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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Spartanburg County Court of Common Pleas

J. MARK HAYES, II CIRCUIT COURT JUDGE

Appellate Case No. 2014-001606

Willie A. Rogers and Vennie Rogers.....Petitioners.

vs.

Charles Carr, in his Individual and Official Capacity as the Personal Representative
of the Estate of Thurman L. Bomar, Deceased, Katherine Christian and Joyce
King.....Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Charles P. Edwards, #1840
Attorney at Law
P.O. Box 2552
Spartanburg, SC 29304
864-585-0995
864-948-1947

ATTORNEY FOR RESPONDENTS

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STATEMENT OF THE CASE

On March 8, 2011, the Defendant/Respondent Charles Carr presented to the Probate Court a document entitled Last Will and Testament of Thurman Lawrence Bomar. (Thurman Bomar's Last Will and Testament) (R. pp. 209-210). The Will nominated Charles Edward Carr as personal representative. Mr. Carr petitioned for informal probate of the Will and informal appointment as personal representative. (Petition for Informal Probate and Informal Appointment) (R. pp. 18-23).

Following informal appointment, this formal proceeding was commenced on June 10, 2011. In their Complaint, Plaintiffs/Appellants alleged that they and others were nieces and nephews of the late Thurman Bomar and were his sole heirs. Appellants alleged that the Will offered for informal Probate was the product of a forgery and/or undue influence and requested that the Will be declared null and void, that Charles Carr be removed as personal representative and that Willie A. Rogers, the Plaintiff, be appointed in his place. (Appellants Complaint to Contest Authenticity of Last Will and Testament) (R. pp. 31-36).

The Respondents, as proponents of the Will, offered testimony from Charles J. Hodge, attorney. (R. p. 61). He identified a Will cover that the Respondents state was found with the Will. The Will cover was printed with the name,

Hodge & Devine

Attorneys at Law

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Attorney Hodge stated this was the firm name under which he practiced on July 27, 1988, the date on which the Will was signed and witnessed. (R. p. 65). He identified the witnesses to the Will as Mary Kunak and Gayle C. Hawkins. (Last Will and Testament of Thurman Bomar) R. pp. 209-210). (R. pp. 64-65). He testified that Mrs. Kunak was a nurse in his father's medical office. (R. p. 64). At the time the Will was executed, Mr. Hodge's law office was next door to his father's medical practice. (R. p. 64). From time to time he would ask Mrs. Kunak to serve as a witness to the execution of legal documents if needed. (R. p. 64). He stated that Ms. Hawkins worked for his law office at the time in question. (R. p. 65). He stated that the Notary, Vickie Wing also worked for him at that time. (R. p. 65). He stated that he did not remember Thurman Bomar or Mary Bomar personally and could not recognize them from a photograph that he was shown. (R. p. 66). He stated his father treated a number of Bomars as patients. (R. p. 66). He indicated that it was likely he, and not his partner Mr. Devine, who had prepared the Will although he had no independent memory or records twenty five years after the fact to establish that. (R. p. 66). He stated that he often prepared simple Wills during that time. (R. p. 67). The Will in question is a simple Will. (Thurman Bomar's Last Will and Testament) (R. pp. 209-210).

The Defendants next offered Ms. Mary Kunak, one of the witnesses to the Will. She identified her signature on the Will as being from her hand. (R. p. 69).

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Other evidence in support of the validity of the Last Will and Testament was introduced but is not germane to the certiorari issues and thus will not be set forth.

As to the forgery allegation, the Respondents offered into evidence four recorded Deeds bearing the signature of Thurman L. Bomar. These deeds were entered for comparison with the signature of Thurman L. Bomar on the proffered Last Will and Testament. Also for signature comparison they offered two affidavits for collection of two small estates bearing the signature of Thurman L. Bomar. (R. p. 120-122).

Three of the Deeds were executed at different times, and witnessed by different parties, regarding different pieces of real estate. Two of the Deeds were notarized by members of the Spartanburg County Bar. (R. p. 215-220). The two Affidavits for collection of small estates were notarized by long time employees of the Spartanburg County Probate Court. (R. p. 221-222, R. p. 12). In his Order, the Trial Judge commented upon the reputation of these persons for honesty and integrity. (R. p. 12-13). The Trial Court noted that the signatures on the deeds and affidavits were very similar to the signature on the Will. (R. p. 13). The Court concluded that the signature on the Will was genuine and not the product of forgery. (R. p. 13).

There was abundant additional evidence tending to disapprove the forgery allegation, but that evidence is not relevant on Certiorari and will not be repeated. (R. pp. 11-13).

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ARGUMENT

I.

WAS THE DECISION OF THE LOWER COURT BIASED BECAUSE THE LOWER COURT COMMENTED UPON THE REPUTATION FOR VERACITY OF VARIOUS NOTARIES AND WITNESSES TO LEGAL DOCUMENTS THAT WERE INTRODUCED FOR SIGNATURE COMPARISON?

An action to contest a Will is an action at law. If the proceeding in the Trial Court is in the nature of an action at law, the Appeal Court may not disturb the Trial Court's findings unless there is no evidence to support the findings of the Trial Judge. In re. Estate of Cumbee, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999). Most of the questions on this issue were questions of fact better decided by the Trial Judge than on appeal.

The Trial Court's determination that the Will was not the product of forgery was supported by evidence. The attorney who prepared and supervised the execution of the Will testified. He identified one of the witnesses and the Notary as employees of his. He identified the other witness, Ms. Kunak, as an employee of his father, Dr. Joseph Hodge. He stated that his office was next door to his father's office and he occasionally called on Ms. Kunak when he needed a witness. (R. p. 64).

The Appellant argues that Ms. Kunak testified that she worked for Dr. Hodge from 1991 and 1995 and thus could not have witnessed the 1988 Will. Ms. Kunak

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testified that she worked for Dr. Joseph Hodge for fourteen years. (R. p. 68). She stated that she was working for Dr. Joseph Hodge at the time the Will was drawn. (R. pp. 68-69). The transcript indicates that she stated that she worked for Dr. Joseph Hodge from 1991 to 1995 when he passed away. (R. p. 69). (The writer believes this is a scrivener's error of the court reporter. The writer believes that the testimony was from 1981, rather than from 1991. That would amount to fourteen years). She corroborated that the offices of Dr. Hodge and attorney Hodge were located next door to each other and that occasionally attorney Hodge would ask her to assist in witnessing legal documents. (R. p. 69). Although she did not remember having witnessed this Will, nor did she recognize Thurman or Mary Bomar, she identified her signature on the Will as being from her hand. (R. p. 69).

Appellant argues that because the attorney and witness had no memory of the Will signing event and could not recognize photos of the Testator that their testimony should not be considered in support of the Will. Respondents would submit that the fact that the attorney and witness did not specifically remember the event and could not recognize a photograph of the Testator is not unusual given that preparation and execution of a Will by an attorney is often a one-time encounter and the attorney often has no other contact with the client. Further, in this case, twenty years had passed.

The Respondents offered signatures for comparison to the Will that were on publicly recorded documents, witnessed by multiple different witnesses and notarized by

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multiple different Notaries Public on multiple different occasions. (DB 44V, Page 559, DB 44V, Page 560, DB 66P, Page 431, DB 82N, Page 826) (R. pp. 215- 219). (Document from Spartanburg County Probate file number 93-417) (R. p. 221) (Document from Spartanburg County Probate file number 90-531). (R. p. 222). The signatures on these documents closely resembled the signature on the Will. (Thurman Bomar's Last Will and Testament) (R. pp. 209-210). The Appellant argues that these signatures should not be acceptable for comparison because all of them are forgeries. The writer would submit that multiple forgeries are less likely than an isolated single forgery. The writer would further submit that where multiple executions are observed by different witnesses and different notaries the chance they are all forgeries grows less likely. The Appellants allegation that all of the documents are forgeries is not credible.

Abundant evidence supports the Trial Judge's decision that the Will was not forged.

The Appellant argues that the Court's stated familiarity with witnesses to the various documents for signature comparisons indicates bias. The statement by the Trial Judge of his familiarity with the Court employees and attorneys who witnessed the documents, if error, is harmless, given the abundant evidence that the Will was not forged. Where evidence is so conclusive on a point that no other rational conclusion could be reached, a decision will not be set aside. State v. Gillian, 360 S. C. 433, 602 S. E. 2d 62 (Ct.App. 2004).

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However, this was probably not error. In a law case tried without a jury, questions regarding the credibility and weight of evidence are exclusively for the Trial Judge. Golini v. Bolton, 326 S. C. 333, 482 S. E. 2d 748 (Ct.App. 1997).

If a factfinder, Judge or Jury, knows a witness or knows of the reputation of a witness, it is normal for the factfinder to take this into consideration in determining the truth. This should be permissible so long as this does not rise to the level of bias. There was no bias of the Court as factfinder in this case.

The Appellant cites Campbell v. Campbell, 379 S.C. 593; 666 S.E. 2d 908 S.C. 2008 for the proposition that bias exists when a judge expresses an opinion on a witnesses reputation for veracity. The Campbell case can be distinguished. In Campbell, the Trial Judge went beyond expressing a favorable opinion of the witnesses. He also made disparaging remarks to opposing counsel, which may have indicated bias.

Also, Campbell involved testimonial witnesses testifying directly on the ultimate issue before the Court. Whereas in the case at bar, it is important that these were witnesses to documents, not testimonial witnesses. They did not appear before the Court. Possible bias would seem to be more likely if the witness was personally involved in the proceeding and testifying or appearing before the Court.

It is also important that the documents were witnessed long before the controversy arose that is the subject of this litigation. The witnesses themselves could not have been

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biased or affiliated with one or the other parties because the controversy had not yet arisen.

These are mostly credibility issues best determined by the Trial Judge.

II.

WAS IT ERROR FOR THE LOWER COURT TO FAIL TO FIND FRAUD AND TO FAIL TO DISQUALIFY THE RESPONDENTS FROM INHERITING BECAUSE THE PERSONAL REPRESENTATIVE, AT THE TIME OF THE PERSONAL REPRESENTATIVE'S PETITION TO THE PROBATE COURT, DELAYED SUPPLYING THE NAMES OF ADDITIONAL HEIRS?

Chewning v. Ford Motor Company, 354 S. C. 72, 579 S. E. 2d 605 (2003)

concerns fraud upon the Court. It cites cases from other jurisdictions that have defined fraud upon the Court. It distinguishes between intrinsic fraud and extrinsic fraud.

Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Fraud on the court requires a showing that one has acted with intent to deceive or defraud the court, a showing of conscious wrong doing, what can properly be characterized as a deliberate scheme to defraud. When there is no intent to deceive, the fact that misrepresentations were made to a Court is not of itself sufficient basis for setting aside a judgment for fraud on the Court.

In the case at bar, there was evidence from which the Court could find that Mr. Carr's delay in naming heirs was not fraud. His testimony was that he did not list the Appellant or his brothers or sisters, at that time, because he did not know all of their full names. The clerk indicated on the form that "PR to try and find out add'l intestate heirs

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to before closing". (R. p. 92-96). (Petition for Informal Probate and Informal Appointment). (R. pp. 18-23). Mr. Carr was not related by blood or marriage to the Appellants and it is not unreasonable that he would not know all of their proper names. Based on this, the Trial Court could find that fraud was not committed.

The normal remedy sought for fraud upon the Court is a request to set aside judgment. Even if fraud upon the Court had been proven in this case, this would not necessarily disqualify the Respondents as beneficiaries under the Will, nor render the Decedent intestate and entitle the Appellants to the Decedent's estate. Presumably, there would be other penalties. SC Code Ann. 62-1-106 (2009) cited by Appellants provides for appropriate relief against the perpetrator, but does not identify the appropriate relief.

Even if a fraud upon the Court had been committed, there was no damage to the Appellants. SC Code Ann. 62-1-106 (2009) provides relief to persons injured thereby. Although they were not initially listed as heirs or notified that the estate had been opened, their Complaint was filed shortly after Mr. Carr's Petition for Informal Probate. (Petition for Informal Probate (R. p. 18) Complaint (R. p. 25)). The Appellants have certainly not been deprived of fully exhibiting and trying their case. They suffered no loss by reason of not being named as heirs.

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CONCLUSION

For the reasons stated above, the Respondents ask that the S.C. Supreme Court deny the Petition for a Writ of Certiorari.

Respectfully Submitted,

Charles P. Edwards

Charles P. Edwards, #1840
Attorney at Law
P.O. Box 2552
Spartanburg, SC 29304
864-585-0995
864-948-1947

Dated: August 13, 2014

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PROOF OF SERVICE

I certify that I, as the Respondents' undersigned attorney, have served a copy of the Respondents' Return to Petition for Writ of Certiorari upon the Appellants, Willie A. Rogers and Vennie Rogers, by depositing a copy of same in the United State Mail, postage pre-paid on August 13, 2014, addressed to the Appellants' attorney of record, Mr. Michael F. Talley, 206 Green Avenue, P.O. Box 10081, Greenville, SC 29601.

Charles P. Edwards

Charles P. Edwards #1840
200 Library Street
P.O. Box 2552
Spartanburg, SC 29304
864-585-0995
864-948-1947

August 13, 2014