IN 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. 2014-002410

Raymond D. Hobby ..... Respondent

vs.

Mary T. Hobby ..... Appellant

vs.

Frances B.B. Knowlton, individually and as trustee ..... Respondent

---

APPELLANT'S FINAL BRIEF

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INTRODUCTION

This action involves the disposition of the former marital residence ("544 Crowder Road") of Raymond D. Hobby ("Mr. Hobby") and Mary T. Hobby ("Ms. Hobby") pursuant to the terms of a liquidating trust. Mr. and Ms. Hobby created the liquidating trust in their divorce action. The purpose of the trust was to dispose of their extensive marital property. Frank B.B. Knowlton ("Trustee") agreed to serve as trustee. The creation of a liquidating trust was approved in the family court as part of their settlement of issues in their divorce action. (R. p. 393)

The issue on appeal is whether the circuit court judge erred in granting partial summary judgment in favor of the Trustee and Mr. Hobby, finding that the Trustee had acted reasonably and properly in accordance with the terms of the liquidating trust and in finding that Mr. Hobby had purchased and owned 544 Crowder Road.

The facts are relatively straight forward. Ms. Hobby made a written offer to purchase Mr. Hobby's 57.5% interest in 544 Crowder Road from the Trustee. Her offer was based upon 544 Crowder Road being valued at $225.000. (R. pp. 703-704)) Mr. Hobby then made a counteroffer to purchase her 42.5% interest in 544 Crowder Road based upon the property being valued at $325,000. (R. pp. 705-708) Mr. Hobby's offer was to pay the trust $138,250 which the Trustee would then pay over to Ms. Hobby for her interest. Additionally, he offered to leave the property in the trust to sell with the adjoining property. Leaving the property in the trust was important to Ms. Hobby since she would have the right to continue to live in the residence rent free until the property was sold or she vacated it as set forth in the trust.

Shortly before Ms. Hobby made her offer, the Trustee paid himself fees totaling $292,947. (R. pp. 730-731) The Trustee did not bother to send Mr. Hobby's offer to Ms. Hobby until 43 days after she submitted her offer. (R. pp. 705-708) Almost immediately thereafter, the Trustee began to clamor that the trust was cash strapped and could not pay certain ongoing debts. He notified Ms. Hobby that $56,000, which was part of the cash Mr. Hobby had offered to pay her for her interest in 544 Crowder Road, would be used to service debt totaling $55,970.83. (R. pp. 712-729)

Ms. Hobby had a medical problem that delayed her response. She submitted a statement from her doctor that she was not fit to participate in any court related activities. (R. pp. 717-718) However, prior to any contract being signed by the Trustee and Mr. Hobby, she submitted a second offer based upon a value of $325,000. (R. p. 724) Her expert, Attorney McDougall, opined that her offer was superior to what Mr. Hobby agreed to pay. (R. p. 700; R. p. 699, R. pp. 730-756) The Trustee signed a Purchase Agreement with Mr. Hobby on April 19, 2013 and closed on the same day.

The Trustee had never shown the Purchase Agreement to Ms. Hobby and never gage her an opportunity to submit a different offer, if she chose to do so. The Purchase Agreement between Mr. Hobby and the Trustee were materially different from Mr. Hobby's original written offer. (R. pp. 758-774; R. pp. 705-708) It did not provide for any amount to be paid to Ms. Hobby. It said nothing about leaving 544 Crowder Road in the trust which would have given Ms. Hobby the right to live there until the property sold or she vacated.

The circuit court judge, in granting summary judgment to Mr. Hobby and the Trustee, violated a fundamental rule relating to construction of contracts. He violated rule after rule regarding motions for summary judgment. The circuit court judge ruled on the motions for summary judgment even though discovery was not complete and the depositions of the Trustee and Mr. Hobby, both key witnesses, had not been taken. The circuit court judge re-wrote the language of the liquidating trust as to the Trustee's power to sell trust assets to a transferor (Mr. Hobby or Ms. Hobby). The liquidating trust gave the Trustee broad powers to sell any trust asset to a third party. However, it had restrictions with respect to sales to a transferor. Under the specific trust language, the Trustee could only sell to a transferor if the terms of sale were reasonable, fair and reflected fair market value **and** any other terms mutually agreeable by the parties. However, the circuit court judge in making his analysis found that the liquidating trust provided as follows:

> "Trustee could sell trust property to either Husband or Wife if the transaction was fair, reasonable, and for market value, or if the beneficiaries mutually agreed to other terms." (R. p. 13)

As shown below, the circuit court judge re-wrote the language of the trust. Although both of Ms. Hobby's experts had offered opinions that the Trustee had no authority to sell the property to Mr. Hobby and the sale was invalid, the circuit court judge became a fact finder, holding that it was undisputed that Mr. Hobby had purchased and owned 544 Crowder Road. The circuit court judge found that Ms. Hobby's experts should be disregarded when in fact they established that a dispute existed as to the actions of the Trustee and whether he had violated his fiduciary

duty and a dispute existed over the ownership of 544 Crowder Road. He also disregarded Ms. Hobby's experts regarding the need for further discovery.

South Carolina law does not allow a judge to re-write a contract. South Carolina law requires that discovery be complete before a judge rules on a motion for summary judgment. South Carolina law does not allow a judge on a motion for summery judgment to act as a fact finder and disregard one party's expert's opinions. South Carolina law requires that when experts reach different opinions from the same facts, motions for summary judgment must be denied and the dispute must be resolved by a jury. South Carolina law requires that the judge's order must be reversed.

STATEMENT OF THE CASE

Mr. Hobby filed his Complaint on April 26, 2013. On or about June 12, 2013, Mr. Hobby filed and served an Amended Complaint. In his Amended Complaint, he sought an order confirming his ownership of 544 Crowder Road and directing that Ms. Hobby vacate the marital home. He alleged causes of action against her for reasonable rent, trespass, breach of contract, breach of Ms. Hobby's promise to vacate the marital residence, unjust enrichment and damages as a result of her failure to vacate the home. (R. pp. 61-83)

On May 9, 2013, Ms. Hobby filed a timely Answer in which she denied all claims. On June 10, 2013, Ms. Hobby filed an Amended Answer and Counterclaim and a Third Party Complaint against the Trustee. In her Amended Answer she asserted a general denial, a counterclaim for declaratory judgment, and a Third Party Complaint against the Trustee for indemnification. (R. pp. 57-59) On or about

October 7, 2013, Mr. Hobby filed a timely Reply to the Counterclaim and the Trustee filed a timely Answer to the Third Party Complaint on September 10, 2013. (R. pp. 133-134; R. pp. 124-128)

On or about July 8, 2013, Mr. Hobby filed a motion for partial summary judgment in which he asserted there were no genuine issues of material fact as to Ms. Hobby's liability for his claims. His motion was made upon the following grounds:

> "(1) This is a dispute over the use of real property ("Property") located in Newberry County;
> (2) There is no genuine issue of fact that the Property was sold;
> (3) There is no genuine issue of fact that Plaintiff has been the owner of the Property since April 1, 2012; and
> (4) There is no genuine issue of fact that Defendant has continued living on the Property after it was sold, without Plaintiff's permission and without making any payments to the Plaintiff." (R. p. 240)

Mr. Hobby did not file any affidavits with his motion but stated in his motion that he would rely on "the record in the case and the defendant's admissions".

