

STATE OF MICHIGAN
COURT OF APPEALS

DIANE M. HORN, Personal Representative of the
Estate of ANDREW A. SEIFFERLEIN,,

UNPUBLISHED
March 20, 1998

Plaintiff/Counter Defendant-Appellee,

v

No. 196326
Tuscola Circuit Court
LC No. 95-013897-CH

STANLEY J. FOX and LISA L. FOX,

Defendants/Counter Plaintiffs-Appellants,

and

RANDY ZUEHLKE and KIM ZUEHLKE,

Defendants.

Before: Doctoroff, P.J., and Reilly and Allen*, JJ.

PER CURIAM.

Defendants, Stanley J. Fox and Lisa L. Fox, appeal by right from the judgment setting aside a deed of conveyance from Andrew A. Seifferlein to them and an August 5, 1994 deed of conveyance from Seifferlein to Randy Zuehlke and ordering defendants to pay Seifferlein's estate \$13,710 as repayment for loans Seifferlein made to defendants. We affirm.

Plaintiff, acting as the personal representative of Seifferlein's estate, sued to have the two conveyances set aside on the basis of lack of capacity, lack of consideration and undue influence. Plaintiff also sued for the recovery of money allegedly loaned to defendants but not repaid. Defendants claimed that there was no undue influence or lack of capacity and that the money and property they received from Seifferlein were gifts. An advisory jury found that Seifferlein lacked capacity to make the conveyances, that the conveyances were the product of defendants' undue influence on Seifferlein and that defendants had received \$13,710 from Seifferlein as loans rather than gifts.

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

Defendants first argue that the court erroneously allowed plaintiff to present evidence and argument on the theory of undue influence when that issue was not raised in the pleadings. We disagree. Although defendants correctly point out that undue influence was not pleaded in plaintiff's complaint, defendants did not raise this objection below. To the contrary, as defense counsel's opening indicates, defendants were aware that plaintiff was proceeding on a theory of undue influence and geared their defense accordingly. Further, when defense counsel for the Zuehlkes raised this objection, defendants did not join in the objection. Consequently, because their attorney at trial deemed it proper to proceed on plaintiff's undue influence theory of liability, defendants cannot now claim this was error. To conclude otherwise would allow them to harbor an appellate parachute. *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 542-543; 529 NW2d 318 (1995).

Defendants next argue that the trial court erred in admitting hearsay evidence regarding statements made by the decedent four days after the contested conveyance. We disagree. First, we note that defendants failed to make this objection below and therefore this argument was not preserved. Generally, we do not review unpreserved issues regarding the admissibility of evidence. *People v Newcomb*, 190 Mich App 424, 431; 476 NW2d 749 (1991). Furthermore, we note that arguably plaintiff's testimony regarding statements made by the decedent, although hearsay, was admissible pursuant to MRE 803(2). Because admission of the evidence was not decisive to the outcome of the case, we find its admission to be harmless. See *People v Grant*, 445 Mich 535, 550-553; 520 NW2d 123 (1994).

Defendants next argue that, even if the evidence discussed above was properly admitted, plaintiff failed to meet her burden of proof regarding the existence of a fiduciary relationship between the decedent and defendants, undue influence, mental incapacity and lack of consideration. We disagree. Initially we note that defendants apparently do not appreciate the fact that an advisory jury, rather than the court, found that the decedent lacked the capacity to make the conveyances at issue and that they were the result of undue influence.

Our review of the record leads us to the conclusion that no error requiring reversal occurred below. The evidence produced at trial, particularly defendant's own testimony, was sufficient to trigger a presumption of undue influence, *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976), which defendant has failed to rebut. Defendants have also failed to cite any authority that would demonstrate the advisory jury erred in finding that decedent did not have the capacity to make the conveyance. *Singerman v Municipal Service Bureau, Inc.*, 211 Mich App 678, 684; 536 NW2d 547 (1995). Finally, because lack of consideration was not the basis of the judgment entered below, defendants' arguments in this regard do not demonstrate that any error occurred.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Glenn S. Allen, Jr.

I concur in result only.

/s/ Maureen Pulte Reilly