Circuit Court for Montgomery County
Case No. 425227V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3408

September Term, 2018

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FRANK BUCOLO

v.

DIANA BUCOLO VAN DYKE

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Reed,
Wells,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Wells, J.

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Filed: July 2, 2020

Appellant, Frank Bucolo (Frank) sued his sister, appellee, Diana Bucolo-Van Dyke (Diana), as trustee of a trust that their father, Salvatore Bucolo (Salvatore), created in 2001.[1] The trust provided that when Salvatore died, the trust was to become irrevocable, and half of the trust property was to be held in a separate trust for Frank and the other half was to become Diana's outright. Later, while he was still living, Salvatore appointed Diana as the sole trustee. When Salvatore died, no trustee had been appointed for Frank's trust and the property remaining in Salvatore's trust had not been distributed per the trust's terms.

Suspicious that she might be mismanaging Salvatore's estate and trust, Frank sued Diana. He petitioned the court to appoint a trustee for his own trust, order an accounting of Salvatore's trust, and determine whether Diana negligently performed her duties as trustee.[2] Diana also petitioned the Circuit Court for Montgomery County to appoint a trustee for Frank's trust, which it did. That trustee, Robert McCarthy, Esq., settled with Diana all financial disputes that arose after Salvatore's death and secured assets to fund Frank's trust.

In separate rulings, the court declined to dismiss McCarthy as trustee of Frank's trust, as Frank requested, and, later, approved the settlement agreement between McCarthy and Diana. Finally, the court granted Diana's motion for summary judgment on all of the

[1] As all of the parties here have the same surname, we refer to them by their first names for ease of understanding. We mean no disrespect in doing so.

[2] Frank also asked the court to nullify amendments added in 2012 to the trust agreement. The parties consented to nullify the amendments, and the counts related to the modifications were dismissed with prejudice.

claims in Frank's lawsuit.

Frank appealed and raises five issues which we have condensed and rephrased for clarity:[3]

I. Did the circuit court abuse its discretion in: (1) appointing Robert McCarthy as the trustee of Frank's trust; (2) denying Frank's motion to remove McCarthy as trustee; and, (3) approving the settlement agreement reached between McCarthy and Diana?

II. Did the circuit court abuse its discretion in declining to sanction Diana for a supposed discovery violation?

III. Did the circuit court abuse its discretion in declining to disqualify Nancy Fax as counsel for Salvatore's trust because of a supposed conflict of interest?

For the reasons that follow, we answer each question in the negative and affirm.

## FACTS AND PROCEDURAL HISTORY

In 2001, Dr. Salvatore Bucolo, M.D. established the "Salvatore Bucolo 2001 Trust," which was a revocable trust that he created for himself. He appointed himself the initial

[3] In his brief, Frank presented the following questions:

(1) Whether the trial court erred by appointing a trustee, of its own choosing, for the Frank Bucolo Trust, thereby contravening the express intentions of the settlor that his son possess the right to choose the trustee?

(2) Whether the trial court erred in not removing the Trustee of the Frank Bucolo trust for breach of the Trustee's fiduciary duty to the beneficiary?

(3) Whether the trial court erred in approving the settlement recommended by the court appointed Trustee of the Frank Bucolo trust?

(4) Whether the trial court erred in denying Appellant's Motion for Sanctions regarding Appellee's failure to comply with a discovery order?

(5) Whether the trial court erred in denying Appellant's Motion to Disqualify Defense Counsel?

trustee.

The Salvatore Bucolo 2001 Trust (hereafter, "the 2001 Trust") had three main objectives. *First*, it created a trust for the benefit of Salvatore; he was free to use any of his property for any reason even if it exhausted the trust's income and principal. *Second*, after Salvatore's death, the trust was to become irrevocable. One-half of the trust property -- mostly real estate located in New Jersey -- was to go free and clear to Salvatore's daughter, Diana Bucolo-Van Dyke. *Third*, one-half of the trust property was to go into a trust for his son, Frank Bucolo ("Frank's Trust"), with the remainder, should Frank die without heirs, to Diana. The 2001 Trust required that Frank's Trust be held by a corporate fiduciary.

The 2001 Trust was amended twice in 2006. With the first amendment, Salvatore resigned as trustee, and he appointed the Bank of America and Diana as co-trustees, with Diana having tiebreaking authority. The first amendment to the Trust also allowed Frank to dismiss and choose a different institutional trustee for his trust. With the second amendment, Salvatore appointed Diana as the sole trustee of the 2001 Trust. Salvatore also appointed the financial institution, A.G. Edwards, to be trustee of Frank's Trust. The second 2006 amendment also permitted Frank to remove and appoint a corporate trustee of his trust.

Salvatore died on November 30, 2012. As the sole trustee, Diana was to "distribute the remaining principal and undistributed income, including any property received as a result of [Salvatore]'s death" to pay any of his outstanding debts and then distribute the remaining trust properties according to Salvatore's will: (1) the property at 375 New Dover

Road, Colonia, New Jersey to Diana; (2) the property at 483-485 New Brunswick Avenue and 436 Lawton Place in Perth Amboy, New Jersey to Diana; (3) the property at 479-481 New Brunswick Avenue in Perth Amboy, New Jersey to Frank's Trust; (4) 434 Lawton Place in Perth Amboy, New Jersey to Frank's Trust; and, (5) any other trust property was to distributed evenly between Diana and Frank's trust.

Unfortunately, by the time of Salvatore's death, A.G. Edwards had declined to be trustee of Frank's Trust; that trust remained without a trustee. Further, Diana maintained that she could not make distributions to Frank's Trust because of unforeseen circumstances. As it turns out, Salvatore had acquired several properties in Italy for which he failed to pay federal and State income taxes for several years. That tax debt needed to be resolved before any distributions could be made under the 2001 Trust. It is undisputed that Diana, as personal representative of Salvatore's estate, took the necessary steps to pay the estate's back taxes. Salvatore's failure to pay taxes on his Italian real estate holdings caused a ripple effect for Salvatore's estate, the 2001 Trust, Frank's Trust, and Diana's distribution from the 2001 Trust.

Because of the delay in funding his trust, and his suspicion that Diana was mismanaging Salvatore's estate, Frank sued Diana in the Circuit Court for Baltimore County on September 20, 2016.[4] In his complaint, Frank averred that Diana had, either

[4] Although the case was initiated in the Circuit Court for Baltimore County, *see* case number: 03-C-16-005872, by consent, it was transferred to the Circuit Court for Montgomery County.

intentionally or by omission, never funded Frank's Trust. That accusation was part of a broader claim that Diana, as trustee of the 2001 Trust, negligently performed her fiduciary duties. Additionally, in his suit Frank demanded Diana provide an accounting of the 2001 Trust. Finally, he wanted a trustee appointed to administer his trust.

Diana answered the complaint asserting that although she had the authority to distribute Frank's share of the 2001 Trust's assets to fund Frank's Trust, she had not done so because of the "ongoing issues related to [Salvatore's] estate." Despite these problems, Diana explained that she facilitated the transfer to Frank of at least $470,000 as a result of her resolution of the tax and estate issues surrounding Salvatore's Italian real properties. Additionally, Diana asked the circuit court to appoint a trustee for Frank's Trust and moved to join whomever the court appointed as trustee as a party to the litigation. Frank did not oppose either of Diana's requests.

On May 29, 2018, the Honorable Cheryl M. McCally heard Diana's request to appoint a trustee for Frank's Trust. After taking testimony and considering candidates from Diana and Frank, the court rejected the siblings' suggestions and chose Robert McCarthy, Esquire to be the trustee for Frank's Trust. The court denied a request to join McCarthy as a party, however.

In just over two months, McCarthy and Diana had reached a settlement on all issues regarding distributions from the 2001 Trust, including funding Frank's Trust. On August 3, 2018, Diana asked the court to approve the settlement and to dismiss Frank's complaint with prejudice. Frank opposed both motions and requested the court declare that he had the right to remove McCarthy as trustee of Frank's Trust.

The Honorable Ronald B. Rubin convened a hearing on September 19, 2018 to consider Frank's request for a declaratory judgment. After a hearing, Judge Rubin declined to give Frank declaratory relief and declined to remove McCarthy as trustee of Frank's Trust. Later, on October 4 and 5, Judge Rubin heard evidence on Diana's request to approve the settlement she had reached with McCarthy. At the hearing, Frank, Diana, and two forensic accountants (one for each sibling) testified. After taking the matter under advisement, on November 2, 2018, Judge Rubin delivered a ruling from the bench approving the settlement agreement. An order embodying court's the ruling was docketed on November 5, 2018.

Finally, on December 20, 2018, the Honorable Anne K. Albright heard Diana's motion for summary judgment. At the end of the hearing, the judge granted summary judgment in Diana's favor on all issues remaining in Frank's lawsuit. Frank filed a timely appeal. Additional information will be supplied, as necessary, below.

## DISCUSSION

### I. The Circuit Court's Appointment of a Trustee for Frank's Trust

#### A. The Circuit Court Did Not Err When It Appointed Robert McCarthy as Trustee of Frank's Trust

Frank argues that the circuit court exceeded its authority in appointing Robert McCarthy, Esquire, as trustee for Frank's Trust. Frank maintains that he asked the court to "modify **only** Article 8.2 of the 2001 Trust, permitting an 'individual trustee' in place of a 'corporate trustee'…. Nothing else." (emphasis in Frank's brief). Frank asserts that because this was his only request, the court's selection of McCarthy, and the court's refusal

to allow Frank to dismiss him, ran afoul of not only the express words of the 2001 Trust, but also Salvatore's intent.

Diana notes that although the 2001 Trust called for the appointment of a corporate trustee for Frank's Trust, no corporation would serve in that capacity. A. G. Edwards, First Union National Bank, Wells Fargo, and the Bryn Mawr Trust Company all declined to serve as trustee. In this situation, Diana argues, the court had a duty to appoint an individual to act as trustee for Frank's Trust, otherwise the trust would fail, and she could not make the distribution to her brother per their father's intentions.

The 2001 Trust agreement, as amended in 2006, provided:

> 8.3. Notwithstanding the forgoing, upon Grantor's death, A.G. EDWARDS TRUST COMPANY, F.S.B. shall serve as sole Trustee of any trust established for Grantor's son, FRANK BUCOLO, subject to the following provisions:
>
> > 8.3.1. During his lifetime, Grantor's son shall have the right at any time (1) to dismiss the corporate Trustee or any successor corporate Trustee, and (2) thereupon shall select and appoint as successor corporate Trustee an independent Qualified Corporate Fiduciary.
> >
> > ***
> >
> > 8.3.6. An independent Qualified Corporate Fiduciary is one that is not related or subordinate to Grantor's son (within the meaning of the Internal Revenue Code Section 672(c)) and who has no agreement, express or implied, with Grantor's son regarding the exercise of any power of a Trustee hereunder.

At the hearing on the appointment of a trustee for Frank's Trust, Diana suggested possible candidates to serve as trustee. Frank advanced his own contenders. Neither could agree

on a mutually acceptable person.

After the discussion, the court observed,

> that six years later almost, five and a half, there is no corporate trustee who is either willing or able to serve in the capacity as the settler intended in [Salvatore's] original trust and this amendment, the amended trust, which is the ones that is (sic) government because they have all declined that invitation, whether it be AG Edwards or First Union National Bank or whatever it[']s called, yes First Union National Bank, Bryn Mawr they've all said no thanks."

The court continued,

> I do find that it is not possible for a corporate trustee to be named despite everyone's collective efforts . . . . That leaves the court which is why we're all gathered here with my responsibility as an equitable matter to name a trustee and God help that person who's going to probably never speak to me again, to become the trustee to move this case forward."

The court then chose Robert McCarthy, Esquire to serve as trustee for Frank's Trust.

It is well-established that when interpreting the terms of a trust, a court must determine what the creator of the trust intended to accomplish in creating the trust. *In the Matter of the Albert G. Aaron Living Trust*, 457 Md. 699, 707 (2018) ("It is axiomatic that the intention of the settlor governs the interpretation of a trust agreement.") "'This expressed intention must be gathered from the language of the entire trust, particularly from the clause in dispute, read in the light of surrounding circumstances' at the time the trust was created." *Id.* (quoting *Leroy v. Kirk*, 262 Md. 276, 280 (1971)). Further, the Court of Appeals has held that "[t]he interpretation of a trust, like a will, is a legal determination, and we review *de novo* the lower court's decision." *Id.* (citing *Vito v. Grueff*, 453 Md. 88, 106 (2017)); *see, also, Pfeufer v. Cyphers*, 397 Md. 643, 648 (2007). "[W]e determine whether the circuit court was 'legally correct.'" *Id.* (quoting *Schisler v. State*, 394 Md.

519, 535 (2006); *Nesbit v. Gov't Emps. Ins. Co.*, 382 Md. 65, 72 (2004).

*Vito, supra*, is helpful. There, the circuit court considered modification of a trust when circumstances made it impossible to carry out the settlor's wishes precisely. Candace Vito was one of four beneficiaries of James Vito's trust. Vito, 453 Md. at 94-95. She sued two of the sibling-beneficiaries, claiming that they were mismanaging the trust's assets. *Id*. at 98. In retaliation, the three other sibling-beneficiaries amended James' trust to eliminate Candace as a trustee and beneficiary of the trust. *Id.* The circuit court found that Candace lost her standing to bring suit once she was no longer a potential beneficiary. *Id.* We reversed holding that amendments to trusts may not contravene the intent of settlor. *See Grueff v. Vito,* 229 Md. App. 353, 385 (2016) In affirming our decision, the Court of Appeals discussed a court's revisory power over a trust. The Court held that "courts may amend a trust if doing so would best effectuate the settlor's intent." *Vito*, 453 Md. at 105. There, the three siblings' amendments, divesting Candace of her status as a beneficiary, contravened the settlor's - their father James - intent. In so holding the Court cautioned that although,

> [c]ourts have the inherent power to modify a trust, [they may do so] so long as that authority is exercised with caution and not employed merely as a tool or device to enable beneficiaries to receive a greater income or use of trust property than was intended by the settlor. Before a court utilizes the inherent power of modification, it must first be satisfied that facts and circumstances exist that could not have been foreseen by the testator and that as a result of that lack of foresight, the beneficiary will suffer loss.

*Id*. (quoting *Probasco v. Clark*, 58 Md. App. 683, 687-88) (other internal citations omitted).

Along these same lines, we note that ancient precedent holds that a trust should not fail simply for lack of a trustee. In such an instance a court, in equity, may appoint a trustee

to carry out the settlor's intent. In *Druid Park Heights Co. of Baltimore v. Oettinger*, 53 Md. 46 (1880), the settlor named two friends in his will, Griffith and Keyworth, to be trustees of a testamentary trust created for the benefit of the settlor's wife, daughter, and others. *Id*. at 51-54. Soon after the settlor's death, Griffith passed away, and Keyworth declined to act as trustee. *Id*. at 55. The beneficiaries of the trust petitioned the Circuit Court for Baltimore City to appoint a substitute trustee, which the court did. *Id*. The Court of Appeals affirmed the circuit court stating,

> Now there was a trust, imperative in its character, and which he intended should be executed at all events whether the trustees he named failed to accept the trust or not; and it aids in getting the intent the testator had throughout the will. The exigencies of this trust might require the interposition of the court to execute it, and it is very clear that a court of equity would have power to prevent this provision failing, for want of a trustee to discharge the duties.

*Id*. at 58. *Accord, Second Nat. Bank v. Second Nat. Bank*, 171 Md. 547, 561 (1937) ("[T]here is power inherent in the court of equity having jurisdiction to appoint the trustees, who would also be incorporators, for equity will not allow a trust to fail for want of a trustee, and this is the effect of the chancellor's decree.")

Here, after hearing from both Frank and Diana, the court found that a modification of the 2001 Trust's provisions was necessary, because despite Salvatore's wishes, a corporate trustee would not serve as trustee for Frank's Trust. We think it reasonable that Salvatore could not have foreseen that First Union, A.G. Edwards, or Wells Fargo would all decline to act as a trustee. The circuit court correctly determined there was no dispute that Salvatore intended to create a trust for Frank. Therefore, we hold that it was appropriate for the circuit court to have modified the 2001 Trust under these circumstances

to ensure that Salvatore's intent was met, namely, that Frank received distributions from the 2001 Trust.

### B. The Circuit Court Properly Found that Frank Had No Authority to Remove McCarthy With or Without the Court's Approval

Frank requested the court declare that he had the authority under the terms of the 2001 Trust to fire McCarthy and appoint a trustee of his choosing. Frank argues that was Salvatore's intention. Frank cites the 2001 Trust document which says that Frank **"… shall have the right to remove, with or without cause at any time, any … Trustee of the Frank Bucolo Trust**." (emphasis in Frank's brief). This intent carried over into modifications of the Trust when the amendment stated that "[d]uring his life time **[Frank] shall have the right at any time (1) to dismiss the corporate Trustee or any successor corporate trustee, and (2) thereupon select and appoint a successor corporate Trustee** …." (emphasis in Frank's brief).

At the hearing before Judge Rubin, Frank advanced the same argument. In its oral ruling, the court first noted that the sole relief that both parties sought was the appointment of an individual trustee. No one requested, and the court did not change, any of the other terms of the 2001 Trust. As for Frank's request for declaratory relief, the court ruled as follows:

> . . . I looked at what was done and how we got here and I looked at the [2001] [T]rust and the Estates and Trusts Article carefully, and I've listened to counsel. I am going to enter as declaratory judgment declaring as follows because the Court finds that the plaintiff [Frank] does not have the authority to remove an individual trustee appointed by the Circuit Court under its authority in section 14.5-201 of the 2017 version of the Estates and

Trusts Article.

> The Court will also declare that at this time there is no basis to remove the individual trustee appointed by the Circuit Court on May 31, 2018 at docket entry 179.

As she did at the hearing before Judge Rubin, Diana argues that the expressed language in the 2001 Trust permitted Frank to remove a corporate trustee only. At the hearing, Diana's counsel gave the court a reason why Salvatore insisted that a corporate fiduciary be selected as a trustee for Frank and why Salvatore expressly refused to give Frank the power to dismiss an individual trustee.

> THE COURT: So, the [2001] [T]rust was amended with the party's (sic)[5] consent before my colleague [Judge McCalley] but you're saying the right to removal piece doesn't flow with that[?]
>
> [DIANA'S COUNSEL]: Right Your Honor. It wasn't our position is it was not amended (sic). In the trust instruments Salvatore clearly gave to Frank the right to remove a qualified corporate trustee which is defined.
>
> THE COURT: Right.
>
> [DIANA'S COUNSEL]: And to replace that trustee with another qualified corporate trustee. Salvatore did not want his son to have the right to pick an individual to serve as trustee because I believe Salvatore was concerned that his son might select a friend or somebody who would not necessarily do a good job. Whereas a qualified corporate trustee . . .
>
> THE COURT: I got it.
>
> [DIANA'S COUNSEL]: . . . always has to be careful.

We use the same principles articulated in *Aaron Living Trust*, *supra*, to guide our

[5] Recall that both Frank and Diana agreed to the appointment of an individual trustee for Frank. The transcripts should therefore read, "the parties'."

analysis, namely, that the settlor's "'expressed intention must be gathered from the language of the entire trust, particularly from the clause in dispute, read in the light of surrounding circumstances' at the time the trust was created." 457 Md. at 712 (citing *Pfeufer, supra*, 397 Md. at 649). We do so here to determine why Salvatore used the language that he did in the trust instruments to reach an equitable result based on the circumstances. *Leroy*, 262 Md. at 280.

Frank urges us to harmonize the court's decision to appoint an individual trustee with the 2001 Trust's language giving him unfettered authority to appoint his own trustee. In support, Frank cites *Vito*, *supra*., and the dissent in *Bandy v. Clancy*, 449 Md. 577, 613 (2016), where the issue was interpretation of author Tom Clancy's will for the purposes of determining how much the estate and Clancy's heirs owed in federal estate taxes. *Id*. at 579-80. Judge McDonald, writing for the dissent, sought adoption of a harmonizing approach to interpretation of the will so as "to harmonize its provisions and avoid conflicts, such that the interpretation gives effect to each provision wherever possible." *Id.*

We certainly accept the principle of harmonizing the language in a trust to avoid conflicts, but we should only do so to achieve the overall objectives of the settlor. As we see it, Salvatore had not contemplated the possibility that a corporate trustee would be unwilling to serve as trustee for Frank's Trust. Significantly, Salvatore's intentions on whether Frank could dismiss an individual trustee may be divined from the circumstances. Here, it is clear that Salvatore's intent was that Diana receive half of the residue of his estate outright, but Frank was to receive his half only through the aegis of a corporate trustee. Diana's counsel's explanation for why Salvatore expressly chose a corporate

trustee seems sound, namely that Salvatore wanted an experienced fiduciary, who would be beyond Frank's influence, to act as trustee. We conclude that the plain meaning of the 2001 Trust permitted Frank to change a corporate trustee only. The circuit court, therefore, did not err in denying Frank a declaration of the right to dismiss the individual trustee, McCarthy. Perhaps more importantly, we hold that the circumstances that the court mentioned, protracted litigation between the siblings and the inability to find a suitable corporate fiduciary, meant that if Frank got the relief he requested, it would have meant the likelihood of continued litigation. We conclude that, based on the circumstances that had arisen since Salvatore's death and Salvatore's likely intent, granting Frank the relief he requested would have frustrated Salvatore's goals: that Frank's Trust be funded, and that Frank enjoy the trust's benefits.

### C. The Circuit Court Properly Approved the Settlement McCarthy Reached with Diana

Frank argues that the court should not have approved the settlement agreement that Diana and McCarthy negotiated, chiefly because Frank believes that McCarthy could have done a better job in funding Frank's Trust. He argues that the court committed several erroneous factual findings in its recitation of facts before approving the settlement. Further, with respect to the experts who testified, Frank asserts that it was clearly erroneous for the court to have found Diana's expert more persuasive than Frank's. Finally, he urges us to find that in making several improvements to Salvatore's properties while Salvatore was still alive and could approve such expenditures, Diana's actions evinced a lack of fiduciary

duty to Frank.

All of these arguments are focused on the circuit court's fact-finding and do not address McCarthy's statutorily derived authority as trustee to settle the issues that arose after Salvatore's death. As Diana asserts in her brief, Frank's arguments only obliquely addresses whether McCarthy's actions were reasonable and executed with the requisite skill and caution that a trustee should exercise. She argues McCarthy acted diligently and carefully to resolve the legal and financial issues to Frank's benefit. In Diana's estimation, the court rightly approved the settlement. We agree.

The circuit conducted a hearing on the settlement agreement over three non-consecutive days, comprising over 660 transcript pages.[6] At the hearing, the court heard from Frank, Frank's forensic accounting expert, Bruce O'Hare, Diana, Diana's forensic accounting expert, Salvatore Ambrosino, and McCarthy.

McCarthy testified that immediately upon appointment as trustee, he began "marshalling the assets of the Frank Bucolo Trust." This included successfully getting Diana to deed to Frank's Trust the two pieces of revenue-generating New Jersey real estate that were to be the trust's main assets. In addition to demanding to know how much cash Diana had left over after settling Salvatore's tax problems (about $73,000.00), McCarthy considered "how far back upstream [he was] going to swim to go after Diana for monies." McCarthy hired accountants to go through the financial documents that Diana produced to get a sense of how Diana had managed her late father's estate. Based on his accountants'

[6] September 19, 2018, October 4, 2018, and November 2, 2018.

analysis, he determined that the record-keeping before 2010 was so sloppy that an audit was impossible. From his discussions with Frank, McCarthy discovered that that the case was "like a nasty custody case," with Frank constantly wanting more and harboring intensely negative feelings toward Diana.

> And kind of he would be constantly expanding of what he wanted, and basically go after Diana, and there's a lot of strong feelings against Diana. And it's very clear to me this litigation's never going to end. It's very clear that this is, that Frank would want to spend every penny he has, just so he can get Diana out of this whole, out of this case also. Which is fine for him to do with his money, but it's not fine for me, because I'm the trustee.

McCarthy started his analysis of the distributions to Frank from around 2010, while Salvatore was alive, and discovered that between 2010 and 2017, Salvatore and or the 2001 Trust, gave Diana approximately $158,000.00, while Frank received approximately $8,000.00. But McCarthy discovered that from 2013 forward, Frank received about $100,000.00 more than Diana. Further, McCarthy understood, despite what Frank thought, that Diana could claim a commission as trustee going back to 2001, when she was initially appointed co-trustee, and since Salvatore was alive until 2012, he (at least theoretically) could ratify any financial expenditures Diana made up to that time. Ultimately, he felt that Diana owed Frank $250,000.00.

> And so based on that, I then contacted, recognizing that Frank was going to continue this litigation until the cows came home, and he was never going to end this litigation, never ever. And recognizing that he was his, he talks of millions of dollars, which is, there is just no basis for it at this time. I think realistically Diana owes about 100, 150, realistically, if you held a gun to my head, if I had to sue her for the money, I'd wind up with about 150.
>
> Realistically, if Frank rang the bell and hit the homerun, he'd get about 100, 150, somewhere in there. So, 250, I have some numbers to back it up.

> But every assumption I make here can be challenged, every assumption I could make. And reasonable people could disagree, and reasonable people said no, you should have spent hundreds of thousands of dollars to go back in history, which the records aren't available from the banks because we know that, because Frank's attorney tried to get them from you [Diana's counsel], and served you with, and Lord knows the discovery disputes in this case went on forever.
>
> In light of that, I thought $250,000 was a, not only reasonable settlement but generous to Frank, and the best thing I had in my argument with you [Diana's counsel], my best argument against you is Frank's going to continue this litigation forever. I mean this is going to go on forever.

Diana settled with McCarthy for $250,000.00 in cash.

Section 14.5-203 of the Estates and Trusts (E&T) Article, Annotated Code of Maryland, (2017, 2019 Rep'l Vol.) states:

> (a)(1) A discretionary power conferred on the trustee to determine the benefits of a beneficiary is subject to judicial control to prevent misinterpretation or abuse of the discretion of the trustee.
>
> (2) The benefits to which a beneficiary distribution provision is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of accompanying standards, and on the settlor's purposes in granting the discretionary power and in creating the trust.
>
> (3) Notwithstanding the breadth of discretion granted to a trustee of a trust, including the use of the terms "absolute", "sole", or "uncontrolled", a trustee abuses the discretion of the trustee in exercising or failing to exercise a discretionary power if the trustee:
>
> (i) Acts dishonestly;
> (ii) Acts with an improper motive, even though not a dishonest motive;
> (iii) Fails to exercise the judgment of the trustee in accordance with the terms and purposes of the trust; or
> (iv) Acts beyond the bounds of reasonable

judgment.

(b) A court may review an action by a trustee under a support provision or a mandatory distribution provision in the trust.

Further, E&T § 14.5-804 governs how a trustee should administer the trust:

(a) A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust.

Exercise of reasonable care, skill, and caution

(b) In satisfying the standard described in subsection (a) of this section, the trustee shall exercise reasonable care, skill, and caution.

As trustee, McCarthy owes Frank, the trust's beneficiary, duties of care as a fiduciary, including "administration, prudence, and loyalty." *Hastings v. PNC Bank, NA*, 429 Md. 5, 25 (2012).

We agree with Judge Rubin's assessment, that "Mr. McCarthy is highly qualified and very experienced in fiduciary appointments including fiduciary litigation in Maryland Courts." The record illustrates that before approving the settlement, Judge Rubin reviewed all of the appropriate documents, including the 2001 Trust's account records from 2010 through 2017, heard the valuation testimony from forensic accounting experts O'Hare and Ambrosino, and found Diana's accountant's testimony to be more compelling. Despite what Frank argues, Judge Rubin, as the trier of fact, was free to accept all, part, or none of the testimony of any witness, including experts. *Edsall v. Huffaker*, 159 Md. App. 337, 343 (2004) ("Even though [one] expert's report stated that appellant sustained some injury and that some treatment was reasonable, the jury was not required to accept the expert's conclusions.") We perceive no error in the court's fact-finding. Additionally, the court personally assessed Frank and Diana. Judge Rubin found McCarthy's rationale for settling

to be reasonable. We conclude that circuit court did not abuse its discretion in approving the settlement that McCarthy and Diana reached.

## II. The Court Properly Declined to Sanction Diana for Her Alleged Failure to Comply with a Discovery Order

Frank appeals the circuit court's denial of sanctions for Diana's alleged failure to comply with the court's discovery order. As McCarthy mentioned in one of the passages quoted above, the siblings had engaged in protracted litigation over the 2001 Trust. Diana had maintained that Frank had no standing to demand that she give him an audit of her expenditures from the 2001 Trust. This fundamental disagreement spilled over into what documents Diana felt Frank was entitled to have in discovery. Frank demanded the court compel Diana to provide him with certain documents. The court agreed with Frank, signed an order to compel Diana. But the circuit court stayed the order pending Diana's appeal to this Court to overturn the order. We dismissed Diana's appeal as an untimely. *See, Frank Bucolo v. Diana Bucolo-Van Dyke*, No. 3408, September Term, 2018.

