IN THE SUPREME COURT FOR THE STATE OF ALASKA

HOLLY J. SHELDON-LEE

Appellant,

v.

BIRCH HORTON BITTNER, INC., an Alaskan professional corporation, DAVID K. GROSS, and MARA E. MICHALETZ,

Appellees.

Alaska Supreme Court
Appeal Case No. S-18214

Superior Court Case No. 3PA-20-01219 CI

APPELLANT'S EXCERPTS OF RECORD

VOLUME 1 OF 3

APPEAL FROM THE FINAL JUDGMENT of the SUPERIOR COURT
in the THIRD JUDICIAL DISTRICT AT PALMER, ALASKA
by JUDGE KRISTEN C. STOHLER

Holly J. Sheldon-Lee, Pro Se, Appellant
P.O. Box 1, Talkeetna, Alaska 99676
AlaskanJustice4@gmail.com (907) 232-4063

Filed in the Alaska Supreme Court
on this _____ day of July, 2022.
By: _____
Deputy Clerk

APPELLANT'S EXCERPT OF RECORD

TABLE OF CONTENTS

VOLUME 1

VOLUME 1 (CONTINUED)

VOLUME 1 (CONTINUED)

VOLUME 1 (CONTINUED)

VOLUME 2

VOLUME 2 (CONTINUED)

VOLUME 2 (CONTINUED)

VOLUME 2 (CONTINUED)

VOLUME 3

VOLUME 3 (CONTINUED)

END OF APPELLANT'S EXCERPT OF RECORD

Holly Sheldon Lee
P. O. Box 1
Talkeetna, AK 99676
(907) 232-4063 (Cell)
(907) 733-2333 (Fax)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL AT PALMER

HOLLY SHELDON LEE, Plaintiff, vs. BIRCH HORTON BITTNER, INC., an Alaska Professional Corporation, DAVID KARL GROSS, and MARA E. MICHALETZ, Defendants.	)	Case No. 3PA-20-1219 CI

COMPLAINT FOR LEGAL MALPRACTICE

Plaintiff Holly Sheldon Lee, acting pro se, complains and alleges as follows:

1. Plaintiff Holly Sheldon Lee (hereinafter "Sheldon Lee") is a competent adult resident of the Third Judicial District of the State of Alaska, with her residence in Talkeetna.

2. Defendant Birch Horton Bittner, Inc. (hereinafter "Birch Horton") is a professional corporation that is organized under the laws of the State of Alaska, and that does business as a law firm in the Third Judicial District of the State of Alaska.

3. Defendant David Karl Gross (hereinafter "Gross") is an attorney at law

who is licenced to practice law in Alaska, and who at all times relevant to this complaint was a shareholder in and attorney with defendant Birch Horton.

4. Defendant Mara E. Michaletz (hereinafter "Michaletz") is an attorney at law who is licenced to practice law in Alaska, and who at all times relevant to this complaint was an attorney employed by defendant Birch Horton.

5. On or about September of 2014, Sheldon Lee hired the defendants to represent her in connection with a legal dispute that Sheldon Lee had with her brother, Robert Sheldon. The defendants agreed to represent Sheldon Lee in that dispute, and did in fact provide Sheldon Lee with legal services regarding that dispute.

6. Despite the fact that the defendants provided legal services to Sheldon Lee in that dispute, none of these three defendants provided a written fee agreement to Sheldon Lee for her review and signature. No such written fee agreement was ever signed by Sheldon Lee. This constituted a violation of the professional obligations that Birch Horton and Gross owed to their client, Sheldon Lee, under the laws of the State of Alaska.

