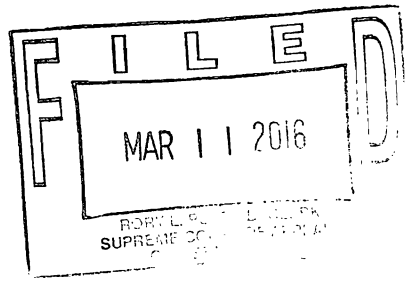
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



ANN KENDALL MORRIS, JOSEPH GREENE, CAROLYN BESTE and MICHAEL BESTE,

Petitioners (Plaintiffs below),

v.

Docket No.: 15-1035

THE ESTATE OF ROBERT LEE MORRIS, EUGENIE MATYAS, individually and in her capacity as the Executrix of and for the ESTATE OF ROBERT LEE MORRIS, EDWARD M. MATYAS and JULIA MATYAS,

Respondents (Defendants below).

BRIEF OF THE RESPONDENTS

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II. STATEMENT OF THE FACTS AND CASE

A. INTRODUCTION

This case is a dispute over the Estate of Robert L. Morris who died on October 27, 2014 in New Jersey.

The Defendant, Eugenie Matyas, and the Plaintiffs, Ann Kendall Morris and Carolyn Beste, are the three children of the late Robert L. Morris and his late wife, Ann Vintroux Morris. Complaint, ¶ 12; A.R. 15. Eugenie Matyas is the mother of the Defendants, Edward M. Matyas and Julie M. Matyas, both in their twenties and the only two grandchildren of Mr. and Mrs. Morris. Complaint, ¶¶ 6 and 7; A.R. 48-49. The Plaintiffs, Ann Kendall Morris and Carolyn Beste, do not have children. Affidavit of John Vintroux, ¶ 6; A.R. 260-261. Mr. Vintroux who resides in Charleston, Kanawha County, West Virginia, was the brother of Ann Vintroux Morris and remained a life-long bachelor and frequently visited his sister and brother-in-law, Robert L. Morris, with whom he had a close relationship. Affidavit of John Vintroux, ¶¶ 1, 2, 3, 4, 5 and 6; A.R. 259-260.

Mrs. Matyas is a resident of New Jersey. Complaint, ¶5; A.R. 21. The Plaintiffs, Ann Kendall Morris, and her husband, Joseph Green, are residents of West Virginia. Complaint, ¶¶ 1 and 2; A.R. 21. The Plaintiffs, Carolyn Beste, and her husband, Michael Beste, are residents of New Mexico. Complaint, ¶¶ 3 and 4; A.R. 21. Edward M. Matyas and his sister, Julia A. Matyas, are residents of New Jersey or Pennsylvania. Report of Guardian, p. 9; A.R. 29.

On April 7, 2011, Mr. Morris executed a General Power of Attorney ("2011 POA") and Last Will Testament ("2011 Will"). Complaint, ¶¶ 15 and 19; A.R. 23-24, 240-45, 253-56. Mr. Morris's 2011 Will and General Power of Attorney were drafted by Harry P. Henshaw, III,

Esquire, a well known Charleston, West Virginia, estate and tax attorney who has been practicing law for over thirty years. Affidavit of Eugenie Matyas, ¶ 12; A.R. 423. The 2011 Will appoints Mrs. Morris as executor and Eugenie Matyas as the alternate; similarly, the 2011 Power of Attorney appoints Mrs. Morris as attorney-in-fact and Eugenie Matyas as the alternate. Affidavit of John K. Vintroux, ¶¶ 8 and 17; A.R. 261-62, 266-67.

After Mrs. Morris's death on August 10, 2012, Mr. Morris was in poor health such that he could not live alone. Neither Ann Kendall Morris nor Carolyn Beste were willing or able to care for their father, and therefore, Mrs. Matyas moved her father to her home in New Jersey in August, 2012. Affidavit of John Vintroux, ¶ 25; A.R. 270-71.

B. THE KANAWHA COUNTY GUARDIANSHIP PETITION, CIVIL ACTION NO. 12-G-100

In or about December, 2012, Ann Kendall Morris and Carolyn Beste filed a Petition in the Circuit Court of Kanawha County, West Virginia (Civil Action No. 12-G-100), seeking to have Mr. Morris declared incompetent and to have a guardian appointed for him. The Petition was denied by the Mental Hygiene Commissioner because of a failure to establish that Mr. Morris was legally incapacitated. Affidavit of Carolyn and Michael Beste, ¶ 7; A.R. 400. The Court accepted the findings of the West Virginia Mental Hygiene Commissioner and dismissed the Petition by Order, dated February 11, 2013. A.R. 257-58. This finding that the Plaintiffs failed to establish Mr. Morris's incapacity was made twenty-two months **after** he executed his Will and Power of Attorney on April 7, 2011. It logically follows that if Mr. Morris was not incapacitated in February of 2013, he was not incapacitated twenty-two months earlier in April of 2011. Yet, the Plaintiffs claim the Will and Power of Attorney are void because Mr. Morris was incapacitated on April 7, 2011, the day they were executed.

C. THE KANAWHA COUNTY CIVIL ACTION NO. 14-C-749

On April 16, 2014, the Plaintiff, Ann Kendall Morris, filed a Civil Action, No. 14-C-749, in the Kanawha County Circuit Court. Brief of the Plaintiffs in Response to the Defendants' Motion to Dismiss, A.R. 379; Affidavit of Carolyn Beste and Michael Beste, A.R. 400. The Complaint asserts that Mr. Morris's Will and Power of Attorney are invalid and that Eugenie Matyas unjustly enriched herself and her family from Mr. Morris's Estate under the Power of Attorney.

D. THE NEW JERSEY VERIFIED COMPLAINT FOR APPOINTMENT OF GUARDIAN, DOCKET # 14-682

On May 13, 2014 a Verified Complaint for Appointment of a Guardian for an Alleged Mental Incompetent was filed by Eugenie Matyas in the Superior Court of New Jersey, Chancery Division, Gloucester County, Docket # 14-682, seeking her appointment as guardian for her father. Affidavit of Carolyn and Michael Beste; A.R. 380, 384. On May 13, 2014, an Order to Show Cause was entered in Docket No. 14-682, under which Mrs. Matyas was appointed as temporary guardian for Mr. Morris, but later on July 30, 2014, when Gerald Sinclair, Esquire was appointed as the Guardian Ad Litem, Mrs. Matyas was directed to refrain from acting as a temporary guardian. A.R. 635-36.

Mr. Morris died in New Jersey on October 27, 2014. A.R. 258.

The New Jersey Guardianship proceeding was dismissed shortly after Mr. Morris's death. Affidavit of Carolyn and Michael Beste, ¶10; A.R. 401. The Counterclaim in the New Jersey action, Docket # 14-682 (A.R. 320-350), asserts essentially the same factual allegations that are asserted by the Plaintiffs in the Kanawha County Civil Actions Nos. 14-C-749 and 2197.

E. THE VOLUNTARY DISMISSAL OF KANAWHA COUNTY CIVIL ACTION NO. 14-C-749 AND THE FILING OF KANAWHA COUNTY CIVIL ACTION NO. 14-C-2197

The Civil Action No. 14-C-749 before Judge Charles E. King was voluntarily dismissed by the Plaintiffs' Notice of Dismissal on December 18, 2014, for reasons not specified in the Notice. However, a new Complaint (Civil Action No. 14-C-2197) making essentially the same factual allegations was filed by the Plaintiffs in Kanawha County Circuit Court on December 27, 2014. The issue that particularly irks the Plaintiffs is that Mr. Morris's Will bequeaths 5% of his Estate to each of his only grandchildren, Edward M. Matyas and Julia A. Matyas. The Plaintiffs' Complaint asserts that the earlier 2008 Will and the 2011 Will are similar except that the 2011 Will adds each of the two grandchildren as 5% beneficiaries. Complaint,¶ 17; A.R. 17.

This Civil Action No. 14-C-2197 was reassigned from Judge Kaufman to Judge King on January 14, 2015. Judge King had been presiding over Civil Action No. 14-C-749, prior to its dismissal. Prior to the reassignment, on January 8, 2015, Judge Kaufman heard arguments on the Plaintiffs' Motion for an Injunction and denied the Motion.

The Estate obtained a very attractive offer (more than the appraised value) for the purchase of Mr. Morris's house in Kanawha City. Affidavit of Jeffrey V. Puff, ¶23.b; A.R. 113-14. However, the Plaintiffs had filed a Lis Pendens in Kanawha County Civil Action No. 14-C-2197, as they had in Civil Action No. 14-C-749. Therefore, the Defendants filed a Motion to Dismiss or Stay and to Expunge Lis Pendens on February 2, 2015. A.R. 88-89. The Motion requests that the Court enter an Order expunging the Lis Pendens filed by the Plaintiffs to allow for the sale of Mr. Morris's residence in Charleston, West Virginia. The Motion requests that

the Plaintiffs' Complaint be dismissed for lack of personal jurisdiction under W.Va. R. Civ. P. 12(b)(2) and for reasons of comity.

A Final Order Permitting Sale of Real Estate was entered by Judge King on February 15, 2015. A.R. 612-16. This Order released the Lis Pendens, authorized the sale of the residence and ordered that the proceeds be placed in the Registry of the Court. A.R. 613. The Order also granted the Plaintiffs' Motion to Continue the hearing upon the Defendants' Motion to Dismiss. A.R. 612.

F. THE NEW JERSEY VERIFIED COMPLAINT TO SET ASIDE PROBATE, DOCKET # 15-00658

On May 1, 2015, the Plaintiffs filed a Verified Complaint to Set Aside Probate in New Jersey, Docket # 15-00658. A.R. 466-480. As is discussed below, the Verified Complaint asserts essentially the same claims that were asserted in all of the earlier West Virginia and New Jersey actions.

G. THE DISMISSAL OF KANAWHA COUNTY CIVIL ACTION NO. 14-C-2197 WITHOUT PREJUDICE UNDER RULE 12(B)(2) AND FOR REASONS OF COMITY

A hearing was held in front of Judge King on August 31, 2015, upon the Motion to Dismiss In Civil Action No. 14-C-2197. On September 22, 2015, the Circuit Court entered an Order Dismissing the Plaintiffs' Complaint without prejudice pursuant to the W.Va. R. Civ. P. 12(b)(2) and for reasons of comity. A.R. 618-624.

On October 2, 2015, the Plaintiffs' Rule 60(b) Motion for Reconsideration was filed. It was set for hearing before Judge King on January 13, 2016, but the Plaintiffs moved to continue the hearing by Motion filed on December 29, 2015. Judge King did not act on the Motion to

Continue. The Plaintiffs did not make an appearance in Circuit Court on January 13, 2016, and Judge King did not rule on the Motion to Reconsider.

H. SIMILARITY OF NEW JERSEY AND KANAWHA COUNTY PROCEEDINGS

The proceedings in New Jersey were substantial and involve substantially all of the issues involved in Kanawha County Civil Action No. 14-C-749, and in the present Kanawha County Civil Action No. 14-C-2197. Affidavit of Jeffrey V. Puff, ¶ 4; A.R. 107. For example, the allegations in the Complaint in Civil Action 14-2197 as to unequal gifting in Paragraph 24 (A.R. 24) are also set forth in Paragraph 20 of the New Jersey Counterclaim, Docket # 14-682. A.R. 325-26. The allegations as to $66,000.00 missing set forth in Paragraph 25 of the Complaint in Civil Action 14-C-2197 (A.R. 24-25) is essentially the same allegation in Paragraph 18 of the New Jersey Counterclaim, Docket # 14-682 (A.R. 324-25), and ¶ 31 of the Verified Complaint in Docket #15-00658. A.R. 474-75. The allegation as to lack of accounting in Paragraph 26 of the Complaint in this case is essentially the same as the allegation in Paragraphs 21-23 of the New Jersey Counterclaim (A.R. 326), and ¶ 31 of the Verified Complaint. A.R. 474-75. The allegation that Mr. Morris's account was made transferrable on death in Paragraph 9 of the Motion for an Injunction in Civil Action No. 14-2196 (A.R. 473-74) is essentially the same as the allegation in Paragraphs 15-17 of the Counterclaim in Docket # 14-682. A.R. 324.

An historical summary of the New Jersey Proceedings is set forth in the Affidavit of Jeffrey V. Puff, which is attached to the Defendants' Motion to Dismiss. A.R. 106-117. The Affidavit's attachments include the reports of Gerald Sinclair, an experienced New Jersey attorney, who was appointed by the New Jersey Court as the Guardian Ad Litem for Mr. Morris. These reports refute all of the Plaintiffs' allegations in the present Civil Action No. 14-C-2197,

and the prior Civil Action No. 14-C-749, and specifically find that there were not "any improprieties or misappropriations (glaring or otherwise) of funds by Eugenie Matyas . . . I simply do not see any real and factual basis that would support any claim for missing funds." A. R. 108.

The Plaintiffs' allegations were also proven without merit by the Affidavit of John Vintroux, Mrs. Morris's brother, and a close friend of Mr. Morris. A.R. 259-310. Additionally, the Affidavit of Harry P. Henshaw, III, who drafted the Mr. Morris's 2011 Will and Power of Attorney also refutes the Plaintiffs' claims. A.R. 576-579.

I. THE EXERCISE OF JURISDICTION BY NEW JERSEY COURTS

The New Jersey Courts have exercised jurisdiction over Mr. Morris's Estate before and after his death. There is not a dispute that the Plaintiffs, Carolyn Beste and her husband, submitted to jurisdiction in the New Jersey Guardianship proceedings when they filed their Counterclaim in Docket # 14-682 (A.R. 311-350), and when they filed their Verified Complaint to set aside Probate in Docket #15-00658. A.R. 466-479. Probate of the 2011 Will occurred by Letters Testamentary filed in the Surrogate Court of Gloucester County, New Jersey, on November 7, 2014. A.R. 239-248.

The question of jurisdiction to probate the Will in New Jersey was thoroughly considered by New Jersey Counsel, Jeffrey Puff.

The factors justifying jurisdiction in New Jersey are as follows:

> Robert Morris had lived in New Jersey for 26 months prior to his death on October 27, 2014; living first at his daughter's home from August 26, 2012 through July 3, 2014, and then living at the Friends Village Nursing Home from July 3, 2014 until the date of his death.

> During those 26 months, Robert Morris had a gym membership in New Jersey, and was treated by all of his many and multiple doctors in New Jersey by New Jersey physicians for 26 months.
>
> The death certificate read that Robert Morris was a resident of the State of New Jersey.
>
> The parties had stipulated to jurisdiction in the guardianship matter in New Jersey.
>
> Mr. Morris died in the State of New Jersey.
>
> Mr. Morris never expressed, nor did he ever choose to move back to West Virginia, because there was no one there to take care of him.
>
> This writer also relied on In Re Seyse, which is a New Jersey Appellate case. The facts in that case are pretty much on point to the case at bar.

Affidavit of Jeffrey V. Puff, ¶¶ 17-18; A.R. 111-12.

The New Jersey proceedings were substantially advanced by the time of Mr. Morris's death as shown by the thorough reports of Mr. Sinclair, the Guardian Ad Litem, which found that the Plaintiffs' claims were without merit. A.R. 126-127, 143-144. The Plaintiffs filed Civil Action No. 14-C-2197 in West Virginia in an attempt to re-litigate their claims in a different forum.

III. SUMMARY OF POSITION

This case does not involve a dismissal for failure to state a cause of action pursuant to W.Va. R. Civ. P. 12(b)(6). Rather, the Defendants' Motion to Dismiss and the Circuit Court's Dismissal Order clearly provide that they are based upon lack of personal jurisdiction pursuant to W.Va. R. Civ. P. 12(b)(2) and the doctrine of comity. It is also clear that a Circuit Court in considering a motion to dismiss under Rule 12(b)(2) or for reasons of comity under W.Va. Code, § 56-6-10, may consider matters outside the pleadings. Based upon a proper review of

the record, including, but not limited to, the pleadings, Affidavits and documents from the New Jersey Court record, the entry of the Order Dismissing the Plaintiffs' Complaint Without Prejudice was not in error.

The Kanawha County Circuit Court did not err in dismissing for lack of in personam jurisdiction under Rule 12(b)(2). Even if the Court did err in dismissing the Complaint under Rule 12(b)(2), the Court properly ruled on the issue of comity. That is, the Circuit Court could have ruled that there was in personam jurisdiction over the Defendants and nonetheless stayed or dismissed the proceedings without prejudice for reasons of comity.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rules 10(c)(6) and 18(a) of the Rules of Appellate Procedure, the Respondents/Defendants state that oral argument is unnecessary because the present appeal is frivolous, the dispositive issues have been authoritatively decided, the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

V. ARGUMENT

A. THE CIRCUIT COURT PROPERLY CONSIDERED MATTERS OUTSIDE THE PLEADINGS IN DECIDING A MOTION TO DISMISS UNDER W.VA. R. CIV. P. 12(B)(2) AND THE DOCTRINE OF COMITY

1. MATTERS OUTSIDE OF THE PLEADINGS ARE PROPERLY CONSIDERED REGARDING A MOTION TO DISMISS UNDER RULE 12(B)(2)

The Plaintiffs incorrectly assert at page 15 of their Brief that "the Court's September 22, 2015 Order clearly states that it was dismissing the Petitioners' Complaint by way of Rule 12(b)(2)." Actually, the Court's Order provides as follows: "The Court Order that the

Defendants are Dismissed for lack of personal jurisdiction pursuant to W.Va. R. 12(b)(2) and because essentially the same issues are being considered by the New Jersey Court." A. R. 623.

When a Motion to Dismiss is based upon jurisdictional grounds, the Court may consider facts and evidence outside the pleadings. Unlike a Rule 12(b)(6) motion to dismiss[1] for failure to state a claim, when deciding a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the Court's consideration is not limited to the facts in the complaint alone.

> It has been well-established that when a nonresident defendant makes a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), the plaintiff bears the burden of establishing sufficient facts upon which the court may exercise jurisdiction over the defendant under the applicable personal jurisdiction statute.
>
> . . .
>
> **[W]hen a defendant challenges the existence of personal jurisdiction in a Rule 12(b)(2) motion to dismiss and includes with its motion "affidavits or depositions, . . . the party resisting such motion may not stand on its pleadings and must come forward with affidavits or other proper evidence detailing specific facts demonstrating that the court has jurisdiction over the defendant."**

Lane v. Boston Sci. Corp., 198 W.Va. 447, 452, 481 S.E.2d 753, 758 (1996) (citations omitted) (emphasis added), see also, State ex rel Bell Atlantic-West Virginia v. Ranson, 201 W.Va. 402, 415, 497 S.E.2d 755, 768 (1997).

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[1] The cases cited by the Plaintiffs at pp. 13-14 of their Appellate Brief are inapplicable because they involve Rule 12(b)(6) Motions, not Rule 12(b)(2) Motions. Riffle v. C.J. Hughes Construction, 226 W.Va. 581, 584, 703 S.E.2d 552, 584 (2010); Forshey v. Jackson, 222 W.Va. 743, 746, 671 S.E.2d 748, 751 (2008); Highmark West Virginia v. Jamie, 221 W.Va. 487, 491, 655 S.E.2d 509, 511 (2007); Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002); Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130, 1134, n. 4 (4th Cir. 1993); Dunn v. Consolidation, 180 W.Va. 681, 683, 379 S.E.2d 485, 487 (1989); Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 324 (4th Cir. 1989); Price v. Hallstead, 177 W.Va. 592, 594, 355 S.E.2d 380, 383 (1987); Collia v. McJunkin, 178 W.Va. 158, 159, 358 S.E.2d 242, 243-44 (1987); Sticklen v. Kittle, 168 W.Va. 147, 164-65, 287 S.E.2d 148, 157 (1981); John W. Lodge Distributing Co., Inc. v. Texaco, Inc., 161 W.Va. 603, 604-05, 245 S.E.2d 157, 158 (1978); Chapman v. Kane Transfer, 160 W.Va. 530, 531, 236 S.E.2d 207, 208 (1977).

2. MATTERS OUTSIDE OF THE PLEADINGS ARE PROPERLY CONSIDERED REGARDING A MOTION TO DISMISS FOR REASONS OF COMITY

With respect to a motion to dismiss upon the doctrine of comity, the court can dismiss a case based upon a mere suggestion or statement in the answer. "It being made to appear from suggestion or statement in the answer that there was another suit pending, the court should have acted in compliance with the requirement of the statute quoted [W.Va. Code, § 56-6-10] and have stayed the proceedings in the instant case. Of course, the suggestion of the pendency of another suit could easily be verified from the court's own records or disproved if not true." Starcher v. United Fuels Gas Co., 113 W.Va. 397, 400, 168 S.E. 383, 384 (1933).

3. FACTS OUTSIDE THE PLEADINGS WERE PROPERLY CONSIDERED BY THE CIRCUIT COURT

In the present case, the Defendants attached to their Motion to Dismiss the Affidavits of Jeffrey V. Puff, Jr. and John K. Vintroux, the Reports of the Guardian Ad Litem, and numerous other documents. The Plaintiffs responded with Affidavits of the Plaintiffs, Carolyn Beste and Michael Beste and Ann Kendall Morris (A.R. 399-414), the Verified Complaint for the Appointment of a Guardian filed in New Jersey, an Order from the Superior Court of New Jersey (A.R. 442-43), a Verified Complaint to Set Aside Probate in New Jersey (A.R. 466-480), with exhibits and Supporting Memorandum (A.R. 46-514), additional Affidavits of the Plaintiffs (A.R. 515-533), and other exhibits (A.R. 535-590). The Plaintiffs' Response includes 192 pages of supporting exhibits. The record on appeal contains 656 pages.

The Plaintiffs' present assertion at page 18 of their Brief that they were not provided an opportunity to challenge the Defendants' proffer of evidence is belied by the Plaintiffs' filing of numerous affidavits and documents in opposition to the Defendants' evidence. Additionally, the

Plaintiffs cannot assert surprise because the law permitting a Circuit Court to consider matters outside the pleadings on motions to dismiss based upon Rule 12(b)(2) or comity is clear and long-standing, and the Defendants' Motion to Dismiss and supporting Briefs clearly assert that the Motion is based upon Rule 12(b)(2) and comity.

B. The Court Properly Held That Mrs. Matyas Did Not Have Sufficient Contacts with West Virginia Respecting the Plaintiffs' Claims

In West Virginia, a two-part analysis is applied in determining whether a Circuit Court has personal jurisdiction over a nonresident defendant.

> A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in . . . W. Va. Code, 56–3–33 [1996].

Easterling v. Am. Optical Corp., 207 W. Va. 123, 129-30, 529 S.E.2d 588, 594-95 (2000).

West Virginia Code § 56-3-33, is West Virginia's long-arm statute that confers specific jurisdiction over a non-resident defendant for a cause of action arising or growing out of the following acts by the nonresident defendant: (1) transacting any business in this state; (2) contracting to supply services or things in this state; (3) causing tortious injury by an act or omission in this state; (4) causing tortuous injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; (5) causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume, or be affected by the goods in this state: *Provided,* that he or she also

regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; (6) having an interest in, using or possessing real property in this state; or (7) contracting to insure any person, property or risk located within this state at the time of contracting. See W. Va. Code, § 56-3-33.

Mrs. Matyas is a resident of New Jersey and, with the exception of a cemetery plot, she does not own an interest in any property located in West Virginia. Under the 2011 Will, after five percent of the Estate is distributed to each of the grandchildren, Mr. Morris's property, including the real estate, was bequeathed to trusts. A.R. 240-47. Significantly, the Plaintiffs' sole claim that the Defendants have an interest in real estate in West Virginia is Mr. Morris's house in which neither Mrs. Matyas nor her children own an interest or individually possess. A.R. 393-94.

Further, the Will grants the Executrix broad powers including those enumerated in W. Va. Code, §§ 44-5A-3(a) through (cc). Exhibit A, Exhibit 8, p. 5. Included is the power to sell and exchange property. W. Va. Code, § 44-5A-3(b). Therefore, the Plaintiffs' claims do not relate to Eugenie Matyas "having an interest in, using or possessing real property in this state" under W. Va. Code, §56-3-33(a)(6), but relate to how the proceeds of sale will be distributed to trusts under the Will that is being probated in New Jersey.

The Court correctly found that Mr. Morris's real estate was not specifically devised to the Defendants and was sold under the Court's Order pursuant to the authority of the Will. Therefore, the Court properly held that the Defendants do not own an interest in real estate relating to a claim of the Plaintiffs within the meaning of the long-arm statute, W.Va. Code, §

56-3-33(6). The Plaintiffs' Complaint in Civil Action No. 14-C-2197, alleges that Eugenie Matyas "unlawfully procured the 2011 Will" and that she "wrongfully influenced" Mr. Morris to execute the 2011 Will. Complaint, ¶ 18; A.R. 23. Yet, the Affidavit of John Vintroux recalls many conversations in March of 2011 with Mr. and Mrs. Morris about adding the grandchildren as beneficiaries under their Wills. John Vintroux Affidavit, ¶¶ 9, 10 and 11; A.R. 262-63. Mr. Vintroux's Affidavit further states that Eugenie Matyas was not present in March 2011 when he and Mr. and Mrs. Morris had these discussions. John Vintroux Affidavit, ¶ 14; A.R. 624. Additionally, Eugenie Matyas's Affidavit states that she did not have any involvement in the preparation of the 2011 Powers of Attorney or Wills and was not present in West Virginia when they were executed. Eugenie Matyas Affidavit, ¶ 12; A.R. 423. These verified factual assertions were not contradicted by any evidence proffered by the Plaintiffs. Therefore, the evidence properly considered by the Circuit Court is that Eugenie Matyas **was not present in West Virginia** when Mr. and Mrs. Morris, without Eugenie Matyas's involvement, decided to amend their Wills to add their grandchildren as beneficiaries.

Mrs. Matyas does not have a business in West Virginia and has not contracted to supply goods or services in West Virginia. Mrs. Matyas's only contacts within West Virginia consist of (1) communications with her father's bank and stock broker, Wells Fargo, an international bank and financial advisor with offices throughout the United States and world, through William Painter, a financial advisor, who has an office in Charleston; and (2) consultations with West Virginia legal counsel, Harry Henshaw, regarding the sale of Mr. Morris's home in Kanawha City. All of the allegations of wrongdoing by Eugenie Matyas involve acts or omissions

committed by Eugenie Matyas in New Jersey. To the extent a tortious injury was suffered by the Plaintiff, Ann Kendall Morris, in West Virginia as a result of Eugenie Matyas's acts in New Jersey, jurisdiction is lacking under W. Va. Code, §56-3-33, because Eugenie Matyas does not regularly conduct or solicit business in West Virginia, engage in a persistent course of conduct in West Virginia, or derive income for goods or services consumed in West Virginia.

Simply, none of the acts allegedly committed by Mrs. Matyas can be construed as sufficient to satisfy any of the grounds for exerting *in personam* jurisdiction as set forth in West Virginia's long arm statute.

As correctly expressed in the Circuit Court's Order, both of the grandchildren reside outside of West Virginia and have never entered West Virginia to commit any tortious act, and therefore, there is no in personam jurisdiction under the long-arm statute, W. Va. Code, § 56-3-33. The Plaintiffs' Complaint does assert an "unjust enrichment" claim against the grandchildren of Mr. Morris, but nowhere is it asserted that the grandchildren had minimum contacts with West Virginia relating to their receipt of monies from their mother. Complaint, ¶¶ 85-9; A.R. 34; see also, the Plaintiffs' Brief in Response to Defendants' Motion to Dismiss, at p. 18; A.R. 395. There is not an allegation that the grandchildren were in West Virginia when they received the monies. There is not an allegation that the unjust enrichment claim arose from the grandchildren's doing any of the following in West Virginia: (1) transacting business; (2) contracting to supply services; (3) causing a tort by their acts; (4) regularly soliciting business, engaging in a persistent course of conduct or deriving substantial benefit revenue for goods sold; (5) breaching a warranty; (6) having interest in West Virginia property; or (7) insuring anybody. W. Va. Code, § 56-3-33(a)(1)-(7). In fact, Paragraph 76 of the Plaintiffs' Complaint admits that

the grandchildren did not commit any act, much less an act in West Virginia, relating to the unjust enrichment claim. "Defendants Edward M. Matyas and Julia Matyas each received Estate assets **by and through the actions of their mother.**" Plaintiffs' Complaint, ¶ 76 (emphasis added). Moreover, based upon the Report of the Guardian Ad Litem, Gerald Sinclair, Esq., cited above, there has been no unjust enrichment by misappropriation of funds by Eugenie Matyas to Edward M. Matyas and Julia Matyas, the grandchildren of the deceased Mr. Morris. A.R. 108.

Realizing that the West Virginia long arm statute may not apply, the Plaintiffs, in the alternative, argue that they have jurisdiction over the Defendants by virtue of W. Va. Code, § 55-13-11. That section provides that in a declaratory judgment action all interested parties must be served so that they may have the opportunity to appear. That section does not provide for an independent source of jurisdiction over the Defendants.

Accordingly, the Complaint must be dismissed for lack of personal jurisdiction pursuant to W.Va. R. Civ. P. 12(b)(2).

C. THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE ACTION WITHOUT PREJUDICE ON THE BASIS OF COMITY

W.Va. Code, § 56-6-10 provides as follows:

> Whenever it shall be made to appear to any court, or to the judge thereof in vacation, that a stay of proceedings in a case therein pending should be had until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein, upon such terms as may be prescribed in the order.

W. Va. Code, § 56-6-10. This section of the Code, and its predecessors, applies when there are courts of the same or different states exercising jurisdiction over the same cause.

> Whether denominated reciprocity, comity or necessity, the principle is imperative, because [it is] essential to the orderly administration of justice. It avoids the conflict, confusion and imposition that inevitably may follow or result from the encroachment by one court upon the jurisdiction of coordinate tribunals assuming to act in the same matter, whether they be within the same or different state governments. Necessarily, any other course may, and often would, produce unjust if not disastrous results, rather than promote that justice which courts are ordained to administer.

Whan v. Hope Natural Gas Co., 81 W.Va. 338, 342, 94 S.E. 365, 367 (1917) (brackets added). Decisions under this section are within the sound discretion of the Court. Dunfee v. Childs, 59 W.Va. 225, 53 S.E. 209 (1906).

It is important to note that even if Judge King ruled there was in personam jurisdiction over Eugenie Matyas and her children under Rule 12(b)(2), the Court could nonetheless dismiss the Complaint on comity grounds. As stated above, the underlying premise of comity exists where courts of different states are exercising jurisdiction over the same dispute. See, Whan v. Hope Natural Gas Co., 81 W.Va. 338, 341-42, 94 S.E. 365, 366-67 (1917).

Mr. Morris's Estate has been subject to probate jurisdiction in New Jersey since November 7, 2014, when the Letter Testamentary were filed with the Gloucester County Surrogate's Court. Eugenie Matyas was appointed Executrix. This jurisdiction has been put in issue by the Plaintiffs by their Verified Complaint to Set Aside Probate but New Jersey has, for now, exercised jurisdiction over Mr. Morris's Estate. If the New Jersey Court determines that it is without jurisdiction based upon Mr. Morris's domicile, the Circuit Court's Order provides that the Will may be probated in West Virginia. A.R. 623. As discussed above, the Counterclaim in Docket # 14-682 and Verified Complaint in Docket # 15-00658, embrace the

same subject matter as the allegations asserted by the Plaintiffs in the Complaint in Kanawha County Civil Action No. 14-C-2197.

The Plaintiffs are understandably unhappy with the results they obtained thus far in New Jersey. The resolution of the Plaintiffs' claims in New Jersey will resolve the claims asserted in the Complaint filed in West Virginia. New Jersey is the appropriate forum for resolving those claims because the proceedings are already well-advanced. There is no reason to re-litigate these issues in West Virginia. There certainly has been neither a showing nor an allegation that the New Jersey proceedings have been unlawful or even unfair.

Similarly, there is no reason to probate Mr. Morris's Will in two different states as the Plaintiffs presently request. The Circuit Court correctly decided not to tell the New Jersey Courts, which have already expended significant judicial resources in the Guardianship Proceedings and in probating Mr. Morris's Will, that New Jersey does not have jurisdiction. The Circuit Court of Kanawha County wisely and in the interests of judicial economy and minimizing the parties' litigation costs stopped a parallel proceeding in West Virginia while the New Jersey Courts decides the jurisdictional question, and if this New Jersey decision is adverse to Eugenie Matyas, the Will can be probated in West Virginia.

Noticeably absent from the Plaintiffs' Brief is any discussion of the Circuit Court's dismissal for reasons of comity. Rather, the Plaintiffs devote their entire argument to a non-existent Rule 12(b)(6) and Rule 56 ruling.

The Plaintiffs ignore the Court's comity ruling because the Plaintiffs do not have any way to respond to the following question: If the Circuit Court were to retain jurisdiction and order the probate of Mr. Morris's Will in West Virginia, and the New Jersey Court overrules the

Plaintiffs' Motion on jurisdiction and continues to probate the Will in New Jersey, what then? The Plaintiffs do not offer an answer.

The Supreme Court answered the question when it held that the doctrine of comity is the solution to "the legal chaos that prevails in the United States as the result of fifty conflicting state jurisdictions . . . when there are proceedings on the same subject matter between the same parties" in different states. Berger v. Berger, 177 W.Va. 58, 58, 350 S.E.2d 685, 685 (1986), see also, Whan v. Hope Natural Gas Co., 81 W.Va. at 341-42, 94 S.E. 365, 366-67 (1917). The Circuit Court properly followed the precedent established in West Virginia that the present case should be dismissed without prejudice on the basis of comity.

D. THE CIRCUIT COURT DID NOT COMMIT ERROR IN MAKING ANY FINDING OF FACT THAT IS MATERIAL TO THE ISSUES OF IN PERSONAM JURISDICTION AND COMITY

The Petitioners complain that the Circuit Court impermissibly made findings of fact in violation of Rule 12(b)(6). The Petitioners are wrong because, as first discussed above, this was a case involving Rule 12(b)(2) and comity. This is not a Rule 12(b)(6) case. Second, the Petitioners are wrong because the factual findings were supported by the record, and even if incorrectly made, they constitute harmless error. "Errors that are harmless or do not affect the substantive rights of the parties do not require reversal." Ilosky v. Michelin Tire Corp., 172 W.Va. 435, 450, 307 S.E.2d 603, 619 (1983), quoting, Jennings v. Smith, 165 W.Va. 791, 272 S.E.2d 229, 231 (1980) (per curium). A discussion of the factual findings that the Petitioners claim are in error follows.

The Circuit Court found that Mr. Morris suffered from Alzheimer's. A.R. 617. Mr. Morris suffered from dementia. According to the Report of the Court Appointed Guardian Ad Litem, Gerald A. Sinclair, and by reference to the certification of a Dr. Lotkowski, Mr. Morris suffered from dementia.

> In his certification, Dr. Lotkowski says that Mr. Morris suffers from "dementia with psychoses", hemorrhagic stroke and other severe medical conditions.
>
> . . .
>
> The Affidavit of physician Kenneth Master, M.D. found that Mr. Morris has "severe dementia with behavior disturbance" and that he has been "aphasic" and unable to communicate significantly for the past two years." . . . [and is] "unable to manage his affairs and is in need of a guardian."

Amended Report of Gerald A. Sinclair, Esquire (as of October 1, 2014), p. 3; A.R. 139; see also, Interim Report of Counsel for Robert Lee Morris, ¶ 9; A.R. 587.

Alzheimer's is defined in the Merriam-Webster Dictionary as "a degenerative brain disease of unknown cause that is the most common form of dementia." Whether Mr. Morris's severe dementia was caused by Alzheimer's or some other malady is immaterial. In addition, Mr. Morris's mental condition is a back-ground fact that is relevant to the Defendants' Motion to the extent it shows that the legal proceedings in New Jersey were thorough and well-advanced, a factor for consideration on the issue of comity.

The Petitioners assert that the Circuit Court found that Eugenie Matyas was appointed by the New Jersey Chancery Court as guardian of her father in May of 2014, that the Circuit Court ignored the fact that the Chancery Court denied Ms. Matyas' request to act as guardian,

and that, therefore, Ms. Matyas was not the legal guardian at the time of her father's death. Petitioners' Brief, p. 17. The Circuit Court Order finds as follows:

> On May 13, 2014, an *Order to Show Cause* was entered in the New Jersey Guardianship wherein Ms. Matyas was appointed as temporary guardian for Mr. Morris. He died on October 27, 2014 before a permanent guardian was appointed. Mr. Morris's Will was probated in Gloucester County, New Jersey, on November 7, 2014. Mr. Morris's estate filed an estate/inheritance tax return in New Jersey and paid $121,506.64 in tax to the State of New Jersey.

Order Dismissing Plaintiffs' Complaint Without Prejudice, p. 2; A.R. 618.

Here, the Circuit Court did not find that Eugenie Matyas was the guardian of her father at the time of his death. This is yet another example of the Plaintiffs asserting that the Circuit Court made a finding that the Circuit Court did not actually make.

The facts are that Eugenie Matyas was her father's attorney-in-fact under the April 7, 2011 Power of Attorney when Mr. Morris moved to New Jersey. In addition, the facts are that Eugenie Matyas was the appointed and acting temporary guardian of her father from May 13, 2014 until July 30, 2014, a time when he was residing in New Jersey. A.R. 635-36.

The Report of the New Jersey Guardian Ad Litem is attached to the Affidavit of Jeffrey V. Puff, Esquire, and it was the Plaintiffs' burden to present contrary evidence. While the Defendants did not cross-examine the Guardian Ad Litem, Mr. Sinclair, in his Report states that he met with both sides in the dispute.

> I had Mr. Beste "spoon-feed" me the documents that he and Carolyn thought supported these discrepancies since I have literally been provided over 800 pages of various financial documents in this case. I also requested that Ms. Matyas provide her position on these allegations.

> After reviewing all of the evidence thoroughly that was made available by my request from both sides, I do not believe that Ms. Matyas has taken any of her father's funds contrary to her duty under the Power of Attorney
>
> . . .
>
> I simply do not see any real and factual basis for the allegations of misappropriations or unauthorized withdrawals that would support any claim for missing funds.
>
> . . .
>
> Similarly, I do not see any basis to support the allegation of unequal gifting or the change in beneficiary as has been claimed.

Amended Report of Gerald A. Sinclair, Esquire, pp. 7-8; A.R. 127-28. The findings relating to Mr. Sinclair's Report are in the record and under Rule 12(b)(2), it was the Petitioners' burden to put forth contradicting evidence and they did not. Moreover, Mr. Sinclair's Report is evidence that the New Jersey proceedings were well advanced, a factor in considering the issue of comity.

The Petitioners' Brief at page 18 asserts on the page and in footnote 3 that the Circuit Court "concluded as fact" that because the Estate filed tax returns in New Jersey, the New Jersey Court had "assumed jurisdiction over Mr. Morris's Estate and/or that Mr. Morris was domiciled in New Jersey at the time of his death," and this caused the Circuit Court to find the Defendants' comity argument persuasive. The Plaintiffs cite to A.R. 618, which is page 2 of the Dismissal Order. Nowhere on page 2 of the Order or on any other page does the Circuit Court conclude that New Jersey does or does not have jurisdiction because tax returns were filed in New Jersey. Again, that tax returns were filed in New Jersey is evidence that the New Jersey proceedings were well advanced, a factor in considering the comity issue. Judge King specifically left the decision over whether New Jersey has jurisdiction to the New Jersey Court, and that if jurisdiction is held to be lacking, the Plaintiffs can probate the Will in West Virginia. A.R. 623.

Finally, the Petitioners state that the Circuit Court made a "determination that a jury was not needed given no genuine issue of material fact may have been in dispute." Petitioners' Brief, p. 19. Again, neither Rule 12(b)(6) nor Rule 56 governing summary judgment was mentioned in the Dismissal Order. The Circuit Court did not decide that no material factual issues were in dispute in derogation of the Petitioners' right to a jury trial. The Dismissal Order was **without prejudice.** All of the Petitioners' substantive claims remain open to litigation in New Jersey, and if the New Jersey case is dismissed on jurisdictional grounds, the Circuit Court's Order provides that "the Plaintiffs can have Mr. Morris's Will probated by the Kanawha County Commission in the normal procedure." A.R. 623. A dismissal based upon comity pursuant to W.Va. Code, § 56-6-10, does not involve an adjudication on the merits. Keenan v. Scott, 78 W.Va. 729, 732, 90 S.E. 331, 332 (1916). Similarly, a dismissal for lack of in personam jurisdiction is typically without prejudice and does not have a preclusive effect. 2-12 Moore's Federal Practice, § 12.51. The Circuit Court's Dismissal Order was specifically "without prejudice" (A.R. 624), and clearly does not foreclose any of the Plaintiffs' claims from being litigated before a jury.

In short, despite the Petitioners' insistence that the Circuit Court issued a Summary Judgment Order dismissing the Petitioners' substantive claims, the Circuit Court's Order is nothing more than a decision that the case, at least for now, should be decided by the New Jersey Court.

VI. CONCLUSION

Based upon the foregoing, it is clear that the Circuit Court correctly considered matters outside the pleadings in deciding to dismiss the Plaintiffs' Complaint for lack of personal jurisdiction pursuant to W.Va. R. Civ. P. 12(b)(2) and for reasons of comity.

WHEREFORE, the Respondents/Defendants respectfully request that this Court affirm the Order of the Circuit Court Dismissing the Plaintiffs' Complaint, and the Respondents respectfully request such other and further relief as this Court deems just and proper.

THE ESTATE OF ROBERT LEE MORRIS, EUGENIE MATYAS, individually and in her capacity as the Executrix of and for the ESTATE OF ROBERT LEE MORRIS, EDWARD M. MATYAS and JULIA A. MATYAS,

By Counsel

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ANN KENDALL MORRIS,
JOSEPH GREENE, CAROLYN
BESTE and MICHAEL BESTE,

Petitioners (Plaintiffs below),

v. **Docket No.: 15-1035**

THE ESTATE OF ROBERT LEE MORRIS,
EUGENIE MATYAS, individually and in
her capacity as the Executrix of and for the
ESTATE OF ROBERT LEE MORRIS,
EDWARD M. MATYAS and JULIA MATYAS,

Respondents (Defendants below).

CERTIFICATE OF SERVICE

I, Christopher S. Smith, hereby certify that on the 11th day of March, 2016, the foregoing **BRIEF OF THE RESPONDENTS** was served by United States first class mail, postage prepaid, on the following:

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