

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 2016

Diane M. Fremgen
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. 2015AP2383

Cir. Ct. No. 2012CV2146

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BRUCE W. BULLAMORE AND RUSSELL C. BULLAMORE,

PLAINTIFFS-APPELLANTS,

V.

**ROBERT W. BEDNAR, INDIVIDUALLY, AND IN HIS CAPACITY AS
SUCCESSOR CO-TRUSTEE OF THE ELEANOR H. ROBSEL REVOCABLE
TRUST DATED JANUARY 25, 2008, AS AMENDED BY THE FIRST
AMENDMENT TO TRUST DATED DECEMBER 3, 2008, ROBBYN M. SHYE,
ESTATE OF RICHARD J. ROBSEL AND NEIL F. GUTTORMSEN, IN HIS
CAPACITY AS TRUSTEE OF THE RUSSELL W. BULLAMORE AND
ELEANOR H. BULLAMORE REVOCABLE TRUST DATED JUNE 3, 2003,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County:
EMILY S. MUELLER, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Brothers Bruce W. and Russell C. Bullamore appeal from an order for summary judgment dismissing their claims against Robert Bednar, Robbyn Shye, and Richard Robsel, the beneficiaries of their deceased former stepmother's trust. The Bullamore brothers maintain that they were entitled to receive one-half of their former stepmother's assets and that the circuit court improperly granted summary judgment in favor of Bednar, Shye, and Robsel. We disagree and affirm.

¶2 Russell W. Bullamore married Eleanor H. Bednar. It was the second marriage for both and each had two children: Russell's were Bruce and Russell, Jr.; Eleanor's were Robert Bednar and Robbyn Shye. In 2003, the couple created the Russell W. Bullamore and Eleanor H. Bullamore Revocable Trust (the Bullamore Trust). Under its terms, on the death of the first settlor the trust would become irrevocable and the surviving settlor would be made trustee. The surviving settlor would have a limited right to invade the corpus during his or her lifetime and on his or her death; the remainder was to be divided equally among the four children, Bruce, Russell, Jr., Bednar, and Shye.

¶3 Along with the Bullamore Trust, Russell and Eleanor executed a Declaration of Transfer and Addendum to the Trust (Declaration). The Declaration was effectively a marital property agreement and purported to transfer all property presently belonging to or later acquired by Russell and/or Eleanor to the Trust.

¶4 Upon Russell's death in 2006, various assets transferred directly to Eleanor by virtue of her joint tenancy or beneficiary designation.¹ The Bullamore Trust was never the titled owner or named beneficiary of these disputed assets. Eleanor retained the assets. She later married Richard Robsel and in January 2008, created and funded the Eleanor H. Robsel Revocable Trust (the Eleanor Trust). She designated the Eleanor Trust as the beneficiary of various assets, including those that passed to her upon Russell's death. Bednar, Shye, and Robsel were named as beneficiaries of the Eleanor Trust; the Bullamore brothers were excluded. Upon Eleanor's death in 2011, numerous assets transferred into the Eleanor Trust by virtue of their beneficiary designations and, pursuant to the Trust's terms, were distributed to Bednar, Shye, and Robsel. Other assets transferred directly to Bednar and Robsel by virtue of their joint tenancy. At Eleanor's death, the only property titled in the name of the Bullamore Trust was a duplex, which passed to the Bullamore brothers.

¶5 The Bullamore brothers commenced suit against defendants-respondents Bednar, Shye, and Robsel, alleging claims of implied contract and conversion.² Relying on the Declaration to the Bullamore Trust, they sought one-half of the assets that passed to the defendants-respondents upon Eleanor's death. The parties filed competing summary judgment motions along with supporting affidavits and briefs. The circuit court concluded that Bednar, Shye, and Robsel

¹ These assets comprised a bank account, municipal funds, five annuities, and two life insurance policies.

² The Bullamore brothers originally pled six claims and named additional defendants. The complex procedural history of this case includes motions to dismiss, several rounds of amended pleadings, and a prior appeal. See *Bullamore v. Bednar*, No. 2014AP232, unpublished slip op. (WI App Nov. 19, 2014).

were entitled to summary judgment for two reasons. First, the court determined that the Bullamores' pleadings failed to set forth a colorable claim against Bednar, Shye, or Robsel. Observing that the crux of the implied contract claim was that the defendants "received and retained assets without having the legal right to do so," the court stated:

This is really not an implied contract claim. The cases on implied contract talk about having a meeting of the minds, and there is a contract that is implied in fact, even though there may not be the written document or an actual contract claim. So as a claim of implied contract, I do not believe that what is alleged meets the definition or elements of implied contract.

¶6 The circuit court similarly concluded that the Bullamores failed to state a viable conversion claim as to Bednar and Robsel, which it summarized as alleging that they "converted the assets of Eleanor's trust to themselves in violation of the terms of said trust." The court explained:

The facts here do not, it seems to me, establish a violation of the terms of Eleanor's trust. There is within this complaint an allegation of the terms of the original trust, the Bullamore Trust were violated, but I don't believe we can characterize this as providing even allegations that Bednar and Robsel violated the terms of the Eleanor trust.

