

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35482

VIVIAN KNOTTS and BETTY NELSON

Appellants

vs.

SHARON JAMES and GLEN NELSON

Appellees

**On Appeal from Honorable Jack Alsop, Judge
Circuit Court of Clay County
Civil Action No. 06-C-45**

Appellants' Brief

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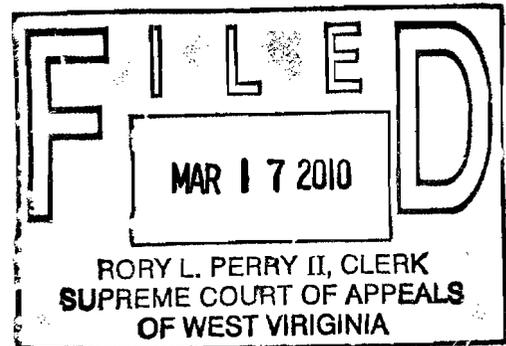


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II. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This appeal raises significant and essential legal issues about the ability of a testatrix to dispose of her assets upon death without the fear of interference by others. On September 18, 2006, a complaint was filed by the Appellees, the disgruntled heirs at law of Irene T. Nelson, to set aside and revoke the Order of the County Commission of Clay County, West Virginia granting the probate of the Last Will and Testament of Irene T. Nelson, dated July 29, 2005, as provided by W.Va. Code § 41-5-11 (2004).

On May 1, 2006, the Last Will and Testament of Irene Triplett Nelson, was initially admitted to probate by the County Commission of Clay County, West Virginia, whereby Vivian Knotts and Betty Nelson, being the joint Appellants herein, qualified as the Co-Executrixes of the Estate of Irene Triplett Nelson. Upon remand by the Circuit Court of Clay County for reconsideration, the County Commission of Clay County entered a subsequent Order on November 13, 2007, denying presentation of the Last Will and Testament of Irene Triplett Nelson for probate and effectively removing Appellants-Defendants from their previously appointed positions as Co-Executrixes. The Clerk of the County Commission of Clay County, in an effort to avoid an Estate without representation, appointed Vivian Nelson Knotts and Glen Nelson as the joint administrators of the intestate estate of Irene Triplett Nelson, being one child on each side of the controversy, pending further determination by the Circuit Court of Clay County. Thereafter on December 20, 2007, the Appellant, Vivian Nelson Knotts, filed a Petition for Appeal from the County Commission Order with the Circuit Court of Clay County.

On May 30, 2008, Appellant, Vivian Knotts, filed a Motion for Summary Judgment and Memorandum of Law in Support of Defendant's Motion for Summary Judgment. Thereafter, Appellant, Betty Nelson, joined in said Motion. Then at the Pretrial Conference on June 25,

2008, the court heard the oral argument of counsel regarding the pending Motion for Summary Judgment. On August 18, 2008, the Trial Court¹ issued its Order denying summary judgment on the issues of competency to make a will and the existence of undue influence. Thereafter on October 7, 2008, the Trial Court issued its Order granting partial summary judgment in favor of the Appellants, Vivian Knotts and Betty Nelson, on the issues of whether or not the Last Will and Testament of Irene Triplett Nelson, dated July 29, 2005, was executed in accordance with the formalities of West Virginia statutory law and as to whether Vivian Nelson Knotts, wrongfully caused the death of her mother, Irene Triplett Nelson, as claimed by Appellees. Appellants respectfully assert that their Motion for Summary Judgment should have been granted in full because the record clearly showed at that time, as it shows now, that no genuine issues of material fact exist and there was and is no evidence supporting any of Appellants' claims.

The jury trial commenced on October 2, 2008, in the Circuit Court of Clay County, West Virginia, Judge Jack Alsop presiding. On October 3, 2008, at the close of the Appellees-Plaintiffs case in chief, Appellants-Defendants submitted to the Court a verbal motion for judgment as a matter of law with respect to the claims of undue influence and lack of testamentary capacity. On that same day the Trial Court took the motion under advisement and did not render a ruling at that time. Further, on October 7, 2008, at the conclusion of the presentation of all the evidence, the Appellants-Defendants again submitted to the Trial Court a verbal motion for judgment as a matter of law and included by reference their previous motion for judgment as a matter of law at the close of the Plaintiffs'-Appellees' case in chief. The Trial Court again took the motion under advisement and did not render a ruling at that time. The action was thereafter submitted to the jury for determination subject to the Trial Court's later

¹ Circuit Court of Clay County, West Virginia, Judge Jack Alsop presiding

determination on Appellants'-Defendants' said motion for judgment as a matter of law. On October 7, 2008, the jury returned a verdict in favor of the Appellees-Plaintiffs, finding that (a) Irene Triplett Nelson lacked the requisite capacity to execute her Last Will and Testament on the 29th day of July, 2005, and (b) that the Last Will and Testament of Irene Triplett Nelson, dated July 29, 2005, was the product of the undue influence of Vivian Nelson Knotts and Betty Nelson. (Verdict Form).

Thereafter, on October 17, 2008, Appellants-Defendants filed a Joint Motion and Memorandum for Judgment as a Matter of Law, or in the alternative, For a New Trial. On December 15, 2008, counsel appeared before the Trial Court and presented arguments on said motion. The Trial Court again took the motion under advisement and did not render a ruling at that time. The Judgment Order of the Court upon the jury verdict was signed by the Trial Court on January 6, 2009, and entered by the Clerk on January 7, 2009. In accordance with Rule 59(b) of the West Virginia Rules of Civil Procedure, the Appellants-Defendants, on January 13, 2009, filed a "Renewal and Ratification of Motion" within ten (10) days of the entry of the judgment order.

By Order dated, June 10, 2009, and entered by the Trial Court of Clay County on June 12, 2009, the Trial Court denied Appellants'-Defendants' Joint Motion and Memorandum for Judgment as a Matter of Law, or in the alternative, For a New Trial. Appellants-Defendants respectfully assert that their Joint Motion and Memorandum for Judgment as a Matter of Law, or in the alternative, For a New Trial should have been granted because the Appellees-Plaintiffs failed to establish a prima facie right to recover.

As set forth in full detail *infra*, the Trial Court's errors were serious and prejudicial. Accordingly, Appellants-Defendants respectfully request this Court to reverse the judgment of the Trial Court and enter judgment in favor of the Appellants-Defendants.

III. STATEMENT OF FACTS

Irene Triplett Nelson died on April 29, 2006, a resident of Clay County, West Virginia. (Defendant's Trial Exhibit No. 14.) She was preceded in death by her husband, Virgle Nelson, and a daughter, Nancy Nelson. Irene Triplett Nelson was survived by four children, to wit: Appellees-Plaintiffs herein, Sharon James and Glen Nelson, and Appellants-Defendants herein, Vivian Nelson Knotts and Betty Nelson. Additionally, Irene Triplett Nelson was survived by a granddaughter, Whitney Nelson, being the daughter of Nancy Nelson, deceased. Said granddaughter is not presently a party hereto.

The present action involves the disinheritance of two children by the decedent, Irene Triplett Nelson. All claims by Appellees-Plaintiffs regarding decedent's competency as well as all claims of undue influence on the part of Appellants-Defendants, arise directly from Appellees'-Plaintiffs' professed shock and dismay in learning that they had been disinherited by their mother under her Last Will and Testament. For this reason, close examination of the facts leading up to this disinheritance becomes necessary in order to understand the basis for this disinheritance and discover plainly that Irene Triplett Nelson was at all times fully competent and not subject to influence of any kind on the part of Appellants-Defendants, and that she clearly had ample reason to exclude the Appellees-Plaintiffs from her estate. On the other hand, there was no evidence presented to show the testatrix's lack of competency or any undue

influence. This lack is made apparent in the Court's Orders denying Appellants'-Defendants' motion.

