



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0726

RUSSEL W. MASON, as Executor of the Estate of Christine Ebert,

Plaintiff-Below/Petitioner

v.

**CHRISTINE TORRELLAS, Ancillary Administratrix
of the Estate of Christine Ebert,**

Defendant-Below/Respondent

Circuit Court of Mineral County
Civil Action No. 15-C-9
Hon. Phil Jordan, Judge

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE¹

On March 16, 2015, Russell W. Mason (“Petitioner”), brought suit against Christine Torrellas (“Respondent”). App., 2-5. Respondent is the executor of the estate of Christine Ebert (“Decedent”) in New York (the place of Decedent’s domicile and residency at the time of her death), and ancillary administratrix in the corresponding West Virginia ancillary administration proceeding (where Decedent owned real property at the time of her death). App., 2-5, 13. In his Complaint, Petitioner claimed he was a beneficiary of an earlier will executed by the Decedent on November 12, 2012 (“WV Will”), in which she left Petitioner a car lot and some farm equipment. App., 6-7, 14. Decedent’s only known family relations living in the United States are the Respondent (her niece) and the Respondent’s mother (her sister) – both of whom live in New York. App., 2-3. On July 31, 2012, while she was living in West Virginia, Decedent appointed Irene Ketelson, her sister and Respondent’s mother, her power of attorney. App., 5. Decedent spent much of her life in West Virginia, but moved to New York in the fall of 2012. App., 14. The decedent’s domicile became New York when she moved to her sister’s home (and later into an assisted living facility) in November 2012 and never returned to West Virginia. App., 1-7, 14. More than a year later, on January 30, 2014, the Decedent executed a new will (“NY Will”), which revoked any prior wills and which did not include any bequest to Petitioner. App. 3.

The Decedent died on February 11, 2014 at the Winthrop University Hospital in New York. App., 2. At the time of her death, the Decedent lived as a permanent resident in an assisted living facility located in North Lynbrook, New York. App., 5. Following the

¹ Petitioner’s brief includes numerous facts never presented before and not included anywhere in the record below. Petitioner acknowledges this. Pursuant to Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure. The “Court may disregard errors that are not adequately supported by specific references to the record on appeal.

Decedent's death, the NY Will was offered for probate in the proper surrogate court of the State of New York, County of Nassau, by Respondent on April 14, 2014. App., 4. Then, in June 2014, the New York surrogate court entered a final decree to probate the NY Will. The NY Will was later admitted for ancillary probate before the Mineral County, West Virginia Commission on July 24, 2014. App., 3.

Rather than challenge the probate of the NY Will *in* New York where it originated, or in front of the Mineral County, West Virginia Commission, where it was already pending, Petitioner filed a separate, parallel proceeding in which he asserted numerous counts of wrongdoing allegedly sufficient to invalidate the NY Will. App., 8. Petitioner asked the Mineral County Court to “impeach the NY Will by issue of *Devisavid Vel Non*, vacate the *Ex Parte* Order of Ancillary Administration and properly recognize the WV Will of Christine Ebert.” App., 8. In light of the fact that the NY Will was already probated through the New York surrogate court, Respondent moved to dismiss Petitioner's Complaint because subject matter jurisdiction was not present and Petitioner failed to state a claim upon which relief could be granted, pursuant to West Virginia Rules of Civil Procedure 12(b)(1) and (6). The Mineral County Court held oral arguments on Respondent's Motion to Dismiss on June 16, 2015, and thereafter granted Respondent's Motion, dismissing the case. App., 45. Rather than challenge the New York Will Probate in New York, or even attempt to do so in the ancillary administration proceeding, Petitioner filed this appeal, alleging that the Mineral County Court's application of full faith and credit to the New York probate was in error.

II. SUMMARY OF ARGUMENT

Petitioner challenges the Mineral County Court's dismissal of his Complaint, claiming that the Court erred by awarding full faith and credit to the New York probate. According to Petitioner, jurisdiction over a will contest proceeding depends only on domicile of the decedent and location of the property at issue. *See* Pet. Brief at 5-6. However, this demonstrates a fundamental misunderstanding of both the facts and law as it relates to jurisdictional issues in this case.

Not only did the Mineral County Court properly adhere to its constitutional obligation in awarding full faith and credit to the New York probate decision, it properly dismissed the Complaint because, when a will is executed and then probated in a foreign state, any challenge to the validity of that will, including allegations of undue influence, fraud, or lack of capacity, must be raised in that same foreign court. At no point did the Mineral County Court tell the Petitioner he could *not* challenge the validity of the Decedent's will. Rather, any such challenge must occur by the proper proceeding in the proper court, and the Mineral County Court is *not* that court.

Even if every factual allegation in Petitioner's Complaint were true (which the Respondent refutes), the Mineral County Court still lacks jurisdiction to hear the purported will contest. Thus, it must be dismissed. *See* W. Va. R. Civ. P. 12(b)(1), (6). Moreover, the Complaint was properly dismissed because, even if jurisdiction to contest the probate of a foreign will in a West Virginia circuit court *were* dependent on domicile, the Decedent in this case was domiciled in New York at the time of her death. Because Petitioner has shown no

evidence warranting reversal of or alteration to the lower court's order, that decision should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners' brief contains only limited record references and distinguishable legal authorities. West Virginia Rule of Appellate Procedure 21(c) provides, "[a] memorandum decision affirming the decision of the lower tribunal may be entered under this Rule when: (1) this Court finds no substantial question of law and the Court does not disagree with the decision of the lower tribunal as to the question of law; (2) upon consideration of the applicable standard of review and the record presented, this Court finds no prejudicial error; or (3) other just cause exists for summary affirmance." As Petitioner does not cite sufficient legal support for his assignments of error, oral argument is not warranted.

IV. ARGUMENT

A. STANDARD OF REVIEW

With respect to the standard of review for orders granting motions to dismiss, this Court has held as follows:

The Court has explained that "[t]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint." *Collia v. McJunkin*, 1278 W. Va. 158, 358 S.E.2d 242, 243 (1987) (citations omitted). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)." Syllabus Point 3, *Chapman v. Kane Transfer Co. Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977). "Dismissal for failure to state a claim is proper 'where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Murphy v. Smallridge*, 196 W. Va. 35, 37, 468 S.E.2d 167, 168 (1996). This Court has also held that "[a]ppellate review of a circuit court's order

granting a motion to dismiss a complaint is de novo.” Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995) (Emphasis added).

Mey v. Pep Boys-Manny, Mo & Jack, 228 W. Va. 48, 52, 717 S.E.2d 235, 239 (2011) (Emphasis added).

B. THE MINERAL COUNTY COURT PROPERLY DISMISSED PETITIONER’S COMPLAINT BECAUSE IT LACKS JURISDICTION OVER PETITIONER’S CLAIMS.

1. THE FULL FAITH AND CREDIT CLAUSE PRECLUDES JURISDICTION OVER A FOREIGN WILL CONTEST.

A circuit court must dismiss a Complaint if it lacks jurisdiction over the subject matter and/or fails to state a claim upon which relief can be granted. W. Va. R. Civ. P. 12(b)(1), (6). Here, Petitioner brought this action to invalidate the NY Will already validated and probated by a foreign court (New York). But the Full Faith and Credit Clause of the United States Constitution precludes the Mineral County Court from proceeding with a contest of the Probated NY Will.

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

U.S. Const. Art. IV, § I.² In applying this Clause, West Virginia courts have said there is “no jurisdiction, general or statutory, to set aside the probate of a foreign will admitted to probate here on an authenticated copy.” *See McVey v. Butcher*, 72 W. Va. 526, 78 S.E. 691 (1913), *citing Woofter v. Matz*, 71 W. Va. 63, 76 S.E. 131 (1912). Thus, the Mineral County Court was obligated to give full faith and credit to the New York probate court, which had already decided the NY Will was valid. Because of this, the Mineral County Court correctly determined that it

² The West Virginia Supreme Court of Appeals honors the full faith and credit of other jurisdictions’ decisions. *See Clark v. Rockwell*, 190 W. Va. 49, 435 S.E.2d 664 (1993) (holding that, even where another state’s decision regarding liability benefits under an automobile policy would violate public policy under local law, it was entitled to full faith and credit); *State ex rel. Lynn v. Eddy*, 152 W. Va. 345, 163 S.E.2d 472 (1968) (holding that full faith and credit prevented a wife from prosecuting an action for divorce in the courts of West Virginia where the court of the sister state had jurisdiction over the parties and the subject matter and both parties were represented by counsel).

did not have jurisdiction over the subject matter and as such, Petitioner could not state a claim upon which relief could be granted.³ *See* W. Va. R. Civ. P. 12(b)(1).

Petitioner agrees that the New York probate process was completed. App., 3, 23-24, *See also* Pet. Brief at 4. A court judgment was obtained through probate of the cogency of the NY Will. That NY Will was properly deemed to validly transfer ownership of the Decedent's personal and real assets. App., 4. Respondent relied upon the validity of the probate decree from the New York court when she began the ancillary administration process in Mineral County to properly and completely devise the Decedent's West Virginia property. App., 4-6. After Respondent, as ancillary administrator, took the final step to conclude the West Virginia ancillary administration by mailing to the Mineral County Clerk's office the completed Waiver of Final Settlement Containing Personal Representative Affidavit, the Petitioner filed the subject Complaint, effectively suspending closure of the ancillary estate.⁴ *See generally* App., 1-8.

By completing probate in the New York surrogate court, Respondent obtained a court judgment that properly and validly transferred ownership of Decedent's personal and real assets. Petitioner cannot rightfully bring his will contest in a different court, seeking reassessment of the work of a foreign jurisdiction to obtain a different result. *See* U.S. Const. Art. IV, § 1. The Mineral County Court properly adhered to its obligation to honor the New York probate, give it full faith and credit, and thereby prevent Petitioner's challenge to the

³ Furthermore, the Respondent was appointed as executor in New York and therefore derives her authority for ancillary administration in West Virginia from that New York executorship. She is thus not liable to be sued in West Virginia. *See Vaughan v. Northup*, 40 U.S. 1 (1841); *Crumlish's Adm'r v. Shenandoah Val. R. Co.*, 40 W. Va. 627, 22S.E. 90 (1895) (holding that an executor or administrator cannot be sued out of the state conferring his authority); *Cf. Winning v. Silver Hill Oil Co.*, 89 W. Va. 70, 108 S.E. 593 (1921) (holding that a foreign executor also could not bring action against a resident of West Virginia).

⁴ Since dismissal of this matter, the stay was removed from the ancillary administration of the Decedent's estate and the process was completed. The matter is now closed.

validity of the NY Will in West Virginia, rather than in New York. *See Woofter v. Matz*, 71 W. Va. 63, 76 S.E. 131 (1912). West Virginia courts have no “general or statutory jurisdiction to set aside a will and probate thereof for fraud of one domiciled in another state, duly probated there, and subsequently duly admitted to probate in this state.”⁵ *See id.* The Mineral County Court correctly found the case at bar to be squarely within the *Woofter* ruling. It thus properly awarded the New York probate decision full faith and credit.

Motions to Dismiss provide necessary relief in instances where a party requests relief that it cannot receive or attempts to enforce rights that it does not have. *See State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). Here, despite Petitioner’s hopes for impeachment of the NY Will, vacation of West Virginia’s ancillary administration, and a new probate of an earlier, revoked will, he cannot obtain that relief in the Mineral County Circuit Court. Thus, a motion to dismiss provided Respondent with the necessary relief in this instance where the Petitioner cannot enforce rights he does not have. This is in line with the United States Constitution and West Virginia case law. As such, the dismissal should be affirmed.

2. NEW YORK LAW REQUIRES A SURROGATE COURT ONLY PROBATE A WILL IF IT DETERMINES THAT SUCH WILL IS PROPERLY EXECUTED, IN FORMALITIES AND CAPACITY.

In New York:

1. Before admitting a will to probate the court must inquire particularly into all the facts and must be satisfied with the genuineness of the will and the validity of its execution. . . .
2. If it appears that the will was duly executed and that *the testator at the time of executing it was in all respects competent to make a will and not under restraint* it must be admitted to probate as a will valid to pass real and personal property, unless otherwise

⁵ Respondent maintains that Decedent was domiciled in New York. *See infra* Part N.D. 1.

provided by the decree and the will and decree shall be recorded. . .

N.Y. Probate Proceedings Law § 59-a-1408.1-2 (emphasis added). “[T]he Surrogate may not grant probate to a will until she is satisfied that the will is valid. If the court suspects that the decedent failed to satisfy the statute-of-wills formalities, or *lacked testamentary capacity, or was under undue influence, or was induced by fraud, she may not admit the will to probate.*”⁶

Margaret Valentine Turano, Practice Commentaries, N.Y. Surr. Ct. Pro. § 1408 (emphasis added). In fact, this “section placing upon the surrogate the duty of inquiring particularly into all the facts and circumstances to the end that he be satisfied with genuineness of will and validity of its execution applies even though the probate is uncontested.” See *In re Foulds’ Will*, 196 N.Y.S.2d 816, 21 Msc. 2d 402 (N.Y. Sum.Ct.1960); *Will of Wharton*, 453 N.Y.S.2d 308, 114 Misc. 2d 1017 (N.Y. Sum. Ct.1982) (“The objective in a proceeding to probate a purported will is to carry out the testamentary wishes of the decedent as reflected in his will by admitting to probate only an instrument or a portion of the will which has been duly executed by a decedent who is free from restraint, has testamentary capacity and is otherwise competent to execute a will.”).

Petitioner rests his claim of error on an unpersuasive Kentucky case, *Marr v. Hendrix*, 952 S.W.2d 693 (Ky. 1997). However, the *Marr* court was working with entirely different statutory language than that which is at issue here.⁷ See generally *id.* In *Marr*, the Kentucky court held that “local courts have residual jurisdiction to entertain such actions and decide those issues pertaining to the underlying validity of the will, *i.e.*, testamentary capacity

⁶ This accounts for all claims alleged by Petitioner in his Complaint.

⁷ In fact, if the *Marr* holding were persuasive, it would actually support dismissal of Plaintiff’s Complaint for lack of jurisdiction to challenge the New York probate decision.

and undue influence that were *not* raised and resolved in the foreign jurisdiction.” *Id.* at 693 (emphasis added). In *Marr*, the Kentucky court reviewed the probate statute by which the Florida court admitted a will to probate, and determined that, because the Florida court did *not* have to assess testamentary capacity and undue influence to probate the will, by statute, such issues could be examined later by the Kentucky court. *See id.* Unlike the Florida statute, the New York probate process required, by statute, assessment of a will’s validity, including capacity and influence issues. Thus, *Marr* does not apply here.

However, not only is this Kentucky decision not persuasive in West Virginia, it in fact flies in the face of West Virginia’s *own* case law, which requires application of the full faith and credit clause to foreign judgments. *See Woofster*, 71 W. Va. 63, 76 S.E. 131 (1912). Also, even if, by some other analysis, this *Marr* decision were persuasive, the *Marr* facts are distinguishable from the situation at bar because unlike the Florida statute, the New York statute examined in *Marr*, by which the subject NY Will was probated required review of testamentary capacity, fraud, and undue influence, etc. *See* N.Y. Probate Proceedings Law § 59-a-1408.1-2. Thus, Petitioner’s assertion that a West Virginia court should reexamine the probate of the NY Will, despite the fact that issues of capacity and influence raised by Petitioner were already assessed by the New York court cannot succeed. Nothing in *Marr* obligates, or even permits, this Court to ignore the laws of West Virginia, or the priority of the New York probate decision, to reverse the Mineral County Court’s dismissal of Petitioner’s Complaint.

C. IN THE ALTERNATIVE, EVEN IF PETITIONER COULD CHALLENGE THE NY WILL IN WEST VIRGINIA, THE PROPER PROCESS WOULD HAVE BEEN TO CONTEST THE WILL THROUGH THE OPEN AND EXISTING ANCILLARY PROBATE PROCEEDING.

Despite the Petitioner's allegations to the contrary, the Mineral County Court's dismissal of his Complaint was justified in both West Virginia case law and the United States Constitution. However, even if this were *not* the case, the ancillary proceeding for probate of the foreign will was ongoing when Petitioner filed this separate will contest.⁸ App., 17-18. It was not until Petitioner's case was dismissed that the ancillary proceeding could be completed. In West Virginia, the county commission completes the process of ancillary probate of a foreign will. *See* W. Va. Code § 41-5-13. When a foreign will is submitted to the county commission, it presumes, in the absence of evidence to the contrary, "that the will was duly executed and admitted to probate as a will of personalty in the state or county of the testator's domicile," and if it "appears from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of land in this state by the laws thereof, such copy may be admitted to probate as a will of real estate." *See* W. Va. Code § 41-5-13. Thus, the commission has the power to assess the probate of the NY Will as to West Virginia real estate owned by the Decedent. If there were *any proper* method by which to challenge at least the ancillary probate of the NY Will here in West Virginia, it would have been in front of the Commission, which has some level of authority to confirm probate in the foreign court, within the ancillary proceeding, not in a *separate*, parallel action.

To be clear, the probate process in New York includes an assessment of the validity of the will and as such, the county commission in Mineral County, West Virginia would

⁸ After Respondent, as ancillary administrator, took the final step to conclude the ancillary administration by mailing to the Mineral County Commission's Clerk's office the completed Waiver of Final Settlement Containing Personal Representative Affidavit, Petitioner filed his Complaint in Circuit Court, which effectively suspended closure of the ancillary estate pending resolution of this separate action. App., 1-7, 18.

be obligated to award that determination full faith and credit, thereby admitting it to probate in West Virginia. *See* W. Va. Code § 41-5-13. However, because the county commission – not the circuit court – is charged by statute with this ancillary proceeding, it is the county commission – not the circuit court – who may have *any* valid jurisdiction to hear the Petitioner’s claims. Accordingly, dismissal of Petitioner’s Complaint was proper.

D. IN THE ALTERNATIVE, EVEN IF THE MINERAL COUNTY CIRCUIT COURT HAS JURISDICTION TO HEAR PETITIONER’S WILL CONTEST, THE COMPLAINT WAS PROPERLY DISMISSED BECAUSE PETITIONER FAILED TO PLEAD SUFFICIENT FACTS TO SHOW THE PROBATE OF THE NEW YORK WILL WAS IMPROPER.

1. THE DECEDENT’S DOMICILE WAS NEW YORK.

According to Petitioner, the “issue of whether West Virginia has jurisdiction over Petitioner’s Complaint depends on what state [the Decedent] was domiciled in at the time of her death and where the property at issue is located.” *See* Brief of Petitioner at 5, *citing In re Chadwick’s Will*, 80 N.J. Eq. 471, 85 A. 266 (N.J. 1912). First, as Respondent has argued in detail above, jurisdiction is precluded by the application of the full faith and credit clause to the New York probate of the NY Will. Second, Petitioner’s argument is not an accurate representation of the law in West Virginia (which indeed applies the full faith and credit clause to will contests). *See Woofter*, 71 W.Va. 63, 76, S.E. 131 (1912). This is apparent, since Petitioner actually cites only to a New Jersey case and no West Virginia case law. The New Jersey case on which Petitioner pins his hopes, *In re Chadwick’s Will*, holds that courts do not have “general jurisdiction to admit to probate the last will and testament of a nonresident having a domicile at the date of his death in another state, although decedent leave property in this state, except as ancillary to a probate by the courts of the locality of such domicile.” 80 N.J. Eq. at 471, 85 A. at 266. Because the Decedent’s domicile was New York, Petitioner’s own supporting

case law confirms that West Virginia only has jurisdiction as ancillary to the probate of the New York court. *See id.*

Despite Petitioner's assertions to the contrary (not to mention, the additional, unproved assertions not present in the record before the lower court, but nonetheless utilized by Petitioner), at the time of her death, Decedent lived in a permanent assisted living facility in New York. App., 5 . Regardless of the address written on the death certificate, which was simply the last address at which the Decedent lived alone, Petitioner acknowledges that the Decedent moved to New York. App., 18. She left West Virginia in 2012⁹– initially moving in with her sister and niece (the Respondent). She never returned to West Virginia. App., 1-7, 14. After moving to New York, the Decedent executed a new will. App., 3.

It is well-established that a person's domicile is the place where they are and where they intend to retain a permanent address. *See Shaw v. Shaw*, 155 W. Va. 712, 187 S.E. 2d 124 (1972). It cannot be said that the Decedent was not in New York. Given her permanent move to the assisted living facility, and the fact that she never did return to West Virginia forward, it cannot be said that she ever intended to return to West Virginia. *See White v. Tennant*, 31 W. Va. 790, 792, 8 S.E. 596, 598 (1888) (holding that the length of time at which one resided or now resides in one place or another is not dispositive; rather, it is the conjunction of being in a place with the intention of remaining, and/or the intention not to return to the former location, that matters). Therefore, even taking all the facts outlined in the Petitioner's

⁹ According to the Petitioner, the Decedent only went to New York to "visit." However, not only is this assertion not supported by the record in any way (made apparent by the fact that the Petitioner makes no effort to offer a citation), the record instead demonstrates that the Decedent indeed moved her domicile, as she not only moved in with her relative, she moved again to a permanent assisted living facility, where she resided at the time of her death. App., 1-7, 14.

Complaint as true, the Decedent's decision to move to a permanent assisted living facility easily establishes her intent to remain in New York – thereby establishing her new domicile. *See Shaw*, 155 W. Va. at 712, 187 S.E. 2d at 124; App., 14.

In light of these facts, even considering the factors Petitioner demands as necessary, *i.e.* domicile and location of property, jurisdiction does not lie in West Virginia. It lies instead in the place of the Decedent's domicile – New York.¹⁰ Thus, there is no claim upon which relief may be granted, because jurisdiction does not lie in West Virginia. *See W. Va. R. Civ. P. 12(b)(1), (6)*.

2. ANY PURPORTED ERROR IN THE LOWER COURT'S RULING IS HARMLESS, BECAUSE PETITIONER'S CLAIM FOR FRAUD IS NOT SUFFICIENTLY PLEADED.

It is well-settled that the general pleading standard is relatively low for most claims. *See W. Va. R. Civ. P. 8(a)*. However, there are some causes of action, such as Petitioner's claim for fraud, that require a higher standard of pleading. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *W. Va. R. Civ. P. 9(a)*. Petitioner alleged only that Respondent "misled [the Decedent] into executing the NY Will, thereby committing fraud." App., 8. Other factual statements raised in Petitioner's Complaint are generally associated only with his gripes regarding the Decedent's purported domicile or mental condition. *See generally* App., 1-9. He includes nothing to indicate that (1) an act claimed to be fraudulent was the act of the defendant or induced by her;

¹⁰ Petitioner inserts numerous allegations and purported facts that are not supported by the underlying record. Petitioner even acknowledges that "most of the factual allegations as set forth by Petitioner is mere proffer based upon information and belief and without citation." Brief of Petitioner at n.1. However, this only serves to further show that Petitioner failed to properly plead a short and plain statement to show he was entitled to relief. *See W. Va. R. Civ. P. 8(a); 12(b)(6)*. Even if these proffered facts are in fact true, and are also so important or essential to Petitioner's alleged claims against Respondent that Petitioner feels they are necessary to support his position on appeal, they should have been included in the Complaint to properly meet the pleading standard.

(2) that the act was material and false; that it was relied upon and that the Decedent was justified at the time in relying upon it; and (3) that the Decedent was damaged because she relied upon it. *See Lengyel v. Lint*, 167 W. Va. 272, 276, 280 S.E 2d 66 (1981). In fact, it is doubtful that Petitioner even meets the normal Rule 8(a) standard of pleading for this fraud claim, never mind the Rule 9(a) heightened particularity standard necessary for fraud. He states no specific act leading to fraud, does not explain how or even if the Decedent relied on such an act, and does not show how she was damaged in any way. The lower court cannot deny a motion to dismiss where Petitioner fails to point to or identify *any* facts that support each element of fraud. Accordingly, it properly dismissed Petitioner's Complaint. *See* W. Va. R. Civ. P. 9(a), 12(b)(6).

V. CONCLUSION

WHEREFORE, for the reasons set forth herein, Respondent, Christine Torrellas, Ancillary Administratrix of the Estate of Christine Ebert, respectfully requests that this Court affirm the judgment of the Circuit Court of Mineral County, West Virginia.

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Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**RUSSELL W. MASON as Executor of
the Estate of Christine Ebert,**

Plaintiff-Below/Petitioner

Supreme Court No. 15-0726

v.

**CHRISTINE TORRELLAS, Ancillary
Administratrix of the Estate of
Christine Ebert,**

Defendant-Below/Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on 14 December 2015 I served the foregoing "Brief of Respondent" on counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Daniel R. James
Nicholas T. James
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