(5)

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 18, 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 18, 2013 is the, ... Appellant.

FINAL BRIEF OF APPELLANT

Desa Ballard
Harvey M. Watson III
BALLARD & WATSON
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299

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

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN EXERCISING SUBJECT MATTER JURISDICTION IN THIS MATTER, WHEN THE TERMS OF THE TRUST AGREEMENT CLEARLY PROVIDE FOR DISPUTES TO BE DECIDED BY A TRUST PROTECTOR. IN THE ALTERNATIVE, THE COURT SHOULD HAVE DECLINED TO EXERCISE SUBJECT MATTER JURISDICTION IN LIGHT OF THE SETTLOR'S CLEAR INTENT, AS EXPRESSED IN THE TRUST AGREEMENT, THAT DISPUTES REGARDING HER TRUST BE ADJUDICATED OUT OF COURT UNLESS THE TRUST PROTECTOR DETERMINED OTHERWISE.

II. THE TRIAL JUDGE ERRED IN FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF THE TRUSTEE WHEN THE FACTS WERE STIPULATED AND THE TRUST PROTECTOR HAD VALIDATED THE DECISIONS OF THE TRUSTEE. AS A RESULT, THE TRUSTEE WAS ENTITLED TO JUDGMENT IN HER FAVOR ON LIABILITY AND THE NO CONTEST CLAUSE.

III. THE TRIAL COURT ERRED IN DETERMINING THAT THE TRUSTEE'S OBLIGATIONS REGARDING DISTRIBUTION TO HUGH AND HIS COMPANY WERE CLEAR FROM THE LANGUAGE OF THE TRUST AGREEMENT, BECAUSE THE TRUST AGREEMENT WAS AMBIGUOUS IN MULTIPLE RESPECTS. AS A RESULT, THE TRIAL JUDGE SHOULD HAVE DEFERRED TO THE OPINION OF THE TRUST PROTECTOR THAT APPELLANT HAD ACTED APPROPRIATELY.

IV. THE TRIAL COURT ERRED IN DETERMINING THAT HUGH'S COMPANY WAS BOTH A BENEFICIARY AND A CREDITOR AND THAT APPELLANT HAD VIOLATED HER FIDUCIARY DUTY WITH RESPECT TO THE CORPORATION. THE TRIAL COURT ERRED IN FAILING TO CONCLUDE THAT RESPONDENTS VIOLATED THE "NO CONTEST" PROVISION OF THE TRUST AGREEMENT AND IN DETERMINING RESPONDENTS HAD PROBABLE CAUSE TO BRING THIS ACTION.

V. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST APPELLANT IN HER INDIVIDUAL CAPACITY, BECAUSE THE EVIDENCE REFLECTED THAT SHE ACTED ONLY IN HER REPRESENTATIVE CAPACITY FOR ALL MATTERS RELEVANT TO THIS MATTER.

VI. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AND COSTS TO RESPONDENTS.

STATEMENT OF THE CASE

This is an appeal from two orders of the circuit court in a matter which originated in probate court. Appellant Courtney Feeley-Karp (hereafter "Courtney") is the adult daughter of the decedent, Deborah Dereede (hereafter "decedent" or "Courtney's/her mother"). By designation of the decedent, Courtney serves both as personal representative of her mother's estate and successor trustee of the decedent's trust (decedent serving as the initial trustee during her lifetime). Respondent Hugh Dereede (hereafter "Hugh") had been the decedent's husband since 2010 [1]. Respondent Tyre Dealer Network Consultants Inc. (hereafter "Hugh's company") is, on information and belief, a Canadian company owned or controlled by Hugh.

Hugh and his company filed suit against Courtney four months after her mother's death, asserting that Courtney had breached her fiduciary duty to him and his company by failing to make a priority distribution to him from the trust immediately after the sale of real property owned by the Trust, notwithstanding Courtney's other obligations under the trust agreement and notwithstanding financial obligations of the estate which had to be paid from the trust and the mandatory claims period for the estate. In essence, he claimed the distribution to his company and to himself had to be made regardless of any other obligations of the trust or estate debts.

Courtney moved for judgment on the pleadings and for summary judgment, both of which were denied. Following a nonjury trial, the Circuit Court found Courtney had breached her fiduciary duty to Hugh and his company, and awarded damages and attorney's fees to both (not

[1] Decedent also had an adult son, Michael Fehily, who was named as a defendant but has not participated in this action.

distinguishing between the two). On reconsideration, the circuit court clarified that Courtney was liable to Hugh and his corporation both individually and in her capacity as Trustee. This appeal followed.

STATEMENT OF FACTS[2]

Decedent executed a revocable trust agreement on December 18, 2013, while she was married to Hugh, but after she began treatment for the cancer that would take her life. (R. pp. 506-507 ¶¶ 6-8). On the same day she created the trust, Decedent transferred a residence in York County, South Carolina into the trust, which was recorded at Book 13883, Page 240[3]. At the time of her death, decedent owned two (2) other homes, not in South Carolina, neither of which had been put in the trust. (R. p. 244, lines 6-23).

Decedent died on August 15, 2014. (R. p. 508, ¶ 24). Pursuant to decedent's directives, her daughter Courtney was appointed as personal representative and assumed the duties of Trustee of her mother's now-irrevocable trust. (R. p. 508, ¶¶ 28 & 29).

The estate had liquid no assets, not even enough to pay for the decedent's funeral. (R. pp. 510-512, ¶¶ 43 & 56; R. p. 256, lines 12-17). The estate had significant debts and expenses, and one of decedent's three houses (in Arizona, which had two mortgages on it) was in pre-foreclosure. (R. p. 256, line 12 – p. 257, line 13). "There were costs associated with the estate, including the maintenance of three houses, the preparing for the sale of the other two houses, among other things." (R. p. 256, lines 14-17; R. p. 260, lines 6-9; lines 19-23).

As PR, Courtney prevented the house in Arizona from going into foreclosure so she could maximize its value for the estate. (R. p. 258, lines 4-12). There were medical bills associated with the decedent's continuing treatment for breast cancer leading up to her death. (R. p. 258, lines 15-16; R. p. 259, line 20 – p. 260, line 8). There was credit card debt. (R. p. 258, lines 15-22).

---

[2] This Statement of Facts includes a recitation of all facts relevant to the multiple issues raised on appeal.
[3] The deed is not designated for inclusion in the record as its status as a trust asset is not disputed.

Courtney, who is a practicing lawyer in Massachusetts, construed South Carolina law to require the Trust to pay any debts of the estate before making any trust distributions. (R. p. 250, lines 2-9; R. pp. 509-511, ¶¶ 32, 33, 35 - 38, 45). She familiarized herself with the requirements of South Carolina law to properly administer the trust and estate. (R. p. 250, lines 5-11).[4] The estate was complex, since the decedent had owned real property in three states, and Courtney recalled her mother being in litigation some years prior as a result of the closure of a business. (R. p. 510, ¶ 39). Because the estate could not do so, Courtney and her husband paid for her mother's funeral expenses. (R. p. 511, ¶ 50; R. p. 262, lines 7-14).

Courtney's life was complicated at this time not only by her mother's death and her new responsibilities as personal representative and trustee. Shortly before her mother died[5], Courtney gave birth to a child, who was born at 26 weeks' gestation, weighing one pound and six ounces. Lucy was still in the neonatal intensive care unit when Courtney's mother died and Courtney became the personal representative and trustee. (R. p. 507, ¶¶ 13-15; R. p. 311, lines 1-8). She was also returning to work. *Id.* (lines 8-12).

The trust agreement had conflicting terms but Courtney attempted to balance the provisions and act appropriately. (R. pp. 509-510, ¶¶ 32, 33, 35-38), Courtney interpreted Section 1 of the trust as a testamentary power of appointment where the settlor had reserved the right to make other gifts, other trusts, or otherwise provide for disposition of her property during her lifetime and she was required to allow the estate creditor period to expire before she made any distributions from

---

[4] The trial judge interrupted Courtney's answer but the content reflects that Courtney did, in fact, consult South Carolina law. *Id.* She later confirmed that she had educated herself on South Carolina trust law. (R. p. 296, line 25 – p. 297, line 5).

[5] Decedent died on August 15, 2014. Courtney's baby, Louisa Catherine Karp ("Lucy") was born on June 16, 2014. (R. p. 303, lines 9-15; R. p.311, lines 3-8).

the trust. (R. p. 302, lines 11–18). She believed her decision was mandated by the trust agreement. (R. p. 303, line 21 – p.304, line 1). She also interpreted the trust to require that all trust beneficiaries were subject to the six-month requirement of the trust, *i.e.,* required to respect the instruction set forth in the trust to wait six months before distribution. (R. p. 304, lines 2–10). She was certain that if she paid money to Hugh before the six-month period passed and a contingency arose which required payment of estate debts or devise by subsequent will, Hugh would not have returned any money to the trust. (R. p. 304, lines 6-10).

Courtney obtained a purchaser and scheduled a closing to occur in December 2014, only four (4) months after her mother's death. (R. p. 511, ¶¶ 51 & 52). Through his counsel, Hugh contacted the closing attorney and directed that $250,000.00 of the sales proceeds be paid to his company per the trust and Hugh wanted his half of the net sales proceeds. *Id.* At Para. 53.

Courtney explained to Hugh that she could not make any trust distributions until all of the estate creditors were identified and satisfied. *Id.* At 54-56. Courtney consulted with counsel and confirmed that her reading of the trust documents prevented her from making any distributions from the trust at that time. *Id.* At 57 & 58. (R. pp. 515-516, ¶ 5). The trust's counsel (in Arizona, who was representing the trust and estate in dealing with the probate issues in Arizona), communicated with Hugh's counsel, who "acknowledged that he would advise his client similarly if he were in my position." *Id.*

The closing for the sale of the house occurred on December 19, 2014, a Friday. (R. p. 306, lines 11–13). Proceeds were transferred to the trust's bank account the following Monday, December 22, 2014. (R. p. 512, ¶¶61-63; R. p. 304, lines 14-18). Hugh demanded a total payment of almost $300,000.00 that day. (R. p. 501; R. p. 502; R. pp. 511-512¶¶ 53, 64).

Courtney contacted her Arizona attorney to please communicate with Hugh's attorney since Courtney and her husband wanted to be in Boston where their daughter remained in NICU. (R. p. 512, ¶ 66). Hugh and his company filed suit against Courtney, individually and as Trustee, the day after the sales proceeds were released to Courtney. (R. p. 502; R. pp. 39-133; R. p. 306, lines 16-20). Courtney removed the case to circuit court. (R. pp. 134-138).

Courtney's motion for judgment on the pleadings was denied, with Judge Kimball concluding the pleadings raised "an issue of fact" and that he required "clarification of the facts and circumstances affecting the legal issues presented." (R. pp. 4-5).

Courtney and Hugh triggered the provision of the trust to appoint a "trust protector" whose responsibility under the trust agreement, *inter alia,* was to resolve disputes regarding the trust. Catherine Kennedy, Esquire, was appointed as Trust Protector in October 2015. (R. pp. 206-210). The parties stipulated to the facts to be considered by Ms. Kennedy. (R. p. 196).

Ms. Kennedy issued a report in January 2016 based on the stipulated facts. In her report, Ms. Kennedy concluded that "the trustee would have been foolish, if not in breach of her fiduciary duties, to immediately distribute the net proceeds received from the sale" of the real estate as Hugh demanded. (R. pp. 522-528). The record now reflected the "clarification of the facts and circumstances affecting the legal issues presented" that Judge Kimball required before ruling on the legal issues presented. (R. pp. 4-5). The issues were therefore ripe for summary judgment based on the stipulated facts.

With the factual issues resolved, Courtney moved for summary judgment[6], providing a

[6] The motion that was actually heard was the Second Amended Motion for Summary Judgment. (R. pp. 188-210). The affidavits of Courtney and Mr. Ribadeneira were attached to the original Motion for Summary Judgment, as was

recitation of the undisputed facts, and the report of the trust protector, whose decisions were binding on the parties. (R. pp. 188-205; R. pp. 506-514; R. pp. 515-516; R. p. 421). The trust agreement provided that the "[t]rustee will not be liable for any act or omission to act if acting according to the written instructions of, or with the written consent, of the Trust Protector." (R. p. 421). Since the Trust Protector had validated Courtney's concerns, the trust required that Courtney be found "not liable for any act or omission" because her actions had been approved, albeit after the fact, by the trust protector.

Judge Kimball denied summary judgment, even though the facts were stipulated, and the Trust Protector had validated Courtney's handling of the trust assets (and her refusal to make a priority distribution to Hugh). (R. pp. 6-7). In denying the motion, Judge Kimball again ruled that "it would be inappropriate to end the case at this juncture. . . without further clarification of the facts affecting the legal issues presented." *Id.* That was the same standard he had relied upon to denying judgment on the pleadings. (R. pp. 4-5). While stating that the non-moving party needed only submit "a mere scintilla of evidence" to withstand summary judgment, Judge Kimball did not identify any facts that were in dispute. (R. pp. 6-7).

Judge Kimball tried the case nonjury on April 19, 2016. While multiple witnesses testified, no new facts were introduced into the record[7]. Nonetheless, Judge Kimball issued an order finding

---

the report of the Trust Protector and the stipulated facts. (R. pp. 152-179).

[7] Hugh presented trial testimony of Professor Alan Medlin, who Judge Kimball recognized as an expert, but qualified the recognition by saying "I'm not going to say he's an expert in his interpretation." (R. p. 343, lines 1-9). As he had in his earlier affidavit in opposition to Summary Judgment, Professor Medlin opined that the settlor intended Hugh and his company to be treated with priority. (R. p. 345, lines 2 – 12; R. p. 346, line 20 – p. 347, line 6; R. p. 351 lines 19-21). He had also opined as much at the summary judgment stage. (R. p. 518, ¶ 4). However, Professor Medlin also concluded in his affidavit and testimony that he could understand how Courtney came to the conclusion that she did. *Id.* at Paragraph 8; R. p. 557, lines 4-5 ("I don't agree with them, but I understand them.") His opinion was that Courtney could have the trust distribution to Hugh, not that she was required to. (R. p. 519, ¶8). Professor Medlin,

in favor of Hugh and his company, concluding that Courtney had breached her fiduciary duty to both of them (even though the company was also determined to be a creditor) by not immediately distributing the demanded amount of funds to them following the sale. (R. pp. 10-19).

Judge Kimball found that the trust agreement required Hugh and his company to be treated with priority over any estate creditors, or other estate or trust beneficiaries, notwithstanding Courtney's other obligations under the trust agreement and/or the estate. *Id.* Judge Kimball also concluded that Hugh and his company had probable cause to file this suit against Courtney and they were therefore not barred by the "no-contest" from recovering from the trust. Upon motion for reconsideration by Courtney, the trial judge affirmed his order in total, clarified that his order had intended to adjudicate Courtney liable *personally* as well as trustee and that the judgment was entered against her in both capacities. (R. pp. 20-27).

Judge Kimball suggested during trial that he had drawn conclusions prior to actually hearing the case, which is logical under these circumstances because the facts were stipulated and trial testimony really added nothing useful to the record. By way of example of what may have been pre-determined decisions, the following sample is provided:

- ". . . I believe the agreement does require that she sell the property to pay the note." (R. p. 231, lines 8-9)
- "It's clear that the plaintiff loses his interest, whatever it may be." (R. p. 253, lines 20-21) (discussing the no-contest clause)
- "Look it's apparent from the documents who that is. . . We don't need to ask that. I know who profits. It's not a profit, as a matter of fact. It's just . . . increasing what they get the benefits." Q: (directed at witness) "Who benefits from the forfeiture?" Judge: "Well, the other people." (R. p. 256, lines 5-13)
- "You already testified you didn't know what her intent was." (R. p. 285, line 25 – p. 286, line 1).

---

drew a different conclusion than did Ms. Kennedy, but he did not find fault with how Courtney had proceeded.

- "Look, the documents are what they are. She's alleged it's a mistake. There's no evidence that it was a mistake." (R. p. 287, lines 10-12) (during the first witnesses' examination)
- "It doesn't matter whether she thinks it's fair or not." (R. p. 293, line 25 – p. 294, line 1) (discussing Courtney's good faith)
- "It doesn't matter whether she believes it or not. . . It doesn't matter what she believes she ought to do, if the statutes tell her what she must do. I am not going to hear testimony about it." (R. p. 297, lines 14-21).
- "[The trust]. . it's pretty specific about paying those items. I'm not going to call them a debt or a claim or whatever. Paying those items. . . the amount of money is to be paid is clearly defined in that article. So what happened?". (R. p. 312, lines 10–19).
- "Did you think you had a duty to protect the specific amounts that are mentioned in here? Witness: Yes. I think my – my intent was to ascertain all the known debts all.. Judge: That isn't what this days. . . It just directs a payment in a specific amount as soon as practicable after my death." (R. p. 314, lines 9-19)

ARGUMENT

Standard of Review

[S]ubject matter jurisdiction is a question of law for the court." *Doe v. Barnwell Sch. Dist. 45*, 369 S.C. 659 (S.C. Ct. App. 2006) *citing Murphy v. Owens-Corning Fiberglas Corp.*, 346 S.C. 37, 43, 550 S.E.2d 589, 592 (Ct. App. 2001), *overruled on other grounds by Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003). "Questions of law may be decided with no particular deference to the trial court." *Id. citing Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

As to the questions relating to breach of fiduciary duty and the no-contest clause, the standard of review will depend on whether the action sounds in law or in equity. If the essential nature of the cause of action is legal, the action to be taken by the circuit court is controlled by its determination of whether or not there is any evidence to support the factual findings of the court below. *NationsBank of South Carolina v. Greenwood*, 321 S.C. 386 (Ct. App. 1996), *citing Dean v. Kilgore*, 313 S.C. 257, 437 S.E.2d 154 (Ct. App. 1993). In an action at law, on appeal of a case

tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Id. citing Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Accordingly, the standard of review in a case sounding in law is whether there is any evidence which reasonably supports the circuit court's findings.

Construction of the trust instrument is a question of law. *Germann v. New York Life Ins. Co.*, 286 S.C. 34 (Ct. App. 1985). An action for breach of fiduciary duty is an action at law and the trial judge's findings of fact will be upheld unless without evidentiary support" (although here the facts were stipulated). *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579 (Ct. App. 2000) *citing Corley v. Ott*, 326 S.C. 89, 485 S.E.2d 97 (1997).; *Future Group, II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996).

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without a reference. The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876 (1974)." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579 (Ct. App. 2000) *citing Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). Again, however, the facts were stipulated prior to the summary judgment hearing.

ISSUE ONE

The trial court erred in exercising subject matter jurisdiction in this matter, when the terms of the trust agreement clearly provide for disputes to be decided by a Trust Protector. In the alternative, the court should have declined to exercise subject matter jurisdiction in light of the settlor's clear intent, as expressed in the trust agreement, that disputes regarding her trust be adjudicated out of court unless the Trust Protector determined otherwise.

Among other things, the 83-page trust agreement provided in Article 1, Section 8 for appointment of a "Trust Protector" with broad powers, among which is an express delegation of authority to "unilaterally resolve any dispute, claim or conflict between beneficiaries, . . . between a beneficiary and a trustee . . . Such resolution shall be binding on all parties to my Trust and shall not be subject to review." (R. p. 421). More importantly:

> No one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution together with submitting information and a detailed supporting memorandum of law.

Id. The Trust Protector was vested with what appears to be exclusive authority to adjudicate any disputes between the trustee and beneficiaries, and only when the Trust Protector decides that a lawsuit is necessary regarding the "dispute, conflict or claim involve[ing] an interpretation or construction of my Trust Agreement" may an action be filed in court of competent jurisdiction. *Id.* Similar to a party who requires an arbitration provision in an agreement, the decedent didn't want her financial affairs litigated in the public eye. Professor Medlin agreed that the Trust Protector's authority would include authority to decide "any of these claims." (R. p. 375, lines 19-23).

South Carolina recognized the concept of a Trust Protector for the first time in 2014 with the adoption of S.C. Code Ann. Sections 62-7-103(27) and 62-7-818. There is no known South Carolina jurisprudence discussing the concept. The concept has received much criticism nationally, suggesting that the role merely complicates the administration of a trust. Bowe, *The Case Against the Trust Protector*, 37 Aztec Law Journal 77[8].

[8] The article cites to earlier articles that point out the confusion caused by the use of Trust Protectors. Alexander, *Who Will Watch the Watchmen?*, 27 Cardozo L. Rev. 2807 (2006); Ausness, *The Role of Trust Protectors in American*

South Carolina law does not expressly grant the Trust Protector the authority to adjudicate disputes arising from the trust or to authorize suits to be brought. S.C. Code Ann. Section 62-7-818. However, the statutory terms are subservient to the governing instrument itself. *Id.* Thus, the inclusion in this particular trust agreement of the adjudicatory and gatekeeper roles for the trust protector in this case is especially unique. Here is a settlor who granted the trust protector with unparalleled authority solely to keep her private affairs away from public litigation unless an independent third party determined there was no other choice.

Hugh never even asked for a trust protector. Hugh's counsel thought Courtney's only option, in light of those conflicts, was to resign. (R. p. 255, line 16 – p. 256, line 2). Professor Medlin referred to certain provisions of the trust as a "maze." (R. p. 365, line 14; R. p. 367, lines 12-13). Ms. Kennedy agreed. (R. p. 405, line 17). Thus, the trust agreement was impossible to implement as written[9].

Of course, if Courtney had resigned, Hugh would have become the successor trustee (R. p. 416). He would have been subject to the same terms. (R. p. 417). By his argument, Hugh is apparently asserting he would have ignored the conflicts, and give himself priority to the detriment

---

Trust Law, 45 Real Prop. Est. & Tr. J, 319 (2010); Sterk, *Trust Protectors, Agency Costs and Fiduciary Duty*, 27 Cardozo L. Rev. 276 (2006).

[9] Hugh's position, as adopted by the trial judge, would enable a property owner to isolate her property from her personal debts, even pre-existing debts, by requiring a priority distribution of trust assets to a specified trust beneficiary to the detriment of estate creditors, and to other beneficiaries. Courtney questions whether such a structure would even be legal, insofar as the estate creditors would be prejudiced by the priority trust distribution to Hugh. Query, under Hugh's and the Judge's interpretation of the trust, what would have been Courtney's obligation if the South Carolina property had sold for less than the mortgage and costs of sale? Obviously, other trust assets would have been swallowed up by the shortage. However, there were no other trust assets.

of the other beneficiaries. Professor Medlin did not address this conundrum, and he "understood" how Courtney had exercised the caution that she exercised. (R. p. 519, ¶8; R. p. 351, lines 7-10).

The real property in the trust was for sale when the decedent died. (R. p. 332, lines 5-6). Courtney was required by the trust to sell the real property. (R. p. 230, lines 1 – 11). She kept the existing listing and signed a contract to sell the real property within a few months of the decedent's death. (R. pp. 496-500).

A portion of Article Six of the trust provides that

> As soon as practicable[10] following my death, my Trustee shall sell [the South Carolina house]. The sales proceeds shall be used to first to pay off any mortgage against the property, and second to pay off that certain promissory note given to me by [Hugh's company] . . . after payoff of said mortgage [on the South Carolina house owned by the trust] and said note, my trustee shall . . . distribute one-half of the remaining net proceeds to Hugh Dereede, outright and free of trust."

(R. p. 432, Section 4(a).) Hugh took the position that this distribution to him was required to be done as soon as the sale closed, notwithstanding the debts of the estate (which would have to be paid from the trust if the probate estate was insufficient) or the trustee's other obligations under the trust. (Complaint).

Courtney, who is a licensed attorney in Massachusetts, believed the provision of the trust upon which Hugh was relying conflicted with other provisions of the trust, and she attempted to apply the "as soon as practicable" language with her other obligations as trustee. The trust did not require any immediate distributions, so discretion was required. (R. p. 256, line 12 – p. 257, line 13). There was other real estate in the estate, some of which had mortgages and required repairs,

[10] The Trust Protector pointed out that "as soon as practicable after my death" does not equate to "immediately." (R. p. 527). Professor Medlin agreed. (R. p. 345, lines 7-12).

and Courtney felt she had to address the debts of the estate before she could make any trust distributions. (R. p. 230, line 1 – p. 287, line 6; R. p. 289, line 4 – p. 290, line 14; R. p. 292, line 2 – p. 293, line 6; R. p. 296, line 25 – p. 297, line 10; R. p. 301, line 25 – p. 302, line 3; R. p. 303, line 19 – p. 306, line 20; R. p. 307, line 1 – p. 308, line 24; R. p. 309, line 18 – p. 311, line 16; R. p. 316, line 15– p. 317, line 18; R. p. 133).

Courtney repeatedly explained her concerns to Hugh, but instead of listening, he filed suit against her the day after the sales proceeds from the sale of the house were released. (R. p. 502). No Trust Protector had been appointed when suit was filed, but within a few months, the parties (through counsel) agreed to appoint attorney Catherine Kennedy as trust protector. (R. pp. 34-38; R. p. 307, lines 8 – 22; R. p. 379, lines 13-19).

On three occasions, Professor Medlin called the trust a "maze." (R. p. 359, line 8; R. p. 365, line 14; R. p. 367, lines 12-14). Ms. Kennedy was also critical of the trust and even pointed out that she would not have drafted it the way it was written. (R. p. 379, lines 6-10). Ms. Kennedy agreed with Professor Medlin that the trust was a "maze." (R. p. 405, line 17). Upon her appointment, Ms. Kennedy reviewed trust agreement and applicable law, and undertook her duty, pursuant to the trust agreement, to advise Courtney (as trustee) as to "what I thought she should do in this circumstance." (R. p. 379, line 20- p. 380, line 8). Ms. Kennedy concluded that Courtney had acted in good faith in carrying out her duties as trustee, including not making a priority distribution to Hugh or his company prior to addressing other claims of the estate and trust. (R. p. 380, lines 17–19; R. p. 382, line 1– p. 384, line 5). Ms. Kennedy specifically opined that the provisions of S.C. Code Ann. 62-7-505 supported Courtney's decision not to immediately

distribute to Hugh, because the trust may be secondarily liable for creditors' claims if the probate estate is insufficient to satisfy the estate debts. (R. p. 384, line 6- p. 386, line 7).

Ms. Kennedy also opined that, when Hugh decided he may have had a claim against the trust, he should have complied with the provisions of the trust and request the appointment of a trust protector prior to filing suit. (R. p. 393, line 20–p.394, line 13). She would have recommended that a client in that situation try to work with the other trustee to appoint a trust protector, but "the trust protector can grant authority for somebody to bring a contest." *Id.* (Lines 17-25).

There appears to be little authority on the question of subject-matter jurisdiction of a court when the trust provides for a trust protector to decide conflicts or otherwise carry out the settlor's intent. On one case, however, the appellate court said that the settlor, by including a provision in the trust for a trust protector to resolve disputes the settlor expressed his intent that "where his trust was ambiguous or imperfectly drafted, the use of a trust protector would be [the settlor's] preferred method of resolving those issues.[11]" *Minassian v. Rachins*, 152 So.3d 719, 727 (Fla. App. 2014). While the case did not focus on subject matter jurisdiction[12], the court did conclude that the settlor's intent was that the trust protector be used as "preferred method of resolving issues", then "[r]emoving that authority from the trust protector and assigning it to a court violates the intent of the settlor." *Id.*

---

[11] Under the facts, it is clear that the trust protector in the Florida case was appointed after the litigation between the parties had begun. *Minassian*, 152 So.3d at 720.

[12] In a footnote, the appellate court said that it had limited jurisdiction to decide whether the amendments to the trust made by the trust protector were valid and was "the only issue for which this court has jurisdiction at this time." *Id.* (Footnote 1).

Having determined the trust protector in that case had authority to make amendments to the trust to effectuate the intent of the settlor, the case was remanded "with directions that the trust protector's amendments are valid." The effect of the court's decision was to effectively conclude the litigation among the parties, since the trust protector's amendments to the trust, made after litigation began, clarified the issues about which there was confusion and allowed the matter to be concluded.

In this case, the settlor clearly indicated her desire that "all" disputes were to be resolved by the trust protector. (R. pp. 421, Section 8(h).) The settlor said that the trust protector's function, *inter alia*, was to "protect the financial recourses controlled and governed by my Trust. . ." *Id.* That seems to be a clear indication that the settlor intended that her personal affairs not be subjected to lengthy, expensive litigation and instead that any disputes be resolved by the trust protector, whose decision was "binding on all parties to my Trust and shall not be subject to review." *Id.* Section 8(h). This conclusion is amplified by the inclusion of the "no-contest" provision in the trust. (R. p. 487).

In fact, the trust agreement vests the trust protector with such wide-spread and all-encompassing authority to resolve disputes, that the trust provides that "[n]o one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector. . ." who can decide the dispute herself, "submit the claim or dispute for mediation and/or binding arbitration." *Id.* Only after the trust protector has exhausted the procedures spelled out in the trust for resolution of disputes may the trust protector then "give any claimant the authority to file and maintain an action in a court of law." *Id.*

While much of the trust agreement in this case is ambiguous and the provisions give conflicting directions to the Trustee, one thing is clear: the settlor did not want her personal affairs submitted to a court. She built in a specific, detailed dispute resolution process for any dispute about the Trust which was required to be employed by anyone claiming funds from the trust. The trust agreement authorized the Trust Protector (not the beneficiary) to bring suit "in a court of competent jurisdiction for the interpretation and construction of such Trust Agreement, or the Trust Protector may instruct my Trustee to do so." *Id.* The no-contest provision still applies even if the Trust protector grants authority for a suit to be brought. *Id.*

Indeed, the Trust Protector herself suggested the determination of rights under the trust would have been hers to decide, had the suit not been brought without a trust protector in place. After determining that Courtney, as trustee, would have been "foolish" to accede to Hugh's demands, Ms. Kennedy said she would not have granted Hugh the right to file this lawsuit in December 2014, had she been the trust protector before suit was filed. (R. p. 528). However, since the suit had been brought, Ms. Kennedy determined that she must leave the issues of good faith and probable cause to bring the case to the court. *Id.*

That is precisely what the decedent did not want. By ignoring the provisions of the trust requiring a dispute to be submitted to a trust protector, Hugh, in effect, eviscerated the intent of the decedent by usurping the trust protector's authority and transferring it to the court. This is contrary to the express intent of the decedent, who wanted disputes about her trust decided out of court, by the trust protector. Because the trust protector was appointed after the lawsuit was initiated, she felt she could not adjudicate issues between the parties.

Hugh completely ignored the provisions of the trust agreement that required the appointment of a trust protector to address disputes about the trust. Hugh violated the trust provisions filing suit. No court had jurisdiction to decide the issues presented unless or until the Trust Protector authorized the action to be filed, which did not occur. Alternatively, the court erred in declining to address the issues raised by Hugh unless or until a Trust Protector authorized the suit to be filed. Once that occurred, summary judgment was appropriate. *See* discussion, *infra.*

ISSUES TWO AND THREE

The trial judge erred in failing to grant summary judgment in favor of the Trustee when the trust protector had validated the decision-making of the Appellant and the trust agreement made the Trust Protector's decisions final, and also in failing to rule as a matter of law that Hugh was barred from receiving trust distributions by the no-contest clause.

The trial court erred in determining that the trustee's obligations regarding distribution to Respondent were clear from the language of the trust agreement, because the trust agreement was ambiguous in multiple respects. As a result, the trial court erred in finding that Appellant had breached her fiduciary duty to Respondents, especially since the Trust Protector validated Appellant's decisions.

As discussed above in more detail, Courtney filed a motion for summary judgment, with affidavits and the report of the trust protector, seeking an order that she was entitled as a matter of law to a ruling that her actions were reasonable and made in good faith, and that Hugh's actions violated the no-contest provision of the trust. (R. pp. 506-514, R. pp. 515-516; R. p. 196; R. pp. 522-528; R. pp. 188-205).

First in denying the motion for judgment on the pleadings, Judge Kimball thought there were facts to be adjudicated. Once the facts were stipulated to the Trust Protector, and she issued her report regarding the dispute, her decision was "binding on all parties . . . and not subject to

review." (R. p. 421, Section 8(h)). For that reason, summary judgment was appropriate at that point. Judge Kimball's denial of summary judgment was error and should be reversed[13].

Additionally, the trial judge erred in finding that Courtney had breached her fiduciary duty following trial. Not only should summary judgment have been granted in Courtney's favor, no new evidence was introduced at trial, which merely provided a forum to re-hash the undisputed evidence already established at summary judgment. The trust protector's determination that Courtney's decision was reasonable in light of the conflicting obligations set forth in the trust agreement should have determined the issue in Courtney's favor. Additionally, even after trial, the evidence is susceptible of only one inference, *i.e.,* that Courtney acted reasonably in light of the conflicting obligations the trust agreement placed upon her.

Prior to the sale of the South Carolina house (which was the source of the claim by Hugh of a monetary distribution), Courtney's Arizona attorney contacted Hugh's attorney and explained the requirement under the trust that "neither the trust nor the estate would be making any large distribution of assets prior to payment of all administrative expenses and third-party debts." (R. pp. 515-516, ¶5). Nonetheless, as outlined above, Hugh filed suit the day the sales proceeds were forwarded to Courtney (as trustee).

Article VI, Section 4 (a) of the decedent's trust agreement stated:

My Trustee shall make the following specific distribution of trust property:

---

[13]. Appellant asserts that the rule established in *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986) and its progeny is incorrect, in that S.C. Code Section 14-3-330(1) expressly permits an appeal after final judgment of an interlocutory order (that a would not have been immediately appealable because of its interlocutory nature at the time) which affected the final judgment. Where, as here, the facts were stipulated, there were no factual issues which required a trial, and the actual trial provided no factual information that was not already of record, it is respectfully asserted that the appeal of the denial of summary judgment should be permitted. Appellant will file a motion pursuant to Rule 217, SCACR.

A. Specific distribution of Real Estate Sales Proceeds, Household Contents, and Certain Vehicles to HUGH DEREDE.

As soon as practicable following my death, my Trustee shall sell the house and lot located at 131 Whispering Pines Drive. . . The sales proceeds shall be used first to pay off any mortgage against the property, and second to pay off that certain promissory note given by me to Tyre Dealer Network Consultants, Inc. Said promissory note, at the time of the execution of my Trust, is in the amount of $250,000.00, but in no event shall the amount due exceed one-half of the sales price of the property. After payoff of said mortgage and said note, my Trustee shall then distribute one-half of the remaining net sales proceeds to HUGH DEERDE, outright and free of trust. . .

(R. p. 431-432).

No promissory note exists. It seems clear from the record whether one ever existed. Hugh said that the decedent went to a lawyer who created a trust said that "the promissory note was no longer necessary."[14] (R. p. 318, lines 1-22). The note "went away when . . . after the house was put in the trust. I was told by the lawyer and by [decedent] that now takes care of that note, because it was going to be dealt with in the trust." (R. p. 321, line 21 – p. 322)[15]. As PR, Courtney had possession of all of her mother's papers and did not find a note, so she believed it never existed. (R. p. 270, lines 4-15). Courtney also believed that the lack of the existence of a note distinguished Hugh's company from being a creditor, and made it a beneficiary. (R. p. 272, lines 2-4). It is undisputed that Hugh's company did not to file a claim against the estate.

[14] Hugh testified that he and the decedent purchased the house "just for the two of us, and we would each own fifty percent of it." (R. p. 319, lines 3-7). Although he offered no documentary evidence, he claimed he had to loan the decedent her one-half of the purchase price because her bank backed out of the mortgage she had executed because "her income had been made in Canada as opposed to the United States.". (R. p. 319, lines 8-25). He said they agreed "for [his company's] benefit" to do a promissory note "which was dictated by the equivalent of your IRS. . . and that I could take money from the company provided there was a percentage of interest applied to it over a period of time." (R. p. 320, line 24 – p. 321, line 13).

[15] The terms of the mysterious note are not known and there was no testimony as to who owed the note (the estate, the trust, a company owned by the decedent, etc.), the terms of the note, or whether any payments had been made during the decedent's lifetime or what the balance supposedly was at the time of death. It is not known whether the note was payable to Hugh, or to his company.

Hugh was aware that the Rock Hill house had been put into a trust, because "the South Carolina tax people . . . charge[d] us the eight thousand instead of the two thousand." (R. p. 318, lines 14-19). The decedent also told Courtney that the trust was created for tax purposes. (R. p. 243, lines 22-23; R. p. 244, lines 6-12).

Before Courtney (as trustee) closed on the sale of the house, Hugh emailed on December 11, 2014 and demanded that he be paid from the sales proceeds (he did not mention his company). (R. p. 133). Courtney responded and explained that "estate law requires that all debts and expenses of Mom's estate be paid and settled before any distributions are made. This includes anything in the Trust as the Trust has legal responsibility for paying the debts of the estate." *Id.* She then went on to explain fiduciary duty and her concern about the complicated nature of the estate. *Id.* He then filed suit immediately after the closing was completed.

Courtney was right. Article Two, Section 4 of the trust agreement said that "[A]ll property transferred to my Trust. . . shall be held, administered and distributed according to the terms of my Trust Agreement." (R. p. 53). The trust contained a provision for revocation or amendment by the settlor, (R. p. 62-63, Section 3 (*Id.* R. p. 62)), a provision for the settlor to amend the terms of the trust by a subsequent will or codicil (R. p. 66, Section 1), and any subsequent trust or will could have eviscerated the trust, if another had surfaced after the settlor's death. The estate owed multiple mortgages and other debts which may have had to be paid from trust assets.

While the trust did require "immediate distribution of specific devises" from "my Trust Estate") as set forth in Article Six, (R. p. 66, Section 2) the document itself provided no guidance for how to interpret the specific devises with respect to their impact on the Trustee's other obligations. Article Five also requires the trust to "pay all expenses, claims and taxes from the

Administrative Trust.[16]" (R. p. 66, Section 3(a)). The Trustee was also obligated to pay "final medical expenses and all funeral costs, legally enforceable claims against me, reasonable expenses of the administration of my Trust, including those attributable to my Probate Estate. . ." (*Id.* R. p. 67, Section 4). The Administrative Trust was also obligated to pay "all Death Taxes. . ." Article Five, Section 5, p. 5.2. And, just to make sure everything was confusing, Article Six, Section 1 provided that "[e]xcept for the distributions directed in the following Section of this Article Six, all distributions of my Trust Estate shall be made in accordance with the Articles that follow." P. 6-1. Section Four of Article 6 provided for the "specific distribution" to Hugh. *Id.* P. 6-2. Section Four was one of "the Articles that follow." *Id.*

Lastly, Article Ten, Section 5 specifically provided that "if my Trustee determines that there is a compelling reason to postpone a distribution to a beneficiary, then my Trustee shall continue to hold and administer such beneficiary's trust . . ." While that section might be intended to apply only to the trusts created by the remainder assets of the Trust, it does not say that.

Courtney knew that she had to enforce the trust "in its entirety." (R. p. 232, lines 5-6).

Hugh's suit was for, *inter alia*, payment of a promissory note that didn't exist, and when no one knew the balance on the note if it did exist. No demand was made to Courtney for payment of the note, and no documentation was presented showing whether any money remained due on the note when the death occurred. (R. p. 304, lines 20-23). Hugh wanted Courtney to ignore all of her other responsibilities as trustee to other beneficiaries of the trust, and as personal representative to creditors, and pay him first, from the proceeds of the sale of the house, even if the Estate or Trust owed other obligations. Presumably a trust agreement could have been prepared

[16] Of course, none of these terms is defined in the trust agreement.

that required a Trustee to do that, but this trust agreement was too ambiguous and conflicting for any Trustee to be able to responsibly carry out all of the duties incumbent upon her and also make a priority distribution to Hugh (and/or his company) on a promissory note that did not exist[17].

Hugh's position presumes that there are other assets to pay the debts owed by the decedent at her death, that the mortgage on the subject real estate was sufficiently small so that there would be leftover proceed. He presumed a lot.

As noted above, the trust protector, Catherine Kennedy, concluded the trust was ambiguous and gave conflicting direction, and she supported Courtney's decision to determine all estate claims prior to making any trust distributions. Even Hugh's expert, Professor Alan Medlin, said Courtney's only option was to resign. (R. p. 351, lines 8-10; R. p. 358, lines 1-3). That, of course, would not have solved any problem, because either the successor trustee Hugh would have abandoned his obligation to the other beneficiaries in favor of himself, or he would have been burdened by the same conflicts that Courtney had. There was no middle ground. The language of the trust agreement made it impossible to administer the trust.

Professor Medlin testified only that, in his opinion, Courtney "could have" made the distribution to Hugh and his company without incurring liability to others. (R. p. 358, lines 17-21). He did not opine that her failure to do so was a breach of fiduciary duty. In fact, he "under[stood] how a trustee could take such a position." (R. p. 519, ¶ 8). Professor Medlin's testimony might have been helpful in the beginning, when Courtney was trying to determine what she should do, but it offered no insight into how Courtney should have resolved the dispute (other

[17] During testimony, Hugh's attorney and Courtney read through multiple provisions of the trust, and even they disagreed on whether the "one-half of the net proceeds" from the sale of the house was a part of the estate or a part of the trust. (R. p. 235, line 2 – p. 238, line 23).

than to resign and leave the dispute for someone else) or in determining whether she breached any fiduciary duty.

Professor Medlin provided no solution to the problems created by the ambiguities in the trust agreement; instead he offered Courtney the option to resign, which would have resulted in a successor trustee with the same conflicts and confusion that crippled Courtney. *See discussion supra.* Perhaps he offered a scholastic solution, but a meaningless one.

The trial judge erred in concluding there was evidence to support a conclusion that Courtney breached her fiduciary duty to Hugh and his company (assuming his company was a beneficiary of the trust, *see* discussion below). There was no evidence to support that conclusion. Both experts supported Courtney conclusion, although Professor Medlin suggested a resignation would have avoided the problem (or left it for someone else to deal with). The trial judge's ruling should be reversed.

ISSUES FOUR AND FIVE

The trial court erred in determining that Respondent Tyre Dealer Network Consultants Inc (Hugh's company) was both a beneficiary and a creditor and that Appellant had violated her fiduciary duty to Hugh's company. Hugh's company could not be both a creditor and a beneficiary at the same time.

The trial court erred in failing to conclude that Respondents violated the "no contest" provision of the trust agreement and in determining Respondents had probable cause to bring this action.

The 83-page trust agreement did not define "beneficiary." By including reference to a promissory note in the trust agreement, the decedent seems to be referring to a debt, which would make Hugh's company a creditor. The trial judge concluded, inexplicably, that it was both a

creditor and a beneficiary. (R. p. 16) ("In effect, TDN's position . . . is essentially that of a creditor for the repayment of a loan. . . [t]he Trustee's failure to pay TDN . . . was a breach of fiduciary duty."). (R. p. 17). ("TDN is a creditor, not a beneficiary. The no-contest clause does not apply to creditors."). Respectfully, it must be one or the other.

The complaint alleged that Hugh's company was a beneficiary of the trust. (R. p. 40, ¶ 2). The answer acknowledged that Hugh's company was a beneficiary, as did the amended answer. (R. p. 136, ¶ 2; R. p. 141, ¶ 2). Courtney considered it a beneficiary. (R. p. 272, lines 2-4). Professor Medlin thought it was a creditor that could have filed a claim against the estate. (R. p. 346, line 25 – p. 348, line 8). Hugh thought his company was a creditor. (R. p. 336, lines 21-24). "I'm a creditor then, if you want to know the answer." (R. p. 338, lines 11-12).

(R. p. 348, lines 1-17). However, he also opined Hugh's company might be a beneficiary, so "maybe he gets paid twice." (R. p. 348, lines 16-17). Testimony at trial never tied down exactly what Hugh's company was, but the pleadings established by allegation and answer that Hugh's company was a beneficiary. (R. p. 372, line 1-25; R. p. 558, lines 1-24). Oddly, Judge Kimball said it really didn't matter what the complaint said. (R. p. 372, line 25; R. p. 558, lines 1-25; p. 373, lines 1- 7). "It's not a verified complaint. It doesn't bind anybody. People could amend it according to a change in the proof, to conform to the proof in the file. I'm not interested in going over the complaint." *Id.* However, no amendment was made, perhaps leading to the trial judge's inconsistent ruling that Hugh's company was both a creditor and a beneficiary.

If Hugh's company was a creditor, its one and only chance to get paid was to file a claim against the estate, which it did not do. (R. p. 558, lines 1-2). The trial judge refused to penalize Hugh's company under the no-contest clause, because it was a creditor. (R. p. 17). However, it

also found that Courtney breached a fiduciary duty to TDN/Tyre because it was a beneficiary. There was no other way to assess liability against Courtney (as Trustee) for the claim by Hugh's company except to conclude it was a trust beneficiary.[18]

Respectfully, it has to be one or the other. If it is a creditor, it missed the deadline for filing a claim with the estate. If it is a beneficiary, the trial judge erred in finding that Courtney breached her fiduciary duty to it. *See* discussion *infra.*

The trial judge erred in finding that Hugh (and TDN/Tyre, if it is, in fact, a beneficiary) had probable cause to bring this lawsuit. The order found that the no-contest provision would not apply to TDN/Tyre because it was a creditor. If that's true, then it's only remedy was against the estate. This lawsuit is not against the estate. In that event, judgment against Courtney in favor of TDN/Tyre was error.

The judge erred in finding that there was probable cause for Hugh and/or his company to bring the lawsuit The judge's rationale was that the language of the trust agreement was "clear" so there was "probable cause" to bring the lawsuit. (R. pp. 17-18). As discussed above in detail, there was nothing about this trust agreement that was clear. The language of the trust agreement was so confusing and conflicting, no one knows if the company was a creditor or beneficiary (assuming a note even existed), and things don't get any clearer from there.

Professor Medlin testified that the trust agreement placed Courtney in a position of conflict so her only option was to resign. That would have solved nothing, because the successor trustee,

---

[18] This entire argument relates to a promissory note that doesn't exist, and that seems to be conceded. The trust could not create the promissory note simply by referring to one in the abstract, although Hugh's testimony was that they did not need a promissory note because of the trust. (R. p. 318, lines 19-22).

as designated by the trust agreement, was Hugh, and he would have the same conflict.

Instead, the trust obligated Hugh (and any other beneficiary) to invoke the Trust Protector provisions of the trust for any dispute. Hugh made no effort to do that. He directly contradicted the trust agreement by filing suit. There could be no other example of "lack of probable cause" than an intentional violation of the trust agreement under which Hugh was seeking a recovery.

There is no evidence to suggest that Hugh (and/or his company) had probable cause to bring this suit, especially since it related to an imaginary promissory note. The no-contest provision should have been applied as a matter of law, to bar any recovery by Hugh and/or his creditor/beneficiary company. The trial judge's order on that issue should be reversed and the matter should be remanded with direction to enter an order in Courtney's favor, barring the claims of Hugh (and his creditor/beneficiary company) on the basis of the no-contest clause.

ISSUE SIX

The trial court erred in entering judgment against Appellant in her individual capacity, because the evidence reflected that she acted only in her representative capacity for all matters relevant to this matter.

The complaint in this matter alleged wrongdoing by Courtney in her capacity as trustee of the trust. (R. p. 41, ¶ 8). There are no allegations in the complaint made against Courtney in her individual capacity.

The complaint sought relief against Courtney only in her capacity as trustee.

> . . . Plaintiff prays for the following:
> (a) For an order finding that the proceeds of sale . . . shall be paid. . .
> (b) For an order finding that Courtney Feeley-Karp breached her fiduciary duty...
> (c) For... attorney fees and costs... for the Trustee's actions...

(R. p. 46).

Hugh's own lawyer established in his examination of Courtney that all of her actions were taken in her capacity as trustee. (R. p. 228, lines 1-2).

Q. The language in this trust, about middle of the first paragraph, I believe it says, all powers shall be exercised only in a fiduciary capacity?

A. Correct.

Q. Any dispute with that?

A. No.

(R. p. 246, line 23 – p. 247, line 3).

The order awarding judgment in favor of Hugh and his company addressed Courtney only in her capacity as Trustee. (R. pp. 18-19).

1. The Trustee was required. . .
2. The Trustee breached her fiduciary duty. . .
3. The Trustee breached her fiduciary duty . . .

Id.

The final order did not distinguish against Courtney in her individual capacity versus her capacity as trustee, but in its silence, it must be construed to enter judgment against Courtney only in her capacity as Trustee. That's the way it was pleaded, that's the way the evidence was presented, and that's what the order said.

On motion for reconsideration, Courtney raised the issue to clarify that, because no findings against her individually had been made. (R. p. 239, ¶22). That is precisely what she was required to do. *Fryar v. South Carolina Law Enforcement Division*, 369 S.C. 395, 631 S.E.2d 918 (Ct. App. 2006) (when a judge grants relief not requested, aggrieved party must raise issue on motion to reconsider).

Ordinarily, a party may not obtain relief not requested in the pleadings. *Barnett v. Barnett*, 282 S.C. 343, 318 S. E.2d 570 (Ct. App. 1984). *See also Pittman Mortgage Company v Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997) (absent an amendment to the pleadings or implied consent to consider relief not requested, the pleadings define the issues). Simply naming Courtney in her individual capacity did not submit her individual person to the claims expressly made in the complaint against the trustee only. *See Quality Trailer Products v. CSL Equipment*, 349 S.C. 216, 562 S.E.2d 615 (2002) (reviewing the content of the emotion for the relief sought, despite a caption which suggested the relief sought was different than the motion itself sought). *See also Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (1995) (persons cannot become parties to an action merely by adding their names to the caption); *See also Collins Music Co. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) (looking to the content of the filing rather than the caption to determine the substance of the relief sought).

In his order denying reconsideration, the trial judge acknowledged that the earlier order made no findings of wrongdoing against Courtney individually, nor did it grant judgment against her individually. (R. p. 26). Instead of enforcing the pleadings and order as written, he concluded that he must include Courtney individually because, he reasoned, doing so would "frustrate" Hugh and his company's ability to recover. *Id.*

During oral argument on the motion, Judge Kimball stated that the issue had not been pointed out prior to trial. (R. p. 559, line 1-p. 571, line 23). Doing so, however, would have given Hugh and his counsel notice of their failure of allegations and failure or proof. Failure to offer proof of an element of the claim is fatal to recovery. *See Ford v. Atlantic Ry Co.*, 169 S.C. 41, 168 S.E. 143 (1933), affirmed 287 U.S. 502 (the burden of proof remains on the party against whom it

was initially cast). As it is, Hugh made no amendment to his pleading to conform to the testimony (although conflicting) that Hugh's company was a creditor. Raising the issue prior to reconsideration would have simply given Hugh and his company an opportunity to fix their omission.

ISSUE SEVEN

The trial court erred in awarding attorney fees and costs to Respondents.

In the trial judge's order determining liability, he concluded that Hugh and his company were entitled to recover attorney's fees under S.C. Code Ann. §62-7-1004, which permits assessment of attorney's fees and costs in "a judicial proceeding involving the administration of a trust." He concluded that "this action involved the administration of a trust." (R. p. 18, ¶ 5). He deferred a ruling on the actual amount of the fees and costs to be awarded to a later date. *Id.*

Courtney properly raised this issue in her Motion for Reconsideration. (R. p. 219, ¶22), noting that she would again address the issue after a final order on attorney's fees and costs was issued. Hugh's counsel subsequently submitted an affidavit for attorney's fees and costs.

Courtney did not take issue with the amount of fees and costs sought by Hugh and his company, but asserted that fees should not be awarded at all because liability should not have been assessed. (R. pp. 28-33). Consistent with her failure to address the specific amount, Courtney's return to the affidavit of attorney fees pointed out numerous reasons why no fees and costs should be awarded at all. (R. pp. 221-224).

The main reason fees should not have been awarded is that the judgment on the merits was erroneous for the reasons set forth previously. Setting aside the award against Courtney resolves

this issue without further inquiry. The award of attorney's fees and costs should be reversed in its entirety.

Neither Hugh nor his company sought an award of attorney fees or cost pursuant to §62-7-1004. They did seek attorney's fees and costs, but without citing any authority for the award. The trial judge supplied the authority to award attorney's fees and costs on his own. As discussed above in detail, and in the return to affidavit of attorney's fees, the trial judge should not have awarded relief that was not prayed for in the complaint. *Barnett v. Barnett*, 282 S.C. 343, 318 S. E.2d 570 (Ct. App. 1984).

The trial judge did not differentiate to whom the attorney's fees and costs were awarded, *i.e.*, to Hugh or to his company or to both (nor did the Affidavit of Attorney's Fees). If the appellate court agrees with Courtney's argument set forth above that Hugh's company as a creditor and therefor lost any right to recover by not filing a claim against the estate, then Hugh's company is not entitled to fees. Yet the award does not differentiate between Hugh and his company; the judgment is vague and incapable of properly being entered. Since the attorney's fees are not differentiated, a reversal as to only one of the two Respondents will require an allocation of attorney's fees. The record will not support such an allocation.

Lastly, consistent with the decedent's clearly articulated desire that disputes regarding her trust not be aired publicly (and instead reserved to the Trust Protector), the trust itself limited the amount of attorney fees that could be awarded in a dispute regarding the Trustee's decision to delay a distribution. Article 10, Section 5, Paragraph (h) expressly limits the amount of fees that can be awarded to a beneficiary who objects to the Trustee's decision to delay a distribution. (R. p. 82). Moreover, the prayer for attorney's fees was based, apparently, on a common-law

argument, and not on any statute or provision of the trust.

The award of attorney's fees and costs should be reversed, primarily because the trial judge erred in finding that Courtney had breached her fiduciary duty to one or both Hugh and/or his company. Even if those awards are upheld, however, the award of fees cannot stand for the reasons set forth herein.

CONCLUSION

This matter was specifically intended by the decedent to be resolved separately; but for Hugh's impatience in respecting the Trustee's multiple and conflicting obligations, this matter would have never been brought to this Court. The decedent did not want it here. Whether that is subject matter jurisdiction or summary judgment, it's clear that the relief sought in this court by Hugh and his company should not have been awarded to them.

Additionally, the evidence does not support the findings that Courtney breached her fiduciary duty (especially to a creditor to whom she owed no duty). The experts actually agreed that Courtney's position was a difficult one and was not unreasonable (although Professor Medlin opined that the problem could have somehow been resolved by Courtney's resignation; however, he did not suggest what would happen next).

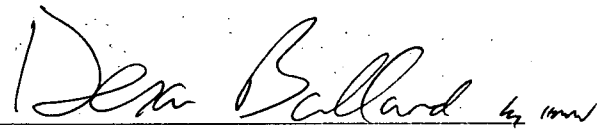
The decision of the trial judge to deny summary judgment and to award judgment in favor of Hugh and his company should be reversed. Moreover, the trial judge erred in failing to find that the no-contest provision of the trust should be enforced against Hugh (and his company, if it is a beneficiary) because he/they lacked probable cause (even according to their own expert) to file this action when they did.

Courtney prays for an order vacating the trial judge's order in their entirety and remanding 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 no contest clause.

Alternatively, judgment in favor of Hugh's company should be set aside since it is a creditor and it never filed a claim with the estate.

Fees should be vacated in their 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@desballard.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

August 14, 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 COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

Desa Ballard by Hand

Desa Ballard
Harvey M. Watson III
BALLARD & WATSON

Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299

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

ATTORNEYS FOR APPELLANT

August 24, 2017