Circuit Court for Howard County
Case No. C-13-CV-18-000342

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2072

September Term, 2019

BEVERLY JANE GAZMEN

v.

STEVEN M. SHIMOURA, M.D., P.A., *et al.*

Graeff,
Gould,
Wright, Alexander Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: March 10, 2021

On November 25, 2019, a jury in the Circuit Court for Howard County found Beverly Jane Gazmen liable to her former employer, Steven M. Shimoura, M.D., P.A. (the "PA") for constructive fraud, and awarded the PA $936,423.34 in compensatory damages. On Ms. Gazmen's counterclaim, the jury found that she was entitled to $1,923.08 in unpaid wages, but dismissed the other counts on a motion for judgment under Maryland Rule 2-519.

In this appeal, Ms. Gazmen contends that no final judgment has been entered; and that the court erred in (1) denying her motions to compel discovery; (2) denying her motion for partial summary judgment to strike the affirmative defenses to her counterclaim; (3) barring certain testimony; (4) denying her motion for judgment at the conclusion of the PA's case-in-chief on its constructive fraud count (5) granting a motion for judgment against her on her intentional tort claims; and (6) its jury instruction regarding construction fraud.

Finding no error or abuse of discretion, we affirm.

BACKGROUND

Dr. Steven M. Shimoura, M.D. is an otolaryngologist. From approximately 1996 to 2018, Dr. Shimoura practiced medicine through the PA. On January 1, 2018, the PA became part of a group of seventeen otolaryngology practices under an umbrella entity called The Center for Advanced ENT Care, LLC (the "ENT LLC"). Dennis Tritinger was the chief executive officer of the ENT LLC during the relevant time period.

Ms. Gazmen was employed as a part-time office administrator for the PA, beginning in 1996. Ms. Gazmen administered payroll, paid office expenses, and managed the PA's

employee benefits, including its health insurance plan. When Dr. Shimoura joined ENT LLC on January 1, 2018, Ms. Gazmen's duties remained the same.

In June 2018, Dr. Shimoura noticed a dramatic increase in the PA's debt to a hearing aid supplier. This alarmed him because the number of patients seen by the PA, as well as the gross revenues of the PA, had not changed. Ms. Gazmen failed to provide an adequate explanation, prompting Dr. Shimoura to visit his bank to take over all of the PA's finances.

At Dr. Shimoura's request, Ms. Gazmen compiled a document summarizing the compensation paid to the PA's five employees, including herself. According to that document, Ms. Gazmen was being paid a salary of around $70,000, even though Dr. Shimoura never agreed to a salary above $50,000. Dr. Shimoura later discovered that Ms. Gazmen had not told him the truth—in fact, that year she was paid over $76,000, only through June. Upon further investigation, he discovered that over many years, Ms. Gazmen had overpaid herself a total of $889,095.96, paid her personal expenses from the PA's account, and enrolled herself in a platinum health insurance plan, all without Dr. Shimoura's knowledge or consent.

Dr. Shimoura reported these discoveries to Mr. Tritinger. Mr. Tritinger indicated that Ms. Gazmen's former employer, Chesapeake Orthopaedics ("Chesapeake"), had expressed similar issues with Ms. Gazmen, and suggested that Dr. Shimoura reach out to Chesapeake. In a subsequent conversation with Chesapeake's practice manager, Dr. Shimoura shared his concerns and learned that Chesapeake had, in fact, had similar problems.

Mr. Tritinger was aware that, in addition to her part-time work for the PA, Ms. Gazmen was also working part-time at an orthopedic practice known as OrthoMaryland. OrthoMaryland was part of Centers for Advanced Orthopaedics ("CAP"), a similar umbrella organization formed for orthopedic practices. Mr. Tritinger spoke with his counterpart at CAP, Dr. Nicholas Grosso, M.D., to inform him of Dr. Shimoura's concerns so that Dr. Grosso could, if he so chose, give OrthoMaryland a heads-up. Although there is no indication in the record that Dr. Grosso took any action as a result of this conversation, one month later, OrthoMaryland chose not to renew its contract with Ms. Gazmen. A friend of Ms. Gazmen who worked at OrthoMaryland testified that the company had concerns about Ms. Gazmen's management style.

Dr. Shimoura terminated Ms. Gazmen's employment on June 26, 2018.

In July 2018, the PA filed suit against Ms. Gazmen, alleging counts for constructive fraud and conversion.

Ms. Gazmen filed a counterclaim for unpaid wages under the Maryland Wage Payment and Collection Law. Later, Ms. Gazmen amended her counterclaim to add additional counts and parties. Specifically, ENT LLC was added as a defendant to Ms. Gazmen's unpaid wages claim, and Ms. Gazmen alleged additional counts for defamation, false light, and tortious interference with contracts and prospective advantage against Dr. Shimoura, the PA, Mr. Tritinger, and ENT LLC. The three intentional tort claims were each predicated on the conversations described above which, according to Ms. Gazmen, caused her reputational harm, a decline in health, and the termination of her employment with OrthoMaryland.

During discovery, Ms. Gazmen filed motions to compel, which counter-defendants opposed. The court denied portions of Ms. Gazmen's motions and granted others.

After discovery closed, all parties filed motions for summary judgment, which were denied. Ms. Gazmen¸ among other things, moved for partial summary judgment to strike the affirmative defenses asserted in response to her intentional tort claims.

Prior to trial, the counter-defendants filed a motion in limine to limit the scope of Ms. Gazmen's testimony and to bar her expert and three family members from testifying. The court granted these motions.

During trial, the court whittled down the claims through a series of rulings, as follows:

- The court granted the ENT LLC's motion for judgment on Ms. Gazmen's unpaid wages count;
- The court granted the counter-defendants' motion for judgment dismissing Ms. Gazmen's intentional tort claims; and
- The court granted Ms. Gazmen's motion for judgment on the PA's conversion count.

As a result, the only claims decided by the jury were the PA's claim for constructive fraud and Ms. Gazmen's claim for unpaid wages against the PA.

After a five-day trial, the jury awarded the PA damages in the amount of $936,423.34 for constructive fraud and awarded Ms. Gazmen damages in the amount of $1,923.08 for unpaid wages. The jury's verdict also found that Ms. Gazmen had committed constructive fraud with the requisite malice entitling the PA to punitive damages. The amount of punitive damages, however, was to be determined by the same jury in a separate phase of the trial. However, the parties reached a stipulation that obviated the need for the

punitive damages phase and resulted in the PA's withdrawal of its claim for punitive damages.[1]

On November 27, 2019, the court reduced the jury's findings to an Order of Judgment (the "Order of Judgment"), awarding the PA the net amount of $934,500.26. The clerk subsequently entered a separate paper called Notice of Recorded Judgment, that specified the amount due to the PA.

Ms. Gazmen timely appealed and presents the following questions for our review, which we have re-ordered to align with our discussion below:

1. Where the Order of Judgment and the Notice of Recorded Judgment entered by the trial court in this case did not adjudicate, or complete the adjudication of, all claims against all parties in, and to, this case, is there a final judgment that is appealable under Maryland Rules 2-601 or 2-602 or Courts and Judicial Proceedings Article §§ 12-301 or 12-303?

2. Did the trial court err in, at the conclusion of Gazmen's case at trial, denying Gazmen's Maryland Rule 2-519 motion for judgment as to Shimoura, P.A.'s constructive fraud count, where there was no evidence from which the jury could properly have found that Gazmen was the dominant party in a confidential relationship with Shimoura, P.A., and in granting the Counter-Defendants' Rule 2-519 motions relating to Gazmen's counterclaims, when there was evidence from which the jury could properly have found in her favor on those counterclaims?

3. Where the trial court failed to include an essential element of a constructive fraud claim in its instruction to the jury on Count One of Shimoura, P.A.'s amended complaint, did the trial court err?

4. Did the trial court err in denying Gazmen's motions to compel Shimoura, P.A., Shimoura, M.D., ENT Centers, and Tritinger to produce tax and financial documents and information to Gazmen?

[1] The PA agreed to waive its claim for punitive damages in return for certain commitments by Ms. Gazmen to furnish information regarding her assets and financial situation.

5. Did the trial court err in denying Gazmen's Celotex summary-judgment motions against Shimoura, P.A., Shimoura, M.D., ENT Centers, and Tritinger?

6. Did the trial court err in barring Gazmen from calling her expert forensic accountant, Richard L. Wolfe, from testifying about business, tax, and financial matters relating to the Shimoura, P.A., and ENT Centers, in barring Gazmen from testifying about the tax, business, and financial matters she discussed with Dr. Shimoura and Mr. Tritinger, and in barring Gazmen from calling at trial members of her family who were familiar with the distress and harm Gazmen suffered as a result of the intentional tort counterclaims that Gazmen pleaded in her Amended Counterclaim?

Further facts will be presented as warranted.

DISCUSSION

I.

FINAL JUDGMENT

Ms. Gazmen argues that the Order of Judgment entered by the Court on November 27, 2019 was not a final judgment under Maryland Rule 2-601. Ms. Gazmen insists that the order did not resolve all claims against all parties. Namely, she contends that the order failed to address her claim for unpaid wages against ENT LLC and the PA's claim for punitive damages against her. Thus, she concludes, no final judgment has been entered and her appeal must be dismissed. We find no merit to this argument.