On or about September 19, 2013, Ms. Hobby filed a motion for summary judgment upon the grounds that: (1) the evidence was undisputed; (2) the trustee acted outside of the scope of his powers and authority in quitclaiming the marital residence to the plaintiff; and (3) the quitclaim is therefore null and void. Ms. Hobby's motion was supported by the affidavits of Attorneys John O. McDougall and Arthur E. White, III. (Ms. Hobby's motion for summary judgment)

On or about December 23, 2013, the Trustee filed a motion for summary judgment asserting that there were no genuine issues of material fact and that the Third Party Defendant is entitled to judgment as a matter of law. His motion was

made upon the following grounds:

> "(1) Third Party Defendant Frances B. B. Knowlton acted as a prudent trustee exercising the required reasonable care, skill and caution under the circumstances in this case;
> (2) Third Party Defendant Frances B. B. Knowlton breached no duty owed to Third Party Plaintiff Mary T. Hobby;
> (3) Third Party Defendant Frances B. B. Knowlton breached no duty owed to Third Party Plaintiff Mary T. Hobby which has proximately resulted in any damage to the Third Party Plaintiff; and
> (4) That the language of the Final Divorce Decree and Order which created the Hobby Liquidating Trust and the Hobby Family Liquidating Trust, copies of which documents are incorporated by reference herein gave the Third Party Defendant Frances B. B. Knowlton the authority to sell the residence referred to in the Third Party Complaint to Raymond D. Hobby for his offer that was reasonable, fair and reflected market value in that the language of the Final Divorce Decree and Order provides:
> Either party may purchase any asset from the trust, provided the sale terms are reasonable, fair and reflect fair market value or other terms mutually agreeable to the parties. (Order dated October 10, 2010 at paragraph 3 f.)
> and the Trust Agreement provides:
> Trustee may sell any Trust Asset to a Transferor [as defined in the Order and Trust Agreement] provided the sale and terms of sale are reasonable, fair and reflect fair market value and any other terms mutually agreeable by the parties." (R. pp. 355-356)

The motions were heard by the Honorable Frank R. Addy, Jr. on March 12, 2014. By an Order dated May 6, 2014, Judge Addy granted the motions of Mr. Hobby and the Trustee and denied the motion of Ms. Hobby. (See Order dated May 6, 2014) Ms. Hobby filed a timely motion to reconsider, alter or amend, which Judge Addy denied without explanation in an Order dated October 17, 2014. (R. pp. 27-28) This appeal was promptly filed.

BACKGROUND

On December 8, 2011, Ms. Hobby submitted an offer to the Trustee to buy Mr. Hobby's interest in 544 Crowder Road based on a valuation of $225,000. At this

time, Ms. Hobby held title to 544 Crowder Road. She offered to pay the trust $127,231 and she consented to those funds being paid to Mr. Hobby in exchange for his 57.5% interest in 544 Crowder Road.

On January 3, 2012, Mr. Hobby made an offer to purchase 544 Crowder Road based on a valuation of $325,000.00. He offered the following:

> "I greatly appreciate the opportunity to make an offer to purchase the property in Kinards, SC, 544 Crowder Road and surrounding acreage. It is my opinion that this property is essential to the value of the overall property holdings that surround it and being extracted from the farm will drastically damage the total value of the property. **Therefore, I would extend an offer to the trust to purchase Ms. Hobby's interest of 42 ½% to maintain the most value and marketable position for the overall property.**
>
> I am offering to purchase this property for $138,125.00 as is where is. This is based on the 42 ½% of the full $325,000.00 appraisal that was used in the evaluation of material assets at the time of divorce and was agreed on by both parties. No broker discounts, no commissions, no reductions for any reasons.
>
> **I am further offering to leave this asset in the Trust to maximize the properties value for any future sale opportunities and receive no distributions until the property is sold and all trust liabilities are satisfied.**
>
> According to Ms. Hobby's appraisal it contends the property isn't worth that amount. I, as stated above disagree not only for the overall value of the total farm but feel the size, quality and location of the home keeps it at the former numbers.
>
> As to reimbursements for expenses to Ms. Hobby for taxes, maintenance and repairs, these should be denied. If there is any devaluation or cost to maintain this property it should be borne by Ms. Hobby for failure to comply with the final divorce order to convey this property into the trust. As you know I personally have not asked to date for any reimbursements for funds I have advance on behalf of trust assets, taxes, maintenance, repairs, mortgage payments, interest or any other cost associated. This will be accounted for when the trust is solvent and has adequate cash flows." (Emphasis supplied)

His offer, it bears emphasis, was to purchase Ms. Hobby's interest in 544 Crowder Road, not put funds in the trust to service debt. All he was going to pay was $138,125 to be used to pay Ms. Hobby for her 42 ½% interest in the property.

Mr. Hobby's offer was dated January 3, 2012. Although the Trustee later claimed to be pressed for cash, the Trustee did not bother to forward his offer to Ms. Hobby and her attorney until after the close of business on January 20, 2012, some 43 days after Ms. Hobby had submitted her offer. The Trustee advised that he would close on Mr. Hobby's offer by January 31, 2012 unless she made a better offer in the interim. In other words, the Trustee had piddled around in notifying her of Mr. Hobby's offer but gave her 11 days within which to respond. The Trustee did not hold title to 544 Crowder Road at this time.

On January 31, 2012, the Trustee again wrote Ms. Hobby's attorney, John McDougall, informing him that the trust's mortgage payments (on various trust assets) were becoming due and that the Trustee could not wait more than a day or two for her to make a better offer. Two days later, on February 2nd, the Trustee advised Ms. Hobby's attorney that the trust could not meet its obligations and needed an immediate cash infusion of $56,000 to service its debts.

On February 7, 2012, the Trustee advised Ms. Hobby and her attorney that he had a check in hand for $56,000 from Mr. Hobby as an advance on the purchase of the 544 Crowder Road and that he would have to accept Mr. Hobby's offer unless she made a materially better offer by close of business that day. However, the Trustee did not offer any explanation as to how Mr. Hobby's offer which was to pay

Ms. Hobby for her interest, would provide the trust with cash to service debt. The trust did not even have title to 544 Crowder Road at this time and whether or when the trust would obtain title was then unknown. No written contract was signed. However, the Trustee did not send the $56,000 to Ms. Hobby to begin the buyout of her interest.

On February 7, 2012, Attorney McDougall wrote the Trustee:

> "In follow up to our telephone conversation of today's date, this is to advise and confirm that I have been unable to communicate with Mary Hobby throughout the day on yesterday's date and today's date. I do not know whether she has had an opportunity to see your email of today's date regarding the 544 Crowder Road property, I do not know whether she is in town or out of town, and I do not know whether she is hospitalized or not. I do know that when I spoke with her on Friday, February 3, she was in a great deal of pain, and she was not able to make a decision regarding a counterproposal regarding the 544 Crowder Road property due to pain, medication, etc. I will continue to attempt to communicate with Mary Hobby regarding this matter, I realize that time is of the essence, and I will be back in touch with you on this matter by tomorrow, February 8. I do request that you not finalize any proposals regarding the sale of this property with Mr. Hobby until I have had an opportunity to communicate with Ms. Hobby regarding same."

On February 8, 2012, Attorney McDougall wrote the Trustee:

> "I am enclosing a copy of the fax transmittal which I have received from Moore Orthopaedics, John Clavet, MD, regarding Mary Hobby. Please note that Mary is under his medical care and it is his opinion that she is not fit to participate in any court-related duties at this time, which, as I understand it, includes making a decision on the counterproposal that she intends to make regarding the purchase of 544 Crowder Road.
>
> I have just spoken with Mary and she assures me that she is quite interested in purchasing this property out of the trust, that she does intend to submit a viable counterproposal to purchase this property, and that she would object to the property being sold to Ray Hobby at this time.
>
> As I have previously advised you, Mary Hobby has been in extreme pain during recent weeks and has been heavily medicated for that pain. This

has interfered with her being able to respond to the counterproposal received from you/Ray Hobby, which was sent to her, me, at 5:12 p.m. on Friday, January 20, after our office was closed, which I did not review until Monday, January 23, at which time I forwarded it to Mary Hobby for her review.

