

STATE OF MICHIGAN
COURT OF APPEALS

KRYSTL Y. WEBB, Personal Representative of
the Estate of JOSEPH D. GREEN, Deceased,

UNPUBLISHED
July 17, 2003

Plaintiff-Appellee,

v

No. 235424
Oakland Circuit Court
LC No. 99-019071-CH

WILLIAM J. GREER,

Defendant-Appellant,

and

KEVIN D. DUNKLEE, KAREN S. DUNKLEE,
DONALD OLIVER, CATHY OLIVER,
FREDERIC MARQUARDT and GEANNE
MARQUARDT,

Defendants-Appellees.

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

In this action involving a dispute over real property that allegedly was subject to a real estate development agreement between plaintiff's decedent, Joseph Green, and defendant-appellant William J. Greer (hereinafter defendant), defendant appeals as of right from a judgment for plaintiff, following a jury trial. We affirm in part, reverse in part, and remand.

I

Plaintiff sued defendant and defendants-appellees in her capacity as the Personal Representative of the estate of her father, Joseph Dewitt Green, who died on March 23, 1999. On March 25, 1997, defendant conveyed 7.35 acres of Rose Township property to Green via a quitclaim deed. On that same date, Green and defendant entered into an agreement to develop eight parcels of real estate, including the 7.35 acres of property deeded to Green. The agreement provided that Green would pay for all development-related expenses, that the proceeds from the sales of the developed parcels first would reimburse Green's expenditures, and that the parties would share any remaining profits.

After Green's death, plaintiff discovered that, in April 1999, defendant had recorded three quitclaim deeds purporting to transfer several development parcels (denominated parcels one, three and four) from Green to defendant. Plaintiff sued defendant, alleging that defendant forged the deeds and seeking to quiet title with respect to the involved parcels. Plaintiff also averred that defendant breached the development agreement by failing to reimburse Green for any expenses he had paid, and by failing to provide Green his share of the profits from defendant's sale of several parcels within the development after Green's death.¹

Defendant filed a countercomplaint alleging that Green breached the real estate agreement because he neglected to pay virtually all development-related expenses, and that he forged the three quitclaim deeds from Green and requested that the court quiet title to the three parcels in him. Defendants-appellees filed a cross claim asserting their lack of knowledge concerning any forgery by defendant, and requesting damages and indemnification from defendant in the event they lost their properties to plaintiff.

The jury returned a special verdict finding that neither Green nor plaintiff breached the development agreement, that defendant committed a material breach of the agreement and converted the property of the deceased, that the deeds from Green to defendant were forged, and that defendant and Green did not intend the deed of 7.35 acres to Green for security purposes. The circuit court entered a judgment quieting title to the three parcels described within the forged deeds, and awarded plaintiff a judgment of \$216,781.05.

II

Defendant first contends that the circuit court erred by failing to rule on his motion for reconsideration of the judgment, effectively precluding him from filing a motion for judgment notwithstanding the verdict (JNOV). Defendant's argument reflects his concern that because of the circuit court's failure to address the merits of his motion for reconsideration, this Court might deem unpreserved his various challenges to the sufficiency of the evidence supporting the jury verdict for plaintiff. However, this issue is moot because, in denying plaintiff's motion to dismiss defendant's appeal, this Court already considered and rejected plaintiff's characterization of defendant's appeal as untimely, given defendant's failure to file in the circuit court a proper motion for reconsideration of the final judgment, *Webb v Greer*, unpublished order of the Court of Appeals, entered January 2, 2002 (Docket No. 235424). *City of Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000). Furthermore, defendant offers no explanation or authority in support of his suggestion that the circuit court's failure to rule on his motion for reconsideration precluded him from filing a motion for JNOV.² *Houghton v Keller*, 256 Mich App 336, 339; ___ NW2d ___ (2003).

¹ Plaintiff further alleged defendant's conversion of the property of a deceased in violation of MCL 700.171, and sought other equitable relief. Defendants-appellees were named as parties to the suit because they had purchased three development parcels from defendant, and plaintiff sought to quiet title or to obtain an equitable lien with respect to these parcels.

² The Michigan Court Rules authorize a party to file a motion for JNOV "[w]ithin 21 days after entry of judgment," with no requirement that the moving party first pursue a motion for
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To the extent defendant expresses concern regarding the preservation status of his challenges to the sufficiency of the evidence presented at trial, we find that defendant properly preserved his challenges because he moved for a directed verdict at trial with respect to all counts of plaintiff's complaint, and the circuit court ruled on defendant's motions. MCR 2.515; *Napier v Jacobs*, 429 Mich 222, 229, 234-235, 238; 414 NW2d 862 (1987). Because the instant record appears adequately preserved to permit this Court's review of defendant's challenges to the sufficiency of the evidence, and because defendant offers no explanation as to what further enhancement of the record a remand would provide, we decline his request to remand for the circuit court to consider a motion for JNOV.

III

Defendant next argues that the circuit court erred by denying his motion for a directed verdict with respect to his claim that Green and plaintiff breached the development agreement. This Court reviews de novo a circuit court's ruling on a motion for a directed verdict. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). In reviewing the circuit court's ruling, this Court examines the evidence presented and all legitimate inferences arising therefrom in the light most favorable to the nonmoving party. *Farm Credit Serv's of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 668; 591 NW2d 438 (1998). "A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ." *Candelaria, supra* at 71-72. "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). The "appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Serv's, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

Green and defendant entered their real estate development agreement in March 1997. Plaintiff introduced an exhibit consisting of fifty checks she found within Green's file related to the development property. Of the thirty-five checks dated between March 1997 and September 21, 1998, at least twenty plainly relate to development expenses (engineering, excavation, road commission expenses, surveying, township charges) or list within the check's memo section the development property address (1000 Davisburg Road, defendant's address), while at least ten others clearly were written either payable to or on behalf of defendant. Defendant did not dispute the number or amounts of the checks within plaintiff's exhibit, that Green wrote some specific checks for development expenses, including property taxes, or that Green wrote defendant several checks, and defendant acknowledged at trial that he did not know how much money Green had paid for development-related expenses.

Plaintiff testified that she located within Green's files no evidence of reimbursement to Green or his estate for the development-related expenses, except for some amount arising from the September 1998 sale of parcel two, despite defendant's 1999 sales of parcels three, four and seven. Defendant complained at trial that he did not receive one-half of the proceeds from the

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rehearing of the order entering judgment. MCR 2.610(A)(1).

sale of parcel two, but acknowledged on cross-examination that Green used the sale proceeds to pay several outstanding bills and, therefore, Green did not receive reimbursement for any prior expense payments he had made.

While defendant introduced evidence that, in late April 1998, Gordon Excavating received from him a certified check in the amount of \$20,000, which he allegedly paid from proceeds of a mortgage he obtained on part of the development property, plaintiff elicited testimony that in mid-April Green withdrew \$22,000 from his investment account to pay for roadwork expenses. This testimony supports a rational inference that Green withdrew the excavation expense money from his own account, then transmitted the money to defendant who obtained a certified check payable to the excavation company listing himself as the remitter. Excavation company owner David Gordon further testified that he received from defendant cash and at least one check written on the account of GTS Business Machines.

Defendant alleged that he had to pay expenses left by Green, who was broke, but plaintiff's evidence showed that Green had money available in a stock account during his lifetime, and that his estate had significant assets. While defendant indicated that he had written checks to pay for expenses related to a slow-down lane and other township compliance requirements, the township did not issue the requirements until after Green's death, and defendant acknowledged that he did not notify the estate or request its reimbursement of these expenses.³

The above evidence amply supports the jury's reasonable determination that Green and plaintiff had the ability to and did in fact pay for all development-related expenses of which they had knowledge, and for which they did not receive reimbursement. To the extent that defendant introduced evidence and testimony indicating to the contrary, that he had to pay for various expenses because Green had no money or otherwise neglected to pay, the jury apparently discredited this evidence, and this Court will not revisit the jury's determinations concerning the weight of evidence and credibility of witnesses. *Zeeland Farm Serv's, supra* at 195; *Hunt, supra* at 99.⁴

IV

Defendant also asserts that the circuit court erroneously precluded him from challenging his ownership of the development property at the time he conveyed the 7.35 acres to Green. Defendant wished to introduce evidence that someone had forged the name of defendant's brother, Arnold Greer, on the deed that conveyed 17.65 acres of property from defendant, his brother and his sister to defendant alone. On the first day of trial, the court granted plaintiff's

³ Apart from these checks, defendant alleged that he paid various expenses in cash.

⁴ We note that defendant's related argument, that the jury verdict was against the great weight of the evidence, lacks merit because the above-described testimony provided competent support for the jury's verdict, and the verdict was not otherwise manifestly against the clear weight of the evidence. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

motion in limine⁵ to preclude this evidence on the basis that it constituted an affirmative defense that defendant had waived by not raising it in his responsive pleadings.

We review for an abuse of discretion a trial court's decision whether to admit evidence. *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Whether a particular assertion qualifies as an affirmative defense constitutes a question of law that we review de novo. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379 (2001).

According to MCR 2.111(F)(3), “[a]ffirmative defenses must be stated in a party’s responsive pleading, either as originally filed or as amended in accordance with MCR 2.118,” and must set forth the facts constituting the defenses. Plaintiff’s original and first amended complaints asserted that Green had title to 7.35 acres of the development property pursuant to a March 25, 1997, deed from defendant to Green. In his affirmative defenses to the initial complaint, defendant asserted with respect to the March 25, 1997, deed only that it constituted an equitable mortgage. In his affirmative defenses to the amended complaint, defendant stated, “No proper deed or equitable mortgage was ever executed by Greer to Joseph . . . Green, so Green never owned the property.”⁶

Defendant’s argument concerning plaintiff’s motion in limine indicates that he wished to introduce at trial the suggestion that Green had involvement in a forgery of the deed pursuant to which defendant obtained title to the development property from himself and his siblings. We find that defendant’s reliance on the asserted invalidity of the deed pursuant to which he received title to the development property, before conveying 7.35 acres to Green via the entirely distinct deed relied on in plaintiff’s complaint, qualifies as an affirmative defense. Plaintiff’s complaints nowhere referred to the deed pursuant to which defendant obtained his ownership interest, and thus defendant’s injection of the issue in response to plaintiff’s claim of ownership represents “a defense that does not challenge the factual merits of a plaintiff’s prima facie case, but which otherwise denies relief,” *Harris v Vernier*, 242 Mich App 306, 314; 617 NW2d 764 (2000), or “a matter that accepts the plaintiff’s allegation as true and even admits the establishment of the plaintiff’s prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff’s pleadings.” *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993).

Because defendant failed to raise the affirmative defense as required by MCR 2.111(F), he waived it. *Harris, supra* at 312.⁷ To the extent defendant suggests that he raised the

⁵ We note that defendant cites no authority for the proposition that the circuit court should not have considered plaintiff’s allegedly untimely motion in limine. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 57; 649 NW2d 783 (2002) (observing that a party may not leave it to this Court to search for authority to sustain or reject its position).

⁶ In his countercomplaint, defendant raised a count to quiet title to the development property on the basis that the deed from him to Green constituted an equitable mortgage. Defendant only mentioned the deed from himself and his siblings to him alone to establish the proposition that “clearly . . . the land in question was initially owned by [defendant].”

⁷ Defendant did state in two sentences within a motion for summary disposition that Green had
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affirmative defense by asserting that he executed no proper deed to Green, we fail to comprehend how defendant's allegation would have apprised plaintiff of defendant's intent to suggest that Green forged the deed pursuant to which defendant obtained title to the property.⁸ Defendant's allegations plainly involved fraudulent conduct by Green, which defendant entirely failed to plead with particularity. MCR 2.112(B)(1). While defendant now suggests that the circuit court should have permitted him to amend one of his pleadings to assert the defense, there is no indication in the record that defendant ever requested leave to amend a pleading. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471-472; 628 NW2d 577 (2001).

V

A

Defendant further contends that the circuit court erred by denying his motion for a directed verdict with respect to plaintiff's quiet title counts because insufficient evidence established that defendant owned the 17.65 acres of property at the time he deeded 7.35 acres of the same property to Green. The deed quit claiming 17.65 acres from defendant, his brother and sister to defendant alone bears a date of March 25, 1997, although the notary's stamp indicates that he witnessed the signing of the deed on March 27, 1997. The deed quit claiming 7.35 acres of the development property from defendant to Green also bears a conveyance date of March 25, 1997, on which date the notary also witnessed the signatures to that deed.

Defendant incorrectly asserts that the undisputed evidence established that the conveyance of 17.65 acres to him occurred subsequent to his conveyance of 7.35 acres of the same property to Green. Both deeds express that the conveyances occurred on March 25, 1997. Defendant cites no authority for the proposition that the notary's March 27, 1997, date of acknowledgment of the deed from he and his siblings to him alone rendered the deed ineffective until March 27. *Houghton, supra*. To the contrary, the March 27 date of acknowledgment did not render the deed of 17.65 acres to defendant ineffective between the parties to the conveyance, but only signified that the deed did not meet the statutory requirements for recording until its March 27 acknowledgment. MCL 565.8; *Irvine v Irvine*, 337 Mich 344, 352;

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forged the name of Arnold Greer on the deed granting defendant his interest in the development property. The remainder of defendant's motion for summary disposition, brief in support of summary disposition, and reply to plaintiff's response to his motion for summary disposition addressed the alleged equitable mortgage status of the deed from defendant to Green, and nowhere did the circuit court's opinion denying defendant's motion mention the alleged forgery by Green. Irrespective to what extent defendant raised his forgery claim in the context of the motion for summary disposition, he still waived the affirmative defense by failing to raise it in his initial pleadings and failing to request leave to amend any of his pleadings to assert it. *Harris, supra* at 312.

⁸ Defendant provides no citation to the record in support of his suggestion that plaintiff's counsel "was in contact with . . . Arnold Greer, who told him that he never signed the deed." See *Great Lakes Division of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998) (explaining that a party may not leave it to this Court to search for a factual basis to sustain or reject its position).

60 NW2d 298 (1953); *Evans v Holloway Sand & Gravel, Inc*, 106 Mich App 70, 81-82; 308 NW2d 440 (1981). Moreover, defendant ultimately recorded the deed pursuant to which he received his 17.65 acres before the recording of the deed conveying a portion of the same property to Green. MCL 565.29 (providing that the first-recorded deed has priority over unrecorded deeds involving the same property, irrespective of the date of execution of the unrecorded deeds); *Drake v McLean*, 47 Mich 102, 104; 10 NW 126 (1881).

B

Defendant additionally alleges his entitlement to a directed verdict concerning plaintiff's quiet title count premised on the forged deeds because "there was no room for reasonable minds to differ as to what the language of the [real estate development agreement] provided." According to defendant, he had no reason to forge Green's name on the three quitclaim deeds reconveying the development parcels to defendant because the language of the agreement authorized him to obtain a court order to force Green to sign deeds conveying the development parcels, even if Green did not wish to do so. Defendant failed to preserve this issue for appellate review, however, because he did not argue at trial his entitlement to a directed verdict with respect to count II of plaintiff's amended complaint on the basis that the development agreement plainly rendered it unnecessary for him to forge Green's name on the deeds involving development parcels one, three and four. MCR 2.515; *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995).

Furthermore, we find it plain from the record that defendant was not entitled to a directed verdict pertaining to plaintiff's allegations of forgery. Plaintiff testified that she had worked with Green, reviewed thousands of checks and other documents within Green's business files, and consequently had familiarity with Green's signature, but denied that Green's purported signature on the September 1998 deeds conveying parcels one, three and four to defendant appeared similar to Green's true signature. Plaintiff also presented the testimony of a handwriting expert who similarly opined, after comparing nearly fifty documents signed by Green before his death with Green's alleged signature appearing on the September 1998 deeds, that "the questioned signature on the quitclaim deeds . . . was not written by one and the same person, Joseph P. Green," but by someone who tried to copy his signature. Plaintiff further testified that, after Green's death, defendant made repeated efforts to discuss with her the disposition of the development property, and that when she later questioned defendant regarding his property-related concerns, he advised her that she did not "have to worry about that anymore" because he had "taken care of that." Defendant recorded the allegedly forged deeds in April 1999, after the victim's death.

This evidence and the legitimate inferences arising therefrom supports the jury's reasonable determination that defendant forged Green's name on the three September 1998 deeds. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Candelaria, supra* at 71-72. Although defendant denied forging the deeds and argued to the jury that in light of the development agreement language he had no reason to forge the deeds, the jury apparently rejected defendant's argument by explicitly finding that defendant did indeed forge the deeds, and this Court will not substitute its judgment for the jury's well-supported finding or determination of credibility. *Zeeland Farm Serv's, supra* at 195; *Hunt, supra* at 99.

Accordingly, we conclude that defendant was not entitled to a directed verdict with respect to the quiet title counts of plaintiff's first amended complaint.

VI

Defendant next argues that the circuit court erred in denying him a directed verdict with respect to the quiet title count of his countercomplaint because the evidence established as a matter of law that the deed of 7.35 acres from him to Greer constituted an equitable mortgage.

The power of a court of equity to construe an instrument in the form of an absolute deed of conveyance as security for the payment of a debt is not open to question. However, the burden of proof rests on the party asserting such a transaction to be a mortgage to establish his claim by clear and satisfactory proof. [*Wilson v Potter*, 339 Mich 247, 251; 63 NW2d 413 (1954).]

The intent of the parties to the deed, as evidenced by all of the surrounding circumstances, controls the question whether the deed represents security for the repayment of a loan. *Sheets v Huben*, 354 Mich 536, 540; 93 NW2d 168 (1958); *Wilson, supra* at 251; *Koenig v VanReken*, 89 Mich App 102, 106; 279 NW2d 590 (1979). Some circumstances that persuasively signify the parties' intention that a deed constitute security for a loan include the inadequacy of consideration given in exchange for the deed, the grantor's existing indebtedness to the grantee, and the parties' unequal bargaining positions, *Sheets, supra* at 540-541; *Wilson, supra* at 251; *Koenig, supra* at 106-107. Of these circumstances, "inadequacy of consideration is the most important." *Ellis v Wayne Real Estate Co*, 357 Mich 115, 119; 97 NW2d 758 (1959). The true nature of the parties' intent in executing a deed represents a question of fact that belongs to the jury, which occupies a better position than an appellate court to evaluate the witness testimony and other proofs. *Wilson, supra* at 251.

After carefully reviewing the record, we conclude that defendant failed to establish as a matter of law that Green gave him inadequate consideration in exchange for the deed conveying 7.35 acres of development property to Green. Defendant correctly observes that the deed recites only Green's nominal consideration of one dollar in exchange for the 7.35 acres of development property. However, defendant ignores relevant provisions of the March 1997 agreement to develop the property including the 7.35 acres, which defendant and Green executed contemporaneously with defendant's execution of the deed to Green, and other evidence of the circumstances surrounding the agreement and conveyance.

The language of the agreement, ¶ 2, unqualifiedly announces that "Green owns free of any liens or encumbrances a tract of land" described identically to the 7.35-acre parcel conveyed within the deed from defendant to Green. Consistent with the language on the face of the deed and within ¶ 2 of the agreement describing Green's absolute title to the 7.35 acres, the agreement provides as follows that Green would keep title to five acres of the development property even if the project did not reach successful completion:

In the event that Plat Act 591 is repealed or changed to the extent that the parties cannot maximize the divisions of the property and development, or cannot agree eventually to a change of their anticipated development, then in that event JOSEPH D. GREEN shall retain five (5) acres described hereinafter The

remaining 2.35 acres shall be sold as soon as practicable and the profits from such sale after payment of expenses, shall be paid to the benefit of WILLIAM J. GREER.

The agreement further explains that “Green has the funds and capital available to provide for any necessary expenses in the development and sale of the subject properties,” and plaintiff testified that Green brought to the development project much experience in business and property matters, including the ownership and operation of many rental properties on which Green had accomplished various construction work.

According to the agreement, Green would “provide all funds necessary for development, including but not limited to roadway expense if necessary,” and plaintiff introduced Green’s development-related checks and checks to or for defendant, written between March 1997 and September 1998, that totaled approximately \$44,500. Plaintiff additionally introduced testimony suggesting that Green withdrew \$22,000 from his investment account to pay for roadwork expenses.

Given these circumstances, defendant did not clearly and convincingly establish that Green provided inadequate consideration for the conveyance of the 7.35 acres. While defendant disputed during his testimony that Green had any or as much construction and development experience as defendant, the jury had the prerogative to determine the credibility of the disputed evidence on these points. *Zeeland Farm Serv’s, supra* at 195; *Botsford Gen Hosp v Citizens Ins Co*, 195 Mich App 127, 142-143; 489 NW2d 137 (1992).

We further find that defendant failed to clearly and convincingly establish that he executed his deed to Green for security purposes. At trial, defendant repeatedly averred that he executed the deed to Green as security for Green’s loan, to permit the additional subdivision of the property in Green’s name, and in exchange for Green’s agreement to pay for all development expenses. Plaintiff’s counsel impeached defendant’s trial testimony, however, with his inconsistent deposition statements that he deeded the property to Green solely to permit the additional subdivision of the development property. The jury reasonably could have determined on the basis of defendant’s various statements that defendant made the conveyance to Green solely for the purpose of obtaining additional property subdivisions, a purpose which would not support the finding that the deed to Green constituted an equitable mortgage. *Wilson, supra* at 251; 1 Cameron, Michigan Real Property Law (2d ed), § 18.6, pp 659-660; see also *Candelaria, supra* at 71-72; *Hunt, supra* at 99.⁹

Because defendant failed to present clear and convincing evidence, let alone undisputed evidence, of the circumstances in which Michigan courts have declared a deed to represent an

⁹ Our review of the record also leads us to conclude that defendant failed to present clear and convincing evidence that a loan from Green to defendant existed at the time defendant executed the deed to Green. Defendant testified that, around March 1997, he owed Green \$20,000, that he repaid Green this amount in cash, and that Green had documentation commemorating his loan to defendant, but defendant produced no documentation supporting his testimony concerning the existence of a loan or his repayment of it.

equitable mortgage, i.e., that Green obtained the deed from defendant through his coercive abuse of a debtor-creditor relationship with defendant, we conclude that the circuit court properly denied defendant's motion for a directed verdict regarding his equitable mortgage claim. *Ferd L Alpert Industries, Inc v Oakland Metal Stamping Co*, 379 Mich 272, 277-279; 150 NW2d 765 (1967); *Wilson, supra* at 251-253; *Candelaria, supra* at 71-72.

VII

In a related claim, defendant challenges the propriety of the circuit court's instructions describing the doctrine of equitable mortgage. Our review of the record reflects that the circuit court's instructions accurately reflect Michigan law with respect to equitable mortgages, specifically that the parties to a deed must intend that the conveyance represent security for an obligation, that the parties' intent may be gleaned from the documents and other circumstances surrounding the transaction, and that the party asserting an equitable mortgage bears a clear and convincing burden of proof, as reflected in *Ellis, supra* at 118, *Sheets, supra* at 540, and *Wilson, supra* at 252-253. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (explaining that instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury).¹⁰

VIII

Defendant next asserts that the circuit court erred by denying his motion for a directed verdict concerning plaintiff's claim that he converted property of a deceased in violation of MCL 700.171.

Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. *Citizens Ins Co of America v*

¹⁰ Even assuming that the circuit court's instructions qualify as imperfect to the extent that they did not (1) provide illustrative examples of circumstances that might substantiate the parties' intent that a deed would constitute an equitable mortgage, i.e., the grantor's indebtedness to the grantee and the inadequacy of consideration; or (2) emphasize the significance of an inadequacy of consideration in determining the parties' intent, the instructions nonetheless do not warrant reversal of the jury's verdict. During his closing argument, defense counsel urged the jury to find that defendant intended the conveyance to Green to constitute security because (1) defendant owed Green money; (2) "[t]he pressure of the fact that you're in a bad bargaining position can be something that, is considered to determine what was your intent"; (3) Green paid nothing for the conveyance from defendant, and (4) "[i]f you didn't pay a dime, that's a good indication the law says, a very good, a strong indication that it's an equitable mortgage, not a deed." The jury thus had awareness of the particular circumstances, recognized in case law, on which defendant relied in attempting to substantiate a finding that defendant intended the deed to Green as security for his loan to defendant. As indicated above, the record supports the jury's determination that defendant did not clearly and convincingly establish that he executed the deed to Green for security purposes. Because the court's instructions accurately described the applicable law governing the jury's consideration of the facts on which defendant relied in arguing the existence of an equitable mortgage, we conclude that the instructions do not warrant reversal of the jury's special verdict. MCR 2.613(A); *Case, supra* at 6.

Delcamp Truck Center, Inc, 178 Mich App 570, 575; 444 NW2d 210 (1989). The parties and the circuit court agreed that the common law tort of conversion may occur only with respect to another's personal property, not real property.

Count VI of plaintiff's first amended complaint, titled "Conversion of property of the deceased (MCL 700.171),"¹¹ included the following three paragraphs and request for relief:

45. Plaintiff incorporates the allegations contained in Paragraphs 1 through 44, above, as though fully set forth herein.

46. Defendants, *by way of the conveyance of the parcels by the forged Quit Claim Deeds*, embezzled or wrongfully converted the property of the deceased, Joseph D. Green.

47. Defendants are liable to the Plaintiff for double the value of the property so embezzled or converted, which is to be recovered for the benefit of the Estate, pursuant to MCL 700.171.

WHEREFORE, Plaintiff . . . requests this Court enter a judgment against Defendants . . . jointly and severally awarding Plaintiff twice the amount of her actual damages, in an amount in excess of Twenty-five Thousand Dollars . . . and to award Plaintiff any other relief as the Court deems just and appropriate, including an appointment of a Receiver for the property. [Emphasis added.]

The only specific instance of alleged conversion plainly involves defendant's conveyance of the three development parcels "by way of the forged Quit Claim Deeds."¹² Because the tort of conversion does not occur with respect to real property, defendant's act of conveying the three development parcels via the forged deeds did not constitute an act of conversion.¹³

¹¹ Although the Legislature repealed MCL 700.171 effective April 1, 2000, 1998 PA 386, the parties and the court agreed that § 171 applied to plaintiff's complaint filed in December 1999.

¹² Plaintiff argued at trial, and argues in her brief on appeal, that she sought damages on the basis of defendant's conversion of the real estate *and the proceeds* arising from the sale of the property. However, the language of count VI simply does not address proceeds. The common law conversion described in count V of plaintiff's first amended complaint alleged defendant's wrongful retention of proceeds "from the sale of the parcels." However, plaintiff withdrew count V during trial apparently because she agreed with defendant's assertion that "common law conversion" did not encompass alleged conversion involving real estate.

¹³ We find erroneous plaintiff's argument, and the circuit court's apparent agreement, that because the probate code addresses the disposition of both personal and real property, the reference to conversion of the property of a deceased within MCL 700.171 encompasses both the conversion of a deceased's personal and real property. Plaintiff's argument ignores the plain language of MCL 700.171, which provides for double damages "[i]f a person embezzles or wrongfully *converts any of the moneys, goods, chattels, or effects of any deceased person* before letters of authority are granted." (Emphasis added). Absolutely nowhere does this section contemplate an expanded definition of the common law tort applicable only to personal property.

(continued...)

In light of the fact that defendant's actions as alleged in count VI of plaintiff's first amended complaint do not involve tortious conversion, the circuit court erred by denying defendant's motion for directed verdict with respect to this count.

IX

Defendant further contends that the circuit court improperly imposed an equitable lien to secure plaintiff's judgment on development parcels owned by defendant and his wife as tenants by the entireties. The trial record in this case contains no suggestion that the wife of defendant, who was "a single man" at the time of the execution of all the deeds relevant to the issues determined at trial, had any interest in the development parcels. Furthermore, our review of the lower court record reveals no documentary evidence or testimony tending to establish any interest of defendant's wife in the development properties. Although defense counsel at the May 16, 2001, hearing regarding plaintiff's motion for settlement of the judgment, and within defendant's motion for reconsideration, referred to the existence of a 1998 deed granting 1000 Davisburg Road (defendant's home address) and other property allegedly including development parcels five, six and seven to defendant and his wife as tenants by the entireties, defense counsel did not introduce any documentation at the hearing, and did not submit any documentation to the objection or motion for reconsideration, that tended to substantiate his wife's alleged interest in the development parcels. Even on appeal, defendant fails to provide, or cite to the record, any factual support for his assertion that his wife has an interest in the property. Because defendant has failed to provide sufficient facts for our proper consideration of the basis for his challenge to the circuit court's grant of an equitable lien, he has abandoned our review of his claim of error. *Great Lakes Division of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998).

X

Lastly, defendant challenges the circuit court's award to defendants-appellees of the right to indemnification from defendant for the value of their parcels, arguing that the court invaded the province of the jury. We need not address this issue because defendant's argument on appeal completely fails to address the propriety of equitable indemnification, which was the basis for the circuit court's award to defendants-appellees. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997).

Furthermore, in light of the jury's findings, the circuit court appropriately awarded defendants-appellees the right to indemnification from defendant. In defendant's answer to defendants-appellees' amended cross claim seeking indemnification from him, defendant admitted the allegation of defendants-appellees that they were "innocent and have absolutely no knowledge as to any alleged forged deeds in regard to the parcels that they purchased in good faith and belief from Defendant William J. Greer."

(...continued)

To the contrary, the statute's enumeration of specific examples of convertible property includes personal property exclusively.

The jury's well-supported finding that defendant forged the deeds to parcels one, three and four from Green to defendant, before defendant subsequently conveyed parcels three and four to the Dunklees and the Olivers, required the circuit court to quiet title to parcels one, three and four in plaintiff, personal representative of Green's estate. To reobtain ownership of their properties, the Dunklees and the Olivers would have to pay plaintiff the values of the parcels, \$39,900 for each. The circuit court's award to plaintiff of an equitable lien in remaining development parcels five, six and seven to secure the amount of plaintiff's judgment against defendant, similarly would obligate the Marquardts, who purchased parcel seven from defendant, to pay plaintiff \$39,900 to extinguish the lien with respect to their parcel.

Because defendant's misconduct (breach of contract, forgery), which gave rise to the court's awards of equitable relief to plaintiff, necessitated defendants-appellees' payments of the values of their parcels if they wished to keep their properties, the circuit court appropriately awarded defendants-appellees the right to seek indemnification from defendant, who sold them the parcels. *Dale v Whiteman*, 388 Mich 698, 705; 202 NW2d 797 (1972).

In sum, we reverse the circuit court's denial of defendant's motion for a directed verdict with respect to plaintiff's conversion count premised on MCL 700.171. We affirm the judgment for plaintiff in all other respects, and also affirm defendants-appellees' equitable right to indemnification from defendant. We remand the case so that the circuit court may amend the judgment to reflect the dismissal of the conversion count, and for recalculation of the judgment for plaintiff in light of this dismissal.

Affirmed in part, reversed in part, and remanded. Jurisdiction is not retained.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White