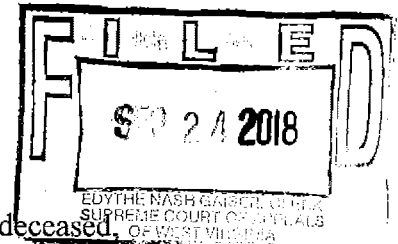


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In the Supreme Court of Appeals of West Virginia



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

And

David Brent Gomez and
Robert Brian Gomez,
Defendants Below

vs.) No. 18-0426

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

**Petitioner's Reply to Response Brief of Appellees Andrea Gomez Smith and
Matthew Eric Gomez, D.O.**

Mark Gomez
Executor and Individually

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Statutes:

Rule 56(a) of the W.Va. Rules of Civil Procedure

**Petitioner's Reply to Response Brief of Appellees Andrea Gomez Smith
and Matthew Eric Gomez, D.O**

Assignment of Error 1

Respondents Andrea Gomez Smith and Matthew Eric Gomez, D.O. have filed their Response Brief asserting certain legal arguments to this Court regarding this Assignment of Error 1 of Petitioner's Brief. The trial court refused to prepare its own findings and order in this case, (PAVol2-58) two Orders were prepared and proposed by participating attorneys Gary Pullin and Richard Neely.

This Court has held that "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. . . . In deed: "Trial courts should not have to guess the nature of claimed defects. . . [and] this Court should not have to examine with a fine tooth comb the lines of trial transcripts to discern the true meaning of objections made at trial." Syl. Pt. 2, *State ex rel. Copper v. Caperton*, 1996 W.Va. 208, 470 S.E.2d 162 (1996) and *State v. Ladd*, 210 W.Va. 413, 428-429, 557 S.E.2d 820, 835-836 (2001). These respondents, by and through their attorney of record, Richard F. Neely, did not articulate or preserve for appellate review, the issue which they now brief and assert in this appellate Court. The trial transcript of the hearing held on April 2, 2018 shows, that after lengthy argument by out-of-state- defendant Western Surety Company, by and through local counsel, the trial court had the following discussions:

- 1· · analysis here is the fact that an estate is like an LLC or
- 2· · a corporation, that it's an artificial entity and so that's
- 3· · going to be the ruling of the court. It seems to me that
- 4· · that's the likely way the Supreme Court would rule on that.

·5· · · Now, you know, they say that the circuit judge's job is to
·6· · · determine what the law is and then implement it. Well, you
·7· · · know, really that's easier said than done in a lot of
·8· · · cases. It's not unusual. That's what makes the law so
·9· · · interesting though. There is always varying fact patterns,
10· · · different twists on things and, you know, it's not filling
11· · · out forms and then coming to court. I know that. I mean,
12· · · there is a lot of things to consider. So the motion is
13· · · granted. Motion to strike is granted. Claims against
14· · · Western Surety, Empower, Kayla Addison, I think that covers
15· · · it. All right.

16· · · · · MR. PULLIN: Your Honor, consequently Western
17· · · Surety and Empower and Kayla Addison would be dismissed
18· · · from the civil actions then?

19· · · · · THE COURT: Correct.

20· · · · · MR. PULLIN: Thank you, Your Honor.

21· · · · · MR. GOMEZ: Your Honor, could you add from --
22· · · Your Honor, I guess it would be ab initio.

23· · · · · THE COURT: Well, I think that's what they're
24· · · talking about, from the beginning.

·1· · · · · MR. GOMEZ: Yes. Your Honor, would that include
·2· · · -- I filed an answer on behalf of the estate to Mr. Neely's
·3· · · will contest.

·4· · · · · THE COURT: It's all stricken.

·5· · · · · MR. GOMEZ: Well, that means there's no answer to
·6· · · the will contest.

·7· · · · · THE COURT: You have 20 days within which to file
·8· · · an answer.

·9· · · · · MR. GOMEZ: Your Honor, will you release --

10 · · · · · THE COURT: Hold on. Mr. Neely wishes to speak
11 · · on that.
12 · · · MR. NEELY: Your Honor, I'm the plaintiff in this
13 · · will contest. And what I have to do is move this thing
14 · · forward to get it in front of a jury. I haven't made a
15 · · motion on any technical thing about Mr. Gomez not being
16 · · licensed to practice, et cetera. All I want to do is get
17 · · the thing to go forward. You know, it's not necessary for
18 · · me that he file another answer but to just take the regular
19 · · answer and give it to some jackleg lawyer who will put his
20 · · name on it and file it.
21 · · · · · So I'm perfectly happy to have it go forward on
22 · · that proposition. I'm just here today to get a motion to
23 · · compel because what I need is some discovery. All right.
24 · · And past that, I'm not arguing about the nits and lice of
· 1 · the procedure. I'm a plaintiff's lawyers. I hate
· 2 · procedure any way. (PAVol.2-32,33)

Despite the plaintiffs being “perfectly happy” to have the case proceed with Mark Gomez representing the Estate in the capacity and position of non-attorney Executor, they now offer and devote 7 of 10 pages in their response brief now objecting to this “proposition.” While plaintiffs allowed the cases to proceed in litigation for many months, the Executor fully developed legal defenses and theories on behalf of the Estate. Plaintiffs/Respondents now find themselves in jeopardy of having their case dismissed by summary judgment due to their failure to develop any facts to support the allegations of their complaint. The reasoning of not allowing non-attorneys to engage in circuit court litigation is for the protection of the represented party. In this case, the

represented party is the Estate and no other entity. In this case, the named beneficiaries of the Estate have participated in the litigation and protected their individual interests, *pro se*. (PA-209-217) Your Petitioner shows that Respondents failed to make objection of this issue before the trial court and did not preserve their right to now assert it on appeal.

Assignment of Error 2

Respondents list the affidavits and supporting documents that Petitioner relied upon in making his motion for summary judgment as follows:

- 1) David Gomez's affidavit;
- 2) Mark Gomez's affidavit;
- 3) Letter for Dr. Jennifer Hancock, PsyD; and
- 4) Handwritten Letter for Dr. Rafael Gomez to his daughter, Appellee Andrea Gomez(sic)

Respondent's complain that "None of these documents (or the version of the truth for which they stood) had ever been challenged by cross examination, nor was there any opportunity to offer expert testimony that the purported letter of Dr. Gomez was a forgery." (*Response Brief of Appellees Andrea Gomez Smith and Matthew Eric Gomez* at pg. 8)

During the motion hearing of this case on April 2, 2018, trial counsel for Respondents made the following statements and argument:

- 5· ······MR. NEELY: That's the doctrine of prior relative
- 6· ·revocation. But that's a question of fact. In other
- 7· ·words, in this case, for example, there was all kinds of
- 8· ·family interactions between 2008 and when Dr. Gomez died

·9· · · which was in 2017. · So there were various kinds of
10· · · interactions. · *And I have not looked factually at what*
11· · · *those interactions were nor have a looked at this will, nor*
12· · · *have I looked to see that there may very well have been an*
13· · · *intervening will that was out there that he executed.*
14· · · · · · · · · · So my focus is exclusively on two things in this
15· · · case. · *First, the fact that this will was procured by, best*
16· · · *case, undue influence.* · Because Dr. Gomez at the time that
17· · · he executed this will had had fairly significant brain
18· · · surgery and was being cared for by Mr. Mark Gomez –
19· · · · · · · MR. GOMEZ: · And me and my brother.
20· · · · · · · THE COURT: · No interruptions, please.
21· · · · · · · MR. NEELY: · *The facts were extremely suspicious*
22· · · given that all of his prior relations with his children
23· · · indicated that he was sharing everything equally with them. (TR-36)

23· · · · · · · Now there is a gentlemen in the gallery that's
24· · · got his hand up. · This is not -- if you want to talk to one
·1· · · of the lawyers, you can.
·2· · · · · · · MR. NEELY: · Facts. · I have to get facts from the
·3· · · horse's mouth.

·4· I am led to understand that in 2015, Dr. Gomez
·5· . . signed a document that was a reconciliation of all wills
·6· . . indicating that he intended to leave all of his property
·7· . . equally to his children. And, again, *I don't have that*
·8· . . *document but I would expect to produce that document in the*
·9· . . *course of the litigation.* (TR-38-39)

The transcript reveals that the “focus” of Respondents’ case is on “undue influence” by Mark Gomez on Dr. Gomez. The principal claim in attacking a will is usually lack of testamentary capacity. “To have capacity, a testator must be able to do four things at the moment he signs his will: (1) know and recollect the natural objects of his bounty, that is those persons who were members of his family who normally would have some expectation of sharing in his property after his death; (2) know and intelligently understand the nature of the business in which he was engaged; (3) know in a general way what property belonged to him and what it was worth in a general way what property belonged to him and what it was worth in a general way; and (4) hold such knowledge in his mind a sufficient length of time to be able to form some rational judgment in relation to them. See Syl. Pt. 19, *Kerr v. Lunsford*, 8 S.E. 493, 484 (W.Va. 1888).

“Undue 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 575 (2010).

This Court has established the threshold a plaintiff must overcome in order to succeed on an undue influence claim:

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

Syllabus Point 5, *Frye v. Norton*, 148 W.Va. 500, 135 S.E.2d 603 (1964).

Syl. Pt. 3, *Milhoan v. Koenig*, 196 W.Va. 163, 469 S.E.2d 99 (1996). Similarly, “undue influence cannot be based on suspicion, possibility or guess that such undue influence has been exercised, but must be proved and the burden of proof of such issue rests on the party alleging it’ Syllabus Point 7, *Floyd v. Floyd*, 148 W.Va. 183, 133 S.E.2d 726 (1963).” Syl. Pt. 2, *Cale v. Napier*, 186 W.Va. 224, 412 S.E.2d 242 (1991).

Petitioner’s motion for summary judgment required the Respondents to bear their burden of proof at the motion hearing. The Respondents failed to offer any proof whatsoever, relying instead on the naked allegations of “undue influence” their complaint.

At the motions hearing, Respondents’ trial counsel fell into the proof trap of Syl. Pt. 2 of *Cale v. Napier* arguing the alleged “facts were extremely suspicious” (PAVol2-36) as such “suspicions” do not support their will contest action or provide facts to defeat petitioner’s motion for summary judgment. Continuing in their *Response Brief*, Respondents argue that “The complaint in this case clearly shows that there are numerous contested issues of fact to be resolved by discovery.” (*Response Brief of Appellees Andrea Gomez Smith and Matthew Eric Gomez, D.O.* at Page 8)

However, Respondents did not file the required Rule 56 affidavit requesting additional discovery and failed to provide a showing that discovery was needed to establish any issue of material fact that would precluded summary judgment. *Defendant’s Rule 56 Motion for Summary*

Judgment was filed on November 14, 2017, which suspended discovery until and unless the non-moving party files the required Rule 56 Affidavit. After the time to file their Rule 56 Affidavit had passed, respondents requested discovery from Mark Gomez to shore up their “information and belief case.” (PA Vol2-40) Your petitioner argues that there is no such thing as an “information and belief” case. Summary judgment requires the non-movant to produce evidence that supports their allegations. Summary judgment can be made at any time pursuant to Rule 56(a) of the W.Va. Rules of Civil Procedure. At summary judgment, Respondents were required “to show their cards” of competent evidence supporting their Will Contest. However, when their bluff was called, they had no held no evidentiary cards to lay on the table.

Respondents bemoan that lack of formal discovery prevents them from developing their case. However, without discovery, respondents surely could have produced expert medical witness testimony to decipher and interpret Rafael’s personal and private medical records published in their Complaint, if said expert were willing to testify under oath that Rafael was without testamentary capacity due to his brain cancer. Andrea Gomez Smith could have verified her complaint by verification of the allegations. See *King v. Dogan*, 31 F.3d 344 (5th Cir. 1994) holding “unauthenticated documents are improper as summary judgment evidence” and “A plaintiff’s verified complaint can be considered as summary judgment evidence to the extent that it comports with the requirements of FED.R.CIV.P. 56(e)”

Respondents now place much emphasis their *Response Brief* that discovery is needed to produce a handwriting expert to testify as to the authenticity of Rafael’s letter to Andrea Gomez Smith dated June 15, 2016. (PA-280-282) A review of the trial record shows that the this letter was written by Rafael *the day after he executed his will* before his attorney Robert M.Fletcher. Rafael’s

letter, written after he had executed his Last Will and Testament, has no bearing or relevance to whether undue influence was exerted at the time of the execution of the Will. Moreover, acquiring a handwriting expert for this purpose is independent of any discovery Respondents would obtain from the Executor or beneficiaries. Indeed, your petitioner produced direct testimony on the matter by affidavit of David Gomez overcoming such allegations. "Later, my father even wrote a hand written letter demanding that Andrea return the ring and jewelry. Which she never did. In his letter, my father also stressed how he was not very content with the way Andrea was treating other members of the family." (PA-72) Again, respondents offered no evidence on this matter of Rafael's hand written letter or any other matter pending before this Court.

Respondents filed a Complaint full of salacious accusations, defamations against Mark Gomez personally and published Rafael's personal and private medical records in violation of the standards set forth by federal HIPPA, but after more than 10 months of litigation, "have produced not a scintilla of evidence to support their allegations. "In conclusion, because there is no genuine issue as to any material fact, the defendants are entitled to judgment as a matter of law." *Neely v. Zimmer*, Case 2:11-cv-00444 Document 68 Filed 08/02/12 Page 12 of 12, U.S.D.C. Southern District of West Virginia, affirmed by 4th Circuit Court of Appeals (*October 31, 2013*)

The June 26, 2018 Hearing in Violation of Stay of Proceedings in 17-P-402

In their Response Brief, the respondents write,

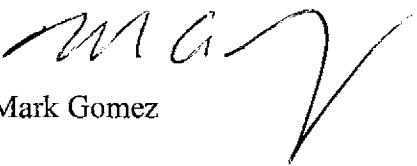
"... Appellee moved on May 22, 2018 for default by virtue of the failure to answer and gave notice that the motion would be heard by Judge Evans on June 26, 2018. The motion for default was never heard because on 31 May 2018 this Honorable Court entered a stay, which stopped all further proceedings in the circuit court."

The trial transcript of the June 26, 2018 motion hearing² belies respondents' assertion that the "motion for default was never heard." Your petitioner shows that there was in fact a hearing in Civil Action 17-P-402 after the Notice of Appeal was filed and after this Court issued the Order Granting Stay. (PA-273)

Conclusion

"Undue 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.*" The respondents have submitted no evidence to overcome petitioner's motion for summary judgment. Further, their legal arguments do not pertain to the issues surrounding undue influence at the time of the actual execution of the will but rather those based on "suspicion," hurt feelings from being disowned by their father, and "character assassination" of Mark Gomez.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MAG', followed by a long, sweeping horizontal stroke that extends to the right.

Mark Gomez

² The transcript of the June 26, 2018 hearing was not made a part of the Appendix of this appeal as the hearing was conducted after the filing of the Notice of Appeal and Order for Stay of Proceedings. Said transcript is made an exhibit to your *Petitioner's Motion to Dismiss For Violation of Stay and Motion to Disqualify Richard F. Neely, Esq. and the Law Firm of Neely and Callaghan from Further Appearances in these Cases*, filed contemporaneously with this Reply Brief.