

2013 WL 2476036 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma

Loretta M. GOODIN, an Incapacitated Person and Wade Bagwell, an Individual,
Trust and Beneficiary and Guardian of Loretta M. Goodin, Plaintiff/Appellee,
Connie Sue LOGAN, an Individual and Co-trustee of the Loretta M. Goodin Trust, Defendant/Appellant.

No. 110,878.
March 11, 2013.

Hughes County Case No: CJ-2010-21

Appellant Connie Sue Logan's Brief in Chief

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***iii Introduction**

In 2002, Loretta Goodin created a trust. Loretta amended her trust in 2007 after suffering catastrophic injuries in a car wreck. The amended trust was the last written or stated declaration of Loretta's wishes to distribute her assets- until June 21, 2012

when a misguided jury disregarded Loretta's final wishes and redistributed her assets. This case is the family dispute which resulted from the amended trust.

Loretta's daughter, Connie Logan, ("Logan") an R.N. for over 20 years, lived with and tirelessly cared for her mother 24 hours a day 7 days week, for 13 months after asking for nothing in return. Wade Bagwell, ("Bagwell") Loretta's grandson, rarely visited Loretta following the accident, but spent time selling Loretta's cattle and claiming them as his own. Loretta eventually requested to move in with Bagwell and did. Bagwell was established as Loretta guardian and then prevented contact between the mother and daughter that had been so close. Bagwell also prompted a state investigation alleging while in her care Logan **financially** took advantage of Loretta, which the State found to be meritless. Loretta lived with Wade four months before, Loretta's worst fear materialized and she was placed in a nursing home, where she died.

Upon Loretta's death, Bagwell began attacking Loretta's estate plant that was drafted by attorney Victor Pryor. Bagwell asserted Loretta lacked testamentary capacity and Logan exerted undue influence on Loretta to amend her trust and pay for Logan's home remodeling. Bagwell declined to make such allegations while Loretta was still alive, still his ward and still making other decisions that he approved. Logan counterclaimed against Bagwell for conversion of Loretta's cattle. The District Court improperly dismissed Logan's counterclaim on the eve of trial with outstanding issues of material fact pending. The District Court proceeded over Logan's objection in an ill-founded jury trial on the issues of equity i.e. Loretta's testamentary capacity and undue influence regarding the estate documents and the payment for the remodel of her home. The jury was misled and confused for an entire week of trial testimony, which resulted in a verdict against Logan.

***1** This appeal is two-fold: 1) the journal entry improperly disposing of Logan's counter-claim for conversion as there were outstanding issues of material fact; (2) appeal the jury verdict against Logan, as improper and unfounded in fact or law.

Issues

- The Court erred in dismissing Logan's counterclaim as there are numerous disputed facts that established a substantial controversy related to Bagwell's conversion of cattle owned by Loretta.
- The Court failed to follow District Court [Rule 27](#) when it took Bagwell's Motion for Summary Judgment under advisement for 253 days following the hearing. Four days prior the jury trial, the Court dismissed Logan's counterclaim, which prejudiced the prepared trial strategy. Logan was prevented from presenting basic evidence of the conduct of Bagwell related to the cattle, which would have affected the jury's view of Bagwell's motive, opportunity, believability, and ultimately the jury's verdict.
- The proceedings were irregular on the matters of testamentary capacity, undue influence and duress are equitable in nature and were improperly tried before a jury.
- Bagwell failed to present clear and convincing evidence that Loretta lacked the testamentary capacity to execute the Quit Claim Deed in April 2008 and Amended Trust in May 2008.
- Bagwell failed to meet the basic legal standards Loretta was under undue influence or duress when she executed the Quit Claim Deed in April 2008 and Amended Trust in May 2008.
- Bagwell failed to establish through evidence Loretta was under undue influence or duress when Loretta paid for the remodeling of Logan's house or that Logan breached her fiduciary duty.
- The verdict forms were in conflict with the applicable law of the State of Oklahoma.
- Bagwell impassioned the jury by intentionally misrepresenting facts and the chronology of the case intentionally to confuse the jury as evidenced by the jury note during deliberation.

*2 • Dr. McCrory was never certified as an expert witness but was treated as such. McCrory's was unable to state his opinion with a degree of medical certainty, it was allowed and the Court failed to identify or explain to the jury the necessity of medical testimony meeting the standard of any degree of medical certainty.

Statement of the Case

1. Loretta Goodin (hereafter "Loretta") had three children: Billy Bagwell, Donnie Ray Goodin and the Appellant, Connie Logan, (hereafter "Logan"). (Amended Trust, Resp. Ex. 8 p. 26.)

2. Marvin Wade Bagwell, the Appellee (hereafter "Bagwell") is the son of Billy Bagwell. Loretta was the paternal grandmother of Bagwell. (Trans. V. III, p. 112, 1. 17-25.)

3. Since the time Bagwell was in high school, he and Loretta raised cattle on the same piece of land, although they were not in a partnership together. (Trans. V. II, p. 190, 1. 13-23.) There is an unresolved dispute as to the number of cattle owned by Loretta from 2008 until 2010. Bagwell claims Loretta owned 20 head of cattle and one bull. (Trans. V. II, p. 212 1. 12-16) In contrast Loretta's last documented cattle count in late 2007 stated she independently owned 170 head of cattle (Resp. MSJ R p. 88-90) In reliance on Loretta's documentation Logan asserted that since 2008 Bagwell was converting Loretta's cattle. (Def. Object. R. p. 76-99.) Logan filed a counterclaim against Bagwell for conversion. (Answer/Counterclaim R. p. 14-18)

4. On December 22, 1995, Loretta purchased a DC Caterpillar Bulldozer (hereafter "D-6 Dozer") for her son Donnie Ray Goodin. Even though Loretta purchased the D-6 Dozer, the Bill of Sale was written out with Donnie Ray Goodin as Purchaser and the title has remained in his name. (Trans. V. II, p. 131, 1. 11-20, Bill of Sale Plf. Ex. L.)

5. On November 8, 2002 Loretta established "The Loretta M. Goodin Trust dated November 8, 2002"(hereafter "Trust"). (Agreed Sup. of Fact, R. p. 150.) The Trust listed Loretta and Susie Ann Miller as co-trustees. (Trust, Resp. Ex. 8 p. 2.) Susie Miller is Loretta's sister. (Trans. V. I, p.80, 1, 8-9.)

*3 6. On November 12, 2007 Goodin was severely injured in a car accident which caused life threatening injuries and resulting in a two month hospitalization. (Agreed Stip. of Fact, R. p. 150; Trans. V. II, p. 19-20, 1.4-2.) On January 11, 2008 Goodin was discharged from the hospital. (Agreed Stip. of Fact, R. p. 150.) Thereafter unable to physically care for herself, Logan cared for Goodin 24 hours a day, 7 days a week from the time of Loretta's discharge until February 2009. (Trans. V. II, p.174, p. 231, 1.4-24.)

8. Following her hospital discharge in January 2008 Goodin visited her bank, and was denied access to her funds due to actions of Susie Miller, acting as power of attorney for Goodin while Goodin was hospitalized from November 2007 through January 2008. (Trans. V. III, p. 158-159, 1. 21-5.)

9. On January 17, 2008 Goodin saw her physician Semira Charboneau, D.O. Dr. Charboneau determined Goodin was mentally able to take care of her own **financial** affairs. (Charboneau Note, Resp. Ex. 1.)

10. On January 28, 2008 Goodin executed a Revocation of Durable Power of Attorney revoking the Durable Power of Attorney of November 8, 2002. (Revocation, Resp. Ex. 2.)

11. Goodin met several times with her attorney Victor Pryor to discuss her estate from March 25, 2008 and up through May 8, 2008. (Agreed Stip. of Fact R. p. 150.) All of these meetings between Goodin and Pryor occurred at the law office of Pryor in Holdenville, Oklahoma. (Trans. V. III, p. 11, 1. 15-20.) Logan drove Goodin to all of the meetings with Pryor, as Goodin was unable to drive after the accident. (Trans. V. III, p. 165-166, 1.25-10.)

- A. Pryor had acted as Loretta's attorney since the mid-1970's, and knew Goodin very well. (Trans. V. III., p. 12-13, 1.13-12.)
- B. Pryor had been practicing law for 40 years and estate work and probates were a fair percentage of Pryor's overall law practice. (Trans. V. III, p. 32,1. 1-7; and p. 39-40, 1. 17-6.)
- C. Pryor confirmed at all times during Loretta's visits between March 2008 and May 2008 Loretta had testamentary capacity. Pryor stated it was his duty as Loretta's attorney to ensure she had testamentary capacity prior to the execution of any documents. (Trans. V. III, p. 75- 76, 1. 25-7.)
- *4 D. Pryor testified at no time during his visits with Loretta was she confused or unsure about what she owned and how she wanted to disperse her assets. (Trans. V. III, p. 81,1. 8-16.)
- E. Pryor testified Logan never directed or advised Pryor on the creation of the Amended Trust or Quit Claim Deed or other documents prepared and executed and never actively participated in the preparation/procurement of the documents. (Trans. V. III, p. 33, 1. 13- 19.) Pryor had no belief or indication that Logan made Loretta do anything against her will. (Trans. V. III, p. 31,1.1-9.)
- F. Pryor observed that Loretta was physically affected by the car accident, specifically her ability to walk but Loretta's mental state of mind was not affected by the car accident. (Trans. Vol. III, p. 29, 1.3-6.)
- G. Carol Pryor, wife of attorney Pryor, testified that she was at Pryor's office on several occasions when Goodin came to discuss her estate in 2008. (Trans. V. III, p. 86, 1. 7-22.) While in the law office Goodin inquired about Pryor's children by name and occupation without being prompted. (Trans. V. III, p. 86-88.1. 23-11)
- H. Carol Pryor had known Goodin almost her entire life, and described Loretta's mental status, memory and behavior the same as it had always been. (Trans. V. III, p 88, 1. 15-20.) Further there was no doubt at all times between March 25, 2008 through May 8, 2008 Goodin was aware of the property she owned and the documents she was executing. (Trans. V. III, p. 90-91,1.19-12.)
- I. Carlene Bruner, Loretta's best friend for over 50 years attended several of the meetings with Pryor and Goodin at Pryor's office between March 25, 2008 and May 8, 2008. (Trans. V. III. P. 101,1. 3-4; p. 105-106, 1. 20-3.) Bruner did not participate in the meetings between Pryor and Goodin, but heard Goodin tell Pryor how her estate was to be distributed. (Trans. V. III, p. 101,1. 3-4; p. 105-106,1. 20-10.)
- J. Bruner states Loretta had physical difficulty after the car accident, but was mentally competent and unchanged. (Trans. V. III, p. 106-107 1. 23-3.)
12. On April 8, 2008 and again on April 16, 2008 Loretta met with Pryor to discuss her estate. (Agreed Stip. of Fact R. p. 150.) On April 16, 2008 Loretta executed a Durable Power of Attorney appointing Logan as her lawful attorney. (POA, Resp. Ex. 3.)
- *5 13. On April 18, 2008, Loretta met with Pryor to discuss her estate. Logan attended a portion of the meeting but did not actively participate in the preparation of any documents. (Agreed Sup. of Fact R. p. 150, Trans. V. VI, p. 20-21, 1. 15-6.)
14. On April 21, 2008 Loretta again met with her attorney Pryor regarding her estate. (Agreed Sup. of Fact R. p. 150.) Also on this date, Loretta executed a Quit Claim Deed from Trust to Logan of approximately 80 acres in Section 21, Township 9 North Range 10 East in Hughes County. (QCD, Resp. Ex. 4.)
15. On May 8, 2008 Loretta executed the first amendment to the original trust (hereafter "Amended Trust") a new will, and a new power of attorney. All documents were prepared and witnessed by Pryor and his staff. (Agreed Sup. of Fact R. p. 150, Amended Trust Resp. Ex. 5, p. 5-6.) The Amended Trust listed Loretta and Logan as co-trustees of the Trust and removed

Susie Miller as co-trustee. (Resp. Ex. 5 p. 1 and 5.) The personal and real property was identified for distribution included the D-6 Dozer which was bequeathed to Donny Ray Goodin and Bagwell equally. (Resp. Ex. 5 p. 2.) The Will designated Logan to serve as personal representative of Loretta's estate. (Will, Resp. Ex. 6, p.2.)Loretta was 82 years old when she signed the Amended Trust. (Agreed Stip. of Fact R. p. 150.)

16. On May 12, 2008, Loretta fell and broke her hip resulting in surgery. (Agreed Stip. of Fact R. p. 150, Trans. V. II, p. 234, 1.9-11, Med. Rec. dated 5/15/08, Plf. Ex. I-13.)

A. Even though this information was within the medical records admitted by the Plaintiff, Bagwell testified to the contrary. He believed Loretta had **broken her hip prior** to signing the Amended Trust documents on May 8, 2008, and Logan used Loretta's **broken hip** to coerce Loretta into signing the Amended Trust prior to obtaining treatment for the hip. (Trans. V. II, p. 195, 1.1-15). No evidence for this theory was provided by lay or expert witnesses.B.

The medical record dated May 15, 2008 provides "This is an 82 year old female who fell on Monday". The Monday prior to May 15, 2008 was May 12, 2008. (Med. Rec. dated 5/15/08, Plf. Ex. 1-13.)

***6** C. Bagwell's attorney knew Loretta fell and broke her hip on May 12, 2008 (*after* the execution of the Amended Trust, *not before*), because he specifically questioned Dr. Charboneau about the May 12, 2008 fall in her deposition taken on July 20, 2010. Nevertheless, at trial Bagwell theorized the fall and **broken hip** occurred first and Logan forced Loretta to sign the Amended Trust in exchange for medical treatment of the **broken hip**. (Depo of Charboneau Resp. Ex. 21 p. 21-22,1. 18-1; Read to the jury Trans. V. III, p. 197, 1. 6-8; Vol. II, p. 195,1. 1-15.)

17. While living with Logan, sometime between June 2008 and December 2008, in order to make Logan's home more comfortable for herself, Loretta suggested and agreed to pay for Logan's home to be remodeled including constructing a new bedroom and bathroom for Loretta, and a remodel to the kitchen and den. (Trans. V. III, p.176-177, 1.18-24.)Logan's house was remodeled between December 2008 and February 2009 for a total amount paid by Loretta of \$62, 119.16. (Trans. V. III, p., 1.)

A. Billy Bagwell, Loretta's oldest son, testified that he told Loretta she should pay to have an additional bedroom built onto Logan's house. (Tran. V. III, p. 130,1. 11-25.)

B. Loretta spoke to Bruner about remodeling Logan's house and having an extra bedroom built on so she could spend the rest of her life living in Logan's home. Bruner never heard Logan talk about remodeling Logan's house, it was always at the direction and suggestion of Loretta. (Trans. V. III, p. 109,1. 7-20.)

C. Donnie Ray Bagwell, witness for Bagwell testified Loretta suggested, offered and agreed to pay for the new bathroom in Logan's house. (Trans. V. II, p.125, 17-13.)

18. In February 2009 Loretta moved in with Bagwell. (Agreed Stip. of Fact R. p. 150.)

A. Billy Bagwell did not approve of Loretta moving to Bagwell's house, as Logan was an RN and would receive better care living with Logan. (Tran. V. III, p. 134-135, 123-2.)

B. The majority of the witnesses that had previously spent time with Loretta were not allowed access to Loretta after she moved into Bagwell's house, including Logan, and Charlene Bruner. (Trans. V. III, p. 173,1. 2-3; Trans. V. II, p. 110, 1. 13-25.)

19. In an attempt to regain contact with her mother, on March 6, 2009 Logan filed a Petition for Appointment of Guardian requesting she was appointed the guardian for Loretta. (Agreed Stip. of Fact, R. p. 150.)

*7 20. Sometime between March 2009 and April 2009 the Oklahoma Division of Adult Protective Services “APS” was contacted by Bagwell to conduct an investigation alleging Logan had **financially exploited** Loretta. (Depo. Smith Resp. 22, p. 20, 1. 21-23, Trans. V. III. P. 173-174, 1. 17-19.) APS concluded Logan did not have any undue influence upon Loretta, did not **financially exploit** Loretta, and that Loretta had mental capacity during that time. (Id. p. 64, 1. 15-22; APS ltr. Resp. Ex. 18.) During Smith's Investigation:

A. David Smith, the APS investigator interviewed both Loretta and Logan and conducted an inspection of Logan's home to review renovations. (Id., p. 21-22, 1.22-6; p. 41, 1. 15-25.) Smith found the renovations acceptable. Logan answered all investigation questions regarding the renovation to Smith's satisfaction. (Id., p. 41, 1.15-25; p. 44, 1. 6-22.) Loretta confided in Smith she willingly offered to pay for the remodel of Logan's home. (Depo of Smith Resp. Ex. 21 p. 74, 1 9- 22 read to the jury Trans. V. III. p. 173-174, 1. 17-19.)

B. During Smith's interview with Loretta he conducted a Mini Mental Status Exam (MMSE). Loretta passed. (Id. p. 47-48, 1. 9-9; p. 62, 1. 3-11.) The MMSE is a test of memory and reasoning. (Trans. V. II. p. 11-12, 1. 1-20.)

C. Loretta confided to Smith during his interview that she wanted to leave additional property to Logan, but she didn't want Bagwell to be upset with Loretta about it. (Depo. Smith Resp. 22, p. 25-26, 1.8-4, Trans. V. III. p. 173-174, 1. 17-19.)

E. Smith's independent assessment of Loretta was that she was not the type of person that could be manipulated or was in a mental state that would have made Loretta vulnerable to manipulation. (Id. at p. 44, 1. 6-22.)

