

STATE OF MICHIGAN
COURT OF APPEALS

IN THE MATTER OF THE CLIFFORD W.
JACKSON & STELLA D. JACKSON
REVOCABLE LIVING TRUST

WELLS FARGO BANK, N. A., Trustee of the
CLIFFORD W. JACKSON & STELLA D.
JACKSON REVOCABLE LIVING TRUST,

UNPUBLISHED
October 16, 2012

Petitioner-Appellee,

and

PATRICIA SEELEN, ANDREA JACKSON and
HOLLY JACKSON,

Appellees,

v

JAMES C. JACKSON and JOHN W. JACKSON,

Respondents-Appellants.

No. 302489
Marquette Probate Court
LC No. 10-031839-TV

In re STELLA D. JACKSON LIVING TRUST

WELLS FARGO BANK, NA, Trustee for the
STELLA D. JACKSON LIVING TRUST,

Petitioner-Appellee,

and

PATRICIA SEELEN, ANDREA JACKSON and
HOLLY JACKSON,

Appellees,

v

No. 302490
Marquette Probate Court

Respondents-Appellants.

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

In these consolidated cases, appellants appeal as a matter of right the probate court's order granting the petition of Appellee Wells Fargo Bank, N.A. to authorize distributions to the designated beneficiaries from two trusts: (1) The Clifford W. Jackson & Stella D. Jackson Revocable Living Trust ("CJRLT"); and (2) The Stella D. Jackson Living Trust ("SJLT"). Appellants assert that the trial court erred because the CJRLT had been restated in its entirety as the SJLT, that there thus was only a single trust, and that allowing distributions from both the CJRLT and the SJLT permitted double distributions to some beneficiaries. Because we find that the CJRLT was effectively amended to preclude further amendment or revocation, and that the SJLT was therefore ineffective, we affirm in part, vacate in part, and remand for further proceedings.

I. BASIC FACTS

The basic facts of this case are not in dispute. On August 1, 1997, Clifford Jackson and Stella Jackson (together sometimes referred to as the "Settlers" or, individually, as a "Settlor") signed a trust agreement creating the CJRLT, and jointly conveyed unspecified property to the trust. Wells Fargo's predecessor was named the trustee of the CJRLT. The CJRLT contained six paragraphs: (1) Paragraph FIRST: Funding; (2) Paragraph SECOND: Provisions During Settlor's Lifetime; (3) Paragraph THIRD: Establishment of Family and Marital Trusts; (4) Paragraph FOURTH: Administrative Provisions; (5) Paragraph FIFTH: Trustee's Powers; and (6) Paragraph SIXTH: Amendment; Revocation. Paragraphs SECOND, THIRD, AND SIXTH of the CJRLT are relevant to this appeal.

In paragraph SECOND, the Settlers retained the "right to use or to direct the payment of any part or all of the net income and the principal of this trust" for any purpose, as well as the right to "revoke or amend [in writing] this instrument . . . [which] is personal to the Settlor, or the survivor thereof." In paragraph THIRD, the agreement stated that, upon the death of either Settlor, the assets of the CJRLT would be divided into two separate trusts: (1) the Family Trust; and (2) the Marital Trust.¹ While the Family Trust contained a provision for gifts to beneficiaries, the Marital Trust contained no similar provision. After the distributions were made, the remaining assets were to be distributed in equal shares amongst the Settlers' surviving children (and per stirpes to any descendants of predeceased children). In paragraph SIXTH, the Settlers expressly retained the right to "alter, amend, modify, or revoke this instrument in whole

¹ The terms of both the Marital Trust and Family Trust were specified in the CJRLT.

or in part, at any time hereafter,” and provided that the “interest of every beneficiary or remainderman hereunder” was subject to this power. Paragraphs SECOND and SIXTH thus each redundantly contained language authorizing the Settlor to amend or revoke the CJRLT. Paragraph SIXTH also declared that the instrument would become irrevocable upon the death of “Settlor.”²

