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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6003

ELLOUISE BLOXOM MEARS,
Appellant,

v.

BROOKS T. MEARS
Appellee.

PETITION FOR REHEARING AND APPENDIX FOR APPELLANTS

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PETITION FOR REHEARING

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

This Petition for Rehearing is not merely a suggestion that this Court reconsider that evidence relating to the date the Notice of Appeal and Assignments of Error in this case was filed, but this is a respectful and sincere request that the Supreme Court of Appeals of Virginia examine the entire record of the proceedings before the Trial Court and, then, reconsider the Affidavits filed on behalf of J. Fulton Ayres and Beulah Lowe Mason, Clerk and Deputy Clerk, respectively, of the Circuit Court of the County of Accomack, Virginia.

Such an examination will reveal at least four definite and specific errors committed by or on behalf of the Clerk of the Circuit Court of the County of Accomack, Virginia. These errors are briefly described as follows:

1. Rule 5:1, paragraph 3 (a) provides that all opinions of the Judge become part of the record, and Rule 5:1, paragraph 5 (a) requires the Clerk of the Trial Court to place such opinions in the record on appeal. Furthermore Rule 5:1, paragraph 6 (d) provides that any memorandum of the Judge giving reasons for the judgment is a part of the record that must be printed. However, a certain letter from Judge Jefferson F. Walters to counsel bearing date of December 27, 1963, (Appendix 1), which was the fourth part of the record designated to be printed according to appellant's Designation of the Parts of the Record to be Printed, is not contained in the record of this cause on appeal. The absence of this letter from the record on appeal is verified by the Clerk of this Court in his letter to counsel for appellant under date of February 17, 1965, (Appendix 2).

The letter from Judge Walter to counsel concerned the basis for Judge Walter's allowance of attorneys' fees as well as his reluctance to reserve the right of alimony. Therefore, this letter should have been part of the record on appeal pursuant to the rules of this Court, and in accordance with this Court's holdings in *Simmons* v. *Boyd,* 199 Va. 806, 102 S.E. 2d 292, 298, where Mr. Justice Snead stated:

> "The cross error assigned that the court erred in making a part of the record the two

> letters it addressed to counsel pertaining to setting aside the verdict is clearly without merit. They were properly included in the record under Rule 5:1§§ 3(a) and 5(d) of Rules of Court. . . ."

The Clerk's failure to place the aforementioned letter of Judge Walter to counsel in the record on appeal constitutes error.

2. The court reporter's transcript of this cause was not signed by counsel for all parties, and, therefore, in accordance with the requirements of Rule 5:1, paragraph 3 (f) of the Rules of Court, counsel for appellant gave opposing counsel reasonable written notice of the time and place of tendering said transcript, with a reasonable opportunity to examine the original before tender. Judge Walter certified that the transcript had been presented to him for certification with reasonable written notice having been given to opposing counsel of the time and place that the transcript would be tendered for certification. The reasonable written notice referred to by Judge Walter consists of a written notice which was mailed to opposing counsel, and that notice was a copy of the original which was on file with the Clerk of the Circuit Court of the County of Accomack, Virginia.

The notice states that the transcript will be tendered on March 30, 1964, and it bears the certification that a true copy of this notice was mailed to Wescott B. Northam on March 24, 1964. Obviously, since the transcript is not signed by counsel for all parties, Judge Walter could not have made his certification unless this notice was with the Court papers

when he made his certification. However, the date of filing of this notice, according to the Clerk's notation thereon, is April 13, 1964, which is fourteen days after Judge Walter made his certification. Acceptance of the notation on this notice as the actual date it was filed with the Clerk would, in effect, be an impeachment of Judge Walter's certification that attorneys for the complainant had reasonable notice in writing of the time and place at which the transcript would be tendered, since the transcript was tendered fourteen days prior to the filing of the notice. The Judge's certification is conclusive proof that the notice was filed prior to March 30, 1964. Thus, the Deputy Clerk was in error as to her notation of the date of filing.

It is interesting to note that both the notice of the time and place that the transcript would be tendered for certification and the Notice of Appeal and Assignments of Error were marked filed by the Deputy Clerk on April 13, 1964, and, also, that both of these pleadings bore the certification that a copy was mailed to opposing counsel on March 24, 1964. Certainly, it is not unreasonable and, in fact, more probable to believe that, since an error was obviously made in noting the date of filing of the notice of presenting the transcript, the same error was made in noting the date of filing of the Notice of Appeal and Assignments of Error.

Furthermore, in regard to the date of filing of the notice to present the transcript, the dispute is not between the Deputy Clerk and counsel for appellant, but it is between the Deputy Clerk and Judge Walter. The evidence is overwhelming against the Deputy Clerk in regard to the date upon which the notice was filed.

3. The Clerk certified that he received the transcript in this cause, duly certified by Judge Walter, on October 7, 1963. Obviously, this certificate is erroneous, since the Judge did not certify the transcript until April 6, 1964. This Court, on page 8 of its opinion, explains this error by referring to the time when the transcript was first filed with the Clerk, but such explanation does not justify the Clerk in making a certificate that he received the transcript duly certified by the Judge at a time when the transcript had not yet been certified. Whether the Clerk's error consisted of certifying that the transcript had been certified when, in fact, it had not yet been certified or whether the error was due to the fact that the Clerk made his certificate not on the date he actually received the certified transcript, but as of the date he thought he had received a certified transcript, the result is the same. The Clerk erred.

The explanation offered by this Court for the Clerk's erroneous certificate, although possibly exonerating him for such error, also offers an explanation of how the erroneous notation of the dates of filing on the notice to present the transcript and the Notice of Appeal and Assignments of Error came to appear thereon. Those notations, just as the Clerk's certifiicate stating the date the duly certified transcript was filed, were made not at the actual time of filing, but they were made later to reflect what was mistakenly thought to be the actual date of filing.

4. Rule 5:1, paragraph 7 of the Rules of Court requires the Clerk of the Trial Court to transmit the record to the Clerk of this Court at Richmond, Virginia, or Staunton, Virginia, or to any Justice of this

Court, as requested by counsel for appellant. Counsel for appellant requested that the Clerk of the Trial Court transmit the record to Chief Justice John W. Eggleston, and this request was acknowledged by the Clerk of the Trial Court in his letter to counsel for appellant under date of May 12, 1964 (Appendix 3). However, the record was not transmitted by the Clerk of the Trial Court to Chief Justice Eggleston as requested by counsel for the appellant, but instead, it was transmitted directly to this Court at Richmond, Virginia, (the Petition was presented to Mr. Justice I'Anson, rather than to Chief Justice Eggleston, at the request of Chief Justice Eggleston).

Whatever may have been the reason for the failure of the Clerk of the Trial Court to transmit the record in accordance with the request of counsel for appellant is immaterial. What is material is that the Clerk of the Trial Court violated the provisions of a rule of this Court and, in doing so, committed error.

A denial of this appellant's Petition for Rehearing would be, in effect, a judicial condonation of those errors committed by or on behalf of the Clerk of the Trial Court. Consideration should be made of the fact that the sole basis for the affidavits filed on behalf of the Clerk of the Trial Court and his Deputy Clerk was that to their knowledge, there had never been any error charged on the part of this Deputy Clerk in regard to having made an erroneous entry or notation of any kind on any paper during a period extending from August, 1913, until the present, excluding those periods when Mrs. Mason was not employed in the Clerk's office of the Circuit Court of the County of Accomack, Virginia. Certainly, these affidavits

must be diminished in value at least somewhat by the appearance of those errors contained in the record of this cause.

Although the affidavit filed herein by the Deputy Clerk states that she, to the best of her knowledge, has performed her work without error, it is possible for an error to be committed by the Clerk or Deputy Clerk of a Court of record. The case of *Condrey* v. *Childress,* 203 Va. 755, 127 S.E. 2d 150, discloses just such an error. The evidence in *Condrey* v. *Childress,* supra, indicated that although the counsel for appellant had filed his Designation of the Parts of the Record to be Printed within ample time and that attached to the Designation was a notice to the Clerk to transmit the record to the Clerk of this Court as provided by law, the Clerk did not transmit the record within four months following the day on which the judgment appealed from was entered. Thus, the failure to transmit the record within the four-month period required the appeal filed therein to be dismissed. The fact should be noted that the decision in *Condrey* v. *Childress,* supra, was rendered on August 31, 1962, and that in the very next legislature, that of 1964, Section 8 - 489 of the 1950 Code of Virginia was amended in order to eliminate such a hardship as that caused by the situation in *Condrey* v. *Childress,* supra.

That amendment consists of the following:

> "But, notwithstanding the foregoing limitations of time, no appeal, writ of error or supersedeas shall be refused or dismissed for failure to deliver the record within the required time if it shall appear from evidence

satisfactory to the Supreme Court of Appeals that the clerk of the court below failed to deliver to the clerk of the Supreme Court of Appeals the record on appeal within the required time after having been notified to do so in accordance with the provisions of the rules of court of the Supreme Court of Appeals."

It is not the contention of counsel for appellant that a mere mailing to the Clerk of the Court below will satisfy the requirements of Rule 5:1, paragraph 4, of the Rules of Court, but it is contended that a mailing to the Clerk accompanied by actual receipt by the Clerk as evidenced by the Notice of Appeal and Assignments of Error within the Court file is a complete compliance with Rule 5:1, paragraph 4. Whether or not counsel for appellant informed the Clerk of his failure to note the date of filing upon the Notice of Appeal and Assignments of Error should not create a conclusive presumption that the notation on this pleading of the date of filing is correct.

The error contained in the affidavit made by counsel for appellant is only partial, and it does not contaminate the entire affidavit. This error is limited to what counsel was doing when he examined the Court file in this cause. He stated that he examined the Court file, so that he might list the exhibits in the certificate to be signed by the Judge. Since the blank appearing in the second paragraph of the certificate contained no exhibits, but was marked through, counsel for appellant was erroneous as to this part of his affidavit, but how extensive is the error? The blank was marked through in pen, and since the certificate was prepared by counsel for appellant, it is obvious that

this crossing out was done after an examination was made of the record. Certainly, evidence of this error is not evidence that the entire affidavit is erroneous.

Whether or not the Notice of Appeal and Assignments of Error in this cause was filed on the date indicated by the Deputy Clerk's notation or at an earlier time as indicated by the affidavit of counsel for appellant is a question of fact that must be determined by the Supreme Court of Appeals of Virginia. In its previous opinion, this Court has held that the affidavit filed on behalf of counsel for appellant is not sufficient to impeach the notation of the Deputy Clerk. This Court has apparently relied on the affidavits filed on behalf of the Clerk and Deputy Clerk of the Court below as presenting conclusive proof of the error-free performance of the duties of the Clerk of the Circuit Court of the County of Accomack, Virginia, but the record of the proceedings before the Trial Court in this cause indicates that such duties have not been performed without error.

The only evidence of error committed on behalf of counsel for appellant occurred only after the appeal in this cause was granted, but the several errors committed by or on behalf of the Clerk of the Trial Court occurred during the pendency of the proceedings in this cause before that Court.

CONCLUSION

This Court, on page 2 of its opinion, has relied on that part of the opinion in *Leigh* v. *Commonwealth,* 192 Va. 583, 66 S.E. 2d 586, 588, wherein Chief Justice Hudgins stated:

". . . Ordinarily the date of filing noted by the clerk on papers filed in his office is conclusive."

However, it is respectfully submitted that the presence of the several errors on the part of the Clerk of the Court below would require this Court to be governed by that part of the holding in *Leigh* v. *Commonwealth,* supra, at 66 S.E. 2d 589, where Chief Justice Hudgins stated:

"Defendant, in order to obtain a review by this court, complied with every requirement prescribed by the rules of Court. He should not be denied a review simply because of an error made by a ministerial officer of the court. . . ."

Since this Court's opinion has been concerned solely with the Motion to Dismiss, it is respectfully requested that the portion of the Opening Brief hereinbefore filed on behalf of the appellant relating solely to the question of alimony, support, and attorneys' fees be made a part of this Petition for Rehearing, in the event that a rehearing is granted the appellant.

Respectfully submitted,
ELLOUISE BLOXOM MEARS,
Appellant

By MELVIN J. RADIN,
Of Counsel

FINE, FINE, LEGUM, SCHWAN & FINE
720 Law Building
Counsel for Appellant

APPENDIX 1

COMMONWEALTH OF VIRGINIA
THIRTY-FIRST JUDICIAL CIRCUIT

Jefferson F. Walter
Judge
Onley, Virginia

December 27, 1963.

Mr. Louis B. Fine,
Attorney at Law,
Law Building,
Granby and Plume Streets,
Norfolk 10, Virginia.

Dear Sir:

Re: *Mears* v. *Mears*

I have your letter of the 11th instant in further reference to the above matter.

In preference to pursuing the matter by correspondence, I deem it more appropriate to set the matter for further hearing on a day in the next term of the court. Accordingly, I am setting it for Wednesday, February 5, 1964, at 10 A.M. I hope this will suit both counsel.

I might suggest to counsel that my two courts have tried to follow the Minimum Fee Schedule adopted by the members of the Eastern Shore Bars, with the court's approval, without reference to the suggestion of the Virginia State Bar.

I also suggest to counsel for respondent to be

good enough to cite me some authority to support his contention that, in such a case as this one, an *a mensa* divorce should be entered in this matter in favor of respondent, and yet kept open against complainant awaiting such time as respondents may deem it proper and appropriate to come in then and ask for support.

Very truly yours,

/s/ JEFFERSON F. WALTER, *Judge*

CC: Mr. Wescott B. Northam,
Attorney for Complainant,
Accomac, Virginia.

APPENDIX 2

SUPREME COURT OF APPEALS
OF VIRGINIA

Richmond 23210

February 17, 1965

Melvin J. Radin, Esq.
Attorney at Law
Granby and Plume Streets
Norfolk, Virginia 23510

Re: *Ellouise Bloxom Mears* v. *Brooks T. Mears*

Record No. 6003

Dear Mr. Radin:

This will acknowledge receipt of your letter of February 16, 1965, with reference to a certain letter written by Judge Jefferson S. Walter to counsel under date of December 27, 1963.

We have rechecked the record filed here by the Clerk of the Circuit Court of Accomack County, and do not find the letter you refer to.

Sincerely yours,

/s/ H. G. TURUN, *Clerk*

HGT:ek

APPENDIX 3

COMMONWEALTH OF VIRGINIA

OFFICE OF

COUNTY CLERK AND CLERK OF THE CIRCUIT COURT

OF ACCOMACK COUNTY

Accomac, Virginia

May 12, 1964

Mr. Louis B. Fine, Attorney,
Law Building,
Granby and Plume Streets,
Norfolk, Virginia 23510

Re: *Mears* v. *Mears* (Divorce)

Dear Sir:

Today we have received from your office the defendant's designation of the parts of the record to be printed, with a request that the record by transmitted to the Honorable John W. Eggleston, Chief Justice of the Supreme Court of Appeals of Virginia.

It has been the policy of this office to collect the costs incurred by the clerk in making up the transcript before the record is transmitted or mailed to the Supreme Court of Appeals, the cost of same being $5.00, under section 8-468.1 of the Code. Will you kindly let us have check for said amount at this time.

Pursuant to Rule 5:1. The Record of Appeal, the record will remain in this office for twenty days unless

Mr. Wescott B. Northam, Attorney for the defendant, submits a request in writing that the same be transmitted earlier.

Yours very truly,

/s/ J. FULTON AYRES, *Clerk*

JFA-m