In 2004, Irene Triplett Nelson's other daughter, Nancy Nelson, was murdered. Instead of bringing the family closer, the murder deeply divided the family. Nancy's husband was tried and convicted of the murder while Irene Triplett Nelson continued to have doubts as to whether or not he was guilty. Nancy's daughter, Whitney Nelson, went to live with Appellee-Plaintiff, Sharon James.

Thereafter, a custody battle ensued between sisters, Defendant Betty Nelson and Plaintiff Sharon James. Irene Triplett Nelson supported Betty Nelson in this battle and drafted an affidavit in support which claimed that Sharon James had abused her own children. Ultimately, Sharon James retained custody of Irene Triplett Nelson's granddaughter, Whitney, and what minimal contact between grandmother and granddaughter that had existed was further reduced. Irene Triplett Nelson continued to blame Sharon James, not without reason, directly for the lack of a relationship between Irene and her grandchild.

Irene Triplett Nelson then filed for grandparent visitation. The litigation was hostile and Sharon James excoriated her mother by stating in pleadings, among other things, that "Irene Triplett Nelson is not a good and decent person," that she had "horribly and brutally abused any *familial* claim upon Whitney Nelson," and that "Irene Triplett Nelson has made her bed and she can stay in it – alone." (Defendants Trial Exhibit No. 4, Exhib. "Reply to Petition" para. 5, First Defense, Sixth Defense) Further, James stated "that Plaintiff did not want to -- have any desire to speak with or associate or subject themselves to the company of Irene Nelson." (TT² - Day Two p. 224; Defendants Trial Exhibit No. 6) At one point, Irene wrote on a Response that the Jameses were "only entitled to the wrath of God." (Defendants Trial Exhibit No. 4).

² Trial Transcript, October, 2008

Further, Sharon James filed a motion in that visitation litigation in which she sought a permanent injunction against her mother, Irene Triplett Nelson, “to prevent her from further contacting, harassing or tormenting [her and her family].” (Defendants Trial Exhibit 5, “Motion for Permanent Injunctive Relief.”) In response to the motion, Irene Triplett Nelson wrote, “I have endured their hostility. Sharon, Ray and my only son Glen. After Sharon lied to Whitney about me she won’t even look at me. They will have to answer God for that, all except Whitney.” (Defendants Trial Exhibit 5)

Because of this ongoing animosity, Irene Triplett Nelson decided to change her Last Will and asked a friend, Vickie Leighton, to help her prepare a draft. (TT - Day Three p. 7) Defendants, Betty Nelson and Vivian Knotts were not involved as Vickie Leighton helped Irene Triplett Nelson consider drafting a new Last Will. (TT Day Three p. 16). Ms. Leighton was one of Nancy’s best-friends and became close to Irene Triplett Nelson after the murder of her daughter Nancy. (TT Day Three p. 6) Ms. Leighton testified that Irene wanted to revise her will because of the way she was being treated by the Plaintiffs as well as by the Plaintiffs' children. (TT Day Three pgs. 7-9) Irene Triplett Nelson told Ms. Leighton that Glen Nelson’s children had made some really bad remarks to her.

Irene Triplett Nelson talked at length to Ms. Leighton about her desire to disinherit Glen Nelson. Vickie Leighton testified that Glen Nelson had ignored his mother, Irene Triplett Nelson, at the funeral of his father, Virgle Nelson. (TT Day Three p. 9). Nonetheless, Ms. Leighton convinced Irene Triplett Nelson to let her speak with Glen Nelson first to try to resolve the conflict between mother and son; however, Ms. Leighton was practically thrown off the property of Glen Nelson when she went to his house, having not made it past his driveway. (TT Day Three p. 10). Ms. Leighton testified that, in chasing her away, Glen’s son told her to “If –

if you don't get your ass off of our property, I'll put you off." (TT Day Three p. 10). Thereafter, Ms. Leighton was unable to reconcile Glen Nelson and his mother.

Vickie Leighton drove Irene Triplett Nelson to the office of Attorney William C. Forbes in Charleston for an appointment in which Mr. Forbes and Irene Triplett Nelson discussed the provisions of her will. (TT Day Three p. 211). Irene Triplett Nelson had also earlier retained Mr. Forbes to represent her in the petition for grandparent visitation. Mr. Forbes testified that the family feud was the impetus for Irene Triplett Nelson revising her will. (TT Day Two p. 205-206). Irene Triplett Nelson repeatedly told him that she did not want either Sharon James or Glen Nelson to share in her estate. Mr. Forbes testified that one of the primary reasons she wanted a will was to make sure that her daughter, Sharon James, and her son, Glen Nelson, received no interest in her property because "she was devastated by the level of hostility and anger and the way she was treated by her daughter." (TT Day Two p. 215). Mr. Forbes stated, "I would have been amazed if anybody would have left anything to people that said and did these things to them, whether - You know, I don't know who you could, and she certainly didn't want to after it had gotten this far." (TT Day Two p. 225).

Attorney Forbes did not believe that Irene was influenced to make the will. He stated, "she was very strong-willed" and "was a very bright, smart woman." (TT - Day Two p. 211). Additionally, he stated that he never discussed the terms of the Last Will with either Defendant, Betty Nelson or Vivian Knotts, prior to Irene's death. (TT- Day Two p. 211-212).

Attorney Forbes remained certain that Irene Triplett Nelson was of sound mind at the time she executed her Last Will and Testament. (TT- Day Two p. 213). Mr. Forbes testified at the trial in this matter that Irene "was well above testamentary capacity in the sense that she was - - She's one of those people that could run a store, could run a business. She was very

articulate, very in control of herself, and understood what she wanted. (TT- Day Two p. 213). He repeatedly stated that Irene Triplett Nelson was a very strong-willed woman. Mr. Forbes further testified that Irene Triplett Nelson knew the objects of her bounty. “At the time she signed the will, she knew who her family members were, she knew who her grandchildren were, she was oriented to time and place...” (TT - Day Two p. 214). Further Mr. Forbes testified that “[s]he was very careful to reward those children who honored her and treated her fairly and to not give anything to the people who didn’t.” (TT -Day Two p. 213).

The Last Will and Testament of Irene Triplett Nelson was prepared by Attorney Forbes at her direction alone. The Last Will was executed on July 29, 2005, at the First Bank of Charleston, Charleston, West Virginia, in the presence of two competent witnesses and a licensed notary. Sherry Strickland and Julie D. Wilson, two bank employees, signed their names as witnesses to the Last Will and Testament of Irene Triplett Nelson in the presence of each other and in the presence of Irene Triplett Nelson. In addition to the Will, the two witnesses and the notary executed a self-proving affidavit. Irene Triplett Nelson did not sign the self-proving affidavit.

One of the witnesses to the will, Julie Wilson, testified at the trial in this matter as to Irene Triplett Nelson's competency. In addition to the testatrix requesting her to witness the Will, Ms. Wilson specifically recalled that Irene Triplett Nelson spoke at length about a quilting machine. (TT - Day Two p. 192). Ms. Wilson opined that Irene Triplett Nelson was of very sound mind and that she did not question Ms. Nelson’s competency. (TT- Day Two p. 191) The notary, Joslyn Truett, also partook in the conversation about the quilting machine, and she testified that she too believed that Irene was of sound mind. (TT- Day Two p. 148).

No evidence was produced by Appellees-Plaintiffs that in any way contradicted the facts and circumstances surrounding the execution of the Last Will and Testament by Irene Triplett Nelson. No evidence was produced by Appellees-Plaintiffs to contradict this account or which suggests in any way that Irene Triplett Nelson may have lacked competency to execute a Last Will at the time of its execution in July of 2005. Further, Appellees-Plaintiffs produced no witness to testify as such and in fact, Glen Nelson acknowledged that he spoke only twice to his mother in nearly two years prior to her death and that such conversations were likely less than 5 minutes each and not contemporaneous with the execution of her Last Will. (TT - Day Two p. 23) Other than the naked assertion that Irene Triplett Nelson lacked testamentary capacity and that Vivian Knotts and Betty Nelson unduly influence their mother, no facts to support such claims exist within the record and no question of material fact exists regarding the facts and circumstances surrounding the execution of the Last Will by Irene Triplett Nelson. Further, Appellees-Plaintiffs offered no medical or other professional opinion evidence.

IV. ASSIGNMENTS OF ERROR

- A. The Trial Court erroneously denied Appellants'-Defendants' motion for judgment as a matter of law at the close of the Appellees'-Plaintiffs' case in chief and at the close of all the evidence.
- B. The Trial Court erroneously denied Appellants'-Defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.
- C. The Trial Court erroneously allowed the testimony of James Samples at the trial of this matter because the Appellees-Plaintiffs failed to disclose Mr. Samples as a witness prior to trial.
- D. The Trial Court erred in not granting summary judgment in favor of the Appellants-Defendants on the issue of testamentary capacity because no genuine issue of material fact exists as to whether or not Irene T. Nelson had the requisite capacity to execute her Last Will and Testament on July 29, 2005 and as to whether or not the Last Will and Testament of Irene T. Nelson was a product of Vivian Knotts and Betty Nelson's undue influence.

V. STANDARD OF REVIEW

A. Judgment as a Matter of Law

A circuit court's denial of a motion for judgment as a matter of law is reviewed de novo. See Brannon v. Riffle, 197 W.Va. 97, 100 (W.Va. 1996). The West Virginia Rules of Civil Procedure provide that "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." W. Va. R. Civ. P. 50(a). This Court has held that "in reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, in ruling on a denial of a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the nonmoving party. If on review, the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of the appellate court to reverse the circuit court and to order judgment for the appellant." Pipemasters, Inc. v. Putnam County Comm'n, 218 W. Va. 512, 517 (W. Va. 2005).

Renewed Motion for Judgment as a Matter of Law

The West Virginia Rules of Civil Procedure provide that "[i]f, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew the request for judgment as a

matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59." W.Va. R. Civ. P. 50(b).

"[I]n considering whether a motion for judgment notwithstanding the verdict under subsection (b) should be granted, the evidence should be considered in the light most favorable to the plaintiff, but, if it fails to establish a prima facie right to recover, the court should grant the motion." Syl. Pt. 6, Huffman v. Appalachian Power Co., 187 W.Va. 1, 415 S.E.2d 145 (W.Va. 1991). Further, this Court has enumerated several factors to be considered in determining the sufficiency of the evidence in connection with a renewed motion for judgment as a matter of law. "In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syl. Pt. 5, Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984). Further, a renewed motion for judgment as a matter of law "may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." Sias v. W-P Coal Co., 185 W.Va. 569, 577, 408 S.E.2d 321, 329 (W.Va. 1991).

As set forth below, there can be but one reasonable conclusion as to the proper judgment in this case. The jury's verdict with respect to the Plaintiffs' claims of undue influence and lack of testamentary capacity was improper as a matter of law. This Court should, therefore, reverse the circuit court's decision.

B. Summary Judgment

A circuit court's entry of summary judgment is reviewed de novo. *See Greenfield v. Schmidt Baking Co.*, 189 W. Va. 447, 485 S.E.2d 391 (1997). The West Virginia Rules of Civil Procedure provide that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56. A court should grant a motion for summary judgment “only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law.” *Payne’s Hardware & Bldg. Supply, Inc., v. Apple Valley Trading Co. of W.Va.*, Syl. Pt. 1, 200 W.Va. 685, 490 S.E.2d 772 (1997); *Cottrill v. Ranson*, Syl. Pt. 1, 200 W.Va. 691, 490 S.E.2d 778 (1997).

The moving party has the burden of establishing by affirmative evidence the absence of a genuine issue of material fact. *Payne’s Hardware*, Syl. Pt. 4, 200 W.Va. at 685, 490 S.E.2d at 772. Once the moving party does so:

the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Id. “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syllabus Point 2, *Williams v. Precision Coal, Inc.*, Syl. Pt. 2, 194 W.Va. 52, 459 S.E.2d 329 (1995).

In this case, the Trial Court erred in its application of the law to the facts. This Court should, therefore, reverse the Trial Court's decision.

VI. DISCUSSION OF LAW

A. The Trial Court erroneously denied Appellants'-Defendants' motion for judgment as a matter of law at the close of the Appellees'-Plaintiffs' case in chief and at the close of all the evidence.

Appellants-Defendants respectfully assert that the Trial Court erred in failing to grant Appellants'-Defendants' motion for judgment as a matter of law at the close of the Appellees'-Plaintiffs' case in chief and at the close of all the evidence on the issues of lack of testamentary capacity and undue influence. Appellees-Plaintiffs presented no evidence at trial which shows that Irene Triplett Nelson lacked capacity to execute her Last Will and Testament on July 29, 2005, or that the Last Will and Testament of Irene T. Nelson was the product of undue influence. As set forth below, there can be but one reasonable conclusion as to the proper judgment in this case. The jury's verdict with respect to the Appellees'-Plaintiffs' claims of undue influence and lack of testamentary capacity was improper as a matter of law.

1. Appellees'-Plaintiffs' claim that Irene Triplett Nelson lacked the necessary testamentary capacity to execute her Last Will and Testament on July 29, 2005, fails as a matter of law.

At the trial in this matter, the Appellees-Plaintiffs failed to prove by a preponderance of the evidence that Irene Triplett Nelson lacked the capacity to execute her Last Will and Testament on July 29, 2005. Accordingly, the Trial Court erred in denying Appellants'-Defendants' oral motion for judgment as a matter of law at the close of the Appellees'-Plaintiffs' case in chief. Therefore, Appellants-Defendants are entitled to judgment as a matter of law. The Trial Court erred because there can be only one reasonable conclusion as to whether or not Ms. Nelson possessed the requisite testamentary capacity to execute her will on July 29, 2005. Under West Virginia law, once the proponents of the Will have proven the due execution of the

Will, the burden of proving the lack of capacity of the testator at the time of execution of the Will is on the contestants thereof. Kerr v. Lunsford, 31 W.Va. 659, 8 S.E. 493 (W.Va. 1888); Nicholas v. Kershner, 20 W.Va. 251, 1882 WL 3513 (W.Va. 1882). The Trial Court erred because the Appellees-Plaintiffs failed to meet this burden in this civil action.

In relevant part, W. Va. Code § 41-1-2 (2004) provides, “no person of unsound mind, or under the age of eighteen years, shall be capable of making a will.” W.V. Code § 41-1-2 (2004). The Appellants-Defendants presented to the Trial Court ample evidence that on July 29, 2005, Irene Triplett Nelson was of sound mind and disposing memory. Further, the evidence presented to the Trial Court is legally insufficient to support the jury verdict that Irene Triplett Nelson lacked the requisite capacity to execute her Last Will and Testament on July 29, 2005.

When the incapacity of a testator is alleged, the vital question is as to her capacity of mind at the time when the will was executed. Syl. Pt. 4, Stewart v. Lyons, 54 W.Va. 665, 47 S.E.2d 442 (1903). Moreover, as this Court has noted:

It is not necessary that a testator possesses high quality or strength of mind to make a valid will, not that he then have a 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.

Syl. Pt. 3, Stewart v. Lyons, 54 W.Va. 665, 47 S.E.2d 442 (1903). This standard is recognized as one of the lowest standards of competency in the law. It requires only that one understand the act of making a will, the nature of one's property, and the natural objects of one's bounty (i.e. one's children). Moreover, while it requires one to maintain an awareness as to those objects of bounty, the law provides no requirement that they be provided for under a will. The Appellants-Defendants presented evidence at trial that the Last Will of Irene Triplett Nelson contemplates

the natural objects of her bounty. In Article I – Declaration of the Last Will and Testament of Irene Triplett Nelson, Irene Triplett Nelson states that she has "four children and eight grandchildren." See Joint Trial Exhibit 1, Last Will and Testament of Irene Triplett Nelson.

During the trial in this case, the evidence presented by the Plaintiffs also showed that on July 29, 2005, Irene Triplett Nelson was of sound mind and disposing memory. As the Court properly instructed the jury, the mental capacity to make a will is quite minimal: capacity is sufficient if the testatrix was of sufficient mind and memory to (1) understand she was making a will to dispose of her property at her death; (2) understand generally the nature and extent of her property; (3) know the names and identities of her relatives, next-of-kin or natural objects of her bounty; and (4) understand her relationship to her relatives, next-of-kin, or natural objects of her bounty. Stewart v. Lyons, 54 W. Va. 665, 47 S.E. 442 (1903). (TT – Day Three p. 101). The Appellees-Plaintiffs presented no evidence that at any time, much less any relevant time, Irene Nelson lacked any of the four requisite mindsets.

The testimony of the Appellees'-Plaintiffs' own witnesses at trial who interacted with Irene Triplett Nelson on or about the day she executed her Last Will indicate that she was of sound mind and disposing memory. The Appellees-Plaintiffs called as a witness only one of the attesting witnesses to the Decedent's Last Will and Testament, namely Sherry Strickland McCormick. Ms. McCormick testified that Irene Triplett Nelson was of sound mind and disposing memory on July 29, 2005. Additionally, the Appellees-Plaintiffs called Joslyn L. Truett, a notary public as a witness at the trial of this matter. Ms. Truett testified that she was present during the execution of the Will on July 29, 2005. Ms. Truett further testified that Mrs. Nelson knew that she was executing a Will because Mrs. Nelson knew to sign her name on each page of the Will and knew to produce photo identification to verify her identity for the witnesses.

The Appellees-Plaintiffs, however, did not call as a witness the scrivener of the Will in their case in chief. The Appellants-Defendants called William C. Forbes, the scrivener of the decedent's Will, as a witness at the trial in this matter. William C. Forbes testified that he believed without a doubt that Irene Triplett Nelson was of sound mind and disposing memory on July 29, 2005. In denying Appellants'-Defendants' motion for judgment as a matter of law, the Trial Court erred in relying on the evidence that the attesting witnesses had not previously known Irene T. Nelson as supporting a claim of lack of capacity. There is no requirement under West Virginia law that requires witnesses to a will to have previously met the testator.

By contrast, the Appellees-Plaintiffs failed to offer at trial any evidence beyond self-serving allegations on the issue of the decedent's testamentary capacity. All of the witnesses at the trial in this matter called by the Appellees-Plaintiffs testified that Irene Triplett Nelson at all times knew who her children were, namely, that she had a son, Glen Nelson, a daughter, Sharon James, a daughter, Betty Nelson, a daughter, Vivian Knotts, a deceased daughter, Nancy Nelson, and a grandchild, Whitney Nelson, as seen in the trial testimony of Mary Jane Blankenship this matter:

Q Would she talk about her family?

A No. We just -- We just talked.

Q Did you --

A Nothing --

Q -- in the course of those trips and your conversations with her, did she know who her children were?

A Know who her children was?

Q Right.

A Of course.

Q Did she know that she had a son, Glen Nelson?

A (Nodded.) Well, sure.

Q Did she know she had a daughter, Sharon James?

A Well, yeah, but she was angry with her.

Q Did she know that she had a daughter, Betty Nelson?

A Yeah.

Q Did she know that she had a daughter, Vivian Knotts?

A (Nodded.)

Q Is that a yes?

A Yes, sir.

Q Did she know that she had a daughter, Nancy, who had passed away?

A (Nodded.) Yes.

Q Did she know that she had a granddaughter, Whitney, who was the surviving daughter of Nancy?

A Yes.

She just -- She didn't lose her mind. She was just confused, so I'm not insinuating she was crazy. I'm just insinuating that she would wander from time to time.

(TT Day One p. 178-179). The only evidence presented by the Appellees-Plaintiffs at the trial of this matter in support of their claim for lack of testamentary capacity was that Mrs. Nelson drove her car too fast, did not play Yatzee anymore, and was "pitiful", without explaining what the witness means by "pitiful."

Although the Appellees-Plaintiffs presented evidence that both Virgile Nelson and Irene Nelson had expressed previous intentions throughout their lifetimes to leave the family farm to their son, Glen Nelson, this evidence does not rise to the level necessary to impeach the validity

of a Will. The testatrix had a right to change her mind and, on the evidence of her son's treatment of her, good reason to do so. Most importantly, Sharon James admitted upon cross examination that she never said that her mother was totally incompetent. Ms. James testified at the trial in this matter that "I don't know that anybody ever claimed Mommy was totally incompetent, period. I didn't claim that." (TT – Day 2 p. 109).

The Appellee-Plaintiff, Glen Nelson's, only argument was he had been promised the farm and always expected to get it. Even after his reprehensible treatment of his mother, he could not seem to accept the fact that she had every right to change her mind and leave him out of her will. Mr. Nelson's expectations certainly do not rise to a meaningful attack on Irene's testamentary mental capacity. Even Irene Nelson's participation in those struggles up to the end of her life shows her clear mental acumen. (Defendants Trial Exhibits 2, 3 ,4, 5, and 6). All the evidence makes clear that she knew her property, she knew the names and identities of her relatives, and she understood her relationship to her relatives, perhaps all too well. Certainly, Irene Triplett Nelson knew what she was doing on July 29, 2005, in signing the Will and there was no evidence to the contrary presented at the trial.

Mary Jane Blankenship, a witness called by the Appellees-Plaintiffs, testified that Irene Nelson was "just pitiful" and sometimes acted confused. (TT - Day One p. 173, 179). However, Ms. Blankenship testified upon cross-examination that she did not see or speak with Irene Triplett Nelson on July 29, 2005. (TT - Day One p. 174). Further, Ms. Blankenship testified that although she believed that Irene drove too fast, this witness continued to ride to Summersville and back to Clay with her on at least two occasions. (TT - Day One p. 174-175). Further, Ms. Blankenship provided testimony that Irene Nelson was transacting her own business affairs and was negotiating on her own behalf to purchase a new mobile home. (TT - Day One p. 176).

Irene Nelson told Ms. Blankenship that a new mobile home would cost approximately \$68,000.00 and that Irene Nelson only had \$60,000.00 readily available to her. (TT – Day One p. 169). In fact, this witness of the Appellees-Plaintiffs pointed out the testatrix's good mental condition while offering nothing about any incompetence to make a will.

Several other witnesses were called by the Appellees-Plaintiffs who testified generally that they noticed a change in Irene Triplett Nelson after the murder of her daughter, Nancy Nelson. Although, they did not describe the change. Of course, anyone would "change" following such a tragedy. No witness, however, testified as to her condition on July 29, 2005. Furthermore, no witness, including those called by the Appellees-Plaintiffs, denied that Irene Triplett Nelson did conduct her own business affairs up until the time of her death in April, 2006. Katherine Knotts and Don Jarvis testified that Mrs. Nelson was conducting her own business affairs. Specifically, Katherine Knotts testified that Irene Nelson came into her hardware store, alone, during the time period at issue and purchased some items. (TT - Day One p. 155). Further, Don Jarvis testified that Irene Nelson called him when she received a statement from the gas company that resembled a bill, questioning why the gas company sent a bill when she received free gas. (TT - Day One p. 201).

A witness for the Appellees-Plaintiffs, James Samples, the Clay County Prosecuting Attorney, testified that he had concerns about Irene Nelson's behavior during the murder trial of Larry Thomas. Mr. Samples testified that Irene Nelson disagreed with his opinions about the case and that she expressed her views to the Judge at the sentencing hearing in open court. Specifically, Mr. Samples testified that:

Q Do you have any reason to doubt her mental capacity on December 20, 2005?

