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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2704-21**

**TIMOTHY J. ROBBINS and  
KIMBERLY J. WILLIAMS,**

**Plaintiffs-Appellants,**

**v.**

**GINGER L. JONES,  
JENNA JONES, and  
DOROTHY D. ROBBINS,**

**Defendants-Respondents.**

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Argued September 13, 2023 – Decided September 22, 2023

Before Judges Currier, Firko, and Susswein.

On appeal from the Superior Court of New Jersey,  
Chancery Division, Salem County, Docket No.  
C-000003-21.

Daniel L. Mellor argued the cause for appellants  
(Kulzer & DiPadova, PA, attorneys; Daniel L. Mellor,  
on the briefs).

Thomas M. North argued the cause for respondent  
Dorothy D. Robbins.

Dante B. Parenti argued the cause for respondents Ginger L. Jones and Jenna Jones (Lauletta Birnbaum, LLC, attorneys; Dante B. Parenti and Michael C. Donio, on the brief).

PER CURIAM

This appeal arises out of a family dispute concerning the inter vivos transfer of a farm and farmland property. Plaintiffs Timothy J. Robbins and Kimberly J. Williams, two of defendant Dorothy D. Robbins's three children, appeal from the April 14, 2022 Chancery Division order denying their motion for reconsideration of the March 4, 2022 order granting summary judgment to defendants Ginger J. Jones, Dorothy's daughter, Jenna Jones, Dorothy's granddaughter, and Dorothy.<sup>1</sup> Because we conclude there are genuine issues of material fact that precluded judgment as a matter of law under Rule 4:46-2(c), and discovery is incomplete, we reverse and remand.

I.

Viewed in the light most favorable to plaintiffs, Templo Fuente De Vida Corporation v. National Union Fire Insurance Company of Pittsburgh, 224 N.J. 189, 199 (2016), the pertinent facts are as follows. Dorothy, a widow, was the owner a farmhouse and the surrounding seventy-three acres, where she has

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<sup>1</sup> For ease of reference, we refer to the parties by their first names. In doing so, we intend no disrespect.

resided since 1957. She also owns another farm in the same town. Dorothy has three adult children: Timothy, Kimberly, and Ginger. Ginger and her family live near Dorothy's farm, and Ginger's family farms the property next to the farmhouse. Ginger's son, Cody Jones, helps run their family's farm and wants to continue farming the land. According to Dorothy, she and her late husband, John D. Robbins, had always planned to gift the farmhouse to Ginger and transfer the farmland to her for a reduced price. Timothy lives in Pennsylvania, and Kimberly does not farm.

In 2014, Dorothy met with her longtime attorney, Katie Coleman, to prepare her last will and testament. Dorothy provided Coleman with notes on how she intended her estate to be divided. Dorothy's notes reflect that she wanted the farmhouse to go to Ginger and for Ginger to have the first option to purchase the farmland. Accordingly, Dorothy's 2014 will left the farmhouse to Ginger and gave Ginger the first option to purchase the property for \$4,000 an acre.

In February 2019, then eighty-two-year-old Dorothy suffered a debilitating stroke, resulting in a two-month hospitalization. Dorothy had always expressed to her children that she wanted to live in her home for as long as possible. After her stroke, Ginger and Jenna provided round-the-clock care

for Dorothy in her home. Plaintiffs claim Dorothy paid Ginger and Jenna, who is a nurse, \$1,000 per week for their services.

After her stroke, Dorothy contacted Coleman and indicated she did not want to wait until her passing to give Ginger the farmhouse and the farmland. Dorothy also wanted to convey the farmhouse and farmland to Ginger to avoid a potential Medicaid lien in the event Dorothy's condition deteriorated to the point she needed outside nursing care. On August 8, 2019, Coleman prepared deeds to the farmhouse and seventy-three acres of adjoining farmland. Dorothy deeded the farmhouse to Ginger for \$1.00 while reserving a life estate in the property. That day, Dorothy also deeded the farmland to Ginger for \$75,000—approximately \$1,000 per acre. After executing her 2014 will, Dorothy contends the farm underwent farmland preservation in Salem County, which reduced its value. The purchase price of the farmland was secured by a promissory note and mortgage in the amount of \$75,000 payable to Dorothy's estate within three months of her demise.

When Timothy and Kimberly learned about the transfer of property to Ginger, they confronted Dorothy. Plaintiffs contend Dorothy did not comprehend what she had done and wondered if she had made a mistake. Ginger

was present during this conversation and advised her siblings she would not return the properties or pay fair market value for them.

On February 18, 2021, Timothy and Kimberly filed an order to show cause (OTSC) and a three-count verified complaint against Ginger alleging the deeds were procured by undue influence, Ginger "dominates" Dorothy, and the properties should be returned to Dorothy because Dorothy intended the properties to be transferred in equal shares to her three children. Plaintiffs sought to revoke the deed (count one); to be afforded a limited period of discovery (count two); and to appoint a special guardian under N.J.S.A. 3B:12-4<sup>2</sup> "to assist in the accomplishment of any protective management" and to

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<sup>2</sup> N.J.S.A. 3B:12-4 provides:

The court may appoint a special guardian to assist in the accomplishment of any protective arrangement or other transaction authorized under this article who shall have authority conferred by the order and shall serve until discharged by the order after reporting to the court of all matters done pursuant to the order of appointment.

If the court has appointed a special guardian to assist in the accomplishment of a protective arrangement pursuant to this section, the special guardian shall be entitled to receive reasonable fees for [their] services, as well as reimbursement of [their] reasonable expenses, upon application to the court, payable by the

prevent "waste, dissipation, and/or a further misappropriation by Ginger" (count three). The trial court ordered Dorothy be joined as an indispensable party and that plaintiffs to have no contact with Dorothy until further order. Plaintiffs filed their first amended complaint in accordance with the order and in a second amended complaint named Jenna as a defendant. The parties agreed, and the trial court found, there was a confidential relationship<sup>3</sup> between Ginger and Dorothy. Plaintiffs contend that as a result of the confidential relationship, defendants have the burden by clear and convincing evidence to prove the deeds were not the product of undue influence.

After limited paper discovery was exchanged and Dorothy's de bene esse deposition was taken, in light of her age and COVID-19 concerns, Dorothy filed a motion for summary judgment seeking to dismiss the second amended complaint. No other fact or expert depositions had been taken. In support of her summary judgment motion, Dorothy submitted a certification as well as

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estate of the minor, incapacitated person or alleged  
incapacitated person.

<sup>3</sup> As discussed later in our opinion, a confidential relationship arises where a person has confidence in and relies upon another person usually based on family ties, advanced age, or trust, and the party relied upon typically dominates the situation.

certifications from Ginger, Jenna, Coleman, and a report authored by Dr. Barry Rovner, a geriatrician. Dorothy had not previously served the report on plaintiffs.

Dorothy certified that she signed her certification at the kitchen table of the farmhouse she gave to Ginger. Dorothy also certified that Timothy left the farm when he went off to college and currently lived in Pennsylvania; Kimberly lived nearby with her husband, they own their own business, are very busy, and do not farm. Dorothy stated that she and her late husband John "had talked for a long time about leaving the farmhouse and the farm to . . . Ginger, because she and her husband farm, and our grandson Cody wants to farm as well." Dorothy certified the rest of her estate was to be divided evenly between her three children.

