NUMBER 13-15-00389-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

RAMON RUBEN GARZA, AS HEIR OF CONCEPCION GARZA ZAMORA, JUANITA GARZA ZAMORA AND EUGENIA G. GARZA, **Appellant,**

v.

MARIA I.Z. DIAZ, PH.D., ET AL., **Appellees.**

On appeal from the County Court at Law No. 2 of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Justice Rodriguez

This suit concerns a dispute over the disposition of property under the will of Jesus Garza Zamora. In 2013, Maria I.Z. Diaz and other heirs of Jesus's estate (appellees) filed a petition for bill of review seeking to vacate a 1996 probate order, which they

contended had wrongly denied appellees their shares of Jesus's estate.[1] Appellees claimed that fraudulent administration of Jesus's estate prevented them from learning of their rights until the statute of limitations for bills of review had passed. Appellees argued that the fraud made it appropriate to toll the statute of limitations, hear the bill of review, vacate the order, and recognize the interest of all beneficiaries, which included appellees. The county court agreed and entered an amended order from which this appeal is taken. By two issues, appellant Ramon Ruben Garza (Ramon) contends that the county court erred because there is no evidence of extrinsic fraud so as to toll limitations, and that appellees had inquiry notice, therefore any tolling period began when the order was executed. We reverse and render.

I. BACKGROUND

Jesus passed away in 1995, leaving a will that read in pertinent part as follows:

> Upon the death of my wife Estella C. Garza, said separate property shall vest in fee simple in my heirs in accordance with the laws of descent and distribution. I declare that I do not have any children neither of my body nor adopted. I further declare that my heirs at the present time are my three sisters, Concepcion Garza Zamora, Juanita Garza Zamora, and Eugenia G. Garza, who now reside in Brooks County, Texas. In addition, my other heirs would consist of the children of my deceased brothers and sisters or their heirs.

[1] The "other heirs," including Maria I.Z. Diaz, filed two suits regarding this matter. The trial court consolidated those suits. On appeal, Ramon does not dispute the identities of these purported heirs under the will of Jesus Garza Zamora. Ramon only disputes whether the trial court erred in granting the bill of review. At trial, Ramon stipulated that the following persons would be other heirs within the meaning of the will: Pablo Alejandro Garza, Roberto Garza, Emma Elizondo, Carmen Mead, Alexandra Garza, Marla Rita Carrales, Juan Lino Garza, Carmen Garza, Elma Cantu, Guadalupe Garza Jr., Romulo Garza, Eduardo Garza, Aida Garza Lopez, Rebecca Perez, Alonzo Garza Zamora, Pedro G. Zamora Jr., Pablo Zamora Garza, Maria Ignacia Rodriguez, Arturo Garza, Hilaria G. Garcia, Ruben Garcia, Natalia G. Salazar, Ted Garza, Felicitas G. Torres, Maria Dora G. Salinas, Maria Ignacia Zamora Diaz, Florentino A. Zamora Jr., Daniel Garza, and appellant Ramon Ruben Garza. Certain of these "other heirs" died prior to the date of trial, and Ramon stipulated to the identities of the deceased heirs' children.

Jesus's wife, Estella Garza, served as executor of his estate. Estella retained an attorney to help with estate administration, and based on the attorney's advice, she filed an application to admit Jesus's will as a muniment of title in the county court of Hidalgo County. The court issued citation for the muniment-of-title proceeding which was posted on the courthouse door on April 22, 1996, as prescribed by the then-controlling Texas Probate Code. *See* Act of March 17, 1955, 54th Leg., R.S., ch. 55, § 31, 1955 Tex. Gen. Laws 88, 97 (hereinafter "former TEX. PROB. CODE § 31"). On May 21, 1996, the county court granted the application and entered an order, which was drafted by Estella's attorney. The order included the following critical passage:

> Applicant [Estella] was granted a life estate in decedent's separate property as described in his will, with remainder interest being equally divided between Concepcion Garza Zamora, Juanita Garza Zamora, and Eugenia G. Garza.

Noticeably absent from the order were the "other heirs" mentioned in the will, heirs that included "the children of [Jesus's] deceased brothers and sisters or their heirs." The 1996 order thus excluded the "other heirs" from the distribution of property.

In 2013, two groups of the "other heirs" filed petitions for bill of review seeking to set aside the muniment of title order. The county court consolidated the two groups of petitioners into their current state (appellees). Appellees alleged that the court had misconstrued the will in 1996 when it omitted them from the probate order. Appellees asserted that the court had been misled by the extrinsic fraud of the executor Estella and her attorney. Appellees further alleged that such extrinsic fraud had prevented them from discovering their predicament until the statute of limitations for bills of review had passed. Appellees thus requested that the trial court toll the statute of limitations, hear

the bill of review, vacate the 1996 order, and "declare" their right to take under the will. The petitions were chiefly contested by Ramon, who had by then acquired a sizeable interest in the estate property.

