STATE OF MICHIGAN
IN THE COURT OF APPEALS

In Re: Estate of Robert F. Byrne:

Northern Trust Bank FSB,
Trustee of The Robert F. Byrne Trust, as
Amended and restated, and Personal
Representative of the Estate of Robert F. Byrne;
RFB Properties, Inc.; RFB- Bloomfield, LLC;
R.F. Byrne Co., Byrne Aviation, LLC;
And RFB-Aurelius, LLC,

Docket No. 307641

Oakland Probate No. 06-306903-CZ
Hon. Daniel O'Brien

Plaintiffs/Appellants,

v.

Estate of Marlene R. Bills, John Becker,
Personal Representative,

Defendant/Appellee.

______________________________________/

APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Dated: August 2, 2012

COUNTER-STATEMENT OF QUESTIONS INVOLVED

In this action for breach of fiduciary duty and other claims, plaintiff Northern Trust Bank at trial asked that defendant Marlene Bills be ordered to pay $1,580,013 and disinherited from a house decedent Robert Byrne gave her. The jury awarded the Bank $625,838 and the trial court awarded $181,537, and entered judgment on the combined $807,375, with interest bringing the total to $944,013. The court later granted Ms. Bills a directed verdict/JNOV, vacated all the awards, and entered a judgment of no cause of action.

I. The Bank never moved for a new trial or JNOV on the award, but on appeal requests not only the now-vacated judgment amounts, but also the $772,638 that both the jury and court at trial declined to award it. Is the Bank barred on appeal from seeking anything above the $807,735 combined jury/court awards, plus interest?

Plaintiff-appellant Northern Trust Bank answers:	**No**
The Probate Court:	**Did not answer**
Defendant-appellee Estate of Marlene Bills[1] answers:	**Yes**

II Did the Probate Court properly direct a verdict for Ms. Bills on the Bank's claims of breach of fiduciary duty and taking funds to which she was not entitled?

Plaintiff-appellant Northern Trust Bank answers:	**No**
The Probate Court answered:	**Yes**
Defendant-appellee Ms. Bills answers:	**Yes**

III. Did the Probate Court properly direct a verdict on the Bank's claims of self-dealing?

Plaintiff-appellant Northern Trust Bank answers:	**No**
The Probate Court answered:	**Yes**
Defendant-appellee Ms. Bills answers:	**Yes**

IV. Should the Bank's request for judgment disinheriting Ms. Bills from the house Mr. Byrne gave her based on the *in terrorem* clause of his trust be rejected, where it is not properly presented for appellate review and also fails on the merits?

Plaintiff-appellant Northern Trust Bank answers:	**No**
The Probate Court answered:	**Yes**
Defendant-appellee Ms. Bills answers:	**Yes**

[1] Ms. Bills died in November 2011, two days after entry of the order being appealed, and this Court in early 2012 on Northern Trust's motion substituted her estate. This brief will refer to defendant-appellee as "Ms. Bills" or "Mari."

COUNTER-STATEMENT OF QUESTIONS INVOLVED (cont'd)

V. Did the Probate Court properly direct a verdict for Ms. Bills on the Bank's claim of fraudulent concealment?

Plaintiff-appellant Northern Trust Bank answers:	**No**
The Probate Court answered:	**Yes**
Defendant-appellee Ms. Bills answers:	**Yes**

VI. Did the Probate Court properly grant Ms. Bills JNOV on the accounting claim and find that she had fully accounted?

Plaintiff-appellant Northern Trust Bank answers:	**No**
The Probate Court answered:	**Yes**
Defendant-appellee Ms. Bills answers:	**Yes**

VII. In the event this Court finds any reversible error, is Ms. Bills entitled to a new trial or, at a minimum, a remand for the Probate Court to rule on her motion for new trial?

Plaintiff-appellant Northern Trust Bank answers:	**No**
The Probate Court:	**Did not answer**
Defendant-appellee Ms. Bills answers:	**Yes**

VIII. If this Court affirms the Probate Court, should it also lift the stay it entered in February 2012 and give its opinion immediate effect?

Plaintiff-appellant Northern Trust Bank answers:	**No**
The Probate Court:	**Did not answer**
Defendant-appellee Ms. Bills answers:	**Yes**

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Cases

[2] All cases have been shepardized via Lexis and are valid in relevant part through August 2, 2012.

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Statutes and court rules

INDEX OF ATTACHMENTS

These unpublished cases are being filed electronically as an attachment to this brief:

In re Cadarette Estate, unpublished per curiam opinion of the Court of Appeals, decided June 9, 2009 (Docket No. 284132).

Estate of Dziuban, unpublished per curiam opinion of the Court of Appeals, decided November 20, 2008 (Docket No. 279539)

In re Estate of Johnson, unpublished per curiam opinion of the Court of Appeals, decided July 19, 2012 (Docket No. 304420)

In re Estate of White, unpublished per curiam opinion of the Court of Appeals, decided November 18, 2008 (Docket No. 279866)

In re Harriet Fishbeck Trust (Aft Rem), unpublished per curiam opinion of the Court of Appeals, decided April 24, 2003 (Docket No. 233858)

Lemberg v Korotkin-Schlesinger & Assocs, Inc, unpublished per curiam opinion of the Court of Appeals, decided March 15, 2012 (Docket No. 301116)

Northern Warehousing Inc v State (On Rem), unpublished per curiam opinion of the Court of Appeals, decided August 22, 2006 (Docket No. 260598)

Peppler v The Peppler Agency, Inc, unpublished per curiam opinion of the Court of Appeals, decided December 13, 2011 (Docket No. 300194)

Quality Mfg, Inc v Mann, unpublished per curiam opinion of the Court of Appeals, decided December 15, 2009 (Docket No. 286491)

In re Tobias Estates, unpublished per curiam opinion of the Court of Appeals, decided May 10, 2012 (Docket No. 304852)

JURISDICTIONAL STATEMENT

Although the Probate Court's November 25, 2011 Opinion and Order reserved a ruling on Ms. Bills' motion for new trial, it nonetheless appears to be a "final order" as defined by MCR 7.202(6)(a)(i) and MCR 5.801(B), and thus the Bank's jurisdictional statement is correct.

INTRODUCTION

Plaintiff Northern Trust Bank, its judgment "tainted" by the daughter and estate lawyer of decedent Robert Byrne, injected itself into a 33-year personal and business relationship in a misguided attempt to distribute Mr. Byrne's assets not as he intended, but as its demanding new customer and referral source wanted. Before Mr. Byrne was even buried the Bank fired and locked out his longtime companion, defendant Mari Bills, then set her up with an outrageous accounting demand as she herself was descending into Alzheimer's, and sued when she could not comply. In a six-day jury and bench trial the Bank spun its theory of fiduciary-duty breach and other supposed wrongs, but the jury rejected most of it and the trial court did away with the rest.

The Bank now seeks not only reinstatement of the verdict but hundreds of thousands of dollars that both the jury and trial court refused to award it. Its appeal is without merit.

COUNTER-STATEMENT OF FACTS[3]

I. The Bank's statement of facts should be disregarded in full.

Contrary to MCR 7.212(C)(6), the Bank's brief does not fairly state all material facts without argument or bias. At several points, the Bank *misstates* key facts. It asserts Bob Byrne "**Never Recovered From Dementia**," and paints him as doddering from 2002 until his death in late 2005. Brief, pp 10-11 (emphasis in original). But it ignores the contrary testimony of its own witnesses, Bob's daughter and his estate lawyer, that through his last will and trust revision two months before his death he was emotionally stable, knew the extent of his property and his dispositional decisions, and that in general, his capacity to understand things was "fine." TR 8/6/10 Henry, pp 166-67 (discussing deposition); TR 8/9/10 Prekel, pp 104-05, 123.

[3] The court's ruling in large part dealt with Ms. Bills' directed-verdict motion, which it took under advisement at trial then granted in full. 11/25/11 Opinion and Order, pp 1-38. But the court did consider Ms. Bills' motion for JNOV on the undue-influence and accounting claims, *Id* at 38-42, thus her trial evidence is relevant to those issues and will be cited here as necessary.

Elsewhere the Bank relies on excluded material as if it were part of the record:

- The court struck large parts of Ken Pogue's testimony and instructed jurors to disregard it. TR 8/5/10, pp 220-24. The Bank's brief not only cites that stricken testimony, but relies on it as the sole "evidentiary" support for a key point – without telling this Court the material is outside the record. *See, e.g.*, Brief, p 6 (citing stricken Pogue testimony that Bob named Mari on bank accounts "for his convenience").

- Similarly, the Bank quotes Kate Henry's testimony that, as to various post-2002 securities transactions her father made, "I don't believe he was competent to be doing this kind of stuff then." Brief, p 11, *quoting* TR 8/6/10, p 118. But that remark also was stricken, and the jury told to disregard it, *Id* at 118-19. Meanwhile the Bank ignores the *admitted* testimony, Henry's deposition with which she was impeached, that her father was fully capable of making dispositional decisions regarding his assets in October 2005. TR 8/6/10 Henry, pp 166-67.

- The Bank asserts Mari "cleaned out the accounts" after Bob's death, Brief, p 17, despite the trial court's repeated rebuke of that as "objectionable," "inappropriate," and "mischaracterizing," since the accounts were joint. TR 8/6/10, pp 75-76, 77-78, 184-87; 8/9/10, pp 179-82.

The Bank cites facts selectively. It notes a friend's testimony that Bob "was not able to manage his own financial affairs," Brief, p 11, but ignores the testimony of his daughter – who "talked to him almost daily and saw him weekly," *Id* – and of his post-2002 financial adviser that he was fully aware and knowingly moved millions around, right up to his final dispositional decision in October 2005. TR 8/6/10 Henry, pp 166-67; TR 8/12/10 Riga, pp 79-84.

Other examples abound, too numerous to catalog. The Bank's tendentious statement of facts is undercut, countered, and in places flatly debunked by evidence it simply ignores, contrary to MCR 7.212(C)(6). This Court should disregard it in full.[4]

[4] The Bank's brief also improperly expands the record by attaching a complaint Mari's estate filed in 2012 in another action, in plain violation of MCR 7.210(A).

II. A lengthy relationship begins.

Robert Byrne and Mari Bills met and began dating in 1972. Bob, then 52, was the wealthy, self-made owner of a Detroit beer distributorship; Mari, 36, was executive secretary to the President of Vernor's. TR 8/12/10 C. Becker, p 244, 247; DX 65. Countering the Bank's theme that she was "just an office manager" to Bob, Mari introduced voluminous evidence of their 33-year personal relationship, in which he was "Grandpa Bob" to her extended family. DX 65-72; TR 8/12/10 J. Becker, pp 108-20. They had a "very close relationship" and even Kate Henry had no doubt her father "cared deeply" for Mari; he frequently said he "owed his life" to her. TR 8/6/12 Henry, pp 97, 169; 8/12/10 C. Becker, p 256.

Not long after they met, Bob moved from the Detroit Athletic Club to the apartment complex where Mari and her daughter Cheryl, 13, lived. TR 8/12/10 C. Becker, pp 243-45. He prevailed on Mari to leave Vernor's to work with him at his company, United Beverage, where she worked until the mid 1970's. She then purchased a Big Boy franchise which became "incredibly successful" and bought a second, at the Top of Troy building, which she successfully operated until selling both in 1983. *Id* at 247-48.

The couple's strong personal relationship endured throughout the time Mari first worked for Bob, and long after. Bob threw a surprise 50th birthday party for Mari in 1986 that was well attended by friends and family, including his daughter, Kate Henry. *Id* at 248-49. Throughout their lives together Bob and Mari were "kindred spirits, lovers, friends, companions." *Id,* p 253. Certainly they maintained a business relationship, but Mari was not simply an office manager:

> Bob and Mari, even though they had some ups and downs as a couple, they had -- they were together for thirty three years. Now I -- I can only attest from 1980 on, but they were always together. And they were a couple, you know. I mean a little different couple, but they loved each other. [TR 8/12/10 J. Becker, p 112].

John Becker met Bob in 1980. When John married Mari's daughter, Cheryl, Bob walked her down the aisle; he and Mari were "the parents of the bride essentially." TR 8/12/10 J. Becker, pp 111-12; C. Becker, pp 245-46; DX 66,67. Bob attended the Becker childrens' christenings and "all of their events. They called him Grandpa Bob for their entire lives," TR 8/12/10 J. Becker, p 111, while he referred to them to others as their "grandchildren." TR 8/10/10 Mazer, p 211. Bob routinely divided major holidays, spending half the day with Mari and the Beckers, then driving to East Lansing to spend the other half with his daughter's family. TR 8/12/10 C. Becker, pp 250-51. He had had a rocky relationship with his own daughter, telling her after she "screwed up" her first year of college that she could "go back when you can pay for it yourself," TR 8/6/10 Henry, p 11, though in 2001 they repaired the relationship.

The Beckers lived out of Michigan then returned; they saw Mari and Bob several times a week since they all lived in the same subdivision. John Becker and Bob became very close friends and the couples double-dated each week and often traveled together, taking cruises to celebrate holidays or family birthdays. TR 8/12/10 J. Becker, pp 108-10. Bob and Mari also traveled frequently alone, and he always paid. *Id*, p 120. He was very generous and frequently lavished gifts upon Mari, the Beckers, his biological family and others in his life; he surprised the Beckers' daughter on her 16th birthday with a new car. *Id* at 125-26; TR 8/10/10 Mazer, p 192. Beginning in 1980, Bob would buy Mari a new car every 2-3 years. TR 8/12/10 J. Becker, 124. In fact two of the checks the Bank sought to recover, for $23,135 and $5,966, were to Rinke Cadillac for Mari's car. *Id* at 125; PX 59, 60, 68. Bob also bought luxury cars for Kate Henry and Barbara Mazer; the Bank did not pursue either for those funds. *Id* at 126; TR 8/6/10 Henry p 135-37; TR 8/10/10 Mazer p 191.

Over the years Bob dated other women and was generous to them, as well. TR 8/6/10 Henry, pp 14-16; TR 8/10/10 Mazer, pp 179-89; TR 8/12/10 C. Becker, pp 255-56. But it was always Mari in whom he found emotional solace and security: a year before he died, he described their relationship in a Christmas card that included a $100,000 check as a gift:

> We both agree that ours is a strange love...I am a difficult and wild bird who likes staying out of the coop...I love you, cherish the years together and who knows what the future will bring...All my love. [DX 71].

As Mari's daughter related, "[s]he loved him the whole package from the moment she met him till he died in her arms." TR 8/12/10 C. Becker, p 256.

III. Ms. Bills and Mr. Byrne invest together.

Both Bob and Mari were business-savvy. After cashing out of his beer distributorship Bob enjoyed a life of plane-flying and other such pursuits; he also was a real-estate investor and venture capitalist. TR 8/12/10 J. Becker, pp 127-33; TR 8/5/10 Pogue, p 214. Mari largely managed the day-to-day functions of his properties out of a Birmingham office they shared 20+ years, while he enjoyed his avocations and vetted potential investment deals. She was "a friend, a lover, a business associate, a care giver for a period of time." *Id*, p 115. Bob had a keen sense for the deal; he leased a Lansing-area warehouse to his daughter and her husband for their beer distributorship on terms so stringent, Kate called them "ridiculous." TR 8/6/10 Henry, pp 16.

Bob and Mari invested in real estate and business opportunities; one was the Aston Travel Agency, principally owned by Mari's sister, Karen Brown. TR 8/10/10 Gormely, pp 23-24. The Bank argued that Mari concealed her interest in Aston and induced Bob to make a loan. PXs 31, 44, 51; TR 8/10/10 Gormely, pp 22-23. But no witnesses set forth the circumstances under which the loan was made nor were any loan documents offered, and the proofs showed not only that Bob knew of Mari's interest, but told others about it and offered the women financial advice prior to making the loan. TR 8/12/10 J. Becker, pp 137-42; TR 8/10/10 Mazer, p 193.

A $243,755 check Mari wrote from one of the joint accounts in October 2002 to purchase a condo at 1394 Ashford in Troy also was at issue. PX 36, 68. The Bank argued that Mari fraudulently concealed her purchase, misleading Bob into thinking he owned the condo, and offering a financial statement listing it as his, as the artifice of that deception. PX 25. However as with the travel agency, the Bank's own witnesses demonstrated that Mari was open about her purchase. Leonard Prekel, Bob's estate-planning lawyer, testified that Mari told him she was purchasing a condo in Midtown Square Development in her name and did not conceal her ownership. TR 8/9/10 Prekel, pp 130-31; DX 59. He also testified that he was involved in all of Bob's real-estate transactions and had no involvement with the purchase of 1394 Ashford, and that Bob never told him he thought he owned the condo. *Id* at 126-28, 132. Although the Troy condo appeared on a Byrne financial statement, the Comerica representative to whom it was submitted had no independent knowledge of it and was not privy to any discussions between Bob and Mari about it. TRQ 8/12/10 Quattro, pp 29-30.[5]

IV. Bob provides for his loved ones via estate planning.

A. His active estate management

Bob was very involved in his estate planning, and as he grew older became concerned that his wealth be distributed in a particular manner at his death. TR 8/9/10 Prekel, pp 63, 68-73. He hired Prekel in 1999 to review planning for what at that point was an approximately $20 million estate. Bob had unfettered access to Prekel and met with him up to 15 times a year – often just popping in – and corresponded regularly via telephone and memo. *Id*, pp 63-64. Bob

[5] Ms. Quattro's 8/12/10 testimony was transcribed separately, and will be designated "TRQ."

was decisive in his estate planning, and was particularly intent on preventing Kate or anyone else from trying to upset it after his death. *Id*, pp 68-73; TR 8/5/06 Pogue, pp 261-66.

In the 1980s and 1990s, "[i]t was pretty much common knowledge" that upon Bob's death Mari would get the bulk of his estate. TR 8/5/10 Pogue, p 216. Contrary to the Bank's depiction of her as "just an office manager," the evidence was uncontroverted that Bob loved Mari and wanted to take care of her; he often stated that "he owed his life to Mari." TR 8/9/10 Prekel, p 139; TR 8/12/10 C. Becker, p 244; J. Becker, pp 181, 209-10. He bought a house on Lake Angelus in 1997; it was always intended for her and in 1997-98 she moved in, and it became her primary residence. TR 8/9/10 Prekel, pp 102-03; TR 8/12/10 J. Becker, pp 104-05.

A March 1999 memo from Prekel to Bob, DX 40, outlined the significant provisions of his then-operative estate plan. Drafted in 1996, it named Mari successor trustee and gave her the Lake Angelus house and 45 percent of the residuary; Kate was to receive the warehouse and 1/3 of the residuary, and the Beckers, the remaining 22 percent. In consultation with Prekel, Bob amended his Trust and revised his Will on June 25, 1999 to give Mari and Kate each 40 percent of the Trust residuary and the Beckers, 20 percent. PX 72. Bob wanted Kate to serve as co-successor trustee with Mari, so both were named as agent under durable powers of attorney, and he named Mari sole beneficiary of his $1.46-million pension plan. *Id*.

Bob made minor changes from 1999-2001, but autumn 2001 marked a pronounced shift in his estate plan, coinciding with a head injury suffered in a fall in his garage. TR 8/6/10 Henry, pp 28, 31. Not long after the fall he reconciled with his daughter and named her his patient advocate; on November 23, 2001 he executed a general durable power of attorney revoking all prior ones and naming Kate his agent. PX 18; DXs 4, 46; TR 8/6/10 Henry pp 121-23. Ten days later, Kate was substituted for Mari both as sole beneficiary of Bob's $1.4-million pension and as residual Trust beneficiary. PX 20; DX 5; TR 8/6/10 Henry, pp 27-28. In sharp contrast to this action, Gormely and Prekel never told Kate there was a problem with her being so designated while a fiduciary to her father under a power of attorney, nor did they try to retrieve those funds or demand she give an accounting. *Id*, pp 125-28.

In April 2002, Mari grew concerned one day when Bob didn't show up at their office; she went to his house and found him unconscious on the floor. She had him rushed to the hospital where he underwent emergency surgery for an aneurysm. TR 8/6/10 Henry, pp 31-33. After leaving the hospital, Bob spent a month in a rehabilitation facility then went to Mari's Lake Angelus home to convalesce. *Id*, pp 60-61. That autumn he underwent neuropsychological testing; the report indicated "significant residual deficits in higher brain functions" likely due to repeated falls; it was not consistent with Alzheimer's. PX 7, p 6. Doctors diagnosed him with "dementia due to effects of chronic traumatic brain injuries," and recommended that a guardian or conservator be "consider[ed]." *Id*.[6] Kate never acted on that recommendation because her father was proud and "still with it enough," and did nothing afterward to monitor any of his transactions on his far-flung, multimillion dollar holdings. TR 8/6/10 Henry, pp 69, 110-11.

Following his 2002 diagnosis, a time at which the Bank portrays Bob as "demented," he plainly understood the nature of his assets and had specific intentions as to the titling of his accounts. TR 8/12/10 Riga, p 79. He moved millions of dollars around various accounts in the three years after his 2002 diagnosis; his attorney said he was "fine," and "like a cat with nine lives." TR 8/9/10 Prekel, pp 156-57; TR 8/10/10 Gormely, p 100.

[6] The Bank subtly but significantly misquotes the report, leaving a misimpression on the key point of whether Bob in fact was so debilitated as to *require* a guardian. *Compare* Brief, p 10, lines 4-6, with PX 7, p 6, Recommendation 3.

Bob took specific steps to ensure Mari's care after he was gone. TR 8/12/10 J. Becker, pp 181, 209-10. He wanted Mari to receive the Lake Angelus house after his death the same way Kate was to receive the Aurelius warehouse, i.e. free from estate taxes and encumbrances, and rewrote his Trust in December 2004 to accomplish that. TR 8/9/10 Prekel, p 103. Ms. Henry was not pleased since, as residuary beneficiary, carrying out her father's wish would cost her "like eight hundred grand." TR 8/6/10 Henry, pp 28-29, 92-96; PX 22. Bob amended his Trust again on June 29, 2005 and again on October 18, 2005, the same day he executed his Last Will. PXs 21, 23. At no time did anyone challenge his competency to do so. Prekel confirmed that all changes were made at Bob's direction, that he had appropriate capacity to do so, and he acted free of duress or undue influence. TR 8/9/10 Prekel, pp 104-05; 154-57.

Article Sixth of the Will, PX 67, states that "[t]he provisions I have previously made...by beneficiary designation for Marlene Mari Bills from time to time were made by me on a voluntary basis...." *Id*, p 10. Article Ninth expressly prohibits anyone from any action that directly or indirectly "attacks or seeks to invalidate...any gift I have made or will make during my lifetime, whether before or after the date of this Last Will and Testament...." *Id*, p 13.

B. The joint accounts

In addition to gifting Mari the lake home, Bob ensured her financial security by making her a joint owner on a series of bank and securities accounts, thus giving her access to the funds during his life and ownership of them after his death. TRQ 8/12/10 Quattro, p 12; TR 8/12/10 J. Becker, pp 181, 209-10; DXs 8-13; PXs 92-94, 96. Based on their decades of friendship and business relations, John Becker testified without refutation that Bob "had an extensive knowledge" of how various types of accounts worked, including joint accounts: he knew that "joint meant joint, that both people have an equal share," that any money he put into a joint account with Mari, she could withdraw at any time; and that any such funds would be paid to her as beneficiary or survivor upon his death – "*He absolutely knew that*." TR 8/12/06 J. Becker, pp 172-76 (emphasis added). The four joint, personal accounts are central to this litigation, and their account agreements were admitted into evidence:

- Comerica account 74557 (PX 92) was opened on 10/18/04, and registered in the names of "Robert F Byrne or Marlene R Bills." Its signature card indicates Bob and Mari each as authorized signers, with Mari as a "beneficiary." *Id*, p 1. The agreement on the back provided, "4. The Authorized Signatures on the reverse side are those of the Authorized Signers and any one (1) of the Authorized Signers may transfer or withdraw funds in the Account by any method we may allow." *Id*, p 2. It was a personal, not business, account, and either Bob or Mari could withdraw any and all funds. TRQ 8/12/10 Quattro, pp 9, 12.

- Comerica account 73914 (PX 93) was opened on 12/3/04 and registered in the same manner as 74557. It too was a joint, personal account, with Mari again listed as beneficiary. TRQ 12/10/10 Quattro, p 13; PX 93. Both Bob and Mari acknowledged that either "may transfer or withdraw funds in the Account by any method [Comerica] may allow." *Id*, p 2.

- Comerica account 48632 was opened by "Byrne, Robert F. or Kathleen" in July 1979 with Manufacturers National Bank as a "Joint, with survivorship" account. PX 94, p 4. Mari was added as an additional joint accountholder in May 1987. *Id*, pp 1-3; TRQ 8/12/10 Quattro, p 20.

Bob knew Mari's 2005 diagnosis with dementia and Alzheimer's would require long-term, very expensive care and "[h]e wanted to be able to take care of her," so in September 2005, an $850,000 Comerica Securities account, 71720, was opened between Bob and Mari, as joint owners with survivorship rights. PX 96; TR 8/12/10 J. Becker, pp 181, 209-10.[7] Though he earlier had been mistaken about the source of the funds, John Becker at trial testified that the account was funded from another joint account with survivorship rights Bob and Mari held, with just under $1 million in it. TR 8/12/10, pp 178-80. The application identified "Robert Byrne and

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[7] In contrast to the Bank, which had no admissible evidence regarding Bob's intent as to any of the disputed accounts, the contemporaneous comments Mr. Becker testified to were admissible under *In re Cullmann Estate*, 169 Mich App 778; 426 NW2d 811 (1988) and MRE 803(3).

Marlene Bills" on the Account Registration, and specifically was identified as "Joint - Tenants with Rights of Survivorship." PX 96, p 1. It listed Bob as Primary Account Holder and Mari as Joint Account Holder. *Id.* Bob was well aware of the concepts of individual vs. joint accounts with a beneficiary designation, and that the latter was a way to pass on account proceeds "by operation of law" at death, outside of his will. TR 8/9/10 Prekel, pp 87-90, 96-99, DX 57.

Julie Quattro was Bob's private Comerica banker since 1989. She knew Mari as both his office manager and girlfriend, because Bob referred to her that way and was affectionate toward her. TRQ 8/12/10, pp 5, 8. Quattro met and spoke regularly with Bob and interacted with Mari to obtain periodic financial statements, typically signed by him. *Id*, p 25. Bob's joint accounts with Mari were personal, "not a business account." *Id* at 9-10; PX 92, 93. Quattro confirmed that per the account agreements, in Comerica's view neither "would have any limitation on their ability to draw any funds from [account 74557]." *Id* at 12. On both nos. 74557 and 73914, Mari was not only a joint owner but also a beneficiary, which to Comerica meant that at Bob's death, she was entitled to the funds in each, despite the lack of "survivorship" language. *Id* at 12-14. Bob never told Quattro the joint personal accounts were for business convenience: nobody ever gave her any documentation indicating that, nor did Bob ever limit Mari's access in any way, or instruct Quattro that, upon his death, Mari would not own the funds in them. *Id* at 5, 14-17.

Prekel had advised Bob of the nature and importance of properly titling accounts and beneficiary designations, and Bob to the end showed that he understood by titling properties and accounts in his Trust's name, i.e. his 2003 UBS accounts. *Id* at 97; TR 8/12/10 Riga, pp 73-82; DX 15. But he titled the $850,000 Comerica brokerage account jointly in his own name and Mari's, with rights of survivorship. PX 96; TR 8/9/10 Prekel, pp 97-100; DX 32. Prekel conceded Mari had a contractual right to the $850,000 Comerica account that, but for the Bank's asserted claim, under the law should be paid to her. TR 8/9/10 Prekel, p 102.

Prior to filing this case in 2006, Prekel knew Bob had four joint Comerica accounts, and said so in a court pleading. TR 8/9/10 Prekel, p 91; 8/6/10, pp 320-22. At trial, he testified that an account had to read joint "with rights of survivorship" for the co-owner to be entitled to its funds. *Id.* But at deposition, he answered quite differently regarding the consequence of the joint accounts relative to Bob's overall estate plan:

> ...they would pass free of estate taxes because there's a direction that all taxes be paid out of the trust residue, and beyond that I'm not sure. *And of course, whoever is the other, the surviving joint owner who gets the account, there's a presumption that the surviving joint owner is entitled to the proceeds from that account*. [TR 8/9/10 Prekel, pp 91-92 (quoting deposition) (emphasis added)].

Prekel at his deposition also noted that an account need not be titled "joint tenants with right of survivorship" to have that effect, "[a]ll it needs is joint tenants." *Id*, p 93 (quoting deposition). At trial he called that earlier testimony, "inaccurate at the time, yes." *Id* at 93-94.

Bob via his wills provided for other female friends, adjusting what they would receive as relationships waxed and waned. TR 8/6/10 Prekel pp 288-89; TR 8/5/10 Pogue, pp 211-12. But other than his daughter, the only woman he ever named on a joint account was Mari.

C. Bob's mental faculties

The Bank provides argument but no medical evidence regarding Bob's post-2002 condition; instead it offers Kate's testimony about occasional driving confusion. But when Bob in 2002 bought a vacation condo, Prekel had no concern about his mental awareness or capacity. TR 8/9/10, pp 122-23. Similarly, investment adviser Steve Riga frequently met and interacted with Bob starting in late 2003 when he moved $2 million to new UBS accounts, and had no concerns of impairment, dementia, or diminished capacity. Bob understood the nature of his assets and had specific intentions as to the titling of his UBS accounts, and "seemed fully capable of handling his affairs." TR 8/12/10 Riga, pp 79, 82-84, 95-97. Through the final months of his life, Bob transferred hundreds of thousands of dollars between accounts without the aid of an attorney, guardian or conservator. *Id*, pp 89-90; TR 8/12/10 J. Becker, p 240. Prekel conceded that as of October 18, 2005, when Bob executed his final Will less than two months before his death, "there wasn't any question in my mind he was -- he had the capacity to make a will." TR 8/9/10, p 41. Bob never was adjudged incompetent nor was a conservator appointed or even sought, and contrary to the Bank's suggestion of a virtual captive on the shores of Lake Angelus, he regularly stayed on his own at his Bloomfield Hills condo. TR 8/6/10 Henry, pp 108, 181-82.

The Bank introduced no competent evidence that Mari exercised undue influence – or indeed, *any* influence – over Bob in opening securities or bank accounts. TR 8/9/10 Prekel, pp 219-38; TR 8/10/10 Gormely, pp 33-36. It admits it is seeking funds back only from Mari; as to similar transfers to Kate Henry or Barbara Mazer at the same time, it maintains Bob had no competency problems nor was he unduly influenced. TR 8/6/10 Henry, pp 91-92. Bob's dispositional decisions in the last decade of his life gave Kate and her sons $5 million more than they would have had – but she seeks more. *Id* at 95-96, 170-78; TR 8/9/10 Prekel, p 238.

V. Mr. Byrne passes away, and the team springs into action.

Bob in late 2005 was diagnosed with terminal esophogeal cancer. On December 13 he was discharged from the hospital and taken by ambulance to Lake Angelus; the Beckers and Mari expected he had 3-6 months left, and outfitted the house to make him as comfortable as possible. TR 8/12/10 J. Becker, pp 214-16. But the next morning, Wednesday, December 14, he died. *Id*, C. Becker, p. 256; TR 8/6/10 Henry, pp 74-75; PX 34.

Bob had made clear that all his beneficiary designations to Mari were voluntary and he did not want anyone fighting in court over his bequests. PX 67, pp 10-13. Despite that, within hours of his death his daughter, his estate lawyer, and Thomas Gormely, head of the Bank's settlement group, who had never even met Bob, sprang into action. They met at Prekel's office that night, excluding Mari because they "did not consider it relevant." TR 8/9/10 Gormely, p 242-45; TR 8/6/10 Henry, pp 140-44. Gormely's follow-up email to his Bank colleagues reveals Northern Trust immediately assuming the lead position in the effort to pry assets from Mari:

> Hi Andy -
>
> We were advised late Wednesday by a local attorney that we are named as Successor Trustee for one of his clients that died that morning. We had no prior relationship with the decedent. I met with the attorney (Leonard Prekel, a solid T&E practitioner/ACTEC, etc.,) and the decedent's daughter Wednesday evening and picked up the documents and an outline of the assets....
>
> *　　*　　*
>
> The reason for this email is that we are proceeding today to have Northern appointed as a Special Personal Representative of his estate for the purpose of securing assets pending administration. Here's why - the deceased had a former girl friend (somehow that doesn't sound right for an elderly person) who was his office/business manager and literally did everything for him. Collected income, paid bills, wrote all the checks, etc. She thinks that she is the prime beneficiary and the executor/trustee and she isn't. The attorney and the decedent's daughter have strongly recommended that we immediately take steps to keep this business manager away from the "cookie jar" and that will be likely happening today....[DX 2].

Within a day of Bob's death, the Henry-Prekel-Gormely triumvirate had locked Mari out of the Birmingham office the two shared for decades, which Mari learned when she stopped by to pick something up en route to the funeral home. Northern Trust also informed Mari via letter that "her services were no longer going to be needed," and that she should make arrangements to pick up her things. TR 8/9/10 Gormely, pp 241-47; 8/12/10 J. Becker, pp 217-22. Already reeling from brain-tumor surgery two months earlier and from Bob's death, Mari was left shocked, confused, and worried. In direct response to the Bank's actions, she went with her son-in-law to Comerica on December 20 and, at its advice, withdrew all funds from joint accounts 74557 and 73914 and closed them. TR 8/12/10 J. Becker, pp 221-23; PX 65, 66, 68. As she was an owner of the account, she did not need to act via power of attorney.

Kate Henry not only was residual beneficiary but became a significant and demanding Northern Trust customer, with a six-figure personal investment portfolio. Gormely admitted the Bank has an interest in both keeping her happy and maximizing her recovery from Mari, so she will have more money to invest with it, and that it favored her over Mari despite owing each fiduciary duties as a beneficiary. TR 8/10/10, pp 40-42, 59-64; DX 3.[8] Significantly, the court in its post-trial bench opinion found Gormely's views had been "tainted by the false description of the circumstances surrounding this case given to him from the outset by Kathleen Henry and Leonard Prekel." TR 8/13/10, p 160; 8/12/10, p 319).[9]

VI. Ms. Bills' health spirals downward, and the Bank turns up the heat.

Gormely, Prekel, and Henry launched an investigation to identify any transfer or gift Bob made to Mari in the four years preceding his death, hiring forensic accountant Michael Puckett to review Bob's financial records. TR 8/9/10 Gormely, pp 243-49, 275-77. Though Mari's counsel advised Prekel in person in December 2005 that he was representing her, Prekel in 2006 sent Puckett to interview her without her counsel present. TR 8/10/10 Gormely, p 51. Likely to

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[8] Such favoritism appears to be standard procedure at Northern Trust, where "our business model is to service and pursue successful individuals, families and institutions." *See*, 12/22/08 First General Counsel's Report in Federal Election Commission MUR 6035, *available at http://eqs.sdrdc.com/eqsdocsMUR/10044272854.pdf* (accessed 7/30/12), p 2 (citation omitted) (cut-rate jumbo mortgage to then-Sen. Barack Obama, with whom Northern Trust had no prior relationship, was not illegal $108,000 campaign contribution but rather made in ordinary course of Bank wooing new clients; Sen. and Mrs. Obama later invested $3 million with it).

[9] It also called Kate's testimony "surprisingly inconsistent with credible and persuasive evidence offered by" Mari, and "completely contradictory to other credible evidence in the case...." *Id.*

avoid highlighting that outrage, Puckett did not testify at trial – instead Gormely testified, without the aid of a data compilation, spreadsheet or the like, as to thousands of documents he personally reviewed. TR 8/9/10 Gormely, pp 254-55. The Bank "spent an enormous amount of time" trying to come up with $6 million cash to pay estate taxes within nine months, and part of the solution it devised was to pursue the transactions involving Mari. *Id* at 279. Northern Trust's actions left her badly shaken. TR 8/12/10 J. Becker, p 217.

In addition to firing Mari and locking her out, Northern Trust abruptly ended her medical coverage only two months after her brain-tumor surgery; she had no COBRA rights. TR 8/12/10 J. Becker, pp 218-20. Throughout 2006 her condition worsened, and on August 17 the Bank's lawyers sent her a six-page letter demanding she account for every single transaction with Bob, personal or business, going back decades – even if Bob in 1973 had taken her to dinner, or bought her a dress on a Bahamian port call – and threatening litigation should she not. TR 8/10/10 Gormely, p 44-47, 284-85; PX 14. Predictably, Mari could not account for every financial transaction between herself and her "kindred spirit, lover, friend, companion" of 33 years, and the Bank sued on October 31, 2006. *Id* at 47-48; TR 8/12/10 C. Becker, p 253. Northern Trust's complaint alleged a variety of wrongs, and sought "return" of $1.58 million, treble damages and attorney fees, forfeiture of the Lake Angelus house, and an accounting. When Mari read the complaint, she was "devastated." *Id*, p 252. (At trial, the court would note the unusual manner in which the Bank pursued its accounting claim. TR 8/12/10, pp 159-60).

Mari was hospitalized a second time in 2006 after falling at home; the Beckers had to break in to reach her and she spent three weeks in a hospital geriatric ward. TR 8/12/10 J. Becker, 105. Mr. Becker, her son-in-law, was appointed her conservator in October and guardian in December, and when she was discharged on December 4, the Beckers moved her to a secured Alzheimer's/dementia unit at Harbor Chase – due not only to her rapidly deteriorating mental condition but also the Bank's threats to take the house Bob bought for her. *Id* at 103-06.

The Bank deposed Mari at Harbor Chase in 2007, over her neuropsychologist's advice that various cognitive impairments "severely compromised" her ability to testify accurately:

> While [she] is able to give opinions about various matters, she is not able to reliably generate opinions based upon well considered, rational thought processes [and] is likely to confabulate or fill in the gaps of her memory loss by statement things that are untrue, thinking that they actually happened that way. DX 73.

Mari's deposition was taken, but only after the parties agreed that it would not be used without consideration of the doctor's note along with it.[10]

A. Cross-motions for summary disposition

The Bank sought summary disposition, arguing that Mari's status as a fiduciary under various powers of attorney meant she had engaged in self-dealing contrary to MCL 700.1214, and that she was disinherited under the Trust by virtue of having defended this action. 8/8/07 MSD. Mari opposed that motion, noting that the accounts were joint and that because of that, she never conducted any transactions under a power of attorney. TR 4/27/09, p 14. The court denied both motions as to disinheritance and deferred the other issues. 5/1/09 Order.

The court in July 2009 issued its first ruling on the Bank's fiduciary/self-dealing argument, finding that Mari, by virtue of being named in various powers of attorney, was bound as a fiduciary to MCL 700.1214's prohibition against self-dealing, which she violated by writing checks to herself from various joint accounts. 7/21/09 O&O, pp 4-8. It granted the Bank summary disposition. *Id* at 10-11. Mari sought reconsideration, noting that one must be both named and acting under a power of attorney to have violated MCL 700.1214; that MCL

[10] The Bank denies agreeing, Brief, p 14 n5, but Dr. Drasnin's note was specifically included as a deposition exhibit. DX 73; *see also* TR 8/9/10 Prekel, pp 59-61; TR 8/6/10, pp 295-302.

700.1104(b) was not implicated because Bob at no time was adjudged incapacitated; and that, under MCL 700.1104(k), the "governing instrument" was not any power of attorney (since none of the joint accounts were opened pursuant to any) but rather the account documents. 8/10/09 motion. The court held a hearing, TR 10/1/09, and reversed its grant of summary disposition. The Bank sought reconsideration, but was denied. 4/21/10 order.

B. Trial and post-trial

The matter was tried to a jury and the bench over six days in August 2010. Mari was legally incapacitated and unable to participate or even attend. The Bank abandoned several of its claims and amended its complaint. At the close of the Bank's case Mari moved for directed verdict, which the court deferred. TR 8/10/10, p 170-78; TR 8/12/10, pp 8-30.

The jury found for Mari as to undue influence, conversion and unjust enrichment, and for the Bank on breach of fiduciary duty with regard to taking funds; it awarded $625,838. It found fraudulent concealment as to the Troy condo. TR 8/13/10, p 148. Ruling from the bench on the Accounting claim, *Id* at 153, the court found Mari not liable for the Troy condo, the June 2003 Aston Travel loan write-down, or withdrawal of the $850,000, in the latter case based on the indicia of joint ownership. The court found "no basis whatsoever" for undue influence, and that the Bank failed to show any meaningful impairment of Bob's faculties. It held Mari liable for the four post-death transactions totaling $181,337, ruling she was authorized to withdraw from accounts 74557 and 73914 during Bob's life, but not after. *Id* at 170-72. Mari briefed the directed verdict motion and moved for JNOV/new trial. 10/6/10 and 10/11/10 motions. The Bank sought JNOV only as to disinheritance claim, and did not seek a new trial.

On November 25, 2011, the court ruled. It granted Mari a directed verdict on all claims except undue influence, on which issue the jury found for Mari. 11/25/11 Opinion and Order

(O&O), pp 18-40. It directed a verdict on fiduciary-duty breach as to the Aston Travel loan and the Troy condo, since the evidence was that Bob knew of and consented to the transactions, and thus there was no evidence from which a reasonable juror could find breach of a fiduciary duty. *Id*, pp 18-20. As to the $243,755 check written the date of the condo's purchase, the court found that the Bank presented no evidence to rebut MCL 487.703's presumption of joint ownership in account 48632, nor any admissible evidence establishing it as a mere "convenience account" not intended to vest joint ownership in Mari. *Id* at 20-22. It applied the same analysis to other checks from Comerica 48632, the account that replaced it, 74557, and 73914, both of which it found to be joint accounts. *Id* at 23-26. Since the Bank presented no evidence from which a jury could conclude Mari had breached any fiduciary duty, the court directed a verdict for her on all PX 68 transactions, dismissing the fiduciary duty claim. *Id* at 27-32.

The court also directed a verdict for Mari for all PX 68 items as to conversion, wrongful taking of funds, and unjust enrichment. *Id* at 32-36. Because the Bank produced no evidence of fraudulent concealment, the limitation period was not tolled. *Id* at 35-38. The court thus entered judgment for Mari on all the jury claims. *Id* at 40. It then revisited its ruling on the four post-death withdrawals and, since the two accounts provided survivorship rights, vacated its 8/13/10 verdict and entered judgment for Mari, since she had fully accounted. *Id* at 41-42.

VII. Postscript

On November 27, 2011, two days after the court exonerated Mari in the litigation whose filing five years earlier had "crushed" and "devastated" her, she died in the dementia unit at Harbor Chase. Northern Trust promptly moved to substitute her estate and stay proceedings.

STANDARD OF REVIEW

Rulings on a motion for directed verdict and JNOV are reviewed de novo. *Hord v Environmental Research Inst of Mich (Aft Rem)*, 463 Mich 399, 410; 617 NW2d 543 (2000).

Other applicable standards are discussed below, as appropriate.

ARGUMENT

I. The Bank has waived any recovery beyond $807,375 plus interest.

In addition to Mari's house, the Bank seeks the full $1.58 million on PX 68. Brief, p 50. But it waived its right to seek anything above the combined trial award of $807,375 plus interest.

Where a party fails to seek JNOV on an issue, it is not properly preserved for appellate review. *Lemberg v Korotkin-Schlesinger & Assocs, Inc*, unpublished per curiam opinion of the Court of Appeals, decided March 15, 2012 (Docket No. 301116), *citing Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). And where a party seeks JNOV because the verdict was against the great weight of the evidence, that also must be raised in the trial court via a motion for new trial. *Id* at *18, *citing Sherman-Nadiv v Farm Bureau Gen Ins Co of Mich*, 282 Mich App 75, 80; 761 NW2d 872 (2009). The 9/23/10 Judgment included the jury's $625,838 award and the court's $181,537 award, plus interest. While the Bank had sought the full $1.58 million on PX 68, it was rebuffed. Yet unlike Mari, who also fared worse at trial than she had hoped and sought JNOV/new trial based on several issues, the Bank moved only for "judgment of disinheritance" on the house. It did not claim the awards were against the great weight of the evidence, or deserving of JNOV or a new trial. 10/12/10 Motion. Only on appeal does it spring the argument that it should receive $772,278 more than it did at trial.

A party may not object on appeal where it failed to do so below, since that would permit it to harbor error as an appellate parachute. *Marshall Lasser PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). If the Bank believed itself entitled to the full $1.58 million on PX 68, it should have sought JNOV or a new trial below, rather than additur from this Court.

Indeed, the Bank has no basis for seeking *any* monetary relief. Its JNOV motion dealt only with the house, and while it attacks aspects of the directed verdict, it does not request the typical remedy, a new trial – because it waived its right to do so by not moving for one within 14 days of the November 25, 2011 grant of JNOV. MCR 2.610(D), MCR 5.001(A).

II. The Probate Court properly directed a verdict on the claims of breach of fiduciary duty and improperly taking account funds.

The Bank's first two arguments meld into one, i.e. that the court erred in throwing out the $625,838 jury award for breach of fiduciary duty and taking account funds. Brief, pp 21-41. While it characterizes the court as "vacating the jury verdict," *Id* at 21, 29, the court in fact directed a verdict for Mari, 11/25/11 O&O, pp 18-32.

A. Mari was co-owner of all joint accounts with survivorship rights, and thus all checks, withdrawals, and other transfers were proper.

The court properly found that the Bank's attempt to recover the funds on PX 68 suffered an essential failure of proof. The account documents, Michigan law, and the Bank's own expert established Mari as a joint owner of all four accounts with survivorship rights who thus enjoyed the unfettered right to their contents. *Esling v City Nat'l Bank & Trust Co*, 278 Mich 571, 577; 270 NW 791 (1936), *citing Negaunee Nat'l Bank v LeBeau*, 195 Mich 502; 161 NW 974 (1917) ("...with or without the passbook representing the same, either could have withdrawn the entire amount during the lifetime of the other").

The account documents established this. Account 48632, from which the majority of the PX 68 checks were drawn, and the Comerica Securities account, 71720, both explicitly stated, joint with full survivorship rights. PX 94, 96. Even Prekel admitted Mari properly could write checks to herself from account 48632. TR 8/9/10, pp 195-201. The proofs entitled her to the presumption of joint ownership, carrying with it the right to withdraw all funds for any purpose, which the Bank presented no evidence to rebut. O&O, pp 20-21, *citing Habersack v Rabaut*, 93 Mich App 300, 305; 287 NW2d 213 (1979); *In re Cullmann Estate*, 169 Mich App 778, 787; 426 NW2d 811 (1988); MCL 487.703; and MCL 487.713(c).

The court also correctly held accounts 74557 and 73914 joint ones in which Mari had a right to the funds; the Bank even conceded that the latter, the $850,000 securities account, unambiguously allowed her to withdraw. TR 8/12/10, pp 348-49. The court properly rejected the Bank's claims that the word "survivorship" must be used because MCL 487.703 supplants the common law completely, and is meant to protect only banks. As it noted, *Leib v Genesee Bank*, 371 Mich 89, 93; 123 NW2d 140 (1963) belies both assertions: absent the "magic words" a court is simply to look to other evidence as to whether survivorship rights were intended. O&O, p 24, *citing Leib* and *Peoples St Bank of Belleville v Alstaedt*, 301 Mich 662; 4 NW2d 48 (1942).[11] While *Leib* held that not every joint account carries survivorship rights, it did not adopt the Bank's view that absent that language, there is no survivorship – it simply directed that other evidence be looked to. 371 Mich at 94; TR 8/12/10, pp 352-53 (court).

In re Estate of White, unpublished per curiam opinion of the Court of Appeals, decided November 18, 2008 (Docket No. 279866) shows how the *Leib* analysis works. In a joint account, absence of the word "survivorship" simply gives each co-owner the right unilaterally to end the relationship – it does not automatically airbrush the other out of the picture:

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[11] At trial Prekel reversed his position from his deposition and court filings, and deemed Mari not the beneficiary of account *funds*, but of "the authority to sign." TR 8/9/10, p 174. When he persisted that even a "beneficiary" designation was not sufficient to create survivorship rights, the judge sent the jury out so he could inquire as to the basis for that view, and hinted at a contempt finding. *Id* at 218-29. For her part, Mari noted that the Bank's strained legal view was not even relevant unless it could prove the funds in the joint accounts did not come from her. *Id*.

> ..."ordinary" joint tenancy is characterized by a right of survivorship, *even if not expressly designated* with such a right -- the only effect of no express language is that the right of survivorship in an "ordinary" joint tenancy is unilaterally severable by any party thereto. *Wengel v Wengel*, 270 Mich App 86, 94-95; 714 NW2d 371 (2006). In *Leib*, there was testimony from the bank vice-president but not the depositor as to the "intent of the parties," and there was evidence that the depositor regarded a particular joint account as only his. In contrast, the disinterested evidence here is that White was advised that the legal consequences of placing money into the "new account" would be the creation of a joint account *with a right of survivorship*, even if that was not specifically written on the account, and that White deliberately put his money into that account with full knowledge. (emphasis in original).

Consistent with that, the court surveyed the Bank's evidence and found it supportive of only one conclusion: Bob intended 74557 and 73914 to have survivorship rights. O&O, pp 24-27. Unlike *Leib*, there was no evidence Bob regarded any funds as only his; the evidence was to the contrary. Each card's "registration" section listed Mari as an owner with him, and she was a "Beneficiary" in the signature section; both cards expressly provided withdrawal rights. O&O, p 25; PXs 92, 93.[12] Thus, each account was a "joint account" under MCL 487.713(b). *Id*. Nor did the evidence support that Bob intended Mari to have only check-signing rights, which she could have had by signing only in the "account signature" section – the Bank's reading renders meaningless her designation as co-owner. *Id*, pp 25-26. Nor did the Bank present evidence Bob intended to limit her right to withdraw from 74557 when it was opened to replace 48632 in 2004, *Id* at 26, or that he at any time wanted to sever survivorship rights. He knew what a joint account was, knew Mari would have co-ownership, and "absolutely" knew she would get the funds at his death. TR 8/12/10 J. Becker, pp 172-76; *see also* TR 8/9/10 Prekel, pp 87-90.

"Michigan law is clear that upon the death of a person holding a bank account jointly with rights of survivorship, the account balance passes by operation of law to the surviving joint

[12] The cards' beneficiary designation is crucial given Bob's statement, six weeks before he died, that he made all such designations for Mari voluntarily. PX 67, p 10; TR 8/9/10 Prekel, p 160.

tenant." *In re Tobias Estates,* unpublished per curiam opinion of the Court of Appeals, decided May 10, 2012 (Docket No. 304852), *citing* MCL 487.703 and *Jacques v Jacques*, 352 Mich 127, 135; 89 NW2d 451 (1958). "Thus, when a deposit is made in the name of the depositor or any other person 'in form to be paid to either or the survivor of them,' it is prima facie evidence that the depositor intended to vest title to the deposit in the survivor. Rebutting this presumption requires reasonably clear and persuasive proof that the depositor intended otherwise." *Id, citing* MCL 487.703 and *Jacques*, 352 Mich at 136-137. Bob could have renounced joint ownership and withdrawn the money to divest Mari of survivorship rights, *In re Pitre*, 202 Mich App 241, 242-243; 508 NW2d 140 (1993), but he never did either of those things.

The court also correctly rejected as unsupported by evidence, the Bank's portrayal of the accounts as merely for business "convenience." The registration for 74557 listed "Robert F. Byrne or Marlene Bills" as joint owners; Mari signed the front as "Beneficiary" while Bob signed the reverse as "Primary Owner." O&O, p 23. It expressly made the account subject to Comerica's Deposit Account Contract, and the Bank presented no evidence that contract provides for rights other than those usually enjoyed by joint owners. *Id.* Prekel admitted that as lawyer for Bob's estate, he had not located a single document in which Bob expressed an intent to limit Mari's rights as joint owner, or indicated the accounts were made joint for convenience or business purposes only. He admitted Bob could have given Mari check writing authority without making her a joint owner. TR 8/9/10, pp 205-08. And he acknowledged it "could be" that Bob wanted her to become beneficiary of 74557 upon his death. *Id*, pp 212-13. Likewise, Gormely has "no idea" what Bob's intent was in opening the Comerica Securities account, that it could have been to fund Mari's medical care. TR 8/10/10, pp 115, 140-41. And even Prekel, in his petition in the probate of the estate, called the four accounts "joint." TR 8/9/10 Prekel, pp 90-91;

Id at 182 (court); TR 8/10/10 Gormely, p 85. Given all that, plus Bob's familiarity with financial accounts and their use of the term "beneficiary," which he knew from his own estate planning, a reasonable jury could reach but one conclusion: Bob intended to create a joint account with survivorship rights. O&O, pp 30-32. Indeed, as the court noted, that eclipses the question of whether any account was a "convenience" account. TR 8/9/10, pp 295-97 (under *Jacques*, "the fact that it's a convenience account while the person is alive, that's just one aspect of the nature of the account. It doesn't change whether the account...could also be a survivorship account").[13]

To defeat Mari's right to joint ownership, the Bank had to show she obtained that status via fraud or undue influence. MCL 487.703; *Cullmann*, 169 Mich App at 782-783. It had to do so with admissible evidence, and the court correctly (and repeatedly) ruled that such statements had to be contemporaneous with the opening of the accounts – supposed statements of Bob relating his intent, *after* account creation, were inadmissible as hearsay, not within MRE 803(3). TR 8/6/10, pp 310-315; *Pence v Wessels*, 320 Mich 195, 202; 30 NW2d 834 (1948) (statements not made in the presence of the joint owner, regarding intent in creating joint account, are inadmissible if made either after account creation or at an unascertained time); *accord In re Skulina Estate*, 168 Mich App 704, 710; 425 NW2d 135 (1988), *citing Mitts v Williams*, 319 Mich 417, 424-425; 29 NW2d 841 (1947) and *Serkaian v Ozar*, 49 Mich App 20; 211 NW2d 237 (1973); *see also In re Estate of Johnson*, unpublished per curiam opinion of the Court of Appeals, decided July 19, 2012 (Docket No. 304420) (decedent's statements as to what he

[13] The Bank's claim that the court "noted [Prekel's] testimony that the accounts were convenience accounts," Brief, p 6, citing O&O, pp 15, 21, is misleading in the extreme. Mari at trial was given a continuing objection as to any testimony from Prekel about Bob's statements *after* the time he opened the accounts, since *Cullman* and MRE 803(3) plainly bar them. TR 8/6/10, p 238. The court properly disregarded Prekel's testimony, O&O p 22 & n 25, and there is no admissible evidence of business "convenience" accounts. Per Quattro, they were personal.

intended with earlier beneficiary designation explained a past sequence of events and thus was a "statement of memory or belief" excluded under MRE 803(3). The court correctly recognized this, both in repeatedly excluding evidence, O&O, p 22, and in ultimately directing a verdict for Mari. *Id* at 28-29, 31 ("There is no evidence to support a claim that Bills somehow pressured Byrne into opening and funding these accounts"). The Bank's theory as to undue influence, as with its claim of "convenience" accounts, is based exclusively on testimony (Prekel and Pogue) the court properly deemed inadmissible, in rulings the Bank does not challenge on appeal. Indeed, it is remarkable that for all the time and effort the court devoted to considering *Cullmann* with the parties, *e.g.* TR 8/6/10, pp 238, 303-304; TR 8/9/10, pp 3-13, 23-27, 109, the Bank's brief does not even mention the case. And it is incredible that the Bank bases its charge that the court "invaded the province of the jury on fact issues," on properly excluded evidence. Its "extensive evidence at trial demonstrating that...liquid assets were intended to pay taxes," Brief, p 30, consists exclusively of Prekel's attempted testimony that was barred under *Cullmann*.

Lastly, to the extent the Bank argues that the $850,000 from the Comerica Securities account belonged to Bob's estate because it treated the funds that way under the Internal Revenue Code, Brief at 17-18, it errs. It is settled that "state law determines the taxpayer's property and rights to property, but that, once those are established, the tax consequences...are dictated by federal law...." *Dep't of Treasury v Comerica Bank*, 201 Mich App 318, 324; 506 NW2d 283 (1993), *quoting United States v Nat'l Bank of Commerce*, 472 US 713, 722, 725; 105 S Ct 2919; 86 L Ed 2d 565 (1985) (internal quotation marks omitted); *see also Logan v Zimmerman Brush Co*, 455 US 422, 430; 102 S Ct 1148; 71 L Ed 2d 265 (1982) ("The hallmark of property...is an individual entitlement grounded in state law"). Even assuming the Federal tax code deemed the funds part of Bob's estate, the Bank gets it exactly backward. "[S]tate law determines the nature and extent of a taxpayer's property interest in any given property." *Comerica Bank*, 201 Mich App at 325 (citation omitted.

The Bank accuses the court of taking from the jury the fact question of Bob's intent. Brief, pp 31-34. But a directed verdict is appropriate where reasonable minds could not differ on a factual question, *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008). And the Bank failed to produce any admissible evidence that the munificent Mr. Byrne intended not to create survivorship rights in the joint accounts with his longtime personal and business companion, to whom he "owed his life" and who he could see was herself slipping toward the twilight fog of Alzheimer's. The directed verdict was warranted.[14]

B. The Bank presented no evidence of undue influence sufficient to overcome the mandatory presumption of MCL 487.703.

1. The Bank has neither preserved nor properly presented the issue.

The Bank's prolix "statement of questions" says nothing about "undue influence," and the issue set forth at pp 34-36 of its Brief is waived. *River Investment Group, LLC v Casab*, 289 Mich App 353; 797 NW2d 1 (2010). Further, the Bank failed to preserve the undue-influence issue by moving for a new trial or JNOV on it, *Hines*, 265 Mich App at 443; MCR 2.610(D).

2. The jury properly found Mari did not unduly influence Bob.

MCL 487.703 provides a mandatory presumption that creation of a joint account is prima facie evidence of the depositor's intent to create survivorship; the presumption can be rebutted by evidence of fraud or undue influence. *In re Cadarette Estate*, unpublished per curiam opinion of

[14] The Bank's litany of items supposedly creating a fact question as to Bob's intent, Brief, 38-41, does nothing of the sort. All either misstate the evidence, i.e. citing the power of attorney, despite no disputed withdrawal being made under one, or referring to the "Robert F. Byrne General Accounts" which the court properly recognized was merely the name printed on checks and of no legal significance; or they make assertions wholly without evidentiary support, such as the claim that Bob somehow was deceived into signing the 2004 account cards. They do nothing to counter the legally mandated conclusion that the accounts were joint, with survivorship rights.

the Court of Appeals, decided June 9, 2009 (Docket No. 284132). The Bank argues that a presumption of undue influence exists such that the presumptions "counter each other" and bar a directed verdict even in the accounts using "magic words." Brief, pp 34-36. It is incorrect.

In *Estate of Dziuban*, unpublished per curiam opinion of the Court of Appeals, decided November 20, 2008 (Docket No. 279539), this Court addressed the precise "battle of presumptions" the Bank sets up:

> Funds placed in joint accounts are presumed to be the property of the survivor. This presumption must be rebutted by reasonably clear and persuasive proof. When the presumption of undue influence also exists, the burden is on the survivor on the account to show, by a preponderance of the evidence, that no undue influence exists. *If this burden is satisfied, an appellee is able to benefit from the statutory presumption*. [Op at 9 (emphasis added), *citing* MCL 487.703, *Habersack*, 93 Mich App at 305, and *Jacques*, 352 Mich at 136-137].

Mari satisfied her burden: the court denied her a directed verdict on undue influence, O&O, p 33, put the issue to the jury *just as the Bank requested*, TR 8/6/10, p 113, gave the jury the instruction the Bank agreed to, *Id* at 108-21, 130-31, and the jury rendered its verdict:

> JURY FOREPERSON: Did Marlene Bills exercise undue influence to obtain for herself any property of the plaintiff's, Robert Byrne, or his companies? Answer: ***No***. [TR 8/13/10, p 147 (emphasis added)].

In its JNOV ruling the court then vacated its judgment to conform to that verdict, O&O at 38-40. This was consistent not only with the statute, but with the Bank's own statement in its closing. TR 8/13/10, pp 69-70. The Bank cannot overcome the statutory presumption of survivorship.

The Bank failed to seek a new trial or JNOV on that point, but it doesn't matter because the undue-influence charge was not only unsupported by evidence, but contrary to it. Prekel testified Mari never tried to unduly influence Bob's estate planning. O&O, pp 12-13; TR 8/9/10, p 234. Kate was at no time blocked from accessing her father, even at Lake Angelus. TR 8/6/10 Henry, p 55. There was *no* evidence of *anything* Mari did during account creation. And the

Bank's flimsiest theory, that Mari pressured Bob to marry, crumbled into a laugh line when Barb Mazer testified that he "said that about every woman." TR 8/10/10, p 206. Opposing these gossamer proofs was the host of indisputable reasons for Bob's gifting decision, including his longtime relationship with Mari, his habitual generosity, her saving his life by finding him unconscious, etc. TR 8/13/10, pp 156-58, 168-69. Not to mention, her consistent position from the beginning that all transactions took place with Bob's knowledge and consent. 11/7/06 Answer, p 4, Affirmative Defense No. 2. The Bank chose the trier of fact on this issue, got the instruction it sought, and lost. Its theory of undue influence was pure fantasy, concocted by the non-credible Prekel and Henry and embraced enthusiastically by Gormely, TR 8/13/10, pp 158-60, to placate the Bank's wealthy new customer and referral source under its "business model."

One other point bears mention: the Bank complains that the Probate Court "earlier applied the presumption," citing the 2009 summary-disposition ruling in which it said there was "no question" the transactions resulted from undue influence. Brief, pp 34-35. But as the Bank knows, the court later revisited that ruling, TR 8/9/10, pp 109-12, and did so correctly since the issue of sufficient evidence to overcome the presumption of undue influence is for the trier of fact. *In re Peterson Estate*, 193 Mich App 257, 262; 483 NW2d 624 (1991). The assertion that the court "earlier applied the presumption" is less than fully accurate.[15]

C. The Bank offered no evidence of any fiduciary-duty breach, or causation.

Mari plainly had fiduciary duties at various times, but the court correctly required the Bank to prove both breach and proximate cause of damages. O&O, p 18, *citing Vicencio v Ramirez*, 211 Mich App 501; 536 NW2d 280 (1995) and *Prentis Family Foundation v Barbara*

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[15] It also is not relevant, since a Probate Court has considerable discretion to reconsider, even to the point of giving an earlier unsuccessful motion a "second chance," though nothing has changed. *In re Moukalled Estate*, 269 Mich App 708, 714; 714 NW2d 400 (2006).

Ann Karmanos Cancer Inst, 266 Mich App 39, 49; 698 NW2d 900 (1995). The Bank presented no admissible evidence establishing either, and the court correctly directed a verdict.

The Bank on appeal focuses on the fiduciary duties Mari owed as employee and officer of Bob's companies and under the powers of attorney, and argues that it proved several breaches – in her opening the 2004 accounts, transferring "company and other" funds into them, "manipulating" deposits to get funds into accounts where she had signing authority, etc – "all for no benefit to Byrne." Brief, p 26. But it offers no evidence proving *any* of those things. 11/25/11 O&O, pp 27-32. There is no evidence Mari used any power of attorney to open any account; thus the "for benefit of Mr. Byrne" language is of no legal relevance. *See*, *Peppler v The Peppler Agency, Inc*, unpublished per curiam opinion of the Court of Appeals, decided December 13, 2011 (Docket No. 300194) (defendant owed plaintiff fiduciary duty under power of attorney, but in asking plaintiff to sign 2003 Agreement she did not do so under it; fiduciary-duty claim properly dismissed). "A fiduciary must act with the utmost faith and loyalty *on matters within the scope of the fiduciary relationship*." *Id* (emphasis in original), *citing In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003). Once a fiduciary is co-owner on a joint account, absent some breach of fiduciary duty in obtaining that status, he is fully entitled to withdraw all funds. *Peppler*, *supra*.

Likewise, there is no evidence Mari pressured Bob into opening accounts, or that he signed account cards unwillingly, or did not understand or intend the legal relationship they created. The evidence is to the contrary. TR 8/12/10 J. Becker, pp 172-76. Bob was under no disability, but rather a vague 2002 recommendation to "consider" guardianship, on which nobody acted. His investment adviser and even his disputatious lawyer confirmed he fully understood the financial decisions he was making. Facts are indeed stubborn things, and the Bank's rhetoric runs square into them. The court correctly directed a verdict on first 10 entries on PX 68. *Id* at 27-30.

The court correctly applied the same reasoning in directing a verdict on the four post-death transactions from accounts 74557 and 73914, and granting JNOV on the accounting claim as to them. O&O, pp 30-32, 41-42. The Bank argues that Mari breached fiduciary duties by writing checks from those accounts following Bob's death, "when [her] duty to the companies still existed." Brief, p 21. But each account was titled in Bob's and Mari's name individually, as joint owners, not as officers of or in the name of any of the companies. O&O, p 28. Whatever the source of the funds, once in the account they became the property of the two individuals, and any fiduciary duties Mari owed Bob ended with his death. Further, even were that not the case, the Bank fired Mari within days of Bob's death, ending any fiduciary duties at that point. *Quality Mfg, Inc v Mann*, unpublished per curiam opinion of the Court of Appeals, decided December 15, 2009 (Docket No. 286491) (defendant Mann while corporate officer was required to fulfill fiduciary duties, but not post-resignation). It offers no authority recognizing such duties post-termination, and its discussion of duties owed as company officer, Brief at 22, is inapposite. Mari had survivorship rights by virtue of being named "beneficiary" on the account instrument, and was free to withdraw all account funds. O&O, pp 30-32.

The Bank claims the court imposed a heightened standard by requiring evidence of bad faith or fraud to find breach of fiduciary duty, criticizing its use of *In re Green Charitable Trust*, 172 Mich App 298, 313-314; 431 NW2d 492 (1988) to require such a showing, and limiting *Green* to trusts with exculpatory clauses. Brief at 22-24. But this Court has read *Green* precisely as the court did, to require bad faith or fraud generally to establish breach of fiduciary duty. *In re Harriet Fishbeck Trust (Aft Rem)*, unpublished per curiam opinion of the Court of

Appeals, decided April 24, 2003 (Docket No. 233858) ("the trial court correctly noted that to establish a breach of fiduciary duty it is necessary show more than 'mere mistakes or errors of judgment where a fiduciary has acted in good faith,' and that a showing of 'bad faith,' or 'arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty' is required"), *citing Green*, 172 Mich App at 314, 315, and *Commercial Union Ins Co v Liberty Mutual Ins Co*, 426 Mich 127, 136; 393 NW2d 161 (1986) (brackets omitted). *Fishbeck Trust* involved no exculpatory clause nor any other distinction the Bank engrafts onto *Green*; instead it involved mere allegations that respondent violated her fiduciary duties as co-trustee. Plaintiff's claim was dismissed after it failed to establish bad faith, and this Court affirmed. The Bank's claim here properly suffered the same fate. O&O, p 19.

D. The court did not impinge on the jury's role nor make credibility findings.

The Bank's argument that the court "improperly invaded the jury's province," and "made new judicial fact-findings, including findings on witness credibility," Brief at 25-28, is incorrect. Leaving aside that the court did not second-guess the jury but rather held that it never should have gotten the case, the Bank's argument does not hold water.

The Bank's claim centers on its theory of self-dealing, i.e. that Mari breached her fiduciary duty in writing each of the checks on PX 68. But Mari was a co-owner of those accounts, with all the legal rights that attend ownership. As even Prekel testified, as legal owner of an account she had a right to draw checks on it. TR 8/9/10 p 102. Inflammatory descriptions of her conduct as "commingling," "taking those funds for personal use," etc, Brief, p 22, cannot overcome the fact that the court correctly determined they were *joint* accounts.

Urging this Court to disregard the account signature cards, the Bank asserts that Mari breached fiduciary duties in setting up the accounts in 2004, since the powers of attorney required all actions undertaken pursuant to them to be for Bob's benefit. Brief, pp 26-28. But as it has throughout the litigation, the Bank simply ignores the complete lack of evidence that Mari acted pursuant to any power of attorney – because its position is, her status alone is sufficient to cause a fiduciary-duty breach. TR 8/10/10 Gormely, p 59. Thus the Bank is left with proving Bob was induced to confer joint ownership through fraud or undue influence – but there is no evidence of that, either, and the jury so held. Indeed, the fact Bob signed the account agreements granting Mari joint ownership of the account provides an absolute defense: the informed consent of the principal. *In re Estate of Cummin*, 474 Mich 1117; 712 NW2d 447 (2006). Under the evidence, including the joint account agreements, PXs 92-94, 96, the Bank failed to provide evidence to create a jury issue as to breach of fiduciary duty.

Because Mr. Byrne, a savvy businessman well-versed in the ways of finance, understood the implications of a joint account and signed the account-opening agreements, PX 92-94, 96, this case is nothing at all like *Vanderwall v Midkiff*, 166 Mich App 668; 421 NW2d 263 (1988), on which the Bank relies heavily, Brief at 25-26. In *Vanderwall*, defendant Rowbotham, decedent's stepdaughter, got her stepfather to sign a power of attorney only weeks before his death, when he was physically incapacitated and even the act of signing was "arduous." She then used the PoA to redistribute the contents of several of his bank accounts on which she was not an owner, into other accounts naming either herself or her sisters as joint owners with him. 166 Mich App at 673. Here, of course, Mari had a longstanding relationship with Bob, was a co-owner of the accounts well before the disputed transfers, and did nothing via power of attorney.

Finally, the Bank's criticism that the court made a credibility-based finding of fact, Brief, p 25, is incorrect. In the cited passage, the court noted that it had repeatedly excluded Prekel's testimony because it did not relate to Bob's state of mind at the time the accounts were opened –

and then in a footnote observed that, based on the documentary evidence, "[i]t is not clear to this Court that Prekel's allegations are credible...." O&O, pp 22-23 n25. The context makes plain that the court was simply saying, diplomatically, that Prekel's excluded testimony not only was hearsay, but demonstrably untruthful. It in no way conducted "judicial factfinding" nor invaded the jury's province, especially since Prekel's testimony properly was excluded.

III. The Probate Court correctly ruled for Mari on the self-dealing claim.

A. Standard of review

To the extent the Bank challenges the court's reconsideration of summary disposition on self-dealing, Brief at 41-45, it ignores that after that ruling, *it* sought reconsideration but was denied. 4/21/10 order. Denial of reconsideration is reviewed for abuse of discretion, *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004).

B. The court properly rejected the Bank's reading of MCL 700.1214, both on summary disposition and in directing a verdict.

From before this action was filed, Mari has argued that she undertook all transactions at Bob's express direction and with his knowledge, consent, and approval, and that he ratified them. Verified Answer, p 9; 9/6/07 MSD Response, Exs A,I,O; 8/7/09 motion for reconsideration, pp 7-12 (discussing evidence); TR 8/12/10 J. Becker, pp 172-76 (Bob "absolutely knew" Mari would get the joint-account funds at his death); PX 92-94, 96. The Bank presented no contrary evidence in either its summary-disposition motion or at trial; instead it argued a different *legal* standard: that Bob's knowledge and consent were irrelevant, and that under EPIC's prohibition on self-dealing, Mari's merely being named in a power of attorney barred the transactions. 8/8/07 MSD brief, pp 11, 12; TR 8/10/10 Gormely, p 59. It persists on appeal, Brief, pp 41-44.

The court agreed at first; its original summary-disposition ruling did not address the issue of "governing instruments" under MCL 700.1214. But on reconsideration it realized Mari's position was legally correct – it undid summary disposition based not on a fact question, but on an interpretation of the applicable law. 3/4/10 Order, p 3. The Bank on appeal wrongly focuses on resurrecting its original summary disposition via a fact dispute, Brief, pp 43-44. But it lost that summary disposition, then had a verdict directed against it, based solely on its erroneous legal interpretation of EPIC, not on the absence of a factual issue. *See In re Estate of Leete*, 290 Mich App 647, 660; 803 NW2d 889 (2010) ("appellant's argument on appeal is responsive not to the existence of a factual question, but to an interpretation of the applicable law").

At the relevant time, MCL 700.1214 provided:

> **700.1214 Fiduciary; prohibited conduct.**
>
> Sec. 1214. Unless the governing instrument expressly authorizes such a transaction or investment, unless authorized by the court, or except as provided in section 4405 of the banking code of 1999, 1999 PA 276, MCL 487.14405, a fiduciary in the fiduciary's personal capacity shall not engage in *a transaction with the estate that the fiduciary represents* and shall not invest *estate money* in a company, corporation, or association with which the fiduciary is affiliated, other than as a bondholder or minority stockholder. A fiduciary in the fiduciary's personal capacity shall not personally derive a profit from the purchase, sale, or transfer *of the estate's property*. (emphasis added).[16]

The statute is inapplicable because 1) the "governing instruments" – the account documents – expressly authorized each challenged transaction; 2) Mari conducted none of the transactions via power of attorney, 3) none were "with the estate that the fiduciary represents" as EPIC defines those terms, and 4) they did not involve "estate money."

1. The challenged transactions all are excepted from MCL 700.1214's self-dealing ban because the "governing instruments" for each joint account expressly authorized Mari's withdrawals.

The Bank's claim that MCL 700.1214 levies a blanket prohibition on "transactions in the principal's property by one who is a fiduciary by virtue of a power of attorney," Brief, pp 41-42,

[16] The statute was amended to add to the list of excepted conduct. 2009 PA 46, eff. April 1, 2010.

was twice rejected below – correctly. 11/25/11 O&O, p 19 n22; 3/5/10 Order. Northern Trust advocates strict liability for anyone merely named in a power of attorney, i.e. a *per se* bar on any estate-related transaction (even one not carried out through it), because a power of attorney is a "governing instrument" under MCL 700.1104(k), and that term is used in MCL 700.1214. Brief, p 43 n9. But leaving aside that the transactions here were not with the "estate" (*see infra*), the Bank ignores that § 1214's mention of "governing instruments" comes in the form of an *exception* to coverage: a fiduciary is barred from engaging in any of the described transactions *unless* "the governing instrument expressly authorizes" it, or another exception applies. MCL 700.1214. Here, the transactions at issue all were authorized by a governing instrument: the account documents that made Mari a joint account owner with Bob.

"EPIC defines 'governing instrument' broadly." *Estate of Leete*, 290 Mich App at 666. The definition includes "a deed; will; trust; insurance or annuity policy; account with POD [pay on death] designation; security registered in beneficiary form (TOD [transfer on death]); pension, profit-sharing, retirement, or similar benefit plan; instrument creating or exercising a power of appointment or a power of attorney; *or dispositive, appointive, or nominative instrument of any similar type*." *Id citing* MCL 700.1104(k) (emphasis added). That definition certainly includes the account-opening documents for each of the four accounts at issue, which made Mari a joint owner fully entitled to their contents. PX 92-94, 96. The evidence is uncontroverted that Bob "had an extensive knowledge" of how joint of accounts worked, and knew any money would be Mari's upon his death. TR 8/9/10 Prekel, pp 87-90, 96-99; TR 8/12/06 J. Becker, pp 172-76. It is those account documents that governed the transactions at issue, authorized every one, and rendered inapplicable the self-dealing prohibition of MCL 700.1214.

The Bank's attempt to create a fact question misses the mark. It claims "[t]here was evidence [Mari] used Byrne's Powers of Attorney," but the only specific transfers it cites are two not at issue in this case, made from account 12608. Brief, p 44. That account is not one of the four from which the challenged transactions were made, PX 68, and by the Bank's own admission it was not a joint account at all, but one from which Mari was removed in 2002. Brief, p 44. They are not transactions for which the Bank seeks recovery, and thus do nothing to establish actionable self-dealing or breach of fiduciary duty under the statute.

The Bank also errs in (again) criticizing the court for "fact finding," Brief, p 43, *citing* O&O, p 19 n 22. The court merely pointed out the Bank's failure to submit any evidence Mari accomplished any disputed transaction via power of attorney. *Id*; see also 3/4/10 Order. That is "fact finding" only in the sense of pointing out that the emperor is wearing no clothes.

2. Mere designation in a power of attorney does not render one a "fiduciary" under EPIC with regard to all transactions.

The Bank's reading of MCL 700.1214 stretches the statute beyond recognition, and would incorrectly outlaw as self-dealing even transactions (like these) having nothing to do with a power of attorney. The Legislature in enacting EPIC included under its definition of "agent," "an attorney-in-fact under a durable or nondurable power of attorney and an individual authorized to make decisions as a patient advocate concerning another's health care." MCL 700.1103(a). "Fiduciary," meanwhile, "includes, but is not limited to, a personal representative, guardian, conservator, trustee, plenary guardian, partial guardian, and successor fiduciary," but the list does not include "agent." MCL 700.1104(e). Admittedly that definition is non-exclusive, and the Legislature conceivably could have intended "fiduciary" also to include one who merely holds the status of an attorney-in-fact under a power of attorney ("agent"), such that they are banned by MCL 700.1214 from any interested transaction. But the better reading is that the

Legislature's act of omitting "agent" from MCL 700.1104(e) was purposeful, designed *not* to automatically extend "fiduciary" status to those merely named but not acting under a power of attorney. *See*, *People v Chupp*, 200 Mich App 45, 49; 503 NW2d 698 (1993) (under the maxim *expressio unius est exclusio alterius*, statutory glossary defining "victim" for purposes of restitution to "include[] a sole proprietorship, partnership, or corporation" bars governmental entity from seeking restitution; because they "are not listed as possible victims, it is presumed that such omission is an exclusion...."), *citing* MCL 700.866(1)); *accord City of Detroit v Muzzin & Vincenti, Inc*, 74 Mich App 634, 639-640 n4; 254 NW2d 599 (1977) (exclusion of corporate officers from glossary definition of "employer" subject to criminal penalty bars imposition of liability on defendant). While the Bank suggests Mari needs the statute rewritten to effectuate her view, it is Northern Trust whose remedy lies with the Legislature. *See People v Crigler*, 244 Mich App 420, 424-425; 625 NW2d 424 (2001) (post-*Chupp*, Legislature amended Crime Victim's Rights Act to include "governmental entity" among the list of "victims").

The statutory purpose also supports Mari's reading. EPIC "shall be liberally construed and applied to promote its underlying purposes and policies," all of which include the protection of "decedents, missing individuals, protected individuals, minors, and[/or] legally incapacitated individuals." MCL 700.1201(a)-(d).[17] Bob Byrne was none of those things until December 14, 2005. Similarly, when enacted in 1998, EPIC "was intended to modernize probate practice by simplifying and clarifying the law concerning decedents' affairs and by creating a more efficient probate system." *Estate of Leete*, 290 Mich App at 661 (emphasis added), *citing* MCL 700.1201 and MCL 700.1303(3). Applying the statutory self-dealing prohibition of MCL 700.1214 to a

[17] The package of EPIC amendments enacted via 2009 PA 46, effective April 2010, deleted a fifth goal, "[t]o facilitate use and enforcement of certain trusts."

person named in a power of attorney to *any* transaction she makes regarding her principal's property while that principal is alive, and regardless of whether the power of attorney is actually used, does nothing to further EPIC's goals. What it does is encourage exactly what has occurred here: scorched-earth litigation egged on by a demanding residuary beneficiary seeking to undo estate-planning choices that cost her "like eight hundred grand." Indeed, since the Bank is trying to thwart Bob's wishes, it is *Mari's* position that advances EPIC's aims.

The Bank relies on *Cummin* in arguing that the mere naming of Mari in a power of attorney is sufficient to invoke the self-dealing prohibition. Brief, pp 41-44. But in *Cummin*, an elderly principal executed a durable power of attorney her daughter then used, while the mother was in a nursing home and incapacitated by strokes and dementia, to convey to herself some of decedent's property. Here, of course, Mari made no disputed withdrawal via power of attorney. Of even greater significance, the Supreme Court's order of peremptory reversal in *Cummin* applied the common-law rule, not EPIC, since respondent had an accrued right in the property that predated EPIC's effective date, 474 Mich at 1117-18. Thus, any discussion of MCL 700.1214 is *obiter dicta*.

MCL 700.1212 addresses a fiduciary's duties and obligations, stating that "[a] fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary." It does not say, though it could have, that the fiduciary stands in a position of confidence and trust "with respect to any principal under a durable power of attorney." Which is not to say EPIC's provisions could not be extended to cover factual situations involving an incapacitated individual and an agent who, acting pursuant to a durable power of attorney, transfers that person's property to herself during the disability. But that did not happen here.

A statute should be interpreted to avoid producing absurd results, injustice, or prejudice to the public interest. *Camden v Kaufmann*, 240 Mich App 389, 395; 613 NW2d 335 (2000) (citation omitted). The Bank's interpretation of MCL 700.1214, if accepted, would produce all three. It would create a disincentive for anyone to agree to be named attorney-in-fact, for fear of having a transaction with the principal unwound, years later and where the power of attorney had absolutely nothing to do with it. This is especially so since many fiduciary relationships at common law relate to a subject matter wholly separate from EPIC. The Bank's position would strongly discourage a person who had given his adult child a durable power of attorney to assist with medical or business issues in the event of disability, from making a wholly proper gift to that child – for instance, by putting her on a joint account and telling her to write herself a check – for fear of a successor trustee or PR trying to claw back the money years later. TR 4/27/09, pp 20-22. The Probate Court properly rejected this untenable reading of the statute.

3. No transaction was "with the estate" for purposes of § 1214.

The Probate Court also correctly held that Mari did not engage "in a transaction with the estate that the fiduciary represents...," MCL 700.1214, and that the statutory bar against self-dealing therefore did not apply. 3/4/10 Opinion & Order, p 3.

The EPIC contains a glossary, and thus its terms must be applied as expressly defined. *In re Turpening Estate*, 258 Mich App 464, 465-466; 671 NW2d 567 (2003) (citation omitted) (applying MCL 700.1103(f)). It defines "estate" to include "the property of the decedent, trust, or other person *whose affairs are subject to this act* as the property is originally constituted and as it exists throughout administration. MCL 700.1104(b) (emphasis added).[18] But Bob never

[18] The definition further defines "estate" to include "the rights described in sections 3805, 3922, and 7606 to collect from others amounts necessary to pay claims, allowances, and taxes," which is not relevant here.

was adjudged incompetent, placed under guardianship or conservatorship, or otherwise "subject to the provisions of EPIC." 3/4/10 O&O, p 3. Nor was Mari ever appointed to represent such an estate. *Id*. The closest thing the Bank has is the amorphous 2002 recommendation to "consider [the] need for a guardian or conservator....," PX 7, p 6, which it misquotes in its Brief, and which never was followed up on anyway – because Bob at all times was competent.

It is a selective incompetence the Bank pushes in asserting Bob was one "whose affairs [were] subject to the act" – enfeebled and incapacitated in making some transactions, but not those involving its demanding, favored customer. Thus in late 2003, in the supposed depths of his dementia, Bob's transfer of $2.3 million from an account he owned jointly with Mari, into one titled solely in his trust, was not beyond his capacity to carry out – "in this particular instance." TR 8/10/10 Gormely, pp 103-04; 110-12; PX 17. Similarly, Bob was competent to gift his daughter with a car from Rinke Cadillac, but not Mari at the very same time. *Id*, p 105-07. Using Northern Trust's *ad hoc* standard, under which taking a wrong turn while following one's child to the freeway is sufficient to make one subject to EPIC, TR 8/6/10, p 72, nearly every octogenarian would be "subject to the act" when it is convenient for the proponent of that status. That would please the Bank, "in this particular instance" anyway, but it is not the law.

In a footnote, Northern Trust tries to obfuscate the court's reasoning, arguing alternatively that MCL 700.1214 "is not limited to decedents or court-appointed fiduciaries," that a variety of other definitional sections in the EPIC's glossary are implicated, and that various other far-ranging provisions come into play, thereby making the *assets* at issue governed by the EPIC. Brief, p 43 & n9. But in struggling to evade the plain statutory language, the Bank misses the point. MCL 700.1214 bars a fiduciary from engaging in "a transaction *with the estate that the fiduciary represents*," (emphasis added) and "estate" is defined to include "the property of the decedent, trust, or other person whose affairs are subject to this act...." MCL 700.1104(b). The relative clause "whose affairs are subject to this act" refers to "decedent, trust, or other person," its last antecedent, and not "property," as the Bank apparently would have it read ("property....whose affairs are subject to this act"). *See*, *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6; 708 NW2d 778 (2005) (modifying clause in a statute will be construed to modify only the last antecedent unless some language in the statute requires a different interpretation); *see also* Shertzer, *The Elements of Grammar* 47 (1986) ("subordinate clauses should be placed near the words they modify"). Because Bob at no time in his life was a "person whose affairs are subject to this act," any assets at issue in this case – even adopting the Bank's view of them as exclusively "his" – were not part of an EPIC-covered "estate" during his life, and thus MCL 700.1214 does not apply. The Probate Court's 2010 ruling was correct.

C. Alternate grounds support judgment for Mari on this issue.

Even if all the foregoing were incorrect, MCL 700.1214 still has no application as to Comerica account 48632, since Mari was a joint owner on it since 1987, PX 94, p 3, and thus had accrued rights to those funds prior to EPIC's April 1, 2000 effective date. MCL 700.8101(2)(d); *Cummin*, 474 Mich at 1117-18. Mari raised this issue in her 8/10/09 motion, which the court granted on other grounds, leaving it unaddressed. It stands as an additional basis for affirming judgment in her favor on the self-dealing claim, at least with regard to the items from PX 68 (totaling $517,282) paid from that account.

IV. The court correctly rejected the Bank's attempt to invoke the *in terrorem* clause.

A. The Bank has waived any request for judgment on the issue.

The Bank's disinheritance argument fails on the merits, but even if it didn't, it at most could garner a new trial. The Bank's brief in passing requests JNOV disinheriting Mari from the house, p 47, but its Statement of Questions and discussion focus solely on the grant of directed verdict. *Id*, pp ix-x, 45-47. This is insufficient to present JNOV for review. *River Investment Group, LLC*, 289 Mich App at 360.

B. The *in terrorem* clause is unenforceable by statute, and under its plain terms.

Northern Trust presents a moving target on this issue. Early on it claimed Mari's defense of this case disinherited her, then at trial argued disinheritance based on her claiming the $850,000 in the Comerica Securities account. TR 8/9/10 Prekel, pp 43-44; 10/12/10 JNOV. Now on appeal, it points to *all* of her account claims, including the $181,537 in post-death checks. Brief, p 45. In whatever version, Bank's theory lacks merit.

In terrorem clauses are to be strictly construed, *Saier v Saier*, 366 Mich 515, 520; 115 NW2d 279 (1962), *quoting* 49 ALR 204, and forfeiture under one should be "avoided if possible, and only where the acts of the parties *come strictly within the express terms of the punitive clause* of the will *may a breach thereof be declared*." *Id* (emphasis in original). None of the funds Mari withdrew were a "portion of [Bob's] estate," PX 20, and thus are not covered under the clause. The Bank's only authority to the contrary is the post-trial bench ruling that the court itself vacated, and the federal tax code, which as discussed above, does not determine property rights. Brief, p 45. The Bank would have Mari forfeit her home for withdrawing funds that the evidence shows Bob intended her to receive upon his death. TR 8/12/10 J. Becker, pp 172-76.

Nor can the *in terrorem* clause be applied to Mari for *defending* this case. "It may be laid down as a general rule, that a provision in a will forfeiting a share of a contesting beneficiary is inapplicable to occasion the loss of a share of a legatee or devisee who does not initiate a contest, even though he may participate therein." *Saier*, 366 Mich at 522, *quoting* 57 Am Jur Wills, § 1514, p 1028. In the Bank's view, Mari's choices when it sued were a) do nothing and lose the property Bob gave her, or b) mount a defense and lose the property Bob gave her. This despite Prekel's admission that, through all Bob's estate-plan revisions, the one constant was his wish that Kate get the warehouse, and Mari, the Lake Angelus house. TR 8/9/10, pp 102-05. [19]

The Bank tries to evade the statutory provision holding *in terrorem* clauses unenforceable if probable cause exists by arguing that MCL 700.2518 applies only to wills, not trusts. Brief, p 46, *citing In re Mary Griffin Trust v Hall*, 483 Mich 1031; 765 NW2d 613 (2009). But after *Mary Griffin Trust* was issued, the Legislature enacted a substantially identical provision for trusts, 2009 PA 46, codified at MCL 700.7113. That provision took effect April 1, 2010 and renders dead on arrival the disinheritance requests, since Mari had at least probable cause both to defend this action and withdraw account funds. It is surprising to say the least that "the largest personal trust company in the country...involved in this business for well over 100 years," TR 8/9/10 Gormely, pp 244-45, whose trust and estate expert has 54 years in practice, *Id* at 97, would raise a disinheritance issue before this Court, yet fail even to mention that statute.

V. The Bank offered no evidence of fraudulent concealment regarding the Troy condo and directed verdict properly was granted.

"Fraudulent concealment means employment of an artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Grebner v Runyon*, 132 Mich App 327, 339-340; 347 NW2d 741 (1984). "An exception to this rule is that there is an affirmative duty to disclose where the parties are in a fiduciary relationship." *Lumber*

[19] Application of the *in terrorem* clause also would violate Mari's rights under US Const, Am I, and Const 1963, art I, § 3. The Petition Clause immunizes legitimate efforts to influence the government, and this immunity extends to use of the courts. *California Motor Transport Co v Trucking Unlimited*, 404 US 508, 510; 92 S Ct 609; 30 L Ed 2d 642 (1972). Where a provision would prevent a party who has been hauled into court from defending herself, it unduly infringes the petition right and must be invalidated.

Village, Inc v Siegler, 135 Mich App 685, 695; 355 NW2d 654 (1984) (citations omitted). "Fraud cannot be presumed but must be proven by clear and convincing evidence." *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

The Bank's proofs relating to the Ashford condo consist solely of financial statements listing it as an asset of Bob's, which it claims were the artifice Mari used to mislead him into thinking he owned the condo, when she actually did. But Prekel testified he was not sure who prepared those statements and, far more important, Mari *told him at the time that she was buying a condo in the development.* TR 8/9/10 Prekel, p 130; DX 59 (emphasis added). He also conceded that he handled all of Bob's real-estate transactions and required that all properties be titled in the trust's name for estate-planning purposes; that he had nothing to do with the purchase of that property; and made no attempt to have it titled in the trust's name. TR 8/6/10 Prekel 165; DX 60.

The Bank offered nothing to prove what Bob did or did not know about the condo purchase, nor was there testimony as to what Mari did or did not intend about title ownership. It offered no witness to the transaction, nor any paperwork documenting it. TR 8/12/10, pp 310-11. The limited evidence gave the factfinder no basis on which to conclude that Mari "employ[ed] an artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action," as required by *Grebner*, and the court correctly directed a verdict. O&O, pp 37-38. (The Bank's amended complaint also argued Mari fraudulently concealed the Aston Travel loan, ¶ 30, but it abandons that by failing to brief it, Brief, p. 48, and properly so. TR 8/12/10 J. Becker, pp 137-42; 8/10/10 Mazer, p 193).

VI. The Probate Court correctly found Mari fulfilled any duty to account.

A. Standard of review

In reviewing a grant of equitable relief, this Court will set aside factual findings only if they are clearly erroneous; whether equitable relief is proper under those facts is reviewed de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

B. Mari fully accounted for everything.

The court properly corrected its initial award to the Bank of $181,537 from four post-death checks Mari wrote, which was contrary to Quattro's unrebutted testimony, the account registration agreements, and signature cards clearly identifying Mari as "Beneficiary" on 74557 and 73914, PX 92, 93. Bob's knowledge of joint accounts and beneficiary status, combined with the language of his October 18, 2005 Will stating his beneficiary designations of Mari were voluntary, along with Quattro's and John Becker's testimony, correctly led the court to conclude there was no basis for distinguishing those four checks from the others. O&O, pp 41-42. The funds withdrawn via those checks were as much hers as they were when Bob still was alive.

The Bank offers no serious discussion on this point in its one-page argument; for that matter it does not even cite authority beyond a boilerplate citation allocating to Mari the burden of showing she properly accounted. Brief, p 49. Leaving aside its failure to properly present the issue, *In re Temple Marital Trust*, 278 Mich App 122, 139; 748 NW2d 265 (2008) (party may not merely announce a position and leave it to this Court to discover and rationalize the basis for its claims), the Bank's cursory discussion misses the point. The Probate Court found Mari had no duty to account, thus there is no burden to bear.

The Bank's factual challenge also lacks merit. Its only real argument is that fact-finding had "closed" 15 months earlier, and thus the court was barred from reconsidering its earlier ruling or re-weighing the evidence, particularly that of Quattro. Brief, p 49. But Mari's' motion put before the court, based on trial evidence, the issues of the alleged breaches of fiduciary duty and whether the accounts were joint with survivorship rights. 10/11/10 motion, pp 4-13. The Bank offers no authority supporting the view that a court after a bench trial may not revisit its factual findings upon a timely motion; the rule in fact is to the contrary. MCR 2.517(B). And because this Court pays special deference to a trial court's credibility findings given the latter's "special opportunity...to judge the credibility of the witnesses who appeared before it," MCR 2.613(C), the Bank presents no error, much less clear error warranting reversal. *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999).

VII. If this Court reverses on any claim, Mari is entitled to a new trial and/or summary disposition on some claims.

Even if this Court finds merit in any of the Bank's contentions, the Bank is not entitled to judgment in its favor. Rather, Mari would be entitled to a new trial for any or all the reasons set forth in her motion for JNOV/new trial. *See*, MCR 2.610(E)(1) (denial of motion for JNOV allows prevailing party on appeal to raise issues entitling her to a new trial if this Court reverses). At a minimum, remand would be warranted for the court to rule on that motion. O&O, p 42.

A. The Bank's repeated trial references to excluded evidence constitutes misconduct that prejudiced Ms. Bills and warrants a new trial.

The only proofs the Bank offered relating to Bob's intent to open "convenience" accounts, and/or use accounts to fund estate taxes at death, were hearsay statements he supposedly made after the joint accounts were opened; the court properly excluded them under *Pence*, *Cullmann*, and similar authority. Yet despite those repeated rulings, often made after extensive briefing and/or argument, outside the jury's presence so it would not be improperly influenced, TR 8/9/10, pp 3-13, the Bank persisted in trying to put the information before the jury. *See, e.g.*, TR

8/6/10, pp 215-17, 219-38; 265; 8/9/10, pp 23-27. Mari specifically noted the Bank's actions were prejudicing her before the jury, and could not all be objected to. TR 8/6/10, pp 303-06; 8/13/10, pp 105-07. Likewise, the court repeatedly rebuked the Bank for its "inappropriate" and "mischaracterizing" references to "Mr. Byrne's" accounts, and Mari's withdrawals as "cleaning them out," since they were joint accounts. TR 8/6/10, pp 75-76; 8/9/10 Prekel, pp 179-82. (Even its main damages compilation, PX 68, bears those misleading labels). Nonetheless the conduct persisted, sometimes only moments later. TR 8/6/10, pp 77-78; 248.

The Bank's prejudicial attempts "indicate a deliberate course of conduct aimed at preventing a fair and impartial trial." *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999), *rev'd on other grounds, Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004), "a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Id*. Indeed, despite numerous objections and sidebars on this issue, the Bank argued the excluded evidence in its closing as substantive proof of Mari's liability (and also impermissibly shifted burdens onto her). TR 8/13/10, pp 61-62, 64-66; 106 (objection). The misconduct materially prejudiced Mari and denied her a fair trial, as evidenced by the jury's partial findings, and the Bank cannot obtain relief without a new trial for Mari.

B. The combined verdicts constituted an impermissible double recovery.

Michigan law generally prohibits a double recovery. *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 361 n8; 660 NW2d 351 (2003) (citation omitted). The court's bench ruling identified specific transactions for which it (initially) found Mari liable, i.e. the last four listed on PX 68, but the jury's verdict did not – instead it simply awarded damages in bulk according to each claim. Both worked off of PX 68, because the Bank directed them to. Because the jury found Mari generally liable for taking funds to which she was not entitled, in the amount of

$625,838, and the court's verdict found damages regarding the same accounts – in all likelihood, some of the same transactions – any reversible error cannot be remedied by simply reinstating the verdicts, since that would give the Bank a windfall. Instead, a new trial would be warranted.

C. The verdicts were against the weight of the evidence and contrary to law.

For the reasons discussed above, the original verdicts of the jury and court were against the great weight of the evidence. There was no evidence Mari took one cent without Bob's approval, as expressed either in his being advised of the transaction (as with the Ashford condo) and/or giving approval at the outset, i.e. by having a joint account with her as co-owner. There was no evidence of undue influence, and no evidence she breached any fiduciary duty. Even if the grant of directed verdict/JNOV erred, the weight of the evidence entitles Mari to a new trial. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990).

D. The Bank's claims for five of the items on PX 68 are time-barred.

This Court will affirm on alternate grounds where the trial court reaches the correct result. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). Mari in 2007 argued that the three-year limitation of MCL 600.5805 governing actions for breach of fiduciary duty, barred the Bank from recovering for any transaction prior to October 17, 2003. 9/6/07 Response/MSD, pp 8-9; TR 4/27/09, pp 49-52. This would have covered the first five transactions on PX 68, totaling $473,431. 9/6/07 Response, p 9. The court denied the motion in part based on fraudulent concealment. 7/21/09 O&O, p 10. But only the condo was the subject of fraudulent concealment at trial, and the court properly directed a verdict on that. 11/25/11 O&O, p 36. Based on that reasoning, it also should have granted Mari's 2007 motion for summary disposition. Even if the Bank somehow revives its claim for the first five items on PX 68, the limitation defense is an alternate basis for this Court to affirm their dismissal.

VIII. This Court's opinion should also lift the stay and have immediate effect.

This vendetta against one who could not personally fight back has gone on long enough. The claims on which it was based have been thoroughly exposed as mere smoke and hot air, yet through operation of MCL 600.867(1) and this Court's 2/21/12 stay, Mr. Byrne's donative wishes still have not been fully carried out as the seventh anniversary of his death approaches. In addition to affirming the Probate Court in full, this Court should vacate its stay and give its opinion immediate effect under MCR 7.215(F)(2). *Northern Warehousing Inc v State (On Rem)*, unpublished per curiam opinion of the Court of Appeals, decided August 22, 2006 (Docket No. 260598) (dissolving injunction and giving opinion immediate effect). Enough is enough.

CONCLUSION/RELIEF REQUESTED

For the foregoing reasons, Ms. Bills requests that this court affirm in full the Probate Court's November 25, 2011 Opinion and Order. In the event it deems any of the Bank's issues meritorious, the appropriate remedy is a new trial for the alternate reasons set forth above, and not judgment for the Bank in any fashion.

Respectfully submitted,

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Dated: August 2, 2012

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

In re CADARETTE Estate.

JUNE CADARETTE and SHIRLEY BOBOLTZ, Petitioners-Appellees,	UNPUBLISHED June 9, 2009
v	No. 284132 Alpena Probate Court LC No. 04-013709-DE
NORMAN CADARETTE, Respondent-Appellant.	

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Respondent-appellant appeals as of right the probate court's order determining the estate assets of decedent Mae A. Cadarette. We affirm.

Decedent and her late husband were the parents of five children, Norman Cadarette, Shirley Boboltz, June Cadarette, Rosemae Auer, and Donald Cadarette. Decedent's husband passed away in 1976. In 1995, decedent drafted a will that left her property equally to all of her children. Before decedent's death, approximately $94,000 of decedent's assets were transferred into joint accounts with respondent, which he thereafter transferred into his sole name.[1] Following a three-day bench trial, the trial court determined that the transferred funds were estate assets to be divided equally among decedent's children.

[1] In October 1998, respondent removed over $20,000 from a joint account and transferred it to another account in his name alone. In addition, three certificates of deposit, in the approximate amounts of $50,000, $14,000, and $9,000 respectively, were transferred from decedent's sole ownership to joint ownership with respondent on December 28, 1998, and then to sole ownership of respondent on July 26, 2000.

I.

Contrary to the position he took at trial, respondent argues on appeal that the durable power of attorney decedent executed naming respondent as decedent's attorney-in-fact had been revoked, therefore eliminating any fiduciary duty to decedent. At trial, however, respondent argued that a subsequent power of attorney executed by decedent in favor of his sister, June Caradette, was a "springing" power of attorney that never became effective; as such, the durable power of attorney in respondent's favor remained in effect and, by its explicit terms, authorized him to make gifts to himself. Generally, an issue must be raised before and decided by the trial court in order to be preserved for appellate review. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). And further, "[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). Therefore, we decline to review this argument.

II.

Respondent next argues that that the trial court erred in finding that he owed a fiduciary duty to decedent at the time the transfers at issue were made. We disagree. A trial court's findings of fact in a bench trial are reviewed for clear error, and its conclusions of law are reviewed de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

While the grant of a general power of attorney creates a fiduciary relationship, *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983), a fiduciary relationship may exist even where there is no durable power of attorney in effect. A fiduciary relationship exists when one person "stands in a position of confidence and trust" with another person. MCL 700.1212(1). One who owes a fiduciary duty to another is required to act for the benefit of the other on matters within the scope of the relationship. *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003).

At trial, respondent testified that decedent requested his assistance with financial and other matters as she got older and had trouble getting around. Respondent arranged to have decedent's social security and pension income deposited directly into an account he opened in both their names. In addition, respondent testified that he would write checks from the joint account for decedent's needs. Also, respondent testified that he arranged for a relative to care for decedent for a period of two years. Respondent's sister, Rosemae, testified that decedent primarily looked to respondent for assistance, and respondent's brother, Donald, testified that respondent helped decedent every time she needed anything.

These facts establish that respondent stood in a position of trust and confidence in relation to decedent beyond the time period of the effectiveness of the power of attorney. As such, respondent was required to act for decedent's benefit, rather than in his own personal interests. *Id*. The trial court did not err in finding that respondent owed a fiduciary duty to decedent at the time the transfers at issue were made.

III.

Finally, respondent argues that he was entitled to full access to funds in those accounts in which he was a joint owner with decedent. We disagree.

MCL 487.703 governs deposits in the name of joint beneficiaries and provides that the co-owners are treated as joint tenants. The contents of such accounts can be paid to either person during the lifetime of both, or to the survivor after the death of the other co-owner. The statute further provides for a mandatory presumption that the creation of such an account is prima facie evidence of the depositor's intent that there be rights of survivorship in the account. *Id*. However, this presumption can be overcome by evidence of fraud or undue influence. *Id*. With respect to the latter, "[a] presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

Sufficient evidence was presented at trial to establish the existence of a fiduciary relationship between respondent and decedent, even if the power of attorney in respondent's favor had been revoked. Moreover, respondent undoubtedly benefited from the transfers of funds into accounts in his sole name, especially in light of his testimony that he spent the money on himself. Finally, respondent's own testimony that he directed decedent to transfer funds in at least one account into joint ownership because of concerns that a sibling was stealing from decedent shows that he had the opportunity to influence the transaction.

The evidence at trial indicates that respondent acted outside his authority as decedent's principal when he transferred the funds from the jointly held accounts into an account in his sole name. The bulk of the funds were transferred on December 28, 1998. It appears that decedent was in the hospital at that time. Therefore, it is unlikely that decedent authorized, or was even aware of, the transfer. In addition, the evidence showed that decedent was unhappy to discover that respondent had opened a checking account in both their names, and that decedent closed this account and transferred the money back into a savings account solely in her name. Respondent has not demonstrated that he was entitled to full access to the funds in jointly held accounts.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of BERTHA DZIUBAN, Deceased.

PAUL A. DZIUBAN, Personal Representative for the Estate of BERTHA DZIUBAN, Deceased,

Appellant,

v

JOHN JAMES DZIUBAN,

Appellee.

UNPUBLISHED
November 20, 2008

No. 279539
Arenac Probate Court
LC No. 05-007682-CZ

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

In this action stemming from consolidated circuit court and probate court cases, appellant Paul Dziuban, as personal representative for the estate of Bertha Dziuban, deceased, appeals as of right from the probate court's order granting judgment in favor of appellee John James Dziuban. The probate court ordered that John Dziuban owned a Washington Mutual Financial Services brokerage account and one-half of a certificate of deposit at Independent Bank free of any claims of ownership by the estate. The judge also ordered that John Dziuban reimburse the estate for 25 United States Savings Bonds that he cashed in, that the real estate at issue is owned as specified on the deeds, and that Arnold Dziuban owns the checking account. We affirm.

I. Basic Facts And Procedural History

Bertha Dziuban died on August 27, 2003. Ten children survived her. Her husband John Joseph Dziuban died in 1975. Bertha Dziuban owned the following assets titled jointly with various of her children: (1) Independent Bank Certificate of Deposit titled "Bertha Dziuban or Arnold Dziuban or John James Dziuban"—approximate balance $97,500; (2) Washington Mutual Financial Services brokerage account titled "Bertha Dziuban and John James Dziuban"—approximate value $250,000; (3) real estate in Standish and Presque Isle titled jointly with rights of survivorship with all ten of her children; (4) Series E bonds titled in the name of Bertha Dziuban and "John J. Dziuban"—approximate value $13,400; and (5) State Bank of Standish checking account titled in the name of "Bertha or Arnold Dziuban"—approximate value $9,000.

Paul Dziuban contends that Bertha Dziuban intended for all her assets to be used to support the 90 acres of real estate in Standish ("the family farm"), so that it would be available to generations that followed. Paul Dziuban further urges that the assets titled jointly with John Dziuban should be placed in a constructive trust so that they can be used for this purpose, rather than for John Dziuban's personal gain.

John Dziuban has lived in California since 1968, and his practice was to visit Michigan for about a month every year in November and December to see his mother. He is Bertha Dziuban's oldest son. He is not married and has no children. His relationship with his mother was friendly, cordial, and trusting. He testified that his mother did not discuss her finances with many people, but that he was able to help her with finances. When in Michigan, he assisted her with routine banking. He did her tax forms for several years in the 1980s and again around 2000 when he sold a stock for her resulting in a capital gain. He also helped with home improvements and fought her insurance company for reimbursement when a tornado damaged her property. On a healthcare agency's form, Bertha Dziuban indicated that John Dziuban had power of attorney over her.

On a trip to Michigan in 1993, John Dziuban helped Bertha Dziuban set up the deeds, brokerage account, and a bank account that became the certificate of deposit that are at issue in this case. During this visit, John Dziuban did some research for his mother on interest rates and, based on this, helped her open an account at Independent Bank. On a subsequent visit, in 1999, John Dziuban informed his mother that she had several bank accounts that were not making much interest and helped her consolidate her accounts in a certificate of deposit at Independent Bank. Bertha Dziuban made John Dziuban and another son, Arnold Dziuban, joint owners of this account with her. These were Bertha Dziuban's only unmarried children at the time.

Also, while visiting in 1993, John Dziuban recommended to his mother that she open a brokerage account. He said that this was after she asked him how she could sell her stocks. He helped her set up an account with the same broker that he used in California. He made the phone calls, assisted her with the application and affidavit of domicile, and helped transfer her stock certificates to this account. At times, John Dziuban spoke to his mother about buying and selling stocks from this account, but she only made two transactions in the ten years that she was managing the account. In 1993, Bertha Dziuban also asked her son, David Dziuban, about her financial affairs and her stocks. He testified that she told him that the stocks were for all the kids to have something to remember their father by. But only John Dziuban was listed as a joint owner of this securities account.

During his 1993 visit, Bertha Dziuban told John Dziuban that she wanted to put all of her children on her property deeds. To meet this goal they met with a local attorney, Ron Bergeron, who was also the Probate Judge. Judge Bergeron testified that he believed that John Dziuban made the appointment and that he met with them together. Prior to preparing the deeds listing Bertha Dziuban and all her children as joint tenants with rights of survivorship in all her real estate, Judge Bergeron believed he discussed the implications of joint ownership with Bertha Dziuban. He also discussed with her the desirability of avoiding probate. He described her as having good mental facilities and did not have any concerns about her being influenced by John Dziuban.

According to her children, Bertha Dziuban was a trusting person and trusted all of her children. Many of her children testified about having a close and loving relationship with their mother and said that she treated them as equals. Her children said that she was a strong-willed and private person, particularly about finances. Her children also reported no concerns about her cognitive abilities, but did not believe she was financially sophisticated.

Bertha Dziuban had begun having difficulty seeing in 1990. And in 1993, she was diagnosed with macular degeneration, which caused her increasing difficulty with vision. John Dziuban testified that in 1993, when they opened the accounts in question, she could read with the help of a magnifying glass, but by 2000, she could no longer read her financial statements, even with her magnifying glass. She relied on her children to assist her in activities of daily living. Many of them even assisted her with her banking and paying bills by helping her sign checks and perform transactions.

Bertha Dziuban had financial dealings with several other children as well. David Dziuban helped her sell a home in Detroit that she lived in with her husband. Arnold Dziuban did her tax returns for her from 1994 to 2000 and once researched interest rates for her at her request. She also loaned $10,000 to Paul Dziuban to help him start a business.

It was common practice for Bertha Dziuban to have joint accounts with her children. In addition to John Dziuban, sons Arnold, Paul, and Joe Dziuban all testified that they were joint owners of her bank accounts at some time. One of her daughters, Deanna Deleeuw, testified that she encouraged her mother to put more than one name on her accounts for convenience and for security. Deleeuw did warn her mother that she thought it was best to have only unmarried children on the accounts so there would be less conflict. While preparing her deeds, Judge Bergeron testified that he is sure that he spoke with Bertha Dziuban about what joint ownership with rights of survivorship means and its risks.

John Dziuban testified that he knew his mother wanted to keep the farm in the family because she deeded it equally to all the children and they discussed it. Paul Dziuban said that his mother told him in a 1990 conversation that she wanted all of her assets to be used to support the farm. He recalled her saying, "I want to tie everything together to maintain the farm so its there for all the grandkids and great-grandkids." He said that she did not want to leave money to anyone by dividing it ten ways because she wanted it all to be used to maintain the farm. She spoke of not wanting the farm to be a financial burden on any of the children, so she wanted to use any money she had to operate the farm. He stated that he recommended using a trust to accomplish this, but that they did not plan this together.

In 1990, when Joe Dziuban spoke to his mother about selling the farm because of her medical concerns, she told him that her intention was to keep the farm in the family and that she was taking care of things so that it would remain in the family. Similarly, Bertha Dziuban told Deleeuw that the plan was for the farm to be available to everyone without a financial burden on them because her accounts would be maintaining the properties. She spoke with Arnold Dziuban about keeping the farm intact and mentioned that she had enough money to keep it going. In 1993, she told David Dziuban that, when she is no longer here, she wanted all the children to get the same amount. She expressed strong concern and frustration that she would not be able to accomplish this unless she went through probate court, but she wanted to avoid this at all costs.

Other than avoiding probate, Bertha Dziuban was not clear on how she would like the children to accomplish her wishes. She told some of her children that she had things taken care of, and mentioned to several people at the hospital in 2003 that she had a will in her bedroom. After her death, when her children gathered in her room, they found two hand-written pages in a notebook that gave burial instructions and named John Dziuban as her power of attorney. It is believed that this document was written several years prior, when her vision was better, because of her handwriting and references to a fence.

John Dziuban testified that he told his mother that he would try to help her achieve her goal of keeping the farm in the family. While discussing the real estate deeds, he stated that he warned her, however, that there was no guarantee that he could accomplish this because it would require that all the children get along. He stated that she responded by saying "good luck." After her death, John Dziuban even established an account in multiple children's names for the maintenance of the farm with money (about $8,100) found at the house. He, however, said that he was not sure exactly what his mother's wishes were or what she wanted him to do with all the assets. After her death, he took documents that related to the accounts he was in joint ownership of from Bertha Dziuban's home.

There was a gathering of siblings soon after Bertha Dziuban's death where they were all informed that they were all equal owners of the family's real estate. At this meeting, there was discussion of creating a trust so that the farm could be maintained and passed on to descendants, rather than pass by rights of survivorship from joint ownership. John Dziuban advised his siblings that he had a plan to use the assets to maintain the family farm.

During a November 2004, John Dziuban told Paul Dziuban in phone conversation, "We have plenty of money." He also sent an e-mail in November 2004 disclosing for the first time the ownership of each of the estate assets, and stating that the current plan was to fund the real estate with these accounts because he, his mother, and many siblings wanted to preserve the farm. John Dziuban testified that if the family wanted to keep the farm, then his plan was to use the funds he received from his mother to keep the farm. He also said that his plan was never to use all of the funds for this purpose.

Paul Dziuban and David Dziuban went to John Dziuban's home in California in December 2004 to discuss the status of their mother's assets. At this meeting, John Dziuban gave them copies of all the brokerage account statements, and they discussed trying to find a vehicle to hold the estate assets. By March 2005, John Dziuban felt that his plan "went out the window." He wanted everyone to attend a family meeting and this was not accomplished, so he felt that there was low family interest in maintaining the farm. He said when there was talk of litigation against him, he backed out of his original plan. In March 2005, John Dziuban sent an e-mail to his siblings telling them that the accounts that he owned jointly with his mother were his personal accounts and that he was not willing to make an accounting of them to his siblings. He also told them that their mother knew the risks of having joint accounts and that he considered the accounts his personal accounts. John Dziuban also mentioned in a phone conversation with Arnold Dziuban that all the certificate of deposit funds did not have to be used to support the farm because they were jointly held.

The Independent Bank certificate of deposit was held jointly between Arnold Dziuban and John Dziuban. When family talks were breaking down, Arnold Dziuban decided to close out the entire CD and place the proceeds in a checking account for the farm and another CD. He considered the account to belong to the entire family for maintenance of the farm and was concerned that John Dziuban would take all the proceeds as joint owner. Arnold Dziuban was able to close the original CD account by filing a lost certificate of deposit form and opened the new CD jointly with Deleeuw to protect it from John Dziuban. Arnold Dziuban was also the joint owner of a checking account with his mother and used that account to pay the farm's expenses.

John Dziuban also took 25 savings bonds from his mother's bedroom. His father purchased the bonds and the face value of the bonds was $2,500. The bonds were in the name of John J.[1] and Bertha Dziuban. Bertha Dziuban had told David Dziuban that his father had bonds and she did not know what to do with them. Bertha Dziuban spoke with John Dziuban about cashing them in, but they decided not to because they were still earning interest. John Dziuban claimed ownership of the bonds because he loaned his father $2,500 in 1960 to help him purchase the farm and his father promised to "give the 20 acres or buy you bonds or something" to pay him back. John Dziuban inferred that the bonds were his, but acknowledged that it is possible that they were in his father's name. Joe Dziuban testified that John Dziuban told him that he could cash the bonds in because he had the same first name and middle initial as stated on the bonds and they could avoid probate by cashing them in. John Dziuban cashed the bonds in for over $13,000. He deposited those proceeds in the brokerage account that he shared with his mother.

After a bench trial, the probate court found that Bertha Dziuban was not "overpowered in any way" and that her free will was not affected to her detriment. Rather, the probate court found "that she acted according to her own wishes."

II. An Inference Of Undue Influence

A. Standard Of Review

Paul Dziuban's argues that because of the confidential and fiduciary nature of John Dziuban's relationship with his mother Bertha Dziuban, combined with his inequitable benefit from her distribution of the assets, the probate court erred when it did not accord a presumption of undue influence on the transactions at issue.

A suit attempting to set aside a transaction because of undue influence is an equitable action.[2] This Court reviews de novo a trial court's decision in an equitable action.[3] We review for clear error the trial court's factual findings, while we review for an abuse of discretion the court's dispositional rulings.[4] A finding is clearly erroneous when the reviewing court is left

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[1] Bertha Dziuban's husband was named John Joseph Dziuban.

[2] *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983).

[3] *Slatterly v Madiol*, 257 Mich App 242, 248-249; 668 NW2d 154 (2003).

[4] *In re Baldwin Trust*, 274 Mich App 387, 396-397; 733 NW2d 419 (2007).

with a definite and firm conviction that a mistake has been made.[5] The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes.[6]

B. Legal Standards

A presumption of undue influence is required where the evidence establishes: (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction.[7] A confidential or fiduciary relationship exists when one party has placed complete trust in the other party who has the requisite knowledge, resources, power, or moral authority to control the subject matter at issue.[8] A fiduciary relationship exists as fact when there is confidence given on one side, and a resulting superiority and influence on the other.[9] It is a broad term that focuses on relationships involving inequality.[10] Common examples include where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser.[11]

A relationship where an inexperienced party relies on another party does not necessarily create a fiduciary relationship.[12] Assisting with and conducting another's business affairs does not give rise to a fiduciary relationship because it lacks the required reliance on the judgment of another.[13] In a family context, relationships are based on mutual trust and commitment, so marriage is not a relationship that has traditionally been recognized as involving fiduciary duties.[14] However, fiduciary relationships can exist in informal relationships where one person trusts and relies on another.[15]

C. Applying The Standards

Here, certainly John Dziuban benefited from his mother including him as a joint owner on the certificate of deposit and the brokerage account. He was able to claim ownership of these

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[5] *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

[6] *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

[7] *In re Estate of Erickson*, 202 Mich App 329, 331; 508 NW2d 181 (1993).

[8] *In re Estate of Karmey*, 468 Mich 68, 74-75; 658 NW2d 796 (2003).

[9] *In re Wood's Estate*, 374 Mich 278, 283; 132 NW2d 35 (1965), overruled on other grounds to extent inconsistent with *Windmeyer v Leonard*, 422 Mich 280, 288; 373 NW2d 538 (1985).

[10] *Karmey*, *supra* at 74 n 3.

[11] *In re Wood's Estate*, *supra* at 285-286.

[12] See *Ulrich v Fed Land Bank of St Paul*, 192 Mich App 194, 196; 480 NW2d 910 (1991).

[13] *In re Jennings' Estate*, 335 Mich 241, 243-244; 55 NW2d 812 (1952).

[14] *Karmey*, *supra* at 74-75.

[15] *Van't Hof v Jemison*, 291 Mich 385, 393; 289 NW 186 (1939).

significant assets upon her death. Additionally, John Dziuban had the opportunity to influence his mother's decisions about these assets. He spoke to her about both accounts and he was with her when she established them, even doing most of the work to set up the brokerage account. The relevant issue, however, is whether this relationship rose to the level of a fiduciary relationship or was merely a case of a son, knowledgeable in financial matters, providing advice and assistance to his mother.

John Dziuban responded affirmatively when he was asked if he was the person his mother trusted and in whom she had confidence. She asked him about financial matters, while she typically was reluctant to talk about them with others. When asked for her power of attorney on a healthcare form, she listed John Dziuban. She listed him as a joint owner of most of her valuable assets. Increasingly, since the early 1990s, she needed his assistance to help her read the documents. What is not clear is that she relied on him for these decisions or that there was inequality in the relationship.

The probate court found through much consistent testimony that Bertha Dziuban was strong-willed and strong-minded. The probate court further found that she acted according to her own wishes and that she did not always follow John Dziuban's recommendations. Notably, she chose not to list him as a joint owner on her checking account; she did not give him exclusive joint ownership of the certificate of deposit, also listing another son as a joint owner, even though John Dziuban was with her when she set this account up; and she deeded her real estate to all ten children, even though Jon Dziuban was with her when she performed this transaction.

Bertha Dziuban also asked other children financial questions about the same transactions. It appears that she made her own decisions about her assets and did not rely solely on John Dziuban to make these decisions. As a trusted child, John Dziuban and his mother had a close relationship and he had the opportunity to influence her life and these decisions. This opportunity alone, however, does not result in a presumption that John Dziuban exercised undue influence.[16] Bertha Dziuban did not rely on John Dziuban in making these decisions and the relationship was not a confidential or fiduciary relationship. Thus, there is no basis for finding a presumption of undue influence to apply.

But, even if there were a fiduciary or confidential relationship and a presumption of undue influence was accorded to John Dziuban, we conclude that the probate court did not clearly err in finding such presumption would have been overcome. Where a presumption of undue influence arises, the burden shifts to prove that the transactions were not the result of undue influence.[17]

At trial, the probate court found that, if there was a burden shift, John Dziuban had met his burden and did not abuse the relationship. The probate court specifically found that Bertha Dziuban understood the documents she was signing. The probate court based this finding on the testimony of Judge Ronald Bergeron who, in his capacity as a private attorney, met with Bertha

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[16] *In re Hannan's Estate*, 315 Mich 102, 122; 23 NW2d 222 (1946).

[17] *Kar v Hogan*, 399 Mich 529, 541-542; 251 NW2d 77 (1976); *Van't Hof*, *supra* at 393-394.

Dziuban and John Dziuban to deed her property jointly. Judge Bergeron stated that he discussed probate avoidance and the risks of joint ownership with Bertha Dziuban. He further testified that Bertha Dziuban had good mental faculties. Additionally, the probate court mentioned the testimony of several of Bertha Dziuban's children that she had good mental capacity and was strong-willed. The probate court highlighted Bertha Dziuban's familiarity with joint accounts because of her frequent practice of using and adjusting the owners of them.

Paul Dziuban does not allege that there was direct evidence that undue influence was used. Rather, he alleges that the presumption was appropriate and not rebutted. However, the probate court concluded that if there was a presumption, then it was adequately rebutted. Whether or not there is sufficient evidence to overcome the presumption of undue influence is for the trier of fact to decide.[18] "To prove undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will."[19] Here, there was no evidence that Bertha Dziuban did not wish for her estate to pass the way it did. She made arrangements according to her intentions for distribution of her assets, even if the assets have not been used as she may have hoped.

In short, John Dziuban offered sufficient evidence to satisfactorily rebut the presumption of undue influence. The probate court's failure to establish on the record if the presumption was accorded to Paul Dziuban did not deprive him of full consideration of the claim.[20] The probate court effectively held that John Dziuban met his burden to rebut any presumption, stating that if John Dziuban had a confidential or fiduciary relationship with Bertha Dziuban, "it was not abused." And we conclude, considering the evidence presented during the course of the trial, there was sufficient evidence in the record to support that holding.

Paul Dziuban also argues that it was error to find that John Dziuban did not abuse a possible confidential or fiduciary relationship and that more than one child may have had a confidential or fiduciary relationship. As discussed above, the probate court made findings to support his satisfaction that any presumption was adequately rebutted. Additionally, the probate court said that Bertha Dziuban had a trusting relationship with most of her children and involved some of them in her financial dealings. This raised the possibility of confidential or fiduciary relationships with more than one child and highlighted some of the probate court's reasoning in deciding when a parent-child relationship becomes confidential or fiduciary in nature.

Paul Dziuban also disputes the probate court's finding that Bertha Dziuban's loss of eyesight occurred past 1993, when the accounts in question were created. Judge Bergeron reported no recollection of Bertha Dziuban's vision being poor when he created the deeds. The probate court mentioned that poor vision alone would not support a finding of undue influence,

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[18] *In re Estate of Peterson*, 193 Mich App 257, 260; 483 NW2d 624 (1991).

[19] *McPeak v McPeak*, 233 Mich App 483, 496; 593 NW2d 180 (1999).

[20] *Conant, supra* at 502.

and it was not clear how much Bertha Dziuban's vision was impaired in 1993. This was after her diagnosis of macular degeneration, but before she was declared legally blind in 1999.

In sum, we conclude that the probate court did not err in finding that there was no fiduciary or confidential relationship between John and Bertha Dziuban and in determining that any possible presumption of undue influence was rebutted.

III. Determinations of Ownership

A. Standard of Review

Paul Dziuban argues that John Dziuban should not have been granted ownership of the brokerage account and one-half of the certificate of deposit. A trial court's finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made.[21]

B. Joint Accounts

In some sense, a joint bank account has the effect of a testamentary disposition.[22] Funds placed in joint accounts are presumed to be the property of the survivor.[23] This presumption must be rebutted by reasonably clear and persuasive proof.[24] When the presumption of undue influence also exists, the burden is on the survivor on the account to show, by a preponderance of the evidence, that no undue influence exists.[25] If this burden is satisfied, an appellee is able to benefit from the statutory presumption.[26]

Here, as discussed above, John Dziuban has met his burden of showing that no undue influence existed and, therefore, is presumed to be the surviving owner of the accounts. There is no evidence to directly contradict Bertha Dziuban's intent for these accounts to vest in John Dziuban's ownership.

C. Brokerage Account Papers

Paul Dziuban disputes the probate court's finding that Bertha Dziuban filled out the brokerage account papers creating a joint account. It is not clear from the testimony who filled out the papers creating the account. John Dziuban took an active role in opening this account. He stated that when he opened the account, Bertha Dziuban wanted his name on it with her. He stated that the account was set up over the phone and that an application was mailed in. He testified that Bertha Dziuban had to fill out an affidavit of domicile and he took her to have it

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[21] *Miller*, *supra* at 337.

[22] *Jacques v Jacques*, 352 Mich 127, 134; 89 NW2d 451 (1958).

[23] MCL 487.703; *Habersack v Rabaut*, 93 Mich App 300, 305; 287 NW2d 213 (1979).

[24] *Jacques*, *supra* at 136-137.

[25] *Habersack*, *supra* at 305.

[26] *Id*.

notarized, and she had to fill out another one once he returned to California. Bertha Dziuban was active in creating the joint account and reviewed the account statements for the next ten years, but it is not clear which of the papers she filled out.

Paul Dziuban asserts that it was error for the probate court to find that Judge Bergeron explained the risks of joint ownership and avoidance of probate and, therefore, that the court was not convinced that Bertha Dziuban was improperly influenced. Judge Bergeron testified that he was sure that he discussed avoiding probate and that he warned Bertha Dziuban of the risks of joint ownership. The probate court concluded that because Bertha Dziuban understood the consequences of joint ownership that it was her decision to title her assets in this way. We have no basis upon which to overturn this conclusion.

D. Real Estate

Paul Dziuban disputes the probate court's finding that, if John Dziuban had unfettered control over his mother, he did not persuade her to place all of the real estate in his name. Bertha Dziuban titled her assets jointly with several of her children. She also changed who held assets jointly with her a number of times. Paul Dziuban contends that, because Bertha Dziuban was alone with John Dziuban, he asserted more control over her decision to include only him on the brokerage account. But we conclude that Bertha Dziuban's behavior was more consistent with her pattern of making determinations of how to title the assets based on her wishes. We note that she had 11 months of a year to change the joint owner of accounts when John Dziuban was *not* present with her.

These findings of the probate court do not leave us with a definite and firm conviction that the probate court made a mistake. We conclude that the dispositional rulings on the accounts in question follow reasonably the logic of the findings.

IV. Constructive Trust

Paul Dziuban requests the imposition of a constructive trust over the joint accounts. A constructive trust is appropriate when circumstances under which property was acquired make it unconscionable for the legal title-holder to retain beneficial interests.[27] A constructive trust may be imposed to avoid unjust enrichment.[28] Constructive trusts do not arise by agreement or intention, but by operation of law.[29]

Here, Bertha Dziuban's goal was apparently to keep the family farm in the family. It was not clear from her actions or her words how she intended to accomplish this. It is clear that she decided, of her own free will, to leave the real estate equally to each of her children and her accounts to various of her children by titling them jointly. Her express testamentary goal

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[27] *Kent v Klien*, 352 Mich 652, 656; 91 NW2d 11 (1958).

[28] *In re Estate of Swantek*, 172 Mich App 509, 517; 432 NW2d 307 (1988).

[29] *Arndt v Vos*, 83 Mich App 484, 487; 268 NW2d 693 (1978).

involved the land and was silent as to the accounts. She may have wished her accounts to be used by the title-holders to pay for the expenses of maintaining the real estate, but she made no clear expression in act or words to that end. She may have trusted her children to take action to that end, but she did not require it. She had the knowledge, ability, and opportunity to make alternate arrangements, but chose this disposition. We conclude that the probate court did not err when it refused to impose a constructive trust.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JOHNSON.

JULIA L. JOHNSON, Personal Representative of the Estate of DEAN ALAN JOHNSON, Plaintiff-Appellant,	UNPUBLISHED July 19, 2012
v	No. 304420 Lapeer Probate Court
RONDA A. WICKHAM, Defendant-Appellee.	LC No. 10-036286-CZ

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the probate court's order dismissing her complaint with prejudice. Because the probate court properly granted summary disposition for defendant on plaintiff's constructive trust claim on the basis that plaintiff failed to establish a justiciable question of fact, we affirm.

The decedent, Dean Alan Johnson, was killed in a motorcycle accident on July 10, 2010. Plaintiff, Johnson's ex-wife, serves as the personal representative of his estate and conservator for their three children. The controversy in this case concerns the disposition of Johnson's employer-provided death benefits, which primarily include life insurance proceeds and accident insurance proceeds, which were disbursed to defendant, Johnson's sister. Shortly after plaintiff and Johnson's divorce, Johnson changed the beneficiary of his death benefits from plaintiff to defendant. The divorce proceedings were contentious and involved plaintiff's claim that Johnson had sexually assaulted her daughter from a previous relationship. Plaintiff's allegation resulted in criminal charges being brought against Johnson as well as a petition to terminate his parental rights. A jury acquitted Johnson of all of the charges, and he ultimately retained his parental rights to his children. The same judge who presided over the instant case also presided over Johnson's criminal trial as well as the divorce and abuse and neglect proceedings.

After Johnson's death, all of his employment-provided death benefits, roughly $600,000, were distributed to defendant. Thereafter, plaintiff filed a complaint seeking to impose a constructive trust on the funds. Plaintiff alleged that Johnson had intended that defendant use the funds to support his three children. Plaintiff also alleged that defendant breached a fiduciary duty owed to Johnson by exercising undue influence over him at the time that he named defendant as the beneficiary of his death benefits. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on plaintiff's constructive trust and breach of fiduciary duty/undue influence claims. The probate court granted the motion, stating that it was convinced that Johnson trusted defendant and did not want plaintiff in any way involved with his money and assets. The court reasoned that statements that Johnson had made to plaintiff while they were married and vague statements that he made to friends were not enough to set aside his intent that defendant be the beneficiary of his death benefits, as evidenced when Johnson wrote defendant's name on the beneficiary form. The court also determined that Johnson was a competent, intelligent man and did not make his beneficiary designation based on undue influence. Subsequently, the court dismissed plaintiff's remaining conversion claim with prejudice.

We review de novo a lower court's decision granting a motion for summary disposition. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). In reviewing a ruling made under MCR 2.116(C)(10), "a court tests the factual support by reviewing the documentary evidence submitted by the parties." *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We must consider the substantively admissible evidence and all reasonable inferences drawn from that evidence in the light most favorable to the nonmoving party. *Id*. at 567-568; *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. at 120.

Plaintiff argues that the probate court erred by granting summary disposition for defendant on plaintiff's constructive trust claim.[1] A constructive trust may be imposed "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest[.]" *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958). The party seeking to impose a constructive trust must show that the property was "obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property[.]" *Kammer Asphalt Paving Co, Inc v East China Twp Schs*, 443 Mich 176, 188; 504 NW2d 635 (1993) (quotation marks and citations omitted). Notably, however, "it is not necessary that property be wrongfully acquired. It is enough that it be unconscionably withheld." *Kent*, 352 Mich at 657.

[1] Plaintiff does not challenge the probate court's decision granting summary disposition for defendant on her breach of fiduciary duty/undue influence claim. In fact, plaintiff appears to have abandoned her argument with respect to that claim by admitting that defendant "was the proper recipient of the proceeds because she was the last named beneficiary[.]" Moreover, in arguing that the pivotal question concerns Johnson's intent in naming defendant as the beneficiary, plaintiff does not assert that defendant exerted undue influence over Johnson in an effort to be designated the beneficiary of his death benefits.

Plaintiff argues that although Johnson's death benefits were properly paid to defendant because she was the last-named beneficiary, it was unfair and inequitable for defendant to retain the benefits for herself because the evidence showed that Johnson intended the funds to be used for his children. Plaintiff's argument lacks merit. Johnson named defendant as the sole beneficiary of his death benefits, without restriction, and did not indicate an intent that defendant hold the funds in trust for the benefit of his children. In addition, Johnson could have named his children as beneficiaries if he desired, but he did not do so. Plaintiff's claim regarding Johnson's intent was based in part on conversations that she had with him while they were married concerning life insurance and what would happen to the children if he died prematurely. Plaintiff admits that she did not have any discussion with Johnson regarding his death benefits after they divorced. Plaintiff's general, pre-divorce conversations regarding his desire to financially provide for his children if he died prematurely do not establish that Johnson intended for defendant to use his employer-provided death benefits for his children.

Plaintiff also relies on the testimony of Robert Brewer, Johnson's close friend, that Johnson had told him that his children would be better off financially if he died. Brewer also testified, however, that he could not recall whether Johnson made that statement before or after his divorce and Brewer did not know the source of funds that would have purportedly made his children better off financially. Brewer assumed that Johnson was referring to Social Security benefits. Moreover, Brewer testified that he did not know whether Johnson intended for his children to receive his death benefits. Thus, Brewer's testimony sheds little light on Johnson's intent with respect to the benefits.

Plaintiff further relies on the affidavit and deposition testimony of Bethany Shippey and the affidavit of Rebecca McClaren, both former girlfriends of Johnson. Shippey's and McClaren's statements, however, constitute inadmissible hearsay. In her affidavit, Shippey claimed that Johnson had told her that his children "would be set for life if anything" happened to him and that his "employer-provided 'benefit plan' was set up to take care of his children." At her deposition, Shippey admitted that Johnson had never used the term "employer provided benefit plan" and had instead referred to his life insurance policy. Similarly, McClaren averred that Johnson had told her that his children "would be financially stable if he died[,]" and that Johnson named defendant "as the beneficiary of his life insurance proceeds because he trusted that she would hold and use that money for their benefit."

"'Hearsay' is a statement, other than the one made by the declarant . . . offered in evidence to prove the truth of the matter asserted." MRE 801(c). "MRE 803(3) excepts from the rule against hearsay '[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), *but not including a statement of memory or belief to prove the fact remembered or believed* . . . .'" *UAW v Dorsey*, 273 Mich App 26, 36; 730 NW2d 17 (2006) (emphasis added).

Here, Johnson's statements made to Shippey and McClaren were statements of belief not included within the MRE 803(3) hearsay exception. The statements conveyed Johnson's belief that his children would be "set for life," that they would be financially stable, and that defendant would use the life insurance proceeds for their benefit. Further, "a statement explaining a past sequence of events (from the standpoint of the declarant at the time of the statement) is not a then existing physical condition within the meaning of the rule but, rather, 'a statement of memory or belief' that is explicitly excluded from the exception." *People v Hackney*, 183 Mich App 516, 527 n 2; 455 NW2d 358 (1990). Thus, Johnson's statement that his employer-provided benefit plan or life insurance policy had been set up to take care of his children was a statement of belief and, as such, it did not fall within the MRE 803(3) exception.

Plaintiff also asserts that the probate court erred by relying on its prior knowledge of Johnson gleaned from presiding over the previous court proceedings. We note that plaintiff's counsel opened the door for the court's reliance on its prior knowledge by stating that "[t]he Court knows Dean Johnson well. Knows, I think . . . Julia Johnson . . . Rhonda Wickham and the circumstances surrounding this . . . as well as I can . . . argue today." See *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003) ("[E]rror requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.") In any event, even if the probate court erred by relying in part on its prior knowledge, reversal is not required. We further note that plaintiff presented no evidence consistent with a donative intent subsequent to the previous legal proceedings and before his death. Therefore, plaintiff failed to present admissible evidence establishing a justiciable question of fact regarding whether Johnson intended for defendant to use his death benefits to provide for his children. The probate court correctly determined that plaintiff failed to present evidence sufficient to overcome defendant's motion based on MCR 2.116(C)(10). Accordingly, the court properly granted the motion.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of JOHN PATRICK WHITE.

JEROME M. DAHL as Trustee of the JOHN PATRICK WHITE TRUST,

Appellant,

v

GEOFFREY C. LAWRENCE as Personal Representative of the ESTATE OF JOHN PATRICK WHITE, DONALD J. BAUMGARTNER, JACALYN D. BAUMGARTNER, RICHARD A. BEKKALA, SUSAN P. BEKKALA, and THE UNIVERSITY OF MICHIGAN,

Appellees.

UNPUBLISHED
November 18, 2008

Nos. 279866, 279867
Iron Circuit Court
LC No. 06-000070-DA

JEROME M. DAHL as Trustee of the JOHN PATRICK WHITE TRUST,

Petitioner-Appellant,

v

JACALYN DAHL BAUMGARTNER and RICHARD A. BEKKALA,

Respondents-Appellees.

No. 281420
Iron Circuit Court
LC No. 06-000083-CZ

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

These three appeals arise out of the estate plan of John Patrick White, who died of lung cancer on July 12, 2006, at the age of 79, having never married and having no children.

Specifically at issue are whether the will White executed in 2006 (the "2006 Will") shortly before his death should be admitted to probate, whether and to what extent a trust White created in 1993 was funded, and whether that trust could recover certain funds that White transferred into a new bank account created in 2006. The first and last of these issues turn on whether White was unduly influenced by his cousin Jacalyn Baumgartner ("Jacalyn") and his friend and, toward the end of his life, caretaker, Richard Bekkala ("Bekkala"). The trial court found no undue influence; it therefore admitted the 2006 Will to probate and determined that the White Trust could not recover the particular funds. The trial court also found that White had only funded the White Trust with a single bank account. The trustee of the White Trust appeals, and we affirm.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court may consider summary disposition under the correct court rule even if it is granted under an incorrect court rule. *Tingley v 900 Monroe, LLC*, 266 Mich App 233, 245; 731 NW2d 427 (2005), vacated on other grounds 474 Mich 1104 (2006). "We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). The clear error standard of review affords a certain amount of deference to the trial court's findings, and this Court will only reverse those findings if definitely and firmly convinced that the trial court was mistaken. *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 222-223; 707 NW2d 353 (2005). This Court will affirm the correct result, even if it was not necessarily for the correct reason. *Computer Network, Inc v AM General Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005).

The language used in a will or trust is reviewed de novo as a matter of law; the fundamental goal of both is to carry out as nearly as possible the intent of the testator or settlor. *In re Estate of Reisman*, 266 Mich App 522, 526-527; 702 NW2d 658 (2005). In the absence of some ambiguity in the document, that intent is presumed to be found in the plain language used therein. *Id*. Standing is an issue of law that is reviewed de novo. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 291; 737 NW2d 447 (2007). A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, although any preliminary issues of law are reviewed de novo. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007).

This case is very factually intensive. Moreover, the parties alleging that White was unduly influenced admit that they have no direct evidence thereof. Their proofs are, by their own concession, largely based on their views that White's revised estate plan was out of character and contrary to what he would have done if he had been fully aware of various other events in the lives of his family members. It is therefore necessary to go into some detail regarding the evidence adduced during a four-day bench trial.

White was born in 1926. He and his mother were abandoned when he was six or seven years old, and they moved to Iron River, Michigan, where White and his aunt Hope were raised as siblings, their ages being close. Hope had three children, James, Jerome, and Jacalyn. These children, as adults, are involved in this litigation. Collectively, they viewed themselves as having had close relationships with White all of their lives.

White obtained undergraduate and doctorate degrees from the University of Michigan, and according to several witnesses he retained a deep attachment to the University of Michigan throughout his life. He also retained a deep attachment to the Iron River area, keeping a house and his voter and vehicle registrations there despite spending most of his professional life as a professor at Northern Illinois University in DeKalb, Illinois. White was regarded by everyone who knew him as very knowledgeable, very intelligent, very perceptive, very firmly opinionated, very meticulous, very much in control of his life, and very educated; several also noted that although he was friendly, he was also a very direct and even intimidating person. However, he was apparently "baffled" by some things, in particular tax forms and home repairs or "mechanical stuff." White had a close relationship with Hope and Hope's three children, James, Jerome, and Jacalyn.

In 1993, White retired from teaching and returned to Iron River. He set up an estate plan consisting of a trust and a pour-over will. The White Trust document states that it is established "with an initial contribution of one hundred dollars" and providing for the distribution of various assets – the contents of his residences specifically, otherwise in the form of liquidating everything to money – and naming White as the sole trustee.[1] The White Trust provided that White could withdraw any trust assets and amend or revoke the trust's provisions "upon my written and signed direction delivered to the Trustee or attached to this instrument" and alter the trust provisions "by a document executed with the formality required for a valid will or codicil, even though it is not submitted to a probate court." The pour-over will simply devised the entirety of White's estate after payment of obligations and expenses into the White Trust. James and Jerome testified that White discussed his estate plan with them on numerous occasions, advising them that they should do something similar and asserting that the White Trust was "an all encompassing vehicle" in which he had "everything" up to and including his car, his house, his groceries, and potatoes. However, White apparently also told them that he did not have a will because he did not need one, and it is undisputed that – with one notable exception[2] – White never actually *titled* anything in the name of the White Trust.

In 2003, White was diagnosed with cancer of the throat that was, apparently, generally recognized at the time as being terminal. He had a succession of surgeries and medical treatments associated with the cancer, and although the testimony is unclear, it appears that at least some had the effect of making his voice "rough" and "gurgley." He stopped communicating as much with Hope because she was becoming hard of hearing and his voice was becoming unintelligible to her, which White found highly frustrating. Neither James nor Jerome

[1] It also provides that White may name a cotrustee or resign and appoint a successor. Hope and Jerome were named as successor trustees with James as a backup, but by the time of trial, Hope and James had both resigned, apparently at Jerome's request, leaving Jerome as the only trustee.

[2] A single bank account at Wells Fargo Bank, herein referred to as the "Trust account." The store manager at the Iron River branch of Wells Fargo Bank testified that White had several other accounts at that bank with various other names on each. He also explained that White was a "very private" individual, and he did not wish any of those other people to be able to discover each other or the other accounts.

had any discussions with White regarding his estate plans after this time, and they both reduced their contact with White in general,[3] partly because of other events in their own lives and partly because they did not perceive Jacalyn's emailed updates on White's status to be "encouraging" them to visit. It is undisputed that the "two people closest" to White in his last years were Jacalyn and White's friend Richard Bekkala.

White originally retained Bekkala to perform lawn care services, and eventually they became friends; by 2005 Bekkala had taken on additional personal responsibilities for White, including being placed on White's safety deposit box, picking up White's mail, and running errands. By the end of 2005, Bekkala was also responsible for recording entries in White's check register, which White called "the secretary." Bekkala described his relationship with White as being friends, and his services were voluntary on that basis, although often White would tell Bekkala what to do; Bekkala described White as "very direct." Bekkala testified that he did not even have discretion regarding shopping: White would give him a list of specific items to buy, and Bekkala would do so. This was consistent with other witnesses' testimony regarding their observations of the relationship: as another of White's friends and a former student, Robert McCormick, observed, there was "genuine comradery there," but "[a]nyone who knew J. Patrick knew he was very demanded [sic] and opinionated, and wanted things done in a certain way[, a]nd it's clear to me that [Bekkala] had already been well trained with that respect."

Hope's health was deteriorating, as well; by 2005, Jacalyn was acting as Hope's primary caregiver, and Hope was spending a great deal of time in and out of hospitals or other facilities. During a hospitalization in December 2005, it became apparent that Hope was not competent to care for herself, and indeed at the time she was confused, disoriented, and obviously not able to be discharged to anywhere other than another care facility. James suggested a "divestment plan" to distribute Hope's assets to the siblings in order to preserve those assets, and pursuant to that, Jerome wrote an $11,000 check to each of the siblings from Hope's account. In the meantime, according to Jacalyn, Hope had been in the practice of giving gifts of money to her and to her family for many years. At some point in 2005, Hope gave Jacalyn or her children a number of checks from a Scudder Money Market account, and part of Jacalyn's caregiving duties involved cashing Hope's retirement checks, of which she kept half.[4] Jerome discovered funds to be "missing" from the Scudder account while looking into Hope's finances, and Hope was unable to explain what happened to the funds because she was incoherent at the time.

Jerome contacted James and Jacalyn. Jacalyn admitted that she had taken the money. James and Jerome told her that it needed to be returned and that she could not take money from

[3] The last time either of them saw White in person was around Thanksgiving in 2005.

[4] There is no dispute that Jacalyn's retention of half of these checks was entirely proper, although Jacalyn considered it a gift, whereas James and Jerome considered it compensation. The testimony was unclear, but it appears that there is some dispute between the siblings as to whether the other half of those checks was properly accounted for. James and Jerome contend that Jacalyn stole the other half, but they also concede that all of the money they feel to have been wrongly taken from Hope was eventually repaid.

Hope; they later characterized it as theft. However, Jacalyn consistently maintained that it was a gift. The siblings held a meeting on the matter that apparently became quite emotionally charged. Neither James nor Jerome were present at the time the checks were signed, Jerome agreed that Hope was "sometimes" competent in 2005 and that he was not present when the checks were signed; James agreed that if Hope *had* been competent at the time, she had the right to give away her money as she pleased. Hope did not testify. Hope made a considerable recovery after being placed in a nursing home. Nevertheless, no additional evidence was presented regarding the nature of the transactions between Hope and Jacalyn beyond Jacalyn calling them a gift and her brothers calling it theft.

In early January 2006, Jacalyn approached White for help and explained to White that James and Jerome believed she had stolen money from Hope but that Hope had in fact given her the money. By that time, White had known about the $25,000 check and the other checks "for a long time." Jacalyn also discussed the "divestment plan" with White to the extent of explaining to White that she had received a check for $11,000 and another for $3,000, and that she had not been involved in Jerome's and James's meeting with an attorney regarding the plan. White decided to give Jacalyn a cashier's check so that the money could be repaid without James or Jerome discovering the source of the funds. The manager at Wells Fargo Bank testified that the cashier's check was issued because White had asked him how one could conceal the source of the funds from a recipient.

In late January 2006, White was readmitted to the hospital, where he underwent some additional medical procedures and his cancer was diagnosed as being imminently terminal. White indicated that he wanted to make a will; Jacalyn and Bekkala testified that they assumed that meant White did not have one, although they agreed that White never actually said that. By this time, Bekkala was significantly involved in White's care, and Jacalyn was primarily responsible for keeping the rest of the family informed about White's condition. When White left the hospital on March 4, 2006, he was very weak and barely able to move on his own, although by the end of the month he was described by his doctors as "making a nice come-back," and he was eventually even able to drive on his own. Nevertheless, Jacalyn contacted attorney Mark Tousignant, who visited with White at home and worked on drafting a new will. The 2006 Will changed White's estate plan in a number of ways[5] and explicitly revoked the 1993 Will, but it did not address the White Trust, because White had indicated to Tousignant that nothing was titled in the trust, and Tousignant concluded that it was an empty vessel. Tousignant was unaware at the time that there actually was a bank account titled in the White Trust. During the proceedings, White expressed anger with James and Jerome at the way they were treating Hope. White also explained that he no longer wished the White Trust to be his estate plan.

On March 7, 2006, White withdrew all but $30,000 from the White Trust bank account and transferred it directly into a new account. The new account was jointly owned by Jacalyn

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[5] In significant part, it leaves a large bequest to the University of Michigan, a reduced share to James and Jerome, and some stocks to Jacalyn and Bekkala. It leaves nothing to Hope or to the Iron County Museum and Historical Society.

and Bekkala. The new account did not state whether it had any right of survivorship, but the Wells Fargo Bank store manager testified that he had to approve a transaction of that size, and he had explained to White beforehand the consequences of the new account, including the fact that in a joint account, each person "has got sole equal rights to that money just like you and just like anyone else is [sic] on the account," irrespective of the order of names. He discussed the matter and concluded that all three did in fact all want to be joint owners. He explained that that way, "any one of them could have removed the entire amount at any time after it was opened . . . [e]ven after death."

On March 24, 2006, White signed the 2006 Will. He then tore up what witnesses believed to be his 1993 Will and the White Trust document.[6] White had numerous visitors during this general time period, almost all of whom testified that although he was very weak physically, he remained his usual strong and independent self mentally, and indeed he continued to do so until the end of his life. One witness testified that he seemed not to be the same person she had known because he had difficulty interacting, but numerous other witnesses who had been in greater contact with White testified adamantly to the contrary. White died on July 12, 2006.

The first issue in this case is whether the White Trust was funded with any assets other than the Wells Fargo Bank account.[7] No particular formality is required to establish a trust, so long as the totality of the evidence clearly and unambiguously shows that the settlor intended to do so. *Crissman v Crissman*, 23 Mich 217, 221 (1871); *Frost v Frost*, 165 Mich 591, 593-594; 131 NW 60 (1911). However, it is additionally necessary to do something – in other words, undertake an affirmative act – to "divest the donor of the equitable ownership, and vest such ownership in the donee." *O'Neil v Greenwood*, 106 Mich 572, 579; 64 NW 511 (1895). Where the donor actually retains the property involved, it must be particularly unequivocally demonstrable "that, from the time it is made, the beneficiary has an enforceable equitable interest in the property, contingent upon nothing except the terms imposed by the declaration of the trust itself." *Hamilton v Hall's Estate*, 111 Mich 291, 295-296; 69 NW 484 (1896). A wide variety of acts can suffice. See *O'Neil*, *supra* at 579-580 and *Ellis v Secor*, 31 Mich 185, 189-192 (1875).

However, some kind of explicit conveyance of identified assets for the benefit of another must take place. *Pierowich v Metropolitan Life Ins Co*, 282 Mich 118, 121; 275 NW 789 (1937); *Osius v Dingell*, 375 Mich 605, 613; 134 NW2d 657 (1965). Whether such a transfer took place may also be determined by examining all the facts and circumstances. *Osius*, *supra* at 614. Therefore, the trustee is correct in asserting that formally retitling assets in the name of the trust

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[6] The trustee raised an argument that Tousignant never provided a complete copy of the White Trust document, because an addendum referred to in the document was missing from the documents Tousignant provided. Tousignant provided everything White gave to him, and the trustee found a copy of the addendum, which proved to be merely a discussion of White's views of how a school ought to spend money. The addendum clearly has no bearing on the critical issue of whether, and to what extent, the White Trust was funded.

[7] The trial court ruled that, notwithstanding White's destruction of the White Trust document, he did not revoke the White Trust, or even intend to, because he intentionally and explicitly left $30,000 in the White Trust's bank account. This ruling has not been cross-appealed.

is unnecessary. However, no evidence has been provided of any actual conveyance taking place. The trustee accurately notes that the White Trust document *presumes* that the White Trust contains assets, but that might suggest a prior transfer or an anticipated future transfer at some time before the trust becomes effective. It would also be consistent with the contemporaneously executed pour-over will. A list of assets was found with a draft copy of the White Trust document, but again, this does not necessarily prove anything.

The trustee also relies on the so-called "income-corpus rule." *City of Austin v Austin Nat'l Bank of Austin*, 503 SW2d 759, 760-761 (Tex, 1973). No Michigan court has discussed this, but the rule is simple and rational in appropriate circumstances: an *absolute bequest* of income from some property may be considered an effective gift of the property itself. See 174 ALR 319. In *Coble v Patterson*, 114 NC App 447, 453; 442 SE2d 119, 122; (1994), the Court of Appeals of North Carolina explained that a *testamentary* gift of income, where the testator failed to provide any limitation on the extent of that gift and also failed to provide any *other* disposition of the principal from which that income was derived, will constitute a gift in fee of the principal. In *Matter of Tayrien's Estate*, 609 P 2d 752, 755 (Okla, 1980), a similar rule is explained in the context of the presumption that "a testator intends to dispose of his entire estate and avoid intestacy in whole or in part." This is, again, quite rational: as a *practical* matter, irrevocably divesting one's self of all benefits from some thing *effectively* divests one's self of that thing.

However, the rule is also clearly intended to apply where the "gift" is a testamentary bequest of some sort. Here, the trustee argues that White intended to convey his stocks to the Trust because he arranged to have the dividend checks paid into the White Trust's bank account. We find the "income-corpus rule" inapplicable. On the basis of the evidence here, White *did not* in any way divest himself of control over the income (the stock dividends), or of the corpus (the stocks themselves). As the sole trustee of the White Trust, he retained the right to manipulate at will whatever assets he placed into that trust, including the stock dividend payments. And, in the absence of some manifested intent to permanently surrender all future control of stock dividends, we cannot conclude that merely directing them to go to another entity automatically precluded him from subsequently taking some other action with those stocks. Thus, there is no evidence that White gave up personal control over those stocks.

The trial court rendered the correct legal ruling that White needed to "do something" in order to convey his assets into the White Trust. Furthermore, the trial court did not commit clear error in reaching the factual finding that the evidence failed to show White doing so here. Therefore, we affirm the trial court's holding that, at the time White died, the only asset in the White Trust was the $30,000 in the White Trust's bank account, and all of White's other assets belonged to his estate.

The other issue in this matter is whether White was unduly influenced into making the 2006 Will or transferring all but the above-mentioned $30,000 from the White Trust account into the new joint account.

Initially, we reject the trustee's contention that the new account lacked a right of survivorship. The trustee correctly observes that a bank account *can* be joint without carrying a right of survivorship. *Leib v Genesee Merchants Bank & Trust Co*, 371 Mich 89, 92-95; 123 NW2d 140 (1963). However, if the account does not explicitly say anything about survivors or survivorship, "the intent of the parties can be founded upon other admissible evidence." *Id*. at

94. Furthermore, an "ordinary" joint tenancy is characterized by a right of survivorship, *even if not expressly designated* with such a right – the only effect of no express language is that the right of survivorship in an "ordinary" joint tenancy is unilaterally severable by any party thereto. *Wengel v Wengel*, 270 Mich App 86, 94-95; 714 NW2d 371 (2006). In *Leib*, there was testimony from the bank vice-president but not the depositor as to the "intent of the parties," and there was evidence that the depositor regarded a particular joint account as only his. In contrast, the disinterested evidence here is that White was advised that the legal consequences of placing money into the "new account" would be the creation of a joint account *with a right of survivorship*, even if that was not specifically written on the account, and that White deliberately put his money into that account with full knowledge.

"It can not be claimed that a will is valid, unless the testator not only intends, of his own free will, to make such a disposition, but is capable of knowing what he is doing, of understanding to whom he gives his property, and in what proportions, and whom he is depriving of it as heirs or devisees under the will he revokes[.]" *Beaubien v Cicotte*, 12 Mich 459, 489-490 (1864). Thus, a will is invalid if it is the product of undue influence, meaning that "'the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will.'" *In re Karmey Estate*, 468 Mich 68, 75; 658 NW2d 796 (2003), quoting *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). "Undue influence may be exercised through fraud," and it may also be established by inference. *Dodson v Dodson*, 142 Mich 586, 588-589; 105 NW 1110 (1905). "The influence exerted, to be deemed 'undue,' must be such as amounts to moral or physical coercion, so that the testatrix was prevented from exercising her own judgment and free will, and her act became, in effect, that of another." *In re Klinks Estate*, 210 Mich 614, 618; 178 NW 14 (1920).

A presumption of undue influence arises where the evidence shows "(1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction." *Kar*, *supra* at 537. However, it is always incumbent on the proponents of a will to make at least a prima facie showing that the testator had sufficient capacity to make that will, and ultimately to prove that affirmatively if the other proofs warrant doing so. *Beaubien v Cicotte*, 8 Mich 9, 12-14 (1860); *Kempsey v McGinniss*, 21 Mich 123, 147-150 (1870). The proponent of any particular fact – including the existence of undue influence – has the burden of proving that fact, and the proponent of a *case* continues to carry the burden of proving the *case*. *Kar*, *supra* at 538-540. The presumption of undue influence is only "mandatory" if no rebuttal evidence is introduced, whereas it remains a "permissible inference" unless such overwhelming rebuttal evidence is introduced that it meets "the standard for a directed verdict." *Id*. at 541.

There is no serious dispute that the elements are met here: Jacalyn and Bekkala were in positions of confidence and trust, they participated in some way in preparing the 2006 Will or in the bank account transfer, and they benefited therefrom. Although the trustee contends that the trial court failed to apply, or even mention, the presumption, the trial court's finding that White was not, in fact, unduly influenced necessarily entails a finding that there was sufficient rebuttal evidence to reduce the presumption to a mere permissible inference that it declined to make. See *Brooks v Delrymple*, 1 Mich 145, 149-150 (1848). Furthermore, when it denied a motion for reconsideration or a new trial, the trial court did explicitly find the presumption, if any, "was clearly overcome by the evidence at trial." We find no clear error in that finding.

The evidence overwhelmingly shows that White was not subjected to any effective *direct* manipulation. Indeed, the testimony described White as a person who, to his last moments, was far more likely to impose his will on those around him, no matter what his physical condition. We find that ample evidence was provided tending to rebut the presumption of undue influence, reducing that presumption from a mandatory one to a merely permissible one. The gravamen of the will opponents' argument is, in fact, that Jacalyn and Bekkala controlled White indirectly, by controlling what information he had available. Indeed, the will opponents explicitly or implicitly conceded that they had no actual evidence that Bekkala or Jacalyn exerted any other kind of influence over White.

Appellants allege that Bekkala unduly influenced White by failing to record the transfer of all but $30,000 from the White Trust account in White's check register and failed to advise Tousignant of that transaction. However, the check register did not keep a running balance of the account, the transfer was direct, it would be reasonable to conclude that White knew what he had done with his own money, and Bekkala felt it was not his place to give White financial advice or to inject anything into the discussions with Tousignant unless invited.[8] Bekkala in particular was described by all witnesses as clearly a well-trained subordinate. We find in this no evidence that Bekkala lied to White, kept information from White, or otherwise influenced White by arranging for White to receive inaccurate or incomplete information.

Jacalyn allegedly unduly influenced White largely on the basis of allegations that she defrauded Hope, James, and Jerome. Aside from the implication that Jacalyn is of an inherently distrustful character, these allegations have no bearing whatsoever on whether Jacalyn lied to White. The only coherent claim that we can discern that pertains to White is the allegation that Jacalyn failed to disclose to White her alleged theft from Hope, wrongly described James and Jerome as making untrue accusations against her, and mislead White as to James' and Jerome's interest in him and treatment of Hope.

However, the above allegations all presume a particular resolution of the relative credibility of witnesses: Jacalyn consistently maintained that the money she received from Hope was a gift of which White had long since been well aware, and explaining that James and Jerome were accusing her of something she felt was untrue would have been strictly true. The evidence reveals an antagonistic and distrustful family relationship with some likelihood that the siblings genuinely perceived Hope's mental state differently; it is possible that Jacalyn was incorrect, but we see no evidence that she lied. Her emails regarding White were apparently neither encouraging nor discouraging, and James and Jerome testified that they did not visit for a variety of reasons. The evidence does not show that Jacalyn engaged in a program of keeping White's family away from him and making him believe that they were disinterested in his welfare. See *In re Persons' Estate*, 346 Mich 517, 532-534; 78 NW2d 235 (1956). The evidence does not

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[8] White asked Bekkala for a suggestion for a single bequest and then subsequently disregarded the suggestion Bekkala offered.

clearly reveal how "supportive" of the divestment plan Jacalyn was, but to the extent she received money from it, she divulged that to White. We find no basis for disturbing the trial court's apparent conclusion that Jacalyn's testimony was credible.

In short, the trial court's statement that there was no evidence "that anybody lied to anybody" might be an overstatement; however, the trial court did not commit clear error to the extent it concluded that there was no evidence that anybody lied to White. The evidence was, in fact, that White was fully in command of his faculties, largely in command of anyone and everyone around him, and if not fully informed about the world around him, then at least not being actively mislead.[9] The evidence of White's self-control was sufficient rebuttal of the presumption of undue influence that the trial court did not commit clear error in finding it merely permissible and deciding that the evidence showed the contrary.

The will opponents also assert that the trial court erroneously excluded evidence of events that took place after the 2006 Will was executed. We disagree. The conduct of a beneficiary after the execution of a will may indeed be probative in determining whether undue influence was exerted over a testator. *Persons' Estate*, *supra* at 532. However, the trial court did not commit any legal error by ruling that such evidence was inherently inadmissible; rather, it did not find the proffered evidence relevant to this case except to the extent it affected something that took place before the will was executed. This is a correct statement of the law. None of the proffered events that took place after the will execution appear to show anything more than a strained family relationship, a belief on the part of Jacalyn and Bekkala that they actually were the copersonal representatives as stated in the 2006 Will, a distrust of and unwillingness to work with James and Jerome, and a belief that the new joint Wells Fargo account was outside of White's estate. The trial court did not err in excluding this evidence as irrelevant to whether Jacalyn or Bekkala unduly influenced White.

"[W]hile it may be said that a testator's blood relations are the natural objects of his bounty, his bounty is not limited by blood relationship, nor have his blood relations any natural or inherent right to his property." *Spratt v Spratt*, 76 Mich 384, 391; 43 NW 627 (1889). Ultimately, the will opponents argue that, because White left an estate plan that seemed contrary to their views of natural justice, White *must* have done so under undue influence. Their proof, however, appears to presume that a finding of undue influence has already been established, or at most consists of evidence from which multiple inferences other than criminal wrongdoing could be drawn, and to the extent it can, it appears to be in the nature of character evidence. Although the evidence certainly does not rule out the possibility of undue influence, the trial court did not commit clear error in reaching the factual finding that none had been proven, even taking the presumption of undue influence into account.

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[9] The will opponents also argue that White did not know what he owned without Bekkala and Jacalyn to tell him. In fact, the evidence shows the opposite: that White knew precisely what he owned, to the extent of making corrections to some of the lists prepared for him, and the help from others was more to establish the specific details and to reconfirm what White already knew.

This conclusion ultimately disposes of the final issue: whether the White Trust can recover the funds that White transferred into the new joint account on March 7, 2006. We agree that the trial court's discussion could be construed as incorrectly applying the principle of standing, but we find that it reached the correct result.

Standing requires, at a minimum, that the defendant caused the plaintiff an actual injury to some legally protected interest that can be repaired by a court ruling. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001). If the money was not wrongfully removed from the White Trust, the White Trust clearly fails this test. However, "standing" refers to a status required of a would-be litigant to *bring* a lawsuit. *Id*. This writer therefore agrees with the trustee that "standing" depends on the contents of the pleadings alone. See *Dodak v State Administrative Bd*, 441 Mich 547, 560 n 22; 495 NW2d 539 (1993), disapproved of on other grounds *Rohde v Ann Arbor Public Schools*, 479 Mich 336, 353-354; 737 NW2d 158 (2007). Although the trial court did not explicitly cite a court rule, and it did use the word "standing," it is clear from the transcripts that the trial court granted summary disposition pursuant to MCR 2.116(C)(10) because it found that the trustee could not prevail at trial, not because it found the suit barred for a lack of standing

We find this to be correct because, as discussed, the trial court did not commit clear error in finding that White was not unduly influenced and the new joint account had a right of survivorship. Therefore, the trial court did not commit clear error in finding that White had legitimately and properly removed that money from the White Trust in the process of putting it into the "new" account. Therefore, even if it had been proven that Jacalyn and Bekkala were not entitled to retain the money in the "new" Wells Fargo account, the White Trust had no basis for recovering it.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

In re HARRIET FISHBECK TRUST

WILLIAM M FISHBECK,

Petitioner-Appellant,

v

CATHERINE A. BRAUN,

Respondent-Appellee.

UNPUBLISHED
April 24, 2003

No. 233858
LC No. 91-096477-TI
LC No. 90-094073-SE

Before: Donofrio, P.J., and Markey and Murray, JJ.

PER CURIAM.

Petitioner appeals by right the decision of the probate court finding facts and imposing no surcharge on respondent on remand from our Supreme Court, *In Re Fishbeck Trust (Fishbeck v Braun),* 463 Mich 940; 620 NW2d 851 (2000), which vacated Part III of *In re Harriet Fishbeck Trust*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 1999 (Docket No. 208585), (*Fishbeck II*). We affirm.

The underlying facts of this case need not be repeated here. In a 1993 bench trial the probate court found that in 1956 the petitioner and his parents orally agreed to convey the family farm and its related equipment to him on their death. The probate court also found that the family agreement was amended in 1980 to give petitioner only a life estate in part of the farm, which would pass on his death to respondent's children from her first marriage. This Court affirmed the trial court's judgment granting specific performance of the amended family agreement instead of Harriet's 1987 amended trust and last will and testament, *In Re Harriet Fishbeck Trust*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 1996 (Docket No. 170708), (*Fishbeck I*), lv den sub nom *In Re Fishbeck Trust (Fishbeck v Braun),* 454 Mich 915; 564 NW2d 49 (1997).

With this latest appeal, petitioner first argues that the doctrine of the law of the case does not preclude his challenge to respondent's children taking under the amended family agreement as determined by the trial court in its 1993 judgment. We disagree. Whether the law of the case applies is a question of law subject we review de novo, *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001), but the trial court's factual findings are reviewed for clear error, MCR 2.613(C); *In re Webb H Coe Marital and Residuary Trusts*, 233 Mich App 525, 531; 593 NW2d 190 (1999).

The doctrine of the law of the case provides that "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The doctrine also binds lower courts, which may take no action on remand that is inconsistent with an appellate court's decision on the case. *In re TM (After Remand)*, 245 Mich App 181, 191; 628 NW2d 570 (2001); *McCormick v McCormick (On Remand)*, 221 Mich App 672, 677-679; 562 NW2d 504 (1997). Here, the trial court was limited by the purposes for which our Supreme Court remanded this case, to "consideration [of] whether respondent should be surcharged" under former MCL 700.544(1) and MCL 700.818(2) and (4), and to "make the necessary findings of fact and determine whether to impose a surcharge." *In Re Fishbeck Trust, supra*, 463 Mich 940.

The application of the law of the case is a discretionary policy of the courts, *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002), but is followed to foster finality of judgment and also because an appellate court lacks jurisdiction to modify its own judgments except on rehearing, *Grievance Administrator, supra*, 260; *Ashker, supra*, 13; "The law of the case is applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts." 5 Am Jur 2d, Appellate Review § 605, p 301.

The law of the case may not be applied where the facts have materially and substantially changed, *Grace, supra*, 362, or where an intervening change in the law has occurred, *Sumner v General Motors Corp (On Remand)*, 245 Mich App 653, 662; 633 NW2d 1 (2001), but petitioner alleges neither a change in the facts nor a change in the law. Although the doctrine of the law of the case is inapplicable to issues that have not actually been decided either implicitly or explicitly in the prior appeal, *Grievance Administrator, supra*, 261, here, the trial court specifically found in its original judgment that any alleged influence by respondent in 1987 (when Harriet changed her will and trust) had no bearing on the family agreement reached in 1956 and modified in 1980. This Court affirmed the family agreement, as determined by the trial court in *Fishbeck I, supra*, and specifically affirmed the trial court's declination to reach the petitioner's claim of undue influence. *Fishbeck I, supra*, slip op at 8

Thus, Petitioner's undue influence claim is beyond the scope of remand, was already addressed by the trial court it its initial judgment, and affirmed by this Court in *Fishbeck I, supra*. Further litigation of this issue is barred by the law of the case and the need for finality of judgment. *Grievance Administrator, supra*, 261; 5 Am Jur 2d, Appellate Review § 605, p 301. Similarly, petitioner's claim of breach of fiduciary duty (which could not have arisen until after the amended family agreement was in place in 1980) was implicitly rejected because it was immaterial to the amended family agreement.

Next, petitioner argues that on remand the trial court erred by finding that respondent did not breach any fiduciary duties, including failing to keep petitioner informed of the administration of Murray's trust and failing to exercise undivided loyalty. Accordingly the trial court abused its discretion by not surcharging respondent. We disagree. Equitable principles govern proceedings in probate court, *In re Cox's Estate*, 284 Mich 628, 633; 279 NW 913 (1938), and appeals are not de novo but on the record, MCR 5.802(B)(1); MCL 600.866(1); *In re Green Charitable Trust*, 172 Mich App 298, 331; 431 NW2d 492 (1988). Although, factual findings of the probate court are reviewed for clear error, *In re Webb H Coe Marital and Residuary Trusts*, *supra*, 531, substantive decisions of the probate court, including whether to surcharge a fiduciary, are reviewed for an abuse of discretion, *In Re Tolfree's Estate*, 347 Mich 272, 289, 291; 79 NW2d 629 (1956); *In re Rice Estate*, 138 Mich App 261, 270; 360 NW2d 587 (1984). An abuse of discretion occurs only when a trial court's decision is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment, but defiance thereof, not the exercise of reason but rather of passion or bias." *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999), and quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Analysis of this issue must start with the purpose for which our Supreme Court remanded this case to the trial court, which was to "make the necessary findings of fact and determine whether to impose a surcharge" under former MCL 700.544(1) and MCL 700.818(2) and (4). *In Re Fishbeck Trust*, *supra*, 463 Mich 940. Our Supreme Court properly reminded this Court that it is the trial court that determines facts in the first instance, and this Court reviews those findings for clear error. MCR 2.613(C). When testimony before the trial court conflicts, this Court will accord great deference to the trial court's assessment of credibility because of its ability to hear and see the witnesses as they testify. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998); *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988).

Here, it was undisputed, and the trial court properly found, that at the time of the alleged improprieties, respondent was not the trustee of Harriet's trust. Although respondent was the nominal co-trustee of Murray's trust, she never exercised any control over or administered any of the property in either trust. Thus, as to Harriet's trust, respondent could not be found liable because she was not a trustee, and as to Murray's trust, respondent could not be liable for any obligations "*arising from ownership or control of property of the trust estate,*" or for torts committed "*in the course of administration of the trust estate*" because she did not exercise ownership or control, or administer the trust estate. The trial court did not clearly err by finding no liability under former MCL 700.818(2).

For the same reasons, the trial court did not clearly err by finding that respondent breached no duty under former MCL 700.544(1) that caused loss to the estate. No loss occurred to Murray's trust as result of improprieties listed in the statute: embezzlement; commingling (it was petitioner who controlled the trust assets and commingled them); negligence or wanton mishandling of an estate (petitioner managed and controlled the trust assets); self-dealing (the trial court found that the changes Harriet made were her own uninfluenced by respondent); failure to account or to timely terminate an estate (none was alleged); and, the trial court found no other breach of duty occurred.

Harriet was the settlor of her own trust. By its terms, she could revoke or amend in her discretion. Further, under Murray's trust, Harriet held a power of appointment over Murray's trust A (the marital deduction trust), which she exercised on her death through article III of her last will and testament. Petitioner argues that Harriet was required to give him notice as co-trustee pursuant to art. V, § (B)(7) (an intervivos power of appointment) of Murray's trust agreement but Harriet exercised her testamentary power of appointment authorized by art. V, § (B)(3). Harriet was neither required to give notice to the trustee of Murray's trust by the trust agreement nor was it advisable because her will was always revocable and subject to amendment before her death. Thus, notice to petitioner as co-trustee of Murray's trust after Harriet's death (when her last will and testament was filed with the probate court) was proper. Furthermore, as a contingent beneficiary during Harriet's lifetime of Harriet's intervivos, revocable trust, Harriet did not have a fiduciary duty to advise petitioner of amendments to her trust agreement. "The trustee shall keep the presently vested beneficiaries of the trust reasonably informed of the trust and its administration." MCL 700.814(1), repealed by 1998 PA 386, effective April 1, 2000. See e.g., *In re Childress Trust*, 194 Mich App 319; 486 NW2d 141 (1992) (a contingent beneficiary of a revocable, intervivos trust became a vested contingent beneficiary after the trust became irrevocable on the death of the settlor).

As for respondent's duties as co-trustee of Murray's trust, the trial court obviously chose to credit respondent's testimony that she did not understand the legal documents involved, that she never counseled or suggested that her mother exercise her power of appointment or amend her trust agreement, that she did not know what Harriet intended to do when she drove her mother (who was not a licensed driver) to Urquhart's office, and after the fact, Harriet did not inform respondent of any detail (consistent with the trial court's finding that Murray and Harriet kept financial matters "close to the vest"), but only that she had changed things "to make things fair." The record amply supports the trial court's factual determination that Harriet acted of her own free will and was not uninfluenced by respondent.

Further, the trial court correctly noted that to establish a breach of fiduciary duty it is necessary show more than "mere mistakes or errors of judgment where [a fiduciary has] acted in good faith," *In re Green Charitable Trust*, *supra*, 314, and that a showing of "bad faith," or "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty," *id*., 315, quoting *Commercial Union Ins Co v Liberty Mutual Ins Co*, 426 Mich 127, 136, 393 NW2d 161 (1986), is required. On this record, the trial court did not clearly err by finding that respondent did not act in bad faith.

Former MCL 700.818(4) provided: "The question of liability as between the estate and the trustee individually may be determined in a proceeding for accounting, surcharge, indemnification, or other appropriate proceeding." A proceeding to "surcharge" a trustee occurs when a fiduciary is held personally liable for a loss caused to the estate by breach of fiduciary duty. For example, when a breach of fiduciary duty resulted in loss to an estate (failing to timely close the estate as required by statute before a bank failure), each of three co-executors was surcharged for the loss. *In Re Tolfree's Estate*, *supra*, 288. In the present case, the trial court did not clearly err by finding that even if respondent breached a fiduciary duty, no loss to the estate occurred as a result because Harriet's amended trust and will were not enforced. Thus, the trial court did not abuse its discretion by determining that no surcharge should be imposed on respondent.

However, the real issue in this case is whether petitioner may "surcharge" respondent for his attorney fees as result of a decade of litigation. As this Court noted in *Fishbeck II*, slip op 3, Michigan follows the American rule whereby each litigant is responsible for his own attorney's fees in the absence of an express statute, court rule, or judicial exception. *In re Freeman Estate*, 218 Mich App 151, 156-157; 553 NW2d 664 (1996); *In re Sloan Estate*, 212 Mich App 357, 361; 538 NW2d 47 (1995). Michigan also follows the rule that to obtain compensation from an estate for legal services rendered, the estate must have been conferred a benefit by either an increase or preservation of its assets. *Id.*, 362; *In re Valentino Estate*, 128 Mich App 87, 94-95; 339 NW2d 698 (1983). Here, petitioner may not recover his legal fees because they were not incurred to enhance or preserve the estate. They were incurred to enforce the family agreement in derogation of his mother's amended trust and last will and testament.

Petitioner also cannot prevail under the theory that he successfully defended an action to remove him as co-trustee. Several Michigan cases have allowed a fiduciary to recover attorney fees from the estate as an expense of administration after successfully defending a removal action on theory that stability of administration benefits the estate. See e.g., *In re Gerber Trust*, 117 Mich App 1, 323 NW2d 567 (1982), and *In re Hammond Estate*, 215 Mich App 379, 387-388; 547 NW2d 36 (1996). *In re Valentino Estate*, *supra*, is also instructive. This Court held that attorney fees incurred by the guardian and the conservator (separate persons) of a protected minor child of the decedent could not be assessed against the decedent's estate because there was no benefit to the estate from the litigation initiated by either the guardian or conservator. *Id.* at 93-94. Further, this Court noted that a fiduciary must have fully prevailed and not contributed to the underlying cause of the litigation to recover attorney fees from the estate, opining:

> Because the orderly administration of an estate requires that fiduciaries not be changed unnecessarily, we hold that attorney's fees for defending the fiduciary may be chargeable to the estate. However, the *Baldwin* [*In re Baldwin's Estate*, 311 Mich 288; 18 NW2d 827 (1945) (fiduciary did not fully prevail)] and *Davis* [*In Re Davis's Estate*, 312 Mich 258; 20 NW2d 181 (1945) (fiduciary contributed to the situation resulting in litigation)], cases show that, where the fiduciary does not completely prevail, or where the fiduciary was partially to blame for bringing about unnecessary litigation, the fiduciary rather than the estate should be responsible for the [fiduciary's] attorney's fees. [*Id.*, 95-96:]

In this case, although respondent in 1991 moved to remove petitioner as a co-trustee or in the alternative to appoint a receiver, petitioner's primary litigation was instituted to compel distribution of the estate and trust property in derogation of the express terms of Harriet Fishbeck's last will and amended trust. For the most part, petitioner was successful, except that the trial court found that the family agreement was amended in 1980. As to respondent's motion to remove petitioner, the trial court denied it in an order entered on June 3, 1992, that also permitted petitioner to amend his complaint to allege that respondent breached her fiduciary duties and also addressed discovery issues. In deciding the removal motion, the trial court ruled:

> The request for appointment of a receiver is denied. The court is not persuaded that a receiver will enhance the ability of the parties who ultimately prevail to collect any judgment that may be rendered in this case. The court directs that William Fishbeck maintain accounting records in a manner and form agreed to by all parties, and failing that, in manner and form ordered by the court following hearing requested by any interested party. [Order with respect to discovery, jury trial, and William Fishbeck's request to amend pleadings, June 3, 1992; ¶ 2.]

Thus, respondent's motion for removal was a minor pretrial matter resolved well before the trial in this matter was commenced a decade ago. The litigation here did not involve attempting to remove petitioner as co-trustee; it centered on petitioner's claim that an oral family agreement existed contrary to the will and trust of his mother. Moreover, petitioner was not without fault for the main litigation (keeping the family agreement a secret, even from the family's estate planning attorney), and for the removal motion (exclusion of respondent from management of the trusts and commingling of trust assets). Petitioner also did not totally prevail on either matter. The trial court found that the family agreement was slightly different from what petitioner claimed, and on the removal motion, petitioner was ordered to account "in a manner and form agreed to by all parties," or as ordered by the court. Of course, the main reason petitioner cannot prevail on his claim for surcharge is that his attorney fees were not incurred to benefit the estate, the incurred attorney fees benefit William Fishbeck. *In re Sloan Estate*, 361-362. Petitioner simply provides no authority or meritorious argument that an exception to the American rule applies in this case. *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 152; 610 NW2d 272 (2000).

Petitioner also argues the doctrine of clean hands renders the family agreement unenforceable by respondent's children because it is the product of respondent's disloyalty. We disagree.

The doctrine of clean hands may be asserted as a defense to a claim for equitable relief and provides, "that one who seeks the aid of equity must come in with clean hands." *Rose v National Auction Group*, 466 Mich 453, 463; 646 NW2d 455 (2002), quoting *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975), quoting *Charles E Austin, Inc v Secretary of State*, 321 Mich 426, 435; 32 NW2d 694 (1948). Moreover, to bar relief under the clean hands doctrine the misconduct of the party seeking relief "must bear a more or less direct relation to the transaction concerning which complaint is made . . . ." *McFerren v B & B Investment Group*, 253 Mich App 517, 254; 655 NW2d 779 (2002), quoting *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 671; 5 NW2d 524 (1942).

Here, respondent did not seek enforcement of the family agreement in equity, petitioner did. Respondent, in fact, offered proofs in opposition to the existence of the family agreement, which the trial court considered together with all of the other evidence in arriving at its conclusion, affirmed on appeal, that the family agreement was amended in 1980, well before any alleged impropriety by respondent. Further, respondent's alleged misconduct in 1987 bore no direct or indirect relation to the family agreement, last amended in 1980. Thus, the doctrine of clean hands as a defense to equitable relief has no application to the instant case. Moreover, petitioner's argument also fails under principles fostered by the law of the case doctrine: finality of judgment and lack of jurisdiction by this Court to modify its prior judgment except on rehearing. *Grievance Administrator, supra*, 261; *Ashker, supra*, 13.

Finally, petitioner argues that the trial court erred by failing to impose mandatory sanctions pursuant to MCR 2.116(F) and 2.114. We disagree. Petitioner fails to cite where in the record the trial court was specifically requested to impose sanctions for alleged violations of MCR 2.114(D), or requested that the trial court find respondent or her counsel in contempt pursuant to MCR 2.116(F). Both court rules require a finding by the trial court of a violation of the court rules. As a general rule, this Court will only review issues decided by the trial court. *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). See also *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (to be preserved for appeal an issue must be both raised and decided by the trial court).

Petitioner asserts this issue was raised as part of his motion to surcharge respondent, which requested only that the trial court "assess cost and attorney fees against respondent." Petitioner filed his motion on June 19, 1997, years after the alleged court rule violations. On remand, the trial court rejected petitioner's factual claims and denied petitioner's motion to surcharge respondent. As discussed above, the trial court did not clearly err in its factual findings or abuse its discretion by denying a surcharge. In sum, petitioner abandoned this issue by failing to timely preserve it, and it was properly rejected as part of the trial court's order on remand denying imposition of a surcharge on respondent.

We affirm.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Christopher M. Murray

S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

In re Tobias Estates.

CAROL TOBIAS, as personal representative of THE ESTATE OF RAYMOND TOBIAS and THE ESTATE OF ROGER TOBIAS,

Petitioner-Appellant,

v

GREGG B. DAVIS and DIANN L. DAVIS,

Respondents-Appellees.

UNPUBLISHED
May 10, 2012

No. 304852
Barry Probate Court
LC No. 11-025721-CZ

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Petitioner Carol Tobias, as personal representative of the Estates of Raymond Tobias and Roger Tobias, appeals as of right the trial court's order granting defendants Gregg and Diann Davis's motion for summary disposition. We affirm.

I. FACTS

This case arises from disputes between the parties involving two separate issues. The first challenges the validity of two deeds that Raymond Tobias executed before his death. The second issue involves the handling of certain bank account funds.

A. THE DEEDS

In 1943, Raymond Tobias and his then wife Dora purchased approximately 40 acres of land in Carlton Township, Barry County, Michigan. Dora Tobias died in May 1977. Raymond Tobias then married his second wife, Cleone Reigler Tobias. And in November 1978, Raymond and Cleone Tobias executed a quit-claim deed to Raymond's only son, Roger Tobias, regarding the 40-acre property. The language of the 1978 deed reserved a power of appointment, stating in pertinent part as follows:

> GRANTORS reserve and grant to RAYMOND H. TOBIAS the full use, benefit, control, possession and power to sell or otherwise deal with said premises

> for and during his lifetime, and RESERVE AND GRANT to CLEONE REIGLER TOBIAS, upon the death of RAYMOND H. TOBIAS, the full use, benefit, control, income and possession of said premises for and during her lifetime, provided she is married to RAYMOND H. TOBIAS at the time of his death.

In July 1982, Raymond and Cleone Tobias executed a quit-claim deed, transferring two acres of the 40-acre property to Raymond Tobias' granddaughter, Diann Davis (then known as Diann Tobias). Diann built a home on the two acres. Diann married Gregg Davis in 1995, and transferred ownership of the two acres to herself and Gregg Davis.

Cleone Tobias died in August 2002. In May 2007, Raymond Tobias executed a warranty deed, transferring another 23 acres of the original 40-acre property to the Davises. These 23 acres of land were adjoining to the Davises' two-acre property. And in January 2009, Raymond Tobias executed a quit-claim deed, transferring the remaining 15 acres of the original 40-acre property to the Davises. Raymond Tobias died intestate in December 2009.

B. THE BANK ACCOUNT

In 2008, Raymond and Roger Tobias had a joint bank account at the Thornapple Valley Credit Union. Roger Tobias claimed that he was informed that the account was about to escheat to the state of Michigan, presumably due to lack of activity on the account. As a result, Roger Tobias withdrew $26,644.53 from the account and transferred it to a separate account. Roger Tobias used those funds to open another account at United Bank.

In January 2009, Raymond Tobias then demanded that Roger Tobias return the funds that he had taken. Roger Tobias complied and delivered a check in the amount of $26,139.27 to Diann Davis. Those funds were then deposited into a joint account held by Raymond Tobias and Diann Davis at Hastings City Bank.

Roger Tobias died in May 2010.

C. PROCEDURAL HISTORY

In February 2011, Carol Tobias filed suit against her daughter and son-in-law, Diann and Gregg Davis. In the first count of the complaint, seeking to quiet title in the property, Carol Tobias claimed that after Cleone Tobias' death, the 40-acre property (less the two acres deeded to Diann Davis in 1982) was owned by Roger Tobias, subject to the life estate of Raymond Tobias. She alleged that the 2007 and 2009 deeds from Raymond Tobias to the Davises were ineffective because they did not refer to the power of appointment authorized by the 1978 deed. Carol Tobias asserted that, at most, the 2007 and 2009 deeds conveyed only Raymond Tobias' interest as a life tenant, and his life estate expired at the time of his death in December 2009. In the second count of the complaint, Carol Tobias alleged that the funds placed into the joint account between Raymond Tobias and Diann Davis were the property of the Estate of Roger Tobias.

In their answer, with regard to the first count of the complaint, the Davises asserted that the 1978 deed was intended to be what is known as a Lady Bird deed or intervivos power of appointment and that Roger Tobias was the default beneficiary in the event that Raymond Tobias did not otherwise dispose of the property. According to the Davises, "this type of ownership is uniquely different from a simple 'life estate.'" The Davises further asserted that Cleone Tobias' death did not change the parties' interests; that is, Raymond Tobias retained his power of appointment and Roger Tobias remained the default beneficiary. The Davises contended that the 2007 and 2009 deeds were effective because the transfers did not require reference to the power of appointment. Therefore, according to the Davises, after Raymond Tobias fully conveyed the property via the 1982, 2007, and 2009 deeds, no real estate remained to pass to Roger Tobias. With regard to the second count of the complaint, the Davises admitted that they possessed the funds at issue, but asserted that Raymond Tobias gifted the funds to them.

The Davises moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that the 1978 deed, which contained the power of appointment, was a valid Lady Bird deed, intended to allow Raymond and Cleone Tobias flexibility in deciding how to dispose of the subject property. Roger Tobias was named in this deed only as the default beneficiary in the event that Raymond and Cleone Tobias did not exercise their power of appointment to dispose of the property before their deaths. Noting that Carol Tobias was not challenging the validity of the 1982 deed to Diann Davis even though that deed contained the same conveyance language as the 2007 and 2009 deeds, the Davises argued that if the 1982 deed was valid despite its failure to refer to the power of appointment, then the 2007 and 2009 deeds should not be considered invalid merely for failure to refer to the power of appointment. Citing § 4 of the Powers of Appointment Act,[1] the Davises further argued that, once created, the power of appointment does not need to be specifically referenced in order to transfer a valid fee interest.[2] The Davises also pointed out that their conduct and documentary evidence demonstrated that each of the three transfers were intended to be and, in fact were, valid fee interests. The Davises contended further that, in executing the contested deeds, Raymond Tobias' intent, as evidenced by witness affidavit and a video recording made at the time of execution of the 2009 deed, was to prevent Roger Tobias from acquiring the land after he took the funds from the bank account.

Turning to Carol Tobias' claim regarding the bank account funds, the Davises argued that Raymond Tobias intentionally placed the money in a joint account with Diann Davis to avoid further interference from Roger Tobias. In support of this contention, the Davises submitted a witness affidavit. Further, the Davises pointed out that, under Michigan law, when funds are held jointly in a bank account with rights of survivorship, it is presumed that the depositor intended those funds to pass by operation of law to the surviving joint tenant, here, Diann Davis. And although the presumption may be rebutted by reasonably clear and persuasive proof of a contrary intent, the Davises argued that Carol Tobias presented no such evidence.

Carol Tobias responded, explaining that, although she believed that the 1982 deed was as equally defective as the 2007 and 2009 deeds, she did not challenge the 1982 deed due to the Davises' long-held claim to that portion of the property. Glancing over the significance of § 4 of the Powers of Appointment Act, Carol Tobias contended that "the better practice is to refer to the

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[1] MCL 556.111 *et seq*.

[2] MCL 556.114.

retained power in any future conveyance." And, because Raymond Tobias failed to follow this "better practice" in executing the 2007 and 2009 deeds, Carol Tobias argued that the deeds were ineffective and the property conveyed therein became the property of Roger Tobias upon Raymond Tobias' death. With regard to the bank account funds, Carol Tobias contended that questions of fact remained regarding Raymond Tobias' intent in creating the joint account with Diann Davis. That is, Carol Tobias asserted that the joint account was created merely as a convenience and that the money was intended for Raymond Tobias' care during his lifetime, with Diann Davis being only the fiduciary for disposition of those funds, not an intended claimant to those funds.

After a hearing on the motion, the trial court granted the Davises' motion on the basis of the reasons set forth in their brief in support of their motion for summary disposition.

Carol Tobias now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Where, as here, the trial court grants a motion for summary disposition brought pursuant to both MCR 2.116(C)(8) and (C)(10), and it is clear that the trial court looked beyond the pleadings, this Court "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)," which "tests whether there is factual support for a claim."[3]

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.[4] The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.[5] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[6] We review de novo the trial court's ruling on a motion for summary disposition.[7]

B. VALIDITY OF RAYMOND TOBIAS' EXERCISE OF HIS POWER OF APPOINTMENT

Carol Tobias argues that a deed that purports to convey title to property to a third person, without reference to previously retained power of appointment, is not effective to divest title in the original grantee. While we agree that the "better practice" would indeed be to include a

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[3] *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[4] MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[5] *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

[6] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[7] *Roberts v Titan Ins Co*, 282 Mich App 339, 348; 764 NW2d 304 (2009).

specific reference to the power of appointment in later conveyances that purport to invoke that power, we conclude that under the circumstances here such reference was not required by law.

As the Davises argue and the trial court acknowledged, the 1978 deed in this case was what is known as a Lady Bird deed.

> A "Lady Bird" deed is a nickname for an enhanced life [e]state deed. It is named after Lady Bird Johnson, because allegedly President Johnson once used this type of deed to convey some land to Lady Bird. An enhanced life estate deed is a variation of a quitclaim deed that . . . enable[s] named persons to receive the home upon death, free of Medicaid claims and liens. . . . Generally, it works like a traditional Life Estate Deed . . . . It goes beyond a life estate deed, because not only does the life tenant get to live there for life, that former owner also reserves more than just a life estate. Also reserved are the rights to sell, commit waste, and almost everything else, except the transfer on death to the "remainderman."[8]

As the Davises point out, Michigan Land Title Standards 9.3, titled, Life Estate with Power to Convey Fee, confirms that, in Michigan, a donee may transfer a fee interest in the subject property: "The holder of a life estate, coupled with an absolute power to dispose of the fee estate by inter vivos conveyance, can convey a fee simple estate during the lifetime of the holder. If the power is not exercised, the gift over becomes effective." The Standard does not indicate whether specific reference to the power of appointment is required at the time it is invoked; however, that requirement has been clarified by Michigan caselaw and statute.

Under the common law, a donee's power of appointment was not properly exercised, without expressly referring to the power, "unless a contrary intention to exercise the power [could] be sufficiently proven."[9] But this case is not governed by common law. The governing statutory rule of law in this case comes from § 4 of the Powers of Appointment Act. That section provides, in pertinent part, as follows:

> Unless otherwise provided in the creating instrument, an instrument manifests an intent to exercise the power if the instrument purports to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument, or if the instrument either expressly or by necessary implication from its wording, interpreted in the light of the circumstances surrounding its drafting and execution, manifests an intent to exercise the power. . . .[10]

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[8] http://definitions.uslegal.com/l/lady-bird-deed/ (last accessed April 17, 2012).

[9] *Hund v Holmes*, 395 Mich 188, 193-194; 235 NW2d 331 (1975).

[10] MCL 556.114.

As § 4 indicates, the necessity of a reference to the power of appointment in later conveyances can be provided for within the creating instrument.[11] However, the creating instrument in this case—the 1978 deed—contains no provision requiring or waiving any such reference. Thus, we turn to the remainder of the governing statutory language.

Where the creating instrument does not contain a provision requiring or waiving reference to the power of appointment, a donee may nevertheless manifest an intent to exercise the power in a later instrument (1) "if the instrument purports to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument," or (2) "if the instrument either expressly or by necessary implication from its wording, interpreted in the light of the circumstances surrounding its drafting and execution, manifests an intent to exercise the power."[12]

In support of her position that the deeds were ineffective, Carol Tobias relies on the Michigan Supreme Court's decision in *Hund v Holmes*.[13] However, that reliance is misplaced. In that case, applying the latter of the two statutory methods to manifest intent to exercise the power, the Court determined that the "wording" in the residuary clause of the testatrix's will was not sufficient to manifest her intent to exercise an earlier granted power of appointment.[14] However, the Court in that case did not consider the former of the two statutory methods to manifest intent to exercise the power, which we conclude is in fact the relevant applicable language here.

Here, "even though the power [was] not recited or referred to in" the 2007 or 2009 deeds (or the 1982 deed), Raymond Tobias manifested an intent to exercise the 1978 power of appointment in those instruments because they "purport[ed] to transfer an interest in the appointive property that [Raymond Tobias] would have no power to transfer except by virtue of the power[.]" That is, absent inclusion of the power of appointment language in the 1978 deed, that deed would have been a simple quit-claim transfer of Raymond Tobias' complete fee interest in the property to Roger Tobias. In that event, Raymond Tobias would have no longer had any powers, rights, or ownership title to the property to transfer. However, the power of appointment language was included, and it was "by virtue of [that] power" that Raymond Tobias retained his right to "transfer an interest in the appointive property[.]" Therefore, the power was not required to be "recited or referred to" in the later deeds.

Accordingly, we conclude the trial court properly granted summary disposition to the Davises on this issue because even though the three intervivos conveyances did not contain

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[11] *Id.* ("Unless otherwise provided in the creating instrument . . . .").

[12] *Id.*

[13] *Hund*, 395 Mich at 188.

[14] *Id.* at 197-198.

specific reference to the 1978 power of appointment, by executing those conveyances, Raymond Tobias effectively transferred his fee interest to the Davises.

C. OWNERSHIP OF THE BANK ACCOUNT FUNDS

Carol Tobias argues that where monies are turned over to a person believed to be the attorney-in-fact for the decedent, those monies are assets of the estate of the decedent that are required to be returned to the personal representative of the estate. More specifically, Carol Tobias asserts that when Roger Tobias turned over the disputed funds to Diann Davis, she was acting as Raymond Tobias' attorney-in-fact and that she was only intended to be the fiduciary for disposition of those funds, not an intended claimant to those funds. According to Carol Tobias, the joint account was created merely as a convenience.

In making her argument, Carol Tobias concedes that she is lacking factual support for her claim, but she contends that summary disposition on this issue was premature. Summary disposition can be premature if it is granted before discovery on a disputed issue is complete.[15] However, the mere fact that the discovery period remains open does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate. The question is whether further discovery stands a "fair chance of uncovering factual support" for the opposing party's position.[16] In addition, a party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence.[17] It is not sufficient for a party to promise to offer factual support for her claims at trial.[18] Conjectures, speculations, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury.[19]

Here, we conclude that summary disposition on this issue was not premature. Although the discovery period remained open, Carol Tobias failed to present any material independent evidence in support of her claim. Her speculation regarding the nature of the relationship

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[15] *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

[16] *Id*.

[17] *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994); see *Coblentz v Novi*, 475 Mich 558, 570; 719 NW2d 73 (2006) (concluding that the plaintiffs could not complain that summary disposition was premature because they did not offer the required MCR 2.116(H) affidavits with the probable testimony to support their contentions).

[18] *Maiden*, 461 Mich at 121; *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 150; 715 NW2d 398 (2006).

[19] *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994); *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

between Raymond Tobias and Diann Davis was mere conjecture and speculation, and further discovery did not stand a fair chance of uncovering factual support for her position.

Michigan law is clear that upon the death of a person holding a bank account jointly with rights of survivorship, the account balance passes by operation of law to the surviving joint tenant.[20] Thus, when a deposit is made in the name of the depositor or any other person "in form to be paid to either or the survivor of them,"[21] it is prima facie evidence that the depositor intended to vest title to the deposit in the survivor.[22] Rebutting this presumption requires reasonably clear and persuasive proof that the depositor intended otherwise.[23]

As stated, Carol Tobias has failed to present any proof that Raymond Tobias intended anything other than to have the bank account balance pass to Diann Davis upon his death. To the contrary, the evidence that the Davises submitted confirmed that there was no genuine issue of material fact regarding Raymond Tobias' intent. In an affidavit, his home health service provider, Mitzi Carroll, attested that she was "well aware of the estranged relationship between Raymond and his son, Roger Tobias." According to Carroll, Raymond Tobias told her, "on several occasions that he gifted money to Diann Davis to both prevent Roger from absconding with said funds and to ensure Diann receive the funds."

Accordingly, we conclude the trial court properly granted summary disposition to the Davises on this issue because Carol Tobias failed to rebut the statutory presumption and the evidentiary support that when Raymond Tobias created the bank account jointly with Diann Davis, he intended that upon his death the title to those funds would vest in Diann Davis.

We affirm. The Davises, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Joel P. Hoekstra

[20] MCL 487.703; *Jacques v Jacques*, 352 Mich 127, 135; 89 NW2d 451 (1958).

[21] MCL 487.703.

[22] *Jacques*, 352 Mich at 136.

[23] *Id.* at 136-137.

STATE OF MICHIGAN

COURT OF APPEALS

BARBARA LEMBERG and STEVEN LEMBERG,

Plaintiffs-Appellees,

v

KOROTKIN-SCHLESINGER & ASSOCIATES, INC., KOROTKIN INSURANCE GROUP, and KENNETH KOROTKIN,

Defendants-Appellants.

UNPUBLISHED
March 15, 2012

No. 301116
Oakland Circuit Court
LC No. 2008-092314-CK

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

In this negligence action, defendants appeal as of right the trial court's judgment in favor of plaintiffs against defendants following a jury trial. We affirm.

I. FACTS & PROCEEDINGS

This case arises from defendants' alleged failure to obtain adequate insurance coverage for a diamond engagement ring that was lost by plaintiffs in 2007. Defendant Kenneth Korotkin (Kenneth) was plaintiffs' insurance agent. Plaintiffs maintained that their agreement with defendants for insurance of the diamond engagement ring was for the replacement value of the ring. But after the ring was lost, plaintiffs discovered their policy covered only $36,776, despite the fact that the ring's appraised value was $107,000.

On June 17, 2008, plaintiffs filed a complaint against defendants alleging negligence. Plaintiffs essentially claimed that a special relationship was formed between them and Kenneth, and that in the context of their special relationship, Kenneth informed them that the ring was insured for full replacement value; that is if the value of the ring increased over time, the policy would account for any increase in value. Plaintiffs alleged that defendants negligently failed to accurately represent the nature and extent of the insurance coverage and failed to provide clear and accurate advice when plaintiffs made an ambiguous request that required a clarification. Defendants answered plaintiffs' complaint and denied all plaintiffs' allegations.

Subsequently, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendants argued that there was no special relationship, and that any confusion regarding the policy was plaintiffs' fault because plaintiffs failed to read the terms of the policy.

A hearing was held regarding defendants' motion for summary disposition on July 15, 2009, and the trial court issued a written opinion denying defendants' motion on July 21, 2009. The trial court found that plaintiffs presented evidence demonstrating a genuine issue of material fact in regard to whether there was a special relationship between the parties. The trial court further found that any question regarding plaintiffs' comparative fault was a question for the jury.

The four-day jury trial began on September 27, 2010. Plaintiffs rested at the end of the second day, and defendants moved for a directed verdict. Defendants argued that plaintiffs failed to establish a special relationship. Defendants also argued that plaintiffs failed to establish a prima facie case of fraud or misrepresentation. In response, plaintiffs stated that they were not alleging fraud or misrepresentation, but were rather pursuing a negligence claim based on Kenneth's conduct and misrepresentations. The trial court denied defendants' motion and did not state its reasoning on the record. On October 1, 2010, the jury returned a verdict finding that defendants were negligent, that defendants' negligence was a proximate cause of plaintiffs' injury and damage, and finding that plaintiffs' damages totaled $76,644.

Plaintiffs moved for case evaluation sanctions and for entry of judgment on October 22, 2010. On October 26, 2010, the trial court entered a judgment for plaintiffs in the amount of $83,215.72. On February 2, 2011, the trial court awarded $85,661 in case evaluation sanctions in favor of plaintiffs. On March 15, 2011, an amended judgment in favor of plaintiffs in the amount of $169,370.39 was entered to reflect the original judgment amount, additional statutory interest, and case evaluation sanctions. Defendants now appeal as of right.

II. SUMMARY DISPOSITION

Defendants first argue that the trial court erred when it denied their motion for summary disposition pursuant to MCR 2.116(C)(10). Specifically defendants argue that because plaintiffs failed to read their insurance policy, they cannot claim entitlement to benefits that are different from those set forth in the policy. Defendants also argue that plaintiffs' claim is barred by the statute of limitations.

We review de novo a trial court's decision on a motion for summary disposition. *Davenport v HSBC Bank*, 275 Mich App 344, 345; 739 NW2d 383 (2007). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

Initially, we note that defendants' argument is premised on the erroneous assumption that plaintiffs were pursuing a misrepresentation or fraud claim rather than a negligence claim.

Plaintiffs' complaint alleged a single count of "negligence/professional malpractice/ misrepresentation as to all defendants." Although the label of the count is arguably unclear regarding whether plaintiffs were alleging negligence or negligent misrepresentation, the complaint clearly asserted the traditional elements of a negligence claim: duty, breach of duty, causation, and damages. *Pressey Enterprises, Inc v Barnett-France Ins Agency*, 271 Mich App 685, 687; 724 NW2d 503 (2006). The complaint also alleged the existence of the type of special relationship between plaintiffs and defendants necessary to establish a duty in a negligence case against an insurance agent under *Harts v Farmers Ins Exch*, 461 Mich 1, 10; 597 NW2d 47 (1999). Defendants' brief in support of their motion for summary disposition itself recognized that plaintiffs were suing for negligence. Moreover, the case was tried as a negligence action, with the trial court instructing the jury regarding the elements of a negligence claim and the requirements for establishing a special relationship necessary to establish a duty on the part of an insurance agent under *Harts.* Further, the verdict form asked the jury to decide the elements of a negligence claim; it asked the jury to decide whether defendants were negligent, whether defendants' negligence was a proximate cause of plaintiffs' damages. After the jury was excused to deliberate, the trial court asked whether there were "[a]ny objections to anything that's occurred so far on the record in this case," and defense counsel answered negatively."[1] Therefore, defendants' contention that plaintiffs were suing them for misrepresentation rather than negligence lacks merit.

Accordingly, we address whether the trial court properly denied defendants' motion for summary disposition regarding plaintiffs' negligence claim. "In a negligence action, a plaintiff must show that the defendant owed the plaintiff a duty, that the defendant breached that duty, causation, and damages." *Pressey*, 271 Mich App at 687. An insurance agent generally does not owe a duty to a potential insured to advise regarding the adequacy of coverage. *Harts*, 461 Mich at 8. The agent's job is merely to present the insurer's product and to take orders from those who want to purchase the coverage offered. *Id.* "However, as with most general rules, the general no-duty-to-advise rule, where the agent functions as simply an order taker for the insurance company, is subject to change when an event occurs that alters the nature of the relationship between the agent and the insured." *Id*. at 9-10. In particular, a special relationship may arise between an insurance agent and an insured when:

> (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id*. at 10-11 (footnotes omitted).]

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[1] Defense counsel had, however, previously and unsuccessfully sought an instruction on the elements of misrepresentation.

"When a special relationship exists, an agent assumes a duty to advise the insured regarding the adequacy of insurance coverage." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 28; 761 NW2d 151 (2008).

In this case, plaintiffs presented evidence at the summary disposition stage to establish that they had a special relationship with defendants under each of the four *Harts* factors. First, there is evidence that their insurance agent misrepresented the nature or extent of the coverage offered or provided. Plaintiffs testified at a deposition that when plaintiff Barbara Lemberg's (Barbara) diamond engagement ring was added to their homeowners' insurance policy, Kenneth represented that the ring was being insured for its replacement value. Further, plaintiffs presented evidence that Kenneth's representation that the ring was insured for its replacement value was false. Kenneth testified at a deposition that guaranteed replacement coverage for jewelry is not available, that his best suggestion for insuring jewelry would be to get an appraisal every year, and that he never advised plaintiffs to get an appraisal every year. Further, Kenneth's November 19, 2007, letter to the Office of Financial and Insurance Services stated that he represents no carrier that offers guaranteed replacement coverage for jewelry items. The insurer, Chubb Group of Insurance Companies (Chubb), paid plaintiffs only $36,776 for the lost ring, even though it was appraised for $107,000. Therefore, plaintiffs presented evidence that Kenneth misrepresented the nature or extent of the coverage offered or provided, thereby establishing a special relationship under the first *Harts* factor.

The same evidence establishes the second *Harts* factor for establishing a special relationship. In *Harts*, the Supreme Court indicated that "[a]n example of an ambiguous request that might in certain circumstances require clarification is the request for 'full coverage.'" *Harts*, 461 Mich at 10 n 11. Here, plaintiffs' request for replacement value coverage was ambiguous, given that it was for an inexact and, according to Kenneth, nonexistent type of coverage. Cf. *Pressey*, 271 Mich App at 689 ("Unlike the ambiguous request for 'full coverage' discussed in *Harts*, plaintiffs' request for contents coverage was not a request for an inexact or nonexistent type of coverage."). Kenneth's own testimony suggests that plaintiffs' request required clarification that yearly appraisals were required to update the value of the ring.

For the same reasons, the third *Harts* factor is satisfied. Plaintiffs' evidence reflects that an inquiry was made that may have required advice and that Kenneth gave advice that was inaccurate. In particular, Kenneth incorrectly advised that plaintiffs' coverage would pay the replacement value of the ring but failed to explain that yearly appraisals were required.

The fourth *Harts* factor is also satisfied. Plaintiffs presented evidence that an Agent of Record (AOR) letter was prepared by defendants and signed by plaintiff, Steven Lemberg (Steven); the letter reflects that defendants assumed an additional duty by either express agreement with or promise to plaintiffs. The AOR letter states: "We understand that [defendant, Korotkin-Schlesinger & Associates, Inc. (the Korotkin insurance agency or the insurance agency)] will not share responsibility for any deficiencies in the present insurance program to which this letter pertains until its review and is able to provide recommendations." The clear implication of the letter is that, once the insurance agency had an opportunity to review plaintiffs' insurance program and to make recommendations, it would share responsibility for any deficiencies in plaintiffs' insurance program. Accordingly, the letter reflects the assumption of an additional duty by express agreement with or promise to plaintiffs.

Thus, because plaintiffs presented evidence that a special relationship existed under any of the four *Harts* factors, defendants owed a duty to advise plaintiffs regarding the adequacy of their insurance coverage. *Zaremba*, 280 Mich App at 28.

We conclude that plaintiffs also presented sufficient evidence to establish a genuine issue of material fact regarding the remaining elements of their negligence claim. Plaintiffs produced evidence that defendants breached the duty to advise plaintiffs regarding the adequacy of their insurance coverage by representing that the ring was insured for replacement value and by failing to tell plaintiffs that they must continually reappraise the ring to ensure it was adequately insured. Although Kenneth denied making the representations to which plaintiffs testified, he admitted on cross-examination that his alleged representations would breach the standard of care. In light of Kenneth's admissions that the alleged misrepresentations regarding replacement value coverage and the failure to offer advice regarding the need for continual reappraisals would breach the standard of care, plaintiffs have presented evidence that defendants breached their duty to advise plaintiffs regarding the adequacy of their coverage.

Plaintiffs also presented evidence of causation and damages. Chubb paid plaintiffs only $36,776 for the lost ring, even though it was appraised for $107,000. Plaintiffs thus suffered damages in that they were paid less than the replacement value of the ring. A factual issue existed regarding whether the shortfall in coverage resulted from Kenneth's negligence in representing to plaintiffs that they had replacement value coverage and in failing to advise them of the need to continually reappraise the ring.

Defendants further contend that they were entitled to summary disposition because plaintiffs had a duty to read the policy and thus could not reasonably or justifiably have relied on Kenneth's representations that the policy provided replacement value coverage. This argument lacks merit because, as discussed *supra*, plaintiffs claim was for negligence rather than fraud or misrepresentation. Reasonable or justifiable reliance is not among the elements of a negligence claim. See *Pressey*, 271 Mich App at 687. It is true that, "as a general rule, an insured must read his or her own policy." *Zaremba*, 280 Mich App at 29. However, in a negligence claim against an insurance agent, an insured's duty to read his or her policy is a matter for the jury to consider in the context of comparative negligence. *Id*. at 36. As the *Zaremba* Court explained:

> In summary, we hold that when an insurance agent elects to provide advice regarding coverage and policy limits, the agent owes a duty to exercise reasonable care. The insured has a duty to read its insurance policy and to question the agent if concerns about coverage emerge. A jury should consider these corresponding duties in the crucible of comparative negligence. [*Id*.]

"The question of a plaintiff's negligence for failure to use due care is a question for the jury unless no reasonable minds could differ or the determination involves some ascertainable public policy considerations." *Id*. at 33.

Defendants have identified no ascertainable public policy considerations that would warrant removing the issue of comparative negligence from the jury's consideration. Moreover, reasonable minds could differ regarding whether plaintiffs negligently failed to read their policy and whether any such negligence proximately caused their damages. Plaintiffs did not testify unequivocally at deposition that they failed entirely to read the policy. Also, it is not clear that reading the policy would have led plaintiffs inescapably to the conclusion that the policy failed to provide replacement value coverage.

Barbara testified on cross examination regarding the policy that, "Yes, I read my mail, but not every word of it." She further explained, "I knew that when I flipped through what is the summary that I — the ring would stand out as something that had numbers written next to it." When asked whether she read the policy so that she understood how the ring was being covered, she responded, "not really." When later shown the 2006 coverage summary and asked if she remembered seeing it, Barbara stated that she did not recall seeing it in December 2006, but that "[s]omething very much like this, I have seen over many years." She did not know whether she saw the 2006 summary when it arrived, but she testified that "I have seen this description of the jewelry before," including before the date of the loss. Further, when asked to review a section of the policy stating that Chubb would increase the amount of coverage for each article of itemized jewelry annually by a percentage based on industry trends for jewelry values, Barbara testified that she believed in 2007 that the policy in effect at the time of the loss contained that language, reflecting her familiarity with policy provisions. In addition, Steven testified that he believed Chubb was updating the appraised value of the ring, based on what Kenneth told him and based on what the policy said, thus implying that he had read at least part of the policy.

It is also notable that the policy stated that (1) Chubb would annually increase the coverage for each article of itemized jewelry based on industry trends for jewelry values and (2) Chubb would pay up to 150 percent of the amount of itemized coverage for that article, but not more than the maximum amount of coverage. Given these provisions, it is not clear that reading the policy would have led plaintiffs ineluctably to the conclusion that it failed to provide replacement value coverage. A reasonable jury could find, based on plaintiffs' testimony, that they mistakenly understood the policy to mean that Chubb's annual increase in the itemized coverage based on industry trends rendered it unnecessary for plaintiffs to reappraise the ring themselves. Therefore, a factual question existed whether plaintiffs were negligent in failing to read the policy and, if so, whether such negligence proximately caused their damages.

Defendants also assert in connection with this issue that the statute of limitations bars plaintiffs' claim. Generally, an issue must have been raised before, and addressed and decided by, the trial court to be preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Here, defendants did not raise the statute of limitations issue in their motion for summary disposition or supporting brief. Although defendants' reply brief in support of their summary disposition motion referred in passing to the statute of limitations, defendants did not present or develop any argument that summary disposition on the basis of the statute of limitations was appropriate. And although the statute of limitations was addressed at the motion hearing, defense counsel did not advance an argument that plaintiffs' entire claim was barred by the statute of limitations. Further, the trial court did not address the statute of limitations in its written opinion and order denying defendants' motion for summary disposition. We thus conclude that because the statute of limitation issue was not raised and decided below, it is not preserved for appellate review. Review of that issue is thus limited to plain error. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Id*.

Defendants' cursory argument regarding the statute of limitations fails to identify a clear or obvious error that affected the outcome of the lower court proceedings. *Duray*, 288 Mich App at 150. Defendants' brief on appeal devotes only a short paragraph comprised of three sentences to this issue. The only authority cited is MCL 600.5805(10), which provides a three-year limitation period for all actions to recover damages for death or injury. "An appellant may not merely announce its position or assert an error and leave it to this court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position. Insufficiently briefed issues are deemed abandoned on appeal." *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004) (quotations and citations omitted). In light of defendants' cursory argument, they have abandoned this issue on appeal and we thus decline to address the issue further. *Id*.

III. JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants argue that they are entitled to judgment notwithstanding the verdict (JNOV) on the basis of four separate grounds.

Defendants failed to move for JNOV and failed to file any post-trial motions. Thus, the issue whether defendants were entitled to JNOV was not raised before or addressed and decided by the trial court, and is accordingly not properly preserved for appellate review. *Hines*, 265 Mich App at 443. Additionally, defendants argue that they are entitled to JNOV because the verdict is against the great weight of the evidence. To preserve such a claim, a party must raise the issue below in a motion for a new trial. *Sherman-Nadiv v Farm Bureau Gen Ins Co of Mich*, 282 Mich App 75, 80; 761 NW2d 872 (2009); *Brown v Swartz Creek VFW*, 214 Mich App 15, 27; 542 NW2d 588 (1995). Because defendants did not file in the trial court a motion for new trial arguing that the verdict was against the great weight of the evidence, the great weight of the evidence argument is not preserved.

Because defendants failed to preserve their argument that they are entitled to JNOV by filing a motion for JNOV below, review is limited to plain error affecting substantial rights. *Duray*, 288 Mich App at 150. "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Id*. Because defendants failed to move for a new trial on the ground that the verdict is against the great weight of the evidence, review of that issue is required only if a miscarriage of justice will otherwise result. *Sherman-Nadiv*, 282 Mich App at 80. "When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses." *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006).

"A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Roberts v Saffell*, 280 Mich App 397, 401; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009).

Defendants' first basis on which they claim to be entitled to JNOV is that in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003), our Supreme Court held that a contracting party's reasonable expectations cannot supersede the clear language of a contract. In *Wilkie*, the Court rejected the notion that a party's reasonable expectations should be considered when interpreting a contract, stating:

> In sum, the rule of reasonable expectations clearly has no application when interpreting an unambiguous contract because a policyholder cannot be said to have reasonably expected something different from the clear language of the contract. Further, it is already well established that ambiguous language should be construed against the drafter, i.e., the insurer. Therefore, stating that ambiguous language should be interpreted in favor of the policyholder's reasonable expectations adds nothing to the way in which Michigan courts construe contracts, and thus the rule of reasonable expectations should be abolished. [*Id.* at 62.]

As the above quote reflects, the *Wilkie* Court was addressing the proper method of *interpreting a contract*. *Wilkie* did *not* address the elements of a negligence claim or the requirements for establishing a special relationship between an insured and an insurance agent under *Harts*. The jury's determination in this case regarding the elements of plaintiffs' negligence claim did not require any interpretation of the insurance policy and thus did not implicate the discredited interpretive doctrine of reasonable expectations. Therefore, defendants have failed to establish that they are entitled to JNOV on this basis.

The second ground on which defendants seek JNOV is that Kenneth's representation that plaintiffs' policy provided replacement value coverage pertained to a future event rather than a present or past fact. "[A]n action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute actionable fraud." *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Defendants' argument on this matter is premised entirely on their erroneous view that plaintiffs were pursuing a fraud or misrepresentation claim. As discussed above, however, plaintiffs' claim was for negligence, as defendants themselves recognized at various points in this case. Kenneth's misrepresentation was relevant to plaintiffs' negligence claim in order to establish a special relationship between the parties and defendants' resulting duty to advise plaintiffs regarding the adequacy of coverage, under the first ground set forth in *Harts*, 461 Mich at 10. *Harts* provides that a special relationship may arise where "the agent misrepresents the nature or extent of the coverage *offered or provided*." *Id*. (emphasis added). Plaintiffs' testimony established that Kenneth's misrepresentation, that the policy provided replacement value coverage, occurred when the coverage was offered or provided, i.e., when plaintiffs presented the appraisal to Kenneth in order to obtain replacement value coverage for the ring. Accordingly, the evidence conformed to the requirements in *Harts*, and defendants were not entitled to JNOV on this basis. For the same reason, the trial court did not err in denying defendants' motion for a directed verdict on this ground.

The third ground on which defendants seek JNOV is that plaintiffs had the means to verify the truth of Kenneth's representation and that plaintiffs' trial testimony that they read the policy but misunderstood it is not compelling and should not be considered because it conflicts with their deposition testimony. As discussed above, however, the trial court properly rejected defendants' argument on this issue at the summary disposition stage because whether plaintiffs failed to read their policy presented an issue of comparative negligence for the jury to resolve. *Zaremba*, 280 Mich App at 33, 36. Also, reasonable jurors could honestly reach differing conclusions regarding whether to credit plaintiffs' testimony that they read the policy but misunderstood it to provide replacement value coverage. A factual question existed regarding whether plaintiffs changed their deposition testimony at trial. As discussed, plaintiffs' deposition testimony can be understood to suggest that they read at least portions of the policy. In addition, as discussed more fully below, plaintiffs explained at trial what they meant in their deposition testimony. Because a factual question existed on which reasonable minds could differ, defendants were not entitled to JNOV on this basis, and the trial court did not err in denying defendants' motion for a directed verdict on this ground.

Finally, defendants have failed to establish that the verdict is against the great weight of the evidence. Defendants again assert that plaintiffs' trial testimony was unsupported and conflicted with their deposition testimony regarding whether they read the policy. However, as discussed, plaintiffs' deposition testimony can be read to mean that they read at least portions of the policy. Further, Barbara explained at trial what she had meant in her deposition, i.e., that she did not remember specifically reading the most recent policy issued but that she had become very familiar with the policy over the years. On cross-examination at trial, Barbara stated:

> *Q.* Did you read that policy, the 2006 to 2007 policy? Did you read your declaration sheet when you paid the bill?
>
> *A.* And what I testified to in my deposition and what I'm saying now is I can't specifically remember reading that policy that year. But if you want to know have I read the summaries over the year [sic] and the policies over the years, yes.
>
> *Q.* You actually said you did not read the policy to see what was actually covered. Will you agree you made that statement, ma'am?
>
> *A.* I will agree there's a sound bite that if you put together two particular statements it appears that I said that. But I will tell you that my testimony absolutely was that I was very familiar with this section of the policy, over a period of years I was very familiar with this policy and I know and I could find the page for you that I finally get to tell you I simply cannot say that in 2006, December, that I was standing there with the mail reading the particular page you wanted me to say I had read. I cannot remember exactly that year.
>
> *Q.* Okay. You're finished with that answer then?
>
> *A.* Yes.
>
> *Q.* Okay. I'm going to read it for the jury.
>
>> "Did you ever read the policy, you know, so that you understood what was being covered, how the ring was being covered?"

"Not really."

You did say that?

A. And the policy you kept insisting was the policy in 2006, December. You wanted me to go back to that moment in time and say do you remember reading that policy for that information. And I said not really.

Similarly, on cross-examination at trial, Steven explained what he meant in his deposition testimony regarding whether he had read the policy:

Q. The question is whether or not how — I asked you whether or not you read the policy concerning the jewelry coverage. You said no.

A. I didn't say no.

Q. Okay. Can I read it to the jury and let them decide?

A. Okay.

Q. Okay.

"But did you read the policy to see what was — what it said was replacement value?"

Let me read that again because I didn't do a very good job.

"But did you read the policy to what it — to see what it said was replacement value? If you did, I'm not suggesting you did."

"No, I mean I looked at it, I didn't study it. I was led to believe that I had replacement insurance on — on my — on the ring. That's what I thought all along."

Now I think what you want to say is you want to say, well, [Kenneth] told me I had replacement value; isn't that so?

A. No. I read and understood the policy. When I say I didn't study it, that means I didn't from the beginning of the policy to the end study it like I was taking a test. But I read it and I understood it.

Q. Okay. So you — it's your testimony today that you actually read this coverage?

A. Yes.

Q. And you read that coverage to say that you had guaranteed or replacement value?

A. Yes.

The jury was free to assess whether it believed plaintiffs' explanations of their deposition testimony. We can discern no basis to depart from the general rule requiring this Court to accord substantial deference to the jury's credibility determinations. *Allard*, 271 Mich App at 406-407.

Defendants also assert that there is no reason to believe Steven's testimony that the handwritten date on a second appraisal of the ring, July 18, 2007, nearly two months before the ring was lost, was a mistake. Defendants state that the appraiser testified that when Steven requested the appraisal, he never mentioned that the ring was lost. However, the appraiser testified as follows on this matter:

> *Q.* Do you remember why [Steven] said he wanted the second appraisal done?
>
> *A.* No. Probably update. A lot of people call and say I want to update an appraisal. We just do it automatically.
>
> *Q.* Did he indicate to you at the time he asked you for the update that it had been lost and he wanted to know what it was worth?
>
> *A.* I don't think so.
>
> *Q.* If he had said that, do you remember it well enough to know one way or another or it's just one of those things you might not remember?
>
> *A.* You know, I'm not that young. I can [sic] go back three years in my memory.

Thus, although the appraiser at one point indicated that Steven did not say the ring was lost, the appraiser's testimony could also be read to suggest that he simply could not remember whether Steven said it. Further, Steven unequivocally testified that he did not have the appraisal in July 2007, that the appraisal was done after the ring was lost, and that he could only attribute the date on the appraisal to human error. On cross-examination, Steven explained:

> *Q.* And you'll agree that the date on [the appraisal] indicates it was a month and a half or so before the ring is lost; isn't that so?
>
> *A.* The date — the date is mistaken.
>
> *Q.* Isn't that what it says though?
>
> *A.* That's what it says, yes. It's mistaken.
>
> *Q.* So if the jury is to believe this particular date, would you agree that your testimony is incorrect as it pertains to that particular item?

> *A.* Look, I can think of lots of situations like when you write a check sometimes and the year is just changed or the month is changed, you — you — you forget that we're now in 2010 and you make a mistake. [The appraiser] made a mistake. I asked for that after the ring was lost, a couple days later I got that and I sent it right to the insurance company. I know that's what happened. There's a mistake on the date. You're making much more out of that than it is. It's a mistake.

Again, the jury was free to decide for itself whether it found credible Steven's explanation of the date on the second appraisal. No basis exists for this Court to depart from the deference generally accorded to the jury's judgment on such matters. *Id*.

Accordingly, defendants are not entitled to JNOV on any of the grounds asserted on appeal. Thus, defendants have failed to establish a clear or obvious error warranting relief on this unpreserved issue. Further, the verdict is not against the great weight of the evidence, and no miscarriage of justice will result from the failure to review that unpreserved issue. Lastly, the trial court properly denied defendants' motion for directed verdict.

IV. NEW TRIAL

Defendants' final argument on appeal is that they are entitled to a new trial on three separate grounds. Defendants did not move for a new trial, accordingly, because the issues raised by defendants were not raised before or addressed and decided by the trial court, our review is limited to plain error affecting substantial rights. *Duray*, 288 Mich App at 150.

Defendants first assert that they are entitled to a new trial because the trial court erred in refusing to interpret the insurance policy, leaving the interpretation to the jury, and failing to instruct the jury that the policy provided stated value coverage.

The proper interpretation of a contract is ordinarily a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). The meaning of an ambiguous contract, however, is a question of fact to be decided by a jury. *Id*. at 469. In this case, the trial court did not submit the interpretation of the insurance policy to the jury. This case is not a breach of contract action against an insurer requiring interpretation of the policy. Rather, as discussed *supra*, plaintiffs brought a negligence claim against their insurance agent for the failure to advise them regarding the adequacy of coverage. Contractual interpretation was not essential to establishing the elements of plaintiffs' negligence claim.

Further, defendants mischaracterize what the trial court decided. The relevant portion of the transcript to which defendants cite pertains to the court's decision to sustain an objection to defense counsel's cross-examination of Steven. In ruling on the objection, the trial court did not state that it was submitting the interpretation of the policy to the jury. After repetitive questioning by defense counsel regarding Steven's understanding of the policy, plaintiffs' counsel objected, and the trial court sustained the objection, in the following exchange:

> *Q.* Okay. And everybody said, look, that's what the policy clearly says except you; isn't that where we're at?

MR. PAIGE [plaintiffs' counsel]: Objection.

THE COURT: All right. Objection sustained. At this point —

MR. MONNICH [defense counsel]: Who else — I will ask the question.

THE COURT: All right.

MR. MONNICH: Sure, I'll rephrase it.

THE COURT: At this —

MR. MONNICH: All we're talking about —

THE COURT: No, no, we're not even rephrasing at this point. You've asked it 20 different ways, he's answered it however he's answered it. If you want to say what do those words mean, it's an exhibit, the jury can read it, they can see those words. And you keep asking him what do they mean —

MR. MONNICH: I believe words — I believe —

THE COURT: — to his —

MR. MONNICH: — the words mean what they say.

THE COURT: Pardon?

MR. MONNICH: I believe the words mean what they say.

THE COURT: And you will argue that to the jury.

MR. MONNICH: All right.

THE COURT: And the jury will read those words and they'll listen to the testimony and they'll make their own determination.

As this exchange reflects, the trial court was not stating a decision to submit the interpretation of the policy to the jury. The trial court was merely sustaining an objection to defense counsel's repeated questioning of Steven regarding what the policy said, and the trial court observed that the jury could read the policy, consider the testimony, and make a determination. In short, the trial court was merely explaining why it was sustaining the objection to defense counsel's continued questioning; it was not announcing a decision to submit the interpretation of the policy to the jury. Accordingly, defendants have not established plain error affecting substantial rights in regard to the trial court's "refusal" to interpret the insurance contract.

Defendants next assert that a new trial is necessary because the trial court erred in allowing plaintiffs' counsel to use unproven or contested facts in posing a hypothetical question to Kenneth regarding the standard of care.

"In order to be considered competent evidence, the hypothetical questions, through which testimony is elicited, must be in 'substantial accord' with the facts presented at trial." *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 618; 769 NW2d 911 (2009). "Counsel, in propounding a hypothetical question to an expert witness, may assume any state of facts which the evidence tends to establish, and may vary the questions so as to cover and present the different theories of fact. But there must be evidence in the case tending to establish all the facts stated in the question." *Federoff v Meyer Weingarden & Sons, Inc*, 60 Mich App 382, 387; 231 NW2d 417 (1975) (quotations and citation omitted). A hypothetical question is proper unless the record is entirely barren of facts forming a basis for the question. *Steinberg v Ford Motor Co*, 72 Mich App 520, 530; 250 NW2d 115 (1976); *Federoff*, 60 Mich App at 387.

In this case, plaintiffs' counsel asked Kenneth if plaintiffs asked their agent whether they had replacement value coverage on their ring, and their agent said yes, if it's lost or stolen, you will get replacement value, such advice would breach the agent's duty. Kenneth responded that such a statement by an agent would be incorrect, but that whether it breached the agent's duty was a legal question. When reminded that he testifies on such issues regularly as an expert, Kenneth stated he would say it is a breach but that he is not the lawyer in the case. The question was then repeated at various points, with plaintiffs' counsel summarizing the same basic facts, i.e., that the agent told plaintiffs that they had replacement value coverage and that if they ever lost the ring, Chubb would pay the replacement value and had in some cases paid more than the replacement value to the agent's clients. Kenneth then answered by denying that he made the statements assumed in the question but saying that such statements by an agent would be incorrect, without answering whether the standard of care would be breached.

The facts assumed in the hypothetical questions were supported by plaintiffs' testimony. Plaintiffs testified that Kenneth told them they had replacement value coverage on the ring, that he did not need anything else from plaintiffs, that Chubb would pay whatever it cost to replace the ring, and that some of his clients had received more than they needed to replace their jewelry. Thus, the hypothetical questions propounded to Kenneth were proper because they were in substantial accord with the facts presented at trial. *Unibar*, 283 Mich App at 618. Although Kenneth denied making the statements plaintiffs attributed to him, case law does not require that the facts assumed in a hypothetical question be entirely uncontested. Accordingly, defendants have not demonstrated plain error affecting substantial rights and are not entitled to a new trial on this ground.

Defendants' final argument for a new trial is that the trial court erred in instructing the jury on a negligence theory that did not exist and in failing to instruct the jury on negligent misrepresentation and the clear and convincing evidence standard.

"Jury instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Freed v Salas*, 286 Mich App 300, 327; 780 NW2d 844 (2009) (quotation and citation omitted). Defendants' argument fails to acknowledge that plaintiffs' claim was for negligence rather than fraud or misrepresentation, as discussed *supra*. Thus, the trial court properly instructed the jury on the elements of negligence rather than the elements of misrepresentation. Further, because plaintiffs were not pursuing a fraud or misrepresentation claim, the trial court did not err in declining to instruct on the clear and convincing evidence standard that applies to such claims. *Hi-Way*, 398 Mich at 336.

Accordingly, defendants are not entitled to a new trial on any of the grounds asserted on appeal because defendants have failed to establish a clear or obvious error warranting relief.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

STATE OF MICHIGAN

COURT OF APPEALS

NORTHERN WAREHOUSING INC., d/b/a NORTHERN FOOD SERVICE, Plaintiff-Appellee,	UNPUBLISHED August 22, 2006
v	No. 260598 Court of Claims LC No. 04-000239-MK
STATE OF MICHIGAN, DEPARTMENT OF EDUCATION, Defendant-Appellant.	ON REMAND

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. *Northern Warehousing Inc, v State*, 475 Mich 859; 714 NW2d 287 (2006). In our earlier opinion, *Northern Warehousing Inc, v State*, unpublished opinion per curiam of the Court of Appeals, issued March 7, 2006 (Borrello, J. (*dissenting*) Docket No. 260598) (*Northern I*), we affirmed the trial court's order granting a preliminary injunction to plaintiff which enjoined defendant from diverting United States Department of Agriculture (USDA) food commodities to cooperatives that certain school districts had formed. *Id*. at *1. We found that plaintiff had a likelihood of success on the merits of at least one of its claims, specifically its claim for promissory estoppel. *Id*. at *15. Since plaintiff only needed to present a likelihood of success on one claim, we did not address the plaintiff's other causes of action presented to the trial court[1]. *Id*. at *15 n 3.

The Supreme Court disagreed and reversed the decision of this Court, stating:

> Promissory estoppel requires reasonable reliance on the part of the party asserting estoppel. The contract between the parties contains an integration clause. Reliance on pre-contractual representations is unreasonable as a matter of law when the contract contains an integration clause. See *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 504 (1998). We REMAND

[1] Plaintiff's complaint also alleged causes of action for a violation of the Urban Cooperation Act, breach of contract, silent fraud and fraudulent misrepresentation.

> this case to the Court of Appeals for expedited consideration of the likelihood of success of plaintiff's other causes of action. [*Northern I*, *supra*.]

We now consider the likelihood of success of plaintiff's other causes of action to determine if another basis for granting injunctive relief exists. We find that plaintiff did not show a likelihood of success on its claims for a violation of the UCA, breach of contract, silent fraud or fraudulent misrepresentation. Accordingly, we reverse the grant of the preliminary injunction.

I. STANDARD OF REVIEW

A granting of injunctive relief is within the discretion of the trial court and this Court reviews for an abuse of discretion. *Mich Coalition of State Employees Unions v Mich Civil Serv Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). "The exercise of this discretion may not be arbitrary, but rather must be in accordance with the fixed principles of equity and jurisprudence and the evidence in the case." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263; 489 NW2d 211 (1992). This Court will not overturn a trial court's findings of fact unless it is convinced that it would have reached a different result. *Alliance for the Mentally Ill of Michigan v Dep't of Community Health*, 231 Mich 647, 661; 588 NW2d 133 (1998). Additionally, "[w]hether a plaintiff has a cause of action under the statute presented a question of statutory interpretation" that this Court reviews de novo. *Long v Chelsea Community Hosp*, 219 Mich App 578, 581-82; 557 NW2d 157 (1996).

II. ANALYSIS

A. Violation of the Urban Cooperation Act

We find that plaintiff does not have a likelihood of success on the merits of its claim for a violation of the Urban Cooperation Act (UCA), MCL 124.501 et seq. In its brief on appeal, plaintiff states that it "does not claim a private right of action under [the RSC or UCA] for enforcement of either statute. Instead, plaintiff claims breach of contract facilitated through a violation of the RSC and UCA." However, in plaintiff's first amended complaint, Count II alleges a "VIOLATION OF THE URBAN COOPERATION ACT." Plaintiff goes on to allege that defendants have "materially and substantially violated the requirements" of the UCA in various ways. Thus, as before us on the record, plaintiff has alleged a violation of the UCA and we agree with the defendant that plaintiff cannot prevail on the merits of such a claim as no private right of action exists.

This Court stated in *Long*, *supra* at 583:

> If the common law provides no right to relief, and the right to such relief is instead provided by statute, then plaintiffs have no private cause of action for enforcement of the right unless: (1) the statute expressly creates a private cause of action or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions.

We again addressed this concept when we stated "where a statute creates a new right or imposes a new duty unknown to the common law and provides a comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred." *Claire-Ann Co v Christenson & Christenson, Inc*, 223 Mich App 25, 31; 566 NW2d 4 (1997) (citations omitted). Here, the UCA created a new right that is unknown to our common law; however, it failed to expressly provide for a private right of action. Furthermore, a cause of action cannot be inferred as the UCA provided a means of enforcement by entrusting the responsibility of upholding the law to a public officer by requiring the governor to approve all such interlocal agreements. MCL 124.510. Therefore, there is no private right of action, plaintiff does not have a likelihood of success on the merits of its claim of a violation of the UCA, and the trial court abused its discretion in finding that plaintiff had a likelihood of success on the claim.

B. Breach of Contract

We find that plaintiff does not have a likelihood of success on the merits of its claim for breach of contract. The contract between plaintiff and defendant provided, in pertinent part:

> The State of Michigan shall enter into an agreement with a Contractor(s) to provide Warehousing and Delivery Services for various region(s) . . . for the State of Michigan. . . . The contractor will be the primary distributor of commodities within a region, *however, some recipients may have sufficient volume as to allow direct shipment from USDA. Direct shipment to recipients shall be at the discretion of [the Michigan Department of Education]*.
>
> *Exact quantities to be received, warehoused and distributed are unknown*. The contractor will be required to provide services related to the food that may be ordered during the Contract period. Quantities specified, are estimates based on prior year receipts and/or anticipated USDA shipments, and the State is not obligated to order in these or any other quantities. (Emphasis added).

Defendant argued, inter alia, that plaintiff cannot show a likelihood of success on this claim because the contract language specifically states that receiving agencies may obtain commodities directly from the USDA and that the contract does not guarantee plaintiff a minimum volume of commodities to store and distribute. We agree.

The goal of interpreting a contract is to discern the intent of the contracting parties. *Quality Products & Concepts Co v Nagel Precision*, 269 Mich 362, 375; 666 NW2d 251 (2003). Parties are presumed to understand and intend what the language employed clearly states. *Chestonia Twp v Star Twp*, 266 Mich App 423, 432; 702 NW2d 631 (2005). When interpreting contracts, we give effect to every word and phrase insofar as practicable. *Hunter v Pearl Assurance Co*, 292 Mich 543, 545; 291 NW2d 58 (1940). If the language of the contract is clear and unambiguous, interpretation is limited to the words used and parol evidence may not be used to show a different intent. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). "The judiciary may not rewrite contracts on the basis of discerned 'reasonable expectations' of the parties." *Id*. at 656-57.

We find the language of this contract to be clear and unambiguous. The contract refers to plaintiff as the "primary distributor." The court of claims relies upon this reference to find defendant's breach, stating that defendant "systematically disregarded" the contract by allowing other school districts to form cooperatives in order to directly receive commodities from the USDA. However, the court of claims and plaintiff both ignore the second part of the "primary distributor" clause which explicitly gives defendant that right by stating, "…however, some recipients may have sufficient volume as to allow direct shipment from USDA. Direct shipment to recipients shall be at the discretion of [the Michigan Department of Education]." In giving effect to each word of this phrase, the conclusion that plaintiff is not the primary and *exclusive* distributor and that not *all* commodities *must* come from plaintiff is inescapable. To conclude otherwise is a direct contradiction of the words and would render the first part of the phrase utterly meaningless. Furthermore, the contract plainly states that the quantities that may be ordered are unknown. The language of this paragraph is not mandatory. Defendant was under no obligation to provide plaintiff with any specified amount of business at any particular time. This substantiates the interpretation that plaintiff is not the *sole* provider because some recipients may be receiving shipment directly from the USDA.

From this, we are convinced that the trial court's finding of fact that the language of the contract was ambiguous is wrong. Thus, the trial court erred by allowing in extrinsic evidence when considering the likelihood of success on plaintiff's breach of contract claim. Based upon the clear and unambiguous language of the contract alone, we accordingly find that plaintiff does not have a likelihood of success on a breach of contract claim.

C. Silent Fraud and Fraudulent Misrepresentation

These two causes of action will be addressed together as the defendant asserts the same defense to both causes of action which the plaintiff rebuts with the same argument. Defendant argues that plaintiff's claims for silent fraud and fraudulent misrepresentation are barred by governmental immunity and thus the trial court erred in finding that there was a likelihood that plaintiff would prevail on these claims. We agree.

Governmental immunity is addressed by the government tort liability act (GTLA), which states:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. [MCL 691.1407(1).]

The exceptions provided in the act are the highway exception, MCL 691.1402, the motor vehicle exception, MCL 691.1405, the public building exception, MCL 691.1406, the proprietary function exception, MCL 691.1413, and the governmental hospital exception, MCL 691.1407(4). The only other tort claims that will survive a grant of immunity are "those that arise from the exercise or discharge of a nongovernmental function." *Tate v City of Grand Rapids*, 256 Mich App 656, 659; 671 NW2d 84 (2003). A governmental function is an activity which is "expressly or impliedly mandated or authorized by constitution, statute, or other law." *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 620; 363 NW2d 641 (1984); MCL 691.1401(f).

The language is clear that only five exceptions to the GTLA exist and none apply here to plaintiff's claims. However, plaintiff asserts that the immunity does not apply because the State was not authorized to expand the pilot program because the cooperatives were formed in violation of the UCA; thus the State's action were unlawful, ultra vires actions for which there was no legal authority. Plaintiff relies upon *Richardson v Jackson County*, 432 Mich 377; 443 NW2d 105 (1989) to support this argument; however, both plaintiff and the trial court omit an important part of *Richardson* that improper performance of an authorized activity is still authorized. *Id*. at 385.

In *Richardson*, our Supreme Court determined that failure to comply with § 141 of the Marine Safety Act (MSA) did not render defendant's operation of a beach unauthorized under § 1 of 1917 PA 156. *Id*. at 380-31. Section 1 of 1917 PA 156 authorizes the county to operate recreational facilities such as a public beach. *Id*. at 381; MCL 123.51. Section 192 of the MSA regulates this authorized activity by requiring that buoys be placed to mark a safe swimming area in accordance with § 141. *Richardson*, *supra* at 382; MCL 281.1192(1). Section 141 contains buoy application, inspection, permit and placement requirements. *Richardson*, *supra* at 382-83; MCL 281.1141. The county failed to comply with the requirements of § 141 but our Supreme Court found this failure to comply insufficient to render the county's activity unauthorized, stating:

> Improper performance of an activity authorized by law is, despite its impropriety, still "authorized" within the meaning of the *Ross* governmental function test. An agency's violation of a regulatory statute that requires the agency to perform an activity in a certain way cannot render the activity ultra vires, as such a conclusion would swallow the *Ross* rule by merging the concepts of negligence and ultra vires. [*Richardson*, *supra* at 385-86.]

Here, defendant's failure to comply with the specific requirements of the UCA in forming its cooperatives does not defeat its authority to form them under the RSC. Similar to the general language of § 1 of 1917 PA 156, the RSC does not impose strict requirements to establish a cooperative, but rather generally authorizes their creation by stating:

> (4) A general powers school district may enter into agreements or cooperative arrangements with other entities, public or private, or join organizations as part of performing the functions of the school district. [MCL 380.11a(4)]

Then, similar to the stricter regulations provided by §§ 141 and 192 of the MSA, the UCA provides the regulations by which a cooperative is to be formed by requiring, inter alia, an interlocal agreement, MCL 124.505b, and approval of the governor, MCL 124.510. See MCL 124.501 et seq. As in *Richardson*, failure to comply with these specific regulations does not render the actions unauthorized. The Legislature has explicitly authorized the creation of cooperatives. By regulating the manner in which the cooperative must be formed, the Legislature did not withdraw that power. *Richardson*, *supra* at 385. In fact, the UCA explicitly provides that:

> If any provision of this act conflicts with any other statute of this state providing for the authorization or performance of joint or cooperative agreements or undertakings between public agencies of this state or between public agencies of this state and public agencies of other states or of Canada, the provisions of *the other statute shall control*. Emphasis added. [MCL 124.503.]

This further substantiates the assertion that the Legislature had no intent to withdraw the power given to school districts to enter into cooperatives by the RSC. Since the authority for school districts to form cooperatives explicitly exists, the school districts actions were authorized, despite the failure to comply with the strict requirements of the UCA. *Richardson*, *supra* at 385-86. Plaintiff does not have a likelihood of success on the merits of its claims for silent fraud and fraudulent misrepresentation. The trial court abused its discretion in finding that defendant's actions were unlawful, ultra vires actions for which there was no legal authority.

III. CONCLUSION

We conclude that plaintiff did not show a likelihood of success on its claims for a violation of the UCA, breach of contract, silent fraud or fraudulent misrepresentation. Thus, the standard for issuing a preliminary injunction under *Mich State Employees Ass'n v Dept of Mental Health*, 421 Mich 152, 157-58; 365 NW2d 93 (1985) was not satisfied. We accordingly reverse the grant of the preliminary injunction and we dissolve the stay of the injunction granted by our Supreme Court. Further, we give our judgment immediate effect pursuant to MCR 7.215(F)(2).

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello

STATE OF MICHIGAN

COURT OF APPEALS

RONALD D. PEPPLER,

Plaintiff-Appellant,

v

THE PEPPLER AGENCY, INC., and JANET L. PEPPLER,

Defendants-Appellees.

UNPUBLISHED
December 13, 2011

No. 300194
Wayne Circuit Court
LC No. 09-025460-CK

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Plaintiff Ronald D. Peppler (Ronald) appeals by right the circuit court's grant of summary disposition in favor of defendants The Peppler Agency, Inc. (Peppler Agency) and Janet L. Peppler (Janet). We affirm, albeit in part for different reasons that those relied on by the circuit court.

I

Ronald and Janet were married in 1973. As husband and wife, Ronald and Janet owned, operated, and managed the Peppler Agency, a small, closely held insurance company in Harper Woods, Michigan. Ronald and Janet divorced in 1999, but continued as co-owners and co-managers of the Peppler Agency. At the time of the divorce, Ronald owned 55 percent of the Peppler Agency's stock and Janet owned 45 percent of the Peppler Agency's stock. Also in 1999, Ronald and Janet entered into a Stock Redemption and Deferred Compensation Agreement (the 1999 Agreement). The 1999 Agreement provided that the Peppler Agency could purchase all of a shareholder's stock and pay deferred compensation to the shareholder or his or her beneficiaries under certain circumstances including the death of the shareholder, the long-term disability of the shareholder, or the termination of the shareholder's employment with the company.

Ronald subsequently became addicted to cocaine and took a prolonged leave of absence from the Peppler Agency to seek inpatient treatment. In November 2000, Ronald appointed Janet as his attorney-in-fact pursuant to a durable power of attorney. The durable power of attorney granted Janet full legal authority to hold, sell, or encumber any of Ronald's real or personal property, to access and withdraw any money from Ronald's bank accounts, to exercise all powers and options with regard to Ronald's life insurance policies and employee-benefit plans, to prosecute or defend any lawsuit on Ronald's behalf, to hire or terminate any employee on Ronald's behalf, to vote as Ronald's proxy in any corporation in which he held stock, to place Ronald in any hospital or medical facility, and to otherwise manage all of Ronald's assets and affairs.

Ronald was arrested and charged with drug possession in August 2001, and then again in February 2002. Following his arrest in February 2002, Ronald resigned as an officer and director of the Peppler Agency. However, Ronald continued as the Peppler Agency's resident agent and as a 55-percent owner of the company. Ronald also continued to collect reduced annual payments of $50,000 and other fringe benefits from the Peppler Agency. Ronald maintains that these annual payments of $50,000 plus benefits constituted proof that he continued serving as an employee of the Peppler Agency even after his resignation as an officer and director in February 2002. In contrast, Janet maintains that Ronald's employment was completely terminated as of February 2002, and that the payments of $50,000 a year were merely part of the deferred compensation to which Ronald was entitled in exchange for the redemption of his stock under the 1999 Agreement.

Janet allegedly sent a letter to Ronald in March 2002, informing him that his employment with the Peppler Agency had terminated, that the company was redeeming his stock pursuant to the 1999 Agreement, and that the continued payments of $50,000 a year were part of the deferred compensation to which he was entitled in exchange for his stock under the 1999 Agreement. Ronald has consistently denied that he ever received such a letter.

Then, in August 2003, Janet sent her attorney to meet with Ronald and to ask Ronald to convey all his stock to the Peppler Agency. Ronald refused, insisting that he was still on a leave of absence from the Peppler Agency and that he remained an employee of the company. Ronald informed Janet's attorney that he would be calling a meeting of the shareholders to make clear that he was still on a leave of absence, that he remained an employee of the Peppler Agency, and that he would not be selling his stock to the company. It does not appear that any such meeting of the shareholders was ever held.

In September 2003, Janet sent another letter to Ronald, again informing him that his employment had terminated and that the Peppler Agency would be redeeming his stock under the terms of the 1999 Agreement. The letter proposed that the redemption of Ronald's stock should be fully completed by September 30, 2003. However, Ronald still had not agreed to sell his stock by the end of September 2003.

On October 13, 2003, Ronald was arrested on firearms-related charges and lodged in the Wayne County jail. Ronald's court-appointed attorney informed him that he would likely be sentenced to prison if ultimately convicted. Ronald became disenchanted with his appointed attorney and contacted Janet to ask for her assistance in retaining a different criminal defense attorney to represent him. Janet informed Ronald that she would assist him in locating a new defense attorney, but asked him in exchange to sign a Stock Redemption Agreement (the 2003 Agreement). The 2003 Agreement confirmed that Ronald's employment with the Peppler Agency had terminated, that Ronald's shares would be redeemed by the company, that Ronald would be paid $220,000 for his stock, and that Ronald would receive additional deferred compensation of $50,000 per year for 72 months. Ronald finally agreed to sell his shares to the

Peppler Agency and signed the 2003 Agreement on October 29, 2003.[1] Ronald now contends, among other things, that he had no choice but to sign the 2003 Agreement because he was incarcerated and in a vulnerable state; he claims that he signed the document under duress.

Janet succeeded in retaining a different defense attorney for Ronald, and Ronald was sentenced to a drug treatment program in lieu of prison. However, Ronald left the drug treatment program before completing it and was subsequently rearrested in 2004. Thereafter, Ronald was ultimately convicted and sentenced to prison, where he served two years of his sentence before being released on parole in October 2006. Ronald was finally discharged from parole on April 17, 2008.

Meanwhile, Ronald's insurance producer license had been suspended by the Michigan Office of Insurance and Financial Regulation (OFIR). In early 2009, Ronald requested reinstatement of his insurance producer license, but the OFIR refused on the ground that he had been convicted of a felony. See MCL 500.1205(1)(b); MCL 500.1239(1)(f).

Ronald then informed Janet that he wished to "end his leave of absence" and return as an employee and co-owner of the Peppler Agency. Believing that Ronald had sold his stock and terminated his employment by way of the 2003 Agreement, Janet refused Ronald's request. Ronald subsequently began investigating Janet's activities and the Peppler Agency's finances and allegedly discovered that Janet had converted substantial sums of money from various joint accounts during the previous several years. For instance, Ronald discovered that Janet had withdrawn $100,000 from a jointly owned Morgan Stanley investment account on March 27, 2002. Ronald also discovered that Janet had withdrawn several smaller sums from various other accounts. During discovery, Ronald also allegedly discovered that the Peppler Agency had paid Janet more than $450,000 in unauthorized bonuses during 2002 and 2003.

On October 16, 2009, Ronald filed the instant action in the Wayne Circuit Court, seeking both money damages and equitable relief. Ronald set forth claims of breach of fiduciary duty, breach of contract, conversion, and fraud. He also sought an accounting, the imposition of a constructive trust, and rescission of the 2003 Agreement on the grounds of duress, undue influence, and fraud.

On February 10, 2010, defendants moved to dismiss Ronald's claim of breach of fiduciary duty and his three claims seeking rescission of the 2003 Agreement pursuant to MCR 2.116(C)(7). Defendants argued that these four claims were all barred by the doctrine of laches. In particular, defendants pointed out that Ronald had waited almost six years after he signed the 2003 Agreement to file his lawsuit and asserted that he was not entitled to rescind the 2003 Agreement merely because he now had "seller's remorse." Defendants argued that the 2003 Agreement had been voluntarily and fairly entered into and that Janet had relied on the 2003 Agreement in her operation and management of the business since 2003. Specifically,

[1] Ronald has acknowledged receipt in full of the $220,000 owed to him under the terms of the 2003 Agreement. The additional payments to Ronald in the amount of $50,000 per year as deferred compensation appear to have continued during the pendency of this case as well.

defendants argued that Janet had invested significant time and money into the Peppler Agency since 2003, believing that the company belonged solely to her, and that it would be unfair to permit rescission of the 2003 Agreement after almost six years.

Plaintiff responded to defendants' motion by arguing that he had not waited too long to commence the lawsuit. He pointed out that he had been incarcerated until October 2006, and that he was not discharged from parole until April 2008. He also observed that he had been financially unable to tender back the $220,000 and other consideration paid to him under the 2003 Agreement, but argued that this should not defeat his claims seeking rescission of the 2003 Agreement because it would be inequitable to require him to tender back the money when he could not afford to do so. Ronald additionally argued that Janet's fraudulent concealment of her financial activity and conversion of $100,000 from the parties' joint investment account had impaired his ability to file the lawsuit earlier. He asserted that defendants should be precluded from invoking the doctrine of laches because Janet had acted with unclean hands; he further asserted that Janet's claims that she relied on the 2003 Agreement in building up the company were implausible and inherently incredible.

The circuit court held oral argument on defendants' motion on April 2, 2010. Defendants' attorney argued that Janet had relied to her detriment on the validity of the 2003 Agreement by investing her own time and money into the Peppler Agency since 2003. Counsel for defendants further asserted that Ronald could have filed his claims much earlier, even despite his incarceration and parole. Counsel contended that Ronald had waited too long to file the claims and that it would be prejudicial and unfair to allow rescission of the 2003 Agreement after nearly six years.

Ronald's attorney responded that his client had suffered from a drug addiction for the past six years and had been unable to commence the lawsuit any earlier. Counsel argued that Ronald had not wanted to sign the 2003 Agreement, but had been effectively coerced into doing so because he knew that Janet would not help him to retain an experienced criminal defense attorney if he did not sign the document. Counsel also asserted that his client had been dependent upon Janet for almost everything in 2003, and that Janet had promised to take care of him. Counsel claimed that Janet had violated this special relationship of trust and confidence by forcing Ronald to sign the 2003 Agreement and to sell his stock. He also asserted that Ronald had not been financially able to bring the action until 2009, and that the $220,000 paid to Ronald under the 2003 Agreement was an unfairly low price for Ronald's stock.

The circuit court observed that Ronald had received $220,000 under the terms of the 2003 Agreement and accordingly doubted counsel's representation that Ronald had been financially unable to commence the lawsuit until 2009. With respect to the $100,000 that Janet had withdrawn from the parties' joint investment account, the court noted that half of the money had been held separately for Ronald's benefit in the form of a certificate of deposit and that Janet had likely withdrawn the money and placed it into the certificate of deposit to protect the assets while Ronald was in jail. The circuit court ruled that the reasons offered by Ronald for his delay in bringing the lawsuit were "unfounded" and that any rescission of the 2003 Agreement would prejudice defendants "enormous[ly]." The court concluded:

> This woman has worked and kept this business going since really 2000 as a 45 percent stockholder. If this agreement is rescinded, [Janet] loses her ability to run the business because [Ronald] comes back as a 55 percent stockholder and run[s] the business without a license. No.

The circuit court ruled that Ronald had unreasonably delayed the commencement of his lawsuit and that his claim of breach of fiduciary duty and claims seeking rescission of the 2003 Agreement were barred by the doctrine of laches. On April 20, 2010, the circuit court entered an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) with regard to Ronald's claim of breach of fiduciary duty and his three claims seeking rescission of the 2003 Agreement.

On June 11, 2010, defendants moved for summary disposition of the remaining claims in Ronald's complaint pursuant to MCR 2.116(C)(10). With regard to Ronald's claim seeking the imposition of a constructive trust, defendants argued that Ronald's stock had been properly redeemed by the Peppler Agency more than six years earlier and that there was no basis for holding the stock in constructive trust. Defendants asserted that the stock had already been sold by way of the 2003 Agreement, that the sale was not tainted by fraud, misrepresentation, or concealment, and that it would not be inequitable to allow the 2003 Agreement to stand. With respect to Ronald's fraud claim, defendants argued that Ronald was not entitled to relief because he had not identified any false or misleading representations by Janet. Regarding Ronald's claim for an accounting, defendants argued that Janet had already voluntarily provided all the financial documents and records that Ronald was seeking. Indeed, defendants pointed out that Ronald had acknowledged receipt of these financial records at his deposition and that he was not making any further claim in this regard.[2]

With regard to Ronald's conversion claims, defendants argued that although Janet had withdrawn $100,000 from the parties' joint investment account, she had placed Ronald's half, $50,000, into an interest-bearing certificate of deposit for safekeeping. They pointed out that Janet had prepared and signed a document on March 27, 2002, stating that she had withdrawn $100,000 from the parties' joint investment account, that she had deposited $50,000 into her own personal account, and that she had deposited the other $50,000 into a certificate of deposit at Comerica Bank "with the sole intention of safe keeping for Ron Peppler. This entire account is his account and should anything happen to me, be known that this $50,000 belongs entirely to him." After the instant lawsuit was filed, Ronald requested a return of this $50,000, and on January 4, 2010, Janet provided Ronald with a cashier's check from Comerica Bank in the amount of $62,058.99, representing the full amount of principal and interest accrued on the certificate of deposit. Ronald testified at his deposition that his claim of conversion related to Janet's withdrawal of the $100,000 had been "resolved" by way of the cashier's check from Comerica Bank. Regarding the other purported instances of conversion alleged in Ronald's

[2] In particular, Ronald testified at his deposition that although he had set forth a claim for an accounting in his complaint, "we've gone through discovery and that accounting has taken place and been done. . . . I don't believe there are any remaining open items."

complaint, Ronald similarly testified at his deposition that the sums of money in question had all been accounted for and that the matters had all been resolved to his satisfaction. Accordingly, defendants argued that there remained no genuine issues of material fact and that Ronald's conversion claims should be dismissed.

Lastly, defendants argued that Janet had not breached the 1999 Agreement by asking or inducing Ronald to sign the subsequent 2003 Agreement. Ronald had previously alleged that, under the 1999 Agreement, the understanding of the parties was that he could take an indefinite paid leave of absence from the Peppler Agency and could return to full employment at the end of the leave of absence. But defendants pointed out that, even if this were true, the 2003 Agreement expressly provided that it superseded the 1999 Agreement to the extent that the two documents were inconsistent. Moreover, the 2003 Agreement specifically stated that Ronald's "employment with the [Peppler Agency] has terminated." Defendants further argued that Ronald had freely and voluntarily signed the 2003 Agreement and that there had been no undue influence or duress involved in the execution of the document. Even assuming that Janet had in fact informed Ronald that she would not assist him in retaining new defense counsel unless he signed the 2003 Agreement and agreed to sell his stock, defendants contended that Janet made no actual threats and that her conduct did not rise to the level of undue influence or duress. Defendants suggested that duress required the commission of an illegal act and that Janet had done nothing unlawful. In addition, defendants contended that there could not have been any undue influence because Janet had not owed a fiduciary duty to Ronald.

The circuit court held oral argument on defendants' motion for summary disposition of the remaining claims. After the parties had reiterated their arguments at length, the circuit court ruled that there remained no genuine issues of material fact and that defendants were entitled to judgment as a matter of law. The court observed in pertinent part:

> In this case, counts 1 through 4 were [already] dismissed on summary disposition. The remaining counts . . . will also be dismissed. I think the testimony was clear in [Ronald's] deposition. As I stated, I read it. From page 19 forward, he was satisfied with all the accountings . . . during this case and [testified] that he wasn't pursuing those, which means that there can be no count for an accounting since he was satisfied with them. There can be no fraud because he's satisfied with all the accountings. And I agree [Janet] did take $50,000 and placed it in a CD for [Ronald's] benefit. He was paid that amount plus his interest on that. And now . . . I know the fact that this was a joint account and at any time he could have taken the money out, and it's a good thing that [Janet] did [deposit the money into the account]. [T]here's no conversion here. [Janet] kept the money in a trust account and [Ronald has] been paid. Certainly there's no breach of contract.
>
> I guess the argument is that the 2003 [Agreement] is a voidable contract and a breach of the 1999 contract. There is no fiduciary relationship here, nor is there any unlawful act. The duress that he had to sign this agreement or she wouldn't get him an attorney is such a red herring that I can't believe it. [Ronald] asked [Janet] for help to begin with. And [Janet] had already requested that he sell his stock. . . . As I stated, there is no undue influence and there certainly is no

> fiduciary duty. There were no threats made to [Ronald] in any documentation I've seen.

On August 20, 2010, the circuit court entered an order granting summary disposition in favor of defendants with respect to Ronald's remaining claims. Ronald has timely appealed.

II

We review de novo the circuit court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). It is well settled that this Court will affirm the circuit court if it reached the correct result, even if it did so for the wrong reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). Similarly, even if summary disposition has been granted under the wrong rule, we may affirm so long as summary disposition would have been correctly granted under a different subrule. *Spiek*, 456 Mich at 338 n 9.

III

Ronald first argues that the circuit court erred by dismissing his claim of breach of fiduciary duty and his claims seeking rescission of the 2003 Agreement on the grounds of duress, undue influence, and fraud. He asserts that there remained several genuine issues of material fact with regard to these four claims and that the circuit court made an improper credibility determination when it chose to believe Janet's version of events regarding the formation and execution of the 2003 Agreement over his own. He also asserts that defendants were not entitled to judgment as a matter of law because there remained unresolved issues of fact concerning whether Janet acted with unclean hands. We disagree.

The obvious problem with Ronald's breach of fiduciary duty claim is that Janet owed him no fiduciary duty with regard to the formation or execution of the 2003 Agreement. In order to maintain a claim of breach of fiduciary duty, the plaintiff must establish that the defendant owed him or her a duty of trust and confidence. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 469; 646 NW2d 455 (2002). As explained earlier, Janet owned 45 percent of the stock of the Peppler Agency and Ronald owned 55 percent of the stock of the Peppler Agency at the time. It is axiomatic that a *minority* shareholder owes no fiduciary duty to a majority shareholder. *Fausek v White*, 965 F2d 126, 131 (CA 6, 1992). We acknowledge that Ronald had appointed Janet as his attorney-in-fact pursuant to a durable power of attorney and that a durable power of attorney creates a fiduciary relationship. *In re Conant Estate*, 130 Mich App 493, 498; 343 NW2d 593 (1983). But when Janet approached Ronald and asked him to sign the 2003 Agreement, she did not do so in her capacity as Ronald's attorney-in-fact. Indeed, if she had been acting as Ronald's attorney-in-fact at the time, she could have simply signed the 2003 Agreement, herself. After all, the durable power of attorney gave Janet full authority to act on Ronald's behalf and to sell or convey any of Ronald's real or personal property. A fiduciary must act with the utmost faith and loyalty *on matters within the scope of the fiduciary relationship*. See *In re Karmey Estate*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003). Janet's act of persuading Ronald to sell his stock and to sign the 2003 Agreement was clearly outside the scope of her fiduciary relationship as it existed under the durable power of attorney. Because Janet owed Ronald no fiduciary duty with respect to the formation and execution of the 2003 Agreement, Ronald's claim of breach of fiduciary duty was properly dismissed.

As for Ronald's three claims seeking rescission of the 2003 Agreement, it is undisputed that Ronald did not tender back the $220,000 and additional deferred compensation payments received under the agreement. An action for rescission on the ground of fraud, misrepresentation, or duress carries with it certain prerequisites, including a duty on the part of the plaintiff to tender back what he or she has received. *Gloeser v Moore*, 283 Mich 425, 431; 278 NW 72 (1938); *Dorgan v Birney*, 272 Mich 145, 153; 261 NW 278 (1935). Indeed, "[o]n a rescission, it is necessary, as a rule, to tender back the property received in exchange for the consideration sought to be recovered, so as to restore the original *status quo*, and when the parties seeking relief cannot make restitution, through their own acts or fault, rescission is generally denied." *Latimer v Piper*, 261 Mich 123, 133; 246 NW 65 (1933). Because Ronald failed to tender back that which he had received, his claims seeking rescission of the 2003 Agreement were properly dismissed.[3]

IV

Ronald also argues that the circuit court erred by dismissing his conversion claims when the evidence established that Janet had improperly withdrawn money from the parties' joint account and that she had only repaid it after the commencement of this action. Ronald asserts that the circuit court made improper credibility determinations and improperly inquired into Janet's motivation for taking the money. Again, we disagree.

Ronald specifically testified at his deposition that he was no longer pursuing his claims of conversion and that all moneys allegedly converted by Janet had been subsequently accounted for. By testifying under oath that all the conversion claims had been resolved, Ronald effectively abandoned the claims. Moreover, given Ronald's testimony that all of the allegedly converted moneys were subsequently accounted for, the circuit court properly concluded that there remained no genuine issues of material fact. See MCR 2.116(C)(10).

Ronald argues that even though his half of the $100,000 withdrawn from the parties' joint account was eventually paid back and fully accounted for, Janet took the money without permission in the first instance. He asserts that this, alone, is sufficient to establish that the money was wrongfully converted. But Ronald conveniently disregards the fact that Janet was authorized to withdraw the funds from their *jointly owned* account. "In the civil context, conversion is defined as any distinct act of domain wrongfully exerted over *another's* personal

[3] Ronald now asserts in his brief on appeal that he "did, in fact, attempt to tender back the stock payments to Janet." But as the pleadings and documentary evidence in this case make clear, Ronald attempted to tender back *only a portion* of the payments he had received under the 2003 Agreement. Indeed, Ronald has unequivocally stated in numerous documents that he could not afford to tender back the full $220,000. Nor has he explained why he did not tender back the additional, substantial deferred compensation payments that he received under the 2003 Agreement.

property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992) (emphasis added). The money in the parties' joint account belonged equally to Janet and Ronald, and a person cannot convert his or her own property as a matter of law. *Id*. The circuit court did not err by dismissing the conversion claims.

V

The circuit court properly dismissed Ronald's claims for rescission, breach of fiduciary duty, and conversion. Thus, although we do so in part for different reasons than those relied on by the circuit court, we affirm the grant of summary disposition in favor of defendants on these claims.

In light of our conclusions, we need not consider whether the circuit court made improper credibility determinations or whether defendants should have been precluded from raising the defense of laches on the ground that Janet acted with unclean hands.[4]

Affirmed. As the prevailing party, defendants may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens

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[4] Ronald does not challenge the circuit court's dismissal of his breach of contract and fraud claims; nor does he challenge the circuit court's dismissal of his claims seeking an accounting and the imposition of a constructive trust. Accordingly, we decline to address these matters further.

STATE OF MICHIGAN

COURT OF APPEALS

QUALITY MANUFACTURING, INC.,

Plaintiff-Appellee/Cross Appellant,

UNPUBLISHED
December 15, 2009

v

No. 286491
Genesee Circuit Court
LC No. 04-079512-CZ

BRIAN D. MANN, BRIAN D. MANN, JR., and QUALITY WAY PRODUCTS, LLC,

Defendants-Appellants/Cross Appellees,

and

BRIAN D. MANN,

Counter Plaintiff-Appellant/Cross Appellee,

v

QUALITY MANUFACTURING, INC.,

Counter Defendant-Appellee/Cross Appellant,

and

BRIAN D. MANN,

Third Party Plaintiff-Appellant,

v

JAMES E. KIRBY,

Third Party Defendant-Appellee.

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendants Brian D. Mann, Brian D. Mann Jr., and Quality Way Products, LLC appeal by right a judgment entered in favor of plaintiff Quality Manufacturing, Inc., who cross appeals, following a twelve-day bench trial in this case involving a failed business relationship. We reverse in part, affirm in part, and remand for further proceedings.

Defendants raise several arguments on appeal, but we begin with their last issue which challenged as erroneous the trial court's conclusions of law that defendants breached fiduciary duties, conspired to breach fiduciary duties, and tortiously interfered with Quality Manufacturing's employees and customer relationships. After review of the trial court's findings of fact for clear error and de novo review of its conclusions of law, we agree with defendants. See *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Although Quality Manufacturing argues that this issue was not preserved for appellate review, a party is not required to take exception to a trial court's findings or decisions when a bench trial is held. See MCR 2.517(A)(7); *Morris v Clawson Tank Co*, 459 Mich 256, 275 n 13; 587 NW2d 253 (1998).

Mann was vice president of Quality Manufacturing from about May of 1994, when it was incorporated, until July 2, 2004, when he notified Kirby, its president and sole shareholder, that he resigned. According to Mann, he resigned because Kirby failed to honor his repeated promise that Mann was a 50 percent owner of the company and legal documents reflecting that interest would be forthcoming. Mann then incorporated a business, called Quality Way, which directly competed with Quality Manufacturing. Employees from Quality Manufacturing voluntarily chose to become employees of Quality Way. Many former customers of Quality Manufacturing became customers of Quality Way. Quality Manufacturing sued, alleging that Mann breached his fiduciary duties as vice president and that Mann Jr. conspired with him to do so. These claims are without legal merit.

MCL 450.1541a(1) of the business corporation act provides:

> (1) A director or officer shall discharge his or her duties as a director or officer including his or her duties as a member of a committee in the following manner:
>
> (a) In good faith.
>
> (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.
>
> (c) In a manner he or she reasonably believes to be in the best interests of the corporation.

And, with regard to an officer's duties, MCL 450.1531(4) provides: "An officer, as between himself and other officers and the corporation, has such authority and shall perform such duties in the management of the corporation as may be provided in the bylaws, or as may be determined by resolution of the board not inconsistent with the bylaws." It does not appear from the record evidence in this case that Mann's duties as vice president were set forth in bylaws.[1] Clearly, the statutory duties imposed on Mann as vice president related to the management of Quality Manufacturing.

Quality Manufacturing has never claimed that Mann breached his fiduciary duties with regard to the actual operational management of Quality Manufacturing; rather, the claims were that he breached his duties by planning for his competing business while employed at Quality Manufacturing, resigning unexpectedly, opening a competing business, and "taking" its employees and customers with him. The trial court, citing MCL 450.1541(a), held that Mann was required, at least, to give notice of his intentions with regard to Quality Manufacturing:

> In essence, Brian Mann Sr., vice president of Quality Manufacturing, orchestrated a sneak attack on Quality Manufacturing which was planned while he was an officer of that corporation. His actions cannot be determined to be conducted in "a manner he reasonably believed to be in the best interests of the corporation." At the very least, Quality Manufacturing was entitled to notice of what was a foot [sic]. I find under the circumstances of this case that Mann as vice president of the company had an obligation to give notice of his intention to leave, give notice of his intention to form a competitive company and give notice of his intention to raid Quality Manufacturing's employees. Not doing so was wrongful and a breach of his duties as an officer of that corporation. His conduct put Quality Manufacturing at a competitive disadvantage.

We disagree with the trial court's conclusions as unsupported by the facts and the law.

First, Quality Manufacturing failed to set forth any legal authority in support of its claim that Mann was required to give any specific notice of his intention to resign as vice president and terminate his employment. Under MCL 450.1535(1), an officer can be removed with or without cause and there is no indication that notice is required. By the same token, MCL 450.1535(3) provides that an officer "may resign by written notice to the corporation." The statutory language is permissive, not mandatory; there is no indication that any particular notice of resignation, written or otherwise, is required by statute.

And, according to the record evidence, Mann was not a party to an employment contract with Quality Manufacturing that obligated him to tender any particular notice of resignation. Under Michigan law, then, Mann's employment with Quality Manufacturing is presumed to have been at-will employment. See *Rood v General Dynamics Corp*, 444 Mich 107, 116; 507 NW2d 591 (1993); *Franzel v Kerr Mfg Co*, 234 Mich App 600, 612; 600 NW2d 66 (1999). Thus, the employment relationship was terminable by Quality Manufacturing or Mann at any time, for any or no reason whatsoever. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982); *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572; 753 NW2d 265 (2008). Therefore, the trial court's legal conclusion that Mann breached a fiduciary duty owed to Quality Manufacturing by failing to provide notice of his intention to terminate the employment relationship is erroneous and is reversed.

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[1] We note that the trial exhibits were not provided to this Court. See MCR 7.210.

Second, Quality Manufacturing failed to set forth apposite legal support for its claims that it was entitled to notice of Mann's intention to form a competitive company or that Mann could not plan for his own competing business while an officer employed by Quality Manufacturing. Instead, in support of these claims, Quality Manufacturing relies, as it did in its trial brief, solely on the case of *Production Finishing Corp v Shields*, 158 Mich App 479; 405 NW2d 171 (1987), a case that is clearly factually distinguishable. In that case, the defendant officer was actively pursuing a "longstanding objective" of the plaintiff which was to secure a particular business opportunity with a particular potential client for the plaintiff. *Id*. at 483. When that potential client indicated that it did not want to do business with the plaintiff, the defendant officer asked if they would consider becoming his personal client. *Id*. Thereafter, the defendant officer submitted a proposal to the prospective client and met with them several times in pursuit of this business opportunity for himself, not for his employer. *Id*. at 484. He then purchased equipment and established a corporation to perform those services for that particular client in July of 1981, while he remained an officer of the plaintiff's company. The defendant officer did not inform the plaintiff of these events until after he resigned in August of 1981. This Court held that the defendant officer breached his fiduciary duties by "diverting a corporate opportunity for his own personal gain." *Id*. at 485. It is clear that, but for the defendant officer's actions on behalf of and at the behest of the plaintiff, he would never have secured that business opportunity for himself. Thus, the well-reasoned rule that "a person who undertakes to act for another shall not, in the same matter, act for himself . . . [and] all profits made and advantage gained by the agent in the execution of the agency belong to the principal" applied. *Id*. at 486-487.

But Quality Manufacturing has never alleged usurpation of a corporate opportunity against Mann or claimed that Mann competed unfairly against Quality Manufacturing by using information gained through his employment. In fact, the evidence of record would not support such a claim. To the contrary, the evidence of record reveals that Kirby, the sole shareholder of Quality Manufacturing, had no experience in the basement column industry and had no experience with the machinery used to fabricate the columns. Mann, on the other hand, had worked at AFCO Manufacturing, which made basement columns, for 22 years, had seen a column machine built, and actually ran the column machine. Mann had also been president of AFCO Manufacturing for a couple of years. Mann knew the customers, suppliers, and subcontractors within the basement column industry. This was the valuable knowledge that he brought to Quality Manufacturing; it was not acquired while he worked at Quality Manufacturing. Kirby had no experience in, or knowledge of, the basement column industry. At the time Mann left Quality Manufacturing, he had worked with basement column customers for about 32 years, only ten of which was while employed at Quality Manufacturing.

Not only was there no employment agreement between Quality Manufacturing and Mann, but there also was no anticompetitive covenant. MCL 445.774a(1) provides that "[a]n employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business." Here, Quality Manufacturing is attempting to secure by judicial intervention what it did not secure by fair contractual bargaining supported by consideration. That is, by virtue of the trial court's judgment, Quality Manufacturing received the benefit of a bargain that was never negotiated or agreed upon.

Quality Manufacturing has also failed to cite any legal support for its claim that Mann was prohibited from planning for a basement column business while an officer of Quality Manufacturing—a claim that defies the well-known general prohibition against restraints of trade in the absence of a valid legal agreement. See *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006); *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 485-497; 650 NW2d 670 (2002). Several legal treatises have extensive commentary on the issue, including 3 Fletcher Cyclopedia of the Law of Corporations, §856, which discusses the well-established principle that former officers or directors of a corporation, unless prohibited by contract, may compete against a former employer in the same business and that they "do not violate their duty of loyalty when they merely organize a corporation during their employment to carry on a rival business after the expiration of employment." Likewise, Law of Corporate Officers and Directors: Indemnification and Insurance, § 3:11, provides:

> Unless restricted by contract, corporate officers and directors may resign and form a competing enterprise. This may be done with complete immunity because freedom of employment and encouragement of competition generally dictate that such persons can leave their corporation at any time and go into a competing business. Before actually terminating his or her relationship with the corporation, a corporate officer or director is generally free to make arrangements or preparations for the competing business, provided no wrongful or unfair acts are committed.

This principle is also set forth in Restatement 2d Agency, § 393, comment e, p 218:

> *e. Preparation for competition after termination of agency*. After the termination of his agency, in the absence of a restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed. See §396. Even before the termination of the agency, he is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete.

And, again, in Am Jur 2d, Corporations § 1482, p 473-474:

> The fact that one was once a director or officer of a corporation does not preclude such person from engaging in a business similar to that conducted by the company. Generally, in the absence of a contractual provision to the contrary, corporation fiduciaries, such as directors or officers, are free to resign and form an enterprise that competes with the corporation after they sever their connection with it. Further, in the absence of a contract provision to the contrary, former corporate fiduciaries may solicit the customers of their former corporation for business unless the customer list is itself confidential.

And in 2 Callmann on Unfair Competition, Trademarks and Monopolies, § 16:26 (4th edition):

> A partner, employee, agent or independent contractor, who today are business associates, may tomorrow become competitors. Without a restrictive agreement,

> at the termination of his or her employment an employee can go to work for a competitor or form a competing business. Indeed, even prior to terminating the current employment relationship, the employee has a right to seek and prepare for alternative employment, and has no obligation to disclose to the current employer any intent to become a competitor.

Clearly, in the absence of any specific claim of wrongdoing, Mann did not breach any fiduciary duty owed to Quality Manufacturing when he planned for his business while employed by Quality Manufacturing. There is no allegation that Mann competed with Quality Manufacturing contemporaneously while its vice president as the defendant officer did in *Production Finishing Corp*, *supra*. And Quality Way was not, in fact, formed until after Mann tendered his resignation to Kirby.

The evidence of record reveals that Mann was dissatisfied with his employment situation. He began planning, and even secured funding for, a new venture in case he could not negotiate an agreeable resolution to his grievance with Quality Manufacturing. That is, Mann thoughtfully prepared for his future in the only business in which he had ever worked—the basement column industry. Mann established a line of credit and his son secured a potential location for the new business, a location that Mann Jr. would also use to house his flagpole business. Mann did not purchase any inventory for his new venture and did not legally form his new company until after he had resigned from Quality Manufacturing. He did nothing to sabotage the future success of Quality Manufacturing before he left. In fact, the last week he worked there, he had sales totaling $134,732 and the last day he worked, his sales totaled $42,000. No evidence was presented that, while employed by Quality Manufacturing, Mann used his agency to benefit himself rather than Quality Manufacturing. Further Mann was not required to give notice to Quality Manufacturing of his intention to form a competing company and he was not prohibited from forming a competing company. Therefore, the trial court's legal conclusions to the contrary are erroneous and are reversed.

Third, the trial court concluded that Mann breached his fiduciary duty to Quality Manufacturing when Mann failed to provide it notice that he intended to "raid Quality Manufacturing's employees." Again, we disagree with the trial court's imposition of a notice requirement as unsupported by legal authority. Similarly, when many employees from AFCO Manufacturing left that employment to work for Quality Manufacturing, Quality Manufacturing found no legal impediment to such action. But, more importantly, the evidence of record does not support the conclusion that Mann "raided" Quality Manufacturing's employees.

Not one employee of Quality Manufacturing had an employment contract with Quality Manufacturing; they were all at-will employees. Accordingly, they were entitled to terminate their employment at any time. See *Kimmelman*, *supra* at 572. The evidence was consistent that the employees left Quality Manufacturing because they did not want to work for Kirby. They did not leave Quality Manufacturing because they were enticed to do so by any actions of Mann; rather, they left simply because they wanted to work for Mann after Mann resigned from Quality Manufacturing. In fact, the employees of Quality Way actually received less favorable benefits than they did working for Quality Manufacturing. Quality Manufacturing has wholly failed to present any legal authority to support its claim that Mann breached fiduciary duties he owed to it merely because, after he resigned, all of Quality Manufacturing's employees freely chose to terminate their employment and seek employment with Quality Way. Therefore, the trial court's legal conclusion that Mann breached a fiduciary duty owed to Quality Manufacturing by failing to provide notice of his intention to "raid" Quality Manufacturing's employees is erroneous and is reversed.

In summary, while vice president of Quality Manufacturing Mann was required to discharge his duties in good faith, with the care of an ordinarily prudent person in that position, and in a manner reasonably believed in the best interests of the corporation. MCL 450.1541a. There is no evidence that Mann breached these duties. Quality Manufacturing flourished while Mann was in charge of its operations. But Mann was not legally obligated to continue to work for Quality Manufacturing. He also was not legally obligated to refrain from working for or forming a competing company. Although he began planning for his future while he remained vice president of Quality Manufacturing, Mann did nothing that negatively impacted Quality Manufacturing while he was its vice president. That is, while vice president, he managed "the affairs of the corporation solely in the interest of the corporation." *L A Young Spring & Wire Corp v Falls*, 307 Mich 69, 101; 11 NW2d 329 (1943). After he resigned from Quality Manufacturing, there is no legal reason he could not pursue the same customers or that former employees from Quality Manufacturing could not work for Mann. Therefore, the trial court should have dismissed all of the breach of fiduciary duty claims against Mann. And the conspiracy to commit a breach of fiduciary duty claim against Mann Jr. premised on these same allegations should also have been dismissed by the trial court.

Next, we turn to the trial court's conclusion that Mann tortiously interfered with a business relationship or expectancy of Quality Manufacturing. Again, we disagree. One of the elements of this claim is "an intentional inducing or causing a breach or termination of the relationship or expectancy." *Lakeshore Comm Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995); see, also, *AOPP v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003). That is, there must be "[a]n unjustified instigation of the breach by the defendant." *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). In its brief on appeal, just as in its trial brief, Quality Manufacturing only argues that Mann "intentionally set up a competing business with his son and stole QMI's customers." This allegation is insufficient to establish improper instigation or that Mann wrongfully induced customers to terminate their relationship with Quality Manufacturing. After Mann left Quality Manufacturing and established his own business, he was merely competing for the same customers of basement columns—customers that did not have contracts with Quality Manufacturing. Most of the customers knew and did business with Mann, who had been in the basement column business for about 32 years, only ten of which was with Quality Manufacturing. The customers had no contact or history with Kirby. Further, the sales figures belie the claim. The month after Mann resigned, Quality Manufacturing had record sales totaling $556,247.25. In light of the lack of evidence in support of this claim, it should have been dismissed by the trial court.

The trial court also concluded that Mann tortiously interfered with employment contracts that Quality Manufacturing had with its employees. There is no evidence to support this holding and Quality Manufacturing has failed to cite to even a single case in support of its claim. The fact is, Quality Manufacturing did not have employment contracts with any employee, including Mann. As discussed above, all of the employees at Quality Manufacturing were at-will employees. They could terminate their employment, and be terminated from their employment, at any time for any or no reason. And, again, the evidence was consistent—the employees left

Quality Manufacturing after Mann resigned because they did not want to work for Kirby, not because they were enticed to do so by any "intentional inducing" or "unjustified instigation" by Mann. Thus, this claim also should have been dismissed.

In summary, the trial court erroneously concluded that Mann breached his fiduciary duties to Quality Manufacturing and that Mann Jr. conspired with him to do the same. With regard to the interference claims, the trial court also erroneously concluded that (1) Mann tortiously interfered with employment contracts Quality Manufacturing had with its employees, (2) Mann tortiously interfered with a business relationship or expectancy of Quality Manufacturing, (3) Mann Jr. assisted Mann with these endeavors, and (4) Quality Way was liable for such intentional interferences. None of these claims were meritorious and they were the only surviving claims from Quality Manufacturing's complaint. Accordingly, the trial court should have entered a judgment of no cause of action with regard to Quality Manufacturing's entire action. We reverse the judgment in favor of Quality Manufacturing and remand for entry of a judgment of no cause of action against Mann, Mann Jr., and Quality Way. The trial court is also directed to enter a judgment in the amount of $1,120,689 in favor of Mann and against Quality Manufacturing and Kirby consistent with its holding on Mann's promissory estoppel claim.

In light of our conclusion, we need not address several other issues defendants raised on appeal. First, we need not address defendants' argument that the trial court erred when it offset Quality Manufacturing's damages by Mann's damages awarded on his individual claims against Quality Manufacturing and its owner, Kirby. Mann, alone, is entitled to damages with regard to his promissory estoppel claim set forth in his complaints against Quality Manufacturing and Kirby. The trial court determined those damages to be $1,120,689 and Quality Manufacturing has not appealed this award by the trial court. Second, we need not address defendants' argument that the trial court erred in awarding case evaluation sanctions in the amount of $78,000 against Mann without first determining the several liability of all defendants pursuant to MCL 600.2957. Quality Manufacturing is not entitled to case evaluation sanctions. Third, we need not address defendants' argument that the trial court erred in failing to allocate a percentage of fault to Quality Manufacturing and Kirby, as required under MCL 600.2957 and MCL 600.6304, with regard to Quality Manufacturing's damages. Quality Manufacturing is not entitled to an award of damages. Fourth, we need not address defendants' argument that the trial court erred when it failed to reduce the future damages awarded to Quality Manufacturing to net present value. Quality Manufacturing is not entitled to damages.

Defendants also argue that the trial court erred when it reached the conclusion of law that Kirby did not breach fiduciary duties as president of Quality Manufacturing. We disagree with defendants' characterization of the trial court's holding.

In a bench trial, the trial court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *Chapdelaine*, *supra* at 169. A finding of fact is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Count III of Mann's counterclaim against Quality Manufacturing was a breach of fiduciary duty claim, and included the following allegations:

> 18. Plaintiff's President falsely represented that the corporation would honor the commitment to provide 50% of the value of the business to Defendant/Counter-Plaintiff Brian D. Mann.
>
> 19. Defendant Counter-Plaintiff Brian D. Mann placed special trust and confidence in the President as agent of the corporation and relied on him to exercise his judgment in acting for the interests of Defendant Counter-Plaintiff Brian D. Mann in causing the corporation to provide him with an equal interest in the Plaintiff.
>
> 20. As agent for Plaintiff, the President violated his fiduciary duty; violated his duty to act in good faith; failed to act in a timely and reasonable manner; and failed to disclose information as to the refusal to comply with this commitment.

The trial court dismissed this claim holding: "Count three alleges that Kirby breached a fiduciary duty to Brian Mann. No such duty has been identified during the trial. This count is dismissed." We agree with the dismissal of this claim.

It appears from the complaint that Mann was alleging that Quality Manufacturing, through Kirby, breached fiduciary duties owed to Mann personally but, as the trial court held, such a claim was not established. In their brief on appeal, defendants seem to argue that Kirby breached fiduciary duties owed to Quality Manufacturing and, apparently, thereby breached fiduciary duties owed to Mann. Although inartfully worded, that does not seem to be the allegation in the counterclaim. Nevertheless, defendants have no standing to pursue an action against Kirby on behalf of Quality Manufacturing. See, e.g., *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003). Further defendants fail to explain or support their claim that Kirby owed a fiduciary duty to Mann, a mere employee and not a stockholder of Quality Manufacturing. Therefore, this issue is without merit. The trial court properly dismissed Count III of Mann's counterclaim.

Next, defendants argue that the trial court erroneously dismissed Mann's allegations of estoppel and fraud in light of its conclusion that Quality Manufacturing and Kirby were jointly liable for a breach of promise to make Mann an owner of Quality Manufacturing. We disagree.

Mann's counterclaim against Quality Manufacturing and third-party complaint against Kirby included claims of (1) equitable estoppel premised on Mann's purported reliance on Kirby's representations that Mann was a 50 percent owner and would be provided with the necessary document to reflect that interest, (2) fraud and misrepresentation premised on verbal representations purportedly made by Kirby to Mann and others that Mann was a 50 percent owner of Quality Manufacturing and that they were equal partners, (3) silent fraud based on Kirby's failure to disclose that Mann was not a 50 percent owner of Quality Manufacturing and would not become a 50 percent owner of the company, (4) fraud based upon bad faith promise grounded on Kirby's purported promise that Mann was a 50 percent owner of Quality Manufacturing and would be provided the necessary documents reflecting that interest, and (5) innocent misrepresentation premised again on the purported representation by Kirby that Mann was a 50 percent owner of Quality Manufacturing.[2] On appeal, however, Mann only challenges the trial court's rejection of the first three claims; thus, we turn to those claims.

To establish actionable fraud and misrepresentation, a plaintiff must prove that (1) the defendant made a material misrepresentation, (2) that was false, (3) when the defendant made it, he knew it was false or made it recklessly, (4) the defendant made the representation with the intention that the plaintiff would act upon it, (5) the plaintiff did in fact act in reliance on it, and (6) the plaintiff suffered damages. See *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *M & D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Here, the trial court noted in its findings of fact that the evidence supported a conclusion that Mann was promised an ownership interest in Quality Manufacturing. However, the trial court also held that Mann failed to establish his claim that Kirby promised him 50 percent ownership; Mann's ownership interest was never to exceed 49 percent. Credibility determinations are for the finder of fact. *In re Miller*, *supra* at 337; *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). Nevertheless, the fraud claim failed because Mann did not present evidence establishing that when Kirby promised Mann an ownership interest in Quality Manufacturing, the promise was false or that Kirby knew the promise was false. We agree with the trial court's conclusion. Mann failed to establish that, at the time the promise of an ownership interest was made, the promise was false and Kirby knew that he would not honor the promise. Fraud claims must be proved by clear and convincing evidence. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008) (citations omitted).

The elements of silent fraud are the same as those of fraudulent misrepresentation except that the misrepresentation supporting a claim of silent fraud is based on the defendant's suppression of a material fact that he was legally bound to disclose, rather than on an affirmative representation. *McConkey*, *supra* at 28-29; *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988). The trial court rejected this claim, holding that to establish it, Mann would have had to prove that Kirby failed to disclose the fact that he had no intention of making Mann a partner and that Kirby knew he was not going to make Mann a partner or owner. But, the trial court reasoned, it already concluded that the promise to make Mann an owner was real and Kirby believed it to be true when he made it. We agree with that conclusion. Mann failed to prove that, at the time the promise of an ownership interest was made, Kirby knew that he would not honor the promise but did disclose that intention to Mann.

Mann argues in his appeal brief that "[t]he court views the claims of fraud in a vacuum, and incorrectly limits the time frame to the original promise. Representations of Mann's ownership were made throughout the 10 years Mann built this business, as were the representations that the stock would be issued." But the "original promise" is what induced Mann to leave his long-time employment with AFCO Manufacturing, as Mann alleged in his counterclaim and third-party complaints. As Mann claimed throughout the trial, but for Kirby's promise of an ownership interest in Quality Manufacturing, Mann would not have left AFCO Manufacturing and the ownership opportunity that he had at that company. Thus, Kirby's

[2] Mann also raised a fraudulent concealment claim in both his counterclaim and third-party complaint, but those claims were summarily dismissed with prejudice by order dated June 20, 2007.

original promise, and Mann's reliance on that promise, is what gave rise to Mann's purported damages. That Kirby made representations to potential employees and customers that Mann was an owner of Quality Manufacturing is of no legal consequence to Mann.

And, in his brief on appeal Mann agrees that his equitable estoppel claim was properly dismissed by the trial court because it is a doctrine, not a cause of action, but Mann argues that Kirby should be equitably estopped from profiting from his breached promise. See *Hoye v Westfield Ins Co*, 194 Mich App 696, 704; 487 NW2d 838 (1992). In light of our conclusion that Quality Manufacturing is not entitled to damages, we need not address this issue.

On cross appeal, Quality Manufacturing argues that the trial court erred when it utilized a 12 percent profit margin to calculate its damages. This issue is rendered moot by our conclusion that Quality Manufacturing was not entitled to damages.

Quality Manufacturing also argues on cross appeal that the case evaluation sanctions awarded to it by the trial court were unfairly low. This issue too is rendered moot by our conclusion that Quality Manufacturing did not prevail on any of its claims.

In conclusion, the judgment in favor of Quality Manufacturing is vacated and the trial court is directed to enter a judgment of no cause of action with regard to Quality Manufacturing's entire case against Mann, Mann Jr., and Quality Way. The trial court's order for case evaluation sanctions in favor of Quality Manufacturing is also vacated. The trial court is further directed to enter a judgment in the amount of $1,120,689 in favor of Mann and against Quality Manufacturing and Kirby.

Reversed in part, affirmed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens