

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Roger Lawrence Smith,  
*Appellant-Defendant,*

v.

Cynthia Smith-Young, Deborah  
Carroll, Angela Smith, and  
Christina M. Simmons,  
*Appellees-Plaintiffs*

April 5, 2023

Court of Appeals Case No.  
21A-PL-2535

Appeal from the Knox Circuit  
Court

The Honorable Gregory Alan  
Smith, Special Judge

Trial Court Cause No.  
42C01-1712-PL-46

**Memorandum Decision by Chief Judge Altice**  
Judges Brown and Tavitas concur.

**Altice, Chief Judge.**

## **Case Summary**

- [1] This action involves a dispute between siblings over real estate following the death of their mother. Cynthia Smith-Young, Deborah Carroll, Angela Smith, and Christina M. Simmons (collectively, Sisters) filed a complaint against Roger Smith (Brother) alleging breach of contract, breach of fiduciary duty, fraud, and detrimental reliance, and seeking imposition of a constructive trust. The matter proceeded to a jury trial and after the presentation of evidence, Sisters moved to dismiss all their claims except for their request for imposition of a constructive trust, which motion the trial court granted. As the only remaining issue was a matter of equity, Sisters asked the trial court to remove the matter from the jury. The trial court denied Sisters' request, and the jury ultimately returned a verdict in favor of Brother. Sisters filed a motion for judgment notwithstanding the verdict (JNOV), which the trial court denied.
- [2] After the trial court entered final judgment on the jury's verdict, Sisters timely filed a motion to correct error, which the trial court granted. Specifically, the court set aside the jury's verdict, ordered a new trial on Sisters' request for imposition of a constructive trust, and entered judgment in favor of Sisters for breach of fiduciary duty. Brother appeals, presenting five issues for our review, which we consolidate and restate as:

1. Was the motion to correct error deemed denied prior to the trial court's ruling?

2. Did the trial court err in granting Sisters' motion to correct error?

[3] We reverse and remand with instructions.

### **Facts & Procedural History**

[4] Sisters and Brother are the children of Roger L. (Father) and Darlene Smith (Mother). In 2008, Father and Mother met with Attorney Daniel Siewers, who prepared a Last Will and Testament for each of them. In addition, Father and Mother each executed a power of attorney appointing the other as their attorney in fact. In her 2008 will, Mother named Brother as her personal representative.

[5] Father died on September 4, 2009. Thereafter, Sisters and Brother looked after Mother. Sisters had a rotating schedule to assist Mother with cleaning, cooking, and shopping, and Brother took care of Mother's five-acre property,<sup>1</sup> made necessary repairs to her home, and drove Mother to most of her appointments. Although Mother was in poor physical health, she was "very sharp" and did not have any issues with diminished mental capacity. *Transcript Vol. 3* at 22. Each of the siblings testified that Mother took care of her own business and finances. On September 21, 2009, Mother executed a new power of attorney appointing Brother as her attorney in fact. Brother exercised his

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<sup>1</sup> An appraisal of Darlene's property showed that, using a sales comparison approach, the market value of the house and surrounding acreage as of April 23, 2021, was \$139,000.

power of attorney “a couple of times” to write checks and pay Mother’s bills when she was in the hospital or a rehabilitation center. *Transcript Vol. 3* at 76.

[6] In August of 2014, the siblings met to discuss Mother’s ongoing care. According to Sisters, this was not a secret meeting, and, although they discussed the option of a nursing home, they did not vote that day to place Mother in a nursing home. Brother testified to the contrary, claiming that the subject of placing Mother in a nursing home was discussed and that Sisters voted in favor of the idea. Brother testified that he objected and informed Sisters he had power of attorney.

[7] Unbeknownst to Brother and Sisters, Mother met with Attorney Siewers in April 2015, and they discussed substantive changes Mother wanted to make to her will. Mother also told Attorney Siewers that she wanted to deed her house and acreage to Brother to protect that asset from being used up if she were to be placed in a nursing home.<sup>2</sup> Attorney Siewers’s notes from this meeting indicated that he discussed with Mother the option of deeding her property to one or more of her children and that Mother rejected this suggestion because she “wished to deed [her property] to [Brother].” *Exhibits* at 75.

[8] On May 6, 2015, Brother drove Mother, at her request, to meet with Attorney Siewers. Mother went into the office by herself while Brother waited outside in

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<sup>2</sup> This request was consistent with Mother’s prior experience wherein her mother-in-law had deeded her property solely to Father to protect that asset from potential nursing home expenses. Upon her mother-in-law’s death, Father sold the property and distributed the proceeds equally between himself and his siblings.

the car. A short time later, Mother asked Brother to come into the office where she informed Brother of her decision to deed her house to him. Brother tried to talk Mother out of deeding her property to only him but Mother was “adamant” that Brother “gets” the property. *Transcript Vol. 3* at 77.

- [9] Before leaving Attorney Siewers’s office that day, Mother executed a Transfer-On-Death-Deed (the Deed) and a revised will. The Deed conveyed Mother’s property to Brother and included a provision that transferred the property to Christina upon Brother’s death. Mother retained a life estate in the property. With her revised will, Mother made one substantive change, specifically, removal of one of the sisters as a successor personal representative. Like her original will, Mother’s revised will named Brother as personal representative and contained the following residuary clause:

All the rest and residue of my property and estate, real, personal and mixed, of whatsoever kind and nature and wheresoever situated shall pass to my children, share and share alike.

*Exhibits* at 5-6. Mother died on November 18, 2016.

- [10] Two days after Mother’s death, Brother removed her revised will and a letter handwritten by Mother (the Letter) from Mother’s safe and read them to Sisters. In the Letter, Mother mentioned her “new will” and stated that her “[o]ld will” should be used “to reference [her] wishes if they are too vague in the new one.” *Exhibits* at 8. She also wrote: “If [Brother] asks for everyone but

Christina to turn in their keys to the house when I die . . . Page 2 explains why.” *Id.* On Page 2 Mother explained:

On May 6, 2015, I signed over the house to [Brother]. He was just as surprised then as you are now that I would do that. I did it to save my house if I have to go to a nursing home. . . . I asked him to share the money with you 4 after he sells it – or if he wants to keep it arrange to pay you 4 your shares.

*Id.* at 9. A picture of a second note handwritten by Mother was also admitted into evidence.<sup>3</sup> In this note, Mother wrote: “The house goes to [Brother] when I die to pay you girls your share and keep it or sell and split 5 ways. If something should happen to him the property would go to Christina to deal with. Hope it works!!! Enjoy – Mom.” *Id.* at 42-43.

[11] Shortly after Mother’s death, Deborah asked Brother if he was going to keep the house or sell it, and Brother indicated that he had not decided but also indicated that he did not have to share the value thereof with Sisters as Mother stated in the Letter. On April 27, 2017, Brother executed a Transfer on Death Deed Revocation, revoking the provision in the Deed that transferred the property to Christina in the event of his death. To date, Brother has not paid Sisters their proportionate shares of the value of Mother’s property to which they claim they are entitled pursuant to Mother’s wishes.

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<sup>3</sup> The actual note could not be located.

- [12] On December 6, 2017, Sisters filed their complaint against Brother. Sisters did not make a jury demand. Brother filed his responsive pleading on January 30, 2018. He likewise did not make a jury demand. On October 16, 2019, the trial court issued an order setting, among other things, a three-day jury trial to commence on October 6, 2020. No objections were made to the jury trial setting.
- [13] On June 22, 2020, Brother filed a motion for summary judgment. Before Sisters filed their response, a special judge was appointed to hear the case. On December 10, 2020, the special judge entered an agreed case management plan that included a three-day jury trial set for May 17-19, 2021. Neither party objected to the new trial setting. Following a hearing on Brother's summary judgment motion, the trial court denied the motion on April 14, 2021.
- [14] Prior to the jury trial, Sisters filed their proposed jury instructions, including instructions defining constructive trust as well as the various theories alleged in support of imposition thereof. The jury trial commenced on May 17. At the conclusion of all the evidence, Sisters orally moved to amend their complaint to conform to the evidence. Specifically, Sisters moved to dismiss their breach of contract claim, acknowledging that there was no evidence to support it, and to combine the remaining enumerated claims into a single claim seeking imposition of a constructive trust. Brother did not object except to the extent Sisters' motion was being made for the purpose of trying to remove the action from being decided by the jury.

[15] After the court granted Sisters' request to amend their complaint, Sisters requested removal of the case from the jury, arguing that because the only remaining issue was equitable in nature, it would be "error" to submit the matter to the jury. *Transcript Vol. 3* at 182. Brother objected, arguing that the circumstances demonstrated "the most profound example of waiver." *Id.* at 183. Specifically, Brother noted that Sisters never objected to the jury trial, they tendered jury instructions on constructive trust, and they waited until after all evidence was presented to the jury to amend their complaint to remove their sole legal claim (i.e., breach of contract).<sup>4</sup> The court denied Sisters' request, explaining that "this claim should have been addressed previously." *Id.* at 184. The court also noted that, "even with the contract claim [the matter] could have been pulled into equity and tried by the Court" at any time prior to the jury trial. *Id.*

[16] Sisters next moved for a directed verdict, which the trial court denied. The jury trial then resumed with closing arguments and final instructions. The jury returned a general verdict in favor of Brother and against Sisters. Sisters immediately moved for a JNOV, which the trial court denied, stating it would "enter judgment on the verdict." *Id.* at 230. The court entered final judgment in favor of Brother on May 26, 2021.

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<sup>4</sup> In permitting Sisters to amend their complaint to conform to the evidence, the trial court noted that there was no evidence presented as to breach of contract. The court therefore dismissed that claim in its entirety.



[17] On June 24, 2021, Sisters filed their motion to correct error but did not request that the matter be set for a hearing. Brother requested two extensions of time to file his opposition and Sisters did not object. The trial court granted the extensions, and Brother filed his response in opposition to the motion to correct error on August 16, 2021. On September 16, 2021, the court, with agreement of the parties, set a hearing on the motion to correct error for October 5, 2021.

[18] On October 22, 2021, the court entered its order granting Sisters' motion to correct error. The court found that "it is clear that there should not have been a jury trial ordered" as the matter "sounded almost entirely in equity." *Appellant's Appendix Vol. III* at 195. The court concluded that "it was error not to withdraw the case from the Jury on [Sisters'] motion." *Id.* The court also determined that "the jury verdict is not supported by sufficient evidence." *Id.* The court therefore ruled:

[Sisters'] Motion to Correct Errors is Granted. The Jury Verdict is hereby vacated and set aside. [Sisters'] Motion to withdraw this matter from the jury and try the same to the Court is granted. A new trial is ordered on [Sisters'] request for imposition of a constructive trust. Judgment is entered against [Brother] and in favor of [Sisters] for breach of a fiduciary duty.

*Id.* at 200. Brother filed his notice of appeal on November 17, 2021. Additional evidence will be provided as necessary.

## Discussion & Decision

### *1. Deemed Denied*

[19] As a threshold issue, Brother argues that the motion to correct error was deemed denied by operation of Ind. Trial Rule 53.3 and is therefore voidable.<sup>5</sup> Specifically, he claims that the motion was deemed denied on August 10, 2021, which was forty-five days after the motion was filed, because as of that date the trial court had neither set the matter for a hearing or made a ruling.

[20] Ind. Trial Rule 53.3(A) provides:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied.

The deemed denied provisions are “self-activating” and once the motion to correct error is deemed denied, the trial court’s power to rule on the motion is extinguished. *Williamson v. Williamson*, 825 N.E.2d 33, 47 (Ind. Ct. App. 2005). An exception to the time limitation for ruling on a motion to correct is if “the

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<sup>5</sup> Before filing his appellant’s brief, Brother requested this court to remand the matter to the trial court with instructions to reinstate the jury’s verdict, claiming that Sisters’ motion to correct error was deemed denied before the trial court issued its order granting the motion. A majority of the motion’s panel denied Brother’s request. Brother reasserts his argument in his appellant’s brief. This court retains the inherent authority to revisit decisions of the motions panel, and we choose to do so in this case. *Baker v. Pickering*, 178 N.E.3d 347, 350 (Ind. Ct. App. 2021), *trans. denied*.

parties who have appeared or their counsel stipulate or agree on the record that the time limitation for ruling . . . does not apply.” T.R. 53.3(B)(1).

[21] Here, Sisters’ motion to correct error was filed on June 24, 2021. The trial court did not set the matter for a hearing and did not rule on the motion within the time limitation set out in T.R. 53.3(A) and there is nothing in the record that indicates that the parties stipulated or agreed on the record that the time limitation does not apply.

[22] Nevertheless, we agree with Sisters that the invited error doctrine is applicable here. “A party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct.” *Shipley v. KeyBank Nat. Assoc.*, 821 N.E.2d 868, 879 (Ind. Ct. App. 2005). An invited error is not subject to appellate review. *Batchelor v. State*, 119 N.E.2d 550, 556 (Ind. 2019).

[23] Brother requested, and the trial court granted, two extensions of time for Brother to file his statement in opposition to Sisters motion to correct error. Although T.R. 59(E) provides that a party who opposes the motion “may” file a statement in opposition “not later than fifteen days after service of the motion,” Ind. Trial Rule 6 does not permit a trial court to extend the time for the filing of such statement after the fifteen-day period has passed. The trial court thus erred in permitting Brother to file a belated statement in opposition.

[24] Although the trial court erroneously granted Brother additional time to file his statement in opposition to the motion to correct error contrary to T.R. 6, we are

persuaded by the fact that Brother affirmatively made such request. Further, in Brother's motions for additional time, he noted that Sisters did not object to his request thus indicating that, despite the time limitations set out in the trial rules, the parties were either working together toward resolution or were both ignorant of the dictates of the trial rules. We choose to believe the former.

[25] Brother eventually filed his statement in opposition nearly a week after the day he now claims Sisters' motion to correct error was deemed denied. Brother also agreed to a hearing date on the motion to correct error that was beyond the time limits of T.R. 53.3(A). Brother cannot now use his affirmative request for additional time to file his response and acquiescence in setting a hearing outside the time limitations for ruling on the motion to correct error as a sword. Under these circumstances, we find that it is appropriate to apply the invited-error doctrine to Brother's claim that the motion to correct error was deemed denied before the trial court ruled on it. We will therefore address the merits of the arguments presented for review.

## ***2. Motion to Correct Error***

[26] Sisters' motion to correct error claimed that the jury verdict in favor of Brother was "erroneous as a matter of law." *Appellant's Appendix Vol. III* at 172. In support of their motion, Sisters argued that it was "gross procedural error to allow the jury to render a verdict on matters that can only be decided by a court in equity." *Id.* at 173.

[27] The trial court granted Sisters’ motion on several bases. First, the trial court found that it was error to submit the constructive trust issue to the jury and thus, Sisters were entitled to a new trial. The trial court also concluded that the jury’s verdict regarding imposition of a constructive trust was against the weight of the evidence. And finally, the trial court entered JNOV as to Sisters’ claim for breach of fiduciary duty.

***Ind. Trial Rule 59(J)(1)***

[28] Under Indiana Trial Rule 59(J), a trial court must be satisfied that some “prejudicial or harmful” error has occurred before any remedial action may be taken. *See also Weida v. Kegarise*, 849 N.E.2d 1147, 1151 (Ind. 2006). If a trial court determines that prejudicial or harmful error has been committed, “[it] shall take such action as will cure the error, including ... [g]rant a new trial.” T.R. 59(J)(1). Here, the trial court granted a new trial on the issue of imposition of a constructive trust, finding that it was error to submit such claim to the jury.

[29] It is well settled that a constructive trust “is more in the nature of an equitable remedy than an independent cause of action.” *Kalwitz v. Estate of Kalwitz*, 822 N.E.2d 274, 280 (Ind. Ct. App. 2005) (citing *Chosnek v. Rolley*, 688 N.E.2d 202, 211 (Ind. Ct. App. 1997)), *trans. denied*. Equally established is that a party is not entitled to a jury trial on equitable claims. *See Songer v. Civitas Bank*, 771 N.E.2d 61, 63 (Ind. 2002) (citing *Dean v. State ex rel. Bd. of Med. Registration & Examination*, 233 Ind. 25, 116 N.E.2d 503 (1954); *W.A. Flint Co. v. John V. Farwell Co.*, 192 Ind. 439, 134 N.E. 664 (1922)).

[30] In denying Sisters' motion to withdraw the case from the jury, the trial court stated that their request "should have been addressed previously," thereby seemingly agreeing with Brother that Sisters waived any argument that their claim for a constructive trust could not be decided by a jury. *Transcript Vol. 3* at 184. In granting Sisters' motion to correct error, the trial court reversed its finding of waiver and found that it was "error not to withdraw the case from the Jury on [Sisters'] motion" because Sisters were not entitled to a jury trial on their claim for a constructive trust. *Appellant's Appendix Vol. III* at 195 (emphasis supplied). While we agree that Sisters were not entitled to a jury trial on their claim for constructive trust, we do not find that, under the circumstances, it was error to submit such to the jury for a determination. In so concluding, we consider the two cases relied upon by the trial court in reaching its contrary conclusion.

[31] In *Ballard's Estate v. Ballard*, 434 N.E.2d 136 (Ind. Ct. App. 1982), the successive administrator for the estate (the Bank) filed a three-count complaint against the decedent's son asserting a legal claim for fraud/misrepresentation in count one and seeking the equitable remedy of cancellation of a contract in counts two and three. The defendant initially filed a request for a jury trial on all issues, but prior to trial, moved for separate trials. Specifically, the defendant requested a jury trial as to the legal issue and a bench trial as to the equitable claims. The Bank objected to separate trials, and the trial court denied the defendant's motion. At the close of the Bank's case-in-chief, the defendant moved for a directed verdict on count one and to withdraw the equitable issues

presented in counts two and three from the jury. The trial court granted both motions and dismissed the jury, stating that the balance of the case sounded totally in equity.

[32] On appeal, the Bank argued that the trial court erred in dismissing the jury at the conclusion of its case-in-chief. The court observed that a demand for a trial by jury is permissible “of any issue triable of right by a jury.” *Id.* at 140 (citing Ind. Trial Rule 38(B)). We concluded that the two remaining claims were “essentially if not entirely equitable in nature” and thus, because “the right to a trial by jury does not exist in cases of purely equitable cognizance,” the Bank was not entitled to a trial by jury. 434 N.E.2d at 141. Therefore, there was no error in the trial court’s dismissal of the jury.

[33] In *Stacey-Rand, Inc. v. J.J. Holman, Inc.*, 527 N.E.2d 726 (Ind. Ct. App. 1988), Holman filed a multi-count breach of contract lawsuit against several corporations and individuals. At the close of the plaintiff’s case-in-chief, the trial court granted a motion for a directed verdict in favor of all defendants except Stacey-Rand on the first three counts and entered judgment against Stacey-Rand for specific money damages on those same counts. Because the claims remaining against Stacey-Rand were equitable claims requesting the court to pierce the corporate veil, Stacey-Rand moved for dismissal of the jury, which motion the trial court denied. The matter was submitted to the jury, and the jury returned a verdict in favor of the plaintiff. On appeal, Stacey-Rand argued that the trial court committed “reversible error in failing to dismiss the jury upon their motion.” *Id.* at 728.

[34] The *Stacy-Rand* court recognized the tenet that “a plaintiff is not entitled to a jury trial when claiming a cause in equity.” *Id.* at 728. However, the court also noted that “a defendant in a suit in equity has no constitutional right to a trial by the court without a jury.” *Id.* (citing 27 AM. JUR. 2D § 238). The court further stated that “rarely, if ever, can the submission of an issue to a jury be deemed a ground of error.” *Id.* (citing 27 AM. JUR. 2D § 238). With these principles in mind, this court held that even though the plaintiff’s remaining claims was equitable in nature, the trial court was “not under an absolute duty to dismiss the jury before proceeding with the trial.” *Id.* In other words, the court held that it was not reversible error to submit the equitable claims to the jury.

[35] Here, the trial court found that the decision in *Stacey-Rand* is inconsistent with Art. 1, section 20 of the Indiana Constitution, which guarantees the right to trial by jury only in those actions that were triable by jury at common law,<sup>6</sup> and that the court’s decision in *Ballard* is “more sound.” *Appellant’s Appendix Vol. III* at 197. We disagree with the trial court’s reading of the *Ballard* and *Stacey-Rand* cases. Indeed, we do not find the holding in *Stacey-Rand* to be “contrary” to the holding in *Ballard* or in conflict with the tenet that there is no right to a jury trial for equitable claims. *Id.*

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<sup>6</sup> The constitutional right to a trial by jury is embodied in Ind. Trial Rule 38.



[36] The procedural posture of *Ballard* and *Stacey-Rand* is key to understanding their holdings. In *Ballard*, the Bank appealed arguing that it was error to dismiss the jury. Implicit in the Bank's argument was that the Bank was claiming it was entitled to a jury trial as to its equitable claims. In finding no error, this court held that the Bank, as the plaintiff, was not entitled to demand that a jury trial be held on such claims. This is consistent with Indiana law.

[37] In *Stacey-Rand*, the trial court refused to dismiss the jury even though the only remaining claims were equitable in nature. On appeal, the defendant argued that this was error because the plaintiff did not have a right to a jury trial on those claims. The court recognized that the plaintiff did not have a right to a jury trial, but also noted that a defendant did not have a right to a trial by the court. Tipping the scale for the *Stacey-Rand* court was the principle that "rarely, if ever, can the submission of an issue to a jury be deemed a ground of error." 527 N.E.2d at 728 (citing 27 AM. JUR. 2D § 238); *cf. Bergal v. Bergal*, 153 N.E.3d 243, 260 (Ind. Ct. App. 2020) (finding *waiver* of claim that it was error to submit equitable claims to a jury), *trans. denied*.

[38] We find that the *Ballard* and *Stacy-Rand* decisions can be read in harmony. As acknowledged in both cases, it is an accepted tenet that a plaintiff does not have a right to demand a jury trial as to matters of equity. However, it does not follow that a jury trial as to a matter of equity necessarily constitutes error. Here, it would not have been reversible error if the trial court had granted Sisters' motion to remove the remaining equitable claim for imposition of a constructive trust from the jury at the conclusion of the evidence. Likewise, the

trial court's initial ruling that Sisters waived their claim that the jury should not be permitted to consider their equitable claim, was also not erroneous.

[39] Further, aside from its weighing of the evidence in favor of Brother, which is the province of any fact-finder, Sisters have not explained how they have been harmed or prejudiced by submission of the matter to a jury. Under the circumstances of this case, Sisters' request for a trial to the court following the jury's verdict against them is essentially a request for a proverbial second bite at the apple. We therefore conclude that submitting Sisters' claim for imposition of a constructive trust to the jury was not an error upon which the trial court could take the remedial action of granting a new trial. The trial court abused its discretion in granting Sisters' motion to correct error on this basis.

***T.R. 59(J)(7)***

[40] We next consider the trial court's decision to grant Sisters' motion to correct error and enter a JNOV<sup>7</sup> on imposition of a constructive trust and breach of

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<sup>7</sup> Ind. Trial Rule 50(A) provides:

Where all or some of the issues in a case tried before a jury . . . are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

fiduciary duty based on its assessment of the evidence.<sup>8</sup> T.R. 59(J)(7) provides, in pertinent part:

In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a non-advisory jury is clearly erroneous as contrary to or not supported by the evidence.

A party may move for JNOV “in a motion to correct errors.” T.R. 50(A)(4).

[41] Breach of fiduciary duty is intertwined with imposition of a constructive trust.

A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. The duty to convey the property may rise because it was acquired through fraud, duress, undue influence or mistake, or through a breach of a fiduciary duty, or through the wrongful disposition of another’s property. The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it.

*Melloh v. Gladis*, 261 Ind. 647, 656, 309 N.E.2d 433, 438-39 (1974) (quoting 5 SCOTT ON TRUSTS § 404.2); see also *Zoeller v. E. Chicago Second Century, Inc.*, 904 N.E.2d 213, 221 (Ind. 2009) (noting that the remedy of a constructive trust is

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<sup>8</sup> To the extent the trial court remanded for a new trial on imposition of a constructive trust, the court stated in its order that “imposition of a constructive trust is appropriate and should be granted following a hearing on the specifics of that remedy.” *Appellant’s Appendix Vol. III* at 200.

available upon a showing of standard fraud or a breach of duty arising out of a confidential or fiduciary relationship); *Kalwitz*, 822 N.E.2d at 280 (noting that the duty to convey the property may arise because the property was acquired through fraud, duress, undue influence or mistake, or *through a breach of a fiduciary duty* or the wrongful disposition of another’s property).

[42] We first note that Sisters did not reassert their request for JNOV in their motion to correct error. Their motion to correct error was based solely on their argument that the jury was not permitted to consider their equitable claim for a constructive trust. Nevertheless, the trial court determined that the jury’s verdict was against the weight of the evidence and thus entered JNOV on constructive trust and breach of fiduciary duty.<sup>9</sup>

[43] Granting a JNOV on the basis that the verdict was against the weight of the evidence, i.e., the thirteenth juror rule, is an “extraordinary and extreme” power afforded trial courts. *Weida v. Kegarise*, 849 N.E.2d 1147, 1153 (Ind. 2006). Our Supreme Court has stated: “It is only where there is no reasonable dispute as to the facts, where the evidence for the party bearing the burden of proof is uncontradicted and unimpeached, that the trial court may enter

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<sup>9</sup> In its order, the trial court stated:

In reviewing the evidence in a light most favorable to the non-moving party, [Brother], and construing all inferences in [Brother]’s favor, the Court finds that as to all of [Sisters]’ “counts or theories” raised in the complaint (after amendment) and tried to the jury, (*except the count or theory on Fiduciary duty*), the motion would probably be denied. The evidence as to those other theories was conflicting.

*Appellant’s Appendix Vol. III* at 197 (emphasis supplied). In short, the trial court found that the only matter that was against the weight of the evidence was regarding breach of fiduciary duty.

judgment in favor of a party having the burden of proof.” *State ex rel. Peters v. Bedwell*, 371 N.E.2d 709, 712 (Ind. 1978). If there is relevant evidence that supports the verdict, then a JNOV may not properly be granted “because evidence which supports the verdict is sufficient evidence, and the final determination is left to the fact finder.”<sup>10</sup> *Huff v. Travelers Indem. Co.*, 363 N.E.2d 985, 990 (Ind. 1977). “The trial court may not weigh the evidence when considering whether to enter judgment contrary to the verdict.” *Id.* at 990-91.

[44] To impose a constructive trust on a conveyance, there must be a finding that the grantor reposed confidence in the grantee and “it must further appear that the grantee, *at or before the time of such conveyance*, abused the confidence reposed in such a way as to improperly influence the grantor, or to mislead or overreach him, and thus to obtain an unconscionable advantage for himself.” *Westphal v. Heckman*, 113 N.E. 299, 303 (Ind. 1916) (superseded by statute on another issue as stated in *Matter of Estate of Banko*, 622 N.E.2d 476 (Ind. 1993)) (emphasis supplied).

[45] The trial court found that Brother’s own admissions established that he owed a fiduciary duty to Mother. Specifically, the court noted that Brother was Mother’s attorney in fact, she relied on him for assistance, and he was named as

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<sup>10</sup> Indeed, had Sisters appealed the jury’s verdict in favor of Brother, Sisters would have been appealing a negative judgment, which would have required them to show that the evidence points unerringly to a conclusion opposite that reached by the jury. *See Universal Auto, LLC v. Murray*, 149 N.E.3d 639, 642 (Ind. Ct. App. 2020).

her personal representative in her will. The court also found that Brother admitted knowing of Mother's wishes to equally divide her property amongst himself and Sisters and that Mother had reiterated the same in her written notes. In the trial court's view, the evidence clearly showed that Brother breached his fiduciary duty to Mother when he refused to divide the value of Mother's property equally among the siblings.

[46] Brother maintains that because there is no evidence that he breached any fiduciary duty to bring about Mother's irrevocable transfer of her property to him, imposition of a constructive trust is not warranted. Thus, he argues that the trial court erred in granting Sisters' motion to correct error. We agree.

[47] First, Brother acknowledges that Mother gave him power of attorney. A power of attorney creates a fiduciary relationship between a principal and his agent, or attorney in fact. *In re Estate of Compton*, 919 N.E.2d 1181, 1186 (Ind. Ct. App. 2010). Although at common law, there was a presumption of undue influence that attached to transactions that benefitted an attorney in fact, the current statutory scheme (*see* Ind. Code § 30-5-9-2) "ostensibly abrogated" this presumption. *Compton*, 919 N.E.2d at 1186. Under the current statute, "[a] presumption of undue influence is now conditioned upon the attorney-in-fact's actual use of the power of attorney to effect the questioned transaction for his benefit." *Id.* at 1187. The presumption may be raised through proof of a confidential or fiduciary relationship independent of the power of attorney but, standing alone, the fiduciary relationship created under a power of attorney "carries with it no presumption of validity or invalidity respecting a transaction

benefiting the attorney-in-fact.” *Id.* (quoting 4 Daniel R. Gordon et al., *Henry’s Indiana Probate Law and Practice* § 30.18 at 160.1-160.2 (2007)). Thus, Brother’s fiduciary duty as Mother’s attorney-in-fact does not, standing alone, give rise to a presumption of undue influence.

[48] After reviewing the record, the evidence concerning Brother’s exercise of his authority as Mother’s attorney-in-fact was Brother’s testimony that he would, at Mother’s direction, write checks to pay her bills when she was hospitalized or in a rehabilitation facility. There is no evidence that Brother abused his fiduciary relationship as Mother’s attorney-in-fact to improperly influence Mother or to bring about the conveyance of her property to him. Rather, the record is clear that Mother was of sound mind and made her own decisions regarding her business and finances up until the time of her death. Indeed, she independently sought the advice of counsel and she, alone, made the decision to not accept her attorney’s advice to deed her property to all of her children. In her handwritten letters, Mother acknowledged that Brother was “just as surprised” when learned that she was deeding her house to him. *Exhibits* at 9.

[49] To the extent that Mother indicated in her notes that Brother was going to equally divide the value of her property among all the siblings, we note Brother’s contrary testimony that when Mother executed the Deed, she told him that she wanted him to have the property. And, again, we note that Mother acted against the advice of counsel in deeding the property only to Brother. The jury was tasked with weighing Brother’s testimony, Mother’s actions, and Mother’s handwritten notes in reaching a decision about whether

Mother's act of deeding her property to Brother was or was not brought about by any undue influence of Brother. Either conclusion could have been reached by the jury. The court's finding that the jury's verdict is against the weight of the evidence in this regard is erroneous.

[50] To the extent the trial court found that Mother "relied" on Brother for assistance following Husband's death, we note that the evidence clearly showed that she relied on Sisters too. *Appellant's Appendix Vol. III* at 198. Indeed, there was no dispute that Mother relied on Brother and Sisters for upkeep of her property, cooking, cleaning, and other daily tasks. Without more, however, such does not create a fiduciary relationship. This is especially true when the testimony from all of the siblings was that Mother was of sound mind and exercised independence with regard to her personal affairs up until her death. In any event, whether or not Brother's upkeep of the property, home repairs, and help with driving Mother to appointments gave rise to a fiduciary relationship between Brother and Mother was a matter within the jury's discretion. We cannot say that the jury's verdict was against the weight of the evidence.

[51] To the extent Sisters assert that Brother unduly influenced Mother's decision by telling her about a supposed vote they had to place her in a nursing home, Brother testified that Mother was already aware of such and broached the subject with him. At the very least, the evidence was conflicting and the trial court, as the thirteenth juror, was not at liberty to reweigh such evidence and come to a decision contrary to the jury.



[52] In short, the evidence presented was capable of multiple interpretations as to whether Brother abused any fiduciary relationship he may have had with Mother. The jury obviously concluded that there was no breach of fiduciary duty and thus no basis for imposition of a constructive trust. To conclude otherwise required a reweighing of conflicting evidence. We therefore conclude that the trial court abused its discretion in granting Sisters' motion to correct error. This matter is remanded to the trial court with instructions to reinstate the jury's verdict in favor of Brother.

[53] Judgment reversed and remanded with instructions to reinstate the jury verdict in favor of Brother.

Brown, J. and Tavitas, J., concur.