Circuit Court for Prince George's County
Case No. CAL 17-17024

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 109

September Term, 2019

KENNETH J. DIAS, JR., et al.

v.

THE ESTATE OF WALTRAUT CICCONE

Meredith,*
Arthur,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: December 21, 2021

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

The Circuit Court for Prince George's County entered a judgment granting relief to the Estate of Waltraut Ciccone ("the Estate"), appellee and cross appellant, in a case in which the Estate had sued Marie Dias ("Marie") and her son Kenneth J. Dias, Jr. ("Kenneth"), appellants and cross appellees. The Estate alleged that the Diases, who each held a Maryland real estate sales license, had taken unfair advantage of its decedent, Waltraut "Val" Ciccone ("Ms. Ciccone"), by persuading Ms. Ciccone to sell her home to Kenneth for $60,000 in March 2016 at a time when the market value of the home was over $200,000. The court found that Marie had taken unfair advantage of a confidential relationship with Ms. Ciccone, and declared the conveyance to Kenneth void. The court imposed a constructive trust on the property for the benefit of the Estate, and awarded other ancillary relief.

The Diases noted an appeal, and the Estate noted a cross appeal.

QUESTIONS PRESENTED

The Diases present for our review the following questions, which we quote verbatim:

A. Was the evidence sufficient to sustain the court's verdict as not clearly erroneous?

   (i) Does the trial court's erroneous finding of subsidiary facts vitiate any inference which could be premised on those erroneous findings?

B. Was the issue of a straw-purchaser raised by the pleadings and supported by sufficient evidence?

As we will explain in this opinion, we will hold that there was sufficient evidence to find: (1) that Marie was in a confidential relationship with Ms. Ciccone, (2) that there were no erroneous findings of fact material to the court's finding and legal conclusions in that regard, and (3) that the court's finding that Kenneth was a straw purchaser who was the beneficiary of Marie's breach of Ms. Ciccone's confidence was within the scope of the issues raised in the pleadings and was adequately supported by the evidence.

In its cross appeal, the Estate presents the following four questions:

> A. Did the Trial Court commit plain legal error, or was [it] clearly erroneous, in not entering a judgment for [the Estate] on the Civil Conspiracy and Aiding and Abetting Counts?
>
> B. Did the Trial Court commit plain legal error, or was [it] clearly erroneous, in not entering a judgment for [the Estate] against Kenneth Dias, Jr. on the Breach of Fiduciary Duty count?
>
> C. Did the Trial Court commit plain legal error, or was [it] clearly erroneous, in not awarding [the Estate] compensatory damages which included attorney's fees?
>
> D. Did the Trial Court commit plain legal error, or was [it] clearly erroneous, in not admitting the opinion of Dr. Wuerker that Waltraut Ciccone was suffering from chronic dementia?

Because any error with respect to these four questions was at most a harmless error, we answer the cross appellant's questions in the negative.

We shall affirm the judgment of the Circuit Court for Prince George's County.

FACTS AND PROCEDURAL BACKGROUND

The evidence at trial revealed the following. In early 2016, Waltraut Ciccone was a 78-year-old woman in poor health who lived in Clinton, Maryland, in a home that she

had owned since her divorce in the late 1980s. During the early portion of 2016, a person named David Nelson, who was described at trial as a "boarder" or "tenant," resided in the basement of Ms. Ciccone's home, and he provided some minimal assistance to Ms. Ciccone by performing chores such as shopping. There was evidence that Ms. Ciccone was in poor health during that time frame. Joan Foor—a retired nurse who lived in California, but had been "very good friends" with Ms. Ciccone for over fifty years—testified that she spoke to Ms. Ciccone by phone frequently during the January-February 2016 time frame, and Ms. Foor's impression of Ms. Ciccone's health was that she was "very depressed" and "not well." Ms. Foor commented that, at times, Ms. Ciccone's "thinking" was "slow, lethargic almost."

Medical records admitted at trial reflected that, on February 1, 2016, Ms. Ciccone was taken via ambulance to Southern Maryland Hospital after she was discovered lying on the floor of her home. The medical records indicate that, upon that occasion, Ms. Ciccone was "disheveled," "unkempt," "incontinent of urine and feces," suffering from altered mental status, "unable to provide any medical history," and "confused[,] disoriented[,] and unable to give a reliable history[.]" When asked if she knew why she was in the emergency department, Ms. Ciccone replied: "I fell for the third time this week." The records from the February 1 hospital visit reflected that, after she was administered fluids for her dehydration and discharged, David Nelson (Ms. Ciccone's boarder) came to pick her up from the hospital.

Two days later, on February 3, 2016, Ms. Ciccone was again transported by ambulance to Southern Maryland Hospital, where she complained of general weakness and a history of falls. The emergency department record reflects that Ms. Ciccone reported that she was "falling every day for no reason" and that she felt "lightheaded, dizzy, and weak before she falls." The record further stated: "It is noted that [Ms. Ciccone] does not know where she is or the current month/year." The record from this hospital visit also included a note that Ms. Ciccone was "confused on questioning and demonstrates non-linear thought processes." She was admitted and given numerous tests.

A report of a hospitalist, Dr. Michelle Tang, dated February 4, 2016, observed that Ms. Ciccone was "likely debilitated from malnutrition[.]" Dr. Tang's report further reflected that Ms. Ciccone "states [that] she had been somewhat confused, CT head no acute findings again in the ED, and now she is back to her neurologic baseline which seems to be demented." Dr. Tang also noted that Ms. Ciccone "lives at home alone and has friends to check on her and assist with transportation but would likely benefit from assisted living. No surviving family that she will admit." Ms. Ciccone was discharged on February 10, 2016. Her discharge summary noted: "Dementia: Stable[.]"

That same date (February 10, 2016) is the date that one of the Diases delivered, via David Nelson, a contract offer Maria Dias had drafted for her son Kenneth to purchase Ms. Ciccone's home, which is located in the Oak Orchard subdivision at 9609 Hale Drive, Clinton, Maryland 20735. The Diases live in that same subdivision, approximately one-third of a mile away from Ms. Ciccone's home. The offer of

purchase—on forms published by the Greater Capital Area Association of Realtors®, commonly referred to as "GCAAR"—provided for Marie's son Kenneth to purchase Ms. Ciccone's home for $60,000.00. Kenneth signed the offer on February 10, 2016, but he testified that his mother alone filled out the contract forms without input from him. One contract addendum on a GCAAR form captioned "Addendum of Clauses—A" included a term that had been typed on blank lines at the end of the form, stating: "Purchaser agrees that the Seler [sic] will *live* ~~have a 'life estate'~~ in the property *at no charge*, as long as she is alive or so long as she is able to occupy the property." (Italicized words added by hand.) Another typed document, that was not on a GCAAR form, was captioned "ADDITIONAL PROVISIONS," and stated:

> Dias will pay the following recurring property bills:
>
> Pepco;
> Washington Gas;
> Washington Sanitary & Suburban Company;
> Real Estate Taxes; and,
> Hazard Insurance.
>
> Dias will also:
> Purchase a walk-in tub;
> Pre-pay for funeral arrangements; and, if requested,
> Pay for a stair-climber.

In hand-writing at the bottom of these additional provisions was another sentence: "Dias will also take care of Clover[,]" Ms. Ciccone's dog.

Kenneth's signatures and initials on the contract documents prepared by Marie Dias were dated February 10, 2016. Ms. Ciccone's signatures on those documents, which she signed without making any changes, were all dated "3-1-16."

A closing was conducted at Ms. Ciccone's home, in Ms. Ciccone's bedroom, on March 11, 2016. The settlement officer (Michelle Woods) testified that she first met Ms. Ciccone in her bedroom on the day of the settlement, and had never talked to Ms. Ciccone prior to that day. The power and water were both off at that time. Ms. Woods said "[i]t was apparent" that Ms. Ciccone and Marie Dias "were friends" based upon Ms. Woods having witnessed "their exchange with each other while I was there." Ms. Woods was aware that the tax assessment valuation for the house was $200,000.

Kenneth acknowledged that, although the contract required him to pay the utilities for the property, he did not do so. The outstanding water bill of $152.46 and County taxes of $3,532.76 for 2015-16 were deducted from Ms. Ciccone's proceeds of sale. At the closing, Marie brought the check to cover the purchase price. The check was drawn on a checking account of a family trust funded by Marie of which Kenneth was a beneficiary. Kenneth never moved into the property.

The settlement officer (Michelle Woods) later prepared a memorandum reflecting that David Nelson had attempted to disrupt the settlement. Ms. Woods stated in her memorandum:

> Re: 9609 Hale Drive, Clinton, MD
>
> I, the below signed, conducted the closing on March 11, 2016 at the property address listed above.
>
> Present also at the time was a gentleman named Dave. He was cordial at first and let me in the home but became belligerent after a period of time. He smelled greatly of alcohol. It was requested he leave the room where the signing was taking place.

