Circuit Court for Montgomery County
Case No. 378975

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 288

September Term, 2016

MERRILL COHEN, Trustee

v.

REHAB AT WORK CORP., *et al.*

Nazarian,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: August 23, 2017

During Raymond and Julie Howar's marriage, Ms. Howar formed two entities: Rehab At Work, Corp. ("RAW") on her own, and Howar Family Realty, Corp. ("HFR") with Mr. Howar. In the course of adjudicating the Howars' divorce in 2008, the Circuit Court for Montgomery County determined that Ms. Howar owned fifty-five percent of each entity and Mr. Howar owned forty-five percent. After the divorce, Mr. Howar sought protection under federal bankruptcy law, and Merrill Cohen (the "Trustee") was appointed trustee of his estate.

As part of the asset-marshaling process, the Trustee sued RAW, HFR, and Ms. Howar, and later amended his complaint to state several direct and derivative claims designed to recover distributions to which, he alleged, Mr. Howar was entitled. After a bench trial, the circuit court found in favor of RAW, HFR, and Ms. Howar. The Trustee challenged alleged computational errors in a Motion to Alter or Amend Judgment (the "Motion to Amend"), and the circuit court denied the motion. The Trustee appeals both decisions and we affirm.

I. BACKGROUND

The Howars married in 1988. In March 1994, Ms. Howar formed RAW, a subchapter S corporation that provides industrial and occupational rehabilitation services to clients at clinics in the Washington, D.C. metropolitan area. From the beginning, she served as RAW's Chief Executive Officer ("CEO"). In its Articles of Incorporation, RAW authorized and issued twenty shares to Ms. Howar. In 1995, Ms. Howar suffered health

issues and Mr. Howar started assisting her with RAW. She later transferred nine shares of her RAW stock to Mr. Howar.

Until the Howars' separation in 2006, RAW employed both of them, and both received salaries and distributions from the company.[1] Then, in February 2006, Mr. Howar stopped working at RAW, and Ms. Howar assumed the majority of his responsibilities, including maintaining RAW's accounts receivable and accounts payable, marketing, and negotiating RAW's leases and other contracts.

The Howars separated in March 2006, and Mr. Howar filed for divorce later that year. After a bench trial, the circuit court found that Mr. Howar retained forty-five percent ownership interest in both RAW and HFR, that Ms. Howar owned fifty-five percent of both, and that Mr. Howar had a right to receive distributions from RAW and HFR. RAW had been—and continues to be—a successful business,[2] and prior to 2011, each received distributions from RAW.[3]

On March 31, 2011, Mr. Howar filed a voluntary petition in bankruptcy, and the Trustee was appointed to manage his bankruptcy estate. As a result of his filing, Mr. Howar's ownership interests in RAW and HFR passed to his bankruptcy estate, but neither

[1] During the marriage, Mr. Howar also worked as the principal broker for HFR, a real estate business started by Mr. Howar's grandfather and incorporated by both of the Howars in 2002.

[2] RAW's income tax return for 2014 showed gross receipts of almost seven million dollars.

[3] According to Ms. Howar's testimony, Mr. Howar's distributions were reduced to offset loans from RAW that he did not think he would be able to repay.

paid any distributions to the estate. Shortly after his appointment in 2011, the Trustee learned that Mr. Howar had a lawsuit pending against RAW and Ms. Howar.[4] The Trustee also learned that RAW had made loans to Ms. Howar and to HFR without executing promissory notes or adopting corporate resolutions.[5]

In 2011, Ms. Howar's stated salary was $400,000, and she actually was paid $388,500.[6] In early 2012, RAW hired a new accountant, Michael McGinley, who noticed that the distributions to the Howars were not proportionate to their ownership interests in RAW, as is required for subchapter S corporations. To remedy this imbalance, Mr. McGinley converted about $207,000 of Ms. Howar's distributions into loans, effective December 31, 2011, because increasing her salary retroactively would result in tax penalties to RAW. Also around this time, Ms. Howar's salary increased to about $700,000

[4] The court resolved this lawsuit in RAW and Ms. Howar's favor, ruling that RAW could offset Mr. Howar's distributions against his loans to the company.

[5] The Trustee testified that RAW made similar loans without promissory notes or resolutions to Mr. Howar when he was employed by and involved with RAW. Ms. Howar testified that no notes or documentation were prepared for the loans because that was the "standard operating procedure" at RAW beginning in the 1990s. Those practices diverge from Internal Revenue Service ("IRS") recommendations that loans by a corporation to an officer be written and include an interest rate, a period for repayment, and consequences for failing to repay the loan. One of the Trustee's experts, Louis Ruebelmann, testified that the IRS would treat these loans as income, not distributions, if it audited RAW and that he would not be shocked if a family-owned business paid personal expenses. Also, in 2014, Ms. Howar amended the tax returns to impute interest on her outstanding loans from RAW.

[6] As a subchapter S corporation tax expert testified, S corporations must pay both payroll and self-employment taxes on money paid to S corporation owners. As a result, S corporation owners seek to pay themselves lower salaries in favor of larger distributions.

because Mr. McGinley believed that she was undercompensated and because RAW had "had a fabulous year."

In a letter dated November 28, 2012, the Trustee demanded that RAW take steps to recover funds loaned to Ms. Howar and HFR. RAW responded that it would not pursue claims against Ms. Howar or HFR. On July 11, 2013, the Trustee filed a complaint containing direct and derivative claims against RAW, HFR, and Ms. Howar, all designed to recover monies on behalf of RAW and to require distributions that, at least to the extent of Mr. Howar's share, would flow to the bankruptcy estate. RAW, HFR, and Ms. Howar filed a Motion to Dismiss Complaint or, in the Alternative, Motion for Summary Judgment, which the court granted as to claims arising prior to Trustee's appointment on March 31, 2011.

On March 25, 2014, the Trustee filed an amended complaint that alleged five counts: (1) a direct count against RAW seeking payment of *pro rata* distributions to the estate; (2) a derivative count against Ms. Howar to recover money paid by RAW to satisfy Ms. Howar's obligations; (3) a derivative count against HFR and Ms. Howar to collect loans made to HFR by RAW; (4) a derivative count against Ms. Howar to collect loans made to her by RAW; and (5) a direct count alleging constructive fraud against Ms. Howar and RAW. RAW, HFR, and Ms. Howar filed an answer.

After a three-and-a-half day bench trial, during which the circuit court granted RAW, HFR, and Ms. Howar's Motion for Judgment as to Trustee's third count and denied the motion as to all other counts, the court delivered an oral opinion on November 24, 2015.

The court started by saying that "the single most important factual issue" lay in determining "the reasonable compensation for the job that [Ms.] Howar[] performs as the [CEO] of [RAW]." The court reviewed the expert testimony of Neil Demchick, the Trustee's expert, and Michael Graham, RAW, HFR, and Ms. Howar's expert, and accepted Mr. Graham's estimate that Ms. Howar was paid approximately $840,000 in 2015, as well as his determination that the reasonable amount of compensation for each of the prior four years should be computed by discounting the 2015 amount by five percent per year. Then, by comparing the aggregate amount of Ms. Howar's estimated annual compensation to her actual salary, the court determined that Ms. Howar had been *under*paid by $148,350 for the period between 2011 and 2015. After explaining its math, though, the court turned to the law, found that RAW didn't owe fiduciary duties to its shareholders, and found in favor of the defense on Count I. The court also found in favor of the defendants on Count II because the reclassification of payments as loans worked to the benefit of the corporation; found in favor of Ms. Howar on Count IV because the company had consistently made loans without documentation; and found in favor of Ms. Howar on Count V because the company's practices were consistent with Mr. Howar's reasonable expectations. The court then entered judgment in favor of RAW, HFR, and Ms. Howar on all counts of the amended complaint.

After the court made its ruling, counsel for the Trustee identified what he believed were computational errors in the court's calculation of Ms. Howar's compensation, that the court's calculations for 2015 had compared twelve months of reasonable compensation

with eight months of actual compensation. The court noted the alleged error, didn't find the error significant, and seemed to anticipate further proceedings on the question. On December 15, 2015, the court entered a written order consistent with its oral ruling.

The next day, the Trustee filed a Motion to Amend under Maryland Rule 2-534. The Trustee again cited computational errors, and by his math, Ms. Howar was *over*paid by $135,500 for the 2011 to 2015 period, not *under*paid by $148,350. RAW, HFR, and Ms. Howar opposed the Trustee's motion and the Trustee filed a reply on December 23, 2015. At a hearing on March 11, 2016, the court acknowledged the computational error, but nevertheless stated that its computation was offered as an alternative ground because it also found that the Trustee failed to state a claim in Count I. Accordingly, the court denied the Motion to Amend and entered a written order the same day.

The Trustee filed a timely appeal of the circuit court's judgment and its denial of the Motion to Amend. We will discuss additional facts below as necessary.

II. DISCUSSION

The Trustee challenges three of the circuit court's decisions on appeal: *first*, its denial of his Motion to Amend; *second*, its determination that neither RAW nor Ms. Howar owed the Trustee any fiduciary duties; and *third*, its finding that RAW, HFR, and Ms. Howar's compensation expert witness was more persuasive than Trustee's expert.[7] We find none of these arguments persuasive.

[7] In his brief, the Trustee phrased his Questions Presented as follows:

A. The Circuit Court Correctly Denied Trustee's Motion To Amend.

The Trustee argues that "[t]he Trial Court erred in denying [his] Motion to Alter or Amend when, as the trial court itself admitted, it had incorrectly computed the damages analysis when initially granting judgment to [Ms. Howar and RAW] on the basis that no damages were shown by [the Trustee]." He contends that "the reciprocal of th[e court's] analysis [that Ms. Howar having been underpaid resulted in no damages] means that an overpayment constitutes damages which must be remediated by a . . . judgement" in his favor.

Ms. Howar and RAW agree that the circuit court acknowledged the mathematical error. They argue, however, that the circuit court did not abuse its discretion when it

1. Whether the trial court erred in denying Plaintiff's Motion to Alter or Amend Judgment when the court acknowledged that its decision granting judgment for defendants was based on a computational error which was outcome determinative.

2. Whether the trial court erred in applying this Court's ruling in *Bontempo v. Lare*, 217 Md. App. 8[ ](2014) and that of the Court of Appeals in *Bontempo*, 444 Md. 344[ ](2015) when it concluded that an action by Plaintiff would not lie against the corporate defendant for damages or, derivatively, against its officer and director for improper receipt of funds not proportionately matched to Plaintiff as shareholder of the corporation.

3. Whether the trial court improperly credited the expert testimony of a witness whose opinion was not supported by facts or logic and was not directed at the appropriate level of compensation for the corporation's executive, when that issue was central to the outcome of the case.

declined to alter or amend the judgment because it "reasoned that, regardless of the mathematical error's potential impact upon the determination that [the Trustee] had suffered no damages, [the Trustee] was not entitled to relief for the additional reason that [the Trustee] had failed to establish that the corporation was liable to him."[8] We agree with RAW and Ms. Howar that the circuit court's computational error does not affect the outcome of the Trustee's claim.

The correct standard of review for a Motion to Amend is abuse of discretion.[9] *Cent. Truck Ctr., Inc. v. Cent. GMC, Inc.*, 194 Md. App. 375, 397 (2010). "A ruling on a motion to alter or amend the judgment is 'directed to the sound discretion of the court, and in the absence of abuse thereof, no appeal will lie."' *Id.* at 397–98 (citation omitted). An abuse of discretion occurs:

> 'where no reasonable person would take the view adopted by the [trial] court [ ]'... or when the court acts 'without reference to any guiding principles.' An abuse of discretion may also be found where the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court [ ]'... or when the ruling is 'violative of fact and logic.'

[8] The Trustee's and Ms. Howar and RAW's briefs each discuss the underlying merits of the circuit court's calculation, which, as we explain, we don't need to evaluate.

[9] The Trustee asks us to apply a different standard of review than Ms. Howar and RAW. The Trustee argues that we should apply a clear error standard of review to the factual errors the circuit court declined to correct when it denied the Motion to Amend, and that the court abused its discretion by failing to correct them. Ms. Howar and RAW counter that the correct standard is abuse of discretion, and that Trustee "waived or abandoned the issue" by failing to brief it. We find the issue preserved—although the Trustee did not state expressly that the circuit court abused its discretion, he sufficiently presented the argument in his brief.

> Questions within the discretion of the trial court are 'much better decided by the trial judges than by appellate courts, and the decisions of such judges should be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred.' In sum, to be reversed '[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'

Id. at 398 (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418–19 (2007) (alterations in original)). An abuse of discretion "should only be found in the extraordinary, exceptional, or most egregious case." *Id.* (quoting *Aventis Pasteur, Inc.*, 396 Md. at 419). And because the abuse of discretion standard makes "generous allowances for the trial court's reasoning," *Das v. Das*, 133 Md. App. 1, 15 (2000), we give great deference to its conclusion and uphold that conclusion in the absence of an apparently serious error, *Central Truck Center, Inc.*, 194 Md. App. at 398. We explained the boundaries of the court's discretion in *Steinhoff v. Sommerfelt*:

> That a party, *arguendo*, should have prevailed on the merits at trial by no means implies that he should similarly prevail on a post-trial motion to reconsider the merits. A decision on the merits, for instance, might be clearly right or wrong. A decision not to revisit the merits is broadly discretionary. The appellant's burden in the latter case is overlaid with an additional layer of persuasion. Above and beyond arguing the intrinsic merits of an issue, he must also make a strong case for why a judge, having once decided the merits, should in his broad discretion deign to revisit them.

144 Md. App. 463, 484–85 (2002).

The circuit court determined, among other things, that Ms. Howar was underpaid between 2011 and 2015, "and that because what she is entitled to exceeds what she has

actually received, the plaintiffs in this case ha[d] suffered no damage from her actions." In showing its work, the court referred to a chart that showed what it determined to be Ms. Howar's actual and reasonable compensation for each year between 2011 and 2015, as well as the surplus or shortage Ms. Howar received for each year.

Once the court concluded its oral opinion, the Trustee's counsel inquired whether the numbers used to calculate Ms. Howar's reasonable compensation accounted for the first eight months of 2015—the time until RAW completed its financial statement—or for the full twelve months. The court stated that the number it used estimated Ms. Howar's compensation for the entire year, and found that as long as her annual salary did not exceed $703,178, she was underpaid from 2011 to 2015.

In his Motion to Amend, the Trustee raised two alleged computational errors, arguing that "the Court's calculations were based on an erroneous comparison for 2015 [where the reasonable compensation accounted for twelve months while the actual compensation accounted for just eight months] which, when rectified, changes the balance of damages necessitating a determination of damage sustained by Plaintiff warranting judgment in Plaintiff's favor." *First*, the Trustee argued that reducing the reasonable compensation for 2015 to cover an eight-month period would result in an underpayment to Ms. Howar of $4,931 rather than $284,811. *Second*, the Trustee asserted that the court had subtracted the 2012 actual compensation and reasonable computations incorrectly, finding an overpayment to Ms. Howar of $36,684 for that year rather than the correct value, an overpayment of $40,684. When the correct numbers were substituted into the court's

aggregated analysis for 2011 to 2015, the Trustee argued, the court should have found that Ms. Howar was overpaid by $135,530.

Of course, none of this changes the fact that the court found in favor of RAW on Count I because corporations don't owe fiduciary duties to shareholders. Computational issues aside, the court also appeared to believe that the Trustee had not proven any damages. But even if we assume that the court did the math wrong, and that Ms. Howar in fact had been overpaid, the outcome is the same, and the court did not abuse its discretion by declining to reverse its original decision.

B. The Circuit Court Correctly Concluded That The Trustee Did Not Have A Cause Of Action Against RAW And Ms. Howar.

According to the Trustee, the circuit court "in effect [] validat[ed]Ms. Howar's improper conduct and that of RAW, which she controlled" when it failed to find fault in the re-characterization of distributions paid to Ms. Howar as a loan. The Trustee argues that if the payments from RAW to Ms. Howar, as the majority shareholder of the company, were "disguised distributions . . . , then Mr. Howar, and after his bankruptcy, the Bankruptcy Estate of Mr. Howar was entitled to a proportional distribution reflecting their 45% ownership of [RAW]."

1. The Trustee did not have a cause of action against RAW.

The Trustee offers two reasons why the circuit court was mistaken in its conclusion that a corporation does not owe fiduciary duties to its shareholder: *first*, that the Trustee was merely alleging a claim for money due and owing to the estate, not a breach of fiduciary duty; and *second*, that protecting minority shareholders requires a corporation to

maintain fiduciary duties to them. The Trustee relies on *Bontempo v. Lare*, 217 Md. App. 81 (2014), *aff'd*, 444 Md. 344 (2015), as support for the proposition that shareholders can bring a direct claim against a corporation, and he cites *Mona v. Mona Electric Group, Inc.*, 934 A.2d 450 (2007), *Werbowsky v. Collomb*, 362 Md. 581 (2001), and *Lerner v. Lerner Corp.*, 132 Md. App. 32 (2000), as support for the view that a corporation owes duties to its shareholders.

In this case, only one count of the amended complaint alleged a direct claim against RAW, and it sought a proportionate distribution based on "disguised distribution[s]" allegedly paid to Ms. Howar. In its oral ruling at the close of the trial, the circuit court found in favor of RAW on this count:

> Count I, recovery of debt for distributions wrongfully made by RAW, and the only defendant is RAW, not [Ms.] Howar. Now, in paragraph 24 and 25 [of the amended complaint], the claim is for 45 percent of the sums paid as corporate distributions, regardless as whether characterized as loans, distributions, payments to HFR, which was dealt with earlier in the case, legal fees because RAW had made the payments to the benefit of [Ms.] Howar and did not make corresponding distributions to the trustee. In paragraph 26, it is requesting 45 percent of any excess compensation, and it uses the term disguised as debt.
>
> To the extent then that this talks about the company wrongfully engaging in conduct and disguising distributions, it really sounds to me like it's more than an action on debt. It sounds much more like it is an action for some type of breach of fiduciary duty, but as a corporation, a corporation owes no fiduciary duty to its stockholders, or shareholders rather, and I went back and looked at Bontempo in light of this discussion that we had during the course of closing argument in this case, and Bontempo is not to the contrary. Because in Bontempo the only breach of fiduciary duty claim was in Count III, and that

was a derivative claim brought on behalf of the corporation against the controlling owner or direction . . . . That case is principally, as we all know a discussion of the minority shareholders' right to a remedy for oppression and specifically, doesn't typically include employment remedies. But there is nothing in the language of Bontempo that suggests that you can bring, a shareholder can bring a private action, or direct action, against the corporation for a breach of fiduciary duty.

And as an integral component of the plaintiff's claim under Count I, is that RAW has improperly classified loans, payments for legal fees, as an effort to avoid its obligations to pay the plaintiff distributions to which it is entitled. Since if the payments were properly loans, were properly payments of legal fees, the company would not be obliged to make proportionate distributions to plaintiff. So, necessary for the claim, is that these things have been improperly classified by the corporation.

In addition, to which, as I mentioned, the plaintiff alleges that RAW has paid excessive compensation to Ms. Howar, and that is also a form of disguise the distribution. So, it sounds, to some extent like it is a claim for breach of fiduciary against RAW and no such claim would lie, in which case the defendants would be entitled to have Count I dismissed.

To the extent, however, that it can be viewed as a claim for debt, which is what it was entitled and it is a fact that at least in 2012, there were some payments made that were classified as distributions and no correspondence proportionate payments were made to the plaintiff in this case. And even to the extent that the argument could be made as to any other payments made in other years, again, the Court would find the defendants are, in any event, entitled to judgment on Count I because the evidence, as previously discussed, shows the reasonable compensation to which Ms. Howar was entitled exceeds the payments that she actually received from the corporation, and therefore, the plaintiffs have suffered no damage.

We agree with the circuit court that *Bontempo* is no help to the Trustee. In that case, an aggrieved minority shareholder brought two direct claims against the company: the first under § 3-413 of the Corporations and Associations Article ("CA") of the Maryland Code, and the second under a breach of contract theory. *Bontempo v. Lare*, 444 Md. 344, 356 (2015). The first direct claim sought dissolution of the company, under CA § 3-413, based on the minority shareholder's status as a shareholder and the alleged "illegal, fraudulent, and oppressive" conduct of the majority shareholders with respect to him. *Id.* During oral argument in this case, though, the Trustee's attorney acknowledged that he is not requesting such equitable relief in this case (nor could he, since he made no allegations of illegal or oppressive conduct by Ms. Howar and the circuit court determined that there was no fraudulent conduct). Moreover, and unlike the second direct claim in *Bontempo*, the minority shareholder—originally, Mr. Howar—never entered into a shareholders' agreement that could give rise to non-statutory shareholder rights and obligations, such as a right to receive distributions. *See id.* at 350–51.

Of the cases the Trustee cites in his brief, only *Mona* lends any support to the notion that a shareholder can bring a direct claim against a corporation. *See* 176 Md. App. at 697. But *Mona* also specifies that "[t]o maintain a direct action, the shareholder must allege that he has suffered an injury that is separate and distinct from any injury suffered either directly by the corporation or derivatively by the stockholder because of the injury to the corporation," *id.* (internal citation and quotation marks omitted), and that "[a]ny damages recovered by the shareholder in the direct action go to the shareholder himself." *Id.*; *see*

also Oliveira v. Sugarman, 451 Md. 208, 231 (2017) ("The remedy that a shareholder seeks must benefit the shareholder as an individual, not the corporate entity." (citation omitted)). In *Bontempo*, we "held that, because [the *company*] was the injured party with respect to the [majority shareholder]s' misuse of corporate funds, the monetary remedy should make [the *company*] whole. Once [the company] was made whole by the [majority shareholders], it would be up to the company to decide whether to make a distribution to its shareholders. [*Bontempo*,] 217 Md. App. at 126–30." 444 Md. at 362 (emphases added). And here, the injury the Trustee alleges—that money paid to Ms. Howar should have been characterized as distributions rather than loans or salary—is an injury to the company. To the extent that Mr. Howar (and, in his shoes, the Trustee) had any right to distributions, they were not specific to him—they were proportional, and at the discretion of the company. We agree, therefore, that the Trustee did not state a claim that could entitle him, through Mr. Howar, to recover unpaid distributions from RAW.

2. The Trustee did not have a cause of action against Ms. Howar.

The Trustee also challenges the circuit court's finding that Ms. Howar did not breach a fiduciary duty to Trustee when she re-characterized her distributions as loans. We see no error in that conclusion.

"The directors of a corporation stand in a fiduciary relation to the corporation and its stockholders." *Mona*, 176 Md. App. at 695 (citations omitted). A director is required by statute to act reasonably and in the corporation's best interests. CA § 2–405.1(c); *Leavy v. Am. Fed. Sav. Bank*, 136 Md. App. 181, 192 (2000). Under the business judgment rule,

codified at CA § 2–405.1(g), directors are presumed to act in a manner consistent with these duties, and the party challenging a director's decision bears the burden of rebutting that presumption. *Mona*, 176 Md. App. at 696 (citing *Bender v. Schwartz*, 172 Md. App. 648, 667 (2007)). Put another way, "[t]he business judgment rule protects corporate directors from liability when the[y] act prudently and in good faith." *Oliveira*, 451 Md. at 221 (citation omitted).

Maryland corporate law anticipates the possibility that majority shareholders might misuse their authority to the detriment of minority shareholders or the corporation itself or both:

> Maryland common law recognizes that minority shareholders are entitled to protection against fraudulent or illegal action of the majority. Especially in closely held corporations, the majority shareholder owes a fiduciary duty to the minority shareholder (or shareholders) "not to exercise [their] control to the disadvantage of minority stockholders." *Lerner[]*, 132 Md. App. [at] 53[]. A majority shareholder owes a fiduciary duty to minority shareholders not to use his voting power for his own benefit or for a purpose adverse to the interests of the corporation and its stockholders. *Cooperative Milk Serv. v. Hepner*, 198 Md. 104, 114 [] (1951).

Mona, 176 Md. App. at 697.

Here, the circuit court found that the Trustee had not established any breach of duty on the part of Ms. Howar:

> With respect to Count II, the recovery of funds paid by RAW to satisfy obligations of [Ms.] Howar, this is a derivative action brought by the corporation against [Ms.] Howar, and therefore, in fact, you have RAW alleging that [Ms.] Howar has violated a duty that she owes to them. Specifically, under that Count, the claim is that improper loans were made,

including loans to [HFR] . . . , and that the corporation made excessive distributions to [Ms.] Howar. . . .

* * *

As previously stated, the Court has concluded that the reasonable compensation to which [Ms. Howar] is entitled exceeds the actual compensation received and therefore, RAW has suffered no injury. Further, from the evidence[,] the actions undertaken by the defendant, Ms. Howar, to reclassify the dividends in 2012 and to treat the payments as loans and not distributions post-2012, while to the detriment of the shareholder, that is the minority shareholder, actually worked to the benefit of the corporation, and therefore, there is no breach of duty to the corporation, as I noted by reclassifying them as loans, the corporation didn't incur any obligation to the minority shareholder and there were other benefits that were previously mentioned that were testified to by Mr. McGinley.[10]

* * *

With respect to Count IV, recovery of loans RAW made to [Ms.] Howar, again this is somewhat duplicative of Count II, it is a derivative claim made by the corporation against [Ms.] Howar, although here the allegations seem to be that these loans were improper because no documents exist, there is no interest, there is no term. However, according to the testimony of Mr. McGinley and the others presented to the Court, the fact that the loans were made without documents, without terms is consistent with the long-term history of the business of this company from its inception, certainly going back to when Mr. [] Howar joined the company, which I think might have been in 95, but any way, long before this litigation began. Further, according to the testimony of Mr. McGinley, to have loans where there is no documentation that bear no interest and have

[10] Mr. McGinley testified that he recommended that Ms. Howar change the post-2011 distributions to loans because it wouldn't result in any tax penalties for RAW in case of an audit by the IRS and didn't require RAW to pay out additional cash to Mr. Howar or the Trustee.

> no payment date or due date, is not all that unusual in small, privately held companies.
>
> So, particularly considering again, reasonable compensation for the years 2011 to 2015, it seems the actual compensation she received, I find there is no damage, and accordingly, on Count IV, enter judgment in favor of [Ms.] Howar.

The circuit court found that Ms. Howar did not breach any fiduciary duty because although the minority shareholder—then Mr. Howar—did not benefit from the reclassification of the distributions as loans, the decision to reclassify these payments benefited the company. Expert testimony supported this conclusion. Ms. Howar, RAW's sole director, testified that she accepted Mr. McGinley's re-characterization recommendation because it was in RAW's best interests. Ms. Howar based her decision on the advice of professionals, and we discern no error in the circuit court's conclusion that she did so reasonably and appropriately.

C. The Circuit Court Did Not Err In Crediting One Expert's Testimony Over The Other's.

The Trustee contends that the circuit court did not properly consider Mr. Demchick's testimony and chose inappropriately to rely on Mr. Graham's "flawed" testimony, which the Trustee thinks that the court should have disregarded. The Trustee implores us to "vacate[] and [] remand[this case] to the trial court with instructions to disregard the testimony of [Mr.] Graham," leaving the court to reconsider the case while "relying on [Mr.] Demchick[']s testimony." We decline the invitation to second-guess the trial court's first-hand assessment of these dueling experts.

The admissibility of expert testimony "is a matter largely within the discretion of the trial court and its action will seldom constitute ground for reversal." *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 417 (2013) (quoting *Radman v. Harold*, 279 Md. 167, 173 (1977)). Under the abuse of discretion standard, "we may not reassess the credibility of [an] expert witness, or the weight of his testimony" because "[t]hat is quintessentially a job for the trial court sitting as a fact-finder in this bench trial." *Leavy*, 136 Md. App. at 199–200. In addition, "[i]n deciding whether there is sufficient evidence to support the trial court's factual finding, we assume the truth of all the evidence relied upon by the trial court, and of all favorable inferences fairly deducible from that evidence." *Id.* at 200. And "[i]f there is any competent, material evidence to support the factual findings below, the weight and value of such evidence must be left to the trier of facts, as it is not our function to determine the comparative weight of conflicting evidence." *Id.* (quoting *Carling Brewing Co. v. Belzner*, 15 Md. App. 406, 412 (1972)).

Here, the court heard from four competing experts, including Messrs. Demchick and Graham.[11] Mr. Demchick, a financial analyst with an expertise in executive compensation and damages analysis, testified on behalf of the Trustee. He testified about how he analyzed RAW's compensation and the resources on which he relied to determine the

[11] Of the other two testifying experts, one testified for the Trustee—Mr. Ruebelmann, a certified public accountant ("CPA") with an expertise in accounting and taxation and with experience with small companies—and the other testified for RAW, HFR, and Ms. Howard—Mr. McGinley, RAW's CPA since March 2012 and an accredited business evaluator with an expertise in accounting and tax-related matters. The Trustee does not challenge the court's findings regarding these experts' credibility in his brief, *i.e.*, that Mr. McGinley was more persuasive than Mr. Demchick.

appropriate compensation for an executive such as a CEO, including Economic Research Institute ("ERI") data for CEOs at comparable companies, financial analysis prepared by Regional Management Associates to determine return on net revenues or sales, RAW's performance, and Ms. Howar's duties and functions at RAW. Relying primarily on return on net sales percentages, Mr. Demchick testified that the reasonable compensation for Ms. Howar was roughly $457,959 in 2012, $520,500 in 2013, $512,407 in 2014, and $780,611 in 2015. He testified that Ms. Howar's actual compensation was $708,017 in 2012, $738,718 in 2013, $749,900 in 2014, and $749,900 in 2015. And according to Mr. Demchick, all of these salaries, except for 2015, resulted in return on sales percentages below the ratio he considered appropriate. Mr. Demchick also detailed the amount of money Ms. Howar received from RAW in excess to her salary from 2011 to 2015, funds that he characterized as $1,773,721 in "effected distributions."

Mr. Graham, a compensation consultant and expert with a specialty in executive compensation, testified that determining reasonable executive compensation requires an understanding of the industry, the organization, the position, and the individual in the position. He detailed these factors in his report, and observed that Ms. Howar brought more to the position of CEO at RAW than an average CEO. Mr. Graham criticized Mr. Demchick's approach of focusing almost exclusively on RAW's bottom line—a method not used generally by compensation experts, he said, because it ignores the other factors. He also criticized Mr. Demchick's reliance on ERI because it focuses on the cash component of CEO compensation and ignores non-cash components. According to Mr.

Graham, Ms. Howar's reasonable compensation should have been between $800,000 and $1.3 million for 2015, and closer to the higher figure. In order to determine Ms. Howar's reasonable compensation before 2015, Mr. Graham reducing the compensation for 2015 by 3.5 to 4 percent, the average rate of increase over the last few years for CEOs' salaries in similar businesses.

In rebuttal, Mr. Demchick characterized Mr. Graham's method for determining Ms. Howar's reasonable compensation as unreasonable. In particular, he took issue with the fact that Mr. Graham's method "doesn't consider the fact that there could be variations between each of the years," and that when determining total compensation for an executive, "to only look at one year, is certainly not in my opinion appropriate, because the total compensation includes incentive compensation and simply by definition that's based upon the results of that year." Mr. Demchick also stressed that the compensation for an executive can vary greatly according to the performance of the company.

After hearing all of the experts' testimony, the court found Mr. Graham more persuasive than Mr. Demchick.[12] In making this determination, the court considered the fact that Mr. Demchick "is not a certified compensation analyst" and had done about one actual compensation analysis per year over thirty years—half for large companies and half

[12] The court also found Mr. McGinley, who testified, in part, about the business purposes of re-characterizing the loans and advances to Ms. Howar, more persuasive than Mr. Demchick, and stated that although Mr. McGinley was not a compensation expert, his services in evaluating businesses included compensation issues. The court made no express finding about Mr. Ruebelmann.

for smaller, private companies. In contrast, the court emphasized that Mr. Graham "was the only compensation expert to testify in the case:"

> He's got 41 years in the industry. He does approximately 120 evaluations per year, and some of those evaluations involve hundreds, if not thousands, of employees in a particular classification. He specializes in CEO and executive compensation. He has written two or three books on the subject. He has worked with large companies and small companies. . . . And while at times, he certainly presents on the witness stand as a little too full of himself, in fairness, he has perhaps more reason to be full of himself than many experts that the Court has seen . . . .

After comparing the competing analyses, the court found "that [Mr. Demchick's] analysis focuse[d] almost exclusively on the company's performance and fail[ed] to take into account certain other significant factors as testified to by Mr. Graham," including Ms. Howar's "talent factor":

> [T]here was evidence that she started the company, she built the company from one location to its present nine locations, and she personally guarantees all of the loans of the company and the leases. She is a licensed therapist and so she sets the quality controls for the company, companywide. It is her relationships with the customers that she built over time and her reputation that are in large measure responsible for the company's ongoing success and referrals of clients to the company, and clearly, she is critical to the company's continued performance.

The court found that Mr. Demchick's analysis relied too heavily on the data from ERI, which "give[s] undue weight to the cash component of [an executive's] compensation" without regard to any non-cash compensation. The court determined that Ms. Howar's total compensation from 2008 to 2015 was "pretty steady" and "fluctuates between a low

of 604,000 in 2010 to a high of $825,942 in 2013, and measured as a percentage of net revenues, it flows between roughly 10 percent of net revenues to 12 percent of net revenues."

The circuit court heard competing expert testimony, weighed the competing opinions, found Mr. Graham's testimony more useful, and found that Ms. Howar's compensation was reasonable. For us to direct the trial court otherwise, as the Trustee requests, would be to substitute our judgment for that of the court that sits in a far better position to assess the weight and value of the competing expert witnesses. *See Leavy*, 136 Md. App. at 200 (stating that the assessment of the credibility of an expert witness's testimony "is quintessentially a job for the trial court sitting as a fact-finder in [a] bench trial"). That is not our role.[13]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

[13] After argument, the Trustee filed a Motion to File Substituted Redacted Pages of Record Extract or In the Alternative for an Order Sealing the Record Extract and Briefs. The appellees opposed this motion, but suggested instead that the ten pages at issue, E.877–87, be stricken from the Record Extract. The appellees' suggestion makes the most sense, and we grant the motion in part, deny it in part, and direct that those pages be stricken. We deny the appellees' request that we consider imposing sanctions on the Trustee.