Circuit Court for Anne Arundel County
Case No. 02-C-12-174408

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1873

September Term, 2016

MICHAEL K. FISHER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT K. FISHER

v.

ESTATE OF DORIS R. FISHER

Nazarian,
Shaw Geter,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 1, 2018

This appeal arises out of a long-running dispute between a son, Michael K. Fisher, and his stepmother, Doris Fisher ("Wife"), over the estate of the son's deceased father. Mr. Fisher, in his capacity as the personal representative of his father's estate, appeals the decision of the Circuit Court for Anne Arundel County dismissing nine counts and granting summary judgment on the other five counts of his operative complaint. He also appeals the circuit court's denial of his motion to alter or amend the judgment. For the reasons set forth below, we affirm the judgment.

Also pending are the Wife's motion to dismiss the appeal, which we deny, and her motion to strike Mr. Fisher's notice of substitution of party, which we grant. And since Wife passed away on October 1, 2017, after Mr. Fisher filed this appeal, we substitute her estate as the appellee.

I. BACKGROUND

This case has a long and complicated procedural history that involves at least two cases: (1) a circuit court case from which this appeal arises, and (2) an orphans' court case initiated by Wife's petition to caveat a will (the merits of which are not before us).[1] Both actions arose from the death of Mr. Fisher's father, Robert K. Fisher ("Father") on January 11, 2010.

About a week after Father died, on January 19, 2010, the Register of Wills named Mr. Fisher as personal representative of Father's estate based on a 1993 will. Shortly

[1] Mr. Fisher also filed a related case in the U.S. District Court for the District of Maryland (Civil Case No. WDQ-11-1038).

thereafter, Wife, who had been married to Father for about 13 years at the time of his death,[2] filed a petition to caveat the 1993 will in the Orphans' Court for Anne Arundel County. The petition challenged Mr. Fisher's appointment as personal representative on the ground that Father had executed a later will in 2005 that named Wife as personal representative. On June 15, 2010, the orphans' court accepted the 2005 will, removed Mr. Fisher, and appointed Wife as personal representative.

Mr. Fisher appealed that decision. In 2014, after a jury trial, the circuit court found that the 2005 will had not been duly executed.[3] As a result, the circuit court transferred Mr. Fisher's motion to be reappointed as personal representative back to the orphans' court, which granted the motion on June 23, 2015 and reinstated Mr. Fisher as personal representative of Father's estate.

In the meantime, on December 12, 2012, Mr. Fisher initiated this case by filing a thirty-six-count *pro se* complaint seeking to assert claims both in his individual capacity and his capacity as Father's personal representative. An abridged version of the first round of this litigation: the circuit court dismissed the complaint, Mr. Fisher appealed, we affirmed the circuit court's dismissal of Mr. Fisher's individual claims, but reversed and remanded for consideration of Mr. Fisher's remaining claims as personal representative.

[2] Johanna Fisher, Father's first wife and appellant's mother, died in 1993 and Father married Wife in 1997, after entering into a prenuptial agreement.

[3] Before the jury trial took place, Mr. Fisher had appealed the circuit court's decision denying two of his motions. We dismissed that appeal, on the grounds that the circuit court's order on those motions did not constitute a final judgment. *Fisher v. Fisher*, No. 0753, September Term 2011 (Apr. 2, 2013).

Fisher v. Fisher, September Term 2013, No. 1386 (Jul. 9, 2015) (available at 2015 WL 5968701). We noted that the circuit court had rejected Mr. Fisher's claims as personal representative only because the orphans' court had removed him, and the eventual decision to reappoint him was "such a significant change in the litigation between the parties" that we could not affirm the dismissal. *Id.* at *3.

On remand, Mr. Fisher filed a First Amended Complaint. Wife moved to dismiss and for summary judgment, and Mr. Fisher responded with the Supplemental Amended Complaint that is the subject of this appeal.[4] The Supplemental Amended Complaint lists fourteen counts, many of which are duplicative for reasons we will explain:

- Count 1 – claim for an accounting of the assets of Father's estate;
- Count 2 – claim for a constructive trust over the (former) residence of Wife and Father ("Gambrills Property");
- Counts 3 and 4 – malicious use of process based on Wife's filing of the petition to caveat;
- Counts 6–10 – conversion and constructive fraud related to Wife's alleged use of estate assets to pay her legal bills;
- Counts 11 and 14 – theories of "unjust enrichment" related to Wife's occupation of the Gambrills Property after Father's death;
- Count 12 – removal of Wife as trustee of the (purported) Robert K. Fisher Revocable Trust; and
- Count 13 – a theory of unjust enrichment based on Wife's alleged retention of estate assets.

[4] The Supplemental Amended Complaint was filed after Wife filed her motions to dismiss and for summary judgment (in May 2016), but before the hearing on those motions (in September 2016). It appears that the complaints are identical, except for the addition of a fourteenth count in the Supplemental Amended Complaint. The parties do not dispute that the Supplemental Amended Complaint is the operative one, and because the parties and the circuit court treated that complaint as such, we will do the same.

Wife moved to dismiss Counts 1–5, 11, 12, and 14 (May 11, 2016) and moved for summary judgment on Counts 6–10 and 13 (May 17, 2016) The circuit court held a hearing on those motions on September 26, 2017, and issued a ruling from the bench on October 3, 2016. The court granted the motion to dismiss Counts 1–5 and 11, 12, and 14, and granted summary judgment in favor of Wife on Counts 6–10 and 13. A written order memorializing those rulings was entered on October 8, 2016. Mr. Fisher moved to alter or amend the judgment pursuant to Maryland Rule 2-534, and the court denied the motion in a one-sentence order on November 5, 2016. Mr. Fisher timely filed a notice of appeal.

On October 1, 2017, after the appeal was filed and the briefs submitted, Wife passed away. On November 7, 2017, Mr. Fisher filed a Notice of Substitution of Party, asserting that he, in his capacity as "trustee," should be substituted for Wife as appellee to the extent she is a party in the capacity of a "trustee" for various trusts that Mr. Fisher asserts were defendants in his complaint. On November 16, 2017, the Estate of Doris R. Fisher filed a Motion to Strike Appellant's Notice along with a Notice of Substitution of Party of its own, asserting that it should be substituted as appellee. As we explain below, the motion to strike is granted and the Estate of Doris R. Fisher is substituted as appellee in this case.

Also pending is Wife's motion to dismiss the appeal. That motion is also discussed below and is denied. We address the merits of the appeal first, and then briefly discuss each of the motions. Additional facts relating to all pending issues will be supplied as necessary below.

II. DISCUSSION

A. The Circuit Court Did Not Err In Dismissing Or Granting Summary Judgment On All Claims.

Mr. Fisher challenges the circuit court's decisions to dismiss or grant summary judgment in favor of Wife on all of his remaining claims.[5] When reviewing a decision to grant a motion to dismiss for failure to state a claim upon which relief can be granted, "we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Schisler v. State*, 177 Md. App. 731, 742–43 (2007) (citations omitted). In so doing, "we accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Converge Servs. Grp. v. Curran*, 383 Md. 462, 475 (2004).

That said, "[t]he well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 644 (2010). In addition, "[i]n the interest of judicial efficiency, we may affirm the judgment of a trial court to grant a motion to dismiss on a different ground than that relied upon by the trial court, as long as the alternative ground is before the Court properly on the record." *Forster v. State, Office of Pub. Def.*, 426 Md. 565, 580–81 (2012) (citations omitted); *Robeson v.*

[5] Mr. Fisher stated his Questions Presented as follows:

> 1. Did the lower Court err in dismissing Counts 1-5 and 11-13 and in granting summary judgment on Counts 6-10?
>
> 2. Did the lower Court err in denying Appellant's Md. Rule 2-534 Motion?

State, 285 Md. 498, 502 (1979) ("[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, [we] will affirm."); *accord Parks v. Alpharma, Inc.*, 421 Md. 59, 65 n.4 (2011); *City of Frederick v. Pickett*, 392 Md. 411, 424 (2006); *Medical Mgmt. and Rehab. Servs., Inc. v. Md. Dept. of Health and Mental Hygiene*, 225 Md. App. 352, 363 (2015).

When we review a decision to grant summary judgment, we decide whether the trial court's grant of the motion was legally correct. *Laing v. Volkswagen of Am., Inc.*, 180 Md. App. 136, 152–53 (2008). We first decide whether a genuine dispute of material fact exists, and if not, what the ruling of law should be. *Jurgensen v. New Phoenix Atlantic Condo. Council of Unit Owners*, 380 Md. 106, 114 (2004). We resolve all inferences from the record against the moving party.[6] *Id.*

[6] Mr. Fisher also argues globally that the circuit court should not have entered judgment against him because Wife failed to file a timely responsive pleading, as required by Maryland Rule 2-323(e), and thus admitted "the claims remanded from the COSA on August 14, 2015." But he identifies no place in the record—and we could find none—where he raised this issue in the circuit court at any time between the remand of the case and the First Amended Complaint on January 26, 2016. And even if he had raised the issue, he chose to file a First Amended Complaint that superseded the original complaint. *See Gonzales v. Boas*, 162 Md. App. 344, 355 (2005). Moreover, on February 12, 2015, the circuit court extended the time to respond to all pending pleadings to thirty days after the entry of an order on Wife's then-pending motion to enforce a settlement agreement. It doesn't appear that such an order was ever entered, but in any event, the case proceeded in May 2016, when Wife filed her motions to dismiss and for summary judgment and Mr. Fisher responded. We see no abuse of discretion in the court's handling of these motions and deadlines.

1. The circuit court did not err in dismissing Count 1 (claim for an accounting of Father's estate).

In Count 1, Mr. Fisher (as personal representative) seeks an accounting from Wife of the assets of Father's estate. He asserts that under Maryland Rule 6-545(d) and MD. CODE ANN., ESTATES AND TRUSTS ("ET") § 6-403, he, as successor personal representative, is entitled to an accounting of the estate assets from Wife in her capacity as "special administrator."[7] The circuit court dismissed Count 1 on the ground that the orphans' court had jurisdiction over this issue. The circuit court went on to observe that the orphans' court had already denied Mr. Fisher's request for an accounting.

The circuit court did not err in dismissing Count 1.[8] Mr. Fisher's request for an accounting fell squarely within the jurisdiction of the orphans' court. *Tribull v. Tribull*, 208 Md. 490, 499 (1956) ("Primarily, of course, the administration of a decedent's estate is

[7] Contrary to Mr. Fisher's assertion, our opinion of April 2, 2013 did not "appoint" Wife as the special administrator of Father's estate. We noted, in *dicta*, that under ET § 12-701(a)(3)(ii), Wife likely assumed the status of "special administrator" during some or all of the period during which her appointment as personal representative was disputed before the orphans' court and on appeal. *Fisher v. Fisher*, slip op., September Term 2011, No. 0753 at fn.4 (Apr. 2, 2013).

[8] The fact that the request for an accounting in this case was brought under a rule and statute different than the request in the orphans' court does not affect the outcome. The rule under which the request was brought in orphans' court was Maryland Rule 6-452, which requires, in relevant part, the court to order a former personal representative to file an accounting of the estate's property with the court and to deliver such property to the successor personal representative. The rule and statute at issue here—Maryland Rule 6-545(d) and ET § 6-403—set forth the duties of a "special administrator," which include but are not limited to collecting, managing, and preserving an estate's property and providing an accounting to a successor personal representative. The rule under which the request is brought is not as important for our purposes as the substance of the request—namely, an accounting of the assets of an estate.

committed to the Orphans' Court."); ET § 2-102 ("The [orphans'] court may conduct judicial probate, direct the conduct of a personal representative, and pass orders which may be required in the course of the administration of an estate of a decedent.").

Mr. Fisher has not cited any cases or authority supporting the claim that the circuit court—as opposed to the orphans' court—should exercise jurisdiction over Count 1. And indeed, our cases hold that where the orphans' court has the power to grant a remedy, the circuit court does not have jurisdiction. *See Kroll v. Fisher*, 182 Md. App. 55, 61–62 (2008) ("circuit courts sitting as equity courts are occasionally held to have jurisdiction over claims related to the administration of a decedent's estate, instead of orphans' court—but only where the orphans' court lacked power to grant a complete and adequate remedy," and holding that the claim was properly dismissed because the orphans' court did not lack the power to grant the remedy that the appellant sought, namely an equitable accounting of the decedent's finances). In short, Count 1 was properly dismissed.[9]

[9] Also, as the circuit court observed, it would eventually gain jurisdiction over the accounting issue if Mr. Fisher appealed the orphans' court decision denying his request for an accounting, so dismissal would not have the effect of denying Mr. Fisher his day in (circuit) court. Nor do the circuit court's observations about the orphans' court proceedings indicate that it considered matters outside the pleadings in making its decision on the motion to dismiss Count 1. *See Parks*, 421 Md. at 72. And even if it had considered matters outside the pleadings, we could still affirm its decision on the independent ground that the orphans' court has jurisdiction over the request for an accounting. *See id.* at 65 n.4; *see also Kroll*, 182 Md. App. at 61–62 (orphans' court has the power under the Estates and Trusts article to order an equitable accounting because conducting such an accounting is relevant to a personal representative's duties with respect to estates); ET § 2-102. In short, the outcome would have been the same whether or not Mr. Fisher had already requested an accounting in orphans' court.

2. The circuit court did not err in dismissing Count 2 (constructive trust over the Gambrills Property).

In Count 2, Mr. Fisher sought a constructive trust over the Gambrills Property, Wife and Father's former residence, for the benefit of the estate. He contends that Wife wrongfully acquired title to the Gambrills Property after Father's death and that the property belongs rightfully to Father's estate.

As an initial matter, there is some confusion surrounding the court's holding with respect to Count 2. The court's oral ruling appears to make a factual finding, which would suggest its intention was to grant summary judgment on Count 2, but went on to say that it was "dismissing" Count 2:

> With regard to Count II, the constructive trust on the Gamble's (ph) [sic] property, I am ***dismissing*** that count. The Court is ***finding and holding that the property was held as a tenancy by entirety***. It passed to the Defendant after the death of Robert Fisher and the estate has no control over it. That both Judge Silkworth and the Court of Appeals [sic] and most recently the Orphan's Court [sic] all agree that the parties had power via the prenuptial agreement to transfer property. I've looked at that agreement.
>
> And I have absolutely no issue with their ruling and do find that there was no issue with that being transferred and creating a tenancy by the entirety as they did throughout the marriage. And based on that, I am ***dismissing*** Count II.

(emphasis added) The written order disposing of the case says that Count 2 was dismissed, and Mr. Fisher argues that the circuit court improperly considered material outside the pleadings in doing so. But it isn't necessary for us to resolve this issue because the operative complaint does not justify a constructive trust on its face and the dismissal was legally correct.

A constructive trust isn't actually a cause of action, but a "remedy employed by a court of equity to convert the holder of the legal title to property into a trustee for one who in good conscience should reap the benefits of the possession of said property." *Wimmer v. Wimmer*, 287 Md. 663, 668 (1980). "The purpose of the remedy is to prevent the unjust enrichment of the holder of the property." *Id.* To successfully allege that his father's estate is entitled to a constructive trust over the Gambrills Property, Mr. Fisher must allege facts supporting a finding that Wife acquired title "by fraud, misrepresentation, or other improper method," or that "the circumstances render it inequitable" for Wife to retain title. *Id.*

Mr. Fisher claims that in this case, a tenancy by the entireties could never have been created in the Gambrills Property because Wife's acquisition of the title (1) violated paragraphs 2 and 6 the 1997 prenuptial agreement; (2) was wrongful because Father's money, not Wife's, was used to buy the property, which violated paragraph 5 of the 1997 prenuptial agreement; and (3) was accomplished through Wife's alleged abuse of her "confidential relationship" with Father. Mr. Fisher argues in the alternative that if a tenancy by the entireties had been created, and Wife legitimately acquired title, Wife wrongfully retained title when she executed deeds of trust to secure loans against the property and, he contends, severed the tenancy. None of those allegations or theories supports the relief he seeks.

First, Mr. Fisher is wrong when he claims that Wife wrongfully acquired title to the property. Indeed, neither paragraph 2 nor paragraph 6 of the 1997 prenuptial agreement

precluded Wife from owning any interest in the couple's residence. Viewed by itself, Wife did waive in paragraph 2 her right to take property from Father through his will, as his heir, or otherwise at his death:

> ***WIFE hereby waives, releases and relinquishes all right, title, estate and interest***, statutory or otherwise, including, but not limited to curtesy, statutory allowances, distribution in intestacy and right of election to take against the Will of HUSBAND, as well as the right to act as personal representative of his estate, ***which she might acquire under the present or future law of any jurisdiction as the wife, widow, heir-at-law, next-of-kin, or distribute of HUSBAND in his property, owned by him at the time of the marriage or acquired by him at any time thereafter*** and in his estate upon his death.

(emphasis added) But paragraph 4 explicitly allowed both Wife and Father to transfer or convey property to one another voluntarily during their lifetimes, if they so chose, and provided that neither party intended to "limit or restrict in any way" the respective right to do so:

> ***[E]ither party shall have the right to transfer or convey to the other any property or interest therein which may be lawfully conveyed or transferred during his or her lifetime*** or by Will, and neither party intends by this Agreement to limit or restrict in any way the right and power to receive any such transfer or conveyance from the other . . . .

(emphasis added) So the express terms of the prenuptial agreement allowed Wife and Father to acquire a residence in a tenancy by the entireties during their marriage.[10]

[10] As the circuit court pointed out, three prior courts have agreed with this interpretation of the prenuptial agreement: (1) the circuit court, when it dismissed Mr. Fisher's individual claims; (2) this Court, when we affirmed that decision; and (3) the orphans' court, when it denied Mr. Fisher's request for an accounting.

Similarly, paragraph 6 provides that the couple's residence *at the time the agreement was executed*, in 1997, was owned by Father alone:

> It is expressly recognized that HUSBAND is the sole owner of the residence occupied by the parties, and the use of any joint funds, or of any separate funds contributed by WIFE, for the repair or maintenance of the residence for the joint benefit and continued use of the parties shall not create any interest in the property in WIFE.

But it doesn't say anything about a residence the couple might acquire later. The paragraph is written in the present tense and is unambiguous, and there's no dispute that the Gambrills Property was acquired *after* the prenuptial agreement was executed. In short, Father and Wife did not violate the prenuptial agreement when they acquired the Gambrills Property as tenants by the entireties, and paragraphs 2 and 6 provide no basis on which to impose a constructive trust.

Second, Mr. Fisher argues that Wife wrongfully acquired title to the Gambrills Property because they purchased it with Father's money. But that fact, if true, wouldn't make the purchase improper. Mr. Fisher relies on paragraph 5 of the prenuptial agreement, which provides that assets obtained by either party through use of their own "separate estates" shall remain part of their "separate estates":

> Any assets obtained by either party as a consequence of the use, investment, reinvestment or any transfer of any portion of their separate estate, and any income therefrom, and any appreciation in the value thereof, shall remain part of such separate estate.

Again, however, paragraph 4 allowed Wife and Father to "opt out" of the other provisions of the agreement during their lifetimes if they chose. Mr. Fisher does not allege that the

deed wasn't signed by both Wife and Father, and his allegation that Father's funds were used cannot overcome the presumption that spouses take title to real estate as tenants by the entireties. *Beall v. Beall*, 291 Md. 224, 234 (1981) ("By common law, a conveyance to husband and wife does not make them joint tenants, nor are they tenants in common; they are in the contemplation of the law but one person, and hence they take, not by moieties, but by the entirety.") (citation omitted); *see also Arbesman v. Winer*, 298 Md. 282, 285–90 (1983) (reviewing at length the history and nature of tenancy by the entireties); *Bruce v. Dyer*, 309 Md. 421, 426–27 (1987) (noting that Maryland retains the estate of tenancy by the entireties "in its traditional form"); *Young v. Cockman*, 182 Md. 246, 251 (1943) (noting that "[a] conveyance to a husband and wife will ordinarily create a tenancy by entireties . . . .").

Third, the allegation that Wife wrongfully acquired title through a "confidential relationship" with Father cannot support a request for a constructive trust. The mere fact of a "confidential relationship" doesn't mean that Wife acquired title by "fraud, misrepresentation, or other improper method" or that some other inequity existed. *See Wimmer*, 287 Md. at 668, 671. The existence of a "confidential relationship" creates a presumption of undue influence, where the "dominant" party is presumed to act in a manner inconsistent with the welfare of the other party. *Id*. at 668–69. But Maryland courts have not approved the imposition of a constructive trust unless "there has been some transaction in which the alleged wrongdoer has acquired property in violation of some agreement or in which another person had some good equitable claim of entitlement to property resulting

from the expenditure of funds or other detrimental reliance resulting in unjust enrichment." *Id.* at 669.

No such wrongdoing is alleged here. For the reasons we already have discussed, neither Wife nor Father violated the prenuptial agreement, or any other agreement, in acquiring this property, nor does Mr. Fisher allege that Wife committed any other wrongdoing in connection with that transaction. And although the complaint does allege that Father suffered from "post-stroke depression and changes in personality, dementia secondary to strokes" and other dementia, there is no allegation that Wife took advantage of Father's allegedly compromised mental state to enrich herself or to any other end.

Fourth, Mr. Fisher argues that if a tenancy by the entireties existed, Wife severed it when she executed several deeds of trust to secure loans against the property. He cites *Downing v. Downing*, 326 Md. 468, 479 (1992) for the proposition that a mortgage by a single joint tenant destroys the joint tenancy. But although that proposition might hold for a *joint* tenancy between a mother and son, as in that case, it doesn't apply to a tenancy *by the entireties*. A tenancy by the entireties—a joint tenancy with rights of survivorship between a husband and wife because "they are in the contemplation of the law but one person"—cannot, by definition, be severed by a spouse's independent action. *Beall*, 291 Md. at 234. Either an absolute divorce or "some form of joint action by the husband and wife is necessary in order to achieve a severance." *Bruce*, 309 Md. at 428 (citations omitted).

The complaint does not state a claim that supports the imposition of a constructive trust over the Gambrills Property, and the circuit court correctly dismissed Count 2.[11]

3. The circuit court did not err in dismissing Counts 3 and 4 (malicious use of process).

Counts 3 and 4 allege malicious use of process.[12] The claims are based on Wife's filing of the February 24, 2010 petition to caveat Father's 1993 will in the orphans' court. Shortly after Father's death, Mr. Fisher was appointed as personal representative of his estate based on the 1993 will. Wife's caveat petition challenged that appointment, based on Father's 2005 will. Initially, the orphans' court agreed with Wife, removed Mr. Fisher, and appointed Wife as personal representative. But after Mr. Fisher appealed that ruling, a jury trial found that the 2005 will had not, in fact, been duly executed, and Mr. Fisher was ultimately reappointed as personal representative of Father's estate in 2015.

Mr. Fisher's complaint alleges that Wife's caveat petition constituted malicious use of process because she filed it with the knowledge that the 2005 will was not duly executed. Mr. Fisher claims damages under Counts 3 and 4 in the amount of $902,922, the value of estate assets that Wife transferred between 2010 and 2015 in her capacity as personal representative and/or special administrator[13] of Father's estate. The circuit court dismissed

[11] Wife argues that the dismissal of Count 2 should be affirmed on the ground that Mr. Fisher failed to join necessary parties. Because we hold that Count 2 was properly dismissed for failure to state a claim, though, it is not necessary for us to reach that argument.

[12] The counts are virtually identical; the main difference is that Count 3 seeks actual damages and Count 4 seeks punitive damages.

[13] *See supra*, n.7.

both counts on the grounds that malicious use of process cannot be grounded in a caveat proceeding and that no special injury was alleged.

Actions for malicious use of process "are concerned with maliciously causing . . . civil process to issue for its ostensible purpose, but without probable cause . . . ." *One Thousand Fleet Ltd. P'ship v. Guerriero*, 346 Md. 29, 36 (1997) (quoting *Walker v. Am. Sec. Co.*, 237 Md. 80, 87 (1964)). The Court of Appeals "has long recognized that '[s]uits for malicious prosecution are viewed with disfavor in law and are to be carefully guarded against'" because "[p]ublic policy requires that citizens be free to resort to the courts to resolve grievances" without fear of retaliation. *Id.* at 36, 37 (quoting *North Point Constr. Co. v. Sagner*, 185 Md. 200, 206 (1945)). Malicious use of process has five elements, "all of which must co-exist in order to maintain the action" (*id.* at 41): (1) the institution of a prior civil proceeding by the defendant (2) without probable cause (3) and "with malice" (*i.e.*, the party instituting the proceeding had an "improper motive") that was (4) terminated in favor of the plaintiff and that (5) caused damages to the plaintiff "by arrest or imprisonment, by seizure of property, or other special injury . . . ." *Id.* at 37. "To qualify as a 'special injury,' the damages must be different than those that ordinarily result from all suits for like causes of action." *Id.* at 44.

The circuit court did not err in dismissing Mr. Fisher's malicious use of process claims. The caveat proceeding did not terminate "in favor of" Father's estate. The result of the jury trial was a finding that Father's 2005 will had not been duly executed and the reappointment of Mr. Fisher as personal representative. In addition, as the circuit court also

found, the alleged injury—Wife's use of her status as personal representative and/or special administrator of Father's estate to "illicitly transfer" estate assets valued at $902,922—does not qualify as the "special injury" required for malicious use of process. To the extent the estate was injured at all, that injury was readily compensable in property or money, and in the normal course of the estate proceedings. Put another way, the alleged injury is the ordinary sort of injury in an estate dispute, not an injury arising specially from Wife's decision to file the caveat petition.

4. The circuit court did not err in dismissing Count 5 (alleged transfer of estate assets as payment for legal services).

In Count 5, Mr. Fisher alleges that Wife failed to ask for court approval to use estate assets to pay legal bills totaling $187,682.26, a failure that, he asserts, violates ET § 7-502, § 7-602, and § 7-604 and Maryland Rule 6-416. Those sections and that rule relate to the requirement that a personal representative file with the orphans' court a petition requesting permission to make payment to an attorney for legal services in connection with the administration of an estate.

The circuit court dismissed Count 5. There is some confusion about the ground on which the court made that ruling, but because, as we discuss below, the circuit court's decision to dismiss was legally correct, we affirm it all the same.[14]

[14] The confusion arises from the court's suggestion that it may have considered matters outside the pleadings in dismissing Count 5. The ruling references both "insufficient evidence" (which is not a relevant consideration in deciding a motion to dismiss) and a failure to plead sufficient facts (which is the relevant inquiry):

> I've noted that an appeal from the accounting issue, which has been decided by the Orphan's Court [sic] is still being

The parties' positions with respect to Count 5 require a bit of unpacking. Wife's arguments before the circuit court and here are the same: (1) the circuit court lacked jurisdiction over administrative matters before the orphans' court and (2) the code sections and rule cited by Mr. Fisher do not create a private cause of action. Mr. Fisher responded in the circuit court that the court *did* have jurisdiction under ET § 6-303(b) and § 1-301(b), but he did not address whether the sections cited create a private cause of action (presumably he thought they did, since he relied on them). On appeal, Mr. Fisher does not make any specific argument, but instead points to a "Hearing Brief" and a "Notice to the Court Regarding Material Facts Newly Discovered" that he filed in advance of the September 25, 2016 hearing on the motions to dismiss and for summary judgment in the circuit court. And he asserts that the circuit court should have ordered an accounting rather than dismissing this claim.

As an initial matter, Mr. Fisher has waived this issue because he failed to present argument in his appellate brief, and we affirm on that ground. *Beck v. Mangels*, 100 Md. App. 144, 149 (1994); *Klauenberg v. State*, 355 Md. 528, 551–52 (1999) ("[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal."); Md. Rule 8-504(a)(5) (requiring that an appellate brief contain "[a]rgument in

> considered. Without information based on that accounting, ***there is simply insufficient evidence – the complaint does not plead sufficient facts upon which relief can be granted***, so I'm dismissing that count as well.

(emphasis added)

support of the party's position"). But even if we did reach the merits, we would find that the circuit court did not err in dismissing Count 5. As we discussed with respect to Count 1, issues surrounding the payment of an estate's legal bills fall within the jurisdiction of the orphans' court, and the dismissal of Count 5 was legally correct on jurisdictional grounds.[15] *Kroll*, 182 Md. App. at 61–62; *Shapiro*, 233 Md. at 87–88; *Tribull*, 208 Md. at 499; ET § 2-102.

5. The circuit court did not err in granting summary judgment on Counts 6–10 (conversion and constructive fraud) and Count 13 (unjust enrichment by retention of estate assets).

Counts 6–10 are all very similar and allege various forms of "conversion."[16] They flow generally from the allegation that Wife wrongfully transferred $187,682.26 in estate assets to her attorneys. Count 13 ("Unjust Enrichment Of Doris R. Fisher By Her Retention Of The Estate's Assets") also alleges that Wife "misappropriated a minimum of $903,922.52" of estate assets. The circuit court granted summary judgment on Counts 6–10 and 13, after finding insufficient evidence to create a genuine issue of material fact, and observing that Mr. Fisher could not present evidence to support Counts 6–10 or 13 without the accounting he requested in Count 1.

[15] It is appropriate to affirm the circuit court's dismissal of Count 5 on jurisdictional grounds, even though the basis for the circuit court's decision is unclear, because the jurisdictional argument was raised in the circuit court and the record supports its decision. *Forster*, 426 Md. at 580–81; *Robeson*, 285 Md. at 502; *Parks*, 421 Md. at 65 n.4; *City of Frederick*, 392 Md. at 424; *Medical Mgmt. and Rehab. Servs.*, 225 Md. App. at 363.

[16] The counts are titled as follows: Count 6, "Malicious Conversion"; Count 7, "Malicious Conversion – Punitive Damages"; Count 8, "Conversion"; Count 9, "Constructive Conversion"; and Count 10, "Constructive Fraud."

On appeal, Wife argues that Counts 6–10 and 13 all are based on the premise that she was in possession of estate assets, and there is no evidence that she was ever in possession of estate assets. And she's right. Mr. Fisher identified no evidence that Wife possessed estate assets, used estate assets to pay her legal bills, or "illicitly transferred" $903,922.52 of estate assets. His theory with respect to Counts 6–10 seems to be that Wife must have used estate assets to pay her attorneys because, at the time the $187,682.26 was paid to her attorneys and the $903,922.52 allegedly transferred, her annual income was $40,503. But in his brief, Mr. Fisher points generically to *all* of the exhibits to his summary judgment motion and *all* of the exhibits attached to the same "Hearing Brief" and "Notice" referenced in his argument with respect to Count 5.

Again, Mr. Fisher has waived this issue because he failed to present a legal argument in his appellate brief, and we affirm on that ground. *Beck*, 100 Md. App. at 149; *Klauenberg*, 355 Md. at 551–52; Md. Rule 8-504(a)(5). We have reviewed his briefing in the circuit court and found no citations to evidence that could raise a genuine issue of material fact regarding Wife's possession of estate assets.[17] And—as we, the orphans'

[17] The evidence that does exist in the record—Wife's affidavit and the deed to the Gambrills Property—support a finding that the assets Wife acquired after Father's death were transferred to her through pay-on-death or other nontestamentary means. In the affidavit, Wife identifies numerous particular pay-on-death accounts and other financial vehicles with nontestamentary transfer provisions, states that she was not aware of any accounts in Father's name on which she was not named as a beneficiary, and that any money paid to her legal counsel came from her own personal income, savings or pension.

Mr. Fisher argues that Wife's affidavit is inadmissible under ET § 9-116 (the "dead man's statute"), which provides that a party to a proceeding by or against the personal representative of or heir to an estate (among others) "may not testify concerning any transaction with or statement made by the dead . . . person . . ." (except for several situations

court, and the circuit court have all previously held—paragraph 4 of the prenuptial agreement expressly authorized transfers or conveyances of property interests by Wife and Father to one another during their lifetimes.[18] The circuit court did not err in granting summary judgment on Counts 6–10 and 13.

6. The circuit court did not err in dismissing Count 11 (unjust enrichment / subrogation).

Count 11 ("Unjust Enrichment By $73,892.73 – Subrogation") alleged that Wife was unjustly enriched when she borrowed $25,000, secured by a deed of trust on the Gambrills Property, and used the proceeds from that loan and other (unidentified) estate assets to pay off another loan on her individually-owned rental property in Edgewater (the "Edgewater Property"). Count 11 asked the court to subrogate Father's estate to the loan

not applicable here). We need not reach that issue because the burden of proof in this case is not on Wife, but rather on Mr. Fisher, and the circuit court found correctly that he produced no evidence to support his claims. Put another way, when the plaintiff has produced no evidence in support of his or her claim, then granting summary judgment is appropriate regardless of whether the defendant produces contradictory evidence. So although Wife's affidavit provides some background and context for the parties' lengthy and contentious dispute, it does not form the basis for our decision to affirm the summary judgment.

[18] Mr. Fisher argues that *Stewart v. Stewart*, 214 Md. App. 458 (2013), supports his argument that the waiver clause precluded Wife from claiming any interest in accounts she held jointly with Father. But his reliance on that case is misplaced. Although the court in *Stewart* described waiver and exception language similar to that in paragraphs 2 and 4 of the prenuptial agreement, the meaning of that language was not before the court in *Stewart*. *Id.* at 464–65. Instead, the issue was whether the prenuptial agreement had been valid and enforceable; we held that it was. *Id.* at 467, 477, 482. And indeed, as we observed in a footnote (in *dicta*), the prenuptial agreement had not precluded the wife from leaving the marriage with "assets worth at least $1.2 million, after accounting for the division of marital property," which implied that the couple in that case did indeed take advantage of the exception to the waiver clause in their agreement by the transfer of property from the husband to the wife. *Id.* at 472 n.4.

for the Edgewater Property. The circuit court dismissed Count 11, holding that that claim depended on the ownership of the Gambrills Property, which the court already had resolved in Wife's favor. The court observed that there "cannot be any facts alleged that would indicate that [Wife] could somehow be unjustly enriched by doing what she wants with her own property."

Mr. Fisher repeats the arguments he made with respect to Count 2, and they fail here for the same reasons they failed there. The court did not err in dismissing Count 11.

7. The circuit court did not err in dismissing Count 12 (removal of Doris R. Fisher as trustee of a purported "Robert K. Fisher Revocable Trust").

Count 12 asked the court to remove Wife as trustee of a purported "Robert K. Fisher Revocable Trust," which allegedly was created in 2005 in connection with Father's 2005 will (although Mr. Fisher also alleges that the trust declaration was never executed). The circuit court dismissed Count 12, holding that there is "no power in the law or the trust declaration that gives the personal representative of the estate the power to remove the trustee . . . ."

Mr. Fisher concedes that he, as personal representative, does not have the power to remove Wife as trustee. Instead, he cites a purported trust provision and ET § 14.5-706, and seems to argue that the declaration and the code provide the *court* with the authority to remove Wife as trustee where she could not have been the legitimate trustee. He appears to argue that Wife should be removed because, under the language of the trust declaration, her caveat of Father's 1993 will resulted in her "predeceasing" Father:

> If any . . . person files any pleading or paper with a court or administrative tribunal or representative to question or challenge any provision of this Trust Declaration or of Grantor's Will, then . . . all provisions of this Trust Declaration shall be construed . . . as if that person and his or her children and other issue predeceased Grantor.

As such, he contends, if Wife were deceased at the time the trust was created—not "deceased" in literal terms but figuratively "deceased" for the purposes of the trust—then she could not have been the legitimate trustee.

Mr. Fisher hasn't cited any authority supporting his right, as personal representative, to bring a private cause of action under ET § 14.5-706 to remove Wife as the trustee. And even if he did have a right of action, none of the circumstances listed in that section apply here.[19] The circuit court did not err in dismissing Count 12.

[19] ET § 14.5-706 provides in relevant part:

> (2) The court may remove a trustee if:
>
> (i) The trustee has committed a serious breach of trust;
>
> (ii) Lack of cooperation among cotrustees substantially impairs the administration of the trust;
>
> (iii) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
>
> (iv) There has been a substantial change of circumstances and removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interest of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

8. The circuit court did not err in dismissing Count 14 (unjust enrichment by failure to pay rent on the Gambrills Property).

Count 14 alleges that Wife was unjustly enriched by living in the Gambrills Property when it was an estate asset, and he claims that Wife owes the estate rent totaling $194,460.92. The circuit court dismissed Count 14, holding that Wife had no obligation to pay rent to the estate on a property that belonged to her. This count also turns on the same core issue—Wife's ownership of the property—as Count 2, and we find for the same reasons that the circuit court did not err in dismissing Count 14.

B. The Circuit Court Did Not Err In Denying Mr. Fisher's Motion To Alter Or Amend Judgment Under Maryland Rule 2-534

Mr. Fisher argues that the circuit court erred in denying his motion under Rule 2-534 to alter or amend the judgment with respect to Counts 2 and 14. We review the denial of a Rule 2-534 motion for abuse of discretion. *Miller v. Mathias*, 428 Md. 419, 438 (2012). A trial court abuses its discretion when no reasonable person would take the view the court adopted, when the court acts without reference to any guiding principles, or when it fails to consider the proper legal standard. *Id.*; *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (citations omitted). Mr. Fisher's arguments in support of the motion to alter or amend simply repeat his arguments in opposition to Wife's motion to dismiss, and the circuit court did not abuse its discretion in denying Mr. Fisher's motion.

C. The Estate Of Doris Fisher's Motion To Strike Mr. Fisher's Notice Of Substitution Of Party Is Granted.

On November 7, 2017, Mr. Fisher filed a Notice of Substitution of Party. The Notice appears to assert that (1) the following are parties to this appeal: "the purported Robert K.

Fisher Revocable Trust" and "the several trusts under the purported 'Trust Declaration of Robert K. Fisher;'" (2) before her death, Wife was the trustee of such "purported" trusts; (3) Mr. Fisher is now the trustee of those trusts; and (4) Mr. Fisher (in his capacity as trustee) should therefore be substituted for those parties in this appeal. In appellate posture terms, the appellant seeks to have himself (in his capacity as trustee) substituted for some of the appellees, and thus to have himself on both sides of the appeal.

On November 16, 2017, The Estate of Doris R. Fisher filed its own Notice of Substitution of Party, along with a Motion to Strike Mr. Fisher's notice. The estate's notice states that it, pursuant to Maryland Rules 8-401(b) and 2-241(a)(1),[20] by and through its personal representative Kirstin Smith (Wife's daughter), should be substituted for Wife as an individual due to her death. The estate argues—correctly—that there was only ever one defendant in the underlying case, *i.e.*, Wife, as an individual, and that therefore, there was only ever one appellee in this appeal.

Mr. Fisher does not dispute that there was only one summons issued and served in this case. Nevertheless, he argues that serving Wife with a summons was sufficient to serve her in all of the "various capacities" in which she was named in the complaint. We disagree. The plain language of Maryland Rule 2-112(a) requires that a separate summons be issued "for *each* defendant." (emphasis added) The summons, issued to Wife alone, did *not* provide notice to the (alleged) trusts listed in the caption of the original or subsequent

[20] Maryland Rule 8-401(b) provides that "[t]he proper person may be substituted for a party on appeal in accordance with Maryland Rule 2-241." Maryland Rule 2-241(a)(1) provides that the "proper person" may be substituted for a party who dies.

complaints, including but not limited to "the purported Robert K. Fisher Revocable Trust" and "the several trusts under the purported 'Trust Declaration of Robert K. Fisher.'" So the Motion to Strike is granted, Mr. Fisher's notice of substitution of party is stricken, the Notice of Substitution of Party filed by the Estate of Doris Fisher is granted, and the Estate of Doris Fisher is substituted for the appellee Doris Fisher.

D. Wife's Motion To Dismiss Is Denied.

Finally, Wife moves to dismiss the appeal under Maryland Rule 8-602(a), because of the failure of Mr. Fisher to comply with the requirements of (1) Rule 8-503 as to length of his brief, (2) Rule 8-504(a)(4), for failing to include references to pages of the record extract supporting the assertions in the statement of facts, and (3) Rule 8-501(c), for failing to include parts of the record in the extract reasonably necessary for the determination of the questions presented.

We sympathize with Wife's complaints. Mr. Fisher exceeded the word limit for his brief by 2600 words, his brief is largely devoid of references to the record supporting his statement of facts, and parts of the record extract were missing. We do not condone these deficiencies, and parties who fail to adhere to the rules of appellate procedure risk dismissal. Wife has, however, by her attorneys' diligence, supplied the material that has made it possible for us, with similar effort, to reach decisions on the core issues, and we prefer to decide cases on the merits whenever possible. *See Joseph v. Bozzuto Mgt. Co.*, 173 Md. App. 305, 347–48 (2007); *Brown v. Fraley*, 222 Md. 480, 483 (1960) (dismissal of appeal is a "drastic corrective" and decision to dismiss appeal is within discretion of the

Court). Mr. Fisher should not consider this a victory, and we will not hesitate in the future to dismiss if he repeats his failures to follow the Maryland Rules.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. APPELLEE'S MOTION TO DISMISS DENIED. APPELLEE'S MOTION TO STRIKE NOTICE OF SUBSTITUTION OF PARTY GRANTED. ESTATE OF DORIS R. FISHER SUBSTITUTED FOR APPELLEE DORIS R. FISHER. APPELLANT TO PAY COSTS.