FOURTH DIVISION
August 9, 2018

No. 1-17-0492

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re Estate of EUGENE LANG, Deceased,	)	Appeal from the
	)	Circuit Court of
(Dena Dixon and Dionne Lang, Petitioners-Appellants,	)	Cook County
	)	
v.	)	No. 13 P 2996
	)	
Darb Lang, Dawn Lang, and Doreen Shaheen,	)	Honorable
Respondents-Appellees).	)	Daniel B. Malone
	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court judgment affirmed. Respondents were entitled to summary judgment on petition to invalidate will, claim of tortious interference with expectancy under will, and petition to recover assets. Petitioners failed to produce any admissible evidence showing decedent lacked testamentary capacity or was subjected to undue influence.

¶ 2 Petitioners Dionne Lang and Dena Dixon filed a petition in 2013 against their siblings, Respondents Darb Lang, Dawn Lang, and Doreen Shaheen, seeking to invalidate their father's 2006 will and to recover assets. Petitioners contended that their father lacked testamentary capacity and also alleged undue influence on the part of Respondents. After about three years of

discovery, the trial court entered summary judgment in favor of Respondents. Petitioners appeal. For the reasons that follow, we affirm the grant of summary judgment.

¶ 3 BACKGROUND

¶ 4 Eugene Lang executed his will and trust on February 8, 2006. Eugene had been married and divorced five times, and his will acknowledged the existence of a number of children whom he had fathered and from whom he was estranged. Eugene stated that he was closest to five children—namely, those who are now the parties to this appeal. Eugene also declared in his will that these five children were the only children for whom he intended to provide by the will.

¶ 5 Pursuant to the will and trust, Eugene left everything to Darb; if Darb did not survive Eugene by 30 days, the balance of the estate would pass to Dawn and Doreen; and if none of those three survived Eugene by 30 days, the balance of the estate would pass to Dena and Dionne. On the same day he executed his will and trust, Eugene executed special needs trusts for Dena's two children, funding each with $50,000.

¶ 6 Eugene died on April 7, 2013. Within six weeks, the probate petition was filed on behalf of Darb, the named executor. In November 2013, Dena and Dionne filed the petition to invalidate the will and recover assets. They asserted two grounds: Eugene lacked testamentary capacity, and Eugene was subject to undue influence.

¶ 7 Discovery ensued for over two years. In March 2016, Respondents filed a joint motion for summary judgment, later amending it in August 2016. They argued that Petitioners had failed to marshal any evidence to rebut the presumption in favor of Eugene's testamentary capacity or to demonstrate the exertion of undue influence on Eugene.

¶ 8 Respondents additionally cited witnesses attesting to the soundness of Eugene's mental state. These witnesses included Quin Frazer, the attorney who drafted Eugene's will and trust,

and Marian Guccione, Eugene's long-time assistant. Guccione had retired in 1999 but continued to visit the office one or two times a week through the fall of 2006.

¶ 9 In his deposition, Frazer testified that he had drafted over a thousand wills and a thousand trusts in his career. In late 2004, he received a telephone call from Dawn. She told him that her father needed an estate planning attorney. Dawn explained that Eugene's prior estate planning lawyer was deceased, so Eugene needed a new lawyer. Dawn wanted Frazer to meet with Eugene. Frazer asked Dawn to provide him with Eugene's most recent estate planning documents so he could see them before he met with Eugene.

¶ 10 Frazer went to Lang Exteriors, Inc., a company owned by Darb and Eugene. Frazer initially met with Dawn and Darb for a half-hour and learned about the family and the business. They told Frazer that Darb was the primary owner of Lang Exteriors, and that Eugene was the minority owner. Frazer recalled being told that there were five children of Eugene's in the same family. He was also told there was a family from a prior marriage.

¶ 11 During this initial meeting, Darb and Dawn did not want Frazer to do anything for them but for Eugene, if Eugene chose to hire Frazer. They then introduced Frazer to Eugene. Frazer asked Dawn and Darb to leave, and he met with Eugene alone for a half-hour. Frazer asked Eugene to whom he wanted to leave his property, and Eugene said he wanted to leave 100 percent to Darb. Frazer asked Eugene to whom he wanted the property left if Darb did not survive Eugene. Eugene responded that he wanted Dawn and Doreen to get his property. Frazer asked Eugene what he wanted if Dawn and Doreen did not survive him. Frazer said that Eugene "thought probably Dena and Dionne," although, according to Frazer, Eugene was not sure about this; it was something he would consider.

¶ 12 Eugene then told Frazer that he had family from another marriage, but he did not want them to receive anything. He also told Frazer he might have some illegitimate children but did not wish to provide for them in the will, either.

¶ 13 After this discussion, Frazer explained to Eugene that he should be aware that, by not leaving equal amounts to all of his heirs, he was likely to get a will contest which would be expensive and take a lot of time. Frazer explained that one way to address that issue would be to leave a certain amount to each person and provide that the person would lose that bequest should the person contest the will and lose. Frazer also discussed the possibility of giving property with the same proviso—that the person would lose the property if that person contested the will. Eugene told Frazer he did not want to do that and told him that Darb would just have to deal with any possible will contest. Although Frazer thought that would put a burden on Darb, he did not discuss it with him, as Darb was not his client.

¶ 14 Frazer also told Eugene that he should have a will, a trust, a power of attorney for healthcare, and a power of attorney for property and asked Eugene whom he wanted as executor, trustee and agent. Eugene told Frazer that he wanted Darb "to be everything." Frazer asked Eugene, should Darb be unable to do it for some reason, whom he wanted. Eugene said he thought Dawn would be the right person.

¶ 15 Frazer then asked Eugene whether he wanted to hire him as his lawyer to do the estate planning. Eugene told Frazer that there were certain people he did not like. Eugene said "I don't like Irish, I don't like Papists, I don't like Jews, I don't like blacks." According to Frazer, when Eugene was done, Frazer told him, "Just so you know, I'm 100 percent Irish on my mother's side of the family, and I was raised a Papist—actually, I said I was raised a Catholic, which is what he

meant by being a Papist." Frazer told Eugene, "I just want you to know that before you decide whether you want to hire me or not."

