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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA K. WEAVER, MASTER-IN-EQUITY

Appellate Case No.: 2021-000816

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ... Respondent,

v.

John Edward Vergeldt, ... Appellant.

FINAL BRIEF OF APPELLANT

Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
BALLARD & WATSON
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

ATTORNEYS FOR APPELLANT

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1. Did the trial judge err in granting the motion to amend to allow Respondent Vicki to seek damages barred by res judicata, as damages had been excluded by an order in prior litigation between the parties?

2. Did the trial judge err by failing to apply the proper standard of proof, the one established by settlor's tenth amendment to the trust, which permitted a finding of liability by one beneficiary against another only if "an act or omission [is] committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries"?

STATEMENT OF THE CASE

The orders on appeal arise from the second of two suits between two surviving adult children of the decedent, John Vergeldt Jr. The first litigation was resolved after a trial in 2015. (R. pp. 3-11). Respondent Vicki Lynn Vergeldt (hereinafter "Vicki") filed a motion for reconsideration, but did not appeal the order in that case.

Less than a year later, Respondent Vicki filed a new lawsuit (Case No. 2016-CP-46-00820)[1] seeking to remove her brother, Appellant John Vergelt (hereinafter "John") as successor trustee and for "additional or alternative injunctive relief" relating to John's alleged failure to provide access to trust records. (R. pp. 405-494). Vicki did not seek damages against John, as all relief sought was equitable in nature. *Id.*

More than three years later, Vicki sought to amend her Petition to seek damages against Appellant John for the first time. (R. pp. 619-630). Appellant John opposed the motion via counsel, but it was granted. (R. pp. 23-25).

At subsequent trial, Appellant John objected to attempts to recover damages based upon the 2014 order concluding the 2014 case, and objected to expert testimony offered on the issue of alleged damages. Nevertheless, the trial court entered judgment against Appellant John in the total amount of $361,092.88, "said amount being comprised of $299,719,26 to restore the trust assets; additional expenses of $5,870.00 and attorney's fees of $55,512.62." (R p. 42). Appellant John filed a motion to reconsider, and amended motion to reconsider after receipt of the trial transcript. The motions to reconsider were denied in their entirety. (R. pp. 46-65). This appeal followed.

[1] Like the first action, this action was filed initially in probate court and removed to Circuit Court.

STATEMENT OF FACTS

The orders on appeal arise from lengthy litigation between two surviving adult children of the decedent, John Vergeldt Jr. The decedent executed a Revocable Living Trust in 1978 that became irrevocable at the time of his death. The trust was amended and restated in July 2009. (R. pp. 79-134).

The first litigation was filed in probate court as Case No. 2014-GC-46-012. The probate judge referred the case to the Circuit Court and it was assigned Case No. 2014-CP-46-01956. The action sought a declaratory judgment "related solely to the construction and interpretation of the Trust Agreement… (R. p. 67). At the time the action was filed, the plaintiff Vicki Lynn Vergeldt, sued her brother John Vergeldt and her sister Patricia Vergeldt Downey. *Id.* She sought a declaratory judgment as to the construction of the trust, as well as a determination that she had probable cause to bring the lawsuit such that she was not excluded from the trust by the "no contest" provision of the trust. *Id*. She also sought litigation costs with no statutory or common law basis pleaded. The "trust" was the restated trust from July 2009, as well as a Ninth Amendment dated February 5, 2010, and a Tenth amendment dated March 7, 2011. (R. pp. 79-144).

The complaint was amended twice prior to trial. The First Amended Complaint sought the same relief (declaratory judgment, probable cause to file the lawsuit and litigation costs). (R. pp. 167-275). The Second Amended Complaint included a request in the declaratory judgment for a determination of the date on which the settlor lacked capacity (as well as the original declaratory relief regarding construction of the trust), a finding of probable cause to bring the case, and litigation costs pursuant to S.C. Code Ann. Section 62-7-1004.

The case was tried in 2015. The trial judge specifically stated that he was awarding equitable relief only. "I make no finding relating to the liability of any party or the lack thereof,

as no claim is stated for breach of any duty, and no relief is sought from the Court to compel the trustee to perform any duties that may be required. . .”[2] (R. p. 4).

The trial judge found the settlor of the trust “likely became unable to manage or conduct his own affairs sometime between the late Fall of 2012, and March 2013, when his son John initiated a guardianship proceeding in York County Probate Court. *Id.* According to the order, the guardianship proceeding was not completed prior to the settlor’s death due to opposition from Respondent Vicki Lynn Vergeldt. *Id.* The Court found “it was not until May 6, 2013 that [settlor’s] primary physician rendered a medical opinion of legal incapacity, which ‘triggered’ certain pro visions of the Trust.” *Id.* p. 3. In the last years of his life, settlor lived at various times with each of his children, residing with John until his death in 2013.

Importantly, the final order included the following observation:

> It is apparent that the parties have a poor and strained relationship. Their communications foster acrimony and suspicion. In the course of dealing with Mr. Vergeldt’s affairs, Vicki has questioned John’s handling of Mr. Vergeldt’s affairs, and demanded accountings. John has responded by minimal communications and unnecessary assertions of authority that have contributed to Vicki’s questions concerning John’s handling of Mr. Vergeldt’s affairs as Successor Trustee. This unfortunate set of circumstances has led to the present action, but <u>I find that in the posture presented by Vicki’s prayer for relief, she has not directly challenged John’s actions as Successor Trustee</u>. Her prayer seeks only an interpretation of the applicable Michigan and South Carolina law and the often-amended trust Agreement.

