

IN THE SUPREME COURT OF OHIO

DANIEL B. LETSON, ADMINISTRATOR,
WWA OF THE ESTATE OF KATHRYN M.
D'ALESSANDRO, DECEASED

APPELLEE,

v.

GREGORY A. MCCARDLE, SR., *et al.*

DEFENDANT,

THE HOME SAVINGS AND LOAN
COMPANY OF YOUNGSTOWN, OHIO

APPELLANT

) On Appeal from the Trumbull County Court
) of Appeals Eleventh Appellate District

) Court of Appeals
) Case No. 2009-T-0122

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
THE HOME SAVINGS AND LOAN COMPANY OF YOUNGSTOWN, OHIO

Richard J. Thomas (#0038784)
(COUNSEL OF RECORD)
Henderson, Covington, Messenger,
Newman & Thomas Co., L.P.A.
6 Federal Plaza Central, Suite 1300
Youngstown, OH 44503
Phone: 330.744.1148
Fax: 330.744.3807
rthomas@hendersoncovington.com
COUNSEL FOR APPELLANT,
THE HOME SAVINGS AND LOAN
COMPANY OF YOUNGSTOWN, OHIO

Gus K. Theofilos (#0007688)
(COUNSEL OF RECORD)
11 Federal Plaza Central, Suite 910
Youngstown, OH 44503
Phone: 330.746.6612
Fax: 330.746.0545
COUNSEL FOR DEFENDANT
KATHY M. D'ALESSANDRO

Daniel B. Letson (#0034527)
(COUNSEL OF RECORD)
Letson, Kragalott & Stack
160 E. Market Street, Suite 250
Warren, OH 44481
Phone: 330.393.1529
Fax: 330.393.1528
dletson@lks-law.com
COUNSEL FOR APPELLEE,
DANIEL B. LETSON, ADMINISTRATOR,
WWA OF THE ESTATE OF KATHRYN M.
D'ALESSANDRO, DECEASED

Gregory A. McCardle, Sr.,
Belmont Corr. Inst. #A531427 68518
Bannock Road - St. Rt. 331
St. Clairsville, OH 43950
DEFENDANT

FILED
SEP 23 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE
IS ONE OF PUBLIC OR GREAT GENERAL INTEREST

This case is one of public or great general interest that involves the interplay between the Uniform Fiduciary Act (“UFA”) and the Uniform Commercial Code (“UCC”). Furthermore, the decision of the Eleventh District Court of Appeals that Defendant-Appellant The Home Savings & Loan Company of Youngstown, Ohio (“Home Savings”) had actual knowledge of a breach of fiduciary duty by Defendant Gregory McCardle (“Gregory McCardle”) and acted in bad faith creates a direct conflict among the Ohio appellate districts. Prior to the decision of the Eleventh District, case law in Ohio interpreting the UFA was uniform. The UFA protected a bank dealing with a fiduciary unless the bank had actual knowledge of a breach of fiduciary duty or acted in bad faith. Inkrott, 55 Ohio St.3d at 27. Moreover, mere negligence or a bank’s negligence in failing to follow its own procedures did not constitute bad faith. Nations Title Ins. of New York, Inc. v. Bertram (2nd Dist. 2000), 140 Ohio App.3d 157, 164; In re: Clark v. National City Bank, 7th Dist. Nos. 99 CA 88, 99 CA 103, 2000 Ohio 2572, 2000 Ohio App. LEXIS 4596, *10. The Eleventh District’s decision essentially held that a bank employee’s negligence gives rise to both actual knowledge and bad faith. The decision creates a conflict among Ohio’s appellate districts, uncertainty in this important area of law for banks, and an obstacle for commerce at a time when Ohio’s economy is in a deep recession.

The Eleventh District held that Gregory McCardle was a fiduciary of the decedent, Kathryn M. D’Alessandro (“Decedent”), under a power of attorney at the time of the transaction with Home Savings. Therefore, as a matter of law, Home Savings was dealing with an authorized fiduciary. However, the Eleventh District held that Home Savings liable, because Home Savings permitted Gregory McCardle, the holder of a valid power of attorney, to deposit a check payable to the Decedent in a temporary account opened in his name. The Eleventh

District's decision completely ignores R.C. 5815.08 which shields a bank from liability "[i]f a fiduciary makes a deposit in a bank to the fiduciary's personal credit of...checks payable to the principal and indorsed by the fiduciary..."

Banks throughout the country deal with fiduciaries in numerous types of transactions, including transactions with attorneys-in-fact, guardians and trustees. "The Uniform Fiduciaries Act was developed to facilitate commercial transactions, by relieving [banks] who deal with authorized fiduciaries from the duty of ensuring that entrusted funds are properly utilized for the benefit of the principal by the fiduciary." Master Chemical Corp. v. Inkrott (1990), 55 Ohio St.3d 23, 26. Banks are entitled to rely upon the provisions of the UFA to insulate them from liability when dealing with fiduciaries. "To require...bank[s] to inquire of the circumstances of every...transaction [with a fiduciary] where suspicious circumstances exist would bring the wheels of commerce to a halt" because "[b]anks would be reluctant to allow such accounts" and, thus, "[t]he purpose of the UFA, both nationally and as adopted by our state, would be thwarted." Bertram, 140 Ohio App.3d at 166.

The Eleventh District's decision runs the very risk that the UFA seeks to avoid – placing an undue burden on commerce. The decision needlessly imposes increased costs to monitor fiduciaries on Home Savings and other banks by punching holes in the UFA liability shield. This case presents the opportunity for this Court to address the interplay between the UFA and the UCC, define the scope of the protections provided by the UFA, and provide financial institutions (the grease that permits the wheels of commerce to turn in Ohio) with certainty with respect to potential liability when dealing with fiduciaries.

STATEMENT OF THE CASE AND FACTS

This case involves Home Savings' negotiation of a \$53,654.04 check payable to Decedent presented to Home Savings by Decedent's fiduciary and attorney-in-fact, Gregory McCardle, under a power of attorney. On October 23, 2009, the Trumbull County Court of Common Pleas, Probate Division, issued a Judgment Entry finding Home Savings liable to Decedent's estate for permitting her fiduciary to deposit the check into an account in the fiduciary's name. On August 9, 2010, the Eleventh District affirmed the trial court's judgment.

The events central to this case began in November of 2006. On or about November 8, 2006, Gregory McCardle attempted to cash a check payable to Decedent in the amount of \$53,654.04 at Home Savings.¹ Gregory McCardle presented Home Savings with a General Durable Power of Attorney (Plaintiff's Exhibit 33) ("Power of Attorney") through which Decedent granted Gregory McCardle with broad powers, including the power to handle banking transactions. Nothing in the Power of Attorney indicated that it was forged, and the Eleventh District did not find that this Power of Attorney was forged.

Home Savings' employee, Patricia Scarpine ("Ms. Scarpine"), handled the transaction, and opened an account in Gregory McCardle's name individually. Although Ms. Scarpine did not recall the transaction and Home Savings' internal policies generally required a power of attorney account to be opened in the name of the represented person, Melinda Davies, Home Savings' Vice President and Deposit Operations Manager, testified as to why the account was opened in Gregory McCardle's name individually rather than in his fiduciary capacity. According to Ms. Davies, if the fiduciary wants to cash a check, rather than deposit it, Home Savings requires an account to be opened to make sure that sufficient funds are available before

¹ Mr. McCardle attempted to cash the check earlier on October 25, 2006. However, Ms. Scarpine filled out the paperwork for opening the account incorrectly. As an apparent result, the account was not opened until November 8, 2006, when Mr. McCardle signed a new signature card.

Home Savings pays the check. In such cases, an attorney-in-fact can open an account in his own name with a check payable to a principal, if the attorney-in-fact has a proper power of attorney.

After the account was opened, Gregory McCardle issued a check in the amount of \$5,000.00 payable to “cash” on November 15, 2006, and a check in the amount of \$15,000.00 payable to Ken Heinschman on November 20, 2006. On November 20, 2006, Gregory McCardle closed the account and Home Savings issued him an official bank check in the amount of \$33,645.57. No one from Home Savings who Plaintiff subpoenaed to testify at trial had any knowledge regarding how Gregory McCardle was using the proceeds of the check to Decedent.

