

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-1990

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**JAMES D. VANCE, PATRICIA A. VANCE,
AS GUARDIANS FOR MERALD B.
WHITEAKER,**

PLAINTIFFS-RESPONDENTS,

V.

**THOMAS H. THIEDE AND TIMOTHY A.
THIEDE,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Rock County:
JAMES E. WELKER, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Vergeront, Deininger, Lundsten, JJ.

¶1 VERGERONT, J. In this action, the guardians of Merald Whiteaker claim Thomas Thiede exerted undue influence over Whiteaker for the purpose of obtaining Whiteaker's money, and that Timothy Thiede, Thomas's son, received title to residential real estate clear of all mortgages and other benefits as a result of Thomas's conduct. The trial court entered judgment against both Thomas and Timothy for \$28,660 plus costs and imposed a constructive trust and lien on the real estate for that amount. Thomas appeals portions of the trial court's findings of fact, contending there is insufficient evidence to find he knew of Whiteaker's incompetence and exerted undue influence on him. Timothy appeals the trial court's finding that he was aware of and participated in the transfer of funds from Whiteaker's account to the Thiedes' bank account. He also contends the court erred in imposing a constructive trust on the real estate, and, alternatively, challenges the amount of the constructive trust.

¶2 We conclude the findings of fact as they relate to Thomas are not clearly erroneous, but the finding that Timothy was aware of and participated in the transfer of funds from Whiteaker's account to the Thiedes' account is clearly erroneous. We also conclude that a constructive trust on the real estate is proper, but only in the amount that Timothy was unjustly enriched as a result of Thomas's undue influence on Whiteaker. That amount, we conclude, is \$16,478.20. In addition, we conclude that a constructive trust on the \$6,000 Thomas transferred to Timothy is proper, and Thomas is liable to the guardians for that amount.

¶3 Accordingly, we affirm the money judgment against Thomas; reverse the money judgment against Timothy and remand to the trial court with instructions to enter judgment against Timothy in the amount of \$6,000 plus costs;

and reverse the constructive trust and lien¹ imposed on the real estate in the amount of \$28,660 plus costs, and remand with directions to the trial court to reduce the amount to \$16,478.20 plus costs.

BACKGROUND²

¶4 In 1994, Merald Whiteaker moved from North Carolina to Beloit, Wisconsin, to live with his former girlfriend, Nona Thiede,³ in her home. He was seventy-eight years old at the time. Nona's son Thomas also lived in Nona's home. Timothy lived in Mazomanie, Wisconsin. Nona and Thomas each received approximately \$600 per month in social security, and that was their only income. Whiteaker had an income of \$1,269.82 per month, consisting of social security and a pension. Beginning in May 1997, until she went into a nursing home in March 1999, Nona was in and out of the hospital. She died in August 1999.

¶5 On either January 12 or 13, 1999,⁴ Thomas accompanied Whiteaker to the bank to withdraw \$19,300 from Whiteaker's account. Thomas and Whiteaker had a discussion after which Whiteaker asked the bank clerk to have the check made out to Thomas. Due to bank policy the check could not be made payable to Thomas and instead it was made payable to First American Credit Union with "In reference to Thomas Thiede" typed on the check. Thomas and

¹ Timothy does not separately challenge the imposition of a lien on the real estate corresponding to the amount of the constructive trust, assuming the constructive trust is proper, and therefore we do not address the question whether imposition of a constructive trust on the real estate automatically entitles the beneficiaries of the constructive trust to a lien on the real estate.

² The facts in this section were not disputed at trial unless otherwise indicated.

³ We refer to the Thiedes by their first names for clarity.

⁴ The withdrawal slip states "1/13 1999" while the cashier's check contains the date of January 12, 1999. Which date is correct has no bearing on our decision.

Timothy had a joint checking account at First American. Thomas deposited the check in the account at First American.

¶6 On January 15, 1999, Thomas withdrew \$13,445.01 from the First American account in the form of a check made payable to the City of Beloit. “[F]rom Timothy Thiede” was typed underneath “City of Beloit”; Thomas testified that he had “from Timothy Thiede” put on the check. Thomas used the check to pay off two mortgages on Nona’s home, and a satisfaction of the mortgages was recorded with the register of deeds. Thomas drafted a quit claim deed on January 20 conveying the home from Nona to Timothy, and Nona signed the deed. The deed was recorded with the register of deeds. Thomas remains living in the house and does not pay rent to Timothy.

¶7 On March 26, 1999, Thomas again accompanied Whiteaker to the bank. This time \$9,360 was withdrawn from Whiteaker’s account. The check was made payable to Whiteaker. Whiteaker endorsed the check and made it payable to Thomas, who also endorsed the check and deposited it in the First American account.

¶8 On March 28, 1999, Thomas gave Timothy a \$6,000 check drawn from the First American account made payable to Timothy. According to both Thomas and Timothy, Timothy was to hold the money for Nona’s funeral expenses. Thomas testified that he transferred this money to Timothy because he could not have more than \$2,000 in his account at any one time because of his receipt of disability benefits. The evidence concerning what happened to this money will be discussed later in the opinion.

¶9 One day after the \$6,000 check was drafted, Patricia Vance, Whiteaker’s niece, took Whiteaker to live with her in Soldiers Grove, Wisconsin.

There, Vance had Whiteaker examined by a physician, who concluded Whiteaker was not mentally competent and was suffering from Alzheimer's disease. The trial court found Whiteaker incompetent and appointed Vance and her husband, James Vance, as guardians. The Vances then investigated Whiteaker's bank account withdrawals from the preceding year and initiated this action.

¶10 The amended complaint sought a judgment against Thomas for the amount of funds wrongfully taken from Whiteaker, a constructive trust on the house and any other property obtained with Whiteaker's funds, and an order for return of the \$6,000 from Timothy.

¶11 Thomas's defense at trial was that Whiteaker was competent when he withdrew the money from his account, and the money was for reimbursement for household expenses, which Whiteaker had not contributed to, and other purposes desired and approved by Whiteaker.

¶12 The court entered written findings of fact and conclusions of law, which included the following findings.⁵ Thomas and Timothy were aware Whiteaker was incompetent and confused, not capable of making financial decisions, and extremely susceptible to influence because of his incompetent condition. Thomas was in a position of trust and able to influence Whiteaker. Whiteaker paid his own living expenses. Thomas influenced Whiteaker to divert money from Whiteaker for his own use. Timothy was aware of and participated in the transfer of funds from Whiteaker's bank account to the defendants' bank account and, the court found, "this represented a concerted action, and, therefore, a

⁵ The written findings incorporate the findings of fact and conclusions of law made by the court verbally at the conclusion of the trial in addition to certain written findings expressly set forth.

conspiracy between defendants.” Finally, the court found that a substantial portion of Whiteaker’s funds went directly to the house and the plaintiffs were entitled to a constructive trust. The court entered judgment against both Thomas and Timothy in the amount of \$28,660, the total of the two withdrawals from Whiteaker’s account plus costs, and it imposed a constructive trust on the real estate and a lien, both in the amount of the money judgment.

DISCUSSION

Undue Influence

¶13 We first consider Thomas’s challenge to the trial court’s factual findings underpinning its determination that Thomas exerted undue influence on Whiteaker. Undue influence has four elements: susceptibility, opportunity to influence, disposition to influence, and coveted result. *Dejmal v. Merta*, 95 Wis. 2d 141, 155, 289 N.W.2d 813 (1980). Undue influence must be proved by clear, satisfactory, and convincing evidence. We do not overturn the trial court’s findings unless they are against the great weight and clear preponderance of the evidence, *id.* at 154, that is, unless they are clearly erroneous. *Schorer v. Schorer*, 177 Wis. 2d 387, 396, 501 N.W.2d 916 (Ct. App. 1993) (equating the “against the great weight and clear preponderance of the evidence” standard with the “clearly erroneous” standard).

¶14 Thomas asserts that these findings are clearly erroneous: from the middle of the summer of 1998 Whiteaker was incompetent; Thomas was aware of Whiteaker’s incompetence; based on his incompetence, Whiteaker was extremely suggestible to influence; and Thomas was in a position of trust, had the opportunity and admittedly was able to influence Whiteaker, and did so.

¶15 We conclude there is ample evidence to support the trial court's findings based on the requisite burden of proof.

¶16 There was extensive evidence at trial on Whiteaker's confused mental condition in late 1998 and early 1999. The doctor who examined Whiteaker in the spring of 1999 opined that he had probably suffered from Alzheimer's for at least two years and was not mentally competent between January 1, 1999 and April 2, 1999. Vance, her husband, Whiteaker's sister, Whiteaker's nephew, and his nephew's wife all testified that they saw Whiteaker at various times during the latter half of 1998 and he was confused, rambled in conversation, had poor personal hygiene, wore dirty clothes, and appeared unkempt.

¶17 In addition, Sally Huber, a bank teller who had known Whiteaker four or five years, testified to Whiteaker's state of confusion when he came to the bank. She was present on the two occasions when Thomas accompanied Whiteaker to make withdrawals. She was concerned about the first transaction because Whiteaker was confused and she felt Thomas was trying to influence or take advantage of Whiteaker and was telling Whiteaker what to do. During the second withdrawal, Huber testified, Whiteaker told her he was withdrawing the money to pay for funeral costs for himself and Thomas; she offered to make the check payable to the funeral parlor, but Thomas said, "no, we can't do that."

¶18 There was other testimony about Thomas's dominating conduct toward Whiteaker. In the late fall of 1998, Thomas told his nephew that he (Thomas) was keeping \$1,000 of Whiteaker's social security checks and giving the rest to Whiteaker. Whiteaker's nephew's wife testified that Thomas told her, "I can get [Whiteaker] to do anything"; he also told her that at times he would try

to get to the mailbox before Whiteaker, and if he did he would cash Whiteaker's social security checks and give Whiteaker "a couple of hundred dollars" of it. She believed Whiteaker was afraid of Thomas because of the way Whiteaker acted when Thomas's name was mentioned. Patricia Vance testified that Thomas told her he was cashing Whiteaker's social security checks and giving Whiteaker about \$300 while keeping the rest, and that he had been doing so for the past five or six months.

¶19 In sharp contrast to this testimony, Thomas testified Whiteaker was competent. He did not believe Whiteaker needed to be taken to a doctor or that he was a danger to himself. He insisted that Whiteaker was as "clear as a bell" on the day Thomas accompanied Whiteaker to the bank to withdraw the \$19,000. He and Whiteaker were friends, he said, and he denied that he had more authority in the relationship than Whiteaker did.

¶20 According to Thomas, Whiteaker contributed very little to household expenses, did not pay rent, did not help pay the taxes, and he (Thomas) paid a lot of the expenses. He used part of the \$19,000 withdrawal to catch up on the back taxes. He testified that Whiteaker and his mother had discussions about paying off the mortgages on the house and he was involved in a couple of them. Whiteaker offered to pay the mortgages off. Thomas contradicted Huber's testimony regarding the reason Whiteaker gave for withdrawing money the second time: Thomas said it was to prepay Whiteaker's and Nona's funeral expenses and Whiteaker offered to take out this money. However, Thomas acknowledged, none was used for these purposes. He acknowledged he cashed and kept approximately \$1,000 of Whiteaker's social security; but he said it was only for two or three months and he used only about \$200 to \$300 for bills and gave the rest back to Whiteaker.

¶21 Thomas argues that because he lived with Whiteaker, he had the opportunity to observe Whiteaker on a daily basis, and the trial court erred in not accepting his testimony on Whiteaker's competency. And he argues that because Whiteaker did not pay for his living expenses, Whiteaker benefited from Thomas assuming them.

¶22 However, the trial court, not this court, decides how to resolve credibility conflicts. See *Dejmal*, 95 Wis. 2d at 154. In addition, we examine the record for facts that support the trial court's findings, *id.* at 154, not facts that might support a finding to the contrary. The trial court could choose to disbelieve Thomas's testimony, and it did, explaining why it did so. Among other reasons the court gave for doubting Thomas's credibility was Thomas's own testimony that he transferred money from Nona's account and from his account to keep them below certain levels so as to remain eligible for government benefits.

¶23 Believing the other witnesses on the issue of Whiteaker's competency, the trial court could reasonably infer from the fact that Thomas lived with Whiteaker that he was in a position to witness Whiteaker's actions that indicated incompetence. The trial court could also reasonably infer that because Thomas had a close relationship with Whiteaker, he was in a position of trust and had the opportunity to influence Whiteaker. The trial court could reasonably infer from Whiteaker's bank statements that he was paying room and board, since he received over \$1,200 a month in social security and a pension, yet with the exception of three deposits, he routinely deposited considerably less than that amount on a monthly basis. In addition, Whiteaker's nephew testified he heard Thomas say that Whiteaker "more than paid for his stay [at Nona's home]." The trial court therefore had a reasonable basis for rejecting Thomas's justification for

the large withdrawals and deciding that Thomas was diverting Whiteaker's money for his own use.

Conspiracy

¶24 We next consider Timothy's challenge to the finding that he was aware of and participated in the transfers of funds from Whiteaker's account to Thomas's and his joint bank account at First American, and that this represented a concerted action and therefore a conspiracy between Thomas and him. Timothy contends there is no evidence he was present during the transfers, or participated in them, or even was aware the funds were being transferred from Whiteaker's account to his father's and his account.

¶25 A conspiracy is a combination of two or more persons acting together to accomplish an unlawful purpose or a lawful purpose by an unlawful means. *Edwardson v. American Family Mut. Ins.*, 223 Wis. 2d 754, 760, 589 N.W.2d 436 (Ct. App. 1998). The elements of conspiracy are: formation and operation of the conspiracy; the wrongful act or acts done pursuant thereto; and the damage resulting from such act or acts. *See id.* To be a party to a conspiracy, there must be more than knowledge, acquiescence, or approval of a plan. *Winslow v. Brown*, 125 Wis. 2d 327, 331, 371 N.W.2d 417 (Ct. App. 1985). A participant must have intentionally participated and cooperated in the act to further a common purpose. *Id.* A conspiracy must be established by clear, satisfactory, and convincing evidence. *Cox v. Cox*, 259 Wis. 259, 262, 48 N.W.2d 508 (1951). We treat evidence supporting conspiracy as a factual finding. *See Drexler Et Ux v. Zohlen*, 216 Wis. 483, 487, 257 N.W.2d 675 (1934). The trial court's factual

findings are not overturned unless clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000).⁶

¶26 The illegal purpose in this case is using Whiteaker's money to benefit others by means of exerting undue influence on him. It is reasonable to infer Timothy was aware of Whiteaker's incompetence since Timothy did visit him on occasion. Therefore, if there were evidence or reasonable inferences from the evidence that Timothy participated in the transfer of funds from Whiteaker's account, one could reasonably infer from that participation that Timothy was conspiring with his father to unlawfully divert money from Whiteaker for his and/or his father's use. However, we have searched the record, mindful that we are to draw all reasonable inferences from the evidence in favor of the trial court's findings. We are able to find no evidence or reasonable inference from the evidence that Timothy participated in the transfer of funds from Whiteaker's account, or was even aware they had occurred before he received title to Nona's house.

¶27 Although it is reasonable to infer from the evidence that Timothy was aware that neither his father nor his grandmother had the money to pay off the mortgages on his grandmother's home because both had limited income, we do not agree with the guardians that it is reasonable to infer Timothy knew the money came from Whiteaker's account. Timothy testified he never discussed finances with Whiteaker and no evidence contradicts that. Although both Thomas and Timothy testified that the account at First American was in both their names, Thomas testified Timothy did not use the account; rather, Timothy's name was on

⁶ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

it in case something happened to Thomas. There is no evidence Timothy used the account. The bank statement lists only Thomas's name and address, and there is no evidence or testimony from which one could reasonably infer that Timothy ever saw the bank statements showing the two deposits or saw the two checks drawn from Whiteaker's account. Thomas said he had "from Timothy Thiede" put on the \$13,445.01 check and there is no evidence to the contrary.

¶28 Thomas testified that he told Timothy he was paying off the mortgages on the house, probably the day he did it, but there is no evidence that he and Timothy discussed where the money came from. Thomas testified Timothy did not ask him to put the house in his name and there is no contrary evidence: the evidence was that Thomas and Timothy had always understood that Nona wanted Timothy to have the house. The acceptance of the transfer of the house from Nona to himself, without at least the knowledge that the funds that paid off the mortgage came from Whiteaker, cannot constitute active participation in a conspiracy, because the only reasonable inference from the record is that Timothy was going to receive title to the house in any case.

¶29 The guardians rely on this testimony from Timothy as evidence that Timothy knew about the withdrawals from Whiteaker's account:

Q. You were aware that \$19,300 was withdrawn from Merald Whiteaker's savings account on January 13, 1999 and deposited in that account; is that correct?

A. Yeah. I didn't know right away, but I—

Q. But you found out later?

A. Yes.

Q. Okay. And you also found out that on March 23rd, 1999, \$9,360 have been withdrawn from Whiteaker's account at the First National Bank and deposited in that account?

A. Correct.

Q. Also, you're aware that your grandmother had two mortgages on the house?

A. Yes.

Q. And that the – there was a check written for \$13,445.01 to the City of Beloit that was used to pay off those mortgages?

A. Yes.

Q. And your father was the one who got the check or asked that the check be made and took it down to the city and paid off the mortgages; is that right?

A. Yes.

¶30 The guardians argue the court could choose to disbelieve Timothy's testimony that he did not know about the transfers until later. However, while it is true the court did not have to believe Timothy's testimony that he only found out later, there is no evidence, or reasonable inferences from the evidence, to the contrary. Therefore, even if we disregard this testimony, there is no evidence, and, certainly no clear and convincing evidence, that Timothy knew about the transfers when they occurred, let alone participated in them. *See Stewart v. State*, 83 Wis. 2d 185, 193-95, 265 N.W.2d 489 (1978) (negative inference from a defendant's fabrication is not affirmative proof of elements of crime).

¶31 The guardians also argue that even if Timothy did not know of the first withdrawal from Whiteaker's account when it occurred, when Timothy then received the deed to the house, after Thomas had paid the mortgages off and told Timothy he had done that, Timothy could have inquired of Thomas where the money had come from. However, the case law does not support the underlying premise of this argument—that Timothy's failure to inquire about the source of the money constitutes a participation or cooperation in the act of wrongfully diverting that money from Whiteaker. The most that can be said on this record is that, at

whatever point in time Timothy learned the money for the mortgage payoff came from Whiteaker, he was acquiescing in his father's scheme.

¶32 The same is true with respect to the \$6,000 check that Thomas drew from the First American account payable to Timothy for Nona's funeral expenses. The trial court's comments indicate the trial court believed Timothy used this money for his own business purposes, and, treating this as a factual finding, we conclude it is not clearly erroneous.⁷ However, there is no evidence or reasonable inferences from the evidence that Timothy knew this money came from Whiteaker, either when Thomas gave it to him or at any point before he spent it for his own business purposes.

¶33 Because we conclude that the finding that Timothy participated in the transfer of funds from Whiteaker's account to his joint account with his father is clearly erroneous, we reverse the judgment entered against Timothy for the full amount of the withdrawals.

Constructive Trust

¶34 We next consider the constructive trust the trial court imposed on the house. First, Timothy contends the court erred in imposing a constructive trust because he was not unjustly enriched by receiving the property since it was always

⁷ Timothy testified he deposited the money in his construction business account in another bank and used it for business expenses; he explained this by saying he had the equivalent amount at home in cash, and he knew it would be his responsibility to "come up with" this amount when his grandmother died. He also testified he paid only \$500 toward his grandmother's funeral because "most of it had been used for legal fees and stuff beforehand." Thomas testified that Timothy gave him back "awful close" to the full \$6,000 and he [Thomas] used it on legal fees. The trial court's comments from the bench indicate that the trial court believed Timothy used the \$6,000 for business expenses because there were no records to show payment for any funeral expenses nor bank records to show he returned the money to his father, and the court did not believe those transactions would have occurred by cash.

understood he was to receive it from his grandmother, and because the property was not obtained by fraud. Alternatively, Timothy asserts that even if a constructive trust is proper, the court erred in the amount of the constructive trust it imposed.

¶35 A constructive trust is an equitable device created by law to prevent unjust enrichment, which occurs when one party receives a benefit and its retention is unjust to another. *Wilharms v. Wilharms*, 93 Wis. 2d 671, 678, 287 N.W.2d 779 (1980). A constructive trust is imposed only when legal title is held by someone who in equity and good conscience should not be entitled to beneficial enjoyment and when title was obtained by means of fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or by any form of unconscionable conduct. *Id.* at 678-79.

¶36 A constructive trust may be imposed against a person who did not participate in the wrongful conduct or know of the conduct initially. *Id.* at 679. If the elements have been satisfied and the person holding title is not a bona fide purchaser, then a constructive trust may be imposed. *Id.*

¶37 Whether the facts warrant imposition of a constructive trust is a question of law, which we review independently of the trial court. *Hendricks v. M.C.I., Inc.*, 152 Wis. 2d 363, 366, 448 N.W.2d 289 (Ct. App. 1989).

¶38 We conclude the trial court properly imposed a constructive trust on the house, but the amount must be modified in light of our holding that the court's factual finding that Timothy participated in a conspiracy with Thomas was clearly erroneous. We have already held there is sufficient evidence to support the trial court's finding that Thomas exerted undue influence on Whiteaker to obtain money from Whiteaker's bank account; this is an abuse of a confidential

relationship. There is also sufficient evidence to support the court's finding that the mortgages were paid off with money from Whiteaker's account. It is undisputed Timothy did not pay any money for the house, and he is therefore not a bona fide purchaser. It is not necessary that Timothy have participated in Thomas's wrongful conduct or knew of it at the time it occurred. He is enriched by obtaining title to a house free and clear of all mortgages without having paid any consideration, and it is an unjust enrichment to the extent that Whiteaker's funds were used to pay off the mortgages and make improvements to the house. Although the evidence was that Nona had always intended that Timothy have her house, it follows from that fact only that Timothy is not unjustly enriched by what he received from Nona—that which would have been his without Thomas's undue influence on Whiteaker.

¶39 With respect to the proper amount of the constructive trust, we agree with Timothy that he was not unjustly enriched by the full amount of the withdrawals from Whiteaker's account—\$28,660—because the testimony established Thomas used some of that for his own purposes. We reject the guardians' argument that the doctrine of constructive trust may, and should, be broadly construed in this case to permit a constructive trust on the entire amount that Thomas withdrew because otherwise Whiteaker will never recover all the money wrongfully taken from him. The doctrine does not permit a constructive trust to be imposed in the absence of unjust enrichment, and Timothy is unjustly enriched only insofar as he received a benefit from the funds his father withdrew from Whiteaker's account.

¶40 In Timothy's alternative argument he contends the amount of the constructive trust can be no more than \$16,061.55, consisting of the \$13,445.01 Thomas paid on the mortgages, and \$2,616.54 which Thomas withdrew from the

First American account on May, 11, 1999, to pay for new windows in the house. However, the record discloses Thomas withdrew other amounts from his account that were spent on the house: \$243.20 for lumber for the house by check dated January 28, 1999, and \$174.45 for lumber for the house by check dated March 1, 1999. Therefore, the proper amount of the constructive trust on the house is \$16,478.20.

¶41 In addition to benefiting from the money Thomas used for the house, Timothy benefited from the \$6,000 his father gave him, based on the trial court's findings regarding the disposition of that sum. We do not agree with Timothy's implicit suggestion that a constructive trust may be imposed only on the house. In *Richards v. Richards*, 58 Wis. 2d 290, 299, 206 N.W.2d 134 (1973), the court decided it was proper to impose a constructive trust for the full amount of insurance proceeds paid to the second wife of the deceased in favor of the children of his first marriage, and concluded that the second wife was liable to the children for the full amount of the proceeds. The constructive trust was based on the wrongful conduct of the deceased, not of the second wife, and the second wife had spent some of the proceeds. By analogy in this case, it is proper to impose a constructive trust on the \$6,000 which Thomas transferred to Timothy, and Timothy is liable to the guardians for this amount.

CONCLUSION

¶42 Accordingly, we affirm the money judgment against Thomas; reverse the money judgment against Timothy and remand to the trial court with instructions to enter judgment against Timothy in the amount of \$6,000 plus costs; and reverse the constructive trust and lien imposed on the real estate in the amount

of \$28,660 plus costs and remand with directions to the trial court to reduce the amount of this trust to \$16,478.20 plus costs.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