(R. p. 5) (emphasis added).

The trial judge’s order repeatedly stressed that he was only providing a construction of the trust, as the pleadings requested that relief. By way of example,

[2] The trust document required construction of the trust under Michigan law, and all parties acknowledged the applicability of Michigan law to the issues before the Court).

- Because Plaintiff seeks only a declaration of the meaning of [Paragraph Fifth], I make no finding or conclusion concerning whether John, as Successor Trustee, has correctly applied the language of Paragraph Fifth.
- As this action does not directly challenge the actions of the Successor Trustee, I make no declaration concerning probable cause to make such a challenge.
- . . . not answered in this order, namely, the propriety of John's management of trust assets and affairs prior to becoming Successor Trustee. . .

Id. at pp. 8-10.

The trial judge found John Vergeldt "became successor trustee on March 6, 2013"[3] and prior to becoming successor trustee [on March 6, 2012], John's duty was entirely to Mr. Vergeldt until Mr. Vergeldt's death." *Id.* at p. 10. He found that the successor trustee, John, had a duty to provide "all available information relevant to the Trust property without time limitation" and "a duty to provide statements of account at least annually to current trust beneficiaries and to permit inspection of the financial records of the Trust from the date of Mr. Vergeldt's death. No particular format the presenting statements is prescribed."

The trial judge made "[n]o declaration concerning probable cause to challenge of the Successor's Trustee's performance of his duties is made, as such issue is not presented in this action." Additionally, [n]o finding or conclusion in this order shall be deemed to be a determination of compliance, non-compliance with applicable law or the terms of the Trust Agreement. Further, no finding or conclusion in this order shall be deemed to establish the amount of any entitlement of any beneficiary under the terms of the Trust agreement." *Id.* p. 11. (Emphasis added). No award of attorney's fees was made. *Id.* (emphasis added).

[3] This finding was linked to a report from Mr. Vergeldt's primary care physician introduced during the guardianship proceeding, which report was dated May 6, 2013). *Id.* p. 10.

Clearly, issues regarding whether any party had sustained damages as a result of any acts or omissions of John's handling of the trust prior to Mr. Vergeldt's death could have been decided in the first case. The trial judge's order went out of its way to say that, because no one asserted a claim for liability or damages, he decided only the issues presented, *i.e.*, construction of the trust.

Respondent Vicki Lynn Vergeldt filed a motion for reconsideration, but did not appeal the order.

Less than a year later, Respondent Vicki filed a new lawsuit, this time seeking equitable relief only. In Case No. 2016-CP-46-00820[4] Vicki sought to remove John as successor trustee and for "additional or alternative injunctive relief" relating to John's failure to provide access to trust records. Despite the language of the order in the first case, Vicki did not seek damages against John. All relief sought was equitable. (R. pp. 405-494).

More than three years later, Vicki sought to amend her Petition and, for the first time, to seek damages against Appellant John. (R. pp. 521-523). The basis for the amended relief was required "based on the evidence uncovered during the course of this litigation. . ." *Id.* p. 522. While John's counsel appeared and opposed the motion, it was granted. (R. pp. 23-25).

On June 10, 2019, Vicki filed her first pleading seeking damages against John. (R. pp. 524-618). Most of the damages sought by Vicki were damages that should have been litigated in the original action, as they related to distributions made from the trust prior to the initiation of the first lawsuit. *Id.* p. 527, ¶¶ 15-19. The Amended Petition made reference to the trial judge's order from the 2014 litigation, and included allegations that John had not responded appropriately to requests for information after the 2015 order was issued. The amended petition even alleged that

[4] Like the original action, this action was filed in probate court as Case No. 2016-GC-46-00018 and removed to Circuit Court.

Vicki had not been able to seek damages in the prior action because she had not been provided with records prior to bringing that action. *Id.* ¶¶ 28-29.

For the first time, Vicki sought damages against John, both for actions he performed prior to his father's death, as well as after, including multiple transactions that had occurred prior to the first lawsuit and which should have and could have been litigated in the first litigation. John, who was *pro se*, filed a Response to the Amended Petition, denying Vicki was entitled to recover any damages from him, and seeking various legal and equitable relief against Vicki. (R. pp. 619-630). While John did not use the term *res judicata*, he did expressly assert that issues raised in the Amended Petition had already been addressed in the prior litigation. *Id.* ¶¶ 13 – 24.

The parties agreed for a non-fiduciary limited special trustee to review the trust records back to December 31, 2016; the date of December 31, 2016 is not explained in the record. (R. pp. 13-16). The order allowed the special trustee to "begin her accounting at a date as early as January 1, 2008." *Id.* No specific discussion was made regarding the special trustee to recognize the findings of the trial judge in the first action, *i.e.*, that John owed no duties to Vicki prior to becoming successor trustee on May 6, 2013. (R. pp. 3-11). John, however, specifically prayed that the order in the 2014 action was binding and no findings inconsistent with that order could be made. (R. pp. 621-622 ¶¶ 15, 17, 22). John specifically pointed out that the special trustee was not permitted to examine transactions prior to him becoming successor trustee (in 2013) but the special trustee had done so. *Id. at* ¶ 30).

