

**In the Supreme Court of Appeals of West Virginia**

No 18-0426



Mark Andrew Gomez, Executor of the Estate of Aurelio Rafael Gomez, MD., deceased,  
Defendant/Third-Party Plaintiff & Counter Claimant Below, Petitioner

and

David Brent Gomez and  
Robert Brian Gomez,  
Defendants Below

v.

Andrea Gomez Smith and Matthew Eric Gomez, D.O.  
Plaintiffs and Counter Defendants Below, Respondent

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Circuit Court of Kanawha County  
Civil Action Nos. 17-P-402 and 17-C-1292

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**PETITIONER'S BRIEF**

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Mark Gomez  
*For Himself*, in his individual capacity  
As Executor of the Estate of Aurelio Rafael Gomez  
3500 Staunton Avenue, S.E.  
Suite 7  
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## ASSIGNMENT OF ERROR 1

The trial court erred when it found, “as a matter of law, that all pleadings, including the Complaint, filed by the non-lawyer Mark Gomez as “pro se Executor,” are void *ab initio* and are hereby deemed a nullity....” After making this conclusion, the trial court wrote this Court “has not yet formulated a syllabus point as to whether an executor of an estate who is not a duly licensed attorney, can appear on behalf of the estate in a representative capacity in a court of law...”

## ASSIGNMENT OF ERROR 2

The trial court erred by failing apply the holding of Syllabus Pt. 3 of *Williams v. Precision Coil, Inc.*, 194 W.Va. 52,60, 459 S.E. 2d 329, 337 (1995) which shifts the burden of proof and production to the non-moving parties when the moving party has made a properly supported motion for summary judgment and abused its discretion by not requiring the plaintiffs to produce evidence showing the existence of a genuine issue for trial or submit an affidavit explaining why further discovery is necessary before denying defendant’s properly supported motion for summary judgment.

## STATEMENT OF THE CASES

On November 2, 2015, Margaret Jo Ann Gomez died after a long and debilitating illness. (PA-298) Two days after Margaret died, Andrea Gomez Smith and Matthew Eric Gomez entered Margaret and Rafael’s home safe and Andrea Gomez Smith took the entirety of Margaret’s jewelry, including a 3.8 carat diamond engagement ring. (PA-300) The total value of the jewelry being something over \$100,000. (PA-71) Margaret did not want Andrea Gomez Smith to have her jewelry especially her engagement ring. (PA-71, 299) Margaret wanted Robert to receive her engagement ring at her death. (PA-71) Margaret and Rafael’s second born son, David Gomez, was the only child

to be entrusted with the keys to the safe containing their personal property. (PA-70) Matthew Eric Gomez called David and told him that “Dad wants to know where is the key to the safe ” (PA-299) This statement was untrue and a subterfuge to gain access to Margaret’s jewelry as Rafael was not concerned with anything other than the loss of his wife and was understandably experiencing great mourning and grief. (PA-299)

In December 2016, Aurelio Rafael Gomez was diagnosed with brain cancer. This diagnosis was made just seven (7) weeks after his wife of 53 years had died. Upon learning of his terminal condition, Rafael’s thoughts turned to the bounty of his estate and how he should bequeath his properties. (PA-67) Rafael was very transparent with this intentions and discussed with all his children his final wishes. In particular, Andrea Gomez Smith objected to Rafael making an *inter vivos* transfer to her, Robert and Matthew of the “farm property,” approximately 10 acres of unimproved land located in Kanawha County telling Rafael she did not want to own any of the parcel with Robert as a joint tenant wanted Rafael to give her the valuable parcels and Robert the unusable “ravine” parcel. (PA-69-70)

Andrea Gomez Smith became disgruntled and wrote a letter to Rafael and provided a copy to each of her siblings titled “Unfair Property Divide.” (PA-70)

After writing the “Unfair Property Divide” letter, Andrea Gomez Smith expressed her anger by engaging in a course of conduct designed to harass Rafael and the brothers that were looking after Rafael. Robert, a Florida resident, came home to spend time with his father. (PA-67) During this time, at Rafael’s, request and direction, Robert demanded that Andrea Gomez Smith return the taken jewelry to Rafael. (PA-72) Andrea Gomez Smith responded and retaliated by applying for and being granted a restraining order against Robert. (PA-72)

Andrea Gomez Smith then called the Kanawha Adult Protective Services reporting that Rafael was being abused, both financially and physically, by Mark Gomez. (PA-70) APS workers investigated the allegations and found them to be unfounded (PA-280). Rafael was working for Highland Hospital as a physician at the time of this interview and investigation.(PA-72)

Expressing his disappointment and irritation with Andrea Gomez Smith, he handwrote a letter addressed to her and copied to all of his children, telling her “you have to quit that notion that you have the right to promote legal and criminal problems against other members of the family.” (PA-282) The last time that Andrea Gomez Smith saw her father was on April 25, 2016, her birthday, when he went to her house to deliver a birthday gift, a Christian Cross necklace. While Rafael was busy selecting what he thought to be an appropriate gift, Andrea Gomez Smith, was herself busy researching the County records to ascertain the real properties owned by him.