To reiterate the above, Mary Hobby does intend to make a counterproposal regarding the purchase of the 544 Crowder Road property from the trust, and she intends to do so as soon as she is medically fit to do so. We would request, demand, that no action be taken on the sale of this property prior to Mary Hobby being able to respond to that counterproposal which she received on or about January 23, only 16 days ago."

His letter included a letter from Ms. Hobby's orthopedic surgeon, Dr. Clavet, who stated:

"This letter is being dictated today to serve the purposes of establishing that Mary Hobby, who is under my medical care, is currently undergoing treatments for an undisclosed issue and is not fit to participate in any court related duties at this time."

On February 27, 2012, Attorney McDougall emailed the Trustee and asked that Ms. Hobby be given 43 days within which to respond which was the same time for response as Mr. Hobby had had.

"Frank, as you are aware our office closes @ 5:00pm each day, to include Fridays. Since your email was sent after our office was closed this past Friday, I have not had a chance to review your email of 1/27/12 @ 5:20pm until this time. I do not know whether Ms. Hobby has had an opportunity to review it at all since your email was not sent to her when you sent it to me. As you are aware Ms. Hobby made an offer to purchase this property on 12/8/11. Ms. Hobby did not receive a response to her offer until 1/20/12 (which was sent at 5:12pm on Friday afternoon after our office was closed for the weekend) some 43 days after she made her proposal. I would think that you would extend to her the same courtesy that was extended in behalf of Mr. Hobby and the trust and provide her with a 43 day period to respond to Mr. Hobby's proposal. She may not need that long, however, she certainly needs more than 1 week to do so."

Two days later, on February 9, 2012, the Trustee notified Ms. Hobby and her

attorney that he had accepted Mr. Hobby's offer and was using the cash advance to service the trust's debts. Neither Mr. Hobby nor the Trustee submitted any evidence to Ms. Hobby as to how Mr. Hobby's offer had changed. What offer the Trustee supposedly accepted is unknown since neither Mr. Hobby nor the Trustee have been deposed. Mr. Hobby, whose written offer dated January 3, 2014 was to pay $138,125 to the Trustee for the Trustee to pay to Ms. Hobby for her interest, Mr. Hobby's written offer was not to use the cash to service debt. Title had still not been transferred at this time and no written contract had been signed with Mr. Hobby at this time.

According to Mr. Hobby, he advanced $56,000 and then another $56,000 on March 14, 2012 toward his purchase of the house to allow the trust to continue operating. However, the receipt he submitted did not identify the payee. Furthermore, there is no reference to a second payment in the contract that Mr. Hobby and the Trustee signed on April 19, 2012. A second payment is not mentioned by the Trustee. Ms. Hobby had no opportunity to make a counteroffer during this time. The Trustee never disclosed the terms of the Purchase Agreement to Ms. Hobby.

Importantly, the Trustee's emails did not mention why the trust was cash strapped. The trust was cash strapped because the Trustee had withdrawn $292,947 for his fees since September 30, 2011. (R. pp. 751-753)

On March 20, 2012, prior to any written contract being signed by the Trustee and Mr. Hobby and prior to title being transferred to the trust, Ms. Hobby made a second offer through her attorney as follows:

> "I have been advised that Mary Hobby is willing to purchase the 544 Crowder Road property which is titled in her name by making a cash payment to the trust in the amount of $186,875 (the value of Mr. Hobby's 57.5% interest) with her reserving the right to determine what, if anything, is due her for the expenses that she has paid regarding this property from October 8, 2010, to present, at a later date. This offer is based upon the property having a $325,000 value and she paying the trust 57.5% of the value of the property. The $186,875 will be paid immediately to the trust upon confirmation that the property will be released to Mary Hobby free and clear of any claim and/or interest from the trust."

Ms. Hobby's offer was not accepted. Instead, the Trustee signed a Purchase Agreement with Mr. Hobby on April 19, 2012. The Trustee had never disclosed the terms of this agreement to Ms. Hobby before he signed it. The terms of the Purchase Agreement were materially different from terms set forth in Mr. Hobby's January 3, 2012 letter. It is apparent that the terms had been renegotiated. The Trustee had never disclosed the negotiations that led to a contract to Ms. Hobby and never gave her a chance to object to the written contract or make a better offer.

The differences in Mr. Hobby's offer of January 3, 2012 and the contract dated April 19, 2012 are significant:

> (1) Mr. Hobby's January 3, 2012 offer was to pay $138,125.00 to purchase Ms. Hobby's 42 1/2 % interest in the property. The April 19, 2012 Purchase Agreement says nothing about distributing the cash to Ms. Hobby.
>
> (2) Mr. Hobby's January 3, 2012 offer was to leave the property in the trust. This could have easily been done by selling the property under a contract of sale where title did not pass until all payments were made. This would have allowed Ms. Hobby to continue to reside there until all payments had been made. This was not included or addressed in any way in the agreement. The Trustee has never provided an explanation as to why the Purchase Agreement did not include Ms. Hobby's right to live there when that was part of Mr. Hobby's offer. The April 19, 2012 Purchase Agreement says nothing about this.

(3) The Trustee agreed in the Purchase Agreement to finance $186,875.00 even though Mr. Hobby had a judgment against him for $5,000,000.00. No commercial lender would have provided such financing to a judgment debtor who had a $5,000,000.00 judgment against him.

In both affidavits, Attorney McDougall has opined that Ms. Hobby's offer was superior to the deal Mr. Hobby got under the Purchase Agreement. Attorney McDougall opined as follows:

"9. The trustee did not enter into a contract to sell 544 Crowder Road until April 19th, 2012. See purchase agreement and mortgage attached as Exhibit H. The purchase agreement did not tract the offer made by Mr. Hobby, other than the price was $325,000. The contract says that prior to entering into the purchase agreement, Mr. Hobby delivered to the trustee a non-refundable payment of $56,000. Mr. Hobby then gave a promissory demand note for $186,875. The balance which had to be paid at closing was $82,125.00. Thus, Mr. Hobby paid $138,125 ($56,000 and $82,125) to the trustee which was 43% of the price or represented payment to the trustee for Mary's share. The property was not left in trust and the total cash that the trustee received was $138,125.00. Mary's offer was to pay $86,875 to the trustee to buy Mr. Hobby's 57.5% interest in the property. Mary's offer was superior to Mr. Hobby's since it would have provided the trustee with approximately $48,850 more cash than did Mr. Hobby's. Her offer would have put $186,875 in the hands of the trustee unless it was distributed to Mr. Hobby as compared to Mr. Hobby's payment of $138,125. Her offer also was a 'cash' offer and not cash and a Note to be paid over a period of time." (R. p. 1062, ¶9)

Ms. Hobby conveyed title to 544 Crowder Road to the Trustee on April 11, 2012. Eight days later, on April 19, 2012, the Trustee and Mr. Hobby executed the Purchase Agreement. They closed on the sale of 544 Crowder Road on the same day. Although Ms. Hobby had given a general warranty deed to the Trustee, the Trustee delivered only a quitclaim deed to 544 Crowder Road to Mr. Hobby.

TRUSTEE POWERS TO DISPOSE OF TRUST ASSETS

The liquidating trust agreement gave the Trustee the authority to sell trust

assets. The Trustee had broad authority to sell to third parties. However, the authority to sell to a transferor was restricted under the terms of the liquidating trust.