> He started yelling inside the home and then outside the window for Ms. Ciccone to stop signing. Ms. Waltraut Ciccone continued to sign the papers.

When the deed dated March 11, 2016, was first submitted for recording, it was returned to Ms. Woods with a request for her to "[e]xplain sales price less than 60% of assessed value per Cty Atty Ofc." A notation at the bottom of the rejection form added: "Sales price is 29% of the assessed value." (Capitalization altered.) Woods later notarized an "Affidavit of Consideration" which was filed in the Land Records division of the Circuit Court for Prince George's County on April 25, 2016. The affidavit stated:

> Under [p]enalties of perjury, the undersigned Grantors and Grantees make oath or affirm the following:
>
> 1. The actual consideration paid or to be paid in connection with the conveyance is $60,000.00.
>
> 2. The outstanding mortgage balance on the property is $4661.11.
>
> 3. There is no quid pro quo in this transaction (the Grantor is not receiving something in addition to the stated consideration under the Deed for conveying the property at substantially less [than] the property's current assessed value).
>
> 4. The circumstances for which and the reason why the property is being sold for less [than] the property's current assessed value are as follows:
>
> > House needs extensive renovations/rehab. Grantor shall reside in the property at no charge or cost to the Grantor.

After the closing, Ms. Ciccone continued to reside in the house she had sold to Kenneth Dias. But her compromised health led to another hospitalization in April after her friend Ms. Foor had arranged for a home health nurse to conduct a physical welfare

assessment. As a result of that assessment, Ms. Ciccone was transported by ambulance to Southern Maryland Hospital on April 13, 2016, where she remained for two weeks.

Dr. Christopher Wuerker is an emergency room physician who treated her during her April 2016 hospital stay, and, due to her condition when she arrived, he had a distinct recollection of Ms. Ciccone years later when he testified at the trial of this case. He testified that, given the number of patients he treats per shift and the passage of time, it was "unusual" that he would remember her, but "she was remarkable" because:

> The state of her --- just the --- her complete appearance and state which was the apparent neglect, I would say which was that --- and I do recall her and I still recall her, the --- you know, a very --- an elderly, frail, skinny woman who was essentially covered from head to toe in dried feces.

Dr. Wuerker was accepted as an expert witness in emergency medical services and emergency medicine. It was his opinion that, at the time of Ms. Ciccone's April admission, she was "gravely disabled and a danger to herself," and he would have admitted her involuntarily if he had not been able to persuade her to agree to stay. He testified that her short- and long-term memory loss made her susceptible to suggestions, and she lacked the decision-making capacity for anything more complex than choosing food items off a menu.[1]

[1] The court would eventually rule that Dr. Wuerker had an insufficient basis to also express the opinion that, based on his interactions with her in April 2016 and his review of the medical records of February 1, 2016 and February 3-10, 2016, Ms. Ciccone suffered from "chronic dementia" and was incompetent to enter into a complex real estate transaction on March 11, 2016. The court granted the Diases' motion to strike those portions of Dr. Wuerker's testimony in which he expressed that opinion. This ruling is the source of cross appellant's fourth issue on cross appeal.

Because of Dr. Wuerker's concerns about Ms. Ciccone's ability to safely return home after she was admitted to Southern Maryland Hospital on April 13, 2016, a social worker named Shanay Atkins became involved in her care. A note written by Ms. Atkins on April 29, 2016, reveals that Ms. Ciccone's "friend, Marie Dias" would be involved (with Ms. Ciccone's consent) in Ms. Ciccone's plan of care, and that "Mrs. Dias will be living with and providing assistance to [Ms. Ciccone]." The note added that "Capital Coordinated Medicine is requiring that the Pt or Rep call them to initiate services" and that Ms. Atkins "provided Mrs. Dias with the contact number to" follow up. But Marie Dias testified that she "d[id]n't recall" whether she ever made any calls on Ms. Ciccone's behalf to arrange medical services after April 29.

After the settlement took place on March 11, Ms. Woods failed to disburse the seller's net proceeds to Ms. Ciccone until May, at which point Marie provided Ms. Woods with a bank account number to transfer the funds.

Marie did, however, arrange for Maurita Weaver to provide in-home care for Ms. Ciccone beginning in August 2016.

Ms. Weaver testified that she first went to Ms. Ciccone's house in April 2016, at the request of Marie Dias, to "take a look" and "see what it would cost to possibly clean it and take a look at [Ms. Ciccone]." Ms. Weaver said: "I had never seen a house look like that . . . I didn't know where to begin." She testified that, when she visited the home in April 2016, Ms. Ciccone

> was a mess. She was in pain. She --- the bed was, it was nasty. It was --- she was kinda like layin' in, ya know, feces on the sheets and she had a

> wheelchair and I think Marie held the wheelchair. She, she got up and I was able to pull her Depends off and put another one back on and I think Dave [Nelson], Dave was there and he got the, we got the sheets off and got another one put back on and laid her back down on the bed.

When Ms. Weaver returned to the house in August 2016, after David Nelson had been evicted by Kenneth Dias, Ms. Ciccone's physical condition was "a little bit better than what I saw in April, but she still needed a lot of cleaning up. She still needed a lot of care." Ms. Ciccone was unable, at that point in time, to get out of bed by herself. With respect to the condition of the house in August 2016, Ms. Weaver testified:

> It was almost unlivable. It was nasty. It was, it was nasty. I mean, her refrigerator had a bunch of old, rotten food in it. Her bedding again was always, ya know, was soiled. It was --- ya know, she, she --- there was a dog there. It was just nasty. The basement where Dave was, it was dishes. It was a refrigerator down there that had molded food in it that when you open it it had maggots comin' out of it. It was laundry everywhere. Her bathroom and her bedroom, the toilet was actually brown from just stain, just not havin' been cleaned. The house hadn't been cleaned in months on months on months.

Carolyn Lowe was a neighbor who had lived across the street from Ms. Ciccone for thirty-three years. Ms. Lowe testified that, in 2015, Ms. Ciccone's house was "filthy," but appeared structurally sound. Ms. Lowe said that she would go over to Ms. Ciccone's house occasionally "just to make sure that I put my eyes on her because I didn't see her that frequently." Ms. Lowe observed that, by January 2016, Ms. Ciccone was unable to get in and out of her car by herself and was "[e]xtremely limited . . . in her ability to get around . . . she needed assistance."

Ms. Lowe had noticed the commotion at Ms. Ciccone's house on the day in August 2016 when David Nelson was evicted by Kenneth Dias, and Ms. Lowe went

across the street to see if she could be of assistance to Ms. Ciccone. Ms. Lowe found Ms. Ciccone to be "extremely upset."

The next day, Ms. Lowe checked the online real estate records of the Maryland State Department of Assessments and Taxation and found a record showing that Ms. Ciccone's house had been transferred to Kenneth Dias via a deed recorded on April 27, 2016. Ms. Lowe printed out a copy of the record and took it to show Ms. Ciccone, who "became extremely upset, [and] started using profanity[.]" After that, Ms. Lowe contacted various agencies to try to get Ms. Ciccone some help. Ms. Lowe was contacted by Detective Williams of the Prince George's County financial crimes unit, and, at his request, she typed up a report on behalf of Ms. Ciccone, and she then verified with Ms. Ciccone that the report was correct before Ms. Ciccone signed the report.

Ms. Ciccone's health continued to decline, and she died on February 5, 2017. Her ex-husband, Orlando Ciccone, filed a petition to be appointed personal representative of her estate. On March 22, 2017, Marie Dias also filed a petition to be appointed personal representative of Ms. Ciccone's estate; Marie indicated in her petition that she was "filing [to be appointed personal representative] to make sure the decedents [sic] debt[s] get paid."[2] (Capitalization altered.)

[2] Schedule B for the form "Small Estate Petition for Administration" provides for a list of assets and debts of the decedent. Ms. Dias stated on the form that Ms. Ciccone had two checking accounts and an IRA, with a combined value of $9,609.17, and that her other assets were "Furniture: TBD" and "Vehicle: TBD." Under debts, Marie listed "Funeral Home to be Determined." But Orlando Ciccone paid for Ms. Ciccone's funeral expenses even though the contract of sale had included a commitment among the (continued…)

At a hearing the Orphans' Court conducted to decide who should be appointed personal representative, counsel for Marie represented to the court (in Marie's presence):

> Ms. Dia[s] was a friend of Ms. Ciccone prior to her death. She helped [Ms. Ciccone] on a daily basis. In fact she provided care for her, so she had a woman going to the house and she was paying for it because Ms. Ciccone, although she was mentally able to make decisions, she was not physically able to move. So Ms. Dia[s] . . . paid for this caretaker to come over.

