STATE OF MICHIGAN

COURT OF APPEALS

THE BEHLER-YOUNG COMPANY,

Plaintiff-Appellee,

v

A.C. BEAUDRY, INC., DONALD A. BEAUDRY, and KATHLEEN BEAUDRY,

Defendants,

and

ROBERT L. POMEROY and PEGGY POMEROY,

Defendants-Appellants.

UNPUBLISHED
September 25, 2008

No. 277775
Genesee Circuit Court
LC No. 04-080526-CZ

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In this garnishment action, defendants Robert and Peggy Pomeroy appeal by leave granted an order directing garnishee Merrill Lynch & Company to turn over their IRA accounts, and garnishee Metropolitan Life Insurance Company to turn over the cash surrender value of Robert Pomeroy's life insurance policies to satisfy a consent judgment entered in plaintiff's favor. See *The Behler-Young Co v A C Beaudry Inc*, unpublished order of the Court of Appeals, entered May 18, 2007 (Docket No. 277775). We reverse and remand for proceedings consistent with this opinion.

I. Facts

Defendant Robert Pomeroy was treasurer and president of A.C. Beaudry, Inc., which was involved in the construction business. Defendant Peggy Pomeroy was the secretary of the company. Plaintiff was a supplier of heating, ventilation, and cooling materials and sold materials to A.C. Beaudry, Inc. for various construction projects. On December 28, 2004, plaintiff brought an action against these and other defendants asserting claims for (1) breach of contract, (2) open account/account stated, (3) violation of the Michigan Building Contract Fund Act (MBCFA), MCL 570.151 *et seq.*, (4) quantum meruit, and (5) claim and delivery. An

affidavit attesting to the existence of the open account and a copy of the account, which included invoices dating from April of 2004 through December of 2004, were attached to the complaint. On January 17, 2005, plaintiff amended its complaint to add a conversion claim and request for treble damages pursuant to MCL 600.2919(a).

After various proceedings occurred, an order of consent judgment was entered on February 8, 2006. The terms of the consent judgment are as follows:

> This matter having come before this Court pursuant to The Behler-Young Company's complaint, the parties hereby stipulate and agree to the following Consent Judgment:
>
> 1. Plaintiff, The Behler-Young Company (hereinafter "Behler") shall have a Final Money Judgment against Defendant A.C. Beaudry, Inc. in the amount of $486,475.08 plus a service charge of 1.5% per month calculated from January 5, 2006 and actual attorney fees pursuant to the contract.
>
> 2. Behler shall have a Final Money Judgment against Robert L. Pomeroy, individually in the amount of $350,000.00 plus interest of 10% per annum calculated from January 12, 2006, statutory costs and statutory attorney fees pursuant to MCL 570.151, et al.
>
> 3. Behler shall have a Final Money Judgment against Peggy Pomeroy in the amount of $15,000.00 pursuant to MCL 570.151 et al. which will be paid as follows:
>
> a. $9,000.00 upon execution of the Consent Judgment;
>
> b. $6,000.00 by November 1, 2006;
>
> c. Should Peggy Pomeroy default in the payments of paragraphs 3 a and b above, the Judgment [against Peggy Pomeroy - - -][1] will be automatically amended to $30,000.00 plus statutory interest, costs and statutory attorney fees.
>
> 4. Upon entry of this Consent Judgment, Donald A. Beaudry and Kathleen Beaudry are hereby dismissed with prejudice and without costs to all parties.
>
> 5. Defendants, A.C. Beaudry, Inc., Robert L. Pomeroy and Peggy Pomeroy, forever waive any right to appeal.

Thereafter, Peggy Pomeroy defaulted on the payment provisions and, according to its terms, the consent judgment was automatically amended. Subsequently plaintiff began collection activities. Numerous writs for garnishment were issued and defendants Robert and Peggy Pomeroy underwent discovery examinations before the trial court. This appeal pertains to the garnishment

[1] Handwritten note unable to be deciphered but appears to be non-substantive.

of accounts held by Merrill Lynch & Company and Robert Pomeroy's life insurance policies issued by Metropolitan Life Insurance Company.

