THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2010-CP-22-00512

Miriam Fabian., ...Appellant,

v.

Marilyn K. Fabian and Walter J. Pikul, as Co-Trustees of the Denis Fabian Family Trust and the Denis Fabian QTIP Trust,.....Respondents.

NOTICE OF APPEAL

Miriam Fabian appeals the Order dismissing Petitioner's Complaint and granting the Respondents' Counter-Claim for attorney's fees issued by the Honorable Larry B. Hyman, Jr., dated September 6, 2011 and filed September 27, 2011, and the Order denying Petitioner's Motion for Reconsideration issued by the Honorable Larry B. Hyman, Jr., dated April 16, 2012 and filed May 1, 2012. Appellant received the filed Order Denying the Petitioner's Motion for Reconsideration on May 8, 2012. A copy of each of the Orders is attached hereto.

[Signature page follows]

SOWELL GRAY STEPP & LAFFITTE, LLC

By: _____

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Marilyn K. Fabian and Walter J. Pikul, as Co-Trustees of the Denis Fabian Family Trust and the Denis Fabian QTIP Trust,.....Respondents.

PROOF OF SERVICE

I, the undersigned Attorney of the law firm of Sowell Gray Stepp & Laffitte, LLC, attorneys for the Appellant in the above-referenced matter, certify that I have served the Notice of Appeal on the person(s) named below by placing a copy of same in the United States Mail on May 14, 2012, postage prepaid, addressed as follows:

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May 14, 2012

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May 15, 2012

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

Re: Miriam Fabian vs. Marilyn K. Fabian and Walter Pikul, as Co-Trustees of The Denis Fabian Family Trust and the Denis Fabian QTIP Trust
Case No.: 2010-CP-22-00512

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, are the original and one copy the following:

1. Notice of Appeal;
2. Proof of Service of the Notice of Appeal on the Respondents (attached to Notice of Appeal);
3. A copy of the orders which are to be challenged on appeal (attached to the Notice of Appeal);
4. Our Firm's check in the amount of One Hundred and 00/100 Dollars ($100.00) representative of the filing fee.

I would appreciate your filing as appropriate and returning a clocked-in copy via our courier. By copy of this correspondence, I am notifying opposing counsel of this communication with the court.

Thank you for your assistance, and should you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Amy L.B. Hill

SOWELL SG GRAY

Litigation is our Business.

ALBH:kmw

Enclosures

cc: Walker H. Willcox, Esquire
Mark W. Buyck, Jr., Esquire

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN)	C/A NO. 2010-CP-22-512
Miriam Fabian, Petitioner,	
vs.	**ORDER DENYING THE PETITIONER'S MOTION FOR RECONSIDERATION**
Marilyn K. Fabian and Walter J. Pikul as Co-Trustees of the Denis Fabian Family Trust and The Denis Fabian QTIP Trust,	
Respondents.	

On August 8 and 9, 2011, this matter was tried non-jury. At the conclusion of the case, the Court requested the parties submit proposed orders within 14 days. On September 6, 2011, the Court signed the Findings of Facts and Conclusions of Law which was submitted by the Respondents. The Findings of Facts and Conclusions of Law denied the relief sought in the complaint and granted the Respondents' request for attorneys' fees. On September 22, 2011, the Respondents received the signed order and they served it on the Petitioner, Miriam Fabian ("Miriam"). Miriam subsequently moved, pursuant to Rule 59(e), SCRCP, to amend the Court's order. The Respondents submitted a brief in opposition, and the Court heard the parties' arguments on March 22, 2012.

ANALYSIS

"[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Wright, et al, Federal Practice and Procedure § 2810.1, 124 (2d ed. 1995). "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.

App. 1990). Moreover, a Rule 59(e) motion may not be used to relitigate old matters. Pac. Ins. Co. v. Am. Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998).[1] Mere disagreement does not support a Rule 59(e) motion. Hutchinson v. Staton, 994 F.2d 1076, 1082 (4th Cir. 1993).

The Fourth Circuit Court of Appeals recognizes only three grounds to grant a motion to amend: (1) to accommodate an intervening change in controlling law, (2) to account for new evidence not available at trial, or (3) to correct a clear error of law or prevent a manifest injustice. Pac. Ins. Co. v. Am. Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). Miriam asserts neither of the first two grounds to support her motion. Instead, Miriam argued at the hearing that the Court's findings that the Trust grants broad discretion to distribute principle and income to Marilyn Fabian ("Marilyn") and that Marilyn is the beneficiary to the Q-Tip trust were irrelevant. Miriam also argued that the Court's conclusion that the Statute of Limitations bars this action was in error.

I. The Court correctly found that the Trust grants broad discretion to distribute income and principal to Marilyn and that Marilyn is the only beneficiary to the Q-Tip trust.

Miriam's counsel repeatedly asked witnesses questions regarding trust distributions to Marilyn, the reasons for the amount of the distributions to Marilyn, accountings of the Trusts, and the value of the Q-Tip trust. Miriam's counsel pursued this line of questioning to support her claim that the Respondents asked for an interpretation and reformation of the subject trust to provide for Erika Fabian to punish Miriam for asking for an accounting. Trial Transcript, p. 272, l. 15-p. 284, l.16. The Respondents countered with evidence that Marilyn was the only

[1] South Carolina courts look to federal law to interpret state rules of civil procedure that track the language of a corresponding federal rule. Gardner v. Newsome Chevrolet-Buick, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) and The Beach Company v. Twillman, Ltd., 351 S.C. 56, 62, 566 S.E.2d 863, 865-866 (Ct. App. 2002).

beneficiary of the Q-Tip trust and the Respondents did not improperly withhold information from Miriam and that the distributions to Marilyn were proper. The Court's findings on these factual issues, which were introduced by Miriam, were relevant and necessary to dispel the notion that the Respondents either used bad faith or possessed an improper motive against Miriam.

Moreover, Miriam admitted the evidence regarding the distributions, trust value, and accounting, and she did not object when the Respondents entered their evidence on the issues. Evidence admitted without objection is competent, and the trier of fact may make findings based on such evidence. Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 266, 442 S.E.2d 611, 616 (1994). Miriam waived her ability to either exclude or limit the evidence by failing to object at its entry.[2]

Miriam placed the distributions, value and accounting claims at issue, and the Court entered necessary findings and conclusions based on the claims and evidence presented at trial. Miriam's request, post judgment, that the Court limit the effect of the evidence in her favor is without merit and is denied.

II. The Court correctly held that the Statute of Limitations bars this action

The Court found that Miriam knew about her claims in October 2006.[3] Miriam filed this action more than three years after her claims accrued, on January 22, 2010. The Court correctly

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[2] The Court notes that Miriam placed all of the disputed findings regarding distribution, accountings, and identification of beneficiaries in her proposed order.

[3] Miriam and Uri testified that they knew in October 2006 that Marilyn was "no longer defending the trust." Miriam's damages claim includes attorneys' fees she incurred in November 2006. The evidence that supports the finding that Miriam knew about her claims in October 2006 is overwhelming.

held that the general three year statute of limitations precludes this action.[4]

In addition, on April 30, 2007, Miriam received the Respondents' amended answer in the first action clearly expressing that Respondents were joining with Erika Fabian to interpret and/or reform the Trust. A beneficiary has one year "after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust." S.C. Code § 62-7-1005(a). The Court held that the amended answer was a report as set forth in Code Section 62-7-1005(a). The term "report" is not limited to either an accounting or a financial document. Rather, the Trust Code describes a report as follows:

> The Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality . . . **The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.**

S.C. Code § 62-7-813, comments (emphasis added).

The April 30, 2007, amended answer satisfies the notice requirement set forth in Section 62-7-1005(a). Therefore, this action is also barred by S.C. Code § 62-7-1005(a). The Court did not err in finding and concluding that Miriam's claims are time barred.

III. The Court correctly concluded that the Trust was entitled to attorneys' fees.

A. The award of attorneys' fees was proper.

Miriam filed this action and a third action a few months before the trial of the first action involving Erika Fabian. Miriam presented claims in this action that required the parties to litigate, for a second time, whether Denis Fabian intended Erika Fabian to receive a share of the

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[4] The three year statute of limitations is set forth in S.C. Code § 15-3-530.

Family Trust. Moreover, Miriam questioned witnesses and presented evidence regarding the distributions to Marilyn, the Trust value, and accountings, which are at issue in the third action between these same parties. Walt Pikul testified that the multiple lawsuits have caused a drain on him and the trusts. Similarly, Marilyn, who is Denis's 80 year old widow, testified that the continuous litigation has been very stressful on her.

"[T]he Court, as justice and equity may require, may award costs and expenses, including reasonable attorneys' fees, to any party to be paid by another party or from the trust that is the subject of the controversy." S.C. Code § 62-7-1004. The terms of Code Section 62-7-1004 do not require a finding of bad faith but allow an award of attorneys' fees based on equitable grounds.[5] The Court correctly found and concluded that Miriam filed this action to advance her interest and she did so at the cost of the Trusts, the other beneficiaries, and the Trustees. Therefore, the Court correctly concluded that Miriam must reimburse the Trust the attorneys' fees it expended to defend this action pursuant to S.C. Code § 62-7-1004.

B. Miriam waived her claim that the attorneys' fees were unreasonable.

The Respondents submitted contemporaneous time entries evidencing their claim for attorneys' fees. The entries were admitted without objection and with no argument that they were unreasonable. Miriam now challenges the fees as unreasonable for the first time in her Rule 59(e) Motion. A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Hickman, 301 S.C. at 456, 392 S.E.2d at 482.

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[5] The comments to Section 62-7-1004 do not mandate a finding of bad faith to award attorneys' fees. Rather, the first comment states that the Court's authority to award attorneys' fees is grounded in equity.

Miriam waived her argument that the fees are unreasonable.[6]

Miriam fails to carry her burden to present any grounds sufficient to prevail on a Rule 59(e) motion. Consequently, the Court denies the motion.[7]

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge for the Fifteenth
Judicial Circuit Court of Common Pleas

Date: 4-14-2016

Conway, South Carolina

[6] The Court notes that the attorneys' fees submitted by the Respondents were less than the fees submitted by Miriam.

[7] Miriam's remaining claims of error are mere disagreements with the Courts findings and conclusions, and the claims do not provide grounds to amend the Findings of Facts and Conclusions of Law.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	C/A NO. 2010-CP-22-512

Miriam Fabian,
Petitioner,

vs.

Marilyn K. Fabian and Walter J. Pikul as Co-Trustees of the Denis Fabian Family Trust and The Denis Fabian QTIP Trust,
Respondents.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

On January 22, 2010, the Petitioner commenced this action alleging that the Respondents breached various trustee duties. The Respondents timely answered and raised a counter-claim for attorneys' fees. On August 8 and August 9, 2011, the Court conducted the non-jury trial of the matter. After hearing testimony, gauging the credibility of the witnesses, and reviewing the exhibits and the evidence presented, the Court, pursuant to Rule 52 of South Carolina's Rules of Civil Procedure, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACTS

1. On May 25, 1990, Denis Fabian ("Denis") executed a trust agreement ("Trust Agreement") that established two trusts upon his death: (1) the Fabian Q-Tip Trust and (2) the Fabian Family Trust. Petitioner's Exhibit 2, Article V, ¶ 1. Upon Denis's death, his entire estate was to be placed in the two trusts. Id.

2. Marilyn Fabian was 81 years old at the time of this trial. Marilyn Fabian ("Marilyn") and Denis married in 1973 which was later in both of their lives. Trial Transcript, p.

186, l. 12. Denis and Marilyn had no children together. However, Marilyn had two daughters from a previous marriage, who are beneficiaries to the trusts.

3. Denis had four siblings, including one who lived in Israel named Eli Fabian ("Eli"), and two nieces. Trial Transcript, p. 40 and p. 42. One niece was Erika Fabian ("Erika"), who was the daughter of one of Denis's siblings who died in a concentration camp during World War II (Trial Transcript, p. 42, l. 12) and another niece was Miriam Fabian ("Miriam") who is Eli's daughter. Trial Transcript, p. 42, l. 6. Miriam resides in Tel Aviv, Israel with her husband Uri Fabian ("Uri"). Miriam is in her seventies and Uri is 78 years old. Trial Transcript, p. 80, ll. 21-24.

4. Marilyn and Denis met and lived together for the majority of their married lives in Fayetteville, North Carolina. Trial Transcript, p. 186, ll. 8-14. The two subsequently moved to Debordieu, South Carolina to retire. Trial Transcript, p. 248, l. 17-p. 249, l. 19.

5. In or around 1990, Denis engaged the services of an attorney in Pawleys Island, South Carolina named Ross Lindsay, III ("Buddy Lindsay"). Trial Transcript, pp. 320, ll. 6-7. Buddy Lindsay drafted the Trust Agreement for Denis. Id.

6. Walt Pikul ("Walt") is a CPA from Fayetteville, and he served as Denis's accountant and business associate for approximately 20 years. Trial Transcript, p. 255, ll. 22-25.

7. The Trust Agreement and subsequent amendments appointed Marilyn, Walt, and Buddy Lindsay as the Trustees of the two trusts. Petitioner's Exhibit 2.

8. Denis and Eli were close to the same age, and they remained in contact mainly through telephone correspondence during the waning years of their lives. Trial Transcript, p. 40, ll. 9-12 and p. 41, ll. 18-24. Eli was close to 80 years old when Denis created the Trust

Agreement, and he was a heavy smoker who was in poor health in the 1990's. *See* Trial Transcript, p. 78, ll. 6-11 (Eli was 90 years old when he died in 2000 meaning he was around 80 in 1990 when Denis created the Trust Agreement) and Trial Transcript, p. 47, ll. 13-19. Miriam and Erika only made contact with Denis sporadically. Trial Transcript, p. 78, l. 24-p. 79, l. 3 and p. 81, ll. 14-19. Miriam and Uri personally visited Denis once or twice during the last ten years of his life, and Erika made one visit to Denis and Marilyn one or two years before Denis's death. Id.

9. Denis died on February 5, 2000 in South Carolina, and his entire estate was placed in two trusts created in the Trust Agreement. Pet. Ex. 2, Article V, ¶ 1. The bulk of the estate was placed in the Fabian Q-tip trust ("Q-Tip Trust"), and the remaining assets were placed in the Fabian Family Trust ("Family Trust"). Id. and Trial Transcript, p. 301, ll. 9-18. Marilyn became the life beneficiary of both trusts upon Denis's death. Id. at Article VI, ¶ 1 and VIII, ¶ 1.

10. The Trust Agreement grants broad discretion to the Trustees to distribute income and principal from the Q-Tip Trust and the Family Trust to Marilyn and her grandchildren. Pet. Ex. 2, Article VI, ¶ 2 and Article VII, ¶ 1. Upon Marilyn's death, the balance held in the Q-Tip Trust pours over to the Family Trust. Pet. Ex. 2, Article VI, ¶ 5. Marilyn is the only beneficiary to the Q-Tip trust. Id. and Trial Transcript, pp. 301, l. 21-p. 302, l. 7. All trust expenses are paid from the Q-Tip Trust. Trial Transcript, p. 301, ll.19-20. The identities of the beneficiaries to the Family Trust and the proper distribution of the trust balance remaining at Marilyn's death from the Fabian Family Trust, if any, is the source of this and other litigation.

11. The Trust Agreement provides as follows regarding the distribution of the trust balance from the Family Trust after Marilyn's death:

> Upon or after the death of the survivor of my said spouse and me, my Trustee shall divide this Trust as then constituted into two (2) separate shares so as to provide One (1) share for the children of Marilyn K. Fabian and One (1) share for my brother, Eli Fabian. If either of my said wife's children predceases [sic] her, the predeceased child's share shall be distributed to his or her issue per stirpes. If my said brother, ELI FABIAN, predeccases me, then one half of his share shall be distributed to his daughter, MIRIAM FABIAN, or her issue per stirpes; and the other half of his share shall be distributed to my niece, ERICA [sic] FABIAN, or her issue per stirpes.

Trust Agreement Article VII ¶ 2. This provision is referred to as "Paragraph 2."

12. On March 12, 2000, weeks after Denis's death, Eli died. Trial Transcript, p. 47, ll. 22-25. Miriam was his only surviving heir.

13. A year after Denis's death in 2001, Miriam and Uri visited Marilyn in South Carolina and went to see Buddy Lindsay. Trial Transcript, p. 53, ll. 20-23. Buddy Lindsay communicated to Miriam his understanding that Eli's estate was the beneficiary of half of the remainder of the trust balance. Trial Transcript, p. 323, ll. 9-12.

14. Erika also visited Marilyn after Denis's death, and she spoke with Buddy Lindsay as to whether she was a beneficiary to the trusts. Buddy Lindsay, after some initial confusion, advised her that she was not a beneficiary because Eli survived Denis. Trial Transcript, p. 324, ll. 14-22.

15. Erika disagreed with the interpretation set forth by Buddy Lindsay and Miriam, and she retained James Matthew Dillon ("Mr. Dillon"), who is an attorney in Mt. Pleasant, South Carolina, to represent her. Trial Transcript, p. 113, ll. 2-5. Mr. Dillon, after vetting the disputed trust language to experts he knew, concluded that the trust language was ambiguous and a mistake. Id. at ll. 8-13.

16. Mr. Dillon testified that the experts he consulted with agreed that the trust

language was ambiguous in that it provides a distribution plan to Miriam and Erika or their issue per stirpes only if Denis, the settlor, survives Eli and not Marilyn, the life beneficiary. Trial Transcript, p. 147, l. 3-p. 148, l. 9. The substitution of the word "me" for "her" would resolve the problem and provide the Trustees a guide as to the proper distribution when Marilyn dies. Id. Paragraph 2 does not instruct the Trustees what to do with "Eli's share" if Eli predeceased Marilyn. Trial Transcript, p. 333, ll. 3-6.

17. On July 16, 2004, Mr. Dillon filed a petition on behalf of Erika in the Georgetown County Probate Court alleging that the trust language was ambiguous and reformation was necessary to correct a mistake that frustrates Denis's purpose which was stated in the Trust Agreement. Petitioner's Exhibit 5, ¶ 5. This action is referred to as the "first action."

18. Mr. Dillon named the Trustees and anyone who might be affected by the proposed reformation as respondents. Trial Transcript, p. 115, ll. 2-8. Erika's petition did not request damages or any monetary relief from the trust; rather, the petition sought a reformation to ensure that Erika receive a share after Marilyn's death. Petitioner's Exhibit 5. Mr. Dillon testified that Erika was not "seeking anything from anybody[,][w]e were asking the Court to fix [Paragraph 2]." Trial Transcript, p. 146, ll. 16-24.

19. Mr. Dillon retained two experts to review the Trust Agreement, and they opined to Mr. Dillon that the disputed provision was ambiguous on its face. Trial Transcript, p. 122, l. 1-p. 124, l. 16 and p. 150, l. 21-p. 151, l. 2. Professor Brent Hellwig, who is a professor of trusts and estates at the University of South Carolina School of Law, was one of the experts. Trial Transcript, p. 118, l. 21-p. 119, l. 11.

20. Erika's petition was served on Buddy, Walt, and Marilyn as Trustees. Trial

Transcript, p. 329, ll. 4-17. The Trustees agreed that the trust needed to hire two separate attorneys to represent it. Trial Transcript, p. 329, ll. 4-23. Buddy felt that as the drafter he could not take a position in the fight between Erika and Miriam. Id.

21. Walt testified that he consulted with North Carolina attorneys about the disputed provision to determine the best course of action. Trial Transcript, p. 289, ll. 9-13. These attorneys agreed that the Trust Agreement was a "mess" and advised him to find South Carolina counsel. Id. Walt spoke to the Trusts' financial advisor, Herb Ormond then with A.G. Edwards, Inc., for a recommendation of a South Carolina attorney, and Mr. Ormond recommended Mark Buyck to represent the Trusts. Id. at p. 291, ll. 4-20.

22. When the Respondents contacted and engaged Mark Buyck on behalf of the trust, they only had a few days to answer the Petition. Id. at ll. 21-25. Initially, the Respondents filed an answer that denied the Trust Agreement was ambiguous and required reformation. Petitioner's Exhibit 10.

23. Mr. Dillon testified that Miriam was served on or around December 2004. Trial Transcript, p. 117, ll. 13-19. Miriam engaged an attorney, Chase McGill, to protect her interest in the case, and he answered the petition on Miriam's behalf. Trial Transcript, p. 61, ll. 14-25.

24. Mr. Dillon attributed any delay or idleness in the initial phase of the first action occurring from 2005 to 2007 to normal trial practices and procedures and not based on a lack of evidence supporting Erika's claims. Trial Transcript, p. 117, ll. 8-25 and p. 151, ll. 7-14. Mr. Dillon testified that his experts held their opinions that the trust was ambiguous and required reformation regardless of the Respondents' position and testimony. Trial Transcript, p. 150, ll. 12-25.

25. Miriam testified that in March 2006, Marilyn called her and questioned why the trust should defend Miriam. Trial Transcript, p. 63, ll. 2-10. Based on the telephone call from Marilyn, Miriam testified that she was concerned about the case, and she retained Tim Thompson in place of Mr. McGill to represent her. Id. at p. 64, ll. 5-16. Uri testified that the telephone call occurred in October 2006 and that he and Miriam knew then that "Marilyn was not going to defend the trust." Trial Transcript, p. 174, ll. 21-25.

26. Miriam testified that sometime in 2007, her attorney requested an accounting of the Trust. Trial Transcript, p. 65, ll. 13-18. Miriam admitted that she received a response and that she learned the amount that Marilyn received a month from the Trusts. Id. at p. 65, ll. 17-18 and p. 66, ll. 6-9.

27. On March 30, 2007, Marilyn called Mr. Dillon attempting to discuss the action with him. Trial Transcript, p. 127, ll. 19-p. 128, ll. 25. Marilyn told Mr. Dillon that "the case was a horrible situation, that it had been caused by a mistake in the Trust, and that it was going to work a terrible injustice." Id. at ll. 12-16.

28. On April 9, 2007, the Respondents amended their response to Erika's petition to agree that the language was ambiguous and required reformation.

29. Marilyn was questioned during the trial and in the first action about her basis to join with Erika's position in the first action. Marilyn testified that she and Denis spoke about his estate plans on frequent occasions as husband and wives ordinarily do. Trial Transcript, p. 217, ll. 1-4. Marilyn and Denis discussed Denis giving his money to charitable institutions, but he changed his mind based on allegations in the Wall Street Journal that some charitable institutions wasted money. Id. at ll. 4-8. Marilyn suggested to Denis that he give half of the trust balance to

her family and the other half to his family. Id. at ll. 11-18. Marilyn testified that Denis described in detail on numerous occasions that after his death his family share would go half to Erika and half to Miriam. Id. at p. 218, ll. 20-25. Marilyn was present when Denis told Erika personally that he was going to take care of Erika. Id. at p. 220, ll. 11-14.

30. Marilyn testified numerous times after repeated questioning during the trial that her understanding that Denis intended to distribute a share of the trust balance to Erika never changed. Trial Transcript, p. 221, l. 8-p. 222, l. 6. The first response to the Petition in 2004 was the subject of a mistake. Trial Transcript, p. 215, ll. 4-14.

31. Walt testified that he met with Denis about four times a week, typically at the Fayetteville post office, and they often discussed Denis's estate planning. Trial Transcript, p. 286, l. 11-p. 287, l. 25. Denis told Walt after reflecting about Erika's father dying in a concentration camp that Denis intended to take care of Erika. Trial Transcript, p. 258, ll. 3-21. Walt corroborated Marilyn's testimony that Denis's initial desire was to distribute the trusts' remainder assets to charitable institutions but Denis changed his mind upon learning of the article in the Wall Street Journal. Trial Transcript, p. 257, ll. 6-14. Denis told Walt that Marilyn suggested that Denis should divide the remainder of the trust balance between her family and his family, which Denis ultimately agreed to do. Id.

32. Walt and Denis reviewed the Trust Agreement together. Walt questioned Denis about Paragraph 2, but Denis did not give Walt clear guidance. Trial Transcript, p. 288, l. 19-p. 289, l. 8. Walt in hindsight wishes he would have been more forceful in demanding an explanation of Paragraph 2 from Denis, but Walt believed at the time that he would get a chance to discuss the paragraph with Denis before he died. Trial Transcript, p. 288, l. 19-p. 289, l. 8.

33. Walt consulted with attorneys in North Carolina about the provision, but they did not provide a definitive answer. Id. at 289, ll. 9-13.

34. Walt testified that his position never changed regarding Denis's intent and that he simply did not have time to interpose an opinion regarding the proper response to Erika's petition in 2004. Trial Transcript, p. 291, l. 4-p. 292, l. 11. Walt relied on his counsel to handle the matter. Id. at p. 292, ll. 12-20.

35. After the Respondents joined with the request to reform the trust, Miriam petitioned to remove the case to the Court of Common Pleas, which Erika contested, and Miriam prevailed. Trial Transcript, p. 148, l. 20-p. 149, l. 4. After removal, Miriam filed a motion for summary judgment arguing that the Trust Agreement was clear and unambiguous and that the reformation statute was inapplicable to the trust. Id. at ll. 9-20 and Respondents' Exhibit 2. The motion was denied and Miriam moved to amend the Court's decision, which was denied. Respondents' Exhibit 3. Miriam moved to strike Marilyn's affidavit stating that Denis intended to distribute a share of the trust balance to Erika, and that motion was denied. Trial Transcript, p. 149, l. 21-p. 150. Miriam subsequently moved to exclude extrinsic evidence about Denis's intent at trial, and that motion was denied. Id at p. 150, ll. 5-11. Miriam filed a cross claim against the Respondents in the first action.

36. The case was scheduled for trial in June 2010 nearly six years after Erika filed the petition. Trial Transcript, p. 157, ll. 11-14. Mr. Dillon testified, and the Court finds, that Miriam's desire to defend her potential share of the trust to the fullest extent is what kept the case pending for six years. Id. at p. 158, ll. 13-17. The Trustees, including the Respondents, neither invited nor caused the first action to last six years and end in a trial. Id. at p. 159, ll. 14-16. In

contrast, the Respondents moved to stay the first action to allow the Court to resolve whether reformation was proper thus saving the expense of a trial. Respondents' Exhibit 9.

37. A few months before trial, Miriam filed this action and a third action against the Respondents. Trial Transcript, p. 91, ll. 1-25. Miriam provided no explanation as to why she filed three separate actions instead of litigating all of her claims in the first action.

38. After the first day of trial on June 7, 2010, the Trustees met and unanimously agreed to settle the action with Erika for $175,000.00. Respondents' Exhibits 6 and 7 and Trial Transcript, p. 295, ll. 18-20. Walt and Buddy Lindsay testified that the settlement was in the best interest of the trust and its beneficiaries because it finally ended the litigation over Erika's claims. Trial Transcript p. 297, ll. 5-9 and p. 335, ll. 14-18, and p. 338, ll. 19-25. Mr. Dillon and Buddy Lindsay agreed that the losing party of the first trial would appeal causing the Trust to incur more litigation costs. Trial Transcript, p. 145, l. 17-p. 146, l. 11, p. 335, ll. 14-18 and p. 338, ll. 19-25.

39. The settlement was a complete and final resolution of Erika's claim and it did not benefit the Respondents at all. Trial Transcript, p. 338, ll. 2-10. The settlement only benefitted any share that Miriam may receive from the Family Trust when Marilyn dies. Id. at ll. 11-15.

40. The settlement was read to the Court in the first action on June 8, 2010 with the Respondents and Miriam present. Trial Transcript, p. 92, ll. 6-11. The Court ended the first action without objection from Miriam. Id. at p. 94, ll. 8-14 and Respondents' Exhibit 4, p. 16, ll. 5-20.

41. The first action settled, but Miriam has two actions pending against the Respondents and the Trust. Walt testified that the multiple lawsuits filed by Miriam have

imposed a drain on him and the trust. Trial Transcript, p. 293, l. 11-p. 294, l.3. Marilyn testified that the continuous litigation has been very stressful on her. Trial Transcript, p. 244, ll. 23-25. As of August 4, 2011, the Trust has incurred $38,290.11 in legal fees to defend this action. Respondents' Exhibit 8.

42. The trust has paid Willcox, Buyck & Williams, P.A. attorneys' fees totaling approximately $205,000.00. However, this amount was expended for attorney's fees and costs incurred in all three actions filed by Miriam and was not limited to fees charged in the first action. Trial Transcript, p. 315, ll. 11-15. Miriam claims that she expended more than $220,000.00 solely in the first action. Trial Transcript, p. 70, ll. 3-17. No evidence exists that the attorneys' fees the trust paid to Willcox, Buyck & Williams, P.A. in the first action were unreasonable.

43. The Court had the opportunity to gauge the credibility of the Respondents when they testified about their reasoning for asking the Court in the first action to reform the trust to provide Erika a remainder share. The Court finds that their position was taken in good faith and based on a genuine and reasonable belief that Denis intended for Erika to receive a share of the trusts. Their position was not the subject of an improper baseless preference to Erika.

44. In addition, Miriam's proffered interpretation of Paragraph 2 leaves Eli's estate as a remainder beneficiary of the Family Trust. Miriam and Erika are close to the same age as Marilyn. Erika's reformation claim if successful would have allowed the Trustees to distribute the shares to Miriam and Erika or directly to their issues per stirpes if the nieces predeceased Marilyn. Now, if Marilyn predeceases Miriam, the Trustees must distribute a share, if any is remaining, to Eli's estate, which may have been closed eleven years ago. Trial Transcript, p.

294, l. 7-p. 295, l. 13. If Miriam predeceases Marilyn, then the Trustees do not know how to handle Eli's share, and it will likely have to be placed in Eli's estate and then on to Miriam's estate. Paragraph 2 on its face provides the Trustees no guidance when distributing Denis's family shares after Marilyn's death.

45. The Court finds that the Respondents did not intend to and did not gain any benefit by joining with Erika seeking a reformation of the trust and settling the first action. The Respondents did not drive the litigation in the first action. Miriam offered no credible evidence to support her notion that the Respondents caused her to incur approximately $220,000.00 in legal and expert fees in the first action. Miriam argued that the trust expended more than $200,000.00 in defending the Respondents in the first action. However, Walt testified that the figure set forth by Miriam was the running total for all three actions and was not limited to the first action. The Court finds that Erika's claim and Miriam's zealous protection of her purported share were the direct causes of the extensive litigation and litigation expenses in the first action and not the Respondents.

46. Miriam filed this action and a third action against the Respondents a few months before the trial in the first action. ~~The timing of the this action and the third action lead the Court to find that Miriam filed the lawsuits to dissuade the Respondents from testifying against her in the first trial.~~ JBH

In addition, the issues of whether Paragraph 2 is ambiguous and whether Denis intended to distribute a share to Erika were litigated in the first action now have again been litigated in this action. Moreover, Miriam in this action raised questions regarding the value of the trusts and distributions to Marilyn, which are at issue in the third action. The duplicate claims and

JBH

arguments lead the Court to find that Miriam is unduly causing a drain on the trust assets and Trustees to the detriment of the trust and the trust beneficiaries.

47. The Trustees unanimously agreed to settle the claim with Erika and received a full and final release from Erika and her heirs. The Trustees entered into the settlement for the best interests of the trust and its beneficiaries to limit litigation costs. The Respondents gained nothing by settling with Erika. The party who benefitted from the settlement was Miriam. The Court finds that the settlement with Erika was proper and in the best interests of the trust.

CONCLUSIONS OF LAW

1. The Trust Agreement provides the following authority to the Trustees when handling claims for or against the trust:

> (17) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the Trust Estate as the Trustee shall deem best.

Petitioner's Exhibit 2, Article X ¶ 17, p. 13. The Trust Agreement provides the Trustees broad authority in handling or dealing with claims involving the trust, and the Court holds that it authorized the Respondents on behalf of the trust to request a reformation of the trust.

2. "A trustee must administer a trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the South Carolina Trust Code." S.C. Code § 62-7-801. The South Carolina Trust Code defines the "terms of a trust" as follows:

> "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument **or as may be established by other evidence that would be admissible in a judicial proceeding.**

S.C. Code § 62-7-103(17)(emphasis added).

Extrinsic evidence is admissible in a judicial proceeding to interpret an ambiguous trust. Fabian v. Fender, 326 S.C. 349, 353, 483 S.E.2d 474, 476 (Ct. App. 1997). Although the words of a trust are the first resort, the paramount concern in a construction case is determining a settlor's intent. Epworth Children's Home v. W.F. Beasley, 365 S.C. 157, 167, 616 S.E.2d 710, 715 (2005). Extrinsic evidence is also admissible in a judicial proceeding to determine whether a latent ambiguity exists (Id.) and to prove and correct a scrivener's error. Fenzel v. Floyd, 289 S.C. 495, 498, 347 S.E.2d 105, 107 (Ct. App. 1986).[1] Extrinsic evidence is admissible to reform the terms of a trust, even if it is unambiguous, to correct mistakes. S.C. Code § 62-7-415.

Denis told the Respondents on numerous occasions that he intended to distribute assets to Erika. Paragraph 2 does not contemplate the likely event of Eli predeceasing Marilyn and it provides no guidance to the Trustees on how to distribute Eli's share if Eli does not survive distribution. The paragraph is ambiguous and Miriam's proposed interpretation that Eli's estate was to take a share of the Family Trust directly contradicts what Denis told the Respondents he wanted.

Also, interpreting Paragraph 2 to distribute assets to Eli's estate more than a decade after he died and then possibly distributing the assets to Miriam's estate if she predeceases Marilyn is an absurd and inefficient result. The Court holds that Paragraph 2 is ambiguous and the Respondents were authorized to utilize extrinsic evidence to administer the trust during the first action to protect the interest of the beneficiaries, which they reasonably believed included Erika.

3. In addition, "it is a well settled right of a trustee that wherever there is a *bona fide*

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[1] The rules of construction for trusts and will are the same. Epworth Children's Home v. W.F. Beasley, 365 S.C. 157, 167, 616 S.E.2d 710, 715 (2005).

doubt as to the true meaning and intent of the provisions of the instrument creating a trust or as to the particular course [the trustee] ought to pursue, the trustee is always entitled to maintain a suit in equity at the expense of the trust estate and obtain a judicial construction of the instrument and directions as to [the trustee's] own conduct." Bangert v. The Northern Trust Company, 839 N.E.2d 640, 646 (Ill. Ct. App. 2005). The Restatement Third of Trust states that:

> a trustee may apply to a court for instructions regarding the administration or distribution of a trust if there is a reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of trust provisions.

Restatement (Third) of Trusts § 71. The Respondents possessed a reasonable basis and *bona fide* doubt about the true meaning of Paragraph 2, and they were under no duty to "defend the trust" at all costs or face liability to Miriam.

4. The Court holds that the Respondents did not violate any trustee or fiduciary duties allegedly owed to Miriam by requesting that the Court reform the trust to conform with Denis's intent.

5. The Trust Agreement grants the Trustees the following authority to hire professionals on behalf of the Trust:

> (18) To employ and compensate agents, accountants, investment advisers, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, realtors, and other assistants and advisors deemed by the Trustee needful for the proper administration of the Trust Estate, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided he was selected and retained with reasonable care.

The trust authorized the Respondents to retain legal counsel "if the Trustee deemed representation needful for the proper administration of the estate." The Respondents had to answer Erika's petition or go into default, and the Trustees deemed it necessary to hire separate

legal counsel for the Trust. The Respondents hired their attorneys through advice of North Carolina counsel and the trusts's financial advisor Herb Ormond. The Respondents selected and retained Mark Buyck with reasonable care, and they are not liable for any damages allegedly caused by a mistaken first answer.

6. The measure of damages for a breach of trust is as follows:

A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) the profit the trustees made by reason of the breach.

S.C. Code § 62-7-1002. Miriam fails to demonstrate that the Respondents breached any trustee duties. In addition, Miriam fails to demonstrate that the alleged trust violations caused either her or any beneficiaries to suffer any damages. The Respondents received no benefit in the first action, and the Respondents did not needlessly drive up the cost of litigation. Miriam incurred her attorneys' fees defending Erika's claim against her alleged half of the trust for her benefit and not the trust. The settlement with Erika was in the best interests of the trust and to Miriam's benefit. Miriam fails to demonstrate that either she or the trust suffered any damages attributable to the Respondents.

7. The South Carolina Trust Code contains the following statute of limitations for actions against a trustee:

(a) Unless previously barred by adjudication, consent, or limitation, a beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary or on behalf of a beneficiary against a trustee for breach of trust must be commenced within three years after the first to occur of:

(1) the removal, resignation, or death of the trustee;
(2) the termination of the beneficiary's interest in the trust; or
(3) the termination of the trust.

S.C. Code § 62-7-1005.

Miriam and Uri testified that they knew that Marilyn was "no longer defending the trust" in October 2006. Miriam received information that adequately disclosed Marilyn's position in October 2006 and her claim accrued at that time. In addition, on April 30, 2007, the Respondents served their amended answer on Miriam. The amended answer provided Miriam sufficient information to put her on notice of the claims she asserts in this action. Miriam filed this action on January 22, 2010, more than three years after her claim accrued and more than 2 years after she received the Respondents amended answer. Miriam's claims are time barred.

8. "In a judicial proceeding involving the administration of a trust, the court as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is subject of the controversy." South Carolina Code § 62-7-1004.

The Court holds that justice and equity require it to charge Miriam with the legal fees that the trust incurred in defending this action. The action involves duplicate litigation and was not filed to advance the interest of the trust or other beneficiaries. This litigation has placed a strain on trust financial resources and on the Trustees themselves. Consequently, the Court holds that

equity and justice require that it award the trust the reasonable attorneys' fees it expended to defend this action, which are $38,290.11.

NOW THEREFORE, the Court dismisses the Complaint and grants the Respondents' Counter-Claim for attorneys' fees in the amount of $38,290.11.

IT IS SO ORDERED.

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge for the Fifteenth Judicial
Circuit Court of Common Pleas

Date: 9-6-2011

Conway, South Carolina