

Circuit Court for Montgomery County
Case No. 469745V

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 1557

September Term, 2021

KORALINA CASTELLO

v.

BRYN ADAMS, ET AL.

Wells, C.J.,
Graeff,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: April 4, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2019, Koralina Castello, appellant, on behalf of her minor daughter T.,¹ brought suit in the Circuit Court for Montgomery County against T.’s father, Troy Baacke, and his wife, Bryn Adams,² appellees, for breach of fiduciary duty, conversion, civil conspiracy, and related claims. Ms. Castello alleged that Mr. Baacke, with the assistance of Dr. Adams, had wrongfully converted a lump-sum distribution of pension benefits that were bequeathed to T. by her godmother, Patricia Marie Quinn.³ After a one-day trial, the circuit court found Mr. Baacke liable for breach of fiduciary duty, awarded Ms. Castello \$112,877.62, and appointed a guardian of the funds recovered on behalf of T.

Ms. Castello filed a post-trial motion to alter or amend judgment regarding the appointment of a guardian. She argued that no party requested the appointment of a guardian, and no evidence was introduced at trial supporting such an appointment. The circuit court denied her motion to alter or amend judgment.

On appeal, Ms. Castello presents the following questions for this Court’s review, which we have rephrased slightly, as follows:

¹ To protect her privacy, we shall refer to the minor child by her first initial. *See In re G.T.*, 250 Md. App. 679, 683 n.1 (2021).

² Bryn Adams holds a Ph.D. We shall refer to her in this opinion as Dr. Adams.

³ Ms. Castello originally filed suit against Mr. Baacke and the personal representative of Ms. Quinn’s estate, James Quinn. She subsequently filed a First Amended Verified Complaint, the operative complaint in this case, substituting Dr. Adams for Mr. Quinn as a defendant. *See Pomroy v. Indian Acres Club of Chesapeake Bay, Inc.*, 254 Md. App. 109, 119 (2022) (An amended complaint supersedes a former complaint.). In October 2019, Ms. Castello filed a line with the circuit court, requesting to remove Mr. Quinn as a party defendant. Mr. Quinn was subsequently removed from the case, and trial proceeded against only Mr. Baacke and Dr. Adams.

1. Did the circuit court err in appointing a guardian of the funds recovered on T.’s behalf?
2. Did the circuit court err in rejecting Ms. Castello’s conversion claim on the ground that the lump sum distribution of pension benefits was comingled with other funds in appellees’ bank accounts?
3. Did the circuit court err in rejecting Ms. Castello’s civil conspiracy claim on the ground that there was no agreement between Mr. Baacke and Dr. Adams?
4. Did the circuit court err in calculating damages by deducting the value of taxes withheld from the lump sum distribution of pension benefits?

For the reasons set forth below, we shall affirm, in part, and reverse, in part, the judgment of the circuit court, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND⁴

I.

First Amended Verified Complaint

On September 27, 2019, Ms. Castello, in a representative capacity on behalf of T., filed a First Amended Verified Complaint, the operative complaint in this case, against appellees. It contained seven counts, asserting the following claims for relief: (1) breach of fiduciary duty on a theory of negligence; (2) imposition of a constructive trust; (3)

⁴ Neither Mr. Baacke nor Dr. Adams filed a brief in this case. Accordingly, we shall treat the facts, as revealed in the record extract and Ms. Castello’s brief, as undisputed. *See Rector v. Azzato*, 74 Md. App. 684, 687 n.2 (1988) (“Since appellee did not file a brief, we treat the facts as revealed in the record extract and appellant’s brief as undisputed.”); *McHugh & Assoc. v. Com. & Farmers Bank*, 59 Md. App. 519, 522 (1984) (“Appellee did not file a brief. Therefore, based on our review of the record extract and the appellant’s brief, we will treat the above facts as undisputed.”).

conversion; (4) fraud; (5) unjust enrichment; (6) civil conspiracy; and (7) injunctive relief, respectively.⁵

The complaint alleged that T. was born on September 7, 2007. Ms. Castello, T.'s natural mother, and Mr. Baacke, T.'s natural father, were never married. Ms. Castello and Mr. Baacke had a relationship with Ms. Quinn, a fifth-grade teacher employed by the Archdiocese of Washington ("ADW"). T. became close friends with Ms. Quinn, and after many years, Ms. Quinn began to refer to T. as her goddaughter.

In 2012, Ms. Castello and Mr. Baacke ended their relationship, and at that time, Mr. Baacke brought suit in the Circuit Court for Montgomery County against Ms. Castello, seeking custody of T. The ensuing litigation resulted in a Custody Consent Order, pursuant to which Ms. Castello was granted sole physical and legal custody of T., and Mr. Baacke was granted periodic visitation with T. Ms. Castello subsequently married a United States Air Force officer, and both Ms. Castello and T. relocated to the State of Georgia with him.⁶ Mr. Baacke remained in Maryland, where T. would visit him during school breaks.