Because of her stroke, Dorothy certified she has limited use of her left arm and a reduced field of vision in her left eye, but she can see and understands what is going on. Dorothy certified that Ginger and Jenna take turns caring for her at her farmhouse, where she wishes to stay, and her son-in-law Bill (Ginger's husband) and Cody run the farm. In order to avoid Timothy and Kimberly feeling "slighted," Dorothy certified she had a promissory note and mortgage prepared along with the 2019 deed, which requires Ginger to pay \$75,000 to

Dorothy's estate within three months of her demise. Dorothy stated she looks at her bills and approves them before Ginger writes the checks for her. Dorothy denied the allegations made by Timothy and Kimberly that Ginger has "isolated" her from them and their families, and Ginger has taken her to family events outside the home.

Dorothy certified that she made her decision—the gift of the farmhouse to Ginger and the sale of the farmland at a reduced price—as her "free and voluntary decision." Dorothy certified that "[n]o one influenced [her] or pressured [her]," she does not need a guardian, and she wants the second amended complaint dismissed. At her de bene esse deposition, Dorothy testified no one, including Ginger, pressured her to deed the farm to Ginger, and that she paid Ginger and Jenna a "minimal" sum to care for her and wanted the lawsuit dismissed.

Ginger and Jenna submitted a joint certification in support of their motion for summary judgment. Ginger and Jenna certified the two of them provide "round-the-clock" care to Dorothy since she returned from the hospital following her stroke, "devoting 168 hours per week" caring for her at her home—two days per week by Ginger and five days per week by Jenna. In February 2021, the time was reduced to 144 hours per week because of Jenna's



employment as a registered nurse. Carol Robinson, a non-family member, has covered the additional time.

Coleman certified that her law practice focuses on estate planning and administration. Coleman certified that she has been representing Dorothy since 2014 when Dorothy retained her services to prepare a last will and testament. Coleman attached a copy of the handwritten notes Dorothy provided her addressing how to divide her estate. According to Coleman, the notes expressed Dorothy's desire to devise her home to Ginger and for Ginger to have the first option to purchase the farmland.

Coleman certified that Dorothy executed the 2014 will in her office, but she had no specific recollection of meeting with her before she signed her will, although it was Coleman's custom and practice to meet with clients before a will is signed to ensure it reflects their wishes. Coleman certified that in 2019 Dorothy contacted her again to prepare paperwork to have the farm conveyed to Ginger. After discussing the matter with Dorothy, Coleman confirmed Dorothy decided to convey the farm and the farmland property to Ginger as part of a plan to protect her assets from a potential Medicaid lien should she require nursing care she was unable to afford. Coleman certified that Dorothy's stroke

"weakened" her, but she "was still competent and fully understood the implications of the deed," which she signed.

In support of their motion, defendants submitted a report prepared by Dr. Rovner, who was retained by counsel to opine as to Dorothy's mental capacity to understand the effect of the farmhouse and farm deeds she signed on August 8, 2019. Due to her hemorrhagic stroke in February 2019, Dr. Rovner stated Dorothy suffered "motor, sensory, and cognitive deficits." Dr. Rovner examined Dorothy and noted she reported memory problems to her physician in 2012, and had normal range scores on the Mini-Mental State Examination (MMSE)<sup>4</sup> through May 2017. In September 2018, Dr. Rovner noted that Dorothy had a "notable decline in memory" and her MMSE score. In November 2018, she was diagnosed with dementia.

Following her stroke, Dr. Rovner noted the records showed Dorothy had "impaired delayed recall." In December 2020, Dr. Rovner reported that

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<sup>4</sup> The MMSE is a thirty-point questionnaire that is used in clinical and research settings to measure cognitive impairment, often to screen for dementia. It is also used to evaluate the severity and progression of cognitive impairment and to follow an individual's cognitive changes over time. Ingrid Arevalo-Rodriguez et al., Mini-Mental State Examination (MMSE) for the Early Detection of Dementia in People with Mild Cognitive Impairment (MCI), 2021 Cochrane Database Systematic Revs. CD010783.

Dorothy's primary care physician opined she "is able to make financial and medical decisions," and in June 2021, her neurological and cognitive examinations were "unchanged." Dr. Rovner noted Dorothy was attentive and cooperative during his examination, understood her assets included her home, savings, and farmland, and that she always wanted Ginger to have the farm.

In conclusion, Dr. Rovner opined that despite Dorothy's deficits in orientation, memory, and visuospatial perception, she understood the purpose of her visit, her frailty, expressed her thoughts "cogently," demonstrated "intact judgment," and "good judgment." Within a degree of medical certainty, Dr. Rovner concluded that Dorothy possessed the mental capacity to understand the effect of giving her farmhouse and selling her farmland to Ginger.

In their response to defendants' statement of material facts, plaintiffs asserted that Dorothy could not recall what the fair market value of the farmhouse and farmland were at the time she executed her 2014 will and 2019 deeds. Plaintiffs contended under the 2014 will, Ginger was required to pay \$4,000 per acre for the farmland. Two years later, Dorothy purchased a fifty-percent interest in the farmland from Darlene and Bassett Robbins, Jr., her in-laws, for \$4,496 per acre, however, the 2019 deed transferred the farmland to Ginger for less than \$1,000 per acre. Plaintiffs asserted Ginger is only paying

\$50,000 not \$75,000, because the promissory note is payable to Dorothy's estate, of which Ginger is a one-third beneficiary.

Plaintiffs contended the value of the farmland in 2016 was "\$344,477, which equates to a buyout price of \$4,496.60 per acre," while the 2019 deed transferred the farmland to Ginger for "less than \$685 per acre." Plaintiffs posited that Dorothy's annual pension and Social Security income alone "is more than double the eligibility amount for New Jersey Medicaid." Coleman produced her file pursuant to a subpoena, and plaintiffs contend there was no reference to Medicaid, and no record of Dorothy's assets or income in the records.

Plaintiffs also stated that Dorothy testified at her deposition that she thought she was paying Ginger and Jenna \$30 per week, when in fact, the payments are \$1,000 per week. Plaintiffs claimed they are not seeking to have Dorothy deemed incapacitated or have a permanent guardian appointed for her person or property; they only seek a "special guardian" appointed to preserve the status quo pending the outcome of this matter.

In his certification in opposition to defendants' motion for summary judgment, Timothy certified Dorothy and his deceased father John, told Timothy and his siblings that the parents' estates would be divided equally among the

three children; Timothy would serve as executor; and the farm was "sacred" and was to be "preserved in the family for future generations." In 2012 when John died, Timothy certified Ginger "insinuated herself" into being Dorothy's primary caretaker, which the family "acceded to," but Ginger "abused that trust." Timothy certified that Ginger and later Jenna isolated Dorothy from him, Kimberly, and their families and that Ginger insists on being present when he or Kimberly speak to Dorothy. Timothy certified that Ginger "writes out the checks to pay all [of] Dorothy's bills." Timothy stated as Dorothy has gotten older, "she has grown more confused and increasingly unable to manage her finances."

According to Timothy, Ginger does not bring Dorothy to visit him or Kimberly or their families, and asks friends to watch Dorothy if Ginger and Jenna are unavailable instead of Timothy, Kimberly, or other family members. Timothy certified that Ginger removed all family pictures from Dorothy's residence except for wedding pictures and pictures of Ginger and her family. Timothy certified the fair market value of the farm "is at least \$5,000[] per acre, or \$365,000 in total."

Timothy noted that during her de bene esse deposition, Dorothy stated she drives "almost every day," but she has not driven since she had the stroke,

approximately two years before the deposition. Timothy also certified that Dorothy testified that she deposits her pension check at Woodstown National Bank every month, but the bank closed in 2003. According to Timothy, since the stroke, Dorothy requires assistance with dressing, bathing, and using the commode. Timothy stated Ginger and Jenna take Dorothy to all of her medical appointments. Timothy certified "Dorothy consistently looks to Ginger for approval when speaking." Timothy also certified that Ginger refuses to allow church members to visit Dorothy and thwarted efforts made by plaintiffs to see Dorothy on her birthday and other special occasions, such as baby showers, by "intercepting" invitations or "pressuring" Dorothy not to respond.

B. Bassett Robbins, Jr., Dorothy's brother-in-law, submitted an affidavit in opposition to defendants' motion for summary judgment. Bassett and his late brother John worked the farm for over five decades and decided to register the farm in farmland preservation. Bassett attested to the fact that the Township had many meetings over the preservation process, and Ginger began "showing up unannounced." Bassett also claimed Ginger identified the fifteen acres to be designated for future farm buildings, which he thought was "unfair." According to Bassett, Ginger got the farmhouse, farm buildings, and all the land, which is not what John would have wanted.

Kari Foote, Dorothy's granddaughter, submitted an affidavit in opposition to defendants' motion for summary judgment. Kari stated Ginger and Jenna isolate Dorothy from her and the rest of the family. Kari claims Ginger and Jenna do not allow other family members to attend Dorothy's medical appointments or be alone with her. According to Kari, Dorothy's "mental condition is poor," she "repeats herself frequently, gets confused easily," and forgets things. Kari stated Ginger and Jenna have "manipulated" Dorothy and "profited immensely" at her and the family's expense.

Brittany Lacy, another of Dorothy's granddaughters, also submitted an affidavit in opposition to defendants' motion. Brittany stated she stayed with Dorothy a couple evenings each week in 2018 when she was a graduate student. Brittany stated she observed Dorothy was "losing her memory, her ability to make decisions independently, and her ability to take care of herself."

Marsha Simpkins, Dorothy's niece, also submitted an affidavit in opposition to defendants' motion. Marsha stated after John's death, Dorothy named all three children, in their presence, joint powers of attorneys and executors, and Marsha claimed it was "understood" that Dorothy's three children would also be equal beneficiaries of her estate. Marsha learned Dorothy's will was changed in 2014 without Timothy and Kimberly's knowledge, that Dorothy

changed her power-of-attorney to Ginger alone, and the 2014 will gave Ginger the farmhouse and the right-of-first refusal to buy the farm after Dorothy's death. Marsha claimed Dorothy's memory problems escalated and she became "more vulnerable and dependent on Ginger."

According to Marsha, Timothy and Kimberly offered to assist Dorothy but were excluded from her caregiving plan and healthcare decisions. Marsha stated Timothy and Kimberly are "forbidden" from seeing their mother, reportedly at "her request."

Plaintiffs also submitted copies of Dorothy's voluminous medical records, her de bene esse deposition transcript, records from a joint bank account held by Dorothy and Ginger, text messages, and emails in opposition to defendants' motion. Plaintiffs argued there were numerous disputed facts including Dorothy's mental capacity, whether there was undue influence exerted by Ginger over Dorothy, the value of the farmland, and whether the 2019 deeds were executed for Medicaid planning purposes. Since the credibility of the parties and fact witnesses is at issue, defendants were not entitled to summary judgment. Plaintiffs also requested the trial court permit them to depose Dr. Rovner, procure a rebuttal medical expert, and conduct additional discovery before the court decided defendants' summary judgment motion.



Following oral argument on March 4, 2022, the trial court granted defendants' motion for summary judgment and dismissed plaintiffs' second amended complaint with prejudice. In its oral opinion, the trial court recounted the procedural history and facts pertinent to the motion. The trial court found there were no genuine issues of material fact and concluded there was no evidence to suggest Dorothy lacked the capacity to make decisions about "herself, her finances, or her real estate." While acknowledging the close relationship between Dorothy and Ginger, the trial court determined there was no undue influence asserted on Dorothy. The trial court solely relied upon Coleman's and Dr. Rovner's certifications to conclude "there is a single and unavoidable resolution" to grant defendants' motion. A memorializing order was entered.

Plaintiffs moved for reconsideration requesting the trial court reconsider its grant of summary judgment to defendants. Plaintiffs also requested an opportunity to complete discovery, depose defendants' fact witnesses, and serve a rebuttal medical expert report. On April 14, 2022, the trial court denied plaintiffs' motion for reconsideration. This appeal followed.

The following issues are presented:

(1) the trial court erred by granting summary judgment where Dorothy's mental state was the central issue in the matter;

(2) the trial court erred by granting summary judgment where defendant introduced expert testimony in her defense;

(3) the trial court erred in granting summary judgment where discovery was far from completed;

(4) the trial court erred by granting summary judgment despite credibility issues being presented and further erred by resolving such factual issues in defendants' favor;

(5) the trial court erred in granting summary judgment where plaintiffs' case relied on establishing the knowledge and state of mind of defendants;

(6) the trial court erred in granting summary judgment where it was undisputed the making of the 2014 will and the 2019 deeds was hidden from plaintiffs;

(7) the trial court erred in granting summary judgment despite the existence of numerous genuine issues of material fact;

(8) the certification submitted by the parties in support of and in opposition to the motion for summary judgment demonstrated numerous issues of material fact;

(9) Dorothy's medical history established numerous issues of material fact;

(10) Dorothy's deposition testimony revealed numerous issues of material fact;

(11) the trial court abused its discretion in failing to reconsider its decision to deny plaintiffs' request for Dorothy's in-person testimony and instead relying on her videotaped de bene esse deposition; and

(12) the trial court abused its discretion in failing to reconsider its decision to rely on Dr. Rovner's medical report after realizing his evaluation was not ordered by the trial court, but rather Dr. Rovner was a paid expert retained by defendants.

## II.

We review a trial court's grant of summary judgment de novo, "applying the same standard as the trial court." State v. Anderson, 248 N.J. 53, 67 (2021) (quoting Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019)).

As noted by our Supreme Court

By that standard, summary judgment should be granted "when 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'"

[Woytas, 237 N.J. at 511 (quoting Brill, 142 N.J. at 528-29).]

"An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would

require submission of the issue to the trier of fact.'" Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

We review an order denying reconsideration for abuse of discretion. Reconsideration "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion." Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010). Rather, "[r]econsideration should be utilized only for those cases which fall into that narrow corridor in which either (1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Reconsideration is only to point out "the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." Palombi, 414 N.J. Super. at 288.

Accordingly, we will not disturb a trial judge's denial of a motion for reconsideration absent "a clear abuse of discretion." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). Such circumstances arise "when a decision is 'made without a rational explanation,

inexplicably departed from established policies, or rested on an impermissible basis.'" Id. at 382.

Based upon our review of the record, we conclude the trial court erred in granting defendants summary relief without first allowing full discovery as requested by plaintiffs because there are genuine issues of material fact concerning Dorothy's capacity to create a will and Ginger's and Jenna's involvement with Dorothy's decision to convey the farmhouse to Ginger and giving her a right of first refusal for the farmland. We also conclude the trial court erred in denying plaintiffs' motion for reconsideration because factual and expert discovery is incomplete, and plaintiffs were prejudiced by not having an opportunity to retain and serve a rebuttal medical expert report.

A.

Pretrial discovery should be liberally allowed. "Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts." Jenkins v. Rainer, 69 N.J. 50, 56 (1976). Discovery is permissible "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." R. 4:10-2(a). Though not defined in the discovery rules, "relevant evidence" is defined in our evidence rules as

"evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. See Camden Cnty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Env't Prot., 320 N.J. Super. 59, 64 (App. Div. 1999) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory."). Plaintiffs contend these principles were not adhered to in the trial court's summary disposition of this dispute. We agree.

#### B.

In granting summary relief without completed discovery, the trial court made credibility determinations based solely on Dorothy's certification, her *de bene esse* deposition testimony, Ginger's, Jenna's, and Coleman's certifications, and the report of Dr. Rovner. However, the certifications submitted by plaintiffs disputed the statements of defendants' certifications, raising issues of fact. For instance, plaintiffs' certifications stated Dorothy denied during a visit in December 2020, that it was her intention to transfer the residence and farm entirely to Ginger. Instead, she said she wanted all three of her children to share her estate equally, stating, "What did I do wrong?" This is in direct contrast to defendants' supporting certifications.

Plaintiffs also point out that after the 2019 deeds were executed, Dorothy testified at her deposition that, "As far as I can remember, I believe that the farmland and the farm [are] in my name, not anybody else's." Dorothy's testimony was also mistaken as to other aspects of her life including her statement about driving, payments made to Ginger and Jenna for her care, and the amount of her pension. At her de bene esse deposition, Dorothy testified she would like Timothy and Kimberly to call and visit her and wanted the no contact order vacated. In addition, plaintiffs were entitled to depose Dr. Rovner's regarding his testing, conclusions, and opinions.

The certifications submitted by defendants along with Dr. Rovner's report do not contain clear and convincing evidence from which the trial court could conclude on summary disposition that Dorothy had the mental capacity to execute a will in 2014 and deeds in 2019. We recognize as a general principle, "a very low degree of mental capacity" is required to execute a deed. In re Will of Liebl, 260 N.J. Super. 519, 523 (App. Div. 1992). But based upon our review of the record, summary judgment was prematurely decided.

To determine whether an individual has capacity, courts must consider if he or she is able to "comprehend the property [he or she is] about to dispose of; the natural objects of [his or her] bounty; the meaning of the business in which

[he or she was] engaged; the relation of each of these factors to the others, and the distribution that is made by the will." In re Livingston's Will, 5 N.J. 65, 73 (1950). Capacity is tested at the time of execution of the deed. Id. at 76. "[T]he burden of establishing a lack of [] capacity is upon the one who challenges its existence . . . [and] must be [proven] by clear and convincing evidence." In re Estate of Hoover, 21 N.J. Super. 323, 325 (App. Div. 1952).

"[U]ndue influence is a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets, generally by means of a will or inter vivos transfer." In re Estate of Folcher, 224 N.J. 496, 512 (2016) (alteration in original) (quoting In re Estate of Stockdale, 196 N.J. 275, 302-03 (2008)). It represents conduct that causes a person to accept another's domination or influence, rather than follow his or her own wishes. Stockdale, 196 N.J. at 303.

The party contesting the deed has the burden of establishing undue influence. Folcher, 224 N.J. at 512. If the deed benefits someone who stood in a confidential relationship to the testator and if there are additional suspicious circumstances, a different presumption arises—that the proponent of the deed



exerted undue influence. Ibid. The factors considered in determining whether a confidential relationship exists include:

whether trust and confidence between the parties actually exist, whether they are dealing on terms of equality, whether one side has superior knowledge of the details and effect of a proposed transaction based on a fiduciary relationship, whether one side has exerted over-mastering influence over the other or whether one side is weak or dependent.

[Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 402 (App. Div. 2007).]

Here, the trial court should have afforded plaintiffs the opportunity to conduct discovery, including the depositions of fact witnesses, the deposition of Dr. Rovner, and to have Dorothy independently examined by a medical expert of their own choosing.

Based upon our de novo review, we conclude the trial court erred in granting defendants' motion for summary judgment because it was premature to do so in the face of incomplete discovery. The trial court also mistakenly exercised its discretion in denying plaintiffs' motion for reconsideration and request for additional discovery and leave to serve a rebuttal expert report, warranting reversal and remand.

In sum, we reverse the trial court's order granting defendants summary judgment dismissing the second amended complaint, and we reverse the order

denying plaintiffs' motion for reconsideration. The trial court shall conduct a case management conference within thirty days and set forth deadlines for completion of factual and expert discovery, including expert reports and depositions. We offer no dispositive determination on the factual and legal issues that may be presented as the matter proceeds on remand.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION