THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
ON PETITION FOR WRIT OFCERTIORARI TO THE COURT OF APPEALS
Initial case Court of Common Pleas

S. Jackson Kimball III, Master-in-Equity

Opinion No. 5639 (S.C. Ct. App. filed July 3, 2019)

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SC Court of Appeals

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, ... Petitioner,

v.

Deborah Dereede Living Trust dated December
18, 2013, Hugh Dereede and Tyre Dealer Network
Consultants, Inc., ...Respondent.

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Petitioner Courtney Feeley-Karp, individually and as Trustee of the Living Trust of Deborah Dereede (hereafter "Courtney") seeks an order of this Court issuing a writ of certiorari to review the decision of the South Carolina Court of Appeals in the instant matter, which failed to address novel issues of law that were properly preserved and presented on appeal.

The decision of the Court of Appeals was issued on April 10, 2019, and Courtney filed for petition for rehearing *en banc*. By order dated July 3, 2019, the Court of Appeals granted the rehearing, without specifying which issue it had agreed to rehear, and it withdrew its earlier opinion. On the same date, the Court "dispense[d] with further briefing and argument" and issued a "substituted" opinion which did not address any of the issues raised in the petition for rehearing. There is no prior precedent known to Courtney which addresses the authority of the Court of Appeals to not address any issues on rehearing, but rather to simply write a substituted opinion without addressing the errors in the original.

Similarly, the Court of Appeals did not address Courtney's request for rehearing *en banc* at all, did not specify which issue(s) on which rehearing was supposedly granted, and did they provide an opportunity for briefing or additional argument on rehearing of whichever issue(s) it granted rehearing. The amended opinion on July 3, 2019 rewrote a portion of the original opinion but did not address or resolve any of the issues raised on rehearing. This petition for writ of certiorari is based on the amended opinion issued July 3, 2019. There is no known precedent addressing the obligations of the Court of Appeals on a request for rehearing *en banc*.

Courtney respectfully requests that this Honorable Court issue a writ of certiorari to the Court of Appeals to address the novel procedural and substantive issues presented by this appeal, which were not resolved by the Court of Appeals in its original or substituted opinion.

STATEMENT OF FACTS

Courtney is one of two surviving children of the deceased, Deborah Dereede. Shortly before her death, decedent executed a will and trust naming Courtney as personal representative and successor trustee. Courtney became successor trustee of the trust upon her mother's death. Hugh Dereede, the man who had only recently married their mother a few years prior to her death, sued Courtney in her capacity as Trustee of the decedent's trust[1], claiming he and a Canadian company owned by him were owed a priority distribution from the Trust without consideration of assets of the estate, obligations of the estate, and other beneficiaries rights and duties owed to them. The primary source of funds for these distributions was the sale of the house owned by the trust in Lake Wylie, South Carolina, which closed on Friday December 19, 2014 after some back and forth between counsel for the parties as to distribution of funds. At time of closing, Hugh's counsel had agreed it was reasonable to wait until the creditor's period was over to distribute funds. However, on Monday December 22, 2014 Hugh communicated his demand for immediate distribution to himself and Tyre to Courtney. Before she could respond, he filed suit the next day.

After the suit was filed, a Trust Protector was appointed under the terms of the Trust who issued a report with various findings, including: (1) Courtney acted reasonably and appropriately in not distributing assets to Hugh and Tyre when he demanded immediate distribution as she would have been foolish and likely in violation of other fiduciary duties; (2) Courtney acted reasonably in continuing to not distribute when the creditor period closed as there was a new reasonable basis for non-distribution, the no-contest clause which would have precluded distribution absolutely to beneficiaries who challenged a judgment of the Trustee found to be taken in good faith by a court; and (3) that while the Trust required beneficiaries to present their claims to the Trust Protector

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[1] It has not been explained how or why a trust, which held only a single piece of real estate that was heavily mortgaged, contained multiple inapplicable provisions among its 83 pages.

who could authorize claims to be filed in court or not, and although she was not appointed at the time Hugh filed suit on December 23, 2014 (the day after he demanded distribution), she would not have authorized the filing of the suit .

Although Hugh produced no documentation to support his allegations[2] and the facts were not in dispute (and therefore should have been decided on summary judgment), the trial court found in his favor after a bench trial, in a confusing order which contradicted itself on at least one significant issue. On rehearing, the trial judge refused to address the contradiction in the order and assessed personal liability against Courtney, even though the complaint had not requested that relief.

Courtney filed an appeal, and the Court of Appeals issued its first opinion, which affirmed[3]. Following a request for rehearing *en banc* the Court of Appeals issued an order purporting to grant rehearing but dispensed with further briefing and argument. It separately issued a "substitute" opinion which did not address the petition for rehearing at all, but simply rewrote portion of the original opinion without explanation.

The original trial court proceedings before Judge Kimball were tried non-jury, which presented the Court of Appeals with an appeal in which it was required to determine whether there 'was evidentiary support for the trial judge's findings. *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).

In its original decision in April, 2019, the Court of Appeals did not state the scope of review, and erroneously decided that the entire appeal was to be determined by a single provision

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2 The entire basis for the trust, per Hugh, was to provide for the payment of a promissory note that was never produced and may never have existed. Hugh testified "once we had the trust, we didn't need [the note]."

3 The Court of Appeals dismissed that portion of the appeal that sought to appeal the denial of summary judgment.

of the Trust agreement (which was 80+ pages long – see App. pp. 00424-505[4]). As a result, the entire original opinion of the Court of Appeals was flawed, because the entire trust agreement was required to be read as a whole. Alderman v. Alderman, 178 S.C. 9, 181 S.E. 897 (1935).

This was pointed out on rehearing to the trial court (App. p. 00223 ¶3), on appeal, (App. pp. 610-616) and on rehearing to the Court of Appeals (App. pp. 000696-00697). The Court of Appeals did not answer this question in its original opinion or its substituted opinion.

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing on the merits issue was submitted to the Court of Appeals in a timely manner but would show that the Court of Appeals did not address any of the issues raised on rehearing in its amended hearing issued on July 3, 2019. While the Court of Appeals issued a "substituted" opinion, it did not address any of the errors raised in the Petition for Rehearing.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in refusing to consider the merits of the petition for rehearing, while supposedly granting it and issuing an amended opinion which did not address the issue raised on rehearing.

2. Did the Court of Appeals err in refusing to consider or even address the petition for rehearing *en banc*, despite the proper form of the request and the rationale included in the petition for hearing the matter *en banc*.

3. Did the Court of Appeals (and the trial court) err in its decisions regarding Hugh's corporation Tyre? Both the Court of Appeals and the trial court decided that Tyre could recover against Courtney without determining whether the corporation was a creditor of the estate or a beneficiary of the trust and without any evidence that a promissory note ever existed. The Court of Appeals erred in deciding it made no difference how Hugh's company was characterized (creditor versus beneficiary), it was entitled to a judgment against Courtney for breach of fiduciary duty. However, Tyre,

[4] Based on Hugh's testimony, the trust was made solely so that Hugh, a Canadian citizen, could receive an inheritance fraudulently by avoiding payment of taxes to the United States Government. (App. pp. 00661 – 00664, discussing Hugh's tax scheme). The entire trust, therefore, had an illegal purpose but the trial judge did not want to hear it. (App. pp. 000663, citing R. p. 341, line 4).

as a creditor of the estate, failed to file a claim with the estate so if it is a creditor, as opposed to a beneficiary, its ability to collect was lost. If Tyre was a beneficiary (the trial found it was both), it would have been bound by the no-contest clause. (Rehearing issue 8). Did the Court of Appeals err in affirming the trial court's decision that Tyre had probable cause to bring this action, when no court yet has been able to decide whether Tyre is a creditor or a beneficiary?

4. Did the Court of Appeals err (as did the trial court) in reading and applying only one ambiguous provision of the trust without regard for other obligations placed upon the Trustee by the remainder of the trust and the obligations of the estate? (Issues 1, 2 and 3 in Petition for Rehearing). The Court of Appeals erred, in its reissued opinion in determining the record lacked sufficient evidence to determine the financial obligations of the combined trust/estate obligations, when in fact that evidence was of record (Plaintiff's Exhibit 5 was the Inventory and Appraisement that outlined the assets and debts of the Estate) (App. p. 000506-509). Did the Court of Appeals err in finding sufficient evidence existed to support entry of judgment against Courtney for breach of fiduciary duty, when the trust agreement contained conflicting provisions and both the Trust Protector and Hugh's expert found her position "understandable" and agreed that Courtney had acted in good faith. (Rehearing Issues 3, 4, 5, 6, 7, 9, 13. 14, 15, 16, 17).

5. Did the Court of Appeals (and the trial court) err in disregarding the opinion of the Trust Protector that Courtney's decisions were appropriate in light of the circumstances presented and to have acted other than she did would have been "foolish."? (Rehearing issue 5, 7, 15, 18). In addition, did the Court of Appeals err in its summary disposition of the issues regarding the Trust Protector, since the issue is a novel issue in South Carolina and the Court's approval of Hugh's actions despite the decedent's desire to keep her financial affairs private by including the Trust Protector provisions in the trust, which expressly prohibited a lawsuit without permission of the trust protector? (Rehearing issue 18)

6. Did the Court of Appeals err in affirming the trial court's finding that Hugh had probable cause to bring this action and was not, therefore, precluded from recovery by the no-contest clause of the trust? (Rehearing issue 8, 10, 19).

7. Did the Court of Appeals err in affirming personal liability against Courtney, when the pleadings did not request that relief? (Rehearing issue 11 & 12)

8. Did the Court of Appeals err in affirming an award of attorney fees that was not prayed for in the complaint? (Rehearing issue 20)

<u>ARGUMENT - A</u>
<u>Issues 1 & 2</u>

1. Did the Court of Appeals err in refusing to consider the merits of the petition for rehearing, while supposedly granting it and issuing an amended opinion which did not address the issue raised on rehearing.

2. Did the Court of Appeals err in refusing to consider or even address the petition for rehearing *en banc,* despite the proper form of the request and the rationale included in the petition for hearing the matter *en banc.*

Rule 219, SCACR, allows for hearing *en banc* when "the affirmative vote of six (6) members" vote to grant *en banc* hearing. The Court of Appeals apparently ignored, and affirmatively did not address, the request for *en banc* rehearing, because the order granting rehearing bore only three (3) signature, those being the judges who decided the original opinion. (App. p. 000716).

Courtney correctly followed procedure to suggest rehearing *en banc.* Rule 219(b) provides "if a suggestion for rehearing *en banc* is . . made, it shall be included in the petition for rehearing.". The suggestion <u>was</u> included in the petition for rehearing, together with the rationale as to why *en banc* rehearing was appropriate. (App. pp. 000695-696).

Rule 219 <u>requires</u> the Clerk of the Court of Appeals to submit a "suggestion" for rehearing *en banc* to the entire Court of Appeals. "The Clerk of the Court of appeals shall transmit the suggestion to all judges of the Court.[5]" The Rule requires the entire membership of the Court of Appeals to consider and address the "suggestion" for rehearing *en banc.* "A vote

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[5] Respondent Hugh violated the Rules as well. Rule 219 specifically forbids the filing of a return to a petition for rehearing *en banc.* "No response shall be filed by the other parties unless the Court shall so order." Rule 219(b). Hugh filed a response to the petition for rehearing *en banc* <u>without</u> permission of the Court of Appeals to do so. (App. pp. 000707-000713). The prohibition on returns to petition for rehearing is not limited to *en banc* requests. The general rules on rehearing prohibits any response to a petition for rehearing without express permission from the Court. "No return to a petition for rehearing may be filed unless requested by the Appellate Court." Rule 221(a), SCACR.

will not be taken . . . unless a member of the Court [as a whole] calls for a vote on the suggestion." *Id.* Lastly, the rule requires that the party requesting rehearing *en banc* "shall be advised that the suggestion has been rejected." *Id.*

None of that happened. Instead, the original panel which authored the April, 2019 decision voted to "grant" rehearing, but then eviscerated its vote by unilaterally "dispense with further briefing and argument." (App. 000716). In addition, the original panel failed to specify on what issue it was granting rehearing[6] and it did not advise the parties on which issues it intended to address, if any, in its "substitute" opinion. *Id.*

It appears the Clerk of the Court of Appeals simply ignored Courtney's request for rehearing *en banc*, and the original panel ignored the request as well. Instead, the original panel, without stating what rehearing issue it was addressing, simply wrote a different "substitute" opinion. (App. pp. 000718 – 000727).

There is virtually no decisional law addressing the proper procedure by which an appellate court is to address *en banc* requests. Nor are there any published opinions which discuss the factors which should be considered in deciding whether a matter should be heard *en banc*. Those few decisions which address *en banc* requests simply recite them as having been filed. *See e.g.,* Middleton v. Williamson, 383 S.C. 490, 681 S.E.2d 967 (2009); State v. Dudley, 364 S.C. 578, 614 S.E.2d 623 (2005).

Nor is there much law nationwide on the issue. There is one decision in Ohio which remanded a case to a prior court when the prior court failed to address a request for *en banc* consideration. McFadden v. Cleveland State University, 180 Ohio App. 810, 907 N.E.2d 742 (2009). That case can be read to suggest *en banc* consideration is appropriate when there

[6] Courtney's petition contained twenty (20) issues to be addressed on rehearing.

appears to be a conflict in decisions as to the prospective and retroactive application of a judicial decision.

A decision of the Oregon Workers Compensation Division opined that *en banc* consideration is "those issues of first impression that would have a widespread impact on the workers compensation system. . ." In The Matter of Glen E. Hammersley, 55 Van Natta 3741 (2003). In stating the decision for *en banc* decision is a matter for the court's discretion, it referenced an opinion of "significant case review" as a standard by which to allow *en banc* consideration. *Id.* While not having performed an exhaustive, nationwide search as to the applicable standard for determination of *en banc* review, Courtney would suggest that simply ignoring the request and not addressing it is, itself, a legal error. This Court has recognized that the failure to exercise an abuse of discretion when discretion exists is legal error in that it is an *ipso facto* abuse of discretion. State v. Hawes, 411 S.C. 188, 767 S.E.2d 707 (2015); Arrow Bonding Company v. Warren, 399 S.C. 603, 732 S.E.2d 743 (2012).

This issue can be more fully briefed on Certiorari. At this point, it is sufficient to point out again that this case is one of first impression, in that it is the first appellate decision (located by Courtney) in South Carolina which addresses any part of the new statutory procedure providing for a settlor to keep her private affairs from the court through the use of a trust protector. S.C. Code Ann. Section 62-7-103, and Section 62-7-818 (effective January 1, 2014). The issue was fully briefed in the appeal. (App. pp. 000602-610). Decisions from other jurisdictions can be explored on grant of certiorari.

Courtney raised the issue[7] as one of subject matter jurisdiction, because the trust agreement in this case specifically prohibited the filing of a lawsuit without permission of the

[7] The issue was raised on rehearing before the trial court as one of subject matter jurisdiction on petition for rehearing, in that subject matter jurisdiction issues can be raised at any time. (App. p. 000221-000222).

trust protector. This trust agreement expressly provided that "all" disputes were to be resolved by the trust protector and "no one" may file a lawsuit without express permission of the trust protector. (App. p. 000435, § 8(h)). The Court of Appeals' original decision did not consider the possibility that a settlor's express directive limiting a beneficiary's ability to challenge a trust in public court proceedings might, in fact, limit a court's subject matter jurisdiction[8].

On rehearing, the Court was asked to at least acknowledge the novel issue and address how it affected a court's consideration of the issues presented. (App. p. 000702, ¶ 18). But the Court of Appeals ignored that point on rehearing (as it did all points).

Certiorari should be granted to address the procedural and substantive issues presented by the petition for rehearing *en banc* and the Court of Appeals' failure to address the issue at all.

ARGUMENT - B
Issues 3 and 4

3. Did the Court of Appeals (and the trial court) err its decisions regarding Hugh's corporation Tyre? Both the Court of Appeals and the trial court deciding that Tyre could recover against Courtney without determining whether the corporation was a creditor of the estate or a beneficiary of the trust and without any evidence that a promissory note ever existed. The Court of Appeals erred in deciding it made no difference how Hugh's company was characterized (creditor versus beneficiary), it was entitled to a judgment against Courtney for breach of fiduciary duty. However, Tyre, as a creditor of the estate, failed to file a claim with the estate so if it is a creditor, as opposed to a beneficiary, its ability to collect was lost. If Tyre was a beneficiary (the trial found it was both), it would have been bound by the no-contest clause. (Rehearing issue 8). Did the Court of Appeals err in affirming the trial court's decision that Tyre had probable cause to bring this action, when no court yet has been able to decide whether Tyre is a creditor or a beneficiary?

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[8] Neither decision of the Court of Appeals addressed a subject-matter jurisdiction issue that Courtney raised in her reply brief. (App. pp. 000675 – 000679). Due to space limitations, Courtney incorporates by reference those pages of her Appellant's brief which point out that the probate court never had subject-matter jurisdiction of this matter when it was filed, and the absence of subject matter jurisdiction at the initial filing should invalidate these entire proceedings. No claim for breach of fiduciary duty was ever pleaded, yet Courtney finds herself personally liable on a claim that was never made and over which the probate court lacked subject matter jurisdiction.

4. Did the Court of Appeals err (as did the trial court) in reading and applying only one ambiguous provision of the trust without regard for other obligations placed upon the Trustee by the remainder of the trust and the obligations of the estate? (Issues 1, 2 and 3 in Petition for Rehearing). The Court of Appeals erred, in its reissued opinion in determining the record lacked sufficient evidence to determine the financial obligations of the combined trust/estate obligations. Did the Court of Appeals err in finding sufficient evidence existed to support entry of judgment against Courtney for breach of fiduciary duty, when the trust agreement contained conflicting provisions and both the Trust Protector and Hugh's expert found her position "understandable" and agreed that Courtney had acted in good faith. (Rehearing Issues 3, 4, 5, 6, 7, 9, 13. 14, 15, 16, 17).

In issuing its substitute opinion, the Court of Appeals did acknowledge that the 83-page trust agreement might have contributed to Courtney's difficulties in carrying out the conflicting obligations imposed upon her, when it incorporated the testimony of both Professor Alan Medlin and Catherine Kennedy (the appointed Trust Protector) describing the trust as a "maze." After doing so, however, it suggested that Courtney's dilemmas were really quite simple and affirmed the trial court. Among the questions that have not been addressed in any meaningful way on appeal are:

- In its order finding Courtney breached her fiduciary duty, the trial court referred to Hugh's corporation Tyre as both a creditor of the estate and a beneficiary of the trust. (App. p. 000025 ¶ 3– finding Tyre was a beneficiary, followed a finding on the very next page that it was a creditor. (App p. 000026 ¶ 4). The Court of Appeals disposed of this in its substituted opinion by stating "whatever doesn't make any different doesn't matter." (App. p. 000724). However, Tyre never filed a claim against the estate, nor was it ever able to produce evidence of a claim (the so-called promissory note), so if it is a creditor, it gets nothing. If it is a beneficiary of the trust, it is subject to the no-contest clause. Its status makes a huge difference. But we still don't know whether it is a creditor or a beneficiary.
- Conflicting obligations placed upon Courtney in her role as personal representative and trustee (conflicts that Professor Medlin said could only be solved by resigning and leaving the exact same conundrum for the next trustee)(App. p. 000358, lines 8-9) all of which was the result of a poorly-drafted trust agreement that gave conflicting instructions (Ms. Kennedy said Courtney

would have been "foolish, if not [in] a breach of her fiduciary duty" if she had done as Hugh demanded). (App. p. 000410 line 18 – p. 000411, line 8).

- How can Courtney have breached her fiduciary duty when the trust protector said that Hugh and Tyre's debt were among "the last things" that should be paid before Courtney and her brother receive whatever might be left in the trust? (App. p. 000392, lines 20- p. 000392, line 4).
- Complete absence of evidence that a promissory note for the alleged money due to Hugh and his company ever existed (and a lack of effort by Hugh to even establish the existence of the debt), or even what the purported balance of the note was at the time Hugh filed his lawsuit. (App. .000410, line 18 – p. 000411, line 8)
- Probable cause for Hugh to bring this lawsuit, when the trust protector opined that the trust agreement provided that Courtney was "conclusively presumed to have acted in good faith" by waiting for the six-month period with respect to the power of appointment to expire before making any distributions. That was so because of language in the Trust Agreement at Article Five, Section 1. (R. p. 388, line 6-22). Ms. Kennedy characterized that provision of the Trust Agreement as a "safe harbor" for a trustee who needed more information and needed the six months to be certain.
- The illegal purposes of the trust. (App. p. 000661 – p. 000663).
- The trial judge's repeated statements indicating his lack of willingness to hear the entire case[9]. (App. p. 000238, line 12-12 "It does not matter what she thinks"; p. 000244, lines 12 "But isn't the answer to the question everything?"; p. 000247, lines 8-11 "There is no reason for her reading all of that into the record . . . I can read it."; App. p. 000253, line 6 "Let's move on."; App. p. 000256, line 3-7 "Well, the answer was no, so you don't need to explain. . . No, your answer was no."; App. p. 00060, line 8 "Ms. Karp, I am perfectly capable of reading the trust. Just answer his question."; App. p. 000260, line 20 – 25 "It's clear that the plaintiff loses his interest, whatever it may be."; App. p. 000261, lines 4-13 "Well, that – I can read that. I can --- look it's apparent from the documents who that is. . . We don't need to read that. I know who profits. It's not a profit as a matter of fact. . .[10]"; App. p. 000262, lines 21-22 "What is she supposed to do, resign?"; App. p. 000279, lines 18-21 "Listen. Let's move on. . . It's been asked and answer, enough for me at least."; App. p. 000280, line 8 "That's an answer.

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9 This was addressed in Courtney's appellant's brief but not addressed by the Court of Appeals in either of its opinions. (App. pp. 000600 – 000601).

10 The trial judge's statement here was cutting off Courtney and answering a question posed by opposing counsel before Courtney could answer herself. (App. p. 000261, lines 10-13). When opposing counsel attempted a follow-up question to the question the judge had answered himself, the trial judge said, "I don't answer questions" and opposing counsel attempted to make clear he was trying to examine the witness. (App. p. 000261, lines 16-20).

> Move on."; App. p. 000280, line 21 "Keep going."; App. p. 000287, lines 15 – 17 "Let's move on." . . It's become argumentative"; App. p. 000288, lines 22-24 "Look, the complaint asks for an interpretation. This is an answer to the complaint. Let's move on."; App. p. 000294, lines 10-13 "Look, the documents are what they are. She's alleged it's a mistake. There's no evidence that it was a mistake."; App. p. 000300, line 25 – p. 000231, line 1 "It doesn't matter whether she thinks it's fair or not."; App. p. 000301, line 17 – 25 "Move on. . . That's my problem with this. . . I'm not sure it matters what she thinks. . . in any of these areas" ; App. p. 000303, line 19-21 "I'm simply not going to hear questions based on a brief submitted in a motion I heard on an issue that I have got to decide."; App. p. 000304, lines 14-15 "It doesn't matter whether she believes it or not."; App. p. 000316, lines 13-14 "No, she hasn't answered the question."; App. p. 000340, line 15 "Does any of this matter?"; App. p. 000348, line 4 "Let's move on[11]."; App. p. 000000349, lines 3 – 6 "That's enough. . . We're going to talk about something else."

Courtney's briefs went into extensive detail about the multiple ambiguities in the trust document. (App. p. 000596 – 000599; pp. 000600- 000615; App. p. 000668 – 000669). Neither decision of the Court of Appeals addressed this issue. Courtney's petition for rehearing (which was ostensibly granted) addressed this in detail. (App. p. 000696-000698). As did the original opinion, the Court of Appeals ignored this issue and ruled that one single provision of the trust agreement in Article Six controlled the decision in this case[12]. (App. p. 000719). Thus, the primary focus of Courtney's appeal has yet to be addressed.

In its substituted opinion, the Court of Appeals concluded that it could not effectively address Courtney's argument about how the ambiguities of the trust agreement and the lack of

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[11] It was at this point that the judge made clear he was not interested in the illegal nature of the trust, as it was being demonstrated via testimony that the trust existed to help Hugh, who is not an American citizen, not pay the United States government and still enjoy the benefits of joint home ownership. The trial judge noted "That law does not say that he pays the IRS a nickel. It just has to do with when the funds are paid to the seller, who may be a non-resident." (App. p. 000348, lines 22-25).

[12] It is ironic that the Article Six provision upon which Hugh relies, and which the Court of Appeals finds is the single operative section to assess liability against Courtney, requires distribution "as soon as practicable after my death" (App. p. 000446) but the other trust distributions (Article Ten) are to occur "[u]pon my death." (App. p. 000450). It should be obvious that the moment of death, which triggers all trust distributions except for the one to Hugh, occur contemporaneously with death,, or "upon my death," but Hugh was supposed to wait until "as soon as practicable after my death." (Article Six) (App. p. 000446).

financial resources of the estate and trust factored into an analysis of Courtney's liability. In fact, the Court of Appeals said that Courtney's position "falters" because "there is nothing in the record that tells us what the assets and liabilities . . . of either the Trust or . ... probate estate were." (App. 000723). The Court was simply wrong. The entire accounting of the estate was introduced into evidence as Exhibit 5 (App. p.000506-509). Similarly, it is undisputed that the trust had nothing in it at all, until the house was sold. (App. p. 000510 – 000514). Courtney's affidavit in support of summary judgment, which was included in the record, also discussed the financial situation of both the trust and the estate. (App. p. 000163). The Court of Appeals either missed it or refused to acknowledge it. As a result, this issue on appeal has yet to be addressed.

ARGUMENT - C
Issues 5 and 6

5. Did the Court of Appeals (and the trial court) err in disregarding the opinion of the Trust Protector that Courtney's decisions were appropriate in light of the circumstances presented and to have acted other than she did would have been "foolish."? (Rehearing issue 5, 7, 15, 18). In addition, did the Court of Appeals err in its summary disposition of the issues regarding the Trust Protector, since the issue is a novel issue in South Carolina and the Court's approval of Hugh's actions despite the decedent's desire to keep her financial affairs private by including the Trust Protector provisions in the trust, which expressly prohibited a lawsuit without permission of the trust protector? (Rehearing issue 18)

6. Did the Court of Appeals err in affirming the trial court's finding that Hugh had probable cause to bring this action and was not, therefore, precluded from recovery by the no-contest clause of the trust? (Rehearing issue 8, 10, 19).

The decedent's trust agreement contained multiple mandatory provisions that were intended to keep her financial affairs private. While much of the trust is ambiguous, the decedent's instructions to those who were to receive assets from her trust were crystal clear:

Article III, Section 8

> H. The Trust Protector may unilaterally resolve any dispute, claim or conflict between beneficiaries, including those who have, or claim to have, a present or future interest in property, *between a beneficiary and a trustee,* . . . Such resolution shall be finding on all parties to my Trust *and shall not be subject to review.*
>
> No one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution. . . Subsequent to his or her review, the Trust Protector may give any claimant the authority to file and maintain an action in a court of law. The granting of such authority by the Trust Protector shall in no way nullify the "No Contest" provision. . .

(App. p. 000435) (emphasis added).

Beneficiaries are subject of the terms of the trust. Decedent made it clear that the Trust Protector was a gateway procedure, which would be handled privately, to resolve disputes and prevent her financial and marital affairs from being filed for public viewing in a court. She included an unusually strong provision which (1) required a beneficiary to get permission of the Trust Protector before filing suit, and (2) reaffirmed the "no contest" provision of the trust, even if the Trust Protector authorized suit.

The amendments to the South Carolina trust code that enacted provisions related to a trust protector do not provide such a strong barrier to resolution of trust disputes as a matter of law. *See* Section 62-7-818. The decedent elected to provide an inflexible mechanism for the trust protector to resolve issues, all for the obvious reason of minimizing conflict, expense, and exposure of her private affairs.

The decisions of the trial court and the Court of Appeals ignore the Trust Protector provisions of the trust and make it permissible for Hugh to ignore them as well, without consequence. Both the statutes of the 2014 trust code and the provisions of this trust agreement

for dispute resolution are rendered meaningless by the decision below and the decisions of the Court of Appeals.

Once a trust protector was appointed Courtney did as she was required to do by the trust agreement, which was to consult with and obtain advice from the trust protector. She did everything the trust protector told her to do. Neither the trial court nor the Court of Appeals found it worth comment that Courtney had followed the advice of the trust protector.

Hugh was in such a hurry to force a priority recovery from the trust, which had no cash in it of any kind until the sale of the house in Lake Wylie, that he filed suit within mere days of the house owned by the trust being sold. He didn't bother to follow the procedures set forth in the trust. He didn't care that Courtney had conflicting obligations. These issues were argued extensively by Courtney in her initial brief on appeal (App. 000596 – 000598; 000601 – 000610), and in her reply brief. (App. 000666 – 000668). Other than referencing generic existing precedent on the issue of subject matter jurisdiction (none of which involves interpretation of the role of a trust protector) the Court of Appeals has not addressed this question.

ARGUMENT - D
Issue 7

> Did the Court of Appeals err in affirming personal liability against Courtney, when the pleadings did not request that relief? (Rehearing issue 11 & 12, Issue 6 of Appellant's brief and reply brief).

The trial judge made no findings against Courtney personally. He found she did not act in bad faith. The complaint in this matter never alleged that Courtney acted outside of her duties as trustee; in fact, it specifically alleged that Courtney acted solely as trustee in the alleged acts and omissions for which Hugh sought relief. (App. pp. 000619 – 000622). The sole nexus between personal liability and the pleadings filed is the caption in this case, which alleges that the claims are made against Courtney. However, they were not.

In its decisions, the Court of Appeals did not address this issue. Similarly, it did not address it on rehearing. In both decisions, the Court of Appeals overlooked the insufficiency and failure of the pleadings and the absence of factual findings on this issue, and addressed the issue as one of law, *i.e.,* whether a trustee can be held individually liable for her acts as trustee. (App. p. 000691 – original decision; App. p. 000725 – substitute opinion). Neither decision recognized the absence of pleading any claim against Courtney in her individual capacity.

Similarly, the trial judge entered personal liability <u>solely</u> because the caption of the case included a reference to Courtney "individually." (App. p. 000046). At rehearing before the trial court, the trial judge seemed unable to grasp the concept that he had awarded judgment against Courtney personally without it ever having been requested and without any findings that she had acted other than in her capacity as trustee. (App. pp. 000575 - 000582). The trial judge's decision to impose personal liability against Courtney was based on his conclusion that "I don't know any other way to deal with a fiduciary." (App. p. 000584, lines 23-24).

The Court of Appeals addressed the merits of the legal analysis of whether a trustee can be held personally liable despite the issue having not been pleaded, and despite the assertion by Hugh's own counsel that Courtney had acted "solely" in her capacity as trustee. Courtney's briefs on appeal explored the procedural barriers to a personal judgment in detail. (App. p. 000619 – 000621; pp. 0900672 - 000673.) In both decisions, the Court of Appeals ignored the deficiency of the pleadings and findings and instead addressed the substance and merits of the personal liability argument. (App. p. 000691; p. 000725).

More importantly, for the edification of the bench and bar going forward, the existing decision will inhibit the willingness of any reasonable person (or entity) from agreeing to serve

as Trustee, even if appointed by the Court. The Court of Appeals did not address Paragraph 17 of the Petition for Rehearing, which asked the following question:

> 17. As the late Chief Justice Harwell used to ask from the bench, "what is the long-term effect of this decision?" If a trustee can act in good faith and still have personal liability imposed on her, then no reasonable person will ever agree to serve as a trustee in South Carolina again.

(App. p. 000702).

The question of Courtney's personal liability should never have been addressed at all on appeal. The procedural defects of the pleadings prohibited it.

Certiorari should be granted to address the error of the Court of Appeals in failing to apply the law applicable to pleading requirements and failure to request relief before awarding personal liability against a party.

<u>ARGUMENT – E</u>
Issue 8

> Did the Court of Appeals err in affirming an award of attorney fees that was not prayed for in the complaint? (Rehearing issue 20)

The complaint in this action requested attorney's fees "from the trust, or from Defendant Feeley-Karp's distribution of said trust" but cited no authority for the request. (App. p. 000052-000053). Hugh did not cite S.C. Code Ann. Section 62-7-1004, nor did he seek attorney's fees from Courtney personally. *Id.* The trial judge sought and found the authority upon which he relied to award attorney's fees by supplying reference to S.C. Code Ann. Section 62-7-1004[13].

Courtney's primary position on attorney's fees is that the award against her as trustee and individually should not have been made, so the award of fees should not have been made.

[13] The trial judge awarded attorney's fees in his original order (App. p. 000026), denied rehearing on this issue (App. p. App. 000033), and issued a later order determining the amount of attorney fees. (App. p. 000037). Courtney did not object to the <u>amount</u> of fees requested by Hugh, but objected to any award being made.

However, she also pointed out procedural defects in the complaint that prevented an award of attorney's fees.

Similarly, they did not differentiate what fees were due to Hugh versus which fees were due to Hugh's company Tyre. Lastly, the trial judge awarded fees that were expressly prohibited by the trust agreement.

The Court of Appeals' original decision did not address this issue, although it presumed it was permissible for the trial judge to rely upon a statute that had not been cited and to award relief that had not been requested. (App. p. 000692). It overlooked Courtney's argument that the issue was not pleaded.

Courtney expressly raised this issue on rehearing. (App. pp. 703 – 704, Issue 20). The Court of Appeals' substituted opinion repeated the same ruling as the original decision, not answering the issue Courtney had raised. (App. pp. 000725 – 00726). As a result, Courtney has not yet received appellate review of the issue she raised on appeal regarding the procedural bar to recovery of attorney's fees.

Certiorari should be granted to allow Courtney's argument regarding attorney's fees to be considered by an appellate court.

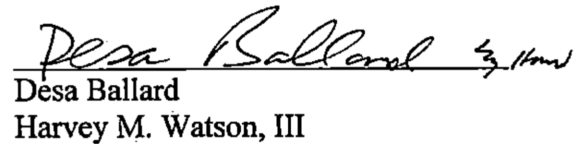
CONCLUSION

Due to a multitude of errors by the trial court and in both opinions of the Court of Appeals, Courtney respectfully requests this Court to issue of a writ of certiorari to the Court of Appeals, followed by a briefing schedule for further proceedings. It is respectfully submitted that Courtney has not had any meaningful appellate review and the Court of Appeals' consideration of this appeal was without substance and did not address the issues raised.

Similarly, the Court of Appeals failed to address Courtney's request for *en banc* consideration, and that issue has not been addressed.

Constraints of space as permitted by court rule, limit the detailed analysis which is required to fully analyze the many errors of the Court of Appeals. Certiorari should be granted so that these issues can be explored in full. Specifically, and perhaps most importantly, an appellate court of this state should address the novel issues presented here by the trust protector provisions of the trust in issue, rather than just summarily dismissing them.

Respectfully submitted by



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ATTORNEYS FOR PETITIONER

August 2, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
Initial Case Court of Common Pleas
S. Jackson Kimball III, Master-in-Equity

Opinion No. 5639 (S.C. Ct. App. filed July 3, 2019)

RECEIVED
AUG 02 2019
SC Court of Appeals

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, ... Petitioner,

v.

Deborah Dereede Living Trust dated December
18, 2013, Hugh Dereede and Tyre Dealer Network
Consultants, Inc., ... Respondent.

PROOF OF SERVICE

I, Mara Ballard, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on August 2, 2019, I served a copy of the **Petition for Writ of Certiorari** and the **Appendix Volumes I and II** in the above-captioned case on the following individual by electronic mail and by United States Mail, with sufficient first-class postage affixed, addressed as follows:

John P. Gettys, Jr., Esquire
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Daniel Joseph Ballou, Esquire
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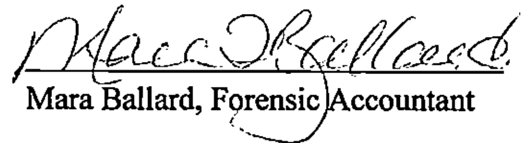

Mara Ballard, Forensic Accountant

August 2, 2019

Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

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Friday, August 2, 2019

RECEIVED
AUG 02 2019
SC Court of Appeals

<u>*Via Hand Delivery*</u>
Honorable Daniel E. Shearouse
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: *Dereede Living Trust v. Courtney Feeley Karp*
Appellate Case No: 2016-001921

Dear Mr. Shearouse:

Please find enclosed an original and seven (7) copies of the Petition for a Writ of Certiorari. Also enclosed, please find one original and one copy of the Appendix (two volumes each). Please stamp the extra copy "filed" and return it via our courier. Also enclosed is our firm's check for the filing fee. Please do not hesitate to contact me with any questions. We greatly appreciate your assistance in this matter.

With warm personal regards, I am,

Sincerely yours,

Mara T. Ballard

Mara T. Ballard, CMA, CFE
Forensic Accountant
Mara@desaballard.com

cc <u>via Hand Delivery</u>
Honorable Jenny Abbott Kitchings, Court of Appeals (Petition only)

<u>Via US Mail</u>
John Gettys, Esquire[1]
Daniel Ballou, Esquire

[1] A copy of the Petition will be emailed to Mr. Gettys and Mr. Ballou, but a hard copy will be mailed along with a copy of the two volume Appendix.