wn. App. 144, 75 P.3d 592 (2003)	36

<i>Snohomish County v. Rugg</i> , 115 Wn. App. 218, 61 P.3d 1184 (2002)	44
<i>Vasquez v. Hawthorne</i> , 145 Wn. 2d 103, 33 P.3d 735 (2001)	2, 22
<i>Wilcox v. Lexington Eye Institute</i> , 130 Wn. App. 234, 122 P.2d 729 (2005)	36, 37
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982)	20

Court Rules

CR 15(a).....	3, 31
CR 56	3, 6, 8, 34, 37, 38, 41
CR 56(a)	44
CR 56(e)	44
CR 56(c)	19
CR 59	4
RAP 14.3 (a)	47

Statutes

RCW 11.96A <i>et seq.</i>	23
RCW 11.96A.150	47
RCW 11.96A.150 (1).....	47
RCW 11.96A.150 (2).....	47

Other Authority

14A Karl B. Tegland, <i>Washington Practice</i> § 25.6, at 96 (2003)	20
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I. INTRODUCTION

This matter returns to this Court a second time on the same issue – appeal of a trial court’s grant of a motion for summary judgment on the issues of undue influence and incapacity.

In 2005, Stuart Rippee executed a community property agreement and will that gave his entire estate to his second wife, Respondent Denise Rippee. Nothing was left for Stuart’s¹ daughter, Appellant Laura Burwash, who is afflicted with multiple sclerosis (“MS”) or Stuart’s two grandsons, Jeffery Burwash and Michael Ryan. The community property agreement and will were executed at a time when Stuart Rippee was taking significant pain medications for the prostate cancer he had been battling since 1999.

In 2007, Stuart’s will was filed with the Court. In February 2008, Laura filed a challenge of the will and community property agreement. In 2008, Denise filed a motion for summary judgment on whether undue influence and incapacity existed. The trial court granted Denise’s motion and Laura appealed. In 2009, the Court of Appeals ruled that the trial court had incorrectly granted Denise’s summary judgment. *In re Estate of Rippee*, 149 Wn. App. 1009, 2009 WL 502400 (Wn. App. Div. 1).

¹ A number of individuals share the same family names (Burwash, Rippee, and Running). First names will be used as a matter of convenience, no disrespect is intended by this informality.

In 2013, Denise again filed a motion for summary judgment on the same issues of undue influence and incapacity, which the trial court again granted. The trial court granted summary judgment in error and this appeal follows. In 2009, this Court ruled that it was error for the trial court to grant summary judgment and it was error for the trial court to do so again in 2013.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted Denise Rippee's motion for summary judgment on the issues of capacity and undue influence. CP 287-289. The moving party has the burden of showing that there is no issue of material fact. *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990). After taking all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party, the court can only grant summary judgment if, from all the evidence, reasonable persons could reach but one conclusion. *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 999 P.2d 42 (2000). 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. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 108, 33 P.3d 735 (2001).

2. The trial court erred when it granted Denise Rippee's motion to amend her pleading five years after her answer, after one appeal, and just prior to the trial court ruling on Denise's motion for summary judgment because doing so greatly prejudiced Laura. CR.15(a); *Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.* 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (prejudice to the nonmoving party is the "touchstone" of whether an amendment to a pleading should be allowed).

3. The trial court erred when it granted Denise Rippee's motion to shorten time to hear motion for summary judgment. CP 247-248. Motions for summary judgment must be noted no later than 28 days before the hearing. CR 56. Just 7 days before the untimely noticed hearing on Denise's motion for summary judgment, the Court granted a motion to shorten time to hear motion for summary judgment in 22 days from the time of notice instead of the 28 days required by Civil Rule 56. CP 243-244, 247-48. Appellant Laura Burwash was materially prejudiced by being forced to respond to an untimely noted motion for summary judgment on shortened time.

4. The trial court erred when it denied Laura Burwash's motion for reconsideration of the order granting motion for summary judgment. CP 303. Appellant Laura Burwash's motion for reconsideration should have been granted due to (1) irregularity in the

proceeding of the trial court; (2) new evidence submitted in response to reply material filed one day before the hearing; and (3) that substantial justice had not been done. CR 59.

III. STATEMENT OF THE CASE

A. Procedural History

1. In 2009, the Court of Appeals reversed the trial court's grant of summary judgment.

On August 9, 2007, Denise Rippee filed a last will and testament dated November 28, 2005, for Stuart Rippee in King County Superior Court. CP 1-3. No notice was provided to any parties and no probate was commenced. On February 20, 2008, Laura Burwash filed a petition to contest the will and contemporaneously executed community property agreement. CP 4-26.

On April 8, 2008, Denise filed "Reply to Petition to Set Aside the Community Property Agreement and Will, Request for an Accounting and Order to Issue a Citation and Attorney's Fees." CP 27-29. In the Reply, Denise admitted to the following paragraphs in Laura's petition: 2.1, 2.4, 2.11, and 2.40. CP 27. The reply was signed by attorney James J. Dore, Sr. CP 29. Paragraph 2.11 of Laura's petition stated:

From that point, Denise has been antagonistic to Laura. Denise objected to Mr. Rippee and Laura maintaining any relationship. Denise also objected to Mr. Rippee's relationship with his grandsons. Denise's objections

increased over the course of her marriage to Mr. Rippee.

CP 7.

On the same day, Denise filed a motion for summary judgment, which the trial court granted on May 9, 2008.

Following various motions, the trial court entered an order of dismissal and judgment in favor of Denise Rippee on June 24, 2008.

Laura Burwash filed a notice of appeal on June 27, 2008.

On March 2, 2009, this Court issued its ruling reversing the grant of summary judgment and issued a mandate to remand the matter to the trial court.

In its decision, this Court stated with regard to the issue of incapacity that there was a question of fact as to Stuart's capacity that precluded the grant of summary judgment:

[Laura] presented sufficient evidence to create a genuine issue of material fact as to [Stuart's] competency at the time he signed the will and CPA.

In re Estate of Rippee, 149 Wn. App. 1009, 2009 WL 502400, *5 (Wn.

App. Div. 1); CP 241.

Similarly, the Court of Appeals found a question of fact prevented the grant of summary judgment with respect to the issue of undue influence:

[T]here is evidence that Rippee may have lacked capacity or been under undue influence at the time he executed the

CPA and will due to his isolation, health, medication, and nature of his relationship with his wife. The trial court erred in granting summary judgment for Denise because the evidence submitted raises genuine issues of material fact.

Id. at *6 (underline added); CP 242.

2. The trial court grants a second motion for summary judgment.

Litigation proceeded in the trial court following remand. On July 9, 2012, the trial court issued an order certifying the matter for trial. CP 30. The trial court set a trial date of December 3, 2012. CP 34-35. The deadline for dispositive motions was November 19, 2012. CP 37. On November 13, 2013, the trial court entered an order continuing the trial a second time to February 11, 2013. CP 38. The deadline for dispositive motions was January 28, 2013. CP 46.