The trial court in the instant case recognized the order from the prior action. (R. p. 31). However, the trial court ignored the findings of the order and awarded Respondent Vicki damages based on Nonetheless, when the instant case was tried, Respondent Vicki was permitted to seek and recover damages for John's supposed handling of the trust prior to him becoming successor

trustee. The special trustee's report which covered "the trust's account, finances and assets covering the period January 1, 2009 and December 31, 2016" (R. p. 34 ¶ 9). Vicki also called a witness who presented what he termed an "accounting" using the "prudent man standard" for the period December 31, 2008 and ending April 30, 2019.

The trial judge awarded Vicki damages for the period time that John was not responsible for the handling of the trust, *i.e.,* during the time he was serving as co-trustee, when the prior order had expressly stated that as co-trustee John's only duty was solely to his father. (R. pp. 3-11).

Both experts analyzed and offered opinions regarding what testified was John's duty during a time the trial judge in the prior action had already determined John owed no duties to Vicki or the trust, and when John's sole duty was to his surviving father. Both based their estimates of John's alleged misdeeds as successor trustee and damages supposedly incurred by the trust to include several years of time the trust was managed solely by the now-deceased Settlor, when John had no obligation to the beneficiaries of the trust. The trial judge awarded damages as if the order in the prior case had never existed, and awarded damages to Vicki based on what was considered to malfeasance by John back to 2008, when the now-deceased settlor was solely responsible for decisions made regarding trust assets, until John became successor trustee in 2013.

John, who unfortunately remained unrepresented, fully preserved his argument that the prior order determined the parties' father was in charge of all financial transactions of the trust until John became the successor trustee at the time of the settlor's death in 2013. (R. p. 719, lines 14-20). "So anything prior to that, it's already been ruled, my father was in charge of. So a lot of things [Vicki's counsel} brought up are things from 2008 or 2009."

While John did not use the legal terms "law of the case" or "issue preclusion" or "claim preclusion" he made it very clear that he objected to Vicki's attempts to recover damages from

him when the prior order expressly vindicated him for any handling of the trust assets prior to his father's death in 2013. *Id.*

The special trustee, Kathleen Palinski, was qualified as an expert with John's consent. (R. p. 724, lines 7-16). Ms. Palinski acknowledged she had reviewed financial records related to the handling of the trust back to 2008. (R. p. 733, lines 15-25). Again, John objected and pointed out the prior order limited his exposure to a period beginning in 2013, and not back to 2008 when his father had sole control of the trust). (R. p. 736, lines 9-14). The trial judge didn't recognize John's objection and directed him to ask questions during cross examination. (R. p. 736, lines 15-20).

Much of Ms. Palinski's testimony and report focused on the period prior to John becoming the successor trustee then the settlor died. (R. p. 738, line 3 – p. 746, line 23). She pointed out John's efforts to distribute the corpus of the trust following the settlor's death. (R. p. 747, lines 20-25). Ms. Palinski's opinion was limited to her believe that John's "work as trustee [did not rise] to the standards" she had set forth. (R. p. 750, lines 5-12). Her criticism of John's work was that he would have "benefited from hiring a bookkeeper or an accountant" to assist with his duties." (R. p. 750, lines 13 – p. 751, line 12).

Ms. Palinski's testimony was that John breached his duties under the trust agreement because he lacked impartiality, and the probate court would not have found it acceptable." (R. p. 751, line 17 – p. 752, line 7). Her testimony related exclusively to the accounting records prior to John becoming successor trustee. Additionally, Ms. Palinski did not testify that John's acts or omissions had caused any damages to the trust.

She elaborated on the chart she had prepared which reflected disbursements and accountings done by the now-deceased settlor, from 2008-2012. (R. p. 754, line 2 – 16). She pointed out that John had also written checks on trust account during the time period of 2009

through 2011, making no reference to the unappealed finding from the 2014 order that John owned no duty to anyone other than his father during that period of time.

During cross examination, Ms. Palinski expressly rejected the unappealed finding from the earlier case that John's duties did not begin until his father's death, asserting her view that John had been assisting his father with handling trust funds "as early as October of '08." (R. p. 760, lines 1-8). In fact, Ms. Palinski disputed the ruling from the prior case, stating her opinion that the now-deceased settlor could not choose who handled the trust assets prior to his death because John was co-trustee. (R. p. 760, line 19 – p. 763, line 8).

Essentially, Ms. Palinksi's opinion ignored the final order in the original case; or perhaps she was not aware of the order. Her testimony, which lacked any findings as to proximate cause or damages, focused primarily on time that John was not responsible for handling the trust money. Ms. Palinski even admitted she was assuming that, during the time the now-deceased settlor was handling the trust finances. "I don't know who the co-trustee would have been . . . I'm interpreting this to infer that you or someone else was serving as his co-trustee." (R. p. 768, lines 2 – p. 772, line 21).

No other conclusion is possible other than Ms. Palinksi based her entire review and opinion without realizing that the original unappealed order had absolved John of any responsibility for handling the trust prior to his father's death. On re-direct, Ms. Palinski confirmed she had read the trust documents, but she was not asked if she was aware of the unappealed order from the first lawsuit that exonerated John of any handling of trust assets or funds until his father's death. (R. p. 773, line 16 - p. 776. line 7). On re-direct, Ms. Palinski was allowed to speculate as to what duties a co-trustee would have had generally, without any reference to the unappealed order. (R. p. 776, line 8 – p. 777, line 24).

The only other expert provided by Vicki was a CPA who also seemed oblivious to the unappealed order from the 2014 action which limited John's responsibility for handling the trust to the time period following the now-deceased settlor's death. Charles E. Bosler, a certified public accountant was certified as an expert in "accountancy and bookkeeping." (R. p. 964, lines 18-22). Again, John did not object to Mr. Bosler's qualification as an expert in accountancy and bookkeeping. *Id.* lines 22-23.

Mr. Bosler did not testify to the standard of care of a Successor Trustee or whether he had any opinions regarding the conduct of Respondent. His area of expertise was numbers. As to numbers, most of Mr. Bosler's report and testimony was based on what he and his office guessed a prudent man might have done under the circumstances and the vast majority of it related to trust transactions prior to John becoming responsible for handling the trust finances. (R. p. 981, lines 13-24; R. p. 982, line 23-p. 983, line 11; R. p. 984, line 22- p. 985, line 10; R. p. 985, lines 17-21; R. p. 985, lines 6-14; R. p. 988, line 15-p.989, line 3; R. p. 994, line 1-p. 995, line 13).

Mr. Bosler testified he had sufficient information "to make a good guess of what the trust had at each year end from 2008 and pretty good records from all the transactions that happened. Not a month-to-month for every account, but enough to make a lot of sense. . ." (R. p. 967, lines 5 – 16).

Mr. Boster repeatedly qualified his report and explained his inability to give precise numbers:

- Some of these might have had different names, but they all ended up being trust – treated as trust assets along the way, even if they were in an account with John Jr.'s name. (R. p. 969 lines 10-15).

- Those assets eventually got treated as trust assets later. So I included them in the accounting. Id. lines 16-19).
- … however, at the bottom quarter of the page, you'll see off to the left, it says insufficient explanation and support, payments to, and it says who those entities are… some of those payment actually were explained. They were payments to beneficiaries… R. p. 970, lines 3 – 14.
- So that's 154,000 let's say, initially of unexplained expenditures… it wasn't believed that John Jr. had any credit cards – at least not by Vicki. (R. p. 971, lines 8-14).
- ... cash transfers out that we just don't know – sometimes we know that they went to that commingled account. . . with John E. Vergeldt's – him and his wife's name… but I can't say that all of t hose cash transfers – they just listed on the bank statements as cash transfers out. (R. p. 971, line 25 – p. 972, line 6).
- ... if you go down the list, there's – there was a lot of checks written that we just never got the bank statements for, so we don't know what the checks are for." (R. p. 972, lines 16-19).
- … each year there's generally an operating loss of keeping the trust open, and generally there's not a profit; it's a loss, because the expenditures are more than revenue, even – because the investment income wasn't enough to pay for all of [decedent's] expenses to live. (R. p. 976, lines 10-16).
- I mean, all a person could do is go on a prudent man standard after that point, because there's no way to see what money was really spent on it from our viewpoint. (R. p. 981, lines 21-24).
- … this approach was arrived after reading both the trust agreement… lacking an exact accounting, judges sometimes go with what a prudent man might do. (R. p. 985, lines 6-10).
- So we tried to be fair all the way through, and it was largely our firm's judgment." (R. p. 990, lines 1-2).

Without having been qualified as having any knowledge in trusts, Bosler gave opinions as to what was required by a trustee under "the trust agreement itself as well as the laws of Michigan and South Carolina". (R. p. 992, lines 5-8; p. 993, line 5 –19). Bosler opined that, as to the cottage, Respondent should not have complied with the trust agreement and should have

> . . . looked for a solution right away instead of drag on expenses and have an asset out there subject to rapid depreciation if not cared for. And I – a prudent man would have looked for a solution to, hey, why don't one of you take this; I know our father wanted it in the family but that wasn't reasonable." distributed this whole thing and wrapped it up and would have been done, and it would have eased everybody's life."

(R. p. 994, line 9 – p. 995, line 13).

John objected to introduction of the Bosler report. "But he has made so many assumptions that he's plugged into his numbers, I can't agree to it. He's made – and he has said so… what that means is you guessed – he guessed… So this entire report is a guess. And he never talked to me." (R. p. 996, lines 23-25).

Even after overruling John's objection, Mr. Bosler continued to point out the assumptions upon which his report was based. "… we felt was over and above a prudent man spending. Then sometimes courts allow interest, so we put that number in just to ballpark that number in case the Court would find it appropriate." (R. p. 1001, lines 14 – 22).

Bosler's testimony veered so far outside his area of expertise, he not only testified as to the obligations imposed by the trust document and South Carolina law. (R. p. 992, lines 5-8; p. 993, lines 5 –19). However, he was not qualified as an expert in fiduciary law, nor could he have been based on the *voir dire* conducted prior to his qualification as an expert in accounting and bookkeeping. (R. p. 961, line 18 – p. 964, line 21).

Mr. Bosler even testified to the amount of attorney's fees incurred by Plaintiff and the "tab" that he was still running; he admitted he was unsure if the amount of attorney's fees he was asking for on behalf of the Plaintiff "involved the 2014 lawsuit as well." (R. p. 1006, line 22 – p. 1007, line 17). His response was "I would assume so, but I can't say for sure. You know, I don't know." *Id.*

A plain reading of Mr. Bosler's testimony and report, most of which is based on his non-existent "prudent man" standard, failed to understand, recognize or apply the trial judge's order which limited John's fiduciary responsibility to the period of time after his father died in 2013. It is not clear from the record whether Vicki intended to secrete the court's prior rulings from her experts. However, having done so, she presented testimony that had no relevance to the short period of time, beginning in 2013, for which John was a fiduciary.

