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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CASE NO: 2D 19-1949
LT No.: 17-CA-2092-CI

T. Nichole Drapp and
Michael R. Streiff,
Appellants,

v.
Edward Reid McDaniel,
Appellee.

On Appeal from the Circuit Court Sixth Judicial Circuit
Pinellas County, Florida

REPLY BRIEF

Appellants' Reply Brief Filed by

Ann M. Allison
Fla. Bar Number: 790311
ALLISON LAW GROUP
Attorneys for Appellant
111 South Riverhills Drive
Temple Terrace, FL 33617
☏ (813) 531-6584 TELEPHONE
Ann@AllisonLaws.com EMAIL
Admin@AllisonLaws.com EMAIL

Table of Contents

Page

Table of Authorities…………………………………………………………..ii

Argument in Reply ………………………………………………………….1-7

A. Appellee's Questionable Fact Section. ……………………………………1-3

B. Appellee's Rebuttal Arguments Are Deceptive and Fallacious…………. .3-7

1. The Carpenter's Estate Burden-Shifting Does Not Apply to the Deed……3

2. An Adverse Inference Does Not Replace Appellee/Plaintiff's Burden to Satisfy the Elevated Clear and Convincing Evidence Standard…………4

3. Appellants Did Not Fail to Object. …………………………………6

Conclusion……………………………………………………………………. 7-10

Certificate of Compliance……………………………………………………11

Certificate of Service…………………………………………………………11

Table of Authorities

Page

I. Cases

Berry v. Berry,
992 So. 2d 898 (Fla. 2d DCA 2008)..

Blimpie Capital Venture Inc. v. Palms Plaza Partners Ltd.,
636 So. 2d 838 (Fla. 2d DCA 1994)……………………………………………2

Bon Secours - Maria Manor v. Seaman,
959 So. 2d 774 (Fla. 2d DCA 2007)……………………………………………….3

DiSarrio v. Mills,
711 So. 2d 1355 (Fla. 2d DCA 1998)…………………………………………..2

Golden Yachts Inc. v. Hall,
920 So. 2d 777 (Fla. 4th DCA 2006) …………………………………………… 5

In re Carpenter's Estate,
253 So. 2d 697 (Fla. 1971). ……………………………………………….. 3, 4

Omulepu v. Dept of Health,
249 So. 3d 1278 (Fla. 1st DCA 2018)…………………………………………….5

Parkerson v. Nanton,
876 So. 2d 1228 (Fla. 1st DCA 2004)…………………………………………...2

Shaw v. Jain,
914 So. 2d 458 (Fla. 1st DCA 2005)……………………………………….... 4-5

State v. Thompson,
852 So. 2d 877 (Fla. 2d DCA 2003)……………………………………………….2

ARGUMENT IN REPLY

We stand by our Initial Brief (IB) [1] because Appellee's Answer Brief (AB) simply does not dispute (or even address) some 90% of the legal principles and arguments we articulated. Accordingly, we address Appellee's few arguments here in this Reply Brief (RB) and conclude with a brief summary and conclusion; and we shall resist the temptation to use the leftover space only to rehash the same facts, details, and arguments we already packed into our lengthy IB.

A. Appellee's Questionable Fact Section.

First, Appellee's AB complains that our fact section is "wholly unsatisfactory" because it "fails to give a full and accurate account of the facts of this case" (AB 1-2), so Appellee supplies his own sparse shambolic fact section that appears to cite to facts or evidence in the Record. But upon reviewing Appellee's facts and locating the material referenced, we notice Appellee's citations to the Trial transcript contain page numbers but no line numbers to direct the reader; we also discovered a citation to allegations in Appellee's amended complaint (AB 2) and a two-page cite to the trial Transcript for "the three deeds were of no force and effect because they represent fraudulent transactions, breaches of fiduciary duties, and exploitation of the elderly" – that turns out to be a citation to arguments Appellee's

[1] We adhere to the abbreviations we used in our Initial Brief (IB).

counsel made at trial (AB 2), even though pleadings and arguments of counsel do not constitute facts or evidence. "Argument by counsel who is not under oath is not evidence." DiSarrio v. Mills, 711 So. 2d 1355, 1357 (Fla. 2d DCA 1998).

Attorney Arguments and Party Pleadings vs. Evidence. Appellee's recitations of facts and evidence and citations to the Record must be carefully scrutinized because it appears Appellee is passing off counsel's arguments at trial and the allegations in his complaint as facts and evidence in the Record even though "under Florida law, absent a stipulation, statements of counsel not made under oath are not evidence" and even "the Standard Jury Instructions in Civil Cases" explicitly clarifies that "statements .. attorneys now make and the arguments they later make are not to be considered as evidence in the case … ." Parkerson v. Nanton, 876 So. 2d 1228, 1230 (Fla. 1st DCA 2004).

Moreover, a trial court's determinations in a final judgment "must be supported by record evidence not just counsel's assertions." State v. Thompson, 852 So. 2d 877, 878 (Fla. 2d DCA 2003). An attorney's "argument interspersed with unsworn representations of fact" does not constitute evidence upon which a trial court can make conclusions because "a trial court cannot make a factual determination based on an attorney's unsworn statements." Blimpie Capital Venture Inc. v. Palms Plaza Partners Ltd., 636 So. 2d 838, 8407 (Fla. 2d DCA 1994). Accordingly, Appellee's fact section (AB 1-4) should not cite to attorney arguments

or allegations in pleadings because neither constitute facts or evidence; attorney arguments or statements at a hearing or trial "constitute argument only, not testimony" because an attorney's unsworn "representations about disputed factual issues did not qualify as testimony" or evidence. Bon Secours - Maria Manor v. Seaman, 959 So. 2d 774, 778 (Fla. 2d DCA 2007).

B. Appellee's Rebuttal Arguments Are Deceptive and Fallacious.

Appellee's AB contains only three short arguments: That the Record contains competent substantial evidence to support the Final Judgment (AB 7) including that "a presumption of undue influence arose" thus Appellant Dr. Drapp had the burden (but failed) to articulate a rational explanation why Appellee would execute a Deed to her (AB 8); that trial court correctly gave Appellee the negative inference that he met his burden (AB 9,11); and that Appellants did not object at trial and thus waived their objection to the 2018 Final Judgment in the DOM (AB 10-11).

1. The Carpenter's Estate Burden-Shifting Does Not Apply to the Deed.

First, Appellee's undue influence argument that imposed a burden on Appellants is incorrect as a matter of law, and Appellee cites only to Carpenter's Estate to support the proposition that "if a plaintiff is able to establish a confidential relationship existed … then a presumption of undue influence arises placing" a burden on the defendant to give "a reasonable explanation for the active role in the affairs of the

grantor." (AB 8). However, Carpenter's Estate is not applicable here, and Appellee omits the essential detail that the holding in Carpenter's Estate applies solely to the context of contesting a will *vis a vis* Fla. Stat. 732.31 regarding "the burden of proof in will contests," with the Court concluding the "better rule …. shifts to the beneficiary only the burden of coming forward with a reasonable explanation for his or her active role in the decedent's affairs, and specifically in the preparation of the will, and we so hold." In re Carpenter's Estate, 253 So. 2d 697, 704 (Fla. 1971).

The Florida Supreme Court is clear that Carpenter's Estate applies only to the context of will challenges where, unlike here, the grantor is dead and cannot testify. Carpenter's Estate lacks precedential value at bar because neither the law nor the facts are "sufficiently similar" to those at bar: "A prior opinion has precedential value only to the extent … the material facts are sufficiently similar." Shaw v. Jain, 914 So. 2d 458, 461 (Fla. 1st DCA 2005). The trial court erroneously applied the wrong law to improperly impose duties upon Appellants thus its Final Judgment must be reversed under a de novo review.

Finally, Appellee never explained how his Carpenter's Estate theory applies here to this non-probate case or affects Appellee's elevated burden to defeat the prima facie cases established under the legal presumptions that Deeds are valid; Grantors are competent/sane; and Grantors have a legal duty to know and understand what they sign as they are bound by their signatures. Berry v. Berry, 992 So. 2d 898,

900 (Fla. 2d DCA 2008). Appellee did not dispute the application of these presumptions or that he must satisfy the elevated clear and convincing standard to overcome them.

2. An Adverse Inference Does Not Replace Appellee/Plaintiff's Burden to Meet the Elevated Clear and Convincing Evidence Standard. Second, Appellee requested an inference "that we have proven our case as to all those elements *because he has introduced no evidence to contradict any of the elements* of our complaint in all the counts" (emphasis added). (T 147:12-16). But Appellant Streiff had no such burden to satisfy yet the trial court responded: "Under the circumstances I believe it is appropriate for the Court to, uh, grant your motion … as to Mr. Streiff as to all counts." (T 147:17-22). An adverse inference "is unlike a presumption because it merely allows the fact-finder to infer a fact that is rationally related to the facts established in the record" but it does not shift the burden of proof" and it can be "misconstrued by allowing an adverse inference to become an independent fact that by itself can meet the burden of proof… which it cannot" because the burden requires "sufficient record evidence –apart from any adverse inference." Omulepu v. Dept of Health, 249 So. 3d 1278, 1283 (Fla. 1st DCA 2018).

The trial court erred as a matter of law because it granted a negative inference "that we have proven our case" when Appellee/plaintiff had not yet actually proven his case, thus improperly relieving plaintiff's burden to prove its case

notwithstanding Florida law recognizes an "adverse inference instruction does not relieve a party from its burden of proof at trial." Golden Yachts Inc. v. Hall, 920 So. 2d 777, 780 (Fla. 4th DCA 2006). For this reason alone the negative inference was erroneous and the decision must be reversed under a de novo review.

3. Appellants Did Not Fail to Object. Finally, Appellee's third point argues Appellants waived their arguments because "there was no objection" when the trial court "admitted the divorce judgment into evidence" and "when it granted the negative inference against Streiff" (AB 5) because Appellants did not object but, rather, counsel for Intervenor/co-Appellant South Florida Lending made the objection at trial. (AB 11, FN 1). Either Appellee purposely misrepresents the truth or failed to adequately study and know the facts before making the argument.

Here, the trial transcript clearly proves counsel for Intervenor/co-Appellant South Florida Lending also acted as co-counsel for Appellant Dr. Drapp (T 6: 2-3, 8-9, 11-13) with the trial court's approval and Appellee's counsel did not object:

4 MR. STERN: Good morning, your Honor. I'm
5 the attorney on the motion to intervene that you
6 granted last week.
7 THE COURT: Okay. That's right.
8 MR. STERN: But I'm also going to be
9 co-counsel for Miss Drapp.
10 THE COURT: Okay. Thank you.
11 MR. STERN: And just to be clear on that,
12 will I be allowed to ask questions of the
13 witnesses and -- you don't have any objection --
14 THE COURT: Oh, sure.

15 MR. STERN: Thank you.

(T 6: 4-15). Even so, the trial court's Final Judgment makes a different error indicating Appellee objected when he did not: "Counsel for Intervenor, Joseph Stern, was allowed to fully participate in the trial, including cross examination of witnesses, over objection of counsel for Plaintiff." (R 569). The trial court did not indicate when it thought Appellee articulated the objections it referenced, but the trial Transcript certainly does not support such a conclusion. (T 6: 4-15).

Moreover, Appellants asserted two Objections at two different times regarding the relevance of the DOM Judgment. (T 165: 18-19; T 168:1-4). The 2018 DOM Judgment was not relevant to the 2016 Deed in this case and Appellee improperly introduced the DOM Judgment to impeach Appellants during the direct examination of Appellee's witness, Curtis Drapp.

Thus, this appears to be yet one more troubling contradiction of the trial Transcript, and it is disturbing the trial court got this fact so wrong and Appellee also failed to read the trial Transcript before filing his AB because, had he read it, he would know his defective argument is based on a false premise and therefore Appellee's argument fails.

CONCLUSION

The trial court erred as a matter of law when it failed to acknowledge the fundamental legal presumptions Florida law recognizes –that Deeds are presumed valid, Grantors presumed competent/sane, and parties have a duty to read the documents they sign. The trial court erred when it failed to require Appellee to satisfy the elevated clear and convincing evidentiary burden. Appellee did not even know the specific dates or factual details of his own alleged illness, treatments, and any other excuses he used to try to prove mental incompetency at the time he signed the Deed even though he admitted at trial he did not read what he signed. As such, the trial court erred when it voided the Deed with no evidence that Appellee was mentally incompetent on August 4, 2016 to the extend he was unable to comprehend the nature and effect of the Deed he executed to Dr. Drapp.

First, the trial court used the wrong standard to void the Deed –"vulnerable adult" or "confused and weak" *is not* the correct legal standard as the Second District expressly noted in Tyler that "mere mental weakness will not authorize a court of equity to set aside a deed if such weakness does not amount to inability to comprehend the nature and effect of the transaction and is not accompanied by evidence of imposition or undue influence." Florida law and equity recognizes only the rigorous "mental incompetence" standard.

Appellee never supplied any evidence identifying the exact kind of cancer, its severity or degree, the date of his diagnosis or any dates related to it, whether the cancer affected his brain or mental competency specifically on August 4, 2016 when he executed the Deed. Appellee also did not give any specific information about his alleged chemotherapy or other treatments – he did not identify any dates when he started receiving treatments or the date he received his last/final treatment; he did not identify the dates of the time span when he was treated; he did not identify types of treatment he received, any side effects he experienced, whether or how any treatments affected his brain functioning and to what extent it affected him; whether he had any treatments on August 4, 2016 *when he executed the Deed* and to what extent that treatment affected him; when was his last treatment before he executed the Deed August 4, 2016. With so many missing relevant details, Appellee simply could not, and did not, overcome presumptions and satisfy the clear and convincing burden.

The Record contains no medical evidence; no clear and convincing evidence from anyone present when Appellee executed the Deed August 4, 2016; and Appellee's testimony is uncorroborated because Curtis Drapp was not present when Appellee executed the Deed. Indeed, Appellee does not himself even testify he was mentally incompetent such that he was unable to comprehend the nature and effect of the Deed when he executed it to Dr. Drapp. The Record simply does not contain

anywhere near the amount of evidence necessary to overcomes the legal presumptions that the Deed is valid, the Appellee/Grantor was sane, and the parties to the Deed read and understood the Deed before they signed it.

As discussed herein, Appellee failed to meet the heavy burden to produce clear and convincing evidence to rebut the presumptions and prove Appellee was mentally incompetent on August 4, 2016, and did not understand the nature and effect of the Deed he executed to Appellant Drapp. For all the foregoing reasons, this Court should reverse the trial court's decision because the record contains no competent evidence to support it, and enter an order of involuntary dismissal.

CERTIFICATE OF COMPLIANCE

I certify this Brief is formatted as to size and style in compliance with Fla. R. App. 9.210(a)(2), with 1- inch margins on all sides and a size 14-point Times New Roman Font including footnotes.

Ann M. Allison
Fla. Bar No. 790311

CERTIFICATE OF SERVICE

I CERTIFY I filed and served Appellants' Reply Brief on January 22, 2020 in Florida's E-filing System Portal via email to Matt Weidner at service @mattweidnerlaw. com, Joe Stern at stern@jealegal.com, and any secondary email addresses in the clerk's mailing matrix for this case in compliance with Fla. R. Jud. Admin 2.516.

Respectfully Submitted,

Ann M. Allison
ALLISON LAW GROUP
Fla. Bar No. 790311
111 South Riverhills Drive
Temple Terrace, FL 33617
☏ (813) 531-6584 TELEPHONE
🖶 (813) 985-5661 FAX
🖰 Ann@AllisonLaws.com – Primary EMAIL
🖰 Admin@AllisonLaws.com – Secondary EMAIL