

14-1060

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

MURL LOUISE TRIBBLE and
JANET PEARL SARGENT,

Plaintiffs,

v.

Civil Action No. 06-C-178-N
Judge David W. Nibert

POLLY SUE PICKENS,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

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2014 SEP -5 P 2:00

On October 28, 2013, and June 6, 2014, came the Plaintiff, Janet Pearl Sargent, by counsel, Tim C. Carrico, Esq.; the Plaintiff, Murl Louise Tribble, appeared in person and by counsel, James M. Casey, Esq.; and the defendant, Polly Sue Pickens, appeared in person and by counsel, Dwight J. Staples and Gail T. Henderson Staples, Esq., pursuant to the Defendant's Motion for a New Trial.

The Court after due consideration of the Defendant's Motion for a New Trial, the Plaintiff, Janet Sargent's, Response and Memorandum of Law to the Defendant's Motion for a New Trial, the arguments of counsel, and a consultation of the pertinent authorities, hereby **FINDS** and **ORDERS** that the Defendant has failed establish a basis for a new trial. Accordingly, the Defendant's Motion for a New Trial shall be **DENIED**. In further support of this ruling, the Court states as follows:

1. Defendant raised the issue of statute of limitations before trial and during trial. Plaintiff Sargent argued the matter was an issue of fact that should be determined by the jury. As is clear by the Judgment Order and the record, the Court held its ruling in abeyance each time the issue was raised. No ruling was ever made on the issue. At the

close of all evidence, the Court accepted proposed jury instructions from all parties. Defendant did not offer any proposed instruction related to the statute of limitations. Therefore, the Court finds that Defendant waived the issue of statute of limitations.

2. The Court did not err in granting a directed verdict in favor of Plaintiffs by finding as a matter of law that there was a fiduciary relationship between Defendant and her mother. Ms. Pickens admitted at trial to sharing a special and/or confidential relationship with her mother. Therefore, there was no question of fact to be determined by the jury. Accordingly, the Defendant's Motion for a New Trial on Ground II in shall be **DENIED**.

3. The Court did not err in refusing Defendant's instructions number 13, 14, or 25 for the reasons set forth in Plaintiff Pickens' Response to Defendant's Motion for New Trial. Defendant's Instructions No. 13, 14, and 25 relate to alleged capacity issues as to the General Power of Attorney, Medical Power of Attorney, and deed, executed by the decedent in the Defendant's favor.

Evidence of these legal instruments was introduced at trial. Plaintiffs at trial did not challenge the legal validity of the General Power of Attorney or Medical Power of Attorney at trial. Plaintiffs argued to the jury that these documents were a ratification of what the decedent believed was the existence of a special and/or confidential relationship between the Defendant and the decedent. Specifically, that decedent believed since 1988 that the Defendant was helping her as to her daily living finances, and her estate. The validity of the General Power of Attorney and Medical Power of Attorney was not contested at trial. Accordingly, the denial of the aforementioned instructions does not for a basis for a new trial.

Additionally, as to the deed referenced under Ground III of Defendant's Motion for a New Trial, the Court granted the Defendant judgment as a matter of law as to the Plaintiffs claims relating to the 2002 real estate deed. Hence, the denial of the aforementioned instruction re likewise does not form a basis for a new trial.

Accordingly, the Defendant's Motion for a New Trial on Ground III in shall be **DENIED.**

4. The Court did not err in permitting counsel for Plaintiff to argue for damages relating to timber litigation and/or Gladys Sayre's estate. There was evidence in the record of these two items. Even if, *arguendo*, no evidence had been produced, the jury did not award Plaintiff's any damages based on either item. Therefore, there is no basis to grant Defendant a new trial as to Ground IV of Defendant's Motion for a New Trail.

Accordingly, the Defendant's Motion for a New Trial on Ground IV shall be **DENIED.**

5. Defendant's Grounds V, VI, VII and VIII, of Defendant's Motion for a New Trial do not establish a basis for a new trial. Accordingly, the Defendant's Motion for a New Trial on Grounds V, VI, VII, and VIII shall be **DENIED.**

6. The Defendant's objections and exceptions to this Order are duly noted and preserved.

ALL OF WHICH IS HEREBY ORDERED, ADJUDGED, AND DECREED.

THE CLERK SHALL SUBMIT CERTIFIED COPIES OF THIS ORDER TO THE ATTORNEYS OF RECORD.

ENTER:


DAVID W. NIBERT, JUDGE

DATED:

September 5, 2014

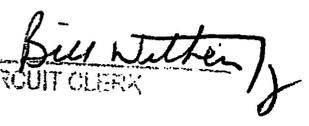
Prepared by:



Tim C. Carrico, Esq. (WVSB # 6771)
Carrico Law Offices LC
1412 Kanawha Boulevard, East
Charleston, WV 25301
(304) 347-3800
(304) 347-3688 fax
Counsel for the Plaintiff Janet P. Sargent

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IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

MURL LOUISE TRIBBLE and
JANET PEARL SARGENT,

Plaintiffs,

vs.

CIVIL ACTION NO.: 06-C-178-N
Judge David W. Nibert

POLLY SUE PICKENS,

Defendant

JUDGMENT ORDER

The trial of this matter commenced on January 22, 2013, and was completed on February 1, 2013. For trial, the Plaintiff, Janet Pearl Sargent, appeared in person and by counsel, Tim C. Carrico, Esq.; the Plaintiff, Murl Louise Tribble, appeared in person and by counsel, James M. Casey, Esq.; and the defendant, Polly Sue Pickens, appeared in person and by counsel, Dwight J. Staples and Gail T. Henderson-Staples, Esq.

Whereupon, jury selection began. Thereafter, a panel of six (6) jurors and two (2) alternates were sworn in. The jurors included: Eric Myers, Rex Nance, Lola Taylor, Dewey Conrad, Chris Zirkle, Addie Roberts, David Cassell (alternate) and Ruth Caplinger (alternate).

Plaintiffs presented their case in chief on January 22, 23, 24, 25 and 28, 2013, then rested subject to rebuttal following the Defendant's case in-chief. Without any

objections, Defendant's witnesses, Dr. V. B. Lakhani and Dr. Ralph Smith testified during Plaintiffs' case in chief.

The court then addressed the Defendant's and Plaintiffs' Motions for Directed Verdict pursuant to W. Va. R. Civ. Proc. 50 (a). As to the Defendant's written and oral Motions for Directed Verdict, the Court ruled as follows:

1. The Defendant's Motion for Directed Verdict on Plaintiffs' Count 1, W. Va. Uniform Declaratory Judgment Act, was **GRANTED** as the Plaintiffs voluntarily withdrew Count 1 at the Pretrial of July 1, 2011. (1/28/13 Tr., p. 2).

2. Defendant's Motion for Directed Verdict on Plaintiffs' Claim of Lack of Capacity to execute Deed dated February 20, 2002 was **GRANTED** as the Plaintiffs voluntarily withdrew Count 2 at the Pretrial of July 1, 2012. (1/28/13 Tr., p.2).

3. Defendant's Motion For Directed Verdict on Plaintiffs' Claim of Undue Influence to execute Deed dated February 20, 2002 was held in abeyance. (1/28/13 Tr., p.3).

4. Defendant's Motion for Directed Verdict on Plaintiffs' claim for Partition of Real Estate was neither granted nor denied since the Court ruled it was not a jury issue. Further, the Plaintiffs had voluntarily withdrawn the Partition claim at the Pretrial of July 1, 2012. (1/28/13 Tr., p. 7).

5. Defendant's Motion for Directed Verdict on Plaintiffs Claim of Breach of Fiduciary Duty as Power of Attorney was **DENIED**. (1/28/13 Tr., p. 9).

6. Defendants' Motion for Directed Verdict on Plaintiffs' Claim of Lack of Capacity to Execute Power of Attorney was **GRANTED** as the Plaintiffs voluntarily withdrew this Count at the Pretrial of July 1, 2012. (1/28/13 Tr., p. 9).

7. Defendant's Motion for Directed Verdict on Plaintiffs Claim of Undue Influence to Execute Power of Attorney was held in abeyance, however the Plaintiffs voluntarily withdrew this Count. (1/28/13 Tr., p. 9).

8. Defendant's Motion for Directed Verdict on Plaintiffs' Claim of Breach of Fiduciary Duty as Executrix of the Estate was **DENIED**. (1/28/13 Tr., p. 12).

9. Defendant's Motion for Directed Verdict on Plaintiffs' Claim of Breach of Contract as Executrix of the Estate was **GRANTED** as the Plaintiffs voluntarily withdrew this Court. (1/28/13 Tr., p. 12).

10. Defendant's Motion for Directed Verdict on Plaintiffs Claim of Conversion was **DENIED**. (1/28/13 Tr., p. 13).

11. Defendant's Motion for Directed Verdict on Claim of Constructive Fraud was **DENIED**. (1/28/13 Tr., p. 24).

12. Defendant's Motion for Directed Verdict on Plaintiffs Claim of Fraud was **GRANTED** as to the Fraud Claim to obtain the Power of Attorney in 2000 but is **DENIED** as to the Fraud claim for failure to disclose the Estate's assets in 2005. (1/28/13 Tr., p. 31).

13. Defendant's Motion For Directed Verdict on Plaintiffs' Claim of Tortious Interference with Expectancy was **DENIED**. (1/28/13 Tr., p. 36).

14. Defendant's Motion for Directed Verdict on Plaintiffs' claims of a W. Va. Code §11-11-7 violation was held in abeyance, however the Plaintiffs voluntarily withdrew this Court. (1/28/13 Tr., p. 38).

15. Defendant's Motion for Directed Verdict on Punitive Damages for Plaintiffs' Claims of Fraud and Tortious Interference is **DENIED**. (1/28/13 Tr., p. 40).

As to the Plaintiffs' Motions for Directed Verdict, the Court ruled as follows:

1. Plaintiffs' Motion for Directed Verdict on the Establishment of a Fiduciary Relationship between Louise Pickens and Polly Pickens was **GRANTED** as the Court ruled that the fiduciary relationship existed since June 8, 1988 when Charles Pickens Estate Appraisal was filed until Louise Pickens death on January 5, 2005. (1/28/13 Tr., p. 45).

2. Plaintiffs' Motion for Directed Verdict on their claim of Conversion was held in abeyance. (1/28/13 Tr., p. 47).

Prior to the Defendant commencing her case, the Defendant filed a written Motion for Reconsideration of the Court's Directed Verdict on the establishment of a Fiduciary Relationship. After oral argument, said motion was **DENIED**. (1/29/13 Tr. p. 52). Additionally, the Defendant renewed her Motion to Dismiss the Plaintiffs' Claims of Tortious Interference with An Expectancy, Fraud, Constructive Fraud, Conversion, Breach of Fiduciary Duty and Undue Influence based on the statute of limitations. Said motion was held in abeyance. (1/29/13 Tr., p. 56).

Thereafter, the Defendant presented her case. During a break on January 29, 2013, the Court revisited an earlier ruling wherein Defendant's Exhibit 9, a DHHR report, was excluded from the evidence. After consideration of *Lacy v. CSX Transportation, Inc.*, 205 W. Va. 630, 520 S.E.2d 418 (1999) the Court reversed its prior ruling and admitted Defendant's Exhibit 9 into evidence. (1/29/13 Tr., pgs. 57 - 58).

On Thursday, January 31, 2013, the Court made the following rulings pursuant to W. Va. R. Civ. Proc. 50 (a):

(1) The Court **GRANTED** the Plaintiffs' Motion for a Directed Verdict on the Defendant's Claims of Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Fraud, Tort of Outrage, False and Misleading Statements, Slander and Libel based on the telephone call to the West Virginia Department of Health and Human Resources Adult Protective Services and W. Va. Code §9-6-12. (1/31/2013 Tr., pgs. 8 - 12).

(2) The Court **GRANTED** the Plaintiff, Janet Pearl Sergent's Motion for Directed Verdict on Defendant's Slander counterclaim and **DENIED** the Plaintiff, Murl Tribble's Motion for Directed Verdict on Defendant's Slander counterclaim. (1/31/13 Tr., p. 17).

(3) The Court **GRANTED** Plaintiffs' Motion for Directed Verdict on Defendant's Claim of Fraud based on the Court's findings that the Fraud claim was not pled with specificity as required by W. Va. R. Civ. Proc. 9. (1/31/13 Tr., p. 27).

(4) The Court **GRANTED** Plaintiffs' Motion For a Directed Verdict on Defendant's counterclaim of Tortious Interference with Fiduciary Duties. (1/31/13 Tr., p. 29).

(5) The Court **GRANTED** Defendant's Motion for Directed Verdict on all of the Plaintiffs' Claims to set aside the Deed conveyance identified as Plaintiffs' Exhibit No. 11.

(6) The Court **GRANTED** the Defendant's Motion for Directed Verdict on the Plaintiffs' Claims on the Power of Attorney.

(7) The Court **GRANTED** the Defendant's Motion for Directed Verdict on the Plaintiffs' Claims on the Medical Power of Attorney.

(8) The Court again **DENIED** Defendant's Motion for Reconsideration of its prior Directed Verdict on the establishment of a Fiduciary Relationship.

(9) The Court **GRANTED** Defendant's Motion for Directed Verdict on the Plaintiffs' Claim of Constructive Fraud regarding the Deed. (1/31/13 Tr., p. 25).

(10) The Court **DENIED** as moot Plaintiffs' Motion For Directed Verdict on Conversion.

Additionally, the Defendant withdrew her claim of false and misleading statements.

That out of the presence of the jury the defendant, Polly Pickens, vouched the record as to her objection and exception to the Court's refusal to give the following proposed jury instructions:

- a. Defendant's proposed instruction no. 13 as per Ellison v. Lockard, 34 S. E. 2d 326 (W. Va. 1945; Cyrus v. Tharp, 126 S. E. 2d 31 (W. Va. 1962) and Harper v. Rogers, 387 S. E. 2d 547 (W. Va. 1989). (Subscribing Witness); (1/31/13 Tr., p. 31);

- b. Defendant's proposed instruction no. 14 as per Syl. pt. 1 of Work v. Rogerson, 160 S. E. 2d 159 (W. Va. 1968). (Fraud/No Presumption); (1/31/13 Tr., p. 31);
- c. Defendant's proposed instruction no. 25 as per Nicholas v. Kershner, 20 W. Va. 251 (1882) and Ward v. Brown, 44 S. E. 2d 488 (W. Va. 1903) (Testimony of treating physicians); (1/31/13 Tr., p. 31); and
- d. That out of the presence of the jury the defendant, Polly Pickens, vouched the record as to her objection and exception to the Court giving Plaintiffs' proposed instruction no. 20 (Executor's statutory non-probate estate filing duties). (1/31/13 Tr., p. 32).

That during closing arguments, the defendant, Polly Pickens, objected and excepted to the Plaintiff, Janet Sargent's, oral closing argument (1) requesting the jury to award damages in the amount of \$11,000 relating to the Plaintiff's argument that this amount constituted Louise Pickens 50% share of the 2002 timber litigation proceeds that she was entitled to, which were not allegedly accounted for based on the evidence at trial; and (2) requesting the jury to award damages in the amount of \$36,000.00 relating to her argument that this amount constituted Louise Pickens' 50% share of non-probate assets that she was entitled to from her sister, Gladys Sayre's Estate in 2000, Plaintiff's Exhibit no. 4, which are also allegedly not accounted for based on the evidence at trial. The basis for the defendant's objections included relevancy and that there was no evidence presented that would permit the jury to award those damages against the defendant.

The Court denied the defendant's objection.

After the instructions were read to the jury and after closing arguments, but prior to the case being adjudicated by the jury, the Court heard the Defendant's written and oral Motion for a Mistrial. The Defendant argued that the Court, over Defendant's objections, improperly allowed counsel for the Plaintiffs to present in closing arguments specific, unproven monetary amounts of \$11,000.00 regarding a 2002 timber litigation settlement and \$36,000.00 regarding the 2000 Gladys Sayre estate. Further, the Defendant objected to Plaintiffs publishing the specific monetary amounts to the jury. The Court **DENIED** Defendant's Motion for a Mistrial. (2/1/13 Tr., pgs. 32 – 40).

Based on the forgoing rulings, the following claims were submitted for the jury's consideration:

a. Plaintiffs' claims against the Defendant:

Count Eight: Breach of Fiduciary Duty as the Executor of Louise Pickens' Estate

Count Ten: Conversion

Count Eleven: Constructive Fraud

Count Twelve: Common Law Fraud

Count Thirteen: Tortious Interference with Expectancy

Count Fifteen: Punitive Damages

b. Defendant's counterclaims against the Plaintiffs:

Against Murl Tribble: Tort of Outrage

Slander

Negligent Infliction Emotional Distress

Punitive Damages

Against Janet Sargent:

Tort of Outrage

Negligent Infliction of Emotional
Distress

Punitive Damages

The jury, having heard all of the evidence, instructions of the Court and arguments of counsel, returned its verdict on Friday, February 1, 2013, as follows:

JURY VERDICT

- a. Do you find by a preponderance of the evidence that Polly Pickens breach her fiduciary duty as executrix of the estate of Louise Pickens? YES.
- b. Do you find by a preponderance of the evidence that Polly Pickens tortuously interfered with the Plaintiff's expectancy? YES.
- c. Do you find by a preponderance of the evidence that Polly Pickens committed conversion of Louise Pickens property as fiduciary for Louise Pickens? YES.
- d. Do you find by a preponderance of the evidence that Polly Pickens committed constructive fraud? YES.
- e. Do you find by clear and convincing evidence that Polly Pickens committed fraud? YES.
- f. We the jury finds in favor of the Plaintiffs, and against the Defendant, Polly Pickens, and assess their compensatory damages as follows:

\$94,124.00 determined as follows:

\$98,476.00	CD Total
-\$14,036.00	CD's after death
<u>-\$9,260.00</u>	Cashed prior to death for sitters
\$75,180.00	
+\$5,050.00	E Bonds
<u>+13,894.00</u>	Checking Acct. Balance
\$94,124.00	

- g. Shall punitive damages be assessed against the Defendant? NO.
- h. Do you find by a preponderance of the evidence that the conduct of Murl Louise Tribble was outrageous and intentional? NO.
- i. Do you find by a preponderance of the evidence that Murl Tribble committed slander against Polly Pickens? NO.
- j. Do you find by a preponderance of the evidence that Murl Tribble caused negligent infliction of emotional distress to Polly Pickens? NO.
- k. Shall punitive damages be assessed against the Plaintiff, Murl Louise Tribble as to the slander claim? NO.
- l. Do you find by a preponderance of the evidence that the conduct of Janet Pearl Sargent was outrageous and intentional? NO.
- m. Do you find by a preponderance of the evidence that Janet Pearl Sargent caused negligent infliction of emotional distress to Polly Pickens? NO.
- n. FOREPERSON'S CERTIFICATION: LOLA TAYLOR

It is **ORDERED** that the Plaintiffs, Janet Pearl Sargent and Murl Tribble are granted **JUDGMENT** in their favor and against the defendant, Polly Pickens, as to the defendant's counterclaims submitted to the jury referenced above.

It is accordingly **ORDERED** that the plaintiffs, Janet Pearl Sargent and Murl Tribble as to their claims against the defendant are granted **JUDGMENT** against the defendant, Polly Pickens, in the amount of \$94,124.00 along with prejudgment and post judgment interest provided by the law. The Jury was instructed by the Court that said amount of \$94,124.00 shall be paid into the Estate of Louise Pickens; therefore, it is **ORDERED** that the Defendant shall pay the judgment award into the Estate of Louise Pickens.

Pursuant to West Virginia Code §56-6-31 and the administrative order of the West Virginia Supreme Court of Appeals, the statutory rate of interest on judgments and decrees for 2013 is 7%. Accordingly, it is **ORDERED** that the plaintiffs, Janet Pearl Sargent and Murl Tribble are awarded judgment against the defendant, Polly Pickens, in the amount of \$94,124.00 along with post judgment interest at 7% per annum.

That the plaintiffs' entire judgment against the defendant is for special damages as contemplated by West Virginia Code §56-6-31(a). Therefore, the plaintiffs are entitled to pre-judgment interest under West Virginia Code §56-6-31(a) on their entire award.

The Plaintiffs contend that their causes of action accrued on June 9, 1988, when Charles Pickens' estate appraisal was initially filed.

The Defendant alleges plaintiffs' cause of action for breach of fiduciary duty claim occurred on April 19, 2005 (Date of Filing Initial Appraisal), that the tortious interference with Plaintiff's expectancy claim accrued on April 19, 2005 (Date of Filing Initial Appraisal), that the conversion of Louise Pickens property as fiduciary for Louise Pickens claim and the constructive fraud claim accrued on December 2, 2004 (Date the Certificates of Deposits for Louise Pickens or Polly Pickens were initially cashed) and the fraud claim accrued on April 19, 2005. (Date of Filing Initial Appraisal).

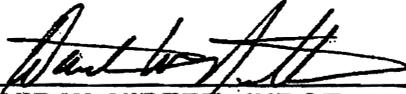
For purposes of W. Va. Code §56-6-31(a), the parties agree that the date of accrual is April 19, 2005; however, the parties reserve the right to argue different dates of accrual with regards to the different causes of action to the extent they differ from the April 19, 2005 date.

That it is accordingly **ORDERED** that the plaintiffs are awarded prejudgment interest on \$94,124.00 at 7% per annum from April 19, 2005, until the date of entry of judgment.

It is therefore, **ORDERED**, and **ADJUDGED** that the defendant, Polly Pickens, shall pay the cost of the jury fees as calculated by the Clerk of the Circuit Court, to be remitted within (10) days of the entry of this Order.

The exceptions and objections of all parties adversely affected by this Order are hereby preserved.

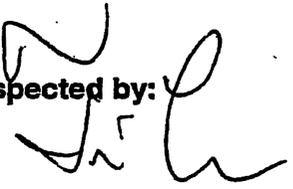
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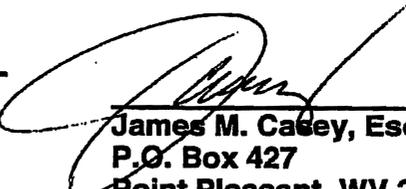
ENTER: 
DAVID W. NIBERT, JUDGE

DATED: July 10, 2013

Prepared by:


Dwight Staples, Esq. (WVSB # 3566)
Gail Henderson-Staples, Esq. (WVSB#1676)
Henderson, Henderson & Staples, LC
711 Fifth Avenue
Huntington, West Virginia 25701
Telephone: (304) 523-5732
Facsimile: (304) 523-5169
Counsel for Defendant, Polly Sue Pickens

Inspected by: 
Tim C. Carrico, Esq. (WVSB # 6771)
Carrico Law Offices LC
1412 Kanawha Boulevard, East
Charleston, WV 25301
Telephone: (304) 347-3800
Facsimile: (304) 347-3688
Counsel for the Plaintiff Janet P. Sargent


James M. Casey, Esq. (WVSB # 667)
P.O. Box 427
Point Pleasant, WV 25550-0427
Telephone: (304) 675-3999
Counsel for Plaintiff Murl Louise Tribble

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