NO. 12-15-00250-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

SUMMER KIDD COLBY, APPELLANT	***§***	***APPEAL FROM THE 114TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
PAUL GEFREH, TRUSTEE IN BANKRUPTCY FOR VICKIE MILHOLLAND, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Summer Kidd Colby appeals from a take nothing judgment rendered in favor of Paul Gefreh, trustee in bankruptcy for Vickie Milholland. Colby raises four issues. We affirm.

BACKGROUND

On June 27, 2011, Milholland, Colby's mother, recorded a gift warranty deed in which Colby conveyed a tract of Smith County property to Milholland. Colby and Milholland disagreed as to the deed's validity. According to Milholland, Colby voluntarily conveyed the property to her because she recognized that it belonged to Milholland. According to Colby, Milholland obtained Colby's signature on the deed by deceit. Specifically, Colby contended that Milholland prepared a contract in which Colby agreed to pay Milholland $9,145 in exchange for Milholland's vacating Colby's home in Colorado. Colby contended that she signed this contract, not the deed, and that Milholland took Colby's signature page from the contract and affixed it to the deed.

Colby sued Milholland, and alleged that Milholland obtained the Smith County property through fraudulent behavior. Milholland denied Colby's allegation and asserted a counterclaim. Milholland subsequently filed a suggestion of bankruptcy. Eventually, Gefreh intervened in the

action, the bankruptcy court lifted the stay for this litigation, and the matter proceeded to a bench trial. The trial court rendered judgment in favor of Milholland.[1] As for Colby's statutory fraud claim, the trial court explained its ruling as follows:

> With regard to the causes of action set forth in the fourth amended verified complaint filed by Ms. Colby, formerly known as Ms. Kidd, the fraud in real estate and stock transactions cause of action set forth in the first claim for relief, the Court finds that Ms. Kidd or Colby has failed to carry her burden with regard to that and does not find fraud in real estate transaction or stock transaction cause of action pursuant to Texas Business and Commerce Code section 27.01.

Colby filed a motion for new trial, which the trial court denied. This appeal followed.

LEGAL AND FACTUAL SUFFICIENCY

In her first and second issues, Colby challenges the legal and factual sufficiency of the evidence to support the trial court's judgment on her claim of statutory fraud in a real estate transaction.

Standard of Review and Applicable Law

When, after a bench trial, the trial court makes no written findings of fact or conclusions of law, we assume that the trial court made all findings in support of its judgment. ***Pharo v. Chambers Cty.***, 922 S.W.2d 945, 948 (Tex. 1996). The judgment must be affirmed if it can be upheld on any legal theory supported by the evidence. ***In re W.E.R.***, 669 S.W.2d 716, 717 (Tex. 1984) (per curiam). If, as in this case, the appellate record includes the reporter's and clerk's records, the trial court's implied findings are not conclusive. ***BMC Software Belg., N.V. v. Marchand***, 83 S.W.3d 789, 795 (Tex. 2002). We review a trial court's implied findings for legal and factual sufficiency of the evidence under the same standards as those applicable to appellate review of a jury's verdict. *See* ***Catalina v. Blasdel***, 881 S.W.2d 295, 297 (Tex. 1994).

When reviewing a trial court's implied findings for legal sufficiency, we set aside the findings only if the evidence at trial would not enable reasonable and fair-minded people to reach the findings under review. *See* ***City of Keller v. Wilson***, 168 S.W.3d 802, 827 (Tex. 2005). We credit favorable evidence if a reasonable fact finder could, and disregard contrary evidence unless a reasonable fact finder could not. ***Id.*** In its role as fact finder, the trial judge may choose to believe one witness and disbelieve another. ***Id.*** at 819. It is not necessary to have testimony

[1] The trial court's judgment includes a notation that it is final and appealable.

from both parties before the fact finder may disbelieve either. *See* ***id.*** at 819-20. The fact finder may disregard even uncontradicted and unimpeached testimony from disinterested witnesses, but is not free to believe testimony that is conclusively negated by undisputed facts. ***Id.*** at 820. When a reasonable fact finder could decide what testimony to discard, a reviewing court must assume it did so in favor of the finding, and disregard it. *See* ***id.*** It is also the province of the fact finder to resolve evidentiary conflicts. ***Id.*** When reasonable, we assume the fact finder resolved all evidentiary conflicts in a manner consistent with its findings. *See* ***id.*** If a reasonable fact finder could resolve conflicting evidence either way, reviewing courts must presume it did so in favor of the prevailing party, and disregard the conflicting evidence. ***Id.*** at 821.

