

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

JUN 02 2015

Frank R. Addy, Jr., Circuit Court Judge

SC Court of Appeals

Case No. 2013-CP-36-193
Tracking No. 2014-002410

Raymond D. Hobby, *Respondent,*

v.

Mary T. Hobby, *Appellant,*

v.

Frances B. Knowlton, Individually and as Trustee, *Respondent.*

FINAL BRIEF OF RESPONDENT
FRANCES B. KNOWLTON (CORRECTLY KNOWN AS FRANCIS B. B.
KNOWLTON)

R. Davis Howser
Jeffrey Silverberg
Howser, Newman & Besley, LLC
Post Office Box 12009
Columbia, South Carolina 29211
Phone: (803) 758-6000
Fax: (803) 758-4445
rdhowser@hnblaw.com
jsilverberg@hnblaw.com

Attorneys for Respondent Knowlton

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT KNOWLTON AS TO APPELLANT'S CLAIM THAT KNOWLTON BREACHED HIS FIDUCIARY DUTY TO APPELLANT WHEN HE SOLD THE FORMER MARITAL HOME TO RESPONDENT RAYMOND HOBBY.
- II. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT KNOWLTON AS TO APPELLANT'S CLAIM THAT KNOWLTON EXCEEDED THE SCOPE OF HIS AUTHORITY AS TRUSTEE UNDER THE TRUST AGREEMENT WHEN HE SOLD THE FORMER MARITAL HOME TO RESPONDENT RAYMOND HOBBY.
- III. WHETHER THE CIRCUIT COURT GRANTED SUMMARY JUDGMENT PRIOR TO APPELLANT HAVING A FULL AND FAIR OPPORTUNITY TO CONDUCT DISCOVERY.

STATEMENT OF THE CASE¹

This action arises from the sale of the former marital home (“the Residence”) of Respondent Raymond D. Hobby (“Mr. Hobby”) and Appellant Mary T. Hobby (“Ms. Hobby”) to Mr. Hobby by Respondent Francis B. B. Knowlton (“Knowlton” or “Trustee”), who served as the trustee of a liquidating trust established pursuant to a Divorce Decree entered by the Family Court (“Divorce Decree”) in the Hobbys’ divorce action. At the time of the sale, Mary Hobby resided at the Residence. Raymond Hobby commenced the present action against Ms. Hobby when she refused to vacate the Residence upon his purchase of the property from the Trust. Ms. Hobby subsequently asserted a third-party action against Trustee for allegedly breaching his fiduciary duties in connection with the sale of the Residence.

Mr. Hobby filed his Complaint on April 26, 2013, asserting causes of action for Ejectment, Trespass and Unjust Enrichment. Mary Hobby filed her Answer to the Complaint as well as a Motion to Dismiss the Complaint on May 9, 2013. Ms. Hobby’s Motion to Dismiss was denied, and on June 10, 2013, she filed an Amended Answer, Counterclaim and Third Party Complaint, asserting a counterclaim against Mr. Hobby for Declaratory Judgment, and causes of action against the Trustee for breach of fiduciary duty and equitable indemnification. Mr. Hobby amended his complaint on June 13, 2013, asserting claims under the South Carolina South Carolina Residential Landlord and Tenant Act, a claim for an injunction, an action for Breach of the Trust Agreement and other equitable claims, all arising from Ms. Hobby’s refusal to vacate the Residence. Meanwhile,

¹ Respondent Knowlton’s Statement of the Case and Statement of Facts sections of this Brief are intended to supplant the following sections of Appellant’s Brief: Introduction, Statement of the Case, Background, Trustee Powers to Dispose of Trust Assets and Affidavits Submitted by Ms. Hobby.

the Trustee filed his Answer to Ms. Hobby's Third Party Complaint on June 28, 2013. Ms. Hobby subsequently filed an Answer to Mr. Hobby's Amended Complaint on September 9, 2013. The Trustee then filed an Answer to Ms. Hobby's Answer to the Amended Complaint, Counterclaim and Third-Party Complaint on September 12, 2013.

On July 9, 2013, Mr. Hobby moved for Partial Summary Judgment on the issue of liability as to all causes of action in his First Amended Complaint. Ms. Hobby filed her own Motion for Summary Judgment on September 20, 2013, requesting the Court grant her summary judgment on the ground that the Trustee "acted outside the scope of his powers and authority in quitclaiming the marital residence to the plaintiff and the quitclaim is therefore void and a nullity." On December 27, 2013, Trustee filed a Motion for Summary Judgment. The Honorable Frank R. Addy, Jr. heard the parties' cross-motions for Summary Judgment on March 12, 2014. Pursuant to an Order dated May 6, 2014 (filed May 12, 2014), Judge Addy granted Trustee's Motion for Summary Judgment and Mr. Hobby's Motion for Partial Judgment. Ms. Hobby's Motion for Summary Judgment was denied, and she timely filed a Motion to Alter or Amend and/or to Reconsider pursuant to Rule 59(e), SCRCF. Ms. Hobby's motion to reconsider was heard on October 17, 2014. After the hearing on Ms. Hobby's motion to reconsider, Judge Addy upheld his prior rulings on the parties' cross-motions for Summary Judgment and denied the Motion to Alter or Amend and/or to Reconsider pursuant to a Form 4 dated October 17, 2014. This appeal followed.

STATEMENT OF FACTS

I. Background

Mr. Hobby and Ms. Hobby were married on June 24, 1978. (First Am. Compl. ¶ 6, R. p. 61, at ¶ 6) They were subsequently divorced on October 8, 2010. Pursuant to the terms of the Divorce Decree, the parties were required to create a liquidating trust (the “Trust”) and to transfer a majority of their marital assets into the Trust. (Divorce Decree, R. pp. 506 – 527; R. pp. 1132-1153) Furthermore, the Divorce Decree prescribed certain terms that were to be included in the Trust. (R. p. 62, at ¶ 7) The Divorce Decree provides in relevant part:

To effectuate a complete, fair and equitable apportionment of marital assets and debts, the parties shall create a trust. **The following terms shall govern the parties in the creation and operation of this trust** and/or are relevant regarding each party’s interest in this trust and the assets and debts to be placed in it.

- a. **This trust is created pursuant to this Order. . . .**
...
- f. Either party may purchase any asset from the trust, provided the sale and terms are reasonable, fair, and reflect fair market value **or** other terms mutually agreeable to the parties
- g. Except as otherwise detailed in this Order, [Mr. Hobby] shall be the beneficiary of fifty-seven and ½ percent (57.5%) of the trust.
- h. Except as otherwise detailed in this Order, [Ms. Hobby] shall be the beneficiary of forty-two and ½ percent (42.5%) of the trust.

(Divorce Decree 8-9, R. pp. 513-14; R. pp. 1139-1140) (Emphasis added):

Among the marital assets required to be placed into the liquidating trust was the Residence located at 544 Crowder Road, Kinards, South Carolina. (Divorce Decree ¶ 3(m), Schedule A, R. pp. 516, 523) At the time of the entry of the Divorce Decree, the Residence was titled solely in Ms. Hobby’s name. (First Am. Comp. ¶ 10, R. p. 62, at ¶10) The

Divorce Decree provides that Ms. Hobby shall have “sole and exclusive” use of the Residence and the surrounding three (3) acres of land “until such property is sold, or until vacated by her.”² (Divorce Decree ¶ 3(s), R. p. 518)

In compliance with the Divorce Decree, Mr. Hobby and Ms. Hobby created and executed the Hobby Family Liquidating Trust Agreement (the “Trust Agreement”) on December 6, 2010 and December 9, 2010, respectively. (*See* Trust Agreement, R. pp. 528-57) The parties mutually agreed that Respondent Francis B.B. Knowlton (“Knowlton” or “Trustee”) would serve as the trustee of the Trust. (R. p. 529; *see* R. p. 514, at 3(d); R. p. 119, at ¶ 20). The parties also agreed that Terry Williams (“Williams”) would serve as the independent accountant for the Trust. (*See* Affidavit of Terry Williams, R. p. 1096, at ¶ 6). It was Ms. Hobby’s counsel in the divorce action, John McDougall (“McDougall”), who first recommended that Knowlton serve as trustee. (R. pp. 570-71). McDougall also recommended that Williams serve as the Trust’s accountant.