In June, 2016, Rafael consulted West Virginia licensed attorney, Robert M. Fletcher for estate planning advice and based on these consultations, Attorney Fletcher drafted a Last Will and Testament and presided over and supervised the execution of said Last Will and Testament in his law office on June 14, 2016. (PA-286)

According to the terms of the Last Will and Testament, Rafael’s sons, defendants Mark Andrew Gomez, David Brent Gomez and Robert Brian Gomez were named beneficiaries. All three received specific bequests and Robert was named to be beneficiary of the “rest, residue and remainder” of his estate upon death. His other two children, Andrea Gomez Smith and Matthew Eric Gomez, the plaintiffs, were specifically excluded from Rafael’s Will for “personal reasons.” Rafael nominated his oldest son, Mark Gomez, to be the Executor of his estate upon his death. According to the estate plan devised by Rafael and Attorney Fletcher, most of Rafael’s property was

transferred *inter vivos*. At the time of his death, Rafael owned real estate and a corporation in his birth country of Colombia and owned two (2) deferred compensation accounts having a value of approximately \$75,000 that he earned while an employee of the State of West Virginia. These deferred compensation accounts were administered and held by defendant Great-West Life and Annuity Insurance Company, a Colorado corporation doing business in West Virginia as Empower Retirement. At the time of his death, the only property he still owned in the United States was this \$75,000 held by Empower Retirement.

Rafael died on May 4, 2017 at the Hospice House in Charleston. Thirty one (31) days after Rafael's death, Andrea Gomez Smith, presented herself to the Kanawha Probate and Fiduciary Commissioner's Office, and applied to become the Administrator of Rafael's Estate claiming under sworn testimony that Rafael had died intestate. Based upon her sworn testimony (PA-294) and the posting of a \$500,000 probate fiduciary bond issued by Western Surety Company, the Kanawha Probate and Fiduciary Supervisor appointed Andrea Gomez Smith as the Administratrix of the Estate of Aurelio Rafael Gomez.

Thirty three (33) days after Rafael's death, Mark Gomez learned that Andrea Gomez Smith had been named the Administratrix of the Estate just two days before.

The next day, Mark Gomez, presented Rafael's Last Will and Testament dated June 14, 2016, (PA-283-286) to the Kanawha Probate and Fiduciary Commissioner's Office and said office issued its *Order Revoking Administratrix Appointing Executor* (PA-289) appointing Mark Gomez as Executor, to serve without bond, per the instructions of the Rafael's Will. The *Order Revoking Administratrix Appointing Executor* directed Andrea Gomez Smith to relinquish and turn over all papers and property ..... (PA-289) belonging to the Estate of Aurelio Rafael Gomez to Mark

Gomez, the Executor. Her attorney at the time, David R. Karr, Jr., Esq., stated Andrea Gomez Smith had no estate property in her possession. (PA-290-292)

**Civil Action 17-C-1292**

Upon review of the Estate property and assets, Mark Gomez determined that Andrea Gomez Smith had taken approximately \$120,000 of their mother's jewelry, including the 3.8 carat diamond ring, from the Estate without justification or legal authority.

Thereafter, she sought and obtained a restraining order against Robert,. (TR-72) Subsequently, Andrea Gomez Smith contacted the Kanawha Adult Protective Services making a complaint that Rafael was in a state of physical and financial abuse by Mark Gomez. (PA-72) Upon interviewing Rafael, who was working for Highland Hospital as a physician at the time, the APS investigator found her allegations to be unfounded. After April 25, 2016, Andrea Gomez Smith's birthday, she never called Rafael or visited him before his death on May 4, 2017.

On September 13, 2017, Mark Gomez as Executor of the Estate of Aurelio Rafael Gomez, filed Civil Action 17-C-1292, making a Complaint demanding that Andrea Gomez Smith return Margaret's jewelry. (PA-274-279) Margaret had died intestate and by operation of law, her property transferred to Rafael as her husband. However, this legal transfer of property rights from Margaret to Rafael would not possible until Margaret's estate had been probated. Andrea Gomez Smith took the property from Margaret and Rafael's safe two days after Margaret's death, a time when Margaret's estate was not eligible to be administered. When Rafael did become the Administrator of Margaret's estate, he demanded the return of the jewelry and specifically Margaret's diamond ring from Andrea Gomez Smith by hand-written letter. (PA-280-282)

## **Facts of 17-P-402**

Subsequently, on October 25, 2017, Andrea Gomez Smith and Matthew Eric Gomez, the disowned heirs of the Estate of Aurelio Rafael Gomez, filed a Will Contest/Impeachment alleging that Rafael lacked the testamentary capacity to make his June 14, 2016 Last Will and Testament. This June 14, 2016 Last Will and Testament was made under the supervision of licensed West Virginia attorney, Robert M. Fletcher. (PA-286)

The plaintiffs made specific claims against Mark Gomez, personally, that he exerted undue influence over Rafael, converted Estate property and generally “committed fraud” and sought for Mark Gomez to be removed as Executor and Andrea Gomez Smith to be named the “Executor” of the Last Will and Testament of the same Will that they claimed to be invalid.

In their Complaint, the plaintiffs published portions and exact excerpts from Rafael’s personal and private medical records. (PA-18-22) Andrea Gomez Smith had obtained these medical records when she was appointed Administratrix by Kanawha Probate and Fiduciary Commissioner for a two day period, June 5 to June June7, 2017. When the Probate Commissioner revoked Andrea Gomez Smith appointment as Administratrix, she was ordered to relinquish all property belonging to the Estate to the newly appointed Executor. Executor Mark Gomez sent written correspondence to Andrea Gomez Smith requesting the return of all property. Andrea Gomez Smith filed a “Final Inventory, by and through West Virginia attorney, David Karr, averring that she had returned all property to the Estate. (PA-290-292) Despite this sworn testimony, Andrea Gomez Smith kept possession of Rafael’s medical records and excerpts and portions of the medical records were published *verbatim* in her Complaint. (TR-18-22).

Mark Gomez filed an Answer on behalf of the Estate as Executor, as well as in his personal capacity, to the allegations of the Will Contest Complaint. (PA-77-99) On behalf of the Estate, the Executor counterclaimed that the plaintiffs had violated Rafael's state privacy rights as set by the Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). The HIPAA Privacy Rule applies to the individually identifiable health information of a decedent for 50 years following the date of death of the individual. (See CFE §160.103 *Definition of "Protected Health Information"* ¶ (2)(iv).)

On his personal behalf, Mark Gomez counterclaimed that he had been the victim of plaintiffs' defamation per se by publishing the untrue assertion that Mark Gomez "is a convicted felon" when they knew such assertion to be untrue.

#### **Defendant Kayla Addison**

Along with the Answer, Executor Mark Gomez filed a third-party claim against Kayla Addison for interference with Rafael's banking and business relations with City National Bank and outrageous conduct that arose while Rafael was alive. Defendant Addison failed to file a timely responsive pleading after having been served with Summons and Third-party Complaint. Executor Mark Gomez filed a Motion for Default as to Liability of Kayla Addison due to her counsel's neglect. Prompted by the default motion, defendant Addison's trial counsel filed a belated Motion to Dismiss citing improper joinder of defendant Addison to the will contest.

#### **Defendant Empower Retirement**

As Executor, Mark Gomez filed a third-party claim against Empower Retirement demanding payment of the proceeds of the Deferred Compensation Accounts in the approximate amount of \$75,000. Immediately after filing their Complaint, attorney of record, Richard F. Neely, Esq., wrote

to Empower Retirement requesting them to hold the \$75,000 retirement proceeds from the Executor of the Estate. Attorney Neely did not provide a courtesy copy of the letter to the Executor. Upon request, Empower Retirement employees refused to provide a copy of Neely's letter to the Executor did read it to the Executor over the phone. Based upon Neely's letter, Empower Retirement refused to relinquish the funds to the Estate. The Neely letter addressed to Empower has not been entered into the trial record.

### **Western Surety**

Additionally, Mark Gomez, as Executor, had Andrea Gomez Smith's fiduciary bond company, Western Surety Company, served with notice of both Civil Action 17-P-402 and 17-C-2912 by the Secretary of State, as the Estate was making a claim against Andrea Gomez Smith's \$500,000 fiduciary bond for retaining the \$120,000 worth of jewelry or the proceeds from the sale of such, in her possession while she was Administratrix, as well as a claim for breach of fiduciary duty by publishing Rafael's person and private medical records that she had obtained during her two day stint as Administratrix. The Estate alleged that Andrea Gomez Smith breached her fiduciary duty as Administratrix by deliberately failing to return said medical records to the Estate as Ordered by the Kanawha Probate and Fiduciary Commissioner. The Estate alleged no tort claims against Western Surety Company.

### **SUMMARY OF ARGUMENT**

The plaintiffs in the Will Contest of 17-P-402 failed to present any evidence to support their allegations of conversion, undue influence and fraud. Defendants Mark Gomez and the Estate filed both a Motion to Dismiss pursuant to Rule 12(b)(6) Failure to State a Claim and a Motion for Summary Judgment with supporting affidavits but the defendants failed to present evidence or

provide a Rule 56 Affidavit explaining why discovery should be had.

Third party defendants Kayla Addison and Empower Retirement failed to timely file a responsive pleading after proper service of the third party complaint. Both defendants failed to offer and excuse for this neglect to the trial judge and the Estate is entitled to default judgment.

Western Surety Company is not a defendant to this lawsuit but an interested party to the proceedings as a guarantor of Andrea G. Smith's probate fiduciary bond and must receive notice of the lawsuit against her.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Your Petitioner states that oral argument is necessary pursuant to the criteria of Rule 18(a) and believes the case should be set for a Rule 20 oral argument as the issues present a case of first impression under West Virginia law and an issue of fundamental importance to the public as to whether a non-attorney Executor may represent the Estate in the circuit courts. Your Petitioner recognizes that as a pro se litigant he may not be entitled to present oral argument.

### **ARGUMENT**

The presiding judge issued two orders after the April 2, 2018 motions hearing, to wit:

#### **1. The *Neely Order***

Pursuant to direction of the trial court, Richard F. Neely, Esq. drafted an Order that was executed and filed in Civil Action 17-P-402 on April 17, 2018 (hereinafter referred to as the "*Neely Order*") with the court writing:

"the court finds the first four motions entirely without merit and finds that the fifth motion to consolidate civil actions is premature because Civil Action 17-C-1292 was filed by Mark Gomez as executor at a time when Mark Gomez was not a member of the West Virginia Bar

licensed to practice law in this State and, therefore, the Complaint in 17-C-1292 was void *ab initio*.”

Continuing, Attorney Neely wrote for the trial court:

“Because the issue of fraud perpetrated on the decedent is *factual and legally intertwined* with the issues of coercion, undue influence, and alleged fraud with regard to the preparation and execution of the will, the claims concerning misappropriation before the decedents death are properly joined with the will contest and the demand for the return of such property as may have been misappropriated under the defective will.” (Emphasis added)

## **2. The *Pullin Order***

2) The Order prepared by Gary E. Pullin, Esq., counsel of record for defendants Western Surety Company and Andrea Gomez Smith, was executed and filed on May 9, 2018 (hereinafter referred to as the “*Pullin Order*”) and entered in Civil Action 17-C-1292. The circuit court applied the same findings, conclusions of law and effect of the *Pullin Order* in 17-P-402 writing:

“Whereupon Defendants were appearing before the Court on other pleadings brought in the companion case of 17-P-402 and brought before the court motions similar to those raised in the instant case.”

### **ASSIGNMENT OF ERROR 1**

In the *Pullin Order*, the trial court concluded that this Court “has not yet formulated a syllabus point as to whether an executor of an estate who is not a duly licensed attorney, can appear on behalf of the estate in a representative capacity in a court of law...” (PA-9)

The trial court concluded that as “an artificial legal entity,” a probate estate should be compared with a corporation. It is well settled in West Virginia that “A corporation cannot act pro

se but must act, in all of its affairs, through an agent or representative.” *Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty*, 228 W.Va. 762, 724 S.E.2d at 429. As such, Western Surety, rather than provide a defense based on the facts of the case, attempts to financially cripple and deplete Rafael’s \$75,000 (TR-21)Estate by forcing it to hire an attorney. However, due to Empower Retirement’s refusal to relinquish the retirement proceeds to the Estate based solely upon Attorney Neely’s letter, the Estate has no money to hire an attorney and no assets to sell from the Estate to fund this expense.

The trial record shows that after the Executor had several initial consultations with local attorneys , but the Estate has no money to hire an attorney as Empower holds the proceeds. In this case, the out-of-state corporation, that must be represented by a licensed West Virginia attorney, is defending its bonded fiduciary, not by disputing the facts of the case and applying well settled West Virginia law, but through litigation designed to drain the Estate and dissipate Rafael’s bequest of the “rest, residue and remainder” of his Estate due his son Robert Gomez.

Your Executor is faced with a legal dilemma. The executor’s oath is found at W.Va. Code §44-1-3:

The oath of an executor, or of an administrator with the will annexed, shall be that the writing admitted to record contains the true last will and testament of the deceased, as far as he knows or believes, and that he will faithfully perform the duties of his office to the best of his skill and judgment.

As your Petitioner told the trial court, “But as far as me practicing law, they filed a lawsuit against the estate. I want to hire an attorney but I have no money.” (TR-24) When the Estate was served with Summons and Complaint, the West Virginia Rules of Civil Procedure engaged and the

Estate had 20 days to file an answer. Mark Gomez, being named a defendant separate and apart from the Estate also had 20 days to file a responsive pleading. Without Estate funds to hire an attorney, the Executor “faithfully performed the duties of his office to the best of his skill and judgment” filed an Answer on behalf of the estate, made a third party complaint against Empower Retirement, the out of state corporation that held the Estate’s funds and would not release the funds to the Executor, Additionally, Kayla Addison, a City National Bank employee was made a third party defendant for her alleged interference with Rafael’s banking relations and her outrageous conduct toward him, during his life. There was a nexus between the counterclaim Mark Gomez asserted against Andrea Gomez Smith and the third party complaint brought against Kayla Addison. At ¶ 34 of the *Answer & First Amended Counterclaims & First Amended Third Party Complaint*, it was alleged,

“34. Continuing her interference with Rafael’s life, at some point, the exact date being unknown, Andrea Smith told Kayla Addison, Lisa Francis’s replacement as the branch manager at the City National Bank in Kanawha City, that her father, A. Rafael Gomez, M.D. was incompetent to handle his banking affairs.” (PA-86).

It appeared that the *res gestae* of the case included Addison and the time was ripe to bring th claim as the same facts and circumstance and legal arguments would occur if brought as separate cases or the Estate may loss the claim due to the shortened statute of limitations for bringing Estate claims for injuries to the decedent during life.

If your Executor did not file responsively pleadings, the case would have gone into default and your Executor would have breached his fiduciary oath of W.Va. Code §44-1-3 for not faithfully perform the duties of his office to the best of his skill and judgment. Without doubt, Attorney Neely would have brought a Motion for Default against the Estate. This is not speculative, as Neely did

in deed and fact file a Motion for Default after the entries of the Pullin and Neely Orders striking all of the Estate's pleadings. (PA-268-272)

Your Executor shows that if he had not filed the Answer, the allegations of plaintiffs' Complaint would have been deemed admitted and the Last Will and Testament of Aurelio Rafael Gomez impeached and his fiduciary duty to the Estate breached.

The second part of the dilemma is that filing these pleadings has been alleged to be an unauthorized practice of law by out-of-state corporation Western Surety Company, out-of-state corporation Great West Life and Annuity Insurance Company doing business in this State as Empower Retirement and Kayla Addison.

The *Pullin Order* found, "as a matter of law, that the Gomez Estate is, and was at all times relevant to any of the filings submitted in this matter, not a 'natural person' but artificial legal entity like a corporation." (PA-12)

A corporation is fundamentally different from a probate estate. In West Virginia a corporation must be formed to conduct "business." Corporations are formed, regulated by and registered with the Secretary of State. Corporations are deemed perpetual in their existence. Corporation's have annual reporting requirements. Corporations are taxed, must obtain workers compensation insurance, unemployment insurance pay 941 payroll taxes, and make annual reports to the Secretary of State. Corporations are owned by shareholders and these shareholders determine the employment and compensation of their corporate officers. Corporations act without judicial oversight. Hiring a lawyer to represent a corporation is a legitimate business expense and tax deduction. The collective will of a majority of shareholders determines the course of the corporation. A licensed attorney must represent the collective will of the stockholder in court, not the president

or some other non-attorney corporate officer. The shareholder owners are living and are able to make continual decisions about their ownerships rights. The living shareholders have the flexibility to litigate legal claims, forego the claims, or settle the claim depending on the current business operations and environment.

In contrast, probate estates are not formed for business purposes but rather, to distribute a decedent's property. Probate estates are created at the death of decedent, by operation of law, regardless of whether the decedent made a will or dies intestate. In life, the Testator determines how he desires his personal and real properties are to be divided. The Testator, unlike the corporate shareholder, does not have the ability to make present decisions, as is required for business, but must give thoughtful contemplation and make his testamentary wishes well in advance.

In West Virginia, the Executor is called a "personal representative." W.Va. Code §44-1-15. The executor is nominated by the decedent and appointed by the County Commission by and through each county's Probate and Fiduciary Commissioner's Office, "West Virginia's probate court." (See Still Laying Claim: An Update to Developments in Will Contest Litigation in West Virginia, Winton & Kelley, 119 W.Va. L. Rev Online 17 (2016))

The administration of an estate is supervised by the Probate Commissioner and executors and administrators are bound by oath of fiduciary office whereas a corporate officer takes no such oath. Probate administrators and executors are called "personal representatives" whereas attorneys are called officers of the court and attorneys of record. Probate administrators and executors compensated by percentage (4%-6%) of the total estate whereas attorneys charge an hourly wage for their services representing the Estate.

Executors and administrators are given special status due to their fiduciary responsibilities.

Everyday, West Virginia non-lawyer residents represent estates in the 55 county commission probate offices without “the benefit of counsel” of a licensed attorney. It appears that in fact, non-lawyer administrators and executors are engaged in preparing legal documents and filing said documents with the County Commission. Though not a court of record, the Orders issued by the Probate Commissioner have legal and binding effect. Prior holdings of this Court require attorneys to represent corporations in the various Magistrate Courts, also not courts of record. In contrast, The County Commissioner, encourage executors and administrators to proceed pro se as attested by the many how-to manuals and handbooks published on-line and elsewhere by the Probate Commissioners.

If this Court accepts the analysis and conclusions found in the *Pullin Order*, the Testator’s advanced estate planning may be “wrecked” by a disgruntled and disowned heir’s payment of a \$200 filing fee to the clerk to avail himself or herself of the West Virginia courts. Under the proposed *Pullin Rule* set by the trial court, disgruntled heirs may proceed *pro se* in the judiciary while the Estate would be required to employ the services of an attorney from estate assets. In this likely scenario, the Testator’s prior consultations, engagement and *payment of* an attorney’s services in estate planning, preparation and execution of a of a will are for naught in the face of even a frivolous claim . As in this case, the disgruntled heirs do not have to have a factually supported claim before the Executor is required to defend against the Estate. The proposed *Pullin Rule*, estate assets will be required to be dissipated in a way not contemplated by the Testator for the hiring of an attorney when the estate is already represented by a “personal representative.” (W.Va. Code 44-1-1 *et.seq.*)

Your Executor cites *Steele v. McDonald*, 202 S.W. 3d 926 (2006) where the Court of Appeals of Texas considered an independent executor appearing in court. The Texas appellate court

found that “because Gene is not licensed to practice law, he is prohibited from representing his co-appellants.” Continuing, the Court stated, “it is not at all clear whether Gene may appear pro se as an independent executor.” Continuing, “Courts in other jurisdictions which have addressed this issue have virtually all concluded that the representation of an estate may not appear pro se in behalf of the estate ..... Consistent with these authorities, we hold that Gene may not prosecute this appeal pro se in his capacity as Independent Executor of the Duke Estate.”

Your Executor adopts the opinion of Chief Justice Gray, dissenting:

“An independent executor can do anything the decedent could do if he was still alive, unless there is some limitation upon the independent executor's powers at the time of the appointment.<sup>1</sup> See generally cases cited in *Kanz v. Hood*, 17 S.W.3d 311, 316-317 (Tex.App.-Waco 2000, pet. denied) (Gray, C.J., dissenting). I would include in that expansive statement of authorized acts the ability to appear on behalf of the estate and act as the decedent could with regard to being the litigant in a judicial proceeding. Today's holding to the contrary by the majority causes me grave concern for truly cost effective independent administration of estates in Texas. For this reason and as explained below, I dissent.

Texas has long been recognized for the truly effective independent administration of a decedent's estate. Probate planning in other states frequently involves setting up trusts during the life of the decedent to own and control assets and, more importantly, keep them from becoming part of the decedent's estate subject to the administration of the probate court at the time of the decedent's death. That type planning, and its attendant costs, is avoided in Texas by our very effective and efficient administration of estates using truly independent

administrators, though it may be used in Texas for other purposes. All over Texas estates are being probated, inventories prepared and filed, and estates being closed without an attorney being involved. I do not see how that can continue under the holding of the majority that although Gene had appeared as his own attorney, representing himself individually and as independent executor of Duke's Estate, "Gene, as independent executor, is either represented by Beale [an attorney] or not currently represented in this matter." Maj. Op. pgs. 928-929.

I find no help or support for this holding in the citation of out of state authorities on this issue. And I note that even that authority is divided. But unless those states provide for Texas style independent administration, and the person attempting to represent the estate in those cases was appointed as the independent executor of the estate, and also unless the powers of the independent administrator in those states are as broad as the powers of an independent administrator in Texas, the discussion of out of state authority is suspect and the reliance on that authority is misplaced.....The expansive holding of the majority means that nothing can be done by a personal representative in any judicial proceeding other than via an attorney. This is not the law. Further, this holding will come as an enormous surprise to the personal representatives of estates that have been and are currently being probated and who regularly represent the estate as independent executor in judicial proceedings without being represented by counsel..... I join no part of the majority's order."

Chief Judge Gray, *dissenting Steele v. McDonald*, 202 S.W. 3d 926 (2006)

In this case, all three beneficiaries of Rafael's Will have participated in this litigation, representing themselves. (PA-209-215) In the cases cited by the *Pullin Order*, almost all have factual

patterns where the executor was acting on his own behalf to the detriment of the other beneficiaries.

In the case before the Court, all parties and their licensed trial counsel engaged in substantial litigation with Executor Mark Gomez before alleging that as a non-lawyer he had no standing to file on behalf of the estate. Only after the Executor pointed out that Western Surety did not have a valid claim for attorneys fees (PA-327-329) did the out-of-state corporation assert not a legal defense, but allegations that he was engaged in the unauthorized practice of law. (PA-331-358)

### **ASSIGNMENT OF ERROR 2**

The trial court erred by failing apply the holding of Syllabus Pt. 3 of *Williams v. Precision Coil, Inc*, 194 W.Va. 52,60, 459 S.E. 2d 329, 337 (1995) which shifts the burden of proof and production to the non-moving parties when the moving party has made a properly supported motion for summary judgment and erred by not requiring the plaintiffs to produce evidence showing the existence of a genuine issue for trial or submit a Rule 56 affidavit explaining why further discovery is necessary before denying defendant’s properly supported motion for summary judgment.

On November 14, 2017, Mark Gomez, individually, filed a Motion for Summary Judgment alleging that the plaintiffs failed to produce any evidence to support their naked allegations and claims of conversion, misappropriation of property, undue influence and fraud. According to the *Neely Order*, “the Court, *having previously reviewed the documents* in support and opposition to said motions, then proceeded to hear arguments of counsel and pro se litigants.” Unfortunately, the *Neely Order* did not provide the trial court’s analysis of its denial of Mark Gomez’s Motion for Summary Judgment.

In Syllabus Pt. 3 of *Williams v. Precision Coil, Inc*, 194 W.Va. 52,60, 459 S.E. 2d 329, 337 (1995) this Court held:

“If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the non-moving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided by Rule 56(f) of the West Virginia Rules of Civil Procedure.”

In the *Neely Order*, the trial court acknowledged that it had reviewed and considered Mark Gomez’s Motion for Summary Judgment stating, “The Court, having previously reviewed the documents in support and opposition to said motion, then proceeded to hear arguments of counsel and pro se litigants.” Said supporting documents included the affidavits of Mark Gomez, David Gomez and Robert Gomez.

**David Gomez’s affidavit** avers the following:

“I witnessed my father make all of his personal decisions, all his medical decisions and all his financial decisions. In fact, I was the one that helped manage my father’s bank account. I managed my father’s bank accounts by internet.” (PA-66)

“Mark did not have the password or internet access to his accounts.” (PA-66-67)

“All transactions were approved by my father and monitored by me. My father was very much in control of all his daily life’s activities. Also, my brother Robert was involve and aware of all financial transactions. Robert lived with my father of 3 months of combined time in the last 6 months of my father’s life. Robert was very much involved with my father and his care.” (PA-67)

“The plaintiffs offered no help with helping my parents. In fact, Andrea Beth Gomez lived less than 1 mile away from my parents residence and never helped and never visited.” (PA-67)

“As they knew, I was the keeper of the keys to the safe; I had one key with me and one key hidden in my parent’s house.” (TR-71)

“So just a couple after her death, Matthew called me. I let my guard down and they did what my Mother feared. They robbed her safe of all jewelry, coins and her diamond wedding ring.” (PA-71)

“My father made all his decisions on his own until his last days in Hospice.”. (PA-73)

“In fact, Mark never used the power of attorney that my Father had given to him. My father made all his medial decision and remained very mentally capable until the last days of his life. (PA-73)

“These plaintiffs never were around my father to know anything he was capable of doing.” (PA-73)

“The plaintiffs did not even visit my Father in Hospice care the last weeks of his life.” (PA-73)

“My father contacted a Lawyer on his own and went with his caretaker Patsy and made a new Will. Mark was not even involved and did not accompany my father when he made his new Will. My father made all his decisions on his own.” (PA-73)

**Mark Gomez’s affidavit** avers the following:

“In May 2016, my father asked me to help him find an attorney to help him prepare his Will. I told him that I wanted to have nothing to do with the formation of his will.” (PA-41)

“I delivered Mrs. Curnutte’s message to Rafael whereupon he contacted attorney Fletcher and arranged for his legal services. Obviously, Attorney Fletcher prepared Rafael’s Last Will and

Testament, his Medical Power of Attorney and a General Power of Attorney for Rafael's review and execution. I was not present when any of these documents were discussed, drafted or executed."

(PA-41)

The last time Rafael Gomez saw his daughter, Andrea Smith, was on April 25, 2016, Andrea's birthday. (PA-41)

When Rafael entered General Hospital at the beginning of January, 2016, neither Andrea or Matthew came to visit him. (PA-41)

#### **Dr. Hancock's Letter**

Four (4) days before Rafael executed his Last Will and Testament before his attorney, Robert M. Fletcher, Dr. Jennifer Hancock, PsyD, had an initial "session" and prepared a letter for Rafael's long-time bank, City National Bank. Dr. Hancock addressed her letter to Mr. Mark Davis of City National and wrote:

"I am a psychologist at the CAMC Cancer Center. Per Dr. Aurelio Gomez's request, I am providing this letter. I saw Aurelio Gomez (birth date: 11/6/1932) on June 10, 2016 for an initial session. Although no formal capacity evaluation was conducted, it is my clinical opinion that on June 10, 2016, Dr. Gomez had capacity to make medical decisions and consent to treatment. He was able to discuss his medical diagnosis and treatment. He fully understood his medical treatment, and the consequences of treatment. On June 10, 2016, he presented as oriented with normal attention and concentration. No deficits were noted at that time. Sincerely, Jennifer Hancock, PsyD, Psychologist" (PA-243)

#### **Rafael's Handwritten Letter to Andrea Gomez Smith of June 15, 2016.**

The day after executing his June 14, 2016 Last Will and Testament and consulting with

Attorney Fletcher, Rafael handwrote a letter addressed to Andrea Beth Gomez Smith. Rafael wrote:

“I have been visited by police officers with police cars. I have been receiving notices and visited by govt protective social workers investigating physical and financial abuse. I was advised by a domestic lawyer that this was mental abuse and advised to me to write this letter to all members of the family. I don't want you to make any contact in any way. You are not to call me or come to my house. You always talk about properties and its value and its distribution and you say everything I do is not fair. Two days ago I went to see a lawyer specializing in Wills and I made my Will in his presence. After explaining my whole situation to him, he advised me that it sounds like someone is trying to set me up to question my mental competency.

I made my Will in the presence of a lawyer specializing in Wills and was not influenced or advised by anyone in any way. I don't want anybody to question or make comments about its contents such as properties, its value and distribution. It is my personal decision how I distribute my property. You were concerned about Rickie being under duress when he was to sign the deed to this house at the time of your Mother's death, but you were not concerned about my emotional stress when I gave you your mother's diamond ring and you took other jewelry from the safe. Don't forget that diamond belongs to me. You mail the diamond ring and other items to my lawyer's address: Robert Fletcher, 900 Lee St. E. Chas. WV 25301. When your Mother was alive you practically did not have any relationship with her. She was sick for seven years and for the last two years very grave. You never visited her or called her to see if she needed any help. Your Mother employed several caretakers in the last two years of her life. Patsy was her last caregiver. She is a good Christian woman and a good worker.

She liked her very much and became good friends. She was employed by her and not by Mark as you claim. I know that your dear husband, Christopher MacCorkle Smith insulted your Mother several times when she was sick. He told her she was going to be dead in 2 years and burn in hell. He said this in your presence and you did not open your mouth to defend your Mother from such vile insults. If Mark was here, I am sure such things would not have happened and he would have defended his Mother accordingly and effectively.

It is very sad that it came to this point to be necessary to write this sorrowful and disparaging letter but I feel your behavior brought this upon yourself. Rickie will be receiving a similar letter concerning his condition and behavior. I am very well aware what Rickie is doing to the other members of the family and myself.

This is a very serious matter. You chose whatever are willing to do, but you have to quit the notion you have the right to promote legal and criminal problems against the other members of the family. (Signed) A. Rafael Gomez, M.D. 6/15/16" (PA-280-282)

In contrast, the plaintiffs offered no evidence whatsoever in Civil Action 17-P-402, only naked allegations unsupported by competent evidence. The trial court erred by not recognizing that the burden of proof had shifted to the plaintiffs to rehabilitate their case in the face of a motion for summary judgment.

“Where a party is unable to resist a motion for summary judgment because of inadequate opportunity to conduct discovery, that party should file an affidavit pursuant to W.Va. R. Civ. P. 56(f) and obtain a ruling thereon by the trial court.”

Neither the plaintiffs nor their counsel of record submitted a Rule 56(f) affidavit to the trial court.

“A circuit court’s entry of summary judgment is reviewed de novo.” Syllabus Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E. 2d 755 (1994). Summary judgement is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Id.* at Syllabus Pt.4

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure. Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E. 2d 329 (1995).

Defendant Mark Gomez, the moving party submitted affidavits and documentary evidence in support of his motion for summary judgment. The plaintiffs, the nonmoving party failed to submit any evidence to rehabilitate their case and failed to submit a Rule 56(f) affidavit explaining why further discovery is necessary.

“Furthermore, [w]e, like the Fourth Circuit, place great weight on the Rule 56(f) affidavit, believing that “[a] party may not simple assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in the affidavit.” *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir.1995).

“A nonmoving party cannot avoid summary judgment merely by asserting that the

nonmoving party is lying. Rather, Rule 56 requires a nonmoving party to produce specific facts that cast doubt on a moving party's claims or raise significant issues of credibility. The nonmoving party is required to make this showing because he is the only one entitled to the benefit of all reasonable or justifiable inferences when confronted with a motion for summary judgment. Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition or rumors." Syllabus Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W.Va. 61, 459 S.E. 2d at 338, at 14 (emphasis in original)

Specifically regarding Will Contest/Impeachment cases, this Court has held:

"In an action to impeach a will the burden of proving undue influence is upon the party who alleges it and the mere suspicion, conjecture, possibility or guess that undue exercise has been exercised is not sufficient to support verdict which impeaches the will on that ground."

Syllabus Pt. 5, *Frye v. Norton*, 148 W.Va. 500, 135 S.E. 2d 603 (1999)

The trial record shows that the plaintiffs failed to produce a 'scintilla of evidence' to support the naked allegations of conversion, undue influence and fraud alleged in their Complaint. Further, the plaintiffs failed to file the required Rule 56 affidavit after the filing of the Motion for Summary Judgment stating under oath that more time for discovery would be needed to defend the Summary Judgment.

Further, there is a previous Will made by Rafael in 2008. (PA-283-286) This Will has been presented and filed into the trial record for consideration of the doctrine dependent relative revocation. (TR-) If the current Will is impeached, the 2008 Will bequeathing the entire estate to David Gomez will be probated. At the April 2, 2018, motions hearing, the trial court inquired:

THE COURT: "While he is looking for that, can I ask a question? Am I hearing that Dr.

Gomez, the father—had a will executed in 2008? The sole beneficiary which was one of these three individuals, on of the three sons over here?” (April 2 Transcript at p. 35)

THE COURT: “It’s okay. I think this prior will may have some relevance to the plaintiff’s overall position in this litigation. Of course, judges are always looking for ways to simplify cases, to cut to the chase on cases, to see what’s really, you know, going to be the battle so to speak. I got your argument.” (TR-38)

### **Testamentary Capacity**

“Long ago, in Syllabus Point 3 of *Stewart v. Lyons*, 54 W. Va. 665, 47 S.E. 442 (1903), this Court held:

It is not necessary that a testator possess high quality or strength of mind, to make a valid will, nor that he then have as strong mind as he formerly had. The mind may be debilitated, the memory enfeebled, the understanding weak, the character may be peculiar and eccentric, and he may even want capacity to transact many of the business affairs of life; still it is sufficient if he understands the nature of the business in which he is engaged when making a will, has a recollection of the property he means to dispose of, the object or objects of his bounty, and how he wishes to dispose of his property.

In Syllabus Point 4 of *Lyons*, this Court explained that “[w]hen incapacity of a testator is alleged against a will, the vital question is as to his capacity of mind at the time when the will was made.” In other words, “[t]he time to be considered in determining the capacity of the testator to make a will is the time at which the will was executed.” Syllabus Point 3 of *Frye v. Norton*, 148 W. Va. 500, 135 S.E.2d 603 (1964). Therefore, “ “[e]vidence of witnesses present at the execution of a will is entitled to peculiar weight, and especially is this the case

with the attesting witnesses.’ Point 2, Syllabus, *Stewart v. Lyons*, 54 W. Va. 665 [47 S.E. 442 (1903) ].” Syllabus Point 4, Frye. “[T]estimony relating to a testator's condition generally before and after the will is signed is of little or no probative value.” *Frye*, 148 at 511, 135 S.E.2d at 610.

The plaintiffs have offered no evidence to support their allegations that Rafael lacked the required testamentary capacity to make his Last Will and Testament on June 14, 2016. The plaintiff’s have no personal knowledge of Rafael’s mental status at the time he executed this Will as their did not see him for more than a year before his death. The last time Rafael Gomez saw his daughter, Andrea Smith, was on April 35, 2016, Andrea’s birthday (PA-41) It is legally presumed that licensed Attorney Robert M. Fletcher would not draft and oversee the execution of Rafael’s Will if he believed him not to be of sound mind to make this Will. Dr. Jennifer Hancock’s “clinical opinion that on June 10, 2016, Dr. Gomez had capacity to make medical decisions and consent to treatment” is undisputed by the plaintiffs. (PA-243) The plaintiffs rely on the naked excerpts taken from Rafael’s medical records to allege incapacity, but offer no expert medical testimony to decipher these medical records for the trial court. In his affidavit, Dr. David B. Gomez, O.D., himself a practicing licensed West Virginia medical professional, astutely averred, “Medical records do not testify to anything, a medical expert would be the one to testify.” (PA-74)

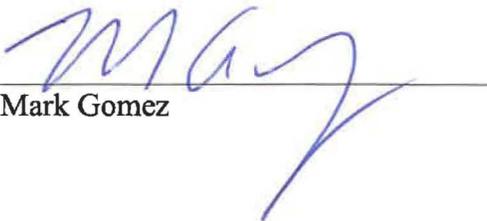
The plaintiffs have failed to produce any evidence that would support the allegations in their Complaint against Mark Gomez in his individual capacity. The plaintiffs have shown no evidence that Mark Gomez unduly influence Rafael to make his Will.

## CONCLUSION

Whether Mark Gomez is allowed to proceed as Executor in the West Virginia Judiciary as a lay Executor or whether the \$75,000 Estate is required to hire an attorney, the facts have been well developed during the course of this litigation will not change and the legal theories have be set forth and filed. There is no evidence to support the plaintiffs' claims for conversion undue influence or fraud claimed against Mark Gomez. Defendant Andrea Gomez Smith has failed to offer a valid defense as to why she took Estate property, undisputed to have a value of between \$100,000 and \$120,000, and failed to return it upon Order of the Kanawha Probate and Fiduciary Commissioner's Office and demand of the Executor.

Mark Gomez, individually, requests that this Court dismiss the plaintiffs' claims of conversion, undue influence, and fraud alleged against him for lack of proof in the trial record and the unlikely production of evidence in the future that would negate or overcome the deficiencies of material facts in plaintiff's case. Your Petitioner requests that his personal counterclaims and third party claims proceed to jury trial.

Respectfully submitted,

  
Mark Gomez