STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Katherine "Kit" McGlinchey
(a/k/a Katherine L. McGlinchey-Frye),
individually and as Executrix of the
Estate of John W. Frye,
Defendant Below, Petitioner

vs) **No. 11-0591** (Marion County 06-C-344)

Mark E. Frye, Plaintiff Below,
Respondent

FILED
November 10, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Katherine "Kit" McGlinchey (a/k/a Katherine L. McGlinchey-Frye), individually and as Executrix of the Estate of John W. Frye ("petitioner"), appeals from the trial court's order denying petitioner's motion for a new trial following an adverse jury verdict in this breach of contract action. Petitioner asserts various trial errors. Respondent Mark E. Frye ("respondent") has filed a response. Petitioner seeks a new trial.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Respondent's father, John W. Frye ("the decedent"), died testate on April 27, 2006. The decedent was previously married to respondent's mother, Elizabeth Weimer[1] Frye ("Elizabeth Frye"). During the marriage, the decedent and Elizabeth Frye acquired an ownership interest in certain acreage in Grant County ("subject property"),[2] along with the decedent's brother, Andrew N. Frye Jr. The decedent and Elizabeth Frye divorced in 1978. Many years later, the decedent and petitioner married. Respondent states that the decedent devised and bequeathed all of his estate to petitioner.

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[1] Elizabeth Frye's middle name is spelled "Wymer" in the petition for appeal.

[2] The parties also refer to this property as the "Bruce Lands," a name apparently given to the property by prior owners.

The exhibits at trial included the lay contract ("Plaintiff's Exhibit 1")[3] executed by the decedent and Elizabeth Frye, which contained various provisions for the division of their property in contemplation of their divorce. This agreement provided, *inter alia*, that the decedent would purchase Elizabeth Frye's interest in the subject property and that he would provide in his Will that his ownership interest in the property would go to their children, one of whom is respondent. Respondent states that the failure of his father (the decedent) to honor this contract and bequeath the subject property to his children in his Will precipitated this action wherein he asserted multiple causes of action. Only the breach of contract claim was ultimately tried before the jury.

Respondent testified at trial that he wanted the subject property as it was "the last piece of memory" he has of his father that had not been "sold off, hocked, borrowed money from, and used up." Petitioner testified at trial that respondent had not been close with the decedent for years; that he had neither telephoned the decedent nor sent him either a birthday or Christmas card for several years; and that respondent had not participated in the Frye family Thanksgiving gatherings at the subject property from 1995, through 2005.

Respondent conceded on cross-examination that he was not close with his father (the decedent) toward the end of his father's life. On re-direct examination, when respondent was asked to explain this estrangement, petitioner objected and cited the trial court's prior *in limine* ruling that neither party could testify as to communications with the decedent. The trial court overruled the objection. Thereafter, respondent testified that early in his father's relationship with petitioner, he had posed concerns to his father regarding petitioner and urged him to end the relationship. Respondent further explained that when he later tried to "mend fences," petitioner wrote him a "nasty letter to let me know that I was not welcome, not liked, not respected, not wanted." The trial court allowed respondent to read this letter into the record over petitioner's relevancy and unfair prejudice objections stating:

> [Y]ou [petitioner's counsel] by your questioning implied that he [respondent] didn't have any relationship with his dad, and he was estranged from his dad, and evidently didn't care about his dad. Didn't send him any cards, or call, or anything like that. And I think he can explain why.

Elizabeth Frye was recalled as a witness during petitioner's case-in-chief. She was questioned about the ways in which the lay contract referenced above (Plaintiff's Exhibit 1) had been modified by subsequent agreements and actions, including the property settlement agreement arising out of the divorce between the decedent and Elizabeth Frye.

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[3] Respondent notes that petitioner has made no assignment of error that Plaintiff's Exhibit 1 is not a contract.

In denying petitioner's motion for judgment as a matter of law,[4] the trial court noted that while there was not "any great dispute in the evidence," the case should go to the jury because of the different inferences that the jury could take from the evidence in terms of whether Elizabeth Frye and the decedent intended the subject property to end up with their sons. The jury was given the following special interrogatory to be answered either "yes" or "no":

> Do you find by the preponderance of the evidence that Dr. John W. Frye, Sr., and Dr. Elizabeth W. Frye had a contract that obligated Dr. John W. Frye, Sr., to Will the Grant County property referred to as the "Bruce Lands" to their children [?]

Approximately fifteen minutes after the jury began its deliberations, it returned a verdict in favor of respondent answering the special interrogatory in the affirmative. The trial court denied petitioner's motion for a new trial filed pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure. "[T]his Court's standard of review concerning a ruling upon such a motion is whether the circuit court abused its discretion. *Williams v. Charleston Area Medical Center*, 215 W.Va. 15, 18, 592 S.E.2d 794, 797 (2003); *Andrews v. Reynolds Memorial Hospital*, 201 W.Va. 624, 629, 499 S.E.2d 846, 851 (1997); *In re State Public Building Asbestos Litigation*, 193 W.Va. 119, 124-26, 454 S.E.2d 413, 418-20 (1994), *cert. denied*, 515 U.S. 1160, 115 S.Ct. 2614, 132 L.Ed.2d 857 (1995); syl. pt. 1, *Cook v. Harris*, 159 W.Va. 641, 225 S.E.2d 676 (1976)." *Price v. Charleston Area Med. Ctr., Inc.*, 217 W.Va. 663, 667, 619 S.E.2d 176, 180 (2005).

I. Asserted Evidentiary Errors

Petitioner asserts that the trial court erred in allowing respondent to read petitioner's scathing letter to him at trial. Petitioner asserts that respondent read the letter so that he could blame her for his failed relationship with the decedent and to generate anger in the jury toward her. Respondent states that the trial court ruled that the letter was proper evidence to explain why he was estranged from his father after petitioner's counsel had questioned him regarding the period of estrangement, which was the same time period that his father was involved with petitioner and during which petitioner wrote the letter to him.

Next, petitioner asserts that the trial court erred in overruling her hearsay objection to Elizabeth Frye's testimony that she came to possess Plaintiff's Exhibit 1 when Woodrow Potesta, the decedent's attorney, asked that she pick up a file from him that contained "things . . . that should not be destroyed," including Plaintiff's Exhibit 1. Petitioner asserts that this testimony concerning a statement allegedly made by Mr. Potesta was hearsay as it was for the truth of the matter asserted. Petitioner adds that there is no exception to the hearsay rule

[4] Rule 50 of the West Virginia Rules of Civil Procedure.

that would allow this prejudicial testimony, which suggested that Plaintiff's Exhibit 1 was of legal significance or importance. Respondent states that attorneys have a duty to preserve files and important documents and that Mr. Potesta apparently felt that Plaintiff's Exhibit 1 was significant enough for him to preserve it for almost thirty years. Respondent adds that Mr. Potesta was deposed and was available to testify had petitioner elected to call him as a witness at trial.

Next, petitioner asserts that the trial court erred in allowing Elizabeth Frye to testify, over objection, that on January 30, 1978, she, the decedent, and their attorneys all agreed to "[p]ut the boys on the deed, as survivorship with their father."[5] Petitioner asserts that this prejudicial testimony violated the Statute of Frauds as well as West Virginia Code §48-29-301, which provides that a contract between a husband and wife is not enforceable "unless there is some writing sufficient to indicate that a contract has been made between them and signed by the spouse against whom enforcement is sought or by his or her authorized agent or broker." Respondent counters that Plaintiff's Exhibit 1 was the only document at issue and it was in writing and signed by the decedent and Elizabeth Frye (his parents). Respondent adds that Plaintiff's Exhibit 1 was the document that formed the basis of his breach of contract claim and that petitioner did not raise a Statute of Frauds argument in relation to Plaintiff's Exhibit 1.

"'The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.' Syllabus point 1, in part, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995)." Syl. Pt. 3, *Reynolds v. City Hosp., Inc.*, 207 W.Va. 101, 529 S.E.2d 341 (2000) (per curiam); *see also* Syl. Pt. 2, in part, *Jenkins v. CSX Transportation, Inc.*, 220 W.Va. 721, 649 S.E.2d 294 (2007) (per curiam). "Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed." *Covington v. Smith*, 213 W.Va. 309, 322–23, 582 S.E.2d 756, 769–70 (2003)(internal citations omitted). Under these standards and the facts and circumstances of the case *sub judice*, we find no error in the trial court's evidentiary rulings discussed above.

II. Dead Man's Statute

[5] Petitioner's argument on this issue is brief and confusing. It appears from the record that there was a discussion in 1978, between the decedent, Elizabeth Frye, and their lawyers, about placing the sons of the decedent and Elizabeth Frye, who were then minors, on a deed.

Petitioner asserts that the trial court erred in allowing Elizabeth Frye to testify, over petitioner's objection, to her transactions with the decedent, including that the subject property should be the "Frye Place" and that the decedent agreed that if she deeded her share of the subject property to him, he would will his ownership interest in that property to their sons, as reflected in Plaintiff's Exhibit 1. Petitioner asserts that this testimony violated the Dead Man's Statute (West Virginia Code §57-3-1) as it was being offered for the truth of the matter asserted. Petitioner adds that testimony was prejudicial as it had an "emotional hook of family preservation" and gave credence to respondent's contract theory. Respondent asserts that the trial court properly admitted the testimony as petitioner cannot meet one of the requisite factors to bar the testimony under the Dead Man's Statute. *See Meadows v. Meadows*, 196 W.Va. 56, 468 S.E.2d 309 (1996).

"[W]e review a circuit court's ruling on the admissibility of testimony under an abuse of discretion standard, but to the extent a circuit court's ruling turns on an interpretation, meaning, or scope of the statute or a rule of evidence our review is *de novo*." *Meadows*, 196 W.Va. 56, 59, 468 S.E.2d 309, 312 (citation omitted). Applying this standard and under the facts and circumstances of this case, we affirm the trial court's decision in this regard. To the extent there was any error in the admission of this testimony, it was harmless given the other evidence at trial.

III. Trial Court's Ruling that Petitioner Shall Refrain from Entering Upon the Subject Property

Petitioner states that Andrew Frye Jr., the decedent's brother who owns an undivided one-half interest in the subject property, was in the audience when the verdict was returned and orally requested at that time that petitioner be prohibited from going onto the subject property. Petitioner's counsel responded by arguing that the trial court lacked jurisdiction to issue an injunction concerning property located in another county (Grant County).[6] The "Trial Order" entered upon the jury's verdict states that "[i]t is further the Order of this Court that the Defendant [petitioner] has no right to enter upon the real estate known as the 'Bruce Lands' and therefore she shall refrain from doing so." Respondent asserts that this ruling was made post-verdict and, thus, could not have affected the verdict.

In the order denying petitioner's motion for a new trial, the trial court expressed its belief that it was "prudent that the parties not have contact with each other, given the jury's verdict for the Plaintiff [respondent] and, more especially, the nature of their 'highly volatile' relationship." The trial court also recalled that petitioner's counsel "conceded to having no reason for the defendants [petitioner] to be upon the property." The trial court concluded that

[6] Petitioner's counsel raises other arguments, such as the lack of a verified complaint, notice, or bond for an injunction. Because these arguments were not raised below, they will not be addressed in the first instance on appeal.

even if it had improperly enjoined petitioner from entry upon the property, the ruling was post-verdict and was not a basis to award a new trial. Having considered the parties' arguments on this issue and the facts and circumstances of this case, this Court agrees.

IV. Conclusion

For the foregoing reasons and after reviewing the parties' briefs and the record designated for purposes of this appeal, we affirm.

Affirmed.

ISSUED: November 10, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh