TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00100-CV

James E. Wade, Appellant

v.

Johnny Wade, Individually; Amanda Wade, Individually; and Amanda Wade, as the Independent Executor of the Estate of Edell Wade, Appellees

FROM THE COUNTY COURT AT LAW OF BURNET COUNTY
NO. P9127, HONORABLE, W. R. SAVAGE, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

This is an appeal from a take-nothing judgment of the county court-at-law of Burnet County in a suit to rescind the sale of a ranch. Appellant is James E. Wade (Bud), and appellees are his brother and sister-in-law, Johnny and Amanda Wade. Amanda was sued individually and as executor of the Estate of Edell Wade.

In 2004, Edell Wade, Bud and Johnny's mother, sold her ranch to Johnny and Amanda. In 2012, after Edell's death, Bud sued Johnny and Amanda claiming fraud, and like causes of action, in an effort to rescind the sale. The court granted Johnny and Amanda's partial summary judgment for all of Bud's claims save one, which it submitted to a jury. Upon jury findings favorable to Johnny and Amanda, the court rendered final judgment that Bud take nothing. This Court will affirm the judgment.

The ranch consists of 475 acres situated in the hills of north Burnet County near the Lampasas County line. In 1952, Otto and Edell Wade, Bud and Johnny's father and mother, purchased the ranch from the estate of Edell's parents. Doubtless by dint of hard work and thrifty management, Otto and Edell coaxed a livelihood from the ranch for themselves and their seven children. After the children left home, the Wades continued to live on and operate the ranch. When Otto sickened and died in 1996, Edell, age 81, remained on the ranch determined to live out the balance of her days there and hoping that the ranch would somehow remain in the family.

Edell was a sturdy, resolute country woman. She had always worked on the ranch alongside her husband. After a full day's work outside, she still had duties in the house such as cooking, cleaning, and taking care of the children. As her daughter Charlene testified, she was a "pretty strong woman" with "strong thoughts."

Johnny was the youngest child and his mother's favorite. Even when he was a grown man, Edell was fond of introducing him as her "baby son." When Johnny graduated from Lampasas High School, he left Central Texas for California. At first, he worked as a laborer, all the while learning the steel-construction business. After several years, he formed his own successful steel-construction operation. Almost from the time of his arrival in California, he telephoned his mother every week.

In the meantime, Johnny met and married Amanda. Although trained in law, she eventually managed the office operation of Johnny's construction business.

Johnny and Amanda visited Edell on the ranch whenever his work allowed him to leave California. During these visits, Johnny built several outbuildings on the ranch, including a

shop and a garage with an apartment. He testified that whatever his mother needed, he would see that she received it.

Edell visited Johnny and Amanda in California several times. On one visit, she stayed a month. Once they took her on a cruise off the California coast to Mexico. Amanda took her sightseeing and shopping around town. Edell's granddaughter, Kim George, testified that Edell liked Amanda and admired her for being able "to do anything a guy could do."

During all of this time, Johnny continued to worry about Edell living alone on the ranch. Apart from Johnny, and sister Emma, who lived in Georgia, not many of the other children spent much time at the ranch, although daughter Nancy was there at regular intervals because Edell paid her to do some of the housework and ranch chores. Edell, however, was the principal care-giver for the livestock and the land. For example, one night one of the cows was having trouble giving birth to its calf. Edell, by herself, delivered the calf. But life on the ranch was sometimes hard. During a winter storm, the electricity was off for some time, shutting off power to the well pump. As there was no water in the house, Edell carried water up from the creek for household use. Johnny and Amanda paid for the installation of a central cooling and heating system in the house after Edell had suffered from heat exhaustion during the course of a particularly hot spell.

In time, Johnny became concerned that his mother was not receiving proper care and decided that he needed to return to the home place to take care of her. When Johnny and Amanda were at the ranch for the holidays in late 2003, he asked Edell if she would sell the ranch to him. Edell said that she would if he met her price of $1,000 per acre. He agreed.

The basic terms of the sale were agreed upon in a meeting in January 2004 at the law office of Pat Cavness. Cavness, Edell, Johnny, Amanda, and Johnny's sister, Nancy, were present. Johnny was prepared to pay cash, but the attorney and the accountant advised Edell of the unfavorable tax consequences of a cash transaction. Consequently, the transaction was tailored to give Edell an income stream, rather than a cash sale. The purchase price was $500,000, which was reflected in a long-term note, thirty-two years, bearing interest at 2%.[1] As part of the agreement, Johnny and Amanda promised that Edell could live on the ranch for so long as she wanted. That promise was reflected in the sale documents as an enforceable life estate. And, in fact, she did live on the ranch in her own house until she died.

After the ranch sale, Johnny and Amanda returned to California to wind up the business. Edell much anticipated their return. She wrote her granddaughter, Kim George, "Them (Johnny and Amanda) going to move here is kinda like [a] dream of some sort."

According to Kim George, the time from Johnny's and Amanda's return from California to the ranch until the time of her death was the happiest period in Edell's life. Edell now knew that she would always be on the ranch; that the ranch remained in the family; that Johnny and Amanda were there to help her; and Johnny relieved her of the care of the ranch.

Late in 2009, Edell decided to modify Johnny's promissory note by reducing the interest rate to zero and by reducing the amount of the principal by $40,000. These changes were reflected in what the parties termed the "Modification Agreement."

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[1] The amount over $475,000 (i.e., $25,000) reflected the sales price of the ranch livestock, farm equipment, etc.

After she sold the ranch, Edell told Johnny that she would tell the other children about the sale. When Bud heard about the sale, he thought he "smelled a rat" and figured Johnny had "bamboozled" Edell. Instead of calling his mother about the sale, he called his sister, Nancy. Nancy, however, did not recall much about the specifics of the sale although she had been present at the closing.

Bud did nothing further for about eight years. After Edell's death, he filed suit to rescind the sale of the ranch, claiming generally that the sale price was too low and the payment terms were too lenient. By his suit, he asserted fraud, statutory fraud, fraudulent inducement, breach of fiduciary duty, conspiracy, defalcation, tortious interference with inheritance rights, and undue influence. Besides rescission, Bud sought damages, exemplary damages, disgorgement of profits, interest, and attorney's fees among other things.

Johnny and Amanda filed a motion for partial summary judgment. Their principal contention was that Bud's claims were barred by the statute of limitations. In response to the limitations defense, Bud asserted the discovery rule.

After hearing, the court granted summary judgment that Bud take nothing on all causes of action save breach of fiduciary duty, which the court submitted to a jury. The jury found that both Johnny and Amanda complied with their fiduciary duties to Edell. The court then rendered a final take-nothing judgment.

By his first issue, Bud claims that the court erred in granting summary judgment. Bud asserts that his causes of action were not barred by limitations by virtue of the discovery rule. We disagree.

The discovery-rule exception defers the accrual of a cause of action unless the plaintiff knew or should have known of the facts giving rise to the cause of action. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996). The discovery rule is a very limited exception to statutes of limitations. *Shell Oil Co. v. Ross*, 356 S.W.3d 924, 929–30 (Tex. 2011). The cases to which the discovery rule applies "should be few and narrowly drawn." *S.V. v. R.V.*, 933 S.W.2d 1, 25 (Tex. 1996). The reason for strictly limiting application of the discovery rule is to avoid defeating the purposes behind the limitations statutes. *See Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006). Application of the discovery rule is limited to those cases in which the evidence of injury is objectively verifiable and the nature of the injury is inherently undiscoverable. *Computer Assocs.*, 918 S.W.2d at 456.

In our view, the claimed injury is not objectively verifiable. There is nothing objectively wrongful about the sale of real estate by a parent to a child, even at below-market terms and even when the child is a fiduciary of the parent. *See Gates v. Asher*, 280 S.W.2d 247, 250 (Tex. 1955); *Saufley v. Jackson*, 16 Tex. 579, 582 (1856). Because a parent often has reasons for transferring property to a child, other than to receive fair-market value, evidence of injury from such a sale of property is not objectively verifiable. Rather, the claim depends upon the testimony of witnesses concerning the parties' intentions at the time of the sale. *Moczygemba v. Moczygemba*, 466 SW.3d 212, 217–18 (Tex. App.—San Antonio 2015, pet. denied). Likewise, Bud's claim depends upon expert testimony concerning the market value of the ranch and the commercially reasonable terms of the loan. Because there is no objectively verifiable evidence of Bud's injury, we need not determine whether the injury was inherently undiscoverable.

By his second issue, Bud complains that the court erred in rendering judgment based on the jury's answers to special issues that both Johnny and Amanda, in accepting the Modification Agreement, complied with their fiduciary duties to Edell. He claims that the jury's answers were supported by no evidence or, alternatively, the answers were contrary to the great weight and preponderance of the evidence.

In considering a "no evidence" point, the court considers only the evidence and inferences tending to support the jury's findings, viewed most favorably in support of the findings, and disregards all contrary evidence and inferences. *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 458 (Tex. 1992).

It was Johnny's and Amanda's burden to establish that their acceptance of the Modification Agreement complied with their fiduciary duty to Edell. To discharge that burden, they were required to show that Edell was in her right mind; that she made the modification voluntarily; and that she had consulted with an attorney before making the modification. *See Vogt v. Warnock*, 107 S.W.3d 778, 784–85 (Tex. App.—El Paso 2003, pet. denied). All the evidence was that Edell was in her right mind when she entered into the Modification Agreement. She was a strong-willed and independent person capable of making her own decisions during the entire period at issue.

Edell's modification of the terms of the promissory note was voluntary—it was her own idea. She disliked paying taxes on the interest income generated from the note, so she wanted to reduce the interest rate to zero. Edell also wanted to make a gift to Johnny by reducing the amount of the note. As daughter Charlene testified, Edell was not someone who could be "conned" into something she did not want.

She also had the benefit of the advice of her attorney, Mike Martin, concerning the transaction and she requested him to prepare the papers reflecting the modification.

Bud argues that the modification of the promissory note benefitted only Johnny and Amanda and not Edell. As such, he contends, the transaction was unfair to Edell and constituted a breach of fiduciary duty as a matter of law. We disagree. A competent donor's voluntary gift to a fiduciary is fair as a matter of law. *See Vogt*, 107 S.W.3d at 784–85. The no-evidence argument is without merit.

When reviewing a jury verdict to determine the factual sufficiency of the evidence, the court of appeals considers and weighs all of the evidence, and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence so as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The jury, of course, is the sole judge of the credibility of the witnesses and the weight to give their testimony. The jury may choose to believe one witness and disbelieve another. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005).

In support of his contention that Edell's modification of the note was not voluntary, Bud suggests that Johnny and Amanda curtailed Edell's access to family visits and company. This was accomplished, he claims, by locking the gate to the ranch and by not allowing Edell to leave the ranch.

The evidence was, however, that the gate was locked at Edell's request. She had been upset when an intruder had entered into and driven over the ranch. Keys to the lock were furnished to those of the family who wanted them. In addition, the family was told that a key was hung on a post down from the gate. It is true that in her later years Edell did not leave the ranch as much as

before. By this time, however, she was suffering from incontinence and preferred to remain close to home.

Bud claims that Mike Martin represented Johnny and Amanda, not Edell, in the modification transaction. He bases this assertion upon the fact, among other things, that Martin represented Johnny and Amanda from time-to-time; that Johnny brought Edell to Martin's office for the conference with Martin; and that Martin billed Johnny and Amanda for the work on the modification agreement.

Mike Martin practiced law in Lampasas for almost forty-two years. During that period, he had represented clients in thousands of transactions, and no complaint had ever been filed against him. He began representing Edell in 2007. He testified unequivocally that he represented Edell in the modification of the note transaction, not Johnny and Amanda. He drafted the agreement at Edell's request after meeting with her in his office and after a later telephone conference with her. As was its right, the jury accepted his testimony.

Bud suggests that much of Johnny's and Amanda's proof was "self-serving" and that his evidence was more "reliable." However, it is the jury's task to weigh the evidence and credit its reliability. This the jury did, and this Court will not disturb its conclusion.

This Court has considered all of the evidence and has concluded that the jury's answers that Johnny and Amanda complied with their fiduciary duty to Edell in accepting the Modification Agreement are not contrary to the great weight and preponderance of the evidence.

The judgment of the county court-at-law is affirmed.

Bob E. Shannon, Justice

Before Chief Justice Rose, Justices Field and Shannon*

Affirmed

Filed: January 26, 2017

* Before Bob E. Shannon, Chief Justice (retired), Third Court of Appeals, sitting by assignment. *See* Tex. Govt. Code § 74.003(b).