In her final order, the trial judge acknowledged the prior litigation, but she also ignored unappealed effect of the final order in that case. The trial judge's order parroted what the experts had said, which is John had breached his fiduciary duty at all times when he was serving as co-trustee (exactly the opposite of the original order) and as successor trustee. (R. p. 35). The preclusive effect of the prior order was never mentioned. The trial judge faulted John for numerous transactions undertaken exclusively by the now-deceased settlor, including transactions in 2011.

The trial judge calculated damages based on $544,113.00 "which includes the total assets that existed at the time of the Settlor's death… and the total of unaccounted for expenditures during Respondent's time as co-trustee prior to settlor's death." (R. pp. 31-45). Her finding as to what was in the trust at the time of the Settlor's death was based on Bosler's report which contained "a good guess of what the trust had at each year end from 2008 thereafter and pretty good records from all the transactions that had happened." (R. p.966, line 20 – p. 968, line 24).

Bosler admitted his numbers were not accurate because he was "missing information" and he had "admittedly you'll see a lot of information in the report that certainly I only got from Vicki" (R. p. 968, lines 6-20). By way of example, Bosler included $154,000 of "unexplained expenditures" made during the settlor's life, including some payments to Capital One credit cards "and it wasn't believed that [the deceased settlor] had any credit cards – at least not by Vicki" so Bosler assumed those to be misappropriations by John. (R. p. 971, lines 1-14). "[A]ll a person could do is go on a prudent man standard after that point, because there's no way to see what money was really spent… ." (R. p. 981, lines 21-24). The amount of money Bosler claimed was in the trust at the time of the settlor's death was "common sense on some expenses, and I came up with what I thought a prudent man would have experienced if they were managing the trust." (R. p. 983, lines 7-11). In other words, Bosler's testimony was based on pure speculation, massaged by Vicki's own speculation, which speculation was taken by the trial judge as definite numbers not subject to dispute.

The trial judge also awarded attorney's fees and costs to Vicki, not noting that she was relitigating things she had already litigated and lost, and despite the damage she was seeking were not available to her because of the prior action and the final order in the prior action. The total judgment entered against John was $361,092.88 "said amount being comprised of $299,719,26 to restore the trust assets; additional expenses of $5,870.00 and attorney's fees of $55,512.62." (R. p. 42).

John filed a motion to reconsider, and amended motion to reconsider after receipt of the trial transcript. John's motions to reconsider were denied in their entirety. (R. pp. 46-65).

ARGUMENT

I. THE TRIAL JUDGE ERRED IN GRANTING THE MOTION TO AMEND TO ALLOW RESPONDENT VICKI TO SEEK DAMAGES BARRED BY *RES JUDICATA,* AS A CLAIM FOR DAMAGES HAD ALREADY BEEN EXCLUDED BY THE FINAL ORDER IN THE 2014 LITIGATION**.**

As indicated by the original trial judge, the first litigation among these parties was limited to equitable relief only. The original trial judge went out of his way to make it clear that he could have addressed claims for liability and damages had the pleadings made such a request, but he did not do so because only equitable relief was sought.

The order ending that action, filed August 31, 2015, contained the following specific statements:

> I make no finding relating to the liability of any party, or the lack thereof, as no claim is stated for breach of fiduciary duty, and no relief is sought from the court to compel the Trustee to perform any duties that may be required by the Michigan Trust Code.
>
> [Vicki] has not directly challenged John's actions as Successor Trustee.
>
> No finding or conclusion in this order shall be deemed to be a determination of compliance, or non-compliance, with applicable law, or the terms of the Trust Agreement. Further, no finding or conclusion in this order shall be deemed to establish the amount of any entitlement of any beneficiary under the terms of the Trust Agreement.

It is clear that Vicki *could* have asserted a claim for damages in the first action. The doctrine of *res judicata* prohibited an amendment to the 2016 order to permit a claim for damages because any claim for damages was ripe through the time of the deceased settlor's death and should have been contained and resolved in the 2014 action. Vicki argues that she did not know the extent

of her damages during the 2014 action.[5] However, knowing she had any damages at all was the triggering factor, and the pleadings in the 2014 action certainly alleged damages were occurring as a result of what Vicki asserted in that action was a failure by John to sustain his fiduciary obligations to her both prior to and after their father's death.

> It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, *regardless of the form that the issue may take in the subsequent action.*
>
> The rule will also apply even though the subsequent action is upon a different cause of action and involves different subject matter, claim or demand, than the earlier action. In such cases, it is likewise immaterial that the two actions have a different scope or are based on different grounds, or are tried on different theories, or are instituted for different purposes and seek different relief.

Laughon v. O'Braitis, 360 S.C. 520, 527-528, 602 S.E.2d 108 (Ct.App. 2004) (emphasis in original).

The final order in the original lawsuit brought by Vicki made clear that damages had been incurred but the trial judge did not award damages because no prayer for liability or damages was included in the pleading.

[5] By way of comparison, South Carolina follows the "discovery rule" when applying the statute of limitations in tort claims. In such cases, once the plaintiff knows she has any damages, the statute of limitations starts to run, even if she does not know the extent of her damages. *Stoneledge At Lake Keowee Owners' Association Inc. v. IMK Development Co..*, 425 S.C. 268, 821 S.E.2d 504 (Ct.App. 2018). It is indisputable that Vicki knew she had sustained damages, or was at least reasonably certain, during the litigation of the 2014 lawsuit. Since the cause of action for damages arose during the litigation of the 2014 suit, Petitioner's remedy was to seek to amend that action by way of a supplemental complaint. *See High v. High*, 389 S.C. 226, 697 S.E.2d 690 (Ct.App. 2010) where plaintiff filed for separate maintenance and support because she did not have grounds for divorce at the time of filing, but once the one-year period has passed, she filed a supplemental complaint seeking a divorce on the statutory grounds of one year's separation. *See* Rule 15(d), SCRCP, which permits a supplemental complaint to set forth "transactions or occurrences or events which have happened since the date of the pleading sough to be supplemented. . ."

When the instant action was brought, it sought equitable relief only, and related primarily to seeking equitable relief for ongoing administration of a trust. In the original complaint in the instant action, filed on March 16, 2016, three causes of action were asserted: petition to remove trustee, release of trust records, an accounting and a prayer for litigation costs. (R. pp. 405-494).

Three years later, Vicki was granted permission to amend the pleadings in the instant case to seek a finding of liability against John for breach of fiduciary duty, as well as an award of damages. Two obstacles prevented the relief from being granted: (1) the final order in the first action absolved John of any liability for errors or omissions in handling trust assets prior to the death of the parties' father; and (2) the doctrine of *res judicata* prohibited the addition of any substantive claim that could have been litigated in the first action.

The original action was between the same parties and related to the same subject matter as the instant action. Therefore, a second action which sought to seek damages "might have been litigated in a prior action." *Equivest Financial v. Ravenel,* 422 S.C. 499, 507, 812 S.E.2d 438 (Ct.App. 2018).

> Res judicata precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action… *Res judicata* is the branch of law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies.

Id. 422 S.C. at 507.[6] (citations omitted).

This Court focuses on three elements which must be present in order for *res judicata* to apply. First, "same identity of the parties or their privies." *Id.* at 508. Secondly, "requires the subject matter be identical." *Id*. Third, the prior action must have resulted in a "final, valid

[6] In *Equivest Financial*, the Court of Appeals affirmed the trial court's judgment on the basis of *res judicata* being raised as an additional sustaining ground on appeal, even though the issue was "not raised at trial."

judgment on the merits." *Id.* 422 S.C. at 508-509. See also *Judy v. Judy*, 383 S.C. 1, 8, 677 S.E.2d 213, 217 (Ct.App. 2009) ("When claims arising out of a particular transaction or occurrence are adjudicated, *res judicata* bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit"); and *Riedman Corp v. Greenville Steel Structures Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992) ("To establish *res judicata*, three elements must be shown: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit."). "*Res judicata* also bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *See also South Carolina Public Interest Foundation v. Greenville County*, 401 S.C. 377, 737 S.E.2d 502, 507 (Ct.App. 2012) ("*Res judicata's* fundamental purpose is to ensure that no one should be twice sued for the same cause of action . . . the doctrine. . . flows from the principle that *public interest* requires an end to litigation, and no one should be sued twice for the same cause of action.

Vicki's claim for damages could have and should have included in the first action. "… [I]t is in the public interest that there should be an end of litigation that that no one should be twice sued for the same cause of action. *Nelson v. QHG of South Carolina Inc.*, 354 S.C. 290, 580 S.E.2d171 (Ct.App. 2003),[7] citing *judy Bank v. United States Fidl & Guar.Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945).[8]

While John objected to the amendment, the trial judge erroneously ruled that allowing a claim for damages five years after the litigation between the parties began would not result in

[7] This Court's decision in *Nelson* contains an instructive discussion regarding the different standards applied to *res judicata* and collateral estoppel. *See* 354 S.C. at 305.

[8] At the conclusion of Day 2 of trial, Vicki's counsel stated ". . . Judge, there's got to be an end to this litigation. This is – as you've heard testimony now, this has been seven years ongoing. Continuing to - - continuing to be forced to litigate or the threat of litigation is… " to which the Court responded, "I agree…" (R. p. 1091, lines 18-23).

prejudice. (R. pp. 23-25). In denying John's motion for reconsideration on this issue, the trial judge ruled that John did not raise the prior litigation as an affirmative defense and the issue was not preserved. (R. p. 49). As discussed in detail above, while John did not call the doctrine *res judicata*, he clearly pleaded that the prior litigation and the prior final order were one of his defenses to the amended petition. (R. pp. 620-624 ¶¶ 12-15, 22, 23, 36). The precise words used by John in his pleading did not define the scope of his objection; the substance of his response was that these issues had already been litigated and decided. *Garrison v. Target Corp*., 429 S.C. 324, 838 S.E.2d 18 (Ct.App. 2020), footnote 32; *See also Fields v. Regional Medical Center of Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005). The issue of the preclusive effect of the prior order was fully raised and preserved.

In denying rehearing, the trial judge also addressed the merits of John's argument, and erroneously concluded that "there is no identity of subject matter between the First Lawsuit and present litigation nor did the First Lawsuit adjudicate [John's] liability or [Vicki's] damages." (R. p. 50). Frankly, the trial judge's explanation that the claims were different because damages were sought in the instant action is exactly the point, not a distinguishing point on *res judicata* or issue preclusion.

The trial judge also concluded that the liability and damages "were not necessary to support the 2014 Final Order." (R. p.50). That misses the point of res judicata. Not only could the liability and damages have been litigated in the 2014 action, the trial judge had to go out of his way to make clear that he was <u>not</u> ruling on those issues, because both issues had permeated the litigation of the first matter.

Vicki had waived her right to seek damages when the 2014 action was concluded. *Res judicata* prevented the amendment from being made in this action. *Yelsen Land Company v. State*

of South Carolina, 397 S.C. 15, 723 S.E.2d 592 (2012). "For purposes of *res judicata*. . . the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation." *Id.* 723 S.E.2d at 596.

The first litigation presented an opportunity to adjudicate all equitable and legal claims that existed at that time. Vicki did not elect to seek damages in the first action, and she is precluded from seeking them in the instant action.

"*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties. . . *Res judicata* ends litigation, promotes judicial economy and avoid the harassment of re-litigation of the same issues." *Nelson v. QHG of South Carolina, supra*. 354 S.C. at 304.

The trial court's order denying rehearing that "[b]oth actions concern Respondent's handling and administration of the Trust as Co-Trustee and Successor Trustee." (R. p. 31). The issues were the same when the second action was brought, and at the time of the filing of the instant action, the relief sought was arguably not foreclosed since the probate court had continuing jurisdiction over (internal) matters of the trust. Only when the amendment was sought in 2019 to include a claim for damages did the character and nature of the instant action and to seek damages did *res judicata* become applicable and preclusive. The order granting the amendment was error.

Nothing in the instant action was done that could not have been done in the first action. A limited trustee could have been appointed to review trust records and to reconstruct what records may have been found not to exist. For whatever reason, cost or otherwise, Vicki elected not to seek damages in the first action. Nothing prevented it. As the order focuses on assets and records that go back to December 31, 2008, all issues related to damages that were adjudicated here could have been and should have been litigated in the first action, if at all.

By way of example, in the amended petition, paragraph 28 refers to documents obtained in the prior litigation as having shown . . . "substantial and unexplained irregularities in Trust assets". (R. pp. 524-618). The amended petition was carefully worded to avoid the obvious bar imposed by *res judicata.* The amended petition claims that Vicki did become aware of the "extent to which Respondent. . . took and spent trust assets and funds and commingled the same for his own benefit" but that was an issue that was squarely before the Court and could have been undertaken the first time around. (R. p. 531 ¶ 32).

The order dated June 13, 2019 granting Vicki's Motion to Amend should be vacated. This Court's order of February 2, 2021 should likewise be vacated because the damages issue was precluded by *res judicata*.

II. THE TRIAL JUDGE ERRED IN FAILING TO APPLY THE SETTLOR'S STANDARD OF PROOF AS SET FORTH IN THE TENTH AMENDMENT TO THE TRUST, WHICH PERMITTED A FINDING OF LIABILITY BY ONE BENEFICIARY AGAINST ANOTHER ONLY IF "AN ACT OR OMISSION [IS] COMMITTED IN BAD FAITH OR WITH RECKLESS INDIFFERENCE TO THE PURPOSE OF THE TRUST OR THE INTERESTS OF THE BENEFICIARIES."

Prior to his death the Settlor amended his trust on numerous occasions. The full trust was admitted into evidence without objection[9] at trial as Plaintiff's Exhibit 3. (R. p. 774, lines 5-25).

The Tenth Amendment to the Trust Agreement dated March 7, 2011 changes several provisions of the then-existing trust, and added a new provision as follows: "The following paragraph should be added to the end of Paragraph SEVENTH."[10]

[9] Respondent objected to the admission of the trust document unless it included all ten amendments. (R. p. 774, lines 3-25).

[10] The additional provision added also provided for the "individual successor trustee [to] be indemnified from the applicable trust estate for reasonable legal expenses in defending any claim or action filed by a trust beneficiary, except for a claim or action based upon an act or omission by the Successor Trustee to have been committed in bad faith or with reckless indifference to the purposes of the trust… ."

> An individual Successor Trustee's liability is limited to an act or omission committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries.

(R. pp. 1266-1267).

"The primary consideration in construing a trust is to discern the settlor's intent." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 166, 616 S.E.2d 710, 715 (2005), cited in *Holcombe-Burdette v. Bank of America*, 371 S.C. 648, 640 S.E.2d 480,484 (Ct.App. 2006). It cannot be disputed that the settlor intended, by the Tenth Amendment, to discourage litigation among his children following his death and to prohibit liability by one against the other unless the proof established "an act or omission committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries." (R. pp. 1266-1267).

The settlor may have been well aware of the degree of hostility and acrimony between his children, as he amended and restated the trust documents repeatedly, "seven times." (R. p. 33). It seems consistent with the settlor's understanding of the family dynamic that he established the highest possible burden of proof, second only to a "beyond a reasonable doubt" burden of proof applicable only in criminal proceedings, before any of his children would be able to seek or obtain damages against the other in connection with trust activity. Sanders, *supra*, at § 9:13.

By way of additional disincentive for his children to litigate with one another, the same Tenth Amendment included an indemnification provision for anyone who was sued for actions in his capacity as Successor Trustee. "The individual Successor Trustee shall be indemnified from the applicable trust estate for reasonable legal expenses in defending any claim or action filed by a trust beneficiary, except for a claim or action based upon an act or omission by the Successor

Trustee to have been committed in bad faith or with reckless indifference to the purposes of the trust." (R. p. 1267).[11]

This court's order failed to recognize or apply the applicable burden of proof as dictated by the settlor. Under no circumstances did the court's findings rise to the level required by the settlor as a precondition to one of his children obtaining a finding of liability or damages from the other.

On review of the record, and with the heightened standard of proof required by the settlor before his children could recover damages from one another, the record does not establish that John acted in bad faith or with reckless disregard. Paragraph 11 of the court's order makes a finding that John "failed to adhere to the term of the trust and his fiduciary duties. . ." Paragraph 12 referenced "lack of recordkeeping and commingling of funds." Paragraph 13 says John "mishandled" certain matters and Paragraph 14 finds that he "failed to follow the terms of the trust."

In denying John's motion for reconsideration, the trial judge misunderstood John's argument, and thought John was arguing that his liability should have been determined based on a clear and convincing argument. (R. pp. 46-65). That was not John's point on rehearing. He merely pointed out that there were only two possible common law burdens of proof, in the absence of a contractual provision to the contrary.

[11] It also bears noting that the Tenth Amendment set forth numerous situations in which any beneficiary forfeited his or her interest in the trust, one of which is "objects in any manner to any action taken or proposed to be taken in good faith by the Successor Trustee . . ." Applied to the instant action, since Plaintiff did not plead or even recognize the applicable burden of proof established by the settlor, the Plaintiff should have forfeited any interest she had in the trust.

No common law burden of proof was applicable because the settlor's wishes controlled. "The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust. . ." *Holcombe-Burdette v. Bank of America*, 371 S.C. 648, 640 S.E.2d 480, 484 (Ct.App. 2007), citing S.C. Code Ann. § 62-7-112. "In ascertaining a settlor's intent, if the language of the trust instrument is perfectly plan and capable of legal construction, such language determines the force and the effect of the instrument." *Id*. at 485, citing *Chiles v. Chiles*, 270 S.C. 379, 384, 242 S.E.2d 465 (1978).

The now deceased settlor expressly and clearly stated that no liability would attach in any lawsuit between his beneficiaries absent the highest possible burden of proof, *i.e.*, only if the proof showed that the act or omission upon which liability was sought was "committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries."

In her order, the trial judge failed to even state what burden of proof she relied upon in imposing liability or damages. As required, John raised the issue on rehearing, and specifically cited the language of the Tenth Amendment so the trial judge would determine the intent of the settlor. The trial judge still did not understand. "Respondent has cited no case or statutory law requiring a higher standard of proof, so the court finds and concludes that the applicable standard of proof is indeed the preponderance of the evidence standard." (R. p. 57). Just in case she was wrong, however, the trial judge also considered the evidence based on a clear and convincing burden of proof and affirmed her prior order. *Id*.

Most disturbing of all is the trial judge's suggestion that the settlor could not establish "a conclusion of law to be made by the Court." *Id.* Nothing could be further from the truth.[12]

[12] Also of concern is the trial judge's summary of what it saw as John's failings. "If not for [John's] action over the past seven (7) or more years of using Trust's assets to enrich himself. . . intentionally withholding information and records from [Vicki] . . and using the Trust to intimidate, harass and threaten [Vicki] the parties would not have

"Construction depends upon the trustor's intent at the time of execution as shown by the face of the document." *Holcombe-Burdette v. Bank of America*, 640 S.E.2d at 485. "The primary consideration in construing a trust is to discern the settlor's intent." *Id.*, citing *Bowles v. Bradley*, 319 S.C. 377, 380, 461 S.E.2d 811, 812 (1995).

It was fully within the settlor's intent to spell out the terms upon which the beneficiaries were required to deal with one another. The trial court was not free to pick its choice of burden of proof (or, as in this case, to fail to even state the burden of proof relied upon). The language of the trust controlled. Respondent Vicki failed in establishing that any act or omission by John was committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries

The trial judge's order must be reversed and the matter remanded for entry of judgment in favor of John.

CONCLUSION

The trial judge's errors substantially prejudiced Appellant John, and unnecessarily complicated this litigation by granting the motion to amend the complaint when damages were precluded as a result of Respondent Vicki's failure to seek damages in the 2014 action, which led to several more years of litigation for both parties, as well as burdening the resources of the Court.

Most fundamentally, the trial judge erred in (1) awarding damages for periods of time for which John had been determined not to owe a fiduciary duty to anyone other than his father (until his father's death) as already determined in the unappealed 2014 litigation; and (2) not stating a

become embroiled in two protracted litigations . . . (R. p. 57). Even on rehearing, the trial judge paid no attention to the final order in the 2014 action, which exonerated John from any wrongdoing and clearly stated he had no fiduciary duty to any beneficiary until his father died. (R. pp. 3-11).

burden or proof for the findings of fact relied upon to award judgment against John and, when the error was called to her attention, in failing to apply the mandatory burden of proof set forth in the Tenth Amendment to the Trust Agreement.

John respectfully seeks an order of this Court vacating the trial judge's orders in the 2016 litigation, and remanding for entry of judgment in favor of John.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard (S.C. Bar No.498)
Harvey M. Watson III (S.C. Bar No. 74053)
BALLARD & WATSON
226 State Street
West Columbia, SC 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

ATTORNEYS FOR APPELLANT

March 3, 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA K. WEAVER, MASTER-IN-EQUITY

Appellate Case No.: 2021-000816

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ...Respondent,

v.

John Edward Vergeldt, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)

BALLARD & WATSON
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

ATTORNEYS FOR APPELLANT

March 3, 2022