UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1992

September Term, 2014

CHARLES NDEUMENI

v.

AMELIE KEMOGNE

Krauser, C.J.,
Hotten,
Berger,

JJ.

Opinion by Berger, J.

Filed: December 1, 2015

*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.

This appeal arises out of a judgment awarded to the appellee, Amelie Kemogne ("Kemogne"), against the appellant, Charles Ndeumeni ("Ndeumeni"), following a bench trial in the Circuit Court for Prince George's County. Ndeumeni challenges the denial of his motion for summary judgment, the admission of certain testimony offered against him, and the sufficiency of the evidence presented at trial. On appeal, Ndeumeni presents four issues for our review.[1] We rephrase and reorder the questions as follows:

> 1. Whether the trial court erred in denying Ndeumeni's motion for summary judgment on Kemogne's fraud claim notwithstanding the lack of a written agreement between the parties.
>
> 2. Whether the trial court abused its discretion in denying Ndeumeni's motion to exclude testimony because Kemogne failed to comply with her discovery obligations.

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[1] The issues, as presented by Ndeumeni, are:

> 1. Whether the trial court abused its discretion and erred in entering judgment in favor of the Appellee after the trial judge allowed testimony from undisclosed factual witnesses and unproven expert witness? [sic]
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> 2. Whether the trial court committed an error of law in finding fraud even though the Appellee failed to meet her burden of proof on each element of the tort?
>
> 3. Whether the trial judge erred in denying the Appellant's Motion for Summary Judgment where it was undisputed that no written contract existed?
>
> 4. Whether the trial judge erred in denying the Appellant's claim for breach of contract and unjust enrichment against the Appellee?

3. Whether the trial judge erred in permitting two witnesses to give opinion testimony.

4. Whether the evidonce was sufficient with respect to Kemogne's claim for fraud.

5. Whether the trial court erred in offsetting Kemogne's damage award to the extent Kemogne caused Ndeumeni damages.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Prince George's County with the exception of its award for attorney's fees. We remand this action with instructions to vacate the award entered in Kemogne's favor for attorney's fees.

FACTUAL AND PROCEDURAL BACKGROUND

Ndeumeni and Kemogne lived and were married in Cameroon. In 2003, Kemogne moved to the United States. Unbeknownst to Kemogne, Ndeumeni initiated a divorce in Cameroon and moved to the United States in 2004. Ndeumeni informed Kemogne that they were no longer married when he arrived in the United States in 2004. Later, in December of 2004, Ndeumeni married Mary Inoussa ("Inoussa"). Ndeumeni, however, lived apart from Inoussa and continued to live with Kemogne. Nevertheless, Ndeumeni and Kemogne continued to live and sleep together and otherwise cohabitated as if they were husband and wife.

In March of 2007, Ndeumeni purchased real property located at 1501 Northern Lights Drive, Upper Marlboro, Maryland 20774 ("the property"). At trial, Ndeumeni argued that he desired to purchase the property as an investment. Kemogne, however, contended that the property was purchased at her insistence because she desired a large house close to

Washington, D.C., where she could entertain her family and hold events associated with her position as a make-up sales person. Kemogne further averred that the reason she did not purchase the property herself was because she already owned two other properties, and therefore, Ndeumeni could obtain better financing. Accordingly, Kemogne maintained that the parties had an agreement whereby Ndeumeni would obtain financing, purchase the home, and transfer it to Kemogne shortly after settlement. Pursuant to Kemogne's theory of the case, Kemogne deposited a sum of money into Ndeumeni's bank account that was intended to cover the down payment on the property.

Ndeumeni then purchased the property in his name. In consideration for a loan used to purchase the property, Ndeumeni took out two mortgages on the property. Kemogne was primarily responsible for paying the first mortgage, whereas Ndeumeni paid the second. After the property was purchased, Ndeumeni and Kemogne continued to reside together in the master bedroom of the property. Ndeumeni and Kemogne permitted Kemogne's family to live with them for periods of time, and they also rented rooms in the property to tenants to obtain additional income.

In 2011, Kemogne demanded that Ndeumeni place her name on the deed to the property in accordance with their previous agreement for Ndeumeni to transfer the property to her. Initially, Ndeumeni expressed an intent to transfer the property, but stated that he had just not gotten around to it. Later, Ndeumeni refused to transfer the property. Upon Ndeumeni's refusal to transfer the property, Kemogne ceased making paymeats on the first mortgage and collecting rents from the tenants living on the property. Ndeumeni filed an

action to have Kemogne evicted, and in a separate proceeding, Kemogne was adjudicated to be in wrongful possession of the property.

Thereafter, Kemogne filed this action in the Circuit Court for Prince George's County. Her initial complaint included allegations of breach of contract and fraud. Kemogne later amended her complaint withdrawing her allegations of breach of contract, and instead sought recovery under theories of fraud and unjust enrichment. Ndeumeni filed a motion for summary judgment arguing that he was entitled to judgment as a matter of law because Kemogne's fraud action could not be maintained because she had failed to comply with the Statute of Frauds. Ndeumeni's motion was summarily denied without a hearing.

Just before trial, Ndeumeni moved to exclude the testimony of a number of witnesses because Kemogne had failed to adequately disclose their identity and the subject of their testimony as requested in discovery. The trial judge recognized that Kemogen had failed to comply with her discovery obligations. The judge, however, denied Ndeumeni's motion to exclude the witnesses' testimony, and instead permitted Ndeumeni to question all of Kemogne's witnesses as to the anticipated content of their testimony in preparation for the trial that began later that afternoon.

Both parties testified at trial. Additionally Kemogne called the parties' house cleaner, Bernadette Ngjine ("Ngjine"); Kemogne's brother, Roger Ngeugaum; and a former realtor, Gaetan Fouzing ("Fouzing"), who was also a family friend, and who helped broker the transaction for the property. Ndeumeni, for his part, called his current wife, Mary Inoussa ("Inoussa"), to testify at trial.

At the conclusion of trial, the trial judge found that Ndeumeni fraudulently induced Kemogne to make payments toward the property. The trial judge, however, discounted Kemogne's award to the extent that Kemogne lived in the property without making payments. The trial judge aso awarded Kemogne $11,750.00 in attorney's fees.

This timely appeal followed. Additional facts will be discussed as they are necessitated by the issues presented.

DISCUSSION

I. The Circuit Court Did Not Err by Denying Ndeumeni's Motion for Summary Judgmended

A. Standard of Review

The entry of summary judgment is governed by Maryland Rule 2-501, which provides:

> The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Md. Rule 2-501(f).

We review a trial court's decision granting a motion for summary judgment *de novo*, and we construe all "reasonable inferences that may be drawn from the facts against the moving party." *Myers v. Kayhoe*, 391 Md. 188, 203 (2006). A trial court has considerable discretion when denying a motion for summary judgment. *Dashiell v. Meeks*, 396 Md. 149, 164 (2006). This is so because the denial of summary judgment "involves not only pure legal questions but also an exercise of discretion as to whether the decision should be postponed until it can be supported by a complete factual record." *Id.* Accordingly, "on appeal, the

standard of review for a denial of a motion for summary judgment is whether the trial judge abused his discretion and in the absence of such a showing, the decision of the trial judge will not be disturbed." *Id.* at 165 (citing *Foy v. Prudential Ins. Co. of America*, 316 Md. 418, 424 (1989); *Metro. Mortg. Fund, Inc. v. Basiliko*, 288 Md. 25, 29 (1980)). For the reasons that follow, we hold that the circuit court did not abuse its discretion in denying Ndeumeni's motion for summary judgment.

B. Ndeumeni's Motion for Summary Judgment was Properly Denied

Ndeumeni's motion for summary judgment was based on the premise that because the alleged agreement made between Ndeumeni and Kemogne failed to satisfy the Statute of Frauds, she should be precluded from arguing that there was an agreement under a theory sounding in tort.[2] Initially, we observe that in her original complaint Kemogne did allege that Ndeumeni breached a contract with her. Plainly, a breach of contract claim could not be sustained when it is undisputed that the parties failed to comply with the Statute of Frauds with respect to their agreement to transfer real property. Accordingly, Kemogne filed an

[2] Critically, with respect to his motion for summary judgment, Ndeumeni only argues that he was entitled to judgment because Kemogne cannot satisfy the Statute of Frauds. Although we reject Ndeumeni's argument with respect to the Statute of Frauds, we do not address here whether Kemogne satisfied her burden of production with regard to her fraud claim. Ndeumeni does, in fact, argue that the evidence was insufficient to sustain the judgment ultimately rendered against him. He does not do so, however, in the context of why it was error for the trial court to deny his motion for summary judgment. Accordingly, we limit our analysis of the denial of Ndeumeni's motion for summary judgment to the issue presented by him, and we address the sufficiency of the evidence in Part III, *infra*.

amended complaint withdrawing her allegations of breach of contract, and instead pursued claims under theories of fraud and unjust enrichment.

> To prevail on a claim for fraud, a plaintiff must prove by clear and convincing evidence that '(1) the defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purpose of defrauding the plaintiff, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation.'

White v. Kennedy Krieger Inst., Inc., 221 Md. App. 601, 635 (2015) (emphasis omitted) (quoting *Hoffman v. Stamper*, 385 Md. 1, 29 (2005)).

At issue here is whether Kemogne must satisfy the Statute of Frauds in order to pursue a tort action involving an agreement for the sale of real property. Ndeumeni, for his part, argues that Kemogne cannot prevail in her fraud claim in the absence of a written agreement. The relevant statute provides:

> No action may be brought on any contract for the sale or disposition of land or of any interest in or concerning land unless the contract on which the action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or some other person lawfully authorized by him.

Md. Code (1974, 2010 Repl. Vol.) § 5-104 of the Real Property Article ("RP"). The question then becomes whether this action for fraud is an action "brought on any contract for the sale of disposition of land" so as to require compliance with the Statute of Frauds. *Id.*

The material difference as to why Kemogne may maintain her tort action, but not her contract claim, is due to the different inquires with respect to each claim. For example, "[w]e have long adhered to the objective theory of contract interpretation, giving effect to the clear terms of agreements, *regardless of the intent of the parties at the time of contract formation*." *Myers*, *supra*, 391 Md. at 198 (emphasis added). The Statute of Frauds, then, is but one cog in a broader judicial construct that aims to articulate the objective meaning of an agreement between individuals. A tort action for fraud, however, is fundamentally distinguishable because it hinges on the *subjective intent of the speaker* when a statement is made that causes another harm. *Tufts v. Poore*, 219 Md. 1, 12 (1959) ("The gist of the fraud in such cases is not the failure to perform the agreement, but the fraudulent intent of the promisor, the false representation of an existing intention to perform where such intent is in fact non-existent, and the deception of the promisee by such false promise.").

It is in observation of these principles that we have routinely held "that allegations of negligent or fraudulent inducement are not barred by the Statute of Frauds." *Greenfield v. Heckenbach*, 144 Md. App. 108, 140 n.10 (2002). Undoubtedly, in Maryland the questions of whether a fraud has been committed with respect to a contract and whether a plaintiff may prevail in a breach of contract action are completely separate inquiries. This principle is illustrated by the fact that in Maryland, the Statute of Frauds may operate to render a contract unenforceable, but it does not make the contract void. *Daugherty v. Kessler*, 264 Md. 281, 285-86 (1972) ("The agreement need not, however, be enforceable by the plaintiff as a contract. . . . Accordingly, it usually is held that contracts which are voidable by reasons of

the statute of frauds . . . can still afford a basis for a tort action when the defendant interferes with their performance."); *see also Annapolis Fire & Marine Ins. Co. v. Rich*, 239 Md. 573, 585 (1965) ("It is clear that under the provisions of the Statute of Frauds, oral [promises] within the Statute . . . were not invalid or illegal, but merely unenforceable." (footnote omitted)). It is apparent, then, that the failure to satisfy the Statute of Frauds does not render an agreement a nullity. Rather, the doctrine merely renders the agreement unenforceable as a contract.

In the present action, Kemogne cannot satisfy the Statute of Frauds, and, therefore, her alleged contract with Ndeumeni is unenforceable. Nevertheless, Kemogne alleges that she was tricked into entering the deal in the first place. Making a prima facie case for fraud here does not require a finding that the agreement between Kemogne and Nedumeni is an enforceable contract. Stated differently, we need not hold that the agreement reached by Kemogne is enforceable in order to hold that Kemogne was tricked into making that agreement. Accordingly, we hold that the failure to satisfy the Statute of Frauds does not serve as a bar to Kemogne's tort claims.

II. Witness Testimony

A. Discovery Violations

Ndeumeni further avers that the trial court erred in denying his motion to exclude the testimony of Kemogne's witnesses when Kemogne failed to adequately disclose the witnesses and the contents of their testimony in discovery. Maryland Rule 2-433(a) provides the trial court with broad discretion in remedying discovery violations. Md. Rule 2-433(a).

Critically, Rule 2-433(a) employs a permissive, but not mandatory, "may" where the rule provides that "the court . . . *may* enter such orders in regard to the [violation] as are just . . ." *Id.* (emphasis added). Accordingly, "[o]ur review of the trial court's resolution of a discovery dispute is quite narrow; appellate courts are reluctant to second-guess the decision of a trial judge to impose sanctions for a failure of discovery." *Sindler v. Litman*, 166 Md. App. 90, 123 (2005). "Differently put, in order to reverse a trial court's decision, it must be 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.'" *Valentine-Bowers v. Retina Grp. of Wash., P.C.*, 217 Md. App. 366, 378 (2014) (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 198-99 (2005)). Accordingly, we will only reverse the trial court's decision with respect to discovery disputes if the trial court abused its discretion. *Pinsky v. Pikesville Rec. Council*, 214 Md. App. 550, 590 (2013) ("[Rulings] on discovery disputes . . . [are] reversed on appeal only in the presence of an abuse of . . . discretion.").

We have articulated the following five factors that are to guide the trial court's discretion when considering the imposition of discovery sanctions:

> (1) whether the disclosure violation was technical or substantial; (2) the timing of the ultimate disclosure; (3) the reason, if any, for the violation; (4) the degree of prejudice to the parties respectively offering and opposing the evidence; and (5) whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance.

Hossainkhail v. Gebrehiwot, 143 Md. App. 716, 725-26 (2002) (citing *Taliaferro v. State*, 295 Md. 376, 390-91 (2002)). Notably, these factors often overlap. *Hossainkhail*, *supra*,

143 Md. App. 725-26. Moreover, the trial court is not required to articulate a finding with respect to each factor, and "[t]he court's exercise of discretion is presumed correct until the attacking party has overcome such a presumption by clear and convincing proof of abuse." *Id.* at 725-26.

In the action *sub judice*, Ndeumeni sought to discover a list of Kemogne's witnesses and the substance of the witnesses' testimony. Kemogne, however, failed to timely disclose the inforation Ndeumeni sought. It was not until six weeks prior to trial that Kemogne provided Ndeumeni with the names of the witnesses she sought to call at trial. After receiving the names of witnesses, however, Ndeumeni made no attempt to depose the witnesses, and waited until two weeks before trial to file a motion to prevent the witnesses from testifying. Moreover, the trial court observed that although it was improper for Kemogne to fail to disclose certain witnesses, the witnesses were named in the parties' pre-trial statement, and their contact information was available through their subpoenas. Therefore, Ndeumeni was on notice of some of the individuals that may be called at trial. After weighing the equities on both sides, the trial judge articulated the following ruling with respect to Ndeumeni's motion to strike the testimony of Kemogne's witnesses:

> THE COURT: . . . All right, the Court believes that there has been partial compliance with this interrogatory but not full compliance because you are still -- they still don't know why you are calling them. They know why your are calling the people who allegedly were there at the time of the signing of the alleged contract or deed of trust or whatever.

> But exactly why you are calling them and what you expect their testimony to be needs to be ascertained by the defense. . . .
>
> . . .
>
> You got a bunch of witnesses, you know their names and even if we have their addresses. What are they supposed to be testifying about? And I want those answers provided in voir dire under oath starting in about three minutes. So what we are going to do is we are going to have a mini deposition and I want those witnesses called out of order and I want the -- I want the defense attorney to be able to get their testimony under oath as to what is the substance of their testimony. And that is the sanction that I am imposing rather than striking the testimony of these witnesses all together.

Thereafter, testimony was taken from each witness as to the contents of what they would testify to at trial. In this appeal, Nduemeni argues specifically that it was error to admit the testimony of Fouzing, the realtor that allegedly brokered the deal between Nduemeni and Kemogne. After hearing Fouzing's and Ngeugaum's proposed testimony prior to trial, Nduemeni again moved the court to exclude his testimony. Having given Nduemeni an opportunity, albeit brief, to ascertain the content of the proposed witnesses' testimony, the trial court denied Nduemeni's motion to exclude Kemogne's witnesses, including Fouzing, from testifying. In denying Ndeumeni's motion with regard to Fouzing, the court said, in part:

> THE COURT: All right, fine. The Court finds that the testimony of even Mr. Fouzing which may be probative and relevant is clearly foreseeable and not surprising and his actual name was given sufficiently in advance for him to have been investigated. Even if deposition -- even if not deposed, a telephone call to Mr. Fouzing would have been just an act of

> diligence on the part of the defendant and there was sufficient information to have done that -- the motion to quash his testimony is also denied at the discretion of the Court.

In the present action, the trial judge recognized that Kemogne's failure to comply with her discovery obligations placed Ndeumeni at a disadvantage. Rather than employing an overboard sanction and further delaying trial or excluding Kemogne's evidence, the trial judge crafted a ruling that aimed to reconcile our interest in ending litigation with our interest in ensuring the fairness of our judicial proceedings. After weighing the witnesses' proposed testimony, the degree of the violation committed by Kemogne, the degree to which the violation prejudiced Ndeumeni, and the availability of alternative remedies, the trial judge found that Ndeumeni had a sufficient opportunity to ascertain the evidence offered against him, and that it would not be appropriate to exclude the evidence completely. Based on these facts we cannot say that the trial judge's decision was "beyond the fringe of what the court deems minimally acceptable." *Wilson*, *supra*, 385 Md. at 198-99. The trial judge, therefore, did not abuse his discretion in his decision regarding Kemogne's discovery violation. We, therefore, affirm the trial court's discretion to deny Ndeumeni's motion to exclude Kemogne's evidence.

B. Witness Opinion Testimony

In his brief, Ndeumeni further argues that it was error to permit Ngjine to testify about her observations, and her opinions deduced therefrom, while cleaning the property because she did not have sufficient information about Ndeumeni's and Kemogne's relationship.

Ndeumeni further avers that it was error to permit Fouzing to testify because he was never qualified as an expert.

1. Ngjine's Testimony

With respect to Ngjine's testimony, we recognize that the decision to admit lay opinion testimony lies within the sound discretion of the trial court." *Thomas v. State*, 183 Md. App. 152, 174 (2008). The trial judge acknowledged that Ngjine's testimony was of minimal probative value, and that if he were the attorney he would not have had Ngjine testify. The testimony however was certainly relevant, if only minimally probative. Here, Ngjine testified as to her observations while cleaning the property. Further, Ngjine opined as to the inferences she drew regarding the parties' relationship with each other. The testimony was proper lay testimony because Ngjine testified as to her direct observations while cleaning the property, the opinions she expressed were rationally based on those perceptions, and the testimony was helpful in determining a fact in issue. *See* Md. Rule 5-701 ("[Lay witness testimony] is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."). We, therefore, hold that the court did not err in admitting the testimony of Ngjine.

2. Fouzing's Testimony

Ndeumeni further argues that Fouzing was improperly permitted to offer expert testimony because he had not been qualified as an expert witness. Maryland Rule 8-131 provides that "[o]rdinarily, the appellate court will not decide any other issue unless it plainly

appears by the record to have been raised in or decided by the trial court . . ." In this action, Ndeumeni argues for the first time on appeal that Fouzing should not have been permitted to testify as to certain mortgage lending practices because he had not been qualified as an expert. Although Ndeumeni did object to Fouzing's testimony on the grounds that Kemogne had not complied with her discovery obligations, Ndeumeni never questioned Fouzing's status as a lay or expert witness so as to give the trial court an opportunity to rule on this question in the first instance. Accordingly, we hold that the issue of Fouzing's status as a lay or expert witness is not preserved for appellate review.

Assuming, *argued*, that the question regarding Fouzing's testimony was preserved, we further hold that the admission of Fouzing's testimony was not error, and certainly not prejudicial error. "We 'review rulings on the admissibility of evidence ordinarily on an abuse of discretion standard.'" *Sail Zambezi, Ltd. v. Md. State Highway Admin.*, 217 Md. App. 138, 155 (2014). We do, however, recognize that "expert opinion testimony may not be offered in the guise of lay opinion testimony." *Warren v. State*, 164 Md. App. 153, 167 (2005). While lay opinion testimony is that which is "rationally based on the perception of the witness," Md. Rule 5-701, expert testimony is that which is "based upon specialized knowledge, skill, experience, training or education." *Warren*, *supra*, 164 Md. App. at 167 (quoting *Raglan v. State*, 385 Md. 706, 725 (2005)). Assuming further that improper expert testimony was admitted, "[i]t is ths policy of this Court not to reverse a lower court judgment if the error is harmless and the burden is on the appellant in all [civil] cases to show prejudice as well as error." *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 219

(2011) ("Even when a trial court is found to have abused its discretion, 'it has long been the settled policy of this [Court not to reverse for harmless error.'").

In this matter, Fouzing brokered the transaction involving the property. Fouzing testified that he was present when Ndeumeni and Kemogne reached an understanding that the property was to be purchased for Kemogne in Ndeumeni's name, and subsequently transferred to Kemogne. To be sure, Fouzing would not have had opportunity to observe the parties' transaction were it not for his "specialized knowledge, skill, experience, training or education" with respect to the real estate market. Fouzing's professional or expert status does not, however, render any testimony he offers expert testimony. Rather, expert testimony is only that which is "based upon" such expertise. *Warren*, *supra*, 164 Md. App. at 167. Here, notwithstanding his expertise, Fouzing's testimony was based upon his personal observations while facilitating the transaction. Accordingly, Fouzing offered lay testimony and it was not required for him to be qualified as an expert. In any event, had Fouzing testified beyond the scope of his personal observations, Nedumeni has not satisfied his burden to show if, and if so, how he was prejudiced by the testimony.

Accordingly, we hold that the objection to Fouzing's testimony was not preserved. Furthermore, if the allegation of error was preserved, the trial judge did not abuse his discretion in admitting Fouzing's testimony. Finally, assuming, argued, that the trial judge did abuse his discretion in admitting Fouzing's testimony, Nedumeni has not shown that he was prejudiced by inadmissible testimony.

III. The Evidence Was Sufficient to Sustain a Judgment for Fraud

Ndeumeni argues that Kemogne failed to satisfy her burden of production and set forth a prima facie case for fraud. As discussed *supra*, in order to make a prima facie case for fraud, the plaintiff

> must prove by clear and convincing evidence that '(1) the defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purpose of defrauding the plaintiff, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation.'

White, *supra*, 221 Md. App. at 635 (quoting *Hoffman*, *supra*, 385 Md. at 29). Critically, in a court trial, although the trial judge is bound to make findings of fraud in accordance with the "clear and convincing" standard, we are bound by the requirement of Md Rule 8-131(c), which provides:

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

Indeed, "[w]e do not evaluate conflicting evidence but assume the truth of all evidence, and inferences fairly deducible from it, tending to support the findings of the trial court and, on that basis, simply inquire whether there is any evidence legally sufficient to support those findings." *Mid South Bldg. Supply of Md., Inc. v. Guardian Door and Window, Inc.*, 156 Md.

App. 445, 455 (2004). In this action, Ndeumeni does not argue that the factual findings made by the trial judge were clearly erroneous. Rather, Ndeumeni maintains that when viewing the factual findings made by the trial judge in the aggregate, Kemogne has failed to make a prima facie showing of fraud. Specifically at issue in this action is whether there was sufficient evidence for a fact-finder to reasonably infer that Ndeumeni acted with the requisite intent to commit fraud when he made the statement to Kemogne that he would put her name on the deed.

To be sure, this issue hinges on whether Kemogne satisfied her burden of production in making a case for fraud, rather than whether the trial judge erred in relying on her testimony. We have "pointed out that the clear and convincing standard of proof pertains only to the burden of persuasion, not the burden of production." *Sass v. Andrew*, 152 Md. App. 406, 433 (2003). We have said:

> [T]he burden of production, which is central to the analysis of legal sufficiency, does not fluctuate with fluctuations in the burden of persuasion. . . . [T]he burden of production has nothing to do with whether evidence **should be believed.** Its concern is with the logical pertinence of evidence, **if believed,** validly to establish a required conclusion. . . . The *prima facie* or legally sufficient case requires some competent evidence, which **if believed and given maximum weight,** would establish all of the required legal elements of the tort . . . .

Sass, *supra*, 152 Md. App. at 434 (emphases in original) (internal quotations omitted).

The second element of fraud requires that a statement's "falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth."

Nails v. S & R, Inc., 334 Md. 398, 415 (1994). In articulating what it means to have knowledge of a statement's falsity, the Court of Appeals has held:

> 'An action cannot be supported for telling a bare naked lie, *i.e.*, saying a thing which is false, knowing or not knowing it to be so, and without any design to impose upon or cheat another, and without intention that another should rely upon the false statement and act upon it; but if a falsehood be knowingly told, with an intention that another should believe it to be true and act upon it, and that person does act upon it and thereby suffers damage, the party telling the falsehood is responsible in damages in an action for deceit . . .'

VF Corp. v. Wrexham Aviation Corp. 350 Md. 693, 704 (1998) (quoting *McAleer*, *supra*, 35 Md. at 453). Indeed, "'recovery in a tort action for fraud or deceit in Maryland is based upon a defendant's deliberate intent to deceive.'" *VF Corp.*, *supra*, 350 Md. at 704 (quoting *Ellerin v. Fairfax Savings, F.S.B.*, 337 Md. 216, 230 (1995)).

At the outset, we accept the trial judge's factual findings. After hearing all of the evidence at trial, the court found that Ndeumeni told Kemogne "you buy that house for us and I will have your name put on the deed." Further, the fact that statement ultimately proved to be false is uncontested. Rather, the gravamen of this action is whether there is any support for the trial judge's statement that Kemogne's "dream was destroyed by a plan who renegade on his promise and *who never had really a sincere intention to consummate that promise when he made the deal*." (emphasis added).

We recognize that it is seldom the case when there will be direct evidence of a defendant's fraudulent intent. Critically, "[t]here is no requirement that appellant admit to knowing a statement is false before a jury may reach that conclusion, so long as there is clear

and convincing evidence presented that appellant knew his representations were false; a jury is entitled to make that finding." *Mathis v. Hargrove*, 166 Md. App. 286, 315 (2005); *see also Dynacorp Ltd. v. Arametel Ltd.*, 208 Md. App. 403, 457 (2012) ("A plaintiff satisfies the elements of false representation and knowledge of falsity where circumstantial evidence establishes that a defendant makes a promise without intending to perform." (quoting *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 154 Md. App. 94, 159 (2003) ("[F]raudulent intent can be inferred from circumstantial evidence."))). Accordingly, there will be sufficient evidence to sustain the fact-finder's finding of the requisite intent "so long as the evidence is unambiguous and plain to the understanding and it is reasonable and persuasive enough to convince the [fact-finder]." *Mathis*, *supra*, 166 Md. at 316. A reasonable inference that Ndeumeni never intended to perform the agreement, however, must be based on more than mere "surmise and conjecture." *Sass*, *supra*, 152 Md. App. at 437.

We are also cognizant that the mere failure to perform in accordance with an agreement, alone, cannot sufficiently demonstrate the intent requirement to maintain a fraud action. *Tufts*, *supra*, 219 Md. at 10 ("A fraudulent pre-existing intent not to perform a promise made cannot be inferred from the failure to perform the promise alone. But, it may be considered with the subsequent conduct of the promisor and the other circumstances surrounding the transaction in sustaining such an inference."). "Under certain conditions, [however,] a failure or refusal to perform is strong evidence of an intent not to perform the promise at the time it was made." *Id.* Additionally, the fact that Ndeumeni stood to benefit by denying Kemogne an ownership interest in the property is, alone, insufficient to prove

fraudulent intent. *First Union Nat. Bank*, *supra*, 154 Md. App. at 148 ("A possible motive for committing a fraud . . . does not prove fraudulent intent.").

In his decision, the trial judge clearly found Kemogne more credible than Ndeumeni. We are cognizant that it is the fact-finder's prerogative to make credibility determinations about the weight to be afforded to a witness's testimony. "'A refusal to believe evidence of a [defendant], however, does not, of itself, supply affirmative evidence of the dishonesty, fraud, deceit, or misrepresentation charged. The issue is whether [the plaintiff] presented sufficient evidence of the charge to meet the clear and convincing standard of proof.'" *VF Corp.*, *supra*, 350 Md. at 711 (quoting *Attorney Grievance Comm'n v. Clements*, 319 Md. 289, 298 (1990)). In order to find fraud, there must be some evidence that Ndeumeni did not intend to perform in accordance with the agreement at or before the time the statement was made. Stated another way, there are two possible alternatives; Ndeumeni never had an intent to consummate the parties' agreement either at or before the time the agreement was reached, or Ndeumeni developed an intent to betray his agreement sometime after the agreement was reached.

While Ndeumeni never performed obligations under the agreement and he stood to benefit from deceiving Kemogne, that alone is insufficient to establish the requisite intent for fraud. Nevertheless, these facts along with the trial judge's credibility determinations weigh in support of the trial judge's findings. Furthermore, the fact that before and after the transaction for the property it was Inoussa's understanding that her husband purchased the

property and it was marital property supports the inference that it was Ndeumeni's intent before the transaction to retain title to the property.

We emphasize that on appeal, the question for us is not whether would have reached the same findings had we been exercising original jurisdiction. Rather, we inquire as to whether, after observing all of the evidence in a light most favorable to Kemogne, there was sufficient evidence to support each element for a claim of fraud. When viewed in the aggregate, Nedumeni's failure to perform in accordance with his agreement, the potential benefit to be realized by defrauding Kemogne, the permissible inferences that could be drawn from Ndeumeni's and Inoussa's understanding that the property was theirs, and the permissible inferences that could be drawn regarding Ndeumeni's conduct towards his former wife, all support the trial judge's finding that Ndeumeni had an intent to defraud Kemogne. While we recognize that the trial judge's findings relied almost entirely on circumstantial evidence, reliance on circumstantial evidence to find intent is entirely permissible so long as it is "plain to the understanding and it is reasonable and persuasive enough to convince the [fact-finder]." *Mathis*, *supra*, 166 Md. at 316. Here, the evidence was sufficient to permit the trial judge to infer that Nedumeni had the required intent to defraud Kemogne. Accordingly, we hold that the trial judge did not error in rendering judgment against Ndeumeni with respect to Kemogne's allegations of fraud.

IV. The Trial Court Did Not Err in Offsetting the Judgment to Reflect Ndeumeni's Damages

Ndeumeni finally contends that the circuit court erred in denying his claim for breach of contract and unjust enrichment. In his counterclaim, Ndeumeni sought $28,680 in damages resulting from damages incurred when Kemogne ceased contributing to the mortgage on the property and yet continued to live on the property. In the final judgment, the trial judge found that Ndeumeni suffered damages in the amount of $25,000 for the time in which Kemogne occupied the property as a wrongful detainer, as well as another $8,400 in unpaid rent from tenants other than Kemogne. Ndeumeni was, therefore, credited $33,400 ($4,720 more than he sought in his complaint) for the time Kemogne occupied the property without making payments.[3]

In light of the fact that Ndeumeni was awarded everything he sought with respect to his allegations that Kemogne occupied the property without paying rent or the mortgage, we fail to ascertain any error below. Generally, an appellate brief must contain an "[a]rgument in support of the party's position on each issue" and "[a] short conclusion stating the precise relief sought." Md. Rule 8-504(a)(6), (7); *Mathis*, *supra*, 166 Md. App. at 318 (declining to address argument where "we are unable to comprehend the legal theory appellants advance."). In this action, Ndeumeni's brief contains a recitation of the law that largely tracks the trial judge's rationale in offsetting the amount awarded to Kemogne. Indeed,

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[3] Kemogne's judgment was discounted by an additional $31,532 for the contributions Ndeumeni made to the mortgage on the property. Accordingly, Kemogne's judgment was offset by a total of $64,932.

Ndeumeni was credited for damages in excess of those he sought in his counter-complaint. Accordingly, we perceive no error respect to the relief Ndeumeni seeks. We, therefore, hold that the trial court did not err in discounting Kemogne's award to the extent she was adjudicated to wrongfully remain on the property.

V. The Trial Judge Erred in Awarding Attorney's Fees

At the conclusion of trial, the judge awarded Kemogne $11,750.00 in attorney's fees. In so doing, the judge said:

> And in a case where you have to hire a lawyer [because you've been cheated out of what you were entitled to, namely a share of this house as underwater as it is, you deserve your day in court and you deserve representation. So [Kemogne] is going to recover $11,750 in counsel fees.

In Maryland, the "American Rule" prevails for determining when it is appropriate to award attorney's fees. *Bontempo v. Lare*, 217 Md. App. 81, 134 (2014). "Under the American Rule, 'in the absence of a statute, rule or contract expressly allowing recovery of attorneys' fees, a prevailing party in a lawsuit may not ordinarily recover attorneys' fees.'" *Id.* (quoting *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566, 590-91 (1999)). Here, we discern no basis under which it would have been appropriate to award Kemogne attorney's fees. Accordingly, we vacate solely the circuit court's award of attorney's fees.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED WITH THE EXCEPTION OF ITS AWARD OF $11,750.00 IN ATTORNEY'S FEES. JUDGMENT REMANDED WITH INSTRUCTIONS TO VACATE THE AWARD FOR ATTORNEY'S FEES. APPELLANT TO PAY COSTS.