Subsequent to the creation of the Trust, Trustee made repeated requests to Ms. Hobby to transfer the title to the Residence to the Trust pursuant to the Divorce Decree and the Trust Agreement. (*See, e.g.*, R. p. 572, lines 8-20; *see also* R. p. 573) Although Ms. Hobby understood her obligation to transfer title to the home to the Trust, (Mary Hobby Dep., R. p. 574, lines 7-18, p. 575, lines 22-25), she refused to do so until April 2012 (Mary Hobby Dep., R. p. 576-77; *see also* General Warranty Deed from Ms. Hobby to Trustee, R. pp. 467-70).

² The Trust Agreement executed by Mr. Hobby and Ms. Hobby also gave Ms. Hobby sole and exclusive use of the Marital Home until it was sold. (Trust Agreement, Article XII(f), R. p. 546)

II. The Trust Agreement

According to the Trust Agreement, “The Liquidating Trust . . . was created pursuant to the Final Order and Divorce Decree dated October 8, 2010, of the Honorable Joseph W. McGowan, III, Judge of the Family Court for the Eighth Judicial Circuit.” (Trust Agreement, Article I(a); R. p. 529). Moreover, according to the Trust Agreement,

The Liquidating Trust is established for the sole purpose of liquidating various marital assets belonging to [Mr. Hobby and Ms. Hobby] in the most fair, objective, and impartial manner available and in a manner that maximizes the value of such marital assets and satisfies the debts associated with those assets to the extent reasonably possible. In effecting the purpose of this Liquidating Trust, the Trustee shall be mindful of the desire of the parties to divest the Trust Assets for amounts approximately equal to the fair market value of such properties and Trustee shall liquidate the Trust Assets in an orderly fashion while being mindful of prevailing market conditions and the term of the Trust. For the avoidance of doubt, although the Trustee shall have the right to exercise and [sic] all rights, powers and privileges set forth herein, such powers shall be exercised in the furtherance of the purposes of the Trust, specifically selling Trust Assets in a timely, prudent and efficient manner and distributing proceeds as provided herein. The Trustee . . . will not unreasonably prolong the duration of the Liquidating Trust. . . .

(Trust Agreement, Article I(c); R. p. 530).

Article IX (a) of the Trust Agreement contained the following provisions regarding the powers of the trustee:

Powers for Trustee. Consistent with the purposes of the Trust as a liquidating Trust and the purposes as further described in Article I (c), the Trustee is authorized in its fiduciary discretion (which shall be subject to the standard of reasonableness and good faith to all beneficiaries) with respect to any property, real or personal, . . . **without authorization by any court . . . :**

(xxxii) To sell, convey or otherwise deal with or dispose of any and all Trust Assets forming a part of the Liquidating Trust estate, at such time or times and in such manner and upon such terms as, **in the absolute and uncontrolled discretion of the Trustee may [sic] deem expedient and proper**, provided, however, that i) Trustee shall have an obligation to exercise appropriate and reasonable due diligence with respect to the sale of any Trust Asset such that Trustee is reasonably satisfied that any sale has

occurred on an arms-length basis and has maximized the value of the Trust Asset being divested, and ii) Trustee may sell any Trust Asset to a Transferor provided the sale and terms of sale are reasonable, fair, and reflect fair market value **and** any other terms mutually agreeable by the parties.

(Emphasis added).

The provision of the Trust Agreement concerning the Trustee's ability to sell Trust Assets to Ms. Hobby or Mr. Hobby is nearly identical to the paragraph of the Divorce Decree allowing for the same. (*See* R. p. 514, at 3(f); R. p. 539, at Article IX(a)(xxxii)). The only difference is the Trust Agreement substituted the conjunctive "and" in place of the disjunctive "or" immediately preceding the clause "any other terms mutually agreeable by the parties." (*See id.*)

III. The Sale of the Residence

On December 1, 2011, McDougall, on behalf of Ms. Hobby, sent a letter to Trustee informing him that Ms. Hobby was interested in purchasing the Residence from the Trust. (Aff. of John O. McDougall September 19, 2013, R. p. 699, at ¶ 3)³ On December 8, 2011, McDougall forwarded Ms. Hobby's offer to Trustee to purchase the Residence. (*Id.* at ¶ 4) Ms. Hobby offered to purchase the Residence for \$225,000, of which \$127,231 would be paid in cash to the Trust. (*Id.* at Ex. B, R. pp. 703-704) This offer was based upon a November 23, 2011, appraisal of the Residence, which appraised the home's value at \$300,000. (*Id.*) Thus, Ms. Hobby offered \$75,000 less than the appraisal on which she based her offer. (*See id.*)

³ Trustee only cites to the affidavits of Mr. McDougall in this Brief for convenience and to the extent the affidavits contain undisputed factual statements and/or to the extent the affidavits contain/authenticate documents in the record. As will be discussed in this Brief's Argument section, Trustee challenges the admissibility of the opinions contained in Mr. McDougall's affidavits.

Trustee subsequently informed Mr. Hobby about Ms. Hobby's offer to purchase the Residence, and Mr. Hobby made a counteroffer to purchase the property on January 3, 2012. (R. pp. 707-708) Mr. Hobby offered to purchase the Residence for \$325,000. (*Id.*) Mr. Hobby's offer was based on a 2009 appraisal of the Residence, which valued the property at \$325,000. (R. pp. 707, 703). After conferring with Williams, the Trust's independent accountant, Trustee determined that Mr. Hobby's offer was superior to Mary Hobby's offer. (Aff. of Frank B. B. Knowlton, R. p. 835, at ¶ 12; Aff. of Terry Williams, R. p. 1097, at ¶ 8).

Trustee emailed Mr. Hobby's offer to both McDougall and Ms. Hobby on January 20, 2012. (Aff. John O. McDougall, September 19, 2013, Ex. C, R. pp. 705-706) McDougall responded to Trustee's email on January 23, 2012, informing Trustee that he had forwarded the offer to Ms. Hobby and would advise as to her response. (*Id.* at Ex. D; R. p. 709-710) Trustee responded to McDougall that same day (January 23, 2012), indicating "I will need to move fairly fast on this as the Trust needs an immediate infusion of cash to service the debt for February and beyond." (*Id.*) While Ms. Hobby denies ever seeing Mr. Hobby's counteroffer until months after it was made, (Mary Hobby Dep., R. p. 594-96), on January 24, 2012, Ms. Hobby emailed Mr. Hobby's offer to Burke Watson—who had appraised the property for \$325,000 in 2009—asking for his advice concerning Mr. Hobby's offer (Mary Hobby Dep., Ex. 25, R. p. 597). Thus, Mary Hobby knew of Mr. Hobby's counteroffer by this date.