The CJRLT subsequently was amended several times to provide for additional distributions upon the death of the Settlers. On December 9, 1998, the Settlers amended paragraph THIRD of the CJRLT to change the amount provided for each of their surviving grandchildren in the Family Trust from \$100,000 to \$250,000. The Settlers made a second amendment on the same day (December 9, 1998), amending paragraph SECOND of the CJRLT to include distributions to the following beneficiaries: (1) \$100,000 to Bethel Lutheran Church (upon Clifford’s death); (2) \$100,000 to St. John Church (upon Stella’s death); (3) \$100,000 to Ishpeming School Board; and (4) \$5,000 to the Salvation Army. On July 26, 2000, the Settlers made a third amendment to the CJRLT, amending paragraph THIRD by adding a \$5,000 distribution from the Family Trust to Shawn Jackson (a grandson) upon the death of both Settlers. On May 9, 2001, the Settlers made their final joint amendment to the CJRLT, requiring that any distribution due to John W. Jackson be held in trust and distributed pursuant to the trustee’s discretion. All four amendments were made pursuant to the Settlor’s powers contained in paragraph SIXTH, not paragraph SECOND.

Clifford Jackson passed away on March 3, 2003. To acquire preferential tax treatment for the assets that, pursuant to the provisions of the CJRLT and by virtue of Clifford Jackson’s death, were placed into the Family Trust, Stella Jackson signed, on November 13, 2003, a document captioned “Disclaimer.” The Disclaimer specifically noted that paragraph SECOND of the CJRLT could potentially be interpreted to render taxable the assets distributed to the Family Trust. In signing this document, Stella Jackson declared her intent as follows:

My intent in executing this disclaimer is to insure that the assets distributed to the FAMILY TRUST do not qualify for the marital deduction, rather, that these assets be fully taxable in the federally taxable estate of Clifford W. Jackson and fully utilize his applicable exclusion amount under the Code.

Stella Jackson then stated:

With due consideration of the foregoing, I irrevocably and unqualifiedly disclaim any and all rights that I may have under the terms of Paragraph SECOND of the trust, specifically, I disclaim the right to use or direct the payment of any part or

² While not addressed by the parties, it appears that the CJRLT only becomes irrevocable upon the death of both Settlers, since the term “Settlor” is defined in the agreement to include both Clifford Jackson and Stella Jackson, and a contrary interpretation would render certain language of the CJRLT to be surplusage.

all of the net income and the principal of trust assets under that Paragraph as well as the ability to revoke or amend the Trust.³

Stella Jackson explicitly exempted from disclaimer: (1) any of her rights under the Marital Trust; and (2) her right to receive income from the Family Trust. Further, the Disclaimer made no mention of her redundant rights (to revoke or amend the trust) contained in paragraph SIXTH of the CJRLT. Stella Jackson executed and delivered this Disclaimer to the trustee (Wells Fargo), who accepted it and, by virtue of the disclaimer of any “ability to revoke or amend the Trust,” treated the CJRLT as irrevocable.⁴ According to Wells Fargo, Stella Jackson was able to obtain favorable tax treatment for the assets in the Family Trust as a result of the Disclaimer.⁵

On May 10, 2005, Stella Jackson signed a document creating the SJLT, which purported to “amend and restate” the CJRLT “in its entirety” pursuant to her rights under paragraph SIXTH. Wells Fargo was appointed trustee for this trust. The distributions and inheritance to the Settlers’ children specified in Article V of the SJLT were substantially, although not entirely, identical to those stated in the CJRLT, except that the manner of distribution differed slightly, and the SJLT also added a \$5,000 distribution to St. Vincent DePaul. Since Wells Fargo treated the prior Disclaimer as having rendered the Family Trust irrevocable, it subsequently administered both the CJRLT and Stella Jackson’s new SJLT as two independent trusts. The annual statements indicated the existence and maintenance of two separate trusts; these documents had been provided to Stella Jackson since 2004/2005, and had also been provided to Appellants since 2007.

Stella Jackson passed away on March 6, 2009; afterwards, Wells Fargo made distributions from the two separate trusts (instead of one single, fully restated trust), since it believed the Family Trust in the CJRLT was irrevocable. This resulted in additional payments to the Settlers’ grandchildren totaling \$755,000. On September 16, 2009, Appellant James Jackson contacted Wells Fargo via phone and expressed concern over the additional distributions that he noticed in the August 2009 annual statements; he threatened legal action. Appellants took no further action until May 26, 2010, when James Jackson sent a letter (along with an attached opinion letter from his attorney) to Wells Fargo, arguing that Stella Jackson’s retained power to amend the trust in paragraph SIXTH of the CJRLT was: (1) not effectively disclaimed; and (2) properly used to restate the entire trust as one single trust, rendering the double distributions erroneous because the CJRLT no longer existed.

³ The Disclaimer defines the term “Trust” as the CJRLT.

⁴ According to Wells Fargo, it was the Settlers’ attorneys—not Wells Fargo—who drafted the Disclaimer and the SJLT documents.

⁵ Although Wells Fargo claims that Stella Jackson received the preferential tax treatment from the IRS, it has not submitted proof of this. While Wells Fargo’s brief on appeal cites a favorable IRS document approving the credit shelter as if it was Stella Jackson’s approval letter, it is clear that this was merely an example letter submitted by Appellants with their lower court brief.

In 2010, Wells Fargo filed these petitions with the probate court, asking the court to: (1) authorize the contested distributions and approve Wells Fargo’s administration of the trust; (2) provide instructions on how to proceed; and (3) discharge Wells Fargo as trustee once all funds were distributed. Appellants objected, asserting that the SJLT effectively terminated the CJRLT (because the Disclaimer was ineffective), so the additional distributions were made in error. The probate court held a hearing on October 5, 2010, at which the parties debated the validity of Stella Jackson’s Disclaimer.

The probate court issued an opinion and order, noting that the primary issue in this case was the validity of the Disclaimer. However, the court determined that it was the effect of the language purporting to renounce Stella Jackson’s right to amend the CJRLT—not the fact that it was titled “Disclaimer”—that was relevant to this case. The court found that Stella Jackson had effectively renounced her right to amend the CJRLT, and it therefore (1) decided that the SJLT was ineffective in restating the Family Trust portion of the CJRLT; and (2) found the distributions made by Wells Fargo from the Family Trust and the SJLT to have been authorized.

II. STANDARD OF REVIEW

As stated in *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008):

Issues of statutory construction present questions of law that this Court reviews de novo. [*In re Duane V Baldwin Trust*, 274 Mich App 387, 396; 733 NW2d 419, mod 480 Mich 915 (2007).] But appeals from a probate court decision are on the record, not de novo. See MCL 700.1305; MCL 600.866(1); MCR 5.802(B) (1); *In re Webb H Coe Marital and Residuary Trusts*, 233 Mich App 525, 531, 593 NW2d 190 (1999). The trial court's factual findings are reviewed for clear error, while the court's dispositional rulings are reviewed for an abuse of discretion. *In re Coe Trusts*, *supra*; *In re Baldwin Trust*, *supra* at 396–397, 733 NW2d 419. The trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. *In re Baldwin Trust*, *supra* at 397, 733 NW2d 419, citing *Maldonado v Ford Motor C.*, 476 Mich 372, 388, 719 NW2d 809 (2006).

III. THE DISCLAIMER OPERATED AS AN AMENDMENT TO THE CJRLT

The probate court determined that, notwithstanding the title of “Disclaimer”, the Disclaimer operated as a renunciation of Stella Jackson’s right to amend or revoke the CJRLT. The critical language in the probate court’s opinion is as follows: “Although the document is captioned as a ‘Disclaimer’, the importance of the wording to these facts is that it operates as a renunciation of Stella Jackson’s right to amend the Clifford and Stella Jackson Trust.”

Notwithstanding the probate court’s choice of words, the purported “Disclaimer” was not a “renunciation” as that term normally is used in the estate context. Renunciation generally refers to a situation where a devisee “renounces” any interests received from a will in order to take intestate. See *In Re Dodge Testamentary Trust*, 121 Mich App 527, 561; 330 NW2d 72 (1982). The word has been used relatively interchangeably with the word “disclaimer.” See *Defreese v Lake*, 109 Mich 415, 426 (1896). In both cases the words refer to the non-acceptance

of some right passed to the devisee by the testator. In Michigan, disclaimer is governed by statute. MCL 700.2901 *et seq.* The disclaimer functions as a non-acceptance of an interest, wherein “[t]he disclaimant is treated as never having received the disclaimed interest.” MCL 700.2909. However, a person’s ability to disclaim a property interest is not limitless; some laws expressly preclude a person from disclaiming property in certain situations. *State Treasurer v Snyder*, 294 Mich App 641, 648; ___ NW2d ___ (2011); MCL 700.2910(2).

“Disclaimable interest” includes, but is not limited to, property, the right to receive or control property, and a power of appointment. Disclaimable interest does not include an interest retained by or conferred upon the disclaimant by the disclaimant at the creation of the interest. For purposes of this definition, the survivorship interest in joint property is not considered to be an interest retained or conferred upon the disclaimant even if the disclaimant created the joint property. [MCL 700.2901(2)(b).]

Relevant here is that Stella Jackson did not disclaim her “survivorship interest in joint property” but rather her own right to amend or revoke the CJRLT, which they executed in 1997. Thus the right to amend or revoke the CJRLT did not pass to her on Clifford Jackson’s death, and she could not therefore “disclaim” this right.

This Court concludes nonetheless that, notwithstanding the probate court’s imprecise language, the language of the Disclaimer operated as an amendment to the CJRLT. The Disclaimer states in relevant part:

3) I understand the provisions of this Paragraph Second could be interpreted in a manner which would treat any assets being distributed under the Trust to the FAMILY TRUST created under Paragraph THIRD of the Trust as qualifying for a marital deduction under Section 2056 of the Internal Revenue Code.

4) My intent in executing this disclaimer is to insure that the assets distributed to the FAMILY TRUST do not qualify for the marital deduction, rather, that these assets be fully taxable in the federally taxable estate of Clifford W. Jackson and fully utilize his applicable exclusion amount under the Code as provided in the Trust result in “the maximum amount to be transferred without the imposition of the federal gift or estate tax”.[sic]

5) With due consideration of the foregoing, I irrevocably and unqualifiedly disclaim any and all rights that I may have under the terms of Paragraph SECOND of the trust, specifically, I disclaim the right to use or to direct the payment of any part or all of the net income and the principal of trust assets under that Paragraph as well as the ability to revoke or amend the Trust.

6) In making this disclaimer, I am not disclaiming any rights I may have to income from the FAMILY TRUST created under the provisions of Paragraph THIRD of the Trust. Additionally, I am not disclaiming any rights I may have

under the provisions of the MARITAL TRUST created under said Paragraph THIRD.

The instrument was signed by Stella Jackson and delivered to the trustee, who acknowledged receipt. This is sufficient to effect an amendment of the CJRLT. Paragraph SECOND of the CJRLT states, "Settlor, or the survivor thereof, may at any time in writing revoke or amend this instrument." Further, Paragraph SIXTH of the CJRLT provides in relevant part:

. . . Settlor or the survivor thereof also reserves the rights to alter, amend, modify, or revoke this instrument in whole or in part, at any time hereafter, including the right to change trustees, by written notice delivered personally or sent by registered or certified mail to trustee at its last known address or by supplemental agreement duly executed by Settlor or the survivor thereof and trustee After the death of Settlor this instrument shall become irrevocable.

The Disclaimer thus satisfies the requirements of the CJRLT for amendment. In addition, MCL 700.7602 supports a finding that the Disclaimer operated as an amendment of the CJRLT. That statute provides in relevant part:

(3) The settlor may revoke or amend a revocable trust in any of the following ways:

(a) By substantially complying with a method provided in the terms of the trust.

(b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, in either of the following ways:

(i) If the trust is created pursuant to a writing, by another writing manifesting clear and convincing evidence of the settlor's intent to revoke or amend the trust.

We conclude that the Disclaimer is (1) written notice, (2) by the settlor, (3) either delivered or sent to trustee (as demonstrated by the signed "Acknowledgement of Receipt of Disclaimer" section). Thus, although not labeled as an amendment, it substantially complies with the method for amendment provided by the terms of the trust. Therefore, pursuant to MCL 700.7602(3)(a), we conclude that Stella Jackson's Disclaimer amended the CJRLT. Further, the method described in the trust is not designated as the exclusive method for amendment; MCL 700.7602(3)(b)(i) therefore provides that Stella Jackson could amend the CJRLT by another writing manifesting clear and convincing evidence of the Settlor's intent to revoke or amend the trust. The probate court could correctly treat the Disclaimer as an amendment under either the terms of the trust or the statute.

The question then becomes whether the amendment rendered the CJRLT irrevocable by Stella Jackson, and not subject to further amendment, and thus not able to be amended and restated as the SJLT. We conclude that it did.

IV. THE DISCLAIMER SUCCESSFULLY AMENDED THE CJRLT TO RENDER IT IRREVOCABLE BY STELLA JACKSON, AND NOT SUBJECT TO FURTHER AMENDMENT

Because the 2003 Disclaimer is properly viewed as an amendment to the CJRLT, it is appropriate to consider the language of the Disclaimer as part of the trust instrument. See MCL 700.7103(m) (defining “trust instrument” as “a governing instrument that contains the terms of the trust, including any amendment to a term of the trust). A trust instrument must be read and construed as a whole. *Detroit Trust Co v Rivard*, 315 Mich 62, 70-71; 23 NW2d 206 (1946).

Paragraph THIRD of the CJRLT states in relevant part:

On the death of the first of Settlers to die Trustee shall, as of such death, divide all the property subject to this agreement, including any assets which may be added from Settlers [sic] probated estate into two (2) separate shares in the manner set forth below:

FAMILY TRUST

Trustee shall allocate to the “Family Trust” assets to be selected by Trustee of a value which when added to the value of assets which constitute taxable gifts during Settlor’s lifetime will result in the total value of property which is the maximum amount to be transferred without the imposition of a federal gift or estate tax. It is Settlor’s intent that the total value of the unified tax credit allowable under the Internal Revenue Code be applied to the value of property allocated to the Family Trust. . . .

MARITAL TRUST

All of the remaining assets of this trust shall then be allocated to the “Marital Trust” and shall be held and administered and disposed of as follows: . . .

The 2003 Disclaimer indicates that Stella Jackson’s intent in executing that document was to “insure that the assets distributed to the FAMILY TRUST do not qualify for the marital deduction, rather, that these assets be fully taxable in the federally taxable estate of Clifford W. Jackson and fully utilize his applicable exclusion amount under the Code as provided in the Trust result in ‘the maximum amount to be transferred without the imposition of the federal gift or estate tax’.[sic]”

It is clear that the intent of the settlors in providing for the creating of the Family Trust and Marital Trust sub-trusts was to enable the settlors to take advantage of certain federal tax exemptions at death, while still providing support for the surviving spouse. Additionally, it is clear that the intent of the 2003 disclaimer was to insure that the assets of the Family Trust were not Stella’s assets, but rather were included in Clifford Jackson’s estate (with applicable exclusions), for tax purposes. This Court has found that similar language in a trust instrument “unequivocally establishes a specific planning scheme” and unequivocally expresses the settlors’ intent to create a distribution scheme designed to minimize federal estate taxes. See *Karam v Law Offices of Ralph J. Kilber*, 253 Mich App 410, 426-427; 655 NW2d 614 (2002).

Therefore, the probate court could properly conclude, under either the terms of the trust or MCL 700.7602(3)(a) or (b), that the 2003 Disclaimer was an amendment to the CJRLT, and that the stated intent of Stella Jackson was to bring the Family Trust into compliance with the stated goal of minimizing federal estate taxes.

Among the provisions of this Disclaimer amendment was the following:

5) With due consideration of the foregoing, I irrevocably and unqualifiedly disclaim any and all rights that I may have under the terms of Paragraph SECOND of the trust, specifically, I disclaim the right to use or to direct the payment of any part or all of the net income and the principal of trust assets under that Paragraph as well as the ability to revoke or amend the Trust.

As noted, two separate paragraphs of the CJRLT had authorized the Settlers to amend or revoke the CJRLT: Paragraphs SECOND and SIXTH. To that extent, those paragraphs were redundant. In amending the CJRLT to eliminate “the ability to revoke or amend the Trust,” the Disclaimer amendment only specifically referenced Paragraph SECOND. Nonetheless, the probate court concluded:

the phrase “. . . as well as . . .” in conjunction with the ‘ability to revoke or amend’ refers to the authority under both Paragraph Second and Paragraph Sixth of the original trust document. [Underline in original.]

We agree. Were we to read the language of the Disclaimer amendment to refer only to the ability to revoke or amend under Paragraph SECOND, then we in effect would be rendering that language a nullity, because revocation or amendment could simply be accomplished pursuant to a different, redundant paragraph, Paragraph SIXTH. This is not permissible. See *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). Moreover, and notwithstanding the specific reference of the Disclaimer amendment to “Paragraph SECOND,” what the Disclaimer eliminated was Stella Jackson’s “ability” to revoke or amend in the future. The only way to effectively eliminate her “ability” to revoke or amend the CJRLT is to read this language as eliminating any right to further revocation or amendment under *either* of the redundant trust paragraphs.

We conclude that the Disclaimer successfully amended the CJRLT to render it irrevocable by Stella Jackson, and not subject to further amendment.

Additionally, MCL 700.7416 provides that “[t]o achieve the settlor’s tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor’s probable intention. The court may provide that the modification has retroactive effect.” The probate court thus had the power, when confronted with clear evidence of Jacksons’ tax objectives, to amend the trust, regardless of whether the 2003 Disclaimer was itself an amendment. Although the probate court did not specifically reference this statute, it buttresses our conclusion that the probate court did not abuse its discretion in its dispositional ruling.

V. THE SJLT WAS INEFFECTIVE

Because we find that the Disclaimer was an effective amendment of the CJRLT, we agree with the probate court's conclusion that it "operates as a renunciation of Stella Jackson's right to amend the [CJRLT]." But we further conclude therefrom that the SJLT was ineffective.

By its terms, the SJLT, does not purport to alter any of Stella Jackson's rights under the Marital Trust, but purports to "amend[] and restate[] [the CJRLT] in its entirety." Although Stella Jackson retained all rights given to her under paragraph THIRD of the CJRLT, which includes "the power to appoint all or any part of the principal of the Marital Trust[,] it is impossible to ascertain from the SJLT any intent to make such an appointment in creating the SJLT. The probate court properly concluded that "this language in the 2005 document was ineffective." However, it did so, in the probate court's words, "[b]ecause she had previously, in this court's view, renounced her ability to amend the Family Trust." We find that the probate court thereby improperly limited the effect of the Disclaimer amendment. By the Disclaimer, Stella Jackson had not merely eliminated her ability to further amend the Family Trust that had been created under the CJRLT, but rather had eliminated her ability to amend "the Trust." As noted, the Disclaimer amendment defined the "Trust" as the CJRLT (not as the Family Trust). Consequently, as a purported amendment of the CJRLT, the SJLT was ineffective in its entirety.

We therefore conclude that the probate court properly held the Disclaimer to be an effective amendment of the CJRLT, and properly found authorized the distributions by the Trustee from the Family Trust. To that extent, we affirm. However, we further find that because the SJLT was ineffective, the probate court erred in finding authorized the distributions by the Trustee from the SJLT. To that extent, we vacate the decision of the probate court, and we remand for further proceedings consistent with this opinion.

We find it unnecessary to address Wells Fargo's statute of limitations defense, which in any case we note is not preserved for appellate review because the probate court did not decide the issue. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Although this Court may overlook preservation requirements if the issue is a question of law and all the facts were available for presentation at trial, *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006), we decline to do so in this case, because, in addition to the lack of a ruling from the probate court on this issue, the issue presents factual questions that render the current record inadequate for this Court to decide the issue as a matter of law.

We note specifically, among these factual questions, that the record does not contain the file of Appellants' earlier petition; since this Court does not know when Wells Fargo received service of process on that matter, the precise duration that the statute of limitations on Appellants' cause of action may have been tolled cannot be determined. Further, the record does not establish exactly when Appellants received the "August 2009" report that arguably effectively put them on notice of the claim. The probate court also did not address whether Appellants' filed objections were sufficient to "commence a proceeding" under MCL 700.7905, or whether this did not occur until they filed their petition on October 20, 2010. Finally, the probate court did not address whether Wells Fargo waived this defense by failing to raise it in a

responsive pleading. MCR 2.116(C)(7); MCR 2.116(D)(2). We therefore decline to address this issue.

Affirmed in part, vacated in part, and remanded for further proceedings.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Mark T. Boonstra