[Cite as *Reinbolt v. Kern*, 2013-Ohio-1359.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

John F. Reinbolt, Jr., as Guardian of Lori D. St. Clair & Arlene M. St. Clair

Appellee

v.

James D. Kern, et al.

Appellants

Court of Appeals No. WD-12-041

Trial Court No. 2010-CV-0507

DECISION AND JUDGMENT

Decided: April 5, 2013

* * * * *

Robert E. Searfoss, III, for appellee.

Mark D. Tolles, for appellants.

* * * * *

JENSEN, J.

{¶ 1} Defendants-appellants, James D. Kern and Linda L. Kern, timely appeal several orders of the Wood County Court of Common Pleas rendered in connection with the June 5, 2012 jury verdict against them and the July 3, 2012 award of attorneys fees to appellee, John F. Reinbolt, Jr. Appellants assign five errors for our review:

ASSIGNMENT OF ERROR NO. 1: The trial court erred to the prejudice of defendants-appellants in allowing the testimony of plaintiff-appellant [sic] Arlene St. Clair without first making a determination in the present proceeding of her competency when such issue was raised by defendants-appellants prior to her testifying.

ASSIGNMENT OF ERROR NO. 2: The trial court erred to the prejudice of defendants-appellants in overruling the motion for a directed verdict of the defendants-appellants at the close of the plaintiffs-appellees [sic] case in chief.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in granting attorneys fees to the disqualified attorney where the disqualification arose from representation of a party by the attorneys [sic] firm who was an indispensable party defendant in this action.

ASSIGNMENT OF ERROR NO. 4: The trial court erred in granting a separate award of attorneys fees to a party that had a contingency fee agreement with the attorney.

ASSIGNMENT OF ERROR NO. 5: The trial court erred to the prejudice of defendants-appellants in instructing the jury on money damages, where the amended complaint requested only a foreclosure on the premises.

{¶ 2} For the reasons that follow, we find all of appellants' assignments of error not well-taken and affirm the trial court's orders.

I. FACTUAL BACKGROUND

{¶ 3} To properly address appellants' assignments of error, it is necessary to review the relationship between the parties and the earlier legal proceedings that gave rise to this appeal.

A. The Underlying Action

{¶ 4} Appellee, John F. Reinbolt, Jr., was appointed guardian of sisters Lori D. and Arlene M. St. Clair by the Wood County Probate Court on August 3, 2007. Reinbolt filed a lawsuit on October 15, 2007, on behalf of the St. Clair sisters against appellant Linda Kern alleging that Mrs. Kern mishandled or converted social security payments totaling $88,349.60 in her capacity as the representative payee for her cousins, the St. Clairs, who have mental or intellectual limitations. Reinbolt also alleged in the lawsuit that Mrs. Kern had failed to repay $1,989.35 loaned to her by Arlene St. Clair and that she cashed in two $5,000 life insurance policies that Lori and Arlene St. Clair had received from their parents. Mrs. Kern failed to answer and a default judgment was entered in Reinbolt's favor on February 28, 2008.

{¶ 5} The trial court held a damages hearing at which Reinbolt sought compensatory damages of over $100,000 and punitive damages of more than $269,000. The court awarded only nominal damages of $1, holding that Reinbolt's evidence in support of his damages claim had not been authenticated. Reinbolt appealed to this court.

We reversed the trial court's decision insofar as damages should have been awarded for the loan proceeds obtained by Mrs. Kern and for the conversion of the life insurance policies and we remanded the damages issue to the trial court. On July 21, 2009, the trial court in Wood County case No. 2007CV0830 awarded Reinbolt damages of $11,989. That judgment was never satisfied.

B. The Kerns' Dissolution

{¶ 6} On December 4, 2007, approximately two months after case No. 2007CV0830 was filed and after 37 years of marriage, Linda and James Kern filed a petition for dissolution in the Wood County Domestic Relations Court. In the proposed decree of dissolution, Mrs. Kern sought to surrender to her husband her interests in the following three properties:

(1) 76.44 acres located at 6374 C.R. 33 in Section 23 of Scott Township, Sandusky County, Ohio (Parcel ID No. 231600000500) ("the Sandusky County property") (Trial Exhibit 1);

(2) 5.05 acres located at 1385 Bowling Green Road East, Bradner, Ohio 43406 (Parcel ID No. L46-412-010000010000) ("the Route 6 property") (Trial; Exhibit 2); and

(3) 40.89 acres in Freedom Township, Wood County, Ohio (Parcel ID No. D13-512-360000017000) ("the Freedom Township property") (Trial Exhibit 3).

