



Missouri Court of Appeals
Southern District

Division Two

TERRY BRACKNEY, AS PERSONAL)
REPRESENTATIVE OF THE ESTATE OF)
RENATE MACK,)

Appellant,)

vs.)

ROBERT WALKER and NANCY WALKER,)
CRYSTAL HOUSE and NATHANIEL)
HOUSE, DIRECTOR, DEPARTMENT OF)
REVENUE, STATE OF MISSOURI, and)
CENTURY BANK OF THE OZARKS,)

Respondents.)

No. SD36808

FILED: July 13, 2021

APPEAL FROM THE CIRCUIT COURT OF OZARK COUNTY

Honorable Judge R. Craig Carter

AFFIRMED IN PART, REVERSED IN PART

Terry Brackney ("Brackney"), a domiciliary foreign personal representative ("DFPR"),¹ appeals the trial court's judgment denying his counterclaims for quiet title and constructive trust brought on behalf of the estate (the "Estate" or "Mack's Estate") of Renate Mack ("Mack").

Brackney raises five points on appeal. Point 1 argues the trial court erred in applying the one-year statute of limitations for the admission of a will to probate to his claims for quiet title and

¹ A personal representative appointed by a non-Missouri court is a DFPR and has the power to maintain actions on behalf of the nondomiciliary decedent's estate by filing authenticated copies of appointment by the foreign probate court together with a copy of his official bond. *See* §§ 473.676 and 473.677. All statutory citations are to RSMo. (2018).

constructive trust. Finding merit in Brackney's point 1, we reverse as to this point which disposes of points 2 and 3.² In points 4 and 5, Brackney argues the trial court erred in denying Brackney's claim for constructive trust (point 4) and attorney's fees (point 5). Finding no merit in either point, we affirm the trial court's judgment as to those claims.

Factual and Procedural History

This case involves a dispute over real estate in Ozark County, Missouri, (the "Property")³ between Robert Walker and Nancy Walker (the "Walkers"), Crystal House and Nathaniel House (the "Houses"), and the personal representative of Mack's Estate, Brackney, appointed by a court in Florida.

Charles D. Walker, Sr. ("C.D. Walker") and Mack owned the Property as joint tenants with rights of survivorship.⁴ In 1997, C.D. Walker died. Mack subsequently moved to Florida. In 2005 or 2006, Mack began renting the Property to the Houses for \$375 per month. On May 17, 2014, Mack died in Okaloosa County, Florida. After Mack's death, the Houses continued to live on the Property but ceased paying rent.

In July 2014, the Walkers filed an action for adverse possession and quiet title against the unknown heirs of Mack, seeking title to the Property, and requesting service by order of publication. In November 2014, the Missouri trial court entered a default judgment in the

² Point 2 argues if the trial court did not err in applying the one-year statute of limitations, the trial court erred in not joining Mack's heirs as indispensable parties. Point 3 argues that the trial court erred in denying his claim for quiet title. The trial court did not reach the merits of the quiet title claim because it found that Brackney's claim was barred by the one-year statute of limitations.

³ The legal description for the Property is: All of Lot 1 of Ozark Acres Subdivision as shown on the recorded plat thereof in the Office of the Recorder of Deeds of Ozark County, Missouri, ALSO all of Lot 2 of Ozark Acres Subdivisions as shown on the recorded plat thereof in the Office of the Recorder of Deeds of Ozark County, Missouri, EXCEPT that part of Lot 2 described as follows: Beginning at the Southwest corner of Lot 3 of said Ozark Acres Subdivision; thence South 73 degrees 11 minutes West eleven feet; thence in a Northwesterly direction fifty four (54) feet and ten (10) inches to a point which is eighteen (18) feet and seven (7) inches West of the East line of said Lot 2; thence in a Northeasterly direction forty six (46) feet and six (6) inches to a point which is eleven (11) feet West of the East line of said Lot 2; thence North 0 degrees 11 Minutes East to the North Line of said Lot 2; thence South 83 degrees 29 minutes East to the Northwest corner of Lot 3 of said Ozark Acres subdivision; thence South degrees 11 minutes West to the place of beginning. All being part of the NW ¼ SW ¼ Section 5, Township 22, Range 13.

⁴ C.D. Walker and Mack were not married but were in a romantic relationship. The Walkers are C.D. Walker's son and daughter-in-law. The Houses are C.D. Walker's great-granddaughter and her husband.

Walkers' favor. On March 13, 2015, in the probate division of the circuit court of Okaloosa County, Florida, Brackney was appointed as personal representative of Mack's Estate. In July 2015, the Walkers executed a general warranty deed purporting to convey the Property to the Houses. The Houses paid \$20,000.00 for the Property.⁵ Brackney filed a Motion to Set Aside the Judgment in the Walkers' adverse possession case, which motion was granted by the trial court. Pursuant to section 473.676, Brackney filed in the probate division of the circuit court of Ozark County, Missouri authenticated copies of his appointment as the DFPR for the Estate and a waiver of bond issued by the Florida court. Brackney later filed an amended counterclaim for quiet title and constructive trust adding the Houses as parties in response to the Walkers' claim for adverse possession.⁶

In June 2020, a trial was held. The trial court denied the Walkers' adverse possession claim and quiet title claim. The trial court also denied Brackney's quiet title claim and constructive trust claim.⁷ In denying Brackney's counterclaims, the trial court concluded "[it] must apply the one-year statute of limitations" finding both of Brackney's counterclaims time barred because an estate had not been opened in Missouri within one year of the death of Mack. On Brackney's constructive trust claim, the trial court also found "assuming *arguendo* that [Brackney's] counterclaim might proceed, the evidence at trial failed to prove that [the Walkers] deprived [Brackney] of property by fraud." Brackney appeals the trial court's judgment denying his counterclaims.

⁵ According to bank records, the Property had a fair market value of \$66,000 using the income analysis approach and a value of \$45,000 using the cost comparison approach. This appraisal was conducted in June 2015.

⁶ The Missouri Department of Revenue and Century Bank of the Ozarks were also named as parties based on Brackney's allegations that Century Bank had a deed of trust agreement it entered into with the Houses and the Missouri Department of Revenue had a tax lien on the Property.

⁷ The trial court found:

3. [Brackney] did not open a Missouri estate for [Mack] within one year. [Brackney] did file as a foreign personal representative of [Mack's Estate]. This [E]state was not opened within one year of the date of Mack's death[.]

Discussion

Point 1—Statute of Limitations

In point 1, Brackney argues the trial court erred in applying the one-year statute of limitations for admitting a will to probate to his counterclaims for quiet title and constructive trust. We agree. The one-year statute of limitations for applying for letters of administration to admit a will is not the statute of limitations that applies to actions for quiet title or constructive trust brought by a DFPR.

Standard of Review

"Whether or not the statute of limitations applies to an action is a question of law that this Court reviews *de novo*." ***Drury v. Missouri Youth Soccer Ass'n, Inc.***, 259 S.W.3d 558, 576 (Mo. App. E.D. 2008). On questions of law, we give no deference to the trial court's rulings. ***Meadowfresh Sols. USA, LLC v. Maple Grove Farms, LLC***, 606 S.W.3d 193, 202 (Mo. App. S.D. 2020).

Analysis

"Whether the statute of limitations bars a lawsuit depends on the nature of the cause of action and when the action accrued." ***Cook v. DeSoto Fuels, Inc.***, 169 S.W.3d 94, 102 (Mo. App. E.D. 2005). In deciding which statute of limitations applies, Missouri courts look to the gravamen of the action. ***Wages v. Young***, 261 S.W.3d 711, 715 (Mo. App. W.D. 2008). "[T]he 'gravamen' of the complaint or a fair reading of the complaint in its totality, should determine [what type of cause of action is alleged] and then the applicable statute of limitations should be applied." ***Id.*** (quoting ***Wenthe v. Willis Corroon Corp.***, 932 S.W.2d 791, 796 (Mo. App. E.D. 1996)).

The trial court ignored the gravamen of Brackney's actions—quiet title and constructive trust—and mistakenly assumed Brackney was required to open a probate estate in Missouri within one year in order to maintain the claims. With no administration pending in Missouri, a DFPR may file authenticated copies of his appointment and bond in the probate division, which

gives the DFPR "all powers of a local personal representative and [he] may maintain actions and proceedings in this state" with the same "duties and obligations of a local personal representative[.]"⁸ §§ 473.677 and 473.676. In other words, if a DFPR has filed his authenticated copies of appointment and bond in the probate court, he does not have to open an estate in Missouri to have the same powers as a local representative.

Here, Brackney, the DFPR did properly file authenticated copies of his appointment and waiver of bond in the Missouri probate court in order to maintain counterclaims on behalf of the estate.⁹ Accordingly, the one-year limitation for the commencement of administration of a decedent's estate does not control.¹⁰ Point one is granted. The resolution of point 1 renders Brackney's points 2 and 3 moot.

⁸ Section 473.677 states:

A [DFPR], who has complied with section 473.676, may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this state, subject to any conditions imposed upon nonresident parties generally. When acting in this state under this authority, a [DFPR] has the duties and obligations of a local personal representative, except that he may pay or deliver personal property under section 473.691.

Section 473.676 states:

If no local administration, or application or petition therefor, is pending in this state, a [DFPR] may file with a probate division of the circuit court in this state, in a county in which property belonging to the decedent is located, authenticated copies of his appointment and of any official bond he has given.

⁹ The Walkers cite us to no statute that requires a DFPR to open an estate in Missouri within one year in order to maintain actions on behalf of the estate. The Walkers do cite us to section 473.675, which states "[t]he law of this state respecting proceedings, procedures and substantive rights relating in any way to the property in this state of a nonresident decedent and its disposition, . . . shall apply as if the decedent had been a resident of this state[.]" However, this statute does not help the Walkers' position since it merely means Missouri law applies to proceedings relating to property in Missouri.

¹⁰ The actions brought before the trial court by Brackney were counterclaims for quiet title and a constructive trust filed in response to the Walkers' adverse possession and quiet title claims. "An action to quiet title is governed by the ten year statute of limitation contained in section 516.110." **Basye v. Fayette R-III School Dist. Bd. Of Educ.**, 150 S.W.3d 111, 115 (Mo. App. W.D. 2004). In an action to impose a constructive trust, courts apply the statute of limitations applicable to the underlying claim which gives rise to the imposition of the constructive trust. *See e.g., Rajanna v. KRR Invs., Inc.*, 810 S.W.2d 548, 550 (Mo. App. W.D. 1991) (applying section 516.010's ten-year limitations to a constructive trust action where the gravamen of the claim is title to real estate); and **Dean v. Noble**, 477 S.W.3d 197, 204 (Mo. App. W.D. 2015) (applying section 516.120's five-year limitations for fraud actions to the plaintiff's claim for constructive trust where the gravamen of the claim is alleged fraud).

Point 4—Constructive Trust

In addition to barring Brackney's constructive trust claim on the basis of the one-year statute of limitations discussed in point 1, the trial court trial court found "assuming *arguendo* that [Brackney] might proceed, the evidence at trial failed to prove that the [Walkers] have deprived [Brackney] of property by fraud."¹¹ In response to this ruling, Brackney's point argues the trial court "misapplied the law" and "the decision was against the manifest weight of evidence in that the trial court should have granted Brackney's claim for constructive trust and awarded damages against the Walkers and the Houses and cancelled the conveyance from the Walkers to the Houses." While Brackney's point improperly combines a misapplication-of-the-law challenge with an against-the-weight-of-the-evidence challenge, we review *ex gratia* this point and treat it as an against-the-weight challenge.¹²

Standard of Review

We will affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Ivie v. Smith*, 439 S.W.3d 189, 198-99 (Mo. banc 2014). A circuit court's judgment is against the weight of the evidence only if the circuit court could not have reasonably found, from the record at trial, the existence of a fact that is necessary to sustain the judgment. *Id.* at 206. When the evidence poses two reasonable but different conclusions, appellate courts must defer to the trial court's assessment of that evidence. *Id.* Accordingly, this standard of review takes into consideration which party has the burden of proof and that the trial court is free to believe

¹¹ Brackney's counterclaim sought imposition of a constructive trust based on the Walker's "fraud and omissions" in obtaining a default judgment against Mack's heirs. Brackney's prayer for relief requested the "fair market value of the [P]roperty, the fair rental value of the [P]roperty, and interest thereon" be held in constructive trust. Brackney did not seek cancellation of the conveyance from the Walkers to the Houses in his constructive trust claim in his amended counterclaim. For that reason, Brackney's claim on appeal is different than the claim he presented to the trial court.

¹² "[W]e prefer to resolve appeals on their merits[.]" *Bartsch v. BMC Farms, LLC*, 573 S.W.3d 737, 742 (Mo. App. W.D. 2019). Where an appellant's argument is readily understandable, we have the discretion to review non-compliant briefs *ex gratia*. *Scott v. King*, 510 S.W.3d 887, 892 (Mo. App. E.D. 2017).

all, some, or none of the evidence offered to prove a contested fact, and the appellate court will not re-find facts based on credibility determinations through its own perspective. **Houston v. Crider**, 317 S.W.3d 178, 186 (Mo. App. S.D. 2010). "A court will set aside a judgment as against the weight of the evidence only when it has a firm belief that the judgment is wrong." **Id.** (internal citations and quotations omitted).

Analysis

Brackney bore the burden of proof to demonstrate he was entitled to a constructive trust. "To establish a constructive trust, an *extraordinary* degree of proof is required" and the "evidence must be unquestionable in character." **Fix v. Fix**, 847 S.W.2d 762, 765 (Mo. banc 1993) (emphasis added). "The evidence must be so clear, cogent, and convincing as to exclude every reasonable doubt in the mind of the trial court." **Id.** Constructive trusts are used by courts to "compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." **Brown v. Brown**, 152 S.W.3d 911, 916 (Mo. App. W.D. 2005) (quoting **Kerber v. Rowe**, 156 S.W.2d 925, 927 (Mo. 1941)). "[T]he touchstone for imposition of a constructive trust is injustice or unfairness, which may take the form or be the product of fraud (actual or constructive), abuse of a fiduciary or confidential relationship, undue influence, or unjust enrichment." **Id.** at 918. Brackney has failed to meet his burden in demonstrating that the trial court's denial of his constructive trust claim was against the weight of the evidence.

To successfully make an against-the-weight-of-the-evidence challenge, an appellant must perform four steps. **Houston**, 317 S.W.3d at 187.¹³ Brackney's argument skips all four

¹³ These steps are:

- (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
- (2) identify all of the favorable evidence in the record supporting the existence of that proposition;
- (3) identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and,

steps in ineffectually attempting to explain why the trial court's failure to impose a constructive trust was in error. Brackney seems to challenge the trial court's finding that he failed to prove the Walkers engaged in fraud (e.g., "The trial court erred in assuming *arguendo* that [Brackney] failed to prove the Walkers deprived Mack's Estate of the Property by fraud"). In support of his argument, he contends that the "contradicting testimony" between Robert Walker's affidavit for service by publication, in which he attested he "has been unable to locate an address for service on the heirs[,] " and his trial testimony, in which he testified that he made no attempt to locate the heirs, makes it "clear the Walkers intended to conceal the filing of their petition from Mack's heirs and attain default judgment."

But Brackney completely ignores our standard of review—which defers to the trial court's superior judgment on issues of credibility—and fails to cite *any* favorable evidence that supports the trial court's decision to deny the imposition of a constructive trust against the Walkers. "The omission of material favorable evidence from the weighing process strips [Brackney's] purported demonstration of any analytical value or persuasiveness." *Id.* 189.¹⁴ Brackney's argument lacks the analytical structure necessary for the presentation of a cogent and persuasive argument. Without such structure, reversal would require us to:

devise and articulate [our] own demonstration of how the omitted favorable evidence, either by itself or considered along with the partial favorable evidence . . . is lacking in probative value as compared to the totality of the evidence, so as to be against the weight of the evidence. Such action on our part would thrust us into becoming an advocate on [Brackney's] behalf; a role we are prohibited from assuming.

(4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition.

Id.

¹⁴ "An argument must explain why, in the context of the case, the law supports the claim of reversible error. It should advise the appellate court how principles of law and the facts of the case interact." *Brown v. Brown-Thill*, 543 S.W.3d 620, 629 (Mo. App. W.D. 2018) (internal quotation and citation omitted).

Id. Point 4 is denied.

Point 5—Attorney's Fees

In point 5, Brackney argues that the trial court erred in rejecting his prayer for attorney's fees "because as a result of the Walkers['] wrong doings [the Estate] was caused to incur said fees in collateral litigation." In his amended counterclaim, Brackney sought attorney's fees "pursuant to RSMo. § 527.100"¹⁵ on his quiet title claim and "to justify the equitable balancing of benefits" in his constructive trust claim.

We need not address whether the collateral litigation exception¹⁶ applies because Brackney never sought attorney's fees based on collateral litigation in his pleadings or motion for new trial.¹⁷ "An appellate court will not, on review, convict a trial court of error on an issue which was not put before it to decide." **First Bank Centre v. Thompson**, 906 S.W.2d 849, 859 (Mo. App. S.D. 1995). "Even in a court-tried case, where a post-trial motion is not necessary to preserve an *otherwise properly raised issue* for appellate review, the appellant must make some effort to bring the alleged error to the trial court's attention." **Heck v. Heck**, 318 S.W.3d 760, 767 (Mo. App. W.D. 2010) (internal citation omitted). Here, Brackney asks us to convict the trial court of an error on an issue that it was never asked to decide. We decline to do so. Brackney did not put the trial court on notice of his precise allegation of error and give the trial

¹⁵ Section 527.100 provides: "In any proceeding under sections 527.010 to 527.130 the court may make such award of costs as may seem equitable and just." Brackney, in his amended counterclaim, cited this statute that gives the trial court discretion to award *costs* (not attorney's fees) in a declaratory judgment action (not a quiet title action).

¹⁶ The collateral litigation exception allows a plaintiff to recover attorney fees that he expended in collateral litigation with a third party as a result of a defendant's wrongdoing. **Beavers v. McGinnis**, 277 S.W.3d 308, 310 (Mo. App. S.D. 2009). "For the collateral litigation exception to be applicable, the plaintiff must have incurred attorneys' fees in a different cause of action, involving a different party, caused by a breach of duty by the defendant." **Collier v. Manring**, 309 S.W.3d 848, 853 (Mo. App. W.D. 2010).

¹⁷ Brackney fails to include in his brief a statement of how this issue was preserved. Rule 84.04(e) requires appellants to include in their argument for each claim of error "a concise statement describing whether the error was preserved for appellate review[.]" Missouri Court Rules (2021). The failure to comply with Rule 84.04(e) "preserves nothing for appellate review." **In re Marriage of Fritz**, 243 S.W.3d 484, 487 (Mo. App. E.D. 2007).

court an opportunity to decide that issue and point 5 is, therefore, dismissed.¹⁸ See ***Meadowfresh Sols. USA, LLC v. Maple Grove Farms, LLC***, 586 S.W.3d 329, 345 (Mo. App. S.D. 2019).

Conclusion

The portion of trial court's judgment denying Brackney's counterclaim for quiet title is reversed. The case is remanded for further proceedings on that claim consistent with this opinion. In all other respects, the trial court's judgment is affirmed.

MARY W. SHEFFIELD, J. – Opinion Author

GARY W. LYNCH, J. – CONCURS

DON E. BURRELL, J. – CONCURS

¹⁸ Even if we did review his argument, Brackney fails to explain how the court abused its discretion in failing to award attorneys' fees. The trial court's decision to grant or deny attorneys' fees is reviewed for an abuse of discretion absent a contractual or statutory provision that *requires* attorney's fees. ***Tupper v. City of St. Louis***, 468 S.W.3d 360, 374 (Mo. banc 2015). "A trial court ruling is an abuse of discretion when it 'is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.'" ***State ex rel. Mo. Highways & Transp. Comm'n v. Boer***, 495 S.W.3d 765, 769 (Mo. App. S.D. 2016) (quoting ***Lozano v. BNSF Ry. Co.***, 421 S.W.3d 448, 451 (Mo. banc 2014)). Even if we accept his argument that "it is equitable to award [Brackney] his attorneys' fees[.]" which we do not, Brackney makes no attempt to explain how the denial of attorney's fees is so unreasonable and arbitrary that it shocks our sense of justice.