THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Sr.
Circuit Court Judge

APPELLATE CASE NO. 2017-001131

Glenn Gunnells, Individually and as the Personal Representative of the Estate of Helen B. Gunnells.....Appellant.

v.

Cathy G. Harkness .....Respondent

INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Appellant Glen Gunnells ("Appellant") submits this reply brief to address errors of law and citation of improper or unavailing authority in the Brief of Respondent filed by Cathy Harkness ("Respondent").

Reply to Argument I

In this argument, Respondent asserts that the "trial judge analyzed the broad gambit of factual testimony" and goes on to recount "some of the most salient facts that the Court relied on to 'outweigh' the isolated testimony of Ms. Klok and Ms. Voytko." [Resp. Br. p. 6].

It is important to note, however, that the Probate Court did not analyze the legal professionals' testimony, nor did the Probate Court weigh their credibility versus the other witnesses.

If it is well-settled that, in a will contest based on undue influence, the contestant must show that the influence was brought directly to bear upon the testamentary act – then how would the only two witnesses to the testamentary act be "isolated" as Respondent assumes? *Wilson v. Dallas*, 403 S.C. 411, 337, 743 S.E.2d 746, 760 (2013) (holding that in a will contest case, facts are irrelevant "if they have no bearing on the execution of [testator's] testamentary documents" and "shed no light on whether the [testator's] will was somehow overcome at the time he signed the documents finalizing his estate plan").

The Respondent offers no arguments against the legal professionals' factual testimony – because the testimony shows a lack of undue influence in the testamentary act. The Respondent offers nothing in face of the Appellant's assertion that evidence from the drafting attorney is relevant – because is proves the Appellant's case.

There is something dramatically wrong with the Probate Court's decision, as well as the law of undue influence in South Carolina, if the Probate Judge can simply *ignore* the testimony of the only witnesses to the testamentary act and pretend they did not see what they saw, or hear what they heard or do what they did – and then have the Appellant claim "there was substantial evidence for the Court to weigh against the 2 to 3 hour meeting with Ms. Klok and Ms. Voytko." [Resp. Br. p. 9].

If the proof must be by clear and compelling evidence, then the Probate Court cannot simply disregard the most important evidence, and have it simply be within his "discretion" to do so. That is the definition of an abuse of discretion. It shows that the Probate Court did not meet the high standard of "clear and compelling" evidence.

The Respondent suggests that the "veracity of the witnesses" cannot be passed on by the Court of Appeals. [Resp. Br. p. 6]. If that is true, then in the face of no explanation from the Probate Court (as to why he disregards the legal professionals' testimony, or finds their testimony outweighed by the family members, or somehow failing to follow ethical, moral or professional standards), how can their testimony *not* be heard? It cannot without ignoring the vast body of undue influence law in this state.

The Probate Court's Order is a miscarriage of justice.

Reply to Argument V

Respondent does not demonstrate any evidence of threats or force to the Testarix by the Appellant [Resp. Br. p. 14], which is the critical element for finding undue influence based on physical intimidation. *Hairston v. McMillian*, 387 S.C. 439, 446, 692 S.E.2d 549, 553 (Ct. App. 2010). By arguing that threats against the *Respondent or her sister* somehow meets this test, Respondent is arguing against precedent.

Moreover, try as she might, the Respondent cannot show restricted visitation – the best she can do is offer a snippet of testimony from Mr. Brantley that Glenn did not "like" for Testatrix to talk to Respondent. [Resp. Br. p. 14]. But Respondent admitted to staying away from her mother [Exh. 4-5], and Respondent's sister did not seek to talk to Testratrix during the month the new Will was exectuted. [Tr. Vol 1. P. 82, 85].

None of the examples of restricted visitation cited by Respondent is actually *proof* of restricted visitation. Mr. Brantley, Ms. Carroll and Dr. Chanson all had the opportunity to meet regularly with the Testatrix and talk alone with the Testatrix.

As stated in Appellant's Brief, "cherry picking snippets of testimony while ignoring admissions and concessions form the same witnesses" is not enough to support the Probate Court's order. [App. Br. p. 25]. This is a critical factor omitted from the Respondents' Brief, and which does not support the Probate Court's findings.

Reply to Argument VI

Here, the Respondent simply ignores the two pages of Appellant's Brief describing Dr. Chanson's testimony. [App. Br. pp. 25-27; Resp. Br. p. 15]. There is little doubt that the Probate Court cherrypicked this testimony for medical opinions. [Order, p. 13]. Therefore, Respondent has abandoned this issue on appeal and her arguments are not presented for review because they consists of cursory and conclusory statements without citation to authority. *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal.").

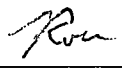
Reply to Argument VIII

In this argument, Appellant contended that the Probate Court erred in admitting the testimony of Ms. Carroll because of the lack of personal knowledge. By failing to address the substance of the argument, Respondent has conceded the point. "If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct." *Turner v. South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008). Also, again, the Respondent uses cursory and conclusory arguments which should be disregarded by the Court. *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013).

CONCLUSION

Based on the foregoing arguments and citation to authority, the Court should reject the erroneous positions advanced in the Brief of Respondent.

BROWN & VARNADO, LLC



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December 11, 2017
Mount Pleasant, South Carolina

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PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Appellant's Initial Reply Brief*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this date to the following:

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December 11, 2017

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: ***Glenn Gunnells individually and as the Personal Representative of the Estate of Helen B. Gunnells v. Cathy G. Harkness***
Appellate Case No.: 2017-001131
Our File No. 5218

Dear Ms. Kitchings:

Enclosed herewith for filing please find one (1) original and one (1) copy of ***Appellant's Initial Reply Brief.*** Upon filing, please return the file-stamped copy of both in the envelope provided. By copy of this correspondence, I am providing all Counsel of Record with a copy of the same via U.S. Mail.

If you have any questions or concerns, please do not hesitate to contact my office.

With kindest regards, I remain,

Very truly yours,

BROWN & VARNADO LLC

Robert B. Varnado

RBV/awm
cc: Donald Howe, Esquire (*Via U.S. Mail*)
Michelle Weil, Esquire (*Via U.S. Mail*)
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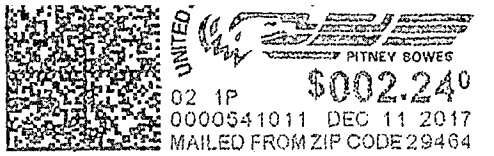

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