IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 4, 2020

CORA BETH RHODY v. JUNE E. RHODY ET AL.

Appeal from the Chancery Court for DeKalb County
No. 2014PR66 Ronald Thurman, Chancellor

No. M2019-01150-COA-R3-CV

The decedent's daughter filed suit to set aside conveyances of her father's property made pursuant to a durable power of attorney. The trial court granted summary judgment in the petitioner's favor, holding that the decedent lacked the mental capacity to enter into any legal agreement on the date the durable power of attorney was executed. Because we conclude that there is a genuine issue of material fact as to this question, we reverse the entry of summary judgment and remand for such further proceedings as may be necessary and consistent with this opinion

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

ARNOLD B. GOLDIN, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and W. NEAL MCBRAYER, JJ., joined.

Sue N. Puckett-Jernigan, Smithville, Tennessee, for the appellants, June E. Rhody, Billy Myron Rhody, and Colton Rhody.

Gayle C. Hendrix, Smithville, Tennessee, for the appellee, Cora Beth Rhody.

OPINION

BACKGROUND AND PROCEDURAL HISTORY

The petitioner-appellee in this lawsuit, Cora Beth Rhody ("Cora Beth"), is the daughter and only child of the decedent, Kenny Rhody ("the Decedent"). The Decedent died intestate on September 24, 2014, leaving Cora Beth as his only heir-at-law.

Approximately three years after the Decedent's death, on November 28, 2017, Cora Beth, proceeding as the administratrix of her father's estate, filed her "Petition to

Set Aside Conveyances and Transfers and for Injunctive Relief" in the Dekalb County Chancery Court ("the trial court"). Therein, Cora Beth detailed several transfers of her father's property that she sought to set aside. Named as respondents were the following individuals: June Rhody ("June"), Billy Rhody ("Billy"), and Colton Rhody ("Colton"). Billy and Colton were alleged to be recipients of the Decedent's property pursuant to the disputed transfers, and it was alleged that June, the Decedent's mother, had operated under an invalid durable power of attorney in connection with making these transfers. According to Cora Beth's petition, before the transfers occurred, the Decedent had been hospitalized and heavily medicated when June procured his signature to a durable power of attorney appointing her as his agent and attorney-in-fact. The petition prayed that the court would declare the durable power of attorney as void *ab initio* due to the Decedent's alleged mental incapacity at the time of its execution.

June, Billy, and Colton (collectively "the respondents") filed an answer to Cora Beth's petition in December 2017 wherein they admitted the Decedent had executed the disputed power of attorney but "emphatically denied that the decedent did not know what he was executing." In defense of the action against them, they averred, in part, as follows:

> 1. Any and all documents executed either by the decedent and/or his attorney in fact . . . were done at the request of the decedent while decedent was lucid and decedent never made any attempt to undo or nullify the documents executed by decedent's attorney in fact.
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> 2. The power of attorney in question was executed by the decedent without any of the respondents being present at the hospital. In fact, the person staying with him on this particular occasion was Cindy Rhody, the decedent's sister-in-law, and she was requested by the Notary Public to leave the room and told by the Notary that he wanted to question him, the decedent, to make sure he was aware of what he was doing in executing the document.
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> 3. The power of attorney, being notarized and witnessed, speaks for itself that the decedent was competent and capable of executing same.

The respondents also observed that, after his hospitalization, the Decedent recovered and came home and took care of his own affairs for many months. They contended that he had been fully in charge of his faculties.

In November 2018, nearly a year after the respondents filed their answer, Cora Beth moved for summary judgment in the case. In support of her motion, Cora Beth relied on the affidavit of Dr. James McDowell. In his affidavit, Dr. McDowell opined that the Decedent "did not have the capacity to knowingly sign a legal document or enter

into a legal agreement during the last year of his life." The respondents strongly opposed Cora Beth's request for summary judgment, and in March 2019,[1] they submitted evidence of their own via affidavits on the issue of the Decedent's mental capacity. According to the respondents, the evidence showed that the Decedent "was conscious, alert, and aware of what was taking place at the time of the execution of the power of attorney."

The summary judgment motion came to be heard on May 8, 2019, and later that month, on May 30, 2019, the trial court entered an order granting Cora Beth summary judgment. As outlined in the order, the court identified the issue before it as "whether the decedent . . . had the mental capacity to knowingly sign a legal document or enter into a legal agreement on the date that the Durable Power of Attorney was executed." The following analysis from the trial court reflects the rationale behind its decision to grant Cora Beth summary relief:

> 17. In his Affidavit . . . Dr. McDowell opined to a reasonable degree of medical certainty that [the Decedent] did not have the mental capacity to knowingly sign a legal document or enter into a legal agreement during the last year of his life due to being chronically ill, malnourished, and chronically on narcotic pain medications that would affect his judgment. *Affidavit of Dr. McDowell at ¶ 17*.
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> 18. The Respondents' Response relies on inadmissible hearsay evidence and evidence that would violate *Tenn. Code Ann.* 24-1-203.
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> 19. The Respondents rely on two affidavits: the Affidavit of James R. Wilson, a notary public who was working at Baptist Hospital on October 18, 2013; and the Affidavit of Cindy Rhody, wife of the decedent's brother, Respondent Myron Rhody.
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> . . . .
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> 24. In the case at bar, the Respondents have failed to adduce documentation and information sufficient to establish the existence of a genuine issue of material fact.
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> 25. Based upon the proof adduced, the Court finds that the decedent lacked the mental capacity to execute a legal document or enter into a legal agreement on the date that the Durable Power of Attorney was executed, namely, October 18, 2013. The Court bases this finding upon the medical opinions of Dr. McDowell as set forth in his November 16, 2018 Affidavit

[1] The respondents supplemented their summary judgment filings by tendering additional evidence at the beginning of May 2019.

> and the extensive list of narcotic medications that the decedent was being administered; specifically, fentanyl, oxycodone, morphine, and hydrocodone. The Court finds that the Affidavits provided by the Respondents cannot overcome the medical opinions contained in the Affidavit [of] Dr. James G. McDowell, a medical expert. Therefore, there exists no dispute as to any material fact and the Petitioner's Motion for Summary Judgment is well-taken and should be granted.

Upon the entry of summary judgment, this appeal followed.

ISSUES PRESENTED

The issues raised by the respondents in their appellate brief all center on the alleged error of the trial court's decision to grant Cora Beth summary judgment. The respondents generally submit that the trial court erred in failing to find that there were genuine issues of material fact regarding the Decedent's mental capacity, and in particular, they assert that the trial court erred in relying solely on the affidavit of Dr. McDowell and in finding that they had relied on inadmissible hearsay evidence and evidence in violation of Tennessee Code Annotated section 24-1-203.

STANDARD OF REVIEW

When a trial court's ruling on a motion for summary judgment is on appeal as it is here, our review is de novo without a presumption of correctness. *Collier v. Legends Park LP*, 574 S.W.3d 356, 358 (Tenn. Ct. App. 2018). As a reviewing court, we make a fresh determination that the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Id.* Concerning the general standard governing summary judgment, the Tennessee Supreme Court has outlined it as follows:

> A trial court should grant summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Conversely, a trial court should not grant summary judgment when genuine issues or disputes of material fact are present. A dispute of material fact is that which "must be decided in order to resolve the substantive claim or defense at which the motion is directed."

Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734, 748-49 (Tenn. 2015) (internal citations omitted). Importantly, at the summary judgment stage, it is not the trial court's function to weigh the evidence and determine the truth of the matter involved. *Eden W. ex rel. Evans v. Tarr*, 517 S.W.3d 691, 705 (Tenn. Ct. App. 2015).

DISCUSSION

When entering summary judgment in this matter, the trial court noted that the issue before it was whether the Decedent had the requisite mental capacity to execute the durable power of attorney that is in dispute. The trial court ultimately answered this question in the negative by resorting to the medical opinions of Dr. McDowell, holding that the conflicting proof offered by the respondents "cannot overcome" the proof tendered through Dr. McDowell. We disagree with the trial court's conclusion on this issue and also reject its determination that the respondents' opposition to summary judgment relied on inadmissible hearsay evidence and evidence that violated Tennessee Code Annotated section 24-1-203.

We turn first to the trial court's criticism of the evidence relied on by the respondents. Initially, we observe that it is somewhat unclear to which evidence the court's criticism was directed. Indeed, the trial court did not specify which evidence it found objectionable. To the extent that it was criticizing as hearsay certain medical records offered by the respondents, we note that these records were accompanied by an affidavit reflecting that they "were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business." The law provides a hearsay exception for such business records:

> The business records exception, Tennessee Rule of Evidence 803(6), provides, in pertinent part, that
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> > [a] . . . record[] or data compilation . . . made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the . . . record or data compilation
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> is admissible despite it being hearsay.

Fusner v. Coop. Constr. Co., LLC, 211 S.W.3d 686, 692-93 (Tenn. 2007).

Despite the lack of clarity, however, we assume that the trial court was not specifically objecting to the medical records proffered by the respondents. Rather, we assume it was criticizing instead the affidavits of James Wilson and Cindy Rhody that were introduced at summary judgment. Indeed, immediately following its vague criticisms about hearsay and a supposed violation of Tennessee Code Annotated section 24-1-203, the trial court referenced the fact that the respondents relied on the Wilson and Rhody affidavits. As explained below, these affidavits are not infirm, but rather, they are indicative of the fact that genuine issues of material fact exist in this case.

Even assuming both documents were severely littered with hearsay, which does not appear to be the case, that would not be a basis to ignore the entirety of the affidavits and disregard that evidence which was competent and admissible on the question before the court. *See Estate of Buford Taylor v. SunTrust Bank*, No. M2012-02628-COA-R3-CV, 2013 WL 5762230, at *6 (Tenn. Ct. App. Oct. 22, 2013) ("We have carefully and thoroughly reviewed the affidavit . . . and have determined that while portions of it . . . may contain inadmissible hearsay . . . the affidavit also contains admissible evidence, which properly should have been considered."). Here, the referenced affidavits contain admissible evidence probative of the question of the Decedent's mental capacity and alertness. For instance, James Wilson, who attested he was acting as a notary public in October 2013 when he went to the room of the Decedent "to notarize a document," stated as follows:

> It is my custom and habit before notarizing any document to determine if the person proposing to execute same is competent and aware of what he is about to do. This especially applies to anyone who is a patient in a hospital. Although I do not recall the specific questions posed to [the Decedent], I can unequivocally say he was alert and oriented and aware of the document he was executing as being a power of attorney and the resulting implications.

For her part, Cindy Rhody testified in her affidavit as follows as to the Decedent's decision to execute the power of attorney: "Although he was very sick, [the Decedent] knew what he wanted done. The power of attorney was not executed for a few days after it arrived at the hospital." She also offered evidence that after the Decedent's discharge from the hospital, he eventually came home "where he was able to go places and take care of his own business for several months."

We also are unpersuaded that the statute referenced by the trial court, Tennessee Code Annotated section 24-1-203, poses a problem for either of these affidavits. That statutory provision, which is commonly known as the Dead Man's Statute, reads as follows:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.

Tenn. Code Ann. § 24-1-203.

Under well-established case law, it is clear that two things must take place to bring a case within the operation of the statute and justify the rejection of the evidence. First, the proposed witness must be a party to the suit in such a way that a judgment may be rendered for or against him. *Matter of Estate of Pritchard*, 735 S.W.2d 446, 448 (Tenn. Ct. App. 1986) (citing *Montague v. Thomason*, 91 Tenn. 168 (1892)). Second, the subject matter of that party's testimony must be of some transaction with or statement by the testator or intestate. *Id.* Based on these criteria, it is clear that the affidavits of James Wilson and Cindy Rhody are not barred by the Dead Man's Statute. After all, neither of these affiants is a party to this case. Accordingly, contrary to the suggestion of the trial court, Tennessee Code Annotated section 24-1-203 is no bar. *See id.* at 449 ("It is clear that the witness is not a party to the litigation. Since the proposed witness is not a party to the cause for or against whom a judgment may be rendered he is not incompetent as a witness.").

Because these affidavits, along with other evidence submitted by the respondents, are probative of the Decedent's mental capacity in the last year of his life and on the date of the execution of the power of attorney, it is clear from the record that Dr. McDowell's opinion was not the only evidence offered on this issue. The record had conflicting evidence, and it was not the province of the trial court to settle the issue at summary judgment. Thus, to the extent the court weighed the evidence when it stated that the affidavits submitted by the respondents "cannot overcome" Dr. McDowell's opinions, it was in error. As set out in our exposition of the standard governing summary judgment, it is not the trial court's role to weigh evidence and decide the truth of matters at summary judgment. *Tarr*, 517 S.W.3d at 705; *see also Hamrick v. Spring City Motor Co.*, 708 S.W.2d 383, 389 (Tenn. 1986) ("[S]ummary judgment is not ordinarily the proper procedure for determining whether a prima facie case has or has not been overcome by countervailing evidence.").

Although the court's reference that the respondents "cannot overcome" Dr. McDowell's opinions gives us some reason to believe that the respondents' evidence was weighed by the trial court for its truth, we also have reason to believe that the respondents' evidence was perhaps ignored entirely. For one, as we have already detailed, the court had reservations about the respondents' evidence as hearsay and as a violation of the Dead Man's Statute. It also appears, however, that the court may have disregarded the affidavits of James Wilson and Cindy Rhody due to the fact that neither affiant was a medical expert. Indeed, immediately after stating that these affidavits "cannot overcome" the opinions of Dr. McDowell, the trial court stated that Dr. McDowell was "a medical expert." Of course, as explained below, the fact that neither Mr. Wilson nor Ms. Rhody are medical experts is not a sufficient reason to disregard the proof set forth by them, if such disregard is in fact what occurred in the trial court.

