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I. INTRODUCTION

Stuart Rippee died on August 3, 2007, after an eight-year battle with prostate cancer. Due to the fact that -- by her own choice -- his daughter Laura Burwash maintained no relationship with him and had essentially demonstrated contempt for the financial assistance he had given her over the years, Stuart left nothing in his Will to her and her two minor sons. Instead, in his 2005 Will and Community Property Agreement, he left his estate to his wife of twenty years, Denise Rippee, who had been by his side throughout his illness. The 2005 estate planning documents were drafted by an attorney Stuart had known for decades, and who had drafted consistent estate planning documents for Stuart over a period of twenty years.

Stuart had executed a Will in 1988 that had also left his entire estate to his wife and nothing to his daughter, over a decade before he was diagnosed with cancer. In 1999, after Stuart and Denise bought a house for Laura and her family to occupy to help prevent Laura from losing custody of her children in a dependency action, Stuart executed a Will giving his executor (Denise) the authority to expend up to \$100,000 to obtain title for Laura in the house in which she was residing, as well as \$10,000 each to Laura's minor sons in trust. After two years went by and

Laura and her husband never paid rent to Stuart and Denise, the Rippees told them to move out. Laura and her husband “trashed” the house when they moved out and did not speak with Stuart or Denise for a period of approximately two years. It was this deterioration of the relationship with his daughter that led Stuart to amend his Will in 2005 so that it would revert to the 1988 estate plan.

Six months after Stuart died, Laura filed a petition contesting the Will and CPA. Denise’s former counsel filed a motion for summary judgment almost immediately after Laura filed her petition, and before any discovery had been completed. The trial court erroneously granted the motion based on the woefully inadequate record before it. Laura appealed the summary judgment and this court reversed the trial court and remanded for discovery.

After the mandate was issued, Denise obtained new counsel and more than three years of discovery took place. The discovery included eight years’ worth of Stuart’s medical records; twenty years’ worth of his estate planning history; the deposition of Don Running, the attorney who drafted the contested Will and CPA, that Stuart clearly had testamentary capacity in 2005 and that Denise played no role in the procurement of the estate plan; the declarations of the witnesses to the execution of the Will and CPA that Stuart appeared to have capacity when he signed the

documents; the deposition of Denise that she played no role whatsoever in the estate plan and that Stuart had capacity; the testimony of Laura's own expert witness, Lily Jung Henson, M.D., that Stuart's medical records showed no indication that he suffered cognitive impairment that would undermine his testamentary capacity or make him susceptible to the influence of another; and the deposition of Laura herself that Stuart was perfectly lucid and had full cognitive capacity until just weeks before his death, though by her own choice did not visit or even speak to her father for an extended periods before his death.

Summary judgment was properly granted in this case in 2013, once the undisputed facts had been established by extensive discovery. On appeal, Laura contests the granting of the summary judgment; the granting of a motion to amend the response when the amendment was not prejudicial and was done in the interest of justice; the granting of a motion to shorten time for oral argument on summary judgment when again there was good cause and no prejudice; and the denial of a motion for reconsideration when it was based on evidence within Laura's control prior to the motion on summary judgment.

Laura Burwash is essentially asking this court to ignore Stuart Rippee's testamentary intent and re-write his Will because "equity" requires that she get part of his estate due to her chronic illness and

financial need. Stuart tried for years within his lifetime to help Laura, to no avail. Stuart's choice to leave his entire estate to his wife of twenty years – consistent with a Will he wrote in 1988, the year after they wed – should be respected and upheld by this court. Stuart Rippee had the right to decide how his estate should be distributed, and he did so with sound mind and of his own free will. Denise Rippee respectfully requests that this court uphold the trial court's rulings as they are in keeping with the clear testamentary intent of Stuart Rippee.

II. ISSUES ON APPEAL

1. Whether Denise Rippee's motion for summary judgment pursuant to CR 56 should be upheld because there are no genuine issues as to material fact, when Laura Burwash conceded in her deposition that Stuart had no cognitive impairment during the time frame that he executed his estate planning documents; when the drafting attorney and witnesses to the Will provided undisputed evidence that he had capacity; and when the undisputed evidence from the drafting attorney and from Denise established that Denise played no role whatsoever in the procuring of the Will, and that it was not the product of undue influence.
2. Whether the trial court acted within its sound discretion in granting

Denise's motion to amend her answer when, under CR 15(a), leave to amend should be freely given by the court "when justice so requires" unless the amendment would result in prejudice to the nonmoving party; and when Laura has demonstrated no prejudice whatsoever, as Denise's amended response – denying that Denise became antagonistic to Laura and that she objected to Stuart's relationship with Laura and her sons – is entirely consistent with Denise's deposition testimony and pleadings; and when Laura has failed to meet her burden that the trial court's granting of the motion to amend was "manifestly unreasonable discretion, exercised on untenable grounds or for untenable reasons."

3. Whether the trial court acted within its sound discretion in granting Denise Rippee's motion to shorten time to hear the motion for summary judgment pursuant to LCR 7(b)(10) when there was good cause for the motion and no prejudice to Laura Burwash; and when Laura Burwash has failed to meet her burden that the trial court's granting of the motion to shorten time was "manifestly unreasonable discretion, exercised on untenable grounds or for untenable reasons."

4. Whether the trial court exercised its sound discretion in denying Laura Burwash's motion to reconsider the order granting motion for summary

judgment pursuant to CR 59 based on Dr. Lily Jung Henson's testimony when the timing of the doctor's testimony was within the sole control of Laura Burwash and was not evidence that was unavailable prior to the summary judgment motion; and when Laura Burwash has failed to meet her burden that the trial court's denial of the motion to reconsider was "manifestly unreasonable discretion, exercised on untenable grounds or for untenable reasons."

III. STATEMENT OF THE CASE

A. Procedural History

Stuart Rippee died on August 3, 2007. His wife of almost twenty years, Denise Rippee, filed his original Will – executed almost two years before his death -- with the court on August 9, 2007. CP 1-3.

Contemporaneous to his execution of his Will 2005, Stuart executed a Community Property Agreement designating that all of his property was community property. CP 24-26. No probate was opened. On February 20, 2008, Laura Burwash, filed her petition to contest the Will and Community Property Agreement. CP 4-26.

On March 7, 2008, prior counsel filed a brief response and motion to dismiss the petition on procedural grounds. On April 3, 2008, prior counsel Dore filed a reply to Laura's petition, admitting four of the forty

averments raised in the petition and denying the other thirty-six. CP 27-29. On April 8, 2008, Dore filed a seven page motion for summary judgment accompanied by mostly unsworn statements. The former trial judge granted the motion for summary judgment and Laura Burwash appealed.

In 2009 this court reversed the prior trial court's grant of summary judgment in an unpublished opinion, noting that former counsel Dore did not even respond to "any of the issues set forth by the appellant that are determinative of the appeal." In re Estate of Rippee, 149 Wn.App. 1009, 2009 WL 502400 (Wn.App. Div. 1).

In June 2009, undersigned counsel appeared and substituted for former counsel Dore. Discovery took place for the next three years.

The case was certified for trial in July 2012, and an amended case schedule was entered in August 2012, which included a September 15, 2012, deadline for disclosure of witnesses. CP 30-37. The amended case schedule set a trial date the week of December 3, 2012. On November 13, 2012, the court entered an Order Continuing Trial Date to February 11, 2013, and with a cut-off for dispositive motions of January 28, 2013, but included no extension of the deadline to disclose witnesses. CP 38-40.

Over the next several weeks, undersigned counsel communicated at length with the court and counsel to try to ascertain who the trial judge

would be and when the trial judge could hear the motion for summary judgment. CP 55-56, 75-112. It was not until late December 2012 that it was determined who the trial judge would be, and the trial court was absent for the holidays until early January 2013. CP 41, CP 55-56, 75-112. When undersigned counsel inquired of the trial court as to scheduling oral argument on the summary judgment, there were no dates available that would fit within the amended case schedule. CP 55-56, 75-112, 162-69. Thus, undersigned counsel filed a motion to continue trial date and amend the case schedule and simultaneously noted oral argument for an available date – February 8, 2013 – that was prior to the current trial date, and filed a motion to shorten time. CP 120-147, 162-178, 200-223. The court granted the motion to shorten time and oral argument was held on February 8, 2013. CP 247-248.

The trial court granted Denise Rippee's motion for summary judgment. CP 287-289. Laura Burwash brought a motion for reconsideration in part based on a new declaration of a witness, Lily Jung Henson, M.D., that Laura disclosed four months after the deadline for witness disclosure, and who had been deposed by Denise prior to the oral argument on the summary judgment motion. CP 290-302. The trial court denied the motion for reconsideration and this appeal follows. CP 303.

B. Substantive History

In her opening brief, Laura Burwash primarily relies on a recitation of facts in this court's 2009 unpublished opinion on this case, and essentially ignores the evidence produced after three years of discovery. The only admissible evidence before this court in 2008-09 were some of the statements within Laura's verified petition and a few brief, conclusory, and essentially useless declarations. Laura alleged in her petition that Stuart was cognitively impaired by narcotics at some point during his cancer treatment, though she set forth no factual basis as to when this alleged impairment existed, and then stated "it is believed" he was impaired in 2005 when he executed his Will. CP 9, 11-12. Laura further alleged that she and Denise did not have a good relationship, and that Denise prevented Stuart from seeing Laura and her sons, and then stated that "it is believed" that Denise procured the Will when Stuart lacked capacity and that it was the product of undue influence. CP 5-13.

In her deposition, however, Laura directly contradicted these allegations and admitted that she did not detect **any** signs of cognitive impairment on Stuart's part until just one week before he died. Supp. CP 467-472. Further, she testified that she had no knowledge whatsoever of the circumstances surrounding his estate planning over the years, and that it was Laura who chose not to have contact with Stuart in the last years of

his life due to the fact that she found it “depressing”, she was ill from the effects of multiple sclerosis, and she disliked Denise. Supp. CP 466-470, 473-480, 485-486, 488-489.

The record before the court today bears no resemblance to the record before the court in 2008-09. Some examples are set forth below.

	Record in 2008	Record in 2013
Testimony of Attorney Don Running	Sworn statement that “based on (his) long standing dealings and contacts with (decedent), he had capacity” in 2005. No context for when/where the dealings and contacts were or what they consisted of. No testimony that he drafted the 2005 Will or CPA or any prior Wills.	Deposition testimony that he had known Stuart since they were friends in middle school, that their families were friends, and that he is an attorney who did trust and estate work for Stuart and his mother. That he drafted a Will for Stuart in 1985, right after Stuart’s divorce, giving the estate to minor Laura in trust. That he attended Stuart and Denise’s wedding and observed they had a good relationship over the years. That in 1988 he drafted a Will at Stuart’s request in which Stuart left his entire estate to Denise. That in 1999 he drafted a Will at Stuart’s request directing Denise to expend up to \$100,000 to acquire title in a house for Laura, and \$10,000 in trust for each of the two minor grandsons. That in 2005, after Laura had trashed a house Stuart provided for her to live in and after their relationship “sourred”, Stuart contacted him to change his estate plan to leave his entire estate to Denise, consistent with the 1988 estate plan. That he drafted the 2005 Will and CPA and that he had no communications whatsoever with Denise about Stuart’s estate plan at any point during Stuart’s lifetime. That he personally visited Stuart in April and July of 2007, just before

		Stuart's August 2007 death, and that he believed Stuart still retained testamentary capacity at those times. That he never saw any indication at any time that Stuart lacked testamentary capacity. That his own brother died of cancer and he is familiar with the illness and the medications used to treat it. Supp. CP 532-559.
Testimony of Denise Rippee	none	That she in no way participated in Stuart's estate planning at any point in their marriage, was not aware of what he included in his estate plan, and never expressed any opinions to him as to what he should include in his estate plan. That she never discouraged Stuart's relationship with Laura and her sons, and actually affirmatively encouraged the relationships. That she had a very positive relationship with the grandsons and wanted to have a good relationship with Laura, but Laura constantly rebuffed her. That she never objected to Stuart's financial support of Laura, and that she was more inclined than Stuart to offer material support, such as car payments, clothing and supplies. That although he was on medication during his cancer treatment, Stuart's cognitive abilities were not diminished until just days before he died. Supp. CP 485-530.
Testimony of the witnesses to the execution of the Will and CPA	none	Sworn declaration from witness Sarah Burger that she witnessed Stuart's execution of his 2005 Will, and that he appeared competent, unimpaired, and not under the influence of another. Sworn declaration from witness/notary Aubryum Ludberg that she witnessed Stuart's execution of his 2005 Will and CPA, and that he appeared competent, unimpaired, and not under the influence of another. Further, that she knew Stuart and Denise by sight and had previously notarized their signatures on a real

		estate document. That she notarized Stuart's signature on a deed in December 2002, when he was also competent, and she saw no difference in his cognitive functioning in 2005 as compared to 2002. CP 116-117, Supp. CP 441-451, 578-590.
Evidence as to Stuart's medical condition and cognition	<p>No medical records.</p> <p>Statements by Laura Burwash in her petition that Stuart took narcotic pain medications including oxycontin and morphine "popsicles", passed out with "popsicles" in his mouth, and his cognition was impaired at some unspecified time.</p> <p>Conclusory declaration by Don Running that Stuart had capacity in 2005, with no factual basis set forth and no testimony as to how long he knew Stuart, and that he had drafted Stuart's estate plans for two decades prior to the execution of the 2005 Will.</p>	<p>Over 1200 pages of medical records detailing Stuart's cancer treatment; expert testimony from Lily Jung Henson, M.D. that in her review of medical records from 2005, that Stuart was "cognitively intact", and that there was no indication that Stuart lacked testamentary capacity or was subject to undue influence. CP 284-286, Supp. CP 426-440.</p> <p>Admission by Laura Burwash in her deposition that she had "no idea" what types of medications Stuart took or when he took them; that on one occasion possibly in the early 2000's, Stuart used a "popsicle" at Laura's house and it made him seem "goofy, happy and high as a kite" but less impaired than a person who had consumed alcohol. That the only time she ever saw any evidence that Stuart's cognitive abilities were impaired to any degree was during a phone call a week before Stuart died when Stuart could not remember a boat he once owned. Supp. CP 467-468, 491-492.</p> <p>Deposition testimony by Don Running and Denise Rippee as to the medications Stuart took for pain, and that the medications did not appear to impact his cognitive abilities at any time at or near the execution of the Will and CPA. Deposition testimony from Don Running that he visited Stuart in person in April and July 2007, and although he was ill and on medication, Stuart's conversation with Running led him to conclude he still possessed testamentary capacity at</p>

		those times. Supp. CP 511, 538-539, 544, 558.
Testimony of Laura Burwash	Statements by Laura Burwash in her petition that she had a good relationship with Stuart throughout her life, but that Denise prevented her from seeing Stuart during his illness. That Denise restricted Laura's access to Stuart to phone calls once he was housebound. That Denise refused to let Laura visit Stuart on his deathbed. That Denise discouraged Stuart's relationship with his grandsons.	Deposition testimony by Laura that she did not like Denise and avoided contact with her. That on only one occasion did Denise ask Laura to leave Stuart and Denise's home, and that there were no other occasions she could recall where Denise prevented or discouraged contact. That Laura chose not to visit Stuart for at least the last 18 months of his life because it was depressing for her, traveling to Vashon required a ferry ride, and she did not like being around Denise. That Denise called Laura's residence days before Stuart died to let her know that Stuart would die soon, and invited her to come see him, and that Laura chose not to visit or even make a telephone call to Stuart because she did not feel well and because she could not stand the sound of Denise's voice. That Laura's sons spent a lot of time visiting Stuart and Denise – including birthdays and holidays – because Stuart was "the one with the money", and that Stuart and Denise took the boys on vacations with them and bought things for them. Supp. CP 466-470, 473-480, 485-486, 489.

The record before this court after three years of discovery paints a clear picture of evidence in this case. The following facts are not disputed:

- Laura dislikes Denise. Supp. CP 474, 487.
- Laura and Denise did not have a good relationship. Supp. CP 458-459, 499-500.
- Stuart married Denise in 1987 and executed a Will drafted in 1988 by

attorney Don Running leaving his entire estate to Denise and disinheriting Laura. Supp. CP 497, 548-549, 568-570.

-- Laura had two children by the age of twenty, was diagnosed with multiple sclerosis between the births of her two children, and faced losing custody of those children in a dependency action from 1996 to 1998.

Supp. CP 482, 501, 505, 512, 514.

-- In 1998 Stuart and Denise bought a house for Laura and her family to occupy to help Laura retain custody of her children, and Laura and her husband agreed to pay rent when they became financially able. Supp. CP 505, 509, 513, 518.

-- In 1999 Stuart executed a Will drafted by Don Running naming Denise as executor and authorizing her to expend up to \$100,000 to acquire title for Laura in the house in which she was residing at the time of his death, and giving \$10,000 to each of Laura's minor sons in trust with the remainder of the estate to Denise. Supp. CP 542-543.

-- In October of 2000, after Laura and her husband never paid rent, Stuart and Denise hired a lawyer who sent a letter to Laura and her husband asking them to vacate, and offering them \$2000 if they left the house in good shape and moved out in a timely manner. Supp. CP 463-464, 506, 514, 520.

-- Laura and her husband left the house in a damaged condition and Laura

chose to have no contact with Stuart for a time after the move. Supp. CP 464, 521, 536-536.

-- Stuart contacted Don Running in 2005 and told him he wanted to change his estate plan to leave everything to Denise and nothing to Laura, and Running executed a Will and CPA to that effect. Supp. CP 535-537, 540-542, 554-555.

-- Stuart signed the 2005 Will and CPA in front of witnesses who have testified he signed of his own free will and appeared competent, unimpaired, and not under the influence of another at the execution. CP 116-117, Supp. CP 441-451, 578-590.

-- Denise never prevented or discouraged Stuart's relationship with Laura and her sons, and only on one occasion did she ask Laura to leave the Rippee residence. Supp. CP 466-470, 473-480, 485-486, 489, 493-494, 500, 505-506, 512, 519, 521, 523-527, 529-530.

-- Stuart took pain medication for his cancer, but was not cognitively impaired at the time he executed his Will and CPA, and had testamentary capacity at the time. CP 284-286, Supp. CP 426-440, 467-468, 491-492, 511, 538-539, 544, 558.

-- Denise did not participate in or influence Stuart's estate planning at any time. Supp. CP 481, 500-501, 503-504, 506-507, 513, 541-542, 553, 556-558.

It appears that the only fact in dispute is **why** Denise and Laura did not have a good relationship. Denise testified Laura was to blame, and Laura testified that Denise was to blame, while both agreed that the discord began in the late 1980's. "Who started it" is not a dispute of a **material** fact, as discussed further below.

IV. ARGUMENT

A. The Trial Court Properly Granted Denise Rippee's Motion for Summary Judgment As There Are No Disputed Issues of Material Fact as to Stuart Rippee's Testamentary Capacity or the Lack of Undue Influence

Upon a *de novo* review of the record below, this court should uphold the trial court's granting of Denise Rippee's motion for summary judgment. Summary judgment is appropriate if the record before the court shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR56(c); Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). The summary judgment procedure exists to prevent the waste of time and resources on trials when the material issues of fact are not disputed and to test whether evidence to sustain the allegations actually exists. Almay v. Kvamme, 63 Wn.2d 326, 329, 387 P.2d 37 (1963). A material fact is one upon

which the outcome of litigation depends. Harris v. Ski Park Farms, 120 Wn.2d 727, 737, 844 P.2d 1006 (1993). Even if some facts are in dispute, where there are no material facts at issue under a legal principle that disposes of a controversy, summary judgment is proper. Hackler v. Hackler, 37 Wn.App. 791, 794, 683 P.2d 241 (1984), review denied, 102 Wn.2d 1021 (1984).

Although the moving party bears the initial burden of showing absence of an issue of material fact, once this showing is met, the burden shifts to the non-moving party, who must set forth specific admissible facts showing that there is a genuine issue of material fact for trial. CR 56(e); Young v. Key Pharmaceuticals, 112 Wn.2d 216, 25-26, 770 P.2d 182 (1989). The moving party can satisfy her initial burden in either of two ways: (1) she can set forth her version of the facts, and allege that there is no genuine issue as to these facts; or (2) she can simply point out to the Court that no evidence exists to support the non-moving party's case. Howell v. Bloodbank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991); Guile v. Ballard Community Hosp., 70 Wn.App. 18, 21, 851 P.2d 689 (1993). Where proof of an essential element of a claim is lacking, all other facts are rendered immaterial and summary judgment must be granted. Young, 112 Wn.2d at 225. The trial court did not err in granting Denise's motion for summary judgment.

The case before this court in 2013 bears no resemblance to the case as presented to this court in 2008-09. Laura Burwash filed a petition in February 2008 that made numerous allegations and relied on broad conclusory statements and no actual evidence. Furthermore, Denise Rippee's counsel in 2008 provided virtually no admissible evidence in support of his motion for summary judgment. The record before this court after the first motion for summary judgment consisted of Laura's petition, and a few unsworn and/or conclusory statements of witnesses. No discovery had taken place. The record did not include declarations of witnesses to the execution of the Will, and inexplicably although there was a declaration from the attorney who drafted the Will, his declaration did not include the fact that he actually drafted the Will **and** other prior Wills for Stuart Rippee going back two decades. This court in 2009 had no choice but to reverse the prior trial court's granting of the summary judgment in 2008.

After more than three years of discovery, the truth is now before this court. Laura Burwash has been unable to provide any evidence to support the allegations made in her 2008 petition: she directly contradicted many of her allegations during her deposition, and offers no reasonable, admissible evidence as to material issues of fact from any other sources.

On appeal, Laura argues that because the relationship between the parties is “complicated and contested”, this court must reverse the summary judgment and weigh the evidence to determine whether Laura is entitled to equitable relief. While it is true that credibility determinations should not be made by the court in granting a motion on summary judgment, and that the evidence must be construed in the light most favorable to the non-moving party, the mere fact of a contentious relationship between the parties does not justify denial of a motion for summary judgment. A contentious relationship is not proof positive that material issues of disputed fact exist. The key factor this court must consider is whether there are any genuine issues of **material** fact. And here there are not.

Laura’s reliance on Vasquez v. Hawthorne, 145 Wn. 2d 103, 108, 33 P.3d 732 (2001), to support her argument that complicated or contentious relationships prevent a court from granting a motion for summary judgment is both misplaced and misleading. In Vasquez, a man sued the estate of the decedent to receive a portion of the estate because he alleged he was in a same-sex, committed, marital-like relationship with the decedent and had the equivalent of community property rights, while the family of the decedent claimed there was no such relationship. Clearly there was a disputed issue of material fact – the very nature of the parties’

relationship – which was pivotal to deciding the case on equitable grounds, thus summary judgment was not appropriate. The case at hand has no such disputed **material** facts.

To determine **materiality**, this court must look to the caselaw regarding testamentary capacity and undue influence and examine the factors that are relevant to these issues.

1. Testamentary Capacity

By her petition, Laura has challenged Stuart's testamentary capacity. Testamentary capacity requires that the testator know: the effect of a Will; who constitutes the natural objects of testator's bounty; and what property comprises the estate. See Dean v. Jordan, 194 Wn. 661, 79 P.2d 331 (1938); In re Kessler's Estate, 35 Wn.2d 156, 211 P. 2d 496 (1949). Any adult of sound mind may execute a Will. RCW 11.12.010. Evidence must be clear, cogent and convincing to invalidate a Will which on its face is rational and is properly executed, and a testator is presumed to have capacity. In re Estate of Eubank, 50 Wn.App, 611, 617, 749 P. 2d 691 (1988).

There are no disputed material facts as to capacity, and viewing the evidence in the light most favorable to Laura, she cannot prevail on this claim as a matter of law. There is no evidence in the record that Stuart did not understand the effect of a Will, or that he did not know who

the natural objects of his bounty were¹, or that he did not know what property comprised his estate. The testimony of the drafting lawyer, Denise, Laura, and the witnesses to the Will establish capacity as to all three criteria. Laura's own expert witness, Dr. Jung Henson, reviewed Stuart's medical records and opined he was "cognitively intact" in 2005 and that although his medications **could** impair cognition, she saw nothing to believe Stuart did not meet the three criteria for testamentary capacity. Laura's verified petition does not include evidence that Stuart lacked testamentary capacity in 2005, and Laura testified in her deposition that the **only** time Stuart was showing any sign of cognitive impairment was during a phone call in mid 2007, a week before he died.

Furthermore, the undisputed evidence establishes that although Stuart loved his daughter and grandsons, based on his daughter's behavior over the years he rationally decided not to leave her any part of his estate. Laura nearly lost custody of her sons in a dependency action and Stuart did not think she was a good parent. Laura did not pay rent and then "trashed" the house Stuart and Denise provided for her and her family to live in. As Stuart's cancer progressed, Laura sent her children to stay with him and Denise because "he was the one with the money", but Laura

¹Although the 2005 Will misspelled Laura's last name as "Berwash", so did the 1999 Will. Although the 2005 Will did not specify the names of Stuart's grandsons, neither did the 1999 Will.

herself had very little contact with Stuart because she did not like Denise and because Stuart's illness depressed her. Laura's older son moved away from her and lived with his father well before Stuart died, and for a time Stuart and Denise allowed Laura's younger son to live with them. The younger son had significant behavior problems. Thus, there is no evidence before this court that Stuart failed to understand who were the "natural objects of his bounty", and the undisputed evidence suggests rational reasons for Stuart's choosing to disinherit Laura and her sons.

There are no disputed issues of material fact relevant to Stuart's testamentary capacity, and thus Laura Burwash's challenge to the Will on these grounds must fail as a matter of law.

2. Undue Influence

Likewise, there are no disputed material facts as to Laura's claim of undue influence. In order to prevail on a claim of undue influence at trial, Laura Burwash must prove by clear, cogent and convincing evidence that another party exercised influence on Stuart to induce him to execute his Will and CPA such that it rises to the level of coercion, interferes with his free will, and interferes with an exercise of his judgment and choice at the time of the testamentary act. Kessler at 377. As to undue influence, the material issue of fact is not whether there was influence in the form of

“advice, persuasion, or even importunity” but rather “influence that overcomes the will of the testator” so that the will is “a result of such coercion that free agency is destroyed.” In re Estate of Bottger, 14 Wn.2d 676, 699-700, 129 P.2d 518 (1942). As with the claim of lack of capacity, above, Laura has presented no evidence to support this claim.

The drafter of the Will, Don Running, testified that Stuart was the **only** party with whom he discussed the Will and that Denise played no part. Further, Mr. Running had drafted three wills for Stuart Rippee in the twenty years prior to the drafting and execution of the 2005 Will and CPA, and was clear that Denise did not participate in any way. Likewise, in her sworn testimony Denise indicates that Stuart made his own independent decisions about his estate planning and that she at no point even suggested to him what should be in his Will. Laura testified that she had absolutely no knowledge of the circumstances surrounding the execution of the 2005 Will, or of any of Stuart’s wills. Witnesses Burger and Ludburg gave sworn statements that Stuart appeared to be acting of his own free will and not under the influence of another when he executed the 2005 Will in their presence. Laura presented no evidence to dispute the testimony of Don Running, Denise Rippee and the witnesses to the Will.

Furthermore, Laura has failed to present evidence to shift the

burden of proof to Denise on this issue.² Laura testified that Denise did not like her and that she did not like Denise, but presented no evidence that: Denise participated in the procurement of the Will; received an unusually or unnaturally large part of the estate; or occupied a confidential or fiduciary relationship with Stuart. See Dean at 671-72.

It is not disputed that Laura and Denise's relationship was strained. Both accuse the other of starting and continuing the animosity, but "who started it" really doesn't matter. Laura has failed to establish evidence that her difficult relationship with Denise then caused Denise to unduly influence the execution of Stuart's 2005 Will and CPA.

Denise and Stuart were married for twenty years, and there is nothing unusual or unnatural about a husband leaving his entire estate to his wife. In 1988, a year after they wed and seventeen years before the execution of the 2005 Will, Stuart Rippee executed a Will which left his **entire** estate to Denise. In the late 1980's to mid 1990's, Laura had two children; was diagnosed with a chronic illness; married, divorced and married again; and faced a dependency action in regard to her children. Stuart and Denise were both very close to the children despite the strained

²² In its unpublished 2009 opinion reversing summary judgment, this court indicated that based on the record before it at that time, Laura had created rebuttable presumption of undue influence in her pleadings because of Denise's admission to section 2.11 of her petition's averments. As discussed above and below, this admission/answer was erroneous, was inconsistent with the record and pleadings as a whole, and was amended

relationship between Laura and Denise. Both Stuart and Denise participated in several months of meetings with CPS/DCFS to create a safe and stable environment for the boys, even going so far as to purchase a house as their community property for Laura and her family to live in on Vashon so that Stuart and Denise could help raise the boys. This is undisputed.

Shortly after they bought the house for Laura and her family to occupy, Stuart was diagnosed with prostate cancer. Within eight months of his diagnosis, Stuart executed his 1999 Will. Just over a year after the execution of the 1999 Will, Stuart and Denise's plan for Laura and her family to occupy the house fell apart when Laura and her husband failed to pay rent during their two-year occupation of the house. Don Running learned from Stuart that Laura and her family "trashed" the house and Denise testified Stuart was "disgusted" when he saw the state the house was in. In 2002, Stuart and Denise sold the house.

Taking all evidence and inferences in the light most favorable to Laura, the most she can establish is that Denise could be cranky or annoyed with her, **not** that she prevented Laura and the boys from having access to Stuart or vice versa, nor that she influenced Stuart to disinherit them.

prior to the court's ruling on summary judgment,

The undisputed evidence is that in September 2005, Stuart contacted Don Running saying he wanted to change his Will back to essentially his 1988 Will -- leaving everything to Denise -- and that Denise never talked to Don about this whatsoever. This was consistent with the way Stuart approached his estate planning with Don Running in 1985, 1988, and 1999: Stuart expressed to Don what he wanted, Denise had no contact with Don; and Don drafted the documents per Stuart's requests.

Don Running had a long visit with Stuart in April 2007 and again in July 2007, and Stuart was still the Stuart that Don had known for over four decades: speaking his own mind and making his own decisions.

Laura Burwash has failed to present facts that would raise suspicion that Stuart's Will and CPA were the product of undue influence, and has failed to shift the burden to Denise to prove a lack of undue influence.

Even assuming, *arguendo*, that this court were to find the burden has been shifted, Denise has presented sufficient evidence to restore the balance favoring validity of the Will with rebuttal evidence. The drafter of the Will establishes Denise did not participate in procuring the Will, Denise corroborates it, and Laura presents no evidence that Denise participated in any way, let alone coerced Stuart to the degree that he was no longer acting of his own free will. Summary judgment is properly

granted when as in this case no material facts are disputed by contradictory evidence. Denise is entitled to summary judgment in her favor as to the issue of undue influence as a matter of law.

3. Inadmissibility of Testimony of John Fewel and Dean

Running

In her reply to the Response to Motion on Summary Judgment, Denise moved to strike the declaration of John Fewel and portions of Dean Running's deposition. CP 249-261. The trial court did not issue a specific ruling as to the motion to strike, but this court should find that Mr. Fewel's declaration does not meet the requirements of CR 56(e), and Dean Running's deposition testimony inasmuch as it speculates on what he thought Stuart **might** do in estate planning likewise does not meet the requirements of CR 56(e).

Affidavits must (1) be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. Grimwood v. University of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); Blomster v. Nordstrom, Inc., 103 Wn.App. 252, 259-60, 11P.3d 883 (2000). Ultimate facts, conclusions of fact or

conclusory statements of fact are not sufficient. Grimwood, 110 Wn.2d at 359; Blomster, 103 Wn.App at 260.

Mr. Fewel states in his declaration that at some unspecified point in the 15 years he knew Stuart before Stuart's death, Stuart told him that: he loved Laura and his grandsons; Denise did not like his Laura; Stuart said he "should" provide for his grandsons as opposed to "would" provide for his grandsons; and that Mr. Fewel was surprised by the Stuart's Will and thought Denise was somehow to blame³. Mr. Fewel's declaration lacks sufficient foundation for admissibility and fails to establish that Mr. Fewel is competent to testify to these matters based on personal knowledge. A declaration based on "information and belief" is insufficient. Klossner v. San Juan County, 93 Wn.2d 42, 45. 605 P.2d 330 (1980). This court should find that Mr. Fewel's declaration in its entirety - or at the very least sections 8, 11, and 12 - are inadmissible and cannot be considered in determining whether summary judgment should be granted.

Dean Running testified that he never discussed estate planning

³ It is significant to point out that Dean Running in his deposition testified that John Fewel called him after Stuart Rippee died and told him Denise was the sole beneficiary of the estate; that Fewel was "pretty upset" about it and did not think it was fair; that Fewel, and not Stuart, had been the one to tell him Laura had MS; that Dean Running thought Fewel may have been the person who "instigated" the investigation into the Will. In his declaration, Fewel asserts that Denise did not like Dean Running and prevented Stuart from seeing him. Fewel then opines that Denise prevented Stuart from seeing people she didn't like, so she must be the reason he did not include Laura and her sons in his Will. Dean Running, however, testified that Denise was a "nice lady" and he "got along well" with her.

with Stuart; that Stuart was fair and generous; that Laura had a problem with not being financially sophisticated; and that he was “sad to hear” Stuart changed his Will two years before he died because he “wasn’t in the best position to make a good decision” and was “overwhelmed with the disease.” Dean Running is not competent to testify about Stuart’s estate plan because he lacks personal knowledge, and this is impermissible opinion testimony. Dean Running testified that Stuart never discussed his estate planning with him and rarely if ever discussed Laura and the grandsons, except to mention if his grandsons were visiting when Stuart and Dean spoke on the telephone. When asked if Stuart discussed with him his feelings or affection toward Laura and her sons, Dean Running replied he did not. Dean Running’s testimony that he would “expect” Stuart to include Laura and her sons in the Will is inadmissible conjecture and should not be considered in the *de novo* review of the summary judgment for the reasons stated above.

B. The Trial Court Acted Within Its Sound Discretion in Granting Denise Rippee’s Motion To Amend Her Answer When There Was No Prejudice to Laura Burwash

CR 15(a) provides that a trial court may grant a motion to amend an answer to a petition, and caselaw establishes that leave to amend should

be freely given by the court “when justice so requires” unless the amendment would result in prejudice to the nonmoving party. Kirkham v. Smith, 106 Wn.App. 177, 181, 23 P.3d 10 (2001). The standard of review this court is to apply in reviewing the granting of the motion to amend is “manifest abuse of discretion”, and the trial court’s ruling must be upheld unless this court finds that the trial court’s ruling was “manifestly unreasonable discretion, exercised on untenable grounds or for untenable reasons.” Wilson v. Horsely, 137 Wn.2d 500, 505, 974 P.2d 313 (1999).

The amendment to deny the averment set forth in section 2.11 of the petition to contest the will – that the Denise Rippee became antagonistic to Laura Burwash and that Denise objected to the Stuart Rippee’s relationship with Laura and her sons – is entirely consistent with the discovery in this matter and consistent with Denise’s denials of thirty-six of the forty averments in Laura’s petition. The fact that section 2.11 was ever admitted in the first place was an inexplicable error on the part of Denise’s prior counsel. The admission of 2.11 is inconsistent with prior counsel’s pleadings and arguments, and the admission was made without Denise’s knowledge and perhaps was a typographical error on the part of prior counsel. There are numerous other averments alleging that Denise interfered with or prohibited the relationship between Stuart and his daughter and grandsons that Denise denied in her answer.

The record is clear that there was no surprise or prejudice as a result of the amendment. From the start, Denise denied multiple averments alleging that she prevented Laura from having contact with Stuart and that she was antagonistic to Laura. Laura's counsel deposed Denise Rippee in August 2011 and repeatedly asked if she was antagonistic to Laura or if she objected to the Stuart's relationship with Laura and Laura's sons, and Denise repeatedly testified that she was not antagonistic, did not object to the relationships, and actually encouraged the relationships. CP 122-147, Supp. CP 485-530. Given that Denise testified to this issue at length during a deposition that occurred a year and a half prior to the motion to amend and summary judgment, there is no real basis for Laura to object. In addition to Denise's deposition testimony, in her own deposition testimony Laura admitted that Denise never discouraged or prevented Stuart from seeing or communicating with Laura and her sons. CP 122-147, Supp. CP 466-470, 473-480. When asked in her deposition if Denise ever told her she was not allowed to come to Stuart and Denise's house, Laura testified on **one** single occasion during her sons' lifetime -- but she cannot recall when -- Denise told her to "get out" of Stuart and Denise's Vashon home. When asked if Denise had told her she was not allowed in Stuart and Denise's house on any other occasions besides that single incident where she told Laura to "get out",

Laura responded “I don’t remember.”

Laura Burwash has failed to meet her burden of establishing a manifest abuse of discretion on the part of the trial court in granting the motion to amend the answer and the trial court’s ruling should be upheld. Further, Denise Rippee’s deposition in mid 2011 was clear and unequivocal, and was not contradicted by any prior or subsequent statements made by Denise.

Laura Burwash also argues for the first time on appeal that the amendment should also have been a basis for the trial court denying the summary judgment because it created an issue of Denise’s credibility that could not be resolved on summary judgment. This argument is without merit and the authority cited by Laura is not on point. There is no record of Denise ever making any substantive statement in any form that contradicts her deposition testimony. There is no impeachment evidence. As set forth above, there are no disputed issues of material fact in this case and summary judgment was proper and supported by the record.

**C. The Trial Court Acted Within Its Sound Discretion in Denying
Laura Burwash’s Motion for Reconsideration**

The trial court’s denial of the motion for reconsideration pursuant to CR 59 was within its sound discretion, and can only be overturned on

appeal by a finding of manifest abuse of discretion. Estate of Treadwell ex re Neil v. Wright, 115 Wn.App. 238, 249, 61 P.3d 1214 (200); Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

There was no evidence presented via the motion for reconsideration that could not have been presented at the time of summary judgment. The presentation of Dr. Jung Henson's testimony was entirely within the control of Laura's counsel, and Denise should not be penalized by their tactical choices. The deadline to disclose witnesses was September 15, 2012, per the case schedule. CP 36-37. Even when the trial date was continued from December to February, the deadline for disclosure of witnesses was not extended. CP 38-40. Nevertheless, Laura Burwash endorsed Lily Jung Henson, M.D., as a witness for the first time on January 9, 2013. CP 44-56. On January 17, 2013, Denise Rippee filed a motion to exclude Dr. Jung Henson's testimony at trial due to lack of relevance, waste of time and late disclosure. CP 44-56.

While awaiting the court's ruling on the motion to exclude, undersigned counsel noted a deposition of Dr. Jung Henson for February 6, 2013, which was the first date before the summary judgment that she was available, per the legal assistant for Laura Burwash's counsel. In her deposition, Dr. Jung Henson testified that Laura Burwash's counsel first

contacted her a few months earlier, but she did not know exactly when, and that counsel only provided her with any discovery to review just two days before her deposition. Supp. CP 426-440. Given the fact that Laura disclosed an expert witness four months after the deadline and that witness was only available to be deposed two days before the oral argument on the motion for summary judgment, it cannot be reasonably argued that the shortening of time from 28 days to 22 days for oral argument in any way prejudiced Laura or that the evidence was not available to her earlier. This was a situation of her own making.

Dr. Jung Henson testified that based on her review of the discovery, Stuart Rippee was “cognitively intact” during the time period in 2005 when he executed his will and she saw no evidence of impairment that would impact his testamentary capacity or lead him to be influenced by others. CP 284-286, Supp. CP 426-440. She also testified as to the levels and types of medication Stuart was taking in mid to late 2005, and opined that there was no evidence that they impacted his cognition. Ibid. In her declaration, signed on February 20, 2013, and filed at the same time as the motion to reconsider, Dr. Jung Henson cites a few instances in mid to late 2005 where she saw indications in the medical records that there was a possibility Stuart may have had some cognitive impairment, but she does offer any new testimony to contradict her deposition testimony that

the records had no indication Stuart lacked the requisites for testamentary capacity or was unduly susceptible to influence.

Given the nature of Dr. Jung Henson's testimony and the fact that the timing of the presentation of that testimony was solely within the control of Laura's counsel, it is clear that the trial court acted within its sound discretion in denying the motion to reconsider.

Laura further argues that her counsel's response to the motion for summary judgment was "hastily prepared" and that the shortened time prejudiced her ability to respond, but other than her argument regarding Dr. Jung Henson's testimony, she sets forth nothing to show how she was actually prejudiced.

The court shortened time for oral argument on this case within its sound discretion and for good cause. It was clearly within the interests of justice to allow this summary judgment motion to be heard. The parties were faced with a situation where the court administration had some delay in reassigning the case to a trial judge, and as in all cases the parties must deal with the caseload and availability issues of the trial court. Per CR 6(c) the unavailability of the court is not cause to prevent a motion from going forward. Undersigned counsel had communicated with various members of court staff starting in late November 2012 to attempt to note argument within the civil rules and case schedule, and any delays were in good faith

on her part.

The trial date and amended case schedule entered on November 13, 2012, by agreement of the parties was entered at a time when the ability to note a summary judgment motion for oral argument was unknown. The court was in transition given the first assigned trial judge's cases required reassignment, and the Order Changing Judge was not signed until December 20, 2012. Given the brief unavailability of the court over the holidays, and the court's ability to schedule oral argument for summary judgment, the trial court acted within its discretion to shorten time for oral argument on the summary judgment motion. Local Civil Rule 7(b)(10) granted the trial court the authority to shorten time on good cause. Local Civil Rule 40(e) provided the trial court the authority to adjust the trial date and case schedule.

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

Per RAP 14.3 and RCW 11.96A.150, Denise Rippee should be awarded attorney's fees and costs incurred as a result of having to respond to this appeal. The court should reject Laura's argument that she should be awarded fees and costs based on "equity" and regardless of whether she prevails in this appeal. The "equity" urged by her counsel appears to be that Laura has a chronic health condition and lacks financial resources,

thus she deserves some of Stuart's money. The fact remains that Stuart, with testamentary capacity and of his own free will, made a choice as to whom he would leave his estate. There is no basis to ignore Stuart's testamentary intent, and there is no basis to further penalize his widow, Denise, by ordering her to pay any fees and costs incurred by Laura.

B. CONCLUSION

A de novo review of the record below establishes that there are no disputed issues of material fact in this case and that Denise Rippee is entitled to summary judgment as a matter of law. The trial court did not abuse its discretion in granting the motion to amend and denying the motion for reconsideration.

Stuart Rippee had testamentary capacity and was entitled to leave his estate to whomever he saw fit. Stuart's estate plan was a product of his own free will and was not the product of undue influence. Based on Laura Burwash's prior exploitation of Stuart's generosity, her personal and financial irresponsibility, and her neglect of Stuart for most -- if not all -- of her adult life, Stuart chose to leave all of his estate to his loyal wife Denise. Moreover, the law does not require Stuart to have given reasons to disinherit his daughter and her minor sons, nor does the law allow the court to re-write Stuart's estate plan because his daughter has financial

need and a chronic health condition. A court may only disturb an estate plan if it was executed when the testator lacked testamentary capacity or the estate plan was the product of undue influence. Granting of the summary judgment was proper because there are no disputed issues of material fact bearing on testamentary capacity or undue influence. Further, Laura was not prejudiced by the granting of the motion to amend and has failed to meet her burden of establishing that the trial court's granting of the motion was a manifest abuse of discretion. Finally, the trial court acted within its sound discretion in denying the motion to reconsider when it was based on the declaration of a witness that Laura disclosed almost four months past the deadline for disclosure of witnesses and whose testimony was available to Laura and within her control throughout this lawsuit.

Respondent Denise Rippee asks this court to affirm the rulings of the trial court in this case.

DATED this 10th day of October, 2013.

RESPECTFULLY submitted,

By: 
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