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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-44

Filed: 5 September 2017

Swain County, No. 11 CVS 137

EARL WAYNE FORTNER and HENRY FORTNER, Co-Administrators of the Estate of Johnnie H. Fortner, Sr., Plaintiffs,

v.

JONATHAN A. HORNBUCKLE and LYNDIA HORNBUCKLE FORTNER, Defendants.

Appeal by Plaintiffs from judgment entered 6 June 2016 by Judge Marvin P. Pope, Jr., in Swain County Superior Court. Heard in the Court of Appeals 8 June 2017.

*Fred H. Moody, Jr., for Plaintiffs-Appellants.*

*McGuire, Wood & Bissette, P.A., by Mary E. Euler, Joseph P. McGuire, and Murphy H. Fletcher, for Defendants-Appellees.*

DILLON, Judge.

Plaintiffs are the co-administrators of the estate (the “Estate”) of their deceased father Johnnie H. Fortner, Sr., (the “Decedent”). They brought this action against their father’s domestic partner and *her* son for money to help defray expenses of the Decedent’s estate. (Prior to his death, Decedent transferred significant assets

to his domestic partner and her son, assets which Plaintiffs reported to state and federal taxing authorities in valuing their father's estate.)

### I. Background

Prior to the his death, Decedent lived with Defendant Lynda Hornbuckle Fortner. The couple held themselves out as husband and wife. Lynda had a son from a previous marriage, Defendant Jonathan A. Hornbuckle. About a year before his death, Decedent executed deeds conveying certain real property to Lynda and other real property to Jonathan. Decedent placed the executed deeds in an envelope and handed them to Lynda. Lynda, however, did not cause the deeds to be recorded until after Decedent's death.

Upon Decedent's death, the real estate conveyed by Decedent to Lynda and to Jonathan was included as part of the value of Decedent's Estate, for which state and federal death taxes became due. Also included in the value of the Estate was a joint bank account Decedent had with Lynda (the "Joint Account") which had a balance of approximately \$250,000 at the time of his death.

Plaintiffs brought this action essentially seeking (1) from Lynda and Jonathan money to pay the portion of the death taxes attributable to the real estate which Decedent had conveyed to Lynda and Jonathan; and (2) from Lynda the balance of a Joint Account or, in the alternative, recovery from Lynda of an apportioned share of death taxes attributable to funds in the Joint Account.

Defendants filed a responsive pleading. With regard to the five deeded properties, Defendants asserted that the transfers to Lynda and Jonathan constituted *completed* gifts (though the deeds had not been recorded) and that as a result (1) the five properties were not properly included in the Estate for purposes of calculating its tax liability; and (2) Plaintiffs were therefore not entitled to recover an apportioned share of the Estate's tax liability attributable to those properties from Defendants. Defendants also contended that the Estate should not be permitted to use any funds in the Joint Account to pay the debts of the Estate.

A jury trial was held in Swain County Superior Court. The trial court entered a judgment in favor of Plaintiffs on all claims. Defendants appealed the verdict. Our Court reversed the judgment of the trial court and ordered a retrial. *Fortner v. Hornbuckle*, 235 N.C. App. 247, 265, 761 S.E.2d 683, 694 (2014). Following the new trial, the jury returned verdicts in favor of the Defendants on all claims, and the trial court entered judgment accordingly. Plaintiffs appeal.

## II. Analysis

### A. Plaintiffs Were Not Prejudiced by Trial Court's Exclusion of Certain Disputed Testimony

Plaintiffs first contend that the trial court committed error in sustaining Defendants' objection to portions of Lynda's testimony, citing the Dead Man's Statute, N.C. Gen. Stat. § 8C-1, Rule 601(c) (2015). We disagree.

Specifically, Plaintiffs contend that the trial court erred in sustaining Defendants' objection to Lynda's testimony concerning certain statements Decedent made when he gave her the envelope containing the five deeds, including telling her that "you take these home, put them up and keep your mouth shut" after handing her the envelope.<sup>1</sup>

With regard to evidentiary rulings, the exclusion of evidence constitutes reversible error only if the appellant shows that the error "was prejudicial error, *i.e.*, that a different result would have likely ensued had the error not occurred." *Responsible Citizens v. Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983). And our Supreme Court has held that "[t]he erroneous exclusion of evidence is not prejudicial when the same or substantially the same testimony is subsequently admitted into evidence." *State v. Garcia*, 358 N.C. 382, 420, 597 S.E.2d 724, 750 (2004) (internal quotation marks and citations omitted).

Here, Plaintiffs argue that the challenged testimony should have been admitted due to waiver of the Dead Man's Statute. Assuming, *arguendo*, that the trial court improperly sustained Defendants' objection to the testimony at issue, we do not find that Plaintiffs were prejudiced as a result, as the testimony subsequently came in anyway. Specifically, shortly after the trial court prohibited Lynda from

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<sup>1</sup> Plaintiff argues that the testimony was relevant to show that the Decedent did not intend to complete the gift of the real estate when he handed Lynda the deeds.

quoting Decedent, Plaintiffs' counsel again questioned Lynda about her receipt of the envelope containing the deeds from Decedent. Plaintiffs' counsel asked:

Q. Well, you did what you did, you got it, you took it home, put it up and kept your mouth shut about it because of the instructions you received from Mr. Fortner; did you not?

A. Yes.

Defendants did not object to this question. As this is substantially the same testimony and conveyed substantially the same information as the disputed testimony, we do not find that the trial court's exclusion of the testimony at issue was prejudicial. *See Garcia*, 358 N.C. at 420, 597 S.E.2d at 750. Therefore, Plaintiffs' arguments as to the excluded testimony at issue are overruled.

B. The Trial Court Did Not Err in the Disputed Instructions to the Jury

Plaintiffs contend that the trial court inappropriately took judicial notice of the judgment in a prior action between the parties, *Fortner v. Fortner*, No. 08-CVS-154 (the "Prior Action"), and instructed the jury based on the Prior Action. Specifically, Plaintiffs argue that the trial court improperly took judicial notice of the Prior Action in making the following jury instruction regarding the issue of a completed gift:

In a prior proceeding, 08-CVS-154, it was established by the greater weight of the evidence that the deeds were validly conveyed from [Decedent] to Lynda H. Fortner and to Jonathan A. Hornbuckle. A judgment in that prior proceeding was entered in favor of the defendants in this action and as a consequence, I instruct you that the following deed requirements were met:

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The deed contained the name of the grantor, Johnnie Fortner.

The deeds contained the identity of the grantee, Jonathan Ashley Hornbuckle for three of the deeds and Lynda Hornbuckle Fortner for two of the deeds.

*The deeds contained the operative words of conveyance such that the words in the deeds showed Johnnie Fortner's intent to transfer his interest in the properties so deeded.* [emphasis added]

The deeds adequately identified the land conveyed in each deed.

The deeds were properly signed by Johnnie Fortner.

The deeds were properly sealed.

The deeds were properly acknowledged by Johnnie Fortner before a notary public, an official authorized by law to take such acknowledg[e]ments.

It was also established by the greater weight of the evidence that at the time Johnnie Fortner signed and delivered the deeds he was of sound mind and that the deeds were not procured through undue influence or fraud.

Plaintiffs only argument concerns the emphasized portion of the quoted jury instruction. We disagree that this portion constituted prejudicial error.

Our standard of review of alleged errors in jury instructions is *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or

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misinformed[.] The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

*Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (internal citations and quotation marks omitted).

Pursuant to Rule 201(a) of our Rules of Evidence, a trial court may take judicial notice of an “adjudicative fact.” Rule 201(b) further provides that a “judicially noticed fact” is one that is “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” N.C. Gen. Stat. § 8C-1, Rule 201(b) (2015). A “[t]rial court[] may properly take judicial notice of ‘its own records in any prior or contemporary case when the matter noticed has relevance.’” *Stocum v. Oakley*, 185 N.C. App. 56, 61, 648 S.E.2d 227, 232 (2007) (citation omitted).

Here, the Prior Action was a proceeding brought by Plaintiffs and other heirs of the Decedent against Defendants and others, in which Plaintiffs attempted to set aside the deeds from Decedent to Defendants on the grounds of lack of mental capacity and undue influence and have a constructive trust imposed on the properties described in the deeds. In the Prior Action, the trial court ruled in favor of Defendants

on all claims.

We have reviewed the jury instruction in its entirety and conclude that the portion challenged by Plaintiffs does not constitute reversible error. The challenged portion only states that the words in the deeds themselves was sufficient to demonstrate an intent to transfer the property. The trial court otherwise instructed the jury to make the determination whether the Decedent, in fact, did make the transfer when he handed the deeds to Lynda. Further, the trial court did not err in making the challenged jury instructions based on the doctrine of collateral estoppel, as the issue of the validity of the deeds was, or should have been, decided in the Prior Action.

The doctrine of collateral estoppel, also referred to as “issue preclusion,” precludes re-litigation of a fact, question or right in issue

when there has been a final judgment or decree, necessarily determining [the] fact, question[,] or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question[,] or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit.

*King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 805 (1973). The doctrine of collateral estoppel “is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally.” *Id.* at 356, 200 S.E.2d at 805 (internal quotation marks omitted). “[W]hen

a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.” *Id.* at 355, 200 S.E.2d at 804 (internal quotation marks omitted).

In the Prior Action, Plaintiffs brought claims to set aside the deeds at issue, based, in part, on undue influence. Our Supreme Court has elaborated on what constitutes undue influence:

Undue influence in the execution of a deed is such fraudulent influence as perverts the free exercise of the grantor’s will, *so that the deed does not express his real purpose and desire*. The controlling principle is stated in *Myatt v. Myatt*, 149 N. C. 137, 62 S. E. 887, 888: “It is true that, to constitute undue influence, it is not necessarily required that there should exist moral turpitude, or even an improper motive; but, if a person from the best of motives, having obtained a dominant influence over the mind of a grantor, thereby induces him to execute a deed, or other instrument materially affecting his rights, which he would not have made otherwise, exercising the influence obtained to such an extent that the mind and will of the grantor is effaced or supplanted in the transaction, so that the instrument, *while professing to be the act and deed of the grantor*, in fact and truth only expresses the mind and will of the third person, the actor who procured the result, such an instrument so obtained is not improperly termed ‘fraudulent.’

*Owens v. Rothrock*, 198 N.C. 594, 595, 152 S.E. 681, 681 (1930) (emphasis added).

Here, the issue of whether the deeds in question express Decedent’s “real purpose and desire” was necessarily decided in the Prior Action as shown by the jury

rendering a verdict and the trial court entering judgment that the deeds should not be set aside for undue influence. *See id.* The issue of whether the deeds purport to show Decedent's intent to "deliver" the deeds, to complete the gift, was already decided in the Prior Action between Plaintiffs and Defendants. As such, collateral estoppel bars Plaintiffs from attempting to recontest this issue. Because a trial court "may properly take judicial notice of 'its own records in any prior or contemporary case when the matter noticed has relevance[.]'" *Oakley*, 185 N.C. App. at 61, 648 S.E.2d at 232 (citation omitted), the trial court acted within its authority to take judicial notice of the language indicated in the deeds.

With regard to the remainder of the challenged jury instruction, Plaintiffs make no arguments as to how they were prejudiced. As such, Plaintiffs have not met their burden of "showing that the jury was misled or that the verdict was affected by an omitted instruction." *Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 177. Plaintiffs' assignment of error in the jury instructions is overruled.

C. The Trial Court Did Not Err in Denying Plaintiffs' Motion for Directed Verdict

Plaintiffs contend that the trial court erred in denying their motion for a directed verdict on their claim for apportionment of estate taxes and interest on the Joint Account. Plaintiffs argue that the trial court should have directed a verdict on this claim as Lynda "admitted the truth of the basic facts" of their claim for apportionment, leaving no issue to be resolved by the jury. We disagree.

The standard of review for the denial of a motion for directed verdict is “whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury.” *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citation omitted).

Plaintiffs premise their claim for apportionment on N.C. Gen. Stat. § 28A-15-10, which provides that administrators of an estate can access funds in a joint deposit account with a right of survivorship, but only if “needed to satisfy claims against a decedent’s estate”; that is, only after all other assets of the estate have been exhausted. N.C. Gen. Stat. § 28A-15-10 (2015).

Based on our careful review of the record, we find that it contains sufficient evidence, when viewed in the light most favorable to Defendants, to survive Plaintiffs’ motion for directed verdict. Here, one of the Plaintiffs did directly state at trial that the Estate could not satisfy the claims against it. However, other testimony indicates that the Estate owns various parcels of real property which could generate funds sufficient to satisfy claims against the Estate. For instance, one Plaintiff testified that some of the Estate’s properties are sitting idle as opposed to generating income. Furthermore, testimony indicates that one of the Plaintiffs conducts business on one of the Estate’s properties, but does not pay rent.

Additionally, although one Plaintiff stated that the Estate’s real properties cannot be sold because of tax liens, the veracity of this testimony is a question of fact

for the jury. In fact, this testimony was contradicted by the testimony of an accountant who testified on Plaintiffs' behalf. The accountant testified that the Internal Revenue Service would more than likely refuse to enter into a compromise agreement as to the Estate's tax liabilities because it believed the Estate's properties could be sold. As it is up to the jury to resolve the conflicting evidence, a directed verdict would be improper. *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976).

### III. Conclusion

Based on the aforementioned reasons, we conclude that Plaintiffs received a fair trial, free from reversible error.

NO ERROR.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).