

IN THE COURT OF APPEALS OF IOWA

No. 8-370 / 07-2011
Filed October 1, 2008

**ELOISE BORGUS, on behalf of the
Estate of Jack W. Borgus, and
ELOISE BORGUS, individually,**
Plaintiffs-Appellees,

vs.

MICHAEL BORGUS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley,
Judge.

Michael Borgus appeals from the district court decision finding he had
cooperated in helping his deceased father, Jack Borgus, defraud his step-
mother, Eloise Borgus, out of her marital assets. **REVERSED.**

Rex J. Ridenour, Davenport, for appellant.

Steven J. Havercamp of Stanley, Lande & Hunter, Davenport, for
appellees.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

HUITINK, P.J.

Michael Borgus appeals from the district court decision finding he had cooperated in helping his deceased father, Jack Borgus, defraud his step-mother, Eloise Borgus, out of her marital assets. We reverse.

I. Standard of Review.

This case was filed as an equity action, and the parties agree it was tried in equity. Our review is therefore de novo. Iowa R. App. P. 6.4. We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

II. Background Facts.

Upon our de novo review of the evidence in this case, we find the following facts:

Jack divorced his first wife, Marilyn Lease, in 1973. When Jack married Eloise the next year, Jack and Marilyn's sixteen-year-old son, Michael, blamed Eloise for the divorce. As a result, Michael and his father had a very strained relationship, and Michael and Eloise had no relationship. Michael joined the Navy after high school and started a family of his own. He served in the Navy for sixteen years and then moved his family to Minnesota. By 1999, Jack and Michael rarely spoke with each other.

Jack and Eloise did not have any children during their thirty-year marriage. They lived in Davenport, with Jack working as a boiler engineer and Eloise working as a part-time waitress. By all accounts, Jack was a very stern man. Jack handled the couple's finances and did not allow Eloise to see any of their financial statements. When Eloise asked about their financial future, Jack told

her that he would take care of her when he died. Prior to 2002, Jack held most of the couple's monetary assets in a joint account or in certificates of deposit that were payable to Eloise upon his death.

During the 1990s, Jack developed serious health problems, most notably congestive heart failure and chronic lung disease. Over the years he had numerous surgeries to insert three different pacemakers. He was also dependent on dialysis due to chronic renal failure. In late 1999 and early 2000, Jack spent a substantial amount of time in the hospital. Jack called Michael because he was angry that Michael did not visit or contact him while he was in the hospital. The conversation became very heated and ended so abruptly that Michael believed he would never speak with his father again. Shortly thereafter, Jack executed a will leaving his entire estate to Eloise. The will specifically excluded Michael from any form of inheritance.

In 2002 Jack and Eloise's relationship began to sour when Jack accused Eloise of having an affair. At about the same time, Jack's doctor diagnosed him with dementia. In late 2002 Jack called Michael and spoke with him for the first time since their argument in early 2000. Jack asked Michael for his social security number. When Michael asked why he needed the social security number, Jack told him to "shut up" because he wanted to give him some money. Michael gave him his social security number. On November 15, 2002, Jack transferred more than \$100,000 into a certificate of deposit at a local bank. Unbeknownst to Michael, this certificate of deposit named Michael as the pay on death beneficiary. In January 2003 Jack opened a savings account and listed Michael as a joint member on the account. Jack then sent Michael a short letter

asking him to sign and return a document regarding the joint savings account. In the spring of 2003, without telling Michael what he was doing, Jack transferred nearly \$200,000 into the joint savings account. Sometime in 2003 Jack also sent Michael a letter telling him to sign a document that would put his name on the title of his truck.

By July of 2003, Jack's doctor believed that he had progressed to advanced dementia. The doctor's diagnosis was only based on a "crude screening tool" for dementia because Jack never followed through with a neurological exam. In September 2003 Jack called Michael for a second time and asked to meet him. They met at a gas station in Waterloo. Jack gave Michael \$1000 in cash, some fishing equipment, a set of keys to the truck, and an envelope containing copies of the paperwork for the certificate of deposit and copies of a statement from their joint savings account. Michael did not immediately look at the information in the envelope. Jack went on to tell Michael that he wanted to divorce Eloise because she was having an affair. Michael told him he needed to find a lawyer. This was the last time Michael ever saw his father alive. Later that day Michael looked in the envelope and discovered that the savings account and certificate of deposit totaled more than \$300,000.

A few months later, Michael called Jack and asked for \$2000 to help pay some bills. A week later, Jack sent him a check for \$2000.

In May 2004 Eloise obtained a restraining order against Jack when he allegedly threatened to harm her. Jack moved out of the family home and into a hotel. Eloise hired an attorney and sought temporary support. At about the same time, Michael transferred \$217,000 out of the joint savings account into his

own personal account. Jack called Michael and asked why he transferred the money. Michael told him he did not trust Eloise because of the pending legal proceeding. Per Jack's instructions, Michael transferred \$200,000 back to the joint account. During this time, Jack also began to communicate with his former wife, Marilyn, and arranged so that all of his financial statements would be sent to her home. Marilyn brought Jack his mail and helped him get groceries while he lived in the hotel. She also helped him write checks to pay his bills. Jack eventually moved to a nursing home but died shortly thereafter in August 2004, at the age of eighty. Approximately three days after his death, Michael withdrew all of the money from their joint savings account. Michael also cashed in the certificate of deposit. In total, Michael received \$337,000. Eloise was left with approximately \$20,000.

III. Prior Proceedings.

Eloise, as an individual and as the executor for Jack's estate, filed a petition against Michael alleging several theories of recovery that were based entirely on Michael's alleged misconduct. Specifically, Eloise claimed Michael (1) breached his fiduciary duty to Jack by encouraging him to transfer the couple's joint assets to accounts where he would stand to inherit the assets outside of probate; (2) converted or misappropriated funds; (3) made intentional false representations and omissions intended to deceive, induce, and defraud Eloise by having Jack transfer the assets away from the couple's marital accounts; (4) "breached his duty of good faith by both misstating and omitting material facts and by encouraging Jack to transfer assets he held jointly with Eloise over to [himself]"; and (5) exercised undue influence on Jack.

After discovery, Michael filed a motion for summary judgment arguing there was no evidence to prove he had done anything wrong. The district court denied Michael's motion for summary judgment, and the matter was eventually tried to the court. On October 31, 2007, the district court entered judgment in favor of Eloise for \$337,000. The court did not cite any legal authority for its decision or apply the facts to any of the legal theories of recovery proposed by Eloise. Instead, the court entered judgment against Michael because:

The court finds the circumstantial evidence both clear and convincing that Michael knew Jack was trying to defraud Eloise of the joint tenancy marital property. . . .

. . . .
. . . Michael cooperated in Jack's act of defrauding Eloise of her rights as surviving spouse to the financial assets Jack had promised her would be for her care after he died. Michael intentionally participated in a fraudulent transfer of marital assets into joint tenancy with himself when he knew or should have known that such transfer violated Jack's fiduciary duties to Eloise as her husband who handled all of the finances and controlled her.

. . . The interference with Eloise's reasonable expectations developed over almost thirty years of marriage to Jack should not be enforced by a merely mechanical application of contractual joint tenancy law. The law should not be used as a sword against widows, even by an orphan.

Michael now appeals, claiming the court erred in (1) denying his motion for summary judgment, (2) denying his motion for directed verdict, and (3) ordering him to pay Eloise \$337,000.

Because we find the issue dispositive, we will only address the court's ultimate decision ordering Michael to pay Eloise \$337,000.

IV. Merits.

The court found Michael liable because he "cooperated" with and "intentionally participated" in Jack's attempt to defraud Eloise of her share of the

marital assets. The court came to this conclusion after it determined Michael “knew or should have known that such transfer violated Jack’s fiduciary duties to Eloise as her husband who controlled all of the finances and controlled her.”

We find the district court’s decision erroneous for two reasons. First, the court’s theory of liability is incompatible with Eloise’s theories of recovery. Eloise elected to pursue claims against Michael, not Jack or his estate. Eloise did not contend *Jack’s* inter vivos transfer of marital personal property constituted a fraud on her legal and equitable rights as a surviving spouse. Her entire case was based on the theory that Michael preyed on Jack’s weakened condition. Therefore, no one argued whether Jack’s actions constituted a fraud on Eloise’s legal and equitable rights. The court clearly rejected her theory that Michael somehow manipulated or defrauded Jack because it expressly found that Jack was the one who defrauded Eloise and violated his own fiduciary duties to her. Once the court determined Eloise had failed to prove her claims against Michael, it should have entered judgment for Michael. Instead, the court went on to fashion its own basis for recovery and found Michael was liable for Jack’s fraudulent activities because he “cooperated” and went along with Jack’s plan. This legal theory is entirely inconsistent with any argument made before the district court. We will not find a defendant liable under a legal theory that was neither raised nor argued before the district court.

We also find the court erred when it determined Michael was liable for Jack’s fraud merely because he cooperated with Jack or he “knew or should have known” that Jack’s inter vivos transfer of personal property was a violation of Jack’s fiduciary duties to her. We cannot agree that Michael should have

known that his father was violating his fiduciary duties to Eloise by giving him this much money or that Michael should have known that his acceptance of these funds somehow perpetuated a fraud against his step-mother. First, we know of no fiduciary duty under Iowa law arising between husband and wife, absent extenuating circumstances. Second, a parent has the right to transfer their personal property to his or her child prior to death via joint tenancy, see *Gunsaulis v. Tinger*, 218 N.W.2d 575, 578 (Iowa 1974) (noting a husband may create a valid joint tenancy in his personal property between himself and a third person without restrictions or limitations during his lifetime), and a child does not commit fraud by merely accepting the personal property. Third, there is no evidence that Jack (1) knew the extent of his father's entire estate, (2) ever knew he was receiving more than his father's share of the marital assets, or (3) knew or believed that his father was giving him these assets in order to spite Eloise or because Eloise was allegedly having an affair. We simply find no evidence or legal theory to support the court's conclusion that Michael somehow perpetuated a fraud against Eloise by accepting what was given to him. Therefore, we reverse the district court's decision finding the same.

Even if we were to assume, *arguendo*, that the issues actually raised at trial—but not ruled upon by the court—were preserved for our review, we would still find Eloise failed to prove Michael was liable under any of her stated theories of recovery.

Conversion. A conversion occurs when a person exercises wrongful control or dominion over the property of another in denial of or inconsistent with the other's possessory right to the property. *Larson v. Great West Cas. Co.*, 482

N.W.2d 170, 173 (Iowa Ct. App. 1992). The record reveals that Michael lawfully obtained possession of these assets because he was the surviving tenant of the joint savings account and he was the person identified as the “pay on death beneficiary” in the certificate of deposit. See generally *In re Estate of Martin*, 261 Iowa 630, 639, 155 N.W.2d 401, 406 (1968). Therefore, he did nothing to exercise “wrongful control or dominion” over these assets. There was no conversion here.

Bad Faith or Breach of Fiduciary Duty. We also find Michael did not obtain these funds through bad faith or breach of a fiduciary duty because there was no fiduciary relationship between Jack and Michael. A fiduciary relationship exists between two persons “when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 52 (Iowa 2003). Indicators of a fiduciary relationship include the acting of one person for another; the having and the exercising of influence over one person by another; the reposing of confidence in one person in another; the dominance of one person by another; the inequality of the parties; and the dependence of one person upon another. *Id.*

There is simply no evidence to prove that Michael acted for Jack, that Jack reposed confidence in Michael, that Michael dominated Jack, or that Jack was dependent on Michael. Instead, the evidence proves that Jack was a very independent person who kept tight control of his assets. The evidence clearly shows that Jack, even though he suffered from dementia, was the one who came up with the plan to give the bulk of his estate to his son, rather than his wife.

Jack carried out all of these financial transactions by himself through personal transactions with bank tellers. One of these tellers had dealt with Jack for many years. She testified that there was nothing out of the ordinary in the way he transacted his business towards the end of the life and that she had no idea that he was suffering from dementia. A second teller testified that she met with Jack on May 19, 2004, and he “seemed fine.” She had no concerns about his actions and she had no idea he had been diagnosed with dementia.

After a thorough review of the record in this case, we find there was no fiduciary relationship between Michael and Jack. Accordingly, the plaintiffs’ claims that Michael breached this fiduciary relationship or acted in bad faith with regards to this fiduciary relationship are meritless.

Undue Influence. To set aside a transfer on the ground of undue influence, one must show “such persuasion as results in overpowering the will of the [grantor] or prevents him from acting intelligently, understandingly, and voluntarily—such influence as destroys the free agency of the grantor and substitutes the will of another person for his own.” *Mendenhall v. Judy*, 671 N.W.2d 452, 454 (Iowa 2003) (quoting *Leonard v. Leonard*, 234 Iowa 421, 429, 12 N.W.2d 899, 903 (1944)). The elements necessary to establish a finding of undue influence are: (1) susceptibility to undue influence, (2) opportunity to exercise such influence and affect the wrongful purpose, (3) disposition to influence unduly for the purpose of procuring an improper favor, and (4) result clearly the effect of undue influence. *Id.* Our preceding discussion concerning the alleged fiduciary relationship, when coupled with Michael’s limited involvement with Jack during the five years leading up to his death and the fact

that Jack made the bulk of these transfers before he saw Michael in September 2003, convinces this court that Eloise's undue influence claim is meritless.

Fraud. We also find there was insufficient evidence to prove Michael "intended to deceive, induce, and defraud" either Jack or Eloise. The elements for recovery in a fraud action are: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent, (6) justifiable reliance, and (7) resulting injury. *Smidt v. Porter*, 695 N.W.2d 9, 22 (Iowa 2005). The failure to disclose a material fact known to the person who has a legal duty to inform the other contracting person of the matter can also constitute fraud. *Clark v. McDaniel*, 546 N.W.2d 590, 592 (Iowa 1996). This misrepresentation may occur "when one with superior knowledge, dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact involved in the transaction." *Id.* (quoting *Kunkle Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 653 (Iowa 1984)). In this case there is no evidence that Michael made any false statements or failed to disclose any material fact to either Michael or Eloise. Accordingly, Eloise's theory of fraudulent recovery must fail.

V. Conclusion.

The district court's stated theory of liability was improper in light of the issues actually raised at trial. Because the evidence also does not support Eloise's theories for recovery, we reverse.

REVERSED.