

STATE OF INDIANA

IN THE HOWARD CIRCUIT COURT

COUNTY OF HOWARD

CAUSE NO: 34C01-1503-EM-00032

IN THE MATTER OF THE ESTATE OF
LILLIAN SMITH, Deceased,

JUANITA PETTIFORD, Personal
Representative

JUANITA PETTIFORD, in Her Capacity as
Personal Representative,

Plaintiff,

vs.

INDIANA HEARTLAND FEDERAL CREDIT
UNION,

Defendant.

ENTERED

SEP 04 2018

HOWARD CIRCUIT COURT

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT**

The Plaintiff Juanita Pettiford as Personal Representative of the Estate of Lillian Smith having filed an amended petition for delivery of estate assets [and] complaint for monetary damages on April 4, 2018; and Defendant Indiana Heartland Federal Credit Union having filed its answer and affirmative defenses on April 23, 2018; and Plaintiff having appeared by personal representative Juanita Pettiford and counsel Dan J. May, and Defendant having appeared by Buffey Hedrick and counsel Codie J. Ross and Sara B. Valenzuela at a bench trial held July 24, 2018; and Defendant by counsel having submitted proposed findings of fact and conclusions of law on July 30, 2018, and Plaintiff by counsel having submitted proposed findings of fact and conclusions of law on August 23, 2018; and the Court having considered the pleadings filed, the

evidence, arguments, and proposed orders submitted, the record, and applicable law, herein enters its Findings of Fact, Conclusions of Law and Judgment.

**I.
FINDINGS OF FACT**

1. Lillian Smith, a resident of Howard County, Indiana, passed away on January 11, 2012. At the time of her passing, Lillian had one (1) child, a son Robert Killebrew, and four (4) surviving grandchildren (all children of Robert), namely: Joyce Durham f/k/a Joyce Killebrew, Fonda Killebrew, Myron Killebrew, and Juanita Pettiford f/k/a Juanita Nix.

2. Prior to her passing, on March 7, 2006, Lillian had executed a Last Will and Testament which provided for a specific bequest of her jewelry and furs to her granddaughter Fonda, and disposition of all other assets to her son Robert and four (4) grandchildren in equal shares. The 2006 Will provided the appointment of Fonda as personal representative and the appointment of Robert to serve if Fonda was unwilling or unable to serve. The Will also provided it revoked any and all former wills made by Lillian. (Exhibit 10).

3. Lillian had executed a prior Last Will and Testament on May 21, 1993, which provided for the same bequest and property distribution as the Will later signed in 2006. The only difference was the 1993 Will provided the appointment of Robert and Fonda as co-executors of the estate. (Exhibit 9). Both the 2006 and 1993 Wills were drafted by attorney James B. McIntyre.

4. At the time of her passing, Lillian owned property, which consisted of real estate located at 1130 E. Jefferson Street, Kokomo, Indiana, having a "trending" assessed value of \$26,900 as of March 2011 (Exhibit 12), and an account (#1892) with two (2) shares on deposit with the Indiana Heartland Credit Union (herein "Heartland"). (Exhibit 11) Of the share accounts at Heartland, one was a savings account with a balance of \$56,527.10. The other share, an escrow-

savings having a balance of \$2,000.00 designated Fonda as a pay-at-death beneficiary, and the proceeds plus a CUNA insurance benefit totaling \$4,000.00 were paid by Heartland to Fonda in March 2012 (Exhibit 5).

5. After Lillian's death, on or about January 30, 2012, Joyce, Fonda, Robert, and his wife Rose went to attorney James McIntyre and obtained copies of Lillian's Will. Fonda had earlier obtained a copy of the 1993 Will from her grandmother's home. They then went to Heartland and presented copies of Lillian's death certificate and the 1993 Will to Heartland's manager Buffey Hedrick, said Will designating Robert and Fonda as co-executors.

6. On January 30, 2012, Robert presented to Heartland an Application for Consent to Transfer signed by himself and having the (stamped) signature of the Howard County Assessor dated January 30, 2012 (Exhibit B). The submitted application sought the transfer of Lillian's Heartland saving account claiming a \$20,000.00 date of death value, which amount was inaccurate. Ms. Hedrick informed Robert that there could be no transfer of the account until forty-five (45) days had passed from the date of death, and in addition to an accurate Application for Consent to Transfer, he also needed to submit an Affidavit for Transfer of Assets Without Administration also known as a Small Estate Affidavit.

7. On March 12, 2012, Robert returned to Heartland but still did not have a small estate affidavit. Ms. Hedrick contacted Solidarity Federal Credit Union to seek advice on obtaining the affidavit, and was advised to contact the County Assessor. She did so and at Ms. Hedrick's request, the Howard County Assessor faxed to Heartland an Affidavit for Transfer of Assets Without Administration form. Ms. Hedrick gave the form to Robert, advising him he would need to complete it and have it notarized.

8. On March 13, 2012, Robert accompanied by his wife Rose, and his daughters Fonda and Joyce returned to Heartland. Robert presented to Ms. Hedrick completed and signed documents seeking to transfer the proceeds of Lillian's account to him. He presented an Application for Consent to Transfer for Heartland savings account (#1892) having date of death value of \$56,527.10. The Application was signed by Robert and had the (stamped) signature of the Howard County Assessor. (Exhibit 3).

9. Robert also submitted to Heartland a completed and signed Affidavit for Transfer of Assets Without Administration, which was the form, now completed, provided to him by Ms. Hedrick supplied by the Howard County Assessor's office. (Exhibit 1). The completed Affidavit contained Robert's notarized signature as the affiant. The Affidavit provided in part, "4. That the value of the gross probate estate (entire assets of the estate) of said decedent, wherever located, less liens and encumbrances, does not exceed \$50,000.00 and 5. That this affiant is: (1) a distribute, being an heir-at-law; or (2) a beneficiary named under decedent's Last Will and Testament;.. And is entitled to receive without administration all property owned by the decedent at date of death from the person, firm, or institution holding any such assets."

10. After reviewing the documents submitted by Robert and verifying his identity by making him show his Indiana driver's license, Ms. Hedrick, manager of Heartland, issued Robert a check from Heartland payable to him in the sum of \$56,527.10, effectively transferring the proceeds from Lillian's share savings account to him (Exhibit 4). Ms. Hedrick made no inquiry as to value or extent of any other estate assets or the existence or amount of any indebtedness owed.

11. None of Robert's other three (3) family members that were present, including his daughters Fonda and Joyce, voiced any objection to Heartland's release of the proceeds to Robert. Fonda told Ms. Hedrick she would not fight with Robert over the money. Per her trial

testimony, Fonda was aware her father was a poor handler of money and had a problem with alcohol.

12. Robert cashed the check from Heartland and retained the entire proceeds even though pursuant to Lillian's Will he was only entitled to one-fifth, and his four (4) children were each entitled to an equal share. Neither Joyce, Fonda, Juanita, nor Myron received any portion of the proceeds.

13. Fonda and Joyce were aware Robert received the proceeds of the Heartland account on March 13, 2012. Juanita became aware sometime thereafter. It is unknown when Myron became aware Robert had received the proceeds of the Heartland account. Neither Joyce, Fonda, Juanita, nor Myron ever sought legal action to collect their portions of Lillian's Heartland account proceeds from Robert during his lifetime, or from his estate after his passing in 2017.

14. One year after Lillian's passing, on January 11, 2013, attorney James B. McIntyre filed a petition for probate of will without administration in Howard Superior Court 4 cause 34D04-1301-EM-06, submitting the 2006 Will. On January 14, 2013, Judge Hopkins granted the petition, and entered an order which found the decedent's 2006 Will admitted to probate and closed the estate. Mr. McIntyre withdrew his appearance January 14, 2013.

15. On July 23, 2014, Fonda Killebrew as Personal Representative of the Estate represented by counsel Dan J. May filed a petition to open the estate, which petition was granted. On August 25, 2014, Fonda as Personal Representative filed a petition for delivery of estate assets, complaint for monetary damages and fraud against Heartland based upon its transfer of Lillian's share savings account proceeds to Robert on March 13, 2012. Robert was not named as a party to the suit.

16. In March 2015, the undersigned qualified as Special Judge. The case was reassigned to Howard Circuit Court as this cause.

17. On August 7, 2017, after a hearing, the court entered an order granting a motion to remove Fonda Killebrew as personal representative and appointed Juanita Pettiford as successor personal representative of the Estate of Lillian Smith.

18. On April 4, 2018, Plaintiff Juanita Pettiford as Personal Representative of the Estate of Lillian Smith filed an amended petition for delivery of estate assets [and a] complaint for monetary damages with jury demand. The petition seeks delivery of the share savings account from Heartland pursuant to Ind. Code 29-1-13-10, and the complaint alleged Heartland acted negligently when it transferred \$56,521.10 from the share account previously held by deceased Lillian Smith, to Robert Killebrew on March 13, 2012. The Plaintiff further alleges Defendant Heartland committed deception under Ind. Code 35-43-5-3 and criminal conversion under Indiana Code 35-43-4-3 entitling the Plaintiff to punitive or treble damages.

19. On April 23, 2018, Heartland by counsel filed its answer and affirmative defenses denying liability, claiming its agents were not negligent in the transfer of the share account, and that the Plaintiff, non-party estate beneficiaries including Robert Killebrew and the Howard County Assessor were contributorily negligent.

20. On July 10, 2018, at a pretrial conference, the parties by counsel waived submission of this cause to a jury, and a bench trial was scheduled and held July 24, 2018.

21. On July 24, 2018, the Plaintiff presented her case in chief. The Plaintiff called four (4) witnesses, namely: Joyce Durham, Stephen Wilson (as an expert), Juanita Pettiford, and Buffey Hedrick. The Defendant then presented its case in chief, calling three (3) witnesses, namely:

Fonda Killebrew, Buffey Hedrick, and Joseph Montel (as an expert). The Defendant also presented the affidavit testimony of former Howard County Assessor Jamie Shepard (Exhibit A).

22. At trial, the Plaintiff submitted testimony by its expert attorney Stephen Wilson, General Counsel and Director of Compliance for First Farmers Bank and Trust in Kokomo, Indiana. Having examined the small estate affidavit (Exhibit 1) used for the transaction between Indiana Heartland and Robert Killebrew, Mr. Wilson opined that the affidavit did not comply with I.C. §29-1-8-1 as it was deficient inasmuch as it did not indicate who the distributees were and it did not state if the distributees were contacted by the affiant.

23. Mr. Wilson advised that the affidavit would prompt him to make “further inquiry”; however, he also advised that checking a will that is presented, checking for identification, and contacting local government constituted “further inquiry”. When asked, Mr. Wilson declined to opine Heartland had breached the standard of care by conducting the transaction with Robert Killebrew on March 13, 2012; however, he stated that he would have advised the financial institution against releasing the account based upon the noncompliant affidavit.

24. At trial, the Defendant submitted testimony by its expert attorney Joseph Montel, an adjunct professor at the Indiana University School of Law in Indianapolis and former Director, President, and C.E.O. at Bank of Indiana, N.A. and Indiana Bank Corp.. Attorney Montel reviewed the pleadings and documents associated with this case, the discovery (including written discovery and depositions), and conducted an interview with Buffey Hedrick.

25. Attorney Montel provided his report, which was marked as Defendant’s Exhibit C. Per his report and through his testimony, he explained how the Credit Union’s agreement with its own depositor, federal floors, and state laws affect the transaction between the Credit Union and Robert Killebrew.

26. Mr. Montel opined Ind.Code §29-1-8-2 discharges and releases Heartland from any liability after it transferred Lillian Smith's account balance to Robert Killebrew. Further, he opined the same statute made Robert Killebrew accountable to the other heirs of the Estate.

27. Mr. Montel opined that, not only did Heartland not breach the standard of care, but it was also legally obligated to provide the funds to Robert Killebrew upon his presentation of the affidavit, regardless of whether or not the affidavit was statutorily deficient.

28. He further opined it mattered not that the amount of funds in Lillian Smith's account on the date of transfer exceeded \$50,000, as it is not incumbent upon Heartland to ensure that the estate's value was less than that amount, and it was reasonable for Heartland to rely upon the Small Estate Affidavit that was provided to it by the Howard County Assessor.

29. After the submission of evidence on July 24, 2018, the Court took all matters under advisement pending submission of proposed orders. The Defendant by counsel submitted its proposed order on July 30, 2018, and the Plaintiff by counsel submitted its proposed order on August 23, 2018.

30. Any findings of fact contained with the Conclusions of Law and Judgment is hereby incorporated herein.

II. CONCLUSIONS OF LAW AND JUDGMENT

1. The court has subject matter jurisdiction of the matters herein, and personal jurisdiction over the parties.

2. Indiana law provides for a "small estate" procedure without administration codified in Ind. Code sections 29-1-8-1 et seq.. The purpose of the procedure is to settle a small estate without administration so to allow the estate beneficiaries to obtain title to assets of a nominal amount or have assets transferred to them with a costly administration that may consume all the

assets. Ind. Code 29-1-8-1 (Commission Comments); Indiana Estate Planning and Probate Practice, Section 52.20.

3. Ind. Code 29-1-8-1(a) provides: “Forty-five (45) days after the death of a decedent and upon being presented an affidavit that complies with subsection (b), a person: (1) indebted to the decedent; or (2) having possession of personal property or an instrument evidencing a debt, an obligation, a stock, or a chose in action belonging to the decedent; shall make payment of the indebtedness or deliver the personal property or the instrument evidencing a debt, an obligation, a stock, or a chose in action to a distribute claiming to be entitled to payment or delivery of property of the decedent as alleged in the affidavit.”

4. Ind. Code 29-1-8-1(b), as effective in March 2012, provided: “The affidavit required by subsection (a) must be an affidavit made by or on behalf of the distribute and must state the following: (1) That the value of the gross probate estate, wherever located (less liens and encumbrances), does not exceed fifty thousand dollars (\$50,000). (2) That forty-five (45) days have elapsed since the death of the decedent. (3) That no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction. (4) The name and address of each distributee that is entitled to a share of the property and the part of the property to which each distribute is entitled. (5) That the affiant has notified each distributee identified in the affidavit of the affiant’s intention to present an affidavit under this section. (6) That the affiant is entitled to payment or delivery of the property on behalf of each distributee identified in the affidavit.”

5. Ind. Code 29-1-8-1(b)(1) was subsequently amended effective July 1, 2018 to state: “That the value of the gross probate estate, wherever located, (less liens, encumbrances, and

reasonable funeral expenses) does not exceed fifty thousand dollars (\$50,000.00).” [*Emphasis added*].

6. Ind. Code 29-1-8-2, as effective in March 2012, provided: “The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof or their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.”

7. Plaintiff seeks to recover from Defendant the proceeds of Lillian Smith’s formerly owned Heartland share account pursuant to Ind. Code 29-1-13-10. Subsection (a) provides in relevant part: “Upon the filing of a petition by the personal representative or any other person interested in the estate alleging that any person has, or is suspected to have, concealed, embezzled, converted or disposed, of any real or personal property belonged to the estate of a decedent, or has possession or knowledge of any such property or of any instruments in writing relating to such property, the court having probate jurisdiction, upon such notice as it may direct, may order such person to appear before it for disclosure, and may finally adjudicate the rights of the parties before the court with respect to such property.”

8. Plaintiff claims Defendant acted negligently when it transferred \$56,521.10 from the share account to Robert Killebrew on March 12, 2012. Negligence is comprised of three elements: (1) a duty on the part of the defendant to conform his conduct to the standard of care necessitated by the relationship; (2) a breach of that duty; and (3) injury that the plaintiff suffered as a result of that failure. Benton v. City of Oakland City, 721 N.E.2d 224 (Ind. 1999).

9. Pursuant to the Indiana Comparative Fault Act, fault percentages based upon the relative contribution in causing the harm may be allocated to the plaintiffs, defendants, and named nonparties. Ind. Code 34-51-2-7. Here, the Defendant has asserted the affirmative defense of contributory negligence by Plaintiff and nonparties Robert Killebrew and the Howard County Assessor.

10. The notarized Affidavit for Transfer of Assets Without Administration (Small Estate Affidavit) executed by Robert Killebrew and given to Heartland by the Howard County Assessor did not comply with I.C. §29-1-8-1 in this case where there were multiple beneficiaries of the property. The Affidavit did not comply with the statute in that it did not provide (1) the name and address of each distributee that is entitled to a share of the property and the part of the property to which each distributee is entitled; (2) that the affiant had notified each distributee identified in the affidavit of the affiant's intention to present the affidavit; and (3) that the affiant is entitled to payment or delivery of the property on behalf of each distributee identified in the affidavit.

11. In the tendered Affidavit, Robert Killebrew affirmed under oath that the value of the gross probate estate property less liens and encumbrances did not exceed \$50,000.00, and he was entitled to receive without administration all property owned by the decedent at her date of death.

12. Robert Killebrew was given \$56,527.10 by Indiana Heartland, which was being held in the share account of the deceased, Lillian Smith based upon the Small Estate Affidavit and

Application for Consent to Transfer tendered by Robert Killebrew, both forms supplied by the Howard County Assessor's Office.

13. Robert Killebrew did not distribute any of proceeds from Lillian Smith's Indiana Heartland Federal Credit Union account to the other beneficiaries of the Estate of Lillian Smith.

14. According to Ind.Code §29-1-8-2, Heartland was discharged and released to the same extent as if it dealt with a personal representative of the Estate of Lillian Smith when Heartland delivered Lillian Smith's personal property pursuant to the affidavit of Robert Killebrew.

15. Also, pursuant to Ind. Code 29-1-8-2, Heartland was neither required to see to the application of the account proceeds to its rightful beneficiaries nor obligated to inquire into the truth of any statement in the affidavit. As such, Heartland did not have a duty to ensure distribution of the account proceeds to the estate beneficiaries or to inquire further as to truth asserted by Robert in the affidavit that the value of the estate less liens and encumbrances was less than \$50,000 and he was the only one entitled to the proceeds of the Heartland account.

