SIXTH DIVISION
March 2, 2018

No. 1-17-1233
2018 IL App (1st) 171233-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EMILY KNEDLIK, Plaintiff and Counterdefendant-Appellant, v. VIVIAN HAUPT and LAURA WYSOCKI, Defendants and Counterplaintiffs-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. Nos. 14 L 9514 & 15 L 1726 (Consolidated) Honorable Peter Flynn, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's decision in favor of defendant who did not have fiduciary duty to plaintiff was proper; the trial court's decision, that defendant who had a fiduciary duty to plaintiff adequately rebutted the presumption of wrongdoing with clear and convincing evidence, was against the manifest weight of the evidence; judgment affirmed in part and reversed in part.

¶ 2 Plaintiff, Emily Knedlik, appeals the trial court's order that entered judgment in favor of defendants, Vivian Haupt and Laura Wysocki (collectively, defendants), after a bench trial. Knedlik brought suit against Haupt and Wysocki for, *inter alia*, breach of fiduciary duty and conversion. On appeal, Knedlik argues that the trial court's decision was against the manifest weight of the evidence because defendants failed to rebut with clear and convincing evidence the presumption of wrongdoing that arose when defendants withdrew $225,000 from two of

Knedlik's bank accounts after having been appointed successor agents for Knedlik's health care and property powers of attorney. We find that the trial court's decision was erroneous. Specifically, we find that judgment should have been entered in favor of Wysocki, but not in favor of Haupt, and thus we reverse the trial court's judgment in favor of defendant Haupt and affirm its judgment in favor of Wysocki.

¶ 3 BACKGROUND

¶ 4 Knedlik and Haupt are sisters who were estranged from one another for approximately 20 years beginning in 1992. At the time of the filing of this order, Knedlik was approximately 91 years old, and Haupt was approximately 77 years old. The sisters' estrangement ended in 2011 after Knedlik located Haupt's address online with the help of her neighbor, sent Haupt a few notes, and Haupt eventually responded. On March 6, 2011, Haupt and Wysocki, who is Haupt's daughter and Knedlik's niece, went to Knedlik's home in the 5300 block of South Christiana Avenue to visit her and her husband, James Knedlik[1] (collectively, the Knedliks). After their initial meeting, defendants continued to visit Knedlik once every few weeks. Subsequently, Haupt, Wysocki, and occasionally Wysocki's husband ran errands and helped Knedlik with various projects around the house.

¶ 5 In 2012, the Knedliks added Haupt and Wysocki as joint tenants to their bank accounts at Bank of America and Marquette Bank, so that defendants could help Knedlik and her husband pay their bills and withdraw money when needed because the Knedliks were not able to do so due to their advanced age. On September 18, 2012, Knedlik, with the assistance of an attorney, executed two power of attorney documents, one for health care and one for property. Her husband was appointed as her agent, and Haupt and Wysocki, respectively, were appointed as successor agents. Specifically, both power of attorney documents stated:

[1] James Knedlik was living at the time, but passed away on December 29, 2012.

> "If any agent named by me shall die, become incompetent, resign or refuse to accept the office of agent, I name the following (each to act alone and successively, in the order named) as successor(s) to such agent:
>
> Sister, Vivian Haupt, 7710 Greenway 1SW, Tinley Park, IL 60487
>
> Niece, Laura Jean Wysocki, 13336 S. LeClaire Ave., Crestwood, IL 60445[.]"

The power of attorney for property listed the powers granted to Knedlik's agent, including, *inter alia*, real estate transactions, financial institution transactions, stock and bond transactions, tangible personal property transactions, and borrowing transactions. Also on September 18, 2012, Knedlik, with an attorney's assistance, executed a last will and testament that named her husband as executor and Haupt and Wysocki, respectively, as successor executors.

¶ 6 In June 2013, Knedlik slipped and fell in her home, fracturing her right ankle. She initially spent a few days in the hospital and was then transferred to a nursing home, where she stayed until October 9, 2013. On August 12, 2013, Haupt withdrew $100,000 from Knedlik's Marquette Bank account, and $125,000 from Knedlik's Bank of America account. The parties dramatically disagree regarding the facts leading up to Haupt's withdrawal of the funds. Haupt claims Knedlik insisted that Haupt move closer to Wysocki to cut down on the time needed to travel to Knedlik's. Haupt further claims Knedlik gave permission for the withdrawals, which Knedlik vehemently denies. Haupt used the $225,000 that she withdrew to make a cash offer on a real estate purchase in Crestwood, which was accepted. The closing took place during the first week of October 2013.

¶ 7 Defendants continued to visit Knedlik and assist her after she returned home from the nursing home. In April 2014, defendants visited Knedlik for the last time. In July 2014,

defendants received a letter from Knedlik's attorney asking for the money that Haupt withdrew and used to purchase her Crestwood home.

¶ 8 On September 11, 2014, Knedlik filed a complaint in the circuit court of Cook County against defendants, individually and collectively, alleging the following counts: (1) breach of fiduciary duty, (2) willful and wanton conduct, (3) constructive trust, (4) accounting, (5) conversion, and (6) civil conspiracy. In a section labeled "common facts," Knedlik alleged that, "Based upon information and belief, [p]laintiff executed a [p]ower of [a]ttorney over [f]inances, naming Vivian Haupt as power of attorney or, in the alternative, [d]efendants were appointed as fiduciaries for the sole purpose of paying [p]laintiff's bills." In the count for breach of contract, Knedlik alleged that defendants breached their duty to her by, *inter alia*, failing to use Knedlik's funds for designated uses, withdrawing money from Knedlik's account without her permission, and using that money to purchase a home for Haupt without Knedlik's consent.

¶ 9 On January 13, 2015, defendants filed a counterclaim containing counts for declaratory relief and breach of contract. The basis of the counterclaim were allegations that in return for performing services for Knedlik during her life, Haupt and Wysocki would be written into Knedlik's estate plan so that they would inherit her property upon her death. On February 18, 2015, defendants' counterclaim was severed, renumbered as 15 L 1726, and transferred to the Chancery Division of the circuit court. Knedlik filed a motion to dismiss the counterclaim, or in the alternative for summary judgment, which, after a hearing, was entered and continued so that defendants could re-plead their counterclaim. Defendants filed their amended counterclaim on April 19, 2016. It contained counts for breach of contract, fraud, and unjust enrichment. On April 21, 2016, defendants filed a motion to consolidate Knedlik's claim with their counterclaim for purposes of trial, which was ultimately granted. Knedlik filed a motion to dismiss

defendants' amended counterclaim, which was granted in part and denied in part. The court dismissed the counts for fraud and unjust enrichment, and allowed the count for breach of contract to proceed.

¶ 10 Knedlik's claim and defendants' counterclaim proceeded to trial on January 30, 2017, and January 31, 2017. After opening statements, Knedlik called Haupt to testify as an adverse witness. Haupt testified that she and Wysocki first went to visit Knedlik on March 6, 2011. Haupt stated that Knedlik asked her to do things around the house for her, and confirmed that she, Wysocki, and Wysocki's husband were paid for their work. She testified that in September 2012, she went with Knedlik to an attorney in order to change her will and powers of attorney for health care and property to reflect Haupt and Wysocki as her agents and named beneficiaries. Haupt further confirmed that she was aware that Knedlik changed her will and powers of attorney for health care and property to include Haupt's and Wysocki's names. Haupt testified that she never put any money into the accounts to which Knedlik added her name. Haupt further testified that all of the checks that she wrote out of Knedlik's accounts were for Knedlik's expenses, with the exception of a one-time withdrawal for her own medical expenses. Haupt stated that she received Knedlik's permission before making the withdrawal for medical expenses, and "[i]f I didn't get her consent on anything, I didn't do it." Haupt also testified that she and Knedlik never agreed that the money in the accounts was a gift. When asked whether in August 2013, when she made the withdrawals in question, Haupt felt like the money in the accounts was hers, she responded, "I didn't want to think that way. That's not the kind of person I am. But, legally, it was that way."

¶ 11 Haupt testified that there was nothing in writing regarding the $225,000 withdrawals, and that everything was verbal. Haupt did not agree that Knedlik did not find out about the

withdrawals until seeing her bank statements, because Haupt told her at the nursing home at the beginning of August 2013, stating, "I explained very explicitly what I took out of one bank and what I took out of the other." Haupt stated: "I went to see her and I told her exactly what I did. Because she gave permission to [Wysocki], and I talked to her on the phone." The following exchange occurred between Haupt and Knedlik's counsel:

> "Q. And you never asked for permission yourself before you took the money, did you?
>
> A. I didn't ask her first.
>
> Q. Thank you.
>
> A. I asked her after the fact.
>
> Q. So you asked her after you took the money out?
>
> A. Yes. But it didn't make any difference either way, her or I. And it wasn't --
>
> Q. You answered the question, thank you --
>
> A. [U]ntil the 12th, August 12th, that I took the money out. It was two weeks later."

Haupt testified that, at the time she withdrew the money, she knew that Wysocki had asked Knedlik for permission because Wysocki had called her and told her everything was "fine." When asked whether Knedlik ever told her to "go ahead, take my $225,000," Haupt responded, "I'm trying to think how it all went. Because I called her up and I told her again what we were gonna do and what the plan was. And she said everything was fine. But she didn't literally say those kind of words." When asked again if this was before she took the money out, Haupt stated, "Yes. It was the same -- either that night or the next day." Shortly thereafter, the court asked

Haupt if she was sure that this conversation took place before she withdrew the money, and Haupt responded, "I'm a little bit mixed up now. Because all I know is I took it out on the 12th."

¶ 12 When asked how Knedlik responded when Haupt told her what she was going to do, Haupt testified that Knedlik "was kind of a little bit quiet, she didn't say too much about it. She didn't hardly show any emotion, actually. She just listened and that was it." When asked if Knedlik ever told her to go ahead and take the $225,000, Haupt responded that she did not, but that Knedlik "kept telling me and nagging me to move and move closer, move closer to [Wysocki]." When asked whether Knedlik ever said she had permission to take the $225,000 and go buy a house with it, Haupt responded "[n]ot in that manner, no." Further, when asked if Knedlik ever said yes in any form, Haupt answered, "[s]he didn't say no either." Haupt testified that she did not put Knedlik's name on the home that she purchased because she "didn't need to do that." Haupt also testified that Knedlik did not mention anything about her new home or ask for the money back until April 2014, and that when she asked, Haupt "had no way of giving her any money back." When asked if she ever physically struck Knedlik, Haupt answered that she did not.

¶ 13 When questioned by her own counsel, Haupt stated that the last time she saw Knedlik was with Wysocki in April 2014, at Knedlik's home. Haupt testified that her understanding was that she was a co-owner of the bank accounts at issue, and was told that by the bank teller. When asked whether she considered that money to be her money, she stated "[y]es, I guess. Yeah. I would think so. I mean, being a co[-]owner, actually, it is." Haupt testified that she never used the powers of attorney granted by Knedlik. Haupt further stated that Knedlik began to request that Haupt move closer to Wysocki in the beginning of 2013, and offered the money in the accounts to Haupt, saying "[h]elp yourself." Haupt testified that Knedlik asked her to move

"[t]oo many times to mention" and that Haupt would tell her she could not because of her husband, who needed her care.

¶ 14 Also on cross-examination, Haupt testified that she had personally asked Knedlik for the money to buy the house when she spoke with her on the phone on approximately July 30 or July 31. Haupt was also asked whether she had a meeting at the nursing home with Knedlik before she took the money out of the account and Haupt responded, "Yes." Haupt testified that the closing on her home purchase took place on October 4, 2013, and she could not recall whether she told Knedlik about the home after the closing. Haupt testified that due to the passing of her husband, she did not have any visits with Knedlik from November 29, 2013 to February 1, 2014, but would still speak on the phone with her. Haupt testified that their final visit was in April 2014, and on that date, Knedlik said, " 'I want my money,' or something like that." Haupt could not recall Knedlik previously asking for the money back. Haupt testified that she sold her condominium in May 2014, but took a "huge loss on it."

¶ 15 Wysocki was also called as an adverse witness by Knedlik's counsel. During her adverse direct examination, Wysocki testified that she and Haupt first visited Knedlik in 2011, and that she had not been in contact with her prior to that since 1992. Wyosocki stated that on their third visit, Knedlik began discussing adding Haupt to the bank accounts, and requested that Haupt and Wysocki help the Knedliks with errands and chores around the house. Wysocki testified that after Knedlik's husband passed away, Knedlik said that she would not be around to spend all the money that she had, and that Haupt should "help herself." Wysocki stated that after she and Haupt were added to the bank accounts, neither of them ever put any of their own money into those accounts. Wysocki testified that while Knedlik was in the nursing home, Haupt continued to pay her bills. Wysocki testified that she went to visit Knedlik in the nursing home sometime

around July 30 or 31, 2013, and "told her we were going to take her advice and make the move." Wysocki testified that the idea of Haupt moving closer to Wysocki was Knedlik's request, not Haupt's plan.

¶ 16 When asked whether Knedlik gave permission for Haupt to withdraw the money and use it to buy a house, Wysocki testified that she explained to Knedlik "what needed to be done" three times in order to "make sure that [Knedlik] really truly understood what I was saying." Wysocki stated that she and Haupt told Knedlik that they were going to "take her advice" in July 2013, specifically testifying that she told Knedlik the following:

> "My mom found a place that would be accommodating to her and my dad, and that in order to do this, we would have to take the money out of the bank account, because there was a contingency. And in order to get this house, that it would be the only one that she would consider [in] the area -- if this is what she wanted us to do, this is how it would have to happen."

Wysocki also testified that Knedlik had told her that Haupt's moving would be a "great benefit" to both Wysocki and Knedlik. Wysocki described Knedlik as being inflexible, and wanting "everything done in her own time frame." Wysocki testified that she "made sure it was perfectly clear that the money would be withdrawn from [Knedlik's] bank account, and she said that it would be fine. She never said no."

¶ 17 Referencing the deposition that Wysocki had previously sat for in this case, the following exchange occurred between Wysocki and Knedlik's counsel:

> "Q. You were asked this question about the end of July 2013 visit by you with Emily Knedlik at [the nursing home], and did you give this answer:
>
> (Record read as follows:

Question: And what did you say to Emily?)

***

Your answer at the deposition, beginning on line two. Quote:

(Continuing:

I told her that we were going to take her up on her suggestions for purchasing somewhere else that's closer to me like she wanted.

She went ahead and suggested, you know all the -- reiterated all the points, the positive points for moving and [w]hat they were.

And then I told her but in order to do that, you know, the relater -- or the [r]ealtor -- at that time said, you know, cash talks. You know, you should make an offer type of thing. And I told her then how we would go about doing it.

I didn't go into specifics of, like -- I just gave her a roundabout figure. At that time, around [$]200,000, you know, of what we would need in order to accomplish this.

And then I repeated the whole conversation as well, too. I wanted to make sure she understood.")

End of quote.

Was that the question, and was that the answer that you gave?

A. Yes.

Q. So in that answer you never asked Emily Knedlik specifically, verbally. 'Is it okay for us to borrow or take that money out of your accounts,' did you? Yes or no?

A. I did not give an exact dollar figure, no.

Q. You never asked permission, did you?

A. I asked her if it was okay."

¶ 18 Wysocki testified that after her July 2013 visit with Knedlik, she told Haupt that Knedlik said it was okay to withdraw the money for the house. When asked what body language or expressed words Knedlik's consent was based on, Wysocki responded, "[a] nod of head and saying 'okay.' " Wysocki stated that after Knedlik was released from the nursing home on October 9, 2013, they did not discuss the $225,000 withdrawal. Wysocki also denied that Knedlik ever called and demanded her money be returned, and stated that Knedlik never protested the funds being withdrawn until she and Haupt were at Knedlik's home for a visit in April 2014. When asked if it would be fair to describe Knedlik as "a very frugal, tight-fisted woman[,]" Wysocki responded, "Yes." She also agreed that Knedlik was not someone who would give money to people lightly.

¶ 19 During cross-examination by her counsel, Wysocki stated that the reason she and Haupt agreed to do work for the Knedliks was "because there was an agreement that if, you know, the things that we would do for her and help her with, and pay bills, and take care of them, that we would be in their will." Wysocki testified that when she and Haupt were added to the Knedliks' bank accounts, she thought it meant that "if one or both of them pass away, that we would inherit their estate." Wysocki also stated that Knedlik brought up Haupt moving closer to Wysocki various times from January through July 2013. Wysocki also testified that she never used the power of attorney that Knedlik granted her.

