## MEMORANDUM DECISION





ATTORNEYS FOR APPELLANTS

Nathan S.J. Williams
Shannon K. Connors
Shambaugh, Kast, Beck & Williams, LLP
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Emily C. Guenin-Hodson
Mark C. Guenin
Guenin Law Office, P.C.
Wabash, Indiana

# IN THE COURT OF APPEALS OF INDIANA

The Estate of Dorothy Lease, With Sue Sailors As Personal Representative, and The Lease Family Trust Number One, Susan Sailors as Trustee,

*Appellants-Defendants,*

v.

The Estate of Juanita Jane Hershey,

*Appellee-Plaintiff.*

October 4, 2023

Court of Appeals Case No. 22A-PL-2186

Appeal from the Fulton Circuit Court

The Honorable Stephen R. Kitts II, Special Judge

Trial Court Cause No. 25C01-1908-PL-514

**Memorandum Decision by Judge Foley**
Judges Vaidik and Tavitas concur.

**Foley, Judge.**

[1] The Estate of Dorothy Lease, with Sue Sailors as personal representative, and The Lease Family Trust Number One, Susan Sailors[1] as Trustee (collectively "the Lease Estate") appeal the trial court's July 6, 2021 Order ("Summary Judgment Order") and August 15, 2022 Order ("Findings and Conclusions"). The Lease Estate raises the following issues, which we restate as:

> I. Whether the trial court erred when it denied the Lease Estate's motion for summary judgment;
>
> II. Whether the trial court's judgment was clearly erroneous as it relates to: (A) the ownership of certain farm bank accounts; (B) the running and expiration of the statute of limitations; and (C) the award of treble damages and attorneys' fees; and
>
> III. Whether the trial court abused its discretion by excluding certain witness testimony.

We affirm in part, reverse in part, and remand with instructions.

---

[1] Sue Sailors and Susan Sailors refer to the same person, who we will refer as "Sailors" moving forward. We also note that Sailors is sometimes referred to as "Lavonne" in the record before us. Sailors is not named as a defendant in her individual capacity.

## Facts and Procedural History

[2] Dorothy Lease and William Hershey inherited real estate located in Fulton County, Indiana ("the Farm") from their grandfather.[2] The Farm consisted of approximately 144 acres, of which 122 acres were tillable. Dorothy Lease (individually "Dorothy") was married to Harris Lease, and William Hershey was married to Juanita Hershey (individually "Juanita"). The Leases and the Hersheys each owned an undivided one-half interest in the Farm as tenants by the entirety (husband and wife). On September 27, 1995, the Leases and the Hersheys entered into an Option to Purchase Real Estate, whereby the Hersheys granted the Leases, or the survivor of them, the option to purchase the Hershey's share of the Farm upon the passing of both William and Juanita. Harris Lease and William Hershey died first, leaving Dorothy and Juanita as the surviving joint tenants for the Farm. Juanita resided in Arizona and Dorothy resided in Fulton County.

[3] Beginning in 2009, the tillable acreage of the Farm was cash leased to Timothy Sailors, Dorothy's grandson, at the rental rate of $115.00 per acre. On December 1, 2017, Dorothy entered into a second lease agreement (the "2017 Farm Lease Agreement") with Timothy Sailors, for a three-year term ending December 31, 2020, and at the rental rate of $125.00 per acre. Dorothy signed the 2017 Farm Lease on behalf of Juanita as Juanita's attorney in fact. Juanita

---

[2] Their brother was also included in the inheritance, but William Hershey and Dorothy Lease bought his interest prior to his death. *See* Tr. Vol. 2 pp. 148–149.

had not executed a general power of attorney for Dorothy, but rather a limited power of attorney for the specific purpose of conducting banking for Juanita at Wells Fargo Bank.

[4] In order to manage the farm, Dorothy and Juanita maintained two joint bank accounts ("Farm Accounts")[3] with funds generated from farming operations. On July 1, 2008, Dorothy and Juanita executed a Relationship Change Application, adding Sailors (Dorothy's daughter and Timothy Sailors's mother) as a "Secondary Joint Owner [ ]" to accounts ending in 6561 and 5420. Ex. Vol. 2 pp. 32–39. Dorothy and Juanita also owned a joint certificate of deposit ("CD") with funds generated from the Farm.[4] Dorothy and Sailors then used funds from the Farm Accounts to pay for Dorothy's attorney's fees and fees for a survey and appraisal and paid certain expenses for the maintenance of the Farm without consulting Juanita.

[5] Juanita was in failing or poor health during much of this time. In 2009, she suffered two strokes and a heart attack. In October of 2017, a conservatorship was established for Juanita in Arizona and William Hershey (Juanita's son) was Juanita's appointed conservator ("the Conservator"). On December 14,

---

[3] Accounts ending in 6561 and 5420, respectively.

[4] The information regarding which account number refers to the CD is not clear from the record. There is one CD with two different account endings: 4212 and 0300. Sailors's name appears on documents with the account ending in 0300, but not on the documents with the account ending in 4212. *See* Appellant's App. Vol. 3 pp. 79; 108; *see also* Ex. Vol. 1 p. 72. The trial court identifies the CD as "4212/0300." Appellant's App. Vol. 2 p. 44.

