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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 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

**PETITION FOR REHEARING and MOTION FOR EN BANC REVIEW**

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## INTRODUCTION

The Appellant Glen Gunnells ("Appellant") submits this petition for rehearing pursuant to Rule 221(a), South Carolina Appellate Court Rules, and requests a hearing *en banc,* pursuant to Rule 219(a), South Carolina Appellate Court Rules.

**Argument 1**

The Court of Appeals found that, *inter alia*, the testimony of Klok and Voytko was sufficient to rebut the presumption of undue influence that arose due to Glenn's fiduciary relationship with Testatrix. [Op.at p. 5]. However, the Court of Appeals should not use their testimony for one purpose – i.e., rebutting the presumption of undue influence caused by the existence of a fiduciary relationship – <u>but then ignore the same testimony in determining whether there was any undue influence at all</u>. Yet, that is exactly what the Court of Appeals does.

Here, the **only** two witnesses to the testamentary act were Klok and Voytko – which makes them of critical importance; they far outweigh the other witnesses. Their testimony is essential not only to establish not only whether there (1) evidence to rebut the presumption of undue influence caused by the existence of a fiduciary relationship; but (2) whether there was sufficient evidence to find undue influence at all.

In an undue influence case, the contestant <u>must</u> show that the influence was brought directly to bear upon the **testamentary act**. *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. The Court of Appeals ignores this precedent, however.

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. As the Opinion makes clear, Klok had the Appellant stand outside her office during the entire time

Klok was revising the Testatrix's will. [Opinion at 8, n. 5]. On the day she met with Klok, Testatrix was of sound mind; she was very upset with her two daughters, did not wish to be around them and was adamant about wanting to leave her Estate to Respondent. [R. 400-401]. "She seemed very, very sure, and that's one thing that struck me that I still remember." [R. 409]. Klok said that had she ever felt the Testatrix was unsure, she would never have finished the Will that day. [*Id.*]. 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. 402]. 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. 407-409]. [1]

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. 411]. Klok remembered

[1] 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. [*Id.* at 86-91]. In her judgment, there were no "red flags". [R. 427-432]. Voytko witnessed the New Will. [R.432].

that the Testatrix was very worried about her daughter, the Respondent, causing problems once she found out about the New Will. [R. 401].

So, if: (1) the main function in an undue influence cases is to look at only the testamentary act (*Wilson v. Dallas*, 403 S.C. 411, 337, 743 S.E.2d 746, 760 (2013)); and (2) the contestant has the burden of prove undue influence (*Smith v. Whetstone,* 209 S.C. 78, 84, 39 S.E.2d 127, 129 (1946); *see also* S.C. Code Ann. § 62-3-407), then it is self-evident to the Appellant that the testimony of the only two witnesses to the testamentary act is ***critical***. Appellant has said this over and over.

Appellant does not put Klok and Voytko forward because they spent three hours with the Plaintiff; he puts them forward because it's what transpired ***during those three hours (the attorney meeting) that makes the difference in an undue influence case***. There is something drastically 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 that they did not see what they saw, or hear what they heard or do what they did – and then have the Court of Appeals ignore their testimony.

The case should have been over when Klok and Voytko testified[2]. Respondent offered no rebuttal testimony that put into question Klok's qualifications or professionalism, nor any expert

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[2] Reported decisions in South Carolina have given great weight to the testimony of the attorney who drafted the challenged testamentary document – **except this one**. *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.

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.

Likewise, the Probate Court never rejected the testimony of Klok or Voytko. He never made a finding that their testimony lacked credibility. He never ruled that Klok violated her obligations as an attorney or acted in any way inappropriately. Respondent offered no rebuttal testimony or witnesses that showed Attorney Klok mishandled the execution of the New Will, or violated her professional duties. He never made one finding of fact that Klok or Voytko did anything wrong, unseemly or in Glenn's interest and not the Testatrix's. The Probate Court does not offer one iota of evidence sufficient to discount Klok's or Voytko's testimony.

But here, the Court of Appeals gives the Appellant the benefit of Klok and Voytko's testimony that the Probate Court and Circuit Court ignored when it found no presumption of undue influence caused by the existence of a fiduciary relationship, but then turns around and ignores it (just as the lower courts did) when it comes to the question of whether there was undue influence in the first place. The Court of Appeals did not find that Klok and Voytko had credibility then lost it; it just ignores what they had to say. So did the Probate Court. This is error.

