

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH M. EMMOREY, AKA ELIZABETH
BRAUNSCHNEIDER,

UNPUBLISHED
February 28, 1997

Plaintiff-Appellee,

v

No. 189696
Kent Circuit Court
LC No. 94-2756-DO

PAUL V. EMMOREY,

Defendant-Appellant.

Before: Gribbs, P.J., and Holbrook, Jr., and J. L. Martlew,* JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce entered following a bench trial. We affirm.

Defendant first argues that the trial court erred in its factual determination that plaintiff contributed \$33,000 to the parties' Florida property. This Court will not reverse a trial court's finding of fact unless clearly erroneous. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding of fact is clearly erroneous if, after a review of the entire record, this Court is left with the definite and firm conviction that a mistake has been made. *Id.*

In this case, plaintiff's testimony regarding her contributions to the Florida property was inconsistent in some respects, and defendant sought to establish circumstantially that plaintiff had used \$30,000 of the annuity proceeds to purchase a certificate of deposit rather than contributing the proceeds to the Florida property. At trial, however, defendant failed to offer any direct evidence that plaintiff made such a purchase or that plaintiff inaccurately testified in regards to depositing the funds into the parties' joint checking account. Thus, the trial court was presented with conflicting and inconsistent testimony as well as circumstantial evidence regarding the funding of the Florida property. Without any direct evidence of plaintiff having purchased a certificate of deposit, the trial court's factual determination turned essentially on the credibility of the witnesses. This Court gives special deference to

* Circuit judge, sitting on the Court of Appeals by assignment.

a trial court's findings when based on the credibility of witnesses. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991). Moreover, in cases where the trial court saw the witness and heard the testimony, this Court gives great weight to the trial court's factual determinations resulting from that testimony. *Beason, supra* at 810; MCR 2.613(C). Accordingly, based upon our review of the evidence presented to the trial court, we cannot say that a definite and firm conviction exists that the trial court's findings as to the funding of the Florida property were clearly erroneous. *Beason, supra* at 805.

Defendant next argues that the trial court erred in its factual determination that plaintiff contributed \$37,000 to the parties' Bristol Avenue property. Specifically, defendant contends that the evidence presented at trial was insufficient to support the trial court's finding in that it consisted exclusively of plaintiff's testimony, without any corroborating evidence.

In this case, however, defendant failed to offer any evidence disproving plaintiff's contentions regarding her contributions to the Bristol property. Therefore, the trial court's finding again turned on the credibility of the witnesses. Accordingly, we cannot say that a definite and firm conviction exists that the trial court's findings as to the parties' respective contributions to the Bristol property were clearly erroneous. *Id.*

Defendant also argues that the trial court abused its discretion by not conducting a full evidentiary hearing prior to ruling on defendant's motion for a new trial. After the trial court entered its judgment, defendant moved the trial court for a new trial pursuant to MCR 2.611(A)(1)(a) and MCR 2.612(C)(1)(c), alleging that plaintiff had perjured herself and perpetrated fraud on the court when she testified to her contributions regarding the Florida property. In support of these allegations, defendant submitted with his motion the affidavits of himself and a representative of the bank where plaintiff allegedly purchased the certificate of deposit as well as additional documentary evidence tending to support his allegations.

This Court has stated that "where a party has alleged that fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations." *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). However, this Court has also held that when a party's claim that his opponent has perjured himself is dependent upon newly discovered evidence, then the claim should be treated as one based on new evidence rather than one based on fraud or perjury. *Stallworth v Hazel*, 167 Mich App 345, 352-353; 421 NW2d 685 (1988). Since defendant's allegations of perjury and fraud were based on newly discovered evidence, his claim should be treated as one involving newly discovered evidence. *Id.*

This Court reviews a trial court's decision to deny a motion for a new trial based on newly discovered evidence for abuse of discretion. *Rappaport v Rappaport*, 185 Mich App 12, 16; 460 NW2d 588 (1990). In order for a new trial to be granted on the basis of newly discovered evidence, the proponent of the motion must establish that: (1) the evidence itself is newly discovered, (2) the evidence is not cumulative, (3) the evidence would have affected the outcome of the trial, and (4) the proponent of the motion for a new trial could not with reasonable diligence have discovered the

evidence and produced it at trial. *People v Menchura*, 205 Mich App 481, 483; 517 NW2d 797 (1994); MCR 2.611(A)(f). In this case, defendant clearly fails part four of this analysis. A review of the record and the offered evidence leads this Court to conclude that defendant could have offered the evidence during trial if he had acted with reasonable diligence. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial based upon the new evidence. *In re Pope Estate*, 205 Mich App 174, 178-179, 517 NW2d 281 (1994); *Rappaport*, *supra* at 12, 16.

Defendant finally argues that the trial court's dispositional ruling was unfair and inequitable in light of its erroneous findings of fact as to the parties' respective contributions to the Florida and Bristol properties. This Court reviews a trial court's dispositional ruling for fairness and equity. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). Moreover, in order to reverse a trial court's dispositional ruling, this Court must be left with a firm conviction that the trial court's ruling was inequitable and unfair. *Id.*

Defendant rests his argument as to this issue exclusively on his allegations that the trial court clearly erred in its determination of the parties' respective contributions to the Florida and Bristol properties. As noted previously, we have concluded that the trial court did not clearly err in regards to these findings, and we are not firmly convinced that the trial court's ultimate dispositional ruling was inequitable and unfair. *Id.*

Affirmed.

/s/ Roman S. Gibbs

/s/ Donald E. Holbrook, Jr.

/s/ Jeffrey L. Martlew