2018, Juanita passed away and Pamela Heath ("Heath")[5] was appointed as the personal representative for Juanita's Estate (collectively "the Hershey Estate"). Dorothy established the Lease Family Trust (Number One) and conveyed her one-half interest in the Farm to the Trust.[6]

[6] On August 30, 2019, the Hershey Estate filed a complaint against Dorothy and the Lease Family Trust (Number One) alleging: Count I, partition;[7] Count II, misappropriation of funds; Count III, fraud and misrepresentation; and Count IV, breach of fiduciary duty and willful mismanagement. A courtesy copy of the complaint was sent to Dorothy and the Lease Family Trust (Number One)'s counsel. Three days after the complaint was filed, Dorothy entered into a new farm lease agreement (the "2019 Farm Lease Agreement") with Timothy Sailors, still charging $125.00 per acre, but for a term of seven years.[8]

[7] On July 20, 2020, Dorothy passed away and the Lease Estate was substituted as a party.[9] After the death of Dorothy and Juanita, Sailors claimed that she was the owner of the Farm Accounts as the survivor of both Juanita and Dorothy.

---

[5] Heath is Juanita's daughter.

[6] The record does not indicate the date the trust was established. Sailors serves as Trustee of the Lease Family Trust (Number One).

[7] Count I is not a subject of this appeal.

[8] The 2017 Farm Lease Agreement had not yet expired, and no terms were changed. Prior to the 2019 Farm Lease Agreement, Timothy Sailors "rented the [F]arm for a two (2) year period that auto renewed unless terminated[.]" Tr. Vol. 3 p. 81. The 2019 Farm Lease Agreement was prepared by counsel for Dorothy and the Lease Family Trust (Number One). The Hershey Estate was not consulted.

[9] Moving forward, any facts involving the Lease Estate and the Lease Family Trust (Number One) will be referred to as: the Lease Estate.

On November 6, 2020, the Lease Estate moved for summary judgment and designated the following evidence: an affidavit from Sailors and portions of Heath's deposition. The Hershey Estate filed its response to the Lease Estate's motion for summary judgment and designated the following evidence: an affidavit from Heath, portions of Sailors's and A.J. Jordan's depositions. On June 22, 2021, a hearing on the motion for summary judgment and sanctions was held. On July 6, 2021, the trial court issued the Summary Judgment Order, which denied the Lease Estate's motion for summary judgment.

[8] On March 28 and 29, 2022, a bench trial was held. At the outset of trial, the Hershey Estate requested—and the trial court ordered—a separation of witnesses. At the start of the second day of trial, the Hershey Estate moved for exclusion of two witnesses whom the Lease Estate intended to call because they violated the separation of witnesses order. The trial court granted the motion and excluded the two witnesses from testifying. On August 15, 2022, the trial court issued its Findings and Conclusions, which stated in pertinent part:

> II. STATEMENTS OF LAW
>
> . . . .
>
> C. Fiduciary Duties
>
> The duties the parties herein owed to one another in this arrangement are founded in common law. Here, [the Hershey Estate] rel[ies] on a series of cases: *Ruse v. Bleeke*, 914 N.E.2d I, 11 (Ind. Ct. App. 2009); In re Rueth Dev. Co., 976 N.E.2d 42, 53

(Ind. Ct. App. 2012); and *Bunger v. Demming*, 40 N.E.3d 887, 899 (Ind. Ct. App. 2015.)

*In re Rueth* specifically relies on IC 23-4-1 *et al*, the Uniform Partnership Act of Indiana. The Court's position is that these principles are applicable herein.

D. Interest

Indiana Law provides for the award of prejudgment interest, where exact amounts for determining such interest can be determined. The annual rate of interest applicable herein is eight percent (8%.) IC 34-51-4- *et al*; IC 24-4.6-1 *et al*. Specifically, [the Hershey Estate] cites *Sollers Point Co. v. L.M. Zeller*, 145 N.E.3d 790, 801–02 (Ind. Ct. App. 2020.)

E. Misconduct

Here, [the Hershey Estate] extensively cites multiple areas of the Law, to-wit: The Indiana Code of Professional Conduct 3.1; 3.2;3.3; IC 34-24-31-1; and common law definitions of fraud, specifically as defined in *Rice v. Strunk*, 670 N.E.2d 1280 (Ind. 1996.)

F. Intermingled Funds

The Court agrees that [the Lease Estate's] reliance on I.C. 32-17-11-18 to justify seizing jointly held funds is in error.

G. Statute of Limitations

The Court also agrees that any otherwise applicable Statute of Limitations can hardly apply here, where the circumstances that have resulted in the complaint continue and are ongoing.

III. CONCLUSIONS OF LAW

1. [The Lease Estate entered] into a land contract that benefitted their family at the expense of [the Hershey Estate], without [the Hershey Estate's] knowledge or consent, by giving themselves a land contract at substantially less than fair market value;[ ]

2. [The Lease Estate] have failed or refused in every way to abide by the terms of the original land contract;[ ]

3. Documents were signed for [Juanita] by parties with no authority to do so;[ ]

4. [The Lease Estate] repeatedly filed motions that were frivolous at best and spurious at worst, including but not limited to:

a) Citations for contempt without a legal basis;

b) Confidential settlement agreements not proper for the Court's consideration;

c) [The Lease Estate's] Mandatory Motion to Correct Error Under Trial Rule 59(A);

d) Corrected Motion for Mandatory Motion to Correct Error;

e.) Notice of Appeal;

f.) Corrected Notice of Appeal;

g.) Motion to Certify for Interlocutory Appeal;

h.) Motion to Disqualify [ ] Heath;

i.) Motion for a 2nd Trial Rule 16 Scheduling Conference;

j.) Motion to Compel a 2nd Deposition of [ ] Heath;

all of which had to be answered by [the Hershey Estate], regardless of their merit. What these flurries of Motions to the Court contained were not questions of fact or legal issues to be raised; they were endless and needless attempts to avoid and delay the proceedings, without a basis in Law.

