

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-20485
Summary Calendar

PHOENIX HOME LIFE MUTUAL INSURANCE CO.,

Plaintiff,

versus

HARVEY S. CLARK, ET AL.,

Defendants,

HARVEY S. CLARK, ETC.,

Defendant-Cross
Plaintiff-Appellant,

DONALD W. TAYLOR,

Defendant-Cross
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-2488)

(January 24, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM*:

Appellants appeal the district court's denial of their amended

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion should not be published.

motion for new trial. We affirm.

FACTS AND PROCEDURAL HISTORY

Phoenix Home Life Mutual Insurance Company ("Phoenix") filed a complaint in interpleader alleging adverse claims to the proceeds of a life insurance policy issued on the life of Frank Clark in the amount of \$62,920.00. The district court granted Phoenix leave to pay the policy proceeds to the registry of the court and dismissed Phoenix from the suit. The adverse claimants to the policy include Appellee Donald Taylor ("Taylor"), the designated beneficiary of the policy, and Appellants Harvey Clark ("Clark") and Lucy Hendrick-Snyder ("Snyder"), Frank Clark's brother and half-sister. The remaining defendant to the original complaint was dismissed out of default. Clark and Snyder alleged that Taylor exerted undue influence on Frank Clark to be named as beneficiary.

Taylor filed a motion for summary judgment and for sanctions contending that Clark and Snyder had no basis to support their allegation or contest his validity as the named beneficiary. The motion was supported by Taylor's affidavit attesting that he did not learn that he was the designated beneficiary until Frank Clark's death, that he had little influence on Frank Clark's actions through his services as his attorney in unrelated matters, and that he did not use this limited influence to coerce Frank Clark. Clark and Snyder failed to respond to Taylor's summary judgment motion. Despite Clark and Snyder's failure to file a response in opposition or to submit any competent summary judgment evidence, the district court considered Taylor's motion for summary

judgment in light of the entire case file. The court found nothing to controvert Taylor's summary judgment evidence, and granted the motion for lack of summary judgment evidence sufficient to raise a genuine issue of material fact. The court, however, denied sanctions.

The district court entered a final judgment in favor of Taylor. Clark and Snyder subsequently filed a motion for new trial and an amended motion for new trial. The motions alleged for the first time that the change in beneficiary in favor of Taylor was due to fraud and/or undue influence. The court denied both motions. Clark and Snyder timely appealed the district court's order denying their amended motion for new trial.

JURISDICTION AND STANDARD OF REVIEW

Clark and Snyder's appeal from the district court's denial of their amended motion for new trial compels this Court to determine whether the appeal is jurisdictionally defective under Federal Rule of Appellate Procedure 3(c). *Turnbull v. United States*, 929 F.2d 173, 176 (5th Cir. 1991). An order denying a motion for new trial is reviewable, but not appealable. An appeal should be taken from the final judgment. *Id.* (citing *Osterberger v. Relocation Realty Serv. Corp.*, 921 F.2d 72, 73 (5th Cir. 1991)).

Rule 3(c) requires that a notice of appeal "designate the judgment, order, or part thereof appealed from." See FED. R. APP. P. 3(c). Clark and Snyder's notice appealed from "an Order denying their Amended Motion For New Trial...." However, the notice failed to designate the judgment appealed from, *i.e.* the final judgment

granting Taylor's motion for summary judgment.

We find it clear that Clark and Snyder intended to appeal from the judgment, and in this situation this Circuit has treated an appeal from an order denying a motion for new trial as an appeal from the adverse judgment itself. *Osterberger*, 921 F.2d at 73. Therefore, because the final judgment granted Taylor summary judgment motion, our review is *de novo*. *Abbott v. Equity Group*, 2 F.3d 613, 618 (5th Cir. 1993), *cert. denied*, ___U.S.___, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994).

ANALYSIS

Clark and Snyder contend that the transfer of funds from client to attorney is *prima facie* fraudulent under Texas law. Specifically, they argue that insurance proceeds in excess of \$60,000.00 should not be considered a simple gift or token, especially in light of the fact that Frank Clark was seriously ill with AIDS, Taylor knew he had AIDS and the insurance benefits were much greater than the rest of Frank Clark's estate.

Clark and Snyder failed to file a response to Taylor's motion for summary judgment. Their sole pleading opposing the summary judgment motion asserted that they "dispute any rights of Donald Taylor to the insurance proceeds." Their argument on appeal, argued for the first time in a motion for new trial and an amended motion for new trial, was not raised until after the district court entered final judgment in favor of Taylor.

Clark and Snyder "cannot attack summary judgment on appeal by raising distinct issues not before the district court." *John v.*

Louisiana (Bd. of Trustees), 757 F.2d 698, 710 (5th Cir. 1985). Therefore, any new issues or evidence introduced after judgment may not be considered by this Court. See *Colony Creek, Ltd. v. Resolution Trust Corp.*, 941 F.2d 1323, 1326 (5th Cir. 1991).

Having failed to raise their issues in a response to Taylor's motion for summary judgment, Clark and Snyder's argument was not properly before the district court. However, the court, in considering Clark and Snyder's motion for new trial and amended motion for new trial, did not state its grounds for denying the motions. Therefore, we are unable to determine whether the district court denied the motions on the merits after considering the argument raised in opposition to the court's summary judgment order.

However, we find it unnecessary to address the question of whether the district court's consideration of Clark and Snyder's argument in opposition to summary judgment raised in their post-judgment motion for new trial and amended motion for new trial creates an "appealable" substantive issue. Even if we consider their argument on appeal, we find that it is without merit. Clark and Snyder have failed to identify any evidence in the record that supports their contention that Frank Clark's designation of Taylor as beneficiary of his life insurance proceeds was fraudulent, the result of undue influence, or an improper gift. AFFIRMED.