

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-302

JUNE TERM, 2006

Mary Jane Paquette	}	APPEALED FROM:
	}	
	}	
v.	}	Franklin Superior Court
	}	
Lionel Charbonneau and Francine Charbonneau	}	
	}	DOCKET NO. S327-02 Fc

Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Defendants Lionel and Francine Charbonneau appeal from a superior court judgment concluding that they breached a fiduciary duty to plaintiff Mary Jane Paquette by expending plaintiff=s proceeds from a mortgage deed, and awarding damages to plaintiff of \$89,322. Defendants contend the court erroneously ignored their claim to a portion of the proceeds as named mortgagees on the mortgage deed. We affirm.

The facts as found by the trial court may be summarized as follows. Plaintiff has a long history of manic depression and has been hospitalized on several occasions, including a two-year stay in the Vermont State Hospital. Plaintiff lived for two separate periods with her son and daughter-in-law, defendants Lionel and Francine Charbonneau, from 1990 to 1992, and again from 1997 until 2001. Because of difficulties managing her financial affairs, plaintiff executed to defendant Francine Charbonneau a financial power of attorney in 1990, and executed a second power of attorney in February 1999.

At the time of the second power of attorney, plaintiff=s income consisted entirely of her monthly social security check of about \$700 and a monthly mortgage payment of about \$600 on a property located in St. Albans. Plaintiff and her husband (since deceased) had sold the property to plaintiff=s other son and daughter-in-law, Glenn and Deborah Charbonneau. When they divorced, Glenn conveyed title to Deborah as part of the divorce settlement, and she assumed the mortgage payments to plaintiff. In February 1999, defendants= attorney prepared a revised mortgage deed, signed only by Deborah, which purported to modify the original mortgage in several respects: it reduced the monthly payment from \$600 to \$500; added a provision stating that the mortgage would be due in full if Deborah had any other adults living in the home with her; ^[1] deleted the provision that the mortgage would be considered paid in full upon plaintiff=s death; and added defendants Lionel and Francine Charbonneau as named mortgagees, with right of survivorship. Plaintiff testified, and the court found, that the purpose of deleting the earlier provision and adding defendants to the mortgage was to ensure that they would receive the proceeds from the mortgage payments after plaintiff=s death.

In March 2001, Deborah reportedly violated a provision of the mortgage deed, so that the mortgage amount therefore became due and payable. Plaintiff agreed to accept \$100,000 as a final payment (the balance due was considerably higher). Deborah refinanced the loan, and sent the parties a check for \$100,000. Exercising her power of attorney, Francine cashed the check, deposited \$57,900 into defendants= checking account and \$40,000 into their money market account, and retained \$2100 in cash. The court found that defendants told plaintiff the money was hers, and that plaintiff informed them that she wanted to use it to pay off her debts in full and to help pay off defendants= debts as a gift in return for allowing her to continue to live with them. Plaintiff expected to retain the balance as a Anest egg.@ In any event, defendants paid off plaintiff=s debts totaling less than \$11,000, and over the next month spent most of the remainder (\$89,322) on purchases for themselves. In June 2001, following an argument, defendant Lionel Charbonneau ordered plaintiff to move out of the home.

In August 2002, plaintiff filed a complaint against defendants alleging, among other claims, breach of fiduciary duty, and seeking reimbursement of the monies which defendants had expended. Following a one-day bench trial, the court issued a written decision, concluding that defendant Francine Charbonneau had breached a fiduciary duty owed to plaintiff under her power of attorney, and that defendant Lionel Charbonneau had knowingly assisted Francine in violating her trust. The court entered judgment for plaintiff, awarding her \$89,322 (\$100,000 less the money expended

to pay off plaintiff=s debts). This appeal followed.

Defendants contend the court erroneously ignored the 1999 mortgage deed that included both plaintiff and defendants as mortgagees, and that allegedly entitled defendants to a two-thirds share of the \$100,000. Defendants did not raise this argument at trial. Indeed, as the court found, they had not asserted any claim to the \$500 monthly mortgage payments, and had told plaintiff that the \$100,000 was hers to expend as she wished. Defendants= sole argument at trial was that, as their attorney argued in his opening statement, plaintiff had made an unconditional gift of the money to Auser . . . in any manner that they saw fit. Accordingly, the claim based on the mortgage deed was not preserved for review on appeal. See Gus Catering, Inc. v. Menusoft Sys., 171 Vt. 556, 559 (2000) (mem.) (arguments not raised before trial court are not preserved for review on appeal).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice

[1]

There appears to be some discrepancy between the trial court=s finding with respect to this part of the mortgage deed and the language provided in the deed, which stated that the mortgage would be due in full if Deborah sold or transferred any interest in the property. Neither party challenged this finding, however, and it is immaterial to our disposition of the case.