IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STEPHEN M. HOOD, Plaintiff Below,

Petitioner,

v. No. 22-0214

JEFFREY E. HOOD, INDIVIDUALLY AND IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF DOROTHY HOOD, AND LINDA HOOD, INDIVIDUALLY, Defendants Below,

Respondents.

PETITIONER'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

(Civil Action No. 15-C-546)

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3. That the Court misstated the law when it found that "the affidavits submitted by the attesting witnesses, physicians, notary, etc. are entitled to great weight based upon the findings in Cantarelli[.]"
4. That the Court misstated the law when it concluded that an insane delusion must be based on an "extraordinary belief in spiritualism" that testator followed when constructing a will.
5. The Circuit Court erred by concluding Appellant failed to plead "insane delusion" in his Complaint when Appellant pled "lack of testamentary capacity" which encompasses "insane delusion."
6. That the current law that the time to be considered in determining the capacity of the testator to make a Will is the time at which the Will was executed should be modified.

II. STATEMENT OF THE CASE

This matter involves the contest of Dorothy Hood's Last Will and Testament. Dorothy Hood was married to her husband Marshall Hood. Marshall Hood passed away in 2004 and Dorothy later passed away in 2013. Dorothy Hood and Marshall Hood had two children, Stephen "Sam" Hood and Jeffrey Hood. Neither Dorothy Hood nor Marshall Hood had any other children. Sam Hood filed this action after his mother Dorothy Hood passed away and he discovered that her Will left all of her property to his brother Jeffrey Hood. Over the years, Dorothy Hood executed at least two wills prior to the contested September 7, 2007, Last Will and Testament, and each of them divided her property equally between her children if her husband predeceased her. App. at pp. 975-997.

At issue is whether Dorothy Hood was suffering from dementia at the time she signed her Last Will and Testament on September 7, 2007, whether she had testamentary capacity at the time she signed her Will, and whether she was unduly influenced by Jeffrey Hood to disinherit Sam Hood. "Dementia is a progressive disease that does not lend itself to 'lucid intervals' of high level functioning." App. at p. 486. "Persons with dementia may have some degree of fluctuation in attention and alertness but these fluctuations are not seen in the executive functions that are essential for testamentary capacity." App. at p. 486. "For these functions, dementia goes one way and that is toward ever diminishing abilities." App. at p. 486. Just four months after signing her Will, Dorothy Hood was found permanently incapacitated due to dementia on January 28, 2008. App. at p. 774. On

January 31, 2008, Dorothy was transferred to Wyngate, a full-service long-term assisted living facility. App. at p. 783. Dorothy lived the rest of her life at Wyngate, ultimate dying of Alzheimer's disease on July 20, 2013. App. at p. 123.

There is a plethora of evidence that shows that Dorothy Hood lacked testamentary capacity at the time she signed her will on September 7, 2007. There is evidence from her friends and family, attending physicians, the attorney that drafted her will, and expert witnesses that Dorothy Hood lacked testamentary capacity the day she signed her will.

By 2006, it was evident to Dorothy's friends and family that she was suffering from dementia. William Burdette, Jr. testified that Dorothy got lost after leaving his store, returned and asked him to call her deceased husband to pick her up. App. at pp. 348-349. David Hager testified that Dorothy forgot that his mother's legs had been amputated and demanded that they lift the sheet covering her lower body to verify; forgot to go to his mother's funeral; was unable to recognize his children whom she had known for years; and that Dorothy's personal hygiene had markedly deteriorated. App. at pp. 356-358. Ortrud Vallejos, Dorothy's friend and housekeeper, testified that Dorothy defecated herself, did not clean herself, and that when she showed up at Dorothy's house, Dorothy did not recognize her. App. at pp. 381, 385. Ann Justice testified that Dorothy told her that she was feeling confused and that her "mind was not right;" and on another occasion, after attending a church service, Dorothy asked her when the service was going to begin. App. at p. 431. Taylor Hood testified that

Dorothy was no longer able to pay her own bills or her taxes and that a caretaker was paying the bills. App. at p. 932. All of these facts show signs of worsening dementia and occurred prior to Dorothy signing the contested Will.

Likewise, by 2006, Dorothy's medical records indicate she was suffering from dementia. On August 4, 2006, Dorothy went to the hospital suffering from swelling of the tongue after having eaten a "large quantity of shrimp." App. at pp. 632-633. Dorothy had a shellfish allergy going back 40 years, yet she had forgotten and told hospital staff that she had "no reactions to shellfish in the past." App. at pp. 632-633. On October 12, 2006, Dorothy reported to Dr. Ahmet "Ozzie" Ozturk, M.D., M.S., that she was having "problems with falling asleep, waking tired in the morning, daytime fatigue, feeling sleepy during the day, and being forgetful of little things… and experiences moderate depression." App. at p. 642. These problems are indications of "sundowning" which is often associated with dementia. App. at p. 483. During this visit, Dorothy also stated to the clinical staff that both of her parents died of cancer, when in reality her father died from complications of diabetes in 1945, and her mother died of heart failure in 1972. App. at p. 642. These are symptoms of dementia.

On July 26, 2007 Dorothy was admitted to the hospital where she was described as having "unsteady gait, confusion, delirium," "appears forgetful at times; becomes agitated," and "reoriented to surroundings as needed." App. at p. 689. At this visit, she was seen by attending physician Dr. Chadwick Smith, M.D., who stated that "just

from my initial interview with this patient I believe she does have some underlying dementia which is present." App. at p. 698. Dr. Smith goes on to state that Dorothy repetitively asked him his name and what the situation was, and that she could not remember how long she had the pain she described or recall other medical history. App. at p. 698. Dr. Smith then stated "No further history is obtained secondary to her dementia." App. at p. 699. Dr. Laura S. Duncan, M.D., who also attended to Dorothy during this visit, described her as "somewhat forgetful, maybe even somewhat demented." App. at p. 696. Dr. Duncan went on to state that "patient seems to state one thing and then maybe forgets and states something completely different when asked the same question..." App. at p. 695. This occurred about one month prior to Dorothy signing her new will.

Dorothy saw her primary care physician, Dr. Kevin Yingling, on November 10, 2006, and March 9, 2007, whose notes indicate: "Neuro abnormal." App. at p. 646, 662. On June 6, 2007, Dr. Yingling's nurse returned a phone call from Dorothy and noted "Pt very confused about calling office. Pt. stated she did not want to call us." App. at p. 671. Dr. Yingling submitted an Affidavit stating that he believed Dorothy Hood had testamentary capacity when she signed her will on September 7, 2007, but like her other attending physicians, he did not see Dorothy on that day.

On December 4, 2007, Dorothy was found to have "poor short-term memory." App. at p. 714. On December 6, 2007, Dorothy was found to be "disoriented to place and time" and "Repeatedly asks why the nursing staff is here and what is going on." App. at p. 718. On

January 18, 2008, Cabell County EMS was called to Dorothy's home where she was found on the floor needing help to get up. App. at pp. 727-728. Dorothy refused treatment against medical advice, and signed her name "Dorothy Adkins," her maiden name from 67 years prior. App. at pp. 727-728.

On January 23-24, 2008, Dr. Mohammed Ahmed found that Dorothy had dementia. App. at pp. 732-733. E. Saunders, M.D. noted: "During her hospital course, she did have a history of baseline dementia. It was discussed with her family that prior to this admission she had spent multiple weeks at home, sitting on the couch without taking care of herself." App. at pp. 781-782. On January 28, 2008, Dorothy was found permanently incapacitated due to dementia. App. at p. 774. On January 31, 2008, Dorothy was transferred to Wyngate, a full-service long-term assisted living facility. App. at p. 783. Dorothy lived the rest of her life at Wyngate, ultimate dying of Alzheimer's disease on July 20, 2013. App. at p. 123.

Turing to the procurement of the Will, it was in early August 2007, as Dorothy's dementia progressed, that Jeffrey Hood put his mother in contact with his best friend, attorney Paul Farrell, in order to draft a new will for Dorothy. App. at p. 314. Mr. Farrell had never done any legal work for Dorothy or Marshall Hood and did not have prior knowledge of the extent of Dorothy's assets. On August 7, 2007, and over the course of a week, Mr. Farrell took contemporaneous handwritten notes of his telephone calls with Dorothy Hood. App. at pp. 847-848. Mr. Farrell followed up those notes with a memo summarizing their conversations, which he made in anticipation of

litigation. App. at pp. 849-850. Those notes show that Dorothy Hood did not understand the nature and extent of her estate.

Mr. Farrell's notes reflect Dorothy's incorrect belief that Sam Hood owed her $150,000 from the sale of the family business, Huntington Piping, which she and Marshall sold to Sam in the 1980s. App. at p. 848. Sam purchased Huntington Piping in 1984 for $316,418. The purchase price was paid to Dorothy and Marshall in three installments of $25,113 (paid in 1987), $191,759 (paid 1988) and $99,546 (paid in 1989) which is reflected on Dorothy and Marshall's tax returns for those years. App. at pp. 851-856.

Mr. Farrell's notes also show that Dorothy believed that she had not received any distribution from her late husband's estate, of which Sam Hood was the Executor. App. at p. 850. Marshall's entire probate estate consisted of one asset, a checking account in the amount of $12,280.77, which was promptly distributed to Dorothy in April 2004 after Marshall's death in March. App. at pp. 865-867. Through prior estate planning, most of Dorothy and Marshalls assets had been placed in Dorothy's name over the years. App. at p. 850.

The notes also reflect Dorothy's incorrect belief that Marshall owned a fortune in antique cars that Sam had in his garage, in which she was the rightful owner. App. at p. 847. In reality, there were only two antique cars and Marshall had sold them to Sam: a 1953 MG sold to Sam in 1988, and a 1917 Ford Truck sold to Sam in 1994. App. at pp. 857-864. Sam paid for those vehicles, and received title to and possession of those vehicles at least ten years prior to Marshall's death. App. at pp. 857-864. Though these vehicles were

antiques, neither were particularly valuable at the time and were hardly a "fortune in cars."

Mr. Farrell's notes also show that Dorothy incorrectly believed that she had an interest in one of Jeffrey Hood's businesses, Snider's, which even Mr. Farrell suspected was not true. App. at pp. 848, 317-318. Despite these limited proffers from Dorothy, Mr. Farrell never inquired as to the extent of Dorothy's assets because "It's really none of my business at that point." App. at p. 308. "There was no discussion as to the value" of her estate. App. at p. 308. Because she was suffering from dementia, she did not understand the nature or value of her estate, and believed she owned assets that she actually did not. Moreover, her basis for disinheriting Sam was that she erroneously believed that Sam had wrongfully taken property that belonged to her. App. at p. 850.

For an estate that was worth about one-million dollars, Mr. Farrell drafted a will for Dorothy that was merely one and one-half pages in length, double spaced, not including the attestation page. App. at pp. 105-107. The will disinherited Sam Hood, left all of Dorothy's property to Jeffrey Hood, and made Jeffrey the Executor. App. at pp. 105-107. The will was executed by Dorothy on September 7, 2007. Paul Farrell and his associate Neisha Brown witnessed the will and Terrie McMahon Snow notarized their signatures. App. at pp. 105-107.

In regards to discussions they had with Dorothy during the will execution ceremony to determine testamentary capacity, Paul Farrell and Neisha Brown gave deposition testimony that directly

conflicted with affidavits they each later submitted to the lower court. Mr. Farrell testified at deposition that he did not review the will with Dorothy at the will execution ceremony in front of the other witness and notary. App. at 324. He asked no questions that would test her memory of her estate. App. at 324. He only asked "general competency questions, anticipating the litigation," such as "What day are we on? What month is it? Who is the president? Do you understand why we're here today? Questions like that." App. at 324. However, in his later affidavit, Mr. Farrell states generally that he had discussions with Dorothy to satisfy himself that she "was of sound mind, understood her business and the reason she was present that day and how she wished to dispose of her property." App. at pp. 109-110.

Ms. Brown testified at deposition that she did not ask Dorothy any questions herself and does not recall any specific questions that Paul Farrell asked Dorothy, other than "to orient her to day, time and place." App. at 302. She does not recall Paul Farrell asking Dorothy if she understood that she was leaving her entire estate to Jeffrey Hood or if it was her intent to leave nothing to any of her grandchildren. App. at p. 303. She does not recall Paul Farrell asking whether Dorothy was on any medication, whether Dorothy had been recently hospitalized, or if Dorothy had any questions. App. at pp. 302-303. She does not recall whether Dorothy read the will or had the will read to her. App. at pp. 302-303. However, in her later affidavit, Ms. Brown testified that she "had discussions with Dorothy" to satisfy herself that she "was of sound mind, understood her

business and the reason she was present that day and how she wished to dispose of her property." App. at pp. 111-112.

In her affidavit, Terrie McMahon Snow testified that she observed Dorothy Hood's behavior and conversations with the attorney during the will execution ceremony, and that she was satisfied that Dorothy "was of sound mind and that she understood the circumstances and her surroundings…" App. at pp. 113-114. However, Ms. Snow had "no independent memory of Dorothy Hood or the signing of her will." App. at pp. 305-306.

Though testimony of the drafting attorney and subscribing witnesses are usually entitled to greater weight than other evidence that tends to show lack of testamentary capacity, the testimony here is weak and contradictory. Taken with the other evidence of attending physicians, and friends and family, there are certainly material facts that are contested which a jury should hear.

III. PROCEDURAL HISTORY AND CIRCUIT COURT DECISION

On October 21, 2013, Plaintiff Stephen M. Hood filed a Complaint in Cabell County Circuit Court against Jeffrey E. Hood contesting their mother's will, having the Civil Action number 13-C-782. After extensive discovery, Plaintiff filed a Complaint against additional defendants Jeffrey E. Hood as Executor, Linda Hood, Paul T. Farrell, and Ferrell, White & Legg, PLLC to preserve his rights in those claims, while contemporaneously filing a motion to amend his Complaint in the action numbered 13-C-782. The two actions were then consolidated under civil action number 15-C-546. The lower court later

dismissed Paul T. Farrell, and Ferrell, White & Legg, PLLC from the case.

The Honorable F. Jane Hustead, the Honorable Christopher D. Chiles, the Honorable Paul T. Farrell, and the Honorable Alfred E. Ferguson, all Judges of the Sixth Judicial Circuit, voluntarily requested to be recused from presiding over this matter. This Court granted the Judges' request to be recused in its September 10, 2015, Administrative Order and also assigned the Honorable Gary L. Johnson to preside over this case. The case was later transferred to the Honorable Jay M. Hoke in 2017 after the Honorable Gary L. Johnson resigned.

Over the years, the parties filed numerous motions for summary judgment, memoranda in support thereof, and memoranda in opposition thereto, all of which are included in the Joint Appendix. On April 10, 2018, the lower court continued the trial on Defendants' motion and ordered Defendants to submit a medical timeline to Plaintiff. Defendants submitted the timeline as ordered. App. at p. 522. Plaintiff submitted a response to the medical timeline to the court on June 7, 2018. App. at p. 589.

Despite the plethora of evidence showing Dorothy Hood lacked testamentary capacity at the time she executed her will, the court below granted Defendants' motion for summary judgment on the grounds that Plaintiff produced no evidence that could prove any of his allegations. App. at p. 1040. On March 21, 2022, Petitioner timely appealed the Order granting summary judgment for Respondents.

IV. STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument pursuant to West Virginia Rule of Appellate Procedure Rule 19 because the result below was against the weight of the evidence and because it involves assignments of error in the application of settled law. Petitioner also requests oral argument under Rule 20 because certain issues are of fundamental public importance and also involve inconsistencies or conflicts among the decisions of lower tribunals.

V. SUMMARY OF ARGUMENT

The Circuit Court below erred when it granted summary judgment to Defendants finding that there were no genuine issues of material fact in dispute. There are numerous disputes of fact that call into question the testamentary capacity of Dorothy Hood at the time she executed her will. Such facts show that her dementia, her insane delusions, and undue influence of Jeffrey Hood defeated her testamentary capacity. Upon the record as a whole, a rational trier of fact could have found that Dorothy Hood lacked testamentary capacity. The Circuit Court order granting summary judgment should be reversed.

VI. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 2, Painter v. Peavy, 192 W. Va. 189,

451 S.E.2d 755 (1994). Summary judgment is only "appropriate where the record taken as a whole could no 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. Syl. Pt. 4, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

"A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syl. Pt. 1, Johnson v. Junior Pocahontas Coal Co., Inc., 160 W. Va. 261, 234 S.E.2d 309 (1977). "A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances." Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 171, 133 S.E.2d 770, 777 (1963).

"A genuine issue or dispute is simply one "about which reasonable minds could differ." Dent v. Fruth, 192 W. Va. 506, 510, 453 S.E.2d 340, 344 (1994). "A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. Pt. 5, Jividen v. Law, 194 W. Va. 705, 461 S.E.2d 451 (1995).

VII. ARGUMENT

1. The Circuit Court erred by granting summary judgment on all claims despite the existence of genuine issues of material fact.

Summary judgment is only appropriate where the moving party shows that "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963). The evidence must be such that "the record cannot lead a rational trier of fact to find for the nonmoving party." Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 366 (1995). "On a motion for summary judgment the court can not summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue." Aetna Casualty & Surety Co., 148 W. Va. at 171, 133 S.E.2d at 777.

Appellant offered an abundance of evidence to the Circuit Court showing that Dorothy Hood did not have the required testamentary capacity to execute a will, that Appellees unduly influenced Dorothy to leave her entire estate to Jeff Hood, that Appellees thereby tortiously interfered with Sam Hood's inheritance, that Appellees committed conversion of property belonging to the estate, and that Appellees engaged in civil conspiracy in carrying out these torts. However, the Circuit Court failed to review, acknowledge, or discuss that evidence. Instead, the Circuit Court summarily tried the factual issues without considering all of the evidence, and granted summary judgment in favor of Appellees. In doing so, the Circuit Court committed reversible error.

a. Evidence shows that Dorothy Hood lacked testamentary capacity at the time she executed her will because she was suffering from dementia.

In a will contest such as the case at bar, the proponents of the challenged will have the burden of proof to establish the testamentary capacity of the decedent. Powell v, Sayers, 134 W.Va. 653, 662-663, 60 S.E.2d 740, 747 (1950); Syl. Pt. 7, Mongomery v. Montgomery, 147 W.Va. 449, 128 S.E.2d 480 (1962). The test of "testamentary capacity" requires that the testator be capable of understanding: (1) the nature and consequences of her acts; (2) the property to be disposed; and (3) the object of her bounty. Syl. Pt. 1, Payne v. Payne, 97 W.Va. 627, 125 S.E. 818 (1924). Syl. Pt. 19, Kerr v. Lunsford, 31 W.Va. 659, 8 S.E. 650 (1888). The test requires, at a minimum, that the testator, at the moment she signs the will, know and intelligently understand the nature of the business in which she was engaged and know what property belonged to her and, generally, what the property was worth. Syl. Pt. 3, Stewart v. Lyons, 54 W.Va. 665, 47 S.E. 442 (1904).

Dementia is not a disease that happens overnight. Dementia is a chronic disease that slowly and progressively worsens. App. at p. 275. At the time an individual is diagnosed with dementia by a physician, the disease has often been present for three to five years. App. at p. 275. The evidence (medical records, lay and expert testimony, and other documented evidence) presented in this case establishes that Mrs. Hood began suffering from dementia in 2006, and possibly as early as 2004. Defendants claim that Dorothy had testamentary capacity at the time she signed her will and she was not incapacitated until January 2008.

Dorothy's attending physicians explicitly identified and documented her underlying dementia in late July 2007, just one week prior to her first consultation with Attorney Paul Farrell, and six weeks **before** she signed the contested will. App. at p. 269. Just three months after she signed the will, Dorothy was admitted to the hospital on December 4, 2007, and was found to have "poor short-term memory." App. at p. 714. On December 6, 2007, Dorothy was found to be "disoriented to place and time" and "Repeatedly asks why the nursing staff is here and what is going on." App. at p. 718. Just four months **after** signing her Will, on January 28, 2008, Dorothy was found permanently incapacitated with dementia and immediately moved into a full-service long-term living facility. App. at pp. 774, 783.

As a consequence of her dementia, Mrs. Hood lacked testamentary capacity at the time she signed the will on September 7, 2007. Attorney Paul Farrell's notes from telephone calls with Dorothy indicate that she did not know what property belonged to her or what that property was worth. Dorothy erroneously believed that Sam Hood owed her $150,000 from the sale of the family business, Huntington Piping. App. at p. 848. Dorothy erroneously believed that she had not received any distribution from her late husband's estate, when she had in fact received all of the estate's assets. App. at p. 850. Dorothy erroneously believed that she owned a fortune in antique cars and that Sam had wrongfully taken them; not only were the cars not worth a fortune, they were sold to Sam by Marshall years prior. App. at p. 847. Dorothy also erroneously believed that she owned an interest in one of Jeffrey Hood's businesses, Snider's, which even Mr. Farrell

suspected was not true at the time they spoke. App. at pp. 848, 317-318. Mr. Farrell's notes reflect that Dorothy's house was titled in her name. App. at p. 847. However, Mr. Farrell did not inquire as to the extent of Dorothy's estate as an estate planning attorney should have. App. at p. 308.

These erroneous beliefs that Sam owed her money or had converted her assets were listed in Mr. Farrell's notes as the reason Dorothy had decided to completely disinherit Sam and his children. App. at pp. 847-850. The notes state that "Sam has everything" and "Feels Sam has monies that belong to her." App. at pp. 847-848. Dorothy's will merely states "I have intentionally left nothing to my son Stephen M. (Sam) Hood, knowing that he was well provided for during my lifetime." App. at p. 172. Defendants say this statement is evidence that Dorothy had testamentary capacity because Sam was well provided for by his parents. However, Dorothy's statements to Attorney Paul Farrell regarding why she believed she and Marshall had "well provided" for Sam and not Jeffrey are clearly based on falsities. These notes show that there is a material fact in dispute whether Dorothy knew the nature and consequences of her acts of signing a new will that disinherited Sam, the property she owned to be disposed, and the object of her bounty.

Further evidence that Dorothy lacked testamentary capacity at the time she signed her will can be adduced through reviewing Dorothy's medical records, which indicate progressing dementia beginning in 2006. However, the Circuit Court's Order ignores most of those medical records, mentioning only the July 9, 2007, September 13,

2007, and September 20, 2007 medical records that suggest Dorothy was competent. App. at p. 1052.

The Circuit Court cites Dr. Yingling's notes on July 9, 2007 stating that Dorothy "was in her usual state of health and mental competence" which is an absolutely meaningless statement because he does not describe Dorothy's usual state of competence. App. at p. 1052. While the July 9, 2007 visit notes that Dorothy was alert and oriented, the second page of the report shows that Dr. Yingling did no review whatsoever of her "neuro" or "psych" systems. App. at p. 676. Other medical records show that Dorothy was lacking mental competence in July 2007 and that she had dementia. App. at pp. 698-700.

The September 13, 2007, medical record shows that Dorothy "was alert and oriented to time place and person." App. at p. 1052. However, being "alert and oriented x3" is not adequate "to determine the decision-making capacity of the examinee." App. at p. 598. Alert and oriented x3 only shows that the examinee is "conscious (Alert) and asked only to identify self, location, and time/date (Orientation x3.)" App. at p. 598.

On September 20, 2007, Dr. Yingling again saw Dorothy and his "records reflect that he had a discussion with Mrs. Hood about her current and future living arrangements." App. at p. 1052. In and of itself, this medical record has no bearing on Dorothy Hood's testamentary capacity. However, the discussion about Dorothy's living arrangements occurred because Jeffrey Hood inquired with Dr. Yingling "as to how the family could have Dorothy involuntarily removed to an

assisted living facility" because she was exhibiting mental problems. App. at p. 438.

The Court inexplicably fails to mention in it's order how it reconciled the vast amount of other medical records evidencing Dorothy's cognitive decline, including the July 26, 2007 and July 28, 2007 hospital visits in which Dorothy's attending physicians note their findings of dementia. App. at pp. 698-700. These records were temporally close to the date Dorothy signed her will. The Court committed error when it failed to acknowledge or consider this evidence in its Order, and instead cherry-picked three visits that seemed to support Defendants' position.

The medical records show a genuine issue of material fact in contention regarding Dorothy's testamentary capacity when she executed the contested will after being identified by multiple attending physicians as suffering from dementia.

Many friends and family-members of Dorothy testified that she was declining mentally in 2006 and 2007, which coincides with the execution of the will. However, the Circuit Court merely cites the testimony of Kathy Parrish, who indicated that she believed that "during the Summer and Fall 2007 Mrs. Hood appeared to have a good understanding of her affairs and she observed nothing to indicate that she was not mentally competent." App. at p. 1052.

A considerable number of witnesses testified to Mrs. Hood's lack of mental and testamentary capacity leading up to and including the date on which she signed the contested will. William Burdette, Jr. testified that Dorothy got lost and asked him to call her deceased

husband to pick her up. App. at pp. 348-349. David Hager testified that Dorothy forgot that his mother's legs had been amputated and demanded that they lift the sheet covering her lower body to verify; forgot to go to his mother's funeral; was unable to recognize his children whom she had known for years; and that Dorothy's personal hygiene deteriorated. App. at pp. 356-358. Ortrud Vallejos testified that Dorothy defecated herself and did not clean herself, and that when she showed up at Dorothy's house, Dorothy did not recognize her. App. at pp. 381, 385. Ann Justice testified that Dorothy told her that she was feeling confused and that her "mind was not right;" and on another occasion, after attending a church service, Dorothy asked her when the service was going to begin. App. at p. 431. Taylor Hood testified that Dorothy was no longer able to pay her own bills or her taxes and that a caretaker was paying the bills. App. at p. 932.

Martha Hood testified that she noticed Dorothy began declining mentally shortly after Marshall Hood's death in 2004. App. at p. 434. Martha also testified that she spoke with Jeffrey Hood and Linda Hood about Dorothy's decline over the years, with the frequency increasing in 2006 and 2007 as Dorothy's mental status deteriorated. App. at pp. 434-435. Martha described various instances in 2007 of Dorothy's forgetfulness, poor hygiene, anger, and confusion, which together is indicative of progressing dementia. App. at pp. 435-439.

b. The attorney that drafted Dorothy Hood's will, the witness to the will, and the notary have given conflicting testimony on how they determined she had testamentary capacity.

"The time to be considered in determining the capacity of the testator to make a will is the time at which the will was

executed." Syl. Pt. 8, James v. Knotts, 227 W. Va. 65, 705 S.E.2d 572 (2010), quoting Syl. Pt. 3, Frye v. Norton, 148 W. Va. 500, 135 S.E.2d 603 (1964). "The evidence of attesting witnesses, of attending physicians, and of a lawyer who drafted the will, is entitled to great weight on the question of mental capacity of a testator to make a will." Cantarelli v. Grisso, No. 18-0839 (Jan. 13, 2020)(Memorandum Decision), citing Syl. Pt. 3, Floyd v. Floyd, 148 W. Va. 183, 133 S.E.2d 726 (1963). "Although such evidence in favor of a will is not conclusive, it must be clearly outweighed by other evidence in order to support a verdict against the validity of the will." Cantarelli v. Grisso, No. 18-0839 (Jan. 13, 2020)(Memorandum Decision), citing Syl. Pt. 3, Floyd v. Floyd, 148 W. Va. 183, 133 S.E.2d 726 (1963).

Attorney Paul Farrell drafted the contested will and witnessed its signing. Mr. Farrell testified at deposition that he did not review the will with Dorothy at the will execution ceremony in front of the other witness and notary. App. at 324. He asked no questions that would test her memory of her estate. App. at 324. He only asked "general competency questions, anticipating the litigation," such as "What day are we on? What month is it? Who is the president? Do you understand why we're here today? Questions like that." App. at 324. Mr. Farrell asked no questions during the will execution ceremony that actually tested Dorothy's competency. Mr. Farrell also made no inquiry as to whether Dorothy was on medication, if she had recently been seen or treated by a physician, or if she was having memory problems. App. at p. 327. However, Mr. Farrell testified

that he believed at the time that Dorothy Hood executed her Will, she had testamentary capacity. App. at p. 327.

Mr. Farrell confirmed that he did not have any discussions with Dorothy about the nature or amount of her estate other than the few pieces of information she volunteered during their initial telephone call, which as we now know are entirely incorrect. Mr. Farrell testified that he did not know the value of Dorothy's estate at the time he drafted the will. App. at p. 308. In fact, Mr. Farrell admits that he suspected Mrs. Hood was incorrect about one of those items; namely, being an owner of Jeffrey Hood's business, Snider's. App. at pp. 848, 317-318. At that point, Mr. Farrell should have been on notice that Dorothy may have had functional deficits to her mental capacity. Indeed, Mr. Farrell's notes indicate utter confusion on Dorothy's part regarding her estate. Had Mr. Farrell actually asked Dorothy questions that tested her knowledge of her assets, he may have actually discovered that she had no idea. Mr. Farrell's procedures were lax and that may have been because the will was for the mother of his long-time friend.

However, after the poor testimony he gave during his deposition, Mr. Farrell supplemented the record with an Affidavit that states generally that he had discussions with Dorothy to satisfy himself that she "was of sound mind, understood her business and the reason she was present that day and how she wished to dispose of her property." App. at pp. 109-110. This conflicting testimony creates a material question of fact whether Mr. Farrell did enough to test

Dorothy's testamentary capacity to make such a determination, which a jury should decide.

Neisha Brown was the second witness to the will signing. At deposition, Ms. Brown testified that "I just know that Judge Farrell asked her a series of questions, and I listened, and then I signed the Will as a witness." App. at p. 302. When asked in her deposition if she recalled the questions that Mr. Farrell asked to Dorothy, Ms. Brown testified, "I don't recall specific questions, but I know they were to orient her to day, time, and place." App. at p. 302. When asked to recall the questions to the best of her ability, she responded, "Honestly, I don't remember specific questions, but I know they were--she knew the day. She knew the time. She knew where she was. Those were the questions that he asked." App. at p. 302. When asked if Mr. Farrell asked any questions other than orienting Mrs. Hood to day, time, and place, she again responded: "I don't recall." App. at p. 302. Ms. Brown was asked if Mr. Farrell read the will to Mrs. Hood and her response was: "I don't remember." App. at p. 303. Ms. Brown did not ask Dorothy any questions. App. at p. 303.

Ms. Brown later signed an Affidavit in which she emphatically states, "That on September 7, 2007, I had discussions with Dorothy A. Hood for the purposes of satisfying myself that Ms. Hood was of sound mind, understood her business the reason she was present that day and how she wished to dispose of her property." App. at p. 111-112. This statement completely contradicts her prior testimony in which she stated that she did not ask Dorothy any questions and only recalled Mr. Farrell asking Dorothy questions to

orient her to day, time, and place. As we know, being alert and oriented x3 does not mean a person has testamentary capacity. App. at p. 598.

This conflicting testimony creates a material question of fact whether Ms. Brown had sufficient reason to believe Dorothy had testamentary capacity to execute a will, which a jury should decide. Furthermore, there are sufficient discrepancies between her Affidavit and her deposition testimony for a jury to conclude that Neisha Brown is not a credible witness as to Dorothy's testamentary capacity.

Terrie McMahon Snow notarized Dorothy's signature on the disputed will. In her Affidavit, Ms. Snow states that she "observed Dorothy A. Hood's behavior and conversations with the attorney on September 7, 2007, both prior to and during the signing of her will, and Dorothy A. Hood did not appear confused at all nor was she hesitant to sign the will… based on my observations of Dorothy A. Hood and the conversations had with Dorothy A. Hood, I was satisfied that she was of sound mind and that she understood the circumstances and her surroundings…." App. at pp. 113-114.

However, in a 2015 conversation with Plaintiff Sam Hood, which Ms. Snow acknowledges happened in her Affidavit, Ms. Snow stated that she has "no independent memory of Dorothy Hood or the signing of her will." App. at pp. 305-306. As she strongly hints in her affidavit, Ms. Snow's testimony is based on her routine protocol and not anything specific to Dorothy Hood. App. at p. 114.

Although the evidence of the attesting witnesses and attorney who drafted the will are entitled to great weight, the

testimonial evidence of Paul Farrell, Neisha Brown, and Terrie McMahon Snow, is weak, as all have given conflicting testimony. Taken with the other strong evidence from her attorney and others that Dorothy did not know what her assets were, evidence of dementia from her attending physicians shortly before executing her will, and evidence of dementia from her friends and family, these material issues of fact should not have been decided on summary judgment and the Circuit Court's order granting summary judgment should be reversed.

c. Evidence shows that Jeffrey Hood may have unduly influenced Dorothy Hood to disinherit Sam Hood to obtain her entire estate.

In it's order, the Circuit Court disposes of the undue influence claim by stating that "Plaintiff has offered little or no factual evidence to support his claim of undue influence. The evidence in the record, relates to Mrs. Hood's mental status." App. at p. 1053. The Circuit Court ignored evidence that Jeffrey Hood had the motive, the ability, a history of attempting to take his father's property, and the susceptibility of Dorothy to such manipulation due to her advanced age and worsening dementia. Because of her dementia, Dorothy did not understand that the supposed reasons for disinheriting her son, Sam, were factually flawed, or that those falsities had been fed to her by her oldest son, Jeffrey, for the purpose of having her leave her entire estate to him.

Undue influence, which can invalidate a will, may be established by either direct or circumstantial evidence. Syl. Pt. 3, Cale v. Napier, 186 W.Va. 244, 412 S.E.2d 242 (1991). Evidence admissible to establish undue influence can include the advanced age

or physical or mental infirmities of the testator. Syl. Pt. 4, Cale v. Napier, 186 W.Va. 244, 412 S.E.2d 242 (1991). Also admissible to establish undue influence is evidence that "the testator had previously either expressed an intention to make a contrary disposition of the property or had a prior will which made a disposition contrary to that of the contested will. Syl. Pt. 5, Cale v. Napier, 186 W.Va. 244, 412 S.E.2d 242 (1991).

During his deposition, Jeffrey admitted that he gave Dorothy a written list of false and misleading information, claiming that Sam had been given various assets by his parents and had thus been treated better than himself. App. at p. 1005. In that list, Jeffrey told Dorothy that Sam had been given—not paid for—the family business Huntington Piping. App. at p. 1003. Importantly, this is the exact reason Dorothy gave Paul Farrell for leaving her entire estate to Jeffrey and disinheriting Sam. App. at p. 849.

The list given by Jeffrey to Dorothy also claimed that Sam was given $1,270,000 in real estate, but omitted the fact that the actual equity in the real estate was minimal, and that Sam assumed the notes on those properties. App. at p. 1003. This is reflected in Marshall's letter to Jeff explaining that Sam "was given the equity as well as the balance on each note." App. at p. 960. Jeffrey Hood does not dispute that he wrote this list and provided it to Dorothy, and when discussing what he meant by the word "given" as used in the list, stated that "That was my choice of words. Maybe I shouldn't have said that." App. at p. 1005.

This is not the first time Jeffrey Hood has taken advantage of his parents' vulnerabilities and trust. In 1996, Jeffrey tricked his father, Marshall, into unknowingly signing ownership of Marshall's business over to Jeff. When Marshall discovered what Jeffrey had done, he wrote the following to Jeffrey:

> Right now I do not own anything. I have nothing to leave your mother when I die. You own all of the Hood Steel stock and are collecting the $4,000 Cecil pays. I never signed over my I.S.C. stock to you or anyone that I can remember. I remember signing some letter size sheets with a typed narrative. I never read them because I trusted you.

App. at p. 955.

Jeffrey responded by suing his father. The law firm that represented Jeff in that lawsuit was Farrell, Farrell, & Farrell, PLLC, the same law firm that, one decade later, Jeffrey Hood would arrange to draft Dorothy's will that disinherited Sam. App. at pp. 310-312. After that lawsuit was resolved, Jeffrey Hood once again used Farrell, Farrell, & Farrell, PLLC, to file a lawsuit against Marshall Hood. App. at pp. 310-312. Jeffrey Hood ceased all contact with his parents and did not allow them to see their grandchildren. That estrangement lasted thirteen years. App. at p. 941. Paul Farrell acknowledged that there has been "bad blood" between Jeffrey Hood and Sam Hood for decades. App. at p. 310.

Knowing that Dorothy would welcome a rekindled relationship with her son, and knowing that her mental health was deteriorating, Jeffrey re-entered her life after Marshall died and fed her with misinformation to make her believe that he had been mistreated and Sam had been favored. Then he personally arranged for Paul Farrell to draw

up a new will for Dorothy with the purpose of disinheriting Sam. Mr. Farrell testified that he cannot remember "whether Jeff told me his mother was going to call or if he asked me to call," but it is clear that Jeffrey Hood was instrumental in arranging the call and the procurement of the will. App. at p. 314.

It also appears Jeffrey took Dorothy to the law firm the day she signed the will. In her deposition, Ms. Brown initially stated that "Jeff may have brought" Dorothy to the will signing, then she quickly shifted to "I actually don't remember, but I know someone brought her. I don't think she came by herself." App. at p. 302.

Jeffrey knew his mother's mental health was deteriorating and that she could be easily manipulated. In mid-September 2007, the same month in which Dorothy signed the will, Jeffrey Hood, Linda Hood, and Martha Hood met with Dr. Yingling, Dorothy's primary care physician. App. at p. 438. Jeff told Dr. Yingling that his mother was exhibiting odd behavior and that her mental condition was deteriorating. App. at p. 438.

Finally, after the will had been signed, Jeff kept it a secret from everyone until after Dorothy passed away. Family friend Ruth Ann Johnson testified that before Dorothy died, she asked Jeff if Dorothy had her estate planning in order. Jeff lied and told her that Dorothy had a will and her assets would be distributed to both Sam and Jeff. App. at pp. 998-1000. Under Dorothy's prior will, all of Dorothy's property would go to Marshall, unless he predeceased her, in such case her property would have gone to her sons equally. App. at pp. 975-983.

Dorothy was 88 years old when she signed the contested will and was suffering from dementia. She was therefore susceptible to Jeffrey's influence to disinherit Sam. Dorothy had executed two previous wills, one from 1996 and one from 1998, that gave her property equally to her two sons if her husband had predeceased her at the time of her death, which shows that she had intended to treat her sons equally prior to Jeffrey's undue influence. App. at pp. 975-997.

The Court erred when it dismissed the claim because it failed to acknowledge the evidence submitted to it regarding the claim of undue influence and there are clearly material issues of fact in contention that should be decided by a jury.

d. Evidence shows that Jeffrey Hood intentionally and tortiously interfered with Sam Hood's inheritance.

"An intended beneficiary may sue for tortious interference with a testamentary bequest." Syl. Pt. 2, Barone v. Barone, 170 W. Va. 407, 294 S.E.2d 260 (1982). The elements of a tortious interference claim with business relations are "(1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages." Spangler v. Washington, No. 21-0002, 2022 W. Va. LEXIS 48, at *15 (Jan. 12, 2022)(Memorandum Decision).

In addition to the facts set forth in the preceding section concerning Undue Influence, and as more fully set forth here, Dorothy had two prior wills that left her property to her sons equally. Dorothy's August 20, 1998 will left her property in trust to her husband Marshall, but if he predeceased her, her property went to her

sons equally. App. at pp. 975-983. Dorothy's February 9, 1996 will similarly left her property in trust to her husband Marshall, but if he predeceased her, her property went to her sons equally. App. at pp. 984-997. Both of those wills were executed before her mental decline which likely began in 2004. Likewise, Dorothy's estate would be divided equally among her sons if she had never executed a will and had died intestate. W. Va. Code § 41-1-3a. These facts establish an expectancy of a testamentary bequest but-for the contested will, and shows that the contested will is an outlier from the other wills.

The Circuit Court failed to acknowledge, discuss, or even mention these prior wills in its ruling, and instead concluded, erroneously, that Sam failed to establish an expectancy of a testamentary bequest. App. at p. 1053. The Circuit Court merely found that Sam "offered little or no factual evidence to support his claim of tortious interference." App. at p. 1053.

Notably, the 1996 will was executed a handful of years after Sam purchased and took possession of the antique cars, and a decade after he purchased and took control of Huntington Piping, and yet Dorothy divided her estate evenly among her sons in 1996. Again in 1998, Dorothy divided her estate equally between her sons. Between 1998 and 2007, Dorothy made no other significant gifts to Sam Hood.

The evidence of the prior wills clearly establishes an expectancy interest in that Sam would receive an inheritance but-for the contested will. The evidence also establishes that Jeffrey Hood intentionally misled and misinformed Dorothy Hood for the purpose of having her disinherit his brother, Sam Hood. His motivation is clear.

He believes his brother was favored by his parents and that Sam did not deserve to get anything else. Under Dorothy's prior will, Sam would have received half of the probate estate. By misleading Dorothy and procuring a new will on her behalf, Jeffrey Hood tortiously interfered with Sam Hood's bequest. The Circuit Court committed reversible error in finding there were no facts in dispute and dismissing this claim and should be reversed.

2. That the Court erred when it found that Appellant did not file with the Court any medical records cited in his expert's report.

In it's order granting summary judgment to the Defendants, the court below found that Dr. Miller's opinion that "Dorothy Hood 'was not able to manage her daily affairs', with this opinion appearing to be expressly inconsistent with the evidence submitted to the Court… the opinion of Dr. Miller does not appear to be based upon any personal observations, or upon any of the medical records or affidavits presented to the Court, and is therefore not sufficient to create a genuine issue of material fact." App. at pp. 1052-1053. Bobby Miller, M.D., a Board-Certified Neuropsychiatrist and Forensic Psychiatrist, opined with reasonable medical certainty that: "Dorothy Hood, by virtue of her evolving dementia, lacked the testamentary capacity to enter into her will dated 9/7/2007…." App. at p. 267.

On page two of Dr. Miller's report titled "Forensic Psychiatry Record Review", Dr. Miller lists his sources of information including: "…Medical Records from Cabell Huntington Hospital, Medical Records from St. Mary's Medical Center, Medical Records from Kevin Yingling, M.D., Medical Records from Charles Meadows, M.D., Medical

Records from Terrence Triplett, M.D.,…Physicians/Medical Examiner's Certificate of Death, Determination of Incapacity Form, Affidavits, Deposition of Ortrud Vallejos, Deposition of Judge Paul Farrell…." App. at p. 268. On the very same page, Dr. Miller lists the heading "RECORD REVIEW" and then proceeds to summarize various medical records of Dorothy Hood and legal records filed in the proceeding below which he reviewed. App. at p. 268. The records reviewed and summarized by Dr. Miller specifically include the records from Dorothy's July 26, 2007 visit to St. Mary's Medical Center in which her attending physicians, Drs. Duncan and Smith, found that Dorothy had underlying dementia. App. at p. 269.

Dorothy Hood's medical records that Dr. Miller relied upon were filed with the Circuit Court with Plaintiff's Response to Defendants' Medical Timeline on June 7, 2018. App. at p. 589. These medical records and Dr. Miller's testimony show that there is a material factual dispute whether Dorothy Hood had testamentary capacity to sign her will on September 7, 2007, and whether she was susceptible to undue influence.

Dr. Miller died during the pendency of the case below, and Dr. David A. Clayman, Ph.D., replaced him as Plaintiff's expert witness. The Circuit Court also failed to mention in it's order why it did not consider the testimony of Dr. Clayman, who found that the evidence was "strongly suggestive of Mrs. Hood suffering from large functional deficits resulting from cognitive impairment as early as August 2006." App. at p. 594. Dr. Clayman examined Dorothy's medical records and "found numerous instances that call into serious question

her executive function capabilities, such as the ability to make and understand a will." App. at p. 482.

The Circuit Court's finding that Dr. Miller's testimony was not based on records presented to the Circuit Court, and that his opinion was inconsistent with the evidence submitted to the Circuit Court is clearly erroneous and should be reversed.

3. **That the Court misstated the law when it found that "the affidavits submitted by the attesting witnesses, physicians, notary, etc. are entitled to great weight based upon the findings in Cantarelli[.]"**

Under Cantarelli v. Grisso, No. 18-0839 (Jan. 13, 2020)(Memorandum Decision), "the evidence of attesting witnesses, of attending physicians, and of a lawyer who drafted the will, is entitled to great weight on the question of mental capacity of a testator to make a will." Cantarelli, citing Syl. Pt. 3, Floyd v. Floyd, 148 W. Va. 183, 133 S.E.2d 726 (1963).

The Circuit Court found that "the affidavits submitted by the attesting witnesses, physicians, notary, etc. are entitled to great weight based upon the findings in Cantarelli." On the matter of testamentary capacity, affidavits are not entitled to any greater weight than sworn deposition testimony. It is "**evidence** of attesting witnesses, of attending physicians, and of a lawyer who drafted the will" on the matter of mental capacity that is entitled to great weight. Paul Farrell's affidavit testimony and Neisha Brown's affidavit testimony do not carry any greater weight than their deposition testimony.

4. That the Court misstated the law when it concluded that an insane delusion must be based on an "extraordinary belief in spiritualism" that testator followed when constructing a will.

The Court found that "Plaintiff did not provide evidence that proves the testator exhibited insane delusions based on her extraordinary belief in spiritualism that she followed when constructing her Will…" It is not the law in West Virginia, or any other state, that an insane delusion must be based on an "extraordinary belief in spiritualism" that would have affected a will. Rice v. Henderson, 140 W. Va. 284, 291, 83 S.E.2d 762,767 (1954) The Court's statement of law is erroneous.

To destroy testamentary capacity, the insane delusion must affect the will and influence the testatrix to dispose of her property in a manner which she would not do in the absence of the delusion. When the testatrix's false belief is not based on any evidence, it amounts to an insane delusion. *See generally* 1 Harrison on Wills and Administration for Virginia and West Virginia, §123(11) (3d ed. 1985).

Utah, Colorado, Pennsylvania, Indiana, Wisconsin, North Dakota, South Dakota, Georgia, Missouri, Tennessee, Maryland, Florida, and likely other states, have all adopted this reasoning regarding the destruction of testamentary capacity based on insane delusion. App. at pp. 810-815.

The Circuit Court's statement of law is erroneous and should be reversed.

5. The Circuit Court erred by concluding Appellant failed to plead "insane delusion" in his Complaint when Appellant pled "lack of testamentary capacity" which encompasses "insane delusion."

The Court found that Appellant did not plead a cause of action for "Insane Delusion." West Virginia is a "notice pleading" State requiring a "short and plain statement of the claim showing that the pleader is entitled to relief[.]" Newton v. Morgantown Mach. & Hydraulics of W. Va., Inc., 242 W. Va. 650, 653, 838 S.E.2d 734,737 (2019). There is no law in West Virginia that requires "insane delusion" to be separately pled from lack of testamentary capacity.

In Appellant's Complaint and Second Amended Complaint, Sam Hood pled that Dorothy Hood lacked testamentary capacity to execute a will. Testamentary capacity may be affected in various ways, including when a person is suffering from insane delusions. Rice v. Henderson, 140 W. Va. 284, 291, 83 S.E.2d 762,767 (1954). An insane delusion necessarily bears on a person's testamentary capacity when it causes that person to not know the nature and extent of her estate, the objects of her bounty, or affects how she wishes to dispose of her property. Syl. Pt. 3, Stewart v. Lyons, 54 W. Va. 665, 47 S.E. 442 (1903).

Dorothy Hood's insane delusion that Sam Hood had not paid her for the purchase of Huntington Piping, and had otherwise taken or converted other property of hers was not based on any fact and amounts to an insane delusion. Dorothy Hood acted on this insane delusion by disinheriting her son Sam and thus the insane delusion destroyed her testamentary capacity.

The Circuit Court committed reversible error when it found that Sam Hood failed to plead "insane delusion" and dismissed his claims.

6. That the current law that the time to be considered in determining the capacity of the testator to make a Will is the time at which the Will was executed should be modified.

Our current law on testamentary capacity states "The time to be considered in determining the capacity of the testator to make a will is the time at which the will was executed." Syl. Pt. 8, James v. Knotts, 227 W. Va. 65, 705 S.E.2d 572 (2010), quoting Syl. Pt. 3, Frye v. Norton, 148 W. Va. 500, 135 S.E.2d 603 (1964). To the extent that this law makes evidence of testamentary capacity from any other point in time outside of the execution ceremony irrelevant, it should be modified. This law fails to take into account that the will drafting process can take place over a period of weeks, or longer; that the testator will give her or his attorney information over that time period that will be incorporated into the will; and that the testator may review the will prior to the date of execution and may not read it at the execution ceremony. Furthermore, it promotes fraud by enabling a bad actor to secrete a person away on the day of the will signing so no person other than the will witnesses and notary sees the testator and may testify that the testator was incapacitated that very day.

Here, Dorothy Hood was admitted to the emergency room showing symptoms of dementia less than two weeks prior to her first conversation with her attorney about drafting her Will. Dorothy's first conversation with her attorney was one month prior to executing her Will. The conversations with her attorney show that Dorothy did not understand the extent of the property she owned. The Will was drafted prior to the date Dorothy executed it, and she did not read the Will at the execution ceremony. Dorothy was found permanently

incapacitated due to dementia just four months after signing her will. Such facts are highly relevant to Dorothy Hood's testamentary capacity at the time she executed her Will and should be considered.

VIII. CONCLUSION

The Circuit Court below granted summary judgment to Defendants finding that there were no genuine issues of material fact in dispute. As shown above, there are numerous disputes of fact that call into question the testamentary capacity of Dorothy Hood at the time she executed her will. Such facts show that her dementia, her insane delusions, and undue influence of Jeffrey Hood defeated her testamentary capacity. A rational trier of fact could have found for Sam Hood and therefore the granting of summary judgment to Defendants was inappropriate. The Circuit Court order granting summary judgment should be reversed.

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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner Stephen M. Hood certifies that on June 21, 2022 service of the foregoing "**Petitioner's Brief**" was served upon the parties via United States mail, postage prepaid, to the following counsel of record:

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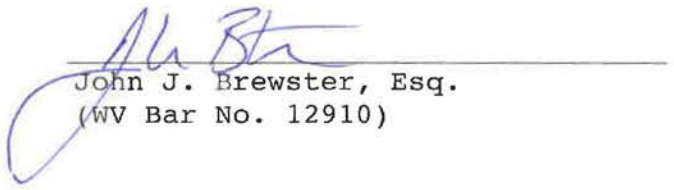

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