IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 29, 2023 Session

# THE STATE OF TENNESSEE EX REL. JOAN ROSS WESTERMAN ET AL. v. PEGGY D. MATHES ET AL.

**Appeal from the Chancery Court for Davidson County**
**No. 19-1310-II Anne C. Martin, Chancellor**

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**No. M2022-00611-COA-R3-CV**

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The trial court granted Defendants/Appellees' motion for a directed verdict at the close of Plaintiff/Appellant's proof. Discerning no error, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded**

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Eugene N. Bulso, Jr. and Nicholas Tsiouvaras, Franklin, Tennessee, for the appellant, Joan Ross Westerman.

T. William Caldwell, Thomas C. Corts, John Michael Gillum, and Justin D. Wear, Nashville, Tennessee, for the appellees, NGM Insurance Company, and Peggy Duncan Mathes.

## OPINION

### I. FACTUAL AND PROCEDURAL HISTORY

At the center of this on-going dispute is a home constructed on seven acres of real property in Pegram, Tennessee ("the property"). This is the fourth appeal to this Court, and an additional action was adjudicated in the United States District Court for the Middle District of Tennessee ("the federal court" or "the district court"). *See* ***In re Estate of Jane***

***Kathryn Ross***, No. M2012-02228-COA-R3-CV, 2013 WL 3346717, (Tenn. Ct. App. June 27, 2013) ("***Ross I***"); ***In re Estate of Ross***, No. M2013-02218-COA-R3-CV, 2014 WL 2999576, (Tenn. Ct. App. June 30, 2014), *perm. app. denied* (Tenn. Nov. 21, 2014) ("***Ross II***"); ***In re Estate of Ross***, No. M2014-02252-COA-R3-CV, 2015 WL 4557058 (Tenn. Ct. App. July 28, 2015) ("***Ross III***"); ***Wildasin v. Mathes***, No. 3:14-cv-02036, 2019 WL 2269878, (M.D. Tenn. May 28, 2019) ("***Ross IV***" or "the federal action"). The current case concerns the value of the property when it was sold at action in 2014. The background facts relevant to our review are established by the four previous actions.

Decedent Jane Kathryn Ross ("Ms. Ross") is the mother of Paul Sorace ("Mr. Sorace") and Appellant Joan Ross Westerman ("Ms. Westerman").[1] ***Ross I*** at *1. Ms. Ross and her husband John Sorace were divorced when their children were young. ***Id.*** at *3 n.1. Ms. Westerman lived with Ms. Ross, and Mr. Sorace lived with his paternal grandparents in a home next door to his father. ***Id.*** In 1998, Ms. Ross executed a will naming Ms. Westerman and Mr. Sorace as beneficiaries of most of her estate. ***Id.*** at *1. In 2000, she executed a durable power of attorney to Ms. Westerman. ***Id.***

In 1991, Mr. Sorace, then a bachelor, purchased real property consisting of seven acres and a "modest two[-]bedroom home . . . in Pegram for $57,400." ***Id.*** In June 2005, Ms. Ross sold her home in Nashville and moved into Mr. Sorace's home in Pegram. ***Id.*** Ms. Westerman lived in California. ***Id.*** at *3.

Shortly after Ms. Ross relocated to Pegram, she and Mr. Sorace executed a contract to build a 3,553 square-foot home ("the home") on the seven-acre parcel. ***Id***. at *1. In July 2005, they both signed the construction contract as "owners," and construction of the home was completed in June 2006. ***Id.*** In July 2006, Ms. Ross and Mr. Sorace moved into the new home, and Mr. Sorace demolished the small farmhouse. ***Ross II*** at *1**.** Ms. Ross contributed approximately $433,000 to construct the new home; Mr. Sorace contributed approximately $16,000. ***Id.*** However, the deed to the property was not revised and listed Mr. Sorace as the sole owner. ***Ross I*** at *8.

Mr. Sorace married in 2007. ***Ross I*** at *1. His wife had a 5-year old child from a previous relationship. Mr. Sorace and his wife subsequently had twins, and Ms. Ross and the Sorace family lived together in the Pegram home. ***Id.*** at *1. In the meantime, Ms. Ross' mental capacity declined, and "by May of 2008[,] Ms. Ross was clearly demented, severely impaired, had considerable psychotic symptoms of anxiety, fearfulness, and paranoia, and in fact, she confused her son, Paul, with her [deceased] husband." ***Id.*** at *5. In November 2008, Ms. Westerman relocated Ms. Ross to California. ***Id.*** at *3. Ms. Westerman asked Mr. Sorace to sell the home in order to pay for Ms. Ross' care; Mr. Sorace refused. ***Ross II*** at *1.

[1] Ms. Westerman was known as Joan Ross Wildasin when the previous lawsuits were litigated.

In March 2009, Ms. Westerman, acting as Ms. Ross' next friend, filed an action for partition of the property, damages, and for a constructive trust. ***Ross I*** at *1. Ms. Ross died in April 2010, and Appellee Peggy Mathes ("Ms. Mathes") was appointed Administrator of her estate.[2] ***Ross IV*** at *1. Ms. Ross' estate ("the Estate") was substituted as the plaintiff in ***Ross I***. ***Ross I*** at *1. The Estate asserted claims against Mr. Sorace and his wife for a resulting trust, a constructive trust, rent, conversion, unjust enrichment, financial exploitation, and violation of the Adult Protection Act.[3] ***Id.*** The litigation in ***Ross I*** focused on Ms. Ross' mental capacity and her intentions with respect to ownership of the property. ***Id.*** at *1-*4. Following a bench trial in August 2012, the trial court awarded the Estate a resulting trust in the real property. ***Id.***

Mr. Sorace appealed. ***Id.*** Acknowledging a "less than satisfying" result, this Court reversed the trial court's judgment. ***Id.*** at *8. In ***Ross I,*** we held:

> Under the law of resulting trusts, however, we must conclude that [this] is the proper result. Mr. Sorace bought the real property in June 1991 and was the sole owner. By deciding to build a house on property owned by her son, Ms. Ross increased the value of Mr. Sorace's property. But the deed for the property still shows Mr. Sorace to be the sole owner, and the law of resulting trusts does not permit a court to declare such a trust based on improvements to real property.

We remanded the matter to the trial court. After further proceedings, the trial court awarded the Estate a judgment for unjust enrichment in the amount of $417,000. ***Ross II*** at *2. Mr. Sorace again appealed and asserted that the Estate had waived its claim for unjust enrichment and had not proved the value of the improvements. ***Id.*** at *1. We affirmed the trial court's judgment. ***Id.*** In so holding, we concluded that the evidence did not preponderate against the trial court's finding that Ms. Ross' contributions to the construction of the home enhanced the value of the property by $417,000. ***Id.*** at *5.

In the meantime, in 2011 — while ***Ross I*** was pending in the trial court — Ms. Mathes obtained an appraisal of the property as part of the administration of the Estate. ***Ross IV*** at *1. The "appraisal indicated that the house on the property consisted of 3,553 square feet of finished, above-grade interior space, with an estimated value of $480,000." ***Id.*** Ms. Mathes determined that the Estate lacked sufficient assets to pursue the claim against Mr. Sorace and agreed to a settlement. ***Ross III*** at *1. Ms. Westerman opposed the settlement and retained attorneys to represent her interests as a beneficiary. ***Id.*** at *3.

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[2] Ms. Ross appointed her attorney and Ms. Westerman as co-executors in her Will. Ms. Ross' attorney predeceased her, and Mr. Sorace objected to the appointment of Ms. Westerman as administrator. In August 2010, Ms. Mathes, the Administrator for the Metropolitan Government of Nashville Davidson County, was appointed Administrator C.T.A. of the Estate by agreement.

[3] Mr. Sorace's wife subsequently was dismissed.

In February 2012, Ms. Mathes, Ms. Westerman, and Ms. Westerman's attorneys "entered into an agreement stating, in pertinent part, that [Ms. Westerman's] attorneys would 'at no cost to the estate, prosecute th[e] matter to trial' and that 'all [of the attorneys'] fees and expenses shall be the responsibility of [Ms. Westerman].'" ***Id.*** at *1, *5. Additionally, while his appeal of the trial court's unjust enrichment award was pending (***Ross II***), Mr. Sorace filed a petition for bankruptcy, and the bankruptcy trustee ("the Trustee") was substituted for Mr. Sorace. ***Id.*** at *4. In January 2014 — with leave of the bankruptcy court — counsel for Ms. Westerman executed on the unjust enrichment judgment and purchased the property on behalf of the Estate for $325,000 at a sheriff's sale. ***Id.*** at *4; ***Ross IV*** at *1.

In February 2014, Ms. Westerman's attorneys filed a motion for fees and expenses. ***Ross III*** at *4. Notwithstanding the agreement regarding Ms. Westerman's responsibility for attorney's fees, Ms. Mathes did not file an objection to the fees, and neither the probate court nor the Trustee were made aware of the agreement. ***Id.*** Following a hearing in March 2014, the trial court assessed $178,598 in attorney's fees and expenses against the Estate. ***Id.*** The trial court also granted Ms. Mathes' motion for administrative fees. ***Id.***

On March 13, 2014, the attorneys retained by the Estate also filed a motion for fees for services rendered to the Estate. ***Id.*** When the trial court heard the motion on March 28, a dispute regarding who was entitled to fees for which services ensued, and Ms. Mathes asserted that Ms. Westerman's counsel acted without authorization when he purchased the property on the Estate's behalf. ***Id.*** A week later, Ms. Westerman filed a motion to remove Ms. Mathes as administrator of the Estate. ***Id.*** In her motion, Ms. Westerman "alleg[ed] negligence in the administration of the estate and misrepresentation of facts to the court during the March 28th hearing." ***Id.*** Copies of her filings — including the February 2012 agreement pertaining to legal fees — also were served on the Trustee. The Trustee, in turn, filed a Tennessee Rules of Civil Procedure Rule 59.04 motion to set aside the assessment of fees against the Estate. ***Id.*** at *5. ***Id.*** Ms. Mathes supported the motion, "stating that [the] fees [of Ms. Westerman's counsel] 'were not to be paid from the estate, only the portion inherited by [Ms. Westerman].'" ***Id.***

The probate court concluded that, in light of the parties' actions and conduct following the 2012 agreement, "it would be not only highly inequitable. . . but unconscionable for th[e] [c]ourt to award all of [counsel's] fees only against Ms. [Westerman]." ***Id.*** The trial court determined that

> the retainer agreement reflected that only those fees incurred after the August 15, 2012 trial would be assessed against the estate and that the fees incurred from August 1 through August 15 were the sole responsibility of Ms. [Westerman]. As a result, the probate court granted in part and denied in part the Trustee's motion to alter the prior fee order by assessing $55,132 in attorney's fees and expenses incurred between August 1 and 15, 2012 to Ms.

> [Westerman] and reducing the original award of fees assessed against the estate to $123,666.35. At the same time, the probate court granted the firm's final motion for attorney's fees and awarded an additional $28,788.75, which the court assessed against the estate.

***Id.*** The trial court entered final judgment in the matter in September 2014, and the Trustee appealed.[4] ***Id.*** at *1. We affirmed the trial court's judgment in July 2015. ***Id.*** at *10.

In the meantime, this Court affirmed the trial court's judgment in ***Ross II*** on June 30, 2014.[5] The probate court granted Ms. Westerman's motion to sell the property at public auction, and Ms. Mathes hired Bill Colson Auction & Realty ("the auction company") to facilitate the sale. ***Ross IV*** at *1. An auction sale was set for October 2014, and Bobby Colson ("Mr. Colson") was named to serve as the auctioneer. ***Id.*** at *1-2.

Prior to the auction, Mr. Colson obtained a report from RealTracs, a subscription service, that incorrectly indicated that the house consisted of 2,538 square feet. ***Id.*** at *2. As a result, the house was advertised "as consisting of approximately 1,000 square feet less than its true size[,]" and Ms. Mathes neither noticed nor corrected the advertised square footage. ***Id.*** On the day of the auction, counsel for Ms. Westerman informed Mr. Colson of the error and provided him with a copy of the 2011 appraisal. ***Id.*** Before bidding on the property began, Mr. Colson announced the correct size, appraised value of $480,000, and property tax assessment of $400,000. ***Id.*** "No one cancelled the auction after these announcements." ***Id.***

On October 18, 2014, the property sold at auction for $315,000, and Ms. Mathes moved the probate court to approve the auction contract. ***Id.*** "Despite a request for the probate court to acknowledge that $315,000 was the current fair market value of the property, [the probate] court expressly refused to do so." ***Id.*** Following a hearing in November 2014, the probate court "simply approved the auction sale price as 'fair and reasonable' based on all the circumstances and noted that $315,000 was a 'commercially reasonable price.'" ***Id.*** "[T]he probate court expressly did *not* rule on the property's fair market value[.]" ***Id.*** at *7 (emphasis in the original).

While the matter was pending in the probate court, on October 28, 2014, Ms. Westerman — acting "as a beneficiary of the Estate" — filed an action in federal court against Ms. Mathes, her law firm, and the auction company. ***Id.*** at *1, n. 3. After "a long and contentious history" in the federal court, Ms. Westerman's claim of negligence against

[4] We take judicial notice of the date of the trial court's final judgement.

[5] We observe that the judgment affirming the award of damages to the Estate in ***Ross II*** did not become final until the Tennessee Supreme Court denied permission to appeal in November 2014.

Ms. Mathes was tried by a jury in August 2017.[6] ***Id.*** at *1. The jury awarded Ms. Westerman a judgment against Ms. Mathes in the amount of $114,167. ***Id.*** at *2. On appeal from the recommendation of the magistrate judge, the district court granted Ms. Westerman's motion for pre-judgment interest.[7] ***Id.*** at *9. The district court entered its final judgment on May 28, 2019. Ms. Mathes paid the total judgment of $142,500.

The record in the current case reflects that in October 2017 — after the jury entered its verdict in ***Ross IV*** **—** Ms. Mathes filed motions in state court to require Ms. Westerman to pay the federal court judgment and amounts "pursuant to a settlement with Bill Colson Auction & Realty Company, in the same action" into the Estate. Ms. Westerman filed a motion for distribution of fees and expenses totaling approximately $241,734 to four law firms. Following a hearing in November 2019, the trial court granted Ms. Westerman's motion for distribution and denied Ms. Mathes' motions as barred by the federal court's judgment.

On October 21, 2019, Ms. Westerman made a written "derivative demand" on Ms. Mathes. In her demand, Ms. Westerman asserted that the jury in ***Ross IV*** had determined that Ms. Mathes was negligent and had breached her fiduciary duty to the Estate and that the Estate was damaged by Ms. Mathes' "negligence, [her] breach of fiduciary duty, and [her] failure faithfully to perform the obligations the law imposes upon [her] as administrator ad litem of the Estate." Ms. Westerman demanded that Ms. Mathes cause her surety, NGM Insurance Company ("NGM"), to pay her bond amount of $100,000 to the Estate and stated that she would commence a "derivative action on behalf of the Estate" if Ms. Mathes failed to take the demanded actions by October 28, 2019.

On October 30, 2019, Ms. Westerman filed the current action against Ms. Mathes and NGM (collectively, "Appellees") in the Chancery Court for Davidson County. In her complaint, Ms. Westerman asserted that ***Ross IV*** was an action to recover damages that she "personally sustained as a beneficiary of the Estate." She submitted that the jury in ***Ross IV*** found that Ms. Westerman sustained damages in the amount of $114,167 as "a 50% beneficiary of the Estate, establishing that the Property sold at auction for $228,334

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[6] In the federal action, Ms. Westerman, "as a beneficiary of the Estate, alleged that Defendant Mathes committed negligence as Administrator of the Estate, that she committed negligence as legal counsel, and that the auction company committed negligence and negligence *per se*. The Court granted summary judgment to Defendant Mathes as to the negligence-as-legal-counsel claim but left the negligence-as-Administrator claim intact. The Court also dismissed [Ms. Westerman's] claim against Mathes' law firm. The parties later stipulated to the dismissal of all claims against the auction company." ***Ross IV*** at *2 (footnote omitted). The federal court determined it had subject-matter jurisdiction based on diversity because Ms. Westerman's "negligence claim involved an alleged breach of duty as to Plaintiff as a *beneficiary*, not as a representative of the Estate[.]" ***Id.***

[7] Ms. Westerman ultimately was awarded $32,873.78 in pre-judgment interest.

less than its fair market value as a result of [Ms.] Mathes' negligence." She asserted:

> The jury's verdict, and the subsequent Judgment, conclusively [] establish (a) that Mathes was negligent in connection with the sale of the Estate's Property; (b) that Mathes breached her fiduciary duty to the Estate; and (c) that Mathes damaged the Estate in the amount of $228,334.

Ms. Westerman submitted that "such findings bind Mathes under the doctrine of issue preclusion[.]"

Ms. Westerman also asserted that Ms. Mathes failed to comply with her October 21 demand letter and that, under ***Reed v. Robilio***, 400 F.2d 730 (6th Cir. 1968), and ***In re Estate of Cuneo***, 475 S.W.2d 672 (Tenn. App. 1971), she "may assert the Estate's claims against Mathes derivatively on behalf of the Estate." She asserted a claim of negligence against Ms. Mathes and argued that "[o]wing to Mathes' negligence, the Property sold for only $315,000, which the jury's [v]erdict in [***Ross IV***] establishes to be $228,334 below the fair market value of the Property." Accordingly, Ms. Westerman asserted that the Estate was entitled to judgment against Ms. Mathes "in the amount of $228,334, plus pre-judgment interest, less the credit (if any) to which Mathes is entitled for having previously paid $142,500."

Ms. Westerman also asserted a claim against NGM for recovery under the surety bond. She maintained that the Estate was an intended third-party beneficiary of the $100,000 public official bond issued and that the Estate constituted a " 'person interested in or entitled to a recovery on [the bond]' within the meaning of Tennessee Code Section 30-1-208(a)."[8] Ms. Westerman prayed for an award of compensatory damages in excess

[8] Tennessee Code Annotated section 30-1-208 provides:

> (a) Any person interested in or entitled to a recovery on a bond given by a personal representative may commence and prosecute a suit on the same in the name of the state of Tennessee for that person's own use.
>
> (b) Where several persons are entitled to a recovery on bonds given by a personal representative, a verdict and judgment or a decree rendered on the bond in favor of one shall not be a bar to any other person so entitled, but each may respectively sue for and recover each person's own proportion until the whole penalty is recovered.
>
> (c) When suits are brought on bonds given by a personal representative, it shall be sufficient to make profert of an attested or certified copy, and, if the copy is contested, either party may have a subpoena for the clerk to bring the original bond.
>
> (d) The person for whose use a suit may be brought under this law shall be liable to costs in the same manner as if the suit had been brought in the person's own name, and the court may render judgment or decree for the costs accordingly.

of $100,000, pre-judgment interest, attorney's fees, costs, and expenses. She also prayed that Ms. Mathes and NGM be held jointly and severally liable for the damages.

On December 2, 2019, NGM answered the complaint, acknowledged the bond and Ms. Mathes' duty of care, and generally asserted that it had no knowledge or information regarding Ms. Westerman's allegations. NGM argued that the bond did not cover Ms. Westerman's claims and that recovery in excess of $100,000 was not available under the "penal sum of the NGM Bond[.]" NGM also asserted a crossclaim against Ms. Mathes for indemnity under the bond.[9]

On December 9, Ms. Mathes answered NGM's crossclaim and admitted NGM's allegations, denied that Ms. Westerman was entitled to a judgment, and asserted that any expenses incurred by NGM should be paid by Ms. Westerman. She also answered Ms. Westerman's claim, admitting the jury award in ***Ross IV*** and contending that the jury found total damages in the amount of $114,167. She stated:

> It is admitted that the evidence proved that the Plaintiff was a 50% beneficiary of the [E]state, but it is denied that the property sold at auction for $228,334.00 less than its fair market value as a result of Peggy D. Mathes' negligence. In fact, the jury verdict established that the property sold at auction for $114,167.00 less than its fair market value as a result of the negligence of Peggy D. Mathes.

Ms. Mathes acknowledged that she did not reimburse the Estate for the damages and stated that "[s]he was ordered to pay the full amount of the judgment plus interest against her to [Ms. Westerman] despite her offer to pay the money to the [E]state." She asserted that the judgment in favor of Ms. Westerman had been satisfied and that she was "without sufficient information to state Plaintiff will fairly and adequately represent the interest of the Estate in this action by paying any money to her brother who is a 50% heir." Ms. Mathes maintained that the jury found that her negligence "caused the property to sell for $114,167.00 below the fair market value of the property."

Ms. Mathes asserted the affirmative defenses of failure to state a cause of action; collateral estoppel; *res judicata*; and accord and satisfaction. She also asserted that the Governmental Tort Liability Act governed any action against her. Ms. Mathes further asserted that Ms. Westerman was not the administrator of the Estate and, accordingly, could not maintain an action on behalf of the Estate.

[9] In May 2020, NGM dismissed its crossclaim against Ms. Mathes pursuant to Tennessee Rules of Civil Procedure Rule 41.01.

Ms. Westerman filed a motion for summary judgment on December 31, 2019. In her motion, Ms. Westerman sought a judgment of $208,382.70 against Ms. Mathes and $100,000 against NGM. Ms. Westerman asserted that Ms. Mathes was precluded from contesting the jury verdict in ***Ross IV*** under the doctrines of *res judicata* and collateral estoppel. She additionally asserted that NGM "as the surety on a $100,000 bond [Ms.] Mathes posted to secure the faithful performance of her duties as administrator, is liable to pay the bond penalty to the Estate."

In January 2020, Ms. Mathes responded to Ms. Westerman's motion and filed a counter-motion for summary judgment. In her motion, Ms. Mathes repeated her assertion that the jury in ***Ross IV*** determined the total damages caused by her negligence were $114,167 — not $228,334 — and that the judgment against her had been fully satisfied. NGM also responded in opposition to Ms. Westerman's motion and in support of Ms. Mathes' motion.

Following a hearing in February 2020, the trial court determined that Ms. Mathes was collaterally estopped from relitigating the issue of negligence and granted Ms. Westerman's motion for summary judgment on the issue with respect to the Estate. The trial court denied Ms. Mathes' motion for summary judgment with respect to damages. The court concluded:

> Just as the parties cannot look behind or read into the jury verdict and must take it at face value, the Court also cannot make assumptions regarding its relationship to a claim the Estate did not bring in the Federal Litigation. The Court cannot assume that the jury would have awarded the Estate damages of $114,167 if the Estate had been a party to the Federal Litigation, or take the jury verdict for Westerman as conclusive on the issue of the Estate's damages, if any, for Mathes' negligence. This issue therefore remains open for determination.

The trial court also found:

> The only proof of damages at trial in the Federal Litigation was presented by Westerman through an expert witness, appraiser Richard Exton, who opined that the Property was worth either $115,000 or $165,000 more than was paid at the sale (depending on the date [on] which the appraisal was based). The jury was not asked about, nor is there any evidence to provide a basis for its $114,167 verdict.

The trial court denied the parties' cross-motions to alter or amend its order on summary judgment, and the matter was set to be heard by a jury.

Prior to trial, Appellees filed four motions in limine: 1) to limit the evidence of damages to the testimony of witnesses who testified in ***Ross IV***; 2) to exclude testimony of Ms. Westerman regarding the value of the property; 3) to exclude evidence regarding construction costs; 4) to exclude testimony regarding Ms. Mathes' negligence. Ms. Westerman opposed the motions and filed a motion to quash a subpoena to and exclude the testimony of Richard Exton ("Mr. Exton"), who testified in ***Ross IV***. After a hearing in September 2021, by order entered on September 10, the trial court granted Ms. Mathes' motion in limine to exclude evidence of negligence on the basis that negligence had been established in ***Ross IV***. The court denied Appellees' remaining motions and granted Ms. Westerman's motion to quash the subpoena to Mr. Exton on the basis that Ms. Westerman did not intend to rely on him at trial and Appellees had not retained him as an expert witness. Appellees filed a motion to reconsider with respect to the admissibility of Ms. Westerman's testimony regarding the value of the property, and the trial court granted the motion after a hearing in March 2022.

In April 2022, a jury trial began on the sole issue of the fair market value of the property when it was sold at auction on October 8, 2014. Appellees moved for a directed verdict at the close of Ms. Westerman's proof. After considering supplemental authority provided by the parties, the trial court granted the motion on its determination that Ms. Westerman had not introduced evidence of the fair market value of the property "at or around the time of the auction." The trial court entered final judgment in the matter on April 22, 2022, and this appeal ensued.

## II. ISSUES PRESENTED

Ms. Westerman raises the following issues for review, as stated in her brief:

> 1. Ms. Mathes is bound by a prior judgment arising from the acts at issue here. That judgment established that Ms. Westerman by virtue of her one-half interest in her mother's estate was individually injured by Ms. Mathes in the amount of $114,167. Did the trial court err by holding the judgment did not conclusively establish that the estate's damages were twice that of Ms. Westerman, or $228,334?
>
> 2. The Parties stipulations of facts are generally binding on them and the court. Below, the Parties stipulated that Plaintiff's damages were either $114,167 or $228,334. Did the trial court abuse its discretion by refusing to award Plaintiff the lesser amount when she offered to accept it?
>
> 3. The law permits the owner of property, or the owner's representative, to testify to the property's value, and does not limit this capacity to record ownership. Ms. Westerman was both the attorney-in-fact of an equitable owner and then later herself the holder of an equitable interest in the real

property at issue. Did the trial court abuse its discretion by excluding Ms. Westerman's testimony of the property's value?

4. Tennessee precedent allows the admission of property tax appraisals to prove a property's value, except in eminent domain cases. Given that this is not an eminent domain proceeding, did the trial court abuse its discretion in excluding the valuations contained in the property tax record cards?

5. Plaintiff submitted multiple forms of evidence to prove the value of the property, all of which were admitted by the trial court as relevant to that very determination. This determination is the only one which the jury would have had to make to resolve this case. Did the court err in granting a directed verdict on the basis that Plaintiff's evidence was insufficient?

Ms. Mathes raises two additional issues:

1. Should the trial court have prohibited Joan Westerman from bringing this claim on behalf of the Estate of Jane Ross ("Estate")?

2. Should the trial court have found on summary judgment that res judicata and the prohibition against double recovery prohibited Ms. Westerman from litigating this lawsuit?

## III. STANDARD OF REVIEW

The question presented by a Tennessee Rules of Civil Procedure Rule 50 motion for a directed verdict is whether the party with the burden of proof "has presented sufficient evidence to create an issue of fact for the jury to decide." ***Burton v. Warren Farmers Co-op.***, 129 S.W.3d 513, 520 (Tenn. Ct. App. 2002) (citation omitted). When considering a motion for a directed verdict, the trial court "must take the strongest legitimate view of the evidence and accept all reasonable inferences in favor of the nonmoving party." ***Brown v. Crown Equip. Corp.***, 181 S.W.3d 268, 281 (Tenn. 2005) (citation omitted). A directed verdict is appropriate only if "the evidence is susceptible to only one conclusion[]" and "reasonable minds could not differ as to the conclusions to be drawn from the evidence." ***Id.*** If there is any doubt regarding conclusions that might be reached from the evidence, the question is one for the jury. ***Burton***, 129 S.W.3d at 520 (citation omitted). We review a trial court's decision to grant a directed verdict *de novo*, with no presumption of correctness. ***Brown***, 181 S.W.3d at 281. We must apply the same standards as the trial court and will affirm the court's judgment only if the evidence supports only one conclusion. ***Id.***

## IV. ANALYSIS

We begin our discussion by observing that the parties both assert that the jury's verdict in ***Ross IV*** is conclusive on the issue of damages in this case. However, as the trial court noted in its order denying the parties' cross-motions to reconsider its order on summary judgment, "the parties[] dispute . . . whether the federal jury's monetary award was intended to represent the entire amount of damages suffered by the Estate, or the amount of damages suffered solely by [Ms. Westerman] — one of the Estate's two beneficiaries." As the trial court also noted, "[t]his case has been complicated by the parties' failure to include the Estate, and/or the second beneficiary of the Estate, Paul Sorace, as parties in the prior litigation." The trial court determined that the "factual basis" for the amount of damages awarded by the jury in ***Ross IV*** was unclear and that it could not "make assumptions regarding the federal jury verdict's relationship to a claim that the Estate did not bring in that litigation." Accordingly, the trial court declined to "usurp the role of a Tennessee jury" with respect to the amount of additional damages, if any, to be awarded to the Estate.

In light of the ambiguity of the judgment in ***Ross IV***, we agree with the trial court that Ross IV was not conclusive with respect to damages incurred by the Estate or whether the verdict amount constituted the entirety of the damages caused by Ms. Mathes' negligence. The federal magistrate judge denied Ms. Westerman's claim for post-judgment interest on its determination that it "would result in a 'windfall' to [Ms. Westerman] because it would not be offset by sharing it with the co-beneficiary." ***Ross IV*** at *9. On appeal, the district court "underst[ood] the point[]" but noted that "it needed to be made earlier." The court noted that the question of whether Ms. Westerman "would have to share any part of the judgment" was not before it. ***Id.*** We also note that Ms. Westerman's motion in ***Ross III*** to remove Ms. Mathes as Administrator of the Estate apparently was not granted, and, when Ross ***IV*** was adjudicated, a clear conflict existed between the interests of the Estate and those of Ms. Mathes. Accordingly, we turn to whether the trial court erred in granting Ms. Mathes' motion for a directed verdict in this case.

### Directed Verdict

As an initial matter, we note that the parties agree that the measure of damages in this case is the difference between the fair market value of the property in October 2014 and the auction sale price of $315,000. It is also undisputed that: 1) Ms. Westerman was last on the property in 2012 and has not entered the home since 2008; 2) the home was vacant for a number of years prior to the auction; and 3) the Estate purchased the property at a sheriff's sale for $325,000 in early 2014. In addition, Ms. Westerman successfully moved the court to exclude her evidence of value in ***Ross IV*** — *i.e.* the testimony of appraised value offered by Mr. Exton.

Ms. Westerman submits that the trial court erred by entering a directed verdict in favor of Ms. Mathes on the issue of damages because a jury could determine fair market value based on the evidence introduced a trial — a summary of the costs of construction; the findings affirmed by this Court in ***Ross I*** and ***Ross II***; and photographs and tax records depicting the size and quality of the home. She also asserts that the trial court erred in determining that she was not qualified to testify as to the value of the property and by excluding property tax records as evidence of value.

We review a trial court's determinations to exclude or admit evidence under the abuse of discretion standard of review. ***Allen v. Albea***, 476 S.W.3d 366, 378 (Tenn. Ct. App. 2015) (citation omitted). It is well-settled that

> a trial court abuses its discretion "only when it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" ***Eldridge v. Eldridge****,* 42 S.W.3d 82, 85 (Tenn. 2001) (quoting ***State v. Shirley****,* 6 S.W.3d 243, 247 (Tenn. 1999)). Under this standard, we will not substitute our judgment for the judgment of the trial court. ***Id.*** (citing ***Myint v. Allstate Ins. Co.****,* 970 S.W.2d 920, 927 (Tenn. 1998)). The abuse of discretion standard " reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives,'" and therefore "'envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal.'" ***Henderson v. SAIA, Inc.****,* 318 S.W.3d 328, 335 (Tenn. 2010) (quoting ***Lee Medical, Inc. v. Beecher****,* 312 S.W.3d 515, 524 (Tenn. 2010)).

***Id.*** at 373.

### 1. Exclusion of Testimony

Ms. Westerman contends that the trial court erred by granting Appellees' motion in limine to exclude her testimony regarding the value of the property under Rule 701(b) of the Tennessee Rules of Evidence. She asserts that Rule 701(b) has no application to this case and that the Rule does not require a witness to be an owner of record. She also asserts that she is qualified to testify as Ms. Ross' attorney-in-fact and as a beneficiary of the Estate. She additionally asserts that she has personal knowledge of the property and, accordingly, is qualified to testify as to its value.

Rule 701(b) provides: "A witness may testify to the value of the witness's own property or services." However, even an owner's testimony regarding value must be based on more than mere speculation to be persuasive. ***Airline Const. Inc. v. Barr***, 807 S.W.2d 247, 256 (Tenn. Ct. App. 1990) ("Although an 'owner' of real property is deemed to have special knowledge about his property to offer an opinion as to its value, the owner's opinion

will be given little weight when founded upon pure speculation. There must be some evidence, apart from mere ownership, that this 'value' is a product of reasoned analysis.")

In this case, it is undisputed that Ms. Westerman was not an owner of the property. However, she relies on ***Sekik v. Abdelnabi***, No. E2019-01302-COA-R3-CV, 2021 WL 120940 (Tenn. Ct. App. Jan. 13, 2021) for the proposition that the rule does not require an owner to be an owner of record. ***Sekik*** was a divorce case in which the wife was not the owner of record of real property located in the Middle East. ***Sekik***, 2021 WL 120940, at *1, *19. Under Tennessee law, the property was marital property in which Wife had an interest. ***Id.*** at *19 n. 13. A portion of the property was sold by husband, his brother, and his brother's wife during the pendency of the divorce, and the proceedings included allegations of a conspiracy to defraud the wife. ***Id.*** When the matter was heard, husband was incarcerated and serving a 17-year concurrent sentence "for the felony offenses of aggravated kidnapping, especially aggravated kidnapping, and two counts of aggravated assault." ***Id.*** Both husband and wife testified with respect to the property value, and the non-spouse parties (husbands' brother and brother's wife) objected to wife's testimony. ***Id.*** at *19. The trial court sustained the objection, but later found wife to be more credible with respect to the property value. ***Id.*** We stated, "[g]iven these conflicting rulings, the record is not entirely clear as to the trial court's ultimate resolution of the objection to Wife's testimony." ***Id.*** Additionally, the ruling was not challenged on appeal. ***Id.*** ***Sekik*** is not instructive in this case.

Ms. Westerman also relies on ***Wall v. Thalco, Inc.***, 614 S.W.2d 803 (Tenn. Ct. App. 1981) for the proposition that she is competent to testify as an "equitable owner" of the property based on the fact that she is a beneficiary of the Estate. In ***Wall***, the plaintiff testified as to the value of property as a previous owner of the property, and the defendant offered no evidence of value. ***Wall***, 614 S.W.2d at 806. We determined that the plaintiff was competent to testify because "[e]ven though he had temporarily loaned the title to defendant's corporation, he remained the equitable owner because he was contractually entitled to reconveyance." ***Id.*** As noted, Ms. Westerman was never the owner of the property in this case. ***Wall*** is not applicable here.

The criminal cases relied on by Ms. Westerman are also distinguishable. In ***State v. Watts***, the trial court permitted a property owner to testify regarding the cost to complete repairs to rental property that had been vandalized before the owner inherited it from his father. ***State v. Watts***, No. E2010-00553-CCA-R3-CD, 2011 WL 5517000, at *3 (Tenn. Ct. Crim. App. Nov. 8, 2011). The witness managed the rental property before inheriting it from his father and had already paid several thousand dollars to repair damages to the property. ***Id.*** at *1. The Court of Criminal Appeals determined that the trial court did not abuse its discretion in allowing the testimony under Rule 701(b) and Tennessee Rule of Evidence 602. ***Id.*** at *3. In ***State v. Holt***, the court permitted the owner's spouse to testify regarding the value of a stolen vehicle that was marital property. ***State v. Holt***, 965 S.W.2d 496, 498 (Tenn. Ct. Crim. App. 1997). This Court subsequently cited ***Holt*** for the

proposition "that a witness who is married to the owner of the property *and* who has intimate knowledge of such property is qualified to give a lay opinion as to the value of the property." ***Keith v. Howerton***, No. E2000-02703-COA-R3-CV, 2001 WL 984913, at *8 (Tenn. Ct. App. Aug. 28, 2001) (emphasis added). The property at issue in ***Keith*** was a diamond ring that the witness purchased as a gift to her husband. ***Id.*** As the trial court determined, Ms. Westerman did not have such "intimate knowledge" of the property in this case.

The cases relied on by Ms. Westerman in support of her argument that, as Ms. Ross' attorney-in-fact, she was qualified to testify as to the value of the property are not persuasive. The witness in ***Andrews v. Sprinkle***, No. M2012-02242-COA-R3-CV, 2013 WL 5498093 (Tenn. Ct. App. Sept. 30, 2013), was the administrator of the decedent's estate and was his spouse. The appellants in that case conceded that she was competent to testify with respect to the value of assets in the estate. ***Andrews***, 2013 WL 5498093, at *16. In ***Levine v. March***, the witness was the conservator of the personal property of the woman who had been murdered by her husband. ***Levine v. March***, 266 S.W.3d 426, 430 (Tenn. Ct. App. 2007). ***Levine*** was an action by the wife's parents to recover her personal property. ***Id.*** The appellants in ***Levine*** did not object to the conservator's testimony in the trial court, and we held that they could not challenge the evidence for the first time on appeal. ***Id.*** at 440. In a footnote, we stated:

> Were we to consider the substance of this issue, we would quickly conclude that the conservator of an absent or deceased party's property stands in the shoes of the absent or deceased party and, therefore, may testify with regard to the value of the absent or deceased party's property under Tenn. R. Evid. 701(b).

***Id.*** at 440 n.15.

However, in this case: 1) Ms. Ross was not the owner of the property; 2) Ms. Westerman was not Ms. Ross' conservator; and 3) the trial court found that, "[d]espite the power of attorney, Ms. Ross continued to have the ability to act on her own accord while constructing the home at issue." Ms. Westerman is not the administrator of the Estate, and, as noted above, there is nothing in this record to demonstrate that Ms. Westerman had "intimate knowledge" of the property such that she was competent to testify regarding its value. The trial court did not err by excluding her testimony.

**2. Exclusion of Tax Appraisal**

We turn next to Ms. Westerman's argument that the trial court abused its discretion by excluding tax appraisals of the property as evidence of its fair market value. We have noted that "in Tennessee and elsewhere '[i]t is the overwhelming weight of authority that assessed value is not competent direct evidence of value for purposes other than taxation.'"

***Carpenter v. Sims***, No. E2007-0622-COA-R3-CV, 2007 WL 4963008, at *4 (Tenn. Ct. App. Nov. 7, 2007) *perm. app. denied* (Tenn. April 7, 2008) (quoting C.C. Marvel, Annotation, *Valuation For Taxation Purposes to Show Value for Other Purposes,* 39 A.L.R.2d 209 (1955)); *see also* ***Knoxville Community Development Corp. v. Bailey****,* No. E2004-10659-COA-R3-CV, 2005 WL 1457750, (Tenn. Ct. App. Feb. 18, 2005); ***Union Joint Stock Land Bank of Louisville v. Knox County, et al.,*** 97 S.W.2d 842 (Tenn. Ct. App. 1936)). The trial court did not abuse its discretion in excluding the tax appraisals as evidence of value in this case.

**3. Sufficiency of the Evidence**

We agree with the trial court that the evidence offered by Ms. Westerman would not enable a jury to reasonably asses the fair market value of the property at the time of the auction sale in October 2014. As noted, the home was vacant for some time prior to the auction, and Ms. Westerman has not been inside the home since 2008. Therefore, she had no personal knowledge of its condition in 2014, and the photographs entered into evidence are not indicative of the value of the property at the time of auction.

Further, a summary of construction costs from 2006 is not relevant to the fair market value in 2014. In the context of a foreclosure sale, in ***Eastman Credit Union v. Bennett***, we determined that appraised values determined in 2007 and 2009 were too far removed to determine the fair market value of a property when it was sold in 2011. ***Eastman Credit Union v. Bennett***, No. E2015-01339-COA-R3-CV, 2016 WL 1276275, at *8 (Tenn. Ct. App. Mar. 31, 2016). In ***Halliman v. Heritage Bank***, we held that the sale prices of properties sold three-to-seven months after foreclosure sales were not demonstrative of the fair market value of the properties at the time of foreclosure. ***Halliman v. Heritage Bank***, No. M2014-00244-COA-R3-CV, 2015 WL 1955448, at *6 (Tenn. Ct. App. Apr. 30, 2015). Similarly, this Court's holdings in ***Ross I*** and ***Ross II*** established only the extent to which Mr. Sorace was unjustly enriched by Ms. Ross' financial contributions to the construction of the home in 2006. They are not helpful to the determination of the home's condition or value in 2014.

"Fair market value" has been defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction." ***Granoff v. Granoff***, No. E2015-00605-COA-R3-CV, 2016 WL 7786447, at *5 (Tenn. Ct. App. Mar. 16, 2016). In this case, the Estate purchased the home at a sheriff's sale for $325,000 in early 2014, and it remained vacant until the auction in October. Ms. Westerman did not introduce evidence of an appraised value from October 2014. On the contrary, she successfully moved the trial court to quash Appellees' subpoena of the appraiser who testified in ***Ross IV*** regarding the appraised value of the property in 2014. From our review of the record, we agree with the trial court that Ms. Westerman introduced no evidence that would enable a jury to determine the reasonable fair market value of the property in October 2014.

All remaining issues are pretermitted as unnecessary in light of the foregoing discussion.

## V. CONCLUSION

The judgment of the trial court is affirmed. The case is remanded to the trial court for the collection of costs and for such further proceedings as may be necessary and are consistent with this Opinion. Costs of this appeal are taxed to the Appellant, Joan Ross Westerman, and her surety, for which execution may issue if necessary.

s/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE