

FILED

APR 12 2012

COA No. 30271-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EVELYN RUTH ZEHNER, a widow,

Respondent,

v.

EVELYN MARIE ZEHNER, aka EVELYN MARIE
ZEHNER-SMITH, aka EVELYN MARIE SMITH,
individually,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignments of Error

A. The court erred by granting summary judgment reforming the March 26, 1971 quit claim deed to add all of Evelyn Ruth Zehner's children as grantees rather than just Evelyn Marie Smith, the sole original grantee.

B. The court erred by making finding of fact 12:

The well placed on the property by Marie Smith would ordinarily be deemed an improvement on the property; however, testimony was that the Plaintiff, Evelyn Zehner, did not know that the improvement was being constructed, nor was it necessary. (CP 259).

C. The court erred by making finding of fact 13:

The original well on the property was adequate and available throughout the year. (CP 259).

D. The court erred by making finding of fact 15:

There was no evidence about the well's serviceability. It could not be determined if the well was working and provided the type and quality of water needed to service that property. Based upon the lack of evidence, the court is not able to determine that the well was a reasonable and necessary expense to care for the property. (CP 259).

E. The court erred by making finding of fact 18:

The clean-up costs of the materials hauled in by the Defendant could be up to \$20,000 based upon

the testimony of Defendant's witness Mr. Atchley.
(CP 259).

F. The court erred by concluding it could not determine if the well placed on the subject property by Ms. Smith was a reasonable and necessary expense and was therefore not reimbursable.

G. The court erred by entering judgment for Ms. Smith for only \$1,113.27, the 2010 and 2011 tax payments, when the costs of clean-up should not have been offset against the expenses of caring for the property.

Issues Pertaining to Assignments of Error

1. Did the court err by granting summary judgment reforming the quit claim deed when genuine issues of material fact existed and Ms. Zehner was not entitled to judgment as a matter of law? (Assignment of Error A).

2. Did the court err by making findings of fact 12, 13, 15, and 18 when they were not supported by substantial evidence? (Assignments of Error B, C, D, and E).

3. Did the court err by concluding it could not determine if the well placed on the subject property by Ms. Smith was a

reasonable and necessary expense and was therefore not reimbursable? (Assignment of Error F).

4. Did the court err by entering judgment for Ms. Smith for only \$1,113.27, the 2010 and 2011 tax payments, when the cost of clean-up should not have been offset against the expenses of caring for the property? (Assignment of Error G).

III. STATEMENT OF THE CASE

On July 26, 2010, Evelyn Ruth Zehner filed a petition for reformation of quit claim deed or in the alternative for nullification of quit claim deed against her oldest daughter, Evelyn Marie Smith. (CP 1). Ms. Zehner had lived at 22115 E. Blanchard Rd., Newport, Washington, in the Mount Spokane area, since 1944. (CP 4; RP 57). Of her five daughters, Ms. Smith was the oldest. (RP 74).

On March 26, 1971, Ms. Zehner quit claimed the property to Ms. Smith, the sole grantee. (CP 8). In her petition, however, Ms. Zehner alleged her "intent was to have the defendant, SMITH, look after the property and in the event of the plaintiff's death divide the property referenced in the Quit Claim Deed equally between the plaintiff's five (5) daughters and defendant's siblings." (CP 5). She thus sought reformation of the deed to "effectuate the true intent of the parties at the time of the Deed's attempted creation by adding

all five (5) of the plaintiff, EVELYN RUTH ZEHNER'S, children to the deed . . ." (CP 5).

Ms. Zehner subsequently sought summary judgment seeking reformation of the quit claim deed. (CP 56). She filed a declaration in support of the motion. (CP 71-74). It provides in pertinent part:

In March of 1971, I had several events going on in my life which were extremely worrisome which caused me to execute a quitclaim deed to my daughter, Evelyn Marie Smith. At that time I was divorcing my second husband from a very short term marriage. The marriage was extremely bad as he was a drug user and I was concerned what this man may do. Additionally, I had to undergo major surgery which caused me great concern.

I thought I had no choice but to put my property into my eldest's [sic] daughter's name, in order to protect it. So, I had Evelyn Marie promise me that she would keep the property for her and her sisters. I trusted her completely and never thought she would claim the whole property for herself.

...

I talked to Evelyn Marie and told her that I was preparing a Quit Claim Deed so that she could protect the property for her sisters if something happened to me. Evelyn Marie was my only child that was of legal age and that is why the deed was in her name. Had my other children been of legal age at the time, I would have included them as well. (CP 72-73)

In response, Ms. Smith offered her declaration:

On March 26, 1971, my mother, Evelyn Ruth Zehner, conveyed to me a quit claim deed for the property located 22115 E. Blanchard Road, Newport, WA. The quit claim deed was a gift to me.

At the time of the conveyance, my mother did not mention to me that she or my sisters would have any rights in the property. Until recently, neither she nor my sisters asserted an interest in the property.

As owner of the property, I have paid taxes and insurance on the property as well as made improvements and repairs as necessary. I have also paid some living expenses for my mother who lives on the property. (CP 114).

The court granted summary judgment to Ms. Zehner:

Based upon the above, the court **ORDERS AND DECREES** Plaintiff's summary judgment motion is hereby **granted**.

The court further **ORDERS** that the March 26, 1971 Quit Claim Deed be revised to add all of Evelyn Ruth Zehner's children as grantees to the Quit Claim Deed, which specifically will include Evelyn Marie Smith, Villa Pear Lenz, Terry Arlene Zehner, Lila Bunnette Clark-Antliff, and Velma May Cox.

The court further **ORDERS** that Evelyn Ruth Zehner shall retain a life interest in the property.

The court reserves for further proceedings the issue of defendant's right to reimbursement of expenses. (CP 268).

The case proceeded to trial on Ms. Smith's counterclaim for reimbursement. Based on constructive trust, the court allowed reimbursement for (1) property taxes paid by Ms. Smith in the sum of \$6,867.81, (2) insurance payments of \$1245. (CP 258-59). Expenses of \$9,298.80 for drilling a second well were disallowed. (CP 259). The court also found the clean-up costs of materials hauled in by Ms. Smith could be up to \$20,000 based on testimony from Ms. Zehner's witness, Mr. Atchley. (CP 259). In calculating the judgment in Ms. Smith's favor for \$1,113.27, the court stated in its oral decision:

The expenses in maintaining and responsibly caring for the property are totally offset by the expenses in the clean-up of the garbage that has been deposited on the property.

In addition to the total amount of taxes paid, \$6,867.81, Defendant Ms. Marie Smith should be given credit for her payment on the 2011 real estate tax of \$567.43 and the 2010 taxes of \$545.84.

...

Further, Marie is entitled to an additional \$1,113.27 which constitutes the 2010 and 2011 tax payments. (CP 248).

Ms. Smith appealed. (CP 265).

IV. ARGUMENT

A. The court erred by granting summary judgment reforming the March 26, 1971 quit claim deed to add all of Evelyn Ruth Zehner's children as grantees rather than just Evelyn Marie Smith, the sole original grantee.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007). When determining whether any genuine issue of material fact exists, the court construes all facts and inferences in favor of the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The appellate court engages in the same inquiry as the trial court and review is de novo. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

Here, the court included in its findings, conclusions, and order on the reimbursement trial a "clarification" of its ruling on summary judgment:

By way of clarification of the court's ruling on Plaintiff's summary judgment, the Court found the original grantor in this case is the mother Evelyn Zehner. She was able to testify in her Declarations and again reinforced at trial that she had directed Marie Smith to add the other sisters' names to the property.

Marie had refused and the matter appeared to deteriorate within the family circle to the extent that Marie Smith sent written correspondence to her mother directing her to move out of the property and threatening litigation. It is clear that the joint intent of the quit claim deed was to protect the property. The Defendant argued that it was a unilateral mistake in that the Defendant intended protection for just the mother and the Plaintiff intended protection for the entire family. The Court found this argument to be not persuasive as to a mutual mistake since neither version intended outright transfer to the defendant alone or recognized a life estate to the Plaintiff.

The evidence supported the intent to create a life estate to the mother with equal title to be shared by all five of the children. (CP 256).

Although superfluous and improper, this "clarification" is telling in that it shows the court weighed credibility on conflicting evidence and made fact findings. See *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991). The court cannot resolve factual questions on summary judgment as that determination must be made at trial. *Jones v. State*, 170 Wn.2d 338, 354, 242 P.3d

825 (2010). On this ground alone, the court erred by granting summary judgment.

Indeed, to justify the granting of reformation on the ground of mistake, the mistake must have been mutual or common to the parties to the transaction, as a unilateral mistake cannot support reformation. *Keierleber v. Botting*, 77 Wn.2d 711, 715, 466 P.2d 141 (1970). Ms. Zehner has the burden:

The party seeking reformation has the burden of proving the mutual mistake and must show clearly that the parties to the transaction have an identical intention as to the terms to be embodied in the deed or instrument and that the deed or instrument is materially at variance with that identical intention. When this is proven, a writing may be reformed to truly express the original intention of the parties to the transaction. 77 Wn.2d at 715-16.

An exception to the mutual mistake requirement allows reformation for a unilateral mistake only when a party to a contract shows the other party engaged in inequitable conduct, *i.e.*, knowingly concealing material facts from the other when that party has a duty to disclose that knowledge. *Oliver v. Flow Int'l Corp.*, 137 Wn. App. 655, 664, 155 P.3d 140 (2006). But the exception is inapplicable as the court made no finding that Ms. Smith engaged in inequitable conduct. (*Id.*). Furthermore, Ms. Zehner did not allege unilateral mistake in any event.

Here, Ms. Zehner declared she talked to Ms. Smith and told her she was preparing the quit claim deed so her oldest daughter could protect the property for her sisters if something happened to mother. (CP 72). On the other hand, Ms. Smith stated the quit claim deed was a gift to her. (CP 114). And, at the time of conveyance, Ms. Zehner did not mention to her that she or her other daughters would have any rights in the property. (*Id.*). This conflicting declaration testimony clearly shows a genuine issue of material fact as to whether the parties had an identical intention as required for reformation. *Kieberleber*, 77 Wn.2d at 215-16.

The court erred by weighing and deciding credibility on a motion for summary judgment that can be granted only if there are no genuine issues of material fact. *Brogan & Anensen, LLC v. Lamphiear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009). Accordingly, the order granting summary judgment must be reversed and the case remanded for trial. *Id.*

B. The court erred by making findings of fact 12, 13, 15, and 18 as they were unsupported by substantial evidence.

Findings of fact must be supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). To conclude substantial evidence supports

factual findings, there must be a sufficient quantity of evidence in the record to persuade a reasonable person the declared premise is true. *Wenatchee Sportsmen's Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Findings 12, 13, and 15 relate to the well drilled on the property by Ms. Smith. (CP 259). Summarized, they find respectively that Ms. Zehner was unaware the well was being constructed; the original well was adequate and available throughout the year; and there was no evidence of the well's serviceability. (*Id.*). Finding 18 concerns the \$20,000 cost for cleaning up the materials hauled in by Ms. Smith. (*Id.*).

Contrary to finding 12, Ms. Zehner testified she was aware of the second well being dug. (RP 64). The evidence also showed the well was 20 feet or less and went dry in hot weather. (RP 89). Drinking water was a question as there was no public water. (RP 63, 89). Ms. Smith had talked to her mother about the need for an additional well, but Ms. Zehner, as always, said she did not need anything. (RP 90). Minden Drilling came out to the property, gave an estimate, and talked to them about it. (RP 91). The well was drilled by Minden Drilling at the cost of \$9,298.80 and paid by Ms. Smith. (RP 90-91). The final bill was \$2000 higher than the

estimate because there was not enough water per minute. (RP 91). But Ms. Smith did not have the money to put the well into service. (RP 91). As for clean-up costs, Mr. Atchley came up with no fixed figure and only testified it could cost up to \$20,000. (RP 118-122).

The existence of facts cannot rest on guess, speculation, or conjecture. *Home Ins. Co. v. Northern Pac. R. Co.*, 18 Wn.2d 798, 802, 140 P.2d 507 (1943). In light of this record, however, the court did just that in erroneously making findings of fact 12, 13, 15, and 18. Substantial evidence did not support those findings because there was an insufficient quantity of evidence to persuade a reasonable person that the declared premise in each finding was true. The court erred.

C. Since findings of fact 12, 13, 15, and 18 were unsupported by substantial evidence, the court's determination that the second well was not a reasonable and necessary expense and the clean-up costs offset any expenses of caring for the property were in turn unsupported by those erroneous findings.

Although labeled a finding of fact, the court's determination the well was not a reasonable and necessary expense to care for the property is actually a conclusion of law. A conclusion

erroneously denominated a finding of fact will be treated for what it is and subject to de novo review. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002).

The court made a specific finding that “[t]he well placed on the property by Marie Smith would ordinarily be deemed an improvement on the property . . .” (CP 259). The court then relied on findings 12, 13, and 15 to rebut its own presumption, which would have made the well expense reimbursable. But since those findings were unsupported by substantial evidence, the conclusion of law that the well was not a reasonable and necessary expense did not in turn flow from the facts. *Thorndike*, 54 Wn.2d at 575. The court thus erred by concluding the expense of the well was not reimbursable. Ms. Smith should be awarded \$9,298.80 for the well costs.

By the same token, there is no basis for offsetting the amount of reimbursable expenses against clean-up costs when those costs were not established with reasonable certainty and exactness. *Cf. Cal. E. Airways, Inc. v. Alaska Airlines, Inc.*, 38 Wn.2d 378, 380, 229 P.2d 540 (1951). The evidence does not support an offset. The vague testimony of Mr. Atchley regarding the real cost of clean-up offered nothing to the court but an

invitation to guess, speculate, or resort to conjecture in determining that expense. Since finding 18 is erroneous, offsetting all reimbursable expenses but \$1,113.27 against the unsupported cost of clean-up is improper as well. *Thorndike*, 54 Wn.2d at 575. The court erred by doing so.

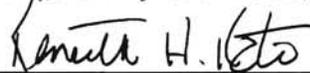
In addition to the \$9,298.80 for well costs, Ms. Smith should be awarded judgment for \$6,867.81 for reimbursable tax payments and \$1,245 for reimbursable fire insurance payments. Rather than \$1,113.27, Ms. Smith's judgment should be for \$17,411.61.

V. CONCLUSION

Based on the foregoing facts and authorities, Ms. Smith respectfully urges this Court to (1) reverse the summary judgment order reforming the quit claim deed and remand for trial, or (2) reverse the judgment for reimbursement of \$1,113.27 and direct the trial court to enter judgment against Ms. Zehner for \$17,411.61.

DATED this 12th day of April, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on April 12, 2012, I served by first class mail, postage prepaid, a true and correct copy of the brief of appellant on J. Gregory Lockwood, Attorney at Law, 522 W. Riverside, Ste 420, Spokane, WA 99201.