At a trial of the matter in 2015, appellees sought to prove that the 1996 probate order was the product of extrinsic fraud on the part of Estella and her attorney. Appellees elicited testimony from Estella's attorney, who had drafted the contested order eighteen years prior. Estella's attorney testified:

> What should be done and what, though mistake, was not done in this case is we should've changed the names of the people and we should've included them. And again, that was done through an oversight both in my office — and again, with the judge reading it, he apparently didn't catch the mistake either.

The attorney testified that no fraud occurred, and that he and his client Estella were unopposed to correcting the mistake, though they had "no opinion" on the proper procedure for such a correction. The attorney acknowledged that during probate, neither he nor Estella had attempted to determine who the "other heirs" were or notify them of their potential interest. However, the attorney also testified that it was common practice in muniment proceedings to simply rely on the court's issued citation by posting near the courthouse in accordance with the requirements of the probate code, without arranging for newspaper advertisements or personal service of potential interested parties. Appellees also introduced other muniment-of-title orders that were drafted by the same attorney for other clients during the same time period. Many of the orders recited that a particular decedent's will had devised all property to a single individual, and such orders included that individual's name.

At trial on the petition for bill of review, Ramon stipulated that all petitioners would qualify as "other heirs" under the meaning of Jesus's will. However, Ramon contended that there was simply no evidence of extrinsic fraud so as to justify vacating or correcting the 1996 judgment in the face of the statute of limitations.

After the bench trial, the county court entered an amended judgment in favor of appellees, granting the petition for bill of review, finding extrinsic fraud, and recognizing the interest of all beneficiaries of Jesus's estate. This appeal followed.

II. BILL OF REVIEW

By his first issue on appeal, Ramon contends that there is no evidence that would support a finding of extrinsic fraud that would justify tolling limitations. Because Ramon's first issue is dispositive, we need not consider Ramon's second issue. *See* TEX. R. APP. P. 47.1.

A. Standard of Review and Applicable Law

We review the granting or denial of a bill of review under an abuse of discretion standard. *Temple v. Archambo*, 161 S.W.3d 217, 224 (Tex. App.—Corpus Christi 2005, no pet.); *see also Ablon v. Campbell*, 457 S.W.3d 604, 608 (Tex. App.—Dallas 2015, pet. denied). However, the trial court's discretion is limited in the instance of a bill of review. *See Temple*, 161 S.W.3d at 224 (in fact applying *de novo* review). The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must become final at some point. *King Ranch, Inc. v. Chapman,* 118 S.W.3d 742, 751 (Tex. 2003); *Garza v. Att'y Gen.*, 166 S.W.3d 799, 807 (Tex. App.—Corpus Christi 2005, no pet.). And the burden on a petitioner is heavy

in pursuing these narrow grounds. *Temple*, 161 S.W.3d at 223; *Layton v. Nationsbanc Mortg. Corp.,* 141 S.W.3d 760, 763 (Tex. App.—Corpus Christi 2004, no pet.); *see Baker v. Goldsmith*, 582 S.W.2d 404, 409 (Tex. 1979) (describing the burden as "onerous"). Therefore, we scrutinize bills of review with "extreme jealousy." *Layton*, 141 S.W.3d at 763 (quoting *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (1950)).

There is legally insufficient evidence of a vital fact when (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *Merrell Dow Pharms., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex. 1997). When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

"A bill of review is brought as a direct attack on a judgment that is no longer appealable or subject to a motion for new trial." *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 504 (Tex. 2010). In general, there are two types of bills of review: equitable and statutory. *See Valdez v Hollenbeck*, 465 S.W.3d 217, 226 (Tex. 2015). Equitable bills of review apply to a variety of forms of action, but statutory bills of review are rarer, and are found primarily in probate and guardianship contexts.[2] *Id.*

[2] The appellees here did not specify whether they sought an equitable or statutory bill of review. A statutory bill of review requires different elements from an equitable bill of review. *Compare Manley v. Parsons,* 112 S.W.3d 335, 337 (Tex. App.—Corpus Christi 2003, pet. denied) (equitable) *with Buck v. Estate of Buck*, 291 S.W.3d 46, 53 (Tex. App.—Corpus Christi 2009, no pet.) (statutory). However,

Ordinarily, a bill of review must be filed within four years of the date of the disputed judgment. *Layton*, 141 S.W.3d at 763; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (West, Westlaw through 2015 R.S.). However, the then-governing Texas Probate Code "unequivocally prescribe[d] a two-year limitations period for all bills of review in probate proceedings." *Valdez*, 465 S.W.3d at 221 (describing former TEX. PROB. CODE § 31); *see also* TEX. ESTATES CODE ANN. § 55.251–52 (West, Westlaw through 2015 R.S.) (substantially recodifying former TEX. PROB. CODE § 31). This two-year statute of limitations applied to all bills of review regarding probate judgments, regardless of whether the bill took an equitable or statutory form. *See Valdez*, 465 S.W.3d at 221.

Once this two-year statute of limitations has passed, petitioners enter uncertain territory in seeking to attack a probate judgment. The discovery rule is categorically unavailable in bill-of-review claims seeking to set aside probate judgments. *Frost Nat'l Bank,* 315 S.W.3d at 497. And there remains an open question as to whether fraud may toll the statute of limitations in the context of a probate bill of review. *See Valdez*, 465 S.W.3d at 231; *Frost Nat'l Bank*, 315 S.W.3d at 511 n.28; *see Little v. Smith,* 943 S.W.2d 414, 420 (Tex. 1997) (noting that Texas courts had "refused" to toll limitations in "claims arising out of probate proceedings in most instances . . . *even in the face of allegations of fraud*") (emphasis added).

B. Analysis

On appeal, Ramon first argues that there is no evidence of extrinsic fraud. In

because we dispose of this case without reaching the merits of the appellees' petition for bill of review, we need not determine whether their petition should be judged under equitable or statutory standards. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *see also* TEX. R. APP. P. 47.1.

general, “the only exception” to the statute of limitations for bills of review is extrinsic fraud. *See Layton*, 141 S.W.3d at 763; *Manley v. Parsons,* 112 S.W.3d 335, 337 (Tex. App.—Corpus Christi 2003, pet. denied). Extrinsic fraud is fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted. *King Ranch*, 118 S.W.3d at 752; *Tice v. City of Pasadena,* 767 S.W.2d 700, 702 (Tex. 1989). Extrinsic fraud is distinguished from intrinsic fraud, which will not support a bill of review beyond the applicable statute of limitations. *King Ranch*, 118 S.W.3d at 752. Intrinsic fraud relates to the merits of the issues that were presented and presumably were or should have been settled in the former action. *Id.* Within that term are included such matters as fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed. *Id.*

In a recent case, the Texas Supreme Court used the term “fraudulent concealment”—rather than “extrinsic fraud”—in deciding whether limitations should be tolled for a bill of review. *See Valdez*, 465 S.W.3d at 229. Fraudulent concealment is a fact-specific affirmative defense to the plea of limitations. *See BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 67 (Tex. 2011); *Hay v. Shell Oil Co.*, 986 S.W.2d 772, 778 (Tex. App.—Corpus Christi 1999, pet. denied). To establish a fraudulent concealment, the plaintiff must establish that a defendant actually knew a wrong occurred, had a fixed purpose to conceal the wrong, and did conceal the wrong. *Shell Oil Co. v. Ross*, 356 S.W.3d 924, 927 (Tex. 2011).

However, we do not believe it necessary to decide whether extrinsic fraud or

fraudulent concealment should properly apply here, because both doctrines require a sort of purposeful or knowing fraud that is simply not present here. The elements of fraudulent concealment require a plaintiff to establish that the defendant "actually knew" a wrong occurred and had a "fixed purpose" to conceal the wrong. *Ross*, 356 S.W.3d at 927. And as we have held, "[t]he element of *purposeful* fraud is important in establishing *extrinsic fraud*." *Layton*, 141 S.W.3d at 763 (emphasis added). Thus, even *if* fraud is capable of tolling limitations for a probate bill of review, *see Frost Nat'l Bank*, 315 S.W.3d at 511 n.28, a purposeful or knowing fraud would be required to trigger such tolling. *See Layton*, 141 S.W.3d at 763.

In this case, appellees failed to show such a purposeful or knowing fraud. For instance, in an attempt to show extrinsic fraud, appellees introduced evidence that Estella's attorney had correctly drafted muniment orders for several other clients. However, this sheds no light on whether a knowing fraud was committed as opposed to a simple mistake. Appellees stressed the fact that Estella did not attempt to contact the other heirs. However, Estella's attorney testified that posting citation at the courthouse was consistent with the notice requirements of the probate code and common practice in muniment proceedings. *See* TEX. ESTATES CODE ANN. § 258.001 (West, Westlaw through 2015 R.S.). Appellees also noted that Estella did not appear at the trial and suggested she had something to hide. However, appellees never sought to subpoena Estella to testify, which they could have done. *Cf.* TEX. R. CIV. P. 176.1 *et seq.* (describing subpoena power). And while appellees repeatedly emphasized the severity of the underlying muniment error, they introduced no more than mere surmise to show

that this error was the product of fraudulent intent. *See Kindred*, 650 S.W.2d at 63. We conclude that appellees introduced no more than a scintilla of evidence that this error was the product of purposeful or knowing fraud. *See Merrell Dow Pharms., Inc.,* 953 S.W.2d at 711; *Layton*, 141 S.W.3d at 763. The evidence is thus insufficient to support appellees' claim of extrinsic fraud so as to toll the statute of limitations for bills of review. *See Merrell Dow Pharms., Inc.,* 953 S.W.2d at 711. This is particularly true in light of the "stringent" scrutiny we must apply in the context of a bill of review. *See Layton*, 141 S.W.3d at 763.

We sustain Ramon's first issue.

III. CONCLUSION

We reverse and render judgment denying the petition for bill of review and reinstate the judgment rendered by the trial court in Cause No. 24,859-B on May 21, 1996, styled *In the Matter of the Estate of Jesus Garza Zamora.*

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
17th day of March, 2016.