

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 1254

BAC
WBN
JMM
PENNY MAGEE, INDIVIDUALLY AND AS
CURATRIX OF BURROD MAGEE AND AS
EXECUTRIX OF THE ESTATE OF JAMES A. MAGEE

VERSUS

ALFREIDA CAUSEY MAGEE, GLADYS MAGEE
WILLIAMS, AND LARRY J. MAGEE

Consolidated With

NO. 2006 CA 1255

IN RE: SUCCESSION OF IDA MAE MAGEE
AND JAMES A. MAGEE

Judgment Rendered: May 4, 2007.

On Appeal from the
22nd Judicial District Court,
In and for the Parish of Washington,
State of Louisiana
Trial Court No. 74,064 c/w 10-394
Honorable Raymond S. Childress, Judge Presiding

J. Edward Thompson
Slidell, LA

Attorney for Plaintiffs-Appellants,
Penny Magee, Individually and as
Curatrix of Burrod Magee and as
Executrix of the Estate of
James A. Magee

M. Reggie Simmons
Franklinton, LA

Attorney for Defendants-Appellees,
Alfreida Causey Magee, Gladys
Magee Williams,
and Larry J. Magee

* * * * *

BEFORE: CARTER, C.J., WHIPPLE, AND MCDONALD, JJ.

CARTER, C. J.

These consolidated cases involve the succession of plaintiffs' parents and an action by plaintiffs¹ to set aside and declare null certain donations *inter vivos* made by plaintiffs' father to defendants.² There is only one issue in plaintiffs' appeal: whether the trial court correctly held (after a trial on the merits) that the signatures on three donations made by James A. Magee two days before his death were not forged.³ Defendants answered the appeal, contending the trial court erred in denying their reconventional demand for sanctions and damages resulting from the mental anguish, embarrassment, and humiliation allegedly caused by plaintiffs' unfounded, malicious, libelous, and slanderous allegations of forgery, lack of capacity, and undue influence. Defendants also seek damages for frivolous appeal.

FORGERY

The trial court's determination that James A. Magee's signatures on the acts of donations in question were not forgeries is a purely factual matter. On review, a trial court's evaluations of credibility and factual findings will not be disturbed unless manifestly erroneous or clearly wrong. See Thompson v. Woods, 525 So.2d 174, 177 (La. App. 3 Cir. 1988); Bartlett v. Calhoun, 491 So.2d 791, 792 (La. App. 3 Cir.), writ denied, 496 So.2d 328 (La. 1986); and State through Dept. of Highways v. Moity, 276 So.2d 770, 772-773 (La. App. 3 Cir. 1973). After reviewing the record and

¹ Plaintiffs, Penny Magee, individually and as curatrix of her brother who suffers from Down's Syndrome, Burrod Magee, are the adult children of James A. Magee.

² Defendants are the surviving spouse, sister, and nephew of James A. Magee, respectively, Alfreida Causey Magee, Gladys Magee Williams, and Larry J. Magee.

³ Two other donations *inter vivos* made by James A. Magee approximately six weeks prior to his death were also at issue in the trial below; however, plaintiffs' sole assignment of error addresses only the three donations made two days before James A. Magee's death.

the trial court's reasons for judgment, we are convinced that the evidence amply supports the trial court's finding of no forgery.

The trial court was impressed with the positive testimony of the attorney who prepared and notarized each act of donation, as well as the testimony and stipulation regarding the testimony of the two witnesses before whom the acts of donation were executed. Each of these eyewitnesses testified that they were present at the time of execution and they personally observed James A. Magee sign the acts of donation.⁴ While acknowledging the expertise of plaintiffs' handwriting expert who after analyzing and comparing the signatures, opined that the acts were signed by someone other than James A. Magee, the trial court was "not persuaded" by the expert's testimony.

We note that the trial court's ruling is in accord with the well-established jurisprudential rule that the testimony of an eyewitness as to the facts of an actual writing must prevail over the testimony of an expert which is based on comparison and is only an opinion. The testimony of experts must yield to that of one who has actually seen the signature affixed to the document. See Arnett v. Marshall, 210 La. 932, 941-943, 28 So.2d 665, 668 (1946); Bartlett, 491 So.2d at 792; Talley v. Talley, 350 So.2d 1276, 1278 (La. App. 3 Cir. 1977); and Moity, 276 So.2d at 773. Therefore, we find that the trial court correctly relied upon the testimony of the notary and witnesses that they had actually seen James A. Magee sign his name on the acts of donation. In view of this evidence, we cannot say that there is

⁴ The testimony also revealed that although James A. Magee was gravely ill, he was alert and able to comprehend the nature and consequences of the acts of donation.

manifest error in the trial court's decision. The record reflects that plaintiffs failed to carry their burden of proof of forgery.

ANSWER TO APPEAL

Defendants answered the appeal, seeking an award for damages for frivolous appeal. Defendants also maintained that the trial court erred in denying their reconventional demand for sanctions and damages under LSA-C.C.P. art. 863 due to plaintiffs' alleged malicious and unfounded allegations in their pleadings that were not supported by any evidence at trial.

Whether plaintiffs had probable cause for their allegations in their pleadings and at trial depended upon their honest belief in making the averments. Our review of the record reveals that plaintiffs acted upon an honest and reasonable belief that their father, James A. Magee, had either been under an undue influence or lacked mental capacity when he made the donations or he did not personally sign the act of donations. These issues require clear and convincing evidence and are questions of fact. The trial court has discretion to sanction under LSA-C.C.P. art. 863, and its factual findings as a basis for sanctions are reviewed under the manifestly erroneous or clearly wrong standard. See Gosserand v. Gumbel, 154 La. 537, 542, 97 So. 852, 854 (1923); **In re Succession of Gates**, 32,348 (La. App. 2 Cir. 10/27/99), 746 So.2d 193, 197-198; **Unkel v. Unkel**, 29,728 (La. App. 2 Cir. 8/20/97), 699 So.2d 472, 476.

The record does not evidence any reckless or wanton desire on the part of plaintiffs to disregard the rights and feelings of defendants, to injure defendants' reputation, to harass defendants or to needlessly increase defendants' costs. While it is true that defendants have suffered

embarrassment and endured some stress related to this litigation, considering the record before us, it does not appear that the trial court was manifestly erroneous in its findings or in its denial of defendants' reconventional demand. See **Gosserand**, 97 So. at 543-544. The fact that neither this court nor the trial court found merit to the plaintiffs' allegations and arguments does not suffice to demonstrate a violation of LSA-C.C.P. art. 863. Sanctions do not automatically or always follow an adverse judgment or ruling. **Unkel**, 699 So.2d at 477.

Likewise, even when an appeal lacks legal merit, damages for a frivolous appeal will not be awarded unless it is clear that the appeal was taken solely for the purpose of delay or that the appellant was not serious in the position advocated. **Cortes v. Lynch**, 02-1498 (La. App. 1 Cir. 5/9/03), 846 So.2d 945, 954; **Samour v. Louisiana Casino Cruises, Inc.**, 01-0831 (La. App. 1 Cir. 2/27/02), 818 So.2d 171, 176; **Dear v. Mabile**, 93-1188 (La. App. 1 Cir. 5/20/94), 637 So.2d 745, 748. In this case, plaintiffs submitted an appellate brief, with citations of authority, setting forth their position on appeal. Although we find no merit in the assignment of error raised by plaintiffs, we feel that plaintiffs were sincere in advocating this position and did not take this appeal solely for the purpose of delay. Accordingly, we find that damages for frivolous appeal are not warranted.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment in all respects. The answer to appeal is denied. Costs of this appeal are to be equally assessed against plaintiffs and defendants.

AFFIRMED; ANSWER TO APPEAL DENIED.