In 2013, Ms. Quinn elected T. as the beneficiary of her pension with the ADW. The pension was structured as an annuity and had a face value of approximately \$183,713.04,

⁵ Counts one (breach of fiduciary duty) and four (fraud) were directed against only Mr. Baacke and count six (civil conspiracy) was directed against only Dr. Adams. Counts two (imposition of a constructive trust), three (conversion), five (unjust enrichment), and seven (injunctive relief), were directed against both appellees.

⁶ The complaint alleged, as follows: "In Georgia, [T.] resides with [Ms.] Castello and her husband . . . an active duty Air Force [o]fficer," and therefore, T. "has a military dependent identification card."

provided that “the annuity [was] left in place and [T.] [was] to take monthly installments beginning shortly after she reached the age of majority.” Mr. Baacke, who was Ms. Quinn’s personal trainer, learned of the beneficiary election at some point in 2017–18. Ms. Castello was unaware of the election at that time.

In May 2018, Ms. Quinn was diagnosed with liver cancer. One month later, on June 16, 2018, she passed away. James Quinn, Ms. Quinn’s surviving brother, was subsequently confirmed as personal representative of Ms. Quinn’s estate. Shortly after Ms. Quinn’s death, the ADW notified Mr. Quinn of the bequest of his sister’s pension to T., and he provided the ADW with Mr. Baacke’s contact information.

On July 11, 2018, the ADW formally advised Mr. Baacke that Ms. Quinn had bequeathed her pension to T. and provided him with details regarding the pension. He then “elect[ed] an immediate lump sum payment of [T.’s] inheritance” and “arranged for all funds received from [T.’s] inheritance to be sent to him via a check made out to [T.]” He never “organiz[ed] any trust mechanism for [T.] or coordinat[ed] any management of inherited funds with [Ms.] Castello — [T.’s] sole legal and physical custodian,” and the election of a lump-sum payment, rather than periodic, future payments structured as an annuity, “lessen[ed] the payout of the plan from almost \$200,000 over its life, to less than \$100,000 [upon] immediate withdrawal[.]”

The complaint also alleged that, on approximately September 18, 2018, Mr. Quinn filed a notice with the Montgomery County Orphan’s Court that “Ms. Quinn had separate death benefits payable to [T.] that would proceed largely out of probate.” Mr. Baacke

identified himself to the orphan's court as T.'s legal guardian. He had "continued discussions with representatives of [the] ADW's pension plan, and eventually, based upon those discussions, developed a plan to secure [T.'s] funds."

In approximately October 2018, Mr. Baacke married Dr. Adams, "his long term girlfriend" and domestic partner. Mr. Baacke disclosed the bequest to Dr. Adams at that time, and he "received her active participation and support in implementing his scheme to gain control over the funds." It was "Mr. Baacke together with [Dr.] Adams" who "decided to elect [the] immediate cashout [sic] of all funds in the plan as soon as it was possible." They "intended to use [T.'s] funds to pay off their own bills, and other questionable uses of the money."

Approximately five months later, in March 2019, the ADW's pension plan "provided Mr. Baacke, on [T.'s] behalf, with the appropriate lump sum distribution paperwork," which "suggested that the lump sum amount payable would be \$58,275.71, and specifically highlighted in several locations mandatory tax withholdings and penalties if the lump sum was taken but not rolled over into a qualifying plan." He "signed the lump sum distribution paperwork on April 3, 2019 on [T.'s] behalf, requesting a full cash out distribution, and returned the forms to [the] ADW's pension plan." He could not, however, "completely execute his plan without [T.'s] physical presence and identification," so he took no further action and "awaited [T.'s] arrival for summer visitation."

The complaint continued that T. returned to Maryland in early June 2019 for extended summer visitation with Mr. Baacke. On approximately June 12, 2019, "Mr.

Baacke received a check from the ADW's pension plan payable only to [T.] in the amount of \$42,104.20, reflecting some \$16,000 withheld in federal and state tax penalties." Using T. and her military dependent identification card, Mr. Baacke deposited the check into a Wells Fargo Bank account that he had "set up that same date as a joint account between himself and T." After he deposited the check, "Mr. Baacke and [Dr.] Adams promptly spent almost all of [T.'s] funds for their own benefit."

Ms. Castello subsequently learned of the inheritance and brought the present suit against appellees. She requested that the court, among other things, "[c]alculate and award direct damages incurred by [T.] as the amount of funds necessary to place her in the same position she would have been in had Mr. Baacke not taken any actions including an early cash out of the pension plan," "[d]eclare the imposition of a constructive trust over sufficient assets of [appellees] to make [T.] whole, . . . and designate [Ms.] Castello as the trustee until such time as she may implement an appropriate separate trust vehicle to administer and invest funds on [T.'s] behalf."

II.

Trial

A one-day court trial was held on September 23, 2021. Ms. Castello was represented by counsel, and both Mr. Baacke and Dr. Adams were self-represented.

During opening statements, counsel for Ms. Castello noted that "there's not very many facts that are actually in dispute in this matter." Counsel explained that "[t]here's no

dispute that Mr. Baacke and [Dr.] Adams took any of the[] actions” alleged in the amended complaint, and “there’s no dispute that the minor no longer has a pension fund.”

