

STATE OF MICHIGAN
COURT OF APPEALS

DEAN VALENTE, MARK VALENTE III,
VALENTE IRREVOCABLE LIVING TRUSTS,
JAMES VALENTE, RICHARD VALENTE and
MATILDE VALENTE TESTAMENTARY
TRUST,

UNPUBLISHED
August 10, 2004

Plaintiffs-Appellants/Cross-
Appellees,

v

MARCO VALENTE, JR.,

No. 242552
Macomb Probate Court
LC No. 99-162001-CZ

Defendant-Appellee/Cross-
Appellant.

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiffs Dean Valente and Mark Valente III are successor trustees of the Valente Irrevocable Living Trusts (irrevocable trusts), of which plaintiff brothers Dean, Mark III, James and Richard Valente are beneficiaries. Mark Valente III also acts as successor trustee of the Matilde Valente Testamentary Trust, a predecessor entity of the irrevocable trusts. Plaintiffs and defendant Marco Valente, Jr., appeal as of right from a June 17, 2002 post-trial order of the probate court awarding various damages. We affirm in part, reverse in part, and vacate in part.

I. Facts and Procedural History

Defendant created the trusts for his children with an inheritance from his mother. Defendant acted as trustee for many years. Following a decade of misuse of trust assets, plaintiffs brought suit against defendant alleging conversion, breach of fiduciary duty, fraudulent concealment, tortious interference, and intentional and negligent infliction of emotional distress. The trial court determined that defendant breached his fiduciary duty and the case went to trial on all other matters.¹ Following a three-and-a-half week trial, the jury, through a special verdict

¹ Pursuant to *In re Messer Trust*, 457 Mich 371, 380-382; 579 NW2d 73 (1998), the
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form, found defendant liable on several theories and awarded plaintiffs \$194,645 in damages and the return of property located at 300 Pensacola in Venice, Florida.²

II. Amendment of Jury Award

Plaintiffs first contend that the probate court erred by disregarding the procedural requirements within MCR 2.611 when it remitted the jury's verdict by \$125,000. Defendant characterizes the probate court's action as vacating the jury award and entering a judgment notwithstanding the verdict. Defendant cross appeals, challenging the probate court's determination to enter a surcharge against defendant for the interest on the \$125,000 mortgage.

The challenged award involves 270 Tamiami Trail, real property in Florida that the irrevocable trusts owned with defendant's sister, Flora Fiscelli, who had a one-half interest in the property. Defendant admitted to mortgaging the Tamiami Trail property to obtain \$125,000, which he used to pay a personal federal tax debt. The jury reached apparently inconsistent results regarding plaintiffs' damages with respect to this property. In several special verdict questions, the jury determined that defendant's mortgage of the Tamiami Trail property and expenditure of the proceeds constituted fraudulent concealment of trust assets, tortious interference with the irrevocable trusts, and conversion of trust assets, for which plaintiffs were entitled to damages for the \$125,000.³ Yet in a separate special verdict question, the jury determined that the irrevocable trusts had not "suffered a loss on the sale of the property located at 270 Tamiami Trail . . . as a result of the mortgage placed on said property by the Defendant?"

As a result, the probate court determined in a post-trial hearing that plaintiffs suffered no damages related to the mortgage expenses and "disallowed" the award of \$125,000.⁴ However, the court declined to completely absolve defendant of fault for mortgaging the Tamiami Trail property. The court assessed a surcharge against defendant for interest on the mortgage.

And the record was well made both at pretrial proceedings as well as through the trial, the effort, erstwhile effort, of the Court along with trial counsel to frame issues for a jury regarding this trust or these trusts and the difficulties in framing the questions for the jury verdict, suffice it to say a good deal of time was taken by counsel and the Court after the proofs in order to formulate the verdict forms. The Court at this point, from the arguments made, would not have given the verdict form in its present form but would have asked a dual question, so-called a

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determination of the prudence of the trustee is a matter for the trial court.

² We note that neither party presented the transcripts of this lengthy jury trial to this Court, although these transcripts were necessary to analyze the issues as presented. This error would have prevented our review of the issue had the probate court's action with regard to the damages award not been clearly erroneous.

³ Although it is unclear from the record on appeal how damages were calculated, both parties concede that the amount included the \$125,000 mortgage.

⁴ These proceedings occurred approximately six months after the jury trial. Their purpose was to settle the final accounting of the trusts consistent with the jury verdict.

finding of fault, whether it be fault, conversion, whatever, and then what if any damages were incurred by the beneficiaries.

And in this type of situation, the Court feels it has a prerogative to do what reasonably flows from the issue, what should be the case, and especially dealing with a trustee, dealing with a higher degree of duty, the Court is not disposed towards absolving the act totally. Therefore, the Court will indicate the trustee is to be liable for an interest rate in effect at the time of his use of the money, that is the \$125,000. He is to absorb—well, I think that’s already a moot issue. The cost and fees of the mortgage. And that shall be assessed to him, adopting a theory of unjust enrichment in the self-dealing with the trust asset Tamiami. By that ruling the Court will reject the finding that there was \$125,000 by way of a jury verdict that should be paid, and I accept the argument that there are no damages beyond, like I say, what I’ve indicated on unjust enrichment.^[5]

Regardless of whether the probate court’s action is characterized as remittitur or JNOV, it was improper to amend the jury’s award of damages. Plaintiffs were entitled to recover for defendant’s wrongful conversion of the proceeds from the mortgage. Defendant correctly notes that the tort of conversion applies only to personal, not real, property.⁶ Had defendant taken the Tamiami Trail property for his own benefit, plaintiffs would not be entitled to recovery under a theory of conversion. However, defendant mortgaged the Tamiami Trail property and converted the *proceeds*, which are personalty, for his own benefit.

Personal property encompasses a broad spectrum of property, including “substantially every valuable thing of a personal nature.”⁷ Although the Michigan Supreme Court has never directly indicated that the proceeds of a mortgage are personal property, it has found that a mortgage, in the hands of the mortgagee, is personal property until foreclosure.⁸ Rents and profits are real estate interests until they are collected and converted into money.⁹ Furthermore, the proceeds from the sale of land are personal, not real, property.¹⁰ The money collected from mortgaging real property is similarly personal property.

Defendant concedes that he used the proceeds from the mortgage for his own benefit. Accordingly, the jury properly found that defendant converted the \$125,000 mortgage proceeds

⁵ Hearing Transcript, May 10, 2002, pp 81-83.

⁶ See *Eadus v Hunter*, 268 Mich 233, 244; 256 NW 323 (1934); *Attorney General v Hermes*, 127 Mich App 777, 786; 339 NW2d 545 (1983); *Embrey v Weissman*, 74 Mich App 138, 143; 253 NW2d 687 (1977).

⁷ *Clark v Chapman*, 215 Mich 518, 526; 184 NW 497 (1921).

⁸ *Id.*

⁹ *Case v Ranney*, 174 Mich 673, 683; 140 NW 943 (1913).

¹⁰ See *Rossmann v Marsh*, 287 Mich 720, 734; 286 NW 83 (1939) (Potter, J.); *Stewart v Young*, 247 Mich 451, 455-456; 226 NW 222 (1929).

for his own use. Therefore, the probate court improperly reduced the damages award by this amount. We cannot tell from the limited record on appeal under what theory the probate court alternatively assessed a surcharge against defendant. We, therefore, vacate the trial court's order assessing such a surcharge and reinstate the jury's verdict including the \$125,000 in damages.

III. Treble Damages

Plaintiffs argue that the probate court erred by failing to treble, pursuant to MCL 600.2919a, the amounts of their damages arising from defendant's wrongful acts of conversion. However, plaintiffs were not entitled to statutory conversion damages.

Plaintiffs' complaint sought damages for common-law conversion. The jury found that defendant had converted \$7,500 in 1982, and specifically indicated on the special verdict form that the amount was subject to treble damages.¹¹ The jury also found that defendant converted an additional \$194,645 over the years. However, statutory conversion encompasses only a defendant's knowing assistance of a third party's acts of conversion and not the defendant's own acts of direct conversion.¹² Although we find it illogical that the party actually converting the property of another cannot be held liable to the same extent as his or her accomplice, we are bound by the statute and case law that strictly applies the plain language of the statute to affirm the probate court's denial of treble damages. The skewed result that occurs from this statute is left for the Legislature to address.

IV. Negligent Infliction of Emotional Distress

Defendant asserts that the probate court improperly denied his motions for summary disposition or judgment notwithstanding the verdict of plaintiffs' claim that his wrongful conduct with respect to the trusts amounted to negligent infliction of emotional distress.¹³ We review a trial court's determination regarding a motion for summary disposition de novo.¹⁴ A motion

¹¹ As will be discussed *infra*, plaintiffs were barred by the applicable statute of limitations from recovering for the assets converted in 1982. Furthermore, as plaintiffs were not statutorily entitled to treble damages, the jury's award was improper.

¹² See *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 434, ___; ___ NW2d ___ (Docket No. 243112, issued March 30, 2004); *Campbell v Sullins*, 257 Mich App 179, 191-192; 667 NW2d 887, lv den 469 Mich 964 (2003); *Marshall Lasser, PC v George*, 252 Mich App 104, 112; 651 NW2d 158 (2002).

¹³ As we find that defendant was entitled to summary disposition of this claim, we need not consider his claim that he was entitled to JNOV. However, we note that as defendant failed to provide the transcripts of the jury trial including his motion for JNOV, he has abandoned this issue for appellate review. *Taylor v Blue Cross & Blue Shield of Mich*, 205 Mich App 644, 654; 517 NW2d 864 (1994).

¹⁴ *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery.¹⁵

Michigan recognizes the tort of negligent infliction of emotional distress only in limited circumstances. In *Wargelin v Sisters of Mercy Health Corp.*,¹⁶ recovery was limited to situations in which a person suffered physical harm from the shock of witnessing a member of their immediate family threatened with serious injury.¹⁷ Plaintiffs' complaint clearly failed to allege a claim for negligent infliction of emotional distress. Their allegations of harm revolve around defendant's treatment of trust assets, not from witnessing a threat of serious injury to another person.

This Court may look beyond an erroneous label placed on a plaintiffs' claim and determine whether a plaintiff otherwise stated a claim in tort.¹⁸ Michigan recognizes a plaintiff's right to recover for emotional distress when the individual: (1) suffers a definite and objective physical injury, (2) that is produced as a result of emotional distress, (3) which distress is proximately caused by a defendant's negligent conduct.¹⁹ The "plaintiff has the burden of proof that the physical harm or illness is the *natural result* of the fright proximately caused by [the] defendant's conduct."²⁰

Plaintiffs alleged the existence of a definite and objective physical injury—"sleeplessness and anxiety."²¹ However, plaintiffs merely allege that their injuries were caused by defendant's general conduct. Plaintiffs fail to allege that specific conduct proximately caused this injury.²² Accordingly, plaintiffs have failed to state a claim for relief pursuant to *Dale v LaCroix* and *McClain v Univ of Mich Bd of Regents*.

In light of the nonspecific and inadequate allegations of any emotional distress claim and failure to allege a claim for negligent infliction of emotional distress, the probate court should

¹⁵ *Id.* at 129-130.

¹⁶ *Wargelin v Sisters of Mercy Health Corp.*, 149 Mich App 75, 80-81; 385 NW2d 732 (1986).

¹⁷ *Id.* See also *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581 n 6; 603 NW2d 816 (1999) (noting that Michigan recognizes the tort of negligent infliction of emotional distress only when a plaintiff witnesses negligent injury to a third party and suffers mental disturbance as a result).

¹⁸ *Electrolines, Inc v Prudential Assurance Co.*, 260 Mich App 144, 159; 677 NW2d 874 (2003).

¹⁹ *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970); *McClain v Univ of Mich Bd of Regents*, 256 Mich App 492, 497-498; 665 NW2d 484 (2003).

²⁰ *Daley, supra* at 13 (emphasis in original).

²¹ *Id.* at 15-16 (finding that evidence of extreme nervousness and irritability constituted facts from which a jury could find or infer a compensable physical injury); *McClain, supra* at 498-499.

²² See *Daley, supra* at 12-14.

have granted defendant's motion for summary disposition of this claim pursuant to MCR 2.116(C)(8).

V. Subject Matter Jurisdiction

Defendant further maintains that the probate court lacked subject matter jurisdiction to rule on the parties' ownership dispute concerning 300 Pensacola. Defendant did not raise this argument before the probate court, but a challenge to subject matter jurisdiction may be raised for the first time on appeal.²³ Whether the trial court had subject matter jurisdiction over a claim is a question of law that we review de novo.²⁴

The probate court has limited jurisdiction, which it derives from statutes.²⁵ By the time the probate court decided the instant ownership dispute, the current Estates and Protected Individuals Code provided for probate court jurisdiction, in relevant part, as follows:

The court has exclusive legal and equitable jurisdiction of all of the following:

* * *

(b) *A proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do all of the following:*

* * *

(v) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust.

(vi) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.^[26]

The plain language of MCL 700.1302(b) vests the probate court with subject matter jurisdiction over a broad category of trust-related matters.

²³ *Bass v Combs*, 238 Mich App 16, 23; 604 NW2d 727 (1999).

²⁴ *Id.*

²⁵ *Manning v Amerman*, 229 Mich App 608, 611; 582 NW2d 539 (1998).

²⁶ MCL 700.1302 (emphasis added). The Revised Probate Court similarly provided for a probate court's legal and equitable jurisdiction over "[p]roceedings concerning the validity, internal affairs, and settlement of trusts, . . . and the declaration of rights involving trusts, trustees, and beneficiaries of trusts . . ." MCL 700.21(b).

The parties do not dispute that, without regard to the situs of 300 Pensacola, the Macomb Probate Court had subject matter jurisdiction to consider the ownership dispute between the irrevocable trusts and defendant trustee regarding 300 Pensacola, which dispute involves the internal affairs of a trust “or the declaration of rights that involve a trust, trustee, or trust beneficiary.”²⁷ The parties also do not dispute that the Macomb Probate Court possessed personal jurisdiction to determine their rights as trusts and trustee. Defendant asserts that the probate court had no authority to enter any order concerning 300 Pensacola due to its location in Florida.

Our Supreme Court has long recognized that a Michigan court, that otherwise has jurisdiction over the parties and dispute before it, may rule on the parties’ respective ownership interests in property situated beyond Michigan’s borders.²⁸ Because the Macomb Probate Court undisputedly had jurisdiction over the parties and the subject matter of their dispute—the real property ownership interest in 300 Pensacola—we conclude that the probate court properly ruled with respect to the parties’ ownership interests in the property, despite its situs in Florida.²⁹

²⁷ MCL 700.1302(b).

²⁸ *Stowell v Johnson*, 280 Mich 627, 631; 274 NW 354 (1937), quoting *Muller v Dows*, 94 US 444; 24 L Ed 207 (1877); *Noble v Grandin*, 125 Mich 383, 387; 84 NW 465 (1900).

²⁹ *Henkel v Henkel*, 282 Mich 473; 276 NW 522 (1937), on which defendant relies, is distinguishable from the instant case. In *Henkel*, the plaintiffs sought to partition real estate, including a parcel located in Florida. The Supreme Court noted the following applicable legal principles:

No statute of this state and no decree entered by the courts of this state has any extraterritorial force. Whenever the decree of this state is enforced in another state, it is done in pursuance of the full faith and credit clause of the Constitution; and then, it is enforced only in case the court has jurisdiction of the subject-matter of the litigation.

“It is elementary law that the courts of one state or country have no jurisdiction to partition lands situated in another state or country.”

“The right to transfer, partition, and charge real estate belongs exclusively to the state within whose territory it is situate.” [*Id.* at 485-486 (citations omitted).]

Unlike a partition case, which is “held to be local in character” and directly affects the nature of the real property itself through physical division or sale of the real property, *id.* at 485-487, in this case, the probate court did not purport to exercise its authority over 300 Pensacola by entering an order that would affect the nature of that property or otherwise encumber it. The probate court merely determined the respective ownership interests of the parties, over whom the court properly had jurisdiction, in a distant parcel of property.

To the extent that defendant also challenges the merits of the probate court's ultimate award of title to 300 Pensacola to plaintiffs within the judgment, we decline to address the issue. Defendant failed to include this specific issue within his statement of questions presented,³⁰ and entirely failed to address the jury's findings as the basis for the judgment awarding plaintiffs title to 300 Pensacola.³¹

VI. Statute of Limitations

Defendant contends that plaintiffs' claim that he converted \$7,500 belonging to the Matilde Valente Testamentary Trust in 1982, was barred by the statute of limitations. Absent a factual dispute, whether a claim is barred by the applicable statute of limitations is a question of law subject to review de novo.³²

At the time plaintiffs filed this action, the Revised Probate Code provided for the following relevant period of limitation:

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. . . .^[33]

The first clause of § 819 plainly and explicitly provides that the final accounting determination governs the applicable period of limitation *unless* plaintiffs' claim otherwise qualifies as "previously barred by adjudication, consent, or limitation."³⁴ Pursuant to multiple distinct tort theories—conversion and tortious interference—the jury in this case awarded plaintiffs \$7,500 in damages that the Matilde Valente Testamentary Trust incurred in 1982 because of defendant's misconduct. Plaintiffs' tort claims of conversion and tortious interference are subject to the following period of limitation:

³⁰ *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 139; 676 NW2d 633 (2003).

³¹ *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997) (explaining that this Court need not consider appellate arguments that fail to address the basis of the trial court's decision).

³² *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002).

³³ MCL 700.819 (emphasis added).

³⁴ *Martin v Beldean*, 469 Mich 541, 546; 677 NW2d 312 (2004).

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

* * *

(10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.^[35]

Because plaintiffs did not commence this action seeking recovery for defendant's 1982 conversion from and tortious interference with the testamentary trust until 1999, seventeen years after their tort claims accrued, the period of limitation within MCL 600.5805(10) precludes plaintiffs from pursuing the tort claims. Because the statute of limitations bars the 1982 tort claims, the probate court as a matter of law should have dismissed the claims related to the 1982 misconduct pursuant to MCR 2.116(C)(7).

In summary, we affirm the court's rejection of plaintiffs' request for treble damages pursuant to MCL 600.2919a, and the court's award of title to 300 Pensacola to plaintiffs. We reverse the probate court's order denying defendant's motion for summary disposition regarding plaintiffs' negligent infliction of emotional distress count, and the court's denial of defendant's motion for no cause of action concerning plaintiffs' time-barred 1982 tort claims. We also vacate the probate court's order disallowing the award of \$125,000 for the conversion of mortgage proceeds relating to the Tamiami Trail property and assessing a surcharge against defendant, and reinstate the jury's damages award.

Affirmed in part, reversed in part, and vacated in part. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper

³⁵ MCL 600.5805. See also *Brennan v Edward D Jones & Co*, 245 Mich App 156, 158; 626 NW2d 917 (2001) (observing that a claim for conversion is governed by the three-year period of limitation applicable to injuries to person or property); *Joba Constr Co v Burns & Roe, Inc*, 121 Mich App 615, 625; 329 NW2d 760 (1982) (explaining that tortious interference is subject to the three-year period of limitation).