Later, the issue came to a head during the hearing to approve the settlement agreement before Judge Rubin. Diana produced two exhibits, which Frank claimed were the subject of the disputed discovery order. One exhibit was receipts from home improvement projects that Diana claimed she made to Salvatore's home in Laytonsville, Maryland during Salvatore's lifetime. The other exhibit concerned a $225,000.00 withdrawal Diana made on that day of Salvatore's death.

When confronted with the issue at the hearing, the court reviewed the docket entries and discovered that another judge had ordered Diana to produce the documents, but the

court stayed that order pending Diana's unsuccessful interlocutory appeal to this Court. This meant that Diana was not obligated to produce the documents at issue until our mandate issued: March 23, 2018. Diana's trial counsel told the court that they complied with the order to compel on April 3, 2018, and supplemented their responses on May 10 and 29, 2018. The court questioned how Diana could be in violation of the court's discovery order based on that sequence of events.

> THE COURT: But if they turned documents over that were responsive to what Judge Ryon directed them to do, seasonably after the Court of Special Appeals issued its mandate, how are they really, under Talafario v. State,[7] which is the five factors I have to balance before I exclude evidence, in violation?
>
> [FRANK'S COUNSEL]: Well …
>
> THE COURT: I guess I (sic) how are they in violation at all? I know that you don't like what happened, but you got an order from one of my colleagues and told them to go do that. They didn't like that. They took an appeal. They're entitled to do that. The filed a motion that I looked at and I granted it. Maybe I should have, maybe I shouldn't have. But I did. So you can't blame them. You can blame me, but you can't blame them.

After further argument from Frank's counsel, the court asked:

> THE COURT: Did you file a motion to reopen discovery or to re-notice [Diana's] deposition?
>
> [FRANK'S COUNSEL]: I did not because I was waiting for the court to rule on the motion for sanctions that was pending, I was hopeful that . . . because the court has, as you know, under the Talafaro case, the court has the discretion to, if in the interests of justice, to postpone the matter . .
> .
> THE COURT: Okay, so would you like a continuance of the trial to

[7] *Taliaferro v. State*, 295 Md. 376, 391 (1983)

depose her on these receipts?

[FRANK's COUNSEL]: No, I want this court to sanction them for their conduct. These documents could have been produced and should have been produced easily during the course of discovery, Your Honor, before discovery cut off in 2017 July.

THE COURT: Have you had them since May of 2018?

[FRANK'S COUNSEL]: I don't doubt that I got them - - not on the 16th, because they were mailed, but I probably got them on the 17th, 18th, or 19th. I don't deny that.

* * *

THE COURT: Okay, so how are you sandbagged? You've had them for four and a half months?

[FRANK'S COUNSEL]: Well, it wasn't four and a half months in May, Your Honor. It was two months.

THE COURT: Well, four and a half months before right this minute.

Frank's counsel demanded complete exclusion of the proffered documents. Ultimately, the court denied the request to exclude, finding that extreme sanction to be inappropriate based on the procedural history, as outlined. Frank's counsel had the documents for months prior to the hearing, and requested no other remedy, such as a postponement to conduct a deposition. Ultimately, the denied the motion to exclude stating: ". . . [A]s Judge Moylan would say, 'if you don't ask for anything other than a homerun and you don't get a single, you can't complain on appeal.'" We agree.

The Maryland Rules of Civil procedure govern discovery. *See* Maryland Rules §§ 2-401 through 2-434. In particular, these rules provide for sanctions when a party fails to

comply with a court order to provide discovery. Rule 2-433 ("Sanctions") states:

> Upon a motion filed under Rule 2-432(a), the court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including one or more of the following: (1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order; (2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence".

Additionally, determination of how a court should exercise its discretion to order sanctions is decided under what is known as the *Taliaferro* factors found in *Taliaferro, supra*. The factors are:

> (1) Was the disclosure violation technical or substantive?
> (2) When was the disclosure made by the party that was out of compliance, if ever?
> (3) What was the degree of prejudice to the party offering and the party opposing the introduction of the evidence?
> (4) Would any prejudice be reduced by continuing the proceedings?
> (5) How desirable is it to continue the proceedings for the purpose of curing the prejudice suffered?

The court's decision whether to order sanctions and the sanction imposed, if any, are reviewed for abuse of discretion. *Butler v. S & S Partnership*, 435 Md. 635, 650 (2013).

We conclude that the court's decision here, finding unwarranted the exclusion of the proffered documents, to be more than reasonable and hardly an abuse of discretion. As noted, the court made a careful examination of the procedural history of the motion to compel. After this review, the court found Diana had committed no sanctionable conduct because her compliance with the discovery order was stayed pending her interlocutory appeal. Once we dismissed that appeal, Diana timely complied with the discovery order. On this record we cannot fathom how Frank was prejudiced. We conclude that the court's

analysis is correct and perceive no error.

### III. The Circuit Court Properly Declined to Disqualify Counsel

Frank claims the circuit court committed reversable error when it denied a motion he filed on December 1, 2016 seeking to disqualify Nancy Fax, Esquire of the law firm Pasternak and Fidis. In an accompanying affidavit, Frank asserted that Fax represented Diana, in her capacity as trustee of the 2001 Trust. Frank maintained that sometime after Salvatore's death in 2012, Fax contacted him to say that he stood to inherit approximately $465,000.00 from Salvatore's IRA and life insurance. According to Frank, Fax told him that he would incur significant tax penalties if he took the sum outright, and it would be in his financial interests to transfer the money to a trust over which Diana would act as trustee. According to Frank, Fax prepared the necessary documents, including a disclaimer, but contends Fax never explained to him the potential conflict of interest because of her alleged representation of Diana.

In his brief, Frank argues that this interaction established an attorney-client relationship between him and Fax pursuant to the factors established in *Atty. Griev. Comm'n v. Brooke*, 374 Md. 155, 174 (2003): (1) a person (Frank) seeks advice from an attorney (Fax); (2) the advice sought pertains to matters within the attorney's professional competence; and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice.

Frank's claim fails for several reasons. First, his claim is unpreserved. As Diana points out in her brief, and we agree, after reviewing the record, Frank did not object to Diana's counsel during any of the proceedings. The only objection that Frank made was

the filing of the motion to disqualify on December 1, 2016. After that, he took no action to press his claim for disqualification, not raising a single objection to opposing counsel at any of the proceedings. Consequently, the issue unpreserved for our review. Maryland Rule 8-131(a) requires an appellant who contests a court's ruling or other error on appeal to press the court to rule on an objection. The failure to do so bars the appellant from obtaining review of the claimed error, as a matter of right. Further, reviewing an unpreserved claim of error is to be rarely exercised and only will be done to further, rather than undermine, the purposes of the rule. *Jones v. State*, 379 Md. 704, 714 (2004). In this instance, we decline to exercise our discretion to review for unpreserved error.

Even if we considered the merits of Frank's claim we would not have found that an attorney-client relationship resulted from his interactions with Fax, nor a conflict in that supposed relationship with Diana. We have mentioned the three criteria for establishing an attorney-client relationship. *Brooke, supra*, 374 Md. at 174.

Section 19-301.9 of the Maryland Rules of Professional Conduct state:

> (a) An attorney who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> (b) An attorney shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the attorney formerly was associated had previously represented a client:
>
> (1) Whose interests are materially adverse to that person; and
>
> (2) About whom the attorney had acquired information protected by Rules 19-301.6 (1.6) and 19-301.9(c) that is material to the matter; unless the former client gives informed

consent, confirmed in writing.

(c) An attorney who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) Use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) Reveal information relating to the representation except as these Rules would permit or require with respect to a client.

In addition, Maryland Rule 19-301.10 provides:

(a) While attorneys are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 19-301.7 (1.7) or 19-201.9 (1.9), unless the prohibition is based on a personal interest of the prohibited attorney and does not present a significant risk of materiality limiting the representation of the client by the remaining attorneys in the firm.

(b) When an attorney has terminated an association with a firm, the firm is not prohibited thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated attorney and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated attorney represented the client; and

(2) any attorney remaining in the firm has information protected by Rules 19-301.6 (1.6) and 19-301.9(c) (1.9) that is material to the matter.

(c) When an attorney becomes associated with a firm, no attorney associated in the firm shall knowingly represent a person in a matter in which the newly associated attorney is disqualified under Rule 19-301.9 (1.9) unless the personally disqualified attorney is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 19-301.7 (1.7).

As a threshold matter, we think the evidence shows that Frank did not seek out

Fax's advice, and more importantly, by his admission, once he received the information from Fax, he sought out separate counsel. We agree with Diana; Frank's actions do not show his reliance on anything that Fax told him. Additionally, we note that part of the basis for Frank's motion to disqualify rested on his mistaken belief that Fax's firm drafted the documents to create a second trust for Frank. Frank later admitted, on the record, that the trust documents were drafted by an attorney at a different law firm from Fax's. Further, Frank's claim that Fax had to be disqualified because she could have been a material witness became irrelevant as Fax, sadly, passed away before any of the hearings here took place. Despite Frank's insistence that an attorney-client relationship existed between him and Fax, we conclude that Frank has not established that he sought out and relied on anything that Fax told to him. We agree that she contacted him and discussed the possibility of establishing a second trust, but, after Frank consulted different counsel, a second trust was never created. On these facts, we cannot say that the circuit court erred in denying Frank's request to disqualify counsel.

**THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.**