# STATE OF MICHIGAN

# COURT OF APPEALS

NANCY LALIBERTE,

Plaintiff/Counter-Defendant-Appellee,

v

JOHN J BRADBURY and LINDA K BRADBURY,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants,

and

DAVID J KRAMER,

Defendant,

and

MICHAEL F FRENCH and PHYLLIS M FRENCH,

Third-Party Defendants-Appellees.

UNPUBLISHED
July 15, 2014

No. 315975
Luce Circuit Court
LC No. 2011-005435-CH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendants appeal by right the trial court's rescission of a deed, following a bench trial, that ostensibly had transferred approximately 15 acres of land to defendants from plaintiff. By rescinding the deed, the court vested title in plaintiff, which allowed her to continue the sale of the parcel via land contract to third-party defendants. We vacate and remand for further proceedings.

## I. PERTINENT FACTS AND PROCEDURAL HISTORY

All of the property disputed in this matter was originally part of a 29-acre parcel purchased in 1973 by James E. Bradbury (Bradbury) and Ann A. Bradbury, who are the parents of both plaintiff Nancy LaLiberte and defendant John J. Bradbury (John). In 1998, the parents added plaintiff's name to the deed as a joint tenant. In 2002, the parents transferred their interest in an approximately five-acre parcel, "parcel 1850," to defendants and Bradbury by quitclaim deed. However, plaintiff retained her interest in the entire 29 acres at that time.

In 2005, plaintiff became aware that the parents wished to convey all interests in parcel 1850 to defendants when she "received a quit claim deed in the mail," which her father verified by telephone was intended to convey only parcel 1850. The deed consisted of two pages, the deed itself, which lacked any description of the property, and an attachment, which contained the property description. Plaintiff undisputedly agreed to sign over her interest in parcel 1850, and to that end she signed the deed, which was witnessed by Alvin S. Bates and Dawn Henderson-Wiltz, and mailed it to Jimmy Bress, a notary and relative of the parties. Notwithstanding the requirements of MCL 55.285(5) of the Michigan Notary Public Act, Bress was not present at the signing itself.

At issue is a *second* deed purporting to convey a 15-acre parcel, "parcel 1800." Plaintiff insists that she executed only one deed, i.e., that for parcel 1850; however, John contends that plaintiff had agreed to sign over her interest in parcel 1800 as well. Like the deed for parcel 1850, the deed for parcel 1800 consisted of two pages, the deed itself, which lacked any description of the property, and an attachment, which contained the property description. Bress testified at his deposition, and the parties agreed at trial, that he never personally witnessed plaintiff execute the deeds, but he nevertheless notarized her signatures on each of the deeds. Both deeds reflect a signature date and a notarization date of November 9, 2005. John testified that he received two deeds back from Bress. However, John did not record the deed for parcel 1800 until the spring of 2007, and John's title company apparently lost the deed to parcel 1850.

In the meantime, the parents died in early 2006. Plaintiff became the executor of their estate and trustee of their trust, and in that capacity paid the 2006 taxes on parcel 1800. She testified that as far as she knew, she became the sole owner of the remaining 24 acres (excluding the 5-acre parcel 1850 which had been transferred to defendants), including parcel 1800. As part of her trusteeship of the parents' trust after their death, and pursuant to her belief that she became owner of 24 of the 29 acres, plaintiff told "everyone" that, inter alia, she intended to sell the property. Plaintiff testified that on July 29, 2006, she received a letter from John in response, expressing interest in purchasing the property, but only for a five-year land contract rather than cash. The letter, along with an envelope bearing plaintiff's address and postmarked July 29, 2006, was introduced at trial. John denied ever having written that letter, and he contended that it was factually inaccurate as well. John further denied having any conversations with plaintiff about purchasing the property, or indeed any conversations with her at all that did not go through an attorney, after their parents' deaths. Plaintiff testified that she responded on August 15, 2006, indicating that she could not accept any type of contract, that the estate had numerous bills left to pay, and that she would want cash for the sale of the property. This letter was also introduced at trial.