Throughout the following days and weeks, Trustee corresponded frequently with McDougall and Ms. Hobby regarding whether Ms. Hobby intended to make a counteroffer to Raymond Hobby's offer. (*See* Aff. of John O. McDougall, September 19, 2013, Exs. E, F; R. pp. 711-723). Trustee sent a number of emails to McDougall and Ms. Hobby informing

them that time was of the essence, as the Trust was on the verge of defaulting on several obligations for the month of February. (*Id.*) In an email dated February 2, 2012, Trustee forwarded McDougall and Ms. Hobby the Trust's February 2012 balance sheet, which showed that the Trust would be short by nearly \$56,000. (R. p. 712) In this same email, Trustee indicated that Mr. Hobby had recently agreed to pay into the Trust the funds necessary to cover the expenses for February 2012 as an advance under his offer to buy the Residence. (*Id.*) On February 7, 2012, Trustee emailed McDougall and Ms. Hobby, informing them that he had received a check from Mr. Hobby as an advance on the purchase price and that "[u]nless I receive a materially better offer by the close of business today, I will accept Mr. Hobby's proposal and the advance. All of the mortgages are now or soon will soon [sic] be in default without this infusion of cash." (Mary Hobby Dep., Ex. 33, R. p. 617)

While McDougall continued to express Ms. Hobby's interest in making another offer on the house, no such offer was presented to Trustee by February 9, 2012, the date Trustee informed McDougall that he was accepting Mr. Hobby's January 3, 2012 counteroffer. Trustee indicated in an email to McDougall and Ms. Hobby on February 9, 2012, that he was going to accept Mr. Hobby's counteroffer to purchase the Residence because the Trust was past due on most or all of the February loan payments and Mr. Hobby's offer was the superior offer before him at that time. (Mary Hobby Dep., Ex. 34, R. p. 618) Trustee expressed his opinion that Ms. Hobby had had more than enough time—eighteen (18) days—to submit a superior counteroffer. (*Id.*) Ms. Hobby maintains the reason she did not submit a counteroffer during this time was due to being medicated for a pinched nerve.

Ms. Hobby did eventually submit a counteroffer to purchase the Residence on March 20, 2012—fifty-seven (57) days after McDougall first acknowledged receipt of Mr. Hobby's counteroffer. (*See* Ex. 25 to Third Party Def. Mem. Opp'n Third Party Pl. Mot. Summ. J., R. p. 628) However, by this date, Trustee had already accepted Mr. Hobby's January 3, 2012 offer to purchase the Residence and Mr. Hobby's advance of the sales price to service the Trust's financial obligations. (Ex. 26 to Third Party Def. Mem. Opp'n Third Party Pl. Mot. Summ. J., R. p. 629)

On April 11, 2012, Ms. Hobby finally conveyed the Residence to the Trustee pursuant the terms of the Trust Agreement. (*See* General Warranty Deed from Ms. Hobby to Trustee, R. pp. 467-70) On April 19, 2012, the Trust's sale of the Residence to Mr. Hobby was consummated, and the Trust delivered a quitclaim deed to Mr. Hobby. (First Am. Compl., Ex. C; R. pp. 75-6). According to Williams, the independent accountant for the Trust, Mary Hobby's March 20, 2012, offer did not represent an increased value of the Residence compared to Mr. Hobby's January 3, 2012, offer because the purchase price Mary Hobby offered to pay (\$325,000) was equal to the purchase price Trustee received from Mr. Hobby. (R. p. 1097, at ¶ 10) Mary Hobby refused to vacate the Residence after its sale to Mr. Hobby and remains in the home to date.

STANDARD OF REVIEW

“An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC.” *Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). “Summary judgment is appropriate where it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997) (citing Rule 56(c), SCRPC). While the appellate court should review the evidence and inferences to be derived therefrom in a light most favorable to the non-moving party, *Lanham*, at 362, 563 S.E.2d at 333, summary judgment should be upheld where the evidence is susceptible of only one reasonable interpretation, *see Brooks*, at 403, 489 S.E.2d at 648 (citing *Clyburn v. Sumter County Sch. Dist. No. 17*, 317 S.C. 50, 52, 451 S.E.2d 885, 887–88 (1994)).

ARGUMENT

Ms. Hobby contends that the trial court erred in granting summary judgment to the Trustee because genuine issues of material fact exist as to whether the Trustee exceeded the scope of his authority under the Trust Agreement or otherwise breached his fiduciary duty to Ms. Hobby as a Trust beneficiary when he sold the Residence to Raymond Hobby. Ms. Hobby also contends that summary judgment was premature and that she should have been afforded more time to conduct discovery. However, as will be discussed below, the trial court properly held that there were no genuine issues of material fact regarding Ms. Hobby’s claims, and therefore, the trial court properly granted Respondent summary judgment.

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF TRUSTEE BECAUSE THE UNDISPUTED EVIDENCE ESTABLISHES THAT TRUSTEE DID NOT BREACH ANY FIDUCIARY DUTY OWED TO MS. HOBBY WHEN HE SOLD THE RESIDENCE TO MR. HOBBY

Ms. Hobby must establish the following elements to prove Trustee breached a fiduciary duty: (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages proximately resulting from the breach. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). Ms. Hobby submits several arguments in support of her claims that Trustee breached his fiduciary duty, all of which concern the manner in which Trustee sold the Residence to Raymond Hobby. However, the trial court properly granted summary judgment to Trustee on Ms. Hobby's claims that he breached his fiduciary duties in connection with the sale of the Residence because the undisputed evidence establishes that Trustee at all relevant times acted within the scope of his authority under the Trust Agreement and administered the Trust prudently with reasonable care, skill and caution. The undisputed evidence also establishes that Trustee acted impartially toward both Raymond Hobby and Mary Hobby in connection with the sale of the Residence.

A. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE TRUSTEE ACTED WITHIN THE SCOPE OF HIS AUTHORITY UNDER THE TRUST AGREEMENT WHEN HE SOLD THE RESIDENCE TO MR. HOBBY

Ms. Hobby's arguments that Trustee breached his fiduciary duties are primarily based upon the allegation that Trustee sold the Residence in contravention of the Trust Agreement. The trial court determined that the Trust Agreement was unambiguous as to the authority it granted the Trustee regarding the sale of Trust assets to a Trust beneficiary and that Trustee exercised this authority prudently and with due diligence. (Order 6, 12-13, R. pp. 17, 23-4)

Nevertheless, Ms. Hobby maintains that the trial court erred by failing to properly analyze and interpret the provision in the Trust Agreement pertaining to the sale of Trust property to a Trust beneficiary. According to Ms. Hobby, Article IX (a)(xxxii) of the Trust Agreement required Trustee to obtain her consent prior to any such sale. However, the trial court correctly held that the Trust Agreement provided Trustee with the authority to sell the Residence to Mr. Hobby without obtaining Ms. Hobby's consent.

A court's primary concern when interpreting and construing a trust instrument is to discern the settlor's intent. *Holcombe-Burdette v. Bank of Am.*, 371 S.C. 648, 658, 640 S.E.2d 480, 484-85 (Ct. App. 2006). "In ascertaining a settlor's intent, if the language of the trust instrument is perfectly plain and capable of legal construction, such language determines the force and the effect of the instrument." *Id* (internal citation omitted). When interpreting the meaning of the language of a trust agreement and ascertaining the intent of the settlor, the court must consider the trust document as a whole. *See id.* at 657, 640 S.E.2d at 484.

Article IX (a)(xxxii) of the Trust Agreement provides, in relevant part, that the "Trustee may sell any Trust Asset to a [trust beneficiary] provided the sale and terms of sale are reasonable, fair, and reflect fair market value **and** any other terms mutually agreeable by the parties." (Emphasis added). According to Ms. Hobby, the trial judge rewrote the Trust Agreement by misquoting the above provision in his May 12, 2014 Order. Ms. Hobby argues that the trial judge "rewrote the agreement by inserting the word 'or' in place of 'and', as provided. . . . This error makes all other findings wrong. He did no analysis and made no rulings based upon the actual language of the trust." (Brief of Appellant 20)

Ms. Hobby's argument that the trial judge failed to consider the actual language of the Trust Agreement when concluding that the Trustee acted in accordance with the Trust Agreement and within the bounds of his fiduciary duty to Raymond Hobby and Mary Hobby is without merit for several reasons. First, the trial judge's Order did analyze the actual language of Article IX (a)(xxxii) and specifically rejected Ms. Hobby's contention that the use of the conjunctive "and" was determinative as to whether the Trustee exceeded the scope of his authority when he sold the Residence to Mr. Hobby:

Here, the Trust Agreement clearly sets forth the powers of the Trustee. Specifically, Article IX, Paragraph (a)(xxxii) gives the Trustee the power to "sell any Trust Asset to [Husband or Wife] provided the sale and terms of sale are reasonable, fair, and reflect fair market value **and any other terms mutually agreeable by the parties.**" Trust Agreement, Article IX, (a)(xxxii) (Emphasis added). Wife argues the use of the conjunctive "and" preceding the clause 'any other terms mutually agreeable by the parties,' indicates that Trustee is required to obtain consent to the terms of any sale of trust property to Husband. However, this is a strained reading of this provision and inconsistent with its plain language. The Court finds the language in Article IX, along with the Trust's language as a whole, unambiguous and subject to only one reasonable, legal interpretation. Therefore, the Court need not look beyond the Trust Agreement's express terms in determining the scope of the Trustee's powers. Under the plain language of Article IX, (a)(xxxii), the Trustee could sell trust property to Husband or Wife without the consent of the other where the sale and terms of the sale are reasonable, fair and reflect market value. Although the trust provisions state that the parties were free to agree mutually to other or additional terms, here, the parties plainly did not agree on other or additional terms. In light of the evidence before the Court, the only reasonable conclusion to be reached is that the terms of the sale of the House to Husband were fair, reasonable and reflected fair market value. Therefore, the sale of the House to Husband was expressly authorized under the Trust Agreement.

(Order, 13-14; R. pp. 24-5) (Alteration in original)

Thus, the trial judge concluded that the Trustee acted within his authority under the Trust Agreement when he sold the Residence to Mr. Hobby even if the word "and" within Article IX (a)(xxxii) is given its plain and ordinary meaning as a conjunctive. The

conjunctive “and” as used in the subject provision simply means that, in addition to the requirement that any sale and its terms reflect fair market value, said terms must also reflect “any other terms” the parties may mutually agree to. Because there was no evidence presented to the trial court that the parties agreed to any other terms, the trial judge determined that the clause following the word “and” in Article IX (a)(xxxii) was inapplicable to the sale of the Residence.

Second, to the extent that the trial judge interpreted the word “and” in Article IX (a)(xxxii) to mean “or”, such an interpretation is consistent with the intent of the parties and the Trust Agreement’s purpose. *See Smith v. United Television, Inc. Special Severance Plan*, 474 F.3d 1033, 1037 (8th Cir. 2007) (noting that “courts have recognized the principle of contract interpretation that the terms ‘and’ and ‘or’ may be interchanged, in context, to carry out the parties’ intent and the agreement’s purpose”); *Dumont v. United States*, 98 U.S. 142, 143, 25 L. Ed. 65 (1878) (“The word ‘or’ is frequently construed to mean ‘and,’ and *vice versa*, in order to carry out the evident intent of the parties.”).⁴ The trial judge held that to interpret Article IX (a)(xxxii) to require consent from one beneficiary before selling a trust asset to the other beneficiary is contrary to the intent of the parties and would frustrate the purpose of the Trust as a liquidating trust: “Allowing one beneficiary to have unconstrained veto power over a commercially reasonable and fair sale of trust property would frustrate the

⁴ Trustee argued the interchangeability of the terms “and” and “or” in his memorandum of law in opposition to Ms. Hobby’s Motion for Summary Judgment and at the Summary Judgment Hearing. (Third Party Def. Mem. Opp’n Third Party Pl. Mot. Summ. J. 11, R. p. 488; Tr. R. 12:16-19, R. p. 170, line 16-19)

Trustee's obligation to sell trust assets 'in a timely, prudent and efficient manner.' Trust Agreement, Article I (c)." (R. p. 25, n. 5).⁵

Third, Ms. Hobby's argument that the trial judge rewrote the Trust Agreement by inserting the word "or" in place of "and" ignores the fact that the Divorce Decree, pursuant to which the Trust Agreement was created, also uses the word "or" rather than "and" when prescribing the circumstances in which Mr. Hobby and Ms. Hobby could purchase a trust asset. According to the Divorce Decree:

To effectuate a complete, fair and equitable apportionment of marital assets and debts, the parties shall create a trust. **The following terms shall govern the parties in the creation and operation of this trust** and/or are relevant regarding each party's interest in this trust and the assets and debts to be placed in it.

⁵ The trial judge expanded upon his reasoning at the hearing on Ms. Hobby's Rule 59 Motion:

THE COURT: . . . Just so that I'm fully understood. It's the very acrimony in that divorce that, based upon Ms. Hobby's interpretation of the trust agreement, that would essentially frustrate the trust agreement. As a practical matter, currently she is residing in the house. She has been there for the period of time since the parties separated, and she doesn't want to leave. And that's simply the brass tacks.

MR. JOHNSON: I understand.

THE COURT: . . . But if the court were to read the trust agreement with the conjunctive "and" instead of the disjunctive "or" then essentially there would be no way for the liquidating trust, because she has no desire to leave the house. She has no intention to leave the house . . . So if she has to sign off on anything and everything that is done in terms of liquidating any property placed into the trust, if she has to mutually agree on the terms of any liquidation, regardless of how fair, reasonable or what have you the terms might be, she has the automatic authority to frustrate the very underlying purpose of that trust. And I do understand your position though on the "and" as opposed to "or".

(R. p. 228, line 16-p. 229, line 15)

It is also noteworthy that Ms. Hobby herself admitted in her deposition that she did not believe she had the authority under the Trust Agreement to veto or approve the sale of trust property. (*See* R. p. 660, line 16-p.661, line 6; p. 662, line 13-p.664, line 5) Although at one point during her deposition Ms. Hobby suggested she did have the right to object to the sale of 544 Crowder Road to Mr. Hobby, she refused to admit that Mr. Hobby had a reciprocal right to object to the sale of the home to her. (R. p. 665, line 21-p. 666, line 25) Interpreting the Trust Agreement to provide only Ms. Hobby with veto power is illogical and contradicts the plain language and meaning of Article IX (a)(xxxii).

a. **This trust is created pursuant to this Order. . . .**

. . .

f. Either party may purchase any asset from the trust, provided the sale and terms are reasonable, fair, and reflect fair market value **or** other terms mutually agreeable to the parties

(R. pp. 1139-1140) (Emphasis added).

Whereas Article IX (a)(xxxii) of the Trust Agreement contains the conjunctive “and” prior to the clause “any other terms mutually agreeable by the parties,” the Divorce Decree uses the disjunctive “or.” Since the Divorce Decree expressly states its terms “shall govern the parties in the creation and operation of [the] trust,” the language of the Divorce Decree must control the interpretation of Article IX (a)(xxxii). In fact, the trial judge acknowledged the controlling nature of the Divorce Decree during the hearing on Ms. Hobby’s Rule 59 Motion:

THE COURT: . . . I would think as an initial matter that the divorce decree obviously would, since it’s the instrument or it’s the order of the court sets up the manner in which the parties are going to finalize the equitable distribution of the property, it would have to control and supercede any subsequent document, especially since obviously it’s—it’s a product of something that the parties agreed to at the time of the domestic litigation. . . .

(R. p. 235, lines 7-14). Moreover, the Trust Agreement itself acknowledges the controlling nature of the Divorce Decree. According to the Trust Agreement, “The Liquidating Trust . . . was created pursuant to the Final Order and Divorce Decree dated October 8, 2010, of the Honorable Joseph W. McGowan, III, Judge of the Family Court for the Eighth Judicial Circuit.” (Trust Agreement, Article I(a), R. p. 529). Thus, interpreting the word “and” within Article IX (a)(xxxii) to mean “or” is not only consistent with the parties’ intent in creating the Trust Agreement, but also consistent with the language used in the Divorce Decree.

Finally, Ms. Hobby's contention that the trial court misinterpreted the Trust Agreement fails to consider the trial judge's alternative sustaining grounds for holding that the Trustee did not breach any fiduciary duty by selling the Residence to Mr. Hobby under the circumstances. According to the trial judge's Order:

As alternate sustaining grounds, the Court finds the Trustee acted in reasonable reliance on the terms of the Trust as expressed in the Trust Agreement when he sold the House to Husband. *See* S.C. Code § 62-7-1006 (trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.)

(R. p. 19). Thus, the trial judge held that, even if Ms. Hobby's interpretation of Article IX (a)(xxxii) is correct, the Trustee's actions surrounding the sale of the Residence were consistent with a reasonable interpretation of the Trust Agreement and the Trustee's reliance thereon was reasonable.

B. THE TRUSTEE DID NOT BREACH HIS FIDUCIARY DUTY BY FAILING TO SEEK COURT APPROVAL OF THE SALE OF THE RESIDENCE TO MR. HOBBY

Ms. Hobby contends that Trustee had "a fiduciary duty to seek court approval" of the sale of the Residence to Mr. Hobby. (Brief of Appellant 16) However, this is in contravention of the express language of the Trust Agreement. According to the Trust Agreement, Trustee was authorized to sell trust property without a court order:

Powers for Trustee. Consistent with the purposes of the Trust as a liquidating Trust and the purposes as further described in Article I (c), **the Trustee is authorized in its fiduciary discretion** (which shall be subject to the standard of reasonableness and good faith to all beneficiaries) **with respect to any property, real or personal, . . . without authorization by any court . . . :**

(xxxii) **To sell, convey or otherwise deal with or dispose of any and all Trust Assets forming a part of the Liquidating Trust estate,** at such time or times and in such manner and upon such terms as, in the absolute

and uncontrolled discretion of the Trustee may [sic] deem expedient and proper, provided, however, that i) Trustee shall have an obligation to exercise appropriate and reasonable due diligence with respect to the sale of any Trust Asset such that Trustee is reasonably satisfied that any sale has occurred on an arms-length basis and has maximized the value of the Trust Asset being divested, and ii) Trustee may sell any Trust Asset to a Transferor provided the sale and terms of sale are reasonable, fair, and reflect fair market value and any other terms mutually agreeable by the parties.

(Trust Agreement, Article IX (a), R. p. 535-539) (Emphasis added).

To the extent Ms. Hobby argues Trustee abused his fiduciary discretion in not seeking court approval, she has failed to present any evidence that Trustee did not exercise his discretion reasonably and in good faith under the circumstances. She also failed to show Trustee did not exercise appropriate and reasonable due diligence with respect to the sale of the Residence to Mr. Hobby.

A trustee's discretion must be exercised in good faith, consistent with the primary purpose of the trust. *Sarlin v. Sarlin*, 312 S.C. 27, 30, 430 S.E.2d 530, 532 (Ct. App. 1993). "The mere fact that if the discretion had been conferred upon the court, it would have exercised the power differently is not a sufficient reason for interfering with the exercise of the power by the trustee. *Estate of Stevens v. Lutch*, 365 S.C. 427, 431, 617 S.E.2d 736, 738 (Ct. App. 2005) (internal quotation marks and citation omitted).

Here, not only was seeking court approval of the sale unnecessary, it would have been impractical. As the trial judge noted at the March 12, 2014 hearing:

THE COURT: ...[T]he reason that the Uniform Trust Code grants the level of discretion to the Trustee that it does—and for the what it's worth category, I was one of the people who worked on the revised Uniform Trust Code when it passed years ago. If you Monday morning quarterback the Trustee in situations like it appears the Defendant is trying to do, it doesn't take into account the very real urgency of making a decision. Sometimes a decision has to be made. And maybe it's not a perfect decision, but it's a decision that circumstances are compelling a

Trustee to make. To accept your argument would render practically every trust unworkable, especially under these facts, because what's being represented is that the Trustee needed cash. There were obligations to service. If the Trustee—their point is well taken. That if the Trustee had petitioned the court to get approval of this . . . the trust goes into default on various obligations and the Trustee is left with even a greater bird's nest to untangle than he had initially. You may have an argument. But it's clear that she had time to consider an offer. I'm sorry she had a pinched nerve. But, I mean, I've had a pinched nerve before. It doesn't keep the brain from working, and she could have made an offer.

(R. p. 191, line 3-p.192, line 5). Moreover, according to Trustee's trust expert, Julian Walker, Jr., a prudent trustee would not have sought court approval under the circumstances.

(Julian Walker, Jr. Dep., R. p. 1223, lines 10-19)

In addition, the undisputed facts establish that Trustee exercised appropriate and reasonable due diligence in selling the Residence in the manner that he did. Under the Trust Agreement, Trustee has the authority to sell trust assets “at such time or times and in such manner and upon such terms as, in the absolute and uncontrolled discretion of the Trustee[, the Trustee] may deem expedient and proper,” so long as he acts with appropriate and reasonable due diligence and the sale is one at arms-length, is fair and reasonable, and reflects market value. (Article IX (a) (xxxii), R. p. 539)

Here, Ms. Hobby has not presented any evidence to suggest that Trustee failed to exercise appropriate and reasonable due diligence. While Ms. Hobby questions the terms of the ultimate Purchase Agreement, Trustee had the discretion to enter a contract to sell the Residence on whatever terms he deemed appropriate and in the best interest of the trust, so long as it was an arms-length transaction, reasonably maximized the value of the property, and reflected fair market value. No one has questioned whether Mr. Hobby's offer was for fair market value or whether it was the best offer in front of the Trustee at the time he decided to accept it and the advance of the purchase price on February 9, 2012. There is also

no evidence that the sale was not one at arms-length, as the record reflects Trustee gave Ms. Hobby ample time (18 days) to make a counteroffer to purchase the Residence before he conveyed his decision to accept Mr. Hobby's offer. Moreover, the Trust's overriding purpose, and Trustee's overall obligation, is to liquidate the assets of the Trust. By accepting Mr. Hobby's offer, Trustee exercised his discretion in good faith and consistently with the Trust's purpose. He also exercised appropriate and reasonable due diligence before accepting Mr. Hobby's offer by conferring with the Trust's independent accountant beforehand to determine which offer was more beneficial to the Trust.

C. THE TRIAL COURT PROPERLY HELD THAT TRUSTEE ACTED PRUDENTLY AND IN THE BEST INTEREST OF THE TRUST WHEN HE DECIDED TO ACCEPT MR. HOBBY'S OFFER TO PURCHASE THE RESIDENCE

Ms. Hobby maintains that she had a medical reason for not responding to Trustee's requests for a counteroffer, and that the trial judge erred in holding her medical condition did not excuse her delay in responding. (Brief of Appellant 21-2). However, even assuming arguendo that Ms. Hobby was prevented from making a counteroffer to Trustee due to a medical condition, this fact is immaterial to the trial judge's determination that Trustee did not breach any fiduciary duty by accepting Mr. Hobby's offer. According to the judge's Order, "Circumstances required the Trustee to act swiftly and make a decision which was in the best interest of the Trust and its beneficiaries, and the Trust was best served by accepting a legitimate, timely offer which allowed it to service urgent financial obligations." (R. p. 17)

It is undisputed that at the time Trustee accepted Mr. Hobby's offer the Trust was in need of a cash infusion as it was on the brink of defaulting on several debts.⁶ Trustee had informed Ms. Hobby and McDougall of the Trust's need for a cash infusion as early as January 23, 2012—three days after providing them with a copy of Mr. Hobby's offer. It was on this date that Trustee also informed Ms. Hobby and McDougall that time was of the essence if Ms. Hobby intended to make a counteroffer given the Trust's financial situation. Ms. Hobby and McDougall were well aware of the Trustee's predicament as the parties communicated frequently over the course of the next two weeks regarding the Trust's financial situation and the need for a cash infusion to service the Trust's debts. Ms. Hobby and McDougall were also aware of the fact that Raymond Hobby had agreed to pay into the Trust the funds necessary to cover the expenses for February 2012 as an advance under his offer to buy the Residence. The undisputed evidence shows that after waiting a total of eighteen (18) days for Ms. Hobby to provide him with a counteroffer for the purchase of the Residence to no avail, Trustee had no choice but to accept Mr. Hobby's offer and cash advance to ensure that the Trust could meet its financial obligations. This was the reality of the situation regardless of the reason why Ms. Hobby failed to make a counteroffer.

The facts surrounding Trustee's sale of the Residence to Mr. Hobby are analogous to the facts in *Ex parte Wheeler v. Estate of Green*, 381 S.C. 548, 673 S.E.2d 836 (Ct. App. 2009). In *Ex parte Wheeler*, beneficiaries under a decedent's will and a prospective purchaser of the decedent's residence alleged the Personal Representative (PR) of the

⁶ Ms. Hobby alleges in her Brief that the financial problems of the Trust were caused by the Trustee depleting the Trust's cash "to pay his fees and expenses of \$292,947." (Brief of Appellant 21). However, Ms. Hobby makes this allegation for the first time in her Brief, and thus it is unpreserved for this appeal. To the extent that this issue is preserved, Ms. Hobby's allegation is not supported by any admissible evidence in the record on appeal and should not be considered by this Court.

decedent's estate had breached her fiduciary duties to the beneficiaries by accepting an offer from another buyer. *Id.* at 552-53, 673 S.E.2d at 839. The decedent's will directed the PR to sell the residence, along with any other real property, "at such time as, in his sole discretion, the sale would be most advantageous financially to [the] estate . . ." *Id.* at 551, 673 S.E.2d at 838.

Prior to the PR being appointed, the prospective purchaser expressed her interest in purchasing the decedent's residence to the PR. *Id.* at 552, 673 S.E.2d at 838. The PR met with the prospective purchaser to discuss the property. *Id.* The prospective purchaser also called the PR several times over the following weeks to check the status of the property and to inquire about an appraisal of the home. *Id.* The PR never responded to these calls. *Id.* When the appraisal of the home was completed, the PR never provided the appraisal to the prospective purchaser. *Id.* The PR subsequently accepted an offer to purchase the home from another buyer for \$325,000, which was \$5,000 above the home's appraised value. *Id.* The following month, the prospective purchaser's attorney sent a letter to the PR, indicating that she was willing to purchase the property for \$350,000. *Id.* However, a formal offer was not submitted until after the PR filed a petition with the probate court to approve the sale of the home to the other buyer. *Id.*, 673 S.E.2d at 839. The PR acknowledged in the petition that the prospective purchaser objected to the sale, but maintained that she had not received the purchaser's offer prior to accepting the other buyer's offer. *Id.*

The South Carolina Court of Appeals held that the PR did not breach her fiduciary duty by accepting the buyer's offer. The Court of Appeals found significant the fact that, despite the PR's knowledge of the prospective purchaser's interest in the home, at the time the PR accepted the other buyer's offer it was the only formal offer that had been presented

to the PR for the purchase of the residence. *Id.* at 556, 673 S.E.2d at 841. According to the court:

Faced with the prospect of waiting on a speculative written offer to materialize, or accepting an in-hand, written offer that was for more than the estate's own appraisal, [the PR] decided it was in the best interest of the Beneficiaries to accept the [buyer's] contract. . . . Given the circumstances, [the PR] would have most likely breached her fiduciary duties had she not accepted the [buyer's] offer.

Id. at 556-57, 673 S.E.2d at 841.

Like the personal representative in *Ex parte Wheeler*, Trustee accepted Mr. Hobby's offer because he decided it was in the best interest of the Trust, and ultimately Ms. Hobby and Mr. Hobby. Although Ms. Hobby, through McDougall, repeatedly conveyed to the Trustee her intent to make a counteroffer, no formal offer was presented prior to Trustee's decision to accept Raymond Hobby's offer on February 9, 2012. In fact, Ms. Hobby did not make a counteroffer until March 20, 2012—fifty-seven (57) days after Mr. McDougall first acknowledged receipt of Mr. Hobby's offer. Given the Trust's financial situation, it was not unreasonable for Trustee to accept the best offer before him at the time rather than wait on Mary Hobby's speculative written offer to materialize. At the time he accepted Mr. Hobby's offer, Trustee had no indication as to when Mary Hobby might make a counteroffer. Had Trustee not accepted Mr. Hobby's offer, he most likely would have breached his fiduciary duties. After all, Mr. Hobby's offer was \$100,000 more than Ms. Hobby's initial offer and \$25,000 more than the most recent appraisal of the Residence.

According to Mr. Walker, when evaluating a trustee's actions, one must focus on the trustee's decision-making process rather than the decision itself. (*See Walker Dep., R.* p. 1222, lines 11-25) A trustee has "a duty to pursue a prudent process" when making decisions. (*Id.* at lines 17-18) Mr. Walker opined that, upon his review of the Trustee's

actions in accepting Mr. Hobby's offer, it was his expert opinion that Trustee acted prudently in arriving at his decision to sell the Residence to Mr. Hobby. (*Id.* at lines 15-21)

Ms. Hobby contends that the trial judge erred in holding there was no evidence that her March 20, 2012 offer was superior to Raymond Hobby's January 3, 2012 offer. According to Ms. Hobby, the opinions expressed by Mr. McDougall in his affidavits are evidence that her March 20, 2012 offer was superior. However, even if Mr. McDougall's opinions concerning which offer was superior are admissible,⁷ Ms. Hobby's emphasis on this point is misplaced.⁸ The fact of the matter is that Mary Hobby's March 20, 2012 offer was made after Trustee had already accepted Mr. Hobby's offer and the advance of the purchase price. Ms. Hobby has presented no evidence that the Trustee did not already obligate the Trust to sell the Residence to Mr. Hobby by March 20, 2012. As the trial judge duly noted, "[m]aybe her dollars were better, so she wasn't a dollar short, but she was a day late in making the offer." (R. p. 199, lines 23-24)

Ms. Hobby's attempt to create a factual dispute regarding Trustee's acceptance of Raymond Hobby's January 3, 2012 offer to purchase the Residence is unavailing. Ms. Hobby argues that the ancillary terms of the April 19, 2012 Purchase Agreement differ from the terms contained in Mr. Hobby's offer,⁹ and that this discrepancy somehow establishes a

⁷ Trustee disputes the admissibility of the opinions contained in Mr. McDougall's affidavits as they amount to nothing more than legal opinions intended to usurp the authority of the Court. *See infra* pp. 27-30.

⁸ Ms. Hobby's argument that her March 20, 2012 offer was superior, even if relevant, is flawed. This offer valued 544 Crowder Road at \$325,000, which is the same purchase price Mr. Hobby paid under the Purchase Agreement. While Ms. Hobby emphasizes that her offer would have resulted in more cash for the Trust than the sale to Mr. Hobby, this cash would not have assisted the Trust in meeting its February 2012 financial obligations, which were part of the impetus behind Trustee's decision to accept Mr. Hobby's offer and advance of the purchase price on February 9, 2012.

⁹ Ms. Hobby focuses on the fact that the Purchase Agreement did not keep the Residence in the Trust as Mr. Hobby offered to do in his January 3, 2012 offer. (Brief of Appellant 12). Mr. Hobby offered to leave the Residence in the Trust in order to preserve the value of the surrounding tract of land, which was also a Trust

genuine issue of material fact as to whether the Trustee in fact accepted Mr. Hobby's offer. However, the record reflects that the Trustee had accepted Mr. Hobby's offer to purchase the Property based upon a value of \$325,000 in February 2012. (Aff. of Francis B. B. Knowlton, May 20, 2013, R. p. 695, at ¶ 11; Aff. of Ray Hobby, R. p. 1105, at ¶ 12); It is undisputed that Trustee conveyed his decision to accept Mr. Hobby's offer to Ms. Hobby and her counsel on February 9, 2012. (See Brief of Appellant 10). Furthermore, it is undisputed that Trustee accepted a \$56,000 advance of the purchase price from Mr. Hobby in February 2012 in order to service the debts of the Trust. (See, e.g., Aff. of Ray Hobby, R. p. 1105, at ¶ 10) Ms. Hobby's focus on the differences between Raymond Hobby's offer and the Purchase Agreement is misplaced because any such differences do not dispute the only relevant, material fact, which is that by the time she made a counteroffer on March 20, 2012 to purchase the Residence, Trustee had already obligated the Trust to sell the Property to Mr. Hobby for a purchase price that was \$100,000 more than her initial offer. (See Aff. of Ray Hobby, R. pp. 1105 – 1106, at ¶¶ 17, 20-1)

D. THE TRIAL COURT PROPERLY HELD THAT TRUSTEE DID NOT BREACH HIS DUTY OF IMPARTIALITY

Ms. Hobby argues that Trustee breached his duty of impartiality by selling the Residence to Mr. Hobby. "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to

asset. (R. p. 121; Aff. of Ray Hobby, R. pp. 1104-1105, at ¶ 8) To the extent that Ms. Hobby attempts to create a genuine issue of material fact in this case by noting that the Purchase Agreement did not keep the Residence in the Trust, Ms. Hobby fails to acknowledge that Mr. Hobby at all relevant times remained willing to sell the Residence to a prospective buyer of the adjoining tract of land to help maximize the value of that tract should the Trustee find a buyer for the surrounding land. (R. pp. 1104-1105, at ¶ 8).

the beneficiaries' respective interests.” S.C Code Ann. § 62-7-803. However, the mere fact that a trustee accepts one beneficiary’s offer to purchase a trust asset over another’s is not evidence that the trustee is favoring one beneficiary over the other. This is especially true here where Trustee provided Ms. Hobby ample time to submit a counteroffer to Raymond Hobby’s offer. Moreover, had Trustee refused to sell the Residence to Mr. Hobby based solely on Mary Hobby’s objection to the sale, Trustee arguably would be favoring her over Mr. Hobby.

Ms. Hobby appears to argue that Trustee breached his duty of impartiality because he failed to protect her right to continue to live in the Residence. However, neither the Divorce Decree nor the Trust Agreement guaranteed her the right to live in the Residence in perpetuity. To the contrary, both documents provided that she only had a right to remain in the Residence until it was sold. (Divorce Decree ¶ 3(s), R. p. 1144; Trust Agreement, Article XII(f), R. p. 546).

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE AFFIDAVITS SUBMITTED BY MS. HOBBY DID NOT CREATE A GENUINE ISSUE OF MATERIAL FACT CONCERNING TRUSTEE’S ALLEGED BREACH OF HIS FIDUCIARY DUTIES

Ms. Hobby contends that the trial judge erred by disregarding the affidavits of her “experts” that were “replete with evidence that the Trustee breached his fiduciary duty.” (Brief of Appellant 20) Ms. Hobby submitted the affidavits of John McDougall and Arthur White in support of her Motion for Summary Judgment. However, not only do these affidavits fail to create any genuine issue of material fact, but they are also inadmissible.

As an initial matter, there is no evidence in the record to support the qualification of Mr. McDougall as an expert regarding any relevant issue in this case. When determining

whether to admit expert testimony, a court must determine whether the proffered expert has “acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter[.]” *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014) (internal quotation marks and citation omitted). While Mr. McDougall’s affidavits contain opinions regarding Trustee’s alleged breach of his fiduciary duties, there is no evidence in the record establishing that Mr. McDougall has the requisite knowledge and skill to qualify as an expert in breach of fiduciary duty cases.¹⁰ The fact that Mr. McDougall is a licensed attorney, by itself, is insufficient to qualify him as an expert regarding the applicable standard of care for a Trustee of a liquidating trust. *See id.* at 636-37, 760 S.E.2d at 407-08 (holding that appellant, who had never handled a case in federal court, let alone a federal antitrust lawsuit, was “unqualified to testify as an expert regarding the applicable standard of care for attorneys handling a federal antitrust lawsuit due to the mere fact that she is licensed to practice law.”).

Even if Mr. McDougall and Mr. White are qualified as experts, the testimony contained in their affidavits are inadmissible, and thus, do not create any questions of material fact to survive summary judgment. “[O]pinion testimony, including that of an expert, which would be inadmissible if testified to at trial may not properly be set forth in an affidavit.” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). “In general, expert testimony **on issues of law** is inadmissible.” *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (Emphasis in original). Here, the testimony contained in Mr. McDougall’s and Mr. White’s affidavits concern questions of law within

¹⁰ Mr. McDougall’s curriculum vitae was attached to his September 19, 2013 affidavit. Although Mr. McDougall’s vitae reflects his extensive experience practicing Family Law, nothing contained in his vitae evidences his experience or knowledge regarding Trust law. To the contrary, Mr. McDougall’s vitae states that “[his] practice is limited to litigation in the Family Court.” (R. p. 701)

the sole province of the trial court. Mr. McDougall and Mr. White each attempt to offer testimony concerning their own interpretation of the Trust Agreement and the scope of the Trustee's authority to sell trust assets to a beneficiary. Mr. McDougall also attempts to opine as to the scope of Trustee's duty as a fiduciary. (R. p. 700, at ¶ 12) ("In my opinion, the trustee had a fiduciary duty to seek court approval.") However, where the settlor's intent is clear from the plain language of the trust agreement, as the trial judge determined here, construction of that agreement is a question of law for the court. *Germann v. New York Life Ins. Co.*, 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App. 1985). Similarly, "[t]he existence of a fiduciary duty is a question of law for the court." *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). Mr. McDougall's and Mr. White's opinions on matters of law are irrelevant.

In *Dawkins*, the South Carolina Supreme Court addressed a Plaintiff's attempt to survive summary judgment based upon an expert affidavit containing primarily legal opinions:

The Court of Appeals also concluded that the expert affidavit should have been considered by the trial court despite the fact that it contained an opinion on the ultimate issue. *Dawkins*, 345 S.C. at 31, 545 S.E.2d at 519. However, because Professor Freeman's affidavit primarily contained **legal** arguments and conclusions, we hold the trial court properly refused to consider the affidavit.

. . . While it is true that "an opinion ... is not objectionable because it embraces an ultimate issue to be decided by the trier of fact," Rule 704, SCRE, Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment. *See O'Quinn v. Beach Assocs.*, 272 S.C. 95, 106-07, 249 S.E.2d 734, 739-40 (1978) (where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court).

In general, expert testimony **on issues of law** is inadmissible. *See generally* Note, *Expert Legal Testimony*, 97 Harv.L.Rev. 797, 797 (1984); *see also*

Askanase v. Fatjo, 130 F.3d 657, 673 (5th Cir.1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because “[s]uch testimony is a legal opinion and inadmissible.”); *United States v. Sinclair*, 74 F.3d 753, 758 n. 1 (7th Cir.1996) (commenting that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

...

. . . Here, Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court at the summary judgment hearing. Although Professor Freeman arguably offered some helpful, factual information, the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the trial court correctly refused to consider it, and the Court of Appeals erred in finding otherwise.

Dawkins, at 65-67, 580 S.E.2d at 436-37 (2003) (Emphasis in original) (internal footnote omitted).

Like the expert affidavit in *Dawkins*, the affidavits of Mr. McDougall and Mr. White primarily consist of legal arguments and conclusions of law intended to usurp the trial court's role in determining whether Trustee was entitled to summary judgment.¹¹ The interpretation of the Trust Agreement, the scope of the Trustee's authority under the Trust Agreement and the scope of any fiduciary duty the Trustee owed to the Trust's beneficiaries are questions of law for the court. Thus, the affidavits of Mr. McDougall and Mr. White are inadmissible and should not have been considered by the trial court when ruling on Trustee's and Ms. Hobby's cross-motions for Summary Judgment.

¹¹ To the extent Mr. McDougall's affidavits contains factual testimony, the trial judge properly held that the factual statements of Ms. Hobby's counsel failed to create a genuine issue of material fact to survive summary judgment. (R. p. 19).

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE APPELLANT HAD A FULL AND FAIR OPPORTUNITY TO COMPLETE DISCOVERY

Ms. Hobby's argument that Summary Judgment was premature because she did not have a full and fair opportunity to complete discovery lacks merit.¹² "A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case" *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009). The party must also show that further discovery would likely uncover relevant facts and would not simply be used as "a fishing expedition." *Dawkins*, at 69, 580 S.E.2d at 439 (quoting *Baughman*, at 112, 410 S.E.2d at 544). Moreover, the party must not have been dilatory in conducting discovery. *See Baughman*, at 113, 410 S.E.2d at 544.

Here, Ms. Hobby was provided a full and fair opportunity to conduct discovery. Ms. Hobby had 320 days in which to conduct discovery from the date she was first served the Complaint in this action to the date the trial court heard the parties' cross-motions for summary judgment. She had 275 days in which to conduct discovery from the date she filed and served her Amended Answer, Counterclaim and Third Party Complaint to the date of the hearing on the parties' cross-motions for summary judgment. She had 257 days to conduct

¹² As an initial matter, it is worth noting that Ms. Hobby, herself, filed a Motion for Summary Judgment on September 20, 2013—more than three months prior to Trustee filing his Motion for Summary Judgment. While Ms. Hobby's Motion for Summary Judgment was served upon Mr. Hobby, the ground for her Motion was that "given the undisputed evidence, the trustee acted outside the scope of his powers and authority in quitclaiming the marital residence to the plaintiff and the quitclaim is therefore void and a nullity." (Def.'s Mot. Summ J., R. p. 353) It is insincere for Ms. Hobby to now argue that more discovery is needed regarding whether the Trustee acted outside the scope of his authority under the Trust Agreement.

discovery from the date Trustee filed his Answer and Counterclaim to the date of the hearing on the parties' cross-motions for summary judgment. She had 246 days to conduct discovery from the date Mr. Hobby filed his Motion for Partial Summary Judgment to the date of the hearing on the parties' cross-motions for summary judgment. She had 75 days to conduct discovery from the date Trustee filed his Motion for Summary Judgment to the date of the hearing on the parties' cross-motions for summary judgment. However, as of the hearing on the parties' cross-motions for summary judgment on March 12, 2014, Ms. Hobby had not served any Interrogatories or Requests for Production on Mr. Hobby or Trustee.¹³ Moreover, the only deposition she noticed was the deposition of Trustee's expert, Julian Walker, which was taken two weeks prior to the March 12, 2014 hearing.

In light of the above timeline, Ms. Hobby simply cannot show that she did not have a full and fair opportunity to conduct discovery prior to the hearing on Trustee's Motion for Summary Judgment. *See Middleborough Horiz. Property Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App.1995) (affirming summary judgment where appellants failed to put forth "a good reason why four months was insufficient time under the facts of [the] case to develop documentation in opposition to the motion for summary judgment"). Ms. Hobby had the burden of prosecuting her action. *See McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006) ("A plaintiff has the burden of prosecuting her action[.]"). Yet, she was dilatory in doing so. She had ample time to conduct any discovery she deemed necessary for the purposes of contesting Mr. Hobby's and Trustee's motions for summary judgment. For her to argue for the first time at the hearing on Trustee's Motion for Summary Judgment that she needed more time to take the


¹³ Both Trustee and Mr. Hobby served written discovery upon Plaintiff.

depositions of the Plaintiff, the Third Party Defendant and the Trust's accountant strains credulity.¹⁴

CONCLUSION

For the reasons discussed above, this Court should fully affirm the circuit court's grant of summary judgment in favor of Respondent Knowlton.

Respectfully submitted,



R. Davis Howser
Jeffrey I. Silverberg
Howser, Newman & Besley, LLC
1508 Washington Street
Post Office Box 12009
Columbia, South Carolina 29211
(803) 758-6000

Attorneys for Respondent Knowlton

June 2, 2015

¹⁴ Although Ms. Hobby argued she needed time to depose the Trust's accountant, Terry Williams, Ms. Hobby had ample time to depose Mr. Williams. Ms. Hobby and her counsel knew that Mr. Williams was the accountant for the Trust. Moreover Ms. Hobby arguably knew that Mr. Williams was a potential witness in this case at the time she filed a third-party complaint against Trustee alleging a breach of fiduciary duty. At the very least, Trustee's affidavit, which was filed with Trustee's Motion for Summary Judgment, put Ms. Hobby on notice that Mr. Williams was a witness in this case. (*See* Aff. of Frank B. B. Knowlton, R. p. 835, at ¶ 12)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2013-CP-36-193
Tracking No. 2014-002410

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JUN 02 2015

SC Court of Appeals

Raymond D. Hobby,

Respondent,

v.

Mary T. Hobby,

Appellant,

v.

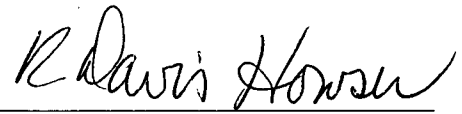
Frances B. Knowlton, Individually
and as Trustee,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Final Brief* of Respondent Frances B. Knowlton (Correctly Known as Francis B. B. Knowlton) complies with Rule 211(b), SCACR.

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R. Davis Howser
Jeffrey Silverberg
Howser, Newman & Besley, LLC
Post Office Box 12009
Columbia, South Carolina 29211
Phone: (803) 758-6000
Fax: (803) 758-4445
rdhowser@hnblaw.com
jsilverberg@hnblaw.com

Attorneys for Respondent Knowlton

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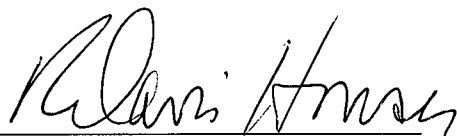
Respondent.

PROOF OF SERVICE

I, the undersigned employee of Howser Newman & Besley, LLC, hereby certify that pursuant to Rules 209(a) and 233(b), *SCACR*, I have caused to be served *Final Brief of Respondent Frances B. Knowlton (Correctly Known as Francis B.B. Knowlton)* in this matter on Appellant and Respondent Hobby via hand delivery on June 2, 2015, addressed to:

Benjamin C. Bruner, Esquire
Bruner Powell Wall & Mullins, LLC
1735 St. Julian Place, Suite 200
Columbia, South Carolina 29204
Attorneys for Respondent
Raymond D. Hobby

Pope D. Johnson, III, Esquire
Pope D. Johnson, III Attorney at Law
1230 Richland Street
Columbia, South Carolina 29201
Attorney for Appellant
Mary T. Hobby



R. Davis Howser
Jeffrey Silverberg
Howser, Newman & Besley, LLC
Post Office Box 12009
Columbia, South Carolina 29211
Phone: (803) 758-6000
Fax: (803) 758-4445
rdhowser@hnblaw.com
jsilverberg@hnblaw.com

Attorneys for Respondent Knowlton

June 2, 2015