THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2015-CP-24-1174

Jerald Lamar Harbin, Special Fiduciary of the Franklin N. Harbin and Edna F. Harbin Living Trust

..... Appellant

v.

Susan H. Williams, George T. Williams, Citifinancial Inc. and CFNA Receivables (SC) Inc.

..... Defendants,

Of whom Susan H. Williams is the Respondent.

REPLY BRIEF OF APPELLANT

ATTORNEY FOR APPELLANT

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(Heading from Appellant's Initial Brief)

1. THE TRIAL JUDGE ERRED, AT THE CLOSE OF THE EVIDENCE, IN REFUSING TO GRANT THE APPELLANT'S MOTION FOR DIRECTED VERDICT ON THE GROUNDS THAT THE DEED IN QUESTION, EXECUTED BY THE SURVIVOR OF TWO CO-SETTLORS, AFTER THE DEATH OF THE OTHER CO-SETTLOR, WAS INVALID, BECAUSE THE GOVERNING TRUST DECLARATION PROVIDED, IN RELEVANT PART, THAT THE AUTHORITY TO WITHDRAW PROPERTY FROM THE TRUST HAD EXPIRED UPON THE EARLIER DEATH OF THE OTHER CO-SETTLOR.

The Appellant will not waste the Court's time by reiterating all of the arguments from the Appellant's initial brief. Instead, the Appellant incorporates the initial brief by reference and will provide specific responses directed at the issues raise in the Respondent's initial brief.

For the court's ease of comparison of that which was admitted or denied in the pleadings,, the Appellant is also attaching, as Appendix A[1] , a summary of the disputed issues as contained the Complaint and the Answer. As Appendix A shows, the only issue is whether Mrs. Harbin, as co-Settlor, had the authority to withdraw the property in question, from the Trust, after the date of Mr. Harbin's death. The Appellant argues that Article 3 controls the outcome. The Respondent appears to be arguing that Article 2 (and possibly other articles) control the outcome.

Replying to the Respondent's first argument in the initial brief, it seems to the Appellant that the Respondent is mixing and overlapping the distinctly different roles of a Settlor and a Trustee, as they relate to the creation, amendment and revocation of a Trust as compared to the administration and distribution of the assets of the Trust Estate. She appears to be conflating both roles into a single entity, by glossing over those distinctly different roles.

1. The definition provisions of the S.C. Trust Code (Article 7 of Title 62) illustrate the existence of some of these differences.

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[1] The Clerk of the Court of Appeals rejected Appendix A when the initial reply brief was filed.

a. The Settlor "is a person who creates, or contributes property to, a trust." SC Code of Laws 62-7-103(14).

b. The Trust Instrument is "an instrument executed by the **Settlor** that contains the terms of a trust." SC Code of Laws 62-7-103(18) Empasis Added.

c. The Terms of a Trust means "the manifestation of the **Settlor's intent** regarding a trust's provisions . . .." SC Code of Laws 62-7-103(17). Emphasis Added.

d. The Settlor's intent is ". . . **as expressed in the trust instrument** or as may be established by other evidence **that would be admissible in a judicial proceeding**." SC Code of Laws 62-7-103(17). Emphasis Added.

e. A trust instrument may contain provisions allowing the trust to be revoked. Revocable means "revocable by the **Settlor** without the consent of the trustee or a person holding an adverse interest . . .." SC Code of Laws 62-7-103(17). Emphasis Added.

2. In addition, the South Carolina Trust Code contains SC Code of Laws 62-7-105(a) which "governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary."

3. Furthermore, the South Carolina Trust Code contains SC Code of Laws 62-7-105(b), which provides that the terms of the trust instrument prevail over the South Carolina Trust Code, except for those items enumerated in SC Code of Laws 62-7-105(b), specifically including section (b)(2) which reads "the duty of a trustee to act in good faith and **in accordance with the purposes of the trust**." Emphasis Added.

The heading of the Respondent's first argument reads:

> ". . . THE GOVERNING TRUST DECLARATION PROVIDED THAT THE SURVIVOR OF THE TWO [SETTLORS] WOULD

SERVE AS TRUSTEE ALONE AND DID NOT LIMIT THE ACTION THE SURVIVING TRUSTEE COULD TAKE IN REGARD TO THE TRUST OR THE TRUST PROPERTY."

The Appellant completely agrees that the Trustee's powers were not affected by Mr. Harbin's death. The Trustee's job was to hold and manage the Trust Estate, and at the appropriate time, to distribute those assets in accordance with the terms of the Trust. At no time did the Trustee ever have the power to revoke the trust or withdraw property from the Trust. Only the Settlors were given the power to withdraw property from the Trust Estate. By the same token, only the Trustee was given the power to distribute property, in the Trust Estate, to the ultimate beneficiaries, in accordance with the terms of the Trust. The Respondent's references to the Trustee's powers to revoke or withdraw are completely misplaced.

In the body of her first argument, which the Appellant is numbering for ease of organization, the Respondent raises the following issues: (1) the Trust Declaration did not contain any language ". . . which in its plain and simple meaning, dictated that the trust became irrevocable on the death of the first of the settlors to die . . ."; (2) the Trust Declaration did not contain any language ". . . that limited the acts which the Settlor or the Trustee might exercise over the Trust property."; (3) the language of Article 3 was "a simple statement and illustration of the independent powers each co-settlor and co-trustee might exercise while both are living"; and (4) the Respondent appears to be arguing that the law in South Carolina has always been that all trusts are revocable unless they are expressly made irrevocable. The Respondent references S.C. Code 62-7-602(a), adopted in 2005 [2], and while acknowledging ". . . the subject trust predates the effective date of this statute, . . . " goes on to assert "the statute is a codification of a well established tenet of trust construction."

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[2] 2005 Act No 66.

I. A review of the relevant language of the Trust Declaration clearly shows that the Respondent's first three arguments are completely contrary to the law and the admitted facts.

1. Contrary to section (1) of the Respondent's argument, Article 3 of the Trust Declaration does contain express language related to the powers of either Settlor to amend or revoke the trust. Article 3 contained an express limitation on those powers: Those powers could only be exercised, by either Settlor, "while **both** Settlors are living." [3] Emphasis added. The Respondent appears to be asking this Court to re-write Article 3 to provide that those powers could be exercised "while **either** Settlor is living." However, the Respondent's wishes do not (and cannot) alter well established law.

2. Contrary to section (2) of the Respondent's argument, Article 2 of the Trust Declaration merely appointed the Trustees and named their successors in office. [4] The Respondent's position is that the language in Article 2, which provided that the surviving co-Settlor would continue to serve as sole Trustee, upon the death of the first co-Settlor, somehow gave the surviving co-Settlor the power to ignore the limitations of Article 3.

3. Contrary to section (3) of the Respondent's argument, Article 3 does contain express language limiting the powers of the surviving co-Settlor.

4. Article 4 of the Trust Declaration contains the provisions regarding when and how the Trustee was to distribute the assets of the trust estate and it named the ultimate

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[3] "Article 3: **While both Settlors are living, either may**: (1) withdraw property from this Trust in any amount and at any time; (2) add other property to the Trust; (3) change the beneficiaries, their respective shares and the plan of distribution; (4) amend this Declaration of Trust in any other respect; and (5) revoke this Trust in its entirety or any provision therein." Emphasis Added.

[4] "Article 2: The Settlors shall act as Trustees during their lives. Upon the death or incapacity of either Settlor, the other Settlor shall act as Trustee alone. Upon the death of incapacity of both Settlors, John R. Harbin shall serve as successor trustee of this Trust."

beneficiaries. [5] Contrary to Respondent's arguments, the death of the first co-Settlor does not alter those responsibilities which were imposed upon the Trustee.

5. In administering the Trust, prior to the ultimate distribution, the Trust Declaration granted to the Trustee the "powers granted to Trustees generally by the 1990 version of the Uniform Trustees Powers Act, enacted as Part 7 of 1990 Act No 521, and codified at S.C. Code Ann. 62-7-701 (1990) by Lawyers Cooperative, were incorporated by reference, along with any additional powers which might be granted by subsequent amendments to the Act and to exercise all additional powers as may be allowed by law." To the fullest extent allowed by law, subsequent amendments to the Act which had the effect of reducing the powers granted by the Act were to be ignored.

For the Court's ready reference, the Appellant is attaching, as Appendix B[6], a copy of the 1990 Uniform Trustees Powers Act, taken from 1990 Act No 521, since it no longer appears in the printed code.

Contrary to the Respondent's arguments, the Trustee was never given the authority to revoke the Trust, amend the Trust or withdraw property from the Trust. Only the Settlors could have exercised those powers. More importantly, those powers could only be exercised while both Settlors were living.

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[5] "Article 4: Upon the death of both Settlors,, the Trustee shall divide the trust estate as then constituted (which shall include any property which may be added from the general estates of the Settlors) into equal separate shares so as to provide one share for each then living child of Settlors and one share for each deceased child of Settlors who shall leave issue then living. Except as set forth below [Article 5], each share set aside for a living child shall be distributed free of trust to such child, and each share set aside for a deceased child who shall leave issue then living shall be distributed per stirpes to such issue.

[6] The Clerk of the Court of Appeals rejected Appendix B when the initial reply brief was filed.

II. Section (4) of the Respondent's argument relies upon S.C. Code of Laws 62-7-602(a) [7] as providing that a Trust is revocable unless the express terms of the trust provide that the Trust is irrevocable. As stated above, the Respondent further asserts "Even though the subject trust predates the effective date of this statute, the statute is a codification of a well established tenet of trust construction."

First, 62-7-602(a) clearly does not apply to the Trust which is the subject of this action. The subject Trust was created in 2000. 62-7-602(a) provides "[t]his subsection does not apply to a trust created by an instrument executed before the effective date of this article." Section 9 of 2005 Act No 66 provides "This act takes effect on January 1, 2006."

Second, even if 62-7-602(a) did apply to the subject Trust, Article 3, by providing the circumstances under which the Trust could be amended or revoked, only while both Settlors were living, satisfies the requirements of that statute..

Finally, the Respondent's argument that 62-7-602(a) was "a codification of a well established tenet of trust construction" is completely wrong. 62-7-602 was enacted as part of 2005 Act No 66.

Prior to the enactment of 2005 Act No 66, the law was completely the opposite of what the Respondent contends..

The South Carolina Reporters Comments to 2005 Act No 66 set forth an accurate summary of the prior law. It also completely refutes the Respondent's legal conclusion that 62-7-

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[7] 62-7-602(a) "Unless the terms of a a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. **This subsection does not apply to a trust created under an instrument executed before the effective date of this article**." Emphasis added.

602(a) codified "a well establish tenet of trust construction." [8]

Under the law in effect in 2000, every trust was presumed to be irrevocable unless its terms expressly provided otherwise. With the exception of the introductory prepositional phrase "While both Settlors are living," the remainder of Article 3 is the exact revocability language used by S.C. Attorney Robert P. Wilkins in the Second Edition of his two volume set entitled "Drafting Wills and Trust Agreement, a Systems Approach" published by Shepards/McGraw-Hill Inc. in 1989.

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[8] South Carolina Comment: South Carolina Trust Code Section 62-7-602(a) is a departure from former South Carolina law, which presumed that a trust was irrevocable unless a power of revocation was validly reserved and that, if a particular method of revocation was specified, it must be strictly followed. Where the right to revoke was reserved and no particular mode was specified, any mode sufficiently showing an intention to revoke was effective. See Peoples National Bank of Greenville v. Peden et al., 229 S.C. 167, 92 S.E.2d 163 (S.C. 1956), citing to 4 Bogert on Trusts and Trustees Section 996 and 54 Am. Jur. Section 77 on Trusts. Likewise, a settlor had to expressly reserve the right to modify a trust. First Carolinas Joint Stock Land Bank v. Deschamps, et al., 171 S.C. 466, 172 S.E. 622 (S.C. 1934). The South Carolina Supreme Court has noted that there are some exceptions to the general rule that a trust cannot be revoked or modified unless such a power is expressly reserved in the trust instrument, such as mistake. Chiles v. Chiles, et al., 20 S.C. 379, 242 S.E.2d 426 (S.C. 1978), citing to the Restatement 2d of Trusts Section 330(2). There was no South Carolina case law or statutory counterpart to SCTC Subsection 62-7-602(b). As to SCTC Section 62-7-602(c), although South Carolina law required strict compliance with the method of revocation provided by the terms of the trust, the courts would recognize a valid revocation as long as it was clear that the settlor had exercised every right within his power to revoke the trust and if notice requirements which were strictly for the benefit of the trustee were waived by the trustee. Peoples National Bank of Greenville v. Peden et al., 229 S.C. 167, 92 S.E.2d 163 (S.C. 1956). SCTC subsection (c)(2) differs from the UTC version by requiring a writing to revoke or amend a trust unless the trust was created orally, and the UTC Comment should be adjusted accordingly. Under prior South Carolina case law, if the power to revoke was not expressly reserved in a trust, the terms of a later will could not control the disposition of property under a previously executed trust document. Bonney v. Granger, et al., 292 S.C. 308, 356 S.E.2d 138 (S.C. Ct.App. 1987). If the right to revoke was reserved and no particular method of revocation was specified, a revocable trust could be revoked by a testamentary devise of the corpus of the trust. Whether a will impliedly revoked a revocable trust was a question of intention. Peoples National Bank of Greenville v. Peden et al., 229 S.C. 167, 92 S.E.2d 163 (S.C. 1956), citing to 54 Am.Jur. Section 77. A residuary clause was insufficient to revoke or amend a trust. First Carolinas Joint Stock Land Bank v. Deschamps, et al., 171 S.C. 466, 172 S.E. 622 (S.C. 1934).

As a result, the Appellant was entitled to a directed verdict, and it was error for the trial judge to deny the Appellant's motion therefor. Rule 50, SCRCP.

(Heading from Appellant's Initial Brief)

2. THE TRIAL JUDGE ERRED IN SUBMITTING TO THE JURY THE ISSUE OF WHETHER OR NOT THE GOVERNING TRUST DECLARATION AUTHORIZED THE SURVIVOR OF TWO CO-SETTLORS TO WITHDRAW THE PROPERTY IN QUESTION FROM THE TRUST, AFTER THE EARLIER DEATH OF THE OTHER CO-SETTLOR.

In the body of her second argument, which the Appellant is also numbering for ease of organization, the Respondent raises two points: (1) The Respondent argues that it was within the sound discretion of the trial judge to find that " 'the Trust document itself does create an issue of fact' and therefore submit the question of fact to the jury"; and (2) the Respondent (correctly) recites some of the legal rules regarding the construction of a trust instrument, but none of those rules are remotely applicable to the issue of whether or not the interpretation of the Trust Declaration should have been submitted to the jury, or whether it was a matter of law for the court.

With regard to section (1), the Respondent completely ignores the fact that the trial judge made a specific ruling that the Trust Document was not ambiguous. The trial judge also made what might be described as a"back up" ruling, finding that, even if he had found an ambiguity in the Trust Document, it would have been a patent ambiguity and not a latent ambiguity. [9] As a result of those rulings, the trial judge ruled that the Respondent could not introduce extrinsic evidence to contradict the plain language of the trust.

Those rulings have not been appealed, and they should now be the law of the case. Burton v. Cnty. of Abbeville, 312 S.C. 359, 363, 440 S.E.2d 396, 398 (Ct. App.1994) (stating the

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[9] THE COURT: I find that there is no ambiguity in the Trust document. But, even if I were to find an ambiguity, it would be a patent ambiguity and no extrinsic evidence is allowed when there are patent ambiguities, only when there is a latent ambiguity. Transcript page 36 line 1 through Transcript page 36 line 5. (R. p. 10, lines 1-5).

appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case) and numerous other cases.

The Appellant submits that both of the rulings were 100% accurate, and the Appellant pointed out to the trial judge during the trial that his rulings meant that there were no factual disputes for the jury to decide.[10]

The trial judge disagreed. [11]

Assuming, arguendo, that the Respondent's position is correct, nowhere does the Respondent does not address the fact that trial judge also ruled that any ambiguity, if one actually did exist, would have been a patent ambiguity rather than a latent ambiguity. [12]

However, in the event the trial judge erred in ruling that the language of the Trust Declaration was not ambiguous, and in the event the Court decides that his ruling is not the law of the case, the trial judge correctly ruled that any ambiguity, if such an ambiguity did exist, would have been a patent ambiguity. Transcript page 36 line 2 through Transcript 36 line 1.

The law is well settled that the interpretation of an unambiguous policy, or a policy with a

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[10] MR. WATSON: I think in light of your rulings, there is nothing to submit to the jury. Transcript page 36 line 13 through Transcript page 36 line 15 (R. p.10, lines 13-15).

[11] THE COURT: Well, I disagree. I disagree. You've alleged in the Complaint that she did not have authority to sign the Deed. The Answer says we disagree; we believe she did have authority to sign the Deed. In reading the Trust document and, again, I'm not finding an ambiguity, but I think it can be, and I don't think subject to different interpretations is the same thing as ambiguity. But I can read the Trust document and if I were seated in your chair or Ms. Jackson's chair, I think I could argue either way that it gives authority or it does not give authority. So I'm going to allow that issue to be presented to the jury.

[12] Beaufort County School Dist v. United Nat. Ins. Co., 392 S.C. 506, 709 S.E.2d 85 (S.C. App. 2011) describes the difference between a patent ambiguity and a latent ambiguity. A patent ambiguity is obvious from the face of the document. A latent ambiguity arises when the words of the document are applied. The case uses the example of a named beneficiary in a will. There is no patent ambiguity because the name of the beneficiary is clearly set out in the will. A latent ambiguity would arise, however, if there were two possible beneficiaries with that same name.

patent ambiguity, is for the court. Beaufort County School Dist v. United Nat. Ins. Co., 392 S.C. 506, 709 S.E.2d 85 (S.C. App. 2011), citing Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 526-27, 167 S.E.2d 420, 423 (1969); B.L.G. Enters., Inc. v. First Fin. Ins. Co., 328 S.C. 374, 377, 491 S.E.2d 695, 697 (Ct.App.1997), aff'd, 334 S.C. 529, 514 S.E.2d 327 (1999).

The law is equally well settled that the interpretation of a policy with a latent ambiguity is for the finder of fact. Beaufort County School Dist v. United Nat. Ins. Co., 392 S.C. 506, 709 S.E.2d 85 (S.C. App. 2011), citing Wheeler v. Globe & Rutgers Fire Ins. Co., 125 S.C. 320, 329, 118 S.E. 609, 612 (1923) (Cothran, J., dissenting).

After ruling that the language of the Trust Declaration was not ambiguous, the trial judge should have also ruled, as a matter of law, that the deed in question was invalid, because the governing Trust Declaration unambiguously provided, in relevant part, that the authority to withdraw property from the trust had expired upon the earlier death of the other co-Settlor,

Alternatively, after correctly ruling that any ambiguity in the Trust Declaration would have been a patent ambiguity, the trial judge should have interpreted Article 3 himself, with the required findings of fact and conclusions of law which are required of judges, but which are not required of a jury, so that his ruling could be reviewed on appeal.

It was error for the trial judge to submit to the jury the interpretation of the language of a trust when either (1) the language is unambiguous or (2) any ambiguity in the language is a patent ambiguity.

(Heading from Appellant's Initial Brief)

3. **Following the jury's verdict in favor of the Respondent, the trial judge erred in refusing to grant Appellant's motion for judgment notwithstanding the verdict on the grounds that that the deed in question, executed by the survivor of two co-Settlors, over five years after the death of the first co-Settlor, was invalid, because the governing Trust Declaration provided, in relevant part, that the authority to withdraw property from the Trust had expired upon the earlier death of the other co-Settlor.**

The Appellant incorporates the earlier arguments related to a directed verdict rather than presenting them again in this argument.

After the jury returned a verdict in favor of the Respondent, the Appellant moved for judgment notwithstanding the verdict on the same grounds raised in the earlier motion for a directed verdict. The motion was denied by the trial judge. Transcript page 136 line 22 through Transcript page 137 line 5 (R. p. 31, line 22-p. 32, line 5)

When the trial judge denied the Appellant's motion for a directed verdict, the trial judge is "deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . .." Rule 50(b), SCRCP.

The Appellant made a motion for a directed verdict, at the close of all the evidence, in accordance with Rule 50(a), SCRCP, which is required as a condition for making a motion for judgment notwithstanding the verdict. Rule 50(b), SCRCP. As a result, the Appellant was entitled to a subsequent judgment notwithstanding the jury's verdict, and it was error for the trial judge to deny the Appellant's motion therefor.

CONCLUSION

The deed executed by the survivor of two co-Settlors, purporting to withdraw property from the Trust, after the death of the other Settlor, was in direct contravention of the plain language of the Trust Declaration which limited the exercise of that power, and similar powers, to the time when both Settlors were still living.

Article 3 plainly states "**While both Settlors are living**, either may: (1) withdraw property from this Trust in any amount and at any time; (2) add other property to the Trust; (3) change the beneficiaries, their respective shares and the plan of distribution; (4) amend this Declaration of Trust in any other respect; and (5) revoke this Trust in its entirety or any provision therein." (emphasis added).

The Appellant was entitled to judgment on this issue as a matter of law. The trial judge erred in refusing the motion for a directed verdict, erred in submitting this issue to the jury for its determination, and erred in refusing to grant the motion for judgment notwithstanding the verdict after the jury returned its verdict in favor of the Respondent.

BY: _____

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Original Reply Brief of Appellant

(Unbound)