IN THE

Supreme Court of Virginia

RECORD NO. 080599

LINDA BELL, et al.,

Appellants,

v.

N. LESLIE SAUNDERS, JR., ESQ.,
Personal Representative, Executor, Administrator,
and Trustee of the Estate of Edward J. Bell, Sr.,

Appellee.

OPENING BRIEF OF APPELLANTS

Denis C. Englisby, Esq. (VSB #12607)
ENGLISBY, VAUGHN & SLONE
Post Office Box 85
10101 Iron Bridge Road
Chesterfield, Virginia 23832-0085
(804) 748-6300
(804) 751-0918 (telecopier)
E-mail: dneubert@englisby.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

SUBJECT INDEX

Page

TABLE OF CITATIONS ii

STATEMENT OF THE NATURE OF THE CASE
AND MATERIAL PROCEEDINGS 2

STATEMENT OF FACTS 4

ASSIGNMENT OF ERROR -

I. THE COURT ERRED IN SUSTAINING THE
DEFENDANT'S DEMURRER 9

QUESTION PRESENTED –

I. DID THE COURT ERR IN SUSTAINING
THE DEFENDANT'S DEMURRER? 10

ARGUMENT AND PRINCIPLES OF LAW. 10

CONCLUSION 14

CERTIFICATE 15

TABLE OF CITATIONS

Page(s)

Authority:

Va. Code § 8.01-184, *et seq*. 3,5,7,10,11,12,13

Va. Code § 8.01-186 13

Va. Code § 8.01-273 . . . . . 10, 11

IN THE

SUPREME COURT OF VIRGINIA

Record No. 080599

LINDA BELL

and

DAVID W. BELL,

Appellants,

v.

N. LESLIE SAUNDERS, JR., ESQ.,
PERSONAL REPRESENTATIVE,
EXECUTOR, AND TRUSTEE OF THE
ESTATE OF EDWARD J. BELL, SR.,

Appellee.

OPENING BRIEF OF APPELLANTS

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

The Appellants, Linda Bell and her son, David W. Bell (plaintiffs in the original proceeding) have noted their appeal from a Final Order, dated January 2, 2008, from the Circuit Court of the County of Powhatan,

Virginia, from The Honorable Thomas V. Warren, Judge, in which Linda Bell and David W. Bell (her son) were the plaintiffs and N. Leslie Saunders, Jr., Esq., Personal Representative, Executor, and Trustee of the Estate of Edward J. Bell, Sr., was the defendant.

STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

1. The undersigned represents the daughter-in-law and grandson of Edward J. Bell, Sr., who died in 1999, and left provisions for them in his will.

2. The defendant (now Appellee) is the attorney, who drafted the will and is, also, the Personal Representative, Executor, Administrator and Trustee of the Estate of Edward J. Bell, Sr. The defendant (now Appellee) qualified as Executor in 1999.

3. The suit alleges that the Estate was worth $17,000,000.00 when Mr. Bell died.

4. The suit alleges that the Executor has not provided the funds to Linda Bell in accord with the provisions of the will since the death of Mr. Bell.

5. The suit alleges that the Executor, however, has taken from the estate $632,467.40 from September, 1999 through July, 2005, as his fee for himself and his law firm.

6. The suit further alleges that of the $17,000,000.00 at the outset of the Estate, $9,439,699.90 were liquid assets at that time, but as of July, 2005, the liquid asset value was $4,303,706.94.

7. The suit alleges that the Executor does not believe that he has to disburse any of the estate to Linda Bell until she dies.

8. The suit requests, in accord with Va. Code § 8.01-184, *et seq.* (Declaratory Judgment Statutes) that the Court (Powhatan Circuit Court) interpret the will to determine the rights of Linda Bell and David W. Bell, and requests an accounting and other relief regarding the propriety or impropriety of the Executor's actions.

9. The Executor filed an Answer, admitting some of the allegations and denying some of the allegations, and the Executor filed a Demurrer.

10. The Court required memoranda on the issue of the Demurrer from both sides, and a proposed Order, reflecting what each attorney wanted the Order to say.

11. The Court did not have a hearing on the issue as to whether or not the Demurrer should be sustained or overruled.

12. The Court entered the Executor's Order, sustaining the Demurrer on January 2, 2008.

13. The undersigned, on behalf of the plaintiffs (now Appellants) filed a Notice of Appeal and this Petition for Appeal.

14. The simple issue is whether or not the Court erred in sustaining the Demurrer.

STATEMENT OF FACTS

1. The undersigned represents the daughter-in-law and grandson of Edward J. Bell, Sr., who died in 1999, and left provisions for them in his will (App. 8).

