Circuit Court for Montgomery County
Case No.: 396535V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2200

September Term, 2015

MICHAEL ARKIN, TRUSTEE OF THE MICHAEL ARKIN REVOCABLE TRUST

v.

ALICIA ARKIN, et al.

Meredith,
Nazarian,
Leahy,

JJ.

Opinion by Meredith, J.

Filed: August 23, 2018

In this appeal, "Michael Arkin, Trustee of the Michael Arkin Revocable Trust" ("the Trust"), appellant, contends that the Circuit Court for Montgomery County erred in finding that a transfer of $1 million, made in 2004 by the Trust to Michael Arkin's daughter-in-law Alicia Arkin ("Alicia"), appellee, and son Devin Arkin ("Devin") was a gift rather than a loan even though Devin and Alicia signed a promissory note. The Trust presents the following questions for our consideration, which we have reordered:

1. Did the Circuit Court err in finding [that] Alicia proved by clear and convincing evidence that notwithstanding the parties' execution of the Note and the Modification, the Loan secured thereby was in fact a valid gift?

2. Did the Circuit Court [commit reversible] err[or] in admitting and relying on inadmissible evidence in reaching its conclusions?

We conclude that there was no reversible error committed by the circuit court, and affirm.

FACTS AND PROCEDURAL HISTORY

The evidence at trial revealed the following pertinent facts. Michael Arkin ("Michael") is a successful businessman and real estate investor who, on October 6, 2000, created the Michael Arkin Revocable Trust, and named himself as the Settlor and Trustee. The Preamble to the Trust Agreement noted that Michael had three children: Jed Arkin ("Jed"), Devin Arkin, and Karen Arkin ("Karen"). The Arkin children were all adults at the time the Trust was created. The Trust Agreement gave Michael, as Trustee, "the sole and absolute discretion" to administer the Trust, including the power to make gifts and

forgive debts. When the Trust was established in 2000, it provided that, upon Michael's death, his three children would each receive one-third of the Trust corpus.[1]

In 2003, Michael's son Devin became engaged to marry Alicia. At that time, the couple lived in Baltimore while Devin finished a master's degree in education at Johns Hopkins. Alicia testified that Michael was "incredibly generous" to Devin and her. She testified that, even before she married Devin, Michael demonstrated his generosity by paying off her undergraduate student loans --- in excess of $50,000 --- because, he said, he did not want her and Devin to start out their lives together in debt.

In 2004, Devin and Alicia moved to Chicago and began house hunting. Devin was employed as a student teacher, and Alicia was in graduate school. Alicia testified that she "follow[ed] [Devin's] lead" in the house-hunting process, and assumed that they were looking at houses that he believed they could afford. The couple looked "at small houses, we [looked] at big houses," and eventually decided to buy a $960,000 lakefront house in Riverwoods, Illinois. Although the couple had little in the way of assets or income, Michael, through his Trust, provided the funds needed to purchase the house. On July 27, 2004, Michael caused his Trust to deposit $600,000 into an account titled in the joint names

[1] Jed's and Devin's shares were to be distributed to them outright. Karen's share was treated differently. She was to receive a distribution of ¼ of her share immediately upon Michael's death. The remaining ¾ of her share would be further held in trust; when she reached the age of 40, ½ of the trust corpus would be distributed to her, and then, when she reached the age of 50, the Trust would terminate, and the balance would be distributed to her. The reasons for the different treatment were not made explicit in the record, although there was evidence that, at that point in time, Karen, unlike her brothers, was unmarried.

of Michael, Devin and Alicia. On August 2, 2004, Michael caused his Trust to deposit an additional $400,000 into the joint account. On August 3, 2004, Devin and Alicia closed on the purchase of the lakefront house. And on August 12, 2004, Michael deposited money into the joint account to cover closing costs.