On May 30, 2008, Plaintiff-Appellee attorney Daniel B. Letson (“Plaintiff-Appellee”), the administrator of Decedent’s estate, filed a concealment action under R.C. 2109.50 against Gregory McCardle and Defendant-Appellee Kathy M. McCardle (“Kathy McCardle”), his wife at the time and Decedent’s daughter. On September 16, 2008, the trial court conducted a hearing on the Complaint. Home Savings was not a party, it was not represented, and no representatives of Home Savings testified. On September 23, 2008, the trial court issued a judgment finding that Kathy McCardle and Gregory McCardle concealed assets of the estate.

On January 13, 2009, Plaintiff-Appellee filed an Amended Complaint naming Home Savings as an additional defendant with respect to the above-referenced \$53,654.04 check. On June 30, 2009, the trial court conducted a hearing with respect to the claims against Home Savings. Importantly, there was no testimony or evidence whatsoever showing that anyone at Home Savings had actual knowledge that Gregory McCardle was acting contrary to Decedent’s best interests by negotiating the check through Home Savings.

On October 23, 2009, the trial court issued a Judgment Entry in favor of Plaintiff-Appellee against Kathy McCardle, Gregory McCardle and Home Savings jointly and severally for \$53,654.04. The trial court made the following relevant findings:

- The \$53,654.04 check contained a forged endorsement of Decedent. *See Appx. at p.20.* (There was absolutely no evidence of such facts at the June 30, 2009 hearing on the Amended Complaint against Home Savings. The signature cannot be a forgery because the trial court held Gregory McCardle was Decedent's fiduciary under the Power of Attorney. Thus, he was authorized to sign Decedent's name).
- Gregory McCardle attempted to cash the check at Home Savings but instead was required to deposit the check due to a waiting period. *See Appx. at pp.20-21.*
- Home Savings' internal procedures required it to open the account in the name of Decedent and required Gregory McCardle to sign the signature card for the account in his capacity as fiduciary. *See Appx. at p.21.* (This contradicted uncontroverted testimony that a fiduciary could open a temporary account in his own name to ensure that a check cleared if he wanted to just cash a check).
- R.C. 5815.06 did not shield Home Savings from liability because this statute only applied if a deposit was made to the credit of a fiduciary as fiduciary. *See Appx. at p.24.* (The trial court never addressed Home Savings' argument that R.C. 5815.08 applied to deposits of checks payable to a represented person that were deposited into a fiduciary's personal account).
- R.C. 1303.37 (UCC 3-307) provided Home Savings with notice of Gregory McCardle's breach of fiduciary duty, and that this fact alone caused Home Savings to act in bad faith. *See Appx. at p.24.* (The trial court did not interpret R.C. 1303.37 and R.C. 5815.08 *in pari materia*).

It is important to note that that trial court *did not find* that that power of attorney that Gregory McCardle presented to Home Savings was forged. *See Appx. at p.23-24.*

On August 9, 2010, the Eleventh District affirmed the trial court's judgment. *See Appx. at pp.1-18.* Without discussing any factual basis for "actual knowledge" or "bad faith" under the UFA, other than Gregory McCardle depositing the check into an account in his name, the Eleventh District held Home Savings had actual knowledge that Gregory McCardle defrauded Decedent and acted in bad faith when it allowed him to deposit the check. *See Appx. at p.15.*

Just as the trial court did, the Eleventh District ignored R.C. 5815.08 and the language of the Power of Attorney. R.C. 5815.08 states in pertinent part:

If a fiduciary makes a deposit in a bank to the fiduciary's person credit of...checks payable to the principal and indorsed by the fiduciary if the fiduciary is empowered to indorse the checks...the bank receiving the deposit is not bound to inquire whether the fiduciary is committing a breach of the obligation as fiduciary.

The Power of Attorney clearly granted Gregory McCardle such authority, stating:

My Attorney-in-Fact/Agent shall act in my name, place and stead in any way that I myself could do, if I were personally present, with respect to the following matters, to the extent that I am permitted by law to act through an agent:

...
(D) Banking transactions

...
(N) All other matters

Therefore, Home savings could "pay the amount of the deposit...upon the personal check of [Gregory McCardle] without being liable to the [Decedent]" unless Home Savings had "actual knowledge that [he was] committing a breach of the obligation as fiduciary in making the deposit or in drawing the check, or with knowledge of such facts that the action of [Home Savings] in receiving the deposit or paying the check amount[ed] to bad faith." R.C. 5815.08.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The Uniform Fiduciary Act requires a bank to have actual knowledge of a breach of fiduciary duty or to act in bad faith before it may be found liable for permitting a fiduciary to deposit a check payable to a represented person into the fiduciary's personal account

In Master Chemical Corp v. Inkrott, this Court addressed the liability of banks that deal with fiduciaries under the UFA, a statute that "shields a bank from liability when the bank knows that the [fiduciary] is acting for the benefit of another." 55 Ohio St.3d at 27. "[W]here [a] bank presents the defense that it dealt with an individual knowing him to be a fiduciary, in order for the [principal or a principal's estate] to successfully maintain a cause of action, it must show that

the bank had actual knowledge of the fiduciary's breach of the fiduciary obligation, or that the bank had knowledge of such facts that its actions in paying the checks amounted to bad faith." Id. "This test is consistent with the purposes of the Act to protect those who honestly deal with another knowing him to be a fiduciary and to place the responsibility of employing honest fiduciaries on the principal." Id.

Plaintiff-Appellee did not establish that Home Savings had actual knowledge that Gregory McCardle was breaching his fiduciary duty to Decedent. "Actual knowledge" is not established by knowledge of the fiduciary relationship. Id. Rather, "actual knowledge" of a breach of fiduciary duty, requires "awareness at the moment of the transaction that the fiduciary is defrauding the principal." Id. at 28. The bank must have "express factual information that the funds are being used for private purposes in violation of fiduciary relationship." Id.

There was no evidence whatsoever at the June 30, 2009 hearing on the Amended Complaint that could be interpreted by any reasonable trier of fact as establishing Home Savings' knowledge that Gregory McCardle was defrauding Decedent. Similarly, there was no evidence at the June 30, 2009 hearing showing that Home Savings had actual knowledge of his private use of the funds. The only reasonable conclusion that can be drawn from the evidence at trial, even under the most liberal interpretation in Plaintiff-Appellee's favor, is that Home Savings did not have actual knowledge that Gregory McCardle was breaching his fiduciary duty to Decedent.

Plaintiff-Appellee also did not prove Home Savings acted in bad faith when it permitted Gregory McCardle to cash the \$53,654.04 check by opening an account in his name to ensure funds were available. While the UFA does not define "bad faith," the UFA and the UCC define good faith. Id. Under the UFA, "[g]ood faith' includes an act when it is in fact done honestly." R.C. 5815.04(E). "This is virtually identical to the UCC [R.C. 1301.01(S)] definition of 'good

faith'; Honest[y] in fact in the conduct or transaction concerned.” Inkrott, 55 Ohio St.3d at 28. For “bad faith” to exist, it must be “‘commercially’ unjustifiable for the [bank] to disregard and refuse to learn facts readily available.” Id. Evidence must exist “which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.” Id. “[M]ere negligence on the part of the depository bank is insufficient to amount to bad faith.” Bertram, 140 Ohio App.3d at 164; *see also* In re: Clark, 2000 Ohio App. LEXIS 4596, *10 (bank’s negligence in failing to follow its procedures was not bad faith). “The distinction between bad faith and negligence is that, unlike negligence, bad faith is willful.” Bertram, 140 Ohio App.3d at 164. Failure to inquire, even facing “suspicious circumstances, does not constitute bad faith, unless such failure is due to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction.” Id.

In this case, no evidence indicated that Home Savings acted in bad faith. R.C. 5815.08 expressly provides that:

[i]f a fiduciary makes a deposit in a bank to the fiduciary’s personal credit of...checks payable to the principal and indorsed by the fiduciary if the fiduciary is empowered to indorse the checks...the bank receiving the deposit is not bound to inquire whether the fiduciary is committing a breach of the obligation as fiduciary.

Under this express language, the mere fact that a bank permits a fiduciary to deposit a check payable to a principal in the fiduciary’s personal account cannot be said to be commercially unreasonable. Although it is arguable Ms. Scarpine violated Home Savings’ internal policies with respect to power of attorney accounts, there was no evidence at the June 30, 2009 hearing showing that she did so willfully or that she intentionally closed her eyes and stopped her ears to avoid learning of a defect in the transaction. Rather, any failure to follow internal policies is negligence, which does not amount to bad faith. Bertram, 140 Ohio App.3d at 164; In re: Clark,

2000 Ohio App. LEXIS 4596, *10. Finally, there was no evidence whatsoever of any self-interest on the part of Home Savings. Just as with the issue of actual knowledge, the only reasonable conclusion that can be drawn from the evidence at trial, even under the most liberal interpretation in Plaintiff-Appellee's favor, is that Home Savings did not act in bad faith.

Both the trial court and the Eleventh District ignored Home Savings' defense under R.C. 5815.08, which expressly addresses a fiduciary's deposit of a check payable to a principal into the fiduciary's personal account. Rather, both courts addressed R.C. 5815.06, which applies to the use of funds from checks deposited into a fiduciary account, and found Home Savings had actual knowledge of Gregory McCardle's breach of fiduciary duty or acted in bad faith from the mere fact that he deposited the \$53,654.04 check into an account in his name. Both courts ignored Inkrott and other decisions defining "actual knowledge" and "bad faith" under the UFA. The Eleventh District decision essentially holds a bank's negligence in failing to follow its own procedures is "actual knowledge" and "bad faith" under R.C. 5815.08. This directly conflicts with the Seventh District's holding in In re: Clark, and ignores the ordinary meanings of "actual knowledge" and "bad faith" as used by the General Assembly. This Court's guidance is necessary to clarify the meanings of "actual knowledge" and "bad faith" under R.C. 5815.08 and the UFA generally and to resolve these important issues. See Inkrott (1990), 55 Ohio St.3d 23.

Proposition of Law No. II: Notice of a breach of fiduciary duty implied by R.C. 1303.77(B)(2)(c) by itself does not preclude a bank from becoming a holder in due course because such implied notice, without more, is not actual knowledge of a breach of fiduciary duty and does not automatically establish that a bank acted in bad faith.

The decisions of the trial court and the Eleventh District rely on R.C. 1303.37(B)(2)(c) in support of the conclusion that Home Savings had actual knowledge of Gregory McCardle's breach of fiduciary duty and acted in bad faith when it permitted him to deposit the \$53,654.04

check into an account in his name. As noted above, R.C. 5815.08 applies where a fiduciary deposits a check payable to a principal into the fiduciary's personal account. Under R.C. 5815.08, the bank accepting such a deposit has no duty to inquire whether the fiduciary is breaching his obligation, and the bank has no liability for paying checks that the fiduciary draws on the proceeds of the deposit, unless the it has actual knowledge of a breach of fiduciary duty or acted in bad faith. R.C. 1303.37(B)(2)(c) appears to address the same situation, and provides:

(B) If an instrument is taken from a fiduciary for...collection...the taker has knowledge of the fiduciary status of the fiduciary, and the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, all of the following rules apply:

...
(2) In the case of an instrument payable to the represented person...the taker has notice of the breach of fiduciary duty if any of the following apply:

...
(c) The instrument is deposited to an account other than an account of the fiduciary as fiduciary of the represented person or an account of the represented person.

The judgments of the trial court and the Eleventh District failed to harmonize these provisions.

According to this Court, "all statutes relating to the same general subject matter must be read *in pari materia*." State ex rel. Gains v. Rossi (1999), 86 Ohio St.3d 620, 622. When interpreting "related and co-existing statutes, [Ohio courts] must harmonize and accord full application to each of [the] statutes unless they are irreconcilable and in hopeless conflict. Id. "In reading statutes *in pari materia*, and construing them together, [Ohio courts] must give a reasonable construction that provides the proper effect to each statute." State ex rel. Cordray v. Midway Motor Sales, Inc. (2009), 122 Ohio St.3d 234, 238.

The trial court and the Court of Appeals failed to apply proper rules of statutory construction and failed to address both R.C. 5815.08 and R.C. 1303.37(B)(2)(c) which must be read *in pari materia*. As stated above, R.C. 1303.37(B)(2)(c) provides that a taker has "notice"

of a breach of fiduciary duty if a fiduciary deposits a check payable to his principal into the fiduciary's personal account." The UCC defines both "notice" and "knowledge." R.C. 1301.01(Y) provides:

"A person has 'notice' of a fact when any of the following applies:

- (1) The person has actual knowledge of it.
- (2) The person has received a notice or notification of it.
- (3) From all the facts and circumstances known to the person at the time in question, the person has reason to know that it exists.

A person 'knows' or has 'knowledge' of the fact when the person has actual knowledge of it..."

From this definition, the "notice" under R.C. 1303.37(B)(2)(c) does not mean that a taker has "actual knowledge" or even "knowledge" of a breach of fiduciary duty. Rather, it is "notice" that is implied from the facts and circumstances known to the taker because the taker has reason to know that a breach of fiduciary duty may exist.

Under the UFA, a bank that accepts a check payable to a principal for deposit into a fiduciary's personal account is liable only if the bank had "actual knowledge" of a breach of fiduciary duty or acted in bad faith. Since the "notice" implied under R.C. 1303.37(B)(2)(c) is not "actual knowledge," the implied "notice" is relevant only to whether a bank taking such a check for deposit acted in bad faith. The question then is whether the "notice" implied by R.C. 1303.37(B)(2)(c) is sufficient by itself to constitute bad faith under R.C. 5815.08.

If this interpretation is applied, the mere fact that a bank accepted a check payable to a principal for deposit into a fiduciary's personal account – a fact that does not even give rise to a duty to investigate on the part of a bank under R.C. 5815.08 – would automatically mean that a bank acted in bad faith. As a result, an irreconcilable internal conflict would result in R.C.

5815.08, because how could something that does not even give rise to a duty to investigate automatically constitute bad faith? Such an interpretation of these statutes essentially means that R.C. 1303.37(B)(2)(c) superseded R.C. 5815.08. This is an improper interpretation of these statutes if it is possible to develop a “reasonable construction that provides the proper effect to each statute.” Midway Motor Sales, Inc., 122 Ohio St.3d at 238; *see also* R.C. 1.47 (“In enacting a statute it is presumed that...(B) The entire statute is intended to be effective”).

The proper interpretation of R.C. 1303.37(B)(2)(c) is that the notice is implied notice. “Notice” under that section means that a bank has reason to know that there may be a breach of fiduciary duty if a fiduciary deposits a check payable to its principal into the fiduciary’s personal account. R.C. 5815.08 can then be applied to determine if a bank acted in bad faith in such a situation. If facts are readily available to the bank showing a breach of fiduciary duty, in addition to implied notice under R.C. 1303.37(B)(2)(c), and the bank intentionally ignored them, or if facts show that the bank acted dishonestly or with some motive of self-interest, then a bank acted in bad faith and R.C. 5815.08 does not shield the bank from liability. Such an interpretation is reasonable and gives effect to both R.C. 1303.37(B)(2)(c) and R.C. 5815.08.

Moreover, a holder in due course takes an instrument free of defenses of the payor, except for real defenses.² Reagans v. Mountainhigh Coach Works, Inc., 2nd Dist. No. 05CA12, 2006 Ohio 423, ¶10. To qualify as a holder in due course, the person taking an instrument must pay value, in good faith, without notice of certain specified claims to the instrument.³ R.C. 1303.32(A)(2). Notice implied by R.C. 1303.37(B)(2)(c) does not fall within the specified

² There was no evidence at the June 30, 2009 hearing on the amended complaint establishing the existence of any real defenses.

