

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HAZEL L. BURG,

Plaintiff-Appellee,

v

JAMES L. BURG and PATRICIA BURG,

Defendants-Appellants.

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UNPUBLISHED

September 15, 2009

No. 284131

Macomb Circuit Court

LC No. 2005-003993-CH

Before: O’Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendants James and Patricia Burg appeal as of right from the trial court’s judgment, following a bench trial, quieting title to certain real property in favor of plaintiff, ordering defendants to pay off various encumbrances against the property, and awarding plaintiff damages of \$27,474.56 in damages for funds converted by defendants, treble damages of \$82,423.68 pursuant to MCL 600.2919a, and \$50,000 as compensation for intentional infliction of emotional distress. We affirm in part and reverse in part.

Defendant James Burg is plaintiff’s son and defendant Patricia Burg is James’s spouse and plaintiff’s daughter-in-law. Plaintiff filed this action to quiet title to real property at 25228 Alex Street in Center Line, Michigan (the “Alex property”), and to recover damages for funds that James Burg allegedly converted from a joint bank account. Following a bench trial, the trial court determined that defendants unlawfully acquired the Alex Street property from plaintiff and withdrew funds from plaintiff’s bank account, which they improperly converted to their own use. The court thereafter denied defendants’ motion for a new trial. Defendants argue that the trial court’s decisions are against the great weight of the evidence and contrary to law.

I. Standards of Review

A trial court may grant a motion for a new trial when a verdict is against the great weight of the evidence or is contrary to law. MCR 2.611(A)(1)(e). When considering a challenge based on the great weight of the evidence, a reviewing court must determine whether the overwhelming weight of the evidence favors the losing party. *Guerrero v Smith*, 280 Mich App 647, 666; 761 NW2d 723 (2008). A trial court’s decision denying a motion for a new trial is reviewed for an abuse of discretion. *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006). Underlying questions of law are reviewed de novo. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008).

We review for clear error a trial court's factual findings made in a bench trial and review de novo its conclusions of law. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003). Deference is given to the trial court's superior ability to judge the credibility of witnesses who appear before it. *Id.* at 652.

## II. Action to Quiet Title

Plaintiff brought this action in part to regain title to the Alex property, which she owned and occupied as her marital home for many years. Plaintiff alleged that defendants fraudulently procured title to the Alex property in 2004. Defendants claimed that plaintiff agreed to sell the Alex property to them for \$100,000 pursuant to a verbal agreement whereby defendants would pay the purchase price by paying off plaintiff's existing home equity line of credit and by paying the remainder over time. The trial court found that there was no agreement to sell the Alex property for \$100,000. Defendants argue that this finding is against the great weight of the evidence.

The trial court's decision was based in part on its determination that defendants' testimony regarding the existence of a verbal agreement was not credible. Noting numerous instances of internally inconsistent testimony by the defendants, we afford deference to the trial court's determination of credibility. *Amb's, supra* at 652. The trial court also determined that other factors supported its determination that there was no agreement to sell the property, including that there was no written agreement reflecting the sale terms, and that defendants' property next door to the Alex property sold for \$210,000. Defendants assert that the price discrepancy is not significant because they presented evidence that plaintiff and her husband had a history of selling other properties to family members for less than fair market value. However, defendants only presented three warranty deeds for other properties that reflected sale prices set in 1989, 1990, and 1993. They presented no corresponding evidence to establish the fair market values of the properties in those years.

Defendants also assert that plaintiff's request for a payoff amount on her line of credit is evidence of an agreement, because they paid off the line of credit with a mortgage they took out on the Alex property. However, in order for defendants to have clear title to the property, plaintiff's line of credit had to be paid off. Thus, the request is not indicative of an agreement. Defendants further assert that they gave plaintiff \$8,000 in cash, which is evidence of an agreement. However, defendants' only evidence of this payment was James's testimony, which the trial court did not find credible.

Defendants additionally contend that the 2003 and 2004 deeds are written evidence of an agreement and satisfy the statute of frauds.<sup>1</sup> We agree that a deed is sufficient to satisfy the

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<sup>1</sup> The statute of frauds generally provides that transactions for the sale of land must be in writing and are void if they are not. MCL 566.106; MCL 566.108.

statute of frauds. *Supple v Wheeler*, 210 Mich 669, 672; 178 NW 96 (1920). However, the deeds in this case reflected a consideration of \$1, not \$100,000. Therefore, they are not written evidence of the alleged agreement that defendant had with plaintiff and do not satisfy the statute of frauds with respect to the alleged agreement. “A deed which does not conform to an oral agreement is not a sufficient memorandum to avoid the Statute of Frauds.” *Baker v Glander*, 32 Mich App 305, 308; 188 NW2d 263 (1971). Therefore, the deeds’ probative value as evidence of an agreement is minimal.