16. In addition, pursuant to Ind.Code §29-1-8-2, Robert Killebrew was made answerable and accountable therefor to any personal representative of the Estate of Lillian Smith or to any other person having a superior right to the proceeds from Lillian Smith's Heartland account such as his children Juanita, Joyce, Fonda and Myron, the other beneficiaries of the estate property.

17. Pursuant to Ind. Code 29-1-8-2 and Ind. Code 29-1-13-10, the personal representative and/or beneficiaries of the Estate could have pursued legal action against Robert Killebrew for their respective shares of the Heartland account.

18. In accordance with Indiana statutory law, Heartland had no legal duty to determine the validity of the will, the heirs of the decedent, the valuation of the estate, the existence of liens and encumbrances, or that the Small Estate Affidavit provided to it by the Howard County

Assessor's office complied with Indiana law. When presented with the Affidavit, a sworn statement asserting that Robert Killebrew was entitled to the share account funds of Lillian Smith, Heartland was obligated to transfer the proceeds to the affiant Robert Killebrew.

19. None of the loss by the Plaintiff would have occurred without the actions of nonparty, Robert Killebrew, who could of simply distributed their share of the account proceeds to his four (4) children but he chose not to. Furthermore, the inaction of any heir of Lillian Smith also constitutes contributory negligence, as neither Fonda nor Joyce objected to Heartland providing the accounts funds to Robert despite being present at the time Buffey Hedrick transferred the proceeds to Robert. The other two heirs Juanita and Myron became aware Robert had received the account's proceeds sometime thereafter; however, none of them pursued legal action to recover his or her share against Robert, who passed away in 2017. Even though Fonda as Personal Representative of the Estate had filed a complaint against Heartland for wrongful distribution of the proceeds in 2014, she did not sue Robert to recover the proceeds he had received and the four (4) other beneficiaries were entitled.

20. The Howard County Assessor's Office was also identified as a nonparty to this litigation. After consult with a larger sister institution, Ms. Hedrick of Heartland requested the Small Estate Affidavit from the Assessor's Office. The Office kept the form and routinely passed it out upon request. The form kept by the Assessor's Office was statutorily deficient as it applied to the transfer of a decedent's property when there was more than a sole beneficiary such as the case here; however, it was reasonable for Heartland to rely upon the Assessor's Office to provide it with a statutorily sufficient Small Estate Affidavit.

21. The Plaintiff's expert witness declined to opine that Heartland breached the applicable standard of care. The Defendant's expert testified that Heartland did not breach the applicable

standard of care. Based upon the evidence presented and the application of Indiana statutory law, the Court finds the Defendant Indiana Heartland Federal Credit Union did not breach the applicable standard of care and, therefore, was not negligent.

22. The Plaintiff failed to provide any evidence indicating that the Defendant Heartland was guilty of or liable for “deception” pursuant to I.C. §35-43-5-3.

23. The Plaintiff failed to provide any evidence indicating that the Defendant Heartland was guilty of or liable for “criminal conversion” pursuant to I.C. §35-43-4-3.

24. The Plaintiff failed to provide any evidence indicating that it is entitled to treble damages against Heartland pursuant to I.C. §34-24-3-1.

25. The Plaintiff failed to provide any evidence indicating that it is entitled to punitive damages against Heartland pursuant to I.C. §34-51-3-4.

26. The Plaintiff, specifically estate beneficiaries Juanita Pettiford, Joyce Durham, Fonda Killibrew, and Myron Killebrew, did each suffer a loss in the amount equal to their respective share of Lillian’s account at Heartland; however, the fault that caused their loss was that of Robert Killebrew.

27. This Court finds that the Indiana Heartland Federal Credit Union acted reasonably, did not breach the applicable standard of care, and fulfilled its obligations pursuant to state and federal law when it provided Robert Killebrew with the proceeds in Lillian Smith’s share account.

28. As such, the Court finds as its verdict that Judgment is awarded in favor of Defendant Indiana Heartland Federal Credit Union.

29. Any Conclusion of Law contained within the Findings of Fact is hereby incorporated herein.

All of which is ORDERED, ADJUDGED, and DECREED this 4th day of September, 2018.



**LYNN MURRAY, JUDGE
HOWARD CIRCUIT COURT**

Distribution:

Dan J. May, Esq.
Sara B. Valenzuela, Esq.
Codie J. Ross, Esq.