21. In the pending guardianship case Loretta communicated to Bagwell's attorney, sometime in April 2009 that she desired for Bagwell to act as her guardian. (Tran. V. II. p.207, 1. 4-15.) On April 22, 2009 the Court appointed Bagwell as guardian of Loretta. (Agreed Stip. of Fact, R. p. 150.)

22. In August 2009, Loretta visited Dr. Rodney McCrory, a general practitioner for the first time for a nursing home admission evaluation. (Trans. V. II, p. 9, 1. 24-25; p.28, 1. 23-25.) Loretta was subsequently admitted to a nursing home by Bagwell, without consultation with any family members including Logan or Billy Bagwell. (Trans. V. III, p. 178, 1. 15-22.)

*8 23. McCrory did not see Loretta again until May 2010, at which time he conducted his first mental evaluation of Loretta in the form of an MMSE. Loretta scored low and was given the diagnosis of failure to thrive and dementia (Trans. V. II p. 13, 1. 13-17, p. 12, 1. 8-11.) The MMSE scores indicate: 30 is mentally competent; 25 is marginal, meaning people close to the subject, notice a difference; 20 is a marked difference; and 10 is a vegetative state. (Trans. V. II. p. 11-12, 1. 1-20.)

24. At trial McCrory extrapolated that looking retrospectively, (even though he had never met or examined Loretta until August 2009) on the MMSE Loretta would lose 1-2 points per year and Loretta would have scored a 15-14 on the MMSE in 2009, a score of 17-16 in 2008, a score of 19-18 in 2007. (Trans. V. II. p. 12 1. 21-25) McCrory then contradicts himself and estimates in 2008 Loretta would have scored a 22-23 on the MMSE. (Trans. V. II. p. 31-32, 1 7-9.) McCrory cannot state this estimation with any degree of medical certainty. (Trans. V. II. p. 31-32, 1. 7 -9.)

25. By January 2010 Loretta had stopped eating, was diagnosed with the failure to thrive and died in the nursing home. (Trans. V. II. p. 36-37, 1. 24-6.)

26. At trial, Bagwell relied on the following evidence to establish Loretta lacked testamentary capacity and/or was under undue influence from January 2008 until May 2008 during the drafting and execution of the Amended Trust and Quit Claim Deed:

A. Loretta bequeathed the D6 Dozer to Bagwell and Donnie Ray Goodin and Bagwell even though Donnie Ray Goodin was and always had been the record owner of the D6 Dozer. (Trans. V. II. p. 131-135, 1. 11-7).

B. Loretta directed her cattle were to be sold with the proceeds divided between Bagwell and Ryan Logan (Connie Logan's son). (Amended Trust Resp. Ex. 5.) Bagwell testified Loretta preferred to have her cattle die of old age on the farm rather than send them to sale.(Trans. V. II. p. 191-192, 1.24-6.)

C. Loretta left additional property to Logan in the Amended Trust. (Trans. V. II, p. 129, 1. 9- 17.)

D. Loretta paid for the renovations at Logan's home. (Trans. V. II, p. 100,1.1-7.)

27. On March 4, 2010 Bagwell filed this case with the following causes of action: (1) Lack of Mental Capacity; (2) Undue Influence; (3) Duress; (4) Violation of Fiduciary Duty and Unjust Enrichment. (Pet., R. *9 p. 4-13.) Bagwell never filed any litigation in his capacity as guardian while Loretta was alive to testify or resolve his contentions.

28. Logan counterclaimed for Bagwell's conversion of Loretta's cattle. (Answer R. p. 14-18) Bagwell moved for Summary Judgment on Logan's conversion counterclaim. (MSJ, R. p. 25-75.)

29. On August 31, 2011 Logan timely responded to the Motion for Summary Judgment including an affidavit of Logan that specifically disputed the facts and assertions contained within the Motion for Summary Judgment. (Resp. MSJ. R. p. 80-99.) On October 5, 2011 the Court heard arguments on the Motion for Summary and the Court took the matter under advisement. (Docket, R. p. 2.)

30. Four days prior to trial, on June 14, 2012, the Court issued a Journal Entry granting Bagwell's Motion for Summary judgment and finding there was no substantial controversy associated with the counterclaim. (JE, R. p. 146-147)

31. On June 15, 2008, Logan's trial counsel filed a Motion to Strike Jury Trial contending that matters of testamentary capacity and undue influence are matters of equity and would be irregular as a jury trial. (Mt. to Strike R. p. 150-151.) The Court denied this Motion.

32. The jury trial took four days, from June 18, 2012 through June 21, 2012. (Docket R. p. 2.) At the close of Bagwell's case in chief, attorney for Logan demurred to the evidence. This motion was denied. (Trans. V. II p. 6-8,1. 25-14.)

33. The jury found for Bagwell pursuant to the following verdict forms:

A. "... Loretta N. Goodin was under undue influence from the Defendant on April 21, 2008 when she executed the Quit Claim Deed conveying the 80 acres to Defendant Connie Sue Logan and then also on May 8, 2008 when she amended the Original Trust dated November 8, 2002. (Ver. Form R. p. 167.)

B. "... Loretta M. Goodin lacked the necessary testamentary capacity in February 2009 to transfer, convey and/or gift to the Defendant Connie Sue Logan those certain amounts conveyed by personal checks of Loretta M. Goodin that totaled \$62,199.16 that personally *10 benefited Defendant as improvements/remodeling to Defendant's home and/or other gifts to Defendant and/or her children." (Ver. Form R. p. 168.)

C. "... Loretta M. Goodin lacked the necessary testamentary capacity on April 21, 2008 to execute the Quit Claim Deed conveying the 80 acres to Defendant Connie Sue Logan and then on May 8, 2008 to amend the Original Trust dated November 8, 2002." (Ver. Form R. p. 169.)

D. "... Connie Sue Logan breached a fiduciary duty to Loretta M. Goodin. Further we the jury find Loretta M. Goodin was damaged in the amount of \$62,119.12 directly attributable to Defendant Connie Sue Logan's violation of her fiduciary duty. (Ver. Form R. p. 170.)

E. "... Loretta M. Goodin was under duress from the Defendant on April 21, 2008 when she executed the Quit Claim Deed conveying the 80 acres to Defendant Connie Sue Logan and then also on May 8, 2008 to amend the Original Trust dated November 8, 2002. (Ver. Form R. p. 171.)

34. On July 5, 2012 Logan filed a Motion for New Trial and Motion for Judgment *Non Obstante* requesting the Court to vacate and set aside the jury verdict. (M. New Trial R. p. 172-173; M. *Non Obstante* R. p. 174-176).

35. On July 13, 2012 the Court entered Journal Entries reflecting the jury verdicts denying Logan's Motion for New Trial and Motion for Judgment *Non Obstante*.. (JE Verdict, R. p. 182-185; JE, R. p. 186.)

ARGUMENTS AND AUTHORITIES

Proposition 1: Summary Judgment was Improper

Summary judgment is proper only when it appears that there is no substantial controversy as to any material fact and that one of the parties is entitled to judgment as a matter of law.¹ Since summary judgment is designed to dispose solely of issues of law appellate's review is *de novo*² and will not give deference to the trial court's legal ruling.³ The counterclaim was for Bagwell's conversion of Loretta's cattle. In dispute was the number of cattle owned by Loretta between January 2008 until 2010. Bagwell asserted Loretta owned 20 head of cattle and one bull,⁴ and Logan claimed the number was much higher, closer to 170 head of cattle.⁵

***11** The elements of conversion required Logan to show that (1) Loretta was the owner of more than 20 head of cattle; (2) Bagwell intentionally took and sold those cattle to his benefit; (3) Loretta did not consent to that sale; and (4) Loretta was harmed as a result of that conversion.⁶ Logan plainly met her burden to show at a minimum that the elements of conversion were satisfied.

Bagwell's overall argument was that Logan did not know the exact number of cattle owned by Loretta, therefore she could not prevail on her counterclaim.⁷ For Logan to survive summary judgment she had to establish there a question of fact as to the number of cattle owned by Loretta. It was not fatal to Logan's conversion claim she could not personally identify each cow.⁸ In late 2007 Loretta's last documented cattle count concluded she owned 170 head.⁹ This documentation relied on by Logan, and provided to the court raised the necessary question of material fact.

It was undisputed, prior to the accident Loretta knew how many cattle she owned.¹⁰ The last documentation of Loretta's cattle count was in 2007 in a signed application to the USDA requesting relief under Livestock Compensation Program signed and certified by Loretta that she owned 170 head of cattle.¹¹

To dispute this Bagwell submitted an affidavit from a former USDA employee that asserts the reported 170 head of cattle was the combined total for Bagwell and Loretta.¹² Combining hears on the USDA application is unlawful under Federal Regulations.¹³ Bagwell took a fallback position that the documented cattle count Loretta submitted to the USDA in late 2007 only proved Loretta owned some cattle, and did not identify the specific cattle within the heard Loretta owned.¹⁴ The Court determined the ***12** fact issue of the cattle's ownership in favor of Bagwell, apparently concluding that Loretta's written representation was wrong and Bagwell's memory was correct. Appellant respectfully suggests that a written proclamation of a cattle inventory should create a fact issue regarding ownership of a mixed herd sufficient to overcome self-interested conclusory testimony of another party.

There is a question of material fact which relies on admissible evidence and simple math as to how many cattle were owned by Loretta from 2008-2010.

- The last known cattle count by Loretta in 2007 resulted in an inventory of 170 head of cattle.¹⁵
- Bagwell testified in 2011 he owned 70-75 head of cattle and Loretta owned around 20-25 cattle.¹⁶
- In Logan's independent survey of the cattle owned by Bagwell and Loretta on June 22, 2010 there were a total of 150 head of cattle¹⁷ Through independent investigation the sales of Loretta's cattle by year were as follows: 2008-33 head of cattle;¹⁸ 2009 -17 head of cattle; and 2010 -31 head of cattle.¹⁹

Excluding any breeding, Loretta **would own 89 head of cattle in 2011**. Even though Logan could not identify the specific cattle within the joint herd which were owned by Loretta,²⁰ she could do the simple math calculations. Based on Bagwell's own testimony and Loretta's business records, a fact finder could reasonable arrive at a cattle count for Loretta of 89 head of cattle.

Bagwell contended that since he was the only one still alive to testify, his testimony had to be accepted as fact. This is incorrect. Logan could reasonably rely on the 2007 cattle count by Goodin. The Journal Entry,²¹ taking Logan's testimony out of context found

“... the Defendant testified that she did not know the number of cattle owned by Plaintiff Loretta Goodin and that she did not know any person other than Plaintiffs Loretta Goodin and Wade Bagwell that would know the number of cattle owned by each; and (i)the Defendant has presented *13 no probative evidence that establishes Goodin's exclusive and current ownership of any cattle beyond those identified by the Plaintiff.”

In the supporting Minute Order, the Court improperly weighed the believability of Logan's prior deposition testimony and subsequent affidavit. The Court disregarded all other forms of evidence including the USDA application prepared by Loretta and Logan's independent investigation results contained in the affidavit.

Unlike testamentary capacity and undue influence, conversion is not a matter of equity and if there is a dispute as to a material fact it is proper before a jury. The Court summarily and improperly entered into the role of resolving obviously contested facts, not questions of law, and ultimately denied Logan's ability to present evidence to support her claim of conversion. Appellant, Logan r requests her counterclaim be remanded back to the District Court for adjudication.

Proposition 2: The Court failed to follow Oklahoma District Court Rule 27, and improperly prejudiced Logan, 4 days prior to jury trial and limited questioning regarding Bagwell's conversion of cattle.

In accordance to Okla. Distr. Ct Rule 27 “In any matter taken under advisement, a decision shall be rendered within sixty (60) days of the date on which the matter was taken under advisement” Bagwell initially filed for summary judgment against Logan's counterclaim for conversion of cattle on July 29, 2011 Logan responded and a reply brief was filed.²² The Motion for Summary Judgment was heard by the Court on October 5, 2011 and taken under advisement.²³ On June 14, 2012, 253 days after the Court took the Motions under advisement, and 4 days prior to the commencement of the jury trial the Court issued a Journal Entry dismissed Logan's Counterclaim for conversion.²⁴ This 11th hour determination by the Court came without prior warning and severely affected and altered Logan's trial strategy.

*14 The Court went so far as to prohibit questions regarding Bagwell's conversion of Loretta's cattle,²⁵ which was supported by Bagwell's own records. Insulating the fact finder from Logan's compelling evidence of conversion artificially bolstered

Bagwell's credibility and left out an important aspect of Bagwell's dealings with Loretta. In addition it certainly explains why explains why Loretta decided to provide for Logan instead of Bagwell. The Court improperly prevented the testimony and evidence regarding Bagwell's conversion of Loretta's cattle which constitutes reversible error.²⁶

Proposition 3: The proceedings were irregular in that testamentary capacity, undue influence and duress are equitable in nature and were improperly tried before a jury.

Testamentary capacity is a question of fact²⁷ and may be considered by a jury, but will ultimately be determined by the court.²⁸ Since testamentary capacity is a matter of equity an appellate court will examine the entire record, and only disturb the trial court's finding in instances where the ultimate finding is against the clear weight of the evidence.²⁹ The District Court improperly allowed this issue to be determined by the jury and did not ultimately decide the testamentary capacity of Loretta.

Probate proceedings are of equitable cognizance.³⁰ While an appellate court will examine and weigh the record proof, it must abide by the law's presumption that the *nisi prius* decision is legally correct³¹ and cannot be disturbed *unless* found to be clearly contrary to the weight of the evidence or to some governing principle of law.³² (emphasis added) The result in the instant action is not legally correct and amounts to much more than faulty reasoning on the part of the Court and jury. Taken collectively there was starkly insufficient proper evidence to support Bagwell's equitable causes of action.

*15 The jury's verdict in the instant matter is clearly contrary to the weight of the evidence and must be reversed because of it is legally faulty and destroys the purpose and intent of a trust or will and allow a person to designate and distribute their bounty of their estate as they wish.

Proposition 4: Bagwell failed to present clear and convincing evidence Loretta lacked testamentary capacity to execute the Quit Claim Deed and Amended Trust.

A testator has the mental capacity to execute a document when at the time of execution "his mind and memory are such that he knows, in a general way the character and extent of his property, understands his relationship to objects of his bounty and who should be in his mind at the rime of making the will, and comprehends the nature and effect of the testamentary act."³³ Every person is entitled to the presumption of sanity.³⁴ Proof that a document was duly executed establishes the prima facie case of the testamentary capacity for the proponent; the burden for proving lack of testamentary capacity rests strongly on the contestant.³⁵ The legal requirement for testamentary capacity is very low, for example an individual may have lacked of capacity to manage his property so that a guardian must be appointed to do so, yet he may still have the testamentary capacity to make a will.³⁶ The Oklahoma Supreme Court noted how heavy the burden is to establish a person did not have testamentary capacity:

"... it is not sufficient to show testator believed the moon is made of green cheese, but it should be established in addition that because of this belief he devised in a way [he otherwise would not have done]."³⁷

The witnesses who spent time with Loretta between January 2008 through May 2008 all stated that she was aware of what she owned and how she wanted to devise it upon her death. Bagwell attempted to establish Loretta lost mental capacity following the car accident in November 2007, and Loretta did not have the testamentary capacity to change the Trust and supporting documents. The key time frame to *16 consider was the period Loretta was engaged in changing her estate documents which was between January 2008 and May 8, 2008. Interestingly the only witnesses offering their sworn testimony that Loretta did not have the mental capacity were the witnesses that spent the least amount of time or no time at all with Loretta during the key time.

- Bagwell testified that Loretta started "slipping mentally and physically" after the car accident in November 2007 but rarely saw Loretta³⁸

- Susie Miller, Loretta's sister testified that after Loretta was released from the hospital in January 2008 Loretta was not in her right mind, yet Miller only visited Loretta one time between January 2008 and February 2009.³⁹
- Dr. McCrory did not meet Loretta until September 2009 or perform a MMSE on Loretta until May 2010, but still extrapolates Loretta did not have testamentary capacity in 2008.⁴⁰ (McCrory's testimony is briefed in Proposition 10. infra.)

Coincidentally the witnesses that testified Loretta had mental capacity between January⁴¹ to May of 2008,⁴² were those who spent the most time with Loretta before and after her wreck including:

- Logan who saw or spoke with Loretta every day prior to the car accident, and worked together side-by-side since the mid-1980's. Following the accident Logan was with Loretta 24 hours a day, 7 days a week caring for Loretta. Logan stated that Loretta was mentally competent and understood what property she owned.⁴³

- Billy Bagwell, Loretta's oldest son and Appellee Bagwell's father, testified that prior to the accident he saw Loretta two to three times a year but following the accident saw Loretta once a week. Billy Bagwell testified that there was no indication that Loretta was having problems mentally between January 2008 to May 2008.⁴⁴

*17 • Carlene Bruner, was Loretta's best friend for over 50 years and saw Loretta every day pre and post accident. Bruner stated Loretta's mental ability was great, and Loretta was still mentally herself and knew what property she owned.⁴⁵

- Dr. Charboneau, Loretta's general practitioner pre and post-accident specially found on January 17, 2008 that Loretta was competent to handle her own **financial** affairs. Dr. Charboneau noted on several times after Loretta moved in with Bagwell that Loretta was being manipulated by her family members for their own monetary gain.⁴⁶

- Victor Pryor, Loretta's attorney for 40 years met with Loretta several times between March 25, 2008 and May 8, 2008 regarding Loretta's estate and always found Loretta to be knowledgeable about the property she owned and how she wanted it distributed.⁴⁷

It is the capacity at the time of the execution of the documents which must be determined.⁴⁸ Prior and subsequent acts only have a bearing to assist in determining the mental status of the testator at the time of executing the documents.⁴⁹ Evidence of bad memory,⁵⁰ physical weakness or disability⁵¹ or even senility⁵² do not independently establish incapacity. The following issues that Bagwell relies on to show Loretta's lacked testamentary capacity amounts to pure speculation and is circumstantial evidence at best that falls short of meeting the burden to overturn a will::

1. The Amended Trust conveyed the D6 Dozer to Bagwell and Donnie Ray Goodin, and Wade when it was already in the name of Donnie Ray.⁵³
2. The Amended Trust directed the sale of Loretta's cattle, even though testimony was offered that Loretta thought of her cows as pets.⁵⁴
3. The Amended Trust allocated additional property to Logan⁵⁵
4. The Amended Trust divided the Bagwell farm.⁵⁶

*18 In looking at the Amended Trust retrospectively the question to determine testamentary capacity is not based upon what an average person would do, or how the jury/Court, or Bagwell or Logan or anyone else would disburse the assets, it is only how Loretta would disperse the assets. Bagwell's evidence the Amended Trust may have been peculiar or eccentric, to an outsider, is irrelevant to the analysis.⁵⁷ It has been held testator's preference or dislike of a family is not evidence of lack of testamentary capacity.⁵⁸ The fact that several witnesses said Loretta loved Bagwell,⁵⁹ or that several witnesses said Loretta and Logan had arguments⁶⁰ has no application to the analysis in determining Loretta testamentary capacity and only used to inflame the jury.

Bagwell found Loretta to be competent in April 2009 to advise his attorney regarding her preference for guardian even though Bagwell contends she was not competent from January 2008 through May 2008.⁶¹

Bagwell failed to provide any evidence beyond hearsay and speculation that Loretta did not have testamentary capacity to execute the Amended Trust. Bagwell was required to provide clear and convincing evidence of this claim.

Proposition 5: Bagwell failed to establish that Loretta was under undue influence or duress when she executed the Quit Claim Deed in April 2008 or Amended Trust in May 2008.

Oklahoma utilizes the classic definition of undue influence: "Undue influence to invalidate a will must destroy the free agency of the testor when the will is made, and in effect it substitutes the will of another for that of the testator."⁶² Suspicion, conjecture, possibility or guess that undue influence may have been exercised is insufficient to invalidate a will especially when such "influence" arises from natural affection; only when the influence is wrongful and, as such, confuses the judgment and control of the *19 testator will a court find the testator's will invalid.⁶³ The Supreme Court specifically pointed out that "The word, 'undue' when used to qualify 'influence,' has a legal meaning of 'wrongful' so that 'undue influence' necessary to invalidate a will means wrongful influence, but influence acquired through kindness affection or attention is not wrongful."⁶⁴ Any influence Logan may have had with Loretta was related to the care and attention Logan provided to Loretta in her final years. This does not amount to "undue" influence.

The burden of proof to first produce evidence of undue influence is upon the contestant.⁶⁵ The burden does not shift unless there was a confidential relationship *and* clear and convincing evidence of active participation in the procurement and preparation of the estate documents.⁶⁶ Only when that relationship is coupled with active participation in procurement or preparation of the will does the presumption arise.⁶⁷ Further there is no presumption of undue influence when the activity of a beneficiary in the preparation of the drafting or execution is done at the request of the testator.⁶⁸

In that event the presumption is met the burden shifts to the party seeking to take under the will to rebut the presumption. In this case the burden never shifted to Logan to establish that the confidential relationship was severed or that Loretta received independent advice.

A "confidential relationship" is generally synonymous with a "fiduciary relationship,"⁶⁹ and exists whenever trust and confidence are placed by one person in the integrity and fidelity of another.⁷⁰ Oklahoma is in line with the majority of jurisdictions which treat the terms alike semantically as well as justicially. The claims of breach of fiduciary duty are combined with the "confidential relationship" prong of undue influence and duress. .

*20 *Estate of Ho/comb* was a similar challenge to testamentary capacity and undue influence.⁷¹ Holcomb was 91 years old, paralyzed and bedridden with significant hearing and vision impairment. Holcomb relied completely on her daughter, Elaine to care for her.⁷² Witnesses testified Elaine's personality was aggressive, intimidating and controlling and "a dominate personality

who it was useless to oppose”.⁷³ In contrast Holcomb was not only physically compromised her personality was submissive and could easily be influenced.⁷⁴ The *Holcomb* court found a confidential relationship existed between Holcomb and Elaine.

As to the second prong of the test “actively participated in the procurement or preparation, Elaine was active in her mother's legal affairs and repeatedly consulted Holcomb's attorney, Don Gaston without Holcomb's presence.”⁷⁵ The court considered the undue influence burden shifting factors set forth in *Hubble*. and found as to the second prong although there was no direct proof of Elaine's active participation in the procurement or preparation of her mother's will, the outlined factors constitute a sufficient convergence of circumstances to justify shifting to the will's proponent the burden of producing evidence of the nonexistence of undue influence.⁷⁶

Similar to Holcomb and Elaine there was undeniably a “confidential relationship” that existed between Loretta and Logan.⁷⁷

Unlike Elaine in *Holcomb*, Logan did not have private meetings with Victor Pryor regarding Loretta's estate and Pryor did not have an attorney client relationship with Logan like Elaine had with Don Gaston. The witnesses with direct knowledge of the preparation and procurement of the estate documents were *21 Logan, Charlene Bruner, attorney Victor Pryor, and Carol Pryor,⁷⁸ who testified Logan did not actively participate in the procurement or preparation of any of the estate documents including the Quit Claim Deed and Amended Trust.⁷⁹ Loretta made initial contact with Pryor in January 2008 regarding amending the Trust.⁸⁰ Since Loretta was never able to drive following the car accident, Logan drove her to all appointments with Pryor.⁸¹ The Oklahoma Supreme Court previously held that driving the testator to meet with his attorney⁸² did not amount to “active procurement/participation”.

Logan was present at two meetings between Loretta and her lawyer.⁸³ First the Oklahoma Supreme Court has held the mere presence of a beneficiary in the room at the time of the execution does not constitute “active participation”.⁸⁴ Second, Logan's attendance was related to the duties she assumed. On April 18, 2008 Logan was present because Pryor was explaining Logan's duties as the Power of Attorney and Logan's presence on May 8, 2008 was to sign the Amended Trust.⁸⁵ There literally was no evidence that Logan actively participated in the procurement. The burden set forth in *Hubble*⁸⁶ never shifted to Logan it remained on Bagwell.

Assume arguendo that the burden of undue influence did shift to Logan. Logan would then be required to show (1) the severance, or non-existence, of the confidential relationship, *or* (2) that the testator had competent and independent advice on the subject.⁸⁷ The confidential relationship between Logan and Loretta remained constant, therefore Logan would have to show Loretta received independent advice.

*22 For advice to be considered *independent*, the advisor must (1) provide the will maker with a full and private consultation regarding the disposition of his estate, (2) be competent to inform the will maker about the legal effect of his dispositive intentions, and (3) be sufficiently dissociated from the interest of the party with whom the will maker stands in a confidential relationship that the advisor can provide impartial and confidential advice⁸⁸

Pryor testified he met with Loretta independently, and discussed at length the possible options for her estate planning.⁸⁹ All of the witnesses with firsthand knowledge of the testified that the estate documents drafted were the result of Loretta's wishes and a voluntary act.⁹⁰ The meetings between Pryor and Loretta meet the standard of independent advice pursuant to *Anderson*,⁹¹ and there was no evidence to the contrary. After the will proponent's successful rebuttal of the presumption restores the case to the procedural posture it would have had if the presumption had never been operative.⁹² This means that contestants must prove the existence of undue influence by a preponderance of the evidence without the aide of the presumption.⁹³

In the case of *Holcomb* there was no *direct* proof that Elaine exercised undue influence over the terms of her mother's will only a considerable amount of circumstantial evidence.⁹⁴ **The court found this circumstantial evidence unpersuasive and found that Holcomb had testamentary capacity and that her will was not a product of undue influence.**

Elaine's personality, handling of her mother's money and contact with Holcomb's attorney went far beyond even the speculation by Bagwell's witnesses at trial. Bagwell presented nothing but circumstantial evidence and pure speculation by witnesses to support the claim for undue influence, including: witnesses *23 "had heard" but never witnessed Logan had hit Loretta in 2002⁹⁵ and Loretta was afraid of Logan, although when pressed none of them could identify a specific incident or circumstance to support this allegation.⁹⁶ To the contrary all other witnesses denied that Loretta was fearful of Logan.⁹⁷ Bagwell's evidence was emotionally compelling and moving for a jury but amounts to speculation and circumstantial evidence which is not enough to overcome the presumption of the nonexistence of undue influence.

Bagwell failed to meet the burden of undue influence and breach of fiduciary duty in the jury trial. The understanding of the intricacies of burden shifting between the parties when considering a claim for undue influence is complex, especially for a jury, which is a strong supporting basis of why this cause of action as a matter of equity is proper before a court and not a jury. Bagwell's failure to meet his burden amounts to reversible error and Logan requests the undue influence/duress and breach of fiduciary duty verdicts are vacated and as a matter of equity the appellate court finds there was no undue influence/duress or breach of fiduciary duty as to the Quit Claim Deed or Amended Trust.

Proposition 6: Bagwell failed to establish through the evidence that Loretta was under undue influence or duress or Logan breached a fiduciary duty when Loretta paid for Logan's house to be remodeled

The same standards as enumerated in Proposition 5 apply generally to the assertions of undue influence to pay for the remodel of Logan's home and that Logan breached a fiduciary duty by allowing Loretta to pay for the remodel. It is undisputed that Logan's home was remodeled between December 2008 and February 2009 and Loretta paid for a portion of the remodel.⁹⁸ What is in dispute is Loretta's *willingness* to pay for the remodel and the *extent* of the remodel.

*24 All of the witnesses including Bagwell agreed that Loretta agreed to pay for some of the remodel on Logan's home. Bagwell, Donnie Ray Goodin and Susie Miller all agreed that Loretta agreed to build a new bathroom onto Logan's home.⁹⁹ The witnesses that testified Loretta only agreed to pay for the new bathroom were those who did not spend any time around Loretta until after the remodel had been completed. David Smith, APS investigator testified about Loretta's offer to pay for the remodel, stemming from his interview of Loretta in April 2009.¹⁰⁰ Loretta had told Smith she agreed to pay for the entire remodel to compensate Logan for all of the care she had provided.¹⁰¹ The Oklahoma APS final investigation determination was Logan did not exert any undue influence on Loretta or **exploit** her for payment on the remodel/renovation.¹⁰²

Bagwell failed to present any evidence beyond speculation and circumstantial evidence as to Logan's exertion of undue influence or breaching a fiduciary duty for Loretta's payment of the remodel. The State of Oklahoma previously investigated these charges previously alleged by Bagwell and found them meritless. This cause of action fails Logan respectfully requests the appellate court to find that there was no undue influence/duress or breach of fiduciary duty in Loretta's payment for Logan's home remodel and vacate the jury's award for \$62,199.16.

Proposition 7: The District Court failed to grant Logan's demurrer to the evidence at the close of Bagwell's case in chief.

At the close of Bagwell's case-in-chief attorney for Logan demurred to the evidence. This motion was denied. This was improper since Bagwell had failed to meet his burden to establish lack of testamentary capacity, undue influence and breach of fiduciary duty.

***25 Proposition 8: The verdict forms to the jury were in conflict with the law of the case and with the evidence presented at trial.**

Prior to trial, and on the record attorney for Logan raised to the Court the difficult, task of crafting proper jury instructions for an equitable matter of testamentary capacity and undue influence.¹⁰³ 103 The Court assured the parties following the submission of evidence to the jury, all of the objections and arguments regarding the instructions and verdict forms would be heard and placed on the record.¹⁰⁴ They were not. Logan's attorney did preserve his objection to the instructions and verdict forms prior to the commencement of trial.¹⁰⁵

The closing statements instructing the jury were an improper recitation of the law. When considering undue influence the element of "active participation" the Oklahoma Supreme Court has found it does not include driving someone to meet with their attorney.¹⁰⁶ Yet during closing arguments, Bagwell's attorney stated:

"He [attorney for Logan] said active participation doesn't include taking Loretta to see Victor Pryor. But, I'm looking at the jury instruction here and right here on number four "Whether the Defendant, Connie Logan, transported Mrs. Goodin to the meetings with the attorney." It's just the opposite, I would ask you to read these and not listen to him.¹⁰⁷

As to the elements considered for undue influence, Bagwell's attorney incorrectly recites to the jury the five factors of undue influence also contained on the jury instructions: (1) Loretta was clearly of advanced age and impaired facilities; (2) Logan was the stronger person in their relationship; (3) Logan was clearly present and active in the procurement and preparation of the amendment.; (4) Logan is the natural bounty of Loretta; (5) Victor Pryor gave Loretta independent and disinterested advice. Bagwell's attorney goes on to say: "It is not necessary to find all five factors to presume undue influence, and these are only guidelines. *26 They're just to help you figure out what these legal words mean"¹⁰⁸ This is inaccurate and misleading to the jury. The elements for undue influence are set forth in *Hubble* and are not as presented by Bagwell's attorney a reflection of the jury instructions.

The verdict form places a compound conclusion before the jury which prejudices Logan and predisposes a verdict for Bagwell." ... Loretta N. Goodin was under undue influence from the Defendant *on April 21, 2008* when she executed the Quit Claim Deed conveying the 80 acres to Defendant Connie Sue Logan *and then also on May 8, 2008* when she amended the Original Trust dated November 8, 2002.¹⁰⁹ (emphasis added). This same error is contained within a similar verdict forms related to testamentary capacity and undue influence.¹¹⁰ These verdict forms presume that if Loretta was under undue influence on April 21, 2008 she would also have to be under undue influence on May 8, 2008. Evidence was presented that Loretta had good days¹¹¹ and bad days and her medical records reflect that Loretta's condition was not simply static or on a progressive decline.¹¹² The verdict forms were also incorrectly explained to the jury.¹¹³

The verdict forms improperly state the law. Testamentary capacity is not required to execute a quit claim deed, or transfer or convey a gift to someone. Yet the verdict forms state the following: "... Loretta M. Goodin lacked the necessary testamentary capacity in February 2009 to transfer, convey and/or gift ... \$62,199.16 as improvements"¹¹⁴ "... Loretta M. Goodin lacked the necessary testamentary capacity on April 21, 2008 to execute the Quit Claim Deed conveying the 80 acres to Defendant Connie Sue Logan."¹¹⁵

***27 Proposition 9: Bagwell improperly impassioned the jury by intentionally misrepresenting facts and intentionally confused the chronology of the events as evidenced by the note from the jury during deliberation.**

The Plaintiff's attorney knew that Loretta broke her hip for the second time on May 12, 2008, 4 days after the Amended Trust was executed by Loretta. Bagwell's attorney suggested that Logan withheld medical treatment until Loretta executed the Amended Trust. Bagwell's attorney knew this was not true in accordance to the medical records which were stipulated to as authentic. ¹¹⁶ In the deposition of Dr. Charboneau, Bagwell's attorney was aware Loretta broke her hip on May 12, 2008, (after the Amended Trust was executed) and specifically asked Charboneau about that date. ¹¹⁷

Q. (By Mr. Brown): In the report it says that she fell on Monday, which based on the calendar would be May the 12th'2008. Can you describe knowledge of Loretta's fall.

A. (By Charboneau): No. It's just whatever is there. I don't remember anything about - I wasn't concerned about the fall, I was taking care of her from a medical standpoint. The surgeon was taking care of her [hip fracture](#). ¹¹⁸

Bagwell's attorney sponsored inflammatory testimony to the jury which suggested Logan withheld medical treatment until the Amended Trust was signed. ¹¹⁹

Q.: We just don't know exactly what day it happened because she didn't get taken to the hospital for several days afterwards correct?

A: That's my understanding.

Q: And it's your belief that Loretta's [hip was broken](#) before she signed the amendment?

A: Yes

Q. And that Connie used that to force her to sign that amendment?

A.I can't say whether she forced her to or not.

Q. But, that's your belief?

A. Yes

Albeit not evidence, but the last thing the jury hears before deliberation Bagwell's closing statement incorrect facts were restated to impassion the jury

***28** “We also heard testimony from Victor Pryor ¹²⁰ and Wade that in May of 2008, before she signed the Amendment, Loretta fell and broke her hip. She had a [broken hip](#). Connie didn't take her to the hospital until May 15. She didn't get that hip fixed for - - she admitted over four days. I think it was probably closer to a week. That's duress. Sounds to me a lot like duress. I'm not going to take you to the hospital until you sign that thing.” ¹²¹

This story line continued after trial. At the hearing to settle journal *entry* held on July 13, 2012 attorney for Bagwell stated he didn't know if Loretta broke her hip before or after the signing of the Amended Trust. ¹²² The misrepresentation of the facts

and chronology confused the jury as evidenced by the jury's note during deliberation.¹²³ The misstated stated facts throughout the trial constitute error.

Proposition 10: Dr. McCrory was never qualified as an “expert” but treated and referenced as one.

The clear abuse of discretion appellate standard applies when COCA reviews a decision on the admissibility of expert testimony. In Oklahoma this standard is applied to an expert witness.¹²⁴ Oklahoma applies this standard to an expert witness, and relied upon the U.S. Supreme Court opinion that applied the abuse of discretion standard to *Daubert* rulings.¹²⁵ “When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.”¹²⁶

McCrory testified although he did not see Loretta until 2010, he believed she did not have testamentary capacity in May 2008 when the Amended Trust documents were executed, but he could not *29 state this opinion with any degree of medical certainty.¹²⁷ McCrory could not provide any further explanation for his retroactive diagnosis denouncing the mental capabilities of a patient he did not meet for another 18 months. When Logan's attorney objected to this testimony, the Court briefly told the jury there was a difference in medical and legal terminology as to testamentary/ mental capacity.¹²⁸ This statement alone - without the proper qualification of McCrory as an expert pursuant to *Daubert* is not enough to avoid reversible error.