Prior to the time Michael transferred the funds that made it possible for Alicia and Devin to purchase the home, the couple signed a promissory note (the "purported note"), dated June 21, 2004, that reflected that Devin and Alicia had received $1,000,000.00 from the Trust, and promised to repay that amount, with interest, on or before June 20, 2013. The purported note provided that interest would accrue at the rate of 3.85% per annum, compounded semi-annually, "and such interest shall be due and payable on each anniversary hereof, with the entire unpaid balance hereof and accrued but unpaid interest thereon, being due and payable in full on June 20, 2013 ('Maturity Date')." Any failure by Devin and Alicia to make any payment under the purported note would constitute a "default event." In the event of any default, the interest rate would become 8%. There was no mortgage or deed of trust signed by Devin and Alicia granting the Trust a security interest in the property.

Alicia testified that it was her signature on the purported note dated June 21, 2004, although she also testified that she had "no recollection" of having signed it because, she explained, she was "given multiple things to sign over the years . . . and trusted Devin in everything I signed."

Devin and Alicia made no payments on the purported note in the ensuing years, although, under the payment terms of the document, the Trust was due to receive a payment of over $38,500 in accrued interest on or before June 21, 2005, and the failure of Devin and Alicia to make that initial payment of interest was a default that, in theory, resulted in the applicable interest rate increasing to 8% ($80,000 per annum). But no payments were tendered by Devin and Alicia, and no demands for payment were made by the Trust until 2014, a few weeks after Devin instituted divorce proceedings against Alicia.

Alicia testified that she was always under the impression that the $1,000,000 was a gift from Michael, her father-in-law, not a loan that would have to be repaid. She testified: "I had always believed this was a gift from [Devin's] dad." And she testified that she was reassured by Devin over the years that they would not have to repay the purchase money to his father:

> [BY APPELLANT'S COUNSEL]: . . . [S]o you're in the house, and is it fair to say that you and Devin never discussed whether or not you'd have to pay the money that his father provided for the house back to his father? Is that fair to say?
>
> [BY ALICIA]: No.
>
> Q. You did discuss it?
>
> A. I discussed it with Devin[;] in my mind, there was money. It was [--] there was not a promissory note, there was money. And in my mind, so I was in this beautiful house and this new marriage, starting a new family, and utter disbelief that this could be happening. It was just amazing. And I would check in with Devin from time to time, do we need to pay any of this back to your dad? This is unbelievable. And he would assure me, time and time, over and over again, no. No, we do not. I'd say, I can't believe how generous your dad is. And he would assure me time and time again that we did not have to pay the money back.

Alicia testified that, in addition to receiving assurances from Devin that they were not expected to pay the money back to Michael, she expressed her gratitude to her father-in-law many times for his generosity, explaining: "I thanked him for the house that we lived in. I thanked him for multiple things over the years. Just, his generosity, which to me spoke to the money and the lifestyle. I would say, the lifestyle. I can't believe that we're living like this." Alicia further testified about her interaction with Michael:

> Q [BY APPELLEE'S COUNSEL] You mentioned, previously, that you were [sic] express thanks to Michael Arkin over the years. Do you remember that?
>
> A [BY ALICIA ARKIN] Yes.
>
> Q What were you thanking him for?
>
> A Everything that he provided us. He was incredibly generous, and we, you know, I would thank him for money for the house for the lifestyle he provided our family. I, I really was genuinely touched and moved and it was amazing.
>
> Q Where would these conversations take place?
>
> A Multiple locations. Family vacations. In our kitchen when he'd come to visit. In his kitchen when I'd visit him.
>
> Q Did he ever respond to any of those thank yous?
>
> A Yes, he did. I mean –
>
> Q How would he do that?
>
> A Most of those occasions would be the big hugs and I love you, I love you too. And, you know, he was very proud of us in, you know, he used to actually say, you're my favorite daughter-in-law. And –
>
> Q Did Michael Arkin say anything to you in 2005 about paying off any debt?

