IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01095

CEASAR OLIVE — APPELLANT

VS.

WILLIE B. MCNEAL AND BERNICE O. BOULDIN — APPELLEES

ON APPEAL FROM CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEES WILLIE B. MCNEAL AND BERNICE O. BOULDIN

ORAL ARGUMENT NOT REQUESTED

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I. SUMMARY OF THE ARGUMENT

The lawsuit was filed by the Grantor-Appellant, who is the step-father of the two Grantees-Appellees, to set aside and or reform a warranty deed on a tract of land in Madison County. The record reveals that the lawyer was selected by the Grantor-Appellant, who interviewed one of the Grantor-Appellees on September 30, 2003, and that the attorney mailed the warranty deed which he prepared to the residential address of the Grantor-Appellant on October 7, 2003. The instrument was signed in the office of the Chancery Clerk of Madison County on October 27, 2003. Then eleven months later, on September 27, 2004, the Grantor step-father filed a three page Complaint to set aside or reform the warranty deed, alleging that he intended to sign a will rather than a deed. Appellant alleges fraud and mutual mistake in that he thought he was signing a will rather than a deed, stating that the deed should be set aside, for want of consideration, unconscionability, fraud, and unjust enrichment.

The Grantees-Appellees answered, setting forth the fact that the deed transaction was initiated by the Grantor-Appellant who selected the attorney and there was no discussion or misunderstanding about the nature of the document.

Only the Appellant and one of the Appellees, McNeal, gave testimony at the trial.

The Chancellor correctly ruled that there was no confidential relationship and that the proof did not show a mutual mistake.

Conclusory statements by the Appellant as to the will versus the deed was the only evidence, but the exhibits introduced into evidence at the trial circumstantially show that he well understood what he was doing and that he initiated the entire transaction. To affirm his understanding of the deed, he signed a separate document, an Affidavit, notarized by the Deputy

Chancery Clerk, Exhibit 6, wherein he swore that he knew and understood that he was signing a deed reserving unto himself a life estate.

The Chancellor's decision is manifestly correctly and fully supported by the evidence.

II. STATEMENT OF FACTS

This was a one-day trial in which only two witnesses testified, namely, the Appellant, Ceasar Olive and the Appellee, Willie McNeal. The Appellees, Willie McNeal and Bernice Bouldin are older step-children of Olive and started living with him and their mother at a very early age on a parcel of land situated in Madison County, Mississippi, where the Appellant operated a retail business and farm and row crops. McNeal and Bouldin helped Olive throughout their early years and maintained a friendly relationship with Olive thereafter. McNeal's mother, who was Olive's wife of many years, passed away in early 2003. Olive has no lineal descendants.

There is no dispute in the record that Olive, a widower, was 77 years but in good health. Olive attempts to make a conclusory statement that he was physically and mentally infirmed; however, the Olive did not testify that to such condition. (R43). Appellant Olive testified that he had a wreck in his pickup truck and they put three pins in his arm and shoulder. He was asked if he had a head injury, his answer was "no, not that I know of." This sharply conflicts with counsel's statement of facts in which he asserted that Olive had suffered head trauma. Be that as it may, there were no medical records, prescriptions, or any type of corroboration of his mental capacity infirmity. The Chancellor correctly ruled that there was no confidential relationship between the Appellee McNeal and Olive. The two Grantees in the deed complained of are McNeal and Bouldin, but there is no evidence whatsoever that Bouldin had any contact, verbal or otherwise, with Olive at any time prior to the execution of the deed.

In the Chancellor's ruling (R98), Olive failed to meet the burden of proof that the deed was made by a mutual mistake or undue influence.

The Complaint in this case, consisting of three pages, did not allege anything about infirmity, about being mentally disabled, about being sick or delusional, and did not understand what was happening. Obviously, Olive has changed from one premise to another in an attempt to find a way to set aside or reform the deed. Basically, he now contends that there was a confidential relationship and/or there was a mutual mistake. The law does not permit a person to escape the consequences of entering into a written agreement upon proof that the person, having had an opportunity to review the terms of the instrument, elected not to do so. The 2002 case of *Brown v. Chapman*, 809 So. 2d 772 (Miss. App. 2002), and the 1991 case of *Godfrey v. Huntington*, 584 So. 2d 1254 (Miss. 1991), clearly supports McNeal's position in this case.

