

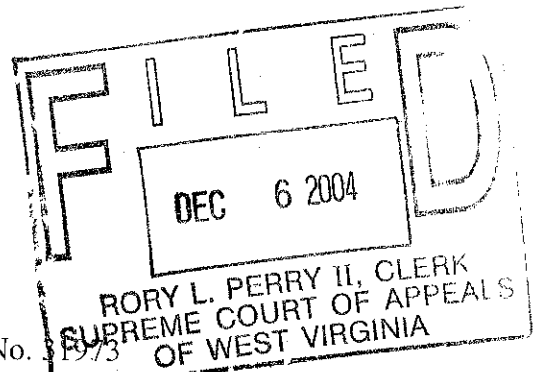
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

ROBERT JULIAN WARE,
BETTY JEAN WORKMAN,
ALMONTA CREAK, and
ROGER WARE,
Appellants

v.

ALMIRA JANE HOWELL,
Executrix of the Estate of Biddie L. Ware
Appellee.

Supreme Court No. 31973
Randolph County Civil Action No: 00-C-110



BRIEF OF APPELLEE

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Counsel for Appellee

RELEVANT FACTS

Biddie Lemon Ware died testate on or about September 26, 1998. Her Will, executed in June 1997 was admitted to probate in the Office of the Clerk of the County Commission of Randolph County, West Virginia, by Jane Howell who was appointed executrix. Thereafter, Appellants filed a notice of contest asserting that: Ms. Ware had executed a Will in 1990; the earlier Will was the true expression of her intentions regarding her estate; and the subsequent Will was the result of undue influence.

The parties engaged in extensive discovery, with Appellants' counsel deposing all of Appellee's witnesses, including Rhonda Lawson, as early as January 2001. Neither in the Complaint filed by Appellants nor during the depositions of the witnesses did Appellants' counsel raise the issue of the validity of the execution of the Will.

On Saturday, November 3, 2001, two days before trial, Appellee's counsel arranged at Appellants' request to take the telephonic, evidentiary deposition of Rhonda Lawson. At that deposition, Appellants' counsel for the first time learned, quite by accident, during her cross examination, that there was confusion about whether Ms. Lawson had been in the immediate presence of Ms. Ware when the Will was signed by the witnesses, although she was clearly present when the Will was executed, and the affidavit she signed indicated she was present with the other witness.

On the following Monday, Appellants' counsel hand delivered a Motion to Amend her Complaint to Appellee's counsel and requested a conference with the Court and counsel approximately 15 minutes prior to the scheduled start of the trial. (Jury selection had

occurred the previous week.) At this meeting she presented the Court with Appellants' Motion to Amend her Complaint to raise the issue of the validity of the execution of the Will.¹

At trial, witnesses generally testified that Ms. Ware was competent; that she could read and write; read books and the newspaper regularly; and carried on extensive conversation. The jury, at the close of the evidence apparently based solely upon the testimony of Rhonda Lawson, and contrary to the testimony of the notary public and other witnesses, found that the Will was not properly executed.

Shortly thereafter, Appellee's counsel moved the Court for a new trial. The lower Court granted Appellee's request on the basis of the sudden change of the focus of the trial, and the credibility of the witnesses involved. Appellants appeal this ruling.

STANDARD OF REVIEW

A lower court ruling granting a new trial is reviewed under an abuse of discretion standard. *Tennant v. Marion Health Care Foundation, Inc.*, 459 S.E. 2d 374, 194 W.Va. 97 (W.Va. 1995).

ISSUE PRESENTED

Whether the lower Court abused its discretion by awarding Appellee a new trial.

ARGUMENT

- I. The lower Court did not abuse the broad discretion afforded a trial court when it granted Appellee's Motion for a New Trial. A witness to the Will completely reversed her testimony only days before trial, when for several years prior had represented her presence during the execution of the Will at issue.**

¹ Ten days prior to trial, Appellants' counsel notified Appellee's counsel of her intent to call Attorney David W. Hart as a witness, as he drafted the 1990 Will for Ms. Biddie Ware. This was in October 2001, after the trial had been rescheduled on at least two previous occasions and no notice of that witness was provided.

This Court has ruled that a trial court has "...broad discretion to determine whether or not a new trial should be granted" In *Re State Public Building Asbestos Litigation* 454 S.E. 2d 413, at 418, 193 W.Va. 119 at 124 (1995); and "The trial court has very broad discretion and the appellate courts will defer a great deal to his exercise of this discretion." [*Asbestos Litigation* at 418). Moreover, this Court has ruled; "It takes a stronger case in appellate court to reverse judgment awarding a new trial than one denying it and giving judgment against party claiming to have been aggrieved." (See *Asbestos Litigation*).

In reaching this opinion, this Court based its holding in part upon the following premise:

"[t]he trial court has opportunities to observe many things in the course of a trial which the printed record presented to an appellate court does not disclose[.]" *Browning v. Monongahela Transport Co.*, 27 S.E. 2d 481, 485, 126 W.Va. 195, 203 (1943).

This Court has further found that "[u]nder Rule 59, the trial court has the authority to weigh the evidence as if he or she were a member of the jury." *Asbestos Litigation* at 419, citing Charles Alan Wright, Federal Practice and Procedure §553 at 247 (2d ed. 1982). In Syllabus point 2 of *Andrews v. Reynolds Memorial Hospital, Inc.*, 499 S.E. 2d 846, 201 W.Va. 624 (W.Va. 1997), this Court noted that a trial judge has the authority to weigh evidence and consider credibility of witnesses.

Recently in *Lamphere v. Consolidated Rail Corp.*, 557 S.E. 2d 357, 210 W.Va. 303 (W.Va. 2001), this Court, in Syllabus point 4, stated:

"Given trial judge's unique knowledge of what occurred at trial that no other judge can have it is perfectly proper for the trial judge to use and consider that peculiar and personal knowledge when

weighing the evidence and assessing the credibility in ruling on the motion for a new trial.”

This Court went on to cite with approval the concurring opinion of Justice Cleckley in *Asbestos Litigation*, when it said:

“There are many critical events that take place during a trial that cannot be reduced to record, which may affect the mind of the judge as well as the jury in forming the opinion as to the weight of the evidence and the character and credibility of the witnesses.”
Lamphere at 361.

The lower Court in granting Appellee’s motion for a new trial considered the credibility of the witnesses, and indicated in its finding that it was concerned about the testimony of the witnesses, particularly Mrs. Lawson; who “...in essence signs an affidavit that says she witnessed the signature of the Testatrix in person, and then comes to court and says ‘No, I lied that I signed that affidavit,...I didn’t really do that’”. Transcript Page 11, April 8, 2002.

The Court went on further to add:

“I’m also a little bit concerned...that [after]...that seventeen months of development and preparation for trial...on a Saturday before trial information is developed and the case is amended on Tuesday, and that winds up being the dispositive issue...I’m concerned that we have all this trial preparation but the issue that’s dispositive is essentially...3 days old - - that concerns me.” Transcript Page 11-12.

Upon further hearing, the Court reiterated its sound reasoning for granting the motion for a new trial when it said:

“...she in 1997 signed the document under oath saying she did these things, and then gives an evidentiary deposition wherein she says she didn’t do these things...the second thing I’m concerned about...Ms. Ware thought she was signing a valid Will. And now

Mrs. Lawson says she wasn't, and that concerns me." Transcript
Page 26 and 27. July 28, 2003.

Appellants assert that "...every reasonable and legitimate inference fairly arising from the evidence in favor of the party for whom the verdict was returned must be considered, and those facts, which the jury must properly find under the evidence must be assumed as true" [*Asbestos Litigation*, citing *Walker v. Monongahela Power Company*, 131 S.E. 2d 736, 147 W.Va. 825 (1W.Va. 1963) *supra* at 419]. However, that analysis was determined to be "...misleading in light of the purpose of Rule 59," *Asbestos Litigation* p. 419. Instead after rejecting this analysis, the Court went on to conclude that Rule 59 allowed the judge to "...weigh the evidence and consider the credibility of witnesses, and if the court found that the verdict was against the clear weight of the evidence, *was based on false evidence*, or will result in a miscarriage of justice, he must set aside the verdict, even if supported by substantial evidence, and grant a new trial. [*Asbestos Litigation* at 420, citing the United States Court of Appeals for the Fourth Circuit in *Poynter v. Ratcliff* 874 F.2d 219, 223 (4th Cir. 1989)](emphasis added).

The lower Court did in fact weigh the evidence and considered the credibility of the witness. The Court plainly expressed its concern that the verdict was based on false evidence. Under the *Asbestos Litigation* standard, the lower court is required to set aside the verdict and grant a new trial, "...if he (the trial judge) finds the verdict...is based on false evidence...he must set aside the verdict, even if supported by substantial evidence, and grant a new trial." *Asbestos Litigation* p. 420. This the lower Court did.

While Appellants contend that the testimony is clearly in favor of the jury verdict, that is neither the beginning nor the end of the analysis. In fact, this does not enter the

consideration. The court in *Asbestos Litigation* held that an award of a new trial may be granted “ . . . even if (the jury verdict) were supported by substantial evidence”, (*Asbestos Litigation*, p. 420). The lower Court correctly granted Appellee’s motion for a new trial because it believed the evidence was false, in light of the affidavit signed by the witnesses of the Will, and the notary public. Appellants point out the differing testimony of the notary public who attested the witnessed signatures and the testimony of the witnesses themselves. Because the Court found that the credibility or recollection of the witnesses was an issue, especially considering her own conflicting statements, and because Appellee did not have the opportunity to investigate this issue when it was raised on the day of trial, following 17 months of discovery, a new trial was granted.

Giving the Appellee the opportunity to delve into the witnesses’ testimony, their recollection of it, and the facts which gave rise to it would provide information pertinent to the jury’s determination of the facts. It is clear that the lower Court felt that the evidence considered by the jury was false evidence, and would result in a miscarriage of justice if allowed to stand. Only by Appellee having the fair chance to provide information to a jury for their consideration could these matters be fully resolved.

This Court has consistently held that the role of an appellate court in reviewing the granting of a new trial is very limited. A trial judge’s decision to award a new trial is not subject to review unless the trial judge abuses his or her discretion. (See Syl. Pt. 3 *Asbestos Litigation*); *Summers v. Martin* 486 S.E.2d 305 199 W.Va. 565 (1997); *Morrison v. Sharma* 488 S.E.2d 467, 200 W.Va. 192 (1997). In explaining what constitutes an abuse of discretion, this Court has said:

“ . . . we will not disturb a circuit court’s decision unless the court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances.” *Gribben v. Kirk* 195 466 S.E.2d 147, 159, W.Va. 488, 500 (1995); and

“In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.” *Gentry v. Mangum* 466 S.E.2d 171, 179 m.6, 195 W.Va. 512, 520 m. 6 (1995).

In the case at hand, no clear error of judgment has occurred. Appellant simply argues that a jury reached a decision and it should not be disturbed. Yet the lower Court expressed its reasons clearly when it awarded a new trial. It is not a clear error of judgment for the Court to be concerned about completely differing testimony given by Ms. Lawson between the date of the signing of the will in 1997 and her testimony at trial in November 2001. Further the decision to award a new trial is perfectly within the bounds of permissible choices afforded the trial court under *W.Va. R.C.P. 59*.

The Court granted the new trial because it was concerned about the real possibility of false evidence being considered by the jury. No material factor is ignored. The Court was cognizant of the jury verdict and the testimony of the other witnesses, but was also concerned about the fact that based upon Ms. Lawson’s trial testimony, the will of Biddie Ware was invalid immediately upon her execution of it. This is in direct contravention of the affidavit signed by Ms. Lawson at the time the will was witnessed and signed. The Court did not make a serious mistake in granting Appellee a new trial. In fact, to fail to do so would be the serious mistake in light of the circumstances surrounding this case.

Appellants assert that an abuse of discretion occurred, but aside from arguing that the jury reached a verdict and it shouldn't be disturbed, Appellants supply no evidence to support this assertion. No abuse of discretion occurred, and the lower Court was correct to award a new trial. This Court should not substitute its judgment for the circuit court's judgment. *State v. Taylor* 593 S.E.2d 645, 654, 215 W.Va. 74, 83 (2004).

II. Appellee does not object to the amendment by Appellants, however believes that fairness requires that she be afforded a legitimate opportunity to respond to the issues raised by the amendment.

Appellants argue that Rule 15, *W.Va. R.C.P.*, freely allows the amendment of the pleadings, and should be permitted by the court. Appellants further assert that they had an absolute right to amend their complaint. Appellants do not recognize that an amendment should not be permitted if the adverse party is prejudiced by the sudden assertion, and hasn't had ample opportunity to meet the issue. *Mauck v. City of Martinsburg*, 357 S.E. 2d 775, 179 W.Va. 93 (W.Va. 1987).

In the instant case, Appellants assert that Appellee's counsel didn't object to the amendment, and therefore the right to object was waived. Appellee's motion for a new trial is not an objection to the amendment, (an absolute right under the Rules), but rather an effort to be given the opportunity to confront the new evidence and motion filed on the day of trial.

Appellants also contend that failure to object at trial waives the right to file a motion for a new trial. This argument doesn't address the point of the motion. Further, this argument was never raised at either rather lengthy hearing the Court conducted on April 8, 2002, or July 28, 2003. Therefore, Appellants cannot for the first time raise the issue on appeal. This Court has historically declined to entertain issues which are raised for the first time on appeal. In

so doing the Court has held: "...as a general rule we will not pass upon an issue raised for the first time on appeal." *Mayhew v. Mayhew*, 519 S.E.2d 188, 204, 205 W.Va. 490, 506 (1999); "we frequently have held that issues which do not relate to jurisdictional matters, and which have not been raised before the circuit court will not be considered for the first time on appeal to this Court.", *Kronjaeger v. Buckeye Union Insurance Co.*, 490 S.E.2d 657, 672, 200 W.Va. 570, 585 (1997); "Because Plaintiff's arguments...,and the City's response thereto, were neither raised, argued nor considered by the circuit court on summary judgment, the subject of this appeal, they are not reviewable by this Court.", *Koffler v. City of Huntington*, 469 S.E. 2d 645, 649 n.6, 196 W.Va. 202, 206, n.6 (1996); and "Indeed, if any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal.", *State v. Miller*, 476 S.E.2d 535, 544, 197 W.Va. 588, 597 (1996).

III. Appellants seek a writ of mandamus improperly, under guise of deprivation of constitutional rights.

Appellants argue that their constitutional rights have been violated, apparently by what they believe is unnecessary delay by the lower Court. However, Appellants admit that no hearing was scheduled to give the lower Court an opportunity to rule on the issues raised.

Further, Appellants argue that the delay has caused them prejudice because a witness (Ralph Ware, whom Petitioner's counsel deposed on January 11, 2001) as to the allegations of undue influence has died. In fact that this witness appeared at the original trial by deposition. Also, Appellants argue that they have no knowledge of the whereabouts of Rhonda Lawson, although Ms. Lawson's mother is employed by an attorney in Elkins. Mrs. Lawson's

mother facilitated communication with Ms. Lawson at the time of her discovery deposition and evidentiary depositions.

The lower Court has entered a ruling on Defendant/Appellee's motion for a new trial. This renders the issue moot. *State, ex. rel Davis v. Viewig*, 529 S.E.2d 103, 207 W.Va. 83 (W.Va. 2000); *Craig v. Hey*, 345 S.E.2d 814, 176 W.Va. 514 (W.Va. 1986). Further, Appellants seek a writ of mandamus improperly, as it has not been filed consistent with the requirements of Rule 71B, *R.C.P.*

Appellants' argument does not seek to compel a remedy. Instead they urge this Court to quickly dispose of this case in their favor because they believe it has taken too long to prosecute their case, notwithstanding the issue of justice. They raised no issue of "delay" while the case was proceeding to trial, and had no objection to the Court's granting of continuances.

Appellant argues that a delay is detrimental to her client, yet in July, 2003, when given the opportunity to try this case again or appeal, the latter option was chosen. The Petition for Appeal was not filed until May, 2004.

Admittedly, a rather extensive period of time has elapsed since the date of death of Ms. Ware. However, that delay occurred for many reasons; the Court's docket, both counsels' calendars, and witness availability among other reasons. This fact does not merit Appellants' urging this Court to dispose of this case without regard to the rights of Appellee to have a fair trial after the jury is fully informed of all information pertinent to its determination.

CONCLUSION

The lower Court, guided by the decisions of this Court regarding a motion for a new trial, properly granted this motion. The lower Court determined that the credibility of the witnesses was an issue, and reasoned false evidence possibly preceded the verdict. Therefore, a new trial was appropriate under the circumstances. The sound decision of the lower Court should be affirmed.

Respectfully submitted,

ALMIRA JANE HOWELL, Executrix of the
Estate of Biddie L. Ware, Appellee
By counsel



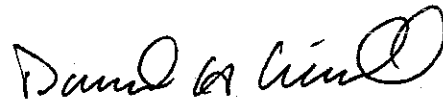
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CERTIFICATE OF SERVICE

I, David H. Wilmoth, counsel for Appellee, do hereby certify that on this date I served a true copy of the foregoing upon Bridgette L. Wilson, counsel for Appellants, by hand delivering a true copy addressed to said counsel as follows:

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Dated this 3rd day of December, 2004.



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IN THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

ROBERT JULIAN WARE,
BETTY JEAN WORKMAN,
ALMONTA CREAK AND
ROGER L. WARE,

Plaintiffs,

vs.

CIVIL ACTION NO. 00-C-110

ALMIRA JANE HOWELL, Executrix
of the Estate of Biddie L. Ware,

Defendant.

P O S T - T R I A L M O T I O N S

of

April 8, 2002 and July 28, 2003

The above entitled and numbered cause came on to be heard in its regular order before THE HONORABLE JOHN L. HENNING, Judge, Twentieth Judicial Circuit, Elkins, Randolph County, West Virginia, and all preliminary matters having been disposed of the cause proceeded to hearing and the following proceedings were had, to-wit:

Taken and transcribed by:

Shirley J. Kittle, ERO
Twentieth Judicial Circuit
Randolph County Courthouse
Elkins, WV 26241

A P P E A R A N C E S

THE HONORABLE JOHN L. HENNING, JUDGE
Twentieth Judicial Circuit
Randolph County Courthouse
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Elkins, WV 26241

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1 POST-TRIAL MOTIONS OF APRIL 8, 2003:

2 THE COURT: Call Ware vs. Howell at this time -- Mr.
3 Wilmoth's here on his Motion to Alter or Amend the Judgment or
4 in the Alternative For a New Trial, and Mrs. Wilson's here on
5 behalf of her clients.

6 Go ahead, Mr. Wilmoth.

7 MR. WILMOTH: Thank you, Your Honor.

8 The -- the basis of my Motion is kind of twofold -- I'm --
9 I'm sure the Court's aware of what took place of what took place
10 -- we tried this case in November. The day of -- the day of the
11 trial following a Saturday -- Saturday Evidentiary Telephonic
12 Deposition of one (1) of the witnesses Plaintiffs came in --
13 Petitioners came in, and filed a Motion to Amend to add a Count
14 to the Complaint alleging that the Will was improperly executed
15 because the witnesses had not executed the Will in the presence
16 of the Testatrix.

17 There was testimony presented by Robin -- I'm sorry --
18 Rhonda Lawson through her Evidentiary Deposition, however, the
19 Notary and the other witness denied that testimony. That issue
20 was one (1) that, apparently, the Jury felt strongly about, and
21 as the Jury Verdict Form indicated if they made that
22 determination they didn't have to go further with the other
23 determination.

24 Since that time I've done a little bit of research and I've
25 found the case of Wade versus Wade which is a 1930's case -- I

1 believe 1938 and that case doesn't speak directly to the facts
2 but it does raise the issue that if witnesses don't execute the
3 Will in the presence of the Testator or Testatrix, but
4 subsequently confirm their execution of the document in the
5 presence of the Testator or Testatrix then the Will is valid.

6 And the Supreme Court's rationale behind that is that you do
7 not want to undo or take away from the Testator's intent on a
8 mere technicality, and that case has been the case -- I believe
9 it was cited with approval in Stevens versus Casdorpf which is
10 a 1998 case. So based upon that research my Motion would be to
11 -- if the Court is not inclined to direct judgment which I'll
12 address in just a minute -- then I would ask the Court to give
13 us the opportunity for a new trial so that the Jury can be
14 instructed as to what the Law is, and evidence or testimony can
15 be presented as to any circumstances that occurred following the
16 witnesses' execution of the Will.

17 As far as my Motion for a New Trial or for Judgment
18 Notwithstanding the Jury's Verdict the sole issue at trial up
19 until the day -- up until the day of trial when the Petitioners
20 were permitted to amend -- the sole issue was whether or not it
21 was the Testator's intent whether there was undue influence
22 exerted over the Testatrix to induce her to execute this Will
23 that left everything to Mrs. Howell or Mrs. Conrad now -- who
24 was the Respondent. There was no evidence to indicate that
25 there was any kind of undue influence exerted over Mrs. Ware at

1 the time she executed the Will -- everyone of the witnesses on
2 both sides indicated that Mrs. Ware was a very competent
3 individual -- that she read -- that she could write -- that she
4 understood when you spoke to her and she understood what she
5 read, and that she executed that Will -- there's no contention
6 that the -- that the signature on the Will was that of Mrs.
7 Ware's.

