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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Cynthia Graham-Howe, Master-in-Equity

Civil Action No.: 2016-CP-26-007190
Appellate Case No.: 2022-00721

In the Matter of Edith Cox Soles, Deceased,

Marcia Soles Anderson and Michael W. Soles,
Individually and as interested Parties, Appellants,

Jimmy R. Soles, Respondent.

s/Brown W. Johnson
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Defendant-Respondent agrees that the applicable standard of review in this case is *de novo*. Of course, Defendant-Respondent properly argues that the *de novo* review does not prevent an appellate court from taking into account the trial judge's assessment of the credibility of the witnesses.

However, Respondent has really attempted to transform the credibility of witnesses concept into the substantial evidence standard of review. Respondent simply summarizes quite briefly very selective sections of each of his witnesses' testimony for the proposition that these would support the trial judge's findings. Then, he argues that since they were witnesses, the trial judge must have evaluated credibility in finding in favor of the Respondents.

Respondent deals with the glaring lack of evaluation of Dr. Barrett's detailed testimony and extensive records by correctly arguing that there is no requirement to make particularized findings as to each aspect of testimony. Then, Respondent in effect argues the *de novo* standard becomes substantial evidence no matter how lacking in analysis was the review of Dr. Barrett's testimony and records. If this argument is correct, there is virtually no case where *de novo* review can occur.

The fact that the trial judge essentially provided the barest review of the testimony and records of Dr. Gary Barrett was sought to be justified in the following manner: "there is no rule or precedent that provides that the judge, as the trier of fact, must assign degrees of weight assessed to each witness and explain those degrees of weight in a final order." Page 8 of Defendant-Respondent's brief. As a bald statement of law, of course this is correct. The problem is that in this case, the trial judge made absolutely no "factual findings" as to the testimony or records of Dr. Gary Barrett. The only thing that the trial judge did, as set out in detail in the Initial Brief of the Plaintiff-Appellant, is to state that the trial judge found his testimony "insightful and thorough as

to his medical position on the medical condition of Mrs. Soles.” The trial judge went on to note that “his testimony has been duly noted and thoroughly reviewed and acknowledged.” Original order, page 2.

One can see that this is really not a finding as to anything whatsoever; and that is giving Defendant-Respondent the benefit of the doubt. If we are really to say that it was a factual finding as to Dr. Barrett, then the finding was that his testimony was insightful and thorough. If that is the case, then a truly *de novo* review of the record cannot simply slough off the findings of Dr. Barrett as having been dealt with appropriately under some amorphous credibility finding by the trial judge. The reason for this is that there was no credibility finding by the trial judge other than to find Dr. Barrett thorough and insightful.

Defendant-Respondent has not really dealt with the essence of this case: a *de novo* review should include at least some analysis of Dr. Barrett’s testimony. This was clearly not done below, but it is not incumbent upon Appellant to prove that the trial judge did not make particular findings as to Dr. Barrett’s testimony. What is at issue is that during this Court’s *de novo* review, is this Court to say that it must essentially ignore Dr. Barrett’s testimony because one can infer that the trier of fact found Dr. Barrett’s testimony to be lacking in credibility? That is what Defendant-Respondent essentially is arguing when he states that *de novo* review should not change the result regardless of the reason that the trial judge failed to discuss Dr. Barrett’s testimony. If the trier of fact had said that she was in the position to review the credibility of Dr. Barrett and she did not believe him for various reasons, then one might say that Defendant-Respondent is correct in seeking to apply the exception to the *de novo* review principle that one should not ignore credibility assessments by the trier of fact, but that is not the situation we have in this case.

It should be noted that Defendant-Respondent did not make a single argument in its brief to refute the detailed discussion in Plaintiffs-Appellants' initial brief as to Dr. Barrett's discussion of Edith Soles' health on the merits. All that was argued is that this Court should not really engage in *de novo* review because the trier of fact allegedly found Dr. Barrett not credible, even though there is nothing in the Order to suggest that, and in fact the specific language in the Order, such as it was, suggests the very contrary.

Defendant-Respondent also summarizes very briefly the testimony of all of the other witnesses.

Catherine Dingle

Defendant-Respondent argues that Attorney Catherine Dingle took Edith Soles into another room to consult with her while Jimmy Soles remained in the lobby. That was not in fact the testimony of Catherine Dingle. Catherine Dingle admitted that she had no personal recollection of the individuals involved. R-165 (10-13). Ms. Dingle admitted that her protocol would not have required Jimmy Soles to leave the room when the deceased was signing the deed and that she had no recollection of what actually happened. R-173 (24) through R-174 (10). She further admitted that she did not remember if there was anyone else in the room when the deed was signed. R-173 (18-21).

Ms. Dingle further admitted a number of other things which were not discussed in Defendant-Respondent's brief. These included the fact that the preparation of the deed was referred to Ms. Dingle by someone in Attorney Kevin Rochford's office, and that was most likely the wife of Mr. Soles who worked for Mr. Rochford's office. Ms. Dingle admitted that her intake employee had written down that the referral had come from J. Harris Soles, who of course was Jill Harris, the Defendant-Respondent's wife. R-167 (7-13). Ms. Dingle further admitted that Edith

Soles' name was not on her intake sheet except as a reference in the body of her secretary's notes, consistent with Jimmy Soles' being the actual client. R-168 (19-24). Ms. Dingle further admitted that the billing name on the file was Jimmy Soles, R-166 (19-24) and that she sent both the bill and the deed to Jimmy Soles. R-171 (8-21). Ms. Dingle was unable to dispute the contention that Jimmy Soles or the Rochford law firm scheduled the appointment, made arrangements to have the deed prepared, got the information that was needed to prepare the deed, and Jimmy Soles was then billed for it. R-172 (1-10). Ms. Dingle admitted that she asked the deceased no questions about her health, her medical records, or anything of that nature. R-174 (18-20). None of this was discussed in Defendant-Respondent's brief.

Kevin Rochford

Defendant-Respondent argues that Mr. Rochford had a multiple-step process in place to verify the competency of Edith Soles. However, there was no specific discussion in Defendant-Respondent's brief in response to the detailed facts set out in the Initial Brief of Plaintiffs-Appellants. Specifically, there was no response to the detailed argument that Mr. Rochford had reason to know of Dr. Barrett's existing voluminous records, because he prepared a Health Care Power of Attorney (see Rochford Deposition, pages 34-35; Affidavit of Kevin Rochford, page 1, Item 5) for Mrs. Soles that would only become effective when Dr. Gary Barrett himself stated that it was necessary. Page 2 of Health Care Power of Attorney. Mr. Rochford knew the importance of Dr. Barrett and knew his records existed, yet he chose to remain ignorant of their contents and never sought them out.

Mr. Rochford further acknowledged that his employee, Jill Harris Soles, was heavily involved in this matter. Rochford Deposition, page 7 (16-23). Mr. Rochford acknowledged the

deceased, Edith Soles, was driven to his office by Jimmy Soles. Deposition, page 8 (9-10); page 26 (2-4).

Defendant-Respondent never addressed the issue that Mr. Rochford testified that he was supposedly representing Edith Soles because she allegedly expressed concerns about confidentiality, when in fact, Jimmy Soles' wife worked for Mr. Rochford. The deceased's regular attorney had been William Phipps in Tabor City, over 100 miles away from Mr. Rochford's office in High Point, North Carolina. There was no discussion in the Defendant-Respondent's brief as to Dr. Gary Barrett's testimony that a one-shot viewing of Ms. Soles by a layman might not disclose advanced dementia during the execution of a deed. R-98 (22) through R-99 (5).

Lovanda Hyatt Testimony

It is acknowledged that rude people can nevertheless tell the truth. However, the fact that Lovanda Hyatt called the Plaintiff a whore and the Attorney an idiot and told him to shut up, certainly disproves the allegation that Lovanda Hyatt was bullied into stating in the medical report that Edith Soles essentially lacked competence. A woman of such strong will certainly would have not said anything that she did not mean to say.

Defendant-Respondent simply provided a few lines as to her testimony, which one would basically look to if the standard of review was substantial evidence, as opposed to *de novo*. Defendant-Respondent did not respond in its brief to the argument that a *de novo* review of the testimony would certainly demonstrate that Ms. Hyatt was lacking in credibility because she was an interested and hostile witness. For example, she told the attorney to shut up (April 16, 2019 Transcript, R-138 (1)) and later called him an idiot (April 16, 2019 Transcript, R-149 (17)) and called the Plaintiff, Mrs. Anderson, a whore (April 16, 2019 Transcript, R-143 (21)).

Defendant-Respondent in its brief did not respond to the argument made in the Initial Brief of the Plaintiffs-Appellants that Ms. Hyatt's own writings contradict her testimony about the deceased's mental capacity, in that she filled out a report stating that Ms. Soles was erratic, hostile, and was hitting people; and was out of her mind and was engaging in combative behavior. R-145. She tried to accuse Marcia Anderson of telling her to write it down; however, the transcript makes it evident that not only is Ms. Hyatt's personality so strong that no one could ever make her say anything that she did not wish to say, Marcia Anderson is the very opposite.

Judy Platt's Testimony

The brief of Defendant-Respondent again briefly provides a few lines in a manner one would use if one were arguing the substantial evidence rule. There was no response at all to the Initial Brief of Plaintiffs-Appellants that Ms. Platt admitted that Edith Soles never spent the night alone and at times was difficult, even hostile, and once threw a cup at Ms. Platt. April 16, 2019 Transcript, R-106. Ms. Platt admitted that she knew that Edith Soles could not be left alone. Ms. Platt admitted that she had to prevent her from going out the door. R-105. She admitted that Edith Soles got confused at times. R-108 (16-17). Finally, Ms. Platt admitted that "something wasn't right" with Edith Soles. R-109 (4-8).

Finally, there was no response in Defendant-Respondent's brief that Ms. Platt was not truly knowledgeable about the condition of Ms. Soles because she testified that the only medication that Ms. Soles took was Xanax. However, it is clear from Dr. Barrett's testimony that she was also taking a great deal of additional medications. April 16, 2019 Transcript, R-111; Dr. Barrett's treatment notes, page 117.

Defendant-Respondent's Discussion of the Testimony of the Plaintiffs and their Witnesses

Defendant-Respondent very briefly touched upon the testimony of the Plaintiffs and caregiver Angela Fowler, who testified in favor of the Plaintiffs-Appellants. Defendant-Respondent of course acknowledged that both of the plaintiffs offered testimony in support of their case. There was absolutely no discussion of that testimony in Defendant-Respondent's brief. Defendant-Respondent argued that the trial Judge made the following recitation:

“Their positions and testimony on the alleged mental incapacity and impairment of Ms. Soles has been duly and thoroughly noted.” Final Order, page 2, paragraph 2.

This of course, like the trial judge's reference to Dr. Barrett, is not any kind of finding of credibility as to these witnesses. It is simply an acknowledgment that they testified. Therefore, the weak exception to the *de novo* standard of review regarding assessment of credibility of the witnesses is totally inapplicable in this case.

With regard to Angela Fowler, Defendant-Respondent noted that the trial judge stated that the testimony of Angela Fowler was significantly disputed by two other caregivers. The trial judge then noted:

“However, her testimony was duly noted and, as with the other Plaintiffs' witnesses' testimony, was given substantial attention.” Final Order, page 3, paragraphs 1 and 2.

The response to this is the same as above—this is no finding on credibility and therefore this Court has the power to review *de novo* the Order of the trier of fact.

Conclusion

Although discussed in Defendant-Respondent's conclusion, it should be noted that Plaintiff-Appellant is not appealing the undue influence finding by the trier of fact. Lack of competency stands alone in this appeal and competency to execute a contract is required regardless of whether or not undue influence existed.

Lovanda Hyatt's outrageous conduct has been highlighted to show that she was not likely to have been forced to write her detailed report setting out Edith Soles' incompetence. By contrast, Marcia Anderson is a mild-mannered person, was respectful and polite to the Court, and surely could not have bested Lovanda Hyatt in a test of wills.

Dr. Barrett's testimony is compelling. A *de novo* review of Dr. Barrett's extensive testimony and detailed medical records demonstrates that the decedent did not have the mental capacity to execute this deed. Again, it should be noted that Dr. Barrett saw the deceased the day before the deed in question, in addition to his treatment history of many years. It is rare indeed that one has the benefit of a medical evaluation in such a contemporaneous manner.

Respectfully submitted,

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham-Howe, Special Master-In-Equity

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Appellate Case No. 2022-000721

In the Matter of Edith Cox Soles, Deceased,
Marcia Soles Anderson and Michael W. Soles,
Individually and as Interested Parties,Appellants,

v.

Jimmy R. Soles,Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellants upon, Luther O. McCutchen, III, counsel for Respondent, by email as called for pursuant to Rule 262 of the South Carolina Appellate Court Rules to his primary email address: lom@lawyersatthebeach.com, this 28th day of July, 2022.

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals

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RE: In the Matter of Edith Cox Soles, deceased
Marcia Soles Anderson and Michael W. Soles v. Jimmy R. Soles
Appellate Case No. 2022-000721
Civil Action No. 2016-CP-26-07190
Our File No. 16-181

Dear Ms. Kitchings:

Pursuant to the South Carolina Appellate Court Rule 262 and Supreme Court Order dated May 6, 2022 regarding Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), enclosed herewith and served upon you please find the following related to the above matter:

1. Reply Brief of Appellants; and
2. Proof of Service.

With best regards,

Yours very truly,

s/Brown W. Johnson

Brown W. Johnson

BWJ:ktb

Enclosures

cc: Luther O. McCutchen, III, Esquire (w/enclosures, via email only)