STATE OF MICHIGAN

COURT OF APPEALS

JAMES BONFIGLIO, SUSAN BONFIGLIO, PBS INVESTMENTS, WOODSHOLLOW INVESTMENTS, LTD. I, a Michigan Limited Partnership, and WOODCREEK CONDOMINIUM ASSOCIATION, a Non-Profit Corporation,

Plaintiffs-Appellants,

v

PENNY G. PAMER,

Defendant-Appellee,

and

FREDERICK P. PAMER and M & J REALTY INC,

Defendants.

UNPUBLISHED
August 23, 2002

No. 222602
Eaton Circuit Court
LC No. 96-000287-CZ

JAMES BONFIGLIO, SUSAN BONFIGLIO, PBS INVESTMENTS, WOODSHOLLOW INVESTMENTS LTD I, a Michigan Limited Partnership, and WOODCREEK CONDOMINIUM ASSOCIATION, a Non-Profit Corporation,

Plaintiffs-Appellees/Cross-Appellants,

v

PENNY G. PAMER,

Defendant-Appellant/Cross-Appellee,

No. 223998
Eaton Circuit Court
LC No. 96-000287-CZ

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and

FREDERICK P. PAMER and M & J REALTY INC,

Defendants.

Before: Hood, P.J., and Holbrook, Jr., and Owens, JJ.

PER CURIAM.

In this case involving the theft of monies between March 1983 through September 1995, plaintiffs appeal as of right in Docket No. 222602 from a judgment entered in their favor after a jury trial. Plaintiffs were awarded $1,671,779 in damages, which included awards for conversion, embezzlement, intentional misrepresentation, silent fraud, and breaches of contract and fiduciary duties. The award for conversion and embezzlement was trebled per instruction of the court. Following a post-judgment motion, plaintiffs were also awarded equitable relief in the amount of $1,693,412.73. In Docket No. 223998, defendant Penny Pamer appeals by leave granted, and plaintiffs have filed a cross-appeal. We have consolidated these appeals to facilitate our review. In Docket No. 222602, we affirm the circuit court's denial of plaintiffs' motions for summary disposition and sanctions. In Docket No. 223998, we affirm in part, reverse in part, and remand for a new trial limited to the issue of damages.

Background Facts

At all times relevant to this case, plaintiffs have been the owners of condominium and rental properties. From 1983 through 1995, defendants Penny and Frederick Pamer oversaw the operations of these properties, both in their capacity as officers of the Condominium Association and as the owners of M & J Realty, Inc., and M & J Realty, the management companies that managed plaintiffs' properties. Plaintiffs alleged that defendants diverted funds due the individual plaintiffs, the partnerships, and the association in excess of $450,000. Dennis Echelbarger, a certified public accountant retained by plaintiffs to account for the monies stolen, testified that the total loss, without interest, was $469,995. This included $449,939 in misappropriated funds and $20,000 in "missing items."[1] The misappropriated funds total

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[1] A report prepared by plaintiffs' CPA explained what the $20,000 figure represented and how it was treated with respect to the total losses sustained:

> It is possible [that the $449,939 in estimated losses] . . . would be increased by additional checks written by the defendants for which no copies are currently available. The plaintiff individuals and entities are missing cancelled checks for the period 1989 through 1995 which total approximately $20,000. The payees could constitute legitimate expenses or could have been funds diverted to the defendants' personal uses. Due to lack of documentation, we did not include these losses or extrapolate the amounts for inclusion in our summary of loss.

consisted of $278,842 in documented misappropriated funds for the years 1989 through 1995, and $171,097 in "extrapolated misappropriations" for the years 1984 through 1988. The misappropriated funds were identified as coming from Bonfiglio Properties (which at various times relevant to this appeal consisted of between 8 and 16 rental units), PBS Investments, Woodshollow Investments, Ltd. I, and Woodcreek Condominium Association.

According to the testimony, full financial records were only available for the years 1989 through 1995. To calculate the losses from 1984 through 1988, plaintiffs' CPA first calculated the average loss per year for each of the four above listed entities for 1989 through September 1995. That figure was then reduced by the Consumer Price Index for each year back through 1984. Extrapolated losses were not calculated for 1983, the year M & J Realty, Inc., first began to manage the properties.[2] Echelbarger testified that in his expert opinion, the total losses suffered by plaintiffs up to the filing of the complaint, including interest, was $608,034.[3]

Prior to trial, settlement was reached between plaintiffs and defendants Frederick Pamer, M & J Realty, Inc., and M & J Realty. These defendants are not part of this appeal. Additionally, just prior to commencement of trial, Pamer successfully argued that the original judge assigned to preside should disqualify himself. Thereafter, another judge was assigned and presided throughout the subsequent trial and post-trial proceedings. This same judge was also assigned to the divorce action pending between Pamer and her husband. Pamer asserts that the judge also presided at a declaratory action involving plaintiffs. This last contention is not challenged by plaintiffs.

Because resolution of the issues in Docket No. 223998 impacts our review in Docket No. 222602, we begin with an examination of the former.

Docket No. 223998

Defendant Penny Pamer (hereinafter Pamer) first argues that the trial court erred in failing to sua sponte instruct the jury as to the "discovery rule." Plaintiffs argue that this issue is not before this Court because it was not raised in the application for leave to appeal. It is true that in her application for leave and supporting brief Pamer argued that the trial court erred in failing to apply the statute of limitations to plaintiffs' claims accruing either three or, alternatively, six years before the complaint was filed. However, we believe that intertwined with the question of whether the statute of limitations prevents recovery for some of the stolen funds is the issue of the applicability of the discovery rule. Indeed, in response to Pamer's motion for summary disposition based on the statute of limitations, plaintiffs argued below that the statute of limitations was tolled by the discovery rule. In any event, because our resolution of this issue turns on the issue raised in Pamer's application for leave, we will address its merits.

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[2] According to the CPA report, "[i]t was assumed the management company utilized this initial partial year to assimilate accounting procedures, tenant methods of payment, involvement of owners and other financial aspects of operations."

[3] Using a 5% rate of interest, the interest was calculated as being $133,737 on the adjusted loss for all entities and $4,832 on the missing items.

We find no error in the trial court's failure to sua sponte instruct on the discovery rule. However, in doing so, we conclude that the court did err in not applying the statute of limitations. The discovery rule provides that an applicable statute of limitations "does not begin to run until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, that he had a possible cause of action." *Thomas v Process Equipment Corp*, 154 Mich App 78, 88; 397 NW2d 224 (1986).

Application of the discovery rule to cases involving commercial conversion was discussed at length in *Brennan v Edward D Jones & Co*, 245 Mich App 156, 159-161; 626 NW2d 917 (2001):

> To determine whether to strictly enforce the statute of limitations or to impose the discovery rule, this Court "must carefully balance when the plaintiff learned of her injuries, whether she was given a fair opportunity to bring her suit, and whether defendant's equitable interests would be unfairly prejudiced by tolling the statute of limitations." [*Stephens v Dixon*, 449 Mich 531, 536; 536 NW2d 755 (1995).] The *Stephens* Court noted that our courts have applied the discovery rule in medical malpractice cases, *Johnson v Caldwell*, 371 Mich 368; 123 NW2d 785 (1963), negligent misrepresentation cases, *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974), products liability cases for asbestos-related injuries, *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 309; 399 NW2d 1 (1986), and in pharmaceutical products liability cases, *Moll v Abbott Laboratories*, 444 Mich 1, 12-13; 506 NW2d 816 (1993). *Stephens, supra* at 537 . . . . The Court emphasized that "'the concern for protecting defendants from "time-flawed evidence, fading memories, lost documents, etc." is less significant in these cases.'" *Id*., quoting *Larson, supra* at 312, . . . quoting *Eagle-Picher Industries, Inc v. Cox*, 481 So2d 517, 523 (Fla App, 1985).
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> . . . We conclude that the strong public policies favoring finality in commercial transactions, protecting a defendant from stale claims, and requiring a plaintiff to diligently pursue his claim outweigh the prejudice to plaintiffs and militate against applying the discovery rule in the context of commercial conversion cases. See *Ins Co of North America v Manufacturers Bank of Southfield NA*, 127 Mich App 278, 283-284; 338 NW2d 214 (1983); *Stephens, supra* at 534. The majority of states have also refused to apply the discovery rule in commercial conversion cases. See *Husker News Co v Mahaska State Bank*, 460 NW2d 476, 477-478 (Iowa, 1990); *Palmer Mfg & Supply, Inc v BancOhio Nat'l Bank*, 93 Ohio App 3d 17, 23-24; 637 NE2d 386 (1994).
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> Plaintiffs further contend that there is no requirement under the law for a property owner to verify that his possessions have not been stolen. However, those jurisdictions that have refused to apply the discovery rule in commercial conversion cases have presumed that property owners
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> > "know what and where their assets are, despite the fact that the presumption may work a hardship upon the property owner who fails to discover his or her ownership rights until after the period has run."

[*Id.* at 159-161, quoting *Fuscellaro v Industrial Nat'l Corp*, 117 RI 558, 563; 368 A 2d 1227 (1977).]

We believe the same policy reasoning applies in the case of commercial embezzlement, even though there, too, the policy may work a hardship on individual plaintiffs. See, e.g., *Menichini v Grant*, 995 F 2d 1224, 1230-1231 (CA 3, 1993).

Accordingly, we hold that in the case at bar the trial court erred in not applying the three-year statute of limitations applicable to actions based on an injury to property. MCL 600.5805(9); *Ins Co of North America, supra* at 282-283. Because the presentation of evidence and the verdict form does not allow us to simply remove from the judgment damages awarded for events occurring outside of the three-year time frame, we remand for a new trial limited to the issue of damages. While "[p]artial new trials limited to the determination of damages are disfavored in large part because issues relating to liability and damages are often closely intertwined . . . , [a]n exception to this general rule is made in cases where liability is clear." *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29, 93; 323 NW2d 270 (1982). See also *Kistler v Wagoner*, 315 Mich 162, 173; 23 NW2d 387 (1946). It appears evident from the evidence adduced in this lengthy litigation that were the case retried on all the issues, the result would not be different on the question of liability.

Pamer also argues that the trial court erred in denying her repeated requests to adjourn the trial due to illness. Given our remand, we need not address the merits of this issue.[4] Similarly, we need not address Pamer's claim that the trial judge abused his discretion denying her motion to disqualify himself or her motion for new trial. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights").

We will, however, address three of Pamer's remaining issues, two of which could possibly be raised again on remand. First, Pamer argues that the trial court erred in allowing testimony that despite evidence that she was a joint tenant on certain of plaintiffs' bank accounts, the account was not a joint account. We disagree. Pamer's argument is based on MCL 487.703.[5] As our Supreme Court observed in *In re Wright Estate*, 430 Mich 463, 467; 424

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[4] In any event, we conclude that the trial court did not abuse its discretion in denying Pamer's motions. *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993). While there was evidence that Pamer was experiencing some physical difficulties in court, both Pamer's own doctor and the court appointed doctor who examined her following an in-court episode indicated that her problems were associated with the stress of trial. Judicial proceedings in a civil case cannot be postponed indefinitely until a party is able to handle the stress of the litigation. There was also evidence that Pamer's physical problems had not precluded her from involvement in strenuous yard work during the time trial was proceeding without her presence in the courtroom.

[5] MCL 487.703 reads:

> When a deposit shall be made, in any bank by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, such deposits thereupon and any additions thereto, made by either of

(continued…)

NW2d 268 (1988), "Under MCL 487.703 . . . , a presumption of ownership is created when a person opens a bank account and names a joint owner with rights of survivorship." "This presumption can, however, be rebutted by reasonably clear and persuasive proof to the contrary …." *In re Cullmann Estate*, 169 Mich App 778, 786; 426 NW2d 811 (1988). Therefore, we find no error in the admission of evidence rebutting the presumption of joint ownership in the accounts.

Second, Pamer argues that the court erred in instructing the jury to treble any damages awarded for conversion and embezzlement. We agree. Question 7.A on the verdict form indicates that if the jury found that Pamer had converted or embezzled plaintiffs' funds, the jury should first identify the amounts involved and then multiply that figure by three.[6] The court's instruction was predicated on MCL 600.2919a, which reads:

(…continued)

> such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same together with all interest thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of both, or to the survivor after the death of 1 of them, and such payment and the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said banking institution for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof.
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> When a deposit has been made, or shall hereafter be made, in any banking institution transacting business in this state, in the names of 2 or more persons, payable to either or the survivor or survivors, such deposit or any part thereof or any interest or dividend thereon and any additions thereto, made by any 1 of the said persons, shall become the property of such persons as joint tenants, and the same shall be held for the exclusive use of the persons so named and may be paid to any 1 of said persons during the lifetime of said persons or to the survivor or survivors after the death of 1 of them, and such payment and the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said banking institution for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof.
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> The making of the deposit in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding, to which either such banking institution or surviving depositor or depositors is a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors.

[6] The jury concluded that Pamer had converted and embezzled $449,939. This is in keeping with the testimony and documentary evidence provided by plaintiffs' CPA. This amount was then trebled for a total award of $1,349,817.

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

This issue was recently decided by this Court. In *Lasser, PC v George*, ___ Mich App ___; ___ NW2d ___ (Docket No. 226920, issued 07/02/2002), we reached the following conclusions:

> The actions proscribed [in section 2919a]—buying, receiving, or aiding in the concealment—all occur after the property has been stolen, embezzled, or converted by the principal. In other words, the statute is not designed to provide a remedy against the individual who has actually stolen, embezzled, or converted the property. Indeed, the statute carefully compartmentalizes the actions of those assisting and the actions of the principal.
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> ***
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> To interpret the words buying, receiving, or aiding in the concealment of stolen property to mean buying, receiving from one's self or aiding one's self in concealment is to needlessly distort and improperly expand the scope of the statute

Accordingly, the statutory treble damages provision does not apply to the person who actually steals, embezzles, or converts the property at issue. *Id.*

Third, Pamer argues that the trial court erred in granting additional equitable relief to plaintiffs when an adequate legal remedy was available. Again, we agree. As our Supreme Court has written, the doctrine of election of remedies is "a procedural rule which precludes one to whom there are available two inconsistent remedies from pursuing both. Its purpose is not to prevent recourse to alternate remedies, but to prevent double redress for a single injury." *Riverview Co-op, Inc v The First Nat'l Bank and Trust Co of Michigan*, 417 Mich 307, 311-312; 337 NW2d 225 (1983) (citations omitted).

> In order for the doctrine to apply, three prerequisites must exist: (1) at the time of the election, there must have been two or more remedies available; (2) the alternative remedies must be inconsistent rather than consistent and cumulative; and (3) the party must have chosen and pursued one remedy to the exclusion of the other(s). [*Production Finishing Corp v Shields*, 158 Mich App 479, 494; 405 NW2d 171 (1987).]

In Michigan, the test for inconsistency of remedies is taken from 25 Am Jur 2d, Election of Remedies, § 11, pp 653-654. See *Production Finishing Corp, supra* at 494-495. The test is as follows:

> For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other. Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other. In this sense, inconsistency may arise either because one remedy must allege as fact what the other denies, or because the theory of one must necessarily be repugnant to the other. More particularly, where the election of a remedy assumes the existence of a particular status or relation of the party to the subject matter of litigation, another remedy is inconsistent if, in order to seek it, the party must assume a different and inconsistent status or relation to the subject matter.

In the case at bar, the election of remedies applies because the remedies sought for unjust enrichment and accounting were inconsistent. Plaintiffs' filed their motion for entry of equitable relief on July 6, 1999, seven days after judgment was entered on the jury verdict. In their unjust enrichment claim, plaintiffs sought restitution in the following amounts: (1) a loss of $449,939; (2) records compensation valued at $22,204.25; (3) accounting compensation valued at $15,940; (4) compensation for attorney fees in the amount of $70,723.11; (5) prefiling interest calculated to be $138,569; and (6) a "contract payment" of $35,000. Their accounting claim sought all of the above in the same amounts, minus the "contract payment." The trial court granted all of the relief sought for accounting, as well as the requested relief for loss, prefiling interest, and contract payment on the unjust enrichment claim.[7]

The verdict form indicates that the jury found damages in the following amounts: (1) $449,939 for monies converted and embezzled; (2) $22,204.25 for fraud; (3) $15,940 for record reconstruction costs; (4) $70,723.11 in attorney fees incurred; (5) $138,569 in interest; and (6) $35,000 for breach of contract. The jury also awarded $19,526 for breach of fiduciary duty.

We believe that the individual amounts awarded as equitable relief, which, minus the award for breach of fiduciary duty, are equivalent to the individual amounts awarded by the jury down to the penny, amounts to a double, even triple, recovery. Further, the record makes clear that the remedies sought were not cumulative, nor did they "proceed from opposite and irreconcilable claims of right." For example, while the election of doctrine remedies would not have precluded plaintiffs' claim for $449,939 under a theory of unjust enrichment if plaintiffs had been able to pursue treble damages under MCL 600.2919a, we have already held that § 2919a does not apply under the circumstances.

Therefore, we vacate the award of relief for unjust enrichment and accounting. This does not preclude plaintiffs from seeking these equitable remedies at a new trial, particularly given the restrictions placed on recovery by the statute of limitations. Further, while we do not find any error in impressing a constructive trust on Pamer's assets, it too is vacated due to the grant of a new trial. This does not preclude plaintiffs from seeking such relief in the future, including in an application for prejudgment remedy.

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[7] An award for interest accruing on the amounts awarded after the filing of the complaint was also included in the award of equitable relief.

On cross-appeal, plaintiffs argue that the trial court erred in denying plaintiffs' motions for summary disposition and by failing to enter a default judgment against Pamer. Given our remand for a new trial on the issue of damages alone, we need not address these issues. See *B P 7, supra* at 359.

Docket No. 222602

Plaintiffs argue that the trial court erred in not finding that Pamer's defense was frivolous and awarding sanctions pursuant to MCL 600.2591. We disagree. MCR 2.625(A)(2) provides in pertinent part that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.
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> (b) "Prevailing party" means a party who wins on the entire record.

A trial court's finding that a defense was frivolous is reviewed for clear error. *Meagher v Wayne State Univ*, 222 Mich App 700, 727; 565 NW2d 401 (1997). "The trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed." *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

Plaintiffs' argument on this issue is two-fold. First, plaintiffs assert that the trial court failed to inform itself of the relevant facts and law to make an informed decision on the motion. This first argument also consists of two parts: (1) that the statute and court rule requires a court to make a finding on whether a defense was frivolous, and (2) that the trial court did not make this requisite finding. We disagree with both assertions.

Plaintiffs' assertion that the statute and court rule require a finding on the issue of frivolousness is based on a misinterpretation of the relevant language. When interpreting a court rule, we apply the same rules as when we engage in statutory interpretation. *CAM Construction v Lake Edgewood Condominium Ass'n,* 465 Mich 549, 259; 640 NW2d 256 (2002). The overriding goal guiding judicial interpretation of statutes and court rules is to discover and give effect to intent of the authors. *Bio-Magnetic Resonance, supra* at 229. The starting place for the search for intent is the language used in the statute and court rule. *Id.* "If the language . . . is clear and unambiguous, then no further interpretation is required. However, judicial construction is appropriate when reasonable minds can differ with regard to the meaning of the . . . language." *Benedict, supra* at 563 (citation omitted).

Again, MCR 2.625(A)(2) states that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2951(1) states that "if a court finds that a civil action or defense to a civil action was frivolous," sanctions are mandatory. Plaintiffs argue that this language means that a court must affirmatively find either that a defense is frivolous or that it is not. We do not believe that the language requires such a choice. Rather, what the language does is establish a conditional relationship that asserts that if the antecedent is true (that an action is frivolous), then the listed consequences must follow. In essence, the language is saying that if the party bringing the motion satisfies its burden of proof, then sanctions must follow. In concluding that the party has not satisfied this burden, a court does not necessarily have to conclude that the converse is true. It is not illogical to say that while a party has not met its burden of proof, the evidence does not affirmatively establish that the defense was not frivolous.

Certainly in most cases, a court that finds that the burden has not been met will also find that the defense is not frivolous. However, the closer a defense gets to the line between the frivolous and non-frivolous, the chances increase that the negative disjunct will not be established. This seems to be the situation faced by the trial court in the case at bar. After listening to arguments on both sides of the sanctions issue and briefly reviewing the trial, the court made the following observations:

> I can't . . . take the position that the positions [defense counsel] . . . took or the defenses he put forth in terms of a bank account and the $130,000.00 and the statute of limitations and whatever else was put out there in the way of argument and defenses to the jury, reached the level of frivolousness. And maybe if I had this case from the beginning I might feel differently. But I didn't. I came in at the eleventh hour.
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> We get into, you know, . . . if there was any reasonable legal basis for it. And I, I can't say with any certainty that there, that there wasn't. I'm going to deny the motion with some reservations because this one approaches it, if I ever had it in any case. But I'm going to deny the motion.

We believe that the court made the finding it was required to on the motion. The judge determined that it had not been established that the defense was frivolous. Without such a finding, the conditional relationship was not established, and sanctions were properly denied.

Further, we do not believe that the court's conclusion was clearly erroneous. Indeed, we have already concluded that Pamer's statute of limitations defense was meritorious. Further, Pamer was within her rights to argue that the statutory presumption raised by MCL 487.703 applied, as plaintiffs were within their rights to offer evidence to rebut the presumption. We acknowledge, as did the trial court, that there are circumstances in this case that move it into that gray area that lies around the line between the frivolous and the non-frivolous. Given this ambiguity, we believe that absent clear evidence to the contrary, this Court should defer to the superior ability of the trial judge to access the positions taken at trial.

Finally, plaintiffs argue as they did on cross-appeal in Docket No. 223998, that the trial court erred in denying their motion for summary disposition. This issue being moot, we decline to address it. See *B P 7, supra* at 359.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ Donald S. Owens