Conclusion

The Appellant, Logan respectfully requests the Appellate Court vacates the Journal Entry dismissing Logan's counterclaim for conversion and remand that matter back to the District Court for adjudication. Further the Appellate Court vacates the jury verdict and corresponding Journal Entry and because this matter is based in equity make a determination that (1) Loretta had testamentary capacity to execute the Amended Trust and Quit Claim Deed; (2) Loretta was not under undue influence by Logan when she executed the Amended Trust and Quit Claim Deed; (3) Loretta was not under undue influence by Logan when she executed the Amended Trust and Quit Claim Deed; (4)Loretta did not lack testamentary capacity to pay for Logan's home remodel; (5) Logan did not breach her fiduciary duty in allowing Loretta to pay for her home remodel, and vacate the award of \$62,119.16 against Logan; and (6) The Quit Claim Deed which was declared void by the Journal Entry is determined as valid and reinstated.

*30 Respectfully Submitted;

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Footnotes

- 1 [Jordan V. Jordan](#), 2006 OK 88 ¶ 17, 151P. 3d 117, 121 (Okla. 2006)
- 2 [Young v. Macy](#), 2001 OK 4, ¶ 9, 21 P. 3d 44, 47 (Okla. 2001)
- 3 [Fisher v. Fisher](#), 2007 OK Civ App. 103 ¶ 3, 171 P. 3d 917, 919 (Okla. 2007)
- 4 [Tran. V. II](#), p. 212 1.12-16
- 5 [Resp. MSJ R.](#), p. 94-96
- 6 [OUJI 27.2](#) and [Welty v. Martinaire of Oklahoma](#), 1994 OK 10, ¶ 6; 867 P. 2d 1273, 1274 (Okla. 1994)
- 7 [MSJ R.](#), p. 33; [Reply R.](#), p. 104
- 8 [Reply R.](#), p. 104
- 9 [Response MSJ R.](#), p. 88-91
- 10 [Bagwell, Trans. V. II](#), p. 191, 1. 2-7; [Logan Depo. Reply R.](#) 118-124
- 11 The signature on the application requires the applicant to certify among other things: "AH of the livestock on this application meet all of the eligibility criteria ... including being maintained by me for commercial use as part of my farming operation All information on this application and all supporting documents provided is true and correct" [Response MSJ, R.](#) p. 88-90
- 12 [MSJ R.](#) p. 51, [Reply R.](#) p. 100-111
- 13 [7 CFR VII, 760-1102-1103](#), attached to [Logan's Response R.](#) p. 83-87
- 14 [Reply MSJ](#) p. 104
- 15 [Response MSJ, R.](#) p. 88-90
- 16 [Response MSJ](#), ref [Bagwell depo](#) p. 68, [R](#) p. 97
- 17 [Response MSJ, R.](#) p. 95
- 18 There should not have been any sale of Goodin's cattle by Bagwell in 2008, since he was not appointed guardian until February 2009 but this is another issue Logan was prevented from asserting.
- 19 [Response Affidavit R.](#) p. 94-99
- 20 [Logan Depo](#) attached to [Reply R.](#) p. 118-122
- 21 [Journal Entry and Supporting Minute Order R.](#) 146-148
- 22 [Bagwell MSJ, R.](#) p. 25-75; [Logan's Objection and Response, R.](#) p. 76-99; [Bagwell's Reply Brief, R.](#) p. 100-124
- 23 [Docket sheet, R.](#) p.2
- 24 [Journal Entry R.](#) p. 146-147, [Minute Order R.](#) p. 148.
- 25 [Trans. V. II](#), p.209-210 1.17-12
- 26 [Trans. V. II](#), p. 209-210, 1.17-12.

- 27 *In Re Benniaht's Estate*, 1972 OK 136, ¶ 5; 503 P. 2d 203 (Okla. 1972)
- 28 *Bilby v. Stewart*, 1915 OK 1075, ¶ 4, 153 P. 1173 (Okla. 1915)
- 29 *In Re Lacy*, 1967 OK 123, ¶6; 431 P. 2d 366 (Okla. 1967)
- 30 *Matter of the Estate of Pope*, 1990 OK 125, ¶12; 808 P. 2d 640,646 (Okla.1990); *Matter of the Estate of artlett*. 1984 OK 9, ¶4; 680 P. 2d 369, 374 (Okla. 1984); *White v. Palmer*. 1971 OK 149, ¶29-31; 498 P. 2d 1401,1406-1407(Okla. 1971)
- 31 *Carpenter v. Carpenter*, 1982 OK 38, ¶10; 645 P. 2d 476, 480 (Okla. 1982).
- 32 *Burdick v. Independent School Dist.*,1985 OK 49, ¶ 12; 702 P. 2d 48, 55 (Okla. 1985)
- 33 *In Re Lacv's Estate*, 1967 OK 123, ¶ 5; 431 P. 2d 366 (Okla. 1967)
- 34 *In Re. Groves Estate*, 1957 OK 146, ¶ 8; 321 P 2d 381 (Okla. 1957)
- 35 *In Re Martin's Estate*. 1953 OK 260, ¶ 18; 261 P. 2d 603 (Okla. 1953)
- 36 *In Re Shipman's Estate*, 1938 OK 591, ¶ 13-17; 85 P. 2d 317 (Okla. 1939)
- 37 *In Re Mason's Estate*, 1939 OK 258, ¶ 7-8; 91 P 2d 657, 660 (Okla. 1939)
- 38 Trans. V. II. P. 198,1.6-7
- 39 Trans. V. I, p. 80,1. 8-9, p. 112,1.24-25, p. 113,1.18-25
- 40 Trans. V. II, p. 31-32,1. 7-9
- 41 January 2008 when Goodin was released from the hospital following the car accident
- 42 May 8, 2008 was when Goodin completed execution of all of the revised estate documents including the Amended Trust.
- 43 Trans. V. III. p. 145-147,1. 23-21; Trans. V. II p. 231,1.4-24;Trans. V. III, p. 165,1. 23-24; V. III. p. 180-181,1. 22-15.
- 44 Trans. V. III p. 112,1.17-25; p. 125,1. 2-18;, p. 127,1. 2-23; and p. 131,1.1-10.
- 45 Trans. V. III, p. 101,1. 3-4; p. 110, p. 13-25; and p. 106-107,1.4-3.
- 46 Depo. of Dr. Charboneau Resp. Ex. 21 p. 5,1.4-6, read to the jury Trans. V. III, p. 197,1. 6-8. Dr. Charboneau's note dated 1/17/08, Resp. Ex. 1., Medical Notes dated 3/5/09 and 3/9/09, Plf. Ex. 1-19,
- 47 Trans. V. III, p. 12-13,1.13-12.,Pryor Invoice, Plf. Ex. X
- 48 *Moore v. Glover*, 1945 OK 322, ¶ 12-16; 163 P. 2d 1003 (Okla. 1945)
- 49 *In Re. Groves Estate*, 1957 OK 146, ¶ 10-11; 321 P 2d 381 (Okla. 1957)
- 50 *In Re. Wilkin's Estate*. 1947 OK 234,¶13-14; 185 P. 2d 213 (Okla. 1947)
- 51 *In Re Baker's Will*. 1952 OK 306, ¶ 21; 248 P. 2d 627 (Okla. 1952); *Rose v. Foster*, 1955 OK 242, ¶ 5; 288 P. 2d 745, (Okla. 1955)
- 52 *In Re William's Estate*. 1952 OK 283, ¶ 11-15; 249 P. 2d 94 (Okla. 1952)
- 53 Trans. V. II, p. 131-135,111-7
- 54 Trans. V. II, p. 191-192,1 2-6
- 55 Trans. V. II, p. 129, 1.9-27
- 56 Trans. V. II p 177,1.7-11
- 57 *In Re Eiston's Estate*. 1953 OK 285, ¶ 9-12; 262 P. 2d 148 (Okla. 1958)
- 58 *In Re Lacy* 1967 OK 123, ¶ 29; 431 P. 2d 366 (Okla. 1967)
- 59 Trans. V. II, p. 129,1.4-7
- 60 Trans. V. II, p. 178,1.9-10
- 61 Trans. V. II, p. 207,1.4-15; which is in direct contradiction with his testimony that after the car accident in November 2007Loretta's 's mental condition went progressively downhill. Trans. V. II p. 198,1.1-6; p. 206,1. 23-25
- 62 *In Re Rutter's Estate* 1937 OK 525, ¶ 8-10;, 73 P. 2d 161, (Okla. 1937); and *Matter of the Estate of Samochee*, 1975 OK 143, ¶ 42-47; 542 P. 2d 498 (Okla. 1975)
- 63 *Matter of Estate of Carano*. 1994 OK 15, ¶ 24-27; 868 P. 2d 669 (Okla. 1994).
- 64 *Hubbell v. Houston*, 1967 OK 138 ¶ 18-29; 441 P 2d 1010 (Okla. 1967)
- 65 *In re Lillie's Estate*. 1945 OK 136, ¶ 11-15; 159 P. 2d 542(Okla. 1945).
- 66 *Hubbell v. Houston*, 1967 OK 138 ¶ 18-29; 441 P 2d 1010 (Okla. 1967); *Myers v. Myers*, 1927 OK 394, ¶ 33-35; 266 P. 452 (Okla. 1927).
- 67 "Estate of Beal, 1989 OK 23, ¶15; 769 P. 2d 150 (Okla. 1989)
- 68 *Hubbell v. Houston*. 1967 OK 138 ¶ 18-29; 441 P 2d 1010 (Okla. 1967);
- 69 Black's Law Dictionary 4th Ed P. 370
- 70 *Fipos v. Stidham*, 1935 OK 855, ¶ 16-18; 50 P.2d 680 (1935)
- 71 *Estate of Holcomb*, 2002 OK 90, 63 P 3d 9 (Okla. 2002)

- 72 *Id* at ¶ 24
- 73 *Id* at 128-29
- 74 Elaine had control of her mother's money, and check writing privileges on Holcomb's accounts. Elaine used Holcomb's accounts to pay for her personal expenses but kept no records of her spending. In a 5 year period Elaine spent excess of \$190,000 of Holcomb's money, constantly overdrawing Holcomb's account in the process. *Id.* ¶ 25-29
- 75 Gaston's records and billing statements treated Elaine and her mother interchangeably as the client on Holcomb's estate matters.
- 76 *Id* at ¶ 30-31
- 77 Trans. V. II p. 231,1.4-24. Unlike Elaine, Logan did not have check writing privileges on Loretta's accounts. Loretta directed Logan what bills to pay and Logan wrote out the checks and gave them to Loretta to sign. Trans. V. II, p. 234, 1.9-11
- 78 Logan at Trans. V. III, p. 165,1.10-22; Bruner at Trans. V. III, p. 105-106,1. 20-3; Victor Pryor at Trans. V. III, p.75-76,1. 25-7; and Carol Pryor at Trans. V. III, p. 86,1. 7-22.
- 79 Logan Trans. V. III, p. 165,1.10-22; Bruer Trans. V. III, p. 105-106,1. 20-10; Carol Pryor, Trans. V. III p. 90-93 1.19-1.
- 80 Trans. V. III, p. 165,1. 3-9
- 81 Trans. V. III, p. 165,1.10-25
- 82 *Matter of the Estate of Webb*. 1993 OK 75 ¶ 10, 38; 863 P. 2d 1116 (Okla. 1993)
- 83 Agreed Stip. R. p. 150
- 84 *Hubbell v. Houston*, 1967 OK 138 ¶ 18-29; 441 P 2d 1010 (Okla. 1967);
- 85 Trans. V. III, p. 55,1.11-24; Amended Trust, Resp. Ex. 5
- 86 *Hubbell v. Houston*, ¶ 18-29;
- 87 *White v. Palmer*. 1971 OK 149, ¶ 28; 498 P. 2d 1401,1406-1407 (Okla. 1971)*Hunter v. Battiest*, 1920 OK 277, ¶ 20-21; 192 P. 575 (Okla. 1920).
- 88 *Estate of Hokomb*, ¶ 35
- 89 Trans. V. III., p. 16,1.8-23
- 90 Pryor at Trans. V. III., p. 28,1. 22-24; Bruner at Trans. V. III., p. 106,1.4-10; Carol Pryor at Trans. V. III., p. 90-91,1.19-12; and Logan at Trans. V. III., p. 165,1.10-22
- 91 *Anderson v. Davis*. 1952 OK 193, ¶ 14-29; 256 P 2d 1099(Okla. 1952)
- 92 12 O.S. 2001 § 2303(2), supra note 17.
- 93 *Brown v. Minter*, 1922 OK 222, ¶ 3-4; 207 P. 976, (Okla. 1922)
- 94 Circumstantial evidence supported (a) Elaine was a dominant and manipulative figure; (b). Holcomb's frailty and dependence on Elaine made her vulnerable to Elaine's dominance and control; (c) Elaine in fact exercised that dominance and control as demonstrated by her dubious handling of Holcomb's money;(d) suspicious acquisition for Elaine of \$80,000 at a time when Holcomb was worried about her own **financial** situation; and (e) by Elaine's active involvement in her mother's legal affairs.
- 95 Goodwin Trans. V. II, p. 96-97,1. 3-21; Bagwell at Trans. V. II, p. 199-200,1.4-15; Miller at Trans. V. I. p. 91-94,110-1; Goodwin Trans. V. II, p.96,1. 3-8
- 96 Bagwell Trans. V. II, p. 178,1.9-10; Miller at Trans. Vol. I, p 80,1.16-17; Donnie Ray Goodin at Trans. V. II, p. 121, p. 16;
- 97 Billy Bagwell testified Goodin was not afraid of Logan Trans. Vol. III, p. 123,1.19-24; Logan testified Goodin was not afraid of her Trans. V. III, p. 180,1.18-19; Victor Pryor testified Goodin was not afraid of Logan or anyone else, Trans. V. III, p. 67,1. 2-6; Carol Pryor testified Goodin was not afraid of Logan and Goodin was not shy. Trans. V. III. p. 89,1. 4-16; Carlene Bruner testified Goodin was not afraid of Logan, Trans. V. III. p. 112,1. 2-12.
- 98 Trans. V. II, p. 256,11-8; Loretta's Bank Statement 2/09 Plf. Ex.M-1
- 99 Bagwell at Trans. V. II. p.171,1.2-4; Donny Ray at Trans. V. II, p.125,1.7-13; Miller at Trans V. I p.115-116,119-2.
- 100 Unfortunately, Smith was not able to appear live at trial which presumably could have affected the jury's opinion of his credibility. The Court failed to instruct the jury that the read deposition testimony of David Smith carried the equal weight of Smith testifying live.
- 101 Depo of Smith Resp. Ex. 21 p. 74,1 9-22 read to the jury Trans. V. III. p. 173-174,1.17-19
- 102 APS Ltr. Resp. Ex. 18
- 103 Trans. V. I. p. 11-13,1.9-25
- 104 *Id.*
- 105 *Id.*
- 106 *Matter of the Estate of Webb*, 1993 OK 75 ¶ 10, 38; 863 P. 2d 1116 (Okla. 1993)
- 107 Trans. V. VI, p. 52, 1.19-24
- 108 Trans. VI p. 21-22,1.1-1

- 109 Ver. Form R. p. 167
110 Ver. Form R. p. 169 and 171
111 Trans. V. ii p. 226-2271. 18-4
112 Medical record dated 1/17/08, Plf. Ex. 1-10 compared to Medical Record dated 2/7/08, Plf. Ex. 1-12
113 Bagwell's attorney regarding the verdict forms: "We're going to ask you for a verdict for Loretta and Wade and I want to make sure there is no confusion. We're asking for a verdict that Loretta lacked the necessary testamentary capacity on April 21st, 2008 to execute the quit claim deed, then also on May the 8th to amend the original trust."¹¹³
114 Ver. Form R. p. 168
115 Ver. Form R. p. 169
116 Agreed Stipulations of Fact R. p. 155
117 Charboneau Depo. Resp. Ex. 21,
118 Deposition of Dr. Cham Respo. Ex. 21 p. 21-22 I. 8-1 read to the jury Trans. V. III, p.197,1.6-8
119 Trans. V. II, p. 195,11-15.
120 Victor Pryor did not testify with certainty that Goodin had broken her hip prior to the signing of the Amended Trust. Trans. V. III, p., I. Not only is the medical record admitted into evidence the best source compared to Pryor's memory of events which occurred in excess of 4 years prior, Pryor states that he could have seen Goodin more times than were documented on his invoice and therefore could have seen her after she broke her hip in 2008. Trans. V. III, p. 57,1.6-8
121 Trans. V. IV, p. 14-15 1,25-7
122 Bagwell's attorney "He attacked my statement in closing that Loretta broke her hip before signing the documents ... ***I don't know, again if that's valid or not.*** It's clearly what the record will show. Secondly, it was also supported by Wade Bagwell's testimony. So again selective memory, leaving out evidence. Again that's why this is not an accurate record of what actually transpired at trial." Transcript from Motion to Settle Journal Entry p. 24-25 1.17-3.
123 Jury Note, Ct. Ex. 2
124 *Gabus v. Harvey*, 1984 OK 4, 678 P.2d 253, 258. *Cities Service Co. v. Gulf Oil Corp.*, 1999 OK 14, ¶ 32, 980 P.2d 116,132 (Okla. 1999)
125 *Cities Service Co. v. Gulf Oil Corp.*, at 11 32, citing, *General Elec. Co. v. Joiner*, 522 U.S. 136,118 S. Ct. 512,139 L Ed. 2d 508 (1997).
126 *Christian v. Gray*, 2003 OK 10, 42 (Okla. 2003)
127 Trans. V. II, p.31-32,1-7-9
128 Trans. V. II p. 53-56,1. 7-4