There is no proof that McNeal selected the lawyer. He was told by Olive to call a certain lawyer and Olive gave him the phone number instructing him to do so. McNeal made an appointment at the request of Olive and went to the lawyer's office. The exhibits showed that was on September 30, 2003. According to the billing date set forth in Exhibit No. 3, the deed (Exhibit No. 3) was mailed on October 7, 2003, and was executed in the Chancery Clerk's office on October 27, 2003.

The facts are undisputed that Olive is a healthy 77 year old self-employed businessman operating an automobile salvage company at which he sells scrap automobiles for profit. The record shows that he sold scrap automobiles around the same time that he signed the deed. There were no partners and no advisors and McNeal and Bouldin had nothing to do with his business transactions. Olive has a bank account and he writes checks. He does not claim to be illiterate or literate-inhibited.

The findings by the Chancellor that there was no confidential or fiduciary relationship is fully supported by the evidence. Moreover, there is no proof that Olive relied upon the influence of McNeal and/or Bouldin for any purpose at any time in the past.

IV. ARGUMENT

Appellant claims his action through his personal attorney was to prepare a Will, not a deed, which in effect requires the Court to reform the instrument. The law in Mississippi requiring the proper burden of proof in deed reformation cases wherein a party pleads mutual mistake is beyond a reasonable doubt. *McCoy v. McCoy*, 611 So. 2d 957 (Miss. 1992), states:

> In an action to reform a deed on mutual mistake theory, the petitioner must demonstrate a mutual mistake among the parties or a unilateral mistake in combination with fraud or inequitable conduct on the part of the benefitting parties.

Perrien v. Map, 374 So. 2d 794 (Miss. 1979), states: "The petitioner must prove that the mutual mistake occurred between the parties beyond a reasonable doubt."

In *Sunnybrook Children's Home v. Dahlem* 265 So. 2d 921, 925 (Miss. 1972), the Chancellor wrote as follows:

> We embrace this opportunity to resolve the discrepancy existing in Mississippi law regarding the proper burden of proof in cases involving reformation of deeds. We have said that the claim of mutual mistake in an action to reform a deed must be proven by clear and convincing evidence.

Additionally, the *Sunnybrook case cites John W. Dilling v. Denise L. Dilling*, (No. 97-CA-00037 COA) as follows:

> **However, "The mistake that will justify a reformation must be in the drafting of the instrument, not in the making of the contract."** *Johnson*, 244 So. 2d at 402 (Miss. 1971). A scrivener's error may be sufficient to warrant the reformation of an instrument. See *Sunnybrook Children's Home, Inc. v. Dahlem*, 265 So. 2d 921, 925 (Miss. 1972) (holding that the evidence showed that grantor intended to convey land located in Range 7 East and that the omission of the range number was a scrivener's error which justified reformation of the description of the land attempted to be conveyed in the grantor's deed). Because the Dillings' property settlement agreement was "no different from any other contract," it too could be reformed if there was a "mistake . . . in the drafting of the instrument."
>
> (emphasis added).

Further, *Sunnybrook* holds:

> However, an abundance of case law existing that the proper burden of proof in a mutual mistake case involving a reformation of a deed is beyond a reasonable doubt. This discrepancy was first noted by the Court over twenty years ago, but was never resolved. In light of the fact that that case authority, supporting beyond a reasonable doubt burden, is more contemporary and more prevalent in reformation cases which establishes otherwise. We hereby conclude the appropriate burden of proof in deed reformation cases when any party pleads mutual mistake is beyond a reasonable doubt.

Sunnybrook Children's Home v. Dahlem, 265 So. 2d 921, 925 (Miss. 1972) (internal citations omitted).

The Appellant's *ex post facto* desire to include a third person as a beneficiary in the land transaction is the reason for the lawsuit in the first place. Circumstances point directly to the fact that if the third person was a Grantee in the original deed we would not be in court. The law in Mississippi does not permit Indian-giving.

The exhibits offered during the course of the trial of this case in and of themselves belie a confidential relationship and clearly dispute mutual mistake. For example, the warranty deed consisting of three typewritten pages contains very professional wording, including the reservation of a life estate and a very complex legal description bearing a line for the Appellant to sign and showing that it was signed in the Chancery Clerk's office on October 27, 2003, and recorded on the same date.

Exhibit No. 2 is an Affidavit signed by the Appellant on October 27, 2003, and notarized by a Deputy Chancery Clerk in Madison County, and which exhibit states that the Appellant is of sound and disposing mind and memory, that he is conveying the property, reserving a life estate for a consideration of the longtime service rendered by them in the farming operation owned by the Appellant. Obviously, this Affidavit was prepared by the attorney and it is set forth in plain language on one page and the Appellant is not able to dispute the contents of that Affidavit.

Exhibit No. 6 is a letter from Attorney Rand to the Appellee requesting that he sign a new deed including Betty Rugley. This letter is dated May 24, 2004, whereas the original conveyance occurred on October 27, 2003, or seven months before the new deed was prepared. Circumstantially speaking, it simply shows that Mr. Olive changed his mind and wanted this third party to participate as a Grantee.

Olive failed to show that McNeal and/or Bouldin exerted undue influence over him in conveying the property to them, or that there was a mutual mistake warranting the reformation of the deed. The Chancellor's ruling is correct and should not be disturbed.

V. CONCLUSION

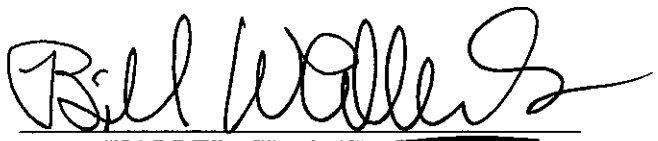
In conclusion, we submit the long-standing principle of appellate law dealing with the decision on the facts by the Chancellor which rule is set out in the 2009 case of *Webb v. Drewrey,* 4 So. 3d 1078 (Miss. App. 2009), which states:

> In a bench trial, the chancellor is the finder of fact and, thus, solely determines the credibility of the witnesses and the weight to be given to the evidence. This court gives great deference to a chancellor's finding of facts. Therefore, we will not disturb the finding of the chancellor when supported by substantial evidence unless the chancellor abused her discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.
>
> *Webb* citing *Moran v. Moran,* (No. 94-CA-01130 COA):
>
> The Mississippi Supreme Court has stated that an appellate court is required to follow the substantial evidence/manifest error standard of review. *Murphy v. Murphy*, 631 So. 2d 812, 815 (Miss. 1994) (citation omitted). Therefore, this Court "will not disturb a chancellor's findings of fact when supported by substantial evidence unless an erroneous legal standard has been applied or is manifestly wrong." Id. (citations omitted). When substantial evidence supports the chancellor's findings, an appellate court shall not disturb those conclusions even if it would have originally found otherwise. Id. (citation omitted); see also *Lenoir v. Lenoir*, 611 So. 2d 200, 203 (Miss. 1992) (a chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings).

The evidence clearly establishes a conscious overt act on the part of the Appellant and selecting a lawyer to prepare and in the execution of the warranty deed. In order to reach the level of proof beyond a reasonable doubt, there must be some corroboration, either by documents or witnesses, that the deed was signed subject to undue influence or that it was a mutual mistake. Such proof was not presented and the burden never shifted from the Appellant to the Appellee, as found by the Chancellor. The decision of the Chancellor in confirming and upholding the original deed should be affirmed by this court.

RESPECTFULLY SUBMITTED this 22nd day of February, 2010.

WILLIE B. McNEAL and BERNICE O. BOULDIN, APPELLEES

BY: 

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CERTIFICATE OF SERVICE

I, Bill Waller, Sr., the undersigned counsel of record for the Appellees, Willie McNeal and Bernice O. Bouldin, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing document via United States mail, postage prepaid, to the following:

Honorable Cynthia Brewer
Madison County Chancery Court
Post Office Box 404
Canton, Mississippi 39046

Robert B. Ogletree, Esq.
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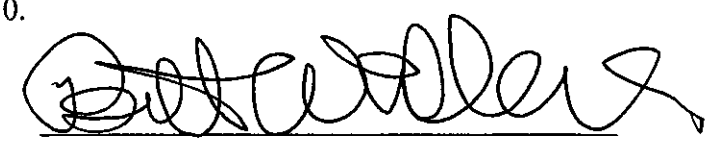
Brandon, Mississippi 39042

This the 22nd day of February, 2010.



BILL WALLER, SR.