2018 IL App (1st) 172899-U

FIRST DIVISION
December 24, 2018

No. 1-17-2899

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

JOHN McELFRESH, as Executor of the Estate of Mary Ann McElfresh, deceased, Plaintiff, v. ALICE McELFRESH JONES, Individually and as Successor Trustee of the Mary Ann McElfresh Irrevocable Trust, dated July 22, 1997, and as Successor Trustee of the Mary Ann McElfresh Revocable Trust, dated July 22, 1997, Defendant-Appellant	)	Appeal from the Circuit Court of Cook County No. 12 CH 41672
(John McElfresh, as Executor of the Estate of Mary Ann McElfresh, deceased, Plaintiff-Appellee; Lloyd McElfresh and Carol McElfresh, Intervenors-Appellees).	)	The Honorable Pamela McLean Meyerson, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Mikva and Justice Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court is affirmed as modified. Defendant forfeited all of her appellate arguments related to the family settlement agreement and its enforceability. The circuit court's findings of fact following the bench trial were not against the manifest of the evidence. The circuit court did not abuse its discretion in calculating damages, and the circuit court's punitive damages award

was not excessive. We modify the circuit court's judgment, however, to make it clear that defendant is not precluded from receiving distributions from her deceased mother's probate estate for assets that were not itemized in the family settlement agreement.

¶ 2 This appeal arises out of a dispute among siblings over the distribution of their late mother's assets, namely two trusts and certain itemized and known probate assets. After a bench trial, the circuit court concluded that Alice McElfresh Jones, the trustee of the trusts, breached her fiduciary duties. The circuit court entered judgment in favor of plaintiff and intervenors and awarded them $414,420 in actual damages and $400,000 in punitive damages. The circuit court also barred Alice from receiving any share of her mother's trusts or probate estate. Alice's posttrial motion to reconsider was denied and she filed a timely notice of appeal. For the reasons that follow, we affirm the judgment of the circuit with one modification.

¶ 3 BACKGROUND

¶ 4 John, Lloyd, and Carol McElfresh and Alice McElfresh Jones are siblings and are the surviving children of the late Mary Ann McElfresh.[1] During her lifetime, Mary Ann established two trusts: the Mary Ann McElfresh Irrevocable Trust, dated July 22, 1997 (Irrevocable Trust), and the Mary Ann McElfresh Revocable Trust, dated July 22, 1997 (Revocable Trust). Alice was named as the trustee of the Irrevocable Trust; Mary Ann was named as the initial trustee of the Revocable Trust, and Alice was named as the successor trustee. During Mary Ann's lifetime, John, Lloyd, and Carol could request that Alice, as trustee, make distributions to them from the Revocable Trust for education purposes or other family expenses.

¶ 5 At the time Mary Ann created the trusts, she lived in Skokie, Illinois, as did John and Lloyd. Carol lived in Belmont, Massachusetts, and Alice lived in Maryland. In 2002, Mary Ann's health was failing and she moved to a nursing home in Newton, Massachusetts. Also in

[1]Mary Ann's son Howard, brother to John, Lloyd, Carol, and Alice, predeceased Mary Ann and left no descendants.

2002, Mary Ann gave Alice power of attorney. In 2003, Alice and her husband bought a second home in Waltham, Massachusetts (Waltham home). Beginning in 2003, Carol and her children frequently stayed in the Waltham home while maintaining an address in Belmont, Massachusetts. There was conflicting testimony at trial as to whether Carol and her children ever actually resided at the Waltham home. In 2007, Mary Ann moved into the Waltham home, where she lived until her death in July 2011. Alice charged Mary Ann and Carol rent for living in the Waltham home, as well as for utilities and insurance. Alice paid herself the rent and other expenses from Mary Ann's trust accounts. Alice also engaged in "double dipping" by paying herself rent from Mary Ann's trust accounts and, from time to time, paying her mortgage on the Waltham home from the same accounts. Alice also paid numerous other personal expenses from those accounts. After Mary Ann died, John was appointed as the executor of Mary Ann's estate. It was only after Mary Ann's death that John, Lloyd, and Carol learned that Alice had made numerous distributions to herself for personal expenses from Mary Ann's trusts without their knowledge.