On December 20, 2012, the court reassigned the matter to a new judge effective January 14, 2013. CP 41.

i. *Numerous procedural irregularities occurred in the noting of the motion for summary judgment.*

On Thursday, January 17, 2013, Denise filed two motions: (1) Motion to Continue Trial Date, Amend Case Schedule, Amend Response to Petition and Exclude Expert Witness Testimony; and (2) Motion for Summary Judgment. CP 42-115; 118-147.

The motion for summary judgment was noticed to be heard on February 8, 2013, in violation of CR 56, which required that motions for

summary judgment be noticed at least 28 calendar days before the hearing. CP 118-119. Denise's motion for summary judgment was noticed only 22 days before the hearing. The Motion to Continue Trial Date was noticed for January 28, 2013, the same day that an opposition would be due to the improperly noticed motion for summary judgment. CP 42-43; 118-119. In the motion to continue trial date, Denise had requested a trial continuance so she could timely note the motion for summary judgment. CP 48.

On Tuesday, January 22, 2013², Laura filed a motion to shorten time to hear motion to strike the hearing on Denise's untimely motion for summary judgment. CP 148-152.

On Wednesday, January 23, 2013, six days after the motion for summary judgment was filed, Denise filed a motion to shorten time to hear motion for summary judgment. CP 162-169. The motion to shorten time requested that the trial court hear Denise's motion for summary judgment on February 8, 2013.

However, by Monday, January 28, 2013, the trial court had not issued any rulings on the respective motions to shorten time or Denise's Motion to Continue Trial Date. This was 11 days before the scheduled time for hearing on Denise's motion for summary judgment and the day

² Monday, January 21, 2013 was Inauguration Day, a national holiday.

Laura's response would be due pursuant to CR 56.

Given the absence of any rulings from the Court, in an abundance of caution, the day after a response would be due under CR 56, Laura's counsel hurriedly prepared a response and filed such response with the trial court on January 29, 2013.

On February 1, 2013, just seven days before the noticed hearing date on Denise's motion for summary judgment, the trial court issued a ruling on the Motion to Continue Trial Date noticed for January 28, 2013. CP 243-244. The order recited that good cause existed to continue the trial date from February 11, 2013, to March 11, 2013; although, the good cause was not identified in the order. CP 243. The amended case schedule presented by Denise's counsel set a new deadline of February 21, 2013 to hear dispositive motions. CP 246. Despite granting a continuance of the trial date, on the same day, February 1, 2013, the trial court also granted Denise's motion to shorten time to permit her motion for summary judgment to be heard on February 8, 2013. CP 247-248. No ruling was ever issued on Laura's motion to shorten time to hear her motion to strike the hearing on Denise's motion for summary judgment.

On February 8, 2013, the trial court heard and granted Denise's motion for summary judgment. CP 287-289. In its findings the trial court held:

The undisputed facts establish that Stuart Rippee had testamentary capacity, and when taking all inferences in the light most favorable to the petitioner, she has not as a matter of law met her burden of proving Stuart Rippee lacked testamentary capacity.

...

When taking all inferences in the light most favorable to the petitioner, she has not as a matter of law met her burden of proving Stuart Rippee's Will and Community Property Agreement were the product of "undue influence".

CP 288 (underline added).

- ii. *The trial court erroneously allowed Denise to amend her Reply to Laura's Petition.*

The order continuing trial date also allowed Denise to amend her "Reply to Petition" in response to Laura's petition. CP 27. Specifically, Denise requested leave to amend her Reply to deny allegation 2.11 of Laura's Petition. In Denise's 2008 Reply, she admitted to being "antagonistic to Laura" and objecting to Stuart maintaining any relationship with Laura or his grandsons. CP 7, 27. The trial court allowed her to amend her Reply to deny allegation 2.11. CP 115.

- iii. *The trial court erroneously denied Laura's motion for reconsideration.*

On February 21, 2013, Laura filed a motion for reconsideration citing procedural irregularities including the shortened time granted to hear the motion for summary judgment, error in requiring Laura to prove her claims by clear, cogent and convincing evidence to defeat summary

judgment, and improper grant of summary judgment given questions of material fact. CP 290-302.

On March 21, 2013, the trial court denied Laura's motion for reconsideration. CP 303. Notice of Appeal was timely filed on March 28, 2013.

B. Substantive History

1. Minimal facts were presented to the Court of Appeals in the 2008 appeal, but such facts were sufficient to create genuine issues of material fact.

(The following portion is recited from the Court of Appeals prior decision in this proceeding, *In re Estate of Rippee*, 149 Wn. App. 1009, 2009 WL 502400 *1 (App. Div. I); CP 236-237.

Stuart C. Rippee died on August 3, 2007. At the time of his death, he was married to Denise Rippee. [Stuart] and Denise were married for more than 20 years and had no children. [Stuart] was also survived by a daughter from a previous marriage, Laura Burwash, as well as two grandsons [Jeffrey Burwash and Michael Ryan]. Over the years, [Stuart] attempted to maintain a close relationship with his daughter, her husband, and his grandsons. However, it is not disputed that the relationship between Denise and [Laura] was contentious at best.

Eight years before his death, [Stuart] was diagnosed with prostate cancer. At times between the diagnosis and his death, [Stuart] used strong pain medications, including OxyContin and morphine "popsicles," to control his pain. As [Stuart's] cancer spread throughout his body, he became more dependent on the pain medication and his wife Denise. Over the years, Denise objected to [Stuart's] relationship with his daughter and his grandsons and restricted interactions between them, isolating her husband

from his daughter and grandsons. [Footnote 2 in the opinion states: “Denise admitted these facts in reply to [Laura’s] petition to set aside the community property agreement and will. See reply to petition, admitting paragraph 2.11 of the verified petition.”] When [Stuart’s] cancer progressed to the point that he was mostly housebound, Denise prohibited [Laura’s] visits with her father at the Rippee home. [Laura] resorted to calling her father or visiting him when he was hospitalized.

In late November 2005, [Stuart] signed a will devising his entire estate to his wife. The “Family” paragraph acknowledged the existence of his daughter, but misspelled her name. There was no mention of his grandsons. [Stuart] executed a community property agreement (CPA) on the same day.

Six days after [Stuart’s] death, the will was filed with the superior court. However, there was no petition for probate, no notice provided to any interested parties, and no personal representative appointed. Despite having an allegedly sizeable estate, [Stuart’s] will left nothing to [Laura] or to his grandsons.

The following are additional facts presented to the Court of Appeals in 2008 and again relevant to this appeal:

Laura Burwash is Stuart Rippee’s only child. CP 5. As Stuart’s only child, Laura and Stuart had a close relationship. He taught her how to ski, and took her on vacations and boat trips. *Id.* Laura’s parents divorced in 1985 when she was 12 years old, and Laura lived with her mother until the age of 17, but had frequent visitation with her father. CP 6. During her teen years, Laura was diagnosed with multiple sclerosis, a progressive and terminal illness. CP 7.

Stuart married Denise shortly after his divorce from Laura's mother. CP 6. Since Denise's marriage to Stuart, Denise and Laura have had a contentious relationship. CP 7.

In 1991, Laura had her first son, Michael. CP 7. Stuart was disappointed with his daughter's pregnancy because she was unmarried and still a teenager, but Stuart was very happy when his grandson was born. *Id.* In 1994, Laura's second son, Jeffrey was born. *Id.* At this time, Laura's MS had progressed and began to affect her daily life. *Id.* Laura's MS appeared to come from Stuart's side of the family as two of Stuart's cousins had MS; one of whom had passed. CP 9.

In 1999, Stuart was diagnosed with prostate cancer. CP 9. There is no dispute that despite his cancer, Stuart loved his grandchildren and spent time with them, taking them fishing and teaching them to ski as he had taught Laura to ski. *Id.*

2. Additional facts presented in 2013 establish more questions of fact such that undue influence and capacity cannot be decided on summary judgment.
 - i. *Stuart had prepared a complex will in 1999 that provided for all his beneficiaries – Denise, Laura and his grandsons.*

In the same year he was diagnosed with cancer, Stuart executed a complex will that provided for all his beneficiaries – his wife, Laura and his grandsons. CP 295; 400-406. Apart from specific gifts to Laura and

his grandsons, he created a trust with the bulk of his estate that would benefit Denise during her lifetime but leave the residuary to his daughter and/or grandsons as Denise would direct. CP 402. This unique provision in the trust would have served as an incentive after his death for more cordial relationships between his wife, daughter and grandsons. *Id.*

- ii. *In 2005, Stuart was medically frail and taking significant pain medications.*

On September 22, 2005, two months before Stuart executed the will and community property agreement, Stuart had an appointment at the Seattle Cancer Care Alliance. At this appointment, Stuart reported being “very depressed” for the past two weeks. CP 296, 337. He stated that he was going through multiple stress factors and remained ambivalent regarding what to do about these stressors. *Id.* He stated, “I feel overwhelmed by it all, and I am tired of fighting this cancer.” *Id.* Stuart had suicidal ideation to end his suffering and his cancer. *Id.* The mental status examination revealed his “mood and affect mostly included sadness, worry, and anxiety, with sudden tearfulness.” *Id.* He also showed “helplessness.” *Id.* Motor function showed psychomotor retardation. *Id.*

The records also indicated that he was going to his vacation home in Arizona with Denise for two months. CP 338.

Stuart's next visit to the Seattle Cancer Care Alliance occurred two months later on November 21, 2005. CP 332-336. The records indicate that he had been at his vacation home in Arizona for a couple months with Denise. CP 332. While in Arizona, Stuart went to see a pain management specialist and his OxyContin was increased in frequency from twice a day to three times a day.³ *Id.* Previously, on September 15, 2005, Stuart had reported that he felt that OxyContin made him feel "fuzzy." CP 345. The pain medication increase occurred two to three weeks before his November 21, 2005, appointment, or about three to four weeks before Stuart signed the will and community property agreement. CP 332. He had lost weight in Arizona from 79.5 kg on September 15, 2005, to 76.4 kg on November 21 – approximately 8 pounds. *Id.* At the appointment, he reported one of his primary concerns was pain management. CP 333. The record reports "he has been sleeping a lot, but he thinks it is due to his depression, and sometimes he sleeps about half the day." *Id.*

³ In addition to OxyContin, Stuart was taking OxyCodone. On August 1, 2005, Stuart reported to his doctor that he was taking "OxyCodone somewhat intermittently, and takes 2 to 4 tablets when he takes them." CP 316. Prescription records indicate that on July 18, 2005, July 27, 2005, and August 8, 2005, Stuart received scripts each for 200 tabs of OxyCodone. CP 423-424. From July 18, 2005, to August 8, 2005, Stuart received enough OxyCodone to take an average of 20 OxyCodone a day, which contradicts his self-reporting that he was taking OxyCodone "somewhat intermittently." Add to this that Stuart was also taking OxyContin. CP 316; CR 421-425.

- iii. *After two months seclusion with Denise and an increase in narcotic intake, Stuart signs a will that disinherits the natural objects of his bounty, his daughter with MS and his two grandsons.*

Just one week after his November 21, 2005, appointment Stuart signed the will and community property agreement that left his entire estate to his second wife Denise, disinheriting his daughter who was stricken with MS and his two grandsons. The will did not mention Stuart's grandsons, and left everything to Denise in a one sentence disposition:

I hereby give, bequeath and devise my entire estate to my wife, Denise E. Rippee.

CP 2.

- iv. *There are significant suspicious facts and circumstances in the procurement of the will and community property agreement.*

Sometime in September 2005, at about the same time that Stuart had complained to his doctor about depression, stress factors, worry and anxiety, as well as exhibiting signs of "helplessness" and psychomotor retardation, Stuart telephoned his attorney Don Running, not to ask for a will, but to tell Mr. Running that "he wanted to make sure that everything went to Denise." CP 416.

During the brief telephone conversation, Mr. Running asked Stuart whether he wanted to leave anything to Laura. Stuart said no, however,

Stuart did not explain why, and Mr. Running did not inquire any further. CP 413. Most surprising, however, was that Mr. Running and Stuart had no discussion of Stuart's grandsons, not even one mention of them. CP 417.

Based on Stuart's telephonic request to "make sure everything went to Denise," Mr. Running prepared a will and community property agreement that did leave everything to Denise, and like their conversation the will did not mention Stuart's grandsons at all. CP 413-419. The will and community property agreement were mailed to Stuart. CP 418. Mr. Running later received the signed originals in November 2005. *Id.* During this process, Mr. Running never met with Stuart. *Id.*

v. *Expert testimony confirms that pain medications can affect cognition.*

Dr. Jung Henson, an expert retained by Laura, executed a declaration that sets forth that pain medication can affect cognition. CP 305-309. "Cognition" is defined as a person's mental processes that include attention, memory, producing and understanding language, learning, reasoning, problem solving and decision making. CP 307. Ingesting alcohol with pain medication can also increase the effect of the pain medication and increase one's susceptible to undue influence, and in particular undue influence from someone the person trusts. *Id.*

- vi. *Stuart's friends are surprised of Laura and Stuart's grandson's disinheritance given Stuart's known love and affection for his daughter and grandsons.*

Close friends of Stuart who learned of the unusual disposition (excluding his daughter and grandsons but leaving everything to his second wife) believed that the disposition was contrary to what they knew about their friend.

John Fewel, a friend and former coworker of Stuart Rippee, who knew Stuart for 15 years before his death, executed a declaration that stated:

- “Stuart would often talk about his love and affection for his daughter Laura, and his grandsons, Jeffrey and Michael.”
- “Stuart and I talked about this matter and he agreed that he should provide for his grandchildren.”
- “Stuart told me that Denise did not like Laura.”
- “Upon observation and belief, Denise would prevent Stuart from spending time or talking with people that she did not approve of.”
- “Upon observation and belief, the reason that Stuart did not leave any provision for Laura, Jeffrey or Michael in his will was that Denise did not like them, and did not want him to leave anything for them.”

CP 160-161 (underline added).

Further, deposition excerpts of Dean Running⁴ evidence that Stuart was susceptible to undue influence and had a reduced mental capacity. Dean had known Stuart Rippee since the early 1960s until Stuart's death in 2007. Dean believed the disposition in Stuart's last will did not reflect what he knew about Stuart. On September 6, 2012, Dean testified at his deposition:

A. I never discussed this with, you know with Stu or – you know, that Will topic never came up, but I would expect that he would have included the grandkids and Laura, to some extent, in the Will. Just, just as I know him, you know.