8 The Jury because they were instructed about the execution
9 of the Will by the witnesses didn't get to the opportunity to
10 determine whether they felt that undue influence was exerted,
11 and I -- based upon the evidence that was presented I believe
12 the Jury would have found that there was no undue influence.
13 However, because they weren't permitted to -- to get to that
14 issue I would ask the Court having sat through the trial and
15 having heard the testimony -- make the determination that she
16 was competent -- that there was no undue influence exerted and
17 to set aside the Jury Verdict based upon the mere technicality
18 that Wade allows the Court to exclude and render judgement in
19 favor of my client, Mrs. Conrad -- Mrs. Howell, and that the
20 Will that was executed in 1997 be the Will that controls the
21 Estate of Biddie Lemon Ware.

22 THE COURT: All right, sir, thank you. Mrs. Wilson.

23 MRS. WILSON: Thank you, Your Honor.

24 Mr. Wilmoth has presented I guess basically two (2) issues
25 now -- one (1) of which was not -- or at least I didn't believe

1 was addressed in his response, and I'll start with that first
 2 because that's what his last issue was -- was whether or not
 3 there was undue influence. And, like I said, that really wasn't
 4 addressed in his Memo so I'm not quite prepared for that, but I
 5 do recall from the trial and from research and from pleadings
 6 that have been filed and instructions that were filed that undue
 7 influence does not mean competency. As Mr. Wilmoth said that
 8 she was competent -- she could read -- she could write -- she
 9 could understand -- I don't believe anybody disputed that. And
 10 that was not the issue that I presented as to whether or not she
 11 was competent -- I admitted from day one that we believed that
 12 she was competent. Our issue was whether or not the parties had
 13 -- the parties being Mr. Wilmoth's client had exerted undue
 14 influence on her especially concerning the circumstances
 15 surrounding the execution of the Will. The witnesses testified
 16 that Biddie Ware came to the -- Mr. Mullens' office -- was in
 17 the back of the parking lot -- did not come inside and the
 18 Notary stooped down beside of her and sort of went over in
 19 general this page -- that page -- did not read the Will fully to
 20 her it was her testimony I believe, but it basically said
 21 "Here's this page -- here's this page" -- that's the Notary's
 22 testimony.

23 The other witnesses who were standing there -- in fact,
 24 Rhonda Lawson testified she did not hear Biddie Ware talk at all
 25 -- she didn't hear Biddie Ware say "This is my Will" -- no words

to that effect whatsoever that made Rhonda Lawson know for certain that Biddie Ware knew she was signing a Will, and that was presented through her testimony which was done by -- a few days before trial because she could not be here for trial. And so with that issue there's just -- there's nothing for the Jury -- the Jury didn't go to this issue so I don't believe that it's proper at this point for Mr. Wilmoth to ask you to declare -- I think as he said it -- or to make the determination that Biddie Ware was competent, and that the Will should not be set aside due to undue influence.

Going back to the first issue, and I'm a little sketchy on what the Motion is about. We did come in the day of trial after we took the Deposition of Rhonda Lawson on a Saturday and I discussed it with David Wilmoth, and I told him what I was going to do -- I filed that the first day of trial to amend our Petition to reflect the improper execution. I did that under Rule 15(b) of the West Virginia Rules of Civil Procedure -- I don't -- I'm not quite clear if Mr. Wilmoth thinks that was a problem, but Rule 15(b) of the West Virginia Rules of Civil Procedure gives this Court wide discretion to amend the proceedings and states that the Court shall do so freely. So I don't really believe that -- that's the issue -- I think what Mr. Wilmoth is saying is -- if the witnesses signed it -- at least and hopefully he'll correct me if I'm wrong, but it sounds like what he's saying is -- if the witnesses signed the

1 Will outside of the presence of the Testator then he referred to
2 Wade versus Wade that it -- that -- that Court raised an issue
3 that if they don't sign in their presence they can affirm their
4 signature -- at least I believe that's what he was saying by
5 this Wade versus Wade decision. But our West Virginia Supreme
6 Court -- now this case as he has said has not been overturned,
7 but our Supreme Court in the case of Stevens versus Casdorph
8 clearly states there is unequivocal -- the relevant requirements
9 of the Statute which is West Virginia code 41-1-3 calls for a
10 "Testator to sign his or her Will or acknowledge such Will in
11 the presence of at least two (2) witnesses at the same time and
12 such witnesses must sign the Will in the presence of the
13 Testator and each other." It's unequivocal language -- the West
14 Virginia Code -- it's unequivocal -- 41-1-3 states --

15 No Will shall be valid unless it be in writing and signed
16 by the Testator. The signature shall be made or the Will
17 acknowledged by him in the presence of at least two (2)
18 competent witnesses present at the same time and such
19 witnesses shall subscribe the Will in the presence of the
20 Testator and of each other.

21 That is simply not what we had -- Rhonda Lawson testified in her
22 testimony that she did not sign Biddie Ware's Will in the
23 presence of Biddie Ware.

24 Now, the other requirements were -- were met -- Biddie Ware
25 signed the Will in the presence of Rhonda Lawson and Sandy

1 Harman, but the Code goes on to say that "The witnesses must
2 subscribe the Will in the presence of the Testator." And Rhonda
3 Lawson unequivocally says she did not sign in the presence of
4 the Testator. I then read the relevant portions of the
5 Attestation Clause which was attached to the Will which says
6 that "We signed in the presence of each other and in the
7 presence of the Testator" and in her testimony she said "I did
8 not sign in her presence -- I came back inside, and I signed her
9 Will outside of the presence of the Testator." So -- and,
10 apparently, the Jury agreed with that because they found that
11 the Will was not properly executed, and the Respondent had the
12 burden of proof by a preponderance of the evidence that the Will
13 was properly executed.

14 In Mr. Wilmoth's Motion he refers to the Jury just
15 basically disregarding the testimony of the Notary, but I would
16 simply say that in the charge to the Jury they're allowed -- it
17 says -- I kind of took it out of your Civil Charge --

18 Allows the Jury to consider among other things the memory
19 of a witness -- the witness's demeanor -- the
20 reasonableness or unreasonableness of the witness's
21 testimony -- if the Jury believes the witness testified
22 falsely it could disregard the witness's testimony
23 completely.

24 And I believe I took that from your Civil Charge that we gave to
25 the Jury that day.

1 THE COURT: It does sound like you did.

2 MS. WILSON: And -- and the Jury Verdict just didn't say
3 why they didn't believe -- I mean that's not part of the -- it's
4 not part of the Jury Verdict Form -- the Jury Verdict Form says
5 "Was it properly executed" and they said that it was not, and
6 for those reasons I would ask that you uphold the decision of
7 the Jury.

8 THE COURT: Well, I'm somewhat concerned about the case --
9 it's extremely rare that this Court would set aside a Jury
10 Verdict -- in fact, I don't know if it's ever been done before.
11 But I am concerned about someone who, in essence, signs an
12 Affidavit that says that they witnessed the signature of the
13 Testatrix in person, and then comes to Court and says "No, I
14 lied that I signed that Affidavit -- I didn't really do that."
15 That -- that's concerning to this Court.

16 I'm also a little bit concerned -- I just looked -- this
17 case was filed in June of 2000, and was tried I think in
18 November of 2001. And I'm a little bit concerned that after --
19 what is that seventeen (17) months of development and
20 preparation for trial -- and you're correct, Ms. Wilson, the
21 Rules do provide for liberal amendments, but I am concerned that
22 the evidence concerning this -- you know -- after nearly
23 eighteen (18) months of trial preparation or after nearly -- I
24 guess that would be seventeen (17) months -- after a year and a
25 half of trial preparation on a Saturday before trial information

1 is developed and the case is amended on Tuesday, and that winds
2 up being the dispositive issue of the trial. And certainly you
3 did the right thing when this information came to your attention
4 moving to amend and present the evidence, but I'm -- I'm
5 concerned that we have all this trial preparation but the issue
6 that's dispositive is essentially from Saturday to Tuesday --
7 one (1), two (2) -- three (3) days old -- that concerns me.

8
9 Mr. Wilmoth, I'm going to take your Motion under advisement
10 and I'm going to look at it and give it some thought, and we'll
11 render a decision. I'll do what I can to render as good a
12 decision as I can.

13 MS. WILSON: Your Honor, could I add one (1) thing that
14 really wasn't addressed --

15 THE COURT: Sure.

16 MS. WILSON: -- by Mr. Wilmoth but given the fact you're
17 going to take it under advisement I'd like for you to consider
18 the case of Brammer versus Taylor -- it's a 1985 decision from
19 the West Virginia Supreme Court and I just happened --

20 THE COURT: Do you have that case with you?

21 MS. WILSON: I do.

22 THE COURT: Did you mention it in your Brief?

23 MS. WILSON: No, I did not.

24 THE COURT: Do you want to just give me a little letter
25 because I'm not going to decide this case this afternoon?

MS. WILSON: Okay, I can do that -- I can just attach this

1 with a letter, and I'll copy Mr. Wilmoth. I just -- I happened
2 to be at a Seminar the other day and this case came up -- it's
3 a 1985 decision which says that "Supervising the execution of a
4 Will constitutes the practice of Law" and it was a Seminar on
5 Will Drafting and that sort of thing and on the ethics portion
6 of the class they were talk -- talking about how secretaries
7 sometimes take a client in the room and execute the Will, and
8 they're saying that's the unauthorized practice of Law. And it
9 actually talks about --

10 THE COURT: Sometimes.

11 MS. WILSON: Pardon --

12 THE COURT: I think they do that about ninety percent (90%)
13 of the time. Okay.

14 MS. WILSON: -- and -- but this case says that's the
15 unauthorized practice of Law and not only could the secretaries
16 or whomever does that have a problem for practicing Law without
17 a license, but the Lawyers that -- if they allow that to go on
18 could have problems. But this case -- just like I said -- the
19 only thing it really talks about is who your claim would be
20 against. In this particular case they had set aside the Will
21 for improper execution, and, basically, in a nutshell it says
22 that if the Will is set aside for improper execution that
23 doesn't affect the beneficiaries. In my case -- my -- my
24 clients -- that would not affect my clients if Mrs. Ware as an
25 intended beneficiary has a claim then it's going to be against

1
2 somebody other than the other beneficiaries that are taking
3 under the Will for improper execution. So I will supplement
4 with this case, and just for your consideration when you're
5 giving this some thought.

6 THE COURT: Yeah, well, again, that -- of course, that kind
7 of goes back to the original thing I said which is you have
8 somebody that executes an Affidavit that says "I did this" and
9 then they come into Court and say "No, I didn't" and that's
10 concerning.

11 MS. WILSON: And for this -- so you know for the delay in
12 time and Mr. Wilmoth can probably add something to this if he
13 wants, but this case got filed way back when with the County
14 Commission -- when we went through that process and we were
15 literally months before we were able to get anything done. And
16 I think Mr. Wilmoth and I came and asked you "What can we do to
17 get this off ground zero" --

18 THE COURT: Yeah, you did.

19 MS. WILSON: -- and then Mrs. Lawson who testified -- the
20 one that said that she wasn't present was I guess basically Mr.
21 Wilmoth's witness and she was not here and we had a time getting
22 her here, and just getting her scheduled.

23 THE COURT: Oh, as far as the delay is concerned I don't
24 think there was any unreasonable delay on your --

25 MS. WILSON: Okay.

THE COURT: -- I just -- I'm just concerned after that long

1 period of time that the dispositive issue comes up such a short
2 time before trial -- that was -- that was my concern.

3 Well, I'll take it under advisement.

4 MS. WILSON: Thank you.

5 THE COURT: Oh, I've got -- and you can send that in, Ms.
6 Wilson, and you can send anything else in, Mr. Wilmoth you
7 wanted to send in.

8 MR. WILMOTH: Okay, thank you, Your Honor.

9 THE COURT: If you guys even wanted to talk -- you can talk
10 and maybe even settle the case. Thank you.

11 MR. WILMOTH: Shall I do an Order just --

12 THE COURT: Yes, if you would.

13 MR. WILMOTH: Okay.

14 THE COURT: Thank you. (Court adjourned).

15 POST-TRIAL MOTIONS OF JULY 28, 2003:

16 THE COURT: Ware versus Howell, 00-C-110. The parties do
17 not appear in person but appear by Counsel -- Ms. Bridgette
18 Wilson and Mr. David Wilmoth.

19 Mr. Wilmoth, I think we're here I guess somewhat on your
20 Motion -- it's been a troubling case.

21 MR. WILMOTH: Your Honor, just -- just to kind of refresh
22 the Court's memory -- we had a trial in this matter back in
23 November of 2001. The day of the trial the Petitioners
24 petitioned the Court for a Motion to Amend Their Pleadings to
25 Include a Count alleging the Improper Execution of the Will.

1 At the conclusion of the Jury trial the Jury returned a
2 verdict that the Will was not properly executed. The Jury
3 Verdict Form did not provide for them to make a determination as
4 to whether or not the Will was procured by undue influence. I
5 thereafter filed a Motion for a New Trial or in the Alternative
6 for Judgement Notwithstanding the Verdict.

7 That Motion for a New Trial was based primarily on the fact
8 that the Motion to Amend was filed the day of trial and the --
9 essentially, the direction of the -- the evidence was changed
10 drastically at that time, and, frankly, I was not prepared to
11 address that issue. There was no testimony at all at the trial
12 concerning the competency of Mrs. Ware at the time the Will was
13 executed.

14 In fact, the only testimony that would have been presented
15 would -- would have been that she was fully competent. All of
16 the witnesses testified that she was able to read -- she was
17 able to write -- she read the newspaper on a daily basis -- she
18 conversed with people -- the only difficulty she had was a minor
19 hearing problem which required whoever was speaking with her to
20 raise their voice, and then she was able to -- to participate in
21 a conversation.

