VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 23rd day of April, 2020.

Present: Goodwyn, Mims, Powell, Kelsey, McCullough, and Chafin, JJ., and Koontz, S.J.

Susan Harold, Appellant,

against Record No. 181308
Circuit Court No. CL15000154-00

Henry C. Devening, Administrator of the
Estate of Donald Wayne Ayers, Appellee.

Upon an appeal from a judgment
rendered by the Circuit Court of
Appomattox County.

Susan Harold appeals a judgment against her for breach of fiduciary duty related to her actions under a power of attorney for Donald Ayers and for legal fees incurred during the litigation. Henry Devening, the administrator of Ayers's estate (the "Estate"), assigns cross-error to the trial court's decisions to reduce the damages award and to deny the Estate's request for accountant fees. We find that the trial court erred in awarding legal fees to the Estate, and we reverse its judgment solely on this ground. We find no error in the remainder of the trial court's judgment.

I.

Ayers died in 2013, possessing a payable-on-death ("POD") bank account worth approximately $2.4 million. After Ayers's death, this POD account was distributed in three equal shares to Ayers's two sons and Harold. Approximately nine months before his death, Ayers moved in with Harold, a family friend. Ayers and his wife had been friends with Harold's parents, and Harold had occasionally come to Ayers's house with her mother to help take care of Ayers shortly before and after his wife's death in 2010.

Before he moved in with Harold, Ayers had signed a General Power of Attorney ("POA") granting Harold the power "generally to perform any . . . acts of any nature whatsoever, that ought to be done or in the opinion of [Harold] ought to be done, in any circumstances as

fully and effectively as [he] could do as part of [his] normal, everyday business affairs if acting personally." 2 J.A. at 554. He also purportedly signed a Gift Letter that gave Harold $300,000 to build a home in which he would live for the rest of his life. *See id.* at 548.[1] During this time, Harold also conducted numerous transactions on behalf of Ayers. These included cash withdrawals from Ayers's accounts, direct transfers from Ayers's accounts into her own, payments to her boyfriend for work on the house and for caring for Ayers, and payments to her son for a trust fund. *See id.* at 370-71, 558-617.

At trial, Harold offered various explanations for the transactions, claiming that she had been (1) drawing on funds from the Gift Letter to build her house, (2) acting upon Ayers's direct instructions, or (3) acting under the POA and for Ayers's benefit. *See id.* at 341-43, 349-53, 358-74, 402-05, 416-17, 424-25, 429, 435. She could not provide an explanation for many of the transactions. *See id.* at 369-71. Ayers's sons testified that they had received less money from their father's estate than they had expected, and the Estate's accountant testified that Harold had made substantial withdrawals and transfers from Ayers's accounts and that a sum of money was missing from the accounts that could not be traced. *See* 1 *id.* at 65-66, 85, 97, 237-56.

The Estate filed a complaint alleging lack of capacity, undue influence, breach of fiduciary duty, and unjust enrichment as well as seeking the imposition of a constructive trust. After a two-day trial, the jury returned a verdict in favor of the Estate on the counts of lack of capacity, undue influence, and breach of fiduciary duty[2] and awarded $327,197.34 in damages,

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[1] At trial, the parties vigorously disputed the authenticity of the Gift Letter. The Estate put forth evidence that Harold had told her mother that she was going to build the house with money that she had obtained from selling her father's rental properties and that she had never told her mother about the Gift Letter. *See* 1 J.A. at 96, 161; 2 *id.* at 353-54, 502, 507. The Estate also presented evidence that the signature on the Gift Letter looked different from the signature on the POA or on other instruments that Ayers had signed and that the notary who had witnessed the document was Harold's friend who lived in North Carolina and whose notary license had expired before she executed her signature. *See* 2 *id.* at 336-49, 548, 613-15. Finally, the Estate's accountant testified that even after the supposed date of the Gift Letter, Harold had not known what a gift letter was and that he had had to advise her to document all gifts that Ayers directed. *See* 1 *id.* at 226-32. We express no opinion on this factual debate except to note that Harold's testimony on these issues was contradicted.

[2] The claims for unjust enrichment and for the imposition of a constructive trust were not presented to the jury for consideration. *See* 2 *id.* at 541; R. at 531. The trial court's final order apparently treated the claims as withdrawn, observing that there was "nothing further remaining

the exact amount of the transactions documented in the Estate's exhibits. *See* 2 *id.* at 558-617; R. at 531. The trial court postponed the consideration of legal fees until after the verdict, at which time the parties briefed the issue. The Estate's request for legal fees and costs included the fees of a second law firm that had worked on the case as well as the fees of an accounting firm. The trial court found the second law firm's fees duplicative and the accounting firm's fees undetailed and unsubstantiated and, therefore, the court awarded only legal fees for the Estate's primary counsel. *See* 2 J.A. at 688-89.

Harold filed a motion to set aside the verdict, which the trial court granted as to all counts except the count for breach of fiduciary duty. The court reduced the jury verdict from $327,197.34 to $263,761.83, finding no evidence in the record to support a portion of the award that was apparently based upon two checks amounting to $63,435.51 that had been deposited into Ayers's POD account at Wells Fargo. *See id.* at 688. Harold appeals from the trial court's judgment. She contends that the evidence was insufficient to establish a breach of fiduciary duty and that the trial court improperly awarded the Estate legal fees under the relevant statute. The Estate assigns cross-error to the trial court's decision to reduce the jury's verdict by $63,435.51 and its decision to deny the request for accountant fees.

II.

A.

The circuit court did not err in finding the evidence sufficient to establish a breach of fiduciary duty. "A plaintiff who is 'armed with a jury verdict approved by the trial court, stands in "the most favored position known to the law."'" *Dixon v. Sublett*, 295 Va. 60, 66 (2018) (alterations and citation omitted). "Where the trial court has declined to strike the plaintiff's evidence or to set aside a jury verdict," this Court reviews "whether the evidence presented, taken in the light most favorable to the plaintiff, was sufficient to support the jury verdict in favor of the plaintiff." *Parson v. Miller*, 296 Va. 509, 523-24 (2018) (alteration and citation omitted). "When the law says that it is for the jury to judge of the credibility of a witness, it is not a matter of degree." *Simpson v. Commonwealth*, 199 Va. 549, 557 (1957) (citation omitted).

A claim for breach of fiduciary duty requires proof of the general elements of duty, breach, causation, and damages. *See Carstensen v. Chrisland Corp.*, 247 Va. 433, 444 (1994).

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to be done in this cause" and ordering the entire action, including all claims therein, "stricken from the docket and placed among the ended causes," 2 J.A. at 691.

See generally Kent Sinclair, Sinclair on Virginia Remedies § 8-7[A]-[B], at 8-40 to -41 (5th ed. 2016). The jury's verdict regarding breach of fiduciary duty was not plainly wrong or without evidence to support it. Harold owed Ayers a fiduciary duty under the POA, particularly given the confidential, care-giving relationship that she had with Ayers. *See Ayers v. Shaffer*, 286 Va. 212, 225 (2013); *Grubb v. Grubb*, 272 Va. 45, 53 (2006); *Nicholson v. Shockey*, 192 Va. 270, 277-78 (1951). Sufficient evidence established that Harold had engaged in various transactions that benefited her, thereby triggering a presumption of fraud regarding these transactions, *see Ayers*, 286 Va. at 224-26; *Grubb*, 272 Va. at 53; *Nicholson*, 192 Va. at 277-78. This presumption shifted "the burden of proof . . . to [Harold] to produce clear and convincing evidence to rebut the presumption." *Grubb*, 272 Va. at 53; *see also Gelber v. Glock*, 293 Va. 497, 528 (2017).[3]

Harold attempted to rebut the presumption by claiming that she had conducted each of the challenged transactions pursuant to the Gift Letter, Ayers's express authority, or the POA. The jury, however, rejected Harold's testimony as unclear and unconvincing evidence of her

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[3] Several Virginia cases either imply or expressly state that the presumption shifts the burden of persuasion (not just production) to the defendant to prove the propriety of the transactions. *See, e.g.*, *Economopoulos v. Kolaitis*, 259 Va. 806, 812 (2000); *Nicholson*, 192 Va. at 277-78; *Todd v. Sykes*, 97 Va. 143, 146 (1899). We recently rejected this view in the undue-influence context. *See Parson*, 296 Va. at 524-28. We need not address the nature of the burden-shifting in the present case, however, because the trial court instructed the jury that if it found that Harold had

> participated in a transaction by which she, as agent, acquired Donald W. Ayers'[s] property or benefits financially, these acts are presumptively fraudulent and the burden is on Susan Harold to overcome the presumption of constructive fraud by clear and satisfactory evidence, and more than a mere preponderance of the evidence.
>
> If you find that the presumption of fraud arises, you shall find your verdict for Susan Harold *if Susan Harold has proven by clear and satisfactory evidence that Susan Harold did not breach her fiduciary duty* to Donald W. Ayers when she benefitted financially from her actions as agent.

R. at 519 (emphasis added); *see also* 2 J.A. at 533-34. This instruction treats the presumption as shifting the burden of persuasion to Harold to prove the propriety of the transactions. Harold does not assign error to this instruction on appeal, and, thus, the instruction is the law of the case. *See Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 590 (2000).

good faith. *See, e.g.*, *Nicholson*, 192 Va. at 282-83. Nearly all of her testimony was self-serving, much of it was uncorroborated, and some of it was either internally inconsistent or contradicted by other evidence, *see supra* note 1. In short, the evidence was sufficient for a reasonable factfinder to conclude that Harold had engaged in transactions that had benefited her, depleting Ayers's assets, and also that Harold had failed to rebut the presumption of fraud arising from these transactions. The trial court thus did not err in finding the evidence sufficient to sustain the jury verdict regarding Harold's breach of fiduciary duty.[4]

B.

The trial court did err, however, in awarding legal fees to the Estate for its primary counsel. The award of legal fees in this case is governed by statute, *see* Code § 64.2-1615, and the statute's interpretation presents a pure question of law that we review de novo, *see Davis v. Davis*, ___ Va. ___, ___, 835 S.E.2d 888, 894 (2019); *Mangrum v. Chavis*, Record No. 160782, 2018 WL 1101719, at *3 (Va. Mar. 1, 2018) (per curiam) (unpublished). In general, we review an award of legal fees for an abuse of discretion. *See Mangrum*, 2018 WL 1101719, at *4; *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 252 (2017). An award of legal fees that are not recoverable under a statutory provision is an abuse of discretion. *See Mangrum*, 2018 WL 1101719, at *4; *Lambert*, 293 Va. at 253.

Code § 64.2-1615(2) states: "An agent that violates this chapter is liable to the principal or the principal's successors in interest for the amount required to: . . . 2. Reimburse the principal or the principal's successors in interest for the attorney fees and costs paid on the agent's behalf." In *Mangrum*, we specifically held that

> [t]he plain language of [Code § 64.2-1615(2)] is clear: an attorney-in-fact is "liable to the principal or the principal's successors in interest for the amount required to reimburse the principal or the principal's successors in interest for the attorney fees and costs *paid on the agent's behalf*." . . . If the General Assembly had intended to authorize courts to award attorney's fees to principals or their successors-in-interest to reimburse their own expenditures in actions against attorneys-in-fact against whom they alleged violations of the Act, it could have included language in

[4] Harold argues on appeal that the Estate called her as an adverse witness and thus is bound by portions of her testimony. We disagree. *See Gelber*, 293 Va. at 527-28 (stating that "[a] plaintiff who calls the defendant as an adverse witness . . . is bound only by testimony which is clear, reasonable, and uncontradicted" (citation omitted)).

> the statute to that effect. It did not do so. The circuit court therefore abused its discretion by awarding attorney's fees to the plaintiffs in this case.

2018 WL 1101719, at *4 (alterations, footnote, and citation omitted) (emphasis in original).

Recognizing that our holding in *Mangrum* precludes reliance on Code § 64.2-1615(2), the Estate relies on subsection (1) of the same statute, which states that "[a]n agent that violates this chapter is liable to the principal or the principal's successors in interest for the amount required to: 1. Restore the value of the principal's property to what it would have been had the violation not occurred," Code § 64.2-1615(1). *See* Appellee's Br. at 37-38. We find this statutory language inapplicable. "Restor[ing] the value of the principal's property," Code § 64.2-1615(1), means restoring the corpus of the estate, not repaying the estate for transactional costs associated with litigation concerning the estate. Subsection (1) does not expressly or implicitly address legal fees. The trial court, therefore, erred in awarding legal fees to the Estate.[5]

C.

Turning to the Estate's first assignment of cross-error, we find that the trial court did not err in reducing the jury's verdict from $327,197.34 to $263,761.83 based on two checks made out to Ayers. On direct examination as an adverse witness, Harold testified that she had executed the two checks at Ayers's instruction and that Ayers had remained in the car while she did so at the bank counter. *See* 2 J.A. at 349-51. While she stated on direct examination that she thought that the checks had been "deposited into Wells Fargo," *id.* at 350, on cross-examination

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[5] In 2019, after our decision in *Mangrum*, the General Assembly amended Code § 64.2-1614 by adding subsection E, which states,

> In a judicial proceeding under this chapter, if the court finds that the agent breached his fiduciary duty in violation of the provisions of this chapter, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any person who petitions the court for relief under subdivisions A 1 through 8, to be paid by the agent found in violation. This provision applies to a judicial proceeding concerning a power of attorney commenced on or after July 1, 2019.

See 2019 Acts ch. 520, at 902. As the Estate commenced these proceedings well before 2019, this statute is not applicable to this case. *See id.*; *see also Bailey v. Spangler*, 289 Va. 353, 358-59 (2015) (noting that "Virginia law does not favor retroactive application of statutes" and that this Court will interpret statutes prospectively unless the legislature has expressly and manifestly declared its intent that the statute operate retroactively).

by her own counsel, Harold clarified further. Harold agreed that these two checks and others like them had been made while she and Ayers were "pulling everything together . . . . to get everything put into Wells Fargo" and that these checks "were written to go to Wells Fargo to go into *his account*" — meaning Ayers's POD account that was ultimately distributed to Ayers's two children and Harold. *See id.* at 385-88 (emphasis added). Moreover, as the trial court emphasized in its ruling, *see id.* at 688, Mike Wilkerson, an employee of Wells Fargo Advisors who had helped Ayers set up the POD account, testified that Ayers had been aware of what he was doing when setting up the POD account, *see id.* at 464-71. There was no evidence that Harold had deposited the money into her own account or had done anything with it other than place it into Ayers's POD account at Wells Fargo. Thus, the trial court correctly determined that the portion of the verdict that reflected the amounts of these two checks was plainly wrong and without evidence to support it. The court did not err by reducing the verdict by $63,435.51.

D.

Finally, with respect to the Estate's second assignment of cross-error, we find that the trial court did not err in denying the Estate's request for an award of accountant fees. Pursuant to our discussion above, *see supra* Part II.B., no statutory authority permitted the trial court to award such fees. Even if there were authority to do so, the trial court found that the accountant's bill was unreasonable because it "contains no details and does not substantiate the fee requested," 2 J.A. at 689. The affidavit pertaining to the accountant's fees describes the work performed on behalf of the Estate but sets forth no hourly rate and contains no description of the amount of time spent on each task. *See id.* at 657-60. In the absence of such substantiation of the reasonableness of the fees, the trial court did not abuse its discretion in denying the Estate's request for these fees. *See Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623 (1998); *RF & P Corp. v. Little*, 247 Va. 309, 322-23 (1994).

III.

In sum, we affirm the trial court's judgment to the extent that it was based upon a finding that the evidence was sufficient to prove a breach of fiduciary duty. We also affirm the trial court's reduction of the jury verdict and its denial of the Estate's request for accountant fees.

Because the trial court erred in awarding legal fees to the Estate, however, we reverse the judgment in part and remand this case for the entry of an order omitting any award of such fees.[6]

This order shall be certified to the Circuit Court of Appomattox County.

A Copy,

Teste:

Clerk

[6] The Estate argues that Harold was also required to produce corroborating evidence pursuant to Code § 8.01-397 in order to "recover against" the Estate. *See* Appellee's Br. at 28-29. The Estate did not raise this argument below, and we thus cannot consider it. *See* Rule 5:25; *Harvey v. Commonwealth*, 297 Va. 403, 417 n.3 (2019). Given our holding, moreover, it is unnecessary to address this issue. *See McQuinn v. Commonwealth* ___ Va. ___, ___ n.5, slip op. at 6 n.5 (Apr. 2, 2020) (per curiam).