The testimony of Klok and Voytko has to be either fully accepted or fully dismissed; it cannot be used for one finding and not the other. The Court of Appeals cannot on the one hand pass on it favorably ("Klok ... testified Testatrix did not feel any pressure about changing her will to no longer include her daughters as beneficiaries" ... the Testatrix was "very frail physically, but mentally she seemed to know what she wanted" and the "Testatrix specifically told her the change in the Will was more about not wanting to leave anything to her daughters rather than a desire to leave everything to Glenn.") but then *tut tut* over "unusual circumstances" at this July 3, 2013

meeting[3]. In fact, many of these unusual circumstances that the Court of Appeals brings up in footnote 5 are **not** that unusual when one looks at the reported cases.[4]

Yes, undue influence may be proved by circumstantial evidence, **but the circumstances relied on to show it must be such as taken together 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. (emphasis added); *Howard v. Nasser*, 364 S.C. 279, 286, 613 S.E.2d 64, 67 (Ct. App. 2005) (citing *Havird v. Schissell,* 252 S.C. 404, 410–11, 166 S.E.2d 801, 804 (1969)); *see also 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."). Here, the Court of Appeals has used Klok and Voytko's testimony to overrule part of the Probate Court; now, it is **should** continue to look at the testimony **together with all the evidence**. If the Court of Appeals lets this decision stand, however, then it ought to overrule *Havird v. Schissell* and *Howard v. Nasser*.

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[3] The Opinion in fact states **incorrectly** asserts that Klok only met with Testatrix one time "despite her normal procedure, which consisted of an initial meeting to take down information, and set goals followed by another appointment several weeks later to execute the will." [Opinion at 8 note 5]. Klok actually testified: "Q. Right. [You] Did not follow your normal protocol of several weeks? A. No, that's not correct. I have different protocols. **I have often sometimes clients who want to do it the same day, and I also do that, but I have a different set of protocols when they want to do it the same day.** (emphasis added)." [R.414-415]. Most times her elderly clients do not want to have multiple meetings. [R. 397]. She schedules and tailors her meetings for each individual client. [*Id.*]. Furthermore, the meeting was a long one – about three hours. [*Id.*].

[4] The Supreme Court found nothing untoward that the beneficiary took the testatrix to his personal attorney. *In re Last Will and Testament of Smoak,* 286 S.C. 419, 422, 334 S.E.2d 806, 808 (1985). In *Calhoun v. Calhoun*, 277 S.C. 527, 532, 290 S.E.2d 415, 419 (1982), our Supreme Court also did not find the fact the beneficiary drove the testator to the lawyer's office to be at all probative; neither, apparently, did the Court of Appeals in *Hembree v. Estate of Hembree*, 311 S.C. 192, 195, 428 S.E.2d 3, 4 (Ct. App. 1993). The fact that the will was unsealed is also irrelevant. *Hembree*, *supra*, 311 S.C. at 195, 428 S.E.2d at 4. But for some reason, all of these "circumstances" are found to be compelling enough to be included in this opinion.

**Argument 2**

The Court of Appeals found that the "record contains sufficient evidence to support the circuit court's finding that the 2013 Will was a product of undue influence." [Opinion, p. 5]. When applying *Wilson v. Dallas*, 403 S.C. 411, 337, 743 S.E.2d 746, 760 (2013), most of these "facts" are either (a) wrong; (b) irrelevant; (c) take place well outside of the testamentary act; or (d) fail to take into consideration the testimony of the only two witnesses to the testamentary act. This amounts to another error.[5]

<u>Wrong Facts</u>

Glenn never cut off visitation or communication. 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. 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. 211-216, 218]. He further testified that spoke to her outside Appellant's presence. [R. 241-242, 244]. Appellant would also bring his mother to visit Mr. Brantley in Waynesboro, Georgia. [R. 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. 679-680]. Ms. Carroll continued to visit Testatrix after her husband's death – including when Appellant was not there. [R. 679, 681-

[5] Note, Respondent never demonstrated any evidence of threats or force <u>to the Testarix</u> 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.

682, 704]. In fact, Ms. Carroll visited Testatrix at her home up until the last week of her life. [R. 703]. Appellant never kept Ms. Carroll away from his mother nor did he ever instruct her to leave when she visited Testatrix. [R. 704].

Based on this, it is incredible that the Court of Appeals would allow to stand a factually incorrect statement in the Opinion such as "Brantley … and Carroll … both presented evidence that Glenn restricted Testatrix's communication and visitation." The Testatrix never stopped calling them; Ms. Carroll testified that she met with Testatrix without Glenn being present; Glenn did take Testatrix to Georgia to visit Brantley. A trial judge may weigh the credibility of witnesses and the credibility of evidence, but he cannot be allowed to sift through a witnesses testimony, cherry-picking out the parts that present a false picture of undue influence (finding them credible!) but ignore equally credible testimony – or worse getting it wrong – that shows no undue influence How can this be fair? If this incorrect testimony is removed from the opinion, then most of the Probate Court's "sufficient evidence" of undue influence evaporates.

Irrelevant Facts

The cameras mounted after Arden's death and Glenn moving into the living room ... Glenn failing to notify his sister of their father's failing health ... an email Glenn sent Belinda at his father's death – proves nothing. They do not have anything to do with the testamentary act but are included – why? What does it have to do with whether he committed undue influence? Nothing. The Court of Appeals also mentions a time when Ms. Davis attempted to enter the house to retrieve Arden's death certificate, when Ms. Costa and Testatrix were in the middle of a physical therapy session – which also proves nothing (it took place after Testatrix changed her will).[6]

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[6] The Probate Court spoke of this too and gave weight to Ms. Davis' and Respondent's testimony but did 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

Take Place Well Outside the Testamentary Act.

The outrageous finding of prescription abuse took place well outside the testamentary act and 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 606]. 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, let alone affirmed by the Court of Appeals.

The only two witnesses to the testamentary act

Even if the Court of Appeals thinks that Klok and Voytko testimony can be used to find no presumption of undue influence based on Glenn's fiduciary relationship – how can it say the Probate Court's findings of fact point un-mistakenly and convincingly to undue influence" when these facts are "taken together" with Klok and Voytko's testimony? It simply cannot.

Just like the Probate Court couldn't dismiss the finding of Klok and Voytko on the fiduciary relationship question, the Court of Appeals cannot dismiss them on the question of undue influence.

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want to see [Ms. Davis], she was upset." [R. 222]. But when Ms. Costa attempted to tell Ms. Davis the same, "she pushed into the door and pushed me out of the way." [*Id.*] Respondent was in the car during this entire encounter. Once again, the Court of Appeals is fine with Ms. Costa's testimony on whether Glenn rebutted the presumption of undue influence as a fiduciary but then discounts the same testimony on whether there was undue influence at all. How is this testimony being "taken together" to "point un-mistakenly and convincingly to the fact that the mind of the testator was subjected to that of some other person" as required by *Howard v. Nasser*, 364 S.C. 279, 286, 613 S.E.2d 64, 67 (Ct. App. 2005). And ***what*** is the matter with calling the police under these facts? Or even under the facts as recorded in the Opinion?

**Argument 3**

We then come to Dr. Chanson's testimony. It is uncontroverted that Dr. Chanson is a licensed, reputable and competent physician who has practiced internal medicine in Charleston since 2000. [R. 594-595]. The Respondent offered no testimony that questioned Dr. Chanson's qualifications in any manner, nor any counter medical expert. As with the legal witnesses, the Probate Court never rejected the Dr. Chanson's testimony, nor made a finding that she lacked credibility, nor ruled that Dr. Chanson violated her obligations as a doctor, or acted in any way inappropriately. He never made a finding of fact Dr. Chanson wrong, unseemly or in Glenn's interest and not the Testatrix's. The Probate Court does not offer one iota of evidence sufficient to discount her testimony.

The Testatrix never missed an appointment with Dr. Chanson. [R. 605]. Office visits would usually last between 30 and 50 minutes. [R. 601]. Furthermore, Appellant was never in the room when Dr. Chanson was examining/treating Testatrix – he would wait in the lobby until Chanson needed to speak to him. [R. 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. 605]. "He seemed to be giving appropriate care to his mother." [*Id.*]. 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. 607, 610].

Significantly, Dr. Chanson saw Testatrix for an appointment on the same day as Testatrix executed the New Will and believed she was of sound mind, albeit depressed at the recent loss of her husband. [R. 612-613, 623-626]. Dr. Chanson believed that Testatrix was competent to make

her own decisions. [R. 610]. She 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. 613, 614, 623]. 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. 606-608]. Dr. Chanson testified to all these opinions to a reasonable degree of medical certainty most probably. [R. 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.

That's the full testimony of Dr. Chanson. The Court of Appeals lets the Probate Court avoid it in its entirety. However, the Court of Appeals, like the Probate Court, found probative that Mrs. Gunnells was "visibly upset," "crying," and "distraught" in the doctor's office. [Opinion, p. 8, note 5]. The Probate Court, also, relied heavily on Dr. Chanson's assertion that she cannot say whether Testatrix was "unduly influenced." [R. 34-36]. The Court of Appeals likewise relied on Dr. Chanson's testimony again in its footnote 6. [Opinion at 9]. This constitutes an error.

First, as stated above, **the circumstances relied on to show [undue influence] must be such as taken together 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). Thus, neither the Probate Court nor the Court of Appeals can cherry pick "good" facts which show undue influence while ignoring "bad" facts that do not. All of the evidence must be viewed together. The Court of Appeals would not violate the trial court's weight or exclusivity of the evidence because here the trial court wholesale ignored it, never making any finding of weight or credibility. The

trial court should not be allowed to find some testimony of a witness fine and credible, but ignore other portions of the same witnesses testimony **without at least making a finding.**. Otherwise, the Court is overruling *Howard v. Nasser* and *Havird v. Schissell*.

Second, 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*, supra, at 431; *Smoak,* supra, at 426. Third, the Court of Appeals has violated its own rule; if it cannot use additional testimony from the record, then how did it use Klok and Voytko to rule against the trial court on the fiduciary relationship? It seems it does when it wants to. It should do it now.[7]

**Argument 4**

The Court of Appeals and Probate Court accepts the testimony of Ms. Carroll that the Testatrix said she had "no choice" in signing the New Will. This testimony provides no context for why the Testatrix allegedly had "no choice" – what if it was because her daughters' conduct left her no choice? This "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. 693-697].

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[7] It should be noted that the Respondent ignored the two pages of Appellant's Brief describing Dr. Chanson's testimony. [App. Br. pp. 25-27; Resp. Br. p. 15]. Therefore, Respondent abandoned this issue on appeal and her arguments are not presented for review because they consist 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."). The Court of Appeals should not have affirmed Ground Number II.

The Court of Appeals should remember that 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. 684]. 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. 704-705]. [8]

***That*** is the "the circumstances which unmistakably and convincingly point to the substitution of another person's will" for the Testatrix? The recollection of a 92-year old, ailing woman (who admitted to an extremely close, personal relationship to the Respondent – "like a daughter" and she would do anything the Respondent asked her to do [R. 697-698, 706]) who "recalls" something that she didn't write – and then promptly forgets it ***immediately after she has read it?*** ***That*** is supposed to outweigh the legal and medical testimony?[9]

**Argument 5**

On May 31, 2016, Appellant submitted his Motion to Alter, Amend and/or Reconsider the Probate Court's 5.12.2016 Order. [R. 97]. Despite Appellant's request for a hearing, the Court issued its decision in an Order on August 26, 2016. [R. 51]. The Motion was denied. The 8.25.16

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[8] The Court of Appeals found that Appellant did not preserve his objection. Appellant does not agree; the Objection [R. 247-250] states a "few objections." One of these is to hearsay and one of which is to lack of personal knowledge. [R. 247-248] One also was to the document itself. [R. 249]. It should be further noted that Respondent did raise this as an appeal point. Appellant did not waive it.

[9] Moreover, Respondent failed to address the merits this argument in her brief. "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).

Order does not address the legal and factual errors of the Probate Court's prior 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 Probate Court simply states that "the record speaks for itself" but gives no legal or factual basis for its conclusions. [R. 57]. This is simply not sufficient in a case where so much testimony and evidence presented rebutted any presumption of undue influence.

**Argument 6**

In the original Order, the Probate Court looked at four circumstances in finding the New Will was the product of undue influence, which it explained in the Second Order was not meant to be exhaustive of formulaic. To the extent the Court still relies on the first and second prongs, Appellant believes they do not accurately reflect South Carolina law as cited by the Probate Court. [R. 97]. As to susceptibility, the Probate Court did point out recent authority where it came up, but the overwhelming weight of all the testimony (including from the Testatrix's brother and daughter) was that the Testatrix was a formidable woman who knew her own mind and was not susceptible to undue influence.

**Argument 7**

In previous cases, the Supreme Court of South Carolina found undue influence claims did not exist even though the evidence was more egregious and pervasive than in the present action. In *Russell v. Wachovia Bank, N.A.*, Testator's son and daughter brought an action to set aside testator's will for undue influence and the court entered summary judgment in favor of the will's proponents. The contestants presented the following evidence: (1) at times, the testator did not

know what state he was in and "doubled up" on his medication; (2) the other beneficiaries in the will were disrespectful and frequently yelled at the testator about money; (3) the proponents monitored his telephone, told him how to dress, and would not let the testator adjust his thermostat; (4) the other beneficiaries spent large sums of the testator's money, had unfettered access to his office, and lived in his house; (5) the proponents had frequent contact with the testator's attorney; and (6) testimony from two doctors indicated that the testator may have been susceptible to undue influence. *Id.* 353 S.C. at 215, 578 S.E.2d at 333. While unattractive, such conduct and demeanor did not amount to undue influence nor did it rise to the level of unmistakable and convincing evidence that they utilized their relationship to substitute their will for his. *Id.* In affirming the grant of summary judgment, the court found the testator remained the ultimate decision maker.

In this matter, the Testatrix, while physically infirm, was not mentally infirm – she was very clear and adamant about what she wanted in her New Will. Notably, Testatrix met with her attorney for several hours where she made it absolutely clear what she wanted to do and why she wanted to do it. Attorney Klok testified that she was quick, rational and precise when answering questions about her family, her property and its disposition.

The record is devoid of any evidence that Appellant interfered with the making of the New Will. Appellant did not dictate the will; he was not present when its proposed contents were discussed; nor was he present when the Will was executed. The circumstances surrounding the drafting and execution of the New Will indicate that it was the product of the free and unfettered act of the Testatrix – who all the witnesses conceded was competent, independent and was of sound mind. *See Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773, 774 (1976).

## CONCLUSION

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. The maker's exercise of judgment and free choice must be prevented to void a will on the ground of undue influence. *Cumbee,* 333 S.C. at 671, 511 S.E.2d at 394. "A mere showing of opportunity or motive does not create an issue of fact regarding undue influence." *Id.* "[T]he issue of undue influence should be resolved in the light of the proposition that a sane testator has the right to dispose of his property as he chooses." *Harris v. Berry,* 231 S.C. 201, 205, 98 S.E.2d 251, 253 (1957). "The mere influence of affection and attachment, or the mere desire of gratifying the wishes of another, will not vitiate a testamentary act unless that act was the result of coercion or importunity beyond the testator's power to resist." *Id.*

Say that Glenn wanted to influence Testatrix. Fine. Say they were a from a crazy family. Undoubtedly. But do not affirm the finding of the Probate Court based on bits and pieces of testimony to make it seem like Glenn used force and fear over a family member to change her will. When the evidence of Klok, Voytko, Chanson, Wexler and Costa – all the evidence that Glenn produced – is fairly added to the case (and not discounted) then the outcome must be different. Here, when all of the evidence is fairly evaluated – or at least fairly discredited, not just merely ignored– then it becomes clear that almost all the weight of the evidence is on the Appellant's side.

## EN BANC REVIEW REQUEST

"The government imposes many restrictions and requirements, but one of the basic rights known to our civilization is the privilege of disposing of property by Will as one elects" *Last Will and Testament of Smoak v. Smoak,* 286 S.C. 419, 427, 334 S.E.2d 806, 811 (1985). Should the trial court be allowed to pick and choose what it wants from Appellant's witnesses, but to ignore the bulk of their testimony even though it states no reason to ignore it? Can the Court of Appeals state that "[n]othing in the record suggests the probate court failed to consider and weigh all of the evidence presented or that the evidence failed to support its finding" when it obviously did so?

How does *Howard v. Nasser*, 364 S.C. 279, 286, 613 S.E.2d 64, 67 (Ct. App. 2005) and *Havird v. Schissell,* 252 S.C. 404, 410–11, 166 S.E.2d 801, 804 (1969) (the circumstances relied on to show [undue influence] must be such as taken together point un-mistakenly and convincingly to the fact that the mind of the testator was subjected to that of some other person") jive with the Court of Appeals rule that probate judge's findings of fact may not be disturbed unless a review of the record discloses there is no evidence to support them, such as in *In re Estate of Anderson?* Can a probate judge blatantly disregard probative facts, received from neutral witnesses (some of whose testimony he has received)? Does the weighing of facts "together" to find undue influence preclude a broken, mismatched, jigsaw of a factual record like the one here?

Appellant submits that this consideration by the full court is necessary to secure or maintain uniformity of its decisions, and that the proceeding involves a question of exceptional importance. Rule 219(a), SCACR.

**BROWN & VARNADO, LLC**

s/ Robert B. Varnado

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April 15, 2020
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

RECEIVED
Apr 15 2020
SC Court of Appeals

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APPELLATE CASE NO. 2017-001131

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

v.

Cathy G. Harkness ...................................................................................................... Respondent

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**PROOF OF SERVICE**

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The undersigned attorney hereby certifies that a true copy of the ***Appellant's*** **PETITION FOR REHEARING and MOTION FOR EN BANC REVIEW** 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 OR BY EMAIL AND EFLEX SYSTEMS IF INDICATED.

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