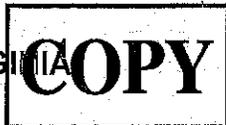


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 33339



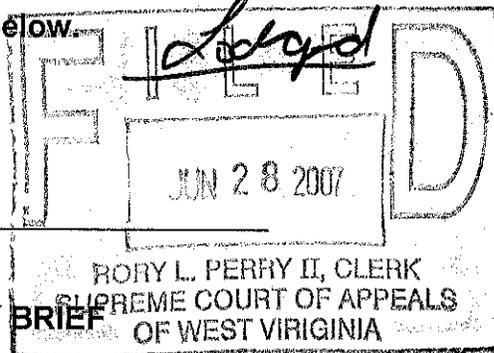
THE ESTATE OF HARTFORD E. BEALER, BY  
U.S. TRUST COMPANY OF FLORIDA, S.B.,  
As Executor of the Estate of Hartford E. Bealer and  
U.S. TRUST COMPANY OF FLORIDA, S.B., as  
Trustee of the Hartford E. Bealer Amended and  
Restated Declaration of Trust, SALLY KIRCHIRO,  
Trustee, and KATHLEEN STONE,

Appellants / Defendants Below,

v.

NANCY B. PARKER, TRUSTEE OF THE HARTFORD E. BEALER FOUNDATION,

Appellee / Plaintiff Below.



APPELLANTS' REPLY BRIEF

Richard G. Gay, Esquire  
WV State Bar ID No. 1358  
Nathan P. Cochran, Esquire  
WV State Bar ID No. 6142  
R. Greg Garretson, Esquire  
WV State Bar ID No. 6222  
Law Office of Richard Gay  
31 Congress Street  
Berkeley Springs, WV 25411  
(304) 258-1966

V. Alan Riley, Esquire  
WV State Bar ID No. 3115  
Attorney at Law, PLLC  
68 East Main Street  
Romney, WV 26757  
(304) 822-7003

*Counsel for Appellants*

## TABLE OF CONTENTS

|       |  |    |
|-------|--|----|
| I.    | The Foundation was void .....  | 6  |
| II.   | The repealed law cited by Nancy Parker, Section 737.206 of the Florida Statutes, is not completely explained in her brief..... | 10 |
| III.  | Parker's claim that the Foundation could meet the five percent rule by granting conservation easements is illusory.....        | 14 |
| IV.   | Parker raises material disputed facts regarding the concept of mistake.....  | 15 |
| V.    | Nancy Parker should not be allowed to profit from her husband's misinforming mr. bealer regarding the five percent rule .....  | 20 |
| VI.   | The Court did not engage in the analysis required to set aside a deed .....  | 21 |
| VII.  | The Court was without jurisdiction to alter Bealer's estate plan or proceed without the ancillary administrator .....          | 21 |
| VIII. | Conclusion .....   | 23 |

**TABLE OF AUTHORITIES**

**Cases**

*Barr v. State*, 731 So.2d 126 (Fla. 4th DCA 1999) ..... 9

*Forsythe v. Spielberger*, 86 So.2d 427 (1956)..... 8

*Key v. Trattmann*, 2007 WL 1517827, \*2 (Fla.App. 1 Dist.,2007).....12

*Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1, (Fla.,2004)..... 8

*O'Daniels v. City of Charleston*, 200 W.Va. 711, 716, 490 S.E.2d 800, 805 (W.Va.,1997)  
 ..... 5, 22

*Proudfoot v. Proudfoot*, 214 W.Va. 841, 591 S.E.2d 767 (2003) .....5, 20, 21

*State ex rel. TermNet Merchant Services, Inc. v. Jordan*, 217 W.Va. 696, 700, 619  
 S.E.2d 209, 213 (W.Va.,2005) ..... 22

*State v. Darynani*, 774 So.2d 855, (Fla.App. 4 Dist., 2000)..... 9

*Taylor Woodrow Constr. Corp. v. Burke Co.*, 606 So.2d 1154, 1155 (Fla.1992) ..... 9

*Woofter v. Matz*, 71 W.Va. 63, 76 S.E. 131, (W.Va. 1912).....21

*Yaffee v. Int'l Co.*, 80 So. 2d 910, 912 (Fla. 1955)..... 10

*Zuckerman v. Alter*, 615 So.2d 661, 663 (Fla.1993)..... 8

**Statutes**

Fla. St § 736.0415 ..... 11

West's F.S.A. § 737.206..... 8

West's F.S.A. § 736.0406 ..... 10

**Other Authorities**

55A Fla Jur 2d Trusts Section 51 ..... 10

**Treatises**

Restatement (Third) of Trusts § 12 (2003) .....12

Restatement (Third) of Trusts § 7 cmt. c (2003) .....12

The Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 (2003).....12

Websters' Ninth New Collegiate Dictionary, 761 (Frederick C. Mish ed. Merriam  
Webster 1991)..... 9

---

COMES NOW, the Appellants / Defendants below ("Estate" herein)<sup>1</sup> by counsel, Richard G. Gay, Nathan P. Cochran, of the Law Office of Richard G. Gay, LC, and Alan Riley, Attorney at Law, now file this Joint Reply Brief pursuant to Rule 10 of the W.Va. R.A.P.

### APPELLANTS' REPLY BRIEF

The sum of Nancy Parker's arguments in this case amounts to pointing out material disputed facts that should have been decided below, instead of having summary judgment granted in her favor.

Which side does the Court believe? Did Bealer make a mistake that precluded the purpose of the Foundation, thereby making the Foundation void *ab initio*? Or was Bealer engaged in self dealing in violation of the terms of a valid Foundation?

Bealer's estate has shown, through the events that occurred, that Bealer relied on Nancy Parker's husband, Ellis J. Parker, who promised that Parker could satisfy the IRS five percent rule and make the Foundation work as Bealer thought it would when he formed it. When Jay Parker did not fulfill his obligation, and Bealer realized his mistake (a mistake made in forming the Foundation because of Jay Parker's assurances) then Bealer withdrew the farm from the Foundation. This is not self dealing;<sup>2</sup> instead, the Foundation did not meet the parameters Bealer understood when he formed it – a classic mistake in the creation of the Foundation, induced by Jay Parker's promises,

---

<sup>1</sup> The Bealer estate is actually a separate party from Sally Kirchiro, (who is one of Bealer's two daughters and Kathleen Stone (who is the daughter of Sally Kirchiro)) however, the parties have joined in this appeal, and, for the Court's convenience in this appeal, are collectively referred to as the "Estate."

<sup>2</sup> This is not self dealing, it is self preservation. Self dealing would be an attempt to withdraw the farm from the Foundation while at the same time seeking favorable tax treatment for placing the farm into the Foundation (which Bealer did not do)

which makes the Foundation void *ab initio*.

Nancy Parker, on the other hand, argues in her appellate brief that Bealer was self dealing against the terms of a valid Foundation.

Which is it? At most, Parker's argument raises material disputes as to the meaning of the facts in this case. These facts are material in deciding whether Bealer made a mistake in the creation of the Foundation, or whether he was engaged in self-dealing. The dispute over these material facts precludes summary judgment, at least in Nancy Parker's favor.

If anything, this Court should order that summary judgment be granted in the estate's favor, since the facts support Bealer's position. Bealer relied on Jay Parker to avoid the application of the five percent rule, and when Parker did not come through as promised, Bealer removed him as trustee and conveyed the farm back to himself in the same tax year, before the Foundation became effective. It's as simple as that.

The arguments Nancy Parker advances are no more than speculation. Also, they do not make sense. Why would Bealer engage in the elaborate scheme to form the Foundation that Parker now suggests, place his own farm into it, make Jay Parker trustee, then virtually conspire with himself to remove Jay Parker, maneuver around his attorneys, and transfer the farm back to himself, when the farm belonged to him in the first place? Why would he have done any of this unless he was mistakenly relying on Jay Parker's representations like the estate has argued?

Further, issues of law exist that should have been decided in the estate's favor, instead of Nancy Parker's. This Court could grant summary judgment to the estate on several issues. For example, the Court lacked jurisdiction to interfere with the operation of the Florida probate court, where Bealer's will had been drafted, signed, and duly

admitted to probate. The Court's decision below had the effect of altering Bealer's testamentary disposition of his Farm by taking the Farm out of his estate plan and putting it back into the Foundation. Also, the Circuit Court did not join the ancillary administrator as a party, thereby failing to consider that the ancillary administrator, as representative of the estate, has an "interest in the real property at issue" within the meaning of *O'Daniels v. City of Charleston*, 200 W.Va. 711, 716, 490 S.E.2d 800, 805 (W.Va.,1997). The Court's Order, in the absence of the ancillary administrator, is void, and consequently, the court below lacks jurisdiction to make a decision as to the title of the Farm. Also, the court set aside the deed removing the farm from the Foundation without engaging in the analysis mandated by *Proudfoot v. Proudfoot*, 214 W.Va. 841, 591 S.E.2d 767 (2003).

The Circuit Court should have denied Nancy Parker's summary judgment motion. If anything, the Circuit Court should have granted summary judgment to Bealer's estate, or held that it had no jurisdiction to alter Bealer's Florida estate plan and dismissed the action entirely.

#### I. THE FOUNDATION WAS VOID

Nancy Parker makes much of the fact that the IRS issued an approval letter to the Foundation. However, Parker seems to ignore the fact that the IRS "recognition" was never utilized. The tax benefits were not utilized or claimed, and the farm was taken out of the Foundation the same year it was put in.

This is much akin to getting a ticket to the dance, but never actually putting your shoes on and getting out on the floor. Can one say he has danced because he got the ticket? Here, Bealer got the ticket when he got the IRS approval.

But he never danced. He never used the Foundation for the purpose it was created, because he realized his Jay Parker-induced mistake in setting up the Foundation in the first place.

Nancy Parker has offered no evidence or expert testimony to refute the testimony of Ronald Fick, Bealer's estate planning attorney, who is a Board Certified, Wills, Trusts and Estate Lawyer in the State of Florida.<sup>3</sup> Fick has testified that the Foundation was always void:

"... under Florida law if a Trust, the execution of which is procured by a mistake - - and in this case we had a mistake because Mr. Bealer was under the mistaken impression that by putting his farm into the Foundation, that was all he was going to have to put in, nothing else, and would never have to sell any of the farm, that the Trust was void. Under Florida law if the execution of a Trust is procured by a mistake, it's void."<sup>4</sup>

Jonna Brown, who, along with Fick, was also Bealer's estate planning attorney, likewise testified that she believed the Foundation was never valid:

"I believe that the Hartford E. Bealer Foundation was never a valid Foundation." Q. "On what do you base that opinion?" A. "Based upon my knowledge of what Mr. Bealer's understanding was of the Foundation." Q. "Anything else?" A. "Based upon that this Foundation was - - the Foundation document was so inconsistent with Mr. Bealer's purposes, that it was never valid."<sup>5</sup>

Nor has Nancy Parker explained why, if the Foundation is valid, that the IRS has not raised any issues about the Foundation. The answer is simple - the estate never

---

<sup>3</sup> Fick and Brown are members of the Florida firm of Dunwody White & Landon, P.A., which has offices in Miami (Coral Gables), Naples, Palm Beach and Hobe Sound, Florida. Their practice is mostly connected with trust and estate law. Fick is a Board Certified Wills, Trusts and Estate Lawyer in the State of Florida, and has been certified since 1988. To become Board certified, an attorney must take an examination, have a substantial involvement in the practice area, obtain recommendations from several peers, and have (for re-certification) 125 CLE credits in a five year period.

