Kenneth E. Raynor, Esq. (Atty. I.D. No.016971997)
Stefanio G. Troia, Esq. (Atty. I.D. No.025821999)
SIMEONE & RAYNOR, LLC
Harvard Law Building
1522 Route 38
Cherry Hill, New Jersey 08002
Tel.(856)663-6700
Fax (856)663-6701
Email: kraynor@srnjlawfirm.com
Email: stroia@srnjlawfirm.com
Attorneys for Appellant, Michael Samalonis

| | | |
|---|---|---|
| | : | SUPERIOR COURT OF NEW JERSEY |
| | : | APPELLATE DIVISION |
| IN THE MATTER OF | : | DOCKET NO: A-003739-23 T4 |
| | : | |
| THE ESTATE OF | : | CIVIL ACTION |
| | : | |
| AUDREY SAMALONIS | : | ON APPEAL FROM |
| | : | |
| | : | SUPERIOR COURT OF NEW JERSEY |
| | : | |
| | : | Docket No.: P-1023-22 |
| | : | |
| | : | Sat Below: |
| | : | Hon. Kathi F. Fiamingo, J.S.C. (Ret.) |
| | : | Hon. Paula T. Dow, J.S.C. (Ret.) |

# BRIEF OF APPELLANT/DEFENDANT, MICHAEL SAMALONIS

# TABLE OF CONTENTS

# TABLE OF ORDERS

# TABLE OF TRANSCRIPTS

| Proceeding | Date | Designation |
|---|---|---|
| Motion Hearing | May 12, 2023 | 1T |
| Trial | May 30, 2023 | 2T |
| Trial | May 31, 2023 | 3T |
| Trial | June 1, 2023 | 4T |
| Trial | June 20, 2023 | 5T |
| Trial | June 21, 2023 | 6T |
| Trial | June 27, 2023 | 7T |
| Trial | June 28, 2023 | 8T |
| Trial | July 31, 2023 | 9T |
| Trial | August 1, 2023 | 10T |
| Trial | August 2, 2023 | 11T |
| Trial | September 6, 2023 | 12T |
| Trial | September 7, 2023 | 13T |
| Trial | September 9, 2023 | 14T |
| Trial | September 10, 2023 | 15T |
| Trial | September 11, 2023 | 16T |
| Trial | October 16, 2023 | 17T |
| Motion Hearing | October 17, 2023 | 18T |
| Trial | December 7, 2023 | 19T |
| Trial | December 20, 2023 | 20T |
| Trial | December 21, 2023 | 21T |

| | | |
|---|---|---|
| Trial | January 22, 2024 | 22T |
| Trial | January 23, 2024 | 23T |
| Trial | January 24, 2024 | 24T |
| Trial | January 25, 2024 | 25T |
| Trial | January 26, 2024 | 26T |
| Trial | January 29, 2024 | 27T |
| Motion Hearing | January 30, 2024 | 28T |
| Motion Hearing | April 26, 2024 | 29T |
| Motion Hearing | May 10, 2024 | 30T |
| Motion Hearing | July 12, 2024 | 31T |

# TABLE OF AUTHORITIES

**New Jersey Statutes** **Page**



**New Jersey Court Rules** **Page**

## CONCISE PROCEDURAL HISTORY

On **April 8, 2022**, Appellant/Defendant Michael Samalonis ("Samalonis") filed a Caveat with the Surrogate protesting the admittance, grant, or appointment of any will, letters, or fiduciary on behalf of Audrey's estate. **Da130**. On **April 22, 2022**, Respondent/Plaintiff Scott Parker ("Parker") filed a Verified Complaint to Appoint Executor with a request to strike the caveat. **Da131-168**. On **June 13, 2022**, Samalonis filed an Answer with Affirmative Defenses (**Da169-176**); and a Motion for Leave to file a Counterclaim which was granted on **August 4, 2022**. **Da177-186**. On **August 15, 2022**, Samalonis filed his Answer and Counterclaim. **Da187-270**.[1] On **December 28, 2022**, the Interested Parties, Susan White and Dorothy Rafferty (hereinafter individually as "White" and "Rafferty," and collectively as the "Interested Parties"), filed an Answer to Parker's complaint. **Da271-275**. On **January 18, 2023**, the Interested Parties filed an Answer to Samalonis' counterclaim. **Da276-292**. On **April 3, 2023**, Samalonis filed a Motion to Shift the Burden of Proof and Persuasion to Parker. **Da293-488**. On **April 28, 2023**, Parker filed a Cross Motion and Certification of Counsel Fees in opposition to Samalonis'

[1] Samalonis's Counterclaim set forth 13 counts: 1. Invalidate Will (undue influence) 2. Invalidate Will (diminished capacity) 3. Invalidate Will (mistake/lack of intent) 4. Breach of Fiduciary Duty as Power of Attorney 5. Invalidating Titling of Assets (undue influence, mistake & lack of intent) 6. Improvident Gifting 7. Conversion 8. Unjust Enrichment 9. Breach of Contract/Settlement Agreement 10. Breach of Fiduciary Duty 11. Negligence 12. Compel an Accounting and Allocation of Expense and Fees 13. Permit Discovery.

motion to shift the burden. **Da489-763**. On **May 8, 2023**, Samalonis filed a reply to Parker's opposition and a response to the cross motion. **Da764-838**. **On May 11, 2023**, Samalonis supplemented his motion to shift and opposition to the dispositive motions filed by Respondents. **Da839-854**. **On May 15, 2023**, Judge Dow denied Samalonis's motion to shift. **Da28-41**. The Interested Parties' motion for partial summary judgment was denied on **May 22, 2023**. **Da861-870.** Parker's motion for summary judgment was granted in part and Count II of Samalonis' complaint was dismissed. **Da1239-1240**. On **May 23, 2023**, Samalonis filed a Motion in Limine with two (2) supporting certifications seeking an adverse inference against Parker for the spoliation of evidence. **Da871-954**.

On **May 30, 2023**, the trial commenced before Judge Fiamingo; an in limine motion filed by Parker seeking to bifurcate the matter was withdrawn and the court heard the application for an adverse inference and reserved decision. **2T1; 2T4-1 to 4; 2T13-1 to 2**. The trial continued. **2T through 17T**. On **October 17, 2023**, Samalonis made his second motion to shift the burden of proof and persuasion against Parker. **18T**. On **October 24, 2023**, the court denied Samalonis's motion to shift. **Da42-50**. The trial continued. **19T through 27T**. Samalonis rested on **January 29, 2024**. **27T141-16 to 19**. Parker then advised the Court he intended to move for a directed verdict but also requested to first call Cynthia A. Earl, Esq., as his first

witness on defense. **27T192-18 to 25; 27T193-1 to 23**.[2]

On **January 30, 2024**, Samalonis moved for reconsideration of the court's October 24, 2023, Order denying his second motion to shift and renewed his request for an adverse inference. **28T**. On **January 30, 2024**, Parker moved for a directed verdict. **28T**. On **March 18, 2024**, the trial court denied Samalonis's motion for reconsideration and application for an adverse inference; and granted Parker's motion for a directed verdict. **Da51-86**.

On **April 3, 2024**, Parker, White, and Rafferty filed a Motion for Counsel Fees and Costs pursuant to R. 4:42-9(a)(3). **Da955-1046**. On **April 8, 2024**, Samalonis filed a Motion for Counsel Fees and Costs pursuant to R. 4:42-9(a)(3) **Da1171-1239**; and a Motion for Stay Pending Appeal. On **April 12, 2024**, Marianne Rebel Brown, Esq., also filed a Certification of Counsel Fees. **Da1047-1109**. On **April 18, 2024**, Samalonis and Respondents responded to the allowance requests. **Da1110-1170; Da1270-1275**. On **April 18, 2024**, Respondents filed their opposition to Samalonis' request for a stay. On **May 18, 2024**, Samalonis's motion to stay was denied. **Da90-97**. On **July 2, 2024**, the court denied and granted, in part, Samalonis's request for

[2] Samalonis's last witness was Earl and Parker called her, on direct, as his first witness as an accommodation so she would not need to return to testify. Samalonis objected to Parker calling Earl prior to the motion and because Samalonis was unable to cross examine Earl that portion of her testimony was not considered by the court or relied upon by Parker for the directed verdict. **27T144-11 and ends at 27T190-13**.

an allowance from the Estate. **Da98-109**. On **July 2, 2024**, the court also denied and granted, in part, Respondents' request for an allowance. **Da110-129**.

On **July 30, 2024**, Samalonis filed the Notice of Appeal. **Da1-22**. On **August 8, 2024**, a Notice of Docketing was filed. **Da1276.** On **November 12 and 18, 2024**, Certifications of Transcript Delivery were filed. **Da23-27**.

## CONCISE STATEMENT OF FACTS

Audrey is the fraternal aunt of Samalonis and his children, William Samalonis and Zachery Samalonis (hereinafter "William" and "Zach"). **19T5-6 to 8; 19T6-20 to 23.** Audrey is not related to Parker, White, or Raffety. Audrey passed away on March 29, 2022, at the age of 83. **19T15-16 to 23; 10T22-7 to 16.** Samalonis and his children shared a long and loving relationship with Audrey and frequently visited her in Marlton and stayed with her Ocean City. **19T23-19 to 25; 19T26-10 to 17; 19T29-16 to 25; Da808-821; Da1367-1411.** They also assisted Audrey with certain chores such as maintaining her properties and traveling between both as she got older. **19T40-24 to 25; 19T41-1 to 18**. Parker is a financial advisor by trade and met Audrey through his mother, Audrey's former friend. **9T190-1 to 10.** Parker was 25 years younger than Audrey and professed a "nephew-like" relationship with her. **10T22-1 to 23.** White and Rafferty were Audrey's co-workers and then friends.

On January 23, 2014, Audrey executed a will and trust (hereinafter collectively referred to as the "January 2014 Will & Trust") that bequeathed her

entire residuary estate to Samalonis and his children, with two equal bequests totaling $200,000 to White and Rafferty. **Da325-329**. She also executed a power of attorney and living will, naming Parker as her agent and Samalonis as contingent agent. **Da1187-1196; Da1197-1199**. All of Audrey's January 2014 estate planning documents were drafted by Nancy Rice, Esq. ("Rice") and created without any "known" input from Parker. **9T72-19 to 24; 10T4-14 to 17**. Audrey's January 2014 documents were executed five months after their planning as commenced as she began the process with Rice in August of 2013. **2T37-23 to 25; 2T38-1 to 7**. Audrey also designated Parker as a 64% beneficiary of her UBS IRA, with the remaining balance going to charities. **2T66-21 to 25; 2T67-1 to 7**. Samalonis, William, and Zach would receive the entirety of their aunt Audrey's residuary estate, which consisted of two (2) properties, one in Marlton and one in Ocean City ("OC"), bank and investment accounts, including a separate investment account with UBS, less $200,000 in bequests to White and Rafferty. **Da331; 2T54-1 to 24**.

Parker's "known" involvement in Audrey's estate planning began when he attended a meeting at Rice's office on March 19, 2014, with Audrey, Rice, Steven Kalodner (Audrey's financial advisor from UBS) and Adam Bower (a representative from Garden State Trust Company "GST").[3] **3T95-2 to 6.** According to Rice, Parker

[3] GST was a trust company designated as the Trustee for Audrey's 2014 Trust for the benefit of Samalonis and his children and was the successor executor under Audrey's Will. **Da339; Da327**.

wasn't scheduled to attend the meeting. **3T96-8 to 12.** Rice testified that during the meeting Parker asserted he wanted the OC property because as a "high income earner" he would be taxed on the IRA. **2T114-11 to 23.** Kalodner spoke very little at the meeting. **2T121-1 to 25; 2T122-1 to 24.** Parker testified he did not request the OC property and that he only mentioned the high income/low income issue regarding the IRA. **10T37-3 to 25; 10T38-1 to 15.** Despite being at the March 19th meeting, Parker testified he was unaware that he was Audrey's agent under the January 2014 power of attorney and unaware of the January 2014 Will and Trust until this action commenced in 2022. **9T76-1 to 4**. Parker testified that he did not know he was the beneficiary of the IRA, despite discussing these "high-income/low-income" issues at the meeting. **10T38-16 to 18.** As a result of Parker's involvement in this process and attendance at the meeting, Parker was now receiving the OC property and Samalonis and his children were to receive the IRA in trust. **2T114-11 to 23; 2T104-7 to 24.** Eight days later, on March 27, 2014, Parker, not Audrey, sent an email to Rice wherein he stated "it was a pleasure meeting you last week at **my aunt's** estate planning meeting. After **we** left your office with a better understanding of how things work **we** had a couple of ideas that **we** wanted to run by you." (emphasis added, hereinafter, the "we email") **Da373-374**.[4] In this email, Parker positions himself to

[4] There is no evidence Audrey opened or received this email as her emails were deleted by Parker on February 16 and 17, 2023. **Da871-954**.

receive the IRA and OC property even though he previously testified that the IRA should be going to "low-income earners." Parker then writes that the "IRA would be going to the dog charities and me like it was in the original will/plan," despite previously testifying he did not know about the January 2014 Will & Trust or him being designated as an IRA beneficiary. **Da373-374**. After this email, a second meeting occurred between Audrey, Parker, and Rice on April 9, 2014. **9T228-21 to 25; 9T229-1 to 4.** Rice took notes at the meeting. **Da1360; 2T147-20 to 25; 2T148-1 to 5.** Parker also wrote out how Audrey's estate was going to be "divvied up" between himself and Samalonis. **10T51-1 to 23; Da394.** Rice testified that Parker "dictated" the April 9th meeting. **2T150-21 to 25; 2T151- 1 to 5.** Parker first testified that he didn't recall the April 9th meeting, and then when shown with his handwritten directions about how Audrey's estate would be "divvied up," he admitted to being present.[5] **9T116-2 to 12; 9T225-1 to 8; 10T51-1 to 23; 10T52-21 to 25; 10T53-1 to 10.** In Parker's handwritten instructions, he again gave himself the OC Property and now 68% of the IRA. **Da394**. The April 9, 2014, meeting dictated by Parker was the last meeting before the signing and the bequests written out by Parker at that meeting were incorporated into the May 2014 Will, along with the beneficiary

[5] A bulk of the trial court's March 18, 2024, opinion granting the directed verdict incorrectly states that Rice didn't take notes at the April 9, 2014, meeting and that Parker wasn't present and therefore Parker, with unwavering testimony denying his presence at this meeting, was more credible than Rice. **Da58-60;80**.

changes to the UBS IRA. **3T138-18 to 21; Da394; Da1201-1207**. Later that day, Parker, seeking to enrich himself even further, sent an email copied to Rice stating "since the IRA is pre-tax funds and most of the funds going to Michael are after tax money don't you thin[k] sic, even giving Micael 5% is too much." **Da921.** Despite this email, the "we email", and the handwritten document authored by Parker divvying up Audrey's estate, Parker testified he never asked Audrey for any of her assets or for an inheritance. **10T141-20 to 25; 10T142-1 to 12**.

Unrelenting and armed with specific knowledge of Audrey's hard-earned estate, Parker, unable to secure funds by any other reasonable means, obtained an unsecured loan from Audrey for $100,000 in July 2014 to invest in a property. **10T139-17 to 24; 10T143-17 to 24; 10T144-12 to 24**. According to Parker, despite making $400-$500k per year, he didn't have any assets or funds himself to invest as he "really didn't have anything at the end of that paycheck." **10T145-25; 10T146-1 to 25; 10T147-11 to 21.**

In addition, less than a month after the May 2014 Will was executed, Parker emailed Rice seeking to be added as a "trust protector" for Audrey and any other clients he referred to Rice. **Da852.** By this time, Parker had already referred Bernice McDowel ("McDowel") to Rice. **9T122-22 to 24.** McDowel was a "paraplegic," according to Parker, and he wanted to be a trust protector for her; but Rice's associate, Andrew Mackerer, Esq. ("Mackerer"), indicated the change would not be

made based upon Mackerer's discussions with McDowel. **14T:6; 14T16-1 to 20.** Parker became angry with Mackerer. **14T18-3 to 14**.[6] Parker could not "remember" how long he knew McDowel prior to claiming she wanted him to be appointed as her trust protector over her son. **10T112-18 to 25; 10T113-1 to 13.** In September 2014, after being unsuccessful in having Rice's office add him as the trust protector for Audrey or McDowel, Parker referred their files Dolchin, Slotkin, and Todd ("DST"), a Center City, Philadelphia firm. **11T12-20 to 25; 11T13-1 to 5.**

Parker, however, claims the reason he referred Audrey to DST was that she noticed, after the signing of the May 2014 Will, that GST was a "successor" executor and "successor trustee" and asked Parker to come over to read the Will to confirm GST was named. **10T132-23 to 25; 10T133-1 to 16.** Parker then testified that due to these alleged "concerns," he contacted DST to "remove" GST from the May 2014 Will. DST's office is near Parker's office and with whom Parker had a relationship prior to referring Audrey. **Da1221**. Oddly, the notes from the initial meeting on September 24, 2014, between Parker and two (2) attorneys at DST do not contain a reference to removing GST, but they do contain words like "executor get money." **Da1221.** Also, the May 2014 Will that was marked up by Jerry Dolchin ("Jerry") on

[6] Parker was also emailed Mackerer requesting to be added as trust protector for her will/trust because purportedly McDowel "couldn't' type her own emails." **9T165-13 to 25; 9T166-1 to 21**.

that day does not strike GST but does circle "without commission." **Da1316.** Parker, not Audrey, conducted almost all of the communications with DST over the next three years.[7] **Da446-448, 451, 453, 1217-1218, 1228, 1231, 1233, 1237, 1361, 1365.** In fact, during this period Audrey never responded to the two emails DST sent her and only had one or two alleged phone calls with DST that purportedly took place in 2014. The only billed telephone call to Audrey was "brief" and purportedly took place on New Year's Eve 2014. **Da1218.** According to DST attorney Wendy Fein Cooper ("Cooper"), Parker was the "point person" for Audrey when discussing the will. **3T197-13 to 25; 3T198-5 to 24.** Parker never copied Audrey on any emails with the exception of one. **Da1364.** No attorney at DST ever met with Audrey, except once, at the signing. **3T177-11 to 15; 7T42-20 to 22; 8T35-6 to 8.**

In March 2017, Parker was added as a beneficiary to a State Street account of Audrey. **12T41-8 to 11.** This allegedly occurred at Audrey's home while no one else was present. Parker claims Audrey invited him over to her house and had him fill out the beneficiary designation portion, naming him the beneficiary to the account. **12T42-2 to 6; 12T45-1 to 10.** Parker claims Audrey knew all the information on the form, except his social security number, but still needed him to fill out the document

[7] To be clear, Audrey never emailed DST or responded to their emails, Parker admitted to deleting the emails in Audrey's purported email account, and Parker testified that Audrey didn't usually use her email.

for her. **12T46-2 to 25; 12T47-1 to 6.** There is no explanation why, if the events unfolded as Parker contends, Audrey couldn't have asked for the SSN by phone.

On April 27, 2017, Parker drove Audrey to the Will signing at DST. **12T63-25; 12T64-1 to 2**. Prior to the signing on April 24, 2017, Cooper sent the draft estate planning documents to Parker and did not copy Audrey. **Da447.** Parker, not Audrey, approved the documents in an email dated April 26, 2017. **Da446.** No notes were taken by the DST attorneys at the signing despite this being the only time they met Audrey. **5T66-20 to 25; 5T67-1 to 5; 8T80-8 to 11.** Neither Cooper, nor Zachary Dolchin[8], Esq., ("Zachary"), recall discussing the contents of the Will with Audrey during the signing. **5T68; 5T73; 8T73-4 to 25; 8T74-1 to 7; 8T76 through 8T80.**

According to Parker, after the Will executed on April 27, 2017 ("April 2017 Will") was signed, Audrey forgave the interest and balance ($25,000) owed by him for the 2014 loan at the time. **11T41-10 to 14.** There are no documents, however, evidencing this forgiveness nor any supportive testimony other than Parker's. **Id**.

In March 2018, Parker began taking Audrey to the Neurology Department at the University of Pennsylvania ("UOP") for what he described as "word finding

[8] Zachary Dolchin is the son of Jerry Dolchin, Esquire, (hereinafter referred to as "Jerry") the senior partner of the firm. Jerry conducted the initial consultation concerning Audrey's file with Parker and Audrey wasn't present. In addition, Parker handled the finances of Jerry's step-father-in-law, Jerry's brother-in-law, his daughter-in-law, Zachary's wife, and referred business/clients between himself and DST. **7T18-1 to 25; 7T19-1 to 25; 7T20-1 to 25.**

issues," however, regarding whether the treating physicians discussed with him Audrey suffering from mini-strokes or dementia, he claimed only that "it could have been mentioned" or that he "didn't' recall." **11T44-12 to 25; 11T45-1 to 4; 11T46-8 to 17; 11T49-18 to 21.** Between March 2018 and June 2019, Parker drove Audrey to UOP and attended appointments with her, and Parker testified that Audrey was concerned about having Alzheimer's at this time. **11T45-23 to 25; 11T46-1 to 5.**

In June 2019, Audrey had a stroke or medical incident and was hospitalized, which led to Parker taking over Audrey's affairs pursuant to a power of attorney previously executed. **16T18-6 to 8; 16T94-2 to 4**. On October 11, 2019, Samalonis filed a complaint to have Audrey adjudicated incapacitated. **Da1531-1573**. On **December 18, 2020**, a Judgment of Incapacity and Appointment of Guardian of the Person and Estate was filed in a prior guardianship matter regarding the Decedent, Audrey Samalonis ("Audrey"). **Da1452-1464**. After that date, Samalonis brought a suit to enforce the settlement agreement between the parties pertaining to Guardianship, and it was consolidated into Samalonis' Counterclaim. **Da187-270**.

## LEGAL ARGUMENT

### I. APPELLATE STANDARD OF REVIEW

This matter comes before the Appellate Court upon directed verdict by the trial court, in favor of Parker, the Plaintiff/Petitioner in the underlying trial. In reviewing a trial court's decision on a motion for directed verdict, pursuant to Rule

4:40-1, the standard of review is de novo. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). A motion for directed verdict must be denied "[i]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ[.]" Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000) (quoting Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 415 (1997)).

The court in the matter of Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969) noted that the judicial function for an involuntary dismissal "is quite a mechanical one" and in this function, "[t]he trial court is not concerned with the worth, nature or extent (beyond a scintilla) of evidence, but only with its existence, viewed most favorably to the party opposing the motion." Id. Further, courts have generally held that such motions should be denied if the plaintiff's case rests upon the credibility of witnesses. See Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482 (1956). Based upon these standards of review, the trial court erred in granting a directed verdict in favor of Parker. The following standard of review is also applicable to this matter: A "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" and as such, are also reviewed de novo on appeal. Rowe v. Bell &Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of

Manalapan, 140 N.J. 366, 378 (1995)). The court made errors interpretating the law from established facts, including in the denial of Samalonis' Motions to Shift.

Typically, a trial court's factual findings and credibility determinations are entitled to deference on appeal; however, where a trial court's factual findings are so "manifestly unsupported or inconsistent with competent, reasonably credible evidence so as to offend the interests of justice," the Appellate Court should not hesitate to correct such a wrong. See In re Will of Liebl, 260 N.J. Super. 519, 524 (App. Div. 1992). The court's factual and credibility determinations were wrong, thereby offending the interests of justice and tainting the entire trial.

## II. TRIAL COURT ERRED BY FAILING TO FIND A PRESUMPTION OF UNDUE INFLUENCE (**Da28-41; Da42-50; Da51-86**)

Prior to rendering a directed verdict judgment in error, the court erred on three occasions in failing to shift the burden of proof and persuasion as to Samalonis's claims of undue influence pertaining to the May 2014 and April 2017 Wills, and certain lifetime transfers, namely the increase in Parker's share of the IRA in May 2014, the gift of the loan balance of $25,000 plus interest in 2017, and the change of beneficiary to the State Street account in 2017.

### A. **Legal Standards to Find Presumption of Undue Influence**

As this Court is aware, there are two sets of standards applicable to claims for undue influence. One pertains to lifetime transfers, and a separate standard pertains to challenges associated with wills. Each of these will be addressed briefly below.

1. Testamentary Instruments

The opponent to the admission of a will bears the burden of proving undue influence. Where the Will, however, benefits one who stands in a confidential relationship with the decedent, and suspicious circumstances exist, that burden shifts to the party with the confidential relationship. See In Re Estate of Stockdale, 196 N.J. 275, 303 (2008). A confidential relationship exists when confidence is naturally inspired or reasonably exists between the parties. Pascale v. Pascale, 113 N.J. 20, 34 (1988). The Court in Pascale went on to say "[t]he nature of a confidential relationship is difficult to define, but encompasses all relationships 'whether legal, natural or conventional in their origin, in which confidence is naturally inspired, or, in fact, reasonably exists.'" Id. (quoting In re Fulper's Estate 99 N.J. Eq. 293, 314 (Prerog. Ct. 1926). A confidential relationship:

> "comprehends…all cases where the relations between the parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from over-mastering influence; or on the other from weakness, dependence or trust justifiably reposed, unfair advantage is rendered probable."

Id.

Regarding suspicious circumstances, the common elements are:

> (1) the initiation of proceedings for the preparation of the instrument; (2) participation in such preparation; (3) presence at the execution of the will; (4) efforts to exclude the natural objects of testator's bounty from his society; (5) concealing the making of the will, and (6) taking possession of the will.

In Re Raynold's Estate, 132 N.J.Eq. 141, 148 (Prerog. Ct. 1942) aff'd 133 N.J. Eq. 346 (E. & A. 1943). Suspicious circumstances need only be slight. In re Blake's Will, 21 N.J. 50, 55-56 (1956).

Once a confidential relationship and suspicious circumstances are established, the burden of proof shifts to the proponent of the Will to establish by a preponderance of evidence that no undue influence occurred. Where a lawyer's independence is compromised, however, which is typically associated with a lawyer previously representing the beneficiary, that burden of proof can increase to clear and convincing. Haynes v. First Nat'l State Bk. Of N.J., 87 N.J. 163, 179 (1981). Appellant contends the heightened burden is applicable in this case.

2. *Inter Vivos* Transactions

A presumption of undue influence arises in connection with *inter vivos* transactions once a confidential relationship is established. Bronson v. Bronson, 218 N.J. Super. 389, 394 (App. Div. 1987). After the burden of proof is shifted, the donee is required to establish by clear and convincing evidence that no deception was practiced therein, no undue influence used, and that all was not only fair, open and voluntary, but that it was also well understood. Id. at 392 (citing In re Fulper's Estate, 99 N.J.Eq. 293, 302 [132 A. 834] (Prerog.Ct. 1926)).

3. Burden of Persuasion

In In re Weeks' Estate, 29 N.J. Super. 533, 538-539 (N.J. Super. App. Div. 1954), shifting of the burden of proof in an undue influence case serves the dual purpose of shifting the burden of persuasion. In Weeks this Court stated:

> There is another matter to be borne in mind. The presumption of undue influence if of that class of presumptions by which a litigant (here the proponent) is called upon to make known facts more easily accessible to him than to his adversary." See, generally, Morgan, supra, 47 Harvard L.Rev, at p.77; cf. Brinkman v. Urban Realty Co., Inc., 15 N.J. Super 354, (App. Div. 1951). **Therefore, where a presumption of undue influence is created, the law puts upon proponent the burden of coming forward with credible 'evidence satisfactorily explaining his conduct' and stating what he knows as to the making of the will**. In re Colton's Estate, 11 N.J.Misc. 410, 166 A. 521 (Prerog.1933), affirmed on other grounds 115 N.J.Eq. 327, 170 A. 610 (E. & A.1934) (emphasis added) Id. at 539-540.

### B. Trial Court Erred in Denying Appellant's Motion to Shift in its May 15, 2023 Order (Da28-41)

Samalonis filed a motion to shift the burden of proof and persuasion to Parker as to the purported Wills executed in May 2014 and April 2017 as well as certain lifetime transfers prior to trial. The court erred in denying said motion and granting Parker's motion, in part, to deny the same.

#### 1. Trial Court Incorrectly Concluded There Were Issues of Fact or Credibility as to Confidential Relationship and Suspicious Circumstances

In holding that there were disputed facts as to whether Parker and Audrey were in a confidential relationship and whether suspicious circumstances existed, the trial court erred for three reasons as will be addressed below.

In support of the Motion to Shift, Samalonis submitted a segregated statement of undisputed facts consisting of 120 paragraphs. **Da300-323.** Almost all of said paragraphs were supported by specific references to the record, identified as certified Exhibits 1 through 30. **Da296-299; Da130-487.** Parker failed to admit or deny these separately identified paragraphs as required by Rule 4:46-2(b). As such, "all material facts in the movant's statement which are sufficiently supported," should have been "...deemed admitted for the purpose of the motion...." Since the statement of undisputed facts was unopposed sufficient evidence was rendered to the court to warrant shifting the burden to Parker regarding the May 2014 and April 2017 Wills and the challenged *inter vivos* transfers and mirroring the timing mirrored of the Wills. Even if the entire statement of facts is not deemed admitted, pursuant to Rule 4:46-2(b), the core facts are undisputed. Those facts, contrary to the court's holding, establish that a confidential relationship and suspicious circumstances existed.

A confidential relationship was established in the following paragraphs of Samalonis' statement of undisputed facts, wherein Parker is referred to as the Petitioner: 20, 21, 25-28, 34, 37, 39, 43, 45, 52, 53, 55, 56, 68, 70-77, 82-83, 85, 86, 88-89, 91-96, 103, 106-111 & 120. **Da300-323.** Of critical note is the fact that Parker was attending estate planning meetings with Audrey at Rice's office and specifically offering input as to May 2014 Will, which altered the January 2014 Will and Trust that benefited Samalonis and his children and was executed without Parker's

involvement. **Da303, ¶ 21-22, Da306, ¶ 34 & Da307, ¶ 37**. In addition, Parker was sending emails to Rice, including one which stated "it was a pleasure meeting you last week at **my aunt's** estate planning meeting. After **we** left your office with a better understanding of how things work **we** had a couple of ideas that **we** wanted to run by you." (emphasis added) **Da304, ¶ 26**. Obviously, this "we email" to the scrivener, by Parker, a beneficiary, concerning Audrey's estate plan, establishes not only a confidential relationship but also an admission of undue influence, as "we" **IS** the proverbial undue influence. **Da 373-374.** Further, as to the May 2014 Will and its drafting, Audrey was, according to Parker's own testimony, relying upon Parker's advice and expertise as a financial planner. **Da304, ¶ 27, Da309, ¶ 45**.

Thereafter, Parker conducts all or almost all communications with DST over a three-year period concerning the alleged April 2017 Will. Parker conducts, without Audrey, the initial consultation with DST. **Da314, ¶70**. Parker discusses the contents and changes to the documents with the attorneys from DST. **Da317-318, ¶ 90-95**. Parker approves the final draft of the April 2017 Will and Parker drives Audrey to the signing, the only time the attorneys at DST met with Audrey. **Da0317, ¶ 88, Da318, ¶ 96 & Da320, ¶ 104.** In addition, Parker admits that he referred Audrey to DST and he referred her to her accountant in 2015. **Da323, ¶ 120**. Further, Parker's emails indicated that one of the reasons Audrey is not communicating with DST was due to her health and that he took her to various doctors in and around this time.

**Da315, ¶ 77, Da323, ¶ 120 & Da320, ¶ 108**. Parker also acknowledged that in 2018, Audrey was diagnosed with "memory loss." **Da321, ¶ 110**. Finally, Parker described his relationship with Audrey as "like a nephew."

Suspicious circumstances were also established in the paragraphs referenced above and in the following paragraphs: 11-19, 22, 23, 33, 35, 36, 37, 38, 41, 42, 44, 46-49, 51-67, 78-81, 84, 90, 97-102, 104, 105, 112-119. **Da300-323.** The record before the court on this pretrial motion was replete with suspicious circumstances. Parker attended two estate planning meetings with Rice and Audrey and he wrote out how the bequests were to be split between him and Samalonis in the April 9, 2014, meeting. **(Da303, ¶ 21, Da304, ¶ 26, & Da306, ¶ 34).** The May 2014 Will and beneficiary changes to the IRA no longer reflected the distributions set forth in the January 2014 Will and Trust but instead reflected the distributions in the document written by Parker, which left him a greater portion of Audrey's assets. **Da302-303, ¶ 11-18, & Da306-308, ¶ 34-41.**

As for the April 2017 Will, Parker handled substantially all of the communications with DST. **Da317, ¶ 89-90, Da320, ¶ 104-105**. Parker was the financial planner for Jerry's step-father-in-law and Zachary's wife, and Zachary also worked on Audrey's file. **Da319, ¶ 98-99**. Zachary admitted to being friends with Parker, and Jerry admitted to making referrals to and receiving referrals from Parker. **Da319, ¶ 100-101**.

Based upon these uncontested facts stemming from Parker's own testimony and documents he authored; the court erred in concluding that Samalonis did not establish the existence of "slight" suspicious circumstances or evidence of a confidential relationship warranting the grant of the Motion to Shift.

2. Plaintiff's Participation in the Estate Planning Process Established a Confidential Relationship as a Matter of Law Since His Interest Increased Thereafter

The court erred as a matter of law in deciding this motion and the standard needs to be clarified by this Honorable Court. Parker's interest in Audrey's estate increased over the sums he was receiving under the January 2014 Will and Trust and associated documents **after** his participation in Audrey's estate planning process. Such actions by Parker must be construed, as a matter of law, as sufficient to establish a confidential relationship and suspicious circumstances and once shifted, the burden of proof must be rebutted by clear and convincing evidence.

In the matter of In Re Raynold's Estate, suspicious circumstances include being present at the signing and participation in its drafting. Id. at 118. As suspicious circumstances need only be slight Parker's presence and participation in the estate planning process is undisputed, this prong is satisfied as a matter of law.

However, as to the confidential relationship, no corresponding affirmative statement has been rendered by this state's courts. Samalonis contends that as a matter of law both a confidential relationship and suspicious circumstances must

exist, warranting the shifting of the burden of proof, where a beneficiary, other than an individual's spouse, domestic partner or civil union partner, is present for or participates in the estate planning process and after which that beneficiary's interest in the testator's estate increases or improves. The undersigned urges this Honorable Court to adopt this standard to establish a bright line rule to guide counsel, protect testators, and discourage interloping beneficiaries.

This rule is appropriate as participation and presence is already an element of suspicious circumstances and one cannot conclude that there is greater evidence of a confidential relationship than the trust reposed in a beneficiary who is participating in the drafting of a testator's estate planning documents. The sanctity of the attorney-client privilege stems from the confidentiality attributable to the communications between a client and his lawyer. See RPC 1.6. From this confidentiality comes the ability to speak freely in an open exchange between the client and his counsel. Within the realm of estate planning, there is no greater necessity than confidentiality to ensure that a testator's wishes are not tainted by the influence, participation and/or presence of a beneficiary to a will. First, no client/testator would invite or have a beneficiary in the room with their attorney during an estate planning meeting unless they shared a confidential relationship. There is no purpose unless the testator is relying upon their input or acceding to the trust naturally reposed in them.

Second, no such meeting could occur without the influence, whether active or passive, of that beneficiary as their very presence will stifle the candor by which the testator communicates with counsel and by which counsel communicates with them. By attending such meetings, a beneficiary gains insight into those confidential communications between the testator and counsel, thereby allowing said beneficiary to exploit that information outside the presence of counsel. The risks are too great.

Because Parker's involvement in the estate planning process was condoned and allowed by counsel, the sanctity of confidentiality was stripped away. Hence, the burden of proof, once shifted, should be clear and convincing evidence. The Court in Haynes v. First Nat'l State Bk. Of N.J., 87 N.J. 163, 179 (1981), stated the following in assessing whether to impose a higher burden of proof:

> In imposing the higher burden of proof in this genre of cases, our courts have continually emphasized the need for a lawyer of independence and undivided loyalty, owing professional allegiance to no one but the testator. In In re Rittenhouse's Will, supra, 19 N.J. at 380-382, the Court questioned the attorney's independence and loyalty in view of the attorney-beneficiary's role in bringing the draftsman and the testatrix together, noting that the beneficiary had been 'unable to give a satisfactory explanation of the relationship' between himself, the draftsman and the testatrix, viz: [I]t would appear the testatrix did not independently choose [the draftsman] as the scrivener of her will. It is fair to assume from the record that she was influenced to do so by [the beneficiary].

Clearly, a scrivener's independence and undivided loyalty is compromised when they allow a non-spousal beneficiary to enter, participate in, and "dictate" a testator's estate planning process. The beneficiary's presence and participation **IS** the very

conflict described in the Haynes' case, whether that beneficiary was previously represented by the lawyer, or whether that beneficiary had a business or personal relationship with the attorney. A "fee agreement" between a beneficiary and the attorney does not alone create the compromised representation identified in the Haynes' case. Clearly, once counsel has communicated with the beneficiary and allowed participation in the planning process, said counsel is not free to speak candidly about the beneficiary and testator's relationship as it would implicate potential malpractice and as such, their error in judgment becomes a millstone upon the neck of truth, requiring the heightened burden of proof.

As to the lifetime transfers, there were two raised by Samalonis in this motion. First, the increase in Parker's share of the IRA, which was made through a beneficiary designation change in May 2014, and a purported forgiveness of the balance of the loan that Audrey made to Parker in or around April 2017. If this Court finds a confidential relationship as to the May 2014 and April 2017 Wills, the burden of proof should shift as to the lifetime transfers as well.

### C. The Trial Court Erred in Denying Appellant's Motion to Shift in its October 24, 2023, Order (Da42-50)

Mid-trial, Samalonis moved again to shift the burden of proof and persuasion to Parker. Most of the core facts identified in the initial pretrial motion were brought out and developed further at trial, and those facts are identified in the Statement of Facts above. Despite establishing a clear pattern of consistent and persistent

involvement in Audrey's estate planning process, by Parker for more than three years, the trial court denied this mid-trial motion to shift and erred.

1. Plaintiff's Participation in the Estate Planning Process Established a Confidential Relationship as a Matter of Law Since His Interest Increased Thereafter

As argued in Section B(2) of this brief, Samalonis contends that the trial court erred as a matter of law in not finding Parker's presence and participation in the estate planning process established both a confidential relationship and suspicious circumstances. Samalonis will rely upon the same legal arguments set forth above in Section B(2), incorporating the testimony and evidence submitted at the time of trial in the Statement of Facts above and in the arguments below.

2. The Trial Court Incorrectly Concluded There Were Issues of Fact or Credibility as to Confidential Relationship and Suspicious Circumstances

The court erred by denying Samalonis' motion to shift on October 24, 2023, based upon the testimonial and factual record before it. The trial court's errors, as noted above in Section C(1), stemmed from an error in law, and as more specifically identified below, arose from a misapplication of the law to the facts of record, as well as an incorrect understanding of the factual record.

Samalonis incorporates by reference herein the Statement of Facts above, so as to avoid redundancy. A cursory review of the Statement of Facts reveals that the trial testimony and evidence closely parallelled the evidence submitted to the court

before the trial. Parker attended meetings at the various scrivener's offices, some with Audrey and some without, he emailed the scriveners, he handwrote the bequests that were incorporated in the May 2014 Will, his interest increased from the January Will and Trust to the May 2014 Will, he conducted almost all the communications with DST with regard to the April 2017 Will, and he drove Audrey to the signing at DST, and was the "point person" for that firm. Further, there is the "we email" from Parker to Rice where he acknowledges his direct influence in the estate planning process. In addition, Parker acknowledges that his interest in the IRA increased as a result of the May 2014 beneficiary change, that he received a $100,000 loan from Audrey during this period of which the $25,000 balance and three years' interest was purportedly forgiven around April of 2017, and he wrote out a form designating him as the beneficiary to Audrey's State Street investment account in 2017.

The evidence produced at trial was so overwhelming that the trial court, in denying the midtrial Motion to Shift, found undue influence as to the April 2017 Will. The trial court's order denying Samalonis' motion stated in relevant part "[h]owever, **what the decedent and petitioner intended** as a simple codicil morphed into the drafting of new documents, which mirrored the dispositive provisions of the May 2014 Rice Will." **Da48.** If, as confirmed by the trial court in its decision, the April 2017 Will was the product of the joint intent of Audrey and

Parker, undue influence occurred, and a confidential relationship and suspicious circumstances existed. **Da46**. Therefore, the court erred in denying the motion.

Further, in denying Samalonis' Motion to Shift, the trial court misapplied the law to the facts and failed to appreciate, or chose to ignore, the significance of Parker's participation in Audrey's estate planning process. According to the trial court's decision, the evidence did not demonstrate that "decedent and petitioner were not dealing on terms of equality or that petitioner had any superior knowledge." **Da50.** Such a conclusion of law, based upon irrefutable examples of a confidential relationship in the record, cannot stand.

If Parker and Audrey were dealing on equal terms and Parker did not have "superior knowledge," Parker's presence and involvement in the estate planning process would not have been so prevalent. The examples of Audrey's reliance on Parker during this process over three years is not an example of "perceived reliance," but instead proof of actual reliance. As such, the court erred in denying Samalonis' motion and in failing to shift the burden by clear and convincing evidence.

3. Trial Court Misunderstood Fundamental Facts of the Case So and Undermined the Entire Trial Process

The trial court erred in a fundamental misunderstanding of the trial testimony and evidence, to such a degree, that it tainted its entire trial process, including its denial of the Motion to Shift, midtrial. While not directly referenced in its opinion of October 24, 2023, denying the mid trial Motion to Shift, the misunderstanding of

the facts becomes self-evident in the trial court's later decision on Samalonis' motion for reconsideration, which is discussed in more detail below.

In essence, as of October 24, 2023, when the midtrial Motion to Shift was filed, the trial court had already received all of the testimony from Rice, the Dolchin attorneys, Parker, Feldhake and Mackerer, and it was this testimony, along with the documentary evidence admitted at trial, at that time, which the trial court fundamentally misunderstood.

The undersigned counsel will rely upon the arguments set forth below pertaining to the denial of its motion for reconsideration in this regard, however, in essence, the trial court incorrectly held that Parker did not attend the April 9, 2014, meeting at Rice's office. From this finding, the trial court incorrectly found Parker more credible than Rice.

Given that this evidence and testimony was before the trial court when it rendered its October 24, 2023, decision denying Samalonis' Motion to Shift, it is obvious that said misunderstanding, of the basic facts of the case, influenced the trial court's decision in formulating its denial.

### D. The Trial Court Erred by Failing to Reconsider its Denial of Samalonis' Motion to Shift (Da51-86)

The trial court erred again by failing to grant Samalonis' motion for reconsideration on the issue of shifting the burden of proof and persuasion, by way of its Order dated March 18, 2024. As noted above, it is Samalonis' position that the

trial court errored in denying the motion for reconsideration based upon the law, the facts, and the applicability of the law to the facts.

With the foregoing being said, this brief has already addressed the trial court's errors of law, and the misapplication of the law to the facts. However, it is the March 18, 2024, opinion which clearly delineates the trial court's errors of fact and credibility determinations which resulted in the denial Samalonis' Motions to Shift and for Reconsideration.

The critical errors of fact, which formed the basis for the trial court's incorrect rulings, were set forth in its' written opinion of March 18, 2024, as follows:

> "Rice testified initially that she had no independent recollection of either meeting. Despite that, and despite the fact that the notes from the March 19, 2014 meeting were made by Rice's associate and not by Rice, she testified that she was able to recall that petitioner 'dictated' what occurred at the meeting.
>
> The testimony demonstrates that Rice had a subsequent conference with decedent at her offices on April 9, 2014. Again, Rice and little recollection of the meeting and no notes from that meeting were introduced. Although Rice maintained that petitioner was in attendance at the meeting, petitioner testified he only attended one meeting with Rice and decedent. Rice's invoice to decedent for services rendered contains an entry for March 19, 2014 made by PAQ for '[c]onference with client, [petitioner, UBS advisor Steve K., Adam (GST and [Nancy Rice] to discuss trustee and review/revise trust provisions.' An invoice entry made by Rice for the conference held on April 9, 2014 states only 'conference with client in office.'
>
> Rice recalled that petitioner made suggestions regarding the terms of the trust decedent proposed be established for respondent and his children, including a suggestion that the trust be named the beneficiary of the individual retirement account. In this regard, petitioner expressed

> his observation that lower income beneficiaries, rather than higher income beneficiaries, should be named beneficiaries of individual retirement accounts due to adverse income tax consequences. Rice advised decedent against naming the trust a beneficiary due to similarly adverse income tax consequences. These suggestions are the ones included in the notes taken during the March 19, 2014 meeting at which petitioner acknowledges being in attendance.
>
> Rice maintains that petitioner expressed a preference to receiving the OC condo rather than an interest in individual retirement account because of adverse income tax consequences. Petitioner testified credibly that while he expressed the observation that lower income beneficiaries, rather than higher income beneficiaries are preferred recipients of IRA benefits, he did not ask to receive the OC condo or any other asset of decedent. Rice determined that petitioner was 'directing' the meeting as a result of his suggestions regarding the trust and her recollection that petitioner indicated an interest in receiving the OC condo.
>
> The court finds that Rice's faulty recollection of a second meeting with petitioner in attendance is not borne out by her contemporaneous invoice entry of a meeting solely with decedent. No notes cotemporaneous with the April 19, 2014 meeting were introduced and not other record of the meeting or its attendees was provided. [footnote 9: Although an entry on Rice's invoice made by PAQ indicates '[r]eview notes from 4-9-14 conference with client and Scott' no such notes were introduced into the record and it is unclear whether PAQ attended the April 9, 2014 meeting or was reviewing information provided by Rice.] On the other hand petitioner unequivocally stated he only attended a single meeting with Rice. The court finds petitioner more credible on this issue than Rice.

**Da58-59.** The factual and credibility errors in the trial court's opinion continues throughout her decision, as she also states "[p]etitioner testified credibly that he attended a single meeting at Rice's office solely at the decedent's request." **Da60.**

This error continues further in the trial court's application of the law to the facts, later in her opinion, wherein she states:

> The only testimony to the effect that petitioner unduly influenced decedent was provided by Rice who acknowledged that she only a vague recollection of the meetings with decedent. Despite that, Rice testified that she recalled that petitioner 'dictated' the meeting at which the devise of the OC condo to him was discussed. Rice had at least two subsequent meetings with decedent, including the meeting at which the 2014 will as executed and the devise of the OC condo to petitioner was set forth**.** Rice testified that she confirmed that it was decedent's intention to make the devise of the OC condo to petitioner and that decedent was not subjected to any undue influence at that time. That meeting was attended solely by Rice, the decedent and employees of Rice's law firm.
>
> At the same time, Rice confirmed that other suggestions made by petitioner with respect to decedent's estate plan were rejected by decedent. Those rejections demonstrate a lack of undue influence exerted upon decedent by petitioner. **The court finds that Rice's recollection of a second meeting with petitioner and decedent was not borne out by either her vague recollections or the evidence presented. Petitioner's unwavering testimony that he attended only a single meeting was more credible than Rice's prompted testimony to the contrary.** Thus, decedent had at least two opportunities during which she the ability to express to Rice any concerns she may have had about any influence upon her by any party.

**(emphasis added), Da80.** Thus, a significant portion of the trial court's decision is focused on the credibility of Parker and the lack of credibility of Rice, a licensed New Jersey Estate planning attorney, who by admitting that Parker dictated the April 9, 2014, meeting only threatened to expose herself to a potential malpractice suit. Instead, the trial court found Parker, the beneficiary who is attending the meetings and having his interest in the estate increased, more credible than Rice.

This factual determination that there was no "second meeting" and that there were no notes taken by Rice for that meeting is the cornerstone upon which the trial court structured its opinion including its assessment of credibility of these witnesses.

Unfortunately, the trial court's opinion crumbles under the weight of the actual testimony and evidence submitted. Despite repeated findings of fact by the trial court that there were no notes from the April 9, 2014 meeting, such notes were admitted into evidence on May 30, 2023. **Da1360; 2T153-1 to 3.** Said notes clearly identify, along with the testimony of Rice, that Parker, or as referenced in this document, "Scott" was present at the April 9, 2014, meeting. **Da1360; 2T147-18 to 25;2T148-1 to 5.** The document states "CCI w/ nephew Scott" and Rice testified that this meant "conference with client in office" with Scott Parker. **2T148-1 to 5.** Not only were there notes taken by Rice, which confirmed Parker's presence at the meeting on April 9, 2014, but the trial court confirms the existence of these notes in footnote 9 of its Opinion. **Da59.** Thus, the trial court was in error to challenge Rice's credibility when the notes existed and were admitted into evidence. Further, these notes establish that Parker was present at TWO MEETINGS, not just one, as the trial court previously found, incorrectly. In addition, the trial court errored in holding that Rice claimed Parker dictated the March 19, 2014, meeting, as Rice actually stated Parker dictated the April 9, 2014, meeting, the last meeting before the May 2014 Will was signed. **3T57-1 to 6.**

Evidence, in the form of a "document" further supports Rice's testimony that Parker was dictating the meeting on April 9, 2014, as Parker admitted that he handwrote a document which "divvyed up" Audrey's estate on that date. This document showed Parker now receiving the OC property and 68% of the IRA, unlike the prior iterations where he was receiving one or the other and unlike the January Will and Trust where he only received 64% of the IRA. **Da394; 9T235-19 to 25.** When asked whether Audrey gave a reason for, in essence, doubling Parker's bequest, between his March 27, 2014, email where Parker stated he would be receiving the IRA again, and the April 9, 2014 meeting, where he was getting the IRA and the OC house, Parker indicated "no." **10T82-6 to 25.** Rice also testified that Audrey gave no explanation for this sudden deviation from her prior plan. **2T150-7 to 25; 2T151-1 to 5**.

Now, despite the trial court's findings of fact that the "[Parker] unequivocally stated he only attended a single meeting with Rice" and its finding as to credibility that the "petitioner [was] more credible on this issue than Rice," the trial testimony actually bore out to the contrary. Parker's testimony repeatedly fluctuated between not being at the meeting on April 9, 2014, to not recalling whether he was at the meeting, to finally admitting he was at the April 9, 2014, meeting and wrote out the document dated April 9, 2011, on that date. Any fair reading of the inconsistencies

and contradictions in Parker's testimony, throughout the trial, would not allow someone to rationally conclude that Parker testified credibly on any issue.

A sampling of the "credible" testimony of Parker regarding his attendance at the April 9, 2014, meeting is as follows:

> Q. So despite her trying to force Audrey to use Garden State, you went back for a second meeting at Ms. Rice's office, is that correct?
> A. [Parker] I was asked to attend two meetings. I don't remember the second meeting too much. I do remember the first meeting.
> Q. But you went back again?
> A. [Parker] I said before I don't remember it. But if they say I was there, I was there. My recall doesn't come up with that meeting.
> Q. Your recall doesn't come up with the April 9th meeting?
> A. [Parker] I think I said it in my testimony and my deposition, yes, I don't recall.

**9T116-2 to 12.** Parker's "unwavering" testimony continues wherein he testifies:

> Q. Now between March 27, 2014, I think the next meeting that you had was the April 9th, 2014 meeting, is that correct?
> A. [Parker] I think I mentioned before that I don't recall that.
> Q. But you're aware of it as a result of –
> A. [Parker] I'm aware of it that it says I was there and I probably was, but I don't recall it.

**9T225-1 to 8.** Parker's testimony, contrary to the trial court's findings, continued as follows:

> Q. Now why were you present for the April 9th meeting?
> A. [Parker] You would have to ask Audrey. She asked me to go again. If she went on her own and never told me it was happening, I wouldn't have gone. She asked me to go a second time.
> Q. So you're saying there wasn't a purpose for you being there?
> A. [Parker] I don't know.

**9T:228-21 to 25;9T229-1 to 4.** This pattern of evasive answers from Parker, the "credible" witness, concerning his attendance at and participation in the April 9, 2014 meeting, continued throughout multiple days of testimony, and yet, according to the trial court's Opinion Parker wasn't even there. **10T49-7 to 23.**

After repeated attempts to deny being present or recalling the meeting on April 9, 2014, Parker's testimony suddenly became more "focused" when attempting to explain away the handwritten document he authored. In an effort to give credence to the document, Parker claimed "Audrey" signed and dated it; however, the document was dated "April 9, 2011" not April 9, 2014. **Da394;10T51-24 to 25;10T52-1 to 12.**

With the vagaries of Parker's memory being cured as to his presence at the April 9, 2014, meeting, Parker begins testifying more clearly as follows:

> Q. Now, you drafted this document?
> A. [Parker] What happened was --
> Q. Well –
> A. [Parker] Did you want to say I drafted it? Yes.
> Q. I'd like you to answer the question.
> A. [Parker] Yes.
> Q. Did you draft this document?
> A. [Parker] I did write down these extrapolations.
> Q. This is all your handwriting?
> A. [Parker] It is.
> Q. And you wrote this down on April 9th of 2014, correct?
> A. [Parker] '14, correct.
> Q. At that meeting?
> A. [Parker] Yes, that's correct.

**10T52-21 to 25;10T53-1 to 10.** During multiple days of testimony Parker refused to concede his presence at the meeting until confronted with his own handwritten

document "divvying up" the estate, but the trial court still incorrectly found that Parker wasn't there and his testimony was both "credible" and "unwavering."

Beyond this glaring and material misunderstanding of the established facts and evidence in this case, by the trial court, there were several other such errors of "fact." By way of example and not by limitation, the trial court claims that "after the [March 19, 2014] meeting, petitioner emailed Rice with some suggestions regarding the provisions of the trust proposed for respondent and his children" and [w]ith the exception of those recommendations, **no other suggestions were made by petitioner with respect to decedent's estate plan." Emphasis added. Da58.** The email referenced by the court, dated March 27, 2014, contrary to the court's findings, made a significant change, namely that it lays the groundwork for Parker to receive both the IRA and the OC house by stating "[t]his would mean that the IRA would be going to the dog charities and me like it was in the original will/plan." **Da373-374.** Obviously, the act of Parker indicating which assets would be going to him, is not simply him making "…some suggestions regarding the provisions of the trust proposed for respondent and his children," as contended by the trial court. This also contradicts the trial court's claim that Audrey "rejected" Parker's alleged desire not to receive the IRA, and by implication that Audrey somehow forced him to take more money, thereby purportedly showing Audrey was in "control." **Da58.**

Further, Parker testified that he was unaware of the January Will and Trust until this litigation commenced in 2022, despite this email, written by him, stating that the IRA would be going to him "like it was in the original will/plan," **9T106- 8 to 20;9T193-14 to 25;9T194-1 to 6.** Parker even testified that he did not know that he was a beneficiary of the IRA or the OC property, despite this email. So, simply put, if Parker didn't have an understanding that he was receiving the OC property at the end of the March 19, 2014 meeting, or the IRA, Parker would have never written that portion of the email.

Additionally, the trial court erred in its decision, regarding the factual record, when it stated, in footnote 10, that "[t]he relationship (namely, the fact that Rice's son worked for GST) was not disclosed to decedent when the recommendation to appoint GST was made." **Da61.** Rice testified that she told Audrey that her son worked for GST, contrary to the trial court's statement of reasons. **3T72-1 to 21.** As an aside, the trial court had no issue with the relationship between Parker and DST, which was extensive, as noted above. The trial court also had no issue that Parker approved the 2017 estate planning documents nor that Audrey wasn't copied on almost all of the emails between Parker and DST.[9] Instead, the trial court concluded, incorrectly, that "Petitioner testified credibly…" that he suggested DST to Audrey

[9] To be clear, Audrey never emailed DST or responded to their emails, Parker admitted to deleting the emails in Audrey's purported email account, and Parker testified that Audrey didn't usually use her email.

"…due to his general knowledge of the firm and its reputation and that he had no prior professional involvement with the firm." **Da61.**

The trial court's opinion also states, "Petitioner also testified credibly that **after decedent executed the 2014 will**, decedent discussed with him her discomfort **with the appointment of GST as trustee** and successor executor." **(emphasis added) Da61.** First, Parker claimed, without support, that Audrey objected early on to Garden State being a Trustee or Executor in the Will. Parker claims Audrey raised this objection during the March 19, 2014, meeting which he attended and later revises his testimony to claim it may have been at the March 19, 2014 meeting or the April 9, 2014 meeting, however both of these meetings were before the May 2014 Will was signed. **9T116-13 to 25;9T117-1 to 15.** Parker went so far as to say, at the end of one of the two meetings, Audrey said "…she didn't want Garden State in the Will" and then "when she got the Will, it was still in there." **9T117-11 to 15.** Despite Parker's claim, Audrey signed the May 2014 Will, with Garden State identified solely as a successor executor and as a trustee if Parker didn't name one. **Da473.** This was the second error in the above statement as GST was not named as Trustee.

The trial court also found Parker to be purportedly credible when he stated that Rice was "in bed with" with GST and trying to take advantage of Audrey, and yet, Parker referred one of his "clients" to Rice, after finding this out, namely Bernice McDowel. **9T119-2 to 25; 9T120-1 to 24; 9T123-21 to 25; 9T124-1 to 25; 9T125-**

**1 to 25; 9T126-1 to 21.** Not only did Parker refer McDowel to Rice after he claimed Rice was "in bed with" GST, Parker sent an email to Rice on June 9, 2014, stating "I would also like the trust protector clause naming me to be used for all trusts we do together." **Da852 & 9T158-17 to 25; 9T159-1 to 20.**[10]

The trial court also incorrectly found that "no explanation was offered to account for this incongruity" in Rice using GST when Rice noted GST would take trusts containing $500,000 or less and Audrey's trust would exceed $1,500,000.00. **Da57, ¶3, footnote5.** The foregoing is inaccurate. As in the trial court's own decision above this statement, "the revocable trust provided that at the death of the decedent $100,000 was to be distributed to each of the interested parties with the balance to be **held in three trusts." Da57, ¶1.** Thus, the 1.5 or 1.8 million would have been reduced by $200,000 to the interested parties and the remaining $1.3 or $1.6 million would have been divided up into three trusts, one for Michael Samalonis and one for each of his children, meaning they would have been around $500,000 each. **2T58-14 to 23.** Rice also indicated that one of the primary reasons Audrey went with GST is that it would allow for Audrey's long term investment advisor to

[10] Parker had a falling out with Rice's office over adding the trust protector provision in the McDowel documents, thereby naming him as a fiduciary in his client's documents, and as a result of this falling out he referred McDowel and Audrey to DST in the fall of 2014. **14T14-1 to 9.** This was the testimony of Andrew Mackerer, Esq., another attorney at the Rice firm. Mackerer testified that he didn't include the trust protector language due to a conversation he had with the client, McDowel and Parker was angry about it.**14T14-23 to 25;14T15-1 to 13;14T16-1 to 25; 14T17-1.**

act as the financial advisor to the trust, which many other trust companies wouldn't allow, and Audrey liked that idea. **2T61-18 to 25; 2T62-1 to 8.**

The trial court incorrectly found that "Petitioner further testified **credibly** that he did not suggest his appointment as trustee under the 2017 Will…" **Da62.** This is contradicted by the testimony and notes of Cooper, who was representing Parker as administrator at the time of trial, and who stated that on April 24, 2017, she spoke to Parker and took notes which stated, "change Tr [meaning trustee] to Scott," thus it was Scott who advised Cooper of this change. **Da1237; 3T249-5 to 25; 3T250-1 to 25; 3T251-1 to 22.** As an aside, if Audrey came to DST, day one, to remove GST why does this note dated April 24, 2017, three days before the signing, between Cooper and Parker state "no garden state as anything?"

The trial court also incorrectly found that Cooper was "…clear that she reviewed the 2017 will with decedent, prior to execution." **Da62.** Contrary to the trial court's Opinion, Cooper testified that she took no notes at the signing and could not recall what, if anything, she reviewed with Audrey regarding the April 2017 Will. **5T66-20 to 25; 5T67-1 to 5; 5T68-6 to 25; 5T69-1 to 25; 5T70-1 to 25; 5T72-1 to 25; 5T73-1 to 25; 5T74-1 to 25.**

The trial court also incorrectly found that "[t]here is no credible evidence that the Dolchin firm owed any allegiance to the petitioner [Parker]…" **Da63.** This is refuted by the voluminous evidence discussed above.

Clearly, documentary evidence and days and days of testimony constitute "reasonably credible evidence" that the trial court's findings of fact and credibility were unsupported by the record and thus offend the interests of justice and should be overturned. See In re Will of Liebl, 260 N.J. Super. 519, 524 (App. Div. 1992). As such, the trial court erred in denying Samalonis' midtrial Motion to Shift, as well as the motion for reconsideration and requests for related relief.

## III. TRIAL COURT ERRED IN RENDERING ITS DIRECTED VERDICT **(Da51-86)**

As noted above, the trial court's determination, on granting a directed verdict, is reviewed under the de novo standard.

### A. Trial Court Failed to Apply the Applicable Standards

A review of the trial court's opinion reveals that none of the evidence, which was favorable for Samalonis, the non-moving party, was "accepted as true" and contrary to the standard, all of the inferences were construed against him, including those pertaining to his claims for breach of contract, breach of fiduciary duty and negligence in regard to Parker's actions in caring for Audrey, as her guardian.

The court's opinion omits any reference to, or inference from, the overwhelming evidence admitted at trial supporting Samalonis' claims as noted in the Statement of Facts and other parts of this brief. As such, instead of ascertaining whether there was a "scintilla of evidence" supporting Samalonis' claims, the trial court erred in construing all inferences, in favor of the moving party, namely Parker.

Further, despite case law prohibiting credibility determinations on a directed verdict analysis, the court made over twenty-two, explicit, credibility determinations, which were almost entirely based upon the testimony of Parker, including numerous credibility determinations as to Samalonis' claims against Parker for breaches in his care of Audrey (counterclaim counts nine, ten & eleven). **Da69** (Petitioner [Parker]testified credibly that although respondent was promptly provided with HIPPA…"); **Da71** (Petitioner [Parker] testified credibly that he was not satisfied with the care…").

As all inferences were drawn in Parker's favor and as the trial court made credibility determinations, contrary to the law, in order to reach its decision to grant a directed verdict, said verdict should be vacated in its entirety.

### B. A Proper Shifting of the Burden and Correct Understanding of Fundamental Facts Would Have Precluded a Directed Verdict

Beyond the trial court's error in applying the law to the facts of this case, the trial court erred, as noted above, in concluding that a beneficiary's attendance and participation in the estate planning process did not shift the burden of proof which, if granted, would have precluded the directed verdict.

Finally, the trial court's opinion is riddled with factual inaccuracies, including but not limited to the most significant of the same, namely that Parker "was not present" at the April 9, 2014, which inaccuracies formed a substantial basis for the trial court's determination as well as its credibility assessments. As the trial court

erred in perceiving and understanding days of testimony, as well as documents admitted into evidence, said errors tainted all other aspects of the directed verdict opinion such that it should be vacated, in its entirety.

## IV. THE COURT FAILED TO APPLY AN ADVERSE INFERENCE AGAINST PLAINTIFF FOR SPOLIATION OF EVIDENCE **(Da51-86)**

On March 18, 2024, the trial court denied Samalonis's requests for adverse inference against Parker for the spoliation even though Parker deleted all emails relevant to this matter from Audrey's account during the litigation, including in February 2023, after formal discovery and preservation notices were served upon his counsel. **Da51; Da871-954**. This was in error.

### A. The Trial Court Applied the Incorrect Legal Standard

Inexplicably, the trial court's analysis fixates on the five-prong tort test from Rosenblit which governs an **independent tort claim**, not the evidentiary **adverse inference** that is available in the underlying litigation itself. **Da74**.[11] Samalonis did not bring an independent tort claim but instead filed a motion in limine prior to the trial. **Da871**. The improper analysis required a finding that Parker acted "intentionally" when deleting the emails to "disrupt the litigation." **Da74.** However, it is well established that adverse inference instructions are permitted where

[11] Tartaglia, 197 N.J. 81, 116-118 (2008): Reaffirms that the adverse inference remedy is procedural, not tort-based, and need not meet the full tort standard.

spoliation is merely negligent or grossly negligent. Lanzo v. Cyprus Amax Minerals Co., 467 N.J. Super. 476, 525–28 (App. Div. 2021). Here, even if Parker did not act maliciously, he affirmatively accessed Audrey's account and wiped its contents clean in 2019 and immediately prior to the inspection of the account. As such, the court's decision is fatally flawed as a matter of law and should be reversed.

### B. Appellant's Motion Would Have Been Granted Under the Proper Legal Standard

Courts have long followed the maxim "'omnia praesumuntur contra spoliatorem,' which means 'all things are presumed against the destroyer.'" Rosenblit v. Zimmerman, 766 A.2d 749, 755, 166 N.J. 391 (N.J. 2001). "Spoliation typically refers to the destruction or concealment of evidence by one party to impede the ability of another party to litigate a case." Jerista v. Murray, 883 A.2d 350, 365 (N.J. 2005) (citing Rosenblit, 166 N.J. 391, 400-01, 766 A.2d 749 (N.J. 2001)). Spoliation of evidence can result in a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. Rosenblit. at 401-06. "The best known civil remedy that has been developed is the so-called spoliation inference that comes into play where a litigant is made aware of the destruction or concealment of evidence **during the underlying litigation**." Rosenblit, 766 A.2d 749, 754-55 (Emphasis added). Further, "the spoliator's level of intent, whether negligent or intentional, does not affect the spoliator's liability…[r]ather, it is a factor to be considered when determining the

appropriate remedy for the spoliation. Hirsch v. General Motors Corp., 266 N.J. Super. 222, 256, 628 A.2d 1108 (Law Div.1993). The existence of a duty to preserve evidence is a question of law to be determined by the court. Hirsch, 266 N.J. Super. at 249.

The trial court erred when it concluded that "there was no litigation then pending or nor was such litigation reasonably anticipated at the time the [Parker] was appointed guardian" in December 2020. **Da75; Da1452.** This is simply incorrect as Samalonis filed a guardianship complaint in October 2019. **Da1531-1573**. Even earlier, Parker certainly anticipated and even braced for litigation when he; caused Audrey's doctor to draft a letter regarding Audrey's condition on July 1, 2019, and later forwarded the same to DST on August 19, 2019; spoke with DST regarding Audrey and Samalonis on August 23, 2019; and on September 24, 2019, contacted DST which, in turn, caused them to forward a letter to Samalonis advising Audrey's estate planning documents could not be changed. **Da1321-1322**; **16T18-6 to 8; 16T94-2 to 4; Da1323-1325; Da1213; Da1300.** Parker testified he first gained access to Audrey's email account in late June or early July 2019; he only deleted emails after he gained access; and Audrey was a "saver," and he did not know "what [Audrey] did with her emails." **12T141-9 to 25; 12T142-1 to 12; 12T143-1 to 17; 16T168-20 to 25; 16T169-1 to 20**.

The trial court denied Samalonis's motion by crediting Parker's unsupported

assertion that the deleted emails were "junk" or not "responsive" to discovery. **Da75.** This was legal error as a litigant may not unilaterally determine whether evidence is relevant once litigation is foreseeable or has commenced. Rosenblit, 166 N.J. at 401–02. Even where the specific contents are unknown, courts have repeatedly held that the destruction of potentially relevant evidence, while a case is proceeding to trial, supports an inference that the evidence would have been unfavorable. State v. Zenquis, 251 N.J. Super. 358, 369-70 (App. Div. 1991) (the court deemed it proper to instruct a jury to infer that notes destroyed by a witness concerning a case at a time when he knew that the case was proceeding to trial contained information inconsistent with the testimony of the witness); In re Gen. Election, 255 N.J. Super. 690, 732 (Law Div. 1992) (a negative inference was drawn against a witness who claimed that all his relevant records had been "put in the garbage"). These principles clearly apply in this case. By denying any remedy, the trial court effectively rewarded Parker's deletion of probative evidence and undercuts the remedial goal of the spoliation doctrine. See Rosenblit, 166 N.J. at 401. An adverse inference is not punitive; it is a necessary tool to preserve the fairness of the process. Id. at 402.

Lastly, pursuant to N.J.S.A. 3B:10-26, "[T]he personal representative shall obverse the standards in dealing with estate assts that would be observed by a prudent man dealing with the property of another;" and an executor also owes a duty of loyalty and cannot use his position to further his own interests. Taylor v. Errion,

137 N.J. Eq. 221 (Ch. Div. 1945), aff'd 140 N.J. Eq. 495 (1947); In addition to a duty to preserve due to the litigation, Parker has a duty to preserve Audrey's emails (digital assets) on behalf of her beneficiaries namely, Samalonis and his children. As such, the trial court's refusal to issue an adverse inference must be reversed.

## V. TRIAL COURT ERRED IN DENYING APPELLANT'S FEES AND COSTS IN ITS JULY 2, 2024, ORDER **(Da98-109)**

Appellant only appeals the portion of this Order partially denying his request for an allowance for fees and costs from the estate.

### A. Trial Court Abused its Discretion by Disallowing $13,606.53 in Costs

Appellant requested a total of $23,011.15 in costs from April 5, 2022, through March 22, 2024, for common and necessary litigation expenses. **Da1244.** The trial court disallowed $13,606.53 of costs as "unreasonable" or "excessive" for trial binders ($4,346.92), deposition fees ($8,499.61), and Charles Jones searches ($760). **Da108-109; Da1267-1268.** Appellant argues the determination to disallow was arbitrary and based on an error. The only basis offered was that "[Parker] did not request approval of any costs associated with this estate litigation." **Da108.** However, Parker requested and received costs totaling $3,815.00 for generalized un-itemization expenses. **Da110; Da114; Da128; Da1048**. As such, the only basis relied upon by the court was mistaken.

Appellant asserts the deposition and trial binder costs are not unreasonable or excessive. Eleven (11) depositions were taken in this matter; 5 were scriveners

($2,948.00); 3 were the Respondents ($3,099.25); and 3 were fact witnesses ($2,452.36) including Amelia Reganis who was subpoenaed by Parker ($1,158.11). **Da1267-1268.** These are required and necessary costs associated with any litigation. The court's only gauge for disallowing these costs was incorrect, and as such its decision was arbitrary and an abuse of discretion. **Da1048**. Thus, the disallowance of costs should be vacated and Appellant's allowance amended to include an additional $13,606.53 in costs.

### B. The Court Abused its Discretion by Disallowing $117,631.24 in Attorney's Fees

Appellant requested $368,880.00 in attorney's fees from April 5, 2022, through March 22, 2024, for this matter. **Da1244** The trial court allowed only $251,248.75 thereby disallowing $117,631.24. **Da108**. The court agreed Appellant had reasonable cause to bring and pursue his will contest satisfying R. 4:42-9(a)(3). It then focused on RPC 1.5(a) and made a loadstar analysis of the fees. Rendine v. Pantzer, 141 N.J. 292, 334 (1995). **Da104-108**. It found the hourly rates of his counsel were "reasonable." **Da106**. The court's sole basis to disallow these fees was the outcome of the trial. However, its decision was again, arbitrary, when it reduced Appellant's award by "one-third." **Da108**. Emphasized that Appellant was unsuccessful; it failed to consider and/or even identify the amount involved as set forth in RPC 1.5(a)(4). Instead, it attempts to justify disallowing the Appellant's "reasonable" fees, because it also disallowed Respondents' "excessive" fees."

**Da107**. Further, the court ignores the fact that Parker's allowance for fees on July 2, 2024, totaled $289,445.46 as Parker retained three firms. **Da124-128**.

### C. The Court's Partial Denial of Fees and Costs Should be Vacated if the Trial Court is Found to Have Erred

If this Court finds that the trial court erred, reverses and remands, the disallowance of Appellant's fees and costs should be vacated.

## VI. PLAINTIFF'S PARTIAL ALLOWANCE OF FEES AND COSTS SHOULD BE VACATED IF THE TRIAL COURT IS FOUND TO HAVE ERRED **(Da110-129)**

Appellant only appeals the portion of this Order which partially grants Respondents' motion. If this Court finds that the trial court erred, reverses and remands, the allowance award for costs and fees for Respondents should be vacated. Should Appellant successfully prosecute his claims on remand, Parker would be exposed to personal liability for a portion if not all of the other parties' attorney fees. In re Niles, 176 N.J. 282 (2003).

## CONCLUSION

Wherefore, Appellant Samalonis respectfully requests that this Honorable Court hold: (1) as a matter of law; and/or as a matter of fact; that a confidential relationship and suspicious circumstances exist such that the burden of proof and persuasion is shifted to Respondent Parker by clear and convincing evidence, as to both the lifetime transfers and the May 2014 and April 2017 Wills; (2) that the directed verdict entered on March 18, 2024 is vacated and this entire matter is

remanded for a new trial; (3) that the awards of attorney's fees and costs entered on July 2, 2024 are amended as requested by the Appellant in this brief or alternatively vacated pending a new trial; (4) that the trial court shall impose a negative inference against Parker with regard to the destruction of Audrey's emails and the removal of documents relevant to matter from Audrey's residence; (5) that any and all disbursements of estate assets to the Parties shall be refunded, retitled, and returned to the estate pending the outcome of the case; and (6) that any further administration of the estate and/or disposition of estate assets is stayed.

**SIMEONE & RAYNOR, LLC**
*Attorneys for Appellant*

s/ Kenneth E. Raynor

Date: June 25, 2025

s/Stefanio G. Troia

# Superior Court of New Jersey

## Appellate Division

Docket No. A-003739-23 T4

| | | |
|---|---|---|
| In the Matter of the | : | CIVIL ACTION |
| | : | |
| | : | ON APPEAL FROM AN |
| ESTATE OF AUDREY | : | ORDER OF THE |
| SAMALONIS | : | SUPERIOR COURT |
| | : | OF NEW JERSEY, |
| | : | CHANCERY DIVISION, |
| | : | BURLINGTON COUNTY |
| | : | |
| | : | Docket No.: P-1023-22 |
| | : | |
| | : | Sat Below: |
| | : | |
| | : | HON. HON. KATHI F. FIAMINGO, |
| | : | J.S.C. (RET.) |
| | : | HON. PAULA T. DOW, J.S.C. (RET.) |

# BRIEF ON BEHALF OF RESPONDENTS SCOTT J. PARKER, DOROTHY RAFFERTY AND SUSAN WHITE

MANIACI, CICCOTTA & SCHWEIZER, LLP
*Attorney for Respondents Scott J. Parker, Dorothy Rafferty and Susan White*
385 Kings Highway North, Suite 209
Cherry Hill, New Jersey 08034
(856) 321-9331
reno@mcs-law.com

*On the Brief:*
RENO JOHN CICCOTTA, ESQ.
Attorney ID# 040551992

Date Submitted: August 28, 2025

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page**

**RULES:**

## PRELIMINARY STATEMENT

This appeal arises from a probate dispute initiated by Michael Samalonis ("Appellant") following the death of his aunt, Audrey A. Samalonis. Appellant challenges the validity of his aunt's estate plan, which was developed with the assistance of independent legal counsel and constituted her clear and consistent testamentary intent. After a full and protracted bench trial in which Appellant presented his case-in-chief, the Trial Court rejected Appellant's claims of undue influence and spoliation of digital evidence, granted a directed verdict in favor of Respondents, Scott Parker, Dorothy Rafferty and Susan White and awarded attorney's fees by subsequent Order. The Trial Court found, time and again, that Appellant failed to present any credible or competent evidence to support his allegations, including the degree of evidence necessary to shift the evidentiary burden to Respondents regarding the enforceability of the estate plan.

Despite multiple opportunities before and during trial, Appellant never established the foundational elements necessary to shift the burden under New Jersey's undue influence doctrine. Nor did he offer any proof, testimonial or documentary, of coercion, fraud, or overreaching by Respondent, Scott J. Parker. The Trial Court's opinion reflects a thorough analysis of the factual record and applicable law, including detailed findings that Appellant's claims

were unsupported by even a *prima facie* showing of the elements for undue influence.

On appeal, Appellant seeks to reframe the factual deficiencies of his case as legal error. But appellate courts give "substantial deference" to trial courts' factual findings and credibility assessments, particularly in matters involving complex family dynamics and testimonial nuance. Cesare v. Cesare, 154 N.J. 394, 411–12 (1998). This Court should affirm the judgment below because the Trial Court's conclusions were not only reasonable, but they were also compelled by the record and the Trial Court's assessment of the credibility of Appellant, Respondent, the scriveners and the other witnesses. Appellant's continued assertion of undue influence is not merely speculative; it is contrary to the evidence and the extensive record developed before the Trial Court.

## PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

On April 27, 2017, Audrey A. Samalonis executed a Will prepared by the law firm, Dolchin, Slotkin and Todd, P.C. A true and correct copy of the April 27, 2017 Will of Audrey A. Samalonis is attached to Appellant's Appendix Volume 1 and marked as **Da0142 – Da0160**.

On May 15, 2014, Audrey A. Samalonis executed a Will with the same dispositive provisions as the April 27, 2017 Will, prepared by the law firm, the Law Offices of Nancy M. Rice. A true and correct copy of the May 15, 2014 Will of Audrey A. Samalonis is attached to Appellant's Appendix Volume 2 and marked as **Da0325 – Da0327**.

On January 23, 2014, Audrey A. Samalonis executed a Will and Revocable Trust prepared by the law firm, the Law Offices of Nancy M. Rice. True and correct copies of the January 23, 2014 Will and Revocable Trust of Audrey A. Samalonis are attached to Appellant's Appendix Volume 3 and marked as **Da0396 – Da0408.**

Audrey A. Samalonis passed away on March 29, 2022. **Da0168 (Vol. 1 of Appellant's Appendix)**. At the time of her death on March 29, 2022, Audrey A. Samalonis, resided at Medford Care Center, 185 Tuckerton Road, Medford,

[1] The factual background and procedural history of the matter are intertwined and therefore presented together.

NJ 08055, (*Id*.) but continued to maintain homes in Marlton, New Jersey and Ocean City, New Jersey. *Id*.

On April 8, 2022, Appellant, Michael Samalonis filed a Caveat to prevent the probate of "any paper purporting to be the Last Will and Testament of Audrey A. Samalonis." A true and correct copy of the April 8, 2022 Caveat is attached to Appellant's Appendix Volume 1 and marked as **Da0130**.

Audrey A. Samalonis was never married and had no children. **Da0031 (Vol 1. Of Appellant's Appendix).**

Respondent, Scott J. Parker, was a close friend of the decedent, Audrey A. Samalonis, for approximately 57 years and provided care and support for her until her death. **Da0032 (Vol 1. Of Appellant's Appendix).** Appellant, Michael Samalonis, was Audrey A. Samalonis' nephew. **Da0031 (Vol 1. Of Appellant's Appendix).**

Respondents, Dorothy Rafferty and Susan White, were long-time friends and co-workers of Audrey A. Samalonis at the Lockheed Martin Corporation and its predecessor companies and were specific legatees, entitled to receive the same amounts in Audrey A. Samalonis' January 23, 2014 Will and Revocable Trust, her May 15, 2014 Will and her April 27, 2017 Will. **See Da0142 – Da0160; Da0325 – Da0327; and Da0396 – Da0408**.

After eight months and twenty-four days of trial devoted exclusively to Appellant's case-in-chief, the Trial Court issued an Order and Opinion on March 18, 2024 granting Respondent's Motion for Judgment Pursuant to Rule 4:40-1 and Motion for a Directed Verdict stating as follows:

- the Caveat filed with the Burlington County Surrogate by Simeone & Raynor on behalf of Michael Samalonis on April 8, 2022 be and is hereby discharged;
- the Last Will and Testament executed by Audrey A. Samalonis, decedent, on April 27, 2017 offered by Respondent for probate be and is hereby admitted to probate;
- Scott J. Parker be and is hereby appointed as Executor of the Estate of Audrey Samalonis, subject to his qualification with the Burlington County Surrogate.

A true and correct copy of the March 18, 2024 Order and Opinion is attached to Appellant's Appendix Volume 1 and marked as **Da0051 – Da0086.**

On March 25, 2024, the decedent's April 27, 2017, Will was admitted to probate by the Burlington County Surrogate. **Da0100 (Vol 1. Of Appellant's Appendix).**

On April 10, 2024, Appellant filed a motion with the Trial Court to stay the estate administration pending appeal.

On May 13, 2024, an Order and Statement of Reasons were issued by the Honorable Paula T. Dow, P.J.Ch. which denied Appellant's motion to stay the estate administration pending his threatened appeal which Order was predicated on, among other things, the unlikelihood of Appellant's success on appeal. See a true and correct copy of the Order attached to Appellant's Appendix Vol. 1 and marked as **Da0096.**

On June 3, 2024, Appellant filed an application for a permission to file an emergent motion for a stay pending appeal with the Appellate Division.

On June 3, 2024, the Appellate Division denied Appellant's application to file an emergent motion for a stay pending appeal.

On July 2, 2024, the Trial Court issued a decision on Respondents' motion for fees and costs, granting it in part and denying it in part. See a true and correct copy of the July 2, 2024 Order and Statement of Reasons attached to Appellant's Appendix Volume 1 and marked as **Da0110 – Da0129**.

On July 2, 2024, this Court issued a decision on Appellant's motion for fees and costs, granting it in part and denying it in part. See a true and correct copy of the July 2, 2024 Order and Statement of Reasons attached to Appellant's Appendix Volume 1 and marked as **Da0098 – Da0109**.

On August 9, 2024, Appellant filed a Motion for Stay Pending Appeal with the Appellate Division Pursuant to R. 2:9-5.

On August 19, 2024, Respondent filed a Brief in Opposition to Appellant's Motion to Stay Administration Pending Appeal.

On August 29, 2024, the Appellate Court entered an Order Denying the Appellant's Motion for Stay Pending Appeal.

## ARGUMENT

### I. LEGAL STANDARD OF REVIEW

Trial judges are afforded broad discretion in making factual findings. This is largely, in part, due to the trial judge's intimate relationship with the facts, the parties, the witnesses, and the record.

Appellate courts apply a deferential standard in reviewing factual findings by a trial judge. Balducci v. Cige, 240 N.J. 574, 595 (2020); State v. McNeil-Thomas, 238 N.J. 256, 271 (2019). In an appeal from a non-jury trial, appellate courts "give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015). Deference is given to credibility findings. State v. Hubbard, 222 N.J. 249, 264 (2015). "Appellate courts owe deference to the trial court's credibility determinations as well because it has 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" C.R.

v. M.T., 248 N.J. 428, 440 (2021) (quoting Gnall v. Gnall, 222 N.J. 414, 428 (2015)).

As long as there is evidence in the record to support the trial judge's factual findings, such findings is binding on appeal. "The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). See State v. Camey, 239 N.J. 282, 306 (2019) ("[w]e will not disturb the trial court's findings; in an appeal, we defer to findings that are supported in the record and find roots in credibility assessments by the trial court"); Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017) ("[w]e review the trial court's factual findings under a deferential standard: those findings must be upheld if they are based on credible evidence in the record"); Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016) (findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence); State v. K.W., 214 N.J. 499, 507 (2013) ("[w]e defer to the trial court's factual findings 'so long as those findings are supported by sufficient credible evidence in the record").

The broad deference given to trial judges increases judicial accuracy and fairness "because an appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the

stand." Balducci v. Cige, 240 N.J. 574, 595 (2020). And "[l]imiting the role of a reviewing court is necessary because '[p]ermitting appellate courts to substitute their factual findings for equally plausible trial court findings is likely to undermine the legitimacy of the [trial] courts in the eyes of litigants.'" State v. McNeil-Thomas, 238 N.J. 256, 272 (2019) (alterations in original) (quoting State v. S.S., 229 N.J. 360, 380-81 (2017)). As such, an appellate court may only overturn or disturb the factual findings of a trial court when a trial court's factual determinations are so manifestly disconnected from the evidence contained in the record that such a decision amounts to injustice. Rova Farms Resort v. Invs. Ins. Co. of America, 65 N.J. 474, 484 (1974).

## II. APPELLANT'S BRIEF IS RIDDLED WITH MISSTATEMENTS, MISLEADING REFERENCES AND OMISSIONS OF FACT

### A. The Record Establishes That Appellant, Michael Samalonis, Had a Strained Relationship with His Aunt for Many Years Leading up to and Including the Date of Her Passing Due to His Temperament and Money Management Issues.

The record establishes that Audrey A. Samalonis would not have needed external persuasion to modify or reduce her nephew, Michael Samalonis' beneficial interest under her estate plan. Appellant, Michael Samalonis, was estranged from his aunt, Audrey A. Samalonis, at various points during her life. At a prior proceeding, the transcript for which Appellant includes in his Appendix to his Brief, Dorothy Rafferty, one of the decedent's best friends,

testified under oath to the decedent's strained relationship, citing Michael Samalonis' behavior as a source of the tension:

> Q. Yes. A little bit lower it says he is not a nice person and then it says always torturing Audrey later. Do you know what that means?
>
> A. Oh. That's what I meant. When he was asking for money, trying to come to her house. Like, **he came to her house a few times when I was there and she wouldn't let him in. She didn't like him coming there. She was afraid of him, because he tortured her.** That's what I meant. He tortured her, like, he was always, you know, saying negative things and bothering them and asking for stuff, and she didn't want it.…"

**Da0588 (Vol. 4 of Appellant's Appendix).** Rafferty also testified that Michael Samalonis had cut off his aunt because she refused to give him money:

> "And then I know they didn't talk very much, but then I know after Audrey's mother died, they disowned her, because she wouldn't give them the money. I do know that. And that's not hearsay. That's a fact. And so that's why I was surprised that he was even in the Will. That's what I'm trying to say. They were mean to Audrey and rude to her all of the time, but she tolerated it for her parents' sake."

**Da0853 (Vol. 4 of Appellant's Appendix)**. But it wasn't just Appellant Michael Samalonis' temperament that impacted his aunt's views. She communicated in her notes and in her meetings with her attorney Nancy Rice, Esquire that Michael had money management problems:

> **"**Q**:** Do you recall anything else outside of your notes concerning your discussions with Audrey about Michael Samalonis or his children?
>
> A: Well, 1 probably independently, but it's right is there also, it says some money management concerns. So, in other words, she was concerned that he might not be good at managing a large sum of money."

**Da0662 (Vol. 4 of Appellant's Appendix).** As a result of this distrust, each of Audrey A. Samalonis' 2014 and 2017 wills restricted the Appellant's access to his inheritance via a trust provision and mandated management of his inheritance by an individual or institutional trustee. This includes the original will executed on January 21, 2014 that Appellant does not claim was subject to any undue influence.

B. **Respondent, Scott J. Parker, Had a Close Relationship With Audrey Samalonis from His Childhood Through the End of Her Life**.

The record reflects that Respondent **Scott J. Parker shared a close and enduring bond with Audrey A. Samalonis from his childhood through the end of her life**. Scott's relationship with Audrey A. Samalonis grew naturally out of Audrey's lifelong friendship with his mother, Catherine Parker, which began when they were teenagers and was reflected in the fact that Audrey was Catherine Parker's Maid of Honor at her wedding to Scott J. Parker's father. Trial Court findings of fact note that Scott "maintained a close relationship with Decedent throughout his childhood and adult life". **Da0032 (Vol 1. Of Appellant's Appendix).** This bond was not occasional or casual. It was continuous, extending from Respondent Parker's upbringing through his adult years, providing a foundation of trust and affection that endured over all of the decades of his life until she passed in 2022.

Testimony further confirms that Audrey considered Scott part of her inner circle. Witnesses identified Catherine Parker as one of Audrey's closest friends and noted that, as a result, Audrey was also "close with Scott". **Da0032 (Vol 1. Of Appellant's Appendix).** Importantly, **there is no evidence of any break in that relationship**; instead, the record reflects that Audrey A. Samalonis and Catherine Parker remained close throughout Audrey's life, cementing Respondent, Scott J. Parker's ongoing presence in her life. Moreover, in her estate planning meetings, Audrey often referred to Respondent Parker in familial terms, describing him as a "nephew" and demonstrating her intention to treat him as family in both personal and legal contexts. **Da0662 (Vol. 4 of Appellant's Appendix).** Audrey and Respondent Parker traveled together to Europe when Respondent Parker was an adult and had children of his own. **Da0575 (Vol. 4 of Appellant's Appendix).**

In 2017, Audrey designated Respondent Parker as her agent under a Durable Power of Attorney which was never used by Respondent Parker prior to the execution of either the 2014 of 2017 wills. When that Power of Attorney arrangement was challenged by Appellant in 2019, the Trial Court accepted Respondent Parker as the Guardian of her person and estate when her health declined. **Da0162 (Vol. 1 of Appellant's Appendix).** Court filings confirm that Respondent Parker served as her Guardian and was identified in official reports

as a "close family friend" who made hundreds of visits to Audrey while she was in care. **Da1452 (Appellant's Confidential Appendix).**

### C. Appellant Fails to Mention That Respondent Parker Was Not Present at the Execution of the Contested Wills. At Her Attorneys' Offices and Repeatedly Implies Otherwise in His Brief.

On numerous occasions throughout his brief, Appellant cites precedent that establishes the rule that a claim of "suspicious circumstances" can arise when the alleged undue influencer is **present at the execution of the will**. Appellant highlights this rule on pages 15, 21, 22, and 25 of his brief without mentioning that **Respondent Parker was not present at the execution of either of the contested wills.** Why would Appellant repeatedly point to the significance of this rule and fail to directly mention that Respondent Parker was not present at the execution of either will if his intention was not to mislead this court?

### D. Appellant Lacked Standing to Challenge the April 27, 2017 Will as Respondent, Scott J. Parker, Receives Less Under the Final Contested Will That Was Allegedly The Product of His Undue Influence and Appellant's Position is Enhanced.

Appellant's challenge to the April 27, 2017 Will is fundamentally flawed because he lacks standing to pursue it. Standing in a will contest requires that the contestant stand to benefit if the challenged instrument is set aside. In Re Hand Will, 95 N.J. Super 182, 184-188 (App. Div. 1967). A party may not file

a caveat to halt probate of a will unless they would be injured by a judgment of probate. In Re Probate of the Alleged Will of Hughes, 332, 325-326 (App. Div. 1990). In order for a caveat to stand, the caveator must be "an individual who would be injured by the Will," "one who would be pecuniarily prejudiced by it." Hughes, 244 N.J. Super. At 325-326. Critical to the analysis in this case is the tenet of law that if a beneficiary under a prior will receives more under the will proposed for probate, the beneficiary will not be able to maintain the caveat against that will due to lack of financial injury. Hand, 95 N.J. Super 184-188.

Here, however, Respondent, Scott J. Parker, the very individual Appellant accuses of exerting undue influence, actually fares worse under the 2017 Will than he did under the May 15, 2014 Will. The dispositive provisions governing the bequests to Scott J. Parker and Michael Samalonis remain entirely the same across both instruments, meaning Parker's gross inheritance is not increased by the later will. The critical difference lies in the allocation of inheritance taxes.

Appellant, Michael Samalonis, lacks standing to challenge Audrey A. Samalonis's April 27, 2017 will because his beneficial interest actually improves under that will compared to the May 15, 2014 will. The record shows that the 2014 will requires the estate to pay inheritance taxes on both probate and non-probate assets, thereby diminishing the residuary trust for Michael Samalonis and his sons. **Da0325 – Da0327 (Vol. 2 of Appellant's Appendix).**

By contrast, the 2017 will shifted the tax burden so that the residuary estate was only responsible for taxes on probate assets, relieving the residuary trust that passes to Michael and his sons from liability for taxes on substantial non-probate assets which passed to Respondent Parker and thereby increasing Appellant's net inheritance. **Da0142 – Da0160 (Vol. 1 of Appellant's Appendix)**. In In Re Hand, 391 N.J. Super. 102 (App. Div. 2007), the Appellate Division held that standing to contest a will requires a showing of injury, that the contestant would receive a smaller beneficial interest under the challenged will than under a prior will. Applying that principle here, since Michael's beneficial interest under the probated 2017 will is greater than his interest under the 2014 will, he has failed to demonstrate the requisite injury to establish his standing to challenge the 2017 will that has now been probated. Accordingly, his contest of the 2017 will must fail for lack of standing. Because setting aside the 2017 Will would not improve Appellant's position relative to Respondent Parker's, and because Parker himself is disadvantaged by its provisions namely the tax allocation provision, Appellant cannot demonstrate a legally cognizable interest in invalidating it. His contest to the April 2017 will must therefore fail for lack of standing.

### E. Decedent, Audrey A. Samalonis' Handwritten Notes Regarding Her Estate Planning and Income Tax Preparation Display Her High Level of Independence and Mental Competence At The Time of the Execution of the Contested 2014 and 2017 Wills.

Audrey A. Samalonis's handwritten notes concerning her estate planning and income tax preparation are compelling evidence of her independence, clarity of thought and competence at and around the time she executed her wills. In 2014, in preparation for meetings with her lawyer, Nancy M. Rice, Esquire, Audrey created detailed handwritten notes about her estate planning, laying out her wishes in her own words **Da0513 – Da0521 (Vol. 3 of Appellant's Appendix).** Two years later, she again took the initiative to memorialize her thinking in a handwritten note dated September 6, 2016, specifically regarding changes she wanted to make to her will. **Da0523 – Da0527 (Vol. 3 of Appellant's Appendix).** These writings demonstrate that she was carefully considering the details of her estate plan, was in command of and actively directing her testamentary planning, and exercising the independence and foresight expected of a competent testatrix exercising her free will.

The level of detail in these handwritten documents further underscores Audrey's independence and competence. For instance, she not only documented her estate planning concerns but also maintained scrupulous tax records, such as her 2014 and 2015 federal income tax notes **Da0528 – Da0531 (Vol. 3 of Appellant's Appendix).** Additionally, her 2015 calendar, which contained her own handwritten annotations (**Da0532 – Da0545 (Vol. 3-4 of Appellant's Appendix)).**, demonstrates that she was closely monitoring financial and

personal obligations on a daily basis at that time. These are not rote documents prepared by others, but rather tangible evidence of her engagement with complex financial and legal matters. Taken together, they confirm that she had the mental acuity to understand her estate, track her assets, and plan carefully for the future.

Such contemporaneous, self-generated records carry significant weight in establishing testamentary competence. They corroborate witness testimony describing Audrey as independent and strong-willed, while also providing objective, unfiltered proof of her reasoning and memory. The act of setting down estate planning directives and meticulously tracking income tax obligations and deductions (including mileage for travel to her medical appointments) in her own handwriting demonstrates a mind that was sharp, organized, intentional, and sound. As such, these carefully constructed personal records stand as direct evidence that Audrey was fully capable of making deliberate and informed testamentary choices at and around the time her wills were executed.

F. **In Prior Guardianship Proceedings, Audrey A. Samalonis' Court Appointed Guardian Ad-Litem, Cynthia Earl, Esquire and Court Appointed Attorney, Eric Feldhake, Esquire Recommended Respondent, Scott J. Parker over Appellant Samalonis to Serve as Audrey's Guardian After Full Investigation of the Estate Planning Process**.

The record demonstrates that both **Cynthia Earl, Esquire**, Audrey's court-appointed Guardian Ad Litem, and **Eric A. Feldhake, Esquire**, her court-

appointed attorney during prior guardianship proceedings initiated by Appellant, independently reviewed Audrey's estate planning documents, interviewed the decedent herself, Appellant, Respondents, family members, friends, the multiple will scriveners and raised no concerns about the process or the issue of Respondent Parker exerting undue influence over Audrey A. Samalonis. In fact, Earl's Mary 17, 2020 Guardian Ad-Litem Letter to the Court was submitted to the court and forms part of the guardianship record **Pa1 – Pa14 (Vol. 1 of Respondent's Appendix).** That report reflects his review of Audrey A. Samalonis' testamentary and financial planning history, which he found consistent with her long-standing intentions. Earl, likewise, received copies of Audrey's estate planning files and correspondence, including materials produced by the law firms that prepared Audrey's wills and trusts. Neither court-appointed attorney identified any undue influence or impropriety exercised by Respondent Parker in that process that would suggest that Respondent Parker was ill-suited to serve as her Guardian.

In carrying out their responsibilities, both Earl and Feldhake also addressed the competing claims of Appellant, Michael Samalonis, and Respondent, Scott J. Parker. Earl's recommendation to the court was unambiguous: **Parker should serve as Audrey's guardian, not Michael**. The settlement agreement between Appellant and Respondent incorporated into the

Guardianship Order expressly recognized Respondent Parker as sole Guardian of the Person and Estate of Audrey A. Samalonis, with Michael only as a contingent authority. This arrangement reflected the attorneys' confidence in Respondent Parker's ability to act in Audrey's best interests, after they had conducted an exhaustive investigation into the estate planning process that produced the 2014 and 2017 wills.

These independent evaluations by court-appointed officers of the court provide strong, objective corroboration that Audrey A. Samalonis' estate planning documents were based on her own decision-making and that Respondent Parker's role in her affairs was appropriate. Earl and Feldhake's recommendations were not made casually. They were the product of document review, witness interviews, professional judgment, and direct engagement with the decedent herself. Their decision to favor Respondent Parker over Appellant, Michael Samalonis, for Guardianship underscores the Trial Court's conclusion that Audrey's testamentary wishes should also be respected.

## III. THE TRIAL COURT PROPERLY DECLINED TO PRESUME UNDUE INFLUENCE BECAUSE APPELLANT FAILED TO ESTABLISH THE BASIC ELEMENTS TO SHIFT THE EVIDENTIARY BURDEN OF CONFIDENTIAL RELATIONSHIP AND SUSPICIOUS CIRCUMSTANCES

Appellant asserts that the Trial Court failed to presume undue influence, and improperly refused to shift the burden on Respondents to establish the

validity of the 2014 and 2017 wills. Appellant insists on this interpretation of the Trial Court's Order because such an interpretation would permit this Court to entirely discard the Trial Court's Order and proceed with a de novo review of "misapplied" law.

However, Appellant seeks to distract from the fact that nothing in the extensive, voluminous record which they produced with their protracted case-in-chief supports the basic elements of a claim of undue influence or the standard for shifting the evidentiary burden. The elements that must be present to create a presumption of undue influence and require a shifting of the evidentiary burden are: **(1)** the existence of a confidential relationship between the testatrix and the person alleged to have exerted the undue influence; and **(2)** suspicious circumstances as to the development disputed estate plan. Haynes v. First Nat'l State Bank, 87 N.J. 163, 176-77.

Two Trial Court judges denied Appellant's requests to shift the burden. In a pre-trial decision, Judge Paula T. Dow, ruled that the record developed through discovery did not contain sufficient evidence to establish that a confidential relationship existed or that suspicious circumstances attended the development of either the 2014 of 2017 wills. **Da0040 (Appellant's Appendix)**.

Appellant then filed a second motion to shift the burden during trial on April 3, 2023, approximately one month into the trial. Trial Judge Kathi

Fiamingo denied Appellant's motion to shift the burden, arguing that the record through that point did not contain **any** factual basis to establish a confidential relationship or suspicious circumstances:

> "As to the 2017 will at issue, the uncontroverted and credible evidence demonstrates that at the time of the execution of the will: decedent was living alone and without reliance upon petitioner or anyone else for assistance; decedent made and attended her own doctor's appointments with the exception of two appointments that petitioner [Respondent herein] took her to; she maintained an active social life; paid her own bills; accumulated comprehensive information necessary for the preparation of her income tax returns and met with her accountant to do so; drove herself to most of her engagements with a few exceptions. In fact, the only credible evidence established that on most of the occasions during which the decedent and petitioner met, decedent invited petitioner and cooked the meals. None of those facts provide any foundation for a finding of the existence of a confidential relationship between decedent and petitioner.
>
> **No evidence was provided to demonstrate that decedent was weak in body or mind leading up to the execution of the 2017 will. The credible evidence demonstrates that decedent was a strong-willed, intelligent, professional woman who took care of her own affairs.** That she asked petitioner for his opinion occasionally, and took that opinion into consideration with varying results, does not mitigate in favor of a confidential relationship…
>
> Based on the credible evidence presented **the court finds that decedent knew what she wanted to do with her assets and she did what she wanted to do.**"

**Da0049–Da0050 (Vol. 1 of Appellant's Appendix).**

Appellant cites In Re Raynolds Estate, 27 A.2d 226, 132 N.J.Eq. 141 to define "suspicious circumstances" but fails to acknowledge that an undue influence analysis only considers whether "suspicious circumstances" existed

**after** the party alleging the undue influence has established that the testator's mind was enfeebled or otherwise susceptible to influence:

> "It has been said that in order to shift the burden of proof to a proponent of a will, on an issue of undue influence, there must be some other elements ***added*** to prove that testator's mind was enfeebled so that it was difficult to resist improper influence and the establishment of intimate confidential relationship."

*Id*. (emphasis added). Appellant is forced to focus on the "suspicious circumstances" portion of the undue influence analysis because the record is devoid of any evidence that a confidential relationship existed or that the decedent was in any way susceptible to influence at the time of the execution of the contested wills.

Appellant also ignores the extensive evidence in the record of Audrey A. Samalonis' independence, competence, and mental soundness at the time that the contested wills were executed. The scriveners of the contested wills (four of whom testified at trial) testified that they privately reviewed the estate planning documents with Audrey A. Samalonis before signing. Despite contrary implications in Appellant's brief, Respondent Parker ***did not*** participate in document execution meetings between Audrey A. Samalonis and her attorneys - - the very moment when her attorneys had the duty to determine whether she possessed testamentary capacity and the wills were the product of her own free

will. They each testified that Audrey A. Samalonis was both fully competent and clear about her testamentary intentions which were the product of her free will.

**Nancy Rice, Esquire**, the scrivener for the decedent's January 2014 and May 2014 wills, testified at deposition that Audrey A. Samalonis was both mentally competent and capable of independent decision-making:

> "Q: Did you feel that there was, you know, any undue influence to Audrey in the execution of that Will?
>
> A: **No.**
>
> Q: And if you thought that there was anything that did not feel as if it was her wishes, would you have stopped the meeting or failed to execute the documents with her?
>
> A: …I wouldn't cooperate or participate if I feel that influence is undue. And **I felt she had the ability to make her own decisions**."

**Da0681- Da0682 (Appellant's Appendix).** Similarly, Wendy Fein Cooper, Esquire, the principal scrivener of Audrey's April 2017 will, testified that Audrey was alert and showed no deficits at the time of execution:

> "At the time of her Will execution, [Audrey] presented fine. There was nothing remarkable about her. **If there had been any question about her that would have given me any pause, things would have been handled differently, but she presented just fine.**"

**Da0693 (Appellant's Appendix).** The Trial Court closely reviewed the testimony of attorneys Rice and Cooper and summarized her findings in the March 18, 2024, trial order:

> "Rice and Cooper both testified that decedent was aware of the natural objects of her bounty. Decedent was aware of her property and the disposition made in the respective wills. **No evidence to the contrary was provided.**
>
> **Respondent [Appellant] produced <u>no testimony</u> that decedent did not comprehend the consequences of either the 2014 will or the 2017 will, or that she was in poor physical health.** Again both Rice and Cooper testified that they each reviewed the respective wills with decedent prior to her execution to confirm her understanding of their provisions. There was **<u>no testimony</u>** that decedent did not understand the import of the dispositive provisions in either will.

**Da0057–Da0058 (Vol. 1 of Appellant's Appendix).** Audrey A. Samalonis executed her final will in April 2017, five years before her death in March 2022. Zachary Dolchin, Esquire, who witnessed the execution of the decedent's final will, issued a letter to the court, declaring the decedent's competence at the time of signing:

> "**At the time of execution of the documents, <u>Ms. Samalonis was of sound mind and body and executed the documents as her free and voluntary act.</u>**"

Appellant produced no evidence to support the claim that Audrey Samalonis was enfeebled or otherwise compromised before, during, or immediately after the signing of the contested wills.

Appellant also misleads this court by overstating the social and business relationship between Respondent Parker and the Dolchin law firm. Before and after the execution of the April 2017 will, Respondent Parker and the Dolchin

had referred two or three clients to each other and nothing more. **See Transcript, Vol 1. September 13, 2024, Vol 1.**

### A. LEGAL STANDARDS TO FIND PRESUMPTION OF UNDUE INFLUENCE AND SHIFTING THE EVIDENTIARY BURDEN TO THE PROPONENT OF THE WILL

"The legal presumption is that the testator was of sound mind when he executed the will." In re Livingston's Will, 5 N.J. 65, 71 (1950) (internal citations omitted.) Generally, a party contesting a will has the burden of proving the decedent was subject to undue influence which must have existed at the time of the **execution** of the will. In re Estate of Stockdale, 196 N.J. 275, 303 (2008); In re Davis' Will, 14 N.J. 166 (1953).

The burden of establishing undue influence rests with the contestant of a will, unless the contestant is able to set forth sufficient evidence of (a) a confidential relationship between the testatrix and a beneficiary of the challenged will **and** (b) suspicious circumstances. Haynes v. First Nat'l State Bank, 87 N.J. 176-77 (1981).

Confidential relationships have been strictly defined by our courts. The Trial Court's opinion cites the seminal case of Est. of Ostlund v. Ostlund, 391 N.J. Super. 390, 401-02 (App. Div. 2007) for its comprehensive review of the relevant case law:

> [i]n Blake v. Brennan, the court found the test for measuring the existence of a confidential relationship is "whether the relations between the parties

> are of such a character of trust and confidence as to render it reasonably certain **that the one party occupied a dominant position over the other and that consequently they did not deal on terms and conditions of equality.**" 1 N.J. Super. 446, 454, (Ch.Div.1948).
>
> The factors to be considered in determining whether a confidential relationship is present, therefore, include whether trust and confidence between the parties actually exist, **whether they are dealing on terms of equality, whether one side has superior knowledge of the details and effect of a proposed transaction based on a fiduciary relationship, whether one side has exerted overmastering influence over the other or whether one side is weak or dependent.**
>
> As one court has said, "there are innumerable cases involving confidential relationships, but the courts have not been able precisely to define what it is." Stroming v. Stroming, 12 N.J.Super. 217, 224, (App.Div.), certif. denied 8 N.J. 319 (1951). Its essentials are both "a reposed confidence and **the dominant and controlling position of the beneficiary of the transaction.**" Ibid. "[T]he dominance must be of the mind and the dependence must be upon the mind," rather than the physical. Ibid. "It exists when the circumstances make it certain that the parties do not deal on equal terms." Ibid. **It does not exist "where the parties deal on terms of equality**," even though they are, at the same time, family members and business associates. Ibid. **The test, then, is a fact-sensitive one, but focuses on the equality of the parties with respect to each another.**

**Da0044 – Da0045 (Vol. 1 of Appellant's Appendix).**

The existence of a confidential relationship **must be proven by a preponderance of the evidence.** *Id.* at 402.

A confidential relationship does not exist where the parties deal on terms of equality. Ostlund at 402. Factors to be considered in determining whether a confidential relationship exists include:

"a) whether trust and confidence between the parties actually exists" [present here as in almost all testatrix/beneficiary relationships];

b) whether they are dealing on terms of equality [absolutely no evidence was offered by Appellant to prove that Audrey A. Samalonis and Scott J. Parker were not dealing on equal terms];

c) whether one side has superior knowledge of the details and effort of a proposed transaction based on a fiduciary relationship [it is undisputed that Scott J. Parker had never served in a fiduciary capacity for Audrey A. Samalonis before her health declined in 2019, two years after execution of the last will];

d) whether one side has exerted over-mastering influence over the other [absolutely no evidence was offered by Appellant to prove this]."

Ostlund at 402.

The record cannot be manipulated to suggest anything other than the fact that at all times material to the development of the 2014 and 2017 wills, Audrey A. Samalonis was independent, self-sufficient, mentally sharp and in total command of her decision-making faculties and free will.

It is only "[w]hen there is a confidential relaionship coupled with suspicious circumstances, [that] undue influence is presumed and the burden of proof shifts to the will proponent to overcome the presumption." In re Estate of Stockdale, 196 N.J. at 303. "The mere existence of a confidential relationship

between the testator and the beneficiary does not alone create a presumption of undue influence." In re Livingston's Will, 5 N.J. at 71 (citing In re Newuman's Will, 133 N.J. Eq. 532, 535 (E. & A. 1943). Some additional facts or circumstances must exist in order to "cast the burden of proof upon the beneficiary" to demonstrate no undue influence was exerted. Ibid. If the burden shifts, it can be overcome based on proof of no undue influence by a preponderance of the evidence. In re Est. of Folcher, 224 N.J. 496, 512 (2016) (citing Stockdale, 196 N.J. at 303).

There is extensive case law that sets forth the standard for determining if a testator had the requisite capacity to form testamentary intent. The Trial Court specifically cited the following points of law regarding mental capacity:

- "The point in time at which testamentary capacity is to be tested is that of the execution of the will." Gellert, 5 N.J. at 76. There are legal presumptions "in favor of testamentary capacity."

- In re Hoover's Est., 21 N.J. Super 323, 325 (App. Div. 1952) and "that 'the testator was of sound mind and competent when he executed the will." In re Will of Liebl, 260 N.J. Super. 519, 524 (quoting Haynes v. First Nat'l Bank of N.J., 87 N.J. at 175-76).

- "As a general principle, the law requires only a very low degree of mental capacity for one executing a will." In re Resnick's Will, 77 N.J. Super. 380, 094 (Ch. Div. 1962).

- Testamentary capacity is measured by "'whether the testator can comprehend the property he is about to dispose of; the natural objects of his bounty; the meaning of the business in which he is engaged; the relation of each of the factors to the others, and the distribution that is

made by the will.'" Liebl, 260 N.J. Super. at 524 (quoting Gellert, 5 N.J. at 73).

- "A will may be contrary to the principles of justice and humanity; its provisions may be shockingly unnatural and extremely unfair, nevertheless if it appears to have been made by a person of sufficient age to be competent to make a will and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold." In re Hoover's Est., 21 N.J. Super. 323, 325, (App. Div. 1952).

- "[T]he burden of establishing a lack of testamentary capacity is upon the one who challenges its existence." In re Hoover's Est., 21 N.J. Super. 323, 325 (App. Div. 1952). The burden of proof is by clear and convincing evidence.

**Da0053–Da0086 (Vol. 1 of Appellant's Appendix).** It is clear, as it was to the Trial Court, that Appellant failed to prove the existence of a confidential relationship by a preponderance of the evidence. Appellant also failed to provide any evidence that the testatrix was not of sound mind and possessed the requisite mental capacity when she executed the contested wills.

### B. THE TRIAL COURT CONCLUDED THAT APPELLANT FAILED TO PRODUCE EVIDENCE TO SUPPORT THE CLAIM OF UNDUE INFLUENCE

Appellant presented his case-in-chief over a period of eight months through numerous witnesses and duplicative testimony and documentary references but failed at any point during those eight months to provide substantive evidence of undue influence. The Trial Court's thorough and reasoned decision of March 18, 2024 affirms this conclusion, making it clear

that Appellant wholly failed to present persuasive evidence for his claims. In fact, the phrase "no evidence" appears **14 times** in the Trial Court's decision.

At no point in the nearly two years of litigation below did Appellant provide evidence to establish that the decedent did not possess the requisite mental capacity to communicate her testamentary intent. Testimony provided at trial further confirmed that the decedent as a strong-willed woman. The Trial Court concluded that the decedent, being of sound mind, made voluntary and intentional updates to her Estate plan. **No testimony was presented to support claim that Respondent Scott J. Parker manipulated the decedent or that the decedent would have been susceptible to such manipulation.** The Trial Court's decision of March 18, 2024, acknowledges this:

> "The court finds that no credible evidence was provided to establish that decedent did not have sufficient testamentary capacity to execute either the 2014 will or the 2017 will. Rice and Cooper both testified that decedent was aware of the natural objects of her bounty and her dispositive intentions. Decedent was aware of her property and the disposition made in the respective wills. **No evidence to the contrary was provided**."

**Da0057–Da0058 (Vol. 1 of Appellant's Appendix)** On this basis alone, Appellant's undue influence claim must fail. Not only is there no evidence of undue influence, but there is also no rational basis for it to exist in context of the facts. Appellant, Michael Samalonis, receives a larger beneficial interest and Respondent Scott J. Parker receives a smaller beneficial interest as a result of

changes to the tax allocation of the April 2017 will compared to the prior May 2014 will.

The Trial Court also noted that Appellant failed to provide other basic evidence to establish other elements of undue influence:

- "**No evidence** was provided as to any decline in the decedent's physical or mental capacity during any period of time prior to June 2019. All of the credible evidence presented demonstrates that prior to June 2019 decedent, and decedent alone, was in control of her finances and was a relatively healthy woman, with some physical ailments for which she sought and received treatment."

- "Respondent has provided **no evidence** that decedent and petitioner [Respondent, Scott J. Parker] were not dealing on terms of equality with respect to the disposition of her assets in either the 2024 will or the 2017 will or with respect to any inter vivos transaction."

- "**No evidence** was presented to demonstrate that the petitioner [Respondent, Scott J. Parker] maintained any position of dominance over the decedent."

- "**No evidence** was provided to suggest that decedent was subjected to any mental, moral or physical exertion which destroyed decedent's free will."

- "**No evidence** was provided whatsoever that the petitioner exercised any influence over decedent with respect to the 2017 will."

- "Decedent was aware of her property and the disposition made in the respective wills. **No evidence** to the contrary was provided."

**Da0053–Da0086 (Vol. 1 of Appellant's Appendix).** The case presented to the Trial Court by Appellant and his counsel was entirely without merit. Appellant's claims were based solely on Respondent's attendance at one or two meetings

with Audrey A. Samalonis' counsel, Nancy A. Rice, Esquire, at Audrey's request. **However, Appellant failed entirely to present any evidence that the Respondent Scott J. Parker persuaded the decedent, then of sound mind, to change the disbursements in her Will through gentle persuasion and conversation let alone through the type of manipulation, coercion, domination or trickery that is standard for viable claims of undue influence. There was simply no evidence presented by Appellant to suggest that changes in the decedent's will were the result of suggestion, persuasion, or interference by Respondent Parker**. Appellant did not present a single piece of evidence over the eight-month trial to suggest that Respondent Parker ever attempted to alter the disbursements in the decedent's estate and underscored by the fact that he receives less under the 2017 will. Appellant's claims were never based on more than a **hunch** that Respondent Parker must have engaged in improper conduct and Appellant's personal dissatisfaction with his aunt's testamentary plan which she dared to include Parker, a non-relative.

A second Trial Court judge reviewed the trial record in the context of Appellant's Motion to Stay the Estate Administration Pending Appeal in which Appellant asserted that Judge Fiamingo should have shifted the burden on undue influence to Respondents during trial. Judge Paula T. Dow, who was reassigned the case after the retirement of Judge Fiamingo, came to the same exact

conclusion about the trial record: "Even if the court agrees with Respondent [Appellant] that it only needed to search for a "**scintilla**" of evidence that would support Respondent's [Appellant's] claims, the record demonstrated Respondent **[Appellant] failed to provide such an amount." Da0096 (Vol. 1 of Appellant's Appendix).**

As such, Appellant's requested appellate relief should not be granted.

## IV. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR SPOLIATION SANCTIONS AS THERE WAS NO EVIDENCE OF WILLFUL DESTRUCTION OF DIGITAL EVIDENCE.

The New Jersey Supreme Court in Rosenblit v. Zimmerman, 166 N.J. 391 (2001), established a five-part test for the tort of fraudulent concealment premised on spoliation of evidence. To prevail, a party must demonstrate: (1) the opposing party concealed or destroyed evidence; (2) the evidence was relevant to the underlying litigation; (3) the party had a legal obligation to disclose or preserve the evidence; (4) the evidence was intentionally withheld or destroyed with the purpose to disrupt the litigation; and (5) the party was damaged in the underlying action by the concealment or destruction. *Id.* at 406–07. The Court also emphasized that remedies for proven spoliation of evidence vary depending on the circumstances, ranging from an adverse inference to discovery sanctions, or in extreme cases, the independent tort. Thus, Rosenblit

requires not only a showing of willful destruction of evidence but proof of deliberate, litigation-focused misconduct.

The trial court correctly applied the framework set forth in Rosenblit when considering Appellant's claim of spoliation. As the court noted, the tort of fraudulent concealment requires proof of a deliberate act undertaken with the "purpose to disrupt the litigation." **Da0074 (Vol. 1 of Appellant's Appendix).** Here, no such showing was made. Although Respondent Parker acknowledged deleting certain of Audrey A. Samalonis' emails pertaining to recipes, coupons, etc., the Court found credible his explanation that the materials were irrelevant "junk" messages, not documents destroyed with the intent to disadvantage Appellant. **Da0075 (Vol. 1 of Appellant's Appendix).** Absent proof of intentional, litigation-oriented destruction, the stringent standard of Rosenblit has not been met.

To be clear, Appellant never presented evidence that Respondent Parker deleted emails between himself and the decedent. In fact, a forensic examination of the decedent's email account revealed that Parker only deleted junk emails that arrived months after the decedent's passing. The Trial Court summarized the same in its decision:

> "Decedent died in March 2022. None of the emails referenced by respondent's IT professional as dating back to January 2023 could have been an email pertinent to this litigation nor could any such email have been between petitioner and decedent…

> Nor is there any evidence that petitioner deleted any emails pertinent to this litigation prior to the decedent's death. Even assuming that the petitioner had deleted any emails after obtaining access in 2019, there was no existing or pending litigation to which such emails would be relevant. No such litigation was filed until after the decedent's death in 2022."

**Da0074 – Da0075 (Vol 1. of Appellant's Appendix).** In addition, the Trial Court properly distinguished between the evidentiary spoliation inference and the separate tort remedy outlined in Rosenblit. The Court recognized that, while New Jersey law permits adverse inferences where concealment or destruction of evidence is discovered "in time for the underlying litigation," Da74, such a sanction is discretionary and must be grounded in a clear showing of prejudice. Here, the Court determined that Appellant failed to demonstrate that the deleted emails contained information material to his undue influence claims. **Da0075 (Vol. 1 of Appellant's Appendix).** Without evidence of prejudice, the Trial Court was well within its discretion to decline to impose an adverse inference.

The Court further emphasized that, at the time Respondent Parker deleted the emails, litigation was not reasonably foreseeable. **Da75 (Vol. 1 of Appellant's Appendix).** Audrey A. Samalonis' guardianship proceedings had concluded with Respondent Parker's appointment, and no probate contest had yet been initiated. Under those circumstances, Respondent Parker was not under an enforceable duty to preserve every scrap of Audrey A. Samalonis' digital correspondence. The Trial Court reasonably concluded that imposing a

spoliation sanction for routine email deletions occurring before the filing of this action would be unwarranted and inconsistent with Rosenblit's careful balance between legitimate preservation obligations and everyday record management.

Finally, the Trial Court properly rejected Appellant's attempt to recast Respondent Parker's fiduciary obligations as grounds for spoliation sanctions. While an Executor must safeguard estate assets, that duty does not transform every personal email of the decedent into evidence requiring indefinite preservation. **Da0075 (Vol. 1 of Appellant's Appendix).** Respondent Parker's deletion of irrelevant emails did not breach his fiduciary role, nor did it deprive the Court of a complete evidentiary record. By declining to impose an adverse inference, the Trial Court vindicated the principles of Rosenblit and ensured that spoliation sanctions remain a remedy reserved for truly egregious, intentional acts of evidence destruction.

## V. THE DIRECTED VERDICT WAS PROPER BECAUSE APPELLANT OFFERED NO EVIDENCE ("NOT A SCINTILLA OF EVIDENCE") SUPPORTING A CLAIM OF UNDUE INFLUENCE

It is notable that at the Trial Court level, the instant matter received a second independent judicial evaluation of the facts by the Honorable Paula T. Dow following the retirement of the Honorable Kathi F. Fiamingo, who presided at the trial. Judge Dow independently evaluated the facts of this case when considering Appellant's motion to stay the estate administration pending appeal

filed below. Judge Dow denied Appellant's application for a stay, concluding that Appellant's claims against Respondent Parker based on undue influence, breach of fiduciary duty and breach of contract were without merit, and that, as such, Appellant would not have success on appeal.

Appellant contends that the Trial Court failed to construe evidence presented at trial in a light most favorable to the Appellant pursuant to R. 4:37-2(b). As such, in addressing the R. 4:37-2(b) standard that evidence must be construed in the light most favorable to the party against whom dismissal is sought, Judge Dow noted that Appellant had failed to offer even a "scintilla" of evidence of undue influence against Respondent Parker:

> "Respondent [Appellant] has failed to demonstrate, by clear and convincing evidence, a settled legal right and a reasonable success on the merits. R. 4:37-2(b) requires the court to determine whether Respondent [Appellant] presented a prima facie case in the counterclaim by drawing all favorable inferences which could sustain a judgment in their favor. Stated another way, dismissal under the court rule is appropriate when there is no rational basis to support an essential element of Respondent's [Appellant's] case. Under Dolson v. Anastasia, the court's focus is directed to the existence of evidence viewed most favorably to the party opposing the motion (in this case, the Respondent [Appellant]).
>
> Throughout its single spaced, thirty-three page opinion, the court found that Respondent [Appellant] presented no evidence that Decedent's 2014 or 2017 Will was invalid. No evidence was presented to demonstrate Petitioner [Respondent Parker] maintained any position of dominance over Decedent, and Respondent [Appellant] failed to demonstrate the existence of a confidential relationship between Petitioner [Respondent] and Decedent. **Even if the court agrees with Respondent [Appellant] that it only needed to search for a "scintilla" of evidence that would**

> **support Respondent's [Appellant's] claims, the record demonstrated Respondent [Appellant] failed to provide such an amount**."

**Da0096 (Vol. 1 of Appellant's Appendix).**

**Two independent trial judges came to the same conclusion on the facts**, or lack thereof, presented during Appellant's case-in-chief.

## VI. THE TRIAL COURT PROPERLY EXERCISED DISCRETION IN MODIFYING APPELLANT'S REQUEST FOR ATTORNEY'S FEES

The Trial Court acted well within its discretion when it awarded from the estate assets Appellant only a portion of the attorney's fees and costs he requested. Rule 4:42-9(a)(3) allows for an award of fees in probate matters where "reasonable cause" exists, but it does not mandate that every dollar expended be reimbursed. Instead, the court must apply the factors in RPC 1.5(a) and exercise equitable judgment. Here, the Trial Court carefully reviewed Appellant's submissions, found that his pursuit of a will contest may have lacked merit, but was not frivolous, and awarded substantial fees and costs. At the same time, the Court recognized that Appellant's claims were ultimately unsuccessful, and that a downward adjustment was warranted in light of the outcome and the nature of the expenses. **Da0098–Da0110 (Vol. 1 of Appellant's Appendix).**

Given the weakness of Appellant's undue influence claims and the absence of supporting evidence, Appellant sought approval for an absurd legal

fee of **$393,891.15**. This figure was particularly absurd given the relative simplicity of the facts and law in matter. Despite that simplicity, Appellant stretched his case-in-chief out over eight months of trial. That prolonged presentation of their case is responsible for most of the attorney's fees in this matter. The estate was decimated by Appellant's needlessly drawn-out trial presentation. This exercise in waste occurred **after** Appellant had spent **$94,634.93** of estate funds on a failed guardianship challenge prior to the decedent's passing. **Pa16 – Pa27 (Vol. 1 of Respondent's Appendix).** In an effort to preserve some of the estate for the rightful beneficiaries (including Appellant Michael Samalonis), the trial court relied on well-established principles. Courts have consistently held that even when "reasonable cause" supports initiating a challenge, the amount awarded must still be fair and proportional. See In re Estate of Vayda, 184 N.J. 115, 121–22 (2005). The Trial Court's decision to discount roughly one-third of the fee request was not punitive, but rather a reasoned application of proportionality, reflecting that Appellant prolonged litigation through **eight unnecessary months of trial** over broad allegations that the Court ultimately rejected. **Da0098 (Vol. 1 of Appellant's Appendix).** This was an appropriate balancing of interests: compensating counsel for work while ensuring that the estate is not drained by unsuccessful and needlessly prolonged litigation.

The Court likewise exercised sound discretion in limiting Appellant's claimed costs. Items such as extensive trial binders, deposition fees, and "search expenses" were not shown to be indispensable to the litigation. **Da0108 (Vol. 1 of Appellant's Appendix).** By contrast, the Court allowed reimbursement for transcripts and other costs it deemed essential. This line-drawing demonstrates the Court's careful scrutiny, not arbitrariness. To the extent Appellant argued that all of his claimed costs should have been allowed, that position ignores the Trial Court's obligation to distinguish between necessary litigation expenses and discretionary expenditures.

Finally, Appellant's assertion that the Court should have disregarded the results of the litigation is contrary to settled law. While success on the merits is not dispositive, it is a proper consideration under RPC 1.5(a)(4), which directs courts to weigh the "amount involved and the results obtained." The trial court expressly considered this factor in setting the award. **Da0108 (Vol. 1 of Appellant's Appendix).** Its decision to award over $250,000 in fees and more than $9,000 in costs. while denying the remainder, reflects a fair and measured exercise of discretion. The judgment should therefore be affirmed as consistent with both Rule 4:42-9(a)(3) and equitable fee-shifting principles.

The estate has been forced to incur significant legal expenses as a direct result of Appellant's relentless and meritless challenges to Audrey A.

Samalonis' duly executed estate plan. Despite clear evidence that the April 27, 2017 Will was properly prepared by independent counsel, witnessed, and notarized, Appellant has pursued years of litigation seeking to overturn it on baseless theories of undue influence. These efforts have not only been thoroughly rejected by the Trial Court, but they have also compelled the Estate to divert substantial resources away from the beneficiaries and toward unnecessary legal defense. As a result, the estate's assets, intended to provide for Audrey A. Samalonis' chosen heirs, have been materially diminished, underscoring the prejudice caused by Appellant's continued pursuit of unfounded claims. Moreover, estate assets have already been irreversibly drained by Appellant's fruitless litigation efforts.

- Appellant challenged Audrey A. Samalonis' choice of Respondent Parker as her Agent under a Durable Power of Attorney. Specifically, Appellant challenged Respondent Parker's suitability to serve as Power of Attorney Agent. After an exhaustive review of the Appellant's claims, the Court accepted a settlement agreement influenced by Guardian Ad Litem, Cynthia Earl, Esquire's conclusion that Respondent Parker should be appointed Guardian.

- The total litigation cost for **Appellant's unsuccessful guardianship challenge** was **$94,634.93**. **Pa1 – Pa14 (Vol. 1 of Respondent's Appendix).**
- Appellant's modified legal fees up through the conclusion of trial were approved by Judge Paula T. Dow on July 3, 2024, to be paid by the estate.
    - The total litigation cost to the estate for **Appellant's unsuccessful will contest** through the conclusion of trial only is **$260,653.00**. **Da0098 (Vol. 1 of Appellant's Appendix).**
- Legal fees for Respondent Parker's first counsel, Marianne Rebel Brown, were approved by Judge Paula T. Dow on July 2, 2024.
    - The total litigation cost to the estate for counsel Marianne Rebel Brown is **$122,048.25**. **Da0110 (Vol. 1 of Appellant's Appendix).**
- Legal fees for Respondent Parker's second counsel, Samuel Fineman, Esquire, were approved by Judge Paula T. Dow on July 2, 2024.
    - The total expected litigation cost for counsel Sam Fineman is **$16,613.49.**

- Legal fees for Respondents' counsel, Reno J. Ciccotta, Esquire, up through the conclusion of trial were approved by Judge Paula T. Dow on July 2, 2024.
    - The total litigation cost to the estate for Respondents' trial and pre-trial legal fees is **$171,222.21**. **Da0110 (Vol. 1 of Appellant's Appendix).**
- Additionally, Respondents anticipates **significant post-trial and appellate legal fees**.
- The total estimated costs to the estate due to Appellant's unsuccessful challenges have virtually **depleted the residuary estate**.
- If Appellant prevails on appeal and this matter is remanded for a new trial, Respondent anticipates many hundreds of thousands of additional legal fees, **which will render the estate insolvent.**

In absence of Appellant's needless litigation, Appellant would have received the periodic benefit of the proceeds of the sale of the Marlton, New Jersey property (subject to the terms of a trust) as part of the residuary estate. However, Appellant has dragged this litigation on far beyond the period in discovery during which he should have reasonably known that there was no evidence to support his obsessive claims. Now, the decedent's residuary estate is insufficient to satisfy its debts.

Based on the foregoing, it is respectfully requested that Appellant's appeal be denied along with any other relief this Court deems just and proper.

MANIACI, CICCOTTA & SCHWEIZER, LLP

BY: */s/ Reno J. Ciccotta*
RENO JOHN CICCOTTA, ESQUIRE
Attorney for Petitioner, Scott J. Parker, and Interested Parties, Dorothy Rafferty and Susan White

Kenneth E. Raynor, Esq. (Atty. I.D. No.016971997)
Stefanio G. Troia, Esq. (Atty. I.D. No.025821999)
SIMEONE & RAYNOR, LLC
Harvard Law Building
1522 Route 38
Cherry Hill, New Jersey 08002
Tel.(856)663-6700
Fax (856)663-6701
Email: kraynor@srnjlawfirm.com
Email: stroia@srnjlawfirm.com
Attorneys for Appellant, Michael Samalonis

| | | |
|---|---|---|
| | : | SUPERIOR COURT OF NEW JERSEY |
| | : | APPELLATE DIVISION |
| IN THE MATTER OF | : | DOCKET NO: A-003739-23 T4 |
| | : | |
| THE ESTATE OF | : | CIVIL ACTION |
| | : | |
| AUDREY SAMALONIS | : | ON APPEAL FROM |
| | : | |
| | : | SUPERIOR COURT OF NEW JERSEY |
| | : | |
| | : | Docket No.: P-1023-22 |
| | : | |
| | : | Sat Below: |
| | : | Hon. Kathi F. Fiamingo, J.S.C. (Ret.) |
| | : | Hon. Paula T. Dow, J.S.C. (Ret.) |

# REPLY OF APPELLANT, MICHAEL SAMALONIS

# TABLE OF CONTENTS

# TABLE OF ORDERS

# TABLE OF TRANSCRIPTS

| | | |
|---|---|---|
| Trial | January 22, 2024 | 22T |
| Trial | January 23, 2024 | 23T |
| Trial | January 24, 2024 | 24T |
| Trial | January 25, 2024 | 25T |
| Trial | January 26, 2024 | 26T |
| Trial | January 29, 2024 | 27T |
| Motion Hearing | January 30, 2024 | 28T |
| Motion Hearing | April 26, 2024 | 29T |
| Motion Hearing | May 10, 2024 | 30T |
| Motion Hearing | July 12, 2024 | 31T |

# TABLE OF AUTHORITIES

**New Jersey Statutes** **Page**



**New Jersey Court Rules** **Page**

## PROCEDURAL HISTORY & STATEMENT OF FACTS

Appellant herein incorporates the Procedural History and Statement of Facts from his brief.

## PRELIMINARY STATEMENT

Respondents' brief does not contest and fails to address the Trial Court erring in assessing the credibility of witnesses, including Respondent, Parker, and the scrivener, Rice, and not knowing that certain records were admitted into evidence and the events to which they related. Specifically, Respondents do not contest that the Trial Court erred in: (1) finding Parker to be more credible than Rice regarding the April 9, 2014, meeting; (2) finding that there were no notes prepared by Rice from the April 9, 2014, meeting; (3) finding that Parker's handwritten directions of the bequests that gave him the OC Property and the IRA were written at a date before the April 9, 2014, meeting; (4) finding that Parker's testimony regarding his attendance and recollection of the April 9, 2014, was "unwavering" and "credible" given that he changed his testimony multiple times until he admitted he was present; and (5) using the incorrect findings of fact and credibility to grant a directed verdict.

## LEGAL ARGUMENT

### I. LEGAL STANDARD OF REVIEW

The proper standard of review for this appeal is clearly de novo. Appellant's recitation of the litany of factual errors that the Trial Court made pertained to

Respondents' motion for judgment under R. 4:40-1. When reviewing a trial court ruling on such a motion, the Appellate court applies a de novo standard. Under Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969), the same standard applies at trial and on appellate review for judgments made under R. 4:37-2(b), R. 4:40-1, and R. 4:40-2.

Other issues on appeal are also subject to de novo review. A decision regarding the existence of a duty to preserve evidence is a question of law that is subject to de novo review. Lanzo v. Cyprus Amax Minerals, 467 N.J. Super. 476, 521 (App.Div.), certify. den. 248 N.J. 247 (2021). The determination of disputed material facts, which exist in this case, "is a matter of law," which is subject to de novo review. State v. Jones, 475 N.J. Super. 520, 528 (App. Div. 2023).

## II. APPELLANT'S BRIEF IS NOT RIDDLED WITH MISSTATEMENTS AND OMMISSIONS OF FACT

### A. Appellant Did not Have a Strained Relationship with his Aunt, Audrey Samalonis

The record establishes that Appellant had a loving and lifelong relationship with his Aunt, who also adored his children, who she bequeathed her estate to in her January 2014 Will and Trust. Parker admitted at trial that the Decedent had affection for Appellant and his children. **16T47-8 to 14.** Erik Feldhake, Esq., the Decedent's court-appointed attorney in the preceding guardianship matter, testified at trial that Appellant cared for the Decedent and she cared for him. **14T60-12 to 16.**

The Court should disregard the deposition testimony of Dorothy Rafferty as

it is not part of the trial record. The transcript was included by Parker's counsel as an exhibit to his cross motion in response to the Appellant's April 3, 2023, motion to shift the burden. The transcript was never introduced at trial and no portions were ever read into the record. Rafferty never testified at trial. As such, the trial court did not rely on Rafferty's deposition testimony when rendering its decision. Respondents are trying to expand the record with documents that were never before the trial court. As established in State v. Harvey, 151 N.J. 117, 201-202 (1997), appellate review of matters is based on the record developed in the tribunal below. The record on appeal is essentially "frozen in time" as of the procedural point where the appeal was taken. Mandel, New Jersey Appellate Practice (GANN), 480.

The best assessment of the nature of Appellant's relationship with the Decedent is a review of the estate planning instruments the Decedent created in January 2014. They were created with the scrivener alone. Parker did not participate in their creation. In those documents, Audrey left her entire probate estate, except for two specific bequests, to Appellant and his children. **Da325-341.**

### B. By Admitting to His Close Relationship With Audrey A. Samalonis Parker Establishes His Confidential Relationship

Parker admits to having a close relationship with Audrey Smalonis. It became the proverbial confidential relationship upon his extensive involvement in Audrey's estate planning process. Parker, a financial advisor, was like a "nephew" and sometimes like a "son" to Audrey. He was clearly in a position of trust, which he

exploited to increase his share of her estate while attending various meetings with her attorneys and corresponding with them. See In Re Fulper's Estate, 99 N.J. Eq. 292, 314 (Prerog. Ct. 1926) (holding that "among the most natural of confidential relationships is that of parent and child). Parker clearly leveraged his familial-like relationship with the Decedent to unduly influence her into altering her estate plan to benefit him and harm Appellant.

Parker was agent for the Decedent since January 23, 2014, despite Respondents indicating in their brief that he became agent for her in 2017. **Da1187-1194.** During the execution of the May 2014 and April 2017 Wills, Parker had already been named the Decedent's power of attorney. It is evident that he was using that authority to communicate with the various counsel on Audrey's behalf. Parker was referred to as Audrey's "point person" and even approved the final draft of the purported April 2017 Will.

Respondents' brief incorrectly states that Parker's mother and the Decedent remained close throughout the Decedent's life. According to Parker's testimony, his mother and Audrey had a falling out that resulted in them not speaking for years prior to the Decedent's death. **9T48-24 to 9T50-21.** During this time, Parker chose to remain close with the Decedent, whom he considered to be like a mother to him. **9T50-22 to 9T51-14; 11T34-9; 11T-126-4 to 7.** Parker's own admissions point to a

confidential relationship that the trial court refused to recognize in assessing whether to shift the burden of proof.

### C. Parker Drove Audrey A. Samalonis to the Execution of the 2017 Will and Participated in Other Suspicious Activities

Respondents' contention that Appellant's arguments are misleading concerning suspicious circumstances is inaccurate. Appellant's initial brief established that Parker performed many of the actions that establish suspicious circumstances according to In Re Raynold's Estate, 132 N.J.Eq. 141, 148 (Prerog.Ct. 1942) aff'd 133 N.J. Eq. 346 (E.&A. 1943). Respondents' effort to reduce Appellant's argument to one factor under Raynold's both misstates the record and ignores the breadth of the governing standard. There is abundant evidence of suspicious circumstances surrounding the Decedent's May 2014 and April 2017 Wills. Parker conducted substantially all communication with the Dolchin firm and admitted driving Audrey to the signing of the April 2017 Will. As to the Rice firm, Parker was in attendance at the meeting on April 9, 2014, at which, according to Rice, Parker dictated the conversation. The April 9, 2014, meeting was the last before the signing of the Will. The bequests identified in this meeting were incorporated into the May 2014 Will.

In contesting a Will, one does not have to prove that undue influence was exercised at the exact time of execution. See Raynold's. Instead, "whenever exerted, whether months or years before, [the undue influence] must still be operative upon

the testator's mind in the very act of executing the instrument and be an effective cause of the disposition made therein," as was evident in this case. Id. (quoting In re Everett's Will, 166 A. 827, 830 (Vt. 1933)).

### D. Claim That Appellant Lacked Standing is Not Before This Court

The claim that Appellant lacked standing was dismissed by the lower court on summary judgment prior to trial. **Da861-870**. Respondents did not preserve the claim and did not bring it before this Court through a proper cross appeal. Respondents' attempt to revive the dismissed claim is procedurally improper and this Court should disregard Respondents' argument.

### E. Handwritten Notes and Other Evidence Cast Doubt on Audrey A. Samalonis's Mental Competence

Respondents dedicate a portion of their brief to present the Decedent's habit of note taking as evidence of her capacity, despite capacity not being an issue before the trial court. Appellant's claim regarding the testamentary capacity of the Decedent was disposed of by the trial court in its Order dated May 17, 2023. **Da868.**

Further, tax forms containing details of payments made, and a calendar that unsurprisingly contains important dates and appointments, are not evidence of the Decedent's engagement with "complex" financial and legal matters. The alleged "handwritten notes" of the Decedent appear to exhibit confusion about her estate plan given that the distributions in the iterations are all different. **Da513-521.** This indecision is especially noteworthy in light of Rice's testimony at trial that the

Decedent did not understand what her assets were during the meetings they had to discuss her estate. **3T36-24 to 3T37-17.** Based on their dates, the handwritten notes were made after Parker attended the March 19, 2014, estate planning meeting and before the April 9, 2014, meeting, which Parker also attended. The record clearly establishes that Parker was communicating with Audrey outside of Rice's presence about the dispositions in the Will during the time between March 19th and April 9th, as is evidenced by the "we" email of March 27, 2014. **Da373-374.** The handwritten note Parker drafted and gave to Rice with the distributions that were later incorporated into the May 2014 Will were almost identical, in format and terms, to these purported notes allegedly drafted by Audrey. **Da394.**

### F. Attorney Recommendations from Prior Guardianship Proceedings are not Properly Part of the Record

The Court should disregard Respondents' assertions concerning the guardianship proceeding because they are not properly before this Court. Specifically, the May 17, 2020, letter from Cynthia Earl, Esq., that Respondents have supplied to this Court in their appendix as **Pa1-14** is not of record in this appeal. The letter was not attached as an exhibit to any pleading of record before the trial court and it was never introduced at trial. Hence, the document was not relied upon by the Trial Court in its March 18, 2024, opinion after trial. **Da53-86.** Appellate review of matters is based on the record developed in the tribunal below. State v. Harvey, 151

N.J. 117, 201-202 (1997) Respondents cannot expand the record by appending documents that were never before the Trial Court.

Furthermore, Respondents incorrectly ascribe the responsibility of vetting the Decedent's estate planning process to the court-appointed attorneys in the guardianship matter, Earl and Eric A. Feldhake, Esq. That was not their function. They were not responsible for finding evidence of undue influence and neither Earl nor Feldhake were aware of the January 2014 Will and Trust bequeathing the bulk of the Decedent's assets to Samalonis and his children, nor the loan to Parker, the gift to Parker or that Parker was so intimately involved in all of Audrey's estate planning for several years. **14T64-2 to 25; 14T68-1 to 25**.

Further, Respondents miscast the facts surrounding the recommendations of the court-appointed attorneys. By way of example, Feldhake testified that he had concerns that Parker was not being forthright with him during their discussions in the guardianship matter. **14T65-19 to 14T66-8.** He also testified that there was an indication during his investigation that Parker improperly carried out his duties as power-of-attorney for Audrey. **14T101-9 to 14T103-7.**

## III. TRIAL COURT ERRED IN DECLINING TO PRESUME UNDUE INFLUENCE

Appellant's initial brief clearly outlined the undisputed facts established at the time when his motions to shift the burden of proof were filed, along with the facts elicited at trial, which refute Respondents' allegations that there wasn't a showing

of a confidential relationship or suspicious circumstances. Simply put, Parker was at nearly every meeting after the January 2014 Will and Trust were executed. He made almost every call and sent almost every email to both Rice and the Dolchin firm. These clearly establish a confidential relationship and suspicious circumstances. Someone does not act as a "point person" with Decedent's counsel unless there is a confidential relationship or that person is exerting undue influence.

Furthermore, Respondents, once again, attempt to improperly expand the record by relying on documentary evidence that was not before the Trial Court. Specifically, Rice's deposition transcript was attached by Parker's counsel as an exhibit to his cross motion in response to Appellant's April 3, 2023, motion to shift the burden. **Da655-684.** The transcript was not entered into evidence at trial and the lower court did not rely on it to render its decision. The same holds for the alleged letter from Zachary Dolchin, Esq., to the "court." **Da714.** This letter, which is unaddressed and dated August 7, 2019, was also attached by Parker's counsel as an exhibit to his cross motion; it was not in evidence and should be disregarded.

Neither Zachary Dolchin nor Wendy Cooper recalled discussing the contents of the Will with Audrey during the signing. Rice indicated that Parker dictated the April 9, 2014, meeting, and she had concerns at the time of the signing. She misunderstood the definition of undue influence at the time of the signing by stating

that it would mean "Mr. Parker bringing her [Audrey] in, sitting her down and telling her what to sign." **3T64-13 to 24.**

### A. Legal Standards to Find Presumption of Undue Influence and Shift the Burden to Proponent of Will

Interestingly, Respondents misconstrue the precedence of Raynold's in their brief by stating the contestant of a Will has to establish that the testator's mind was enfeebled before suspicious circumstances can be considered in an undue influence analysis. This is not accurate. None of the subsequent case law, including In re Rittenhouse's Will, 19 N.J. 376, 385–86 (1955), In re Blake's Will, 21 N.J. 50, 58 (1956), and Haynes v. First Nat'l Bk. of N.J., 87 N.J. 163 (1981), establishes that being enfeebled is a prerequisite for a court to consider suspicious circumstances. The Court in Fulper held "a showing of mental weakness or mental incompetence is by no means a necessary circumstance" to establishing a confidential relationship.

Respondents also assert, incorrectly, as rebutted by Raynold's, that undue influence must be exercised at the exact time of execution of a Will. This misconception was also made by Rice in discussing the circumstances of the signing. Undue influence can occur prior to the execution as long as it impacts the dispositions made in the instrument being executed.

### B. The Trial Court Erred in Finding Appellant Failed to Produce Evidence to Support Claims of Undue Influence

Despite Respondents' contention that evidence was not presented to prove a confidential relationship and suspicious circumstances existed in this matter, an accurate review of the record reveals otherwise. Appellant presented evidence that Parker and the Decedent were not dealing on equal terms concerning the Decedent's estate planning. Audrey relied on Parker to recommend an attorney to change her Will, she relied on his advice and expertise as a financial planner during estate meetings with her attorneys, she relied on Parker to serve as the point person with the Dolchin firm, where he conducted all of the communications and reviewed the final draft of the Will. The question to be asked is, if Parker did not provide superior knowledge and was not in a dominant position regarding the transactions in Audrey's estate planning, why was he involved? What benefit did he provide if Audrey knew and understood her estate as Respondents contend?

## IV. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR ADVERSE INFERENCE AGAINST PLANTIFF FOR SPOLIATION OF EVIDENCE

The Trial Court and Respondents conflate two distinct doctrines, misstate the applicable standard, and sidestep the undisputed fact that Parker destroyed Audrey's emails after litigation was reasonably anticipated, after litigation began and after preservation notices were served. Their continued reliance on Rosenblit v. Zimmerman, 166 N.J. 391 (2001) is misplaced. Rosenblit sets forth the elements of an independent tort action for fraudulent concealment, not the evidentiary remedy

of an adverse inference available within the underlying case. See Lanzo (clarifying distinction and holding that negligence or gross negligence can warrant an adverse inference); See also Tartaglia v. Ubs Painewebber Inc., 197 N.J. 81, 116-118 (N.J. 2008) (reaffirming that the adverse inference remedy is procedural, not tort-based, and need not meet the full tort standard). Appellant sought relief through a motion in limine. **Da871.** The Trial Court erred by applying the heightened tort test requiring proof of "purpose to disrupt litigation." **Da74.**

Parker insists that he deleted "junk" emails and no proof showed destruction of communications between Parker and Audrey. Litigation was reasonably foreseeable as early as July 2019. **Da1321–1325; Da1213; Da1300.** Appellant then filed a guardianship complaint in October 2019. **Da1531–1601.** Thus, litigation was not only foreseeable, it was already pending while Parker was deleting emails. As such, Parker was under a duty to preserve Audrey's digital correspondence and there was no logical reason for an agent to be in a Decedent's account deleting "junk emails." See Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 249 (Law Div. 1993). Parker's unilateral deletion of emails, even if "irrelevant," was legally improper. The evidence adduced at trial also established that all emails were deleted, not just "junk emails." Rosenblit, at 401–02 ("Once litigation is pending or likely, a party has no right to destroy evidence simply because he believes it to be irrelevant.").

Respondents contend that no prejudice was shown. But courts recognize that prejudice **is presumed** where potentially relevant evidence is destroyed. See State v. Zenquis, 251 N.J. Super. 358, 369–70 (App. Div. 1991); In re Gen. Election, 255 N.J. Super. 690, 732 (Law Div. 1992). Parker admitted accessing Audrey's account in 2019 and repeatedly deleting emails thereafter. **12T141–143; 16T168–169.** Because the contents are unknowable due to Parker's conduct, the inference that they would have been unfavorable is both appropriate and necessary.

Respondents' attempt to minimize Parker's fiduciary obligations is unavailing. Under N.J.S.A. 3B:10-26, an executor must manage estate assets prudently and loyally. Emails are part of Audrey's digital estate and bore potential relevance to claims concerning undue influence and Parker's conduct. By wiping them, Parker breached both fiduciary and litigation preservation duties.

## V. TRIAL COURT'S GRANTING OF DIRECTED VERDICT WAS IMPROPER BECAUSE AN ABUNDANCE OF EVIDENCE EXISTED TO SUPPORT DENIAL

Respondents' again attempt to leverage immaterial aspects of the record in order to bolster their arguments by asserting that the trial judge's decision to grant Respondents' motion for judgment was somehow affirmed by a decision from the Hon. Paula T. Dow to deny a motion to stay pending appeal.

This assertion, however, fabricates an impossible scenario. Judge Dow did not conduct an independent review of the record. Judge Dow heard limited evidence on

the motion, without transcripts, and simply relied on the opinion of the trial judge to evaluate one element of the Crowe factors pertaining to a stay request. It is mendacious to suggest that Judge Dow appropriated the role of the Appellate Court and reweighed findings of a completed trial. This Court should disregard the contention that Judge Dow upheld the trial judge's determination.

## VI. TRIAL COURT ABUSED ITS DISCRETION IN MODIFYING APPELLANT'S REQUEST FOR ATTORNEY'S FEES

Respondents failed to oppose and therefore concede that the Trial Court abused its discretion by disallowing $13,606.53 in costs from Appellant. This Court should find in favor of Appellant and allow for these costs to be paid by Audrey's estate.

The Trial Court's denial of fees and costs was not a careful application of RPC 1.5(a), but an arbitrary across-the-board cut based on a mistaken premise and undue emphasis on outcome. The denial of $117,631.24 in attorney's fees and $13,606.53 in costs was not based on RPC 1.5(a) factors, but on an arbitrary "one-third" reduction. Discretion must be grounded in fact and law; it is abused when exercised on an erroneous or incomplete basis. See Rendine v. Pantzer, 141 N.J. 292, 317 (1995).

The Trial Court expressly found counsel's hourly rates reasonable and that there was "reasonable cause" to pursue the will contest. **Da104–106.** Yet, it slashed one-third of the fees because Appellant did not prevail. That is not a proportionality analysis under RPC 1.5(a), but a results-only penalty.

Respondents argue the Trial Court properly considered the "results obtained" under RPC 1.5(a)(4), which is permissible, however, it cannot be the sole justification for denying otherwise reasonable fees. Here, the Trial Court made no finding that Appellant's fees were duplicative, excessive, or unsupported by time records, but instead applied a one-third reduction inconsistent with In re Estate of Vayda, 184 N.J. 115 (2005).

Respondents attempt to portray the Appellant's litigation as "absurd," and "wasteful."[1] However, such baseless rhetoric is not bore out by the record. Respondents' arguments ignore the complexity of the issues presented and the persistent involvement by Parker in Audrey's estate planning process over three years. It ignores the irrefutable cause of the litigation, namely Parker's exploitation of Audrey, to alter her estate plan as established in January 2014, by Will and Trust.

## CONCLUSION

Wherefore, Appellant respectfully requests that this Honorable Court grant the requested relief as identified in his initial brief, along with such other amendments as may be referenced herein.

**SIMEONE & RAYNOR, LLC**
*Attorneys for Appellant*

s/ Kenneth E. Raynor
s/Stefanio G. Troia

Date: September 11, 2025

[1] The Trial Court did disallow fees totaling $127,593.25 from Attorney Ciccotta's office due to duplicative, excessive and unreasonable charges. (Da110-129).