{¶ 7} The couple also sought to award their vehicles and RV to Mr. Kern. Mrs. Kern would receive no property of significant value. The property she intended to release to her husband had an estimated value of $466,000.

{¶ 8} In light of his judgment against Mrs. Kern, Reinbolt sought, and was granted, leave to intervene in the Wood County dissolution. The Kerns failed to pursue the dissolution and they ultimately dismissed the action on May 30, 2008, indicating that they did not wish to proceed with the divorce at that time. What the Kerns did not divulge is that on March 4, 2008, approximately two weeks after Reinbolt was permitted to intervene in the Wood County action, they had filed a petition for dissolution in Sandusky County, proposing to dispose of their property in the same manner as described above. Reinbolt was unaware of the Sandusky County proceedings. The Kerns obtained a decree of dissolution on April 16, 2008. The estimated $466,000 in property was awarded to Mr. Kern as the couple had proposed.

C. The Allegedly Fraudulent Land Transfers

{¶ 9} Appellants jointly owned the Route 6 and Freedom Township properties described above. The Sandusky County property was owned by Linda Kern, James D. Kern, James A. Kern, and Michelle E. Kern. Linda Kern transferred her ownership interest in all three of the properties to James Kern via quitclaim deeds signed on February 10, 2007 in consideration of "$1.00 and other good and valuable considerations." James A. and Michelle E. Kern also quitclaimed their interests in the Sandusky County property to James D. Kern. The deed for the Sandusky County

property was filed with the recorder's office on February 12, 2007. The deed for the Route 6 property was filed on February 15, 2007. And the deed for the Freedom Township property was filed on November 15, 2007.

{¶ 10} Although Reinbolt's original lawsuit was filed October 15, 2007, he claims that Linda Kern and her now ex-husband, co-appellant James D. Kern, fraudulently transferred these parcels of land, and other property described in the domestic relations actions, to divest Linda Kern of assets from which she may ultimately have been obligated to pay on the judgment in case No. 2007CV0830. These transfers by Mrs. Kern precipitated the present lawsuit. Reinbolt filed his complaint in case No. 2010CV00507 seeking to void the transfers, marshal the liens, and foreclose and sell the properties to satisfy the $11,989 judgment. He also requested punitive damages, attorneys fees, and other damages available under the Uniform Fraudulent Transfer Act, R.C. 1336.01 et seq.

D. Appellee's Attorney's Conflict of Interest

{¶ 11} When appellee initially filed the 2007 action and the present action, he was represented by Drew Hanna of the law firm of Hanna & Hanna. Appellants James D. and Linda Kern have a son, James A. Kern. The Sandusky County property that was quitclaimed to James D. Kern had been owned by James D. Kern, Linda Kern, James A. Kern, and James A. Kern's then-wife, Michelle E. Kern. Drew Hanna's brother, attorney Harold Hanna, represented James A. Kern in his divorce from Michelle E. Kern. James A. and Michelle Kern filed for divorce on April 16, 2007. Those divorce proceedings were lengthy and continued through 2012.

{¶ 12} Despite the fact that Harold Hanna was representing James A. Kern, Drew Hanna filed complaint No. 2010CV0507 against Mr. and Mrs. Kern. Drew Hanna named Linda and James D. Kern as defendants, but did not name James A. and Michelle E. Kern, despite the fact that they had participated in quitclaiming the Sandusky County property to James D. Kern. On April 8, 2011, almost a year after the complaint was filed, appellants moved the court to disqualify Drew Hanna from representing Reinbolt, alleging that this presented a conflict of interest because Harold Hanna had represented James A. Kern. The court granted the motion. Reinbolt retained new counsel—Robert Searfoss.

E. The Trial

{¶ 13} The parties tried the fraudulent transfer case to a jury on May 16 and 17, 2012. The jury heard from a number of witnesses, including Reinbolt, Linda Kern, James D. Kern, and Arlene St. Clair.

