UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2056

September Term, 2011

ANTON J. BERK

v.

CAROLE A. BERK, ET AL.

Eyler, Deborah S.,
Kehoe,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: December 8, 2014

Anton Berk filed a multi-count civil action in the Circuit Court for Montgomery County against Carole A. Berk, Earl M. Colson, Esquire, Holly M. Bastian, Esquire, Arent Fox, LLP, and Lawrence L. Bell, Esquire, for their various roles in implementing estate planning arrangements made by Anton's deceased father, Maurice Berk.[1] Carole, Maurice's wife, was a trustee of an irrevocable insurance trust established by Maurice. Colson and Bastian are lawyers who provided legal services to Maurice with regard to estate planning matters, including the administration of the trust. They are members of Arent Fox.[2] Bell is a retired lawyer who, while acting as Maurice's lawyer in the 1980's, prepared one of the trust agreements at issue in this case and, for a time, served as trustee.

The circuit court granted summary judgment in favor of Carole and dismissed Anton's claims against the other defendants. On appeal, Anton argues that the circuit court erred in doing so.[3]

We will affirm the judgment of the circuit court. Anton does not have standing to assert the claims against Carole. Colson and Bastian are lawyers who provided legal services to Maurice regarding estate planning. There is well-developed law in Maryland to the effect that, in circumstances such as those presented in this case, lawyers providing estate planning

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[1]For brevity's sake, we will refer to the members of the Berk family by their first names.

[2]We will sometimes refer to Bastian, Colson, and Arent Fox as the "Arent Fox defendants."

[3]In the statement of questions presented in his brief, Anton also indicated that the circuit court erred in denying his motion for partial summary judgment against Carole. However, he did not address the matter in his brief and we will not consider the issue. *See, e.g., Poole v. State*, 207 Md. App. 614, 633 (2012).

services do not owe a duty to members of their clients' families. Thus, the circuit court correctly dismissed the claims asserted against those defendants. Because Anton's claims against Arent Fox were derivative, dismissal of the claims against Colson and Bastian necessitated dismissal of the claims against Arent Fox.

Bell's case is a bit more complicated because he was a trustee for one of the trusts in question in addition to acting as Maurice's lawyer. Nonetheless, dismissal was appropriate.

BACKGROUND

I. A Very Short Primer on Insurance Trusts

The contentions in this appeal revolve around life insurance trusts prepared for Maurice in the 1970's and 1980's. Life insurance trusts are widely-used estate planning devices designed to allow individuals to pass material wealth, or other objects of their bounty, to their descendants without paying federal estate tax. We will provide some background information to place the parties' arguments in context.[4]

In a life insurance trust, "part or all of the trust property consists of one or more [life] insurance policies" that are payable to the trust upon the death of the insured, who is usually the trust settlor. Myron Kove, George Gleason Bogert & George Taylor Bogert, THE LAW OF TRUSTS AND TRUSTEES § 235, at 67 (rev. 3d ed. 2012) ("Bogert 3d").[5] Insurance trusts

[4]A caveat to the reader: federal tax law in this area is extremely complex. We are painting with a very broad brush because the details are not important to the issues raised in this appeal.

[5]The authors are in the process of updating the treatise volume by volume. This (continued...)

are either "funded," that is, the settlor initially contributes assets to the trust in order to pay policy premiums as they come due, or "unfunded," meaning that the settlor makes periodic contributions to the trust to pay premiums. *Id.* at § 235, at 67–68.

A life insurance trust may hold any of the available types of life insurance policies, the most common of which are term, whole, and universal policies. A "term life insurance policy" is "a wholly aleatory contract [wherein] the insured's economic rights are exhausted and the premiums irretrievably paid out unless the insured dies during the policy term." Eric Mills Holmes, APPLEMAN ON INSURANCE 2D § 173.05(A)(1), at 13 (2012) ("APPLEMAN ON INSURANCE 2D"). "Whole life insurance" is "coverage that persists for the insured's entire lifetime, assuming the policy is not surrendered and the premiums are paid when due." *Id.* at § 173.05(B), at 14. Whole life policies may have a "cash surrender value," meaning "the sum that the insured can get simply by surrendering, or releasing, the policy to the insurance company. Cash surrender value is [a concept] distinctive to life insurance, and whole-life insurance policies contain listings of the cash surrender values in each policy years, usually in terms of $1,000 units of face amount." *Id.* at § 173.05(C)(3)(a), at 16. "Universal life insurance" policies combine elements of term and whole life insurance contracts so that the policy accumulates a cash value. *Id.* at § 173.05(H)(2).

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[5](...continued)
update is not sequential. Therefore, we will cite to both the Rev. 2d and the 3d edition in this opinion. These references reflect the current state of the treatise in its revision.

Federal estate and gift tax laws complicate the picture. We first consider the estate tax implications.

As a general rule, the proceeds of a life insurance policy are included in a decedent's gross estate for purposes of calculating federal estate tax if the decedent retained an "incident of ownership" relating to the policy. 26 U.S.C. § 2042.[6] In order to protect the life insurance policy proceeds from estate tax, the insured cannot "retain any incidents of ownership in the transferred insurance." Bogert 3d at § 264.15, at 62. "Incidents of ownership" is a term of art in the field of estate planning and can be very broadly summarized as any legal or equitable interest in a policy. *See* 26 C.F.R. § 20.2042-1(c)(2), (3), and (4) (setting out legal and equitable rights that constitute an incident of ownership). One incident of ownership is the ability "to change the beneficial ownership in the policy or its proceeds, or the time or manner of enjoyment thereof, even though the decedent has no beneficial interest in the trust." 26 CFR 20.2042-1(c)(4). For these reasons, life insurance trusts are usually irrevocable.

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[6]Section 2042 states in pertinent part:

> The value of the gross estate shall include the value of all property--
> (1) *Receivable by the executor*.--To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.
> (2) *Receivable by other beneficiaries*.--To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person . . . .

