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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
TEASA KAY WEAVER, MASTER IN EQUITY

Appellate Case No. 2021-000816
Lower Case No. 2016-CP-46-000820

Vicki Lynn Vergeldt, individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated
September 27,1978.....Plaintiff/Respondent,

v.

John Edward Vergeldt.....Defendant/Appellant.

INTIAL BRIEF OF RESPONDENT VICKI LYNN VERGELDT, INDIVIDUALLY, AND AS SUCCESSOR TRUSTEE OF THE JOHN VERGELDT, JR. REVOCABLE LIVING TRUST DATED SEPTEMBER 27, 1978

Taylor A. Peace, SC Bar # 100206
Harrell, Martin & Peace, P.A.
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Phone: (803) 345-3353
Fax; (803) 345-9171
tpeace@hmp-law.com

Attorneys for Respondent Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Respondent is satisfied Appellant's corresponding Issues on Appeal No. 1 reflects the issue on appeal that Appellant seeks to have resolved. As to Respondent's position on Issue on Appeal No. 1, Respondent will argue below that the trial court did not err in granting the motion to amend as the damages sought had not been excluded by an order in prior litigation.

II. Respondent is satisfied Appellant's corresponding Issue on Appeal No. 2 reflects the issue Appellant seeks to have resolved. As to Respondent's position on Issue on Appeal No. 2, Respondent argues and/or will argue that the settlor did not establish a standard of proof by limiting liability of one beneficiary against another only if an act or omission is committed in bad faith and with reckless indifference to the purpose of the trust or the interests of the beneficiaries. If he did, which is denied, Respondent presented enough evidence to meet the standard of proof.

STATEMENT OF THE CASE

Respondent is satisfied with Appellant's Statement of the Case to the extent the same conforms to and is consistent with the following Procedural History and Statement of Facts.

I. Procedural History

Respondent initiated this case by filing a Summons and Petition for Removal of Trustee and Related Relief on February 1, 2016 ("Petition") in the York County Probate Court seeking the removal of Appellant as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, as amended, and the same was given C/A No.: 2016-GC-46-00018. (02.01.2016 Petition for Removal of Trustee and Other Related Relief).

In the Petition, Respondent sought to: (1) remove Appellant as Successor Trustee of the Trust, (2) for the immediate release of Trust records, (3) for an accounting of the Trust, and (4) for litigation costs. (Petition) Respondent was forced to file the Petition as the result of Appellant's failure to produce records and accounts to Respondent related to the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, as amended ("Trust")[1] and to otherwise comply with his duties and obligations confirmed by Order of the Honorable S. Jackson Kimball, III, Master In Equity for York County, in the case of Vicki Lynn Vergeldt v. John Edward Vergeldt, Individually and as former Co-Trustee and current Successor Trustee of the John Vergeldt, Jr., Revocable Living Trust dated September 27, 1978, as amended; and Patti Vergeldt Downey, as Qualified Beneficiary of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (C/A No.: 2014-CP-46-1956) ("First Case"). In response to the Petition,

[1] The Trust agreement was amended and restated by the Settlor eight times subsequent to September 27, 1978 with the last being the Eighth Amendment and Complete Restatement of Trust Agreement between John Vergeldt, Jr. and John Vergeldt Jr. dated July 29, 2009 ("Trust Agreement"). Subsequent to the Trust Agreement, Settlor executed the Ninth Amendment to Trust Agreement on February 5, 2010 ('Ninth Amendment") and a Tenth Amendment to Trust Agreement to Trust Agreement ("Tenth Amendment") on March 7, 2011. The Trust Agreement, Ninth Amendment and Tenth Amendment are sometimes collectively referred to herein as "Trust Agreement".

Appellant timely filed an Answer and Counterclaim on March 7, 2016 asserting claims of malicious prosecution, violation of S.C. Code Ann. §15-36-10 ("S. C. Frivolous Civil Proceedings Sanctions Act"), and for Declaratory Judgement (03.07.2016 Answer and Counterclaim)

The case was removed to the York County Court of Common Pleas by Order Removing Case to Circuit Court of the Honorable Carolyn W. Rogers, Probate Judge for York County, dated March 10, 2016 and recorded in the Court of Common Pleas for York County on March 16, 2016. (03.16.2016 Order Removing Case to Circuit Court). Upon removal to the York County Court of Common Pleas, the case was given its current C/A No.: 2016-CP-46-820.

After removal to the Court of Common Pleas, a mediation was held, and, as a result thereof, a Consent Order Appointing Special Trustee and Staying Case ("Order Appointing Special Trustee") was entered on February 20, 2017 and filed on February 23, 2017 (02.23.2017 Consent Order Appointing Special Trustee and Staying Case). The Order Appointing Special Trustee appointed Kathleen Palinski, Esq. as Limited Special Trustee ("LST") of the Trust and authorized her to take all action necessary and appropriate to prepare an accounting of the Trust for the period between January 1, 2009 and December 31, 2016. (¶1, Order Appointing Special Trustee). Also, she in her discretion was authorized to begin her accounting period as early as January 1, 2008 if she deemed it necessary and appropriate. Id. The LST was to deliver a copy of the accounting to all counsel of record along with a written recommendation of any corrective action she believed appropriate to correct any issues. (¶¶ 7 and 8, Order Appointing Special Trustee). The Order Appointing Special Trustee stayed the case for six (6) months from the date of the Order. (¶ 2, Order Appointing Special Trustee). Thereafter, Respondent filed Plaintiff's

Motion for Partial Summary Judgment on November 10, 2017 ("Motion for Summary Judgment"). (11.10.2017 Plaintiff's Motion for Partial Summary Judgment).

Subsequent to the Motion for Summary Judgment, a status conference was held before the Honorable Daniel Dewitt Hall where the parties consented to have the case transferred to the non-jury docket and referred to the Master-In-Equity for disposition (03.27.208 Form 4-Order of Reference). At the time, Judge Kimball was still York County's Master-In-Equity. The Order of Reference was filed in the Office of the Clerk of Court for York County on March 27, 2018. Id.

A hearing on the Motion for Summary Judgment took place on May 9, 2018 before Judge Kimball who issued an Order on May 21, 2018 ("May 2018 Order"). In the May 2018 Order, Judge Kimball determined that the genuine issues of fact existed but he raised a concern whether Trust assets would be fully depleted during the pendency of this action. (May 2018 Order). As a result, Judge Kimball ruled that Appellant was enjoined from making any expenditure of Trust funds without either written consent of Respondent's counsel or an order of the court. Id. If consent could not be obtained, Appellant could apply to the Court for approval of the proposed expenditure. Id. Appellant was required to file two applications/motions for approval of an expenditure between May 21, 2018 and the final hearing in this matter[2].

Thereafter, Appellant filed Defendant's Motion to Dismiss and for Judgment on the Pleadings on April 9, 2019 ("Motion to Dismiss") on the grounds that he voluntarily resigned as Successor Trustee of the Trust effective April 30, 2019[3], and, with his resignation, there were no actual and justiciable controversies for the trial court to determine. (04.09.2019 Motion to Dismiss and for Judgment on the Pleadings). Contemporaneous therewith, Respondent filed a

[2]Specifically, these applications/motions were made while Respondent was in the process of obtaining new counsel due to prior counsel having to undergo medical treatments. It does not appear that a hearing was ever held on Appellant's applications/motions as it appears they were resolved.

[3] Under the Trust Agreement, Appellant's voluntary resignation made Respondent the next successor trustee.

Notice of Motion and Motion to Amend Petition on May 14, 2019 seeking the trial court's leave to file an Amended Petition for Removal of Trustee and Other Related Relief ("Amended Petition"). (05.04.2019 Notice of Motion and Motion to Amend Petition). Generally, Respondent sought leave to file the Amended Petition based on information uncovered and obtained by the LST. Id.

In the Amended Petition, Respondent sought leave to assert causes of action of: (1) breach of trust, (2) breach of fiduciary duty, (3) breach of duty of loyalty, (4) constructive trust, (5) declaratory judgment, (6) indemnity, (7) unjust enrichment, (8) conversion, and (9) litigation costs. (Exhibit A, Motion to Amend). Respondent became aware of these causes of action as a result of the work of the LST who, despite obstacles erected by Appellant, was able to substantially complete her work and produce an accounting with the last amendment being made on January 28, 2018. (Motion to Amend).

A hearing on the Motion to Dismiss and Motion to Amend was held on May 30, 2019 before the Honorable Teasa Kay Weaver[4], who granted the Motion to Amend and denied the Motion to Dismiss by Order filed on June 13, 2019. (06.13.2019 Form 4-Order Granting Motion to Amend and Denying Motion to Dismiss). Respondent filed the Amended Petition on June 20, 2019, this being the same Amended Petition that was attached to the Motion to Amend (06.20.2019 Amended Petition).

Soon thereafter, Respondent, proceeding *pro se*[5], filed his Response to Amended Petition for Removal of Trustee and Other Relief and Request for Damages and Disinheritance of Plaintiff ("Response to Amended Petition") in which he failed to assert his previous pled

[4]Judge Kimball retired in June 2018 and Judge Weaver became the presiding Master-In-Equity soon thereafter.
[5]On July 30, 2019, Appellant's former lawyer, Daniel J. Ballou, Esq., filed a Consent Motion to Withdraw as Counsel that was granted by Judge Weaver in an Order Granting Motion to Withdraw as Counsel on August 16, 2019.

counterclaims but raised new ones sounding in alienation of affection, malicious prosecution, and intentional interference with a contractual relationship (his marriage) as well as damages from his loss of income from his place of employment and other damages. (08.21.2019 Response to Amended Petition for Removal of Trustee and Related Relief and Request for Damages and Disinheritance of Plaintiff). Appellant's Response to the Amended Petition was timely answered/replied to by a Reply to Response to Amended Petition and Other Relief filed August 30, 2019. (08.30.2019 Reply to Response to Amended Petition for Removal of Trustee and Related Relief and Request for Damages and Disinheritance of Petitioner).

At or around the same time, Appellant attempted to pay his attorney's fees and other costs from remaining Trust assets in violation of the May 2018 Order. Appellant was required to return those funds by Order Regarding Trust Expenditures dated September 12, 2019 and amended on November 26, 2019. (09.12.2019 Order Regarding Trust Expenditures and 11.26.2019 Amended Order Regarding Trust Expenditures).

A two-day trial was held in this matter beginning January 30, 2020 in which Appellant and Respondent were allowed to present testimony and other evidence. At the trial's conclusion, Appellant was granted leave to file various affidavits and/or respond to Respondent's evidence, which he did from February 2020 through August 31, 2020. (Tr. p. 373, line 22 – p. 379:25). Some of these affidavits were admitted and others were excluded as being beyond the scope of Judge Weaver's directives. (08.31.2020 Order Granting Petitioner's Motion to Alter or Amend.)

A Final Order was issued by Judge Weaver on February 2, 2021 in which she granted the Trust a money judgment against Respondent in the total amount of $361,092.88, ordered that Respondent was to be treated as having predeceased his and Respondent's father and the Trust's

Settlor, John Vergeldt, Jr., that Petitioner was required to wind up the trust business, and that Appellant's counterclaims were dismissed. (02.21.2021 Final Order).

Appellant filed his Motion to Reconsider on February 12, 2021 which was amended on February 22, 2021. (02.22.2021 Amended Motion to Reconsider). A hearing on the Motion to Reconsider took place on March 17, 2021, and the same was ultimately denied by Order Denying Motion to Reconsider filed on July 2, 2021. (07.02.2021 Order Denying Motion to Reconsider). Appellant then filed his Notice of Appeal on August 3, 2021. (08.03.2021 Notice of Appeal).

II. Statement of Facts

This case is, essentially, the third litigation between Appellant and Respondent concerning the Settlor, his assets, the Trust's assets, and Appellant's actions relative thereto.[6] It is the second litigation involving Appellant's actions relative to the Settlor's assets, the Trust and its assets since the Settlor's death in 2013.

As with this one, the first litigation was filed in the York County Probate Court and was given C/A No.: 2014-GC-46-00012 ("First Case") and was brought by Respondent, who was then a beneficiary of the Trust against Appellant, who was serving as successor trustee, and their other sister, Patricia Vergeldt Downey. It was subsequently transferred to Circuit Court and assigned C/A No.: 2014-CP-46-01956.

The First Case was the result of Appellant's denial of Respondent's various requests for records and/or accountings of the Trust's finances and Appellant's refusal to acknowledge or affirm any duties he owed to her as successor trustee. It was also the result of Appellant's demands that Respondent waive any claim that she may have against him while he was serving

[6] In Judge Kimball's order in the First Case, there is a reference to a guardianship proceeding in the York County Probate Court related to the Settlor that Appellant initiated and which Respondent opposed. Judge Kimball indicates that proceeding was not completed due to the Settlor's death.

as Co-Successor Trustee of the Trust in order to receive her final distribution of Trust assets. As a result, Respondent sought an interpretation of certain provisions of the Trust and for other declaratory relief to include a determination of when the Settlor lost capacity, a finding of probable cause, for litigation costs, and a finding that Respondent would not be 'disinherited' as a beneficiary under the Trust.

The First Case was tried on July 27, 2015 and July 28, 2015 and Judge Kimball issued a final Order on August 31, 2015 ("08.31.2015 Order"). (08.31.2015 Order). In the 08.31.2015 Order, Judge Kimball found, as relevant to this appeal, that

> "During the time John handled Mr. Vergeldt's affairs, and after Mr. Vergeldt's death, he provided a modicum of information concerning the status of the Trust to Vicki and Patti.
>
> It is apparent that the parties have a poor and strained relationship. Their communications foster acrimony and suspicion. In the course of dealing with Mr. Vergeldt's affairs, Vicki has questioned John's handling of Mr. Vergedlt's affairs and demanded accountings. John has responded with minimal [records] and unnecessary assertions of authority that have contributed to Vicki's questions concerning John's handling of Mr. Vergeldt's affairs as Successor Trustee. This unfortunate set of circumstances led to the present action, but I find that in the posture presented by Vicki's prayer for relief, she has not directly challenged John's actions as Successor Trustee. Her prayer only seeks an interpretation of the applicable Michigan statutes and often-amended trust agreement" (p. 5, 08.31.2015 Order)

Judge Kimball also determined that the settlor,

> "likely became unable to manage or conduct his own affairs sometime between the late Fall of 2012 and March of 2013 when Appellant initiated a guardianship proceeding in the York County Probate Court....It was not until May 6, 2013 that [settlor's] primary physician rendered a medical opinion of legal incapacity, which 'triggered' certain provisions of the Trust" pp. 2-3, 08.3.2015 Order).

Based on the pleadings in the First Case, Judge Kimball concluded Respondent was only seeking declaratory relief, and, as such,

> "5. No declaration concerning probable cause to challenge the Successor Trustee's performance of his duties is made, as such is not presented in

this action. Such determination is preserved for such time as Plaintiff challenges the actions of John while acting as Successor Trustee.

6. No finding or conclusion in this order shall be deemed to be a determination of compliance, or non-compliance, with applicable law, or the terms of the Trust agreement. Further, no finding or conclusions in this order shall be determined to establish the amount of any entitlement of any beneficiary under the terms of the Trust Agreement." (emphasis added). (p. 11, 08.31.2015 Order)

Respondent filed the present matter because of Appellant's failure to provide requested trust records and accountings and to otherwise acknowledge the duties and obligations that Judge Kimball determined were owed to her. (¶21, 03.16.2016 Petition) To the extent the Trust records and/or accountings were provided by Appellant, Respondent alleged that they were insufficient, incomplete, and meant to confuse and mislead. (02.01.2016 Petition). Due to Appellant's failure to provide requested Trust records and accountings, Respondent, as in the First Case, only sought declaratory and equitable relief. (02.01.2016 Petition)

As previously identified above, the parties agreed to appoint the LST to prepare and produce an accounting of the Trust's assets and accounts. Presumably, as a result of the Appellant's inability to produce accurate and complete Trust records, the LST was forced to issue numerous subpoenas to various banks, investment houses, and financial institutes for statements and check copies. (Tr. p. 25 line 15- p. 30 line 18). As a result of the subpoenas, the LST, without objection from Appellant, prepared her accounting which had to be amended several times with the last amendment being January 29, 2018. (Exhibit 2, Tr.) The LST was required to make the amendments and issue subpoenas as a result of Appellant's failure to keep, maintain, and/or provide complete and accurate Trust records to the LST. Id.

At the trial of this matter, Judge Weaver recognized the 08.31.2015 Order and acknowledged that it expressly allowed Respondent to challenge Appellant's actions and seek

damages. (Tr. p. 370 line 21- p. 373 line 19). To support thereof, Respondent called the LST, who was duly qualified as an expert in the field of fiduciary standards, and a certified public accountant named Charles Bosler ("Mr. Bosler"), who was qualified as an expert in the field of accountancy. (Tr. p. 16 lines 7-16; Tr. p. 256, lines 18-22). The LST testified as to the Appellant's duties to Respondent as the Co-Trustee and Successor Trustee and Mr. Bosler testified as to her actual damages. (Tr. p. 18 line 11-p. 24 line 1).

With regard to the LST's testimony and opinion, she testified that, in general, the Appellant had certain fiduciary duties and responsibilities to the Settlor and to any then current beneficiaries and that, based on her analysis of the financial information she had been requested to compile, he failed to comply with those duties to his enrichment and to the detriment of the Settlor, the Respondent, and other beneficiaries, as applicable. (Tr. p. 30 line 3- p. 42 line 11). In doing so, she pointed out that, at all times during which Appellant served as Co-Trustee and/or Successor Trustee, there appeared to be a lack of bookkeeping and accounting and clear indications that the Appellant was not impartial. (Tr. p. 42 line 13-p. 44 line 10).

To rebut the LST, Appellant attempted to elicit testimony from the LST that he was absolved of any liability to the Trust for actions that he took that benefited him while the Settlor was alive and serving as Co-Trustee as he claimed his actions were done at the Settlor's direction. (Tr. p. 60 line 4-p. 65 line 7). The LST indicated that she did not believe this was so nor did Appellant present a rebuttal witness. Id. Appellant also attempted to have the LST speculate as to whether or not she knew or assumed that the Settlor was in control of his finances prior to his passing which the LST did not do. Id. In other words, Appellant attempted to blame the Settlor for his own misdeeds and/or to invoke him as a reason to be absolved of liability which the LST testified could not occur. (Tr. p. 68 line 16- p. 72 line 2).

The second expert (who was qualified with John's consent) was Mr. Bosler who testified as an expert in accountancy and bookkeeping. During the course of his testimony, Mr. Bosler testified that his accounting of the Trust's finances was based on information he received from Respondent which were obtained from the LST. (Tr. p. 257 line 10-p. 260 line 11). As the Trust was supposed to wind up after the Settlor's death and because the LST did not have complete financial records, Mr. Bosler testified that he was forced to consider what a prudent man might have done under the circumstances. (Tr. p. 277 line 17-p. 289 line 8).

In that vein, Mr. Bosler testified, like the LST, that the Appellant did not treat Respondent and other beneficiaries equally and impartially, that Respondent appeared to have enriched himself during the Settlor's life and after and appears to have kept such poor records that he nor the LST could determine what some of the Trust's expenditures were for or to whom they benefitted. (Tr. p. 257 line 10-p. 260 line 11; Tr. p. 277 line 17-p. 289 line 8).

Aside from these two experts, Respondent testified she believed she and Appellant had maintained a good relationship for the majority of their lives up until around the time the Settlor went to live with Appellant in York County. (Tr. p. 91 line 1-p. 92 line 10) Respondent also testified that her relationship with Appellant began to deteriorate and finally became ruined after she asked to see the Settlor's and the Trust's financial records. (Tr. p. 97 line 19- p. 100 line 25). Appellant responded with hostility, abuse, and misinformation and demanded that she sign a release in exchange for her last distribution from the Trust. Id. Respondent presented testimony that the First Case followed soon thereafter. (Tr. p. 100 lines 17-p. 102 line 2). In addition, Respondent testified she had been denied access to the family's cottage on Lake Michigan ("cottage") and upon being given access, she discovered that Appellant had let the same go into lapse and severe disarray such that, in her opinion, it had *de minimis* value. (Tr. p.109 line 7-p.

122 line 16). The Court eventually allowed Respondent to present affidavits from various contractors and repairmen into evidence who estimated the cost to repair the cottage and its damage. (08.31.2020 Order Granting Petitioner's Motion to Alter or Amend).

After Respondent presented her case, Appellant presented his own testimony and/or argument and moved to continue the case on the grounds that he was unaware of the evidence that Respondent would be presenting and that he had contacted his own certified public accountant to rebut the reports of the LST and Mr. Bosler. (Tr. p. 318 line 4- p. 319 line 11). Respondent timely produced same as determined by Judge Weaver. (08.31.2020 Order Granting Petitioner's Motion to Alter or Amend). He also requested an opportunity to rebut the affidavits presented by Respondent as to the condition of the cottage. (Tr. p. 318 line 4- p. 319 line 11). Appellant claimed he was not aware of these affidavits either although Respondent presented evidence to the Court that they indeed had been delivered to Appellant's post office box. (Tr. p. 318 line 4- 326 line 21). The Court agreed to hold the evidence open to allow Appellant to present rebuttal evidence.

After several opportunities to present the rebuttal evidence, Appellant failed to submit the same other than two (2) affidavits, one of which was prepared by him as to his opinion of the LST's and Mr. Bosler's reports and another by a man named Robert Nirenberg as to the condition of the Cottage. The Court allowed Mr. Nirenberg's affidavit into evidence, admitted Mr. Bosler's report into evidence, allowed all of the affidavits presented by Respondent, and excluded Appellant's affidavit by order filed August 31, 2020. (03.10.2020 Affidavit of Robert T. Nierenberg).

Subsequent thereto, the Court entered its Final Order on February 2, 2021 ("Final Order") awarding Appellant money damages in the total amount of Three Hundred Sixty One Thousand

Ninety Two and 88/100 ($361,092.88) Dollars being comprised of Two Hundred Ninety Nine Thousand Seven Hundred Ten and 26/100 ($299,710.26) Dollars to the Trust assets, additional expenses in the amount of Five Thousand Eight Hundred Seventy and 00/100 ($5,870.00) Dollars, and attorney's fees and costs in the amount of Fifty Five Thousand Five Hundred Twelve and 62/100 ($55,512.62) Dollars. (02.02.2021 Final Order). The Final Order also found that Appellant was determined to have predeceased the Settlor, that the damages would accrue interest at the post-judgment rate, and that Respondent was to wind up the Trust's business and assets to beneficiaries who were deemed not to have predeceased Mr. Vergeldt. Id. The Final Order dismissed Mr. Vergeldt's counterclaims. Id.

Appellant's present counsel appeared on February 12, 2021 and a Motion to Reconsider was filed the same day. (02.12.2021 Motion to Reconsider). After a hearing on March 17, 2021, the Court denied the Motion to Reconsider on July 2, 2021 and this appeal followed.

STANDARD OF REVIEW

In Appellant's Initial Brief, there are only two (2) grounds for appeal raised. The first ground relates to the Court's granting of Respondent's Motion to Amend to assert damages. The second ground is to the standard of review used by the Court to award Respondent damages. As these two grounds have different standards of review, Respondent will set them out in turn.

A. Standard of Review-Motion to Amend

Under Rule 15(a), SCRCP,

> "[a] party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within thirty days after it is served. Otherwise, a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Ruel 15(a), SCRCP.

"Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result." Id. "This rule strongly favors amendments, and the court is encouraged to freely grant leave to amend." Patton v. Miller, 420, S.C. 471, 490, 804 S.E. 2d 252, 262 (2017) (citing Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E. 2d 711, 717 (Ct. App. 2005)). The prejudice that the civil procedure rules envision, as would warrant denial of a motion to amend the pleadings, is a lack of notice that the new issue is to be tried and lack of opportunity to refute it." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 607 S.E. 2d 711 (Ct. App. 2005). "Courts have wide latitude in amending pleadings." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E. 2d 794, 802 (Ct. App. 1997). "Delay in seeking leave to amend pleadings, regardless of the length of the delay will not ordinarily be held to bar an amendment in the absence of a finding of prejudice." Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 509, 369 S.E. 2d 156, 159 (Ct. App. 1988).

The motion to amend or supplement a pleading is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. Foggie v. CSX Transport., Inc. 315 S.C. 17, 22, 431 S.E. 2d 587, 590 (1993). It will be rarely disturbed on appeal. Berry v. McLeod, 328 S.C. 435, 450, 492 S.E. 2d 794, 802 (Ct. App. 1997). "An abuse of discretion occurs when the [circuit court]'s ruling is based upon an error of law or, when based upon factual conclusions is without evidentiary support." Oulla v. Velazques, 427 S.C. 428, 435, 831 S.E. 2d 450, 453 (Ct. App. 2019) (citing Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E. 2d 565, 566 (1987)).

B. Standard of Review-Construction of Trust/Failure to Apply Standard of Proof

In the second ground for appeal, Appellant has raised, for the issue of whether the Court applied the correct standard of proof based upon language in the Tenth Amendment of the Trust.

This issue was raised to the trial court for the first time on the Motion for Reconsideration. Assuming this issue was properly raised at the trial of the case and not for the first time in the Motion for Reconsideration, Appellant's argument would require a determination of whether the Court: (1) properly interpreted the Tenth Amendment to the Trust and (2) whether the evidence supported the trial court's findings.

In determining whether an action as equitable or legal depends on the main purpose of the action. See Ins. Fin. Services, Inc. v. S.C. Ins. Co, 271 S.C. 289, 247 S.E. 2d 315 (1978). "The main purpose of the action should generally be ascertained form the body of the complaint." Verenes v. Alvanos, 387 S.C. 11, 16, 690 S.E. 2d 771, 773 (2010) (citing Ins. Fin. Servs., Inc. of S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E. 2d. 315, 318 (1978)). "However, if necessary, resort may be had to the prayer for the relief and any other facts and circumstances that throw light upon the main purpose of the action." Id. "The nature of the issues raised by the pleadings and character of relief sought under them determines the character of the action as legal or equitable." Id.

Trusts have long and broadly been a field for the jurisdiction of equity. Id (citing Epworth Orphanage v. Long, 199 S.C. 385, 389, 19 S.E. 2d 481, 482 (1942). A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust. S.C. Code Ann. §62-7-1001(a) (2015). To remedy a breach of trust the court may compel the trustee to redress the breach of trust by paying money, property, or other means. S.C Code Ann. §62-7-1001(b)(3) (2015).

South Carolina Courts have held that an action alleging a breach of fiduciary duty is an action at law; however, a breach of duty may sound in equity if the relief sought is equitable. Ex Parte Wheeler v. Estate of Green, 381 S.C. 548, 673 S.E. 2d 836 (Ct. App. 2009). Restitution and

disgorgement are equitable remedies as is the construction of a trust; however an action for damages is an action at law. See Verenes v. Alvanos, 387 S.C. 11, 690 S.E. 2d 771 (2010).

When reviewing a Master-in-Equity's judgment made in an action at in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence; however, this broad scope of review does not require the appellate court to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses. Friarsgate, Inc. v. First Federal Sav. & Loan Ass'n of South Carolina, 317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995). Dorchester County Dep't of Social Servs v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996). However, "In an action at law, referred to a master or special referee for final judgment, the appellate court will correct any error of law, but must affirm the master's or referee's factual findings unless there is no evidence that reasonably supports those findings." Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997).

In this matter, Appellant has not specified a standard to review to be used with regard to the question of the standard of proof. However, under either standard of review, the trial court's order should be affirmed.

ARGUMENTS

Despite Appellant's arguments, the trial court properly allowed Respondent to amend the pleadings to assert damages in the Amended Petition. Likewise, the trial court construed the Trust properly and applied the proper standard of proof such that the Final Order should be affirmed.

I. THE TRIAL JUDGE PROPERLY ALLOWED RESPONDENT TO AMEND THE PETITION TO ASSERT DAMAGES THEY HAD NOT EXCLUDED AND/OR BARRED BY THE FIRST CASE.

While Appellant has argued that the trial court was not permitted to allow Respondent to amend the Petition based on the First Case and *res judicata*, this argument fails as Judge Kimball specifically made no findings or conclusions related to Appellant's actions as successor trustee or co-trustee or the propriety thereof and specifically preserved them until such time as Respondent brought them. (08.31.2015 Order).

"*Res Judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of prior action between those parties. Under the doctrine of *res judicata*, '[a] litigant is barred from raising issues which were adjudicated in the form suit and any issues which might have been raised in the former suit.'" Judy v. Judy, 393 S.C. 160, 172, 712 S.E. 2d 408, 414 (2011). (citing Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E. 2d 106, 109 (1999)). "The doctrine of *res judicata* is founded on the principle that the public interest requires an end to litigation and that no one should be sued twice for the same cause of action." Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E. 2d 626, 628 (Ct. App. 1995). "*Res Judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plott v. Justin Enterprises, 374 S.C. 504, 511, 649 S.E. 2d 92, 95 (Ct. App. 2007). "Under *res judicata*, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit'" Id (internal citations omitted).

In order for *res judicata* to operate as a bar to a lawsuit the following elements need to be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of

the issue in the former suit. Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 34 512 S.E. 2d 106, 109 (1999). "Because the determination of whether *res judicata* precludes a subsequent suit cannot be reduced to a formulaic process, the Supreme Court cannot adopt or attempt to define a single standard." Judy v. Judy, 393 S.C. 160, 172, 712 S.E. 2d 408, 414 (2011) (internal citations omitted). However, simply seeking a different remedy in the second lawsuit for the same cause of action does not negate the identical nature of the subjects of the two actions where the cause of action is not simply the form of the action in which a claim is asserted, but rather the cause of action is the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon. Id. However, *res judicata* does not bar a second action for damages and other relief where it follows a first action that seeks a declaratory judgment. See Robison v. Asbill, 328 S.C. 450, 492 S.E. 2d 400 (Ct. App. 1997).

Under a Rule 8(c), SCRCP, "[i]n pleading to a preceding pleading, a party shall set forth affirmatively the defenses.....res judicata" or they are waived. Id.; RIM Associates v. Blackwell, 359 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004).

A. Appellant did not raise the affirmative defense of res judicata and it is waived as a result.

As applied to this matter, a review of the Answer and Counterclaim reveals that Appellant failed to set forth an affirmative defense of *res judicata* in the Answer and Counterclaim. (Answer and Counterclaim). He also failed to assert the same defense in his Response to the Amended Petition for Removal of Trustee and Related Relief. (Response to Answer and Counterclaim). While Appellant appears to claim that he brought up the 08.31.2015 Order, his references thereto are a mischaracterization and cannot be construed as raising *res judicata* as a defense to the present action. The first time it appears that Appellant raised the issue of *res judicata* was in his Motion for Reconsideration and Amended Motion for

Reconsideration. As a result, it was improper for the trial court to consider it on the Motion for Reconsideration and it is improper for this court to consider it on appeal. See Patterson v. Reid, 318 S.C. 183, 456 S.E. 2d 436 (Ct. App. 1995); Miller Construction Co., LLC v. P.C. Construction of Greenwood, 418 S.C. 186, 791 S.E. 2d 321 (Ct. App. 2016); Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E. 2d 731, 734 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, it must have raised to and ruled upon by the trial judge to be preserved for review.....Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector).

B. Even if res judicata had been raised, it is was not a bar to amendment of the pleadings and Appellant was not prejudiced by the pleadings amendment.

Even if Appellant had properly pled and raised the issue of *res judicata* to the trial court in response to and/or at the hearing on the Motion to Amend, it was not an abuse of discretion for the court to allow amendment as it was not an error of law to do so and Appellant has not shown any evidence that he was otherwise prejudiced.

i. *Res Judicata* did not bar amendment of the pleadings.

In this particular matter, the trial court properly allowed amendment of the Petition as the issue of damages was not raised and/or ruled upon in the First Litigation, the parties are not identical, and there was no identity of subject matter. Additionally, the claims for damages resulting from the amendment of the Petition could not have been brought in the First Litigation as it was specifically brought due to the Appellant's failure and refusal to acknowledge his duties as the Trust's Successor Trustee. Furthermore, Judge Kimball specifically preserved Respondent's right to bring a second action for damages or otherwise in the final order in the Frist Litigation as described *infra*.

As to the first element of *res judicata*, identity of the parties does not exist. In the First Case, Respondent brought the first action against Appellant while he was serving as Successor Trustee of the Trust and Respondent was merely a beneficiary thereof. (08.31.2015 Order). In this matter, Respondent brought the present action while Appellant was serving as Successor Trustee, but, at or around the same time Respondent sought to and was granted leave to amend the Petition, Appellant resigned as Successor Trustee and Respondent became the Successor Trustee. (Petition, Motion to Dismiss and Motion to Amend Petition.) It is in both capacities as beneficiary and successor trustee that Respondent brought the causes of action for breach of fiduciary duty, breach of the duty of loyalty, and negligence. In other words, the parties reversed positions and capacities in this case such that the parties are not identical.

The second element of *res judicata* is also not present as there is not identity of the subject matter between the First Case and the present action as the issue of damages was not litigated in the First Case. (08.31.2015 Order and Amended Petition). Respondent brought the First Case seeking only declaratory relief based on causes of action relating to: (1) Settlor's mental capacity and lack thereof, (2) the effect the Settlor's competency on who was the trustee of the Trust, (3) when Appellant became co-trustee and/or successor trustee, (4) his duties and obligations to Respondent and when they arose, and (5) whether Respondent had probable cause to bring the First Case. (08.31.2015 Order). Aside from these narrow questions, none were raised or resolved. To be sure, Judge Kimball specifically found that no declaration concerning probable cause to challenge Appellant's performance of his duties as co-trustee or successor trustee as none had been alleged or was before the Court. He also specifically ruled that nothing in the 08.31.2015 Order should be deemed to be a determination of Appellant's compliance or non-compliance with applicable law or the Trust. (¶5, p. 9, 08.31.2015 Order). To be sure,

Judge Kimball ruled that, "[s]uch determination is preserved for such time as Plaintiff {Respondent} challenges the John {Appellant} while acting as Successor Trustee" and that "no finding or conclusion in this order shall be deemed to establish the amount of any entitlement of any beneficiary under the Terms of the Trust agreement." (¶¶5 and 6, p. 9, 08.31.2015 Order). Distilled to their essence, Judge Kimball was aware that Respondent was only seeking declaratory relief in the First Case related to Appellant's duties to Respondent under the Trust agreement and ruled accordingly.

By contrast, Respondent initially brought the present action to have Appellant removed as Successor Trustee based upon his failure to produce trustee records and/or accountings in derogation of the duties imposed by the Trust. (Petition). Respondent also sought to have Appellant immediately release trust records, for injunctive relief, and for litigation costs. (Petition"). Respondent was forced to bring the action even in after Judge Kimball made his unappealed rulings in the 08.31.2015 Order. It was only through the diligent work of the LST that Respondent was finally able discover Appellant's actions and the extent thereof and gained the information necessary to amend the Petition to a challenge to Appellant's actions as co-trustee and/or successor trustee and seek damages for his actions while he was serving of same. (Amended Petition).

As to the third element of *res judicata* (ie: adjudication of the issue in the former suit), there is no finding or conclusion in Judge Kimball's 08.31.2015 Order that determines whether Appellant breached his duties as co-trustee and/or successor trustee and the resulting liability to Respondent and the Trust. The 08.31.2015 Order explicitly finds the opposite. As previously noted, Judge Kimball made an explicit ruling that the question of Appellant's actions as Successor Trustee were not at issue, that his findings and conclusions were not to be construed as

such, and that the issue(s) were preserved until such time that Respondent could challenge Appellant's actions. (¶¶5 and 6, p. 9, 08.31.2015 Order). Any other argument otherwise cannot credibly be made.

As a result, the trial court's decision to allow amendment of the pleadings was not barred by *res judicata* and is not an error of law as a result.

ii. The trial court allowing Petition to amend her pleadings to assert claims and causes of action did not prejudice Respondent as he was on notice and had an opportunity to refute same.

Since *res judicata* did not bar the trial court from allowing Respondent to amend her pleadings, the next question is whether Appellant suffered prejudice under Rule 15, SCRCP.

As previously noted, Rule 15, SCRCP allows a party to amend their pleading

> "...once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within thirty days after it is served. Otherwise, a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. The prejudice that the civil procedure rules envision, as would warrant denial of a motion to amend the pleadings, is a lack of notice that the new issue is to be tried and lack of opportunity to refute it." Rule 15(a), SCRCP.

Delay in seeking leave to amend pleadings, regardless of the length of the delay will not ordinarily be held to bar an amendment in the absence of a finding of prejudice." Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 509, 369 S.E. 2d 156, 159 (Ct. App. 1988).

It is clear in this matter Appellant was not prejudiced by the trial court allowing Respondent to amend her pleadings to seek damages. It is also clear Appellant was steadfast in his resolve to keep his actions as co-trustee and successor trustee hidden and concealed from Respondent presumably because he was aware that his actions, the breach of his various duties,

and the damages that they would cause and/or caused. It was only after approximately six (6) years of litigation that his actions became known to Respondent. It is also clear from the original Petition filed in this case that Respondent believed Appellant had not acted impartially and possibly breached his duties based on his failures and refusals to produced records and accounts and that was why she was seeking to have him removed. She just had no information (based on Appellant's insistent concealment) to allege damages or an amount thereof. It is additionally clear that Appellant had knowledge and/or was on notice of the LST's report of his actions as co-trustee and/or successor trustee while it was being complied and amended and had over a year to refute it as it was last amended in 2018 and the trial of this matter occurred in 2020. In other words, the totality of the circumstances shows that Appellant was on notice that he knew or should have known that his actions as co-trustee and successor trustee breached or may have breached various fiduciary duties he owed to Respondent and the Trust, knew or should have known that Respondent would uncover those breaches, and knew or should have known that she would have brought claim for damages as a result. He just did nothing to prepare to refute those claims even after having been given an opportunity to do so after the trial. (08.31.2020 Order Granting Petitioner's Motion to Alter or Amend.) His failure to act to protect his rights considering the last eight (8) years of protracted litigations can hardly be argued to be lack of notice and opportunity to refute Respondent's claims.

As a result, Appellant did not suffer prejudice because of Respondent being allowed to amend her pleadings.

C. This Court should affirm the trial court's order allowing amendment of the petition

The decision to allow amendment of the pleadings lies within the sound discretion of the trial court and will not usually be disturbed on appeal as noted above absence a showing of

prejudice which can be based on an error of law. Foggie v. CSX Transport., Inc. 315 S.C. 17, 22, 431 S.E. 2d 587, 590 (1993); Berry v. McLeod, 328 S.C. 435, 450, 492 S.E. 2d 794, 802 (Ct. App. 1997). Neither is present in this case as *res judicata* did not and does not prevent the trial court from allowing Respondent to amend the pleadings nor could it be credibly argued that Appellant was prejudiced by the amendment as he was on notice of Respondent's possible claim for damages well before she was and had an opportunity to refute the same as they were related to his actions. Accordingly, it was not an abuse of discretion for the trial court to allow amendment of the pleadings and the trial court's decision should be affirmed.

II. THE TRIAL JUDGE APPLIED THE CORRECT STANDARD OF PROOF IN THIS MATTER AS THE TRUST AGREEMENT DOES NOT PROVIDE FOR A HIGHER STANDARD OF PROOF. EVEN IF IT DID, THAT ISSUE WAS NOT PRESERVED FOR APPEAL.

In Appellant's Initial Brief, there appears to be an argument that the Trust Agreement contains an ambiguity related to the standard of proof that the trial court was required to apply and the ambiguity should be resolved in favor of a high standard of proof. Rather than giving any statutory or case law for the basis of this argument, Appellant speculates about the Settlor's knowledge of Appellant and Respondent's relationship. However, the Trust Agreement contains no such ambiguity and explicitly does not contain a higher standard of proof. As a result, the trial court applied the proper standard of proof in its Final Order

Also, neither party raised the issue of construing the Trust so that a higher standard of proof is applied in its pleadings or at the trial of the matter. It was raised for the first time on the Motion for Reconsideration, and, as a result, is improper for this Court to consider on appeal.

A. Neither pray alleged an ambiguity in the Trust Agreement related to the standard of proof, and, as a result, it is improper for this Court to consider it on appeal.

Appellant claims that the Trust Agreement requires the trial court to apply a higher standard of proof and that the trial court failed to do same. However, a review of record reveals neither party addressed or raised a question about the standard of proof required by the Trust Agreement or its application except on the Motion for Reconsideration. (Motion for Reconsideration 02.12.2021) The only mention of it being that Appellant claimed Respondent had not proved that he acted in bad faith without addressing the Trust Agreement itself or the higher standard that he now believes should be used. Id. As this issue was not raised to or ruled upon by the trial court prior to the Motion for Reconsideration, the issue of the standard of proof is not properly preserved for review and should be struck as a grounds for appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E. 2d 731, 734 (1998).

B. Even if the issue were raised, no higher standard of proof is present in the Trust Agreement.

Appellant claims that the Tenth Amendment to the Trust Agreement requires a higher standard of proof to be used for him to be found liable for his actions as co-trustee and/or successor trustee. However, no higher standard of proof is prescribed in the Trust Agreement, nor does Appellant provide any case statutory or case law allowing a settlor to choose their standard of proof. Appellant can only make this claim when the events of the last approximate decade of his relationship with Respondent is examined and the settlor's intent speculated and extrapolated therefrom. This sort of speculation cannot be considered or allowed to control this matter, and, as such, no ambiguity exists in the Tenth Amendment to the Trust Agreement such that this Court is allowed to construe same. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 701 S.E. 2d 742, 754, 390 S.C. 275 (2010) (Hearn, J., concurring).

"In construing a trust, the primary consideration is to discern the settlor's intent." Bowles v. Bradley, 319 S.C. 377, 380, 461 S.E. 2d 811, 814 (1995). "If the language is plain and capable of legal construction, that language determines force and effect of instrument." Id. "In ascertaining a settlor's intent, if the language of the trust instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument." Holcombe-Burdette v. Bank of America, 371 S.C. 648, 658, 640 S.E. 2d 480, 485 (Ct. App. 2006). "[C]onstruction depends upon the trustor's intent at the time of execution as shown by the face of the document and not any secret wishes, desires or thoughts after the event." Id (citing Chiles v. Chiles, 270 S.C. 379, 384, 242 S.E. 2d 426, 429 (1978)). When there is no defect on face of the trust document, but uncertainty appears upon attempting to effectuate document, documents contain latent ambiguity and parol evidence is admissible to determine settlor's intent. Bowles v. Bradley, 319 S.C. 377, 380, 461 S.E. 2d 811, 814 (1995).

It is undisputed that the Tenth Amendment to the Trust agreement requires, "[a]n individual Successor Trustee's liability is limited to an act or omission committed in bad faith or with reckless indifference of the purpose of the trust or interest of the beneficiaries." (Plaintiff's Ex. 3, Tenth Amendment) It is also undisputed that Tenth Amendment of the Trust agreement provides that, "The individual Successor Trustee shall be indemnified from the applicable trust estate for reasonable legal expenses in defending any claim or action filed by a trust beneficiary except for a claim or action based upon an act or omission by the Successor Trustee to have been committed in bad faith or with reckless indifference to the purposes of the trust." Id. These terms are clear and unambiguous and require no construction or interpretation. It is also clear that the Tenth Amendment does not contain or prescribe an alteration and/or change the standard or burden of proof required for the claims raised in the Amended Petition. Rather, the Tenth

Amendment only alters the factual findings and/or conclusions of law required to for an individual successor trustee to be found for liable for damages to a beneficiary. It does not change the findings of fact and/or conclusions of law for former trustee to be liable to the Trust. Since the Settlor was sophisticated enough in his estate plan to include this limitation, it is only reasonable to conclude he would have been sophisticated enough to include a higher standard of proof if he could and if he so chose. Based on these terms, Appellant appears to be conflating the requirement of a finding of fact and conclusion of law with a standard of proof in order to create an ambiguity where none exists. See McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 33 S.E. 2d 501 (1945).

As a result and based on the clear and unambiguous language of the Tenth Amendment to the Trust Agreement, the Settlor did not intend to impose a higher standard of proof upon to limit a successor trustee's liability. Settlor only intended to limit their liability based upon a finding of fact and/or conclusion of law.

C. The speculation raised by Appellant does not impose a higher standard of proof, but, even if it does, the facts established in the record show that Respondent met the same.

As previously noted, Appellant attempts to impose a higher standard of proof on the case without specification and/or basis, and, as previously argued, the Tenth Amendment to the Trust agreement appears to limit a successor trustee's liability based on a finding and/or conclusion of successor trustee's bad faith. It does not impose a higher standard of proof.

Assuming *arguendo* that the Settlor had such an intent and an ambiguity exists such that the trial court could impose a higher standard of proof (whatever it may be), the facts established by the record in this case show that Appellant satisfied same. This is seen in the fact that Respondent, over the last years of the Settlor's life used Trust funds for his own personal benefit

and enrichment and used his position as co-trustee and successor trustee to threaten and harass Respondent. (Tr. p. 30 line 3- p. 42 line 11). He also unilaterally and with complete disregard to the terms of the Trust and Respondent's rights thereunder denied Respondent access to the Trust's records and accounts and/or provided her with incomplete, inaccurate, and misleading information along. (08.31.2015 Order) He also threatened to 'disinherit' her if she didn't comply with his demands and distributions. (Tr. p. 97 line 19- p. 100 line 25). These actions necessitated the First Case.

Even after the First Case, Appellant (despite not appealing Judge Kimball's 08.31.2015 Order), continued to deny and refuse Respondent access to Trust accounts, records, and other information. This partly because he did not keep or have them by any method. (Tr. p. 30 line 3- p. 42 line 11). His denials, failures and refusals necessitated the hiring of the LST who was required to put the pieces of the Trust's finances together with little help or assistance from Appellant which in turn resulted in the Trust incurring fees and expenses. Id. He further allowed other Trust assets, such as the Cottage, to fall into such disarray that it has *di minimis* value. (Tr. p.109 line 7-p. 122 line 16). All in all, the only conclusion to be drawn from Appellant's actions related to the Trust was that he was attempting to conceal his co-mingling of Trust assets with his own, his own personal enrichment (to include paying or attempting to pay his legal fees from Trust assets in violation of court order), and the degree to which he breached his duties of loyalty and impartiality from Respondent. Under any standard of proof utilized in a civil case or standard of review used by this Court, the evidence presented by Respondent shows she met the same.

Based on these facts in the record, the trial court's order should be affirmed as no higher standard of proof is established by the Tenth Amendment to the Trust Agreement, but, even if

there was, Respondent met the same under any civil standard of proof or standard of review this Court chooses to adopt.

CONCLUSION

Based on the above, the trial court's order should be affirmed, and the appeal dismissed.

HARRELL, MARTIN & PEACE, P.A.

By: _____

TAYLOR A. PEACE, ESQ.
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Phone: (803) 345-3353
Fax: (803) 345-9171
tpeace@hmp-law.com
Attorneys for Respondent Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA KAY WEAVER, MASTER-IN-EQUITY

Appellate Case No. 2021-000816
Lower Case No. 2016-CP-46-000820

Vicki Lynn Vergeldt, individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated
September 27,1978.....Plaintiff/Respondent,

v.

John Edward Vergeldt.....Defendant/Appellant.

PROOF OF SERVICE

I, Tracy Slice Moore, an employee with the firm of Harrell, Martin & Peace, P.A., do hereby certify that on January 14, 2022, I served a copy of the Respondent's Initial Brief and Respondent's Designation of Matter in the above captioned case on the following individuals by electronic mail using their email address listed in the Attorney Information System, addressed as follows:

Desa Ballard
Ballard & Watson
desab@desaballard.com

By: _____
Tracy Slice Moore, Paralegal

January 14, 2022

HARRELL, MARTIN & PEACE, P.A.
ATTORNEYS AT LAW

L.K. "Trey" Harrell, III
Jeremy C. Martin
M. Alan Peace **
Taylor A. Peace
Andrea "Andi" Cornelison
Erik T. Norton

Robert W. Dibble, Jr. *
William Jennings (Bill) Buchanan *
Donald W. Tyler *
Thomas B. Jackson, III *

*Of Counsel
**Certified Mediator/Arbitrator

January 14, 2022

VIA EMAIL AND REGULAR, FIRST CLASS MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Vicki Lynn Vergeldt, et al. v. John Edward Vergeldt
C/A No.: 2021-000816
Our File No: 3490.00001/TAP

Dear Ms. Kitchings:

Enclosed for filing please find the Initial Brief of Respondent's and Designation of Matter for the above referenced case.

By copy of this letter and as evidenced by the Proof of Service, these filings have been served upon counsel for Appellant.

Thank you for your time and attention in this matter. If you have any questions, please do not hesitate to contact our office at the phone number below.

Sincerely,

HARRELL, MARTIN & PEACE, P.A.

Tracy Slice Moore
Paralegal to Taylor A. Peace, Esq.

/tsm
Enclosures

Mailing Address: Post Office Box 1000, Chapin, South Carolina 29036
Physical Address: 135 Columbia Avenue, Chapin, South Carolina 29036
Telephone: 803-345-3353 • Fax: 803-345-9171
harrellmartinpeace.com