Plaintiff testified that she did not recall making an agreement to sell the Alex property, that she had no intent to sell that property, and that she would not have signed any deeds conveying the property to defendants. James Burg testified that plaintiff, on her own, demanded that a power of attorney (“POA”) be drafted and executed in his favor. The POA that was submitted to the court specifically covered the Alex property but was executed after the date of the purported conveyance to the defendants. The POA is evidence that at the time of its execution, plaintiff believed that she still owned the property. Considering all the evidence and discounting defendants’ testimony regarding an agreement, the trial court’s finding that there was no agreement to sell the Alex property for \$100,000 is not against the great weight of the evidence.

Defendants also argue that the trial court’s finding that the deeds conveying title of the Alex property to defendants were fraudulently procured is against the great weight of the evidence. We again disagree.

At a closing set up by James on July 29, 2004, plaintiff signed two deeds that purported to transfer title of the Alex property to defendants. One deed was dated January 16, 2003, and the other deed was dated July 27, 2004. The trial court did not err in finding that the 2003 deed was invalid. That deed reflected that plaintiff and her husband, acting through plaintiff pursuant to a power of attorney, conveyed title to the Alex property to defendants. However, the evidence clearly established that plaintiff did not obtain the power of attorney for her husband until January 8, 2004, nearly a year after the 2003 deed was purportedly executed.

The trial court found that the 2004 deed was invalid because it was procured by defendants’ fraudulent misrepresentation. Defendants argue that there was no evidence that they misrepresented the nature of the deed or that plaintiff relied on any misrepresentation. Fraudulent misrepresentation requires proof that:

- (1) the defendant made a material representation; (2) the representation was false;
- (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion;
- (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004) (internal quotations and citations omitted).]

Defendants are correct that there was no direct evidence that they made any overtly false or misleading statements. However, a finder of fact may make reasonable inferences based on the evidence. See *Gadigian v City of Taylor*, 282 Mich App 179, 185; \_\_\_ NW2d \_\_\_ (2009). Also, circumstantial evidence may be used to prove a proposition, particularly with respect to

questions involving a person's state of mind, intent, motivation, or knowledge. *Bergen, supra* at 387; M Civ JI 3.10.

Considering the circumstantial evidence and reasonable inferences arising from the evidence, the trial court did not clearly err in concluding that defendants made a material misrepresentation to the plaintiff in order to procure her signature on the 2004 deed. Plaintiff testified that she did not recall making an agreement with defendants to sell the Alex property further testified that she would not have made any such agreement. The trial court found that defendants' testimony regarding an alleged verbal agreement was not credible. Plaintiff also testified that she did not recall signing the deeds, never intended to sell the property, and would not have knowingly signed any deeds conveying the Alex property to defendants. Further, the title agency representative testified that his records showed that the transaction involved a mortgage (refinancing), not a purchase. Thus, it was reasonable for the trial court to infer that defendants misrepresented to plaintiff the purpose of the closing and by extension the deeds in order to obtain her signature on the deeds.

In addition, plaintiff's reliance can be reasonably inferred because she testified that if her son James Burg asked her to sign a document, she would have done so because she trusted him, but that she would not have knowingly signed a deed conveying the property to defendants. Thus, the evidence showed that plaintiff, at James's request, would have blindly signed a document represented to her as serving a purpose other than transferring her interest in the property. Accordingly, the trial court's decision to quiet title of the Alex property in favor of plaintiff is not against the great weight of the evidence.

### III. Breach of Fiduciary Duty

Defendants also challenge the trial court's findings that they had a fiduciary relationship with plaintiff, which they breached when they misrepresented the nature of the Alex property deeds. Defendants argue that even if a fiduciary relationship existed, the trial court clearly erred in finding that it extended to matters of real estate. We disagree.

"[A] fiduciary duty arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another." *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005), quoting *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999). One who owes a fiduciary duty to another is required to act for the benefit of the other on matters within the scope of the relationship. *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003). "Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Teadt, supra* at 581.

Defendants testified that they agreed to handle plaintiff's financial affairs due to her inability to do so as evidenced by her unpaid debts. The evidence showed that defendants not only managed plaintiff's finances by paying her bills and expenses, but also took on the responsibility of ensuring that all of plaintiff's financial assets were well managed so that she had sufficient resources to maintain a decent standard of living. Real property is a significant financial asset. The trial court did not clearly err when it found that matters involving the Alex property fell within the scope of the fiduciary relationship.

Consistent with our previous determination that the trial court did not clearly err in finding that defendants fraudulently procured the deeds transferring the Alex property from plaintiff to defendants, defendants likewise breached their duty to act for plaintiff's benefit when they abused their position of trust and obtained the Alex property from plaintiff through deceit.<sup>2</sup> Accordingly, the trial court's decision is not against the great weight of the evidence.

#### IV. Converted Funds

The trial court found that defendants wrongly withdrew funds from plaintiff's joint bank account as reimbursement for expenses they could not verify. James and Patricia Burg were found liable for breach of fiduciary duty and unjust enrichment. Additionally, James Burg was found liable for common-law conversion and Patricia Burg was found liable for statutory conversion. Conversion is defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (citation omitted). Under MCL 600.2919a(1)(b), a person is liable for treble damages where:

[a]nother person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

Unjust enrichment occurs where the defendant has received a benefit from the plaintiff, but it would be inequitable to allow the defendant to retain that benefit. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007). Defendants argue that they presented both testimonial and documentary evidence to support the expenses they incurred in excess of the \$41,700 that James Burg admittedly withdrew from the joint account, for which plaintiff agreed to reimburse them. Again, the trial court did not find defendants' testimony credible. Considering that plaintiff's income over a nine-month period exceeded her expenses by more than \$38,000, the trial court's finding that the \$7,400 cash allowance (more than \$800 a month over this same period of time) was unreasonably high is not clearly erroneous. Defendants presented no documentary evidence to support their contention that plaintiff agreed to reimburse them for expenses associated with another piece of real property. Their documentation only related to the expense, not an agreement. Considering the trial court's assessment of defendants' credibility and the lack of documentary evidence, the trial court did not clearly err in finding that defendants were not entitled to reimbursement for expenses other than those to which the parties stipulated.

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<sup>2</sup> Defendants rely on *In re Karmey*, *supra*, to assert that even if real estate matters were within the parties' fiduciary relationship, the parties were not prohibited from entering into an agreement to sell the Alex property absent undue influence. The law regarding undue influence is another basis on which to invalidate a transaction. See *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). Here, the trial court invalidated the deeds on the basis of fraud. Therefore, it is unnecessary to separately consider undue influence.

Defendants also argue that because James Burg had the authority to sign checks for the joint account, he could not have converted any money. However, it was undisputed that the joint account was exclusively funded with plaintiff's money. James Burg's check-signing authority gave him access to those funds at the bank, but did not entitle him to convert plaintiff's money for his own use without plaintiff's permission. Defendants' argument is without merit.

Relying on *Thrifty v Haner*, 286 Mich 495, 498; 282 NW 219 (1938), defendants also argue that an action in tort for conversion of money is not legally cognizable in this state and, accordingly, the award of treble damages is improper. In *Thrifty*, after analyzing the facts of that case, the Court stated that "[a]n action of tort for conversion of money will not lie." *Id.* at 498. That statement was simply an announcement of the Court's decision in that particular case. *Id.* at 497-497. The Court did not abrogate the common-law tort of conversion of money, which remains a viable claim. See, e.g., *Garras v Bekiares*, 315 Mich 141, 148; 23 NW2d 239 (1946); *Check Reporting Services, Inc v Michigan Nat'l Bank-Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991).

Defendants further argue that treble damages were improper because the statute authorizing them only applies to third parties, and thus cannot apply to Patricia Burg, who is a party to this case. This argument is misplaced. MCL 600.2919a(1)(b) applies to a third party in the sense that it allows for an award of damages against an individual who knowingly received converted property, as opposed to the person who actually converted the property. *Marshall Lasser, PC v George*, 252 Mich App 104, 112; 651 NW2d 158 (2002). Because plaintiff sought treble damages against Patricia Burg as the receiver of the converted funds, she was a necessary party to the action. There is no requirement that a person seek damages against the converter and the receiver in separate lawsuits. Accordingly, the trial court's awards of converted funds and statutory treble damages are not against the great weight of the evidence. Further, defendants are not entitled to any reductions based on alleged stipulations made by plaintiff during summary disposition where plaintiff gave no indication that she intended to be bound by them at trial.

## V. Intentional Infliction of Emotional Distress

Defendants lastly argue that there was no basis for the trial court's \$50,000 award for intentional infliction of emotional distress because their conduct was not extreme or outrageous and because plaintiff presented no evidence of severe emotional distress. The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Walsh v Taylor*, 263 Mich App 618, 635; 689 NW2d 506 (2004). The intensity and duration of a person's distress is relevant to its severity. A plaintiff is not required to have sought medical treatment to establish sufficient distress. *Haverbush v Powelson*, 217 Mich App 228, 235; 551 NW2d 206 (1996).

We agree with defendants that there is no evidentiary support for a finding that plaintiff experienced severe emotional distress. In addressing this element, the trial court stated, "While [plaintiff] was mourning the loss of her spouse, she found it necessary to seek legal advice and commence the instant suit to protect her interest from the adverse actions of her own son and daughter-in-law, which caused her to suffer emotional anguish." However, plaintiff did not testify at trial that she actually suffered any emotional anguish, nor did she allude to any ill effects she experienced as a result of defendants' conduct. Because there is no evidentiary basis for the trial court's finding that plaintiff suffered severe emotional distress, we reverse the trial

court's decision in favor of plaintiff on the intentional infliction of emotional distress count and vacate the \$50,000 award of damages for this claim.

Affirmed in part and reversed in part.

/s/ Peter D. O'Connell

/s/ Michael J. Talbot

/s/ Cynthia Diane Stephens