The Supreme Court of South Carolina

In the Matter of Zabrina B. Delgado, Petitioner.

Appellate Case No. 2019-001003

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 22, 2017, Petitioner was admitted and enrolled as a member of the Bar of this State. Currently, Petitioner is a regular member of the Bar in good standing.

Petitioner has now submitted a resignation from the South Carolina Bar pursuant to Rule 409 of the South Carolina Appellate Court Rules. The resignation is accepted.

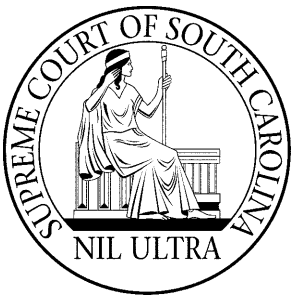
Within twenty (20) days of the date of this order, Petitioner shall surrender the certificate of admission to the Clerk of this Court. If Petitioner cannot locate this certificate, Petitioner shall provide the Clerk with an affidavit indicating this fact and indicating that the certificate will be immediately surrendered if it is subsequently located.

FOR THE COURT

s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina

June 26, 2019



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
July 3, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Melisa White Gay, Respondent

Appellate Case No. 2019-000635

Opinion No. 27899
Submitted June 11, 2019 – Filed July 3, 2019

DEFINITE SUSPENSION

John S. Nichols, Disciplinary Counsel, and Ericka McCants Williams, Senior Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Barbara Marie Seymour, of Clawson & Staubes, LLC, of Columbia, for Petitioner.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (the Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, Respondent admits misconduct and consents to the imposition of a definite suspension for six months. Respondent also requests the definite suspension be made retroactive to the date of her interim suspension: March 21, 2018.[1] We accept the Agreement and suspend respondent from the practice of law in this state for six months, retroactive to the date of her interim suspension. The facts, as set forth in the Agreement, are as follows.

[1] *In re Gay*, 422 S.C. 386, 812 S.E.2d 207 (2018).

Facts

On February 27, 2019, Respondent entered a plea of no contest to the charge of unlawful communication in violation of S.C. Code Ann. § 16-17-430(A)(1) (2015). The facts of the plea indicated that, on December 13, 2017, Respondent willfully and unlawfully conveyed "an immoral message while in a telephonic communication with an individual." Specifically, while meeting with one of her criminal clients who was in custody related to a narcotics trafficking case, Respondent instructed the client's girlfriend to remove United States currency and paperwork from the bathroom of the client's home and take the currency and paperwork to an associate of the client. Respondent was sentenced to one day in jail with credit for one day served.

Law

Respondent admits that by her conduct she violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (violating the Rules of Professional Conduct); Rule 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, truthworthiness, or fitness as a lawyer); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

Respondent further admits her conduct constitutes grounds for discipline under Rule 7(a)(1), RLDE (violating the Rules of Professional Conduct) and Rule 7(a)(5), RLDE (engaging in conduct tending to pollute the administration of justice or bringing the courts or the legal profession into disrepute), Rule 413, SCACR.

Conclusion

We find Respondent's misconduct warrants a definite suspension from the practice of law in this state for six months, retroactive to March 21, 2018, the date of Respondent's interim suspension. Accordingly, we accept the Agreement and suspend Respondent for a period of six months, retroactive to her earlier interim suspension. Within thirty (30) days of the date of this opinion, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct in full or enter into a reasonable payment

plan with the Commission for payment of the costs incurred. Prior to seeking reinstatement, Respondent must demonstrate her compliance with Rule 32, RLDE, Rule 413, SCACR, including completion of Legal Ethics and Practice Program Ethics School within the preceding year.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

IN RE: Deborah Dereede Living Trust dated December 18, 2013, Hugh Dereede and Tyre Dealer Network Consultants, Inc., Respondents,

v.

Courtney Feeley Karp, Individually and As Trustee of the Deborah Dereede Living Trust dated December 18, 2013 and Michael Fehily, as a qualified beneficiary of the Deborah Dereede Living Trust dated December 18, 2013, Defendants,

Of whom Courtney Feeley Karp, Individually and As Trustee of the Deborah Dereede Living Trust dated December 18, 2013, is the Appellant.

Appellate Case No. 2016-001921

Appeal From York County
S. Jackson Kimball, III, Special Circuit Court Judge

Opinion No. 5639
Heard December 6, 2018 – April 10, 2019
Withdrawn, Substituted and Refiled July 3, 2019

AFFIRMED IN PART AND DISMISSED IN PART

Desa Ballard and Harvey M. Watson, III, both of Ballard & Watson, Attorneys at Law, of West Columbia; and

Peter John Nosal and Thomas Carroll Jeter, III, both of Nosal & Jeter, LLP, of Fort Mill, all for Appellant.

John P. Gettys, Jr. and Daniel Joseph Ballou, both of Morton & Gettys, LLC, of Rock Hill, for Respondents.

HILL, J.: After a bench trial, the trial court ruled that Courtney Feeley Karp breached her fiduciary duty as Trustee of a trust created by her late mother by not timely distributing certain trust proceeds to Hugh Dereede (Hugh), Karp's stepfather, and to Tyre Dealer Network Consultants, Inc. (Tyre), Hugh's company. The trial court also awarded Hugh attorney's fees and held Karp personally liable for the verdict. Karp appeals these rulings, which we now affirm.

I.

Some eight months before her death, Deborah Dereede (Deborah), Karp's mother, executed a revocable trust. She named herself trustee and designated Karp as successor trustee. The only asset in the trust was a home located in Lake Wylie, South Carolina, which Deborah put on the market for sale a few months later. Several months after Deborah's death, Karp sold the house, netting $356,242.86.

This appeal turns on the following trust provision:

> As soon as practicable following my death, my Trustee shall sell the house and lot located at 131 WHISPERING PINES DR., LAKE WYLIE, SC 29710. The sales proceeds shall be used first to pay off any mortgage against the property, and second to pay off that certain promissory note given by me to TYRE DEALER NETWORK CONSULTANTS, INC. Said promissory note, at the time of the execution of my Trust, is in the amount of $250,000.00, but in no event shall the amount due exceed one-half of the sales price of the property. After payoff of said mortgage and said note, my Trustee shall then distribute one-half of the remaining net sales proceeds to HUGH DEREEDE, outright and free of trust. The other one-half of the remaining net sales proceeds

> shall be distributed in accordance with the Articles that follow.

After the sale of the house closed, Hugh demanded immediate payment of his and Tyre's share of the proceeds. Karp, who was also the personal representative of Deborah's estate, believed she could not distribute the proceeds until she was certain of the net assets of the trust and the estate, and the time for creditor's claims had expired. Hugh would not be delayed, however, and filed this action in the probate court seeking a declaratory judgment for immediate payment. After procedural sparring, Karp removed the case to circuit court. She continued to refuse Hugh's distribution request but now also claimed that, by suing her, Hugh and Tyre had triggered the trust's no-contest clause thereby forfeiting their right to the proceeds. In the event of such a forfeiture, the disputed monies would go to Karp and her siblings as remainder beneficiaries.

Ten months into the litigation, Karp appointed, with Hugh's consent, Catherine H. Kennedy as trust protector as contemplated by the trust. Kennedy filed a report concluding Karp was justified in waiting on any creditor's claims to clear before making any trust distributions and that the issues of whether Karp exercised good faith in invoking the no contest clause and whether probable cause supported Hugh and Tyre's claims should be decided by the court.

Karp and Hugh testified at the bench trial. Karp called Kennedy as a witness, while Hugh presented S. Alan Medlin as his expert. The trial court ruled (1) Karp breached her fiduciary duty by not timely distributing the house sale proceeds to Tyre and Hugh; (2) Hugh had probable cause to bring this action, and therefore the no contest clause did not apply; (3) because Tyre was a creditor, the no contest clause was inapplicable to it; and (4) Tyre and Hugh were entitled to attorney's fees and costs from Karp.

II.

Because a breach of fiduciary duty claim can be legal or equitable, *see Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010) (stating "an action alleging a breach of fiduciary duty is an action at law," but also that "a breach of fiduciary duty may sound in equity if the relief sought is equitable"), we look to the main purpose of the action to define our scope of review. *Id*. at 16, 690 S.E.2d at 773 ("Characterization of an action as equitable or legal depends on the . . . main purpose

in bringing the action." (internal quotation and citations omitted)). Here, the main purpose is to enforce an alleged unconditional duty to pay a beneficiary. Actions involving trusts are almost always equitable, but there is an exception that applies here: an action against a trustee under an alleged immediate and unconditional obligation to pay money to a beneficiary is a legal action. 4 Scott & Ascher on Trusts § 24.2.1 at 1660 (5th ed. 2007); Restatement (Second) of Trusts § 198(1) (Am. Law Inst. 1959); *see also* S.C. Code Ann. § 62-7-1001 cmt. (Supp. 2018) (noting only traditional remedy at law for breach of trust was limited to suits to enforce obligations to pay money and deliver chattels, otherwise, remedies for breach of trust were "exclusively equitable"). We must affirm the verdict in a legal action tried by a judge alone if any evidence reasonably supports it. *See Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

Although *Verenes* involved the right to a jury trial rather than standards of review, its holding rested on a conclusion that the main purpose of the damages action against the trustee there was equitable, as it sought the classic equitable remedies of restitution and disgorgement. 387 S.C. at 17, 690 S.E.2d at 773–74. Based on the complaint here, and the historical classification of suits seeking enforcement of a trustee's obligation to pay money as legal actions—as recognized in the comment to section 62-7-1001 quoted above—we hold that this is an action at law rather than equity. We acknowledge it is possible that after *Verenes* this action's main purpose could be classified as the equitable remedy of specific performance. If so, our scope of review would expand to de novo, and we may find the facts based on our view of the evidence. *See* S.C. Const. art. V, § 5; *see also Doe v. Clark*, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995).

III.

A. Breach of Trust/Fiduciary Duty

The South Carolina Trust Code describes the duties of trustees and mandates that a trustee "shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries . . . ." S.C. Code Ann. § 62-7-801 (Supp. 2018). The Code also imposes a duty of loyalty on the Trustee. S.C. Code Ann. § 62-7-802(a) (Supp. 2018) ("A trustee shall administer the trust solely in the interests of the beneficiaries."). Where, as here, a trust has two or more beneficiaries, the duty of loyalty includes a duty to "act impartially in investing, managing, and

distributing the trust property, giving due regard to the beneficiaries' respective interests." S.C. Code Ann. § 62-7-803 (Supp. 2018). The Code also incorporates the common law of trusts and principles of equity to the extent they supplement its provisions. S.C. Code Ann. § 62-7-106 (Supp. 2018).

A breach of trust is simply a "violation by a trustee of a duty the trustee owes to a beneficiary . . . ." S.C. Code Ann. § 62-7-1001(a) (Supp. 2018); *see also* Restatement (Second) of Trusts § 201 (Am. Law Inst. 1959); Restatement (Third) of Trusts § 93 (Am. Law Inst. 2012); 4 Scott & Ascher on Trusts, § 24.5.
The trust instrument has been likened to a map on which the settlor has set the course the trustee must faithfully follow, and from which the trustee departs at his peril. *Rodgers v. Herron*, 226 S.C. 317, 330, 85 S.E.2d 104, 110 (1954); *Womack v. Austin*, 1 S.C. 421, 438 (1870); *see* Restatement (Third) of Trusts § 73, cmt. (c) (Am. Law Inst. 2007) ("A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust." (quoting Bogert, *The Law of Trusts and Trustees* § 541 (rev. 2d ed. 1993))).

As the trial court noted, Karp's duty to execute Deborah's intent expressed in Article 6, Section 4 in distributing the proceeds was absolute, not discretionary. *See Cartee v. Lesley*, 290 S.C. 333, 336, 350 S.E.2d 388, 389 (1986) ("The powers of a trustee are either mandatory or discretionary. A power is mandatory when it authorizes and commands the trustee to perform some positive act, and is discretionary when the trustee may refrain from exercising it.").

We agree with the trial court that the trust's directive that Karp sell the house "as soon as practicable" and distribute the proceeds to Tyre and Hugh did not permit Karp to wait until she could ascertain the liquidity of the estate and the extent of any creditors' claims. Such a delay is common and often required in the probate of a person's estate, but as Medlin testified, the unique trust provision here required expedited distribution to Tyre and Hugh. Medlin acknowledged Karp's position was understandable and not one of bad faith, for § 62-3-505(a)(3) makes revocable trust assets subject to probate claims if the probate estate is insufficient to pay its creditors. But, as Medlin emphasized, Karp risked no personal liability by following Deborah's intent to expedite distribution of the house sale proceeds, as the Trust Code insulated her and allowed creditors to follow the money and recover against the distributee. *See* S.C. Code Ann. § 62-7-604(b) (Supp. 2018). Medlin also noted in his affidavit that a personal representative or trustee is only liable to non-beneficiaries if they are personally at fault. *See* S.C. Code Ann. § 62-3-808 (Supp. 2018); S.C. Code Ann. §

62-7-1010(b) (Supp. 2018); *see also* S.C. Code Ann. § 62-7-1002 (Supp. 2018) (stating trustee only liable to beneficiaries for breach of fiduciary duty). He also testified the trust provision at issue was an expression of Deborah's intent that the distributions to Tyre and Hugh be given priority and expedited.

We emphasize our holding is limited to the specific facts of this case and the specific language of this trust provision, which was part of an eighty page trust document that both Kennedy and Medlin deemed "a maze." We acknowledge Karp was placed in a difficult spot, and the "soon as practicable" language limited her options. Karp maintained she had not only the right but the duty to wait until the extent of the creditors' claims could be determined. Kennedy agreed. As we noted, that is the usual procedure for trustees and personal representatives. However, there is nothing in the record that tells us what the assets and liabilities (including any potential estate tax liabilities) of either the Trust or Deborah's probate estate were. Without this information, Karp's position falters. Medlin testified it appeared the Trust had sufficient assets to safely distribute the house sale proceeds to Tyre and Hugh. Without contrary evidence, we are constrained by the "any evidence" standard of review to affirm the trial court's ruling. Our decision might be different were we viewing this issue through the de novo scope.

Karp also attempted to justify her delay by pointing to the possibility that Deborah could have, without Karp's knowledge, changed the terms of the trust by exercising her testamentary power of appointment by will or codicil. Even if we accept Karp's premise, the trust provides that if the trustee receives no notice of such a will or codicil within six months of Deborah's death, the trustee may distribute the trust "as though this power of appointment had not been exercised." Because Karp's delay far exceeded this six month window, her continued withholding of trust distributions in reliance on a potential revision of the trust was untenable.

There is no evidence Karp acted in bad faith. While a Trustee is duty-bound to act in good faith, good faith alone will not excuse a breach of trust. Once it is determined the trustee has failed to carry out the express terms of a trust, good faith "counts for nothing" in the breach of trust calculus. *Rollins v. May*, 473 F. Supp. 358, 365 (D.S.C. 1978); *see* 4 Scott & Ascher, § 24.5 ("A trustee who does the best it can, does, however, commit a breach of trust if the trustee's best is not good enough.").

The trial court's factual findings concerning Karp's breach of trust are supported by evidence, and we must therefore affirm them. *See Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 775.

B. The No-Contest Provision of the Trust

We likewise affirm the trial court's finding that Hugh had probable cause to bring this action, rendering the no contest provision inoperable. *See* S.C. Code Ann. § 62-7-605 (Supp. 2018) ("A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable if probable cause exists for instituting proceedings."); *see also* Restatement (Third) of Property, *Wills* § 8.5 cmt. (c) (Am. Law Inst. 2003) ("Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful."). This again is a factual matter we are bound to uphold if supported by any evidence. *See Townes Assocs*, 266 S.C. at 86, 221 S.E.2d at 775. Professor Medlin's testimony, together with Deborah's intent as expressed in Article 6, Section 4 of the trust, supports the conclusion that Hugh acted reasonably in pursuing this action and it was likely he would prevail.

C. Tyre's Status: Beneficiary or Creditor?

Karp insists the trial court erred in treating Tyre as both a creditor and a beneficiary. She claims Tyre cannot be both (Medlin disagreed). In Karp's view, Tyre was a creditor, and therefore, she could not be liable to Tyre for breach of trust, a cause of action only available to beneficiaries. But this argument leads to a cul-de-sac, for even if Tyre was a creditor, it would not affect Karp's liability for breach of trust to Hugh due to her lack of timely distribution to him, nor would it affect our holding that probable cause existed for this lawsuit. Assuming Tyre was a creditor, the no contest clause would not bind it. If Tyre was a beneficiary, the no contest clause would not apply because Tyre had the same probable cause as Hugh to challenge Karp's actions. A good argument could be made that Tyre was a beneficiary according to the Trust Code, which includes within the definition of beneficiary any person that "has a present or future beneficial interest in a trust . . . ." S.C. Code Ann. § 62-7-103(2)(A) (Supp. 2018). We explain all of this to demonstrate that Karp's argument may be disposed of by one of the great appellate truths: "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

D. Karp's Personal Liability

Karp contends the trial court erred by making her liable in both her capacity as trustee, and personally. We conclude the trial court did not err.

A trustee is liable to the beneficiaries for a breach of trust. § 62-7-1002. This liability is personal, and the trustee must pay any damages from his own funds. *See* Restatement (Third) of Trusts § 100 cmt. a (Am. Law Inst. 2012) ("This Section addresses the measure of a trustee's personal liability for a breach of trust.").

Karp argues section 62-7-1010 protects her from personal liability unless she was personally at fault. This section, however, applies only to a trustee's liability to third parties and does not affect the trustee's personal liability to beneficiaries for breach of trust. *See* South Carolina Trust Code Article 7, Part 10, General Comment ("Sections 62-7-1010 through 62-7-1013 address trustee relations with persons other than beneficiaries."). Section 1010 does, though, highlight that Karp had little risk of personal liability to third party creditors of Deborah's probate estate for promptly distributing the house sale proceeds as directed by the trust.

Although Karp acted in good faith, a trustee is nevertheless personally liable for breach of trust. *See Crayton v. Fowler*, 140 S.C. 517, 519, 139 S.E. 161, 161 (1927) ("[I]t is clear under the law and the facts of the case that he must be held personally responsible for said loss. It is a general rule of law that 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."); *see also Hogg v. Walker*, 622 A.2d 648, 653 (Del. 1993) ("A trustee's liability for a breach of trust is personal in character with all the consequences and incidents of personal liability."); *In re Wills of Jacobs*, 370 S.E.2d 860, 865 (N.C. Ct. App. 1988) ("General common law principles hold that a trustee's breach of trust subjects him to personal liability."); 90A C.J.S. *Trusts* § 343.

E. Award of Attorney's Fees to Hugh

Karp next claims error in the award of attorney's fees. The Trust Code empowers trial courts to order attorney's fees in trust administration cases "as justice may require." S.C. Code Ann. § 62-7-1004 (Supp. 2018). We must affirm a trial court's fee award if any evidence supports it. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). The trial court's comprehensive written attorney's fee award tracked the criteria of *Baron Data Systems v. Loter*, 297 S.C. 382, 384–85,

377 S.E.2d 296, 297 (1989), and its factual conclusions are well anchored by the record.

F. The Trust Protector and Subject Matter Jurisdiction

Karp contends the trial court lacked subject matter jurisdiction over this action because the trust gives exclusive jurisdiction to the trust protector to resolve any disputes.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (internal quotations omitted). Whether a court has subject matter jurisdiction is a question of law we review de novo. *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

A trust protector is defined as "a person, committee of persons or entity who is or who are designated as a trust protector whose appointment is provided for in the trust instrument." S.C. Code Ann. § 62-7-103(27) (Supp. 2018). "The powers and discretions of a trust protector are as provided in the governing instrument and may be exercised or not exercised, in the best interests of the trust, in the sole and absolute discretion of the trust protector and are binding on all other persons." S.C. Code Ann. § 62-7-818 (Supp. 2018). There is no case law interpreting the role of trust protectors in South Carolina or their effect, if any, on subject matter jurisdiction.

The parties designated Kennedy as Trust Protector. Article 3, Section 8(h) of the Trust states, "The Trust Protector *may* unilaterally resolve any dispute, claim or conflict" between beneficiaries and the Trustee. (emphasis added). In the event the trust protector elects to resolve such disputes, the "resolution shall be binding on all parties to [the] Trust and shall not be subject to review." Additionally, Section 8(h) declares:

> No one may file or instigate a claim in a court of law without first submitting the claim to the Trust Protector for resolution . . . . The Trust Protector *may* submit the claim or dispute for mediation and/or binding arbitration. 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. . . . Whenever a dispute, conflict, or claim involves an interpretation or construction of [the] Trust Agreement, the Trust Protector *may* file an action in a court of competent jurisdiction for the interpretation and construction of such Trust Agreement, or *may* instruct [the] Trustee to do so.

(emphasis added).

The plain language of the trust shows Deborah intended a trust protector could, under certain circumstances, have binding authority to resolve disputes like the one that triggered this lawsuit. It is not necessary for us to detail these circumstances, because none of them exist here. By way of example, the trust protector provision arguably requires that any dispute be first presented to the trust protector before a lawsuit can be filed. Yet here the trust protector was not appointed until months after filing. Likewise, the trust protector provision states the trust protector may unilaterally resolve disputes, submit the dispute to mediation or arbitration, file a lawsuit to resolve the dispute, allow a claimant to file suit, or instruct the trustee to file suit. Here, Kennedy in her report not only declined to resolve the dispute but encouraged Karp to seek judicial resolution.

Whatever the contours of the trust protector's authority, we hold that under the circumstances here they do not extend to stripping the trial court of subject matter jurisdiction. Probate Courts and Circuit Courts are specifically empowered to hear trust administration disputes. *See* S.C. Code Ann. § 62-7-201 (Supp. 2018).

IV.

We therefore affirm the ruling of the trial court. Finally, we dismiss Karp's appeal of the denial of her summary judgment motion. *See, e.g.*, *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("[T]he denial of a motion for summary judgment before trial is not reviewable after a trial of a case on its merits.").

Accordingly, the trial court's order is

AFFIRMED IN PART AND DISMISSED IN PART.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christy Byrd, as Next Friend of Julia B., a minor, Appellant,

v.

McLeod Physician Associates II and Dr. John B. Browning, Respondents.

Appellate Case No. 2016-001551

Appeal From Florence County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5662
Heard March 4, 2019 – Filed July 3, 2019

AFFIRMED

Edward L. Graham, of Graham Law Firm, PA, of Sumter, for Appellant.

Mary Agnes Hood Craig, Elloree A. Ganes, Benjamin Houston Joyce, and Deborah Harrison Sheffield, all of Hood Law Firm, LLC, of Charleston, for Respondents.

LOCKEMY, C.J.: Christy Byrd, as next friend of Julia B., a minor, appeals a trial court order denying her motion for a new trial and/or judgment notwithstanding the verdict (JNOV), arguing the trial court erred in declining to

find the obstetric emergency statute inapplicable to this case as a matter of law. We affirm.

FACTS

Christy Byrd brought this medical malpractice action on behalf of Julia B., her minor daughter, alleging Dr. John B. Browning, her obstetrician, breached the standard of care in his October 8, 2009 delivery of Julia. During the delivery, Julia presented with shoulder dystocia when her shoulder became stuck under her mother's pubic bone. Byrd alleges Dr. Browning failed to properly manage and resolve Julia's shoulder dystocia during delivery, which resulted in a permanent brachial plexus nerve injury to Julia's right arm.

On March 12, 2013, Byrd filed a summons and complaint on Julia's behalf against Dr. Browning and McLeod Physician Associates, Inc. (collectively Respondents).[1] Respondents answered with general denials and asserted the affirmative defense of the emergency obstetrical care exception found in section 15-32-230 of the South Carolina Code (Supp. 2018). Respondents later amended their answer to assert the solicitation of charitable funds act defense. At the close of Respondents' case, Byrd moved for a directed verdict, arguing the obstetric emergency affirmative defense did not apply to the case as a matter of law because

> no witness has offered testimony as to the necessary elements, which include medical instability, immediate threat of death or harm. Neither of these two of the three elements have been satisfied. The only testimony that has come in on that has come in in direct contradiction of - - of witnesses' own sworn testimony.

The trial court denied Byrd's motion. The trial court charged the jury as follows concerning section 15-32-230:

[1] Byrd initially sued McLeod Physician Associates, Inc., but during the course of the trial, the trial court determined McLeod Physician Associates II was Dr. Browning's employer at the time of the delivery. As such, McLeod Physician Associates, Inc. was replaced with McLeod Physician Associates II as the co-defendant in this case.

> In an action involving medical malpractice – in a medical malpractice claim arising out of care rendered in a genuine emergency situation in an obstetrician suite where the patient is not stable and there is an immediate threat of death or serious bodily harm to the patient, no physician may be held liable unless it is proven that the physician was grossly negligent. In regards to this emergency exception, the defendants must prove this by the preponderance or greater weight of the evidence.

In addition, the verdict form given to the jury, which neither party objected to, provided:

> 1. Did the defendants prove by a greater weight or preponderance of the evidence that the facts of this case did arise out of a genuine emergency situation where the patient is not medically stable and there is an immediate threat of death or serious bodily injury?

The jury answered this question in the affirmative. In addition, the jury determined Dr. Browning was not grossly negligent. Byrd filed a motion for a new trial absolute and/or judgment notwithstanding the verdict, which the trial court denied in an order dated July 11, 2016. This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings." *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006).

"When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court." *Id*. "Motions for directed verdict or JNOV should be denied if the evidence yields more than one reasonable inference or its inference is in doubt." *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016) (citations omitted). "An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below." *Id*.

> The denial of a motion for a new trial absolute or a new trial nisi for excessiveness of the verdict is a matter within the sound discretion of the trial judge. The appellate court has no power to review his ruling unless it is wholly unsupported by the evidence or is controlled by an error of law.

Soaper v. Hope Indus., Inc., 306 S.C. 531, 534, 413 S.E.2d 38, 40 (Ct. App. 1992), *aff'd as modified*, 309 S.C. 438, 424 S.E.2d 493 (1992) (citations omitted).

LAW/ANALYSIS

Byrd argues the trial court erred in not finding the obstetric emergency exception is inapplicable to this case as a matter of law. The obstetric emergency exception is contained in section 15-32-230 of the South Carolina Code (Supp. 2018) and provides as follows:

> (A) In an action involving a medical malpractice claim arising out of care rendered in a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.
>
> (B) In an action involving a medical malpractice claim arising out of obstetrical care rendered by a physician on an emergency basis when there is no previous doctor/patient relationship between the physician or a member of his practice with a patient or the patient has not received prenatal care, such physician is not liable unless it is proven such physician is grossly negligent.
>
> (C) The limitation on physician liability established by subsections (A) and (B) shall only apply if the patient is not medically stable and:

(1) in immediate threat of death; or

(2) in immediate threat of serious bodily injury.

Further, the limitation on physician liability established by subsections (A) and (B) shall only apply to care rendered prior to the patient's discharge from the emergency department or obstetrical or surgical suite.

We agree with Byrd's assessment that section 15-32-230 is in derogation of the common law. Therefore, we must adhere to the rule of strict construction of this statute. *See Eades v. Palmetto Cardiovascular & Thoracic, PA*, 422 S.C. 196, 201, 810 S.E.2d 848, 850 (2018) ("Statutes in derogation of the common law are to be strictly construed."). "Under this rule, a statute restricting the common law will not be extended beyond the clear intent of the legislature. Statutes limiting a claimant's right to bring suit are subject to this rule." *Id*. (citations omitted) (internal quotations omitted). We also agree with Byrd's interpretation that under a strict construction of the statute, the physician must prove all of the three required elements: (1) the claim arises out of a genuine emergency situation, (2) the patient is not medically stable, and (3) the patient was under an immediate threat of death or serious bodily injury.

Byrd concedes shoulder dystocia is a genuine emergency situation. However, Byrd argues Respondents failed as a matter of law to satisfy the two remaining elements. Specifically, Byrd relies on data collected from the fetal heart monitoring strips, Apgar scores[2], and cord blood gases to support a finding of medical stability and argues these test results did not indicate an immediate threat of death or serious bodily harm. Byrd's experts, citing to this data, opined Julia was medically stable during the delivery.

Many of Respondents' experts, however, opined that shoulder dystocia is by its nature a medically unstable condition. Dr. Stacy Smithson testified the "most risky time during any birth is from the time the head is delivered until the time the

[2]According to Byrd's obstetric and forensic medicine expert, Apgar scores are given to the baby after delivery based on the baby's color, breathing, tone, movement, respiratory rate, and heart rate.

remainder of the body is being delivered." He acknowledged in his deposition testimony read into the record, "from the medical record . . . [t]he baby seemed fine." He noted the fetal monitoring strips did not suggest the baby was medically unstable. He also acknowledged the Apgar scores were fine. However, he testified, "[t]he blood gases revealed some minor abnormalities, but in hindsight we can say that the baby was medically stable. In the midst of a delivery, you cannot say that." In addition, he testified: "This baby was at a threat of immediate risk of brain damage and death the entire time the baby was stuck."

Respondents' expert, Dr. Joseph Mack Ernest, testified as follows:

> Q: When you are delivering a baby and you encounter shoulder dystocia, is that a medically stable or an unstable situation?
>
> A: Well, it depends on how you define medically stable, and I was - - we discussed this in my deposition and I think it's important. It's an important concept.
>
> If you talk about a particular part of the baby, is the heart rate stable? Well, the baby's heart rate was stable; so there was a medically stable heart rate. If you talk about the brain, during the 45 seconds of this delivery, the baby's brain was medically stable, but if you look at the big picture, it was a medically unstable condition.

Dr. Ernest then explained "medical stability" by describing a scenario in which he trips, cuts his forehead, and starts bleeding from an artery:

> I'm talking to you. I can walk. I can breathe. My heart rate is okay, but I'm bleeding and it – and it's not stopping. At a point, I could die from that bleeding.
>
> . . .

Q: So do you have an opinion whether there is an immediate risk of harm when presented with the medical emergency of shoulder dystocia?

A: Definitions are everything right? And how do we define immediate? If immediate is if you don't fix it in a few minutes, there will be brain injury or death, then absolutely, and that's the situation. So I think most people would consider if you are at risk of dying unless something is done in 4 to 5 minutes that was immediate, yeah, I think it's an immediate risk.

Dr. Ernest later stated, "If you talk about the global picture, there was a medical instability because the baby has a limited amount of oxygen, it was being used up, and the situation had to be fixed promptly."

Respondents' pediatric neurology expert, Dr. Michael Duchowny, testified as to the risk to a baby from lack of oxygen during a shoulder dystocia.

Q: It's your opinion obstetricians have over 5 to 6 minutes of lack of oxygen until there's a risk to the baby true?

A: In general, that's true, but there are two points to make here. One is that, firstly, it's different for every baby and, secondly, it's a continuum. It's not like suddenly a switch gets thrown at six minutes to say that you're in the danger zone. The longer the period of time that any of us are without oxygen, the higher the likelihood of some type of brain injury.

. . .

Q: And there was no indication in this case that either mother or baby were not medically stable; true?

A: They were unstable. Any situation where a baby is hung up in the birth canal is potentially a very

> dangerous situation and it is one that presents an immediate danger of bodily harm of either - - either morbidity, brain injury or death.

We must uphold the trial court's denial of Byrd's motion for a new trial absolute and or judgment notwithstanding the verdict if we find any evidence in the record purporting to satisfy these two remaining elements. Here, the experts seem to agree the data from the fetal heart monitoring strips, Apgar scores, and cord blood gases indicated stability. However, Respondents' experts testified medical stability is not based on this information alone. Respondents' experts view shoulder dystocia as a medically unstable situation because if the baby is not delivered, lack of oxygen to can lead to a brain injury or death.

As we explained in *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843-44 (Ct. App. 1997),

> [i]n a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve. Under such circumstances, it is not the function of this [c]ourt to weigh the evidence and determine the credibility of the witnesses.

While Byrd does not agree with Respondents' view of what constitutes medical stability, this view is contained in the record and provides a basis from which a jury could determine the requirements of section 15-32-230 were met.

Byrd asserts Dr. Browning admitted he did not believe Byrd or Julia were under an immediate threat of serious injury or death and he thought they were medically stable during the delivery. Byrd cites to Dr. Browning's testimony during cross-examination.

> Q: This child was never at immediate threat of brain damage in those 45 seconds, was she?
>
> A: No, but you're not - - what you're thinking is to resolve this right away in a correct fashion.

Q: No patient was at risk or at immediate threat of death or serious permanent - - or serious bodily injury during those 45 seconds; true?

A: Well, at the very start of recognizing the shoulder dystocia, that threat of brain injury, that threat of death is there. You go through your motions. You're not looking at the clock to resolve that problem.

Q: But there's no immediate threat for at least five to seven minutes; true?

A: Well, I would say that when you start getting over two or three minutes, there's an increasing risk of problems.

Q: But in the first 45 seconds, there's no immediate threat of any serious harm; true?

A: True.

However, on direct examination by Respondents' counsel, Dr. Browning testified he did not believe the patient was medically stable. Dr. Browning also testified, "[T]he more time it takes to resolve the shoulder dystocia, the more risk of having gradual incremental brain injury and then death."

"[N]either an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 570, 780 S.E.2d 252, 258 (2015). While Byrd argues Dr. Browning's testimony was inconsistent, these inconsistences were for the jury, not the court, to resolve.

Byrd also asserts Respondents' expert misinterpreted the meaning of the term "medically stable" as used in section 15-32-230. Byrd refers to Dr. Ernest's testimony previously cited. Byrd argues that particular definition is too broad. We agree, under Dr. Ernest's definition of medical stability, a patient would never be medically stable in any "emergency situation." A medical emergency by its nature would not be an emergency if it did not have the potential for the patient to become medically unstable and pose a risk of serious bodily injury or death. Nevertheless,

Byrd failed to present this argument to the trial court and presents it for the first time on appeal.

"[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Furthermore, "a party cannot argue one ground at trial then another ground on appeal" *State v. McCray*, 332 S.C. 536, 542, 506 S.E.2d 301, 303 (1998) (citing *State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997)).

Byrd voiced agreement with the jury charge on the emergency medical and obstetrical care statute. Byrd insisted the charge make clear this provision is an affirmative defense and the charge include the definition of gross negligence. Byrd pressed the trial court to include the "not medically stable" requirement in the charge and the verdict form. Byrd, however, did not request the charge provide a definition of "medical stability" or otherwise object to the charge. Moreover, in her motion for a new trial or JNOV, Byrd argued the record lacked competent testimony to establish the elements of the defense. Byrd's motion did not make any arguments relating to the definition of "medical stability." Because Byrd did not object to the jury charges or the verdict form and argued a different ground on appeal than at trial, we agree with Respondents that this argument is not preserved for our review.

CONCLUSION

For these reasons, the trial court acted within its discretion in denying Byrd's motion for a new trial absolute and or judgment notwithstanding the verdict. Therefore, the trial court's order is

AFFIRMED.

SHORT and MCDONALD, JJ., concur.