John testified that he received 2007 and summer of 2008 tax bills for parcel 1800 after he recorded the deed for that parcel. Plaintiff testified that she noticed that she had not been given a tax bill for the property and consulted the township treasurer, who advised her "that there was a deed signed over to John and Linda." At some point, plaintiff persuaded tax assessor Tim Teed that plaintiff was the proper owner of parcel 1800, and Teed redirected the tax bills to plaintiff. John contended that his title search showed that he was the proper owner of parcel 1800. In 2011, matters came to a head when plaintiff sought to sell parcel 1800 to third-party defendants, who had been long-term renters of that property.

Defendants presented expert opinion testimony by way of deposition from Thomas P. Riley, a forensic document examiner. He was provided with a number of exemplars of plaintiff's signature and asked to evaluate whether the signatures ostensibly from plaintiff on the two deeds were, in fact, her signatures. He noted that one of the deeds was a copy, albeit a high-quality one.[1] He opined that it was "highly probable" that the signatures on the deeds were from plaintiff, but noted that there were "a couple of variations present in the questioned signatures that are not represented in the known signatures." He further cautioned that the known exemplars were from 2010 and 2011, whereas the questioned signatures were from 2005. Riley was not asked to, and did not, examine any other signatures.

## II. HEARSAY

Over defendants' objection, the trial court admitted testimony from Teed regarding a December 2005 telephone conversation between Teed and Bradbury. Teed was a building inspector for Luce County at the time, and he contacted Bradbury as a former owner of the 5-acre parcel. During that conversation, Bradbury allegedly stated that he wished for 15-acre parcel to go to his daughter, plaintiff; otherwise his wife and he would not have gone through the expense of splitting off the five acres comprising parcel 1850 for John and separating that on its own deed. Teed wrote a letter dated December 29, 2008, referring to that telephone conversation. The letter was admitted into evidence, as was Teed's testimony describing the conversation.

The decision whether to admit evidence is within the discretion of the trial court and is subject to review on appeal for abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). An abuse of discretion exists if the results are outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). Preliminary legal determinations of admissibility are reviewed de novo. See *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). "A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law." *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004) (quotation marks and citation omitted). However, reversal is only required if the error in the admission of evidence was prejudicial in light of the nature of the error and its effect on the weight of the properly admitted evidence. See *People v Snyder* (*After Remand*), 301 Mich App 99, 111; 835 NW2d 608 (2013); *People v Phillips*, 469 Mich 390, 397; 666 NW2d 657 (2003).

[1] The copied deed was the deed for parcel 1850, the parcel not in dispute.

"Hearsay is generally prohibited because credibility depends not on the sworn and cross-examined witness, but on the unsworn and un-cross-examined, absent narrator." *Rice v Jackson*, 1 Mich App 105, 110; 134 NW2d 366 (1965), citing 2 Jones on Evidence [5th ed], § 268, p 514. However, numerous exceptions to the general rule exist. The statement was admitted pursuant to MRE 804(b)(7), a "catch-all" provision that provides:

> (7) *Other Exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

A hearsay statement under MRE 804(b)(7) must show a particularized guarantee of trustworthiness. *Katt*, 468 Mich at 289-293; see also *People v Welch*, 226 Mich App 461, 466-467; 574 NW2d 682 (1997). When making this determination, the totality of the circumstances should be considered. *Katt*, 468 Mich at 290-291; *Welch*, 226 Mich App at 467-468. Certain factors are used to establish the indicia of reliability for purposes of the catch-all exception:

> (1) the spontaneity of the statements;
>
> (2) the consistency of the statements;
>
> (3) lack of motive to fabricate or lack of bias;
>
> (4) the reason the declarant cannot testify;
>
> (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence;
>
> (6) personal knowledge of the declarant about the matter on which he spoke;
>
> (7) to whom the statements were made, e.g., a police officer who was likely to investigate further; and
>
> (8) the time frame within which the statements were made. The court may not consider whether evidence produced at trial corroborates the statement. [*People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000)].

