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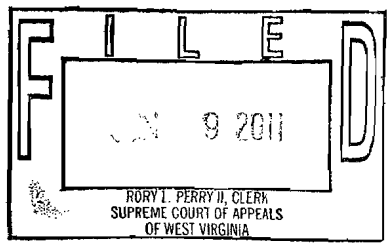
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Robin W. Hammer, Defendant Below,
Petitioner

vs.) No. 11-0075
Thomas M. Hammer, Robert B. Hammer,
Teresa C. Hammer Lang, Mark J. Hammer
and Sharon M. Helms, Plaintiffs Below,
Respondents

PETITIONER'S REPLY BRIEF

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I. MISSTATEMENT OF FACTS BY OPPOSING COUNSEL

Respondents' attorney, David H. Wilmoth, has fabricated a new construction of the facts of this case which did not exist at the time the circuit court made its ruling. Opposing counsel emphasized in argument subsection A of the summary brief, the importance that the lower court considered facts of the case as they existed "at the time of the decision." A review of the lower court's decision will be from this same perspective.

A. REFUSAL TO COMMUNICATE

Respondents state as a fact that, "Upon learning of the existence of this second power of attorney, Tom, Sharon, Robert, Teresa, and Mark attempted to resolve this problem **through discussion** with Respondents below." Attorney David H. Wilmoth probably meant defendants below, not respondents below. **Respondents assert this fact for the very first time in their summary brief and there is no evidentiary support for such a statement anywhere in the Appendix Record. On October 16, 2009 all five respondents signed statements notifying the defendants that, "Should you believe it necessary to communicate with us, we intend to respond only to a court order."** (Appendix rcrd. pp. 380 & 381) The respondents stated in their complaint, "On or about **November 29, 2009, and upon learning of their appointment**, Robert B. Hammer, Mark J. Hammer, and Teresa C. Hammer Lang, each executed a document entitled Notice of Objection to Action." (Appendix rcrd. p. 2, ¶ 5) Respondents' assertion as fact that they attempted to resolve problems with the power of attorney through discussion with the petitioner, **after having already signed documents stating that they would "no longer accept e-mails, telephone calls, or any other form of communication" from the petitioner**, is an absolute falsehood fabricated by their attorney and is not a fact that was considered by the lower court in rendering a decision.

B. KNOWLEDGE OF POWER OF ATTORNEY DATED SEPTEMBER 22, 2008

Respondents state as a fact that at the time of the execution of the second power of attorney dated September 22, 2008, "three of the appointed agents, namely Robert B. Hammer, Teresa Caroldeen Hammer Lang, and Mark J. Hammer were unaware of its execution, contents, provisions, or their appointment." This statement deviates by 11 months, with respect to time, from what was originally written in their complaint and presented to the lower court for consideration; **"Robert B. Hammer, Teresa C. Hammer Lang and Mark J. Hammer were unaware of their appointment as personal representatives or the existence of this document [2008 power of attorney] at the time it was placed of record. This document was placed of record in the aforesaid Clerk's Office on or about August 27, 2009."** (Appendix rcrd. p. 2, ¶ 4) The original statement as presented to the lower court was patently false and it is misleading for opposing counsel to submit a statement of facts to the Supreme Court which attempts to conceal the false allegations in the complaint regarding when his clients actually had knowledge of the existence of the 2008 power of attorney.

The following excerpt of testimony regarding respondents' knowledge of the second power of attorney was taken from the transcript of the first status hearing held in this case on July 1, 2010:

> MR. GUY HAMMER: Yes. Your Honor, the previous statement that the Plaintiffs were not notified of the Power of Attorney is incorrect. I notified, by certified mail, Thomas Michael Hammer and Sharon Marie Helms Hammer – Hammer Helms – by certified mail, return receipt. And I asked my brother, Robin, to mail copies to the other remaining three siblings and he did that." (Appendix rcrd. p. 34, ll. 8-14)

Guy S. Hammer II notified Thomas M. Hammer and Sharon M. Helms via letter dated September 22, 2008 that Ethel M. Hammer had revoked the power of attorney dated November 27, 2002 and thereby revoked all powers and authority granted to them under that document. (Appendix rcrd. p. 68)

Petitioner Robin W. Hammer stated in his answer to the complaint:

> The Defendant denies the allegation that Plaintiffs Robert B. Hammer, Teresa C. Hammer (Lang) and Mark J. Hammer were unaware of the existence of the *General Power of Attorney*, which appointed them as personal representatives, when said document was recorded on August 27, 2009. On September 22, 2008 the Defendant took Ethel M. Hammer to the Davis Trust Company Bank where she executed five original Powers of Attorney before a notary public. In **September of 2008** the Defendant hand delivered an original document to Robert B. Hammer and mailed original documents to Teresa C. Hammer (Lang) and Mark J. Hammer. In **September of 2008** Mark J. Hammer called the Defendant and informed him that his wife, Mary Anne Hammer, became extremely upset when the *General Power of Attorney* was delivered to their house. The Defendant called and left a detailed message for Mary Anne Hammer explaining that her husband had no knowledge whatsoever that he was being appointed as a power of attorney for Ethel M. Hammer. [emphasis added] (Appendix rcrd. p. 63, ¶ 4)

Petitioner Robin W. Hammer issued five interrogatories to Mark J. Hammer specifically in reference to the power of attorney dated September 22, 2008. (Appendix rcrd. pp. 107-108, interrogs. 3-7) Robin W. Hammer informed the circuit court that these "interrogatories were objected to with overly broad objections that actually included every possible objection that they could write." (Appendix rcrd. p. 217, ll. 14-16) Mark J. Hammer refused to answer these interrogatories within 30 days of service. Therefore any grounds for objection were waived pursuant to Rule 33(b)(4) *W. Va. R. C. P.* as evidenced by the certificates of service filed on "10/14/10." (Appendix rcrd. p. 411)

Petitioner Robin W. Hammer stated in his answer to the complaint:

> In **September of 2008** the Defendant asked Robert B. Hammer to contact attorney Stephen G. Jory to request that his client, Thomas M. Hammer, return financial documents to his mother Ethel M. Hammer. The Defendant explained to Robert B. Hammer that he was listed as power of attorney on both documents and Mr. Jory would have a difficult time refusing the request on the basis that he was not a valid personal representative. Robert B. Hammer declined the request stating that we should proceed as if the new *General Power of Attorney* dated September 22, 2008 were valid. [emphasis added] (Appendix rcrd. p. 64)

Via letter to Thomas M. Hammer and Sharon M. Helms dated September 24, 2008, Guy S. Hammer II attempted to recover the financial records of Ethel M. Hammer. (Appendix rcrd. pp. 239-241)

Sharon M. Helms wrote in an email to all of her siblings dated **September 30, 2008** that Guy S. Hammer II "suggested to some of you that I had my opportunity to be Power of Attorney

(which he at no time suggested that I invoke) and that a new power of attorney should be prepared leaving me out. He said he did not intend to inform me in advance. It was quite an unpleasant experience to receive the certified mailings announcing my revocation." (Appendix rcrd. p. 69) Only 8 days after the second power of attorney was executed on September 22, 2008, Sharon M. Helms referred to said document in an email sent to all of her siblings.

Petitioner Robin W. Hammer stated in his answer to the complaint:

> On **October 21, 2008** Teresa C. Hammer (Lang) sent an email to Guys S. Hammer II with CC to all of her siblings stating, "Your attempt to change mom's power of attorney is null and void in the eyes of three of the people included on the document." The allegation that these three plaintiffs had no knowledge of the existence of said Power of Attorney or their appointment as personal representatives is patently false. [emphasis added] (Appendix rcrd. p. 64)

Although Teresa C. Hammer Lang did not specifically identify the three people who believed that the 2008 power of attorney was invalid, it is clear that she meant Robert B. Hammer, Mark J. Hammer and herself. Robin W. Hammer specifically asked Mark J. Hammer in interrogatories if he was one of the three people referred to in this email dated October 21, 2008 and why he alleged in the complaint that he was not aware of the existence of the 2008 power of attorney when it was placed of record on August 27, 2009. (Appendix rcrd. pp. 108-109, interrogs. 8 & 10) Mark J. Hammer refused to answer these interrogatories. For all of the foregoing reasons, it is incredible that Robert B. Hammer, Teresa C. Hammer Lang and Mark J. Hammer all allege in the petition for declaratory judgment that they were not aware of the existence of the second power of attorney when it was recorded by the Clerk of the Randolph County Commission eleven months later on **August 27, 2009**.

C. PRESERVATION OF ASSETS

Respondents state as a fact that Robert B. Hammer, Teresa C. Hammer Lang and Mark J. Hammer executed a document in November of 2009 titled "Notice of Objection to Action" for the intended purpose of protecting the assets of Ethel M. Hammer and a copy was provided to

the Davis Trust Company bank notifying them, "You are also put on NOTICE that the undersigned contest the competency of Ethel M. Hammer at the time of the execution of that certain Power of Attorney dated September 22, 2008." This notice should have piqued the interest of the bank "plaintiffs had Ethel M. Hammer apply for a bank loan in February of 2009, then they had her sign a deed of trust securing a revolving credit line for $142,400.00 in April of 2009." (Appendix rcrd. p. 194) This is especially true in consideration that on March 27, 2009 Robert B. Hammer sent Robin W. Hammer an email stating:

> "We spoke to the president of the Loan Department (of Davis Trust Company) about your concerns regarding the application for the loan. He recommended that we speak to an attorney at Busch, Talbott and Zurbuch. They are the attorneys used by the bank. The attorney recommended that Mom sign the loan application. Additionally, he recommended that her Power of Attorney also sign in the event that Mom's decision making capability was ever called into question." (Appendix rcrd. p. 46, ¶ 8)

The Deed of Trust recorded in the Randolph County Clerk's office does not indicate that anybody signed as Power of Attorney for Ethel M. Hammer. (Appendix rcrd. p. 46, ¶ 8)

Respondents state as a fact that they were fearful that the Notice of Objection to Action was insufficient to protect Ethel M. Hammer's assets and that they filed the instant declaratory judgment action in order to prevent misuse and/or abuse of the 2008 power of attorney by Guy S. Hammer II and Robin W. Hammer. **This statement of fact is being asserted by respondents' attorney for the first time on appeal.** Respondents did not file the declaratory judgment action to prevent misuse and/or abuse of the 2008 power of attorney. Respondents' true desire was to have the 2002 power of attorney to be declared valid in order for them to perpetrate the acts of misuse and abuse of power upon Guy S. Hammer II, one of the individuals the circuit court noted in the guardian ad litem's report who had been "providing excellent care for Ethel Hammer's daily needs and she appears very happy and healthy." (Appendix rcrd. p. 204 ll. 19-22) On October 29, 2010, just two days after the circuit court initially ruled on this case and

dismissed it, the respondents stated their intention to remove all personal property of Guy S. Hammer II from his mother's house; that they would not allow Guy S. Hammer II to spend another night in his mother's house; that Guy S. Hammer II would never be allowed to visit with his mother again unless it was under supervised visitation; and that they would have Guy S. Hammer II arrested if he ever showed up at his mother's home again. (See Affidavit in Appendix rcrd. pp. 390-391) These acts couldn't possibly be construed as done in the "best interests" of Ethel M. Hammer.

Robin W. Hammer issued an interrogatory to Mark J. Hammer requesting that he, "Please identify the genesis of the *Notice of Objection to Action*, which you attached to the complaint as Exhibit C with the notarized signatures of Robert B. Hammer, Teresa C. Hammer Lang and Mark J. Hammer." (Appendix rcrd. pp. 109-111, interrogs. 11-17) Mark J. Hammer refused to answer all seven interrogatories about the Notice of Objection to Action within 30 days of service. Therefore any grounds for objection were waived pursuant to Rule 33(b)(4) *W. Va. R. C. P.* as evidenced by the certificates of service filed on "10/14/10." (Appendix rcrd. p. 411) The document was first notarized on November 20, 2009 by Tessa M. Ware, an employee of attorney David H. Wilmoth. The document was not served upon the petitioner until May 27, 2010, more than half of a year after it was drafted. The declaratory judgment action was filed just 12 days after the petitioner was served the Notice of Objection to Action. (Appendix rcrd. p. 65, ¶ 6)

II. ARGUMENT

A. RESPONDENTS INTENTIONALLY MISSTATED THE FACTS OF THE CASE IN AN EFFORT TO OVERCOME PROBLEMS WITH WHETHER A JUSTICIABLE CONTROVERSY EXISTED

Respondents' attorney has taken creative license in stating the facts when he drafted the complaint and when he prepared the statement of the facts section in the summary brief. "Before

a trial court may grant declaratory relief there must be an actual, existing controversy." Franklin D. Cleckley, et. al., *Litigation Handbook on West Virginia Rules of Civil Procedure* 1152 (3rd ed. 2008)

1. One factor a circuit court should consider is whether the claim involves uncertain and contingent events that may not occur at all.

The West Virginia Supreme Court explained in Syllabus Point 4 of *Hustead on Behalf of Adkins v. Ashland Oil, Inc.* that **one of the factors a circuit court should consider in deciding whether a justiciable controversy exists is, "whether the claim involves uncertain and contingent events that may not occur at all."** *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. 55, 475 S.E.2d 55 (1996). There is a preponderance of evidence in the record that shows that Robert B. Hammer, Teresa C. Hammer Lang and Mark J. Hammer were all aware in 2008 of their appointment as agents for Ethel M. Hammer under the power of attorney executed on September 22, 2008. The contention that these three respondents had no knowledge of the existence of the 2008 power of attorney prior to August 27, 2009 was likely a deliberate and calculated misrepresentation by opposing counsel intended to thwart the circuit court's analysis of whether or not a real controversy existed. Attorney David H. Wilmoth crossed the boundary between being a zealous advocate for his clients and misrepresenting the truth. "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal." Rule 3.3(a)(1) *West Virginia Rules of Professional Conduct.*

Opposing counsel carried the misrepresentation a step further by stating in the complaint, "On or about November 29, 2009, and upon learning of their appointment, Robert B. Hammer, Mark J. Hammer, and Teresa C. Hammer Lang, each executed a document entitled 'Notice of Objection to Action' by which they each exercised their power" to reverse any actions already taken by the defendants under the 2008 power of attorney and notify "all individuals" that they

intended to object to all future actions taken by the defendants under said power of attorney. (Appendix rcrd. p. 2, ¶ 5) Respondents entered into the realm of the hypothetical and conjecture by reversing actions that did not exist and objecting to future actions that did not occur at all. Then only after this case is before the West Virginia Supreme Court does opposing counsel assert as a fact that his clients were fearful about preserving the assets of Ethel M. Hammer.

Robert B. Hammer, Teresa C. Hammer Lang and Mark J. Hammer were each given original power of attorney documents in September of 2008. If there was any truth at all to the nature of the intentions of the respondents, then why did they wait 14 months to draft a Notice of Objection to Action in November of 2009 and 6 more months to serve it upon the petitioner in May of 2010? Robin W. Hammer stated in his answer to the complaint, "The Defendant denies that he ever acted as a personal representative for Ethel M. Hammer under any authority granted by the General Power of Attorney executed on September 22, 2008, which is something that the plaintiffs clearly are unable to say the same." (Appendix rcrd. p. 65, ¶ 6) Guy S. Hammer II, defendant below, only used the Power of Attorney in an attempt to obtain the financial documents that belonged to Ethel M. Hammer. (Appendix rcrd. p. 34, ll. 3 & 17) Respondent Thomas M. Hammer's criminal defense lawyer, Stephen G. Jory, refused to turn over the documents, therefore respondents' desire to reverse the action of Guy S. Hammer II is moot. (Appendix rcrd. p. 243) Respondent Sharon M. Helms stated in an email dated 09-30-08 that Thomas M. Hammer refused both verbal and written requests by her for the return of the financial documents belonging to Ethel M. Hammer. (Appendix rcrd. p. 69, bottom ¶)

Robert B. Hammer, Teresa C. Hammer Lang, and Mark J. Hammer's self-delusional fears that they were unable to protect the assets of Ethel M. Hammer from the defendants below were misplaced. A careful look at the record reveals that concerns about respondents Thomas

M. Hammer and Sharon M. Helms' involvement with the financial affairs and assets of Ethel M. Hammer are genuine. Thomas M. Hammer failed to list any money due by him to the estate of Guy S. Hammer when he performed the appraisement of the estate as the administrator, even though he owed $239,754.31 as of the last annual financial statement preceding the death of Guy S. Hammer. (Appendix rcrd. p. 345) Thomas M. Hammer threatened to file a petition in court and invoke the rights of adverse possession regarding a .91 acre piece of property listed on the appraisement of the estate of Guy S. Hammer. (Appendix rcrd. pp. 282 & 392) He made this threat while serving in a fiduciary capacity as administrator of the estate, which still has not been settled in almost 13 years. On August 24, 2008 Thomas M. Hammer submitted a $37,000.00 bill to his mother, Ethel M. Hammer, to be considered due and payable upon receipt. (Appendix rcrd. p. 235) The bill stated that it was for services rendered as itemized in a letter to his siblings dated April 28, 2008. (Appendix rcrd. p. 396) A review of this letter will reveal that the $37,000.00 bill was a retroactive bill for services allegedly rendered during an **8 year period of time**, which was barred by the statute of frauds because there was no written contract. The April 28, 2008 letter also reveals that Thomas M. Hammer billed his mother $17,800.00 for the use of vehicles from 2000 through 2008 despite the fact that she has not had a driver's license since March 30, 2004. (Appendix rcrd. p. 276)

The following excerpt is from an email that Sharon M. Helms sent to Guy S. Hammer II and Thomas M. Hammer on August 20, 2008:

> Tom, I called you today to ask you for the papers we need to proceed in caring for Mom such as their Federal Tax ID number, business license number, etc. Rob [Robin] is very concerned and he is planning to go to the Department of Health & Human Services with your invoice asking Mom for $37,000 and ask them to take steps to get you to return all needed papers concerning Mom and to cease billing Mom for money she doesn't owe nor can she pay. He feels this is abuse of the elderly. You hung up on me before I could finish telling you why I was calling.
> If there is any way to resolve this without going to Social Services or to court, I believe we should attempt to do it now. If Rob goes to DHHR, they will come out and interview Mom. I didn't

> want Mom to know about any of this. If Rob goes to DHHR, or charges are brought against Tom, she would find out about everything and I believe this would destroy her. (Appendix rcrd. p. 399)

2. Another factor a circuit court should consider is whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest.

The West Virginia Supreme Court explained in Syllabus Point 4 of *Hustead on Behalf of Adkins v. Ashland Oil, Inc.* that **another factor a circuit court should consider in deciding whether a justiciable controversy exists is, "whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest."** *Hustead on Behalf of Adkins, supra.* Robin W. Hammer stated in his answer to the complaint that;

> "If the Court were to declare that the [2008] General Power of Attorney was so technically flawed as to render it invalid, the entry of such judgment or decree would not terminate the uncertainty or controversy giving rise to this civil action. Furthermore, if the competency of Ethel M. Hammer were not the true underlying issue in this civil action, then plaintiffs' attorney, David Wilmoth, could simply draft a new general power of attorney." (Appendix rcrd. p. 66, ¶ 7)

During the hearing held on October 27, 2010 Robin W. Hammer stated to the circuit court, "She [Ethel M. Hammer] would have signed anything they laid down before her." (Appendix rcrd. p. 211, l. 20) A simple declaration as to which, or if either of the two separate power of attorney appointments was valid would not have terminated the controversy as either party could have had Ethel M. Hammer sign a new power of attorney document.

B. RESPONDENTS' COUNSEL RAISED THE ISSUE OF THE COMPETENCY OF ETHEL M. HAMMER

Attached to the complaint as exhibit C was the Notice of Objection to Action in which three of the respondents contested the competence of Ethel M. Hammer as of September 22, 2008. The WV Supreme Court held that, "Rule 10(c) of the West Virginia Rules of Civil Procedure makes a copy of any written instrument that is an exhibit to a pleading a part thereof for all purposes. The contents of such exhibits may be considered as evidence for dispositive motions." Syl. pt. 2, *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W. Va. 498, 625 SE2d 260,

(2005). During a status hearing on August 19, 2010 respondents moved the court for a judgment on the pleadings, which is a dispositive motion referred to by the holding in *Aluise*. (Appendix rcrd. p. 75, l. 21) Petitioner Robin W. Hammer stated that the respondents had raised the issue of the competence of Ethel M. Hammer in Exhibit C of the complaint and the issue needed to be adjudicated. (Appendix rcrd. p. 76, ll. 15-18) Respondents' attorney stated to the circuit court, "We did not raise the issue of competency." (Appendix rcrd. p. 77, l. 1) The petitioner has since informed respondents' attorney of the holding in *Aluise* three times; (a) in a motion, (b) during a hearing, and (c) in a memorandum of argument. (Appendix rcrd. pp. 181, 209 & 268) The holding in *Aluise* is still apparently good case law. See Franklin D. Cleckley, et. al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, p. 45 (3rd ed. Cum. Supp. 2011)

Notwithstanding that respondents' attorney is now unable to claim ignorance of the law, he stated in the statement of facts section of the summary brief that the defendants below "raised the issue of Mrs. Hammer's competency at the time of the execution of the second document." During November of 2009 respondent Sharon M. Helms informed Heidi Ferguson, a caregiver of Ethel M. Hammer, that Dr. Terry Hummer was going to testify that she had diagnosed Ethel M. Hammer with dementia. (Appendix rcrd. p. 184, ¶ c) In a letter dated April 19, 2010 and addressed to attorney David H. Wilmoth, Dr. Terry Hummer concluded, "I would be unable to state that Ms. Hammer is competent, from a cognitive standpoint." (Appendix rcrd. p. 307) This letter is likely one piece of evidence that attorney David H. Wilmoth intended to introduce during the "half day" trial that he originally requested from the circuit court during the July 1, 2010 status hearing. (Appendix rcrd. p. 32, ll. 15-18) These facts belie respondents' assertion as fact that they did not raise the issue of competency. "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal." *Michie's West Virginia Code*

Annotated Court Rules, p. 934, (2009 Edition). Rule 3.3(a)(1) of the *West Virginia Rules of Professional Conduct* states that, "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."

If respondents had not contested the competency of Ethel M. Hammer it is unlikely that their petition for declaratory judgment would have survived a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*. Even if the circuit court exercised its discretion and chose to hear this case and ruled that the reversal clause of the 2008 power of attorney was invalid there is a severability clause which states, "If any provision of this instrument shall be invalid or unenforceable under applicable law, such part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of such provision or the remaining provisions of this instrument." As respondents suggested, it is useful to compare this matter to one in which interpretation of an insurance contract is at issue. In such an instance, this Court has held that, "Language in an insurance policy should be given its plain, ordinary meaning." Syllabus Point 1, *Soliva v. Shand, Morahan, & Co.*, 176 W.Va. 430, 345 S.E.2d 33, 33 (1986) Absent any issue over competency as respondents' attorney alleged, and given the plain and unambiguous language of the severability clause, the circuit court **should** have only found the reversal clause invalid. Furthermore, any judgment entered without addressing the issue of competency would have been an illusory remedy as either party could have had Ethel M. Hammer sign another power of attorney rendering the declaratory judgment ineffective in terminating the controversy, which clearly was not the intent of the West Virginia Legislature as stated in W. Va. Code §55-13-6: "The court may refuse to render or enter a declaratory judgment or decree where such

judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

C. A CONFLICT OF INTEREST AMONG THE RESPONDENTS REGARDING THE ISSUE OF COMPETENCY IS THE MOTIVE FOR WHY THEIR ATTORNEY (1) MADE FALSE REPRESENTATIONS TO THE COURTS, (2) REFUSED TO COOPERATE WITH DISCOVERY REQUESTS, AND (3) DID NOT RESPOND TO THE MOTION FOR MORE DEFINITIVE STATEMENT

As stated in exhibit C of the complaint, three of the respondents contested the competency of Ethel M. Hammer as of September 22, 2008. (Appendix rcrd. p. 14) During the same period of time that three respondents allege that Mrs. Hammer was incompetent, the remaining two respondents were instrumental in having her apply for and obtain a revolving credit line for $142,400.00 in April of 2009 based upon her signature alone and they secretly had her sign a new medical power of attorney on October 13, 2009. (Appendix rcrd. pp. 194 & 48) Petitioner Robin W. Hammer asked Sharon M. Helms in interrogatory no. 31, "What knowledge do you have concerning other secret documents that plaintiffs have had Ethel M. Hammer sign?" (Appendix rcrd. p. 161) Attorney David H. Wilmoth was representing two factions of clients who were on opposite ends of the spectrum with regard to competency. Rule 1.7 of the *West Virginia Rules of Professional Conduct* addresses potential conflicts of interest among clients, "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client". Attorney David H. Wilmoth had an even greater duty as an officer of the legal system to represent the truth in all matters before the courts. Instead of resolving the conflict of interest among his clients in a moral and ethical manner, he chose a solution that subsequently involved making false representations to the courts and refusing to cooperate with discovery requests, all of which was a detriment to petitioner Robin W. Hammer in the instant case.

Respondents argue that because the circuit court appointed a guardian ad litem for Ethel M. Hammer on August 19, 2010 "the purpose of the Motion for More Definite Statement was satisfied." The petitioner first informed the circuit court during a status hearing on July 1, 2010:

> The position that we're taking is that that my mother, Ethel Marie Hammer, is – needs to be in a protected status, needs a Guardian *Ad Litem* appointed. And the – neither Power of Attorney should be used. That she needs someone to protect her interests. (Appendix rcrd. p. 33, ll. 1-5)

Nowhere in the Motion for More Definitive Statement did Robin W. Hammer ask that a guardian ad litem be appointed for Mrs. Hammer. The only request made by petitioner was "that the Court order respondents Thomas M. Hammer and Sharon M. Helms to state their position regarding the claim that Ethel M. Hammer is incompetent." (Appendix rcrd. p. 46) On October 18, 2010 the petitioner responded to a counter-motion and informed the Court that:

> Attorney David H. Wilmoth should be aware that the defendant's Motion for More Definitive Statement is scheduled for hearing on October 27, 2010... Defendant Robin W. Hammer intends to amend his answer to incorporate his counterclaims after the Court addresses the issue of competency as it relates to the positions being taken by each of the five plaintiffs. (Appendix rcrd. p. 186, ¶ 6)

D. THE USE OF THE DECLARATORY JUDGMENT PROCEDURE IN A MANNER WHICH VIOLATES A LITIGANT'S CONSTITUTIONAL RIGHTS IS NOT WITHIN THE DISCRETION OF THE CIRCUIT COURT THEREFORE THIS COURT SHOULD TREAT THE DISMISSAL OF THIS CASE AS ONE MADE PURSUANT TO THE MOST APPROPRIATE RULE WHICH IS A SUMMARY JUDGMENT

W.Va. Const. Art. III, § 10 provides that: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." The West Virginia Supreme Court held in Syllabus Point 1 of *Simpson v. Stanton* that: "Section 10, article 3, of the Constitution of West Virginia, properly applied, secures to a litigant a reasonable opportunity to be heard when the processes of the courts are invoked against him." *Simpson v. Stanton*, 119 W.Va. 235, 193 S.E. 64, 64 (1937). Petitioner Robin W. Hammer stated in his memorandum of argument submitted to the circuit court:

> In October of 2009 defendant Robin W. Hammer went to the Randolph County Prosecuting Attorney's Office and spoke to attorney Andy Mendelson about pressing charges against plaintiffs Thomas M. Hammer and Robert B. Hammer for their involvement in efforts to defraud the defendant out of more than $40,000.00 associated with the purchase of a house from Ethel M. Hammer. (Appendix rcrd. p. 261)

The petitioner had a property interest in the outcome of the declaratory judgment concerning the validity of the 2002 power of attorney naming Thomas M. Hammer as a principal agent and Robert B. Hammer as a successor agent for Ethel M. Hammer. Consequently, Robin W. Hammer had a due process right to a reasonable opportunity to be heard. The due process requirement that a litigant be provided an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 885 S. Ct. 1187, 1191, 14 L.ED. 2d 62, 66 (1965).

The circuit court denied the petitioner a bench trial despite objections raised by both defendants below. (Appendix rcrd p. 224, l. 23 & p. 225, l. 23) The manner in which the lower court decided the case did not provide for the opportunity to call witnesses or to question respondents about documents they submitted into the record and therefore did not provide a meaningful opportunity to be heard. It was not within the discretion of the lower court to adjudicate the case in a manner which violated petitioner's constitutional rights to due process.

A summary judgment "is a determination that, as a matter of law, there is no issue of fact to be tried." Franklin D. Cleckley, et, al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, p. 1112 (3rd ed. 2008). The circuit court stated during the hearing held on October 27, 2010: "The Court's decision is that those issues of fact are not relevant to my determination." (Appendix rcrd. p. 225, l. 19) When Guy S. Hammer II, a defendant below, informed the court that the material issues of fact could be pointed out with just 10 or 15 minutes of direct examination of the three respondents who were present, the court stated, "even with that information, I think it's an issue of determination of law and an issue for The Court to decide,

not an issue of whether or not a jury should decide this." (Appendix Record p. 226) Whether or not Robert B. Hammer succeeded Thomas M. Hammer and Sharon M. Helms under the provisions of the 2002 power of attorney as the sole agent for Ethel M. Hammer and then resigned on October 16, 2009 is a material issue of fact, not a determination of law. The WV Supreme Court stated in footnote 1 of *Booker v. Foose*, "We are not bound by the label below, and we will treat the dismissal as one made pursuant to' the most appropriate rule." *Booker v. Foose*, 216 W.Va. 727, 613 S.E.2d 94 (2005). *Kopelman and Associates, L.C. v. Collins*, 196 W.Va. 489, 494, 473 S.E.2d 910 (1996). *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996). The instant case involved a summary judgment.

E. WHY DID THE COURT DECIDE THE CASE IN THIS UNUSUAL MANNER?

Respondents claim the petitioner knew of the basis for the appearance of impropriety between July and October of 2010 and thereby waived the issue by not raising it before the circuit court. This is not true. There is no indication in the record that the petitioner was aware of Judge Wilfong's family business connections with Thomas M. Hammer at any time before January 8, 2011. On January 7, 2011 petitioner filed a copy of the Notice of Appeal to the Supreme Court with the Circuit Clerk's Office. (Appendix rcrd. p. 412) Thomas M. Hammer did not deny the sworn affidavit of petitioner stating that the next day, on January 8, 2011, he contacted the petitioner and said he was going to sue him for everything he owned, that he bought his last eight new mobile homes from Judge Wilfong's parents, Joe and Janet Godwin who work at Roy's Home Sales, and then said "Good luck sweetie." (see Exhibit C of the motion filed with the WV Supreme Court requesting a stay of the circuit court order) As directed by the Scheduling Order, and pursuant to *Rev. R.A.P.* 7 (e), the petitioner served a letter upon the respondents on March 7, 2011 stating: "The issue of judicial conflict will also be raised in my

appeal brief. **I had no knowledge of the business relationship between Thomas M. Hammer and members of Judge Wilfong's family prior to January 8, 2011**." [no emphasis added]

Judge Wilfong, however, became aware of Thomas M. Hammer's unusual business practices beginning July 1, 2010 when she heard that respondent had business relationships with all local law firms so no local attorney could bring actions against him in Elkins (Appendix rcrd. p. 36, l. 8) and that a claim of criminal tax fraud involving the purchase of 45 mobile homes was behind the power of attorney struggle. (Appendix rcrd. p. 33, l. 21) After learning of respondent's mobile home business, Judge Wilfong had a duty to consult with members of her family regarding any possible conflict and to inform the petitioner of any appearance of impropriety. The only salespersons listed on Roy's Home Sales' web site are Matt Wilfong (judge's husband) and Joe and Janet Godwin (judge's parents).

Two months later, on or about September 2, 2010, respondent and attorney David H. Wilmoth came before Judge Wilfong for a hearing on the matter of *Thomas M. Hammer, et al v. Shoemake, et. al.*, Civil Action No. 10-C-10, regarding and culminating with purchase of the property across the road from Thomas M. Hammer's mobile home business. This property combined with the .91 acre airport property listed by respondent on the probate appraisement (Appendix rcrd. p. 282), a lease signed by respondent for this property (Appendix rcrd. p. 393) and a threat of adverse possession to use this property (Appendix rcrd. p. 392), document a potential mobile home business expansion and the opportunity for a pecuniary benefit by the judge's family, in the form of commissions, if they sell the respondent additional homes.

On January 20, 2011 petitioner requested in a post-judgment motion to the circuit court that: "Whatever influence or control that millionaire Thomas M. Hammer claims to have over the Twentieth Judicial Circuit of West Virginia and the West Virginia State Police be put in

abeyance by staying the order of the court entered December 14, 2010 pending appeal to the West Virginia Supreme Court of Appeals." Although this motion was not designated by either party as part of the Appendix Record, it can be found in the complete record that was transmitted by the Randolph County Circuit Clerk's office. The reason that the statement made by Thomas M. Hammer was not incorporated into the motion filed with the circuit court is because petitioner had only Thomas M. Hammer's word that Judge Wilfong's parents were in the mobile home business until February 12, 2011 when petitioner first found that Joe and Janet Godwin (judges parents) and, surprisingly, Matt Wilfong (judges husband) were the only salespersons listed on the Roy's Home Sales web site (See Exhibit D of Motion for Stay of Circuit Court Order filed with the Supreme Court). Petitioner then called the judge's mother, Janet Godwin, on February 15, 2011 and verified that she sold mobile homes to respondent Thomas M. Hammer.

On February 22, 2011, just 7 days after verifying that there was an issue regarding the appearance of impropriety concerning past and potential future business transactions between members of the judge's family and respondent Thomas M. Hammer, petitioner filed a Motion for Stay of Circuit Court Order with the Supreme Court that cited multiple violations of the Code of Judicial Conduct including:

> "a judge shall not 'knowingly permit others to convey the impression that they are in a special position to influence the judge.'" Page 2, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.' Page 3, "A judge's impartiality might be reasonably questioned since the judge's husband, mother and father all sell mobile homes for a living and one of the parties to the case is in the mobile home business and has purchased eight mobile homes from members of the judge's family and there is an ongoing economic interest in future business transactions." Page 4, "The petitioner specifically informed the circuit court that one of the illegal activities was the failure to pay sales tax on purchases of mobile homes valued at more than $400,000.00. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. The circuit court judge failed to disclose that her husband, father and mother all work locally in the mobile home sales business." Page 4.

Thomas M. Hammer admitted that he purchased several mobile homes in or about 2002 from Janet Wilfong (Judge Wilfong's mother) in a sworn affidavit on March 3, 2011. (see lines 1 & 2 of attachment to Response to Petitioner's Motion for Stay of Circuit Court Order dated March 4, 2011) Respondent's indication of special influence with this sitting judge stands unrebutted on the record. Fresh from his legal victory over the power of attorney, respondent threatened to sue petitioner for everything he has, confident he would win. At the time judge Wilfong heard this matter there was an extant or potential business relationship between respondent and the mobile home dealer where her husband and both parents worked. Supreme Court Justice Robin Davis ruled that a 1985 case, involving a lawyer, well before becoming a judge, created a conflict of interest in 2009 for Judge Thornsbury (about 24 years later) and removed him from the case (Mingo County) *Stanley v. Massey & Rawl.* Passage of time does not remove a conflict, especially a valued business transaction, with repeat business potential with an existing customer in a small community.

In *Clint Hurt & Assoc. V. Rare Earth Energy, Inc.*, the Supreme Court held: "Generally, we have declined to consider non-jurisdictional questions that have not been considered by the trial court." *Clint Hurt & Assoc. v. Rare Earth Energy, Inc.*, 198 W.Va. 320, 480 S.E.2d 529 (1996). This is a general, but not absolute, rule. In a case when parties of one side and the Judge have knowledge of actual and/or potential bias or conflict and have not brought this information to light, how can it be **fair** to penalize defendant for ignorance of these concealed facts? In *Whitlow v. Bd. Of Educ. Of Kanawha County*, 190 W. Va. 223, 226, 438 S.E. 2d 15, 18, (1993), this Court gave the following reasons for their refusal to consider new issues on appeal:

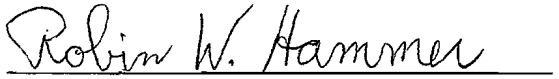
> "The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the issue of **fairness.**"

In the interest of **fairness**, can this Court allow a decision to stand under a cloud of impropriety when all of the evidence is in the record, except for one connecting fact unknown to the defendants below until after conclusion of the proceedings in the lower court, regarding a fundamental matter of justice that is the province of this Court (Disqualification of a judge)? The respondent, Thomas M. Hammer, believed that he had influence with the judge. The appearance of improper influence exists on the record. It was egregiously and insidiously **unfair** for Thomas M. Hammer to flaunt his influence with Judge Wilfong in the face of petitioner in a purported mockery of justice, impugning the integrity of the court and gratuitously adding insult to petitioner's injury.

III. CONCLUSION

In consideration that respondents failed to (1) file a verified complaint, (2) sign verified answers to interrogatories, (3) proffer affidavits, or (4) testify under oath that Robert B. Hammer did not succeed Thomas M. Hammer and Sharon M. Helms as the agent for Ethel M. Hammer under the provisions of the 2002 power of attorney and then resign effective October 16, 2009, the petitioner respectfully requests that this Court reverse the decision of the lower court and enter summary judgment in favor of the petitioner; that the issue of the circuit court's failure to respond to the motion for more definitive statement as it relates to the preservation of counterclaims be addressed; and that the statute of limitations regarding any counterclaims arising out of the issue of the competency of Ethel M. Hammer and/or any actions taken by agents of Ethel M. Hammer be tolled for the period of time that this declaratory judgment action was pending.

Respectfully submitted,



Robin W. Hammer, petitioner

CERTIFICATE OF SERVICE

I, ROBIN W. HAMMER, hereby certify that I have served a true and correct copy of the foregoing *Petitioner's Reply Brief* upon David H. Wilmoth, attorney of record for the Respondents, Thomas M. Hammer, Robert B. Hammer, Teresa C. Hammer Lang, Mark J. Hammer, and Sharon M. Helms, via hand delivery to the following address:

David H. Wilmoth
427 Kerens Avenue, Suite 3
Elkins, WV 26241

DATED: This 6th day of June, 2011.

Robin W. Hammer

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