

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1966

Cir. Ct. No. 2006CV591

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

GREGORY D. SIEGLER,

PLAINTIFF-APPELLANT,

V.

JUDY WEBB AND KAREN KINDEL,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Washington County:
DAVID C. RESHESKE, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Gregory D. Siegler, pro se, appeals the grant of summary judgment in favor of Judy Webb and Karen Kindel, co-trustees of the revocable living trust of decedent Joseph Siegler. Gregory contends the trustees

acquired trust property through conversion and breached their fiduciary duty of fair dealing and proper management of trust assets. His claims do not survive summary judgment analysis. We affirm.

¶2 Gregory and Judy are two of Joseph's and his first wife Patricia's ten children. Patricia died in 1985. Joseph later married Karen Kindel. In June 1997, Joseph and Karen executed a marital property agreement and Joseph established a revocable living trust in which he nominated Karen and Judy as co-trustees upon his death. Joseph died on April 19, 1999, leaving a sizable estate. The probate estate was closed in 2001 in Waukesha county.

¶3 In July 2006, Gregory filed a complaint alleging six causes of action against the trustees.¹ Briefly stated, counts one and two alleged conversion of a trust asset involving an Adams county property Judy and Karen conveyed to Judy and her ex-husband. Counts three and four alleged conversion of an East Troy investment property and an associated breach of fiduciary duty. Count five alleged breach of fiduciary duty involving a Florida condominium. Count six alleged breach of fiduciary duty for failure to include certain assets in the trust and the trustees' handling of the trust.

¶4 The trustees moved for summary judgment. After a failed attempt at mediation, the parties resumed their summary judgment posture. The court granted the trustees' motion because none of Gregory's claims had sufficient evidentiary support. Gregory appeals. More facts will be supplied as needed.

¹ Two of Gregory's siblings initially joined him as co-plaintiffs. Six months later, they voluntarily withdrew. Gregory's counsel also moved to withdraw. Gregory continued pro se.

¶5 In reviewing summary judgments, we employ the same analysis as the circuit court. *Schultz v. Industrial Coils, Inc.*, 125 Wis. 2d 520, 521, 373 N.W.2d 74 (Ct. App. 1985). We need not recount this well-known methodology in full. See, e.g., *Preloznik v. City of Madison*, 113 Wis. 2d 112, 115-16, 334 N.W.2d 580 (Ct. App. 1983). Suffice it to say we generally will affirm the circuit court’s decision granting summary judgment if the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See WIS. STAT. § 802.08(2) (2007-08).²

¶6 Gregory identifies two “Issues Presented”: that the circuit court relied on unsubstantiated and refuted facts, and that the court failed to address all the issues set forth in the complaint. He develops his arguments within the same four-part framework the circuit court employed in its decision. We do likewise.

1. First and Second Causes of Action

¶7 The first and second causes of action allege conversion by Judy and conspiracy of conversion by Judy and Karen of a two-acre parcel of land in Adams county. The property, which is improved with a trailer, was the subject of a 1979 land contract between Joseph and Patricia, as vendors, and two relatives as vendees. The relatives abandoned the contract and never took possession of the property. Judy and her then husband, Scott (the Webbs), took possession of it in 1983 and since that time they alone occupied it and assumed sole responsibility for upgrades, maintenance, expenses and taxes. The entire family treated the property as belonging to the Webbs. When the Webbs divorced in 2003, they discovered

² All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

that Joseph and Patricia had not conveyed title to them. To correct title, Karen, as trustee, notified all of the siblings of the intent to transfer title to the Webbs. All but Gregory waived their interest in the property. Karen conveyed it to the Webbs by quitclaim deed in 2005. Gregory did not formally object or assert a claim to it until filing suit.

¶8 Gregory now contends, essentially, that Judy and Karen knowingly agreed to join forces to take property rightfully belonging to the trust without the beneficiaries' consent so as to interfere with the beneficiaries' possession rights. *See Bruner v. Heritage Cos.*, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999) (explaining elements of conspiracy to convert property). He posits that the court relied on disputed facts in regard to the beneficiaries' consent. In support, he cites a sister's affidavit in which she states that she "never discussed the property with Karen Kindel." He does not state, however, that Karen's lawyer prepared the waivers and that the sister avers in the same affidavit that she "received the waiver and consent regarding the subject property and signed same." In any event, the affidavit loses whatever value it might have had because Gregory submitted it beyond the date for filing summary judgment materials.

¶9 Gregory's own affidavits opposing summary judgment are largely nonevidentiary as well. They refer to and append as exhibits numerous inadmissible e-mails, summaries of conversations among his siblings and other individuals, and letters, such as one a former co-plaintiff sibling's attorney wrote to the beneficiaries "to share ... some of [the sibling's] thoughts and concerns" regarding the administration of the estate and trust. The affidavits also include his conclusions about the items, such as that certain statements are false, one sibling or another is "clearly under the impression" about a particular matter, the estate tax return was fraudulent and the quitclaim deed was illegal. Allegations of

ultimate facts and conclusions of law do not meet the statutory requirement that affidavits opposing summary judgment must be on personal knowledge and are not “evidentiary facts” as would be admissible in evidence. *Krieg v. Dayton-Hudson Corp.*, 104 Wis. 2d 455, 465, 311 N.W.2d 641 (1981); *see Fritz v. McGrath*, 146 Wis. 2d 681, 689 and n. 2 & 3, 431 N.W.2d 751 (Ct. App. 1988), *receded from on other grounds in Ritt v. Dental Care Assocs., S.C.*, 199 Wis. 2d 48, 543 N.W.2d 852 (Ct. App. 1995); *and see* WIS. STAT. § 802.08(3).

¶10 Granted, Karen might have attempted to keep the property in the estate—but at the risk of exposing the estate to a potentially divisive claim by the Webbs of adverse possession. Article 6 of the trust authorized her, as trustee, to abandon claim to the property and to convey it “for such purposes, in such manner, and upon such terms and conditions” as appeared to her to be proper. Karen acted within the scope of her duties as trustee in conveying the property to the Webbs. Summary judgment on the first and second claims was proper.

2. Third and Fourth Causes of Action

¶11 These claims involve an East Troy investment. Two days before Joseph died, Karen quitclaimed her one-half interest in the property to herself and Joseph as survivorship marital property. Gregory alleges that Karen violated terms of the marital property agreement and converted trust property to herself, thereby breaching her fiduciary duty as trustee.

¶12 Gregory is mistaken on the facts and the law. Karen’s interest in the property never was a trust asset. The East Troy property is a residential apartment building which, along with several other investment properties, Karen and her brother owned as tenants in common. It was her individual property under the marital property agreement. When Joseph’s death was imminent, Karen’s lawyer

and accountant advised her to deed her interest in the property to Joseph and herself as joint marital property with right of survivorship to avail herself at Joseph's death of the increase in tax basis for capital gains purposes.

¶13 Gregory then contends that the quitclaim deed is invalid because only Karen signed it. Joseph's and Karen's marital property agreement provided that an asset classified as marital property can be held as survivorship marital property "if the survivorship form of holding is expressly used in the document of title to the property or other written instrument signed by both parties." The quitclaim deed was the "document of title to the property," and the marital property classification and survivorship marital property designation are expressly stated in it. Because it was not an "other written instrument," both parties' signatures are not required. We agree with the circuit court that Karen's electing an option beneficial to herself does not void the transfer.

3. Fifth Cause of Action

¶14 The fifth cause of action alleges that the trustees breached their fiduciary duty regarding a separate trust for a Florida condominium. Paragraph 3.3.B.4 of the trust bequeathed Joseph's interest in the Florida condominium plus \$5,000 "to be held in a separate trust pursuant to the terms of Article 4." Article 4 directed the trustees to hold and administer "as a separate trust" all property so distributed. In July 2000, the trustees executed a deed from themselves as grantors to themselves as grantees. The deed provided that "[i]n no case shall any party dealing with the Grantees ... be obliged or privileged to inquire into any of the terms of said Trust Agreement, or the identification or status of any named or unnamed beneficiary."

¶15 Gregory contends that the trustees breached their fiduciary duty either by creating a separate trust and failing to produce it or by not creating one as directed. He also argues the breach extended to the language in the deed which he claims restricts his ability to examine the separate trust to ensure that he still is a beneficiary and that it comports with the intent of the original trust. We disagree.

¶16 The circuit court's calendar required that the summary judgment motion hearing be continued. Still unclear at the end of the first day whether the trust's directives had been met, the court denied summary judgment on this claim and invited the parties to submit a summary of each claim "as succinctly as possible." Gregory filed seventy-eight pages of documents. The court ultimately granted summary judgment to the trustees on the basis that Gregory's claim was premised upon the existence of a second trust both trustees denied. Gregory contends that this disposition leaves unaddressed his claim that, if a separate trust was not created, the original trust requires that one must be and that he must be allowed to examine it to ensure that it tracks the original one.

¶17 The construction of a testamentary document presents a question of law which we review de novo. *Furmanski v. Furmanski*, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). A court is obligated to uphold the intent of the settlor. *Weinberger v. Bowen*, 2000 WI App 264, ¶12, 240 Wis. 2d 55, 622 N.W.2d 471. The language of the document is the best evidence of intent, *see Madison Gen. Hosp. Med. & Surgical Found., Inc. v. Volz*, 79 Wis. 2d 180, 187, 255 N.W.2d 483 (1977), "particularly when the trust instrument reveals a careful and painstaking expression of the use and purposes to which the settlor's financial accumulations shall be devoted." *State v. First Wis. Nat'l Bank of Oshkosh*, 61 Wis. 2d 432, 442, 213 N.W.2d 54 (1973) (citation omitted).

¶18 To be sure, Article 4 of Joseph’s living trust directs that the condominium be held and administered “as a separate trust.” The complete directive, however, reads “as a separate trust *as follows*” (emphasis added). What follows is four paragraphs setting forth the purpose of the trust; an equitable method of allocating use of the condominium among Karen and Joseph’s children and grandchildren; usage fees; rental to third parties; the trustees’ authority to settle disputes; use of income and principal to pay fees and expenses; and its distribution upon Karen’s death. Article 6 grants trustees “maximum investment responsibility to invest, reinvest and retain trust assets,” authorizes them to convey real property “for such prices, for such purposes, in such manner, and upon such terms and conditions” as they deem proper, to execute whatever instruments are necessary to effect that authority, and to manage the real estate as if they individually owned it.

¶19 Reading Articles 4 and 6 together, we conclude that Joseph’s intent was less to create a separate trust than to achieve a specific purpose, namely, “to provide for the common use and enjoyment of the [Florida condominium] by my children, grandchildren and wife, Karen Kindel, during Karen’s lifetime.” The trust provisions in Article 4 accomplish Joseph’s intent.

¶20 Lastly, the conveyance deed language does not curtail Gregory’s rights as a beneficiary. Karen’s affidavit states that, through Florida counsel, the trustees executed the conveyance deed in accordance with Florida law to clarify title to the Florida condominium. The language is similar to WIS. STAT. § 701.19(11), the purpose of which is to protect third parties by relieving them of the obligation to inquire into a trustee’s authority to transact business. It does not apply to Gregory as a beneficiary.

4. Sixth Cause of Action

¶21 This claim alleges an “overall breach of duty” to the beneficiaries by the trustees’ failure to include certain investment accounts in the estate. As proof, Gregory points to his pleadings in which he describes conversations he had with various people in 2005 regarding the value and beneficiaries of the accounts. He also asserts that the estate tax return listed as a bequest to Karen an amount substantially higher than the amount shown to be distributed to her by the trust and thus concludes the tax return is fraudulent.

¶22 Gregory contends the “facts” as pled are to be taken as true, despite a near total absence of any documentary proof. A party opposing a motion for summary judgment may not rest upon the pleadings, but must set forth specific facts which show the existence of genuine issue for trial. WIS. STAT. § 802.08(3). Gregory’s allegations are woefully short of a sufficient evidentiary grounding.

¶23 Furthermore, the estate was closed in 2001. Gregory’s 2006 lawsuit significantly overshot the time for filing a claim against it. *See* WIS. STAT. § 859.01. Also, Washington county is not the proper venue in which to debate the distribution of assets in an estate probated in Waukesha county. Summary judgment was appropriately granted on each cause of action.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

