

REL: February 12, 2021

**Notice:** This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

---

2190817

---

**Chrissy Riddle, as administrator of the estate  
of Jerry Winkles, deceased**

v.

**Bobby Everett and Sheila Everett**

**Appeal from Winston Circuit Court  
(CV-15-900110)**

MOORE, Judge.

Chrissy Riddle, as administrator of the estate of Jerry Winkles, deceased, appeals from a judgment of the Winston Circuit Court ("the trial

2190817

court") dismissing a declaratory-judgment action against Bobby Everett and Sheila Everett.

On November 16, 2015, Jerry Winkles and Christine Winkles filed a complaint for a declaratory judgment in the trial court in which they asserted that a warranty deed and a subsequent correction deed, both of which had purportedly been signed by or on behalf of the Winkleses and notarized by Thomas W. Jones and which transferred an interest in certain real property in Winston County ("the property") to the Everetts, had been forged or procured by fraud. The Winkleses sought a judgment declaring the deeds void. The Winkleses attached the warranty deed, dated May 28, 2003, and the subsequent correction deed, dated June 16, 2003, to their complaint as exhibits. The Everetts filed a motion to dismiss the Winkleses' complaint on December 10, 2015, asserting, among other things, that the Winkleses' claims were barred by the applicable statute of limitations and that the Winkleses were judicially estopped from asserting claims of fraud and forgery based on assertions made by the Winkleses in another action that was pending between the parties at that time. Specifically, the Everetts asserted that the Winkleses had filed

2190817

a complaint against them on October 31, 2008 ("the 2008 complaint"), that the Winkleses had attached the May 28, 2003, warranty deed to the 2008 complaint, and that the 2008 complaint had averred that it was the intent of the parties that the property would remain the property of the Everetts unless redeemed by the Winkleses. The Winkleses filed a response to the motion to dismiss on December 15, 2015, asserting, among other things, that the deeds in question were void based upon the application of §§ 35-4-20 and 35-4-24, Ala. Code 1975.

On January 6, 2016, Judge Talmage Lee Carter entered an order of recusal. Judge John H. Bentley also recused himself, and the case was reassigned to Judge Mark E. Hammitte on January 8, 2016. The Winkleses filed an amendment to their response to the Everetts' motion to dismiss on February 8, 2016, in which they asserted that the Everetts could not claim equitable relief because they do not have "clean hands." On May 25, 2016, the Winkleses filed a motion for a summary judgment, attaching thereto as exhibits the affidavits of Christine Winkles and Jerry Winkles, both of whom asserted that they had not signed the May 28, 2003, warranty deed or the June 16, 2003, correction deed. The Winkleses

2190817

filed, on June 9, 2016, a response to the arguments raised by the Everetts in their motion to dismiss related to the applicability of the doctrine of judicial estoppel. On August 23, 2016, Jerry Winkles filed a suggestion of death, stating that Christine Winkles had died.

The trial court entered an order on October 31, 2016, denying the Everetts' motion to dismiss and directing them to file an answer to the complaint within 30 days. On November 22, 2016, the Everetts filed an answer to the complaint and asserted counterclaims alleging breach of contract and "fraud/promissory fraud" and seeking an equitable mortgage or an equitable lien on the property. The Everetts asserted, among other things, that the Winkleses had been sentenced to serve jail time after pleading guilty to criminal charges on April 23, 2003; that, as a result, the Winkleses had been unable to pay their mortgage indebtedness on the property; and that the Winkleses had offered to convey to the Everetts ownership of the property, subject to a right of redemption in favor of the Winkleses upon their release from prison, in exchange for the Everetts' agreement to pay the mortgage indebtedness during their incarceration. The Everetts further asserted that the Winkleses' attorney, Jerry Jackson,

2190817

had prepared powers of attorney to appoint Bobby Everett, the Winkleses' nephew, as their attorney in fact; that the Winkleses had executed the powers of attorney; that the Everetts had paid the outstanding indebtedness on the property by mortgaging the property as collateral for a loan; that Jackson had prepared a warranty deed conveying the property to the Everetts subject to a right of redemption in favor of the Winkleses; that Bobby Everett had executed the warranty deed in his capacity as attorney in fact for the Winkleses; and that a correction deed had been executed by Bobby Everett to correct an error in the legal description of the property. According to the Everetts, the Winkleses had been released from prison, had then recorded documents rescinding the powers of attorney they had granted to Bobby Everett, and had filed the 2008 complaint acknowledging the authenticity of the deeds that they now allege were forged or procured by fraud. The Everetts attached to their answer in this case, among other things, copies of the powers of attorney in favor of Bobby Everett, copies of the documents rescinding those powers of attorney, and a copy of the 2008 complaint that had been filed by the Winkleses against the Everetts.

2190817

Jerry Winkles filed a renewed motion for a summary judgment on December 1, 2016, asserting that the powers of attorney in favor of Bobby Everett did not authorize him to convey the property to himself. On December 8, 2016, he filed a motion to dismiss the Everetts' counterclaims. On December 20, 2016, the Everetts filed a motion to strike the affidavit of Christine Winkles, which had been submitted in support of the Winkleses' original summary-judgment motion, based on the suggestion of death of Christine Winkles that had been filed on August 23, 2016. On August 28, 2018, Jerry Winkles filed an amended motion for a summary judgment and a request for the trial court to rule on his motion. On that same date, he filed a motion requesting that the trial court rule on the motion to dismiss the Everetts' counterclaims. On August 29, 2018, the Everetts filed a motion to set a final hearing on the merits and a motion to set a hearing on any pending dispositive motions. Jerry Winkles filed a supplemental brief in support of the summary-judgment motion on September 7, 2018.

The Everetts filed an amended answer on September 12, 2018, asserting the additional affirmative defense of unclean hands. On that

2190817

same date, the Everetts filed a statement in opposition to the summary-judgment motion, attaching thereto, among other things, transcripts from the depositions of Jerry Winkles, Bobby Everett, and Sheila Everett. Additionally, on September 12, 2018, the Everetts filed a response to the motion to dismiss their counterclaims. Jerry Winkles filed a reply to the Everetts' response to the summary-judgment motion on September 13, 2018. On September 13, 2018, the Everetts filed a second amended answer to the complaint, asserting an additional affirmative defense. Jerry Winkles filed on September 14, 2018, a motion to dismiss the amended answer and the second amended answer that had been filed by the Everetts. On September 28, 2018, Jerry Winkles filed a response to the Everetts' reply to the motion to dismiss the Everetts' counterclaims. On May 3, 2019, the Everetts filed a motion to dismiss, asserting that Jerry Winkles had died on February 17, 2019. On August 27, 2019, the Winkleses' attorney filed a suggestion of death, confirming that Jerry Winkles was deceased. On that same date, the Winkleses' attorney filed a motion to substitute Chrissy Riddle, as administrator of Jerry Winkles's estate, as the plaintiff. The trial court entered an order on January 29,

2190817

2020, granting the motion to substitute Riddle as the plaintiff and adding her as a party.

On April 6, 2020, Judge Hammitte entered a number of orders, including, among other things, an order denying the Winkleses' original summary-judgment motion; an order denying Jerry Winkles's motion to dismiss the first and second amended answers filed by the Everetts; an order denying the renewed motion for a summary judgment filed by Jerry Winkles; an order denying Jerry Winkles's motion to dismiss the Everetts' counterclaims; an order denying the Everetts' "motion to dismiss pursuant to Rule 12(b)"; an order denying Jerry Winkles's amended motion for a summary judgment; and an order concluding that the Everetts' motion to strike was moot. On April 8, 2020, Judge Hammitte entered an order recusing himself from further participation in the matter. On April 9, 2020, Riddle filed a motion to reconsider and to vacate Judge Hammitte's rulings because, she argued, it was inconsistent for the trial-court judge to recuse himself and, at nearly the same time, enter rulings that affect the substantial rights of the parties. On May 6, 2020, the Alabama



2190817

Supreme Court entered an order assigning Retired Appellate Judge Pamela W. Baschab to preside over the case.

On July 14, 2020, Judge Baschab entered a judgment in which she, among other things, denied Riddle's April 9, 2020, motion asking the court to reconsider and to vacate the orders previously entered by Judge Hammitte. Judge Baschab further directed that Christine Winkles was dismissed as a plaintiff because "more than six months had passed from the suggestion of death until the substitution of parties," noting that there was no indication that Christine had an estate pending or an appointed representative. See Rule 25(a)(1), Ala. R. Civ. P. In her July 14, 2020, judgment, Judge Baschab concluded that the pleadings and motions that had not yet been ruled on included the Winkleses' original complaint for a declaratory judgment, the Everetts' motion to dismiss the complaint, the Everetts' "oral motion (which was briefed by the parties) for judicial estoppel," and the Everetts' counterclaims. Judge Baschab concluded, among other things, that the Winkleses had ratified any issue concerning the validity of the deeds conveying the property to the Everetts in the 2008 complaint, in which they "acknowledged that the power of attorney

2190817

was done with their knowledge and consent for the purpose of transferring the property to [the Everetts]." Accordingly, she concluded that the deeds were not void, determined that the Everetts' motion to dismiss the declaratory-judgment complaint was due to be granted, and denied the Everetts' counterclaims.<sup>1</sup> Riddle filed a notice of appeal to this court on August 5, 2020.

Riddle presents three arguments on appeal: (1) that the trial court erred in granting the Everetts' motion to dismiss the Winkleses' complaint; (2) that the trial court erred in denying the motion for a summary judgment; and (3) that, because the Winkleses had not signed the warranty deed or the corrected deed, the deeds failed to comply with statutory requirements such that they were rendered void. Riddle does not challenge the dismissal of Christine Winkles as a plaintiff; accordingly, that portion of the trial court's July 14, 2020, judgment is affirmed. See Gary v. Crouch, 923 So. 2d 1130, 1136 (Ala. Civ. App. 2005)

---

<sup>1</sup>The trial court purported to dismiss the "original and amended complaints for Declaratory Judgment" in its final judgment; however, the record does not contain an amended complaint filed by the Winkleses.

2190817

("[T]his court is confined in its review to addressing the arguments raised by the parties in their briefs on appeal; arguments not raised by the parties are waived.").

Riddle first asserts that the trial court erred in concluding that the Everetts' first motion to dismiss remained pending because, she says, it had been denied by Judge Hammitte on October 31, 2016. Riddle asserts that no motion was filed to reconsider the denial of that motion to dismiss and that that motion had again been denied by Judge Hammitte on April 6, 2020, before Judge Baschab purported to grant the motion. We note, however, that, regardless of whether that motion had been denied by a previous order of the trial court, this court has acknowledged that "[a]n interlocutory order may be reconsidered by a trial court on its own motion or on the motion of any party at any time before entry of a final judgment." Warren v. Warren, 94 So. 3d 392, 395, n.4 (Ala. Civ. App. 2012). Accordingly, any error in Judge Baschab's determination that the motion to dismiss remained pending was harmless and does not merit reversal. See Rule 45, Ala. R. App. P.

Before proceeding to consider the merits of Riddle's arguments on appeal, we must first determine the applicable standard of review. With regard to the first issue raised by Riddle -- that the trial court erred in granting the Everetts' motion to dismiss -- both Riddle and the Everetts cite the standard of review applicable to a ruling on a Rule 12(b)(6) motion to dismiss. Additionally, the trial court stated specifically that the Everetts' motion to dismiss the Winkleses' complaint for a declaratory judgment was granted. We note, however, that the trial court explicitly considered, and ultimately relied on, acknowledgments made by the Winkleses in the 2008 complaint against the Everetts in granting the Everetts' motion to dismiss. The only copy of the 2008 complaint in the record appears as an attachment to the Everetts' answer to the complaint.

Rule 12(b) provides, in pertinent part, that

"[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[ Ala. R. Civ. P.], and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

2190817

The Winkleses did not reference the 2008 action or the complaint that commenced that action in their complaint in the present case.

In Drees v. Turner, 10 So. 3d 601, 603 (Ala. Civ. App. 2008), this court considered similar circumstances and stated, in pertinent part:

"In Poston v. Smith, 666 So. 2d 833 (Ala. Civ. App. 1995), this court observed that, in purporting to rule on a motion to dismiss, the trial court had considered matters outside the pleadings and, therefore, the motion had been converted into a motion for a summary judgment; this court determined that, although neither the parties nor the trial court had apparently been aware that the matter had been converted into a motion for a summary judgment, the failure to notify the parties that the motion had been converted was prejudicial to both parties and, therefore, the cause was due to be remanded. 666 So. 2d at 834-35. This court explained that

"if a motion pursuant to Rule 12(b)(6), A[la]. R. Civ. P., is converted into a motion for summary judgment, both parties must be given "a reasonable opportunity to submit affidavits and other extraneous proofs to avoid a party being taken by surprise through conversion of the motion to dismiss to one for summary judgment." Hales v. First National Bank of Mobile, 380 So. 2d 797, 799 (Ala. 1980). "The requirements of Rule 56[, Ala. R. Civ. P.,] apply to a converted Rule 12(b)(6) motion." Graveman v. Wind Drift Owners' Association, Inc., 607 So. 2d 199, 202 (Ala.1992).'

"666 So. 2d at 834. In the present case, as in Poston, the parties were not given 'an opportunity to introduce affidavits

and other evidence in opposition to a motion for summary judgment to demonstrate that genuine issues of material fact exist,' when the same should have been permitted. 666 So. 2d at 835. See also Hugh P. Brindley, D.M.D., P.A. v. Cullman Reg'l Med. Ctr., 709 So. 2d 1261, 1264 (Ala. Civ. App. 1998) (case remanded to assure that the procedural safeguards of Rule 56, Ala. R. Civ. P., are provided to both parties); and Jacobs v. Whaley, 987 So. 2d 1143, 1147[ (Ala. Civ. App. 2007)] (case remanded when trial court did not communicate to parties its intention to treat a motion to dismiss as one for a summary judgment and therefore did not observe procedural requirements of Rule 56(c), Ala. R. Civ. P.)."

Having concluded that evidence outside the pleadings had been considered by the trial court in disposing of the motions to dismiss in that case such that the motions had been converted into summary-judgment motions, this court proceeded to reverse the orders of dismissal and to remand the cause for further proceedings. Drees, 10 So. 3d at 603.

Like in Drees, the trial court in the present case clearly considered matters outside the pleadings in dismissing the Winkleses' complaint. Accordingly, the motion to dismiss was converted into a summary-judgment motion, and both sides should have been given a reasonable opportunity to submit affidavits and other extraneous proof to avoid their being taken by surprise through conversion of the motion to dismiss to one

2190817

for a summary judgment, see Drees, supra, particularly in light of the revival of the Everetts' original motion to dismiss, which had previously been denied, in the present case. We therefore reverse the trial court's July 14, 2020, judgment insofar as it dismissed the Winkleses' complaint, and we remand the cause for further proceedings consistent with this opinion. We decline to consider the remaining arguments on appeal.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Edwards, Hanson, and Fridy, JJ., concur.