At issue before the trial court was the mental capacity of the Decedent to execute the power of attorney. Although Cora Beth offered proof probative of this issue, so too

did the respondents. The fact that the respondents' affiants were not medical experts is not dispositive. Tennessee law has quoted favorably the proposition that "[t]he testimony of lay witnesses who have observed the alleged incompetent is admissible and highly probative since '[o]ne's mental capacity is best determined by his spoken words, his acts, and his conduct.'" *In re Conservatorship of Davenport*, No. E2004-01505-COA-R3-CV, 2005 WL 3533299, at *13 (Tenn. Ct. App. Dec. 27, 2005).[2] The record,[3] therefore, clearly evidenced a genuine issue as to the mental capacity of the Decedent, one which was not capable of resolution on summary judgment. Dr. McDowell gave an opinion that the Decedent did not have the capacity to enter into a legal agreement during the last year of his life, but Cindy Rhody attested that the Decedent "knew what he wanted done" and testified that he had been "able to go places and take care of his own business for several months" after his discharge from the hospital. Further, there are medical records indicating the Decedent was "alert" on the date in question, and according to the affidavit of the notary public who notarized the power of attorney in the hospital, James Wilson, the Decedent "was alert and oriented and aware of the document he was executing as being a power of attorney and the resulting implications." There does not appear to be any dispute that Mr. Wilson was the notary on the power of attorney at issue, and as is evident from the below excerpt from a previous decision, this Court has actually endorsed the proposition that a notary's seal can have some evidentiary value on the question of mental capacity:

> Mr. Dickson contends that the trial court erroneously inferred Ms. Cage's mental capacity from the fact of the notary's seal and signature and that without such an inference the weight of the evidence preponderates in favor of finding that Ms. Cage did not understand the nature, extent, character, and effect of the power of attorney she signed in October 1996.
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> A notary public is a public official of the state of Tennessee . . . and one of the individuals statutorily empowered to take oaths and acknowledgments. When certifying an act, a notary must affix his or her official seal. "The affixation of the notary's seal provides prima facie proof of a notary's official character or, simply stated, that the notary is a notary."

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[2] Although the *Davenport* case involved whether expert medical testimony was required to establish a disability for purposes of a conservatorship case, we see no reason why the principle allowing lay testimony as to mental capacity does not apply in the present context. *See Fell v. Rambo*, 36 S.W.3d 837 846 (Tenn. Ct. App. 2000) ("Expert and lay witnesses gave conflicting accounts of Ms. Crockett's competence when she sold the Crockett farm in February 1993.").

[3] In addition to the affidavits of Cindy Rhody and James Wilson and the medical records of the Decedent, all of which were offered as probative of the Decedent's mental capacity on the date the power of attorney was executed, the respondents offered evidence of the Decedent's active participation in civic affairs after his discharge from the hospital. No doubt, this was offered in part to cast doubt on Dr. McDowell's assertion that the Decedent did not have the capacity to enter into an agreement during the last year of his life.

> When discharging his or her duties, a notary public does so under oath that he or she "will, without favor or partiality, honestly, faithfully, and diligently discharge the duties of notary public." Accordingly, "a presumption arises that notaries perform their public duties correctly" and lawfully. "In layman's terms, a notary public's certificate means a great deal more than the 'Good Housekeeping Seal of Approval.'" When a notary certifies an instrument it "says to the world that the execution of the instrument was carried out according to law."
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> In the present case, the notary properly affixed her signature and seal to the power of attorney. While a notary "is not an insurer of the truth of the recitals," Ms. Wyatt, as a notary, is presumed to have executed her duties correctly and lawfully. This presumption allows the court to infer that by certifying the document Ms. Wyatt not only believed that Ms. Cage, as the person executing the document, was the person she purported to be, but that Ms. Cage understood that she was executing the document "for the purposes therein contained." Given the notary's certification and Ms. Long's testimony that Ms. Wyatt read the document to Ms. Cage in the presence of Ms. Long and that Ms. Long believed that Ms. Cage understood what Ms. Wyatt had read to her prior to signing the document, we do not find that the trial court erred in determining that Ms. Cage possessed the requisite mental capacity . . . to sign the limited power of attorney.

Dickson v. Long, No. M2008-00279-COA-R3-CV, 2009 WL 961784, at *6-7 (Tenn. Ct. App. Apr. 8, 2009) (internal footnote and citations omitted).

We, therefore, conclude that the record reflects a genuine issue of material fact on the question of the Decedent's mental capacity relative to the execution of the power of attorney. As a result, the granting of summary judgment by the trial court was in error.

CONCLUSION

The trial court's order granting summary judgment is hereby reversed, and the case is remanded to the trial court for such further proceedings as may be necessary and consistent with this opinion.

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ARNOLD B. GOLDIN, JUDGE