<sup>4</sup> See Depo. Ronald L. Fick (April 19, 2005) 60:10-18.

<sup>5</sup> See Depo. Jonna S. Brown (April 20, 2005) 109:12-20.

used the Foundation for its tax-exempt purpose, never claimed the Foundation as a legal entity for tax purposes, because the Foundation is void.

Ronald Fick testified:

“ . . . by transferring the property in and out in the same year would not create a problem with the Internal Revenue Service . . . , and particularly where Mr. Bealer’s intent was really thwarted in that he never intended to put any additional property in. He never wanted any part of the farm sold, and it was crystal clear that he was going to have to do one of those two things. He didn’t want to do either, and so given the fact that the property was transferred in and out in the same year there was no tax benefit to Mr. Bealer, no tax benefit to the Foundation, no deductions taken by Mr. Bealer on any tax return, basically no harm, no foul.”<sup>6</sup>

Nancy Parker has not refuted these facts. At least, they should preclude summary judgment in Nancy Parker’s favor. In truth, they are the basis for this Court to grant summary judgment in Bealer’s favor.

The Foundation was void *ab initio* under Florida law<sup>7</sup> because its purposes were frustrated. Bealer was mistaken in his understanding of the five percent minimum distribution rule, and what the rule would mean to the Farm’s future, when he created the Foundation. Bealer believed, (because of Jay Parker’s advice) that the five percent minimum distribution rule did not apply to this Foundation.

West’s F.S.A. § 737.206 states: “A trust is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if so procured, but the remainder of the trust not so procured is valid if it is not invalid for other

---

<sup>6</sup> See Depo. Ronald L. Fick (April 19, 2005) 58:8-21.

<sup>7</sup> Florida law applies to this case because all relevant estate planning and Foundation documents were prepared and signed in Florida. Bealer was a Florida resident, and all relevant actions took place in Florida. It is for this reason that Defendants filed a Suggestion of Lack of Jurisdiction with the Circuit Court and requested that the Circuit Court find that it lacked jurisdiction over this case. Further, the Foundation document itself contains a provision that makes the law of Florida the “governing law” in interpreting the “validity” of the document. See Foundation document Sec. 2.6.

reasons.”

Since the term “mistake” is not defined<sup>8</sup> in the statute,<sup>9</sup> and no case has directly construed this law regarding the definition of mistake with regard to Foundations, the Court should have applied the plain and ordinary meaning of mistake under the rules of statutory construction.<sup>10</sup>

Florida Courts look to a dictionary if the Court determines that a word needs to be defined beyond normal usage<sup>11</sup>: Mistake is defined in the dictionary as

---

<sup>8</sup> This statute became effective in 1993. (There was a 2000 amendment regarding additional language in this statute that is beyond the scope of this case). The term “mistake” is not defined in the statute. Since 1993, only three cases have referred to this statute, none of which construe the term “mistake.”

<sup>9</sup> While no case since 1993 construes this statute regarding the meaning of “mistake” there are a variety of older cases involving wills that seem to indicate that mistakes in inducement are insufficient to invalidate wills, but they are inapplicable, for two reasons. *First*, those cases construe wills, not charitable Foundations created under Federal law. *Second*, in those cases, (including *Forsythe v. Spielberg*, 86 So.2d 427 (1956)), the courts are attempting to determine a testator’s intentions and whether a mistake made by a testator in his or her will should be considered. In this case, there is no doubt as to Bealer’s intentions with regard to the Farm, since he removed the Farm from the Foundation before his death. It may be reasonable for the Court to refuse to postulate on possible mistakes in inducement in a will after the testator’s death, when the testator’s intentions are not certain. It is quite another thing in this case, because we are certain of Bealer’s intentions, and he acted on those intentions before he died. The *Forsythe* cases simply do not apply here.

<sup>10</sup> Florida applies rules of statutory construction similar to those of West Virginia. In *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1, (Fla.,2004), the Court said:

“[T]he legislature is assumed to have expressed its intent through the words found in a statute.” *Zuckerman v. Alter*, 615 So.2d 661, 663 (Fla.1993). Thus, “[i]f the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended.” *Id* In other words, not only do we not need to resort to legislative history, as the dissent does, to understand this plain meaning; we cannot do so. See *Taylor Woodrow Constr. Corp. v. Burke Co.*, 606 So.2d 1154, 1155 (Fla.1992). (“The court should look to legislative history only if the court determines that a statute’s language is ambiguous.”).

*Id.* at 12 [Concurring opinion]

<sup>11</sup> Where a statute does not specifically define words of common usage, a dictionary may be consulted to ascertain the plain and ordinary meaning the Legislature intended to ascribe to the term. See *Barr v. State*, 731 So.2d 126 (Fla. 4th DCA 1999)

*State v. Darynani*, 774 So.2d 855, (Fla.App. 4 Dist., 2000).

“misunderstanding the meaning or implication of something.”<sup>12</sup>

Under that definition, Bealer made a “mistake” because he “misunderstood the meaning or implication” of whether the five percent minimum distribution rule applied to the Foundation – and, under the statute, his mistake made the Foundation void *ab initio*. This means that the Farm was never effectively transferred into the void Foundation. Bealer was therefore under no prohibition that would prevent him from removing the Farm from the Foundation, since the transfer to the Foundation was always void. Self dealing is impossible under these circumstances.

**II. THE REPEALED LAW CITED BY NANCY PARKER, SECTION 737.206 OF THE FLORIDA STATUTES, IS NOT COMPLETELY EXPLAINED IN HER BRIEF**

In the first argument of her brief, Parker claims that the mistake Bealer made was limited to the execution of the document, and that this Court is without power to act because, she claims, Florida law limits the court’s power to reform an instrument to mistakes made in the execution of a document.

Then, Parker argues, it does not matter what the statute says about execution, since there is no remedy under the statute anyway because the entire section has been repealed effective July 1, 2007, and that, “when the statute is repealed, the right or remedy created by that statute falls with it.”<sup>13</sup>

In effect, Parker urges this Court to reject the Florida law regarding mistake that the estate cites in its opening brief because the statute will be repealed effective July 1, 2007.

---

<sup>12</sup> See Websters’ Ninth New Collegiate Dictionary, 761 (Frederick C. Mish ed. Merriam Webster 1991)

<sup>13</sup> Citing *Yaffee v. Int’l Co.*, 80 So. 2d 910, 912 (Fla. 1955)

But, what Parker has not informed this Court is that the statute was not merely repealed, it seems to have been replaced – and replaced by a statute that is favorable to Bealer’s position.<sup>14</sup> The new statute replaces the court’s statutory ability to reform a trust for a fraud or mistake in its execution with the court’s statutory ability to reform a trust for a fraud or mistake in its creation. The new statute reads:

A trust is void if the creation of the trust is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if procured by such means, but the remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons.

West’s F.S.A. § 736.0406

So while the former statute gives the court power to reform a trust for a mistake in its execution, the new statute gives the court power to reform a trust for a mistake in its creation.

The estate has maintained all along that the Court could reform the Foundation because of Bealer’s mistake if the Court applies the law as it currently exists. The new law, if anything, explains the intent of the former statute and broadens the Court’s powers and completely destroys Nancy Parker’s argument.<sup>15</sup>

The application of the principles contained in the new statute agrees with the

---

<sup>14</sup> See Fla. Stat. § 736.0406, Legislative Action Added by Laws 2006, c. 2006-217, § 4, eff. July 1, 2007. See also 55A Fla Jur 2d Trusts Section 51

<sup>15</sup> If this Court believes the new statute applies, then it should consider the following section of the new statute, which gives the Court the power to reform a trust:

Fla. St § 736.0415. Reformation to correct mistakes.

Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor’s intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor’s intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the settlor’s original intent, the court may consider evidence relevant to the settlor’s intent even though the evidence contradicts an apparent plain meaning of the trust instrument.

estate's argument, although they are not necessary for the estate to prevail on this case.

Even if the Court wanted to apply the old statute<sup>16</sup>, the enactment of the new statute makes the legislature's intent clear – they intended the statute to be a broad application to protect people from all manner of fraud and mistake in the creation of trust documents. The Court should, even if it applies the former statute, recognize that the law allows the Court to reform an instrument for mistake, and hold that Bealer made a mistake in the execution of the document, and allow the farm to remain in the estate.

Neither is Parker's argument regarding Fla. Statute 737.4031 persuasive.<sup>17</sup> Her argument is based on the Court decisions in other states, not in Florida. Further, the Court's power to reform is not limited to that statute.

Restatement principles support the concept that Bealer's actions were a mistake. The Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 (2003) states that:<sup>18</sup>

§ 8.3 - Undue Influence, Duress, Or Fraud

(a) A donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud.

(b) A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the

---

<sup>16</sup> Arguably, the former statute could apply because the relevant acts were taken while it was effective.

<sup>17</sup> The Court should note that Nancy Parker's sister, Sally Kirchero, was a co-trustee until the Circuit Court removed her as part of the series of rulings that led to this appeal. It is not persuasive for Nancy Parker to argue that Sally Kirchero has no standing to make an argument under Fla. Statute 737.4031 because she is not a trustee, when that entire issue is wrapped up in this appeal.

<sup>18</sup> The comment of this restatement (property) says that the creation of a trust is within the province of the Restatement of Trusts. However, the Restatement of Trusts says that "A transfer in trust or declaration of trust can be set aside, or the terms of a trust can be reformed, upon the same grounds as those upon which a transfer of property not in trust can be set aside or reformed." Restatement (Third) of Trusts § 12 (2003). This section would then seem to apply to the instant case. At least one Florida appellate court has cited the Restatement Third of Trusts for the legal principles contained therein. See *Key v. Trattmann*, 2007 WL 1517827, \*2 (Fla.App. 1 Dist., 2007) (not yet released for publication) citing Restatement (Third) of Trusts § 7 cmt. c (2003)

donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.

(c) A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.

(d) A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.

### REST 3d PROP-WDT § 8.3

The comment to subsection (d) states that

Comment on Subsection (d)--Fraud:

j. Fraud. A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.

Failure to disclose a material fact does not constitute fraud unless the alleged wrongdoer was in a confidential relationship with the donor.

k. Innocent or negligent misrepresentation. An innocent or negligent misrepresentation is not fraud. To constitute fraud, the wrongdoer must knowingly or recklessly make a false representation about a material fact. An innocent or negligent misrepresentation regarding a material fact can, however, lead the donor to make a donative transfer that the donor would not otherwise have made. In such a case, the donative transfer has been induced by mistake, and should be remedied accordingly. See § 6.1, Comment o; § 6.2, Comment z; § 6.3, Comment p; § 12.1 and Comments f and i.

Based on Comment k. of the Restatement principles, then, even if Jay Parker's representations were entirely innocent, and Nancy Parker's argument is correct that the transfer to the Foundation was a donative transfer, then the resultant donative transfer was "induced by mistake." The Court should therefore honor Bealer's intentions and reverse the Circuit Court.

**III. PARKER'S CLAIM THAT THE FOUNDATION COULD MEET THE FIVE PERCENT RULE BY GRANTING CONSERVATION EASEMENTS IS ILLUSORY**

Nancy Parker's claim that Bealer could have satisfied the five percent rule by granting a "conservation easement" is illusory. The costs were prohibitive, at least as for as the matter was explored. Nancy Ailes and her husband, George Constantz, submitted affidavits that stated that Bealer considered donating portions of the Farm to their conservation group, but the group required substantial funding to accept the Farm.<sup>19</sup>

Jay Parker also testified that he and Bealer met with Nancy Ailes and her husband, George Constantz in 1992 or 1993. Parker testified that Bealer decided not to pursue donating the farm to Ailes and Constantz's group because they requested an endowment of \$250,000 to operate the Farm. Parker said that Bealer was "not a bit interested" after the endowment was mentioned.<sup>20</sup>

Further, Nancy Parker's argument also leaves out the important fact that Bealer did not believe the easements were necessary because Jay Parker had made Bealer believe that the five percent rule could be avoided. Also, Parker's argument does not resolve how the five percent rule would be satisfied each year after the easements were granted.

The argument that Bealer had an option to satisfy the five percent rule with conservation easements is therefore illusory, and should be rejected by this Court.

---

<sup>19</sup> See affidavits attached to Bealer's opening Brief as Exhibits T and U. The affidavits specifically reference George Constantz sending a letter to Bealer telling Bealer that the conservation group would need an endowment to be able to accept the property, after which the deal fell through. Parker also discussed certain easements with another group Ailes worked with but the easements were never made.

<sup>20</sup> See Ellis Parker's Deposition, Page 37:23-39:1-6, attached as Exhibit A.

#### IV. PARKER RAISES MATERIAL DISPUTED FACTS REGARDING THE CONCEPT OF MISTAKE

Parker's argument itself illustrates the disputed facts that existed in the case below. For example, Nancy Parker alleges that based on the fact that Bealer signed an *inter vivos* trust instrument, signed a deed of conveyance, was well educated, knowledgeable, a respected banker with two law degrees, and even changed the name of the document from "Trust" to "Foundation" "leaves no room to argue that Bealer executed the trust instrument by mistake."<sup>21</sup>

What Nancy Parker fails to state is that Bealer signed the trust instrument and the deed of conveyance believing that the Foundation was exempt from the five percent rule. Bealer made a mistake in his understanding of the application of the five percent rule, since he believed Jay Parker's assurance that Parker would be able to exempt the Foundation from the five percent rule. This is a mistake because he believed he was signing a document that would produce one result, instead, he got something else.

For example, Nancy Parker alleges on page 10 of her brief (by citing U.S. Trust attorney Kiziah's testimony), that Bealer fully appreciated the consequences of the IRS contributonal requirement, and therefore there can be no mistake. Nancy Parker, however, avoided including Kiziah's testimony which immediately followed the portion Nancy Parker cited in her brief:

Q. but he was under the impression, as you understand it, that that five percent distributional requirement did not apply to the Millrace property?

A. That's correct.

Q. Why did he not think it applied?

A. It was my understanding that Mr. Parker advised him that it did not apply or that it was not to be of concern.

<sup>21</sup> See Appellee's brief page 9 -10.

Kiziah's Deposition, Page 133:3-10

Attorney Kiziah further testified:

Q. What knowledge or facts does U.S. Trust have to support an allegation that Nancy Parker and her husband actively procured the creation of the Foundation with material misrepresentation to Harford Bealer?

A. It's my understanding that Mr. Parker advised Mr. Bealer that the five percent distribution did not apply, and that was the misrepresentation.

Kiziah's Deposition, Page 134:9-16

Attorney Fick's deposition also supports the concept that Bealer made a mistake, believing Jay Parker's representation that the Foundation could avoid the five percent rule:

Q. And how did you relay that information to him?

A. We told him that we had done the research, and that we were now more certain than ever that there was no way around the five percent distribution rule, and that was it.

Q. Did he have any comment or response?

A. Yes, ma'am. He said that Jay had already worked this out. He thanked us for the research, but he said that this is Jay's baby, and that was actual word he used, "This is Jay's baby. Let's let him run with it."

Fick's Deposition, Page 45:7-18

Bealer's mistake is further confirmed in Attorney Fick's deposition:

Q. So verbally during your second meeting he told you that he wanted a charitable Foundation?

A. Yes.

Q. And the language which is written on this document which bears the date of April 4, 2000, is inconsistent with that request?

A. It didn't comport because what he said he wanted to do was to place this property into the charitable Foundation that we would prepare, and the only thing in the charitable Foundation would be this property. That immediately triggered in our minds a problem with the Internal Revenue Code section that deals with the five percent payout that Foundations are required to meet annually, and so when he said, "I'd like

to put this property into this Foundation," and then he's talking about distributions to charity of funds, it just didn't make any sense, and we told him it didn't make any sense.

Q. What was his response?

A. He said that his son-in-law, Jay Parker, is a tax lawyer, and that Jay Parker had already worked this out with the Cincinnati office of the Internal Revenue Service and with the State of West Virginia, and that the Foundation would not be subject to the same five percent rule that normal charitable Foundations are.

Q. Were those the words he used, or is that how you summarized what he said?

A. Those are more or less the words he used.

Q. So he seemed fully knowledgeable and understanding that a five percent distributional requirement was in place with private Foundations?

A. He seemed ---- no. He seemed fully knowledgeable that his son-in-law was going to take care of anything to do with the Internal Revenue Service, including this five percent distribution requirement.

Q. Is it fair to state then that he knew there was a five percent distributional requirement required in those circumstances for private Foundations?

A. Well, we told him there was.

Q. And you were led to believe that he thought there may be a way around that, is that what I'm hearing you say?

A. He told us that Jay Parker, his tax attorney son-in-law, had a way around the five percent distribution rule.

Fick's Deposition, Page 42:2 - Page 43:25

The essence of these facts is that Bealer made a mistake. If Nancy Parker disputes them, and this Court does not believe that they are so clearly in the estate's favor that this Court is willing to grant summary judgment to the estate, then, at a minimum, the facts need to be tried before a trier of fact and not summarily dismissed.

Nancy Parker also alleges that the reason Bealer removed the real property from the Foundation was because he "simply changed his mind."<sup>22</sup> Appellant bases this allegation on the content of the November 30, 2000 letter removing Parker as Trustee:

"Enclosed herewith please find a duplicate original of Removal of Trustee executed by Mr. Bealer. Mr. Bealer has decided to purpose

---

<sup>22</sup> Appellee's Brief p. 15.

another course of action with the West Virginia Property. He appreciates all of your assistance to date.

As a result of your removal, Mr. Bealer directs that you take no further action on behalf of the Hartford E. Bealer Foundation." The content of the letter offers no reason why Bealer determined to propose another course of action.

Bealer did not "change his mind" regarding the real property. From the outset, Bealer's sole reason to create the Foundation was to protect his West Virginia farm. His mind was always set on that one objective. Because of Jay Parker, he saw the Foundation as a vehicle to achieve that goal and take him where he wanted to go. It is like a person wanting to travel to Miami who boards an airplane because someone told him that the airplane was going to Miami. Once aboard, the person realizes that the airplane will actually be going to Chicago, and, before the airplane leaves, gets off the airplane to switch planes.

That person would have made a mistake. Like Bealer, he corrected the mistake before the airplane took off. Bealer did the same thing. When he realized he had made a mistake in creating the Foundation, and that the Foundation was the wrong vehicle to get him where he wanted to go, he took the Farm out of the Foundation. As Bealer's Florida attorney Ron Fick said "given the fact that the property was transferred in and out in the same year there was no tax benefit to Mr. Bealer, no tax benefit to the Foundation, no deductions taken by Mr. Bealer on any tax return, basically no harm, no foul." See FN-5 above.

Bealer believed, based on Jay Parker's assurances, the farm could be protected by placing it in the Foundation. He also believed that the Foundation would be exempt from the five percent distributional requirement. When, after waiting for over five

months, Jay Parker could not provide any evidence that the Foundation would be exempt from the five percent rule, and realizing that he had to take action to protect the farm prior to January 1, 2001, Bealer removed the farm, for the sole purpose of protecting the property.

The sole reason Bealer removed the property from the Foundation was to protect the farm. This was the sole reason for creating the Foundation, and this was the sole reason for removing the farm from the Foundation. It is because Bealer refused to change his mind regarding the destination or goal he wanted to achieve that he removed the farm from the Foundation - not because he changed his mind.

Also, there is no evidence to support Parker's wild speculation as to why Bealer removed her husband Jay Parker as trustee. The evidence goes against the speculation - Parker "went dark" after advising Bealer that Parker could get around the five percent rule. When Bealer could not get answers from Parker, he removed Parker as Trustee and removed the farm from the Foundation.

There is also no evidence to support Parker's wild speculation as to why Bealer used different counsel when he deeded the property back to himself out of the Foundation - it is just as easy to speculate that the former attorney was too busy, on vacation, or out of town. In any event, it is of no consequence because the Florida attorneys were in control of the issue as they worked out Bealer's estate plan, not the West Virginia attorneys.

---

Taken as a whole, there are material facts here that preclude summary judgment, or, in the alternative, call for summary judgment in the estate's favor.

**V. NANCY PARKER SHOULD NOT BE ALLOWED TO PROFIT FROM HER HUSBAND'S MISINFORMING MR. BEALER REGARDING THE FIVE PERCENT RULE**

Nancy Parker claims that she has "nothing personal to gain."<sup>23</sup>

The entire reason we are here is because Nancy Parker's husband, Jay, promised Bealer that he could get around the five percent rule. Jay Parker's wrong information caused Bealer's mistake in placing the farm into the Foundation.

Now, Nancy Parker is using her husband's action – an action that caused Bealer's mistake – to benefit her by giving her control over her father's farm. This should not be allowed.

Further, Nancy may well have some personal things to gain. For one, the estate has a hierarchy of gifts to make under Bealer's will and testamentary trusts, many of which may lapse because of the severe depletion of resources the lawsuits and other matters have made on the estate. Nancy and her sister are the first two devisees under the trust. Stated another way, Nancy and her sister's gifts will lapse last. However, if the farm is removed from the estate, Nancy may well succeed in blocking her sister's inheritance, since the farm (probably worth well over a million dollars) will not be available to satisfy the gifts under the estate plan – that is, not available for gifts to her sister or her under the estate, but remaining under Nancy's control in the Foundation.

So, by keeping the farm out of the estate and under her control in the Foundation, Nancy may gain an advantage over her sister by blocking or diminishing her sister's inheritance. Nancy Parker should not be allowed to have this advantage over her sister since the reason for the advantage was caused by her husband's action.

