

DA 22-0704

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 211N

LORI BATTAGLIA BOOTH,

Plaintiff and Appellant,

v.

ALEXA L. WEITZEL, f/k/a Alexa L. Ullrich, individually
and as personal representative of the Estate of Dona Battaglia, and
Alexa L. Weitzel, f/k/a Alexa L. Ullrich, and VIRGIL D. WEITZEL,
individually and as trustees of the Estate of Lori Booth, and DOES I to IV,

Defendants and Appellees.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-20-913
Honorable Robert B. Allison, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

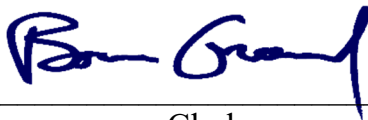
Peter F. Carroll, Attorney at Law, Kalispell, Montana

For Appellees:

Evan F. Danno, Danno Law Firm, P.C., Kalispell, Montana

Submitted on Briefs: August 2, 2023
Decided: November 7, 2023

Filed:



Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(d), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Plaintiff and Appellant Lori Battaglia Booth (Lori) appeals a May 16, 2022 Order from the Eleventh Judicial District Court, Flathead County, granting partial summary judgment in favor of Appellees, her brother Virgil Weitzel, and her niece and Virgil's daughter, Alexa Weitzel (collectively, Weitzels). She also challenges a June 28, 2022 Order granting attorney fees and costs to Weitzels, and a November 9, 2022 Order and Judgment entered in favor of the Weitzels entered following a non-jury trial on Weitzels' counterclaim. We address the following restated issues:

1. *Whether the District Court erred by granting the Weitzels' motion for partial summary judgment.*
2. *Whether the District Court properly awarded attorney fees without a hearing.*
3. *Whether substantial credible evidence supported the District Court's findings of fact entered after a bench trial on Weitzels' counterclaim.*

¶3 We affirm on Issues 1 and 3, and reverse and remand for further proceedings consistent with this Opinion on Issue 2.

¶4 Based upon the summary judgment record, Lori became disabled at age 28 due to bipolar disorder. Thereafter, she received Social Security disability funding that her father, Phillip Battaglia, invested into a fund established at Wells Fargo Bank (Acct. No. 2337).

Lori had joint control of this account with her father and occasionally withdrew funds from the account.

¶5 After Mr. Battaglia died in 2012, Lori, as settlor, established the Lori Booth Revocable Beneficiary Trust (Trust) with another account at Wells Fargo Bank (Acct. No. 1028). The Trust was largely funded by Lori's mother, Dona Battaglia (Dona), who transferred the amount of \$231,208 into the account. This transfer was intended to be Lori's inheritance from her parents. The Trust account was managed by a Wells Fargo financial officer, although Lori, as settlor and sole beneficiary, had latitude in controlling the Trust funds, including the power to revoke the Trust and personally receive any assets held in the Trust upon such revocation. Virgil Weitzel and Alexa Weitzel were designated as trustees. The Trust was scheduled to expire on January 1, 2020, at which point the trustees, as instructed by the Trust, were to divest the Trust of all assets and transfer them to Lori and her husband, Donald Booth. Following Lori's divorce from Donald in 2013, he was removed as a beneficiary of the Trust.

¶6 In December 2014, shortly after Lori's divorce, Dona and Lori moved from their home in Arizona to Whitefish, Montana. Dona purchased a home in Whitefish that was intended to be the inheritance for her other child, Virgil. Virgil moved into the home with Alexa and Alexa's two teenage daughters. When Dona and Lori arrived from Arizona, they moved into a separate residence in the basement of the home, while Virgil, Alexa, and Alexa's daughters lived upstairs.

¶7 On December 30, 2014, Dona conveyed half of her record interest in the home to Alexa. Then, on July 27, 2015, Dona conveyed the second half of her interest in the home

to Alexa, who by that time had moved back to Illinois with her daughters to resolve her own divorce. The conveyance was undertaken upon the encouragement of Virgil, who told Dona the home would ultimately pass to Alexa through him anyway. Lori testified that Virgil did not want the property to be deeded in his name because of financial difficulties he was having with the IRS. Lori also testified that Dona really intended to give Lori one-half interest in the home, despite making the second record transfer to Alexa.

¶8 Beginning in October 2015, Lori began to transfer funds from her Trust account to another personal account at Wells Fargo (Acct. No. 2648). She accomplished this by providing Letters of Authorization for her to transfer funds signed by Virgil and Alexa, as trustees. An authorization signed by Alexa on December 29, 2014, authorized Lori to withdraw up to \$25,000. The authorization signed by Virgil on September 12, 2015, authorized Lori to transfer the “account balance” from the Trust (Acct. No. 1028) to her personal account (Acct. No. 2648) through a one-time disbursement in the approximate amount of \$197,000. By November 2, 2015, all the funds in the Trust account had been transferred to her personal account and the Trust account’s balance was zero. After the funds were transferred to her personal account, Lori made four cash withdraws from this account throughout late 2015 and early 2016 in the total amount of \$193,552. She thereafter closed her personal account on April 13, 2016.

¶9 In her deposition, Lori revealed the purpose of these transfers and withdrawals was to reduce her resources or the appearance of her resources so she could qualify for Medicaid. Lori previously attempted to obtain Medicaid in 2012 following the death of her father, but she did not qualify due to excessive assets, most of which were held by her

Trust. Lori claimed these withdrawals were encouraged by Virgil because he thought depleting the Trust may help her qualify for public assistance, and that Virgil offered to hold some of Lori's withdrawn cash for her while she applied for Medicaid. In 2017, cash in an unknown amount held by Virgil was apparently stolen, along with other personal items, when the parties' Whitefish residence was burglarized.

¶10 Lori also claimed that Dona held \$30,000 in a safe deposit box at the bank. Lori testified that Dona told her about the safe deposit box, but that only Virgil had access to it. Virgil testified the safe deposit box was empty when he and Alexa accessed the box after Dona's death. Outside of the money held by Virgil on her behalf and the funds allegedly placed in the safe deposit box, the location and use of the rest of the withdrawn Trust funds is unknown, except for a portion that funded a bank account jointly held by Lori and Dona.

¶11 Dona died on July 7, 2019, and her estate was to be dividedly equally between Lori and Virgil, through a Last Will and Testament dated September 11, 2012. Alexa was named personal representative of the estate. Following Dona's death, Lori changed the locks to the basement portion of the Whitefish home so that Virgil and Alexa could not access it. When Lori moved out, she had exclusive access to family photographs and jewelry owned by Dona, which were removed from the residence. While Lori admitted to taking the family photographs, she denied taking Dona's jewelry.

¶12 In October 2020, Lori initiated this action, naming Virgil and Alexa as defendants and alleging constructive fraud, breach of fiduciary duty as trustees, and conversion. Weitzels answered in denial and counterclaimed for recovery of the photographs and jewelry they alleged Lori had taken. After discovery, Weitzels moved for summary

judgment on all of Lori's claims, which the District Court granted in May 2022. The District Court also granted Weitzels' request for attorney fees, awarding the amount of \$5,000, but conducted no hearing on the issue. In November 2022, the District Court conducted a bench trial on Weitzels' counterclaim, after which it found in favor of the Weitzels and ordered Lori to pay Virgil half the value of Dona's jewelry, or \$3,007.50, and to turn over half of Dona's photographs in accordance with Dona's will. Lori appeals.

¶13 We review a grant of summary judgment de novo, applying the same M. R. Civ. P. 56(c) criteria used by the District Court. *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 2019 MT 213, ¶ 18, 397 Mont. 161, 451 P.3d 493 (citing *N. Cheyenne Tribe v. Mont. Dep't of Env'tl. Quality*, 2010 MT 111, ¶ 18, 356 Mont. 296, 234 P.3d 51). Summary Judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mont. Env'tl. Info. Ctr.*, ¶ 18. "We review a district court's conclusion regarding the existence of legal authority to award attorney fees for correctness. If legal authority exists, we review a district court's order granting or denying attorney fees for an abuse of discretion. An abuse of discretion occurs when the district court acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice." *Abbey/Land LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 62, 394 Mont. 135, 433 P.3d 1230 (citation omitted). Finally, "[w]e review findings of fact entered after a civil bench trial to determine if they are supported by substantial credible evidence." *Cremer Rodeo Land & Livestock Co. v. McMullen*, 2023 MT 117, ¶ 14, 412 Mont. 471, 531 P.3d 566. We review this evidence in the light most favorable to the prevailing party and leave

the credibility of witnesses and weight assigned to their testimony to the determination of the District Court. *Only a Mile, LLP v. State*, 2010 MT 99, ¶ 10, 356 Mont. 213, 233 P.3d 320. Substantial credible evidence is “evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance.” *Keller v. Liberty Nw., Inc.*, 2010 MT 279, ¶ 20, 358 Mont. 448, 246 P.3d 434 (citation omitted). “We review a district court’s conclusions of law in this context for correctness.” *Kurtzenacker v. Davis Surveying, Inc.*, 2012 MT 105, ¶ 14, 365 Mont. 71, 278 P.3d 1002.

¶14 *I. Whether the District Court erred by granting the Weitzels’ motion for partial summary judgment.*

¶15 Lori challenges the entry of summary judgment dismissing her claims against the Weitzels. Regarding her claims of constructive fraud, Lori contended Virgil and Alexa exercised undue influence over and effectively misled Dona into believing that Lori would receive one-half of the value of the Whitefish home, which Lori claimed Dona wanted her to receive upon Dona’s death. Lori requested a constructive trust be imposed for half of the interest in the home as a remedy for the alleged fraud.

¶16 The District Court concluded that Lori’s factual contentions were not sufficiently supported, but that, in any event, the claims were time-barred. The statute of limitations for an action on the grounds of fraud or mistake is two years. Section 27-2-203, MCA; *Osterman v. Sears*, 2003 MT 327, ¶ 20, 318 Mont. 342, 80 P.3d 435 (citing *Fleming v. Fleming Farms, Inc.*, 221 Mont. 237, 717 P.2d 1103 (1986)). “Constructive fraud” falls within the definition of fraud for the purposes of this statute. *Purcell v. Automatic Gas*

Distribs., 207 Mont. 223, 232, 673 P.2d 1246, 1251 (1983). The District Court ruled the two-year period began running upon the recording of the conveyance of the second half of the interest in the home to Alexa on July 27, 2015, reasoning that Lori then knew or should have known that any promise made to her had been broken.

¶17 Lori’s argument continues to be based primarily upon her perceptions, such as she “understood” one-half of the property would be given to her upon Dona’s death, that Dona had retained “full responsibility” of the property despite the title transfers, and that Dona “knew that the [Weitzels] would take care” of Lori after Dona’s death. However, the District Court reasoned from the record that “Lori’s claim of Dona’s broken promise to deed Lori one-half the property is undocumented, creates no issue of material fact, and, if true, would have created a large inequity in Dona’s distribution of her wealth,” contrary to the intent expressed in her Will; and further, such a “broken oral promise to transfer real property” would have been unenforceable. We agree that the record does not document such a promise, certainly not prior to the expiration of the two-year statutory period to bring a claim.¹ The District Court reasoned that Lori’s proffered “close and personal relationship” between Dona and the Weitzels was insufficient by itself to support her undue influence claim, and was contrary to the overall record, which demonstrated that Dona was

¹ Lori offered a letter signed by Virgil purporting to convey 50% of the net proceeds of the Whitefish home to Lori upon the death of Dona. However, this letter was written and signed after the expiration of the statutory period for bringing the action, and the property was then owned by Alexa, not Virgil.

neither infirm nor unable to act, was well aware of the financial maneuvering of all the parties, and acted in various ways that were complicit with their schemes.

¶18 Regarding Lori's claim for breach of fiduciary duty, the District Court reasoned that the record demonstrated the decision to deplete the Trust account was Lori's decision alone and made for her sole benefit to receive Medicaid funding, and that any promotion of the idea by Virgil was not new or novel to Lori, who understood the relationship between Medicaid benefits and her wealth. Second, the Trust itself, per its terms, relieved the Trustees from liability for discretionary acts made of the beneficiary, Lori. Moreover, the District Court found that the depletion of the Trust account effectively terminated the Trust according to its terms. Lastly, the District Court added that the claim was time-barred by a three-year statute of limitations for breach of fiduciary duty claims.

¶19 Lori again contends that there was at least a factual dispute as to whether Virgil and Alexa exerted improper influence over Dona to Lori's detriment, but as stated above, the District Court determined the evidence proffered by Lori insufficiently supported this claim. Regarding Lori's claim that Weitzels breached their duties to her, trustees are required to administer the trust in a reasonably prudent manner. Section 72-38-809, MCA. But trustees are not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct causing or ratifying the breach. Section 72-38-1009, MCA. Article V(B) of the Trust relieved Weitzels of liability for distributions made pursuant to its terms:

The Trustee shall not be held accountable to any beneficiary if part or all of the principal shall be depleted as a result of distributions under this trust in accordance with the terms of this trust.

Lori was the settlor and beneficiary of the trust, with authority to act pursuant thereto. Upon her request, Weitzels authorized Lori to move funds from the Trust account to her personal account at the same bank. Lori requested Wells Fargo to prepare Letters of Authorization for the Weitzels to sign, for purposes she asserted were necessary to her wellbeing. While Lori contended that these money transactions were the result of improper coaching from Virgil about how to set up Medicaid eligibility, the District Court observed that the record demonstrated Lori's firsthand knowledge about these issues dating back to her 2012 Medicaid application. Her knowledge of this program is precisely why she wanted to move the money from the Trust to her personal account. The District Court cited no evidence that the process of transferring funds out of the Trust was coerced by the Weitzels or encouraged to bring about some personal benefit to them at the expense of the beneficiary, Lori. While reasonable minds could certainly differ as to efficacy of this strategy, authorizing Lori to move funds to a personal account was not prohibited by the Trust, was for a purpose the District Court described as "related solely to what [Lori] perceived as highly important in her life: Medicaid benefits," and did not result in funds going to any other person. Notably, the Trust would have terminated by its own terms a few years later, with the same result: distribution of the funds to Lori personally.

¶20 Once Lori withdrew the Trust funds in-full and transferred them to her personal account at Wells Fargo (Acct. No. 2648), "Lori terminated the Trust by its own terms," as the District Court described it. Trust provision Article V (B)(3) provides in relevant part that "[t]his Trust shall cease and terminate upon the depletion of its assets" The Trust assets were depleted in November 2015 when the balance became zero. The Weitzels were

relieved of their duties and were not required to exercise discretion over how the personal account funds were being used. While Lori correctly argues the District Court erred in also concluding the claim was barred under a three-year statute of limitations, because a five-year period applies, *see* § 72-38-1005(3), MCA, this error is harmless, as the District Court nonetheless correctly entered judgment on the basis of the summary judgment record.

¶21 Regarding Lori's conversion claim, such claims must satisfy the following elements: ownership of property, a right of possession, unauthorized dominion over that property by another, and damages that result. *Lane v. Dunkle*, 231 Mont. 365, 368, 753 P.2d 321, 323 (1988) (citation omitted). The District Court reasoned that Lori oversaw her own money transfers and that there was never the requisite ownership, control, or possession by the Weitzels to effectuate conversion of the funds. On appeal, however, Lori has shifted her focus, arguing conversion occurred when the \$30,000 apparently held by Dona in a safety deposit box at the bank was taken by Virgil, who had sole access to the deposit box. This issue was not addressed by the District Court.

¶22 First, we concur with the District Court's ruling that, upon this record, there was no conversion established with respect to the funds transferred from the Trust to Lori's personal account. The Trustees never exercised unauthorized dominion over Lori's funds. Lori was responsible for transferring the funds from the Trust account to her personal account, and neither of the trustees forced her to execute the transfers beyond complying with Lori's request to authorize her to do so on her own accord.

¶23 Even assuming the safety deposit box claim is properly raised, Lori's testimony on the matter was conflicting. She originally claimed there was \$30,000 in a box inside of the

Whitefish home basement. Later she claimed it was at a bank and in a safety deposit box only accessible by Virgil. Virgil confirmed the existence of the box at the bank but also testified it was empty when he checked it after Dona's death. Lori has not put forward any additional evidence indicating the existence of the \$30,000 in the safety deposit box, nor did she offer evidence that Virgil took money from the box. For these reasons, Lori failed to meet her summary judgment burden on the conversion claim.

¶24 We conclude the District Court properly entered summary judgment dismissing Lori's claims.

¶25 2. *Whether the District Court properly awarded attorney fees without a hearing?*

¶26 The District Court awarded attorney fees to the Weitzels in its June 28, 2022 Order. Lori argues the award was improperly entered because attorney fees and costs can only be awarded following an evidentiary hearing by the District Court. We agree.

¶27 A district court must conduct a hearing before an award of fees is granted. *Textana, Inc. v. Klabzuba Oil & Gas*, 2009 MT 401, ¶ 88, 353 Mont. 442, 222 P.3d 580. The reasonableness of attorney fees must be ascertained under the facts of each case and should be guided by a number of non-exclusive factors reiterated by this Court, including:

(1) the amount and character of the services rendered; (2) the labor, time and trouble involved; (3) the character and importance of the litigation in which the services were rendered; (4) the amount of money or the value of the property to be affected; (5) the professional skill and experience called for; (6) the attorneys' character and standing in their profession; and (7) the results secured by the services of the attorneys.

Plath v. Schonrock, 2003 MT 21, ¶ 36, 314 Mont. 101, 64 P.3d 984 (citing *Swenson v. Janke*, 274 Mont. 354, 908 P.2d 678 (1995)).

¶28 Here, the District Court erred by failing to conduct a reasonableness hearing regarding the grant of attorney fees and costs. Without disturbing any other ruling entered in this case, we remand to the District Court for an appropriate hearing on the matter.

¶29 3. *Whether substantial credible evidence supported the District Court’s findings of fact entered after a bench trial on Weitzels’ counterclaim?*

¶30 Lori argues the judgment entered against her on Weitzels’ counterclaim after the November 7, 2022 bench trial was not supported by substantial credible evidence. Lori argues the District Court erred in ruling that Lori took Dona’s jewelry, and further contends that the District Court improperly based the valuation of the jewelry upon 40-year-old appraisals.

¶31 Testimony was provided by both Alexa and Virgil regarding the missing jewelry. They both testified Lori had exclusive access to the basement in the Whitefish home where she had lived with Dona prior to her death. After Dona’s death, Lori changed the locks to prevent any entry by Alexa or Virgil into the basement, and they testified Lori was secretive about what she was taking out of the house. While she did not testify at trial, Lori suggested in her deposition that Weitzels had taken the jewelry, despite Lori being the only individual with access to her jewelry after her death. She admitted to taking the family photographs. Alexa and Virgil admitted to having some of Dona’s property items that they described as “costume jewelry,” but not any of the valuable pieces centrally at issue. Given the circumstances of access to and control of the jewelry, and viewing the evidence in a light most favorable to the prevailing party, we conclude the District Court’s ruling was supported by substantial credible evidence.

¶32 With respect to valuation of the jewelry, the District Court's determination was based largely on appraisals conducted by a jeweler in 1980 and 1982, valuing the items at \$6,015. While the appraisals offered by the Weitzels may have failed to capture the contemporary value of the items in question, including any appreciation, the District Court had a reasonable basis for finding the value because Lori offered no alternative valuation or other means of appraising the jewelry. The 1980 and 1982 jewelry appraisals were the only evidence provided and upon which the District Court could have based its judgment. We conclude that substantial credible evidence supported the District Court's valuation finding.

¶33 We affirm the District Court's grant of partial summary judgment to the Weitzels on Lori's claims and conclude that substantial credible evidence supported the District Court's judgment following the bench trial on the Weitzels' counterclaim. We reverse the attorney fee award and remand that issue to the District Court for a proper hearing.

¶34 We have determined to decide this case pursuant to Section I, Paragraph 3(d) of our Internal Operating Rules, which provides for noncitable memorandum opinions. The legal issues are controlled by settled Montana law, which the District Court correctly interpreted. The District Court did not err in granting summary judgment, and the District Court's findings of fact after the bench trial were supported by substantial evidence.

¶35 Affirmed in part, reversed in part, and remanded for further proceedings consistent herewith.

/S/ JIM RICE

We concur:

/S/ LAURIE McKINNON

/S/ JAMES JEREMIAH SHEA

/S/ BETH BAKER

/S/ INGRID GUSTAFSON