Starcher, J., Dissenting Opinion, Case No.23609 Bobby Gene Nugen v. Garland J. Simmons

No. 23609 - Bobby Gene Nugen, Administrator of the Estate of Henry Everett Nugen v.

Garland J. Simmons

Starcher, Justice, dissenting:

Certain types of cases are especially ill-suited for resolution by summary judgment. Contests over transfers of substantial sums of money to caretakers by elderly people, especially just before their death, are in this category. Accordingly, I dissent.

As I read it, the evidence in the depositions and affidavits which were submitted to the trial court in this matter on balance tended to show that the senior Mr. Nugen intended to make a gift to Mr. Simmons of the money in the joint account -- some $74,000. So why should Mr. Simmons have to go through a trial in order to keep the money?

There is one reason this case should have been tried, and that reason is easy to understand; indeed most of us learned it as children. It is the application of the Golden Rule: "Do unto others as you would have others do unto you."(1)

If the shoe had been on the other foot, and Mr. Nugen's sons were claiming that Mr. Simmons' father had given most of his money to them -- then I think that Mr. Simmons would feel that *he* had a right to a trial to try to show that Mr. Simmons' father didn't really mean to give his money to the Nugen boys. Applying the Golden Rule, Mr. Nugen's sons should be afforded the same right to a trial that Mr. Simmons would claim.

The result that the Golden Rule dictates is also supported by settled legal principles -- also fairly easy to understand -- which strongly suggest that this case should not have been disposed of on summary judgment.

Under *Kanawha Valley Bank v. Friend*, 162 W.Va. 925, 253 S.E.2d 528 (1979), if the relationship between the senior Mr. Nugen and Mr. Simmons was a *confidential* relationship -- that is, a relationship in which one person trusts and reposes confidence in another, *see Marshall v. Marshall*, 166 W.Va. 304, 307, 273 S.E.2d 360, 362-63 (1980) -- then the burden would shift to Mr. Simmons to prove that the elder Mr. Nugen intended to make a gift.

Whether there was a confidential relationship is a question of fact. This Court has stated that it "*is a question of fact for the jury* to initially resolve as to whether the plaintiff proved that a confidential or fiduciary relationship existed. . . . the burden of proof . . .

shifted . . . only if this initial question was resolved in plaintiff's favor." *Dillon v. Dillon*, 178 W.Va. 531, 362 S.E.2d 759 (1987) (per curiam) (emphasis added).

Mr. Simmons repeatedly acknowledged that he was taking care of Mr. Nugen and "looking out for" Mr. Nugen and handling "his affairs." There can be no doubt that there was enough evidence to create a genuine issue of fact for the jury as to whether a confidential relationship existed.

In my mind, there is little question as to whether such a confidential relationship existed. Of course it did. It is precisely because Mr. Nugen reposed a high degree of trust and confidence in Mr. Simmons that he entrusted Mr. Simmons with the power to write checks on his bank account.

If a jury had agreed there was a confidential relationship, then Mr. Simmons would have had the burden of proving by a preponderance of the evidence that the elder Mr. Nugen intended to make a gift to Mr. Simmons. It is my impression that such proof was well within Mr. Simmons' grasp, if all went well for him at trial.

On the other hand, if a jury had disagreed with my impression and had found that there was no confidential relationship, then the burden would have been on the Nugen sons to rebut the presumption of a *causa mortis* gift which is established in *W.Va. Code*, 31A-4-33 [1994], a rebuttal which would may been difficult but not inconceivable, depending on how the trial went.

Either way the burden lay, a jury's ultimate determination would certainly depend on the demeanor of the witnesses and the cumulative consistency and weight of the testimony on both sides. Would Mr. Simmons come across at trial as a shifty opportunist, or as a decently motivated person? Would the bank employees' several stories have troubling inconsistencies, and would they concede under cross-examination that the senior Mr. Nugen was somewhat confused when he put Mr. Simmons' name on the bank account? Or would the bank employees appear to be solid citizens who had carefully advised a man of sound mind who well knew what he was doing? Would the Nugen sons be believable when they said that their father had called Mr. Simmons a crook? Or would they appear to be lying because their father had chosen someone else to give his money to?

Obviously, these are matters which can only be determined at trial, not in summary judgment. As I have noted, I have an impression as to where the truth probably lies in this case -- but it is only an impression, and it is based on a few depositions and affidavits. If the parties had waived a jury trial and I were the trial judge, I would never decide such a case on a paper record -- I would insist on hearing testimony so I could observe the demeanor of the witnesses and decide whom to believe.

In a case addressing the exact same issue as the instant case, *Koontz v. Long*, 181 W.Va. 800, 803, 384 S.E.2d 837, 840 (1989) (*per curiam*), the trial judge did what I think was the proper thing to do. The judge submitted the case to the jury with correct instructions, and this Court upheld the jury's verdict, saying:

It is the peculiar and exclusive province of the jury to weigh the evidence and resolve questions of fact when the testimony of witnesses is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them. (Citations omitted).

In a recent opinion, *Barnhard v. Redd*, 196 W.Va. 142, 469 S.E.2d 1, (1996) (Per Curiam), we recognized the important role of the jury in such cases.[(2)]

Put another way, although the burden can go different ways, the issue in this case is ultimately the senior Mr. Nugen's intent. And intent is almost always an issue of fact. For example, "[w]hether there has been a delivery of a deed *is a question of fact rather than of law depending upon the intent* of the grantor to vest an estate in the grantee." Syllabus point 2, *Garrett v. Goff*, 61 W.Va. 221, 56 S.E. 351 (1907) (emphasis added).

If at the end of the evidence or even after a jury reached a verdict the trial judge had the firm conviction that there was no evidence upon which a reasonable jury could base a decision for Mr. Nugen's sons, or alternatively for Mr. Simmons, the court could direct a verdict, or set aside a verdict that is clearly improper. But that result would occur *after* the judge and the jury have had the benefit of live testimony -- which I hope that this dissent has shown could make a real difference in the outcome in this case.

Finally, this case prompts me to briefly comment on the dangers of reliance upon summary judgment to resolve issues that are best or necessarily left to a jury.

One danger is that the outcome of a summary judgment motion may be determined not by the merits of the case, but the quality and quantity of the lawyering. For various reasons, it is a real possibility and not an uncommon occurrence that the lawyers for one side, or even for both sides, will not do a top-notch job in the pre-trial phase of litigation. Expensive depositions may be avoided, affidavits may be unartfully drawn, witnesses may not be tracked down, all of the issues involved may not be identified, and the briefs may be scantly researched and written. As a result, a case may be shot down in a summary judgment proceeding -- *not because of the merits of the case* -- but because of the lawyering that preceded the summary judgment determination.

Second, in summary judgment, a court is using a relatively complex and refined mechanism that depends on juggling many evidentiary and legal issues at the same time. The pressures of a trial judge's time-constrained schedule often make this sort of balancing act difficult. As a result -- and in this job of appellate review we see this result -- *the rulings in summary judgment may well be wrong*; not because the judge is inept, but because the format of summary judgment is over-prone to judicial error.

The format of a trial tends to reduce both of these problems. First, at trial, the lawyering makes less of a difference. The witnesses, the evidence and the true legal issues in the case come directly before the court without being entirely mediated through a lawyer's efforts. As a geologist I know says: "Never rely on maps -- get out on the ground!" At trial, the likelihood that the *true* merits of the opposing sides' contentions will be considered is significantly greater.

Also, I think the judging is better in the trial format. At trial a judge generally deals with issues one at a time, out loud, on the record, with instantaneous feedback from counsel. Instead of trying to address a complex picture of issues all at one time and deriving the picture entirely from a set of briefs, trial allows the court to consider the issues one at a time, and the issues are presented in a more tangible fashion. This is easier and I think it gives better results. The impressive results I have already seen in the trial records before me from many of our circuit courts bear out this impression.

Simply put, trial forces a judge to look at and absorb the facts and evidence and issues, whether the judge wants to or not. Trial vastly enhances a judge's understanding of the case.

Finally, a trial gives citizens their day in court, typically before a jury of their peers; this promotes public confidence in the judicial process. While no one likes to lose in court, I have been amazed at how the most adverse verdicts have been accepted by litigants when they were rendered after a jury trial, when the same ruling without a trial would have been forever seen as corrupt.

For the foregoing reasons, I would reverse the circuit court's grant of summary judgment and remand the case for trial.

1. *Familiar Quotations*, John Bartlett (E.M. Beck, Ed.)(1980) suggests that this standard of morality has endured the ages. *See Bartlett's*, St. Matthew, 38:14; Confucius, 69:14; Aristotle, 87:3.

2. *Barnhard,* 196 W.Va. at 146, 469 S.E.2d at 5, stated:

Vercellotti v. Bowen, 179 W.Va. 650, 371 S.E.2d 371 (1988) *(per curiam*) (finding sufficient evidence for a *jury* to conclude that a confidential relationship existed between a mother and daughter in which the mother was aged, ill, isolated and had limited ability in the English language); *Koontz v. Long*, 181 W.Va. 800, 384 S.E.2d 837 (1989) (*per curiam*) (finding sufficient evidence for a *jury* to conclude the existence of a fiduciary relationship); *Yaromey v. King*, 182 W.Va. 126, 386 S.E.2d 493 (1989) (*per curiam*) (finding sufficient evidence of a fiduciary relationship to instruct the *jury* on fiduciary duties and presumption of constructive fraud); *Smallridge v. Sipe*, 185 W.Va. 135, 405 S.E.2d 465 (1991) (*per curiam*) (finding summary judgment improper because of a *factual question concerning whether a confidential relationship existed*); *Webb v. Williams*, 188 W.Va. 7, 422 S.E.2d 484 (1992) (*per curiam*) (finding the record sufficient to support a *jury* finding of clear and convincing evidence of a mistake to rebut the presumption of W.Va. Code 31A-4-33).