STATE OF MICHIGAN

COURT OF APPEALS

RODNEY VAN MIDDLESWORTH and SUE A. VAN MIDDLESWORTH,

Plaintiff/Counterdefendants-Appellants,

v

CENTURY BANK & TRUST COMPANY, Successor Trustee of the HAROLD N. PIPER REVOCABLE TRUST, and TIMOTHY PIPER,

Defendants/Counterplaintiffs-Appellees,

and

LEON PIPER and PHILLIP PIPER, Next Friends of HAROLD N. PIPER, Deceased,

Defendants/Counterplaintiffs.

UNPUBLISHED
May 5, 2000

No. 215512
Kalamazoo Circuit Court
LC No. 95-000982-CK

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiffs commenced this action seeking specific performance of a written agreement between them and the late Harold N. Piper to purchase approximately five hundred acres of farmland and a wheat crop from Piper, and seeking damages for breach of contract. After a bench trial, the trial court found that Piper was mentally incompetent to enter the agreement, and that the circumstances were such that reasonable persons in plaintiffs' position would have been put on notice that they should inquire further regarding Piper's mental competence before proceeding with the agreement. Plaintiffs now appeal as of right, challenging the trial court's order dismissing their complaint with prejudice. We affirm.

Plaintiffs first argue that the evidence of Piper's mental incompetence in March 1995 was insufficient to provide them with notice and require them to investigate his mental ability before proceeding with the transaction. We disagree. This Court reviews the trial court's findings of fact for clear error, MCR 2.613(C); *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997), and defers to the trial court's resolution of factual issues, especially where it involves the credibility of witnesses, *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 99; 535 NW2d 529 (1995). A trial court's finding of fact is clearly erroneous when, although there is evidence to support it, this Court is left with the definite and firm conviction that a mistake has been made. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 9; 596 NW2d 620 (1999).

The necessity for inquiring into plaintiffs' state of mind at the time of their March 1995 business dealings with Piper arises from the holdings of *Shoulters v Allen*, 51 Mich 529, 531; 16 NW 888 (1883), and *Frisbee v Stewart*, 122 Mich 538, 540; 81 NW 325 (1899). In *Shoulters*, the Court held that it was unnecessary to find that Allen, when he gave a note to the plaintiff, had capacity sufficient for the transaction of ordinary business. Rather, it was enough to sustain the note that the plaintiff dealt with Allen in good faith and without notice of lack of capacity in a transaction not calculated to put the plaintiff on his guard. In *Frisbee*, the Court quoted from *Shoulters* and applied its rationale. The Court in *Frisbee* also observed that, although the case was not free from doubt, the preponderance of proof did not favor the complainant considering the fact that the trial judge had "a much better opportunity to observe the manner and appearance of the witnesses, and to judge of the credit to be given them, and to weigh the evidence, than we can have . . . ."

We conclude that neither *Shoulters* nor *Frisbee* requires reversal because sufficient evidence exists in the record to support the trial court's finding. "The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged. To avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract." *In re Erickson Estate*, 202 Mich App 329, 332; 508 NW2d 181 (1993).

Timothy Piper testified that, in the fall of 1992, Rodney Van Middlesworth dried and sold some corn for Piper pursuant to the latter's request, and after Rodney gave Piper the figures involved in the transaction and settled with him, Piper later questioned the calculations and wondered whether he had been paid enough. Rodney then came back and went over the calculations with Piper a second time. Timothy also testified that, in 1993, Rodney agreed to haul and sell part of Piper's corn crop, and Piper believed that Rodney had hauled more bushels than Piper had requested to be hauled. As a result, Piper quit hauling or selling corn for a period of time, and Rodney told Timothy that, in the future, Timothy would have to verify what Piper wanted in order to avoid any more discrepancies. Also, on one occasion Piper asked Rodney to haul a couple of loads of corn for him, and Timothy did not confirm Piper's order because the corn was not ready to haul. In January 1995, Rodney hauled two almost identically sized loads of beans to the market for Piper, receiving a separate check for each load. Piper thought he had been paid twice for the same load of beans, and it took Rodney half a day "to sort it out and make sure that he hadn't been." Rodney was also questioned about his deposition statement

referring to an April 11, 1995, meeting with Piper, regarding which Rodney stated, "He acted like he didn't know what I was talking about. He acted like he had no idea what he was talking about."

Another indication that Rodney Van Middlesworth had notice that Piper was mentally incompetent occurred in relation to a police report that Piper apparently filed on April 28, 1995, accusing Rodney of assaulting him. From all that appears in the record, Piper's charge was false. When questioned about this incident at trial, Rodney denied having told the investigating police officer on May 1, 1995, that Piper's "mind was starting to go," but he was impeached with an excerpt of his deposition testimony in which he acknowledged having made such a statement.

Although these latter incidents occurred some weeks after Piper signed the sales agreement, we believe it reasonable to assume that Rodney's expressed belief on several dates so soon after the transaction that Piper's "mind is starting to go" can be extrapolated backward in time to Piper's condition on March 13, 1995, thus constituting further indication that plaintiffs were on notice regarding Piper's possible mental incompetence.

Additionally, the trial court placed reliance on the fact that three of the four expert witnesses testified to Piper's deteriorated mental state. The first witness, a clinical psychologist, concluded from his examination that Piper's reasoning would have been significantly impaired on and around March 13, 1995 to the extent that he would not have been able to understand the offer to purchase his real estate. The second witness, a neurologist, examined the results of Piper's magnetic resonance imaging (MRI), found evidence of brain shrinkage and hardening of the arteries, and opined that the MRI was consistent with dementia both at the time of the MRI and in March 1995. The third expert witness, a physician specializing in geriatric neurology, concluded that Piper suffered from a combination of Alzheimer's disease and multi-infarct dementia, and that Piper was mentally incompetent at the time of examination as well as in March 1995. Although plaintiffs presented a psychiatric expert witness of their own who came to a contrary conclusion, we give much weight to the opinion of the trial judge who was in the best position to consider and evaluate the testimony of these witnesses. *In re Erickson Estate*, *supra* at 333.

Further, although there is no evidence that Crystal Rolfe, a bank teller who dealt with Piper on a regular basis, communicated to plaintiffs her belief that Piper was mentally incompetent, we concur with the following observation by the trial court:

> How would you expect – if I credit the bank teller's testimony as to how completely incompetent he was for a year before that and Rodney VanMiddlesworth as a neighbor was having regular contact with Mr. Piper, how would you expect he wouldn't notice that if he was in that bad of shape, if I credit that person? How could he be so completely incompetent at the bank and not visibly lacking in other situations?

Plaintiffs argue that defense counsel's closing argument reflects defense counsel's own belief that plaintiffs had no knowledge of Piper's incompetence at the time the sales agreement was executed. During his remarks, counsel stated that he did not believe that plaintiffs "entered into those negotiations

saying to themselves, 'Harold is incompetent and we are going to take advantage of him.'" Whatever counsel may have meant by these remarks, they do not negate the evidence of Piper's mental incompetence in March 1995, nor do they relieve plaintiffs of their obligation to inquire regarding Piper's competence before proceeding with the transaction. The arguments of counsel are not evidence, SJI2d 3.04, and an admission of fact by a counsel is only binding on his or her client "if it is a distinct, formal, solemn admission made for the express purpose of, *inter alia*, dispensing with the formal proof of some fact at trial." *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969), see also *Gojcaj v Moser*, 140 Mich App 828, 833-834; 366 NW2d 54 (1985). Having examined counsel's statement in context, we conclude that it was not meant as a formal admission, but was rather merely part of counsel's rhetoric during argument, charitably suggesting that plaintiffs did not intend to take advantage of an incompetent old man.

Plaintiffs also contend that, even if Piper were mentally incompetent at the time of the agreement, the resulting contract is voidable, not void, and should be set aside only if its terms are unjust or unfair to Piper. However, the trial court determined that the fairness of the contract was affected due to a $75,000 discrepancy between the sale price and the price the property could have brought at auction, a below-market interest rate, and "the fact that it's the family homestead and . . . we'd have to look into the competency of anybody deeding out the family homestead."

Plaintiffs' reliance upon *Brown v Khoury*, 346 Mich 97; 77 NW2d 336 (1956), is misplaced because plaintiffs are not innocent third-party, bona fide purchasers for value without notice as was true in that case. *Id.* at 100. Further, "[t]o rescind a voidable contract, an incompetent must take affirmative action," *Apfelblat v National Bank Wyandotte-Taylor*, 158 Mich App 258, 262; 404 NW2d 725 (1987), and Piper did so by informing plaintiffs he was disclaiming the agreement. Moreover, there is no inequity[1] in the trial court's decision to declare the agreement void because the agreement involved only an acceptance of an offer to purchase Piper's farm, and plaintiffs neither paid Piper for the farm, nor received title from him. As this Court stated in *Star Realty, Inc v Bower*, 17 Mich App 248, 258; 169 NW2d 194 (1969), "The integrity of written contracts must be preserved, but so must an incompetent be protected against his own folly. . . . The evidence presented does not preponderate for specific performance as equitable relief." There was no error.

As their final argument, plaintiffs maintain that prejudicial error resulted from defendants' filing of a post-trial brief. However, as the trial court noted, plaintiffs could have filed a brief of their own or could have moved the court to disregard defendants' brief, but did neither. Reversal is therefore not indicated. MCR 2.613(A).

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] Our Supreme Court in *Brown, supra* at 99-100, stated that the determination of whether a particular contract entered into by an incompetent should be enforced or repudiated was a determination for the trial court to make applying equitable considerations.