¶7 As to both claims, the circuit court concluded that the Bullamores sued the wrong party:

I'm not satisfied that these were correctly pled. The wrongdoing appears to be that of Eleanor, if indeed there was any wrongdoing. But again, her estate is not named, her trust is not named, and the claims here are made, instead of being against Eleanor, are made against essentially the end possessors. And they're made against the possessors of the assets that it is really claimed that Eleanor converted.

¶8 Second, the circuit court concluded that the Declaration could not operate to change the ownership of the disputed assets from Eleanor to the Bullamore Trust. Citing *Reichel v. Jung (In re Estate of Jung)*, 2000 WI App 151, 237 Wis.2d 853, 616 N.W.2d 118, the circuit court determined that the disputed assets naming Eleanor as the beneficiary or co-owner were contractual arrangements governed by WIS. STAT. §705.04 (2013-14)³ (right of survivorship in joint accounts) and WIS. STAT. § 705.10 (nonprobate transfers on death), which by their nature defeated a marital agreement seeking to transfer funds otherwise:

So I believe that *Jung* is a controlling case here and that under the circumstances of this case, and looking as I did at the marital agreement in *Jung* and the marital agreement in this case, I'm simply satisfied that the beneficiary designations and the joint account designations trump this marital agreement and the addendum and that under those circumstances, the defendants are entitled to summary judgment.

¶9 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Frost v. Whitbeck*, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325, *aff'd*, 2002 WI 129, 257 Wis. 2d 80, 654 N.W.2d 225. We first examine the pleadings to determine whether the complaint states a claim and whether the answer joins a material issue of fact or law. *Id.* If an issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for summary judgment and, if so, whether the opposing party's submissions establish a disputed material fact that would entitle the opposing party to a trial. *Id.*; *see also* WIS. STAT. § 802.08(2).

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶10 On appeal, the Bullamores maintain that pursuant to the Declaration, they are entitled to one-half of the assets that passed to Bednar, Shye, and Robsel upon Eleanor's death (the disputed assets). We disagree and conclude that the circuit court properly granted summary judgment in favor of Bednar, Shye, and Robsel. First, we agree that the Bullamores failed to state colorable claims of implied contract or conversion against the three defendants-respondents. As explained by the circuit court, at best, the complaint established a cause of action against Eleanor, not the end possessors of the disputed assets.

¶11 Second, we agree that *Jung* is controlling and defeats the Bullamores' claims. In *Jung*, the husband and wife entered into a marital property agreement (MPA) for purposes of identifying and classifying their individual and marital property. *Jung*, 237 Wis. 2d 853, ¶3. The husband died leaving a will which bequeathed his individual property to his children from a prior marriage, and an annuity. *Id.*, ¶¶1, 8-9. Though the MPA identified the annuity as the husband's individual property, the annuity itself listed his wife as co-annuitant. *Id.*, ¶¶6-7. The annuity passed to the wife as co-owner and the children filed suit, asserting that the annuity transferred to the husband's estate under the MPA and that the wife was required to relinquish her ownership interest. *Id.*, ¶¶1, 9-10, 12. The *Jung* court sided with the wife, determining that under WIS. STAT. § 705.20 (1995-96),⁴ the terms of the annuity itself prevailed over any contrary intent in the MPA:

We agree that in some cases a marital agreement must yield to the terms of a previously agreed-upon contractual arrangement. As we have determined, under WIS. STAT.

⁴ 2005 Wis. Act 206 renumbered WIS. STAT. § 705.20 as § 705.10; the relevant text is identical.

§ 705.20, a contractual arrangement that creates a nonprobate transfer of property will defeat a marital agreement that does not make such a transfer. Under WIS. STAT. § 705.04(1), a joint account with the right of survivorship will defeat a marital agreement that seeks to transfer funds otherwise. We acknowledge that this result places the onus on married couples to be knowledgeable of the terms of contractual arrangements which are included within their marital agreements. This result, however, does not strike us as particularly troubling because it will encourage married couples to become more aware of the terms of their prior contractual arrangements and to express more clearly their intentions in planning their estate.

Jung, 237 Wis. 2d 853, ¶¶2, 30.

¶12 In the instant case, the annuities, life insurance policies, bank accounts and other disputed assets first named Eleanor, then the Eleanor Trust and Bednar, Shye, and Robsel as beneficiaries or joint tenants. The Bullamore Trust was never a named owner or beneficiary of the disputed assets, which all passed via nonprobate transfer. As in *Jung*, the disputed assets' intrinsic joint tenancy and beneficiary designations prevail over the Declaration's extrinsic attempt to control their distribution.

¶13 The Bullamores attempt to distinguish the Declaration on grounds that the MPA in *Jung* purported to classify property and did not seek to transfer the ownership of assets. This distinction is without a difference. As in *Jung*, the extrinsic Declaration cannot and does not override the nonprobate transfers to the beneficiary or joint tenant named in the instrument itself.

By the Court.—Judgment affirmed.

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

