

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

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APPELLATE CASE NO. 2017-001131 SC Court of Appeals

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

v.

Cathy G. Harkness Respondent

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Helen Beatrice Gunnells (“Decedent” or “Testatrix”) died testate on February 7, 2014 in Charleston County, South Carolina. Decedent was the widow of the late Aiken Arden Gunnells. They were married for many years and resided at 1931 Capri Drive, Charleston, South Carolina (“Residence”). They had three (3) adult children: Appellant, Glenn Gunnells (“Appellant”), Respondent, Cathy Harkness (“Respondent”), along with Ms. Belinda Davis (“Ms. Davis”), who was not a party to these proceedings but was present and testified at trial.

Testatrix executed a prior will on November 7, 2006 (“Old Will”), in which she left everything to her husband. [R. p. 399 line 24 – p. 400 line 4]. However, in the event her husband pre-deceased Testatrix, everything would pass to her children in equal shares.

On January 21, 2011, Decedent and Arden Gunnells executed General Durable Power of Attorneys appointing Appellant as their attorney-in-fact. These documents were prepared by Weeks & Irvine of Charleston, South Carolina.

In the Spring of 2012, Arden Gunnells was diagnosed with cancer. Soon thereafter, at his parent’s request, Appellant moved into the Residence to care for his ailing parents. [R. pp.453-455]. In doing so, Appellant sold his own home. [*Id.*]. Arden Gunnells died June 8, 2013. [R. p. 263 lines 9-11].

On June 27, 2013, shortly after her father’s death, Respondent wrote her mother a letter threatening to sue her for personal property items at the Residence. [R. pp. 731-734].

Less than a month after her husband’s death, Decedent executed a new Last Will and Testament on July 3, 2013. (“New Will”). [R. pp. 711-716]. This document was prepared by Suzanne Klok, Esq. of The Klok Law Firm, Mt. Pleasant (“Attorney Klok” or

“Ms. Klok”). [R. p. 396, line 23]. The New Will appointed Appellant as the Decedent’s Personal Representative and designated him as the sole beneficiary of the Decedent’s Estate. [R. pp. 711-716]. Testatrix changed her Will because “she was really upset with her two daughters . . . she was unhappy with the way that they were – you know, she just didn’t want to be around them. There were some fights, I believe, over her husband’s property, and she was very unhappy with the two daughters.” [R. p. 400, lines 16-22].

Ultimately, Respondent followed through on her prior threat and filed an Affidavit and Complaint in Claim and Delivery against the Testatrix on July 19, 2013, in which Respondent claimed she was entitled to certain personal property items that remained at the Residence after her father’s death. [R. pp. 735-736]. The matter proceeded to a hearing on August 23, 2013 resulting in a judgment for Respondent as the Testatrix did not appear.

Testatrix died February 4, 2014. Appellant began administration of the Estate on February 25, 2014 as evidenced by the Application for Informal Probate of Will of Helen B. Gunnells and Information to Heirs and Devisees, both completed and filed with the Probate Court. [R. pp. 749-755].

On July 28, 2014, Respondent filed a Petition seeking to set aside the New Will alleging causes of action for undue influence and duress against Appellant. [R. pp. 66-70]. She filed an Amended Petition thereto on April 16, 2015. [R. pp. 79-82].

Respondent also filed a separate Petition against Appellant on April 16, 2015 seeking to remove him as Personal Representative of the Estate. [R. pp. 86-88]. A hearing on the removal Petition was conducted August 19, 2015. The Court has held that matter under abeyance pending final disposition of the instant Will Contest.

This matter came to a bench trial before the Honorable Irvin G. Condon of the Charleston County Probate Court on March 1-3, 2016. By Order dated May 12, 2016, Judge Condon found for the Respondent. [R. pp. 34-50]. Specifically, the Court found there was “clear and convincing” evidence that the Testatrix was “under undue influence when she made and executed the July 3, 2013 Will” and the New Will was found to be invalid. *Id.* This Order was received by Appellant’s counsel on May 19, 2013.

On May 31, 2016, Appellant’s counsel filed and served his Motion to Alter, Amend and/or Reconsider upon opposing counsel and the Probate Court. [R. pp. 97-122]. On August 25, 2016, Judge Condon denied Appellants Motion. [R. pp. 51-57]. The August 25, 2016 Order was electronically mailed to all counsel of record. On August 26, 2016, Appellant served the Notice of Appeal on Respondent. [R. pp. 94-96].

On March 3, 2017, the appeal came to a hearing before the Honorable Roger M. Young, South Carolina Circuit Court Judge. [R. pp. 58-65]. In his *Order Affirming Probate Court Orders of May 12, 2006 and August 25, 2016*, Judge Young denied the appeal. [*Id.*] This appeal timely followed. [R. pp. 94-96].

STANDARD OF REVIEW

An action to set aside a will is an action at law. *In re Estate of Palliser*, 363 S.C. 437, 474, 611 S.E.2d 250, 255 (2005). When a probate court proceeding is an action at law, the circuit court and the appellate court may not disturb the probate court’s findings of fact unless a review of the record discloses there is no evidence to support them. *Neely v. Thomasson*, 365 S.C. 345, 349-350, 618 S.E.2d 884, 886 (2005). Questions of law, however, may be decided with no particular deference to the lower court. *Id.* An abuse of discretion occurs when the decision of the trial judge is unsupported by the

evidence or controlled by an error of law. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 37, 691 S.E.2d 135, 143 (2010).

STATEMENT OF ISSUES ON APPEAL

- I. Whether the Probate Court erred in finding that the Testatrix's Will was the product of undue influence in the face of uncontroverted evidence and testimony from the Testatrix's Attorney and Paralegal to the contrary, who were the only witnesses to the testamentary act itself?
- II. Whether the Circuit Court's affirmation was incorrect?
- III. Whether the Probate Court erred in considering facts and testimony of events that occurred in the time after the testamentary act and after Testatrix's death as probative in finding that Testatrix's Will was the product of undue influence?
- IV. Whether the Probate Court relied on irrelevant facts and/or made factual findings not reasonably supported in the record in making its determination that that Testatrix's will was the product of undue influence?
- V. Whether the Probate Court erred in finding the Testatrix's Will was the product of undue influence when there was no showing of threats, force or restricted visitation?
- VI. Whether the Probate Court erred by giving great weight to the Respondent's misstated and misrepresented testimony of Testatrix's physician, Dr. Rhonda Chanson, when the medical conclusions found by the Probate Court are not reasonably supported by the record?
- VII. Whether the Probate Court erred in admitting and giving great weight to the unsubstantiated, unsupported and unauthenticated medical records from one of Testatrix's pharmacies?
- VIII. Whether the Probate Court erred in accepting the testimony of Ms. Helen Carroll regarding Testatrix's Statement "I had no choice" when Ms. Carroll testified several times she did not remember ever having a conversation with Testatrix about a New Will, nor knew the circumstances of the statement from which she read?
- IX. Whether the Probate Court's Order denying the Appellant's Motion to Reconsider addressed any of the legal and factual errors of the Probate Court's original Order?

ARGUMENT

The right to make a will directing the ultimate disposition of one's property is one of the basic rights known to our civilization; it encompasses the right to make it to the testatrix's pleasure and in her absolute discretion, whether judiciously or capriciously, justly or unjustly, subject only to the restraints upon the power of disposition that the law has imposed. *Wilson v. Dallas*, 403 S.C. 411, 445, 743 S.E.2d 746, 765 (2013); *In re Last Will and Testament of Smoak*, 286 S.C. 419, 427, 334 S.E.2d 806, 811 (1985) (citation omitted).

“It is elementary that the statutory right of a competent person to dispose of her property as she wishes may not be thwarted by disappointed relatives or by one who thinks the Testatrix used bad judgment or was misled.” *Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773, 775 (1976).

In will contest litigation that alleges undue influence, the South Carolina Probate Code states that: “[the Respondent] will have the burden of establishing undue influence.” See S.C. Code Ann. § 62-3-407. (“Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.”); *Calhoun v. Calhoun*, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982) (“The contestants continue to bear the burden of proof throughout the will contest”); *Smith v. Whetstone*, 209 S.C. 78, 84, 39 S.E.2d 127, 129 (1946) (stating in case where a will is formally executed, the burden of proof is on the contestant to prove undue influence “and this burden remains on him to the end”).

Undue influence may be proved by circumstantial evidence, but the circumstances relied on to show it must point **un-mistakenly and convincingly** to the fact that the mind

of the testator was subjected to that of some other person, so that the will is that of the latter and not of the former. *Howard v. Nasser*, 364 S.C. 279, 286, 613 S.E.2d 64, 67 (Ct. App. 2005) (emphasis added); *Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773, 775 (1976) (“Undue influence may be proven by circumstantial evidence. However, that evidence must be of a substantial nature.”)

For a will to be invalidated for undue influence, the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains her to do things which are against her free will, and that she would not have done if she had been left to her own judgment and volition. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003); *Smoak*, 286 S.C. at 424, 334 S.E.2d at 809.

Undue influence must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; by importunity which could not be resisted; that it was done merely for the sake of peace; so, that the motive was tantamount to force and fear. *Calhoun v. Calhoun*, 277 S.C. 527, 532, 290 S.E.2d 415, 418 (1982); *Russell*, 353 S.C. at 217, 578 S.E.2d at 333 (“The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf. Undue influence is demonstrated where the will of the influencer is substituted for the will of the maker.”)

The mere existence of influence is not enough to void a will as all influences are not unlawful. *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993). “A mere showing of opportunity and even a showing of motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional

evidence that such influence was actually utilized.” *Smoak*, 286 S.C. at 424, 334 S.E.2d at 809; *Russell*, 353 S.C. at 217, 578 S.E.2d at 333.

Where the testator has an unhampered opportunity to revoke a will or codicil after the operation of undue influence upon him, but does not change it, the court – as a general rule – considers the effect of undue influence destroyed. *Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999); *Russell*, 353 S.C. at 217, 578 S.E.2d at 333-334.

I. The Probate Court erred in finding that the Testatrix’s Will was the product of undue influence in the face of uncontroverted evidence and testimony from Testatrix’s attorney and her paralegal – who were the only witnesses to the testamentary act – to the contrary.

The Probate Judge, in denying the motion to reconsider, affirmatively stated that he had examined “all circumstantial evidence” in this case. [R. p. 52, p. 47]. The Probate Judge also went on to say that he “expressly acknowledges and contemplates the testimony of Attorney Klok and [her paralegal] Ms. Voytko. [R. p. 56, p. 46].

But when one refers to the original Order, the only time the Probate Judge discusses the attorney and paralegal, he merely says “Attorney Klok testified there was only one (1) visit for two to three (2-3) hours” and that the attorney “only had contact with the Testatrix for a couple of hours” [R. p. 47]. That is the sum-total of the Probate Court’s analysis regarding Klok and Voytko. In other words, the Probate Judge pulled and isolated one fact [the duration of the visit to the attorney’s office] and then failed to analyze the substance of the testimony of the only two witnesses who were present at the time the execution of the New Will.¹

¹ In doing so, the Probate Court isolates as conclusive a single detail regarding the execution of the Will, “to the exclusion of all other circumstances leading up to and immediately following the visit to Attorney Klok’s office” – which he chides the undersigned for doing (incorrectly) in the Motion to Reconsider. [R, p. 56].

It should be noted the in both Orders, the Probate Court never rejected the testimony of Klok or Voytko. [R. p. 34, p. 57]. He never made a finding that their testimony lacked credibility. [*Id.*] He never ruled that Klok violated her obligations as an attorney or acted in any way inappropriately. [*Id.*] Respondent offered no rebuttal testimony or witnesses that showed Attorney Klok mishandled the execution of the New Will, or violated her professional duties. Contrary to his assertion that he fully acknowledged and contemplated the testimony of Klok and Voytko, the Probate Judge treats them as though they didn't testify at all – contrary to how other Courts have treated the testimony of the drafting attorney.

Since the testimony of the drafting attorney has consistently been found to be probative in all other recent, reported “undue influence” cases in South Carolina, this should amount to reversible error.

It should be noted that these witnesses had direct evidence. Attorney Klok substantiated the original copy of the New Will for the Court. [R. p. 404, lines 2-10]. She said Testatrix met with her and her legal assistant Ms. Voytko on July 3, 2013 for about three (3) hours. [R. p. 397, lines 13-24]. Ms. Gunnells was adamant about having the New Will done that day. [*Id.*]. She brought the Old Will to the meeting with Attorney Klok, knowing that she wanted to change her disposition. [R. p. 399, lines 15-19]. Attorney Klok satisfied herself that Mrs. Gunnells was competent to make a new testamentary disposition. [R. p. 401]. “[T]hroughout our discussions, she was very frail physically but mentally she seemed to know what she wanted. She was pretty clear. Very adamant about it.” [*Id.* lines 12-15].