Mr. Baacke began his opening statement by noting that “this case is really about the future and security of [T.] . . . and her well-being, and that’s first and foremost.” He stated that “[t]he facts of the case, although they may not be in dispute,” are “that there was no ill will or intent on either [his] or [Dr. Adams’] part to cause any harm to [T.]” He also stated that, “when it became an issue, the money was immediately replaced with taxes paid.”

Dr. Adams noted in her opening statement that, “throughout [her] relationship with Mr. Baacke, [she] was never involved in . . . decision-making with the minor.” She stated that “there was no master plan . . . to try to harm or damage” T., and she “actually had very little, if any, involvement in [Mr. Baacke’s] decision-making and the choices he made with regards to . . . the funds and the decision about . . . the retirement fund.”

Ms. Castello testified that she lived in Byron, Georgia, with her husband and four children, including T. She had “multiple” disputes with Mr. Baacke regarding T.’s care and custody. Pursuant to an October 24, 2017 order entered in the custody case between Ms. Castello and Mr. Baacke, Ms. Castello had been T.’s sole legal and primary physical custodian for approximately four years.⁷

⁷ A copy of the October 24, 2017 custody order was entered into evidence as Plaintiff’s Exhibit No. 1. The custody order in effect at trial, effective December 27, 2018, also was entered into evidence as Plaintiff’s Exhibit No. 2. Mr. Baacke testified that, pursuant to the December 27, 2018 order, Ms. Castello retained sole physical and legal custody of T.

Ms. Castello met Ms. Quinn when T. was approximately three years old. T. “loved” Ms. Quinn, and the two “were together all the time.” Ms. Quinn paid T.’s tuition while T. was attending St. Raphael School in Montgomery County, Maryland.

Although Ms. Quinn worked as a teacher for the ADW, Ms. Quinn “did not actually get to teach [T.] She was supposed to teach [T.] in the [fifth] grade, but that was the year she passed away.”

Sometime during the summer after Ms. Quinn’s death, Ms. Castello first learned that Ms. Quinn had bequeathed her ADW pension to T. Ms. Castello initially “didn’t think anything of it,” but a few weeks later, Mr. Baacke mentioned the inheritance to her, stating that they “had come into money from [Ms. Quinn].” Ms. Castello subsequently spoke with Ms. Quinn’s sister, Teresa Quinn, who advised Ms. Castello to “hire an attorney because the money was actually left for [T.], not Mr. Baacke.”

Ms. Castello established an investment trust for T. with First Command Financial Services, pursuant to the Uniform Transfers to Minors Act (“UTMA”), “so if the money does come, it would go straight to” the trust. Under the terms of the trust, Ms. Castello “wouldn’t have any access to that money. It would go straight to First Command and [it] would deal with [the funds].”

Mr. Baacke testified that, on July 11, 2018, he first learned that Ms. Quinn had bequeathed her ADW pension to T. After he received a letter from the ADW advising of the bequest, Mr. Baacke emailed the ADW to identify himself as T.’s father. He did not

copy Ms. Castello, T.'s sole physical and legal custodian, on the email, and he never advised the ADW that he did not have legal custody of T.

Mr. Baacke received a "death benefit calculation" form from the ADW, which reflected that, under the terms of Ms. Quinn's pension, the total monthly benefit payable to T., upon maturity in August 2027, was \$614.94. T. would receive the \$614.94 payment each month for the rest of her life. Mr. Baacke signed the calculation form and returned it to the ADW on September 18, 2018.

Mr. Baacke received a notice from the Montgomery County Register of Wills, stating that \$183,713.04 was the value of the pension, and as a result of the bequest of the pension to T., an inheritance tax of ten percent, i.e., \$18,371.30, was due. On December 3, 2018, Mr. Baacke responded to the tax notice by letter to the Registrar of Wills, requesting a deferment of the payment of the inheritance tax until 2027. In a letter dated December 11, 2018, the Registrar of Wills agreed to defer the tax payment until maturity of the pension on August 1, 2027.

On January 17, 2019, Mr. Baacke was notified that a lump-sum option was available for the pension. Approximately three months later, on April 3, 2019, he signed the requisite paperwork and elected the lump-sum distribution.

III.

Circuit Court's Ruling

On September 28, 2021, the circuit court issued an oral ruling in favor of Ms. Castello. The court stated, as follows:

First, the starting point in terms of determining an outcome in this case is [Ms. Castello's] first-amended complaint. . . . It contains seven counts. [c]ount [one], breach of fiduciary duty as to [Mr.] Baacke; [c]ount [two], constructive trust as to both [appellees], [Mr.] Baacke and [Dr.] Adams; [c]ount [three], conversion as to both [appellees] [Mr.] Baacke and [Dr.] Adams; [c]ount [four], fraud as to [Mr.] Baacke; [c]ount [five], unjust enrichment as to both [appellees], [Mr.] Baacke and [Dr.] Adams; [c]ount [six], civil conspiracy as to [Dr.] Adams; and [c]ount [seven], injunctive relief as to both [appellees] [Mr.] Baacke and [Dr.] Adams.

[Ms. Castello] agrees that [c]ounts [two] and [seven] are moot in light of previous orders that have been entered in this action. Counts [two] and [seven] will, therefore, be dismissed and judgment shall be entered on [c]ounts [two] and [seven] in favor of both [appellees] [Mr.] Baacke and [Dr.] Adams and against [Ms. Castello].

The court then discussed the conversion count (count three), noting that Mr. Baacke deposited a check solely payable to T. into a bank account he controlled and then used those funds for his and Dr. Adams' benefit. The court stated:

The elements of [conversion] are the taking of personal property in another's possession with intention, without permission or justification. The exercise by the tortfeasor of dominion over the chattel, or the property, that the plaintiff was in actual possession, or is entitled to immediate possession of the chattel; and that there was harm done to the chattel.

Under Maryland law as a general rule, money, that is currency, is not subject to a claim of conversion unless the plaintiff seeks to recover specific segregated or identifiable funds. . . .

Moreover, for a conversion claim to succeed, [the] plaintiff must show that the transferred money has not been commingled with other funds. The evidence in this case is clear that the funds were transferred into an account [appellees] jointly owned, thereby commingling the funds with [appellees'] other funds. This caused the cash to lose its specificity. For this reason, the conversion claim against each of the [appellees] fails. The [c]ourt finds in favor of both [Mr.] Baacke and [Dr.] Adams and against [Ms. Castello] as to [c]ount [three] of the first-amended complaint alleging conversion.

The court stated that the conversion claim against Dr. Adams would fail for an additional reason:

The only evidence that [Dr.] Adams benefitted from [T.'s] funds was the \$21,500 that was used to purchase an automobile. On or about January 31, 2020, [Dr.] Adams turned over to Robert McCarthy, Esq., on [T.'s] behalf the sum of \$10,178.54. . . . [B]y February 3, 2020, [Dr.] Adams had turned over to Mr. McCarthy a total of \$54,663.91 for [T.'s] benefit. This amount exceeds . . . the maximum amount [Ms. Castello] could have proven that [Dr.] Adams had converted.

The court next found that there was no unjust enrichment claim (count five) because T. did not confer a benefit on appellees; instead, Mr. Baacke “simply took the money.” Moreover, the unjust enrichment claim failed because appellees had repaid \$54,663.91 after taking \$42,104.20, and therefore, they did not “retain the benefit without payment of its value or the return of the money.”

The court then found in favor of Mr. Baacke on the fraud claim (count four). The claim failed because there was no evidence that Mr. Baacke “asserted a false representation of a material fact” to either T. or Ms. Castello, that T. or Ms. Castello “relied with justification upon the misrepresentation,” or that T. “suffered damages as a direct result of the reliance upon the misrepresentation.”

The court then turned to the claim against Mr. Baacke for breach of fiduciary duty (count one). In that regard, it stated:

The [c]ourt finds that [Mr.] Baacke breached the statutory and common law duties he owes to his daughter, [T.], by taking her money for his own benefit without her knowledge, permission or consent, and by failing to safeguard her money and invest it. Even if it had been his intention to repay the funds, which is doubtful at best, he had no right to borrow, as I think he would have it, the funds from her interest-free; rather, he would have been obligated to

invest the funds in some fashion. He also failed to obtain any tax or investment advice. The best case for [Mr.] Baacke is simple negligence. The worst case, however, is straight-out [fraud]. The evidence suggests the latter and not the former.

The [c]ourt finds in favor of [Ms. Castello] and against [Mr.] Baacke as to [c]ourt [one] of the first-amended complaint alleging breach of fiduciary duty. For breach of fiduciary duty, [Ms. Castello] in her complaint seeks damages in an amount to be determined following an accounting and an award in the same amount to [T.] as a judgment entered against [Mr.] Baacke. The [c]ourt is unaware of any accounting having been done.

In assessing T.'s damages, the court stated that the evidence established that the replacement value of the pension was \$183,713.04. The court deducted from that amount \$16,171.51, which was the taxes that were withheld from the \$58,275.71 lump sum payout.⁸ The court continued:

Additionally, there should be credit for the payments that [Dr.] Adams made on Mr. Baacke's behalf to Mr. McCarthy for [T.'s] benefit. Those payments total \$54,663.91. When we deduct those two amounts from the replacement value, the balance owed would be \$112,877.62. That would be the amount of the award and that will be the amount of the award to [Ms. Castello] under [c]ourt [one], breach of fiduciary duty as to [Mr.] Baacke.

The court then discussed the claim against Dr. Adams for civil conspiracy (count six), noting that "[t]he elements of civil conspiracy" include "a confederation of two or more persons by agreement or understanding," an "unlawful or tortious act done in furtherance of the conspiracy [or] [the] use of unlawful or tortious means to accomplish an act not in itself illegal," and "actual legal damage resulting to the plaintiff." The court found Dr. Adams' testimony to be credible, and based on her testimony, it determined that

⁸ As indicated, the lump sum payout was \$58,275.71. The net payout was \$42,104.20, leaving a difference of \$16,171.51 paid for taxes.

the conspiracy claim failed because “she was not involved in a plan for defendant Baacke to take [T.’s] money.” The claim also failed because Ms. Castello did not prove that Dr. Adams “used any of the money beyond the \$21,500 that was paid for the automobile purchase, and that money was repaid with interest.”

The court then denied Ms. Castello’s request for punitive damages and attorneys’ fees. The court found that punitive damages were not recoverable on the breach of fiduciary duty claim because it “is essentially . . . a form of a negligence claim,” and in any event, there was insufficient evidence to allow such an award because there was “no real evidence” of Mr. Baacke’s “net worth or his ability to pay an award of punitive damages.” The court also found that there was “no legal basis for an award of attorneys’ fees in this case.”

At the end of the proceeding, Mr. Baacke stated that he would “move forward with releasing the funds” to T. The court then asked: “There’s a separate guardianship matter, I understand, isn’t that right?” Mr. Baacke and counsel for Ms. Castello responded in the negative. Ms. Castello’s counsel asked the court to include a line in the order directing the trustee appointed in this case to release the funds to Ms. Castello’s care. Counsel advised that the funds were “going into a separate trust account directly.” The court indicated it would authorize the trustee to release the funds to Ms. Castello to be held in trust for T.’s benefit.

On October 1, 2021, the court issued a written order memorializing its oral ruling. In accordance with the oral ruling, the written order awarded Ms. Castello \$112,877.62 in

damages for Mr. Baacke's breach of fiduciary duty. The written order also provided, as follows:

DETERMINED, that (1) [T.] . . . is entitled to property or benefits, including without limitation the judgment entered herein, that require proper management or protection, and (2) appointment of a guardian of [T.'s] property is in [T.'s] best interest, and it is further,

ORDERED, that Robert M. McCarthy, Esquire, previously appointed "Interim Trustee" in this action . . . be, and hereby is, appointed guardian of the property of [T.], with all the powers and duties set forth in MD. CODE, EST. & TRUSTS §§ 13-214 and 15-102, and it is further,

ORDERED, that [Mr. McCarthy] shall file a [f]iduciary's [a]ccount with this [c]ourt within one year from the date of this [o]rder, and annually thereafter until the guardianship is terminated, and it is further,

ORDERED, that [Mr. McCarthy] shall hold in trust for [T.'s] benefit all funds heretofore recovered in his Interim Trustee capacity, as well as any other funds received in full or partial satisfaction of the judgment entered in this action, and it is further,

ORDERED, that all assets of [T.] shall be placed in a restricted account, with [c]ourt approval being required before withdrawals are made, and it is further,

ORDERED, that within 30 days of the entry of this [o]rder, [Mr. McCarthy] shall file with the [c]ourt proof of deposit of [T.'s] assets into a restricted account, and it is further,

ORDERED, that [Mr. McCarthy's] bond is waived

IV.

Motion to Alter or Amend Judgment

On October 12, 2021, Ms. Castello filed a motion to alter or amend the court's written order. She argued that the order "should be amended in at least one primary manner: it establishes a permanent [t]rustee for funds recovered on behalf of a minor where

no party requested a permanent [t]rustee . . . and indeed where such appointment is not in the best interests of the minor at question.” She asserted in this regard that “no party requested a permanent trustee, and the only pleading for a constructive trust was only interim and found moot by th[e] court.” She requested that the court alter or amend its written order to remove all references to Mr. McCarthy, apart from directing him to transfer any recovered funds to T.’s established UTMA account. Alternatively, she requested that the court “reopen evidence for this issue.”⁹

On November 22, 2021, the court held a hearing regarding Ms. Castello’s motion to alter or amend. Ms. Castello was represented by counsel, and both Mr. Baacke and Dr. Adams were self-represented. Mr. McCarthy, the court-appointed guardian of T.’s property, also appeared at the hearing.

Counsel for Ms. Castello asserted three reasons why the court should revise its written order: (1) the appointment of a guardian of T.’s property was not needed; (2) the appointment of a guardian of T.’s property was not in the best interests of T., “especially if the funds are going into a court-restricted account where they can’t really be invested and accumulate growth over time”; and (3) “it just doesn’t seem like the procedures for the appointment of the guardian were actually followed in this case.” With regard to the third basis for revising the order, counsel asserted that

[t]here was no actual [guardianship] petition. There was no request from any party for the appointment of a guardian. There was no separate hearing on the particular issue. There was no discussing of the prioritization that’s laid

⁹ Neither Mr. Baacke nor Dr. Adams responded to Ms. Castello’s motion to alter or amend the judgment.

out [in] the statutes for who should be guardian, who shouldn't be guardian, [and] what the priorities are.

Both Mr. Baacke and Dr. Adams agreed with the argument asserted by Ms. Castello's counsel.

Mr. McCarthy conceded that Ms. Castello and Mr. Baacke would have priority over him to serve as guardian, but he noted that "the [c]ourt can overlook those priorities for good cause." He stated that the court found good cause to do so based on "the fuss between the parents were such that it be, it would be easier on the child if you had a disinterested third party involved in this case." He declined to take a position, however, on whether he would "stay in or out." On November 22, 2021, the court denied Ms. Castello's motion to alter or amend.

This appeal followed.

STANDARD OF REVIEW

In reviewing an action that has been tried without a jury, the standard of review for this Court is as follows:

When a case has been tried without a jury, we "review the case on both the law and the evidence." [Md. Rule] 8-131(c). We review questions of law without deference, but "give due regard to the trial court's role as fact-finder and will not set aside factual findings unless they are clearly erroneous." *Clickner v. Magothy River Ass'n Inc.*, 424 Md. 253, 266 (2012). We consider the evidence presented at trial in the light most favorable to the prevailing party. *Id.* If there is substantial evidence to support the trial court's determination, "it is not clearly erroneous and cannot be disturbed." *Id.* (quoting *Ryan v. Thurston*, 276 Md. 390, 392 (1975)).

Patriot Constr., LLC v. VK Elec. Servs., LLC, ___ Md. App. ___, ___, No. 942, Sept. Term, 2021, slip op. at 10 (filed March 2, 2023).

DISCUSSION

Ms. Castello contends that the circuit court erred in the following ways: (1) “appointing a guardian of [T.’s] property;” (2) “applying an incorrect legal definition of conversion;” (3) “failing to accord any factual weight to deemed admissions and applying an incomplete standard to not find [Dr.] Adams conspired with [Mr.] Baacke;” and (4) “accord[ing] credit against damages for withheld taxes.” We shall address each issue, in turn.

I.

Appointment of Third-Party Guardian

Ms. Castello contends that the circuit court erred in appointing a guardian of T.’s property, asserting that a court “may not *sua sponte* appoint a guardian of a minor’s property without following any required procedures or providing any prior notice or due process protections.” She argues that the court improperly “appointed a third party guardian of T.’s property *sua sponte*, without any petition from any interested person, without any evidentiary hearing, without comment the day following its verbal announcement it had no intention to do so, and over the objections of the minor’s sole legal guardian and natural mother.”

“A guardian is a person who legally has the care of the person or property, or both, of another person who is incompetent to act for himself or herself.” *Rosebrock v. E. Shore Emergency Physicians, LLC*, 221 Md. App. 1, 11 (quoting 11 *Maryland Law Encyclopedia*, Guardian & Ward § 1 (2014)), *cert. denied*, 442 Md. 517 (2015). “The appointment of a

guardian is a matter within the court’s discretion.” *Matter of Meddings*, 244 Md. App. 204, 219 (2019).

Title 13, subtitle 2 of the Estates and Trusts Article governs guardians of property of minors and disabled persons. *See* Md. Code Ann., Est. & Trusts Art. (“ET”) §§ 13-201 to 13-222 (2017 Repl. Vol. & Supp. 2021). In this context, “[a] guardian is a fiduciary who has control over the ward’s property, subject to court supervision, and is charged with preserving it ‘from being squandered or improvidently used.’” *Seaboard Sur. Co. v. Boney*, 135 Md. App. 99, 112 (2000) (quoting Restatement (Second) of Contracts § 13 cmt. a (Am. L. Inst. 1981)), *cert. denied*, 363 Md. 206 (2001).

ET § 13-201(a) provides that a court may appoint a guardian of a minor’s property “[o]n petition, and after any notice or hearing prescribed by law or the Maryland Rules.” Maryland Rule 10-301(a) provides that “[a]ny interested person may file a petition requesting a court to appoint a guardian of the property of a minor or an alleged disabled person.” The petition must be “filed in substantially the form set forth in Rule 10-111.”¹⁰ Md. Rule 10-301(b). The petitioner shall “serve a show cause order issued pursuant to Rule

¹⁰ The form petition set forth in Maryland Rule 10-111 asks the interested person to state, among other things: (i) the person’s name, age, address, and telephone number; (ii) the minor’s name, age, date of birth, biological sex, address, and the names of the minor’s parents; (iii) the nature of the relationship between the interested person and the minor; (iv) whether the minor is a beneficiary of the United States Department of Veterans Affairs; (v) whether the prospective guardian has been convicted of a crime listed in ET § 11-114; (vi) the names and contact information of all other interested persons; (vii) the names and addresses of all individuals with whom the minor has resided over the past five years; and (viii) the reasons why guardianship of the property is sought. The form petition also instructs the interested person to attach, among other things, the minor’s birth certificate to the form. *See* Md. Rule 10-111.

10-104 on the minor . . . and on the parent, guardian, or other person having care or custody of the minor . . . or of the estate belonging to the minor.” Md. Rule 10-302(a). Pursuant to Rule 10-304(a), “[b]efore ruling on a petition for guardianship of the property, the court shall hold a hearing and give notice of the time and place of the hearing to all interested persons.”

Ms. Castello contends that, although T. had property, i.e., \$112,877.62, that required management or protection, *see* ET § 13-201(b), there was no evidence that a third-party guardian was needed, noting that she had sole legal custody of T. for years, she had established a UTMA trust account that was managed by an independent financial services company, and there was no evidence that she could not adequately manage T.’s funds. She asserts that the court erred in appointing Mr. McCarthy without following the requisite procedure, which requires a petition, notice, and a hearing—none of which occurred here.

We agree that the court did not follow the statutory requirements to appoint a guardian of T.’s property. As indicated, ET § 13-201(a) provides that a court may “appoint a guardian of the property of a minor” only “[o]n petition” and “after any notice or hearing prescribed by law or the Maryland Rules.” There was, however, no guardianship petition filed in this case, and the court did not hold a hearing on the issue of guardianship of T.’s property. *See* Md. Rules 10-301(b), 10-304(a). Under these circumstances, the court did not have statutory authority to appoint a guardian of T.’s property. *See Black v. Black*, 824 S.W.2d 514, 515 (Mo. Ct. App. 1992) (“a court could not appoint a guardian without following the procedure required by statute”); *Doe v. Doe*, 372 P.3d 366, 368 (Idaho 2016)

(judicial authority to appoint a guardian for a minor is fixed and determined by statute). On remand, the circuit court shall remove Mr. McCarthy as guardian of T.’s property and issue any other orders necessary to transfer the funds to Ms. Castello on behalf of T.

II.

Conversion

Ms. Castello next challenges the circuit court’s finding in favor of appellees on the conversion count. She contends that the court erred in “applying an incorrect legal definition of conversion,” and in relying on commingling to deny recovery, noting that the court received evidence of “*extensive* tracing of [T.’s] funds.” She also argues that the court erred in denying recovery for conversion as to Dr. Adams because, when the funds were converted through her bank accounts in June 2019, the total amount of converted funds was \$42,104.20, “not the \$21,500 amount used for the joint car purchase.”

“Conversion, historically known as trover, is defined under modern law as ‘any distinct act of ownership or dominion exerted by one person over the personal property of another in denial of his right or inconsistent with it.’” *Sage Title Grp., LLC v. Roman*, 455 Md. 188, 203 (2017) (quoting *Allied Inv. Corp. v. Jasen*, 354 Md. 547, 560 (1999)). It is “an intentional tort, consisting of two elements, a physical act combined with a certain state of mind.” *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 261 (2004). “The first element is satisfied where the defendant engaged in ‘the wrongful deprivation of’ property, regardless of whether the defendant acquired the property.” *Thornton Mellon LLC v. Frederick Cnty. Sheriff*, 479 Md. 474, 507 n.18 (2022) (quoting *Yuan v. Johns*

Hopkins Univ., 452 Md. 436, 463 (2017)). “The second element is satisfied where the defendant intended to exert control over the property, regardless of whether the defendant acted in good faith and lacked any consciousness of wrongdoing.” *Id.* (quoting *Yuan*, 452 Md. at 463) (cleaned up).

“The general rule is that monies are intangible and, therefore, not subject to a claim for conversion.” *Jasen*, 354 Md. at 564. *Accord Thompson v. UBS Fin. Servs., Inc.*, 443 Md. 47, 56 (2015) (“Originally, because a plaintiff’s intangible property could not be lost or found, a defendant could convert only a plaintiff’s tangible personal property,” but under current law, “a defendant can convert a plaintiff’s intangible property under certain circumstances.”). “An exception exists, however, when a plaintiff can allege that the defendant converted specific segregated or identifiable funds.” *Jasen*, 354 Md. at 564. “Nonetheless, when funds are co-mingled, the monies lose their ‘separateness’ and, therefore, are not subject to a claim of conversion.” *John B. Parsons Home, LLC v. John B. Parsons Found.*, 217 Md. App. 39, 61 (2014). “In cases where Maryland courts have precluded claims for conversion of funds on the basis that the funds were commingled, the plaintiff either never identified a specific dollar amount that was allegedly converted, or the defendant had no obligation to return those funds in the first place.” *Roman v. Sage Title Grp., LLC*, 229 Md. App. 601, 611 (2016), *aff’d*, 455 Md. 188 (2017).

Here, the circuit court found that the conversion claim failed because “the funds were transferred into an account [appellees] jointly owned, thereby commingling the funds with [appellees’] other funds. This caused the cash to lose its specificity.” As indicated,

however, there is an exception for “segregated or identifiable funds” when the plaintiff can identify a specific dollar amount allegedly converted, and the defendant had a legal obligation to return the identical money. *See Jasen*, 354 Md. at 564; *Roman*, 229 Md. App. at 611.

Ms. Castello established that Mr. Baacke received \$42,104.20 on T.’s behalf, and within six weeks, he had spent almost all of it, with \$21,500 spent on a new car for him and Dr. Adams. There was not, however, evidence that appellees were under an obligation to return the identical \$42,104.20 to T.

As this Court has stated, “a conversion action ‘is not maintainable for money unless there be an obligation on the part of the defendant to return the specific money entrusted to his care’; otherwise, there is ‘only a relationship of debtor or creditor,’ and a conversion action ‘will not lie against the debtor.’” *Roman*, 229 Md. App. at 609 (quoting *Lawson v. Commonwealth Land Title Ins. Co.*, 69 Md. App. 476, 482 (1986)). *Accord Darcars Motors*, 379 Md. at 259 n.3 (expressing doubt that \$2,500 cash down-payment was properly subject to conversion claim when “Darcars did not have an obligation to return the specific bills used for the down-payment,” but rather, owed a debt of money that could have been satisfied by a check); *Fla. Desk, Inc. v. Mitchell Int’l, Inc.*, 817 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 2002) (“The fact that the amount is certain does not make an ‘identifiable fund.’ It is necessary to show that the same monies paid to [the defendant] were to be held by [that party] for the benefit of [the plaintiff].”). “When there is no obligation to return the identical money, but only a relationship of debtor or creditor, an

action for conversion of the funds representing the indebtedness will not lie against the debtor.” *Lawson*, 69 Md. App. at 482 (quoting *Lyxell v. Vautrin*, 604 F.2d 18, 21 (5th Cir.1979)). *Accord Advanced Enters. Recycling, Inc. v. Bercaw*, 869 A.2d 468, 472 (N.J. Super. Ct. App. Div. 2005) (conversion action “will not lie in the context of a mere debt or chose in action”). The circuit court properly found in favor of appellees on the conversion count.

III.

Conspiracy

In finding in favor of Dr. Adams on the civil conspiracy count, the court found, based on Dr. Adams’ testimony, which it found credible, that “she was not involved in a plan” for Mr. Baacke to take T.’s money. Ms. Castello contends that the circuit court’s ruling in this regard is erroneous because the court “misunderstood the law and ignored deemed admissions and inconsistencies in [Dr.] Adams’ testimony.”

Maryland appellate courts have defined a civil conspiracy as

a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an unlawful act not in itself illegal, with the further requirement that the act or means employed must result in damages to the plaintiff.

Shenker v. Laureate Educ., Inc., 411 Md. 317, 351–52 (2009) (quoting *Hoffman v. Stamper*, 385 Md. 1, 24 (2005)). *Accord Brass Metal Prod., Inc. v. E-J Enters., Inc.*, 189 Md. App. 310, 352 (2009). A conspiracy claim is comprised of three elements: “1) A confederation of two or more persons by agreement or understanding; 2) [S]ome unlawful or tortious act done in furtherance of the conspiracy or use of unlawful or tortious means

to accomplish an act not in itself illegal; and 3) Actual legal damage resulting to the plaintiff.” *Windesheim v. Larocca*, 443 Md. 312, 347 (2015).

Here, the conspiracy alleged was an agreement between Mr. Baacke and Dr. Adams to convert the pension funds bequeathed to T. Dr. Adams testified that there was no agreement to improperly take T.’s money. The court found her testimony in this regard to be credible. It is not for this Court to second guess the circuit court’s credibility determination. *See State v. Smith*, 374 Md. 527, 533–34 (2003) (weighing of witness’s credibility is a task proper for the fact finder, not the appellate court); *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 250 (2021) (same). The court did not err or abuse its discretion in finding in favor of Dr. Adams on the conspiracy count.

IV.

Damages

Ms. Castello contends that the trial court erred in calculating damages for Mr. Baacke’s breach of fiduciary duty. She notes that the \$112,877.62 awarded was based on a present value of the plan bequeathed to T. of \$183,713.04, minus \$54,663.91 that appellees had placed with Mr. McCarthy, and \$16,171.51 in taxes withheld from the lump sum payout. Ms. Castello argues that the court’s “primary error” was subtracting the \$16,171.51, asserting that the evidence did not support that deduction.

The purpose of the damages remedy is to compensate the plaintiff and pay him or her for their losses. *Matter of Cash-N-Go, Inc.*, 256 Md. App. 182, 221 (2022). “The Maryland cases are in accord with the prevailing rule elsewhere: that if compensatory

damages are to be recovered, they must be proved with reasonable certainty, and may not be based on speculation or conjecture.” *Carter v. Wallace & Gale Asbestos Settlement Tr.*, 439 Md. 333, 350 (2014) (quoting *Asibem Assoc., Ltd. v. Rill*, 264 Md. 272, 276 (1972)) (cleaned up). “It is well established in Maryland that damages based on speculation or conjecture are not recoverable as compensatory damages.” *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 95 (2007).

Here, there was substantial evidence to support the court’s finding that the amount of tax withholdings was \$16,171.51. Mr. Baacke testified that the face value of the pension plan was \$183,713.04, and an immediate cash out would be subject to a 20 percent withholding penalty and a ten percent inheritance tax. He testified that, in a March 2019 notice that he received from the ADW, the gross payout value of the pension plan was listed as \$58,275.71. He also testified that, in June 2019, the check that he received from the ADW was in the net amount of \$42,104.20. The court’s reliance on these numbers to arrive at a sum of \$16,171.51 for taxes was reasonable, and we cannot conclude that the court erred or abused its discretion in its ruling in this regard.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED, IN PART, AND REVERSED,
IN PART; CASE IS REMANDED FOR
FURTHER PROCEEDINGS CONSISTENT
WITH THIS OPINION. COSTS TO BE
PAID BY APPELLANT.**