Q. Uh-huh. Anything in particular that makes you say that?

A. Well, I think he's just kind of a generous, fair-minded person, and there's a lot of money involved.

CP 183.

Dean testified that Stuart was concerned about Laura's ability to take care of herself:

Q. Do you think he [Stuart] would have had a concern for his, you know, daughter to be taken care of after he was gone?

A. Right. I think that there was a problem with her not being financially sophisticated.

Id.

Dean stated that if Stuart signed his will within the last two years of his life, which he did, then during that time Stuart was not in a position

⁴ Not to be confused with Don Running. Dean and Stuart were classmates. Dean's younger brother Don later acted as Stuart's attorney.

to make good decisions:

- Q. Would it surprise you if the Will that he did that changed all this was done, you know, within a year or two of his passing?
- A. Is that true? He changed his Will within the last two years of his passing?
- Q. Yeah. I don't have the exact date off the top of my head, but it's something like that.
- A. Yeah, I would say that Stuart wasn't in the best position to make a good decision. He was overwhelmed with the disease. Yeah, I'm sad to hear that.

CP 184.

IV. ARGUMENT

A. **The Trial Court Improperly Granted Denise's Motion for Summary Judgment.**

1. The Court of Appeals Reviews the Summary Judgment De Novo.

The Court of Appeals reviews summary judgment orders de novo, performing the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). A court may grant summary judgment if the pleadings, affidavits, and depositions establish there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hisle*, 151 Wn.2d at 861.

The burden is on the moving party to prove that there is no genuine issue of material fact that could influence the outcome of a trial. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). But a genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Only if there is “a complete failure of proof concerning an essential element of the nonmoving party’s case” will the moving party be entitled to judgment as a matter of law. *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 808, 6 P.3d 30 (2000).

On review, the nonmoving party is entitled to have the court look at the evidence and all reasonable inferences from the evidence in a light most favorable to her and against the moving party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002). The materials opposing the motion may consist of new declarations, factual materials already on file, or some combination of the two. 14A Karl B. Tegland, *Washington Practice* § 25.6, at 96 (2003).

2. The trial court improperly required Laura to meet her burden of proof for trial to defeat the motion for summary judgment.

In Denise’s reply to the motion for summary judgment, she argued:

The standard of proof at trial – clear, cogent and convincing evidence of lack of testamentary capacity or undue influence – must be applied when this court rules on the summary judgment motion. *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 973, 948 P.2d 1264 (1997).

CP 254.

The above statement that the trial court must apply the standard of proof of clear, cogent and convincing evidence in a motion for summary judgment was misleading. In *Gossett*, the court applied the standard of review at trial because the motion for summary judgment was based on a “deed absolute in form.” *Id.* Further the Court held that as to the evidence presented “reasonable minds could reach but one conclusion.” *Id.*

Nevertheless, in granting the motion for summary judgment in this matter, the trial court’s order stated:

The undisputed facts establish that Stuart Rippee had testamentary capacity, and when taking all inferences in the light most favorable to the petitioner, she has not as a matter of law met her burden of proving Stuart Rippee lacked testamentary capacity.

When taking all inferences in the light most favorable to the petitioner, she has not as a matter of law met her burden of proving Stuart Rippee’s Will and Community Property Agreement were the product of “undue influence”.

CP 288 (underline added).

Although the proper standard of proof in a will contest at trial is clear, cogent, and convincing, “it is not the proper standard to be applied to determinations regarding summary judgment motions.” *Estate of*

Randmel, 38 Wn. App. 401, 405, 685 P.2d 638 (1984) (trial court holding that fraud or undue influence had be proved by clear, cogent and convincing evidence at summary judgment and reversed by the Court of Appeals). The same standard and words were echoed in this Court’s earlier opinion:

At trial, the evidence necessary to establish undue influence must be clear, cogent and convincing. But that is not the burden to survive a motion for summary judgment.

In re Estate of Rippee, 149 Wn. App. 1009, 2009 WL 502400 *6 (Wn. App. Div. 1); CP 241.

3. Equitable issues present hosts of questions of fact and are not susceptible to summary judgment.

“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... the trial court must weigh the evidence to determine whether [the claimant] has established his claim for equitable relief.” *Vasquez v. Hawthorne*, 145 Wn.2d 103, 108, 33 P.3d 735 (2001) (emphasis added); see also *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.” (emphasis added)).

TEDRA proceedings, RCW 11.96A *et seq.* Trust and Estate Dispute Resolution Act, are by nature equitable proceedings. The trial court erred by failing to find that genuine questions of material fact existed.

4. The trial court erred by not finding that questions of fact existed as to Stuart's capacity

As this Court previously stated in its earlier decision:

The question whether [Stuart] had capacity to make a will or a CPA is an issue of fact, not law. *In re Estate of Kessler*, 95 Wash. App. 358, 373 n. 28, 977 P.2d 591 (1999).

In re Estate of Rippee, 149 Wn. App. 1009, 2009 WL 502400, *5 (Wn. App. Div. 1)

The factual analysis applied by this Court in reversing the trial court's 2008 grant of summary judgment is also applicable in this instance:

Denise claimed in her motion for summary judgment that [Laura] provided no support in fact or law for her position that her father did not have capacity to make a will or CPA.

But in her verified petition and in her pleading opposing the motion for summary judgment, [Laura] asserted there was a question of material fact whether [Stuart] had the capacity to execute the will at the time because of the specific circumstances of his health, his isolation, and because his will did not address the scope and nature of his property, misspelled the name of his only child, and omitted mentioning his grandsons, the natural objects of his bounty. [Laura] argued: "The possession of testamentary capacity involves an understanding by the testator of the transaction

in which he is engaged, a comprehension of the nature and extent of the property which is comprised in his estate, and a recollection of the natural objects of his bounty.” *Dean v. Jordan*, 194 Wash. 661, 668, 79 P.2d 331 (1938).

Whether the will is natural or unnatural is a question to be determined in each case as warranted by the facts, especially given the potential beneficiaries who are excluded. In determining the question of what is just or unjust, natural or unnatural, the history of the testator's family is to be considered, as well as the moral equities and obligations that appear as a result. A will may be unnatural when it is contrary to what the testator, 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). [Stuart], [Laura], and his grandsons had an affectionate and loving relationship, and yet through the operation of the CPA or the will, [Stuart] disinherited the natural objects of his bounty.

As stated above, on summary judgment, inferences are construed in the light most favorable to the nonmoving party. [Laura] presented sufficient evidence to create a genuine issue of material fact as to [Stuart's] competency at the time he signed the will and CPA.

Id.

If on summary judgment all reasonable inferences are to be taken in favor of the nonmoving party, can the Court say that a reasonable person could come to only one conclusion that Stuart was competent and not subject to undue influence when he had a significant estate; and a prior estate plan that provided for all his beneficiaries; but he subsequently disinherited his daughter and grandsons in favor of his second wife Denise; when his daughter was afflicted with MS; he undisputedly loved

his grandsons; and the will in question was executed at a time when he had been battling cancer for six years, taking significant amounts of narcotics , and contemporaneous to his telephone call to Mr. Running “to make sure everything went to Denise” he was complaining of depression and exhibited reduced cognition and signs of “helplessness”.

Additionally, the following chart describes the alleged facts and how they raise issues of material fact for trial (the chart is not intended to be inclusive of all issues):

<u>Issue</u>	<u>Question of Fact</u>
1) The confidential nature of Denise and Stuart’s relationship	Stuart’s intent – a <i>Dean v. Jordan</i> factor examines the ability to unduly influence based on the nature of the relationship
2) Denise was present with Stuart when he signed his will and drove him to the notary’s office	Stuart’s intent – a <i>Dean</i> factor examining opportunity and ability to be unduly influenced
3) The unnatural disposition by Stuart to exclude his lineal descendents but leave his entire estate to his second wife	Stuart’s intent – another <i>Dean</i> factor going to the naturalness of his disposition
4) The undisputed fact that Stuart loved his grandsons and left gifts for them in his prior 1999 will	Stuart’s intent – if it is undisputed that Stuart loved his grandsons the reasonable inference is that he would provide for them in his will, he did not.
5) Denise’s admission in her original answer that she disapproved of Stuart’s relationship with his daughter and grandsons, and Denise’s	Credibility – after 5 years and on the eve of trial Denise amends an earlier admission. Denise’s intent – if Denise disapproved Stuart’s relationship with his daughter and grandsons, did Denise unduly influence Stuart to disinherit his lineal descendents, in

later amendment to reverse her admission.	<p>particular his grandsons whom he undisputedly loved.</p> <p>Stuart's isolation – if Denise disapproved of Stuart's relationship with his lineal descendents did Denise actively isolate Stuart from them as alleged in Laura's verified petition, as admitted to by Denise in her original answer</p>
6) By 2005 Stuart had been fighting prostate cancer, for six years, he was taking strong narcotics and suffering from severe chronic pain	<p>Stuart's ability to withstand undue influence – compared to when he was in perfect health, Stuart's cancer affected his vitality and vigor. He was suffering from intense pain and taking pain medications that could affect his cognition. Taking all reasonable inferences in light most favorable to Laura, Stuart's health and the pain medications did reduce his capacity to resist undue influence.</p>
7) Stuart's medical records show that he was suffering from depression and suicidal ideations, and feelings of helplessness	<p>Again, going to Stuart's ability to withstand undue influence</p>
8) Denise was Stuart's sole care taker and means of support.	<p>Stuart's susceptibility to undue influence by Denise because he relied upon her – a <i>Dean</i> consideration</p>
9) Stuart's 1999 estate plan affectively provided for all his heirs.	<p>Stuart's intent – why did Stuart deviate from an estate plan that provided for all his heirs, to one that, most conspicuously, disinherited his grandsons whom he loved?</p>
10) Stuart's two month isolation with Denise in Arizona and the contemporaneous increase in pain medication just before his execution of the 2005 will	<p>Stuart's intent and the opportunity to exert undue influence – a <i>Dean</i> consideration</p>

11) Stuart's friends believe the 2005 will conflicts with Stuart's known views, feelings and intentions	Naturalness of will – a question to be determined in each case as warranted by the facts
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5. The trial court erred by not finding questions of fact existed as to the undue influence of Stuart

Similarly with respect to undue influence, the language of this

Court's earlier decision is instructive and adopted by Laura:

[Laura] also raised an issue of whether [Stuart] had been unduly influenced in the creation of the will and CPA. Even if it is established that [Stuart] possessed testamentary capacity or the capacity to execute a CPA, these documents could be set aside if it is shown that a beneficiary exercised undue influence over the maker. *In re Estate of Lint*, 135 Wash.2d 518, 535, 957 P.2d 755 (1998) (citing *Dean*, 194 Wash. at 671-72, 79 P.2d 331). To invalidate a will, the undue influence must be something more than mere influence, and the influence must be shown which, “ ‘at the time of the testamentary act, controlled the volition of the testator, interfered with his free will, and prevented an exercise of his judgment and choice.’ ” *Kessler*, 95 Wash. App. at 377, 977 P.2d 591 (quoting *Bottger*, 14 Wash.2d at 700, 129 P.2d 518).

In reply to [Laura's] petition to set aside the CPA and will, Denise admitted that she had been antagonistic to [Laura], objected to her husband's maintaining a relationship with his daughter and grandsons, and that her objections increased over the course of her marriage to [Stuart]. At trial, the evidence necessary to establish undue influence must be clear, cogent, and convincing. *Lint*, 135 Wash.2d at 535, 957 P.2d 755 (citing *In re Estate of Mitchell*, 41 Wash.2d 326, 249 P.2d 385 (1952)). But that is not the burden to survive a motion for summary judgment. The *Lint* court noted that despite the “rather daunting burden” placed on will contestants and those claiming undue influence in the execution of documents, a presumption of

undue influence may be raised by showing suspicious facts and circumstances. The *Kessler* and *Lint* courts quote the *Dean* court:

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 [Denise was Stuart's wife and caretaker]; (2) that the beneficiary actively participated in the preparation or procurement of the will [Denise took Stuart to have his will and CPA signed]; and (3) that the beneficiary received an unusually or unnaturally large part of the estate [Denise received all of Stuart's estate]. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator [Stuart had cancer for 6 years], the nature or degree of relationship between the testator and the beneficiary [Denise was Stuart's second wife, and the omitted beneficiaries were Stuart's child and grandsons], the opportunity for exerting an undue influence [Mr. Fewel testified to isolation and Denise admitted to restricting visitation with Laura, also Stuart and Denise in Arizona alone for two months prior to signing of will], and the naturalness or unnaturalness of the will.... [Omitting natural objects of bounty, Stuart's only child and two grandsons were completely excluded]

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, 194 Wash. at 671-72, 79 P.2d 331.

Considering the factors listed in *Dean* with the facts and circumstances here, the evidence presented by [Laura] raises, at the very least, a rebuttable presumption of undue influence and presents a material question of fact sufficient to defeat summary judgment.

In re Estate of Rippee, 149 Wn. App. 1009, 2009 WL 502400, *5-6 (Wn. App. Div. 1).

The facts haven't changed during the course of the litigation from when the Court of Appeals made its decision. In March 2009, there was sufficient evidence without the testimony of Dean Running and declaration of John Fewel to defeat summary judgment. The same is true now, even more so when considered along with the additional evidence.

B. The Trial Court Abused Its Discretion In Granting Denise's Motion to Amend Her Reply to the Petition.

1. Summary of procedural history

On February 20, 2008, Laura filed a verified petition to contest the validity of Stuart's will and community property agreement.

On April 3, 2008, Denise filed a "Reply to Petition to Set Aside the Community Property Agreement and Will." In her Reply to the TEDRA Petition, Denise stated, "The respondent admits 2.1, 2.4, 2.11, and 2.40 and denies each and every allegation contained in the Petition." CP 27.

Admitted paragraph 2.11 reads as follows:

From that point, Denise has been antagonistic to Laura. Denise objected to Mr. Rippee and Laura maintaining any relationship. Denise also objected to Mr. Rippee's

relationship with his grandsons. Denise's objections increased over the course of her marriage to Mr. Rippee.

CP 7.