The court asked: "Why would she do that?" Counsel for Ms. Dias represented: "[Ms. Ciccone] had mobility issues and she wanted to take care of her. They were friends for about two years or so prior." When the court asked why it should appoint Ms. Dias rather than Orlando Ciccone, counsel for Ms. Dias replied: "Because Ms. Dia[s] is – well first of all she was closer to the decedent, she was taking care of the decedent, she was helping her." Marie Dias then said that Ms. Ciccone had been a friend of Marie's *husband* for "seven or eight years," and her counsel reiterated that Marie had been a friend of Ms. Ciccone "for about two years or so prior to her passing."

The Orphans Court appointed Mr. Ciccone to serve as personal representative, explaining that he appeared to be the better candidate because "he wants to know what happened . . . to his ex-wife's property." The court added: "That's what I want to know."

"additional provisions" stating that that Kenneth would "pre-pay for" Ms. Ciccone's funeral arrangements. The value of Ms. Ciccone's furniture was never determined because Kenneth said he simply paid someone to dispose of all contents of the house. And the evidence was unclear as to what became of the balance of the seller's proceeds in the amount of $51,661.19 as shown on the HUD-1 Settlement Statement dated March 11, 2016.

After Orlando Ciccone was appointed personal representative, the Estate filed suit against Marie Dias and Kenneth Dias in the Circuit Court for Prince George's County, asserting a variety of theories.[3]

During the bench trial, there was evidence of the above facts. Additionally, a real estate appraiser called as a witness for the Estate expressed an opinion that, assuming the interior of the Ms. Ciccone's house was "in a condition that you could . . . market it without having to do extensive repairs to it," the value of the property as of March 11, 2016, was $230,000.

Despite the fact that both Marie and Kenneth Dias are licensed real estate sales professionals, each of them denied performing any market valuation of the property before submitting the offer to purchase the house for $60,000. Marie Dias has held a real estate license since 1977 and is a licensed real estate broker in the District of Columbia,

[3] The complaint asserted thirteen counts:

> Count I-Intentional Misrepresentation-Fraud
> Count II-Constructive Fraud
> Count III-Negligent Misrepresentation
> Count IV-Conversion
> Count V-Declaratory [Judgment]/Quiet Title
> Count VI-In the Alternative, Breach of Contract (against Kenneth)
> Count VII-In the Alternative, Unjust Enrichment (against Kenneth)
> Count VIII-Breach of Fiduciary Duty: Fraud, Constructive Fraud, Negligent Misrepresentation and Breach of Contract
> Count IX-Consumer Protection-Unfair or Deceptive Trade Practices
> Count X-Constructive Trust
> Count XI-Civil Conspiracy
> Count XII-Aiding & Abetting
> Count XIII-Accounting

Maryland, Virginia, New York, and formerly Massachusetts. She is also a title insurance producer and a notary, and the owner of the Dias Real Estate Academy, which she testified offers courses in "continuing education for Maryland and D.C., real estate licensees and we do pre-licensing for Maryland salesperson [sic], Maryland real estate brokers, and D.C. brokers." The ethical duties required of real estate professionals is a topic taught by the Dias Real Estate Academy. Marie also owns a real estate brokerage company called Buy Sell Real Estate. She has a Master's degree in Education from Harvard University. Marie acknowledged that, as a member of a Realtors® association, she was bound by the Code of Ethics and Standards of Practice of the National Association of Realtors.® But Marie testified that she made no attempt to establish the market value of Ms. Ciccone's home before it was sold to her son:

> Q [BY COUNSEL FOR THE ESTATE]: As of March 11th, 2016, when you went to settlement on the house, did you have an understanding of what the value of the home was?
>
> A [BY MARIE DIAS]: No.
>
> Q. And you were a licensed real estate agent and broker at the time of the settlement?
>
> A. Yes.
>
> Q. And you didn't make any efforts to attempt to value the home prior to settlement?
>
> A. No. Ms. Ciccone told me what she wanted and that's what she received.

Kenneth has a Master's degree in management science, and is licensed as a real estate sales person in Maryland, the District of Columbia, and Virginia, although he

asserted that he had not been actively using his license. He stated that he had no involvement in drafting the offer to purchase Ms. Ciccone's home other than to review and sign the contract documents his mother had drawn up. He denied knowing who crossed out the words "life estate" and substituted "live at no charge," and he said, "[i]t was this way when I received it" from his mother. He further denied even knowing why the words "life estate" had been in the contract:

> Q. Do you know [who] crossed out the word "life estate"?
>
> A. No, sir. However, it was, it was crossed out when I was presented with the contract.
>
> Q. And do you know who wrote "live at no charge"?
>
> A. Okay. It was this way when I received it.
>
> Q. And did you ask Marie Dias why any of that was crossed out or, or why any terms were written in?
>
> A. No, sir.
>
> * * *
>
> Q. Had you had conversations with anyone about purchasing the property with a life estate?
>
> A. No, sir.
>
> Q. Do you know why the words "life estate" were ever even in this contract?
>
> A. No, I do not.
>
> Q. Did you have conversations with anybody about what the terms of the deal would be prior to it being presented to you by Marie Dias?

A. I only reviewed the contract, agreed to the terms and signed where necessary.

With respect to the amount offered as the purchase price, Kenneth denied conducting any valuation:

Q. So what steps did you take to make sure that this transaction was fair to Mrs. Ciccone?

A. What [I] did was look over the contract, I agreed to the terms and I signed where appropriate.

Q. Okay. And to make sure that the contract was fair to Mrs. Ciccone, did you do any valuation of the fair market value of the home?

A. No, sir.

We will provide additional excerpts from the trial in the discussion of the issues raised on appeal.

At the conclusion of the Estate's case, appellants made a motion for judgment on Counts 1, 3, 4, 6, 7, 9, 11, and 12. Following argument, the court granted judgment in favor of appellants on Counts 1, 9, 11, and 12, leaving Counts 2-8, 10, and 13 remaining for decision.

After the close of appellants' case, the court took the matter under advisement, and delivered an oral ruling from the bench on November 7, 2018, stating, in pertinent part:

> So having reviewed the case as all the evidence in this case, the exhibits, the Court finds that a confidential relationship did, in fact, exist between Marie Dias and Waltraut Ciccone, and in coming to that conclusion, I was very careful to make determinations as to what happened prior to signing of the contract and after.
>
> * * *

So in terms of making a determination as to whether a confidential relationship existed, again, I tried to separate the time prior to the signing of the contract from the time after the signing of the contract, and based on the evidence presented, I cannot find that, based on this evidence, that Kenneth Dias was a party to the relationship, but I am finding, as suggested by [the Estate], that he was merely a straw man for the purposes of facilitating this transaction. So the testimony was --- and he testified himself, and, you know, again, there was nothing for me to suggest that he was not truthful in his testimony. He said he didn't meet [Ms.] Ciccone prior to going to closing.

His mother prepared the contract, who is the other Defendant in this case. He had no knowledge of this additional agreement. He signed it, though, said he didn't remember it, but then, when it was produced, he remembered it. Indicated that he didn't prepare that, either.

So I don't suggest --- I don't find that he was, in any way, affiliated with Mrs. Ciccone, but I do find that he was acting, at the request --- and purchased this property, with the assistance of his mother. So I'm not finding that he had the confidential information. I am --- I am, however, finding that his mother, Mrs. Dias, did have a confidential relationship . . . with Mrs. Ciccone.

Also, Kenneth Dias testified that his mother sought him out, inquired if he still wanted to buy a house. As I said earlier, he didn't prepare the contract. He only met Mrs. Dias (sic [Ciccone]) at the time of settlement, and the funds used to pay for the property were not made [sic] from him directly. They were taken from a trust, which he indicated that he was the beneficiary, and that was the extent of the testimony. He didn't indicate to what extent he was a beneficiary.

[T]his case is very similar to the case of *Conrad v. Gamble*, at 183 Maryland [App. 539, at 552-53 (2008)], which states --- and I'm quoting from the case, "Confidential relationship exists whenever confidence is placed by one person in another and accepted by the other person. Such relationship may arise when a party is[,] under the existing circumstances[,] justified in believing that the other party will not act in a manner adverse or inconsistent with the [re]posing party's interests or welfare. [It extends to] all relationships to which confidence is reposed[,] and in which dominion and influence resulting from such confidence may be exercised by one person over another," which was the case here.

I think that, from the time they met in 2014 up to the time there was some transactions or some things going on that suggested to Mrs. Ciccone that Mrs. Dias would take care of her and would look after her. In making that determination, there are certain factors that the Court indicated we could look at, and one of the factors is age. Mrs. Ciccone, at the time of this transaction in 2014, was 77 years old, when she met Mrs. Dias, and there is some testimony, however, to suggest that she met years earlier. So again, there's no direct testimony that what was said, what was done, how she felt, but they met, and everybody agrees, in 2014.