¶ 20 Wysocki further explained that from January to July 2013, Knedlik would, at least a few times per month, request that Haupt move closer "because the whole inconvenience of waiting for my mom to come to my house, and then for us to get settled with my father, and then proceed on to her house was too lengthy." When asked what Knedlik specifically said during the July

2013 conversation in which Wysocki told Knedlik that Haupt intended to take her advice and buy a house closer to Wysocki, Wysocki stated that Knedlik thought it was "a good idea" and that "it would be a benefit to her." Wysocki testified that Knedlik did not say yes, but "said that would be okay." Wysocki testified that she spoke clearly and slow enough for Knedlik to understand their conversation. Wysocki also clarified that in April 2014, when Knedlik asked Haupt for the money back, Wysocki was not in the same room as them but could hear them talking, and heard Haupt say that she did not have the money to give. Wysocki testified that it was after their last visit in April 2014 that she checked the bank accounts and saw that Knedlik had taken all of the money out and closed the accounts. Wysocki further testified that neither she nor Haupt knew whether Knedlik had changed her will.

¶ 21 Knedlik was previously given leave to sit for an evidence deposition due to her advanced age and physical condition, and thus the transcript of her March 28, 2016, evidence deposition was admitted into evidence. Knedlik testified that at the time of her deposition, she was wheelchair-bound and had been for about one year. She also testified that she had a very good memory, and that any medication she was taking did not affect her ability to testify. Knedlik stated that she and Haupt reconciled after Knedlik sent a note, requesting that Haupt visit her before she died. When asked why she named Haupt (and then Wysocki) as her successor power of attorney, Knedlik replied that she needed someone "to take care of the assets and to pay my bills" because "I was not capable of paying my bills, going to the bank, to pay phone, my gas, electric, so I named her as power of attorney." Knedlik stated that her intent in naming defendants as her power of attorney was to have them pay her bills. She also stated that she did not intend to name Haupt as the co-owner of the bank accounts at issue.

¶ 22 When asked whether she gave Haupt permission to withdraw $225,000 from Marquette Bank or Bank of America to purchase a home, Knedlik responded "[a]bsolutely not, no permission whatsoever." She testified that they had talked about it, but that she never gave permission and they had nothing in writing. Knedlik stated that she demanded her money back "every time [Haupt] paid a visit[,]" and that she would say "how about my money? When are you going to put it back into the account." Knedlik explained that Haupt would not give an answer and ignored her. Knedlik further testified that Haupt also told her that she would get the money back when she sold her condominium. Knedlik testified that on March 27, 2013, when she asked for her money back, Haupt struck Knedlik on her back and head with her hands approximately four times. Knedlik's counsel showed her a note dated March 27, 2013, stating, "As of this day, I promise Vivian that I will make no changes in my will." Knedlik explained that she remembered making the note on "the day that we had the fight and in order to get together and make up." Knedlik testified that she did not become aware of Haupt's withdrawals from her bank accounts until she got her monthly statements when she returned home from the nursing home in October 2013. Knedlik testified that neither Haupt nor Wysocki ever mentioned the withdrawals to her while she was in the nursing home. When asked if she told Haupt that she could take the $225,000 in exchange for Haupt and Wysocki helping take care of her house and doing her chores, Knedlik responded that she did not, and that they were always compensated for any job that was done.

¶ 23 During cross-examination, Knedlik confirmed that the note dated March 27, 2013, was the "make-up letter after she beat me up." Defendants' counsel then asked Knedlik whether she realized the note was written five months before Haupt took the money. Knedlik answered,

"That must have been during an altercation again, because all we did when she came over here is fight."

¶ 24 On January 31, 2017, the trial court entered an order requiring the parties to submit their trial briefs by March 16, 2017, and setting closing arguments for March 28, 2017. The record on appeal only contains defendants' closing brief after trial, and thus we are unsure whether Knedlik filed one. The March 28 date was stricken and re-scheduled to April 6, 2017. On that date, the court entered an order stating that closing arguments had been presented to the court. However, we are unaware of what was argued because the record on appeal does not contain a transcript from that date.

¶ 25 The trial court orally delivered its ruling on May 5, 2017. The court began its ruling by recognizing that Haupt and Wysocki were joint tenants on Knedlik's bank accounts, and "considered themselves *** to be convenience parties on those bank accounts, who had been placed on the bank accounts so that, on Ms. Knedlik's behalf, they could carry out things at Ms. Knedlik's request and direction." The court then made various credibility determinations. The court found credible Haupt and Wysocki's testimony regarding Knedlik's "frequent importuning that Ms. Haupt should move closer to her daughter so that the two of them could attend more promptly to Ms. Knedlik's requirements." The court did not find credible Knedlik's testimony that she did not know anything about Haupt's real estate purchase until she returned home from the nursing home in October 2013, because "[i]f a person discovers when she gets back home and looks at her bank statements that nearly a quarter of a million dollars has gone missing, one would expect her to take some immediate steps. *** But it is undisputed here that Ms. Knedlik did nothing of the sort. She waited for nearly eight months." He also found Knedlik's testimony that she repeatedly complained to defendants to not be credible, specifically stating, "Had Ms.

Knedlik acted in October or within a reasonable distance of October to remove them from the bank accounts and then demand her money back, her testimony might be credible."

¶ 26 As to defendants' credibility on the issue of whether Knedlik gave her permission for the withdrawals, the court found that because their testimony was not "entirely consistent in the precise details of what Ms. Knedlik said, ***, that makes the testimony more credible, not less[,]" reasoning that "it gave the clear impression that they had not sat down beforehand in trying to come up with a precisely dovetailing story." The court again stressed that "[i]t just doesn't make sense" that it took Knedlik eight months to remedy the allegedly stolen funds. Instead, the court opined that "[w]hat appears to the [c]ourt to be far more probable is that Ms. Knedlik, who had before originally reaching out to Ms. Haupt, had another relative who was performing a similar function or set of functions for Ms. Knedlik, in deciding she didn't like the other relative, went through essentially the same disenchantment with Ms. Haupt and Ms. Wysocki." Thus, the court stated its belief: "I think [Knedlik] agreed to the request of Ms. Haupt and Ms. Wysocki that they acquire the residence with funds from Ms. Knedlik's account." The court also held that because Wysocki did not obtain any interest in the residence that Haupt purchased, or in the funds used to buy it, then judgment was to be entered in favor of Wysocki.

