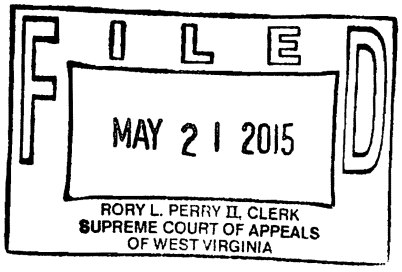
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-1060

POLLY SUE PICKENS,
Defendant-Below, Petitioner

v.

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

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

BRIEF OF THE RESPONDENTS

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I. STATEMENT OF THE CASE

In 2006, the Respondents, Murl Louise Tribble ["Ms. Tribble"] and Janet Pearl Sargent ["Ms. Sargent"], sued their sister, Petitioner, Polly Sue Pickens ["Ms. Pickens"] [collectively, "Respondents"], after Ms. Pickens had recorded a deed in 2005 **after the death of their mother**, Louise Pickens ["Mother"], purporting to convey real estate from the Mother to Ms. Pickens. [App. 33] After discovering other financial improprieties by Ms. Pickens both before and after the Mother appointed Ms. Pickens as her power of attorney in 2000, Ms. Tribble and Ms. Sargent amended their complaint asserting claims of breach of fiduciary duty, conversion, and fraud. [App. 53-58] Finally, after additional discovery, Ms. Tribble and Ms. Sargent filed a second amended complaint asserting claims of lack of capacity, undue influence, breach of contract, tortious interference, and failing to disclose non-probate assets. [App. 66-76]

On January 24, 2013, the case proceeded to trial. [App. 495] At the conclusion of the trial, the jury returned a verdict for Ms. Tribble and Ms. Sargent finding as follows:

- Ms. Pickens breached her fiduciary duties as Executrix of her Mother's Estate
- Ms. Pickens tortiously interfered with the expectancies of Ms. Tribble and Ms. Sargent
- Ms. Pickens converted her Mother's property while serving as a fiduciary
- Ms. Pickens committed constructive fraud
- Ms. Pickens committed active fraud

[App. 1097-1098] Based upon those findings, the jury awarded Ms. Tribble and Ms. Sargent compensatory damages of $94,124.00. [App. 1099][1]

With respect to the verdict being challenged on appeal, there was ample evidence to support it and the legal issues asserted have no merit, were not preserved, or were waived.

Sharon Stapleton, the branch manager of the bank at the Mother's bank, testified at trial[2] about the CDs at issue. [App. 496] She also testified withdrawals made by Ms. Pickens during the life of the Mother using a power of attorney. [App. 497][3]

Another at trial was Dr. Bobby A. Miller, M.D. [App. 504] Dr. Miller is an expert in general psychiatry, neuropsychiatry, and forensic psychiatry. [App. 965] Dr. Miller testified as follows:

> Louise Pickens, by virtue of her chronic and episodic brain disorders was an individual susceptible to undue influence of a designing person resulting in impairment in her ability to both decide freely about the distribution of her property. . . . Louise Pickens was hospitalized and diagnosed with dementia on December 27, 2004, making it more likely than not that at the time in question, the years 2000 to 2002, she was also suffering from a neurodegenerative disease affecting her neuropsychological capacities to act in a knowing and voluntary fashion.

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[1] Significantly, the jury did not award all of the damages sought, but made deductions based upon the evidence presented. [Id.] Moreover, the jury awarded no punitive damages. [Id]

[2] For whatever reasons, Ms. Pickens did not have the entire trial transcribed, including opening statements, some of the witness testimony, and much of the closing arguments. [App. 495-915]

[3] Ms. Stapleton also testified about the Mother's checking account, on which Ms. Pickens' name likewise did not appear, but that Ms. Pickens wrote a $8,853.60 check on that account using a power of attorney. [App. 497, 499] Ms. Pickens' defense regarding this check, however, was that the money had been withdrawn to provide assistance to her Mother after her mother suffered a heart attack, and the jury made a deduction from its award for such assistance. [App. 1099]

[App. 966] Indeed, sadly, the Mother died shortly after being hospitalized in the psychiatric unit at Thomas Memorial Hospital. [App. 970][4]

Ms. Pickens was called by Respondents as an adverse witness at trial. [App. 505] Ms. Pickens admitted that, for many years, she had handled her Mother's financial affairs and that her Mother placed a lot of confidence in her to handle those affairs. [Id.] She admitted that the disputed funds were considered by her Mother to be her Mother's funds. [App. 506] She also conceded that she had set up an account, in her Mother's name, and that she had transferred funds from her Mother's account at another bank into this new account at a different bank. [App. 506-507] Ms. Pickens explained her actions by testifying, "I done that per my mother's instructions." [App. 507] This made no sense, however, when the Mother had done all of her banking at the same location for decades. Moreover, Ms. Pickens admitted that she had not listed the new account at this new bank as a non-probate asset. [Id.] Finally, Ms. Pickens admitted that she eventually had her Mother's name removed from this account and, instead, placed her own name on the account. [App. 508] Rejecting Ms. Pickens' testimony that all of

[4] In response to Dr. Miller's testimony, Ms. Pickens offered the testimony of Ralph Silas Smith, Jr., M.D., a forensic psychiatrist. [App. 513] Dr. Smith testified that the Mother understood the nature and consequences of her actions during the questioned transactions and he generally disagreed with Dr. Miller's opinions. [App. 514] Dr. Smith admitted, however, that the Mother "had some episodes of confusion" [App. 515]; that she had been in a "delirious state" during treatment at the Cleveland Clinic [App. 519]; that at some point, the Mother did suffer from "brain problems" [App. 520]; that deposition testimony given by the Mother upon which he had relied had multiple inaccuracies, particularly with respect to the Mother's short-term memory [App. 521]; and that the Mother's medical records reflected that she had suffered from "dizzy spells," "depression," "nightmares," and hardening of her arteries affecting the flood of blood to her brain for years [App. 522]. Obviously, the jury resolved the conflict in the testimony between Dr. Miller and Dr. Smith in favor of Dr. Miller as a jury is permitted to do.

this was done with the Mother's approval,[5] the jury awarded the $13,877.90 transferred [App. 507] as part of its damages to Ms. Tribble and Ms. Sargent. [App. 1099]

With respect to the Mother's CDs, Ms. Pickens testified that they were stored in Ms. Pickens' safety deposit box. [App. 509] She admitted that on September 1, 2006, she accessed her safety deposit box, in which her Mother's CDs were stored, and that same day deposited $35,000 into Ms. Pickens' separate checking account. [Id.] Ms. Pickens further conceded that when she prepared an appraisement of her Mother's Estate, after her Mother's death, she did not list the contents of the safety deposit box, the CDs, or a joint checking account she shared with her Mother on the list of non-probate assets, blaming her former attorney for the omissions. [App. 512] Finally, Ms. Pickens admitted signing her Mother's name to various financial documents, although she claimed to have done so with her Mother's permission. [Id.]

Ms. Pickens admitted that shortly after her Mother's death, she spent tens of thousands of dollars on improvements to Ms. Pickens' home. [App. 541] She testified that the money to pay for those improvements came "from my little metal box" that she allegedly kept "in my basement" [Id.], but the jury was free to reject that testimony.

Based upon the testimony regarding the Mother's CDs, the jury took the evidence of the total value of the CDs, which was $98,476.00, subtracted 2 CDs which Ms. Pickens contended she cashed prior to her Mother's death in order to compensate people who assisted in caring for her Mother, which were in the amounts of $14,036.00 and $9,260.00, for a total award for Ms. Pickens' conversion of the CDs of $75,180.00. [App. 1099]

[5] Ironically, Ms. Pickens took this money, which she conceded was originally her Mother's and transferred into an account on which she eventually removed her Mother's name, and used it to pay her attorneys in this case. [App. 508]

Ms. Tribble testified at trial. [App. 567] She is a retired letter carrier and lived next to her Mother. [Id.] She moved near her Mother in 1994 after her Mother's health began to decline. [App. 567-568] She testified generally about her Mother's declining illness and how Ms. Pickens used a medical power of attorney to overrule the family's wishes after her Mother was hospitalized that their Mother be allowed to return to her own home, but to instead reside upon discharge with Ms. Pickens. [App. 574] It was at that point that the relationship between Respondents and Ms. Pickens began to deteriorate. [Id.] Eventually, Ms. Tribble testified that Ms. Pickens prevented Ms. Tribble and Ms. Tribble's son from visiting their Mother after she was hospitalized in a psychiatric unit. [App. 575] Finally, she testified about how her Mother died on the day following her release from the psychiatric unit and being fearful of Ms. Pickens when Ms. Tribble attended her Mother's funeral. [Id.]

Ms. Tribble also testified about a number of Series E savings bonds owned by her mother. [App. 596] She testified that, prior to her Mother's death, Ms. Pickens had the savings bonds re-issued changing the owner from the Mother solely to the Mother and Ms. Pickens jointly, and substituting the Mother's Social Security number on the old savings bonds for Ms. Pickens' Social Security number. [Id.] Specifically, Ms. Tribble testified that Ms. Pickens prepared a letter to the Bureau of Public Debt as if written by their Mother; signed their Mother's name; and had the savings bond re-issued so that upon their Mother's benefit, they would pass outside their Mother's Estate to Ms. Pickens. [App. 597]

Again, the jury credited Ms. Tribble's testimony over Ms. Pickens' testimony regarding these disputed savings bonds, awarding $5,050.00 to the Respondents based upon the jury's determination that Ms. Pickens had wrongfully converted them. [App. 1099]

II. SUMMARY OF ARGUMENT

The jury in this case heard conflicting evidence regarding whether Ms. Pickens breached her fiduciary duties as Executrix of her Mother's Estate; whether Ms. Pickens tortiously interfered in Respondents' expectancies regarding the assets that would be included in their Mother's Estate; whether Ms. Pickens tortiously converted their Mother's property; whether Ms Pickens committed constructive fraud in the manner in which she handled their Mother's financial affairs; and whether Ms. Pickens committed actual fraud with respect to the various financial transactions involving their Mother's CDs, savings bonds, and checking account, and a jury resolved that conflicting evidence in favor of Respondents. With respect to damages, the jury did not award everything sought by Respondents, deducting the value of CDs cashed prior to the Mother's death the proceeds of which Ms. Pickens contended she used to care for her mother, and also declining the award of punitive damages.

As to Ms. Pickens' assignments of error: (1) the Respondents' suit was filed in 2006, the year after their Mother's death, well within the applicable statutes of limitation; (2) there was no dispute that Ms. Pickens served in a fiduciary capacity vis-à-vis her Mother; (3) all of the jury instructions were proper and supported by the evidence; (4) non-responsive testimony of the Mother's former attorney was properly excluded; (5) there was evidence for the damages awarded by the jury; (6) the damages awarded were not Respondents' funds, but were their Mother's funds, and the proceeds will be properly paid into the Mother's Estate; and (7) there was ample evidence at trial to support both the jury's verdict.

Accordingly, the Respondents respectfully submit that the judgment should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the dispositive issues in this case have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and the record on appeal, Respondents submit that the decisional process will not be significantly aided by oral argument, and request disposition of Ms. Pickens' appeal by memorandum decision.

IV. ARGUMENT

A. STANDARDS OF REVIEW

Ms. Pickens has taken a shotgun approach to her appeal, complaining that she should have been granted judgment as a matter of law because of alleged statute of limitations issues; that the trial court should not have directed a verdict on her fiduciary relationship; that the trial court erred by giving certain jury instructions; that non-responsive testimony by her Mother's former attorney should not have been excluded; that Respondents' counsel should not have been able to reference specific amounts in closing argument even though there was evidence at trial supporting those amounts; that the jury should not have been advised that any damages would be an asset of the Mother's Estate even though they would be; and that the trial court proceedings were "plainly wrong and contrary to the evidence and the law." [Petitioner's Brief at 1-2]

With respect to whether the trial court erred in refusing to grant Ms. Pickens' judgment as a matter of law on any issue, this Court applies a *de novo* standard of review. Syl. pt., Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

With respect to whether the trial court erred in directing a verdict, this Court also applies a *de novo* standard of review. Syl. pt. 3, Brannon v. Riffle, 197 W. Va. 97, 475 S.E.2d 97 (1996).

With respect to whether the trial court erred with respect to the jury instructions:

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syl. pt. 4, State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).[6]

With respect whether the trial court erred regarding its evidentiary rulings, "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. pt. 10, State v. Huffman, 141 W. Va. 55, 57, 87 S.E.2d 541, 544 (1955), overruled on other grounds by State ex rel. R.L. v. Bedell, 192 W. Va. 435, 452 S.E.2d 893 (1994).

Finally, with respect to argument by counsel to the jury, "the discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." Syl. pt. 6, Matheny v. Fairmont General Hosp., Inc., 212 W. Va. 740, 575 S.E.2d 350 (2002) (quotation marks and citations omitted).

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[6] See also Syl. pt. 1, ("The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.") (quotation marks and citation omitted); Syl. pt. 6, Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 459 S.E.2d 374 (1995) ("The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.").

B. THE TRIAL COURT COMMITTED NO ERROR REGARDING ANY STATUTE OF LIMITATIONS

Ms. Pickens' first assignment of error is that the trial court erred by allowing Respondents' claims to be presented to the jury because those claims were allegedly barred by the statute of limitations. [Petitioner's Brief at 1] She bases this assignment of error on deposition testimony by Respondents that they were aware that some CDs had been placed in both the Mother's name and Ms. Pickens' name well before the Mother's death. [Id. at 13] For a number of reasons, her statute of limitations assignment of error has no merit, particularly where as the trial court correctly concluded - she waived it.

First, the jury awarded damages for converted Series E savings bonds and a checking account, and none of the testimony relied upon by Ms. Pickens [Petitioner's Brief at 12-15] related to those funds. Thus, the only issue is whether the trial court erred by failing to grant her summary judgment on Respondents' claims regarding conversion of the CDs.

Second, Ms. Pickens is wrong when she asserts in her brief that Respondents' claims were subject to a one-year statute of limitations. [Petitioner's Brief at 12] Rather, all of Respondents' claims were subject to a two-year statute of limitations[7] and, moreover, all of their claims were subject to the discovery rule. Syl. pt. 2, Dunn v. Rockwell, 225 W. Va. 43, 689

[7] See Cart v. Marcum, 188 W.Va. 241, 243, 423 S.E.2d 644, 646 (1992), overruled on other grounds, Syl. pt. 1, Dunn v. Rockwell, 225 W. Va. 43, 689 S.E.2d 255 (2009) ("The statute of limitation for this type of tort [conversion] is two years."); Brown v. Community Moving & Storage, Inc., 193 W. Va. 176, 178 n.3, 455 S.E.2d 545, 547 n.3 (1995) ("The two-year statute of limitations period set forth in W. Va. Code, 55-2-12 (1959), is applicable to the fraud claim[.]"); Vorholt v. One Valley Bank, 201 W. Va. 480, 486, 498 S.E.2d 241, 247 (1997) (applying the "catch-all" periods of limitation in W. Va. Code § 55-2-12 to action for breach of fiduciary duty); Syl. pt. 6, in part, Garrison v. Herbert J. Thomas Mem. Hosp., 190 W. Va. 214, 438 S.E.2d 6 (1993) ("[T[he two-year statute of limitations governing actions for damage to property, set forth under W. Va. Code, 55-2-12 [1959], applies to an action for tortious interference . . . .").

S.E.2d 255 (2009) ("The 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition to its application.").

Third, not only did Ms. Pickens' summary judgment motion have nothing to do with Respondents' Series E bond and checking account claims, the evidence upon which she relied concerned only "some" unspecified CDs of which only Ms. Tribble and not Ms. Sargent: "A. . . . So, I went back down there in '94. . . . Q. And that's when you found out that **some of these CDs** were in . . . your mom's name . . . any Polly Pickens' name . . . ? A. Yes." [App. 327] Whether any of these CDs were the same as those that were the subject of the trial is uncertain from Ms. Pickens' summary motion, but what is certain is that Ms. Pickens was not aware of all of the CDs. With respect to Ms. Sargent, the only evidence relied upon in Ms. Pickens' motion for summary judgment was that, at some unspecified time, Ms. Sargent "knew my mother had CDs;" that Ms. Sargent saw "Polly's name on these . . . interest checks" with no connection in her testimony to any CDs; that on one occasion, when Ms. Pickens opened some mail "I'm guessing it was a CD" and Ms. Pickens said, "my names on this, ah, ha, ha;" and that Ms. Sargent "probably" did not visit her mother from 2003 to 2005, which Ms. Sargent denied. [App. 327-328, 840-841] Thus, Ms. Pickens' argument that Ms. Sargent "knew Polly Pickens had her name on these certificates of deposit in the year 2001" in her summary judgment motion [App. 329] was ridiculous and properly rejected by the trial court. As noted in Ms. Sargent's response to Ms. Pickens' summary judgment motion:

> The record reflects that there is evidence supporting the reasonable inference that she did not know our should have known that she had a claim relating to the CDs directed into joint tenancy by the defendant until . . . April of 2007, the month that her attorney, Frank Gritt, received the first set of subpoenaed information from PCB [Putnam County Bank].

