**[Cite as *Letson v. McCardle*, 2010-Ohio-3681.]**

**THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**TRUMBULL COUNTY, OHIO**

| | | |
|---|---|---|
| DANIEL B. LETSON, ADMINISTRATOR, WWA OF THE ESTATE OF KATHRYN M. D'ALESSANDRO, DECEASED, | : | **O P I N I O N** |
| | : | **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 comporting 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. GRENDELL, J., concurs in judgment only.