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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

Case No. 2019-CP-10-02430
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.

REPLY BRIEF

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REINTRODUCTION

Nearly 100 years ago, the Supreme Court of South Carolina explained "It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge." *Ex parte McLeod*, 140 S.C. 1, 3, 138 S.E. 355, 356 (1927) (quoting *Railroad Company v. Stout*, 84 U.S. (17 Wall.) 657 (1873)).[1] Here, the circuit court ignored this principal, substituting its singular judgment as to which evidence mattered most, invading the province of the jury.

REPLY TO RESPONDENTS' STATEMENT OF THE FACTS.

Respondents largely avoid the evidence Appellants put forward on the issues of undue influence and lack of testamentary capacity. Certain "facts" they *do* assert demand a response. There is no evidence "Warren explained to Mr. Bosch he wished for his assets to be distributed as set forth in the 2014 Will[.]" (Resp. Br., p. 4). Bosch's testimony does not support this claim. Warren did not know "exactly what he was doing," considering he believed he was signing a new "will" to prevent his ex-wife from taking. (Bosch Dep., pp. 35, 38-39).

Respondents also ignore Pamela's affidavit giving context to her comment to doctors that Warren made his own decisions. (Resp. Br. p. 4). She merely informed doctors that it was Warren's choice when he gave up on dialysis, effectively choosing to go home and die. Only by improperly "weighing" this statement could it be related to the Revocation. (Aff. Pamela Holliday).

Leaning on witnesses who watched Warren sign the Revocation, Respondents omit that before they arrived, Warren was alone with Ross—the only possible source for Warren's confusion over the "will" and its purpose. (Bosch Dep., p. 29-33, 64-65); (Nettles Dep., pp. 111-113, 115, 117-119, 128, 158-159) (R. Holliday Dep., v2, p. 98) (11/12/2021 Memo in Opp., Ex 35, ¶ 10(b)).

[1] The Court recalled a case where a judge found the testator competent and free of undue influence, but the jury reached the opposite result. *Id*. at 5-6, 138 S.E. at 356-57.

I. SECTION 62-7-604 DOES NOT APPLY TO APPELLANTS' CLAIMS, WHICH ARE NOT TIME BARRED.

A. Appellants do not contest the validity of Warren's Trust.

S.C. Code Ann. § 62-7-604 is a limitations period for "judicial proceedings to contest the validity of a trust." Had the Legislature intended Section 62-7-604 to also apply to an opposite claim advocating ***for*** a trust, it would have provided for the alternative, as it did in S.C. Code Ann. § 62-7-201(c)(1) (addressing claims to "determine the **existence *or* nonexistence of trusts** created other than by will" in the context of jurisdiction) (emphasis added). It could have used the same terminology, but it purposely did not. *Hughes v. W. Carolina Reg'l Sewer Auth.*, 386 S.C. 641, 649, 689 S.E.2d 638, 643 (Ct. App. 2010) ("The general provisions of statutory construction would mandate that when the legislature employs a term other than one specifically defined, the implicit intent is that the undefined term has a different meaning.").

B. Respondents' conundrum: "trust" and "terms of a trust" are *both* defined.

Respondents' try to fool this Court into believing that application of Section 62-7-604 turns on whether the 2016 Revocation is a "term of the Trust." (Resp. Br., p 7 at n.4, 9). Respondents improperly *swap* the word "trust" (as used in Section 62-7-604) with "terms of a trust," forgetting *both* are defined terms.[2] If the Legislature intended Section 62-7-604 to apply to "terms of a trust,"[3] *it would have used that defined phrase*, like Mississippi and Alabama adopted. *See* Miss. Code

[2] Section 62-1-201(49) defines "Trust." Section 62-7-103(17) defines "Terms of a trust."

[3] Respondents claim Appellants ignore "that 'terms of a trust' is a statutorily defined phrase that must be interpreted consistently with how it is used through the South Carolina Trust Code." (Resp. Br., p. 9). It is actually Respondents who miss this point, ignoring that **Section 62-7-604 does not use this "defined phrase**," using the defined term "***trust***" instead. It is only by acknowledging the distinction between "trust" and "terms of a trust" that the latter can be interpreted consistently. Respondents' rhetoric assumes there is no distinction between "trust" and "terms of a trust," thus *it is Respondents* that "altogether disregard the fact that 'terms of a trust' is a statutorily defined phrase." Section 62-7-604 uses "trust" not "terms of a trust."

Ann. § 91-8-604 (a) *and* Ala. Code § 19-3B-604 (both stating a "judicial proceeding to contest the validity of all or part of ***the terms of a trust*** that was revocable at settlor's death . . . .") (emphasis added). Whether the Revocation is a "term of the trust" is irrelevant to Section 62-7-604, which only applies to actions contesting the validity of "a trust."[4] Appellants have not done this.

Respondents claim the Revocation is a "term of a trust," assuming it manifests Warren's intent to revoke the Trust, therefore they conclude this implicates application of Section 62-7-604. (Resp. Br., pp. 8-9). Even if "term of the trust" mattered to Section 62-7-604 (it does not), Respondents' reasoning is fatally circular. Warren's capacity and the undue influence over him *is the issue*. A jury finding that Warren lacked capacity or was unduly influenced clearly means the Revocation did not manifest his intent. S.C. Code Ann. § 62-7-601. Respondents' theory of Section 62-7-604 is unworkable. It makes resolution of the ultimate issue in dispute (*i.e.*, whether Warren had the requisite capacity/intent and was not unduly influenced) a pre-requisite to whether the action even invokes the limitations period. The case would need to be resolved on the merits before one would know it was time barred by Section 62-7-604. The Legislature avoided this conundrum limiting Section 62-7-604 to challenges to the validity of a "trust" rather than "term of a trust."

[4] Unlike Mississippi and Alabama, South Carolina and the other states that have enacted the Uniform Trust Code employ a version of Section 604 that uses "trust" ***not*** "terms of a trust." *See* Ark. Code Ann. § 28-73-604; Ariz. Rev. Stat. § 14-10604; Colo. Rev. Stat. § 15-5-604; Conn. Gen. Stat. § 45a-499qq; D.C. Code § 19-1306.04; Fla. Stat. Ann. § 736.0604; Ga. Code Ann. § 53-12-45; Haw. Rev. Stat. Ann. § 554D-604; 760 Ill. Comp. Stat. Ann. 3/604; Ind. Code Ann. § 30-4-6-14; Iowa Code § 633A.3108; Kan. Stat. Ann. § 58A-604; Ky. Rev. Stat. § 386B.6-040; Mass. Ann. Laws ch. 203E, § 604; Me. Rev. Stat. tit. 18-B, § 604; Md. Code Ann., Est. & Trusts § 14.5-605; Mich. Comp. Laws Serv. § 700.7604; Minn. Stat. Ann. § 501C.0605; Mo. Rev. Stat. § 456.6-604; Mont. Code Ann. § 72-38-604; Neb. Rev. Stat. Ann § 30-3856; N.H. Rev. Stat. Ann. § 564-B:6-604; N.J. Stat. § 3B:31-45; N.M. Stat. Ann. § 46A-6-604; N.C. Gen. Stat. § 36C-6-604; Or. Rev. Stat. Ann. § 130.515; 20 Pa. Cons. Stat. Ann. § 7754; Tenn. Code Ann. § 35-15-604; Utah Code Ann. § 75-7-607; Vt. Stat. Ann. tit. 14A, § 604; Va. Code Ann. § 64.2-753; Wash. Rev. Code Ann. § 11.103.050; W. Va. Code § 44D-6-604; Wis. Stat. Ann. § 701.0604; Wyo. Stat. Ann. § 4-10-604 (all employing the term "trust" to the exclusion of the phrase "terms of a trust").

Respondents' reliance on *Sec. Nat'l Bank v. Rickert (In re Isvik),* 274 Neb. 525, 741 N.W.2d 638 (2007) is misplaced. *Isvik* concerned reformation of a purported revocation, not the statute of limitations. *Isvik* does not (even remotely) suggest that the *statute of limitations* turns on whether a revocation is a "term of the trust." In *Isvik,* it was undisputed the settlor possessed capacity and was free of influence when she wrote a letter purportedly revoking her trust. *Id.* at 536, 741 N.W.2d at 647. The question was whether to *reform* this letter to replace the trustee rather than revoke the trust. *Id.* at 532, 741 N.W.2d at 645; *see* Neb. Rev. Stat. Ann § 30-3841 (allowing a court to "reform *the terms of a trust*"[5] under certain circumstances like South Carolina's § 62-7-415) (italics added). Unlike here, there was no dispute that the settlor in *Isvik* manifested an intent to do something through her letter,[6] and the trustee filed an action under the reformation statute to determine what she intended—revocation or termination of the trustee? *Id.* at 528, 741 N.W.2d at 642. This is precisely why the court specifically limited its holding to the context of the reformation statute. *Id.* (concluding the letter revoking the trust "is a term of that trust **within the meaning of § 30-3841**") (which includes the phrase "terms of a trust") (emphasis added).

[5] Nebraska's reformation statute specifically uses the phrase "terms of a trust." Neb. Rev. Stat. Ann § 30-3841. Like South Carolina, Nebraska's statute of limitations, § 30-3856, does not use the phrase "terms of a trust," and is limited to actions "to contest the validity of a *trust.*" *Isvik* does nothing to suggest its version of Section 604 applies to a claim advocating in favor of a trust. It certainly offers no guidance in South Carolina on that issue.

[6] The *Isvik* court focused on the trust instrument, which expressly reserved the right to revoke the trust by delivering a writing to the trustee which must be a "**document which is distinct from the trust instrument itself.**" *Id.* at 532-533, 741 N.W.2d at 645 (emphasis added). Because the letter met these requirements and the settlor clearly had intent, the letter was a term of the trust. The court had to address whether it was a "term of the trust" *for purposes of the reformation statute* in order to resolve whether the letter could be reformed (*i.e.*, to decide revocation vs. modification).

There is just no support for Respondents' claim that a revocation is a term of the trust for purposes of Section 604, if that matters.[7] Once a trust is revoked, there is no longer a trust—there cannot be "terms" of something that does not exist. Situations may arise where it is proper to consider a document as a term of the trust and to decide whether it should be reformed. S.C. Code Ann. § 62-7-415. In a case like *Isvik,* had the writing been reformed, the trust still existed, and the writing (as reformed) was a term of it. *See* 62-7-103(18) ("Trust Instrument" means an instrument executed by the settlor that contains the terms of trust, **including any amendments** thereto.").[8] This case does not involve reformation, and a "term of the trust" analysis makes no sense.

If Revocation revoked the Trust, then no trust exists, and it has no terms. If the Revocation was the product of undue influence or Warren lacked capacity, it did not affect the Trust and its terms remain unchanged. Even if Section 62-7-604 applies to both actions contesting the validity of "a trust" and the "terms of a trust," Appellants challenged neither the Trust nor its terms.

C. In South Carolina and other jurisdictions, an action in favor of a trust's existence (like here) is distinct from an action to invalidate a trust.

Contrary to Respondents' claim, South Carolina Courts distinguish between an action to invalidate a trust and an action to validate it. *Foster v. Foster,* 393 S.C. 95, 98, 711 S.E.2d 878, 879 (2011) (noting, "Petitioners' reliance on *Rutledge* is misplaced, as this is not a situation where a party is seeking to impose a trust, but rather one where the purported settlor denies the existence of a trust"). Appellants claim the Trust exists—they do not contest its validity. Applying Section 62-7-604 here would make no sense, a trustee who asserts that no trust exists (like Ross) would

[7] Had *Isvik,* occurred in South Carolina, it still would not implicate Section 62-7-604 because the validity of the settlor's letter was never challenged. Furthermore, *Isvik* does not stand for the proposition that a revocation is *per se* a term of every trust. There, the letter was specifically contemplated by the initial trust document. Viewed properly the letter was a term of the trust *despite* the fact that it purported to revoke the trust, not *because* of this fact.

[8] The definition of "Trust Instrument" does <u>not</u> include any form of the word "revocation."

never send "notice of the trust's existence." S.C. Code Ann. § 62-7-604(a)(2) (discussing notice of the trust's *existence* for establishing the limitations period (without stating "*non-existence*")).

Courts analyzing the issue within the context of UTC-604 recognize that a challenge to the "validity of the trust" assumes a trust otherwise exists.[9] The Supreme Judicial Court of Massachusetts considered "what does it mean to litigate, call into question, or challenge the validity of a trust[,]" and instructed that "this definition clearly captures claims — whatever those claims may be titled — **that seek relief <u>against</u> the trust** (*e.g.*, rescission or reformation)." *Sacks v. Dissinger*, 488 Mass. 780, 783-84, 178 N.E.3d 388, 393 (2021) ("Because the relief sought would change or revoke the trust, **implicit in any such claim is that the trust, <u>as is</u>, is not legally enforceable or valid**.") (emphasis added). Because a "challenge" seeks relief "against the trust" and opposes the trust "as [it] is," it is inherent that when a person "commence[s] a judicial proceeding to contest the validity of a trust" that but for the proceeding, the trust would otherwise exist. Thus, unless an action seeks a declaration that the trust is invalid or does not exist, then it is not an action to contest the validity of a trust.[10] Appellants do not seek relief *against* the Trust—they seek relief *for the benefit of* the Trust, because *Respondents* contend no trust exists. Citing cases that apply the statute of limitations to actions seeking to invalidate a trust in favor of either a prior version of the trust or a trust amendment, Respondents' claim that Appellants contend there

[9] This is consistent with the purpose for which the Uniform Trust Code imposes a statute of limitations for contesting *the validity* of a trust, *i.e.*, to define the time when the trust, *as it exists*, becomes "unimpeachable." *See Harvey v. Neumann*, No. 2018-00380-A, 2018 Mass. Super. LEXIS 3818, at *7-8 (Oct. 29, 2018) ("Now that the trust is unimpeachable as a matter of law, there is no basis upon which to enjoin [the trustee] from transferring or distributing trust assets.").

[10] In *Newcomer*, a party sought a declaration of which among competing documents was the "last valid trust agreement." Noting that "Under its plain language, [the statute] sets forth a limitations period for actions *to contest the validity* of a trust" the Court held an action to resolve "whichever document [should be] declared to be the last valid trust agreement. . . was not one challenging the validity of the trust, **we find that the [] statute of limitations is inapplicable**." *Newcomer v. Roan*, 2016-Ohio-541, ¶ 103, 56 N.E.3d 408, 430 (Ct. App. 2016) (italics original, bold added).

is no statute of limitations where Warren revoked his trust, rather than amended it, adding a rhetorical comment that this would "leave a glaring hole in the state's Trust Code." (Resp. Br., pp. 11-12). However, Appellants do not argue this.[11]

Appellants assert Warren never revoked his Trust, not that the Court should reach its conclusion, "[b]ecause Warren revoked—rather than amended his Trust." *Id*. While a settlor generally can amend or revoke a trust, in either case the settlor must possess the required capacity and intent to do so. Because Warren lacked capacity and was unduly influenced, Appellants contend he did not "elect to" do anything to his Trust when the Revocation was signed.

As personal representative, Ross distributed assets via Warren's estate that should have been preserved as non-probate assets *of the Trust.* The Probate Code envisions an action to correct this, providing a limitations period of *3* years. S.C. Code Ann. § 62-3-1006 ("action to recover property improperly distributed" from an estate should be brought "at the later of three years after the decedents death or one year after the time of distribution."). Further, except for their claims for intentional interference with inheritance ("IIWI") and appointment of a receiver, Appellants'

[11] Respondents' misapprehension of Appellants' arguments aside, the Trust Code does not exist in a vacuum. It is a part of the larger statutory scheme of the "South Carolina Probate Code," codified at Title 62, Articles 1-8. The Probate Code applies to trusts as the Trust Code, and like the Trust Code, the Probate Code must exist harmoniously with the rest of South Carolina's law. *See* S.C. Code Ann. § 62-1-103(b)(4) (stating the purpose of the Probate Code as "to facilitate use and enforcement of certain trusts"); S.C. Code Ann. § 62-1-201 (49) (the Probate Code (not the Trust Code) defining "trust"); S.C. Code Ann. § 62-1-103 (providing the principles of law and equity supplement the Probate Code); 62-7-106 (unless otherwise modified the common law of trusts and principles of equity supplement the Trust Code).

claims are equitable.[12] Rhetoric about there being no statute of limitations is a red herring. The law abides a scenario where there is no statute of limitations applicable to equitable claims.[13]

Respondents assume this Court should analyze this appeal as if Appellants challenge the validity of *an amendment* to the Trust. Had the Legislature intended Section 64-7-604 to apply to a challenge to the validity of an *amendment* to a trust, it would have drafted this section to say so, just like Delaware. *See* 12 Del. C. § 3546 (a) ("[a] judicial proceeding to contest whether a revocable trust **or any amendment thereto** . . . was validly created may not be initiated later than . . . ") (emphasis added). This is not the only flaw in Respondents' argument.

Using a hypothetical, Respondents draw analogy between revoking a trust versus amending it, citing a list of foreign authorities. (Resp. Br., pp. 10-16).[14] The reason Section 62-7-604 does not apply does not turn on whether Warren could amend his Trust or revoke it. Section 62-7-604 does not apply because Appellants do not contest the validity of Warren's Trust—Respondents ignore this, drawing a false equivalency between contesting "a trust" versus an "amendment."

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[12] *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (breach of fiduciary duty sounds in equity if the relief sought is equitable); *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) (suit for declaratory judgment is determined by the nature of the underlying issue."); *Dixon v. Dixon*, 362 S.C. 388, 398, 608 S.E.2d 849, 854 (2005) (undue influence is an equitable claim); *Eldridge v. Eldridge*, 398 S.C. 113, 119, 728 S.E.2d 24, 27 (2012) (action to declare constructive trust is in equity). Even if these claims sounded in law, they would be subject to the 3-year statute of limitations for claims for improper distribution from an estate under Section 62-3-1006 or the general 3-year statute of limitations in Section 15-3-530(1).

[13] *Thomerson v. DeVito*, 430 S.C. 246, 250, 844 S.E.2d 378, 380 (2020) (noting "that the statute of limitations does not apply to actions in equity."). *Estate of Holden v. Holden*, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000) ("A proceeding in probate court may either be an action at law or in equity"). "Whether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought." *Id.*

[14] Whether Section 62-7-604 applies to a challenge to an *amendment* is *not* before the Court, inviting dicta. Plus, Respondents should not assume there "would be no question" that 62-7-604 would apply. They cite no South Carolina case holding that challenging an amendment is the same as contesting the "validity of a trust," and Appellants' do not concede this point. *Compare* 12 Del. C. § 3546(a) (referring to amendments) to Section 62-7-604 (with <u>no</u> reference to amendments).

Respondents' hypothetical is not analogous for the most basic of reasons—under it, no one would dispute that the Trust exists. Thus, a challenge to a fictitious amendment would not change the fact that the Trust obviously existed for administration in accordance with its terms.[15]

To this point, Respondents cite no cases involving a claimant advocating for the trust's ***existence***. Instead, their cases all concern actions seeking either to invalidate an existing trust or an amendment to it. *See* (Resp. Br. pp. 10-16) citing *Ast v. Mesker*, 59 Kan. App. 2d 259, 261, 480 P.3d 795, 797 (2020); *In re Elizabeth A. Briggs Tr.*, 2017 S.D. 40, 898 N.W.2d 465, 467 (2017); *In re Admin. of the Lee R. Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, 907 N.W.2d 785, 791 (2018); *Derringer v. Emerson*, 435 F. App'x 4, 5 (D.C. Cir. 2011); *Herman v. Widmer*, 2019 ND 248, 934 N.W.2d 874, 876 (2019); *Shelton v. Tr. Created by the Joint Tr. Agreement of Larry E. Shelton*, 946 N.W.2d 540 (Iowa Ct. App. 2020) (all contesting the validity of amendment to an **existing** trust).[16] Noticeably absent across the nation is any case that has applied UTC-604 to a claimant advocating for the existence of a trust. The reason is simple—Section 604 is not implicated by such a claim. Considering a no-contest provision sheds help light on this point.

A no-contest clause is generally enforceable to avoid a challenge made without probable cause. Still, the *first* question is whether the action *is a contest*. Unless the action alters the

[15] Section 62-7-604 is intended to allow adequate time for claims while promoting the expeditious distribution of trust property in accordance with its terms. A trustee (like Ross) claiming no trust exists is not seeking to expeditiously distribute property for a nonexistent trust.

[16] Respondents cite unpublished or trial court orders with no precedential value. Notably, however, Respondents turn to South Dakota, where courts indicate that a summons and complaint are not required to meet the obligation to "commence judicial proceedings," which Appellants did by filing the Demand for **Non-Probate Inventory** in August 2017 (Case No. 2016-ES-10-01673)—within a year of Warren's death in September 2016. *See In re Carver Revocable Tr.*, 2020 S.D. 31, ¶ 20, 944 N.W.2d 808, 813 (2020) (for the purposes of the limitations period on claims challenging the validity of a trust, finding a party need not file a summons and complaint and can meet the statute by filing an administrative petition, with a subsequent claim challenging the validity of a trust relating back to that initial administrative petition). Thus, even if Section 62-7-604 applies to an action advocating for the Trust's existence, Appellants' claim is not time barred because Appellants timely commenced a "proceeding" by filing the Demand for Non-Probate Inventory.

administration of the trust, it is not a contest. That a claim might *relate* to a will or trust does not mean it is a "contest." *Heslin v. Lenahan (In re Eleanor McCarthy Lenahan Tr.)*, 428 S.C. 598, 604, 836 S.E.2d 793, 797 (Ct. App. 2019) (for the purposes of a no-contest clause, a contest is one that "disrupted or interfered with the actual administration of the trust") (*citing Rafalko v. Georgiadis*, 290 Va. 384, 777 S.E.2d 870, 879-80 (2015) (no-contest clause not violated "because they did not interfere with trust administration") *and In Re Estate of Singer*, 13 N.Y.3d 447, 920 N.E.2d 943, 947, 892 N.Y.S.2d 836 (N.Y. 2009) (no contest clause not violated because deposing father's estate lawyer did not contest, object to, or oppose estate plan)).[17] Equating an action to validate a trust's existence to an action contesting its validity, Respondents would turn no-contest cases on their head—a party that advocates *in support* of the trust would violate the no-contest provision. This absurdity underlies the problem with Respondents' position—they fail to see there *is* a difference between an action contesting the validity of a trust and one that does not.

D. Respondents' arguments regarding statute of repose and laches must fail.

Respondents' assert Section 62-7-604 is a statute of repose and laches applies. (Resp. Br., pp. 13-16 and at n.8). Neither is correct. Whether Section 62-7-604 operates as a statute of repose is irrelevant because Section 62-7-604 does not apply. Plus, no South Carolina case supports this conclusion. Respondents cite a Georgia *trial court* opinion (*Howell v. Bates*), omitting that on review the Georgia Court of Appeals applied its version of § 604 "as a statute of limitations," not a statute of repose. *Howell v. Bates*, 350 Ga. App. 708, 714, 830 S.E.2d 250, 255 (2019). Similarly,

[17] Other states find a request for interpretation does not challenge the intent of the testator or the validity of the will. *Hunter v. Hunter*, 298 Va. 414, 428, 838 S.E.2d 721, 727 (2020); *Va. Found. of Indep. Colls. v. Goodrich*, 246 Va. 435, 438, 436 S.E.2d 418, 420 (1993) ("While forfeiture clauses or 'no contest' clauses effectuate the testator's legitimate interest in preventing attempts to thwart his intent, a request for interpretation does not challenge the intent of the testator or the validity of the will."); *accord Newcomer*, 2016-Ohio-541 at ¶ 103, 56 N.E.3d at 430 (an action to resolve which version of a trust instrument controlled was "was not one challenging the validity of the trust" and concluding "we find that the [] statute of limitations is inapplicable.").

South Dakota has not adopted the Uniform Trust Code, but Respondents cite *In re Elizabeth A. Briggs Tr.*, 2017 S.D. at ¶ 9 n.5, 898 N.W.2d at 469 for the proposition that South Dakota's statute is a statute "statute of repose." (Resp. Br., n. 8). This is misleading. South Dakota merely held it "**may** operate as a statute of repose **in some cases**." *Id.* (not explaining what those cases were) (emphasis added). No other jurisdiction adopting the UTC has offered such an interpretation, and neither should this Court. *See* S.C. Code Ann. § 62-7-1101 (the Trust Code should be interpreted with a mind to promote uniformity among states that enacted the UTC).

Laches does not bar Appellants' claims, nor would it impose the same one-year limitations from Section 62-7-604 if considered. "[T]he "party asserting laches must show it has been materially prejudiced by the other parties' delay." (App. Br., p. 41) (*citing Mid-State Tr., II v. Wright*, 323 S.C. 303, 307, 474 S.E.2d 421, 423 (1996)). Respondents have never explained how they satisfy this requirement, nor do they now, summarily claiming without facts or authority that they either do not have to show prejudice, or that they "will suffer prejudice if Appellants' stale claims are allowed to proceed." (Resp. Br., p. 18). This conclusory statement is the entire response Respondents offer in support of laches, thus they have abandoned this argument.

II. GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE TRUST WAS REVOKED PRECLUDE SUMMARY JUDGMENT.

A. The applicable "version" of S.C. Code Ann. § 62-7-602.

Respondents (and the circuit court) are wrong about which "version" of S.C. Code Ann. § 62-7-602 applied when Warren created the Trust. (Order, pp. 9-11) (Resp. Br., pp. 18-20). In its 116th Session in 2005-2006, the Legislature adopted Act No. 66 (R80, S422), signed into law on

May 23, 2005, as the "South Carolina Trust Code" ("SCTC"). Its original "version" of Section 62-7-602, went into effect on January 1, 2006. [18] The Act states in relevant part:

> **Section 62-7-602.**[19] **Revocation or amendment of revocable trust.**
>
> (a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before the effective date of this article.
>
> . . .
>
> **(c) The settlor may revoke or amend a revocable trust:**
>
> (1) by substantial compliance with a method provided in the terms of the trust; or
>
> (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 <u>that expressly refers to the trust</u>, manifesting clear and convincing evidence of the settlor's intent; or**
> **(B) by oral statement to the trustee if the trust was created orally; or**
>
> **(C) any <u>other written method</u>, other than a later will or codicil, delivered to the trustee and manifesting clear and convincing evidence of the settlor's intent.**
>
> (d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.
>
> . . . .

[18] The full text and legislative history of 2005 S.C. Acts 66, 2005 S.B. 422, 2005 S.C. R. 80 (2005-2006) are available online: https://www.scstatehouse.gov/sess116_2005-2006/bills/05actsp1.php

[19] In the *fall of 2005*, Professor S. Alan Medlin published *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. Rev. 137 (2005), explaining Section 62-7-602, effective January 1, 2006, requires *exactly* what Appellants have said it requires:

> First, the **settlor may revoke** or amend **by executing a <u>later will or codicil, which must state that the trust is revoked</u>** or amended and must clearly and convincingly evidence the settlor's intent. Next, the **settlor may revoke** or amend **by delivering to the trustee <u>a writing, other than a will or codicil</u>, that clearly and convincingly evidences the settlor's intent**.

Id. (all emphasis added).

2005 S.C. Acts 66, 2005 S.B. 422, 2005 S.C. R. 80 (2005-2006) (emphasis added). These requirements applied in 2008 when Warren created the Trust.[20]

As neither the 2014 Will nor 2016 Codicil refers to the Trust (Order, p. 4), neither could revoke it if Section 62-7-602 is correctly applied.[21] That the Will distributed "all of [Warren's] real and personal assets," or "treated his children differently" is not sufficient to revoke the Trust.[22] The circuit court confused Warren's *personal probate estate* (*i.e.*, "his" assets) with his *non-probate estate* comprised of assets the Trust owned. S.C. Code Ann. § 62-7-401(c) (formerly S.C. Code Ann. § 62-7-112) (confirming the creation of a revocable trust is a valid *nontestamentary transfer* of property) (11/17/2021 Hearing Trans., pp. 37-42) (4/18/2022 Hearing Trans., pp. 8-9).

Comments Warren allegedly[23] made to Goltra and Hale cannot satisfy Section 62-7-602(c)(2)(B) because the Trust was not created orally, and neither Hale nor Goltra was a trustee.

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[20] The 2014 amendments *maintained* these requirements—it did not add them. This language existed in 2006 and was *preserved* in later amendments to the Probate Code and SCTC in 2014. *Compare* 2005 S.C. Acts 66, 2005 S.B. 422, 2005 S.C. R. 80 (2005-2006) to the later enacted 2013 S.C. Acts 100, 2013 S.B. 143, 2005 S.C. R. 46 (2013-2014), adopted by the 120th Legislative Session. Comments note Section 62-7-602 (in 2005) was "a departure" from *prior* law governing revocation of trusts, such as *Peoples National Bank of Greenville v. Peden et al.*, 229 S.C. 167, 92 S.E.2d 163 (1956). Respondents are just wrong about *when* the "departure" occurred.

[21] The circuit court erred when finding "By executing the 2014 Will and 2016 Codicil, Warren showed a clear and definite purpose to revoke the trust." (Order, p. 11). *See* Comments to 2005 S.C. Acts 66, 2005 S.B. 422, 2005 S.C. R. 80 (2005-2006) ("A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death."). Mere "execution" does not revoke a trust, because a testator can always destroy that will before death.

[22] The reference in the will to revocation of the trust must be express. Comments to S.C. Code Ann. § 62-7-602 provide, "A residuary clause in a will disposing of the estate differently than the trust is alone **insufficient to revoke or amend a trust**." (Emphasis added).

[23] There is no evidence Warren told Goltra or Hale "that he did not want Pamela and Mark to inherit the business that he spent his life building." (Order, p. 10). It was *Ross* who did not want Mark and Pamela in the business—the same person who benefitted by the Revocation. (Brouthers Dep., pp. 112-114). The circuit court gave greater weight to evidence that is *not* in the record.

Section 62-7-602(c)(2)(B) (Comments noting, "SCTC subsection (c)(2) differs from the UTC version by requiring a writing to revoke or amend a trust unless the trust was created orally.").

The Marital Settlement does not mention revoking the Trust and is not clear and convincing evidence of Warren's intent to do so. S.C. Code Ann. § 62-7-602(c)(2)(C). Ross testified he "assumed" Warren "took care of" the Trust during the divorce. (R. Holliday Dep. v2, pp. 59-60). The drafters contemplated and solved the problem presented by the scenario Ross describes:

> Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. **There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document**.

See UTC Comments as reflected in Act 66 (2005-2006) (adopting S.C. Code Ann. § 62-7-602) (all emphasis added).[24]

Questions of fact prevent the circuit court from finding Warren showed intent to revoke the Trust "on a number of occasions."[25] (App. Br., pp. 18-19). Respondents do not attempt to explain why it is beyond the pale of reason for a jury to find Warren's use of the Trust *even after* the divorce, the 2014 Will, and the 2016 Codicil shows that he did *not* intend to revoke it. Plus,

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[24] Warren's Trust does not specify a particular mode of revocation, but the law does, and Section 62-7-602(c)(2) and its subparts require a *writing* to do so. That Respondents press this argument is surprising, as Truett Nettles admitted he researched the Trust Code while drafting the deathbed Revocation and determined the Trust must specifically be revoked. (Nettles Dep., pp. 127-128).

[25] You can only break an egg once—and you cannot revoke a trust on a "number of occasions." Respondents fail to identify *which* "occasion" is the revoking event. If the divorce revoked the Trust in 2013, then the 2014 Will and 2016 Codicil did not and are irrelevant. If the 2014 Will revoked it, then it was not previously revoked by the divorce, making the divorce irrelevant to any intent Warren may have *later* had. This conundrum infects the entire analysis below. (Order, pp. 9-11). Section 62-7-602 solves this confusion with its clear and convincing writing requirement.

the Marital Settlement did not revoke the Trust—it merely secured Warren's obligation to make payments to Patricia[26] using a preferred economic interest *in distributions* from Zeezrom, not by liquidating or conveying assets that remained in the Trust for the benefit of future generations. (9/24/2021, Respondents' Supp. Memo, Ex. A); (App. Br., pp. 18-19).

B. As to the deathbed Revocation, there are questions of fact as to Warren's testamentary capacity and whether he was subjected to undue influence.

1. Evidence that Warren lacked testamentary capacity.

Regarding testamentary capacity, Respondents agree the "mere scintilla" standard applies. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); *Hairston v. McMillan*, 387 S.C. 439, 445, 692 S.E.2d 549, 552 (Ct. App. 2010). Appellants met this standard, offering ample evidence that Warren lacked testamentary capacity when he signed the Revocation. Respondents have no reply to the circuit court's blatant error in finding Dr. Kimberly A. Collins' unrefuted medical opinion "mentions nothing about the elements of testamentary capacity" (Order, p. 12). Dr. Collin's opinion plainly cites the correct standard and concludes Warren lacked testamentary capacity.[27] (Mot. to Recon., pp. 5-6; 4/18/22 Trans., pp. 3-5; App. Br., pp. 21-23). This erroneous finding was the *sole basis* to refuse to consider her medical opinion.

Effectively conceding Dr. Collins applied the correct standard,[28] Respondents now contend only evidence derived from the moment of execution is relevant to testamentary capacity. (Resp.

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[26] Respondents misconstrue Appellants' arguments and cite no support for their claim that Warren "put all of his assets in the Trust" when he created it. (Resp. Br., p. 20, n. 14). Warren had a two-pronged estate plan, *at the same time.* There is no evidence Warren was "constrained" to rely on Trust assets to pay his *personal* obligations to Patricia. The only "constraint" Warren faced is that he was required by law to comply with Section 62-7-602 if he had intended to revoke his Trust.

[27] Respondents cite *Macauley, et al. v. Wachovia Bank, et al.*, 351 S.C. 287, 569 S.E.2d 371 (Ct. App. 2002) (Resp. Br., p. 21), however *Macauley* involved a life insurance contract, which invokes a different standard. *Id.* at 294, 569 S.E.2d at 375. *Macauley* provides no useful instruction.

[28] Respondents now avoid *Langley v. Lynch*, No. 2017-UP-226, 2017 S.C. App. Unpub. LEXIS 252 (Ct. App. May 24, 2017), which they convinced the circuit court to follow below.

Brief, pp. 22-23). They are wrong.[29] It is settled that inferences of a testator's lack of capacity at the time of execution can be drawn from evidence both *before and after* the testamentary act.

In re Perry's Will, 106 S.C. 80, 84, 90 S.E. 401, 402 (1916), explained:

> It is true that **no witness states a want of capacity at the moment of signing the will**, and that is the important fact. **Her condition, however, is described before and after that moment. From these facts, an inference of incapacity may be drawn**. That inference is not for this Court. The preponderance is not question for this court.

Id. (all emphasis added); s*ee also Ex parte McLeod*, 140 S.C. at 9, 138 S.E. at 358 ("The whole personal history of the testator, mental and physical" is relevant capacity."); *In re Washington's Estate*, 212 S.C. 379, 384, 46 S.E.2d 287, 289 (1948) (court can receive evidence of incapacity that covers "a range of time").

That Dr. Collins did not physically examine Warren and was not present when he signed the Revocation is irrelevant to whether her medical opinion is admissible evidence.[30] (Resp. Brief, p. 23). A physical examination is not necessary to form an admissible medical opinion regarding capacity. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 219-20, 578 S.E.2d 329, 335 (2003), notes that even without an examination, a medical expert can offer "an opinion that Testator was mentally incompetent and therefore more susceptible to undue influence." *Id*. Dr. Collins did just that. At most, Respondents are challenging what *weight* should be given to Dr. Collins' medical

[29] Respondents fail to abide by what they advocate, relying on testimony from Goltra and Hale that Warren had capacity, even though neither of them was present "*at the time he executed the Revocation*." (Resp. Br., p. 23). The circuit court allowed Respondents to have their cake and eat it too, giving weight only to Respondents' "numerous witnesses" (some present, some not) while refusing, without explanation, to consider (or even acknowledge) other expert and lay witnesses offering evidence that Warren lacked capacity and inability to independently read. (App. Br., pp. 2-3, 20-27). It was error to weigh the competing evidence.

[30] Without citing any authority, Respondents claim, "The case law is clear that a testator's medical issues and historical diagnoses cannot form the basis, in and of themselves, for finding a lack of testamentary capacity." (Resp. Br., p. 23). They obviously overlook the likes of *Ex parte McLeod*, 140 S.C. at 9, 138 S.E. at 358 ("The whole personal history of the testator, mental and physical, may be freely ranged over upon the issue of insanity.").

opinion, *not its admissibility*. *Peterson v. AMTRAK*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) (challenges to the scope or quality of review or her education and experience "go to the weight, not the admissibility, of the expert's testimony").[31] Dr. Collins reviewed Warren's medical records and the findings and observations of his treating physicians,[32] and she offered an *unrefuted* medical opinion based on her wealth of experience that Warren lacked testamentary capacity at the time he signed the 2016 Revocation on this deathbed. The circuit court was wrong to ignore it.

Claiming "there is no evidence in the record that [Warren] was insane or suffered any mental illness at the time he executed the Revocation[,]" (Resp. Br., p. 25), Respondents ignore medical records reporting his *dementia*.[33] (11/12/2021 Memo in Opp., Ex. 2, 4, 5, 11-14). Martha Brouthers knew of Warren's dementia, as did Mark. (Dep. M. Brouthers, p. 56; Affidavit of Mark Holliday). Dr. Collins confirmed this diagnosis. (Aff. of Dr. Collins; Supp. Aff. of Dr. Collins). Dr. Collins also found his opioid narcotics could affect his capacity and susceptibility to influence. *Hellams v. Ross*, 268 S.C. 284, 288, 233 S.E.2d 98, 100 (1977) (intoxication can cause incapacity).

Warren's confusion over what he was signing is *not* immaterial. (Resp. Br., p. 24). Warren's probate assets were different from the non-probate assets conveyed to the Trust, under

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[31] In *Hairston*, 387 S.C. at 446, 692 S.E.2d at 553, a special referee considered expert testimony from a doctor who opined the testator lacked capacity based on a review of medical records, without a physical examination. As the fact-finder, the special referee considered all the competing evidence and ultimately found the testator competent, but *Hairston* highlights the difference between *admissibility* and the *weight* of a medical opinion, which the circuit court ignored.

[32] Respondents do not dispute the accuracy of Warren's medical records, even relying on them. Appellants are entitled to the inference that Warren's doctors were correct in finding he had dementia. Respondents offer no logical reason why Dr. Collins, given her vast experience, is not qualified to review these records and diagnoses to form a medical opinion based in part on these documented medical conditions.

[33] Respondents urge this Court to find "harmless" error in the circuit court's weighing of certain medical records over others. (Resp. Br., fn. 15). This error is not harmless—it exemplifies the circuit court's pattern of giving greater weight to Respondents' competing evidence.

the "more sophisticated" estate plan Heyward Carter designed at Warren's request, utilizing both a will and the Trust. Absent satisfaction of Section 62-7-602, changes to Warren's will do not affect the Trust, as these are different tools.[34] Here, a jury could reasonably conclude Warren did not intend to revoke his Trust (terminating the entire *non-probate* prong of his estate plan), when he signed what he believed was a new will.[35] *Ex parte McLeod*, 140 S.C. at 11, 138 S.E. at 358 ("Any fact … tend[ing] to show unsoundness of mind on the part of the testator was admissible …. The fact may not be of much weight, but it was not for the Court to judge of its weight.").

Citing *In re Washington's Estate,* 212 S.C. 379, 46 S.E.2d 287 (1948), Respondents acknowledge "the law requires simply that the testator know **and understand the meaning and consequences** of his act[.]" It was thus necessary that Warren understood he was revoking his Trust, and the consequences of doing so. It matters that Warren thought he needed a new "will" to prevent Patricia from taking and that he never mentioned revoking the Trust to Truett Nettles (nor putting the Trust assets into his probate estate). Combined with the fact that Nettles was "hot to trot" and did not explain what effect signing the new "will" would have on the distribution of the Trust properties only bolsters the significance of Warren's mistaken understanding of what he was signing and its consequences. (Bosch Dep., pp. 31-33; 11/12/2021 Mem. In Opp., Ex. 32, 35; R. Holliday Dep. v2, p. 98; Nettles Dep., pp. 111-113, 115, 117-119, 128; Hale Dep., p. 51).

2. Evidence of undue influence.

Respondents concede a presumption of undue influence arises here. This shifted the burden of proof to them to refute the presumption the Revocation is invalid. (Resp. Br., p. 27). *Howard,*

[34] As Professor Medlin pointed out in his Law Review Article, "A revocable trust, as a valid nonprobate transfer, is effective during the settlor's lifetime because some interest presently passed to the beneficiary. However, a will is considered to effect a probate, or purely deathtime transfer, because no interest passes to a beneficiary until the decedent's death." *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. Rev. 137, 144 (2005).

[35] *Howard v. Nasser,* 364 S.C. 279, 290, 613 S.E.2d 64, 69 (Ct. App. 2005) (evidence of confusion or mistake as to the effect of the signed document is relevant to undue influence).

364 S.C. at 288, 613 S.E.2d at 68. If no evidence rebutted the presumption, *Appellants* would be entitled to *offensive* summary judgment on that basis alone.

If Respondents offered evidence sufficient to rebut the presumption, it does not entitle *them* to summary judgment. Rather, it means Appellants cannot rely *solely* on the presumption *to prevail*, leaving questions of material fact for the jury. Ross had a confidential relationship with Warren, was involved in creating the Revocation, and was alone with Warren just before its execution, influencing Warren's understanding of it (among other facts). This evidence does not vanish or lose relevance just because Respondents rebut the presumption. Rather, these facts just form a part of the evidence to be weighed and decided by a jury. *Ex parte McLeod*, 140 S.C. at 9, 138 S.E. at 358; *Howard*, 364 S.C. at 289, 613 S.E.2d at 69.

Appellants needed only to offer "more than a mere scintilla of evidence" as to undue influence, which they did. However, Respondents argue unmistakable and convincing evidence is necessary. (Resp. Br., p. 29). This is the standard *at trial*, not at summary judgment. Appellants met their *summary judgment* burden, but for the circuit court's improper weighing of the evidence.

Undue influence is found in a variety of factors, including: (1) an unnatural disposition making the influencer the chief beneficiary; (2) a significantly different distribution than in prior estate plans; (3) proximity to death to the act; (4) the testator's mental and physical infirmity and susceptibility to influence; (5) the influencer's involvement with the testamentary instrument or act; (6) confusion or mistake as to the effect of the act; (7) whether the testator is under heavy medication; (8) restricted visitation; (9) whether a copy of the instrument is left with the testator; (10) where the influencer exercised control over the testator; (11) motive and opportunity for influence; and (12) the presence of other suspicious circumstances. Appellants introduced

substantial evidence satisfying these recognized factors. (App. Br., pp. 30-36). Evidence of these factors is relevant to undue influence in *other* precedent[36] and likewise relevant here.

Evidence of undue influence is not limited to what exists "*at the time Warren signed the Revocation*."[37] (Resp. Brief, p. 29) (italics supplied by Respondents). Numerous authorities hold undue influence may be demonstrated by evidence "at the time of **or before the [document's] execution**." *In re Estate of Cumbee*, 333 S.C. at 671-672, 511 S.E.2d at 394 (internal quotations omitted) (relevant acts of undue influence occurred over five years); *accord Gunnells*, 431 S.C. at 123-27, 847 S.E.2d at 100-102; *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993); *Byrd*, 279 S.C. at 427-428, 308 S.E.2d at 789-790 (1983); *Moorer v. Bull*, 212 S.C. 146, 46 S.E.2d 681 (1948). This makes sense, because "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.

Respondents ignore Ross' instigation and involvement in the Revocation's drafting, and it is uncontested Warren did not request the Revocation and did not know Nettles was drafting it. It was only when Ross flew from Utah, directed Nettles to come over (and was alone with Warren beforehand), that Warren first knew he was being asked to sign something—which he thought was a new "will" to prevent his ex-wife from taking. (Bosch Dep., pp. 29-33, 64-65); (Nettles Dep.,

[36] For a examples, *see, e.g., Gunnells v. Harkness*, 431 S.C. 116, 124, 847 S.E.2d 97, 101 (Ct. App. 2020); *Howard*, 364 S.C. at 288-290, 613 S.E.2d at 68-70; *Russell*, 353 S.C. at 219-20, 578 S.E.2d at 335; *In re Estate of Cumbee*, 333 S.C. 664, 673, 511 S.E.2d 390, 395 (Ct. App. 1999); *Byrd v. Byrd*, 279 S.C. 425, 427-430, 308 S.E.2d 788, 789-791 (1983).

[37] Respondents must find it convenient that Warren's fulltime caregiver, Ms. Williams, was sent on an "outing" before Nettles arrived with the Revocation, leaving Ross alone with Warren before the signing occurred—the first *and only* time Bosch had ever seen this happen. (11/12/2021 Memo in Opp., Ex. 33) (Bosch Dep., p. 66). This is important, considering Ms. Williams knew Warren well, questioned whether he would knowingly change his will or trust to treat his children differently, and stated he could not read independently. A jury should decide the weight to be given to her testimony and the circumstances of her being sent away when the Revocation was signed.

pp. 111-113, 115, 117-119, 128, 158-159) (R. Holliday Dep., v2, p. 98) (11/12/2021 Memo in Opp., Ex 35, ⁋ 10(b)). *Ross knew this was not a will,* thus a jury could find Ross misled Warren into mistakenly believing the document concerned his will before Nettles arrived. This evidence *from the day of execution* joins the legion of evidence of undue influence arising prior to the signing.

Respondents claim *Warren* specified that Ross, Lea and Martha were the only persons allowed to visit him, claiming, "the form does not support a finding that *Ross* restricted anyone from vising Warren[.]" (Resp. Br., p. 28, fn 17) (italics by Respondents). But it does. The form is *plainly signed by Ross Holliday* (not Warren) using his power of attorney, signing "Warren Holliday ***by RH [initials] P.O.A.***" (Mem. in Opp., 11/12/21, Ex. 22) (emphasis added). Thus, it *was Ross* who restricted access. (Mem. in Opp., 11/12/21, Ex. 22, page 2 of 2).

