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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Rodger M. Young
Circuit Court Judge

Opinion No. 5716
Heard June 5, 2019 – Filed April 1, 2020
Petition for Rehearing Denied September 9, 2020
Appellate Case No. 2017-001131

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

v.

Cathy G. Harkness .....Respondent

PETITION FOR *CERTIORARI*

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned counsel for Petitioner certifies that a Motion for Rehearing was made and ruled upon by the South Carolina Court of Appeals.

QUESTION FOR REVIEW

Did the Court of Appeals err in affirming the Circuit Court's denial of the Petitioner's appeal under South Carolina's law of undue influence?

STATEMENT OF THE CASE

On July 3, 2013 – less than a month after her husband's death – the Testatrix/Decedent Helen Gunnells executed a new Last Will and Testament ("New Will") at the office of Suzanne Klok, Esquire, in Mount Pleasant. [R. pp. 711-716]. Under the New Will, the Petitioner Glenn Gunnells was appointed Personal Representative and designated as the sole beneficiary of the Decedent's Estate. [R. pp. 711-716].[1]

Ms. Klok testified that Testatrix met with her and her legal assistant (Ms. Voytko) on July 3, 2013 for about three (3) hours. [R. p. 397]. It was the first time that Klok had met her. Klok testified that Testatrix was adamant about having the New Will done that day, and Testatrix brought the Old Will to the meeting knowing that she wanted to change her disposition. [R. pp. 397, 399].

Ms. Klok testified about the duration of the meeting: "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. p. 414-

[1] This changed her earlier November 7, 2006 Will ("Old Will"), in which if her husband pre-deceased Testatrix, everything would pass to her children in equal shares – i.e., Petitioner, Respondent Cathy Harkness and their sister. Belinda Davis. [R. p 399].

415]. Most of the time her elderly clients do not want to have multiple meetings, so she schedules and tailors her meetings for each individual client. [R. p. 397]. Furthermore, she recalled that the meeting was a long one – about three hours. [*Id.*].

Ms. Klok duly satisfied herself that Testatrix 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.*]. Testatrix was very upset with her two daughters; 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].

Although Petitioner 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 <u>not</u> to allow anyone who comes with the client into the conference room during her interviews; no one else enters the room, except her staff. In fact, Klok directed that the Respondent wait *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].

Klok testified that if she had ever felt the Testatrix was unsure, then she would <u>never</u> have finished the Will that day. [R. p. 409]. Klok further remembered Testatrix spoke warmly about Petitioner: "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].

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]. Klok said that: the Testatrix explained her reasoning and rationale for executing the New Will – not because she necessarily wanted to give Respondent the entire estate, but 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]. Klok even remembered that the Testatrix was very worried about her daughter (Cathy Harkness, the Respondent) causing problems once she found out about the New Will. [R. p. 401]. Voytko corroborated Klok's testimony and witnessed the New Will. [R. pp. 425-430, 432].[2]

This is pretty compelling testimony, right? After all, for decades, reported decisions in South Carolina have given <u>great weight</u> to the testimony of the attorney who drafted the challenged testamentary document.[3] And, even more importantly, it is well-settled that in a will contest based on undue influence, the contestant <u>must</u> show that the influence was brought directly to bear upon the testamentary act.[4] No one else was present at the testamentary act! The testimony of Klok and Voytko is all that we have.

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[2] Voytko 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; (4) was grateful for her son; and (5) in her judgment, there were no "red flags". [R. 427-432]. Voytko witnessed the New Will. [R.432].

[3] *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).

[4] *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

For her part, Respondent offered no rebuttal testimony or witnesses that showed Klok mishandled the execution of the New Will, nor that she violated her professional duties, either. The Probate Court, likewise, did not find Klok's or Voytko's testimony unbelievable. In fact, he never rejected it, or made *any* finding that their testimony lacked credibility, or that their testimony should be discounted. [R. p. 34]. He never ruled that Klok violated her obligations as an attorney, or said she acted in any way inappropriately. [*Id.*]. There was no reason for him not to accept her testimony; he *should* have accepted her testimony. The way he did he handled her in his order shows he was consciously *avoiding* her testimony.

In fact, he cites it in his order, but takes nothing of substance into account! Contrary to his assertion that he fully acknowledged and contemplated the testimony of Klok and Voytko, the Probate Judge treats them *as if they had not testified*: "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 was the sum-total of the Probate Court's analysis regarding Klok and Voytko. In other words, he found sufficient evidence of undue influence on the testamentary act – *while ignoring the only witnesses to the testamentary act!*

Well, what about the testimony of the medical professionals you might ask? After all, the reasonable, good health of a testator is considered probative in an undue influence case. *First Citizens Bank v. Inman*, 296 S.C. 8, 8, 370 S.E.2d 99, 99 (1988). Moreover, in case after case, the testimony of the treating physician that the decedent was competent has been found probative by the South Carolina appellate courts. *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.

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.

Well, it turns out that Testatrix was seeing Dr. Rhoda Chanson, M.D. – a licensed and competent physician, who has practiced internal medicine since 2000 – from before her husband's death in 2013, through the execution of the New Will a month later, until she passed away in 2014. [R. pp. 594-595]. Dr. Chanson could not say whether Testatrix was "unduly influenced." [R. pp. 46-57]. But, as her own testimony states, this was because she had no idea what the term "undue influence" meant. [R. pp. 606, 626]. Notwithstanding this, she noted that Testatrix routinely carried on intelligent conversations during her office visits; knew exactly who she was and who her family and children were; had a firm understanding of her surroundings; and made her own decisions. [R. pp. 607, 610]. In other words, Testatrix was competent.

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

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 testified that that Testatrix was competent to make her own decisions. [R. p. 610]. She did not see anything in Testatrix's demeanor that was concerning or that would lead her to believe Petitioner 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].[5]

She likewise discounted the idea floated by Respondent that Petitioner withheld medication from Testatrix. [R. p. 606 ("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.")]. 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. [*Id*.]. p. 606]. Respondent failed to call in an independent medical professional, including Testatrix's pharmacist(s), to support this outrageous contention.

Respondent offered no testimony that questioned Dr. Chanson's qualifications in any manner, nor any counter medical expert. She was clearly an unbiased witness with no reason to favor or discredit one party or the other, and who spent time alone with the Decedent, yet reported no findings of abuse, neglect, force, coercion, or domination of Decedent by Petitioner.[6]

Just as he did with the legal witnesses, the Probate Court never rejected Dr. Chanson's testimony, nor did he make a finding that she lacked credibility, nor did he say that she violated her obligations as a doctor or acted inappropriately in any way. He never once made a finding of fact that Dr. Chanson wrong, unseemly, or was acting in Petitioner's interest; he pointed to not one iota of evidence sufficient to discount her testimony – he actually cited her when it helped him!

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[5] It should be noted that Belinda Davis (Respondent's sister) 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].

[6] Also, 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].

When confronted about this, the Probate Judge merely said "the record speaks for itself" [R. p. 57].

So, how did we lose this case at the Probate Court? Good question. After all, there was *less than one month* between the death of Testatrix's husband (June 8, 2013) and the execution of the New Will (July 3, 2013), and 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.[7] Klok and Voytko both testified that the Petitioner did not interfere with the making of the New Will. *Calhoun,* 277 S.C. at 533, 290 S.E.2d at 419. Dr. Chanson also met alone with her and testified she was competent. *First Citizens Bank v. Inman,* 296 S.C. at 8, 370 S.E.2d at 99 (1988). The Respondent can say whatever she wants about weighing the credibility of witnesses, but Klok and Voytko are the two most important (and Dr. Chanson is the third). Yet their testimony was utterly disregarded except for only the nuggets that the trial judge deemed worthy of finding (so that Respondent would win).

More to the point, Klok's, Voytko's, Chanson's, Wexler's and Costa's testimony all punched holes in the Respondent's arguments that the Petitioner **un-mistakenly and convincingly** subjected the Testatrix's mind to his control, by using force, intimidation and restricted visitation, so that it was his will not hers. *Howard v. Nasser,* 364 S.C. 279, 286, 613 S.E.2d 64, 67 (Ct. App. 2005). After all, 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).

[7] *See also Swiger by and through DeHaven v. Smith*, 406 S.C. 408, 426, 827 S.E. 200, 207 (Ct. App. 2019).

And, of course, we cannot forget that 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. So, their testimony alone was sufficient to find no *undue* influence; they did not simply know "the Testatrix only on a professional basis for a limited amount of time." [R. p. 280].

Importantly, Petitioner's witnesses had independent dealings at the time of the testamentary act. Klok and Voytko spent three hours alone with her helping her draft her New Will. The healthcare professionals knew Testatrix for much longer. They all said that Petitioner did not substitute his will, threaten or force her and they have no reason to lie. But by *ignoring* Petitioner's witnesses (except when it helped Respondent!),[8] the Probate Court set it up as the *Respondent, her Sister, their Uncle and Testatrix's best friend* all on one side, versus *just the Petitioner* on the other! Then it was easy for him to find "undue influence." It is a textbook abuse of discretion.

Thus, we appealed, saying that the Probate Court committed an abuse of discretion *by ignoring the only witnesses to the testamentary act* and *by also ignoring the medical professionals*, even though he was supposed to look at all the evidence, which – ***taken together*** – points un-

[8] For instance, the Probate Court found probative that Testatrix was "visibly upset," "crying," and "distraught" in the doctor's office [R. p. 46] but ignored Dr. Chanson's explanation that Testatrix was upset because of her husband's death. [R. pp. 612-613, 624-626]. The Probate Court, also, relied heavily on Dr. Chanson's assertion that she cannot say whether Testatrix was "unduly influenced" [R. pp. 46-47] but then ignored her testimony that Testatrix carried on intelligent conversations during her office visits; knew exactly who she was and who her family and children were; had a firm understanding of her surroundings; and made her own decisions. [R. pp. 607, 610]. The trial judge also found her testimony on delays filling prescriptions probative [R. p. 47] but not her denial of mismanagement. [R. p. 606]. This testimony concerned events that happened long after the testimonial act. [*Id.*]

mistakenly and convincingly to undue influence. 252 S.C. at 424, 166 S.E.2d at 804. Once again the Probate Judge did not find Petitioner's witnesses to be un-credible; basically, he just signed Respondent's order (which takes some of their testimony wildly out of context). [R. p. 1-14].

At the first level of appeal, however, the Circuit Court held "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."[9] [R. pp. 62-63]. But more importantly, he 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].

The Court of Appeals, however, was compelled to take a more *nuanced* approach. First, it ruled that the testimony of Klok and Voytko was sufficient to rebut the *presumption of undue influence* (that arose due to the fiduciary relationship with Testatrix); thus, apparently, the Probate Court was wrong to ignore them! [R. p. 828]. Good, right? But it nevertheless affirmed anyway, by: (a) refusing to use Klok's and Voytko's identical testimony as to the question of whether there was undue influence at all [R. pp. 828-830]; and (b), in any event, holding that the Probate Judge could disregard the testimony of Dr. Chanson if he wanted to. [R. p. 831-832]. Thus, Klok's and Voytko's testimony was found perfectly acceptable for *one part* of the appeal, but then the Court of Appeals ignored it (like the Probate Court) on the important part. And since the Probate Court ignored most of Dr. Chanson, the Court of Appeals could too![10]

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[9] On January 21, 2011, Testatrix and her husband had executed General Durable Power of Attorneys appointing Petitioner as their attorney-in-fact. Ultimately, the Court of Appeals overruled this finding. [R. p. 829].

[10] The Court of Appeals, like the Probate Court, repeats Dr. Chanson's testimony that Testatrix was "visibly upset," "crying," and "distraught" in the doctor's office after she signed the New Will [R. p. 832, n. 5], but passes over her explanation for the distraught without comment – in effect taking some of her testimony but ignoring the

After that, it was all over but the shouting [R. p. 833-834] – even though the Court of Appeals made some egregious errors with what it left itself to sort out.[11] Particularly troubling was the Court of Appeals' findings in paragraph 5 of their opinion, which sets forth all the problems with the execution of the New Will. But then these "untoward facts" are not that unusual when one actually looks at the reported cases: e.g., *this* 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. at 422, 334 S.E.2d at 808 (1985). In *Calhoun v. Calhoun*, 277 S.C. at 532, 290 S.E.2d at 419 (1982), this Court was fine with the fact the beneficiary drove the testator to the lawyer's office; neither, apparently, so did a panel of the Court of Appeals in *Hembree v. Estate of Hembree*, 311 S.C. at, 195, 428 S.E.2d at 4 (Ct. App. 1993). The fact that the New Will was "unsealed" was also deemed irrelevant in *Hembree*, *supra*, 311 S.C. at 195, 428 S.E.2d at 4. But for some reason, **this** Court of Appeals found all of these "circumstances" compelling enough to be included in its Opinion without mentioning the contrary precedent! [R. pp. 830-831].[12]

ARGUMENT

In its 1946 case, *Smith v. Whetstone*, this Court specifically held: "the circumstances relied on to show [undue influence] **must be such as, taken together,** point unmistakably and

rest. The Court of Appeals likewise relied on Dr. Chanson's testimony again in its footnote 6 [R. p. 823], but then completely ignores any contrary assertions or conclusions she made.

[11] E.g., 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." [R. p. 832 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.*]. The Court of Appeals failed to correct this error. [R. 870].

[12] Also, there is a genuine question whether Klok was really Petitioner's lawyer at all, as the Court of Appeals found so troubling; she had been the closing attorney for property he was selling [R. p. 422]; in conformity with South Carolina practice, she would have been selected by the *buyer's* attorney, not by Petitioner.

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). 209 S.C. 78, 83, 39 S.E.2d 127, 129 (1946) (citing to nearly 100 year old precedent from *Woodward v. James*, 3 Strob. 552, 34 S.C.L. 288 (1849)).

Almost twenty years later, in 1969's *Havird v. Schissell*, this Court once again expressly stated the same rule: "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 (emphasis added)." 252 S.C. 404, 424, 166 S.E.2d 801, 804 (1969). In fact, the rule is still cited with approval by the South Carolina courts – as recently as *Howard v. Nasser*, 364 S.C. 279, 286, 613 S.E.2d 64, 67 (Ct. App. 2005).[13] It is black-letter, cornerstone law.

So, here we are.

This Court has *repeatedly* said (for nearly 70 years) that in an undue influence case, the circumstances **must be taken together** to un-mistakenly and convincingly prove undue influence. Yet, through two appeals, the appellate courts have affirmed the trial judge's bad faith decision to ignore critical evidence, because: "[i]n a law case tried without a jury, questions regarding the credibility and the weight of evidence are exclusively for the trial judge."[14] [R. p. 60-61, 832].

Which is it going to be? Which law applies first in undue influence cases? Is it the rule from *Smith*, *Havird*, and *Nasser supra*? If those cases *truly* articulate the law of undue influence in South Carolina, then Petitioner should prevail – *or he should at the least get a fair, new hearing*

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[13] See also *Calhoun v. Calhoun*, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982); *Mock v. Dowling*, 266 S.C. 274, 276, 222 S.E.2d 773, 774 (1976). It was even favorably cited by the District of Columbia Court of Appeals in *In Re Ingersoll Trust*, 950 A.2d 672, 694 n. 17 (D.C. Ct. App. 2008).

[14] *In re Estate of Anderson*, 381 S.C. 568, 573, 674 S.E.2d 176, 179 (Ct. App. 2009) and *Golini v. Bolton*, 326 S.C. 333, 342, 482 S.E.2d 784, 789 (Ct. App. 1997).

on his appeal before the Supreme Court. This is because the weight of *all* the testimony (both Petitioner's *and* Respondent's witnesses), "**taken together"** does not "point un-mistakenly and convincingly" to the fact that the mind of the Testatrix was subjected to that of the Petitioner when she executed the New Will.

Otherwise, you have a situation like this one, where the trial judge gets to abuse his discretion – by acting as if Klok, Voytko, Chanson, Wexler and Costa were never called or never testified – all because the appellate courts say: "questions regarding the credibility and the weight of evidence are exclusively for the trial judge"? Even when he never made specific findings on the weight or credibility of the testimony that he consciously ignored.

Petitioner submits that *Smith*, *Havird*, and *Nasser* should apply in the first interest. Undue influence cases are a type of case distinct from a regular action; they have a clear and convincing standard and the Supreme Court has repeatedly articulated the requirement that *all* the evidence most point to undue influence. Otherwise, we are left with what we have here – an Opinion that basically overrules *Smith, Havird* and *Nasser* (without saying so), and raises questions about "undue influence" practices which were clear from *Russell*, *Smoak*, *Calhoun*, *Hembree* and *Mock* – that is, until the Court of Appeals handed down this decision.

How does *this* case stand when in 2019, the Court of Appeals found dispositive the fact that the nephew in *Swiger by and through DeHaven v. Smith was not present when the will was drafted* and therefore could not have committed undue influence? 406 S.C. at 426, 827 S.E. at 207. The record is devoid of *any* evidence in this case that Petitioner interfered with the making of the New Will. He did not dictate it; he was not present when its proposed contents were discussed nor was he present when it was executed. Is a finding of undue influence really going to depend on what a trial judge puts in his order, when there is *proof* in the record that Petitioner did

not take part in the crafting of the New Will, that the Testatrix was competent and independent, and the witness were unbiased and believable? The circumstances surrounding the drafting and execution of the New Will (i.e., Klok's and Voytko's testimony) indicate that it was the product of the free and unfettered act of the Testatrix – who they said (and all the witnesses conceded) was competent, independent and was of sound mind.

More to the point, how did the Court of Appeals find that the testimony of Klok and Voytko was sufficient to rebut the *presumption of undue influence* from Petitioner's fiduciary relationship with Testatrix, but then *disregarded the same testimony* – as if it never existed, just like the trial judge did – on *the question of whether there was undue influence at all*? [R. p. 829]. If the Court of Appeals can look at their testimony on one issue, *then it can look at it on all the issues*!

Furthermore, how is the testimony of medical professionals go unheeded in this case, where it was a huge component in past undue influence cases? *Calhoun*, 277 S.C. at 532, 290 S.E.2d at 431; *Smoak,* 286 S.C. at 426, 334 S.E.2d at 811. Do the witnesses called truly matter if the trial judge casually says they knew Testatrix "on a professional basis for a limited amount of time"? [R. p. 280]?

Likewise, how does Court of Appeals allow factually incorrect statements to stand in the Opinion [such as the one citing Testatrix's brother and her best friend] "both presented evidence that Glenn restricted Testatrix's communication and visitation"? The Testatrix never stopped calling them; Ms. Carroll testified that she did meet at least once 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 those parts eminently credible!) but then ignore equally credible testimony that shows no undue influence – or worse getting it wrong.

There are other matters which should be heard, which include the error in relying on wrong facts/irrelevant facts, or facts which occurred outside the testamentary act; the testimony of 92 year old Helen Carroll (who testified only by reading from a letter that she could not say know who drafted it, or when she signed it, and promptly forgot what she said immediately after testifying to it); the fact that *Russell v. Wilson* found not undue influence on facts much "worse" than these; and that all the witnesses conceded the Testatrix was competent, independent and of sound mind. [R. pp. 841-843, 846-849, in Arguments 2, 4, 5, 6 and 7 of the *Petition for Reconsideration*].

If such incorrect or irrelevant testimony is removed from the opinion, or balanced against the received testimony from Petitioner's witnesses, then much of the trial judge's – and the appellate court's – "sufficient evidence" of undue influence evaporates. How can this outcome be fair?

CONCLUSION

"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. at 427, 334 S.E.2d at 811. "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** (emphasis added)." *Mock v. Dowling*, 266 S.C. at 278, 222 S.E.2d at 775. "If the testator had the testamentary capacity to dispose of his property and was free and unrestrained in his volition **at the time of making the will**, the influence that may have inspired it or some provision of it will

not be undue influence (emphasis added)." *In re Last Will and Testament of Smoak,* 286 S.C. at 424, 334 S.E.2d at 809.

Can a probate judge blatantly disregard probative facts, received from neutral witnesses (some of whose testimony he received without comment)? Should the trial court in an undue influence case be allowed to pick and choose what it wants from Appellant's witnesses, but then 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?

Do *Howard v. Nasser* and *Havird v. Schissell* still matter with the Court of Appeals when it rules 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?* Does the weighing of facts "together" to find "undue influence" somehow allow a mismatched, jigsaw of a factual record like the one here? Can the Probate Judge escape abuse of discretion by the use of his very discretion? These are the questions that plague this case.

No one is saying that a trial judge sitting as the finder of fact cannot make factual determinations regarding the credibility of witnesses, *but this is not what this trial judge did*. He improperly discounted testimony, rather than rule it non-credible. He needed to say why he did not believe any of the Petitioners' witnesses, rather than just whitewash them.

You can find that Petitioner influenced his mother, but are you going to find that he used *force and fear over his mother to compel her to change her will*? When the circumstances that **must be taken together** to un-mistakenly and convincingly prove undue influence – rather than

ignored – then the answer becomes ‘no.’ The Court of Appeals went part of the way; the Supreme Court should go further.

Thus, Petitioner respectfully requests that this Court take *certiorari*.

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