

RECEIVED

Oct 26 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Judge

Appellate Case No. 2020-001673

Elisa Montgomery Edwards and Emily Cecile Edwards,.....Respondents,

v.

David C. Bryan, III,.....Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

Appellant, David C. Bryan, hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same.

ARGUMENT

Respectfully, the court’s decision has ignored the effect that the unappealed grant of summary judgment on the Respondents’ claims for conversion of their portion of the estate and for negligence in the administration of the estate. (R. pp. 9-11.) Viewed in the light most favorable to the Respondents, the record indicates that

Respondents have damages proximately caused by the acts subject of *those* claims – but not caused by the fraud on which their case went to the jury.

Respondents’ situation may be quite sympathetic, but the truth is that Respondents consented to summary judgment against them on the claims they had that actually addressed where their losses come from. (R. pp. 9-11.) Respondents left themselves with a square peg to try to fit into a round hole. The trial court, and now this court, impermissibly squared up the hole for them.

I. It is impossible that fraud by Appellant caused Respondents’ damages.

A jury trial resulted in a verdict for Respondents for \$500,000.00 in actual damages and \$100,000.00 in punitive damages, solely on their fraud claim, which was the only claim submitted to the jury. (R. p. 8, p. 227 ln. 19-20, p. 228 ln. 5-9.) This is an appeal of Appellant’s post-trial motions relating to that verdict.

David C. Bryan, Jr. (hereinafter “Testator”) died and left a will. (R. p. 13, p. 93 ln. 6-10, pp. 314-20.) Testator’s son, Appellant, served as personal representative of Testator’s estate, the Testator’s will was probated, and the estate was closed. (R. pp. 14-15, 29-31, p. 94 ln. 24 through p. 95 ln. 23, pp. 314-20.) Testator’s will created a trust, of which Respondents were two of several beneficiaries. (R. pp. 314-20.) The trust provided for the benefit of Testator’s wife for her lifetime, then for distribution of the remaining trust assets to the other beneficiaries. (R. pp. 314-20.) Appellant filed a final accounting in the probate court that listed a disbursement of \$468,587.06 “to trust[.]” (R. pp. 321-22.)

The record indicates that Appellant did not actually make the distribution to the trust. After the estate was closed, Respondents filed this action against Appellant, suing

him for fraud, negligent misrepresentation, conversion, and negligence *per se* for improper administration of the estate. (R. pp. 12-28).

Per their complaint, the Respondents' fraud and negligent misrepresentation claims were based on Appellant having "misrepresented or failed to disclose to [Respondents] as required the true facts about the distribution of the Estate of [Testator]" and that he made false "representations as to the status and disbursements from that Estate and the Trust[.]" (R. p. 16). The fraud claim alleged that Respondents "relied upon the truth of Defendant's representations or acted in reliance upon the nondisclosures in awaiting the distributions from the Estate and Trust" and that their reliance on those representations or nondisclosures proximately caused them damages. (R. p. 16).

The conversion claim alleged that Appellant "exercised the right of ownership or dominion over money that rightfully should have been disbursed to" Respondents. (R. p. 18). Their negligence *per se* claim alleged that Appellant violated his duties as personal representative of the estate and that Respondents "incurred damages as a proximate result of having their funds negligently withheld by" Appellant. (R. p. 18).

Several months before trial, the circuit court granted summary judgment – with the consent of Respondents – on the causes of action for conversion and negligence *per se*, dismissing those causes of action with prejudice. (R. pp. 9-11.) Respondents did not move for reconsideration of that order, nor did they appeal it.

As a result of this grant of summary judgment, Respondents' claims based on Appellant's conversion of their portion of the estate funds and based on Appellant's improper distribution of estate assets were gone, dismissed with prejudice. (R. pp. 9-

11.) Nevertheless, Respondents offered a case at trial that revealed that the damages they sought and obtained a verdict for could only have resulted from the acts subject of these dismissed claims.

Throughout the trial of the case, in Respondent Elisa's witness testimony and through statements of Respondents' counsel, Respondents stated that they were not suing Appellant for anything he may have done or omitted as personal representative and that they were not suing about the way the Testator's estate was administered. (R. p. 110 ln. 23 through p. 111 ln. 6, p. 114 ln. 20-22, p. 115 ln. 3-6, p. 155 ln. 5-13).

Respondent Elisa, on directed examination, testified as follows:

Q. Are you, in any way, in this case, challenging that transfer of property from David C. Bryan, as the personal representative, to himself?

A. No, I'm not.

(R. p. 115 ln. 3-6).

Respondent Elisa also testified that her reliance was on the accounting document Appellant had submitted to the probate court as personal representative, and that document was what she was relying on in saying a fraud had been committed. (R. p. 148 ln. 4 through p. 149 ln. 2). (This court's opinion contains statements contrary to the Respondents' testimony about this.)