Article IX (a)(xxxii) provides:

> "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 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 supplied)

The Trust Agreement clearly sets forth the powers of the Trustee as well as the restrictions on the Trustee selling to a transferor. Specifically, Article IX, Paragraph (a)(xxxii) gives the Trustee the power to "sell any Trust Asset to a Transferor (Mr. Hobby or Ms. Hobby) provided the sale and terms of the sale are reasonable, fair, and reflect fair market value **and** any other terms mutually agreeable by the parties." Liquidating Trust IX, (a)(xxxii) (Emphasis added). The restrictions on the sale to a transferor, requires consent by the other transferor and that the terms of the sale must be "reasonable, fair and reflect fair market value". These restrictions on a sale to the transferor are to protect the other transferor against the trustee and transferor making a sweetheart deal.

The circuit court judge, in his analysis, got the language of the trust wrong. He substituted the word "or" in place of the word "and" in the provision involving a sale to a transferor which re-wrote the trust language. In his order he stated:

> "Trustee moves for summary judgment because the Trust Agreement unequivocally gave him the authority to sell the marital home and because there is no evidence that he failed to act reasonably and prudently in doing so. The Court agrees.
>
> In order to prove her claim for breach of fiduciary duty, Wife must present some evidence that the Trustee breached his fiduciary duty. Wife has failed to present any such evidence. The Court finds that, as a matter of law, the Trust Agreement granted the Trustee the authority to sell the House. No material, factual issue exists as to this question. Nor is there any evidence or inference that the Trustee failed to act reasonably and prudently in selling the home, or that he favored one beneficiary over the other.
>
> The explicit provisions of the Trust Agreement granted the Trustee wide discretion in selling trust assets. He could sell trust property to either beneficiary if the transaction was fair, reasonable, and for market value, **or** if the beneficiaries could mutually agree on other terms. *See* Trust Agreement, Article IX, (a)(xxxii). **Moreover, the terms of the Trust Agreement enabled the Trustee to sell trust property to one beneficiary without obtaining the consent of the other beneficiary** *See id."*

The circuit court judge did not analyze the actual language of the Liquidating Trust. He made no findings as to why sales to transferors were subject to different restrictions. He disregarded the actual language of the trust and re-wrote the terms of the trust. In doing so, he violated a fundamental rule of construction that courts do not and cannot re-write the terms of a contract. *Silver v. Aabstract Pools & Spas, Inc.,* 376 S.C. 585, 658 S.E.2d 539 (2008) (Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.) *Lowcountry Open Land Trust v. Charleston Southern University,* 376 S.C. 399, 656 S.E.2d 775 (2008) (Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties. A court has no authority to

rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction.) The circuit court judge's error in re-writing the contract caused his entire analysis to be flawed and his order granting summary judgment in favor of Mr. Hobby and the Trustee must be reversed.

AFFIDAVITS SUBMITTED BY MS. HOBBY

Although the circuit court judge held that there was no evidence that the Trustee had breached his fiduciary duty and no evidence that the Trustee had failed to act prudently, these holdings are simply wrong. Both of Ms. Hobby's experts provided opinions that the Trustee had breached his fiduciary duty owed to Ms. Hobby and/or acted beyond his authority. Attorney McDougall, in his affidavit dated September 19, 2013, opined:

> "11. In my opinion, the trustee did not have the authority to sell the marital property to Ray. Under Article 12(a)(xxxii), the trustee has an obligation to exercise appropriate and reasonable due diligence with respect to the sale of any trust asset such that the trustee is reasonably satisfied that any sale has occurred at arms length and has maximized the value of the trust asset divested. The trustee here failed to maximize the value of the trust asset being divested. He knew that Mary intended to make a further offer. Mary made a further and better offer prior to the contract with Ray. Although the trustee asserted that there were mortgage payments which were due, any such payments would not have likely triggered a foreclosure action in the period of time Mary sought an order to make her second offer. All the trustee had to do was wait or at least communicate further regarding a deadline. The trustee failed to do so and failed to maximize the value of the trust asset being divested.
>
> 12. A trustee by statute has a duty of impartiality. Here, there was a dispute over which offer should be accepted. I asked the trustee to seek the court's direction and approval as to which offer should be accepted. In my opinion, the trustee had a fiduciary duty to seek court approval and breached his duty by failing to do so.
>
> 13. In my opinion, Mary's offer was clearly superior to the offer made by Ray, $186,875.00 in cash as compared to $56,000.00 and a note from Ray who has serious financial problems. See Ray's

Confession of Judgment for $5,000,000.00, Exhibit I.

14. The trustee did not seek Mary's approval of the terms of the sale to Ray, which, in my opinion, is required under Article 12(a)(xxxii). Furthermore, he did not act to protect her by insisting that Ray close pursuant to the terms of his original offer. Under Ray's offer, Ray proposed to leave the marital property in the trust. If the trustee was going to sell the marital property to him on the basis of the offer he made, the trustee should have insisted upon doing so under a contract of sale where title would not be transferred until the entire debt was paid. I had written the trustee and asked him to confer with Ray regarding the terms of Mary's offer in an effort to obtain his consent and approval. No such effort was made to obtain Mary's consent or approval and no court order was entered authorizing the sale to Ray.

15. In my opinion, the trustee acted outside the scope of his authority and breached his fiduciary duty to Mary and the transfer should be deemed a nullity since he had no authority under the trust to make the transfer." (R. pp. 699-700, ¶11-15)

Attorney White opined:

"3. It appears clear that the terms of the contract of sale are the terms of the offer made by Ray Hobby. To that end, it is my opinion that the trustee went beyond the terms of the contract. Additionally, the transfer of the property out of trust in contradiction to the terms of the contract clearly favors one beneficiary, the plaintiff, over another, Mary which is contrary to the terms of the Liquidating Trust.

4. Furthermore, in my opinion, the trustee did not have the authority to sell the property to the plaintiff as he did. Under Article 9, Section (a), Paragraph (xxxii), the trustee may only sell a trust asset to a Transferor (either Ray Hobby or Mary), provided the sale and the terms of the sale are reasonable, fair and reflect fair market value ***and*** any other terms mutually agreeable to the parties. ***(emphasis added)***. Based upon my investigation, Mary never agreed to any terms under which the sale took place. In fact, she objected to the sale to Ray Hobby and asserted that her offer was better. Since she did not agree to any of the terms of the sale, in my opinion, the trustee lacked authority to sell the property and the purported sale is a nullity. Ray Hobby clearly had knowledge of the trustee's lack of authority contained in the plain language of the Liquidating Trust." (R. pp. 780-781, ¶3-4)

The Trustee submitted a counter affidavit from his expert, Julian W. Walker, Jr., that the Trustee had not breached his fiduciary duty. The Trustee also submitted his affidavit. Thus, breach of fiduciary duty was in dispute. Mr. Hobby submitted his

affidavit stating that he owned 544 Crowder Road which put ownership in dispute. However, these are the very kind of disputes which must be submitted to the jury. *Montgomery v. CSX Transportation, Inc.,* 376 S.C. 37, 656 S.E.2d 20 (2008) (Moreover, even if there is no dispute regarding the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.)

The affidavits submitted by Ms. Hobby also addressed the need for further discovery. Attorney White's affidavit stated:

> "7. In my opinion, Mary T. Hobby should be allowed a reasonable period of time to conduct discovery regarding the issues set forth herein. In my opinion, further inquiry into the facts should be allowed as it is still necessary to determine the following: (a) whether the trustee had authority to enter into a contract with and sell real estate to the plaintiff from the trust without agreement by all parties, namely Mary T. Hobby; (b) even if the trustee had authority, which in my opinion he did not, what were the terms of the contract to sell the property and whether the terms of the contract were violated; and (c) whether the trust did in fact have title to the property the trustee purported to sell and transfer to the plaintiff." (R. p. 782, ¶7)

The undersigned submitted an affidavit which stated as follows:

> "3. I ask that the Court delay ruling on the plaintiff's motion for summary judgment and the third party defendant's motion for summary judgment in order to give me time to depose Raymond D. Hobby, Frank B. Knowlton and Terry Williams. My purpose in deposing Mr. Hobby and Mr. Knowlton would be to learn and discover the details of the purported sale of the Crowder Road properties. The purpose in taking Mr. Williams's deposition is to question him regarding his affidavit that was served on me on March 10, 2014. I want to question him about the opinions he expresses in his affidavit and have him review the affidavits of Artie White and John McDougall. I want Mr. Knowlton to explain to me what debts were due that he accepted the $56,000 payment from Mr. Hobby and what was done with that money. Mr. Hobby and Mr. Knowlton are adverse parties, and I cannot obtain an affidavit from them setting forth facts essential to justify my opposition to the motions for summary judgment. Mr. Williams is an expert on behalf of Mr. Knowlton

> and I cannot seek an affidavit from him. If I am allowed to depose them prior to a ruling being made, I expect to obtain information from them that is supportive to the affidavits of Artie White and John McDougall. I ask that the Court order a continuance to allow time for these depositions to be taken. This action was filed on September 4, 2013 and is only some six months old." (R. pp. 1102-1103, ¶3)

The circuit court judge ignored these affidavits and proceeded to rule on the motions.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri,* 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). The appellate court reviews the grant of a summary judgment motion under the same standard as the trial court, pursuant to Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *E.g., Burriss v. Anderson County Bd. of Educ.,* 369 S.C. 443, 633 S.E.2d 482 (2006); *Dawkins v. Fields,* 354 S.C. 58, 580 S.E.2d 433 (2003). When determining if any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Wilson v. Style Crest Products, Inc.,* 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006). Moreover, even if there is no dispute regarding the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Montgomery v. CSX Transportation, Inc.,* 376 S.C. 37, 656 S.E.2d 20 (2008). Summary judgment should be invoked cautiously to avoid improperly denying a party a trial on the disputed factual issues. *Dawkins v. Fields,*

354 S.C. 23, 545 S.E.2d 515 (2001). Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Spence v. Spence,* 368 S.C. 106, 628 S.E.2d 869 (2006).

ARGUMENT

I.

THE CIRCUIT COURT JUDGE ERRED IN ACTING AS A FACT FINDER, IN DISREGARDING THE AFFIDAVITS SUBMITTED BY MS. HOBBY AND IN GRANTING SUMMARY JUDGMENT WHEN THERE WERE GENUINE ISSUES OF MATERIAL FACT AND/OR DISPUTED CONCLUSIONS TO BE DRAWN FROM THE FACTS

A.

THE CIRCUIT COURT JUDGE ERRED IN BECOMING A FACT FINDER, IN FINDING THAT MS. HOBBY HAD FAILED TO PRESENT ANY EVIDENCE THAT THE TRUSTEE HAD BREACHED HIS FIDUCIARY DUTY AND IN FINDING THAT THE TRUSTEE HAD AS A MATTER OF LAW, THE RIGHT TO DO WHAT HE DID

The circuit court judge found as follows:

> "Trustee moves for summary judgment because the Trust Agreement unequivocally gave him the authority to sell the marital home and because there is no evidence that he failed to act reasonably and prudently in doing so. The Court agrees.
>
> In order to prove her claim for breach of fiduciary duty, Wife must present some evidence that the Trustee breached his fiduciary duty. Wife has failed to present any such evidence. The Court finds that, as a matter of law, the Trust Agreement granted the Trustee the authority to sell the House. No material, factual issue exists as to this question. Nor is there any evidence or inference that the Trustee failed to act reasonably and prudently in selling the home, or that he favored one beneficiary over the other.
>
> The explicit provisions of the Trust Agreement granted the Trustee wide discretion in selling trust assets. He could sell trust property to either beneficiary if the transaction was fair, reasonable, and for market value, or if the beneficiaries could mutually agree on other

terms. *See* Trust Agreement, Article IX, (a)(xxxii). Moreover, the terms of the Trust Agreement enabled the Trustee to sell trust property to one beneficiary without obtaining the consent of the other beneficiary. *See id.* Simply stated, because the House was an asset of the trust, the Trustee had the power to sell it, and he clearly acted with due diligence and in a prudent manner when he did so. Both parties made an offer on the House, and Husband's $325,000 offer was timely and superior to that of Wife. Wife was given ample time to respond to Husband's offer, yet she failed to do so despite several inquiries sent from the Trustee to Mr. McDougall, Wife's lawyer."

These findings were in error for the following reasons:

(1) The circuit court judge misquoted the trust language and re-wrote the agreement by inserting the word "or" in place of "and", as provided. The words "or" and "and" are function words that have different functions. One only has to Google the word "and" to learn that it is a conjunctive "used to connect words of the same part of speech, clauses, or sentences that are to be taken jointly". Googling the word "or" teaches that it is a conjunctive "used to link alternatives". It is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its ordinary and plain meaning. *Bardsley v. Government Employees Insurance Company,* 405 S.C. 68, 747 S.E.2d 436 (2013). This error makes all other findings wrong. He did no analysis and made no rulings based upon the actual language of the trust. Without disrespect for the circuit court judge, the old saying, "garbage in and garbage out" is applicable. The garbage in was the contract as re-written by the circuit court judge. The garbage out was his findings that were based on the agreement which he had re-written.

(2) The finding that Ms. Hobby presented no evidence that the Trustee breached his fiduciary duty is simply wrong. The affidavits of Ms. Hobby's experts are replete with evidence that the Trustee breached his fiduciary duty. See McDougall affidavit, paragraphs 1-15. See White affidavit, paragraphs 3-4. Clearly there was evidence that the Trustee had breached his fiduciary duty. The circuit court judge, acting as a fact finder, simply disregarded these affidavits.

(3) On summary judgment, the circuit court judge cannot pick one opinion over the other and grant summary judgment. That has the judge acting as a fact finder which is impermissible. Instead, the motions of Mr. Hobby and the Trustee should have been denied and the action should be submitted to the jury to decide what evidence and opinions are credible.

B.

THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT THE TRUSTEE ACTED IN THE BEST INTEREST OF THE TRUST BY ACCEPTING THE "LEGITIMATE, TIMELY OFFER" WHEN THE TRUST DID NOT ACCEPT MR. HOBBY'S JANUARY 3, 2012 OFFER BUT MADE A NEW AND DIFFERENT AGREEMENT THAT WAS NOT DISCLOSED TO MS. HOBBY

The circuit court judge found as follows:

> "Further, both Husband and Wife were given notice of the Trust's immediate need for a cash infusion to pay its pending debts. 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. Significantly, South Carolina law states quite clearly that 'compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.' S.C. Code Ann. §62-7-933(G) (Supp. 2008)." (R. p. 17).

In truth, the cash crisis was created by the Trustee. The Trustee depleted the trust cash to pay his fees and expenses of $292,947. Further discovery would provide information as to when and why the terms of the Purchase Agreement differed from Mr. Hobby's original offer. Further inquiry into the facts was needed. The circuit court judge erred in failing to allow additional discovery and in ruling on the motions.

C.

THE CIRCUIT COURT JUDGE ERRED IN BECOMING A FACT FINDER AND IN FINDING THAT MS. HOBBY WAS NOT MEDICALLY DISABLED FROM RESPONDING TO MR. HOBBY WHEN THE UNCONTRAVERTED EVIDENCE ESTABLISHED THAT SHE WAS

The circuit court judge made the following findings:

> "Although Wife claims she was experiencing medical issues which inhibited her from making a counteroffer, the Court finds no basis to excuse her from making a timely counteroffer within the time frame dictated by circumstances and required by the Trustee. Essentially, Wife maintains that she was suffering from a pinched nerve which kept her from making a timely counteroffer. The Court finds that her condition, while undoubtedly painful, would not have rendered her incapable of corresponding with the Trustee over the 18-day time span she had to make an offer. In fact, by the time Wife submitted a counteroffer, fifty-seven (57) days had elapsed since she had received notice of Husband's offer."

The circuit court judge said that Ms. Hobby offered no basis to excuse her failure to respond. This finding is difficult to swallow. Ms. Hobby did not just claim that medical problems delayed her response. She offered a letter from her treating physician that stated:

> "This letter is being dictated today to serve the purposes of establishing that Mary Hobby, who is under my medical care, is currently undergoing treatments for an undisclosed issue and is not fit to participate in any court related duties at this time."

Ms. Hobby did what is customarily done, that is, she provided a doctor's report. There was no counter evidence. There is no basis for the circuit court judge's finding that her pinched nerve was "while undoubtedly painful, would not have rendered her incapable of corresponding with the Trustee over the 18-day time span she had to make an offer". The circuit court judge, once again, erred by becoming the fact

finder and by disregarding this uncontroverted evidence submitted by Ms. Hobby. *Montgomery v. CSX Transportation, Inc.,* 376 S.C. 37, 656 S.E.2d 20 (2008) (Moreover, even if there is no dispute regarding the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.)

D.

THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT THE TRUSTEE ACCEPTED MR. HOBBY'S OFFER, WHEN THE TRUSTEE HAD NOT AND IN SUGGESTING THAT THERE MIGHT BE A SUIT FOR SPECIFIC PERFORMANCE AND IN FINDING IT WAS PRUDENT FOR THE TRUSTEE TO ACCEPT MR. HOBBY'S OFFER

The circuit court judge made the following findings:

> "Importantly, when she did eventually make a counteroffer, there is no question the Trustee had accepted Husband's offer roughly a month earlier, thereby binding the Trust and subjecting it to a suit for specific performance had the Trustee attempted to renege and take Wife's untimely counteroffer. Finally, nowhere in the record can it be shown that the Trustee breached his duty of impartiality. The Trustee at all times acted impartially toward Husband and Wife with respect to the sale of the House. As described above, both parties made offers to buy the marital home and ample time was given to Wife to make a counteroffer. The Trust needed an immediate infusion of cash, and Husband presented a significantly better offer than wife's original offer. It was reasonable and prudent for the Trustee to accept the best offer before him at the time in order to avoid the risk of the Trust defaulting on its debts. *See Ex parte Wheeler v. Estate of Green*, 381 S.C. 548, 673 S.E.2d 836 (Ct. App. 2009) (holding that the personal representatives of a decedent's estate did not breach her fiduciary duties by accepting an offer for the sale of the decedent's residence without considering a substantially higher offer submitted by another prospective purchaser after the offer was accepted.)"

The affidavit of Attorney McDougall addresses the breach of the duty of impartiality. His affidavit, in paragraph 12, states:

"12. A trustee by statute has a duty of impartiality. Here, there was a dispute over which offer should be accepted. I asked the trustee to seek the court's direction and approval as to which offer should be accepted. In my opinion, the trustee had a fiduciary duty to seek court approval and breached his duty by failing to do so."

There is no evidence that an action for specific performance was threatened or being considered if the Trustee had sold to Ms. Hobby. Had the Trustee simply sought guidance from the probate court on the proper interpretation of the liquidating trust, this action would probably have never been filed and no action for specific performance of the trust language would have been brought. The Trustee breached his fiduciary duty in failing to seek guidance from the probate court.

E.

THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT THERE WAS NO EVIDENCE THAT MS. HOBBY'S OFFER WAS SUPERIOR AND THUS NO EVIDENCE OF A BREACH OF FIDUCIARY DUTIES WHEN ATTORNEY MCDOUGALL OFFERED OPINION EVIDENCE ON BOTH ISSUES

The circuit court judge found as follows:

"Even if Wife's counteroffer could be considered timely or otherwise valid, Wife offered the same sum as Husband, and the Court is strained to see how any favoritism could be shown by accepting a timely offer by one party in an amount equal to another party's untimely counteroffer. Accordingly, not only does the record fail to demonstrate a scintilla of evidence that the Trustee breached his fiduciary duties, it proves that he acted within them when he sold the marital home to Husband."

Findings like these make one wonder if the circuit court judge even read the affidavits submitted by Ms. Hobby. There is a dispute as to which offer was better. Her expert, Attorney McDougall, outlined how and why Ms. Hobby's offer was the superior offer. His supplemental affidavit states:

"9. The trustee did not enter into a contract to sell 544 Crowder

> Road until April 19th, 2012. See purchase agreement and mortgage attached as Exhibit H. The purchase agreement did not tract the offer made by Mr. Hobby, other than the price was $325,000. The contract says that prior to entering into the purchase agreement, Mr. Hobby delivered to the trustee a non-refundable payment of $56,000. Mr. Hobby then gave a promissory demand note for $186,875. The balance which had to be paid at closing was $82,125.00. Thus, Mr. Hobby paid $138,125 ($56,000 and $82,125) to the trustee which was 43% of the price or represented payment to the trustee for Mary's share. The property was not left in trust and the total cash that the trustee received was $138,125.00. Mary's offer was to pay $86,875 to the trustee to buy Mr. Hobby's 57.5% interest in the property. Mary's offer was superior to Mr. Hobby's since it would have provided the trustee with approximately $48,850 more cash than did Mr. Hobby's. Her offer would have put $186,875 in the hands of the trustee unless it was distributed to Mr. Hobby as compared to Mr. Hobby's payment of $138,125. Her offer also was a 'cash' offer and not cash and a Note to be paid over a period of time." (R. p. 1062, ¶9)

The Trustee's affidavit states that Mr. Hobby's offer was superior. Attorney McDougall states that Ms. Hobby's offer was superior. The Trustee's decision to finance a large part of the purchase price, when Mr. Hobby had a $5,000,000.00 verdict against him, speaks volumes as to why Ms. Hobby's offer was the superior offer. No bank would have financed this deal for Mr. Hobby. Once again, the circuit court judge became a fact finder and decided not to consider or believe the opinions of Ms. Hobby's expert. This evidence presented a classic case that had to be resolved by the fact finder. *Montgomery v. CSX Transportation, Inc.,* 376 S.C. 37, 656 S.E.2d 20 (2008) (Moreover, even if there is no dispute regarding the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.)

F.

THE CIRCUIT COURT JUDGE ERRED IN BECOMING A FACT FINDER AND IN DISREGARDING ATTORNEY MCDOUGALL'S AFFIDAVIT AND IN FINDING THAT THERE WAS ONLY ONE REASONABLE INTERPRETATION OF THE LANGUAGE IN THE LIQUIDATING TRUST

The circuit court judge found as follows:

> "Finally, Wife's effort to create a material factual issue, by offering the affidavit of her attorney in the underlying domestic action, John McDougall, is unavailing; the plain language of the trust is unambiguous and capable of only one reasonable interpretation. In short, this Court is not required to find the possibility of ambiguity or fiduciary breach, where clearly none exists, simply because an affidavit is filed, and in this case, Mr. McDougall represented Wife in the underlying negotiations concerning the sale of the house. Accordingly, Wife's attorney affidavit regarding the trust represents, at best, an effort to create a factual issue where no such issue is actually in doubt. *See generally Higgins v. Medical University of South Carolina,* 326 S.C. 592, 486 S.C. 2d 269 (Ct. App. 1997) (factual statements of counsel will normally not be considered in determining where issue of material fact exists precluding summary judgment)."

The circuit court judge stated the plain language of the trust is unambiguous. Ms. Hobby agrees if the word "and" is used and given its ordinary use and meaning. When the language of a trust is unambiguous, the court cannot re-write the trust but must enforce it. Here, the circuit court judge, in his analysis, actually changed the wording of the trust to make his findings. If the actual language of the trust is followed, consent of the one transferor to the sale to the other must be obtained **and** the sale must be "reasonable, fair and reflect fair market value" is the only reasonable construction.

II.

THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT IT WAS UNDISPUTED THAT MR. HOBBY OWNED 544 CROWDER ROAD AND COULD SUE FOR TRESPASS, HOLD OVER TENANT, BREACH OF CONTRACT, QUANTUM MERIT, WHEN OWNERSHIP WAS DISPUTED

A dispute existed over whether Mr. Hobby owned 544 Crowder Road even though the circuit court judge held otherwise. Attorney McDougall opined:

> "11. In my opinion, the trustee did not have the authority to sell the marital property to Ray. Under Article 12(a)(xxxii), the trustee has an obligation to exercise appropriate and reasonable due diligence with respect to the sale of any trust asset such that the trustee is reasonably satisfied that any sale has occurred at arms length and has maximized the value of the trust asset divested. The trustee here failed to maximize the value of the trust asset being divested. He knew that Mary intended to make a further offer. Mary made a further and better offer prior to the contract with Ray. Although the trustee asserted that there were mortgage payments which were due, any such payments would not have likely triggered a foreclosure action in the period of time Mary sought an order to make her second offer. All the trustee had to do was wait or at least communicate further regarding a deadline. The trustee failed to do so and failed to maximize the value of the trust asset being divested." (R. pp. 699-700, ¶11)

Attorney White opined:

> "3. It appears clear that the terms of the contract of sale are the terms of the offer made by Ray Hobby. To that end, it is my opinion that the trustee went beyond the terms of the contract. Additionally, the transfer of the property out of trust in contradiction to the terms of the contract clearly favors one beneficiary, the plaintiff, over another, Mary which is contrary to the terms of the Liquidating Trust.
>
> 4. Furthermore, in my opinion, the trustee did not have the authority to sell the property to the plaintiff as he did. Under Article 9, Section (a), Paragraph (xxxii), the trustee may only sell a trust asset to a Transferor (either Ray Hobby or Mary), provided the sale and the terms of the sale are reasonable, fair and reflect fair market value ***and*** any other terms mutually agreeable to the parties. ***(emphasis added)***. Based upon my investigation, Mary never agreed to any terms under which the sale took place. In fact, she objected to the sale to Ray

Hobby and asserted that her offer was better. Since she did not agree to any of the terms of the sale, in my opinion, the trustee lacked authority to sell the property and the purported sale is a nullity. Ray Hobby clearly had knowledge of the trustee's lack of authority contained in the plain language of the Liquidating Trust." (R. pp. 780-781, ¶3-4)

Mr. Hobby acknowledged that there was a dispute over ownership. In his affidavit, Mr. Hobby said:

"16. I have read the Affidavit of John McDougall dated March 10, 2014.

17. I disagree with his statement that I did not have an enforceable contract until April 19, 2012. The sale closed on April 19, 2012, but I had a contract in place over two months prior, when I made the $56,000 down payment to the Liquidating Trust that allowed it to avoid defaulting on its debts.

18. To the best of my knowledge, neither party to the contract for sale agrees with Mr. McDougall that there was no enforceable contract until April 19, 2012. Rather, both parties believe the contract was in place after my offer was accepted on February 9, 2012 and the Trustee deposited my check on February 13, 2012." (R. pp. 1105-1106, ¶16-18)

Once again, the circuit court judge became a fact finder and disregarded the opinions of Ms. Hobby's experts. His order must be reversed. *Montgomery v. CSX Transportation, Inc.,* 376 S.C. 37, 656 S.E.2d 20 (2008) (Moreover, even if there is no dispute regarding the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.)

III.

THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT MS. HOBBY FAILED TO PRESENT ANY EVIDENCE AFFECTING MR. HOBBY'S TITLE TO 544 CROWDER ROAD AND GRANTING SUMMARY JUDGMENT WHEN BOTH OF HER EXPERTS DID SO IN THEIR AFFIDAVITS

The circuit court judge found that:

"Moreover, Wife has failed to present any evidence affecting Husband's

title to the House."

This is wrong. Attorney McDougall, in his affidavit, stated:

> "14. The trustee did not seek Mary's approval of the terms of the sale to Ray, which, in my opinion, is required under Article 12(a)(xxxii). Furthermore, he did not act to protect her by insisting that Ray close pursuant to the terms of his original offer. Under Ray's offer, Ray proposed to leave the marital property in the trust. If the trustee was going to sell the marital property to him on the basis of the offer he made, the trustee should have insisted upon doing so under a contract of sale where title would not be transferred until the entire debt was paid. I had written the trustee and asked him to confer with Ray regarding the terms of Mary's offer in an effort to obtain his consent and approval. No such effort was made to obtain Mary's consent or approval and no court order was entered authorizing the sale to Ray.
>
> 15. In my opinion, the trustee acted outside the scope of his authority and breached his fiduciary duty to Mary and the transfer should be deemed a nullity since he had no authority under the trust to make the transfer."

Attorney White, in his affidavit, stated:

> "3. It appears clear that the terms of the contract of sale are the terms of the offer made by Ray Hobby. To that end, it is my opinion that the trustee went beyond the terms of the contract. Additionally, the transfer of the property out of trust in contradiction to the terms of the contract clearly favors one beneficiary, the plaintiff, over another, Mary which is contrary to the terms of the Liquidating Trust.
>
> 4. Furthermore, in my opinion, the trustee did not have the authority to sell the property to the plaintiff as he did. Under Article 9, Section (a), Paragraph (xxxii), the trustee may only sell a trust asset to a Transferor (either Ray Hobby or Mary), provided the sale and the terms of the sale are reasonable, fair and reflect fair market value ***and*** any other terms mutually agreeable to the parties. ***(emphasis added)***. Based upon my investigation, Mary never agreed to any terms under which the sale took place. In fact, she objected to the sale to Ray Hobby and asserted that her offer was better. Since she did not agree to any of the terms of the sale, in my opinion, the trustee lacked authority to sell the property and the purported sale is a nullity. Ray Hobby clearly had knowledge of the trustee's lack of authority contained in the plain language of the Liquidating Trust."

The circuit court judge once again became a fact finder and disregarded the opinion

evidence from Ms. Hobby's experts. This was error. *Montgomery v. CSX Transportation, Inc.,* 376 S.C. 37, 656 S.E.2d 20 (2008) (Moreover, even if there is no dispute regarding the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.)

IV.

THE CIRCUIT COURT JUDGE ERRED IN CONSIDERING MR. HOBBY'S AFFIDAVIT AND OTHER SUBMISSIONS, WHICH WERE NOT SERVED WITH HIS MOTION AND THE CIRCUIT COURT JUDGE SHOULD HAVE DENIED HIS MOTION SINCE IT WAS NOT SERVED WITH ANY SUPPORTING AFFIDAVITS OR OTHER EVIDENCE

Mr. Hobby did not file any affidavits with his motion for summary judgment. The day before the hearing, Mr. Hobby served his affidavit and a booklet full of unauthenticated hearsay evidence. Rule 4, SCRCP, provides if a motion is to be supported by an affidavit, the affidavit must be served with the motion. Rule 56(e) requires that supporting affidavits set forth such facts that would be admissible in evidence. Mr. Hobby violated these rules. Ms. Hobby objected. The circuit court judge nevertheless proceeded to hear his motion. The circuit court judge should have followed Rule 4 and Rule 56. He should have denied Mr. Hobby's motion since it was not supported by an affidavit as required by Rule 4 and Rule 56, SCRCP.

V.

THE CIRCUIT COURT JUDGE ERRED IN GRANTING MR. HOBBY'S AND THE TRUSTEE'S MOTION FOR SUMMARY JUDGMENT WHEN DISCOVERY WAS NOT COMPLETE

Summary judgment must not be granted until the opposing party has had a

full and fair opportunity to complete discovery.

> "Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Doe v. Batson,* 345 S.C. 316, 548 S.E.2d 854 (2001); *Baughman v. American Tel. & Tel. Co.,* 306 S.C. 101, 410 S.E.2d 537 (1991); *see also Schmidt v. Courtney,* 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) ('Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'')." *BPS, Inc. v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (2005).

This action had been pending for less than a year at the time the summary judgment motion was heard. The Complaint was filed on April 26, 2013 but the issues were not finally joined until October 7, 2013. Ms. Hobby objected to the motions for summary judgment being heard since discovery was not complete. Ms. Hobby complied with Rule 56(f), SCRCP, which says what a party must do if the party cannot submit affidavits to justify the party's opposition to the summary judgment motion. Rule 56(f) provides:

> "(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."

Ms. Hobby did what Rule 56(f) required. She submitted the Affidavit of Pope D. Johnson, III which states:

> "3. I ask that the Court delay ruling on the plaintiff's motion for summary judgment and the third party defendant's motion for summary judgment in order to give me time to depose Raymond D. Hobby, Frank B. Knowlton and Terry Williams. My purpose in deposing Mr. Hobby and Mr. Knowlton would be to learn and discover the details of the purported sale of the Crowder Road properties. The purpose in taking Mr. Williams's deposition is to question him regarding his affidavit that was served on me on March 10, 2014. I want to question him about the opinions he expresses in his affidavit and have him review the affidavits

of Artie White and John McDougall. I want Mr. Knowlton to explain to me what debts were due that he accepted the $56,000 payment from Mr. Hobby and what was done with that money. Mr. Hobby and Mr. Knowlton are adverse parties, and I cannot obtain an affidavit from them setting forth facts essential to justify my opposition to the motions for summary judgment. Mr. Williams is an expert on behalf of Mr. Knowlton and I cannot seek an affidavit from him. If I am allowed to depose them prior to a ruling being made, I expect to obtain information from them that is supportive to the affidavits of Artie White and John McDougall. I ask that the Court order a continuance to allow time for these depositions to be taken. This action was filed on September 4, 2013 and is only some six months old." (R. pp. 1102-1103, ¶3)

She submitted the Affidavit of Arthur E. White, III which states:

"7. In my opinion, Mary T. Hobby should be allowed a reasonable period of time to conduct discovery regarding the issues set forth herein. In my opinion, further inquiry into the facts should be allowed as it is still necessary to determine the following: (a) whether the trustee had authority to enter into a contract with and sell real estate to the plaintiff from the trust without agreement by all parties, namely Mary T. Hobby; (b) even if the trustee had authority, which in my opinion he did not, what were the terms of the contract to sell the property and whether the terms of the contract were violated; and (c) whether the trust did in fact have title to the property the trustee purported to sell and transfer to the plaintiff." (R. p. 782, ¶7)

As shown above, there were many unanswered questions at the time the summary judgment motions were heard. Discovery was not complete. Neither the Trustee nor Mr. Hobby, both key witnesses, had not been deposed. Summary judgment should have been denied.

VI.

THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT THERE WERE NO DISPUTED FACTUAL ISSUES AS TO MS. HOBBY'S LIABILITY AS A HOLD OVER TENANT, WHEN HER COUNSEL ADMITTED THAT FACTUAL ISSUES EXISTED

On page 11 of the Order dated May 6, 2014, the circuit court judge found as

follows:

> "Accordingly, the Court finds no factual issue that precludes the Court from entering summary judgment in Husband's favor on the issue of Wife's liability as a holdover tenant. The only issue that remains to be determined is Husband's damages."

However, at the hearing on March 12, 2014, Mr. Hobby's attorney admitted that there were factual issues:

> "Now, what damages are going to be decided by a jury later, because whether she held over in good faith or in willful violation of the act I think are issues for the jury." (R. p. 161, lines 18-21)

These are factual disputes on the issue of liability that must be determined by a jury.

VII.

THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT MS. HOBBY AGREED TO MOVE OUT AND HAD BREACHED THE TERMS OF THE LIQUIDATING TRUST, WHEN THE TRUST IN NO WAY OBLIGATED HER TO VACATE

The trial judge held as follows:

> "By agreeing that her right to live in the House expired when the Trustee sold the House, Wife also agreed to move out when it was sold. The evidence is uncontested that she refused to move out and that she is still living in the House today."

However, the liquidating trust contains no agreement to move out by Ms. Hobby. It may have been wise to address this in the liquidating trust. However, The trust is silent on this issue. The circuit court judge had no authority to re-write the trust on this issue. *Jordan v. Security Group, Inc.,* 311 S.C. 227, 428 S.E.2d 705 (1993) (Court's duty is to enforce contract made by parties regardless of its wisdom or folly, apparent unreasonableness or parties' failure to guard their rights carefully.)

VIII.

THE CIRCUIT COURT JUDGE MISIDENTIFIED THE ELEMENTS OF A CIVIL ACTION FOR QUANTUM MERUIT AND HIS DECISION THAT QUANTUM MERUIT APPLIES MUST BE REVERSED

The circuit court judge made the following finding:

> "Finally, Husband moves for judgment as to liability on his claim for *quantum meruit*. 'The elements of a *quantum meruit* claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value.' *Earthscapes Unlimited, Inc. v. Ulbrich,* 390 S.C. 609, 616-17, 703 S.E.2d 221, 225 (2010)."

In *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach,* 341 S.C. 1, 532 S.E.2d 868 (2000), the Supreme Court held:

> "We adopt the *Scudder May* test as the sole test for a *quantum meruit*/quasi-contract/implied by law claim. We therefore overrule the following cases to the xtent they rely on this different *quantum meruit* test first announced by the Court of Appeals in *Webb v. First Fed. Savings & Loan Ass'n. supra*: (1) valuable services or materials were furnished; (2) to the defendant; (3) who accepted, used and enjoyed them; (4) under such circumstances as reasonably notified the defendant that the plaintiff was expecting to be paid by the defendant."

Here, Mr. Hobby provided no services or materials to Ms. Hobby. Mr. and Ms. Hobby were parties to a liquidating trust agreement. The doctrine of quantum meruit does not apply and the order of the circuit court judge finding that Ms. Hobby is liable on the quantum meruit claim must be reversed.

CONCLUSION

The circuit court judge went astray when he re-wrote the language of the agreement and changed the word "and" to the word "or" in the liquidating trust. He

went astray when he took on the role of fact finder and acted as a fact finder. He went astray when he proceeded to rule on the motions even though discovery was not complete. His order granting summary judgment in favor of Mr. Hobby and the Trustee should and must be reversed.

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June 2, 2015

IN 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. 2014-002410

Raymond D. Hobby . . . . . Respondent

vs.

Mary T. Hobby . . . . . Appellant

vs.

Frances B.B. Knowlton, individually and as trustee . . . . . Respondent

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that the Final Brief of Appellant, Mary T. Hobby., complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Susan J. Mondello, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served Benjamin C. Bruner, attorney for Respondent Raymond D. Hobby, and R. Davis Howser and Jeffrey Silverberg, attorneys for Respondent Frances B. Knowlton, with the following pleadings by mailing a copy of same, postage prepaid and return address clearly indicated, to them at the following addresses on the 2nd day of June, 2015.

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PLEADINGS:
Appellant's Final Brief

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