In the Missouri Court of Appeals
Eastern District

DIVISION ONE

CYNTHIA O'BRYAN, et al.,	)	No. ED108056
	)	
Respondents/Cross-Appellants,	)	Appeal from the Circuit Court
	)	of Lewis County
vs.	)	14LE-CV00140
	)	
DANNY L. DANNENHAUER, et al.,	)	Honorable Michael P. Wilson
	)	
Appellants/Cross-Respondents.	)	Filed: May 19, 2020

Before Robert M. Clayton III, P.J., Robert G. Dowd, Jr., J., and Roy L. Richter, J.

MEMORANDUM SUPPLEMENTING ORDER
AFFIRMING DECISION PURSUANT TO RULE 84.16(b)

This memorandum is for the information of the parties and sets forth the reasons for our order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT. IN THE EVENT OF THE FILING OF A MOTION TO REHEAR OR TRANSFER TO THE SUPREME COURT, A COPY OF THIS MEMORANDUM SHALL BE ATTACHED TO ANY SUCH MOTION.

Danny L. Dannenhauer, et al. (collectively "Defendants")[1] appeal portions of the judgment, entered after a bench trial, in favor of Cynthia O'Bryan, et al. (collectively "Plaintiffs")[2] on Plaintiffs' claims to set aside a deed and to establish a constructive trust. Plaintiffs cross-appeal the portion of the judgment, entered after a bench trial, in favor of Defendants on Plaintiffs' claim for monetary damages. We affirm.

I. BACKGROUND

This case involves, *inter alia*, ownership of a farm in Lewis County, Missouri that consists of approximately 320-330 acres ("the Farm"). August Charles Thale (individually "Charlie")[3] and Velma Jo Thale (individually "Velma" or "Mrs. Thale") (collectively "the Thales"), who lived in Quincy, Illinois as husband and wife since the mid-1990's, owned the Farm as tenants by the entirety beginning in November 2005.

The Thales first met Defendant Dannenhauer, a cattle farmer, in 1995. Shortly thereafter, Charlie, who at that time handled all significant family-business decisions, leased the Farm by oral agreement to Dannenhauer for $9,000 a year. Defendant continued to lease the Farm pursuant to that agreement for several years, and the Thales and Defendant became friends.

In June 2004, Velma became Charlie's power of attorney pursuant to an "Illinois Statutory Short Form Power of Attorney for Property" ("Power of Attorney"). It is undisputed on appeal that the Power of Attorney gave Velma the authority to sell real property but did not give her the authority to make a gift of real property.

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[1] Defendants consist of: Danny L. Dannenhauer, individually and as beneficiary under the Danny L. Dannenhauer Family Trust ("Trust"); Brenda D. Gunlock, trustee and beneficiary of the Trust; and Heather M. Hipkins, Elizabeth A. Lehenbauer, Jessica L. Koscielski, and Amber N. Dutra, beneficiaries of the Trust. Danny L. Dannenhauer, individually, will be referred to as "Defendant Dannenhauer," "Defendant," or "Dannenhauer." Additionally, the Trust is only involved because it holds title to the real property at issue in the instant case.

[2] Plaintiffs consist of: Cynthia O'Bryan, Deborah Gast, and Angela Anderson, individually; and Cynthia O'Bryan as the personal representative of the Estate of Velma Jo Thale. Plaintiffs Cynthia O'Bryan, Deborah Gast, and Angela Anderson, individually, are granddaughters of Velma Jo Thale ("Granddaughters") and are allegedly Velma Jo Thale's "lawful successor in interests . . . in that they are devisees under [her] Last Will and Testament . . . dated August 14, 2012 . . .."

[3] Because some of the parties involved in this case share the same last name, we will sometimes refer to them by the first names they went by for clarity and ease of reading. No disrespect is intended.

Charlie moved into a nursing home in 2005. Subsequently, Velma began managing the Thales' business affairs for the first time, and she relied entirely on Defendant Dannenhauer to manage the Farm. In approximately December 2011, Velma told Dannenhauer she and Charlie wanted him to have the Farm.

In early January 2012, Dannenhauer called his attorney, John Briscoe, and told him that the Thales wanted to transfer the Farm to him. Briscoe told Dannenhauer he would have to talk to the Thales before drafting anything. A few weeks later, Dannenhauer called Briscoe again and told him he and Velma wanted to move forward, scheduling a meeting with Briscoe for January 19, 2012. Dannenhauer told Briscoe that Charlie was incompetent and in a nursing home but Velma had a power of attorney authorizing her to act on his behalf. Briscoe indicated they would need to record the power of attorney in Lewis County, Missouri. Dannenhauer let Velma know, she brought the Power of Attorney to Briscoe's office, and the Power of Attorney was subsequently recorded in Lewis County on January 18, 2012.

Dannenhauer drove Velma to Briscoe's office on January 19, 2012. During the meeting, Briscoe prepared and notarized a general warranty deed dated January 19 which provided, (1) the grantors were "[Velma], [a]ttorney-in-fact for [Charlie] under [the] Power of Attorney . . . and [Velma], his [w]ife"; and (2) the grantee was Dannenhauer ("the Deed"). The Deed purported to transfer a remainder interest in fee simple absolute in the Farm to Dannenhauer, and to retain a life estate for the Thales as long as either of them lived. Briscoe testified he asked Velma if the transaction was desired by herself and Charlie, and she said it was.

Sometime after the Deed was executed, Velma's Granddaughters, the three Plaintiffs acting in their individual capacity in the instant suit, learned Velma had transferred the Farm to Dannenhauer. As discussed in detail in Section III.A.2.c. of this memorandum: (1) some testimony adduced at the bench trial, when viewed in isolation, arguably indicates the transfer of

the Farm was a sale to Dannenhauer, i.e., that the transfer from the Thales was in exchange for Dannenhauer's promise to pay the Thales $9,000 a year during their lifetimes; while (2) other testimony adduced at the bench trial indicates the transfer of the Farm from the Thales to Dannenhauer was a gift.

On August 1, 2012 Charlie passed away. Subsequently, on August 14, 2012, Velma met with her attorney Andrew Schnack to prepare a will and power of attorney. Velma executed a will that included a remainder clause in favor of her Granddaughters, and Velma did not tell Schnack anything about the meeting with Briscoe or the Deed. Velma also executed a power of attorney giving her granddaughter, Plaintiff Cynthia O'Bryan, authority to act on her behalf.

From April 2013 until Dannenhauer voluntarily vacated possession of the Farm in 2018, Dannenhauer was in possession of the Farm and tendered a total of $45,000 in payments ($9,000 a year) to Velma by check. Plaintiff Cynthia O'Bryan, acting as attorney-in-fact for Mrs. Thale, declined to cash the aforementioned payments because O'Bryan believed Dannenhauer would claim the payments were consideration for the transfer of the Farm rather than for rent. It is undisputed that during the time Dannenhauer was in possession of the Farm from 2013-2018, he made certain repairs and improvements to the Farm.

In July 2014, Plaintiff Cynthia O'Bryan filed the initial petition in the instant case, as attorney-in-fact for Mrs. Thale, who was incapacitated at the time of filing. There was an initial bench trial and judgment; however, the judgment was set aside after it was determined Dannenhauer's Trust, rather than Dannenhauer individually, had title to the Farm.

On December 29, 2017, Plaintiff filed an amended petition, joining the trustee and beneficiaries of Dannenhauer's Trust as defendants. The petition raised claims to set aside the Deed transferring the Farm to Dannenhauer and to establish a constructive trust over the Farm, alleging Mrs. Thale did not have authority pursuant to the Power of Attorney to transfer the Farm

to Dannenhauer because it was a gift and that it would be unjust for him to own the property. The petition also raised a claim for monetary damages, alleging Mrs. Thale was entitled to the yearly payments of $9,000 that were tendered by Dannenhauer since 2013.

On February 27, 2019, a second bench trial took place on all claims. The parties stipulated to several matters including that: (1) Mrs. Thale was incompetent at the time of the trial and Plaintiff Cynthia O'Bryan was operating under the power of attorney executed by Mrs. Thale; (2) because Mrs. Thale was incompetent at the time of the trial, her out-of-court statements were admissible into evidence even though such statements may be hearsay; (3) the fair market value of the Farm at the time the Deed was executed was $891,000; and (4) after the Deed was executed, title of the Farm was transferred to Dannenhauer's Trust.

While the case was under submission, Mrs. Thale passed away and Plaintiff Cynthia O'Bryan filed a suggestion of death on May 1, 2019 with the trial court. The trial court entered its original judgment on May 15, 2019. On June 7, 2019, a motion to amend the judgment was filed by Cynthia O'Bryan, as personal representative of the Estate of Velma Jo Thale, requesting the trial court's May 15 judgment be amended to allow Cynthia O'Bryan, in her capacity as personal representative, and Cynthia O'Bryan, Deborah Gast, and Angela Anderson, individually, be substituted as Plaintiffs. By consent of the parties, the trial court granted O'Bryan's motion to amend.

On June 13, 2019, the trial court entered its amended judgment, finding in favor of Plaintiffs on their claims to set aside the Deed and to establish a constructive trust over the Farm, and finding in favor of Defendants on Plaintiffs' claim for monetary damages. Defendants appeal and Plaintiffs cross-appeal the trial court's June 13, 2019 amended judgment.[4]

[4] To avoid unnecessary repetition, additional evidence and the trial court's detailed findings and conclusions will be set forth in relevant part in our discussion of Defendants' points on appeal and Plaintiffs' points on cross-appeal in Sections III. and IV. of this memorandum.

II. STANDARD OF REVIEW FOR DEFENDANTS' APPEAL AND PLAINTIFFS' CROSS-APPEAL

Our Court reviews a trial court's judgment in a court-tried case pursuant to *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *Sulkin v. Sulkin*, 552 S.W.3d 793, 795 (Mo. App. E.D. 2018). Consequently, we will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.*

"Substantial evidence is evidence that, if believed, has some probative force on each fact necessary to sustain the trial court's judgment." *Day v. Hupp*, 528 S.W.3d 400, 411 (Mo. App. E.D. 2017). Evidence is considered to have probative force when it has a tendency to make a material fact more or less likely. *Id.* When our Court reviews whether the trial court's decision is supported by substantial evidence, we view the evidence and inferences therefrom in the light most favorable to the trial court's judgment and disregard all contrary evidence and inferences. *Id.* In addition, because the trial court is free to believe any, all, or none of the testimony and other evidence presented at trial, we defer to the trial court's credibility determinations. *Id.* Ultimately, the trial court's judgment is supported by substantial evidence when "the evidence and inferences favorable to the challenged proposition have probative force upon the proposition and constitute evidence from which the trier of fact can reasonably decide that the proposition is true." *Id.*

On the other hand, a claim that the trial court's judgment is against the weight of the evidence presupposes there is sufficient evidence to support the judgment, and our Court will reverse the judgment under this standard of review only in rare cases when we have a firm belief the trial court's decision is wrong. *Id.* at 411-12. When our Court reviews whether the trial court's decision is against the weight of the evidence, "we defer to the trial court's findings of

fact when the factual issues are contested and when the facts as found by the trial court depend on credibility determinations." *Id*. at 412. Nevertheless, when reviewing an against-the-weight-of-the-evidence challenge "we can consider evidence contrary to the trial court's judgment that is not based on a credibility determination." *Id*. Furthermore, as recently stated by this Court:

> A trial court's judgment is against the weight of the evidence only if the court could not have reasonably found, from the record at trial, the existence of a fact that is necessary to sustain the judgment. When the evidence poses two reasonable, although different conclusions, we must defer to the trial court's assessment of that evidence.

Id. (citation omitted).

Finally, in reviewing a court-tried case, an appellate court is primarily concerned with the correctness of the trial court's decision rather than the route taken to reach it. *O'Gorman & Sandroni, P.C. v. Dodson*, 478 S.W.3d 539, 543 (Mo. App. E.D. 2015). "Therefore, we are obliged to affirm if we determine [ ] the trial court reached the correct result, regardless of whether the trial court's proffered reasons are wrong or insufficient." *Id*.

III. DISCUSSION OF DEFENDANTS' APPEAL

Defendants raise four points on appeal. Defendants' first, second, and third points on appeal assert the trial court's judgment finding in favor of Plaintiffs on Plaintiffs' claim to set aside the Deed is erroneous. And subpart two of Defendants' fourth point on appeal claims the trial court's judgment finding in favor of Plaintiffs on Plaintiffs' claim to establish a constructive trust over the Farm is erroneous.[5]

[5] Subpart one of Defendants' fourth point on appeal alleges the trial court's judgment finding in favor of Plaintiffs on Plaintiffs' claim to set aside the Deed is erroneous for reasons other than those advanced in Defendants' first, second, and third points on appeal. Because we find Defendants did not develop this contention in the argument section of their brief, subpart one of Defendants' fourth point on appeal presents nothing for appellate review and is deemed abandoned. *See Summer Chase Second Addition Subdivision Homeowners Ass'n v. Taylor-Morley, Inc.*, 146 S.W.3d 411, 418 (Mo. App. E.D. 2004); *In re T.E.*, 35 S.W.3d 497, 506 (Mo. App. E.D. 2001). Subpart one of Defendants' fourth point on appeal is denied.

A. Plaintiffs' Claim to Set Aside the Deed

We first turn to Defendants' first, second, and third points on appeal, which assert the trial court's judgment finding in favor of Plaintiffs on Plaintiffs' claim to set aside the Deed is erroneous.

1. General Law and the Undisputed and Disputed Issues on Appeal

"[T]he cancellation of a deed is an extraordinary proceeding in equity and in order to justify such cancellation, the evidence in support thereof must be clear, cogent and convincing." *Thurmon v. Ludy*, 914 S.W.2d 32, 34 (Mo. App. E.D. 1995) (quotations omitted); *see also Randall v. Randall*, 497 S.W.3d 850, 858 (Mo. App. W.D. 2016) (similarly finding).

Where real property is owned by two spouses as tenants by the entirety, the property is considered to be owned by a single entity, and "neither spouse has any interest which may be conveyed, encumbered or devised by his or her sole act." *Jennings v. Atkinson*, 456 S.W.3d 461, 465-66 (Mo. App. W.D. 2014) (quotations and emphasis omitted). Furthermore, "[a] tenancy by the entirety may be terminated or severed only by joint and mutual action on the part of [both spouses]." *Id*. (quotations omitted). "This principle has been consistently applied to void a conveyance instrument executed by only one tenancy by the entirety spouse . . . [because] a deed by only one of two tenants by the entirety conveys nothing." *Id*. at 466 n.7 (quotations omitted); *see also Bakewell v. Breitenstein*, 396 S.W.3d 406, 416 (Mo. App. W.D. 2013) and *In re Estate of Blair*, 317 S.W.3d 84, 89 (Mo. App. S.D. 2010) (both finding a deed was void when executed by only one tenancy by the entirety spouse).

In this case, it is undisputed that, (1) immediately prior to the time Mrs. Thale executed the Deed, the Thales owned the Farm as tenants by the entirety; and (2) the Power of Attorney from Charlie upon which Velma relied on purporting to transfer the Farm to Dannenhauer did not authorize Velma to make a gift of any of Charlie's real property (including the Farm).

Accordingly, it is also undisputed that the Deed purporting to transfer the Farm to Dannenhauer should be set aside if the trial court in this case did not err in concluding the transfer of the Farm was a gift. *See id*. Furthermore, the only disputed issue with respect to Plaintiffs' claim to set aside the Deed is whether the trial court erred in concluding the transfer of the Farm to Dannenhauer was a gift.

2. The Disputed Issue on Appeal: Whether the Trial Court Erred in Concluding the Transfer of the Farm was a Gift

a. Relevant Law

"[A] party generally establishes a gift has been made if he shows: (1) a voluntary transfer of property or funds has been made without an exchange of payment or services; (2) no prior obligation was thereby discharged; and (3) no future obligation was thereby incurred." *S.M.S. v. J.B.S.*, 588 S.W.3d 473, 504 (Mo. App. E.D. 2019). Nevertheless, "a transfer is not kept from being a gift by payment of a trivial or nominal consideration, or if the consideration is insignificant compared with the value of the property transferred." *Id*. (quoting *Cochenour v. Cochenour*, 642 S.W.2d 402, 406 (Mo. App. E.D. 1982)).

Whether or not a transfer of property is a gift is a question of fact. *S.M.S.*, 588 S.W.3d at 504. Accordingly, in determining whether the trial court has correctly found a gift occurred, "we defer to the trial court's credibility determinations and the trial court's assessment of the proper weight to be given to witness testimony and documentary evidence at trial." *Id*. Finally, a party claiming a gift has been made bears the burden of proving the elements of a gift by clear and convincing evidence. *Wills v. Whitlock*, 139 S.W.3d 643, 653 (Mo. App. W.D. 2004) (citing *Matter of Passman's Estate*, 537 S.W.2d 380, 384 (Mo. banc 1976)).

b. Relevant Portions of the Trial Court's Judgment

The trial court's judgment found in relevant part:

[Because Mrs. Thale was incompetent at the time of the trial and could not testify,] everything the [c]ourt can garner with respect to her precise wishes, intentions, and recollections of the events in the 2011-2012 time period must come from other witnesses . . .. Accordingly, the credibility of the witnesses and the relative reasonableness of their testimony is crucial to the [c]ourt's determinations.

. . .

. . .. The [c]ourt finds, by clear and convincing evidence, that this transaction was a gift. There is no credible evidence that this was a sale.

. . .

Defendant [Dannenhauer] paid no purchase price for the [F]arm. He gave nothing new of value for the [F]arm. Before the date of the [D]eed, Defendant paid annual rent of $9,000 for 17 years under the terms of an oral lease. After the date of the [D]eed, Defendant continued to attempt to pay rent under the same oral lease. Before the [D]eed, Defendant was free to stop renting the [F]arm at any time. After the [D]eed, Defendant was still free to stop renting the [F]arm at any time. The terms were unchanged. Defendant signed nothing promising to pay anything, or to give anything of value for the [F]arm in the future. Before the [D]eed, Defendant occasionally provided neighborly services to the Thales, but Defendant never charged for, or showed any intention to charge for those services, and there was no agreement of any sort that Defendant would continue to provide those services in return for getting a [D]eed to the [F]arm. Defendant agreed in his testimony that he never gave anything of value to the Thales other than the rent. In sum, there was no consideration directly benefitting the Thales, there is no documentation supporting any promise of Defendant to pay for the land, and there was an existing long standing oral rent agreement between them that vitiates any notion that the $9,000 annual payment was for the purchase of the land.

Further, the parties stipulated that the [F]arm had a fair market value of $891,000 at the time the [D]eed was executed. Even if [ ] Defendant [Dannenhauer] could make a good faith argument that the annual rent payment was somehow transformed into consideration for a sale, this transaction still amounts to a gift. *Cochenour*, 642 S.W.2d at 406. The vast disparity between the value of property and the unwritten (and unenforceable) agreement to continue making relatively paltry annual payments until the death of a 89 year old woman and her nursing home-bound husband, appear to be more appropriately considered an implied condition of a gift, rather than consideration for the sale of the land.

c. Analysis of Defendants' Arguments on Appeal

In their first, second, and third points on appeal, Defendants argue the trial court's judgment in favor of Plaintiffs on their claim to set aside the Deed is erroneous because it makes inconsistent findings, it is not supported by substantial evidence, and it is against the weight of the evidence.

Defendant first argues the trial court's judgment makes inconsistent findings to the extent the court found "there was no consideration directly benefitting the Thales" and also found the Farm was still a gift under *Cochenour*, "[e]ven if [ ] Defendant [Dannenhauer] could make a good faith argument that the annual rent payment was somehow transformed into consideration for a sale." We disagree these are inconsistent findings. Instead, they are simply alternative reasons to support the trial court's determination that the transfer of the Farm was a gift.

Furthermore, even if we assume *arguendo* that the trial court somehow erred in finding the Farm was a gift under *Cochenour* because there was only insignificant consideration, our standard of review provides we are primarily concerned with the correctness of the trial court's decision rather than the route taken to reach it. *See Dodson*, 478 S.W.3d at 543. Our standard of review also provides, "we are obliged to affirm if we determine [ ] the trial court reached the correct result, regardless of whether the trial court's proffered reasons are wrong or insufficient." *Id*. Applying the preceding standard of review and for the reasons discussed below, the trial court's decision finding the transfer of the Farm was a gift is correct because the court's determination that the transfer was not made in exchange for any consideration (payment or services) is supported by the evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. *See id.*; *Sulkin*, 552 S.W.3d at 795.

Some testimony adduced at the bench trial, when viewed in isolation, arguably indicates the transfer of the Farm was a sale to Dannenhauer, i.e., that the transfer from the Thales was in

exchange for Dannenhauer's promise to pay the Thales $9,000 a year during their lifetimes. Specifically, during a portion of his testimony, Briscoe stated he understood Dannenhauer promised to pay the Thales $9,000 per year in rent until they died in exchange for a fee simple absolute interest. In addition, Defendant Dannenhauer testified that during the January 19, 2012 meeting in which the Deed was executed: Velma said she wanted Dannenhauer to have the Farm but wanted the transaction set up so she would have income every year; and Dannenhauer told Velma he would pay her $9,000 per year during the Thales' lifetimes.

The trial court's judgment demonstrates the court did not believe or give any weight to this aforementioned, isolated testimony from Briscoe and Dannenhauer. Instead, the trial court found credible and gave weight to the other testimony adduced at the bench trial indicating the transfer of the Farm from the Thales to Dannenhauer was a gift, including the following.

Briscoe specifically testified during the bench trial in the instant case that: Dannenhauer was not legally obligated to paying the $9,000 per year in rent; the Thales were not legally obligated to rent the Farm to Dannenhauer and could have rented it to someone else; and if Dannenhauer stopped paying rent in the amount of $9,000 per year, he would still have a fee simple absolute interest in the Farm after both of the Thales died pursuant to the language in the Deed. Briscoe further testified: the Deed did not create any new obligations with respect to the Farm because Dannenhauer was already renting the Farm prior to the execution of the Deed; Briscoe did not conduct a title search, prepare a contract, a lease, a promissory note, a closing statement, or any other documents documenting any terms of any sale; and Briscoe was not aware of anything Dannenhauer gave in terms of value in exchange for the Farm at the time the Deed was executed. It was also revealed during the bench trial in the instant case that, (1) Briscoe stated in his prior deposition testimony, "[the Farm] was intended to be a gift"; and (2)

Briscoe testified in the first bench trial that, "there was no purchase price because [Mrs. Thale] didn't want to sell the property to [Dannenhauer]."

In addition, Plaintiff Cynthia O'Bryan testified the Thales never discussed selling the Farm, and she was not aware of anything of value that Dannenhauer gave the Thales in exchange for the Farm. O'Bryan and Plaintiff Angela Anderson also collectively testified that Mrs. Thale said she wanted the Farm to go to her three Granddaughters when she died and she wanted Dannenhauer to have the first right of refusal to purchase the Farm for a fair price should the Granddaughters choose to sell it. In addition, Mrs. Thales attorney, Andrew Schnack, testified Mrs. Thale never mentioned selling the Farm. And Dannenhauer testified the oral lease he had with the Thales was the same before and after the Deed was executed and nothing changed.

Deferring to the trial court's credibility determinations and the court's assessment of the weight to be given to witness testimony, the trial court could have reasonably found from the above evidence that, (1) a voluntary transfer of the Farm was purportedly made without an exchange of payment or services; (2) no prior obligation was thereby discharged; and (3) no future obligation was thereby incurred. Accordingly, the trial court could have reasonably found the transfer of the Farm was a gift. *See S.M.S.*, 588 S.W.3d at 504. Moreover, this finding is supported by substantial, clear and convincing evidence, and it is not against the weight of the evidence. *See Day*, 528 S.W.3d at 411-12; *Wills*, 139 S.W.3d at 653; *see also In re Estate of Passman*, 537 S.W.2d at 384.

Finally, because it is undisputed the Deed purporting to transfer the Farm to Dannenhauer should be set aside if the trial court in this case did not err in concluding the transfer of the Farm was a gift, the trial court did not err in finding in favor of Plaintiffs on their claim to set aside the Deed. Points one, two, and three are denied.

B. Plaintiffs' Claim to Establish a Constructive Trust Over the Farm

We now turn to subpart two of Defendants' fourth point on appeal, which maintains the trial court's judgment finding in favor of Plaintiffs on Plaintiffs' claim to establish a constructive trust over the Farm is erroneous. For the reasons discussed below, Defendants' argument has no merit.

1. Relevant Law

A court of equity may impose a constructive trust to provide a remedy in cases where one party has acquired property under circumstances that make it inequitable for him to retain it. *Ralls County Mut. Ins. Co. v. RCS Bank*, 314 S.W.3d 792, 795-96 (Mo. App. E.D. 2010). Pursuant to Missouri Supreme Court precedent, "the constructive trust is a fluid, flexible device which may be employed to remedy many different types of injustice." *Brown v. Brown*, 152 S.W.3d 911, 918 (Mo. App. W.D. 2005) (citing *Durwood v. Dubinsky*, 361 S.W.2d 779, 790 (Mo. 1962) and *Musser v. General Realty Co.*, 313 S.W.2d 5, 9 (Mo. 1958) and *Wier v. Kansas City*, 204 S.W.2d 268, 270 (Mo. 1947)); *see also Douglass v. Douglass*, 570 S.W.3d 130, 136 (Mo. App. W.D. 2019).

Accordingly, "the remedy of a constructive trust is not confined to instances where undue influence is alleged." *Brown*, 152 S.W.3d at 917 (quoting *Parker v. Parker*, 971 S.W.2d 878, 882 (Mo. App. E.D. 1998)). Instead, "the touchstone for imposition of a constructive trust is injustice or unfairness, which may take the form or be the product of fraud (actual or constructive), abuse of a fiduciary or confidential relationship, undue influence, *or* unjust enrichment." *Douglass*, 570 S.W.3d at 136 (emphasis added) (quotations omitted); *but see RCS Bank*, 314 S.W.3d at 795 ("[i]mposition of a constructive trust as a remedy to prevent unjust enrichment is appropriate under certain limited circumstances"). Furthermore, "[t]o establish a constructive trust, evidence must be unquestionable in character and so clear, cogent and

convincing as to exclude every reasonable doubt in the mind of the trial court." *RCS Bank*, 314 S.W.3d at 795-96 (quotations omitted).

2. Analysis of Defendants' Arguments on Appeal

In this case, Defendants argue a constructive trust can only be imposed when there is sufficient evidence of undue influence and there was no such evidence in this case. This argument has no merit pursuant to the case law in the preceding section of this memorandum.

The trial court found a constructive trust should be imposed on the Farm because, *inter alia*, it would be unjust for Defendants to retain the Farm when Mrs. Thale did not have the authority to transfer it to Dannenhauer. This finding is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. *See* Sections III.A. and III.B.1. of this memorandum; *Reyner v. Crawford*, 334 S.W.3d 168, 174 (Mo. App. E.D. 2011) ("[u]njust enrichment occurs when a benefit is conferred on a person under circumstances in which it would be unjust for him to retain that benefit without paying for its reasonable value"). Accordingly, the trial court's judgment finding in favor of Plaintiffs on their claim to establish a constructive trust over the Farm is not erroneous. *See id*.; *Sulkin*, 552 S.W.3d at 795. Subpart two of Defendants' fourth point on appeal is denied.

VI. DISCUSSION OF PLAINTIFFS' CROSS-APPEAL

Plaintiffs raise two points on cross-appeal, which both argue the trial court erred in finding in favor of Defendants on Plaintiffs' claim for monetary damages.

A. Relevant Facts and Relevant Conclusions in the Trial Court's Judgment

From April 2013 until Dannenhauer voluntarily vacated possession of the Farm in 2018, Dannenhauer was in possession of the Farm and tendered a total of $45,000 in payments ($9,000 a year) to Mrs. Thale by check. Plaintiff Cynthia O'Bryan, acting as attorney-in-fact for Mrs. Thale, declined to cash the aforementioned payments because O'Bryan believed Dannenhauer

would claim the payments were consideration for the transfer of the Farm rather than for rent. It is undisputed that during the time Dannenhauer was in possession of the Farm from 2013-2018, he made certain repairs and improvements to the Farm. In Plaintiffs' cross-appeal of the trial court's judgment in favor of Defendants on Plaintiffs' claim for monetary damages, Plaintiffs allege they are entitled to the $45,000 in payments tendered by Dannenhauer from 2013 to 2018.

The trial court's judgment provided two, independent justifications to support finding in favor of Defendants on Plaintiffs' monetary damages claim. First, the trial court found Plaintiff Cynthia O'Bryan's refusal to accept Defendant's checks as tendered constituted a knowing, voluntarily, and intelligent waiver of Plaintiffs right to seek the payments as monetary damages in the instant suit. And second, the trial court concluded ruling in favor of Defendants on Plaintiffs' monetary damages claim was appropriate to balance the equities of the parties.

B. Analysis of Plaintiffs' Arguments on Cross-Appeal

Plaintiffs' first point on cross-appeal challenges the trial court's first justification for its ruling (waiver) and Plaintiffs' second point on cross-appeal challenges the trial court's second justification for its ruling (balancing the equities of the parties).

Even if we assume *arguendo* that the trial court somehow erred in finding Plaintiffs waived their right to the $45,000 in payments, our standard of review provides we are primarily concerned with the correctness of the trial court's decision rather than the route taken to reach it. *See Dodson*, 478 S.W.3d at 543. Our standard of review also provides, "we are obliged to affirm if we determine [ ] the trial court reached the correct result, regardless of whether the trial court's proffered reasons are wrong or insufficient." *Id.* Applying the preceding standard of review and for the reasons discussed below, the trial court's decision to balance the equities of the parties is correct because Plaintiffs have not demonstrated the ruling is not supported by the evidence, is

against the weight of the evidence, or erroneously declares or applies the law. *See id*.; *Sulkin*, 552 S.W.3d at 795.

In Defendants' answers in this case, they pleaded a general prayer requesting the court to provide "such other relief as the [c]ourt deems proper." In an equity proceeding where such a prayer is alleged, a trial court is permitted to balance the equities of the parties within the scope of pleadings and the evidence.[6] *Gassner v. Cromer*, 704 S.W.2d 695, 696 (Mo. App. E.D. 1986).

In balancing the equities of the parties, a trial court is to consider all the equities between the parties as disclosed by the particular circumstances of the case, including "the conflicting conveniences of the respective parties, the willfulness of the encroaching party, and the conduct of the party whose land has been encroached upon regarding acquiescence and laches[.]" *Newmark v. Vogelgesang*, 915 S.W.2d 337, 339 (Mo. App. E.D. 1996) (quotations omitted); *see also Edmunds v. Sigma Chapter of Alpha Kappa*, 87 S.W.3d 21, 29 (Mo. App. W.D. 2002). Furthermore, the trial court has "a broad discretionary power to shape and fashion the relief it grants to fit particular facts, circumstances, and equities of the case before it." *Edmunds*, 87 S.W.3d at 29 (internal quotations omitted) (quoting, *inter alia, Mid–States Paint & Chem. Co. v. Herr*, 746 S.W.2d 613, 616 (Mo. App. E.D. 1988)).

In ruling in favor of Defendants on Plaintiffs' claim for monetary damages in this case, the trial court found in relevant part:

[6] Plaintiffs argue the trial court was not permitted to balance the equities of the parties because it made its ruling within its discussion of Plaintiffs' claim for monetary damages, citing *Savannah Place, Ltd. v. Heidelberg*, 122 S.W.3d 74, 80 (Mo. App. S.D. 2003) in support. *Heidelberg* holds, "ordinarily, a suit that seeks *only* money damages is an action at law rather than equity." *Id*. at 80. (emphasis added and quotations omitted). Here, Plaintiffs' did not seek *only* money damages but also sought the equitable remedies of setting aside a deed and the imposition of a constructive trust. *See, e.g., Abell v. City Of St. Louis*, 129 S.W.3d 877, 881 (Mo. App. E.D. 2004) ("[c]onstructive trusts are equitable remedies . . ."); *Collins v. Jenkins*, 821 S.W.2d 892, 894 (Mo. App. S.D. 1992) and *Matter of Mitchell's Estate*, 610 S.W.2d 681, 688 (Mo. App. E.D. 1980) (both indicating cancellation of a deed is an equitable remedy). Accordingly, *Heidelberg* is distinguishable, and Plaintiffs' reliance upon it is misplaced. Furthermore, there is no suggestion the trial court abused its discretion in trying all three of Plaintiffs' claims in one proceeding. *See Brown v. Brown-Thill*, 543 S.W.3d 620, 628 (Mo. App. W.D. 2018) (providing "[a] trial court has the discretion to try cases involving requests for equitable relief and damages in one proceeding").

> . . . Plaintiff [Cynthia O'Bryan's] current position seems to be that, 'now that the [c]ourt has ruled that the money was for rent and not consideration for a sale, I want my rent money.' However, such 'bootstrapping' seems somewhat disingenuous. The [c]ourt regards [O'Bryan's] decision to reject the money at the time it was offered to be a calculated, strategic decision which arguably strengthened her legal case.
>
> . . . Further, the $45,000 [Defendant Dannenhauer] has retained adequately compensates Defendant for whatever additional expenditures he incurred to improve [the] [F]arm while he believed he owned it. It is not inappropriate for the [c]ourt to attempt to put Defendant back to where he would have been prior to the transaction . . . [T]he [c]ourt does not impute malevolence to Defendant in this transaction . . ..

We find the trial court's judgment demonstrates the court acted within its broad discretionary authority and properly considered all of the equities of the parties as disclosed by the particular circumstances of the case, including "the conflicting conveniences of the respective parties, the willfulness of the encroaching party, and the conduct of the party whose land has been encroached upon regarding acquiescence and laches." *See Newmark*, 915 S.W.2d at 339; *see also Edmunds*, 87 S.W.3d at 29; *Herr*, 746 S.W.2d at 616.

Finally, Plaintiffs argue the trial court's decision balancing the equities is not supported by sufficient evidence because there is "no evidence of the costs of improvements made by Dannenhauer relative to the benefit he derived of them, much less the net costs to him as compared to the net value of the lease[.]" However, this Court's review of the transcript reveals, (1) Dannenhauer testified he made improvements to the Farm from 2013-2018 that he would not have made if he believed he was just renting the property; and (2) Exhibits I and J, which were admitted into evidence *but not made a part of the record on appeal*, detailed the costs of expenditures and improvements Dannenhauer made from 2013-2018.

"If original exhibits are necessary to the determination of any point relied on, they shall be deposited in the appellate court by the [appealing party]." Missouri Supreme Court Rule 81.16(a) (effective from January 1, 2017 to the present). Furthermore, "[w]here exhibits are not

made a part of the record on appeal, such evidentiary omissions will be taken as favorable to the trial court's ruling and unfavorable to the appeal." *Matter of Bohannon*, 583 S.W.3d 490, 497 (Mo. App. S.D. 2019) and *City of Kansas City v. Cosic*, 540 S.W.3d 461, 464 (Mo. App. W.D. 2018) (quotations omitted); *see also Lambrich v. Kay*, 507 S.W.3d 66, 76 (Mo. App. E.D. 2016) (similarly finding with respect to both a transcript and exhibits). We presume, therefore, that Exhibits I and J, which were not included in the record on appeal, supported the trial court's judgment. *See Lambrich*, 507 S.W.3d at 76; *see also Bohannon*, 583 S.W.3d at 497; *Cosic*, 540 S.W.3d at 464.

Based on the foregoing, Plaintiffs have not demonstrated the trial court's judgment in favor of Defendants on Plaintiffs' claim for monetary damages is erroneous. Points one and two on cross-appeal are denied.

V. CONCLUSION

The trial court's judgment is affirmed under Missouri Supreme Court Rule 84.16(b) (2020).

PER CURIAM.