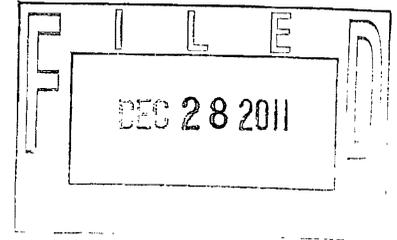


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Thomas H. Johnson and  
Teresa S. Johnson, Plaintiffs Below  
Petitioners



vs. No. 11-1105 (Circuit Court Civil Action No. 09-C-71)

Bertha Kirby, Individually  
and as Administratrix  
of the Estate of Jesse Frances Kirby, Defendant Below,  
Respondent

**PETITIONERS REPLY BRIEF**

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## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided in long standing and well-established case law regarding subject matter jurisdiction and probated Wills, oral argument under Rev. R.A.P. 18(a)(3) is not necessary. Unless the Court, in its discretion, determines that oral argument is necessary then oral argument would be appropriate under Rev. R.A.P. 20 (a)(1) and (2) as a case of first impression or a case involving issues of fundamental public importance.

### ARGUMENT

#### **I. Respondent's characterization of Petitioners' arguments are not based on legal reasoning or established law.**

Respondent attacks Petitioners' arguments concerning the Monroe County Commission's lack of subject matter jurisdiction, by characterizing such an argument as "a last ditch effort to claim title." Respondent's Brief pg 6. Respondent fails to offer any legal reasoning as to why Petitioners' argument should fail. In response, Petitioners' wish to reiterate and reemphasize the argument carefully laid out and cited in their brief, which explains that subject matter jurisdiction can never be waived. See Dishman v. Jarrell, 165 W.Va. 709 at 712 (1980). Further, subject matter jurisdiction can be challenged in any appropriate manner and at any time during the pending suit. See C.W. McKinley, et al, v. Orpha Queen, et al, 125 W.Va. 6 (1943). McKinley in Syllabus point 3 also explains, "The period prescribed in Code §41-5-11 relative to filing a bill in equity, is jurisdictional, limiting the right and the remedy [. . .]." Therefore, since Respondent did not bring her suit before the County Commission prior to the expiration of the statutory time limits then the Commission's decision is void for lack of jurisdiction.

Respondent also points out that no one appealed the ruling of the County Commission

and this current suit was not brought until six months after the ruling, but this point is irrelevant for two reasons. Respondent's Brief pg 4. First, Petitioners never received a copy or notice of the Commission's ruling. Second, and more importantly, the Petitioners were not parties to the proceeding before the County Commission and thus had no right to appeal it. However, that does nothing to change the fact that the Commission's decision is void for lack of subject matter jurisdiction. As this Court explained in State ex rel. Termnet Merchant Services, Inc. v. Jordan, 217 W. Va. 696, 700 (2005), "The urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void." citing Syl. Pt. 5, State ex rel. Hammond v. Worrell, 144 W.Va. 83 (1958). In the present case, the County Commission lacked the required subject matter jurisdiction therefore, the ruling to disregard the probated Will and remove Brenda Kirby as Executrix/Administratrix of the Estate is void.

**II. The Circuit Court's denial of Petitioner's motion for summary judgment on the issue of unjust enrichment should be appealable.**

If this Court chooses to uphold the decision of the Circuit Court and set aside the probated Will and the appointment of Brenda Kirby, then Petitioner's claim for unjust enrichment must be addressed. Respondent is correct in stating that denial of summary judgment is ordinarily not appealable, however, this means that occasionally such orders are appealable. One such instance is illustrated in the case of Arnold v. Palmer, 224 W.Va. 495 (2009), in which this Court heard an appeal on an order from the Circuit Court denying the appellant, Advantage's, motion for summary judgment.

The Court in Arnold quotes from Wilfong v. Wilfong, 156 W.Va. 754 (1973) and states

that “It is generally held that ‘[t]he entry of an order denying a motion for summary judgment made at the close of the pleadings and before trial is merely interlocutory and not then appealable to this Court.’” Arnold at 500. However, the Court heard the appeal because the Court looks at the ultimate effect that the Circuit Court’s decision had. The Circuit Court’s denial of summary judgment cut off Advantage’s right to foreclose, and essentially granted summary judgment in favor of the appellee. In this present case, the Circuit Court’s denial of Petitioners’ motion for summary judgment unfairly favors the Respondent.

Petitioner’s Brief has laid out the standards of summary judgment and argues that the Circuit Court erred in not granting summary judgment to Petitioners on their claim for unjust enrichment since there was no genuine issue of material fact. See Syl. pt. 1 Williams v. Precision Coil, Inc., 194 W. Va. 52 (1995). Petitioners in this case have made a properly supported motion for summary judgment and provided affirmative evidence to show that they are entitled to unjust enrichment. Respondent, however, has not met her burden of production, making no attack on the evidence submitted by Petitioners nor provided any evidence or affidavit that raises a genuine issue of material fact or explains why further discovery is necessary. See Syl. pts 2 and 3 of Williams. Respondent offered no evidence contradicting Petitioners’ purchase of the property, the amount paid for the property and the improvements nor did the Respondent object or offer evidence as to the reasonableness of the amount paid. Respondent did not point to any disputed material facts that would sway the outcome of the litigation. See Syl. pt. 5 of Poling v. Pre-Paid Legal Servs., 212 W.Va. 589. Therefore, summary judgment is appropriate on Petitioners claim for unjust enrichment.

The Circuit Court in the Agreed Amended Order Granting Partial Summary Judgment

stated that “[t]he Court believes the Petitioners may be entitled to unjust enrichment; however, the Court believes further inquiry into the facts is necessary. Questions of fact exist as to what the Petitioners’ beliefs were at the time they made the improvements to the property and also on whether Bertha Kirby knew of the improvement.” App. 95. These inquires are not genuine issues of material fact based upon the standards of unjust enrichment as outlined in Petitioners’ Brief. Respondent failed to meet her burden as the nonmoving party since no evidence was presented to point out any genuine issue of material fact. The Circuit Court failed to provide any guidance as to what genuine issues of material fact existed that would lead a rational trier of fact to find for the nonmoving party, especially since the nonmoving party failed to present any such evidence. Williams supra.

Respondent had her opportunity for discovery, to present evidence, or even request a continuance to conduct the necessary discovery to address the Petitioners’ motion for summary judgment on unjust enrichment, Respondent did none of this. By denying Petitioners’ motion for summary judgment the Circuit Court is granting the Respondent further opportunity for discovery and placing further unnecessary burdens upon Petitioners by having the issue go to trial. Additionally, if the issue of unjust enrichment goes to trial and Petitioners do not prevail all the matters appealed herein will still need to be addressed. For the sake of judicial economy, Petitioners now seek relief on these issues.

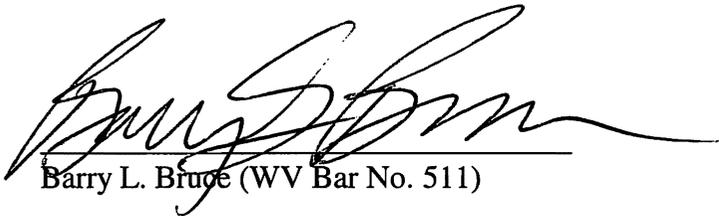
Petitioners’ are entitled to summary judgment on the issue of unjust enrichment, but only if this Court chooses to uphold the decision of the Circuit Court and set aside the probated Will and the appointment of Brenda Kirby. Petitioners’ stand by the arguments put forth in their brief to show that good title was passed to them from Brenda Kirby.

## CONCLUSION

The Circuit Court erred in upholding the Monroe County Commission's April 1, 2009 Order which was void for lack of jurisdiction since Respondent did not meet the statutory deadlines. Therefore, this Court should reverse the decision below and grant Petitioners' motion for summary judgement. Additionally, the Circuit Court erred in not granting Petitioners' motion for summary judgment for unjust enrichment. If this Court determines not to reverse the decision below then Petitioners' are entitled to summary judgment. Thus, Petitioners' claim for unjust enrichment should be granted and the sale of the property to the Petitioners' for the amount of \$11,500.00, the fair market price of the property less the improvements on said property should be approved.

Respectfully submitted,

**THE PETITIONERS  
THOMAS H. JOHNSON AND TERESA  
S. JOHNSON**



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**CERTIFICATE OF SERVICE**

I, Jesseca R. Church, Barry L. Bruce and Associates, L.C. counsel for Petitioners, Thomas H. Johnson and Teresa S. Johnson, do hereby certify that on the 27<sup>th</sup> day of December 2011, I served a true copy of the foregoing by depositing said copy in the United States mail, with sufficient Postage attached thereto, to counsel:

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