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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.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

- I. **Did the lower court err in failing to grant a directed verdict and then judgment notwithstanding the verdict where the Respondents failed to adduce evidence of all nine elements of fraud, including a lack of evidence of damages proximately caused by reliance on any misrepresentation?**
- II. **Did the lower court err in failing to grant Appellant's motion for a new trial where the record is susceptible only of a reading that the jury gave Respondents a verdict only on a theory or theories they expressly were not pursuing or which had been dismissed with prejudice?**
- III. **Did the lower court err in failing to grant Appellant's motion for a new trial *nisi remittitur* where the record is susceptible only of a reading that the jury gave Respondents a verdict for damages that could only flow from acts for which Respondents expressly were not suing Appellant?**

STATEMENT OF THE CASE

This is an appeal from the denial of the motion of the Appellant, David C. Bryan, III (hereinafter “David”) for judgment notwithstanding the verdict or a new trial, absolute or *nisi remittitur*, following a jury verdict of \$600,000.00 for the Respondents, Elisa Montgomery Edwards (hereinafter “Elisa”) and Emily Cecile Edwards (hereinafter “Emily”), on the sole claim submitted to the jury, fraud. (R. pp. ____; order denying motion for jnov & new trial; verdict form; motion for jnov & new trial.)

David C. Bryan, Jr. (hereinafter “Testator”) died on January 9, 2009, and left a will. (R. pp. ____; complaint; will; transcript p. 42 ln. 6-10.) Testator’s son, David, served as personal representative of Testator’s estate, the Testator’s will was probated, and the estate was closed. (R. pp. ____; complaint; answer and counterclaim; will; transcript p. 43 ln. 24 through p. 44 ln. 23.) Testator’s will created a trust, of which Testator’s granddaughter Elisa and her daughter (Testator’s great-granddaughter Emily) were two of several beneficiaries. (R. pp. ____; will.) 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. ____; will.) The will gave David complete discretion with regard to what assets, if any, would go into the trust. (R. pp. ____; will.) Other than some specific devises not at issue here, the share of the Testator’s estate that David chose not to place into the trust were devised to David. (R. pp. ____; will.) Testator’s wife died on October 22, 2009. (R. pp. ____; transcript p. 46 ln. 22-24.) In September of 2010, David filed a final accounting in the probate court that listed a disbursement of \$468,587.06 “to trust[.]” (R. pp. ____; accounting.) The probate court closed the estate by order dated November 9, 2011. (R. pp. ____; order closing estate.)

No challenge was brought to any aspect of the estate administration by anyone, including Elisa and Emily. (R. pp. ____; transcript p. 44 ln. 18-23.) Instead, over six years after the estate was closed, Elisa and Emily filed this action against David, suing him for fraud, negligent misrepresentation, conversion, and negligence *per se* (for violation of duties under the probate code as personal representative). (R. pp. ____; complaint).

Elisa and Emily's fraud and negligent misrepresentation claims were based on David having "misrepresented or failed to disclose to [Elisa and Emily] 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. pp. ____; complaint). The fraud claim alleged that Elisa and Emily "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. pp. ____; complaint).

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

David answered and included a motion for summary judgment in his answer, styling that motion as a counterclaim. (R. pp. ____; answer and counterclaim for summary judgment). Elisa and Emily replied to David's pleading. (R. pp. ____; reply to answer and counterclaim for summary judgment).

Several months before trial, the circuit court granted summary judgment – with the agreement of Elisa and Emily – on the causes of action for conversion and negligence *per se*, dismissing those causes of action with prejudice. (R. pp. ____; order granting partial summary judgment). Elisa and Emily did not move for reconsideration of that order, nor did they appeal it.

On October 20, 2020, at the height of the COVID-19 pandemic, the case was tried to a jury, with precautionary pandemic-related measures such as wearing of masks by witnesses in place. (R. pp. ____; order denying motion for jnov or new trial; verdict form; motion for jnov or new trial; transcript.) After the close of the plaintiffs’ case, Elisa and Emily elected to drop their negligent misrepresentation claim and proceed solely on their claim for fraud. (R. pp. ____; transcript p. 176 ln. 19-20, p. 177 ln. 5-9). David moved for a directed verdict on the one remaining cause of action, for fraud, stating that the plaintiffs had failed to adduce evidence of each element of fraud. (R. pp. ____; transcript p. 179 ln. 17-23). The judge held the motion in abeyance. (R. pp. ____; transcript p. 180 ln. 9-14). At the close of his own evidence, David renewed his motion for a directed verdict, which the judge denied. (R. pp. ____; transcript p. 220 ln. 23 through p. 221 ln. 2.)

At numerous times throughout the trial, through Elisa’s witness testimony and through statements of plaintiffs’ counsel, Elisa and Emily stated that they were not suing David 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. pp. ____; transcript p. 59 ln. 23 through p. 60 ln. 6, p. 63 ln. 20-22, p. 64 ln. 3-6, p. 104 ln. 5-13). 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. pp. ____; transcript p. 64 ln. 3-6).

Elisa also testified that her reliance was on the accounting document David 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. pp. ____; transcript p. 97 ln. 4 through p. 98 ln. 2). She testified that she was damaged because she never received the money that she contended would have been distributed to her had David 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. pp. ____; transcript p. 74 ln. 13 through p. 78 ln. 1.)

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. ____; transcript p. 203 ln. 13-18.)

The jury returned a verdict for Elisa and Emily for \$500,000.00 in actual damages and \$100,000.00 in punitive damages. (R. pp. ____; verdict form.)

David moved for judgment notwithstanding the verdict, for a new trial absolute, or for a new trial *nisi remittitur*. (R. pp. ____; motion for jnov or new trial.) One of the bases for the motion is that the jury's verdict could have been based only on the theory of David'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 David's. (R. pp. ____; motion for jnov or new trial.) Elisa and Emily filed

a memorandum in opposition to the motion. (R. pp. ____; memorandum in opposition for motion for jnov or new trial.) Elisa and Emily’s 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. pp. ____; memorandum in opposition to motion for jnov or new trial p. 2.)

The court reviewed the motion and denied it. (R. pp. ____; order denying motion for jnov or new trial).

This appeal followed.

STANDARD OF REVIEW

Judgment notwithstanding the verdict. “When reviewing the trial court’s ruling on a motion for a directed verdict or a JNOV, this [c]ourt must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” Road, LLC v. Beaufort Cnty., 433 S.C. 164, 174, 857 S.E.2d 371, 376 (Ct. App. 2021) (quoting RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012)). The denial of such a motion is properly reversed where no evidence exists that sustains the factual findings implicit in the jury’s decision. Id. at 175.

New trial. The appellate court will not reverse a trial court’s denial of a motion for a new trial unless it is controlled by an error of law or is not supported by the evidence. Duncan v. Hampton Cnty. Sch. Dist. No. 2, 335 S.C. 535, 517 S.E.2d 449, 455 (Ct. App. 1999).

ARGUMENT

I. The trial court should have granted the motion for judgment notwithstanding the verdict. The only damages evidenced adduced at trial connected to David's actions as personal representative – for which Elisa and Emily were not suing him – not to any reliance by them on a representation by David.

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).

The trial court should have granted the directed verdict motion and erred reversibly in denying David's motion for judgment notwithstanding the verdict. What was placed before the jury did not contain any damages caused by David saying something other than the truth – the truth being, in the light most favorable to Elisa and Emily, that David had not, in the administration of the estate, funded a trust that would have paid Elisa and Emily something.

If, under the only theory on which the plaintiffs proceeded at trial, David had told the truth, Elisa and Emily would simply have known earlier that they would not be receiving any money from the trust set up in the Testator's will – because that was the truth that they complained David kept from them. (R. pp. ____; transcript (testimony of Elisa)). Any misrepresentation of this by

David did not cause Elisa and Emily not to be distributed their portion of estate assets they believed had been placed in a trust. The only thing that arguably caused *that* was a failure by David to perform his duties as personal representative in administering the estate.

A personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, and any order in proceedings to which he is party for the best interests of successors to the estate.

S.C. Code Ann. § 62-3-703(a). Viewed in the light most favorable to Elisa and Emily, David's failure to do *that*, to perform his duty as personal representative, is what caused them to suffer any damages. See id. Emily's description of what the case was about – that David was supposed to divide up the estate but kept it all for himself – is telling. (R. p. ____; transcript p. 203 ln. 13-18.) The jury awarded damages consistent with *that* theory, not on the theory on which the case actually went to trial, and consistent Elisa's testimony of what she could have done with the money had it been properly distributed to her. (R. pp. ____; verdict form; transcript p. 74 ln. 13 through p. 78 ln. 1.) No other evidence of damage was adduced. (R. pp. ____; transcript).

David making representations to the effect that the trust had been funded is not what caused Elisa and Emily not to get the money the jury's verdict is based on. (R. p. ____; verdict form.) In other words, Elisa and Emily did not adduce evidence to the effect that they were damaged because there was a delay of some years in them coming to know that they were not going to receive a portion of assets that passed under the Testator's will. The "position [Elisa and Emily] occupied before being defrauded" was that of receiving nothing through the unfunded trust – exactly the position they were in once the misrepresentations were made. Gilbert, 267 S.C. at 223.

The reason that Elisa and Emily found themselves receiving nothing through the unfunded trust is because David arguably mismanaged the administration of the estate and distributed to himself assets to which they would have been entitled. Viewed in the light most favorable to Elisa and Emily, some damage was caused by David's failure to properly administer the estate. See S.C. Code Ann. § 62-3-703(a). Elisa and Emily's causes of action for that, though, had already been dismissed with prejudice, and, as they stated themselves, they did not go to trial against David on claims about that. (R. pp. ____; complaint; order granting partial summary judgment; transcript p. 59 ln. 23 through p. 60 ln. 6, p. 63 ln. 20-22, p. 64 ln. 3-6, p. 104 ln. 5-13).

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 jury's verdict is unsupported by evidence of damages proximately caused by the fraud – failing to tell the plaintiffs that the trust was unfunded – of which the plaintiffs complain; thus, the trial court should have granted the motion for judgment notwithstanding the verdict. Road, LLC, 433 S.C. at 175. No reasonable jury could have reached the verdict that the damages awarded here to Elisa and Emily were caused by the fraud on which they went to trial against him. See Gastineau v. Murphy, 331 S.C. 565, 503 S.E.2d 712 (1998) (standard for motion for judgment notwithstanding the verdict).

This court should reverse the denial of David's motion for judgment notwithstanding the verdict and enter such a judgment in David's favor.

II. The trial court's decision to deny the motion for a new trial is not supported by any evidence.

Alternatively, the court should reverse the denial of David's motion for a new trial absolute or for a new trial *nisi remittitur*, since that denial is not supported by any evidence of proximately caused damages, as noted above. See Mutual Savings and Loan, 274 S.C. at 632 (elements of

fraud); Duncan, 517 S.E.2d at 455 (standard of review for denial of motion for new trial). The order denying the motion erroneously states that evidence supporting the verdict was adduced. (R. pp. ___; order denying motion for jnov and new trial). Further, even if the court sees what the undersigned does not and determines there is *some* evidence of damages, that evidence is nowhere near the \$500,000.00 in actual damages awarded by the jury and is, thus, motivated by considerations not found in the evidence and the charged law. This entitles David to a new trial absolute or, failing that, a new trial *nisi remittitur* even if this court does not reverse and enter judgment notwithstanding the verdict. See Krepps v. Ausen, 324 S.C. 597, 479 S.E.2d 290, 295-96 (Ct. App. 1996) (standards for new trial regarding excessive damages).

CONCLUSION

Respectfully, the lower court erred prejudicially in failing to grant judgment notwithstanding the verdict or, alternatively, a new trial.

Respectfully submitted,

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PROOF OF SERVICE

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

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