Regarding a factual sufficiency challenge, when a party who had the burden of proof on an issue asserts that a finding is contrary to the evidence, we overrule the complaint unless the party establishes that the adverse finding is against the great weight and preponderance of the evidence. ***Dow Chem. Co. v. Francis***, 46 S.W.3d 237, 242 (Tex. 2001). When making this determination, we consider and weigh all of the evidence. ***Sosa v. City of Balch Springs***, 772 S.W.2d 71, 72 (Tex. 1989). The trial court may consider all the facts and surrounding circumstances in connection with each witness's testimony and accept or reject all or any part of that testimony. ***Santa Fe Petroleum, L.L.C. v. Star Canyon Corp.***, 156 S.W.3d 630, 638 (Tex. App.—Tyler 2004, no pet.). When the evidence is such that "reasonable minds could differ on the meaning of the evidence, or the inferences and conclusions to be drawn from the evidence, we may not substitute our judgment for that of the fact finder." ***Id***. We only set aside as factually insufficient a finding that is clearly wrong and unjust. ***Francis***, 46 S.W.3d at 242.

In a bench trial, the trial court is the sole judge of the credibility of the witnesses and the weight to give their testimony. ***Wilson***, 168 S.W.3d at 819; ***Santa Fe Petroleum, L.L.C.***, 156 S.W.3d at 638. Reviewing courts may not impose their own opinions to the contrary. ***Wilson***, 168 S.W.3d at 819; ***Santa Fe Petroleum, L.L.C.***, 156 S.W.3d at 638.

Statutory fraud in a real estate transaction consists of a

> (1) false representation of a past or existing material fact, when the false representation is
>
> > (A) made to a person for the purpose of inducing that person to enter into a contract; and
> >
> > (B) relied on by that person in entering into that contract; or
>
> (2) false promise to do an act, when the false promise is

(A) material;

(B) made with the intention of not fulfilling it;

(C) made to a person for the purpose of inducing that person to enter into a contract; and

(D) relied on by that person in entering into that contract.

TEX. BUS. & COM. CODE ANN. § 27.01(a) (West 2009). A party's intent is determined at the time when the representation is made and it may be inferred from the party's subsequent acts. ***Spoljaric v. Percival Tours, Inc.***, 708 S.W.2d 432, 434 (Tex. 1986). Intent is a fact question uniquely within the realm of the fact finder because it so depends upon the witnesses' credibility and the weight to be given their testimony. ***Id.*** "Failure to perform, standing alone, is no evidence of the promissor's intent not to perform when the promise was made." ***Id.*** at 435. However, it is a factor to be considered with other factors to establish intent. ***Id.*** "Since intent to defraud is not susceptible to direct proof, it invariably must be proven by circumstantial evidence." ***Id.***

Analysis

Here, there are two different versions of the document Colby signed on June 27, 2011. Because the trial court found against her, Colby must establish on appeal that the evidence was legally or factually insufficient to support the trial court's implied finding that she signed the gift warranty deed rather than the contract in which she agreed to pay Milholland to leave Colby's residence.

Milholland testified that she purchased the Smith County property several years before she conveyed it to Colby in 2008. She testified that Colby reconveyed the property by the gift warranty deed signed on June 27, 2011. In addition to her testimony, Milholland's contention is supported by other tangential evidence. The notary public who notarized Colby's signature on the document identified it in her records as a "Warranty Deed." Also, the title company faxed the document to Milholland on June 27, 2011, the same day on which it was signed. Thus, she would have had little time in which to prepare a different document after receiving the fax from the title company.

Colby, however, testified that she did not sign the gift warranty deed recorded by Milholland. Her husband, who was her boyfriend when she signed the document and was present with her the entire day, testified similarly. Colby contends her version of the signed

document is supported by three "de facto admissions" by Milholland.[2] First, Milholland testified that, until Colby's husband entered her life, Colby would have given Milholland the property. Colby extrapolates an admission from that testimony that Colby did not sign the gift warranty deed because her husband was in her life on June 27, 2011. Second, Milholland testified that Colby had to get something in exchange for giving something away. Third, Milholland testified that she provided two pages to Colby. According to Colby, the gift warranty deed contains at least three pages.

We do not read Milholland's trial testimony as de facto admissions that Colby did not sign the gift warranty deed. When Milholland's testimony is considered in total, her statements certainly could be considered by the fact finder in determining her credibility. But the basic point of her testimony remains that Colby reconveyed the Smith County property to her on June 27, 2011. With regard to her first and second statements, the fact finder could have determined that Milholland was referring to the legal actions brought by Colby after she signed the gift warranty deed. With regard to her third statement, Milholland did not unequivocally testify that the deed was only two pages. Rather, she testified to not knowing the number of pages and expressed her belief that the deed was "two or three pages." Our review of the record indicates the deed comprises a page containing the body of the deed, the signature page, and an exhibit describing the property. A three page document is not inconsistent with Milholland's testimony. Moreover, Milholland testified that Colby read and signed the document, that no pages were missing when the document was signed before the notary, and that Colby "never thought once about signing [the property] back to [Milholland] because [the property] wasn't [Colby's]."[3]

Milholland and Colby strongly disagreed on the particulars of the document that Colby signed. Milholland adamantly and resolutely contended that Colby conveyed the Smith County property to her. Colby, who was equally adamant and resolute, contended that she did not, and that Milholland had taken a signature page from another document and affixed it to the gift

[2] Colby does not argue that these were judicial admissions binding upon Gefreh.

[3] We also note two peculiarities regarding the contract that Colby alleged was signed on June 27, 2011. First, Colby did not provide a copy of the alleged contract until she filed her fourth amended petition on April 10, 2014. Her husband testified that he had taken a copy of the contract from the bank, but lost it for a period of time. Second, the alleged contract produced by Colby was titled "Gift Warranty Deed" and contained instructions applicable to the transfer of real property in both the header and footer of the document.

warranty deed. This is a classic fact issue that we generally leave to the fact finder's determination. *See* ***City of Keller***, 168 S.W.3d at 827; *see also* ***Francis***, 46 S.W.3d at 242.

Viewing the evidence in the light most favorable to the trial court's findings, we conclude that reasonable and fair-minded people could have reached the findings under review. *See* ***Wilson***, 168 S.W.3d at 819, 827. The evidence is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See* ***Francis***, 46 S.W.3d at 242. The evidence that Colby conveyed the Smith County property to Milholland, while contested, is legally and factually sufficient to support the trial court's findings that Colby failed to establish a cause of action under section 27.01(a) of the Texas Business and Commerce Code. We overrule Colby's first and second issues.[4]

DEEMED ADMISSION AND EVIDENTIARY ISSUES

In Colby's third issue, she contends that the trial court erred by permitting Milholland to withdraw an admission. In her fourth issue, she contends that the trial court erred by sustaining objections to three of her trial exhibits. We address these issues together.

Standard of Review and Applicable Law

We apply an abuse of discretion standard when reviewing a trial court's decisions to exclude evidence and to permit the withdrawal of an admission. ***Owens–Corning Fiberglas Corp. v. Malone***, 972 S.W.2d 35, 43 (Tex. 1998); ***Stelly v. Papania***, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam). A trial court abuses its discretion when its decision is unreasonable, arbitrary, or without regard to any guiding rules or principles. ***Lively v. Blackwell***, 51 S.W.3d 637, 641 (Tex. App.—Tyler 2001, pet. denied). A trial court does not abuse its discretion as long as its decision is within the zone of reasonable disagreement. ***PPC Transp. v. Metcalf***, 254 S.W.3d 636, 641 (Tex. App.—Tyler 2008, no pet.).

A party may withdraw an admission when (1) the party shows good cause for the withdrawal, (2) the other party will not be unduly prejudiced, and (3) the withdrawal serves the presentation of the lawsuit's merits. TEX. R. CIV. P. 198.3; ***Time Warner, Inc. v. Gonzalez***, 441

[4] Colby argues that, even if she failed to establish statutory fraud, the trial court could have found in her favor under a claim for common law fraud. However, an appellate court cannot review a case on a theory different from that on which it was pleaded and tried before the trial court. ***Newsome v. Grogan***, 599 S.W.2d 881, 883 (Tex. App.—Tyler 1980, writ ref'd n.r.e.). Moreover, the elements of both claims are virtually identical. ***Miller v. Argumaniz***, 479 S.W.3d 306, 314 (Tex. App.—El Paso 2015, pet. denied). Thus, for the reasons previously discussed, it is unlikely the trial court would have found the existence of a common law fraud claim.

S.W.3d 661, 664 (Tex. App.—San Antonio 2014, pet. denied). Only "relevant evidence" is admissible. TEX. R. EVID. 402. "Relevant evidence" is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. TEX. R. EVID. 401. Evidence is relevant when there is some logical connection, either directly or by inference, between the evidence and a fact to be proved. ***Metcalf***, 254 S.W.3d at 642.

An error of law is reversible if it probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to the court of appeals. TEX. R. APP. P. 44.1(a). To reverse a judgment based on error in the admission or exclusion of evidence, we must conclude that the error affected a substantial right, thereby probably causing the rendition of an improper judgment. *See* TEX. R. EVID. 103(a); ***Nissan Motor Co. v. Armstrong***, 145 S.W.3d 131, 144 (Tex. 2004). When making this determination, we review the entire record and require the complaining party to show that the judgment turns on the particular evidence admitted or excluded. ***Armstrong***, 145 S.W.3d at 144. A trial court's erroneous exclusion of evidence is harmless if the evidence is merely cumulative. ***Id.***

Analysis

Because it is dispositive of the issues, we first determine whether Colby was harmed by the trial court's actions.

The withdrawn admission asked Milholland to "Admit that, on June 27th, 2011, [Colby] refused to meet or see Milholland personally at the bank or anywhere else, effectively communicating that she was not keen on seeing Milholand ever again – even before the signature page of the document titled 'Gift Warranty Deed' was signed." The excluded exhibits referenced (1) a police report from August 4, 2011, in which Milholland said that she had not spoken with Colby for a couple of months, (2) a police report from July 23, 2011, in which Colby and Milholland had a dispute regarding Colby's home in Colorado, and (3) an eviction complaint in which Colby sought to evict Milholland from Colby's home in Colorado.

The withdrawn admission and the three exhibits provided evidence that Colby and Milholland were involved in a dispute around the time when Colby signed the document on June 27, 2011. Other testimony and documentary evidence confirmed that there was dissention between Colby and Milholland. Thus, Colby's appellate complaints focus on cumulative evidence. *See* ***id.*** More importantly, the evidence does not change the dispositive issue in the

case: whether Colby signed a gift warranty deed reconveying the Smith County property to Milholland or instead signed a contract in which she agreed to pay Milholland to move out of her Colorado home.

Simply put, Colby could be upset with Milholland, but still agree to return the Smith County property to her. The trial court heard evidence of the volatility of their mother-daughter relationship, and nevertheless determined that Colby signed the gift warranty deed recorded by Milholland. We do not believe that the additional evidence of conflict in the relationship would have affected the trial court's judgment. Therefore, Colby has failed to establish that she was harmed by the trial court's alleged errors in permitting the withdrawal of an admission and sustaining objections to three items of documentary evidence. Accordingly, we overrule Appellant's third and fourth issues. *See* TEX. R. EVID. 103(a); *see also* TEX. R. APP. P. 44.1(a); ***Armstrong***, 145 S.W.3d at 144.

DISPOSITION

Having overruled Colby's four issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered September 14, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

SEPTEMBER 14, 2016

NO. 12-15-00250-CV

SUMMER KIDD COLBY,
Appellant
V.
PAUL GEFREH, TRUSTEE IN BANKRUPTCY FOR VICKIE MILHOLLAND,
Appellee

Appeal from the 114th District Court
of Smith County, Texas (Tr.Ct.No. 12-1551-B)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellant, **SUMMER KIDD COLBY**, for which execution may issue, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.