2. The defendant (now Appellee) is the attorney, who drafted the will and is, also, the Personal Representative, Executor, Administrator and Trustee of the Estate of Edward J. Bell, Sr. The defendant (now Appellee) qualified as Executor in 1999 (App. 16).

3. The suit alleges that the Estate was worth $17,000,000.00 when Mr. Bell died (App. 3).

4. The suit alleges that the Executor has not provided the funds to Linda Bell in accord with the provisions of the will since the death of Mr. Bell (App. 4).

5. The suit alleges that the Executor, however, has taken from the estate $632,467.40 from September, 1999 through July, 2005, as his fee for himself and his law firm (App. 4-5).

6. The suit further alleges that of the $17,000,000.00 at the outset of the Estate, $9,439,699.90 were liquid assets at that time, but as of July, 2005, the liquid asset value was $4,303,706.94 (App. 6).

7. The suit alleges that the Executor does not believe that he has to disburse any of the estate to Linda Bell until she dies (App. 4).

8. The undersigned, on behalf of Linda Bell and David W. Bell, plaintiffs (now Appellants) filed a Complaint against the Executor under Va. Code § 8.01-184, *et seq.* (Declaratory Judgment Statutes), stating that this case involved an "actual controversy and dispute," and alleged in the Complaint that the defendant (Appellee) has not disbursed to the plaintiffs (Appellants) in accord with the wishes of Mr. Bell, Sr. (App. 2-7).

9. Additionally, the plaintiffs (now Appellants) have stated in the Complaint that although they have received nothing (and it is admitted that

the grandson, David W. Bell, is not entitled to anything until his mother dies, but it is further stated that the defendant (now Appellee) is depleting the estate improperly for his own use) (App. 6).

10. The Complaint alleges that Linda Bell is to receive funds each year since the death of Mr. Bell, Sr. (1999), and that she has not received those funds in accord with the will (App. 3-4).

11. The Complaint further states that although she has not received the funds in accord with the will, the defendant (Executor – Appellee) has drawn down for himself and his law firm $632,467.40 from September, 1999 through July, 2005 (App. 4-5).

12. Paragraph 12 of the Complaint states, "that, in fact, the Trustee (N. Leslie Saunders, Jr., Esq.) has advised the undersigned (counsel for Linda Bell) that he (Mr. Saunders) does not believe that he has to disburse any of the estate until Linda Bell dies (App. 4).

13. Of course, that is his interpretation, and that is why he has not disbursed anything to Linda Bell, although the will speaks clearly and loudly to that disbursement to her each year in Article III(b) and other articles of the will (App. 9).

14. In the "Wherefore" clause to the Complaint, in accord with Va. Code § 8.01-184 (Declaratory Judgment Statutes), the undersigned requests in the "Wherefore" clause that the Court (Powhatan Circuit Court) "interpret the will of Edward J. Bell, Sr., and Edward J. Bell, Jr. (also drafted by the defendant, now Appellee) to determine the rights of Linda Bell and David W. Bell; that this Court (Powhatan Circuit Court) require an accounting of all assets and disbursements of both wills; that this Court (Powhatan Circuit Court) determine if the Executor/Trustee is in proper compliance with the wills of both estates; that this Court (Powhatan Circuit Court) rule that if the Executor/Trustee is not in proper compliance with the wills, that he immediately come into compliance, it being represented to this Court (Powhatan Circuit Court) that according to the records received from the Executor/Trustee from September, 1999 through July, 2005, the Estate of Edward J. Bell, Sr., started with an asset value in 1999 of $9,439,699.90 and as of July, 2005, had an asset value of $4,303,706.94; that this Court (Powhatan Circuit Court) remove the Executor/Trustee if the Court feels it is appropriate; that if the Court (Powhatan Circuit Court) does not feel it is appropriate to remove the Executor/Trustee, then it is respectfully requested that the Court (Powhatan Circuit Court) order the

Executor/Trustee to wind up the Estate of Edward J. Bell, Sr., and to disburse in accord with Mr. Bell's wishes in his will . . ." (App. 8-15).

15. Of course, the Complaint speaks for itself on an issue of demurrer, and the undersigned has simply hit highlights of some of the Complaint.

16. The defendant (now Appellee) filed an Answer, which, of course, speaks for itself. The Answer admits certain allegations and denies certain allegations that respond to the Complaint (App. 33).

