IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 23-CV-298
Appeal No. 23-CV-299

GERARDINE LUMBIH

Appellant

vs.

CAROLYN WILSON, et al,

Appellee

APPELLANT'S BRIEF

Appeal from the District of Columbia Superior Court
Case Nos. 2016 CA 005209 and 2018 CA 006980
(Judge Yvonne Williams)

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III. STANDARD OF REVIEW

In *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015), the Supreme Court of the United States elaborated on the interplay of de novo and clear error review in the context of how facts play into the ultimate legal conclusion, providing that:

> " [A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate" legal question. *Miller* v. *Fenton*, 474 U.S. 104, 113, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). It is analogous to a judge (sitting without a jury) deciding whether a defendant gave a confession voluntarily. The answer to the legal

> question about the voluntariness of the confession may turn upon the answer to a subsidiary factual question, say, "whether in fact the police engaged in the intimidation tactics alleged by the defendant." *Id.,* at 112, 106 S. Ct. 445, 88 L. Ed. 2d 405. An appellate court will review the trial judge's factual determination about the alleged intimidation deferentially (though, after reviewing the factual findings, it will review a judge's ultimate determination of voluntariness *de novo*). *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 333

IV. SUMMARY OF THE ARGUMENT

The Trial Court abused its discretion by not applying equitable principles to find that Ms. Wilson should indemnify Ms. Lumbih for Ntaky's claims against Ms. Lumbih. In addition, the Trial abused its discretion and committed clear error in finding that Ms. Wilson did not breach her deed of conveyance to Ms. Lumbih.

V. STATEMENT OF THE FACTS

In November 2008, Carolyn Wilson ("Wilson") became the owner of real property located in the District of Columbia which was designated as Lot 824 in Square 3024. In 2009, Ms. Wilson subdivided Lot 824 into Lots 825, 826 and 827 in preparation for her planned sale of property. Lot 826 is located at 4203 9th Street NW, Washington, DC 20011. Lot 825 is located at 4201 9th Street NW, Washington, DC 20011. Records maintained by the Office of the Surveyor for the District of Columbia (the "Survey Records") indicate that Lot 825 was defined and designated to be 30 feet wide running from north to south and that it sits directly south of Lot 826. JA-1.

On or about August 28, 2009, Ms. Wilson sold Lot 826 in fee simple to Ntaky Management, LLC ("Ntaky"). The relevant deed identified the property sold as Lot 826 and

specified that the property had dimensions of 20 feet by 40 feet. Ntaky purchased Lot 826 as an investment property with varying potential uses such as for a business, as a rental property, a future development project, and/or an appreciable asset. The southern lot line of Lot 826 extends beyond the northern face of the building that is 4201 9th Street NW, Washington, DC, which puts the boundary line a few feet within Ms. Lumbih's home. JA-2.

On or about September 24, 2010, Ms. Wilson sold Lot 825 in fee simple to Gerardine Lumbih ("Lumbih"). *Id*. The conveyance deed describes the real property by metes and bounds as running 38 feet north to south, and running 40 feet running east to west. However, Lot 825 runs only 30 feet north to south. JA-45-46.

After trial, the Trial Court determined and declared, "that Ntaky (i) is the sole legal and equitable owner of the entirety of Lot 826 in Square 3024 in the District of Columbia and (ii) is entitled to cause the removal of the encroachments on Lot 826 that it identified in its Verified Complaint, specifically the deck, stairway, and HVAC unit, at the cost, risk, and expense of Ms. Lumbih. … Because the Court has determined that Ntaky's quiet title claim has merit, it need not address Ntaky's damages claim against Ms. Wilson." JA-11.

VI. ARGUMENT

A. **The Trial Court abused its discretion by not invoking its equitable powers to shift liability from Ms. Lumbih to Ms. Wilson, by reasoning that Ms. Lumbih had not provided a basis upon which to apply the doctrine of implied indemnity.**

The Trial Court should have exercised its equitable powers to fashion a just result between the parties because the Court found the boundary line to be out of place in the sense that it would have befitted all involved the boundary line were aligned with the "facts on the ground". In other words, if the property line was "in the right place" it would have run between the two

pertinent addresses in a place that obviated the trespass, thereby eliminating Ms. Lumbih's liability to Ntaky, and allowing Ntaky to proceed with any potential sale, free and clear of the cloud on title. Having found that Ntaky had superior title and that the boundary line thus established was unworkable between Ntaky and Ms. Lumbih, the Trial Court should have invoked its equitable powers to find Ms. Wilson liable to the parties on account of any damages associated with the boundary line. However, the Trial Court declined to exercise its equitable powers, stating that, "Ms. Lumbih does not provide any basis for the Court to determine the doctrine of implied indemnity's applicability to this case." JA-12.

Ms. Lumbih contends that she did provide a basis for the Trial Court to determine the doctrine of implied indemnity's applicability to the case. Indeed, the argument was simply, at its core, that Ntaky had sued Ms. Lumbih for something that Ms. Wilson had done, and not for something that Ms. Lumbih had done. JA-27-28. Ms. Lumbih described the situation as one in which it was, "uncontroverted, and the parties do not dispute, that Ms. Wilson conveyed a lot of land to Ntaky that was too wide, because it extended over the actual building line of the physical edifice on the abutting lot; and Ms. Wilson conveyed a lot of land to Ms. Lumbih that was too wide, because it included land that [had] already been conveyed to Ntaky, and it included land that was not even part of the dimensions of the lot." JA-37.

Moreover, Ms. Lumbih argued that the application of the doctrines of indemnity and contribution would depend on how the Trial Court ruled with respect to liability among the Parties, and Ms. Lumbih noted a reservation of rights to brief that issue pending the Trial Court's ruling on liability. However, the Trial Court's ruling did not attempt to determine the claims that Ntaky brought against Ms. Wilson, by finding that, "[b]ecause the Court has determined that

Ntaky's quiet title claim has merit, it need not address Ntaky's damages claim against Ms. Wilson."

Thus, the Trial Court abused its discretion by concluding that Ntaky's claims against Ms. Wilson were irrelevant once it determined the quiet title claims in Ntaky's favor. Indeed, the ruling in Ntaky's favor is the predicate for the Trial Court to determine the applicability of the doctrines of implied indemnity.

Indemnity generally involves the, "shifting of the entire loss from one who has paid it to another who would be unjustly enriched at the indemnitee's expense by the indemnitee's discharge of the obligation." *Dist. of Columbia v. Washington Hosp. Center*, 722 A.2d 332, 340 (D.C. 1998). "When based on equitable principles, indemnity may be granted to an indemnitee if there is a 'significant difference in the kind and quality' between the indemnitee's and the indemnitor's wrongdoing." *Johnson v. Mercedes-Benz, USA*, 182 F. Supp. 2d 58, 65 (D.D.C. 2002) (*quoting Quadrangle Dev. Corp. v. Otis Elevator Co*., 748 A.2d 432, 435 (D.C. 2000)).

As Ms. Lumbih described it, when Ms. Wilson sold the first real property to Ntaky, she created liability *against herself* because she sold *herself* into the situation for which, many years later, Ntaky ended up suing Ms. Lumbih. Ms. Wilson escaped the liability she created for herself, because once Ms. Wilson sold the second real property to Ms. Lumbih, Ms. Wilson succeeding in actually receiving compensation from Ms. Lumbih while at the same time making Ms. Lumbih liable to Ntaky instead of herself.

Accordingly, the Trial Court abused its discretion by finding no basis to apply the law of indemnity, because the Trial Court should have considered whether there was a significant difference in the kind and quality of wrongdoing between Ms. Lumbih and Ms. Wilson. Indeed, the uncontroverted and undisputed evidence at trial demonstrated that there was a significant

difference, and that Ms. Wilson was herself solely responsible for the cloud on title, and that Ntaky and Ms. Lumbih were essentially innocent bystanders.

B. **The Trial Court erred and/or abused its discretion by concluding that the evidence did not establish a breach of contract by Ms. Wilson, because the Trial Court did not consider whether Ms. Wilson did in fact convey what she promised to, and instead equated the pertinent duty to efforts to properly confirm whether Ms. Wilson was conveying what she promised to convey.**

The Trial Court disposed of Ms. Lumbih's breach of contract claim against Ms. Wilson according to the following explanation.

> Ms. Lumbih's breach of contract claim depends upon whether the September 24, 2010 deed imposed on Ms. Wilson an obligation or duty to confirm that the lot dimensions were correct. As a preliminary matter, the Court notes that nowhere does the September 24, 2010 deed expressly or implicitly impose such an obligation or duty on Ms. Wilson.5 (*See* Ntaky Exhibit 4). Additionally, Ms. Lumbih does not cite—and the Court is unaware of—any caselaw generally imposing such a duty on sellers of real property.
>
> In support of a determination that no such duty was imposed on her, Ms. Wilson cites to *Fireison v. Pearson*, 520 A.2d 1046 (D.C. 1987) in which the Court of Appeals considered a fraud claim under Maryland law in circumstances like those at issue in this matter. The Court of Appeals stated in relevant part as follows:
>
> Under Maryland law, the purchaser of property is required neither to examine the land records, nor survey the land, in order to determine the correct acreage. The purchaser clearly has a right to rely on the vendor's representations as to the boundaries and acreage of land. Even when the means of ascertaining the falsity of the vendor's representations are known and accessible, the purchaser's failure to review the land records will not bar his recovery.
>
> If, however, the means of knowledge are at hand*, and the purchaser undertakes to make an examination of the land records*, he cannot say that he was deceived and injured by misrepresentations of the vendor. . . . Thus, the crucial question is whether [the plaintiff]—by himself or through his agent—undertook an examination of the land records.
>
> (*Id*. at 1050 (emphasis original)). Here, Ms. Lumbih obtained a survey of Lot 825 from Vyfhuis which, although it specified that it was "not a property line survey," was nonetheless incorporated into the deed by [Ms. Evans]. Considering all the above, the Court cannot conclude that Ms. Wilson had a duty to confirm that the lot dimensions were correct. The Court shall accordingly deny Ms. Lumbih's third party claim against Ms. Wilson. JA-13-14

However, as Ms. Lumbih stated in her post-trial brief,

> Wilson claims that it was Lumbih who caused the mistake by paying for the Vyfhuis survey, which allegedly involved a chain reaction causing the settlement agent, Ms. Evans, to prepare an erroneous deed for Ms. Wilson to sign. However, this survey clearly states, and it is not disputed that it is "not a property line survey". And to be doubly sure, the expert witness testimony Mr. Currie, confirmed that it is a type of "house location survey" and not reliable. (Oct. 3, Tr. 57, lines 12-17). Thus, Ms. Evans should have known not to have prepared a deed based solely upon a house location survey, which Ms. Wilson alleges. Furthermore, Ms. Wilson's connection with and steering settlement to Ms. Evans, was controverted, and Ms. Wilson's testimony about this was not credible because she suggested that Ms. Evan's was Ms. Lumbih's choice, but Mr. Nelson and Ms. Lumbih both testified that M[s]. Wilson brought them to Ms. Evans. (Oct. 3, Tr. 114, line 19). JA-38.

In a footnote Ms. Lumbih added that, "It is not clear whether Ms. Wilson is making an argument that she is not liable for the Deeds because someone else prepared them, and Ms. Lumbih reserves the right to respond to this argument if it is being made." Id.

Accordingly, it was a mix of an abuse of discretion and clear error for the Trial Court to find that Ms. Lumbih had "made an examination of the land records" by "obtaining" the Vyfhuis survey, thereby obviating the Ms. Wilson's obligation to actually convey the real property described in the conveyance deed. First, it was Ms. Wilson, not Ms. Lumbih, who "obtained" the Vyfhuis survey, because Ms. Lumbih simply paid for it, and obtained it in that limited sense. On the other hand, Ms. Wilson directed Ms. Lumbih to pay for it, and then Ms. Wilson obtained it for herself so that she could give it to the settlement agent, to which she had steered both Ms. Lumbih and Ntaky. Ms. Wilson gave the survey to the settlement agent and Ms. Wilson alleges that the settlement agent used that survey to prepare the deed. Thus, it was an abuse of discretion for the Trial Court to find that it was Ms. Lumbih and not Ms. Wilson who had obtained the Vyfhuis survey, because the Trial Court did not consider or apply the law related to principal and agent relationships, and did not consider any relevant factors, and did not base its decision on the relevant evidence.

Second, the uncontroverted and undisputed evidence demonstrated that the Vyfhuis survey, as an unreliable house location survey, was, by its nature, not equivalent to an, "examination of the land records." Thus, even if it were correct to find that it was Ms. Lumbih, and not Ms. Wilson, who obtained the Vyfhuis survey, it was clear error to find that that survey amounted to an, "examination of the land records."

And third, the Trial Court abused its discretion by basing its reasoning on whether Ms. Wilson had a duty *to confirm* that the lot dimensions in the conveyance deed to Ms. Lumbih were correct. Instead, the Trial Court should have based its reasoning on the duty imposed by the conveyance deed to actually convey the real property so described. Because it was undisputed that Ms. Wilson did not actually convey the real property so described, the Trial Court should have found that Ms. Wilson breached her duty to convey the real property described in the deed.

VII. CONCLUSION

For the foregoing reasons the decision of Trial Court should be remanded so that the Trial Court can apply the pertinent equitable principals; and it should be reversed to find that Ms. Wilson breached her contractual duty to Ms. Lumbih to convey all the property described in the pertinent conveyance deed.

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2023, one copy of the foregoing Brief and the Corresponding Joint Appendix were served by via this Court's ECF system upon the following:

John Arness
Counsel for Appelle Ntaky Management, LLC

Vanessa Carpenter Lourie
Counsel for Appelle Carolyn Wilson

Respectfully Submitted,

/s/

Tyler Jay King

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

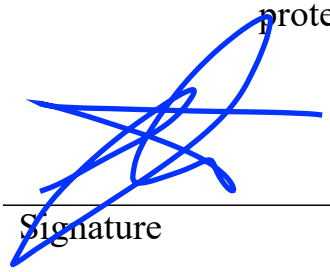
2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.



Signature

23-CV-298 & 23-CV-299

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