NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JMM

2012 CA 0561

SUCCESSION OF JOAN TRICHE FLOOD

VERSUS

OLANDO FLOOD, LINDA S. MELANCON

Judgment Rendered: MAY 10 2013

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APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT

COURT IN AND FOR THE PARISH OF ASSUMPTION

STATE OF LOUISIANA

DOCKET NUMBER 6523

HONORABLE RALPH TUREAU, JUDGE

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KUHN, J DISSENTS & ASSIGNS REASONS

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

JJ PETTIGREW, J. CONCURS

McDONALD, J.

This is a sad case. It contests the validity of a sale and assignment of interest in the succession of Joan Triche Flood (the succession), a Louisiana resident who died on August 4, 2007. Joan Triche Flood (the decedent) was survived by five children: Dr. Herbert Flood, II (Dr. Flood, the testamentary executor of the succession and the defendant in this case), John M. Flood, Heloise E.F. Simmons (Ms. Simmons), Peter J. Flood, and Joseph M. Flood.

BACKGROUND INFORMATION: THE SUCCESSION CASE

A petition for probate of statutory testament was filed by Dr. Flood on August 24, 2007. Nearly two years later, on June 2, 2009, a sworn detailed descriptive list and a tableau of distribution were filed by Dr. Flood, along with a judgment of partial possession.

On June 9, 2009, Ms. Simmons filed an opposition to the first tableau of distribution.[1] Ms. Simmons asserted that Dr. Flood had failed to perform the duty imposed upon him by La. C.C.P. art. 3331 to render an account annually, and she maintained that the first tableau of distribution lacked substantiation and explanation of items listed for payment. Ms. Simmons asked that Dr. Flood be removed as executor and also that he be ordered to render an account for his administration.

On July 9, 2009, Ms. Simmons filed an opposition to Dr. Flood's interim account for the period of August 4, 2007 through December 31, 2008, and maintained that she opposed the account due in part to a lack of substantiation, explanation, and opportunity for review.

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[1] John M. Flood, by letter dated January 31, 2010, to Ms. Simmons' attorney, stated that he was a "silent partner" in his sister Heloise's (Ms. Simmons') efforts regarding the succession, and he favored an independent review of Dr. Flood's actions in regard to the succession. He noted that he had contributed what he could financially, but was unable to continue to contribute to Ms. Simmons' efforts.

On July 24, 2009, Ms. Simmons filed a motion to compel discovery, asserting that the decedent, who was widowed and elderly, suffered from Alzheimer's disease and had diminished capacity for a number of years prior to her death. Ms. Simmons maintained that Dr. Flood had power of attorney for the decedent and handled all of her financial affairs, but never rendered an account of his service and repeatedly refused to do so.

Ms. Simmons noted that while in a nursing home facility, the decedent was raped, and as a result of that incident, Dr. Flood recovered approximately $500,000 for the decedent's damages and $150,000 for his loss of consortium. Ms. Simmons maintained that Dr. Flood invested the $500,000 in an annuity with himself designated as the beneficiary upon decedent's death. She asserted that Dr. Flood had received the cash value in the annuity, $553,780.36, to the exclusion of the decedent's other children and residuary legatees.

Ms. Simmons also maintained that Dr. Flood made substantial transfers to himself and his wife and children from decedent's assets, which exceeded $60,000 just two days after decedent's death, which was contrary to decedent's will as it excluded her other children and residuary legatees. Ms. Simmons asked that Dr. Flood be compelled to respond to her discovery requests.

On March 17, 2009, after a hearing, Dr. Flood resigned as executor without discharge or release. The parties stipulated that Linda S. Melancon was appointed dative testamentary executrix and that Dr. Flood would immediately deliver all documents and assets of the succession to Ms. Melancon.

On October 28, 2009, after a hearing, the parties stipulated to a judgment providing that Dr. Flood would respond to requests for production by Ms. Simmons, provide financial statements to Ms. Simmons, provide files from the

lawsuit filed on the decedent's behalf regarding the nursing home incident, and identify all gifts he made for the decedent, and other matters.

THE PRESENT CASE

In July 2009, Joseph M. Flood died following a motor vehicle accident in Hawaii. Joseph M. Flood resided in Hawaii with his wife, Olanda Flood (Mrs. Flood), the plaintiff in this case.

Some time after her husband's death, Mrs. Flood contacted Dr. Flood to ask for a loan. Mrs. Flood was living in necessitous circumstances, subsisting on $744 per month in Social Security disability payments. Mrs. Flood had a seventh grade education, suffered from depression, and was unemployed. She did not have a telephone, and had to be contacted by mail.

Dr. Flood declined Mrs. Flood's request for a loan. Later, Dr. Flood contacted Mrs. Flood through her daughter, seeking to buy her late husband's interest in the succession for $10,000. Dr. Flood knew that Mrs. Flood was represented by counsel in Hawaii in regard to her husband's fatal accident. Dr. Flood was represented by counsel in Louisiana in regard to the succession.

Dr. Flood had his counsel in Louisiana draft an agreement for the sale of Mrs. Flood's interest in the succession. Dr. Flood's attorney drafted the agreement and submitted it to Dr. Flood for his approval. Dr. Flood sent the document directly to Mrs. Flood in Hawaii without giving it back to his attorney. On August 13, 2010, Mrs. Flood signed the document without consulting her attorney. She sent it back to Dr. Flood, and Dr. Flood sent her a check for $10,000.

On July 20, 2011, Mrs. Flood filed a motion to contest the validity of the sale and assignment of interest in the succession to Dr. Flood, based upon the vice of consent, specifically error and fraud. She asked that the court rescind the sale and assignment of interest, declare it null, and declare that a 20% interest in the

succession of Joan Triche Flood was a part of the patrimony of Joseph M. Flood and his estate.

Mrs. Flood asserted in her motion that Dr. Flood knew that she was in necessitous circumstances and took advantage of her limited financial stability and her limited ability to understand the consequences of her actions by circumventing her counsel and enticing her with a cash payment. Dr. Flood filed an answer generally denying the assertions. In the alternative, and in the event the court granted a rescission of the sale and assignment of interest, he asserted a reconventional demand for repayment of $10,000.

A hearing was held on the matter. Thereafter, the district court ruled in favor of Dr. Flood, finding that the sale and assignment of interest was a valid and enforceable contract, and denying Mrs. Flood's motion to rescind the sale and assignment of interest. The district court noted that "[i]f this Court were a court of equity and not a court of law, a different result would be reached."

Mrs. Flood is appealing that judgment, and makes the following assignments of error.

1. The Trial Court committed legal error when it failed to find fraud under the clear circumstances presented into evidence, flatly ignoring uncontradicted evidence as well as equity.

2. The Trial Court committed legal error in concluding that Hawaii law applied, as opposed to Louisiana law, with regard to the application of fraud defined in the Louisiana Civil Code.

3. The Trial Court erred when it conceded that principles of equity dictate a different result since Louisiana courts are courts of both equity and law and should consider all facts and evidence; when equity will not abrogate the law, it should not only be considered, it should be followed.

ASSIGNMENT OF ERROR NO. 2:
THE CHOICE OF LAW ISSUE

The district court determined that Hawaii law applied to this case. Determining the proper choice-of-law law to be applied to an issue is a question of law for which this court has the plenary and unlimited constitutional power and authority to review *de novo*. **Wooley v. Lucksinger**, 2006-1140 (La. App. 1 Cir. 12/30/08), 14 So.3d 311, 358-359, reversed in part (on other grounds), 2009-0571 (La. 4/1/11), 61 So.3d 507.

Louisiana Civil Code article 3515 provides:

> Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.
>
> That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

Louisiana Civil Code article 3542 provides:

> Except as otherwise provided in this Title, an issue of delictual or quasi-delictual obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.
>
> That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered; and (2) the policies referred to in Article 3515, as well as the policies of deterring wrongful conduct and of repairing the consequences of injurious acts.

An examination of the record shows that Mrs. Flood was domiciled in Hawaii and entered into the contract negotiations while in Hawaii. Mrs. Flood was

in Hawaii when she decided to enter into the contract, she signed the contract in Hawaii, and the agreement was notarized by a notary public in Hawaii. Under the facts of this case, we find that Hawaii has a more significant interest in protecting Mrs. Flood from an alleged fraud than Louisiana does. Thus, after a de *novo review*, we find that Hawaii law should apply in this case.

Under Hawaii law, the standard for proving fraud or misrepresentation with respect to a written contract is extremely high, and a written contract will be cancelled only in a clear case of fraud or misrepresentation supported by clear and convincing evidence. **Island Directory Co., Inc. v. Iva's Kinimaka Enterprises, Inc.**, 10 Haw.App. 15, 27, 859 P.2d 935, 942 (1993).

The evidence must show that: (1) false representations made by defendants, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon them, and (4) plaintiff did rely upon them. **Hawaii's Thousand Friends v. Anderson**, 70 Haw. 276, 286, 768 P.2d 1293, 1301 (1989); **Fisher v. Grove Farm Co., Inc.**, 123 Haw. 82, 103, 230 P.3d 382, 403 (2009).

Mrs. Flood asserts that Dr. Flood misled her into signing the document by telling her that he was paying her not to sue him, that at no time did he ask her to sell him her interest in the succession, and that the document was provided directly to Mrs. Flood, although Dr. Flood knew that she was represented by counsel.

However, Mrs. Flood testified that when Dr. Flood later contacted her, it was not directly, but rather through her daughter, Elizabeth Flood (Elizabeth). Mrs. Flood testified that Elizabeth told her that Dr. Flood would give her $10,000 in return for signing a piece of paper, that he sent her a document (through Elizabeth) to sign, and she signed it without reading it.

Dr. Flood testified that he contacted Elizabeth, told her he was trying to reach Mrs. Flood, and Mrs. Flood called him back. He testified that he told Mrs. Flood, he was willing to pay her $10,000 not to sue him, he would send her some documents, and when she signed and sent them back, he would send her $10,000.

The agreement provides:

> **SALE AND ASSIGNMENT OF INTEREST**
>
> The undersigned individually and in her capacity as the executor/representative of the Estate of Joseph Michael Flood (the "Estate") and the Estate (collectively, "Sellers") do hereby sell and assign to Herbert R. Flood, II ("Buyer") all of their and the Estate's interest in the remaining, undistributed assets of the Succession of Joan Triche Flood ("the Succession"), including but not limited to any and all claims, whether liquidated or not, that the Succession may have or have had against Herbert R. Flood, II or other parties. Sellers will retain any assets they have already received from the Succession.
>
> The consideration of for [sic] this transfer is TEN THOUSAND DOLLARS ($10,000.00) which shall be paid by Buyer a reasonable time after (1) execution of the agreement; and (2) receipt of an opinion letter from the attorney representing the Estate stating that: (a) this agreement is binding and enforceable against the Sellers, and (b) the Sellers have legal authority to enter into this agreement. Sellers hereby agree to take all reasonable steps to cure any legal or technical defect in this agreement to cause it to be fully enforceable and binding against them and the Estate. This agreement shall be enforceable by specific performance.

Mrs. Flood testified that Dr. Flood wanted to pay her to keep her from suing him, but the agreement is clearly a sale and assignment of interest in the succession. Dr. Flood did not tell her what her interest in the succession was worth, and Mrs. Flood could have easily consulted her attorney had she any question about the value of the interest in the succession. We find no manifest error in the district court's finding that Mrs. Flood failed to prove fraud by clear and convincing evidence under Hawaii law.

LOUISIANA LAW ANALYSIS

After finding that Hawaii law applied to this case, the district court went on to find that under either Hawaii law or Louisiana law, there was no fraud proven by Mrs. Flood. Although we find that Hawaii law applies to this case, out of an abundance of caution, we also analyze Mrs. Flood's claims under Louisiana law.

Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. La. C.C. art 1953. Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill. This exception does not apply when a relation of confidence has reasonably induced a party to rely on the other's assertions or representations. La. C.C. art. 1954. Fraud need only be proved by a preponderance of the evidence and may be established by circumstantial evidence. La. C.C. art. 1957.

The existence of fraud is a question of fact. Fraud cannot be predicated on mistake or negligence, no matter how gross. Fraudulent intent, which constitutes the intent to deceive, is a necessary element of fraud. **Whitehead v. American Coachworks, Inc.**, 2002-0027 (La. App. 1 Cir. 12/20/02), 837 So.2d 678, 682.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, Mrs. Flood asserts that uncontradicted evidence and admissions by Dr. Flood proved fraud.[2] She argues in brief that Dr. Flood misrepresented the truth and hid several facts from her in making the transaction, and that at the very least, he took advantage of her. She asserts that he

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[2] Mrs. Flood's argument that the district court ignored the principles of equity will be addressed in assignment of error number three.

intentionally circumvented her counsel by contacting her directly in an attempt to prey upon her desperation for money. Mrs. Flood asserts that Dr. Flood told her he would pay her not to sue him, but that he did not inform her of the existence of claims in excess of a million dollars that were made against him by other heirs to the succession.

Although Mrs. Flood asserts that things were "hidden" from her by Dr. Flood, Mrs. Flood testified that when she called Dr. Flood to ask for a loan, one of the reasons he gave for turning down her request was that there was a claim against him regarding the succession. She testified she knew about the claim against him because "there were a few notices that came to [her attorney] and he mailed [the notices] to me." She testified that she could read, and that she understood some legal language. Thus, the fact the Mrs. Flood knew that there were claims against the succession, via the notices from her own attorney, should have put her on notice to investigate those claims, if she had any question about their value or about the value of her interest in the succession.