³ A holder in due course may not have notice: that an instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series; that an instrument contains an unauthorized signature or has been altered; of a claim to the instrument described in R.C. 1303.36; or that any party has a defense or claim in recoupment described in R.C. 1303.35(A), R.C. 1303.32(A)(2)(c) – (f).

claims of which a holder may not have notice in order to qualify as a holder in due course under R.C. 1303.32(A)(2). Therefore, the notice referenced in R.C. 1303.37(B)(2)(c) is relevant only to whether a person taking an instrument took the instrument in “good faith.” In short, interpreting R.C. 1303.37(B)(2)(c) as being a factor to consider in the bad faith analysis under R.C. 5815.08 is consistent with R.C. 1303.37(B)(2)(c) being a factor in whether a person took an instrument in “good faith” and, thus, qualifies as a holder in due course – a similar analysis since both the UCC and UFA contain virtually identical definitions of “good faith.” See Inkrott, 55 Ohio St.3d at 28.

Furthermore, if the Court finds that R.C. 1303.37(B)(2)(c) and R.C. 5815.08 are in direct, irresolvable conflict, the conflict must be resolved. Importantly, R.C. 5815.08 was enacted after R.C. 1303.37(B)(2)(c) and is part of the statutory body of law dealing specifically with banks dealing with fiduciaries, while R.C. 1303.37(B)(2)(c) is part of the body of law dealing with commercial paper in general. Arguably, the later enactment of R.C. 5815.08 is an expression by the General Assembly that banks dealing with fiduciaries will not be held liable unless more than mere implied notice of a breach of fiduciary duty is given to the bank.

Applying the proper *in pari materia* interpretation of R.C. 1303.37(B)(2)(c) and R.C. 5815.08 and other principles of statutory construction illuminates the errors of the trial court and the Eleventh District when they found that Home Savings had actual knowledge of Gregory McCardle’s breach of fiduciary duty and acted in bad faith solely from the fact that the check was payable to Decedent and deposited into an account in Gregory McCardle’s name. Home Savings requests that this Court accept this appeal to resolve the proper interpretation of R.C. 1303.37(B)(2)(c) and R.C. 5815.08.

Proposition of Law No. III: If a fiduciary breaches a fiduciary duty to a decedent and two or more defendants are found jointly and severally liable to the decedent's estate for the same damages, the damages must be reduced by any amount to which the fiduciary is entitled to receive under the decedent's estate to prevent the fiduciary in breach of his duty from inheriting more than he would have received from the estate in absence of the breach.

Assuming the evidence at the September 16, 2008 hearing, in which Home Savings did not participate because it was not yet a defendant, can be used against Home Savings, the trial court and Eleventh District committed error by finding Home Savings jointly and severally liable with Kathy McCardle and Gregory McCardle for the full amount of the \$53,654.04 check. It is well-settled that in tort actions, such as claims for breach of fiduciary duty, "the measure of damages is normally the amount of money which will compensate and make whole the injured party." Columbus Finance, Inc. v. Howard (1975), 42 Ohio St.2d 178, 184.

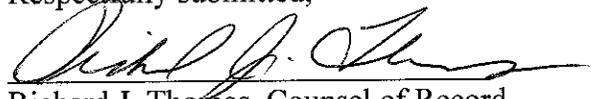
The decisions below turn this principle on its head because, although Kathy McCardle was found to have had knowledge of and was an accomplice in the transaction by which Gregory McCardle opened an account in his own name and deposited the \$53,654.04 check (*see* Appx. at p. 21), she will receive half of any money recovered from Home Savings. While Plaintiff-Appellee is the plaintiff in the underlying case, Kathy McCardle is one of two people who really stand to benefit from any recovery. Despite the Eleventh District's unsupported statement to the contrary, the evidence at the September 16, 2008 hearing showed that Kathy McCardle and her sister, Deborah Heffner, are the only two heirs of the proceeds of the annuity on which the \$53,654.04 check was drawn. Moreover, Decedent's estate was administered by the same trial court as an estate without a will, and Kathy McCardle and her sister were the only heirs at law. Finally, the decision failed to set-off amounts that Gregory McCardle voluntarily returned after he withdrew the proceeds of the \$53,654.04 annuity check. *See In re: Clark*, 2000 Ohio App. LEXIS 4596, *15-16 (set-off is appropriate where funds used by a fiduciary in breach of a

fiduciary duty benefited the ward). Home Savings requests that this Court accept this case to review these important issues regarding damages in tort actions.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Defendant-Appellant Home Savings and Loan Company of Youngstown, Ohio requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



Richard J. Thomas, Counsel of Record
COUNSEL FOR APPELLANT,
THE HOME SAVINGS AND LOAN
COMPANY OF YOUNGSTOWN, OHIO

PROOF OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail, this 22nd day of September, 2010 to the following:

Gus K. Theofilos (#0007688)
(COUNSEL OF RECORD)
11 Federal Plaza Central, Suite 910
Youngstown, OH 44503
Phone: 330.746.6612
Fax: 330.746.0545
COUNSEL FOR DEFENDANT
KATHY MCCARDLE M. DECEDENT

Gregory A. McCardle, Sr,
Belmont Corr. Inst. #A531427 68518
Bannock Road – St. Rt. 331
St. Clairsville, OH 43950
DEFENDANT

Daniel B. Letson (#0034527)
(COUNSEL OF RECORD)
Letson, Kragalott & Stack
160 E. Market Street, Suite 250
Warren, OH 44481
Phone: 330.393.1529
Fax: 330.393.1528
dletson@lks-law.com
COUNSEL FOR APPELLEE,
DANIEL B. LETSON, ADMINISTRATOR,
WWA OF THE ESTATE OF KATHRYN M.
DECEDENT, DECEASED



Richard J. Thomas, Counsel of Record
COUNSEL FOR APPELLANT,
THE HOME SAVINGS AND LOAN
COMPANY OF YOUNGSTOWN, OHIO

APPENDIX

COPY

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DANIEL B. LETSON, ADMINISTRATOR,
WWA OF THE ESTATE OF KATHRYN
M. D'ALESSANDRO, DECEASED,

OPINION

CASE NO. 2009-T-0122

Plaintiff-Appellee,

- vs -

GREGORY A. MCCARDLE, SR., et al.,

Defendants,

THE HOME SAVINGS AND LOAN
COMPANY OF YOUNGSTOWN, OHIO,

Defendant-Appellant.

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 2008 CVA
0027.

Judgment: Affirmed.

*Daniel B. Letson and David S. Swader, Letson & Swader Co., L.P.A., 160 East Market
Street, #250, Warren, OH 44481 (For Plaintiff-Appellee).*

*Richard J. Thomas and Amanda J. Banner, Henderson, Covington, Messenger,
Newman & Thomas, 6 Federal Plaza Central, #1300, Youngstown, OH 44503 (For
Defendant-Appellant).*

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, The Home Savings and Loan Company of Youngstown, Ohio
("Home Savings"), appeals from the October 23, 2009 judgment entry of the Trumbull

County Court of Common Pleas, Probate Division, finding it guilty of concealing, embezzling, conveying away, or having been in the possession of monies of the Estate of Kathryn M. D'Alessandro, deceased.

{¶2} On or about April 5, 2006, following the passing of Andrew D'Alessandro, the husband of Kathryn M. D'Alessandro ("the decedent"), Life Investors Insurance Company of America ("Life Investors") sent a letter to the decedent at her home address outlining information regarding an annuity of which she was the sole beneficiary.

{¶3} On or about August 8, 2006, a durable power of attorney was purportedly executed by the decedent in which Kathy M. D'Alessandro, f.k.a. Kathy McCardle ("Kathy"), the decedent's daughter, was designated as the decedent's attorney-in-fact, and Gregory A. McCardle, Sr. ("Mr. McCardle"), Kathy's husband at the time, was designated as the decedent's successor attorney-in-fact. The decedent's signature was purportedly witnessed by Edith M. Smeltzer ("Ms. Smeltzer"), a Notary Public. However, Ms. Smeltzer later testified at a hearing that she did not witness the decedent's purported execution of the power of attorney and had never met with or spoken to the decedent at any time. According to Mr. McCardle, the power of attorney was not executed by the decedent and Kathy signed the decedent's name and inserted the decedent's initials on the document.

{¶4} On or about October 25, 2006, an annuity claimant's statement and a copy of the power of attorney were submitted to Life Investors. According to Mr. McCardle, Kathy completed the statement and forged the decedent's signature. Ms. Smeltzer indicated that although her signature and notary stamp appear on the

statement, she did not witness the decedent sign it. Home Savings stresses that this is evidence of a breach of duty by Ms. Smeltzer rather than forgery.

{¶5} On or about November 6, 2006, Life Investors wrote to the decedent at her home address regarding the request for a lump sum distribution of the policy. Life Investors issued a check in the amount of \$53,654.04 made payable to the decedent as a lump sum distribution from the annuity. Kathy testified she lived at the decedent's home in 2006 and Mr. McCardle did not move in until 2007. Life Investors was instructed to mail the check to Mr. McCardle as his home address. According to Mr. McCardle, after receiving the check, Kathy forged the decedent's endorsement and he signed his name as "Gregory A. McCardle Sr. POA" below it. Home Savings stresses that the check was made payable to the decedent, c/o Mr. McCardle.

{¶6} On or about November 8, 2006, Mr. McCardle, opened a checking account at Home Savings, and deposited the check into the account. In opening the account, Mr. McCardle provided Home Savings with a power of attorney purportedly executed by the decedent which identified him as the decedent's purported attorney-in-fact. This second power of attorney (Exhibit 33) is dated August 8, 2006, the same date as the first power of attorney (Exhibit 1). This second power of attorney is not witnessed and the decedent's purported signature was allegedly notarized by Ms. Smeltzer, who testified she never met or spoke with the decedent at any time.

{¶7} According to Melinda Davies, a Home Savings employee, in comparing the purported endorsement of the decedent to the decedent's purported signature on the second power of attorney, she indicated that the signatures were similar.

{¶8} According to another Home Savings employee, Isis Verejo (“Verejo”), when a check that is made payable to a principal is deposited, the account should be opened in the name of the principal with the principal’s social security number. It is the policy of Home Savings that when a customer presents a check made payable to a principal that they are endorsing as an attorney-in-fact for deposit, the account is to be titled in the name of the principal with the principal’s social security number. However, the account at issue was opened solely in Mr. McCardle’s name with his social security number and with no reference to his alleged fiduciary capacity. As a result, Mr. McCardle became the sole owner of the funds deposited into the account.

{¶9} On November 15, 2006, Mr. McCardle issued a check from the account in the sum of \$5,000 made payable to “Cash.” On November 20, 2006, Mr. McCardle issued a check from the account in the amount of \$15,000 made payable to “Ken Heimselman” for the purchase of a motor home that was titled in Mr. McCardle’s name. Also on that same date, Mr. McCardle obtained an official check from Home Savings in the amount of \$33,645.57, made payable to himself, and closed the account.

{¶10} On May 30, 2008, appellee, Daniel B. Letson, Administrator, WWA of the Estate of Kathryn M. D’Alessandro, deceased, filed a complaint for concealment of assets, undue influence, declaratory judgment, and breach of fiduciary duty against Kathy and Mr. McCardle.¹ According to the complaint, the decedent executed a power of attorney whereby Kathy was designated as the decedent’s attorney-in-fact; Kathy exerted undue influence over the decedent in procuring the power of attorney; by virtue

1. Kathy and Mr. McCardle are not named parties to the instant appeal.

of the power of attorney, a fiduciary relationship existed between the decedent and Kathy; Kathy committed self-dealing and initiated and/or unduly influenced the decedent to undertake several unauthorized bank account transfers, real estate conveyances and other transactions involving life insurance and certain annuities involving the decedent's funds and interests which benefited Kathy and Mr. McCardle; Kathy and Mr. McCardle had a confidential relationship with the decedent and previously served as the decedent's primary caregivers; Kathy and Mr. McCardle have concealed and/or conveyed away or are in possession of personal property and real estate of the decedent in an amount believed to be in excess of \$80,000; and the transactions, conveyances, and transfers were consummated at a time in which the decedent lacked proper physical and/or mental capacity to form donative intent. Citations to appear were issued and properly served upon Kathy and Mr. McCardle.

{¶11} A hearing was held before Trumbull County Court of Common Pleas Probate Judge Thomas A. Swift on September 16, 2008. The testimony revealed that a general power of attorney was purportedly executed by the decedent which designated Kathy as the decedent's attorney-in-fact and Mr. McCardle as the successor.

{¶12} Pursuant to its September 23, 2008 judgment entry, the trial court held the following: Kathy had a confidential and fiduciary relationship with the decedent; Kathy failed to provide an accounting of all activities undertaken as the alleged attorney-in-fact for the decedent; the quit claim deed transferring the residential real estate from the decedent to Mr. McCardle was forged and improperly notarized; the decedent's assets had been concealed and/or carried away; and Kathy was ordered to provide the trial

court with an accounting of all assets which the decedent had an interest for the period of January 1, 2006 through January 19, 2007.

{¶13} On October 16, 2008, Kathy filed the accounting of all assets for the requisite period.

{¶14} On January 13, 2009, after obtaining leave of court, appellee filed an amended complaint, adding Home Savings as a defendant. With respect to Home Savings, the amended complaint alleged the following: on or about November 8, 2006, Mr. McCardle presented a check made payable to the order of the decedent in the amount of \$53,654.04; the check represented funds to which the decedent was solely entitled; the endorsement on the check, purported to be that of the decedent, was forged by Mr. McCardle; Home Savings wrongfully and/or negligently conveyed the check to an unauthorized individual when it deposited the check into a checking account that was opened on or about November 8, 2006, solely in the name of Mr. McCardle; Home Savings wrongfully and/or negligently conveyed funds of the decedent to an unauthorized individual when it permitted Mr. McCardle to withdraw \$5,000 from the account on or about November 15, 2006, as well as \$15,000 and \$33,645.57 on or about November 20, 2006; and the acts of Kathy and Mr. McCardle were willful, wanton, malicious, oppressive, and undertaken with the intent to defraud.

{¶15} Kathy filed an answer to the amended complaint on January 20, 2009. Home Savings filed an answer on March 20, 2009.

{¶16} A hearing was held on June 30, 2009.

{¶17} Pursuant to its October 23, 2009 judgment entry, the trial court found Kathy, Mr. McCardle, and Home Savings guilty of concealing, embezzling, conveying

away, or having been in the possession of monies of the estate of the decedent. The trial court rendered judgment in favor of appellee in the amount of \$53,654.04 for monies concealed or embezzled together with a 10 percent penalty and all costs of the proceedings. The trial court found Kathy, Mr. McCardle, and Home Savings jointly and severally liable. It is from that judgment that Home Savings filed a timely appeal, asserting the following assignments of error for our review:

{¶18} “[1.] The lower court erred in granting judgment in favor of [appellee] and against [Home Savings] based upon its opinion that Home Savings was guilty of conversion under R.C. 2109.50.

{¶19} “[2.] The lower court erred in entering judgment in favor of [appellee] in the amount of \$53,654.04 for monies concealed, embezzled, conveyed away or in the possession of Home Savings, [Mr.] McCardle, and [Kathy].”

{¶20} In its first assignment of error, Home Savings argues that the trial court erred in granting judgment in favor of appellee based upon its opinion that Home Savings was guilty of conversion under R.C. 2109.50. Home Savings stresses that it did not have notice of Mr. McCardle’s alleged breach of fiduciary duty and did not act in bad faith when it allowed him to deposit the annuity check into his individual account.

{¶21} “We review the probate court’s decision under an abuse of discretion standard of review.” *Estate of Niemi v. Niemi*, 11th Dist. No. 2008-T-0082, 2009-Ohio-2090, at ¶35, citing *Levy v. Thompson*, 2d Dist. No. 20641, 2006-Ohio-5312, at ¶18. An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. *Id.* Therefore, “abuse of

discretion" describes a judgment neither comports with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶22} "*** [T]he probate court has jurisdiction to hear and determine actions involving the misuse of a power of attorney, pursuant to R.C. 2101.24(B)(1)(b)." *Estate of Niemi*, supra, at ¶36.

{¶23} "The holder of a power of attorney has a fiduciary relationship with his or her principal. *Gotthardt v. Candle* (1999), 131 Ohio App.3d 831, 835, ***. Such a relationship is 'one in which special confidence and trust is reposed in the integrity and fidelity of another (***) by virtue of this special trust.' *Stone v. Davis* (1981), 66 Ohio St.2d 74, 78, ***." *In re Estate of Anderson* (Dec. 15, 2000), 11th Dist. No. 99-T-0160, 2000 Ohio App. LEXIS 5928, at 4. (Parallel citations omitted.)

{¶24} "Where a confidential or fiduciary relationship exists between a donor and donee, such as between a principal and an attorney-in-fact, the transfer is looked upon with some suspicion that undue influence may have been brought to bear on the donor by the donee. In such circumstances, a presumption arises that the transfer is invalid and the burden of going forward with the evidence shifts to the transferee to demonstrate the absence of undue influence. However, the party attacking the transfer retains the ultimate burden of proving undue influence by clear and convincing evidence. *Ament v. Reassure Am. Life Ins. Co.*, 8th Dist. No. 91185, 180 Ohio App.3d 440, 2009-Ohio-36, at ¶38, ***." *Estate of Niemi*, supra, at ¶38. (Parallel citation omitted.)

{¶25} Sufficiency is a legal term of art describing the legal standard which is applied to determine whether the evidence is legally sufficient to support the judgment

as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. We will not reverse a civil judgment as against the manifest weight of the evidence if it is supported by any competent credible evidence that goes to each element of the case. *C.E. Morris Co. v. Foley Cons. Co.* (1978), 54 Ohio St.2d 279, syllabus. See, also, *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶26} As an appellate court, we evaluate the findings of the trial court under a presumption that those findings are correct. *Seasons Coal*, supra, at 80. This is because the trier of fact is in the best position “to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Id.*

{¶27} While “[a] finding of an error in law is a legitimate ground for reversal, *** a difference of opinion on credibility of witnesses and evidence is not.” *Seasons Coal*, supra, at 81. As a reviewing court, we are unwilling to second guess the trial court’s determination where there is competent, credible evidence to support it, nor are we willing to weigh the credibility of the witnesses. *Karnofel v. Girard Police Dept.*, 11th Dist. No. 2004-T-0145, 2005-Ohio-6154, at ¶19.

{¶28} In a civil manifest weight of the evidence analysis, a reviewing court may not simply reweigh the evidence and substitute its judgment for that of the trier of fact. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶40. Cf. *Thompkins*, supra, at 387 (in the criminal context, a reviewing court’s role in analyzing a criminal manifest weight of the evidence argument is that of the ““thirteenth juror””).

{¶29} In the case at bar, the trial court properly held that a confidential relationship existed between the decedent, Kathy, and Mr. McCardle. There is no

evidence in the record to establish that the decedent intended to gift the proceeds from the annuity to Kathy and/or to Mr. McCardle.

{¶30} The trial court relied upon competent and credible evidence by holding that Kathy knowingly participated with Mr. McCardle in the transaction at issue. Kathy utilized the power of attorney in order to benefit herself as well as Mr. McCardle. Also, Kathy admitted that she took it upon herself to insert the decedent's initials. Furthermore, Mr. McCardle testified that Kathy forged the decedent's signature on the power of attorney, which was used for purposes of liquidating the annuity.

{¶31} In addition, the record establishes that the check at issue was mailed to an address that Kathy shared with Mr. McCardle. Again, Mr. McCardle testified that Kathy forged the decedent's endorsement. Kathy testified that the decedent's illness was the reason she was distraught when she forged her mother's initials onto the power of attorney document. Also, Kathy's sister, Deborah Heffner ("Deborah"), testified that Kathy called her in November or December of 2006, and informed her that she had cashed in the annuity.

{¶32} With respect to Home Savings, the trial court held the following in its October 23, 2009 judgment entry:

{¶33} "**** [Mr. McCardle] attempted to cash the check at [Home Savings], but was unable to and was instead required to deposit the funds due to a 'waiting period.'

{¶34} "The Court finds that pursuant to [Home Savings'] Operations Manual, any Power-of-Attorney account is to be titled in the name of the fiduciary as Power-of-Attorney for the principal and should use the social security number of the principal. The Court further finds that [Home Savings'] Operations Manual specifies that the

signature card shall be signed by the fiduciary in his capacity as fiduciary. The Court further finds that [Mr. McCardle] deposited the funds into a [Home Savings] checking account titled solely in his own name and bearing his own social security number, and signed the signature card Gregory McCardle, Sr. without a fiduciary designation on November 8, 2006. The Court further finds that [Kathy] had knowledge of the transaction and was an accomplice to the transaction.

{¶35} "R.C. 2109.50 facilitates the administration of estates by providing an expeditious means for bringing into such estates those assets that rightfully belong to the estate. *In re Estate of Fife* (1956), 164 Ohio St. 449. It provides, in part, that:

{¶36} "'Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint.'

{¶37} "In rendering judgment against a person found guilty of having concealed assets of the estate, the probate court must assess the amount of damages to be recovered, order the return of the thing concealed or embezzled, or order restoration in kind. See R.C. 2909.52. In addition to these, R.C. 2[9]09.52 also assess[es] an

additional ten percent penalty plus costs of the complaint against the person found guilty.

{¶38} “The provisions of R.C. 2109.50 *et seq.* have been held to specifically apply to financial institutions. *In re Estate of Popp* (1994), 94 Ohio App.3d 640. *Popp* gives us the elements of a concealment action against a financial institution under R.C. 2109.50. ‘It must first be established that there was a conveyance, made to a wrong party, after which all that is required is to show by a preponderance of evidence that the money belonged to the decedent; it is not necessary to establish that the conveyance was made with a fraudulent or criminal intent.’ *Id.*

{¶39} “[Home Savings] relies on *Clark v. National City Bank* [NE, (Sept. 28, 2000), 7th Dist. Nos. 99 CA 88, 99 CA 103, 2000 Ohio App. LEXIS 4596,] *** and the Uniform Fiduciary Act to support their contention that the bank is not liable for wrongfully converting funds under these circumstances. In *Clark*, a guardian was ordered to deposit \$47,500.00 into a guardianship account. Instead, the guardian deposited only \$42,000.00, cashing out \$5,500.00, and continued then to deplete the funds in the account. The *Clark* court held that although a bank was negligent for failing to follow its own procedures in opening a guardianship account, it did not act in bad faith or with actual knowledge and was accordingly protected under the Uniform Fiduciary Act, which is codified in R.C. 5815.06. *Id.* The Act states:

{¶40} “If a deposit is made in a bank to the credit of a fiduciary as such, the bank may pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which the deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is

committing a breach of the obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.'

{¶41} "Actual knowledge is defined in *Clark* as 'awareness at the moment of the transaction that the fiduciary is defrauding the principal' or 'deliberately evading knowledge because of a belief or fear that inquiry would disclose a defect in the transaction.' *Id.*

{¶42} "Chapter 1303, Ohio's law on negotiable instruments, is instructive on when a bank, or any other taker of a negotiable instrument, is put on notice of a breach of fiduciary duty by the fiduciary. R.C. 1303.37(B) provides that:

{¶43} "If an instrument is taken from a fiduciary for payment or collection or for value, the taker has knowledge of the fiduciary status of the fiduciary, and the represented person makes a claim to an instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, all of the following rules apply:(***) (2) In the case of an instrument payable to a represented person or to the fiduciary as fiduciary of the represented person, the taker has notice of the breach of the fiduciary duty if any of the following apply: (***) (c) The instrument is deposited to an account other than an account of the fiduciary as fiduciary of the represented person or an account of the represented person.'