A No.

Q Did Michael Arkin say anything to you in 2006 about paying off any debt?

A No.

[APPELLANT'S COUNSEL]: Objection. Your Honor, I'm going to object and I, our position is that the note's the note, the note doesn't call for any demand and that whether he requested any money at any time, during the process, is not relevant. So we'd want to – we have that objection.

THE COURT: All right. Overruled.

[APPELLANT'S COUNSEL]: Can we have a continuing objection as to that?

THE COURT: Sure.

* * *

Q [BY APPELLEE'S COUNSEL] In 2007, did Michael Arkin say anything about you paying back any alleged debt?

A [BY ALICIA ARKIN] No.

Q . . . From 2008 to June of 2013 did Michael Arkin say anything to you about paying a debt?

A No.

Alicia was also asked at trial: "In response to your thank yous to Michael Arkin, did he ever respond, ['']don't thank me, just pay me back['']?" She replied: "No."

Alicia testified that she would not have agreed to accept a million-dollar *loan* to purchase a house, because her "mindset was not about getting a big house. It was about

starting a family. And if I ever thought that I had to pay that money back, my priorities were to stay home with the kids."

Devin and Alicia eventually had two daughters, the older in 2005, the younger in 2008. By mutual agreement with Devin, Alicia -- who has a doctorate degree in clinical psychology -- did not work outside the home. At some point, Devin stopped teaching, began doing freelance work, and eventually opened his own advertising business. Alicia testified that Michael continued to be "incredibly generous" to the couple and their daughters, treating them to expensive vacations and other financial support.

But Alicia also testified that her marriage to Devin was long troubled, and that Devin "threatened divorce for about 10 years and [had] a lot of power and control issues." At some point in the later years of the marriage, Devin asked her to meet him at a Chase Bank branch "to sign something for his father." She went to the bank, where she was met by Devin and a notary, and she signed, without reading, a document Devin told her to sign.

She thought nothing more of the notarized document until the summer of 2014, when Devin's divorce threats became more concrete. After years of assuring her that there was no debt they had to repay to his father, Devin sent her a copy of the purported note and the document she signed at Chase Bank. That notarized document turned out to be a modification agreement extending the purported note. It was entered into evidence as Plaintiff's Exhibit 4. It was notarized on December 12, 2013, and purported to be effective as of June 19, 2013, which was the day before the date on which the original purported note would have matured. The modification extended the term of the purported note an

additional five years, until June 20, 2018. No other terms of the purported note were changed.

Alicia testified that she was "in shock" when she saw the purported note and modification document in the summer of 2014. She testified:

> [BY APPELLEE'S COUNSEL] Can you tell me when you first remember seeing that document [Plaintiff's Exhibit No. 1, the original purported note]?
>
> * * *
>
> [BY ALICIA ARKIN] . . . I recall seeing it during the divorce process.
>
> Q And when would that have been?
>
> A The summer of 2014, when we were starting to talk about, for real, getting divorced and there were all these threats that Devin was making about, we owe all this money and you're going to suffer financially if you don't cooperate with me in this divorce process. . . .
>
> * * *
>
> Q And what . . . was the occasion of why you saw that during the divorce process in the summer of 2014?
>
> A During those threats he finally said there's a note, and that's when I asked him, in an e-mail, to send me the note. Then he sent that to me and that's when I saw it, and the modification.
>
> Q What were your thoughts when you first saw it?
>
> A I was . . . in shock. . . .
>
> Q Why were you shocked?
>
> A Because I never thought that this would be the way things would go. I had always believed this was a gift from his dad and I was also just incredibly scared at the time that, you know, [Devin] was making these threats during the divorce. And [I] just couldn't believe that this day had come and that they would do this to me. And the, you know, loving

> relationship that I thought I had with his family, I was just in absolute disbelief.

Devin filed for divorce from Alicia in Lake County, Illinois, on August 4, 2014. The next month, on September 15, 2014, an attorney for the Trust sent a letter to Devin and Alicia, informing them that they were in default on the purported note and demanding that they immediately remit $2,224,787.63, the amount due (with accrued interest) through October 1, 2014. Neither Devin nor Alicia made any payment in response to the demand letter.

On October 15, 2014, the Trust filed a complaint in the Circuit Court for Montgomery County requesting a judgment against Devin and Alicia for the $1,000,000 principal, and accrued interest of $1,224,787, due on the promissory note dated June 21, 2004.

Alicia and Devin filed conflicting answers. Devin retained counsel and filed an answer in which Devin admitted all of the allegations made in the complaint, including liabiity. But Alicia contested the allegations in the complaint. On December 23, 2014, Alicia filed an answer; and an opposition to the Trust's motion for summary judgment.

Alicia also filed various claims against the Trust, Devin, and Michael individually. By the time the case went to trial on November 16, 2015, the claims that survived to be tried were the Trust's complaint on the purported note (and extension), and Alicia's

counterclaim seeking a declaration that the purported note was not enforceable because the $1,000,000 was a gift.[2]

At trial, the court heard live testimony from Alicia and Devin's brother Jed, as well as two videotaped depositions of Devin. Michael had had a stroke in 2012, and he did not attend the trial or testify via deposition.

At the conclusion of two days of a non-jury trial, the court rendered an oral opinion finding that the funds Michael provided to the couple through his Trust to enable them to purchase the lakefront house had been a gift, not a loan. The court's oral ruling from the bench consumes 36 pages of transcript, and concludes by asserting that the court's level of certainty in making the finding of a gift is "beyond a reasonable doubt." After providing a very long explanation, the court summarized its ruling:

> I am acting without the slightest reservation in this particular case. I am acting in light of overwhelming evidence. It causes me no pause, that **based on the overwhelming evidence in this case,** and all reasonable and rational inferences that could be drawn from that evidence, that **all the parties involved understood this to be a gift, that the donor Michael Arkin as trustee for the [T]rust intended at the time of the execution of the note that this was to be a gift**. There was a wink and a crossies at the time that this was signed, call it whatever you will, but there's no take backs now that the parties are involved in a divorce.
>
> [The] Court finds that because the one million was a gift, that both the original note and the subsequent so-called modification [are] unenforceable. And I grant judgment for the defendants Devin and Alicia Arkin as to the plaintiff's complaint.

[2] Alicia was also permitted to argue, as one theory of her counterclaim, that her signature on the modification had been procured by fraudulent means, or by way of intentional misrepresentation by Devin, but the court ultimately found for the Trust on that aspect of the counterclaim, and that ruling is not challenged on appeal.

> Further, as to the counterclaim, the Court grants the defendant Alicia Arkin's counterclaim, and grants the declaratory relief sought stating that the Court finds that the transaction at issue was a gift to Devin and Alicia Arkin and not a loan[,] and therefore the purported note and the purported modification were void (unintelligible).

(Emphasis added.)

This appeal followed.

STANDARD OF REVIEW

Pursuant to Maryland Rule 8-131(c):

> 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.

DISCUSSION

1. Sufficiency of the evidence

Both parties agree that *Rudo v. Karp*, 80 Md. App. 424, 429–30 (1989), is the controlling case that applies to a dispute whether a transfer of property was a gift or a loan. In *Rudo*, Chief Judge Richard Gilbert wrote for this Court:

> A gift may be defined as a gratuitous, voluntary transfer of real, personal, or mixed property made without consideration by one person to another. To constitute a valid gift under Maryland law, there must be:
>
> 1) A clear intent on the part of the donor;
>
> 2) A gratuitous, unconditional transfer of possession;
>
> 3) An immediate transfer of title;
>
> 4) A delivery of the title by the donor to the donee or his or her guardian or representative; and

> 5) An acceptance of the gift by the donee or his or her guardian or representative.
>
> *See Rogers v. Rogers*, 271 Md. 603, 607, 319 A.2d 119 (1974); *DiTommasi v. DiTommasi*, 27 Md. App. 241, 246, 340 A.2d 341 (1975).
>
> "[T]he donor must intend not only to deliver possession, but also to relinquish the right of dominion. If a gift has reference to a future time when it is to operate as a transfer, it is only a promise without consideration, and cannot be enforced in law or equity." *Berman v. Leckner*, 193 Md. 177, 182, 66 A.2d 392 (1949); *Whalen v. Milholland*, 89 Md. 199, 201, 43 A. 45 (1899). The intention of the donor may be expressed in words, actions, a combination thereof, or inferred from the circumstances. *Berman*, 193 Md. at 177, 66 A.2d 392.
>
> The law requires that the evidence demonstrate "that the donor *clearly* and *unmistakably* intended *permanently* to relinquish all interest in, and all control over the *res* which is the subject of the gift." *DiTommasi*, 27 Md. App. at 248, 340 A.2d 341 (emphasis in original). *See also Dorsey v. Dorsey*, 302 Md. 312, 318, 487 A.2d 1181 (1985). Once the gift is completed, it is irrevocable. The burden of proof rests on the donee to establish each and every element of a gift. *Dorsey*, 302 Md. at 318, 487 A.2d 1181; *Grant v. Zich*, 300 Md. 256, 275, 477 A.2d 1163 (1984).

(Emphasis in original.)

The main focus at trial was on the first element listed in *Rudo*: whether or not there was a clear intent on the part of the donor, Michael, to make a gift of Trust funds to Devin and Alicia. Although the Trust complains in its brief that, among other asserted errors, the trial court "erred because it declined to address whether Alicia proved by clear and convincing evidence the other four elements of a valid gift," counsel for the Trust told the trial judge during closing argument that the intention of the donor was the decisive issue. Counsel for the Trust argued:

> [W]e don't believe they've met their burden of proof that at the time . . . or ever that it was intended to be a gift. So . . . again, so we're in the elements of *Rudo,* you know, we're talking about intention because **clearly, there was, there was a transfer of the money, there was a transfer of title to the money, there was delivery of the money and there was an acceptance by, they're calling them, she's calling herself a donee, but there's an acceptance by the party claiming the gift of the money. So the rest of the elements really become subsumed in your decision of whether or not the intention of the party delivering the money was to make a gift** at that time under *Rudo* . . .

(Emphasis added.)

The Trust contends that the evidence to support Alicia's claim of a gift was insufficient to support the trial court's finding. Alicia, on the other hand contends that the trial court's unequivocal finding that the funds were provided as a gift was not clearly erroneous.

In *Rudo*, this Court cited *Berman v. Leckner*, 193 Md. 177, 182 (1949), a case in which the Court of Appeals stated: "The intention of the donor . . . need not be expressed in any particular form. It may be manifested by words or acts, or both, or may be inferred from the relation of the parties and the facts and surrounding circumstances of the case." *Accord Rudo*, 80 Md. App. at 430. There was ample evidence in this case regarding the relation of the parties and the facts and surrounding circumstances to support the trial judge's finding that the funds were intended to be a gift.

In her brief, Alicia highlights some of the evidence that supported the trial court's finding of a gift:

- Alicia's testimony that she thanked Michael for the house and the lifestyle he provided for her and Devin without him ever responding that they owed him money;

- Alicia asked Devin if he was sure they would not have to pay his dad back for the house and Devin assuring her they would not;

- Michael failed to ever ask for, or even mention, payment of the alleged debt during the nine-year term of the purported note in which Devin and Alicia never paid even a single dollar;

- Devin and Alicia never made a single payment;

- Michael continued to provide Devin and Alicia with hundreds of thousands of dollars, and lavish vacations, while they purportedly were in default and owed his Trust over $1 million;

- Michael paid off Alicia's student loans before their marriage because he did not want them to start off their life together in debt;

- Michael could not reasonably have expected Devin and Alicia to afford the $38,500 interest-only payment that would have been due in June 2005 given their employment status in June 2004;

- Michael, with sophisticated knowledge of the real estate business, did not record a deed of trust at the time the purported note was executed.

(Citations to record omitted.)

We agree with Alicia that there was ample evidence to support the trial court's finding that the $1 million dollars was intended to be a gift.

2. Evidentiary rulings

Appellant makes no meritorious argument that the evidence was insufficient to support the trial court's factual finding that the transfer was a gift rather than a loan. But appellant urges us to rule that the trial court committed reversible error by admitting several items of evidence that were not properly admissible. Appellant identifies Defendant's Exhibits 3, 5, and 7 as e-mails that were, appellant contends, inadmissible hearsay, and also

includes a footnote in the appellant's brief complaining that the admission of Defendant's Exhibits 4, 13, and 19 was error. As we shall explain, any error was harmless at most.

The first of these exhibits to be admitted at trial was Defendant's Exhibit 19, a chain of e-mails among Devin, his brother Jed, and Jeffrey Schwaber (an attorney for the Trust), dated November 5, 2013, to December 20, 2013. The "subject" line on the e-mails was "Devin's Promissory Note." In the earliest e-mail, Jed asked Schwaber to "put together a draft letter from my father to Devin and Alicia extending the loan for five years." After Schwaber sent a "proposed letter and accompanying note modification," a second e-mail from Jed asked Schwaber to "get rid of the 'seal' line on the signature page and add" a provision for a notary instead of witnesses. After revised documents were provided, an e-mail from Devin dated December 20, 2013, advised Schwaber that "we sent the signed agreement to my dad directly last week." Schwaber requested a copy, and Devin replied: "Attached." Defendant's Exhibit 13 was a similar chain of e-mails covering the same communications among Jed and Devin and Schwaber about an extension of the note.

These exhibits were offered during Jed's testimony. The objection asserted by counsel for the Trust to Defendant's Exhibit 19 was: "We object on relevance, Judge." Judges are given broad discretion to make rulings on relevance. We perceive no error in the trial judge's decision to overrule this objection. Moreover, at the time of these communications, Jed had been assisting Michael in Trust administration matters; Jed testified: "I assisted my father in preparing or communicating with a lawyer to have him prepare an extension to Devin's, Devin and Alicia's note for the loan on their house, in

November 2013." Consequently, Jed's statements in these documents were admissible pursuant to Rule 5-803(a).[3]

The next exhibit to be admitted was Defendant's Exhibit 5, which was a chain of e-mails regarding documentation for a loan that the Trust was going to make "Guardian" in November 2012. Participants in the chain were Jed, Devin, Michael, and attorney Steven Friedman. The document needed Devin's signature, and Jed asked Devin to "sign this, [and] have it witnessed by someone (probably not Alicia) and mail original to dad." Devin replied: "I don't mind Alicia knowing about this, and she won't pay attention to the substance anyway. Unless there's a reason you don't want her name on the document, it will be easier and faster to use her." Jed responded: "Okay with me."

[3] Maryland Rule 5-803(a) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(a) Statement by Party-Opponent.** A statement that is offered against a party and is:
>
> (1) The party's own statement, in either an individual or representative capacity;
> (2) A statement of which the party has manifested an adoption or belief in its truth;
> (3) A statement by a person authorized by the party to make a statement concerning the subject;
> (4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or
> (5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

When Exhibit 5 was offered during Jed's testimony, counsel for the Trust objected and explained: "[W]e believe [the statement by Devin] would be objectionable and excludable hearsay. It's a statement by Devin, who is not here." Alicia's counsel responded: "Devin's a party opponent." The court overruled the objection.

Although appellant contends that it was error to admit this statement, we conclude that, at the time Devin sent the e-mail, the documents themselves indicate that he *was* acting "as an agent or employee" of the Trust, and he made the statement "during the agency or employment relationship concerning a matter within the scope of the agency or employment." Accordingly, the trial judge did not err in admitting this exhibit.

Defendant's Exhibit 3 was an e-mail dated October 31, 2011, from Devin to his brother, Jed, discussing concerns about their parents. The portion of the e-mail that is the focus of appellant's objection is a comment made by Devin complaining about their father Michael:

> Dad's outrageous and borderline insane (actually, just lose the borderline) behavior regarding your alleged affair with Paula certainly seemed worthy of banishment. He's never apologized, never acknowledged his folly, yet you've somehow managed to see beyond it. While he's certainly much less of a risk when it comes to forwarding photos and such, he seems far more dangerous when it comes to doing real damage to your reputation when in the company of your friends and colleagues (as he did with me when **he ran his mouth at Peri's baby naming about the beautiful house he bought me**). . . .

(Emphasis added.)

Appellant objected that Devin's statement describing his father's behavior at the baby naming event was hearsay because (a) the e-mail was written by Devin

(who was not present at trial), and (b) the statement paraphrased something said by Michael. The court did not ask Alicia's counsel for a response, and admitted the exhibit.

Appellant argues that the trial court erred in admitting the out-of-court statement of Devin; Alicia asserts that statements of Devin were properly admitted under Maryland Rule 5-803(a) as statements of a party-opponent. Even though Alicia had, at one point during this litigation asserted a cross-claim against Devin, by the time the case was tried, Alicia's only party-opponent was the Trust. For some period of time from December 2012 to September 2015, Devin served as a co-trustee of the Trust, and statements that he made in a representative capacity during that time period could have come within the exception provided in Rule 5-803(a). But, Defendant's Exhibit 3 was dated October 31, 2011, before the date Devin served as a co-trustee; so it is not clear from the record that he was an agent or employee of the Trust on October 31, 2011; and in any event, the subject of the e-mails was not the business of the Trust. Further, we do not consider Rule 5-803(a)(5) because, even though Devin filed an answer admitting the allegations made by the Trust, it does not appear that Alicia argued that he was a coconspirator whose statements would be admissible under Rule 5-803(a)(5). Consequently, it appears that the court erred in admitting this bit of evidence contained in Defendant's Exhibit 3.

Defendant's Exhibit 7 is an e-mail from Devin to Alicia dated May 12, 2014. The Trust acknowledges in its brief that "the Circuit Court sustained the Trust's hearsay objection to DX 7, and excluded it. However, the Circuit Court then effectively circumvented and negated its own ruling by declining to strike from the record Alicia's counsel's verbatim recitation of the substance of DX 7 . . . ." It appears from the transcript that the only references to the content of Defendant's Exhibit 7 the court declined to strike was the part of the document that was mentioned by counsel during the portion of Devin's deposition that was played for the court. We perceive no error in that ruling.

Finally, appellant contends that the trial court erred in admitting Defendant's Exhibit 4, which was an e-mail dated January 3, 2013, from Jamie Hertz, Esq. (a co-counsel for the Trust) to Jed, advising Jed that the Trust had obtained summary judgment against Jed and his wife in the amount of $1,937,845.59. Jed forwarded the Hertz e-mail to Devin by e-mail, adding one sentence: "The noose tightens." Before Alicia's counsel offered Defendant's Exhibit 4, she had asked Jed if he had said in his e-mail to his brother, "The noose tightens." Jed conceded he had said that. There was no objection to that question, and no motion to strike Jed's answer. Counsel did subsequently object to the admission of Defendant's Exhibit 4, and counsel gave as reasons: "The relevance of this document and to the extent it's hearsay from Ms. Hertz, as well on top of that it's not, it's just not relevant to this matter what, if anything, happened in regard to the other matter. . . ." The statement

of Jed was already in evidence; and the substance of Ms. Hertz's e-mail was also already in evidence because Jed had already testified that his father had obtained a default judgment of over $2 million against him and his wife after Jed had filed for divorce. Because of the testimony already in the record at the time Alicia offered Defendant's Exhibit 4, any error in admitting the exhibit was harmless.

Although the Trust is correct in its assertion that a trial court has no discretion to admit hearsay over a timely objection unless it qualifies for an exception, *Bernadyn v. State*, 390 Md. 1, 8 (2005), the fact that the trial court may have erred in admitting Defendant's Exhibits 3 and 4 does not provide a basis for us to reverse the court's judgment in favor of Alicia. We deem the evidentiary rulings of which the Trust complains to be, at most, harmless error.

In *Brown v. Daniel Realty Co.*, 409 Md. 565 (2009), the Court of Appeals made plain that, in civil cases, an appellate court will not reverse a judgment based upon erroneous evidentiary rulings unless the party complaining of the rulings carries the burden of persuading the appellate court that the error or errors *probably* – and not merely *possibly* -- caused the court to reach a different judgment than it would have reached in the absence of those errors. Writing for the Court in *Brown*, *id*. at 583-84, Judge Harrell stated:

> Maryland Rule 5-103 provides, in pertinent part:
>
> > (a) Effect of erroneous ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling. . . .

> Thus, even if "manifestly wrong," we will not disturb an evidentiary ruling by a trial court if the error was harmless. *Crane v. Dunn*, 382 Md. 83, 91–92, 854 A.2d 1180, 1185 (2004). The party maintaining that error occurred has the burden of showing that the error complained of "likely . . . affected the verdict below." *Id*. "It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry. Courts are reluctant to set aside verdicts for errors in the admission or exclusion of evidence unless they cause substantial injustice." *Flores v. Bell*, 398 Md. 27, 34, 919 A.2d 716, 720 (2007) (quoting *Crane*, 382 Md. at 91–92, 854 A.2d at 1185).

Accord Zook v. Pesce, 438 Md. 232, 252 (2014) ("in a civil case, a petitioner must not only show error but must demonstrate that the error was prejudicial"); *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 219–20 (2011) (the burden is on an appellant to show that the trial court error is accompanied by prejudice); *Green v. McClintock*, 218 Md. App. 336, 366 (2014) ("even if the circuit court erred in allowing Nelson's testimony about the 2003 will, we would still affirm, because the testimony was cumulative and thus harmless"); *Goss v. Estate of Bertha Jennings*, 207 Md. App. 151, 167 (2012) (the challenged evidence "cannot reasonably be understood as the pivotal evidence that tipped the verdict in favor of the appellees. In short, assuming an error did occur, we conclude that it was harmless as a matter of law.").

We are not persuaded that, even if some, or even all, of these exhibits were erroneously admitted, there was prejudice to appellant. The trial court did not even mention Defendant's Exhibit 4 or Defendant's Exhibit 7 in its exhaustive (and emphatic) oral opinion. And the information in Defendant's Exhibit was repetitive of testimony that had come in through Jed without objection. The admission of Defendant's Exhibit 5 was

not prejudicial because both Devin and Alicia testified that Alicia regularly signed documents at his request without reading them. The court mentioned the general fact of the extension of the promissory note in rendering its opinion, but attached no special significance to Defendant's Exhibits 13 and 19, which were emails on that topic.

In sum, this is one of those cases in which, as the Court of Appeals held in *Fields v. State*, 395 Md. 758, 764 (2006), "[t]he collective effect of the other evidence in this case so outweighs any possible prejudice resulting from the admission of the questioned evidence that there is no reasonable possibility that the [judge] would have reached a different result had [the questioned] evidence been excluded." Accordingly, we affirm the judgment of the Circuit Court for Montgomery County.

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