17. One would think that that would put the case "at issue."

18. The defendant (now Appellee) filed a Demurrer, stating, among other things, "plaintiffs' Complaint against the defendant fails to state a cause of action, and fails to state a case of actual controversy and dispute, and fails to state facts upon which the relief demanded may be granted" (App. 35).

19. The trial court (Judge Warren) requested that the respective parties file memoranda regarding their respective positions, and further requested that each attorney prepare a proposed Order that would rule in their respective favor.

20. This was done by both counsel, and the memoranda are a

matter of record in this case (App. 38-56).

21. There was no verbal argument regarding the issue on the Demurrer.

22. On January 2, 2008, Judge Warren entered the Order prepared by the defendant (now Appellee), with one modification. That Order sustained the Demurrer and dismissed the case. That Order, of course, is a part of the record. That Order, in part, stated, "that the Complaint filed against N. Leslie Saunders, Jr., Executor and Trustee of the Estate of Edward J. Bell, Sr., fails to state such facts upon which the relief demanded may be granted and, therefore, should be dismissed" (App. 57-58).

23. The undersigned, on behalf of the plaintiffs (now Appellants), filed a timely Notice of Appeal (App. 60) and Petition for Appeal.

24. Since the trial court ruled on the issue of the Demurrer without an *ore tenus* hearing, there was no transcript, but the Court signed an appropriate Statement of Facts in this case, with its attachments all referred to above, said Order being entered on 2/12/08 (all of which is a matter of record in this case) (App. 62).

ASSIGNMENT OF ERROR

I. THE COURT ERRED IN SUSTAINING THE DEFENDANT'S DEMURRER.
(Point saved in Memorandum filed on behalf of

the Plaintiffs (now Appellants), which is a matter of record, it being represented to this Court (the Supreme Court of Virginia) that Judge Warren had requested each attorney to prepare an appropriate Order that each attorney wanted the Judge to sign after the Judge read the Memoranda filed by each attorney, and that there was no opportunity for either attorney to state the grounds for his respective objections other than the grounds stated in each respective Memorandum filed by each attorney) (App. 38-44).

QUESTION PRESENTED

I. **DID THE COURT ERR IN SUSTAINING THE DEFENDANT'S DEMURRER?** (AE 1)

ARGUMENT AND PRINCIPLES OF LAW

The Court erred in sustaining the Demurrer. Va. Code § 8.01-273 (Demurrer, etc.) states, in part:

> "in any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer."

The trial court's Order of January 2, 2008, states, in part, "Upon consideration whereof, the Court finds that the Complaint filed against N. Leslie Saunders, Jr., Executor and Trustee of the Estate of Edward J. Bell,

Sr., fails to state such facts upon which the relief demanded may be granted and, therefore, should be dismissed" (App. 57-58).

Apparently, the Court felt that we "stated a cause of action" in accord with Va. Code § 8.01-273 (the Declaratory Judgment statute), because the Order did not say that we did not state a cause of action. The Order says we "failed to state such facts upon which the relief demanded may be granted." Of course, the only thing that this Court (the Virginia Supreme Court) has to do is read the Complaint, which, of course, states a cause of action (undisputed by the Circuit Court Order), to see if it "fails to state such facts upon which the relief demanded may be granted." The cause of action (undisputed) is filed under Va. Code § 8.01-184, *et seq.* (Declaratory Judgment Statutes), and alleges clear impropriety in the way the Executor is handling the will, and his understanding or lack of understanding of the clear intent of the testator, and his belief that he does not have to distribute any of this $17,000,000.00 to the heirs until Linda Bell dies. He has no trouble reading that part of the will that allows him a five percent (5%) Executor fee and a five percent (5%) Trustee fee, and he has no problem exacting and withdrawing (as alleged in the Complaint) the $632,467.40 for himself, his law firm, his secretary and others from September, 1999

through July, 2005. The Complaint alleges that when Mr. Bell died in 1999, the liquid assets were $9,439,699.90, but as of July, 2005, the liquid assets were $4,303,760.94. The Complaint just wants to know where this money went. Linda Bell did not get it, because the Executor does not believe that anyone gets anything until she dies (see Paragraph 12 of the Complaint) (App. 4). Attachment "A" to the Complaint is the will of Mr. Bell, Sr., and the Complaint states that in Article III, Linda Bell is to receive certain funds. Specifically, the will says, "Trustee (the defendant – Appellee) shall pay the net annual income from said one-half of the Trust Estate to his wife so long as she shall live" (App. 3-4). "His wife" is Linda Bell. The Complaint says that the Executor says that he does not believe that he has to pay anybody anything until Linda Bell dies (App. 4). The first paragraph of the Complaint says, "that this is a case of actual controversy and dispute" (App. 2). That, of course, is a requirement of Va. Code § 8.01-184, *et. seq.* (Declaratory Judgment Statutes). The rest of the twenty-five paragraphs that follow state the cause of action (the gist of which is that Linda Bell and David Bell are entitled to certain payments out of the Estate of Edward J. Bell, Sr., and that the defendant (Appellee), the Personal Representative, Executor, Administrator and Trustee of that Estate, has not been abiding by the will

and making those payments. Apparently, the defendant (Appellee) has a different view of what the will says and has refused to make the payments in accord with the terms of the will. The plaintiffs (Appellants) in their Complaint are simply asking the Circuit Court, under Va. Code § 8.01-184, *et. seq.*, to do a number of things that they have requested in the "Wherefore" clause of their Complaint, among which is, "to interpret the will of Edward J. Bell, Sr., and to determine the rights of Linda Bell and David W. Bell; . . . to determine if the Executor/Trustee is in proper compliance with the will; and that this Court (the Circuit Court) rule that if the Executor/Trustee is not in proper compliance with the will that he immediately commit to proper compliance, or that he be removed" (App. 6-7). Interpretation of documents is what Va. Code § 8.01-184, *et. seq.* (Declaratory Judgment Statutes) is all about. Again, the cause of action has been stated (undisputed). The issue is, did we "fail to state such facts upon the relief demanded be granted"? A simple reading of the "Wherefore" clause and the preceding twenty-five paragraphs "state such facts upon which the relief demanded may be granted." Some of that relief that is requested is in accord with Va. Code § 8.01-186 (further relief). The undersigned honestly does not know what else has to be said in the

Complaint to get the relief granted, which is a simple interpretation of the will – and whether or not the Executor is abiding by the terms of the will.

CONCLUSION

For the reasons stated, it is respectfully submitted that the trial court erred in sustaining the Demurrer. It is respectfully requested that this Court (the Virginia Supreme Court) reverse and remand this case with proper instructions to the trial court to proceed with the case.

Respectfully submitted this _____ day of _____, 2009.

LINDA BELL
and
DAVID W. BELL

By:_____
Of Counsel

Denis C. Englisby, Esq.
VSB #12607
ENGLISBY, VAUGHN & SLONE
P. O. Box 85
Chesterfield, VA 23832
(804) 748-6300
(804) 751-0918 (telecopier)
dneubert@englisby.com
Counsel for the Appellants

CERTIFICATE

In accord with Va. Code § 5:17(5)(e), the following information is provided:

(1) The Appellants are Linda Bell and David W. Bell. Their attorney is Denis C. Englisby, Esq., ENGLISBY, VAUGHN & SLONE, P. O. Box 85, Chesterfield, VA 23832; (804) 748-6300. The Appellee is N. Leslie Saunders, Jr., Esq., Personal Representative, Executor, Administrator and Trustee of the Estate of Edward J. Bell, Sr. The attorney for the Appellee is N. Leslie Saunders, Jr., Esq., SAUNDERS, CARY & PATTERSON, 9100 Arboretum Parkway – Suite 300, Richmond, VA 23236; (804) 330-3350.

(2) Copies of this Opening Brief of Appellants have been mailed on the date stated herein to all opposing counsel.

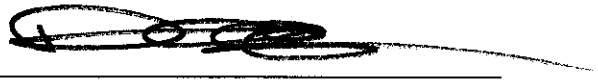
(3) This is not a criminal case.

(4) The undersigned desires to state orally to a panel of this Court the reason why this Appeal should be granted. He wishes to do so in person.

(5) In accord with Rule 5:26 of the Rules of the Supreme Court of Virginia, the appropriate number of copies have been mailed to counsel for

the Appellee and to the Clerk of this Court, and an electronic copy of the Opening Brief and the Appendix has also been filed with the Clerk of this Court contemporaneous with the Brief, transmitted to the Clerk of this Court by the office of Lantagne Legal Printing on behalf of the Appellants, and taken in the form of either filed on the disc, CD, or by e-mailing to the e-mail address provided in Rule 5:27 of the Rules of the Supreme Court of Virginia.

Filed: February 6, 2009



Denis C. Englisby