A. Merrill Lynch & Company Accounts

On October 9, 2006, writs for garnishment were issued to Merrill Lynch & Company with regard to Robert and Peggy Pomeroy. The garnishee disclosures returned by Merrill Lynch dated October 26, 2006, included that (1) the disclosed accounts were "likely exempt from withholding," (2) they served defendants on October 18, 2006, (3) Robert Pomeroy had an Individual Retirement Rollover Account in the amount of $264,139.25, a Roth Retirement Account in the amount of $21,541.53, and a Cash Management Account in the amount of $4.51, and (4) Peggy Pomeroy had an Individual Retirement Rollover Account in the amount of $102,241.63, and a Roth Retirement Account in the amount of $18,394.17.

On November 9, 2006, defendants filed an objection to the writs for garnishment served on Merrill Lynch, arguing that the funds plaintiff sought to garnish were individual retirement accounts that were exempt under MCL 600.6023(a)(11) *et seq*., and were otherwise exempt under the laws of the State of Michigan. On November 20, 2006, plaintiff responded to defendants' objection, arguing that:

> The funds Plaintiff seeks to garnish are not exempt from garnishment, as they are trust funds defalcated by the Defendants pursuant to MCL § 570.151 *et seq*., and Defendants had no legal authority with which to transfer such funds to Garnishee. Defendants have violated the Michigan Builders' Contract Fund Act, MCL § 570.151 *et seq*., and consented to judgment for such violations. Defendants are thus collaterally estopped from arguing that the funds held by Garnishee are not trust funds pursuant to MCL § 570.151 *et seq*., due to the Consent Judgment.

Plaintiff further argued that the funds were not otherwise exempt under the laws of the State of Michigan. And, plaintiff argued, pursuant to MCR 3.101(K), defendants waived their right to object to the garnishment. Defendants had 14 days—until November 1, 2006—in which to object after being served the writ by garnishee Merrill Lynch on October 18, 2006. Their objection was filed November 9, 2006; thus, it was untimely and constituted a waiver of their right to object.

On December 4, 2006, the trial court ordered the funds turned over except that defendants, who had argued that they were exempt under federal law, had fourteen days to prove that the accounts were exempt under federal law. On January 8, 2007, another hearing was held to determine if defendants had proven that the accounts were exempt under federal law. The court held that defendants failed to meet their burden and ordered the funds turned over to plaintiff. The court based its decision on the facts that defendants violated the MBCFA and the documentation they submitted with regard to the Merrill Lynch accounts only addressed the exempt status if the money was properly in the accounts—not the issue of whether the accounts were exempt if the money used to purchase them was acquired by violating the MBCFA.

B. Metropolitan Life Insurance Company

On October 31, 2006, writs for garnishment were issued to Metropolitan Life Insurance Company with regard to Robert and Peggy Pomeroy. The garnishee disclosures returned by Metropolitan Life dated November 27, 2006, indicated that (1) they served defendants on November 27, 2006, (2) Robert Pomeroy had five life insurance policies in the amounts of $12,653.64, $9,580.97, $30,408.48, $14,650 (overdue), and one "currently assigned," and (3) Peggy Pomeroy had two life insurance policies in the amounts of $4,486.02 and $770.69.

On December 12, 2006, defendants filed an objection to the garnishment served on Metropolitan Life. Defendants argued that their life insurance policies were exempt under MCL 500.2207(1) because all policies at issue had the spouse as beneficiary. On December 21, 2006, plaintiff responded that the garnished funds were not exempt under MCL 500.2207(1) because (1) the policies were purchased with trust funds defalcated by defendants in violation of the MBCFA, MCL 570.151 *et seq*., (2) some of the life insurance policies were held for the benefit of the Robert E. Pomeroy Trust, not his wife or children, and (3) defendants failed to timely object, under MCR 3.101(E)(5), to the garnishment which constituted a waiver of their right to object.

On December 21, 2006, plaintiff also filed a motion for the turn over of the garnished funds held by Metropolitan Life. Plaintiff argued that the life insurance policies were purchased by defendants with money held in trust for plaintiff under the MBCFA, MCL 570.151, *et seq*. Thus, pursuant to *Massachusetts Bonding & Ins Co v Josselyn*, 224 Mich 159, 162; 194 NW 548 (1923), plaintiff was the trust beneficiary with a super priority over those funds. Further, defendants were collaterally estopped from arguing that the funds held by Metropolitan Life were not trust funds because they consented to judgment for a violation of MBCFA.

On January 5, 2007, defendants responded to plaintiff's motion to turn over the garnished funds held by Metropolitan Life and argued that the motion should be denied. Life insurance policies, including the cash surrender values, that are payable to a spouse are exempt from garnishments under MCL 500.2207. All of the policies at issue were exempt as payable to Robert's spouse and children. Plaintiff was merely a judgment creditor, regardless of its claims pertaining to the MBCFA. Further, plaintiff averred in its underlying complaint that defendants failed to pay for materials from April 2004 through December 29, 2004. A review of the insurance policies revealed that they were in existence for a number of years prior to 2004, and a majority of the premiums paid were paid before the claims arose. In addition, once plaintiff received the garnishment disclosure from Metropolitan Life which indicated that the funds were exempt under MCL 500.2207, the burden shifted to plaintiff to file a motion to seek an order for the property—defendants were not obligated to file objections. MCR 3.101(J)(7). Nevertheless, defendants' objections were timely filed on December 12, 2006. And, contrary to plaintiff's claim, objections can be filed at any time and are not considered waived under MCR 3.101(K).

On January 8, 2007, the court held that the life insurance policies with the Robert Pomeroy Trust as beneficiary were not exempt, but the others that were to benefit his spouse and children were exempt from garnishment.

C. Subsequent Proceedings Related to Both Writs for Garnishment

On March 8, 2007, defendants filed a supplemental brief in support of their objections to the writs of garnishment. Defendants argued that the court was operating under the misimpression that the IRAs and life insurance policies were purchased with funds obtained by them in violation of the MBCFA. In fact, plaintiff's claim under the MBCFA arose in April of 2004 (from failure to pay invoices) and the vast portion of the approximate $400,000 in the Merrill Lynch accounts accrued from contributions years and decades prior to that time. Since April of 2004, only $1,267.50 was contributed to Robert Pomeroy's accounts and Peggy Pomeroy never worked at A.C. Beaudry so the accrual of her accounts was not from funds contributed by A.C. Beaudry. And, even if the funds used to grow the Merrill Lynch accounts came from both a violation of the MBCFA and personal funds, plaintiff would only be entitled to that portion of the IRAs traceable to the violation of the MBCFA. In other words, according to *Massachusetts Bonding & Ins Co*, *supra*, there must be a proration.

Further, defendants argued, funds held in an IRA are exempt from garnishment under MCL 600.6023. And, the cash surrender value of the life insurance policies cannot be garnished because, as held by *Isaac Van Dyke Co v Moll*, 241 Mich 255; 217 NW 29 (1928), it did not represent a debt. Unless and until the policies are surrendered, the cash surrender value is not owed and does not represent a debt. See *Waatti & Sons Electric Co v Dehko*, 230 Mich App 582, 588; 584 NW2d 372 (1998). But, even if the cash surrender value could be garnished, defendants contended that the value was exempt under MCL 500.2207(1). And, contrary to plaintiff's claims, defendants' objections to the garnishments were timely filed under MCR 3.101(K) and (J)(1) in that they were filed within 28 days after service of the writs on the garnishees and the court rules provide that objections may be filed at any time.

On March 26, 2007, the court heard oral arguments on the various issues before the court. The court held that, pursuant to MCR 2.612(C)(1)(f), it would reconsider its order of January 8, 2007, primarily because defendants' argument that the IRA accounts were exempt under state law, not federal law, might be meritorious. The court scheduled the matter for further arguments to be held on April 16, 2007.

On April 12, 2007, plaintiff filed its supplemental brief regarding the garnishments. Plaintiff argued first that, because defendants failed to timely object to the garnishments as provided by MCR 3.101(K), the funds should have been turned over within 28 days of the service of the garnishment on the garnishee. Second, plaintiff argued, trust funds are not the property of the trustee, but the beneficiary; thus, funds once impressed with a trust, continue to be trust funds indefinitely and such trust follows those funds wherever they go. Third, once the trust funds were commingled with other funds, the entire vehicle into which the funds were deposited was held in trust for plaintiff. Fourth, under MCL 600.6023(1)(k), only one individual retirement account is exempt from levy and sale under execution, if at all. But, here, the IRAs are not exempt because the accounts consist of, at least, commingled trust funds held for the plaintiff's benefit. The same argument holds with respect to the life insurance policies. Defalcated funds were used to pay the premiums for the life insurance policies thus they are not exempt.

On April 12, 2007, defendants filed a brief on reconsideration in support of their position that the garnishments of the IRA accounts and Robert Pomeroy's life insurance policies would be erroneous. First, the consent judgment only stated that a judgment was entered against defendants "pursuant to MCL 570.151 et al." It did not state that any assets owned by defendants represented the proceeds of the trust funds under that Act. The law is well-established, consent judgments do not have collateral estoppel effect; the matters were not adjudicated, they were settled by agreement. Second, IRAs are exempt from garnishment under MCL 600.6023. Third, defendants argued, to the extent that it was claimed that trust funds under MCL 570.151 were used to purchase the IRAs, that matter was never determined and there was no evidence to support that claim. And, the only trust fund money that could have been used, if at all, to pay into the IRAs was about $1,267.50, considering the time frame (after March of 2004) in which plaintiff's claim accrued and the contributions that were made by A.C. Beaudry into Robert Pomeroy's IRA account. Peggy Pomeroy never worked for A.C. Beaudry so her IRA account was not funded by trust fund monies. Fourth, defendants argued, they timely objected to the garnishments under MCR 3.101(J)(1), i.e., within 28 days after the writs were served; thus, objections were not waived. And, fifth, the cash surrender value of the life insurance policies on Robert Pomeroy were not subject to garnishment because they were not a debt and were exempt under MCL 500.2207(1). On April 14, 2007, defendants filed a supplemental brief in support of their claim of exemptions relating to the IRAs. Citing *Cunningham, Davison, Beeby, Rogers & Alward v Herr*, 198 Mich App 258, 259-260; 497 NW2d 575 (1993), defendants argued that, contrary to plaintiff's claim, all of defendants' IRAs were exempt—not just one of them.

Oral arguments continued on April 16, 2007. The same arguments discussed extensively above were repeated by the parties. After hearing oral arguments, the trial court made the following conclusions: (1) "there was no timely objection to the garnishment," and (2) "if there are any funds that are transmitted into these accounts, that, for all intents and purposes, the – the trustee has the right to and to invade these accounts were there's money that's commingled – and to obtain those monies to satisfy the judgment that's been entered." On those grounds, the court ordered Merrill Lynch and Metropolitan Life to turn over the garnished funds. Thereafter, defendants sought a stay pending appeal and leave to appeal from this Court and both were granted. *The Behler-Young Co v A C Beaudry Inc*, unpublished order of the Court of Appeals, entered May 18, 2007 (Docket No. 277775).

II. Analysis

First, defendants argue that they did not waive their right to file objections to the writs of garnishment by failing to file their objections within 14 days after being served the writs. We agree. Court rule interpretation and application is subject to de novo review. *Colista v Thomas*, 241 Mich App 529, 535; 616 NW2d 249 (2000).

Garnishment actions are authorized by MCL 600.4011(1), but court rules set forth the procedure to be followed. See MCL 600.4011(2); *Royal York v Coldwell Banker*, 201 Mich App 301, 305; 506 NW2d 279 (1993). The issue here is whether defendants' failure to file an objection within 14 days of being served the writs of garnishment constituted a waiver of their right to object. Plaintiff has persistently argued that it does. The trial court agreed with plaintiff. But the plain language of the court rule contradicts plaintiff's argument and the court's ruling.

MCR 3.101(K) states, in pertinent part:

> (1) Objections shall be filed with the court within 14 days of the date of service of the writ on the defendant. Objections may be filed after the time provided in this subrule but do not suspend payment pursuant to subrule (J) unless ordered by the court.

Clearly defendants did not waive their right to object to the writs of garnishment although the objections were not filed "within 14 days of the date of service of the writ." Plaintiff's persistent claim of waiver is not only contrary to this rule, but the well-established law of waiver. "[C]onduct that does not express any intent to relinquish a known right is not a waiver, and a waiver cannot be inferred by mere silence." *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). And, contrary to plaintiff's claim, the garnishees were not required to turn over the withheld funds within 28 days from the date of service of the writs because the garnishees were notified that such objections were filed. See MCR 3.101(J). Thus, the trial court's holding that defendants waived their right to object to the writs of garnishment is contrary to the rule set forth in MCR 3.101(K)(1) and is reversed.

Next, defendants argue that the trial court erroneously denied their objections and ordered the release of the funds in the Merrill Lynch accounts and the cash surrender value of Robert Pomeroy's life insurance policies because the consent judgment does not establish that defendants financed or purchased these assets with funds in violation of the MBCFA, MCL 570.151 *et seq*. We agree.

Plaintiff has persistently argued throughout the course of this action that, because defendants entered into a consent judgment "pursuant to MCL 570.151 et al," defendants admitted that funds received in trust under the MBCFA were used to finance their personal Merrill Lynch accounts and Robert Pomeroy's life insurance policies. Therefore, plaintiff has claimed, these typically exempt assets are subject to garnishment. We conclude that, on these facts, plaintiff's argument is fatally flawed.

A consent judgment possesses the same force and character as litigated judgments for purposes of enforcement. *Trendell v Solomon*, 178 Mich App 365, 368-369; 443 NW2d 509 (1989). But a consent judgment is a settlement agreement and thus its terms, for interpretation purposes, are governed by contract principles. See *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999); *Young v Robin*, 146 Mich App 552, 557-558; 382 NW2d 182 (1985). Honoring the intent of the parties is the primary goal in contract interpretation. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). Thus, we consider the plain and ordinary meaning of the words used in the contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). "If the contract language is clear and unambiguous, its meaning is a question of law." *UAW-GM Human Resource Ctr*, *supra*, quoting *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996).

Because it appears that the trial court agreed with plaintiff's argument that by entering into the consent judgment defendants admitted that funds received in trust under the MBCFA were used to finance defendants' personal assets at issue, we turn to the consent judgment. Here, the consent judgment provides that plaintiff shall have a final money judgment against each

defendant in specified amounts "pursuant to MCL 570.151 et al." "Pursuant to" means "[i]n compliance with; in accordance with; under" and "[a]s authorized by." Blacks Law Dictionary (7th ed). And "MCL 570.151 et al" refers to the MBCFA. Thus, next we consider the MBCFA.

The MBCFA is a penal statute, but a civil cause of action for a violation of its provisions has been recognized for years. *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 48 n 3; 631 NW2d 59 (2001). "The prima facie elements of a civil cause of action brought under the [MBCFA] include (1) the defendant is a contractor or subcontractor engaged in the building construction industry, (2) a person paid the contractor or subcontractor for labor or materials provided on a construction project, (3) the defendant retained or used those funds, or any part of those funds, (4) for any purpose other than to first pay laborers, subcontractors, and materialmen, (5) who were engaged by the defendant to perform labor or furnish material for the specific project." *Id*. at 49, citing MCL 570.151 *et seq*. The Court in *DiPonio Constr Co, supra,* further explained:

> The builders' trust fund act "was originally passed in 1931 as a depression-era measure to afford additional protection to subcontractors and materialmen." *People v Miller*, 78 Mich App 336, 342; 259 NW2d 877 (1977). During that era, builders often undertook construction projects that were larger than their ability to finance. *Id*. Therefore, builders often paid suppliers and materialmen on older projects with the funds received on more current operations. *Id*. When difficult economic times arrived, the builders became insolvent and many subcontractors and materialmen were never paid. *Id*. "In light of this history, it is clear that the design of the act is to prevent contractors from juggling funds between unrelated projects." *Id*. [*Id*. at 49.]

In light of the unambiguous law related to consent judgments and the MBCFA, it is unclear to us as to why plaintiff claims that by entering into this consent judgment defendants admitted that funds received in trust under the MBCFA were used by them to finance the disputed personal assets. Even assuming that by entering into this consent judgment defendants admitted to violating the MBCFA, generally all that would mean is that defendants admitted that they were paid for labor and materials provided on a specific construction project, and they retained or used those funds, or part of them, for any purpose other than to first pay plaintiff, who was engaged by defendants to perform labor or furnish material for that specific project. See *DiPonio Constr Co*, *supra*. Nothing in the consent judgment indicates as to what "purpose other than to first pay [plaintiff]" the funds were retained or used. The funds for one specific project could have been used to pay for materials on another unrelated project in violation of the act. Such an explanation is just as plausible as plaintiff's which is that the money was used to finance personal assets. Speculation does not establish facts. And the terms of settlement cannot be rewritten by us. See *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 207; 476 NW2d 392 (1991). Thus, plaintiff's claim that by entering into the consent judgment defendants admitted that funds received in trust under the MBCFA were used to finance their personal assets at issue is without merit.

Plaintiff has also persistently claimed that, because defendants entered into this consent judgment, defendants are collaterally estopped from arguing that the assets held by the garnishees were not financed with trust funds in violation of the MBCFA. Again, plaintiff's claim is unsupported by the law. In fact, the law on the subject is clear—collateral estoppel does

not apply to consent judgments. See, e.g., *Smit v State Farm Mut Auto Ins Co*, 207 Mich App 674, 682; 525 NW2d 528 (1994); *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 102-103; 380 NW2d 60 (1985); *American Mut Liability Ins Co v Michigan Mut Liability Co*, 64 Mich App 315, 326-327; 235 NW2d 769 (1975). Generally, for collateral estoppel to apply three elements must be satisfied, including that "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).

Here, plaintiff claims in its brief on appeal that:

> the Defendants signed a consent judgment that provided that their liability upon which the consent judgment was entered rested on violations of the MBCFA. A violation of the MBCFA means only one thing: trust funds were fraudulently defalcated. It is disingenuous for Defendants to now assert that they did not intend to be bound by the admission in the consent judgment that they violated the MBCFA.

The error in plaintiff's argument is easily spotted. As discussed above, even assuming that by entering into this consent judgment defendants admitted to violating the MBCFA, that is not an admission that defendants used the funds received in trust under the MBCFA to finance their personal Merrill Lynch accounts and Robert Pomeroy's life insurance policies. See *DiPonio Constr Co, supra*. What happened to the trust funds was never litigated and determined. See *Van Pembrook, supra*. Therefore, plaintiff's argument that defendants are collaterally estopped from arguing that the funds held by the garnishees were not financed with trust funds in violation of the MBCFA is also without merit.

Throughout this case, plaintiff has relied on the cases of *Long v Earle*, 277 Mich 505; 269 NW 577 (1936) and *Massachusetts Bonding & Ins Co v Josselyn*, 224 Mich 159, 162; 194 NW 548 (1923) in support of its claim that the whole of defendants' Merrill Lynch accounts and Robert Pomeroy's life insurance policies are subject to garnishment. But these cases are distinguishable from this case.

In *Massachusetts Bonding & Ins Co*, the defendant trustee commingled trust funds with his own money and used those monies to pay premiums on life insurance policies. Our Supreme Court held:

> It is an elementary rule that a trustee may make no profit out of the handling of a trust estate. It is also well settled that where money held upon trust is misapplied by the trustee and traced into an unauthorized investment in property of any nature, the investment thus made, in the absence of a claim of *bona fide* ownership by a third person, may be treated by the *cestui que trust* as made for his benefit. The consideration for the investment is trust money and the *cestui quo trust* becomes the equitable owner of the property purchased therewith. His right thereto is a property right, not one created by any preference or favoritism shown by a court of equity. [*Id*. at 162 (citations omitted).]

Thereafter, the Court held that prorating the proceeds of the policies in the proportion that the trust funds and private funds were invested was the appropriate remedy. *Id*. at 163-164.

Similarly, in *Long*, it was established that the defendant embezzled money belonging to the beneficiaries of a trust and fraudulently converted that money to his own use by purchasing real estate in his name and his wife's name as tenants by the entirety to avoid his creditors. *Id*. at 515, 517. Our Supreme Court, after quoting some of the paragraph set forth above from *Massachusetts Bonding & Ins Co*, held:

> Here, there is some claim that defendant [trustee] commingled the trust funds with funds of his own. If the trustee commingles trust funds with his own, the entire commingled property "will be treated as subject to the trust, to the extent necessary to make good the claim of the *cestui quo trust* to funds traced to, and still found commingled in, the common fund, except in so far as the trustee may be able to distinguish and separate that which is his own." [*Long*, *supra* at 526 (citation omitted).]

These facts are quite different than the facts before us. Here, there is no evidence that defendants commingled their personal funds with funds received in trust under the MBCFA. And, thus, there is no evidence that defendants used any such commingled funds to purchase either the Merrill Lynch accounts or the life insurance policies at issue. That is, the funds received in trust under the MBCFA were not "traced into an unauthorized investment" and there is no evidence that these trust funds constituted "the consideration for the investment[s]." *Massachusetts Bonding & Ins Co*, *supra* at 162. Again, the consent judgment on which this garnishment action is premised merely provides that there is a final money judgment against both defendants "pursuant to MCL 570.151, et al." It does not state that there was a commingling of personal and trust funds or that such commingled funds were used to purchase these personal assets. In both *Massachusetts Bonding & Ins Co* and *Long* it was established that the trustee defendants inappropriately commingled funds. And, contrary to plaintiff's argument, as these cases clearly hold, even if funds were commingled, plaintiff would not be entitled to the entirety of the investments. See, also, *Fidelity & Deposit Co of Maryland v Stordahl*, 353 Mich 354; 91 NW2d 533 (1958).

Apparently, however, the trial court was persuaded by plaintiff's arguments, holding "***if*** there are any funds that are transmitted into these accounts, that, for all intents and purposes, the – the trustee has the right to and to invade these accounts were there's money that's commingled – and to obtain those monies to satisfy the judgment that's been entered." But the holding itself reveals that the trial court did not know whether funds received in trust under the MBCFA were used to acquire or contribute to defendants' personal assets at issue. As discussed above, defendants did not admit to financing the disputed personal assets with such funds when they entered into a consent judgment with plaintiff, nor is there any evidence that defendants commingled personal funds and trust funds or that such commingled funds were used to purchase these personal assets. Accordingly, the trial court should not have ordered Merrill Lynch and Metropolitan Life to turn over the garnished funds on the grounds stated and this decision is reversed.

Next, defendants argue that Robert Pomeroy's life insurance policies were exempt from garnishment under MCL 500.2207(1), contrary to the trial court's decision. Generally, whether life insurance policies are exempt from garnishment presents a question of law. Questions of law are subject to review de novo. See *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Defendants have argued throughout this case that their life insurance policies are exempt from garnishment under MCL 500.2207 because all policies at issue had the spouse as beneficiary, even the ones that were in the name of the Robert E. Pomeroy Trust. Plaintiff has argued that the policies are not exempt because (1) defendants waived their right to object to the garnishment when they failed to file a timely objection, (2) the policies were purchased with trust funds defalcated by defendants in violation of the MBCFA, and (3) some of the policies were in the name of the Robert E. Pomeroy Trust, not his wife or children. For the reasons extensively discussed above, neither of plaintiff's first two arguments have merit. Defendants did not waive their right to object to the garnishment and there is no evidence to support plaintiff's claim that the policies were purchased with funds received in trust under the MBCFA. Thus, we turn to the issue whether the policies held in the name of the Robert E. Pomeroy Trust are exempt from garnishment under MCL 500.2207(1).

MCL 500.2207(1) provides, in pertinent part:

> It shall be lawful for any husband to insure his life for the benefit of his wife, and for any father to insure his life for the benefit of his children, or of any one or more of them . . . and the proceeds of any policy of life or endowment insurance, which is payable to the wife, husband or children of the insured **or to a trustee for the benefit of the wife, husband or children of the insured, including the cash value thereof, shall be exempt from execution or liability to any creditor of the insured**; and said exemption shall apply to insurance heretofore or hereafter issued; and shall apply to insurance payable to the above enumerated persons or classes of persons, whether they shall have become entitled thereto as originally designated beneficiaries, by beneficiary designation subsequent to the issuance of the policy, or by assignment (except in case of transfer with intent to defraud creditors).

Defendants argue that "it is undisputed that the beneficiary under these policies is the Robert Lewis Pomeroy Living Trust" and, thus, the policies are exempt. Defendants refer us to an attachment to their brief titled "Beneficiary and Owner Designation" which indicates that, with respect to two policies in which Robert L. Pomeroy is the insured, "The Policy proceeds will be paid to Robert Lewis Pomeroy, Trustee of the Robert Lewis Pomeroy Living Trust."

The trial court denied defendants' objection to the writ of garnishment with respect to these policies on the erroneous grounds that the objections were untimely and the policies may have been financed by defendants with trust funds in violation of the MBCFA. Accordingly, the trial court did not otherwise decide the issue whether these life insurance policies are exempt under MCL 500.2207(1). To make that determination, it must first be decided whether, as plaintiff has claimed, the policies were in fact financed by defendants with trust funds in violation of the MBCFA. If so, the transactions may be void and the policies may be subject to garnishment. Defendants have volunteered to give an accounting of the trust funds at issue in the

underlying case, limited to the time period in which the damages of $437,506.30 claimed in plaintiff's first amended complaint accrued.[2] We believe that to be the appropriate course of action in this case, considering the circumstances.

We reject plaintiff's argument on appeal that defendants' failure to provide an accounting in the underlying matter, before the consent judgment was entered, precludes such an accounting. The underlying matter was not litigated—it was settled. There is no evidence that the trust funds were used to finance defendants' personal assets. Thus, but for an accounting, the assets would be exempt from garnishment under the appropriate statutes. In any event, to the extent that trust funds were used to finance the policies, prorating the cash surrender value of the policies in the proportion that the trust funds and private funds were invested is the appropriate remedy. See *Fidelity & Deposit Co of Maryland*, *supra*; *Long*, *supra*; *Massachusetts Bonding & Ins Co*, *supra*.

If it is determined that the disputed policies were not financed by defendants with trust funds in violation of the MBCFA, several issues must still be considered. The first issue is whether Robert Pomeroy is a beneficiary under the trust. If he is, is his portion of the trust subject to garnishment? A second issue is whether the purported exempt status of the policies is impacted by the fact that Robert Pomeroy is the trustee of the trust to which the policy proceeds will be paid. Does the trust instrument or, for example, MCL 700.7401(2) give Robert Pomeroy such control over the trust that it becomes subject to garnishment? The record is insufficient for us to make these or any other determinations.

Therefore, we remand the issue of whether the disputed life insurance policies are exempt under MCL 500.2207(1) to the trial court for the appropriate proceedings. Defendants are to provide an accounting of the trust funds at issue in the underlying case, limited to the time period in which the damages of $437,506.30 claimed in plaintiff's first amended complaint accrued, i.e., April of 2004 through December of 2004. To the extent that trust funds were used to finance the policies, the court is to prorate the cash surrender value of the policies in the proportion that the trust funds and private funds were invested. If necessary, the issues of whether Robert Pomeroy is a beneficiary under the trust and whether the purported exempt status of the policies is impacted by the fact that Robert Pomeroy is the trustee of the trust to which the policy proceeds will be paid are to be decided.

Next, defendants argue that their Merrill Lynch IRA accounts were exempt from garnishment under MCL 600.6023. Generally, whether IRA accounts are exempt from garnishment presents a question of law. Questions of law are subject to review de novo. See *Cardinal Mooney High School*, *supra*.

As with the life insurance policies, plaintiff has argued that the IRA accounts are not exempt because (1) defendants waived their right to object to the garnishment when they failed to file a timely objection, (2) the IRA accounts were purchased with trust funds defalcated by defendants in violation of the MBCFA, and (3) in any case, only one IRA account is exempt under MCL 600.6023(1)(k). The trial court denied defendants' objection to the writ of

[2] According to the affidavit and supporting documentation attached to the first amended complaint, this time period is from April of 2004 through December of 2004.

garnishment with respect to these IRA accounts on the erroneous grounds that the objections were untimely and the IRA accounts may have been financed by defendants with trust funds in violation of the MBCFA. Accordingly, the trial court did not otherwise decide the issue whether these IRA accounts are exempt under MCL 600.6023(1)(k).

Generally, an IRA is exempt from execution to collect on a judgment. MCL 600.6023(1)(k). It is uncontested here that the Merrill Lynch accounts are IRAs under that statute. The dispute is whether they were financed in whole or in part by defendants with trust funds in violation of the MBCFA. If so, those transactions may be void and the IRA accounts, or some portion of them, may be subject to garnishment. That issue was never decided by the trial court.

Again, defendants have volunteered to give an accounting of the trust funds at issue in the underlying case, limited to the time period in which the damages of $437,506.30 claimed in plaintiff's first amended complaint accrued. We believe that to be the appropriate course of action in this case, considering the circumstances. Therefore, we remand the issue of whether the disputed IRA accounts are exempt under MCL 600.6023(1)(k) to the trial court for the appropriate proceedings. Defendants are to provide an accounting of the trust funds at issue in the underlying case, limited to the time period in which the damages of $437,506.30 claimed in plaintiff's first amended complaint accrued, i.e., April of 2004 through December of 2004. To the extent that trust funds were used to finance the IRA accounts, prorating the accounts in the proportion that the trust funds and private funds were invested is the appropriate remedy. See *Fidelity & Deposit Co of Maryland*, *supra*; *Long*, *supra*; *Massachusetts Bonding & Ins Co*, *supra*.

Defendants have also argued that, if it is determined that trust funds were not used to finance the IRA accounts in violation of the MBCFA, all of the IRA accounts held by each defendant are exempt from garnishment under MCL 600.6023(1)(k). Plaintiff has claimed that each defendant may only exempt one of their IRA accounts. Because the trial court did not address this issue and the record is limited, we remand this issue for consideration by the trial court if such a determination is necessary.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Pursuant to MCR 7.219, defendants are entitled to costs.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly