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	:	SUPERIOR COURT OF NEW JERSEY
IN THE MATTER OF THE	:	APPELLATE DIVISION
	:	DOCKET NO: A-003772-23 T4
ESTATE OF CHARLES	:	
	:	CIVIL ACTION
FREDERICK REINERT,	:	
	:	ON APPEAL FROM
	:	
Deceased.	:	SUPERIOR COURT OF NEW JERSEY
	:	
	:	DOCKET NO.: CAM-P-54-24
	:	
	:	Sat Below:
	:	
	:	Hon. James Bucci, J.S.C.

BRIEF OF APPELLANT, CHRISTOPHER HARZ

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PROCEDURAL HISTORY

The Appellant in this matter is Christopher Harz ("Appellant" or "Harz"). The Respondents in this matter are Brian F. Hughes ("Respondent" or "Hughes"); and Leslie Cerf ("Cerf"), Nan Rushton ("Nan"), David Rushton, Mark Rushton, Christopher Rushton, Daniel Rushton, and Frances Surowicz (collectively the "Rushtons"). (**Pa001-Pa043**).

Charles Fredrick Reinert ("Decedent" or "Charles"), died on September 10, 2023, at the age of 94. (**Pa044 ¶ 2**).

On September 14, 2023, Cerf filed a caveat protesting the admission to probate of "any paper purporting to be the Will of Charles Frederick Reinert, as well as the appointment of a personal representative," and wherein she specifically asserted being "made aware of a purported later Will of the Deceased." (**Pa183**).

On October 26, 2023, Harz also filed a caveat protesting the admission "to probate any paper purporting to be the Last Will and Testament of Charles Frederick Reinert…or the appointment of a personal representative." (**Pa064**).

On December 28, 2023, Cerf withdrew her caveat. (**Pa105-106**). Therein Cerf "acknowledge[d] that the Last Will and Testament of [Decedent], dated April 19, 2023, may be admitted to probate…and [Hughes] may be appointed as Personal Representative of the Estate." (**Pa106**).

On March 25, 2024, Respondent filed a Verified Complaint setting forth a

claim to set aside Harz's caveat and a claim for tortious interference with inheritance against Harz. As part of his complaint, Hughes also sought the admission to probate of Decedent's April 19, 2023 Will ("2023 Will"). (**Pa044-Pa127**).

On April 26, 2024, Harz filed an (1) Answer with Affirmative Defenses to Respondent's complaint (**Pa128-205**), (2) Motion for Leave to File a Counterclaim and Crossclaim (**Pa206-246**), (3) Motion to Compel the inspection and/or production of the Decedent's death certificate, original wills, and the file of Decedent's scrivener (**Pa247-265**), and the (4) Certification of Appellant (**Pa266-288**). Harz's counterclaim set forth claims against Respondent to compel the production of the Decedent's Will, certified death certificate and medical records; invalidate any wills of the Decedent due to his diminished capacity; invalidated any of his wills due to undue influence over the Decedent on the part Hughes; invalidate any wills due to fraud, deceit or mistake; and to permit discovery. Harz's crossclaim set forth a contribution claim against Cerf.

On May 17, 2024, the Certification of Helen Skoogh Harz, Appellant's wife, was filed in support of Harz. (**Pa289-292**).

On May 20, 2024, Rushtons, Cerf and Nan, filed Certifications in support of Respondent. (**Pa293-296; Pa347-348**). No other pleadings were filed by the Rushtons, however they joined, by a letter to the Court, with Respondent's request to admit the 2023 Will. (**Pa347-348**).

On May 21, 2024, a hearing was held before the Court and thereafter an order was issued setting aside Appellant's caveat; admitting Decedent's April 19, 2023, Will to probate; appointing Respondent as Executor of Decedent's estate; denying all Appellant's motions and including a request for discovery; and dismissing the Respondent's claims against Appellant for tortious interference with inheritance. (**Pa011-012**).

On June 11, 2024, Appellant filed a Notice of Motion for Sanctions Pursuant to R. 1:4-8 and N.J.S.A. 2A:15-59.1 and a Notice of Motion Seeking to Alter and Amend the Judgment or Final Order Pursuant to R. 4:49-2 and for an Allowance and Award of Attorney's Fees and Costs Pursuant to R. 4:42-9(a)(3). (**Pa277-345**). These motions were hand delivered to the Surrogate Court on June 10, 2024.

Appellant's motions were heard on July 10, 2024, and the Court issued an order denying Appellant's requests. (**Pa011**).

On August 1, 2024, Appellant filed a Notice of Appeal. (**Pa001-023**).

On August 13, 2024, Appellant filed an Amended Notice of Appeal. (**Pa024-043**).

On November 22, 2024, the Transcripts were delivered to the Appellate Division (**Pa345**).

STATEMENT OF FACTS

Charles Fredrick Reinert ("Decedent" or "Charles"), died on September 10,

2023, at the age of 94. (**Pa044 ¶ 2**). Charles was married twice, did not have any children, and died a widower. (**Pa045; Pa131 ¶s 4 and 5**).

Appellant, Christopher Harz ("Appellant" or "Harz"), is the nephew of Charles. (**Pa045 ¶ 5, Pa175; Pa273**). Specifically, the Appellant is Decedent's sister's son. (**Pa266 ¶s 1 and 2; Pa175; Pa273**).

Decedent had two (2) additional nephews, namely, Richard J. Lippincott, III ("Lippincott"), and Carl F. Harz. (**Pa045 ¶ 5; Pa267 ¶ 6**).

Edward F. Arnett ("Arnett") is named as a beneficiary in purported prior wills of Decedent and is an interested party. (**Pa083 ¶ 4.01; Pa090 ¶ 4.02; Pa098 ¶ 4.02**). At the hearing, counsel for Appellant alerted the Court that Mr. Arnett did not receive notice of Respondent's complaint in this matter from opposing counsel and he, Mr. La Ratta, did not deny having failed to notice Arnett. The Court also did not notify Arnett. (**1T14 lines15-19; 1T17 lines 16-17**).

Respondent, Brian Hughes, resides at 124 Colonial Ridge Drive, Haddonfield, New Jersey. (**Pa169**). Respondent offers no other facts to the Trial Court to describe and/or even establish the circumstances or duration of his purported relationship with Decedent, but for his address which confirms only that Respondent lived on the same street as Charles for the brief period that Charles resided in Haddonfield.

The Rushtons are not relatives of Decedent but instead are the adult children and one grandchildren (Surowicz) of Decedent's second wife, Frances Rushton, who

Charles had been married to for only a year before she passed, in 2019. (**Pa045-046 ¶s 5-6**).

Charles was married to his first wife, Jean McMaster Reinert ("Jean"), for approximately 60 years. (**Pa045; Pa131 ¶ 4; Pa 215 ¶ 14; Pa267 ¶ 7**). Charles and his first wife purchased 26 Laurel Drive, Cherry Hill, New Jersey in 1959, and were lifelong residents of Cherry Hill until a period after his first wife's passing in 2017. (**Pa130 ¶ 3 and 131 ¶ 4; Pa 215 ¶ 14; Pa267 ¶ 7**). Decedent's only sibling, Joan Harz, passed away in January of 2014. (**Pa267 ¶5; Pa275**).

Harz has known Charles since he was child, and they enjoyed a close and loving relationship. (**Pa267 ¶s 8 and 9; Pa290 ¶ 13**). Throughout his life, Appellant and his family would visit and share holidays and other events with Charles and Jean and would frequently visit with them. (**Pa267 ¶ 10; Pa290 ¶ 8**). Decedent taught Appellant about boating and sailing. (**Pa267 ¶ 11**). Decedent emphasized and instilled upon Appellant the importance of discipline and responsibility. (**Pa267 ¶ 13**). Decedent instructed Appellant how to maintain and care for Decedent's shore property and later relied on Appellant to care for and maintain the property as needed. (**Pa290 ¶ 10**). Charles and Harz also shared the same interests and enjoyed having discussions regarding the same. (**Pa267 ¶12; Pa290 ¶ 11**).

Appellant is married to Helena Skoogh Harz ("Helena"), and they have a teenage son named Leo. (**Pa289 ¶s 2 and 3**). Helena has known Decedent since

2005. (**Pa289 ¶ 4**). She loved Charles and found him to be a charming and sweet man. (**Pa290 ¶ 6**). Charles attended her wedding to Harz. (**Pa290 ¶ 7**). Helena, Appellant, Decedent and Jean shared meals and went out to dinner to BYOB restaurants. (**Pa290 ¶s 8 and 9**). Helena and Charles joked about their shared Swedish heritage. (**Pa291 ¶ 15**). The Decedent took an interest in Appellant's family's life whenever they were together. (**Pa290 ¶ 12**).

Charles purportedly executed a Will in 2016 ("2016 Will") leaving the entire residue of his estate to his first wife Jean and then to Lippincott and Arnett in equal shares should Jean predeceases him. (**Pa097-Pa103**). This Will makes no reference to "nephews."

Jean passed away on October 18, 2017. (**Pa278**).

After Jean's passing in 2017, Charles, then 88 years old, married his second wife, Frances Rushton ("Frances"), in or around June 2018. (**Pa045 ¶ 5; Pa268 ¶ 22**). Frances owned and resided at 125 Colonial Ridge Drive, Haddonfield, New Jersey prior to and at the time of her marriage with Decedent. (**Pa185-192; Pa195 ¶ "Fourth"**).

Respondent resides at 124 Colonial Ridge Drive, Haddonfield New Jersey. (**Pa044**). There is no information on the record identifying when Respondent moved to Haddonfield or identifying the duration of the purported relationship between Charles and Respondent. (**Pa0440127; Pa293-296; Pa347-348**).

On May 22, 2018, Frances Rushton executed a Last Will and Testament that, in part, granted Charles a life estate in the Haddonfield property should he survive her. (**Pa195-196 ¶ "Fourth"**). This Will was drafted by the office of counsel for the Rushtons and specifically by the same counsel who filed Cerf's caveat, namely Raymond G. Console. (**Pa183; Pa194-205**).

On November 26, 2018, Decedent's home in Cherry Hill, New Jersey was sold. (**Pa177-181**).

On November 30, 2018, Decedent purportedly executed a Last Will & Testament bequeathing 50% of the residuary of his Estate to Frances and 25% of the residuary to each of two "nephews, per stirpes" and the document them as "Richard J. Lippincott" and "Edward F. Arnett". (**Pa089-095**). The November 2018 Will ("2018 Will") names Frances as the Executrix and names Lippincott and Arnett as successor Executors. (**Pa091 ¶ 5.01**). None of the Rushtons are named in the November 2018 Will as fiduciaries and/or beneficiaries. (**Pa090-091 ¶ 4.01-4.03**).

Arnett is not the Decedent's nephew. (**Pa268 ¶ 20**).

Frances passed away on June 9, 2019. (**Pa269 ¶ 25; Pa281**).

Appellant and his wife, Helena, attended her funeral in June 2019. (**Pa269 ¶ 26; Pa291 ¶ 16**). At the funeral, Decedent seemed confused and was sitting in a room apart from the main service and during this funeral Decedent mistook Appellant for his brother, Lippincott, twice, despite the fact they do not resemble

each other. (**Pa269 ¶s 27-29; Pa291 ¶s 16 and 17**).

Decedent resided in Frances's Haddonfield residence after she passed away in 2019. (**Pa294 ¶ 10**). It became more difficult for Harz to reach Charles by telephone after his second wife passed away in 2019 and many of Harz's telephone messages for Charles were not returned. (**Pa269 ¶ 30**). Decedent advised Appellant that the Rushtons cared for him on the occasions he was able to contact him by telephone. (**Pa269 ¶ 31**).

Prior to his passing, Charles "was forgetting things; he could no longer take care of his bills; stopped eating properly…[and] was not taking his medication[;] unable to care for himself" (**Pa270 ¶ 37; Pa270 ¶39; Pa291 ¶ 21**). After Frances's passing, certain if not all of the Rushtons began providing care and assistance to Decedent which included "driving for the Decedent." (**Pa269-270 ¶s 31, 38 and 39; Pa291 ¶ 22**). Nan Rushton also assisted Decedent in managing his voicemail messages when she visited his home. (**Pa296 ¶ 13**). The Rushtons moved Charles to an assisted living facility in or around November 2022, because he unable to care for himself and concerns for his safety." (**Pa269 ¶ 32; Pa270 ¶s 36 and 39; Pa291 ¶ 20; Pa294 ¶ 10**).

Charles, less than two months after Frances's passing, purportedly caused an attorney to draft a new will in August of 2019 (2019 Draft Will). (**Pa082-087**). The 2019 Draft Will bequeathed 50% of his estate to his "nephews, per stirpes," however,

once again the document identified Lippincott and Arnett as the same, despite Arnett not being the Decedent's nephew. (**Pa083 ¶s 4.01-4.02**). This draft was never signed, and it is the first document wherein the Rushtons were allegedly named as beneficiaries and Cerf as his "Executrix."

Almost exactly one (1) year later in August 2020, Decedent, now 91, allegedly executed another will ("2020 Will"). (**Pa075-080**). The 2020 Will removed any reference to Decedent's "nephews," including any reference to Lippincott and Arnett and instead, purportedly left the entirety of his estate to the Rushtons. (**Pa076 ¶ 4.01**). The 2020 Will was the first purported Will, allegedly executed by the Decedent, to bequeath any assets to the Rushtons and only occurred after their mother, who was married to the Decedent for one year, had passed.

Another year later in September 2021, Charles, now 92, without explanation, allegedly executed a Will ("2021 Will") identical to the 2020 Will. (**Pa068-073**).

In or around November 2022, Charles was moved into The Residence at Cherry Hill, an assisted living and memory care facility. (**Pa269 ¶ 32**).

On January 11, 2023, Cerf, in her capacity as the Executrix of the Estate of Frances Rushton, and Decedent executed a Deed extinguishing Decedent's life estate in the Haddonfield property and selling same for the listed sale price of $859,900.00. (**Pa185-189**). There was no explanation on the record whether the Decedent received any proceeds from this sale which extinguished his life estate.

On or about April 7, 2023, Decedent's doctor, Robert J. Maro Jr., MD, purportedly drafted a letter addressed to Decedent's scrivener, "Francis X. Ryan, Esquire." (**Pa066**). This letter states, in part, that Charles has a "history of hypertension, arthritis, and coronary disease…with cerebrovascular disease…[and] [h]is neurological examination in normal, with mild short-term forgetfulness, an excellent long-term memory." (**Pa066**). The letter adds that Dr. Maro purportedly "believe[d]" that Decedent was "medically, physically, and mentally able to proceed with any legal issues," and also stated that Charles "…is able to appoint a **power of attorney**, and able to understand all the ramifications of adjusting his will." (**Pa066**) (**Emphasis added**). No certification of Dr. Maro was submitted at the time this matter was heard by the Trial Court nor were any medical records to support the assertions in this letter.

Two weeks later on April 19, 2023, Decedent, now 94, purportedly executed the subject 2023 Will. (**Pa058-Pa062**). The 2023 Will referenced Respondent for the first time and designated him as Decedent's fiduciary and largest single beneficiary of his estate, receiving 30% thereof. (**Pa059 ¶ 4.01**). The Rushtons' collective share decreased from 100% to 70% with each getting 10% in the subject will. The 2023 Will also names Respondent as the "Executor" of the estate and demotes Cerf to the successor role. (**Pa059 ¶ 5.01**). On April 19, 2023, Respondent was also appointed as the Decedent's attorney-in-fact pursuant to a power of attorney

five months before the Decedent's passing. (**Pa066; Pa232 ¶ 105 c.**).

Charles died on September 10, 2023, at the age of 94. (**Pa044 ¶ 2**).

On September 14, 2023, four (4) days after Charles passed, Cerf filed a Caveat with the Surrogate wherein she alleged and asserted, in part, that she is "a beneficiary and executor under a prior Will of the Deceased [and] **having been made aware of a purported later Will of the Deceased**...does hereby caveat and protest against admitting to probate any paper purporting to be the Will of Charles Frederick Reinert." (**Pa183**) (**Emphasis added**).

Decedent's funeral took place on September 29, 2023, and Appellant attended the same with his wife Helena, son Leo, and mother-in-law, Siv. (**Pa270 ¶ 34; Pa291 ¶ 18**). After Decedent's funeral, there was a luncheon that Appellant and his family also attended . (**Pa270 ¶ 35; Pa291 ¶ 19**). During the luncheon Cerf and Nan moved to sit with Harz and Helena and converse about Decedent. (**Pa270 ¶s 35; Pa 290 ¶ 20**). Specifically, Cerf and Nan confirmed to the Appellant and his wife that Decedent was unable to take care of himself prior to his passing and that they, Cerf and Nan, were concerned for Decedent's safety and moved him to an assisted living facility. (**Pa270 ¶s 36 and 39; Pa 290 ¶ 20**). Cerf and Nan also confirmed to the Appellant and his wife that Decedent was increasingly forgetful, unable to pay his bills and/or take his medication and unable to care for himself. (**Pa270 ¶s 37; Pa 290 ¶ 21**). Cerf and Nan further confirmed to the Appellant and his wife that they

had provided care and assistance to Decedent, including transportation and managing his telephone messages and usage; that they, Cerf and Nan, were aware of Appellant's attempts to contact the Decedent over the years and should have returned Appellant's calls to his uncle; (**Pa270 ¶s 38 and 40; Pa291-292 ¶s 22 and 23; Pa296 ¶ 13**).

In her certification, Cerf confirms meeting Harz at Decedent's funeral and inviting Harz to the luncheon. (**Pa293 ¶s 5 and 7**). Cerf confirms "exchanging pleasantries with Harz and speaking about Charles in general terms." (**Pa293 ¶ 8**). Cerf asserts she "knew Charles had a family consisting of nephews, but Charles never mentioned Harz by name." (**Pa293 ¶ 6**). Cerf specifically denies informing "Harz that Charles stopped eating or was not taking his medication," as per paragraph 37 of his Certification. (**Pa294 ¶9**). However, Cerf does not specifically deny informing Harz that Charles was "forgetting things…[and] could no longer take care of his bills," as set forth in Appellant's Certification. (**Pa270 ¶ 37**).

In her certification, Nan also confirms meeting Harz at Decedent's funeral and inviting him to the luncheon. (**Pa295 ¶ 6; Pa296 ¶ 10**). Nan confirms having "the opportunity to speak with Harz" at the funeral and that "Harz asked multiple questions regarding Charles including the events surrounding the passing of Charles as well as his living arrangements in the years prior to his death." (**Pa296 ¶ 11**). Nan also certifies she "often assisted Charles in managing his voicemail messages upon

my many visits to his home." (**Pa295 ¶ 7**). Nan does not specifically deny informing Harz that Charles stopped eating and could not take his medications and could no longer care for himself. Nan also alleges that, after Decedent's passing, his nephew, Lippincott, contacted Nan and asked her to plan Decedent's funeral given her "relationship with Charles." (**Pa296 ¶ 11**). Again, Decedent passed away on September 10, 2023, and four (4) days later Cerf filed her caveat with the Surrogate. (**Pa183**). On October 26, 2023, Appellant also filed a caveat with the Surrogate wherein he alleged and asserted, in part, that he, as the "nephew and intestate heir of the [Decedent]...does hereby caveat and protest against: (1) admitting to probate any paper purporting to be the Last Will and Testament of Charles Frederick Reinert." (**Pa064**).

On November 1, 2023, counsel for Appellant sent a letter to counsel for Cerf enclosing a copy of Appellant's filed caveat and requesting, in part, "a copy of any and all estate planning documents allegedly executed by the Decedent," including but not limited to the "purported 2021 Will, and the 2023 Will…and powers of attorney…and death certificate." (**Pa163-164**). No response was received from Mr. Console to this letter.

On December 15, 2023, counsel for Appellant sent a letter to Respondent requesting, in part, copies of "any previous Wills, along with codicils thereto…Mr. Reinert's death certificate… [and] powers of attorney." (**Pa169-170**). No response

was received to this letter from Respondent.

On December 22, 2023, another letter was sent to counsel for Cerf again Appellant renewed his requests for "copies of any estate planning documents allegedly executed by the Decedent." (**Pa165-167**). No response to these requests was ever received from counsel for Cerf.

However, on December 29, 2023, counsel for Appellant received a letter from Mr. La Ratta, counsel for Respondent, enclosing a copy of Cerf's withdrawal of her caveat and copies of five (5) purported wills executed by Charles including the 2023 Will offered for probate. (**Pa108-111**). A copy of a purported 2019 Draft Will was also provided. Cerf's caveat was withdrawn the day before on December 28, 2023. (**Pa105-106**). According to his Verified Complaint, Respondent was in possession of the original 2023 Will. (**Pa009 ¶ 9**).

On March 25, 2024, Respondent filed a Verified Complaint again seeking, in part, to probate the 2023 Will only. (**Pa044-Pa127**). Respondent's complaint did not contain a copy the Decedent's death certificate. The complaint presented no facts regarding the existence of any original versions of any other prior wills of the Decedent or the circumstances related to the execution of the aforementioned wills or their revocation or destruction. It contained no facts describing the circumstances causing Cerf to withdraw her caveat. Additionally, no facts were presented to the Trial Court explaining how the Rushtons became beneficiaries of Decedent's estate

for the first time under a purported 2020 Will, when Decedent was approximately 90 years old and he was only married to their mother for a year. Further, at that time (2020) the Rushtons had only known the Decedent for a couple of years. Similarly, no explanation was provided as to how Respondent became the executor and the largest single beneficiary of the Decedent's estate on April 19, 2023 only five months before the Decedent's passing.

All the purported prior wills and draft will of the Decedent were submitted to the Trial Court by the Respondent without a certification of their scrivener, Francis X. Ryan, Esq. ("Mr. Ryan" or "Scrivener"), as to their authenticity, creation, drafting, destruction, revocation, or whether other wills do or have existed.

Charles never spoke to Harz, or his wife about a friend and/or acquaintance named Brian Hughes; and Harz and his wife do not know Hughes. (**Pa271 ¶s 43 and 44; Pa292 ¶s 25 and 26**). The Respondent's complaint and the Rushton certifications are also devoid of any information describing the purported relationship between Respondent and Charles.

Again, prior to the filing of Respondent's complaint, Appellant made several requests to inspect the relevant documents in the possession of Respondent, the Rushtons, the Scrivener, and/or the Decedent's medical service providers. All these requests were summarily denied by all the Respondent and the Rushtons.

The Trial Court also denied Appellant any opportunity to conduct discovery

in this matter or, at very least, allow for the inspection of the scrivener's file.

LEGAL ARGUMENT

I. Standard of Review for Summary Actions

A. The Appellate Court's Standard of Review is *De Novo* As The Trial Court's Findings of Fact are Based Solely Upon Documentary Evidence and Makes No and/or Improper Credibility Determinations

No special standards of appellate review govern summary actions conducted pursuant to Rule 4:67. The Appellate Court's review of summary actions conducted pursuant to R. 4:67 applies the usual standard for civil cases. O'Connell v. N.J. Mfrs. Ins. Co., 306 N.J. Super. 166, 172-73 (App. Div. 1997) (applying substantial-credible-evidence standard in reviewing a decision from a summary action). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974). Further, the Appellate Court will decline to disturb "factual findings and legal conclusions of the trial judge unless convinced that [they] were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596, 619 (2017) (quoting Rova Farms Resort v. Inv'rs. Ins. Co., 65 N.J. 474, 484 (1974)).

However, when a court makes findings of fact based on documentary evidence alone, no special deference is warranted. Clowes v. Terminix Int'l, Inc., 109 N.J.

575, 587 (1988); Jock v. Zoning Bd. Of Adjustment of Wall, 371 N.J. Super. 547, 554 (App. Div. 2004), rev'd on other grounds, 184 N.J. 562 (2005). And "[o]ur review of a trial judge's legal conclusions is de novo." Walid v. Yolanda for Irene Couture, Inc., 425 N.J. Super. 171, 179-80 (App. Div. 2012).

Moreover, the scope of appellate review is expanded when the alleged error on appeal focuses on the trial judge's evaluations of fact, rather than his or her findings of credibility. Snyder Realty Inc. v. BMW of N. Amer., 233 N.J. Super. 65, 69 (App.Div.1989) ("[W]here the focus of the dispute is not on credibility but, rather, alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom the appellate function broadens somewhat.").

Further, a trial judge's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995). In cases such as these the Appellate Court's review of a trial judge's legal conclusions is *de novo*. 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 476 (App. Div. 2006) (citing Rova Farms, supra, 65 N.J. at 483–84).

In the subject matter, the Trial Court did not take any testimony and, therefore, could not make any credibility determinations. Instead, it relied solely on the documentary evidence of record and speculative factual assertions and assumptions. The Trial Court relied on the unverified suppositions of Respondent Hughes's

counsel and made factual assumptions and/or inferences of its own which were favorable to the Respondent. As such, the Appellant Courts standard of review in this matter is *de novo*.

II. The Trial Court Erred in Denying Appellant's Leave to File a Counterclaim and Crossclaim as the Claims Set Forth Therein are Part of the Same Controversy Set Forth in Respondent's Complaint. (Pa011 ¶3; 1T4 lines 9-16; 1T49 lines 17-19)

Appellant hereby also incorporates herein the arguments and proper facts of record set forth and identified in sections I through VI of this Brief for the Appellate Court's consideration on this issue.

Rule 4:67-4(a) provides that "No counterclaim or crossclaim shall be asserted without leave of court" regarding summary actions filed pursuant to Rule 4:67. The entire controversy doctrine requires defendant to seek leave to file the counterclaim or crossclaim in order to preserve the claim. The entire controversy doctrine is premised upon "the fundamental principle…that 'the adjudication of a legal controversy should occur in one litigation in only one court[.]'" DiTrolio v. Antiles, 142 N.J. 253, 267 (1995) (quoting Cogdell v. Hospital Ctr., 116 N.J. 7, 15 (1989)).

New Jersey Rule of Court 4:67–1 is designed "to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment while at the same time giving the defendant an opportunity to be heard at the time plaintiff makes his application on the question of whether or not summary disposition is appropriate." Pressler & Verniero, Current N.J. Court Rules,

comment 1 on R. 4:67–1 (2024). See also, Grabowsky v. Twp. of Montclair, 221 N.J. 536, 115 A.3d 815 (N.J. 2015) (citing this text with respect to an improper dismissal under this rule).

To determine whether different claims are part of the same controversy, "the central consideration is whether the claims…arise from related facts or the same transaction or series of transactions. It is the core set of facts that provides the link between distinct claims against the same…parties and triggers the requirement that they be determined in one proceeding." Id. at 267-68 (citations omitted).

Appellant, as next of kin and intestate heir of Decedent, should have been permitted to file and proceed with his counterclaim and crossclaim and proceed to discovery. The causes of action set forth in Appellant's counterclaim obviously arise out of the same facts and circumstances as the Hughes complaint. The facts and circumstances are material and relevant to the complaint and counterclaim and occurred during the same time period; affected and included the same individuals and estate; and dealt with the same issue. Specifically, both seek to determine Decedent's intent regarding the final disposition of his estate.

Appellant also filed a crossclaim against Cerf arising out of the same facts and circumstances in the complaint related to the Respondent's claim for tortious interference with inheritance against the Appellant.[1]

[1] Respondent's tort claim against Appellant was dismissed and, as such, the denial

The Trial Court recognized all the parties' claims dealt with the same controversy when it stated that "essentially, Mr. Hughes wants to have this matter to probate. Mr. Harz wants this matter to go to the next step and have the parties take discovery. That's in simple terms. So again, Counsel, I've read all the papers. However, briefly, I will give the parties an opportunity to make one argument." (**1T4 lines 17-24**). After arguments, the trial court noted that it was "not looking for clear and convincing evidence at that point…[but] looking to see whether there's a…disputed issue of material fact. It has to be of consequence. What is the fact? Is it of consequence?" (**1T40-8-13**).

However, the Court denied Appellant's motion for leave to file his claims despite the same obviously involving the same controversy. The Court held Appellant had "the ability to challenge;" and that "just based on [Appellant's] certifications alone… makes this matter being one brought in good faith." (**1T49 lines 17-18; 1T50 lines 2-4; 2T21 lines 17-20**). The Court also held that the filing of the caveat by Appellant was "not frivolous." (**2T22 lines 1-5**).

Procedurally, the motion for leave should have been granted pursuant to the straightforward standard set forth in Rule 4:67.

III. The Trial Court Erred in Failing to Order the Matter to Proceed as a Plenary Action As Contested Issues of Material Facts Exist. (Pa011 ¶s 1-4; 1T43 lines 14-17; 1T13 lines 4-7; 1T48 lines 21-24)

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of Appellant's request for leave to file his crossclaim is not an issue on appeal.

Appellant hereby also incorporates herein the arguments and proper facts of record set forth and identified in sections I through VI of this Brief for the Appellate Court's consideration on this issue.

Plenary hearings are required when there are "contested issues of material fact on the basis of conflicting affidavits." Conforti v. Guliadis, 128 N.J. 318, 322-23 (1992). This matter should have proceeded as a summary action because the Court identified several contested issues of material facts based solely upon the conflicting allegations in the verified pleadings and certifications filed by the parties and the documents relied upon by the Court.

A. The Trial Court Erred in Failing to Recognize or Consider Certain Contested Facts at Issue and of Record as Material.

Generally, the location of any decedents' residences and/or the periods residing therein and the individuals who have easy, direct, and/or frequent access to the decedent are undoubtedly material facts of great importance in estate matters and especially when a claim of undue influence is asserted.

In this matter, Appellant contested Respondent's allegation that Decedent was a "long-time resident of Haddonfield, New Jersey." (**Pa045 ¶ 3**) (**Emphasis Added**). Appellant alleges Decedent was resident of Cherry Hill, New Jersey for the majority of his 94 years of life. (**Pa130-131 ¶ 3; Pa267 ¶s 7 and 10**) (**Emphasis Added**). Further, Appellant contends that Decedent may have, at most, resided in Haddonfield from June 2018 through November 2022. (**Pa269 ¶s 24 and 32; Pa 270**

¶ 39; Pa291 ¶ 20; Pa294 ¶10). Hughes resides at "124 Colonial Ridge Drive, Haddonfield, New Jersey." (**Pa044**). Frances Rushton, Decedent's second wife, resided at "125 Colonial Ridge Drive, Haddonfield, New Jersey." (**Pa048 ¶ 14; Pa136 ¶ 14; Pa269 ¶ 24**). As noted, Decedent did not marry Frances Rushton, his second wife, until June of 2018 and Decedent ceased residing at the Haddonfield property in November of 2022, when he was moved to a care facility.

Respondent sets forth no other specific facts describing the extent or duration of his relationship with Decedent or when Respondent moved to Haddonfield. Therefore, according to the record, it is unknown why Hughes became a 30% beneficiary to Decedent's estate but for the windfall of Charles moving in across the street from Hughes after his marriage to Frances Rushton in 2018. Further, despite allegedly being Decedent's neighbor for, at most, the four years while he was at the Haddonfield property, Respondent did not make it into the alleged 2019 Draft Will, nor the alleged executed duplicate Wills of 2020 and 2021.

The Trial Court confirmed that the residence was of consequence and went so far as to infer (in Hughes's favor) that since he was a "neighbor" of Decedent in Haddonfield, no other explanation or facts would be needed to justify his sudden inclusion in the 2023 Will of Decedent, a 93-year-old man, who was a non-relative of Respondent and who was committed to an assisted living facility nearly a year prior to the drafting of that Will. Nor did the Court, apparently, place any

significance on the fact that this 93-year-old man passed away only five months later in September of 2023. (**1T18 lines 18-25; 1T19 lines 1-11**). By this logic, if Hughes was not a "neighbor" of the Decedent, the Court would have needed an explanation as to why Hughes, a non-relative, was added to Decedent's 2023 Will even though he was not included in four (4) purported prior wills.

For these reasons, the duration of time Charles resided in Cherry Hill is a contested and material fact, as well as the timing and location of Decedent's move to Haddonfield when in his nineties and then his subsequent move to an assisted living facility in 2022. These facts are material and significant when coupled with the circumstances surrounding the sudden inclusion of the non-relative Respondent and Rushtons in Decedent's purported wills and is certainly one of many suspicions circumstances in this matter.[2] In addition, the move to Haddonfield provided the Respondent and the Rushtons with direct and unfettered access to Decedent thus giving them the opportunity to unduly influence Charles and cause him to execute several wills for their own benefit.

The facts set forth in this section are certainly contested issues that exist in the record and are material.

B. Several Contested Issues of Material Facts Exist on the Record in This Matter.

[2] Cerf filed a caveat four (4) days after Charles passed away upon having learned that her mother's neighbor, Respondent, was named a newly named beneficiary of Charles's estate in addition to the Rushtons.

The Trial Court also failed to identify several contested issues of material facts that exist on the record in this matter. Other such facts are included in other sections of this brief and are incorporated herein for the Appellate Court's consideration.

Specifically, the Court would have perhaps been required to inquire as to why after ninety years of life, the Rushtons, adult children of the Decedent's second wife, to whom he was only married a year, suddenly became the exclusive beneficiaries of Decedent's estate in 2020, when he was mourning the loss of his second wife, and no longer living in his former home. Specifically, none of the Rushtons are included in any of Decedent's purported wills until **after** his second wife's passing and while Charles continued to reside in the Haddonfield property pursuant to a life estate under the control of Cerf. (**Pa195 ¶ "Fourth"; Pa202 ¶ "Fourteenth"**).

The Rushtons are named as beneficiaries in the alleged identical 2020 and 2021 wills of the Decedent.[3] No explanation is given as to why the Decedent would all of a sudden and so late in life, bequeathed the entirety of his estate to these newly acquainted adult "children" of a woman he had only known for a few years and do so in two identical Wills executed almost exactly a year apart.

[3] The purported identical wills naming the Rushtons is also a contested issue of material fact that exits as it is unknown why and/or who deemed it necessary. For instance, if the Rushtons requested them, it could be argued that they wanted to ensure that they could negate any allegations of undue influence regarding the 2020 Will with the 2021 Will. The Scrivener could have some information relevant to this contested material issue.

The residency and/or the living arrangements of Decedent and his mental and physical health are also material and probative in relation to the Decedent's capacity before the 2023 Will was executed. Charles was moved to an assisted living facility in November 2022. This move was predicated by the fact that Charles, according to Leslie and Nan, could no longer care for himself and no longer live independently. These facts are significant and relevant to Decedent's capacity and whether the Decedent was of sound mind or suffering from diminished capacity when the 2023 Will was executed.

Appellant also specifically denied the authenticity of the 2023 Will, prior Wills, Dr. Maro's letter, and that Charles had testamentary capacity, throughout Appellants Answer and Counterclaim and these denials are supported by the facts of record. (**Pa128-129 ¶ 1; Pa133 ¶s 8 and 9; Pa 134 ¶s 10 and 11, Pa135-145 ¶s 13-32; Pa213 ¶s 1 and 2; Pa217 ¶s 29, 30, 31 and 32; Pa219 ¶ 40; Pa220 ¶ 49; Pa223 ¶s 60, 61 and 62; Pa224 ¶s 63-66; Pa225 ¶s 67-72; Pa226 ¶s 73-75; Pa231-232 ¶s 102 and 103; Pa232-235 ¶ 105 a-q. – 107; Pa236 ¶s 109-111**).[4] In particular, Dr. Maro's purported letter to the scrivener raises the specter of diminished capacity such that the Decedent was susceptible to the undue influence of Hughes, and for

[4] Several of the paragraphs referenced are also material and bolster Appellant's undue influence, diminished capacity and mistake, coercion, and fraud claims.

that matter, the Rushtons.[5]

This uncertified letter, which the Appellant was not given an opportunity to vet, stated that Decedent "has a history of hypertension, arthritis, and coronary disease [and]…[he] also has mild forgetfulness, with an intact long-term memory, with cardiovascular disease" that "he believed that [Decedent was] "medically, physically, and mentally able to proceed with any legal issues," including a "power of attorney."[6] The letter was apparently deemed necessary by the scrivener before the 2023 Will could be drafted. (**Pa066**).[7] When counsel for Hughes was asked by the Court, "[w]hat was the reason why that letter was obtained in 2023," Mr. La Ratta stated, "[w]ell Your Honor, I wasn't around at that point in time. We would have to ask Mr. Ryan that question." (**1T7 lines 2-6**). Mr. Latta further speculated

[5] Prior to the Respondent filing his Complaint, Appellant's counsel also made several informal requests to counsel for Respondent and the Rushton Parties to inspect all the wills identified by Respondent, the scrivener's file, and death certificate, but these requests were summarily denied. (**Pa168; Pa165; Pa171; Pa245**). These refusals are also material facts to be considered.

[6] If a power of attorney was also executed in April 2023 naming Hughes as Decedent's agent based upon Dr, Maro's letter, a confidential relationship between them may exist. Certainly, if the Decedent was naming him executor in 2023, he would likewise name Hughes as attorney-in-fact. However, the court didn't allow discovery on the same.

[7] Dr. Maro's purported letter was intentionally omitted from Mr. La Ratta's January 31, 2024 letter along with his short-term forgetfulness and cerebrovascular disease diagnosis of Decedent. As such, Appellant cannot confidently believe other documents regarding the Decedent's health and mental condition, beneficiary designations, Wills and/or estate planning file. **(Pa117-119; Pa224 ¶ 64**).

that "[b]ut I assume that he predicted that somebody would want to contest the will, I would presume," and in response the Court agreed and stated, **"[t]hat's what I assume as well, but again, that's what the [Appellant] wants to know…[t]hat's his argument. I should be entitled to discovery to find that out.**" (**1T7 lines 8-15**). Here the Court agrees with counsel's guess and therefore accepts that the scrivener of the 2023 Will "predicted that somebody would want to contest the will," prior to its drafting (**1T7 lines 8-10**). Surely, if the Court believes the scrivener "predicted" that the 2023 Will would be contested, without more, it would be just as reasonable to assume that Charles was suffering from diminished capacity or a lack thereof, and/or that someone new had entered Decedent's life, at such a late stage, and maybe unduly influencing him. This is especially true in light of these and other suspicious circumstances surrounding the execution of the 2023 Will and the lack of a certification from its scrivener.

The lack of a certification from Mr. Ryan, the scrivener, is also troubling given that there is no way for any party nor the Court to know whether additional Wills were executed in between those presented by Respondent's counsel or before the Wills which were presented by said counsel. In fact, without a certification of the scrivener or a witness to the documents, there is a genuine issue of a material fact as to whether these documents are actually copies of the Decedent's former wills or accurate copies thereof.

Further, there is no context given by the scrivener as to why the doctor's letter was necessary, or if the scrivener knew that the Decedent was in a care facility and couldn't manage his own voicemails or care for himself. There is no context as to whether and/or when the neighbor, namely Respondent, became the Decedent's attorney-in-fact, as per a reference in Doctor Maro's letter, thus giving further support for a confidential relationship between the two. (**Pa066; Pa232 ¶ 105 c.**). There is no context given by the scrivener as to how, why or when the prior wills were revoked or the new wills were executed. The sole "evidence" that the Trial Court relied upon, to deny discovery to Appellant, a nephew who knew the Decedent for his entire life, were "copies" of purported prior wills, unsupported by certifications but taken as true based upon Respondent's counsel's speculation.

In addition to the foregoing, Cerf and Nan filed self-serving certifications on the eve of the order to show cause hearing which purported to dispute several material facts alleged by Appellant and his wife including the "close and loving" relationship" that Appellant certified to as existing between him and his uncle Charles. (**Pa293 ¶ 6; Pa294 ¶ 11; Pa295 ¶ 7; Pa296 ¶s 9 and 12**). Specifically, Appellant certified to having a close and loving relationship with Charles. (**Pa267 ¶s 8-13; Pa268 ¶ 14; Pa269 ¶s 26, 30-31; Pa270 ¶s 34 and 40**). Appellant's wife also certified having a close and loving relationship with Decedent and confirmed Appellant's assertions regarding the same. (**Pa290 ¶s 6, 7, 8, 11, 12, 13, 15 and 16**).

Appellant certified "that it was more difficult to reach the Decedent by telephone after [Frances] Rushton passed and many telephone messages were not returned," and that, "[o]n the occasions that I spoke with my uncle after [Frances] Rushton passed, he informed me that the Rushton Parties were caring for him." (**Pa269 ¶s 30-31**). In addition, Appellant and his wife, Helena, alleged that at Decedent's funeral Nan and Cerf acknowledged that they aware of Harz's attempts to contact this uncle over the years and that they should have returned his calls and regretted not doing so. (**Pa270 ¶ 40; Pa291 23**).

However, Cerf and Nan contest several of these material assertions. Specifically, Cerf confirms "exchanging pleasantries with Harz about Charles in general terms," but did "not recall ever telling Harz that Charles stopped eating or was not taking his medications." (**Pa293 ¶ 8**). Nan also confirms speaking with Harz at Charles's funeral. (**Pa296 ¶ 11**). She admits to assisting Decedent "in managing his voicemail messages upon [her] many visits to his home," but, self-servingly adds she does "not recall ever hearing the playback of a voicemail message from Harz." (**Pa296 ¶ 13**). Nan further asserts that Harz "stated that the last time he actually saw Charles was about eight years ago…when he allegedly was in attendance at Charles' sister's funeral." (**Pa296 ¶ 14**).[8] This is in direct contradiction to Appellant's assertion that he saw Charles at Frances Rushton's funeral in June of 2019. (**Pa269**

[8] Decedent's sister, Joan R. Harz, passed away in 2014. (**Pa273**).

¶s 25-29).

In Conforti, the Court stated in that case that Plaintiff's:

> claims fairly pose factual issues relating to the intent of the parties in reaching their property settlement agreement, the degree to which strict enforcement of the rider provision would be inequitable and unfair, and whether the property settlement agreement implicates concerns of alimony and child support, as well as the existence of mutual mistake and fraud. [Plaintiff's] **certifications of fact should not be read restrictively or literally to determine whether alone they spell out a claim for relief, nor should their probative worth be neutralized or discounted by the opposing certifications**. Rather, they must be examined with an appreciation that **if supported by competent evidence they would establish a prima facie cause of action.** We thus agree with the majority of the Appellate Division that the material facts presented by the conflicting affidavits are sufficiently in dispute to warrant a plenary hearing.

Conforti v. Guliadis, 128 N.J. 318, 328-329 (N.J. 1992).

The Trial Court did not hesitate, contrary to the decision Conforti and other precedent, to neutralize and discount the material facts as set forth in the Appellant's pleadings, as well as in his and his wife's certifications that were undisputed by Respondent or the Rushtons.

These are only a few of the disputed material facts in this matter which warrant proceeding as a plenary action.

IV. The Trial Court Erred in Construing all Inferences in Favor of Respondent, Assuming Several Facts Not of Record, and Considering the Certifications in Support of Respondent by the Rushtons and the Prior Wills as Uncontroverted. (Pa011 ¶s 1-4, 1T44-50)

Appellant hereby also incorporates herein the arguments and proper facts of

record set forth and identified in sections I through VI of this Brief for the Appellate Court's consideration on this issue.

The Trial Court failed to recognize several contested issues of material fact that existed on the record for this matter. Instead, the Court assumed facts not of record; accepted the speculative allegations made by Respondent's counsel; and affirmed the controverted and self-serving certifications of the Rushtons as the basis for finding that contested issues of material facts did not exist. The Court also relied upon uncertified documents and facts to make this determination. The Court then used these improper factual determinations to make improper inferences in favor of Respondent and ignore the certified material facts of Appellant's; the utter lack of material facts from the Respondent; and the material certified admissions of the Rushtons and their prior caveat. These reasonable and well-founded doubts and suspicious circumstances surrounding the 2023 Will of Charles certainly warranted an investigation by allowing the matter to proceed as a plenary action.

After counsel for the parties concluded their arguments, the court reduced the issue before it as follows:

> The argument essentially is…that there are six wills in seven years, which **I will say that the [Appellant] is the next of kin [of Decedent] so he does have standing to be able to file this.** However, the [Appellant] does say that the wills are irrelevant and I don't agree. But I do – practically, **the [Appellant] would have to invalidate numerous wills to be in a position to be a potential beneficiary.** I am not saying he's not allowed to do it. I'm just saying I have to look at this practically and say should this matter be removed from being a

> summary proceeding to one that should involve discovery. So I believe for the purposes of looking at it from, you know, the end result looking – like, from the green looking back to the tee box…**I'm going to take into consideration what [Appellant] needs to…prove and what he needs access to in order to prove his case.** And he is going to have to invalidate six wills. I'm not saying he can't do that. I'll look at the facts, but it does create a burden that he's going to have to, you know, prove and satisfy.
>
> (**1T30-20-24; 1T31-1-17**) (**Emphasis added**).

The standard set forth above by the Court; to consider what Appellant needs to prove and the discovery necessary to prove it, does not exist in New Jersey. This standard begs the Court to make all inferences against Appellant instead of proceeding by the governing standard for summary actions which is whether "a disputed issue of material fact," exists pursuant to R. 4:67-5, and "not looking for clear and convincing evidence." (**1T40-8-11**).

A. The Trial Court Erred in Considering Prior Purported Wills of Decedent Without the Prior Wills Being Lodged with the Surrogate.

The foregoing issues are why courts require that wills be lodged with the Surrogate if they intend to be submitted or relied upon. Specifically, in the matter of In re Lent 142 N.J. Eq. 21, 59 A.2d 7 (E&A 1948), the Court held as follows:

> The next of kin of a decedent have standing to object to the probate of [a] will **despite the fact that there is an existence a will of earlier date by the terms of which they take nothing, since the validity of the earlier will cannot be challenged on the attempted probate of the later one but only if and when it is offered to probate.**
>
> Id. 142 N.J.Eq. 21, 59 A.2d 7, 8 (1948). (**Emphasis added**).

As noted in Lent, said Court, in essence, held that once the prior wills are lodged the parties in interest thereto are then permitted and able to challenge the same. Thus, the corollary is also true, namely, that absent the lodging of these wills, by parties with standing, who participate in the proceeding, the Court should not require or demand litigants to speculate as to how such documents may have been prepared, revoked or whether such documents are genuine. Such a rule would leave litigants in the dark and subject to the mercy of an undue influencer, who as the likely executor, has sole control over a decedent's estate planning file absent discovery being permitted by a court of competent jurisdiction. Actual wills could be omitted, and copies of wills could be altered, forged or produced without explanation as to the circumstances of their creation or revocation. Further, and as in this case, Respondent is using copies of purported wills he has no standing to lodge in order to stay the inquiry by an intestate heir without giving notice to individuals named under said prior wills, such as Arnett.[9]

It is improper for the Court, the Rushtons and Respondent to rely upon the purported 2016 and 2018 Wills without the same being lodged, without notice being

[9] One may qualify as a "party in interest" and be afforded standing to challenge a will if "the person [is] injured by the probate of the will he [or she] contests." Pressler & Verniero, Current N.J. Court Rules, comment 3 on R. 4:26-1 (citing In re Myers' Will, 20 N.J. 228, 235 (1955)). See In re Will of Maxson, 90 N.J. Super. 346, 348 (App. Div. 1966) (internal quotation marks omitted).

given to Arnett, and given the fact that neither the Rushtons nor the Respondent have standing to lodge those documents. Respondent has no standing to lodge any of the purported prior wills, or to rely upon copies of the same to claim that Appellant, as a next of kin, does not have standing to challenge the sole Will lodged, namely the 2023 Will. The Court is allowing Respondent to use these copies of prior wills, not lodged, without having to join or give notice necessary parties to those prior wills such as Arnett.[10]

In Lent, the lower court was overruled when it concluded that the challengers of a will, offered to probate, lacked standing because a prior will of the decedent existed wherein, they were not named. The lower court reasoned that because the challengers did not benefit from the prior will, they initially had no standing to challenge the latter will offered to probate. Again, the reviewing court did not agree with this standard and instead stated that "[i]t seems clear that in a case of this kind, involving the validity of a will, the next of kin, those who would take an interest in the event of intestacy, do have standing to attack any and all wills of a decedent," and further added:

> **[t]he rule applied by the court below if carried to an extreme case would certainly work an injustice.** Suppose for instance, an insane man made a series of wills cutting off his family and benefitting strangers, even unscrupulous fortune seekers, could it be that upon the last of these wills being offered to probate, the man's immediate family,

[10] Again, there is no record of Arnett being formally notified or served with Respondent's Complaint.

> perhaps his minor children, would have no standing to attack it because of the existence of earlier wills under which they are not beneficiaries.
>
> Id. 142 N.J.Eq. 21, 59 A.2d 8 (1948). (**Emphasis added**).

Under these circumstances, as well as in consideration of the precedent of Lent, Appellant's counsel argued that it was "a misconception that there are six wills that [Appellant] has to challenge…[t]here's only been one will that's been admitted to probate…the 2023 will." (**1T12 lines 13-16**). Surely it cannot be expected that a next of kin come forward with irrefutable evidence of undue influence as to all five purported prior wills, when only one was lodged for probate, and four were simply uncertified copies, especially when said next of kin was barred from inspecting the scrivener's file or obtaining basic discovery, despite pre-litigation requests, by letter, and a motion for the same.

As such, all of the prior Wills are irrelevant until they are lodged with the Court and notice is given to Arnett. Notably, even the Rushtons have failed to file a pleading seeking the admission of the 2020 or 2021 Wills to probate or even to lodging them with the surrogate. The sole action taken by the Rushtons was to submit a letter to the Court stating that they joined in the application of the Respondent and specifically to admit the purported 2023 Will to probate.

For these reasons, as well as those mentioned above, the Trial Court should have mandated notice to Lippincott and Arnett, if it intended to rely upon the purported 2016 and 2018 Wills, in order to determine whether said individuals

would come forward to advance them. If Lippincott and Arnett did not come forward, and the Rushtons choose to lodge the 2020 and 2021 Wills, then the Appellant should have still been allowed to proceed with his challenge, for it is better to give an estate to the next-of-kin of a decedent than to a series of undue influencers who seize upon a forgetful elderly man shortly after the loss of his second wife.

As such, absent Lippincott or Arnett coming forward, or some unilateral action by the Court after a trial establishing the potential viability of said documents, Appellant has standing to challenge the respective wills and has clearly set forth issues of material fact as to the 2023 Will which was lodged for probate as well as the 2020 and 2021 Wills if they are subsequently admitted. Upon application for such a subsequent admission, if made, Appellant would ordinarily be permitted to amend his pleadings to further such facts as may be necessary challenge the said documents should such an application be made. It is improper to require a party to speculate, in a counterclaim, about wills for which no one is seeking their admission into probate, when said documents have not been lodged and no preliminary discovery has been permitted.

B. The Trial Court Erred in Considering Prior Purported Wills of Decedent Without a Certification of the Scrivener.

In addition, the Court is allowing these uncertified copies of prior Wills to be relied upon without any context as to their existence, creation or revocation, clearly contrary to Lent and its prodigy, all while compelling the next of kin to refute such

"copies" without discovery or access to the scrivener's file or the actual documents themselves. Because only Decedent and the Scrivener can attest to the circumstances surrounding the preparation and execution of any of Decedent's purported Wills information regarding same cannot be obtained from any other source.

Thus, the main inference in favor of Respondent that the Court makes in this matter is that because there purportedly exist copies of prior wills of the Decedent which do not include Appellant, the Appellant's claims against Hughes, **regarding the 2023 Will,** are not viable. As such, if these circumstances alone would wholly eradicate Appellant's claim as Decedent's next of kin, they should certainly create a disputed material fact as to why Decedent suddenly added Hughes, a non-relative, to the April 2023 Will, especially in light of Cerf's caveat. Such a litany of purported Wills in such a short period of time should also raise material questions regarding the identical Wills naming the Rushtons.

As is clear from the record, the Court's decision in this matter improperly infers and/or assumes that the submission of all the purported prior wills of the Decedent to probate is a foregone conclusion. (**1T31 lines 1-3**). Proceeding on this improper inference, the Court then stated, "I'll just note that there really…has not been any evidence or even allegations produced by [Appellant] that challenges any of the earlier wills other than the 2023 will." (**1T33 lines 4-7**). Clearly, this determination by the Court, as reflected in the record, is contrary to the facts of this

case as discussed above, as well as the relevant and applicable law.

C. The Trial Court Erred in Considering the Certifications of Leslie Cerf and Nan Rushton as Uncontroverted.

The Trial Court improperly accepted several, if not all the facts set forth in the Rushtons' certifications as uncontroverted. During the hearing on the subsequent motions filed by Appellant for, in pertinent part, an allowance for fees from the estate, the Court stated that "[t]here was no contact between the [Appellant] and the decedent for a number of years." (**2T26 lines 24-25**). Here, the court wholly ignores Appellant's certification to the contrary. Therein he states that he contacted Charles by telephone and that it was more difficult to reach him after 2019 but that he did speak with Charles after 2019. Clearly, the Court has opted to assume as true the self-serving certifications of Cerf and Nan, thereby concluding that Appellant had no contact with Charles for years rather than accepting this fact as disputed by the Appellant's own certification.

V. The Trial Court Erred in Dismissing Appellant's Claims for Lack of Reasonable Cause. (Pa011 ¶s 1-4; 1T44-50; Pa010 ¶ 1; 2T17-28)

Appellant hereby also incorporates herein the arguments and proper facts of record set forth and identified in sections I through VI of this Brief for the Appellate Court's consideration on this issue.

As set forth throughout this Brief, the Trial Court ignored and/or minimized the facts of record clearly establishing reasonable cause to bring and pursue his

claims against the Respondent. The Court ignored that Hughes was also not named in any of these four alleged prior wills despite making this fact fatal to Appellant's claim. The Court ignored that Hughes cannot lodge any of the four, not five, prior Wills because he lacks standing. Likewise, the Rushtons would be limited, as non-relatives, to only potentially admitting two prior Wills, the identical 2020 and 2021 Wills. Therefore, the only Will being challenged is the 2023 Will and Appellant has clearly established that he had reasonable cause to bring his claims against the Respondent.

A. Undue Influence

Undue influence is a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets, generally by means of a will or inter vivos transfer in lieu thereof. Haynes v. First Nat'l State Bank, 87 N.J. 163, 176, 432 A.2d 890 (1981). It denotes conduct that causes the testator to accept the "domination and influence of another" rather than follow his or her own wishes. Ibid., (quoting In re Neuman, 133 N.J. Eq. 532, 534, 32 A.2d 826 (E. & A. 1943)). As a general rule, the will contestant has the burden of proving that a testator has been subjected to undue influence, and the undue influence must be shown to have existed at the time of the execution of the will. In re Estate of Stockdale, 196 N.J. 275, 303 (2008). In most instances, a claim for undue influence

requires a fact sensitive analysis. Also, "[u]ndue influence exercised by anyone, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless." Carroll v. Hause, 48 N.J. Eq. 269, 273 (N.J. Prerog. Ct. 1891).

While the Appellant is not required to firmly establish a confidential relationship and suspicious circumstances on the return date for an order to show cause, without the benefit of discovery, many of the traditional factors are present in this case, such as: (1) the 2023 Will was executed five months before Decedent's passing at the age of 94; (2) the new executor and largest single beneficiary, namely Respondent, was not referenced in any of the prior Wills; (3) Charles was moved to an assisted living facility less than a year before the 2023 Will was executed; (4) Respondent was named Decedent's attorney in fact pursuant to a power of attorney; (5) Cerf filed a caveat upon becoming aware of the 2023 Will; (6) multiple wills were executed in rapid succession benefiting new individuals within a short period of time after Decedent's second wife passed; (7) Decedent was suffering from relevant periods of known diminished recall; (8) Neither the Rushtons nor the Respondent would agree, pre litigation, to a joint inspection of the 2023 Will, Scrivener's file, Decedent's medical records, or death certificate; and (9) Respondent and the Rushtons refused to give notice to the alleged beneficiary, Arnett, under the 2016 and 2018 purported wills. (**See also**, **Pa128-129 ¶ 1; Pa133 ¶s 8 and 9; Pa 134 ¶s 10 and 11, Pa135-145 ¶s 13-32; Pa213 ¶s 1 and 2; Pa217**

¶s 29, 30, 31 and 32; Pa219 ¶ 40; Pa220 ¶ 49; Pa223 ¶s 60, 61 and 62; Pa224 ¶s 63-66; Pa225 ¶s 67-72; Pa226 ¶s 73-75; Pa231-232 ¶s 102 and 103; Pa232-235 ¶ 105 a-q. – 107; Pa236 ¶s 109-111).

B. Lack of Capacity

In New Jersey, there is a well-established legal presumption that a testator was of sound mind and competent when he or she executed his or her Will. In re Craft's Estate, 85 N.J.Eq. 125, 130 (Prerog. 1915). The party alleging lack of testamentary capacity bears the burden of proof, by clear and convincing evidence, of that lack of capacity. Matter of Will of Liebl, 260 N.J. Super. 519, 524 (App. Div. 1992). Testamentary capacity is to be determined on the date of the execution of the will. Id. at 524.

Appellant's claim for lack of capacity has merit as it is based upon the facts of record including but not limited to the admissions Cerf and Nan made regarding Decedent's health and inability to care for himself prior to the 2023 Will being created and their caveat; Appellant and his wife's uncontroverted testimony that Charles mistook Appellant for his brother, Lippincott, at the funeral for Frances Rushton in 2019; Decedent's age; and the multitude of wills he purportedly executed in during a very sensitive period in his life. Again, these and other facts bolstering Appellant's claim of diminished capacity, are the admissions of the Rushtons and

the utter lack of facts presented by Respondent.[11]

Ultimately, at this stage of the litigation and considering these the facts of record, incapacity should not have been determined solely based on the pleadings filed, and Appellant was entitled to discovery on the issue.

C. Mistake, Coercion, and Fraud

Coercion or domination must be exerted upon the testator's mind to a degree sufficient to turn the testator from disposing of his property according to his wishes by substituting the wishes of another. In re Will of Liebl, 260 N.J. Super. 519, 528 (App. Div. 1992). "Each case of this nature must be governed by the particular facts and circumstances attending the execution of the Will [or deed] and the conduct of the parties who participated in order to determine if the coercion exerted was undue." In re Livingston's Will, 5 N.J. 65, 73 (1950) (citing In re Raynolds, 132 N.J. Eq. 141, 152 (N.J. Prerog. Ct. 1942)). If the fraud pleading does not include the required specificity, the pleader should ordinarily be afforded the opportunity of amending the pleading in lieu of dismissal of the claim. Rebish v. Great Gorge, 224 N.J. Super. 619 (App. Div. 1988).

Again, Decedent mistook Appellant for his brother in 2019, Arnett is not Decedent's nephew, and/or whether Decedent knew of the life estate.

[11] It must be noted that the record is even devoid of a copy of Decedent's death certificate as the same was not included as an exhibit to Respondent's Verified Complaint.

D. The Trial Court Erred in Failing to Consider the Caveat filed by Leslie Cerf Prior to the Caveat filed by Appellant as a Suspicious Circumstance

A caveat is the formal mechanism by which one gives notice of a challenge to a will that has been or is expected to be offered for probate. In re Myers' Will, 20 N.J. 228, 235, 119 A.2d 129 (1955) (explaining that standing to lodge caveat requires status as one injured by probate of the will being contested). In this matter, Cerf filed a caveat to the 2023 Will. (**Pa183**).

The 2023 Will is the only document offered to probate in this matter and the Rushtons first and immediate inclination was to protest its submission for probate four (4) days after Decedent's passing and upon having been made aware of its existence as per Cerf's caveat. (**Pa183**). There is no doubt that that when the Rushtons first learned of the existence of the 2023 Will, they believed the same to be of dubious origin and could only have been created via nefarious means. This begs the question; Why would the Rushtons file a caveat to a Will in which they stand to receive 70% of the estate of the Decedent, a non-relative. Obviously, it was because in August 2020, ("2020 Will") and September 2021 ("2021 Will"), the Decedent purportedly executed two (2) identical Wills wherein the Rushtons were named as the sole beneficiaries, in equal shares of 100% percent of the residuary estate of the Decedent and Cerf was named as the first executrix. Again, they filed their caveat, four (4) days after Charles died because, in their mind, the 2023 Will

must have been a product of undue influence at the hands of Respondent; the 2023 Will was a mistake and/or the product of coercion and/or fraud; and/or because Charles, according to Nan and Cerf, could no longer feed himself or take his medication and was ultimately incapable of living independently by, at the latest, November of 2022. It must also be noted that it took over three months for the Rushtons to withdraw their caveat on December 28, 2024, and yet the record is void of any circumstances or reasons why they withdrew their caveat. Certainly, the Court alluded to same at the initial hearing when it stated that, "[t]here's also an allegation [of undue influence] that targets the Rushtons…[a]nd there's more evidence again them that as to Mr. Hughes." (**1T46 lines 4-5**).

Again, the caveat was filed by the Rushtons, the individuals who knew the Decedent for only the last five of his 94 years of life and, according to their certifications, assisted and cared for Charles and then moved him to an assisted living facility in 2022. One could certainly contend that, once the Rushtons were able to cause Charles to devise them his entire estate and then remove him from the home of their mother, Frances Rushton, they were finished with Charles. And then along comes the Respondent in 2023, to cause Charles to grant him the largest share of his estate. While, there is no direct evidence, at this time, as preliminary discovery was not permitted, it is reasonable to deduce that the Rushtons were informed that if they pursued their challenge to the 2023 Will, the 2020 and 2021 Wills could be

drawn into question, as well as the purported deed executed, allegedly by the decedent, in 2023, after his admission to the care facility, which extinguished his life estate. Further, it can be presumed, based upon the Rushton's filings in this matter, namely a letter joining in the Respondent's pleading, that the Rushtons came to an "agreement" with the Respondent to avoid such a messy challenge which may bring forth prior beneficiaries and/or certain heirs at law. For these reasons, the Trial Court should have considered the caveat filed by Cerf, so quickly after the passing of the Decedent, and the Rushtons' non-challenge of the Respondent's rapid rise in affection by the Decedent, who was in a care facility at the time, as evidence of a suspicious circumstance in any undue influence analysis.

VI. Trial Court Erred in Denying Appellant's Motions to Alter or Amend the May 21, 2024 Order Pursuant R. 4:42-9 for an Allowance of Attorney's Fees and Costs from Decedent's Estate Pursuant to R. 4:42-9(a)(3) as the Respondent Had Reasonable Cause to Challenge the Will Offered To Probate Respondent. (Pa010 ¶ 1; 2T17-28)

Appellant hereby also incorporates herein the arguments and proper facts of record set forth and identified in sections I through VI of this Brief for the Appellate Court's consideration on this issue.

Pursuant to R. 4:49-2, "…a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all the parties by the party obtaining it." Further, pursuant to R. 4:42-9(d), Prohibiting Separate Orders for Allowance of

Fees; "[a]n allowance of fees made on the determination of a matter shall be included in the judgment or order stating the determination." The Comment to Paragraph (d) clearly sets forth that R. 4:42-9 "has been construed as requiring the application to be made either before entry of the final judgment or with the time prescribed by R. 4:49-2 for a motion to alter or amend the judgment. Czura v. Siegal, 296 N.J. Super 187 (App. Div. 1997); Franklin Med v. Newark Pub Sch., 362 N.J. Super. 494, 516-517 (App. Div. 2003). Specifically, the equitable issue of an allowance for attorney's fees in probate matters was not addressed by the Court during the May 21, 2024 hearing and the Order contained nothing in the form a determination regarding the counsel fees expended by Appellant. As such, Appellant's motion for reconsideration was applicable and proper and Appellant made his request Court to alter and amend its Order to include a determination as to the allowance of attorney's fees and costs to the Respondent in this probate matter.

While the general rule is that the parties to an action must bear their own attorney's fees and costs, various exceptions exist under New Jersey law. One of these exceptions is set forth in R. 4:42-9(a)(3), wherein it states that actions for counsel fees are allowable in a "probate action." Specifically, this rule states as follows and in pertinent part:

> [i]n a probate action, if probate is refused, the court may make an allowance to be paid out of the estate of the decedent. If probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an

> allowance to the proponent and the contestant, to be paid out of the estate.

New Jersey Courts normally allow counsel fees to be paid by the estate to both proponents and contestants in a dispute except in a weak or meretricious case. In re Reisdorf, 80 N.J. 319, 326 (1979); In re Probate Will and Codicil of Macool, 416 N.J. Super. 298, 313 (App. Div. 2010); In re Estate of Reisen, 313 N.J. Super. 623 (Ch. Div. 1998). "To satisfy the rule's 'reasonable cause' requirement, those petitioning for an award of counsel fees must provide the court with 'a factual background reasonably justifying the inquiry as to the testamentary sufficiency of the instrument by the legal process.'" Macool, 416 N.J. Super. at 313 (quoting In re Caruso, 18 N.J. 26, 35 (1955)). Nevertheless, "[e]xcept in a weak or meretricious case, courts will normally allow counsel fees to both proponent and contestant in a will dispute." Reisdorf, 80 N.J. at 326. However, "[w]ell-founded doubts' and 'reasonable cause for investigation' are the terms used by the court, in Matter of Will of Eddy, 33 N.J.Eq. 574 (E. & A.1881), where the ordinary's denial of counsel fees and costs was reversed." Caruso's Will, 18 N.J. 35-36 (N.J. 1955).

In this matter, the Court specifically held that Appellant brought his claims in "good faith;" had a "good faith basis;" and for bringing the challenge to the 2023 Will "based on their certifications and the reply certifications I saw." (**1T49 lines 17-18; 1T50 lines 2-4; 2T21 lines 17-20; 2T22 lines 3-5**). In addition, the Court found that the filing of Appellant's caveat was "not frivolous." (**2T22 lines 1-5;**

2T26 lines 11-13). However, the Court found that Appellant's did not have "reasonable cause for contesting the validity of the will under Rule 4:42-9(a)(3)." (**2T22 lines 10-13**). At the conclusion of the motion hearing, the Court then held that Appellants claims were "weak or meretricious" and denied the fee allowance. (**2T19 lines 20-23**). In specific support of this conclusion, the trial court, relying on the prior wills and Dr. Maro's letter, stated it:

> While [Appellant's] claims were not frivolous, that alone does not mandate that he be awarded attorney's fees and costs against the estate…[a]nd I do not find that they were reasonable for the same reasons that I stated previously in issuing my ruling. There were six wills that were submitted. The [Appellant] was not a beneficiary under any of the wills. There was a letter…from Dr. Maro to counsel, who was involved in the drafting of the most recent will, attesting to the mental state of the decedent.
>
> (**2T26 lines 11-23**).

Further, the facts of this case and specifically, the lengths at which both the Respondent, the Rushtons, and their respective counsel have gone to conceal facts relevant to the matter only aggravated and frustrated any amiable dialogue as requested, by Appellant, on multiple occasions before the Respondent's complaint was filed. In addition, Respondent's inclusion of a spurious claim for tortious interference with inheritance, summarily denied by the Court, compelled the Appellant to defend the same and, as such, further complicating the litigation. To be sure, Count Two of Respondent's complaint was frivolous and promoted for the sole and improper purpose of intimidating the Appellant.

The Court has clearly found that Appellant had well-founded doubts and a good faith basis to question the validity of the Will in this matter and that Appellant's case was reasonable considering the admissions made by the Nan Rushton and Leslie Cerf to Appellant and his wife at the Decedent's funeral as well as Respondent's failure to explain anything about how he became, for the first time, the largest beneficiary and fiduciary for Decedent five months before Decedent's passing, while Decedent was mentally impaired.

CONCLUSION

Clearly, the Trial Court made several misapplications of the law and unsupported factual conclusions and relied upon the same to dismiss Appellant's claims and this request for an allowance of fees from the Estate. Therefore, Courts decision should be reversed and this matter must be remanded for further proceedings.

For the foregoing reasons, Appellant's appeal should be granted.

SIMEONE & RAYNOR, LLC
Attorneys for Appellant

s/Stefanio G. Troia
_____
STEFANIO G. TROIA, Esquire

Date: January 20, 2025

In the Matter of the Estate of CHARLES FREDERICK REINERT, DECEASED	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003772-23T4 Civil Action ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, PROBATE PART, CAMDEN COUNTY Docket No.: CP-54-24 Sat Below: Hon. James Bucci, J.S.C.

BRIEF OF PLAINTIFF-RESPONDENT BRIAN F. HUGHES, EXECUTOR

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ON THE BRIEF:

ANTHONY R. La RATTA, ESQ. (ID #015331996)

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PRELIMINARY STATEMENT

This appeal follows entry of a probate judgment and dismissal of a caveat in an estate dispute. Finding no genuine issue of material fact on the return date of the order to show cause in a summary action, the trial court set aside the caveat filed by the decedent's nephew, who was not named as a beneficiary in any of the decedent's last six Wills.

Plaintiff-Respondent Brian F. Hughes ("Respondent"), executor of the estate of Charles Frederick Reinert, deceased ("Decedent"), brought this action to dismiss the caveat filed by Christopher Harz ("Appellant") and obtain a probate judgment. The trial court scrutinized the record before it and found no genuine issue of material fact concerning either Decedent's testamentary capacity or alleged undue influence at the time of Decedent's execution of his Last Will and Testament dated April 19, 2023.

Further, Appellant failed to plead with specificity, as required by Rule 4:5-8(a), any material facts to support his claim of fraud, mistake, or undue influence against any, not to mention all, of the eight residuary beneficiaries under this Will. Appellant's own certification conceded that he had not seen Decedent since June 1019, which was nearly four years before Decedent executed the Will he was contesting. In the absence of any genuine issue of

material fact in support of Appellant's will contest, the trial court correctly dismissed Appellant's caveat.

Thereafter, Appellant filed a motion to alter or amend the judgment in an effort to extract an award of counsel fees against the estate. The trial court correctly found that Appellant demonstrated no reasonable cause for his will contest which would warrant an award of counsel under Rule 4:42-9(a)(3), and denied Appellant's motion.

For these reasons and those that follow, Respondent respectfully submits that the trial court's probate judgment setting aside Appellant's caveat, and its subsequent order denying Appellant's motion to alter or amend the judgment for purposes of obtaining an award of counsel fees, should both be affirmed on this appeal.

PROCEDURAL HISTORY

A. Pleadings

On September 14, 2023, Respondent Leslie Cerf ("Cerf") filed a caveat protesting the admission to probate of any paper purporting to be the Last Will and Testament of Decedent or the appointment of any personal representative of Decedent's estate. (Pa183).

On October 26, 2023, Appellant filed a caveat protesting the probate of any paper purporting to be the Last Will and Testament of Decedent or the appointment of a personal representative. (Pa064).

On December 28, 2023, Cerf filed a Withdrawal of Caveat, acknowledging that Decedent's Last Will and Testament dated April 19, 2023, may be admitted to probate by the Camden County Surrogate's Court and that Respondent may be appointed as personal representative of Decedent's estate. (Pa105-06).

On March 5, 2024, Respondent filed a Verified Complaint for Probate Judgment seeking to dismiss the caveat filed by Appellant and obtain a probate judgment for Decedent's Last Will and Testament dated April 19, 2023. (Pa044-120). On that same date, the Court entered an Order to Show Cause Summary Action which, in part, appointed Respondent as administrator

pendente lite pending adjudication of his request for a probate judgment. (Da001-07).[1]

On April 26, 2024, Appellant filed an Answer with Affirmative Defenses. (Pa128-205).

On May 20, 2024, Respondents Cerf (Pa293-94) and Nan Rushton (Pa295-96) filed certifications in support of the Verified Complaint filed by Respondent. No other pleadings were filed by the Rushton Respondents, but they joined in Respondent's application to set aside the Appellant's caveat and admit the 2023 Will to probate by letter dated May 20, 2024. (Pa347-48).

B. Motions

On April 26, 2024, Appellant together with his Answer filed a motion for leave to file a counterclaim and cross-claim (Pa206-46) and a motion to compel inspection of Decedent's death certificate, wills, and estate planning file. (Pa247-65). In support of his motion, Appellant included his certification of the same date. On May 17, 2024, Appellant filed a certification of his wife, Helena Skoogh Harz (Pa289-92).

On June 11, 2024, despite the court ruling largely in favor of Respondent and against Appellant at the May 21, 2024 order to show cause hearing,

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[1] Although the plaintiff at the trial level, Respondent uses the prefix "Da" to identify Respondent's appendix as a result of Appellant's mistaken use of the "Pa" prefix for his appendix.

Appellant filed two motions: (1) a motion for sanctions pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1 (which is not the subject of this appeal); and (2) a motion to alter and amend the judgment pursuant to Rule 4:49-2 and for an allowance and award of attorney fees and costs pursuant to Rule 4:42-9(a)(3). (Pa297-345).

C. Judgment and Order

After the conclusion of the May 21, 2024 order to show cause hearing, the court entered a Judgment ("the Judgment"), setting aside Appellant's caveat, admitting the 2023 Will to probate, and appointing Respondent as executor thereunder. (Pa011-12). The Judgment also denied Appellant's motions for leave to file a counterclaim and cross-claim and to compel inspection of Decedent's death certificate, wills, and estate planning file. Id.

On July 10, 2024, following oral argument, the court entered an Order ("the Order"), which denied both of Appellant's motions seeking an award of counsel fees and costs. (Pa010).

D. Notice of Appeal

On August 1, 2024, Appellant filed a Notice of Appeal. (Pa001-23).

On August 13, 2024, Appellant filed an Amended Notice of Appeal. (Pa024-43).

On August 16, 2024, Respondent filed his appellate Civil Case Information Statement. (Da008-012).

STATEMENT OF FACTS

A. Background

Decedent died on September 10, 2023. (Pa044, ¶2). Decedent was a widower at his death. (Pa045, ¶4). During his lifetime, he was married twice. (Id.) His first wife, Jean D. McMaster Reinert, predeceased him in 2017, after 60 years of marriage. (Id.) His second wife, Frances E. Dildine Rushton Reinert, predeceased him in 2019. (Id.)

Decedent did not have any children. (Pa045, ¶5). Decedent was survived by six adult stepchildren: David Rushton; Mark Rushton; Christopher Rushton; Daniel Rushton; Leslie Cerf; and Nan Rushton. Id. Also, he was survived by three adult nephews: Appellant; Richard J. Lippincott ("Lippincott"); and Carl Harz Jr. (Id.) Neither Lippincott nor Carl Harz Jr. participated in the proceedings below, nor are they participating in this appeal.

B. Decedent's Estate Plan

Decedent executed six Wills during the last seven years of his life. (Pa047, ¶13). These Wills were executed on the following dates, and were all prepared by the same law firm (Id.):

- April 19, 2023 ("the 2023 Will") (Pa058-62);

- September 20, 2021 ("the 2021 Will") (Pa068-73);
- August 20, 2020 ("the 2020 Will") (Pa075-80);
- August 7, 2019 ("the 2019 Will") (Pa082-87);
- November 30, 2018 ("the 2018 Will") (Pa089-95); and
- June 1, 2016 ("the 2016 Will") (Pa097-103).

C. The 2023 Will

On January 11, 2023, approximately three months before executing the 2023 Will, Decedent signed a Deed wherein he relinquished his life estate in his residential home. (Pa048, ¶14). Then, on April 7, 2023, Robert J. Maro Jr., M.D., a practicing physician for 40 years and Decedent's long-time personal physician, stated in correspondence to Decedent's long-time estate planning counsel that Decedent was medically, physically, and mentally able to proceed with any legal issues, including modifying his Will. (Pa047, ¶15; Pa066). The correspondence was exchanged less than two weeks before Decedent signed the 2023 Will in front of two witnesses who were long-standing members of the bar. (Id.)

The 2023 Will does not primarily benefit any one individual. (Pa058-62). Rather, the 2023 Will leaves Decedent's residuary estate to eight individuals as follows: 10% each to Decedent's six (6) stepchildren and a step-granddaughter, Frances Surowicz (collectively "the Rushton Respondents") and 30% to Respondent. (Pa048, ¶17; Pa059). The 2023 Will

also designates Respondent as sole personal representative of the estate, to serve without bond. (Pa048, ¶16; Pa059).

D. The 2021 Will

Prior to executing the 2023 Will, Decedent executed the 2021 Will. (Pa048, ¶18; Pa068-73). In the 2021 Will, Decedent nominated his stepdaughter Cerf as sole executrix of his estate, and stepson David Rushton as substitute executor and stepson Christopher Rushton as alternate substitute executor, all without bond. (Pa049, ¶19; Pa076-77). The 2021 Will left the residuary estate in seven equal shares to Decedent's stepchildren Cerf, David Rushton, Christopher Rushton, Daniel Rushton, Nan Rushton, Mark Rushton and step-grandchild Surowicz. (Pa049, ¶20; Pa076).

E. The 2020 Will

Prior to executing the 2023 Will and the 2021 Will, Decedent executed the 2020 Will. (Pa049, ¶21; Pa075-80). The terms of the 2020 Will were identical to the those of the 2021 Will – i.e., Decedent (a) nominated stepdaughter Cerf as executrix and stepsons David Rushton and Christopher Rushton as substitute executors, respectively, all without bond; and (b) left the residuary estate in seven equal shares to Decedent's stepchildren Cerf, David Rushton, Christopher Rushton, Daniel Rushton, Nan Rushton, Mark Rushton and step-grandchild Surowicz. (Pa049, ¶22; Pa076-77).

F. The 2019 Will

Prior to executing the 2023 Will, the 2021 Will, and the 2020 Will, Decedent executed the 2019 Will. (Pa049, ¶23; Pa082-87). In the 2019 Will, Decedent once again nominated his stepdaughter Cerf as sole executrix of his estate. (Pa049, ¶25; Pa084). He designated Edward F. Arnett ("Arnett") as substitute executor, and Lippincott as alternate substitute executor, all without bond. (Id.). The 2019 Will left the residuary estate as follows: 25% each to Lippincott and Arnett, and the remaining 50% to Decedent's stepchildren Cerf, David Rushton, Christopher Rushton, Daniel Rushton, Nan Rushton, Mark Rushton and step-grandchild Surowicz. (Pa050, ¶26; Pa083).

G. The 2018 Will

Prior to executing the 2023 Will, the 2021 Will, the 2020 Will, and the 2019 Will, Decedent executed the 2018 Will. (Pa050, ¶27; Pa089-95). In the 2018 Will, Decedent nominated his then-wife, Frances E. Reinert, as sole executrix of his estate. (Pa050, ¶28; Pa091). He designated Lippincott as substitute executor, and Arnett as alternate substitute executor, all without bond. (Pa050, ¶28; Pa091-92). The 2018 Will left the residuary estate as follows: 50% to his then-wife, Frances E. Reinert, provided she survived him, and 25% each to Lippincott and Arnett. (Pa050, ¶29; Pa090-91). In the event

his then-wife, Frances, predeceased Decedent, which she did, then Lippincott and Arnett would each receive 50% of the residue. (Pa050, ¶29; Pa091).

H. The 2016 Will

Prior to executing the 2023 Will, the 2021 Will, the 2020 Will, the 2019 Will, and the 2018 Will, Decedent executed the 2016 Will. (Pa050, ¶30; Pa097-103). In the 2016 Will, Decedent nominated his then-wife, Jean McMaster Reinert, as sole executrix of his estate, and Lippincott as substitute executor, both without bond. (Pa050, ¶31; Pa099). The 2016 Will left the residuary estate as follows: all to his then-wife, Jean McMaster Reinert, provided she survived him. (Pa050, ¶32; Pa098). If his then-wife, Jean, predeceased Decedent, then Lippincott and Arnett would each receive 50% of the residue. (Pa050-51, ¶32; Pa098-99).

In summary, Decedent's long-term estate plan was set forth in his last six Wills, all prepared by the same law firm, in reverse chronological order:

1. **The 2023 Will** – Decedent's final Will which leaves the residue of his estate to Respondent and Decedent's six stepchildren and one step-grandchild (i.e., the Rushton Respondents). (Pa058-62).
2. **The 2021 Will** – identical to the one preceding it, leaving the residue of the estate to the Rushton Respondents. (Pa068-73).

3. **The 2020 Will** – leaves the entire residue to the Rushton Respondents. (Pa075-80).
4. **The 2019 Will** – leaves 50% of the residue to the Rushton Respondents and 25% each to Lippincott and Arnett. (Pa082-87).
5. **The 2018 Will** – leaves 50% of the residue to Decedent's (second) wife, Frances, and 25% each to Lippincott and Arnett. If Frances predeceased Decedent, then Lippincott and Arnett each get 50% of the residue. (Pa089-95).
6. **The 2016 Will** – leaves the residue to Decedent's (first) wife, Jean. If Jean predeceased Decedent, then Lippincott and Arnett each get 50% of the residue. (Pa097-103).

I. Post-Death Submissions

Following Decedent's death, Decedent's stepdaughter Cerf filed a Caveat against admitting to probate any paper purporting to be Decedent's Last Will as well as the appointment of a personal representative of Decedent's estate. (Pa051, ¶33; Pa097-103). However, Cerf subsequently filed a Withdrawal of Caveat on or about December 28, 2023, and consented to probate of the 2023 Will and the appointment of Respondent as personal representative of Decedent's estate. (Pa051, ¶33; Pa105-06).

By letter dated December 29, 2023, Respondent's counsel advised Appellant's counsel of the existence of the six above Wills and, as a result, the frivolous nature of the Caveat. (Pa051, ¶34; Pa108-111).

By letter dated January 24, 2024, Respondent's counsel reminded Appellant's counsel Decedent died on September 10, 2023, and advised Respondent was unable to probate the 2023 Will or begin the estate administration process as a result of Appellant's existing caveat on file with the Camden County Surrogate. (Pa051, ¶35; Pa113-115).

Appellant refused to withdraw his caveat, even though he was advised he was not a beneficiary – nor even mentioned – in any of the above six Wills. (Pa052, ¶40; Pa108-111; Pa113-115).

As a result, Respondent filed a Verified Complaint for Probate Judgment resulting in the entry of an Order to Show Cause dated March 5, 2024. (Da001-07). In his court submissions before the return date of the Order to Show Cause, Appellant failed to (a) present any genuine issue of material fact with respect to either Decedent's testamentary capacity or alleged undue influence at the time of execution of the 2023 Will or (b) plead with any specificity, as required by Rule 4:5-8(a), any material facts to support his claim of fraud, mistake, or undue influence against any, let alone all, of the eight residuary beneficiaries under the 2023 Will. (Pa128-205).

Indeed, Appellant's own certification revealed Appellant had not seen Decedent since June 2019, which was nearly four years before Decedent executed the 2023 Will. (Pa269). Appellant also acknowledged Decedent had not even informed him directly he had gotten re-married. (Pa268-69). In short, Appellant's certification presented no relevant details concerning Decedent's mental capacity or any fraud, mistake, or exposure to undue influence during Decedent's lifetime. (Pa266-71).

On the return date of the Order to Show Cause, the court heard oral argument and detailed its reasons on the record, later memorialized in the court's Judgment dated May 21, 2024, which is the subject of this appeal. (1T; Pa011-12). Despite the clear absence of any genuine issue of material fact in support of his will contest, Appellant subsequently filed a motion to alter or amend the judgment or final order and for an allowance and award of counsel fees and costs. (Pa297-345).

On the return date of the motion, the court heard oral argument and placed its reasons on the record, memorialized in the court's order of July 10, 2024, which is also the subject of this appeal. (2T; Pa010). In support of his motion, Appellant made no showing as to what the court had overlooked or how it had erred with any specificity, as required by Rule 4:49-2. (Pa297-345). The court further maintained that Appellant's will contest was weak and

meretricious. (2T19). Because Appellant failed to demonstrate reasonable cause for contesting the validity of the 2023 Will, the court denied Appellant's request for an award of counsel fees under Rule 4:42-9(a)(3). (Pa010).

LEGAL ARGUMENT

I. Standard of Review for Summary Actions. (Not raised below).

Appellate review of summary actions conducted pursuant to Rule 4:67 applies the usual standard for civil cases. See, e.g., O'Connell v. New Jersey Mfrs. Ins. Co., 306 N.J. Super. 166, 172-73 (App. Div. 1997) (applying substantial credible evidence standard in reviewing decision from summary action), appeal dismissed, 157 N.J. 537 (1998). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc., v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). When a court makes findings of fact based on documentary evidence alone, however, no special deference is warranted. See Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988); Jock v. Zoning Bd. of Adjustment of Wall, 371 N.J. Super. 547, 554 (App. Div. 2004), rev'd on other grounds, 184 N.J. 562 (2005). Thus, appellate review of a trial judge's legal conclusions in a summary action is de novo. Walid v. Yolanda for Irene Couture, Inc., 425 N.J. Super. 171, 179-80 (App. Div. 2012).

II. The Trial Court Did Not Err in Denying Appellant's Leave to File a Counterclaim and Crossclaim and Handling this Matter as a Summary Action, as Appellant Failed to Create Any Genuine Issue of a Material Fact. (Pa011-12).

Respondent commenced this action in accordance with Rule 4:83-1, which provides in pertinent part: "Unless otherwise specified, all actions in

the Superior Court, Chancery Division, Probate Part, shall be brought in a summary manner by the filing of a complaint and issuance of an order to show cause pursuant to R. 4:67." Likewise, N.J.S.A. 3B:2-4 provides: "The Superior Court, in any proceeding by or against fiduciaries or other persons, may proceed in a summary manner."

Rule 4:67-4(a) provides that in summary proceedings such as this one, when an order to show cause is issued ex parte, "No counterclaim or cross-claim shall be asserted without leave of court."

Under Rule 4:67-5, the trial court shall try the case on the return date of the order to show cause, or on such short day as it fixes. The court is required to hold a hearing only if "there may be a genuine issue as to a material fact," at which point the court "shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment." R. 4:67-5. However, and most significantly for this appeal, if "the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon." Id.

Summary actions are, by definition, short, concise, and immediate, and further, are "designed to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment." MAG Entm't, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super.

534, 551 (App. Div. 2005). Pursuant to Rule 4:67-5, in the absence of a genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon.

Contrary to Appellant's argument, that is exactly what happened here – i.e., Appellant produced no relevant facts to create a genuine issue of any material fact on the return date of the order to show cause that would warrant a plenary hearing.

A. Appellant Failed to Create Any Genuine Issue of a Material Fact with Respect to His Claim of Lack of Testamentary Capacity.

In the proceedings below, Appellant suggested that Decedent lacked testamentary capacity at the time he executed the 2023 Will.

Under N.J.S.A. 3B:3-1, any person at least 18 years of age who is of sound mind may make a Will. Generally, a testator has sufficient capacity to make a Will if he: (1) understands the general nature of the business in which he is engaged and the particular distribution he is effecting; (2) recollects the property of which he means to dispose and the persons who naturally are the objects of his bounty; and (3) comprehends the interrelation of these factors. Gellert v. Livingston, 5 N.J. 65, 71, 73 (1950); In re Blake's Will, 37 N.J. Super. 70 (App. Div. 1955), rev'd on other grounds, 21 N.J. 50 (1956).

A very low degree of capacity will suffice. In re Will of Landsman, 319 N.J. Super. 252 (App. Div. 1999); In re Liebl, 260 N.J. Super. 519 (App. Div. 1992). A very low degree of intelligence suffices for testamentary capacity – less than the capacity to enter into a contract. Ward v. Harrison, 97 N.J. Eq. 309 (E. & A. 1925). A person can be feebleminded, Howell v. Taylor, 50 N.J. Eq. 428 (N.J. Prerog. Ct. 1942), a drunk, a drug addict, or old, Gellert, 5 N.J. at 77, eccentric, In re Lucas, 124 N.J. Eq. 347 (N.J. Prerog. Ct. 1938), or even suffering from lapses of memory. In re Rein, 139 N.J. Eq. 122 (N.J. Prerog. Ct. 1946); In re Gotchel, 10 N.J. Super. 208 (App. Div. 1950).

The law presumes that a testator has the required testamentary capacity, and in any will contest, it is generally presumed that the testator was of sound mind and competent when he executed the Will. Haynes v. First Nat'l State Bank of New Jersey, 87 N.J. 163, 176 (1981); In re Livingston's Will, 5 N.J. 65, 71 (1950) (citations omitted). As a result, ordinarily the contestant has the burden of proving, generally by clear and convincing evidence, that the testator, at the time of execution of the Will, did not have the requisite capacity to make a Will. See In re Frisch, 250 N.J. Super. 438 (Law Div. 1991).

Here, the trial judge did not reach analysis of whether Appellant proffered clear and convincing evidence at the order to show cause hearing:

> But I'm not looking for clear and convincing evidence at that point. I'm just looking to see whether there's a … disputed issue of material fact. It has to be of consequence. What is the fact? Is it of consequence? And that's what I am looking for and that's what I struggle to see from the [Appellant's] submissions.
>
> ****
>
> I find that the affidavits show palpably that there is no genuine issue as to any material fact with respect to the issue of incapacity, so that I can hear this action and decide on the pleadings and render final judgment thereon.
>
> The [Appellant] has not demonstrated any issue regarding capacity starting with the self-executing will and I add Dr. Maro's letter. I have three people [including the two attorney-witnesses to the execution of the 2023 Will] … whose integrity is not challenged, not alleged to have engaged in any wrongdoing all involved in this matter indirectly. Dr. Maro directly submits a letter. No one is challenging the authenticity of it. I would need more than just saying I want to see his file or I want to see the attorney's file. I start with that.
>
> And then I look at the fact that the respondent has not been in contact with the decedent for years . . . . Nor did he ever present a certification from anyone else, including any of his own family members or anyone else that had any contact with the decedent in the latter years of his life, not Mr. Hughes obviously, but no other neighbors. No one. No one at the assisted living facility. Nothing that even raises an allegation with some factual basis that the [decedent] was incapacitated. Being 94 by the time you execute a will is not enough in the eyes of this Court to say someone is incapacitated. Living in an assisted living facility is not enough. The fact that someone might need help doing his bills is not enough, not when I have the letter

> from Dr. Maro stating that he – he being the decedent – is capable of understanding what he was doing and that fact that he was making changes to his will.
>
> (1T40-42).

Appellant failed to establish a genuine issue of material fact with respect to Decedent's testamentary capacity at the time of execution of the 2023 Will.

B. Appellant Failed to Create Any Genuine Issue of a Material Fact with Respect to His Claim of Undue Influence.

From a procedural standpoint, Rule 4:5-8(a) requires allegations of undue influence, fraud, mistake, and similar claims to be pled with specificity, with particulars of the wrong and dates if necessary. Appellant was unable to meet his burden here. In fact, Appellant relied upon the vague argument that the elements of undue influence are "self-evident." Simply put, the allegations set forth in Appellant's responsive pleadings did not set forth with particularity, nor did they constitute as pled, satisfaction of the elements of undue influence.

Undue influence is "a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets, generally by means of a will or inter vivos transfer in lieu thereof." In re Estate of Stockdale, 196 N.J. 275, 303 (2008) (citing Haynes, 87 N.J. at 176). See also In re Niles, 176 N.J. 282 (2003). It denotes conduct that causes

the testator to accept the "domination and influence of another" rather than follow his or her own wishes. Stockdale, 196 N.J. at 303.

As a general rule, the will contestant has the burden of proving that a testator has been subjected to undue influence, and the undue influence must be shown to have existed at the time of the execution of the will. Stockdale, 196 N.J. at 303; see also In re Davis' Will, 14 N.J. 166 (1953). To raise a presumption of undue influence, a will contestant must demonstrate: (1) the existence of a confidential relationship between the testator and the person alleged to have exerted undue influence; and (2) suspicious circumstances as to the Will. See, e.g., Landsman, 319 N.J. Super. 252; Haynes, 87 N.J. at 176; Niles, 176 N.J. 282 (2003). Once a prima facie case is established, the burden of producing evidence shifts to the proponent of the Will, who must then produce evidence to offset the effect of the showing of undue influence. Haynes, 87 N.J. at 182.

The first element -- the confidential relationship -- is generally considered a relationship of trust or dependence. A confidential relationship exists if the testator, "by reason of … weakness or dependence," reposes trust in the particular beneficiary, or if the parties occupied a "relation[ship] in which reliance [was] naturally inspired or in fact exist[ed]." In re Hopper, 9 N.J. 280, 282 (1952). A key element is that the parties to a confidential

relationship "do not deal on terms of equality." Pascale v. Pascale, 113 N.J. 20, 33 (1988). Rather, one side has superior knowledge derived from a fiduciary relationship or from over-mastering influence. Ibid; see also Blake v. Brennan, 1 N.J. Super. 446, 454 (Ch. Div. 1948).

In will contests, the second element of the formula – suspicious circumstances – also must be present, although need be no more than slight for purposes of burden shifting. Haynes, 87 N.J. at 176. "Circumstances suggestive of inequality, unfairness, imposition, or overreaching give rise to a presumption of undue influence, and there is cast upon the proponent the burden of coming forward with evidence in quality and force sufficient to dispel the presumption." Blake, 21 N.J. 50, 55-56 (1956).

When there is a confidential relationship coupled with suspicious circumstances, undue influence is presumed and the burden of proof shifts to the Will proponent to overcome the presumption. Stockdale, 196 N.J. at 303.

Appellant's primary argument below was to simply label documents as "odd" or "suspicious." These were his chief allegations in response to the application to probate the 2023 Will. Such comments clearly did not meet any burden to plead undue influence with specificity, as Appellant would not only have to plead his case of undue influence against Respondent, but also all seven of the Rushton Respondents to set aside the 2023 Will.

Appellant did not even suggest a claim of undue influence against any of the Rushton Respondents, other than Leslie Cerf ("Leslie") and Nan Rushton ("Nan"). Even then, Appellant did not claim that Leslie and/or Nan unduly influenced Decedent. Rather, Appellant simply claimed that they were his source of information gleaned from a post-death funeral luncheon which led to the filing of his Caveat.

The Probate Part judge scrutinized the record for a genuine issue of material fact with respect to undue influence, but could find none:

> Where is the influence? If the influence was exerted, and just again logically, by the Rushton family, all right, why then was there a change in the last will that would give a third of the Estate to Mr. Hughes, and Mr. Hughes' name does not appear at all previously? …
>
> I'm not going to hold it against Ms. Cerf, the fact that she filed a caveat and then withdrew it. I just can't. I'm not going … to draw that inference. And again, there is nothing saying that Mr. Hughes did anything wrong. <u>There is nothing saying that the decedent lacked capacity or was dependent upon Mr. Hughes or relying on him or needed him or was subject to his control</u>.
>
> (1T44 (emphasis added)).

The judge also correctly applied the law to the facts presented – or more accurately, not presented – when considering Appellant's claims with respect to Respondent:

> [I]n applying this law, the [Appellant's] submissions are insufficient to establish a claim of undue influence over the decedent at the time the will was executed. . . .
>
> And again the claim – the claim to the extent it's made against Mr. Hughes, there's just absolutely no evidence presented whatsoever that Mr. Hughes somehow exerted control or influence against the decedent. . . . There's just no evidence. There's not even an allegation of anything that I can consider.
>
> (1T45-46 (emphasis added)).

The same correct application of the law was made by the trial court with respect to its examination of the record with respect to the Rushton Respondents:

> As it pertains to the Rushtons, again, there are allegations against them, but nothing that, so to speak, moves the needle. [Appellant] says he left voice messages for the decedent that were not returned, but there's no evidence that the decedent wanted to speak with the [Appellant], that he ever reached out to the [Appellant], or that the [Appellant] ever reached out to him, that is tried to visit him. They didn't speak for years. So that alone is not, to me, evidence or allegations . . . that I'm going to . . . give[e] weight to . . . . [T]he fact that he gave his interest in the [marital] home [that also belonged to the Rushtons' mother], whatever interest that might be, again, without more is not enough.
>
> [E]ven if I take it as true that, yes, he moved to a nursing home because he needed help and he wasn't able to take care of himself anymore, that's why people go to nursing homes, but that doesn't mean that someone is not of sound mind. I just cannot conclude or even draw the inference that just because someone is

> in a nursing home that they are not capable of making their own decisions. It just – there needs to be more and there is not here.
>
> [T]here must be some showing that decedent was particularly vulnerable to undue influence. . . . There's just no evidence. There's no evidence of suspicious circumstances. There's no evidence of this close confidential relationship.
>
> What I see are stepchildren who are helping their stepfather even after their mother died by helping taking care of him. . . . [W]e're not going to take discovery on it, because in order for us to even get that far there has to be more of an – there has to be more. There has to be something. Again, there's nothing from the nursing home. There's nothing from the neighbors. There's nothing from the [Appellant] himself. And I'll note that the Rushton family joins in Mr. Hughes' application.
>
> (1T46-49).

C. **Appellant Failed to Allege Undue Influence by All of the Residuary Beneficiaries under the 2023 Will, and Thus Any Such Claim Is Precluded by Statute.**

The trial judge correctly noted Appellant did not plead sufficient facts to withstand a summary proceeding, particularly any collusion by Respondent and the Rushton Respondents:

> [Appellant] doesn't really provide many facts to challenge the 2023 will. . . . [H]e's sort of fighting this battle on two fronts. He's challenging the . . . actions of the Rushton family on the one hand, but then on the other hand he's also challenging Mr. Hughes, and he's never made a connection between the two. There's no allegation that there's some conspiracy or that these people are involved with each other or even know each

> other. He points to the fact that one of the Rushtons filed a caveat and then withdrew it. But so what?
>
> (1T31-32).

In fact, Appellant only asserts a claim of undue influence against Respondent in his proposed pleading – the "Counterclaim & Crossclaim filed by [Appellant], Christopher Harz" attached as Exhibit 1 to his notice of motion for leave to file a counterclaim and cross-claim pursuant to Rule 4:67-4. See Pa235, ¶106.

This deficiency in Appellant's pleading is significant for two reasons. First, as stated above, the allegations of undue influence against Respondent lacked the specificity mandated by Rule 4:5-8(a). Second, Appellant alleged no claims of undue influence exerted by the Rushton Respondents, whose interests constitute 70% of the residuary estate under the 2023 Will.

Even assuming arguendo Appellant pled with sufficient specificity his undue influence claim against Respondent (which he did not), he did not even assert undue influence against the Rushton Respondents or allege any collusion among Respondent and the seven Rushton Respondents, thus leaving at least 70% of the 2023 Will intact. Pursuant to New Jersey statute, the Rushton Respondents would then receive the entire residue. Specifically, N.J.S.A. 3B:3-37 provides that "[w]hen a residuary devise shall be made to two or more persons by the will of any testator, unless a contrary intention

shall appear by the will, the share of any residuary devisees . . . not capable of taking effect because of any other circumstance or cause, shall go to and be vested in the remaining residuary devisees, if any there be, and if more than one, then to the remaining residuary devisees in proportion to their respective shares in the residue." N.J.S.A. 3B:3-37 (emphasis added).

Another significant hurdle regards Decedent's prior Wills. Thus, even if Appellant succeeded with his Caveat, he is not permitted to simply ignore or bypass the other five Wills preceding the 2023 Will, which also exclude him as a beneficiary of Decedent's estate. A successful Caveat against the 2023 Will would not magically render this estate intestate. To the contrary, this would only set the stage for further litigation which would require Appellant to invalidate the five preceding Wills, which would each qualify as a valid writing intended as a will. See In re Estate of Ehrlich, 427 N.J. Super. 64 (App. Div. 2012) (unsigned copy of will found to be valid writing intended as will); In re Probate of Will and Codicil of Macool, 416 N.J. Super. 298 (App. Div. 2010) (writing intended as will admitted to probate upon proof by clear and convincing evidence of decedent's actual review of document in question and final assent to its terms).

D. Appellant Failed to Create Any Genuine Issue of a Material Fact with Respect to His Claim of Fraud or Mistake.

As stated above, Rule 4:5-8(a) requires allegations of undue influence, fraud, mistake, and similar claims to be pled with specificity, with particulars of the wrong and dates, if necessary. The trial judge noted that while Appellant "make[s] allegations of fraud or mistake, there's really none alleged." 1T35. As to whether Appellant raised any material fact to his allegation of fraud, the trial judge found that "the answer is he has not. There's just no allegations of fraud." Id. at 1T39.

E. The Facts Presented by Appellant Were Either Irrelevant or Not Tethered to the Critical Time of Execution of the Decedent's Will.

It is well settled that "[u]ndue influence, to vitiate a will, must be operative at the time the will is executed." In re Livingston's Will, 5 N.J. 65, 76 (1950).

Here, Appellant alleged no material facts to support his claim of undue influence. In fact, Appellant's position at the court below was not aimed at stating a factual basis for incapacity or undue influence but rather posing questions. For example, as Appellant's counsel argued at the order to show cause hearing: "Further, as far as questions of undue influence, Your Honor, we believe there's a lot of questions here in this case." 1T17.

Instead of focusing on presenting proofs which would create a genuine issue of material fact, Caveator instead chose to pose unanswered questions. For instance, at the order to show cause hearing, Appellant asked why "Nan Rushton [was] managing the decedent's voicemail and what else was she managing for the decedent?" 1T18. "[W]hy does the decedent need his voicemails managed?" Id. at 1T20.

The trial court also evaluated the sufficiency of the facts Appellant did present:

- Decedent living in an assisted living facility – "I don't believe that moves the needle itself. The fact that someone lives in an assisted living facility does not mean that someone is incapacitated." 1T33.
- Confidential relationship – "there's no facts alleged" with respect to Respondent. 1T34. "There's no statements from anybody that [Respondent] had some sort of undue influence or any control or was able to place any pressure or trick or do anything with respect to the decedent." Id.
- Appellant knowing Decedent longer than Rushton Respondents – Appellant "points out that the beneficiaries arrived in the decedent's life in or about 2018 or 2017. And the question I'll say is that itself is not significant either. He became married and they became his – the

decedent's stepchildren." 1T34. The trial judge elaborated: Appellant "also argues that he and his wife had a relationship with the decedent in the past. . . . [B]ut by his own acknowledgment, [Appellant] did not appear to even know that the decedent had gotten married to a second wife. He never visited him or spoke with him from the time of that marriage forward. There does not appear to be any evidence of that." Id. at T34-35.

- Decedent transferring marital home to Rushton Respondents – Appellant questions Decedent signing over his interest in the marital home to the Rushton Respondents by deed dated January 11, 2023, prior to executing the 2023 Will in April. The trial judge was not persuaded by this fact: "What does the fact that he signed the house over have to do with Mr. Hughes [Respondent]? And the fact that he gave the children of his … deceased wife the house that she had an interest in, is that enough to create a factual issue? And again, standing alone, it does not." 1T36.

The only factual dispute which Appellant attempted to manufacture in the summary proceedings below were the self-serving, bare-bones certifications of himself, his wife, and his mother-in-law. For instance, Appellant claimed to have known Decedent since Appellant was "four or five years old." Pa267, ¶8. He further claimed to have "had a close and loving

relationship with my uncle, and I miss him very much." Id. at ¶9. He also generally recounted non-specific moments spent as a child, such as holidays and boating and sailing. Id. at ¶¶10-11.

More telling was that Appellant could not certify to any meaningful contact with Decedent during Appellant's adult life. In fact, Decedent and Appellant were not even close enough for Decedent to tell Caveator directly that Decedent married Frances E. Rushton in June 2018: "I did not learn that my uncle married Rushton until my father, Carl C. Harz … informed me." Pa268-69, ¶23. Appellant actually certified the last time Appellant even saw Decedent was in June 2019, at the funeral service for Decedent's wife (Frances). Pa269, ¶¶25-26. This would have been nearly four years before Decedent executed the 2023 Will, at a time when Decedent was grieving the loss of his second wife.

In short, the Probate Part judge correctly found the Caveat factually and legally unsustainable, dismissing the Caveat and denying an award of counsel fees. Pa010.

F. The Trial Judge Reached the Same Conclusion as the Appellate Division in an Analogous Situation in Ogborne.

The decision reached by the trial judge on the return date of the order to show cause is consistent with a nearly identical unpublished opinion authored

by the Appellate Division in the case of In the Matter of the Estate of Virginia J. Ogborne, Deceased, Docket No. A-4560-18T3 (App. Div. May 18, 2020).[2]

In Ogborne, one of the decedent's sons filed a caveat, prompting another son, who was named as executor, to file a complaint and order to show cause in a summary action to strike the caveat and admit the Will to probate. The trial court granted the relief sought by the designated executor on the return date of the order to show cause, without a plenary hearing, prompting the caveator to file an appeal.

On appeal, as here, the caveator reprised his arguments that the Will at issue was procured by undue influence and that the testator lacked testamentary capacity to execute the will. After reviewing the record, the Appellate Division determined that the caveator failed to present any facts that raised a genuine issue to preclude entry of the trial court's order, and affirmed. Ogborne, at *2. (Da023).

The Appellate Division noted the executor had commenced the action, like this one, in accordance with Rule 4:83-1, which provides in part: "Unless otherwise specified, all actions in the Superior Court, Chancery Division, Probate Part, shall be brought in a summary manner by the filing of a complaint and issuance of an order to show cause pursuant to R. 4:67." Id.

[2] A copy of the unpublished opinion in Ogborne is reproduced at Da022-034.

(quoting R. 4:83-1). (Da023). If "the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon." Id. at *3. (Da024).

The Ogborne court found that the trial court's review of the caveator's certification submitted in support of his answer to the verified complaint led to its conclusion that "there wasn't any real meat to it, . . . [t]here was a lot of supposition[.]" Ogborne, at *3. (Da024). The trial judge also concluded there was "no reason not to admit this [w]ill to probate," finding the contested will "'very well laid out,' . . . fully complied with Title 3B, was 'properly executed . . . [and] properly witnessed[.]'" Id. (Da024).

In Ogborne, as here, the caveator contended that he had presented sufficient evidence that the Will was the product of undue influence to warrant discovery and a plenary hearing. Id. at *4. (Da025). However, the Appellate Division court found that the caveator's submissions to the trial court were insufficient to establish his claim of undue influence over the testator at the time the Will was executed. Id. at *8-10. (Da029-31).

The facts alleged by the caveator in Ogborne were far more egregious than those alleged by the Appellant in the instant matter. For instance, in Ogborne, the caveator alleged that his brother exerted undue influence by

changing the locks and moving into their mother's residence, isolating and controlling her, and not allowing family members to visit or call her. Id. at *5-6. (Da026-27). In addition, the caveator submitted a certification from a cousin who stated that the decedent had to "sneak" phone calls with her and that the decedent told the cousin that she was afraid of her son and his girlfriend. Id. at *7. (Da028).

Similar to the present case, the Appellate Division found that the caveator's "unsupported allegations are based on his belief. Most of the alleged conduct is untethered to any timeframe … [and] do not specify time periods. Moreover, none of the allegations concern undue influence over [testator's] choices regarding the terms of the [] will." Id. at *8. (Da029).

The Ogborne court concluded that the caveator's proffer did not establish a confidential relationship between testator and son. "It is not enough to demonstrate that a beneficiary who stood to benefit from the will had a close relationship with the decedent." Id. (citing Liebl, 260 N.J. Super. at 528-29). (Da029). "Rather, there must be some showing that the decedent was particularly vulnerable to undue influence." Ibid. (Da029). Moreover, the Ogborne court concluded the caveator's proffer did not establish suspicious circumstances surrounding the preparation and the execution of the Will in dispute. Ogborne, at *8-9. (Da029-30).

On the issue of testamentary capacity, the Ogborne court, again as in this case, found that the caveator had "produced even less proof that [decedent] lacked requisite testamentary capacity to execute the [] will." Ogborne, at *10. (Da031). The Appellate Division noted that when evaluating this issue, "courts must consider if the decedent was able to 'comprehend the property [she was] about to dispose of; the natural objects of [her] bounty; the meaning of the business in which [she was] engaged; the relation of each of these factors to the others, and the distribution that is made by the will.'" Id. (quoting Livingston's Will, 5 N.J. at 73). (Da031). The Ogborne court further pointed out that "as a general principal, the law requires only a very low degree of mental capacity for one executing a will." Id. (quoting Liebl, 260 N.J. Super. at 524; In re Will of Rasnick, 77 N.J. Super. 380, 394 (Cty. Ct. 1962)). (Da031).

The Ogborne court found the facts presented by the caveator to be lacking with respect to the testator's mental capacity at the time the Will executed in 2016. For instance, the caveator's allegation as to his mother's mental condition while hospitalized in 2014, his lay diagnosis that she needed a psychiatric evaluation, and his claim that she suffered from "hallucinations, paranoia, and general rapid decrease in cogence" from an allergic reaction to medication during her 2014 hospital stay. Ogborne, at *11. (Da032). Put

simply, there was "no evidence that single incident continued past her release from the hospital, and certainly at the time she executed the will in 2016." Id. (citing Livingston's Will, 5 N.J. at 76) (holding testamentary capacity is to be tested at date of will execution). (Da032). Further, the caveator's claim that his mother suffered from dementia was "not tethered to the time when the will was executed" and the mere reference of dementia in the decedent's 2019 death certificate did not establish her testamentary incapacity in 2016. Id. (Da032).

In reaching its conclusion that the caveator failed to establish a genuine issue as to any material fact concerning undue influence or lack of testamentary capacity, the Appellate Division observed: "Summary actions are, by definition, short, concise, and immediate, and further, are 'designed to accomplish the salutary purpose of swiftly and effectively disposing of matters which lend themselves to summary treatment.'" Ogborne, at *9-10 (quoting MAG Entm't, 375 N.J. Super. at 551) (quoting Depos v. Depos, 307 N.J. Super. 396, 399 (Ch. Div. 1997)). (Da030-31). Further, "[i]nasmuch as a party in a summary action proceeding is not entitled to favorable inferences such as those afforded to the respondent in a summary judgment motion, the trial court correctly found [caveator] raised no material issue to warrant further

proceedings." Id. at *10 (citing O'Connell, 306 N.J. Super. at 172-73). (Da031).

Using the terminology of the Ogborne court, there was simply "no meat" to the caveator's will contest. The Ogborne court reached the conclusion that the caveator's proofs were insufficient to establish that there was a genuine issue as to any material fact pursuant to Rule 4:67-5, and struck the caveat and admitted the will to probate. The alleged facts and the law call for the same result in this case.

III. Appellant Incorrectly Argues that the Trial Court Erred by Construing All Inferences in Favor of Respondent. (Pa011-12).

Appellant makes a broad, vague claim in his Brief (pp. 30-32) that the trial judge construed all inferences in favor of Respondent. However, he cites no portion of the record where this actually happened.

Moreover, Appellant cites the wrong standard for summary actions. As the Appellate Division pointed out in O'Connell, 306 N.J. Super. at 172, there is a significant difference between a summary action and a summary judgment motion. "A summary proceeding is not a summary judgment proceeding. . . . More importantly, plaintiff is not entitled to favorable inferences afforded the non-movant in a summary judgment proceeding. Compare Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). Consequently, plaintiff's reliance

on entitlement to favorable inferences is misplaced." O'Connell, 306 N.J. Super. at 172.

Likewise, Appellant's claim to be entitled to favorable inferences is legally incorrect, and should be disregarded on appeal.

The trial judge applied the correct standard for summary actions: "We're not here for a motion for summary judgment . . . . I can draw inferences, but [Appellant] hasn't provided sufficient facts for me to do so, at least as it pertains to any relationship between what [Respondent] has done or what his role is and the [Rushton Respondents]." 1T32. The trial court further clarified: "A summary action is not a summary judgment motion. . . . And I'll note that . . . a party in a summary action proceeding is not entitled to favorable inferences such as those afforded to the respondent in a summary judgment motion. That means, as I stated earlier, I'm not to draw any inferences in favor of the [Appellant]." 1T38-39 (citing O'Connell, 306 N.J. Super. 166).

On the return date of the order to show cause, the trial judge framed the posture of this summary action correctly: "So the question again for the Court is has the [Appellant] raised any material issues that really warrant this matter to proceed to the next step and go to discovery?" 1T39. The answer was a resounding "no."

IV. The Trial Court Did Not Err in Considering Decedent's Prior Wills, and Appellant Incorrectly Argues that the Prior Wills Needed to Be Lodged with the Surrogate. (Pa011-12).

Before the Probate Part judge, Appellant devoted much of his argument to the contention that Respondent had not lodged any of Decedent's prior Wills with the Surrogate, and that somehow this failure to do so was "suspicious." Appellant has also claimed that since the five prior Wills had not been lodged, then Appellant must only invalidate the 2023 Will, and the Court can ignore all of the prior Wills – the 2021 Will, the 2020 Will, the 2019 Will, the 2018 Will, and the 2016 Will – and proceed straight to intestacy. This is simply not the law.

N.J.S.A. 3B:3-2.1 became effective in 2005, and statutorily created a will registry "in which a testator or his attorney may register information regarding the testator's will." N.J.S.A. 3B:3-2.1(a) (emphasis added). Significantly, N.J.S.A. 3B:3-2.1(c) provides as follows:

> The existence or nonexistence of a registration for a particular will shall not be considered as evidence in any proceeding relating to such will, and the failure to file information about a will in the registry shall not be a factor in determining the validity of the will.
>
> (N.J.S.A. 3B:3-2.1(c)).

In other words, registration, or lodging, of a Will is entirely voluntarily, and electing not to register a Will has no effect on the validity of the Will.

The will registry statute then directly refutes Appellant's "failure to lodge" defense, and provides no support for Appellant's claims.

In addition, while the existence of these prior Wills may not have deprived Appellant of standing to file his Caveat in the first place, these prior Wills do provide strong evidence of Decedent's long-term testamentary intent in the years leading up to the eventual 2023 Will, as opposed to Appellant's unpersuasive claims of a "close and loving relationship" untethered to any relevant timeframe – i.e., the date of execution of the 2023 Will. As the trial judge correctly stated, "I'm not going to ignore the fact that these other wills are out there." 1T32-33.

V. The Trial Court Did Not Err in Denying Appellant's Motion to Alter or Amend the Judgment. (Pa010).

A. Appellant Failed to Meet His Burden to Alter or Amend the Judgment pursuant to R. 4:49-2.

Appellant's motion to alter or amend the trial court's Judgment dated May 21, 2024 ("the Judgment"), is governed by R. 4:49-2, which provides in relevant part:

> [A] motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred . . . .

(R. 4:49-2 (emphasis added)).

Here, Appellant made no showing with any specificity as to what the trial court had overlooked or how it had erred. This failure was fatal to Appellant's attempt to alter or amend the Judgment, which was the culmination of a thoughtful, thorough, and well-reasoned decision placed on the record. 1T22-50.

B. An Award of Counsel Fees Pursuant to R. 4:42-9(a)(3) Requires a Showing of Reasonable Cause.

As a threshold matter, New Jersey strictly adheres to the "American rule" with regard to attorney fees. See Van Horn v. City of Trenton, 80 N.J. 528, 538 (1979) ("prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser") (internal quotation omitted). Indeed, "sound judicial administration will best be advanced by having each litigant bear his own counsel fees." Gerhardt v. Continental Ins. Co., 48 N.J. 291, 301 (1966). Consistent with this policy, counsel fees are not recoverable absent express authorization by statute, court rule, or contract. State of New Jersey, D.E.P. v. Ventron Corp., 94 N.J. 473, 505 (1983). And even where expressly provided, "the narrowness of [the exceptions] . . . has always [been] rigorously enforced, lest they grow to consume the general rule itself." Van Horn, 80 N.J. at 538.

Under Rule 4:42-9(a)(3), in a "probate action," most typically a will contest, if probate is refused,

> the court may make an allowance to be paid out of the estate of the decedent. If probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate.
>
> (R. 4:42-9(a)(3) (emphasis added)).

Rule 4:42-9(a)(3) permits a court to award attorney fees for both parties in certain types of probate litigation, including will contests, regardless of who ultimately prevails in the lawsuit. "Except in a weak or meretricious case, courts will normally allow counsel fees to both proponent and contestant in a will dispute." In re Reisdorf, 80 N.J. 319, 326 (1979). An unsuccessful contestant is entitled to costs when he or she shows "reasonable cause" for bringing a probate challenge, defined as a belief that "rested upon facts or circumstances sufficient to excite in the probate court an apprehension that the testator lacked mental capacity or was unduly influenced[.]" In re Will of Caruso, 18 N.J. 26, 35 (1955) (this standard works no hardship upon will contestant and protects estate from speculative and vexatious litigation). "Reasonable cause" requires a petitioner seeking an award of counsel fees to provide the court with "a factual background reasonably

justifying the inquiry as to the testamentary sufficiency of the instrument by the legal process." Macool, 416 N.J. Super. at 313.

C. Appellant Was Not Entitled to an Award of Counsel Fees under Rule 4:42-9(a)(3) because His Will Contest Was Weak and Meretricious.

Judged against this standard, the question, then, is whether Appellant had "reasonable cause" to contest the 2023 Will, or whether his case was "weak or meretricious." The answer was the latter, in a resounding fashion. If dismissing the Caveat on the return date of the Order to Show Cause was not a clear signal of the absence of reasonable cause, the trial court made this finding unmistakable in the motion hearing that followed:

> So the question here is is it a weak or meretricious case brought by Mr. Harz [Appellant]? That's really what this whole thing is about, and the answer is yes, so the fees are denied.
>
> ****
>
> The Court found that there were no genuine issues of fact, and that the matter should proceed in a summary manner under Rule 4:67.
>
> (2T19-20).

The trial court further elaborated:

> [Appellant] provided no facts, only suppositions . . . .
>
> ****
>
> Based on what reasonable cause is, he did not have reasonable cause. He had a weak case, and that's what I made clear in my ruling previously. And that's

> confirmed by the fact that I found that there was not genuine issue as to any material fact, and that I could render final judgment in a summary manner under Rule 4:67.
>
> (2T27-28).

D. Good Faith Does Not Constitute Reasonable Cause.

In support of his motion, Appellant relied on that part of the May 21, 2024, transcript where the trial court denied Respondent's claim for frivolous litigation sanctions against Appellant:

> I am going to deny the [Respondent's] request for frivolous litigation damages against the caveator [Appellant] under Rule 1:4-8 or by New Jersey Statute 2A:15-59.1. . . . I'm going to deny that on the grounds that he has the ability to challenge. Just based on his certification alone, to me, makes this matter being one brought in good faith. I can tell you, that's without me weighing credibility, but just based on that alone, the fact that he did have – was – willing that he put in his certification that he had discussions with the Rushtons, that he obtained that information, for me, without anything else, to me shows that there was a good-faith basis for the complaint.
>
> (1T49-50).

Appellant's counsel certified in support of the motion that "[t]he Court's decision that the [Appellant's] challenge to the Will was 'brought in good faith,' and that Respondent had a 'good faith basis' for bringing his claims, warrants an allowance of attorney's fees and costs from the Estate pursuant to R. 4:42-9(a)(3)." (Pa303 at ¶8).

Appellant's argument, however, misstated the applicable standard to be applied to counsel fee applications under Rule 4:42-9(a)(3). The standard is "reasonable cause," not "good faith." Good faith is defined as a state of mind consisting in honesty in belief or purpose. Black's Law Dictionary 762 (9th ed. 2009). Reasonable cause, however, is a higher standard, requiring the contestant to have a legitimate reason, supported by facts and circumstances, for bringing the will contest. Macool, 416 N.J. Super. at 313. As the Probate Part judge made clear on the record, Appellant had no reasonable basis supported by alleged facts for pursuing this will contest. While Appellant arguably may have filed his caveat in good faith because he was an intestate heir, he clearly had no reasonable cause to maintain the will contest without any material facts in his favor.

Put simply, Appellant had nothing more than hope – and questions – in the face of a series of six Wills that left him nothing. See In re Estate of Tenenbaum, 118 N.J. Eq. 405, 408 (Prerog. Ct. 1935), aff'd, 119 N.J. Eq. 488 (E. & A. 1936) (holding no reasonable cause existed where contestant had only "doubt and suspicion as to the validity of the will").

From the outset, Appellant's position has been contrary to the facts in this case, and turns well-established estate law on its head: "One of the soundest rules of construction is that no testator shall be presumed to die

intestate." Kanouse v. Central R. Co. of New Jersey, 97 N.J.L. 185, 188 (E. & A. 1922); accord Hackensack Trust Co. v. Bogert, 24 N.J. Super. 1, 7 (App. Div. 1953) (noting the law abhors intestacy and presumes against it). Appellant simply hoped for a result of intestacy, and ignored all other procedural requirements that would entitle him to relief.

The trial court determined Appellant's "caveat was not filed in bad faith." 2T21. Appellant, however, cannot convert that finding into a showing of the required reasonable cause to warrant an award of fees under Rule 4:42-9(a)(3).

The trial court explained the distinction between Appellant's will contest being "not frivolous" versus having "reasonable cause":

> I found that it [the will contest] was not frivolous, and that's what I found. But I did nothing more and I certainly did not find that the [Appellant] had "reasonable cause for contesting the validity of the will as required under Rule 4:42-9(a)(3)." That's a separate test.
>
> ****
>
> While his claims were not frivolous, that alone does not mandate that he be awarded attorneys fees and costs against the estate.
>
> That is I do not find that they are reasonable. They're two separate inquiries.
>
> (2T22; 2T26).

Simply put, a lack of bad faith does not constitute reasonable cause, and the trial court correctly denied his motion to alter or amend the Judgment in order to seek an award of counsel fees.

CONCLUSION

For the foregoing reasons, it is clear that Appellant failed to establish a genuine issue of material fact concerning Decedent's testamentary capacity or the existence of undue influence, fraud, or mistake with respect to the 2023 Will. Accordingly, this Court should affirm the trial court's May 21, 2024 Judgment setting aside the Appellant's caveat, admitting Decedent's 2023 Will to probate, and denying Appellant's motions for leave to file a counterclaim and cross-claim and for inspection of Decedent's death certificate, Wills, and estate planning file.

Further, it is clear that Appellant failed to demonstrate that he had reasonable cause for his will contest. Accordingly, this Court should affirm the trial court's July 10, 2024 Order denying Appellant's motion to alter or amend the Judgment to allow for an award of counsel fees and costs.

Respectfully submitted,

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Deceased

By: Anthony R LaRatta
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	:	SUPERIOR COURT OF NEW JERSEY
IN THE MATTER OF THE	:	APPELLATE DIVISION
	:	DOCKET NO: A-003772-23 T4
ESTATE OF CHARLES	:	
	:	CIVIL ACTION
FREDERICK REINERT,	:	
	:	ON APPEAL FROM
	:	
Deceased.	:	SUPERIOR COURT OF NEW JERSEY
	:	
	:	DOCKET NO.: CAM-P-54-24
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	:	Sat Below:
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	:	Hon. James Bucci, J.S.C.

REPLY OF APPELLANT, CHRISTOPHER HARZ

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PROCEDURAL HISTORY

Appellant herein incorporates the Procedural History from his Brief.

STATEMENT OF FACTS

Appellant herein incorporates the Statement of Fact from his Brief and counterstatements of facts set forth in Respondent's Brief and by the trial court.

The 2019 Will was not executed. (**Pa82-87; Db7 and 9**). There is no evidence corroborating the authenticity, veracity, or "exchange" of Dr. Maro's letter to the scrivener or the circumstances necessitating its procurement. The letter was not authenticated by a doctor's certification. (**Pa048 ¶ 15; Pa066; Db7**). There is no evidence that original copies of the prior wills exist or whether they were destroyed or revoked. There is no evidence certifying to or even setting forth the facts and circumstances surrounding the preparation and execution of the 2023 Will. Respondent's counsel's assertion that "Appellant had not seen Decedent since 2019," if in fact true, is not dispositive and made by counsel to minimize the fact that Appellant continued to engage and speak with his uncle by telephone after 2019. (**Pa269**). The trial court relied upon the mistaken belief that Appellant had "not been in contact with decedent for years since…2016." (**1T41 lines 24-25; 1T42 line 1**).

Considering all the correct facts of record and affording them a proper evaluation establishes that "there **may** be a genuine issue as to a material fact," warranting discovery and a plenary hearing. R. 4:67-5. (Emphasis added).

PRELIMINARY STATEMENT

This Court's *de novo* review of the unique and complex facts and in this case will determine that a remand is warranted. The trial court conducted a "clear and convincing" analysis of Appellant's claims on the return date rather than limiting its review to discern if genuine issues of material facts "may" exist. This is confirmed by the litany of unanswered questions the trial court lamented in its decisions. These questions mean that there "are" genuine issues of material facts which require a hearing and/or discovery to answer.

The trial court had so many questions because Respondent refused to allow Appellant to inspect the estate documents relevant to his claims despite three (3) prelitigation requests and their failure to submit a certification from the scrivener, the witnesses to the Will, or Dr. Maro. The court's reliance upon these uncertified facts precluded a finding by the court on the return date. R. 4:67-5 only permits a court to try the action on a return date if "…affidavits show **palpably** that there is no genuine issue as to any material fact…." Id. (Emphasis Added). No individual certified to the authenticity of these documents or the circumstances of their creation. It was improper for the trial court to give them the weight it did to dismiss the matter.

Further, the Respondent selectively released certain estate documents to promote a very biased narrative that ignores the telltale signs of lack of capacity, undue influence, mistake, coercion, and fraud. Refusing to cooperate prior to

litigation is a suspicious circumstance considering the dearth of information explaining how Respondent, a non-relative, became the new executor of Decedent's estate and its largest residuary beneficiary in 2023 months before Decedent passed.

Respondent's assertion that Appellant presented no evidence ignores the prejudice suffered by Appellant. Respondent's refusal to cooperate prior to litigation left Appellant in the dark and at the mercy of Respondent a neighbor of Decedent and his possible undue influencer, who is also the executor with sole control over Decedent's estate planning file. This blatant lack of transparency supported the need for discovery. By failing to allow this matter to proceed plenarily, the trial court has rewarded Respondent's behavior. This lack of transparency coupled with the lack of any facts by Respondent identifying how he became included in the Decedent's last will on the eve of his passing establishes that several genuine issues of fact exist.

The trial court's conclusion that the affidavits, or lack thereof on the part of the scrivener or the doctor, "palpably" established that no genuine issues of material facts existed on the return day is inconsistent with the facts of record and the law. The trial court relied almost exclusively on the purported existence of prior wills and Dr. Maro's letter to decide that Appellant would not be able to prove his claims by "clear and convincing." Specifically, the trial court does not consider, recognize, or give any weight to Respondent's absence from these prior wills or the caveat filed on behalf of the Rushtons. The trial court also inferred Dr. Maro's correspondence

to the scrivener and the 2023 Will are uncontroverted without any certification.

The trial court's summary dismissal of all Appellant's claims and requests was premature based upon the record and the genuine issue of material fact existing on the return dated warranted, at very least, the inspection of the wills and scrivener's file to verify the existence of any original prior wills and/or the circumstances surrounding how the subject final Will was created.

The trial court also heavily relied upon the Rushton certifications which filed on the eve of the return date and Appellant was not afforded an opportunity to respond to these eleventh-hour certifications. Such a circumstance is a reasonable basis for remand. State v. Giordano, 283 N.J. Super. 323, 330 (App. Div. 1995).

LEGAL ARGUMENT

I. Standard of Review for Summary Actions

The Appellant Court's standard of review in this matter is *de novo*.

II. The Trial Court Erred in Denying Appellant's Leave to File a Counterclaim and Crossclaim as the Claims Set Forth Therein are Part of the Same Controversy Set Forth in Respondent's Complaint. (Pa011 ¶3; 1T4 lines 9-16; 1T49 lines 17-19)

Respondent does not contest that Appellant's counterclaim and crossclaim arise from related facts or the same transaction set forth in the complaint. Therefore, Appellant's motion for leave to file the counterclaim should have been summarily granted on the return date pursuant to the basic standard set forth in Rule 4:67.

It is unclear if the trial court specifically granted Appellant's motion for leave

but considering his claims were argued on the return date Appellant contends that it was. Rather than directing Respondent to answer the counterclaim, the trial opted to proceed on the return date. This is one of the main reasons why there were so many unanswered questions for the trial court, namely had the Respondent been required to respond by answer to the Petitioner's counterclaims he would have been forced to admit or deny the allegations alleged therein.

A. Genuine and Contested Issues of Material Facts Exist with Respect to Appellant's Claim for Lack of Testamentary Capacity.

Incapacity is usually a fact sensitive analysis. In re Kershak, A-2897-17T3, 2019 WL 1976066 (N.J. Super. Ct. App. Div. May 2, 2019). Appellant's claim for lack of capacity establishes that several genuine issues of material facts may exist.

The trial court states it did not make a "clear and convincing" analysis and found "that the affidavits show palpably that there is no genuine issue as to any material fact with respect to the issue of capacity," and then decided the matter "on the pleadings." (**1T41 lines 8-12**). The trial judge stated Appellant had "not demonstrated any issue regarding capacity starting with the self-executing will and I add Dr. Maro's letter." (**1T41 lines 14-16**). The trial judge declared that the "integrity" of the 2023 Will "was not challenged," and concluded that "no one is challenging the authenticity," of Dr. Maro's letter." (**1T41 lines 17-21**). However, Appellant is certainly challenging the 2023 Will. Appellant also challenges the

doctor's note as the same, without a certification, only creates a genuine and material fact and is not fatal to Appellant's incapacity claim without more. Assuming the note was genuine, one would want to ascertain what Decedent's medical records actually state regarding his ability to recall and what tests were performed or not performed to ascertain whether he actually had capacity. Further, the record lacks a certification by the scrivener or any of the witnesses to the purported Wills.

The trail court lamented that "No one. No one at the assisted living facility," presented a certification. It then concluded that "[l]iving in an assisted living facility is not enough, the fact that someone might need help doing his bills is not enough, not when I have the letter from Dr. Maro." **1T42 lines 6-7, 11-14**). These are flawed arguments. These facts and others are enough to establish that incapacity "may" have existed when the 2023 was signed; and ignores that most if not all of this information cannot be attained without discovery as it is confidential and/or in control of Respondent as the fiduciary to the Decedent's estate.

Appellant's claim for lack of capacity has merit as it is based upon several facts of record.[1]

[1] (1) the Rushtons' prior caveat (Pa183); (2) the admissions made by the Rushtons regarding Decedent's health and inability to care for himself at a time prior to 2023 Will being drafted (Pa270 ¶¶ 36-39; Pa291 ¶¶ 20-22); (3) Appellant and his wife's uncontroverted testimony that Decedent mistook Appellant for his brother at a funeral fin 2019 (Pa269 ¶¶ 36-39; Pa291 ¶¶ 26-29); (4) Decedent's age; (5) Decedent being moved to a nursing home prior to execution of the 2023 Will; (6) the mysterious and first-time inclusion Respondent Hughes, a non-relative, in the 2023

B. Genuine and Contested Issues of Material Facts Exist with Respect to Appellant's Claim for Undue Influence.

A claim for undue influence requires a fact sensative analysis. "Each case of this nature must be governed by the particular facts and circumstances attending the execution of the Will…and the conduct of the parties who participated in order to determine if the coercion exerted was undue." In re Livingston's Will, 5 N.J. 65, 73 (1950) (citing In re Raynolds, 132 N.J. Eq. 141, 152 (N.J. Prerog. Ct. 1942).

Appellant is not required to firmly establish a confidential relationship and suspicious circumstances on the return date for an order to show cause but only that genuine issues of material facts may exist. Even without the benefit of discovery, many of the traditional factors are present in this case.[2]

Regarding the Rushton caveat, the court stated "I'm not going to hold it against Ms. Cerf, the fact that she filed a caveat and then withdrew it. I just can't. I'm not going…to draw that inference." (**1T44 lines 12-14)**. No reason was offered why the court was reluctant to assign any material relevance to the Rushton caveat, which constituted a challenge to the Will submitted, when the same should offer,

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Will; and (7) the multitude of wills he purportedly executed during a very sensitive period in Decedent's life.

[2] (See also, Pa128-129 ¶ 1; Pa133 ¶s 8 and 9; Pa 134 ¶s 10 and 11, Pa135-145 ¶s 13-32; Pa 185-192); Pa213 ¶s 1 and 2; Pa217 ¶s 29, 30, 31 and 32; Pa219 ¶ 40; Pa220 ¶ 49; Pa223 ¶s 60, 61 and 62; Pa224 ¶s 63-66; Pa225 ¶s 67-72; Pa226 ¶s 73-75; Pa231-232 ¶s 102 and 103; Pa232-235 ¶ 105 a-q. – 107; Pa236 ¶s 109-111).

under the unique circumstances of this case, a glimpse into the mind of Cerf and, more importantly, Decedent's weakness and vulnerability and his interactions with Respondent. (**Pa183**). The Rushton caveat coupled with the other relevant material facts support and warrants further investigation.[3] The 2023 Will is the only document offered to probate in this matter and Cerf's first and immediate inclination was to protest its submission for probate four (4) days after Decedent's passing and upon having been made aware of its existence as per her caveat. (**Pa183**). There was no hesitation, as if Cerf knew something, upon simply finding out about the "new" Will.

The trial court wrongly concluded "there's no evidence that the decedent wanted to speak to [Appellant], that he ever reached out to the [Appellant] or that [Appellant] tried to reach out to him, that is tried to visit him. They didn't speak for years." (**1T46 lines 21-24**). This is simply incorrect and makes several assumptions.

The trial court also concluded that "[e]ven if I take it as true that, yes, he moved to a nursing home because he needed help and he wasn't able to take care of himself anymore, that's why people go to nursing homes, but that doesn't mean that someone is not of sound mind." (**1T47 lines 20-24**). It does, however, establish that there "may" be a genuine issue as to a material fact when coupled with the other facts supporting Appellant's claims. The trial court "wants more" but declined to

[3] The unique circumstances include the refusal to allow for an inspection of the estate planning file prior to litigation and the selective production of uncertified documents by the Respondent.

allow for discovery to get it.

C. Appellant is Not Required to Allege Undue Influence by All the Residuary Beneficiaries under the 2023 Will.

The trial court and Respondent also argue Appellant should have also plead claims for undue influence against all seven (7) Rushtons to set aside the subject Will. (**Db22**). However, neither the trial court nor Respondent can identify any precedent to support this argument because it does not exist. Further, it is incorrect because Respondent only submitted the 2023 Will for probate and not the prior purported wills. In addition, Appellant relies on In re Lent 142 N.J. Eq. 21, 59 A.2d 7 (E&A 1948), as more thoroughly brief in his original brief. With the foregoing being said, Lent did conclude that a court should not require or demand litigants to speculate as to how such documents may have been prepared, revoked or whether such documents are genuine. Id. 142 N.J.Eq. 21, 59 A.2d 8 (1948).

The trial court's standard in this matter, requiring challenges to all the wills including those not submitted for probate or "lodged" with the surrogate, is admittedly based upon the supposition that Appellant would need to challenge all the wills because they will be submitted for probate. In this matter, interested parties Richard Lippincott and Carl F. Harz have already waived their claims through nonappearance and Edward Arnett was not served a copy Respondent's complaint.

Besides the Respondent, only the Rushtons remain and it could be argued that their "threat" to submit the purported prior to wills was waived as they have already

withdrawn their caveat and adopted Respondent's claims and defenses.

Respondent relies upon N.J.S.A. 3B:3:37 to argue that if the Petitioner is successful in his challenge, Respondent's share would go to the Rushtons. However, this ignores the fact that evidence of undue influence by the Rushtons could be further revealed during discovery. The court confirmed, "[t]here's also an allegation [of undue influence] that targets the Rushtons…[a]nd there's more evidence against them than as to [Respondent]." (**1T46 lines 4-5**). The trial court continued by confirming a confidential relationship existed between the Rushtons and Decedent when it stated, "[w]hat I see are stepchildren who are helping their stepfather even after their mother died by helping taking care of him." (**1T48 lines 18-20**).

In addition, to date there is no case extending NJSA 3B:3-37 to cover situations where undue influence and/or incapacity was alleged. The statute itself is titled "Residuary devise to two or more residuary devisees; death of one or more before testator" and was meant to cover situations of inadvertent lapses not the procurement of a Will through undue influence or for want of capacity. The Respondent also cites Ehrlich and Macool in support of his position but these cases are distinguishable because the contestants' claims were not disposed of summarily.

D. Genuine and Contested Issues of Material Facts Exist with Respect to Appellant's Claim for Mistake, Coercion and Fraud.

If the fraud pleading does not include the required specificity, the pleader should ordinarily be afforded the opportunity of amending the pleading in lieu of

dismissal of the claim. Rebish v. Great Gorge, 224 N.J. Super. 619 (App. Div. 1988). This would be especially so, given that no discovery was permitted and Appellant was denied access to the scrivener's file and the doctor's file prior to the commencement of the action, despite repeated requests for joint inspections.

Decedent mistook Appellant for his brother during his second wife's funeral in 2019. (**Pa269 ¶¶ 36-39; Pa291 ¶¶ 26-29**). Arnett is not Decedent's nephew but identified as the same in prior wills. (**Pa082-078; Pa089-095; Pa097-103**).

E. Appellant Presented Facts Relevant to the Critical Time of Execution

A review of this section of Respondent's brief reveals that certain evaluations of the evidence made by the trial court were improper and/or incorrect.

The trial court's evaluations of Decedent's move to an assisted living facility in November 2022, reveals it deemed this fact irrelevant when considered by "itself." However, this fact and others are relevant and material to the execution of the Will. The move occurred before the Will was executed and indicates a sudden termination of Decedent's "independence" in 2022 as per the Rushton certifications. Two months later his life estate in the Rushton home is terminated in January of 2023. (**Pa185-192**). Thereafter and inexplicably, Respondent is added to Decedent's Will despite being a non-relative and omitted from all the prior wills of Decedent.

Respondent describes certain facts alleged as "bare bones." This ignores all the relevant material facts identified multiple times in the briefs. Plenary hearings

are required when there are "contested issues of material fact on the basis of conflicting affidavits." Conforti v. Guliadis, 128 N.J. 318, 322-23 (1992). In Conforti, the Court stated that "certifications of fact should not be read restrictively or literally to determine whether alone they spell out a claim for relief, nor should their probative worth be neutralized or discounted by the opposing certifications. Conforti v. Guliadis, 128 N.J. 318, 328-329 (N.J. 1992).

F. Ogborne is Not Analogous to the Subject Matter and its Inclusion Along With Respondent's May 7, 2024 Letter Brief to the Trial Court is in Violation of R. 2:6-1(a)(2).

Respondent's Appendix reveals the same includes a May 7, 2024, Letter Brief enclosing the unpublished Appellate Division's opinion in In the Matter of the Estate of Virgina J. Ogborne, Deceased, Docket No. A-4560-18T3 (App Div. May 18, 2020). (**Da013-034**). The letter brief's inclusion violates R. 2:6-1(a)(2) which allows for the inclusion of a such a brief if it is "…referred to in the decision of the court…or the question of whether an issue was raised in the trial court is germane to the appeal." Here, the trial court's decision is oral and the only reference to Ogborne was made by Respondent's counsel; and no "issue" question exists. This Court should not consider the May 7, 2024 Letter Brief. However, if this Court deems its inclusion proper, the subject matter is clearly distinguishable from Ogborne,

The facts in this matter are more complex, specific, substantial, and unique than those in Ogborne. Our facts establish that there "**may** be a genuine issue of

material fact" in this matter. R. 4:67-5 (Emphasis added). The "affidavits" in this matter, and lack of crucial certifications, do not "show **palpably** that there is no genuine issue as to **any** material fact." Id. (Emphasis added).

In Ogborne, the will's proponent, accused of undue influence, was a child of the decedent. In this matter, the 2023 Will's proponent, Respondent, is also accused of undue influence, but is not a relative of Decedent. This is also a significant suspicious circumstance. In Ogborne, the will's contestant failed to set forth any specific time periods relevant to the time of that will's execution. In this matter, the Will's contestant, Appellant, and the Rushtons, set forth specific facts occurring during time periods relevant and material to the Will's execution. In this case, Appellant's proffer does establish a confidential relationship. Appellant's counterclaim alleged, in part, that Respondent was named as power of attorney for Decedent prior to his passing and Dr. Maro's correspondence also references a "power of attorney." (**Pa224 ¶ 65; Pa233 ¶ 105 f; Pa066**).[4] Additional facts establishing a confidential relationship including the weakness and vulnerability of Decedent prior to the Will's execution have been asserted by Appellant's and confirmed in the Rushtons' certifications, and Dr. Maro's letter. These allegations

[4] On November 1, 2023, December 15, 2023, and February 8, 202, all prior to the complaint's filing, Appellant made written requests to both Respondent and the Rushtons for, in part, copies of any "powers of attorney" for Decedent. (**Pa163; Pa169; Pa173**).

along with others identified previously, clearly establish a confidential relationship may have existed between Respondent and Decedent and that Decedent may have lacked the requisite capacity immediately prior to the execution of the Will. In Ogborne, the proponent of the will was represented by the scrivener of will and counsel certified decedent was "alert and strong-willed just as she had been "a year earlier" in a "zoning matter" and the time of execution and then described the events of that day. Id. at page 9 In this matter, Respondent's counsel is not the scrivener and can make no such certification. The scrivener in this matter has not made such certification. Instead, our scrivener required a "doctor's note" before he would proceed and there are no facts describing the events of that day or identifying the individuals who participated in or accompanied Decedent to the signing. In this matter, not only is the proponent and alleged undue influencer, Respondent, a non-relative; nothing has been offered to the trial court and/or appellate record describing Respondents relationship with the Decedent and his sudden inclusion into Decedent's Will. The lack of any such information from the Respondent or the Rushtons and the Rushtons' caveat also establishes that undue influence may have occurred and/or that Decedent may have lacked capacity.

III. The Appellant Has Properly Argued and Specifically Identified the Improper Inferences Made in Favor of Respondent by the Trial Court.

Appellant herein incorporates section IV, A, B, and C of Appellant's Brief.

IV. The Trial Court Erred in Considering Prior Purported Wills of Decedent

Without the Prior Wills Being Lodged with the Surrogate.

Respondent's argument in this section is frivolous, not applicable, and was only presented to confuse the trial court. Appellant directs this Court to the cases of Whitman v. Estate of Whitman, 259 N.J.Super. 256 (N.J. Super. 1992) and In re Baker, 8 N.J. 321 (N.J. 1951). Both of these cases specifically refer to the lodging of wills, like that of a caveat, with the surrogate. These cases establish that "lodging," like the filing of a caveat is done at the surrogate's office. What Respondent is identifying is the Will Registry with the New Jersey Secretary of State wherein only certain information about a will (Testator, Date of Will, Fiduciaries, and Location of the Will) is requested. The registry also specifically prohibits the submission of a copy of the will and therefore this argument is meritless.

V. Trial Court Erred in Denying Appellant's Motions to Alter or Amend the May 21, 2024 Order Pursuant R. 4:42-9 for an Allowance of Attorney's Fees and Costs from Decedent's Estate Pursuant to R. 4:42-9(a)(3) as the Respondent Had Reasonable Cause to Challenge the Will Offered To Probate by Respondent. (Pa010 ¶ 1; 2T17-28)

Appellant herein incorporates section VI of Appellant's Brief.

CONCLUSION

For the foregoing reasons, Appellant's appeal should be granted.

SIMEONE & RAYNOR, LLC
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s/Stefanio G. Troia
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STEFANIO G. TROIA, Esquire

Date: March 5, 2025