Without a showing of trustworthiness, a statement will be deemed presumptively unreliable and therefore inadmissible. *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000).

Defendants initially argue that plaintiff failed to give proper notice of the statement as required by MRE 804(b)(7). The trial court concluded that that may have technically been true, but that it was not an actual surprise to defendants. The trial court does not appear to have committed clear error in finding it not to have been a surprise. The original complaint filed on July 6, 2011, referenced Teed's letter and attached it as exhibit. Teed's name was referenced in defendants' own affirmative defenses. We do not believe that it was outside the range of principled outcomes for the trial court to disregard the technical notice requirements on the basis of a lack of actual surprise. *Barnett*, 478 Mich at 158.

The propriety of the trial court's admission of the statement turns on its probative value and trustworthiness. The fact that the statement was made over the telephone, rather than in person, undermines the statement's trustworthiness, absent independent corroboration of the identity of the person with whom the witness is speaking. See *People v Thompson*, 231 Mich 256, 258-259; 203 NW 863 (1925); see also *South Dakota v Engesser*, 661 NW2d 739, 752 (SD, 2003). Defendants accurately note that Teed was not an entirely disinterested witness, having taken it upon himself to unilaterally divert tax bills and attempt to void the deed, despite admittedly not having any serious expertise at analyzing legal documents. However, Teed and Bradbury were friends, suggesting that Teed would have been interested in accurately honoring the latter's wishes. The letter in which Teed referred to the telephone conversation was dated before the instant litigation, somewhat supporting its trustworthiness. It also does not appear that the statement was made by Bradbury is response to undue influence or leading questions: he volunteered the information that he and his wife had "a vested interest in that home at that point in time." The statement was made in December of 2005, in close proximity to the time of the execution of the deeds in question, and there can be little doubt that Bradbury had personal awareness of the subject. Analysis of all of these factors from *Lee*, 243 Mich App at 178, indicates that more than likely, the statement had the requisite trustworthiness.

Defendants assert that the statement was improperly "not just ascribed to the elder Mr. Bradbury but to the elder Mrs. Bradbury as well." However, there is no evidence that the trial court treated Bradbury's alleged statement as actually attributed to the parties' mother. Indeed, the trial court's statement that it would "give it the weight that is necessary." The complete lack of any subsequent mention of the statement suggests that the trial court did not consider it to be particularly weighty. Ultimately, we conclude that the trial court's decision to admit the statement was not legally impermissible and was not unreasonable. See *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 729; 761 NW2d 454 (2008) (a trial court's decision on a close evidentiary question is ordinarily not an abuse of discretion). We decline to reverse that decision.

## III. RESCISSION OF THE DEED

Defendants further argue that the trial court erred in ignoring the presumption of legitimacy of the disputed deed and that plaintiff failed to meet her high burden of proving entitlement to rescission of the deed. Because the trial court did not make adequate factual findings and apply those findings to applicable law, we vacate and remand for the articulation of detailed findings of fact and conclusions of law.

The question raised on appeal is a mixed question of law, which is reviewed de novo, *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013), and fact, which is reviewed for clear error. See *Grievance Administrator v Lopatin*, 462 Mich 235, 247, n 12; 612 NW2d 120 (2000). In reviewing equitable actions, this Court reviews de novo the decision itself and reviews for clear error the findings of fact in support of the equitable decision. *Attorney General v Lake States Wood Preserving, Inc.*, 199 Mich App 149, 155; 501 NW2d 213 (1993); *Badon v General Motors Corp.*, 188 Mich App 430, 438; 470 NW2d 436 (1991). A trial court's findings are considered clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

A deed may be rescinded and the conveyance set aside on the grounds of fraud, mistake of fact, coercion, or undue influence. See *Mannausa v Mannausa*, 370 Mich 180, 184-185; 121 NW2d 423 (1963); *Bornegesser v Winfree*, 329 Mich 528, 533-534; 46 NW2d 366 (1951). The party seeking to rescind or reform a written instrument on the grounds of fraud or mistake must prove such by clear and convincing evidence. See *Miles v Shreve*, 179 Mich 671, 680; 146 NW 374 (1914).