On March 2, 2009, this Court issued a decision in which the Court found:

Over the years, Denise objected to Rippee's relationship with his daughter and his grandsons and restricted interactions between them, isolating her husband from his daughter and grandsons.

CP 236.

In support of that finding, in a foot note to the finding above, this Court wrote:

Denise admitted these facts in reply to [Laura's] petition to set aside the community property agreement and will. See reply to petition, admitting paragraph 2.11 of the verified petition. Clerk's Papers (CP) at 153.

CP 237.

Nearly 5 years from the date of Denise's reply and almost 4 years since this Court's decision, on January 17, 2013, Denise filed a Motion to Amend Case Schedule that included a request that Denise be allowed to amend her Reply to change her admission of paragraph 2.11 of Laura's petition to a denial.

Laura objected to Denise's request that she be permitted to amend her Reply. On February 1, 2013, the trial court granted Denise's motion to amend her Reply.

2. The Court of Appeals reviews the trial court's decision for an abuse of discretion.

The standard of review for a request to amend a pleading is a manifest abuse of discretion. *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 837 P.2d 1000 (1992).

3. The trial court's grant of Denise's motion to amend her reply was prejudicial to Laura.

A motion to amend pleadings is governed by CR 15(a) which states: "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." In *Caruso v. Local Union 690 of Int'l Bhd. of Teamsters*, 100 Wash.2d 343, 670 P.2d 240 (1983), we discussed the objective of CR 15:

The purpose of pleadings is to "facilitate a proper decision on the merits", *Conley v. Gibson*, 355 U.S. 41, 48, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957), and not to erect formal and burdensome impediments to the litigation process. Rule 15 of the Federal Rules of Civil Procedure, from which CR 15 was taken, "was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *United States v. Hougham*, 364 U.S. 310, 316, 5 L.Ed.2d 8, 81 S.Ct. 13 (1960). CR 15 was designed to facilitate the same ends.

Caruso, at 349, 670 P.2d 240. As stated by this court, "[t]he touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party." (Citations omitted.) *Caruso*, at 350, 670 P.2d 240.

Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc. 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (emphasis added).

Over the course of the five (5) years since Denise initially filed her Reply, Laura's counsel has repeatedly pointed to, and relied upon, Denise's admission. First, in response to Denise's initial Motion for Summary Judgment filed April 7, 2008, Laura cited to and relied upon Denise's admission that Denise had objected to Stuart maintaining a relationship with Laura or his grandsons. Denise failed to object or even note any disagreement with this statement in her reply on summary judgment in 2008.

This Court also relied, in part, on Denise's admission that she actively attempted to isolate Stuart from his daughter and grandsons. The admission by Denise is significant to this case because it is an indicator of undue influence under *Dean v. Jordan*, 194 Wash. 661, 672-673, 79 P.2d 331. Further, Supreme Court authority identifies isolation of the testator as an important factor in determining the presence of undue influence in the procurement of a testamentary gift. *Matter of Estate of Lint*, 135 Wn.2d 518, 538, 957 P.2d 755 (1998).

The decision of the Court of Appeals to remand this case was made on March 2, 2009. If Denise had any concerns about the admission contained in her Reply, she had ample opportunity to address those concerns at that time. Any argument that she was somehow unaware of what she had admitted in her own pleadings, or any attempt to blame this

on her prior attorney is without merit, as any knowledge possessed by her attorney was imputed to her, and through her to her present attorney. *Hill v. Department of Labor and Industries*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978).

Denise made the motion to amend her Reply on the same day she filed her motion for summary judgment. This was just 27 days before the trial date at the time and after the close of discovery. In Denise's motion for summary judgment, Denise set forth that she and Stuart's grandchildren had a close and caring relationship. CP 125-126. Denise alleged that Laura chose to isolate herself from her father. CP 126-128. And Denise also alleged that she never discouraged or interfered with Stuart's relationship with Laura or his grandsons. CP 129. These allegations were directly in contradiction to her admission in 2008.

The amendment, the flip-flop, of Denise's admission significantly prejudiced Laura. First, discovery had been completed and there was no means to investigate the amendment to Denise's reply. Second, the amendment was sought nearly 5 years after Denise's Reply was filed and just 27 days before trial. Third, the amendment would allow Denise to change a substantial and significant admission, which would have otherwise prevented her from filing her 2013 motion for summary judgment.

The trial court's grant of Denise's motion to amend her Reply resulted in prejudice to Laura and, accordingly this Court should reverse the trial court's decision.

4. If the trial court did not abuse its discretion, the amendment just prior to hearing a motion for summary judgment should have presented a question of credibility that would prevent the grant of summary judgment.

CR 56 states in pertinent part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(Underline added.)

In 2009, when this Court reversed the trial court's grant of summary judgment, this Court cited to Denise's admission as one of the facts and circumstances that "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." CP 241. When considering the totality of the facts and circumstances in this case in 2009, this Court found that the evidence presented "raises, at the very least, a rebuttable presumption of undue influence and presents a material question of fact sufficient to defeat summary judgment." CP 242.

In determining whether to grant summary judgment considering Denise's 11th hour amendment, the trial court should have looked by analogy at cases involving the submission of affidavits to create an issue of fact when such affidavit contradicted prior deposition testimony. Where as questions of fact cannot be created by a declarant who submits an affidavit that contradicts her deposition testimony, a party should not be able to amend her pleading to eliminate a question of fact on summary judgment. *See Selvig v. Caryl*, 97 Wn. App. 220, 225, 983 P.2d 1141 (1999).

At the minimum, the amendment created an issue of credibility, which the trial court could not resolve on summary judgment.

When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied.

Balise v. Underwood, 62 Wn.2d 195, 200, 381 P.2d 966 (1963) (emphasis added).

Denise made a motion to amend her Reply to eliminate her admission that she had interfered with and objected to Stuart's relationship with Laura and his grandsons. On summary judgment, at minimum, this amendment, if allowed, should have raised an issue of fact as to Denise's

credibility and her participation in procuring the 2005 will and community property agreement. Especially considering that the admission went unchallenged for 5 years, despite the admission being material to proceedings before the trial court and this Court.

The trial court's grant of summary judgment should be reversed.

C. The Trial Court Abused Its Discretion In Denying Laura's Motion for Reconsideration.

1. Summary of procedural history.

Denise noticed an untimely motion for summary judgment. Laura promptly filed a motion to shorten time to hear a motion to strike the hearing on the motion for summary judgment. The next day, Denise filed and served a motion to shorten time to hear motion for summary judgment. Eight days later and just seven days before the hearing on Denise's motion for summary judgment, the trial court issued orders granting (1) motion to shorten time to hear motion for summary judgment; and (2) a trial continuance. No order was ever issued on Laura's motion to shorten time to hear a motion to strike the summary judgment hearing.

2. The Court of Appeals reviews the trial court's decision for an abuse of discretion.

The trial court's order on a motion for reconsideration is reviewed for abuse of discretion. *Sjogren v. Props. Of Pacific NW, LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003); *Wilcox v. Lexington Eye Institute*, 130

Wn. App. 234, 241, 122 P.2d 729 (2005) (trial court abuses its discretion “when its decision is based on untenable grounds or reasons”).

Laura filed a motion for reconsideration of the trial court’s order granting summary judgment, the substantive aspect of the appeal of the trial court’s order is addressed above. This section deals with the procedural irregularities that should have prevented an untimely summary judgment hearing from occurring. The order granting Denise’s motion to shorten time, just seven days before the hearing, when the court had at the same time ordered a trial continuance was a decision not based on tenable grounds or reason. The trial court could have granted a motion for trial continuance to provide sufficient time to notice Denise’s motion for summary judgment. Otherwise, the trial court’s grant of a trial continuance served no purpose.

3. The granting of Denise’s motion to shorten time to hear motion for summary judgment was not based on tenable grounds or reason.
 - i. *Laura was prejudiced by the procedural irregularities.*

CR 56 requires that motions for summary judgment be filed no later than 28 days before the hearing. Pursuant to CR 56, Laura would normally have 17 days to respond. Based on the hearing date set by Denise and the Court’s grant of Denise’s motion to shorten time, Laura had only 11 days to respond. To complicate matters further, the trial court

issued the order shortening time only seven days before the hearing; four days after a response would be due. CP 247-248.

On January 17, 2013, Denise served a motion for summary judgment, noted to be heard 22 days later, on February 8, 2013. At the same time Denise filed a motion to continue trial date so that she could timely file her motion for summary judgment. The motion to continue trial was noted for January 28, 2013. On January 22, 2013, Laura filed a motion to shorten time to hear a motion to strike the summary judgment hearing because it was untimely. On January 23, 2013, Denise filed a motion to shorten time to hear her motion for summary judgment.

Per CR 56, based on a hearing date of February 8, 2013, Laura's response was due on January 28, 2013. Because Laura had filed a motion to shorten time to hear a motion to strike the summary judgment hearing, her counsel had delayed preparing a response assuming that no response would be required to an untimely filed motion for summary judgment. However, by January 28, 2013, the Court had not issued any orders on any of the motions noted to be heard prior to January 28, 2013. On January 29, 2013, counsel for Laura hastily prepared a response to the motion for summary judgment and filed it with the Court. The uncertainty occasioned by Denise's untimely noticed summary judgment motion and

the lack of orders from the trial court on the parties' respective motions to shorten time materially prejudiced Laura's ability to respond.

On February 1, 2013, three days after the motion for trial continuance was noted to be heard, the Court issued an order continuing the trial to March 11, 2013. On February 1, 2013, the Court also granted Denise's motion to shorten time to hear her motion for summary judgment on February 8, 2013. No ruling was ever received on Laura's motion to shorten time to hear her motion to strike the hearing.

Given the basis for Denise's motion to continue the trial was so that she could timely file her motion for summary judgment, it made no sense to continue the trial date and then not provide sufficient time for Denise to timely notice a hearing on her motion for summary judgment, especially when Laura would be prejudiced by having to respond to a dispositive motion on shortened time. The procedural irregularities and the motion for summary judgment on shortened time prejudiced Laura's ability to respond to Denise's motion for summary judgment.

- ii. *Delay in bringing the motion for summary judgment, which necessitated noting the motion for summary judgment in an untimely manner, was entirely due to Denise's own delay.*

The trial court should not have granted Denise's motion to shorten time because the untimely filing of Denise's motion for summary judgment was due to Denise's delay.

The trial court found that there was good cause to grant Denise's motion to shorten time but did not set forth what that good cause was. Denise complained to the trial court that due to the judicial transfer of the matter dated December 20, 2012, and effective January 14, 2013, she could not timely meet the dispositive motion deadline of January 28, 2013. However, Denise had ample opportunity to file a motion for summary judgment given the witness declarations and depositions on which she relied.

Denise relied upon the following evidence in support of her motion for summary judgment:

- Portions of transcript of Laura Burwash, April 11, 2011
- Portions of transcript of Denise Rippee, August 31, 2011
- Portions of transcript of Don Running, April 29, 2010
- Declaration of Aubryum Ludberg, October 23, 2012
- Declaration of Sarah Burger, October 24, 2012

Respondent had all deposition transcripts in her possession no later than August 2011. The declaration of Aubryum Ludberg and Sarah Burger were obtained no later than October 24, 2012, in more than ample time to note a motion for summary judgment before the judicial transfer of the matter on January 14, 2013. At the time Denise obtained declarations from Ms. Ludberg and Ms. Burger, the dispositive motion deadline was

November 19, 2012, but no request was made to extend the dispositive motion deadline or continue the trial.

In any event, the identities of Ms. Ludberg and Ms. Burger had been known to Denise since 2005. (CP 116-117.) Ms. Ludberg and Ms. Burger were witnesses and notaries to the will and community property agreement in dispute. Ms. Rippee was present at the signing and these individuals were familiar to her from prior dealings. There was no justified reason why declarations could not be obtained from these individuals anytime between 2009 and 2012.

Denise was put into the position of noting a motion for summary judgment on shortened time due to the lack of her own diligence; yet, it was Laura who is penalized. The matter was remanded in 2009, but Denise waited until the month before the trial in 2013 to bring her motion for summary judgment. There was no good cause such that the trial court should have ordered the hearing of Denise's motion for summary judgment on shortened time.

4. Laura provided evidence in her motion for reconsideration that she did not have the opportunity to present initially.
 - i. *Denise introduced evidence in reply that Laura did not have an opportunity to address prior to the hearing*

CR 56 provides that "The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing."

Dr. Jung Henson's deposition was taken on February 5, 2013, three days before the summary judgment hearing. Just one day before the hearing, on February 7, 2013, Denise submitted a declaration of her counsel reciting Dr. Jung Henson's opinions on Stuart's capacity and undue influence based on medical records Dr. Jung Henson had reviewed. CP 284-286. The declaration was submitted after Denise's reply date and the day before the hearing so that Laura did not have an opportunity to respond to the declaration of counsel.

In her motion for reconsideration, Laura submitted the declaration of Dr. Jung Henson that confirmed that Stuart's capacity and undue influence could be affected by the pain medication he took, and that there was evidence in the medical records about decreases in Stuart's cognition. CP 305-309.

Since the declaration of Denise's counsel regarding Dr. Jung Henson's deposition was received only a day before the summary judgment hearing, the trial court should have properly considered Dr. Jung Henson's declaration submitted with Laura's motion for reconsideration. If the trial court would have done so, the declaration would have raised additional questions of material fact.

Dr. Jung Henson stated in her declaration that:

Assuming that the base line for a person's health is when that person has no illness, it is my opinion that Stuart Rippee's health would have been diminished in 2005 from his baseline due to prostate cancer.

CP 306.

Dr. Jung Henson also cited to a number of medical records that indicated that Stuart's cognition – defined as a person's mental processes that include attention, memory, producing and understanding language, learning, reasoning, problem solving and decision making – was affected by narcotics Stuart was ingesting. CP 307.

A medical entry on September 5, 2005, reported that OxyContin made Stuart feel "fuzzy", which Dr. Jung Henson understood to mean a decrease in cognitive abilities. CP 307. Another entry on September 22, 2005, indicated Stuart had psychomotor retardation, which involves a slowing-down of thought and a reduction of physical movements in an individual. *Id.* And just one week before he executed his will, Stuart reported sleeping a fair amount during the day related to the ingestion of OxyContin. CP 308. Dr. Jung Henson opined that "sleepiness caused by the ingestion of pain medication can be an indication of reduced cognition." *Id.*

Dr. Jung Henson's declaration was relevant to Stuart's susceptibility to undue influence and his mental capacity. Considering

Stuart's health, the increase in his pain medication, and the trip to Arizona he took with Denise for two months before he executed the 2005 will, taking all inferences in Laura's favor, there are questions of material fact as to Stuart's capacity and susceptibility to undue influence.

- ii *The trial court should not have considered the Declaration of Terri Luken regarding the deposition testimony of Dr. Jung Henson.*

A moving party may seek summary judgment with or without affidavits. CR 56(a). However, if there are factual issues then the moving party must present affidavits "made on personal knowledge" setting forth such fact "as would be admissible in evidence." CR 56(e); *Blomster v. Nordstrom, Inc.* 103 Wn. App. 252, 259-260, 11 P.3d 883 (2000). Affidavits setting forth ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact. *Snohomish County v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002).

Denise did not submit the deposition testimony of Dr. Jung Henson, but submitted her counsel's declaration regarding Dr. Jung Henson's deposition. First, the declaration would be inadmissible as hearsay with respect to what Dr. Jung Henson stated. Further, many of the alleged opinions set forth speak to ultimate questions of fact such as "Dr. Jung Henson further testified in her opinion, on November 28, 2005,

Stuart Rippee had the mental capacity to understand what it meant to execute a Will; what his estate consisted of; and who were the natural objects of his bounty.” CP 285.

The trial court should not have considered the declaration of Denise’s counsel in ruling on the motion for summary judgment.

iii. *Medical testimony is not dispositive on the issue of capacity and undue influence*

Issues of incapacity and undue influence are mixed questions of law and fact, not medical determinations that should be considered dispositive on summary judgment. *Endicott v. Saul*, 142 Wn. App. 899, 911, 176 P.3d 560 (2008) (“Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity. In making this determination, the trial court considers evidence from all sources, not just experts.”) *citing to In re Guardianship of Stamm*, 121 Wn. App. 830, 91 P.3d 126 (2004) (finding that medical testimony was not the only testimony on incapacity, but that “other witnesses testified about risks to Stamm’s health and safety and about his relationship with defendant and its negative impact on his health and safety.”); *see In re Melter*, 167 Wn. App. 285, 301, 273 P.3d 991 (2012) (clarifying that testamentary capacity and undue influence are mixed questions of law and

fact and require compound inquiry). Medical testimony is just one piece of a complex factual pattern that must be presented in toto at trial.

As Dr. Jung Henson stated in her declaration:

The information upon which I based my medical opinions at the February 5, 2013, deposition, was limited solely to the information contained in the medical records provided to me for said deposition, and I do not have any information regarding Mr. Rippee's cognitive abilities, state of mind, or susceptibility to undue [influence] at specific times and dates, including those times and dates between checkups, not included in said records.

CP 309.

The facts and circumstance of this case should have prevented the trial court's grant of summary judgment. Stuart loved his daughter and grandsons. CP 160. Stuart had prepared a complex will when he was first diagnosed with cancer in 1999 that provided for all his beneficiaries – Denise, Laura, Jeffrey and Michael. CP 400-406. Stuart had been battling prostate cancer for six years prior to signing his 2005 will. Denise did not like Laura. CP 161. Stuart was taking significant amounts of medication, one of which made him feel “fuzzy.” Just before signing his will, Stuart's pain medication was increased and he had spent two months isolated with Denise in Arizona. Stuart's good friend Dean Running opined that during the last two years of Stuart's life, when Stuart signed his 2005 will, “Stuart wasn't in the best position to make a good decision.” CP 184.

Considering all these facts and circumstances, and all reasonable inferences in the light most favorable to Laura as the non-moving party, there were questions of fact as to Stuart's capacity and susceptibility to undue influence that warranted Denise's motion for summary judgment be denied.

D. Attorneys' Fees and Costs Should Be Awarded on Appeal

RAP 14.3 (a) allows the Court to award statutory attorneys' fees and certain reasonable expenses actually incurred by the parties.

RCW 11.96A.150 allows for the discretionary award of costs, including attorneys' fees, from any party to any party. The Court has the discretion to award attorney's fees from any party to any party in "all proceedings governed by this title, including but not limited to proceedings involving trusts, Decedent's estates and properties, and guardianship matters." RCW 11.96A.150(2). The primary consideration in whether the Court should award fees is equity. RCW 11.96A.150(1).

The Legislature has amended RCW 11.96A.150(1) effective July 22, 2007. The amendment adds the following substantive language: "In 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." (Underline added.) The amendment appears to specifically

overrule prior case law holding that a specific finding or benefit to the trust or estate must be found before an attorney's fees award may be made.

Regardless of whether Laura prevails on appeal, equity would demand that Laura be awarded her attorneys' fees. Considering that Laura who has MS and Stuart's two grandsons were disinherited, Laura's challenge was made in good faith and the action directed to resolving the interests of all who would benefit from Stuart's estate. *See In re Estate of Black*, 153 Wn.2d 152, 173-174, 102 P.3d 796 (2004) (award of fees to all parties from the estate because will dispute involved all the beneficiaries, affects the rights of all beneficiaries, and an award against the estate would not harm any uninvolved beneficiaries).

VI. CONCLUSION

No one disputes that Stuart loved his grandchildren. In 1999, when Stuart was first diagnosed with prostate cancer he met with his attorney and prepared a complex will that provided for all his beneficiaries.

After six years of dealing with his cancer, Stuart complained about depression, stress factors, worry and anxiety as well as exhibiting signs of "helplessness" as set forth in medical records and psychomotor retardation.

During this time, in September 2005, Stuart called his attorney and told him that he wanted to leave everything to Denise. Stuart did not ask for a will. Although, Stuart's attorney inquired about whether Stuart wanted to leave anything to Laura, Stuart and his attorney did not discuss whether he wanted to leave anything to his grandchildren. Stuart's attorney mailed Stuart a simple community property agreement and will. Stuart and his attorney never physically met.

After that conversation, Stuart and Denise took a trip to Arizona for two months where Stuart experienced weight loss and was prescribed an increase in his pain medication OxyContin. Stuart had previously expressed to his physician that his pain medications made him feel "fuzzy." Following his return from Arizona, on November 21, 2005, Stuart continued to report to his physician that he was depressed and that his primary concern was pain management.

One week later, on November 28, 2005, Stuart executed the community property agreement and will that disinherited the natural objects of his bounty – his daughter and two grandsons.

Significant questions of fact exist as to whether Stuart had capacity and/or was subject to undue influence given the known contentious relationship between his second wife, Denise, and his only daughter. Stuart's friends were surprised to learn that his daughter and

grandsons had been completely disinherited. The trial court erred in granting summary judgment. It is respectfully requested that the Court reverse the trial court's grant of summary judgment and remand the matter to be set for trial.

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CERTIFICATE OF SERVICE

I, MICHELLE N. WIMMER, 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 4th 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 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: June 27, 2013



MICHELLE N. WIMMER