I also find that she was suffering from advanced physical disability. The testimony was that she had fallen, and not only had she fallen once. She had fallen twice, and there was some suggestion that she had hip surgery.

The Court also notes that she could barely walk. She was unable to take care of her own daily needs. Two times she was transported to the hospital. Her clothing was soiled, and she was covered in feces, and everybody kept saying that over and over again, and so, the suggestion is she was unable to care for herself.

Testimony was her living environment was not clean, and when admitted to the hospital, prior to signing the contract herself, the medical records indicate that she was confused, not fully oriented, and obeyed commands, opened her eyes spontaneously. Medical records also indicate that they were unable to get a reliable history because of confusion.

Dr. [Wuerker] testified, and he opined that she suffered from dementia. The Court is granting [appellants'] motion in limine [to preclude Dr. Wuerker's opinion that Ms. Ciccone suffered from chronic dementia at the time she signed the contract], because I couldn't find that he had any basis for making that determination. His opinion kind of went back and forth, and when he was asked, on cross-examination, when did he change his opinion, he indicated that after he had spoken to the attorney and after he went back and reviewed his records.

In fact, he had only met with and examined her after the transaction. So the Court is not clear how he could make a determination that she was in that state prior to. Everyone suggested that, you know, she --- and even the medical records suggest that there may have been some evidence of short-term --- some delirium. She was having some --- as they talked about in the medical records, or as the doctor stated, some waxing and waning. She had

good days and bad days, but I don't know that the doctor could have made a determination that she was suffering from a chronic condition on the date that the contract was signed, which was two months prior to him seeing her.

And so, the Court is granting the motion in limine, and the Court is not accepting Dr. [Wuerker's] suggestion that she had dementia prior to signing the contract. However, the Court does find that, as stated earlier, the fact that she had been in and out of the hospital and her mental state was --- you know, it would come, and it would go --- is something that I can review in terms of determining whether there was a confidential relationship.

The testimony was Mrs. Dias had evidence that [David] Nelson was taking advantage of Mrs. Ciccone. Mrs. Dias characterized her relationship with Mrs. Ciccone prior to March 11 as follows, and so, again, the testimony from the hearing for the --- to appoint a personal representative was very telling as to what was going on. She indicated they had been friends. She indicated that a guard rail was purchased for her.

She purchased a walker for her, purchased a portable commode for her, purchased socks, purchased food, and she indicated that [Mrs. Ciccone] was later billed for those items, which would suggest to me that there was some feeling that these --- you know, she was assisting her, and she was relying --- Mrs. Ciccone was relying on her for her care. I think there was no dispute that Mrs. Ciccone was bedridden, and at some point thereafter, Mrs. Dias prepared a contract and a separate agreement for Mrs. Ciccone's home, because she needed cash out and care.

So at this juncture, the Court notes that both Mrs. Dias and Kenneth Dias are both license[d] real estate agents. In fact, Mrs. Dias owns and teaches real estate. So the fact that she entered into this transaction and the thought never occurred to her that maybe this is a situation where I need to get someone, other than myself, to work with another agent, to work with so that this transaction seemed above board is just baffling to me, and I don't accept it as testimony that, you know, she just knew nothing about it, and again, I'm not suggesting that it wouldn't [sic] have been a fair transaction had someone else been involved, but in terms of what I have to decide today, it just --- it seemed to me that, you know, teaching real estate, teaching ethics, being a real estate agent for all these years --- it seems to me that, you know, that would have been one of the first things that you would have done, knowing the condition, the fact that this person was 77 years old, which goes to my next point.

So but I do find that, based on those facts, that there was a relationship, and I think, based on circumstantial evidence, that Mrs. Ciccone relied on that relationship. Mrs. Dias provided services for her, and as suggested in the transcript for [the Orphans' Court hearing to appoint a] personal representative, not clear why anybody would do that, unless, you know, there was some kind of relationship.

Once I make a determination that there was, in fact, a relationship, a confidential fiduciary relationship, the burden then shifts to the Defendant to prove that the transaction was [the] free and uninfluenced act of the grantor, full knowledge of the circumstances connected with it, and its context, and I can't find that, based on the testimony. I don't think that they met their burden. It's a very heavy burden.

The medical records for both hospital visits suggest Mrs. Ciccone was in an altered state, and while I'm not concluding that there was a chronic condition, based on the medical records, I think that an inference can be drawn that Mrs. Ciccone was in no condition to sign a real estate agreement, especially a day after she got out of the hospital. So you're putting an agreement in her face, and she's just now getting out of the hospital, you know, for physical reasons. They said she was confused. She was having difficulty, and I don't know if that's, you know, something that seems above board.

There was no testimony that any other parties to this agreement, other than Mrs. Dias and her son, Kenneth, had access to Mrs. Ciccone, prior to signing these agreements. So, you know, there was a lot of testimony that . . . David Nelson, the neighbor downstairs --- was disruptive, and he was trying to tell her [during the March 11 settlement], you know, "Don't sign it," and, "This is a bad deal," but really no indication that he got involved and did anything to interfere or suggest. You know, it was just kind of all stating he was just very disruptive, but really, no testimony, specific testimony, that he actually got involved with that.

As I said earlier, both Ken Dias and Mrs. Marie Dias are licensed real estate agents. She owns a business that teaches real estate, but neither of them made an attempt to value the home, and so, when asked did you have any idea of what the value of the home was, the answer was no, and it seems to me that's one of the first things you do is find out what is the value of this house. You know, what's a good, you know, deal?

Also both claimed that they didn't know what a life estate was. Assuming that it is true, not sure why they thought that, you know, a non- --- so they didn't understand. So I'm not sure why they would think that Mrs. Ciccone would understand that she was not getting a, quote, "life estate," but she could live in the house, in and of itself. So there was some issue there in terms of the life estate, and you can stay here for as long as you're able, and, you know, they both claim not knowing, they didn't know what a life estate was, which I find that kind of hard to believe, in light of the fact that they've been real estate agents for all these years.

The Court also finds, at some point later, a neighbor indicated that Mrs. Ciccone was not aware that her house was sold. So there was testimony from the neighbor across the street, who, as they say, "Didn't have a nickel in his quarter," and she provided written proof, and she indicated that Mrs. Ciccone started cursing. She tried to get her assistance, and then, to no avail, she typed up a statement, and nothing happened after that.

No indication that the contract was ever explained. There's no testimony to that. The contract --- the value of the house --- and **the appraiser came and said that the value of the house is $230,000. The contract was for $60,000**.

The money, apparently, was never transferred, until Mrs. Dias called [Ms. Woods] to say, "Listen, where's the money?" And then, it's only after that that a copy of Mrs. Ciccone's check was mailed to the title company to transfer the funds. Again, even again, some missteps in terms of the title company. It's like, after the house is sold, the money --- they let the checks clear, and then, the money is mailed. She didn't even have her check, actually. Somebody had to come from the person who sort of was looking out for her.

Title agent testified she was holding the money until she was satisfied that Mrs. Ciccone would not be taken advantage of [by] her neighbor. Not her role. I'm not sure why that occurred, but again, another instance that suggests to me this transaction was not above board, and there's no testimony as to where the money went after the sale. **I still don't know where the money is.**

Anybody know where this $60,000 --- **don't [know] where the $60,000 went**. Again, the person hired by Mrs. Dias, Ms. Weaver, was

stealing from [Ms. Ciccone]. Claims that she had made these transactions, the $9,000 and some --- but, you know, again, transaction, no money, and then, the separate agreement indicated that these additional provisions, Pe[p]co, Washington Gas, Washington Suburban, real estate taxes, and hazard insurance.

So the Court notes that the real estate taxes and the hazard insurance is not an expense that a person who is not a homeowner is responsible for, as a general proposition, to Pe[p]co, Washington Gas, and other Washington Suburban and Sanit[ation] Commission would be. The testimony was that the only thing that actually was executed in this contract was the purchase of a walk-in tub. The insurance arrangements were not prepaid, and the stair climber --- I'm not sure what happened with that.

So viewing all of that together, the Court does find that the Defendants in this case did not meet the burden, and I think that the transaction was not above board. I think it could have been, and, you know, again, had she gotten what she bargained for. It's like who exchanges a $230,000 house for $60,000 house, unless there's something additional, and the something additional just never happened, and I don't think that it was ever intended to happen.

[Kenneth Dias] testified that he never moved into the house to care for her, which is one of the other provisions in the contract, and he said that was because Dave Nelson never --- he had a difficult time getting him out, but I don't understand why that should stop Mrs. Dias . . . from still providing care for her, because again, they continued that.

Every time somebody went to the house, it was filthy, and she was smelly, and she couldn't take care of herself, and on and on and on. So to me, I don't believe that it was ever intended that the terms of this agreement would be carried out, and so, the Court does find that the burden --- [appellants] did not overcome their burden. So the Court is entering --- **with respect to constructive fraud**, definition of constructive fraud occurs when a person breaches some legal or equitable duty to another person. I find that there was a breach of fiduciary duty to Mrs. Ciccone by Marie Dias only, and the breach must be one that deceives others, violates public policy or private confidence, and again, I'm not sure why, you know, this doesn't violate, you know, the policy of elder abuse [sic] or some other policy that we have in terms of, you know, vulnerable adults, and so, **I am finding constructive fraud in this case and finding against . . . Defendant Marie Dias with respect to that count.**

With respect to negligent misrepresentation, . . . [t]he Court has to find that there exists some legal equitable duty and the Defendant breached that duty. You know, again, there was no direct testimony. Circumstantially, you know, again, there was not a whole lot of testimony in terms of any representations made. So **the Court is finding that in favor of the Defendant[s], Count 3**.

Count 4, with respect to conversion of personal property, the Court is entering a judgment against Defendant. The Court does find a conversion with intentional tort consisting of two elements. It has to be ownership, and it has to be the retaining the property for one's own use, and again, there was testimony that, after Mrs. Ciccone passed away, somebody went in, cleaned out the house, took all her property, took it to Goodwill, or got rid of it. Ma[u]rita Weaver testified that [Mrs. Ciccone] had, quote, unquote, "nice things."

Not sure what that meant, because there was also testimony that the house was filthy. It was covered with soot from years of her smoking, and there was really, actually, **no value ever attached to any of the property that was removed**. So I can't make a determination. **I can't speculate as to what the value of the property was.**

So I am finding conversion, entering a judgment against the Defendant and assessing nominal damages of $1, because there was no testimony as to any fair market value of any of the items removed.[4]

* * *

With respect to Count 5, declaratory judgment, the Court is declaring the contract and the deed invalid, and I'm ordering that the real property be returned to the estate of Waltraut Ciccone.

Count 6, breach of contract --- I'm finding that --- I'm actually --- I'm really not sure how to do this, if I should just dismiss it or deny it, because, in light of the fact that **I've declared that the contract was null and void. There's no contract to breach at this point, and so, I'm**

[4] Appellants' counsel sought at this point to clarify whether the judgment on the conversion count was against one or both Defendants, and the court replied that its judgment was against Marie Dias only.

> **either denying that or dismissing it, because of my ruling in Count 5, and the same with Count 7, unjust enrichment.**
>
> **Count 8, breach of fiduciary duty** --- again, I did some research on this, and there seems to be some back and forth as to whether this is actually a cause of action, and so, I think, since I found that there was, in fact, a duty and it was a fiduciary duty, I am finding against [the defendant on] breach of fiduciary duty, if such a cause of action exists, against Marie Dias only, because again, there was really no testimony that Kenneth Dias was involved in any of the back and forth with Waltraut Ciccone during the course of her life and after she passed away, other than the fact that he was the person who actually purchased the home, and again, I think that that was all put in play by his mother, in terms of him being sort of again the straw person to receive the house, to do whatever needed to be done, and so, **I'm only finding that against Marie Dias**.
>
> **And then, Count 13 . . . I am finding against both Defendants for an accounting**, entering a judgment in the amount of $25,000, and that includes any rents collected during this period, and that is not precluding further judgment following an accounting for the monies or properties misappropriated from the estate, and it could also include any valid expenses paid on behalf of Mrs. Ciccone during these payments. To the extent that it was testified that Mrs. Dias hired Ma[u]rita Weaver to care for her and that she expended monies to that extent and there were other funds outstanding, that's all part of the estate, and the Court ---- you know, should be included in the accounting.

(Emphasis added.)

The court added that it did not assess any damages against Marie for her breach of fiduciary duty, but that its award of "damages essentially is returning the house to the . . . estate[,]" along with "anything collected." (Emphasis added.) **The court also noted that it was**

> **making the assumption that, at some point, there's going to be an accounting, and if there are any additional damages, we can address it at the time.**

> In addition, **I'm reserving on the issue of attorneys' fees, too**, because again, I think that that's something only appropriately addressed at the time that a final accounting is done. So I'm not assessing any attorneys' fees at this point, because I think it would be inequitable actually, at this point, and I think it would be more appropriate at the time that this case is finally closed, because it's still going to be ongoing until a final accounting is done.

(Emphasis added.)

After supplemental proceedings, the court entered an amended judgment on February 26, 2019, and a final order resolving remaining issues on July 30, 2019. The Diases appealed and the Estate cross appealed.

It appears that, after the circuit court made its rulings and the parties appealed, the property was sold again with the cooperation of the parties to an unrelated third party for $216,000. We were advised at oral argument that the proceeds of that sale are being held in escrow.

STANDARD OF REVIEW

Appellants recognized that the "clearly erroneous" standard of review is applicable to this case, citing Maryland Rule 8-131(c). Maryland Rule 8-131(c) provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

As the Court of Appeals has observed on many occasions: '"If any competent material evidence exists in support of the trial court's factual findings, those findings

cannot be held to be clearly erroneous."' *Webb v. Nowak*, 433 Md. 666, 678 (2013) (quoting *Figgins v. Cochrane*, 403 Md. 392, 409 (2008)).

To similar effect, appellants quote in their brief the following pertinent excerpts from *Starke v. Starke*, 134 Md. App. 663 (2000), where we stated:

> [T]he test for the legal sufficiency of the evidence is . . .:
>
> > Is there some evidence in the case, including all inferences that may permissibly be drawn therefrom, that, if believed and if given maximum weight, could logically establish all of the elements necessary to prove that the . . . the tortfeasor committed the tort . . . .
> >
> > * * *
> >
> > The invariable inquiry is whether there was some competent evidence to establish all of the elements needing to be established . . . to sustain a judge's verdict as not clearly erroneous.

Id. at 678-80 (cleaned up).

In addition to those pertinent passages from *Starke* quoted by appellants, we note that we also observed in *Starke*:

> Resolving disputed credibility and weighing disputed evidence are matters, of course, in the unfettered control of the fact finder. Where either the credibility of a witness or the weight of the evidence is in dispute, therefore, there is no way in which a fact finder, with such matters properly before [the fact finder], could ever be clearly erroneous for not being persuaded.

Id. at 683.

I. Appellants' contentions

Appellants state in their brief:

> Appellants assert that the evidence is insufficient to support a confidential relationship, and that the trial court's finding in key respects is

> premised on erroneous findings of subsidiary facts which undermine the court's ultimate finding of a confidential relationship.

More specifically, appellants argue: "The evidence is insufficient to establish that in January, February and March 2016 Ms. Ciccone was dependent on Marie Dias, or was in circumstances where it was necessary for her to repose trust and confidence in Marie Dias." And, with respect to the court's allegedly erroneous references to certain subsidiary facts, appellants enumerate three such "findings":

> The trial court erred with respect to three important subsidiary findings of fact . . . . Those erroneous findings are:
>
> (1) Ms. Ciccone signed the contract [of] sale 10 February;
>
> (2) Mrs. Lowe frequently saw Ms. Dias entering Ms. Ciccone's home before March 2016; and
>
> (3) Maurita Weaver began taking care of Ms. Ciccone in April.

We are not persuaded that any of these "subsidiary findings" had any bearing on the court's ultimate legal conclusions. The evidence indicated that Kenneth Dias signed the contract and provided it to Ms. Ciccone's boarder, David Nelson, on February 10, the same day Ms. Ciccone was released from being in the hospital for a week. And all of the places Ms. Ciccone signed the contract reflected a date of March 1. Contrary to appellants' assertion that the trial court erred in finding that Ms. Ciccone "*signed* the contract" on February 10, what the court actually said was that Ms. Ciccone was in no condition to sign a contract that was delivered to her the day she got out of the hospital:

> I think that an inference can be drawn that Mrs. Ciccone was in no condition to sign a real estate agreement, especially a day after she got out

> of the hospital. So you're putting an agreement in her face, and she's just now getting out of the hospital, . . .

In our view, the court was simply indicating that Ms. Dias should have known Ms. Ciccone would not be able to properly analyze a purchase offer the day she arrived home from the hospital. That statement does not undermine the other extensive findings made by the trial judge.

Similarly, there was uncontroverted evidence that Maurita Weaver first *went to* Ms. Ciccone's home, *at Marie Dias's request,* in April 2016, although Ms. Weaver did not begin working as a caretaker until August of that year. Any misstatement in that regard in no way draws into question the court's material legal conclusions.

The same is true with respect to the court's reference to Marie Dias being at the home before March 2016. Ms. Dias acknowledged that her husband was an acquaintance of David Nelson and her husband had visited Mr. Nelson on a number of occasions over seven or eight years. The court's statement about Ms. Lowe was: the "[n]eighbor across the street [*i.e.*, Ms. Lowe] indicated that she saw Mrs. Dias visit Mr. Nelson, side door [sic], on many occasions." That statement does not equate to a "finding" by the court that Mrs. Dias *had been inside* the house on many occasions, and, in any event, would not be materially at odds with the other findings the court made.

Furthermore, appellants' argument about "subsidiary findings" is subject to two fatal flaws. The first is that, in civil cases, the harmless error rule is applied quite differently than it is applied in criminal cases. In *Brown v. Daniel Realty Co.*, 409 Md. 565 (2009), the Court of Appeals made plain that, in civil cases, an appellate court will

not reverse a judgment based upon erroneous evidentiary rulings unless the party complaining of the rulings carries the burden of persuading the appellate court that the error or errors *probably*—and not merely *possibly*—caused the court to reach a different judgment than it would have reached in the absence of those errors. Writing for the Court of Appeals in *Brown*, Judge Glenn T. Harrell, Jr., stated:

> [E]ven if "manifestly wrong," we will not disturb an evidentiary ruling by a trial court if the error was harmless. *Crane v. Dunn*, 382 Md. 83, 91-92, 854 A.2d 1180, 1185 (2004). The party maintaining that error occurred has the burden of showing that the error complained of "likely . . . affected the verdict below." *Id*. "It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry. Courts are reluctant to set aside verdicts for errors in the admission or exclusion of evidence unless they cause substantial injustice." *Flores v. Bell*, 398 Md. 27, 34, 919 A.2d 716, 720 (2007) (quoting *Crane*, 382 Md. at 91-92, 854 A.2d at 1185).

Id. at 584.

Accord Zook v. Pesce, 438 Md. 232, 252 (2014) ("in a civil case, a petitioner must not only show error but must demonstrate that the error was prejudicial"); *Consol. Waste Indus., Inc. v. Standard Equip. Co*., 421 Md. 210, 219-20 (2011) (the burden is on an appellant to show that the trial court error is accompanied by prejudice); *Flores v. Bell*, 398 Md. 27, 33 (2007) (appellate courts of Maryland "will not reverse a lower court judgment if the error is harmless" and "[t]he burden is on the complaining party to show prejudice as well as error"); *Green v. McClintock*, 218 Md. App. 336, 366 (2014) ("even if the circuit court erred in allowing Nelson's testimony about the 2003 will, we would still affirm, because the testimony was cumulative and thus harmless"); *Goss v. Est. of Bertha Jennings*, 207 Md. App. 151, 167 (2012) (the challenged evidence "cannot

reasonably be understood as the pivotal evidence that tipped the verdict in favor of the appellees. In short, assuming an error did occur, we conclude that it was harmless as a matter of law."); *see also Fields v. State*, 395 Md. 758, 763-64 (2006) ("We need not determine whether the testimony of Detective Canales was inadmissible [hearsay] based on *Bernadyn* [*v. State*, 390 Md. 1 (2005)], or even if the evidence is distinguishable, because even if it was hearsay and not admissible, any error was harmless beyond a reasonable doubt.").

The second fatal flaw in appellants' arguments regarding the evidence is that they challenge the *weight* that the trial judge gave to certain evidence rather than the *legal sufficiency* of the evidence that supported the findings of fact and legal conclusions drawn by the trial court. Appellants argue, in essence, that the trial judge placed undue weight on certain evidence and gave too little weight to other evidence or alternative inferences that could have been drawn from the evidence. But, as we noted above in describing the applicable standard of appellate review: "'If *any* competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous.'" *Webb*, 433 Md. at 678 (quoting *Figgins*, 403 Md. at 409) (emphasis added).

In this case, the key factual issue for the trial judge to decide was whether there was a confidential relationship between Marie Dias and Ms. Ciccone at the time the property was sold to Marie's son upon terms that the court found to be unfair. And, as

this Court explained in *Conrad v. Gamble*, 183 Md. App. 539, 552 (2008), this is a question of fact:

> "Absent a presumption arising out of certain relationships (*e.g.*, attorney-client, trustee-beneficiary, principal-agent), the existence *vel non* of a confidential relationship is a question of fact, not of law." *Midler v. Shapiro*, 33 Md. App. 264, 268, 364 A.2d 99 (1976) (internal citations omitted). Accordingly, "[i]f any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." *Figgins*, 403 Md. at 409, 942 A.2d 736 (internal citations omitted). In this case, competent material evidence supported the trial court's finding that the [grantor of the challenged deed] and appellants shared a confidential relationship.

We likewise conclude that, in this case, competent material evidence supported the trial court's finding that there was a confidential relationship between Ms. Ciccone and Marie Dias. As we observed in *Conrad*, the courts have considered a variety of factors in making a finding as to whether a confidential relationship exists, including a person's "advanced age," "mental feebleness," and "dependence" upon the party in whom the vulnerable individual is alleged to have placed confidence. *Id.* at 553. Similarly, in *Mead v. Gilbert*, 170 Md. 592, 606 (1936), the Court of Appeals said:

> [T]he existence of a confidential relationship between the parties is a fact to be shown, as in any other case where it is not presumed as a matter of law (*Upman v. Thomey*, [145 Md. 347, 358 (1924)]), and that in such an inquiry advanced age, physical debility, and mental feebleness are all facts, no one of which is necessarily conclusive, but any one of which may have weight in determining whether the relationship as a fact existed.

We noted in *Conrad* that, although many of the cases discussing confidential relationships examine a transaction concerning a parent and that parent's offspring, the factors addressed in those cases "provide an instructive analytical framework" for

determining whether a confidential relationship exists outside the parental context. 183 Md. App. at 553.

In *Gaggers v. Gibson*, 180 Md. 609 (1942), an aging father of four was persuaded by one of his daughters to convey real estate that was the father's major asset to that daughter's fiancé for less than one-quarter of the property's value. *Id*. at 610-612. The trial court concluded that the daughter whose fiancé acquired the father's property had taken unfair advantage of a confidential relationship. In affirming the judgment of the circuit court, the Court of Appeals noted that the father was "eighty-six years of age and very feeble, and had been so since about a year prior to the execution of the deed." At the time the father executed the deed, "his physical condition was very much reduced. He did not appear to be capable of serious mental effort." The father was also in financial distress and being threatened with foreclosure if he could not bring the mortgage indebtedness of $1,213.55 current. The daughter urged her father to deed the property to the fiancé in return for the fiancé merely paying the amounts in default. She told her father "this is your only way out[,]" and "[s]he did not help him to secure independent and disinterested advice." *Id*. at 611-13. Under these circumstances, the Court of Appeals stated:

> Confidence clearly was reposed in [the defendant daughter], and **a fiduciary relation exists in every case 'in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal.**' *Hensan v. Cooksey*, 237 Ill. 620, 86 N.E. 1107, 1109, 127 Am.St.Rep. 345, and cases there cited. '**The existence of the confidential relation** creates a presumption of influence which **imposes upon the one receiving the**

> **benefit the burden of proving an absence of undue influence by showing that the party acted upon competent and independent advice of another, or such facts as will satisfy the court that the dealing * * * was had in the most perfect good faith on his part and was equitable and just between the parties**.' *Thomas v. Whitney*, 186 Ill. 225, 57 N.E. 808; *Fish v. Fish*, 235 Ill. 396, 85 N.E. 662; *Curtis v. Curtis*, 85 W.Va. 37, 100 S.E. 856, 8 A.L.R. 1091; 16 Am. Jur. p. 661, sec. 393.
>
> * * *
>
> [W]e are convinced the transaction was unwarranted and unfair, and that a constructive fraud was perpetrated.

Id. at 613-14 (emphasis added).

Once a court finds that a confidential relationship existed between the vulnerable grantor and the person alleged to have taken unfair advantage of that relationship, there is a presumption that the transfer was the result of undue influence, and to counter that presumption, the defendant bears a heavy burden of establishing the fairness of the transaction. As the Court of Appeals explained in *Figgins*, 403 Md. at 411:

> **[T]he party receiving the benefit . . . must "show the fairness and reasonableness of the transaction,"** *Sanders* [*v. Sanders*], 261 Md. [268,] 276, 274 A.2d at 388 [(1971)], **and demonstrate that the transfer was "the free and uninfluenced act of the grantor, upon full knowledge of all the circumstances connected with it and of its contents.**" *Upman v. Thomey*, 145 Md. 347, 360, 125 A. 860, 865 (1924); *Kerby v. Kerby*, 57 Md. 345, 350 (1882).

(Emphasis added.)

The rationale for imposing the burden upon the party receiving the benefit to prove that there has been no abuse of the vulnerable transferor's confidence was explained as follows by Judge Wilner in *Upman v. Clarke*, 359 Md. 32, 44 (2000):

> Persons ordinarily desire to retain possession and use of their property while they are alive. If someone who stands in a fiduciary or confidential relationship with another exerts *any* influence on that person to obtain an *inter vivos* transfer of the person's property, for less than full value, that influence is regarded, at least presumptively, as undue and requires an explanation. The exertion of influence for personal gain is, itself, a breach of the trust implicit in the confidential relationship, especially when it causes the person reposing trust to be deprived of his or her property. Thus, in *Vocci v. Ambrosetti*, 201 Md. 475, 485, 94 A.2d 437, 442 (1953), we stated the general rule to be that "he who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence" and concluded that the relationship itself requires the dominant party "to abstain from all selfish projects."

Cf. Mead, 170 Md. at 610 ("It is . . . a policy of the law to protect those who are forced by illness, ignorance, weakness, or other conditions beyond their control to repose confidence in others against any abuse of that confidence.").

The Court of Appeals noted in *Figgins*, 403 Md. at 413, that it had concluded in *Gaggers* "that the daughter had not rebutted the presumption of undue influence, in part, because the father did not receive competent and independent advice[.]" In the present case, neither of the Diases took any steps to ensure that Ms. Ciccone received any advice from any competent and independent advisor.

Although appellants challenge the sufficiency of the evidence to sustain the court's judgment, we are satisfied that there was adequate evidence in the record to support the trial court's legal conclusions. Prior to settlement, Marie Dias's husband had been a friend of Ms. Ciccone for several years, and Marie had also known her for a couple of years. Prior to the transfer of the property to Marie's son on March 11, 2016, Marie had assisted Ms. Ciccone by purchasing several items, including a guardrail for her

bed, a walker, a wheelchair, a portable commode, some non-slip socks, and food. Although Marie Dias testified that she expected Ms. Ciccone to reimburse her for the items, the evidence supported an inference that these services were rendered during the time Marie was seeking to have Ms. Ciccone sell her house to Marie's son at a very low price, and by rendering service and assistance, Marie's conduct fostered an impression on the part of Ms. Ciccone that Marie cared for, and was a trustworthy friend of, Ms. Ciccone. This evidence supported the court's conclusion that Ms. Ciccone was depending upon and relying upon Marie Dias during that period when she was very frail and vulnerable and largely bedridden. Indeed, the contract Marie prepared called for Kenneth and his children to reside with Ms. Ciccone so that there would be persons from Marie's family in the house who could be of assistance to Ms. Ciccone. And, although the outrageously low purchase price goes more to the unfairness of the transaction, it also supports an inference that Ms. Ciccone would not have willingly agreed to sell her sole substantial asset to Ms. Dias's son if she was not reposing trust and confidence in Ms. Dias to treat her fairly in this sales transaction.

Finally, with respect to the appellants' second question, complaining that "the issue of a straw-purchaser" was not "raised by the pleadings and supported by sufficient evidence[,]" we see no error on the part of the trial court. The court mentioned "straw purchaser" only twice during the oral opinion (quoted at length above). The court first made a finding that Kenneth did not have a confidential relationship with Ms. Ciccone: "So in terms of making a determination as to whether a confidential relationship existed

. . . I cannot find . . . that Kenneth Dias was a party to the relationship, but I am finding, as suggested by [the Estate], that he was merely a straw man for the purposes of facilitating this transaction." Later, the court explained it was finding that only Marie Dias was liable for the breach of fiduciary duty alleged in Count 8 because Kenneth had no contact with Ms. Ciccone prior to the closing "other than the fact that [Kenneth] was the person who actually purchased the home, and again, I think that that was all put in play by his mother, in terms of him being sort of again the straw person to receive the house, to do whatever needed to be done . . . ."

In our view, the trial court's description of Kenneth's role as "sort of . . . the straw person to receive the house" was a reasonable view of the evidence. The context in which the court used the terms appropriately addressed issues raised by the pleadings. And the evidence supported the court's view that Marie Dias was the person who was most eager to make this purchase. She prepared all of the terms of the contract without any apparent input from her son; she took care of all pre-closing arrangements; she purchased items for the owner of the property; she hired the title company to conduct the closing; she produced a check from a family trust to pay the purchase price; and after closing, she followed up with the title company about getting the deed recorded, and engaged Maurita Weaver to provide in-home care for Ms. Ciccone. Even though the deed transferred title to Kenneth, the evidence supported the trial court's conclusion that he was merely doing what his mother wanted him to do, and she was the driving force behind this transaction.

In this respect, the transaction bears a similarity to the situation in *Gaggers*, wherein the fiancé of a daughter of the feeble father took title to the father's property, and the court invalidated the sale due to the daughter's violation of her confidential relationship. The Court of Appeals stated in *Gaggers*, 180 Md. at 612: "While it is true the deed is to Gaggers alone, it was procured by his wife, and he is bound by her actions."

Regardless of whether Kenneth's role fits a dictionary definition of the term "straw man," the court's use of that description in this case does not undermine the court's judgment. Although the transaction was procured by Kenneth's mother, he was the party who took title to the property, and even if he was simply doing his mother's bidding, the court properly held him accountable and subject to a constructive trust to correct the wrong to Ms. Ciccone. *See O'Connor v. Estevez*, 182 Md. 541, 555 (1943), a case in which the Court of Appeals affirmed the imposition of a constructive trust as an equitable remedy for the protection of parties who had an equitable interest in, but did not hold legal title to, certain real estate. The Court explained that these are implied trusts that

> arise by operation of equity. These trusts are known as constructive trusts. **They are declared to exist where property has been acquired by fraud or some other improper method, or where the circumstances render it inequitable for the party holding the title to retain it.**

Id. (emphasis added).

The court's imposition of a constructive trust for the benefit of the Estate upon the property to which Kenneth Dias held record title was an appropriate remedy under the circumstances present in this case.

II. The Cross Appeal

The Estate contends, in its first two cross appeal issues, that the court clearly erred in failing to grant judgment in its favor (1) against Marie and Kenneth for civil conspiracy and aiding and abetting as alleged in Counts 11 and 12, and (2) against Kenneth for breach of fiduciary duty as alleged in Count 8.

At the conclusion of the Estate's case, the court granted appellants' motion for judgment on Counts 11 and 12, holding:

> Counts 11 and 12 . . . . So the civil conspiracy and aiding and abetting, you know, again those are difficult for me. To me while I can in my head say, you know, this is a normal case, and you know, I kept saying poor Val, you know, she was the person who really was the victim in this case, but there really was no testimony. And while like I said I can draw from inferences from what the testimony suggests, but there really was no testimony that these folks were conspiring or aiding and abetting in any way.
>
> So I'm denying --- I'm going to grant --- I'm sorry, I'm granting . . . Counts 11 and 12 with respect to the conspiracy and aiding and abetting. Because I really don't have specific facts to support either of those counts.

The Estate argues in its cross appeal that this was error because it was clear from the evidence that Kenneth "was in agreement with Marie Dias and as part of the sale, committed numerous acts in furtherance of the conspiracy[,]" including participating in what he knew, as a real estate agent, had to be a suspect transaction. In its Brief, the Estate highlights certain evidence and asserts that "there was more than enough evidence

to support a finding that the appellants were in a civil conspiracy, and to the extent that Kenneth Dias was a straw man, that he participated and should be found liable for Aiding and Abetting." But, this argument urges us to weigh the evidence in a manner contrary to the weight given by the trier of fact. That is not our job. And, as we said in *Starke*, 134 Md. App. at 683: "Where . . . the weight of the evidence is in dispute, . . . there is no way in which a fact finder, with such matters properly before [the fact finder], could ever be clearly erroneous for not being persuaded." Here, the trial judge was not clearly erroneous for failing to find in favor of the Estate (the plaintiff in this case) on Counts 11 and 12.

The same result applies to the Estate's argument that the trial court erred in not finding Kenneth liable for breach of fiduciary duty as alleged in Count 8. The Estate's argument again would require this Court to re-weigh the evidence and come to a different conclusion than the conclusion reached by the finder of fact. We decline to do so.

Moreover, this ruling appears to have resulted in no prejudice to the Estate; the court required Kenneth to convey title to the property to the Estate. We are not persuaded that the Estate would have achieved a better result if the trial court had held Kenneth liable on Count 8. *See Gaggers*, 180 Md. at 612.

Next, the Estate complains that the court erred in failing to award compensatory damages, including attorneys' fees.

The argument that the court should have awarded compensatory damages (unrelated to attorneys' fees) is sparse and difficult to follow, consisting of just these sentences:

> First, the Trial Court failed to award compensatory damages, or indicate why she wasn't awarding any compensatory damages. As noted above, the Trial Court also found that Marie Dias had committed a conversion and awarded $1.00 as nominal damages as the Trial Court did not find it had sufficient evidence of the value of the converted property. Conversion damages couldn't be proved, given the limitations of our legal system, as all the evidence of lost value was under the control of the Appellants. Appellant [sic] weren't going to acknowledge the value of the items that disappeared from Ciccone's house leaving Weaver testifying to property that was no longer extant to be valued including "nice stuff" such as jewelry, and an Italian armoire full of china and crystal. Marie Dias denied Weaver's testimony that there were furs in Ciccone's home that Weaver gave to Marie Dias.

(References to record extract omitted.)

But, the trial court expressly explained its reason for awarding only nominal damages on the count alleging conversion, stating:

> [N]o value [was] ever attached to any of the property that was removed. So I can't make a determination. I can't speculate as to what the value of the property was.
>
> So I am finding conversion, entering a judgment against the Defendant and assessing nominal damages of $1, because there was no testimony as to any fair market value of any of the items removed.

We perceive no error in the court's award of only nominal damages on the conversion count.

With respect to attorneys' fees, the Court of Appeals has explained many times that Maryland adheres to the American rule that generally requires each party to litigation

to pay its own attorneys' fees. For example, in *Empire Realty Co., Inc. v. Fleisher*, 269 Md. 278, 285-86 (1973), the Court stated:

> The general rule is that, other than usual and ordinary court costs, the expenses of litigation—including legal fees incurred by the successful party—are not recoverable in an action for damages. No attorney fee is ever included in the taxed costs, excepting the appearance fee, unless there is a special statute authorizing it. And, in the absence of special circumstances, as where the parties to a contract agree on the payment of attorney's fees, or a statutory requirement, counsel fees are not a proper element of damages.

(Citations omitted.)

More recently, the Court of Appeals reiterated that there is limited availability of recovery of attorneys' fees in Maryland litigation:

> There are four exceptions to the American Rule where a prevailing party may be awarded attorney's fees: "(1) the parties to a contract have an agreement to that effect, (2) there is a statute that allows the imposition of such fees, (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against a malicious prosecution." *Nova Research*[, *Inc. v. Penske Truck Leasing Co.*,] 405 Md. [435,] 445, 952 A.2d at 281 [(2008)] (quoting *Thomas v. Gladstone*, 386 Md. 693, 699, 874 A.2d 434, 437 (2005)).

Bainbridge St. Elmo Bethesda Apartments, LLC v. White Flint Express Realty Grp. Ltd. P'ship, LLLP, 454 Md. 475, 487 (2017).

The Estate contends that there were two bases on which the court could have awarded attorneys' fees in this case: (1) the fact that this was a case involving fraud or breach of duty, and (2) the collateral litigation exception to the American Rule.

In support of its first argument on this issue, the Estate cited *Crawford v. Mindel*, 57 Md. App. 111 (1984), *Fowler v. Benton*, 245 Md. 540 (1967), and *Russell v. Stoops*,

106 Md. 138 (1907). But the most recent pronouncements the Court of Appeals has made regarding attorneys' fees make plain that there are only four exceptions to the American Rule, and neither fraud nor constructive fraud is one of them.

The Estate's argument that this case triggered the collateral litigation exception to the American Rule meets a similar fate even though collateral litigation *is* one of the recognized exceptions. In *Eastern Shore Title Company v. Ochse*, 453 Md. 303, 329-31 (2017), the Court of Appeals explained:

> When attorney's fees are sought by a party, then "[o]ur basic point of reference when considering the award . . . is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts L.L.P. v. ASARCO LLC*, —— U.S. ——, 135 S.Ct. 2158, 2164, 192 L.Ed.2d 208 (2015) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010)). The American Rule is rooted in "common law reaching back to at least the 18th century." *Id.* (citing *Arcambel v. Wiseman*, 3 U.S. 306, 3 Dall. 306, 1 L.Ed. 613 (1796)).
>
> Maryland follows the American Rule. *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 445, 952 A.2d 275 (2008); *Friolo v. Frankel*, 403 Md. 443, 456, 942 A.2d 1242 (2008); *see also St. Luke Evangelical Lutheran Church, Inc. v. Smith*, 318 Md. 337, 344–46, 568 A.2d 35 (1990) (tracing the history of the American Rule). However, in Maryland, there are four exceptions to the American Rule, and an award for attorney's fees is permitted (1) where a statute allows for the recovery of attorney's fees; (2) where the parties to a contract have an agreement regarding attorney's fees; (3) where the wrongful conduct of a defendant forces a plaintiff into litigation with a third party; or (4) where a plaintiff in a malicious prosecution action can recover damages from the defense of the criminal charge. *Hess Constr. Co. v. Bd. of Educ.*, 341 Md. 155, 160, 669 A.2d 1352 (1996). The third exception is pertinent to this case, and is commonly known as the collateral litigation doctrine.
>
> **The collateral litigation doctrine permits Maryland courts to award legal expenses as damages from <u>a separate litigation against another party</u>** that was caused by the wrongful acts of the defendant.

Empire Realty Co. v. Fleisher, 269 Md. 278, 286, 305 A.2d 144 (1973). The collateral litigation doctrine was explained by this Court in *McGaw v. Acker Merrall & Condit Co.*:

> The general rule is that costs and expenses of litigation, other than the usual and ordinary Court costs, are not recoverable in an action for damages, nor are such costs even recoverable in a subsequent action; but, where the wrongful acts of the defendant has involved the plaintiff in litigation with others, or placed him in such relations with others as make it necessary to incur expense to protect his interest, such costs and expense should be treated as the legal consequences of the original wrongful act.

111 Md. 153, 160, 73 A. 731 (1909); *see also St. Luke Evangelical Lutheran Church, Inc.*, 318 Md. at 345–46, 568 A.2d 35 ("[A]ttorney's fees may be awarded when . . . the wrongful conduct of a defendant forces a plaintiff into litigation with a third party."); *Kromm v. Kromm*, 31 Md. App. 635, 358 A.2d 247 ("The allowance of such expenses manifestly was grounded on the fact that the wrong there complained of had imposed a *necessary obligation* upon the plaintiff to institute the collateral action[.]"), *cert. denied*, 278 Md. 726 (1976).

Collateral litigation expenses are only recoverable "for legal services in a separate litigation against another party[,] which the wrongful act of the defendant had required," and not the legal services rendered in the instant litigation. *Freedman v. Seidler*, 233 Md. 39, 47, 194 A.2d 778 (1963). A plaintiff may recover collateral litigation expenses as damages by demonstrating that such expenses were the natural and proximate consequence of the injury complained of, were incurred necessarily and in good faith, and were a reasonable amount. *See Fowler v. Benton*, 245 Md. 540, 550, 226 A.2d 556 (1967).

(Bolded emphasis added.)

The Estate cites *Montgomery Village Assocs. v. Mark*, 95 Md. App. 337 (1993), in support of its assertion that "[t]he collateral litigation exception does not require two separate lawsuits, against two different defendants, to trigger a plaintiff's ability to recover attorney's fees." We do not agree with that reading of *Montgomery Village*. We

based our ruling in that case on the existence of separate litigation, stating: "An exception to th[e American] rule exists, however, 'where the wrongful acts of the defendant has involved the plaintiff in litigation with others, or placed him in such relation with others as make it necessary to incur expense to protect his interest. . . .' *McGaw v. Acker, Merrall & Condit Co.*, 111 Md. 153, 160, 73 A. 731 (1909)." *Id.* at 344.

But, even if this Court had said in 1993 that no separate litigation was required to qualify for the collateral litigation exception, the Court of Appeals's ruling in *Ochse* in 2017 would control the outcome of this case. We see no abuse of discretion in the court's decision not to award attorneys' fees to the Estate in this case.

Finally, the Estate complains that the trial court erred in not permitting Dr. Wuerker to testify that Ms. Ciccone suffered from chronic dementia at the time of the closing that occurred before Dr. Wuerker examined her. Given the trial court's finding—even after striking that portion of Dr. Wuerker's testimony—that Marie Dias did abuse a confidential relationship with Ms. Ciccone, we fail to see how this evidentiary ruling resulted in prejudice to the Estate. *Brown v. Daniel Realty Co*., 409 Md. at 584 ("[E]ven if 'manifestly wrong,' we will not disturb an evidentiary ruling by a trial court if the error was harmless.").

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.
COSTS TO BE PAID ONE-HALF BY APPELLANTS/CROSS APPELLEES AND ONE-HALF BY APPELLEE/CROSS APPELLANT.