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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN A. MCCLOSKEY, personally and as Executor of the Estate of Edward McCloskey, THE ESTATE OF EDWARD MCCLOSKEY. Respondents-Below, Appellants.	No. 568, 2014
v.	Court Below, Chancery Court of the State of Delaware, C.A. 6061-AGB
RICHARD A. MCCLOSKEY, Petitioner-Below, Appellee.	

APPELLANTS' AMENDED OPENING BRIEF

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I. NATURE AND STAGE OF THE PROCEEDINGS

This action commenced on September 10, 2010, by the filing of a Petition to Review Proof of Will, to Specifically Enforce Promise to Make a Testamentary Devise, to Impose a Constructive or Resulting Trust, and to Rescind Deeds. The Appellee Richard McCloskey is the older brother of the Appellant John McCloskey who is the Executor of co-Appellant, the Estate of Edward McCloskey.

The Appellee became aggrieved when he discovered that his father Edward McCloskey had not left him the family farm house in which the Appellee and his family had resided at the time of his father's passing. The Appellee claims that his father had promised to leave him the home on the condition that he, the Appellee, pay for certain repairs and/or improvements to the home over the course of four decades. There is no writing evidencing this alleged "promise." The only writing to which the Appellee points shows he is entitled to the property is a Will given to him by his father in 1977. Edward McCloskey, however, made two subsequent Wills each revoking all prior Wills. Notably, Edward's 1997 Will left the Appellee a life estate in the home. By 2003, Edward changed his Will again and left the Appellee a one-year estate in the home. The Appellee was unaware of his father's changes to his Will until after Edward had passed away.

The Appellant lived next door to his father and the Appellee for many years. The Appellee claims that the Appellant exerted undue influence over his father, which allegedly caused Edward to change his Will twice.

The parties engaged in substantial discovery and attempted to resolve the action through mediation but such attempt ultimately proved unsuccessful.

Trial in this matter was held from April 22 to April 25, 2013, and then concluded on June 24, 2013. Substantial briefing of the issues took place, including Exceptions to the Master's Draft Bench Report and Final Report. Chancellor Andre G. Bouchard accepted the Master's Final Report and entered it as the Chancery Court Order from which this appeal was taken.

This is the Appellants' Opening Brief.

II. SUMMARY OF ARGUMENT

This appeal is from a Chancery Court Opinion of September 3, 2014 (the "Opinion"), which granted the Appellee's claim for an Oral Contract to Make a Will and accordingly rescinded a deed dated 2008 from the decedent to the Appellant John McCloskey. The Opinion should be reversed for five separate reasons.

(1) Whether the evidence presented at trial did not support a finding of an oral contract to make a Will;

(2) Whether the finding of the court regarding the oral contract to make a will did not comply with the statute of frauds at 6 DEL. C. § 2715;

(3) Whether the alleged "oral contract" between the decedent and the Appellee was not supported by adequate consideration;

(4) Whether the alleged "oral contract" was too vague to be enforceable; and

(5) Since the rescission of the 2008 deed of approximately three acres to the Appellant John McCloskey was predicated upon the finding of an oral contract to make a will, whether the rescission count should similarly be reversed.

III. STATEMENT OF FACTS

Edward McCloskey died on September 1, 2010, at the age of 96.[1] Edward was the father of Appellee Richard A. McCloskey ("Richard") and Appellant John A. McCloskey ("John"). The parties to this action have been Delaware farmers for most of their lives. Richard is the oldest of Edward's children, followed by Ronnie, Bobby, John, and Josephine.

John and his wife Linda moved into a home adjacent to Edward's home where Richard and Wanda had continued to live with Edward until Edward's passing in 2010.[2] For several years thereafter, John worked for Richard on the family farm until John was able to farm his own land and land rented from others.[3]

Although they lived in Edward's home from about 1963 to the present, Richard and Wanda did not begin paying for any household expenses, such as utilities, until about 1974,[4] Edward continued to pay the taxes and insurance on the property. The reason Richard and Wanda began paying some of these monthly expenses was because of the birth of their oldest son in or about 1969.[5] Richard and Wanda felt obligated to help Edward with certain household expenses, which they helped incur with their growing family. Otherwise, Richard and Wanda never

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[1] Trial Tr. at 147, JX 16.
[2] Trial Tr. at 769.
[3] Trial Tr. at 767-768.
[4] JX 31.
[5] Trial Tr. at 354.

paid for any rent for residing at Edward's home over the years.[6] Richard claimed that he paid his father "land rent" for using certain acreage,[7] but with respect to the home itself, Richard never paid his father to for Richard and his family to live there for over 50 years.

It is interesting that the Appellee and his witnesses went to great lengths to show how much care they provided Edward on a daily basis—preparing his meals, cleaning his clothing, assisted him with his medicines, etc.

