

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

AUG 29 2019

APPEAL FROM YORK COUNTY S.C. SUPREME COURT  
S. JACKSON KIMBALL, SPECIAL CIRCUIT COURT JUDGE

Case Nos. 2015-CP-01409  
Appellate Case No.: 2019-001276

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 Whom Courtney Feeley Karp, Individually and As  
Trustee of the Debora Dereede Living Trust dated  
December 18, 2013, .....Petitioner.

In Re: Deborah Dereede Living Trust dated December 18, 2013.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**ATTORNEYS FOR RESPONDENTS**

## ARGUMENT

### **I. The Case Does Not Warrant Discretionary Review.**

This case involves a trust (“Trust”) created by Deborah Dereede, and a dispute between Deborah’s widower (Hugh Dereede, (“Hugh”)) and her daughter (Courtney Feeley Karp (“Karp”)), who was named trustee of the Trust. The dispute arises from Karp’s willful refusal to comply with her mother’s express wishes as set forth in her Trust document. The case was tried before the Honorable S. Jackson Kimball, who held that Karp breached the Trust by failing and refusing to make payment to Hugh and his company Tyre Dealer Network Consultants, Inc., as required by the express terms of the Trust.

The Court of Appeals agreed and affirmed Judge Kimball’s ruling. Karp then sought rehearing by the Court of Appeals, which granted a rehearing, and substituted its original opinion with a revised opinion that also agreed with the findings and conclusions of the trial court. Karp now seeks a writ of certiorari from the Supreme Court. Despite her prolix and overlapping assertions of error and disagreement with the Court of Appeals and the trial court, Karp raises no novel question of law or any other special and important reasons under Appellate Court Rule 226(b) to warrant the issuance of a writ of certiorari. Rather, she simply disagrees with the manner in which the Court of Appeals and the trial court resolved the issues in the case in Hugh’s favor.

### **II. The Court of Appeals Properly Denied *En Banc* Rehearing.**

Karp’s Argument A, asserts a right to *en banc* rehearing of this case where no such right exists. Karp did not seek initial *en banc* review of the case, but only suggested it in her petition for rehearing of the original Court of Appeals opinion. Although the substituted opinion of the Court of Appeals had the effect of finally deciding against *en*

*banc* review, Karp did not seek rehearing of that decision and has waived it. Whether or not waiver has occurred, no basis exists to justify reconsideration of the denial of *en banc* review.

Petitions to rehear a matter *en banc* are governed by SCACR Rule 219, which states that “rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” SCACR 219(a). The Court of Appeals has made no such findings in this case.

Rule 219(b) alternatively states that a party may “suggest” that a matter be heard or reheard *en banc*. Rule 219(b) reads as follows:

**(b) Suggestion of a Party for Hearing or Rehearing En Banc.** If a party desires to suggest that a matter be heard initially *en banc*, the suggestion shall be made in writing, and must be served and filed not later than twenty (20) days prior to the hearing date. If a suggestion for rehearing *en banc* is to be made, it shall be included in the petition for rehearing. No response shall be filed by other parties unless the Court shall so order. The Clerk of the Court of Appeals shall transmit the suggestion to all judges of the Court. A vote will not be taken to determine if the matter shall be heard or reheard *en banc* unless a member of the Court calls for a vote on the suggestion. If no vote is taken on the suggestion, the parties shall be advised that the suggestion has been rejected. SCACR 219(b)(emphasis added).

The Rule in no way requires that the Court of Appeals explain its reasoning for rejecting Karp’s suggestion for *en banc* rehearing, or to disclose any of the workings of the Court to weigh the merits of such a request. Rather than conclude that the Court of Appeals properly exercised its broad discretion relating to her request for *en banc* rehearing, Karp accuses it of ignoring her suggestion.

Karp acknowledges that no caselaw supports her demand for relief, but nonetheless contends, without any evidentiary support whatsoever, that the Court of Appeals refused

to exercise discretion. Since the Rule specifically requires the affirmative call for a vote on the suggestion, in the absence of such a call, no discretion exists, and the failure of the suggestion cannot be an abuse of discretion. The Rule does not specify the means by which the parties should be notified that a suggestion has been rejected and the substituted opinion itself was evidence that no call was made, and that the suggestion expired of natural causes.

Karp not only seeks to create a new cause of action against the Court of Appeals, claiming it violated its own Rules, but she also inexplicably accuses Hugh of violating the Rules himself by responding to her petition for rehearing. (Petition at 6, footnote 5). On May 13, 2019, the Clerk of the Court of Appeals specifically requested a return to the petition for rehearing, and Hugh complied in accordance with Rule 221. Karp's unfounded accusation is outside the record on this appeal, is misplaced and is wrong.

Finally, nothing relating to *en banc* review implicates subject matter jurisdiction, and Karp appears to conflate this issue with the claim that the ostensible trust protector had exclusive jurisdiction to resolve the dispute. Regardless, the issue was fully resolved by the Court of Appeals, Karp sought no rehearing on it, and she presents no reason why granting certiorari on this issue would be appropriate or justified.

### **III. Argument B Simply Rehashes Multiple Issues on Appeal.**

SCACR Rule 242(d)(4) requires a "direct and concise argument in support" of a petition for Certiorari. The Rule further states that "[f]ailure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Argument B is a case in point justifying denial.

Karp has lumped no fewer than 15 previously asserted issues in Argument B, and it is unclear whether she is presenting argument on ambiguity, the no-contest clause, probable cause, good faith, the sufficiency of evidence, her treatment by Judge Kimball or some other issue. None of the points included in Argument B raise any issue justifying the grant of certiorari by the Supreme Court, however. Since Karp simply wants to reargue her case before a different forum, the petition should be denied.

Both the Trial Court and this Court of Appeals concluded that the language in question regarding the payment to Hugh was unambiguous and plain. The fact that Karp created a conflict by pitting Hugh's interests against her own and those of the other estate beneficiaries does not create an ambiguity in the terms of the Trust itself. Sufficient funds existed in the Trust to pay Hugh, and no evidence exists that the probate estate did not have sufficient assets to cover all possible claims, whether initially or after the claims period had expired. To the extent Karp felt she had a dilemma as to who she should pay, it was one she created for herself.

Karp testified that after paying Hugh, the Trust would have had more than \$50,000 available to pay creditors of the estate. [App. at 000271-272]. So too, had she simply paid Hugh according to the Trust, liability for any probate estate deficiencies that did result would have been passed on to Hugh pursuant to S.C. Code Sec. 62-7-604(b). [App. at 000533]. Since we now know such deficiencies never materialized, the decision to require her to fulfill her trustee duties is absolutely correct and fair. Moreover, had she even simply promised to pay Hugh per the Trust at the conclusion of the claims period, Hugh's own testimony cited by Karp establishes she could have avoided this action altogether.

As noted by Judge Kimball, Karp had many opportunities to agree to assurances that she would pay Hugh according the Trust. [App. at 000020, 000032]. Between the time of Deborah's death and the closing on sale of the Lake Wylie property, Karp was steadfast in her refusal to pay Hugh, and has been to this day. Moreover, Hugh brought this case as a declaratory judgment action only and did not assert claims for breach of fiduciary duty. Karp's response was to seek to enforce the no contest provision of the Trust, and that defense became the primary justification for Karp's refusal to pay.

#### **IV. A Trust Protector Provision Does Not Strip the Court of Jurisdiction.**

It is undisputed that the Trust allows the appointment of a trust protector to protect the financial resources of the Trust and the interests of its beneficiaries. However, nothing in the Trust or the Probate Code confers exclusive subject matter jurisdiction upon trust protectors over disputes that would otherwise be heard by the Probate Court or Circuit Court. (Petitioner's Argument C). As the Court of Appeals noted, [w]hatever the contours of the trust protector's authority ... they do not extend to stripping the trial court of subject matter jurisdiction." (emphasis added). Moreover, the trust protector in this case was not appointed until well into the litigation and then specifically declined to resolve the issues of good faith and probable cause, recommending that they should be resolved by the trial court.

Karp acknowledges that the appointment of a trust protector does not implicate subject matter jurisdiction but seeks "consequences" against Hugh for not agreeing to allow her to resolve the dispute. The question becomes, what consequences await the trustee who actively continues to participate in the trial of the case after appointment of a trust protector, and then proffers the trust protector as her own expert witness. If, as suggested

by Karp, the trust protector is effectively an alternate dispute resolution device, then the law is clear that such devices can be and were waived by the parties. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007)(holding that arbitration clause was waived by conduct of the party seeking to enforce it). So too, even if no waiver existed, the trust protector herself refused to answer the essential questions that were presented for trial, effectively abdicating any role she might have had in resolving the dispute. [App. at 000542].

Finally, Karp raised no objection at trial to proceeding before Judge Kimball instead of the trust protector. The first time Karp ever raised the question of the trust protector's authority was in her 59(e) Motion, and since Karp agrees that the issue is not one of subject matter jurisdiction, it is waived. [App. at 000031]. Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005)(holding that issue first raised in post-trial motion is not preserved for appellate review).

Notwithstanding the dearth of case law regarding trust protectors, the question of waiver is not novel. Moreover, nothing in the Trust Code suggests that the appointment of a trust protector confers exclusive jurisdiction upon it to resolve disputes or otherwise deprives the Probate Court or Circuit Court of jurisdiction to resolve cases involving such issues. *See*, S.C. Code Ann. § 62-7-201 (Supp. 2018). No court in any state has ever adopted Karp's position and no dissent in any opinion suggests it has merit. Nor does the question directly invoke constitutional issues or a federal question in conflict with a decision of the U.S. Supreme Court. Consequently, certiorari is not warranted, and the petition should be denied.

**V. Karp Converted the Trust Protector to an Expert Witness.**

Argument C of the Petition also criticizes the Court of Appeals for disregarding the opinion on the Trust Protector as to the appropriateness of Karp's actions. In doing so, the Court recognized that Karp abandoned the function of the trust protector contemplated by the Trust, and instead used the Catherine Kennedy as an expert witness at trial. It is undisputed that no trust protector was appointed until late in the litigation, and that the parties continued to pursue substantial motions practice and discovery thereafter. At trial, counsel for Karp proffered Ms. Kennedy as an expert, and waived any right to claim she retained any further role as an arbiter of disputes under the Trust. The fact that Ms. Kennedy's own report as Trust Protector recommended judicial resolution of the key issues in this case reinforces her limited function, and undercuts Karp's argument that the appointment creates some novel jurisdictional issue for resolution by the Supreme Court.

**VI. Karp Seeks to Avoid the Consequences of Her Own Conduct.**

In challenging the issue of personal liability (Argument D), Karp seeks to avoid the consequences of her own breach of the Trust. Although the original Petition did not allege that Karp acted in her individual capacity, Judge Kimball specifically found that her conduct constituted a breach of the Trust, and that such conduct does not insulate her from personal liability. Under S.C. Code Ann. § 62-7-1001(b)(3), the court may compel a trustee to redress a breach of trust by paying money, restoring property, or other means. Karp's position would frustrate recovery against her for breach of trust and lead to what the trial court described as an absurd result.

If Karp has maintained the assets of the Trust sufficient to cover the claims brought in this case, she should have no cause for concern. However, the law should not and does not allow her to breach the Trust and then spend Trust assets, for example, in protracted

litigation and endless appeals in order to reduce the amount available to satisfy a judgment. In any event, Karp has to this date not paid Hugh any amount either out of the Trust or otherwise and her argument presents no basis for granting certiorari.

General common law principles hold that a trustee's breach of trust subjects him to personal liability. Bogert, *The Law of Trusts and Trustees*, sections 718, 731 (rev. 2d ed. 1982); IIIA Scott on Trusts, section 261 (4th ed. 1988); 76 Am.Jur.2d, Trusts, section 304. As a long-standing rule, when a trustee departs from the directions contained in the trust instrument, he is liable for any loss occasioned, irrespective of good faith or his best judgment. Crayton v. Fowler 140 S.C. 517, 519, 139 S.E.2d 161, 161 (1927). Moreover, the court may fashion its order "to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee." Bogert, section 543(V). Even though no causes of action were asserted against Karp in her individual capacity, the law is clear that she can be personally responsible for her actions taken as trustee. To hold otherwise would effectively immunize her from the effects of refusing to follow the terms of the Trust.

A breach of trust does not require a finding of bad faith. Rollins v. May, 473 F. Supp. 358, 365 (D.S.C. 1978)(noting that "the law in South Carolina is crystal-clear that if a trustee departs from the express provisions of the trust instrument, he does so at his own peril, and not even good faith nor the exercise of his best judgment will absolve him from liability"). As Judge Kimball noted, Karp is a licensed attorney familiar with the law, with greater knowledge of the obligations of a trustee and the legal requirements of a fiduciary. [App. at 000032]. Even if Karp in good faith believed that her mother's creditors had claims to be asserted against the estate, the claims period has long since expired and yet she has steadfastly refused to comply with the Trust to this day. Hugh was Deborah

Dereede's second husband and is not Karp's father. Following Deborah's death, Hugh repeatedly asked Karp for assurances that the distributions required by the Trust would be made, and for whatever reasons Karp responded with excuses that the Court found to be pretextual. [App. at 000032]. Whether her actions rose to the level of bad faith or not, they did not follow the directives of and therefore breached the Trust, for which she is, and should be, personally accountable.

#### **VII. The Award of Attorney's Fees Was Proper.**

Karp erroneously complains in Argument E that Dereede did not pray for attorney's fees in the original complaint. She is simply wrong, as the Complaint plainly asks for an award of attorney's fees in the Third Cause of Action entitled "Litigation Costs." She then argues that Hugh did not cite S.C. Code Ann. 62-7-1004 in his complaint, arguing without any support whatsoever, that a specific citation to the statute is required.

The statute in question provides:

[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

S.C. Code Ann. 62-7-1004 (2018). The trial court found that justice and equity require the award of attorney's fees, and Karp agreed that the amount of the award was reasonable. Again, Karp offers no basis to conclude that certiorari is warranted, and the petition should be denied.

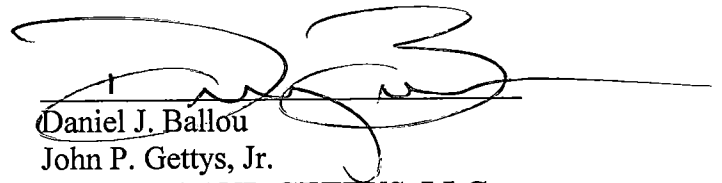
Karp's Petition simply recasts the points she has argued on appeal and presents no point that would justify certiorari review by the Supreme Court. Like a petition for rehearing, certiorari review is not intended to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for

rehearing to have the case tried in the appellate court a second time. *See, Herron v. Century BMW*, 719 S.E.2d 640 (S.C. 2011); *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); S.C.A.C.R. Rules 221(a) and 242.

**CONCLUSION**

For the reasons set forth herein, Hugh respectfully requests that Karp's Petition for Writ of Certiorari be denied.

Respectfully submitted,



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Of Whom Courtney Feeley Karp, Individually and As  
Trustee of the Debora Dereede Living Trust dated  
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In Re: Deborah Dereede Living Trust dated December 18, 2013.

PROOF OF SERVICE


The undersigned certifies that he has served this Respondents' Return to Petition  
for Writ of Certiorari on the Appellant by sending a copy of it via Federal Express  
overnight, postage prepaid, on August 28, 2019, addressed to its attorney of record,

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