{¶44} "In the instant case, the Administrator seeks to recover funds that were conveyed to [Mr. McCardle] by [Home Savings]. The Court finds that there was a conveyance of \$53,654.04 made to [Mr. McCardle] of the proceeds of a check made payable to [the decedent] and deposited into an account in the sole name and social security number of [Mr. McCardle]. The Court further finds that the conveyance was

made to a wrong party, in that the conveyance was made to [Mr. McCardle] in his individual name rather than as [Mr. McCardle] as attorney-in-fact for [the decedent]. The Court further finds that [Home Savings] was aware of the fiduciary relationship between [Mr. McCardle] as the bank was in possession of a copy of the power of attorney presented by [Mr. McCardle]. The Court further finds that the power of attorney provided to [Home Savings] did not expressly give the power to the fiduciary to give gifts to himself. The Court further finds that the proceeds of said check belonged solely to the decedent *** and that [Home Savings] was aware that the funds belonged to her as the check was made payable to her and was purportedly signed by her.

{¶45} “The Court further finds that [Home Savings] is not shielded from liability under R.C. 5815.06. The Court finds that under a strict reading of the statute, to qualify for protection under the statute the deposit must be made to the credit of the fiduciary, as the fiduciary. The Court finds that in this case, the check made payable to [the decedent] was not deposited into an account naming [Mr. McCardle] as fiduciary for [the decedent], but was rather deposited into an account opened by [Mr. McCardle] in his individual name and bearing his social security number. The Court finds that the deposit of the check into the account in the sole name of [Mr. McCardle] was a breach of Mr. McCardle’s fiduciary duty owed to [the decedent]. The Court further finds that under R.C. 1303.37, [Home Savings] had notice of the breach of fiduciary duty, and accordingly acted with bad faith as defined in *Clark* when it allowed [Mr. McCardle] to deposit the check into his individual account. Therefore, the Court finds that in accordance with the holding in *Popp* that [Home Savings] is guilty of conversion under R.C. 2109.50.”

{¶46} We agree. Based on the evidence before us, the trial court properly found the following: the annuity check was made payable to the decedent and the funds belonged solely to her; Home Savings was aware of the fiduciary relationship between the decedent and Mr. McCardle due to the fact that Mr. McCardle presented the second power of attorney (Exhibit 33) to Home Savings and it was in possession of a copy; the check was deposited into an account at Home Savings in the sole name and social security number of Mr. McCardle, in his individual capacity instead of in his capacity as attorney-in-fact; the power of attorney from the decedent to Mr. McCardle did not give power to Mr. McCardle to make gifts to himself; the Operations Manual of Home Savings requires trained employees to read and review powers of attorney and make determinations regarding specific powers granted to attorneys-in-fact; and no "flags" were placed on the account indicating the existence of a power of attorney.

{¶47} There exists relevant, competent and credible evidence upon which the trial court could have based its judgment that Home Savings had actual knowledge of the fiduciary relationship between the decedent and Mr. McCardle due to the issuance of the power of attorney by Mr. McCardle to Home Savings; that Home Savings acted in bad faith, rather than mere negligence, when it allowed Mr. McCardle to deposit the decedent's annuity check in his individual account; and that Home Savings is not protected by the Uniform Fiduciary Act.

{¶48} The evidence before us establishes that Home Savings had actual knowledge, as defined in *Clark supra*, that Mr. McCardle was defrauding the decedent at the moment of the transaction at issue. Again, Home Savings was aware of the fiduciary relationship between Mr. McCardle and the decedent as the bank was in

possession of a copy of the power of attorney. The power of attorney provided by Mr. McCardle to Home Savings did not expressly give the power of the fiduciary to give gifts to himself. Verejo, an employee of Home Savings, testified that the policy of the bank was not followed when Mr. McCardle was permitted to open an account solely in his name with his social security number rather than in the name of the decedent with her social security number. The conveyance here was made to a wrong party since the conveyance was made to Mr. McCardle in his individual name rather than as Mr. McCardle as attorney-in-fact for the decedent. Also, Home Savings had actual knowledge that the proceeds of the check belonged solely to the decedent as the check was made payable to her and was purportedly signed by her. Home Savings had actual knowledge of the breach of fiduciary duty, acted in bad faith when it allowed Mr. McCardle to deposit the check into his individual account, and is guilty of conversion.

{¶49} In addition, although Home Savings was in possession of the power of attorney which did not expressly give the power of the fiduciary to give gifts to himself, Mr. McCardle was permitted to issue a check from the account for \$5,000 made payable to "Cash;" another check for \$15,000 made payable to "Ken Heimselman" for the purchase of a motor home that was titled in Mr. McCardle's name; and finally an official check in the amount of \$33,645.57, made payable to himself, in which Mr. McCardle then closed the account.

{¶50} We determine that there is nothing to suggest that any of the evidence is legally insufficient to support the trial court's judgment or that the trial court's judgment is based on an irrational view of the evidence. The trial court evaluated competent and credible testimony and documents from both sides and drew a conclusion. The trial

court did not abuse its discretion by granting judgment in favor of appellee and against Home Savings for conversion under R.C. 2109.50.

{¶51} Home Savings' first assignment of error is without merit.

{¶52} In its second assignment of error, Home Savings contends that the trial court erred by entering judgment in favor of appellee in the amount of \$53,654.04 for monies concealed, embezzled, conveyed away or in the possession of Home Savings, Mr. McCardle, and Kathy. Home Savings stresses that the trial court should have reduced the judgment amount to reflect \$15,000 that was returned by Mr. McCardle as well as considered the fact that Kathy is a 50 percent beneficiary.

{¶53} The decision of a trial court as to a determination of damages is not to be disturbed absent an abuse of discretion. *Roberts v. U.S. Fid. & Guar. Co.* (1996), 75 Ohio St.3d 630, 634. "Where damages are caused by the acts of two or more persons and joint and several liability applies, each person may be held liable for damages jointly or severally. *Shoemaker v. Crawford* (1991), 78 Ohio App.3d 53, 66-67 ***. Furthermore, judgment can be taken against any joint tortfeasor for the entire amount. *Id.* at 67." *Clark, supra*, at 20. (Parallel citation omitted.)

{¶54} In the instant matter, Kathy testified that Mr. McCardle returned the sum of either \$15,000 or \$18,000 from the \$18,000 that was withdrawn by Mr. McCardle in October of 2006 from the decedent's savings account. There is no concrete evidence to establish that the source of the \$15,000 that was deposited into the decedent's savings account two months later was from the annuity proceeds.

{¶55} In addition, the record reveals that the decedent was the sole beneficiary of the annuity. Although the decedent had two daughters, there is no evidence that

either Kathy or Deborah are beneficiaries of the annuity or that they are even beneficiaries of the decedent's estate.

{¶56} The trial court did not abuse its discretion by holding Home Savings, Mr. McCardle, and Kathy jointly and severally liable for the full amount of the annuity check.

{¶57} Home Savings' second assignment of error is without merit.

{¶58} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas, Probate Division, is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J., concur,

DIANE V. GRENDALL, J., concurs in judgment only.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

DANIEL B. LETSON, ADMINISTRATOR,
WVA OF THE ESTATE OF KATHRYN M.
D'ALESSANDRO, DECEASED,

JUDGMENT ENTRY

CASE NO. 2009-T-0122

Plaintiff-Appellee,

- vs -

GREGORY A. MCCARDLE, SR., et al.

Defendants,

THE HOME SAVINGS AND LOAN
COMPANY OF YOUNGSTOWN, OHIO,

Defendant-Appellant.

For the reasons stated in the opinion of this court, the assignments of error are not well-taken. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas, Probate Division, is affirmed.

It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

FILED
COURT OF APPEALS

AUG 09 2010

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK


JUDGE COLLEEN MARY O'TOOLE

MARY JANE TRAPP, P.J., concur,

DIANE V. GRENDALL, J., concurs in judgment only.

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McCardle, Sr. attempted to cash the check at The Home Savings and Loan Company, but was unable to and was instead required to deposit the funds due to a "waiting period."

The Court finds that pursuant to Home Savings and Loan Company's Operations Manual, any Power-of-Attorney account is to be titled in the name of the fiduciary as Power-of Attorney for the principal and should use the social security number of the principal. The Court further finds that the Home Savings and Loan Company's Operations Manual specifies that the signature card shall be signed by the fiduciary in his capacity as fiduciary. The Court further finds that Gregory McCardle, Sr. deposited the funds into a Home Savings and Loan Company checking account titled solely in his own name and bearing his own social security number, and signed the signature card Gregory McCardle, Sr. without a fiduciary designation on November 8, 2006. The Court further finds that Kathy M. McCardle nka Kathy M. D'Alessandro had knowledge of the transaction and was an accomplice to the transaction.

R.C. 2109.50 facilitates the administration of estates by providing an expeditious means for bringing into such estates those assets that rightfully belong to the estate. *In re Estate of Fife* (1956), 164 Ohio St. 449. It provides, in part, that:

"Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint."

In rendering judgment against a person found guilty of having concealed assets of the estate, the probate court must assess the amount of damages to be recovered, order the return of the thing concealed or embezzled, or order restoration in kind. See R.C. 2909.52. In addition to these, R.C. 2009.52 also assess an additional ten percent penalty plus costs of the complaint against the person found guilty.

The provisions of R.C. 2109.50 *et seq.* have been held to specifically apply to financial institutions. *In re Estate of Popp* (1994), 94 Ohio App 3d. 640. *Popp* gives us the elements of a concealment action against a financial institution under R.C. 2109.50. "It must first be established that there was a conveyance, made to a wrong party, after which all that is required is to show by a preponderance of evidence that the money belonged to the decedent; it is not necessary to establish that the conveyance was made with a fraudulent or criminal intent." *Id.*

The Home Savings and Loan Company of Youngstown, Ohio relies on *Clark v. National City Bank*, 2000 Ohio 2572 and the Uniform Fiduciary Act to support their contention that the bank is not liable for wrongfully converting funds under these circumstances. In *Clark*, a guardian was ordered to deposit \$47,500.00 into a guardianship account. Instead, the guardian deposited only \$42,000.00, cashing out \$5,500.00, and continued then to deplete the funds in the account. The *Clark* court held that although a bank was negligent for failing to follow its own procedures in opening a guardianship account, it did not act in bad faith or with actual knowledge and was accordingly protected under the Uniform Fiduciary Act, which is codified in R.C.

5815.06. *Id.* The Act states:

If a deposit is made in a bank to the credit of a fiduciary as such, the bank may pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed

with the name in which the deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of the obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.

Actual knowledge is defined in *Clark* as "awareness at the moment of the transaction that the fiduciary is defrauding the principal" or "deliberately evading knowledge because of a belief or fear that inquiry would disclose a defect in the transaction." *Id.*

Chapter 1303, Ohio's law on negotiable instruments, is instructive on when a bank, or any other taker of a negotiable instrument, is put on notice of a breach of fiduciary duty by the fiduciary. R.C. 1303.37 (B) provides that:

If an instrument is taken from a fiduciary for payment or collection or for value, the taker has knowledge of fiduciary status of the fiduciary, and the represented person makes a claim to an instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, all of the following rules apply:*** (2) In the case of an instrument payable to a represented person or to the fiduciary as fiduciary of the represented person, the taker has notice of the breach of the fiduciary duty if any of the following apply: *** (c) The instrument is deposited to an account other than an account of the fiduciary as fiduciary of the represented person or an account of the represented person."

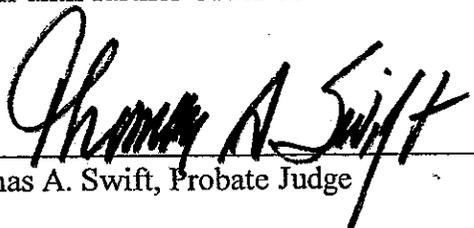
In the instant case, the Administrator seeks to recover funds that were conveyed to Gregory McCardle, Sr. by The Home Savings and Loan Company of Youngstown, Ohio. The Court finds that there was a conveyance of \$53,654.04 made to Gregory McCardle, Sr. of the proceeds of a check made payable to Kathryn D'Alessandro and deposited into an account in the sole name and social security number of Gregory A. McCardle, Sr. The Court further finds that the conveyance was made to a wrong party, in that the conveyance was made to Gregory McCardle, Sr. in his individual name rather than as Gregory McCardle, Sr. as attorney-in-fact for Kathryn D'Alessandro. The Court further finds that The Home Savings and Loan Company of

Youngstown, Ohio was aware of the fiduciary relationship between Gregory McCardle, Sr. as the bank was in possession of a copy of the power of attorney presented by Gregory McCardle, Sr. The Court further finds that the power of attorney provided to The Home Savings and Loan Company of Youngstown, Ohio did not expressly give the power to the fiduciary to give gifts to himself. The Court further finds that the proceeds of said check belonged solely to the decedent Kathryn D'Alessandro and that The Home Savings and Loan Company of Youngstown, Ohio was aware that the funds belonged to her as the check was made payable to her and was purportedly signed by her.

The Court further finds that the Home Savings Loan Company of Youngstown is not shielded from liability under R.C. 5815.06. The Court finds that under a strict reading of the statute, to qualify for protection under the statute the deposit must be made to the credit of the fiduciary, as the fiduciary. The Court finds that in this case, the check made payable to Kathryn D'Alessandro was not deposited into an account naming Gregory McCardle, Sr. as fiduciary for Kathryn D'Allessandro, but was rather deposited into an account opened by Gregory McCardle, Sr. in his individual name and bearing his social security number. The Court finds that the deposit of the check into the account in the sole name of Gregory A. McCardle, Sr. was a breach of Mr. McCardle's fiduciary duty owed to Kathryn M. D'Alessandro. The Court further finds that under R.C. 1303.37, the Home Savings and Loan Company of Youngstown had notice of the breach of fiduciary duty, and accordingly acted with bad faith as defined in *Clark* when it allowed Gregory McCardle, Sr. to deposit the check into his individual account. Therefore, the Court finds that in accordance with the holding in *Popp* that the Home Savings and Loan Company is guilty of conversion under R.C. 2109.50.

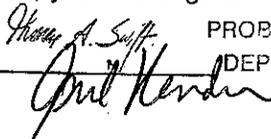
The Court further finds that Gregory McCardle, Sr. knowingly opened the account in his sole name and not in his capacity as fiduciary for Kathryn M. D'Alessandro. The Court further finds that Gregory A. McCardle, Sr. willfully and wantonly embezzled the funds from the account for his own use and benefit. The Court further finds that Kathy M. McCardle nka Kathy M. D'Alessandro had knowledge of and was a participant in the transaction.

Therefore it is ORDERED that The Home Savings and Loan Company of Youngstown, Ohio, Gregory A. McCardle, Sr., and Kathy M. McCardle nka Kathy M. D'Alessandro be and hereby are found guilty of having concealed, embezzled, conveyed away, or having been in the possession of monies of the Estate of Kathryn M. D'Alessandro, deceased. It is ORDERED that judgment be and hereby is rendered in favor of Daniel Letson, Administrator WWA of the Estate of Kathryn M. D'Allessandro, deceased, in the amount of \$53,654.04 for monies concealed, embezzled, conveyed away or in the possession of The Home Savings and Loan Company of Youngstown, Ohio, Gregory McCardle, and Kathy M. McCardle nka Kathy D'Alessandro, together with a ten percent penalty and all cots of these proceedings. It is further Ordered that The Home Savings and Loan Company of Youngstown, Ohio, Gregory A. McCardle, Sr. and Kathy M. McCardle nka Kathy M. D'Alessandro are jointly and severally liable. It is further Ordered that Plaintiff's attorney fees and court costs be and hereby are taxed as costs and shall be payable upon application to and approval by the Court. All until further Order of the Court.


Thomas A. Swift, Probate Judge

Copy mailed delivered on OCT 23 2009 to: Daniel B. Letson, Esq., Thomas Gacse, Esq., Richard Thomas, Esq., Gus Theofilos, Esq. and Gregory McCardle, Sr. . OCT 23 2009

I certify the foregoing to be a true copy of the original writ.

BY  PROBATE JUDGE
DEPUTY CLERK

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