{¶ 14} As background, Reinbolt testified that he became the guardian for Arlene and Lori St. Clair after they requested his assistance when they were unable to pay for groceries and gas for the heat in their trailer. Reinbolt gathered information about their income and learned that each of the sisters was supposed to receive just under $1,000 per month in social security payments. The sisters told them that Mrs. Kern was their representative payee and was giving them only $435 per month. After some discussions with the Social Security Administration, the SSA sent a letter to Mrs. Kern dated February 22, 2006, informing her that she was being removed as payee. Reinbolt

explained that on behalf of the St. Clairs, he filed case No. 2007CV0830 to recover the money owed to the sisters. He obtained a judgment of $11,986 that has not been satisfied.

{¶ 15} Reinbolt told the jury that Mrs. Kern had owned land but signed quitclaim deeds in February 2007, transferring her interests to her then-husband. He identified the various deeds and dates of transfers. Reinbolt told the jury that through this lawsuit, he wanted to foreclose on the properties to retrieve money to satisfy the judgment. He also requested compensatory damages, punitive damages, and attorneys fees.

{¶ 16} Reinbolt testified about the Kerns' Wood County divorce proceedings, his efforts to intervene in that action to prevent a fraud on the St. Clair sisters as creditors of Mrs. Kern, the Kerns' dismissal of the Wood County domestic relations case on May 30, 2008, and the Kerns' filing and finalizing of their dissolution in Sandusky County on April 16, 2008, without his knowledge. Reinbolt testified that the Kerns' decree of dissolution granted to Mr. Kern all the land, vehicles, and the RV that the couple had owned. The Kerns had their marriage dissolved in Sandusky County before dismissing the Wood County action and without Reinbolt having an opportunity to intervene.

{¶ 17} Reinbolt testified that despite the decree of dissolution and despite the transfer of property to Mr. Kern, Mrs. Kern continued to occupy the home on Route 6. He said that he passes by the home often on his usual route to Bowling Green and has seen Mrs. Kern landscaping, preparing for a garage sale, and tinkering in the garage. A sign remains on the home that says "Linda and James Kern." Her car is frequently there.

Reinbolt said that he would see Mrs. Kern there sometimes two to three times a week and sometimes daily. He said that she has been at the home since his first involvement with the St. Clair sisters and has remained there.

{¶ 18} Reinbolt testified that there was no property and no accounts from which to collect his 2008 judgment; he believes Mrs. Kern transferred her entire estate to Mr. Kern; the Kerns were married at the time of the transfer; there was a threat that Reinbolt would sue at the time of the transfers; there was a lawsuit pending at the time that the quitclaim deed was recorded with respect to the Freedom Township property; Mrs. Kern still uses the property; Mrs. Kern is insolvent; and no consideration was given for the transferred properties.

{¶ 19} Mrs. Kern, on the other hand, denied that she knew that there was any investigation into the social security funds. She could not recall when she learned that Reinbolt was seeking to be appointed guardian, but insisted that she never received the letter from SSA. She claimed that she first saw it when it was presented to her by Drew Hanna during the first litigation.

{¶ 20} Mrs. Kern testified that she has lived in a camper on the Sandusky County property since leaving her husband in December 2005. She said that she sometimes goes to the Route 6 property to visit with her grandchildren, but denied that she retains control over the property. She admitted that she may do things around the property such as pulling weeds in the yard. She said she sometimes stays two to six hours but does not stay the night there. Mrs. Kern claimed that her ex-husband is usually not there when she

is at the house. She said that she drives her son's truck and has no vehicle of her own. She has about $18 in a bank account and receives temporary total disability checks from the Bureau of Workers' Compensation. She does not own any real estate, household furnishings, or a television. She said that she never owned anything and that the property acquired during her 37-year marriage did not belong to her. She claimed that everything was purchased with Mr. Kern's disability payments received since he became disabled in May 1990, and maintained that all the property and money acquired during their marriage was her ex-husband's. She held only minimum wage jobs periodically.

{¶ 21} Mrs. Kern insisted that she and Mr. Kern divorced because he was meeting women on the Internet and bringing them home. She claimed that she moved out of the house in December 2005, but waited to file the Sandusky dissolution action because it was at that point that she met someone else and did not want to delay the divorce. She said the Wood County action was filed by Mr. Kern. She admitted that she signed affidavits and the separation agreement in the Wood County dissolution. She acknowledged that their dissolution was finalized in Sandusky County two months before they dismissed the Wood County action, but denied that she was trying to prevent Reinbolt from intervening in Sandusky County. She claimed that it was coincidental that she filed in Sandusky County eight days after Reinbolt was permitted by the court to intervene in the Wood County action.

{¶ 22} Mrs. Kern admitted that she signed the quitclaim deeds in February 2007. She admitted that Mr. Kern gave her no money in exchange for her transfer of the

properties to him. She said he gave her "freedom" in exchange for the properties. She acknowledged that there is a judgment against her but claimed not to have known that a lawsuit was forthcoming at the time she transferred properties to Mr. Kern. She said she is unable to pay her debts and has no assets with which to pay the judgment.

{¶ 23} Mrs. Kern testified that her son and husband own the property on which she lives. She said that her son owns the particular spot on the Sandusky County property where she resides but admitted that the land is not legally divided in such a way. She claimed that she pays her son $100 per month as rent. She did not know if her son's name is on the deed but said he is a party to the loan on the property. She testified that the validity of her son's transfer of the property to his father is being questioned in his divorce proceedings with his wife, Michelle.

{¶ 24} Mr. Kern testified. He clarified that his son owns no interest in the properties but that the loan for the Sandusky County property is in his son's name. He claimed that although Mrs. Kern's name was originally on the deeds, he paid for the properties with his disability payments. He, too, confirmed that he paid her nothing in exchange for the quitclaim deeds. He said that Mrs. Kern walked away with no property at all after the dissolution except her clothing and personal effects. Mr. Kern also testified that he and Mrs. Kern had maintained separate bank accounts since 1989 or 1990. He confirmed that they were married at the time of the real estate transfers and admitted that they bought the properties in 1988 or 1989—before he became disabled in 1990. He insisted that the transfer of properties was in February 2007, before the lawsuit

was filed, but acknowledged that the deed for one of the properties was not recorded until approximately a month after the lawsuit was filed. He claimed he did not know about the lawsuit. He said that he was not aware that there was a claim or potential claim against Mrs. Kern at the time of the February 2007 transfers.

{¶ 25} Mr. Kern verified that Mrs. Kern lives on the Sandusky County property. He said she can be in his house whenever she wants and that they wanted to insulate their grandchildren from the divorce. He also confirmed that he owns the camper she lives in but said his son is responsible for dealing with Mrs. Kern as to her residing on the Sandusky County property. With respect to the Sandusky County property, he said that the February 2007 transfer was precipitated by his son and daughter-in-law's divorce.

{¶ 26} Mr. Kern insisted that he and Mrs. Kern filed their dissolution action in Sandusky County because they thought Wood County lost jurisdiction because they had not finalized their dissolution within 90 days of filing. He knew that Reinbolt had intervened in the Wood County action.

{¶ 27} Arlene St. Clair testified in rebuttal. Her testimony focused on the facts underlying the decision to remove Mrs. Kern as the representative payee for her sister's and her social security checks. Before she testified, appellants' counsel challenged her competency to testify under Evid.R. 601(A). The trial court overruled the objection explaining (1) that she had been competent to testify in the 2007 damages hearing and (2) that the court would reconsider if Ms. St. Clair seemed confused.

{¶ 28} After Reinbolt's case-in-chief, appellants moved for a directed verdict, which was denied. The jury ultimately found in Reinbolt's favor and awarded $11,989.35 in actual damages, $35,968.05 in punitive damages, and attorneys fees in an amount to be decided by the court.

F. The Award of Attorneys Fees

{¶ 29} The court conducted a hearing on Reinbolt's motion for attorneys fees on June 27, 2012. Reinbolt presented expert testimony from Ohio attorney William Hayes. Mr. Hayes testified that the invoices submitted by Reinbolt's attorney, Mr. Searfoss, for 110.95 hours at $200 per hour were reasonable. Mr. Hayes was questioned about the fact that Reinbolt and Mr. Searfoss had a contingent fee agreement. Mr. Hayes testified that the court should take both calculations into account, along with the factors described under Prof.Cond.R. 1.5(a), in determining Mr. Searfoss' reasonable fee. Under the contingent fee agreement, Mr. Searfoss would be owed 40 percent of Reinbolt's recovery, approximately $19,183. At an hourly rate of $200 per hour for 110.95 hours, Mr. Searfoss would be owed $24,280. After review of the briefs of counsel and consideration of the expert testimony, the trial court awarded Reinbolt attorneys fees of $21,000 for Searfoss' invoices.

{¶ 30} In addition to Mr. Searfoss' fee, Reinbolt also sought attorneys fees for amounts charged by Mr. Hanna in both case No. 2007CV0830 and case No. 2010CV0507, even though he had been disqualified due to his firm's conflict of interest. Reinbolt presented evidence that Mr. Hanna billed fees of $39,737.04 in case

2007CV0830 and $22,190 in case No. 2010CV0507. Appellants argued that they should not have to pay fees in case No. 2007CV0830 because attorneys fees had already been denied in that case and because Mr. Kern had not been a party to that suit and could not be liable for attorneys fees in a case to which he was not a party. With respect to case No. 2010CV0507, appellants argued that they could not be required to pay fees to an attorney who had been disqualified for failing to discover a conflict check of interest.

{¶ 31} The court declined to award fees in the first matter and with respect to the second matter, the trial court ordered appellants to pay a reduced fee to Mr. Hanna of $7,000.

II. LAW AND ANALYSIS

ASSIGNMENT OF ERROR NO. 1: The trial court erred to the prejudice of defendants-appellants in allowing the testimony of plaintiff-appellant [sic] Arlene St. Clair without first making a determination in the present proceeding of her competency when such issue was raised by defendants-appellants prior to her testifying.

{¶ 32} Under Evid.R. 601(A), every person is presumed competent to testify as a witness except "those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Where the trial court has determined that a witness is competent to testify, that decision will not be reversed on appeal unless the court has abused its discretion. *State v. Marshall,* 191 Ohio App.3d 444, 2010-Ohio-5160,

946 N.E.2d 762, ¶ 12 (2d Dist.), citing *State v. Clark*, 71 Ohio St.3d 466, 469, 644 N.E.2d 331 (1994).

{¶ 33} "The criteria for determining incompetence for purposes of establishing a guardianship are substantially different than those used in establishing whether a witness is competent to testify at trial." *Id.* at ¶ 13. A person is "incompetent" for purposes of establishing a guardianship if he or she "is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide." *Id.*, citing R.C. 2111.01(D). This is different than the standard provided in Evid.R. 601(A). One is not necessarily determinative of the other. *Id.* at ¶ 14.

{¶ 34} R.C. 1.02(C) defines "of unsound mind" to include all forms of mental retardation and derangement. The judgment entry appointing Reinbolt guardian for the St. Clair sisters (plaintiff's exhibit No. 10) indicates that the primary purpose for establishing the guardianship was to pursue civil action for the misappropriation of social security payments. The entry does not indicate whether the St. Clair sisters were "of unsound mind" as defined by Ohio law and as used in Evid.R. 601(A). Arlene St. Clair is, therefore, presumed to be competent to testify.

{¶ 35} In addition, upon appellants' request that a competency hearing of Arlene St. Clair be conducted, the trial court indicated that Ms. St. Clair had been competent to

testify in case No. 2007CV0830 and indicated that it would reconsider and terminate questioning if Ms. St. Clair's responses exhibited confusion or non-responsiveness. Although appellants point to certain passages in her testimony that they believe demonstrate her lack of competence, the trial judge who observed Ms. St. Clair's testimony found nothing to indicate that she was unable to understand and to testify truthfully as to the topics about which she was questioned. Reviewing the testimony, we cannot say that the trial court abused its discretion. Ms. St. Clair testified about her financial struggles and provided details about the amount and timing of the payments she received. Most of her testimony demonstrated an understanding of what was being asked of her and at certain points, when questions were rephrased for her, she was able to provide appropriate responses.

{¶ 36} Finally, Ms. St. Clair was called only as a rebuttal witness. Her testimony revolved around the facts leading to the underlying action in which Reinbolt obtained the judgment on her behalf. She was not questioned about the Kerns' transfer of property or about the dissolution proceedings through which Mrs. Kern disposed of her property interests. As such, her testimony was largely irrelevant to the issues pertinent to the present case and did not go to the elements of the fraudulent transfer claims.

{¶ 37} Appellants' first assignment of error is found not well-taken.

ASSIGNMENT OF ERROR NO. 2: The trial court erred to the prejudice of defendants-appellants in overruling the motion for a directed

verdict of the defendants-appellants at the close of the plaintiffs-appellees [sic] case in chief.

{¶ 38} The standard of review for a motion for directed verdict is analogous to that of a motion for summary judgment. *Ohio Cas. Ins. Co. v. D & J Distrib. & Mfg., Inc.*, 6th Dist. No. L-08-1104, 2009-Ohio-3806, ¶ 29. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). Similarly, in determining a motion for directed verdict, after construing the evidence most strongly in favor of the party against whom the motion is directed, the trial court must find that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to that party. Civ.R. 50(A)(4).

{¶ 39} Under R.C. 1336.04(A)(1), a creditor can establish a claim for fraudulent transfers by showing that the debtor had an actual intent to commit fraud in the transfer of an asset. It states:

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor * * *.

{¶ 40} As we recognized in *Blood v. Nofzinger,* 162 Ohio App.3d 545, 557-59, 2005-Ohio-3859, 834 N.E.2d 358, ¶ 36 (6th Dist.), "while the creditor seeking to set aside a transfer as fraudulent has the ultimate burden of proving, by clear and convincing evidence, the debtor's intent pursuant to R.C. 1336.04(A)(1), Ohio has recognized that proof of actual intent will often be impossible to procure." Thus, direct evidence of fraudulent intent is not required. *Id*. Actual fraudulent intent may be established by demonstrating "badges of fraud." *Id.* Those "badges of fraud" are statutorily defined in R.C. 1336.04(B):

> (B) In determining actual intent under division (A)(1) of this section, consideration may be given to all relevant factors, including, but not limited to, the following:
>
> (1) Whether the transfer or obligation was to an insider;
>
> (2) Whether the debtor retained possession or control of the property transferred after the transfer;
>
> (3) Whether the transfer or obligation was disclosed or concealed;
>
> (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) Whether the transfer was of substantially all of the assets of the debtor;
>
> (6) Whether the debtor absconded;
>
> (7) Whether the debtor removed or concealed assets;

(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

{¶ 41} If the creditor demonstrates a sufficient number of "badges," an inference of actual fraud arises and the burden then shifts to the debtor to prove that the transfer was not fraudulent. *Blood* at ¶ 36, citing *Baker & Sons Equip. Co. v. GSO Equip. Leasing, Inc.*, 87 Ohio App.3d 644, 650, 622 N.E.2d 1113 (10th Dist.1993); *Aristocrat Lakewood Nursing Home v. Mayne*, 133 Ohio App.3d 651, 662, 729 N.E.2d 768 (8th Dist.1999); *Abood v. Nemer*, 128 Ohio App.3d 151, 713 N.E.2d 1151 (9th Dist.1998). A party need not demonstrate the presence of all badges of fraud; as few as three badges have been held sufficient to constitute clear and convincing evidence of actual fraudulent intent. *Bank One, N.A. v. Plaza East*, 10th Dist. No. 97APE02-184, 1997 WL 710664 (Nov. 10, 1997).

{¶ 42} Here, appellee elicited testimony and admitted evidence demonstrating the presence of numerous badges of fraud:

{¶ 43} 1336.04(B)(1): Linda Kern's transfer of property was to her then-husband, an insider under R.C. 1336.01(G)(1)(a). *See, e.g., Individual Business Servs. v. Carmack*, 2d Dist. No. 24085, 2011-Ohio-1824, ¶ 63 (acknowledging that spouse was "insider" under R.C. 1336.01(G)(1)(a)).

{¶ 44} 1336.04(B)(2): Mrs. Kern continued to reside on the land in the RV that she had transferred to her now ex-husband.

{¶ 45} 1336.04(B)(3): The Kerns first filed a petition for dissolution in Wood County, but eight days after Reinbolt was permitted by the court to intervene in that action, they quickly and quietly petitioned for and finalized their dissolution in Sandusky County while the Wood County action remained pending.

{¶ 46} 1336.04(B)(4): Reinbolt filed his lawsuit against Mrs. Kern approximately one month before appellants filed the quitclaim deed for the Freedom Township property with the recorder's office. There was evidence that Mrs. Kern had reason to be aware that Reinbolt and the St. Clair sisters were questioning the handling of their social security payments at the time the other two pieces of land were transferred.

{¶ 47} 1336.04(B)(5): After transferring her property interests to Mr. Kern, Mrs. Kern's only remaining property consisted of her clothes and personal effects.

{¶ 48} 1336.04(B)(8): Mrs. Kern transferred her interests in three pieces of land, two vehicles, and an RV, with a total value of $466,000, to her husband in exchange for

no consideration, despite having acquired the property during the course of their 37-year marriage.

{¶ 49} 1336.04(B)(9): Upon transferring her ownership interest in the land, vehicles, and RV, Mrs. Kern became insolvent.

{¶ 50} Reinbolt's evidence was sufficient to withstand appellants' motion for directed verdict. Appellants' second assignment of error is found not well-taken.

> **ASSIGNMENT OF ERROR NO. 3**: The trial court erred in granting attorneys fees to the disqualified attorney where the disqualification arose from representation of a party by the attorneys [sic] firm who was an indispensable party defendant in this action.

{¶ 51} An award of attorneys fees is a matter within the sound discretion of the trial court which will not be reversed absent an abuse of that discretion. *Julian v. Creekside Health Ctr.*, 7th Dist. No. 03MA21, 2004-Ohio-3197, ¶ 86, citing *Swanson v. Swanson*, 48 Ohio App.2d 85, 90, 355 N.E.2d 894 (8th Dist.1976). An "abuse of discretion" connotes "an unreasonable, arbitrary or unconscionable attitude upon the part of the court." *Kaffeman v. Maclin*, 150 Ohio App.3d 403, 2002-Ohio-6479, 781 N.E.2d 1050, ¶ 19 (8th Dist.).

{¶ 52} The trial court found that there was, in fact, a conflict of interest requiring appellants' original attorney, Drew Hanna, to decline or discontinue representing him. After hearing expert testimony as to the reasonableness of attorneys fees, the trial court did not require appellants to pay Mr. Hanna for any portion of the over $37,000 in fees

incurred in case No. 2007CV0830. It required appellants to pay only $7,000 of the $22,000 that Mr. Hanna billed in case No. 2010CV0507.

{¶ 53} Some courts have addressed the issue of whether a *client* should be forced to pay attorneys fees to his or her attorney who has been disqualified because of a conflict. It appears that no Ohio state court has addressed the issue of whether a non-prevailing party can properly be ordered to pay attorneys fees to a lawyer who was disqualified from representing the prevailing party because of a pre-existing conflict with the non-prevailing party. The considerations are somewhat different under these circumstances. The award of attorneys fees to the prevailing party being somewhat punitive in nature, the non-prevailing party should not necessarily benefit from the fact that, but for the alleged violation of professional responsibility by the original attorney, he or she would have been required to pay a greater fee to the prevailing party's attorney. On the other hand, rewarding the disqualified attorney is not a desirable result either.

{¶ 54} In this case, appellants waited almost a year before raising the issue of Mr. Hanna's conflict and moving for his disqualification. In addition, appellants provided no evidence of harm caused by Mr. Hanna representing Reinbolt. So although we do not believe that Mr. Hanna should be rewarded for his lack of diligence by an award of his entire fee, we find that the trial court's award of the reduced attorneys fee of $7,000 was not so unreasonable, arbitrary or unconscionable as to constitute an abuse of discretion.

{¶ 55} Appellants' third assignment of error is found not well-taken.

ASSIGNMENT OF ERROR NO. 4: The trial court erred in granting a separate award of attorneys fees to a party that had a contingency fee agreement with the attorney.

{¶ 56} As with appellants' third assignment of error, we review appellants' fourth assignment of error under an abuse of discretion standard.

{¶ 57} A contingency fee agreement is not necessarily controlling in determining the amount of attorneys fees to be awarded. *Julian*, 7th Dist. No. 03MA21, 2004-Ohio-3197, at ¶ 106. A trial court is not required to award attorneys fees in a certain amount merely because that was the amount agreed upon between the party seeking fees and his or her attorneys. *Id.*, citing *Galmish v. Ciccihini*, 90 Ohio St.3d 22, 35, 734 N.E.2d 782 (2000). If other factors suggest that the fee should be more than the contingency fee, then it is not an abuse of discretion for the trial court to award a different amount than originally agreed upon between the party and his attorney. *Id.*

{¶ 58} In determining the fee, a trial court must first calculate the number of hours reasonably spent on the matter, multiply it by a reasonable hourly rate, and then modify the calculation after taking into consideration the various factors set forth in Prof.Cond.R. 1.5(a). *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 569 N.E.2d 464 (1991) (considering the factors set forth in analogous DR-2-106(B) in determining the reasonableness of attorney fees). Those factors are:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

{¶ 59} The trial court heard testimony from attorney William Hayes who appropriately explained that this was the standard to be applied. He opined as to the reasonableness of the hours and the rate for Mr. Searfoss' services and although he acknowledged that there was an issue with Mr. Hanna's fees (as addressed above), he testified that there was no reason to deem Mr. Searfoss' fees unreasonable under the rules. He agreed that the court should also take into account the contingency fee

agreement. The trial court, in fact, did this and arrived at a balance that it determined to be appropriate—an amount that was approximately $3,000 less than what Reinbolt requested and approximately $2,000 more than would have been owed to counsel under the contingent fee agreement. We do not find the trial court's decision to be unreasonable, arbitrary, or unconscionable.

{¶ 60} Appellants' fourth assignment of error is found not well-taken.

> **ASSIGNMENT OF ERROR NO. 5**: The trial court erred to the prejudice of defendants-appellants in instructing the jury on money damages, where the amended complaint requested only a foreclosure on the premises.

{¶ 61} The Uniform Fraudulent Transfer Act provides not only for the setting aside of a fraudulent transfer to the extent necessary to satisfy a debt; a creditor may also obtain "any other relief that the circumstances may require." R.C. 1336.07(A)(3)(c). Other laws, including the common law of fraud, supplement the UFTA. R.C. 1336.10. The amount of damages recoverable is fact-specific and requires consideration of what is necessary to compensate the creditor for harm flowing from the fraud. *Blood,* 162 Ohio App.3d 545, 2005-Ohio-3859, 834 N.E.2d 358, at ¶ 59. "A person injured by fraud is entitled to such damages as will fairly compensate him for the wrong suffered; that is, the damages sustained by reason of the fraud or deceit, and which have naturally and proximately resulted therefrom." *Foust v. Valleybrook Realty Co.*, 4 Ohio App.3d 164, 166, 446 N.E.2d 1122 (6th Dist.1981).

{¶ 62} If appropriate, the trial court may also determine whether punitive damages and attorney fees are warranted. *Blood,* 162 Ohio App.3d 545, 2005-Ohio-3859, 834 N.E.2d 355, at ¶ 60. Under Ohio law, punitive damages and attorney fees may be awarded in fraudulent conveyance cases. *Aristocrat Lakewood Nursing Home,* 133 Ohio App.3d at 672, 729 N.E.2d 768. In order to recover punitive damages, a creditor must establish the underlying cause of action for the fraudulent transfer *and* that the debtor acted with actual malice when making the fraudulent transfer. *Id.* at 672-673. "Actual malice" requires proof that the debtor acted with (1) hatred, ill will, or a spirit of revenge, or (2) a conscious disregard for the rights of others that had a great probability of causing substantial harm. *Id*. at 673.

{¶ 63} Contrary to appellants' fifth assignment of error, Reinbolt in his amended complaint did, in fact, request relief in addition to foreclosure on the premises. Reinbolt requested "any other relief the circumstances may require," as provided for by R.C. 1336.07(A)(2)(c), punitive damages, and attorney fees. In any event, at the trial, appellants made no objection to the trial court's instruction. The court's instruction was appropriate and the jury's award of these damages was requested by Reinbolt and was permissible.

{¶ 64} Appellants' fifth assignment of error is found not well-taken.

III. CONCLUSION

{¶ 65} The court finds appellants' five assignments of error not well-taken, and affirms the orders of the Wood County Court of Common Pleas. The costs of this appeal are assessed to appellants pursuant to App.R. 24.

Judgments affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE