

**In the
Supreme Court of the United States**

ANNE A. SEARS, *Petitioner*

v.

LUCAS D. BOTTORFF, ET. AL., *Respondent*

**On Petition For A Writ Of Certiorari To
The Tennessee Court Of Appeals**

PETITION FOR WRIT OF CERTIORARI

ANNE A. SEARS
1019 Boxwood Dr.
Franklin, TN 37069
615-376-0552

Pro Se

Appendix

APPENDIX B

APPENDIX C

APPENDIX D

estate to be divided equally between Ian Sears and his sister, Anne A. Sears (“Appellant”).

On May 5, 2015, Decedent executed a durable power of attorney (POA) naming Mr. Sears as her attorney-in-fact, with Ms. Sears as successor attorney-in-fact. On August 13, 2015, Decedent signed a typewritten document entitled “REVOKATION [sic] OF POWER OF ATTORNEY.” This document purports to revoke the prior POA in favor of Decedent’s son. Having purportedly revoked Mr. Sears’ POA by execution of the revocation, Appellant thereafter, acted as Decedent’s attorney-in-fact under the original POA, which named her as Decedent’s successor POA. Specifically, between October 15, 2015 and November 20, 2015, Appellant transferred \$116,899.51 from Decedent’s Thoroughbred Financial Services investment account to Decedent’s deposit account at Navy Federal Credit Union (“NFCU”). Then between November 20, 2015 and May 17, 2016, Appellant transferred \$116,747.85 from Decedent’s NFCU account into her own savings account. Appellant spent a substantial portion of these funds, and only \$62,000 remained in her savings account at the time of trial. Appellant was unable to account for the use of these funds.

Also under the POA, on April 28, 2016, Appellant prepared a quitclaim deed transferring to herself all of Decedent’s “rights, title and interest” in the real property located at 1019 Boxwood Drive, Franklin, Tennessee (the “Boxwood Property”), with the exception of a reserved life estate for Decedent. Appellant signed her mother’s name on the quitclaim deed, and signed her own name as “Attorney In Fact.” The consideration recited for this conveyance is “\$10.00 and 12 years of caregiving aid and assistance which amount is equal to or greater than the amount which the property would command at a fair and voluntary sale.” In 2016, the tax appraisal on the Boxwood Property was \$275,300.

On August 16, 2016, shortly after Decedent’s death, Lucas D. Bottorff (“Appellee” or “Administrator CTA”) was appointed Administrator CTA of Decedent’s estate. In December 2016, the Administrator filed a petition to recoup assets of the estate and an amended petition to recoup assets of the estate, naming Anne A. Sears as Respondent. The Administrator CTA also recorded a lien *lis pendens* on the Boxwood Property. On January 17, 2017, Appellant filed a response, in which she averred that Decedent knowingly and intentionally transferred her assets to Appellant.

The case was heard on May 12, 2017. The trial court determined that the foregoing transfers of Decedent’s assets were self-dealing transactions, which were wrongfully committed by Appellant using the POA. The trial court also determined that even if the revocation of the POA in favor of Mr. Sears was legitimate, Appellant owed Decedent a fiduciary duty. Accordingly, the trial court held that these self-dealing transactions gave rise to the presumption of undue influence, which may be rebutted only by clear and convincing evidence that the transactions were fair. The trial court also

S.W.3d 913, 916 (Tenn. 2000); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999); *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); Tenn. R. App. P. 13(d). Whether or not a fiduciary or confidential relationship existed is a question of fact. *Matlock v. Simpson*, 902 S.W.2d 384, 385 (Tenn. 1995); *see also Roberts v. Chase*, 25 Tenn. App. 636, 166 S.W.2d 641 (1942); *Turner v. Leathers*, 191 Tenn. 292, 232 S.W.2d 269 (1950); *Halle v. Summerfield*, 199 Tenn. 445, 287 S.W.2d 57 (1956). Our review of the trial court's findings of fact is *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005).

While we are cognizant that Appellant is proceeding *pro se*¹, it is well-settled that “*pro se* litigants are held to the same procedural and substantive standards to which lawyers must adhere.” *Brown v. Christian Bros. University*, No. W2012-01336-COA-R3-CV, 2013 WL 3982137, at *3 (Tenn. Ct. App. Aug. 5, 2013), *perm. app. denied* (Tenn. Jan. 15, 2014). While a party who chooses to represent himself or herself is entitled to the fair and equal treatment of the courts, *Hodges v. Tenn. Att'y Gen.*, 43 S.W.3d 918, 920 (Tenn. Ct. App. 2000), “[*pro se* litigants are not ... entitled to shift the burden of litigating their case to the courts.]” *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000). Although *pro se* litigants are entitled to some liberality, “the courts cannot create claims or defenses for *pro se* litigants where none exist.” *Barnett v. Tennessee Orthopaedic All.*, 391 S.W.3d 74, 79 (Tenn. Ct. App. 2012) (quoting *Hessmer v. Hessmer*, 138 S.W.3d 901, 904 (Tenn. Ct. App. 2003)).

IV. Analysis

A. Evidentiary Issues

Appellant argues that the trial court erred in refusing to admit certain videos into evidence, which it deemed irrelevant. Specifically, Appellant proffered trial exhibit 18, which is a portable data drive containing several files. The trial court describes the files as

video recordings depicting [Appellant] caring for the Decedent's personal needs, taking Decedent shopping, taking Decedent to an outdoor park, discussing with Decedent certain events purporting to have taken place between Decedent and Ian Spcars, as well as video recordings of what purports to be the interior of the Boxwood property.

On June 6, 2017, the trial court entered a supplemental order, in which it stated that the video files offered as Exhibit 18 were inadmissible hearsay. The trial court added that

¹ Although Appellant is proceeding *pro se*, we note that she is a licensed attorney in Virginia.

startling event or condition, and (3) the statement must be made under the stress of excitement.

Irwin v. Anderson, No. E2012-00477-COA-R3-CV, 2012 WL 6589932, at *1-2 (Tenn. Ct. App. Dec. 17, 2012); *State v. Lane*, 1993 WL 523534 (Tenn. Ct. App. Dec. 15, 1993), citing Neil P. Cohen et al., Tennessee Law of Evidence, § 803(2).2 (2d ed.1990).

As this Court has previously explained:

[T]he ultimate test is spontaneity and logical relation to the main event, and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstance and at a time so near it as to preclude the idea of deliberation and fabrication, it is to be regarded as contemporaneous within the rule.

Irwin, 2012 WL 6589932, at *2 (quoting *Collier v. Davis*, 1994 WL27619 (Tenn. Ct. App. Feb. 3, 1994)). In this case, Appellant alleges that the startling event was the time Mr. Sears spent caring for Decedent in July 2015. However, the video was not made until November 2015, some four months later. Appellant stipulated that Decedent suffered from mental disability during the time that Mr. Sears cared for Decedent and the time that the videos were recorded. Appellant did not demonstrate that the excluded videos fit within any hearsay exception under the Tennessee Rules of Evidence; therefore, they were properly excluded by the trial court.

Appellant argues that several of the videos were not hearsay as they were not offered to prove the truth of the matter asserted, but to “reflect . . . Decedent’s temperament and personality.” Assuming *arguendo* that the videos accurately reflect Decedent’s temperament, it is not germane to the issue of whether Appellant violated her fiduciary duty to Appellant: Appellant stipulated that Decedent suffered from physical and mental disabilities for the last three years of her life; therefore, the videos were not reliable evidence of anything at issue in this case.

Appellant also argues that the trial court erred in applying the dead man’s statute in this case. Appellant contends that as a result of the trial court’s reliance on the statute, significant evidence was excluded. Tennessee Code Annotated section 24-1-203, commonly referred to as the dead man’s statute, reads as follows:

In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.

multiple warnings not to interrupt before having Appellant escorted to a holding cell for a brief recess. Trial courts possess inherent, common-law authority to control their dockets and the proceedings in their courts. *Hodges v. Attorney Gen.*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000). “[T]he trial judge ... is ultimately responsible for every aspect of the orchestration of a trial.” *State v. Milam*, No. M2008-00695-CCA-R3-CD, 2010 WL 744398, at *18 (Tenn. Crim. App. Mar. 3, 2010) (quoting *State v. McCray*, 614 S.W.2d 90, 93 (Tenn. Crim. App. 1981)). The record simply does not support Appellant’s contention that the trial court behaved in a manner that was “biased, highly prejudicial and intended to humiliate and silence her from offering a defense.” This claim is without merit.

B. Breach of Fiduciary Duty

Appellant argues that the trial court erred in determining that the transfer of Decedent’s assets to Appellant was self-serving. Instead, Appellant contends that the transfers were made pursuant to an agreement for caregiving services and in accordance with Decedent’s POA. According to Appellant, this arrangement provided a clear benefit to Decedent, who was able to remain in her own home. With regard to the transfers of Decedent’s assets, the trial court’s order states in relevant part:

[Appellant] initially testified she executed these transfers to herself in order to protect her mother’s assets from being depleted by her brother. When questioned by the court to explain how spending her mother’s money protected her mother, Appellant offered no coherent answer. Likewise, [Appellant] offered no coherent answer when asked by the court if her motive was to protect the assets from dissipation by her brother, why she had not already turned Decedent’s assets over to the Administrator. Upon further questioning from the court, [Appellant] admitted her true motivation was to pay herself compensation she believed she was owed for the many years she had cared for her mother, instead of sharing her mother’s estate with her brother as set out in her mother’s Will.

Ultimately, the trial court found that Appellant owed a fiduciary duty to Decedent and that Appellant breached this duty by transferring title to the Boxwood Property to herself and by transferring Decedent’s funds to Appellant’s bank account. As such, the trial court determined that “these self-dealing transactions give rise to the rebuttable presumption of undue influence, which may be rebutted only by clear and convincing evidence of the fairness of the transaction.” *Matlock*, 902 S.W. 2d at 386.

In attempting to defend the revocation of the POA, Appellant’s brief goes into great detail concerning whether and when her relationship with Decedent became a confidential one. Assuming *arguendo* that the revocation of the POA was valid, Appellant nonetheless fails to acknowledge her fiduciary relationship with Decedent.

assets of the Decedent to compensate herself for those services. Although Appellant refers to an agreement for caregiving services, the document she references is actually an application for veteran's benefits that Appellant completed on behalf of Decedent. This application was signed by Decedent in September 2015, the same period of time in which Appellant stipulated that Decedent was experiencing mental issues. The trial court admitted this "agreement" into evidence as an admission against interest only. From our review, the evidence in the record clearly supports the trial court's findings that Appellant owed a fiduciary duty to Decedent. As such, the transfers of Decedent's assets to Appellant gave rise to a rebuttable presumption of undue influence. As discussed above, the evidence proffered by Appellant failed to meet her burden to rebut the undue influence presumption by clear and convincing proof.

V. Conclusion

For the foregoing reasons, we affirm the trial court's judgment. The case is remanded to the trial court for further proceedings as may be necessary and are consistent with this Opinion. Costs on the appeal are assessed against the Appellant, Anne A. Sears and her surety, for all of which execution may issue if necessary.



KENNY ARMSTRONG, JUDGE