STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
S. JACKSON KIMBALL, SPECIAL CIRCUIT COURT JUDGE
Case No. 2015-CP-46-01409
Appellate Case No.: 2016-001921

IN RE:

Deborah Dereede Living Trust dated December 18, 2013

Hugh Dereede and Tyre Dealer Network Consultants, Inc., ... Respondents,

v.

Courtney Feeley Karp, Individually and As Trustee of the Deborah Dereede Living Trust dated December 19, 2013 and Michael Fehily, as a qualified beneficiary of the Deborah Dereede Living Trust dated December 18, 2013, ... Defendants,

Of which

Courtney Feeley Karp, Individually and As trustee of the Deborah Dereede Living Trust dated December 19, 2013 is the, ... Appellant.

INITIAL REPLY BRIEF

Desa Ballard
Harvey M. Watson III
BALLARD & WATSON
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

Peter J. Nosal
Thomas Jeter
NOSAL AND JETER, L.L.P.
852 Gold Hill Road, Suite 201
Fort Mill, South Carolina 29708
Telephone 803.608.9121
pete@nosaljeterlaw.com
thomas@nosaljeterlaw.com

ATTORNEYS FOR APPELLANT

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Hugh cites to the transcript in support of his statement (on page 4 of his brief) that "the Trust clearly specified that the proceeds of the sale of the Property were to be given preferential treatment by the Trustee." However, the citation provided (Tr. P. 152, lines 1-9) does not say that. The lines cited are a statement by Professor Alan Medlin, the expert called by Hugh. The referenced testimony actually says:

> ... That note was to one afforded the highest priority of payment. So because 7-505 - - - 62-7-505(a)(3) allows a direction of where payment should be made that should be the most protected payment.... The settlor has directed that that's where that payment is to come from, so that TDN note would be the first to be paid, even if we had to get into the revocable trust assets."

(Tr. P. 152, lines 1-9).

That was Professor Medlin's opinion, based on his construction of an ambiguous document. Professor Medlin did not say that anything about the trust agreement was clear, because it was not. That is the reason the trial judge was hearing testimony from him, and from the Trust Protector, because nothing was clear. Professor Medlin even agreed with Courtney and the Trust Protector that, if it was appropriate to invoke the no-contest clause then it was fair not to make distributions from the trust until after the creditor period expired. (Tr. P. 181, lines 3-5).

Similarly, Hugh claimed "This scheme of distribution was confirmed by Respondent's expert Professor Alan Medlin" and cited to Tr. P. 136, line 20-22. That statement, quoted from the transcript, actually says:

> Judge Kimball: All right. I find that Professor Medlin is qualified as an expert on trusts and estate law and practice - - -

(Tr. P. 136, lines 20-22).

The trust protector, Catherine Kennedy, said she agreed with "Professor Medlin that there was a scheme set out by the settlor as to what assets were to be used to pay the claims first. Of course, it was the probate assets that were to be used, by law." (Tr. P. 213, lines 10-15) (emphasis added). She further explained:

> Then if anything flowed from the probate estate into the trust, then anything that was to fall into the residue, or the amount that was to go to Ms. Feeley Karp and her brother, was to be used first to pay the claims. They . . . did have priority. The amount to be paid to Tyre and the amount to be paid to Tyre and the amount to be paid to Mr. Dereedee were - - - were the last things.

(Tr. P. 213, lines 15 – 22) (emphasis added).

Ms. Kennedy concluded that Courtney "would have been foolish to get rid of the cash that she had [to pay the demands asserted by Hugh], because it just didn't seem practicable to do it at that point. She was only supposed to pay this as soon as practicable." (Tr. P. 214, lines 1-4).

Ms. Kennedy also opined that the trust agreement provided that Courtney was "conclusively presumed to have acted in good faith" by waiting for the six-month period with respect to the power of appointment to expire before making any distributions. That was so because of language in the Trust Agreement at Article Five, Section 1. (Tr. P. 216, line 6-22). Ms. Kennedy characterized that provision of the Trust Agreement as a "safe harbor" for a trustee who needed more information and needed the six months to be certain. Of course, Hugh sued before the six months had expired, so once the suit was brought, Courtney's (and to a lesser extent, the Trust Protector's) hands were tied.

Ms. Kennedy also pointed out the uncertainty of the balance due on the note (if such a note existed) at the time of the decedent's death, as to which Hugh gave no information to Courtney prior to the suit or to the Court in this testimony that day.

> ... She indicated, at least on the date that this trust was executed, that there was a note. Did that note still exist on the date of death? I don't know. I don't know if the trustee knows... Everybody seems to assume it's two hundred and fifty thousand dollars.... perhaps it's more than two fifty. Perhaps she made some payments on it.

(Tr. P. 218, line 24 – p. 219, line 18).[1]

Hugh's brief asserts that he only filed the lawsuit "to protect his interests . . . so that Trust assets would not be squandered, improperly disbursed and/or improperly converted for personal use," now impugning Courtney's honesty; Courtney is a licensed attorney (in Massachusetts). (Initial Response Brief, p. 4). That's creative packaging. Hugh testified he filed suit against Courtney "to get a ruling as to when [he was] entitled to [recover] money," (Tr. P.115, lines 1 - 21), and because Courtney had not treated him "fairly." (Tr. P. 122, lines 15-18).[2]

Courtney's counsel attempted to point out that Hugh's "tax scheme", if enforced, enabled Hugh to evade tax responsibility in the United States that he would otherwise owe under the Foreign Investment in Real Property Tax Act (FIRPTA), Chapter 61, Section 12, Foreign

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[1] Ms. Kennedy even pointed out the ambiguity of Hugh's testimony at the hearing which, if true, might have meant that the amount due on the note was $500,000.00. (Tr. P. 219, lines 14 – 21). Ms. Kennedy was correct. The purchase of the price was $500,000.00, and the decedent's contribution was paid by the decedent by way of a mortgage through Bank of America, and which was satisfied at closing. (Plaintiff's Exhibit 6, line 504). Hugh finally acknowledged that he did not pay for the whole price of the house, although his testimony seems intended to confuse this issue. (Tr. P. 104, line 3- p. 105, line 18 ("I came up with another quarter of a million dollars."). Even if Hugh did come up with a "second quarter of a million dollars, he got it back immediately when the decedent's BOA mortgage went through. For reasons that are not clear, the trial judge seemed not to want to focus on Hugh's attempt to mislead the Court, because he cut off Courtney's counsel's efforts to clarify Hugh's earlier misstatements, which seem intended to make it appear he paid for the entire house. "Move on to something else." (Tr. P. 241, line 4 – 9).

[2] Hugh testified that the trust existed only to enable he and the decedent to escape taxes that would have been levied on the residence by South Carolina tax authorities, and other taxes that would be due under Canadian law, because Hugh was a Canadian citizen, because he didn't have a "green card." (Tr. P. 129, line 21). According to Hugh, the entire trust was scheme for tax evasion, which Hugh seeks to have the court both give its blessing and enforce. (Tr. P. 103, lines 5 – 17; p. 105, line 25 – p. 106, line 13; p. 110, lines 7 – 13; P. 111, line 23 – p. 112, line 2; P. 112, line 20 – p. 113, line 14; P. 129, line 5- p. 130, line 24).

Investment in Real Property Tax Act. (Tr. P. 131, line 6 – 132, line 6) However, the trial judge cut him off, stating "[w]e're going to talk about something else." *Id.*[3]

Had the trial judge allowed the argument to proceed, he would have learned that 26 U.S.C. 897(c) and 26 C.F.R. 1.897.1(c) provides an exclusion from the FIRPTA tax if the property interest that is subject to FIRPTA is held as a "creditor" only. *See Haber v. Commissioner*, 52 T.C. 255 (1969), affirmed 422 F.2d 198 (5th Cir. 1970). Now the real reason for Hugh's tax scheme makes sense. He was avoiding taxes, and using the trust to do so.

It's clear, when comparing the property tax obligations of a foreign national that become due upon sale of the property, to Hugh's testimony, that the trust was a tax scheme which sought to enable Hugh to avoid paying any of the money recovered from the sale of the house to the IRS which would otherwise be required by FIRPTA. Hugh understood at least a part of the tax scheme because he insisted his company was a "creditor."

> Q (by Hugh' Counsel): Do you believe that these monies, the two hundred and fifty thousand dollars, is a bequest to you or payment of a deb?
>
> A. Payment of a debt.
>
> Q. Why do you believe that?
>
> A. Because it was covered by a promissory note and later put into the trust accordingly, referring to the promissory note.

(Tr. P. 116, lines 9 – 16).

This becomes more evident on cross examination of Hugh by Courtney's counsel:

> Q. But if you owned property in the U.S., you would have a liability to pay taxes?
>
> A. Correct. . .

[3] Had the trial judge considered FIRPTA, he would have realized that it requires a foreign national to pay to the IRS a fifteen percent (15%) tax based on the gross sales proceeds when real property in the United States which is titled in the name of the foreign national is sold. The trial judge clearly did not understand FIRPTA. (Tr. P. 131, lines 22-23) ("That law does not say that he pays the IRS a nickel.").

Q. So that's the real reason behind this trust, is that if your name was on the deed and you owned half of this property, you would be liable for taxes upon its sale? . . .

A. It was only there to protect me in the form of a promissory note.

Q. But had you owned half the house in your name - - -

A. But I didn't.

Q. Well, I'm saying that's why we're here, is because you didn't want to pay taxes in America?

A. No. I was advised not to do that, so I would have to pay in both countries, which is a normal thing.

Q. So you were advised by Canadian lawyers not to pay taxes in America?

[Hugh's Counsel]: Objection, Your Honor.[4]

(Tr. P. 129, line 25 – P. 130, line 22).

Again, the trial judge made his disinterest in this issue clear. "Judge Kimball: Let's move on." (Tr. P. 131, line 4).

The tax scheme, and Hugh's basic knowledge of it, explains why Hugh became combative and refused to acknowledge that his pleadings had asserted that his solely-owned company, was a "beneficiary" of the trust rather than a creditor.

Q. If your company is a creditor, why did you plead in your lawsuit . . . that it was a beneficiary?

A. Because it's written up as a beneficiary into the trust.

Q. Okay. So it's a beneficiary . . .

A. No, no, no. I didn't say that . . . I didn't say that. You said that.

Q. You just said it's a beneficiary. Okay. Why did you plead that it was a beneficiary in your complaint?

A. Because that's what I read in the trust, is what I said. . . The trust deals with TDN Consultants and Hugh Dereede in one sentence.

[4] Neither Courtney nor her counsel believe Hugh's counsel was aware of or participated in Hugh's efforts to avoid paying taxes in the United States or anywhere else. However, the effect of the trial judge's order is to permit exactly that, particularly to deprive the IRS of the taxes on Hugh's half interest in the real estate which was supposed to be hidden by the trust.

Q. And the trust says you are a bene - - - Tyre is a beneficiary?

A. If that's the interpretation.

Q. So [the decedent] believed that you were a beneficiary?

A. No, that's not what it says. You're putting words into my mouth.

Q. Well, no. You said, if the trust says you were a beneficiary, that's [the decedent's] trust. The trust speaks for her.

A. No. I'm a creditor then, if you want to know the answer.

Q. Then why did you plead that you were a beneficiary?

A. I don't remember pleading as a beneficiary.

(Tr. P. 123, line 7 – P. 124, line 14).

As noted in Courtney's Appellant's brief, the complaint did, in fact, plead that Hugh and his company were beneficiaries. (Complaint dated 12-23-2014, Paragraph 2). As further noted in Courtney's brief, the trial judge treated Hugh and his company both as a beneficiary and as a creditor. (Issues four and five, Appellant's Brief).

Once it becomes apparent what the real motivation for the trust was, *i.e.,* to allow Hugh to receive the sales proceeds of the South Carolina home without having to pay the taxes required by FIRPTA, it makes sense that the supposed "loan" made by Hugh's company and the mysterious promissory note that no one has ever seen are likely fabrications. Surely a "loan" of $250,000.00 would have some paperwork to document its existence but Hugh produced none.

Consider how a promissory note for a quarter of a million dollars simply "disappears."

Q. ... Why did that note disappear, go away?

A. It went away when - - - after the house was put in the trust. I was told by the lawyer. . . that that now takes care of the note, because it was going to be dealt with in the trust. . .

(Tr. P. 106, line 21 – p. 107, line 1)

No explanation was offered for how the promissory note "disappeared." Did it simply vanish? Was it torn up? Did it disintegrate? The mysterious "promissory note" seems to have

existed only in Hugh's mind; it seems likely his tax "scheme" was designed to allow him to receive sales proceeds for real property for which he may have furnished purchase proceeds in order to allow him to escape paying the IRS taxes that would be due under FIRTPA. It's just as likely that the decedent paid the purchase price of the house and the trust was devised as a scheme to allow him to inherit the sales price of the property outside of probate, as well as avoid paying taxes due to the IRS. Maybe the decedent played along; maybe she was ignorant of the scheme. It seems odd that a magic promissory note that no one ever saw, and which now does not exist (and perhaps never did), should not form the basis of a breach of fiduciary duty claim when allowing recovery on that claim is an obvious violation of United States tax law.

Glaringly absent from the record is the testimony from the lawyer who prepared the trust agreement. Perhaps he had seen the magic promissory note, if it ever really existed. Perhaps he could explain why the trust is ambiguous as to whether Hugh and his company were creditors or beneficiaries. Or perhaps his testimony would have confirmed the tax scheme that was designed to allow Hugh to evade FIRPTA taxes, which would certainly have been detrimental to Hugh's position. *In the Matter of Gonzalez*, 409 S.C. 621, 763 S.E.2d 210 (2014) (discussing the history of the rule permitting an evidentiary inference when a party fails to call a witness whose testimony is material to the issues presented and is within the control of the party).[5]

Scope of Review

Based on Hugh's brief at PP. 6-7, it does not appear that the parties disagree on the scope of review, although Hugh did not discuss the scope of review as to the jurisdictional issues raised.

[5] While the lawyer who prepared the trust may have been the decedent's lawyer, Hugh's testimony makes clear that he also consulted the lawyer and relied upon his advice, specifically as to his ability to recover on the promissory note. (Tr. P. 103, lines 16-22) ("I was told by the lawyer the note . . . was no longer necessary") Tr. P. 106, lines 8-11 ("That amount got disputed by the lawyer . . . and they asked if I would waive that one percent."), P. 106, lines 24-25 ("I was told by the lawyer that that now takes care of that note. . .")).

Issue One

The parties seem to agree on the novel nature of the role of trust protector and the absence of authority in South Carolina regarding the role of the trust protector. However, they disagree as to the specifics of the role assigned to the trust protector under this particular trust. Hugh asserts that "nothing in the Probate Code confers exclusive jurisdiction upon trust protectors over disputes that would otherwise be heard by the . . . Court." (Response Brief p. 8). That's true. However, the actual trust agreement in this case, does provide that a court action cannot proceed unless or until the trust protector has authorized the action. (Trust pp. 3-7). The terms of the trust trump the provisions of the trust code. S.C. Code Ann. Section 62-7-818. Additionally, the involvement of and decisions of the Trust Protector "are binding on all other persons," which includes Hugh and his company. Section 62-7-818.

The decedent went out of her way to prevent lawsuits regarding her assets following her death. Hugh is simply incorrect in his assertion that the mandates of the trust agreement regarding resolution of disputes create "a permissive mechanism" for dispute resolution. (Respondent's Brief p. 9). There is nothing "permissive" about it. The trust expressly states that an action may "not be filed in "a court of law without first submitting the claim to the Trust Protector. . . " (Trust p. 3-7). Under the terms of this particular trust (notwithstanding any provision of the trust code) only if and when the Trust Protector authorizes it may suit be filed in court.

As with any contract, the parties are free the include such terms as they choose in a contract, as long as the terms do not violate public policy. *South Carolina Department of Consumer Affairs v. Rent-A-Center Inc.*, 345 S.C. 251, 547 S.E.2d 881 (Ct. App. 2001). The first page of the trust agreement defines the trust as an agreement between "Deborah Dereede, the Trustor, and the Initial Trustee." (Trust, p. 1-1 Section 1). Under simple contract theory, the beneficiaries of the trust are

basic third-party beneficiaries. *Helms Realty Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005), citing *Touchberry v. City of Florence*, 295 S.C. 47, 367 S.E.2d 150 (1988).

As a third-party beneficiary, Hugh (and his company, if it is ever determined to be a beneficiary as opposed to a creditor) gain their rights from the language of the contract, which requires, Under the plain language of the trust, the mandate for the involvement of the Trust Protector to adjudicate disputes is, in essence, a condition precedent seeking to benefit from the trust in any manner.

Just as in arbitration agreements, the parties' own agreement can define when and whether the resolution of a dispute can fall within the jurisdiction of a court or whether private resolution is required. Our appellate courts have discussed this as an issue of jurisdiction; at some points during the dispute resolution, the court may have jurisdiction but in other points in the process, it does not. *Steinmetz v. Am. Media Servs.* LLC, 393 S.C. 72, 709 S.E.2d 708 (Ct. App. 2011); *Main Corp v. Black,* 357 S.C. 179, 592 S.E.2d 200 (2004). A determination of whether a court lacks subject matter jurisdiction over issues embraced by the arbitration provision in a contract is based on the language of the contract itself; the courts use applicable law to determine to what degree the parties have bound themselves to private resolution. *Bradley v. Brentwood Homes Inc.*, 398 S.C. 447, 739 S.E.2d 312 (2012).

Hugh has done nothing pursuant of the terms of the trust agreement. His access to a judicial resolution is barred by his failure to comply with the Trust Protector provisions of the trust agreement. The court's order should be vacated and the matter remanded for entry of a judgment denying the relief requested by Hugh and his company and concluding, as a matter of law, that

they are barred from recovering from the trust by virtue of the terms of the trust agreement and its no-contest clause.[6]

Issues Two and Three

Hugh asserts that the opinions of the Trust Protector during the case are irrelevant to the factual issues presented to the trial court. Ms. Kennedy was appointed as Trust Protector, with the agreement of Hugh. (Order appointing Trust Protector). Under the specific language of the trust, Ms. Kennedy's job was to opine on the Trustee's obligations and recommend her course of action. She did so. It is incredulous for Hugh to now argue that, because the Trust Protector agreed with Courtney, she abandoned her duties and became an advocate.

Ms. Kennedy served and testified as Trust Protector and testified as Trust Protector. (Tr. P. 207, lines 14-15). The parties even had a dialogue with the trial judge as whether Ms. Kennedy was testifying as an expert witness or as Trust Protector, and the trial judge did not qualify her as an expert witness. (Tr. P. 208, line 20 – p. 209, line 23). Her testimony must be afforded more weight than that of Professor Medlin, because Ms. Kennedy was testifying in official position as Trust Protector[7] and, not as Hugh asserts, rejected in its entirety. (Respondent's Brief p. 12-13).

The only substantive argument Hugh makes in his response to Courtney's issues two and three is that Courtney is a lawyer, so she should have known how to construe the trust. (Respondent's Brief pp. 14-15). The trial judge improperly considered Courtney's status as a lawyer and his finding that she had "great knowledge of the obligations of a trustee and the legal

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[6] Hugh's argument that Courtney converted the existing Trust Protector from a neutral to a "partisan expert" is silly. Ms. Kennedy testified to her construction of the trust agreement, and her belief as to how Courtney should have proceeded in the past, and how she should now proceed. That is the job assigned to her by the trust agreement.

[7] Ms. Kennedy did note that the "trust was not particularly artfully drafted", which may be one point on which all parties agree. (Tr. P. 210, lines 22-23). Her opinion on that point, however, was not as an expert witness, but as Trust Protector, explaining the basis for her belief Courtney had acted prudently in light of the poor drafting of the trust.

requirements of a fiduciary" is completely without evidence. (Order Denying Reconsideration p, 4, and Respondent's Brief at PP. 14-15).

The entirety of Courtney's qualifications as an attorney were contained in her testimony:

> A. I'm an attorney, Your Honor. I graduated from Northeastern University School of Law in Boston, Massachusetts. I worked for the Commonwealth of Massachusetts for ten years, and now, I'm in private practice.

(Tr. P. 26, lines 11-15[8]).

It is impossible to support a conclusion that Courtney had any expertise in trust matters based on this record. To do so would suggest that every attorney, regardless of practice or experience, has "great knowledge of the obligations of a trustee and the legal requirements of a fiduciary." This record establishes that the many lawyers involved prior to litigation, during litigation, and even now, all of whom differ on the meaning of the trust. The mind-numbing colloquy between Courtney and Hugh's counsel during Courtney's direct testimony established her considerable inability to understand the trust, despite her status as an attorney[9]. (Tr. P. 6 – 80).

It was inappropriate to consider Courtney's status as an attorney in determining that she had breached her fiduciary duty. It was even more error for the trial judge to conclude that Courtney had any kind of specialized trust knowledge, when the record is completely silent on that issue.

While he is not a lawyer, Hugh acknowledged the trust agreement was difficult to understand. He solved that by reading only the section that applied to him.

> Q. Did you read the trust prior to filing this lawsuit?

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[8] Courtney also noted, in an attempt at levity, "You know I'm a lawyer, right? I don't do math." (Tr. 94, line 4).

[9] This is not unique to Courtney. As explained more fully in Courtney's Appellant's Brief, the trust agreement is inherently contradictory and ambiguous and was virtually impossible for Courtney to administer as written. The true fault for the circumstance in which Courtney found herself, as trustee, is the drafting of the trust agreement.

A. I scanned the trust and re-read the article that dealt - - - the trust didn't really deal with me, only Section 6 did.

Q. So that's the only section you really read?

A. The only one that I would probably be able to understand because it was actually written in English.

Q. . . . Well, the whole trust is written in English, right?

A. Other than the legalese . . . I gave it to a lawyer.

(Tr. P. 125, line 25 – p. 126, line 13).

And we can all see where that got the parties.

Issues Four and Five

Hugh attempts to solve the conundrum as to whether his company is a creditor or beneficiary by claiming, in his Response Brief, that it is both. He also now acknowledges what was suspected all along – there never was a promissory note. (Respondent's Brief p. 15). And using the same magic with which the promissory note "disappeared" (Issue One, *supra.*) his new theory is that "the Trust clearly established the Respondent's claim" so it doesn't really matter anyway. (Respondent's Brief p. 16).

Only if Hugh's company is a beneficiary does it have any status to sue (or be awarded damages) under a breach of fiduciary duty claim. Here, where no one knows whether the company is a creditor or beneficiary based on the language of the trust agreement, that is called an "ambiguity" which has to construed against the drafter. *i.e.,* the decedent. *Davis v. Pruitt Corporation*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016). Since Hugh's company is claiming a right to receive payment as a beneficiary (and was awarded judgment on that basis), the ambiguity must be construed against Hugh, since his claim is derivative of the Trust, *i.e,* the drafter.

It cannot be both. As argued in detail in Courtney's Appellant's Brief, if Hugh's company is a creditor, it lost its chance to seek recovery by failing to file a claim against the estate. If Hugh's

company is unable to sue as a beneficiary because of the ambiguity of the language of the trust, perhaps he has a remedy against the lawyer who drafted the trust. Hugh's testimony makes clear that he (and the decedent) was benefitting from the tax scheme that the trust was intended to create by not having to pay higher taxes,[10] Tr. P. 103, lines 5 – 17; p. 105, line 25 – p. 106, line 13; p. 110, lines 7 – 13; P. 111, line 23 – p. 112, line 2; P. 112, line 20 – p. 113, line 14; p. 129, line 5-p. 130, line 24). The only person involved in this litigation who had no involvement in the language of the trust is Courtney, and she is being penalized with a judgment against her (as trustee and personally) on the basis of an ambiguous document over which she had no control, and tried desperately to interpret and apply.

Hugh asserts that the inability of the Court (or anyone else) to figure out whether Hugh's company is a creditor or a beneficiary under the terms of the trust agreement is a "false choice." (Respondent's Brief p. 15). He now asserts the decedent intentionally "elevated" his company from creditor to beneficiary to put it in a priority position. There is absolutely no evidence of that at all. Hugh now admits there was not a promissory note. So, the language of the trust agreement that requires payment of a "note" has an entirely false predicate. There is no note. Now we know; Hugh's company is neither a creditor nor a beneficiary.

Lastly, Hugh argues that this Court must (as the trial court did) read only one portion of the trust agreement in isolation, *i.e.* the only one that Hugh read, in order to affirm the trial judge's decision. Read in isolation, Article Six could be construed as clear and unambiguous. Unfortunately, South Carolina law does not support Hugh's assertion, mandating that an ambiguous contract be construed as a whole. *Three States Coal Co. v. Mollohon Mfg. Co.*, 137

[10] Hugh's testimony about exactly what kind of taxes he/they was trying to avoid is not really clear, but it certainly includes taxes to the IRS. *See* Issue One, *supra*. However, his testimony suggests York County and Canadian taxing authorities were involved as well. (Tr. P.

S.C. 345, 135 S.E. 380 (1926); *SC Department of Natural Resources v. Town of McClellanville,* 345 S.C. 617, 550 S.E.2d 299 (2001). Even if it did not, Courtney, as a trustee, had to consider all obligations of the trust in determining how to proceed. (Report of Trust Protector).

Again, Hugh argues that Courtney should be held to some "super standard" of care as a trustee since she has a law degree. As explained above, there is no evidence Courtney has any experience as a trustee or with fiduciary obligations (other than the crash course she obtained in this litigation, and as guided by the Trust Protector).

Issue Six

Hugh acknowledges in his Respondent's brief that neither he nor his company made any allegations against Courtney in her individual capacity. (Respondent's Brief p. 17). His acknowledgement asserts Rule 11, SCRCP, as the basis upon which he could not have made any allegations against Courtney personally.

That answers that. Neither Hugh nor his company may obtain relief not requested in the pleadings. *Gainey v. Gainey*, 279 S. 68, 301 S.E.2d 763 (1983) *Tinsley v. Tinsley*, 326 S.C. 374, 483 S.E.2d 198 (Ct App. 1996). Hugh argues that the windfall to him effected by the trial judge's decision on rehearing to specifically impose personal liability upon Courtney was issued because "the Court was not willing to insulate her personally from having to reimburse the trust." (Respondent's Brief p. 16).

Courtney respectfully asserts that there must be some evidence to support a conclusion that she acted outside of her capacity as trustee before she can become personally liable in her individual capacity. Here, there is none, and Hugh and his company acknowledge that, event citing to Rule 11, SCRCP, for the reason they did not so claim.

Courtney did exactly as she was required to do, she raised this issue by Motion for Reconsideration because the trial judge's order was not clear. That did not create an opportunity for the trial judge, as an afterthought, to change the relief requested or awarded, or to supplement the evidence presented, simply because it didn't occur to anyone until the order was issued that Courtney might have personal liability until the order which did not clearly limit her liability.

Courtney respectfully asserts that this record does not support the entry of an order against her personally, and before any court can determine that she bears individual liability must exist, there must be some evidence. Hugh's 11th hour argument that not imposing liability upon a trustee personally would "create a moral hazard and incentivize unreasonable conduct by trustees" is not supported by case law, and Hugh cites none. (Respondent's Brief p. 17).

Entry of individual liability against Courtney is an issue that could be addressed only when and if it is determined that the trust lacks the assets to satisfy its obligations (not just to Hugh but to all beneficiaries), and judicial inquiry is made to determine whether evidence shows Courtney acted outside of her responsibility as a trustee or some other evidence of malfeasance is provided. An inquiry analogous to piercing the corporate veil would be required before Courtney can be held to have any *personal* liability. *See e.g., Dumas v. InfoSafe Corp.* 320 S.C. 188, 463 S.E.2d 641 (Ct. App. 1995). *See also Daniels v. Berry*, 148 S.C. 446, 146 S.E.420 (1929). The issue was clearly not litigated here and there is no evidence to support entry of judgment against Courtney individually.

Issue Seven[11]

The attorney's fees award must be vacated because the judgment must be vacated.

[11] Hugh did not set forth a separate response to Courtney's Issue Seven; however, he does briefly mention the issue of attorney fees in his response to Courtney's Issue Six, and for that reason, Courtney will reply. The reply to this

However, even if all or part of the judgment remains, and even if all or part of the judgment is entered against Courtney individually, the award of attorney's fees must be vacated. Hugh did not plead any statute as a basis for the attorney's fees to be awarded, and it seems he acknowledges that. (Respondent's Brief p. 17). He argues that his prayer did, in fact, pray for attorney's fees, so it was permissible for the trial judge to *sua sponte* search the South Carolina Code for a basis upon which to award them.

In reality, the "prayer" of the complaint to which Hugh refers is the third cause of action, which seeks "litigation costs" and, in paragraph 27, does so "pursuant to the terms of the Trust." (Complaint ¶ 27). Instead of following the request for fees by consulting the Trust Agreement, the trial judge cast about for a statute upon which to award fees.

Under common law, each party bears his own attorney's fees. *Prevatte v. Asbury Arms*, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990). So, a party may not recover attorney's fees from the other side absent a contract or a statute. *Duke Power Co. v. South Carolina Public Service Commission,* 284 S.C. 81, 326 S.E.2d 395 (1985).

In both instances, some standard for the award of attorney's fees is set (whether by contract or by statute) and the party seeking to recover the attorney's fees has the burden to establish that they have met the burden which allows them to recover the fees. Hugh and his company did neither.

The trial judge chose S.C. Code Ann. Section 62-7-1004 as the basis upon which to award attorney's fees. It's unclear why he did so (clearly the statute was not pleaded). If this claim for breach of fiduciary had been brought in circuit court, there would have been no basis upon which

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issue also raises a new issue related to subject matter jurisdiction, which can be raised at any time. *Bardoon Properties, NV v. Eidolon Corporation*, 326 S.C. 166, 485 S.E.2d 371 (1997).

to award attorney's fees, because Section 62-7-1004 only applies to matters filed in probate court regarding "the administration of a trust."

It was error for the trial judge to be permitted to cast about to find a statutory basis upon which to award attorney's fees, and in selecting S.C. Code Ann. Section 62-7-1004 as the basis upon which to do so. The claim for fees was asserted to be the trust agreement, although no specific part of it was asserted as a basis for the claim. The trial judge could not simply choose to award attorney's fees on the basis of his choosing.

Perhaps it was because this action was initially filed in probate court that the trial judge elected to rely upon Section 62-7-1004 to award attorney's fees. (Complaint without exhibits, p. 1; Motion for Removal to Circuit Court, Motion to Dismiss, Affirmative Defenses, and Answer). However, that raises another question.

The trial court lacked subject matter jurisdiction to adjudicate a breach of fiduciary duty claim based on Hugh's jurisdictional allegations

Lost in the noise is the fact that this case was initially filed in the probate court. (Complaint, p. 1). The basis for which subject matter jurisdiction was asserted was S.C. Code Ann. Section 62-7-201(a). *Id.* ¶ 6. The case was removed to circuit court upon Courtney's motion and based upon Section 62-1-302(d)(4) (Motion to Remove, et al.).

Upon reflection, it seems likely that the probate court never had subject matter jurisdiction to entertain a claim for damages for breach of fiduciary duty, based on the failure of Hugh and his company to plead the proper jurisdictional statute. Removal to the circuit court certainly did not change the nature of the action (despite Judge Rogers' order; *see discussion infra.*). Consequentially, no claim for breach of fiduciary duty, a matter external to the trust, was ever vested in the circuit court.

The complaint in this matter did not even plead a claim for breach of fiduciary duty; nor was the complaint ever amended to assert that claim. The causes of action pleaded were, in fact, internal to the trust.

The complaint had three causes of action:

> (1) declaratory judgment seeking an order to require Courtney to "divide the net proceeds from such said, after payment to Plaintiff Tyre Dealer Consultants, Inc., such that he receives a sum certain as was the wishes of the decedent, directed in Article Six, Section 4(a) of said Trust Agreement;
>
> (2) "probable cause"; and
>
> (3) "litigation costs."

(Complaint without exhibits, PP. 1-8).

> The prayer, on the other hand, pleaded for:
> (1) the declaratory judgment requested in the first cause of action;
>
> (2) for "an order finding that Courtney . . . breached her fiduciary duty owed to each of the Plaintiffs, and awarding actual and punitive damages to the Petitioner..." and
>
> (3) attorney fees pursuant to the trust agreement. (Complaint p 8).

The alleged jurisdictional basis for this lawsuit, S.C. Code Ann. Section 62-7-201(a), grants the probate court exclusive jurisdiction over "proceeding initiated by interested parties concerning the internal affairs of trusts." By filing in probate court, pleading Section 62-7-201(a) as the basis of jurisdiction, and asserting causes of action which related solely to the internal affairs of the trust, Hugh and his company defined their claims as being "internal" to the trust.

Judge Rogers (the probate judge) issued an order dated May 7, 2015 removing the matter to the circuit court. (Order dated 5-7-2015). She did so pursuant to S.C. Code Ann. Section 62-1-302(d)(4), which permits removal of "matters involving the internal or external affairs of trusts as provided in Section 62-7-201. . .". (emphasis added). However, the removal was of an action

which pleaded jurisdictional claims exclusively related to the internal affairs of the trust. Judge Rogers could only remove the matters that had been pleaded, and all of those were internal to the trust. As a result, the circuit court only had jurisdiction to address the causes of action internal to the trust, absent an order permitting an amendment to the complaint and the filing of an amended complaint, neither of which occurred.

Hugh could have filed an action for breach of fiduciary duty in either probate court or circuit court, pursuant S.C. Code Ann. Section 62-7-201(c)((3), which grants concurrent jurisdiction to the two courts to deal with matters external to the trust. An external claim would include an action for damages (such as breach of fiduciary duty). But he did not do so; his causes of action invoked jurisdiction only for matters related to the internal affairs of the trust, which precluded an action for damages, and he pleaded causes of action which would have, indeed, been internal to the trust. As a result, the jurisdiction acquired by the probate court, and removed to the circuit court, was limited to matters internal to the trust. As a result, the circuit court lacked jurisdiction in this action to award relief for breach of fiduciary duty, because the jurisdictional predicate of Section 62-7-201(c)(3) was not pleaded and therefore not triggered.

Just as family courts are creatures of statute with limited jurisdiction as fixed by the legislature, *Katzburg v. Katzburg*, *infra,* so, too, is the probate court a statutory court of limited jurisdiction. *Judy v. Judy*, *infra.*

As a lesser argument along the same lines, Hugh's complaint did not plead for (although it prayed for) a claim for breach of fiduciary duty. As with the award of attorney's fees discussed above, it seems pretty clear that a prayer in a complaint, without more, is not enough to assert a

cause of action[12]. There has to be a cause of action pleaded in addition to a prayer for relief. Rule 8(a), SCRCP; *Watson & Howell Builders v. Billingsley*, 310 S.C. 39, 425 S.E.2d 43 (Ct. App. 1992). *See also Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835 (Ct. App. 2012) (pleading must contain facts and statutes upon which the court's jurisdiction depends.).

A complaint must contain (a) a statement of grounds including facts and statutes upon which jurisdiction is based; (2) a statement of facts supporting the claim for relief; and (3) a prayer or demand for judgment sought. *Justice v. The Pantry*, 330 S.C. 37, 496 S.E.2d 871 (Ct. App. 1998), *affirmed as modified* 335 S.C. 572, 518 S.E.2d 40 (1999).

The South Carolina Supreme Court has analyzed probate court jurisdiction insofar as it relates to what issues could have been pleaded in that action. *Judy v. Judy*, 393 S.C. 1 60, 712 S.E.2d 408 (2011). In that case, the Supreme Court's analysis of a claim of *res judicata* depended on a determination of what actions *could have* been pleaded in an earlier probate action. The decision turned on what causes of action could have been pleaded in the probate court, and concluded that a claim for damages for waste could have been adjudicated in probate court. For that reason, a subsequent circuit court action was barred by *res judicata*.

Since the jurisdictional allegations of the complaint in this action did not invoke jurisdiction to litigate matters external to the trust, such as breach of fiduciary duty, or to award damages in tort, it follows that the circuit court's jurisdiction was similarly lacking. *Katzburg v. Katzburg*, 410 S.C. 184, 764 S.E.2d 3 (Ct. App. 2014).

Notwithstanding the jurisdictional allegations of the complaint, it is incongruous to affirm an award of damages for breach of fiduciary duty when no cause of action for breach of fiduciary

[12] As discussed above, the claim for attorney's fees sought recovery pursuant to some unidentified provision of the trust agreement. The award of attorney's fees, however, was based on a statute randomly chosen by the trial judge.

duty was even pleaded (except in the prayer, which took it out of the subject matter jurisdiction invoked by Section 62-. *Standard Roofing Co. Inc. v. Dean Const. Co., Inc.*, 284 S.C. 40, 324 S.E.2d 334 (Ct. App. 1984) ("the trial court erred by going beyond the scope of the pleadings and granting relief on theories not pleaded. Judgments 'not support by the theories of action on which the pleadings [are] framed [are] fatally defective'"), *citing Crocker v. Crocker, 281 S.C. 154, 314* S.E.2d 343 (Ct. App. 1984). "This court has made it clear it will not affirm a judgment that grants relief on an issue not pled." *Mayhill Homes Corp v. Family Federal Sav. And Loan Ass'n*, 284 S.C. 60 324 S.E.2d 340, (Ct. App. 1984)

Conclusion

Courtney incorporates her conclusion in her initial brief. Additionally, she asks that this Court examine the subject matter jurisdiction issue that became apparent on examination on the limited jurisdictional pleading, as argued in the last section herein, and vacate the judgment in its entirety.

Respectfully submitted,

Desa Ballard
Harvey M. Watson III
BALLARD & WATSON
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

Peter J. Nosal
Thomas Jeter
NOSAL AND JETER, L.L.P.
852 Gold Hill Road, Suite 201
Fort Mill, South Carolina 29708
Telephone 803.608.9121
pete@nosaljeterlaw.com
thomas@nosaljeterlaw.com

ATTORNEYS FOR APPELLANT

June 26, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
S. JACKSON KIMBALL, SPECIAL CIRCUIT COURT JUDGE
Case No. 2015-CP-46-01409
Appellate Case No.: 2016-001921

IN RE:

Deborah Dereede Living Trust dated December 18, 2013

Hugh Dereede and Tyre Dealer Network Consultants, Inc., ... Respondents,

v.

Courtney Feeley Karp, Individually and As Trustee of the Deborah Dereede Living Trust dated December 19, 2013 and Michael Fehily, as a qualified beneficiary of the Deborah Dereede Living Trust dated December 18, 2013, ... Defendants,

Of which

Courtney Feeley Karp, Individually and As trustee of the Deborah Dereede Living Trust dated December 19, 2013 is the, ... Appellant.

CERTIFICATE OF SERVICE

I, Mara Ballard, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on June 26, 2017, I served a copy of the **Appellant's Initial Reply Brief** and **Appellant's Reply Designation of Matter** in the above-captioned case on the following individuals by

electronic mail and by standard US Mail, with sufficient first-class postage affixed, addressed as follows:

John Gettys, Jr., Esquire
john.gettys@mortongettys.com
Morton & Gettys, LLC
Post Office Box 707
Rock Hill, South Carolina 29731

Daniel Ballou, Esquire
dan.ballou@mortongettys.com
Morton & Gettys, LLC
Post Office Box 707
Rock Hill, South Carolina 29731

Mara Ballard

June 26, 2017
West Columbia, South Carolina

Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

June 26, 2017

Via U.S. Mail
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Deborah Dereed Living Trust v. Courtney Feeley Karp, et al.*
Appellate Case No: 2016-001921

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the **Appellant's Initial Reply Brief** in the above-referenced matter. Also enclosed are an original and one copy of **Appellant's Reply Designation of Matter** pursuant to Rule 209, SCACR. After both have been filed, please return the clocked copies to our office in the enclosed, self-addressed, stamped envelope.

Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Desa Ballard by HMW

Desa Ballard
desab@desaballard.com

cc: *Via U.S. Mail and Email*
John Gettys, Jr., Esquire
Dan Ballou, Esq.
Via Email
Pete Nosal, Esquire
Courtney Feeley Karp, Esq.

FIRST CLASS MAIL

Law Offices of Desa Ballard

226 State Street
West Columbia, SC 29169

TO:
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211