The relationship between Edward and Richard and Wanda began to deteriorate sometime during the mid-1990s, possibly earlier. For example, Wanda claims that in 1995, Edward put his arms around her and confused her as being his wife, whom Edward had divorced approximately 30 years earlier.[8] According to Wanda, this was an isolated incident that did not surface again.[9] Notably, Edward continued to drive as late as 2006,[10] despite the fact that around 2001, Edward had knee surgery which made him more dependent on others for getting around and going from place to place. It is clear that Richard and Wanda began to resent the additional care Edward needed as he aged, which ultimately proved the basis for

[6] Trial Tr. at 340.
[7] Trial Tr. at 273.
[8] Trial Tr. at 366.
[9] Trial Tr. at 367.
[10] Trial Tr. at 791-792.

the deteriorating relationship between them.[11]

As Edward needed more care and assistance in his day to day activities, John, who lived next door, began to assume a larger role in Edward's personal health care needs.[12] Richard and Wanda were either unwilling or unable to assist Edward with such daily tasks.[13] John was the principal person to transport Edward around after he could no longer drive, and John was virtually the sole caregiver with respect to Edward's medical appointments and other doctor visits throughout the 2000s.

Until 2003, Edward maintained virtually all of his personal financial books and records.[14] Edward kept copious notes and records involving all of his business and financial affairs.[15]

In 2005, Edward was diagnosed with mild dementia and Alzheimer's.[16] This was the first time a mental health/medical evaluation was made regarding Edward's state of mental health. In or around 2006, Edward began to use a wheelchair.[17] Around this time, John enrolled Edward in a Senior Center day care facility that Edward enjoyed visiting five days per week until near the end of his

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[11] See Trial Tr. at 690.
[12] Trial Tr. at 690.
[13] *Id.*
[14] Trial Tr. at 890.
[15] *See, e.g.*, JX 33-37.
[16] JX 40.
[17] Trial Tr. at 911.

life.[18]

Nonetheless, during his lifetime, Edward made a Will in 1977,[19] which was supplemented with a Codicil in 1991.[20] Edward then in 1997 made a new Will.[21] In 2003, Edward made a third Will revoking all prior Wills.[22] The 2003 Will is the subject of the present action. John has been the duly appointed Executor of the Estate of Edward McCloskey from the Register of Wills.

1977 Will

Richard and John were designated as co-Executors of Edward's 1977 Will.[23] Richard and Wanda were given a copy of the 1977 Will. Richard did not give a copy of the Will to John at any point during Edward's life.[24] The parties dispute whether Richard ever informed John that John was a co-executor under that 1977 Will. Richard briefly mentioned to John in passing one day that Edward had made a Will, and that John was a beneficiary of it.[25] Notably, Edward's properties were divided principally between Richard and John, with certain assets also devised to Josephine.[26] Ronnie and Bobby were effectively disinherited, though there were

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[18] Trial Tr. at 920.
[19] JX 1.
[20] JX 2.
[21] JX 3.
[22] JX 5.
[23] JX 1.
[24] Trial Tr. at 219.
[25] Trial Tr. at 916.
[26] *See* JX 1.

also smaller amounts left to them in the 1977 Will.

1991 Codicil

In 1991, Edward executed a codicil that reaffirmed most of the terms of his 1977 Will, including the bequest of certain real property to Richard and John, but made other changes in certain specific devices that have little to do with this litigation.[27] Richard and John remained as co-Executors in the codicil and both were to inherit real property in accordance with the terms of the 1977 Will.

1997 Will

In 1997, Edward asked John to find an attorney to help him prepare a Will.[28] In the 1997 Will, Edward disinherited Richard from taking a fee simple interest in the property previously bequeathed to him, and gave Richard a life estate in the farm house.[29] It is not clear under the terms of this Will whether Richard was to receive a life estate in the roughly 40 acres of land around the home. The remainder interest was left to John and Josephine, with smaller bequests to Ronnie and Bobby. John was designated as the sole Executor of Edward's 1997 Will. Richard was unaware until after Edward's passing that Edward had made any other Wills after the 1991 codicil.

[27] JX 2.
[28] Trial Tr. at 692-693.
[29] See JX 3.

2003 Will

In 2003, Edward asked John once again to take him to see an attorney because he needed to make some more changes to his Will.[30] Although John arranged the meeting with the attorney, he made no recommendations of any kind and largely sat silent while his father explained to the attorney what changes he wanted to make to his new Will.[31] At no time did John ever attempt to persuade to convince his father to do one thing or another with any of his father's assets, since as far as John was concerned, his father's assets were his father's alone to leave however he wanted.[32] In the 2003 Will, Edward once again named John as the sole Executor of his Will. Notably, Edward reduced Richard's interest in the farm house to a one-year estate, leaving the remainder to John and Josephine as in the 1997 Will.[33]

It is clear from the aforementioned facts, that Edward had a falling out with Richard and Wanda, and it was that falling out, rightly or wrongly, that caused Edward to change his Wills in 1997 and 2003 to disinherit Richard from the property Richard believed would be his once his father died. In April 2000, after hearing Edward complain about certain financial dealings with Richard over the years that Edward did not like, the John suggested that Edward write down those

[30] Trial Tr. at 657.
[31] Trial Tr. at 698.
[32] Trial Tr. at 704-705.
[33] JX 5.

issues.[34] It is noteworthy that although John did not have any material input in that list of grievances, by this time, Edward's memory was clearly sufficient enough to recall specific financial dealings with Richard from as early as the 1960s through the present.

Edward was known among his family and peers as a very private person, especially when it came to his personal financial matters.[35] He rarely shared this sort of information with anyone except on a need to know basis, and sometimes not even then.

Richard and Wanda claim that they made various improvements to the farm house over the years.[36] Most of the items listed on Joint Exhibit 24 as "improvements," in actuality upon closer inspection were merely repairs or maintenance issues that Richard, Wanda and their family enjoyed the use of such household costs. The last such "improvement" of significant value/cost was allegedly made sometime around 1995,[37] well before Edward changed his Will in 1997. Richard and Wanda claim that when it came time to discuss whom should pay for a proposed improvement, Edward told them, "go ahead and do it. It's all going to be yours anyway."[38] No one other than Richard, Wanda or Jordan

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[34] JX 21.
[35] Trial Tr. at 437-438, 462, 706.
[36] Trial Tr. at 45.
[37] JX 24.
[38] Trial Tr. at 239.

McCloskey ever heard Edward make such a statement. Richard and Wanda claim that those statements were promises that supported their belief that Edward had intended to leave the property to Richard as devised in the 1977 Will and 1991 Codicil. No other writing of any kind exists to substantiate this alleged "promise" that Edward would leave the house and farm to Richard.

In addition, it is noteworthy that no unbiased witness in this trial testified that s/he ever heard Edward McCloskey promise any sort of *quid pro quo* arrangement with the Petitioner regarding the property at issue.

The extent of Edward McCloskey's ability to care for himself was not undisputed. The Opinion stated, "[i]t is undisputed that neither Edward nor his father Jerry had any desire to perform household chores." Opinion at 34. No such evidence was ever presented. Although it appears that the Appellee and/or his wife performed various household tasks over the years, there is no evidence on the record that Edward asked Richard or Wanda to perform any of these tasks for himself or anyone else, or that such performance in any way related to any promise to leave the property at issue to Richard when Edward passed away. On the contrary, these daily tasks, whomever performed them, were most likely done out of mutual respect for each other in the family, and not as some sort of contractual obligation.

The Opinion summarily dismissed the import of JX-21, which was a document authored and signed by Edward McCloskey in April 2000. "The unreliability of John's testimony also was relevant to the Master's consideration of the April 2000 Document: . . ." Opinion at 27, fn. 98.

It should not go unnoticed that JX-21 was not a stand-alone document that showed Edward clearly gave cash to Richard and/or Wanda on a routine basis. Edward kept copious notes and records involving all of his business and financial affairs, *see*, *e.g.,* JX-33 to 37, including among other things certain handwritten receipts indicating cash payments to Richard or Wanda for various chores and items. It is also noteworthy that Richard and Wanda flatly denied receiving any cash from Edward at all, which by itself makes their testimony suspicious. At the outset of this litigation, the Appellee alleged that Edward was not the kind of person to keep written records of his financial dealings. Although the Petitioner did not turn over *any* documents from the decedent during discovery phase in this matter, what documents the Estate was able to locate showed quite clearly that Edward was interested in and kept records of his financial dealings. Since the Appellee would have had custody of any of Edward's written documents at the time of his passing, aside from those the decedent gave his other son John McCloskey, the Estate understandably relied to a large extent on JX-21 to

corroborate Edward's version of the facts in this case, in addition to disputing the testimony of the Appellee and his family.

With respect to the "promise" at issue in this case, the Appellee went to great lengths to shore up his version of said "promise." The Opinion summarized the promise from the Master's Report as follows, "The credible testimony offered by Richard, Wanda, Jordan, and Chuck Holliday consistently established Edward's repeated promise to leave the Property to Richard in exchange for Richard's commitment to pay for repairs and improvements to the Property." Opinion at 24.

The specifics of the record regarding the alleged promise and any such repairs or improvements deserve closer scrutiny. The Appellee presented JX-24, drafted by the Appellee's wife and/or his daughter-in-law Jordan, as evidence of the improvements/repairs made to Edward's home. Most of the items listed on Joint Exhibit 24 as "improvements," in actuality upon closer inspection were merely repairs or maintenance issues that Richard, Wanda and their family enjoyed the use of since they have resided at the home for over 50 years.

Richard and Wanda claim that when it came time to discuss whom should pay for a proposed improvement, Edward told them, "go ahead and do it. It's all going to be yours anyway." No unbiased witness ever heard Edward make such a statement. Moreover, Richard testified that Richard would be the one to approach Edward, not the other way around, to ask whom should pay for a certain household

expense. Richard and Wanda claim that those statements were promises that supported their belief that Edward had intended to leave the property to Richard as devised in the 1977 Will and 1991 Codicil. No other writing of any kind exists to substantiate this alleged "promise" that Edward would leave the house and farm to Richard.

The Opinion attached significance to the fact that Edward's 1997 Will, which left Richard a life estate instead of a fee simple interest, was not revealed to Richard. "It is notable that, although Edward later revoked those documents [the 1977 Will and 1991 Codicil], he never informed Richard of the 1997 Will or the 2003 Will, leaving Richard unaware that Edward had retreated from his earlier promises." Opinion at 25. Assuming for the moment that the Opinion's conclusion above is correct, it would more likely reveal that Edward had made no such promise to Richard and Wanda, in that if they already felt entitled to inherit the property through some efforts of past performance, there would have been no need to alter their behavior and attitude towards Edward going forward. What is much more likely is that the Appellee simply assumed (incorrectly) that the 1991 Codicil was Edward's last testamentary device because that was the last device Edward made wherein Richard was named as a co-Executor. What is also important here is that even assuming Richard believed Edward had made some sort of *quid pro quo* arrangement relating to improvements for ownership of the property when Edward

died, the 1997 Will left Richard a life interest in the property, thereby securing the Richard's control and ownership of the property for the rest of his life. From Edward's perspective, this would have been entirely consistent with any incorrect assumption Richard would have made regarding control of the property when Edward died.

The only dated testimony about Edward's alleged promise potentially made after the execution of the 2003 Will came from the Petitioner's daughter-in-law Jordan McCloskey. Jordan testified that she heard Edward make the statement, "it's all going to be Richard's anyway" sometime around the 2002-2004 timeframe. This testimony is suspect for a few reasons. First, the witness was vague as to the exact time she allegedly heard Edward say, "I'm glad you're doing it… because it will be yours anyway." Second, there was no contemplated improvement to be made at that time. The last time a roof was installed, according to JX-24, was in 1997, four years *before* Jordan even resided at the premises. Jordan testified that she started staying at the home since 2001. Third, she claimed that the statement itself was made in 2004, approximately seven years after the last roof had been installed. If the Appellee is to be believed, it was not the norm for Edward to make such a statement except in response to a question about whom should pay for a given improvement. Fourth, the context of the alleged statement does not comport with Edward's prior reluctance to discuss his personal financial

affairs with anyone except on a need to know basis, and certainly not with his step-granddaughter. Although Jordan testified that she had no interest in this case regardless of how it turned out, she clearly was either grossly misinformed or more likely being untruthful as to her potential future interest in the property. It is clear, and would have been made clear to her that a fee simple interest in the farmhouse and/or the land would pass to her husband and his older brother after Richard and Wanda pass. Therefore, her testimony is also biased and suspect regarding the alleged "promise."

IV. LEGAL ARGUMENT

The lower court's Opinion (the "Opinion") solely made a finding on the Oral Promise to Make a Will claim, and consequently made a finding that the 2008 Deed should be rescinded as a consequence of its ruling on this count. Therefore, this brief will only address those issues. For the following reasons, the Appellants respectfully request that this Court enter an order finding that the Appellee has failed to establish the elements of the Oral Promise to Make a Will, and otherwise a finding in the Appellants' favor on all other claims and issues.

A. QUESTION PRESENTED: WHETHER THE EVIDENCE DID NOT SUPPORT A FINDING OF AN ORAL CONTRACT TO MAKE A WILL. *See* lower court Docket Number 55477854.

(1)A. SCOPE OF REVIEW

This Court reviews the Court of Chancery's conclusions of law *de novo, see DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chi., Ill.*, 75 A.3d 101 (Del. 2012) (citing *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999)), and its factual findings with a high level of deference. *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005)). This Court will not set aside a trial court's factual findings "unless they are clearly wrong and the doing of justice requires their overturn." *See id.* (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 219 (Del. 2005), *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

This Appeal involves mixed questions of law and fact. To the extent the lower court's Opinion on the merits of the Appellee's claim for an oral promise to make a will was based on an interpretation of the statute of frauds, this Court's review is *de novo*.

(2)A. MERITS OF ARGUMENT

The Opinion correctly noted, "Although Delaware recognizes the validity and enforceability of an oral contract to make a will, the law views those agreements with skepticism." Opinion at 23. There is a preference under the law that either testamentary documents or inter vivos transfers are the preferred method to transfer property. Further, the Opinion correctly noted the elements of a claim for specific performance of an oral contract as a general matter. However, as will be discussed below, there is an additional requirement to consider when the property subject to the alleged contract is real property.

The Opinion found that the Appellee had proven by clear and convincing evidence that Edward made a promise to leave the house and farm to Richard in fee simple when Edward passed away in consideration for Richard paying for certain improvements/repairs to Edward's home. The Opinion cited to *Hunter v. Diocese* in support of the proposition that Delaware has defined a "promise" as "a manifestation of intention to act in a specific way so made as to justify an

understanding that a commitment has been made." Opinion at 24 (citing *Hunter v. Diocese of Wilmington*, 1987 Del. Ch. LEXIS 468).

The Plaintiffs in *Hunter* sought an injunction against a Catholic High School from closing the school for the upcoming year. In support of this claim the Plaintiff argued that the equitable remedy of specific performance should be granted to require the school to remain open for the following year. The Court in *Hunter* disagreed and found that while the school had made a "promise," such promise did not rise to the level of an offer for a contract. "Father Peterman's 'unequivocal' statement that the school would be open in 1987-88 did constitute a 'promise' as that term is understood in the law. . . . That promise, however, did not in my opinion constitute an offer of a contract. It was not offered in exchange for anything; it did not purport to seek acceptance by seeking any performance by anyone. It was gratuitous. Promises of this kind, that lack consideration, are typically not enforceable. *Id.* at 15 (citing *Stonestreet v. Southern Oil Co.,* 37 S.E.2d 676 (N.C. 1946); *Coleman v. Garrison,* Del. Supr., 349 A.2d 8, 11 (1975)).

Here, the Appellants dispute than any "promise" was made by Edward to the Appellee. General statements of intention to leave certain property to someone through a will do not in and of themselves constitute a binding contract. Further, even taking the Appellee at his word, Edward did not ask for any repair or improvement to be made to his home. All such inquiries were made by the

Appellee *while the Appellee and his family lived at Edward's home*. Edward's response to the Appellee when asked whom should pay for a certain household item could just as easily been intended to mean that if the Appellee wanted to make the suggested improvement or repair, the Appellee should pay for it. No one in this proceeding testified that Edward made any requests for any of the claimed improvements or repairs. The "it" that was allegedly promised to the Appellee was never defined by anyone and no evidence in the record supports a finding that the "it" necessarily meant to include the house *and* farm in fee simple absolute.

Other Delaware caselaw on oral contracts to make a will would reach this same conclusion. In *Eaton v. Eaton*, the Court found that a deceased father made an enforceable promise to make a will when he promised to devised each of his two younger sons a one-third interest in his home when he died if they were to make certain substantial improvements to the property. Notably, unlike in the present action, the two sons did not live with their father, and aside from the agreement to leave them an interest in the property when he died, the Court found that the boys would not have expended their resources improving/repairing their father's home. More critically, the parties to that action did not dispute that their father made the subject promise. The older brother who was the executor, and principle inheritor, under the father's will did not dispute that their father had made the promise to the other two brothers. The parties debated whether certain improvements were "part"

of the agreement, but there was no dispute that an enforceable agreement had been made by the father. The father died before he was able to make a new will. His sons had already begun construction of the agreed improvements, and their father signed the building permit(s) for the construction. Under the circumstances, the material terms of the agreement were clear and undisputed unlike the present matter. *Eaton*, 2005 Del. Ch. LEXIS 202.

Similarly, in *Hughes v. Frank,* the Court found sufficient credible evidence of the existence of an oral contract to make a will. In *Hughes*, a caregiver, unrelated to the decedent, agreed to take care of the decedent in exchange for receiving "everything" once the decedent died. In addition, to the Plaintiff's self-serving testimony, the Plaintiff presented extrinsic evidence of the existence of the oral promise. Specifically, the decedent had told her bookkeeper and secretary that the decedent wanted to leave one-third of her estate to the Plaintiff in addition to what she intended to leave her under the will. Further, the decedent had made at least two more letters explaining what she wanted to leave the Plaintiff for her years of service as her caretaker. Under the circumstances, the Court found that the Plaintiff had met her heightened burden of proof of the existence of the oral promise to make a will. *Hughes*, 1995 Del. Ch. LEXIS 143,

By contrast, then Vice-Chancellor Chandler in *Bartato v. Davidson*, rejected the existence of an oral agreement to make a will for a personal services contract when

the Plaintiff's only evidence was her own self-interested testimony. *Bartato*, Del. Ch., C.A. No. 12165, Chandler, V.C., (May 14, 1992). Considering the evidence presented in this action, this case is far more analogous to *Bartato* than to *Hughes* or *Eaton*. All of the testimony regarding the existence of Edward McCloskey's alleged oral promise to make a will was given through self-interested or biased witnesses. If the Court were to accept this scant and unreliable evidence as sufficient to establish an oral contract to make a will, it could open the flood gates to all sorts of unwarranted litigation in this area. Quite simply, anyone could raise a claim for an oral promise after the decedent's death to claim whatever aspect of the Estate the claimant feels entitled. In all of the cases surveyed where this Court found the existence of an oral contract to make a will, a writing of some kind embodying said agreement also existed. In this case, no such writing exists.

The case of *Mazzetti v. Shepherd* is instructive. In *Mazzetti*, a father offered to leave his son his business and his home when he died if his son were to financially provide for his parents and otherwise manage the business. His son did so. The father did in fact leave his business interest to his son, but he devised his home to his daughter. The son challenged the device of the home to the sister and prevailed. The decedent had made at least three wills. The decedent's daughter sought enforcement of the terms of the third and last will. With respect to the existence of the verbal agreement, the Court stated, "With respect to the evidence

on that subject, Remo's clear testimony *is to be discounted* because he has an interest in the matter. But, I note that his account is plausible." *Mazzetti*, 1987 Del. Ch. LEXIS 416 at 4 (emphasis supplied). Instead, the Court understandably relied on the testimony of at least three disinterested witnesses—the decedent's attorney, his accountant, and a disinherited son who corroborated the terms of the verbal agreement in all material respects between the decedent and the Plaintiff. No such unbiased witnesses or evidence was presented in this action.

Further, the Court's opinion in *Mazzetti* is noteworthy in that near the beginning of the opinion, the Court indicated, "There was no writing evidencing this alleged [verbal] agreement." *Mazzetti*, 1987 Del. Ch. LEXIS 416 at 2. However, a careful reading of the opinion reveals that a writing evidencing the promise did exist on the record. Specifically, the opinion stated as follows:

> [The decedent] made two earlier wills in the 1970s fully conforming with the alleged promise. The evidence is that he loved all of his children yet these first two wills conformed to the terms of the alleged promise. Second, the speculation that a promise explains those earlier wills is made more dependable by the testimony of disinterested witnesses, particularly Mr. Mazzetti's youngest son, George. Many witnesses testified to a general understanding that Mr. Mazzetti intended to leave "everything" to Remo, but that intention is as referable to gratitude or special affection as it was to an enforceable promise. It is the testimony of the disinterested witnesses, George Mazzetti, Donald Booker and Frank Battaglia that convincingly demonstrates the existence of a promise.

Mazzetti, 1987 Del. Ch. LEXIS 416 at 5.

It is also noteworthy that not only did the Court "discount" the self-serving testimony of the Plaintiff, but the Court also found that the general understanding that the decedent intended to leave "everything" to Remo was referable as gratitude or special affection, and not an enforceable promise. In the present matter, the law in this jurisdiction establishes clearly that the Appellee Richard McCloskey has not provided sufficient evidence to overcome his heavy burden to support a finding of an oral promise to make a will.

B. WHETHER HE FINDING OF THE COURT REGARDING THE ORAL CONTRACT TO MAKE A WILL DID NOT COMPLY WITH THE STATUTE OF FRAUDS AT 6 DEL. C. § 2715. *See* lower court Docket Number 55477854.

(1)B. SCOPE OF REVIEW

This Appeal involves mixed questions of law and fact. To the extent the lower court's Opinion on the merits of the Appellee's claim for an oral promise to make a will was based on an interpretation of the statute of frauds, this Court's review is *de novo*.

(2)B. MERITS OF ARGUMENT

It is a well-settled maxim that equity follows the law. *Estate of Magargal*, 1984 Del. Ch. LEXIS 532 ("[E]ven though this is a Court of equity it is an established maxim that equity follows the law, at least to the extent that its policy is clearly expressed, ...). Delaware's Statute of Frauds is a clear legislative mandate. It provides as follows:

> No action shall be brought to charge the personal representatives or heirs of any deceased person upon any agreement to make a will of real or personal property, or to give a legacy or make a devise, unless such agreement is reduced to writing, or some memorandum or note thereof is signed by the person whose personal representatives or heirs are sought to be charged, or some other person lawfully authorized in writing, by the decedent, to sign for in the decedent's absence. This section shall not apply to any agreement made prior to May 1, 1933.

Id.

Here, the Appellee offered no writing of any kind that would comply with

the Statute of Frauds, and no writing satisfying it was presented in evidence in this matter.

Further, to satisfy the writing requirement, the Appellee relies on a Will (or Codicil) revoked *twice* by the decedent. The Appellants could find no Delaware case that held a prior revoked will could satisfy the writing requirement under the above-referenced Statute of Frauds. If this Court were to find that either the 1977 Will or 1991 Codicil satisfied the writing requirement for the exception to the statute of frauds writing requirement, when those documents were clearly revoked twice, this Court would create new case law not recognized in any other jurisdiction.

Other jurisdictions cited in the Appellant's Answering Brief below have addressed the issue of whether a prior revoked will could satisfy the writing requirement for a prior revoked will. *See, e.g.*, *Busque v. Marcou*, 147 Me. 289 (Me. 1952); *Gilbert v. Gilbert*, 66 N.J. Super. 246, 254 (App. Div. 1961); *McCraw v. Llewellyn*, 256 N.C. 213 (N.C. 1962); *Luders v. Security Trust & Sav. Bank*, 121 Cal. App. 408, 9 P.2d 271 (Cal. App. 1932). All of these cases are consistent with Delaware's case law on the analysis of the claim for an oral promise to make a will. Specifically, the prior revoked will must establish the intent and obligation of the parties. In other words, the will itself must contain the material terms of the agreement, the terms must be clear, and those terms cannot be aided by parol

evidence. No such evidence is present in this case.

B. WHETHER THE ALLEGED "ORAL CONTRACT" BETWEEN THE DECEDENT AND THE PETITIONER WAS NOT SUPPORTED BY ADEQUATE CONSIDERATION. *See* lower court Docket Number 55477854.

(1)C. SCOPE OF REVIEW

This Appeal involves mixed questions of law and fact. To the extent the lower court's Opinion on the merits of the Appellee's claim for an oral promise to make a will was based on an interpretation of the statute of frauds, this Court's review is *de novo*.

(2)C. MERITS OF ARGUMENT

Promises to make a will are recognized in Delaware, though such agreements "are viewed with suspicion and misgivings given that those cases arise after death has silenced the only person who actually knows the decedent's true intent. Claims of that nature against dead men's estates, resting entirely in parol, based largely upon loose declarations and when the lips of the party principally interested are closed in death, require the closest and most careful scrutiny to prevent injustice being done." *Eaton v. Eaton*, 2005 Del. Ch. LEXIS 202.

Further, "a court of equity will enforce a contract to make a will as long as the contract is clearly proved and there is sufficient consideration. A plaintiff must clearly prove the existence of the promise and he must also establish that the terms of the agreement are *both certain and unambiguous*." *Id.* (emphasis added); *see also Boush v. Hodges*, 1996 Del. Ch. LEXIS 141. Generally, under 6 DEL. C. §

2715, “Delaware’s Statute of Frauds, oral promises to make a will are unenforceable.” *Id.*

Here, Richard claims that he relied on his father’s promise to leave the property to him before making any improvements to the property. Not only was Edward’s alleged “promise” fraught with ambiguities (“go ahead, it’s going to be yours anyway”), there would also appear to be a lack of consideration for the promise since Richard and Wanda also resided at the property and any improvements or repairs they made to it worked to their benefit as much as Edward’s. It is simply inconceivable that Edward, not Wanda, was the instigator behind, for example, the renovation to the kitchen alone. It was clear that Edward had the resources to make any improvements he wanted to his home, but for whatever reasons, chose not to do so. Thus, the more plausible explanation for the improvements to the home were done so because that was what Richard and/or Wanda wanted, not necessarily what Edward may have wanted, and certainly not what was requested by Edward.

In fact, since no substantial improvements were made to the property for over ten years before Edward’s passing, from Edward’s perspective he may have lived up to any such alleged promise by leaving Richard and Wanda a one-year estate in the property after his passing.

C. WHETHER THE ALLEGED "ORAL CONTRACT" WAS TOO VAGUE TO BE ENFORCEABLE. *See* lower court Docket Number 55477854.

(1)D. SCOPE OF REVIEW

This Appeal involves mixed questions of law and fact. To the extent the lower court's Opinion on the merits of the Appellee's claim for an oral promise to make a will was based on an interpretation of the statute of frauds, this Court's review is *de novo*.

(2)D. MERITS OF ARGUMENT

The terms of the alleged oral contract, assuming any oral agreement existed at all, were too vague to be enforceable. With respect to this issue, the Opinion found that "As an initial matter, Edward's use of the word 'all,' given its plain meaning, supports a conclusion that Edward's promise was to leave the entire Property to Richard in fee simple. To the extent the evidence falls short of clear and convincing evidence, any doubt regarding Edward's meaning is resolved by the terms of the 1977 Will and the 1991 codicil, which were provided to Richard and gave context to Edward's repeated promise to leave it 'all' to Richard." Opinion at 26. The Appellants do not agree that the self-serving testimony of the Appellee and his wife is credible with respect to whether Edward "encouraged" Richard to pay for any improvements. In fact, the testimony seemed clear that it was Richard who approached Edward, not the other way around, when it came to

discussing whom should pay for certain improvements or repairs to the home. Moreover, anything Richard may have paid for on the farming operation served to benefit Richard's farming operations alone and did not inure to the benefit of Edward or his Estate when he passed.

The Opinion's speculation as to what, if anything, Edward intended to leave the Appellee highlights the inherent ambiguity in the terms of the alleged agreement. All of the parties to this action were farmers and/or landowners to one extent or the other. Both Richard and John testified that they occasionally have rented land from each other and from other farmers/landowners as part of their farming operations. These are individuals who live and work the land. They, more than most laymen, fully appreciate and understand the distinctions between various ways to own and/or control land. Richard knew the difference between a life estate, a fee simple estate and an estate for a term of years, in addition to various ways to lease land. In fact, he leased land from his own father. The reason Edward gave him a copy of the 1977 Will and 1991 Codicil was not to highlight an alleged promise Richard believed was made, but was given to Richard because Richard was a co-executor under those documents. Further, Richard at no point shared a copy of the 1977 Will or 1991 Codicil with John, who also was a co-executor under both testamentary devices.

Quite simply, Richard just assumed he would inherit the house and farm in fee simple because those were the only testamentary documents he was aware of. Edward was free to change his testamentary disposition and leave his property to whomever he wanted, short of fraud which is not present in this action.

The Court in *In re Maull* decided a dispute over an apparently desirable three-digit license plate that was allegedly promised to different individuals by the decedent. The principle challenger sought enforcement of an oral promise that the decedent would leave the license plate to him as long as he would ensure that the license tags on the decedent's vehicles would not expire. *In re Maull*, 1994 Del. Ch. LEXIS 94. The decedent executed a will devising the license plate to another individual. After years of performing his part of the oral agreement, the challenger requested that the decedent put something in writing proving that he would get the license plate. The decedent then signed a writing which stated, "I hereby, William H. Potter, bequeath on this day of June 9, 1989, A.D. at the time of my death give Tag No. 871 to Rodney Mitchell." *Maull*, 1994 Del. Ch. LEXIS 94 at 3-4. The writing was signed by the decedent under seal and notarized. In denying the challenger's claim to the license plate, the Court first addressed whether the writing quoted above complied with the requirements for execution of a will as set forth in 12 DEL. C. § 202(a). The Court found that the writing did not comply with 12 DEL. C. § 202(a). Further, the Court found that the writing did not

comply with the Statute of Frauds. "Such a contract must be 'certain and unambiguous in all its terms' and 'requires the closest and most careful scrutiny to prevent injustice being done.'" *Maull*, 1994 Del. Ch. LEXIS 94 at 7 (citing *Equitable Trust Co. v. Hollingsworth,* Del. Supr., 29 Del. Ch. 563, 49 A.2d 325, 327 (1946)).

Since the above-quoted letter did not contain the material terms of the purported oral agreement, the Court denied the challenger's request to receive the subject license plate. In effect, the Court made it clear that even part performance under an oral agreement, coupled with a writing evidencing the intent to leave property to an individual, is not enough to overcome the Statute of Frauds or to create an enforceable oral contract to make a will.

In this action, the "it", assuming for the moment anything of the kind was said, was just too vague and ambiguous to be enforced.

D. SINCE THE RESCISSION OF THE 2008 DEED OF APPROXIMATELY THREE ACRES TO THE RESPONDENT JOHN MCCLOSKEY WAS PREDICATED ON THE COURT'S FINDING OF AN ORAL CONTRACT TO MAKE A WILL, WHETHER THE RESPONDENTS TAKE EXCEPTION TO THE FINDING ON THE COURT OF RESCISSION OF DEED. *See* lower court Docket Number 55477854.

(1)E. SCOPE OF REVIEW

This Appeal involves mixed questions of law and fact. To the extent the lower court's Opinion on the merits of the Appellee's claim for an oral promise to make a will was based on an interpretation of the statute of frauds, this Court's review is *de novo*.

(2)E. MERITS OF ARGUMENT

With respect to the Rescission of Deed count in the Appellee's Amended Complaint, the Opinion noted that the 2008 deed should be rescinded "because Edward could not validly convey that property as a result of the oral contract he previously had entered into with Richard. . . ., and because Edward lacked capacity at the time the deed was signed." Opinion at 28.

Although the evidence indicated that Edward was of diminished capacity by 2008, the time of the deed transfer, the Appellants dispute that Edward lacked sufficient capacity to transfer the subject property to John. It was undisputed that this proposed transfer had been discussed between John and Edward several years earlier but for specific reasons that had to do with John's ability to fund the

erection of a barn on the property, the property was not transferred until 2008. Moreover, Richard knew at the time that Edward had transferred the three acres to John and made no objection at all to the transfer. If Richard believed Edward lacked capacity to transfer the property to John, he made no indication that he cared one way or the other. It is this last point of fact that reveals what Richard believed would or would not be "his" upon his father's passing. Namely, if Richard believed he were already entitled to receive the three acres subject because of some purported performance to comply with an oral promise he had with his father, he would have certainly raised the issue in 2008, and not nearly three years later when he discovered that his father had left him a one-year estate in the home.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Appellants respectfully request that the Court Reverse the lower court's decision in this action and GRANT the Appellants such other relief, as the Court deems just and proper.

Dated: December 1, 2014

Respectfully submitted,

WERB & SULLIVAN

/s/ *Jack Shrum*

"J" Jackson Shrum (Bar No. 4757)