Even if she does not block her sister from her inheritance, she may block her

<sup>23</sup> Appellee's Brief, p. 4

sister's daughter (who was given the farm in a specific bequest) from receiving the farm.

Nancy Parker has nothing personal to gain – except control of the farm through her position as trustee, and potentially depriving other persons in the estate from their inheritance. Whether these things amount to Nancy Parker potentially “gaining” here is a question for the Court. But this Court should not allow Nancy Parker to use her husband's actions as a stepping stone to gain control over the farm.

**VI. THE COURT DID NOT ENGAGE IN THE ANALYSIS REQUIRED TO SET ASIDE A DEED**

The Circuit Court did not make any effective analysis under West Virginia law to enable it to set aside a deed, especially in view of the West Virginia cases' complaint alleging undue influence. (See *Proudfoot v. Proudfoot*, 214 W.Va. 841, 591 S.E.2d 767 (2003) stating that a deed would not be set aside for incapacity, undue influence, or fraud except for a clear finding of “one or more of these facts by the evidence” ) *Id.*

Nancy Parker's complaint here in West Virginia contains allegations of undue influence. Apparently, Nancy Parker has not abandoned that position, since her appellate brief states that allegations of undue influence are indeed pending. (See Parker's Brief, p. 4)

The Circuit Court should have analyzed the *Proudfoot* factors before it set aside the deed removing the farm from the Foundation.

**VII. THE COURT WAS WITHOUT JURISDICTION TO ALTER BEALER'S ESTATE PLAN OR PROCEED WITHOUT THE ANCILLARY ADMINISTRATOR**

The Court's decision below had the effect of altering Bealer's testamentary disposition of his Farm by taking the Farm out of his estate plan and putting it back into

the Foundation. This Court has held:

In this state equity has no general jurisdiction, nor jurisdiction given by statute, to set aside a will and the probate thereof, for alleged fraud in the procurement thereof, of one domiciled in another state, duly probated there, and subsequently duly admitted to probate in this state.

*Woofter v. Matz*, 71 W.Va. 63, 76 S.E. 131, (W.Va. 1912)

While *Woofter* is dealing specifically with fraud in the procurement of a will,<sup>24</sup> the principle remains the same, that is, the Courts of this state are not to interfere with the operation of the probate courts in another state.

Since Bealer was using the Foundation as an estate planning tool, and then, subsequent to removing the Farm from the Foundation, gave the farm in an estate related gift to his granddaughter, the Circuit Court's ruling has the effect of interfering with the probate proceedings in Florida. The Circuit Court lacks jurisdiction to interfere with those proceedings and this Court should overturn the Circuit Court's decision.

Also, the Circuit Court did not join the ancillary administrator as a party, thereby failing to consider that the ancillary administrator, as representative of the estate, has an "interest in the real property at issue" within the meaning of *O'Daniels*. The Court's Order, in the absence of the ancillary administrator, is void, and consequently, the court below lacks jurisdiction to make a decision as to the title of the Farm.<sup>25</sup>

---

<sup>24</sup> The analogy is actually fairly direct because the case below contains at least one count in the complaint that alleges fraud on the part of Kathleen Stone in obtaining the property by convincing Bealer to remove the Farm from the Foundation and placing it in his estate plan.

"Prior to and at the time of the alleged making and execution of the Deed of December 11, 2000, the Deceased was wrongfully manipulated and convinced to remove the real estate from the Foundation by Kathleen K. Stone and to allow Kathleen K. Stone to handle most, if not virtually all, of the Deceased's affairs relating to the real estate." See ¶55 of the Complaint.

<sup>25</sup> This Court has held that:

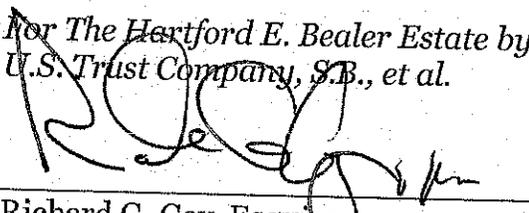
"[I]ack of jurisdiction of the subject matter may be raised in any appropriate manner ... and at any time during the pendency of the suit or action." . . . . As to the

## VIII. CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Circuit Court's grant of Plaintiff Nancy Parker's Motion for Summary Judgment and order the Farm to be placed into Bealer's Estate.

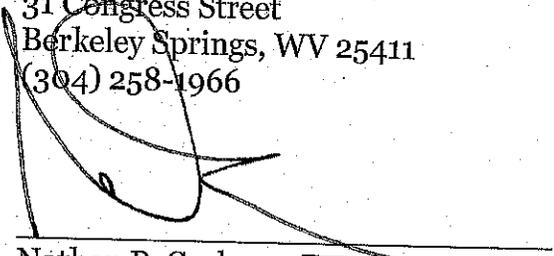
Respectfully submitted,  
The Estate of Hartford E. Bealer, et al.  
Appellants / Defendants Below, by Counsel.

For The Hartford E. Bealer Estate by  
U.S. Trust Company, S.B., et al.



---

Richard G. Gay, Esquire  
WV Bar ID No. 1358  
Law Office of Richard Gay, LC  
31 Congress Street  
Berkeley Springs, WV 25411  
(304) 258-1966

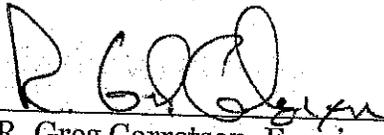


---

Nathan P. Cochran, Esquire  
WV Bar ID No. 6142  
Law Office of Richard Gay, LC  
31 Congress Street  
Berkeley Springs, WV 25411  
(304) 258-1966

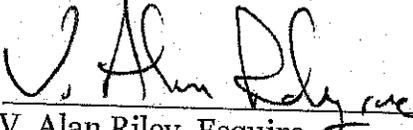
---

appropriate manner by which the lack of subject matter jurisdiction is raised, we have said that "[l]ack of jurisdiction may be raised for the first time in this court, when it appears on the face of the bill and proceedings, and it may be taken notice of by this court on its own motion." . . . ("This Court, on its own motion, will take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein."); . . . The urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void. . . ."  
*State ex rel. TermNet Merchant Services, Inc. v. Jordan*, 217 W.Va. 696, 700, 619 S.E.2d 209, 213 (W.Va., 2005) (citations omitted)



R. Greg Garretson, Esquire  
WV Bar ID No. 6222  
Law Office of Richard Gay, LC  
31 Congress Street  
Berkeley Springs, WV 25411  
(304) 258-1966

*For Sally Kirchiro Trustee  
and Kathleen K. Stone*



V. Alan Riley, Esquire  
Attorney at Law, PLLC  
68 East Main Street  
Romney, WV 26757  
(304) 822-7003

1 Q. That's fine.

2 A. Yes.

3 Q. Have you ever visited the farm?

4 A. Yes.

5 Q. How many times have you visited it?

6 A. I have no idea. I have been married to my  
7 wife for nearly 20 years and we visited  
8 Mr. Bealer at the farm.

9 Q. Do you have any idea how often that you  
10 would go visit Mr. Bealer in a year?

11 A. No, I have no idea how many times.

12 Whenever he wanted to come up here -- he  
13 lost his drivers license in Maryland. And  
14 I drove him around wherever he wanted to  
15 go, whatever he wanted to do.

16 He loved West Virginia and he loved his  
17 farm. So oftentimes I drove him here and  
18 left him here. He had a guy that lived on  
19 the farm who could manage him here. And  
20 I'd gone on many occasions to drive him up  
21 here and left him and came back and picked  
22 him up when he wanted to.

23 Q. Did there ever come a time when you  
24 discussed placing that farm in any type of

1 charitable foundation or trust with  
2 Mr. Bealer?

3 A. Yes.

4 Q. When was the first time that you discussed  
5 that?

6 A. Five years before Mr. Bealer got sick.

7 Q. What was the substance of your  
8 conversation?

9 A. He told me that there was a guy that had  
10 talked to him, I don't remember his name,  
11 but I remember his wife's name. His wife's  
12 name was Nancy Ails from High View, West  
13 Virginia, that he wanted Mr. Bealer to give  
14 the farm to a school of which this man  
15 Ails, would run it.

16 Q. Was Mr. Bealer disposed to do that? Did he  
17 want to do that?

18 A. He was until they wanted him to give  
19 \$250,000. And thereafter he was not a bit  
20 interested.

21 Q. So he was okay with the concept as long as  
22 it was just a farm but when it came to be  
23 more he didn't go through with it; is that  
24 what you're telling me?

1 A. No, I didn't say that. Mr. Ails, according  
2 to what I remember Mr. Bealer saying, he  
3 wanted him not only to give him the farm  
4 but he wanted him to give him \$250,000 in  
5 addition to the farm so that he could do  
6 whatever it was that he was doing.

7 I don't remember what he did but they  
8 did something to the Cacapon River.

9 Q. So that was about five years before the  
10 Bealer Foundation was formed, do you  
11 believe?

12 MS. BITTORF: Objection; mischaracterization of  
13 testimony and lack of foundation.

14 BY MR. COCHRAN:

15 Q. I believe that you said it was five years  
16 before he got sick or before?

17 A. You asked if he ever discussed it with me  
18 and I said yes. In fact, he took me up to  
19 meet this man, that's how I know where he  
20 lives. He took me up to meet the man.

21 The man was very excited about  
22 preserving the river. And that's basically  
23 what it is. Then he told me that he wasn't  
24 about to give \$250,000 to Mr. Ails to run

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE ESTATE OF HARTFORD E. BEALER, BY  
U.S. TRUST COMPANY OF FLORIDA, S.B.,  
As Executor of the Estate of Hartford E. Bealer and  
U.S. TRUST COMPANY OF FLORIDA, S.B., as  
Trustee of the Hartford E. Bealer Amended and  
Restated Declaration of Trust, SALLY KIRCHIRO,  
Trustee, and KATHLEEN STONE,

Appellants / Defendants Below,

v.

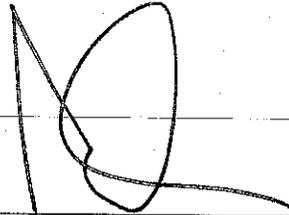
DOCKET NO. 33339

NANCY B. PARKER, TRUSTEE OF THE  
HARTFORD E. BEALER FOUNDATION,

Appellee / Plaintiff Below.

CERTIFICATE OF SERVICE

I, Richard G. Gay, Esquire and/or Nathan P. Cochran, Esquire, counsel for Appellants, The Estate of Hartford E. Bealer, et al., do hereby certify that a true copy of the foregoing **APPELLANTS' REPLY BRIEF** and **CERTIFICATE OF SERVICE** was served upon Tammy M. McWilliams, Esquire, at Trump & Trump, 307 Rock Cliff Drive, Martinsburg, West Virginia 25401 by United States, first-class mail, postage prepaid, this 26 day of June, 2007.



Richard G. Gay, Esquire  
Nathan P. Cochran, Esquire  
R. Greg Garretson, Esquire