¶ 16 Eugene told Frazer that it was not going to stop him from hiring him, and that he had heard Frazer was a good lawyer. Frazer then explained what he needed from Eugene and what Eugene would receive from Frazer. He told Eugene he would send him an engagement letter stating that Eugene had hired him, with the terms of the engagement.

¶ 17 They did not talk at all about specific assets. Frazer also explained to Eugene that he knew very little about his property and company and needed documents. Eugene told Frazer to have Dawn or Darb get him "all that stuff." Frazer testified that Eugene gave him permission to fully communicate with Darb and Dawn.

¶ 18 Frazer obtained an appraisal of Lang Exteriors. As part of the estate planning, Frazer advised Eugene to sell his remaining small percentage of the company to Darb, who already owned the vast majority of the company, rather than leave it until he died. Frazer explained that, if estate tax returns were due, it would require another appraisal and a potential dispute with the Internal Revenue Service (IRS) over the value. Frazer also told Eugene that there was the distinct possibility of a will contest, and he did not need to have a dispute with the IRS at the same time. For the same reason, Frazer recommended that Eugene sell the real estate that he owned. Eugene would sell his interest in the properties, and Darb would be the buyer. Another attorney in Frazer's firm set up limited liability companies into which the properties were transferred. Frazer also testified that the stock certificates were either not issued correctly or "something slipped through the cracks" and there was a correction in 2009.

¶ 19 Frazer met with Eugene two more times. He met with him at Lang Exteriors on the day Eugene signed his estate planning documents. Although Dawn and Darb were present initially, Frazer asked them to leave so he could talk with Eugene.

¶ 20 Frazer went over the estate planning documents to confirm that the documents reflected what Eugene still wanted. Eugene confirmed that they did. When reviewing the trust with Eugene, Frazer identified those portions that referenced Eugene having children from one marriage, children from another marriage, and some illegitimate children. Frazer testified that there was no question in his mind that Eugene knew who those people were.

¶ 21 Frazer also testified that there was no question in his mind that Eugene understood the purposes regarding the creation of the LLCs that had been established for transferring real property and the transactions that Frazer had recommended in connection with Eugene's estate plan. Regarding the estate plan itself, there was no question in Frazer's mind that Eugene understood that he was giving everything to Darb when he executed the will in February 2006. Frazer said that, at the time, Eugene "struck me very strongly as a self made man who expected that his wishes and desires would be carried out [and] was very happy to see that the will carried out his wishes and desires."

¶ 22 Eugene executed his will in the presence of Frazer and two witnesses, Francine Georgis and James Frenden, who then were employees of Lang Exteriors. No one else was present.

¶ 23 Frazer next met with Eugene at his house some six or seven years later, sometime between 2012 and 2013. Frazer testified that, when he met Eugene this third time, he "was not the Eugene I knew" and that Eugene was "a shell of his former self" which had been "a strong, forceful gentleman who sort of dominated the room when he shook your hand." Frazer was not certain whether Eugene knew who Frazer was.

¶ 24 The reason for Frazer's third visit was that Dionne had complained to the State of Illinois that Eugene was not being treated correctly, so someone on behalf of DCFS was going to come to the house. Darb, as Eugene's healthcare agent, asked Frazer to come to see Eugene and meet with the woman.

¶ 25 The woman came to the house and met with Eugene privately in another room while Frazer and Darb were in the kitchen. The woman then left and wrote a report. Frazer believed that Dionne's concern was that she was not being allowed to see her father.

¶ 26 Petitioners responded to the motion for summary judgment, supported in part with an affidavit from Dionne. In her affidavit, she stated that, in addition to the five children (Darb, Dawn, Doreen, Dena, and Dionne), Eugene had several other children (and listed their names). She further stated that, in the alleged will dated February 8, 2006, her name and Dena's name were misspelled.

¶ 27 The trial court entered summary judgment in favor of Respondents and denied Petitioners' motion to reconsider. This appeal followed.

¶ 28 ANALYSIS

¶ 29 Summary judgment is proper only when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *State Bank of Cherry v. CGB Enterprises, Inc*., 2013 IL 113836, ¶ 65. Although summary judgment is to be encouraged as an expeditious method of disposing of a lawsuit, it is a drastic measure and should be allowed only when the right of the moving party to judgment is free and clear from doubt. *Olson v. Etheridge*, 177 Ill. 2d 396, 404 (1997). To survive a motion for summary judgment, a plaintiff need not prove its case but must present some evidence that would arguably entitle it to

judgment. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. We review *de novo* a circuit court's order granting summary judgment. *Passalino v. City of Zion*, 237 Ill. 2d 118, 124 (2010).

¶ 30 I. Preliminary Matters

¶ 31 A. Discovery Issues

¶ 32 We first consider Petitioners' argument that the circuit court abused its discretion by limiting discovery and denying further extension for expert discovery. The trial court is afforded considerable discretion in ruling on discovery matters; its rulings will not be reversed absent an abuse of that discretion. *Olive Portfolio Alpha, LLC v. 116 W. Hubbard St., LLC*, 2017 IL App (1st) 160357, ¶ 23. A trial court abuses its discretion "where no reasonable person would take the view adopted by the trial court." *Id*.

¶ 33 Petitioners first claim that the trial court allowed Darb's "stock objections to written discovery and fractional disclosures to stand." We agree with Respondents that Petitioners have forfeited this issue.

¶ 34 On November 26, 2014, Petitioners filed a motion to compel production of documents (in connection with Darb's July 25, 2014 responses to interrogatories and Petitioners' second request for production of documents due on October 22, 2014). On December 1, 2014, the trial court entered and continued Petitioners' motion to compel production of documents. This motion was never ruled on.

¶ 35 As Respondents correctly note, Petitioners present no evidence from the record that provides any background or explanation as to the reason the motion was entered and continued, or why the motion was never decided. And the record shows that Petitioners never again brought the motion to the trial court's attention or requested a ruling. Petitioners fail to address Respondents' contentions in their reply brief.

¶ 36 The party filing a motion has the responsibility of bringing it to the trial court's attention *and* having it resolved. See, *e.g.*, *Jackson v. Alverez*, 358 Ill. App. 3d 555, 563 (2005). Unless there is a contrary indication, where no ruling has been made on a motion, this court presumes that the motion was waived or abandoned. *Id.*; accord *PNC Bank, National Ass'n v. Wilson*, 2017 IL App (2d) 151189, ¶ 29 ("An alleged error is not preserved for review if the trial court fails to rule upon it.").

¶ 37 Additionally, in their opening brief, Petitioners fail to present any cogent argument to this court in support of their contention that the trial court abused its discretion by purportedly allowing Darb's "stock objections to written discovery and fractional disclosures to stand." Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017) requires a party's brief before this court to "contain the contentions of the [party] and the reasons therefor." Under this rule, "a court of review is entitled to have the issues on appeal clearly defined with pertinent authority cited and reasoned, cohesive legal argument." *Cwik v. Giannoulias*, 237 Ill. 2d 409, 423 (2010). A failure to adequately argue a claim of error results in forfeiture of that claim. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued are waived ***."); *Wilson v. County of Cook*, 2012 IL 112026, ¶ 25 (claims supported by "little or no argument" forfeited under Rule 341(h)(7)). In sum, Petitioners have forfeited this issue.

¶ 38 Petitioners' next contention regarding discovery is that the trial court abused its discretion in limiting their access to bank records. On April 21, 2015, Petitioners issued subpoenas to obtain bank records from Bank of America, BMO Harris and Marquette Bank. Respondents filed a motion to quash, contending that the subpoenas were overbroad, unreasonably intrusive, unjustified harassment, and called for documents and information not reasonably calculated to

lead to relevant or admissible evidence or information. On May 18, 2015, the trial court granted the motion to quash the subpoenas.

¶ 39 On June 9, 2015, Petitioners issued a second, more limited subpoena on Marquette Bank only. Again, Respondents moved to quash the subpoena. Petitioners concede they withdrew the subpoena without prejudice before the trial court ruled on Respondents' motion. Nonetheless, Petitioners now argue that the trial court somehow abused its discretion because, "by quashing the subpoenas of bank records," the court precluded Petitioners from obtaining discovery supporting their claims.

¶ 40 Similar to their first contention concerning their motion to compel, Petitioners withdrew their second subpoena before the court ruled on Respondents' motion to quash, and there is nothing to review.

¶ 41 As for the trial court's decision to quash the first subpoena, Respondents are correct that Petitioners have forfeited any argument that the trial court abused its discretion. Petitioners have failed to: (1) cite any legal authority; (2) present any argument, explanation, or reasoning for why the court's ruling was error; or (3) present any argument, explanation, or reasoning as to how the bank records would have supported their claims, and thus how they were prejudiced by the ruling. Nor have Petitioners provided any transcript or bystander's report from the hearing on the motion. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id*. at 392.

¶ 42 Petitioners next contend that the trial court abused its discretion in denying Petitioners any further extension on expert discovery. Petitioners filed their petition on November 21, 2013. The trial court set a discovery closure deadline of December 18, 2014. As Respondents note, the trial court then gave Petitioners at least eight extensions to complete discovery. Thus, Petitioners were afforded nearly two-and-a-half years to complete discovery.

¶ 43 On January 5, 2016, the trial court entered an order stating:

> (1) "All fact discovery shall be completed by March 4, 2016. This is a final fact discovery 'cutoff';
>
> (2) Petitioners shall provide their responses to Rule 213(f)(2)&(3) interrogatories regarding expert witnesses on or before February 19, 2016; and
>
> (3) This matter is set for status on March 8, 2016."

¶ 44 At the March 8, 2016 status hearing, at the parties' request, the court permitted fact discovery to remain open until April 8, 2016, for the sole purpose of deposing Quin Frazer, Marian Guccione, and Christine Hirst. The court further ordered that "in all other respects the [January 5, 2016] order stands." Thus, Petitioners' responses to Rule 213(f) (2) & (3) interrogatories regarding expert witnesses were due February 19, 2016.

¶ 45 On March 14, 2016, Petitioners filed a "Motion to Set Independent Expert Discovery Schedule." In their motion, Petitioners acknowledged the January 5, 2016 order and the February 19, 2016 deadline for disclosing expert witnesses but stated that, at that time, they were not anticipating that they would call an expert witness. Petitioners asserted that testimony in the depositions of Francine (Georgis) Lang (taken on February 19, 2016), Dawn Lang (taken on February 22, 2016), and Doreen Shaheen (taken on February 22, 2016) prompted them to consult an expert handwriting witness. But Petitioners did not identify the specific testimony nor state

any reason why the testimony of those witnesses suddenly prompted the need for a handwriting expert. And Petitioners failed to identify the expert witness whom they had consulted and did not provide the purported opinions or bases for those opinions.

¶ 46 Respondents opposed the motion, noting these deficiencies in the motion. They further noted that Petitioners had never answered expert interrogatories nor provided any expert's report. They also pointed out that Petitioners had never alleged that the will at issue was a forgery or that any signature in the case was other than genuine.

¶ 47 Respondents also attached the affidavit of James Dahl, the attorney for Darb. In his affidavit, Dahl attested that, before approaching the bench on March 8, 2016, he met with the attorney for Petitioners and the attorney for Dawn and Doreen. Petitioners' attorney told them that he intended to call an unnamed handwriting expert that he had consulted with "two years ago," and that this handwriting expert had " 'recently come back.' " Dahl stated that Petitioners' counsel "did not explain what he meant by that comment." In his affidavit, Dahl also stated both he and the attorney for Dawn and Doreen advised Petitioners' counsel that they objected to this belated disclosure of an expert and thought it was both unfair and an effort to simply postpone the trial.

¶ 48 Respondents asserted that Petitioners' "suggestion that they consulted a handwriting expert only after the deposition of [Francine (Georgis)] Lang border[ed] on an effort to mislead the court." They also argued that Petitioners' claim that they were "not anticipating on calling an expert witness" as of January 5, 2016 was hard to believe, considering that Petitioners had consulted with the handwriting expert two years ago.

¶ 49 After a hearing, the trial court denied Petitioners' motion to set an independent expert discovery schedule. The record contains no transcript of the hearing or any bystander report.

Thus, we must presume that the trial court's order was in conformity with law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92. Beyond that presumption, we would be at pains to find error, in any event. There is no doubt that Petitioners' request for an expert came quite belatedly, and their reason for this late request has never been explained (even on appeal, much less before the trial court) with such sufficient detail that we could say that the trial court's denial of that request was so arbitrary that no reasonable jurist would agree with it. We can find no abuse of discretion on this record.

¶ 50 B. Facts Before This Court

¶ 51 We next address the issue of what "facts" are actually before this court. Respondents correctly note that Petitioners' "Statement of Facts" contains numerous references to facts outside the record that were not presented to the trial court. Respondents previously filed a motion to strike for this reason. We denied that relief, but we may reconsider it, and Respondents raise the issue again in their Response brief.

¶ 52 Petitioners contend that we "can and should" take judicial notice of (1) Eugene's divorce proceedings in the circuit court case of Eugene Lang v. Carol Lang, 92 D 4963. Carol Lang was Eugene's fifth wife and the mother of the five children who are the parties in this case.

¶ 53 "Courts may take judicial notice of matters which are commonly known [citation] or of facts which, while not generally known, are readily verifiable from sources of indisputable accuracy [citation]." *Murdy v. Edgar*, 103 Ill. 2d 384, 394 (1984). An appellate court may take judicial notice of matters that are capable of instant and unquestionable demonstration. See *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 177 (2003) (distance between two locations).

¶ 54 Petitioners are not asking that we take judicial notice of the "fact" that Eugene divorced Carol. Rather, it appears that they are asking this court to take judicial notice of the testimony

from the hearings in those proceedings, statements contained in the marital settlement agreement, and a response to an emergency petition, none of which is in the record or even attached to their brief. In their reply brief, Petitioners argue that "[t]he divorce proceedings are public records and may be requested and easily obtained from the Circuit Court of Cook County's clerk office." Even assuming that the divorce proceedings that took place over a decade before Eugene executed his 2006 will were relevant (an issue never presented to nor decided by the trial court), we agree with Respondents that these matters are not of such common and general knowledge to meet the requirements for judicial notice. And the cases cited by Petitioners, in which this court took judicial notice of official and written *decisions* of other tribunals, are inapposite. Thus, we decline to take judicial notice of the divorce proceedings or testimony, and will not consider these "facts."

¶ 55 Petitioners also contend that we "can and should" take judicial notice of "Secretary of State Website Material," specifically the LLCs established by Quin Frazer, for Darb. Petitioners also note that the printouts from the Secretary of State's website are already in the record. (Since the documents are in the record, it is not entirely clear why Petitioners are requesting that we take judicial notice of them.) Petitioners attached these printouts as exhibits to their response to Respondents' motion to quash the subpoenas for bank records. We have already disposed of that issue. Beyond that, Petitioners offer no argument as to why judicial notice is requested. As noted earlier, Frazer testified in his deposition regarding the creation of the LLCs that had been established for transferring real property. Those facts, for what they're worth, are properly before us.

¶ 56 Respondents further argue that Petitioners' "Statement of Facts" contains numerous improper citations to the following inadmissible medical records of Eugene:

- "Hinsdale Progress Notes," dated November 30, 2001;
- "Laboratory Report" from Quest Diagnostics, dated February 19, 2005, and "Notes" from that report dated February 21 and March 8, 2005;
- "Notes" of Richard Bertenshaw, M.D., dated January 19, 2007, April 13, 2007, October 23, 2007, January 15, 2008, May 1, 2008, September 25, 2008, and August 3, 2009;
- "Notes" from Adventist Midwest Health, dated February 10, July 21, July 26, and July 29, 2009.

¶ 57 Petitioners make an unqualified assertion, without citation to any authority, that "[m]edical evidence is admissible under the business record exception to hearsay and present sense impression." As Respondents point out, however, medical records are admissible "as long as a sufficient foundation is laid to establish that they are business records." *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733 (2006); accord *Solis v. BASF Corp*., 2012 IL App (1st) 110875, ¶ 85. And even if a party satisfies the foundational requirement for medical records, it does not give the party free rein to introduce medical records as a substitute for expert medical testimony, and they may be excluded if they are not relevant or are too complex for a jury to understand on its own. *Troyan*, 367 Ill. App. 3d at 736.

¶ 58 Respondents correctly note that Petitioners failed to establish a proper foundation for the authentication of these records, and at no time during the summary judgment proceedings or Petitioners' motion to reconsider did Petitioners attempt to submit any evidence to lay that foundation. Petitioners concede that they failed to lay a foundation and argue only that they "can" provide the foundation for the documents at trial.

¶ 59 But the time to lay that foundation was at the summary-judgment stage. "In ruling on a motion for summary judgment, a court can only consider evidence that would be admissible at

trial and '[b]asic rules of evidence require that a party must lay the proper foundation for the introduction of a document into evidence' if it wishes to rely on the document in summary judgment proceedings." *Cordeck Sales, Inc. v. Construction System, Inc*., 382 Ill. App. 3d 334, 384 (2008); see also *Gulino v. Economy Fire & Casualty Co*., 2012 IL App (1st) 102429, ¶ 27 (in summary judgment proceeding, where proponent failed to provide any evidence establishing foundation for purported business records, trial court did not err in excluding documents). "In determining the genuineness of a fact for summary judgment, a court should consider only facts admissible in evidence." *Gardner v. Navistar Int'l Transportation Corp*., 213 Ill. App. 3d 242, 247 (1991). "A document the authenticity of which is not established is not admissible evidence." *Id*. at 248. The trial court did not err in refusing to consider the inadmissible medical records.

¶ 60 Respondents also argue that Petitioners' "Statement of Facts" improperly included "facts" based on other inadmissible records, which Petitioners describe as "Driving Records from the Illinois DMV." Petitioners say the trial court erred in failing to consider these documents because they "are admissible as public records of the DMV and Eugene Lang's children testified about them." Because Petitioners provide no citation to legal authority, Respondents argue that they have forfeited their argument. We agree. Moreover, because Petitioners failed to provide any evidence in the trial court to lay a proper foundation for these documents, similar to the medical records discussed above, the trial court did not err in not considering this inadmissible evidence.

¶ 61 II. Count I: Lack of Testamentary Capacity

¶ 62 These preliminary issues aside, we now address Petitioners' claim that the trial court erred in entering summary judgment on count I in favor of Respondents because genuine issues of material fact existed as to Eugene's testamentary capacity.

¶ 63 Testamentary capacity requires that the testator has the sufficient mental ability to know and remember the natural objects of his bounty, comprehend the kind and character of property held, and make a disposition of that property in accordance with some plan formed in the testator's mind. *In re Estate of Osborn*, 234 Ill. App. 3d 651, 658 (1992). A testator is presumed to be competent to execute a will until proven otherwise. *In re Estate of Harn*, 2012 IL App (3d) 110826, ¶ 26. The burden of proof rests on the party asserting the lack of a testamentary capacity. *Kuster v. Schaumburg*, 276 Ill. App. 3d 220, 227 (1995).

¶ 64 In support of their contention that a question of material fact existed as to whether Eugene was of sound memory on February 8, 2006, Petitioners rely on medical evidence that we have already decided was inadmissible. But they also rely on the deposition testimony of Jo-Ellyn Kline, whom they describe as "a long-time friend of Eugene." They argue that her long-time friendship with Eugene "established that over a period of time, he changed and became forgetful of persons, places and things."

¶ 65 Kline testified that she knew Eugene from the late 1960s or early 1970s. She met Eugene through her late husband, John. Kline and her husband had regular contact with Eugene and his wife until Kline had a falling out with Eugene's wife, sometime between 1989 and 1990. In 1993, Kline and her husband moved to Pittsburgh. Between 1993 and 1998, Kline and her husband saw Eugene approximately seven times. After Kline's husband passed away in 1998, Kline saw Eugene only once a year when she visited Chicago. Kline would visit the factory and

go to lunch. Eugene's children always came. Sandy, Kline's sister-in-law, came once, in 2001 or 2002.

¶ 66 Petitioners note that, in her deposition, Kline testified that she had a conversation with Eugene in 2003, in which she "brought up how was it seeing Sandy again, and he just went blank, he just went blank, the conversation stopped." Kline then testified: "I can only think that he was trying to figure out who Sandy was."

¶ 67 Petitioners also rely on Kline's statement that, in 2004, she personally did not think that Eugene knew who she was, unless somebody said her name. Petitioners also rely on a telephone call Kline made to Eugene sometime between the summer of 2004 and 2005, or between 2005 and 2006 (Kline was not certain when). Kline stated that, after her husband's death, though she received telephone calls from Eugene between 1998 and 2003, she could not recall ever initiating a call to Eugene prior to this time. Kline recalled making the call from Pittsburgh when it was dark outside, sometime between 4 and 6 p.m. According to Kline, during this call, Eugene did not know who she was or what she was talking about. The call lasted four to six minutes. She identified herself as "Jo," but she could not recall if she ever used her last name "Kline" during the conversation. Kline never spoke to Eugene again.

¶ 68 Although a nonexpert can give her opinion as to the mental condition of the testator for a reasonable time before or after making the will, she must first testify to sufficient incidents, facts and circumstances to indicate her opinion is not a guess, suspicion or speculation. *Peters v. Catt*, 15 Ill. 2d 255, 260 (1958); accord *In re Estate of Harn*, 2012 IL App (3d) 110826, ¶ 26 (lay witness may give opinion regarding soundness of testator's mind, as long as witness had sufficient opportunity in conversation or other transaction to form that opinion). Otherwise, the opinion is of no value and inadmissible. *Peters*, 15 Ill. 2d at 260. And unless it fairly tends to

show the condition of the testator at the time the will was actually executed, evidence of the testator's mental condition at other times is wholly inconsequential. *Shevlin v. Jackson*, 5 Ill. 2d 43, 47 (1955); accord *Harn*, 2012 IL App (3d) 110826, ¶ 26 (to be relevant, proof of testator's lack of testamentary capacity must pertain to time at or near making of will).

¶ 69 Kline's testimony consisted of isolated incidents of Eugene's purported forgetfulness (of Kline and her sister-in-law, Sandy) that occurred years before Eugene executed his will. Yet "[a] defective memory and mental sluggishness do not render a testator incapable of making a will, unless his mind has become so impaired that he is incapable of understanding the business of making a will while he is engaged in the act." *Malone v. Malone*, 26 Ill. App. 2d 291, 301 (1960). "[A] person may be of unsound mind and memory to some extent, but still be capable of making a will." *Challiner v. Smith*, 396 Ill. 106, 124 (1947). "To have testamentary capacity a testator is not required to be absolutely of sound mind in every respect." *Roller v. Kurtz*, 6 Ill. 2d 618, 627 (1955).

¶ 70 In fact, even when a testator suffers from "an insane delusion on certain subjects," our supreme court has stated that the will cannot be set aside on the ground of mental incapacity, so long as the testator had the mental capacity to know his property and the objects of his bounty, and to make a disposition of his property according to a plan formed by him. *Roller*, 6 Ill. 2d 618, 627-28 (1955). "A mental disturbance, therefore, may or may not reach the state where one loses his capacity to make a valid will; and a failure to recognize someone, and an unreasonable prejudice against the natural objects of one's bounty, do not necessarily indicate a failure of mental power." *Roller*, 6 Ill. 2d at 628. "Neither old age, nor feeble health, nor both, although combined with defective memory, will constitute lack of testamentary capacity." *Challiner v. Smith*, 396 Ill. 106, 124 (1947). And "[e]ccentricity, uncleanliness, slovenliness, neglect of

personal appearance and clothing, offensive and disgusting habits or conduct, do not constitute or establish the want of testamentary capacity or unsoundness of mind." (Internal quotation marks omitted.) *Harn*, 2012 IL App (3d) 110826, ¶ 27 (quoting *Gilbert v. Oneale*, 371 Ill. 427, 434 (1939)).

¶ 71 The trial court correctly noted that this phone call about which Kline testified could not be pinned down with any reasonable certainty in terms of time—even whether it occurred before or after Eugene executed his will, much less whether it occurred within a reasonable approximation of that date. And the fact that on isolated occasions, Eugene struggled to recall Kline or her sister-in-law is simply insufficient to show that, at the time he executed the will, Eugene was not of sound mind. As Respondents correctly note, Petitioners ignore the testimony of Kline that, before her husband died, he told her Eugene planned to give the company to Darb. Kline also agreed that "Darb was far and away [Eugene's] favorite."

¶ 72 What's more, in addition to Kline's and Frazer's testimony regarding Eugene's intent to leave everything to Darb, Eugene's long-time assistant, Guccione, testified that, from the first day she started, Eugene said the girls would get married and their husbands would take care of them and "Darb was going to get everything." We thus hold that the trial court correctly deemed Kline's testimony insufficient to create a genuine issue of material fact as to Eugene's testamentary capacity in 2006.

¶ 73 Petitioners also argue that Eugene lacked testamentary capacity because there was a question of material fact as to whether Eugene knew his property on February 8, 2008. They rely solely on the testimony of Francine (Georgis) Lang, a witness to the will.[1]

[1] Francine was an employee of Lang Exteriors in February 2006 when Eugene executed the will and trust. She later started dating Darb and they married in 2007.

¶ 74 Petitioners base this argument on two portions of Francine's deposition testimony. First, when asked whether she believed that Eugene "had a clear understanding of how much his estate was worth" when he signed the will, she answered: "I mean, I would assume so. I don't know." As Respondents note, that answer proves only that Francine was unwilling to speculate as to what Eugene did or did not know about the details of his estate; apparently, it was not something she discussed in detail with Eugene, and thus she had no first-hand knowledge of Eugene's understanding of his estate's worth. That is a far cry from testifying that Eugene had no idea what his estate was worth.

¶ 75 Second, Francine testified that she was unaware that Eugene owned a car collection, a gold coin collection, or a gun collection. Again, that has nothing to do with whether *Eugene* knew anything about those items. At most, it proves that Francine never discussed this information with her boyfriend and later husband, Darb, or with Eugene.

¶ 76 None of this testimony remotely rebuts Francine's testimony that Eugene appeared to be of sound mind when he signed the will, much less attorney Frazer's testimony to the same effect. We find no disputed question of material fact on this question.

¶ 77 Petitioners also contend that there was a question of material fact as to whether Eugene knew the objects of his bounty on February 8, 2006. Petitioners note that, though Eugene had several other children (besides Petitioners and Respondents), he did not name four of them in the will, even though he had listed them in a 1997 trust document.

¶ 78 We agree with Respondents that this argument is meritless, based on the plain language of the will: "In addition, I also am aware that there may be other individuals I have not named who claim to be my children, but I do not intend to provide for any of those individuals." And

the will specifically named Petitioners and Respondents and stated that "these are the only children of mine for whom I intend by this will to provide."

¶ 79 Petitioners additionally argue that the misspelling of Dena's last name as "Dixion" instead of "Dixon," and the misspelling of Dionne's middle name as "Marget" instead of "Margaret," in the will created a genuine issue of material fact as to whether Eugene lacked testamentary capacity. Petitioners cite no authority for this proposition, nor do they present any argument as to how the misspellings created a genuine issue of material fact. Indeed, as Respondents note, in June 2010, over four years after Eugene executed the will, Eugene gave Dena $50,000 by way of a check that likewise misspelled her name as "Dena Dixion." And in September 2006—only months after the will was executed—Dena received a check from Eugene in the amount of $100,000 and countersigned an IOU that likewise misspelled her name as "Dena Dixion." In neither of those instances did Dena refuse to accept the money, correct the error, or take any action to suggest or investigate whether something was amiss with regard to Eugene. Petitioners have failed to show that a genuine issue of material fact existed as to Eugene's testamentary capacity based on these misspellings.

¶ 80 Petitioners also argue that Eugene lacked testamentary capacity because there was a question of material fact as to whether Eugene understood he was executing a will. They ask two rhetorical questions: 1) "How can Eugene Lang intend to provide for five children when he leaves everything to one?"; and 2) "And how can a witness to the will, Francine (Georgis) Lang not be aware that her future husband was the sole beneficiary of Eugene Lang's estate?". Respondents note that Petitioners do not provide an answer to these rhetorical questions.

¶ 81 Assuming for the sake of argument that answers to these questions are necessary to affirm the trial court's judgment—which in fact is not the case: Eugene did, in his way, provide

for all five children, when he provided in his will that Darb would receive everything; but if Darb did not survive him by 30 days, the balance of the estate passed to Dawn and Doreen; and if none of those three survived Eugene by 30 days, the balance passed to Dena and Dionne. As to the second rhetorical question, we find no relevance whatsoever as to whether either Eugene or Darb ever told Francine that Darb was the sole beneficiary of the will.

¶ 82 We agree with Respondents that the 2006 estate plan could not have been more explicit in leaving everything to Darb, and that the mere fact that Eugene favored Darb over his other children is not determinative. "A person may be prejudiced against some of his children or persons who are the natural objects of his bounty and make unfair remarks about them without having a proper foundation for his conduct, but it does not necessarily follow that he is without testamentary capacity." *Noone v. Olehy*, 297 Ill. 160, 166-67 (1921).

¶ 83 Petitioners further contend that Frazer's opinion that Eugene was competent was based on two meetings of a half-hour each, and this was too short a time period to form an opinion of someone's mental capacity. This argument is also meritless. Unlike Kline, Frazer saw Eugene contemporaneously with the execution of the will and trust. As Respondents note, during his time with Eugene, Frazer engaged him in substantive conversations about his estate, debated him about his intentions, and discussed alternatives. We agree with Respondents that this afforded Frazer, who had drafted more than 1000 wills, a clear opportunity—and by far the best opportunity among the witnesses in this case—to ascertain Eugene's mental capacity.

¶ 84 In their reply brief, Petitioners attempt to raise a new issue. They claim that Frazer's testimony on competency should be barred by the Dead Man's Act (735 ILCS 5/8-201 (West 2014). Petitioners never raised this argument in the trial court. Nor did they raise it in their opening brief, despite knowing that Frazer's testimony was critical to the outcome of this case.

Instead, Petitioners waited until their Reply brief, when Respondents had no opportunity to respond, to raise the Act's application. Because neither the trial court nor Respondents had an opportunity to respond to this argument, it is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("Points not argued [in an appellant's opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); *Moller v. Lipov*, 368 Ill. App. 3d 333, 342 (2006) (primary purpose of forfeiture rule is to provide trial court and opposing party opportunity to address argument and correct possible erroneous ruling).

¶ 85 Forfeiture aside, it is plain to us that the Act is not applicable. The purpose of the Dead Man's Act is to protect decedents' estates from fraudulent claims by barring evidence that the deceased person could have refuted. *People v. $5,608 U.S. Currency*, 359 Ill. App. 3d 891, 895 (2005). The Act addresses the situation where a party sues a deceased person or defends a suit as the representative of a deceased person. *Rerack v. Lally*, 241 Ill. App. 3d 692, 695 (1992). It provides that an adverse party may not testify on his own behalf to any conversation with the deceased or to any event which took place in the deceased's presence. *Id.* Frazer was simply the lawyer who drafted the will; he was in no way a party to this lawsuit.

¶ 86 We conclude that trial court's grant of summary judgment on count I for lack of testamentary capacity was proper.

¶ 87 III. Count II: Undue Influence

¶ 88 We next address Petitioners' argument that the trial court erred in entering summary judgment on count II in favor of Respondents. Petitioners contend that Darb, Dawn, Doreen, and Frazer each exercised undue influence over Eugene, and that genuine issues of material fact exist on this question.

¶ 89 To raise a presumption of undue influence, Petititioners must establish four elements: (1) a fiduciary relationship existed between the testator and a person who substantially benefits under the will; (2) the substantial beneficiaries were in a position to dominate and control the dependent testator; (3) the testator reposed trust and confidence in such beneficiaries; and (4) the will was prepared or procured and executed in circumstances where such beneficiaries were instrumental or participated. *Wiszowaty v. Baumgard*, 257 Ill. App. 3d 812, 818 (1994).

¶ 90 As to Darb, there is no dispute that Darb held the power-of-attorney for property and the power-of-attorney for healthcare for Eugene from February 8, 2006 until Lang's death on April 7, 2013. Thus, Darb had a fiduciary relationship with Eugene. See *DeHart v. DeHart*, 2013 IL 114137, ¶ 313 ("As a matter of law, a power of attorney gives rise to a general fiduciary relationship between the grantor and the grantee."). But the mere existence of a fiduciary relationship is not sufficient to raise the presumption of undue influence. *In re Estate of Letsche*, 73 Ill. App. 3d 643, 646 (1979).

¶ 91 As for the other elements, Petitioners note that Darb and Eugene spent every day together, ate together, and worked together. They assert that "[b]y spending substantial time together, Darb Lang had ample opportunity to exert his dominance and control over Eugene."

¶ 92 "The influence resulting from love or affection which does not seek to control the will of the testator is not undue influence." *Flanigon v. Smith*, 337 Ill. 572, 577 (1929). Our supreme court has held that the presumption of undue influence was not raised from the facts that the beneficiary called the lawyer who drafted the will and asked to be present to witness the will, or from the facts that the beneficiary and testator were living in the same house, the beneficiary called for attesting witnesses, and the beneficiary was present when the will was signed. See *Powell v. Weld*, 410 Ill. 198, 205 (1951). The undue influence that will invalidate a will must

operate to prevent a testator from exercising his free will in the disposition of his estate. *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 513 1993. And the fiduciary must have actually participated in procuring the execution of the will. *Letsche*, 73 Ill. App. 3d at 646.

¶ 93 The trial court correctly noted that there was no evidence whatsoever that Darb had anything to do with procurement. There was no evidence that Darb participated in the preparation of the will and no evidence that he was present when the will was executed. To the contrary, Frazer testified that he met with Eugene alone.

¶ 94 Apart from the fact that Darb had a fiduciary relationship with Eugene, Petitioners failed to submit any evidence in support of the remaining elements necessary to raise the presumption of undue influence. Thus, the trial court properly concluded that Darb did not exercise undue influence over Eugene.

¶ 95 Petitioners also argue that Dawn exercised undue influence over Eugene. They contend that a fiduciary relationship existed between Dawn and Eugene. In support of this contention, they cite to Respondents' answer to the petition in which Respondents generally admitted that "Eugene Lang reposed trust and confidence in Darb, Dawn, and Doreen." But the mere fact that Dawn made such an admission is insufficient to establish that she was in a fiduciary relationship with Eugene. This court has already rejected this very argument:

> "Petitioners assert that respondents concede that a fiduciary relationship existed between Daniel and decedent because they stated in their answer that he 'reposed trust and confidence' in Daniel. We disagree. While this admission may satisfy petitioner's burden to show that decedent reposed trust and confidence in Daniel under the third prong of an undue influence claim espoused above, it is insufficient to establish the

fiduciary relationship, or the 'special confidence,' element of the cause of action." *Ciesiolkiewicz*, 243 Ill. App. 3d at 514.

¶ 96 Petitioners failed to provide any evidence that would establish that Dawn was in a fiduciary relationship with Eugene. Thus, we need not address Respondents' argument that Petitioners also failed to establish the remaining elements to raise the presumption of undue influence as to Dawn. See *Ciesiolkiewicz*, 243 Ill. App. 3d at 513 (once court determined that Petitioners failed to establish that Respondent was in fiduciary relationship with decedent, court had no occasion to reach argument that Petitioners failed to establish that Respondent procured or participated in execution of the will).

¶ 97 Petitioners have forfeited any argument that Doreen exercised any undue influence over Eugene by failing to cite to any legal authority or analysis. And Petitioners have forfeited the issue of whether Frazer exercised undue influence over Eugene because Petitioners did not raise the issue in the trial court. The trial court's grant of summary judgment in favor of Respondents on count II for undue influence was proper.

¶ 98 IV. Count IV: Tortious Interference with Testamentary Expectancy

¶ 99 We next address Petitioners' argument that the trial court erred in granting summary judgment on count IV in favor of Respondents on Petitioners' claim of tortious interference with testamentary expectancy. Illinois recognizes the tort of intentional interference with an expectancy under a will. *In re Estate of Hoover*, 160 Ill. App. 3d 964, 965-66 (1987).

¶ 100 "Although some of the evidence may overlap with a will contest proceeding, a plaintiff filing a tort claim must establish the following distinct elements: (1) the existence of an expectancy; (2) defendant's intentional interference with the expectancy; (3) conduct that is tortious in itself, such as fraud, duress, or undue influence; (4) a reasonable certainty that the

expectancy would have been realized but for the interference; and (5) damages." *In re Estate of Ellis*, 236 Ill. 2d 45, 52 (2009). The tort action will not lie where the remedy of a will contest is available and would provide the injured party with adequate relief. See *Hoover*, 160 Ill. App. 3d at 966 (affirming trial court's dismissal with prejudice of counts alleging tortious interference with expectancies under will when: (1) if plaintiffs prevailed in will contest, they would receive all relief they could have received in tort action; or (2) if plaintiffs failed to establish undue influence in will contest, it could not be said they suffered "in tort").

¶ 101 Count IV of the Petition realleged the same allegations on which counts I and II were based. Count IV also contained the allegation that Respondents "unduly influenced Eugene Lang to execute the Will and Trust, thereby depriving Dionne and Dena of their reasonable expectancy of receiving 1/9th of Eugene Lang's estate." But, as Respondents correctly note, Petitioners ignore that this was their only allegation regarding "tortious conduct" in their tortious interference claim in Count IV. And this allegation was a summation of the allegations set forth in the will contest, duplicative of their will contest claims. Thus, in granting summary judgment on count IV, the trial court correctly concluded that its disposition of the will contest claims in counts I and II meant that there were no circumstances in which Petitioners could prevail in their tortious interference claim. We have now affirmed the trial court's decision as to the will contest claims in counts I and II. Petitioners, having failed to establish undue influence in the will contest, cannot show they suffered "in tort." *Hoover*, 160 Ill. App. 3d at 966. Thus, the trial court properly granted summary judgment in favor of Respondents on Petitioners' claim of tortious interference with expectancy under a will, in count IV.

¶ 102 V. Count III: Petition to Recover Assets

¶ 103 Petitioners' final argument is that the trial court erred in granting summary judgment in favor of Respondents on count III, titled "Petition to Recover Assets." As Respondents correctly note, this count was, in effect, a request for a citation to recover assets under section 5/16-1 of the Probate Act. 755 ILCS 5/16-1 (West 2012). In the citation petition, Petitioners alleged—similar to their allegations in the other counts—that Eugene had diminished mental capacity and that Respondents exercised undue influence over Eugene. Thus, they asserted, any transfers of property to Respondents were invalid and should be returned to the estate.[2]

¶ 104 Section 16-1 of the Probate Act allows a "person interested in the estate" to file a citation petition on behalf of the estate. See, *e.g.*, *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 250 (2006). Section 5/1-2.11 of the Probate Act defines "Interested person" as "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative." 755 ILCS 5/1-2.11 (West 2012).

¶ 105 Petitioners raise one argument as to Count III. They claim that the trial court erred because, as Eugene's heirs, they qualify as a matter of law as "interested persons" under section 16-1. Petitioners, citing *McCormick v. Sanford*, 318 Ill. 544, 547 (1925), note that "[t]he word 'heir' in its primary meaning designates the person appointed by law to succeed to the estate in case of intestacy."

[2] Respondents also contend that Petitioners "failed to properly request and did not receive the trial court's approval to issue such a required citation as required" under [section] 5/16-1" and that summary judgment was proper for this reason alone.

¶ 106 During argument on the motion, the trial court explained that Petitioners "*were* *** interested person(s) up until about three minutes ago." (Emphasis added.) In other words, even if Petitioners, as heirs, were *initially* "interested persons," they no longer were, after the disposition of the other three counts. The trial court concluded that, once Petitioners failed to prevail on the other three counts in their Petition, they could no longer establish any right to anything under Eugene's estate and lacked standing. The court also indicated that, after the disposition of the other three counts in which the court concluded that Petitioners had failed to show lack of testamentary capacity or undue influence, the claim in count III might have become moot. Petitioners do not address this explanation of the trial court.

¶ 107 Whether Petitioners were still "interested persons" or not, we conclude that summary judgment on Count III (the citation petition) was proper. "If a citation petition seeks the recovery of property, it 'must make out cognizable legal claims against the respondent just like any other complaint.' " *Hoellen*, 367 Ill. App. 3d at 250 (quoting C. Golbert, *Using the Probate Act to Recover Assets Stolen From Persons With Disabilities*, 88 Ill. B.J. 510, 512 (2000)). Claims of undue influence and breach of fiduciary duty are two legal theories commonly asserted in a section 16-1 citation petition to recover property. *Id.*

¶ 108 Here, Petitioners asserted these theories plus lack of capacity. But as the trial court explained, all of those claims were disposed of as part of the trial court's rulings on the will contest and the tortious interference count. The trial court had already determined that Petitioners failed to present any evidence that would establish that Eugene had diminished mental capacity, or that Respondents unduly influenced Eugene, and we have now affirmed that decision.

¶ 109 Thus, Petitioners could not prevail on count III, either. The trial court properly granted summary judgment in favor of Respondents on count III.

¶ 110 CONCLUSION

¶ 111 For the foregoing reasons, we affirm the trial court's decision granting summary judgment in favor of Respondents on all counts.

¶ 112 Affirmed.