Clear and convincing evidence is defined as evidence that

> "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995), quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987).

Therefore, in order to persuade the factfinder that rescission of the deed was warranted, plaintiff needed to provide "clear and convincing" evidence overcoming the presumption that the deed accurately reflects the parties' intent to convey the disputed parcel to defendants. *Miles*, 179 Mich at 680.

The trial court observed that defendants had "assert[ed] that the matter is a classic he-said/she-said' scenario," and the trial court then proceeded to treat it as such. The trial court did not clearly err in finding that to be the posture of the case. In the simplest sense, the two parties simply disagree about the validity of a document. The trial court clearly found plaintiff's testimony to be the more credible, crediting her assertion "that she never intended to convey the second parcel," and characterizing defendants' position as "disingenuous," "duplicitous," and a "scenario [that] fails to pass any muster." Credibility determination is inherently a function of trial courts, not appellate courts, and this Court may not interfere with a lower court's evaluation of witness credibility without excellent reason to do so. See *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

However, unlike a *truly* "he-said/she-said" scenario, a considerable amount of evidence beyond the parties' own testimonies exists. The trial court addressed some, but not all, of the evidence, and failed to apply its factual findings to applicable law.

Ultimately, the trial court appears to have concluded that John did, in fact, write the disputed 2006 letter to plaintiff, *after* the date of the disputed deed, purportedly seeking to purchase parcel 1800, thereby implicitly acknowledging that defendants did not own that property at that time. The trial court rejected defendants' denials of authorship of the letter, holding, in relevant part:

> This claim, by [defendants], is made despite the envelope bearing his return address and the letter's signature remarkable in its similarity to others of record of [defendants]. This position of [defendants] requires the Court to believe that someone else, whomever, presumably the Plaintiff, created the letter and mailed it to herself in order to bolster her position in this litigation. This Court has been asked to swallow a fair amount of tales and explanations over the years, but this scenario fails to pass any muster, and is remarkably disingenuous of [defendants] to believe that this Court or any other would accept such a duplicitous argument.
>
> * * *
>
> Further, the Plaintiff had advised [defendants] in a letter of record, upon receipt of his purported letter, that she did not want to sell the property to [defendants] on a land contract in 2006. There is also testimony of record that had the Plaintiff sold the disputed parcel to [defendants], that the remaining holdings of the Plaintiff would be landlocked if the sale were affected [sic]. This fact was contained in the purported letter to the Plaintiff further debunking any doubt that the letter in question was not authored by [defendants], as who else would logically know of the intricacies associated with the property!

The trial court further noted, and apparently found somewhat significant, the undisputed fact that neither of the deeds bore on its face an actual description of the property, but rather "the legal description [was] attached as an exhibit in both instances." The trial court also found that plaintiff paid the majority of the taxes for the 15-acre parcel, and in 2010 sold it in good faith to a long-term leaseholder of the property. The trial court remarked on defendants' two-year delay in recording the deed for the 15-acre parcel, but did not expressly draw any conclusions from the delay. The trial court briefly mentioned that the signature on the letter matches other exemplars of John's signatures.

Although not addressed by the trial court, the record reflects that Post Office stamp cancellation on the envelope associated with the letter is dated July 29, 2006, long before the commencement of the instant litigation. The trial court also did not address, however, the fact that the postmark was from Wisconsin. Nor did the trial court address the hearsay evidence discussed above; as discussed, however, the trial court did not err in admitting it. The trial court

also did not address defendants' expert evidence opining that the signature purporting to be plaintiff's on the deed to the 15-acre parcel was very likely genuine.[2]

The trial court appeared to place some significance on the purported representation in the 2006 letter that plaintiff's remaining landholdings would be "landlocked" if she effected a sale of parcel 1850 to defendants. Our review of the record indicates that the letter actually states that the 15-acre parcel would be landlocked unless plaintiff also were to sell her remaining 9-acre parcel, which defendant contended is an inaccurate statement. In fact, the plat map of the property, admitted at trial, unambiguously shows that defendant is correct; *none* of the involved parcels owned by any of the parties are landlocked, nor would they be in any combination with each other. We express no opinion as to the significance of that fact, but the trial court should consider it on remand.

Most significantly, while addressing the facts in the manner discussed above, the trial court did not make adequate factual findings and apply those findings to applicable law. Instead, the trial court cited generally to various equitable principles, identified four "most common grounds" for granting rescission, found that two of them ("factors (1) and (4)") were "at play," referenced the maxims of "clean hands" and "return[ing] to the status quo," but never applied the facts to the law.[3] In finding "factors (1) and (4)" to be "at play," for example, the trial court suggested that there may have been "fraud, misrepresentation, duress, undue influence or unconscionability," or that a party may have "lacked capacity to contract."[4] However, the trial court did not make any such findings.

On appeal, plaintiff acknowledges that the trial court "did not specifically state that a forgery occurred in this case," but maintains that the trial court "clearly believed there was misconduct involved."[5] Defendants maintain that the trial court "never definitively held that

---

[2] We further note that plaintiff's complaint attached an affidavit in which Bates and Wiltz stated that they only signed one deed, which deed was for the five-acre parcel. However, neither of these witnesses testified at trial, and the affidavit apparently was not admitted as a trial exhibit.

[3] The trial court cited *Schimke v Scott*, 361 Mich 654; 106 NW2d 142 (1960), as support for these four "most common grounds" for granting rescission. In fact, however, the trial court seemed to derive these grounds from a law review article to which it also cited. Kennedy, *Equitable Remedies and Principled Discretion: the Michigan Experience*, 74 U Det Mercy L R 609 (1997).

[4] The other two referenced grounds for rescission, which the trial court did not characterize as "at play," are "contracts entered into because of a mutual mistake of fact," and "contracts where one party has failed to perform." Kennedy, *Equitable Remedies and Principled Discretion: the Michigan Experience*, 74 U Det Mercy L R 609 (1997).

[5] Plaintiff further contends on appeal that a "mutual mistake of fact" supported rescission, and that the trial court "could have relied on mutual mistake to rescind the 1800 deed." Plaintiffs further suggest that rescission would have been appropriate based on "unilateral mistake." The trial court made no such findings, however; to the contrary, it did not even identify such factors as being "at play."

there was fraud," yet appear to concede that the trial court "stated the reasons it was granted [sic] rescission are: that the deed was obtained through misconduct such as fraud, misrepresentation, duress, undue influence, or unconscionability and that the contract was entered into by someone."

The problem is that the trial court never in fact did so, and never explained what the misconduct (if any) was, or how its factual findings supported its conclusions. To the contrary, the trial court expressly declined to do so, instead stating that it "could expand on its thoughts as to what occurred here, but will leave the parties to their own beliefs and conscience." Without the trial court first making adequate factual findings and applying those findings to applicable law, the record on appeal is inadequate for us to review.

## IV. CONCLUSION

Rescission of a deed is an extraordinary remedy. It demands such evidence that should leave the finder of fact with a strong "conviction without hesitancy, of the truth of the precise facts in issue." *In re Martin*, 450 Mich at 227. The record contains considerable evidence in support of the trial court's decision, and we are respectful of the deference we owe to the trial court in its determinations of credibility. We accordingly decline to reverse the trial court, and instead, for the reasons indicated, vacate the trial court's ruling and remand for the articulation of detailed findings of fact and conclusions of law. We do not retain jurisdiction. The parties shall bear their own costs on appeal. MCR 7.219(A).

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra