[Cite as *Landmark Properties, L.L.C. v. Trent,* 2016-Ohio-8574.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

LANDMARK PROPERTIES, LLC	:	
Plaintiff-Appellant,	:	Case No. 16CA862
v.	:	DECISION AND JUDGMENT ENTRY
THOMAS TRENT, et al.,	:	
Defendants-Appellees.	:	RELEASED 12/21/2016

APPEARANCES:

Clifford N. Bugg, Chillicothe, Ohio, for Appellant.

James K. Cutright, Cutright & Cutright LLC, Chillicothe, Ohio, for Appellees.

Hoover, J.

{¶ 1} After a bench trial, the Pike County Common Pleas Court found in favor of defendants-appellees, Thomas Trent and Nancy Trent ("Trents") and against plaintiff-appellant, Landmark Properties, LLC ("Landmark"). Landmark and the Trents own real property in Pike County, Ohio, that is contiguous. A property line dispute arose between Landmark and the Trents over the ownership of 0.77 acres. As a result, Landmark filed a complaint to determine the ownership of the 0.77 acres. Because we find that the trial court's judgment was not against the manifest weight of the evidence, we affirm the judgment of the trial court.

I. Facts and Procedural Posture

{¶ 2} Appellees Thomas Trent and Nancy Trent are married and reside at 317 Tackett Lane, Piketon, Ohio. The Trents own almost 57 acres on Tackett Lane. In the late 1990s, the Trents hired Wallace R. Southworth ("Southworth") to survey their property and find the

boundary lines. Southworth's survey was completed in August 1997[1]. At that time, the property to the west of the Trents' property was owned by Gary Farnham ("Farnham"). Although the Trents' survey was not shown to Farnham, he did not have a problem with the boundaries as set forth by Southworth. In fact, Farnham agreed in his perpetuation deposition that the common boundary line as prepared by Southworth was acceptable to him.

{¶ 3} In 2000, Farnham contacted Southworth to survey his property because Southworth had a good reputation. As a result, Southworth prepared a survey for Farnham in April 2000. A few years later, Farnham transferred his property to Don Wilson and Minta J. Howard in July 2004. The common boundary line as surveyed by Southworth was used in this transfer to Wilson and Howard. Next, Wilson and Howard transferred the property to Kevin Ross ("Ross") in September 2009. Again, the common boundary line as surveyed by Southworth was used in this transfer to Ross.

{¶ 4} After purchasing the real property in 2009, Ross hired Ernie Pritchard ("Pritchard") to complete a survey to delineate the property lines. While Pritchard was completing his survey, he opined that Ross had an inaccurate measurement in his deed.

{¶ 5} In approximately 2011, Pritchard contacted Southworth. Apparently, Pritchard could not find the northwest corner of Ross's lot; and Pritchard wanted Southworth to "find it, or put it back in." As a result of Pritchard's inquiry, Southworth visited the site. Southworth claimed that he found the iron pin in the northeast corner but he had to reset it because it had "got tore out." Southworth further testified that the iron pin in the northwest corner was gone and that he had to reset it. After Southworth reset the pins, he prepared a new property description and plat for Ross.

[1] Terry Smith testified that the original date of the survey was November 1996.

{¶ 6} The new description and plat completed by Southworth in November 2011 showed a length of 402.31' for the north boundary of Ross's property. In Southworth's earlier plat prepared for Farnham in 2000, the same boundary showed a length of 381.15'. Thus, a discrepancy of approximately 21 feet existed between the different surveys.

{¶ 7} After the modifications were made for Ross's property, Southworth also prepared a new description and plat for the Trents. Southworth had contacted the Trents and explained that he had met with Pritchard at least six to ten times and that Pritchard had convinced him that he had to change the line or he would get in trouble. The Trents did not record the documents with the changed description and plat.

{¶ 8} In May 2013, Ross and his wife Nichole Ross conveyed his property on Tackett Lane to Landmark Properties, LLC, for which Ross is the managing member. This conveyance included the description and plat completed in 2011 by Southworth.

{¶ 9} Ross had constructed a roadway between the properties. Nancy Trent claimed that the road was on her property. If the original survey of Southworth were used, the work done by Ross between the properties would be encroaching upon the Trents' property; if the corrected survey from 2011 were accepted, the work would not be encroaching upon the Trents' property. The Trents refused to agree that the 2011 survey contained the correct legal description and plat.

{¶ 10} Consequently, Landmark filed a complaint against the Trents requesting the following relief:

> 1) [The Trents] and all persons claiming under them, be required to set forth the nature of their claims to the 0.77 acres of real property;
>
> 2) All adverse claims to the 0.77 acres be determined by a judgment of [the trial] Court;

3) The [trial court's] judgment declare that [Landmark] owns in fee simple and is entitled to the quiet and peaceful possession of such 0.77 acres of real property, and that [the Trents] and all persons claiming under them, have no right to or interest in the property or any part of it;

4) The judgment permanently enjoin [the Trents], and all persons claiming under them, from asserting any adverse claim to [Landmark's] title to the property;

5) For costs of [the] action; and

6) For such other and further relief as the Court deems just and proper.

{¶ 11} The Trents filed an answer to the complaint. Discovery ensued; and numerous depositions were taken. Prior to trial, the Trents had moved the trial court to allow them to depose Farnham by telephone and to have the deposition admitted as evidence in the trial pursuant to Civ. R. 32(A)(3)(b). The trial court granted the Trents' motion.

{¶ 12} The matter came on for a bench trial on October 15, 2015. In addition to Farnham's testimony, the evidence at trial consisted of testimony from Ross; Southworth; Nancy R. Trent; Pritchard; and another surveyor, Terrence G. Smith. After considering the testimony of all the witnesses and the evidence before it, the court entered an order that "Landmark Properties, LLC's complaint is hereby dismissed and that the prayer for reformation of the deeds of plaintiff and defendants is denied." Although the trial court dismissed Landmark's complaint, it actually denied Landmark's claims on the merits.

{¶ 13} Landmark filed a timely appeal of the trial court's decision and judgment entry.

II. Assignment of Error

{¶ 14} Landmark assigns the following sole assignment of error for our review:

THE TRIAL COURT'S JUDGMENT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. Law & Analysis

A. Standard of Review

{¶ 15} Landmark asserts that the trial court's judgment is against the manifest weight of the evidence. The Trents argue to the contrary.

{¶ 16} When an appellate court reviews whether a trial court's decision is against the manifest weight of the evidence, the court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the factfinder clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶ 20 (clarifying that the same manifest-weight standard applies in civil and criminal cases); *Pinkerton v. Salyers,* 4th Dist. Ross No. 13CA3388, 2015-Ohio-377, ¶ 18, citing *In re M.M.,* 4th Dist. Meigs No. 14CA6, 2014-Ohio-5111, ¶ 22 (applying this standard in a case that involved a burden of proof of clear and convincing evidence). "Because the trial court is best able to view the witnesses, observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the witnesses, a reviewing court will presume that the trial court's findings of fact are accurate." *Cadwallader v. Scovanner,* 178 Ohio App.3d 26, 2008-Ohio-4166, 896 N.E.2d 748, ¶ 9 (12th Dist.), citing *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984). "We will reverse a judgment as being against the manifest weight of the evidence only in the exceptional case in which the evidence weighs heavily against the judgment." *Pinkerton* at ¶ 18.

{¶ 17} Additionally, as this Court previously explained in *State v. Murphy,* 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶ 31:

> It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.

B. Law Regarding Reformation of Instruments

{¶ 18} While Landmark characterized the issues in this matter as "which, if any, of Surveyor Southworth's descriptions are correct" in its Pre-Trial Statement, Landmark's actual causes of action, in its complaint, are unclear. The Trents, on the other hand, described Landmark's requested relief in their Pretrial Brief as "Plaintiff seeks reformation of both deeds to 'correct' the mutual mistake of the common boundary established by Southworth in the 1997/2000 Trent/Farnham surveys." The trial court also stated in its Decision and Order that "Plaintiff seeks to reform the legal descriptions of both parties based upon the changes found by surveyor Pritchard." The trial court ordered "that the prayer for reformation of the deeds of plaintiff and defendants is denied."

{¶ 19} It appears that Landmark's complaint does not plead reformation of an instrument. Rather, the complaint seems to be a quiet title action and/or a declaratory judgment action. However, it was the Trents who actually framed the legal issue for the trial court in its Pretrial Brief as one of reformation of an instrument based on mutual mistake. Landmark did not object to this characterization. Thus, we will evaluate the case as it has been presented to us as one of reformation of an instrument based on mutual mistake.

{¶ 20} This Court has discussed reformation of an instrument in *Patton v. Ditmyer*, 4th Dist. Athens Nos. 05CA12, 05CA21, 05CA22, 2006-Ohio-7107, ¶¶ 27-29:

> Equity allows reformation of a written instrument when, due to a mutual mistake on the part of the original parties to the instrument, the instrument does not evince the parties' actual intention. See *Mason v. Swartz* (1991), 76 Ohio App.3d 43, 50, 600 N.E.2d 1121. "The purpose of reformation is to cause an instrument to express the intent of the parties as to the contents thereof * * *." *Delfino v. Paul Davies Chevrolet, Inc.* (1965), 2 Ohio St.2d 282, 286, 209 N.E.2d 194. "[R]eformation of a contract is appropriate where the written agreement does not accurately reflect the true understanding of the parties, and it is used to effectuate their true intent." *Concrete Wall Co. v. Brook Park* (Feb. 26, 1976), Cuyahoga App. Nos. 34054, 34090, 34171, citing *Greenfield v. Aetna Cas. Ins.* Co. (1944), 75 Ohio App. 122, 61 N.E.2d 226. "The purpose of reformation is not to make a new agreement but to give effect to the one actually made by the parties, which is not accurately reflected in the written agreement." *Concrete Wall Co.*
>
> A person seeking reformation of a written instrument must prove by clear and convincing evidence that the mistake regarding the instrument was mutual. See *Stewart v. Gordon* (1899), 60 Ohio St. 170, 53 N.E. 797, paragraph one of the syllabus; *Justarr Corp. v. Buckeye Union Ins. Co.* (1995), 102 Ohio App.3d 222, 225, 656 N.E.2d 1345. Clear and convincing evidence is the degree of evidence necessary to elicit in the mind of the trier of fact a firm belief or conviction as to the allegations to be established. See In re *Haynes* (1986), 25 Ohio St.3d 101,

104, 495 N.E.2d 23.

> To be entitled to deed reformation based upon a mutual mistake, the mistake must be material. See *Reilley v. Richards* (1994), 69 Ohio St.3d 352, 352-353, 632 N.E.2d 507. "A mistake is material to a contract when it is 'a mistake * * * as to a basic assumption on which the contract was made [that] has a material effect on the agreed exchange of performances.' 1 Restatement of the Law 2d, Contracts (1981), 385, Mistake, Section 152(1). Thus, the intention of the parties must have been frustrated by the mutual mistake." *Id.* Reformation of a deed is available upon a showing that both parties were mistaken as to what was being conveyed. See *Stewart v. Gordon* (1899), 60 Ohio St. 170, 53 N.E. 797.

C. The Trial Court's Judgment is Not Against the Manifest Weight of the Evidence.

{¶ 21} In the case sub judice, although Landmark's theory of the case and causes of action are ambiguous, it nonetheless sets forth the main question as "which, if any, of Surveyor Southworth's descriptions are correct." The trial court answered this question by finding that the original surveys were the correct surveys.

{¶ 22} Southworth had originally surveyed the Trents' property in 1996 or 1997; and the Trents have maintained that this survey contains the correct description and plat. Farnham had no problem with the common boundary of the survey. Southworth also surveyed Farnham's property, which is adjacent to the Trents' property in 2000. The Farnham survey utilized the common boundary line as that shown on the Trents' survey. Even after the transfer of Farnham's property to Wilson and Howard and then later to Ross, the same common boundary line was used.

{¶ 23} According to Southworth, it was not until 2011, when Pritchard contacted him, that he changed the descriptions and plats to the subject properties. Southworth claimed at the time of trial that he was coerced by Pritchard to provide false documents in 2011. Southworth testified that Pritchard prepared two alternative documents to aid Southworth in preparing a new description. Southworth asserted that Pritchard tried to convince him that the common boundary between the Trent property and the Ross property had to be the cattle fence. Southworth testified that Pritchard convinced him that he would get in trouble if he did not change the line.

{¶ 24} Moreover, Southworth admitted at trial that he lied when he prepared the new descriptions and plats. Southworth also acknowledged that although he signed an affidavit stating that the 2011 surveys were the accurate surveys, the affidavit was false. Interestingly, the affidavit was prepared and notarized by Landmark's attorney. Southworth testified that the original survey was the truthful survey.

{¶ 25} Southworth further testified that in 2011 when he was searching for the northwest corner pin, it was missing because excavation was being done in the area. Additionally, fences, hog pens, and cattle pens had been removed since the last time he was on site in 2000. Moreover, work was being completed around the pond, between the pond that topped the bank and down below, and around Big Beaver Creek. It was apparent to Southworth that if the original line from the 1997 and 2000 surveys was utilized, that some of the work was encroaching upon the Trent property by thirty to forty feet.

{¶ 26} It is clear that the Trents, Farnham, Wilson, and Howard had no issues with the common boundary line being that as set forth by Southworth originally. In other words, there is no evidence of the Trents making a mistake with respect to their deed. Moreover, no evidence of

mistake exists on the part of Landmark's predecessors—Farnham, Wilson and Howard—with respect to their deeds. For fourteen years, from 1997 through 2011, the common boundary line was not questioned. In fact, Southworth testified at trial that he did not make a mistake in the Farnham survey completed in 2000 with respect to the Trent/Farnham common boundary. Moreover, Southworth agreed that the "parties on both sides of [the] property line were in agreement that that was the call to be used."

{¶ 27} Nancy Trent testified at trial that she had accepted the boundary line between her property and Farnham's property as Southworth wrote it. Nancy Trent further attested that the fences were not intended to denote the boundary line between the two properties. Nancy Trent also added that she never had a problem with Wilson and Howard when they owned Landmark's property. In fact, Nancy Trent had not experienced any issues with the boundary line until Southworth knocked on her door and explained a possible problem with it and offered to file a new description. Southworth, however, told Nancy Trent that his original survey was correct. Thus, the Trents did not file the new description.

{¶ 28} Nancy Trent also described the encroachment of her property following the work done by Ross. Specifically, Nancy Trent explained that Ross had put a roadway on her property; and that Ross had filled in the creek, eliminating an island where there used to be one.

{¶ 29} Next, Ernest L. Pritchard testified. Pritchard was the land surveyor who had been hired by Ross in 2009 to delineate Ross's property lines. Purportedly, Ross wanted to make improvements and build a structure on his property; and he wanted to make sure it was within the smaller parcel of the two that he had purchased. Pritchard explained that he had to look at the

neighboring surveys in order to evaluate Ross's boundaries. While reviewing the other surveys, Pritchard testified that he uncovered a deviation of over twenty-one feet.

{¶ 30} Pritchard next asserted that he talked with Southworth about the discrepancies. According to Pritchard, Southworth "[d]idn't dispute a thing." Pritchard testified that Southworth absolutely never indicated that any pins had been moved or altered. In response to Pritchard's findings of the deviation, Pritchard claimed that Southworth made a corrective deed. Pritchard was asked about the coercive tactics to which Southworth had testified earlier:

> Q. Did you threaten Mr. Southworth to do this action?
>
> A. My God, no.
>
> Q. Did you threaten him with the loss of his license or legal action if he did not knuckle under to your wishes?
>
> A. My God, no.
>
> Q. Mr. Southworth testified to such (inaudible)…
>
> A. I am appalled. I'm shocked. I'm disturbed. Uh, attacking my character and integrity and also, most importantly, is the tarnishment [sic] it does to the profession.

Lastly, Pritchard testified that the corrections that Southworth did were accurate and true and reflected the intent of the instruments.

{¶ 31} Upon cross-examination, Pritchard admitted that he had not actually prepared a plat or a description for the properties in question. Pritchard did not do a boundary survey of the

Farnham property nor the Trent property. Pritchard did not reconstruct Southworth's 1997 and 2000 surveys. Pritchard further claimed that he did not find the iron pin "on the west bank of Beaver Creek at 1182.38 feet" although Southworth and another surveyor, Terrence Gilbert Smith, found the pin.

{¶ 32} The last witness to testify in the trial was Terrence Gilbert Smith ("Smith"). Smith completed a boundary survey in 2014 for the Trents. Smith testified that he looked at the deeds and the descriptions of the Farnham and Trent properties and did a field investigation. Smith also added that the current fences are not the fence lines of occupation, nor are they property lines. Smith did a total re-survey and a description of the Trent property. Smith found the railroad spike referred to in Southworth's descriptions. In addition, Smith found the iron pin on the west bank of Beaver Creek.

{¶ 33} Smith testified that he was able to accurately recreate the west boundary line of the Trent property using Southworth's earlier description from 1997. Smith was also able to find "monumentations" along the east boundary line. Smith testified that in his opinion there was no error in the description of the Trents' deed as it pertained to the property line; and there were no significant errors in the Trents' description. Smith gave his professional opinion that Southworth completed the Trents' and Farnham's surveys to the best of his ability and consistent with administrative standards. Smith also opined that the 2011 survey that Southworth completed was not consistent with the intent of any deed that he saw. When questioned about some variances, Smith testified that the variances fit within the tolerances that are specified in the Administrative Code and that the county approved them.

{¶ 34} As set forth above, a person seeking reformation of a written instrument must prove by clear and convincing evidence that the mistake regarding the instrument was mutual. *Stewart*, 60 Ohio St. 170 at paragraph one of the syllabus, 53 N.E. 797; *Justarr Corp.*, 102 Ohio App.3d at 225, 656 N.E.2d 1345. Here, the evidence does not indicate a mistake on the part of the Trents, Farnham, Wilson, or Howard with respect to their deeds. Landmark did not prove by clear and convincing evidence that there was even a mistake regarding the instrument.

{¶ 35} Likewise, we will not disturb the trial court's findings that the original surveys of Southworth are the correct surveys. The trial court was best able to view the demeanor, gestures, and voice inflections of Southworth, Pritchard, and Smith, along with the other witnesses, in order to weigh their credibility. The trial court's decision was based on reason and fact. Therefore, it is evident that the trial court, as the factfinder, did not clearly lose its way nor create such a manifest miscarriage of justice that the judgment must be reversed. We refuse to second-guess the trial court here.

IV. Conclusion

{¶ 36} For the foregoing reasons we hereby overrule Landmark's assignment of error. We have considered the error assigned and argued; consequently, we conclude that this is not the exceptional case in which the evidence weighs heavily against the judgment. Accordingly, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment Only.

For the Court

By: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.