¶ 27 The court then addressed the issue of whether Haupt and Wysocki were fiduciaries for Knedlik, and if so, then they must rebut the presumption of fraud that arises when a fiduciary engages in a transaction that benefits the fiduciary. The court stated, "The evidence was that Ms. Haupt and Ms. Wysocki held powers of attorney. There is little to no evidence that they ever exercised the powers of attorney, but it is a fact that they had them." Nonetheless, the court recognized that "it can be said that there is a presumption of fraud arising from the fact that they had powers of attorney, not that the [powers of attorney] were ever exercised in connection with

any of the disputes here." The court explained its position that it believed the "better view that the presumption of fraud arising from the existence of the fiduciary relationship applies only to transactions within the fiduciary relationship." The court relied on *Stahling v. Koehler*, 2013 IL App (4th) 120271, and stated, "I think it is important to recognize that the powers of attorney which make an appearance in the record had nothing to do on anybody's testimony with the house or residence transaction with which we are presently concerned." The court further explained that Haupt and Wysocki's status as cosignatories on Knedlik's bank accounts did not create the presumption of their role as fiduciary, and to recognize as much would be "stretching that presumption way farther *** than the case law would warrant."

¶ 28 Assuming that a fiduciary relationship existed here, the court recognized that defendants must offer clear and convincing proof that they acted in good faith and did not betray Knedlik's confidence, specifically stating that defendants were required to show "that the transaction in question was the decision of the principal, not of the fiduciary." The court stated:

> "I conclude *** that the testimony offered by Ms. Haupt and Ms. Wysocki is convincing and clear that Ms. Knedlik was informed of what Ms. Haupt and Ms. Wysocki desired to do to acquire a residence which met Ms. Knedlik's desire that Ms. Haupt be closer, and that Ms. Knedlik consented to that transaction. This was pretty much by telephone conversation."

Thus, the court determined that defendants sufficiently overcame the presumption of wrongdoing.

¶ 29 Regarding defendants' counterclaim, the court determined that Knedlik's promise to compensate defendants for their services by naming them in her will was essentially a lifetime contract that must be in writing in order to be irrevocable. Here, there was no written contract

and Knedlik, in fact, revoked any agreement in May 2014. Thus, the court ruled in favor of Knedlik on defendants' counterclaim for breach of contract.

¶ 30 The court's May 5, 2017, order stated:

> "This matter coming to be heard for the court's ruling after trial, for the reasons the court gave in open court, before the court reporter, it is hereby ordered: (1) as for Emily Knedlik's complaint, judgment is entered in favor or Vivian Haupt and Laura Wysocki; Knedlik's complaint is hereby dismissed[,] (2) Vivian Haupt and Laura Wysocki's counterclaim is dismissed; judgment is entered in favor of Emily Knedlik[,] (3) [t]his is a final and appealable order."

¶ 31 Knedlik filed her timely notice of appeal on May 16, 2017. We note that defendants did not appeal the judgment on their counterclaim, and thus we do not review the court's decision on that issue.

¶ 32 ANALYSIS

¶ 33 A trial court's decision after a bench trial is reviewed to determine if the judgment is against the manifest weight of the evidence. *Northwestern Memorial Hospital v. Sharif*, 2014 IL App (1st) 133008, ¶ 25. "A judgment is against the manifest weight of the evidence when it appears from the record that the judgment is arbitrary, unreasonable, not based on evidence, or the opposite conclusion is apparent." *Id.*

¶ 34 Bank Accounts

¶ 35 Knedlik first argues that the bank accounts from which Haupt withdrew the $225,000 at issue were convenience accounts, not *inter vivos* gifts. "Where a creator establishes a joint tenancy account by contributing all of the funds and naming himself and another person as joint tenants, a presumption arises that the creator has made a valid *inter vivos* gift to the second

tenant." *Vitacco v. Eckberg*, 271 Ill. App. 3d 408, 411-12 (1995). In order to rebut that presumption, a party must introduce clear and convincing evidence that the account was established as a convenience account. *Id.* at 412. Here, the trial court found that Haupt and Wysocki "considered themselves *** to be convenience parties on those bank accounts, who had been placed on the bank accounts so that, on Ms. Knedlik's behalf, they could carry out things at Ms. Knedlik's request and direction." Although the trial court's statement only takes into account defendants' subjective intent and does not definitively hold that the accounts were convenience accounts, defendants' brief concedes that the accounts were convenience accounts. Further, Knedlik testified that she "needed someone to pay [her] bills," and never intended to name Haupt as a joint owner of her bank accounts. As a result, we find the accounts at issue were convenience accounts, not *inter vivos* gifts.

¶ 36 Breach of Fiduciary Duty

¶ 37 Knedlik argues that defendants breached their fiduciary duty and the trial court improperly determined that defendants sufficiently rebutted the presumption of wrongdoing by clear and convincing evidence. Knedlik also argues that the trial court erred in finding that defendants were not liable for conversion. Although Knedlik's complaint contains six counts, both Knedlik's and defendants' appellate briefs only address the counts for fiduciary duty and conversion, and thus we limit our review on appeal to those two counts.

¶ 38 To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty, the breach of that duty, and damages proximately caused therefrom. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). We address each element in turn.

¶ 39 We first determine whether a fiduciary duty existed. "A confidential or fiduciary relationship exists in all cases where trust and confidence are reposed in another who thereby

gains a resulting influence and superiority. [Citation.] Fiduciary relationships may be shown to exist either as a matter of law or as a matter of fact." *In re Estate of Stahling*, 2013 IL App (4th) 120271, ¶ 18. "An individual holding a power of attorney is a fiduciary as a matter of law." *Estate of Alford v. Shelton*, 2017 IL 121199, ¶ 22. As a result, "an agent appointed under a power of attorney has a common-law fiduciary duty to the principal." *Id.* In this case, Knedlik's husband was appointed the original power of attorney for both property and health care matters. Haupt was appointed as the successor, and Wysocki was appointed successor to Haupt. Thus, upon Knedlik's husband's passing, Haupt became Knedlik's successor power of attorney with a common law fiduciary duty to Knedlik, as a matter of law.

¶ 40 Although not addressed by either party, we find it imperative to make clear that Haupt and Wysocki were not co-successor agents. Haupt had a fiduciary duty to Knedlik once she became Knedlik's agent. On the other hand, Wysocki's position as Knedlik's agent never vested. As a result, Wysocki did not have a fiduciary duty to Knedlik as a matter of law, and thus we must determine whether a fiduciary relationship existed as a matter of fact.

¶ 41 "A fiduciary relationship exists when there is a special confidence reposed in one, who, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one reposing the confidence." *Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 927 (1992). The factors that a court must look at in determining whether a fiduciary relationship exists include: "the degree of kinship, disparity of age, health and mental condition, and the extent to which the allegedly servient party entrusted the handling of his business and financial affairs to and reposed faith and confidence in the dominant party." *Id.* at 927-28. Further, the burden of pleading and proving a fiduciary relationship rests with the party seeking relief, and when the relationship

does not exist as a matter of law, then facts from which a fiduciary relationship stems must be pleaded and proved by clear and convincing evidence. *Id.* at 928.

¶ 42 Here, Knedlik argues that the factors weigh in favor of finding an alternative basis for a fiduciary relationship between defendants and Knedlik. Defendants respond that Knedlik was, in fact, the dominant party and the factors do not weigh in her favor. Having already determined that a fiduciary relationship existed between Haupt and Knedlik, we find that Knedlik has failed to plead and prove by clear and convincing evidence that a fiduciary relationship existed between her and Wysocki. In her complaint, Knedlik groups defendants together as a collective. She does not plead any individual allegations against either defendant, with the exception of the following language in the "common facts" section of her complaint: "Based upon information and belief, [p]laintiff executed a [p]ower of [a]ttorney over [f]inances, naming Vivian Haupt as power of attorney or, in the alternative, [d]efendants were appointed as fiduciaries for the sole purpose of paying [p]laintiff's bills." This allegation, coupled with the evidence adduced at trial, does not rise to the level of clear and convincing evidence. Therefore, Knedlik has failed to meet her burden in showing that Wysocki owed her a fiduciary duty, and thus the trial court's judgment in Wysocki's favor should stand.

¶ 43 Having determined that Haupt had a fiduciary duty to Knedlik stemming from her position as Knedlik's successor agent, the next element that must be addressed involves whether Haupt breached her fiduciary duty to Knedlik. In Knedlik's complaint, she alleged that Haupt breached her duty by, *inter alia*, failing to use the money in her accounts for the uses designated by Knedlik, and withdrawing money for defendants' personal use, namely, to purchase a home for Haupt.

¶ 44 "A presumption of fraud arises when a fiduciary benefits from a transaction involving the principal." *Estate of Alford*, 2017 IL 121199, ¶ 23. "Under a power of attorney for property, 'any conveyance of the principal's property that either materially benefits the agent or is for the agent's own use is presumed to be fraudulent.' " *Id.* "Once a fraudulent transaction has been alleged, the burden then shifts to the agent to prove by clear and convincing evidence that the transaction was fair and did not result from his undue influence over the principal." *Id.*

¶ 45 In addressing the fiduciary relationship and the presumption to which it gives rise, the trial court stated that "the better view [is] that the presumption of fraud arising from the existence of the fiduciary relationship applies only to transactions within the fiduciary relationship." The trial court cited to *Stahling* as support. In *Stahling*, the court was tasked with answering a certified question regarding whether the existence of a health care power of attorney created a fiduciary relationship such that, as a matter of law, a presumption of undue influence would be raised in property or financial transactions. *Stahling*, 2013 IL App (4th) 120271 ¶¶ 1, 25. In answering the question in the negative, the court agreed with the argument that even when a health care power of attorney creates a fiduciary relationship, that relationship does not extend to matters outside the scope of the power of attorney. *Id.* ¶ 23. The court ultimately determined that "a health care power of attorney, *by itself*, does not result in a presumption of undue influence between the power's principal and agent in transactions involving property or financial matters." (Emphasis in original.) *Id.* ¶ 26.

¶ 46 Unlike the trial court, we do not find *Stahling* applicable here. In this case, Knedlik executed power of attorney documents for both health care and property. Haupt had a fiduciary duty to Knedlik pursuant to both the health care and property powers of attorney. However, because the presumption of fraud arose from Haupt's August 12, 2013, withdrawals from two of

Knedlik's checking accounts in the amount of $225,000, the relevant power of attorney document here is the property power of attorney, which was completely absent in *Stahling*. Knedlik's power of attorney for property stated that it included, *inter alia*, two categories of powers: real estate transactions and financial institution transactions. Haupt's withdrawals and eventual purchase of her home could arguably be categorized as either a real estate transaction or a financial transaction, or both. Thus, unlike *Stahlin*g, Haupt's conduct that gave rise to the presumption of fraud, *i.e.* withdrawing $225,000 from two of Knedlik's checking accounts, undoubtedly fell within the scope of Knedlik's property power of attorney. Further, it is clear to this court that Haupt received a benefit from the withdrawals in question because the $225,000 that she withdrew allowed her to purchase a home that she testified she would not otherwise be able to buy. Thus, a presumption of fraud or undue influence arose.

¶ 47 The burden then shifted to Haupt to "rebut the presumption by clear and convincing proof that [s]he has exercised good faith and has not betrayed the confidence reposed in [her]." *Matter of Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997). The trial court found that "the presumption of fraud to which [the] fiduciary relationship gives rise was overcome on the evidence here." We disagree and find that Haupt's evidence at trial did not clearly or convincingly show that she acted in good faith and did not betray Knedlik's confidence. Some relevant factors we consider when determining whether Haupt met her burden to rebut the presumption of fraud are: "(1) a showing that, before the transaction, the fiduciary made a frank disclosure of all relevant information; (2) the fiduciary paid adequate consideration for the transaction; and (3) the principal had competent and independent legal advice." *In re Estate of Teall*, 329 Ill. App. 3d 83, 88 (2002). Our review of those factors and the record before us results in our conclusion that these factors weigh in favor of Knedlik. First, the parties staunchly

disagree as to whether defendants made a frank disclosure of their intentions prior to the withdrawals. Second, defendants have not presented any evidence to show that Haupt ever paid any money for the home that was not from Knedlik's account. Additionally, the record does not contain any evidence regarding the financial specifics of the subject real estate transaction, such as a closing statement. Thus, we are unaware of the value of the property, or whether the amount paid was reasonable. Third, there is no evidence that Knedlik ever sought independent legal advice. Knedlik used an attorney to update her will and power of attorney documents, but did not have independent counsel after defendants allegedly asked her permission to use her money.

¶ 48 A trial court's judgment will not be found to be against the manifest weight of the evidence unless the opposite conclusion is readily apparent. See *Northwestern Memorial Hospital*, 2014 IL App (1st) 133008, ¶ 25. Our review of the evidence presented at trial results in our conclusion that the opposite conclusion was apparent. Haupt contends that Knedlik was aware of her intent to withdraw money from Knedlik's bank accounts to purchase a home, and that she was merely following Knedlik's "advice" that she move closer to Wysocki. Knedlik argues that she and defendants never had any agreement and she never gave her permission for the withdrawals. Haupt and Wysocki concede that none of their alleged agreement was reduced to writing. The trial court found Haupt's and Wysocki's testimony credible and found Knedlik's testimony not credible in various ways. "[A] reviewing court will not disturb the trial court's determination of credibility because the trial court has a superior vantage point, which cannot be reproduced from the cold record, to observe and judge the witness' demeanor and credibility." *Racky v. Belfor USA Group, Inc.*, 2017 IL App (1st) 153446, ¶ 107. We recognize that the trial court was in a better position to weigh the credibility of Haupt and Wysocki, who both testified at trial. However, Knedlik testified via evidence deposition and the record does not contain any

indication that her deposition was video-recorded. As our supreme court has recognized, "[w]ithout having heard live testimony, the trial court was in no superior position than any reviewing court to make findings, and so a more deferential standard of review is not warranted." *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). Therefore, the trial court was in the same position as this court when it assessed Knedlik's credibility. While we do not disturb the credibility determinations made by the trial court, we nonetheless need not view the trial court's credibility findings as to Knedlik with the same deference with which we consider its findings as to defendants because the trial court was essentially working from a cold record, as we are now, when it determined Knedlik was not credible. That being said, our ultimate decision that the trial court's finding was against the manifest weight of the evidence is not based on the trial court's credibility determinations and whether we agree or disagree with them. Instead, we find problematic the trial court's conclusion that the evidence sufficiently rose to the level of clear and convincing to rebut the presumption of fraud.

¶ 49 Simply put, Haupt's evidence of her good faith efforts does not come close to satisfying the clear and convincing standard needed to rebut the presumption of fraud against her. The only evidence defendants presented was their own testimony. Had a disinterested third party corroborated defendants' testimony, then the quantum of evidence in their favor would have been stronger. Additionally, the majority, if not all, of the testimony was merely one party's word against another's. Wysocki testified that she went to visit Knedlik while she was in the nursing home, asked Knedlik if it was okay for Haupt to withdraw the money from Knedlik's account in order to buy a closer home, and Knedlik said that it was okay. Knedlik testified that she never gave permission and they never had any such agreement. Additionally, when confronted with her prior deposition testimony, Wysocki admitted that she did not propose an

exact amount to Knedlik when she allegedly asked for permission. Haupt testified that she spoke with Knedlik prior to withdrawing the funds, but her testimony was unclear and contradictory. At some points, Haupt seemed to intimate that she only spoke with Knedlik *after* she withdrew the funds. For example, Haupt testified that she went to see Knedlik and "told her exactly what I did." Additionally, Haupt expressly stated "I didn't ask her first" when asked if she received permission from Knedlik, but also testified that she knew it was okay for her to withdraw the money because Wysocki told her that Knedlik said it was fine. Further, at some point Haupt suggested that she met with Knedlik in person to tell her about her intention to use Knedlik's money to buy a house, but other times it seemed the conversation regarding the house purchase was over the phone. We find that the substance of Haupt's testimony does little to clear up any confusion regarding whether Knedlik consented to the withdrawals.

¶ 50 Additionally, we find it important that Knedlik explicitly contested that she ever gave permission to Haupt for the withdrawal of the funds. Unlike Haupt's wavering testimony regarding her conversation with Knedlik before or after the withdrawals, Knedlik unequivocally and repeatedly testified that she did not give permission for the withdrawals. Knedlik admitted that the purchase of a home was discussed, but stated that she never gave permission to use money from her bank accounts. Knedlik also testified that neither Haupt nor Wysocki ever mentioned the withdrawals while she was in the nursing home. Wysocki testified that she went to see Knedlik and seek her permission, and that Knedlik said it was "okay" to use her money. However, no one else was present when this conversation allegedly occurred. Thus, this is another piece of testimony that is one person's word versus another's. In a case where clear and convincing evidence was required, we simply do not see how the evidence presented by defendants rises to such a high level. See *Cronin v. McCarthy*, 264 Ill. App. 3d 514, 525 (1994)

(stating that the degree of proof needed to satisfy the clear and convincing evidence standard could be defined as "highly probably true").

¶ 51 We further find the timing of the withdrawals to be circumstantial evidence supporting Knedlik's position in this case. The fact that the withdrawals occurred during the few months that Knedlik was in the nursing home does not cast a favorable light on Haupt's actions. Again, only defendants testified that the sale of the home was on a time-sensitive schedule. No testimony from a disinterested third-party or any written documentation was provided to corroborate this. Other than the time-sensitive nature of the sale, Haupt provided no explanation as to why she felt compelled to purchase a home at the exact time Knedlik was in the nursing home. There is no testimony that Knedlik's demand that Haupt move closer to Wysocki became more frequent or pressing. In fact, the timing of the withdrawals is especially concerning given Wysocki's testimony that Knedlik had asked that Haupt move closer numerous times between January and July 2013. There is no evidence as to why Haupt opted to buy a house while Knedlik was in the nursing home, as opposed to when she was rehabilitated or prior to her entering the nursing home.

¶ 52 Finally, it is apparent to this court that the third element of a claim for breach of fiduciary duty—that Haupt's breach proximately caused Knedlik's damages—has been satisfied here where there is clear evidence that Haupt's withdrawals from Knedlik's bank accounts caused her to suffer a loss of $225,000.

¶ 53 Clear and convincing evidence was required to be presented in order to rebut the presumption of wrongdoing. *Estate of Alford*, 2017 IL 121199, ¶ 23. The foregoing evidence demonstrates that Haupt did not come close to overcoming that burden and so should have been

held liable for breach of fiduciary duty. Therefore, the trial court's decision to the contrary was against the manifest weight of the evidence and must be reversed.

¶ 54 Conversion

¶ 55 Knedlik argues that defendants should have been held liable for conversion. Defendants respond that they had Knedlik's permission to make the withdrawals, and thus no conversion occurred. In its ruling, the trial court does not address Knedlik's conversion count or any of the other counts from Knedlik's complaint. Knedlik acknowledges this in her brief, stating, "It should be noted that the trial court spent very little time, if any, addressing this particular cause of action (conversion)." It is unclear why Knedlik opted to raise arguments regarding the conversion count but none of the other counts in her complaint. Defendants' brief is silent on any findings by the trial court on the conversion count. Although Knedlik argues on appeal that the court erred in ruling against her on the conversion count, the record does not indicate that Knedlik's counsel ever referenced the conversion count in his opening statement or put forth evidence to support her conversion count. Additionally, the record does not contain a copy of Knedlik's posttrial brief, if one was filed. "Issues not considered by the trial court cannot be argued on review." *Lafata v. Village of Lisle*, 185 Ill. App. 3d 203, 207 (1989); see also *Evans ex rel. Husted v. General Motors Corp.*, 314 Ill. App. 3d 609, 616 (2000). Our review of the record indicates that breach of fiduciary duty was the only count of Knedlik's complaint that the trial court considered and addressed. As the record stands, it is unclear what other counts (if any) of Knedlik's complaint the trial court considered, and thus we limit our review to the count for breach of fiduciary duty.

¶ 56 Defendants' Brief

¶ 57 As a final matter, we find it necessary to address Knedlik's contention that doubt has been cast upon all of defendants' appellate arguments due to their failure to cite to the record on appeal in the argument section of their brief. We agree that defendants' brief is inadequate and admonish defendants' counsel for failure to comply with the rule. Rule 341(i) sets forth the rules for appellee briefs, stating: "The brief for the appellee and other parties shall conform to the foregoing requirements except that items (2), (3), (4), (5), (6), and (9) of paragraph (h) of this rule need not be included except to the extent that the presentation by the appellant is deemed unsatisfactory." Ill. S. Ct. R. 341(i) (Jan. 1, 2016). Noticeably absent from the list of excepted requirements is item (7), which explains that an "Argument" section "shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). It further states, "reference shall be made to the pages of the record on appeal where evidence may be found." *Id.* Additionally, it is well-settled that "[t]he failure to provide proper citations to the record is a violation of Rule 341(h)(7), the consequence of which is the forfeiture of the argument." *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 12.

¶ 58 In this case, defendants provide only one citation to the record in their entire argument section. Significantly, the singular record citation defendants provided is contained in the section of their argument in which they state they have no argument on the issue of whether the accounts were convenience accounts or *inter vivos* gifts. The remainder of defendants' argument section does not contain any reference or citation to the record. Such an omission is particularly detrimental where we are asked to review whether the trial court's decision was against the manifest weight of the evidence, and whether defendants overcame their presumption of fraud by clear and convincing evidence—both of which require a close analysis of the record on appeal.

Thus, although we chose to consider defendants' arguments in spite of their deficiencies, we remind defendants' counsel that "our supreme court rules governing appellate practice are mandatory, not merely suggestive." *Perona v. Volkswagon of America, Inc.*, 2014 IL App (1st) 130748, ¶ 21.

¶ 59 CONCLUSION

¶ 60 Based on the foregoing, we affirm the trial court's judgment in favor of defendant Wysocki, and reverse the trial court's judgment in favor of defendant Haupt.

¶ 61 Affirmed in part and reversed in part.

¶ 62 Cause remanded.