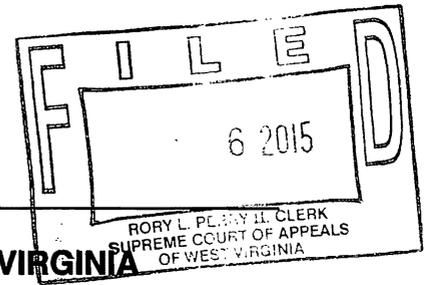


No. 14-1060



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

POLLY SUE PICKENS, Defendant Below,

Petitioner,

vs.

MURL LOUISE TRIBBLE and
JANET PEARL SARGENT, Plaintiffs Below,

Respondents.

Honorable David W. Nibert
Circuit Court of Mason County
Civil Action No.: 06-C-178

PETITIONER'S BRIEF

A handwritten signature in cursive script that reads "Gail Henderson-Staples".

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II. ASSIGNMENTS OF ERROR

1. The lower court committed prejudicial error by allowing plaintiffs' claims of tortious interference with an expectancy, fraud, constructive fraud, and conversion, and breach of fiduciary duty as executrix to be submitted to the jury since the Plaintiff Murl Tribble had factual knowledge fourteen (14) years prior to filing her claims and the Plaintiff Janet Pearl Sargent had factual knowledge seven (7) years prior to filing her claims. The court's ruling is contradictory to the discovery rule. *Dunn v. Rockwell*, 225 W.Va., 43, 689 S.E.2d 255 (2009); *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997).

2. It was prejudicial error for the lower court to grant a directed verdict in favor of the plaintiffs and find as a matter of law that there was a fiduciary relationship between Louise Pickens, the decedent, and Polly Pickens from June 8, 1988 until January 5, 2005 based on a familial relationship. *Nugen v. Simmons*, 489 200 W. Va. 253, S.E.2d 7, 12 (1997).

3. The lower court committed prejudicial error by refusing defendant's instruction number 13 (subscribing witnesses testimony), 25 (weight to be given a treating physician) and 37 (Tortious Interference with a Fiduciary Duty).

4. It was prejudicial error for the lower court to exclude the decedent's attorney's testimony regarding decedent's statement of intent contrary to Rule 803 (3), WVRE, *Rosier v. Rosier*, 705 S.E.2d 595 (W. Va. 2010).

5. It was prejudicial error for the lower court to allow plaintiff's counsel to argue in closing argument unproven, specific monetary amounts since there was no evidence presented to the jury regarding said amounts.

6. The lower court committed prejudicial error submitting plaintiffs' time barred claims (Tortious Interference With An Expectancy, Fraud Has No Basis, Claim Of Constructive Fraud, Conversion, and Breach Of Fiduciary Duty) to the jury since they had no factual basis.

7. It was prejudicial error for the lower court to instruct the jury that any money recovered would be placed in the Estate of Louise Pickens when the Estate of Louise Pickens and the Defendant, Polly Pickens as Executrix of the Estate of Louise Pickens were never a party of this litigation.

8. The lower proceedings were plainly wrong and contrary to the evidence and the law.

III. STATEMENT OF THE CASE

A. STATEMENT OF EVIDENCE PRESENTED AT TRIAL

Louise Ferris Pickens was the mother of all three (3) parties. The Respondents/Plaintiffs Below, Murl Louse Tribble and Janet Pearl Sargent, are the sisters of the Petitioner/Defendant Below, Polly Sue Pickens. Louise Pickens had been married to Charles Pickens. Charles Pickens died April 11, 1988. Louise Pickens died on January 6, 2005. The Respondent Murl Louise Tribble and Janet Pearl Sargent failed to attend their mother's funeral. Louise Pickens had executed a will in which she named the Petitioner, Polly Pickens, as the Executrix of her estate.

After the death of her husband, the decedent, Louise Pickens, went to the Putnam County Bank from May 6, 1988 through November 25, 1988 and caused to be issued fourteen (14) certificates of deposit. Louise Pickens had these certificates of deposit issued in the name of Louise Pickens or Polly Pickens. From January 27, 1989

through November 25, 1989, the decedent caused Putnam County Bank to issue another eighteen (18) certificates of deposit in the name of Louise Pickens or Polly Pickens. In 1990, the decedent had another twenty-one (21) certificates of deposit in the name of Louise Pickens or Polly Pickens. The decedent continued to have certificates of deposits issued in the name of Louise Pickens or Polly Pickens until July 7, 2000. Of the sixty-four (64) certificates of deposit issued by the Putnam County Bank, only three (3) were issued after the execution of the power of attorney referenced in this case. App. Vol. 2:341.

The Plaintiffs testified that they knew Polly Pickens name was on the certificates of deposits as early as 1994 and no later than 2001. App. Vol. 2:579(p.52) and App. Vol 1:524(pgs.81-84).

Jack Wilson, Putnam County Bank President, testified that Polly Pickens played no role when Louise Pickens placed Polly Pickens name on these certificates of deposit and that the paperwork was personally reviewed by him and properly done. App. Vol. 2:682-683(98-99). Additionally, Sharon Stapleton, a 27 year bank employee testified that Louise Pickens handled her own business affairs during the relevant period and was competent to do so. App. Vol. 2:499(pgs.15-17).

A general power of attorney and medical power of attorney were prepared by Attorney Rosalee Juba-Plumley and executed on July 7, 2000. App. Vol. 1:1207-1211. On February 20, 2002, Louise Pickens executed a deed conveying certain real estate to her daughter Polly Pickens. App. Vol. 2:320. The deed was prepared by Attorney Rosalee Juba-Plumley. Attorney Juba-Plumley explained, by example, Louise Pickens'

acumen and determination to grant her property pursuant to her wishes. App. Vol. 2:674(pgs.63-64).

The plaintiffs had alleged that Louise Pickens was mentally incompetent for several years before she died. However, during the year 2002, Louise Pickens was one of the Plaintiffs in a timber lawsuit filed in the Circuit Court of Mason County (Civil Action No. 01-C-44). On **April 17, 2002** her deposition was taken and she answered questions from three (3) different attorneys. App. Vol. 2:329. The lawsuit was settled on August 22, 2002 through mediation conducted by the Honorable J. O. Holiday.

Moreover, Louise Pickens voted her entire life including the years 2002, 2003 and 2004. According to the Plaintiff Tribble's trial testimony, she took her mother Louise Pickens to vote in 2004. App. Vol. 2:589(p.92). Trial testimony revealed that Louise Pickens was very active throughout her life: she was involved in politics, App. Vol. 2:671(pgs.52-53), member of the Mason County Democrat Executive Committee, App. Vol. 2:550(p.45), Flea market every Sunday and visited friends, App. Vol. 2:549(p.38). Plaintiff Tribble also testified how Louise Pickens stayed by herself, bathed herself and cooked for herself through and including 2003. App. Vol. 2:589(p.90).

The Funeral Director, John Chapman, testified that he had visited Louise Pickens before Thanksgiving, 2004 because she wanted to make her own funeral arrangements including the songs to be played. App. Vol 2:615(p.194). He explained:

“Mrs. Pickens, she had her own thoughts and ideas. And so, anybody that would – the way she wanted things was the way she wanted things, not what anybody else wanted.”
App. Vol. 2:615(p.195).

Likewise, Reverend Denver Tucker testified that he knew Charles and Louise Pickens for a long time. According to Reverend Tucker, Louise Pickens was very smart

and there was no way she was being taken advantage of by Polly Pickens at any time. App. Vol. 2:619(p.211).

The only witnesses available to testify regarding the execution of the general power of attorney, the medical power of attorney and the deed were Attorney Rosalee Juba-Plumley and Cynthia Hess. They both testified that Louise Pickens was mentally competent to execute the three documents, that she understood the nature of her belongings, and that she understood the consequences of executing these documents.

After Louise Pickens death, the Plaintiffs filed false papers in the Mason County Clerk's Office in an effort to name themselves as Administratrix of their mother's estate. Their papers stated that their mother had no will and she lived in Mason County the last six months of her life when, in fact, she lived in Putnam County. The County Clerk of Mason County repeatedly asked the Plaintiff Murl Tribble to return the Letters of Appointment she had received. App. Vol. 2:694-695. It took two (2) years and assistance from the prosecutor's office before the Plaintiff Tribble returned the Letters of Appointment; and, even then only four (4) of the seven (7) letters were returned. App. Vol. 2:695(p.148-149). Subsequently, Polly Pickens was appointed Executrix of the Estate of Louise Pickens in Putnam County, West Virginia pursuant to Louise Pickens Last Will and Testament.

B. PROCEDURAL HISTORY

1. COMPLAINT

The current civil action was initially filed on December 18, 2006 as a Declaratory Judgment action to quiet title to 35.42 acres of land described as "Plat of Survey

Showing a Parcel of Land Situate on the Waters of Thirteen Mile Creek, located on Tribble Road, Leon, Union District, Mason County, West Virginia.

The first count of said complaint alleges that the Deed dated February 20, 2002 may be invalid. The second count of the initial complaint requested "Partition of Real Estate".

2. AMENDED COMPLAINT

The plaintiffs amended their complaint on April 30, 2008 to include claims of Breach of Fiduciary Duty as Power of Attorney, Breach of Fiduciary Duty as Administratrix, Conversion, constructive fraud, and fraud; all claims allegedly began July 7, 2000. App. Vol. 1:49.

3. SECOND AMENDED COMPLAINT

Again, on November 4, 2008, the plaintiffs filed a motion to amend their complaint. App. Vol. 1:60. Despite the defendant vigorously opposing the motion to amend the complaint based on the statute of limitations, the lower court granted the Plaintiffs leave to amend their complaint. App. Vol. 1:83.

On February 9, 2009 the Plaintiffs filed the Second Amended complaint that alleged that **all of their claims were based on a "willful scheme and plan of systematically converting, looting, taking, and controlling of her own use and benefit the Decedent's estate."** App. Vol. 1:63. Further, the plaintiffs alleged that the "plan" began after the death of their father on **April 11, 1988**. The second amended complaint added the claims of Lack of Capacity to Execute Deed, Undue Influence To Execute Deed, Breach of Contract as Power of Attorney, Lack of Capacity to Execute

Power of Attorney, Undue Influence To Execute Power of Attorney, Breach of Contract as Executrix of the Estate; tortious interference with an expectancy; violation of W. Va. Code §55-7-9 and punitive damages.

4. COUNTERCLAIM

The Defendant filed several counterclaims against the Plaintiffs: Tortious Interference with Fiduciary Duties, Intentional and Negligent Infliction of Emotional Distress, Fraud, Tort of Outrage, False and Misleading Statements, Slander and Libel. App. Vol. 1:225.

5. PRETRIAL MOTIONS

After taking the plaintiffs' depositions, the defendant filed a Motion For Summary Judgment to bar the plaintiffs claims due to the statute of Limitations, failure to state cause of action, unclean hands, and the doctrine of laches. App. Vol. 1:(p.313). Said Motion was denied. App. Vol. 1:1016.

6. TRIAL

At the onset of the trial, the lower court instructed counsel as follows:

“Now as to all rulings adverse to the plaintiffs, adverse to the defendant, the Court notes the party’s objection to the Court’s ruling.” (Tr. Vol. 5, p. 4).

During the trial and after the trial of this matter, the defendant continually renewed her Motion for Summary Judgment based on the Statute of Limitations. App. Vol. 2:66–67. See Defendant’s renewed motion at App. Vol. 2:784. See also *Defendant’s Motion For Direct Verdict Pursuant to Rule 50* App. Vol. 1:1064. Defendant’s renewed motion at App. Vol 2:880(p.37), and *Defendant’s Motion For New Trial*. App. Vol. 1:396.

At the close of plaintiffs' case and prior to defendant's case, the lower court ruled as a matter of law that there was a fiduciary relationship between Louis Pickens and Polly Pickens from June 8, 1988 until Louise Pickens death on January 5, 2005. App. Vol. 2:611(pgs.179–181). The Defendant requested and filed a *Motion For Reconsideration* of this ruling to no avail. App. Vol. 1:880(p.37),1083.

The Court granted *Defendants' Motions For Directed Verdict as to the following Plaintiffs' claims:*

1. Declaratory Judgment, App. Vol. 2:734
2. Lack of Capacity to Execute Deed, App. Vol. 2:734
3. Undue Influence to Execute Deed, App. Vol. 2:878(p.28)
4. Breach of Fiduciary Duty as Power of Attorney, App. Vol. 1:14
5. Breach of Contract as Power of Attorney, App. Vol. 1:14
6. Lack of Capacity to Execute Power of Attorney, App. Vol. 2:741 (withdrawn by Plaintiff)
7. Undue Influence to Execute Power of Attorney, App. Vol. 2:741 (withdrawn by Plaintiff)
8. Breach of Contract as Executrix of Estate, App. Vol. 2:744 (withdrawn by Plaintiff)
9. Constructive Fraud as to Deed, App. Vol. 2:878(p.28)
10. Fraud as to the power of attorney, App. Vol. 2:763

Plaintiffs' claim to partition real estate and violation of W. Va. Code §55-7-9 were withdrawn. The Court also granted *Plaintiff's Motion For Directed Verdict* as to the defendant's Counterclaims:

1. Intentional and Negligent Infliction of Emotional Distress, App. Vol. 2:1266-1268
2. Fraud, App. Vol. 2:879(p.30)
3. Tort of Outrage, Vol. 2:1266-1268
4. False and Misleading Statements, Vol. 2:1266-1268
5. Slander and Libel regarding a call to Department of Health and Human Resources, App. Vol. 2:873(p.9)
6. Slander as to the Defendant Janet Pearl Sargent App. Vol. 2:876(p.19)
7. Tortious Interference with Fiduciary Duties, App. Vol. 2:879(p.32)

Out of the plaintiffs' fifteen (15) claims alleged in the Second Amended Complaint, only six (6) claims; tortious interference with an expectancy, fraud, constructive fraud, conversion, breach of fiduciary duty as executrix and punitive damages were submitted to the jury. The defendant's counterclaims against the Plaintiff Murl Tribble of outrage, slander, negligent infliction of emotional distress and punitive damages were submitted to the jury. The defendant's counterclaims against the Plaintiff Janet Pearl Sargent of outrage, negligent infliction of emotional distress and punitive damages were submitted to the jury.

7. JURY VERDICT

The jury returned a verdict in favor of the plaintiffs and awarded as damages, the certificate of deposits, bonds and checking account balance valued by the jurors at \$94,124.00. Defendant's Motion for a New Trial was denied. App. Vol. 1:21.

IV. SUMMARY OF ARGUMENT

First and foremost, all of the plaintiffs' claims submitted to the jury were barred by the statute of limitations. The complaint was filed on December 18, 2006. The amended complaint was filed on April 30, 2008 and alleged the basis for their claims began on July 7, 2000. The second amended complaint was filed on February 9, 2009 and alleged the basis for plaintiffs' claims began in April, 1988. The plaintiffs uncontradicted testimony was that they knew as early as 1994 and no later than 2001 about their mother's real property and certificates of deposit.

Second, the lower court usurped the role of the jury and became the fact finder on a pivotal issue of fact: Whether and when was a fiduciary relationship between Louise Pickens and Polly Pickens. The lower court's error was compounded by the fact

that the court's finding of a fiduciary relationship was made at the conclusion of plaintiff's case-in-chief and PRIOR TO the defendant's case-in-chief.

Third, the lower court made evidentiary rulings that conflicted with settled law, and the purposeful intent of the rules by excluding relevant and material evidence, to wit: the lower court excluded the decedent's attorney from testifying about the decedent's statement of intent.

Fourth, the lower court erroneously refused the defendant's instructions on peculiar weight to be given to a subscribing witness's testimony, the burden of proof for a fraud claim, and the peculiar weight to be given to the treating physician's testimony.

Fifth, the lower court erroneously allowed plaintiff's counsel to argue in closing unproven, specific monetary amounts. No evidence had been presented during trial warranting counsel's argument. Hence, the argument of counsel was inadmissible, substantially prejudicial, and tainted the jury as to any alleged monies Polly Pickens received.

Sixth, the lower court erroneously submitted claims to the jury which had no factual basis.

Seventh, the lower court erroneously advised the jury that any monies awarded would go into the Estate; however, neither the Estate of Louise Pickens or Administratrix was ever a party to this litigation.

Finally, the lower court proceedings were plain error and contrary to the evidence and West Virginia Jurisprudence.

V. STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully requests oral argument pursuant to Rule 18(a), W.Va.R. App.P., due to the cumulative and convoluted nature of the assigned errors. Oral

argument can significantly aid the decisional process. Additionally, the Petitioner respectfully requests the extended time provided by Rule 19, W.Va.R.App.P., because of the numerous errors that need to be addressed.

VII. ARGUMENT

A. STANDARD OF REVIEW

“The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998] is *de novo*.” Syllabus point 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009).

The trial court’s ruling denying a motion for a new trial will be reversed on appeal (only) when it is clear that the trial court has acted under some misapprehension of the law or the evidence. Syl. pt. 2, *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W. Va. 209, 672 S.E.2d 345 (2008).

A *de novo* standard of review is applied to a lower court’s ruling on a question of law. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Likewise, whether a jury was properly instructed is a question of law and the review is *de novo*.

Finally, the *de novo* standard of review applies to a lower court’s ruling on a motion for summary judgment. Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Summary judgment is mandated when the record, viewed most favorably to the non-moving party, demonstrates no genuine issues of material fact and the moving party’s entitlement to judgment as a matter of law. *Powderidge Unit Owners Ass’n v. Highland Properties, Ltd*, 196 W. Va. 692, 474 S.E.2d 872 (1996).

B. THE LOWER COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING PLAINTIFFS' CLAIMS OF TORTIOUS INTERFERENCE WITH AN EXPECTANCY, FRAUD, CONSTRUCTIVE FRAUD, AND CONVERSION, AND BREACH OF FIDUCIARY DUTY AS EXECUTRIX TO BE SUBMITTED TO THE JURY SINCE THE STATUTE OF LIMITATIONS HAD EXPIRED.

1. THE PLAINTIFFS HAD FACTUAL KNOWLEDGE OF THEIR CLAIMS NO LATER THAN 2001.

W. Va. Code §55-2-12 states:

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damages of property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) **within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.**

The plaintiffs second amended complaint based their claims on alleged action taken by the defendant beginning in April, 1988. The defendant vigorously protested the amendment because the plaintiffs knew as early as 1994 and no later than 2001 that their mother Louise Pickens had placed Polly Pickens' name on her certificates of deposits, primarily in 1988 and 1989.

At the conclusion of the trial, the only assets at issue and subject to the plaintiffs' claims of tortious interference with an expectancy, fraud, constructive fraud, conversion, breach of fiduciary duty and punitives were the certificates of deposits, some bonds and a checking account wherein certificate of deposits had been placed. App. Vol. 2:576.

The Plaintiff Murl Louise Tribble admitted that she was aware in 1994 of her mother's certificates of deposit issued in 1988, 1989 and 1990. Plaintiff Tribble testified

that she explained to her mother between and “and” and an “or” account on certificates of deposit in 1994. App. Vol. 2:579(pgs.50-53).

Q Isn't it true, Ms. Tribble, that you told your mom the difference in between having "and" or "or" on those certificates of deposit? You told her, didn't you?

A I don't think she understood.

Q But you did tell her, didn't you?

A This was back --

Q I'm just asking, yes or no, didn't you tell her?

A Yes.

Q And that happened in 1994, when that conversation occurred?

A I couldn't say.

Q Let me refresh your recollection again.

A I may have remembered then, but I don't know if I would remember now.

Q The bottom of the page, ma'am. You say, "I told her." And the question is, "In 1994, is that correct?" And how did you answer?

A "Somewhere in the neighborhood of '94."

Q Thank you. So in 1994, you told your mom the difference between having "and" or "or" on her certificates of deposit?

Q Now, your mom passed away in 2005. That was 11 years before your mom died that you told her that?

A Yes.

Testimony of Plaintiff, Murl Tribble
App. Vol. 2:579 (pgs. 50–53).

It is uncontroverted that the Plaintiff Murl Tribble knew that Polly Pickens' name was on certificates of deposit in 1994.

Reflected in the defendant's continually renewed motion for summary judgment was the Plaintiff Janet Pearl Sargent's deposition testimony that she knew that her mother had CD's. Further, Plaintiff Tribble testified that she saw Polly Pickens name on interest checks from what she believed was the certificates of deposit in the year **2001**. App. Vol. 1:524.

It is significant that the Plaintiff Janet Pearl Sargent admitted that she never went to visit her mother for at least two (2) years prior to her death on January 6, 2005. App. Vol. 1:524(p.83).

Additionally, the Plaintiff Janet Pearl Sargent's deposition testimony was part of the defendant's continually renewed motion for summary judgment. Therein, she testified that their fraud claim was based on the certificate of deposits and the probate filings. App. Vol. 1:525(p.87).

2. THE PLAINTIFFS CLAIMS ARE BARRED AS A MATTER OF LAW

In *Dunn v. Rockwell*, 225 W.Va., 43, 689 S.E.2d 255 (2009) the Court further clarified the discovery rule and when the statute of limitations begins to run.

A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.
Dunn, Syl. Pt. 5.

Particularly significant in this case is the third step determination as to when the plaintiffs knew or should have known the facts that led to their claims.

Under the discovery rule set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997), whether a plaintiff “knows of” or “discovered” a cause of action is an objective test. **The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action.** This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.
Dunn, Syl. Pt. 4

Applying the discovery rule and statute of limitations rule as set forth in *Dunn* and *Gaither*, supra, the facts herein clearly demonstrate that the plaintiffs’ claims of tortious interference with an expectancy, fraud, constructive fraud, conversion, and breach of fiduciary duty as executrix are barred by the statute of limitations.

There was no genuine issue of fact as to when the plaintiffs had knowledge of the facts that were the basis for their claims.

3. THE PLAINTIFFS CLAIMS SHOULD HAVE NEVER BEEN SUBMITTED TO THE JURY

As stated in the Statement of Facts herein, the plaintiffs amended their Complaint to include allegations of undue influence, lack of capacity, conversion, fraud, constructive fraud, tortious interference and the like in **April, 2008**. Since the Plaintiff Murl Tribble knew that Polly Pickens name was on the certificates of deposit in 1994, she had factual knowledge **fourteen (14) years** prior to making these allegations. Since the Plaintiff, Janet Pearl Sargent, knew in 2001, she had factual knowledge **seven (7) years prior** to making her allegations. Any allegations regarding the certificates of deposit are barred by the relevant statute of limitations and the doctrine of laches.

In *Calacino v. McCutcheon*, 177 W. Va. 684, 356 S.E.2d 23 (1987), the lower court ruled that the plaintiffs claim of tortious interference with an expectancy was time barred. Therein, the plaintiffs claimed they would have inherited real property from their father had their sibling not fraudulently and deceitfully obtained their father's signature on the deed. This Court affirmed the lower court's decision.

Here, the grantor of the deed, Mr. Malcolm, after executing the deed, lived for seven years. He received three separate checks from the deed sale which he deposited after he got out of the hospital. His sons were aware of the initial transaction involving the option contract for the same property since they had discussed the same with Mr. Malcolm's attorney. It can hardly be doubted that they had notice of the transaction. We seriously doubt if a cause of action for interference existed, but even if it did, the two-year statute of limitations would bar it. W.Va. Code, 55-2-12. *Calacino*, 356 S.E.2d, 23, 26.

Furthermore, the *Calacino* decision noted there was no evidence that the father had any kind of disability. *Ibid* at 25. Likewise, herein the plaintiffs were aware of the Defendant Polly Pickens name being on the certificates of deposits and bonds several years prior to their mother's death.

The lower court should have ruled as a matter of law that the plaintiffs' claims were not only factually baseless but also time barred.

C. IT WAS PREJUDICIAL ERROR FOR THE LOWER COURT TO GRANT A DIRECTED VERDICT IN FAVOR OF THE PLAINTIFFS AND FIND AS A MATTER OF LAW THAT THERE WAS A FIDUCIARY RELATIONSHIP BETWEEN LOUISE PICKENS, THE DECEDENT, AND POLLY PICKENS FROM JUNE 8, 1988 UNTIL JANUARY 5, 2005.

1. THE LOWER COURT USURPED THE JURY'S ROLE TO DECIDE AN ISSUE OF FACT

A critical issue presented is whether the lower court committed reversible error when it ruled as a matter of law that there was a confidential fiduciary relationship

between the Defendant Polly Pickens and the decedent Louise Pickens based only on the familial relationship described by the Defendant Polly Pickens during plaintiffs' case in chief. App. Vol. 2:611(pgs.179-180).

Whether there was a confidential relationship is a question of fact. The Court has stated that it **"is a question of fact for the jury to initially resolve as to whether the plaintiff proved that a confidential or fiduciary relationship existed... the burden of proof ...shifted ... only if this initial question was resolved in plaintiff's favor."** *Dillon v. Dillon*, 178 W. Va. 531, 362 S.E.2d 759 (1987) (per curiam) (emphasis added).

Nugen v. Simmons, 200 W. Va. 253, 489 S.E.2d 7, 13 (1997).

Further, the Court in *Nugen*, supra at p. 14 reiterated the role of the jury:

It is the peculiar and exclusive province of the jury to weigh the evidence and resolve questions of fact when the testimony of witnesses is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them. (Citations omitted).

The defendant submits that the lower court improperly granted a directed verdict to the plaintiffs on the issue of a confidential/fiduciary relationship based on a familial relationship. App. Vol. 2:611 (pgs.179-180). The court's early ruling was especially harmful since it made its ruling prior to the defendant having the opportunity to present any evidence on this issue in her case in chief.

The lower court further explained decision by stating the definition of a fiduciary.

And out of Koontz, and this is a quote from page 802 of the West Virginia Reports, 181 West Virginia, page 802, "A person acts as a fiduciary when the business he transacts or the money or property he handles is not for his benefit, but for the benefit of another to whom he stands in confidence."
App. Vol. 2:611(p.180).

At the time the lower court's decision was made, there was not a scintilla of evidence that the defendant placed monies of her mother in joint accounts. Contrarily, the evidence overwhelmingly revealed that the decedent Louise Pickens handled her own financial affairs.

2. THE DEFENDANT WAS ERRONEOUSLY BARRED FROM RELYING ON W. VA. CODE 31A-4-33

As a result of the lower court's erroneous finding of a fiduciary relationship, the Defendant Polly Pickens was barred from the conclusive presumption that the proceeds in the joint account were a gift from her mother.

A party seeking to prove fraud, mistake or other equally serious fault must do so by clear and convincing evidence and if such fraud, mistake or other equally serious fault is not so proven, then the surviving joint tenant may rely on the conclusive presumption created by W.VA. CODE, 31A-4-33, as amended, that the donor depositor of a joint and survivorship account intended a causa mortis gift of the proceeds remaining in the account after his death to the surviving joint tenant to establish such gift.

Nugen v. Simmons, 200 W. Va. 253, 489 S.E.2d 7, 11 (1997)

3. THE SUBSTANTIAL AND UNCONTRADICTED EVIDENCE WAS THAT THERE WAS NO FIDUCIARY RELATIONSHIP PURSUANT TO WEST VIRGINIA JURISPRUDENCE

a. UNCONTRADICTED TRIAL TESTIMONY OF THE DEFENDANT POLLY PICKENS.

The **uncontradicted** trial testimony of Polly Pickens clearly demonstrates that there was no confidential/fiduciary relationship from 1988 until July 6, 2000. Polly Pickens testified in her case in chief as follows:

- Q After your father passed away in 1988, did that cause you to try to help your mom more?
A Yes, definitely. I was all she had.
Q Now in 1988, did you -- I want to talk about the

business of your mother. Did you write checks for your mother in 1988?

A No, not in 1988.

Q Did your mom -- did she have her own checking account?

A Yes, sir, she did.

Q Did she have her own checkbook?

A Yes, sir.

Q Was she competent in '88?

A Yes, sir.

Q So you didn't do anything, as far as finances were concerned; is that right?

A Mom took care of her own business.

...

Q What about in 1989?

A Same thing. My mom took care of her own business.

Q Did she write her own checks?

A Yes, sir.

Q Had her own checkbook?

A Yes, sir.

Q And you didn't really write any of those checks for her.

A No.

Q What about in 1990; same thing, a couple of years after your dad passed?

A No.

Q Did you handle your mom's financial affairs?

A No, mommy done her own business.

Q Same question with regards to '91.

A My mom done her own business in '91, also.

Q '92?

A Same thing.

...

Q She paid her own bills?

A Yes, sir.

Q Did you take her to the store?

A Yes, sir.

...

Q Never went to Peoples Bank?

A I can remember going one time with daddy.

Q The same question -- I don't want to belabor the point, but all the way up until about 1998, did you handle your mother's business?

A No. Mommy done her own thing.
Q So she wrote her own checks all through them years;
right?
A Yes, she did.
Q Did you really have anything to do with her
financial affairs during that time period?
A No, I did not.
App. Vol. 2:800(p.25)-801

As a result of the lower court ruling as a matter of law that there was a fiduciary relationship, the plaintiffs obtained the benefit of the presumption of constructive fraud.

In the case of *Kanawha Valley Bank v. Friend*, Syl., 162 W. Va. 925, 253 S.E.2d 528 (1979) the court ruled that a presumption of constructive fraud **may** arise in connection with joint bank accounts with survivorship, **if the parties of the joint account occupy a fiduciary or confidential relationship.** In *Kanawha Valley Bank v. Friend*, supra there was a fiduciary relationship **at the creation of the joint account.** Therein, the Defendant Friend used his power of attorney **to create** joint checking and savings accounts with survivorship.

Unlike *Kanawha Valley Bank v. Friend*, supra, Louise Pickens and Polly Pickens did not have a fiduciary relationship at the time Louise Pickens added Polly Pickens to the certificates of deposit (CD's). More important, from 1988 to July 6, 2000, Louise Pickens **of her own accord** placed Polly Pickens name on the certificates of deposit. A fiduciary relationship did not occur until the power of attorney was signed on July 7, 2000. Prior to that time, and even after, Louise Pickens and Polly Pickens shared a loving mother-daughter relationship. The uncontroverted evidence was that Polly Pickens did what was asked by her mother, Louise Pickens.

In *Vance v. Vance*, 192 W. Va. 121, 451 S.E.2d 422 (1994), the court affirmed the lower court granting summary judgment as a result of there being no material issue

of fact as to whether the defendant used any fiduciary power to divert funds to a joint account. Therein, the court noted that **the decedent** had created the joint account with rights of survivorship and transferred substantial assets into the account. Moreover, the court explained that the **“appellants introduced nothing indicating the money transfers were a result of any fiduciary power”**. *Vance*, at 425

In cases which followed *Kanawha Valley Bank v. Friend*, id., the Court pointed out that the mere existence of a power of attorney or of a fiduciary relationship is not the fact which is determinative of whether the agent or fiduciary has the burden of proving that the transfer of funds or property to a joint tenancy with the right of survivorship was intended as a bona fide gift. Rather, **the Court stressed that the real question is whether the fiduciary used his fiduciary powers to direct funds or other property into a joint tenancy with right of survivorship account.**

There was no evidence presented in the case at bar that the defendant Polly Pickens had fiduciary powers and used those powers to direct funds into the certificates of deposit with joint tenancy. Contrarily, the evidence presented was that **the decedent** Louise Pickens placed her own funds into a joint tenancy.

In *Koontz v. Long*, 181 W. Va. 800, 384 S.E.2d 837 (1989), the court upheld the jury’s finding of a fiduciary relationship between the deceased and her niece when the deceased added her niece’s name to a certificate of deposit with right of survivorship. The court’s ruling was based on the testimony of the bank employee who testified that the decedent did not intend to give her niece a gift.

b. UNCONTRADICTED TRIAL TESTIMONY OF THE BANK EMPLOYEES WHO TRANSACTED BUSINESS FOR THE DECEDENT LOUISE PICKENS

In the present case, the plaintiffs called their sole witness, Sharon Stapleton, a 27 year employee of Peoples Bank to testify regarding Louise Pickens transactions at

the bank. **Ms. Stapleton testified that Louise Pickens would always transact her own business through and including 2002.** App. Vol. 2:499(pgs.15–17). She also stated that she never recalled the Defendant Polly Pickens accompanying her mother at the bank. App. Vol. 2:500(p.19). Moreover, Sharon Stapleton testified that the first check she saw with Polly Pickens signature was in August, 2004 and it was signed as Power of Attorney. App. Vol. 2:501(p.22).

Ms. Stapleton testified that she remembered the decedent Louise Pickens. App. Vol. 2:501(p.22). When asked if she recognized the Defendant Polly Pickens in open court, Ms. Stapleton responded “No”. App. Vol. 2:501(p.23).

Additionally, the Defendant called Jack Wilson, President of Putnam County Bank, the bank where the certificates of deposits were issued. Mr. Wilson was a sixty (60) year employee at the Putnam County Bank. He was Bank President in the late 1980’s to the present and knew the decedent Louise Pickens. Mr. Wilson testified that the decedent Louise Pickens, would come to the Putnam County Bank to make deposits and purchase certificates of deposit after her husband died. (Tr. Vol. 4, p. 89).

Mr. Wilson gave unrebutted testimony that it was part of the bank’s policies and procedures to explain to a depositor that once a co-owner is placed on a certificate of deposit that there are equal rights, meaning one has as much power as the owner. App. Vol. 2:683(p.99). He also explained that his job duties included reviewing the paperwork every evening wherein Louise Pickens placed the name of Polly Pickens on numerous certificates of deposit. App. Vol.2:681(p.92). Moreover, he testified that his employees knew that only Louise Pickens had the right to place someone else’s name on those certificates of deposit.

Mr. Wilson testified regarding Defendant's Exhibit No. 6 (App. Vol. 2:341–343) which listed sixty-four certificates of deposit listed in the name of the Decedent Louise Pickens on Polly Pickens. Of the 64 certificates of deposit, only three (3) were placed in the names of Louise Pickens or Polly Pickens after July 7, 2000, the date Louise Pickens executed a general power of attorney for Polly Pickens. Some of the dates issued and the number of certificates of deposit, (CD) were as follows: 1988 – 14 CD's; 1989 – 18 CD's; 1990 – 21 CD's; 1991 – 1 CD; and 1992 – 1 CD. In other words, 54 of the 64 certificates of deposit were placed in the names of Louise Pickens or Polly Pickens from 1988 through 1992. According to Mr. Wilson, there was no evidence that the Defendant Polly Pickens ever came to his bank to have her name placed on the certificates of deposit.

Q Did Polly Pickens -- could she come into that bank and have her name placed on those certificates of deposit?

A No.
App. Vol. 2:683(pg.99).

In *Nugen v. Simmons*, supra, the court relied on the affidavits of the bank employees who had knowledge of the joint account's creation. The court emphasized that one cannot assert a fiduciary relationship based only on facts indicating a friendly or familial relationship. *Nugen v. Simmons*, 489 S.E.2d 7,12 (W. Va. 1997).

While the fact that the Defendant Pickens and her mother had a loving relationship is noteworthy, it is not determinative of a fiduciary relationship.

The lower court clearly erred when it directed a verdict as a matter of law that there was a confidential fiduciary relationship from June 8, 1988 to the date of death of Louise Pickens.

D. THE LOWER COURT COMMITTED PREJUDICIAL ERROR BY REFUSING DEFENDANT'S INSTRUCTIONS NUMBERED 13, 25 and 37.

The next question presented is whether the lower court committed prejudicial error when it refused to give jury instructions which were correct statements of the law and were not covered by other instructions. It is always the duty of the trial court to instruct the jury on all correct principles of law. Instructing a jury on a correct statement of law applicable to the case is essential to a fair trial, *Goodwin v Hale*, 198 W.Va. 554, 482 SE2d 171 (1996). A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence, *Foster v Sakhai*, 210 W. Va. 716, 559 SE2d 53 (2001).

1. INSTRUCTION NUMBER 13

Defendant's proposed instruction no. 13 as per *Ellison v. Lockard*, 127 W. Va. 611, 34 S. E. 2d 326 (1945); *Cyrus v. Tharp*, 147 W. Va. 110, 126 S. E. 2d 31 (1962) and *Harper v. Rogers*, 182 W. Va. 311, 387 S. E. 2d 547 (1989). (Subscribing Witness).

Instruction No. 13 states as follows:

The Court instructs the jury that the testimony of a subscribing witness is entitled to peculiar weight on the issue of the grantor's capacity, and the testimony of witnesses present at or about the time of the signing of the power of attorney has more weight than the mere opinion of parties, including a doctor, as to the deceased grantor's competency or conduct at other times. App. Vol 2:1289.

Cynthia Hess was employed by the Law Office of Rosalee Juba-Plumley for a period of seven (7) years. She was subsequently employed by Attorney David Moye for seven (7) years. (Tr. Vol. IV. p.16). App. Vol. 2:662 (pgs.14–15). During her

employment by Attorney Rosalee Juba-Plumley, her job duties included making appointments, assisting in preparing legal documents, and the like. App. Vol. 2:662 (pgs.16–17).

It is significant that Cynthia Hess testified that she had known the decedent Louise Pickens at least ten (10) years or more prior to her death because her ex-husband had lived close to Louise Pickens. App. Vol. 2:663(p.18). Cynthia Hess testified that the decedent had utilized Rosalee Juba-Plumley as her private attorney for years. Ms. Hess stated that many different individuals would bring the decedent to Attorney Plumley's office including the Plaintiff Murl Tribble and the decedent's sister, Gladys Quickle. App. Vol. 2:663(pgs.9–20).

Cynthia Hess gave unrebutted credible testimony that the Defendant Polly Pickens played no role in the decedent requesting a general power of attorney, a medical power of attorney, or any way interfering with the desires of the decedent Louise Pickens. The following testimony was of Cynthia Hess, the notary public who notarized the general power of attorney and the medical power of attorney dated July 7, 2000 revealed that Louise Pickens knew what she was going and red the documents before signing them. App. Vol. 2:667(pgs. 34-35).

At the time of this trial, Attorney Rosalee Juba-Plumley had been a practicing attorney for twenty-eight (28) years. Attorney Rosa Juba-Plumley was the subscribing witness for the deed in this case and she also prepared the general power of attorney and medical power of attorney. Attorney Rosalee Juba-Plumley was physically present when all three (3) documents were executed. Attorney Rosalee Juba-Plumley had known the decedent Louise Pickens for many years and had engaged her in

conversation as early as 1996. She had actually represented the decedent on multiple occasions including the orchestration of a guardian/conservatorship for the decedent's sister, Alvis Quickle, who had to be placed in a nursing home. App. Vol. 2:672.

Additionally, Attorney Rosalee Juba-Plumley had represented the decedent during a timber litigation case wherein the decedent had her deposition taken on April 17, 2002 and answered questions from three (3) attorneys. App. Vol. 2:672(p.57)–673(pgs.58–60).

Attorney Rosalee Juba-Plumley testified that the Defendant Polly Pickens never influenced or otherwise asserted any influence over the decision making of her mother, Louise Pickens. Juba-Plumley described their relationship as "...a great relationship.." App. Vol. 2:676(p.71).

Furthermore, Attorney Juba-Plumley testified that Louise Pickens was "sharp as a tack..." very, very kind, very friendly, but (Louise had a mind of her own." App. Vol. 2:676(p.72).

As stated in Syl. Pt. 4, *Ellison v. Lockard*, 127 W. Va. 611, 34 S.E. 326 (1945), the testimony of a subscribing witness to the execution of a writing is entitled to peculiar weight in considering the capacity of the party executing it.

The jury should have been instructed that the testimony of Cynthia Hess and Attorney Rosalee Juba-Plumley should have been entitled to peculiar weight and more weight than the opinions of parties regarding the decedent's conduct at other times. The lower court erroneously refused to instruct the jury on this correct statement of law. The defendant noted her objection to the Court's refusal. App. Vol. 2:1288-1289.

2. DEFENDANT'S INSTRUCTION NUMBER 25

Defendant's proposed instruction no. 25 as per *Nicholas v. Kershner*, 20 W. Va. 251 (1882) and *Ward v. Brown*, 53 W. Va. 227, 44 S.E.2d 488 (1903) (Testimony of treating physicians);

Instruction No. 25 states as follows:

The Court instructs the Jury that the evidence of physicians, especially those who attended Louise Pickens, and were with her considerably during the time it is charged she was of sound mind, is entitled to great weight. App. Vol. 2:1289.

Louise Ferris Pickens was regularly treated by her family physician, Dr. V. B. Lakhani. Dr. Lakhani testified that he treated Louise Ferris Pickens several times each year beginning in August, 1992 until her demise on January 6, 2005.

It is significant that in an office visit on June 29, 2000, Dr. Lakhani wrote, "**I have examined Mrs. Pickens today and found her of sound mind.**" This medical examination took place eight (8) days prior to the execution of the general power of attorney and medical power of attorney which are the subject of this litigation. App. Vol. 2:313.

Part of the defendant's continually renewed motion for summary judgment indicated Dr. Lakhani's deposition testimony wherein he stated that Polly Pickens brought her mother to her medical appointments: "...she's the only one that took care of her, as far as I know, because I never saw the rest of her family." App. Vol 1:365(p.39).

The Court refused to instruct the jury that his testimony was entitled to great weight which is a correct statement of the law and not covered by another instruction. The defendant again noted her objection to the Court's refusal. App. Vol. 2:1289.

3. DEFENDANT'S INSTRUCTION NUMBER 37

Defendant's proposed instruction number 37 states as follows:

The court instructs the jury that to establish prima facie proof of tortious interference with her fiduciary duties, the Defendant, Polly Pickens, must show by a preponderance of the evidence: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside the relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages.

The court correctly noticed that the instruction was to the prima facie case only and the defendant agreed to rewrite the instruction to contain the additional elements. App. Vol. 2:879. However, prior to rewriting the instruction, the Court ruled that tortious interference with a fiduciary duty only applies to third parties who have nothing to do with the estate and that the relationship between Polly Pickens as Executrix of the Estate and the Estate included the plaintiffs.

MS. STAPLES: The relationship is between the Executrix and the estate.

MR. CASEY: But she has a fiduciary duty to the beneficiaries of the estate.

MR. STAPLES: I understand that. But that they interfered with that, her duties, is the claim. We have plenty of evidence of that.

THE COURT: Are you talking about all this litigation that occurred up there in Putnam County that's occurring here in the Circuit Court of Mason County? Is that what the claim is for tortious interference with a fiduciary duty?

MR. STAPLES: Absolutely. Come up here to tell the Mason County Courthouse that there was no will, knowing that -- and also to tell them here in Mason County, sign affidavits that Ms. Tribble should be appointed, that there was no will, when they testified that Polly Pickens told him there was a will, and they knew there was a will. That's clearly intentionally interfering.

THE COURT: In my view, this tort, tortious interference with a fiduciary duty, applies to third-parties who have nothing to do with the estate, are not heirs, have no right, and they -- these third parties outside of that relationship, not heirs, not a fiduciary of the estate, act to interfere. I believe that strikes, because that's what the law is, and I'm going to grant -- I'm not going to -- I'm going to grant directed verdict on tortious interference with fiduciary duties. I'm not going to give Defendant's Instruction Number 37. Note the Defendant's objection. I'm simply relying on the fact that these people are within the class of people who have a relationship to the estate of Louise Pickens, and therefore not a member of that class of persons who could be found libel for tortious interference with fiduciary duties.

THE COURT: I'm saying that because they have an interest in the estate of Louise Pickens, that they're not third parties who have no interest in the estate of Louise Pickens, that they are not a member of the class of persons who may be libel for tortious interference of fiduciary duties.

MS. STAPLES: Judge, I don't think that's what the case law says.

THE COURT: If a funeral director came in, some third party who had no -- I don't even know if a funeral director would be a proper -- some person who had no relationship to the estate whatsoever interfered with fiduciary duties of Ms. Pickens as the Executor, I believe that is the type of claim that is contemplated by -- and if I'm wrong, the Supreme Court will tell me.

MR. STAPLES: Note our exception.
App. Vol. 2:879-880(p.34).

E. THE LOWER COURT COMMITTED PREJUDICIAL ERROR BY TENDERING INSTRUCTION NO. 18 TO THE JURY

Instruction No. 18 was an erroneous and misleading statement of the law and the evidence. It stated that plaintiffs had to prove by a preponderance of the evidence that Polly Pickens had a duty to include as part of the PROBATE ESTATE the joint

certificates of deposits, e-bonds and joint checking account; and, if she failed to include them in the PROBATE ESTATE that she had breached her duty. App. Vol. 1:112T.

NONE of the certificates of deposits referred to in Instruction No. 18 were part of the **PROBATE ESTATE**: they were all a part of the **NONPROBATE ESTATE**.

Additionally, the court refused to instruct the jury that an executor of an estate may amend their appraisal. App. Vol. 2:1290. The Defendant Polly Pickens uncontradicted testimony was that she had given her former lawyer the joint tenancy CD's and bonds and he prepared the initial appraisal. App. Vol. 2:818(pgs.95-97),819,820(p.102). Ms. Pickens also testified that once she hired new counsel, an amended appraisal was filed that listed the CD's and bonds on the nonprobate forms.

F. IT WAS PREJUDICIAL ERROR FOR THE LOWER COURT TO EXCLUDE THE DECEDENT'S ATTORNEY'S TESTIMONY REGARDING DECEDENT'S STATEMENT OF INTENT

During the direct examination of Rosalee Juba-Plumley, Esq., she was asked numerous questions about Louise Pickens legal affairs. Louise Pickens had advised her counsel regarding what she wanted to do with her property and why. She testified that the defendant had attempted to discourage her mother from deeding her the property. Attorney Rosalee Juba-Plumley testified that Louise Pickens wanted to make sure that Polly had that property and **was concerned that the other two daughters would cause a problem for Polly**. App. Vol. 2:674(p.65)–675(p.66).

The court ruled Attorney Juba-Plumley's statement regarding Louise Pickens statement of intent was inadmissible.

Said ruling is prejudicial error for the following reasons:

1. It is a statement of the deceased's, Louise Pickens, then existing state of mind, i.e. intent Rule 803 (3), WVRE.
2. The statement was offered as evidence of a material fact: Louise Pickens intent. Rule 803, WVRE.
3. The statement is more probative on the point for which it is offered than any other evidence. Rule 803, WVRE.
4. The general purpose of the rules and interest of justice will best be served by admission of the statement into evidence. Rule 803, WVRE.

The question presented is whether the trial court committed prejudicial error when it struck the trial testimony of Attorney Rosalee Juba-Plumley wherein she stated the testamentary intent and mental feeling of the Decedent, Louise Pickens; and, when, she testified that Louise wanted to give her daughter a gift and that "she was concerned that the other two daughters" (the Plaintiffs) "would cause a problem for Polly." WVRE 803 (3) states, in pertinent part, as follows:

"[a] statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

The Trial Court improperly instructed the jury to disregard the testamentary intent of the testator, Louise Pickens, when Louise was advising her Attorney Rosalee Juba-Plumley of her desires. In *Rosier v. Rosier*, 227 W. Va. 88, 705 S.E.2d 595 (2010) this Court has already stated that the testimony of the attorney who prepares a power of attorney and deed is admissible to explain the intentions of the

decedent. The testimony is admissible hearsay evidence under WVRE 803(3) and should be considered as proper evidence.

The purpose of the testimony of the attorney was to explain Stearl Rosier's intentions when requesting the lawyer to prepare the deeds. Mr. Miller recalled that Stearl Rosier was concerned that his property would not be distributed to his children if the joint tenancy deeds were not altered. We find that this was permissible evidence. *Id* at 611.

Clearly, the lower court committed reversible error when it excluded the testamentary intent of Louise Pickens by instructing the jury to disregard Attorney Juba-Plumley's testimony.

G. IT WAS PREJUDICIAL ERROR FOR THE LOWER COURT TO ALLOW PLAINTIFFS' COUNSEL TO ARGUE IN CLOSING ARGUMENT UNPROVEN, SPECIFIC MONETARY AMOUNTS

During closing argument, the lower court permitted counsel for the Plaintiff Sargent, to argue and publish to the jury over the objections of defendant's counsel that the jury could award damages for timber litigation settlement monies that the Decedent Louise Pickens had received in 2002. There was not a scintilla of evidence presented that the Defendant Polly Pickens ever possessed or handled the timber settlement monies. Any settlement monies for the timber litigation would have been received by the Decedent Louise Pickens approximately three (3) years before her death.

Moreover, Rosalee Juba-Plumley, Counsel for the Decedent Louise Pickens testified that the Defendant Polly Pickens had nothing to do with the timber settlement. App. Vol. 2:673(p.59). Avis Quickle, a Plaintiff in the timber litigation with her sister, Louise Pickens, testified that Louise Pickens took care of the timber case. App. Vol. 2:1175. There was not a scintilla of evidence presented regarding a specific amount of monies the decedent Louise Pickens received.

Also, the lower court erroneously permitted counsel for the Plaintiff Sargent to argue in closing and publish to the jury over the objections of defendant's counsel that the jury could award damages for monies received by the Decedent, Louise Pickens, from the estate of her sister, Gladys Sayre. The Estate of Gladys Sayre was settled in the year 2002, approximately three (3) years prior to Louise Pickens' death in 2005. Avis Quickle, a beneficiary in the Gladys Sayre estate with her sister, Louise Pickens, testified that Polly Pickens had nothing to do with the Gladys Sayre estate settlement monies. App. Vol. 1:1181–1182.

The argument of plaintiff's counsel was inadmissible, substantially prejudicial, and tainted the jury as to any monies Polly Pickens allegedly received. The *Defendant's Motion for a Mistrial* as a result of this highly prejudicial argument was denied. App. Vol. 1:1094, App. Vol. 2:1292-1298.

H. **THE LOWER COURT COMMITTED PREJUDICIAL ERROR BY SUBMITTING PLAINTIFFS' TIME BARRED CLAIMS TO THE JURY SINCE THEY HAD NO FACTUAL BASIS**

The plaintiffs' time barred claims of tortious interference with an expectancy, fraud, constructive fraud, conversion, and breach of fiduciary duty as executrix should have never been submitted to the jury since they had no factual basis. A theory without any supporting facts does not meet Rule 56 (e)'s explicit mandate for specific facts. *Craddock v. Watson*, 475 S.E.2d 62 (W. Va. 1996). Pursuant to their second amended complaint, the plaintiffs' claims were based on a scheme by the Defendant to use undue influence beginning in 1988 until their mother's death in 2004. Clearly, since undue influence was no longer an issue App. Vol. 2:882(p.44), the plaintiffs remaining claims cannot stand.

1. **THE PLAINTIFFS' CLAIM OF TORTIOUS INTERFERENCE WITH AN EXPECTANCY HAS NO BASIS**

In order to establish a prima facie case of tortious interference with an expectancy, the plaintiffs had to prove; one, the existence of an expectancy; two, the intentional act of interference by Polly Pickens; three, proof that the intentional interference caused harm; and, proof of damages. The Plaintiffs failed to offer **ANY** evidence that they were expected to receive more than they did from the Estate. The Plaintiffs failed to offer **ANY** evidence of an intentional act of interference by Polly Pickens and that said act caused harm.

The Plaintiff Murl Tribble testified that she had no witness or evidence that Polly Pickens used her Power of Attorney to get her name on any certificates of deposit. App. Vol. 2:581(p.59). She also testified that she had no witnesses to testify that Polly Pickens had her name placed on their mother's certificates of deposit. App. Vol. 2:1581 (pgs.60-64). Furthermore, Plaintiff Murl Tribble testified she had no knowledge of what transpired when her mother reissued her Bonds. App. Vol. 2:579(p.125)–598(p.126).

The only evidence presented by the plaintiffs was their bald assertion that Polly Pickens exerted **undue influence** over Louise Pickens and thereby interfered with their expectations. **The Court ruled as a matter of law the Plaintiffs failed to prove undue influence.** Hence, since the plaintiffs' tortious interference claim was premised upon their undue influence claims, then their tortious interference claim must fail.

In *Printz v. Printz, Jr.* (No. 13-0495, April 25, 2014), the Court held in a *Memorandum Decision* that because "(T)he circuit court concluded that inasmuch as she could not prove undue influence as a matter of law, then her tortious interference claim must also fail." *Printz*, at 5.

2. THE PLAINTIFFS' CLAIM OF FRAUD HAS NO BASIS

The plaintiffs had the burden of proving fraud by clear and distinct proof. Syl. Pt. 1, *Work v. Rogerson*, 152 W. Va. 169, 160 S.E.2d 159 (1968). It is never presumed. Plaintiffs had the burden of proving (1) that the act claimed to be fraudulent was the act of Polly Pickens or induced by Polly Pickens; (2) that it was material and false; (3) that the plaintiffs relied upon it and (4) that the plaintiffs were damaged because they relied upon it. Further, each element must be proven with clear and convincing evidence. *Univ. of W. Va. Bd. Of Trustees v. VanVoochies*, 84 F. Supp. 2d 759 (N.D. W. Va. 2009)

The Plaintiffs failed to meet their burden. Again, the **only evidence** presented by the Plaintiffs was their bald assertion that Polly Pickens exerted undue influence over Louise Pickens and thereby committed fraud. The plaintiffs also alleged that the defendant fraudulently failed to include a certain checking account in the non-probate inventory; however, the Defendant did file an amended appraisal listing the checking account that was in her name, Polly Pickens, and her mother's name, Louise Pickens. The amended appraisal was filed on **June 19, 2008**. The Plaintiffs Second Amended Complaint was filed on February 9, 2009.

The fact that the Defendant Polly Pickens initial lawyer failed to initially include nonprobate assets is harmless and, at best, negligent since the nonprobate assets he failed to list were monies in Polly Pickens and her mother's name only. None of the nonprobate assets were in the names of the plaintiffs. None of the nonprobate assets were the property of the plaintiffs as a matter of law.

As previously stated, since their undue influence claim was void as a matter of law, pursuant to *Printz*, supra, then their claim of fraud is also void.

3. THE PLAINTIFFS' CLAIM OF CONSTRUCTIVE FRAUD HAS NO BASIS

As a result of the lower court's ruling that as a matter of law a fiduciary relationship existed between Louise Pickens and Polly Pickens, the plaintiffs erroneously received a presumption of constructive fraud.

Noteworthy is that in order to invoke constructive fraud, under *Kanawha Valley Bank v. Friend*, 162 W. Va. 925, 253 S.E.2d 528 (1979), the plaintiffs must not only show a fiduciary relationship existed, but also that the fiduciary used the relationship to direct property into the joint tenancy. *Nugen v. Simmons*, 200 W. Va. 253, 489 S.E.2d 7 (1997). There was not a scintilla of evidence presented by the plaintiffs that would indicate that at the time Louise Pickens added Polly Pickens to the certificates of deposit that Polly Pickens and Louise Pickens had a fiduciary relationship **and**, as a result of that fiduciary relationship, Polly Pickens had her mother, Louise Pickens, add her name to the certificates of deposit. In *Vance v. Vance*, 192 W. Va. 121, 451 S.E.2d 422 (1994), the court refused to imply constructive fraud because there was **no evidence that the fiduciary caused the transfers to joint tenancy.**

The uncontradicted evidence was that the certificates of deposit cashed at the decedent's direction in 2004 by the defendant were clearly used to pay for Louise Pickens babysitters App. Vol. 2:374, 368-371. Hence, the defendant bore her burden of establishing the honesty of the transaction. *Kanawha Valley Bank v. Friend*, 162 W. Va. 925, 253 S.E.2d 528, 531 (1979)

Additionally, the *Vance* court rejected invoking constructive fraud because of the affidavits of independent witnesses who stated that the decedent understood what he was doing. Herein, there was substantial undisputed testimony from independent

witnesses (bank employees, the funeral director, the pastor, attorney, subscribing witness, and treating doctor) that the decedent Louise Pickens handled her own business and knew exactly what she was doing up to planning her own funeral only months before her death.

4. THE PLAINTIFFS' CLAIM OF CONVERSION HAS NO BASIS

In order to maintain an action for conversion, the plaintiffs must show the wrongful exercise or assumption of authority by Polly Pickens over Louise Pickens assets, depriving her of her possession. *Rodgers v. Rodgers*, 184 W. Va. 82, 399 S.E.2d 664 (1990).

“If one has the right to take possession of personal property without legal process, it is difficult to imagine upon what theory he could be deprived of that right, if he attempted to exercise it, by legal process which subsequently turned out to be void. In either case plaintiff’s position would be precisely the same.” *Mendelson v. Irving*, 155 App. Div. 114, 139 N. Y. S. 1065. “An action for taking and detaining personal property can only be maintained where plaintiff was the owner or entitled to the possession of the property at the time of the taking.” *Wilson v. Live Stock Co.*, 153 U.S. 39, 38 L. Ed. 627. *Kisner v. Commercial Credit Co.*, 174 S.E. 330 (W. Va. 1934), Syl. Pt. 3, *Thompson Development, Inc. v. Kroger Co.*, 413 S.E.2d 137 (W. Va. 1991).

The plaintiffs failed to offer **ANY** evidence that Polly Pickens wrongfully exercised authority over their mother’s assets and deprived Louise Pickens of her assets. Nor did the plaintiffs offer **ANY** evidence that they were entitled to their mother’s certificates of deposits, bonds or checking account. See *Haines v. Cochren Bros.*, 26 W.Va. 719, 723 (1885) (Court held that to maintain conversion action plaintiff must show right to immediate possession of the property.) Louse Pickens signed her own checks and transacted her own business. App. Vol. 2:497(p.7), 499(p.17).

Sharon Stapleton, Peoples Bank branch manager testified that the first check she saw with Polly Pickens name on it was in August, 2004 and Polly Pickens had signed it as Power of Attorney. The uncontroverted evidence was that Polly Pickens obtained those monies in August, 2004 at her mothers' request to pay for babysitters for the decedent Louise Pickens. App. Vol. 2:814(p.79-81), 815,816. Moreover, the checks to the babysitters were clearly written from those monies. App. Vol. 2:368-371.

5. THE PLAINTIFFS' CLAIM OF BREACH OF FIDUCIARY DUTY

The plaintiffs failed to present **ANY** evidence that the defendant breached her fiduciary duty as Executrix of the Estate. Polly Pickens testified that she submitted all of the jointly titled certificates of deposit to her prior Estate counsel. She further testified that once she learned Attorney Payton failed to include them on the non-probate form, she dismissed him as her counsel. It is undisputed that an amended appraisal was filed listing the certificates of deposit and a joint checking account in Louise Pickens and Polly Pickens name. Moreover, the certificates of deposits were not part of assets that were due the plaintiffs.

I. THE LOWER COURT COMMITTED PREJUDICIAL ERROR WHEN IT GRANTED A DIRECTED VERDICT ON DEFENDANT'S CLAIM OF TORTIOUS INTERFERENCE WITH FIDUCIARY DUTIES

As a result of the lower court misinterpreting the law on tortious interference with a fiduciary duty, it granted a Directed Verdict in plaintiffs' favor on defendant's claim. App. Vol. 2:879(p.32-33).

Tortious Interference was first recognized in West Virginia in *Torbett v. Wheeling Dollar Savings & Trust Co.*, 173 W. Va. 210, 314 S.E.2d 166 (1984). The Court outlined the necessary proof to establish prima facie case: (1) existence of a contractual or

business relationship of expectancy; (2) an intentional act of interference by a party outside that relationship of expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. Syl. Pt. 2, *Torbett*, supra.

The court erroneously ruled that the plaintiffs were not outside the relationship between the Defendant, Polly Pickens as Executrix and the Estate of Louise Pickens.

The lower court's ruling is confounded by the court's allowance of the plaintiffs' claim of tortious interference with an expectancy against the defendant. If the plaintiffs were not outside the relationship between the Defendant Polly Pickens and the Estate, then Polly Pickens could not be outside the relationship between the plaintiffs and the Estate; and, therefore plaintiffs' claim of tortious interference with an expectancy against the defendant should not have been submitted to the jury .

In other words, the lower court's logic is inconsistent and contrary to West Virginia jurisprudence. As to defendant's claim against the plaintiffs for tortious interference with fiduciary duties, the defendant was able to present evidence of a prima facie case: existence of a relationship; the intentional act of interference (filing false papers in the Mason County Clerk's office; causing harm (litigation in Putnam County); and, damages.

J. IT WAS PREJUDICIAL ERROR FOR THE LOWER COURT TO INSTRUCT THE JURY THAT ANY MONEY RECOVERED WOULD BE PLACED IN THE ESTATE OF LOUISE PICKENS WHEN THE ESTATE OF LOUISE PICKENS AND THE DEFENDANT, POLLY PICKENS AS EXECUTRIX OF THE ESTATE OF LOUISE PICKENS WAS NEVER A PARTY TO THIS LITIGATION

The lower court responded to a jury question and informed the jury that if the plaintiffs were to receive a judgment that the monies would go into the estate; however,

the Estate of Louise Pickens was never a party to this litigation. Moreover, Polly Pickens was never sued as Polly Pickens, Executrix of the Estate of Louise Pickens.

K. THE LOWER COURT PROCEEDINGS WERE PLAINLY WRONG AND CONTRARY TO THE EVIDENCE

To trigger application of the plain error doctrine, there must be (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Syl. pt. 7, State v. Miller, 459 S.E.2d 114 (W. Va. 1995), Volker vs. Frederick Business Properties, 465 S.E.2d 246 (W. Va. 1995).

Herein, the lower court proceedings were plain error and contrary to the clear weight of the evidence and the law. The proceedings and subsequent verdict affected the substantial rights of the defendant and seriously affected the fairness, integrity and public reputation of the judicial proceedings.

CONCLUSION

Wherefore, the Petitioner respectfully submits that the Order denying the Defendant Below a new trial should be reversed and the claims should be dismissed as a matter of law. Clearly, the record shows that there were substantial errors made by the lower court. Said errors caused substantial prejudice. The lower court's failure to apply well established law was reversible error. The lower court usurped the role of the jury and made findings of fact that were genuine issues for trial. Additionally, the lower court improperly excluded relevant and material evidence. Moreover, the lower court erroneously and, to the prejudice of the Petitioner, failed to properly instruct the jury.

No. 14-1060

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

POLLY SUE PICKENS, Defendant Below,
Petitioner,
vs.

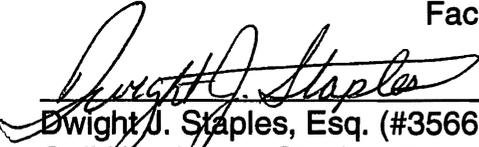
MURL LOUISE TRIBBLE and
JANET PEARL SARGENT, Plaintiffs Below,
Respondents.

Honorable David W. Nibert
Circuit Court of Mason County
Civil Action No.: 06-C-178

CERTIFICATE OF SERVICE

I, Dwight J. Staples, Counsel for Counsel for the Defendant Below, Petitioner, Polly Sue Pickens, hereby certify that a true and correct copy of the foregoing "**PETITIONER'S BRIEF**" was served by hand delivery on this 6th day of April, 2015, on the following:

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