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 REPLY BRIEF

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

(Civil Action No. 15-C-546)

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1. Reply to Response to Assignment of Error No. 1: Evidence in the record was sufficient to establish the existence of material facts in dispute.

Evidence shows that material facts were in dispute that Dorothy Hood lacked testamentary capacity at the time she executed her will, which was caused by dementia or an insane delusion, and that Jeffrey Hood manipulated his mother into disinheriting his brother Stephen "Sam" Hood.

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).

Attorney Paul Farrell, who drafted the will and was an attesting witness, testified that he was satisfied that Dorothy Hood had testamentary capacity. However, Attorney Paul Farrell's contemporaneous notes from telephone calls with Dorothy regarding the contents of her will indicate that she did not know what property belonged to her or what that property was worth. Dorothy Hood told Mr. Farrell that she owned an interest in one of Jeffrey Hood's businesses, Snider's, and Mr. Farrell testified that he suspected that was not true. App. at pp. 848, 317-318. That alone should have been a red flag that Dorothy Hood did not have testamentary capacity to execute a will. His notes reflect that Dorothy was trying to get into Woodlands, an independent living and assisted living facility located

in Huntington, West Virginia, which also should have alerted him to possible capacity issues. App. at p. 848. Despite Dorothy Hood's suspect assertion that she owned an interest in Snider's, Mr. Farrell never inquired as to the extent of Dorothy's assets or the value of her estate. App. at p. 308.

Mr. Farrell noted that "Mrs. Hood mentioned that she was embarrassed by the rift between her two sons, and that she loved them equally, but felt Sam had unfairly obtained all the assets in his father's businesses and estate and she was not aware of any distribution she had received from her late husband." App. at p. 850. Dorothy Hood told Mr. Farrell that she believed that Sam owed her $150,000 from the sale of the family business, Huntington Piping, which was not true as Sam had paid for that business back in the 1980s as reflected on his parents' tax returns. App. at pp. 848-856. Dorothy also erroneously believed that she owned a fortune in antique cars and that Sam had wrongfully taken them, when in fact Sam had purchased those cars from his father many years prior. App. at pp. 847-850, 857-864. Finally, Dorothy Hood believed that Sam had taken all of Marshall's assets after he died, when in fact Sam had transferred all those assets to his mother. App. at pp. 850, 865-867.

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 her son Sam. App. at pp. 847-850. Notably, Mr. Farrell's notes do not mention any other property Dorothy Hood believed Sam had received as her basis for disinheriting him. Despite all of this, Dorothy Hood'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. That is a polite way of saying she disinherited Sam because "Sam had unfairly obtained all [of Marshall's] assets..." as Mr. Farrell's notes state. App. at p. 850.

"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. 160, 171, 133 S.E.2d 770, 777 (1963). Mr. Farrell's notes are material facts that conflict with his testimony that he believed Dorothy Hood had testamentary capacity to execute a will. The notes show that she did not know her property because she erroneously believed that she owned an interest in Snider's, when she did not, and that Sam owed her, or had wrongly taken from her, hundreds of thousands of dollars. The function of the court at the summary judgment stage is not to weigh evidence, as such, summary judgment was improperly granted on this issue.

At the will execution, Mr. Farrell merely asked Dorothy Hood some basic "competency" questions that had little bearing on her testamentary capacity. Whether this was an adequate basis for Neisha Brown, the other attesting witness, to form an opinion of Dorothy Hood's testamentary capacity is a question of fact. Ms. Brown testified at deposition that she remembered nearly nothing about the will execution ceremony. 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. Whether a person is oriented to day, time, and place is not the standard for testamentary capacity.

Ms. Brown did not ask Dorothy any questions herself. App. at p. 303. Nevertheless, Ms. Brown later signed an Affidavit stating without any basis, "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. What discussions she had with Dorothy Hood are a mystery because she did not describe any such discussions at her deposition. Ms. Brown testified that she believed Dorothy Hood was competent to execute a will, but she cannot articulate any basis for that belief. Thus, whether or not Ms. Brown had a reasonable basis for believing Dorothy Hood had the testamentary capacity to execute a will is a question of fact that should have been decided by a jury.

There are also conflicting medical records and opinions as to Dorothy Hood's testamentary capacity around the date she executed her will. Dr. Yingling, Dorothy Hood's primary care physician, and one of Respondents' experts, opines that he believes Dorothy Hood had testamentary capacity to execute a will in September 2007. Supp. App. at pp. 188-189. However, from his Affidavit, Dr. Yingling apparently did not review or consider the July 26, 2007, medical records. Dr. Miller, Petitioner's expert, did consider these medical records together with other evidence, and it was his opinion that Dorothy Hood was suffering from advanced dementia (Stage 2) at the time she executed her will and did not have the requisite testamentary capacity

to do so. App. at pp. 54-57. Petitioner's expert, Dr. Clayman, Ph.d., further opined that because of her dementia, Dorothy Hood "would not have been able to understand complex concepts such as the size and nature of her estate." App. at p. 484.

On July 26, 2007, Dr. Chadwick Smith, M.D., noted after examining Dorothy Hood that "Just from my initial interview with this patient I believe that she does have some underlying dementia which is present. She repetitively asks me my name and the situation. It makes her history extremely limited." App. at p. 695. On the same day, Dr. Laura S. Duncan, M.D. observed that "The patient does appear somewhat forgetful, maybe even somewhat demented, very difficult to obtain a consistent history. The patient seems to state one thing and then maybe forgets and states something completely different when asked the same question, but overall the patient does appear to be in no acute distress and does appear to be alert and oriented times three when answering questions regarding person, place, and time appropriately." App. at p. 696.

These medical records from just six weeks prior to Dorothy Hood executing the challenged will were not even considered by Dr. Yingling. Dr. Yingling bases his opinion that Dorothy Hood had testamentary capacity on the fact that she was "Alert [and] Oriented to time, place and person" also known in the medical community as "AOx3." App. at pp. 187-189. Alert and Oriented to time, place, and person is not testamentary capacity because it is not determinative whether a person is capable of understanding: (1) the nature and consequences of her acts; (2) the property to be disposed; and (3) the

object of her bounty. See Syl. Pt. 1, Payne v. Payne, 97 W.Va. 627, 125 S.E. 818 (1924).

Dr. Clayman, Ph.d., opined that AOx3 "observations are not at all indicative of the sound higher level cognitive abilities it takes to understand and distribute an estate. "Alert" simply means awake and "not somnolent." Oriented X 3 is similarly a bottom level indicator of mental abilities and not at all a sign of testamentary capacity." App. at p. 485. Another of Petitioner's experts, Dr. Ibanez, M.D., opined that "The term "Alert and Oriented x3" is part of the Mental Status Examination and is an overly generalized term and vague in nature, where the examinee is noted as being conscious (Alert) and asked only to identify self, location, and time/date (Orientation x3.)." App. at p. 598. He further stated that "The ability of an examinee to only correctly identify the three items of orientation is inadequate for an examiner to screen for a Neurocognitive Disorder such as dementia." App. at p. 598.

These experts' explanations of "AOx3" are consistent with Dr. Duncan's findings on July 26, 2007, that Dorothy Hood could not give "a consistent history" and that she "does appear to be alert and oriented times three when answering questions regarding person, place, and time appropriately." App. at p. 696. It is for the jury to weigh the attending physicians' evidence that Dorothy Hood was suffering from dementia affecting her memory in July 26, 2007, against other attending physicians' evidence that Dorothy Hood was alert and oriented to time, place, and person.

Respondents claim the July 26, 2007, medical records are irrelevant and "not sufficient to overcome the affidavits of the attorney who prepared Dorothy Hood's Will, the subscribing witnesses, the Notary, and her attending physician." Resp. Brief p. 15. "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). Cantarelli does not give Dr. Yingling's medical opinion any more weight than Dorothy Hood's other attending physicians; Nor does it give more weight to the drafting attorney, attesting witnesses, or notary.

On the question of testamentary capacity, Cantarelli gives great weight to "evidence of attesting witnesses, of attending physicians, and of a lawyer who drafted the will" over other evidence of capacity, such as evidence of family, friends, acquaintances, and others. "Although such evidence [that is given great weight] 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).

Here, there is competing evidence that is given great weight in regards to testamentary capacity, and there is also evidence entitled to lesser weight on the question of capacity of Dorothy's

family, friends, and acquaintances showing that Dorothy was suffering from dementia during the time period she executed her will. While Respondents attempt to paint the testimony of all of Petitioner's lay witnesses with the brush that they were merely acquaintances of Dorothy or that they were friends of Petitioner, many of those that testified had known Dorothy Hood for many years including Ortrud Vallejos, who had known Dorothy for about 30 years. App. at p. 366. Ms. Vallejos testified to Dorothy's dementia, specifically recalling cleaning Dorothy after a traumatic episode of incontinence in which Dorothy failed to clean herself and the house in early September 2007, about the time Dorothy executed her will. Such evidence is entitled to be weighed by a jury.

Furthermore, there is evidence that Jeff Hood was behind the scenes influencing Dorothy Hood to disinherit Sam by giving her false information regarding the property Marshall had previously given or sold to Sam. Evidence of his prior manipulations are in the record. App. at p. 868. At the time she executed her will, Dorothy Hood was clearly suffering from dementia diminishing her reasoning and memory making her susceptible to undue influence. Mr. Farrell's notes show that she had an irrational belief that Sam had unfairly taken or withheld property from her. App. at pp. 847-850. Jeff Hood had previously complained to his mother about property that he believed his parents were unfairly gifting to Sam. App. at p. 868. These unfounded beliefs were incorporated into Dorothy's will which disinherited Sam. Jeff also was the person who requested Mr. Farrell to draft the will. App. at p. 314. These facts are enough to be a

triable issue for the jury on undue influence under Cale v. Napier. Syl. Pt. 3, Cale v. Napier, 186 W.Va. 244, 412 S.E.2d 242 (1991).

2. Reply to Response to Assignment of Error No. 2: Dr. Miller's opinion was based upon medical records and affidavits presented to the court, and the Circuit Court's finding that the opinion had no basis is erroneous.

In it's order granting summary judgment to the Defendants, the court below found that "the opinion of Dr. Miller does not appear to be based... upon **any** of the medical records or affidavits presented to the Court..." (emphasis added). App. at pp. 1052-1053. That is absolutely false. All of 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.

Dr. Miller's report does not reference *some* of the medical records submitted by Respondents to the circuit court. The medical records not referenced in his report were records that did not reflect upon Dorothy Hood's testamentary capacity. A summary of these records can be found in Dr. Yingling's Affidavit. App. at pp. 187-189. Such records merely indicated that Dorothy Hood was alert and oriented to time, place, and person, at the time of her medical visit and are not probative on the matter of testamentary capacity. As set forth in detail above, AOx3 is a low-level indicator that a person is awake and knows who and where they are.

Dr. Yingling in his Affidavit references medical records created by Drs. Peter Ataro, M.D., and Feras Elbash, M.D., on September 13, 2007. He makes no reference to the medical records created by Drs. Duncan and Smith dated July 26, 2007, in which they

find that Dorothy Hood is presenting with symptoms consistent with dementia. Dr. Yingling bases his opinion that Dorothy Hood had testamentary capacity not just on his own records, but upon Dorothy Hood's medical records created by other medical doctors. What is good for the goose is good for the gander. If Dr. Miller's report is flawed because he did not reference each and every medical record submitted to the circuit court, then Dr. Yingling's Affidavit is similarly flawed.

Respondents also attempt to diminish Dr. Miller's opinion that Dorothy Hood "was not able to manage her daily affairs" as being "inconsistent with the actual observations of her family physician and with the undisputed fact that Dorothy Hood was at that time and for several months thereafter living on her own and managing her affairs." Resp. Brief at p. 27. Dorothy was living alone at the time she executed her will, but she was indisputably not managing her own affairs. Her family hired people to stay with her and help her, but Dorothy would fire them. App. at p. 789. She was forgetting to pay her bills. App. at p. 932. She had someone help her pay her bills and write checks for her. App. at pp. 435, 932. Her grandson Taylor Hood began handling her taxes because Dorothy had not filed tax returns for the last several years. App. at p. 932. Friends and family stopped by and checked on her often. App. at pp. 381, Supp. App. at pp. 138, 140. Dorothy Hood would get lost while driving. App. at p. 436. Her family provided transportation for her, even taking her to visit her primary care physician where they discussed moving Dorothy out of her house

and into an assisted living facility in mid-September 2007. App. at p. 438.

Respondents believe Dr. Miller's conclusion that Dorothy Hood was in the second stage of dementia at the time she executed her will is inconsistent with his description of the three stages of dementia. Resp. Brief at p. 27. They are wrong. Though the timeframes are approximations, Respondents seem to take them literally. Dr. Miller describes the timeframes of the three stages of dementia as follows:

> Most dementias have already been present 3 to 5 years prior to their medical diagnosis. The total duration of the illness is approximately 8-12 years (variability based upon timing of the diagnosis). Of those dying from dementia, typically, Stage I lasts 5 years, Stage II lasts 5 years, and Stage III lasts 1 year.

App. at p. 55.

Dorothy Hood died of Alzheimer's disease on July 20, 2013. App. at p. 123. If Stage II and Stage III of dementia last for a combined six years as indicated in Dr. Miller's report, then on July 20, 2007, Dorothy Hood would have entered Stage II of dementia. This supports Dr. Miller's conclusion that Dorothy Hood was in Stage II at the time she executed her will on September 7, 2007. Furthermore, a person dying from dementia typically has the disease for 11 years. This would put the onset of Dorothy's dementia in July 2002. Stage I typically lasts 5 years in a person dying from dementia (as Dorothy Hood did). From the above, this means that Dorothy Hood transitioned from Stage I dementia to Stage II in July 2007. On July 26, 2007, Dr. Chadwick Smith, M.D. noted after examining Dorothy Hood that "Just from my initial interview with this patient I believe that she does

have some underlying dementia which is present." App. at p. 695. Dr. Miller notes that dementia is usually present 3-5 years prior to diagnosis, and from the above calculation we can discern that Dorothy was likely at the long end (5 years) of that timeframe. This is further supported by her determination of incapacity due to dementia on February 1, 2008, because in a very short period of time from her initial diagnosis she was found incapacitated due to dementia. App. at p. 117.

Not only did the circuit court below improperly dismiss Dr. Miller's report and the medical records it relied upon, it did not even consider the reports of Dr. David A. Clayman, who replaced Dr. Miller as Plaintiff's expert witness due to the untimely death of Dr. Miller. Dr. Clayman's reports did reference the medical records that Dr. Miller did not reference, he also referenced Dr. Yingling's Affidavit. App. at p. 485. "I have reviewed the medical timeline regarding Dorothy A Hood as submitted by the Defendants and as supplemented by the Plaintiff." App. at p. 592. The medical timeline includes as exhibits each medical record including those submitted by Respondents. App. at pp. 602-793.

Respondents waged a war against Petitioner's experts and any evidence put forth by Petitioner that evidenced Dorothy Hood's dementia by filing multiple baseless motions to strike, none of which the circuit court granted. See Supp. App. at pp. 246-250. Respondents now improperly seek to extend that war here, falsely claiming that Dr. Clayman "disregarded most [of] Mrs. Hood's medical records in forming his opinion" and that "he ignored the opinion of Dr. Yingling, Mrs.

Hood's long-time primary physician…" Resp. Brief at p. 28. Dr. Clayman specifically stated that he referenced Respondents' medical timeline. App. at p. 592. That timeline includes as exhibits each and every medical record of Dorothy's for the time period "one year prior to her retaining Paul Farrell and through six (6) months after the execution of her will on September 9 (sic), 2007." App. at p. 522.

Dr. Clayman spoke at length why Dr. Yingling's opinion that Dorothy Hood had testamentary capacity because she was "alert and oriented X 3" was "not indicative of the sound higher level cognitive abilities it takes to understand and distribute an estate." App. at p. 485. Dr. Yingling performed no neurological tests on Dorothy Hood that would have tested her mental capacity. Respondents' assertion that Dr. Clayman disregarded medical records and Dr. Yingling's opinion in forming his opinion that Dorothy Hood lacked testamentary capacity is not based in reality. Respondents' argument that Petitioner did not rely on Dr. Clayman's opinion is likewise not supported, as his two Affidavits were submitted to the circuit court, together with Petitioner's medical timeline, and was discussed in the motions to strike and response. App. at pp. 481, 589, Supp. App. at p. 246.

Respondents assert that the opinions of Drs. Miller and Clayman are unsupported opinions that fail to comply with Rule 703 of the West Virginia Rules of Evidence because they are "merely conjecture and speculation." Rule 703 states "An expert may base an opinion on **facts or data in the case that the expert has been made aware of** or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an

opinion on the subject, they need not be admissible for the opinion to be admitted." (emphasis added) As discussed above, Drs. Miller and Clayman's medical opinions were based on hundreds of pages of medical records, affidavits, and testimony concerning Dorothy Hood, and such opinions are proper.

3. Reply to Response to Assignment of Error No. 3: On the matter of testamentary capacity, affidavits are given no greater weight than other evidence of the attesting witnesses, attending physicians, and the lawyer who drafted the will.

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 did not give great weight to "the evidence of attesting witnesses, of attending physicians, and of a lawyer who drafted the will." The Circuit Court gave great weight to "the affidavits submitted by the attesting witnesses, physicians, notary, etc." The Circuit Court ignored inconvenient evidence of attending physicians showing Dorothy Hood had dementia in finding there was no material fact in dispute. App. at pp. 695-696.

Respondents argue that the Circuit Court merely committed an error syntax rather than an error of law when it used the term "affidavits" rather than "deposition testimony" in its Order. Not only do words have meaning, but Respondents seemingly miss the point that it is "**evidence** of attesting witnesses, of attending physicians, and

of a lawyer who drafted the will that is given great weight" on the matter of testamentary capacity, not any certain form of evidence such as affidavits, deposition testimony, or otherwise. All medical records from Dorothy Hood's attending physicians, Attorney Paul Farrell's contemporaneous notes from conversations with Dorothy Hood, deposition testimony of the attesting witnesses and drafting attorney, and the affidavits of any of the foregoing persons, should all be given great weight in the matter of Dorothy Hood's testamentary capacity. That evidence should then be weighed by a jury, and other evidence of lay witnesses should also be considered.

4. **Reply to Response to Assignment of Error Nos. 4 and 5: Insane delusion was properly raised in the Second Amended Complaint as a part of testamentary incapacity and evidence was provided that shows Dorothy Hood lacked testamentary capacity due to an insane delusion which affected her will.**

Respondents falsely claim that Petitioner failed to timely file its Motion for Summary Judgment. On July 30, 2018, Petitioner requested an extension to file his motion for summary judgment, and the Circuit Court granted Petitioner an extension to August 13, 2018, by Order entered July 31, 2018. App. at pp. 925-926. Petitioner timely filed his Motion for Partial Summary Judgment on August 13, 2018. App. at pp. 802-817. The Motion alleges that Dorothy Hood was suffering from an insane delusion that destroyed her testamentary capacity and affected her will. App. at pp. 810-811.

In it's Order, the Circuit Court found that "Plaintiff did not plead a cause of action in the original Complaint, or the Second Amended complaint for "Insane Delusion." App. at p. 1054. That is not true. In his Second Amended Complaint, Petitioner alleged as follows:

19. As a result of her deteriorating mental health, Mrs. Hood began to lose the capacity to understand her personal, family or business affairs." App. at pp. 3-4.

46. Upon and after Marshall Hood's death, Defendants intentionally and maliciously began a concerted effort to influence Dorothy Hood to believe the Defendant's allegations that Plaintiff "has everything" from Marshall Hood's estate; that Plaintiff "has monies that belong to her;" that Plaintiff "owes her at least $150,000 from sale of" Huntington Piping; that Plaintiff "has antique car(s) [that] belong to Marshall"; that Plaintiff "obtained more than his fair share of his father's property over the years;" that Plaintiff "cleaned out his father's office and desk and kept whatever properties or materials were there;" that Plaintiff "had unfairly obtained all the assets in his father's businesses and estate;" and that Plaintiff "was well provided for" by Marshall Hood. App. at p. 8.

79. The probated will of Dorothy Hood dated September 7, 2007 was not executed by Dorothy Hood when she possessed the required testamentary capacity under West Virginia law to execute a valid will and is invalid and void. App. at p. 13.

Insane delusions can affect the testamentary capacity of a person if the person bases her or his will on such insane delusion. The claim of insane delusion is properly made under a claim of lack of testamentary capacity. West Virginia has no case law that sets forth that a claim for insane delusion that destroys testamentary capacity needs to be set forth specifically in addition to a claim for lack of testamentary capacity. Here, Petitioner set forth his claim that Dorothy Hood lacked testamentary capacity to create a will, and evidence shows that not only did she lack testamentary capacity because of dementia, she also was suffering from an insane delusion that caused her to believe Petitioner had stolen valuable property from her which caused her to disinherit him from her will.

An insane delusion necessarily bears on a person's testamentary capacity under West Virginia law 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. This shows that Dorothy Hood did not understand the nature of her property, one of the requirements of testamentary capacity, and thus did not have testamentary capacity.

Respondents argue that they had lack of notice of the assertion of insane delusion which resulted in an incomplete development of the factual record to evaluate such a claim. At this pre-trial stage of the case, Respondents could have further developed evidence for a defense to an insane delusion claim. There was no further evidence to develop though because the property Dorothy Hood believed Petitioner had unfairly taken from her was discussed *ad nauseum* during the depositions of Sam Hood, Jeff Hood, and Paul Farrell.

Nevertheless, a circuit court also has discretion to permit a party to amend its pleadings to conform to the evidence, *even post-verdict*, so long as the opposing party has the opportunity to respond with evidence, is not prejudiced by the sudden assertion, and it permits the presentation of the merits of the action. Coffield v. Robinson, 245 W. Va. 55, 59-60, 857 S.E.2d 395, 399-400 (2021). Here, the insane delusion assertion of lack of testamentary capacity was made pre-trial, the Respondents had ample opportunity to meet the

evidence and did so in their response in opposition, and Respondents were not prejudiced by the assertions because it was pre-trial.

5. Reply to Response to Assignment of Error No. 6: The Court should give greater consideration to evidence of testamentary incapacity outside the day of the execution of the will.

Respondents completely misconstrue Petitioner's argument for modifying West Virginia's current law on evidence of testamentary incapacity outside the date of execution of a will. Petitioner is not alleging that Paul Farrell did anything nefarious. Though Petitioner certainly believes that Paul Farrell was negligent in drafting and witnessing a will for a person that he had reason to believe did not know the nature of her property and therefore lacked testamentary capacity. Respondents create a straw man argument that Petitioner believes Paul Farrell did a last second "switcharoo" with a second will that Dorothy Hood did not read, but that is not Petitioner's argument at all.

Petitioner's argument is Respondent Jeff Hood used his unsuspecting longtime friend Paul Farrell to draft a will for his mother Dorothy Hood, who by this time Jeff knew was well suffering from dementia. While Dorothy could still hold shallow conversations with people at this point, she no longer knew the extent of her property and was under the delusion that Petitioner had misappropriated her property. The witnesses to the will would have no reason to believe that Dorothy did not know her property. The witnesses did not know what property Dorothy owned and Paul Farrell did not adequately inquire because Jeff was his longtime friend. If

nobody else saw Dorothy the day she executed her will, nobody else can testify to her testamentary capacity.

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). Paul Farrell's notes taken one month prior to Dorothy executing her will shows that she did not know the extent of her property. Six weeks prior to the execution of her will, she could not give her own medical history, and an attending physician found her to be suffering from dementia. These facts prior to the execution of the will should be considered.

II. 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 August 15, 2022 service of the foregoing **"Petitioner's Reply Brief"** was served upon the parties via United States mail, postage prepaid, to the following counsel of record:

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