When Ross texted Pamela and Mark to suggest everyone visit Warren before he died, Ross already had Nettles working on the Revocation. Neither Mark, Pamela, *nor Warren for that matter*, knew this. After it was signed, Respondents argue Pamela could have asked Warren to sign a *new* testamentary instrument while visiting with him privately. (Resp. Br., p. 28). One must really wonder how Pamela would even know to ask her dying father to execute a *new* testamentary instrument, as there is no evidence Ross revealed the Revocation's existence to her. Respondents have now admitted they believe it is perfectly acceptable for one of Warren's children to influence him to sign a new testamentary document while alone with him as he is dying.[38] The evidence certainly supports that occurred with Ross' procurement of the signed Revocation days earlier.

[38] Respondents apparently advocate that she should ask for this while Warren lacked testamentary capacity. (11/12/2021 Memo in Opp., Ex. 51, ⁋ 5) (noting Warren suffered "delirium, poor judgment, confusion, forgetfulness" and cognitive defects "in the few days" before his death).

Respondents urge adoption of a new rule that undue influence cannot exist without threats, restricted visitation,[39] or coercion. (Resp. Br., p. 29). These are factors, not requirements. A confidential relationship, *standing alone*, creates a presumption of undue influence. "In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, ***or***[40] an existing fiduciary relationship at the time of or before the [document's] execution." *In re Estate of Cumbee*, 333 S.C. at 671-672, 511 S.E.2d at 394 (internal quotations omitted) (emphasis added); *Byrd*, 279 S.C. at 430-431, 308 S.E.2d at 791-792; *Moorer*, 212 S.C. at 149, 46 S.E.2d at 682. Besides, Martha Brouthers testified that Ross exercised control over Warren, excluding him from business matters. (R. Holliday Dep., v2 II, pp. 8-9) (Brouthers Dep., pp. 114-15, 123, 157). Ross also did not always tell Warren about his discussions with Nettles. (Nettles Dep., p. 16; R. Holliday Dep., v2, p. 13). Dr. Collins' medical opinion shows Warren was more susceptible to undue influence. (11/12/2021 Memo in Opp., Ex. 3, 44, 45).

Bosch's claim that Warren said his daughter would "challenge his will" does not warrant summary judgment. Bosch could not deny whether Warren was influenced to make that comment. (Bosch Depo, pp. 37-38). Further, this reinforces that Warren mistakenly believed he was signing a new will. (Bosch Depo, pp. 31-33). Warren never mentioned the Trust to Bosch while discussing his "will," and there is no evidence Warren knew or understood he was signing an instrument entirely revoking his Trust that day, reinforcing that he did not "understand the meaning and consequences of his act[.]" *In re Washington's Estate*, 212 S.C. at 385-386 46 S.E.2d at 289. Respondents assert Warren's confusion does not matter, but they are wrong. *Howard*, 364 S.C. at

[39] While there is evidence of Ross using his power of attorney to restrict visitation while Warren was at Sweetgrass, little was needed on this issue because both Pamela and Mark lived out of state.

[40] The use of the word "or" is important. As a disjunctive particle, it marks an alternative. *K&A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009). This is not an elements test; it is a factors test.

290, 613 S.E.2d at 69. Respondents admit it was not Warren's idea to revoke the Trust, and no one explained what effect the Revocation would have on the Trust and its assets—Nettles did not know the effect even though he prepared the Revocation, and admitted Warren did not understand these matters. (Nettles Dep., pp. 111-113, 115, 117-119, 128, 158-159).

Warren's Trust and his Will/Codicil are different estate planning tools specifically set up with Heyward Carter's assistance to coexist. Warren may have changed his Will, but in eight years he never changed (and continued to use) the Trust. Had Warren wanted it revoked, he had *every* chance over those eight years to do it. Nowhere in the record is there evidence from *any* competent witness that Warren told them to prepare a writing revoking his Trust. This is more evidence that Warren did not intend to revoke it, but the circuit court turned a blind eye.

III. INTENTIONAL INTERFERENCE WITH INHERITANCE.

South Carolina has not refused to recognize a claim for intentional interference with inheritance ("IIWI").[41] Rather than follow the lead of *Wellin v. Wellin*, 135 F. Supp. 3d 502, 513 (D.S.C. 2015) (finding South Carolina would adopt the claim),[42] the circuit court plowed new earth, rejecting the claim in a manner contrary to the State's public policy to protect the beneficiaries of estate instruments from harm caused by others' misconduct. *Cf. Fabian v. Lindsay*, 410 S.C. 475, 488, 765 S.E.2d 132, 139 (2014). Respondents avoid the substance of these authorities.

Respondents contend Appellants lost the ability to assert a claim for IIWI because they failed to timely challenge the Revocation. (Resp. Br., p. 36-37). If this were true, the effective

[41] *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014); *Douglass v. Boyce*, 344 S.C. 5, 9, 542 S.E.2d 715, 717 (2001).

[42] Since the circuit court's Order, *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), was decided, finding South Carolina would adopt a claim for intentional interference with expectancy.

statute of limitations for IIWI would be coextensive with Section 62-7-604, after which time the probate remedies are foreclosed. Yet, Comments to Section 62-7-604 make clear a claim for IIWI "is not subject to [the limitation period of] this section."[43]

The circuit court has concurrent jurisdiction with the probate court and may hear Appellants' IIWI claim as explained in Appellants' Initial Brief. (App. Br., pp. 45-47). Respondents do not dispute that the circuit court has jurisdiction over a claim of IIWI—they just argue *this* circuit court does not. Considering the circuit court shares concurrent jurisdiction over matters removed from probate court, it would be absurd to require a plaintiff to file its probate claims in probate court, remove those claims to circuit court, and then file a separate claim in circuit court for IIWI, and then move to consolidate all the claims in a single proceeding. *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.").

IV. APPELLANTS' REMAINING CLAIMS.

The circuit court erroneously granted summary judgment as to Appellants' remaining claims for declaratory judgment, constructive trust, breach of fiduciary duty, accounting, and appointment of receiver for the simple reason that this result rested on its flawed conclusion that no questions of fact exist on the issues of capacity and undue influence. Because this finding is wrong, it cannot sustain dismissal of these claims. Plus, it is difficult to imagine a situation more fundamentally unfair and contrary to due process than to grant summary on the basis of insufficient evidence to support these claims when the Court refused to allow Appellants to conduct *any*

[43] Although *Wellin* suggested the tort may be restricted to cases where the plaintiff <u>has</u> no remedy in probate court, whether this applies is unsettled in South Carolina. Respondents cite no authority for the proposition that a probate claim that is barred in one respect (which is not the case) precludes an entirely independent claim (*i.e.,* IIWI) not governed by probate procedures. *See The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. Rev. 137, 149 (observing, "The probate process does not control revocable trusts because they are non-probate transfers - estate planners often use revocable trusts for this reason.").

discovery related to them. *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).

Respectfully submitted,

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December 12, 2022

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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 D. 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, 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.

PROOF OF SERVICE

The undersigned certifies that she served a copy of the foregoing **Appellants' Reply Brief** to all counsel of record on December 12, 2022 by electronically mailing a copy of the same as follows:

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