There are also gift tax issues. As a general rule, "the payment of premiums by the grantor on policies transferred to an irrevocable trust will in most instances fail to qualify for the annual gift tax exclusion." Bogert 3d § 264.15, at 66. There is an exception to this rule, first recognized in *Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968), which held that contributions to an irrevocable trust for the benefit of another are eligible for the annual gift tax exclusion if the beneficiary of the trust is given the right to withdraw a specified dollar amount from the trust each year, and the annual contributions are less than the sum of the withdrawal rights. As a result, *Crummey* withdrawal arrangements "are frequently used in irrevocable insurance trusts to secure the annual exclusion [from gift tax liability]." Bogert 3d § 264.15, at 66–67. In order for a transfer to a trust to qualify for the annual gift tax exclusion, the trustee must notify the beneficiary that the gift has been made and that he or she has the right to withdraw the transfer from the trust. *Id.* § 1111 at 989.

There is a final relevant nuance. Individuals having *Crummey* withdrawal rights may also have other beneficial interests in the trust, specifically, the right to share in the insurance policy proceeds upon the death of the settlor. However, there is no requirement that *Crummey* withdrawal right holders have an additional interest. As we will see in this case, Maurice established an irrevocable insurance trust that gave Anton *Crummey* withdrawal rights, but Anton was not intended to share in the proceeds of the policy at Maurice's death.

To summarize, when a *Crummey* insurance trust operates as intended, the insurance policy proceeds are excluded from the estate of the settlor and are not subject to estate tax.

Additionally, the settlor's annual policy premiums are not subject to gift tax. This is because the settlor/insured does indirectly what he or she cannot do directly (without incurring gift tax). When the settlor makes annual contributions to the trust, the individuals holding withdrawal rights may withdraw their pro rata share of the contribution and use it for their own purposes. If, however, withdrawal rights are exercised, the purpose of the trust is defeated because there will not be adequate assets in the trust to pay the insurance premium.

II. Factual Background

During his lifetime, Maurice Berk was a successful businessman and entrepreneur in Montgomery County. Maurice died in 2008 at the age of 87. Anton is one of Maurice's four children.

(1) The 1974 Trust and the Ruth M. Berk Insurance Trust

On August 13, 1974, Maurice created an irrevocable life insurance trust (the "1974 Trust") which designated his then wife, Ruth Berk, as trustee, and his children, *viz.* Anton and his siblings, as well as their descendants, as beneficiaries. The initial asset of the 1974 Trust was $13,994, which Ruth used to pay a year's premium on a life insurance policy issued by The Manufacturers Life Insurance Company in the amount of $500,000 (the "Manulife policy"). Although the policy itself is not in the record, the Manulife Policy was either a whole life or universal life policy because it accumulated a cash surrender value.

In 1983, Maurice and Ruth were divorced. As part of their property settlement agreement, Maurice executed another insurance trust (the "Ruth Berk Trust") which was

intended to provide $500,000 to Ruth upon Maurice's death. Maurice's quarterly gift tax returns for the period 1974–86 are included in the record. These returns indicate that, in some years, Maurice made gifts to the 1974 Trust, in other years to the Ruth Berk Trust, and in some years to neither.

(2) The 1984 Berk Family Trust

On March 30, 1984, Maurice created a revocable trust titled the Berk Family Trust Agreement (the "Family Trust") designating himself as trustee. Maurice explicitly excluded Anton as a beneficiary of the 1984 Berk Family Trust.[7] There were multiple revisions to the Family Trust,[8] but no iteration of the trust documents in the record altered Anton's exclusion as a beneficiary.

(3) The 1986 Insurance Trust

In May, 1986, Maurice, represented by Bell, created a new irrevocable life insurance trust (the "1986 Insurance Trust") which held a new insurance policy issued by Great-West

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[7]The 1984 Trust recited in pertinent part that Maurice "wishes to indicate that he has left nothing outright or in trust for his son, [Anton], because he has received of the Grantor's bounty previously and the Grantor has provided for Anton's children." What exactly Maurice meant by "his bounty" is unclear. The record shows that, from 1974 through 1986, Maurice was the personal representative of Anton's grandfather's estate. In that capacity, Maurice made multiple cash distributions to Anton. Anton also inherited an interest in a 600-acre parcel of land in Germantown, Maryland from his grandfather's estate. This property was sold in 1989 for approximately $14 million. Anton, then 26 years of age, received $7 million from the sale.

[8]The record contains references to a "Second Amendment and Complete Restatement of the Berk Family Trust Agreement, dated June 20, 1995" and a "Ninth Amendment to the Berk Family Trust dated October 3, 2006."

Life & Annuity Insurance Company (the "Great-West policy"). Maurice designated Bell as trustee and the 1984 Berk Family Trust as beneficiary. Maurice structured the 1986 Trust as a "*Crummey* trust," that provided present withdrawal rights up to $5,000 per year for "[e]ach beneficiary of the Grantor (the Grantor's spouse and his children) . . . ." Thus, Anton, although neither a beneficiary of the 1986 Insurance Trust nor the 1984 Family Trust, was a holder of present withdrawal powers.[9]

The 1986 Insurance Trust agreement required the trustee to notify *Crummey* withdrawal power holders when a contribution was made. Specifically, the 1986 Trust stated:

> Upon receipt of any transfer, contribution, or addition to this Trust (including any payment of premiums made by the Grantor's employer on group term life insurance assigned to this Trust), the Trustee shall promptly make reasonable efforts to give written notice (hereinafter a "Letter of Notice") to each beneficiary of the Grantor . . . , specifying the following:
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> > (i) The existence of the absolute present right of withdrawal from this Trust;
> > (ii) The amount of Trust property subject to that beneficiary's absolute present right of withdrawal;
> > (iii) The manner in which that beneficiary . . . may exercise this absolute present right of withdrawal; and
> > (iv) The date on or before which the absolute present right of withdrawal must be exercised prior to its lapse.

In this litigation, Anton asserts that he never received any notices that he had withdrawal rights from Bell.

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[9]Maurice's gift tax returns for the years 1986–1995 are in the record. The returns list Anton Berk as a recipient of 20% of Maurice's gifts to the 1986 Trust in each of those years.

Bell acted as trustee of the 1986 Insurance Trust from 1986 until 1995. In 1995, Maurice ended his relationship with Bell. Bell resigned as trustee and returned all trust documents to Maurice. In a letter to Maurice discussing his resignation, Bell stated: "I am separately reflecting a withdrawal as Trustee of the Insurance Trusts, as I believe you may wish to have new counsel discuss with me appropriate ways of replacing the Trustee."

(4) Later Changes to Maurice's Estate Plan

In 1999, Maurice retained Bastian and Colson to restructure his estate planning arrangements. As part of this effort, these lawyers drafted an instrument, signed by Maurice, that appointed Carole as successor trustee of the 1986 Trust.[10] Shortly thereafter, Carole, in her capacity as trustee, transferred ownership of the Great-West policy from the 1986 Insurance Trust to herself and changed the beneficiary designation of the Great-West policy from the Family Trust to herself, with Jessica E. Dollack (one of Anton's siblings) as the contingent beneficiary. The Great-West policy was, for all practical purposes, the only asset of the 1986 Insurance Trust. There is no dispute that all of these actions were taken with Maurice's approval.

(5) Maurice's Death and Anton's Caveat Action

Maurice passed away in May of 2008. Anton filed a caveat to Maurice's will and codicil thereto. Acting pursuant to Estates and Trusts Article § 2-105, the Orphans' Court

[10] At the circuit court, Anton, on the one hand, and Carole and the Arent Fox defendants, on the other, disagreed as to whether Carole's appointment was effective. It is not necessary for us to reach this issue because, as we will explain, we agree with the circuit court's conclusion that Anton lacks standing to pursue his claims against Carole.

transmitted dispositive issues relating to the caveat proceeding to the circuit court for adjudication. In due course, the circuit court granted a motion for summary judgment in favor of the personal representatives of Maurice's estate. Anton appealed the judgment to this Court. A panel of this Court affirmed the judgment of the circuit court in an unreported opinion. *Berk v. Berk*, No. 995, September Term 2010, filed October 6, 2011.

(6) The Current Litigation

After Maurice's death, Carole made a claim under the Great-West policy and received a check in the amount of $653,692.29. Anton then filed the present action. His complaint, which was amended three times, sets out claims for conversion, negligence, legal malpractice, breach of trust, and tortious interference with contract, against various combinations of the appellees.

At the core of all of Anton's claims are the following factual allegations: (1) he was a beneficiary to the 1974 Insurance Trust; (2) the Manulife policy owned by that trust accumulated an unspecified cash value between 1974 and 1986; (3) in 1986, Bell, acting at Maurice's behest, caused the Manulife policy to be transferred to the 1986 Trust; (4) whereupon the Manulife policy was surrendered for its cash value and the proceeds used as a partial payment for the Great-West policy that was the asset of the 1986 Trust. Anton also asserted that he was a beneficiary of the 1986 Trust and that both Bell and Carole owed him a fiduciary duty which they breached in a variety of ways. Specifically, the amended complaint asserts:

Count 1: Conversion: Carole "improperly and without lawful authority assumed control of the 1986 Irrevocable Trust, as sole Trustee of said Trust, without any authority either under the trust instrument or applicable law" and, in that capacity, converted to her own use the Great-West policy on Maurice's life. The Arent Fox defendants aided and abetted her in this process.

Count 2: Conversion: Bell "provided substantial assistance to others and actively participated in the improper removal from, transfer and/or conversion of the assets of the 1974 Irrevocable Life Insurance Trust to the 1986 Irrevocable Life Insurance Trust." Bell drafted the 1986 Insurance Trust Agreement and, as trustee of that trust "knowingly received into said Trust the assets known by him to have been improperly converted from the 1974 Irrevocable Trust." These actions were "in violation of the rights and interests of the beneficiaries of the 1974 Irrevocable Life Insurance Trust."

Count 3: Breach of Trust: Carole "acting without legal right or authority, wrongly and improperly assumed control of the 1986 Irrevocable Trust, as Trustee of said Trust." In that capacity, she wrongfully changed the beneficiary of the Great-West policy owned by the 1986 Insurance Trust from the Berk Family Trust to herself, in violation of her duties as trustee. The Arent Fox defendants aided and abetted her in these actions.

Count 4: Negligence: Although this count is captioned as "Negligence," it alleges that Carole, by taking the actions described in the previous counts, breached her fiduciary duties to Anton and his siblings, who are asserted to be the beneficiaries of the 1986 Trust. The Arent Fox defendants aided and abetted her in these actions.

Count 5: Negligence: Bell, in his capacity as Maurice's attorney, owed a duty of care to the beneficiaries of the 1974 Insurance Trust and, by drafting the 1986 Trust Agreement and "actively advising, aiding, facilitating and/or participating in the surrender or 'cashing in' of the Manulife life insurance policy or policies held as the principal assets of the 1974 Irrevocable Trust," breached that duty. Additionally, Bell was negligent in drafting the 1986 Trust Agreement because the agreement failed to include a provision for the replacement of the trustee. Finally, Bell was negligent in failing to send notices that Maurice had made gifts to the 1986 Trust to Anton and the other persons holding *Crummy* withdrawal rights pursuant to the 1986 Trust Agreement.

Count 6: Imposition of a Constructive Trust: Anton, as one of Maurice's four children, "has a good and equitable claim to a portion of said Great-West insurance proceeds improperly received and retained by . . . Carole." Anton sought imposition

of a constructive trust upon the proceeds of that policy "and any traceable proceeds thereof."

Count 7: Tortious Interference with the Great-West Insurance Policy: Carole and the Arent Fox defendants "intentionally and wrongfully took actions which induced [Great-West] to breach its obligations to the [1986 Trust] and the named beneficiaries therein, or to otherwise render it impossible for [Great-West] to properly perform under the life insurance contract held by the 1986 Trust[.]"

Count 8: Tortious Interference with the 1986 Trust Agreement: The Arent Fox defendants tortiously interfered with the rights of the Berk children who were "beneficiaries of both the 1986 Trust and the 1974 Irrevocable Trust from which the assets of the 1986 Trust were (wrongfully) taken[.]"

Count 9: Breach of Trust: Bell, in his capacity as Maurice's lawyer and as trustee of the 1986 Trust, violated the rights of Anton and his siblings in the 1974 Trust and the 1986 Trust by (1) "facilitating and/or participating in [the] conversion of the Manulife policy, the principal asset of the 1974 Irrevocable Trust, to a new life insurance policy issued by Great-West . . . which was then placed not in the 1974 Irrevocable Trust but in . . . the 1986 Irrevocable Trust;" (2) resigning as trustee of the 1986 Trust without petitioning the circuit court for the appointment of a replacement; and (3) failing to act to protect the interests of Anton and his siblings after Bell learned in 1999 that Carole intended to convert the Great-West policy to her own benefit.

Count 10: Legal Malpractice: Bell was retained by Maurice "to protect and preserve the children of Maurice Berk, including [Anton], and their rights and interests to payment of at least $500,000 in life insurance proceeds upon the death of Maurice Berk," and, therefore owed to the Berk children "a duty to exercise ordinary care and diligence" and to bring "a reasonable degree of professional skill and knowledge [to the] discharge of his services as an attorney[.]" Bell breached those standards by drafting the 1986 Trust Agreement that changed the terms of the beneficiaries of the 1974 Trust, circumstances that resulted in Anton and his siblings receiving nothing from the Manulife policy.

As relief, Anton sought damages in the amount of his proportionate share of the Great-West policy, a constructive trust over the proceeds of that policy, punitive damages, attorneys' fees, and court costs.

The Arent Fox defendants filed motions to dismiss the counts pertaining to them on the basis that they failed to state a cause of action. They asserted that, although they owed a legal duty to their client, Maurice, they owed no duty to Anton. As to Anton's conversion claim, they contended that Anton did not have a property interest in any of the insurance policies in question and accordingly did not have standing to assert a claim of conversion. Bell filed motions to dismiss on essentially the same grounds.

Carole filed a motion for summary judgment. She asserted that the 1986 Trust designated the Berk Family Trust as its sole beneficiary and the terms of the Berk Family Trust explicitly excluded Anton as a beneficiary. Accordingly, she contended that she owed no duty to Anton and that he "is not entitled to any proceeds from the 1986 Life Insurance Trust under any theory of recovery because he was never a beneficiary of that Trust." Further, she asserted that all of her actions taken with regard to the 1986 Trust and the Great-West policy were taken at the request of Maurice and with the advice of Colson and Bastian, his legal counsel. In concert with her co-defendants, Carole asserted that Anton lacked standing to pursue conversion and tortious interference with contract claims related to the Great-West policy and the 1986 Trust Agreement.

In a series of hearings, the circuit court granted Carole's motion for summary judgment and the other parties' motions to dismiss.[11] The court also denied Anton's motion

[11] The Arent Fox defendant's filed a motion to dismiss Anton's original complaint and supplemental motions addressing Anton's first and second amended complaints. All of the motions were granted, the final one with prejudice.

for partial summary judgment against Carole. We will discuss the reasoning of the court as pertinent later in this opinion. The court also denied Anton's motions for reconsideration. We will provide additional facts as necessary in our analysis.

Anton's claims and their ultimate dispositions are summarized in the table on the following page:

Count	Carole Berk	Earl Colson	Holly Bastian	Arent Fox, LLP	Lawrence Bell
Original Complaint					
1. Conversion (Great-West Policy)	Summary Judgment	Dismissed w/ Prejudice	Dismissed w/ Prejudice	Dismissed w/ Prejudice	
2. Conversion (Assets of 1974 Insurance Trust)					Dismissed w/ Prejudice
3. Breach of Trust (1986 Insurance Trust)	Summary Judgment	Dismissed w/ Prejudice	Dismissed w/ Prejudice	Dismissed w/ Prejudice	
4. Negligence (Transfer of Great-Western policy to Carole)	Summary Judgment	Dismissed w/ Prejudice	Dismissed w/ Prejudice	Dismissed w/ Prejudice	
5. Negligence (Violation of rights and interests in the 1974 Insurance Trust)					Dismissed w/ Prejudice
6. Constructive Trust (Proceeds of Great-Western Policy)	Summary Judgment				
First Amended Complaint					
7. Tortious Interference with Contract (Great-West Policy)	Summary Judgment	Dismissed w/ Prejudice	Dismissed w/ Prejudice	Dismissed w/ Prejudice	
8. Tortious Interference with Contract (1986 Insurance Trust)	Summary Judgment on	Dismissed w/ Prejudice on	Dismissed w/ Prejudice on	Dismissed w/ Prejudice on	
9. Participation in Breach of Trust (1974 and 1986 Trusts)					Dismissed w/ Prejudice
Second Amended Complaint					
10. Legal Malpractice ("transfer" of policies from 1974 to 1986 Trusts and drafting the 1986 Trust Agreement)					Dismissed w/ Prejudice
Third Amended Complaint					
Amending Count 5 – ((i) failure to give notice of withdrawal rights; (ii) improper resignation as trustee of 1986 Insurance Trust; (iii) failure to take action to prevent conversion of the Great Western policy in 1999)					Dismissed w/ Prejudice

ANALYSIS

I. Carole Berk

We review the circuit court's grant of summary judgment *de novo*. *Harford County v. Saks Fifth Ave. Distrib. Co.*, 399 Md. 73, 82 (2007). Summary judgment is appropriate when the moving party establishes that there are no disputes as to material facts and that it is entitled to judgment as a matter of law. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737 (1993). A dispute of fact is material if its resolution affects the outcome of the case. *Utica Mut. Ins. Co. v. Miller*, 130 Md. App. 373, 391 (2000). To be "genuine" in this context, a factual dispute must be more than hypothetical or conjectural: "the mere existence of a scintilla of evidence in support of the [non-moving party's] claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff." *Beatty*, 330 Md. at 738. Put another way, "when a movant has carried its burden, the party opposing summary judgment 'must do more than simply show there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

At the conclusion of the hearing on Carole's and Anton's cross motions for summary judgment, the circuit court stated (emphasis added):

> Mr. Fischler [, appellant's counsel,] and your client . . . have the dubious distinction of pointing out to the Court a series of actions that were taken regarding these trusts that, while on the one hand they may not have been on their face wrong, they clearly do raise some questions. And I say a dubious distinction ***because even having raised those issues I think the***

plaintiff falls short of pointing to any conduct by Carole Berk that should give rise to any liability on her part.

I think Mr. Reed [, Carole's counsel], in a fairly succinct fashion, when he argues that assume arguendo that nothing happened in 1999, and then when the grantor died what would have happened to this trust. ***Well, the 1984 trust would have been a factor there and they clearly excluded the plaintiff.***

And the term "disinherit," as I said earlier, the basis for that wasn't to disinherit him, but that he had been taken care of elsewhere or by other means, and therefore was not named as a beneficiary to that trust.

And so there's ***no evidence here that any jury or a court could find that Carole Berk did anything other than follow the advice of her advisors.***[12] And I don't think anyone in this courtroom would argue that the advice that she was given was not by certainly competent counsel who practiced this kind of law, and one of those is a noted authority in the area of estates and trust laws. And so that argument just doesn't carry the day.

It would be pure speculation what a trustee would have done given the language of the '74 trust. What would a trustee have done? The trustee had fairly broad discretion in that case.

* * * *

[E]ssentially, ... there is no disagreement with respect to the material facts. What the disagreement is about is whether some of those facts should have occurred or not. That's what the disagreement is about.

But what the Court has to decide is that looking at those facts, and there being no dispute as to any of the material facts, whether one party or the

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[12]In his brief, Anton excoriates the circuit court for this observation. Although Maryland does not appear to have ruled on the precise point, the general rule is that reliance on competent legal counsel is evidence of prudence on the part of the trustee but not a complete defense when the trustee is shown to have acted unreasonably. *See* RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b(2). A reading of the circuit court's opinion as a whole makes it clear that the court did not base its decision entirely on its assessment of the reasonableness of Carole's actions as trustee, but also concluded Anton was without standing to challenge them. As to the latter ground, the circuit court was entirely correct.

> other is entitled to a judgment as a matter of law. And the Court finds that Ms. Berk is entitled to a judgment as a matter of law. There's no misconduct by her here.
>
> And I will conclude by referring back to my original comment. Oh, yes. There's plenty of clouds in this case. Plenty of clouds. But the rain shouldn't fall on Ms. Berk. Where the case goes from here I suppose remains to be seen.

In his brief to this Court, Anton contends that the circuit court erred by granting summary judgment in favor of Carole because there were material facts in dispute. He states:

> The record makes it clear that all of the Berk children were intended beneficiaries of the 1984 Trust.[13] The Court below never understood the effect of "Section 3" of the 198[6] Trust.
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> * * * *
>
> Notwithstanding the foregoing undisputed specific intent and obligation of Maurice, Carole's counsel told the court that it was of no matter that proceeds from the property of the 1974 Trust were used to pay for the insurance policy in the 1986 Trust because that was done by the trustee of the 198[6] Trust, Appellee Bell.[14] The evidence shows that Bell knew full well he was skirting the law and legal rights of the beneficiaries of the 1974 Insurance Trust. And, it is undisputed that Carole illegally inserted herself as Trustee of the 198[6] Trust to take advantage of ill-gotten gains, and frustrated the undisputed intent of that trust.

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[13]This statement is not correct. The beneficiary of the 1986 Insurance Trust was the 1984 Berk Family Trust whose terms explicitly excluded Anton. *See* note 7, *supra.*

[14]This statement is inaccurate. At a hearing before the circuit court, Carole's counsel stated, correctly, that there was no evidence to support Anton's assertion that the Manulife policy (the primary asset of the 1974 Trust) was liquidated to provide cash for the purchase of the Great-West policy (the primary asset of the 1986 Trust). Carole's counsel then asserted that, even if such evidence existed, summary judgment would still be appropriate. Arguing that a non-existent fact would be irrelevant if it existed is not a concession that the fact exists.

> In addition to Anton's right to claim against the [1986] Trust under Section 3, Appellee's counsel admits that Anton had "Crummey" rights to withdraw cash annually from the 198[6] Insurance Trust. This admission raises two factual disputes which would be relevant in a jury trial: first, did Maurice really intend that Anton should have nothing from any source, as Carole says, and, second, did the undisputed failure to provide "Crummey" notices by Trustee Bell, and failure to correct this Bell error by illicit trustee, Carole, conceal the withdrawal right, conceal the asset from the beneficiaries, and deny Anton the ability to protect his interests
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> * * * *
>
> Since the Court below did not understand which facts were disputed and which were undisputed, as discussed above, itemized in the footnotes to the "Judge's Ruling" and incorporated herein, it could not make a correct ruling and it did not.

Anton's contentions are unpersuasive. Taking the facts in the light most favorable to Anton, we affirm the circuit court's grant of summary judgment in favor of Carole as to all counts. Anton brought claims for conversion, breach of trust, negligence, constructive trust, and tortious interference with a contract against Carole. We first address Anton's claims that there were material facts in dispute.

A. Issues as to Material Facts

(1) Anton's Asserted Status as a Beneficiary of the 1986 Insurance Trust

All of Anton's claims against Carole rest on the premise that he had a beneficial interest in the 1986 Insurance Trust. The beneficiary of the 1986 Trust was the 1984 Berk Family Trust. Initially, Anton asserts that "[t]he record makes it clear that all of the Berk children were intended beneficiaries of the 1984 Trust" but this statement is patently

incorrect—the Berk Family Trust Agreement specifically *excluded* Anton as a beneficiary. Anton's contention is without merit and does not warrant further discussion.

Anton raises two additional arguments. The first is that the 1986 Trust Agreement designated Anton as a member of a class of individuals having *Crummey* withdrawal rights. The second is that the 1986 Insurance Trust Agreement was intended to satisfy any claims asserted by the beneficiaries of the 1974 Insurance Trust Agreement against the proceeds of any policy owned by the 1986 Trust. We will address these arguments in order.

(2) The *Crummey* Withdrawal Rights

The 1986 Insurance Trust Agreement provided that Maurice's spouse and his four children had *Crummey* withdrawal rights. That is, each member of that class of individuals had the right to withdraw a *pro rata* share of any gifts made by Maurice to the trust. However, this beneficial interest is more apparent than real. As we have explained, the purpose of designating *Crummey* withdrawal power holders is to benefit the beneficiaries of the trust and the transferor's estate. Any benefit to the present withdrawal power holders themselves is only incidental and, in fact, runs directly counter to the transferor's intent because contributions are paid into the trust in order to pay the premiums on the life insurance policy held in trust. *See* Bogert 3d at § 264.15, at 62, 66–67; § 1111, at 987. Phrased another way, if a *Crummey* withdrawal power holder actually exercised his or her right to withdraw funds following a contribution, the trust would have insufficient assets to pay upcoming policy premiums, thus frustrating the purpose of the trust.

Anton claims that the fact that he was given *Crummey* withdrawal rights in the 1986 Trust Agreement "raises [a] factual dispute[] which would be relevant in a jury trial: . . . did Maurice really intend that Anton should have nothing from any source[?]" We disagree. When the 1986 Trust Agreement is read in conjunction with the Berk Family Trust Agreement, Maurice's intentions are quite clear: the only entity entitled to receive the proceeds of any policy held by the 1986 Trust is the Berk Family Trust and Anton is not a beneficiary of the Family Trust.

In his brief, Anton asserts that he never received notice of contributions to the 1986 Insurance Trust. This is irrelevant to his claims against Carole. The pertinent provision of the 1986 Trust Agreement provides (emphasis added):

> ***Upon receipt of any transfer, contribution, or addition to this Trust*** . . ., the Trustee shall promptly make reasonable efforts to give written notice (hereinafter a "Letter of Notice") to each beneficiary of the Grantor [containing specific information set forth by the trust's language.]

Carole's duty to take reasonable efforts to notify Anton extended only to contributions made while she was trustee, i.e. from November 15, 1999 (the date Carole was appointed as trustee) until December 28, 1999 (the date Carole transferred the Great-West policy from the 1986 Trust, effectively terminating the trust by removing its only asset). There is no evidence in the record that Maurice made a contribution to the trust during that period.[15]

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[15] As discussed in footnote 9, *supra*, the record contains Maurice's gift tax returns through 1995. But Carole did not become the trustee of the 1986 Trust until 1999. Anton provided no evidence of contribution during her time as trustee.

(3) The Relationship Between the 1974 Trust and the 1986 Trust

Anton also asserts that a factual dispute exists as to whether he has the right "to claim against the 1984 Trust." This argument is based on Section 3 of the 1986 Trust Agreement, which states in pertinent part:

> Section 3. Grantor passing with Spouse Surviving. If upon my passing there are any claims due under the Maurice H. Berk Insurance Trust dated August 13, 1974, the Trustee shall review such claims and after satisfying himself as to the propriety of such claims may use the this Trust's assets to satisfy said claims.

This language is ambiguous. As evidence of its meaning, Anton points to two letters written by Bell in 1996 to David A. Wechsler, Esquire,[16] regarding the 1986 Trust Agreement. Summarizing and consolidating the pertinent information in those letters, Bell stated that Maurice's and Ruth's marital settlement agreement obligated him "to fund a life insurance policy for his children" and that "[t]he language in the more recent Insurance Trust was created to permit the amount claimed for the benefit of Berk's children to be paid through that Trust to the [1974] Insurance Trust . . . ."

From this, a fact finder could reasonably infer that § 3 was intended to address claims made against the 1986 trust on behalf of the beneficiaries of the 1974 Trust. Anton places unwarranted weight on the existence of that inference. We will explain why.

First, we do not read Anton's brief as asserting that the marital separation agreement required Maurice to maintain insurance for his children's benefit for the remainder of his

[16]The record does not disclose Wechsler's interest in the matter.

life.[17] Instead, Anton argues that a claim arose because the Manulife policy (the primary asset of the 1974 Trust) was liquidated and its proceeds used to partially fund the Great-West policy (the primary asset of the 1986 Trust). The difficulty with this contention from Anton's perspective is that there is no evidence in the record from which a reasonable fact finder could conclude that the Manulife policy was surrendered for its cash value or that proceeds from the Manulife policy were used to fund the Great-West policy. Moreover, the party to assert such a claim would be the trustee of the 1974 Trust, *i.e.*, Ruth, and not Anton. This brings us to another problem with Anton's claim that the provisions of the 1974 Trust give him rights that he can enforce against the 1986 Trust.

The 1974 Trust Agreement provided that the trustee, i.e., Ruth Berk, was under no obligation to make equal distributions of the trust proceeds to the beneficiaries. The pertinent provision stated (emphasis added):

> Upon the death of the Settlor, the Trustee shall pay to or apply to the use of a group consisting of the children of the Settlor and the issue of such children, so much of the net income from and principal of the trust estate as the Trustee, in her discretion, shall deem advisable in the best interests of the Settlor's children and their issue. . . . ***The Trustee shall not be required to equalize distributions among the children of the Settlor or the issue of such children***. (E. 273).

In other words, as Carole points out in her brief, under the terms of the 1974 Trust, upon Maurice's death, "the trustee could have given Anton all, some, or none of the proceeds of the Trust but Anton was not ***guaranteed*** to receive anything." (emphasis in

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[17]The separation agreement is not in the record extract.

original). As the circuit court noted in its bench opinion, "[i]t would be pure speculation what a trustee would have done given the language of the '74 trust."

We agree with the circuit court in that the dispositive issue is whether Anton had standing to assert his claims against Carole. The record raises no disputes of fact as to that issue. We turn next to whether Carole was entitled to summary judgment as a matter of law on the claims asserted against her by Anton.

B. Judgment as a Matter of Law

(1) Conversion

Summary judgment in favor of Carole was proper as to Anton's conversion claim. To prevail, Anton bore the burden of proving that Carole exercised a "distinct act of ownership or dominion" over his "personal property . . . in denial of his right or inconsistent with it." *Allied Inv. Corp. v. Jasen*, 354 Md. 547, 560 (1999) (citation and internal quotation marks omitted). Anton could not meet this burden because, as we have explained, the record simply does not support his strenuous and repeated assertions that he had any right to any portion of the proceeds of the Great-West policy.

(2) Breach of Trust

Summary judgment in favor of Carole was proper on Anton's breach of trust claim. Carole had no fiduciary duty to Anton when she became trustee in 1999 because Anton was not a beneficiary of the 1986 Trust. The only event that would trigger a duty on her part to

Anton would have been a contribution to the Trust. There is no evidence that any contribution was made in the relevant time period.

Anton also asserts that Carole was under a duty to correct what he alleges were Bell's failures to notify Anton of earlier contributions. Carole, as successor trustee, is not liable for the conduct of a prior trustee. Md. Code Ann., Est. & Trusts, § 14-405(l) ("A successor trustee may not be held liable for the acts or omissions of any predecessor trustee.").

(3) Negligence

Summary judgment in favor of Carole was proper on Anton's negligence claim for many of the same reasons as we have already described. In an action for negligence, a plaintiff must show: 1) that the defendant was under a duty to protect the plaintiff from injury, 2) that the defendant breached that duty, 3) that the defendant's breach of duty proximately caused the loss or injury suffered by the plaintiff, and 4) that the plaintiff suffered actual loss or injury. *Corinaldi v. Columbia Courtyard, Inc.*, 162 Md. App. 207, 218 (2005). "Whether a plaintiff presented sufficient evidence of the elements of negligence is generally a question for the fact finder, but the existence of a legal duty is a question of law to be decided by the court." *Id.* Anton did not establish that Carole had a duty to him in his capacity as a beneficiary of the 1974 Trust. Anton also did not establish that he was a beneficiary of the 1986 Trust to whom Carole owed a duty. Finally, Anton did not present evidence that Carole breached the duty she owed to him in his capacity as a holder of

Crummey withdrawal power because no contributions were made to the 1986 Trust during Carole's tenure as trustee.

(4) Constructive Trust

Summary judgment in favor of Carole as to Anton's request for the imposition of a constructive trust was proper. In *Porter v. Zuromski*, 195 Md. App. 361, 368–69 (2010), we discussed the remedy of a constructive trust (internal citations and quotations omitted):

> A constructive trust is a remedy that converts the holder of legal title to property into a trustee for one who in good conscience should reap the benefits of the property. Its purpose is to prevent the unjust enrichment of the holder of the property. This remedy applies where a property has been acquired by fraud, misrepresentation, or other improper method, or where the circumstances render it inequitable for the party holding the title to retain it. Ordinarily, such factors must be shown by clear and convincing evidence . . . .

Anton has not shown fraud, misrepresentation, or impropriety on Carole's part based on any duty she owed to him. Furthermore, Anton presented no evidence that the property held by the 1986 Trust was his own property.

(5) Tortious Interference with the
Great-West Policy and the 1986 Trust

The court did not err by granting summary judgment in favor of Carole on Anton's claims for tortious interference with contracts, in the form of the Great-West policy and the 1986 Trust. Tortious interference with an existing contract requires a plaintiff to prove: "(1) existence of a contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional interference with that contract; (4) breach of that

contract by the third party; and (5) resulting damages to the plaintiff." *Fowler v. Printers II, Inc.*, 89 Md. App. 448, 466 (1991) (citing *K & K Mgmt., Inc. v. Lee*, 316 Md. 137, 155 (1989), among others). Anton was neither a party to the Great-West policy nor a party to the 1986 Trust Agreement.

II. The Arent Fox Defendants

The circuit court dismissed Anton's claims against Bastian, Colson, and Arent Fox because the court concluded that the relevant allegations in Anton's complaint did not set out a claim upon which relief could be granted. In *RRC v. BAA*, 413 Md. 638 (2010), the Court of Appeals summarized the standards by which trial courts decide such contentions, as well as the appellate scope of review:

> [A] court must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, i.e., the allegations do not state a cause of action for which relief may be granted. Consideration of the universe of "facts" pertinent to the court's analysis of the motion are limited generally to the four corners of the complaint and its incorporated supporting exhibits, if any. The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice. Upon appellate review, the trial court's decision to grant such a motion is analyzed to determine whether the court was legally correct.

Id. at 643–44 (citations omitted).

Anton argues that the court erred by dismissing his claims for negligence, breach of trust, conversion, and tortious interference with contract against the Arent Fox defendants

because it erroneously applied principles enunciated by the Court of Appeals in *Noble v. Bruce* , 349 Md. 730 (1998). Anton argues that the circuit court erroneously relied on *Noble* to dismiss these claims because Anton had claimed that Bastian, Colson, and Arent Fox (derivatively), had committed intentional torts and had not claimed that they were acting in furtherance of Maurice's estate planning objectives at Maurice's direction. We are not persuaded by these arguments.

In *Noble*, the Court of Appeals considered how Maryland's general rule that a lawyer is not liable to non-clients for negligence should apply in cases where the professional services in question were advice as to estate planning and will drafting. 349 Md. at 733. After reviewing the competing policy reasons for imposing or not imposing liability upon lawyers in these situations, the Court concluded that "the traditional rule of strict privity applies in the instant cases, and . . . beneficiaries may [not] maintain a malpractice action against the attorneys because no employment relationship existed between the beneficiaries and the attorneys." *Id.* at 752–53. In doing so, the Court considered the plaintiffs' assertion that they were owed a duty by the lawyers because "the intent of the testators in employing the attorneys and the direct purpose of the attorney's representation of the testators was to benefit the [plaintiffs]." *Id.* at 753. The Court rejected this notion:

> In cases involving wills, the beneficiary of a will is not necessarily the beneficiary of the attorney-client relationship. The testator/client's intent and purpose in executing a will may not be to benefit the beneficiaries named in the will, but rather to prevent the intestate distribution of assets. In other words, the testator's intent may be 1) to exclude certain individuals who would otherwise inherit the testator's property without a will and to ensure that those

> individuals are unable to inherit, or 2) to personally provide for distribution of assets rather than leaving distribution to the intestate succession.

Id. at 754.

The Court identified a number of policy reasons for its ultimate conclusion, several of which are particularly relevant to the case before us. One of them was that "the strict privity rule protects the attorney-client relationship. Adopting a new rule that would subject an attorney to liability to disappointed beneficiaries interferes with the attorney's ability to fulfill his or her duty of loyalty to the client and compromises the attorney's ability to represent the client zealously." *Id.* at 756. Another is that the strict privity rule protects the confidentiality of the attorney-client relationship: "[a]n attorney . . . should not be placed in the position where he or she would have to reveal a testator/client's confidences in an attorney malpractice action asserted by a nonclient beneficiary." *Id.* at 758. Finally, the Court noted that:

> The beneficiaries are in effect requesting this Court to reform the wills so that the attorney will be responsible for the payment of taxes. If such liability were allowed, the attorney would be paying out-of-pocket for an additional bequest to the beneficiaries not expressed in the will.

Id. at 756.

Applying this reasoning to the case before us, we conclude that the court did not err in dismissing the counts against the Arent Fox defendants. Bastian and Colson took no action separate and apart from providing legal services to Maurice so that their client could

realize his estate planning goals. *Noble* makes it clear that Anton was not an intended third-party beneficiary of these services.

Anton argues that the rule of *Noble* should not be extended to cases in which the lawyers are accused of torts other than negligence. The argument misperceives the policy reasons underlying the *Noble* rule. From our perspective, it matters not whether a disappointed beneficiary packages his or her claims in terms of negligence or other torts. The determinative focus is not on the cause of action, but on the nature of the legal services that are alleged to give rise to liability. There is nothing in the complaint that suggests that Bastian and Colson were doing anything other than assisting Maurice in his decisions to dispose of his assets. Put another way, we see no reason why the Arent Fox defendants should be mulcted in damages to confer upon Anton economic benefits that his father did not intend him to have.[18]

Because Anton's claims against Arent Fox's liability were derivative, dismissal of the claims against Colson and Bastian necessitated dismissal of the claims against Arent Fox.

III. Lawrence Bell

Anton asserted conversion, negligence, breach of trust, and legal malpractice claims against Bell. Anton contends that the circuit court erred in dismissing these claims with prejudice.

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[18] As an alternative basis for our decision, Anton's conversion and tortious interference with contract claims against the Arent Fox defendants fail for the same reasons that they failed against Carole. *See* Part I of this opinion.

Anton's conversion claim fails because: (1) Anton never had a possessory interest in the Manulife policy (the asset of the 1974 Trust) or the Great-West policy (the asset of the 1986 Trust); and (2) the principles of *Noble v. Bruce* operate to protect Bell from claims by disappointed would-be beneficiaries such as Anton. As we explained in addressing Anton's claims against the Arent Fox defendants, *Noble v. Bruce* precludes Anton's claim that Bell was negligent in drafting the 1986 Trust Agreement because, when Bell drafted that agreement, Bell owed a duty to Maurice, his client, and not to Anton.

Anton's claims that Bell breached a duty owed to Anton by preparing the 1986 Trust Agreement are equally meritless. First, Bell never owed a duty to Anton in his capacity as a beneficiary of the 1974 Trust because Bell was not the trustee of that trust. Anton's claims notwithstanding, the beneficiary of 1986 Trust was the Berk Family Trust which, by its express terms, excluded Anton.[19] Assuming *arguendo sed dubitante*, that Bell breached a duty by resigning as trustee of the 1986 Trust without first petitioning the circuit court for the appointment of a replacement, such a duty was owed to that trust's beneficiary which was, as we have discussed, the Berk Family Trust. The trustee of the Berk Family Trust was Maurice, who was perfectly aware that Bell had resigned. Finally, Bell was under no duty to Anton to intercede in a former client's estate planning arrangements to protect a beneficiary

[19] Anton also contends that he should be treated as a beneficiary of the 1986 Trust because § 3 of the 1986 Trust permits the trustee of that trust to consider claims arising out of the 1974 Trust. The argument fails because there is no evidence that any proceeds of the Manulife policy (the asset of the 1974 Trust) were used to purchase the Great-West policy (the asset of the 1986 Trust).

of the 1986 Trust but, assuming, again *arguendo sed dubitante*, that such a duty existed, it was owed to the Berk Family Trust, and not to Anton.

The final arrow in Anton's quiver is based on his status as a person with *Crummey* withdrawal rights for the 1986 Trust. Anton asserts that Bell was negligent by failing to notify him when Maurice made contributions to the 1986 Trust. Before the circuit court, Anton did not assert a claim for his pro rata share of his father's contributions to the 1986 Trust. On appeal, he does not argue that he would have exercised those rights had notice been given. Rather, Anton asserts that, had notice been given, he would have been made aware of the existence of the 1986 Trust and, specifically, § 3 of the 1986 Trust Agreement—the provision that authorized the trustee to consider claims made on behalf of the beneficiaries to the 1974 Trust. However, the only claim that Anton has identified that could have been asserted under § 3 is his assertion that the 1974 Manulife policy was cashed in to partially pay for the 1986 Great-West policy. But Anton can point to no evidence in the record that, either directly or inferentially, supports this contention.

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