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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price
Circuit Court Judge

Appellate Case No. 2022-000592

Pamela Holliday Wallin; Mark Bennett Holliday; Kingsley K. Holliday; Sara Jane Holliday; and John C. Holliday……Appellants,

v.

Ross Samuel Holliday as Personal Representative of the Estate of Warren; Phillip Holliday; Ross Samuel Holliday, individually; Warren Lea Holliday, individually; 2233 Highway 17 North, LLC; 2237 Highway 17 North, LLC; 2805 Highway 17 North, LLC; 1606 Meeting Street, LLC; Bacons Bridge Road, LLC; 4687 Franchise Street, LLC; Zeezrom Properties, LLC; John Doe Leased Vehicle; 1905 North Main Street, Summerville, LLC; 815 Folly Road, LLC; 832 Coleman Blvd., LLC; 2189 Discher Avenue, LLC; New Space Science, LLC; Pirates Plunder, LLC; Sawgrass Technologies, Inc.; Holliday Amusement Company, Inc.; and The Revocable Trust Agreement between Warren P. Holliday as Settlor and as Trustee……..……..……..Respondents.

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STATEMENT OF THE ISSUES

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II. **Did the circuit court err in concluding Appellants' claims are time barred where this conclusion is contrary to the plain language of S.C. Code Ann. § 62-7-604 and where neither the order nor the record supports the application of laches?**

III. **Did the circuit court err in finding South Carolina does not recognize a claim for intentional interference with inheritance and that it lacked jurisdiction over this claim?**

IV. **Did the circuit court err in granting summary judgment as to Appellants' remaining claims because this finding was premised on its mistaken finding that the Trust was revoked and, further, by finding Appellants failed to introduce evidence to support their remaining claims even though the circuit court only permitted discovery on the issues of capacity and undue influence?**

STATEMENT OF THE CASE AND FACTS

Warren P. Holliday ("Warren") and his former wife, Patricia, had four children: Pamela, Mark, Ross, and Lea. The couple amassed significant wealth, with much of it in the form of real estate holdings. (12/11/2020 Memo in Opp., Ex. 1) (Nettles Dep., p. 146). In 2002, attorney F. Truett Nettles, II ("Nettles"), helped Warren and Patricia draft a simple will dividing Warren's estate equally among his children. (Nettles Dep., p. 13-14). However, by 2008 Warren's health was declining, and Nettles referred Warren to Attorney Heyward Carter for a more sophisticated estate plan. (Nettles Dep., p. 7-8). With Mr. Carter's help, Warren established a two-pronged estate plan. First, by creating The Warren P. Holliday Revocable Trust (the "Trust"), Warren was able to ensure certain assets would pass outside of probate (*i.e.,* the Trust created a "non-probate" estate). Second, Warren and Patricia executed a new will to address the distribution of their probate estate (*i.e.,* the property and assets not held by the Trust). (Carter Dep., Ex. 2-3).

Honoring the first prong of this estate plan, Warren transferred certain real estate and business holdings to the Trust. (11/12/2021 Memo in Opp., Ex. 41-42.). Warren's revocable Trust would become irrevocable at his death, allowing the corpus to be distributed outside of probate and taking advantage of certain beneficial tax treatments. As a generation skipping trust, the Trust also allowed for Warren to provide for generations, which was important to him. (2008 Trust, Hale Depo. p. 32, Brouthers Dep. 105, 148-49). Important to this action, Warren's four children were equal beneficiaries of the Trust. (2008 Trust). As of 2015, the year before Warren died, the Trust's holdings were estimated to be worth $20,000,000.00 by Warren's counsel. (12/11/2020 Memo in Opp., Ex. 1). This Trust and its *non-probate assets* lie at the heart of this appeal.

For the second prong of Warren's estate plan, Mr. Carter crafted a new will for Warren and Patricia for the distribution of the assets owned by them individually—*i.e.*, the property and assets not transferred to the Trust. (Carter Dep. p. 14-15, Ex. 2). This will devised the probate estate evenly among their children. This appeal does *not* concern Warren's *probate estate*.

After creating this two-pronged estate plan, Warren's health continued to decline. In 2009, Warren suffered from end-stage kidney disease, and in early 2010 he underwent a failed kidney transplant. (12/11/2020 Memo in Opp., Ex. 2-5, 9)). Warren had comprehension difficulties as well as problems balancing, which caused frequent falls. (*Id*. Ex. 9). In August 2010, Warren self-reported difficulty concentrating and comprehending what he read. (*Id*. Ex. 6; 11/12/2021 Memo. in Opp., Ex. 1). An MRI revealed he had "chronic ischemic disease of the brain[,]"—a physical finding of dementia. (12/11/2020 Memo in Opp., Ex. 9, 10). Later that year, Warren spent four months hospitalized in Utah after visiting his children and grandchildren. Upon his release to travel home to South Carolina, Warren thought he was going to a NASCAR race. (Aff. Mark Holliday). Once home, Warren's medical records show his dementia and confusion continued to progress,

including one event where he was observed to be "demented and wandering around, with feces on him." (11/12/2021 Memo in Opp., Ex. 5, 11).

Warren's son, Ross knew of Warren's deteriorating mental faculties. In 2013, Ross testified that "as part of his older age and being in poor, poor health" Warren's business had been slipping. (11/12/2021 Memo in Opp., Ex. 7). Bolstering this statement, witness Derek Arsenault testified that Ross told him that Warren "didn't have a sound mind" and "didn't have the mental capacity" to accept lease terms that were negotiated with Warren in 2010 involving one of the Trust properties. (11/12/2021 Memo in Opp., Ex. 46). Ross had power of attorney over both Warren and the businesses forming the corpus of the Trust, and as Warren declined Ross began exercising more and more control, pushing his father out in the process. (R. Holliday Dep., v2 II, pp. 8-9) (Brouthers Dep., pp. 114-15). Ross's aunt, Martha Brouthers,[1] kept the books for the Trust's various businesses, and she testified that Ross began, "trying to take more and more control over who had what." (Brouthers Dep., p. 123). According to Martha, Ross needed to be "reign[ed] in" because he was taking money from the businesses. (*Id*., pp. 91-92). Ultimately, Martha stopped keeping the books in June of 2015, by which time Ross had personally withdrawn more than $4,000,000.00 from the businesses.[2] (*Id*. pp. 79-80).

[1] Martha is Patricia's sister and Warren's sister-in-law. She maintained a close relationship with Warren while working in the family business. (Brouthers Dep., pp. 17-19).

[2] Martha said Ross' withdrawals made managing the finances difficult. (Brouthers Dep., pp 81-82). Ross justified them as compensation for his efforts managing the properties owned by the Trust. (Mark Holliday Affidavit; R. Holliday Dep., v1, pp. 48-52). The form of the compensation varied, but "payments" took the form of unreimbursed loans, cash for Ross and his wife, and car payments. (Mark Holliday Affidavit; R. Holliday Dep., v1, Ex. B). During this time (amidst the real estate crash), Ross also built an 8,000 square foot house in Utah and began acquiring several vehicles. (R. Holliday Dep., v1, pp. 64-70).

With Ross exercising control over the businesses, Warren was kept in the dark.[3] (R. Holliday Dep., v2, p. 17; Brouthers Dep., pp. 114-115; Nettles Dep. Ex. 21); (11/21/2021 Memo. in Opp., Ex. 21). Martha explained that Ross abused this power and began to treat his father differently, because, "he did not want [Warren] to know what was going on." (Brouthers Dep. pp. 114-115; 157).

Despite the millions that Martha testified Ross received from the businesses, testimony shows Ross also resented that he managed the Trust's business assets considering the Trust provided that his siblings would ultimately share equally in the Trust upon Warren's death.[4] (Brouthers Dep., p. 142-144, 146; R. Holliday Dep., v2, pp. 24-25). Martha testified that Ross wanted Warren to change his estate plan because the Trust was shared equally with his siblings. She recalled an incident when, "Ross banged his hand on the conference table . . . [and] was adamant that he was the power-of-attorney and he was not going to come down [to Charleston] and run this business and make his siblings rich." Martha reported that Ross said "he wasn't going to share anything with his siblings." (Brouthers Dep., pp. 112-113, 142-143).

Sadly, Warren's failing physical and mental health were not his only difficulties. In 2013, Warren and Patricia divorced.[5] Nettles represented Warren in the divorce but admitted that 95%

[3] In 2015, Nettles informed a family court judge that Warren did not personally run the family business or make business decisions, "And given his age and condition he probably doesn't know the answers to any questions so we're in a hard spot here." (11/12/2021 Memo in Opp. Ex. 21). According to longtime employee Paul Herman, Ross had taken control over the businesses by around 2014. (11/12/2021 Memo in Opp., Ex 23).

[4] Warren never treated his children differently, and this approach never changed for as long as Martha knew him. (Brouthers Dep., pp. 29-30). Warren told her he wanted his kids to share and share alike. (*Id*., p. 165).

[5] Martha testified that Ross influenced his parents' divorce. (Brouthers Dep., pp. 124, 132-133).

of his communications were with Ross—*not Warren*. (R. Holliday Dep., p. 15-16; Nettles Dep., pp. 16-17). Nettles "assumed" Ross shared their discussions with Warren, but Ross admitted he did not always inform Warren of his discussions with Nettles. (Nettles Dep., p. 16; R. Holliday Dep., v2, p. 13). Thus, Ross controlled the flow of information between Warren and Nettles—a practice that continued in later years and plays an important part in this case.

After the divorce, Warren executed a new will (the "2014 Will"), which Nettles prepared. (12/11/2020 Memo in Opp., Ex. 34). The 2014 Will removed Patricia[6] and adjusted the distribution of his probate estate to leave a larger percentage to Ross and Lea. (*Id*.). Importantly, no changes whatsoever were made to the Trust, and Warren continued to utilize the Trust after signing the 2014 Will, including listing the Trust as a payable on death beneficiary of his accounts. (11/12/21 Memo in Opp., Ex. 39-40; R. Holliday Dep., v2, pp. 37-40, Ex. G).

In January of 2016, Warren executed a codicil (the "2016 Codicil") to his 2014 Will, also prepared by Nettles. This Codicil provided for bequests of specific dollar amounts to Mark and Pamela from his probate estate, rather than basing those bequests on a percentage as before.[7] (12/11/2020 Memo in Opp., Ex. 35). However, as before, the 2016 Codicil did not affect Warren's *non-probate estate*, as it made no changes to the Trust or the assets it held. Once again, Warren continued to utilize the Trust accounts after the 2016 Codicil was executed. (11/12/21 Memo in Opp., Ex. 39).

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[6] The Will was amended, but it was unnecessary to amend the Trust to remove Patricia. The divorce treated her as predeceasing Warren as a matter of law. *See* S.C. Code Ann. § 62-7-607.

[7] Ross was involved in Nettles' preparation of the 2016 Codicil, altering Mark and Pamela's bequests. Nettles' correspondence *identifies* Ross as the "client" not Warren. (Ross Dep, V2, pp. 10-12). The 2016 Codicil was sent to Warren only after it was first sent to Ross for review. When Nettles sent a draft of the 2016 Codicil *to Ross*, Nettles asked *Ross* if it was what Warren wants. (11/12/2021 Memo in Opp., Ex. 27, 29, 55; Nettles Dep., Ex. 26).

By the summer of 2016, Warren was in grave condition. Medical records from August 2016 report a multitude of serious health conditions in addition to his dementia. (11/12/2021 Memo in Opp., Ex. 8-10). Warren underwent heart surgery in August to address his chronic heart failure, spending a week in the hospital. (*Id*.). Shortly thereafter he was hospitalized again with kidney problems and noted to be in an "**[a]ltered mental status and lethargic.**" (*Id*., Ex. 11).

By this point, Warren's death was imminent. Knowing this, Ross (*not Warren*) directed Nettles to contact Heyward Carter, instructing that, "You need to make sure that you guys – that everything here [with Warren's estate] is in harmony." (R. Holliday Dep. v2, pp. 59-60). Ross wrongfully "assumed" the Trust had already been "taken care of." [8] (*Id*.). Thus, to Ross, putting Warren's estate "in harmony" meant that Nettles should make sure *all* assets passed according to Warren's 2016 Codicil, *including the non-probate assets in Warren's Trust.*[9] (*Id*., pp. 60, 62-64). When asked why Warren was not involved in these discussions, Ross explained, "[M]y dad at this time was actually very sick. I mean, he died less than 30 days later." (*Id*., p. 63).

Mr. Carter testified that Nettles called him in August of 2016 to request a copy of Warren's Trust. (Carter Dep., pp. 41-42). According to Nettles, he first learned of the Trust from Mr. Carter, who told him it was in place. Whatever is the case, Nettles hatched a plan to revoke the Trust and recommended this plan *to Ross*, but Nettles *did not* inform Warren of the plan. Ross, who stood to gain millions if the Trust was revoked, "agreed" with the revocation plan. (R. Holliday Dep., v2,

[8] Of course, what *Ross thought or assumed* about his father's Trust is irrelevant to Warren's true intent. His assumption is relevant only to show *why Ross* prompted Nettles to ensure the Trust was revoked before Warren died.

[9] Ross knew this would eliminate Appellants' interest in the Trust entirely, and substantially increase the amount Ross and Lea would receive upon Warren's death. (R. Holliday Dep., v2, pp. 72, 85).

pp. 63-64). When Nettles was asked under oath whether it was his idea, or Warren's idea, to revoke the Trust, Nettles admitted, "**It was my idea**." (Nettles Dep., pp. 115, 118) (emphasis added).

Billing records show Nettles began drafting the Revocation on September 6, 2016, while Warren was hospitalized and quite confused. (11/12/2021 Memo. in Opp., Ex. 13-15, 25). Nettles confirmed that he, "discussed the trust revocation with Heyward Carter **as you [*Ross*] requested**." (Nettles Dep., p. 113, Ex. 29) (emphasis added). When Nettles asked for Mr. Carter's input on a draft revocation, Mr. Carter refused to comment believing it to be inappropriate. (Carter Dep., pp. 47, 49).

In support of Respondents' motion(s) for summary judgment, Nettles gave an affidavit representing, "I drafted the Revocation of the 2008 Revocable Trust upon instruction from my client, Warren P. Holliday." (Aff. F. Truett Nettles, II). However, this sworn statement later proved false when Nettles admitted during his deposition that he *never* spoke to Warren about revoking the Trust. Instead, he communicated *only with Ross*—a fact confirmed throughout the record. (Nettles Dep., pp. 111-113, 117-119, 128, Ex. 30; R. Holliday Dep., v2, pp. 58-65; 11/12/2021 Memo in Opp., Ex. 29).[10]

While preparing the draft Revocation, Nettles did nothing to determine what assets or properties were owned by the Trust so that he could advise Warren of the effect of signing the Revocation. (Nettles Dep., pp. 111-113, 117-119, 128-129). When Nettles previously prepared the 2014 Will and 2016 Codicil for Warren's *probate estate*, Nettles allegedly did not even know

[10] Attorney Allen Jeffcoat, III, gave an affidavit in a separate malpractice action against Nettles arising, in part, from Nettles' admission that he was unaware of Warren's Trust when he drafted the 2014 Will and 2016 Codicil, with Ross's participation and direction. Mr. Jeffcoat highlighted that the Trust Revocation was Nettles' idea, not Warren's. He also noted all of Nettles' communications regarding the revocation were with Ross, not Warren, prior to asking Warren to sign it. (11/12/2021 Memo in Opp., Ex. 29).

Warren had a Trust. This means Nettles never once had a discussion with Warren at any point in time about whether Warren wanted his Trust assets to pass through probate, as Respondents now allege should occur but fail to demonstrate. Nettles admitted:

> A: When I wrote the will, **I represented to Warren** that this disposes of all of your properties.
>
> Q: And it did, but for those properties in the trust.
>
> A: Well, **I didn't tell him but for the properties in your trust because I didn't know about a trust**.

(Nettles Dep., p. 117) (emphasis added). Finally, Nettles confirmed Warren **never** expressed the intent to revoke the Trust or to otherwise dispose of its assets through his *probate estate*, admitting:

> A: Well, actually I didn't know when I did the revocation how much, if any, property he had actually put into the trust, I didn't know that. I think he -- I don't know. I just don't recall that.
>
> . . .
>
> A: But I do know that his intent was to leave things according to his will. And if that earlier document still had any legal effect, **then it was my judgment it would be best to specifically revoke that**.
>
> Q: His [Warren's] intent is based on your testimony; correct?
>
> A: No, it's based on his expressions to me.
>
> Q: **He specifically said to you: I want to take all of my properties that are in the trust and put them all in my estate?**
>
> A: **No, he did not mention the trust to me.**

(Nettles Dep., pp. 118-119, and also 111-113, 128).

Once Ross and Nettles were satisfied with the Revocation, Ross arranged to have the document given to Warren on September 15, 2016. Ross flew to Charleston from Utah, speaking to Nettles eight times between September 12 and 15, 2016. (R. Holliday Dep., v2, pp. 65, 68-71; 11/12/2021 Memo in Opp., Ex. 28, 30). Warren was never consulted.

On September 15, 2016, Ross was at Warren's condo with him and called Nettles to come with the Revocation. (R. Holliday Dep., v2, p. 98; Nettles Dep., pp. 158-159). Warren's fulltime caregiver, Tiawanna Williams, who was usually with Warren had been sent on an "outing" before Nettles arrived.[11] (11/12/2021 Memo in Opp., Ex. 33). *This left Ross alone with Warren* in the condo leading up to the moment when he would be asked to revoke the Trust—something that before this day Warren did not know was afoot. (Bosch Dep., pp. 30-31, 64-66). Greg Bosch (Warren's massage therapist), then arrived. (*Id*., 29-31, 64-65). Unprompted, Warren asked Bosch to be a "witness" because he was "changing his **will**," and that he "was rewriting his **will**," and that the document being brought over soon for him to sign was "his **will**." (*Id*., 31-33) (emphasis added). Warren mistakenly commented this was needed because of his divorce and to prevent his ex-wife from sharing in his estate.[12] (Bosch Dep., pp. 35, 38-39) (11/12/2021 Memo in Opp., Ex. 35, ¶10(b)). Of course, the document given to Warren was not his "will," nor was it necessary to prevent his ex-wife from sharing in his estate when he died. Ross, while he was alone with Warren, is the only person who could have framed Warren's misunderstanding of the "will" he was about to be shown, because others had not yet arrived. (R. Holliday Dep., v2, p. 72).

Nettles and his associate, Alecia Bores, arrived with the Revocation (not a new will, as Warren believed) while Bosch was with Warren. (Nettles Dep., p. 161). Nettles showed the document to Warren for the very first time, while Ross, Bores, and Bosch observed. (Nettles Dep., pp. 167-168; Bosch Dep., pp. 47-51). According to Bosch, Nettles "didn't read the whole document to [Warren]." Instead, Nettles directed Warren to certain sections. (Bosch Dep., p. 60-

[11] Bosch testified this was the **first and only time** he had ever seen Warren when Ms. Williams, was not also present. (Bosch Dep., p. 66).

[12] Warren harbored *great* disdain for his ex-wife. (11/12/2021 Memo in Opp., Ex. 34, ⁋ 9).

61). Nettles confirmed this. (Nettles Dep., p. 170). Describing the whole process, Ross said, "I think Truett [Nettles] was pretty hot to trot to get it signed and done." (R. Holliday Dep., v2, p. 98). Nettles told Warren he "should" sign the Trust Revocation, despite admitting Warren never mentioned to him moving the assets of the Trust into his probate estate. Nettles also testified Warren did not "understand the legal import" of the Trust. (Nettles Dep., p. 118-119).

Although September 17th was Warren's 74th birthday, rather than stay, Ross flew back to Utah once the Revocation was signed. Warren died days later on September 28, 2016. Ross, as personal representative of the estate sought to probate Warren's estate, including all those assets that should have been held by the Trust and passed outside of probate.

PROCEDURAL HISTORY

On September 19, 2018, Appellants brought this action in probate court alleging the purported deathbed Trust Revocation was ineffectual. (Complaint). Respondents answered and moved to remove the matter to the circuit court, which the probate court granted. (Motion to Remove; Order, dated 5/10/2019). Once removed, Respondents filed an amended answer and counterclaims, to which Appellants replied. (Amended Answer and Counterclaim). The circuit court, by the Honorable Bentley D. Price, issued an order designating this action complex and assigning it to himself for all further proceedings. (Order, dated 8/17/2020). On June 2, 2020, Respondents moved for summary judgment, later amending this motion on September 1, 2020. On December 10, 2020, Respondents filed yet another motion for summary judgment, withdrawing the prior motions. (Summary Judgment Motions, filed 6/2/2020, 9/1/2020, 12/10/2020). Appellants filed a memorandum in opposition the next day. (12/11/2020 Memo in Opp.; Letter re: Add'l Exhibits; Addendum re: Scrivener's Error). Respondents' motion was heard on December

16, 2020.[13] (12/16/2020 Transcript).[14] At the hearing, Respondents sought additional time to reply to Appellants' memorandum, which the court allowed. (Order, dated 12/22/2020). Respondents filed their reply on December 24, 2020, which contained material not previously offered in support of their motion. Thus, Appellants filed a "sur reply." (Reply; Objections and Sur-Reply).

No further hearing was held, and the motion remained under advisement for some time. Then, on May 7, 2021, Respondents filed *yet another* motion for summary judgment, raising for the first time that Appellants' suit was time-barred by S.C. Code Ann § 62-7-604. (Motion for Summary Judgment re: § 62-7-604). Appellants opposed this new motion, asserting Section 62-7-604 does not control their claims. (12/21/2021 Memo in Opp.). Respondents filed a reply, adding yet another new argument that Appellants' suit was barred by laches. (10/4/2021 Reply). Appellants filed a supplemental Memorandum opposing Respondents' motions for summary judgment on November 12, 2021. (11/12/2021 Memo in Opp.).

Ultimately, the circuit court agreed to hear Respondents' new motion *and* rehear the prior motion in one consolidated hearing held on November 17, 2021. (11/17/2021 Trans.). Thus, by the time these matters were heard (and reheard), Respondents sought summary judgment on the primary bases that: (1) Warren revoked the Trust even before he signed the Trust Revocation; (2) Warren had the requisite testamentary capacity to execute the Trust Revocation on September 15, 2016, and there was no evidence of undue influence; and (3) Appellants' lawsuit was time barred.

On March 3, 2022, the circuit court granted Respondents' motion for summary judgment. (Order, 3/3/2022). As argued below, the court's factual findings are not only insufficient to support

[13] The order on appeal inadvertently states the hearing was held on Sunday, December 20, 2020.

[14] Court Administration informed counsel that the second half of the transcript from this hearing, which covered Appellants' arguments opposing Respondents' motions for summary judgment, could not be located in the court reporter's files and, thus, was not furnished to Appellants.

its ruling, but the court also improperly weighed the facts, substituting its own assessment of the evidence for that of a jury, in violation of the summary judgment standard. Therefore, on March 11, 2022, Appellants filed a motion to reconsider pursuant to Rule 59, SCRCP. (Rule 59 Motion). The circuit court denied this motion order on April 22, 2022, and this appeal timely followed. (Order, 4/22/2022; Notice of Appeal).

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP." *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 203, 743 S.E.2d 850, 852 (Ct. App. 2013). "If a reasonable juror looking at the evidence in the light most favorable to the non-movant could draw more than one inference about a material fact from it, summary judgment must be denied." *Abdelgheny v. Moody*, 432 S.C. 346, 350, 852 S.E.2d 225, 228 (Ct. App. 2020) *citing Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). At summary judgment, the court does not weigh conflicting evidence with respect to a disputed material fact. *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001); *accord Penza*, 404 S.C. at 205, 743 S.E.2d at 853 (finding reversible error where the trial court weighed competing evidence at summary judgment).

As it concerns the claim that Warren lacked testamentary capacity, Appellants need only submit a mere scintilla of evidence to survive summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) ("In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). As to the claim that Warren was subjected to undue influence, Appellants "must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." *Swiger v. Smith*, 426 S.C. 408, 415, 827 S.E.2d

200, 203 (Ct. App. 2019). However, Appellants are entitled to a rebuttable *presumption* of undue influence arising from Ross' power of attorney and confidential relationship. *Howard v. Nasser*, 364 S.C. 279, 288, 613 S.E.2d 64, 68 (Ct. App. 2005).

ARGUMENT AND CITATION OF AUTHORITY

Appellants asserted seven causes of action, including undue influence/lack of capacity, intentional interference with inheritance, breach of fiduciary duty, constructive trust, declaratory judgment, accounting, and the appointment of a receiver. (Complaint). In addition to damages, the core relief Appellants seek is a determination that the Trust was not revoked and remains valid. Thus, Appellants contend the corpus of the Trust remains part of Warren's *non-probate* estate and should be administered in accordance with the Trust.

The circuit court based its grant of summary judgment on three primary conclusions. First, it found Warren effectively revoked the Trust, precluding all claims. Second, the court concluded Appellants' claims are time barred. In addition, as to Appellants' claim for intentional interference with inheritance, the circuit court found that not only did South Carolina not recognize this claim but also that it lacked jurisdiction over the claim. Each of these findings was error because: (1) questions of fact *and* settled law preclude the circuit court from finding that Warren revoked the Trust prior to signing the deathbed Revocation, and additional questions of fact exist as to whether Warren lacked testamentary capacity to execute the deathbed Revocation and whether his signing of this document was the product of undue influence; (2) the limitation period of S.C. Code Ann. § 62-7-604 does not apply to Appellants' claims and there are no findings to support the application of laches; (3) the circuit court was wrong to find South Carolina does not recognize a claim for intentional interference with inheritance and it lacked jurisdiction over the claim; and (4) it was error to grant summary judgment as Appellants' remaining causes of action, finding Warren

revoked the Trust and also for insufficiency of evidence, considering the court limited Appellants' discovery to only the issues of testamentary capacity and undue influence, despite denying them the opportunity to conduct discovery directed to these claims.

I. The circuit court erred in finding there were no genuine issues of material fact as to whether Warren Holliday's Trust was revoked.

The crux of this case is whether the Trust was revoked or remains valid. However, at the summary judgment stage the circuit court does not pass on this ultimate question. Instead, the sole question at this stage is whether the evidence, and inferences, when viewed in the light most favorable to Appellants would permit a jury to find in their favor. *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. Properly viewed, the question is whether the record contains evidence from which a jury *could* determine the Trust was not properly revoked, either from lack of testamentary capacity or because of undue influence. However, rather than reviewing the record for the *existence* of evidence, the circuit court went further to *weigh* the competing evidence. This was error. *See S.C. Prop. & Cas. Guar. Ass'n*, 345 S.C. at 518, 548 S.E.2d at 883 (the court does not weigh the evidence at summary judgment). Having failed to adhere to this well-settled standard, the circuit court invaded the province of the jury. *See Rainey v. S.C. Dep't of Soc. Servs.*, 434 S.C. 342, 355, 863 S.E.2d 470, 477 (Ct. App. 2021) (finding it is for the jury to resolve the issue where multiple inferences may be drawn from the evidence presented at summary judgment). This error is most apparent from the circuit court's exceptionally one-sided recitation of the facts, wherein the court completely ignored a library of conflicting evidence in the record. Simply put, the circuit court cannot resolve factual disputes at summary judgment. Yet that is precisely what it did.

A. The circuit court's finding that the Trust was revoked by Warren's 2013 divorce, the 2014 Will, and/or the 2016 Codicil is contrary to the plain language of S.C. Code Ann. § 62-7-602 and unsupported by the evidence.

Accepting Respondents' argument that Warren revoked his Trust through his 2013 divorce, 2014 Will, and 2016 Codicil, the circuit court cherry-picked a few words from S.C. Code Ann. § 62-7-602 for the alleged proposition that a revocable trust can be revoked "by any mode sufficiently showing an intention to revoke." (Order, 3/3/2022, p. 9). However, this phrase appears nowhere in Section 62-7-602. On this false premise, the circuit court erroneously found that the 2013 divorce, 2014 Will, and the 2016 Codicil revoked the Trust, because they showed "a clear and definite purpose . . . to revoke the Trust." (*Id*., p. 11). This is manifest error as a matter of law and fact. The court overlooked that Section 62-7-602(c) differs from the Uniform Trust Code by "requiring a writing to revoke or amend a trust unless the trust was created orally." *See* S.C. Code Ann. § 62-7-602(c) (Reporter's Comments). This statute provides:

> (c) The settlor may revoke or amend a revocable trust:
>
> . . .
>
> **(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:**
>
> **(A) a later will or codicil that <u>expressly refers to the trust</u>, manifesting clear and convincing evidence of the settlor's intent**; or
> . . .
>
> (C) any other written method, other than a later will or codicil, delivered to the trustee and manifesting clear and convincing evidence of the settlor's intent.

S.C. Ann. § 62-7-602(c) (all emphasis added).

Warren's Trust does not specify a revocation procedure, but the revocation must still be in writing pursuant to this statute.[15] Where the writing relied upon is a later will or codicil, that

[15] Prior to the enactment of Section 62-7-602 in 2005 the question of whether a subsequent will "impliedly revoked a revocable trust ***was*** a question of intention." *See* S.C. Code Ann. § 62-7-602 (Reporter's Comments) (*citing Peoples Nat'l Bank v. Peden*, 229 S.C. 167, 169, 92 S.E.2d 163,

instrument must expressly refer to the trust to satisfy the law's requirement for revocation. In this case, neither the 2014 Will nor the 2016 Codicil mention the Trust, yet the court nevertheless found Warren revoked the Trust by signing them, citing Section 62-7-602 as authority for its conclusion. (Order, 3/3/2022, pp. 9-11). This is plainly an error of law, because S.C. Code Ann. § 62-7-602(c)(2)(A) explicitly mandates that the "clear and convincing evidence of the settlor's intent" to revoke a trust is satisfied only where the later will or codicil "expressly refers" to the Trust. [16]

The circuit court found the 2014 Will and 2016 Codicil "directly conflict" with the Trust and thus showed "clear and definite purpose … to revoke [it.]" (*Id*., p. 11). Not only does this plainly ignore the writing requirement of Section 602, it also fails as a matter of fact. At the summary judgment stage, Appellants are entitled to the reasonable inference that the failure to mention revoking the Trust in these instruments is evidence that Warren did not intend that result. *See, e.g.*, S.C. Code Ann. § 62-7-602 and Reporters Comments thereto (commenting that a residuary clause in a will disposing of the estate differently than the trust is alone *insufficient* to revoke or amend a trust). Nettles testified he researched the Trust Code when drafting the Revocation and he determined the Trust must specifically be revoked. (Nettles Dep., p. 127-128). Further, the existence of a will is not inconsistent with the existence of the Trust, as Warren's estate plan created by Mr. Carter *always consisted* of *both* a will (for his probate estate) and the Trust (for his non-probate estate). Because Warren and Nettles never discussed revoking the Trust

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164 (1956)). The enactment of Section 62-7-602 made clear that this intent must be embodied in the writing itself with an express reference to the Trust. *See* S.C. Code Ann. § 62-7-602(c)(2)(A).

[16] This error is compounded by the court's reliance on testimony from Nathan Hale and David Goltra suggesting Warren was upset with Appellants for taking Patricia's side in the 2013 divorce. (Order, 3/3/2022, p. 10). This cherry-picked testimony does not supplant the need to satisfy the requirements of Section 62-7-602(c)(2)(A). Absent an express reference to the Trust as mandated, this testimony is bald speculation as to Warren's intent—precisely why § 602 sets mandatory requirements.

when the 2014 Will and 2016 Codicil were created, and Warren never mentioned transferring the Trust assets into his probate estate, a reasonable jury could find that Warren intended to treat his children differently only as to his *probate estate*,[17] but still intended the Trust assets to be shared equally among them. *See, e.g., Myers v. Sinkler*, 235 S.C. 162, 175, 110 S.E.2d 241, 247 (1959) (stating "the probate estate and the non-probate trust are in reality separate entities: the former was the testator's true estate, of which he disposed by his will; the latter was not his property.").

The circuit court also reasoned that "Warren told [Mr. Hale and Dr. Goltra] he did not want Pamela and Mark to inherit the business that he had spent his life building." However, there is no support for this finding. Mr. Hale's *actual* testimony was that Warren *never mentioned* changing the way the real estate business assets in the Trust would be distributed amongst his four children.

> Q. Did he [Warren] discuss anything with you about changing land distributions so that it would pass differently between the children as opposed to evenly?
>
> **A. No. No, he [Warren] didn't discuss those details.**

(Hale Dep., p. 51) (emphasis added). Mr. Hale also confirmed that he and Warren *did not discuss* who Warren wanted his assets to go to at his death, and in the last six months of Warren's life they had very little discussions at all about business. (*Id*., pp. 11, 29).

Like Mr. Hale, Dr. Goltra knew Warren changed his will (*i.e.,* his *probate* estate) after the divorce. However, Dr. Goltra was clear that Warren *never mentioned* also changing his payable

[17] The 2014 Will states its purpose is to make devises from the "residue of **my estate**." (12/11/2020 Memo in Opp., Ex. 34) (emphasis added). The 2016 Codicil states its purpose was "to prevent any such controversy in **the administration of my probate estate**, I have decided to make certain bequests in a sum certain of money rather than a percentage of assets." (12/11/2020 Memo in Opp., Ex. 35) (emphasis added). From this specific description limiting the Codicil to his "probate estate," a jury could find Warren contemplated the existence of his non-probate estate and chose to exclude it from the effects of this instrument.

on death bank accounts[18] nor changing how title to properties were held in the Trust. (D. Goltra Dep., v2, pp. 992-93).

From the actual testimony of Mr. Hale and Dr. Goltra, it is an impossible leap to the sweeping (and mistaken) finding that Warren told them he did not want Pamela and Mark to inherit the business. (Order, 3/3/2022, p. 10). Neither testified to this alleged intent. In truth, the only evidence before the circuit court is Martha's testimony that **it was Ross** who did not want his siblings to share in the businesses. (Brouthers Dep., pp. 112-114). This is but one more example of the court flouting the applicable standard.

As a matter of law, and under the applicable standard, the later 2014 Will and 2016 Codicil cannot constitute "clear and convincing evidence" to sustain the circuit court's conclusion because neither instrument expressly refers to the Trust. Even without this statutory mandate, it remains true that under the standard of review, Appellants are entitled to a finding that the Will's and Codicil's utter silence toward the Trust must mean that Warren did *not* intend to revoke the Trust. By giving Respondents, rather than Appellants, the benefit of the doubt, the circuit court erred.

The circuit court also erred by finding Warren revoked the Trust even earlier by entering into a Marital Settlement Agreement when he divorced Patricia in 2013. The court's reliance on Bogert's on Trusts to support this conclusion is legally and factually wrong, because Warren did not convey "any property that covers the trust property." Warren merely agreed to create a "preferred" interest *in distributions* from Zeezrom Properties, LLC, to secure certain payments Warren promised to Patricia. She was not given any voting power nor ownership interest in Zeezrom, nor any real property it owned. The Marital Settlement Agreement does not mention

[18] As explained herein, these accounts named the Trust as Warren's payable on death beneficiary. (11/12/2021 Memo in Opp., Ex. 40).

revoking Warren's Trust, so it too fails to satisfy Section 62-7-602(c)(2)(C), requiring that the writing relied upon must manifest "clear and convincing evidence of the settlor's intent" to revoke.

Last, but not least, the circuit court ignored evidence raising questions of fact as to whether Warren manifested any intent to revoke the Trust on these prior occasions. First, the circuit court does not explain how it can be true that Warren "clearly" intended to revoke his Trust through these prior instruments, yet he continued to use the Trust *after these instruments were executed*. In September of 2015 (after the 2014 Will was executed), both Warren and Ross[19] signed a bank form affirming the existence of the Trust and naming it as a "payable on death" beneficiary of money from his personal bank should he pass away (at which point the Trust would become irrevocable). Warren continued to use the Trust's bank account after both the 2014 Will and 2016 Codicil were executed, with the Trust being identified on the account. (11/12/2021 Memo in Opp., Ex. 39, 40). These undisputed facts must be viewed in the light most favorable to Appellants, and a jury could conclude Warren's continued use of the Trust after the divorce, the 2014 Will, and 2016 Codicil demonstrate he did not intend to revoke the Trust. Because granting summary judgment based on these *prior* instruments was error, Appellants therefore turn attention to the 2016 deathbed Revocation.

B. The circuit court erred in finding the 2016 deathbed Revocation was valid because there are material questions of fact as to Warren's testamentary capacity and whether he was subjected to undue influence in connection with its signing.

The primary issue is whether the 2016 deathbed Revocation effectively revoked the Trust. Appellants introduced competent evidence creating genuine issues of material fact that this purported Revocation was ineffectual for two reasons. First, Warren lacked the testamentary

[19] That Ross also signed this form naming the Trust as a payable on death beneficiary in 2015 belies his self-serving assertion that the Trust had previously been revoked by Warren's divorce from Patricia. The circuit court overlooked or weighed and rejected this relevant fact.

capacity to execute the Revocation. Second, its signing was the product of undue influence. The circuit court erred in granting summary judgment in the face of this evidence.

1. **The uncontradicted medical opinions of Dr. Kimberly A. Collins, M.D., together with Warren's medical records, create a question of fact as to whether Warren lacked testamentary capacity to execute the 2016 deathbed Revocation**.

"The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will." S.C. Code Ann. § 62-7-601. Whether Warren had the testamentary capacity to revoke the Trust turns on his capacity to know (1) his estate, (2) the objects of his affections, and (3) to whom he wished to give his property. *In re Estate of Weeks*, 329 S.C. 251, 263, 495 S.E.2d 454, 461 (Ct. App. 1997). "A will contest for lack of testamentary capacity raises a purely legal issue **which contestants are entitled to have submitted to the jury if there is *any* evidence tending to support the challenge**." *Garbade v. Garbade*, 260 S.C. 58, 60, 194 S.E.2d 186, 187 (1973) (all emphasis added).

To survive summary judgment, Appellants need only submit a *mere* scintilla of evidence that Warren lacked the necessary capacity. *See Hancock*, 381 S.C. at 330, 673 S.E.2d at 803 (holding the "mere scintilla" requirement applies to summary judgment on claims subject to the preponderance of evidence burden); *Hairston v. McMillan*, 387 S.C. 439, 445, 692 S.E.2d 549, 552 (Ct. App. 2010) (the preponderance of evidence burden applied to a challenge to a testator's capacity). Appellants met this burden, and the circuit court erroneously ignored competent evidence, including, *inter alia*: (a) the uncontradicted medical opinions of Kimberly A. Collins, M.D.; (b) Warren's medical records confirming his dementia and other serious physical and mental ailments; and (c) conflicting witness testimony relevant to Warren's testamentary capacity.

a. Dr. Collins's uncontradicted medical opinion that Warren lacked testamentary capacity precludes summary judgment.

Kimberly A. Collins, M.D., is a renowned forensic pathologist and medical expert. (11/12/2021 Memo in Opp., Ex. 44). She reviewed Warren's medical records and various testimony to conclude to a reasonable degree of medical certainty that he suffered from clinical dementia and cognitive deficits associated with his end-stage kidney disease. (*Id*., Ex. 3). Specifically, she opined Warren lacked testamentary capacity:

> [T]he testimony, as I stated previously, combined with the medical records that document that Mr. Holliday had long standing dementia and cognitive impairments, and further coupled with his declining health and the introduction of a new narcotic drug, **reinforces my opinion that Mr. Holliday lacked the testamentary capacity to know and understand his estate and to whom he wished to give his property at the time he was asked to sign the purported trust revocation document on September 15, 2016**.

(*Id*., Ex. 45) (emphasis added). Based on Warren's serious mental and physical impairments, Dr. Collins also opined that Warren was more susceptible to undue influence at the time he signed the purported deathbed Revocation. (*Id*.).

Incredibly, however, the circuit court found, "[Dr. Collins'] opinion mentions nothing about the elements of testamentary capacity." (Order, 3/3/2022, p. 12). This is obviously wrong. As quoted above, Dr. Collins' affidavit specifically finds that Warren failed two of the three elements for testamentary capacity (*i.e*, knowledge of his estate and whom he wished to receive his property) in connection with the signing of the Revocation. The circuit court cites no other reason for refusing to consider Dr. Collins' opinion. Compounding this mistake, the circuit court erred by relying on *Langley v. Lynch*, No. 2017-UP-226, 2017 S.C. App. Unpub. LEXIS 252 (Ct. App. May 24, 2017) to justify its finding. Not only is *Langley* unpublished, with no precedential value, the holding and logic of *Langley* are inapplicable. Unlike Dr. Collins, the expert in *Langley*,

relied on *the wrong* legal standard. *Id.* at LEXIS 252. Here, Dr. Collins applied the correct standard, and the circuit court still looked the other way. Further, in *Langley,* five separate physicians examined the decedent, each finding him competent. Here, Dr. Collins' opinion is *unrefuted* and further supported by Warren's medical records.[20]

In *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 219-20, 578 S.E.2d 329, 335 (2003), the Supreme Court of South Carolina observed:

> Absent examination of Testator by the expert, ***or*** **an opinion that Testator was mentally incompetent and therefore more susceptible to undue influence**, we fail to see how expert medical testimony can be probative as to undue influence. . . . "**Had this expert testimony related to mental capacity *it might have properly been considered* on that issue."**

Id. (quoting *Smoak v. Smoak*, 286 S.C. 419, 427, 334 S.E.2d 806, 810 (1985)) (all emphasis added).

Dr. Collins applied the correct legal standard to Warren's condition when the Trust Revocation was signed, concluding he lacked testamentary capacity at the time. She further opined Warren's condition made him susceptible to undue influence when he was asked to sign. Thus, her medical opinion checks all the boxes. She also found that opioid narcotics, which Warren was prescribed, could affect his capacity and susceptibility to influence. *Hellams v. Ross*, 268 S.C. 284, 288, 233 S.E.2d 98, 100 (1977) (noting intoxication can cause incapacity at the time of the making and execution of a will). The question is this simple: Could a reasonable jury accept Dr. Collins'

[20] Respondents did not depose Dr. Collins or challenge her opinions, nor did they offer any counter experts. Moreover, any challenge to the scope or quality of Dr. Collins' review or her education and experience, these matters "go to the weight, not the admissibility, of the expert's testimony," providing no basis to ignore her medical opinion. *Peterson v. AMTRAK*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005); *accord Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1996). Respondents bear the initial burden to prove the *absence* of any genuine issue of material fact, but they presented no expert testimony whatsoever to counter Dr. Collins' medical opinion.

unrefuted medical opinions and find Warren lacked testamentary capacity? Because the answer is clearly yes, summary judgment was improper.

The circuit court turned, a blind eye to the multitude of medical records confirming Warren's mental and physical impairments. Instead, it cherry-picked from portions of the records that favor Respondents. (Order, 3/3/2022, p. 4-5; 12/10/2020 Summary Judgment Motion, Ex. J; Aff. Pamela Holliday). In doing so, the circuit court improperly weighed competing evidence *from within the same source.*[21] This failure to view the evidence in the light most favorable to Appellants is reversible error. *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 265-66, 536 S.E.2d 399, 405 (Ct. App. 2000) ("at the summary judgment stage of litigation, the court does not weigh conflicting evidence regarding a material fact in dispute, nor does it make credibility determination") (citations omitted). Some of what the circuit court ignored includes:

- An MRI revealed Warren had "chronic ischemic disease" of the brain which is a physical finding of dementia. (11/12/2021 Memo in Opp., Ex. 2).
- A report that Warren was confused and having dementia. (*Id*., Ex. 4).
- Medical records documented that Warren was, "demented and wandering around with feces on him." (*Id*., Ex. 5).
- Warren *self-reported* that he had difficulty comprehending what he read and difficulty concentrating, and self-reported memory loss and higher functioning mental problems. (12/11/2020 Memo in Opp. Ex. 6, 15).
- A report from August of 2016 documenting a multitude of health conditions affecting Warren. (11/12/2021 Memo in Opp. Ex. 9).
- MUSC's records emphasize, in bold text, that Warren was in an "**[a]ltered mental status and lethargic**." (*Id*., Ex. 11).

[21] By relying on *portions* of Warren's medical records to justify its ruling, the circuit court found those records competent and relevant to Warren's testamentary capacity. Thus, it was error to ignore *the rest* of the records confirming Warren's dementia and serious mental defects. (*See e.g*., (11/21/2021 Memo in Opp., Ex. 8, 9, 11, 12, 13). In deciding which portions of these records to believe, and which portions to ignore, the circuit court invaded the province of the jury.

- A report that Warren was unable to reliably provide his own medical history due to his altered mental state. (*Id*., Ex. 12, 13, 14)).

When viewed in the light most favorable to Appellants, Warren's medical records create questions of fact about Warren's testamentary capacity leading up to and at the time he signed the purported Revocation. Just a few days earlier he was disorganized and believed he was being admitted to the hospital from Utah. Two days before being asked to sign the Revocation, Warren was discharged with 24/7 full-time home nursing care and a prescription for Oxycodone to spend his last days at home. (11/12/2021 Memo in Opp., Ex. 15, 16). The day before he was asked to sign, Warren was unable to complete dialysis. (*Id*., Ex. 17). These records, together with Dr. Collins' medical opinion, are *at least* a scintilla of evidence from which a jury could find Warren was cognitively impaired, medicated, and lacked testamentary capacity at the time he signed the Revocation. The circuit court's grant of summary judgment on this issue should therefore be reversed. *See Garbade*, 260 S.C. at 60, 194 S.E.2d at 187 (finding contestants are entitled to a jury trial if there is **any evidence** tending to support the challenge to lack of testamentary capacity).

b. The circuit court erred by improperly weighing the testimony in the record.

Just like with the medical records, the circuit court also cherry-picked from the testimonial evidence in the record, presenting a misleading account of witnesses' testimony and improperly resolving questions of fact by weighing the evidence. For starters, the circuit court found "numerous witnesses" (without identifying them) that testified to Warren's capacity when he signed various testamentary documents. As explained above, the only question to resolve is whether Warren had testamentary capacity when he signed the deathbed Revocation, and Respondents have not met *their burden* at the summary judgment stage to prove there is no question of material fact on this critical issue. Further, cross-examination revealed critical

questions of fact in the testimony of Respondents' witnesses, assuming these are the "witnesses" the circuit court relies on.[22]

Warren signed the Trust Revocation just a few days before he died. Although Dr. Goltra was not present when it was signed, he *confirmed* Warren was suffering "delirium, poor judgment, confusion, forgetfulness" and other cognitive defects "in the few days" before his death. (11/12/ 2021 Memo in Opp., Ex. 51, ¶ 5).[23] Dr. Goltra also admitted he was unaware of documented mental defects in Warren's medical records, which he never read. (D. Goltra Dep., v1, pp. 34-40). While Dr. Goltra offered an affidavit in which he claimed to have reviewed Warren's available "scans" and none showed Warren was demented, he later admitted in his deposition that the only scans he read *were of Warren's hips and lumbar spine*, *not his brain*. (11/12/ 2021 Memo in Opp., Ex. 51, ¶ 6; D. Goltra Dep., v1, p. 35). This is precisely why credibility should be left to the jury.

Similar problems lie in the testimony of Mr. Hale. While Mr. Hale said Warren seemed cognitively fine near the end, this conflicts with Dr. Goltra's testimony that Warren was suffering delirium, poor judgment, confusion, and forgetfulness near the end. Mr. Hale was not present when the Revocation was signed, and he did not know the seriousness of Warren's condition, including that he had been diagnosed with cognitive impairment and prescribed opioids. (Hale Dep., pp. 25-27). As it relates to the revocation of the Trust, **Mr. Hale confirmed that Warren never**

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[22] To the extent the circuit court relied on testimony from Ross and Nettles, South Carolina's Dead Man Statute, S.C. Code Ann. § 19-11-20, limits their testimony. Ross is an interested heir. Nettles is facing a separate legal malpractice lawsuit over his handling of the Trust Revocation, and he has an indirect interest in whether the Trust was validly revoked. Nonetheless, the Dead Man's Statute will not render incompetent any testimony from Ross or Nettles that is against their interest, as a recognized exception to the rule. Admissions from Ross and Nettles are relevant to capacity but will be reviewed in greater detail in the assessment of undue influence herein, *infra*.

[23] David Goltra is a doctor, but he confirmed he was not testifying as an expert witness. (D. Goltra Dep., v1, p. 17).

mentioned any intent to divide the Trust properties unevenly. (*Id*., p. 51). He also testified Warren was clear in his intent that he wanted to provide for many generations—an important point Martha echoed. (Hale Dep., p. 32) (Brouthers Dep., pp. 105, 148-149). A jury could find that revoking the Trust would be contrary to this intent.

Mr. Bosch also did not know Warren was prescribed opioids. (Bosch Dep. p. 55). He recalled "verbatim" that Warren thought he was "changing his will," and "rewriting his will," and the document being brought over by Nettles was "his will."[24] (*Id*., pp. 31-33). It should be concerning that Warren was led to understand the new "will" was needed to prevent his ex-wife from sharing in his estate, as Bosch reported. (*Id*., p. 35). Bosch said Nettles "didn't read the whole document to [Warren]" and only directed Warren to certain sections. (*Id*., pp. 60-61). This raises serious questions for the jury about what Warren understood was happening and whether he knew the effects of the Revocation, including who would take and how much receive if it was executed.

Alecia Bores had never met Warren, knew nothing about his file, and had no knowledge of what comprised his estate. (Bores Dep., pp. 17-18, 20, 26-27, 37). While she ordinarily made a practice of confirming a client's testamentary capacity before having them sign an estate planning document were, she admitted this statement was "**not regarding Mr. Holliday[.]**" (*Id*., pp. 20-21, 23) (emphasis added). She also was not aware Warren was dying, and she did not determine whether he was on opioids before witnessing his signature. (*Id*., pp. 28-29, 46). Further, there is a

[24] Under the applicable standard, a jury could conclude that statements Warren's statements about his new "will" Nettles brought allows the inference that Warren was indeed confused and mistaken (or misled), believing he was signing yet another will, because the 2016 Codicil, his *probate instrument*, includes an express reference to the potential for challenges *to his probate estate*. (11/12/2021 Memo in Opp., Ex. 43).

conflict between Ms. Bores' claim that Warren read the Revocation, and Ms. Williams' testimony that Warren could not independently read documents.

The circuit court simply ignored (or improperly weighed and rejected) Dr. Collins' medical opinion putting Warren's testamentary capacity into question, as well Ms. Williams' testimony that she did "not believe that [Warren] would knowingly change his will or trust with the effect of treating his children differently than each other." (11/12/2021 Memo in Opp., Ex. 32). Evidence that Warren could not independently read the Revocation is important, considering Bosch testified that Nettles did not read the whole document and directed Warren only to certain sections. This is all the more important considering Warren incorrectly thought he was signing a new "will." Combined with Nettles' admissions that: (1) Warren never mentioned the Trust to him, (2) Nettles never explained the effect of the Revocation on the Trust properties; and (3) that Warren did not understand the legal importance of the Trust, a reasonable jury could find that Warren did not intend, or was mistaken (or misled) to revoke the Trust, and thus lacked capacity. (Nettles Dep. pp. 117-119). *In re Washington's Estate*, 212 S.C. 379, 385-86, 46 S.E.2d 287, 289 (1948) (testamentary capacity requires the testatrix to understand the nature and consequences of the act as well as the manner and effect of the desired distribution); *Matheson v. Matheson*, 125 S.C. 165, 169-70, 118 S.E. 312, 313 (1923) (affirming that testamentary capacity required that the testator "know what he was doing" and "did he do it on purpose" and "did he intend to include only those he beneficiaries of his will").

By choosing certain witnesses over others, the circuit court improperly weighed the evidence. At the summary judgment stage, this amounts to reversible error. *See Lanier Constr. Co. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 278, 681 S.E.2d 909, 911 (Ct. App. 2009) ("At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a

disputed material fact." (Internal quotations omitted)). The court committed similar error in finding there was no evidence of undue influence.

2. It was error to grant summary judgment on Appellants' claim for undue influence because the law imposes a presumption that Warren's deathbed revocation was the product of undue influence, and the evidence creates a question of fact as to whether Warren was subjected to undue influence.

"To void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker's exercise of judgment and free choice." *In re Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999) (citing *Todd v. Woodard,* 297 S.C. 264, 376 S.E.2d 276 (1989)). "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, ***or*** an existing fiduciary relationship at the time of or before the [document's] execution."[25] *Id*. (citing *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) (citing *Byrd v. Byrd,* 279 S.C. 425, 308 S.E.2d 788 (1983); *Moorer v. Bull,* 212 S.C. 146, 46 S.E.2d 681 (1948)). Our Supreme Court has recognized that "by the very nature of the case, the evidence of undue influence will be mainly circumstantial [because it] is not usually exercised openly so it can be directly proved." *Byrd,* 279 S.C. at 427, 308 S.E.2d at 789. *See also Accord Cumbee*, 333 S.C. at 672, 511 S.E.2d at 394; *Gunnells v. Harkness*, 431 S.C. 116, 847 S.E.2d 97 (Ct. App. 2020) (noting "the evidence of undue influence will be mainly circumstantial"). Undue influence may consist of a single act or be the result of a series of actions that occur over time. *See e.g., Estate of Cumbee,* 333 S.C. at 668-69, 511 S.E.2d at 392 (where the acts occurred over a period of five years); and *Gunnells*, 431 S.C. 116, 847 S.E.2d 97 (where the

[25] The use of the word "or" is important. This is not an elements test; it is a factors test. Appellants need not check every box to survive summary judgment.

acts occurred over about a year). Thus, Ross' history of control and influence over Warren and the businesses owned by the Trust is important.

It is paramount that in certain circumstances, which are present here, the law creates a *presumption* of undue influence in this case. This Court explained in *Howard v. Nasser*,

> **A presumption of undue influence arises** if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the [the document at issue]. ***The effect of the presumption is to shift to the proponent the burden of going forward with the evidence*** . . .

Howard, 364 S.C. at 288, 613 S.E.2d at 68 (citing *Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f* (2003) (bold added, italics in original).

Here, it is undisputed (and Respondents have conceded) that a fiduciary relationship existed between Ross and Warren. (11/17/2021 Trans., p. 18). The circuit court's order acknowledged this confidential relationship, however, the court wholly ignores the presumption of undue influence that shifts the burden *to Respondents*. (Order, 3/3/2022, p. 13). This is significant, because this Court has explained, when the presumption arises, "**the issue should be submitted to the jury**, where . . . the person charged with the undue influence [is a] chief beneficiary, and that such person generally dominated the testatrix." *Howard*, 364 S.C. at 289, 613 S.E.2d at 69 (internal citations omitted) (finding genuine issues of material fact existed regarding claim of undue influence) (emphasis added); *Estate of Cumbee,* 333 S.C. at 672-73, 511 S.E.2d at 394 (finding a fiduciary relationship created the presumption of undue influence where son had mother's power of attorney and managed her finances); *Moorer,* 212 S.C. at 149, 46 S.E.2d at 681-82 (holding issue of undue influence was properly submitted to the jury where there was evidence the testator's son was in a confidential/fiduciary relationship with his mother and he indicated an intention to procure for himself her estate); *Hairston*, 387 S.C. at 447, 692 S.E.2d at 553 (existence

of a fiduciary relationship raises a presumption of undue influence.").

No one disputes that the Revocation, if valid, substantially increased the amount Ross and Lea received at Warren's death. (R. Holliday Dep., v2, p. 72). There is also evidence that Ross engaged in increasing control over Warren's businesses owned by the Trust. Ross wanted Warren to change his estate plan, and Ross initiated and remained heavily involved in the creation and execution of the Revocation. He also orchestrated its signing from Warren's deathbed. When Nettles handed the Revocation to Warren, ***none*** of the steps that led to this moment were done at Warren's direction. From these facts, a jury could find Warren was unduly influenced, especially when instructed as to the presumption that applies.

A jury could also find that Ross' instruction to Nettles to make sure Warren's estate was "in harmony" by ensuring there were no assets to pass through Warren's *non-probate* estate bore directly on the purported testamentary act. Recall, Martha testified Ross was adamant that he was not going to manage the businesses just to make his siblings rich. (Brouthers Dep., pp. 112-113, 142-143). The Revocation gives Ross his wish if it is valid. However, because undue influence is presumed in this case, a jury could find that Ross put in motion and orchestrated the steps that led to drafting and presenting the Revocation to Warren as just one more exercise of control, all while Warren was at his weakest.

However, the error does not stop there. Beyond the circuit court's failure to apply the presumption of undue influence in this case, it also failed to consider the myriad of evidence satisfying numerous factors recognized by South Carolina courts as evidence of undue influence.[26]

[26] For clarity, as a factors test, Appellants are not required to satisfy every factor that may be relevant to undue influence. In addressing the several factors listed herein, Appellants neither imply nor concede that all the factors stated herein are necessary to survive summary judgment.

First, South Carolina recognizes that an unnatural distribution is a relevant factor in an undue influence case. *Byrd*, 279 S.C. at 430, 308 S.E.2d at 791 (evidence of undue influence can include an unnatural disposition that makes the influencer the chief beneficiary of the will). Here, it is undisputed that an unnatural disposition results from the Revocation, with Ross and Lea their bequests increase tremendously. (R. Holliday Dep., v2, p. 72).

Second, also relevant is that the Revocation resulted in a significantly different distribution of Warren's probate and non-probate assets compared to his prior estate plan. This result is contrary to Warren's desires according to Martha, who testified Warren had always been unwavering in that he wanted to provide for all his grandchildren. (Brouthers Dep., pp. 105, 148-149). A point Mr. Hale echoed. (Hale Dep, p. 32). *See Howard*, 364 S.C. at 290, 613 S.E.2d at 69 (finding relevant that the challenged disposition of Nasser's estate was significantly different from his two prior wills); *Gunnells*, 431 S.C. at 124, 847 S.E.2d at 101 (noting a significant difference from prior will was relevant).

Third, no one disputes that the purported Revocation was executed in *very* close proximity to Warren's death. *Byrd*, 279 S.C. at 430, 308 S.E.2d at 791 (where it was relevant to finding undue influence that the new will was formed less than six months before the testator's death).

Fourth, there is evidence that Warren's physical and mental infirmities existed both prior to and at the time he executed the purported Revocation. Moreover, Dr. Collins concluded Warren's condition made him more susceptible to undue influence at the time of signing. *Byrd*, 279 S.C. at 427, 308 S.E.2d at 789 (finding relevant that the testator was mentally and physically infirm and thus susceptible to influence); *Howard*, 364 S.C. at 290, 613 S.E.2d at 69 (finding relevant that Nasser was physically infirm as a result of a terminal illness prior to the execution of

the will); *Russell*, 353 S.C. at 219-20, 578 S.E.2d at 335 (noting expert opinion capacity susceptibility to undue influence may be property considered).

Fifth, evidence that Ross put in motion and stayed involved in Nettle's preparation of the Revocation, which occurred without Warren's input, is relevant to undue influence. *Howard*, 364 S.C. at 290, 613 S.E.2d at 69-70 (finding relevant the influencer's presence at meetings with the attorneys to discuss the new will). The circuit court's order glaringly omits to mention Ross' involvement in the Revocation's creation, or even list Ross as among those present when Warren was asked to sign, even though he flew in from Utah and stood to gain millions. (Aff. of Ross Holliday).

Sixth, Ross orchestrated the circumstances surrounding Warren's signing of the purported Revocation. He flew to Charleston, spoke to Nettles several times, and invited Nettles to bring over the Revocation at the precise time that Ms. Williams was sent on an "outing"—something Bosch had never seen before. This put Ross alone with Warren leading up to Nettles' arrival, after which Warren had the false understanding he would be changing his *probate estate* by singing a "will." *Howard*, 364 S.C. at 290, 613 S.E.2d at 69 (recognizing that evidence of confusion or mistake as to the effect of the document being signed is relevant to the question of undue influence). Further, because Ross immediately returned to Utah after the Trust Revocation was executed instead of celebrating his father's final birthday with him, a jury could find Ross' visit to South Carolina was primarily motivated by ensuring the Trust was revoked.

Seventh, Warren was prescribed opioids at the time he signed the Revocation. Taking such strong medication is relevant to his susceptibility to undue influence *Byrd*, 279 S.C. at 428, 308 S.E.2d at 790 (where the court held that "susceptibility to undue influence" was established by facts including that the testator was under heavy medication).

An eighth factor is found in Ross' actions restricting Appellants' ability to visit Warren when he was in the Sweetgrass Village Assisted Living Community. Ross did not even identify Mark and Pamela as among Warren's children on documents he submitted to this facility. (11/21/2021 Memo in Opp., Ex. 22). *See Byrd*, 279 S.C. at 429, 308 S.E.2d at 790 (deeming as relevant evidence that James and the members of his immediate family restricted visits). This raises the inference that Ross' conduct was part of a larger scheme to use his control over Warren to isolate and ostracize Appellants. *Accord Estate of Cumbee,* 333 at 668-69, 511 S.E.2d at 392 (commenting the actions of the influencer developed over a span of five years).

Ninth, Warren never asked for his Trust to be revoked. Warren's estate lawyer, Mr. Carter, refused to assist Nettles' efforts to revoke it, finding it inappropriate. *Cf. Howard*, 364 S.C. at 290, 613 S.E.2d at 69-70 (finding an attorney's belief that an action was inconsistent with an estate plan was relevant). The record contains the affidavit of Allen Jeffcoat, III, Esquire, pointing out the impropriety of Nettles' conduct, given that Warren never mentioned putting his Trust assets into his probate estate and Nettles' claim that he was unaware the Trust existed when he prepared Warren's 2014 Will and 2016 Codicil. Finally, there is no evidence that a copy of the Trust Revocation was left with Warren. *Estate of Cumbee*, 333 S.C. at 673, 511 S.E.2d at 395 (noting a copy of the newly procured will was not given to the testator in discussion of undue influence).

As a tenth factor, Martha testified that Ross exercised heavy-handed control over Warren and the businesses owned by the Trust. Her testimony indicates that Ross was frustrated with his father and wanted his estate plan changed. (Brouthers Dep., pp. 112-113, 142-143). Because Ross not only controlled the Trust businesses, but also controlled communications with Nettles, Ross was uniquely positioned to circumvent Warren's wishes with regard to the disposition of his probate and non-probate estates. (R. Holliday Dep., V2, pp. 15-16; Nettles Dep., pp. 16-17). This

is bolstered by the evidence that Ross had a history of excluding Warren from business meetings because, "[Ross] did not want [Warren] to know what was going on." (R. __).

Finally, as an eleventh factor, all the evidence, when viewed in the light most favorable to Appellants, demonstrates there were "suspicious circumstances" surrounding the preparation and execution of the purported deathbed Revocation. *See Howard*, 364 S.C. at 288, 613 S.E.2d at 68 (quoting *Restatement (Third) of Property, Wills and Other Donative Transfers § 8.3. cmt. F* (2003)). Warren never asked for the Revocation and did not know Nettles was preparing it. (Nettles Dep., pp. 111-113, 117-119, 128). From the evidence offered, a reasonable jury could find that Ross was angry that Mark and Pamela share equally in the Trust managed. The jury could also find Ross leveraged his power of attorney to serve his own ends, which was made even more possible when considering Nettles most often communicated with Ross, not Warren, even referring *to Ross* as his "client" on matters concerning Warren's estate planning. (R. Holliday Dep., v2, p. 11). With Warren hospitalized, confused, prescribed opioids, and dying, the circumstantial evidence here would support a finding that Ross exerted undue influence, directing Nettles to make sure Warren's affairs were "in harmony" with what Ross assumed his father's estate plan to be. The jury could also find suspicious that Nettles gave an affidavit to the court asserting that, "I drafted the Revocation of the 2008 Revocable Trust upon instruction from my client, Warren P. Holliday[,]" but then he testified exactly the opposite in his deposition, admitting he never spoke to Warren about the Trust or the Revocation until he stood by Warren's deathbed, "hot to trot" to get Warren to sign it. (Nettles Depo., pp. 111-113-, 117-119, 128; R. Holliday Dep., v2. P. 98). These conflicting statements by Nettles concerning a *critical* fact—how and why the Revocation was put in Warren's hands—*by themselves create a question of fact for the jury*. So do the conflicting statements about whether Ross was in the room (Bosch said he was not, yet Ross's

affidavit claims he observed every step of the signing). There is also a question over whether Warren could independently read the Revocation. Bores had never met Warren before, but said he read it, whereas Ms. Williams was his full-time caregiver and said he could not independently read). (11/12/2021 Memo in Opp., Ex. 32). There is more.

On the day the Trust Revocation was given to Warren, Ms. Williams, who knew Warren well and could have helped him read the document, was sent on an outing—something Bosch had never seen before. (Bosch Dep., p. 66). The evidence would allow a reasonable jury to find Ross arranged the timing of Nettles' visit while Ms. Williams was away, giving Ross time alone with Warren. It was immediately after this that Warren had the mistaken impression that he was signing a new "will" and that doing so was necessary to prevent his ex-wife (whom he despised) from recovering—a topic that both Bosch and Bores confirmed was on Warren's mind. (Bosch Dep., pp. 21-33, 35; Bores Dep., p. 25). The jury could find that because Nettles was "hot to trot" to have Warren sign, no explanation whatsoever was given to him (privately or otherwise) as to how the distribution of the Trust properties would occur if Warren signed (because Nettles himself did not even know this). But, Ross understood the significant impact of signing it, and once it was signed he left town and returned to Utah—mission accomplished. A reasonable jury could find this evidence troubling, to say the least.

As explained herein, there is evidence in the record, if viewed in the light most favorable to Appellants, from which a reasonable jury could reach these conclusions. Whether the jury accepts or rejects this evidence is entirely within the jury's province. At this stage, the court is merely concerned with whether this evidence exists, and it does. This precludes summary judgment. *See Estate of Cumbee,* 333 S.C. at 668-69, 511 S.E.2d at 392; *Hembree*, 311 S.C. at

196, 428 S.E.2d at 5; *Byrd,* 279 S.C. 425, 308 S.E.2d 788; *Moorer,* 212 S.C. 146, 46 S.E.2d 68; *Gunnells*, 431 S.C. 116, 847 S.E.2d 97.

With *so many relevant factors satisfied* in the record, the circuit court's failure to mention these points (including the presumption of undue influence) confirms it misapplied the summary judgment standard and should be reversed. *See Howard*, 364 S.C. at 291, 613 S.E.2d at 70 (reversing the grant of summary judgment and finding at this stage the court should "offer no opinion regarding Appellants' [chance of] success on the merits[, but] merely find that Appellants' offered sufficient evidence" to go to the jury); *McGimsey v. Gray*, 260 So. 3d 25 (Ala. 2018) (reversing grant of summary judgment and noting, "it is not the absence or presence of any one factor" that determines whether there was undue activity by the favored beneficiary in procuring the execution of the will); *Stephenson v. Warren*, 136 N.C. App. 768, 772, 525 S.E.2d 809, 812 (2000) (concluding plaintiff demonstrated "facts which would satisfy several of the factors bearing on undue influence" and denying summary judgment).

II. The circuit court erred in concluding Appellants' claims to validate the Trust are time barred.

The circuit court found Appellants' claims are time barred, either by operation of S.C. Code Ann. § 62-7-604 or by laches, concluding both the statute and laches imposed a one-year limitation period from Warren's death to file suit. Both of these findings were error.

A. The one-year time bar contained in Section 62-7-604 does not apply here because the statute only applies to actions seeking to *invalidate* a trust, which this is not.

The plain language of S.C. Code Ann. § 62-7-604 limits its application to actions seeking to *invalidate* a trust. This is *not* an action to invalidate the Trust.

Section 62-7-604 provides:

(a) A person must commence a judicial proceeding to **contest the validity of a trust** that was revocable at the settlor's death within the earlier of:

(1) one year after the settlor's death; or

(2) one hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice **informing the person of the trust's existence**, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) the trustee knows of a pending judicial proceeding **contesting the validity** of the trust; or

(2) a potential contestant has notified the trustee of a possible judicial proceeding **to contest the trust** and a judicial proceeding is commenced within one hundred twenty days after the contestant sent the notification.

(c) A beneficiary of a **trust that is determined to have been invalid** is liable to return any distribution received.

S.C. Code Ann. § 62-7-604 (emphasis added).

As the circuit court correctly noted, Appellants' "declaratory judgment action seeks to declare the [Trust] valid." (Order, 3/3/2022, p. 15. Because Appellants are not "contesting" the validity of the Trust, Section 62-7-604 simply does not apply. *See Southeastern Fire Ins. Co. v. South Carolina Tax Commission*, 253 S.C. 407, 410, 171 S.E.2d 355, 356 (1969) (noting, "if a statute is clear and unambiguous there is no room for construction, and courts must give the terms of the statute their literal meaning."); *Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.").

The Reporter's Comments to Section 62-7-604 instruct that Appellants' claim to declare the Trust valid is not an action "contesting" its "validity." These Comments state: "A 'contest' is an action **to invalidate** all or part of the terms of the trust." *Id.* That an action "contesting" a trust is distinct from an action to validate a trust is apparent when the statutory language is considered as a whole. *See S.C. Prop. & Cas. Ins. Guar. Ass'n v. S.C. Second Injury Fund,* 434 S.C. 544, 549, 864 S.E.2d 899, 902 (Ct. App. 2021) ("[T]he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.").

For example, subsection 62-7-604(a)(2) provides the limitations period is shortened to 120 days if the trustee gives the claimant notice of the "**trust's existence**." *Id*. (emphasis added). This plain language contemplates a claimant filing suit in response to notice from the trustee that the trust *exists*. Here, it turns the statute on its head to expect a trustee to send notice "of the trust's *existence*" when Respondents contend the Trust *does not exist*. Applying this section in this case renders the notice requirement in 62-7-604(a)(2) meaningless. *See Lightner v. Hampton Hall Club*, 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.") (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)). If the legislature intended Section 62-7-604 to apply to actions *in support* of a trust, then it would have expressly provided for notice to claimants that a trust *no longer existed*. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'").

That Section 62-7-604 does not apply is further supported when considering this section in context with the broader statutory scheme of the Probate Code, paying attention to the distinction

between a testators' *probate estate* and his *non-probate estate*. Section 62-7-604 contemplates an action seeking *to stop the administration of a trust where the trustee believes one exists.*[27] Such a claim following the death of the settlor, if successful, has the practical result of making the assets of the trust part of the decedent's *probate estate*, rather than being administered by the trustee. This matters because the personal representative must pay claims against the *probate estate* within 14 months of the decedent's death. *See* S.C. Code Ann. § 62-3-807 (providing a 14-month deadline to pay claims from the *probate* estate). Thus, it makes sense that Section 62-7-604 would impose a one-year limitation to actions to *invalidate* a trust, so the creditors of the probate estate may know whether there is any claim that may increase the estate's ability to pay before settling their claims. Delay in asserting a claim to *invalidate* a trust could negatively affect innocent third parties, such as creditors of the decedent's *probate* estate.

However, this interplay is not involved here, where Appellants assert the Trust has *not* been revoked. Appellants' action to *validate* the Trust is akin to a claim against the personal representative of Warren's probate estate for improperly taking control of the Trust's assets. This is important, because the Probate Code provides a three-year statute of limitations for actions challenging the distribution of assets from a probate estate. *See* S.C. Code Ann. § 62-3-1006 (providing that an action "to recover property improperly distributed" from the probate estate may be brought **within the later** of three years after the decedents death, or one year after the improper

[27] Subsections (b) and (c) of Section 62-7-604 further prove the statute only applies where an action seeks to invalidate a trust that is being administered by the trustee after the settlor dies. Subsections (b) and (c) are completely meaningless here, where Respondents claim there is no Trust to administer, and there are no Trust assets to distribute to beneficiaries. *See Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs*., 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004) (the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless). Nothing in Section 62-7-604 directs what happens if Appellants prevail and the Trust is found valid.

distribution). Applying Section 62-7-604 and its one-year limitation period on this case is inconsistent with the broader statutory scheme.

Even if Section 62-7-604 had any import here (which it does not), it would not apply to Appellants' claim for undue influence because this claim lies in equity.[28] Equitable claims (like undue influence) are not subject to a statute of limitations. *See Dixon v. Dixon*, 362 S.C. 388, 400, 608 S.E.2d 849, 854–55 (2005) (the statute of limitations is inapplicable to mother's undue influence claim); *Bullard v. Crawley*, 294 S.C. 276, 284, 363 S.E.2d 897, 902 (1987) (claim alleging undue influence is an equitable action); *Anderson v. Purvis*, 220 S.C. 259, 67 S.E.2d 80 (1951) (court's power to do equity transcends the statute of limitations). Because the Trust Code is silent as to a limitations period applicable to Appellants' claims to prove the Trust exists, the common law and principles of equity apply. *See In re Estate of Brown*, 427 S.C. 138, 146, 828 S.E.2d 789, 793 (Ct. App. 2019) ("Where the Probate Code is silent, our common law can speak."); *and* S.C. Code Ann. § 62-7-106 (The common law of trusts and principles of equity supplement this article . . . ."); *accord, Smith v. Linder*, 77 S.C. 535, 541, 58 S.E. 610, 611-612 (1907) (applying the limitations applicable to fraud in an action to equitably set aside a deed based on fraud and undue influence, and noting **the action does not accrue until the conduct is discovered**) (emphasis added).

[28] The circuit court does not cite any South Carolina case in support of the premise that Section 62-7-604 should apply to equitable claims. Other than citing *Deep Keel LLC, v. Atl. Private Eqty. Grp*., 413 S.C. 58, 62, 773 S.E.2d 607, 609 (Ct. App. 2015), at footnote 3, for an unrelated evidentiary comment, there is not a single South Carolina case cited in the circuit court's order as it relates to any applicable time-bar. Furthermore, although the circuit court makes parenthetical reference to several foreign cases, none of these authorities support the application of Section 62-7-604 to Appellants' claims seeking to validate the Trust's existence, nor do these authorities support the proposition that Section 62-7-604 would apply to equitable claims such as undue influence.

For these reasons, the circuit court erred in finding the one-year limitation period contained in Section 62-7-604 applied to Appellants' claims. Perhaps in recognition of this error, the circuit court went on to find the doctrine of laches also applies. This, too, was error.

B. The circuit court's finding that the doctrine of laches imposed a one-year time bar on Appellants' claims is error because it is unsupported by the law or facts.

The circuit court found Appellants' claims were also barred by the doctrine of laches—which the court essentially determined imposed the same one-year limitation period as S.C. Code Ann.§ 62-7-604. (Order, 3/3/2022, p. 9). This ruling is made without citation to any legal authority and with no meaningful explanation of the court's reasoning.

"The party asserting laches[29] must satisfactorily show negligence, the opportunity to have acted sooner, and material prejudice." *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct. App. 1999) (citing *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994)). "Importantly, delay in the assertion of a right does not, in and of itself, constitute laches," instead, "the party asserting laches must show it has been materially prejudiced by the other parties delay." *Mid-State Tr., II v. Wright*, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (1996) (citing *Archambault v. Sprouse,* 218 S.C. 500, 63 S.E.2d 459 (1951)). "[W]hether laches applies in a particular situation is highly fact-specific, so each case must be judged on its own merits." *Mid-State,* 323 S.C. at 307, 474 S.E.2d at 423.

The record contains no evidence that any alleged delay in filing this action caused Respondents any prejudice. This is likely why the circuit court's order identifies no evidence of

[29] A party may not assert laches as an equitable defense if they have unclean hands. *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (where the defendant was precluded from asserting the affirmative defense of Laches "due to his own unclean hands"). The circuit court failed to consider the evidence of Ross' conduct surrounding the creation and execution of the Revocation by Warren on his deathbed, which should render this defense unavailable.

prejudice and makes no finding of such. The only factual basis for the circuit court's imposition of laches is its conclusion that Appellants waited until after Ross, as the personal representative of Warren's probate estate, disbursed the inheritance checks to Appellants. However, this is not evidence of prejudice. Warren's 2016 Codicil entitled Mark and Pamela to those specific bequests, regardless of whether the Trust had been revoked or not.

Moreover, the circuit court provides no explanation of how it reasoned laches imposed a *one-year* time bar. The circuit court observed that Appellants "seek to hold Ross liable for the very *actions he took as Personal Representative* of the Estate by stripping him of the protection that § 604 should afford the trustee." (Order, 3/3/2022, p. 9). This conflates that § 604 applies to actions of a trustee, not a personal representative. Appellants seek a ruling that the Trust exists, which if successful, puts at issue Ross' improper distribution of the Trust's assets through the probate estate. The one-year period in Section 62-7-604 protects a *trustee* from claims for his conduct as a trustee *in the administration of a trust*, yet Respondents deny the existence of the Trust and it is undisputed that Ross *never took any actions* to administer the Trust. It is absurd for Ross to claim entitlement to protections afforded a trustee while simultaneously claiming the Trust does not exist. Application of Section 604 (and laches) under these pretexts illogical. These manifest errors require reversal of the order below.

III. The circuit court erred in dismissing Appellants' claim for intentional interference with inheritance.

The circuit court summarily found Appellants' claim for intentional interference with inheritance fails as a matter of law. First, the circuit court relied on its mistaken conclusion that there was no question of fact as to whether the Trust was revoked, a matter addressed and refuted above. *See* App. Br. § I (*supra*). Furthermore, the circuit court gave a conclusory finding that South Carolina does not recognize a cause of action for intentional interference with inheritance

and, additionally, the circuit court did not have subject matter jurisdiction over this claim. The circuit court offered no explanation of its reasoning nor any meaningful citation to law to support these findings, which were error and must be reversed.

A. The circuit court erred in finding that South Carolina does not recognize a cause of action for intentional interference with inheritance.

The South Carolina Supreme Court has never held that this state does not recognize a cause of action for intentional interference with inheritance. While the Supreme Court has not yet explicitly adopted the claim, this is because it has not had the opportunity to do so. *See Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) (declining to opine on the adoption of this claim *because the issue was not preserved*); *Douglass v. Boyce*, 344 S.C. 5, 9, 542 S.E.2d 715, 717 (2001) (declining to address whether South Carolina adopted this claim *because to do so in that case would have been advisory*). It is widely accepted that if given the opportunity, the Supreme Court will adopt a cause of action for intentional interference with inheritance. *See Wellin v. Wellin*, 135 F. Supp. 3d 502, 513 (D.S.C. 2015) (finding South Carolina would adopt the cause of action for intentional interference with inheritance); *see also McKee v. Lincoln Nat'l Life Ins. Co.*, Civil Action No. 0:21-0499-MGL, 2022 U.S. Dist. LEXIS 132458, at *10 (D.S.C. July 25, 2022) (finding South Carolina would adopt a claim for intentional interference with expectancy).

The *Wellin* Court carefully reviewed the South Carolina Supreme Court's decision in *Douglass*, noting several reasons why litigants should be confident that South Carolina will adopt this claim. First, in *Douglass*, even though the question was not preserved, the Court went out of its way to offer telling dicta on the matter, reminding the bench and bar that "We have adopted the closely analogous tort of intentional interference with prospective contractual relations." *Wellin*, 135 F. Supp. 3d at 512 (quoting *Douglass*, 344 S.C. at 9 n.4, 542 S.E.2d at 717). In adopting this analogous claim, the Court stated it was "join[ing] the vast majority of our sister jurisdictions." *Id*.

(citing *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990)). Not coincidentally, the *Douglass* Court also cites to *Allen v. Hall*, 328 Ore. 276, 974 P.2d 199 (Or. 1999). This is significant because in *Allen,* the Oregon Supreme Court held the claim for intentional interference with inheritance was simply an extension of the tort of "intentional interference with economic relationships"—*i.e.*, precisely the "closely analogous tort" the *Douglass* Court noted it had recently adopted. *See Douglass*, 344 S.C. at 9 n.4, 542 S.E.2d at 717.

Second, and perhaps most compelling, *Douglass* went on to define what the elements of intentional interference with inheritance would be if it were adopted. *Id.* For these elements the Court cited, among other things, the Second Restatement of Torts. *Id.* (citing *Restatement (Second) of Torts § 774B (1979)*). Reliance on the Restatement is telling, because the Restatement explains that a "substantial majority" of jurisdictions have adopted the claim for intentional interference with inheritance. *Id.* Therefore, considering that Supreme Court elected to join the "vast majority of our sister jurisdictions" when it adopted the "closely analogous tort of intentional interference with prospective contractual relations," it follows that South Carolina would likewise be in the majority of jurisdictions that recognize the claim for intentional interference with inheritance. *Douglass*, 344 S.C. at 9 n.4, 542 S.E.2d at 717.

This conclusion is also supported by the Reporter's Comments to S.C. Code Ann. § 62-7-604, which states: "An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to [the limitation period of] this section. For the law on intentional interference, see Restatement (Second) of Torts Section 774B (1979)." Noteworthy is that the Comments to the statute rely upon the same provisions of the Restatement as did the *Douglass* Court. Ultimately, to find that South Carolina does not recognize this claim would run contrary to the State's established public policy to protect the beneficiaries of estate

instruments from the harm caused by the misconduct of others. *Accord Fabian v. Lindsay*, 410 S.C. 475, 488, 765 S.E.2d 132, 139 (2014) (adopting a cause of action where it served to protect "frustrated third-party beneficiaries of estate instruments").

For these reasons, the circuit court erred in finding South Carolina does not recognize a claim for intentional interference with inheritance.

B. The circuit court erred in finding that it lacked subject matter jurisdiction over the claim for intentional interference with inheritance.

The circuit court summarily concluded the probate court lacked jurisdiction over the "tort claim" of intentional interference with inheritance, and therefore upon removal, the circuit court also lacked jurisdiction. This was error.

"Subject matter jurisdiction is a court's power to hear and determine cases of the general class to which the proceedings in question belong." *Simmons v. Simmons*, 370 S.C. 109, 113-14, 634 S.E.2d 1, 3 (Ct. App. 2006) (quoting *Williams v. Jeffcoat*, 434 S.C. 461, 466, 863 S.E.2d 822, 824-25 (Ct. App. 2021)). S.C. Code Ann. § 67-7-201(c) provides that the "probate court has concurrent jurisdiction with the circuit court" concerning the external affairs of a trust, including proceedings to "determine the existence or nonexistence of trusts," as well as "other action and proceedings involving trustees and third parties." S.C. Code Ann. § 67-7-201(c)(1) & (3). The circuit court correctly acknowledged in its order that this action seeks "to declare [Warren's] Trust valid[.]" (Order, 3/3/2022, p. 15). The probate court has jurisdiction over this action, and also over tort claims against a trustee of a trust, as well as tort claims against a personal representative of a probate estate. *See* S.C. Code Ann. § 62-7-1010 (regarding tort claims against trustee); S.C. Code Ann. § 62-1-302 (generally describing probate court's jurisdiction to be over "all subject matter related to" the "determination of property in which the estate or protected person has an interest"); S.C. Code Ann. § 62-1-201(4) (defining "claims" to include actions "in tort"). These plain

statutory provisions reveal there is no basis for the circuit court's assumption that the probate court lacked jurisdiction over the claims and parties, and thus, no basis for the circuit court's finding that it lacked jurisdiction upon removal.

As authority for its conclusion, the circuit court cites *Waddell v. Kahdy*, 309 S.C. 1, 4, 419, S.E.2d, 783, 785 (1992). However, *Waddell* involved a request for change of venue, and the decision provides no instruction on the issue of whether the circuit court has jurisdiction over Appellants' claim for intentional interference with inheritance. The circuit court's reliance on *Judy v. Judy*, 393 S.C. 160, 169, 712 S.E.2d 408, 412 (2011) is also misplaced. *Judy* turned on the application of *res judicata*, where the plaintiff fully adjudicated his partition action in probate court, and then later filed a tort claim for waste in circuit court. To analyze whether *res judicata* applied, the appellate court had to determine whether the probate court had jurisdiction to decide the waste claim in the partition action before it. In finding the probate court was statutorily authorized to hear the tort, the *Judy* Court observed that S.C. Code Ann. § 62-1-302 and S.C. Code Ann. § 62-1-201 used "broad wording" to define the probate court's jurisdiction. *Id*. at 169, 712 S.E.2d at 413. Neither of these cases support the circuit court's mistaken finding. This appeal involves an action which began in probate court, and which Respondents removed to the circuit court. If *Judy* has relevance, it favors Appellants' position, making clear that the probate court's jurisdiction extends to tort claims arising in matters before it. *Id*.

Furthermore, as a court of general jurisdiction, the circuit court certainly has the power to hear and decide a claim for intentional interference with inheritance. *Cf. Walker v. Russell*, 10 S.C. 82, 84 (1878) ("[T]he Court of Common Pleas is a Court of general jurisdiction in civil cases, while the Court of Probate is one of limited and inferior jurisdiction."); *accord Davis v. Davis*, 214

S.C. 247, 255, 52 S.E.2d 192, 195 (1949) ("[I]t is no longer subject to doubt but that the Court of Common Pleas has concurrent jurisdiction on such matters with the Court of Probate.").

If given effect, the circuit court's ruling would require the filing of two separate actions simultaneously, one for intentional interference with inheritance in the circuit court, and another in the probate court asserting all their other claims. In the absence of any legal requirement, this makes no practical sense, especially where, as here, Respondents requested this action and all the claims therein be removed to the circuit court and designated complex. The same result would occur if Appellants filed two separate actions and then consolidated them before the circuit court post removal. *Cf. Contra Craft v. S.C. Comm'n for the Blind*, 385 S.C. 560, 569, 685 S.E.2d 625, 629 (Ct. App. 2009) ("Whatever doesn't make any difference, doesn't matter.") (citing *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)).

For these reasons, the circuit court's summary assumption that it lacks jurisdiction should be reversed.

IV. The circuit court erred in granting summary judgment as to Appellants' remaining claims for declaratory judgment, constructive trust, breach of fiduciary duty, accounting, and receivership.

Because the circuit court found the Trust had been revoked, or that Appellants' assertions of lack of capacity and undue influence were time barred, it also granted summary judgment as to Appellants' remaining claims for declaratory judgment, constructive trust, breach of fiduciary duty, accounting, and appointment of receiver. Because these threshold determinations were error for the reasons explained above, *supra*, granting summary judgment as to Appellants' remaining claims should be reversed for the same reasons. But there is more.

The circuit court's order additionally faults Appellants for failing to present sufficient evidence to support these additional claims. (Order, 3/3/2022, p. 14). Any perceived shortfall in

the evidence offered on these claims cannot be the fault of Appellants, because it is undisputed that the circuit court ordered the parties in a status conference that discovery was strictly limited to the issues of testamentary capacity and undue influence. (6/9/2020 Motion for Protective Order; 7/1/2020 Motion for Protective Order). It is patently unfair and contrary to Appellants' right to full and fair discovery to grant summary on the basis of insufficient evidence when the Court refused to allow Appellants to conduct any discovery related to these claims. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (holding summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery).

CONCLUSION

For the reasons set forth herein, Appellants respectfully request this Court to reverse the circuit court's erroneous grant of summary judgment and remand the matter for a trial on all claims.

Respectfully submitted,

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September 7, 2022
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