

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

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FIFTH THIRD MORTGAGE COMPANY,  
  
Plaintiff/Counter-Defendant-  
Appellee,

UNPUBLISHED  
May 21, 2013

v

ROBERT MITCHELL and CARLA  
CARMOUCHE,

No. 308913  
Oakland Circuit Court  
LC No. 2009-106191-CH

Defendants/Counter-Plaintiffs-  
Appellants,

and

OLLIE MITCHELL and WILLIAM MITCHELL,  
  
Defendants.

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Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendants/counter-plaintiffs Robert Mitchell and Carla Carmouche (defendants<sup>1</sup>) appeal as of right a February 15, 2012, trial court order granting plaintiff/counter-defendant Fifth Third Mortgage Company's (Fifth Third's) motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons set forth in this opinion, we affirm.

**I. FACTS**

This dispute involves a single-family residence located at 362 Fremont Street in Bloomfield Hills, Michigan (the property). Prior to June 2004, it is undisputed that Ollie Mitchell and his wife Mary Mitchell owned the property in a tenancy-by-the-entireties. In the spring and summer of 2004, Mary was terminally ill. At that time, Ollie and Mary had nine

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<sup>1</sup> We will refer to Robert Mitchell and Carla Carmouche as "defendants" because defendants Ollie Mitchell and William Mitchell are not involved in this appeal.

surviving adult children including William Mitchell, Robert Mitchell, and Carla Carmouche. Ollie testified at a deposition that Mary wanted to leave the property to those three children. Ollie did not object to Mary's wishes, but he denied signing any deed to transfer the property.

On June 29, 2004, someone recorded a quitclaim deed with the Oakland County Register of Deeds that purported to transfer the property to William, Robert and Carla. The deed was prepared on June 24, 2004, and it contained the signatures of both Mary and Ollie and it was notarized. However, Ollie testified at deposition and submitted an affidavit attesting that he did not sign the deed. He testified that it was possible that Mary signed his name on the deed.

The facts and circumstances surrounding the drafting and recording of the deed are unclear. Robert testified that at or about the time Mary executed the deed, Mary called him and explained that she was soon going to pass away and that she wanted to put the property in Robert's name. Robert testified that he told Mary to include some of his siblings on the title because he was often out of town. According to Robert, Mary agreed, and decided that she would also include William and Carla's names on the property. Robert testified that Mary asked him if he knew of anyone who could assist her with the transaction and he recommended Robin Hopkins, a realtor and family friend. Robert "suspected" that Mary contacted Hopkins about the quitclaim deed and he testified that Hopkins drafted the deed. He denied that he drafted the deed. According to Robert, shortly after he spoke with Mary, Hopkins called him and said, "I recorded that deed for your mom, and she put the house in . . . you, William and Carla's name."

Hopkins' testimony differed. Hopkins testified that she met with Mary and notarized the quitclaim deed after Robert contacted her. Hopkins testified that Robert asked her if she would notarize a deed for Mary, but she also testified that Robert simply stated that Mary wanted to see Hopkins. Hopkins testified that she met with Mary two times. Hopkins stated that Mary wanted to ensure that a son-in-law and a daughter-in-law did not receive a stake in the property and she testified that Mary informed her that she wanted to "leave the property to her three children." Hopkins testified that when she went to Mary's home to notarize the deed, there were several people in a room with Mary, and "[e]veryone signed the Deeds. I notarized it. I'm done with it." Hopkins explained that she did not prepare the deed or record the deed. Hopkins did not know who prepared the deed, but noted that the deed stated that Robert prepared the deed. She did not know where the original documents were, but stated, "[t]he county would have them." She explained, "I only notarize the documents with a signature. I'm not the keeper of documents. That's not what my charge is."

About a month after Hopkins notarized the quitclaim deed, according to Hopkins, Robert contacted her again and asked her to assist William in obtaining a mortgage on the property. Hopkins agreed. She understood that Ollie and Mary intended the mortgage to be a "gift of equity" to William and explained that Mary wanted Ollie "off of the mortgage" but wanted him to be able to "remain in the house, and upon his passing, then the house would be to her children."

Before William obtained a mortgage on the property, two days before she died, Mary executed a power of attorney wherein she authorized Ollie to act as her attorney in fact to exercise or perform any act related to the property "which I/we have, own, or have an interest in." Mary authorized Ollie to act for her in "negotiating for, and in the sale and transfer of said

property, and to perform all and every act, deed, and thing whatsoever requisite and necessary to be done in the premises. . . .” Hopkins agreed that she notarized the power of attorney, and testified that Mary was of sound mind to sign the document. Hopkins explained that Mary executed the power of attorney because it was “needed for several transactions” that Mary “had going at the time.”

Mary died on August 9, 2004, three days after executing the power of attorney. The next day, August 10, 2004, Ollie conveyed the property to William via a warranty deed. Ollie signed the deed individually and as attorney in fact for Mary. The deed was recorded on September 22, 2004. Ollie testified that after his wife died, “I deeded the property to my son,” and he remembered, “deeding something to William Mitchell.”

The conveyance to William was necessary in order for William to obtain the aforementioned mortgage on the property. Indeed, at or about the same time Ollie executed the warranty deed, William obtained an \$80,000 mortgage on the property from Flagstar Bank. Hopkins testified that she arranged for William to obtain the Flagstar mortgage. She explained that Robert brought Ollie and William to the title company for the closing on the mortgage and she testified that Robert “absolutely” knew about the Flagstar mortgage. Hopkins testified that Ollie signed all of the mortgage documents and Flagstar approved the mortgage. Flagstar apparently did not notice the quitclaim deed in the chain-of-title. Hopkins testified that the \$80,000 Flagstar mortgage paid off the then-existing mortgage on the property with the remainder, approximately \$27,000, disbursed to Ollie.

According to Hopkins, approximately one year after William obtained the Flagstar mortgage, Robert approached Hopkins and requested that she assist William obtain a second mortgage on the home. Hopkins assisted William secure a second mortgage from Fifth Third. Hopkins explained that Odoms Financial originated the second mortgage for \$157,500, Fifth Third, in turn, obtained the mortgage from Odoms Financial. With the proceeds of the mortgage, William paid off the Flagstar Bank mortgage, and, according to William, he loaned Robert \$65,000. William testified that after less than a year, Robert stopped making payments on the personal loan. It is undisputed that William subsequently defaulted on the Fifth Third mortgage.

Robert testified at a deposition and denied that William loaned him \$65,000. He acknowledged signing a promissory note, but he denied that the note involved a mortgage on the property and he denied having any knowledge of the Fifth Third mortgage.

After William defaulted on the Fifth Third mortgage, Fifth Third commenced foreclosure proceedings on the property. During a review of the chain-of-title, Fifth Third learned about the June 2004 quitclaim deed and commenced this suit against Robert and Carla to quiet title.<sup>2</sup> Robert and Carla filed a counter-complaint, alleging that they owned the property free and clear of Fifth Third’s mortgage and that Fifth Third slandered title to the property.

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<sup>2</sup> Fifth Third later added Ollie Mitchell and William Mitchell as defendants; however, neither individual is involved in this appeal.

During discovery, William, Robert and Carla all testified at deposition that they had never seen the quitclaim deed before Fifth Third commenced this proceeding. Carla testified that she recalled Mary saying that she would “put some of the kid’s names on the property,” and she “assumed” she was made a co-owner but she did not know who specifically Mary planned to put on the title. Carla had “no idea” when she found out that she was put on the deed to the property. She testified that she did not know who owned the property, and before the lawsuit, she thought William owned the property. At one point, when Fifth Third’s counsel asked Carla if she believed herself to be a co-owner of the property, Carla responded, “never” and she stated that she “never even looked at it as that. I never looked at it as that at all.”

Fifth Third moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact regarding the invalidity of the quitclaim deed. Fifth Third argued that there was no evidence to show that the grantors delivered the deed to any of the grantees. Additionally, Fifth Third argued that the deed could not have conveyed title because Ollie testified that he never signed the deed. Without Ollie’s signature, Fifth Third argued, Mary could not have split the tenancy-by-the-entireties. Defendants responded, arguing that there were genuine issues of fact with respect to delivery of the deed where Robert testified that Mary informed him about her intentions to convey the property and that Hopkins called Robert and told him that she recorded the quitclaim deed. Defendants also argued that there was a question of fact regarding Ollie’s signature because his signature appeared on the document.

The trial court granted Fifth Third’s motion for summary disposition. The court found that the deed was invalid given Ollie’s testimony that he did not sign the deed. Further, the court reasoned that even if Ollie signed the deed, defendants did not come forward with any evidence to show that it was delivered to the grantees. The court entered a written order wherein it granted Fifth Third’s motion for summary disposition, dismissed defendants’ counter-complaint, quieted title in Fifth Third’s favor, declared the quitclaim deed void and declared the Fifth Third mortgage valid and enforceable. This appeal ensued.

## II. ANALYSIS

Defendants contend that the trial court erred in granting Fifth Third’s motion for summary disposition. We review de novo a trial court’s decision on a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). When reviewing a motion brought under MCR 2.116(C)(10), we consider “the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Id.* at 551-552. A moving party is entitled to summary disposition pursuant to MCR 2.116(C)(10) when “there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 552. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ.” *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006). The party opposing the motion cannot merely rely on its pleadings to show that there is a genuine issue of material fact, but instead must offer evidence that would be admissible at trial to establish a disputed fact. MCR 2.116(G)(4) (6); *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Defendants first contend that the trial court erred in concluding that there was no genuine issue of fact regarding delivery of the deed.

Unlike a will, a deed conveys a present interest in land and it must be delivered and accepted to be valid. *Gibson v Dymon*, 281 Mich 137, 141; 274 NW2d 739 (1937). “A deed takes effect from the time of its delivery, and not from the time of its date, execution or record[ing].” *Ligon v Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007) (quotation and citation omitted). Recording of a deed creates a rebuttable presumption of delivery that “shifts the burden of proof onto the party questioning the delivery.” *Energetics, Ltd, v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993). “The purpose of the delivery requirement is to show the grantor’s intent to convey the property described in the deed.” *Id.* As such, delivery depends not solely on the act of presentation, but rather on the grantor’s intent to make a delivery. *McMahon v Dorsey*, 353 Mich 623, 626; 91 NW2d 893 (1958) (quotation and citation omitted). “The act of delivery is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is that act of the grantor, indicated either by acts or words or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit.” *Tighe v Davis*, 283 Mich 244, 248-249; 278 NW 60 (1938) (quotation and citation omitted). “The test is whether it can be said that delivery of the deed was such as to convey a present interest in the land.” *Id.* (quotation and citation omitted). Subsequent acts of the grantor and grantee can shed light on whether delivery occurred. See *Schmidt v Jennings*, 359 Mich 376, 384-386; 102 NW2d 589 (1960).

In this case, there was no question of fact regarding delivery of the deed. While delivery to a single grantee can constitute delivery to all joint grantees, *Reed v Mack*, 344 Mich 391, 397; 73 NW2d 917 (1955), here, there was no evidence to show that Mary transferred a present interest in the property to any of the grantees. Robert testified that Mary informed him that she wanted to put the property in his name. According to Robert, Mary agreed to also put William and Carla on the property. However, even assuming Mary’s out of court statements were admissible at trial under, for example, MRE 803(3) as evidence of the declarant’s then-existing state of mind, the conversation did not amount to evidence of delivery. Instead, at best, Robert became aware of Mary’s intent to transfer the property at some point in the future. Indeed, the conversation ended with Robert providing Mary with the name of a realtor. After that, Robert merely “suspected” that Mary contacted the realtor and he never saw the deed. Other than Hopkins’ hearsay statements, there was no admissible evidence to show that Robert knew that Mary transferred the property. There was no evidence that Mary delivered a present interest in land to Robert or to some other third person to hold for the benefit of Robert. To the extent defendants’ rely on Robert’s testimony regarding Hopkins’ out of court statements, defendants fail to show how the hearsay statements would be admissible at trial. As such, the alleged hearsay statements are insufficient to create a genuine issue of material fact. See MCR 2.116(G)(6) (a party opposing a motion for summary disposition must offer evidence that would be admissible at trial to show that there is a disputed issue of fact).

Moreover, Mary’s actions following execution of the quitclaim deed show that she did not convey a present interest in the property to the grantees. In particular, shortly after Mary executed the deed, she executed a power of attorney wherein she authorized Ollie to act as her attorney in fact and to perform any act related to the property. In the power of attorney, Mary represented that she and Ollie owned the property and she authorized Ollie to perform any act

“necessary to be done to the premises.” Hopkins testified that Mary was of sound mind to execute the power of attorney and she explained that Mary needed to execute the document because she had several ongoing transactions related to the property. Hopkins testified that she helped arrange the Flagstar mortgage sometime after notarizing the quitclaim deed because Mary wanted Ollie to be able to live at the property and for it to pass to the children upon Ollie’s death. Mary’s actions show that she retained control over the property after executing the quitclaim deed. She exercised control by granting Ollie the power to execute transactions related to the property and she attempted to control the disposition of the property following her death. This evidence shows that Mary did not deliver a present interest in the land. Rather, she retained control over the property up until her death. See *Resh v Fox*, 365 Mich 288, 289-292; 112 NW2d 486 (1961) (manual delivery of deed to grantee with instructions not to record until after grantor’s death did not amount to delivery where grantor retained all incidents of control over the property).

In addition, there was no evidence to show that any of the grantees were aware that Mary transferred a present interest in the property. While there was testimony that Mary wanted to leave the property to some of her children, recording a deed with intent to transfer property at death does not constitute delivery, *Lawton v Campau*, 214 Mich 535, 537; 183 NW 203 (1921), and delivery made after the grantor’s lifetime is generally not effective. *Phelps v Pipher*, 320 Mich 663, 672-673; 31 NW2d 836 (1948). Here, all three grantees testified at depositions that they had never seen the quitclaim deed before Fifth Third commenced suit. Carla testified that she was aware Mary planned to put some of her children’s names on the property, but Carla had “no idea” when she learned that her name was on the quitclaim deed. Carla testified that, before the lawsuit, she thought that either Ollie or William owned the property and she did not think that she co-owned the property.

Furthermore, the actions of all three grantees after Mary executed the quitclaim deed show that they were unaware of the deed and that Mary did not convey any present interest in the property. Specifically, shortly after Mary executed the quitclaim deed, Hopkins assisted William obtain the Flagstar mortgage on the property per Robert’s request. According to Hopkins, Robert was at the closing with William and Ollie. At about the same time, Ollie executed the warranty deed and conveyed the property to William. There is no evidence that Carla or Robert objected to the transfer and Carla testified that she thought that William owned the property after Mary passed away. Further evidence showed that Robert was aware of the Fifth Third mortgage and that William obtained the mortgage in order to lend him a substantial amount of money. Robert acknowledged signing the promissory note, and Hopkins testified that she discussed the Fifth Third mortgage with Robert. Robert never objected to William exercising control over the property. In short, defendants cannot prove delivery where the evidence shows that none of the grantees were aware of the quitclaim deed until after Mary’s death. See *Gibson*, 281 Mich at 140 (noting that “If a grantor without the knowledge or assent of the grantee places a deed on record, that will not constitute a delivery for the reason the grantee has not assented to receive the deed. . . .”)

In sum, we conclude that the trial court did not err in finding that defendants failed to come forward with evidence to show that the deed was delivered to any of the grantees. Therefore, irrespective of whether Ollie signed the deed, summary disposition was appropriate where a deed is effective only upon delivery. *Ligon*, 276 Mich App at 128. Because there was

no delivery, the quitclaim deed was not valid and Fifth Third was entitled to summary disposition.<sup>3</sup>

Affirmed. Both parties having presented valid arguments on appeal, neither party may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello  
/s/ Kirsten Frank Kelly  
/s/ Christopher M. Murray

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<sup>3</sup> Given our resolution of the issue of delivery, we need not address whether the trial court erred in granting summary disposition on the alternative ground that the deed was invalid because it was not signed by Ollie Mitchell.