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 EXECUYOR OF THE ESTATE OF DORTHY HOOD, AND LINDA HOOD, INDIVIDAULLY,
Defendants Below,

Respondents.

RESPONDENTS' BRIEF

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

(Civil Action No. 15-c-546)

Submitted By:

William L. Mundy, Esquire (WVSB #2678)
MUNDY & ASSOCIATES
P.O. Box 2986
Huntington, West Virginia 25728
Telephone: (304) 525-1406
Fax: (304) 525-1412
wlmundy@mundylawoffice.com
Counsel for Respondents

I. COUNTER STATEMENT OF THE CASE

Succinctly stated, by her Last Will and Testament, Dorothy Hood, who had two children, bequeathed her entire estate to her oldest son, Jeffrey Hood. Her reason for disinheriting her younger son, Stephen (Sam) Hood was explained in her Will. It was because of the amount which Sam had received from his parents during their lifetimes. Since her Will complied with testamentary requirements, the only real issue in this case is whether Dorothy Hood lacked testamentary capacity at the time that she executed that Will. *Stewart v. Lyons* 54 W. Va. 665, 47 S.E. 442 (1903)

A. Procedural History

The procedural history of this matter as it relates to the issues raised by Appeal has been summarized by the Petitioner in Section III of his Brief.

B. Statement of Undisputed Material Facts

1. The attorney who prepared and witnessed Dorothy Hood's Will prior to him becoming a Circuit Judge, Paul Farrell, Sr., testified (JA307) and averred (JA228) that she was competent. When asked in his deposition how he did that, Judge Farrell testified:

> Well, I had, because I had had numerous conversations with her, where she expressed her desires. She was clear. She was consistent. She asked very pointed questions. She wanted to know about her husband's estate. She wanted to know about the cars. She wanted to know about the $300,000. And she was very clear about her instructions. So I was satisfied as to her competency. (JA327)

2. The other witness to that Will, Neisha Brown, who was also an attorney, and the individual who notarized that Will testified (JA299) and/or averred (JA228 & 230) that Mrs. Hood was competent. (See, Respondent's Brief, §§ IV-B-2(a)(b)&(c), *infra* which discusses points 1 & 2, above)

3. The medical records of her primary care physician relating to her care in

close proximity to the date upon which her Will was executed noted that she was alert and oriented. (JA1253 & 1255) Additionally, her primary physician submitted an affidavit in which he averred that to a reasonable degree of medical certainty, Dorothy Hood had the "requisite cognitive capacity to consent to medical procedures, conduct her business, including executing a will." (JA1247)

4. The Petitioner, in effect, conceded her competence at the time his mother signed her Will when he described a visit with her on either the evening before or immediately after she had executed that Will. He confirmed that she was living alone and managing her affairs. More significant, after his visit had concluded, Petitioner did not take any action or voice any concern about her ability to continue living in her house without assistance. (JA1197-1200)

From the arguments in his Brief, it appears that Petitioner's claim that his mother lacked testamentary capacity is based primarily upon the recollections of some acquaintances that recounted a few isolated incidents of confusion or lapse in memory. None of these recollections have much probative value, and collectively they are insufficient to "clearly outweigh" the testimony of the drafting attorney, subscribing witnesses, notary, and attending physician.

Petitioner suggests that among the issues raised in this appeal is whether Dorothy Hood was suffering from dementia at the time she signed her Will. (Petitioner Brief at 4) Respondents disagree. The issue is not whether Dorothy Hood, who was 88 years old at the time she signed her Will, may have exhibited signs consistent with dementia. It is whether she lacked testamentary capacity at the time she executed her Will. The two are not the same.

With respect to the other issues, Respondents contend that although "undue influence" was alleged by the Petitioner, there are no facts in the record to support that claim. To establish "undue influence" there must be evidence to prove that "the free agency of the testator" was impaired at

the time the Will was executed. There is nothing in the record to suggest that this occurred. To the contrary, according to Judge Farrell, Mrs. Hood disinherited Sam because the amount he had previously received from his father was far more than Jeffrey had ever received and she wanted things to be equal. That is not undue influence; it is a rational decision based upon existing facts.

The same can be said about Petitioners "tortious interference" or his "insane delusion" claims. There is absolutely no evidence in the record to suggest that the Respondent did anything to cause Mrs. Hood to disinherit the Petitioner. Likewise, there is no evidence to suggest the existence of an irrational belief in non-existent facts. A few years after he graduated from college, the Petitioner had been given the family contracting business along with other assets and property by his father but nothing had been given to his brother, Jeffrey, even though Jeffrey had worked in that business for ten years. This is a fact supported by evidence in the record. Mrs. Hood wanted things to be equal, so she bequeathed her estate to Jeffrey. This was a rational decision. According to the attorney who prepared her Will, this was her intent and she was quite clear in communicating it.

II. SUMMARY OF ARGUMENT

Petitioner's arguments appear to fall into two categories: those that relate to whether there are any factual disputes relating to substantive claims and/or legal theories and those which relate to immaterial inconsistencies such as between a witness' affidavit and their deposition testimony. As it relates to testimonial inconsistencies, Respondent's argument is simple: unless the discrepancy is material to the issue, it is unimportant. As to the substantive issues, Respondents' summary of argument is specifically addressed to each of those issues as follows:

A. Lack of Testamentary capacity

Testamentary capacity is to be determined at the time the Will is executed. It is not

necessary that the testator have a great degree of mental acuity. *Cantarelli v. Grasso*, No. 18-0839 (W. Va. 2020) *quoting Stewart v. Lyons* 54 W. Va. 665, 47 S.E. 442 (1903). All that is required is that the testator understand that he is making a Will, is aware of the property being disposed, knows the objects of his bounty, and how he intends to dispose of his property. *Id.* In making that determination, the testimony of the attorney drafting the Will and of the testator's primary physician, although not conclusive are accorded great weight. *Cantarelli v. Grasso*, No. 18-0839 (W. Va. 2020) *quoting, Floyd v. Floyd,* 148 W. Va. 183, 133 S.E.2d 726 (1963). The attorney who drafted and witnessed Dorothy Hood's Will, Paul Farrell; the other witness, Neisha Brown; and the notary, Terrie L. McMahon Snow, attested to Mrs. Hood's competence. Her attending physician, Kevin Yingling, M.D., stated that to a reasonable degree of medical certainty she was competent. It was also undisputed that at the time she executed her Will, Mrs. Hood was living alone and managing her affairs. The affidavits submitted by the Petitioner were from a few acquaintances who claim to have observed that Mrs. Hood was sometimes confused and forgetful. These recollections are of insignificant foibles that occurred many years before those affidavits were executed and none have any bearing on testamentary capacity.

B. Undue influence

To avoid a Will because of undue influence, it is necessary for the party alleging it to establish that the free will of the testator did not exist at the time the Will was executed. *Greer v. Vandevender,* No. 16-1228 (W. Va. 2018) *quoting Stewart v. Lyons* 54 W. Va. 665, 47 S.E. 442 (1903). In this case the Attorney who drafted Dorothy Hood's Will had numerous telephone conversations with her to discuss her intent, met with her at her home and, at his office when she signed her Will. According to him she was clear in her intention and her reason for bequeathing her property to her oldest son. Not only was her reason rational but also the facts upon which she

made that decision were accurate. Even though Jeffrey Hood had worked in the family contracting business for many years during which time it prospered, their father gave that business to Sam as well as giving him several parcels of real property within a few years of his graduation from college. Sam also received from his parents shares in another family business that were worth about $740,000. Because Jeffrey received nothing from his father, his mother, Dorothy Hood, wanted things to be more equal so she bequeathed her property to Jeffrey. There is nothing in the record to suggest that Dorothy Hood was not exercising her free will at the time she made this decision to disinherit the Petitioner.

C. Insane delusion

The Petitioner first asserted this claim in a motion for summary judgment which was filed long after the time for dispositive motions were due and long after the time for discovery had expired. Petitioner's "insane delusion" theory was not asserted in the original Complaint or the Amended Complaint. For this reason, it would be unfair to consider it. But, even if it had been asserted in a timely manner, there are no facts to support such a claim. It does not seem that this Court has ever considered if an "insane delusion" would vitiate testamentary capacity thereby destroying the validity of an otherwise proper Will. It is submitted that if this Court was inclined to consider this issue, this case is not appropriate for that analysis.

Generally, this doctrine of "insane delusion" is applied in cases in which a testator possesses testamentary capacity but is motivated by an irrational belief about the facts. See, *Boney v.* Boney, 265 Ga 839, 462 S. E. 2d 725 (1995) The test is not whether the testator's belief about the facts is accurate since a testator is entitled to be wrong; it is whether that belief is rational. Additionally, and most importantly, the "insane delusion" must materially affect the Will. Here there are no facts to support such a claim. Dorothy Hood's belief that the Petitioner benefitted

from his father's largesse is not only rational but also is demonstrably true. So, if she thought both of her children should benefit equally, her decision to prefer Jeffrey over Sam in her Will is not insane; it is rational. Moreover, it is no different from the decision of her husband to have preferred the Petitioner over his Jeffrey when he gave the Petitioner two viable, profitable and valuable companies as well as several parcels of real property.

D. Tortious Interference

This tort is substantially like the tort of intentional interference with economic expectancy. Proof requires the proponent to establish the existence of an intentional act that caused harm. *Barone v. Barone*, 170 W.Va. 407, 294 S.E.2d 260 (1982). Based upon *Prinz v. Prinz*. No. 13-0495 (W. Va. 2014) since Petitioner's claim of tortious interference seems to be based upon the same theory as his undue influence claim, it shares the same lack of merit.

III. ORAL ARGUMENT

As provided by Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, Respondents do not think this appeal satisfies the criteria for oral argument. There is nothing new or unique about this case. The material facts are not in dispute nor is the applicable law and the issues have been fully developed by the parties in their respective briefs.

IV. ARGUMENT

A. Standard of Review

The standard of review of a Circuit Court's granting a summary judgment is *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 451 S. E. 2d 755 (1994). It is appropriate to grant a summary judgment when the material facts are not in dispute and further inquiry is not necessary to for the application of the appropriate law. Or, as concisely stated in *Painter v. Peavy:* " Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to

find for the nonmoving party. . ."

B. Response to Assignment of Error No. 1 - The Circuit Court's grant of a summary judgment was proper because the evidence in the record was insufficient to establish the existence of a dispute about any material facts

1. The evidence in the record established the fact that Dorothy Hood possessed testamentary capacity at the time she executed her Will.

Dorothy Hood died on July 12, 2013. Her Will, which was executed on September 7, 2007, left her entire estate to her oldest son, the Respondent, Jeffrey Hood. She explained that this was because of the extent to which she and her husband had provided for their other son, Petitioner, Stephen Hood. Specifically, in her Will Mrs. Hood stated: (JA172)

> I have intentionally left nothing to my son Stephen M. (Sam) Hood, knowing that he was well provided for during my lifetime.

Mrs. Hood's Last Will and Testament had been prepared by Paul Farrell, Sr. prior to him becoming a Judge of the Cabell County Circuit Court. According to Judge Farrell, before she signed that Will, Mrs. Hood reviewed it and confirmed that it accurately reflected her intentions. (JA224) Judge Farrell and another attorney in his office, Neisha Brown, witnessed its execution, and both testified that at the time the Will was signed, Mrs. Hood was competent. (JA127; 303) Additionally, Judge Farrell submitted an affidavit in which he averred that at the time Mrs. Hood executed her Will, she appeared to be of sound mind, understood her business and that she was present for the purpose of executing her Will. (JA109) He further stated that she understood the purpose of this Will and how it provided for the distribution of her estate. (JA110) A similar affidavit was submitted by attorney Neisha Brown (JA111). In it she attested to the competence of the Ms. Hood. Terry McMahon Snow, who notarized Mrs. Hood's signature on her Will averred that she was present and observed the discussions among Dorothy Hood, Judge Farrell, and Ms. Brown and that she believed that Mrs. Hood was of sound mind and that she had the testamentary

capacity to execute that Will. (JA113)

With respect to the preparation and execution of that Will, Judge Farrell testified during his deposition that his first contact with Dorothy Hood was by telephone. (JA314) During that conversation Mrs. Hood lamented about the acrimonious relationship between her sons. (JA314) She advised Judge Farrell that she wanted to leave everything to Jeffrey because Sam had received more than his fair share. (JA315) She felt that "Sam had been well provided for by his father, to the exclusion of Jeff." (JA320) According to Judge Farrell, in connection with the preparation of the Will he had numerous conversations with Mrs. Hood by telephone and that he visited her at her home on one occasion. (JA319) During these conversations, Mrs. Hood clearly expressed her intentions. According to Judge. Farrell: "She was very concise and precise in what she wanted done." (JA319)

Judge. Farrell personally delivered a draft to her at her home on August 13, 2007. (JA321) Three weeks later, Judge Farrell related that Mrs. Hood executed her Will at his office. According to him: (JA324)

> As was my custom and habit, I would have met with her, gone over the terms – just her and me, gone over the documents with her. After she was satisfied and we insured we had what we wanted in the Will and in the Powers of Attorney, I would have asked my staff to come in and witness it and be a – get a notary

Additionally, at his meeting with Mrs. Hood to discuss the Will, Judge Farrell testified that he asked Mrs. Hood some general questions to assess her competency. (JA324) In further elaborating, Judge Farrell stated that he repeated these questions in the presence of the other witness and the Notary:

> I wanted to assure myself and those witnesses to the Will that she was competent. * * * Well, I had, because I had numerous conversations with her, where she expressed her desires. She was clear. She was consistent. She asked very pointed questions. * * * And she was very clear about her instructions. * * * [W]hen I had the notary and Neisha Brown witness it, I, again, went through the questions to say you're sure then that Ms. Hood was

competent. (JA327)

In short, as Judge Farrell summarized "As I said, I satisfied myself, based on my month-long interactions with her, that she was competent to make a Will" (JA328)

Neisha Brown, who was then an attorney in Judge Farrell's office, witnessed Mrs. Hood's Will. Ms. Brown corroborated that Judge Farrell had asked Mrs. Hood several questions to assure that Mrs. Hood was competent to execute her Will. More specifically, she testified: 'I would not have signed this Will as a witness if I had not believed that she was competent to sign that Will." (JA303) As she further explained: *Id.*

> I listened to the questions that Judge Farrell asked her that day and her responses. And in my judgment, on that day and time, she was competent to sign the Will."

Mrs. Hood's competence to execute her Will was further corroborated by the individual who notarized her signature. Specifically, in her affidavit, Terrie McMahon Snow averred that she had observed Dorothy A. Hood's behavior and conversations with the attorneys both prior to and during the signing of her Will, and that Dorothy A. Hood did not appear confused at all nor was she hesitant to sign the Will; that she was satisfied that Mrs. Hood was of sound mind; and that she understood the circumstances and her surroundings when she executed that Will on September 7, 2007. (JA113) Ms. Snow further stated in her affidavit that she was knowledgeable about persons suffering from dementia and Alzheimer's and that she would not have notarized the Will if Mrs. Hood had exhibited any signs of dementia or Alzheimer's or confusion or hesitancy of any type at the time she executed her Will. *Id.*

Kevin Yingling, MD, who had been Dorothy Hood's primary care physician since 2002, submitted an affidavit in which he stated that in his opinion during September 2007, Ms. Hood had the "requisite cognitive capacity to consent to medical procedures, conduct her business, including executing a Will." (JA1247) Dr. Yingling's conclusion about Ms. Hood's mental

competence is corroborated by her medical records. These records showed that Dorothy Hood was seen by Dr. Yingling at Marshall Health on July 9, 2007, which was about two months prior to the execution of her Will. Dr. Yingling's notes reflected that Ms. Hood was in her usual state of health and mental competence. (JA1250)

Mrs. Hood was seen by Drs. Ataro and Elbash at Marshall Health on September 12, 2007, which was about four days after she had executed her Will. Those physicians noted that Ms. Hood was "Alert" and "oriented to time, place, and person." (JA1253) Dr. Yingling made similar observations when he next saw Ms. Hood on September 20, which was about two weeks after she had executed her Will. According to those records, Dr. Yingling discussed with Ms. Hood her current living arrangements. His notes reflect that she was living alone, that she wanted to sell her house, and that she was thinking about moving to the Woodlands, a local retirement facility. (JA1122) Even more specific, Dr. Yingling in his affidavit (JA1247) affirmed her testamentary capacity:

> That it is my opinion to a reasonable degree of medical certainty that in September 2007, Dorothy Hood had the requisite cognitive capacity to consent to medical procedures, conduct her business, including executing a will, as her cognitive capacity was appropriate to make informed decisions for an 88-year-old individual.

As further evidence of her general competence, it was undisputed that at the time she executed her Will, Dorothy Hood lived alone and was managing her own affairs. Moreover, she continued to live by herself in the house in which she and her husband had resided until January 2008. Even the Petitioner conceded that at the time his mother signed her Will she was living alone and was managing her medical affairs (JA1200) and may have been operating an automobile. (*Id.*) She then relocated to an assisted living facility in this area. In fact, she was not declared incompetent until about five months after she signed her Will. (JA588)

It is also significant to note that the Petitioner claimed to have visited his mother on September 6 or 7, 2007 which was the exact time period in which she signed her Will. His only negative observation was that she could not find a nail clipper that had belonged to her husband. (JA1198) Certainly, nothing about that visit caused him to doubt her competence since he left after a short time and never mentioned any concern to anyone about his mother's mental status or about her ability to continue to live on her own and to manage her affairs. Id.

According to *Cantarelli v. Grasso*, No. 18-0839 (W. Va. 2020) which quoted *Floyd v. Floyd,* 148 W. Va. 183, 133 S.E.2d 726 (1963):

> "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," *id.*, syl. pt. 8 (citation omitted), and in making the determination, [t]he 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. 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. Syl. Pt. 3, *Floyd v. Floyd*, 148 W. Va. 183, 133 S.E.2d 726 (1963).

Of equal importance in determining the existence of testamentary capacity is the fact that mental acuity is not the test. An individual can have testamentary capacity even though he is not competent to transact business. *Stewart v. Lyons*, 54 W. Va. 665, 47 S.E. 442 (1903); *Prichard v. Prichard*, 135 W. Va. 767, 65 S.E.2d 65 (1951). This has been the law for many years. As pointed out by C*antarelli* which quoted *Stewart v. Lyons*, 54 W.Va. 665, 47 S.E. 442 (1903) (Syl Pt. 3):

> "[i]t is not necessary that a testator possess high quality or strength of mind, to make a valid will, nor that he then have as strong mind as he formerly had. The mind may be debilitated, the memory enfeebled, the understanding weak, the character may be peculiar and eccentric, and he may even want capacity to transact many of the business affairs of life; still it is sufficient if he understands the nature of the business in which he is engaged when making a will, has a recollection of the property he means to dispose of, the object or objects of his bounty, and how he wishes to dispose of his property." Syllabus Point 3, *Stewart v. Lyons*, 54 W.Va. 665, 47 S.E. 442 (1903).

The minimal evidence offered by the Petitioner not only fails to "clearly" outweigh the testimony and affidavits of the attesting witnesses, the drafting attorney, and Mrs. Hood's primary

physician but also, and even more importantly, fails to relate to her testamentary capacity. Relying primarily upon the recollections of some acquaintances about observed behavior that occurred many years before they were recounted in connection with this litigation, Petitioner suggests the existence of a factual dispute about his mother's testamentary capacity. From the prolix narrative in his brief, it appears that the Petitioner is attempting to create a misimpression that his mother was so demented that she was unable to function. If this were true, it would be logical to infer that Petitioner, who lived in Huntington not far from his mother, would have noticed and taken some action to ameliorate that situation. (JA1198) But he did not. Rather, as previously recounted, Petitioner was driving to or from his home when he saw his mother's garage door was open. He stopped to visit his mother but was not particularly concerned about her ability to live alone and manage her affairs. *Id.*

A good example of the misimpression the Petitioner is attempting to foist upon this Court is the observation of William Burdette, Jr. Mr. Burdette was hardly a close acquaintance of Mrs. Hood. He was a counter-man at an electrical supplier who had waited on her when she purchased some light bulbs. According to him, possibly within a year after her husband's passing, which was three years before she executed her Will, she became confused and asked him to call someone to help her get home. Initially, she asked him to call her husband, which Petitioner suggests a lack of testamentary capacity. More than likely it was reflexive since she had only recently lost the person upon whom she had depended for more than 60 years. But what is more important, when she realized her mistake, she was able to ask him to call her son and when that was not successful, to call her housekeeper. (JA348-49)

Petitioner's brother-in-law, David Hagar, who did not live in Huntington, occasionally saw Dorothy when he visited his family. Mr. Hagar who never indicated that he had any medical

training, gratuitously offered an opinion based only upon his occasional encounters, that Dorothy Hood was suffering from a "severe mental disease." Such opinion is not admissible pursuant to Rule 701 of the West Virginia Rules of Evidence, as Mr. Hager was not qualified as a medical expert on mental disease. Once again, if Mrs. Hood's mental condition was as apparent as Mr. Hagar described, it would have been obvious to the Petitioner who probably would have seen her on a regular basis. Certainly, it would be reasonable to infer that he would have taken some action to help her or, at a minimum, been able provide something to document her alleged condition. But he did not. More important, if her condition was so obvious to a lay person, it would have been more obvious to Dr, Yingling who had been her physician for about five years and who was far more competent than Petitioner's brother-in-law to make that diagnosis. Apparently, it was not that obvious, probably because Mr. Hagar was exaggerating to please his brother-in-law. So rather than corroborate Mr. Hagar's non-medical opinion of Mrs. Hood's mental acuity, her primary care physician opined to a reasonable degree of medical certainty, that she was competent to manage her affairs and had the capacity to make a Will. (JA1247)

Another of the Petitioner's friends, Ortud Vallejos, testified that on one occasion when she visited, Dorothy Hood had experienced some fecal incontinence. (JA382) Noteworthy, Ms. Vallejos did not indicate that Mrs. Hood was living in squaller or that this was other than a single incident. (JA383) To the contrary, she assured Mrs. Hood that such accidents happen on occasion. (JA385) According to her, she helped Mrs. Hood clean herself (JA384). She said that she told the Petitioner's wife, Martha, about this. (JA386) But there is nothing in the record to indicate that Martha took any action or to suggest that Mrs. Hood's incontinence was other than an isolated accident which could have resulted from a myriad of gastrointestinal causes.

A lady who claimed have been an intimate friend for more than 20 years, Ann Justice, said

that on one occasion in 2006 Mrs. Hood was confused about whether a church service was about to start even though it had just ended. (JA431) The significance of this claim is not whether Ms. Justice's recollection of an insignificant event which occurred in 2006 is accurate but rather that it was the only incident that occurred in the course of a 20-year intimate friendship. Certainly if Mrs. Hood had serious mental issues Ms. Justice, as her intimate friend, would have been able to describe more than a single incident.

Finally, Petitioner's son, Taylor Hood testified that his grandmother had help writing the checks to pay her bills. He did not say she was unable to do so and he did not say she had a caretaker, just somebody to help her write her checks. (JA931)

Other than the single visit on September 6 or 7 that was previously described, (p.11, *supra*) Petitioner could not recount anything about his mother which would indicate that she was not competent. His wife, Martha Hood, in her affidavit recounted a discussion with Dr. Yingling in mid-September 2007. According to her, Dr. Yingling was asked whether Mrs. Hood was able to continue to live by herself. (JA435) Apparently, Dr. Yingling thought that she was because Mrs. Hood continued to do so. This discussion is significant for two reasons: First, Mrs. Hood's family accepted Dr. Yingling's evaluation of her ability to live alone and manage her affairs. Second, it shows that Dr. Yingling's affidavit which reiterated that conclusion, was based upon a medical judgment that he had previously made and which was based upon a considered analysis of her condition as communicated by her family as well as from his own observations. Obviously, since it was made in his capacity as Mrs. Hood's physician it has substantial credibility which a few sporatic recollections are insufficient to rebut.

The Petitioner suggests that Mrs. Hood's medical records show that "multiple attending

physicians" opined that she was "suffering from dementia." (Petitioner's Brief at 21) No records to support this claim have been cited. It does appear that in July 2007, Mrs. Hood was transported by EMS to St. Mary's Hospital because of a radiating pain originating in her neck. The ER physician, Dr. Chadwick, noted that she *might* have some underlying dementia. In connection with that incident, another physician, Laura Duncan MD, noted that Mrs. Hood was forgetful and "*maybe* even somewhat demented" but she also noted that she was "alert and oriented times three when answering questions regarding person, place, and time." According to *Canteralli* these records are irrelevant and are certainly not sufficient to overcome the affidavits of the attorney who prepared Dorothy Hood's Will, the subscribing witnesses, the Notary, and her attending physician. As was made clear by *Canteralli* at p.8, medical records that are unrelated to conditions existing at the time a Will are executed are irrelevant and immaterial:

> Assuming petitioner properly authenticated the medical records, they do not speak to the decedent's capacity at the time the will was executed. In fact, they do not speak to testamentary capacity at all. Given that a testator need not "possess high quality or strength of mind" and that a testator's mind may be "debilitated" and memory "enfeebled," the records do not raise a question as to the decedent's recollection of her property or her intention to devise her home to respondent on the day the will was executed, as testified to by Mr. Wilson and the decedent's caretakers.

It is also significant to consider that the plethora of medical records (JA522-588) relating to Mrs. Hood during the period prior to her will and for a few months thereafter, other than the few that have been cited by the Petitioner, do not mention confusion or dementia. It seems reasonable to infer that if there was anything amiss with Mrs. Hood's mental status, it would have been noted in those records.

2. There was no conflicting testimony from the attorney who drafted the Will, the witnesses to the Will or the Notary. Each unequivocally testified and/or averred that Dorothy Hood was competent

(a) Paul Farrell

In his deposition, Judge Farrell testified, that in connection with the preparation of Dorothy Hood's Will he had numerous conversations with her by telephone and that he visited her at her home on one occasion and at his office prior to her signing her Will (JA319) He stated that during these conversations, Mrs. Hood clearly expressed her intentions: "She was very concise and precise in what she wanted done." (JA319) According to him, "I satisfied myself, based on my month-long interactions with her, that she was competent to make a Will" (JA328). Judge Farrell further testified that before Mrs. Hood signed her Will he had a private conversation with her to review its provisions and make sure she understood it and that it was she intended. (JA324) Then according to Judge Farrell he questioned her in the presence of the other witness, Neisha Brown and the Notary so that they could determine if she was competent. (JA 27)

Petitioner suggests Judge Farrell's clear and unequivocal testimony conflicts with a statement in an affidavit which he signed several years later. (Petitioner Brief at 24) Petitioner finds fault with the averment: "That on September 7, 2007, I had discussions with Dorothy A. Hood for the purpose of satisfying myself that Mrs. Hood was of sound mind, understood her business and the reason she was present that day and how she wished to dispose of her property." (JA110) It is difficult to understand Petitioner's claim. Although the exact words in the affidavit may have been different from those used by Judge Farrell in his deposition and although the description of this event in his deposition testimony was more detailed, in substance his testimony and his affidavit are identical: he had discussions with Mrs. Hood to assure himself that she was competent. Petitioner's suggestion that Judge Farrell was required to give her a competency test is absurd. (Petitioner Brief at 24-25) There is no requirement that an attorney who drafts a Will must "test" a testator to determine competency and the Petitioner has not cited any legal authority for

that proposition. Judge Farrell had numerous conversations and meetings with Mrs. Hood about her Will over a two-month period. He is a knowledgeable and experienced attorney who had prepared approximately 100 Wills during his time in private practice. (JA308) Based upon his experience and his interactions with Mrs. Hood, he was qualified as an attorney to determine Mrs. Hood's testamentary capacity at the time she executed her Will.

(b) Neisha Brown

With respect to Neisha Brown, who witnessed Dorothy Hood signing her Will, Petitioner suggests that an inconsistency between her deposition testimony and an affidavit which she signed a few years later creates a question about material facts. Petitioner is incorrect because there are no material facts in dispute. The only inconsistency is whether Ms. Brown asked Mrs. Hood any questions or merely listened to her responses to questions asked by Judge Farrell. The identity of the interrogator is not material, it is the answers which are given that need to be evaluated. Substantively there is no inconsistency: questions were asked and answers were given and based upon those answers as well as any other observations that she may have made, Neisha Brown believed that Mrs. Hood was competent. For Petitioner to suggest that because Ms. Brown could not recall who interrogated Mrs. Hood more than seven years after she witnessed the Will, she is not a credible witness is inappropriate. (Petitioner Brief at 26) The fact that her memory may have faded over time does not destroy her credibility.

(c) Terrie McMahon Snow

Petitioner faults Ms. Snow, who merely notarized the signatures of Mrs. Hood and the witnesses by claiming that she once told him that she could not recall the Will signing ceremony. However, in her Affidavit, Ms. Snow indicated that she told Petitioner that she would not have

notarized his mother's signature if she did not appear to be competent. (JA114) If the Petitioner thought that Ms. Snow was being untruthful or inconsistent, he could have deposed her. What is important is that she observed the Will signing ceremony and signed an affidavit stating that based upon her observations of Mrs. Hood, she did not think she was confused or hesitant to sign her Will. Whether she could remember anything is not particularly material since she averred that she would not have notarized Mrs. Hood's Will if she thought she was confused or lacked understanding. (JA114)

3. The record is devoid of any evidence to indicate that Jeffrey Hood and/or Linda Hood unduly influenced his mother to disinherit Sam Hood

Although Petitioner suggests that his claim of undue influence is supported by circumstantial evidence, there is none. His theory seems to be divided into two parts: that his mother was demented and that his brother is an evil man. From these fallacies, Petitioner theorizes that Jeffrey must have taken advantage of Dorothy Hood's diminished capacity to engender a mistaken belief which motivated her decision to disinherit him. But this claim is without evidentiary support, is factually inaccurate, and does not satisfy the criteria for undue influence..

The circumstances surrounding the preparation and execution of Dorothy Hood's Will have been discussed in a prior section of this brief. (Argument §§ 2(a) & (b), *supra*). Judge Farrell who drafted her Will and was one of the witnesses to its execution summarized the process:

> I wanted to assure myself and those witnesses to the Will that she was competent. * * * Well, I had, because I had numerous conversations with her, where she expressed her desires. She was clear. She was consistent. She asked very pointed questions. * * * And she was very clear about her instructions. * * * [W]hen I had the notary and Neisha Brown witness it, I, again, went through the questions to say you're sure then that Ms. Hood was competent. (JA 327)
>
> * * *

> As I said, I satisfied myself, based on my month-long interactions with her, that she was competent to make a Will" (JA328)

Additionally, her attending physician, Kevin Yingling, M.D., averred:

> That it is my opinion to a reasonable degree of medical certainty that in September 2007, Dorothy Hood had the requisite cognitive capacity to consent to medical procedures, conduct her business, including executing a will, as her cognitive capacity was appropriate to make informed decisions for an 88-year-old individual.

As was made clear in *Greer v. Vandevender,* No. 16-1228 (W. Va. 2018), to avoid Dorothy Hood's Will because of undue influence, the Petitioner must prove that his mother's free will was nonexistent at the time she executed her Will:

> "'[u]ndue influence, to avoid a will, must be such as overcomes the free agency of the testator at the time of actual execution of the will.' Syllabus Point 5, *Stewart v. Lyons*, 54 W.Va. 665, 47 S.E. 442 (1903)." Syl. Pt. 10, *James v. Knotts*, 227 W. Va. 65, 705 S.E.2d 572 (2010).

Additionally, *Greer* pointed out that in determining if there was undue influence:

> "[t]he testimony of an attending physician or the lawyer who drafted the will is also entitled to great weight on the question of mental capacity." *Floyd v. Floyd*, 148 W. Va. 183, 196-97, 133 S.E.2d 726, 734 (1963).

Based upon the Petitioner's version of the facts, it does not appear that he even suggests the existence of any evidence to support his claim. Probably the most apparent evidentiary deficiency with the Petitioner's undue influence claim is that Jeffrey Hood never discussed his mother's Will with her. Nor, according to him, did she ever disclose her testamentary intention to him. (JA1106)

Rather, the gravamen of the Petitioner's claim is the unsubstantiated allegation that Respondent communicated "false and misleading information" to his mother. But, even if Petitioner's claim was correct, which it is not, communication of inaccurate information has nothing to do with establishing undue influence. The criterion is that the "undue influence" must be sufficient to overcome "the free agency of the testator at the time of actual execution of the

will". There is nothing in the record to indicate that Dorothy Hood's "free will" was impaired because of any information. She had the unfettered ability to consider and analyze all information and the "free will" to accept, reject, or disregard all or part of it. More important, none of the "information" which Petitioner asserts was misleading, is not substantially accurate.

Among his claims, the Petitioner points to a list of real estate that was prepared by someone in 1980 as part of an appraisal. (JA1003) He begins his discussion by misstating that "Jeffrey admitted that he gave Dorothy a written list of false and misleading information...." And he concludes by falsely stating "Jeffrey Hood does not dispute that he wrote this list and provided it to Dorothy ...." (Petitioner Brief at 28) This completely misrepresents and misstates Jeffrey Hood's testimony. What Jeffrey Hood stated in his deposition was that he did not know the source of the list, (JA1088) He thought the list had been given to him by his mother and that his only involvement with that information was to subtract the value of two listed properties. (JA1088):

> Well, the document that I've written on was from 27 years ago, and I suppose my mother and I must have had a conversation, although I don't know, and she gave that to me and I backed out the value of the house on Kennon Lane [and] Sam's house on Fairfax Drive
> ....

There is nothing in the record from which to determine when this conversation occurred.

With respect to this list, Petitioner faults Jeffrey for using the term "gave" which Petitioner defines as being without compensation. Petitioner claims that because he received the property subject to a mortgage, he was given nothing. (JA1160) However, the deed from his parents reflects that they had received nothing for the property which had been conveyed for "love and affection". (JA1056) Moreover, since, as shown by her signature on the deed, Dorothy was a party to the transaction she would have known the circumstances under which it was "given" to Sam "without consideration" and could not have been misled by the word "gave." Interestingly, Petitioner notes that his father, Marshall Hood, used the word "gave" when he clarified that he only "gave" Sam

the equity. (Petitioner Brief at 28)

Also, Petitioner received many other parcels without consideration other than the love and affection of his parents. (JA1192)

With respect the transfer of Huntington Piping, which was referenced on that sheet, Petitioner admitted that in April 1978, he received as a gift from his parents all the common shares of Huntington Piping. (JA1164) The reason for this, according to Petitioner was for him to profit exclusively from its business operations: (JA1165)

> So that any appreciation in the value of Huntington Piping after 1977, when Dad sold me the company after Jeff left to go into the real estate business, Dad wanted me to benefit fruits of whatever it is that I built after Jeff left to do his own thing.

Although Petitioner claimed that this gift had no value, he is wrong. The shares of common stock gave him ownership of a viable and successful operating business. In addition to its "hard assets" Huntington Piping had good will, a customer base, a credit rating, and the ability to borrow money and bond jobs. In fact, Plaintiff conceded that the business "had a great reputation" and that he "benefitted from [that] good name and reputation: (JA1126)

> My father left a – had a sterling reputation. He was very respected. He was very trusted. He founded a business that had a great reputation. And I benefitted from his good name and good reputation.
>
> * * *
>
> I was a son who was able to come in as the second generation of an established business and run it.

Although not mentioned in the list, but which corroborates the statement in Dorothy Hood's Will that Petitioner had been "well provided for," in 1991 his parents gave him shares in another business, Appalachian Builders, which were worth $739,500. (JA1164)

The second prong of Petitioner's argument is to suggest that Jeffrey is a "serial taker of

advantage" of his parents by referring to a dispute involving their father and his transfer of Hood Steel to Jeffrey. Jeffrey has a far different version from that suggested by Petitioner, who was not involved in the matter. According to Jeffrey: (JA1097-1098)

> Once again my recollection is that Dad said "take this stuff, I don't care about it. I know its not worth anything if we have to sell it on the hoof, but whatever deal you can make, give me the money," and that's what happened.
>
> * * *
>
> I don't remember my dad selling me anything. I remember my dad, if you want to use the term "giving" it to me. He gave it to me with the understanding that I would make some sort of a deal, and whatever it is, in addition to a tenant for me, whatever I could do with the equipment, sell it to who, for what, that if there was any proceeds that he got them, by some manner or means

The three most disturbing things about Petitioner's reference to disputes between Jeffrey and his father are: first, his mother was not involved; second, all occurred while his father was alive which was several years before his mother signed her Will; third, none are admissible evidence pursuant to Rule 404(a)(1) of the West Virginia Rules of Evidence. Additionally, the application of evidentiary doctrine *res inter alios acta.* prohibits the use of this argument by the Petitioner because he was not a party to the dispute. *E.g., Levine Bros. v. Mantell,* 90 W. Va.166, 111 S.E. 501 (1922)

Again, to make something out of nothing, Petitioner misrepresents other evidence in the record. He asserts that "Jeffrey took Dorothy to the law firm the day she signed the Will." There is no evidence in the record to suggest that he did. To the contrary, Jeffrey specifically denied that he did: (JA1114)

> Q. On the day the will was executed, lets focus on that, how far was it from your mom's house to the Farrell Law Firm?
> A. I mean, I don't know how to answer that. Not very far. Maybe five or ten minutes in an automobile.

Q. Uh-huh. Do you know how she got there?
A. No.
Q. So you didn't take her?
A. No.
Q. Did your wife take her?
A. No.
Q. Did you pick her up?
A. No.
Q Did your wife pick her up, if you know?
A. Well, I'm answering for my wife –
Q. If you know.
A. I don't think she'd had have done it, without me knowing, but no.
Q. Did you see her at all that day?
A. No

Petitioner, referencing a meeting described by his wife, Martha Hood, in her affidavit, claims that "Jeff told Dr. Yingling that his mother was exhibiting odd behavior and that her mental condition was deteriorating." (Petitioner Brief at 30) Apparently, Dr. Yingling did not think that it was debilitating because Mrs. Hood continued to live alone, manage her affairs, and drive her car. Additionally, Dr. Yingling averred that among other things, Mrs. Hood was competent to execute her Will. (JA1247)

Finally, Petitioner points to an alleged conversation before his mother died between a "busy-body" friend and Jeffrey Hood. According to Petitioner Jeffrey lied to her about the contents of Dorothy's Will. (Petitioner Brief at 30) First since it was none of her business, whatever Jeffrey may have said was probably less offensive than telling her to mind her own business. But, more important, Petitioner mis-represents her deposition testimony. Her exact words were that when she asked if Dorothy had a Will, Jeffrey said: "it's the standard – my two sons, blah, blah, blah." (JA1000)

Perhaps the assertion that is most indicative of the fact that Petitioner's undue claim is completely devoid of merit is his summary of the evidence: Dorothy was 88 years old and had executed two previous Wills which were different from the one she signed in 2007. (Petitioner

Brief at 31) Proof that Respondent overcame the free agency of his mother requires more than that. Among other thing it requires proof that Jeffrey "'actively procured' the will" *Cantarelli v. Grasso*, No. 18-0839 (W. Va. 2020) at p.4

4. There is no evidence to suggest that Jeffrey Hood intentionally and tortiously interfered with Sam Hood's inheritance.

Petitioner's tortious interference claim seems to be a reiteration of his undue influence claim. Basically, it appears the Petitioner's argument on this issue is simple: I expected to inherit something, but because my mother thought otherwise my brother must be responsible. Certainly, that is not sufficient. The essence of this tort is interference not the failure to receive what was expected. Yet, Petitioner's only argument seems to be that since he had an expectation of inheritance, there is a factual question to be resolved. He is not correct. There is no evidence to establish any interference by Jeffrey with anything.

As previously pointed out, Jeffrey had never discussed his mother's Will or knew anything about it until after it was executed: (JA1106)

Q. Did you ever talk to your mom about her Will?
A. No.
Q. Not at all?
A. No.
Q. Did she ever tell you what she intended to do?
A. No.

Obviously, Petitioner's intentional interference claim is that his brother unduly influenced his mother to disinherit him. Petitioner appears to concede that the evidence is the same. (Petitioner Brief at 31). The only other fact asserted to support this contention is that Mrs. Hood had executed two prior Wills which did not disinherit the Petitioner. But that is not evidence of an intentional act by the Respondent to cause that result. As was made clear in *Cantarelli*, when an intentional interference claim is based primarily upon the same facts as an undue influence

claim, if undue influence is not established the intentional interference claim must, likewise, fail:

(*Id.* at p.8)

> Because petitioner's tortious interference claim is predicated on respondent's alleged undue influence over the decedent in contacting Mr. Wilson, and because we found that such conduct is insufficient to establish undue influence, petitioner's tortious interference claim likewise fails.

C. Response to Assignment of Error No. 2 - The Court never found that records cited by Petitioner's expert had not been filed

Petitioner, apparently, has mis-construed the Court's evaluation of the report from Petitioner's expert, Bobby Miller, M.D. (JA257) The Court never said that the Petitioner had failed to file medical records. What the Court stated in Paragraph 16 was that "within Cantarelli analytical frame-work, 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." [Emphasis added] (JA1052-53) Additionally, the Petitioner failed to mention Paragraph 15 of the Order in which the Court pointed out that the report did not indicate that Dr. Miller considered the information presented by the Respondent in reaching his conclusions. Most significant was the Court's reason for rejecting the opinions of Dr. Miller:

> In that respect, Dr. Miller (now deceased) expressed the opinion that at the time that she executed her Will, 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.

With respect to expert testimony, this Court has held in *Jividen v. Law*, 194 W.Va. 705 461 S.E.2d at 461 (1995) (Syl. Pt. 6). that conclusory opinions which do not have evidentiary support will not create a factual dispute sufficient to resist the entry of a summary judgment:

> An expert witness' affidavit that is wholly conclusory and devoid of reasoning does not comply with West Virginia Rule of Civil Procedure 56(e).

Similarly, quoting *Carapellucci v. Town of Winchester*, 707 F. Supp. 611, 620 (D. Mass. 1989)

the Court in *Miller v. Bd. Of Governors of Fairmont State Univ.*, No. 15-0390 (May 20, 2016) at page 8 stated:

> It is the court's responsibility to determine whether the underlying factual evidence is sufficient to support the ultimate conclusion. The expert's expression of the ultimate conclusion alone does not improve the plaintiff's case against summary judgment or directed verdict. If the law were otherwise, the testimony of expert witnesses could cause the ultimate issue "too easily [to] become whatever an expert witness says it is." See In re Air Crash Disaster at New Orleans, 795 F.2d at 1233 (noting that "trial courts must be wary lest the expert become nothing more than an advocate of policy before the jury.") Expert testimony must not be allowed to circumvent the purposes of summary judgment in this manner. See Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 672-73 (D.C.Cir.1977) (noting that Rule 703 was not intended "to make summary judgment impossible whenever a party has produced an expert to support its position.")

Dr. Miller's report was prepared on August 16, 2016 which was approximately three years after Dorothy Hood had died and nine years after she signed her Will. He never examined, tested, or had any contact with Mrs. Hood. His opinion appeared to be based upon some, but not all, medical records and a few anecdotal recollections of people who knew Mrs. Hood. Dr. Miller referenced only a few medical records relating encounters prior to the date of Mrs. Hood's Will and some of those generated after she was declared incompetent. Significantly, however, his analysis never mentioned the medical records of Dr. Yingling and the other physicians at Marshall Health who examined Mrs. Hood during the period July - September 2007, which was when the Will was executed. Additionally, he offered no theory to explain how the three individuals, Paul Farrell, Neisha Brown, and Terri Snow who interacted with and observed Mrs. Hood in connection with the execution of her Will could be so mistaken about her mental status.

Rather than mention the available information which clearly indicated that Dorothy Hood was competent to execute her Will, Dr. Miller's report was based entirely upon a few anecdotal recollections and emergency room encounters. He completely ignored the observations of her primary care physician and the people involved with the preparation and execution of her Will.

Even more significant, Dr. Miller stated that at the time she executed her Will, Dorothy Hood "was not able to manage her daily affairs." (JA56) This statement was entirely 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.

According to *Cantarelli v. Grisso*:

> [t]he 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. 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.

In addition, Dr. Miller's conclusion appears to be inconsistent with his description of the three stages of dementia. Although he opines without analysis that Mrs. Hood was in the second stage of dementia, his arithmetic is incorrect. The data he referenced (JA55) is that dementia is usually present for 3 to 5 years prior to diagnosis and that Stage 1 lasts about 5 years. Dorothy Hood was diagnosed in about January 2008, so, by his analysis in 2007 when she made her Will, she was only in Stage 1. Likewise, Dr. Miller's data is that the duration of the illness is between 8 and 12 years and that Stage 2 and Stage 3 together last only 6 years. Application of this data would likewise indicate that since Dorothy Hood died in 2013, she would have been in Stage 1. Dr. Miller's result-oriented analysis is another example of his conclusion being inconsistent with the evidence.

An opinion, such as that offered by Dr. Miller, which is not based upon actual observations, which ignores undisputed facts, and which is inconsistent with the data upon which he relied, is not sufficient to "clearly" outweigh anything. The purpose of an expert report is to consider and explain all the evidence, not just the evidence that supports the opinion he was hired to express. Any opinion that is inconsistent with the undisputed facts has no validity and should be disregarded. This is exactly what the Circuit Court did.

Petitioner questioned the Court's failure to mention the report of David Clayman who replaced Dr. Miller. Probably, the reason is quite simple: none of the Petitioner's memoranda seemed to mention it. Perhaps this is because Petitioner realized that it was more flawed that the report of Dr. Miller. Also, shortly after Dr. Clayman's report was made available, Respondent filed a motion to strike it and preclude his testimony for several reasons. (JA1267)

Among the apparent flaws in his report is that Dr. Clayman disregarded most Mrs. Hood's medical records in forming his opinion. Instead, he based his opinion only upon those few notes which suggested that Mrs. Hood may have been confused or possibly that she was suffering from dementia. He never related those notes to the circumstances under which they were prepared, such as after Mrs. Hood had been transported to the ER by ambulance fearing that she had suffered a heart attack because of chest pains. A more significant flaw is that Dr. Clayman never explained how Mrs. Hood was able to live alone and manage her affairs at the time she executed her Will but lack the testamentary capacity to do so. Also, he failed to reconcile the observations of the attorney who drafted Mrs. Hood's Will, the witnesses to its execution and the Notary, who were with and observed Mrs. Hood when she signed her Will. Further, he ignored the opinion of Dr. Yingling, Mrs. Hood's long-time primary physician, who expressly stated that she was competent to have executed her Will.

Also significant to its apparent invalidity is that Dr. Clayman's report, like the one Dr. Miller was hired to prepare, fails to consider the evidence of competence submitted by the three people present at the time Dorothy Hood signed her Will or explain how Judge Farrell, the experienced attorney who prepared her Will, could have had numerous meetings and conversations with Mrs. Hood over a two and one-half month period and not be able to judge her testamentary competence. Dr. Clayman also fails to explain how a Dorothy Hood had the mental capacity to

live alone and manage her affairs but not have the capacity to execute her Will.

This Court has stated that "an expert's deposition or affidavit that is conclusory only is not sufficient to meet the burden of a party opposing the [summary judgment] motion." *Gentry v. Magnum*, 195 W. Va. 512, 466 S.E.2d 512 (1995). Even the most cursory evaluation of Dr. Clayman's report shows that it is more akin to phycological legerdemain rather than a scientific dissertation.

Although Dr. Clayman claims to have reviewed Dorothy Hood's medical records from March 2006 to September 7, 2007 he picked only four to discuss. It seems reasonable to suggest that this was because Dr. Clayman found information in those records to justify his pre-conceived conclusion. In fact, there were twenty-three medical records during this time period. (JA523-24) He states as a fact his conclusion that Mrs. Hood would not have been able to understand complex concepts such as the size and nature of her estate." There is no explanation for this conclusion, nor did it disclose the basis for his conclusion that Mrs. Hood's estate was too complex for her to understand. Also, his report fails to explain how Mrs. Hood could live alone and manage her affairs at this time. He ignores the entry in Dr. Yingling's notes (JA1265) that on September 20, 2007, which was two weeks after she executed her Will, she was able understand that she should sell her home before moving to Woodlands, a retirement community.

He criticizes Dr. Yingling's observation that Mrs. Hood appeared to be "alert and oriented to time, place, suggesting that those terms cannot be considered to be "proof of her testamentary capacity". Obviously, Dr. Clayman is not suggesting that an individual who is alert and oriented lacks mental capacity. Dr. Yingling had been Mrs. Hood's primary physician for about five years prior to the date of her Will. As her doctor he would have noted in his records if she was demented, confused, or otherwise mentally impaired. But he did not. Rather, in his affidavit he stated that

"Dorothy Hood had the requisite cognitive ability to consent to medical procedures, conduct her business, including executing a will, as her cognitive capacity was appropriate to make informed decisions for an 88-year-old individual. (JA1247)

Finally, Dr. Clayman notes that the mental state of people with dementia does fluctuate. But, he claims that these fluctuations are non-existent in "the executive functions" required for testamentary capacity. He never defines "executive functions," describes how they affect testamentary capacity, or relates them to Dorothy Hood. Nor does he explain how Dr. Yingling, Neisha Brown and Paul Farrell could be so mistaken about her testamentary capacity or how Dorothy Hood could continue to live on her own and manage her affairs for several months after she signed her Will.

What is important to any analysis of testamentary capacity is that neither a high level of mental acuity nor an "executive function" (whatever that means) is necessary to have testamentary capacity. As described in *Cantarelli:*

> [i]t is not necessary that a testator possess high quality or strength of mind, to make a valid will, nor that he then have as strong mind as he formerly "had. The mind may be debilitated, the memory enfeebled, the understanding weak, the character may be peculiar and eccentric, and he may even want capacity to transact many of the business affairs of life; still it is sufficient if he understands the nature of the business in which he is engaged when making a will, has a recollection of the property he means to dispose of, the object or objects of his bounty, and how he wishes to dispose of his property." Syllabus Point 3, *Stewart v. Lyons*, 54 W.Va. 665, 47 S.E. 442 (1903).

Moreover, testamentary capacity is determined at the time a Will is executed and the evidence of the drafting attorney, witnesses, and primary physician and must be "clearly outweighed". The unsupported opinions of an "expert" who never met, interviewed, examined or tested the testator and whose conclusions do not consider that the testator lived alone, consented to her medical treatment, and managed her affairs is insufficient to resist a motion for summary judgment.

Finally, based upon the deficiencies in his report, it seems reasonably clear that Dr. Clayman's opinion failed to comply with Rule 703 of the West Virginia Rules of Evidence. His opinions seem to be merely conjecture and speculation. Because these deficiencies are so obvious, the Court is entitled to ignore them even in connection with a summary judgment motion. *San Francisco v. Wendy's International. Inc.*, 221 W. Va. 734, 656 S. E. 2d 485 (2007)

D. Response to Assignment of Error No. 3 - The Court correctly applied the well-established legal principle that the evidence of attesting witnesses, the attending physician, and the attorney drafting the Will is entitled to great weight.

The gravamen of this claim is that the Court failed to use the word "testimony" or to refer to the affidavits and deposition testimony of attesting witnesses, the attending physician, and the attorney drafting the Will collectively as "evidence." This is nonsense. Both Judge Farrell and Neisha Brown submitted affidavits and were deposed. There was no substantive inconsistency; both witnesses testified and averred to the competence of Dorothy Hood at the time she signed her Will. The Notary who was present and Mrs. Hood's attending physician, Kevin Yingling, MD, filed affidavits but were not deposed. Each of them averred to Mrs. Hood's competence.

Petitioner asserts that the affidavits of Judge Farrell and Neisha Brown do not have any greater evidentiary significance than their deposition testimony. Respondent agrees. But the Petitioner's argument has nothing to do with the weight of evidence. His claim is that there was a difference between their affidavits and their testimony. But there was no difference except, perhaps, the specific language used to describe the same thing; in fact, they were consistent. This has already been discussed in this Brief. (Respondent Brief §§IV-B-2 (a) &(b))

In Paragraph 23 of its Order, (JA1054) the Court stated that "after making a careful review of the record in accordance with the principles enunciated by our Supreme Court in Cantarelli together with the other points and authorities cited herein, the Court has determined that it is just

and reasonable as a matter of law to conclude *that based upon the documents, arguments ,evidence and material facts in this Case* that there is no genuine issues of material fact in dispute...." [Emphasis added] This evidence would have included both the affidavit and the deposition testimony of Paul Farrell and Neisha Brown.

In other words, it seems reasonably apparent that the Court's failure to use the term "deposition testimony" in Paragraph 14 of its Order (JA1052) was merely an error in syntax rather than being an error of law.

E. Response to Assignment of Error No. 4 - Since the Court's primary reason for disregarding the Petitioner's claim of "insane delusion" was that it was not properly raised, the Court's suggestion about the legal requirements for such a claim are not important to its decision

Long after the time in which dispositive motions were due and after discovery had been completed, Plaintiff filed a motion for partial summary judgement for a claim which had never been asserted. The basis for that motion was the claim that Dorothy Hood's Will should be nullified because it resulted from an "insane delusion". That claim was not based upon any allegation in the complaint. Rather, much like Athena who sprung fully grown from the mind of Zeus, Petitioner's motion came to exist, fully developed, without having been alleged in the complaint or any other pleading that had been filed. This is not proper.

As a predicate for a motion for summary judgment, in accordance with the requirements of Rule 56 of the West Virginia Rules of Civil Procedure, the relief sought must be "upon a claim, counterclaim, or cross claim." Here, although Plaintiff's second amended complaint contained five causes of action, none mention an "insane delusion" as a theory upon which relief could be granted. More important, since "insane delusion" has never been recognized by this Court as reason to invalidate a Will, Petitioner's failure to plead it with some specificity is certainly prejudicial. Obviously, under this circumstance, Respondent would have had no notice of the

Petitioner's intention to raise that claim until after his motion for summary judgment had been filed.

The Court's ruling with respect to this motion was based upon the fact that it was not pleaded but was first asserted in a motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. (JA1054). Although the Court commented that Petitioner had not pointed to any evidence of insane delusions predicated upon spiritualism, in fact, there was no evidence of an insane delusion of any type.

In short, although the Court's view of this concept may have been somewhat limited, it does not alter the fact that since this concept has never been recognized in this State, it is impossible to know what the parameters of that claim might be. As a fact, as pointed out in the following section of this Brief, there is no evidence to suggest that Dorothy Hood was suffering from any delusions at the time she made her Will. For this reason, Petitioner's suggestion that had the Court considered any other legal concepts, its decision would be the same.

As a predicate for a motion for summary judgment, in accordance with the requirements of Rule 56 of the West Virginia Rules of Civil Procedure, the relief sought must be "upon a claim, counterclaim, or cross claim." Here, although Plaintiff's second amended complaint contained five causes of action, none mention an "insane delusion" as a theory upon which relief could be granted.

F. Response to Assignment of Error No. 5 - Lack of testamentary capacity does not encompass insane delusion nor does insane delusion negate the existence of testamentary capacity

Petitioner recognizes that West Virginia is a notice pleading state. (Petitioner Brief at p.37) This, as stated in Rule 8 of the West Virginia Rules of Civil Procedure, requires 'a short and plain statement of the claim showing that the pleader is entitled to relief." "[A] complaint must be

intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is." *Harrison v. Davis,* 197 W./ Va. 651, 478 S.E.2d 104 (1996) (fn.17). Moreover, the requirement of a "short and plain statement" does not allow a plaintiff to "fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint." *Id.* In view of this precedent, it seems somewhat specious for the Petitioner to argue that his claim of "insane delusion" which has never been recognized in this State's jurisprudence, was "intelligibly sufficient" to be understood from a pleading containing five separate causes of action, none of which ever mentioned "insane delusion".

Petitioner's suggestion that his claim of "insane delusion", which is also described as "monomania" was subsumed by his claim that his mother lacked testamentary capacity is misplaced. "Insane Delusion" to support an attack upon a Will, has never been recognized in West Virginia. That parameters of that syndrome were described in *Dougherty v. Rubenstein,* 914 A.2d 184, 172 Md. App. 269 (Md. App. 2007):

> The "insane delusion rule" of testamentary capacity came into being almost 200 years ago, as the invention of British jurists in Dew v. Clark, 162 Eng. Rep. 410 (Prerog.1826). The rule was devised to cover a gap in the existing law, which held that "idiots and persons of non-sane memory" could not make wills, see 34 & 35 Hen. 7, ch. 5 (1534), but accepted as valid the will of a testator "who knew the natural objects of his or her bounty, the nature and extent of his or her property, and could make a `rational' plan for disposition, but who nonetheless was as crazy as a March hare[.]" Eunice L. Ross & Thomas J. Reed, Will Contests § 6:11 2d. (1999).

In *Nodvin v. Arogeti,* 592 S.E.2d 846, 277 Ga. 602 (Ga. 2004) which discussed the elements of that cause of action, observed:

> "Monomania is a mental disease which leaves the sufferer sane generally but insane on a particular subject or class of subjects." For a will to be set aside based on monomania, the caveator must show that the testator suffered from monomania at the time he made his will, and that his will resulted from or was connected with the monomania. In Boney, [Boney v. Boney, 265 Ga. 839, 462 S.E.2d 725 (1995)] we outlined the elements necessary to show that someone is suffering from monomania.

> "The person so affected is subject to hallucinations and delusions and is impressed with the reality of events which have never occurred and things which do not exist, and his actions are more or less in conformity with his belief in these particulars... [.] It is not every delusion which will deprive one of testamentary capacity. It must be an insane delusion. A definition of such a delusion which has been approved by this court is that it exists wherever a person conceives something extravagant to exist which has no existence whatever, and he is incapable of being permanently reasoned out of that conception. [Cit.] The subject-matter of the insane delusion must have no foundation in fact, and must spring from a diseased condition of mind...."

What is important and what the Petitioner conveniently ignores is that monomania is not inconsistent with testamentary capacity. Both may exist. Monomania is a derangement regarding a single subject which may have affected a provision in a Will. As was pointed out in *Winn v. Dolezal*, 355 P.2d 859, 1960 OK 165 (Okla. 1960):

> An insane delusion may exist notwithstanding full mental capacity in other respects and the test as to validity of a will when contested upon the ground that testator was laboring under an insane delusion is not whether testator had general testamentary capacity, but whether an insane delusion materially affected the will. An insane delusion is a belief in things which do not exist, and which no rational mind would believe to exist. The essence of an insane delusion is that it has no basis in reason, cannot be dispelled by reason, and can be accounted for only as the product of mental disorder. [Citations omitted]

What should be obvious from this analysis is that there is a vast difference between the evidence required to establish a lack of testamentary capacity and that needed to prove that a Will was affected by an insane delusion.

In his seconded amended complaint, as is relevant to this argument, Petitioner alleged only that when she executed her Will, Dorothy Hood did not have the requisite testamentary capacity "under West Virginia law" (JA13 at ¶ 79) As reaffirmed in *Cantarelli v. Grisso*, No. 18-0839 (W. Va. January 13, 2020) the well-established law in this State is that testamentary capacity requires only that the testator:

> "understands the nature of the business in which he is engaged when making a will, has a recollection of the property he means to dispose of, the object or objects of his bounty, and how he wishes to dispose of his property."

Stewart v. Lyons, 54 W.Va. 665, 47 S.E. 442 (1903); *James v. Knotts*, 227 W. Va. at 65, 705 S.E.2d at 572 (W. Va. 2010). This requirement is far different standard from the evidence required to determine, not merely that a testator was mistaken about salient facts but rather was clinging to an irrational and inviolable belief in the existence of those facts.

By the specific language in the complaint, Petitioner expressly limited any inquiry to whether his mother lacked "testamentary capacity under West Virginia law." [Emphasis added] And since the doctrine of "insane delusion" has never been articulated by our Supreme Court, it would be difficult to suggest that even the most liberal construction of Petitioner's complaint would provide "intelligibly sufficient" notice that he intended to assert a novel claim to impeach his mother's Will.

In short, since the Petitioner never properly asserted "insane delusion" in his complaint, or his two Amended Complaints, there is no predicate for a summary judgment motion. To even consider it would be inappropriate since lack of notice would have resulted in an incomplete development of the factual record required to evaluate such a claim.

Notwithstanding the procedural impediment to any consideration of "insane delusion" there is absolutely no evidence in the record to establish that the reason enunciated by Dorothy Hood for bequeathing her entire estate to her son, Jeffrey, evidenced insanity. To the contrary, her decision was quite rational. Even the Plaintiff conceded that her statement about him being "well provided for during my lifetime" was accurate. (JA1125)

The basis for Plaintiff's motion seems to be the misplaced notion that if he is able demonstrate that his mother may have misconceived some economic factors, she must have been insane. (Petitioner Brief at 37). He is wrong for several reasons. The most obvious is that Dorothy Hood's Will did not disinherit the Plaintiff because she thought he owed her money or did not pay

for Huntington Piping or anything else. Rather, it simply stated her belief that during her lifetime the Petitioner had benefitted greatly from the opportunities, gifts, and other things that he had received. Certainly, as was discussed in an earlier section of this Brief which addressed Petitioner's undue influence claim (Respondent Brief §IV-B-3) this is a rational belief.

The Petitioner's contention that if he can establish that his mother was mistaken about a few things, she must have been too "crazy" to make a Will is not a correct interpretation of the "insane delusion" concept. A testator is entitled to be wrong about salient facts but being wrong does not vitiate a Will. The essence of an insane delusion is that the belief of those facts has no basis in reason, cannot be dispelled by reason, and can be accounted for only as the product of a mental disorder. But it really does not matter here, because Dorothy Hood's belief that the Petitioner had been well provided for was conceded by him. (JA1126)

G. Response to Assignment of Error No. 6 - The Petitioner has not suggested any cogent reason to change the law regarding the time when testamentary capacity is determined

The implication which appears to underlie Petitioner's contention that modification of the existing standard for the time when testamentary capacity is to be determined, seems to be that Judge Farrell, who as both a practicing attorney and a Circuit Judge, has had an impeccable reputation might have engaged in a nefarious scheme in connection with Dorothy Hood's Will signing ceremony. To even imply that Judge Farrell might have "secreted" Dorothy Hood so that people who could testify about her incompetence would not have had the ability to observe her, sounds like the plot of a John Grisham novel. Moreover, the factual assertion that Mrs. Hood did not read her Will is without any evidentiary basis. Judge Farrell testified: (JA324)

> I would have met with her, gone over the terms – just her and me, gone over the documents with her. After she was satisfied and we insured we had what we wanted in the Will and

in the Powers of Attorney, I would have asked my staff to come in and witness it and be a – get a notary.

It appears that Petitioner is suggesting that Judge Farrell first reviewed the Will with Mrs. Hood and then, when she was not looking, not only substituted another, different Will but also prevented her from reading that bogus document. If this is his contention, he should have cited some evidence to suggest that he had more than a defamatory intent in making that claim.

More significant, Petitioner's suggested basis for asserting that the existing law is flawed and should be changed makes little, if any, sense. Maybe he is arguing that some emergency room doctor who had examined her shortly after she had been transported by ambulance because she feared she might be having a heart attack, thought "she *might* have some underlying dementia" or was "*maybe* even somewhat demented" should be determinative of his mother's testamentary capacity. Certainly, that information can be considered but for it to have any import it must clearly outweigh the testimony of the drafting attorney and the primary physician. *See, Cantarelli* at p. 7 Petitioner's suggestion that because he is unable to satisfy the evidentiary criteria for nullifying his mother's Will, that the law needs to be changed is certainly a suggestion that is devoid of substantial merit.

V. CONCLUSION

There is absolutely nothing in the record to support the Petitioner's claim that Dorothy Hood lacked testamentary capacity when she executed her Will on September 7, 2007. To the contrary, everyone who was present when the Will was signed attested to her competence as did her primary physician. Additionally, her reason for bequeathing her entire estate to Jeffrey as she stated in her Will, was both a rational and understandable decision. During his lifetime, as detailed in this brief, Dorothy and her husband gave their other son, Sam, two operating business entities, Huntington Piping and Appalachian Builders, plus several parcels of real estate. Sam got his

share while his parents were alive and Dorothy wanted to make the situation a little more equal at her death.

Since the Petitioner has been unable to point to any evidence that is sufficient to "clearly outweigh" the testimony and affidavits of the drafting attorney, the witnesses to the Will, and her primary physician, the decision of the Circuit Court granting a summary judgment should be affirmed.

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

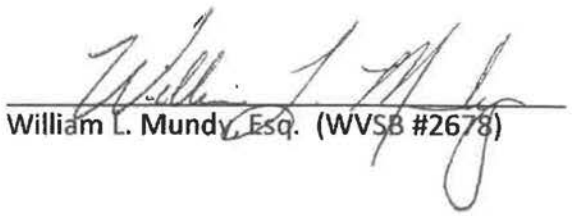
BY COUNSEL

William L. Mundy, Esquire (WV Bar #2678)
MUNDY & ASSOCIATES
Post Office Box 2986
Huntington, WV 25728
(304) 525-1406
wlmundy@mundylawoffice.com

CERTIFICATE OF SERVICE

I, William L. Mundy, counsel for Respondents, hereby certify that I have served the foregoing **RESPONDENTS' BRIEF** upon the following counsel of record, via email and U.S. Mail, first-class, postage prepaid, on this the 27TH day of July, 2022:

Mark W. Kelly, Esquire
John J. Brewster, Esquire
RAY, WINTON & KELLEY
109 Capitol Street, Suite 700
Charleston, WV 25301
markkelley@rwk-law.com
johnbrewster@rwk-law.com



William L. Mundy, Esq. (WVSB #2678)