2012 IL App (5th) 110512-U

NO. 5-11-0512

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DEWAYNE L. KELLEY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Randolph County.
	)	
v.	)	No. 10-L-9
	)	
DEBRA A. KEMPFER,	)	Honorable
	)	Eugene E. Gross,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court improperly entered a directed verdict after the plaintiff presented evidence of the defendant's tortious interference with an expectancy under a will.

¶ 2 The plaintiff, DeWayne L. Kelley, filed an action for tortious interference with an expectancy under a will against the defendant, Debra A. Kempfer, in the circuit court of Randolph County. Following the presentation of the plaintiff's case-in-chief at trial, the circuit court granted the defendant's motion for a directed verdict. On appeal, the plaintiff argues that the circuit court's directed verdict was improper because he produced evidence establishing the defendant's tortious interference with an expectancy, including evidence raising the presumption of the defendant's fraudulent conduct. We reverse and remand.

¶ 3 BACKGROUND

¶ 4 On May 31, 1994, Walter Lee Kelley, the father of the plaintiff and the defendant, executed a last will and testament, devising the residue of his estate to the plaintiff, the

defendant, their sister, Patricia Kelley, and Walter's wife, Dorothy E. Kelley, who died in February 2009. In his last will and testament, Walter "intentionally made no provisions *** for [his] son, Allen R. Kelley, because [Walter] had given him substantial sums of money during [his] lifetime."

¶ 5 In October 2004, Walter suffered a stroke. On November 10, 2004, Walter executed a power of attorney for healthcare and for property, thereby giving the defendant the power to make healthcare decisions on his behalf and giving her broad powers to handle his property. In July 2006, Walter began living at the Coulterville Care Center, a nursing home and skilled care center; thereafter transferred to Mason Manor Woods, an assisted living center; and then returned to Coulterville Care Center. Walter died on December 13, 2008.

¶ 6 On April 22, 2010, the plaintiff filed his complaint and jury demand for tortious interference with expectancy. In his complaint, which is to be liberally construed (*Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1059 (2002)), the plaintiff alleged that beginning June 2004, the defendant "set forth on an intentional scheme to divert [Walter's] assets *** to herself and her husband, for her own personal benefit, thereby interfering with [the] [p]laintiff's expectancy." The plaintiff alleged that the defendant "did so by abusing her position of trust and responsibility as both healthcare and general and/or property power of attorney over [Walter], taking advantage of his age [and] diminished mental and physical capacity, limiting his contact with [the] [p]laintiff[ ] and other family members, and otherwise unduly influencing or deceiving [Walter]." The plaintiff alleged that the defendant's tortious conduct resulted in the transfer of Walter's funds deposited in accounts at First National Bank of Steeleville and Coulterville Banking Center for the defendant's own use and benefit; the use of Walter's funds to buy the defendant gifts for her family; the transfer of Walter's dividend checks for the defendant's use and benefit; and the transfer of Walter's truck, gun collection, guitar, furniture, appliances, and other personal property for

the defendant's own use and benefit.

¶ 7 At trial, testifying as an adverse witness in the plaintiff's case-in-chief, the defendant asserted that Walter gave her most of his assets. The defendant testified that she and Walter shared two joint banking accounts, one at First National Bank of Steeleville and one at the Coulterville Banking Center of the First State Bank of Campbell Hill. The defendant testified that she and Walter opened the First National Bank of Steeleville account in 1980, when she was 20 years old. The defendant testified that the Coulterville Banking Center account was established in late 2005, early 2006. The defendant testified that the joint accounts held only Walter's funds. The defendant testified that after Walter died, she withdrew the balance of the accounts.

¶ 8 The defendant testified that she opened Walter's mail and paid his bills full-time after November 2006 and until his death in December 2008. The defendant testified that she deposited Walter's $1,400 social security checks into one of the two joint accounts. The defendant testified that she cashed Walter's dividend checks, some as much as $400, and either deposited the funds into the accounts, bought groceries, or bought necessary items for Walter. The defendant testified that dividend checks involving more substantial sums were deposited into the joint checking accounts. The defendant testified that from December 2006 through September 2007, she gave Walter's $700 pension checks to Dorothy. The defendant testified that after 2007, she deposited Walter's pension checks into the joint accounts. The defendant testified that from the joint accounts, she paid Walter's assisted living center charge of $2,387 a month.

¶ 9 The defendant testified that on or about December 9, 2005, she wrote $100 checks to Walter's family members, including herself, as Christmas gifts, per Walter's request. The defendant testified that Walter would also routinely provide her funds to use for gas money. The defendant identified a check dated July 12, 2006, that she wrote for $150 cash, but she

did not remember what it was used for.

¶ 10 The defendant testified that other than receipts and bank records, she did not keep an independent journal of income and deposits received on Walter's behalf. The defendant testified that she produced in discovery all of the bank statements and receipts she had in her possession. The receipts in evidence, dated 2007 and 2008, documented approximately $1,000 worth of grocery and healthcare items the defendant allegedly purchased for Walter's benefit.

¶ 11 The bank statements in evidence revealed that on January 10, 2005, the balance of the defendant and Walter's joint account at the First National Bank of Steeleville equaled $3,358.68. By January 10, 2006, the balance equaled $14,005.95. On January 10, 2007, it equaled $17,073.08. On January 10, 2008, the balance equaled $5,669.20. On December 10, 2008, three days before Walter's death, the account balance amounted to $3,932.51.

¶ 12 On November 30, 2004, the initial balance in the defendant and Walter's joint account at the First State Bank of Campbell Hill (the Coulterville Banking Center) was $2,602.03. The January 31, 2006, account statement showed a balance of $1,014.47. The January 31, 2007, account statement revealed a balance of $4,627.50. The balance at the Coulterville Banking Center on December 12, 2008, the day before Walter died, was $7,332.36. The defendant admitted that no portion of these balances represented funds contributed by her. Walter's 2007 and 2008 individual income tax returns revealed an adjusted gross income of $22,077 in 2007 and an adjusted gross income of $16,983 in 2008.

¶ 13 The defendant testified that in November 2006, when Walter moved into the Coulterville Care Center as a result of an argument with Dorothy, she moved some of his items into her home. The defendant testified that these items included four firearms, tools, and a toolbox, although the defendant testified that the toolbox had been stolen. The defendant testified that Dorothy also handed the defendant Walter's guitar, saying, "It was

your dad's." The defendant therefore kept it in her possession. The defendant testified that she did not discuss with Walter whether she should keep the guitar. The defendant, along with her husband Kenny Kempfer, testified that Walter had gifted his truck to them. The defendant also testified that she had in her possession Walter's pocket watch. The defendant testified that she purchased, with Walter's money from the joint accounts, a bed, a loveseat, a television stand, and a television and that all of these items, except the loveseat, were being stored in the defendant's garage. The defendant testified that her sons destroyed the loveseat during a party. The defendant acknowledged that she did not turn the guns, the furniture, the tools, and the other property in her possession over to Walter's estate.

¶ 14 The defendant testified that in May 2008, the plaintiff requested that the defendant provide information regarding the joint bank accounts. The defendant testified that she "said no, because as far as [she] was concerned, it was [her] father's and [hers]."

¶ 15 Linda Brunell, the plaintiff and the defendant's sister through marriage, testified that in August 2008, after Walter had suffered a stroke, the defendant had told her that she had purchased Walter's truck and thereby owned it. Linda testified that in 2008, Walter at times did not know what he was doing. Linda testified that in May 2008, her father was at a diminished capacity and was not "as sharp as he once was."

¶ 16 The plaintiff testified that in 2006, after Walter suffered a stroke, he was confused and could not read or write. The plaintiff testified that by August 2008, the defendant was in possession of Walter's truck.

¶ 17 During the plaintiff's case-in-chief, in discussing the line of questioning showing that the defendant benefitted from transactions exercised after the execution of the power of attorney, the circuit court stated as follows:

> "In *** the [c]ourt's mind, exercising a power of attorney is almost a transactional item. *** I don't think there's some generic moment in time where you

say I'm now the power of attorney, because that doesn't really–it doesn't create a guardianship automatically, I guess is what I'm getting at. *** I would agree if she's acting as power of attorney she does have a fiduciary duty."

¶ 18 At the close of the plaintiff's evidence, the circuit court concluded that there was a lack of evidence regarding Walter's capacity, that "it's legally impossible to convert funds in a joint account," that no evidence indicated that "the accounts themselves were ever created by undue influence or fraud or were created by use of the power of attorney," that the allegations regarding the gifts and property in the defendant's possession should have been brought by way of a citation in the probate proceedings, that the defendant was not exercising her power of attorney in writing checks from the joint account, and that the plaintiff failed to present evidence regarding the amount of the dividend checks the defendant cashed. Accordingly, the circuit court entered a directed verdict in the defendant's favor. On October 21, 2011, the circuit court entered its written order granting the defendant's motion for directed verdict. On November 21, 2011, the plaintiff filed a notice of appeal.

¶ 19 ANALYSIS

¶ 20 On appeal, the plaintiff argues, *inter alia*, that the circuit court erred in entering a directed verdict because the plaintiff presented evidence showing that the defendant committed tortious interference with an expectancy under the will.

¶ 21 "A directed verdict *** is properly entered in those limited cases where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' (*Pedrick* [*v. Peoria & Eastern R.R. Co.*], 37 Ill. 2d [494,] 510 [(1967)])." *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). In ruling on a motion for directed verdict, a court may not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party opposing

the motion. *Id.*

¶ 22 A motion for directed verdict presents a question of law as to whether, when all of the evidence and reasonable inferences therefrom are viewed in an aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37. The standard for entry of a directed verdict is a high one and is not appropriate if reasonable minds may differ as to inferences or conclusions to be drawn from the facts presented. *Id.* "Our standard of review is *de novo*." *Id.*

¶ 23 "[I]n a tort claim for intentional interference with inheritance, '[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.' Restatement (Second) of Torts §774B (1979)." *In re Estate of Ellis*, 236 Ill. 2d 45, 52 (2009). "The 'widely recognized tort' does not contest the validity of the will; it is a personal action directed at an individual tortfeasor. See *Marshall v. Marshall*, 547 U.S. 293, 312 *** (2006) (the tort claim 'seeks an *in personam* judgment against [the defendant], not the probate or annulment of a will')." *Id.* "Although some of the evidence may overlap with a will contest proceeding, a plaintiff filing a tort claim must establish the following distinct elements: (1) the existence of an expectancy; (2) defendant's intentional interference with the expectancy; (3) conduct that is tortious in itself, such as fraud, duress, or undue influence; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages." *Id.* "The remedy for a tortious interference action is not the setting aside of the will, but a judgment against the individual defendant, and, where the defendant has himself received the benefit of the legacy, a constructive trust, an equitable lien, or 'a simple monetary judgment to the extent of the benefits thus tortiously acquired.' Restatement (Second) of Torts §774B(e) (1979)." *Id.*

¶ 24 At trial, the plaintiff presented evidence that he expected to receive a portion of Walter's residuary estate pursuant to the will. The plaintiff also presented evidence that the defendant intentionally interfered with that expectancy when, after being named power of attorney, she benefitted from transactions and received from Walter cash gifts, funds that were deposited into an account she co-owned, a truck, and other personal property.

¶ 25 No one disputed at trial that the power of attorney was valid and authorized the defendant to sign, cash, and deliver checks to herself and to deposit the funds in one or both joint checking accounts. The defendant testified that she began doing so in November 2006. As a matter of law, a power of attorney gives rise to a general fiduciary relationship between the grantor of the power and the grantee. *In re Estate of Elias*, 408 Ill. App. 3d 301, 319 (2011); *In re Estate of Miller*, 334 Ill. App. 3d 692, 697 (2002); *Pottinger v. Pottinger*, 238 Ill. App. 3d 908, 918 (1992); *Lemp v. Hauptmann*, 170 Ill. App. 3d 753, 757 (1988). The mere existence of a fiduciary relationship prohibits the agent from seeking or obtaining any selfish benefit for herself, and if she does so, the transaction is presumed to be fraudulent. *Spring Valley Nursing Center, L.P. v. Allen*, 2012 IL App (3d) 110915, ¶ 12; *In re Estate of Elias*, 408 Ill. App. 3d at 319; *Deason v. Gutzler*, 251 Ill. App. 3d 630, 637 (1993); *Lemp*, 170 Ill. App. 3d at 757. "Thus, any conveyance of the principal's property that either materially benefits the agent or is for the agent's own use is presumed to be fraudulent." *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 12.

¶ 26 "Once the presumption of fraud is established, the burden shifts to the agent to show by clear and convincing evidence that the transaction was fair and equitable and did not result from undue influence." *Deason*, 251 Ill. App. 3d at 637. "To rebut the presumption, a fiduciary must establish that the transfer was a gift." *Id.* "Where there is a fiduciary relationship, a gift is not presumed, regardless of the relationship of the parties involved." *Id.* "Three significant factors that have been recognized as overcoming the presumption of

fraud are (1) a showing that the fiduciary made a frank disclosure [of all relevant information], (2) the fiduciary proves that he or she paid the fair value for property obtained, and (3) the fiduciary proves that the principal received competent and independent [legal] advice." *In re Estate of Miller*, 334 Ill. App. 3d at 698; see also *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 13; *In re Estate of Pawlinski*, 407 Ill. App. 3d 957, 968 (2011); *In re Estate of Teall*, 329 Ill. App. 3d 83, 88 (2002); *In re Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997).

¶ 27 "The burden is on the agent to rebut the presumption by showing that he acted in good faith and that he did not betray the confidence placed in him." *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 13. "If the agent satisfies that burden, the transaction in question will be upheld. See 755 ILCS 45/2-7(a) (West 2010) (an agent who acts with due care for the benefit of the principal will not be held liable merely because the act also benefits the agent)." *Id.* "However, if the agent fails in that burden, the transaction will be set aside. See 755 ILCS 45/2-7(a), (f) (West 2010)." *Id.*

¶ 28 In this case, the circuit court incorrectly determined that the defendant owed a fiduciary duty only in transactions invoking her power of attorney. See *In re Estate of Elias*, 408 Ill. App. 3d at 320 (transactions benefitting the defendant after grant of power of attorney are presumed fraudulent); *In re Estate of Miller*, 334 Ill. App. 3d at 700 (fact that power of attorney was not necessary for checking account transactions does not diminish fact that a fiduciary relationship existed). Instead, as a matter of law, the power of attorney executed in November 2004 gave rise to a general fiduciary relationship between Walter and the defendant. See *In re Estate of Miller*, 334 Ill. App. 3d at 697. Any subsequent conveyance of Walter's property that either materially benefitted the defendant or was for the defendant's own use is presumed to be fraudulent. See *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 12.

¶ 29 Here, the defendant testified that after Walter granted her power of attorney, she conveyed Walter's pension, social security, and dividend checks into a joint checking account that she co-owned and that she took possession of additional funds, including cash and dividend checks of lesser amounts. She testified that she also took possession of Walter's truck, watch, tools, furniture, and other personal property. She thereby conveyed Walter's property to materially benefit her, and, because the defendant was a fiduciary to Walter, these conveyances are presumed to be fraudulent. See *id.*; *In re Estate of Rybolt*, 258 Ill. App. 3d 886, 889 (1994). That the defendant benefitted from the transfers is clear. Once the presumption of fraud was established, the burden shifted to the defendant, as fiduciary, to show by clear and convincing evidence that the transactions were fair and equitable and did not result from undue influence. See *Spring Valley Nursing Center, L.P.*, 2012 IL App (3d) 110915, ¶ 12; *In re Estate of DeJarnette*, 286 Ill. App. 3d at 1091.

¶ 30 Although the defendant testified that Walter gifted her the funds, the truck, and the property, we find that this limited testimony, which was presented only during the plaintiff's case-in-chief due to the circuit court's directed verdict, did not, in itself, amount to clear and convincing evidence that the transactions were fair and equitable and did not result from undue influence. We certainly cannot conclude that reasonable minds could not differ as to inferences or conclusions to be drawn from the facts presented so as to sustain the circuit court's directed verdict.

¶ 31 The defendant argues that the plaintiff's claim fails because he failed to prove the existence of his expectancy in the joint accounts, which she co-owned. The defendant's argument is misplaced. The transactions wherein the defendant benefitted included the deposit or transfer of Walter's funds into joint accounts that she owned with him. The plaintiff had an expectancy of an inheritance of Walter's funds, which the defendant consistently cashed or deposited into accounts she co-owned with Walter. Because she

benefitted from these transactions, the presumption of fraud arises.

¶ 32 We recognize that the presumption of fraud discussed above and the presumption of donative intent, created by joint tenancy, may serve to cancel each other where a joint account was created before the fiduciary relationship began and where deposits made during the fiduciary relationship followed a procedure established before the relationship. See *In re Estate of Teall*, 329 Ill. App. 3d at 88; *In re Estate of Rybolt*, 258 Ill. App. 3d at 890. This case, however, presents neither scenario.

¶ 33 The Coulterville Banking Center joint checking account was created after the defendant was granted power of attorney for Walter. "[W]hen the joint tenancy is created after the fidicuairy relationship is established, the controlling presumption is one of fraud." *In re Estate of Miller*, 334 Ill. App. 3d at 700. Further, "[t]he fact that the power of attorney was not necessary for the checking account transactions *** does not diminish the fact that a fiduciary relationship existed." *Id.*

¶ 34 Although the First National Bank of Steeleville joint checking account was created prior to the defendant becoming Walter's fiduciary, the deposits made during the fiduciary relationship did not follow a procedure established before the fiduciary relationship. See *id.* at 702; *In re Estate of Harms*, 236 Ill. App. 3d 630, 640 (1992). Instead, the defendant established a new procedure of conveyances in November 2006, which was after the execution of the November 2004 power of attorney from which she achieved the status of a fiduciary as a matter of law. See *Simon v. Wilson*, 291 Ill. App. 3d 495, 503 (1997). After November 2006, the defendant began transferring Walter's individual funds to their joint accounts. See *In re Estate of Rybolt*, 258 Ill. App. 3d at 890 (no presumption of donative intent arises where the fiduciary makes a deposit of trust funds to a preexisting joint account). The controlling presumption, therefore, is one of fraud. *Id.*

¶ 35 The defendant argues, and the circuit court held, that the plaintiff's cause of action for

tortious interference with an expectancy under a will should have been brought within the probate proceeding of Walter's estate. The defendant claims specifically that the title to the the gun collections, guitar, furniture, appliances, and other personal property should have been determined in a citation proceeding in the probate court.

¶ 36 Initially, we note that section 2-619(a) of the Code of Civil Procedure permits dismissal when a "cause of action is barred by a prior judgment" or when a "claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(4), (a)(9) (West 1996). Yet, the defendant did not raise this issue in the circuit court as an affirmative matter that would defeat the plaintiff's claim. See *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1012 (2010) (allegation that tort claims were barred for failure to challenge the will in probate proceedings raised in a section 2-619 motion to dismiss); *Clarke v. Community Unit School District 303*, 2012 IL App (2d) 110705, ¶ 37 (when defendant fails to raise issue of standing as an affirmative defense in a section 2-619 motion and issue is not argued before the trial court, appellate court need not consider the trial court's *sua sponte* determination of the issue). Further, the supreme court has held that a tort claim for intentional interference with an expectancy is appropriate in cases, such as this one, where the claim involves *inter vivos* transfers of property. See *In re Estate of Ellis*, 236 Ill. 2d at 55-56; *cf. Robinson v. First State Bank of Monticello*, 97 Ill. 2d 174, 185 (1983) (where the plaintiffs entered into a settlement agreement with the estate agreeing not to file a will contest, the court did not recognize a subsequent tort action for intentional interference with inheritance).

¶ 37 Based on the foregoing, we find that the evidence, when viewed most favorably to the plaintiff, did not so overwhelmingly favor the defendant that no contrary verdict based on the evidence could stand under the plaintiff's tortious interference with an expectancy claim. The plaintiff's case-in-chief established a factual basis to support the allegations in his complaint

that the defendant tortiously interfered with the plaintiff's expectancy of an inheritance. The plaintiff established a factual basis to show the existence of an expectancy, the defendant's intentional interference with that expectancy, the presumption of fraud, a reasonable certainty that the devise would have been received but for the defendant's interference, and damages. In the very least, a question of fact remained for the jury, given proper instructions. See generally *Prudential Insurance Co. v. Romanelli*, 243 Ill. App. 3d 246, 252 (1993). "It is not required that a trial court's findings of law be shown to be incorrect before its grant of motion for a directed verdict can be overturned, but, rather a directed verdict can stand only if it is impossible for a contrary verdict, based on the evidence to stand." *Id.* at 253. We cannot say such a situation exists here. Accordingly, we conclude that the grant of a motion for directed verdict at the close of the plaintiff's case-in-chief was improper, and we reverse and remand to the circuit court for a new trial. Because we reverse and remand on this basis, we need not address the parties' remaining contentions.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Randolph County is reversed, and the cause is remanded for a new trial.

¶ 40 Reversed and remanded.