STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF YORK	)	**CIVIL ACTION NO.: 2016-CP-46-00820**
Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, Petitioner, vs. John Edward Vergeldt Respondent.	)	**ORDER DENYING MOTION TO RECONSIDER**

THIS MATTER came before the Court on March 17, 2021 at 2:00 PM for a hearing on Respondent John Edward Vergeldt's ("Respondent") Amended Motion to Reconsider ("Motion"). Due to the ongoing public health crisis precipitated by the COVID-19 pandemic, the hearing took place *via* the internet-based video conferencing platform Cisco Webex as allowed by the Administrative Order of the Honorable Donald W. Beatty, Chief Justice for the Supreme Court of South Carolina, *Re: Operation of the Trial Courts During Coronavirus Emergency (As Amended March 4, 2021)* (Appellate Case No. 2020-000447). Present at the hearing was Taylor A. Peace, Esq., attorney for Petitioner Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Trust dated September 27, 1978 ("Petitioner") and Respondent's counsel, Desa Ballard, Esq. Petitioner also appeared.

In the Motion and Respondent's Memorandum in Support Motion to Reconsider and Supplemental Motion to Reconsider, Respondent argues the Court should reconsider its rulings in the Final Order entered on February 2, 2016. He also asks the Court to reconsider, amend or vacate other prior temporary orders entered during the present litigation.

Respondent asserts the Court erred in allowing Petitioner to amend her initial Petition for Removal of Trustee and Related Relief ("Petition") to assert legal causes of action and entitlement to damages. Respondent argues these causes of action are barred by the doctrines of *res judicata* and issue preclusion due to the rulings in the case of *Vicki Lynn Vergeldt v. John Edward Vergeldt, Individually, and as Successor Trustee of the John Edward Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 and Patricia Vergeldt Downey* (C/A No.: 2014-CP-46-01956) ("First Lawsuit"). Respondent also argues amendment of the Petition was in error as the case was already referred to this Court and Respondent was denied his right to a jury trial as a result. Respondent further asserts the Court erred by failing to apply the proper standard of proof and/or that Petitioner presented expert testimony to meet same, erred by freezing assets of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 ("Trust"), and erred by allowing and considering certain items of Petitioner's evidence while denying Respondent the right to rebut same.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing argument of counsel and reviewing documents in the Court's file, the following Findings of Fact and Conclusions of Law are made.

A. *Res judicata* and Issue Preclusion

In the Motion, Respondent argues the Court should reconsider, amend, and/or vacate the Final Order on the grounds the Order Granting Motion to Amend ("Order Allowing Amendment") entered on June 13, 2019 and following Amended Petition for Removal of Trustee and Related Relief filed June 20, 2019 ("Amended Petition") were in error based on the doctrines of *res judicata* and issue preclusion. This ground for reconsideration fails.

"*Res Judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of prior action between those parties. Under the doctrine of *res judicata*, '[a] litigant is barred from raising issues which were adjudicated in the form suit and any issues which might have been raised in the former suit.'" Judy v. Judy, 393 S.C. 160, 172, 712 S.E. 2d 408, 414 (2011). (citing Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E. 2d 106, 109 (1999)). "The doctrine of *res judicata* is founded on the principle that the public interest requires an end to litigation and that no one should be sued twice for the same cause of action." Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E. 2d 626, 628 (Ct. App. 1995). "*Res Judicata* 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." Plott v. Justin Enterprises, 374 S.C. 504, 511, 649 S.E. 2d 92, 95 (Ct. App. 2007). "Under *res judicata*, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit'" Id (internal citations omitted). "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." Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 34 512 S.E. 2d 106, 109 (1999). However, *res judicata* does not bar a second action for damages and other relief where it follows a first action that seeks a declaratory judgment. See Robison v. Asbill, 328 S.C. 450, 492 S.E. 2d 400 (Ct. App. 1997).

Narrower than *res judicata* is the doctrine of collateral estoppel or issue preclusion. See Liberty Mut. Ins. Co. v. Employers, Ins. of Wausau, 284 S.C. 234, 237, 325 S.E. 2d 566, 568 (Ct. App. 1985) (internal citations omitted). Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Carolina Renewal, Inc. v.

South Carolina Dept. of Transp., 385 S.C. 550, 553, 684 S.E. 2d 779, 782 (Ct. App. 2009). "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." Id (citing Snavely v. AMISUB of S.C., Inc., 379 S.C. 386, 398, 665 S.E. 2d 222, 228 (Ct. App. 2008)). To prove a defense of issue preclusion, Respondent must show that the issues in this lawsuit were: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Id. The doctrine of collateral estoppel should not be rigidly or mechanically omitted. Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it. Id (internal citations omitted).

To avail themselves of these defenses, a party must affirmatively plead them or they are waived. See Rule 8(c), SCRCP; RIM Associates v. Blackwell, 359 S.C. 170, 183, 597 S.E.2d 152, 159 (Ct. App. 2004) ("Res judicata is an affirmative defense that must be pled at trial in order to be pursued on appeal…..An affirmative defense is waived if not pled….Generally claims or defenses not presented in the pleadings will not be considered on appeal.").

1. *Res Judicata* and Collateral Estoppel Not Raised in Pleadings

As applied to this matter, neither *res judicata* nor collateral estoppel were raised by the Respondent in his Answer and Counterclaim filed March 7, 2016 ("Answer") or his Response to Amended Petition for Removal of Trustee and Related Relief and Request for Damages and Disinheritance of Plaintiff field August 21, 2019 ("Amended Counterclaim"), and, as a result, they are waived. See Id. Because they were raised for the first time in the Motion, it would be improper for the Court to consider them. See Patterson v. Reid, 318 S.C. 183, 456 S.E. 2d 436 (Ct. App. 1995); Miller Construction Co., LLC v. P.C. Construction of Greenwood, 418 S.C. 186, 791 S.E.

2d 321 (Ct. App. 2016).

2. *Res Judicata* Did Not Preclude Amendment of the Petition

Even if Respondent properly raised *res judicata* and collateral estoppel as affirmative defenses, it was proper for the Court to allow amendment of the Petition to assert legal causes of action for damages.

a. Amendment of the Petition was not in error based on *res judicata*.

As to the first element of *res judicata*, identity of the parties is not present. In the First Lawsuit, Petitioner brought her action against Respondent individually and as the successor trustee to declare, among other things, her rights in the Trust and entitlement to information concerning same. In contrast, the present action was brought, ultimately, by Petitioner individually and as successor trustee against Respondent for actions taken while he served as co-trustee and successor trustee that she believed were breaches of his fiduciary duties. In other words, the identity of the parties and their duties toward each other reversed between the First Lawsuit and this case such that the parties are not identical.

The second element of *res judicata* is also not present as there is no identity of subject matter between the First Lawsuit and present litigation nor did the First Lawsuit adjudicate Respondent's liability or Petitioner's resulting damages. In the First Lawsuit, Petitioner sought only declaratory relief related to: (1) John Vergeldt's Jr.'s ("Settlor") mental competency and lack thereof, (2) the effect Settlor's competency had on who was trustee of the Trust, (3) when Respondent became co-trustee and/or successor trustee, (4) his rights and obligations toward Petitioner as one of the Trust's beneficiaries, and (5) whether Petitioner had probable cause to pursue the First Lawsuit. To be sure, the final Order in the First Lawsuit filed August 31, 2015 ("2014 Final Order") found that no declaration concerning probable cause to challenge Respondent's performance of his duties as co-trustee or successor trustee was being made, and it

was preserved until such time that Petitioner had adequate information, which Respondent was withholding, to challenge his actions. The 2014 Final Order further found no conclusion therein should be deemed to be a determination of Respondent's compliance or non-compliance with applicable law or the Trust. No damages were claimed or adjudicated in the First Lawsuit or 2014 Final Order. In contrast, the Amended Petition expressly seeks damages related to Respondent's actions relative to the Trust as co-trustee or successor trustee such that identity of subject matter does not exist. To the extent Respondent argues Petitioner should have brought a claim for damages in the First Lawsuit, the same is not persuasive as the relief requested was only declaratory. In particular, Petitioner brought the First Lawsuit to obtain information about the Trust and Respondent's actions which he was intentionally withholding, presumably, in an attempt to conceal his actions and frustrate her efforts to discover same. To rule otherwise as to the claim for damages would not be fair or just.

The same analysis applies to the third element of *res judicata* as Respondent's liability for his actions as co-trustee and/or successor trustee and damages to Petitioner and the Trust were not adjudicated in the First Lawsuit or needed to support to final decision in the 2014 Final Order. Those issues were also expressly preserved in the 2014 Final Order which went unappealed and from which Respondent has not sought relief.

b. Issue Preclusion is also not present such that allowance of the Amended Petition was not error

The argument that issue preclusion or collateral estoppel requires reconsideration of the Final Order also fails since Respondent's liability and Petitioner's resulting damages were not actually litigated in the First Lawsuit, were not determined, and were not necessary to support the 2014 Final Order. They were expressly preserved under the 2014 Final Order. Presumably, these issues were not litigated and preserved as Respondent did not or would not recognize his own

duties toward the Petitioner and would not provide information relating to the Trust.

c. No error allowing Amended Petition

As a result, the Court finds and concludes that *res judicata* and issue preclusion did not prohibit the Court from allowing amendment and filing of the Amended Petition, and this ground for reconsideration fails.

B. Respondent's Right to a Jury Trial

Respondent also asserts he was denied his right to a jury trial on Petitioner's legal causes of action in the Amended Petition. This ground for reconsideration also fails.

Under Rule 38(b), SCRCP, "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than ten (10) days after service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party." Rule 38(b), SCRCP. "The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of a trial by jury." Rule 38(b), SCRCP. Also, "[i]n equity the parties are not entitled, as a matter of right, to a trial by jury. However—counterclaims—including those raised in equitable actions—may, at times, be entitled to a jury trial. As we have previously explained: (1) if both the complaint and the counterclaim are in equity, the entire matter is triable by the court. (2) If both are at law, the issues are triable by a jury. If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial. (4) If the complaint is equitable and counterclaim legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim." Wachovia Bank, Nat'l Assn. v. Blackburn, 407 S.C. 321, 328-329, 755 S.E. 2d 437, 441 (2014). Also, Rule 53(b), SCRCP provides, "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action may be referred to a master or special referee by order of a

circuit judge or the clerk of court….Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court." Rule 53(b), SCRCP.

In this matter, the Petition was filed February 1, 2016 in the York County Probate Court and Respondent filed his Answer and Counterclaim in which he asserted counterclaims for: (1) abuse of process, (2) malicious prosecution, (3) violation of the South Carolina Frivolous Civil Proceedings Sanctions Act, and (4) an action for a declaratory judgment. Respondent did not demand a jury trial in his pleading despite having the right to do so. The case was referred to this Court by Order of Reference filed March 17, 2018. The Amended Petition was then filed on June 20, 2019, and Respondent filed his Response to the Amended Petition on August 21, 2019 in which he failed to re-assert his claims or assert a demand for a jury trial. No separate jury trial demand has been filed or entered since.

Because of the nature of the claims Respondent raised in his Answer and Counterclaim, he could have demanded a jury trial when it was filed or shortly thereafter, but he failed to do so. He also could have demanded a jury trial when he filed his Response to Amended Petition and divested this Court of jurisdiction of the causes of action to which he is entitled under Rule 53(b), SCRCP, but he did not do so. In other words, Respondent waived his right to a jury trial under the applicable rules of civil procedure.

As a result, the Court finds and concludes that Respondent was not denied his constitutional right to a jury trial. He waived same, and, therefore, the Court is not required to reconsider, amend, and/or vacate the Final Order on that ground.

C. *Sua Sponte* Relief

Respondent additionally seeks to have the Court reconsider, amend, or vacate some of its prior temporary orders and/or Final Order due to the purported *sua sponte* relief granted during

this litigation. This ground for reconsideration fails.

1. May 21, 2018 Order

The Court initially notes Respondent's description of the May 21, 2018 Order is a mischaracterization. The May 21, 2018 Order prohibited Respondent from making expenditures from the Trust without Petitioner's consent or order of the Court. If Petitioner's consent could not be obtained, Respondent could make application to the Court. The application was required to include the amount of the expenditure, an explanation of the necessity of the expenditure, and the bill, estimate, invoice or other documentation evidencing the need for an expenditure. In other words, the Trust assets were not frozen. Regardless, the injunction imposed by the May 21, 2018 Order became moot with Respondent's resignation as successor trustee effective April 1, 2019 such the Court is not required to reconsider, amend, and/or vacate same. See Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E. 2d 474.

It is additionally worth nothing that Respondent did not seek reconsideration of the May 21, 2018 Order under Rule 59, SCRCP or seek the appeal thereof which would have been allowed under S.C. Code Ann. §14-3-330 (4). As a result, the time for Respondent to seek reconsideration or appeal of the May 21, 2018 Order has passed such that the Court cannot reconsider same if it were not already moot.

Aside from the legal argument, there have only been two (2) instances in this litigation in which Respondent could not obtain Petitioner's approval for expenditures such that Court intervention was required. The first instance concerns the Application of John E. Vergeldt for Approval of Payment which was filed on May 30, 2018 ("First Application") and concerned expenses related to a cottage owned by the Trust located in Au Gres, Michigan. The Court's file reveals no order was entered approving or denying the First Application leaving the Court to assume Petitioner ultimately consented to the proposed expenditures. The second instance was

the Application of John E. Vergeldt for Approval of Payment filed August 29, 2019 in which Respondent sought to have the Trust pay for his former attorney's fees and costs related to this litigation which the Court denied in the Order Regarding Trust Expenditures filed September 12, 2019 ("September 2019 Order'), as amended on November 26, 2019 on the basis Respondent had not followed the procedures in the May 21, 2018 Order. Court also imposed the same injunctive relief on Petitioner which has gone unappealed. If Respondent was unable to make expenditures related to the damage to the cottage as he claims, it was not because of the *sua sponte* relief issued by the Court.

Based on the above, the relief granted in the May 21, 2018 Order is not a ground for reconsideration, vacation, or amendment of the Final Order.

2. Termination of Interest in Trust

In addition to the May 21, 2018 Order, Respondent asserts the termination of his interest in the Trust set forth was not requested in the pleadings and is a ground for reconsideration; however, this argument fails.

Under Rule 8, SCRCP, "All pleadings shall be so construed as to do substantial justice to all parties." Rule 8, SCRCP. In order to achieve substantial justice for all parties, our courts have determined that pleadings should be liberally construed. Fountain v. Fred's, Inc., 429 S.C. 533, 839 S.E. 2d 475 (Ct. App. 2020). It is the substance of the requested relief that matters "regardless of the form in which the request for relief was framed." Richland County v. Kaiser, 351 S.C. 89, 94, 5767 S.E. 2d 260, 263 (Ct. App. 2002) (internal citations omitted). "Indeed, our supreme court has 'repeatedly held that that the plaintiff may obtain any relief appropriate to the case made by the pleadings and the evidence, without regard to the *form* of the prayer for relief'. Fountain at S.C. 487 (2020) (citing Beaty v. Mass Protective Ass'n, 160 S.C. 205, 207, 158 S.E. 206, 207 (1931)). "Especially is this true in an equity case." Id. In a similar vein, "Courts have the inherent

power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." Ex parte Dibble, 279 S.C. 592, 595, 310 S.E. 2d 440, 442 (Ct. Ap. 1983).

Respondent correctly points out that a party may generally not be granted relief unless it is requested in pleadings. Norwest Properties, LLC v. Strebler, 424 S.C. 617, 819 S.E. 2d 154 (Ct. App. 2018). However, the Amended Petition alleges, among other things, that Respondent placed Trust assets in his own name, that he used Trust funds and assets for his own personal gain and to intimidate and harass Petitioner, distributed Trust assets in a way that was contradictory to the Trust, used them to pay for this litigation, and let Trust assets falls into disrepair and waste. The Amended Petition also alleges that Respondent concealed and/or attempted to conceal these actions from Petitioner and that he took the same willfully, recklessly and with conscious disregard to Petitioner's rights. Attached to the Amended Petition was the Eighth Amendment and Complete Restatement to Trust Agreement between John Vergeldt, Jr., Settlor, and John Vergeldt, Jr., Trustee, the Ninth Amendment To Trust Agreement, and the Tenth Amendment to Trust Agreement. Under these documents, the Trust provides that a beneficiary is to be treated as if they predeceased Settlor if they seek to impair or invalidate any of the Trust's provisions. Finally, the Amended Petition prays the Court issue such other and further relief as the Court deems just and proper.

Based on the evidence presented at the hearing in this matter, the Court finds that it, while sitting in equity, has the power to liberally construe the relief requested in the Amended Petition such that it can terminate Respondent's interest in the Trust and enforce other provisions thereof to ensure that a just result is reached. As a result, the ground for reconsideration of the Final Order fails.

D. Standard of Proof

In addition to the above, Respondent asserts the Final Order should be reconsidered

because the Court failed to include the appropriate standard of proof or apply same. Like those before it, this ground for reconsideration fails.

Respondent argument that the Final Order's failure to address the applicable standard of proof is based on the terms of the Tenth Amendment which states a successor trustee's liability would be limited to his/their actions taken in bad faith and with reckless indifference to the Trust. Respondent attempts to interpret this language to mean that the Court should apply the clear and convincing standard of proof rather than the lower standard of preponderance of evidence.

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 in this matter is indeed the preponderance of evidence standard. The Court finds and concludes that the same was applied in this matter based on the evidence was presented such that reconsideration is not required.

Even if the clear and convincing evidence standard of proof were required to be applied, the evidence presented the First Lawsuit and this action proves Respondent's liability and Plaintiff's damages by clear and convincing evidence. The record is clear. If not for Respondent's actions over the past seven (7) or more years of using Trust's assets to enrich himself to Petitioner's detriment, intentionally withholding information and records from her so that she could not exercise her rights under the Trust, and using the Trust to intimidate, harass and threaten Petitioner, the parties would not have become embroiled in two protracted litigations and incurred extensive attorney's fees to both of their detriments.

The Court also finds and concludes that the language of the Tenth Amendment related to proof of a successor trustee's bad faith and reckless indifference is of no assistance to Respondent as that term implicates a conclusion of law to be made by the Court. It does not correlate to a particular standard of proof that Petitioner must meet. As a result, this ground for reconsideration fails.

E. Evidentiary Issues

Many of the remaining objections Respondent raises relate to evidentiary issues; however, these objections do not require the Court to reconsider, alter, and/or vacate its Final Order as the Court does not find that it abused its discretion as to the admission of Petitioner's or Respondent's evidence. See Moore v. Moore, 360 S.C. 241, 599 S.E. 2d 467 (Ct. App. 2004).

1. Timeliness of Production of Exhibits and Disclosure of Witnesses.

One of the evidentiary objections raised by Respondent concerns the timeliness of the production and disclosure of Petitioner's exhibits and witnesses. However, this objection fails.

During the first day of the trial, Respondent objected to Petitioner's exhibits on the grounds they were not timely produced. He claimed he had not seen them prior to. Respondent asked for a continuance on the second day of trial on these grounds. Petitioner was able to provide proof that the witnesses were disclosed and exhibits mailed to Respondent prior to trial albeit shortly before. The Court denied the request considering the age of the case and that Petitioner, her witnesses, and Respondent all traveled to York for the final hearing. However, the Court took the issue of the timeliness of the production of exhibits and disclosure of witnesses under advisement to determine if the same would be admitted into evidence.

After the hearing, Respondent filed multiple motions seeking to have some of Petitioner's witnesses and evidence excluded which are noted in the public record. The Court eventually allowed Respondent to present his own affidavits, reports and/or other proposed exhibits to the Court to eliminate any prejudice Respondent may have suffered, if any, due to the late production of documents and disclosure of witnesses as indicated in an Order entered May 12, 2020 which was amended by an Order Granting Petitioner's Motion to Alter or Amend entered August 31, 2020. In particular, the Court granted Respondent leave to procure his own expert to review the Trust's accounting records and prepare a rebuttal report to that of Plaintiff's expert, Charles E.

Bosler, and to provide affidavits as to the condition of the Cottage. The only affidavits that Respondent submitted were those of Robert T. Nirenberg and Audry Scheible. The Court allowed the former, but the latter was excluded. Respondent also submitted an affidavit executed by himself related to Mr. Bosler's report that was excluded.

Regarding the timeliness of the production of exhibits and disclosure of witnesses, Rule 26(a), SCRCP provides, "Parties may obtain discovery by one or more of the following methods:….written interrogatories…requests for production…" Rule 26(a), SCRCP. "A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response include information thereafter acquired, except that requests for discovery under Rule 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that the information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party" Rule 26(e), SCRCP. "In addition, a party is under a duty seasonably to supplement his response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony." Rule 26(e), SCRCP. Also, "[a]t any time after the commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery….Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan for discovery and schedule for discovery…." Rule 26(f), SCRCP. Relatedly, "[t]he order may, in its courts discretion, also: (1) provide that exhibits or witnesses not listed at the hearing may not be called or admitted in evidence at the trial, unless such witness or exhibit is discovered after pre-trial hearing and promptly disclosed to opposing parties." Rule 16(b),

SCRCP. "The entire thrust of discovery rules involves full and fair disclosure, 'to prevent a trial from becoming a guessing game or one of surprise for either party." Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E. 2d 213, 217 (Ct. App. 1997) (internal citations omitted). "Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial…" Id at S.C. 113.

In this matter, the Court finds and concludes that the parties exchanged interrogatories and requests for production to which they both answered and/or responded. Also, no court order was entered dictating the time by which discovery had to be completed and/or finalized. Accordingly, either party could have and had a duty to supplement their answers to interrogatories and/or documents produced in response to requests for production at any time prior to trial which Petitioner did by mailing the objection to exhibits to Respondent's last known address between three times between January 16, 2020 and January 28, 2020. See Rule 26, Rule 33, Rule 34, and Rule 5(b) ("Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and compliant"). The Court concludes that no violation of the discovery rules occurred as a result that would warrant the exclusion of the exhibits if that were Respondent's position.

To the extent Respondent argues he suffered prejudice by not having the proposed exhibits and witnesses disclosed to him prior to trial as he claims, such prejudice was eliminated by the Court allowing Respondent to submit rebuttal affidavits as to the condition of the cottage as well as the opportunity to obtain his own qualified expert to rebut Mr. Bosler's report which he failed to do during the six (6) month period after the final hearing. In other words, both parties were allowed an opportunity to offer the same type of exhibits into evidence as the other regarding the cottage and Respondent had an opportunity to but failed to procure an expert witness to rebut Mr. Bosler's report.

Accordingly, the timeliness of the production of reports and disclosure of Mr. Bosler as a witness is not a ground for reconsideration or amendment of the Final Order.

2. Hearsay

Respondent asserts in the Motion that the Court improperly allowed Petitioner to present hearsay into evidence. However, Respondent failed to timely object to said hearsay, if it existed, and the same is waived as result and cannot be a ground for reconsideration. See Patterson v. Reid, 318 S.C. 183, 456 S.E. 2d 436 (Ct. App. 1995); Miller v. Construction Co., LLC v. P.C. Construction of Greenwood, 418 S.C. 186, 791 S.E. 2d 321 (Ct. App. 2016).

3. Affidavit of Audry L. Scheible and attachments

The Court properly excluded the Affidavit of Audry L. Scheible and attached exhibits considering Respondent attempted to introduce same into evidence after Ms. Scheible presented testimony to the Court and she concluded same. If Respondent wished her to testify as to matters in the affidavit, he should have elicited it at the time of her testimony. The exclusion of her affidavit and attachments is not grounds for reconsideration.

4. Charles E. Bosler Report

Aside from the timeliness of the production of Mr. Bosler's report, Respondent argues the same should have been excluded for other reasons to include but not limited to the fact that it was not based on actual knowledge, included transactions for which the settlor was responsible and could not preclude, and included legal analysis. Tangentially, Respondent argued that the Court erred in failing to consider his written response to Mr. Bosler's report as it was *in lieu* of cross-examination.

In this matter, Mr. Bosler was Petitioner's witness, he provided testimony that he was provided the Trust's bank statements and other account records, and these records serve as the basis of his report. Mr. Bosler's report was based on his actual knowledge of the documents

presented to him as required under Rule 602, SCRE. He was also qualified as an expert in the field of accountancy such that the statements and testimony he made about the facts and data used to come to the conclusions in his report and testimony related thereto were proper under Rule 703, SCRE. As a result, the Court finds and concludes Mr. Bosler had personal knowledge of the facts and records presented to him which serve as the basis of his report, and it was proper to admit the same into evidence.

As to whether the report included transactions for which the Trust's settlor was solely responsible, Respondent had an opportunity to testify after Mr. Bosler's testimony and chose not to do so nor did he present witnesses to testify as to whether the Settlor was responsible for the transactions at issue despite being on notice of Petitioner's claims. Even so, testimony about Respondent's communications with Settlor about what Settlor intended with regard to specific transactions would have been barred by S.C. Code Ann. §19-11-20, as amended, (1976) ("Dead Man Statute"). The Court finds and concludes Respondent presented little evidence, if any, about transactions for which the Settlor was responsible, and this argument is not a ground for the Court to reconsider the Final Order as a result.

To the extent the Bosler report includes legal analysis, the Court finds that Mr. Bosler's report and analysis was being provided solely for a comparison between how Respondent acted with regard to the Trust's assets versus how he believed a similarly situated fiduciary would/should have acted as required by applicable accountancy standards. This testimony is allowable under Rule 703 and Rule 704, SCRE.

Further, Respondent's reply to Mr. Bosler's report was not in compliance with Court's May, 2020 Order, as amended, which allowed him time to engage an accountant or other expert to rebut Mr. Bosler's report as he represented to the Court he had. It also cannot be *in lieu* of cross-examination as it was not given in the form of questions to which Mr. Bosler had an opportunity

to answer or respond. Rather, the response was in the form of a sworn statement which the Court properly excluded as being, at its best, testimony and/or commentary on Mr. Bosler's report given by a person who is not an accountant or similarly qualified expert, who could not be cross-examined by Petitioner's counsel, and represents an attempt by Respondent to testify after he was given his right to do the same at the final hearing.

As a result of the above, the Court finds and concludes that the Court properly admitted Charles E. Bosler's report into evidence, excluded Respondent's response, and the same is not a reason for the Court to reconsider the Final Order.

F. Absence of Expert Testimony

Respondent has additionally argued the Court erred in its Final Order because Petitioner did not present expert testimony as to whether Respondent's breach of duties was the proximate cause of Petitioner's damages.

The Motion takes issue with Petitioner's two (2) expert witnesses. The first expert was Kathleen Palinski, Esq. who was qualified as an expert in fiduciary standards and who was appointed as Limited Special Trustee by Consent Order Appointing Special Trustee and Staying Case filed on February 23, 2017. Respondent argues Ms. Palinski never testified that Respondent's breach and/or breaches of duties under the Trust proximately resulted in Petitioner's damages. However, as noted in Dereede Living Trust dated December 17, 2013 v. Karp, 427 S.C. 336, 831 S.E. 2d 435, the South Carolina Court of Appeals found that a breach of trust makes a trustee liable to beneficiaries regardless of intention. Considering Ms. Palinski testified that Respondent did not comply with the terms of the Trust or fiduciary standards or duties, Respondent is and/or was liable to Petitioner for his breaches the Trust and fiduciary duties. In other words, his failure to comply with the Trust was the proximate cause of Petitioner's damages. As to the amount of damages, Mr. Bosler testified to same. He also testified as to the impact that Respondent's breach and/or

breaches of Trust had on the Trust's assets which resulted in Petitioner's damages that were granted in the Final Order. In particular, the damages being the amount of Trust funds and assets Respondent used to benefit and/or enrich himself to Petitioner's exclusion, the unequal distributions he made to himself and other beneficiaries to Petitioner's exclusion, and expenditures he made that were unaccounted for during the time Respondent was serving as co-trustee and/or successor trustee.

When viewed together and in light of the evidence presented, the Court finds and concludes that it had evidence in hand necessary to find and conclude Respondent was the direct and proximate cause of Petitioner's damages. As a result, this ground for reconsideration fails.

G. OTHER GROUNDS

In addition to the above grounds, the Court notes that the Motion contains several other grounds for reconsideration that are generally tied to the above. However, Respondent did not argue them at the final hearing, separately brief them, or argue them at the hearing on the Motion. The Court is left to assume that Respondent is abandoning these grounds. See Johnson v. Sonoco Products Co, 381 S.C. 172, 672 S.E. 2d 567 (2009); First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E. 2d 513 (1994). . To the extent he is not, they are rejected as grounds for reconsideration.

ORDER

Based on the above Findings of Fact and Conclusions of Law, the Court has determined that the numerous grounds for reconsideration raised in the Motion do not rise to a level such that the Court is required reconsider, amend and/or vacate the Final Order.

Accordingly, **IT IS THEREFORE**, **ORDERED, ADUDGED, AND DECREED** that Respondent's Motion is **DENIED.**

{JUDGE'S SIGNATURE APPEARS ON NEXT PAGE}

York Common Pleas

Case Caption: Vicki Lynn Vergeldt VS John Edward Vergeldt

Case Number: 2016CP4600820

Type: Order/Other

So Ordered

s/ Teasa K. Weaver 3084