No. 101605 - *Patricia E. Lee v. Charles W. Lee*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Justice, dissenting:

In this case, the majority of the Court has concluded that the orders of both the family court and the circuit court should be reversed and that the majority's contrary interpretation of the evidentiary record and governing law settles the parties' dispute as to the meaning of their prenuptial agreement. Because the majority has substituted its own judgment for that of the lower courts when neither the facts nor the law support such a result, I respectfully dissent.

A. The Record on Appeal Does Not Support the Petitioner's Arguments

The issue before the Court in this case concerns the meaning to be afforded to the phrase "another relationship" as that term is used in the parties' prenuptial agreement. Because the agreement, itself, does not define that term, the majority considered the parties' intent in its construction thereof, adopting Mrs. Lee's interpretation of this phrase as the "correct" meaning of "another relationship." Resolution of the case in this manner is problematic, however, because the record designated by Mrs. Lee, as the party petitioning this Court for relief, does not contain factual support for the relief she has requested.

When a party appeals to this Court for relief from a lower court's order, the petitioner must file a record of the proceedings had in the lower court in order to perfect his/her appeal to permit this Court a meaningful opportunity to review the alleged errors. *See* W. Va. Rev. R. App. P. 5(g)(2). The record on appeal "consists of the papers and exhibits filed in the proceedings in the lower tribunal, the official transcript or recording of proceedings, if any, and the docket entries of the lower tribunal." W. Va. Rev. R. App. P. 6(a). *See also* W. Va. Rev. R. App. P. 7 (detailing requirements for appendix record); W. Va. Rev. R. App. P. 8 (permitting designated record in lieu of appendix record). Moreover, "*the petitioner* is responsible for making the initial determination as to whether a written transcript of a proceeding in the lower tribunal will assist the Court in deciding the issues presented on appeal." W. Va. Rev. R. App. P. 9(a) (emphasis added). Finally, to facilitate the Court's review of errors assigned on appeal, the petitioner's brief is required to include in its argument "appropriate and specific citations to *the record on appeal* . . . ." W. Va. Rev. R. App. P. 10(c)(7) (emphasis added). If the petitioner fails to provide such evidentiary support for his/her arguments, "[t]he Court may disregard errors that are not adequately supported by specific references to the record on appeal." *Id.* Thus, it is clear that a party petitioning this Court for relief from a lower court's order has a duty to provide this Court with a record of the lower court's proceedings. However, the mere provision of a record is not the end of the petitioner's duty. The petitioner also must ensure that the appellate record contains documentation of the lower court's alleged errors insofar as he/she also is required to

reference those specific portions of the record that demonstrate the lower court's alleged errors and support his/her request for relief therefrom.

This Court, also, has recognized an appealing party's responsibility to ensure that the record on appeal supports his/her request for relief.

> An appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court *unless error affirmatively appears from the record. Error will not be presumed*, all presumptions being in favor of the correctness of the judgment.

Syl. pt. 5, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966) (emphasis added). *Accord* Syl. pt. 4, *Alexander v. Jennings*, 150 W. Va. 629, 149 S.E.2d 213 (1966) ("'An Appellate Court will not reverse the judgment of an inferior court unless error affirmatively appear upon the face of the record, and such error will not be presumed, all the presumptions being in favor of the correctness of the judgment.' Point 2, syllabus, *Shrewsbury v. Miller*, 10 W. Va. 115 [(1877)]."); Syl. pt. 3, *Rollins v. Daraban*, 145 W. Va. 178, 113 S.E.2d 369 (1960) ("'An Appellate Court will not reverse the judgment or decree of an inferior court, unless error affirmatively appear on the face of the record; and such error will not be presumed, all presumptions being in favor of the judgment or decree.' *Richardson v. Donehoo*, 16 W. Va. 685 [(1880)], Pt. 14 Syllabus."); Syl. pt. 4, *Rollins*, 145 W. Va. 178, 113 S.E.2d 369 ("'A plaintiff in error assumes upon himself the burden of showing error in the judgment complained of.' *Griffith v. Corrothers*, 42 W. Va. 59, [24 S.E. 569 (1896),] Pt. 2

Syllabus."). *See also* Syl. pt. 5, *Pozzie v. Prather*, 151 W. Va. 880, 157 S.E.2d 625 (1967) ("When the alleged errors of the trial court involve the sufficiency of the proof and the testimony upon which the judgment of the trial court is based is not made a part of the record for appellate purposes, the appellate court must presume that the judgment of the trial court is correct and warranted by the testimony."). Thus, an appellant seeking relief from this Court is required to provide the Court with that portion of the record of the underlying proceedings that supports his/her entitlement to such relief.

Despite Mrs. Lee's clear duty to provide this Court with an evidentiary record from which it could consider fully her request for relief from the orders entered by the family court and the circuit court, Mrs. Lee shirked her obligation by relying, instead, upon a record that does not permit the Court to undertake a full review of her assignments of error. Mrs. Lee contends that her intent as to the meaning of the phrase "another relationship" should prevail over that proposed by Mr. Lee. The record before the Court in this case contains the hearing testimony of Mr. Lee, which fully sets forth and explains his belief as to the meaning of this term. Strikingly absent from the appellate record, however, is any similar statement from Mrs. Lee, either oral or written. This Court's review of the correctness of a lower court's order is substantially assisted by the review of such testimonial statements and hearing transcripts given that they provide insight as to the court's reasoning underlying its ruling. Because the sparse appellate record in this case does not contain information

demonstrative of Mrs. Lee's intent in negotiating the terms of the prenuptial agreement she entered into with Mr. Lee prior to their marriage, there is no factual basis to support the reversal of the lower courts' orders. In short, "error [does not] affirmatively appear[] from the record" in this case. Syl. pt. 5, in part, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897.

When error is not readily apparent from the record on appeal, the lower court's order should be affirmed:

> From this record, we cannot say that there was any reversible error in the judgment of the circuit court . . . . [T]he burden is on the appellant to produce a record which discloses affirmatively the reversible error committed [below]. . . . Ordinarily, the failure to do so requires the affirmance . . . of the lower court, since error will not be presumed in the absence of an affirmative showing. . . .

DeLong v. Kermit Lumber & Pressure Treating Co., 175 W. Va. 243, 246, 332 S.E.2d 256, 259 (1985) (internal citations omitted). In the case *sub judice*, the limited record, viewed in its entirety, does not compel the conclusion that error is apparent so as to warrant reversal of the lower courts' rulings; consequently, the lower courts' orders should be affirmed. Because the majority nevertheless has presumed the presence of error despite the record's insufficiency and has, correspondingly, reversed the ruling of the circuit court, I dissent.

B. The Lower Courts' Rulings Were Not Clearly Erroneous

Furthermore, the majority of the Court has failed to afford the circuit court's order the appropriate level of deference that is warranted by the procedural posture of the instant proceeding. The pivotal issue in this case is the meaning of the phrase "another relationship" in the parties' prenuptial agreement. There is no disagreement as to the ambiguity of this term; rather, the dispute concerns the phrase's precise meaning. As observed by the majority in its opinion in this case, such an inquiry is reviewed for clear error:

> This Court has advised that "[w]hen a trial court determines that an agreement is ambiguous and construes the meaning of a provision in the contract based on extrinsic evidence, such as the parties' intent, our standard of review is 'clearly erroneous.'" *Jessee v. Aycoth*, 202 W. Va. 215, 218, 503 S.E.2d 528, 531 (1998) [(per curiam) (internal citation omitted)].

Majority Op., ___ W. Va. at ___, ___ S.E.2d at ___, Slip op. at 5-6. "Clearly erroneous" is not, however, the standard by which the majority ultimately adjudicated the correctness of the circuit court's ruling. Rather, by undertaking a detailed plenary review and interpretation of the contract language at issue herein, the majority essentially conducted a *de novo* review that afforded no deference to the correctness of the lower courts' decisions.

It goes without saying that the subject prenuptial agreement is ambiguous, and the majority appropriately states that such an initial determination of contractual ambiguity is a question of law that we review *de novo*. *See Williams v. Precision Coil, Inc.*, 194 W. Va.

52, 62 n.18, 459 S.E.2d 329, 339 n.18 (1995) ("In interpreting a contract, a court determines the existence of an ambiguity as a matter of law." (internal quotations and citations omitted)); *Williams*, 194 W. Va. at 65 n.23, 459 S.E.2d at 342 n.23 ("A contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction. Whether a contract is ambiguous is a legal question reviewable by this Court *de novo*." (internal citation omitted)); Syl. pt. 1, in part, *Berkeley Cnty. Pub. Serv. Dist. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968) ("The question as to whether a contract is ambiguous is a question of law to be determined by the court.").

However, once contractual ambiguity has been determined to exist, the next step of the decisional process requires resolution of the ambiguity. Here, the lower courts both determined that they needed to consider extrinsic factual evidence of the parties' intent to define the meaning of the term "another relationship." Such reference to, consideration of, and reliance upon extrinsic evidence to provide meaning to the words used by the parties to a contract constitute the resolution of a question of fact, which this Court reviews for clear error:

> [W]hen a trial court's answers [as to the meaning of contractual provisions] rest not on plain meaning but on differential findings by a trier of fact, derived from extrinsic evidence as to the parties' intent with regard to an uncertain contractual provision, appellate review proceeds under the "clearly erroneous" standard. The same standard pertains whenever a trial court

> decides factual matters that are essential to ascertaining the parties' rights in a particular situation (though not dependent on the meaning of the contractual terms *per se*). In these types of cases, the issues are ordinarily fact-dominated rather than law-dominated and, to that extent, the trial court's resolution of them is entitled to deference.

Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 100, 468 S.E.2d 712, 715 (1996) (footnote omitted). *Accord Jessee v. Aycoth*, 202 W. Va. 215, 218, 503 S.E.2d 528, 531 (1998) (per curiam) ("When a trial court determines that an agreement is ambiguous and construes the meaning of a provision in the contract based on extrinsic evidence, such as the parties' intent, our standard of review is 'clearly erroneous.'" (internal citation omitted)). *See also* Syl. pt 4, *Moore v. Johnson Serv. Co.*, 158 W. Va. 808, 219 S.E.2d 315 (1975) ("An appellate court's review of fact-finding determinations made by a trial court in the construction of a contract should respect and sustain such interpretations, unless they are clearly erroneous."). Thus, the proper inquiry, as summarized by Justice Cleckley, is "whether the contractual provision at issue is unambiguous. If it is, th[e] case presents a question of law that is subject to our *de novo* review. On the other hand, if ambiguous it becomes a *factual issue, and we must give deference to the findings made below*." *Fraternal Order of Police*, 196 W. Va. at 101, 468 S.E.2d at 716 (emphasis added).

In conducting a clear error analysis of a lower court's factual determinations of parties' intent in entering a contract, this Court has recognized that

> clear-error review ordinarily heralds a rocky road for an

> appellant. Under this standard, appellate courts cannot presume to decide factual issues anew. Our precedent ordains that deference be paid to the trier's assessment of the evidence. . . . In the last analysis, an appellate tribunal should not upset findings of fact or conclusions drawn therefrom unless, on the whole of the record, the judges form a strong, unyielding belief that a mistake has been made. Under this standard, as long as the lower court's rendition of the record is plausible, our inquiry is at an end.

Id., 196 W. Va. at 100 n.4, 468 S.E.2d at 715 n.4 (internal citations omitted). In other words,

> [a] finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. pt. 1, in part, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Accordingly, "absent a mistake of law, an appellate tribunal [has limited authority to] disturb a circuit court's determination [under the] clearly erroneous [standard]. This means, of course, that if there are two or more plausible interpretations of the evidence, the circuit court's choice among them must hold sway." *Tiffany Marie S.*, 196 W. Va. at 237, 470 S.E.2d at 191. Therefore, review of a case for clear error does not give an appellate court unfettered discretion or judicial license to reverse a lower court's decision simply because the appellate court interprets the facts informing the lower court's decision differently than the meaning ascribed thereto by the inferior tribunal. Rather, error must affirmatively appear from the record in the case; error that is so plain as to alert the reviewing court that a mistake

clearly has been committed by the lower court, which error is apparent from the lower court's ruling upon the evidence. Syl. pt. 1, in part, *Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177.

There is no question that, under the facts of the case *sub judice*, there were "two . . . plausible interpretations of the evidence." *Tiffany Marie S.*, 196 W. Va. at 237, 470 S.E.2d at 191. As such, the circuit court's determination, based upon its review of the facts, was entitled to deference. The majority of the Court was not at liberty to substitute its own interpretation of the evidence for that of the circuit court, particularly where the record presented for appellate consideration in this case failed to support the petitioner's request for relief much less evidence a definite mistake in the circuit court's ruling emanating therefrom. In short, the inadequate appellate record simply does not beget a "definite and firm conviction that a mistake has been committed" by the circuit court. Syl. pt. 1, in part, *Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177.

Equally troubling is the specific type of contract that is at issue in the case *sub judice*. The majority, through its decision, effectively has nullified the parties' prenuptial agreement, into which both parties freely entered, despite the fact that this Court long has acknowledged its obligation to uphold prenuptial agreements: "[T]he legal system must continue to encourage marriage even if that means honoring prenuptial agreements that are

not to judges' personal liking." *Gant v. Gant*, 174 W. Va. 740, 746, 329 S.E.2d 106, 113 (1985), *overruled on other grounds by Ware v. Ware*, 224 W. Va. 599, 687 S.E.2d 382 (2009). *See also Gant*, 174 W. Va. at 749, 329 S.E.2d at 116 ("Unless a prenuptial agreement is so outrageous as to come within unconscionability principles as developed in commercial contract law, . . . West Virginia courts will not evaluate the substantive fairness of prenuptial agreements[.]" (internal citation omitted)). While the decision obtained by the circuit court upon the evidence before it may not have been the most preferable way of resolving the instant controversy, such resolution was not so fraught with error as to be manifestly wrong. Accordingly, this Court was required to defer to the circuit court's judgment. Instead, the majority refused to afford the circuit court the deference it was due. I cannot condone such an unwarranted result.

For the foregoing reasons, I respectfully dissent from the majority's opinion in this case. I am authorized to state that Justice McHugh joins me in this dissenting opinion.