

STATE OF MICHIGAN
COURT OF APPEALS

PAL-O-MAR BAR, IV, INC.,

Plaintiff/Counter-Defendant-
Appellant,

v

BADGER MUTUAL INSURANCE COMPANY
and WARREN BANK,

Defendants,

and

ROBERT ABRAHAM and RONALD
ABRAHAM,

Defendants/Counter-Plaintiffs-
Appellees.

UNPUBLISHED
November 26, 2013

No. 310448
Wayne Circuit Court
LC No. 10-011027-CZ

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's entry of judgment in favor of defendants, following a bench trial. We affirm.

At issue in this case is the allocation of insurance proceeds for theft loss from a rented commercial premise. Plaintiff, Pal-O-Mar Bar, IV, Inc., rented a bar from defendants, Robert Abraham and Ronald Abraham.¹ In about 1981, Robert and Ronald sold their bar, Pal-O-Mar Bar, but retained ownership and possession of the real estate. Robert testified that they did not convey the fixtures. There was a preliminary purchase agreement, indicating the fixtures were conveyed, but no purchase agreement was presented at trial and Robert could not recall if there

¹ Defendants did not obtain relief regarding their claims for rent and damage to the property. The parties do not challenge the trial court's ruling with regard to the counter complaint, and therefore, we do not address it.

was a purchase agreement. Johnnie Salemassi, as the president of Par-O-Mar Bar, IV, Inc., signed a lease with defendants on November 1, 1997. He and his wife, Fatima Salemassi, operated the bar. A subsequent purchase agreement was executed by Johnnie, but he was released from that agreement, and the parties operated on an unwritten month to month lease. Johnnie died on March 28, 2009, and Fatima wanted to sell the bar. She entered a management and purchase agreement with a potential buyer, Ali Zagher. Fatima testified her relationship with Zagher was difficult. On December 28, 2009, Zagher took many items from the business. Fatima was thereafter unable to pay the rent, and returned the keys to defendants in January 2010. Fatima filed an insurance claim and submitted a list of items stolen from the bar. The total amount of property lost was \$42,538 and the settlement of the claim was \$18,880. Defendants Robert and Ronald claimed they were entitled to the proceeds for 11 items: three back bar coolers, an underbar sink, a range/griddle, a smoke fan, a double booth, two single booths, a bar made submersible washer, and an undercounter low temperature glass washer.

Robert testified these items belonged to him and that they were all connected to the real estate. He testified that the three bar coolers were bolted to cement walls. Fatima testified that the bar coolers were not permanently attached to the structure; they were heavy, but they were on wheels and plugged in. According to Fatima, the range was only attached through a gas line, the undercounter low temperature glass cleaner was connected to a water line but was portable, the booths were attached with screws, the bar made washer was only attached by being plugged in, the smoke fan was hooked to the wall but was portable, and the underbar sink was permanently attached by a water pipe.

The trial court determined the items were part of the real property, and that defendants were entitled to damages for the items in the amount of \$10,675.60.

On appeal, plaintiff argues the trial court applied the wrong law to determine whether plaintiff or defendants were entitled to the proceeds and that, even if the trial court applied the correct law, defendants² were not entitled to the proceeds from the three back bar coolers and the range. We disagree. “Following a bench trial, we review for clear error the trial court’s factual findings and review de novo its conclusions of law.” *Ligon v City of Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). “The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court

² Defendants contend that this issue is not preserved for appellate review because plaintiff failed to cite authority in the trial court. Our review of the record reveals that the court admonished counsel for the parties for failing to cite legal authority in support of their positions. Consequently, the court ordered counsel to remain present until excused while it conducted legal research. To preserve an issue for appellate review, it must be raised, addressed, and decided in the trial court. *Michigan’s Adventure, Inc v Dalton Twp*, 290 Mich App 328, 330 n 1; 802 NW2d 353 (2010). Although plaintiff’s counsel failed to cite this case law in support of its argued position, the issue was raised, addressed, and decided, and therefore, is preserved for appellate review. *Id.*

made a mistake.” *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). Trial courts are generally afforded great deference because they are in a better position to examine the facts. *Id.* It is the function of the trier of fact to resolve issues regarding credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). When witnesses testify to diametrically opposed assertions of fact, the test of credibility must lie where the system has reposed it—with the trier of fact. *Kalamazoo Co Rd Comm’rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964). Intent need not be proven by direct evidence, but may be circumstantial and inferred from the totality of the circumstances. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 12; 596 NW2d 620 (1999). We review de novo the application of the facts to the law. *Van Buren Twp v Garter Belt, Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003).

A fixture is something that possibly exists apart from realty, but by annexation may be assimilated into realty. *Fane v Detroit Library Comm*, 465 Mich 68, 78; 631 NW2d 678 (2001). Generally, fixtures may be removed without material injury to the premises. *Lovett v Birmingham-Seaman-Patrick Co*, 192 Mich 372, 379; 158 NW 881 (1916). A three-part test determines what creates a fixture. *Wayne Co v Britton Trust*, 454 Mich 608, 610; 563 NW2d 674 (1997). “Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty.” *Id.*

Annexation occurs by the attaching or affixing of personal property to real property; even slight attachment to some structure or appliance affixed to the real property becomes a fixture. *Id.* at 615. Constructive annexation occurs when there is no actual or direct annexation to the realty, but the removal of the fixtures from the realty would impair both the value of the fixtures and the value of the realty. *Id.* at 616, 618. With regard to adaptation, an object introduced to realty may become a fixture if it is a necessary or useful supplement to the realty in light of the realty’s purpose. *Id.* at 618-619. Finally, the intention to make permanent accession to the realty requires the court to examine the objective visible facts and consider whether the article was intended to be a permanent accession to the realty. *Id.* at 619. The intent of the annexing party is found by examining the surrounding circumstances. *Id.* “Intent may be inferred from the nature of the article affixed, the purpose for which it was affixed, and the manner of annexation.” *Id.* In the absence of a definite and specific agreement retaining ownership of fixtures, the overt actions, not secretive or subjective intentions, control. See *Nadolski v Peters*, 332 Mich 182, 187-188; 50 NW2d 744 (1952). A trade fixture is defined as “a fixture installed on a leasehold by a tenant that the tenant may remove at the termination of the lease.” *Wayne Co*, 454 Mich at 612 n 2. A trade fixture is deemed the personal property of the lessee. *Outdoor Sys Advertising, Inc v Korth*, 238 Mich App 664, 668; 607 NW2d 729 (1999). Whether an object constitutes a trade fixture presents a mixed question of law and fact subject to de novo review on appeal. *Id.*

In this case, the trial court found the disputed items were intended to complement the real property and were accessions to the property. The trial court found there was no dispute that the items were annexed to the real property and that they were used for the purpose of the bar business. In light of the record on appeal, we conclude the trial court reached the correct conclusion. Robert testified all the items were attached to the real property. There was no evidence that they were not used for the bar business. On the contrary, Fatima indicated that the items were readily removable. Finally, defendants rented the property, as a bar, for years and,

with the exception of Fatima's testimony regarding the smoke fan, there was no evidence that plaintiff installed or purchased any of the fixtures. In the absence of an agreement delineating the ownership of the fixtures or receipts evidencing the purchase of the items and the intent to retain the items following completion of any lease agreement, we cannot conclude that the trial court's factual findings were clearly erroneous. *Nadolski*, 332 Mich at 187-188; *Ligon*, 275 Mich App at 124. Consequently, the trial court correctly determined the fixtures were part of the realty.

Plaintiff contends that the trial court erred in relying on *Sequist v Fabiano*, 274 Mich 643; 265 NW 488 (1936), and *Kent Storage Co v Grand Rapids Lumber Co*, 239 Mich 161; 214 NW 111 (1927). It contends that *Cameron v Oakland Co Gas & Oil Co*, 277 Mich 442; 269 NW2d 227 (1936), should apply rather than the cases cited by the trial court. In *Cameron*, our Supreme Court recognized the rule that "buildings erected by a tenant upon leased premises at his own expense and for his own use and benefit may be removed at any time during the tenancy or within a reasonable time thereafter[.]"³ *Id.* at 451. Following de novo review, we cannot conclude that the court committed legal error. Contrary to the *Cameron* decision, this dispute did not involve the erection of buildings on the bar premises. Rather, at issue is whether the stolen fixtures assimilated to the realty or were properly classified as trade fixtures, and therefore, the personal property of plaintiff. In the instant case, Fatima testified that Johnnie purchased the smoke fan. Other than that testimony, there was no evidence that plaintiff purchased, installed or contributed to the disputed items. Plaintiff also argues that the fixtures were not defendants' because they were previously sold. However, the only evidence that the fixtures were previously sold was a preliminary purchase agreement. In contrast, Robert testified that the disputed items were not sold. Plaintiff has not met its burden to establish that defendants previously sold these items or that the items were not fixtures assimilated into the property. *Triple E Produce Corp*, 209 Mich App at 175-176.

Plaintiff further contends that there was insufficient evidence to support the contention that the back bar coolers and components of the restaurant range were assimilated to the realty, and therefore, \$5,940 must be subtracted from the judgment. We disagree. "When reviewing a claim that there was insufficient evidence presented in a civil case, this Court must view the evidence in a light most favorable to the plaintiff and give the plaintiff the benefit of every reasonable inference." *Scott v Illinois Tool Works*, 217 Mich App 35, 41; 550 NW2d 809 (1996). Because of the lack of documentary evidence, the trial court was forced to rely on the trial testimony of the witnesses, their intent, and the photographs of the premises. The court was presented with diametrically opposed versions of events and resolved the credibility determination in favor of defendants. *Kalamazoo Co Rd Comm'rs*, 373 Mich at 314. Accordingly, there was sufficient evidence to support the court's decision.

³ This rule regarding buildings evolved from public policy. The owner of soil and the public benefitted from encouraging the tenant to devote himself to agriculture and improve the property to aid in his success. However, the tenant had no incentive to erect fixtures if the improvement was deemed to be the property of the owner. *Cameron*, 277 Mich at 446, 452.

Next, plaintiff argues that defendants' recovery of the insurance proceeds for the disputed items was barred by unjust enrichment because they previously sold the fixtures, and therefore, it would be unjust for them to collect the proceeds for the items. This unpreserved issue is reviewed for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Unjust enrichment is "the unjust retention of money or benefits which in justice and equity belong to another." *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010) (internal quotation omitted). However, plaintiff failed to establish that defendants previously sold the fixtures.⁴ Without a showing that "defendants received a benefit from plaintiff and that an inequity resulted to plaintiff as a consequence of defendants' retention of that benefit[.]" plaintiff's claim must fail. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003).

Finally, plaintiff argues the trial court's "visceral attitude towards counsel precluded a fair trial" and requests the matter be remanded to a different judge. We disagree. This issue is not preserved for appellate review because plaintiff failed to move to disqualify the judge in the trial court. *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). A judge is disqualified when personally biased or prejudiced for or against a party or attorney. MRE 2.003(C); *In re Contempt of Henry*, 282 Mich App at 679-680. Judicial rulings are not a valid basis for a motion to disqualify unless they display deep-seated favoritism or antagonism that makes fair judgment impossible. *Id.* at 680. A party challenging the bias of the trial court bears the heavy burden of overcoming the presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Plaintiff failed to demonstrate plain error affecting substantial rights from this unpreserved issue. Our review of the lower court record reveals that the trial court admonished counsel for the parties regarding their preparation of the case and the failure to provide legal authority in support of their positions. This criticism did not rise to the level of deep-seated favoritism or antagonism and was directed at both attorneys. Accordingly, this claim of error does not provide plaintiff with appellate relief.

Affirmed. Defendants may tax costs. MCR 7.219.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood

⁴ Plaintiff was not a party to the earlier lease delineating the sale of fixtures and did not present testimony from that tenant regarding the purchase. Further, plaintiff did not present proofs that the items mentioned in the earlier agreement with a non-party were the same items at issue in this case. Consequently, the trial court was left to assess the testimony from the parties regarding this claim.