> The plaintiff was aware that her parents had certificates of deposit. However, she was unaware of the specifics relating to their value, amounts, number of CD's existing, and bank of issuance. She was not aware of whether there were any in existence at the time of her mother's death. She was unaware of her parent's finances other than an occasional mention of a CD.
>
> After her mother passed away in January 2005, the defendant filed the first Probate. It did not disclosure the PCB CDs, or the PCB joint checking account.
>
> In the spring of 2006, the Plaintiff found some PCB CD interest check stubs in the joint names of the defendant, and her mother. She took them to Frank Gritt, Esq., who issued subpoenas to PCB. . . .
>
> As explained above, the jury could reasonably infer from the evidence that the defendant intentionally failed to disclose the PCB CD's in her non-probate inventory because she wanted to hide their very existence from the plaintiff and the other sister.

[App. 690-691]

Finally, although Ms. Pickens eventually filed an amended inventory of non-probate assets, dated June 19, 2008, listing the CDs, this was after Respondents filed their suit in 2006. [App. 72-73] Accordingly, Respondents' claims presented to the jury presented genuine issues of material fact which Ms. Pickens could have argued to the jury were barred by a statute of limitations,[8] but as the trial court correctly ruled, she waived the issue by failing to present any instruction to the jury on the statute of limitations:

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

[8] See, e.g., Syl. pt. 3, Stemple v. Dobson, 184 W.Va. 317, 400 S.E.2d 561 (1990) ("Where a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time **is a question of fact to be answered by the jury**.") (emphasis supplied).

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

[App. 21-22]

Inexplicably, not only does Ms. Pickens' brief fail to mention this, but states that her motion for summary judgment on the statute of limitations issue "was denied," citing page 1016 of the appendix. [Petitioner's Brief at 7] In the trial court's letter ruling, however, it clearly states: "[T]he Court finds that there exists genuine issues of material fact which makes this case improper for the granting [of] summary judgment." [App. 1016]

At that point, it was incumbent upon Ms. Pickens to offer statute of limitations instructions not only so the issue could be presented to the jury, but so Respondents could offer their own instructions, for example, regarding the discovery rule. When Ms. Pickens failed to offer any statute of limitations instructions, the trial court correctly ruled that, "Defendant waived the issue of statute of limitations." [App. 22]

In Syllabus Point 4 of Gaither v. City Hospital, Inc., 199 W. Va. 706, 487 S.E.2d 901 (1997), for example, this Court held that "the question of when plaintiff knows or in the exercise of reasonable diligence has reason to know of medical malpractice is for the jury." This Court also observed that, "[i]n the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury." Id. at 715, 487 S.E.2d at 910. Later, in Syllabus Point 5 of Dunn, supra, this Court held:

> 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 limitations 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.**

(emphasis supplied).

Here, the evidence relied upon by Ms. Pickens in her summary judgment motion, previously discussed, was clearly insufficient as a matter of law to warrant removing the considerable dispute over when Respondents either knew or should have known of the claims which were ultimately submitted to the jury and, as this Court has previously held, Ms. Pickens waived the statute of limitations issue when she failed to offer any statute of limitations instruction to the jury.[9]

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[9] See, e.g., State v. Bingman, 221 W. Va. 289, 654 S.E.2d 611 (2007) (defendant waived statute of limitations defense by failing to tender statute of limitations instruction); State v. Boyd, 209 W. Va. 90, 543 S.E.2d 647 (2000) (defendant waived statute of limitations defense by failing to tender statute of limitations instruction); see also United States v. Alberico, 559 F.3d 24 (1st Cir. 2009) (defendant waived statute of limitations defense by failing to tender statute of limitations instruction); United States v. Munoz-Franco, 487 F.3d 25, 54 (1st Cir. 2007) ("Appellants also argue that the district court erred in failing to instruct the jury on the statute of limitations on the ground that the jury could have relied on conduct outside the limitations period in finding defendants guilty. At trial, however, Gutiérrez's attorney explicitly declined to seek a statute of limitations instruction, and the other appellants made no request for such an instruction."); United States v. Matzkin, 14 F.3d 1014, 1017-18 (4th Cir. 1994) (statute of limitations is not a jurisdictional defense and can be waived; counsel's failure to seek statute of limitations instruction was not plain error even though it was "not an intentional relinquishment of a known right; but was a failure to make the timely assertion of that right").

C. THE TRIAL COURT COMMITTED NO ERROR REGARDING MS. PICKENS' FIDUCIARY RELATIONSHIP WITH HER MOTHER AS SHE CONCEDED IN HER DISCOVERY RESPONSES AND TRIAL TESTIMONY THAT SUCH FIDUCIARY RELATIONSHIP EXISTED

Ms. Pickens' complaints regarding the existence of a fiduciary relationship with her Mother are confusing.

First, the general power of attorney from the Mother to Ms. Pickens, which was Respondents' first trial exhibit, was dated July 7, 2000. [App. 1207-1208] So, as a matter of law, Ms. Pickens had a fiduciary relationship thereafter regarding her use of that power of attorney.[10] The trial court relied upon Ms. Pickens' status as her Mother's power of attorney to determine her status as a fiduciary [App. 611] and was correct in doing so.

Second, Ms. Pickens' misconduct came to the attention of Respondents when Ms. Pickens' was acting as Executrix of her Mother's Estate which, again, gives rise to a fiduciary relationship as a matter of law.[11] Again, the trial court relied upon Ms. Pickens' status as

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[10] Vance v. Vance, 192 W. Va. 121, 123, 451 S.E.2d 422, 424 (1994) ("[A] power of attorney creates an agency relationship, and this establishes a fiduciary relationship between the principal, or the party who granted the power, and the agent, or the party who receives the power."); Kanawha Valley Bank v. Friend, 162 W. Va. 925, 928, 253 S.E.2d 528, 530 (1979) ("A power of attorney creates an agency and this establishes the fiduciary relationship which exists between a principal and agent.")

[11] Dantzic v. Dantzic, 222 W. Va. 535, 545, 668 S.E.2d 164, 174 (2008) ("It is clear that the completion of the appraisal form, including the attestation to a fair market value of the nonprobate life estate interest, is a mandatory function that must be performed by the executor in his or her fiduciary capacity."); Syl. pt. 4, in part, In Re: Estate of Lapinsky v. Sparacino, 148 W. Va. 38, 132 S.E.2d 765 (1963) ("An executor or administrator of the estate of a deceased person is under a duty to take custody of the estate and to administer it in such a manner as to preserve and protect it for ultimate distribution. In the discharge of such duty, he is held to the highest degree of good faith; and is required to exercise that degree of care and diligence which prudent persons ordinarily exercise, under like circumstances, in their own personal affairs."); see also Latimer v. Mechling, 171 W. Va. 729, 732, 301 S.E.2d 819, 822 (1983) ("The personal representative of the estate of a deceased acts in a fiduciary capacity. His duty is to manage the estate under his control to the advantage of those interested in it and to act on their behalf.").

Executrix of her Mother's Estate to determine her status as a fiduciary [App. 611] and was correct in doing so.

Third, the evidence was undisputed that after their father died in 1988, Ms. Pickens essentially served in the same role administering his Estate as she did after their Mother died in 2005. [App. 611] The evidence is further undisputed that after she began administering their Mother's Estate, the Respondents learned of similar improprieties and self-dealing with respect to administration of the father's Estate. Again, as a matter of law, the executor or administrator of an estate gives rise to fiduciary obligations and the trial court was correct that based upon Ms. Pickens' administration of her father's Estate and the reliance of their Mother on that administration, Ms. Pickens' had a fiduciary relationship vis-à-vis the Mother.

Finally, Ms. Pickens admitted in her discovery responses, which was Respondents' seventh trial exhibit, that she had a fiduciary relationship with her Mother. [App. 1229-1231] Moreover, as the trial court noted in its order denying Ms. Pickens' motion for a new trial, "Ms. Pickens admitted at trial to sharing a special and/or confidential relationship with her mother." [App. 22] Accordingly, it is a bit difficult to understand how Ms. Pickens can now fault the trial court for determining that she had a fiduciary relationship when she conceded as much in her discovery responses and testimony at trial.

Ms. Pickens' argument that the trial court's findings regarding her fiduciary relationship with her Mother was "based on a familial relationship" [Petitioner's Brief at 17] is simply incorrect. Rather, as noted it was based on (1) her administration of her father's Estate; (2) her Mother's admitted reliance on her for the management of her Mother's financial affairs after her

father's death; (3) the power of attorney granted by the Mother; and (4) her administration of her Mother's Estate.

The only case relied upon by Ms. Pickens, Nugen v. Simmons, 200 W. Va. 253, 489 S.E.2d 7 (1997), has no application to this case.[12]

In Nugen, the administrator of an estate sued the decedent's nephew to recover monies held in a joint account between the decedent and the nephew. As the Court noted, W. Va. Code § 31A-4-33(b) provides, "When a deposit is made by any person in the name of such depositor and another or others and in form to be paid to any one of such depositors, or the survivor or survivors of them, such deposit, and any additions thereto, made by any of such persons, upon the making thereof, shall become the property of such persons as joint tenants. All such deposits, together with all interest thereon, shall be held for the exclusive use of the persons so named, and

[12] In her brief, Ms. Pickens inconsistently argues that the trial court's award of judgment on the issue of fiduciary relationship as a matter of law "was especially harmful since it made its ruling prior to the defendant having the opportunity to present any evidence on this issue," but later proceeds to extensively set forth her evidence of the absence of a fiduciary relationship. [Petitioner's Brief at 18-23] Accordingly, Ms. Pickens was not prohibited from presenting evidence on the issue:

> I have heard time and time again evidence that Polly Pickens did this mother, Polly Pickens took her mother to the bank, Polly Pickens aided her mother in financial matters. "Mom wanted me to do this. I did whatever mom told me to do." And I just haven't heard any testimony from anybody to the contrary.
>
> I don't even think that the Plaintiffs themselves contested that Polly Pickens did these things for her mother. . . .
>
> Polly Pickens was on the witness stand. She was called as an adverse witness by the Plaintiffs. And if her testimony was wrong, you had an opportunity to cross-examine her, let's say, during the Plaintiff's case in chief, to raise that point with the Court.

[App. 783]

may be paid to any one of them during the lifetime of them, or to the survivor or survivors after the death of any of them."

Accordingly, in Syllabus Point 2 of Dorsey v. Short, 157 W. Va. 866, 205 S.E.2d 687 (1974), this Court had held, "Code, 1931, 31A-4-33 as amended, creates, in the absence of fraud, mistake or other equally serious fault, a conclusive presumption that the donor depositor of a joint and survivorship bank account intended a causa mortis gift of the proceeds remaining in the account after his death to the surviving joint tenant."

Thus, in order to sustain the administrator's claim against the nephew, it was required there be evidence, as there is abundantly in the instant case, of something like administration of an estate, use of a power of attorney, the transfer of funds both pre- and post-death from the decedent's account to the relative's separate account, the forging of the decedent's name to documents such as requests for the reissuance of savings bonds, etc., in order to establish a fiduciary relationship, but the only evidence this Court noted in Nugen was as follows:

> In support of this assertion, he states that Simmons had invited Henry Nugen to live with him three years previously; that Simmons and Henry Nugen had been meeting for coffee six days a week for six or seven years before Mr. Nugen's death, and that Simmons said in his deposition that he was looking out for the decedent's interests as well as his health. None of these facts gives rise to the kind of fiduciary relationship contemplated by the Court in Kanawha Valley Bank v. Friend. There, the Court discussed several fiduciary relationships, including that created by a power of attorney, a partnership, a declaration of trust which provided for equal sharing in profits from the sale of certain lands, and the attorney-client relationship. 162 W. Va. at 928-30, 253 S.E.2d at 530-31. The Appellant offers no support for finding a fiduciary relationship based only on facts indicating a friendly or familial relationship.

Nugen, supra at 200 W. Va. at 257-258, 489 S.E.2d at 11-12 (footnote omitted).

Not only does Nugen fail to support Ms. Pickens' fiduciary status arguments, it directly undermines it as the evidence was undisputed that there was much more than just a "friendly or familiar relationship" between Ms. Pickens and her Mother. She handled nearly every aspect of her Mother's financial affairs after her father's death in 1988 and continued her self-dealing even after her Mother's death in 2005. More importantly, she did so not in the role of "family member," but as Power of Attorney and Executrix.

Plainly, the trial court's rulings regarding Ms. Pickens' fiduciary duties are well-supported by the law and the evidence of record.[13]

D. THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO ITS INSTRUCTIONS

None of the five instructional errors asserted by Ms. Pickens has any merit.

1. The Trial Court Committed No Error by Refusing to Instruct the Jury under W. Va. Code § 31A-4-33

First, Ms. Pickens complains that the trial court's ruling on her fiduciary relationship prevented her from asserting "the conclusive presumption that the proceeds in the joint account were a gift from her mother," citing W. Va. Code § 31A-4-33. [Petitioner's Brief at 18] Ms.

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[13] Although, based primarily upon Ms. Pickens' own testimony, as well as her status as estate administrator and power of attorney, the trial court directed a verdict on the issue of fiduciary status, it instructed the jury as follows:

> [T]he Plaintiffs still must prove . . . that Polly Pickens used her confidential or fiduciary relationship with Louise Pickens to cause transfers to be made into their joint names. If you conclude that the Plaintiffs satisfied this burden and that constructive fraud is properly invoked, the burden shifts to Polly Pickens to prove by a preponderance of the evidence that Louise Pickens intended to make a *causa mortis* gift of the jointly held assets by titling the assets jointly, and that Louise Pickens did not title the assets jointly merely for her own convenience.

[App. 1122] Thus, jury could have agreed with Ms. Pickens "that Louise Pickens made certain gifts in the form of monies identified by the certificates of deposit, checking accounts, and E-bonds to Polly Pickens," as the trial court instructed the jury [App. 1123], but after hearing all of the evidence, it did not.

Pickens' description, however, of this statute as establishing a "conclusive presumption" is incorrect as this Court held in Syllabus Point 2 of Dorsey supra, that "fraud, mistake or other equally serious fault," as the jury found in this case, will overcome the presumption. Ms. Pickens' brief contains no reference to anywhere in the record where she offered an instruction under W. Va. Code § 31A-4-33 and it is obviously not error for a trial court to fail to give an instruction not tendered.[14]

2. The Trial Court Committed No Error by Refusing to Give a "Subscribing Witness" Instruction

Second, Ms. Pickens complains that the trial court refused to give her proposed Instruction No. 13. [Petitioner's Brief at 24] Again, Ms. Pickens' brief contains no reference in the record to this instruction, but only a reference to Ms. Pickens' counsel stating for the record an objection to the trial court's previous decision regarding some instruction tendered. [Id.] Moreover, the authority relied upon has no application to this case.

In Syllabus Point 4 of Ellison v. Lockard, 127 W. Va. 611, 34 S.E.2d 326 (1945), where a dispute over a deed was involved, this Court held, "The testimony of a subscribing witness to the

[14] See R. Civ. P. 51 ("Either before or at the close of the evidence, any party may file written requests that the court instruct the jury on the law as set forth in the requests . . . ."); Syl. pt. 4, State v. Bartlett, 177 W. Va. 663, 355 S.E.2d 913 (1987) ("A court, though asked, is not bound to instruct a jury generally as to the law of the case. Instructions as to specific law points ought to be asked. A court may, without request, if it think the interest of justice and a fair trial call for it, instruct the jury in matter of law, the instruction being bound in law and relevant to the evidence; but it is not bound to do so unless asked; but, if asked to give such proper specific instructions, it must do so.") (quotation marks and citations omitted); State v. Schofield, 175 W. Va. 99, 331 S.E.2d 829 (1985) ("if a party fails to offer an instruction regarding a particular point of law upon which she relies, she cannot later complain of the absence of that instruction unless the error was so plain and the result so outrageous that the trial court ought to have intervened to do substantial justice.") (citations omitted).

execution of a writing is entitled to peculiar weight in considering the capacity of the party executing it."

Here, Cynthia Hess, a Wal-Mart employee, was called by Ms. Pickens to testify about her work for an attorney in 2000 when the Mother executed a power of attorney in favor of Ms. Pickens. [App. 662] Although Ms. Pickens represents in her brief that Ms. Hess "had known the decedent . . . at least ten (10) years or more . . . because her ex-husband had lived close to Ms. Pickens" [Petitioner's Brief at 25], Ms. Hess actually testified that although she knew of the Mother, she actually did not speak with her until the Mother came to the attorney's office for whom Ms. Hess, at that time, worked. [App. 663] Moreover, Ms. Hess testified, consistently with Respondents' assertion of the undue influence exercised by Ms. Pickens over the Mother, that "there was times that Polly made the appointments" for the Mother to come to the attorney's office. [Id.] Ms. Hess also testified that the Mother called the attorney's office from Ms. Pickens' home asking for preparation of the 2000 power of attorney; that Ms. Hess took the power of attorney to Ms. Pickens' home to have the Mother execute the power of attorney; and that it was signed and notarized in the presence of Ms. Pickens. [App. 664] Obviously, despite Ms. Hess' testimony that she had no reason to believe that the Mother was under the undue influence of Ms. Pickens at the time the power of attorney was executed, the jury was free to consider the Mother's compromised physical and mental condition, as testified to a reasonable degree of medical certainty by Dr. Miller, as well as Ms. Pickens' conduct both before and after the power of attorney was executed, and find that execution of the power of attorney was the product of fraud and breach of fiduciary duty. As Ms. Hess conceded upon cross-examination:

Q. Does this give Polly Pickens the right to take Louise's property for her own benefit?

A. No. . . .

Q. Did you get a sense or feeling at this time this was going on, that Louise Pickens had confidence and trust in Polly Pickens? . . .

A. Yes.

Q. Would you give the power of attorney to someone you didn't have trust or confidence in to take care of your business affairs?

A. No.

[App. 667-668] Accordingly, Ms. Hess was permitted to testify about her observations of the Mother when the 2000 power of attorney was executed; she conceded on cross-examination that it was prepared and executed in the context of a trust relationship between the Mother and Ms. Pickens; she stated that it could not be used by Ms. Pickens to take the Mother's property for Ms. Pickens' own benefit; and the jury was free to weigh the testimony and find for Respondents.

The attorney under whose supervision Ms. Hess prepared the 2000 power of attorney, Rosalee Juba-Plumley, also testified. [App. 671] Although Ms. Pickens' brief states, "Attorney Rosalee 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" [Petitioner's Brief at 25], that statement is not supported by the record as (1) Ms. Hess testified that the power of attorney and medical power of attorney were prepared by her, not Ms. Juba-Plumley [App. 668-669]; Ms. Hess testified that they were executed and notarized by the Mother in Ms. Pickens' home when Ms. Juba-Plumley was not present [App. 664]; Ms. Hess testified that no one explained to Ms.

Pickens when the power of attorney was executed by her Mother as to Ms. Pickens' obligations arising from the power of attorney [App. 669-670]; Ms. Hess testified that she had no knowledge of Ms. Juba-Plumley speaking to anyone, including the Mother, about the powers of attorney [App. 670]; and although Ms. Juba-Plumley was present when a deed conveying property from the Mother to Ms. Pickens was signed [App. 675], she offered no testimony that she was present when the power of attorney and medical power of attorney were signed [App. 671-679] The powers of attorney themselves, which were introduced as Plaintiffs' Exhibit Nos. 1 and 2, were notarized only by Ms. Hess, **not by Ms. Juba-Plumley**. [App. 1208 and 1211] So, Ms. Pickens' arguments regarding Ms. Juba-Plumley as a subscribing witness to them make no sense.

Moreover, the instruction referenced in Ms. Pickens' brief, if tendered in that form, was an erroneous statement of law as Syllabus Point 4 of Ellison merely states, "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," and the language in Ms. Pickens' brief goes further to state that the testimony of such subscribing witness "has now weight than the mere opinion of parties, including a doctor, as to the deceased grantor's competency or conduct at other times" [Petitioner's Brief at 24] which is obviously an incorrect statement of the law[15] and it is not error to reject an instruction which is an incorrect statement of the law. Syl. pt. 11, State v. Derr, 192 W. Va. 165, 451 S.E.2d 731 (1994) ("A trial court's refusal to give a requested instruction is reversible only if: (1) the instruction is a correct statement of the law; (2) it is not substantially

[15] Indeed, in Syllabus Point 6 of Cyrus v. Tharp, 147 W.Va. 110, 126 S.E.2d 31 (1962), a case cited by Ms. Plumley, this Court held, "The evidence of an officer taking the acknowledgment to a deed, or of a person present at its execution, or of a physician who observed or treated the grantor at or near the time of the execution of the deed, is entitled to peculiar weight in considering the grantor's capacity.").

covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.").

Finally, if Ms. Pickens had offered a subscribing witness instruction, it would not have been error on the part of the trial court to refuse it in light of the evidence at trial, particularly where the jury's verdict was predicated solely upon findings of breach of fiduciary duty, tortious interference, conversion, fraud, and constructive fraud relative to the CDs, the Series E bonds, and the checking account.[16] [App. 1097-1098] As the trial court noted:

> Defendants' Instructions No. 13, 14, and 25 relate to alleged capacity issues as to the alleged capacity issues as to the General Power of Attorney, Medical Power of Attorney, and deed, executed by the decedent in the Defendant's favor. . . .
>
> The validity of the General Power of Attorney and Medical Power of Attorney was not contested at trial. Accordingly, the denial of the aforementioned instructions does not for[m] a basis for [a] new trial.
>
> Additionally, as to the deed, the Court granted the Defendant judgment . . . as to the . . . deed. Hence, the denial of the instruction . . . does not form a basis for a new trial.

[App. 22-23]

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[16] Syl. pt. 15, State v. Bradshaw, 193 W. Va. 519, 457 S.E.2d 456 (1995) ("Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as it accurately reflects the law. Deference is given to the circuit court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed for an abuse of discretion.") (quotation marks and citation omitted); Syl. pt. 1, Wiggin v. Dillon, 66 W. Va. 313, 66 S.E. 689 (1909) ("A verdict clearly supported by law and the evidence should not be disturbed because an erroneous instruction was before the jury.").

3. The Trial Court Committed No Error by Refusing to Give a "Treating Physician" Instruction

Third, Ms. Pickens complains that the trial court refused to her proposed Instruction No. 25. [Petitioner's Brief at 27] Again, Ms. Pickens' brief contains no reference in the record to this instruction, but only a reference to Ms. Pickens' counsel stating for the record an objection to the trial court's previous decision regarding some instruction tendered. [Id.] Moreover, it is clear from the record that no reversible error was committed.

As with the argument regarding a "subscribing witness" instruction, any "treating physician" instruction regarded the issue of the Mother's mental capacity and the jury did not make any finding regarding mental incapacity or undue influence. Indeed, as noted in the very Judgment Order from which Ms. Pickens has appealed, the trial court noted as follows:

> As to the Defendant's written and oral Motions for Directed Verdict, the Court ruled as follows . . .
>
> Defendant's Motion for Directed Verdict on Plaintiffs' Claim of Lack of Capacity to execute Deed dated February 20, 2001 was GRANTED as the Plaintiffs voluntarily withdrew Count 2 at the Pretrial . . .
>
> Defendant's Motion for Directed Verdict on Plaintiffs' Claim of Lack of Capacity to Execute Power of Attorney was GRANTED as the Plaintiffs voluntarily withdrew this Count at the Pretrial . . .
>
> Defendants' Motion for Directed Verdict on Plaintiffs' Claim of Undue Influence to Execute Power of Attorney was held in abeyance, however the Plaintiffs voluntarily withdrew this Count. . . .
>
> On Thursday, January 31, 2013, the Court made the following rulings . . . .
>
> The Court GRANTED Defendant's Motion for Directed Verdict on all of the Plaintiffs' Claims to set aside the Deed conveyance identified as Plaintiffs' Exhibit No. 11. . . .

> The Court GRANTED the Defendants' Motion for Directed Verdict on Plaintiffs' Claims on the Power of Attorney. . . .
>
> The Court GRANTED the Defendants' Motion for Directed Verdict on the Plaintiffs' Claims on the Medical Power of Attorney. . . .

[App. 11-14] Accordingly, based upon those rulings, only the claims of breach of fiduciary as Executor of her Mother's Estate, conversion, constructive fraud, common law fraud, and tortious interference went to the jury [App. 16] and how the failure to give a "subscribing witness" or "treating physician" instruction to the jury impacted the case is difficult to discern.

With respect to the instruction itself, which Ms. Pickens contends would have told 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," she relies upon the pre-World War I and Rules of Evidence cases of Nicholas v. Kershner, 20 W. Va. 251 (1882) and Ward v. Brown, 53 W. Va. 227, 44 S.E. 488 (1903), but in Syllabus Point 8 of Ward, this Court held, "Expert testimony, except under special circumstances, is entitled to only such weight as the jury may deem it entitled to when viewed in connection with all the evidence and circumstances; and it is error to instruct the jury that the evidence of physicians testifying as experts only, on the trial of an issue devisavit vel non, is entitled to great weight."

Here, the two experts at trial were Dr. Miller and Dr. Smith, not Dr. Lakhani, who never testified. As to those two expert witnesses, the trial court properly instructed the jury regarding the weight to be afforded their testimony. [App. 1115] How it was reversible error to refuse to give an instruction regarding giving "great weight" to an expert who did not testify makes no sense.

4. The Trial Court Committed No Error by Refusing to Give Ms. Pickens' Tortious Interference Instruction

Fourth, Second, Ms. Pickens complains that the trial court refused to give her proposed Instruction No. 37. [Petitioner's Brief at 28] Again, Ms. Pickens' brief contains no reference in the record to this instruction, but only a reference to Ms. Pickens' counsel stating for the record an objection to the trial court's previous decision regarding some instruction tendered. [Id.]

Ms. Pickens concedes that the instruction was erroneous as tendered to the Court and it is not error to refuse to give an instruction that misstates the law. Syl. pt. 2, State v. Collins, 154 W. Va. 771, 180 S.E.2d 54 (1971) ("An instruction which does not correctly state the law is erroneous and should be refused.").

Ms. Pickens concedes that she never tendered a correct instruction, but excuses her failure by arguing that once the trial court ruled that the fiduciary duties of an executor or administrator of an estate extends to its beneficiaries, there was no reason to tender a correct instruction. [Petitioner's Brief at 28-29]

Of course, one cannot complain about the failure to give an instruction one never tenders, but more importantly, Ms. Pickens' argument is directed not towards the failure of the trial court to give an instruction, but the trial court's ruling that the fiduciary duties of an executor or administrator of an estate extends to its beneficiaries, which is an issue that Ms. Pickens does not raise in her brief and, more importantly, it is an issue upon which the trial court correctly ruled. Syl. pt. 2, in part, Latimer, supra ("The fiduciary duty owed by an executor or administrator to the beneficiaries of the estate is paramount to any moral obligation that may exist between the personal representative and some third party.").

In Syllabus Point 2 of Torbett v. Wheeling Dollar Sav. & Trust Co., 173 W. Va. 210, 314 S.E.2d 166 (1983), this Court held that the elements of a prima facie case for tortious interference are: (1) existence of a contractual or business relationship or 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. Obviously, as the trial court correctly held, the Respondents, as beneficiaries to whom Ms. Pickens owed a fiduciary relationship, were not "outside that relationship" and could not have "tortiously interfered" with the performance of Ms. Pickens' fiduciary duties that she owed to them. As nice as it might sound to a fiduciary to be able to sue the persons to whom the fiduciary's duties are owed for asserting the fiduciary's breach of those duties, such cause of action is beyond preposterous.

5. The Trial Court Committed No Error by Giving Instructions Regarding the Duties of an Executor or Administrator of an Estate

Finally, Ms. Pickens complains that the trial court gave Instruction No. 18 regarding breach of fiduciary duties by executors of an estate. [Petitioner's Brief at 29-30] Initially, Respondents note that Ms. Pickens does not identify anywhere in the record where she objected to this instruction and, in the absence of an objective, Ms. Pickens waived any instructional error.[17]

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[17] See, e.g., Ferguson v. Aggregate Industries Building Materials, LLC, 2013 WL 1632524 at *3 (W. Va.) (memorandum decision) ("As petitioner failed to object to the jury instructions, he waived any objection herein."); State v. Davis, 220 W. Va. 590, 598, 648 S.E.2d 354, 362 (2007) ("The record before us shows that the defendant's trial counsel failed to raise any contemporaneous objections at trial to alleged errors concerning jury instructions and thus waived his client's right to raise these issues on appeal except by way of plain error or ineffective assistance of counsel."); Syl. pt. 1, Roberts v. Powell, 157 W. Va. 199, 207 S.E.2d 123 (1973) ("A party may only assign error to the giving of instructions if he objects thereto before arguments to the jury are begun stating distinctly the matter to which he objects and the grounds of his objection.").

Moreover, Ms. Pickens' description of Instruction No. 18 takes it completely out of context. When Instruction No. 18 references including the CDs, Series E bonds, and checking account in the "probate estate" that did not mean, as Ms. Pickens suggests, that the trial court was instructing the jury that Ms. Pickens should have listed these as "probate assets." Rather, it was correctly instructing the Court that Ms. Pickens was required to list these "non-probate assets" in her appraisement. Indeed, Instruction No. 19 instructed the jury that, "The law requires the executrix of an estate shall within 90 days . . . list and appraise on a nonprobate inventory form all tangible and intangible nonprobate personal property owned by the decedent" [App. 1129], which unquestionably would have included the CDs, Series E bonds, and checking account.

Of course, this is why this Court has held that, "Instructions must be read as a whole, and if, when so read, it is apparent they could not have misled the jury, the verdict will not be disturbed . . . ." Syl. pt. 3, in part, Lambert v. Great Atlantic & Pacific Tea Company, 155 W. Va. 397, 184 S.E.2d 118 (1971).

Finally, to be blunt, the jury heard Ms. Pickens blame her former lawyer for the failure to list the CDs and Series E bonds in the initial appraisement [Petitioner's Brief at 30] and either did not believe Ms. Pickens or did not care as it was her fiduciary duty and motive to hide her transactions with her Mother, not her former lawyer's.

E. THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO CERTAIN TESTIMONY BY THE MOTHER'S FORMER ATTORNEY

The Mother's former attorney, Ms. Juba-Plumley, was permitted to testify extensively at trial regarding her interactions with the Mother. [App. 671-679] Again, as with most of Ms.

Pickens' assignments of error, it is neither relevant nor properly preserved in the appellate record.

This particular assignment involves the following colloquy involving property deeded by the Mother to Ms. Pickens which is not even the subject of the appeal:

> Q. But Mrs. Louise Pickens wanted to give her daughter [Ms. Pickens] a gift [of real property through execution of a deed]?
>
> A. Yes. She wanted to make sure that Polly had that property. And it seems to me that she was concerned that her other two daughters would cause a problem for Polly.
>
> MR. CASEY: Objection. Move to strike.
>
> BY MR. STAPLES:
>
> Q. Is that what she told you?
>
> THE COURT: Sustained. Disregard that. Ladies and gentlemen, disregard that last answer or statement by the witness.

[App. 675] At that point, Ms. Pickens' counsel simply abandoned the line of questioning, related solely to the deed of real property that was not an issue addressed in the verdict.

First, Ms. Juba-Plumley's answer was clearly non-responsive and could have been properly excluded for that reason.[18]

Second, a statement that the Mother was allegedly concerned that Respondents "would cause a problem for Polly" is hardly a statement of testamentary intent. When asked if in her

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[18] See, e.g., State v. Giles, 179 W. Va. 323, 327, 368 S.E.2d 107, 111 (1988) ("The trial judge did not abuse his discretion since the prosecutrix's answer was nonresponsive, vague, and not pursued by the State in any other questions."); Syl. pt. 1, State v. McNemar, 108 W. Va. 237, 151 S.E. 176 (1929) ("An answer by a witness, in excess of the scope of a question properly propounded, which answer might be prejudicial to the complaining party if permitted to be considered by the jury, will not ordinarily constitute reversible error, when the trial court has promptly instructed the jury to disregard it.").

opinion the Mother wanted to give the real property which was included in a deed from the Mother to Ms. Pickens that was prepared by Ms. Rosa-Plumley, she understandably answered "Yes." The idea that rejection of Ms. Rosa-Plumley's then gratuitous observation that Respondents "would cause a problem for Polly" is somehow reversible error is ridiculous as Ms. Plumley's affirmative testimony regarding the Mother's testamentary intent was admitted.[19]

Finally, Ms. Pickens never objected to the trial court's striking of Ms. Rosa-Plumley's non-responsive testimony and, therefore, did not preserve the issue for appeal.

F. THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO CLOSING ARGUMENT

Ms. Pickens' assertion of issues having nothing to do with the jury's verdict continues with her next assignment of error regarding references in closing argument to timber settlement monies upon which the jury returned no verdict. [Petitioner's Brief at 32-33]

During closing argument, Ms. Sargent's counsel went through the evidence of damages. With respect to the proceeds of a settlement of timber litigation, counsel stated:

> Now, in addition, you heard evidence about a timber lawsuit, you heard $22,000. Go through the bank records. In the bank records, in Louise's bank records you're not going to see any deposits, no nothing; nothing as to any $22,000 that went into Louise Pickens' bank account. We know it was $22,000. Rosalee Plumley said she turned it over, but it never hit the only account that Louise had. . . .

[19] R. Civ. P. 61 ("No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); see also Thorn v. Casey, 2014 WL 2404320 at *2 (W. Va.) (memorandum opinion) ("Because the substance of Dr. Khosrovi's summary was introduced through other sources—including petitioner's own testimony—we find that if there was error in its exclusion, that error was harmless.").

> In addition to that, Gladys Sayre's estate. If you look into the Gladys estate, you heard all kinds of testimony about that. . . . Louise's share of the non-probate share of that was $36,000; that was her share. . . .

[App. 889] Absolutely no objection was made to this argument at this time and counsel's argument then goes on for several pages of the transcript when, during argument on an entirely different matter, the following ultimately occurred:

> You also have the tax returns. We have her tax returns from 2000 to 2004, Louise's tax returns. You don't see any settlement or anything like that on her tax returns. . . .
>
> MR. STAPLES: I think it is improper for the plaintiffs to get up an allege $11,000 from a timber lawsuit that was settled in the year 2002, and also to allege from the Gladys Sayre estate $36,000 that was settled in 2000. There's been no evidence that my client has anything to do with those monies, refunds, or anything else. I think it's a totally improper argument, and I think it's prejudicial to my client and it's a prejudice to the jury.
>
> MR. CARRICO: Your Honor, the evidence is uncontroverted that at the time of the timber suit, she . . . was her power of attorney . . . . Also, at the time of Gladys Sayre's estate . . . the Court's determined that she was a fiduciary. So the argument is that she was her fiduciary at the time. . . .
>
> THE COURT: I'm going to let you go ahead and argue it. I know . . . there's the examination of Polly Pickens, did you make any effort to do an accounting of these funds.

[App. 890]

So, once again, Ms. Pickens made no contemporaneous objection; there was record evidence to support counsel's argument; and any error was harmless as the jury returned no verdict on either the timber settlement or Gladys Sayre estate claims. See Syl. pt. 2, Lacy v. CSX Transportation, Inc., 205 W. Va. 630, 520 S.E.2d 418 (1999) ("The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the

appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.") (quotation marks and citation omitted).

G. THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO REFUSING TO GRANT JUDGMENT AS A MATTER OF LAW ON RESPONDENTS' TORTIOUS INTERFERENCE, FRAUD, CONSTRUCTIVE FRAUD, CONVERSION, AND FIDUCIARY DUTY CLAIMS

Ms. Pickens' next assignment of error apparently involves the trial court's failure to grant a directed verdict on Respondents' causes of action, but it is somewhat cryptic as it references R. Civ. P. 56(e) which states, "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial," and Ms. Pickens' complains in her brief that the trial court erred "by submitting plaintiffs' time barred claims to the jury" [Petitioner's Brief at 33], not that the trial court erred by refusing to grant her motion for summary judgment. In any event, there was more than sufficient evidence to support the jury's verdict.

1. The Evidence Construed in Light Most Favorable Amply Supports the Jury's Verdict for Tortious Interference

Under Syllabus Point 2 of Torbett, supra, the elements of a prima facie case for tortious interference are (1) existence of a contractual or business relationship or **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.

Here, there was sufficient evidence upon which the jury could determine that (1) Respondents had a reasonable "expectancy" that their Mother's property would be included in

their Mother's Estate for which they were beneficiaries; (2) Ms. Pickens intentionally interfered in that expectancy by using her confidential and fiduciary relationship to have their Mother's separate property in the form of the CDs, Series E bonds, and checking account converted to joint ownership; (3) in the absence of Ms. Pickens' use of her confidential and fiduciary relationship, their Mother's separate property would not have been converted to joint property; and (4) Respondents' damages consist of the value of that property which now, under the judgment order, will properly be placed into their Mother's Estate.

The RESTATEMENT (SECOND) OF TORTS § 774B (1979) states, "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." As noted in the Reporter's Note to this RESTATEMENT section, "A substantial majority of the cases now grant recovery in tort for intentionally and tortiously interfering with the expectation of an inheritance or gift."

In Syllabus Point 5 of Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1983), cert. denied, 469 U.S. 981 (1984), this Court held as follows:

> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.[20]

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[20] See also Syl. pt. 3, Walker v. Monongahela Power Co., 147 W. Va. 825, 131 S.E.2d 736 (1963) ("In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.").

Moreover, "although the circuit court does have some role in determining whether there is sufficient evidence to support a jury verdict, it is not the role of the circuit court to substitute its credibility judgments for those of the jury or to assume the jury made certain findings because they did not believe evidence presented on other issues." Smith v. Cross, 223 W. Va. 422, 430, 675 S.E.2d 898, 906 (2009) (quotation marks and citation omitted).

Respondents' tortious interference claim was not predicated, as alleged in Ms. Pickens' brief, on "their bald assertion that Polly Pickens exerted undue influence over Louise Pickens" [Petitioner's Brief at 34; rather, Respondents' tortious interference claim was predicated that Ms. Pickens took advantage of her confidential and fiduciary relationship with their Mother and to use that relationship in a self-serving manner to convert their Mother's separate property that would have been included in their Mother's Estate into joint property that would pass to Ms. Pickens outside that Estate and then hid her tortious interference by not including at least some of that joint property in the list of non-probate assets on the appraisement she filed as Executrix of their Mother's Estate. Plainly, this was more than sufficient evidence to support the jury's tortious interference verdict.

2. The Evidence Construed in Light Most Favorable Amply Supports the Jury's Verdict for Fraud

The elements of fraud are set forth in Syllabus Point 1 of Lengyel v. Lint, 167 W. Va. 272, 280 S.E.2d 66 (1981):

> The essential elements in an action for fraud are: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it."

(citation omitted).

Here, as Ms. Pickens concedes in her brief [Petitioner's Brief at 35], she failed to include certain non-probate assets in her appraisement of her Mother's Estate and she can blame her former attorney all she wants, but a jury could have determined that such failure constituted fraud.

Moreover, the jury heard evidence regarding re-issuance of the Series E bonds and certainly could have rejected Ms. Pickens' testimony that her acts of completing forms on behalf of her Mother and signing her Mother's name to those forms were at her Mother's direction, and could have determined that Ms. Pickens committed fraud when during the process of the reissuance of those bonds, their ownership was changed by Ms. Pickens from separate to joint.

3. The Evidence Construed in Light Most Favorable Amply Supports the Jury's Verdict for Constructive Fraud

It is well-established that:

> The fiduciary duty is "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law [.]" Elmore v. State Farm Mut. Auto. Ins. Co., 202 W. Va. 430, 435, 504 S.E.2d 893, 898 (1998) (quoting BLACK'S LAW DICTIONARY 625 (6th ed. 1990)).

Napier v. Compton, 210 W. Va. 594, 598, 558 S.E.2d 593, 597 (2001); see also McKinley v. Lynch, 58 W. Va. 44, 57, 51 S.E. 4, 9 (1905) (observing that a fiduciary relationship exists "whenever a trust, continuous or temporary, is specially reposed in the skill or integrity of another").

Here, without question, as found by the trial court, Ms. Pickens and her Mother had a confidential and fiduciary relationship arising from the administration of her father's estate;

arising from a power of attorney executed by the Mother to Ms. Pickens; and arising from Ms. Pickens' status as Executrix of her Mother's Estate.

In Miller v. Huntington & Ohio Bridge Co., 123 W. Va. 320, 15 S.E.2d 687 (1941), this Court held:

> "Constructive fraud" is a breach of legal or equitable duty which irrespective of moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interest, and neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud, whereas intent to deceive is an essential element of actual fraud, the presence or absence of such intent distinguishes actual from constructive fraud.

See also Stanley v. Sewell Coal Co., 169 W. Va. 72, 76-77, 285 S.E.2d 679, 683 (1982).

Again, Ms. Pickens' reliance on Nugen is unavailing as the nephew in the case, unlike Ms Pickens in this case, enjoyed no confidential or fiduciary relationship with the decedent. Rather, this case is like Kanawha Valley Bank, supra, in which the decedent's brother-in-law and business associate used his confidential and fiduciary relationship with the decedent to place $30,000 in proceeds from matured Treasury bills into a joint savings account, and in which this Court found constructive fraud.

Finally, the jury heard Ms. Pickens' testimony that certain CDs were cashed by her and used to pay for her Mother's care and deducted those amounts from their award to Respondents, which confirms that where Ms. Pickens offered satisfactory evidence, as in Nugen, that transactions were conducted for the Mother's benefit, they were not the product of constructive fraud, but when transactions were conducted solely for Ms. Pickens' benefit, they were the product of constructive fraud.

4. The Evidence Construed in Light Most Favorable Amply Supports the Jury's Verdict for Conversion

In West Virginia, conversion is any distinct act of dominion wrongfully exerted over the property of another, and in denial of his rights. Rodgers v. Rodgers, 184 W. Va. 82, 399 S.E.2d 664, 677 (1990); Miami Coal Co. v. Hudson, 175 W. Va. 153, 332 S.E.2d 114, 121 (1985). Conversion may be proved in three ways: (1) by a tortious taking; (2) by any use or appropriation to the use of the defendant indicating a claim of right in opposition to the rights of the owner; or (3) by a refusal to give up the possession to the owner on demand. Shamblin's Ready Mix, Inc. v. Eaton Corp., 819 F.2d 1139 (4th Cir. 1987); see also Hinkle Oil & Gas, Inc. v. Bowles Rice McDavid Graff & Love LLP, 617 F.Supp.2d 447 (W.D. Va. 2008).

Obviously, there was sufficient evidence that by claiming ownership of the CDs, Series E Bonds, and checking account funds as her own separate property that became her separate property in transactions that were either fraudulent and/or violations of her fiduciary duty, Ms. Pickens had wrongfully converted what should have been property included in her Mother's Estate.

5. The Evidence Construed in Light Most Favorable Amply Supports the Jury's Verdict for Breach of Fiduciary Duty

With respect to the jury's finding that Ms. Pickens breached her fiduciary duties owed to Respondents as Executrix of their Mother's Estate, there was evidence that she failed to include all of the non-probate assets that should have been included and, again, she attempted to shift the blame for that omission to her former attorney, but the jury was free to reject that testimony.

H. THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT AS A MATTER OF LAW ON MS. PICKENS' COUNTERCLAIM FOR TORTIOUS INTERFERENCE WITH HER DUTIES AS EXECUTRIX

In retaliation for Respondents' suit against Ms. Pickens as Executrix of their Mother's Estate, Ms. Pickens counterclaimed, alleging that the suit constituted tortious interference with her duties as Executrix. Obviously, if that were the case, then any fiduciary, an attorney handling client funds for example, could counterclaim against a plaintiff suing for breach of fiduciary duty, claiming that the suit constituted "tortious interference" with the performance of the fiduciary's obligations. Ms. Pickens' argument to the contrary is absurd.

She complains -- how can Respondents maintain an action against her for tortiously interfering with their expectancy when she cannot maintain an action against them for tortiously interfering with her duties as Executrix because "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." [Petitioner's Brief at 39]

Of course, there is no inconsistency because as fiduciary, it was Ms. Pickens who owed a duty to her Mother not to use that fiduciary relationship in a self-serving manner to have the Mother's separate property converted to joint property such that it would not pass through the Mother's Estate and, likewise, it was Ms. Pickens who owed a duty to the beneficiaries of her Mother's Estate, including Respondents, not to use her status as Executrix in a fraudulent and self-serving manner.

In Hatfield v. Health Management Associates of West Virginia, 223 W. Va. 259, 267, 672 S.E.2d 395, 403 (2008), this Court affirmed summary judgment where a terminated employee sued her former supervisors contending that they had tortiously interfered with her employment

relationship by firing her, agreeing that "Because they were acting within the scope of their employment, appellees Ms. Atkins and Ms. Ball were acting on the hospital's behalf—and, as our law is clear, the appellee hospital cannot be held liable for tortious interference with its own contract with the appellant." Likewise, in this case, the trial court correctly determined that Respondents could not be sued for asserting their rights as beneficiaries of their Mother's Estate against Ms. Pickens in her capacity as Executrix of that Estate.

I. THE TRIAL COURT DID NOT ERR IN CORRECTLY ADVISING THE JURY THAT ANY JUDGMENT PROCEEDS WOULD BE AN ASSET OF THE MOTHER'S ESTATE

Ms. Pickens' arguments that the "Estate of Louise Pickens was never a party to this litigation" and "Polly Pickens was never sued as Polly Pickens, Executrix of the Estate of Louise Pickens" [Petitioner's Brief at 40] make no sense.

Respondents' first amended complaint asked that damages be awarded to their Mother's Estate. [App. 58] Respondents' second amended complaint asked that damages be awarded to their Mother's Estate. [App. 77] Finally, Respondents' entire suit was predicated on the theory that due to Ms. Pickens' tortious conduct, the CDs, Series E bonds, and checking account proceeds had been wrongfully converted by Ms. Pickens and should have been included in their Mother's Estate.

J. NONE OF PETITIONER'S ASSIGNMENTS WARRANT APPLICATION OF THE PLAIN ERROR DOCTRINE

Ms. Pickens' final assignment of error concerns the "plain error" doctrine, but nowhere in this section of her brief does she identify what "plain error" occurred other than her general dissatisfaction with the judgment. [Petitioner's Brief at 40]

The purpose "plain error" doctrine, however, is not to attack a judgment, but to raise an issue not adequately preserved in the record. Syl. pt. 4, in part, State v. Grubbs, 178 W. Va. 811, 364 S.E.2d 824 (1987) (Under "[t]he plain error doctrine . . . the court may take notice of plain errors or defects affecting substantial rights although they were not brought to the attention of the court."

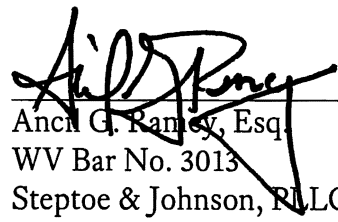
Ms. Pickens' argument that "the lower court proceedings were plain error" [Petitioner's Brief at 40] bespeaks a misunderstanding of the doctrine, which warrants no relief in this case.

V. CONCLUSION

WHEREFORE, for the reasons stated herein, Respondents respectfully request that the judgment of the Circuit Court of Mason County be affirmed.

MURL LOUISE TRIBBLE and JANET PEARL SARGENT

By Counsel



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CERTIFICATE OF SERVICE

I do hereby certify that on May 21, 2015, I caused to be deposited in the United States Mail, postage prepaid, a true copy of the BRIEF OF THE RESPONDENTS, addressed as follows:

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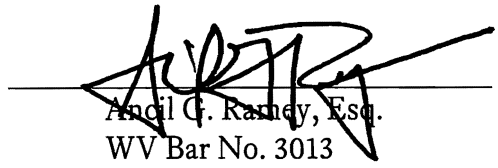

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