

**SIXTH DISTRICT COURT OF APPEAL  
STATE OF FLORIDA**

---

Case No. 6D23-1351  
Lower Tribunal No. 2020-CA-011336-A

---

BROOKE ROYAL,

Appellant,

v.

KIM ROYAL and TAMMY DICKERSON,

Appellees.

---

Appeal from the Circuit Court for Orange County.  
A. James Craner, Judge.

October 6, 2023

PER CURIAM.

Brooke Royal (“Royal”), who was the plaintiff below, appeals the final order dismissing with prejudice her second amended complaint for damages that she filed against Appellees, Kim Royal and Tammy Dickerson.<sup>1</sup> The trial court concluded that, under *DeWitt v. Duce*, 408 So. 2d 216 (Fla. 1981), which it found to be “persuasive and controlling,” the dispute being asserted in the second amended

---

<sup>1</sup> This case was transferred from the Fifth District Court of Appeal to this Court on January 1, 2023.

complaint was more appropriately resolved in a separate probate court proceeding discussed below. Our review of this final order is de novo. *See Jordan v. Nienhuis*, 203 So. 3d 974, 976 (Fla. 5th DCA 2016) (“A trial court’s order granting a motion to dismiss with prejudice is reviewed de novo.”).

## BACKGROUND

According to the factual allegations in this operative complaint—which, for purposes of this appeal, we accept as true and draw all reasonable inferences in Royal’s favor<sup>2</sup>—on September 12, 2020, Royal’s grandmother, Sharon Thurston, passed away. At the time of her death, Thurston owned three separate accounts with the Navy Federal Credit Union in the aggregate sum of approximately \$666,500.00, with Royal being the sole named or designated “pay-on-death” beneficiary of all three accounts. Royal alleged that, resultingly, upon Thurston’s death, she became the owner of and had control of these three accounts.<sup>3</sup>

---

<sup>2</sup> *See Ray Coudriet Builders, Inc. v. R.K. Edwards, Inc.*, 157 So. 3d 484, 485 (Fla. 5th DCA 2015) (“[I]n reviewing a trial court’s order granting a motion to dismiss with prejudice, we must take all factual allegations [of the complaint] as true and draw all reasonable inferences in favor of the pleader.” (citing *Wallace v. Dean*, 3 So. 3d 1035, 1042–43 (Fla. 2009))).

<sup>3</sup> *See* § 655.82(3)(b), Fla. Stat. (2020) (providing that a bank account may be designated to be paid on death to a surviving beneficiary with ownership passing to the designated beneficiary on the death of the account holder, with the asset being excluded from the decedent’s probate estate)

Royal further alleged that within two weeks of Thurston's death, Appellees represented to her that Thurston intended for these funds to be distributed through her estate. In reliance upon these representations, Royal directed that the Navy Federal Credit Union issue separate checks, in equal amounts, to each Appellee individually. Royal averred that she later discovered that neither Thurston's will nor her trust, copies of which were attached as exhibits to Royal's second amended complaint, specifically devised or mentioned these accounts. According to these exhibits, neither Appellee was named in Thurston's will to be the personal representative of her estate, nor was either named to act as trustee of Thurston's trust. Royal alleged that Appellees knew that their representations were false when they made them and that she has since unsuccessfully demanded that Appellees return these funds to her.

Royal's second amended complaint asserted causes of action against Appellees for (1) fraudulent misrepresentation, (2) negligent misrepresentation, and (3) "money had and received" and sought judgment for money damages against Appellees, jointly and severally. Appellees moved to dismiss this second amended complaint for reasons unrelated to any alleged insufficiency in the allegations contained therein. As previously indicated, the trial court granted the motion based on *DeWitt*. We reverse.

## ANALYSIS

In *DeWitt*, the appellants had filed a petition to revoke the probating of the decedent's will but then voluntarily dismissed their petition just before trial, choosing to take under the will. 408 So. 2d at 217. Two and one-half years later, the appellants filed a tort action in federal court for wrongful interference with an inheritance and sought to have the decedent's residence conveyed to them and for "an accounting for residuary amounts." *Id.*

The district court dismissed the action based on section 733.103(2), Florida Statutes (1977). *Id.* at 218. This statute provided:

In any collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence; and of the fact that the will was unrevoked on the testator's death.

§ 733.103(2), Fla. Stat. (1977). The district court reasoned that this statute prevented the appellants from relitigating issues of undue influence and testamentary capacity, and thus prevented the appellants from presenting facts necessary to establish their claim of tortious interference with an expectancy. *DeWitt*, 408 So. 2d at 218.

On appeal, the Fifth Circuit Court of Appeals concluded that the case involved a question of Florida law that the Supreme Court of Florida should more appropriately decide; and it certified to the Court the following question:

Does Florida Law, statutory or otherwise, preclude plaintiffs from proving the essential elements of their claim for tortious interference with an inheritance where the allegedly wrongfully procured will has been probated in a Florida court and plaintiffs had notice of the probate proceeding and an opportunity to contest the validity of the will therein but chose not to do so?

*DeWitt v. Duce*, 642 F.2d 159, 160 (5th Cir. 1981).

The Florida Supreme Court answered the question in the affirmative, holding that section 733.103(2) barred the appellants from bringing a subsequent action in tort for wrongful interference with a testamentary expectancy when they had an adequate remedy in probate with a fair opportunity to pursue it. *DeWitt*, 408 So. 2d at 221.

We conclude that the trial court here, in dismissing Royal's second amended complaint with prejudice, has read the holding in *DeWitt* too broadly. Simply stated, unlike in *DeWitt*, Royal has made no claim for tortious interference with an inheritance, nor has she argued, asserted, or collaterally attacked the will or trust of her grandmother, Thurston, as having been wrongfully procured. Moreover, Royal alleged that these bank accounts were owned by her, outside of the estate, before later distributing the funds to Appellees, in their individual capacities, based on their materially false representations.

Accordingly, we reverse the final order of dismissal with prejudice and remand for further proceedings.

REVERSED and REMANDED.

TRAVER, C.J., and WHITE, J., and LAMBERT, B.D., Associate Judge, concur.

Scott A. Smothers and Mitchell L. Davis, of Smothers Law Firm, P.A., Apopka, for Appellant.

Lisa C. McCrystal and Margaret A. Wharton, of Wharton Law Group, P.A., Oviedo, for Appellees.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING  
AND DISPOSITION THEREOF IF TIMELY FILED