

No. 14-1060

JUN 10 2015

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 REPLY BRIEF



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A. THE RESPONDENTS' STATEMENT OF THE CASE SET FORTH ALLEGATIONS NOT CONSISTENT WITH THE EVIDENCE IN THIS CASE

The respondents' statement of the case sets forth numerous facts that are not consistent with the evidence presented in this case and not consistent with the procedural history. For example, the respondents initiate their skewed statement of facts by implying that Polly Pickens recording "a deed in 2005 after the death of their mother... purporting to convey real estate from the mother to Ms. Pickens" was improper. Yet, the attorney, Rosa Juba-Plumley, who prepared the deed gave unrefuted testimony as to why the deed was not recorded at the time it was prepared:

Q Now, the deed was not immediately recorded.
Were you aware of that?

A I had suggested some things.

Q What did you suggest?

A Again, Polly Pickens really wanted that property to be available to her mom if she needed to sell it, if she needed money, whatever she needed. So I suggested to Polly if she didn't want to record it, she didn't have to, that recording of the deed only goes to the benefit of the person receiving it. There's nothing that you are required to record. Apparently, Polly chose not to record it.

Q That was your idea?

A **It absolutely was my idea.**

(App. Vol. 2, 675)

Another example of respondents' skewed representations is the respondents' statement that "For whatever reason, Ms. Pickens did not have the entire trial transcribed, including opening statements, some of the witness testimony..." A review

of the procedural history herein reflects that the briefing schedule in this case was amended in order for this Honorable Court to attempt to repair the court reporter's damaged hard drive. (App. 1, 493). The court reporter lost part of the trial transcript, not Polly Pickens.

Noteworthy is the fact that the respondents repeatedly assert and imply that the respondents' undue influence claim was a factor determined by the jury when, in fact, the lower court granted judgment in favor of the Petitioner on any and all claims regarding undue influence. Although the respondents insert their arguments with references to undue influence, their brief is void of any cross assignment of error on that issue.

Throughout their Statement of Facts and arguments, the respondents reiterate testimony from Bobby A. Miller, M.D. regarding undue influence. Presumably, the respondents assert this argument to embellish their arguments, particularly their fiduciary relationship argument; however, the trial court correctly ruled that the respondents failed to meet their burden of presenting evidence of a sufficient nature for any undue influence claims and awarded judgment in favor of the petitioner on any and all claims alleging undue influence.

Moreover, respondents' reiteration of the petitioner's testimony regarding the Putnam Bank Account is distorted as to time and place. The petitioner testified that her mother, Louise Pickens, took care of her own financial affairs. The bank president and bank employees also gave undisputed testimony that Louise Pickens transacted her own business through at least 2002. (App. Vol. 1, 15-18,22; App. Vol. 2, 680-681).

Avis Quickle, Louise Pickens' sister, testified that her sister handled her own business affairs from 1988 to 2002. (App. Vol. 1, 1171 – 1172).

As to the Putnam County bank account, the evidence clearly reflected that the account was set up with her mother's own funds to pay for her mother's sitters when the decedent became ill. (App. 2, 505 - 507). This fact was never disputed and as can be seen by the jury verdict, the jury agreed. (App. 1, 1099).

The respondents in the present case attempt to scramble facts to confuse this Court regarding any alleged acts of Polly Pickens. The truth of the matter is that all evidence adduced during the trial demonstrated that Polly Pickens did not have a joint savings account, did not have a joint checking account, did not handle any of her mother's financial affairs from 1988 through 2002, the time period that her mother placed Polly Pickens' name on the certificates of deposit (CD's) at Putnam County Bank where Jack Wilson was the president. Jack Wilson testified that he had been an employee of Putnam County Bank since 1952 and had known the decedent, Louise Pickens. As such, Mr. Wilson was familiar with the policies and procedures of Putnam County Bank. During the direct examination of Jack Wilson, he stated that he personally reviewed the certificates of deposit transactions of the decedent, Louise Pickens, from 1988 through 2002. A list of those certificates of deposit were admitted into evidence as Defendant's Exhibit No. 6. (App. 2, 34 – 343). There were some sixty four (64) certificates of deposit at Putnam County Bank where the decedent, Louise Pickens, had placed Louise Pickens or Polly Pickens names on the certificates of deposit. The following testimony was given by Jack Wilson.

BY MR. STAPLES:

Q In looking at those certificates that are listed on that list and knowing the bank's policies and procedures, do you have any reason to question that it was Louise Pickens who had those names -- that had Polly Pickens' name put on those --

MR. CASEY: Objection. Calls for speculation.

THE COURT: Overruled.

BY MR. STAPLES:

Q You can answer.

A I did not see anything that didn't look anything but okay.

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

A **No.**

Q Was there ever a report to you by any of the -- I don't know if I asked you this; if I did, forgive me. Was there ever a report to you by anyone that she had attempted to do that?

A No.

Q Is it a part of the bank policies and procedures to explain the significance of placing a co-owner on a certificate of deposit?

A They are made mindful that there are equal rights, either one of them; give us the certificate and you've got the money.

Q When you say equal rights, what do you mean?

A That means one has as much power as the other.

Q **If your name appears on it, you have as much power as the other person; is that correct?**

A **Yes.**

BY MR. STAPLES:

Q She would have been an owner of those certificates on the date that those certificates were issued; is that correct?

A Yes.

Q She had as much ownership right as Louise Pickens had; is that correct?

A Yes.

(App. 2, 683)

Therefore, there was never any conversion, fraud, tortious interference or constructive fraud because Polly Pickens never appeared at Putnam County Bank. The decedent, Louise Pickens, placed Polly Pickens' name on these certificates of deposit.

It was not until **after** Louise Pickens' death that the petitioner had her mother's name removed from the checking account pursuant to petitioner's prior attorney's advice. [App. 2, 507 (p. 47)]

Respondents erroneously imply foul play when they assert that a \$35,000.00 deposit into the petitioner's separate checking account happened on the same day she visited her safety deposit box wherein her mother's CD's were stored. (respondents' brief, p. 4). Again, the respondents' allegations are not consistent with the evidence. The bank produced the petitioner's loan papers evidencing **her personal loan** of \$35,000.00 being deposited the same day she visited her safety deposit box. (App. Vol. 2, 346-347 and 811).

Noteworthy is the fact that the respondents failed to address the unrefuted testimony of Avis Quickle, the decedent's sister. Ms. Quickle testified that the respondents tried to manage their mother's property contrary to her wishes. (App. Vol. 1, 1161 – 1162).

B. THE RESPONDENTS KNEW ABOUT THE CERTIFICATES OF DEPOSIT MORE THAN TWO (2) YEARS BEFORE THEY FILED THEIR CLAIMS

A claim is barred if it is not timely filed. West Virginia jurisprudence is clear: a party has to file a claim within a certain period of time when they know or should have known of a possible claim. Gaither v. City Hosp., Inc. 199 W. Va. 706, 4876 S.E.2d 901 (1997).

By their own admissions, the respondents were aware of Polly Pickens' name being on their mother's CD's.

“Where a party knows his rights or is cognizant of his interest in a particular subject-matter, but takes no steps to enforce the same until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. This disadvantage may come from death of parties, loss of evidence, change of title or condition of the subject matter, intervention of equities, or other causes. When a court of equity sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.’ Carter v. Price, 85 W. Va. 744, 102 S.E. 685 (1920) Syllabus Point 3. “Syllabus Point 2, Mundy v. Arcuri, 165 W. Va. 128, 267 S.E.2d. 454 (1980).

Syl. pt. 2, Calacino v. McCutcheon, et al., 177 W. Va. 684, 356 S.E.2d 23 (1987).

Respondents' argument that Petitioner's Motion For Summary Judgment was based on unspecified CD's is simply not true. The motion sets forth **ALL** of the CD's and the E bonds subject to the lawsuit. (App. 1, 317, 454, 456 – 477).

Since the evidence was uncontradicted as to when the respondents knew or should have known of their claims, the trial court should have granted Plaintiff's Motion for Summary Judgment.

C. THE TRIAL COURT'S FINDING OF A FIDUCIARY RELATIONSHIP BETWEEN THE PETITIONER AND HER MOTHER FROM 1988 UNTIL HER MOTHER'S DEATH IS INCONSISTENT WITH WEST VIRGINIA JURISPRUDENCE

The initial flaw in respondents' argument that the trial court committed no error in finding a fiduciary relationship is that whether a fiduciary relationship existed is an issue of fact to be determined by a jury, not the trial court. Nugen v. Simmons, 200 W. Va. 253, 483, S.E.2d 7, 14 (1997).

The second flaw is the trial court's reliance on one (1) act in 1988 to justify a finding of a fiduciary relationship from 1988 until at least a power of attorney was signed on July 7, 2000. The lower court found that simply because the petitioner assisted her mother, Louise Pickens, in preparing the estate papers of her husband and petitioner's own father (Charles Pickens) that act constituted a fiduciary relationship. The record is clear from all of the uncontradicted testimony from bank employees, lay people, legal personnel and the petitioner; Louise Pickens handled her own business affairs from 1988 until at least 2002. Even the bank documents reflect that the decedent, Louise Pickens wrote and signed her own checks during this time period. This testimony is replete and not refuted.

D. THE PETITIONER DID NOT ASSERT THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON W. VA. CODE §31A-4-33

Respondents erroneously argue that “The Trial Court Committed No Error By Refusing To Instruct the Jury under W. Va. Code §31A-4-33.” since the petitioner’s brief never asserts this argument. See Petitioners Brief, p. 18.

E. THE TRIAL COURT’S REFUSAL TO GIVE CERTAIN INSTRUCTIONS WAS ERROR

Contrary to respondents’ argument, the trial court specifically requested the petitioner to place her objections on the court’s refusal to read instruction numbers on the record after his rulings. (App. 2, 882).

The failure to give the subscribing witness instruction (No. 13) was error as it was a correct instruction of the law and not covered by other instructions. A trial court’s refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial. *Doe v. Wal-mart Stores, Inc.* 210 W. Va. 664, 558 S.E.2d 663 (2001).

Again, the respondents erroneously imply that the undue influence claim was pertinent to the subscribing witness’ testimony and the jury’s consideration (resp. brief, p. 20) when, in fact, the trial court granted judgment in favor of the petitioner on all undue influence claims.

Moreover, it is unfortunate that the respondents would represent that Ms. Hess testified she prepared the power of attorney and medical power of attorney, not Attorney

Juba-Plumley (resp. brief p. 21). Clearly, Ms. Hess worked for Attorney Juba-Plumley and Attorney Juba-Plumley would instruct her as to what to do. (App. Vol 2; 667, 675).

Contrary to respondents' argument, Attorney Juba-Plumley was the subscribing witness for the deed.

Q Whose signature is that?

A That is Ms. Louise Pickens' signature.

Q She signed that in your presence?

A She did.

Q This signature is notarized; is that right?

A Yes, sir, it is.

Q It's notarized by you, isn't it?

A Yes, it is.

Q Is that at the time when you didn't have a secretary?

A Yes.

Q And you were an official notary for the state of West Virginia?

A I have been an official notary through the state of West Virginia for many, many years, as are most attorneys who do the deeds and property work.

Q I am also. Is there any question in your mind, ma'am, that at the time this document was executed – was it executed in your office?

A It was.

(App. Vol. 2, 675)

Ultimately, the testimony of the subscribing witnesses to the decedent's legal documents is evidence for a jury to contemplate with regards to when a fiduciary relationship was established.

F. THE TREATING PHYSICIAN INSTRUCTION SHOULD HAVE BEEN SUBMITTED TO THE JURY

The respondents' argument is flawed in that they argue "How it was reversible error to refuse to give an instruction regarding... an expert.. who did not testify makes no sense." (respondent's argument, p. 25). First, Dr. Lakhani was not a retained expert: Dr. Lakhani was Louise Pickens treating physician for many years. Second, and most important, is the fact that Dr. Lakhani **DID TESTIFY AT TRIAL** and; therefore, the jury did, in fact, consider his testimony. (Dr. Lakhani's testimony was not transcribed due to the court reporter's computer malfunction. App. Vol. 493).

G. THE TESTIMONY OF DECEDENT'S ATTORNEY REGARDING THE DECEDENT'S INTENT WAS ADMISSIBLE AND SHOULD NOT HAVE BEEN STRICKEN

Attorney Rosa Juba-Plumley was Louise Pickens attorney. She gave explicit testimony regarding her legal representation of Ms. Pickens over numerous years. Her testimony regarding Mrs. Pickens intent on why she handled her legal affairs in a certain manner is relevant to the decedent's intent. (App. Vol. 2, 671 – 678). The lower court specifically instructed counsel that the trial court would automatically note counsel's objections to his adverse rulings. (App. Vol. 2, 795).

Moreover, Attorney Rosa Juba-Plumley's testimony was consistent with the undisputed testimony of Louise Pickens' sister, Avis Quickle. The decedent's sister, Avis Quickle, gave unrefuted testimony regarding the respondents desire to manage their mother's property **contrary** to their mother's wishes.

Q Did she tell you who called those surveyors?
A No. Well, she told me the two girls.
Q Okay. What two girls was –
A Pearl and Murl
Q So she told you that Janet Pearl Sargent and Murl Tribble had called surveyors onto her property?
A Yeah. She told me that.
Q And she also told you that she did not want those surveyors on that property?
A Yes, she did.
Q Okay.
A Because it was her property.
Q Did she indicate to you why they had called surveyors on her property while she was still living?
A No. She didn't know. She didn't know why they called her [sic] in there. Because she was trying to get – get her property straightened up.

...

Q Did she ever tell you, ma'am, what Pearl had said to her about the farm and her desire for that farm?
A **She told me that Pearl wanted the farm.**
Q **Okay.**
A **And she said, "I told her that she wasn't going to get it."**
Q **Okay. Pearl wanted the farm for herself, right?**
A **That's what she told me.**
Q **And she said she wasn't going to get that farm; is that right?**
A **Right.**

(App. Vol. 1, 1161 – 1162).

Moreover, Avis Quickle also testified that from 1988 through 2004 decedent Louise Pickens understood how to give a gift.

Q And back in those days, in, say, from 1988 up through 2003 or '4, did she understand - - if she wanted to give someone a gift, did she understand how to do that?

A She sure did.

Q Okay. And if she would give a gift, would it be a gift that she would give because she liked that person, or she loved them, or she just wanted to?

A **She gave them from the bottom - - she gave gifts from the bottom of her heart.**

Q **And she loved Polly; is that right?**

A **Right. She loved Polly.**

(App. Vol. 1, 1169 – 1170)

H. **THE PETITIONER HAD A VIABLE CLAIM FOR TORTIOUS INTERFERENCE WITH FIDUCIARY DUTIES**

Without question, the respondents obtained letters of appointment as Administratrix of their mother's estate with full knowledge that Polly Pickens was named as the Executrix in their mother's will. They further complicated matters by refusing Diane Cromley, the county clerk's request to return the letters. (App. 2, 693 – 695). Ms. Cromley had to seek assistance from the prosecutor's office. The evidence revealed that the respondent Tribble kept three of the letters of appointment.

... it is clear that liability is to be imposed only if the defendant intends to interfere with the plaintiff's contractual relations in the sense that he acts with knowledge that interference will result...

W. Page Keeton, Prosser & Keeton On The Law of Torts §129, at 982 (5th ed. 1984).

I. **THE TRIAL COURT'S REFUSAL TO STRIKE HIGHLY PREJUDICIAL AND UNPROVEN ALLEGATIONS IN CLOSING ARGUMENT WAS "INCONSISTENT WITH SUBSTANTIAL JUSTICE"**

The trial court's refusal to strike highly prejudicial and unproven statements by counsel on closing argument was "...inconsistent with substantial justice". W.Va. R. Civ. P. 61. The jury was permitted to hear and consider the respondents' allegations that the petitioner took unsubstantiated and unproven specific monetary amounts of \$22,000 and \$36,000. Even though the jury verdict did not include those amounts, the arguments allowed the jury to be tainted and impermissibly persuaded as to petitioner's conduct regarding monies.

J. **THERE WAS NO EVIDENCE OF TORTIOUS INTERFERENCE WITH AN EXPECTANCY**

The respondents argue that there was (1) an expectancy, (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. In evaluating the elements and applying them to the facts of this case, Jack Wilson, Putnam County Bank President, presented unrebutted testimony that Polly Pickens never came to his bank to have her name placed on the certificates of deposit. (App. 2, 683). The other bank personnel who testified was Sharon Stapleton, a twenty-seven (27) year employee of

Peoples Bank. Sharon Stapleton testified Polly Pickens was **never** at her bank telling her mom how to manage her affairs.

- Q So Polly was never up there with her, that you -
A I just don't recall.
Q She wasn't there with her every time telling her, "Mom, you do this; Mom, you do that"?
A Not that I'm aware of.

. . .

- Q So Polly Pickens listed those CDs, and that money from the document went into the estate; right?
A The checks were payable to the estate.
Q You were asked a question about the checking account, right, some questions about the checking account? Louise Pickens had a checking account; is that correct?
A Yes.
Q And that checking account was in Louise Pickens' name only after her husband passed away; is that correct?
A To my knowledge, yes.
Q Did Polly Pickens' name ever appear on that account?
A To my knowledge, it did not.

. . .

- Q So Louise Pickens signed her own checks, it looks like, for the most part, all the way up, right -- those start in -- what year did they start?
A '98.
Q That's pretty much Louise Pickens signing all of those checks?
A Yes.
Q What about the next year?
A Yes.

Q What year was that?
A '99.
Q Let's look at 2000.
A It does appear to be, as well.
Q Signed by Louise?
A Yes.
Q She's conducting her own business, isn't she, at your bank, signing her own checks in the year 2000.
A Yes.
Q What about 2001?
A Yes, sir.
Q Louise Pickens?
A Louise.
Q Still conducting her own business, right?
A Uh-huh.
Q Is that correct? You have to say yes, so the court reporter can take it down.
A Yes.

(App. 1, 499 – 500).

Actually, Sharon Stapleton's testimony regarding Louise Pickens' conduct at People's Bank was the same as the testimony of Jack Wilson at Putnam County Bank. Since those were the two banks where the decedent had certificates of deposit, the unrefuted trial testimony was that Polly Pickens never interfered with any alleged expectancy. Moreover, the certificates of deposit at People's Bank were properly listed on the appraisal prepared by Polly Pickens' prior attorney.

Clearly, the suggestion that Polly Pickens "converted to joint ownership" certain CD's or checking accounts is completely inconsistent with the trial testimony, the documents themselves, and misleading to this Court.

Even Avis Quickle, the decedent's sister, testified that Louise Pickens would have known if the petitioner was defrauding her. (App. Vol. 1, 1184).

Quite simply, there was no evidence of tortious interference with an expectancy.

K. THE RESPONDENTS' CLAIM OF FRAUD HAS NO BASIS

The respondents take the position that every time an appraisal for an Estate is filed, it is fraud to not list all "non probate assets". This reasoning has no merit since the appraisal in the present case was amended and listed CD's in Louise Pickens or Polly Pickens name.

There was testimony that the E bonds were reissued because they were lost and they were reissued in the social security number of the decedent, not Polly Pickens. (App. 2, 511).

These so called acts of fraud simply do not have merit and do not meet the elements required by West Virginia jurisprudence.

L. THE RESPONDENTS' CLAIM OF CONSTRUCTIVE FRAUD IS IMPERMISSIBLE SINCE THE TRIAL COURT USURPED THE ROLE OF THE JURY

Since the trial court in this matter erroneously ruled as a matter of law that there was a confidential and fiduciary relationship between Polly Pickens and Louise Pickens in 1988, any argument that Polly Pickens was guilty of constructive fraud must fail. The respondents can not disregard the testimony of the bank employees and other witnesses that the decedent conducted her own business affairs during this time period.

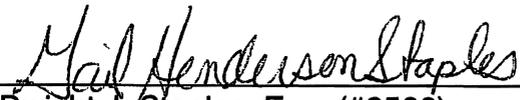
CONCLUSION

The trial court made numerous errors that substantially affected justice in this case. A pivotal error was the trial court's finding of a fiduciary relationship beginning in

1988 without any evidence that the petitioner used her alleged fiduciary powers to direct funds or other property into a joint tenancy with right of survivorship.

Additionally, the trial court's rejection of the respondents' own admissions regarding when they knew or should have known of their claims was a substantial error that affected justice in this case.

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. Finally, the lower court erroneously and, to the prejudice of the Petitioner, failed to properly instruct the jury. Simply put, a plethora of errors were committed by the trial court in this case.


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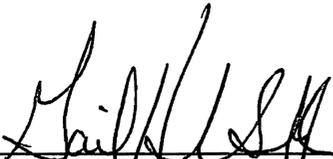
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JANET PEARL SARGENT, Plaintiffs Below,
Respondents.

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

CERTIFICATE OF SERVICE

I, Gail Henderson-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 REPLY BRIEF**" was served by United States Mail, postage prepaid, on this 10th day of June, 2015, on the following:

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