

Before the Supreme Court of Appeals of West Virginia

Docket No. 34738.

LOIS ARNOLD,

Plaintiff,

vs.

DAVID G. PALMER, Trustee, CHRISTINA J. PALMER, Trustee, ADVANTAGE BANK, an Ohio corporation, and JEFFREY SCOTT ARNOLD, Executor of the Last Will and Testament of Jeffrey A. Arnold, Deceased,

Defendants.

* * *

ADVANTAGE BANK,

Appellant,

vs.

LOIS ARNOLD, DAVID G. PALMER, Trustee, CHRISTINA J. PALMER, Trustee, JEFFREY SCOTT ARNOLD, Executor of the Last Will and Testament of Jeffrey A. Arnold, Deceased, JEFFREY SCOTT ARNOLD, Individually, SAMANTHA NICOLE FOGGIN, MELISSA ANN DAILEY and KELLI BETH ARNOLD,

Appellees

BRIEF OF APPELLEE LOIS ARNOLD

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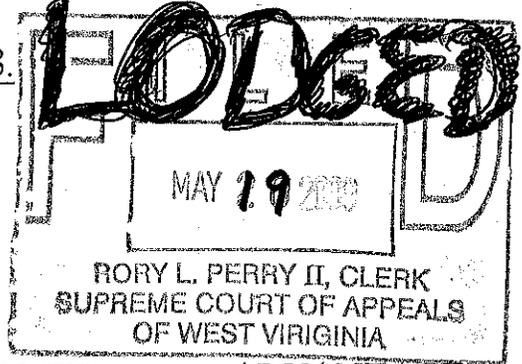


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ADVANTAGE BANK,

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Trustee, CHRISTINA J. PALMER, Trustee,
JEFFREY SCOTT ARNOLD, Executor of the
Last Will and Testament of Jeffrey A. Arnold,
Deceased, JEFFREY SCOTT ARNOLD,
Individually, SAMANTHA NICOLE
FOGGIN, MELISSA ANN DAILEY and
KELLI BETH ARNOLD,

Appellees

BRIEF OF APPELLEE LOIS ARNOLD

TO THE HONORABLE BRENT D. BENJAMIN, CHIEF JUSTICE, AND THE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

And again comes the Appellee LOIS ARNOLD, by RICHARD A. HAYHURST, her counsel, and submits her brief in opposition to the BRIEF OF APPELLANT (the "Appellant's brief") and the AMICI CURIAE BRIEF ON BEHALF OF THE WEST VIRGINIA BANKERS ASSOCIATION, INC., AND THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC. (the "Amici brief") heretofore filed herein.

I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This is an appeal from a final order of the Circuit Court of Wood County, West Virginia, finding that the Appellant, Advantage Bank, is not entitled to foreclose on a deed of trust signed by Jeffrey A. Arnold, now deceased, ("Mr. Arnold") during his lifetime, and Lois Arnold ("Mrs. Arnold") to secure repayment of a debt owed by Mr. Arnold separately, when Advantage Bank had not filed a proof of claim against Mr. Arnold's estate or attempted to collect the debt from that estate.

II. STATEMENT OF THE FACTS.

Appellant, Advantage Bank, lent money to Mr. Arnold during his lifetime and took a deed of trust lien against the marital home, titled to Mr. and Mrs. Arnold in joint tenancy with right of survivorship, which the Arnolds had owned for approximately five years. Mr. Arnold alone was obligated on the note. Mr. and Mrs. Arnold were married for about 20 years and Mr. Arnold was a public accountant and conducted a number of other businesses. Mr. Arnold

died testate and directed his fiduciary to pay all his debts as soon after his death as possible, but the fiduciary stopped paying the mortgage loan on Mrs. Arnold's residence.

Pursuant to *W. Va. Code* §44-2-26, a "claims-bar" date of June 9, 2009, was fixed for the filing of proofs of claim against Mr. Arnold's estate and notice was duly published by the fiduciary commissioner. By letter dated April 13, 2007, the Appellant was advised that Mrs. Arnold would not be assuming her late husband's debt and that the Appellant should file a proof of claim against Mr. Arnold's estate. Notwithstanding almost two months of actual notice, the Appellant failed, refused or neglected to file a timely proof of claim and now seeks to relieve itself of the consequences of its inaction by foreclosing on the widow's home. She is entitled to have that home free and clear of her late husband's separate indebtedness by virtue of the joint-tenancy provisions of her deed and the direction to Mr. Arnold's fiduciary in his will first to satisfy all debts he owed at the time of his death.

Otherwise, the averments of fact by the Appellant in its brief are generally correct, except in two places. On pages 2 and 4, the Appellant contends that Mrs. Arnold "did not respond" to the Appellant's motion for summary judgment. Mrs. Arnold filed no brief in opposition to the Appellant's motion but appeared at the *ore tenus* hearing on said motion and presented the Court with points and authorities, based on the record, why the Appellant's motion for summary judgment was not well founded and should be denied. There is no requirement of law to file a brief in opposition to any motion¹ nor is there any requirement of law for a party opposing summary judgment to file any counteraffidavits or other materials in opposition

¹ *W. Va. R. Civ. P.* 6(d)(2) governs when responses to a motion shall be served and filed but does not by its own terms require a written brief or memorandum in opposition to any given motion.

thereto² if the motion and motion papers fail to show that the moving party is entitled to judgment as a matter of law. It is not sufficient a basis for an award of summary judgment that the facts be uncontested---the movant must be entitled to the judgment as a matter of law. It is a tautology to suggest that a movant is entitled to judgment as a matter of law simply because there is no genuine issue of material fact. The second prong of *W. Va.R. Civ.P.* 56(c) requires that the party seeking summary judgment be entitled to that judgment as a matter of law---i.e., that prevailing law supports the request for relief. See, for example, Syll.Pts. 5 and 6, *Employers' Liability Assurance Corporation vs. Hartford Accident and Indemnity Company*, 151 W.Va. 1062, 158 S.E.2d 212 (1967)³; *Calvert vs. West Virginia Legal Services Plan, Inc.*, 464 F.Supp. 789 (S.D.W.Va., 1979).

² *W. Va.R. Civ.P.* 56(c) says, in pertinent part, "The adverse party prior to the day of hearing may serve opposing affidavits." [Emphasis added] See *State ex rel. Michael A. P. vs. Miller, J.*, 207 W.Va. 114, 118-9, 529 S.E.2d 324, 358-9 (2000): "The word 'may' generally signifies permission and connotes discretion." *State v. Hedrick*, 204 W.Va. 547, 552, 514 S.E.2d 397, 402 (1999) (citations omitted). See also *Powers v. Union Drilling, Inc.*, 194 W.Va. 782, 786, 461 S.E.2d 844, 848 (1995) (stating "[t]he legislators' choice of the term 'may' ... was intended to operate in a discretionary, rather than an obligatory, manner"); *Weimer-Godwin v. Board of Educ. of Upshur County*, 179 W.Va. 423, 427, 369 S.E.2d 726, 730 (1988) ("The word 'may' generally should be read as conferring both permission and power."); *Hodge v. Ginsberg*, 172 W.Va. 17, 22, 303 S.E.2d 245, 250 (1983)"

³ Syll.Pts. 5 and 6 of *Employers' Liability Assurance Corporation vs. Hartford Accident and Indemnity Company* provide as follows:

5. Upon a hearing on a motion of one of the parties for summary judgment, after due notice, when it is found that there is no genuine issue as to any material fact and that the adverse party is entitled to judgment as a matter of law, the failure of such party to file a motion for summary judgment does not preclude the entry of such judgment in his favor.

6. When it is found from the pleadings, depositions and admissions on file, and the affidavits of any party, in a summary judgment proceeding under Rule 56 of the West Virginia Rules of Civil Procedure, that a party who has moved for summary judgment in his favor is not entitled to such judgment and that there is no genuine issue as to any material fact, a summary judgment may be rendered against such party in such proceeding.

In explaining these syllabus points, this Court said, *id.* at 1077-8, 158 S.E.2d at 220-1, as follows:

It is well established that since the purpose of the summary judgment proceeding is to expedite the disposition of the case, a summary judgment may be rendered against the party moving for judgment and in favor of the opposing party even though such party has made no cross-motion for judgment. 3 Barron and Holtzoff, *Federal Practice and Procedure*, Chapter 11, Section 1239, page 178; *Roberts v. Fuquay-Varina Tobacco Board of Trade, Inc.*, E.D.N.C., 223 F.Supp. 212; *American Automobile Insurance Company v. Indemnity Insurance Company of North America*, E.D.C.Pa., 108 F.Supp. 221, affirmed 3 Cir., 228 F.2d 622; *Northland Greyhound Lines v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1150*, D.C.Minn., 66 F.Supp. 431; *Local 33, International Hod Carriers*

The Amici brief contains a host of supposed "facts" that were not before the trial court and should thus be disregarded by this Court. *See Barney vs. Auvil*, 195 W.Va. 733, 741-2, 466 S.E.2d 801, 809-10 (1995):

Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered. *Whitlow v. Bd. of Educ. of Kanawha County*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993); *Shrewsbury v. Humphrey*, 183 W.Va. 291, 395 S.E.2d 535 (1990); *Cline v. Roark*, 179 W.Va. 482, 370 S.E.2d 138 (1988).

The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we have the benefit of its wisdom.

Whitlow v. Bd. of Educ. of Kanawha County, 190 W.Va. at 226, 438 S.E.2d at 18.

Building and Common Laborers' Union of America v. Mason Tenders District Council of Greater New York, 2d cir., 291 F.2d 496; *Proctor and Gamble Independent Union of Port Ivory, New York, v. Proctor and Gamble Manufacturing Company*, 2d cir., 312 F.2d 181, certiorari denied, 374 U.S. 830, 83 S.Ct. 1872, 10 L.Ed.2d 1053; *Walters v. Dunlap*, W.D.C.Pa., 250 F.Supp. 76; *Carpineta v. Shields*, Fla., 70 So.2d 573, 48 A.L.R.2d 1185. In the opinion in the *Carpineta* case the Supreme Court of Florida said: "* * * there can be no sound reason why, when one party has moved for a summary judgment, the court, in the absence of a timely and meritorious objection, cannot dispose of the whole matter by granting a judgment to either party if it finds that the facts as properly construed against the prevailing party show that he is entitled to a summary final judgment as a matter of law, even though it may be better practice to file a cross-motion."

An obvious reason for permitting the entry of summary judgment, without motion or cross-motion by the adverse party when it appears that he, instead of the moving party, is entitled to such judgment is the avoidance of the delay and hardship which would result from withholding such judgment until formal motion should be made or reopening or remanding the proceeding solely for that purpose and subsequently entering such judgment upon such delayed formal motion. In such instance a formal motion is clearly neither necessary nor desirable and courts do not look with favor upon or require such futile and unwarranted procedure.

Without waiver of Mrs. Arnold's objections to the consideration of any such "fact," it may be necessary to comment on some of the supposed "facts" herein.

Other relevant facts may be referred to in the body of the argument as needed.

III. ASSIGNMENTS OF ERROR AND MANNER DECIDED IN LOWER TRIBUNAL.

The Appellant frames the issue as whether the trial court erroneously denied the Appellant's motion for summary judgment. It frames its argument in four subparts, to-wit:

- A. It contends that the trial court erred in finding that the failure of the Appellant to file a proof of claim against Mr. Arnold's estate inhibits the enforcement of a deed of trust.
- B. It contends that the trial court's ruling contradicts well-settled West Virginia real estate law.
- C. It contends that the trial court failed to enforce the plain terms of the deed of trust.
- D. It contends (anew in this Court without raising the issue in the trial court) that the Appellant could not lawfully have required Mrs. Arnold to become a party to Mr. Arnold's note.

All of the foregoing issues were resolved against the Appellant at the trial court level, except issue D, which was raised anew in this Court and not presented to or, *a fortiori*, considered by the trial court.

The real issue in this case is whether a bank can lend money to the income-earning spouse, take jointly-held property as collateral, fail or neglect to file and prosecute a

proof of claim against the estate of the income-earning spouse after death and then foreclose on the residence of the non-obligated surviving spouse to make up for its neglect in prosecuting a timely claim against its debtor's estate. Mrs. Arnold submits that the proper resolution of the issue is: "No."

III. STANDARD OF REVIEW.

The standard of review for the award of a permanent injunction via the vehicle of summary judgment is set out in *State By and Through McGraw vs. Imperial Marketing*, 203 W.Va. 203, 209, 506 S.E.2d 799, 805 (1998), as follows:

In *Weaver v. Ritchie*, 197 W.Va. 690, 693, 478 S.E.2d 363, 366 (1996), this Court set forth the following *a priori* standard of review with regard to permanent injunctions: "In reviewing challenges to the findings and conclusions of the trial court, we apply a two-pronged deferential standard of review with the final order and ultimate disposition (granting of the permanent injunction) reviewed under an abuse of discretion standard, and the underlying factual findings under a clearly erroneous standard." *See also*, syl. pt. I, *G Corp, Inc. v. MackJo, Inc.*, 195 W.Va. 752, 466 S.E.2d 820 (1995).

In *Pritt vs. Republican National Committee*, 210 W.Va. 446, 451, 557 S.E.2d 853, 858 (2001), this Court articulated the standard of review of orders granting summary judgment as follows:

We typically apply a plenary review to an order of a circuit court deciding a summary judgment motion. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. I, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Also involved in this proceeding are numerous legal questions, the resolution of which is integral to the summary judgment ruling. In this regard, we likewise review anew a lower tribunal's determination of questions of law. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we

apply a *de novo* standard of review.” Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

This general rule is enriched by this Court’s holding in *Payne vs. Weston*, 195 W.Va. 502, 506, 466 S.E.2d 161, 165 (1995), where it held that summary judgment is not a remedy to be exercised at the circuit court’s option—it must be granted when there is no genuine dispute over a material fact and one of the litigants is entitled to judgment as a matter of law.

Finally, this jurisdiction is an “any basis” jurisdiction—*i.e.*, this Court may affirm the rulings of the trial court if the ruling is correct, regardless the basis on which the trial court made its ruling. *See*, for example, *Wilkinson vs. Searls*, 155 W.Va. 475, 481, 184 S.E.2d 735, 740 (1971):

It is well settled, nevertheless, that when a case is before this Court on appeal, it makes no difference upon what ground the trial court based its judgment, because always the question on appeal is whether the judgment being reviewed is correct. *State ex rel. Dandy v. Thompson*, 148 W.Va. 263, pt. 5 syl., 134 S.E.2d 730.

V. ARGUMENT.

A. The award of injunctive relief was plainly right and not an abuse of discretion.

The decision of the Supreme Court of Appeals of West Virginia in *Dobbins vs. Cunningham*, 217 W.Va. 580, 618 S.E.2d 589 (2005)(*per curiam*, and unanimous) seems to be largely dispositive of the issues raised by the petitioner herein.

In *Dobbins vs. Cunningham*, the parties acquired 83.45 acres of land in Braxton County, West Virginia, in 1991, as joint tenants with right of survivorship and not as tenants in common, as is the case with Mr. and Mrs. Arnold in the instant case. In 2001, they borrowed

money from the Bank of Gassaway to settle outstanding debts. Mr. Dobbins signed the note and both parties signed a deed of trust to secure the Bank of Gassaway in the repayment of Mr. Dobbins's note, as was the circumstance in the instant case. In 2003, the parties' relationship "soured." A partition suit followed and the issue in the partition suit was whether Ms. Cunningham's interest in the jointly owned real estate was subject to Mr. Dobbins's debt.

In resolving the matter, the Supreme Court did not publish a new syllabus point or refer to a syllabus from an earlier case dealing with the real property issue but did state, *id.* at 582-3, 618 S.E.2d at 591-2, as follows:

The equities in this case weigh in the appellant's favor. Prior to the partition action, the appellant had a home, a half-interest in an 83.45-acre tract of land, and believed that she had a half-interest in a successful logging business. Now, the appellant stands homeless, landless, and without a steady source of income. These circumstances suggest that the appellant was not unjustly enriched as reasoned by the circuit court.

* * *

In the instant case, the appellant did not sign the promissory note in question and did not agree to be responsible for the \$65,000.00 loan secured by the note. The circuit court nevertheless held that the appellant could be held "personally liable on the [promissory] note. . . even though [she] did not sign the negotiable instrument given to evidence the debt." Because the appellant did not sign the promissory note, we find that the circuit court erred as a matter of law in holding the appellant responsible for any of the debt owed on the promissory note.

Since Mrs. Arnold did not sign the promissory note, likewise she cannot be held liable for the payment of the promissory note and the note cannot be enforced against her. *See,*

also, *W. Va. Code* §46-3-401(a).⁴ The effect of allowing the Appellant to foreclose, however, is to make Mrs. Arnold indirectly liable for her late husband's separate debt, even though she cannot be held directly liable for it—at the pain of losing her home.

In the instant case, the Appellant knew when it made the loan to Mr. Arnold that his interest in the real estate was as a joint tenant and that should he die before the other joint tenant, his interest in the collateral disappears by operation of law—by virtue of the words of purchase in the deed creating the joint tenancy. It knew, therefore, that should Mr. Arnold die first, the property held in joint tenancy passed to the surviving joint tenant free and clear of claims against the first joint tenant to die. See Fisher, J., *Creditors of a Joint Tenant: Is There a Lien after Death?* 99 *W. Va. L. Rev.* 637 (1997). Thus, it took its collateral position *vis-à-vis* the jointly held property *cum onere* and thus the risk that the interest of its debtor in said real estate might be extinguished by operation of law should he die (as he did) before Mrs. Arnold.

Although the trial court did not express itself in quite this way,⁵ it is clear that it carefully weighed the competing interests of the Appellant and of Mrs. Arnold and found that the equities in the case clearly and substantially favored Mrs. Arnold and disfavored the Appellant. Some of those concerns were as follows:

⁴ *W. Va. Code* §46-3-401(a) provides as follows:

A person is not liable on an instrument unless (i) the person signed the instrument or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under section 3-402.

⁵ The West Virginia Supreme Court of Appeals is not limited to the trial court's reasoning in order to sustain its actions. It may employ any basis in law disclosed by the record to sustain the result. See Syllabus point 3, *Barnett vs. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment."). See, also, *Hustead ex rel. Adkins vs. Ashland Oil, Inc.*, 186 W. Va. 590, 475 S.E.2d 55 (1996); *State ex rel. Vernatter v. Warden*, 207 W. Va. 11, 528 S.E.2d 207 (1999).

a. The Appellant had both legal⁶ and actual notice of the circumstance that Mr. Arnold, and Mr. Arnold alone, was liable to the Appellant on the note secured by the deed of trust.

b. The Appellant had both legal and actual notice that Mrs. Arnold was not liable for and did not intend to pay the note out of her own assets.

c. The Appellant had both legal and actual notice that Mr. Arnold's estate was directed in his will to pay his just debts as soon as possible after his death.

d. The Appellant had both legal and actual notice of the claims-bar date fixed by the Fiduciary Commissioner nearly two months before that date and chose not to file a timely proof of claim against Mr. Arnold's estate.⁷

e. The Appellant had legal notice of the provisions of *W. Va. Code* §44-2-26, which provided that if the Appellant failed to file a timely proof of claim, it could still recover against the estate if there is a surplus remain after providing for all claims presented in due time, but only if he had no actual knowledge of the publication to creditors or knowledge of the proceedings before the Fiduciary Commissioner. Since the Appellant had actual knowledge of the proceedings before the Fiduciary Commissioner and actual knowledge of the publication to creditors by virtue of the letter from Mrs. Arnold's counsel to the Appellant dated April 23, 2007, it has waived its right to participate in any surplus.

⁶ The term "legal" notice or "legal" knowledge refers to the principle that everyone is presumed to know the law. See *Griffin vs. Fairmont Coal Company*, 59 W.Va. 480, 53 S.E. 24, 37 (1905) (subsequently criticized, distinguished and limited on other grounds); *State vs. McCoy*, 107 W.Va. 163, 148 S.E. 127, 130 (1929)

⁷ It should also be noted that the Appellant did not file a timely answer to the process served on it herein, from which it may be concluded that it was neither diligent in protecting its interests against Mr. Arnold's estate nor diligent in protecting whatever interests, if any, it had in Mrs. Arnold's home.

f. The Appellant had legal notice of the provisions of *W.Va.Code* §44-2-27, which allows a creditor to follow any assets of an estate distributed to the heirs and beneficiaries for a period of two years following such distribution, but only to the extent that any assets are distributed to them. See *Fitzwater vs. Dawson*, 159 W.Va. 659, 226 S.E.2d 45 (1976).

g. Allowing the Appellant to foreclose on Mrs. Arnold's home before the settlement of Mr. Arnold's estate and ascertainment whether there is a surplus on which its untimely claim might operate is inequitable and unjust.

h. Mrs. Arnold's right to protection of her home in circumstances similar to these violates the nearly national public policy of "widespread reluctance to allow the creditors of one spouse to sell the family house to satisfy debts." See *Harris vs. Crowder*, 174 W.Va. 83, 87, 322 S.E.2d 854, 858, 51 A.L.R.4th 893 (1984), where the Court said, *id.* at 89-91, 322 S.E.2d at 860-1, as follows:

We are not disposed, therefore, to allow the inexorable logic of property law to be entirely dispositive of the issue before us. When a creditor seeks to sell a family's home to satisfy the debts of one spouse alone, a whole new dimension is given to the equitable provision in our partition statute that excludes partition when prejudice occurs to another tenant. When, for example, a modest, jointly-owned house has an unassignable \$75,000 mortgage at 8 percent and would sell on today's market for \$100,000, how is the wife to be compensated for the loss of her contract right to a low interest mortgage? Under such circumstances partition of the family home would be like partition of a table: when we partition a table we do not emerge with two small tables; we emerge with two useless pieces of junk!

Nonetheless, we hold that creditors of one joint tenant may reach that joint tenant's interest and force partition either in kind or by sale, but only if "the interest of the other person or persons so entitled will not be prejudiced thereby." *W.Va.Code*, 37-4-3 [1957]; See also *Consolidated Gas Supply Corp. v. Riley*, 161 W.Va. 782, 247 S.E.2d

712 (1978). Obviously, the interest of a non-debtor spouse in jointly-held property can never be reached by the creditors of the other spouse.

* * *

The equitable considerations that should instruct a circuit court's determination of when forced partition of a joint tenancy is equitable are too varied to be addressed in the abstract here. Certainly, however, the favored treatment that sound public policy would extend to family houses need not necessarily be extended to jointly owned business property. There should be a fairly strong presumption that business property may be reached in a creditor's suit. Similarly, both the size and the nature of joint holdings must be taken into consideration. Finally, it is an ancient maxim of equity that those who seek equity must be willing to do equity. Of course, there is a limit to this obligation: creditors cannot demand the life's blood of an innocent spouse.

Even though *Harris vs. Crowder* was a partition suit, nonetheless the same principles should be applicable in this context when weighing the equities of the parties, and there is no question that the trial court not only did not abuse its discretion in granting an injunction against foreclosure under the unique facts of this case but honored its obligation properly to weigh the equities of the parties under existing West Virginia law.

B. W.Va.Code §44-2-28 does not provide relief for the Appellant.

The Appellant cites *W.Va.Code* §44-2-28 for the proposition that "no deed of trust, created by a decedent in his lifetime, shall be barred because the decedent's creditor fails to present a claim against the decedent's estate." BRIEF OF APPELLANT at 7. This is a mischaracterization of the scheme set out in *W.Va.Code* §§44-2-26, -27 and -28,⁸ which provide

⁸ §44-2-26. When claims not presented and proved barred of recovery from personal representative. Every person including the state tax commissioner, having a claim against a deceased person, whether due or not, who has not, after notice to creditors has been published as prescribed in this article, presented his claim on or before the time fixed in such notice, or before that time has not instituted a civil action or suit

mechanism for handling the circumstance presented here by the Appellant—how to deal with a creditor who doesn't protect himself by filing a proof of claim, and which should be read *in pari materia*.⁹ A fair reading of these three Code sections indicates that (a) a creditor must file his proof of claim in timely fashion in order to be paid from the assets of the estate; (b) a creditor who doesn't file a timely proof of claim may, to the extent of any surplus left over after the costs of administration and any allowed claims are paid, be paid from the estate or may follow any

thereon, shall, notwithstanding the same be not barred by some other statute of limitations that is applicable thereto, be barred from recovering such claim of or from the personal representative, or from thereafter setting off the same against the personal representative in any action or suit whatever; except that if a surplus remain after providing for all claims presented in due time, or on which action or suit shall have been commenced in due time, and such surplus shall not have been distributed by the personal representative to the beneficiaries of the estate, and the claimant prove that he had no actual notice of the publication to creditors nor knowledge of any proceedings before the fiduciary commissioner, such creditor may prove his claim by action or suit and have the same allowed out of such surplus; and, in order that such late claims if proved may be provided for, the fiduciary commissioner shall reopen his report if the same has not been returned to the county commission, or if returned, shall make and return a supplemental report: *Provided*, That, as to real estate, the provisions of subsection (b), section one of this article shall apply.

§44-2-27. When distributees and legatees may be sued on claims; extent of liability; costs.

(a) Every creditor who has not presented his claim to the fiduciary commissioner before distribution of the surplus by the personal representative, or before that time has not instituted a civil action or suit thereon against the personal representative, may, if not barred by limitation, bring a civil action against the distributees and legatees, jointly or severally, at any time within two years after such distribution. But no distributee or legatee shall be required to pay to creditors suing by virtue of this section a greater sum than the value of what was received by him out of the decedent's estate, nor shall any distributee or legatee be required to pay to any one creditor a greater proportion of such creditor's debt than the value of what was received by such distributee or legatee bears to the total estate distributed. A creditor suing by virtue of this section shall not recover against such distributees and legatees the costs of his civil action.

(b) Any creditor of a deceased person upon whose estate there is no administration pursuant to subsection (b), section one of this article, may, if not barred by limitation, bring a civil action against the sole beneficiary at any time within two years after recordation of the appraisal.

§44-2-28. When enforcement of lien to secure claim barred.

When the right to bring action or suit against distributees and legatees on any claim against the decedent shall become barred, the right to enforce such claim against real estate shall also become barred to the extent that such claim could have been collected out of the personal assets of decedent. The provisions of this section shall not apply to liens upon real property acquired or created in the lifetime of decedent, made or created to secure claims due and payable in future installments or at a future date.

⁹ "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syllabus Point 3, *Smith vs. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975). See, also, *Mangus vs. Ashley*, 199 W.Va. 651, 487 S.E.2d 309 (1997).

distributed funds to the distributees within two years of distribution. While *W.Va.Code* §44-2-28 provides that ordinarily a creditor cannot recover from the distributees any sum of money it could have collected through the estate by the filing of a proper proof of claim (and such potential recovery is to be set off from any recovery from distributees), the *setoff* contemplated by this Code section is not applicable to a secured creditor where security is given by the debtor during his lifetime. What the Code section *does not say* is that the deed of trust creditor is permitted to foreclose to collect the secured debt notwithstanding its failure to file a timely proof of claim. The Appellant's reading of *W.Va.Code* §44-2-28 to say that "a deed of trust (being a lien created within the decedent's lifetime to secure claims due and payable in future installments) is never barred under Chapter 44 but is preserved despite a creditor's inability to enforce its underlying debt"¹⁰ is a substantial overread of the applicable Code provisions. Finally, nothing in *W.Va.Code* §44-2-28 even remotely touches on the question answered by the trial court—should the creditor who slept on its rights and did not pursue its remedy with the decedent's estate, be allowed, as a matter of equity, to foreclose upon and eject the innocent widow from her home.

C. A deed of trust may retain its vitality after the secured debt becomes unenforceable by virtue of the statute of limitations, but that does not automatically mean that equity will permit foreclosure thereon.

In Section B. i., of the BRIEF OF APPELLANT, the Appellant cites a series of cases that hold, correctly, that the lien of a deed of trust survives the expiration of the statute of limitations on the underlying secured note. This principle is consistent with the circumstance that the statute of limitations on a promissory note may be as short as six years, *see W.Va.Code* §46-3-118, while the statute of limitations on enforcement of a deed of trust may be as long as

¹⁰ BRIEF OF APPELLANT at 8 [Emphasis in original].

thirty-five years (assuming the deed of trust was entered into on or after May 5, 1921), see *W.Va.Code* §55-2-5. All the cases cited by the Appellant deal with this singular proposition and none deal with the equitable issue presented to the trial court—should the deed of trust trustees be permitted, as a matter of equity, to foreclose under the unique circumstances presented by this case—on behalf of a creditor who slept on its rights and did not enforce its debt against the decedent's estate but seeks to deprive the non-obligated widow of her home. Thus, none of these cases are in any way apposite.

D. Federal Reserve Regulation B was not before the trial court and cannot now be interposed as grounds for reversal of the trial court's order.

This Court has made it perfectly clear that it will not consider on appeal arguments not raised in the trial court. See, for example, *Bailey vs. Norfolk and Western Railway Company*, 206 W.Va. 654, 676, 527 S.E.2d 516, 538 (1999)(Davis, concurring, in part, and dissenting, in part), as follows:

See Kronjaeger v. Buckeye Union Ins. Co., 200 W.Va. 570, 585, 490 S.E.2d 657, 672 (1997) (“We frequently have held that issues which do not relate to jurisdictional matters and which have not been raised before the circuit court will not be considered for the first time on appeal to this Court.”); Syl. pt. 2, *Trent v. Cook*, 198 W.Va. 601, 482 S.E.2d 218 (1996) (“[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.”); *Barney v. Auvil*, 195 W.Va. 733, 741, 466 S.E.2d 801, 809 (1995) (“Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered.”); *Whitlow v. Board of Educ. of Kanawha County*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) (“Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal.”); *Michigan Nat'l Bank v. Mattingly*, 158 W.Va. 621, 626, 212 S.E.2d 754, 757-58 (1975) (“[T]his Court will

not consider nonjurisdictional questions not acted upon by the trial court.”); Syl. pt. 4, *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 157 W.Va. 93, 199 S.E.2d 308 (1973) (“This Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.”); *Konchesky v. S.J. Groves & Sons Co., Inc.*, 148 W.Va. 411, 414, 135 S.E.2d 299, 302 (1964) (“[I]t has always been necessary for a party to object or except in some manner to the ruling of a trial court, in order to give said court an opportunity to rule on such objection before this Court will consider such matter on appeal.”). FNI

^{FNI} We have explained this limited scope of review thusly. The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we have the benefit of its wisdom. *Whitlow v. Board of Educ. of Kanawha County*, 190 W.Va. at 226, 438 S.E.2d at 18.

Nowhere in the record is there even the remotest suggestion that the applicability of Federal Reserve Regulation B, 12 *C.F.R.* §202.7, was submitted for the consideration of the trial court. Thus, the applicability, *vel non*, of Federal Reserve Regulation B is not properly before this Court on appeal and the Appellant's and Amici's arguments grounded on that regulation should be disregarded.

E. Assuming, *arguendo*, that Federal Reserve Regulation B is properly before this Court, it is immaterial to the issues under review.

Federal Reserve Regulation B deals with equal credit opportunity and was designed to prevent lenders from routinely requiring one spouse to obligate himself or herself to the lender if the borrowing spouse otherwise met the lender's creditworthiness criteria and to

prevent discrimination in lending based on marital status, to carry out the provisions of the Equal Credit Opportunity Act, 15 *U.S.C.* §1691, to eradicate discrimination in lending especially against married women. See, for example, *Riggs National Bank of Washington, D.C. vs. Lynch*, 829 F.Supp. 163 (E.D.Va., 1993), *aff'd* 36 F.3d 370 (4th Cir., 1993); *Diamond vs. Union Bank and Trust of Bartlesville*, 776 F.Supp. 542 (N.D.Okla., 1991).

Nothing in Federal Reserve Regulation B or in the Equal Credit Opportunity Act deals with the question whether a lender granting a loan to a married man on the basis of his own credit should be allowed to sleep on its rights and not enforce its debt against the man's decedent estate but thereafter foreclose on the non-obligated widow's home when she had been promised in her late husband's will a home free and clear of his debts. The issue is simply a matter of balancing of equities and the trial court came to the right balance.

F. Amici's argument about the putatively catastrophic effect of sustaining the trial court's decision is not properly before the Court and, in any event, unavailing.

Amici curiæ present to this Court, without first allowing the trial court to have the benefit of the argument or putative facts underlying the argument, that real estate lending in West Virginia will either come to a halt or be in violation of federal law if the trial court's ruling is sustained. To support their position, they represent that they conscripted several banks in West Virginia with the following question:

Please identify whether (and if possible the total number of loans) your institution currently has loans secured by a deed of trust that is signed by both spouses or joint tenants, but where only one spouse or joint tenant signs the promissory note.

Amici brief, at 2.

Amici report that 22 [of their 47 bank members and 63 associate members] responded and 95% of those 22 [presumably 21] who responded said that they had “at least one loan which would be negatively impacted if this Court were to uphold the Trial Court’s ruling.”
Id.

Unfortunately for their position, the Amici did not ask a relevant question. The question that might have proven illuminating would be how many of the banks had loans to one spouse only, collateralized by a deed of trust on jointly titled property, where the lender did not file a timely proof of claim against the borrower’s estate, the borrower spouse’s estate did not or could not pay the secured indebtedness, the borrower’s will provided that the non-obligated spouse would receive the collateral property free of the borrower’s indebtedness and the lender then attempted to foreclose on the widow’s non-probate home to remedy the consequences of the lender’s failure to pursue the borrower’s estate. Unfortunately, the results of that question are not before either the trial court or this Court.

The Amici also argue, Amici brief at 11-12, that enforcement of the trial court’s ruling would “punish banks for compliance with federal law and would require write-down of assets” and “would adversely affect borrowers in West Virginia.” All of this argument is utterly speculative. The trial court’s ruling merely requires secured lenders who do not have both property owners obligated on the secured debt to exercise at least some degree of vigilance to pursue remedies against the borrower’s estate. The exercise of such vigilance would not have required the Appellant, or any bank, to violate federal law—just make an informed risk decision when making a loan to one of more than one realty owners, secured by the realty, that the borrower may die before the note is paid and that the estate of the borrower may not be

borrower may die before the note is paid and that the estate of the borrower may not be forthcoming with debt retirement for whatever reason. There is no reason in the record to believe that this combined risk is anything more than negligible.

As previously noted, this Court will not consider matters *dehors* the record made in the trial court. Nor will it consider matters *dehors* the record when such matters are utterly speculative. See *Harrison vs. Harman*, 80 W.Va. 68, 92 S.E. 460 (1917); *State vs. McCauley*, 130 W.Va. 401, 43 S.E.2d 454 (1947); *State vs. Bosley*, 159 W.Va. 67, 72, 218 S.E.2d 894, 897 (1975)¹¹; *Gibson v. Little General Stores, Inc.*, 221 W.Va. 360, 655 S.E.2d 106 (2007); Syl.Pt. 1, *Oates vs. Continental Insurance Company*, 137 W.Va. 501, 72 S.E.2d 886 (1952); *Lacy vs. CSX Transportation, Inc.*, 205 W.Va. 630, 642, 520 S.E.2d 418, 430 (1999){“Consequently, arguments that amount to “nothing more than speculation and conjecture ... [are] properly excluded” *Gardner v. CSX Transp., Inc.*, 201 W.Va. 490, 502, 498 S.E.2d 473, 485 (1997).}

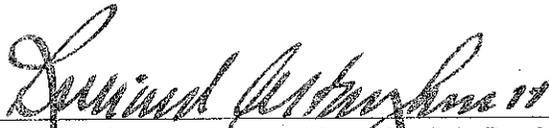
This case represents a situation where a lender slept on its rights and neglected, or decided not, to participate in the probate process involving its sole debtor and has further elected not to abide the probate process to determine whether there is a surplus in the Estate to cover its debt, and has been enjoined from foreclosing on a deed of trust under what is very likely to be a very rare set of circumstances. The trial court struck the correct balance—it held that the Bank, having acted so negligently or erroneously, cannot have “the life’s blood of an

¹¹ “As stated in *State v. McCauley*, 130 W.Va. 401, 43 S.E.2d 454 (1947), ‘We do not consider matters *Dehors* the record.’ See *Hartman v. Corpening*, 116 W.Va. 31, 178 S.E. 430 (1935), wherein the Court said ‘On error, the appellate review of a ruling below is limited to the very record made there.’ In *State v. Comstock*, 137 W.Va. 152, 70 S.E.2d 648 (1952), the Court held, in Syllabus 9, ‘Under West Virginia Constitution, Article VIII, Section 5, when a judgment or decree is reversed or affirmed by this Court, the Court will not consider and decide a point which does not fairly arise upon the record *73 of the case.’ See also 1B M.J. Appeal and Error, s 189 Et seq. The remarks complained of do not appear upon the record of this case and the Court will not consider this assigned error.”

innocent spouse." *Harris vs. Crowder, supra* at 91, 322 S.E.2d at 861.

VI. CONCLUSION AND PRAYER.

For all of the foregoing reasons, this Honorable Court should affirm the decision of the trial court.

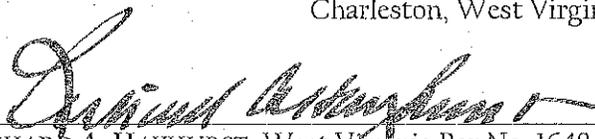


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Certificate of Service

Pursuant to *W. Va. R. App. P.* 15(b), the undersigned counsel for the Appellee LOIS ARNOLD hereby certifies that on the 19th day of May, 2009, he served the foregoing and hereto-appended BRIEF OF APPELLEE LOIS ARNOLD on the other parties hereto by depositing true copies thereof in the facilities of the United States Postal Service, regular first-class postage prepaid, in envelopes addressed to their counsel of record when appearing by counsel and upon the party *pro se* when not appearing by counsel, at the addresses thereof, respectively, last known to the undersigned, to-wit:

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Appellees David G. Palmer, Trustee, and Christina J. Palmer, Trustee	David G. Palmer, Esquire, Palmer & Titus Law Offices, Post Office Box 1625, Parkersburg, West Virginia 26102-1625.
Appellee Jeffrey Scott Arnold, as Executor of the Last Will and Testament of Jeffrey A. Arnold, deceased.	Robert L. Bays, Esquire, Paul L. Hicks, Esquire, Bowles Rice McDavid Graff & Love, PLLC, Post Office Box 49, Parkersburg, West Virginia 26102-0049.
Appellee Jeffrey Scott Arnold, Individually	Jeffrey Scott Arnold, 2003 Murdoch Avenue, Parkersburg, West Virginia 26101.
Appellee Samantha Nicholle Foggin	Samantha Nicholle Foggin, 329 Short Run Road, Belleville, West Virginia 26133.
Appellee Melissa Ann Dailey	Melissa Ann Dailey, 26 High Circle Road, Washington, West Virginia 26181.
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