¶ 6 Around April 2012, John, Lloyd, Carol, and Alice entered into a Family Settlement Agreement (FSA) to govern the distribution of the trust and probate assets. The FSA provided that the trusts would be terminated and that the beneficiaries would receive distributions according to a payment schedule attached to the FSA (Schedule A). According to Schedule A, each beneficiary would receive a one-quarter share of the total assets available for distribution from both trusts and from probate minus the "advancements" or distributions made to them during Mary Ann's lifetime. Under Schedule A, Alice had a negative balance of $74,420 due to her because of the roughly $700,000 in advances she received during Mary Ann's lifetime. John, Lloyd, Carol, and Alice all executed the FSA and Alice made a partial distribution of some of the

trust assets to the beneficiaries. However, Alice later declared, "I am revoking my signature [on the FSA] and do not agree with the [FSA]." Alice made no further distributions to her siblings and subsequently distributed over $300,000 from the trust accounts to herself.

¶ 7 John, in his capacity as executor of Mary Ann's estate, initiated this action in November 2012, and filed a seven-count amended complaint in May 2013 against Alice individually and in her capacity as trustee of both the Irrevocable Trust and Revocable Trust. The circuit court permitted Lloyd and Carol to intervene and adopt the amended complaint as their own. The complaint asserted claims for declaratory judgment seeking to have Alice distribute the trust assets, provide information about the trusts to the beneficiaries, and for an accounting. The complaint also sought injunctive relief to prohibit Alice from taking certain actions with trust assets and to provide documentation and an accounting related to trust assets. The claims for declaratory and injunctive relief were mooted, however, when the circuit court granted John's petition to remove Alice as trustee of both the Revocable Trust and Irrevocable Trust. Two days after Alice was removed as trustee, she transferred over $40,000 in trust assets to her own personal account. The circuit court appointed Lloyd as the trustee, and ordered Alice and her attorney to turn over all documents to Lloyd and to provide an accounting of the trust assets.

¶ 8 John's amended complaint also asserted claims against Alice for conversion, breach of fiduciary duties, and fraud. Alice answered the amended complaint and did not raise any affirmative defenses or counterclaims. The matter proceeded to a five-day bench trial where the circuit court heard testimony from John, Lloyd, Carol, and Alice, as well as from the attorney who drafted the FSA. The parties submitted posttrial briefs with proposed conclusions of fact and law. In a written order, the circuit court found that Alice breached her fiduciary duties to Mary Ann during her lifetime, as well as to the trust beneficiaries. The circuit court entered

judgment in favor of John, Lloyd, and Carol, and awarded them $414,420 in actual damages and $400,000 in punitive damages. Alice's posttrial motion to reconsider was denied, and Alice filed a timely notice of appeal.

¶ 9 ANALYSIS

¶ 10 On appeal, Alice raises twelve issues for our review, which we address below. We first note, however, that Alice's appellate brief contains substantial defects that have impeded our review of the circuit court's judgment. First, Alice fails to provide this court with a complete statement regarding our standard of review. Illinois Supreme Court Rule 341(h)(3) (eff. Nov. 1, 2017) provides that an appellant must "include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument." Under a separate heading placed in the argument section of her brief, Alice makes the following statement:

> "The issue of whether the [c]ircuit [c]ourt accurately found clear and convincing evidence of the existence of a 'special relationship' between Alice and her mother Mary Ann that would create a fiduciary duty to her mother and/or her siblings *** is reviewed on an abuse of discretion standard. All of the remaining issues raised in this appeal should be reviewed by the [c]ourt *de novo*."

This is the only statement regarding our standard of review that appears anywhere in Alice's brief; she does not include any statement of the standard of review in her discussion of any of the 12 issues she raises on appeal. Her statement regarding the standard of review is insufficient for three reasons. First, Alice fails to provide any citation to authority to support her contention that the abuse of discretion standard applies to the issue of whether a special relationship existed

between herself and Mary Ann that might give rise to a fiduciary duty. Second, she lumps together the remaining 11 issues without separately discussing the standard of review for each of those issues. Third, she fails to cite any authority to support her contention that the *de novo* standard applies to any of the issues she raises on appeal. In sum, we find that Alice's brief does not comply with Rule 341(h)(3).

¶ 11 This lackadaisical effort on the part of Alice's counsel is unacceptable and imposes a serious burden on this court's duties to ascertain the correct standard of review and to promptly resolve an appeal on its merits where possible. Alice's counsel is undoubtedly familiar with our supreme court's rules governing appellate briefs, as he has handled numerous appeals both in this court and in our supreme court. But here, he made no meaningful effort to comply with Rule 341(h)(3), which has impeded this court's ability to engage in an efficient and meaningful review of the circuit court's judgment.

¶ 12 Additionally, our review has been further frustrated by Alice's citations to the record in support of her statement of facts and arguments. Rather than supporting her factual assertions by citing to the pleadings or the trial transcript, Alice regularly cites to her own "proposed findings" of fact and law set forth in the posttrial brief she filed in the circuit court. For instance, Alice's brief asserts, "[i]n 2001, while Mary Ann still lived in her home in Skokie, Illinois, she added Alice to the Chase Bank account ending in #3555 as joint account holder with right of survivorship." To support this factual assertion, Alice cites to the "proposed findings of fact" in her posttrial brief, which in turn cites to the trial transcript by date and page number. Alice's brief does not provide direct citations to the report of proceedings—which contains the entire trial transcript—but instead provides this court with a trail of breadcrumbs to follow in order to ascertain the facts established at trial. A more frustrating example is Alice's statement in her

brief that "[t]he FSA provided that Alice had no obligation to repay the $74,400 purported excess distribution back to her siblings or their offspring and, importantly, included a binding mutual release of any further claims or actions between the parties." To support this "fact," she cites to the "proposed conclusions of law" section of her posttrial brief, which in turn cites "Trial Exhibit 4," with no citations to a specific page number. "Trial Exhibit 4"—which only appears in the supplemental record that was filed in this court *after* Alice's brief was filed—is the FSA, which is a six-page document covering a variety of topics. Alice's use of indirect citations to the record when direct citations are available, and citations to entire documents to support a single factual assertion, is an affront to Illinois Supreme Court Rules 341(h)(6) and (7) (eff. Nov. 1, 2017), which require, respectively, "appropriate reference[s] to the pages of the record on appeal," and "citation of *** the pages of the record relied on." Alice employs indirect citations throughout her brief, leaving this court to question whether she is attempting to deliberately confuse this court or otherwise to delay a resolution of this appeal.

¶ 13 Our supreme court's rules governing appellate briefs are mandatory (*Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶ 7), and this court "is not simply a depository into which a party may dump the burden of argument and research" (*People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 56). As a court of review, we are entitled to have the issues on appeal clearly presented. *Holmstrum v. Kunis*, 221 Ill. App. 3d 317, 325 (1991). It is not our duty to scour the record in an effort to understand an appellant's position when the appellant fails to adequately or accurately describe the proceedings below. We have the discretion to strike briefs that do not comply with our supreme court's rules or, in rare cases, dismiss appeals for serious rule violations. *Collier v. Avis Rent A Car System, Inc.*, 248 Ill. App. 3d 1088, 1095 (1993). We elect to do neither here, but we will disregard any facts asserted

in Alice's brief that are not supported by direct, accurate citations to the record, and we will not utilize our resources to follow her trail of breadcrumbs to find support for her arguments in the record. We admonish Alice's counsel that future noncompliance with our supreme court's rules will not be tolerated.

¶ 14 We turn now to the merits of Alice's arguments on appeal. Her first set of arguments relate to the enforceability of the FSA, which she advances by scattering parts of this argument throughout several different sections of her brief. First, she argues that the circuit court should have determined whether the FSA was an enforceable contract, although Alice does not take a firm position as to whether it was enforceable. She argues that "this [c]ourt should, at a minimum, remand this case for a ruling from the [c]ircuit [c]ourt as to whether the FSA is enforceable." Elsewhere she argues that the circuit court erred by treating as unenforceable the FSA and the broad release of any claims by the parties contained therein. She contends that her nonperformance under the FSA did not render the agreement unenforceable, and thus any damages should have been limited to those arising from her breach of the FSA. This leads to her argument that John never pleaded a breach of contract claim, an argument that she raised for the first time in a motion for a finding of judgment in her favor pursuant to section 2-1110 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1110 (West 2016)) at the close of John's case-in-chief, which the circuit court denied. Alice argues that the circuit court erred by denying this motion because the circuit court should have dismissed John's entire complaint for failing to assert a breach of the FSA. In the alternative, Alice argues that if the FSA was unenforceable, the circuit court should not have relied on the FSA or Schedule A in calculating damages, as those documents reflected settlement negotiations and were not admissible under Illinois Rule of

Evidence 408 (eff. Jan. 1, 2011), although Alice fails to provide us with any citation to the record reflecting any pretrial objection to Schedule A or any contemporaneous objection at trial.

¶ 15 We find that Alice forfeited all of her arguments related to the FSA and its enforceability. The essence of Alice's argument is that John's amended complaint was defective because he failed to plead a breach of contract claim based on Alice's breach of the FSA. Alice never moved prior to trial to dismiss this action based on John's failure to assert a breach of contract claim, nor did she raise any affirmative defenses, or assert any counterclaims, such as a claim for a declaratory judgment as to whether the FSA was enforceable. Instead, Alice proceeded to trial on the issues as framed by the pleadings and thereby forfeited any challenge to sufficiency of John's amended complaint. See *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 60-62 (1994) (finding that the defendant waived its appellate challenge to the sufficiency of the plaintiff's complaint by answering the complaint and proceeding to trial). The court in *Adcock* explained that there is an exception to this rule where a party attacks the complaint for failing to state *any* recognized cause of action, a challenge that may be raised at any time, but that the exception does not apply where the complaint either defectively or imperfectly alleges *a* cause of action. *Id.* at 61-62.

¶ 16 Here, the exception identified in *Adcock* does not apply because Alice did not argue that John's amended complaint failed to state any recognized cause of action. Instead, she argued that John's failure to plead a breach of contract claim should have resulted in the dismissal of his entire complaint during trial. She raised this argument for the first time in her section 2-1110 motion for judgment in her favor at the close of John's case-in-chief, but her argument was already too late, as she proceeded to trial on the claims set up in John's amended complaint. Her motion for judgment was little more than an attempt to raise a defense to John's complaint midtrial and to sidestep the issues framed by the pleadings for trial. By answering John's

amended complaint and proceeding to trial, Alice forfeited any argument regarding the sufficiency of the complaint. We therefore decline to address any of Alice's arguments related to the enforceability or applicability of the FSA. For these same reasons, we find that the circuit court did not err by denying Alice's section 2-1110 motion for judgment in her favor.

¶ 17 Next, Alice argues that the circuit court ignored "the undisputed fact" that two of Mary Ann's bank accounts—a Chase Bank account ending in #3555 (3555 account) and a Chase Bank account ending in #3776 (3776 account)—were joint accounts with rights of survivorship in favor of Alice, and thus the money that Mary Ann deposited into those accounts were gifts to Alice. Alice further argues that there was insufficient evidence of a "special relationship" between Alice and Mary Ann that would give rise to a fiduciary duty running from Alice to Mary Ann. We find that Alice's argument regarding the existence of a fiduciary duty to Mary Ann is frivolous because she owed Mary Ann a fiduciary duty as a matter of law by virtue of a power of attorney. We further find no error in the circuit court's conclusion that Alice failed to rebut a presumption of fraud with respect to benefits she received as a result of transactions involving the trusts during Mary Ann's lifetime.

¶ 18 In an appeal from a judgment following a bench trial, we will not disturb the circuit court's findings of fact unless those findings are against the manifest weight of the evidence. *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010). "A finding [of fact] is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Id.* The circuit court's judgment following a bench trial will be upheld if there is any evidence to support the judgment. *Id.*

¶ 19 A fiduciary duty may exist either as a matter of law or as a matter of fact. *In re Estate of Stahling*, 2013 IL App (4th) 120271, ¶ 18. "An individual holding a power of attorney is a fiduciary as a matter of law." *In re Estate of Shelton*, 2017 IL 121199, ¶ 22. The agent appointed under a power of attorney "has a common-law fiduciary duty to the principal." *Id.* "The fiduciary relationship between the principal and agent begins at the time the power of attorney document is signed." *Id.* "A presumption of fraud arises when a fiduciary benefits from a transaction involving the principal." *Id.* ¶ 23. "Under a power of attorney for property, 'any conveyance of the principal's property that either materially benefits the agent or is for the agent's own use is presumed to be fraudulent.' " *Id.* (quoting *Spring Valley Nursing Center, L.P. v. Allen*, 2012 IL App (3d) 110915, ¶ 12). "Once a fraudulent transaction has been alleged, the burden then shifts to the agent to prove by clear and convincing evidence that the transaction was fair and did not result from his undue influence over the principal." *Id.*

¶ 20 Additionally, with respect to deposit accounts, "when a valid joint tenancy is shown, a presumption arises that the joint tenant who provided funds for the account did so with the intent of making a gift to the other joint tenant." *Rasmussen v. LaMagdelaine*, 208 Ill. App. 3d 95, 103 (1991). Whether a gift was intended must be determined as of the time the joint account was created. *Id.*

¶ 21 In its written order, the circuit court found that as of 2002, the Revocable Trust held the 3555 account. Mary Ann was the signatory on the 3555 account, and the circuit court found that the 3555 account "was set up shortly after the trust was created and all [of] the siblings recognized the account as belonging to the Revocable Trust for the benefit of [Mary Ann] during her lifetime." Lloyd previously had a power of attorney for Mary Ann, but Mary Ann granted Alice a power of attorney in February 2002, and Alice became a signatory on the 3555 account

shortly before Mary Ann moved from Skokie to Massachusetts in 2002. The circuit court found that "[w]hen Alice's name was added to the 3555 [a]ccount, Alice continued to consider the account a Revocable Trust account." The circuit court concluded that Alice owed Mary Ann a fiduciary duty by virtue of being a trustee for both trusts starting in 1997, the February 2002 power of attorney, and because of the "special circumstances of [Mary Ann and Alice's] relationship." The circuit court also rejected Alice's argument that because she was a joint owner of the 3555 account with a right of survivorship, she had an undivided interest in that account and did not need to make an accounting for her withdrawals from it. The circuit court found that Alice's own testimony established that the 3555 account was known to be a Revocable Trust account, that Mary Ann had the right to decide what to do with funds in the 3555 account during her lifetime, that Alice followed Mary Ann's directions when making distributions, and that Alice prepared a detailed accounting for the 3555 account.

¶ 22 In this court, Alice's argument focuses on the circuit court's finding that a "special relationship" existed between Mary Ann and Alice that gave rise to a fiduciary duty, but fails to address the undisputed fact that Alice had a power of attorney for Mary Ann starting in February 2002. That power of attorney gave rise to a fiduciary relationship as a matter of law. *In re Estate of Shelton*, 2017 IL 121199, ¶ 22. Alice does not direct our attention to any facts in the record to establish when Alice became a signatory to the 3555 account. It is clear, however, from Alice's own trial testimony that that the 3555 account was understood to be a Revocable Trust account. Alice testified that the 3555 account "was for Mary Ann's benefit and basically at her direction. [Mary Ann] was in total control of the [Revocable Trust] during her lifetime." Alice further testified that she wrote checks from the 3555 account at Mary Ann's direction. Therefore, any

conveyance of Mary Ann's property from the 3555 account that either materially benefited Alice or was for Alice's own use is presumed to be fraudulent. *Id.* ¶ 23.

¶ 23 Alice argues that when Mary Ann added Alice as a joint account owner with a right of survivorship, a presumption arose that Mary Ann did so with the intent to make a gift to Alice of the funds on deposit in that account. But as we noted above, Alice does not direct our attention to any facts in the record to establish when Alice became a signatory to the 3555 account,[2] and the record reflects that Alice treated the 3555 account as a Revocable Trust account. We therefore have no basis from which we might conclude that a presumption arose in favor of Alice that Mary Ann intended to make a gift to Alice of the funds on deposit in the 3555 account. The circuit court's findings that the 3555 account was a Revocable Trust account and that Alice owed Mary Ann a fiduciary duty as a matter of law by virtue of the February 2002 power of attorney executed by Mary Ann are not against the manifest weight of the evidence.

¶ 24 Alice's next set of arguments relate to the circuit court's calculation of actual damages. We review a circuit court's damages award following a bench trial under the manifest weight of the evidence standard. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA,* 384 Ill. App. 3d 849, 859 (2008). An award of damages is not against the manifest weight of the evidence or manifestly erroneous if there is an adequate basis in the record to support the circuit court's determination of damages. *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147 (1972); *Aetna Insurance Co. v. Amelio Brothers Meat Co.*, 182 Ill. App. 3d 863, 865 (1989).

[2]In her brief, Alice asserts, "In 2001, while Mary Ann still lived in her home in Skokie, Illinois, she added Alice to the Chase Bank account ending in #3555 as joint account holder with right of survivorship." To support this contention, Alice cites to the "proposed findings of fact" in her posttrial brief, which in turn cites to the trial transcript by date and page number. The portion of the trial testimony cited, however, does not establish when Mary Ann added Alice as a joint owner of the 3555 account.

¶ 25 The circuit court found that

> "Alice is liable to her siblings for actual damages of $74,420 [one quarter of the total trust and probate assets minus the advancements Alice received during Mary Ann's lifetime] plus the amounts Alice withdrew from the trust accounts after Schedule A was prepared and agreed upon. Alice withdrew, or paid to others for her benefit, over $340,000 from the 6701 [a]ccount between April 13, 2012[,] (the date she signed the [FSA]) and October 9, 2013 (the date she was removed as [t]rustee)."

¶ 26 The first part of the circuit court's actual damages calculation—the $74,420—is fairly straightforward. The parties had all previously agreed that Schedule A accurately reflected the total value of Mary Ann's trusts and probate assets at the time of her death and the amount of advances each sibling received during Mary Ann's lifetime. The circuit court then followed the parties' lead by dividing the total value of Mary Ann's trusts and probate assets at the time of her death ($2,517,162) by four in order to calculate each sibling's one quarter share of the trust and probate assets ($629,289), and then subtracting the amount of advances each sibling received during Mary Ann's lifetime. The circuit court found that Alice was entitled to her one quarter share of her mother's trust and probate assets—$629,289—minus the $703,711 in advances, leaving Alice with a balance due of negative $74,420. That negative amount was therefore payable to Alice's siblings in order to ensure that each sibling received their fair share of their mother's trust assets. The second portion of the actual damages calculation—the $340,000—which Alice does not contest, was based on Alice's withdrawal of trust assets following Mary Ann's death.

¶ 27 Alice first argues that the circuit court erred because the total damages of $414,420 were actually gifts from Mary Ann to Alice because those funds were held in joint accounts with rights of survivorship in favor of Alice. Alice contends, "There was no evidence presented by [p]laintiffs at trial that Alice's testimony that Mary Ann approved the gifts and expenditures at issue was false." This argument must fail, however, because as we noted above, Alice was the trustee of the Irrevocable Trust from its inception in 1997 and had power of attorney for Mary Ann starting in February 2002. Thus, any conveyance of Mary Ann's property that either materially benefited Alice or was for Alice's own use is presumed to be fraudulent, and Alice failed to establish that Mary Ann intended to make a gift to Alice of the funds held in the joint accounts. It was incumbent on Alice to rebut the presumption of fraud by demonstrating by clear and convincing evidence that the transactions were fair. *In re Shelton*, 2017 IL 121199, ¶ 23. The circuit court concluded that Alice failed to meet her burden. In this court, Alice merely argues that Mary Ann made numerous generous gifts to all of her children during her lifetime, but Alice does not direct our attention to any facts in the record to establish that the trust property she received while holding a power of attorney for Mary Ann was the result of a series of fair transactions. Therefore, we cannot say that the circuit court's finding that Alice failed to rebut the presumption of fraud by clear and convincing evidence was against the manifest weight of the evidence, and we reject Alice's argument Mary Ann gave Alice $414,420 in gifts.

¶ 28 Next, Alice argues that the circuit court erred when it found that Alice was not entitled to credits against her advances for the amounts she charged in rent to Mary Ann and Carol for the Waltham home. Alice argues that the rent charged was consistent with the fair market rents in that area. Alice contends that she testified that the rent she was paid was fair and there was no evidence to contradict her testimony. Alice, however, fails to direct our attention to facts in the

record that form the bases of her opinion that the rent was fair. She further contends that there "is substantial evidence in the trial record of the monthly mortgage payment, real estate taxes, insurance and utilities paid by Alice for the Waltham property," which she claims is indicative of its fair rental value, although she fails to direct our attention to specific facts in the record to establish what those amounts were. Alice also contends that Carol signed a written lease in 2003 for $2000 per month in rent, which is indicative of the fair rental value.[3] Alice argues that, in calculating damages, the circuit court should have given her credit for the rent she received that was paid from the trusts to cover Mary Ann and Carol's rent. She contends that the circuit court instead counted all of those payments as advances from the trusts to Alice, which Alice argues is a windfall to her siblings.

¶ 29 We cannot say that the circuit court's refusal to credit Alice for the rental payments when calculating damages was against the manifest weight of the evidence. Alice fails to direct our attention to any portion of the record to support her argument that the amounts of rent she charged Mary Ann and Carol were fair, other than her own conclusory and self-serving testimony. It was undisputed that starting in late 2003, Alice paid herself $2000 per month from Mary Ann's trust assets for Carol's rent, and that Alice increased the total monthly rental amount to $3000 in July 2007 when Mary Ann moved into the Waltham home. Carol testified that she signed a lease under duress for the Waltham home in 2003 but did not move in. She testified that she signed the lease at Alice's request "for insurance purposes." Carol testified that she and her children lived in Belmont, Massachusetts, and never lived at the Waltham home. There was sufficient evidence in the record from which the circuit court could conclude that Alice was not entitled to a credit for the rent payments that Alice made to herself from Mary Ann's trust assets

[3]A written lease agreement appears in the record that purports to cover a period December 1, 2003, to December 1, 2004. The lease was only signed by Carol, as there is no signature on the line under "Landlord." Furthermore, the words "under duress" appear next to Carol's signature.

for Carol's rent, totaling $264,000 ($2000 per month for 132 months). Furthermore, as we discussed above, Alice had power of attorney for Mary Ann at the time Mary Ann moved into the Waltham home, and thus it was Alice's burden to show that any amount of rent she received from the trusts for Mary Ann's rent while Mary Ann resided at the Waltham property was fair. Alice has not done so. Additionally, at the same time that Alice was charging Mary Ann rent for the Waltham property, which was paid out of Mary Ann's trust assets, Alice also "doubled dipped" by paying the mortgage on the Waltham home from Mary Ann's trust assets. Alice makes no effort to reconcile the amount of rent she received from Mary Ann's trusts and the amounts she took from the trusts to pay for her own mortgage expenses as justified, or that these amounts rebut by clear and convincing evidence the presumption that the transactions were fraudulent or resulted from undue influence. Therefore, Alice has not demonstrated that the circuit court erred in calculating the damages award by refusing to credit any rent Alice collected from the trusts against the total amount of advances Alice received during Mary Ann's lifetime.

¶ 30 Alice also argues that she saved the estate $197,376 by moving Mary Ann out of a nursing home and into the Waltham home. Alice, however, fails to support this argument with appropriate citations to the record. We therefore have no basis from which we might conclude that the circuit court's decision to not credit Alice with those alleged savings was manifestly erroneous.

¶ 31 In sum, Alice has not established that the claimed advances that she received should be reduced in any manner, as the advances were not gifts and the rent she charged to the trusts was properly treated as an advance. The circuit court further found that Alice withdrew $340,000 from the 6701 account (the Irrevocable Trust's account) and either deposited the funds into her own personal account or used the funds to pay for her own personal expenses. The $340,000

constituted actual damages because that money belonged to the estate, not Alice. Alice does not contest this portion of the damages award. In other words, the circuit court's actual damages award effectively disgorges all of the funds that Alice took that exceeded the $629,289 in advances she had already received. The circuit court's actual damages calculation was not against the manifest weight of the evidence.

¶ 32 Next, Alice argues that the circuit court's punitive damages award was excessive[4] because between 2007 and 2011, Alice's post-tax income averaged $78,000. Alice further contends that there is little chance that she will ever serve as a trustee again, and thus the punitive damages award will not achieve its purpose of deterring her from similar conduct in the future.

¶ 33 The circuit court found,

> "Alice took advantage of her position of trust and confidence for years, taking more than her share of trust assets before her mother passed. After her mother's death, Alice finally acknowledged her wrongdoing and came to an understanding with her siblings. Her siblings, generously, were ready to forgive her and not require her to reimburse them for taking more than her share. Alice rejected that resolution and continued raiding the trust funds. Most egregiously, she attempted to evade this [c]ourt's October 9, 2013[,] [o]rder [removing Alice as trustee] by emptying out the balance in the Trust Proceeds Savings Account [the 3776 account] two days after the [o]rder. This willful and malicious conduct warrants punitive damages in the amount of $400,000."

[4]Alice also argues that punitive damages were "unwarranted" because punitive damages are not available for breach of contract claims. We have already concluded, however, that Alice forfeited her arguments related to whether John's complaint should have asserted claims sounding in contract. See *supra* ¶ 15.

¶ 34 Our supreme court has explained,

> "Punitive damages are intended to punish the wrongdoer and to deter that party, and others, from committing similar acts in the future. [Citations.] Because of their penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded. [Citations.] A reviewing court will not disturb an award of punitive damages on grounds that the amount is excessive unless it is apparent that the award is the result of passion, partiality, or corruption." *Deal v. Byford*, 127 Ill. 2d 192, 203-04 (1989).

We consider several nonexhaustive factors when reviewing a punitive damages award, including "the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant." *Id.* at 204. We also must assess the punitive damages award in light of the specific facts on a case-by-case basis. *Id.* "Moreover, the underlying purposes of an award of punitive damages must be satisfied." *Id.*

¶ 35 Alice does not raise any argument with respect to the "nature and enormity of the wrong" and does not argue that her conduct did not warrant a punitive damages award. The circuit court concluded that for years, Alice took advantage of her mother and took more than her fair share of the trust assets. After Mary Ann's death, Alice continued to raid the trust funds for her own benefit to the tune of $340,000 while refusing to distribute her siblings' fair share of the trust estate, and removed $40,000 in trust assets two days after being removed as trustee. The circuit court concluded that Alice's conduct was "willful and malicious." In relation to Alice's conduct in taking $300,000 in trust assets for herself while acting as trustee with fiduciary duties to the other trust beneficiaries and another $40,000 after having been removed as trustee, coupled with

Alice having engaged in a series of transactions during Mary Ann's lifetime that were presumptively fraudulent, the $400,000 punitive damages award is proportional to the wrong. In other words, the punishment fit the crime. See *Hazelwood v. Illinois Central Gulf R.R.*, 114 Ill. App. 3d 703, 713 (1983) ("Recognizing that punitive damages are in the nature of a criminal sanction, we are simply saying that the punishment should fit the crime. An award which is disproportionate to the wrong serves none of the purposes of punitive damages and is excessive.").

¶ 36 Alice next argues that, due to her financial situation, it is unlikely that she will ever be able to pay the punitive damages amount. No party has directed our attention to any portion of the record on appeal to show that the circuit court had any evidence before it related to Alice's financial status. However, Alice's financial status is just one factor that we consider when evaluating a punitive damages award, and her inability to pay the award is, on its own, insufficient to overturn the punitive damages award. See *Leyshon v. Biehl Controls North America, Inc.*, 407 Ill. App. 3d 1, 16-17 (2010) (explaining that our supreme court's decision in *Deal*, which enumerates several factors to consider when evaluating a punitive damages award, implicitly overruled our supreme court's holding in *Mullin v. Spangenberg*, 112 Ill. 140, 145-46 (1884) that where the plaintiff fails to introduce evidence of the defendant's financial status, the plaintiff is only entitled to a punitive damages award based on a presumption that the defendant has no pecuniary resources).

¶ 37 Finally, we are not persuaded by Alice's argument that the punitive damages award will not achieve its purpose of deterring her from similar conduct in the future. She contends that, as an employee of the federal government, she does not "make her living acting in the role of trustee." She then argues, "[a]s such, there is little to no chance that she will ever serve [as a

trustee] again." No matter how "little" the chance is that she might be asked to serve in a fiduciary capacity to others in the future, the punitive damages award is a clear deterrent to similar future conduct by Alice. The punitive damages award sends a clear message to others in the McElfresh family and to society in general that a fiduciary who violates her duty against self-dealing stands to do more than simply reimburse an injured party for the wrong, but is also subject to a financial punishment.

¶ 38 Considering the facts of this case and the factors discussed above, we conclude that the punitive damages award is not excessive.

¶ 39 Alice's final argument on appeal is that the circuit court erred by finding that Alice "shall have no right to receive any of the assets remaining in *** Mary Ann['s] *** probate estate." Alice argues that the controversy before the circuit court involved Mary Ann's trusts and that the circuit court had no authority to decide an issue not raised by the parties.

¶ 40 The circuit court's calculation of damages, which we have affirmed (see *supra* ¶¶ 26-31), begins with the $74,420 that Alice owed to her siblings based on Schedule A. Schedule A, in turn, calculates this amount by dividing into four equal shares the itemized assets in both the trusts and in the probate estate, and then deducts from each sibling's share the advances they had already received. Alice's share was a negative $74,420. Therefore, the damages calculation only takes into account the amount that would have been Alice's one-quarter share of the probate estate assets listed in Schedule A, as well as her one-quarter share of what was in Mary Ann's trusts. The circuit court's order concluded that Alice

> "shall have no right to receive any of the assets remaining in the Irrevocable Trust, the Revocable Trust, or Mary Ann['s] *** probate estate. Those assets shall

be distributed among John, Lloyd and Carol in accordance with their respective interests, consistent with this opinion."

¶ 41 We first emphasize that the parties do not assert that there are any assets in Mary Ann's probate estate that are not accounted for in Schedule A. It is clear that the circuit court's order calculated John, Lloyd, and Carol's damages based on their pro rata share of the assets identified in Schedule A, which included certain known and itemized probate assets. The circuit court's order, however, appears to suggest that Alice is barred from receiving any future distribution from Mary Ann's probate estate, even for assets that are not itemized in Schedule A. But John, Lloyd, and Carol never requested such relief, and the circuit court's order made no findings of fact to support what amounts to an additional sanction against Alice. We therefore modify the circuit court's judgment to make it clear that Alice is not barred from receiving her share of any assets from Mary Ann's probate estate that were not itemized in Schedule A, and which may later be discovered or recovered and added to Mary Ann's probate estate.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court is affirmed as modified.

¶ 44 Affirmed as modified.