"[A] final judgment exists only when the trial court intends an 'unqualified, final disposition of the matter of the controversy' that completely adjudicates all claims against all parties in the suit, and only when the trial court has followed certain procedural steps when entering a judgment in the record." *URS Corp. v. Fort Myer Construction Corp.*, 452 Md. 48, 65 (2017); *see also Spivery-Jones v. Receivership Estate of Trans Healthcare,*

Inc., 438 Md. 330, 353-54 (2014) ("A final judgment is an order that 'has the effect of putting a party out of court'"). Here, on its face, the Order of Judgment reflects the court's understanding that it fully and finally resolved all issues in the case.[2]

The entry of judgment is governed by Maryland Rule 2-601, which provides:

> **(a) Separate Document—Prompt Entry.**
> (1) Each judgment shall be set forth on a separate document and should include a statement of an allowance of costs as determined in conformance with Rule 2-603.
> (2) Upon a verdict of a jury or a decision by the court allowing recovery only of costs or a specified amount of money or denying all relief, the clerk shall forthwith prepare, sign, and enter the judgment, unless the court orders otherwise.
> (3) Upon a verdict of a jury or a decision by the court granting other relief, the court shall promptly review the form of the judgment presented and, if approved, sign it, and the clerk shall forthwith enter the judgment as approved and signed.
> (4) A judgment is effective only when so set forth and when entered as provided in section (b) of this Rule.
> (5) Unless the court orders otherwise, entry of the judgment shall not be delayed pending determination of the amount of costs.
>
> **(b) Applicability—Method of Entry—Availability to the Public.**
> (1) *Applicability*. Section (b) of this Rule applies to judgments entered on or after July 1, 2015.
> (2) *Entry*. The clerk shall enter a judgment by making an entry of it on the docket of the electronic case management system used by that court along with such description of the judgment as the clerk deems appropriate.
> (3) *Availability to the Public*. Unless shielding is required by law or court order, the docket entry and the date of the entry shall be available to the

[2] The question of whether an order is a final judgment gets trickier when the case involves multiple parties and multiple claims that are resolved in a piecemeal fashion either through motions practice or stipulation. There is a significant body of case law that addresses the finality of order in such contexts, including the primary case discussed by the parties, *Rohrbeck v. Rohrbeck*, 318 Md. 28 (1989). *Rohrbeck* does not involve the finality of a judgment entered on a jury verdict, and therefore does not help us with the analysis.

> public through the CaseSearch feature on the Judiciary website and in accordance with Rules 16-903 and 16-904.
>
> **(c) Recording and Indexing.** Promptly after entry, the clerk shall (1) record and index the judgment, except a judgment denying all relief without costs, in the judgment records of the court and (2) note on the docket the date the clerk sent copies of the judgment in accordance with Rule 1-324.
>
> **(d) Date of Judgment.** On or after July 1, 2015, regardless of the date a judgment was signed, the date of the judgment is the date that the clerk enters the judgment on the electronic case management system docket in accordance with section (b) of this Rule. The date of a judgment entered prior to July 1, 2015 is computed in accordance with the Rules in effect when the judgment was entered.

There are three requirements under this rule that are relevant here. The first requirement—found in subsection (a)(1)—is that the final judgment must be reflected in a "separate document." Here, the Order of Judgment is a separate paper, and thus satisfies that requirement.

The second and third requirements—both found in subsection (a)(2)—are that the judgment is both *signed* and *entered*. Under this subsection, the duty to prepare, sign, and enter the judgment rests with the clerk of the court, "unless the court orders otherwise." Md. Rule 2-601(a)(2). Here, the court *did* order otherwise, because after the jury's verdict was announced, the court instructed the clerk to refrain from entering a judgment and asked counsel for the PA to prepare a proposed final judgment.[3] Thus, under subsection (a)(2),

[3] The court instructed Shimoura PA's counsel to "run [the proposed judgment] by" Ms. Gazmen's counsel, and try to resolve any disagreements over its content before submitting it to the court. The record reflects no disagreement among the parties as to whether the final judgment submitted by the PA's counsel and entered by the court accurately stated the jury's verdict.

the judge (instead of the clerk) was permitted to sign the Order of Judgment because the court "order[ed] otherwise." The Order of Judgment, therefore, cleared the second Rule 2-601 hurdle—the signature requirement.

The third requirement for a proper final judgment—that it be *entered* by the clerk—was likewise satisfied. The entry of the judgment is governed by subsection (b)(2), which requires the clerk to "mak[e] an entry of [the judgment] on the docket of the electronic case management system used by that court along with such description of the judgment as the clerk deems appropriate." In accordance with that requirement, on November 27, 2019 at 2:41 pm, the clerk entered the judgment in the electronic case management system docket of the circuit court. The entry stated:

> Principal: $934,500.26
> Total Judgment: $934,500.26
> Total Judgment Index: $934,500.26
> Post-Judgment Interest: Legal Rate[4]

We will now turn to Ms. Gazmen's contention that the Order of Judgment does not mention her unpaid wages claim against ENT LLC or the PA's punitive damages claim against her. As discussed above, both claims had been resolved by the time the jury was sent to deliberate, as the court granted ENT LLC's motion for judgment on Ms. Gazmen's unpaid wages claim, and the PA withdrew its claim for punitive damages in exchange for Ms. Gazmen's agreement to produce discovery on her financial condition. So it's not as if

[4] There is no mention of costs in the judgment entry because the court did not require Ms. Gazmen to pay the court costs incurred by any other party; thus, she owes no money for court costs.

those claims had slipped through the cracks. But even if they had, the finality of the Order of Judgment would remain. We explain.

The various steps in a civil litigation can be seen as a multi-layered filtering process through which each claim and issue must pass before getting to the jury. There are numerous ways for a claim or issue to be filtered out of the case. Some claims and issues may be eliminated by, among other things, a motion to dismiss for failure to state a claim under Rule 2-322(b)(2), a summary judgment motion under Rule 2-501, a motion for judgment under Rule 2-519, or even by stipulation. Only the claims and issues that make it through the pretrial and trial gauntlets are submitted to the jury. That's when Rule 2-522, which governs the submission of issues to the jury, kicks in. Rule 2-522 states:

> **(a) Court Decision.** In a contested court trial, the judge, before or at the time judgment is entered, shall prepare and file or dictate into the record a brief statement of the reasons for the decision and the basis of determining any damages.
>
> **(b) Verdict.**
>
> (1) *Unanimity.* Unless the parties stipulate at any time that a verdict or finding of a stated majority shall be taken as the verdict or finding of the jury, the verdict of the jury shall be unanimous.
>
> (2) *Verdict Containing Written Findings.*
>
> (A) Court May Require. The court may require a jury to return a verdict in the form of written findings upon specific issues. For that purpose, the court may use any method of submitting the issues and requiring written findings as it deems appropriate, including the submission of written questions susceptible of brief answers or of written forms of the several special findings that might properly be made under the pleadings and evidence. The court shall instruct the jury as may be necessary to enable it to make its findings upon each issue.
>
> (B) Omission of Issue. If the court fails to submit any issue raised by the pleadings or by the evidence, all parties waive their right to a trial by jury of the issues omitted unless before the jury retires a party demands its submission to the jury. As to an issue omitted without

> such demand, the court may make a finding or, if it fails to do so, the finding shall be deemed to have been made in accordance with the judgment entered.
>
> (3) *Return in Open Court.* A verdict shall be returned in open court. If the verdict is in the form of written findings pursuant to subsection (b)(2) of this Rule, the verdict sheet shall be handed to and examined by the judge prior to the announcement of the verdict or any harkening or polling. If there is any material inconsistency between the verdict as announced and the written findings, the court shall inform the jury and the parties of the inconsistency and invite and consider, on the record, the parties' position on any response.
>
> (4) *Polling.* On request of a party or on the court's own initiative, the jury shall be polled before it is discharged. If the poll discloses that the jury, or stated majority, has not concurred in the verdict, the court may direct the jury to retire for further deliberations or may discharge the jury.
>
> (5) *Objections; Waiver.* No party may assign as error the submission of issues to the jury, the instructions of the court, or the refusal of the court to submit a requested issue unless the party objects on the record before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury.

The application of this rule in this case is straightforward. Ms. Gazmen contends that the Order of Judgment is not a final judgment because it left open her claim in Count I of her counterclaim, for unpaid wages against ENT LLC. However, that claim wasn't submitted to the jury, and for good reason: the court had previously dismissed it. Under subsection (b)(2)(B), if an issue is omitted from the verdict sheet and a party makes no demand for its inclusion, the right for the jury to resolve the issue is waived, and all such issues "shall be deemed to have been made in accordance with the judgment entered."

A similar analysis applies to the second reason offered by Ms. Gazmen that there was no final judgment—that the Order of Judgment left open the PA's claim for punitive damages against her. As noted above, when the jury returned a verdict finding that Ms.

Gazmen committed constructive fraud with actual malice, the amount of punitive damages was intended to be determined by the jury in the next phase of the trial. As it turned out, there was no next phase, because the PA agreed to abandon its request for punitive damages under its stipulation with Ms. Gazmen. As a result of that stipulation, the jury's work was complete when it returned its verdict. Thus, the issue of punitive damages is likewise "deemed to have been made in accordance with the judgment entered." *See Weichert Co. of Maryland v. Faust*, 419 Md. 306, 316 n.1 (2011); *see also MacBride v. Pishvaian*, 402 Md. 572, 580 (2007), *abrogated on other grounds by Litz v. Maryland Dep't of Env't*, 434 Md. 623 (2013).

In other words, a judgment entered pursuant to Rule 2-601 on the jury's verdict embraces and fully resolves the resolution of *every* issue that was decided, or could have been decided, by the jury or the court. Accordingly, the Order of Judgment fully and finally resolved all claims and issues in the case, including the unpaid wages claim against ENT LLC and the PA's claim for punitive damages.

II.

ANALYSIS OF MS. GAZMEN'S CLAIMS OF ERROR

We turn now to Ms. Gazmen's remaining contentions. As noted above, Ms. Gazmen contends that the court erred in (1) denying her motions to compel discovery to produce tax returns and other financial information; (2) denying her motion for partial summary judgment to strike the affirmative defenses asserted in response to her intentional tort claims; (3) barring testimony of certain witnesses; (4) denying her motion for judgment at the conclusion of the PA's case-in-chief on its constructive fraud count; (5) granting the

counter-defendants' Rule 2-519 motion that resulted in the dismissal of her intentional tort claims; and (6) its jury instruction for constructive fraud.

We will address these issues in an order slightly different than the order presented by Ms. Gazmen.

A.

CONSTRUCTIVE FRAUD

Ms. Gazmen contends that the trial court erroneously denied her motion for judgment on the PA's constructive fraud claim and erroneously instructed the jury on the elements of constructive fraud.

> In a jury trial, we review a trial court's denial of a motion for judgment if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question. Put another way, we will reverse the trial court's denial of a motion for judgment only if the facts and circumstances permit but a single inference as relates to the appellate issue presented.

Estate of Blair by Blair v. Austin, 469 Md. 1, 16-17 (2020) (cleaned up). We review the trial court's decision without deference. *Id.* at 17.

We review a trial court's denial of a proposed jury instruction for an abuse of discretion. *Collins v. National R.R. Passenger Corp.*, 417 Md. 217, 228 (2010). An instruction should be given if it is a correct statement of the law, supported by the evidence, and not otherwise fairly covered by other instructions. *Id.* at 229. The court's discretion is abused if it was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Gunning v. State*, 347 Md. 332, 351-52 (1997) (quotations omitted).

The instructions given by the trial court that related to the PA's constructive fraud claim were as follows:

An agent or employee has a fiduciary relationship to the principal or employer. This means that assignments must be carried out in good faith, and such persons must:

(1) make full disclosure to the principal of all facts material to the principal's, employer's or partner's decision to accept or reject the proposed transaction; and

(2) act with care, skill and diligence for the sole benefit of the principal, employer or partners.

To recover damages for constructive fraud, it must be shown by clear and convincing evidence that:

(1) The defendant owed a legal or equitable duty to the plaintiff, usually arising out of a relationship where trust and confidence exist, such [as] a fiduciary relationship or confidential relationship;

(2) The defendant breached that duty to the plaintiff by engaging in conduct that violated a confidence or injures the public interest;

(3) The plaintiff suffered damages as a result of the defendant's actions.

A confidential relationship is one in which two persons stand in such a relation to each other that the Plaintiff must necessarily repose trust and confidence in the good faith and integrity of the Defendant. Where a confidential relationship or fiduciary relationship exists, the ordinary duty of one to make inquiry to discover the existence of fraud is relaxed. The confiding party is under no duty to make inquiry to discover that the confidential relationship has been breached.

A fiduciary relationship exists when one party is under a duty to act or give advice for the benefit of another. A fiduciary duty requires a party with such responsibility to act solely in the interest of the beneficiary without any self-interest or self-dealing.

An agent's relationship to a principal is that of a fiduciary. An agent has a duty to disclose fully to her principal any information the principal may reasonably want to know.

Whenever a confidential or fiduciary relationship is established, the burden falls on the trusted party to show that her conduct was proper.

On appeal, Ms. Gazmen argues that the instructions were defective because they neglected to instruct the jury that, to find a confidential relationship, it must find that Ms. Gazmen exercised "dominion or influence" over Dr. Shimoura. In support of this proposition, Ms. Gazmen relies on *Chassels v. Krepps*, 235 Md. App. 1 (2017), which dealt with a claim of constructive fraud in a dispute involving family connections. She further argues that, as Dr. Shimoura's subordinate, she merely acted as an "intermediary" between Dr. Shimoura and the accounting and payroll service providers of the PA, and therefore she did not exercise the requisite dominion or influence over him or the PA to create a confidential relationship.

Ms. Gazmen's argument rests on an incomplete articulation of the governing legal principles. The phrase "dominion or influence" means, in the context of confidential relationships, that one party (here, Dr. Shimoura, on behalf of the PA) reposed his trust and confidence in the good faith and integrity of the other party (here, Ms. Gazmen). This concept was explained by Judge Nazarian in *Chassels*, 235 Md. App. at 16, and by the Court of Appeals in *Thompson v. UBS Fin. Servs., Inc.*, 443 Md. 47, 70 (2015), in which the Court of Appeals defined a confidential relationship in words that, in substance, the trial court in this case echoed when it instructed the jury. The Court of Appeals stated:

> For constructive fraud's purposes, a plaintiff and a defendant are in a confidential relationship where the defendant has gained the plaintiff's confidence and purports to act or advise with the plaintiff's interest in mind. Accordingly, a plaintiff and a defendant are in a confidential relationship only if the plaintiff depends on the defendant. For example, a plaintiff and a defendant are in a confidential relationship where the parties stand in such a relation to each other that the plaintiff must necessarily repose trust and confidence in the defendant's good faith and integrity. Thus, all fiduciary

> relationships are confidential relationships, but not all confidential relationships are fiduciary relationships[.]

Id. at 70–71 (cleaned up).

The jury instructions given in this case capture the essential component of a confidential relationship— "trust and confidence" placed by one party in the other. *Id.* at 70; *see also Porter v. Zuromski*, 195 Md. App. 361, 369 n.12 (2010) (quoting *Bass v. Smith*, 189 Md. 461, 469 (1948)) ("A confidential relationship exists 'where one party is under the dominion of another or where, under the circumstances, such party is justified in assuming that the other will not act in a manner inconsistent with his or her welfare.'") ; *Buxton v. Buxton*, 363 Md. 634, 654 (2001) (quoting 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 2.5 (4th ed. 1988)) ("A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind."). Accordingly, the instructions given to the jury on constructive fraud comported with Maryland law.[5]

In addition, there was substantial evidence that Dr. Shimoura placed significant trust and confidence in Ms. Gazmen's integrity, so much so that he delegated complete control

[5] Moreover, as noted above, the jury was instructed that a fiduciary relationship is a confidential relationship, which is a correct statement of the law. *Thompson*, 443 Md. at 70–71. And, the jury was instructed that employees owe employers fiduciary duties, which is also a correct statement of the law. *See Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 37-38 (1978). Here, there was no question that Ms. Gazmen owed fiduciary duties to the PA. As a matter of law, therefore, Ms. Gazmen was in a confidential relationship with Dr. Shimoura and the PA. Arguably, it would have been reversible error if the jury had *not* found the relationship to be a confidential one.

to her and provided virtually no supervision over the financial affairs of the PA. As Dr. Shimoura testified:

> This is somebody who helped me start my practice[.] I knew nothing about the business of medicine whatsoever, and I was told repeatedly, . . . you're the doctor[,] you take care of patients, I will take care of the business side of the practice.

Dr. Shimoura also stated that Ms. Gazmen "paid herself the checks[,]"and that he signed what she put in front of him. He additionally stated that he agreed to a higher salary for Ms. Gazmen because he "was grateful to not have to worry about handling payroll and bill paying on [his] own." Further, Dr. Shimoura testified that he considered Ms. Gazmen as "almost like another family member" and trusted her implicitly. And, as indicated above in footnote 5, the employer/employee relationship is a fiduciary and, hence, a confidential relationship. Accordingly, the trial court properly denied Ms. Gazmen's motion for judgment on the PA's constructive fraud claim.

B.

INTENTIONAL TORT CLAIMS

Ms. Gazmen argues that the trial court committed "plain error" in granting the motions for judgment made by the counter-defendants under Maryland Rule 2-519, which resulted in a dismissal of her intentional tort claims.

We review a trial court's granting of a motion for judgment without deference. *Bord v. Baltimore Cnty.*, 220 Md. App. 529, 543 (2014); *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 682-83 (2007). "A judge must grant a civil defendant's motion for judgment as a matter of law if the plaintiff failed to present evidence that could persuade

the jury of the elements of the tort by *a preponderance of the evidence*." *Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 270 (2004).

Ms. Gazmen's first argument is that the counter-defendants failed to state with particularity the basis for their Rule 2-519 motions. We disagree. Counsel painstakingly pointed out specific elements of each of the claims and explained why, in their view, the evidence fell short of making a prima facie case. The court patiently engaged with counsel from both sides on a count by count basis. In fact, Ms. Gazmen's counsel's arguments were directed squarely at the specific points raised by the counter-defendants' counsel. As such, Rule 2-519's particularity requirement was satisfied here.

Ms. Gazmen's next contention—that the counter-defendants didn't carry their burden of showing that there were insufficient facts to support her claims—fares no better. Ms. Gazmen had the burden of production and persuasion on her intentional tort claims, the former being the requirement that she "produce sufficient evidence on an issue to present a triable issue of fact and avoid a directed verdict." *Bd. of Trustees, Cmty. Coll. of Baltimore Cnty. v. Patient First Corp.*, 444 Md. 452, 469-70 (2015). The Rule 2-519 motion tested whether she met her burden of production. *See Giant Food, Inc. v. Booker*, 152 Md. App. 166, 177 (2003). As noted above, the counter-defendants identified the evidentiary gaps in Ms. Gazmen's case-in-chief. If Ms. Gazmen believes the trial court improperly granted the motion, the burden is on Ms. Gazmen to pinpoint the specific evidence in the record that the court overlooked in granting the motion. *See Terumo Medical Corp. v. Greenway*, 171 Md. App. 617, 623 (2006) ("A motion for judgment pursuant to Rule 2-519 . . . is concerned only with whether the plaintiff has met the burden

of *prima facie* production, as a matter of law, and not with the weight of the evidence, as a matter of fact."). It is not our job to scour the record to determine whether Ms. Gazmen made out her prima facie case on her intentional tort claims.[6] *See Ruffin Hotel Corp. of Maryland, Inc. v. Gasper*, 418 Md. 594, 618 (2011) ("[A]ppellate courts cannot be expected to either (1) search the record on appeal for facts that appear to support a party's position, or (2) search for the law that is applicable to the issue presented.").

C.

MOTIONS TO COMPEL

Ms. Gazmen argues that the trial court erred in denying her motions to compel the defendants to produce their tax returns and other financial documents. Ms. Gazmen does not explain how these rulings either impaired her ability to defend the constructive fraud claim or to survive the counter-defendants' Rule 2-519 motion on her intentional tort counterclaims. She also fails to identify the specific document requests and/or interrogatories at issue, let alone why the court's rulings as to such requests were an abuse of the court's discretion.[7] Again, it is not our responsibility to comb through each ruling

[6] To be sure, however, we did review the trial record in its entirety, and we agree with the trial court's finding that Ms. Gazmen failed to meet her burden of production. In any event, even if Ms. Gazmen had adduced enough evidence to survive the Rule 2-519 motion, in light of our affirmance of the jury's constructive fraud finding, it is difficult to see how her tort claims could still be viable. Each of those claims hinge, in one way or the other, on Ms. Gazmen's allegation that she was wrongly accused of misappropriating funds from the PA. The jury found that she did, in fact, misappropriate funds from the PA, and we are affirming that finding.

[7] Courts have broad discretion to resolve discovery disputes. *See Rose v. Rose*, 236 Md. App. 117, 131 (2018). Consequently, we review the denial of a motion to compel

to find something to support her claims. *See Ruffin Hotel*, 418 Md. at 618. For these reasons alone, her argument fails.[8]

D.

MS. GAZMEN'S MOTION FOR SUMMARY JUDGMENT

Ms. Gazmen argues that the trial court erred in not granting her "Celotex" summary judgment motion to essentially strike certain affirmative defenses alleged in response to her intentional tort claims. This argument has no merit for several reasons.

First, a trial court has the discretion to deny a motion for summary judgment even if it satisfies the requirements under Rule 2-501.[9] *Dashiell v. Meeks*, 396 Md. 149, 165 (2006). Ms. Gazmen has not persuaded us that in doing so here, the trial court abused its discretion.

Second, affirmative defenses to a claim only come into play if the party asserting the claim proves its case. *Armstrong v. Johnson Motor Lines, Inc.*, 12 Md. App. 492, 500 (1971) (defining affirmative defense as a defense that "directly or implicitly concedes the basic position of the opposing party, but which asserts that notwithstanding that concession

applying the abuse of discretion standard. *Gallagher Evelius & Jones, LLP v. Joppa Drive-Thru, Inc.*, 195 Md. App. 583, 597 (2010).

[8] Nonetheless, we did review the motions, responses, the transcripts, and the rulings, and it appears to us that the court carefully reviewed the motions and the discovery requests at issue and made findings amply supported by the record. Thus, we see no indication that the trial court abused its discretion.

[9] We also reviewed the summary judgment papers and it does not appear that Ms. Gazmen satisfied the requirements of Rule 2-501 by establishing the absence of a genuine dispute of material fact.

the opponent is not entitled to prevail because he is precluded for some other reason"). Even if the court had granted Ms. Gazmen's motions to strike the affirmative defenses, it would not have altered the outcome because her intentional tort claims did not survive the Rule 2-519 motion.

E.

MOTIONS IN LIMINE

1.

Mr. Wolfe's and Ms. Gazmen's Testimony

Ms. Gazmen argues that the trial court erred in granting the motions in limine that barred her and her designated expert, Richard L. Wolfe, from testifying to certain matters. Ms. Gazmen wanted to testify about her alleged confrontation with Dr. Shimoura over his own accounting improprieties. Ms. Gazmen also wanted to call Mr. Wolfe to testify on two topics: (1) the alleged improprieties and irregularities of Dr. Shimoura's financial and accounting practices in support of her own testimony on the subject; and (2) that any damages awarded to the PA should be reduced by the amount of money the PA saved in taxes as a result of her embezzlement. The court agreed with the counter-defendants' that Ms. Gazmen didn't raise the issue of Dr. Shimoura's alleged financial improprieties during discovery and therefore excluded such evidence.

Ms. Gazmen contends that the court erroneously sanctioned her because (1) there was no pretrial motion as required under *Butler v. S&S Partnership*, 435 Md. 635, 656-59 (2013); (2) the record does not establish the court's exercise of its discretion was guided by the factors enumerated in *Taliaferro v. State*, 295 Md. 376, 390-91 (1983); and (3) the

record does not evidence that the court "actually and clearly exercised its discretion," as required under *Schneider v. Little*, 206 Md. App. 414, 436 (2012), *reversed on other grounds*, 434 Md. 160 (2013).

In our view, unless such evidence would have helped Ms. Gazmen defend the constructive fraud claim or survive the Rule 2-519 motion on her intentional tort claims, the exclusion of such evidence would be a moot issue. When these issues were argued in the circuit court, Ms. Gazmen maintained that the evidence regarding Dr. Shimoura's financial improprieties supported her request for punitive damages for her intentional tort claims. Punitive damages became a non-issue when the court dismissed her intentional tort claims. Notably, Ms. Gazmen did not argue in the circuit court, and does not argue on appeal, that such evidence would have helped her defeat the Rule 2-519 motion on her intentional tort claims. Nor does she contend on appeal that such evidence would have helped her defend the constructive fraud claim. This evidentiary issue is, therefore, moot.[10]

We turn now to the other matter that Mr. Wolf was proffered to discuss—the tax ramifications of both Ms. Gazmen's misappropriation of funds and of any damages award to the PA. Apparently, Mr. Wolfe was of the belief that Ms. Gazmen's misappropriation would have reduced the PA's taxable income and thus reduced its tax obligations, and therefore in calculating the damages, the amount of such savings should be deducted from

[10] Nevertheless, we reviewed the motion papers and the relevant portions of the transcript and have determined that Ms. Gazmen's contention fails on the merits as well. It was clear that the court did not sua sponte exclude evidence and therefore didn't run afoul of *Butler*. It is also clear that the trial court painstakingly considered each relevant factor, even if it didn't mention each factor by name; indeed, the trial court's ruling consumed approximately seven pages of the transcript.

the amount she misappropriated. The court properly rejected this theory because the tax consequences of both her embezzlement and any recovery by the PA are matters between the PA and the taxing authorities. The notion that Ms. Gazmen is entitled to the benefit of the tax consequences of her misconduct is facially absurd. The court did not abuse its discretion by excluding such testimony from Mr. Wolfe.

2.

The Three Family Members' Testimony

Ms. Gazmen argues that the court erred excluding, as a discovery sanction, testimony from three of her family members about the alleged harm she suffered as a result of the purported intentional torts. However, Ms. Gazmen's intentional tort claims were dismissed on the counter-defendants' Rule 2-519 motion. Ms. Gazmen does not attempt to explain how the excluded testimony could have altered that result, and from our review of the record, we see no plausible basis that it could have done so. This issue is moot as well.[11]

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[11] We did, however, review the issue on its merits and perceive no abuse of discretion in the court's exclusion of such evidence as a discovery sanction.