Respondent Elisa testified that she was damaged because she never received the money that she contended would have been distributed to her if Appellant had distributed money to the trust as he had represented to the probate court, and she calculated out for the jury her estimate of what that money would be worth as of the day of trial had she received and invested it. (R. p. 125 ln. 13 through p. 129 ln. 1.)

Respondent Emily's deposition testimony was read into the record, and she testified as follows:

Q. Tell me in your own words what this case is about.

A. So when my great-grandfather died, his estate was supposed to be divided. And my great-uncle didn't do that and just kind of took it all for himself.

(R. p. 254 ln. 13-18.)

The losses outlined by the testimony and evidence Respondents produced flowed from conversion of their portion of the estate and from Appellant's failure to administer the estate properly – but the Respondents had already given up their claims for damages arising out of those things. (R. pp. 9-11.)

During the trial, Respondents voluntarily dismissed their negligent misrepresentation claim and proceeded solely on their fraud claim. (R. p. 227 ln. 19-20, p. 228 ln. 5-9).

Appellant made and renewed a motion for a directed verdict, which was denied. (R. p. 230 ln. 17-23, p. 231 ln. 9-14, p. 271 ln. 23 through p. 272 ln. 2.) After the verdict, Appellant moved for judgment notwithstanding the verdict, for a new trial absolute, or for a new trial *nisi remittitur*. (R. pp. 39-51.) One of the bases for the motion is that the jury's verdict could have been based only on the theory of Appellant's improper management of the estate, his failure as personal representative to distribute to and from the trust – in other words, that there was no evidence of damages proximately caused by some misrepresentation of Appellant's. (R. pp. 39-51.)

Respondents filed a memorandum in opposition to the motion. (R. pp. 412-15.)

Respondents' memorandum stated the following:

Both Plaintiffs' witness and Defendant testified, without defense objection, that Defendant filed documents with the Lexington County Probate Court establishing an exact numerical value of the "trust" (\$468,587.06). Plaintiffs' witness clearly established that the Will in question provided for each Plaintiff to receive one-fourth (1/4) of the remaining corpus of the "trust". Plaintiffs' witness clearly established calculations, based on conservative historical performance of the stock market, demonstrating that the "trust" funds not distributed by Defendant would have accrued to at least Six Hundred Seven Thousand Six Hundred Eighty Dollars (\$607,680).

(R. p. 413.)

As this quotation illustrates, even the Respondents know that their damages flow from improper estate administration – a cause of action they allowed to be dismissed with prejudice. Respondents had already given up their right to a verdict for damages based on *that*. The Respondents have never pointed to some argument that their losses arise from their reliance on a false representation made by Appellant. They have contended at every stage of the process that their damages come from them not getting the estate funds to which they were entitled.

Appellant's brief in this case lays this out in some detail. The point of all that argument, though, is that the Respondent's damages were not caused by a lie (i.e., a fraudulent misrepresentation); rather, they were caused by Appellant not distributing the estate funds properly. At the time the case went to the jury, *Respondents were no longer suing Appellant for that*. (R. pp. 9-11.)

In the light most favorable to Respondents, Appellant’s fraud was in lying to them about what he did with the money – not in how he distributed the money. The nine elements of fraud – the plaintiff’s only tried claim – are “(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer’s ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury.” Mutual Savings and Loan Ass’n. v. McKenzie, 274 S.C. 630, 632, 266 S.E.2d 423 (1980).

Generally, the injured party in a fraud and deceit action is entitled to recover such damages as will compensate him for his pecuniary loss and place him in the same position he occupied before being defrauded. However, only damages which are the natural and proximate consequence of the fraudulent misrepresentations of the defendant and can be clearly defined and ascertained are recoverable.

Gilbert v. Mid-South Machinery Co., Inc., 267 S.C. 211, 223, 227 S.E.2d 189, 194 (1976) (internal citation omitted).

There is no evidence of damages caused by the fraud the plaintiffs claimed the defendant committed. Evidence of a required element of fraud is lacking. Mutual Savings and Loan, 274 S.C. at 632.

The court must have misapprehended the law, the record, or both.

II. Rehearing *en banc* would be proper.

“A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR.

As discussed above, the verdict in this case cannot be squared with the law, and this court's opinion upholding that verdict also cannot be reconciled to the law. They say that hard cases make bad law. Appellant urges this court not to make this such a case.

WHEREFORE, Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
Attorney for Appellant

October 26, 2023

RECEIVED

Oct 26 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Judge

Appellate Case No. 2020-001673

Elisa Montgomery Edwards and Emily Cecile Edwards,.....Respondents,

v.

David C. Bryan, III,.....Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing petition for rehearing on the date given below by emailing it to counsel for the Respondent at the address(es) noted below.

David E. Belding, Esq., at beldinglawsc@gmail.com

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Attorney for Appellant

October 26, 2023