22 The witnesses to the Will -- the other witness Sandy
23 Harman and also a Notary Cassie Wilmoth both verified at
24 their testimony at trial that the Will was executed in the
25 presence of the Testator and it was the testimony of the other

1 witness Rhonda Lawson who in her Deposition in January of 2001
2 indicated that she couldn't remember much, but in her Deposition
3 in November of 2001 said "I wasn't there."

4 The -- the issue is one (1) that I would ask the Court to
5 allow me to have another trial basically for the purpose of --
6 of instructing the Jury as to some exceptions to that Rule
7 particularly the ruling of Wade versus Wade -- it's an old case
8 -- it's a 1938 case, but the language in that Wade case says,
9 essentially, two (2) separate places -- one (1) -- "An error of
10 rigid construction of the Statute should not be allowed to stand
11 in the way of right and justice or be permitted to defeat a
12 Testator's disposition of his property." And the Court went on
13 to say that "To do otherwise would be an illiberal inflexible
14 construction of a Statute giving preeminence to letter and not
15 to spirit and resulting in the thwarting of the intentions of
16 the Testator."

17 I think with liberative notice and the opportunity to do
18 some research and present that testimony to the Jury their --
19 their decision may have been otherwise as to the issue of
20 whether or not the Will was executed properly, and also the
21 allegation -- the original allegation in the Petition was that
22 the Will was procured by undue influence. And, essentially,
23 little, if any, effort to present that testimony -- whether that
24 was a strategic decision based upon the amendment or whether
25 there was a lack of evidence in that regard I don't know, but I

1 think it's appropriate for a new trial to be awarded so that we
2 can address those issues and instruct the Jury properly as to
3 what the Law is. And also, Your Honor, to -- if a new trial was
4 not there then to -- to take recognition of the decision of Wade
5 versus Wade, and say it's a minor technicality as to the issue
6 of the execution of the Will.

7
8 There's clearly -- she was competent -- she understood what
9 she was doing and I'm not going to let a violation of the letter
10 of the Law affect the spirit of the Law in that this is a lady
11 who intended to rewrite her Will -- that it was done so, and the
12 Testator intended for her daughter to have her Estate. And this
13 -- this attempt by the other siblings, in essence, form sour
14 grapes -- if you can't have it -- or if we can't have it then
15 you're not going to have it either is something that is contrary
16 to what the Testator wanted and we should not be sitting in
17 judgement so to speak of -- of what it is the Testator wanted
18 when it's clear that she was competent, and there's no question
19 as to what her desires were.

20 THE COURT: If I recall, Mr. Wilmoth, from the trial Ms.
21 Lawson I think, in fact, testified that she did not see Ms. Ware
22 sign the Will -- that's what I recall the testimony.

23 MR. WILMOTH: I believe, Your Honor, that she testified
24 that way at trial, however, her Deposition that was taken in
25 January she -- her Deposition was approximately five (5) pages
long, and the number of times that she responds to the questions

1 particularly about the events with "I don't remember" or "I
2 don't recall" or "I think" would lead one to believe that maybe
3 she wasn't quite right with her testimony. Her testimony was
4 provided, Your Honor, about the reading of the Deposition -- an
5 Evidentiary Deposition that was taken by phone on Saturday
6 before trial began on Tuesday so --

7 THE COURT: Now, the other witness -- Sandra Harman -- I
8 don't recall -- did she testify at trial?

9 MR. WILMOTH: She testified at trial, Your Honor, yes, she
10 did.

11 THE COURT: And what did she testify?

12 MR. WILMOTH: My recollection of her testimony was that she
13 was there -- that the Will was executed -- the Will was executed
14 in the parking lot in behind Mr. Mullens' office and Ms. Ware
15 was sitting --

16 THE COURT: In a car or --

17 MR. WILMOTH: -- she --

18 THE COURT: -- they took it out --

19 MR. WILMOTH: -- Ms. -- Ms. Ware was sitting in the
20 passenger seat of a car in the back of Mr. Mullens' office and
21 she was parked right up next to Mr. Mullens' office and the
22 witnesses watched her sign the Will and then went to the porch
23 which was about -- I don't know being familiar with Mr. Mullens'
24 office -- fifteen (15) feet away from her, and executed the Will
25 on the porch I believe. The trial was a year and a half ago and

1 I didn't review Ms. Harman's Deposition, but my understanding of
2 her testimony was that they -- they executed the Will on the
3 porch while she was in the parking lot in the car and my
4 familiarity leads me to believe that was about fifteen (15) feet
5 away.

6 Ms. Wilmoth was -- was unequivocal that it was executed by
7 both witnesses in the presence of Mrs. Ware.

8 THE COURT: Ms. Wilson, what do you recall?

9 MS. WILSON: My recollection is a little bit different in
10 a couple of respects -- not much though. Rhonda Lawson
11 testified initially through a Deposition and Rhonda Lawson is
12 Mr. Wilmoth's witness -- not our witness. She --

13 THE COURT: Well, I think she started out as Mr. Wilmoth's
14 witness, and wound up as your witness.

15 MS. WILSON: Exactly -- exactly, Your Honor. And I didn't
16 know that until Saturday before trial -- we could not get her
17 here for trial due to some complications -- she's living in
18 another State and had children, and for whatever reason could
19 not come here for trial. She did come here initially for the
20 Deposition though. She -- because we could not get her here for
21 trial we chose to on Saturday morning to go to Mr. Wilmoth's
22 office, and have her Evidentiary Deposition taken over the
23 telephone which we did.

24 THE COURT: Now, you say we -- did you arrange for that?

25 MS. WILSON: No, Mr. Wilmoth arranged for that and I came

1 to his office, and we had this Depos -- or this Evidentiary
2 Deposition which we intended to use as trial testimony due to
3 her unavailability at trial. She had -- had some -- I do recall
4 during the Deposition that she had some sketchy recollection,
5 but during the Evidentiary Deposition she testified
6 unequivocally, and that was read before -- to the Jury that
7 although she couldn't remember a lot she does remember not
8 signing it in front of Biddie Ware. She says "I specifically
9 recall going back into the office -- signing my name on the
10 conference room table or somewhere to that effect, and Cassandra
11 Wilmoth then notarized her signature in the office not in front
12 of Biddie Ware." I mean it was --

13 THE COURT: Not in the presence.

14 MS. WILSON: Exactly. And Mr. Wilmoth has cited -- well,
15 one (1) other case while -- just to respond to your question --
16 Ms. Wilmoth, the Notary, did testify that everybody was right
17 there at the car when it was signed. Sandra Harman on the other
18 hand sort of wishy washed for lack of a better word back and
19 forth depending upon whether I was answering the questions or
20 whether Mr. Wilmoth was answering the questions. But what I
21 gathered from the end of her testimony was "I just really don't
22 remember. I do know that normally we sign it in the presence of
23 the Testator, but I just really don't know" -- that is my
24 recollection of her testimony. But she did sort of waiver back
25 and forth -- depending upon who was asking the questions.

1 But Mr. Wilmoth has cited the case of Wade versus Wade
2 basically saying we're not going to hold a rigid construction of
3 the Statute, but our Supreme Court has recently said otherwise
4 with two (2) cases which I have cited in my earlier Briefs. One
5 (1) is Stevens versus Casdorff -- I don't know if I'm
6 pronouncing that correctly -- it's a 1998 case which just
7 basically says "Here's the Statute and that Will is not valid
8 unless they signed the Will in the presence of the Testator and
9 of each other." And in that particular case there was a clear
10 intention -- the man went into the Bank -- the Decedent went
11 into a Bank -- he said -- you know -- "I want you guys -- this
12 is my Will -- I want you to sign it" -- there was a clear
13 intention and the Court said basically "To bad -- you did not
14 follow the letter of the Law -- the Law says this and we have
15 this Rule for a reason, and you have to have that or there's no
16 valid Will."

17 In another case -- 1985 Brammer versus Taylor the Supreme
18 Court again basically said the same exact thing. In this
19 particular case the Decedent went into a Bank again and he had
20 a Codicil written to his Will and he said -- you know -- "This
21 is the Codicil to my Will" -- he gave it to the President of the
22 Bank -- he signed it and then right there in front of the
23 President of the Bank he said "Can you have this Codicil
24 witnessed and notarized?" The President of the Bank took the
25 Will -- or the Codicil to a different area -- another day even

1 I believe and had it witnessed and notarized. Needless to say
2 the person died, and they all sued the Bank. The intended
3 beneficiary in the Codicil sued the Bank and sued the President
4 and everybody involved. And the Court in that case specifically
5 -- again, cited the Statute and said these are the requirements.

6 They found that -- this is what I thought was interesting
7 which is very similar in this case -- in the Brammer Court they
8 found that not only was the drafting of a Will for a person the
9 practice of Law, but also the supervising of the execution are
10 activities which constitute the practice of Law and you might
11 recall in this case Mike Mullens wasn't even there. His office
12 did the Will -- they went to the back -- Cassandra Wilmoth
13 basically supervised the execution of the Will based upon her
14 testimony which is the unauthorized practice of Law which is
15 very similar to this Brammer case, but what's important -- it
16 says -- "If the Defendants have engaged in the unauthorized
17 practice of Law in this case they would be prima facia
18 negligent." And it goes on and talks about responsibilities of
19 that person, but it goes on to say -- it does not say that the
20 Codicil would become valid -- it basic -- it says if you got a
21 cause of action that -- that beneficiary has a cause of action
22 it's against the Bank or whoever supervised the execution of the
23 Codicil. It doesn't go on to say "Well, the guy intended it --
24 he came in and he wanted this Codicil signed -- that he intended
25 it we're not going to hold a rigid construction of the Statute.

1 In fact, it said just the opposite -- it said there's -- there
2 might -- might be a case of negligence against the people
3 supervising it, but the Codicil was still held invalid. And the
4 beneficiaries in the Will which was done with the proper
5 ceremony so to speak was the document that determined how that
6 man's property would be distributed, and the Codicil was
7 completely invalid.

8 So that case is very similar to ours, but I think what the
9 Court in 1985 and then again in 1998 our Supreme Court has
10 unequivocally said "This is the Statute -- it must be followed
11 -- if there's a problem -- if they don't follow it -- maybe
12 there's a cause of action against the people that supervised it"
13 -- but the Will still -- you still have to follow that in order
14 to have a valid Will.

15 So I know there is some concern about Mrs. Law -- or Ms.
16 Lawson -- she said in her testimony that she never even read
17 Biddie Ware's Will -- she said "I walked out -- I don't know
18 much about it -- they told me to put my signature on it -- my
19 boss, essentially, told me to put, and I did it and I didn't
20 read it." So for those reasons I would ask that the
21 Respondent's Motions be dismissed, and that a Final Order be
22 entered.

23 The other important thing here is Biddie Ware died in 1998
24 -- the Respondent qualified as Executrix within days after her
25 death, and according to the Statute State Law requires that a

1 settlement be done within five (5) years which would be up this
2 September.

3 THE COURT: Well, Ms. Wilson, the -- the Jury must have
4 been persuaded by Ms. Lawson -- by her testimony that -- because
5 the Jury found that the Will had not been properly executed, and
6 they must have been persuaded of that by Ms. Lawson because, in
7 essence, she's the only one that testified to that.

8 MS. WILSON: That's correct, Your Honor. And the other
9 contention that Mr. Wilmoth alleged was that there wasn't much
10 testimony -- if you will recall this was several days long trial
11 where there was much testimony considering undue influence and
12 the invalid execution of the Will. There was -- we did not
13 allege incompetency -- that was not an allegation so there was
14 no testimony concerning that, but at the end the Jury Verdict
15 Form which I think I brought a copy with me if you need it
16 basically said "Was it -- was it executed properly? Check yes
17 or no." They checked no -- they didn't even bother to go on to
18 determine whether or not there was undue influence because of
19 the way the Jury Verdict Form read if you checked it was not
20 validly executed then you found in favor of the Petitioners --

21 THE COURT: Mm-hum.

22 MS. WILSON: -- which is what the Jury did.

23 THE COURT: Well, I -- I'm somewhat concerned about the
24 verdict because we have this Ms. Lawson that was a witness by
25 Deposition -- by Evidentiary Deposition -- that, in essence,

1 must have been the dispositive witness with the Jury, but I --
2 I'm concerned about two (2) things -- one (1), you have Ms.
3 Lawson who in 1997 signs under oath that, in essence, she did
4 these things. And then she has her Discovery Deposition -- she
5 says she really can't remember -- which is under -- perhaps
6 understandable, but then she gives an Evidentiary Deposition in
7 which she says she didn't do it.

8 MS. WILSON: Okay, if I could, Your Honor, just -- if I
9 could break in one (1) minute. In her Discovery Deposition it
10 was not asked -- she had a sketchy recollection of the events
11 that no one neither me nor Mr. Wilmoth just asked her -- did you
12 sign it in the presence of the Testator.

13 THE COURT: Did you sign it --

14 MS. WILSON: So if you -- and I can bring that -- I don't
15 have it with me, but I do recall reading that Deposition, and
16 that was never asked.

17 THE COURT: I -- I'll accept your representation. So she
18 -- she in 1997 signed the document under oath saying she did
19 these things, and then she gives an Evidentiary Deposition
20 wherein she says she didn't do these things, and it concerns me
21 about the -- about her credibility. That -- that's normally a
22 issue for the Jury to determine.

23 And I guess the second thing I'm concerned about is at
24 least it would appear -- although the subject of undue influence
25 is perhaps still out there, but it would appear to -- to me that

1 absent -- from just removing that issue of undue influence Ms.
2 Ware thought she was signing a valid Will. And, now, Mrs.
3 Lawson says she wasn't, and that concerns me.

4 Anything else? Mr. Wilmoth?

5 MR. WILMOTH: Just a couple things, Your Honor. The cases
6 Stevens versus Casdorph and Brammer versus Taylor are not as
7 factually similar to this -- the facts of this case as I think
8 they need to be for them to be controlling authority on the
9 situation. Secondly, the -- it's true that Ms. Ware did die in
10 1998 I believe in late August or early September of 1998 and
11 both Wills appointed Mrs. Conrad -- Mrs. Howell at the time --
12 now Mrs. Conrad as the Executrix of those -- of her Estate. She
13 did qualify to do that and the -- the reason that has not been
14 completed is because very shortly after that death that Mrs.
15 Wilson's clients began the process of contesting the contents of
16 the Will, and that -- that's the reason for the delay. It's --
17 it's obviously not Mrs. Conrad's refusal to do that.

18 THE COURT: Anything else, Mrs. Wilson?

19 MS. WILSON: Nothing that I can think of, Your Honor.

20 MR. WILMOTH: Your Honor, I do have -- if the Court would
21 like I have a copy of the Deposition of Ms. Lawson, and this was
22 taken in January 13th of 2001. She did appear in person in my
23 office for that purpose -- I did not inquire of her the specific
24 question as to whether or not she witnessed that Will in the
25 presence of Mrs. Ware. It was not asked of her in January -- it

1 was asked of her in November -- it's about five (5) page --
2 actually it's four (4) pages per page, but in the Deposition
3 it's about five (5) pages. I can provide the Court a copy of
4 that if you would like and --

5 THE COURT: No, I'll accept Ms. Wilson's representation she
6 just says the question wasn't asked.

7 MR. WILMOTH: Yeah, but -- but Ms. Lawson's testimony,
8 essentially, throughout the entire transcript of her Deposition
9 is "I don't recall -- I don't recall -- I don't remember." So
10 --

11 THE COURT: I guess the Saturday before trial she kind of
12 remembered it.

13 MS. WILSON: The only thing I would say, Your Honor, just
14 in close is there may be an issue regarding Ms. Lawson, but that
15 should not be a burden that my client should have to suffer.
16 According to our West Virginia Supreme Court -- according to our
17 West Virginia Supreme Court the Will is invalid based upon her
18 testimony -- the Jury chose to believe her. The charge which I
19 pulled out gives the Jury the right to believe or disbelieve
20 Cassandra Wilmoth, Sandra Harman, Rhonda Lawson -- any of those
21 witnesses. According to your Charge -- they could take the
22 testimony as they thought was appropriate, and it should not be
23 my clients that suffer from this. If there's a claim -- maybe
24 there's a claim against them I don't know, but if there's a
25 claim it's not against my clients and the Will should be held

1 invalid.

2 THE COURT: It doesn't appear your clients have done
3 anything wrong.

4 MS. WILSON: Exactly, Your Honor.

5 THE COURT: It appears that Ms. Lawson is the one that's
6 done something wrong by signing an Affidavit that she did
7 something, and then saying "No, I didn't do it."

8 MS. WILSON: Which is exactly what happened in that Brammer
9 decision where they took the Codicil to people later and they
10 notarized it as if they had signed in the day that the man came
11 into the Bank and signed the Codicil -- it's almost identical
12 except in that particular case there's no allegations of undue
13 influence. It was a man -- he came in and said, "Here's my
14 Codicil -- you sign it" -- and they take it and then they back-
15 date the Notary Stamp and say that those witnesses saw it so
16 it's almost identical to that, and in that particular case that
17 Codicil was held invalid.

18 THE COURT: Yeah, well, like I say, it appears that perhaps
19 at least this portion of the problem of this case is created by
20 Ms. Lawson signing an Affidavit that she did something, and then
21 saying "No, I didn't want to do it -- I lied."

22 MR. WILMOTH: Your Honor, that's -- that's the issue I
23 think I should have the opportunity to -- to investigate further
24 as to Ms. Lawson's credibility because she did in fact in 1997
25 say (a) -- in 1991 she said (b), and in -- in November of 1991

1 she said (c). And with the amendment to the pleadings taking
2 place the morning of the trial I certainly didn't have an
3 opportunity to -- to bring in any testimony concerning her
4 credibility or to cross examine her about her credibility in
5 regard to the Deposition and the Affidavit and things of that
6 nature that certainly would have been something for the Jury to
7 consider her credibility and the weight of the evidence, and you
8 counter that with testimony of Ms. Harman and Ms. Wilmoth. I
9 think the Jury should have the opportunity to revisit that.

10 THE COURT: Okay, well, it -- it is of very great concern
11 to me about Ms. Lawson changing her story -- changing her story
12 from signing the Affidavit in '97 to her trial testimony, but
13 that is an issue for the Jury to decide. But even though it's
14 an issue for the Jury to decide it's of concern also that the
15 matter arose so lately -- the issue arose so lately and that it
16 was I guess discovered -- other new testimony was discovered on
17 Saturday, and I guess was presented on Tuesday or something of
18 that nature.

19 So I'm going to do an unusual thing -- maybe the first time
20 I've ever done it, but it's with deep regret I'm going to grant
21 Mr. Wilmoth's motion and order that this case be set for a new
22 trial. I'm going to note your objection, Ms. Wilson, and I'm
23 going to do two (2) things, and I'll let you make a choice on
24 this, Ms. Wilson. I will set this rather quickly for a new
25 trial if you want, or I will simply enter that order saying --

1 or granting a new trial and let you appeal if you want to. And
2 you may want to think that over -- why don't you just let me
3 know sometime if you could maybe later this week because if you
4 want to appeal then I think you should have that right -- well,
5 you do have that right, but I'll make it convenient for you to
6 appeal. And if you don't want to appeal -- you simply want to
7 go to trial then let me know and I'll try -- because I've set on
8 this case to long -- I think we should get this thing resolved
9 -- I'll give you a quick trial date, and you'll have precedence
10 over many things -- not criminal cases -- perhaps the cases with
11 a whole bunch of experts, but I'll give you that -- a real high
12 priority.

13 Why don't you decide what you want to do and let Mr.
14 Wilmoth know, and you guys get back to me later let me know what
15 you want to do.

16 Anything else?

17 MR. WILMOTH: Nothing, Your Honor, thank you.

18 THE COURT: All right, Mr. Wilmoth, you do an Order to that
19 effect.

20 MR. WILMOTH: I will.

21 THE COURT: I will say I'm not sure this has ever happened.
22 All right, thank you.

23 THE BAILIFF: All rise. (Court adjourned).
24
25

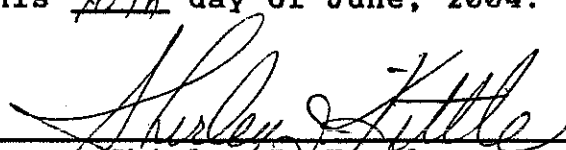
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STATE OF WEST VIRGINIA,
COUNTY OF RANDOLPH

I, Shirley J. Kittle, Electronic Recording Operator, Twentieth Judicial Circuit, Randolph County, West Virginia, hereby certify that I attended the Court proceedings had in the cause named and numbered in the caption hereto on April 8, 2002 and July 28, 2003, reported the proceedings had upon such cause by electronic audio recording, and that from the electronic recording tapes I have caused to be transcribed under my supervision the foregoing thirty-one (31) pages, and that same constitute the true and correct proceedings had on said cause to the best of my skill and ability.

I hereby certify that the transcript within meets the requirements of the Code of the State of West Virginia, 51-7-4, and all rules pertaining thereto as promulgated by the Supreme Court of Appeals.

WITNESS my hand this 10th day of June, 2004.



Shirley J. Kittle
Electronic Recording Operator
Twentieth Judicial Circuit Court
Randolph County Courthouse
Elkins, WV 26241