

2012 WL 1912759 (Mass.App.Ct.) (Appellate Brief)  
Appeals Court Of Massachusetts.

Francis J. GIORDANO, Plaintiff/Appellant,  
v.  
Stephen F. GIORDANO, Giovanna Giordano and Heather Giordano, Defendants/Appellees.

No. 2012-9-0408.  
May 15, 2012.

On Appeal from An Order of the Superior Court for Bristol County

**Brief of the Defendant/Appellee, Giovanna Giordano**

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## NOTE RE: REFERENCES TO TRANSCRIPT

1TTr = Trial Transcript Excerpts Part One

2TTr = Trial Transcript Excerpts Part TwoTAUBREFERENCES TO RECORD APPENDIX:

R = Record AppendixSY \*1 STATEMENT OF THE ISSUES

**I. Whether the trial court (trial part one) properly instructed the jury, in considering the constructive trust claim, on the standard of value; whether the trial court erred in failing to instruct the jury that an exchange of one promissory note for another does not constitute value; and whether the trial court properly instructed the jury on notice.**

**II. Whether the trial court (trial part two) properly found no actual intent to defraud and properly ruled that Francis failed to satisfy his burden of proof that the consideration paid by Giovanna was not reasonably equivalent.**

**III. Whether both trial judges properly did not impose a construction trust upon the property as a matter of equity, in order to avoid unjust enrichment.**

**IV. Whether the trial court (trial part one) properly precluded Francis from impeaching Giovanna through the use of immaterial and collateral evidence.**

**V. Whether the trial court properly dismissed Francis' elder abuse claim.**

**SUMMARY OF ARGUMENT**

**I. “Value” instruction given by the trial court (trial part one) was appropriate and consistent with the Restatement.**

The trial court appropriately instructed the jury on the standard of value. The instruction that “a person who innocently has acquired title to a property for which she has paid value is under no duty to restore it” is consistent with the Restatement's \*2 standard for bonafide purchaser for value. See [Restatement \(Second\) of Trusts §284\(1959\)](#). Moreover, the instruction mirrors the definition of bonafide purchaser as it is defined in Black's Law Dictionary *See Black's Law Dictionary* 161 (5th Ed. 1979).

The court instructed the jury on “value” and provided the jury with examples of how to interpret that term. Likewise, the court instructed the jury on “notice” and provided the jury with examples of how to interpret that term.

The jury instructions were appropriate in light of the legal principals and evidence presented by the parties. Clearly, the trial court met its responsibility of placing the jury in the best possible light to perform its duty.

**II. Trial court (trial part two) properly found no actual intent to defraud and properly ruled that Francis failed to satisfy his burden of proof that the consideration paid by Giovanna was no reasonably equivalent.**

Deference must be given to the trial judge to ascertain the evidence and determine credibility of the witnesses before it. See *Browning-Ferris Industries, Inc. v. Casella Waste Management of Massachusetts, Inc.*, 79 Mass.App.Ct. 300,307-308(2011). Moreover, “[n]othing in [section 5](#)[of the Uniform Fraudulent \*3 Transfer Act] suggests that the presence of some combination of these factors or even all them, compels a finding of fraud; the factors are simply those that may be considered.” *Baker Tanks, Inc. v. C&B Construction Management Trust, Inc.*, 2008 WL 2200259(Mass.App.Div.2008). After review of the evidence, the trial court determined that despite some presence of “badges of fraud” that there existed no intent on the part of Stephen to defraud Francis and that determination must be given its due unless it is clearly erroneous.

Moreover, “[w]hether a transfer is made for a reasonably equivalent value is a question of fact, which the [court] will reverse only if clearly erroneous.” *In re Ozark Restaurant Equipment Co.*, 850 F.2d 341,344(8th Cir.1988). Further, the court “must examine all aspects of the transaction in order to measure carefully the value of all of its benefits and burdens to the debtor, direct or indirect.” *In re Crawford*, 454 B.R. 262,273(Bankr.D.Mass.2011). Furthermore, Francis has the burden to prove that the sale was not for reasonably equivalent value. The trial court found that Francis did not meet his burden of proof. Francis did not provide any evidence of \*4 value other than one sheet from an appraisal report to which the author was not available to testify.

In addition, the court could have found that the loss of use of the portion of the property occupied by Francis constitutes value. Notwithstanding, Francis failed to meet his burden of proof on the issue of reasonably equivalent value as the trial court correctly determined.

**III. Both trial court judges appropriately did not impose a constructive trust upon the property in order to avoid unjust enrichment.**

Where, “one of the contracting parties defaults, the other party does not automatically have an unjust enrichment claim against the third party.” *Taylor Woodrow Blitman Construction Corp. v. Southfield Gardens Co.*, 534 F.Supp. 340,347 (D.Mass.1982). Further, “[w]here [Francis] has an adequate remedy at law, equity will not consider a claim for unjust enrichment.” *Id.* Francis did not testify to any entitlement to reside at the property rent free for the rest of his life. In fact, when questioned about reserving any life estate in the property when Francis conveyed the property to Stephen, Francis answered “no”. In support of same, Stephen testified that there was no agreement that Francis would reside at the \*5 property rent free. The understanding, at

least as testified by Stephen, was that he would take care of Francis for the rest of his life. The inference is that no matter where Francis resided that Stephen would take care of him, whether that be at the subject property or any other property.

Furthermore, there is no evidence that Giovanna knew of any fiduciary relationship between Stephen and Francis. As such, to suggest that Giovanna is somehow part of Stephen's breach of his fiduciary trust to Francis when there is no evidence to support same is clearly wrong.

**IV. The trial court (part one) did not err in precluding Francis from impeaching Giovanna on evidence that is immaterial and collateral to the case.**

“A party has no right to present extrinsic evidence to contradict the witness testimony when that evidence relates to an immaterial and collateral issue.” 14B Howard J. Alperin, *Massachusetts Practice Series, Summary of Basic Law* §10.50 (4th Ed. 2011). The Supreme Judicial Court has ruled that it does not “disturb a judge's decision to admit evidence absent an **abuse** of discretion or other legal error.” *Zucco v. Kane* 439 Mass. 503, 507 (2003). Francis sought to question Giovanna on the fact that she signed \*6 preprinted forms which indicate that there exists no title issues relating to the property and there exists no zoning issues impacting the property's legality. However, neither document rebuts the jury's finding that Giovanna is a bonafide purchaser for value. The documents may best be used to collaterally impeach Giovanna, but not to show that she had any knowledge of Stephen's wrong-doing. The trial judge appropriately excluded documents pertaining to Giovanna's 2006 refinance transaction.

**V. The trial court did not err in dismissing the **elder abuse** claim.**

The absence of an express private cause or right of action in the **elder abuse** statute is an indication of the legislature's reluctance to provide for one. To imply a private cause or right of action would be inconsistent with the legislature's intentions as the legislature, if it wanted to create a private cause or right of action in the statute, would have so expressly provided. See *All Brands Container Recovery, Inc. v. Merrimack Valley Distributing Co., Inc.*, 54 Mass.App.Ct. 297 (2002).

It is clear that the legislature bestowed the enforcement of the **elder abuse** statute on the Commonwealth of Massachusetts and the Department of \*7 **Elder** Affairs. Further, Francis has not provided any evidence of **elder abuse**, but to suggest that Stephen received a substantial benefit from Francis when Francis conveyed the property to Stephen. However, there is no evidence to support that Giovanna **abused** Francis. The trial court's dismissal of the **elder abuse** claim was proper.

**STATEMENT OF THE CASE**

This action was filed by Francis Giordano (“Francis”) against his son, Stephen F. Giordano (“Stephen”), his daughter-in-law, Heather Giordano (“Heather”), solely as trustee process defendant, and his daughter, Giovanna M. Giordano (“Giovanna”), alleging various claims including declaratory judgment, **elder abuse** violation M.G.L. c.266, §30, accounting, breach of contract, trustee process and injunctive relief. The claims stem from a transfer and a sale of the real property located at 144 Fremont Street in Taunton, Massachusetts: the transfer of the property from Francis to Stephen and the sale of said property from Stephen to Giovanna. A Verified Complaint was filed with the Bristol County Superior Court sitting in Fall River, Massachusetts on July 6, 2006. Contemporaneously with the filing of the Verified \*8 Complaint, Francis sought and obtained a Memorandum of Lis Pendens in accordance with M.G.L. c.184, §15.

On August 17, 2006, Giovanna filed a Motion to Dismiss pursuant to Mass.R.Civ.P. 12(b) (6). On September 15, 2006, Giovanna filed and assented to Motion to Dissolve the Memorandum of Lis Pendens. On December 11, 2006, the Court entered its order regarding Giovanna's Motion to Dismiss and decided that the claims for declaratory judgment and injunctive relief as they relate to a resulting trust were dismissed and claims relating to **elder abuse** and M.G.L. c.266 §30 were dismissed by agreement of the parties. The Court found that the claims relating to declaratory judgment and injunctive relief as they relate to a constructive trust and M.G.L. c.109A were triable claims and that the claims for breach of contract and accounting were also triable claims.

Subsequently, Francis amended his complaint to add a claim for conversion. Each party filed a Motion for Summary Judgment which motions were ultimately denied by the trial court. On March 27, 2007, the trial court issued an order bifurcating the claims for breach of contract and constructive trust which the Court determined that it would hear first by way of jury \*9 trial. Depending upon the outcome of the jury trial, the remaining claim(s) shall be tried.

The breach of contract and constructive trust claims were tried to a jury. Giovanna's affirmative defense that she is a bonafide purchaser for value of the property was also tried to the jury. On December 7, 2009, the jury returned a verdict in favor of Francis on the breach of contract and constructive trust claims. While the jury returned the aforementioned verdicts, it found that Stephen did not commit any fraud. Rather, the jury found that Stephen violated his fiduciary duty to Francis. The jury also found that Giovanna is a bonafide purchaser for value when she purchased the real property in April 2004.

The remaining claim for fraudulent transfer was tried without a jury, Maguire, J., presiding over the trial. Judge Maguire issued his findings of fact, rulings of law and order for judgment on January 11, 2011 which found in favor of Giovanna on the fraudulent transfer claim. Judge Maguire opined that although Stephen was insolvent at the time of the transfer, Francis did not meet his burden of proof on the issue of whether or not the transaction was for a reasonably equivalent value.

\*10 As a result of said ruling, Francis filed for an appeal of both the jury verdict finding that Giovanna is a bonafide purchaser for value and Judge Maguire's ruling in favor of Giovanna on the fraudulent transfer claim.

#### STATEMENT OF FACTS

Francis purchased the property located at 144 Fremont Street in Taunton, Massachusetts on November 12, 1976 by assuming the prior owner's mortgage. 1TTr8-9. In 1981, while working for Metropolitan Life, Francis sustained an injury. 1TTr9. As a result of said injury, Francis received a settlement from workers' compensation in the amount of One Hundred Ninety-Two Thousand (\$192,000.00) Dollars. 1TTr10. Francis did not receive the settlement in one lump sum. 1TTr10. Francis received Sixty Thousand (\$60,000.00) Dollars in year one of the structured settlement. *Id.* Francis then received successive payments in the amount of Forty Thousand (\$40,000.00) Dollars, Ten Thousand (\$10,000.00) Dollars and Twenty Thousand (\$20,000.00) Dollars. *Id.* Francis received the last payment under the structured settlement in 1997. *Id.* By 1997, Francis used most of the structured settlement and needed additional monies to live. 1TTr23. As a result \*11 of same, Francis borrowed Twenty Thousand (\$20,000.00) Dollars from the Taunton Federal Credit Union. 1TTr11.

In March 2001, Francis filed bankruptcy due a lot of credit card debt. 1TTr13 and 20. In July 2001, Francis received a discharge from bankruptcy. 1TTr14 and 38. In the bankruptcy petition, Francis listed the value of the real property at One Hundred Fifty Thousand(\$150,000.00) Dollars. 1TTr21

Subsequently, Francis had a discussion with Stephen regarding the real property. 1TTr15,24,33,34,39 and 40. Giovanna was not involved in any discussion(s) between Francis and Stephen regarding the transfer of the property in October 2001. 1TTr24,27 and 45.

After the discussion between Stephen and Francis concerning the transfer of the property to Stephen, Francis called a family meeting at the Season's Palace. 1TTr41. Francis informed the family that he was transferring the property to Stephen and the family proceeded to discuss a number of scenarios of how to use the real property. 1TTr42,40-51 and 55-56. However, the family never discussed an agreement to build a family compound according to Stephen, Heather and Giovanna. 1TTr44,50-51 and 55-56. Giovanna \*12 understood the transfer to be a sale and had no problem with Francis transferring the property to Stephen. 1TTr55-56. However, Melissa Giordano-Hensley was not happy about the transfer. 1TTr37 and 56. After that meeting, the only understanding that Stephen, Heather and Giovanna took from the meeting was that the property would be transferred to Stephen. 1TTr43,46,52-53 and 56-57. Stephen only knew that he was going to take care of Francis for the rest of Francis' life wherever that may be whether it be at the subject property or at another property. 1TTr42-43. Giovanna had no knowledge of

the undertaking at any time on or before the October 2001 transfer. Giovanna learned of the transfer of the property to Stephen in late 2001. 1TTr54-55.

On October 17, 2001, Francis appeared at the Bristol County Northern District Registry of Deeds to transfer the real property to Stephen. 1TTr17-18. Francis did not reserve a life estate in the deed nor did he indicate in the deed the purpose of the transfer to Stephen. 1TTr19.

On April 21, 2004, Stephen sold the real property to Giovanna for One Hundred Sixty-Five Thousand (\$165,000.00) Dollars. 1TTr46 and 57. Stephen sold \*13 the property to Giovanna because he could no longer afford to make the mortgage payments. Giovanna had no knowledge of Stephen's IRS debt or credit card debt prior to purchasing the property. 2TTr20-21. Giovanna had no real knowledge of Stephen's mortgage debt other than Stephen could no longer afford the house. 2TTr3-4 and 23. Stephen was not looking to profit from his sister. 1TTr47-48 and 2TTr8. Stephen used the proceeds from the sale to satisfy his existing mortgage and avoid foreclosure. 1TTr47 and 2TTr8. Stephen informed his father about the sale of the property to Giovanna and Francis was satisfied with the sale in light of Stephen's current financial condition. 1TTr48 and 58 and 2TTr8-9. Giovanna also discussed the sale of the property to her with Francis prior to the closing. 2TTr13 and 17.

Since Giovanna has owned the real property, Francis has not paid any rent to Giovanna. 1TTr29. Giovanna gave Francis a monthly stipend of Two Hundred (\$200.00) Dollars for sixteen (16) months until Francis refused to further accept said payments in light of the pending action. 1TTr29-32, 58, 60-61.

Since Giovanna lives in Connecticut, Stephen has acted as her property manager and agreed to care for \*14 the property in her absence and collect the rents as instructed by Giovanna. 1TTr48 and 2TTr9-11. Giovanna's son, John, also collected rents at the request of Giovanna. 2TTr14. For a period of time after Giovanna purchased the property, Stephen resided at the property and paid Giovanna rent. 1TTr49 and 2TTr59. Melissa and Attorney Hensley, Francis' counsel, also paid rent to Giovanna to reside at the real property. 1TTr38 and 2TTr27.

## ARGUMENT

**I. The trial court (trial part one) properly instructed the jury, in considering the constructive trust claim, on the standard of value; the court did not err in failing to instruct the jury that an exchange of one promissory note for another does not constitute value; and the court did not fail to properly instruct the jury on notice.**

A Judge “presiding over a jury trial ought himself to state in his charge comprehensively, plainly and forcibly all the governing principals of law as to the issues raised by the pleadings and supported by evidence, so that the jury may clearly understand their duty and be enabled to perform it intelligently.” *Dartt v. Browning-Ferris Industries, Inc.*, 427 Mass. 1(1998); *Buckley v. Frankel*, 262 Mass. 13, 15(1928); \*15 *Maxwell v. Massachusetts Title Insurance Company*, 206 Mass. 197, 200(1910); *Commonwealth v. B&M Fitzgerald Builders, Inc.*, 71 Mass.App.Ct. 486, 489(2008). “The Trial Judge maintains discretion in charging the jury, and a charge is to be read as a whole in determining whether the jury were properly instructed.” *Commonwealth v. B&M Fitzgerald Builders, Inc.*, 71 Mass.App.Ct. 486, 489(2008); *Ventresco v. Liberty Mutual Insurance Company*, 55 Mass.App.Ct. 201, 206 (2002) “A Trial Judge is not constrained to put his instructions into any particular words; rather he is required only to provide a full and accurate explanation of the governing law applicable to a particular case.” *Commonwealth v. B&M Fitzgerald Builders, Inc.*, 71 Mass.App.Ct. at 489. Further, “[i]t is well settled, however, reversible error will not be found merely by consideration of a fragment of an instruction which may be open to criticism.” *Ventresco v. Liberty Mutual Insurance Company*, 55 Mass.App.Ct. 201, 206(2002); *Haven v. Town of Brimfield*, 345 Mass. 529, 533(1963).

In instructing the jury and providing the instructions, the Court labored lavishly so that the jury may understand, in layman terms, what was before them. 1TTr63-84. The Court on a number of occasions stated the law and in the next breath repeated the law \*16 in understandable terms. Id. On occasion, the Court repeated the definitions of the legal terms contained in the instructions along with defining the burdens of proof to which each party must overcome. Id. The instructions were full, fair,



correct and clear. The Court also rendered complete explanations of the law and the jury's duty, as fact finder, to apply the facts to the law. In no uncertain terms did the Court waiver on its duty to fully inform the jury as to their responsibilities.

The Court defined a bonafide purchaser for value as “a person who innocently has acquired the title to a property for which she has paid value is under no duty to restore it” 1TTr74-77. The Court's definition of a bonafide purchaser is no different than the definition contained in Black's Law Dictionary which defines bonafide purchaser as “[o]ne who has purchased property for value without any notice of any defects in the title of the seller.” *Black's Law Dictionary* 161(5th Ed. 1979); Also see *Denn v. Miller*, 2010 WL 2312348 (Mass.Land Ct. 2010). Likewise, the Restatement (Second) of Trust provides that “[i]f the trustee in breach of trust transfers trust property to, or creates a legal interest in the subject matter of the trust in, \*17 a person who takes for value and without notice of the breach of trust, and who is not knowingly taking part in an illegal transaction, the latter holds the interest so transferred or created free of the trust, and is under no liability to the beneficiary.” *Id* at §284. The Court's instruction on a bonafide purchaser for value comports with the aforementioned Restatement. 1TTr74-77.

For value, the Court defined value in a number of ways. 1TTr75-76. The Court instructed the jury that value can be the “payment of a debt of the seller owed to a third person and that the transfer is for value if the third person, meaning the holder of a mortgage or note, had no notice of the breach of trust that gave rise to a constructive trust on the property”. *Id*. The Court also instructed the jury that “[a] buyer also provides value if he provides a payment used by [] seller to pay off a mortgage, a note, or any debt.” *Id*. Further, “a buyer provides value if she makes any payment of money to the seller.” *Id*. The jury heard evidence on whether Giovanna is a bonafide purchaser for value. It is clear from the evidence that the purchase price was One Hundred Sixty-Five Thousand and 00/100 (\$165,000.00) Dollars and that the sale proceeds \*18 were used to satisfy Stephen's mortgage. 1TTr47 and 2TTr8. If we accept as value the payment of money or consideration paid to a third party, under the [Restatement \(Second\) of Trusts §298](#), Giovanna gave value for the transfer. [Section 298](#) dictates that “[i]f money is paid or other property is transferred or services are rendered as consideration for the transfer of trust property, the transfer is for value.”

On the issue of notice, the trial court instructed the jury that “a purchaser before providing value and taking title has knowledge of any facts sufficient to put him or her upon inquiry that there may be some outstanding right in conflict with title” can not be considered a bonafide purchaser. 1TTr76. The Court further instructed the jury that notice of a fact consists of “actual knowledge of it”, receipt of “notice and notification of it” or “from all the facts and circumstances known to him or her at the time in question, [she] has reason to know that it exists.” 1TTr76. The court further instructed the jury that the “fact that the property has been obtained for a payment substantially less than the property's real value may in itself give reason to know of some wrong-doing and thereby establish notice of another's ownership of the \*19 property.” *Id*. at 77. Digesting the instructions and applying the evidence thereto, the jury determined that Giovanna is a bonafide purchaser for value. 1TTr102. The jury heard evidence that Giovanna was not involved in any agreement or arrangement between Francis and Stephen respecting the Fremont Street property. 1TTr45. Specifically, Stephen testified that Giovanna had nothing to do with the transfer of the property from Francis to Stephen. *Id*. Moreover, both Stephen and Francis testified that Giovanna had no knowledge of nor was she a party to the purported agreement between Francis and Stephen. 1TTr28 and 45. Further, Giovanna would have to know of Stephen's intent not to perform the purported agreement. Furthermore, the notice or knowledge must be imputed from the time existing around September/October 2001 or on or before the transfer of the property on October 17, 2001 from Francis to Stephen.

Francis had the burden to demonstrate that Giovanna knew of the purported agreement between Francis and Stephen and that Giovanna knew that Stephen never intended to perform the agreement at the time Francis conveyed the property to Stephen. Meeting the aforementioned burden, Francis could demonstrate \*20 Giovanna's knowledge of Stephen's impropriety. However, the evidence clearly demonstrates that Giovanna had no knowledge of the purported arrangement between Francis and Stephen until some time after Francis transferred the property to Stephen. 1TTr54-55. There may have been some discussions of a transfer between Francis and Stephen at the Seasons Palace Restaurant in which Giovanna was present along with Heather and Melissa, but the transfer had not taken place and there was never discussed any definite time frame as to when the transfer would take place or what the terms of any purported agreement would be. Further, there exists no evidence that Giovanna knew that Stephen intended not to perform the agreement. Francis appeared at the Registry to transfer the property to Stephen without even telling Stephen of the transfer until after the deed was recorded. 1TTr33. There exists no evidence that Giovanna knew

of the transfer on or before the transfer date or the terms of any purported agreement between Francis and Stephen. See [Smith v. Knapp](#), 297 Mass. 466 (1937).

In *Smith v. Knapp*, the defendant and Helen C. Tripp lived in the same house since 1927. It appears that the Defendant and Ms. Tripp were roommates. In \*21 1927, the defendant borrowed One Thousand Five Hundred and 00/100 (\$1,500.00) Dollars from the New Bedford Cooperative Bank and gave as security a mortgage on her real estate. On occasion, Ms. Tripp paid monthly installments to the bank as a contribution to the common living expenses. However, during the period of 1927 to 1932, Ms. Tripp did not contribute a great deal to the common expenses but had told the defendant that her mother had created a Four Thousand and 00/100 (4,000.00) Dollars trust fund which would pass to Ms. Tripp on her mother's death. When she received this money, Ms. Tripp agreed to pay the defendant what was proper. After Ms. Tripp's mother's death in 1931, she represented to the defendant that she had conferred with the treasurer of the bank about the arrears due on the mortgage and had received his assurance that the matter of paying could wait until the settlement of the estate of Ms. Tripp's mother. The defendant was not acquainted with the plaintiff and had no knowledge of her property and there was never any talk between the defendant and Ms. Tripp about obtaining any money from the plaintiff.

On July 12, 1932, Ms. Tripp, by false and fraudulent representations induced the plaintiff to \*22 turn over to her the sum of Two Thousand and 00/100 (\$2,000.00) Dollars on the understanding that it was to be invested by Ms. Tripp in syndicate in Providence, Rhode Island. On the same date, Ms. Trip applied One Thousand Four Hundred and 00/100 (\$1,400.00) Dollars of that money in payment of the balance due on the note of the defendant to the bank, and the bank on the same date discharged its mortgage. The defendant first learned of the payment of the mortgage by Ms. Tripp when the latter telephoned her that she was at the bank and paying it off. The defendant first learned in October or November, 1932, that the money was obtained from the plaintiff by Ms. Tripp when she was arrested on a charge of larceny on the plaintiff's complaint. The master was not able to find any evidence that the defendant connived or conspired with Ms. Tripp to obtain any money from the plaintiff, or that the defendant had any knowledge of how or where the money was obtained when it was applied to the discharge of the mortgage. The arrangement was that Ms. Trip had agreed to pay or share in the common living expenses and that she would contribute to same upon the receipt of money from her mother's estate. See *Id.* generally at 467-469.

\*23 In contrast of the aforementioned case, *Jones v. Swift* stands for a different proposition. In *Jones*, the Trustee of the Swift Trust obtained a loan from the New England Trust Company ("Trust Company") and uses, as collateral, the shares currently entrusted to him. The Trustee obtains the loan in his name, individually, and is the individual holder of the shares. However, it is important to note that although the shares are in the Trustee's name, the shares are the property of the Swift Trust. Naturally, the Trust Company believes that the Trustee is the owner of the shares and not the Trustee of the Trust to which the shares belong. Included in the shares that were pledged by the Trustee to the Trust Company are the shares of Swift. The Trust Company never knew that the \$25,000.00 loan was obtained by the Trustee as Trustee for the Swift Trust. The Trust Company always regarded the loan as the Trustee's personal loan. Similarly, Swift never knew, prior to the Trustee's death, that this loan had not been obtained by the Trustee in his name as Trustee, or that the stock so pledged as part of the collateral for said loan had not been issued in his name as Trustee under the Trust Indenture. However, Swift had knowledge of, and consented to, the loan obtained by \*24 the Trustee.

Upon the death of the Trustee, the Trustee's wife conveys the shares to Swift by assent from the Successor Trustee for no consideration. Swift, who was the beneficiary of the first loan, obtains a loan from the Trust Company to satisfy the first loan. Swift received the remaining \$1,000.00 from the new loan after payment of the first loan. However, more importantly, the parties agree that the transfer would not be regarded as a sale but merely as a transfer or an assignment of the shares to Swift without consideration. Also, Swift drafted the Trust documents and was aware that the Trust did not authorize the Trustee to use the Trust property in the manner in which the Trustee originally used the Trust property. In essence, Swift had knowledge of the terms of the Trust and knowledge that the original Trustee obtained a loan for his benefit and used the Trust property as collateral for said loan. The Court, though, opined that "[w]hen the transferee is or is regarded as the equivalent of a bona fide purchaser for value, however, he has not been unjustly enriched, and where the trustee pays or agrees to pay to the transferor's creditor a debt of the transferor, the transferee has \*25 given value." *Id.* 300 Mass. at 185.



The problem that Swift faces is that he knew and consented to the original Trustee obtaining the \$25,000.00 loan from the Trust Company. *See, Jones* at 186. Moreover, Swift did not demonstrate that he was harmed by reason of the fact that he did not know that the loan was obtained by the original Trustee in the original Trustee's individual capacity as opposed to the original Trustee's capacity as Trustee of the Swift Trust. Essentially, Swift was paying off his own loan, as the original loan for \$25,000.00 was obtained by the Trustee for the benefit of the Swift Trust in violation of the Trust that Swift created. Consequently, Swift is not a bona fide purchaser for value because he essentially took a second loan in the amount of \$26,000.00 to pay off his first loan. However, if the loan was truly the original Trustee's loan as the Trust Company believed it to be and Swift satisfied the Trustee's loan without being unjustly enriched, then Swift would have been a bona fide purchaser for value. But since there was no consideration for the assignment or transfer of the shares to Swift and then Swift subsequently uses those shares as collateral for a second loan in the amount of \$26,000.00 to satisfy the \*26 first loan, Swift cannot be a bona fide purchaser for value. Furthermore, as indicated above, Swift had knowledge and consented to the original Trustee obtaining the first loan. Therefore, Swift not only did not give consideration for the assignment or transfer of the shares, he had knowledge of the breach of the Trust.

The *Jones* case is distinguishable from the instant case in that Swift was essentially paying off his own loan. The *Jones* court opined that had Swift paid off the original Trustee's loan, then there would be consideration or value. In the instant case, Giovanna paid Stephen's mortgage debt. This is not a scenario where Giovanna was paying off her own debt by way of some impropriety vis-a-vis the *Jones* case. Remember, the first loan obtained by the original Trustee, in *Jones*, was obtained in contravention to the terms of a trust. Giovanna did not violate any trust by purchasing the real property. A *Jones* instruction would probably confuse the jury in that the factual circumstances in this case are distinguishable from *Jones*. The jury may have been looking for a transfer or an assignment of property by either Stephen or Giovanna to themselves as opposed to an outright sale \*27 of the property from Stephen to Giovanna. Additionally, the jury, after reviewing the evidence, found that Giovanna had no knowledge or notice of any perceived plan or agreement between Francis and Stephen or of Stephen's intention not to perform any plan or agreement. The outright sale of the property and the lack of knowledge lead the jury to find that Giovanna is a bona fide purchaser for value. More so, despite Francis' intention, Giovanna has much to lose if the property is sold at foreclosure. Giovanna stands to lose her investment and her creditworthiness.

The reliance upon the *Demoulas* case is faulty as the standard used by the *Demoulas* Court to determine value is derived from the Uniform Commercial Code. *See, Demoulas, 424 Mass 501, 546*. The *Demoulas* Court looked to the Uniform Commercial Code because it was dealing with stock and partnership interests. *Id.* There may have been some real estate dealings, but the real estate dealings were done in the commercial setting. *See, Demoulas* generally. More so, the *Demoulas* case appears to suggest that a person gives value for rights if he acquires them in return for any consideration sufficient to support a simple contract. *Id.* at 547. The *Demoulas* case does not appear to \*28 employ a "reasonable equivalent value" standard. Further, the *Demoulas* case appears to deal with fiduciary relationships or those that intimately involve more knowledge or awareness than the ordinary person. *Id.* Here, the jury found that Stephen breached his fiduciary relationship with Francis. However, the jury declined to extend that breach to Giovanna when they found that she is a bona fide purchaser for value.

Francis urges a different finding than that rendered by the jury. Yet, Francis offers no additional facts that would support a reversal. The jury heard all of the facts asserted by Francis in his brief and it is up to the jury to make a determination as to credibility. The jury, given the appropriate instruction on bona fide purchaser for value, found that Giovanna paid value for the property without any knowledge or notice of any wrongdoing on the part of Stephen.

Despite Francis' contention, reality does not confirm Francis' family compound story. Even from a practical standpoint, the ability to do what Francis alleges is highly improbable let alone mathematically impossible. Property values in the neighboring \*29 communities to which Francis' compound theory persist have higher property values than that of Taunton, Massachusetts. The likelihood that the sale of the property in the manner contemplated by Francis would yield enough proceeds to purchase property in neighboring communities like Rehoboth, Dighton and the like, is not feasible. The jury did find that there existed some breach between Stephen and Francis and issued a verdict accordingly which resulted in a judgment in favor of Francis

against Stephen for \$135,000.00 plus interest. In the same breath, the jury found Giovanna to be a bona fide purchaser for value of the property.

**II. The trial court (trial part two) did not err in finding no actual intent to defraud and in ruling that Francis failed to satisfy his burden of proof that the consideration paid by Giovanna was not reasonably equivalent.**

Rule 52(a) of the Massachusetts Rules of Civil Procedure dictates that “[f]indings of fact shall not be set aside unless clearly erroneously, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.” Mass.R.Civ.P. 52(a) (2012). “In applying the clearly erroneous standard for the findings of a [judge] sitting without a jury, Appellate Courts must \*30 constantly have in mind that their function is not to decide factual issues de novo.” *First Pennsylvania Mortgage Trust v. Dorchester Savings Bank*, 395 Mass. 614, 621 (1985). “The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.” *Id.* “The question for the Appellate Court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.” *Id.* More so, “[a]ny findings by the trial judge, especially upon matters of credibility, will receive usual deferential review under the clearly erroneous standard[.]” *Browning-Ferris Industries, Inc. v. Casella Waste Management of Massachusetts, Inc.*, 79 Mass.App.Ct. 300, 307-308 (2011). However, the Appellate Court will review de novo the trial court’s ultimate conclusion of law. See, *Zabin v. Picciotto*, 73 Mass.App.Ct. 141, 170 (2008). In applying the clearly erroneous standard, as indicated above, the judgment issued by the trial court must stand as the trial court \*31 appropriately found no violation of the Uniform Fraudulent Transfer Act.

**Actual Fraud**

“A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor.” M.G.L. c. 109A, §5 (a)(1). The Act delineates a number of factors which may be considered in determining a debtor’s actual intent to defraud. These “badges of fraud” are contained in §5(b) of the Uniform Fraudulent Transfer Act. See, M.G.L. c. 109A, §5(b). Although the Court found that at least one badge of fraud was present in the case in that the conveyance of the property from Stephen to Giovanna was a transfer to an insider as defined under the Uniform Fraudulent Transfer Act, the Court found, at page 6 of its Findings, that Stephen’s actual intent in conveying the property to Giovanna was not to “hinder, delay, or defraud” Francis. Contrarily, Stephen’s intent was to preserve the home so that it would not be lost to foreclosure. R.79.

\*32 As indicated above, the Court has to be given deference on the credibility of the evidence. The only way the trial court can assess whether or not intent exists in any case is to hear the evidence and assess its credibility. Here, the Court found that there was no intent on the part of Stephen to defraud Francis. In fact, Stephen testified that the main reason that he transferred the property to Giovanna was due to the fact that he could no longer afford the property. More so, Stephen testified that he informed Francis that he was going to sell the property to Giovanna. 1TTr48. If Stephen intended to defraud Francis, he would not have informed him that he was selling the property to Giovanna.

The Court found an additional “badge of fraud” present in the case. R.77. The Court found that Stephen was insolvent as provided by M.G.L. c. 109A, §3(a) and (b). However, the Courts did not find, after its review of the evidence, that Stephen intended to defraud Francis. Factors listed under §5(b) are factors that may be considered in determining whether it was actual intent. See M.G.L. c. 109A, §5(b). “Nothing in §5 suggests that the presence of some combination of these factors, or even all of them, \*33 compels a finding of fraud; the factors are simply those that may be considered.” *Baker Tanks, Inc. v. C&B Construction Management Trust, Inc.*, 2008 WL 2200259(Mass.App.Div.2008). Francis attempts to argue that Stephen maintained control over the property. However, Stephen testified that he merely collected rents at the direction of Giovanna and deposited the rents into a bank account set up by Giovanna. Giovanni’s son, John, on occasion also collected the rents. Further, Stephen and

Giovanna's son, John, performed maintenance and upkeep at the property all at the direction of Giovanna. The determination of whether or not there exists actual fraud should lie with the trial judge.

### Constructive Fraud

There are two ways to establish constructive fraud. The first is to demonstrate that “[a] transfer made or an obligation incurred by a debtor as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (i) was engaged or was \*34 about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they become due.” [M.G.L. c. 109A, §5\(a\)\(2\)](#). The Court determined that this section did not apply in that Stephen was not engaged in or about to engage in any business or transaction nor was he in the process of incurring new debt. R.76. The Court's ruling on this issue should stand as the record is devoid of any evidence to demonstrate that Stephen engaged or was about to engage in a business or a transaction in which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. Further, there exists no evidence that Stephen intended to incur new debts by way of the sale of the property to Giovanna. In light of the above, there is no need to touch upon the reasonably equivalent value standard under this section as the Court appropriately found this section inapplicable in this case.

The second method of finding a constructive fraud is to demonstrate that “[a] transfer made or obligation \*35 incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made a transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.” [M.G.L. c. 109A, §6\(a\)](#). The Court ruled that Stephen was insolvent in that the sum of his debts exceeded his assets and that he was not paying his taxes and other financial obligations as they became due. R.78. However, the Court found that Francis failed to prove that the consideration paid by Giovanna to Stephen was not reasonably equivalent to the home's value. *Id.* at pp. 7-8. To establish a fraudulent transfer under Massachusetts law, Francis must establish both that Stephen was insolvent prior to the sale or that he was rendered insolvent as a result of the sale and that the sale was made without fair consideration or reasonably equivalent value. See [In re Hause, 13 B.R. 75 \(Bankr.D.Mass.1981\)](#). “Whether a transfer is made for a reasonably equivalent value is a question of fact, which the [court] will reverse only if clearly erroneous.” [In re Ozark Restaurant \\*36 Equipment Co., 850 F.2d 342, 344 \(8thCir. 1988\)](#). Further, the court “must examine all aspects of the transaction in order to measure carefully the value of all of its benefits and burdens to the debtor, direct or indirect.” [In re Crawford, 454 B.R. 262, 273 \(Bankr.D.Mass.2011\)](#).

The Court, in its Findings of Fact, found that Stephen sold the property to Giovanna for \$165,000.00 and that the loan proceeds were used to pay off Stephen's mortgage. R.74. The Court also found that Francis did not pay any rent since he conveyed the property to Stephen on October 17, 2001. *Id.* The burden is on Francis to demonstrate that the purchase price in the amount of \$165,000.00 was not reasonably equivalent value. However, Francis failed to do so. Francis introduced the last page of an appraisal report, but failed to qualify the report, in its entirety, by having the author testify. Giovanna objected to the admissibility of the last page of the appraisal report as the report itself is hearsay. Such testimony would have been compelling as to the value of the property vis-a-vis the purchase price paid by Giovanna. More so, Stephen testified that he was not looking to profit from his sister. So the fact that \*37 the two were siblings certainly impacted the purchase price. Moreover, there was evidence that Francis did not pay rent subsequent to October 17, 2001 and that failure remains true even today. As such, the trial court could have found that the loss of use of the portion of the property occupied by Francis constitutes value.

The case of [In re Pilavis](#) is distinguishable from the instant action. Francis relies on the aforementioned case for its opinion that “in an intra-family transaction, the court places a heavier burden on the transferee to establish fair consideration for the transfer”. [In re Pilavis, 233 B.R. 1, 11 \(Bankr.D.Mass. 1999\)](#). The Pilavis Court cites [In re Fair](#) to support its opinion. See [In re Fair, 142 B.R. 628, 631 \(Bankr.E.D.N.Y.1992\)](#). Both cases deal with property settlement agreements in divorce proceedings and whether

transfers under said agreements are made with fair consideration. The standard the courts rely upon is fair consideration and not reasonably equivalent value. However, there appears to be no definition of either term and a determination on whether or not fair consideration or reasonably equivalent value has been given is left to the trial \*38 court. Neither court defines the term “intra-family”, however, and each case deals with transfers among husband and wife and in *In re Fair*, in part, to an issue.

Here, we are dealing with a transfer among siblings which the *In re Pilavis* and *In re Fair* cases do not seem to address. More so, the transactions in each case were made without any cash considerations or payment of an antecedent debt. The *In re Fair Court* found that the transfer of property from husband and wife to wife and daughter for maintenance and child support constituted fair consideration in light of the aforementioned standard. To that end, the instant case is distinguishable on two grounds. First, the transfer here is between siblings and not a husband and a wife transferring property to a wife and their daughter. Second, the transaction in the instant case resulted in the satisfaction of Stephen's mortgage. In other words, Stephen received cash which permitted him to satisfy his existing mortgage obligation. As such, Giovanna argues that the burden of proof remains upon Francis to prove that the transfer was not for a reasonably equivalent value. Further, it is important to note that in *In re Fair* the consideration given was \*39 for past and future maintenance and child support. See *In re Fair* at 632. Here, in the instant action, some value may be afforded for Francis being able to reside in the property rent free from the date of the transfer.

### **III. The trial court (part one and part two) did not err in failing to impose a constructive trust upon the property as a matter of equity, in order to avoid unjust enrichment.**

Equity is a concept of fairness. It denotes the spirit and habit of fairness and justness. *Black's Law Dictionary* 44 (5th Ed. 1979) “The question of credibility of witnesses is for the jury, and not for the court on appeal.” *Hoffman v. Liberty Motors Company, Inc.*, 234 Mass. 437, 438 (1920). Further, “where the accuracy of the findings depends upon the credibility of oral testimony, the conclusions of the Judge who saw and heard the witnesses must be given due weight and [the Appeals Court] will not disturb any facts resolved on the basis of the Judge's assessment of credibility.” *Massachusetts Electric Company v. Pacific National Investment Corporation*, 9 Mass.App.Ct. 752, 753 (1980).

“The doctrine of unjust enrichment is equitable in nature and correspondingly broad.” \*40 *Taylor Woodrow Blitman Construction Corp. v. Southfield Gardens Co.* 534 F.Supp. 340, 347 (D.Mass.1982). The Court defines unjust enrichment as “the retention of money or property of another against the fundamental principles of justice or equity and good conscience.” *Id.* Moreover, when “one of the contracting parties defaults, the other party does not automatically have an unjust enrichment claim against the third party.” *Id.* Further, “[w]here [Francis] has an adequate remedy at law, equity will not consider a claim for unjust enrichment.” *Id.*

Francis did not testify to any entitlement to reside at the property rent-free for the rest of his life. In fact, when questioned about reserving any life estate in the property when Francis conveyed the property to Stephen, Francis answered “no”. 1TTr19. In support of same, Stephen testified that there was no agreement that Francis would reside at the property rent-free. 1TTr53. The understanding, at least as testified by Stephen, was that he would take care of Francis for the rest of his life. The inference is that no matter where Francis resided that Stephen would take care of him, whether that be at the subject property or any other property. Francis argues that Giovanna agreed that Francis could reside at the \*41 property rent-free. However, that reliance is made upon Giovanna's counsel's mental impressions and as the evidence dictates no such agreement was made with either Stephen or Giovanna.

With respect to Francis' belief that Giovanna did not provide consideration is futile as it is clear from the testimony of Stephen and Giovanna that Giovanna paid Stephen One Hundred Sixty-Five Thousand (\$165,000.00) Dollars for the purchase of the property. See discussion, supra.

Further, Francis testified that Giovanna was not present at the one meeting he had with Stephen. 1TTr27. Likewise, Francis testified that Giovanna was not a party to the agreement between he and Stephen. 1TTr28. Stephen testified that Giovanna had no involvement in the transfer of the property. 1TTr45. There is no testimony by Francis, Stephen or Giovanna that would

demonstrate that Giovanna participated in any breach of a fiduciary duty or knew of any purported fraud on the part of Stephen. The mere fact that Francis has been permitted to reside at the property rent-free does not comport with any agreement by Stephen or Giovanna to allow Francis to reside there rent-free. Simply, Stephen and Francis had an \*42 understanding that Stephen would take care of Francis for the remainder of his life. As agreed, *supra*, whether that means that Francis would reside at the subject property or at another property remains to be determined. However, the fact does remain that Francis has resided at the property rent-free since October 2001.

It is clear that Francis did not allege a claim for unjust enrichment in this case. However, it is unclear as to whether Francis sought a remedy under the theory of unjust enrichment. Either way, unjust enrichment is an equitable remedy which materializes or ripens when there is no adequate remedy at law. See cases cited, *supra*. However, the jury returned a verdict in favor of Francis against Stephen in the amount of One Hundred Thirty-Five Thousand (\$135,000.00) Dollars plus accrued interest and costs.

Lastly, the jury is the trier of fact in the jury trial and is the best judgment of credibility and the facts in which they seek to believe as true. The jury spoke when they found a breach of contract and a breach of fiduciary duty, and therefore a constructive trust, against Stephen. However, they also spoke when they found that Giovanna is a bonafide purchaser for value \*43 despite the imposed constructive trust against Stephen. The jury is in the best position to determine credibility and reliability of the evidence. See cases cited, *supra*. To that end, the jury's determination should be allowed to stand.

#### **IV. The trial court (trial part one) did not err in precluding Francis from impeaching Giovanna through the use of closing documents related to the 2006 refinance transaction of Giovanna's property.**

“A party has no right to present extrinsic evidence to contradict a witnesses testimony when that evidence relates to an immaterial and collateral issue.” 14B Howard S. Alperin, *Massachusetts Practice Series Summary of Basic Law* §10.50 (2011). The Supreme Judicial Court has ruled that it does not “disturb a Judge's decision to admit evidence absent an **abuse** of discretion or other legal error.” *Zucco v. Kane*, 439 Mass. 503, 507 (2003). **Abuse** of discretion is defined as a view or action “that no conscientious Judge, acting intelligently, could honestly have taken.” *Dahms v. Cognex Corporation*, 455 Mass. 190, 204 (2009) citing *Davis v. Boston Elev. Ry.*, 235 Mass. 482, 502 (1920). However, “in assessing whether a Judge has **abused** his discretion, we do not simply substitute our judgment for that of the Judge, rather, we ask whether \*44 the decision in question rests on whimsy, caprice, or arbitrary or idiosyncratic notions.” *Dahms* at 203; citing *Boulter-Hedley v. Boulter*, 429 Mass. 808, 811 (1999). “This standard gives great deference to a Judge's decision.” *Boulter-Hedley* at 811.

In light of the above, it is clear that the Appellate Courts will leave undisturbed the trial judge's decision whether or not to admit evidence absent an **abusive** of discretion. See cases cited above. The evidence that Francis seeks to introduce pertains to Giovanna's 2006 refinance of her property. The documents to which Francis sought to inquire upon appears to be a mortgage application and a mortgage title survey affidavit.

Giovanna argues that neither of the above documents would rebut the jury's finding that Giovanna is a bonafide purchaser for value. The purported documents in question may at best be used to collaterally impeach Giovanna. In essence, the admission of the documents do not add any probative value to the material issue before the Jury. The only use available to Francis is to “divert the Jury's attention to an entirely collateral inquiry.” *Commonwealth v. Jones*, 63 Mass.App.Ct. 1113 (2005). \*45 Further, there is a chance, although remote, that the Jury would have misused the information. See *Id.* It is in the Judge's discretion to “reasonably conclude that the danger of unfair prejudice outweigh[s] any probative value that any reference [to the 2006 refinance transaction] may have on the question of credibility.” *Id.* In other words, the Jury was presented with a task of determining whether Giovanna is a bonafide purchaser for value. The time frame surrounding the constructive trust claim relates to the 2001 transaction between Francis and Stephen and the 2004 transaction between Stephen and Giovanna. Allowing the 2006 transaction into evidence would not be germane to the material facts before the Jury. It would only serve to draw the Jury away from the facts that are germane to the case. See *Commonwealth v. Doyle*, 5 Mass.App.Ct. 544, 550 (1977) (where the Court opined that “a party is not permitted to prove, or disprove, a collateral issue as of right.”)



In *Commonwealth v. Doyle*, the defendant sought to impeach the credibility of witness through testimony from the defendant's wife. The witness stated in direct testimony that he had a conversation with the defendant and that the defendant said that he might \*46 divorce his wife. *See Id.* at 550. The defendant's wife later testified that she and the defendant had recently renewed their marriage vows on two separate occasions. *Id.* The Appeals Court opined that “[w]hether the defendant was planning to obtain a divorce was clearly collateral to the issue which was the subject matter of the trial.” *Doyle* at 550. The Defendant was charged with procuring the burning of a building in the Town of Holliston. *See Doyle* at 544. Likewise, in the instant case, any purported impropriety averred by Francis would not have any bearing on the constructive trust claim and ultimately the bonafide purchaser for value standard because said evidence would have been collateral.

It is important to note that Francis permitted the 2006 refinance transaction by releasing his lis pendens that was recorded against the property. Francis was in agreement with Giovanna to obtain a lower fixed interest rate. To question the validity of the 2006 refinance transaction is to advocate hypocrisy. On the one hand, Francis supports the refinance by releasing the lis pendens. On the other hand, he questions the validity of the transaction in light of the pending litigation. The refinance was consummated after the \*47 commencement of the case and with the agreement of Francis. So any question as to the state of the title to the property was abandoned when Francis released the lis pendens. For Francis to question the validity of the refinance certainly questions Francis' credibility.

Francis appears to suggest that he was unaware of the 2006 refinance transaction especially where he argues that he discovered the concealed transaction at the Registry of Deeds. *See Appellant's Brief* at p.47. As indicated above, Francis agreed to the release of his lis pendens to permit Giovanna to refinance the property to obtain a fixed interest rate. As agreed, Giovanna did obtain a fixed interest rate. The purpose of the refinance, as suggested by Francis, was not to assist Stephen in any purported goals. The purpose of the refinance transaction was solely to allow Giovanna to obtain a fixed interest rate to avoid the consistent increases in her existing variable interest rate.

Francis also seems to suggest that somehow Giovanna had a fiduciary relationship with Francis to which no claim has been made. It appears that Francis is attempting to connect Giovanna to Stephen at every opportunity in order to convince this Court that Giovanna and Stephen somehow colluded to injure \*48 Francis. That assertion is clearly erroneous in light of the Jury's assessment of the evidence before it. The attempt to cloud the case with collateral evidence that is not material is futile. The Trial court correctly excluded the collateral evidence as it provided no value to the material issue before the court.

#### **V. The trial court did not err in dismissing the elder abuse claim.**

Francis sought relief pursuant to M.G.L. c. 19A, The Elder Abuse Statute. However, nothing in this statute sections would amount to or suggest a private cause or right of action.

The legislation does not expressly or impliedly create a private cause or right of action for private individuals. Even though §26 states that “nothing in this Chapter shall be construed to be a limitation of powers or responsibilities assigned by law to other department or agencies”, it does not imply a private cause or right of action. The legislature clearly designed this law for public action to be taken by the Commonwealth of Massachusetts and more particularly the Department of Elder Affairs.

The absence of the express private cause or right of action in the elder abuse statute is an indication \*49 of the legislature's reluctance to provide for one. To imply a private cause or right of action would be inconsistent with the legislature's intentions as the legislature, if it wanted to create a private cause or right of action in the statute, would have so expressly provided. *See All Brands Container Recovery, Inc. v. Merrimack Valley Distributing Co., Inc.*, 54 Mass.App.Ct. 297, 301 (2002). “[The Supreme Judicial Court] has been reluctant to infer a private cause of action from a statute in the absence of some indication from the legislature supporting such inference.” *Loffredo v. Center for Addictive Behavior*, 426 Mass. 541, 544 (1998); *see also Berucki v. Ryan*, 407 Mass. 1009 (1990). To permit Francis the opportunity to bring an elder abuse claim against Stephen and Giovanna is to usurp the legislature's intentions and the power of the Commonwealth and Department of Elder Affairs.

Further, Francis has not provided any evidence of **elder abuse**, but to suggest that Stephen received a substantial benefit from Francis when Francis conveyed the property to Stephen. However, the evidence demonstrates that Giovanna supported Francis by allowing him to reside in the property rent-free for eight (8) years now and providing to Francis a monthly \*50 stipend of Two Hundred (\$200.00) Dollars for a period of at least sixteen (16) months. Giovanna's actions in no way translates to any **abuse** of Francis. Accordingly, the dismissal of the **elder abuse** claim by the trial court was proper.

### CONCLUSION

In light of the vast supporting evidence and applicable law, the Appellee respectfully requests that the jury verdict (trial part one, Kane, J. presiding) finding that Giovanna is a bonafide purchaser for value and the bench trial decision (trial part two, McGuire, J. presiding) finding in favor of Giovanna on the fraudulent transfer claim be upheld and affirmed.

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