Mrs. Flood testified that she did not show the contract to her attorney, as she was afraid he would advise her not to sign it, and that she did not read the agreement. The fact that Mrs. Flood was afraid that her attorney would advise her not to sign the agreement is indicative that she knew it was a bad deal. As for Mrs. Flood's failure to read the agreement before she signed it, the law is clear in that regard. It is well settled that a party who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, that he did not understand it, or that the other party failed to explain it to him. See, e.g., **Tweedel v. Brasseaux**, 433 So.2d 133, 137 (La. 1983); **Hidalgo v. Sun Const., L.L.C.**, 2010-0754 (La. App. 1 Cir. 12/22/10), 2010 WL 5480730 (unpublished).

Clearly, Mrs. Flood made a bad bargain in agreeing to take $10,000 for her interest in the succession. However, the mere fact that a contract works a hardship upon one of the parties does not authorize a court to set it aside. **Englemann v. Auderer**, 10 La.App. 136, 121 So. 194, 195 (La.App.Orl.1929). It is not the province of the courts to relieve a party of a bad bargain, no matter how harsh. **TEC Realtors, Inc. v. D & L Fairway Property Management, L.L.C.**, 2009-2145 (La. App. 1 Cir. 7/9/10), 42 So.3d 1116, 1131, writ denied, 2010-1841 (La. 10/29/10), 48 So.2d 1092.

The district court determined that based upon the evidence presented, there was insufficient evidence to satisfy the requisite element of intent to defraud by Dr. Flood. Based upon the evidence, we cannot say that the district court committed manifest error in that determination.

This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, Mrs. Flood asserts that the district court erred when it conceded that principles of equity dictated a different result, yet failed to rule in her favor.

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. La. C.C. art. 9. When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages. La. C.C. art. 4.

Our analysis of the district court's ten pages of reasons for judgment shows that the district court simply misspoke, and meant to say that that there was no need to resort to equity because the law was clear and unambiguous; but that under

a purely equitable framework the outcome of the case would have been different. We agree with that statement.

This assignment of error has no merit.

Therefore, for the foregoing reasons, the district court judgment, denying Olanda Flood's motion to contest the validity of the sale and assignment of interest in the succession of Joan Triche Flood, is affirmed. No assessment of costs will be made in this case.

AFFIRMED.

SUCCESSION OF JOAN TRICHE FLOOD

VERSUS

OLANDO FLOOD, LINDA S. MELANCON

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2012 CA 0561

JEK by Jmm

KUHN, J., dissenting.

I disagree with the majority's conclusion that Hawaiian law, rather than Louisiana law, is applicable. Generally, issues of delictual or quasi-delictual obligations are governed by the law of the state whose "policies would be most seriously impaired if its laws were not applied...." La. C.C. art 3542; also see La. C.C. art 3515. Article 3542 provides that the policies of "deterring wrongful conduct and ... repairing the consequences of injuries acts" are among the policies to be considered in analyzing a choice of law issue. Both of these policies are highly relevant to the allegations of fraud raised by plaintiff herein. Moreover, this case concerns a Louisiana succession and involves the disposition of assets located in Louisiana. Thus, a weighing of the pertinent policies preponderates in favor of applying Louisiana law. Under the circumstances, the policies of Louisiana will be most seriously impaired if its law is not applied to this case.

Additionally, I disagree with the majority's alternative conclusion that there was no manifest error in the trial court's finding that fraud was not proven under Louisiana law. In Louisiana, fraud can result from silence or inaction, as well as actual misrepresentations. La. C.C. art. 1953. Moreover, fraud need only be proven by a preponderance of the evidence and can be established by circumstantial evidence. La. C.C. art. 1957. Dr. Flood knew that plaintiff was in extremely necessitous circumstances since he had refused her request for a loan. At trial, he admitted that he thought the fact that "she needed money" presented him with an "an opportunity." Seizing on plaintiff's desperation for money, he

offered his former sister-in-law, who has only a seventh-grade education, $10,000.00 if she would sign some papers and not sue him. However he failed to advise her either that the papers consisted of a sale and assignment of her interest in the succession of Joan Triche Flood or of the potential value of that interest. Further, although he knew she was represented by counsel, he deliberately chose to contact her directly, rather than through counsel. The totality of these circumstances clearly establishes Dr. Flood's intent to take unfair advantage of plaintiff's necessitous situation by not advising her of the actual nature of the transaction or the potential value of the interest conveyed. Thus, the trial court manifestly erred in concluding fraud was not established under Louisiana law.

Accordingly, I respectfully dissent.