IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01438

IN THE MATTER OF THE ESTATE OF SAMUEL A. FARR, DECEASED: SAMUEL A. FARR V. NANCY WYRICK

Appeal from the Chancery Court of Chickasaw County, Mississippi

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REPLY BRIEF OF APPELLANT SAMUEL A. FARR DECEASED

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INTRODUCTION

Nancy Wirick's response on this appeal confirms that summary judgment in this case was based solely on the court file and Wirick's interpretation of it. There was no additional evidence or testimony presented in support of summary judgment. There was no hearing on the issues presented on this appeal. Therefore, the only issue is whether it was appropriate for the chancellor to decide, based on nothing more than the documents, whether a notary public who signed an affidavit attached to the will on the same day as the will was executed by the testator also served as an attesting witness. Without examining this matter further, or at least requiring the movant to present more than the will and codicil at issue, the chancellor chose between two reasonable alternatives and determined a factual dispute. Under these circumstances, summary judgment was premature and inappropriate.

ARGUMENT

I. Standard of Review

Wirick agrees that the proper standard of review in this case is *de novo*. However, for whatever purpose, Wirick also contends that this Court should somehow incorporate a manifest error or abuse of discretion standard because the case involves a will contest. The Court should decline to do so. In each of the cases cited by Wirick, *Estate of Grantham v. Roberts*, 609 So.2d 1220 (Miss. 1992), *In re: Estate of McQueen*, 918 So.2d 864, 866 (Miss. Ct. App. 2005), and *Estate of Grubbs*, 753 So.2d 1043, 1045 (Miss. 2000), the appellate court reviewed a chancellor's findings **after** a trial or hearing on the merits. That is not the case here. In fact, this Court stands on equal footing with the chancellor because the decision was based entirely on the interpretation of two documents without the benefit of any testimony. Accordingly, the *de novo* standard is the only proper standard of review for this case.

II. The Evidence Fails to Establish the Will and Codicil were not Properly Executed as a Matter of Law.

Wirick's response states that this appeal "will be largely fact-driven." On this, the parties agree. Importantly, since the facts are derived exclusively from the will and codicil, and the operative facts are subject to differing interpretations, a classic trial issue exists. Wirick's argument to the contrary ignores the limitations of Rule 56 of the Mississippi Rules of Civil Procedure.

Wirick initially relies on the documents themselves, but they create more questions than provide answers. Wirick relies on the page numbering of the will, the space provided for attesting witnesses to sign, and the codicil which references the will attested to by Roger McGrew. These facts do not resolve whether or not more than one witness was present when Mr. Farr signed his will. They do not resolve whether the affidavits were executed and notarized at the same time the will and codicil were executed and in the presence of the testator, for the express purpose of attesting to the will and the codicil. They do not resolve whether the notaries were witnesses to the will and signed the affidavits in a dual capacity. Instead of offering evidence concerning what actually took place at the signing of the will and the codicil, Wirick merely offered the will and codicil filed with the clerk to open the probate proceeding. While the documents, and Wirick's argument, certainly raises questions, merely identifying issues is insufficient to carry her burden under Rule 56.

With regard to the "attestation clause" and affidavit, Wirick does not claim that such a clause or affidavit is even required. It is not. The law only requires that the will or codicil be attested by two (2) or more witness who sign the documents. *See* MISS. CODE ANN. § 91-5-1 (1972). Nevertheless, Wirick contends that the failure of the notary public to sign in a particular space is dispositive. On the other hand, the affidavits and the testamentary documents were signed on the same day, and whether or not the affidavits are part of the documents is subject to dispute. Under

these circumstances, relying solely on the documents themselves is insufficient to establish there was only one witness.

Wirick also mistakenly relies on the pleadings filed in this matter to establish there was only one witness to the will. The pleadings and the codicil are correct insofar as these documents recite the fact that the will was executed in the presence of Roger McGrew and the codicil was executed in the presence of John P. Fox. Neither document establishes that the notaries public did not serve as attesting witnesses. If Wirick had filed a motion to dismiss under Mississippi Rule of Civil Procedure 12(b) and raised the fact that the pleadings only identify one attesting witness, her motion, if granted, would have required the estate to amend its pleadings. Any dismissal would have been without prejudice. As it stands, Wirick challenged the pleadings under Rule 56 without offering any evidence beyond the documents themselves, and the chancellor erroneously set aside the will and the codicil without requiring more. To the extent these documents lacked clarity as to the issue of due execution, summary judgment was not the proper remedy.

At the very least, the evidence suggests that two witnesses were present at the signing of the will and the codicil, and whether both of these witnesses satisfy the statutory requirement of an attesting witnesses should have been subject to further factual development. As the Mississippi Supreme Court stated, "[i]t is sufficient, if it appear that they signed their names as witnesses to its execution, and that they be able to state, when called to prove the will, that the requisites of the statute were observed." *Batchelor v. Estate of Powers,* 348 So.2d 776, 777 (Miss. 1977) (citing *Fatheree v. Lawrence*, 33 Misc. 585 (1857)). In each of the cases relied upon by Wirick to support summary judgment, the factual evidence indisputably established the absence of a second attesting witness. The same is not true here. Accordingly, summary judgment should be reversed and this matter remanded for further proceedings.

III. Summary Judgment was Premature and Improper.

Wirick argues that summary judgment is nevertheless proper because the Estate failed to file a formal, written response to her motion or present countervailing evidence. Wirick's argument misconstrues Rule 56.

Wirick contends that her motion, which alleged only one (1) attesting witness, created a presumption that the will was not duly executed, and that this presumption carried her burden of proof. Wirick further contends that the Estate's failure to present evidence in response to her motion entitled her to summary judgment. In support of this argument, Wirick cites cases where the moving party actually presented evidence refuting the non-movant's claims and the non-movant failed to provide a response. In other words, the movant presented evidence to support a dismissal with prejudice. Here, Wirick relied solely on the will and the codicil, and nothing more. As explained above, these documents contained multiple signatures and create genuine issues of material fact concerning the presence of a second attesting witness. Furthermore, it is significant that this matter involves a chancery proceeding where actual evidence, as opposed to argument, is easily and quickly developed in open court. The better approach, as counseled by the Mississippi Supreme Court, is to deny summary judgment and await a full and complete development of the facts. *McDonald v. Holmes*, 595 So.2d 434, 438 (Miss. 1992). This is particularly true where Wirick, the movant, failed to present any affidavits or sworn statements in support of her motion. *See Ratliff v. Ratliff*, 500 So.2d 981 (Miss. 1986).

The Estate contends that a *de novo* review should reveal that further factual development was necessary to invalidate the will and the codicil as a matter of law. The existence of more than one reasonable interpretation or inference concerning the documents is sufficient to raise doubt concerning summary judgment, and require a reversal. *See Miller v. Meeks*, 762 So.2d 302, 304-05

(Miss. 2000). Wirick agrees that the issue on this appeal is "fact-driven." Accordingly, a determination in open court is the proper approach.

IV. The Determination of Heirs Should be Set Aside.

Wirick contends that there is no basis for setting aside the determination of heirs should this Court order remand. Wirick relies on the various orders drafted by her own counsel to show that the additional estate beneficiaries, Prospect United Methodist Church and Prospect United Methodist Church Cemetery Fund, had ample notice after receiving service of process to enter an appearance in this matter on April 21, 2010, the date set by the chancellor for the return of service. Interestingly, Wirick's Brief at 36, acknowledges that neither entity "officially" appeared in this matter at the trial court level. Wirick couches her argument in this fashion because it was known that these beneficiaries were going to be before the court and counsel for the Estate would have made a record of their appearance had the chancellor's order not relieved him of attendance. In his absence, Wirick obtained relief declaring that she was the sole heir at law. The estate timely objected to this relief.

Accordingly, should this matter be reversed and remanded, all interested parties should be given a fair opportunity to enter an appearance.

V. The Estate and the Executrix have Legal Standing.

Wirick contends that this appeal is not proper because the estate lacks standing. For this proposition, Wirick relies on the Mississippi Supreme Court's decisions in *Hoskins v. Holmes County Community Hospital*, 99 So. 570 (Miss. 1924), and *Cajoles v. Attaya*, 111 So. 359 (Miss. 1927). Wirick maintains that these cases establish that an executor is not an interested or necessary party and, therefore, the executor has no standing to participate in this litigation. Wirick misreads both cases and the applicable statutes.

In *Hoskins*, the only question decided by the court was whether or not all of the interested parties to a will contest were properly before the court. 99 So. at 573. Without determining which parties had standing, the court merely ruled that all necessary parties had not been joined and the matter was reversed and remanded for further proceedings. *Id.* The court did, however, discuss the meaning of two Mississippi statutes governing will contests. One statute provided that "[a]ny person" could contest the validity of a will and the other provided that "all persons interested in such contest shall be made parties." *Id.* at 572-73. The court interpreted both statutes as follows:

> The words "interested parties" in the statute mean parties who have a pecuniary interest in the subject of the contest, and under all of the authorities the heirs at law who would take the property of the deceased in the absence of a valid will are interested parties and are necessary parties under the very terms of the statute itself. The court cannot properly entertain a contest of the will without having before it all the parties interested in such contest.

Id. at 573. Because there were multiple "interested parties" who had not been joined in the will contest, the court remanded the case.

Contrary to Wirick's representation, the court did not say that an executor does not have legal standing to participate in this litigation. The court merely stated that an earlier decision, *Kelly v. Davis*, 37 Miss. 76 (1859), stood for the proposition that an executor is not a necessary party to a will contest and that "his duty is to notify the beneficiaries under the will so they may take appropriate action to protect their interests." *Id.* As noted by the court, the *Kelly* decision held that an executor could defend a will although it was not his "imperative duty" to do so. *Id.* In any event, the court did not consider the question presented by Wirick.

Similarly, *Cajoles* has nothing to do with the standing of the estate or the executor on this appeal. In *Cajoles*, the Mississippi Supreme Court considered whether an administrator of an estate could contest an alleged will presented after the inception of a probate proceeding. 111 So. at 360.

Interpreting two Mississippi statutes concerning who could contest a will, the court held that the Legislature intended to limit the right to contest a will to only those "interested in the estate." *Id.* at 360-61. Relying on *Hoskins* and other authorities, the court held that **the right to contest a will** is granted only to heirs or other interested parties and not to the administrator. *Id.* at 361. Again, the case says nothing about the circumstances presented here.

Most recently, this Court relied upon *Hoskins* and *Cajoles* in determining whether grandchildren were proper parties to a will contest filed on behalf of their parents' interest in an estate. *Tatum v. Wells*, 2 So.3d 739, 742 (Miss. Ct. App. 2009). This court reaffirmed that a "person interested" who may file a will contest is defined as those parties "who have a pecuniary interest in the subject of the contest, and under all of the authorities the heirs at law who would take the property of the deceased in the absence of a valid will." *Id.* (citing *Hoskins*, 99 So. at 573). The Court held that the grandchildren were not interested parties because they had no direct, pecuniary interest and there was no guarantee they would have inherited through intestate succession if the will was invalid. *Id.* at 743. As with *Hoskins* and *Cajoles*, the issue in *Tatum* was who could file a will contest.

Therefore, the short answer to Wirick's objection is her argument does not apply to the executor in this instance. It is Wirick, and not the executor, who has filed a will contest. The cases relied upon by Wirick do not foreclose the executor from playing a role in this litigation. In fact, as noted above, prior precedent indicates that an executor may defend a will. Accordingly, Wirick's claim that the estate and the executor do not have standing lacks merit.

CONCLUSION

Based on the foregoing, the Estate requests that this matter be reversed and remanded for further proceedings. The facts are in dispute concerning the execution of the will and the codicil.

A review of the documents themselves is insufficient to resolve these facts. Because only the documents themselves were placed before the chancellor, summary judgment was improper and this factual dispute should be remanded for a hearing.

Respectfully submitted, this the 1st day of June, 2011.

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CERTIFICATE OF SERVICE

This will certify that undersigned counsel for Appellant has this day delivered a true and correct copy of the above and foregoing Reply Brief of Appellant to the following individuals by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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