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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002020-MR

BERNICE AUDREY MCBEE AND MARJORIE MCBEE VEST — APPELLANTS

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 04-CI-00397

WILLIAM K. MCBEE, INDIVIDUALLY AND AS EXECUTOR AND BENEFICIARY OF THE ESTATE OF LUCILLE B. MCBEE; ANNE P. MCBEE; MCBEE AND MCCRACKEN, A KENTUCKY PARTNERSHIP; AND BONNIE LOU MCBEE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, ACREE, AND VANMETER, JUDGES.

ACREE, JUDGE: Bernice McBee and Marjorie McBee Vest (Appellants) appeal from an order of the Grant Circuit Court granting summary judgment in favor of William and Anne McBee, Bonnie McBee, and McBee & McCracken (Appellees). Appellants sued William McBee (Bill) alleging that he improperly administered his aunt's will. In

addition, they claimed that Lucille McBee was unduly influenced or lacked the capacity to devise a will. Finally, they sued Anne McBee and her law firm, McBee & McCracken, for professional negligence . The trial court properly found that no genuine issues of material fact existed. Thus, the judgment of the trial court is affirmed.

The dispute in this case is centered upon the question of ownership of a two-hundred acre parcel of property, known as the McBee Farm, located in Grant County. The property was purchased in 1907 by Robert and Maggie McBee. Robert died in 1932 and Maggie died in 1947. As they both died intestate, the farm passed in equal shares to their five children: Robert, Willie, Herbert, Lucille and Clifford. In 1948, Robert and Willie allegedly executed a deed conveying their interests in the farm to Herbert, Lucille and Clifford. The deed was notarized, but never recorded. Nevertheless, after that date Robert, Willie and their descendants never had possession of the farm, paid taxes on or received any income from the farm.

Robert was the first of the five siblings to die, leaving a widow (Bernice) and a daughter (Marjorie). Willie died next, leaving his son, Bill, as his sole heir. Robert's and Willie's heirs, Bernice, Marjorie and Bill, never took any action to assert an interest in the McBee Farm. When Herbert died in 1985, an estate inventory filed in probate court showed his interest in the property as one-third. His interest passed in equal shares to his wife, Louisa, and his daughter, Bonnie. Upon her mother's death in 1993, Bonnie owned one-third of the farm with the remaining two-thirds being owned by her Aunt Lucille and Uncle Clifford respectively. Clifford and Lucille executed wills on

August 22, 1995. Both were childless and each named the other as sole beneficiary of their respective estates with their nephew, Bill McBee, as contingent beneficiary.

Clifford died in 2000, and Anne McBee (Anne) acted as attorney for his estate with her husband, Bill, serving as executor. At that time, she discovered that the 1948 deed from Robert and Willie to Herbert, Lucille and Clifford had never been recorded and the original had since been lost. Anne drew up a new deed in which Robert's heirs, Bernice and Marjorie, and Willie's heir, Bill, conveyed their interests in the McBee Farm to Bonnie, Lucille and Clifford's estate. This deed, executed June 6, 2001, stated that it was a replacement for the now-lost 1948 deed in which Robert and Willie had conveyed their interests in the property to their remaining siblings. Clifford's estate inventory, filed two weeks later, listed a one-third interest in the McBee Farm, which passed to Lucille as his sole heir. Anne then sent a letter to Bernice and Marjorie stating that the new deed had been recorded.

Lucille, the last of Robert and Maggie's children, died on October 22, 2002. Her will included a $100 bequest to her niece, Marjorie. The bulk of her estate passed to Bill McBee as contingent beneficiary since her brother, Clifford, had predeceased her. The estate inventory listed a two-thirds interest in the McBee Farm. The remaining third was owned by Bonnie McBee. On September 11, 2003, Bill, acting as executor for Lucille's estate, sent Marjorie a check for $100, and he and Bonnie sold the McBee Farm for over half a million dollars. Lucille's estate was settled the following day. According to the 2001 deed, the McBee Farm had been worth $200,000.00. After the property was

sold for more than double that figure, Appellants filed this action. Despite the existence of a very legible carbon or xerographic copy, Appellants claimed there never had been a 1948 deed.

Bernice and Marjorie filed their complaint on September 10, 2004. They alleged that Anne and her law firm, McBee & McCracken, were liable to them because Anne's legal services "fell below the standard required of attorneys practicing law in this Commonwealth." Appellants also claimed that Bill, acting as executor for Lucille's estate, improperly ignored their ownership interest in the McBee Farm. Further, they alleged that Lucille McBee lacked testamentary capacity and was unduly influenced in drafting her will. Bonnie McBee was joined as a defendant in the suit solely because the outcome could affect her ownership interest in the property. Anne and Bill filed separate summary judgment motions, and Appellants filed responses to each. The trial court granted summary judgment in favor of Anne, her law firm, and Bill on March 21, 2005. A subsequent motion for summary judgment in favor of Bonnie was also granted. After their motions for reconsideration and additional findings of fact were denied, Appellants brought this appeal.

STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996). The trial court

must view the evidence in the light most favorable to the non-moving party, and summary judgment should be granted only if it appears impossible that the non-moving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991). The party seeking summary disposition bears the initial burden of establishing that no genuine issue of material fact exists and the burden then shifts to the party opposing the motion to present "at least some affirmative evidence showing that there is a genuine issue of fact for trial." *Id.* at 482. We will apply this standard to each of the grants of summary judgment.

CLAIM AGAINST ANNE McBEE AND McBEE & McCRACKEN

Appellants' claim against these Appellees is simply that Appellants were "third party beneficiaries of Defendant Attorney McBee's representation" of Bill as executor of the Lucille McBee estate. We conclude that the summary judgment motion of Anne and her law firm properly established that Appellants were not third-party beneficiaries of Anne's legal services.

Appellants attempt to thwart the summary judgment motion by asserting that the original 1948 deed never existed, that Anne induced them to sign the 2001 deed by misrepresenting to them that they no longer had any interest in the McBee Farm, and that the affidavit of descent prepared by Anne in support of the 2001 deed failed to comply with the law. These matters, they claim, create a genuine issue of material fact. However, Appellants did not bring an action for fraud or misrepresentation. Because

Kentucky Rule of Civil Procedure (CR) 9.02 requires allegations of fraud to be averred with specificity, even the principles of notice pleading do not allow us to read the complaint that broadly. While these averments might have sufficiently supported a fraud claim against a summary judgment motion, they do not bear at all on the claim Appellants assert – that they were third-party beneficiaries of Anne McBee's legal representation of Bill in the administration of Lucille's estate.

Our appellate courts have had several opportunities to examine the extent of an attorney's liability to third-parties. Such liability falls into two categories. Typical of the first is that in which an attorney is sued by a party he previously sued on behalf of a client. Such actions are for "malicious prosecution" or "wrongful use of civil proceedings"; neither claim is successful in the absence of proof of malice. *See Prewitt v. Sexton*, 777 S.W.2d 891, 895 (Ky. 1989)("[T]he law on this subject has pursued an uneven path [and] must be viewed candidly, as a tort in transition . . . .").

Appellants' claim falls in the second category. Cases in this category hold that attorneys may be held liable for professional negligence where third parties were the intended beneficiaries of their legal representation. *See Hill v. Willmott,* 561 S.W.2d 331, 334 (Ky.App. 1978)("'An attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity[.]'")(quoting *Donald v. Garry,* 19 Cal.App.3d 769, 97 Cal.Rptr. 191 (1971) with approval); *Seigle v. Jasper,* 867 S.W.2d 476, 483 (Ky.App. 1993)(quoting *Hill* with approval). However, in such cases, the attorney's services must have been "primarily and

directly intended to benefit" the third party. *American Continental Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12, 14 (Ky.App. 1998) .

Against the backdrop of these cases, we examine the undisputed facts and Appellants' allegations to determine if there is any possibility that the Appellants would have been able to produce evidence at trial warranting a judgment in their favor. In summary, there is no evidence that Appellants were the intended beneficiaries of the legal services provided by Anne McBee or McBee & McCracken.

Appellants' original complaint asserted that Anne committed professional negligence in her representation of Bill as executor of Lucille's estate in 2002-03, but it made no mention of Anne's or her firm's services provided with regard to Clifford's estate administered in 2000-01. Yet it is Anne's performance of legal services for Clifford's estate that is the focus of the argument appearing in Appellants' brief. It should suffice simply to state that Appellants will not be heard to complain of an attorney's services when those specific services were never the subject of a single allegation of the complaint. However, in deference to the principles of notice pleading, we will address Anne's performance of services for both estates.

In 2000 and 2001, acting in her capacity as attorney for Clifford's estate, Anne discovered that the original of the 1948 deed (of which she had a legible copy) had never been recorded. She was able to obtain Grant County Property Valuation Administration records from 1954 which showed the property's owners as Herbert, Lucille and Clifford. In addition, a 1970 easement granted to the electric company listed

only Herbert, Lucille and Clifford as owners of the property. According to this document, the source of their title was an unrecorded deed. Based on this information, and with knowledge of family tradition regarding the existence of an unrecorded deed executed in 1948, Anne wrote Appellants a letter in May 2001. She asked Appellants to review the enclosed replacement deed she had drafted and requested that they sign it if they were satisfied with its accuracy. Her letter explained why the new deed was necessary.

> Basically, this deed is necessary because the deed signed by [Marjorie's parents and Bill's parents] in January, 1948 (I enclose a copy) was never recorded and we have been unable to locate the original. Unless, the new deed is signed by you all and us transferring the property, lawsuits will have to be filed to determine that Cliff, Lucille and Herbert owned the property.

Clifford did not name either Marjorie or Bernice in his will. Therefore, it cannot be objectively contended that Appellants were in any way third-party beneficiaries of Anne's legal services in drafting the affidavit of descent and the 2001 deed, or in obtaining Marjorie's and Bernice's signatures on both documents.

Similarly, Bernice was not a beneficiary of Lucille's estate. Nor was she, as the widow of Lucille's brother, within that class of persons who would inherit a portion of Lucille's estate had she died intestate. Kentucky Revised Statutes (KRS) 391.010. Bernice therefore has no standing to assert a claim of professional negligence as a third-party beneficiary of Anne's services to Lucille's estate.

Marjorie, who was named in Lucille's will, was left the sum of $100. As executor of his aunt's estate, Bill wrote a check for the sum of $100 and mailed it to Marjorie, thereby satisfying the estate's payment obligation. Marjorie acknowledges receipt but asserts she never cashed the check. This fact is irrelevant however. There was a time when payment by check was not legal tender, but that time has passed. *Mutual Life Ins. Co. of New York v. Hilander,* 403 S.W.2d 260, 263 (Ky. 1966). Today, a check is legally considered "a substitute for money which is commonly and generally used in business and commercial transactions; and likewise in legal proceedings and may be considered as so much money." *McGregor v. Mills,* 280 S.W.2d 161, 163 (Ky. 1955).

When Bill paid Marjorie $100 from Lucille's estate, every benefit to which she was entitled was received. Anne's services were unnecessary to that transaction and the estate's obligation was, in fact, fully satisfied without the benefit of Anne's services. Marjorie received exactly the benefit her aunt intended her to receive.

While it may be said that Marjorie was an indirect beneficiary of the legal services Anne performed relative to Lucille's estate, there is "no basis for concluding that the primary or direct purpose of the firm's employment was to benefit" either of the Appellants. *American Continental Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d at 14. Appellants thus fail to demonstrate any act of Anne's that would allow them to prove their theory of the case, i.e., that they were third-party beneficiaries of the legal services Anne performed. Consequently, summary judgment was properly granted on the issue of

Anne's professional negligence since it would have been impossible for Appellants to prove all the necessary elements of their claim at trial. *Scansteel,* 807 S.W.2d at 483.

CLAIM AGAINST BILL McBEE AS EXECUTOR OF LUCILLE McBEE'S ESTATE

The second issue raised by Appellants is Bill's disposition of the proceeds from the sale of the McBee Farm. Appellants claim Bill, as executor of Lucille's estate, acted improperly when he ignored their ownership interest in the farm. At that time, however, Bill was unaware Appellants even claimed such interest. After all, they had just two years earlier executed a deed relinquishing any right, title or interest in the property that may have existed.

We would point out that Appellants took no action to challenge the 2003 sale of the McBee Farm, nor did they take any action to recover any portion of the proceeds by disputing the validity of the title held jointly by Bill, as Lucille's devisee, and Bonnie. In addition, they have challenged neither the validity of the 2001 deed nor their own execution of that deed. Rather, Appellants argue in this will contest action that in 2001 they were misled as to the true nature of their ownership interest in the McBee Farm. However, they never asserted any claims for fraudulent inducement against any of the Appellees. Given the existence and unchallenged validity of the 2001 deed, there is no evidence that Bill acted improperly in selling the farm and dividing the proceeds with his cousin, Bonnie.

Appellants' claim to ownership of the property is not based on any affirmative evidence. Instead, the entirety of their claim depends on their refutation of

the substantial evidence that they never owned the property. We find it more than ironic that, with but one exception, all the allegations in the Complaint, including those regarding the property, were known to Appellants prior to the 2003 property sale and, indeed, even prior to their execution of the 2001 deed. That one exception was the sale price of the property.

CLAIM TO INVALIDATE LUCILLE McBEE'S WILL

Finally, we reach the issue of the alleged invalidity of Lucille's will. Appellants claim that Lucille was unduly influenced in the drafting of her will by Bill and Anne and that Lucille lacked testamentary capacity. In summary, we see nothing in the record that causes us to believe the Appellants could have prevailed at trial on this issue.

In Kentucky, the "strong presumption in favor of a testator possessing adequate testamentary capacity . . . can only be rebutted by the strongest showing of incapacity." *Bye v. Mattingly,* 975 S.W.2d 451, 455 (Ky. 1998), *citing Williams v. Vollman,* 738 S.W.2d 849 (Ky.App. 1987); *Taylor v. Kennedy,* 700 S.W.2d 415, 416 (Ky.App. 1985). Appellants' showing as to their claim of undue influence, as well as to their claim of incapacity, is so lacking as to not be entitled to survive summary judgment.

In *Bye v. Mattingly, supra*, the Supreme Court said that "[m]erely demonstrating the opportunity to exert such influence is not sufficient[.]" *Bye,* 975 S.W.2d at 458. In the case before us, the Appellants cannot, and do not even attempt to, demonstrate the *opportunity*. In fact, the known factual circumstances surrounding Lucille's execution of her will both defeat a claim of undue influence by Appellees and

bolster the presumption of Lucille's testamentary capacity. The will was executed in 1995, some seven years before her death, and on the same day that her brother Clifford executed his will. The wills mirror each other with each sibling devising his or her estate to the other. Since one of them would outlive the other, their nephew Bill was named as the contingent beneficiary in both wills. These wills were drafted and witnessed by an attorney, not Anne or anyone connected with her law practice, and were notarized by a second attorney, also unconnected with Anne McBee's law practice.

Bye is also instructive regarding testamentary capacity.

> Kentucky is committed to the doctrine of "testatorial absolutism." J. Merritt, 1 *Ky.Prac.-Probate Practice & Procedure,* § 367 (Merritt 2d ed. West 1984). See *New v. Creamer,* Ky., 275 S.W.2d 918 (1955); *Jackson's Ex'r v. Semones,* 266 Ky. 352, 98 S.W.2d 505 (1937). The practical effect of this doctrine is that the privilege of the citizens of the Commonwealth to draft wills to dispose of their property is zealously guarded by the courts and will not be disturbed based on ***remote or speculative evidence***. *American National Bank & Trust Co. v. Penner,* Ky., 444 S.W.2d 751 (1969). The degree of mental capacity required to make a will is minimal. *Nance v. Veazey,* Ky., 312 S.W.2d 350, 354 (1958). The minimum level of mental capacity required to make a will is less than that necessary to make a deed, *Creason v. Creason,* Ky., 392 S.W.2d 69 (1965), or a contract. *Warnick v. Childers,* Ky., 282 S.W.2d 608 (1955).

Bye, 975 S.W.2d at 455(Emphasis added). The entire basis for Appellants' claim that Lucille lacked testamentary capacity is the vague allegation that, at some unspecified time prior to her death, Lucille expressed a belief that unknown people were present on her property and/or living in her car. Presuming, *arguendo,* that Lucille was imagining these things, Appellants' allegations "did not fix the times when the events occurred or

the actions were observed *with relation to the time the will was executed*." *New v. Creamer*, 275 S.W.2d 918, 920 (Ky. 1955)(Emphasis in original). Because Appellants offered nothing indicating Lucille's alleged delusions occurred contemporaneously with her execution of her will, they have "no force with respect to the testator's mental capacity." *Id.* Appellants are correct that they need not prove their case when responding to a summary judgment motion. Nevertheless, if a party opposing summary judgment does not present evidence essential to a successful response – such as a temporal relationship -- both trial court and reviewing court are entitled to conclude that no such evidence exists.

Additionally, Bernice McBee was neither a named will beneficiary nor a member of the class of persons who would take under the rules of intestate succession. She therefore lacks standing entirely to challenge Lucille's will. *Eckert v. Givan,* 298 Ky. 621, 183 S.W.2d 809, 812 (1944)("'[T]he interest one must possess to attack the validity of a will is such that, if he prevails, he will be entitled to a distributive share in the testator's estate.'"), quoting *Rogers v. Leahy,* 296 Ky. 44, 176 S.W.2d 93, 95 (1943).

Unlike Bernice, Marjorie did take under the will and, if principles of estoppel did not prevent her from doing so, would have standing to contest it. As noted, *supra,* Marjorie received what was due her under Lucille's will. Her retention of the $100 check is an indication of her willingness to accept it. We have said in other contexts that if a person "was unwilling to accept the check as payment in full it then became [her] duty to return the check[.]" *Commonwealth v. Breslin Const. Co.*, 291 Ky. 772, 165

S.W.2d 809, 812 (1942)(Commercial context). And so it is when one desires to contest a will.

The general rule is that "where a legatee accepts a devise under a will, he is estopped from later contesting the sufficiency of it[.]" *Gates v. Gates' Ex'r,*281 S.W.2d 1, 2 (Ky. 1955). One can avoid estoppel only by refusing the payment or, once received, tendering the payment into court during the contest. *Brummett v. Brummett,* 331 S.W.2d 719, 722 (Ky. 1960)("They have paid the money into court pending the outcome of this litigation, which removes any estoppel which may have arisen against them."). Marjorie never returned the check nor did she tender any payment or even the uncashed check to the court. She is therefore estopped and cannot challenge the validity of Lucille's will.

"A party opposing a properly documented summary judgment cannot defeat it without presenting at least some affirmative evidence demonstrating that there is a material issue of fact." *Commonwealth v. Whitworth*, 74 S.W.3d 695, 698 (Ky. 2002). Appellants have presented absolutely no evidence that Bill and Anne influenced the drafting of Lucille's will in any way. Nor have they raised any genuine issue of material fact regarding Lucille's testamentary capacity at the time her will was drafted. Finally, Bernice lacks standing to challenge Lucille's will and Marjorie is estopped from doing so. Consequently, the trial court's grant of summary judgment was proper.

For the foregoing reasons, the judgment of the Grant Circuit Court is affirmed.

ALL CONCUR.

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