

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**ELLA J. MONTGOMERY and
MARGARET C. BOWERS,
PLAINTIFFS BELOW,**

Appellees,

v.

No. 35126

**WILLIAM H. CALLISON, JR., AND
CECIL G. CALLISON,
DEFENDANTS BELOW,**

Appellants.

APPELLANTS' REPLY BRIEF

Appellants herein and defendants below, submit the following reply brief in support of their request for reversal of the judgment below as reflected in the final order entered herein by the Circuit Court of Greenbrier County.

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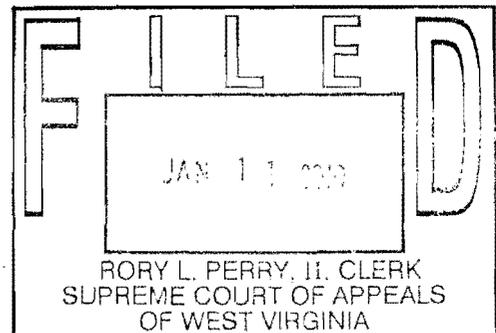


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APPELLANTS' REPLY BRIEF

Appellants discussion of the issues raised was fully addressed with references to the record in the initial brief herein. Here appellants address only the omissions and misstatements in the Response Brief.

WAIVER of R.C.P. 50(b)

For the first time, appellees claim that a waiver of objections to the sufficiency of the evidence addressed below to support the verdict because no motion at the conclusion of all the evidence was made. The record discloses that a motion for directed verdict was made at the conclusion of the appellees case below (as plaintiffs there). A protracted argument was had and the court ruled in favor of appellees. Appellants put on a single non-party witness in defense. That sole witness gave testimony as to his relationship with both the decedent, William H. Callison, Sr. (called "Senior" in the appellants' brief) and William H. Callison, Jr., (again, called "Junior" in that brief) as well as the other appellant, Cecil G. Callison ("Cecil" therein). While the testimony of this witness (Mr. Long) was probative, it did not directly extend to the delivery of deeds in question.

The only other witness called by appellants was a recall of Junior to examine him about his father's exercise of control over the safe deposit box from its opening in 1977 until his death – a subject specifically allowed by the Dead Man's rulings rendered in the in limine hearing. That effort at compliance was not successful and the court repeatedly ruled the subject barred. Then appellees' counsel immediately called Junior as a rebuttal witness before he could

even leave the stand. No opportunity to suggest the defendants “rested” or not. A protracted examination followed about the keys to the safe deposit box – the very subject of counsel’s previous Dead Man’s objection – punctuated by references to a deposition.

The evidence closed. The court reporter then shows (page 61 of August 22, 2007 proceedings) that “(Informal colloquy and lunch recess 10:36 - 1:45).” During this period jury instructions were argued, amended, resubmitted and settled. Also, a motion for directed verdict was certainly made repeating for the record that the grounds were the same as previously argued.¹ Undersigned counsel as an officer of the court and co-counsel assert that as a fact. (Exhibit 1)

The intense argument about jury instructions was reflected in appellants’ motion to set aside the verdict.

No claim of waiver was ever advanced at the hearing on that motion. Counsel for appellees raised it for the first time here citing Chambers v. Smith, 15 W. Va. 77, 198 S. E. 2d 806 (1973). Any trial lawyer and veteran circuit judge was and is aware of that case.

While its sanctions appear severe, its thrust was mitigated by Cline v. Joy Manufacturing Co., 172 W. Va. L769, 310 S. E. 2d 835 (1983) where this court recognized the Chambers ruling but went on to hold: “However, the defendant in his motion for a new trial did assign as a ground that ‘the evidence was insufficient to support the verdict.’ While the trial court overruled the motion for a new trial, we are not foreclosed from reviewing this issue under Syllabus Point 4 of Sanders v. Georgia-Pacific Corp., 159 W. Va. 621, 225 S. E. 2d 218 (1976):

¹The record in this matter has been the subject of turmoil. At the trial court level, after the proper request had been proved, the maximum extensions were secured because the reporter did not complete the transcript. For the same reason this court granted extensions for over a year. Reasons for the delay were varied but included “typist” problems. Some omissions are made including instruction arguments and even the citation of Junior as a witness in his case in chief.

‘Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court’s ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or evidence.’ ”

Confirming a departure from the severity of sanctions is reflected in Navigan Consulting, Inc., v. Wilkinson, 508 F. 3d 277 (5th Cr. 2007) where the court addressed this very issue of R. C. P. 50 (b):

Generally, a party who fails to present a Rule 5(b) motion on an issue at the close of evidence waives both its right or present a Rule 50(b) motion after judgment and its right to challenge the sufficiency of the evidence on appeal. However, Rule 50(b) is construed liberally, and we may excuse “technical noncompliance” when the purposes of the rule are satisfied. “[T]he two basic purposes of this rule are ‘to enable the trial court to re-examine the question of the evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to jury.’ ” In addition, a “defendant’s objection to proposed jury instructions on grounds pertaining to the sufficiency of the evidence issues it seeks to appeal may satisfy these purposes.” (Citations omitted)

The court found that the argument on instructions served the same purpose disallowing a waiver. In that case opposing counsel had raised the issue below in the post judgment hearing – unlike the present case where this last filing is the first mention of a waiver.

Counsel asserts, again, a motion was, in fact, made. However, in any event such a

motion would have been the exact verbiage as earlier posited before two witnesses testified in defense – a “technical non-compliance” at best.

DECEDENT’S EXCLUSIVE
OWNERSHIP ON SAFE DEPOSIT BOX

One of the prime contentions of appellants is that the placing of the three deeds in the safe deposit box amounts to actual or constructive delivery to appellants. That argument is premised on the ownership and access to that box by each of the appellants.

In the Response Brief, appellees repeatedly misstate the record:

Page 7 – “Mr. Callison, on September 23, 1977, rented a safe deposit box . . . “

Page 9 – “. . . the safety deposit box owned and exclusively controlled by William H. Callison, Sr.”

Page 13 – “. . . a safe deposit box owned and exclusively controlled by William H. Callison, Sr.”

Page 16 – “William H. Callison, Sr, executed the deeds discussed herein, and put them in his own safety deposit box.”

The most pointed claim comes at page 30 where appellees’ counsel claims: “No evidence was presented that Mr. Callison, Sr., and William H. Callison, Jr., together rented a safe deposit box on September 23, 1977. The facts establish that Mr. Callison, Sr., rented the safety deposit box and added William H. Callison, Jr.’s, name to it. (See Exhibit 2 Attached).”

The adduced testimony and exhibits reveal the exact opposite. Appellees’ Exhibit

2 is the very rental agreement that displays on its face that Senior and Junior opened the box on September 23, 1977. The terms of that agreement are reflected in Appellants' Brief. Specific proprietary rights are disclosed to both persons who rented the box on September 23, 1977.

The only testimony on the subject came from William H. Callison, Jr., (Junior). On the first day of the trial, he referred specifically to the September 23, 1977 rental in an exchange (page 180):

"Q. Your dad and you both signed that?

A. Yes

Q. At that time when you rented - - you and your dad rented that box, did the bank issue you some key? (Emphasis mine)

A. Yes, sir, keys, two keys."

On the second day of trial, he testified:

"Q. Okay. In 1977 when you went down there, there were not three deeds but two deeds from you and the 1968 and the 1973 deed to the Robinson home place, your dad and you opened that box up?

A. Yes.

Q. You're in a position to know that, Sir?

A. Yes."

In his argument to the jury, appellees' counsel (page 72 second day's transcript) refers to Senior as being "one of the lessors" of the box. He stated "we would readily admit that from the very beginning that Billy Callison's (Junior's) name was also on the deposit box" (page 73 Emphasis mine).

The evidence of the joint leasing of the box on September 23, 1977 was not controverted and acknowledged until this Response Brief.

Furthermore, the testimony of Junior that he and his father added Cecil to the Box is not controverted. But more telling on the issue of delivery intent is the unchallenged testimony that on the very day Cecil's name was added to the safe deposit box, his father delivered his only key to him. Senior is never shown to have visited the box after that date – September 19, 1995.

Thus the exclusive ability to access the box was with William H. Callison, Jr., and Cecil Callison for a year and five months before Senior's death. And upon opening the box, there were the deeds that he had given to his sons by denying himself any access and giving them total unrestrained access.

All the visits to the box, when appellees claim he could have changed the deeds, or destroyed them did not come to pass. In compliance with their father's wishes, the deeds were recorded.

GENE TURNER

Of the errors assigned, the barring of appellants' witness Gene Turner is prominent. Response Brief simply repeats appellees version of the history of this exclusion. No explanation is possible for the court's decision. Gene Turner was a named witness going to the very heart of the issues – the intent of appellants' parents in causing the deeds to be drafted, signing them and providing for their security. Two days after discovering that the order authored by appellees' counsel did not include Gene Turner, he was added by appellants' counsel. Of course, opposing counsel would not agree to this amendment allowing the trial judge to prohibit

his testimony. Gene Turner was no surprise witness, he had been deposed extensively by appellees' counsel. He was one of only two persons living witnesses who could testify as to that intent around the rulings of Dead Man's statute. This act by the trial judge was an unwarranted measure that prohibited the trial jury from hearing crucial testimony as to the wishes of these two deceased parents.

VANE WARNER

The proffered corrections to Vane Warner's deposition were dismissed by the court below at appellees' insistence although accomplished according to the requisites of the applicable rules. Response Brief claims repeatedly that appellees' counsel was prevented from a renewed examination and that Mr. Warner's inability to be re-examined was not contested. Not correct.

It was appellees' counsel who, upon receiving the corrections, contacted Mr. Warner's wife. He supposedly received information from her that his disposition was such as to prevent any further testimony. No notice was given appellants' counsel; no motion was filed; no deposition was noticed; no medical or personal reason was ever advanced for the failure to explore this revised testimony. The trial court agreed with appellees' counsel fully and prevented the testimony.

QUESTIONS of DECEDENT'S

BEHAVIOR

On page 15 of the Response Brief, counsel raises issues in speculation as to

decedent's behavior. "Why else" would decedent have included the realty in his will? Had counsel not been successful in having the court below exclude crucial testimony, the answer would have been available. William H. Callison, Sr., had a rich estate in which only a part was the realty. He has bequeathed serious funds to his two daughters, appellees. On the very day that he signed his will, May 11, 1984, he also signed the deed to the Taylor property to Cecil. The same lawyer drafted both documents. The "common sense" appellees invoke clearly would show an intention of excluding that property from a testamentary document.

Then appellees gave great credence to the boiler plate residuary clause in the codicil. It was signed on September 7, 1984 and altered the original will by taking away a specific gift to appellee Ella Montgomery and placing her in the residuary clause. The reason is clear. On the same day, September 7, 1984, Senior made a gift of \$60,000.00 to appellee Ella Montgomery by purchasing the realty for her where she resides. That transaction resulted in a gift tax return executed by Senior.

Unless William H. Callison, Sr., was somehow addicted to paying lawyers for useless legal work, the answer to appellees' counsel is clear. Senior did his own estate planning. He balanced his assets among his children according to the needs he perceived. That included deeding the three parcels of realty to those who occupied and/or worked the property. It was done by signing deeds to affect that desire. He did so. His intentions have been thwarted by the conduct and result of this case.

DEATH MAN'S STATUTE

The Response Brief cites the same holding as appellants brief Meadows v.

Meadows, 196 W. Va. 56, 468 S. E. 2d 309 (1996). However, appellants focus on the expansion of the term “transaction” to include observations of the otherwise disqualified witness as to what was seen as well as the finding that the statute should be strictly construed. As an example, the testimony of Junior was barred as to his parents displaying an executed deed to him in 1968. This was held to be a “business transaction” far afield from parents providing a gift to a son. This court surely will look at Meadows and determine which side prevails in applying the new rules to the facts here.

WAIVER of the DEAD MAN’S ACT

While this issue has been addressed above where appellees trial counsel asked Cecil if he ever had a key to the box. When he answered “Yes,” a stunned counsel retreated having asked a bad question. However, appellants’ counsel was able to adduce that the key had come from his father on the same day his name was added to the safe deposit box. But a recovered appellees’ counsel then began making sustained objections to any questions about when, how, why the key was given. The waiver by appellees’ question was complete but the trial court’s ruling saved disclosure to the jury the details of this simple act of relinquishing any access to the deeds securely placed by Senior in the safe deposit box he had just given full access to his second son.

The Response Brief also addresses another waiver issue. It is claimed that no testimony from the appellees on direct examination could waive the Dead Man’s Statute because the “subject properties” were never mentioned. Extending this theory of waiver to its logical conclusion, appellees could testify as to the enormous sums given them in the will an referring to

the intention of the testator about those bequests and the attitude in denying siblings without waiving the Dead Man's Statute injunction.

Instead, appellants re-assert that the simple act of calling app witnesses and questioning them about the deeds, box, estate and the other in waived the statute as held in Holland v. Joyce, 155 W. Va. 535, 185 S. E. 2c wishes of the decedent which could have been contested by direct testimony each was willing to do so under oath.

FINALLY

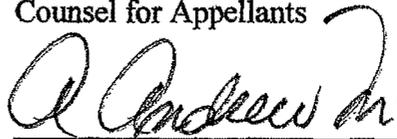
Aside from the opening of the safe deposit box with Junior a deeds in it, and the adding, with Junior, the name of Cecil to the box and ha key to access it, aside from those features, William H. Callison, Sr., made a confirmation of his intent to deliver the deeds by never removing them durin to the box before fully relinquishing any capability of doing so.

1/11/2010

DATE



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Affidavit of A. Andrew MacQueen

I, A. Andrew MacQueen, being duly sworn, hereby state as follows:

1. I am an attorney practicing law in West Virginia

2. On August 21 and 22, 2007, I acted as co-counsel with Timothy N. Barber in the trial of *Montgomery, et al. v. Callison, et al.* [Civil Action No. 98-C-31 in the Circuit Court of Greenbrier County, West Virginia], which action is currently pending on appeal before the West Virginia Supreme Court of Appeals. I am co-counsel for the appellants in the appeal

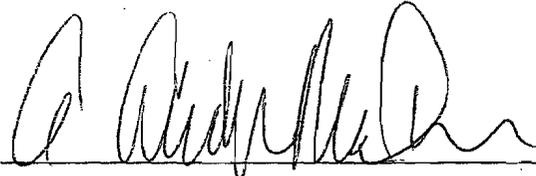
3. I am aware that the transcript of the trial of the Montgomery action does not show that a motion for directed verdict was made on behalf of the defendants/appellants at the close of the evidence in the trial.

4. It was my responsibility to argue matters relating to the jury instructions before the trial Court. The trial transcript contains none of the arguments to the Court relating to the jury instructions.

5. I specifically recall asking the trial Court to note on the record the renewal of the motion for directed verdict and the Judge's noting and overruling the motion upon the conclusion of the evidence. In addition, I specifically recall extensive arguments on behalf of both plaintiffs and defendants concerning the giving and refusal to give several instructions prior to a recess of the proceedings. During the arguments, the Judge asked that Mr. Robert Richardson (trial counsel for the plaintiffs/appellees) and I confer in an attempt to reach agreement on the language of as many of the instructions as we could. Following the recess, Mr Richardson and I informed the Court that we had been able to agree on several of the instructions but that we disagreed on the

language of one or two limited areas. It was my impression that the motion and the exchange relating to the jury instructions was on the record I believe that the absence of them in the trial transcript is a result of a failure by the court reporter.

FURTHER AFFIANT SAYETH NOT.



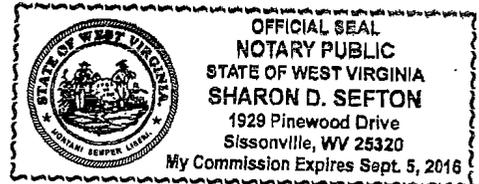
A. Andrew MacQueen

1/11/2010
Date

Taken, Subscribed and sworn to before me on this 11th day of
January, 2010



Notary Public



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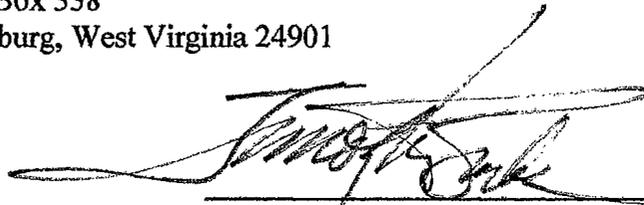
**WILLIAM H. CALLISON, JR. and
CECIL G. CALLISON,**

Appellants.

CERTIFICATE OF SERVICE

I, Timothy N. Barber, counsel for the appellants herein do hereby certify that I have served a true and exact copy of the forgoing Appellants' Reply Brief on the parties herein by faxing the same to counsel of record this 11st day of January , 2010 as follows:

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