While Respondent drove Testatrix to her appointment at the Klok Law Firm, he was not present in the conference room at any time during any discussion or drafting of the New Will. [R. pp. 398-399]. Klok testified that her policy is not to allow anyone who comes with the client into the conference room during her interviews and no one else enters except her staff; in fact, she directed that the Respondent be outside the building throughout the meeting so that he could not possibly overhear the discussions – a decision the Respondent respectfully complied with. [R. pp. 399-400].

On the day she met with Klok, Testatrix was very upset with her two daughters, she did not wish to be around them and she was adamant about wanting to leave her Estate to Respondent. [R. p. 400-401]. “She seemed very, very sure, and that’s one thing that struck me that I still remember.” [R. p. 409, lines 15-17]. Klok said that had she ever felt the Testatrix was unsure, she would never have finished the Will that day. [*Id.* lines 18-24]. Klok remembered that Mrs. Gunnells glowed when she talked about Respondent – “It was very sweet. She was very, very loving about Glenn. It was really in contrast to how she spoke about her daughters, that for them they were more -- it was disappointment, I think, with the daughters. But she was very, very happy that Glenn was taking care of her. And you know, she said she couldn't get out and interact as much as she did if it wasn't for Glenn. And that he really was just, you know, wonderful of all the things he did. And took great care of her.” [R. p. 402, lines 2-11]. Klok explained to the Testatrix that changing her will was her decision and no one else’s; Klok then asked the Testatrix if she felt any force or pressure from any of her children in any way to change her will, to which she replied “no.” [R. pp. 407-408].

Testatrix – while alone and confiding with Klok and Voytko – thoroughly explained her reasoning and rationale for executing the New Will. It was not because she necessarily wanted to give Respondent the entire estate, it was more so that she did not want to give anything to her daughters – “she told me her rationale for it wasn't related to how great Glenn was and she loved him, but it was more how she was disappointed with her daughters.” [R. p. 401, lines 1-15]. Klok remembered that the Testatrix was very worried about her daughter, the Respondent, causing problems once she found out about the New Will. [R. p. 401, lines 16-19].

Voytko corroborated Klok’s testimony: she testified that Testatrix (1) met alone with Klok and Voytko while Respondent waited outside; (2) was of sound mind; (3) was very disappointed with her daughters; and (4) was grateful for her son. [R. pp. 425-430]. In her judgment, there were no “red flags”. [R. pp. 430-431]. Voytko witnessed the New Will. [R. p. 432].

For decades, reported decisions in South Carolina have given great weight to the testimony of the attorney who drafted the challenged testamentary document. *See, e.g., Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 216, 578 S.E.2d 329, 333 (2003); *Calhoun v. Calhoun*, 277 S.C. 527, 531, 290 S.E.2d 415, 418 (1982); *Hairston v. McMillian*, 387 S.C. 439, 446, 692 S.E.2d 549, 553 (Ct. App. 2010); *In re Estate of Anderson*, 381 S.C. 568, 575, 674 S.E.2d 176, 180 (Ct. App. 2009); *Howard v. Nasser*, 364 S.C. 279, 284, 613 S.E.2d 64, 66 (Ct. App. 2005); *Hembree v. Estate of Hembree*, 311 S.C. 192, 195, 428 S.E.2d 3, 4 (Ct. App. 1993); *Cf. Estate of Cumbee*, 333 S.C. 664, 673, 11 S.E.2d 390, 294 (Ct. App. 1999) (finding undue influence where, *inter alia*, Testatrix did not meet with lawyer nor did she read the will). In fact, in *Hairston*, the drafting attorney’s testimony was

considered so significant that it outweighed that of a testifying medical expert who had not examined the Decedent. 387 S.C. at 446, 692 S.E.2d at 553. Here, however, the Probate Court ignored this testimony.

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. *Russell*, 353 S.C. at 219, 578 S.E.2d at 335; *Mock*, 266 S.C. at 277, 222 S.E.2d at 774; *Hairston*, 387 S.C. at 446, 692 S.E.2d at 553; *see also 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”). In *Calhoun v. Calhoun*, the Supreme Court found probative the fact that “the record is devoid of any evidence the [Appellant] interfered with the making of the will.” 277 S.C. at 533, 290 S.E.2d at 419. Once again, however, the Probate Court ignored this as well.

Accordingly, the Probate Court committed reversible error when it adopted the Respondent’s proposed order (identical to the 5.12.2016 Order) with absolutely no mention of the substance of Klok and Voytko’s testimony, then later affirmed that the Court balanced all the evidence. That simply did not happen; it is the elephant in the room.

By electing to ignore the drafting attorney’s testimony – *almost as if she didn’t interview the Decedent at the time of the New Will or testify at trial* – the Probate Court has substantially deviated from what has been considered probative and compelling evidence by the higher courts in South Carolina.

By overlooking the testimony of the legal professionals, the Probate Court has essentially turned undue influence jurisprudence on its head. It is uncontroverted that Klok is a licensed, reputable and competent attorney who has practiced law in the Charleston area for over twenty years in the field of Wills and Estate Planning. Respondent offered no rebuttal testimony that put into question Klok's qualifications or professionalism in any manner, nor any expert testimony that Klok failed: (1) to adequately discharge her duty to the Testatrix; (2) was governed by some conflict of interest; or (3) deviated from the acceptable standard of care for probate attorneys. Yet if the Probate Court's Order becomes the new standard for undue influence litigation, all this formerly probative and compelling testimony is deemed irrelevant. Respondent offered no testimony that Klok in any way deviated from the standard of care for an attorney practicing in the area of Wills and Estates.

Additionally, the only factors the Court relied upon concerning "all other circumstances leading up to and immediately following the visit to Attorney Klok's office" were irrelevant and/or non-dispositive under current jurisprudence.

For example, the Court seemed to find probative that Appellant drove the Testatrix to Klok's office. [R. p. 35]. However, in *Calhoun v. Calhoun*, our Supreme Court did not find the fact the beneficiary drove the testator to the lawyer's office was at all probative. 277 S.C. at 532, 290 S.E.2d at 419 (1982). Neither, apparently, did the Court of Appeals in *Hembree*, 311 S.C. at 195, 428 S.E.2d at 4.

Next, the original Order found that "Respondent acknowledged that Susanne Klok had been his closing attorney on June 6, 2013 and that Attorney Klok had no relationship with Helen Gunnells prior to the Testatrix changing her Will" [R. p. 44] – as if to suggest

some improper collusion between Appellant and Klok. This suggestion is risible. Klok was the closing attorney for the property Appellant was selling [R. p. 422] and in conformity with South Carolina practice, she would have been selected by the buyer's attorney – i.e. not the Appellant. Even if this Court discounts the Appellant's testimony that the Testatrix wanted a female attorney rather than return to the firm where she had her Power of Attorney drawn [R. pp. 472-473], in *Smoak, supra*, the Supreme Court found nothing untoward that the beneficiary took the testatrix to his personal attorney. 286 S.C. at 422, 334 S.E.2d at 808.

While seeming to suggest the one visit with a new lawyer for 2-3 hours is somehow dispositive [R. p. 35], it is not. As Klok stated in her testimony, most times her elderly clients do not want to have multiple meetings. [R. p. 397, lines 4-12]. She schedules and tailors her meetings for each individual client. [*Id.* line 12]. Furthermore, the meeting was a long one – about three hours. [*Id.* lines 13-17]. The facts in *Smoak*, for example, show only one meeting with the lawyer. The number of visits simply is not dispositive – it's what transpired during the attorney meeting that makes the difference. Following *Hembree, supra*, the fact that the Will was “unsealed” when Testatrix left Klok's office, and the Respondent had access to it [R. p. 49] is likewise irrelevant.

If the law of South Carolina is that the *testamentary act* is the principal thing in an undue influence suit, how can the Probate Judge ignore the testimony of Klok and Voytko – the only two witnesses to the testamentary act – without it being an abuse of discretion? If the Probate Judge was truly taking into consideration *all* of the circumstantial evidence, why did he not consider the probative evidence of Klok and Voytko without it being an

abuse of discretion? If not an abuse of discretion, how can Klok and Voytko's probative, uncontested and relevant testimony not only be omitted from the Orders? What is it then?

The Probate Judge finds clear and unmistakable evidence of undue influence on the testamentary act *while ignoring the only witnesses to the testamentary act*. Bluntly, the Probate Court has abused its discretion in finding that "circumstances surrounding the execution clearly indicate the Will was the product of the Respondent and that the Testatrix 'felt she had no choice' but to execute a New Will." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 37, 691 S.E.2d 135, 143 (2010) (holding an abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law); *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) (holding an abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support); *Melton v. Olnik*, 379 S.C. 45, 55, 664 S.E.2d 487, 492 (Ct. App. 2008) (abuse of discretion arises when the judge's decision was controlled by some error of law or lacks evidentiary support).

II. The Circuit Court's affirmation was incorrect.

In his *Order Affirming Probate Court Orders of May 12, 2006 and August 25, 2016*, Judge Young relied upon the fact that "the probate court found, among other circumstances, that a fiduciary relationship existed between the appellant and the testatrix; that on some occasions the appellant prevented testatrix from talking on the phone or having friends visit; that appellant was living with testatrix, was sole caretaker and was testatrix's power of attorney." [R. pp. 62-63]. He also found that the Probate Judge "is not required to

believe uncontroverted testimony because it remains in the fact-finder's province to weigh the credibility and interests of a witness. [R. p. 63].

However, Judge Young also cited to *Howard v. Nasser* for the holding that “when determining whether the testatrix was unduly influenced, all circumstantial evidence, meaning **all circumstances surrounding the execution of the Will that indicate it is as though the Will was the product of another person** rather than the product of the testatrix, is the critical component of evaluation (emphasis added).” [R. p. 62]. He further cites to *Calhoun v. Calhoun* for the principal that “the circumstances must point unmistakably and convincingly to the fact that the mind of the testator was subjected to that of some other person so that the will is that of the latter and not the former.” [R. p. 61]. Finally, he cites to the “abuse of discretion” standard. [R. p. 60].

Judge Young's reliance on the *Vinson v. Harley*, 324 S.C. 389, 409-410, 477 S.E.2d 715, 726 (Ct. App. 1996) is misplaced when considered in relationship to *Howard* and *Calhoun*. If the testamentary act is the “critical component,” then the Probate Court cannot ignore the testimony of Klok and Voytko who were the only witnesses to it. At the very least, the Probate Court had to say why Klok and Voytko's testimony was not credible; yet the Probate Court does no such thing—even in the Order denying the motion to amend.

Similarly, if all the circumstances must point “unmistakenly and convincingly” to the fact that the Will is the product of Appellant's mind and not the Testatrix's, then the Probate Court cannot ignore the uncontroverted testimony of the legal professionals or the sole medical witness who testified – nor can an Appellate Court say the Probate Court was not required to weigh this testimony. And what makes this case so critical for Appellant is that this isn't simply a case where the Probate Court believed the Respondent's fact

witnesses over the Appellant's (troubling as that is when the entire record is reviewed), but the fact that the Probate Court ignores the critical testimony of Klok, Voytko and Dr. Chanson, while at the same time cherry-picking their testimony for plums. It is nothing like in *Vinson* where a jury could reasonably find that the low impact of an automobile collision was sufficient to sustain a defense verdict – it's as if there was no testimony or evidence whatsoever about the accident; in other words, by ignoring it, the Judge treated the testamentary act as a complete cipher.

No one was present at the testamentary act but for the Testatrix, Klok and Voytko. Respondent did not challenge the legal professional's testimony or credibility; she ignored it. She prevailed on the Probate Judge to ignore it, too – and he did. If it is the critical element of the case, and the Probate Court must weigh all the evidence to make a circumstantial case, then the Probate Court abused its discretion when it simply ignored their testimony without saying why or how. Otherwise, the Appellant is left to wonder how the Probate Judge could rule against him on such weak facts that the Probate Court included in its Order, and wonder why it omitted any discussion of the critical testimony. This constitutes a clear abuse of discretion by the Probate Court.

