IN THE COURT OF APPEALS

THE ESTATE OF MADGE HILDERBRAND SHERLIN, Deceased, by MELVIN GREGG, Plaintiff-Appellee	BRADLEY CIRCUIT C.A. 03A01-9507-CV-00228
vs.	HON. JOHN B. HAGLER JUDGE
LARRY VERNON and WIFE, CHERYL VERNON, Defendant-Appellants	REVERSED AND REMANDED

JOE G. BAGWELL, Knoxville, for appellant.

J. DEWAYNE BUNCH, Cleveland, for appellee.

OPINION

McMurray, J.

In this action, the appellee brought suit to collect the balance of a promissory note executed by the appellants in favor of Mack Hilderbrand in the amount of $5,000.00. Apparently a payment in the amount of $1,000.00 was made to Mr. Hilderbrand during his lifetime. The appellants acknowledged signing and delivering the note to Mr. Hilderbrand. They insisted, however, that Mr. Hilderbrand forgave the interest and balance during his lifetime. Mr. Hilderbrand predeceased his wife, Madge Hilderbrand, and upon her death death the note was discovered in her safety deposit box.[1] The court refused to allow testimony regarding forgiveness of the debt based on T.C.A. § 24-1-203, commonly referred to as the Dead Man Statute. Judgment was entered against the appellants and this appeal resulted.

The appellants present the following issues for our consideration:

1. Did the court err in holding that the testimony concerning forgiveness of the debt was barred by the Dead Man Statute?

2. Did the court err in ruling that the Doctrine of Laches did not apply to the facts of this case?

3. Did the court err in holding that the Doctrine of estoppel did not apply to the facts in this case?

[1]After Mr. Hilderbrand's death Mrs. Hilderbrand remarried and became known as Mrs. Sherlin.

4. Could Mack Hilderbrand orally forgive payment of a debt evidenced by a writing without delivery or destruction of the writing?

We will first address the last issue. We are somewhat at a loss to understand why the appellant raises this issue on appeal. Insofar as we are able to determine from the court record and the statement of the evidence filed pursuant to Rule 24(c), Tennessee Rules of Appellate Procedure, the issue was never presented in the trial court and is raised for the first time on appeal. As a general rule, questions or issues not raised in the trial court will not be entertained on appeal. Lawrence v. Stanford, 655 S.W.2d 927 (Tenn. 1983); City of Lavergne v. Southern Silver, Inc., 872 S.W.2d 687 (Tenn. App. 1993). We, therefore, decline to address the issue. To do otherwise is to render an advisory opinion which we are not permitted to do under ordinary circumstances. Appellate courts will not render advisory opinions, Banks v. Jenkins, 449 S.W.2d 712 (Tenn. 1969), and will not decide theoretical issues based on contingencies that may or may not arise. United States Fidelity & Guaranty Co. v. Askew, 191 S.W.2d 533 (Tenn. 1946); American Nat'l Bank & Trust Co. v. Mander, 253 S.W.2d 994 (Tenn. App. 1952).

We will next turn our attention to the question presented in the appellant's first issue, i.e., the applicability of the Dead

Man Statute (T.C.A. § 24-1-203) under the circumstances of this case.

T.C.A. § 24-1-203 provides as follows:

> **24-1-203. Transactions with decedent or ward - Dead man's statute.** In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.

In this case, the statements sought to be admitted, i.e., the statements of Mr. Hilderbrand, do not fall within the purview of T.C.A. 24-1-203. Neither Mr. Hilderbrand's administrator nor his estate is a party to this action, therefore, he is not the "testator, intestate or ward" as contemplated in the statute. See Cothron v. Cothron, 110 S.W.2d 1054 (Tenn. App. 1937). Obviously, if the statements were the statements of Mrs. Sherlin, a different result would obtain. The statute [T.C.A. 24-1-203] cannot be extended to cases not embraced within its terms on the theory that they fall within the evil intended to be remedied. See Rielly v. English, 77 Tenn. 16 (1882) and Carman v. Huff, 227 S.W.2d 780 (Tenn. App. 1949).

The appellee argues vigorously that even if the statements are not proscribed by the Dead Man Statute, the statements are hearsay and are inadmissible.

Rule 801, Tennessee Rules of Evidence, provides as follows:

> **Rule 801. Definitions.** — The following definitions apply under this article:
>
> (a) Statement. - A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion.
>
> (b) Declarant. - A "declarant" is a person who makes a statement.
>
> (c) Hearsay. - "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 802 provides as follows:

> **Rule 802. Hearsay rule.** — Hearsay is not admissible except as provided by these rules or otherwise by law.

Obviously, by the definition of "hearsay" as stated above, coupled with Rule 802, the statements by Mr. Hilderbrand would fall within the definition of hearsay and would be rendered inadmissible unless the statements fall within one of the exceptions to the hearsay rule. Thus, we are compelled to examine the exceptions.

Rule 804 provides in pertinent part as follows:

> **Rule 804. Hearsay exceptions; declarant unavailable. —** (a) Definition of Unavailability. —"Unavailability of a witness" includes situations in which the declarant —
>
> * * * *
>
> (4) Is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity; or
>
> * * * *
>
> (b) Hearsay exceptions. —The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> * * * *
>
> (3) Statement Against Interest. —A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.
>
> * * * *

In this case, the conditions for an exception to the hearsay rule have been met. The declarant, Mr. Hilderbrand, is unavailable because of death and the proffered statement is clearly against the pecuniary interest of the declarant and is "such that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."

We must respectfully disagree with the argument advanced by the appellee that the hearsay rule prevents the introduction of the statements allegedly made by Mr. Hilderbrand during his lifetime relating to forgiveness of the debt sued upon.

We must next examine the record to determine if the exclusion of the statements attributed to Mr. Hilderbrand was harmless or reversible error. See Rule 36(b), Tennessee Rules of Appellate Procedure.

The statement of the evidence reflects that a tender of proof was made. The appellant, Larry Vernon, testified in substance that his wife, Cheryl Vernon, borrowed the sum of $5,000.00 from Mr. Hilderbrand and both signed the note; that Cheryl Vernon made a payment on the note of $1,000.00; and that when the payment was made, Mr. Hilderbrand told them that they did not have to pay him the balance of the money.

Appellant, Cheryl Vernon, testified that she borrowed the money initially and later delivered the promissory note to Mr. Hilderbrand, signed by both her and her husband. She further stated that when her husband told Mr. Hilderbrand that they were in financial trouble and were going to file for bankruptcy, Mr. Hilderbrand told them to forget about their debt to him.

We are of the opinion that it was reversible error to exclude this testimony since the error involved "a substantial right [which] more probably than not affected the judgment or would result in prejudice to the judicial process."

We reverse the judgment of the trial court on this issue and remand the cause to the trial court for a new trial. Since our disposition of this issue is dispositive of this appeal, we pretermit the remaining issues. Costs of this appeal are taxed to the appellee.

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Don T. McMurray

CONCUR:

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Houston M. Goddard, Presiding Judge

_____
Charles D. Susano, Jr., J.

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Plaintiff-Appellee	)	
vs.	)	HON. JOHN B. HAGLER
	)	JUDGE
LARRY VERNON and WIFE, CHERYL VERNON,	)	REVERSED AND REMANDED
Defendant-Appellants	)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Bradley County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

We reverse the judgment of the trial court and remand the case for a new trial. Costs of this appeal are taxed to the appellee.

PER CURIAM