5. [The Lease Estate] attempted to enter into evidence documents they knew were void at best, and fraudulent at worst;

6. [The Lease Estate] violated the Order for separation of witnesses during the final Hearings for this action.

[The Hershey Estate] has been subjected to four years of ridiculous and shocking behavior from [the Lease Estate] that served no purpose but to avoid a clearly stated obligation and create[d] four years of costly and unnecessary litigation. [The Lease Estate's] tactics of obstruction and delay have resulted in further expense to [the Hershey Estate] for a matter that should have been resolved in 2019. [The Lease Estate is] responsible for these expenses, and should therefore be liable for them.

IV. ORDER OF THE COURT

. . . .

2. [The Hershey Estate] is entitled to treble damages, enumerated as follows:

A) Lost rent of $58,377.00 and interest of $30,485.52. [The Lease Estate is [o]rdered to provide payment to [the Hershey Estate] in the amount of $88,862.52 resulting from

[the Lease Estate's] action in renting farm ground for less than the fair market value.

B) [The Hershey Estate] is entitled to receive $25,282.91 from [the Lease Estate] to compensate [the Hershey Estate] for [its] share of the farm accounts. [The Lease Estate is] [o]rdered to provide payment to [the Hershey Estate] in the amount of $25,282.91 for [the Hershey Estate's] share of the farm accounts.

C) [The Hershey Estate] is entitled to receive $18,557.38 from [the Lease Estate] to compensate [the Hershey Estate] for one-half of the expenses improperly paid from the farm accounts. [The Lease Estate is] [o]rdered to provide payment to [the Hershey Estate] in the amount of $18,557.38 for [the Hershey Estate's] share of expenses improperly paid from the farm accounts.

3. [The Hershey Estate] is entitled to receive $131,433.00 from [the Lease Estate] for attorneys' fees. Counsel for [the Hershey Estate] has filed an Affidavit in support of these fees, which is attached to this Order.

. . . .

ATTACHMENT B:

Table of Losses Due to Rental Agreement, plus interest

| YEAR | RENT CHARGED | FMV RENT | LOST RENT | INTEREST (8%) |
|---|---|---|---|---|
| 2009 | $115 | $165 | $165-$115 = $50<br>$50 x 122 A = $6,100<br>$6,100 ÷ 2 = **$3,050** | 12 yrs = **$2,928** |
| 2010 | $115 | $165 | $165-$115 = $50<br>$50 x 122 A = $6,100<br>$6,100 ÷ 2 = **$3,050** | 11 yrs = **$2,284** |
| 2011 | $115 | $187 | $187-$115 = $72<br>$72 x 122 A = $8,784<br>$8,784 ÷ 2 = **$4,392** | 10 yrs = **$3,513.60** |
| 2012 | $115 | $211 | $211-$115 = $96<br>$96 x 122 A = $11,712<br>$11,712 ÷ 2 = **$5,856** | 9 yrs = **$4,216.32** |
| 2013 | $115 | $228 | $228-$115 = $113<br>$113 x 122 A = $13,786<br>$13,786 ÷ 2 = **$6,893** | 8 yrs = **$4,411.52** |
| 2014 | $115 | $228 | $228-$115 = $113<br>$113 x 122 A = $13,786<br>$13,786 ÷ 2 = **$6,893** | 7 yrs = **$3,860.08** |
| 2015 | $115 | $227 | $227-$115 = $112<br>$112 x 122A = $13,664<br>$13,664 ÷ 2 = **$6,832** | 6 yrs = **$3,279.36** |
| 2016 | $115 | $202 | $202-$115 = $87<br>$87 x 122A = $10,614<br>$10,614 ÷ 2 = **$5,307** | 5 yrs = **$2,122.80** |
| 2017 | $115 | $205 | $205-$115 = $90<br>$90 x 122A = $10,980<br>$10,980 ÷ 2 = **$5,490** | 4 yrs = **$1,756.80** |
| 2018 | $125 | $210 | $210-$125 = $85<br>$85 x 122A = $10,370<br>$10,370 ÷ 2 = **$5,185** | 3 yrs = **$1,244.40** |
| 2019 | $125 | $214 | $214-$125 = $89<br>$89 x 122A = $10,858<br>$10,858 ÷ 2 = **$5,429** | 2 yrs = **$868.64** |

Appellant's App. Vol. 2 pp. 37–43. The Lease Estate now appeals.

## Discussion and Decision

## I. Summary Judgment

[9] The Lease Estate contends that the trial court erred when it denied its motion for summary judgment. "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "Summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019)); *see also* Ind. Trial Rule 56(C).

[10] The summary judgment movant invokes the burden of making a prima facie showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden shifts to the non-moving party which must then show the existence of a genuine issue of material fact. *Id.* On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id.*

[11] We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*. Because the trial court entered

findings of fact and conclusions of law, we also reiterate that findings of fact and conclusions of law entered by the trial court aid our review, but they do not bind us. *In re Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018).

### *A. Misappropriation of funds*

[12] The Lease Estate contends that the only misappropriation of funds that the Hershey Estate identified were payments that Dorothy made from the Farm Accounts that she jointly held with Juanita. Although the Farm Accounts were held jointly by Dorothy and Juanita, the Hershey Estate's designated evidence demonstrated that: (1) the Lease Estate wrote checks from the Farm Accounts for Dorothy's personal expenses and expenditures that only benefitted Dorothy;[10] (2) funds from the Farm Accounts were used to pay Timothy Sailors for labor and time despite the farm rental agreement assigning that obligation to Timothy Sailors;[11] and (3) the Lease Estate withheld all rent payment from the Hershey Estate for the year 2019.[12] *See* Appellee's Br. pp. 16–17; Appellee's App. Vol. II pp. 2–62. Questions of material fact exist, and thus, the trial court did not err in denying summary judgment with respect to this issue.

---

[10] *See* Appellee's App. Vol. II pp. 33–34.

[11] *See Id.* at 35–37.

[12] *See Id.* at 18, 20, 48–49.

### *B. Fraud and Misrepresentation*

[13] The Hershey Estate claims that Dorothy signed the 2017 Farm Lease Agreement[13] as Juanita's attorney in fact when Dorothy "was never . . . authoriz[ed] [ ] to act in such a manner." Appellee's App. Vol. II p. 12. The Lease Estate concedes but contends that the Hershey Estate failed to designate any evidence demonstrating its injury—an essential element of fraud. The Hershey Estate claims that the fraud resulted in below market rental value which is sufficient to withstand summary judgment. *See Morris v. Crain*, 71 N.E.3d 871, 881 (Ind. Ct. App. 2017) ("It is well accepted that a designation of evidence in opposition to summary judgment need only clear a low bar, as we err on the side of letting marginal cases proceed to trial on the merits."). At the very least, the Hershey Estate's designated evidence demonstrated that Juanita and the Hershey Estate suffered a pecuniary loss since the rent amount from the 2017 Farm Lease Agreement was below market value which makes summary judgment inappropriate. *See* Appellee's App. Vol. II p. 15. The trial court did not err in denying summary judgment with respect to this issue.

### *C. Breach of Fiduciary Duty and Willful Mismanagement*

[14] On this issue, the Lease Estate makes two assertions that we will address separately. First, the Lease Estate claims that "there is no dispute that Juanita knew and approved of the rental amount that Tim[othy] Sailors paid for the

---

[13] *See Id.* at 62.

Farm, and did not express any displeasure regarding the rental rate." Appellant's Br. p. 20. Specifically, the Lease Estate's designated evidence attributed Heath's knowledge onto Juanita since Heath testified that she became aware that the rental amount was below market value in 2016; thus, the breach of fiduciary claim was barred by the statute of limitations. *See* Appellant's App. Vol. 2 p. 132. The Hershey Estate argues that the evidence does not indicate that Juanita (the injured party) knew that the rental amount was below market value—a question of fact rendering summary judgment inappropriate. Second, the Lease Estate further contends that because Heath became aware of the below market value in 2016, the doctrine of continuing wrong does not toll the statute of limitations as claimed by the Hershey Estate. The Hershey Estate argues that there is no evidence demonstrating that Juanita "discovered the wrongs committed." Appellee's Br. p. 19. Moreover, the Hershey Estate asserts that the statute of limitations was tolled due to Juanita's incapacity via her conservatorship. Viewing the facts in light most favorable to the Hershey Estate, there is conflicting evidence on the material issue of whether Heath's knowledge was attributable to Juanita and whether the doctrine of continuing wrong was applicable. Therefore, the trial court did not err in denying summary judgment with respect to this issue.

[15] The trial court did not err when it denied the Lease Estate's motion for summary judgment, as the designated evidence revealed disputed issues of material fact.

## II. Trial Court's Findings and Conclusions

[16] The Lease Estate challenges the trial court's Findings and Conclusions. When issues are tried upon the facts by the court without a jury, Trial Rule 52 provides that a trial court "shall find the facts specially and state its conclusion thereon" either "[u]pon its own motion" or upon "the written request of any party filed with the court prior to the admission of evidence." "'Our standard of review on judgments under Trial Rule 52 differs slightly depending upon whether the entry of specific findings and conclusions comes *sua sponte* or upon [written] motion by a party.'" *Trust No. 6011, Lake County Trust Co. v. Heil's Haven Condominiums Homeowners Ass'n*, 967 N.E. 2d 6, 14 (Ind, Ct. App. 2012) (quoting *Argonaut Ins. Co. v. Jones*, 953 N.E.2d 608, 614 (Ind. Ct. App. 2011), *trans. denied*). On October 27, 2021, the Lease Estate filed a request for findings of fact and conclusions of law. Where a trial court enters specific findings on motion, our standard of review is well established:

> [We] will "not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). Under our . . . two-tiered standard of review, we must determine whether the evidence supports the findings and whether those findings support the judgment. We consider the evidence most favorable to the trial court's judgment, and we do not reweigh evidence or reassess the credibility of witnesses. We will find clear error only if the record does not offer facts or inferences to support the trial court's findings or conclusions of law.

*Johnson v. Johnson*, 181 N.E.3d 364, 371 (Ind. Ct. App. 2021). In addition, this court may affirm "a judgment on any legal theory, whether or not relied upon by the trial court, so long as the trial court's findings are not clearly erroneous and support the theory adopted." *Dow v. Hurst*, 146 N.E.3d 990, 996 (Ind. Ct. App. 2020).

### *A. Farm Accounts*

[17] The trial court identified three (3) separate accounts as "Farm Assets," which we refer to as the "Farm Accounts."[14] Appellant's App. Vol. 2 p. 44. The court concluded that one-half of the balance ($11,599.33) of Flagstar Account 6561 belonged to Juanita and that $13,683.58 in Flagstar Account 6701 represented Juanita's one-half share of the proceeds from the Farm. The court then entered a judgment in favor of Juanita's Estate in the sum of $25,282.91. *See* Appellant's App. Vol. 2 p. 44. The Lease Estate relies on Indiana Code section 32-17-11-18(a) to support its claim that as the surviving joint owner of the accounts, Sailors was lawfully entitled to the account proceeds upon the deaths of Juanita and Dorothy. We disagree.

Indiana Code section 32-17-11-18(a) provides:

> "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent *unless there is clear and convincing evidence of a*

[14] After Juanita's death, the CD was "transferred by Dorothy [ ] to Juanita's savings account, Flagstar Account 6701." Appellant's App. Vol. 2 p. 44.

> *different intention at the time the account is created*. . . . The right of survivorships continues between the surviving parties."

[18] The evidence presented at trial supports the trial court's findings that the Farm Accounts were funded by revenue from the Farm and that Sailors's name was placed on the accounts "so that she could 'handle emergencies' in her capacities . . . ." Appellant's App. Vol 2 p. 37. Sailors testified that she did not contribute any funds to the accounts and was only added to the Farm Accounts "for purposes of handling emergencies when [Juanita and Dorothy] were in Arizona" and if either of the two became ill. Tr. Vol. 3 pp. 37–38. Sailors also acknowledged that the funds in account 6701 represented Juanita's one-half share of the proceeds from the Farm. Sailors is not entitled to the Farm Accounts.

[19] To the extent that the Lease Estate argues that Dorothy became the sole owner of the Farm Accounts because she survived Juanita, the record rebuts a presumption of right of survivorship. First, Dorothy and Juanita treated the Farm Accounts as half-owned by the other and divided "everything fifty-fifty." Tr. Vol. 3 p. 39. In fact, Sailors testified that she "never touched Juanita's half of the[] [F]arm [A]ccounts . . . [e]ven when [Dorothy] needed money to meet some expenses." *Id.* at 47. Second, Dorothy and Juanita intended the Farm Accounts to be excluded from the purview of Indiana Code section 32-17-11-18 since they established the Farm Accounts "for deposit of funds of a partnership, joint venture, or other association for business purposes . . . ." Ind. Code § 32-17-11-5. It is undisputed that the funds in Farm Accounts were generated from

the tillable acreage of the Farm. *See* Tr. Vol. 3 p, 39 (Sailors testified that the money in the Farm Accounts came from the 122 acres of the Farm). The presumption of survivorship under I.C. § 32-17-11-18(a) is overcome by clear and convincing evidence. The trial court's judgment that Juanita's interest in the accounts was the sum of $25,282.91, as of the date of Juanita's death, is supported by the evidence.

### *B. Statute of Limitations*

[20] The Lease Estate argues that the statute of limitations bars the Hershey Estate's claims for breach of fiduciary duty with respect to the cash leasing of the Farm. The trial court found that Dorothy breached her fiduciary duties to Juanita, as her co-tenant, by cash renting the Farm to Timothy Sailors at a rental rate that was less than the market rental rate. The trial court awarded damages to the Hershey Estate in the sum of $58,377.00, plus interest of $30,485.52, representing the loss of rental value for the years 2009–2019.

[21] The claims of breach of fiduciary duty are subject to a two-year statute of limitations. *See* Ind. Code § 34-11-20-4 ("An action for . . . injury to personal property . . . must be commenced within two (2) years after the cause of action accrues."). The Lease Estate asserts that Heath, who was assisting Juanita with the management of Juanita's interest in the Farm, was aware of the cash rental rate for the Farm in 2016, and as a result the two-year statute of limitations ran prior to the filing of suit in 2019. In its Findings and Conclusions, the trial court found that, "any otherwise applicable Statute of Limitations can hardly

apply here, where circumstances that have resulted in the complaint continue and are ongoing." Appellant's App. Vo. 2 p. 38.

[22] The Hershey Estate argues that the trial court correctly applied the doctrine of continuing wrong, which prevented the running of the statute of limitations until Heath was appointed personal representative of the Hershey Estate on December 14, 2018. "The doctrine of continuing wrong applies where an entire course of conduct combines to produce an injury." *Garneau v. Bush*, 838 N.E.2d 1134, 1143 (Ind. Ct. App. 2005), *trans. denied*. "The doctrine of continuing wrong is not an equitable doctrine, rather, it defines when an act, omission, or neglect took place." *Gradus-Pizlo v. Acton*, 964 N.E.2d 865, 871 (Ind. App. Ct. 2012). However, the doctrine will not prevent the statute of limitations from commencing when the plaintiff learns of facts that should lead to the discovery of the cause of action, even if the relationship with the tortfeasor continues. *Snyder v. Town of Yorktown*, 20 N.E.3d 545, 552 (Ind. Ct. App. 2014).

[23] Juanita passed away in 2018 and there was no evidence presented at trial as to whether she had actual knowledge of the farm rental rates negotiated by Dorothy. However, Heath testified that she "first became aware [that] the cash rent amount. . . was not high enough" in 2016. Appellant's App. Vol. 2 p. 132. Heath further testified that she and Juanita received annual statements of the farm income from Dorothy and 1099 tax income statements from Timothy Sailors, the tenant farmer. Appellant's App. Vol. 2, p. 236. Heath was an enrolled agent with the IRS, meaning she was "licensed to practice tax law in a tax court . . . [and] prepare taxes in accordance with the IRS." Tr. Vol. 2 p.

201. At the very least, Heath appeared to serve as an agent of Juanita for farm related business and taxes since she reviewed the farm income statements and 1099's received by Juanita, and also, prepared and filed income tax returns on behalf of Juanita. *See BGC Entertainment, Inc. v. Buchanan ex rel. Buchanan*, 41 N.E.3d 692, 701 (Ind. Ct. App. 2015) ("Under the rule of imputed knowledge, 'the law imputes the agent's knowledge to the principal, even if the principal does not actually know what the agent knows.'").

[24] Here, the injury alleged by the Hershey Estate is the below market lease rental rate negotiated by Dorothy with Timothy Sailors. The uncontroverted evidence established that Heath either knew or was aware of facts that reasonably should have led Juanita to discover the rental rate under the farm leases.

> [K]knowledge of material facts acquired by an agent in the course of his employment, and within the scope of his authority, is the knowledge of the principal, and where no actual knowledge of the principal is shown, the rule [of imputed knowledge] will be given the effect on the theory of constructive knowledge, resting on the legal principle that it is the duty of the agent to disclose to his principal all material facts coming to his knowledge, and upon the presumption that he has discharged that duty.

*Id.* at 702. To the extent Juanita was ill, infirm, or under conservatorship, that information was provided to Heath, who acted as Juanita's agent with respect to management of the Farm. While Juanita may not have reviewed the actual farm leases executed between Dorothy and Timothy Sailors, Juanita was aware, either personally or by her agent Heath, that Timothy Sailors was the

tenant farmer and she received annual statements for her gross income from the Farm. As a result, the doctrine of continuing wrong is not applicable.

[25] The statute of limitations bars any claims for damages that occurred more than two years prior to the filing of the complaint. We reverse the trial court's award of damages based upon farm leases from the years 2009–2015 because they are barred by the statute of limitations.[15] The Hershey Estate is entitled to damages only for farm leases from the years 2016–2019, which totals $21,289 for loss of rental income, plus $5,114.24 interest. *See* Appellant's App. Vol. 2 p, 43.

### *C. Treble Damages and Attorneys' Fees*

[26] The trial court awarded treble damages and attorney's fees to the Hershey Estate. The trial court did not clearly specify the basis for the awards. The trial court applied treble damages to the following damages awards: 1) lost rent resulting from leasing the Farm for less than fair market value; 2) value of the Hershey Estate's 50% share of the Farm Accounts as of the date of Juanita's death; and 3) reimbursement for the Hershey Estate's share of Dorothy's personal expenses and unauthorized expense from the Farm Accounts.[16]

---

[15] We note that the conservatorship established in October of 2017 tolled the statute of limitations as to the farm lease from 2016 by 11 months. *See* Ind. Code § 34-11-6-1 ("A person who is under legal disabilities when the cause of action accrues may bring the action within two years after the disability is removed."). Once the conservatorship was removed in December of 2018, the Hershey Estate had 11 months to file suit for loss of rental income from 2016.

[16] On November 11, 2022, the trial court entered an amended final judgment in the Chronological Case Summary. That figure represents the damages under Section 2 A–C of the trial court's Findings and Conclusions multiplied by 3 to reflect the treble damages award.

[27] The Lease Estate argues that "[t]here is no evidence to support an award of treble damages [ ] under Indiana Code 34-24-3-1[,]" and thus, the trial court erred in awarding treble damages to the Hershey Estate. Appellant's Br. p. 29. Under Indiana Code section 34-24-3-1, the Crime Victim Relief Act, "a person who suffers a pecuniary loss as a result of certain property crimes may bring a civil action against the person who caused the loss and recover up to three times the actual damages and a reasonable attorneys' fee, along with other expenditures." *Klinker v. First Merchs. Bank, N.A.*, 964 N.E.2d 190, 193 (Ind. 2012). "A criminal conviction is not a condition precedent to recovery under this statute." *Id.* "Rather, the claimant merely must prove each element of the underlying crime by a preponderance of the evidence." *Id.*

[28] The Hershey Estate relies on *Ruse v. Bleeke*, 914 N.E.2d 1, 10 (Ind. Ct. App. 2009) to support its contention that treble damages were properly awarded under the Crime Victim's Relief Act "due to the [Lease Estate's] unauthorized control over [the] Hershey[ ] [Estate's] property." Appellee's Br. p. 27. It is unclear what theories the trial court used to award treble damages. However, the Hershey Estate's complaint alleged fraud which is one of the enumerated crimes under Indiana Code section 34-24-3-1.[17] The trial court acknowledged the Hershey Estate's citations to "common law definitions of fraud, specifically

[17] The Hershey Estate asserted that Dorothy committed fraud and misrepresentation when she "wrongfully signed documents relating to the farm rent purporting to be acting as [Juanita's] Power of Attorney when [Dorothy] was never given a Power of Attorney authorizing her to act in such a manner." Appellee's App. Vol. II p. 12.

as defined in *Rice v. Strunk*, 670 N.E.2d 1280 (Ind. 1996)" under the statements of law section of its Findings and Conclusions.[18] Appellant's App. Vol. 2 p. 38. The elements of actual fraud are: "(i) material representation of past or existing facts by the party to be charged (ii) which was false (iii) which was made with knowledge or reckless ignorance of the falseness (iv) was relied upon by the complaining party and (v) proximately caused the complaining party injury." *Rice v. Strunk*, 670 N.E.2d 1280, 1289 (Ind. 1996). For actual fraud to exist, all of those elements must be met.

[29] The record fails to support a finding that Dorothy made any misrepresentations or false statements that were relied upon by Juanita. In its complaint and at trial, the Lease Estate asserted that Dorothy misrepresented her capacity as Juanita's attorney in fact when she executed the 2017 Farm Lease with Timothy Sailors. That may be, however, there is no evidence that Juanita relied upon, or for that matter, was even aware of the misrepresentation. This case is distinguishable from *Ruse*,[19] where one business partner relied to his detriment upon the false statements of the other partner regarding capital investments made to the business. Here, the evidence does not support a finding of fraud sufficient to support the trial court's award of treble damages.

---

[18] We also note that the Findings and Conclusion do not mention "conversion."

[19] *Ruse v. Bleeke*, 914 N.E.2d 1 (Ind. Ct. App. 2009).

[30] To the extent that the trial court's award of treble damages was based on a finding of conversion of the Farm Accounts on the part of Dorothy or Sailors on behalf of Dorothy, the record does not support such a finding. Conversion is knowingly or intentionally exerting unauthorized control *over the property of another*. *See* Ind. Code § 35-43-4-3; *Auto Liquidation Center, Inc. v. Chaca*, 47 N.E.3d 650, 654 (Ind. Ct. App. 2015). In Section II(A) of this opinion, we established that Dorothy and Juanita jointly owned the Farm Accounts. Consequently, it is impossible for Dorothy or Sailors on behalf of Dorothy to exert "unauthorized" control over the Farm Accounts. The evidence does not support a finding of conversion to support the trial court's award of treble damages.

[31] Because we have concluded that an award of treble damages under the Crime Victim's Relief Act was not supported by the evidence, we separately consider whether the trial court's award of attorney's fees to the Hershey Estate was appropriate. A trial court's decision to award attorney's fees is reviewed for an abuse of discretion. *Dunno v. Rasmussen*, 980 N.E.2d 846, 851 (Ind. Ct. App. 2012). "A trial court abuses its discretion if its decision clearly contravenes the logic and effect of the facts and circumstances or if the trial court has misinterpreted the law." *Id.* The trial court's Findings and Conclusions do not specify which statute or legal authority the trial court relied upon to award attorneys' fees. However, the trial court's language leads us to conclude that it awarded attorney fees under Indiana Code section 34-52-1-1(b) which provides:

> (b) In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
>
> > (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> >
> > (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless;[20] or
> >
> > (3) litigated the action in bad faith.

[32] In the trial court's Findings and Conclusions, the trial court highlights—and the record supports—a number of actions that the Hershey Estate listed as the Lease Estate's "attempts to conceal their breach and bad faith." Appellant's App. Vol. 2 p. 39. The Lease Estate contends that its defenses are not "groundless or in bad faith" because:

> the claims for breach of fiduciary duty were barred by the statute of limitations; the claims under the Crime Victims Relief Act are not supported by the facts of this case; and the Plaintiff/Appellee has not shown that anyone associated with the plaintiff side of this caption relied upon any representation by any of the Defendants.

---

[20] In its brief, the Hershey Estate references this portion of Indiana Code section 34-52-1-1 as its basis for being entitled to attorneys' fees. The trial court's August 2022 Order alludes to subsection (b)(3).

Appellant's Reply Br. p. 13. The Lease Estate merely addresses its defenses and responses to the Hershey Estate's complaint but fails to address the misconduct identified by the trial court under Section III, subsections 4–6, of the Findings and Conclusions.

[33] For instance, three days after the Hershey Estate filed the complaint and fifteen months before the 2017 Farm Lease was set to expire, Dorothy entered into yet another rental agreement with Timothy Sailors, still charging a below market value rent for seven years without consulting Juanita. Not to mention that the 2019 Farm Lease's period was longer than the typical two-year period that Timothy Sailors had previously entered into. After the Summary Judgment Order, wherein the trial court stated that "[t]he parties may presume that the rest of the proceedings will be far more expeditious[,]" the Lease Estate filed a number of motions that had to be answered by the Hershey Estate regardless of their merit. Appellant's App. Vol. II p. 53. One of the motions was a citation for contempt which counsel for the Lease Estate admitted was filed without merit.[21] On the second day of the bench trial, the Lease Estate violated the trial court's separation of witness order.[22] The facts and circumstances in the record support the trial court's conclusion that the Lease Estate filed certain motions

---

[21] In its response to sanctions, counsel for the Lease Estate stated that he filed a citation for contempt because: "I got kinda [sic] upset and I said…'you know what? I think we can talk to him and I'll an [sic] contempt[,'] and then I withdrew it, because I thought, you know, it's not worth the fine, we'll just do a deposition on him." Tr. Vol. 2 pp. 98–99.

[22] We discuss this issue in greater detail in Section III of this opinion. During the second day of the bench trial, the Lease Estate's attorney conceded when asked if he violated the trial court's separation of witnesses order. *See* Tr. Vol. 3 p. 90.

and pleadings "that were frivolous at best" and represented "endless and needless attempts to avoid and delay the proceedings, without a basis in law." *Id.* at 39–40. The trial court did not abuse its discretion in awarding attorneys' fees under Indiana Code section 34-52-1-1(b).

## III. Separation of Witnesses

[34] The Lease Estate claims that the trial court's order "in separating witnesses exceeds the scope of [Evidence] Rule 615." Appellant's Br. p. 37. Indiana Evidence Rule 615 provides:

> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
>
> (a) a party who is a natural person;
>
> (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or
>
> (c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

[35] In other words, the rule "allows litigants to move for separation of witnesses so they cannot hear each other's testimony." *Griffith v. State*, 59 N.E.3d 947, 956 (Ind. 2016). At the Hershey Estate's request, the trial court ordered a separation of witnesses:

> COURT: [I]f we have witnesses in the courtroom at this time, we're asking you to step out in the lobby. When you are called to testify, we'll come get you. You are not to discuss the matter while this case is pending . . . .

Tr. Vol. 2 p. 103; *see also* Ind. Trial Rule 615. The Lease Estate contends that "[t]he [t]rial [c]ourt in this case expanded the [r]ule . . . to include discussions of the matter between witnesses while the case is pending." Appellant's Br. p. 35. We disagree.

> The primary purpose of a separation of witnesses order is to prevent witnesses from gaining knowledge from the testimony of other witnesses and adjusting their testimony accordingly." *Morell v. State*, 933 N.E.2d 484, 489 (Ind. Ct. App. 2010). "Separating witnesses from each other promotes the truthfulness of their testimony." *Harris v. State*, 165 N.E.3d 91, 95 (Ind. 2021). "It ensures memories [are not] tainted by hearing others testify and denies witnesses the opportunity to shape their testimony to match or contradict what others have said." *Id.*

*McClendon v. Triplett*, 184 N.E.3d 1202, 1212 (Ind. Ct. App. 2022), *trans. denied*. The trial court's order was within the bounds of Evidence Rule 615 for it ensured that witnesses would not be predisposed to other witnesses' testimonies before testifying, whether by listening to testimony in the courtroom or by discussing with other witnesses. The Lease Estate further claims that the trial court order was "more specific than Rule 615 by ordering no discussion of expected testimony among the witnesses." Appellant's Br. p. 36. Again, we disagree. The trial court's order simply extended the same prohibitions within the courtroom to discussions that may occur outside the courtroom while the

trial was pending. The order reflected the trial court's pragmatic approach to implementing the order by "preventing witnesses from gaining knowledge from the testimony of other witnesses and adjusting their testimony accordingly." *Morell*, 933 N.E.2d at 489.

[36] Once it was discovered that some witnesses, who had yet to testify, discussed the matter[23] with Sailors—who had already testified—the trial court determined that those witnesses violated its separation of witness order and excluded the witnesses from testifying.

> The determination of the remedy for any violation of a separation order is within the discretion of the trial court. *Joyner v. State*, 736 N.E.2d 232, 244 (Ind. 2000). We will not disturb the trial court's decision on such matters absent a showing of a clear abuse of discretion. *Id.*; *see also Wisner v. Laney*, 984 N.E.2d 1201, 1208 (Ind. 2012) ("We do not disturb a trial court's determination regarding a violation of a separation of witnesses order, absent a showing of a clear abuse of discretion."). "This is so even when the trial court is confronted with a clear violation of a separation order and chooses to allow the violating witness to testify at trial." *Joyner*, 736 N.E.2d at 244.

*Spinks v. State*, 122 N.E.3d 950, 955 (Ind. Ct. App. 2019).

[37] The Lease Estate asserts that no violation occurred because those witnesses did not "enter[ ] the courtroom [n]or [ ] hear[ ] any testimony from any witness . . .

---

[23] When asked if the witnesses and Sailors discussed the case, attorney for the Lease Estate and The Lease Family Trust (Number One) replied in the affirmative. *See* Tr. Vol. 3 p. 90. The record does not reveal whether they discussed Sailors' testimony during that closed meeting.

." Appellant's Br. p. 36. The Lease Estate's argument undermines Evidence Rule 615's purpose. We reiterate that "the primary purpose of a separation of witnesses order is to prevent witnesses from gaining knowledge from the testimony of other witnesses and adjusting their testimony accordingly." *Morell*, 933 N.E.2d at 489. Despite not hearing Sailors's testimony in the courtroom, the witnesses were still privy to Sailors's testimony which is exactly what the separation order intended to prevent. The trial court did not abuse its discretion.

## Conclusion

[38] Based on the foregoing, we affirm the trial court's denial of the Lease Estate's motion for summary judgment. The trial court did not err in its judgment as it relates to: (1) the ownership of certain Farm Accounts; (2) attorneys' fees; and (3) the exclusion of certain witness testimony. The trial court erred in its determination that the statute of limitations did not apply. We reverse the trial court's award of: (1) damages based upon farm leases from the years 2009–2015 and (2) treble damages.

[39] Affirmed in part, reversed in part, and remanded with instructions.

Vaidik, J., and Tavitas, J., concur.