Moreover, it has been held that a “court is not required to accept undisputed evidence as establishing the truth **where there is reason for disbelief** (emphasis added).” *Okatie River, LLC v. Southeastern Site Prep*, 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003) (citing *Johnson v. Painter*, 279 S.C. 390, 392, 307 S.E.2d 860, 861 (1983)). Note that the Probate Court never found Klok and Voytko's testimony about the testamentary act unconvincing or challenged – there was no explanation offered at all; rather, the Probate Court acted as if they hadn't testified at all rather than make a credibility

ruling. *See RRR, Inc. v Toggas*, 378 S.C. 174, 180-181, 662 S.E. 2d. 448, 441-442 (Ct. App. 2008). To receive deference that Judge Young gave him, the trial court must make a credibility finding or explanation; as here, however, the evidence the Court ignores is probative to a ruling of all the facts of the “critical component” of an undue influence case. There is no reason that the Probate Court should disbelieve Klok and Voytko.

The fact that the Court ignored their clear testimony, rather than deal with it head-on, shows that it is probative. When restored to its proper place, their testimony shows that there is not mistaken and clear evidence of undue influence. Since this is what the trial court was tasked to find (i.e., **all circumstances surrounding the execution of the Will**), it is an abuse of discretion to paper over Klok and Voytko’s testimony, and error on the part of the Circuit Court to say that it was within the Probate Court’s power to do so if their testimony is otherwise believable.

III. The Probate Court erred in considering facts and testimony of events that occurred in the time after the testamentary act and after Testatrix’s death as probative in finding that Testatrix’s Will was the product of undue influence.

The 5.12.2016 Order clearly establishes that the Testatrix went to change her Will on July 3, 2013 – less than a month after the death of her late husband on June 8, 2013. [R. pp. 35, 49]. Findings of fact for alleged acts of undue influence after July 3, 2013 – including after Testatrix’s death – should not be permitted to serve as a basis for finding influence *at the time of the testamentary act*. At best, such evidence could only go to whether the Testatrix had unfettered opportunity to change her will. *Hembree*, 311 S.C. at 196-97, 428 S.E.2d at 5.

The Probate Judge seems to acknowledge this in the second Order [R. p. 56], but never goes back and corrects the erroneous finding of undue influence at the time of the testamentary event based on facts which occurred long thereafter.

With regards to whether Testatrix had the “unfettered opportunity” to change her will, there was no testimony or evidence presented that Testatrix, after executing the New Will, (1) wanted to change her Will; (2) tried to change her Will, or (3) was denied access to an attorney to change her Will; likewise, the Probate Judge made zero finding in either Order to that effect – despite suggesting that such evidence might be pertinent in the second Order. [R. p. 56].

In reality, what happened here is that the Probate Judge executed the Respondent’s proposed order – which is silent on the opportunity to change the Will. None of the Probate Court’s findings of post-Will events goes to this issue. It is a red herring to cover the original Order’s clear use of post-testamentary events to improperly support a pre-testamentary finding of undue influence. In any event, Respondent failed to show by unmistakable and convincing evidence that there was any undue influence exerted by Appellant – either before or after the testamentary act.

The Court also relied heavily on Appellant’s alleged maladministration of the Estate in concluding the New Will was the product of undue influence. [R., p. 45] (“In short, he has not administered the Estate in an honest and forthright manner.”) This, however, is completely irrelevant and improper for the same reason. Events that allegedly occurred after the Testatrix’s death in the opening and administration of the Estate have no bearing on whether she was unduly influenced during her life.

IV. The Probate Court relied on irrelevant facts and/or made factual findings not reasonably supported in the record in making its determination that that Testatrix's Will was the product of undue influence.

The Probate Court states that the Testatrix changed her Will “but had not wanted to do so.” [R., p. 38]. This is not supported by the record. The only possible evidence to support such a finding was that Testatrix allegedly told her friend, Mrs. Carroll, “I had no choice.” [R. p. 687]. There are several problems with this testimony, however.

First, Ms. Carroll could not remember the actual conversation with Testatrix ever taking place – showing she lacked the personal knowledge required of a witness. [R. pp. 704-705] (“Q: Okay. Did [Testatrix] ever talk to you about signing a will or something like that? A: No. Q: Never came – A: No.”) [R. p. 684 lines 5-9]. Similarly, on cross-examination after she read the letter, Ms. Carroll did not remember discussing the will with the Testatrix, either. (“Q: So earlier, Mr. Howe had to remind you about . . . a conversation you had about the will with Mrs. Gunnells. Do you remember that conversation? A: No. I don’t.”) [R. p. 704, line 24 – p. 705, line 3].

Second, the meaning behind this statement could be many things – “no choice” because her daughters had abandoned her, “no choice” because her daughters could not be trusted, “no choice” because it was the right thing to do to remove them from the New Will? In *Smoak*, the Testator told one of his daughters, “[t]here’s nothing you can do. It’s just too late. There’s no time.” The *Smoak* Court found that even if it believed the testator was speaking about the Will, the conclusion that the Will was the product of undue influence was simply not warranted. *Smoak*, 286 S.C. at 425, 334 S.E.2d at 810. Here, similarly, Ms. Carroll testified that Testatrix told her, “I had no choice.” Following *Smoak*, even if the Probate Court believed this statement was about the New Will, the conclusion

that the New Will was the product of undue influence is simply not warranted. *Id.* The Probate Court failed to take any such questions into consideration, and as such, committed reversible error for relying on Ms. Carroll's testimony.

The Probate Court noted "Ms. Carroll testified that she knew Glenn to have an alcohol problem because she noticed he would 'slur his words' when talking." [R. p. 39]. This is a single sentence in the 5.12.2016 Order that is not relevant and supports nothing in the Court's findings; it is wholly irrelevant to the matter at hand. Further, Ms. Carroll testified that she never saw Appellant drinking and it was Respondent who voiced these concerns to her. [R. pp. 700-701]. As such, by considering rumors over the testimony of unbiased witnesses, the Probate Court committed reversible error.

The Probate Court also gave weight to Respondent's assertion that she visited with DSS, the Probate Court, independent legal counsel and Legal Aid – with the only evidence of such being a business card to DSS and Respondent's testimony. Respondent presented no independent witnesses or testimony to support the same. The Probate Court failed to consider that nothing came from these visits. No legal action was ever taken. No one from DSS ever intervened. Nothing ever happened after these alleged meetings.

The Probate Court further gives weight to Respondent selling her Corvette to better accommodate her mother when taking her to doctors' visits. [R. pp. 39, 41]. Yet, in the same breath, the Probate Court seems to punish Appellant for selling his house to be a live-in care-taker for his parents. It should be noted that Respondent traded in her Corvette for a Lexus SUV – not an unsightly conversion van or wheelchair accessible shuttle. [R. p. 301].

Furthermore, the Probate Court gives weight to the testimony that Mr. Brantley knew about the contents of the Old Will, but not the New Will. [R. p. 38]. The Probate Court does not explain how this is relevant or probative in its ultimate finding of undue influence. It, along with the other irrelevant and immaterial evidence scattered throughout the 5.12.2016 Order do not support the Probate Court's finding that the New Will was the product of undue influence.

The Probate Court mentions a time when Ms. Davis attempted to enter the house when Ms. Costa and Testatrix were in the middle of a physical therapy session. [R. p. 41]. The Probate Court gives weight to Ms. Davis' and Respondent's testimony but does not take into consideration the testimony of Ms. Costa (an independent and unbiased witness) – who was there caring for Testatrix. Ms. Costa testified “Ms. Gunnells did not want to see [Ms. Davis], she was upset.” [R. p. 362, lines 3-4]. But when Ms. Costa attempted to tell Ms. Davis the same, “she pushed into the door and pushed me out of the way.” [*Id.*, lines 7-8]. The Court gives great weight to Respondent's testimony on the matter. However, Respondent was in the car during this entire encounter.

Finally, and most importantly, the Probate Court ignored another elephant in the room – the fact that Respondent sued her mother almost immediately after her father's death and that her other daughter, Ms. Davis, was largely absent during the latter part of Testatrix's life. Respondent sued her mother for personal items in the Residence she believed rightfully belonged to her – including two candlesticks from Tuesday Morning. [R. p. 312]. The Probate Court failed to take these very probative uncontroverted facts and circumstances into consideration at all in its finding that the New Will was the product of undue influence.

The Probate Court committed reversible error when it found the following unsubstantiated evidence probative: (1) rumors about Appellant's drinking; (2) Respondent's selling her Corvette in exchange for a Lexus SUV; (3) Ms. Carroll's testimony regarding a conversation she cannot remember, and; (4) DSS and Probate Court visits over uncontroverted testimony and evidence showing: (a) Respondent sued her mother almost immediately after her father's death; (b) Ms. Davis was an absent child; (c) No follow up was ever done by DSS or other legal services; (d) Appellant had met Klok on one other previous occasion; and (e) independent witnesses confirmed Testatrix did not want to interact with her daughters.

V. The Probate Court erred in finding the Testatrix's Will was the product of undue influence when there was no showing of threats, force or restricted visitation.

It has been held repeatedly that "[g]enerally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." *Russell*, 353 S.C. at 217, 578 S.E.2d at 333; *Hembree*, 311 S.C. at 196, 428 S.E.2d at 5. Even when a fiduciary relationship exists, the Courts still analyze whether there were threats, force and/or restricted visitation. *See. e.g., Hairston*, 387 S.C. at 447-448, 692 S.E.2d at 553.

While the Respondent and her sister claimed that Appellant "threatened" *them* with "calling the police" (which is rebutted by independent witness testimony from Ms. Costa) – there was absolutely no testimony or evidence that Appellant used threats or force on the Testatrix – which is the person to whom the threat/force would have to be made on in order for it to be probative. *See Hairston*, 387 S.C. at 447, 692 S.E.2d at 549.

The 5.12.2016 Order states that after the execution of the New Will, Mrs. Gunnells was “visibly upset,” “crying,” and “distraught” in the doctor’s office. [R. p. 46]. Dr. Chanson (her treating physician) never tied these emotions to the execution of her New Will. In fact, Dr. Chanson, who testified to these emotions, makes it clear that these were experienced over a period of time and were result of Testatrix’s husband’s recent death – not anything to do her New Will. [R. pp. 613, 614, 623]. It should be noted that during the two years that Dr. Chanson treated Testatrix, Appellant was never in the room for any of her examinations – which lasted anywhere from 30 to 50 minutes. [R. pp. 601, 608]. Dr. Chanson opined that Testatrix’s behavior was appropriate and she did not seem fearful – she saw nothing in Testatrix’s demeanor that was concerning or that would lead her to believe Appellant was exercising any influence over Testatrix. [R. pp. 605-608].

Likewise, there was no testimony or evidence of restricted visitation. Quite the opposite, Klok testified that Testatrix told her that if it weren’t for Appellant, she would not be able to get out and interact as much – visits to the senior center, doctor’s appointments, visit family, etc. [R. p. 402]. Moreover, Testatrix’s brother – Jack Brantley – visited his sister in Charleston after her husband’s death and while Appellant was living with his mother: “I probably visited at least three or four times a year, sometimes more often, according to what was going on, and we talked on the telephone at least two, three, four times a week. And if I didn’t call her, she would call me.” [R. pp. 212-218]. He further testified that spoke to her outside Appellant’s presence. [R. pp. 239-240, 244]. Appellant would also bring his mother to visit Mr. Brantley in Waynesboro, Georgia. [R. pp. 213-214].

On direct examination, Testatrix's "friend," Helen Carroll, testified that after her husband's death, Testatrix lost interest in talking on the telephone but that they would visit at Testatrix's home. [R. pp. 679-680]. She recounted several visits and telephone calls, yet she had very little recollection of the conversations. [*See, generally* R. pp. 670-710.]. She confirmed daughter Belinda Davis was an absent child. [R. p. 699].

Ms. Carroll further testified that in the last few months of her husband's life, Testatrix changed but that was probably because her husband was dying. [R. p. 702]. Testatrix never spoke about any mistreatment, threats, force or any concerns she had about Appellant. [R. p. 704]. Ms. Carroll continued to visit Testatrix after her husband's death – including when Appellant was not there. [R. pp. 679, 681-682, 704]. In fact, Ms. Carroll visited Testatrix at her home up until the last week of her life. [R. p. 703]. Appellant never kept Ms. Carroll away from his mother nor did he ever instruct her to leave when she visited Testatrix. [R. p. 704].

The Testatrix's daughters' testimony fails to show any restriction of visitation. Ms. Belinda Davis was self-admittedly absent – moving to Hawaii right after her father was diagnosed with cancer. [R. pp. 277-278]. She conceded that she had the opportunity to talk to her mother after her father's death – but she chose not to. [R. pp. 267, 282, 286]. It was that Ms. Davis did not talk to her mother much at all, including during the month of July when the New Will was executed. [R. pp. 281, 284].

Respondent's own testimony is indicative that she made a choice to stay away. Only 19 days after her father's death, Respondent admits that she wrote a letter to her mother threatening legal action to recover personal property. [R. pp. 731-736]. In October 2013, she wrote her mother yet another letter. [R. pp. 737-738]. In this letter, Respondent

sarcastically commends her mother for being happy, content and being able to sleep at night. [*Id.*] “[I]t seems you are happy and satisfied with your choices you have made.” [*Id.*]. She also states that she has no desire to visit her mother at her Residence. [*Id.*].

Accordingly, the most Respondent proved was that leading up to and after her husband’s death, Testatrix was sad and sometimes did not want to speak on the phone or have long visits with friends. This was an emotion that Dr. Chanson said, and common sense would dictate, was completely expected and normal – “most marked thing would have occurred after her husband died and appropriately so. She was very depressed about that. That is one of the most significant losses a person can undergo, secondary to the loss of a child. And it is not uncommon that people will have a difficult time with that. And she was no different.” [R. p. 603, lines 17-24].

Short of cherry-picking snippets of testimony while ignoring admissions and concessions from **the same witnesses**, there is simply no real evidence or testimony to support the finding in the Probate Court’s 5.12.2016 Order that states “other children and friends of the Testatrix were not permitted to speak to her on the phone or to be alone with her in the home.” [R. p. 48]. Again – **these are the Respondent’s own witnesses** who can provide no evidence of physical force, neglect or restricted visitation as to the Testatrix at the time of the testamentary act. It would set South Carolina authority on its head to find undue influence in the absence of these critical factors.

As such, the Probate Court committed reversible error and an abuse of discretion when it made this finding and finding that there was evidence of treats, force and restricted visitation when no evidence was submitted to support the same.

VI. The Probate Court erred by giving great weight to the Respondent's misstated and misrepresented testimony of Testatrix's physician, Dr. Rhonda Chanson, when the medical conclusions found by the Probate Court are not reasonably supported in the record.

The reasonable good health of a testator is considered probative in an undue influence case. *First Citizens Bank v. Inman*, 296 S.C. 8, 370 S.E.2d 99 (1988). Moreover, in case after case, the South Carolina appellate courts have found probative the testimony of the treating physician that the decedent was competent. *See, e.g., Calhoun*, 277 S.C. at 532, 290 S.E.2d at 431; *Smoak*, 286 S.C. at 426, 334 S.E.2d at 811. Thus, the Probate Court committed reversible error when it failed to consider all the testimony of Dr. Chanson – which constitutes her full opinion – rather than allowing the Respondent to cherry-pick a statement here or there.

It is uncontroverted that Dr. Chanson is a licensed, reputable and competent physician who has practiced internal medicine in Charleston since 2000. [R. pp. 594-595]. The Respondent offered no testimony that questioned Dr. Chanson's qualifications in any manner, nor any counter medical expert. It should be noted that Belinda Davis testified it was on her suggestion that Testatrix began to see Dr. Chanson [R. p. 260], which Dr. Chanson corroborated. [R. pp. 599-600, 604].

The Probate Court relied heavily on Dr. Chanson's assertion that she cannot say whether Testatrix was "unduly influenced." [R. pp. 46-57]. What the Probate Court failed to consider, however, is Dr. Chanson's own testimony that the reason she was unable to opine on that issue because she had no idea what the term "undue influence" meant. [R. pp. 606, 626]. Notwithstanding the foregoing, Dr. Chanson noted that Testatrix routinely carried on intelligent conversations during her office visits, she knew exactly who she was

and who her family and children were, she had a firm understanding of her surroundings and she made her own decisions. [R. pp. 607, 610].

The Testatrix never missed an appointment with Dr. Chanson. [R. p. 605]. Office visits would usually last between 30 and 50 minutes. [R. p. 601]. Furthermore, Appellant was never in the room when Dr. Chanson was examining/treating Testatrix – he would wait in the lobby until she needed to speak to him. [R. pp. 606, 615-617]. Dr. Chanson opined that Appellant seemed very attentive towards his mother; he asked appropriate questions about Decedent’s health and he would often call the office to ask questions about medications. [R. p. 605]. “He seemed to be giving appropriate care to his mother.” [*Id.* lines 21-22].

Significantly, Dr. Chanson saw Testatrix for an appointment on the same day as Testatrix executed the New Will and believed she was of mind, albeit depressed at the recent loss of her husband. [R. pp. 612-613, 624-626]. Dr. Chanson believed that Testatrix was competent to make her own decisions. [R. p. 610].

Dr. Chanson did not see anything in Testatrix’s demeanor that was concerning or that would lead her to believe Appellant was influencing Testatrix. [R. pp. 605-608]. “Her behavior seemed appropriate in our offices. She didn’t seem to be fearful. I always examined her, and he was not in the room, so I didn’t see anything that would be concerning,” she testified. [R. p. 606].

Dr. Chanson testified to all these opinions to a reasonable degree of medical certainty most probably. [R. pp. 613-614]. She is an unbiased witness with no reason to favor or discredit one party or the other. She always spent time alone with the Decedent, yet reported no findings of abuse, neglect, force, coercion or domination of Decedent by

Appellant. Concerning the medical findings, the Probate Judge said the record speaks for itself. [R. p. 57].

That would be true if the Probate Judge considered her whole testimony. He did not. Rather, while gleaning one statement, the Probate Court ignored Dr. Chanson's full testimony without weighing her complete opinion or discerning the context around the statements – including snippets of testimony about Testatrix's medication. This is an abuse of discretion. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 37, 691 S.E.2d 135, 143 (2010).

VII. The Probate Court erred in admitting and giving great weight to the unsubstantiated, unsupported and unauthenticated medical records from one of Testatrix's pharmacies.

The Probate Court makes an incredible finding of fact that Appellant withheld medication from Testatrix. [R. p. 47]. In fact, this exact theory was discounted by Dr. Chanson. ("Q: So were you aware of . . . mismanagement of care of mismanagement of medication? A: I was not . . . I did not see anything that would have been concerning."). [R. p. 606, lines 11-18]. Furthermore, Testatrix, during her long visits with Dr. Chanson, never mentioned anything of the sort to her or anything else that would have been concerning to Dr. Chanson. [R. p. 606]. Once again, it should be noted that the Probate Judge says "the record speaks for itself" [R. p. 57] – which is *only* true when all Dr. Chanson's testimony is considered.

Respondent failed to illicit *any testimony* from *any witness* that any medication was ever withheld. She failed to call in an independent medical professional, including Testatrix's pharmacist(s), to support this outrageous contention. This is pure conjecture

and speculation on behalf of the Respondent and should never have been considered by the Probate Court.

Ms. Leigh Wechter – Testatrix’s physical therapist – recounted: “[Appellant] appeared genuinely concerned about Mrs. Gunnells, and would take care to prepare her meals, fix her medications and make recommended safety changes to her home to protect her from falls. [Appellant] worked to ensure Mrs. Gunnells had caregivers in the home to assist her with her personal care, as well as provided (sic) her with transportation and assistance with all of her medical appointments.” [R. p. 739]. “[Appellant] made sure that she took her medications.” [R. p. 355, lines 22-33]. Testatrix’s other physical therapist, Ms. Jill Costa, recounted: “Every visit, I got to see how devoted he was to his mother, in which he made sure she had the best possible care.” [R. p. 740].

Respondent has failed to present any evidence, let alone unmistakable and convincing evidence, that Appellant withheld medication from his mother. If there were any true merit to this contention, then Respondent would have been able to elicit the same from Dr. Chanson or another medical professional to support it. As such, the Probate Court committed reversible error when it considered this unsupported conjecture in finding the New Will was the product of undue influence. This constitutes a clear abuse of discretion. *See Vaught v. A.O. Hardee & Sons*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005) (“The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal.”).

VIII. The Probate Court erred in accepting the testimony of Ms. Helen Carroll regarding Testatrix's Statement "I had no choice" when Ms. Carroll testified several times she did not remember ever having a conversation with Testatrix about a New Will, nor knew the circumstances of the statement from which she read.

The Probate Court accepted the testimony of Ms. Carroll that the Testatrix said she had "no choice" in signing the New Will. [R. p. 49]. Ms. Carroll's testimony should never have been admitted or considered by the Probate Court.

The "no choice" testimony came about from Respondent's counsel asking Ms. Carroll to testify regarding a letter she had allegedly signed, but which she had no knowledge regarding how it was drafted, who drafted it, when it was drafted, when she signed it, or the circumstances under which she signed it. [R. pp. 693-697]. The Probate Court correctly excluded this letter from evidence because of the same, yet still considered the testimony elicited from it.

Reading from the letter in her deposition, Ms. Carroll said that the Testatrix told her that she did not want to change her will but Appellant told her she had to. [R. p. 697]. However, before she read from the letter, Ms. Carroll testified on direct examination she did not remember any conversation with the Testatrix concerning a will ("Q: Okay. Did [Testatrix] ever talk to you about signing a will or something like that? A: No. Q: Never came – A: No.") [R. p. 684, lines 5-9]. Similarly, on cross-examination after she read the letter, Ms. Carroll did not remember discussing the will with the Testatrix, either. ("Q: So earlier, Mr. Howe had to remind you about . . . a conversation you had about the will with Mrs. Gunnells. Do you remember that conversation? A: No. I don't.") [R. p. 704, line 24 – p. 705, line 3].

It was only after Ms. Carroll read from the letter that she testified specifically that Appellant kept Testatrix from speaking to her brother and sister – which she had not testified to previously on direct examination. [R. pp. 688, 691]. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. SCORE 602.

It should be noted that Ms. Carroll, a 92-year-old ailing woman, admitted to an extremely close, personal relationship to the Respondent. She testified that the Respondent “was like a daughter to her” and she would do anything the Respondent asked her to do; she even talked to the Respondent every day. [R. pp. 697-698, 691]. Yet, curiously, Respondent did not talk to Ms. Carroll at all between the time Arden Gunnells died and Testatrix died [R. pp. 706-707]. – which could suggest that Respondent was cultivating a lonely, elderly woman more for her anticipated testimony than deep friendship. Despite all of this, the Court admits the testimony of Ms. Carroll, which should have been excluded for lack of personal knowledge. A witness must have personal knowledge of a matter in order to testify about it. Rule 602, SCORE (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). As such, the Probate Court committed reversible error when it gave great weight to the same.

IX. The Probate Court’s Order denying the Appellant’s Motion to Reconsider did not address any of the legal and factual errors of the Probate Court’s original Order.

On May 31, 2016, Appellant submitted his Motion to Alter, Amend and/or Reconsider the Probate Court’s 5.12.2016 Order. [R. pp. 97-122]. Despite Appellant’s

request for a hearing, the Court issued its decision in an Order on August 26, 2016. [R. pp. 51-57]. The Motion was denied.

The bulk of the 8.25.2016 Order discusses the correct application of the law in South Carolina with regards to undue influence and agrees with Appellant's recitation in his Motion to Reconsider. However, the Order does not address the legal and factual errors of the Probate Court's 5.12.2016 Order. Particularly, the Order is silent on much of the above-argued witness testimony – in particular, the weight and credibility of the witnesses presented and the lack of evidence and testimony to support the Respondent's allegations.

The legal and factual conclusions the Probate Court arrived at are simply not supported by the evidence and testimony. The Court simply states that “the record speaks for itself” but gives no legal or factual basis for its conclusions. [R. p. 57]. This is simply not sufficient in a case where so much testimony and evidence presented rebutted any presumption of undue influence.

CONCLUSION

The Probate Court's 5.12.2016 Order is guided by multiple errors of law and fact, which were not corrected by its Order denying the Motion to Reconsider. The Circuit Court ignored these errors in its Order. Accordingly, this Court of Appeals should reverse the Probate Court's holding based on an abuse of discretion and find that the July 3, 2013 Will (“New Will”) was not the product of undue influence, is valid, and is in full force and effect.

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March 1, 2018

Mount Pleasant, South Carolina

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

RECEIVED

MAR 02 2018

SC Court of Appeals

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

v.

Cathy G. Harkness Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this *Final Brief of Appellant* complies with Rule 211(b),
SCACR.



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