A The thing that caused me the most concern regarding what her mental state was at the time was --

Obviously this was her daughter. When we would discuss the case, often she would become upset.

She made some -- what I considered to be inconsistent statements to me regarding whether she felt he was guilty. One time she said that she didn't feel he was guilty of first degree murder but of second degree murder after I had explained to her the differences, and then on another occasion she -- I believe she told me that she didn't believe that he did it, that he was guilty of the murder.

(TT- Day One p. 216). However, Mr. Samples could not recall if he saw or spoke with Irene Triplett Nelson on July 29, 2005. Upon cross examination, Mr. Samples conceded that he would defer to Mr. Forbes, the attorney who prepared the Will, as to whether or not Irene Nelson had the testamentary capacity to execute a Will on July 29, 2005. (TT - Day One p. 221). Additionally, Mr. Samples read to the jury the statement Irene Nelson made to Judge Facemire at Larry Thomas' sentencing hearing. (Defendant Trial Exhibit 12). Mrs. Nelson stated "I did not get satisfaction in regard to his innocence or guilt, it failed to establish a motive, and certainly did not prove premeditation. I cannot believe there was any." (Defendant Exhibit 12). This evidence presented at trial clearly showed that Irene Triplett Nelson on December 6, 2005, some five months after she executed the Will, formed a complex, comprehensive, and well-thought-out statement and possessed the mental capacity to differentiate between first and second degree murder. This type of statement does not come from a mind that is incapable of knowing her property, her children, and what a will does. It did, however, show that she disagreed with the

witness (the prosecutor) about his case, which did not remotely reflect an absence or even diminishment of testamentary capacity. Also, the witness did not assert that it did.

The evidence presented at the trial in this case by the Appellees-Plaintiffs showed strong reasons why a testatrix would want to omit certain of her progeny from her will. The evidence was abundantly clear, even from the testimony of plaintiffs themselves, and completely uncontradicted, that Appellees-Plaintiffs had treated their mother terribly, from a time well before her husband died, until Irene's own death. Appellees'-Plaintiffs' evidence seemed largely directed toward justifying their treatment of their mother or, in Glen Nelson's case, in abandoning and ignoring her altogether even though he lived a short distance away on land she had previously given to him. Appellees'-Plaintiffs' evidence seemed largely directed toward rehashing and re-arguing old issues they had with their mother, all of which, no matter who had been right, would serve as strong incentive to make the perfectly lawful decision to omit them from her will.

The testimony of witnesses present at the execution of a will is to be given "special consideration" Milhoan v. Koenig, 196 W.Va. 163, 166, 469 S.E.2d 99, 102 (1996). This is particularly true of attesting witnesses, such as Sherry Strickland McCormick and Julie Wilson. See Stewart v. Lyons, 54 W.Va. 665, 47 S.E.2d 442 (1903) ("Evidence of witnesses present at the execution of a Will is entitled to peculiar weight, and especially is the case with the attesting witnesses.") The Trial Court erred in not finding that the testimony of the attorney who prepared the document in question and the attesting witnesses was not dispositive in this case. In Silling v. Erwin, the United States District Court for the Southern District of West Virginia, had the opportunity to consider and apply several West Virginia Supreme Court rulings relevant to

testamentary capacity. Silling, 885 F. Supp. 881 (S.D. W.Va. 1995). Focusing on the date on which the testator executed a codicil, the court noted:

Plaintiff was and is unable to produce a single witness who can testify what Silling, Sr.'s mental capacity was on April 13, 1991, contrary to the defense version. . . . Every individual who had daily contact with Silling, Sr. in 1991, each individual present at the codicil's execution, and Silling, Sr.'s treating physician testified Silling, Sr. was competent to execute the codicil in April 1991. Accordingly, the Court **GRANTS** Defendant Erwin summary judgment that Silling, Sr. possessed the requisite mental capacity to execute the codicil on April 13, 1991.

Silling, 885 F. Supp. at 888-889. Much as in Silling, Appellees-Plaintiffs did not produce a single witness who testified that on July 29, 2005, the decedent was anything other than competent to execute her Last Will and Testament. “The evidence of attesting witness, 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). The Appellees-Plaintiffs’ own testimony presented at trial falls far short of “clearly outweighing” that of the lawyer who drafted the Will and the attesting witnesses to the decedent’s execution of the Will. Where the testimony of such witnesses, being entitled to great deference, has clearly established the capacity of the testator and his assets, “the validity of the will can not be impeached, however unreasonable, imprudent, or unaccountable it may seem to the jury or others.” Syl. Pt. 3, Vaupel v. Barr, 194 W.Va. 296, 460 S.E.2d 431 (1994).

The Trial Court erred in concluding that even when the evidence presented at trial is considered in a light that is most favorable to the Appellees-Plaintiffs, the Appellees-Plaintiffs have proved by a preponderance of the evidence that on July 29, 2005, Irene Triplett Nelson did not know (1) that she was engaged in the making a will, (2) the general nature of the property

that she owned, and (3) the natural objects of her bounty. The Appellees-Plaintiffs presented no evidence whatsoever on those points. It has long been held by this Court that a verdict of a jury which is without sufficient evidence to support it, or is plainly against the decided weight and preponderance of conflicting evidence should be set aside. Frye v. Norton, 148 W.Va. 500, 512, 135 S.E.2d 603, 611 (W.Va. 1964); Floyd v. Floyd, 148 W.Va. 183, 133 S.E.2d 726; Ritz v. Kingdon, 139 W.Va. 189, 79 S.E.2d 123; Powell v. Sayres, 134 W.Va. 653, 60 S.E.2d 740. Further, at the close of all the evidence, the Court in response to arguments from Appellees'-Plaintiffs' counsel, stated, "Well, I mean – And although I tend to agree with you the case is stronger as to lack of testamentary capacity, I'm not saying that it comes close, but it's stronger than undue influence, but, you know, quite frankly, outside of Betty Nelson residing in the house, what evidence is there there was any undue influence asserted by either of the defendants or by any third party as to how Irene should leave her property." (TT – Day Three p. 92).

Accordingly, Appellants-Defendants respectfully submit the circuit court erred by not granting their Motion for Judgment as a Matter of Law. Therefore, Appellants-Defendants respectfully request this Court reverse the June 12, 2009, Order from the Trial Court with respect to testamentary capacity.

2. The Appellees'-Plaintiffs' claim that the Last Will And Testament of Irene Triplett Nelson was the product of the undue influence of the Appellants-Defendants, Vivian Nelson Knotts and Betty Nelson, fails as a matter of law.

At the trial in this matter, the Appellees-Plaintiffs presented no evidence showing or even tending to show that the Last Will and Testament of Irene Triplett Nelson was the product of undue influence. In fact, the Appellees-Plaintiffs failed to produce any evidence on the subject of undue influence other than the bare fact that Kenny Knotts, Vivian Knotts' husband, drove Irene Nelson to Charleston, West Virginia, on the day that the Will was executed. In the Trial

Court's Order, entered on June 12, 2009, the Trial Court found that "[s]cant evidence was adduced as to any undue influence being placed upon the decedent, Irene Nelson." No evidence at all was cited by the Court on this point. Further, the Trial Court rendered this issue moot in light of its previous ruling on the issue of testamentary capacity. However, in spite of the Trial Court's finding that the Appellees-Plaintiffs introduced no evidence on the issue of undue influence the jury found that the Last Will and Testament of Irene T. Nelson was the product of undue influence. Clearly, the evidence did not support the jury's verdict.

The Last Will and Testament of Irene Triplett Nelson was not the product of undue influence. "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" Syl. Pt. 5, Stewart v. Lyons, 54 W.Va. 665, 47 S.E. 442 (1903). "Proof of the exercise of such undue influence is, by its nature difficult and must ordinarily be done by evidence of surrounding facts and circumstances, which standing alone would have little importance, but when taken together would permit the inference that, at the time the testator executed his last will and testament, his own wishes and free will had been overcome by another." In re Buck, 503 S.E.2d 126, 130 (N.C. 1998).

Undue influence is generally shown by circumstantial evidence including advanced age, physical or mental infirmities, and a contrary disposition in prior wills. Milhoan v. Koenig, 196 W.Va. 163, 167, 469 S.E.2d 99, 103 (1996). However, "influence which arises from acts of kindness and attention to the testator, from attachment or love, from persuasion or entreaty, or from the mere desire to gratify the wishes of another, if free agency is not impaired, does not constitute and is not alone sufficient to establish undue influence." Syl. Pt. 5 Stewart v. Lyons, 54 W.Va. 665, 47 S.E.2d 442 (1903).

Despite bearing the burden of proof on this claim, Appellees-Plaintiffs failed to present any evidence to support an allegation of undue influence and have offered no evidence whatsoever to bring into question the "free agency" of Irene Triplett Nelson. In fact, the Appellees'-Plaintiffs' entire claim rests upon the premise that because the Appellants-Defendants cared for Irene Triplett Nelson during the last years of her life and throughout a bitter family division and feud, that somehow the fact alone that Irene Triplett Nelson left her estate to the Appellants-Defendants, suggests that undue influence must be involved. This premise is insufficient by law to support such a claim and no evidence whatsoever was produced to establish such a claim. Even in Appellees'-Plaintiffs' closing argument to the jury, the Appellees'-Plaintiffs' counsel conceded that the jury might not find that undue influence occurred. (TT - Day Three p. 111).

"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." Syl. Pt. 5, Frye v. Norton, 148 W.Va. 500, 135 S.E.2d 603 (1964). Importantly, undue influence which invalidates a will is never presumed but must be established by proof which may be either direct or circumstantial. Syl. Pt. 15, Ritz v. Kingdon, 139 W.Va. 189, 79 S.E. 2d 123 (1953), (*overruled on other grounds*).

This Court has previously considered a case not unlike the present matter. In Milhoan v. Koenig, 196 W.Va. 163, 469 S.E.2d 99, (1996), the plaintiff alleged that her father's will was, among other things, the product of undue influence. The defendant was the sister of the testator who had cared for the testator at his home until a disagreement erupted. Thereafter, the testator signed an eviction letter to remove the plaintiff, her boyfriend, and child from his home. The

defendant had drafted this eviction letter. Eventually, the testator executed a new will which completely disinherited his daughter. After the testator's death the County Commission of Hancock County heard the plaintiff's Notice of Contest, yet ruled, after two hearings, that the will was valid. The plaintiff appealed to Circuit Court of Hancock County which affirmed the decision of the county commission. The plaintiff then appealed to the West Virginia Supreme Court of Appeals which also affirmed the two lower court decisions. Milhoan, 196 W.Va. 163, 168, 469 S.E.2d 99, 104.

This Court refused to reverse the circuit court's ruling in Milhoan based on mere suspicion. This Court went on to state:

[T]he record shows that several disputes arose within the family shortly before the decedent changed his will, both the first and second time. Ms. Koenig contends that these disputes, along with the disharmony they represent, caused the decedent to change his will. We also note that Delbina Stanley, a witness for Ms. Milhoan who had cared for the decedent, testified that Ms. Koenig offered to use her money, if necessary, to care for the decedent. Thus Ms. Milhoan presents us with a factual question concerning whether the decedent was unduly influenced to change his will or was influenced by the disharmony. Given that Ms. Milhoan has the burden of proving undue influence by something more than mere suspicion, conjecture or possibility, we find that the county commission and the circuit court's rejection of this argument is not clearly erroneous.

Milhoan v. Koenig, 196 W.Va. 163, 469 S.E.2d 99, (1996).

At the trial in this matter, undue influence has not been shown by something more than mere suspicion, conjecture, or possibility. There was no medical or other expert testimony and the lay witnesses who testified did not address the testatrix's capacity to know her property, the natural objects of her bounty, or the nature and extent of her property or the nature and effect of her act in making a will. Much as in Milhoan, there was disharmony between Irene Triplett Nelson and two of her children, the Appellees-Plaintiffs, Sharon James and Glen Nelson. It is hardly surprising given the discourse between Irene Triplett Nelson and her children, Sharon

James and Glen Nelson, that Irene Triplett Nelson would leave her estate to Appellants-Defendants, Vivian Knotts and Betty Nelson. Sharon James and Irene Nelson were involved in several actions in the Circuit Court of Clay County prior to Mrs. Nelson's death. The Appellee-Plaintiff, Sharon James, testified that she had not spoken to Irene Triplett Nelson since October of 2004. The evidence presented at trial showed that Irene Nelson in her own handwriting indicated that on October 17, 2004, Sharon James said "I'll not speak to you again." (Defendants' Exhibit 8). Further, Sharon James, in a verified pleading stated that "Irene Nelson was not a good and decent person." (Defendants Trial Exhibit 3). If that was not enough, Sharon James in yet another pleading stated that she "desire[d] to have no further contact with Irene Triplett Nelson" and prayed to the Court that it would "enjoin Irene Triplett Nelson from ever contacting, harassing, tormenting, or otherwise interfering with the lives of the Respondents." (Defendants Trial Exhibit 5).

Further, Appellee-Plaintiff, Glen Nelson testified that he had only spoken to his mother two times between September, 2004 and the time of her death in April, 2006, and both occasions were short and unpleasant. (TT - Day Two p. 22-24). As set forth *supra*, the family dispute surrounding the custody battle and grandmother visitation rights had become vicious and bitter between the Plaintiffs and Irene Triplett Nelson. Meanwhile, Appellant-Defendant, Betty Nelson, lived with her mother after she was widowed and Appellant-Defendant, Vivian Knotts, checked on her mother on a daily basis. As previously stated, "influence which arises from acts of kindness and attention to the testator, from attachment or love, from persuasion or entreaty, or from the mere desire to gratify the wishes of another . . . does not constitute and is not alone sufficient to establish undue influence." Syl. Pt. 5, Stewart v. Lyons, 54 W.Va. 665, 47 S.E.2d 442 (1903).

The Appellees-Plaintiffs are left only with mere suspicion and conjecture, alluding to the fact that Irene Triplett Nelson was seventy-five years old, had some physical ailments, and executed a will with a disposition of assets that disappoints the Appellees-Plaintiffs that was the major thrust of the Appellees'-Plaintiffs' evidence. Such suspicion and conjecture, however, weigh little indeed, when the balance contains contrary direct evidence. The attorney who drafted the Will, the disinterested friend who helped Irene Triplett Nelson have the Will drafted, the two disinterested witnesses to the Will, and the notary public all testified that they had either not met Appellants-Defendants, Vivian Knotts or Betty Nelson, or had not observed any undue influence on their part.

Appellees-Plaintiffs were simply unable to offer any evidence on the issue of undue influence. The Appellants-Defendants, on the other hand, offered testimony at this trial from William C. Forbes, the attorney who drafted the Will, who stated emphatically that Irene Triplett Nelson was a strong-willed woman and knew what she wanted to do with her assets. Irene Triplett Nelson sought the aid of a trusted friend, Vickie Leighton, to assist her in the preparation of the Will and this friend testified as to Irene Triplett Nelson's free will and desires regarding the Will. Appellants-Defendants, Betty Nelson and Vivian Knotts, were not involved in the drafting and contemplation of a new Last Will by Irene Triplett Nelson. All other disinterested witnesses, including those who witnessed the signing of the Will, testified to Irene Triplett Nelson's independence and concluded that she was not under the influence of the Appellants-Defendants. While the jury may have been moved by Sharon James's tears on the witness stand or the earlier promise to Glen Nelson that some day the farm would be his (regardless how he would treat his mother), or a general feeling that a mother should not disinherit her progeny, or

some other feeling, or none at all, this jury clearly did not require any evidence at all to reach the verdict it returned. They certainly received none.

Accordingly, Appellants-Defendants respectfully assert the Trial Court erred by not granting the Defendant's Motion for Judgment as a Matter of Law. Therefore, Appellants-Defendants respectfully request that this Court reverse the June 12, 2009, Order from the Trial with respect to undue influence.

B. The Trial Court erroneously denied Appellants'-Defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

Appellants-Petitioners respectfully assert that the Trial Court erred in failing to grant their Joint Motion and Memorandum for Judgment as a Matter of Law, or, in the Alternative, For a New Trial. The renewal of the motion as a matter of law, formerly referred to as a matter for judgment notwithstanding the verdict, is governed by Rule 50(b) of the West Virginia Rules of Civil Procedure. A renewed motion may be made when, "for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence[.]" W.Va. R. Civ. P. 50(b). In other words, a renewed motion under Rule 50(b) "provides the trial court with an opportunity, after the jury has been discharged, to reconsider its previous refusal to grant a motion for a directed verdict pursuant to Rule 50(a)[.]" Sias v. W-P Coal Co., 185 W.Va. 569, 577-578, 408 S.E.2d 321, 329-330 (W.Va. 1991). The West Virginia Rules of Civil Procedure provide that where a verdict has been returned by the jury, the court ruling on a renewed motion may allow the judgment to stand, order a new trial, or direct the entry of judgment as a matter of law in favor of the moving party. W.Va. R. Civ. P. 50 (b)(1). If the renewed motion is granted, the court should also rule on any attendant motions for a new trial. W.Va. R. Civ. P. 50(b).

For all of the reasons set forth, *supra*, Appellants-Defendants, Vivian Nelson Knotts and Betty Nelson, respectfully assert that the Trial Court erred in failing to direct the entry of

judgment as a matter of law notwithstanding the verdict by the jury of October 7, 2008, with respect to Appellees'-Plaintiffs' claims of undue influence and lack of testamentary capacity in favor of the Defendants, pursuant to Rules 50(b) and 59 of the West Virginia Rules of Civil Procedure.

C. The Trial Court erroneously allowed the testimony of James Samples at the trial of this matter because the Appellees-Plaintiffs failed to disclose Mr. Samples as a witness prior to trial.

Appellants-Petitioners respectfully assert that the Trial Court erred in allowing the testimony of James Samples at the trial of this matter. The Appellees-Plaintiffs called as a witness at the trial of this matter, James Samples, despite having failed to disclose such witness to the Appellants-Defendants prior to trial. James Samples is an attorney licensed to practice law in the State of West Virginia and is currently the Prosecuting Attorney for Clay County, West Virginia.

At a hearing on May 19, 2008, the Trial Court found that the Appellees-Plaintiffs filed their Fact Witness Disclosure untimely and in violation of the Scheduling Order entered by the Circuit Court on December 4, 2007. The Trial Court further directed counsel for Appellees-Plaintiffs to provide it with a copy of the deposition transcript of Sharon James dated April 18, 2007, for its review. Upon review of said deposition transcript, the Trial Court held that it would strike those witnesses from the "Witness List of Plaintiffs" whose identity was not timely disclosed to the Appellants-Defendants.

Thereafter, the Trial Court entered a Pre-Trial Conference Order finding that "Plaintiffs filed their Fact Witness Disclosure untimely and in violation of the Scheduling Order entered by the circuit court on December 4, 2007. The Plaintiffs are limited to call as a witness in the trial of this matter to those individuals that were disclosed during the deposition of Sharon James on

April 18, 2007. This Court will, however, limit the testimony of witness to only those issues that are relevant to this civil action in accordance with Rule 402 of the West Virginia Rules of Evidence." (Pre-Trial Conference Order). James Samples was not disclosed to the Appellants-Defendants during the deposition of Sharon James on April 18, 2007. Contrary to the Order of the Court entered on August 14, 2008, Appellees-Plaintiffs called James Samples to testify as a witness at the trial of this matter. However, the Trial Court allowed the testimony of the Appellees-Plaintiffs witnesses at trial even after having knowledge that Counsel for the Appellants-Defendants did not know who Appellees-Plaintiffs intended to call as a witness at trial. Counsel for the Appellants-Defendants argued, "...your Honor, we didn't even know who had been subpoenaed because we never received copies of any of the subpoenas that were served or knew these witnesses, and what is good for the goose is good for the gander. We gave opposing counsel some time ago copies of all the subpoenas which we served in this case, as we sit here today, I still don't know who she served." (TT – Day Two p. 11).

Further, the Trial Court erred in placing great weight on the testimony of James Samples in its decision to deny the Appellants'-Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the Alternative a New Trial. In the Order entered by the Trial Court on June 12, 2009, the Trial Court found that "Jim Samples, Prosecuting Attorney of Clay County, West Virginia, testified that he had significant concerns about Irene Nelson's mental state and about the views she expressed to Judge Facemire at the sentencing of Larry Thomas." However during the arguments at trial on Appellants-Defendants' oral motion for judgment as a matter of law, the Trial Court stated, "Well, the situ – I – I don't think this testimony was near that strong. I think he indicated he has some reservations about – based upon some of the actions that he observed." (TT -- Day Two p. 176). Additionally, Appellants-Defendants assert that such "significant

concerns" and an expression of doubt that the evidence at a criminal trial did not meet the burden of proof do not constitute evidence upon which, without a great deal more, a will properly executed can be set aside.

Further, when Mr. Samples was asked upon cross-examination as to whether or not he would have prepared a will for Ms. Nelson if she had asked he responded, "Based upon my observations, if I thought at that time that she had the necessary testamentary capacity and was competent for that will, I would have prepared a will for her." (TT - Day One p. 218). Further, Mr. Samples testified that he would have to defer to the testimony of the witnesses to the will and the scrivener of the will with respect to the fact that Ms. Nelson was of sound mind and disposing memory on July 29, 2005. Specifically, Mr. Samples stated:

Q. Would you defer to Mr. Forbes because Mr. Forbes who was the person who was present and spoke with her:

A. Sure.

(TT - Day One p. 220-221).

The Trial Court erred in placing greater weight on the testimony of Mr. Samples, or any weight at all, over the attorney who prepared the will and the attesting witnesses who were present at the execution of the will. See Stewart v. Lyons, 54 W.Va. 665, 47 S.E.2d 442 (1903) ("Evidence of witnesses present at the execution of a Will is entitled to peculiar weight, and especially is the case with the attesting witnesses."); Syl. Pt. 3, Floyd v. Floyd, 148 W.Va. 183, 133 S.E.2d 726 (1963)("The evidence of attesting witness, 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.”).

Accordingly, Appellants-Defendants respectfully submit that the Trial Court erred by allowing the testimony of James Samples at the trial of this matter. As such, the admission of this testimony constitutes reversible error. Gilbert v. American Cas. Co., 126 W.Va. 142, 146, 27 S.E.2d 431, 435 (1943).

- D. The Trial Court erred in not granting summary judgment in favor of the Appellants-Defendants on the issue of testamentary capacity and undue influence because no genuine issue of material fact exists as to whether or not Irene T. Nelson had the requisite capacity to execute her Last Will and Testament on July 29, 2005 or as to whether or not the Last Will and Testament of Irene T. Nelson was a product of Vivian Knotts and Betty Nelson’s undue influence.**

Appellants-Defendants respectfully assert that the Trial Court erred in failing to grant summary judgment in favor of the Appellants-Defendants on the issues of lack of testamentary capacity and undue influence, as a matter of law. The Appellees-Plaintiffs presented no evidence to the Trial Court which shows that Irene Triplett Nelson lacked capacity to execute her Last Will and Testament on July 29, 2005, or which shows that a genuine issue of material fact exists as to whether or not Irene Triplett Nelson executed the Will while subject to the undue influence of the Defendants, Vivian Knotts and Betty Nelson.

In addition to the evidence discussed in great detail *supra*, the Appellants-Defendants, presented to the Trial Court affidavits of the people who interacted with Irene Triplett Nelson on or about the day she executed her Last Will that indicate that she was of very sound mind and disposing memory in their Motion for Summary Judgment. William C. Forbes, the drafter of the decedent’s Will unreservedly found that the decedent was of sound mind and disposing memory on July 29, 2005. Additionally, the attesting witness to the decedent’s Last Will and

Testament, Sherry Strickland and Julie Wilson, also found the decedent to be of sound mind and disposing memory. They signed an affidavit to this effect on July 29, 2005, and testified at the Clay County Commission hearing to this effect. By contrast, Appellees-Plaintiffs offered nothing beyond self-serving allegations on the issue of the decedent's testamentary capacity.

The Trial Court erred in not finding that the testimony of the attorney who prepared the document in question and the attesting witnesses was not dispositive in this case. The testimony of witnesses present at the execution of a will is to be given "special consideration" Milhoan v. Koenig, 196 W.Va. 163, 166, 469 S.E.2d 99, 102 (1996). This is particularly true of attesting witnesses, such as Sherry Strickland and Julie Wilson. See Stewart v. Lyons, 54 W.Va. 665, 47 S.E.2d 442 (1903) ("Evidence of witnesses present at the execution of a Will is entitled to peculiar weight, and especially is the case with the attesting witnesses."). Thus, the evidence presented to the Trial Court by both the Appellees-Plaintiffs and the Appellants-Defendants during the Hearing on the Motion for Summary Judgment in this civil action clearly show that no genuine issues of material fact exists as to whether or not Irene Triplett Nelson had the requisite testamentary capacity to execute her Last Will and Testament on July 29, 2005.

Further, the Last Will and Testament of Irene Triplett Nelson was not the product of undue influence. Despite bearing the burden of proof on this claim, Appellees-Plaintiffs failed to produce any direct evidence to support an allegation of undue influence and offered no evidence whatsoever to bring into question the "free agency" of Irene Triplett Nelson. In fact, the Appellees-Plaintiffs entire argument rests upon the premise that because the Appellants-Defendants cared for Irene Triplett Nelson during the last years of her life and throughout a bitter family division and feud, that somehow the fact alone that Irene Triplett Nelson left her estate to

the Appellants-Defendants, suggests that undue influence must be involved. Unfortunately, this premise is insufficient by law to support such a claim.

During the Hearing on the Motion for Summary Judgment, the Appellees-Plaintiffs were unable to show undue influence by something more than mere suspicion, conjecture, or possibility. Indeed, the Appellees-Plaintiffs themselves were unable to offer any direct evidence of undue influence, as seen in deposition testimony taken in this action:

- Q.** How else to you allege that Vivian Knotts and Betty Nelson unduly influences your mother with respect to the preparation of the Will? And the contest in which I'm asking that, ma'am, is Bill Forbes has already testified under oath that no one, be it Vivian Knotts, Betty Nelson or someone else-
- A.** Bill Forbes did not live with mommy and was not at mommy's house every day. The night daddy died, Betty moved in with her that night. Prior to that she was living in Vivian's basement. And mommy was up there every day. They were with her daily, they coerced her daily, they fed her this nonsense daily.
- Q.** Were you present for any of those conversations?
- A.** No. I told you that awhile ago. Don't ask me that again. I was not at Vivian's house. The last time I spoke to Vivian was in January of 2005.

Deposition of Sharon James, April 18, 2007, at 186.

As set forth in detail above, it is hardly surprising given the discourse between Irene Triplett Nelson and her children, the Appellees-Plaintiffs, Sharon James and Glen Nelson, that Irene Triplett Nelson would leave her estate to Appellants-Defendants, Vivian Knotts and Betty Nelson. As previously stated, "influence which arises from acts of kindness and attention to the testator, from attachment or love, from persuasion or entreaty, or from the mere desire to gratify the wishes of another . . . does not constitute and is not alone sufficient to establish undue influence." Syl. Pt. 5, Stewart v. Lyons, 54 W.Va. 665, 47 S.E.2d 442 (1903).

Appellees-Plaintiffs simply did not offer any direct evidence on the issue of undue influence. The Appellants-Defendants, on the other hand, offered testimony from the attorney

who drafted the Will who stated emphatically that Irene Triplett Nelson was a strong willed woman and knew what she wanted to do with her assets. Irene Triplett Nelson sought the aid of a trusted friend, Vickie Leighton, to assist her in the preparation of the Last Will and this friend testified as to Irene Triplett Nelson's free will and desires regarding the Will. Appellants-Defendants, Betty Nelson and Vivian Knotts, were not involved in the drafting and contemplation of a new Last Will by Irene Triplett Nelson. All other disinterested witnesses, including those who witnessed the signing of the Will, have testified to Irene Triplett Nelson's independence and concluded that she was not under the influence of the Appellants-Defendants. In the present matter, undue influence has not been shown by something more than mere suspicion, conjecture, or possibility. Thus, it is clear that no genuine issue of material fact exists as to a whether or not the Last Will and Testament of Irene Triplett Nelson Knotts was a product of undue influence of the Appellants-Defendants.

Accordingly, Appellants-Defendants respectfully submit the circuit court erred by not granting their Motion for Summary Judgment. Therefore, Appellants-Defendants respectfully request this Court review the Trial Court's decision, and reverse the August 18, 2008, Order from the Trial Court with respect to the claims of testamentary capacity and undue influence.

VII. CONCLUSION AND RELIEF SOUGHT

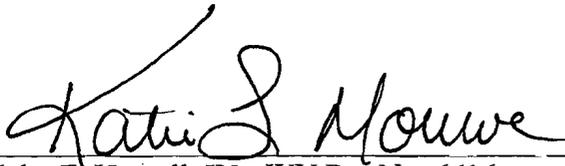
For the foregoing reasons, Appellants-Defendants, Vivian Knotts and Betty Nelson, respectfully request that this Court reverse the jury verdict of October 7, 2008, and the Clay County Circuit Court's rulings denying their motions for judgment as a matter of law. In the alternative, should this Court decide not to reverse the jury verdict and Trial Court's rulings denying their motions for judgment as a matter of law, the Defendants pray that this Honorable Court award it a new trial, or remand this matter to the Trial Court for further proceedings

consistent with this Court's Order. It would be a terrible miscarriage of justice if Irene Triplett Nelson's Will, which she knowledgeably and freely made, and which she had every right to expect to be probated and carried out, were to be nullified by the evidence, or lack thereof, that has been presented in this civil action.

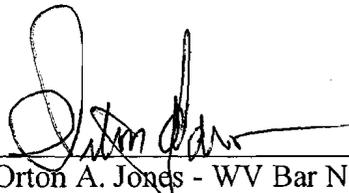
Respectfully submitted this 17th day of March, 2010.

VIVIAN NELSON KNOTTS and BETTY NELSON

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35482

VIVIAN KNOTTS and BETTY NELSON

Appellants

vs.

SHARON JAMES and GLEN NELSON

Appellees

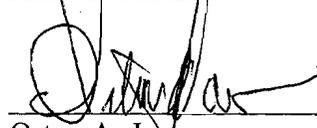
CERTIFICATE OF SERVICE

The undersigned, of counsel for Vivian Nelson Knotts, Individually and as Co-Administratrix of the Estate of Irene Triplett Nelson, deceased, and Betty Nelson do hereby certify that we have served a true and exact copy of the foregoing **Appellants' Brief** upon the following via U.S. Mail, postage prepaid, this 17th day of March, 2010:

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