STATE OF MICHIGAN

COURT OF APPEALS

KRISTINE S. MCPEAK and KERRY L. MCPEAK,

Plaintiffs-Appellees/Cross Appellants,

v

JOANN MCPEAK a/k/a JODY MCPEAK,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
March 18, 1997

No. 176584
Saginaw Circuit Court
LC No. 92-51420-CZ

Before: Markman, P.J., and McDonald and M. J. Matuzak*, JJ.

PER CURIAM.

Defendant appeals as of right from a May 2, 1994, judgment in favor of plaintiffs in this action involving allegations of undue influence and mental distress.

Michael McPeak (McPeak) died on April 25, 1992, a victim of glioblastoma multiforme, a highly malignant brain tumor. On April 3, 1992, McPeak executed an insurance form designating defendant, his second wife, as the beneficiary. Plaintiffs, McPeak's daughters from his first marriage, were the beneficiaries before the change. Plaintiffs filed suit requesting the imposition of a constructive trust and an award of exemplary damages claiming McPeak was incompetent when he signed the beneficiary change and that defendant exerted undue influence over McPeak. The jury found McPeak lacked sufficient mental capacity to change beneficiaries when he signed the form on April 3, that defendant exerted undue influence on McPeak to alter the beneficiary designation and that her conduct was malicious, willful and wanton. Plaintiffs were awarded the proceeds from the insurance contract as well as exemplary damages. Defendant appeals as of right. Plaintiffs cross appeal. We reverse and remand for new trial.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Although the parties raise numerous issues on appeal, neither party addresses what we find to be the determinative issue. Both parties, as well as the trial court, treated plaintiffs' case as an action at law when in fact it was an action in equity.

Plaintiffs' first amended complaint contains what appears to be three separate counts or causes of action. The first count entitled "JODY McPEAK, LACK OF MENTAL CAPACITY-CONSTRUCTIVE TRUST", specifically states "plaintiffs have no adequate remedy at law and are entitled to equitable relief by way of imposition of a constructive trust on the insurance proceeds…." Likewise, plaintiff's second count "JODY McPEAK, UNDUE INFLUENCE-CONSTRUCTIVE TRUST" sets forth an equitable claim as it again appears to request equitable relief. *Kent v Klein*, 352 Mich 652; 91 NW2d 11 (1958) (constructive trusts are equitable in nature). Plaintiffs final count is entitled "JODY McPEAK-INTENTIONAL INTERFERENCE WITH PROSPECTIVE ADVANTAGE. Although this count, if viable, set forth a claim at law, defendant contends, and plaintiffs do not dispute, the claim was abandoned before trial. In any event, this theory was not presented at trial.

Thus, at the time the matter was submitted to the jury, plaintiffs' claims were clearly equitable in nature. Although plaintiffs' filed a demand for jury trial, there is no right to trial by jury in suits in equity.[1] *Lynch v Lynch*, 127 Mich App 34; 338 NW2d 413 (1983); *Robair v Dahl*; 264 NW2d 27; 80 Mich App 458 (1978). This matter was therefore improperly submitted to a jury.

Many of the problems in this case arise because of its improper posture as an action at law. One of the main areas of dissension among the parties involves the question whether plaintiffs were entitled to exemplary damages. There is no question Michigan permits the recovery of exemplary damages in actions which are based upon tortious acts involving malice, fraud, insult, or wanton and reckless disregard of the plaintiff's rights. *Yamaha Motor Corporation, USA v Tri-City Motors and Sports*, 171 Mich App 260; 429 NW2d 871 (1988). In *Veselenak v Smith*, 414 Mich 567; 327 NW2d 261 (1982), the Michigan Supreme Court stated:

> The resolution of the intellectual and legal questions underpinning the award of exemplary damages was stated in the context of a finite number of factual patterns. Much of the work of the Court since then has been to determine the type of conduct which would give rise to the threshold of injured feelings necessary to support an award of exemplary damages.
>
> This Court has held that the act or conduct must be voluntary. This voluntary act must inspire feelings of humiliation, outrage and indignity. The conduct must be malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff's rights.
>
> As a practical matter, the conduct we have found sufficient to justify the award of exemplary damages has occurred in the context of the intentional torts, slander, libel, deceit, seduction, and other intentional (but malicious) acts.

However, as discussed, the instant action was not a tort action. The only tort alleged in plaintiff's complaint, interference with prospective advantage, on which the claim for exemplary damages was based, was abandoned and not presented at trial. Thus, even though plaintiffs may have presented sufficient evidence indicating defendant's conduct was malicious, and inspired feelings of humiliation, outrage and indignity, plaintiffs presented no tort cause of action on which to base the claim for exemplary damages.[2]

Because the equitable nature of this action was not recognized below, the question whether exemplary damages are permissible in equitable actions was not addressed. We decline to decide this significant question where the issue was not briefed and decided below and where the action is not before us in the correct posture, i.e. as an equitable action. However, we note our research has revealed no Michigan cases which permit the recovery of exemplary damages in equitable actions.[3] But see *Birkenshaw v City of Detroit*, 110 Mich App 500; 313 NW2d 334 (1981) and *In re Swantek Estate*, 172 Mich App 509; 432 NW2d 307 (1988) for cases intimating exemplary damages may be permissible in equitable actions.

We therefore vacate the existing judgment and remand the matter for a new trial. Plaintiffs shall be afforded the opportunity to amend their complaint to clarify the nature of the claims asserted.

We will briefly address the parties' remaining issues likely to reoccur on retrial. However, we note many of the evidentiary issues not addressed arose because the exact nature of the cause of action and applicable damages was unclear during the first trial.

Defendant claims plaintiffs' witnesses were improperly permitted to render an opinion regarding McPeak's competence on the date he signed the change of beneficiary form. We disagree. Plaintiffs presented sufficient evidence of Dr. Sonninos qualifications as a neurosurgeon. Any limitation on his qualifications pertain to the weight to be given his testimony, not to its admissibility. *Triple E Produce v Mastronardi Produce*, 209 Mich App 165; 530 NW2d 772 (1995). Additionally, lay opinion testimony is permitted when it is rationally based on the witness' perception and is helpful to a clear understanding of a fact at issue. *Richardson v Ryder Truck Rental*, 213 Mich App 447; 540 NW2d 696 (1995). Here, each of the lay witnesses knew McPeak for an extended period of time and observed him before and after his surgeries. The opinions were based on the witnesses own perceptions and the testimony was helpful to a clear understanding of a fact at issue. The trial court did not abuse its discretion in permitting the testimony. *Richardson, supra*.

Nor did the trial court abuse its discretion in failing to award plaintiffs judgment interest. Plaintiffs' complaint sought the imposition of a constructive trust on the proceeds of the insurance policy. Before trial, plaintiffs moved the court to compel defendant to deposit the insurance proceeds with the court. Having sought and received equitable relief, plaintiffs are not entitled to interest pursuant to the judgment interest statute, MCL 600.6013; MSA 27A.6013. *Gianetti v Cornille (On Remand)*, 209 Mich App 96; 530 NW2d 121 (1995).

The resolution of plaintiffs' remaining claims of erroneously suppressed evidence are dependent upon the nature of claims made and presented at the new trial. We cannot determine without knowing the theory or nature of the claims on retrial what will and will not be relevant.

Reversed and remanded for new trial. No taxable costs, neither party having prevailed in full.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak

[1] Although MCR 2.509 permits the court on motion or on its own initiative to utilize an advisory jury or with the consent of all parties to order a jury trial in an action where there is no right to a trial by jury, the court and the parties must first be aware of the nature of the action before invoking this court rule.

[2] We express no opinion whether the facts presented at trial would have been sufficient to sustain a legal action for the intentional infliction of emotional distress. See *Haverbush v Powelson*, 217 Mich App 228; 551 NW2d 206 (1996).

[3] A review of other jurisdictions addressing this issue reveals no clear majority position. See Annot., 58 A.L.R.4th 844 (1996)