7. During the time that the defendants were representing Sheldon Lee, the dispute was referred by the defendants to a mediator, Eric T. Sanders. Sheldon Lee was not given a choice regarding the mediator that this matter was referred to. During the course of that mediation, Gross and Michaletz, acting individually and in their capacities as attorneys for Birch Horton, attended those mediation proceedings with Sheldon Lee. During that mediation, Gross and Michaletz allowed Sheldon Lee to be pressured, bullied and coerced over a period of many hours into signing a document that was labeled as a "Mediator's Proposal." A true and correct

copy of Sheldon Lee's copy of that document is attached to this complaint as exhibit "A." More specifically, Gross and Michaletz failed to make sure that Sheldon Lee fully understood the legal consequences that would follow if she signed that document. Gross and Michaletez failed to advise Sheldon that she would be giving up important legal and economic rights and protections if she signed that document, that she would receive less property from her mother's trust if she signed that document, or that she should not sign that document. Gross and Michaletez failed to advise Sheldon Lee that she could simply walk away from the mediation proceeding at any time. Gross and Michaletez failed to protect Sheldon Lee from the pressure, bullying and coercion that was applied to her during the nine hours of that mediation proceeding.

8. Sheldon Lee's claims against her brother were not finally resolved until February 14, 2018, when the Alaska Supreme Court issued its decision in the appeal of that case. Sheldon Lee's damages as a result of Birch Horton's malpractice were not a certainty until the Alaska Supreme Court issued its decision in that case.

9. As a result of the legal malpractice that is alleged above, Sheldon Lee has suffered severe economic harm in an amount that is to be proved at trial, and that is alleged to exceed the minimum jurisdictional limits of the Superior Courts of Alaska.

Wherefore, having made her complaint against the defendants, Sheldon Lee prays for relief as follows:

1. For a money judgment against Birch Horton and Gross, and in favor of Sheldon Lee, in such amounts as may be proved at trial;

2. For an award of pre-judgment interest on all amounts that are awarded in

favor of Sheldon Lee, at the legal rate, from the date or dates that such damages accrued;

3. For an award of Sheldon Lee's costs in this lawsuit, as allowed under the Civil Rules;

4. For an award of Sheldon Lee's attorney fees as allowed under the Civil Rules, to the extent that Sheldon Lee subsequently hires an attorney to represent her in this lawsuit; and

5. For such additional or alternative relief as the court determines is just under the facts of this case.

Dated at Talkeetna, Alaska this 11th day of February, 2020.

Holly Sheldon Lee, pro se

You must use black ink to fill out this form.

Your Name: Holly Sheldon Lee

Mailing Address: PO Box 1
Talkeetna, AK 99676

Telephone: 907 232-4063 Message phone: 907 232-4063

NOTE: If for any reason you do not wish the other party to know your physical address, you must still provide a mailing address so that the court and the other party can serve you by mail.

FILED
STATE OF ALASKA
THIRD DISTRICT-PALMER
2020 FEB 19 PM 3:43
CLERK TRIAL COURTS
BY:

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT Palmer
City or Town where the Court is located

Holly Sheldon Lee
Plaintiff,

vs.

Birch Horton and Bittner Inc. et al
Defendant.

Your Case No. 3PA-20-1219CI

NOTICE OF Errata

I, Holly Sheldon Lee, hereby give notice that I am filing the 4 pages of the "Mediator Proposal"
Print your full name here

☐ More pages are attached and incorporated by reference.

I have filed the following documents with this Notice:
4 pages of "Mediator Proposal"

02-19-20
Date

Holly Sheldon Lee
Your Signature (in blue ink if possible)

I certify that on 02/19/20 a copy of this *Notice* and all supporting documents that are attached as indicated above was ☑ mailed ☐ hand delivered to:
☑ Opposing Party Birch Horton and Bittner Inc. et al
☐ Opposing Lawyer _____
☐ AG _____ ☐ CI _____
Your signature: Holly Sheldon Lee

Ex. 5 Page 5 of

MEDIATOR'S PROPOSAL
Mediation December 1, 2015

1. The parties to that certain case entitled *Sheldon Lee v. Sheldon*, Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.

2. The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today. Counsel for Robert Sheldon will prepare and circulate a draft of that document.

3. Upon the execution of the Settlement Agreement and Mutual Release of All Claims as referenced in Paragraph 2 above, the parties will have their attorneys execute and file a stipulation to dismiss with prejudice, all parties bearing their own costs and attorney's fees.

4. Robert Sheldon, as Successor Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, will transfer to Holy Lee Sheldon a one-third non-voting interest in the Mountain House, LLC.

5. Holly Lee Sheldon acknowledges that the attached Operating Agreement is the controlling Operating Agreement of the Mountain House, LLC. Holly will not sign the Operating Agreement or any form related to that Operating Agreement, but will instead sign only this document and the Settlement Agreement and Mutual Release of All Claims that will be drafted to consummate the Settlement reached in the conclusion of the mediation.

6. As a non-voting member of the Mountain House, LLC, Holly Sheldon Lee shall have periodic access to the historic original Mountain House structure ("Mountain House") solely for personal use, and not for commercial use. Holly's access shall be the same as any other LLC member and shall be based upon availability that does not conflict with the LLC's commercial use of the Mountain House for serving customers. Availability shall be determined by a request to Robert Sheldon for available dates within the two-week window immediately following the request. If there are dates in the two-week window following a member's request in which the Mountain House is not booked by LLC customers, then the member, including Holly Sheldon Lee as a non-voting member, may reserve from 1-5 of those available days. Members shall reserve available dates as described above on a first come first serve basis.

7. Holly Sheldon Lee and other LLC members may use the method described in Paragraph 6 above for reserving dates for personal use of the Mountain House for any total number of days per year, with no more than 5 days being consecutive days, again so long as no days conflict with LLC customer reservations.

8. From the personal property and residuary of the Trust, Holly Sheldon Lee will receive and accept as her full and complete entitlement as a Trust beneficiary, the following items:

a. one-third non-voting share of the Mountain House, LLC pursuant to the terms of the Paragraphs set forth above;
b. the entirety of the contents of the Talkeetna Warehouse owned by the Trust, except for up to 50 items of no more than $2,000 of total combined value as determined by the Trustee–which items will not include the Super Cub/Taylor Craft skis;
c. Pottery collection of bowls and plates (the "glazed bowls" which Holly Sheldon Lee

Ex. 6 Page 1 of 3

already possesses, taken at or after the August, 2014 family meeting)

d. Small painting of Anaktuvik Pass by Don Sheldon;
e. Two Jeanne Laurence Flower Paintings;
f. The Long Lulu Painting by Johnson;
g. One trapper cabin chair of rustic construction (this is the hand hewn chair that Don gave to Roberta and collected from the Dutch Hills Cabin, which Holly already possesses);
h. Winter Dog Mushing Scene painting by Henne;
i. Landscape Scene painting by Henne;
j. Mount McKinley in Winter painting by Wagner;
k. Lone Alaska Lady Ziegler poster print;
l. Four "Ski Hill" feathers in frame;
m. Spirit Mask unframed 8 x 16 by Wieland;
n. All additional items already distributed to Holly Sheldon Lee;
o. Family North Coast Native Artifacts;
p. With the exception of personal and financial records, the right to make single use facsimiles of all non-personal and/or financial Roberta Sheldon historical records and photographs (the personal archive) solely for display in a museum;
q. The Caribou Portrait by Goodale
r. Seascape by McDaniel (Holly Sheldon Lee already possesses)
s. Moose hide chair (the one that needs a new replacement hide and is not on display at the museum)

9. All items listed above will be distributed within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims and the filing of the stipulation to dismiss, whichever is later;

10. Holly Sheldon Lee will pay into the Mountain House, LLC the sum of $25,000, within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims, and prior to the distribution of the items listed above.

11. Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders.

Dated this 1st day of December, 2015.

Holly Sheldon Lee

David Gross

6:00 P.M.

Ex 7 ff

MEDIATOR'S PROPOSAL
Mediation December 1, 2015

1. The parties to that certain case entitled *Sheldon Lee v. Sheldon*, Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.

2. The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today. Counsel for Robert Sheldon will prepare and circulate a draft of that document.

3. Upon the execution of the Settlement Agreement and Mutual Release of All Claims as referenced in Paragraph 2 above, the parties will have their attorneys execute and file a stipulation to dismiss with prejudice, all parties bearing their own costs and attorney's fees.

4. Robert Sheldon, as Successor Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, will transfer to Holly Lee Sheldon a one-third non-voting interest in the Mountain House, LLC.

5. Holly Lee Sheldon acknowledges that the attached Operating Agreement is the controlling Operating Agreement of the Mountain House, LLC. Holly will not sign the Operating Agreement or any form related to that Operating Agreement, but will instead sign only this document and the Settlement Agreement and Mutual Release of All Claims that will be drafted to consummate the Settlement reached in the conclusion of the mediation.

6. As a non-voting member of the Mountain House, LLC, Holly Sheldon Lee shall have periodic access to the historic original Mountain House structure ("Mountain House") solely for personal use, and not for commercial use. Holly's access shall be the same as any other LLC member and shall be based upon availability that does not conflict with the LLC's commercial use of the Mountain House for serving customers. Availability shall be determined by a request to Robert Sheldon for available dates within the two-week window immediately following the request. If there are dates in the two-week window following a member's request in which the Mountain House is not booked by LLC customers, then the member, including Holly Sheldon Lee as a non-voting member, may reserve from 1-5 of those available days. Members shall reserve available dates as described above on a first come first serve basis.

7. Holly Sheldon Lee and other LLC members may use the method described in Paragraph 6 above for reserving dates for personal use of the Mountain House for any total number of days per year, with no more than 5 days being consecutive days, again so long as no days conflict with LLC customer reservations.

8. From the personal property and residuary of the Trust, Holly Sheldon Lee will receive and accept as her full and complete entitlement as a Trust beneficiary, the following items:

a. one-third non-voting share of the Mountain House, LLC pursuant to the terms of the Paragraphs set forth above;
b. the entirety of the contents of the Talkeetna Warehouse owned by the Trust, except for up to 50 items of no more than $2,000 of total combined value as determined by the Trustee–which items will not include the Super Cub/Taylor Craft skis;
c. Pottery collection of bowls and plates (the "glazed bowls" which Holly Sheldon Lee

EXHIBIT A
Page 1 of 2

already possesses, taken at or after the August, 2014 family meeting)

d. Small painting of Anaktuvik Pass by Don Sheldon;
e. Two Jeanne Laurence Flower Paintings;
f. The Long Lulu Painting by Johnson;
g. One trapper cabin chair of rustic construction (this is the hand hewn chair that Don gave to Roberta and collected from the Dutch Hills Cabin, which Holly already possesses);
h. Winter Dog Mushing Scene painting by Henne;
i. Landscape Scene painting by Henne;
j. Mount McKinley in Winter painting by Wagner;
k. Lone Alaska Lady Ziegler poster print;
l. Four "Ski Hill" feathers in frame;
m. Spirit Mask unframed 8 x 16 by Wieland;
n. All additional items already distributed to Holly Sheldon Lee;
o. Family North Coast Native Artifacts;
p. With the exception of personal and financial records, the right to make single use facsimiles of all non-personal and/or financial Roberta Sheldon historical records and photographs (the personal archive) solely for display in a museum;
q. The Caribou Portrait by Goodale
r. Seascape by McDaniel (Holly Sheldon Lee already possesses)
s. Moose hide chair (the one that needs a new replacement hide and is not on display at the museum)

9. All items listed above will be distributed within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims and the filing of the stipulation to dismiss, whichever is later;

10. Holly Sheldon Lee will pay into the Mountain House, LLC the sum of $25,000, within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims, and prior to the distribution of the items listed above.

11. Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders.

Dated this 1st day of December, 2015.

Robert Sheldon

Kevin Clarkson

6:00 p.m.

EXHIBIT A
Page 2 of 2

Ex. ____
Page 9 of ____

001478

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

HOLLY SHELDON LEE,

Plaintiff,

vs.

BIRCH HORTON BITTNER, INC., an Alaska Professional Corporation, DAVID KARL GROSS and MARA E. MICHALETZ,

Defendants.

Case No. 3PA-20-1219CI

ANSWER TO COMPLAINT

COME NOW Defendants, Birch Horton Bittner, Inc., David Gross and Mara Michaletz, by and through counsel Cashion Gilmore, LLC, and hereby answer Plaintiff's complaint as follows:

1. Defendants admit the allegations in Paragraph 1 of the complaint.

2. Defendants admit the allegations in Paragraph 2 of the complaint.

3. Defendants admit the allegations in Paragraph 3 of the complaint.

4. Defendants admit the allegations in Paragraph 4 of the complaint.

5. Defendants admit the allegations in Paragraph 5 of the complaint.

6. Defendants admit that they provided legal services to Holly Sheldon Lee ("Lee"). Defendants deny the remainder of the allegations in Paragraph 6 of the complaint.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

7. Defendants admit that Eric Sanders ("Sanders") agreed to be the mediator for a mediation that took place on December 1, 2015. Defendants also admit that Mr. Gross and Ms. Michaletz attended the mediation with Lee in order to represent her interests. Finally, Defendants admit that Lee signed the "Mediator's Proposal." Defendants deny the remainder of the allegations in Paragraph 7 of the complaint.

8. Defendants admit that Lee appealed the trial court's dismissal of her case to the Alaska Supreme Court. Defendants also admit that the Alaska Supreme Court decided against Lee. Defendants deny the remainder of the allegations in Paragraph 8 of the complaint.

9. Defendants deny of the allegations in Paragraph 9 of the complaint.

AFFIRMATIVE DEFENSES

1. Lee has failed to state a claim upon which relief can be granted.

2. Lee has filed this lawsuit in an improper venue.

3. Lee's claims are untimely and stale based on the applicable statute of limitations.

4. Lee has set forth factual allegations that are insufficient to show duress.

5. Lee will be unable to secure an expert witness, which is a requirement for prosecuting a legal malpractice claim, thus requiring dismissal.

6. Lee is responsible for her own conduct; thus, all fault should be allocated to her at trial.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

7. Lee is presumed to have read and understood the Mediator's Proposal; therefore, she assumed the risk of the agreement.

8. Lee is precluded from seeking the relief she now seeks because she took contradictory and inconsistent positions in court.

9. The issue of whether the Mediator's Proposal was enforceable has already been resolved by the trial court and the Alaska Supreme Court; therefore, Lee's claims are barred by collateral estoppel, res judicata, and issue preclusion.

Defendants reserve the right to assert additional affirmative defenses as may be revealed through investigation and discovery.

PRAYER FOR RELIEF

WHEREFORE, Defendants, Birch Horton Bittner, Inc., David Gross and Mara Michaletz, having answered Plaintiff's complaint, pray for the following relief:

1. That Plaintiff's Complaint be dismissed with prejudice;

2. For Defendants' costs and reasonable attorneys' fees incurred in defending against Plaintiff's action; and

3. For such other and further relief as this Court deems just and equitable.

CASHION GILMORE LLC
Attorneys for Defendants

DATE 3-3-20

Chester D. Gilmore
Alaska Bar No. 0405015

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was faxed/mailed/hand-delivered/emailed on the 30th day of March, 2020 to:

Holly Sheldon Lee
P.O. Box 1
Talkeetna, AK 99676

CASHION GILMORE, LLC

By: _____
Jennifer Wilaschek

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

Holly Sheldon Lee
P. O. Box 1
Talkeetna, AK 99676
(907) 232-4063 (Cell)
(907) 733-3335 (Fax)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL AT PALMER

HOLLY SHELDON LEE, Plaintiff, vs. BIRCH HORTON BITTNER, INC., an Alaska Professional Corporation, DAVID KARL GROSS, and MARA E. MICHALETZ, Defendants.	)	Case No. 3PA-20-01219 CI

REPORT TO THE COURT

Plaintiff Holly Sheldon Lee, acting pro se, makes the following report to the court regarding the results of her attempt to meet with opposing counsel regarding trial dates and related issues. On March 16, 2020 plaintiff called the offices of Cashion Gilmore, LLC to speak with Chester D. Gilmore, attorney of record for the defendants in the above captioned case, for a pre-scheduled meeting of the parties at 9 am. Plaintiff was greeted by a voicemail and she left a message requesting that Mr. Gilmore reschedule the meeting of the parties. After not receiving a return call from Mr. Gilmore, plaintiff called again on March 18, 2020 and left a message. The message was not returned. On March 19, 2020 plaintiff called Mr. Gilmores's office for a third time in attempt to comply with the Routine Pretrial Order instructions to jointly submit a list of three trial dates along with the approximate number of trial days that the parties require. That call was not returned. Based upon the absent communication from Mr. Gilmore, plaintiff can only

conclude that he did not want to meet with plaintiff.

Based upon the foregoing, and in accordance with the court's March 10, 2020 order, plaintiff provides the following information to the court regarding her availability for trial. First, plaintiff estimates that she can present her case in three days. Plaintiff assumes, but cannot confirm, that the defendants will require a similar amount of time to present their case.

Second, plaintiff is available for a three day trial, starting on any of the following dates:

1. March 10, 2021
2. March 17, 2021
3. March 24, 2021

Dated at Talkeetna, Alaska this 22 day of March, 2020.

Holly Sheldon Lee, pro se

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

HOLLY SHELDON LEE,

Plaintiff,

vs.

BIRCH HORTON BITTNER, INC., an Alaska Professional Corporation, DAVID KARL GROSS and MARA E. MICHALETZ,

Defendants.

Case No. 3PA-20-1219CI

#1

MEMORANDUM IN SUPPORT OF DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This is a legal malpractice action filed by Plaintiff Holly Sheldon Lee ("Lee") against Birch Horton Bittner & Cherot ("BHBC"), as well as the two attorneys at BHBC who assisted Lee with her case. Lee alleges to have suffered damages as a result of being forced into a settlement agreement at a mediation. Among the damages alleged are the costs incurred in having to hire another lawyer to try to undo the settlement. Because Lee suffered actual damages as of December 29, 2015, when a new lawyer was hired, and because she was on notice of a potential malpractice claim at that time, the statute of limitations began to run. Therefore, Lee was required to file her legal malpractice suit on or before December 29, 2018. Since this action was filed on February 11, 2020, it is almost 14 months late and must be dismissed as untimely.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

II. FACTUAL AND PROCEDURAL BACKGROUND

Lee retained the services of BHBC in September 2014.[1] The primary scope of BHBC's representation was to serve as an advocate for Lee in her role as a beneficiary of her mother's Trust. After several months of trying to informally resolve numerous issues related to the Trust, BHBC filed a lawsuit on Lee's behalf. The lawsuit was filed on February 18, 2015 naming Lee's brother, Robert Sheldon ("Sheldon"), as the defendant. The complaint alleged that Sheldon, as the Trustee, failed to comply with the Trust documents. The main issue in the case was whether Sheldon had the authority to make decisions regarding the Mountain House,[2] or whether the Mountain House should simply be distributed to the beneficiaries. This issue was resolved by the trial court on November 16, 2015, when the Court denied Lee's motion for summary judgment and granted Sheldon's cross-motion for summary judgment.[3] The court ruled that Sheldon, as the Trustee, had total authority to make decisions regarding the Mountain House, as it was an asset of the Trust.

With the central issue resolved, the parties started to discuss the possibility of a mediation to try to wrap up the remaining issues related to certain Trust distributions. After initially considering Brian Shortell and Elaine Andrews as possible mediators, it

[1] This was not the first time that Lee had hired BHBC. In approximately 2008, Lee retained BHBC to assist her with the purchase of an air services company. A retainer was entered into at that time. This matter regarding the Trust was the second matter opened under that retainer.

[2] The Mountain House is a cabin located on a glacier in Denali National Park. This cabin, and its location, carry significant family history, as well as Alaskan history, and is well known among Alaska's hiking and bush pilot communities.

[3] *See* Exhibit 1.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

was agreed that retired Superior Court Judge Eric Sanders ("Sanders") would be the mediator. The mediation was scheduled to take place on December 1, 2015.

While there may be a dispute of fact as to what happened during the course of the mediation, there is no dispute that Lee signed a document called a "Mediator's Proposal," which laid out the terms of the settlement.[4] Specifically, the Mediator's Proposal stated as follows:

> The parties to [the] case entitled Sheldon Lee v. Sheldon, Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.
>
> The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today. . .
>
> Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders.[5]

It is also undisputed that Lee initialed each page and signed in the space provided on the second page.[6] Attorney David Gross also signed as Lee's legal representative at the mediation.[7]

About a week later, Sheldon's lawyer sent out a proposed settlement agreement for review. The draft settlement agreement was then forwarded to Lee for her signature. On December 18, 2015, Lee responded by indicating that she wanted to hire another

---

[4] See Exhibit 2.
[5] Id. (emphasis added).
[6] Id.
[7] Id.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

lawyer to conduct a comprehensive review of the file in order to determine if there were any legal avenues that would allow her to avoid the settlement.[8] In other words, Lee was communicating that she was not pleased with the settlement and wanted to hire a lawyer to try to undo it. On or about December 29, 2015, Lee retained attorney Christopher Brecht ("Brecht") to fill that role.[9]

Brecht first filed a document with Sanders attempting to convince him that no binding settlement was reached at the mediation.[10] In response, Sanders issued a decision on February 26, 2016, finding that Lee "accepted all the terms in the written proposal and must comply with those terms and conditions."[11] Brecht then turned to the trial court and asked Judge Washington to set aside the settlement agreement, which she refused to do.[12] Brecht moved for reconsideration arguing that Lee was sick and confused during the mediation; therefore, she was not able to consent to a settlement.[13]

This argument was also rejected.[14] In the end, Judge Washington found that there was an enforceable settlement agreement. She also found that Lee's post-

---

[8] See Exhibit 3.

[9] See Exhibit 4. This email memorialized a telephone conversation that included Mr. Brecht. As can be noted from this email, there was a discussion during the meeting about efforts to try to undo the settlement. It is possible that Lee retained the services of Brecht before this meeting, but he was certainly retained as of December 29, 2015, the date of the telephone conference.

[10] See Exhibit 5.

[11] See Exhibit 6.

[12] See Exhibit 7.

[13] Interestingly, when Brecht moved for reconsideration, he did not argue that Lee entered into the agreement on the basis of duress. This argument did not appear in any court filings until her February 11, 2020 lawsuit.

[14] See Exhibit 8.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

meditation conduct seeking to avoid the settlement was "vexatious" and done in bad faith, leading to an award of enhanced attorneys' fees against her.[15]

Still not satisfied, Lee hired yet another lawyer to file an appeal from the trial court's final judgment. A decision was handed down by the Alaska Supreme Court on August 31, 2018.[16] In its decision, the Court ruled that the trial court did not err in finding that the settlement was binding and enforceable, and that Lee presented no argument or evidence to suggest that she was not capable of consenting to the settlement. The Court also affirmed the award of enhanced fees due to Lee's vexatious behavior. With that, the case was concluded.

On February 11, 2020, Lee filed a *pro se* legal malpractice claim against BHBC on the basis that she was forced into the settlement. From the complaint, it appears that Lee believes that both BHBC and Sanders created an environment where Lee was unable to consent to the settlement, which is substantially the same argument that had been previously rejected by Sanders, the trial court, and the Alaska Supreme Court. Of course, BHBC vehemently denies that it did anything wrong and takes the position that Lee knowingly and voluntarily entered into the settlement, but had "buyer's remorse" afterward. Now, BHBC seeks a dismissal of Lee's lawsuit on the basis that it is time-barred.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

---

[15] See Exhibit 9 (to be provided as a supplemental exhibit). To reduce foot-traffic to the Court, a copy of this order has not been obtained, but will be filed as a supplement. Presumably the plaintiff has it in her possession, and in any event it is a publicly available document.

[16] See Exhibit 10.

III. DISCUSSION

To prevail on a legal malpractice claim, a plaintiff must show the following: (1) that the defendant has a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) that the defendant breached that duty; (3) that the breach proximately caused the injury; and (4) that actual loss or damage resulted from the negligence.[17] The statute of limitations for such a claim is three years.[18] The statute of limitations will not start running until the claim accrues, which is when all four elements are satisfied.[19] In general, this means that the cause of action will not accrue, and thus the statute of limitations will not begin to run, until the "plaintiff incurs an injury."[20] The decision as to whether the statute of limitations has been violated is a legal issue the Court must resolve.[21] To the extent there are factual issues in dispute, the trial court will act as the finder of fact.[22] If the undisputed facts demonstrate that a malpractice claim was filed more than three years after the claim accrued, the malpractice claim must be dismissed.[23]

In this case, the alleged legal malpractice is based on the assertion that BHBC forced Lee to settle her claims at the mediation taking place on December 1, 2015, when she did not intend to do so.[24] For the purposes of this motion, the critical question is

---

[17] Shaw v. State, Department of Administration, 816 P.2d 1358, 1361 n.5 (Alaska 1991).
[18] Gefre v. Davis Wright Tremaine, 306 P.3d 1264, 1273-1273 (Alaska 2013); AS 09.10.053.
[19] Jones v. Westbrook, 379 P.3d 963, 967 (Alaska 2016).
[20] Russell v. Municipality of Anchorage, 743 P.2d 372, 375 (Alaska 1987).
[21] Cikan v. ARCO Alaska, Inc., 125 P.3d 335, 338 (Alaska 2005).
[22] Taffe v. First National Bank of Alaska, 450 P.3d 239, 242-243 n.9 (Alaska 2019).
[23] See Alaska Rule of Civil Procedure 56.
[24] See Complaint, ¶ 7.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

when Lee's claim accrued, which would commence the running of the statute of limitations.

There is certainly an argument that if, in fact, Lee signed the settlement agreement against her will and under duress, as she claims, Lee suffered an injury at that time. The injury would have been derived from the fact that she entered into an enforceable settlement agreement that was less advantageous than she desired. Technically, there would have been nothing preventing Lee from filing the exact same legal malpractice lawsuit that she filed on February 11, 2020, at the conclusion of the mediation (assuming, of course, that the courts were open). In other words, if Lee truly was coerced into signing the Mediator's Proposal, she would have immediately realized she had a claim. With this in mind, it would be correct to find that Lee's malpractice claim began to accrue on December 1, 2015, and would therefore have to be filed before December 1, 2018.

To the extent the court determines that Lee would have to suffer actual damages before her claim accrues, as opposed to the presumptive damages that resulted from signing the Mediator's Proposal, that date would have been when Lee hired Brecht to help undo the settlement that resulted from signing the Mediator's Proposal. After all, the damages she now claims certainly include the cost of hiring Brecht. Put another way, Lee would not have had to incur Brecht's fees had it not been for BHBC's alleged malpractice. Therefore, since Lee started to incur additional expenses, in the form of attorney's fees, as of December 29, 2015, when Brecht was hired, her legal malpractice claim accrued on that date. Thus, the statute of limitations would have run three years later, or on December 29, 2018.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

The most conservative approach the Court could take would be to find that the legal malpractice claim began to accrue once the trial court rejected Brecht's efforts to undo the settlement agreement. As outlined above, Sanders found an enforceable settlement agreement on February 26, 2016; the trial court rejected Brecht's efforts to undo the settlement in its order dated June 27, 2016; and finally, the trial court, on August 3, 2016, denied Brecht's motion for reconsideration, again holding that the Mediator's Proposal was a binding settlement. Taking the last action by the trial court, the statute of limitations on Lee's legal malpractice claim would accrue on August 3, 2016, requiring that suit be filed on or before August 3, 2019.

Based on the above, there are three possible dates for when Lee's legal malpractice claim began to accrue. No matter which date the Court selects, whether it be the earliest date (December 1, 2015) or the latest date (August 3, 2016), Lee failed to file her lawsuit within the three-year statute of limitations period. Thus, her lawsuit must be dismissed.

A case nearly identical to the facts in this case is Beesley v. Van Doren.[25] In that case, Beesley hired the services of attorney Van Doren in a wage dispute. Van Doren instructed Beesley to endorse a check, without explaining that by signing the check Beesley would be agreeing to a settlement.[26] Beesley signed the check, but did not want to settle.[27] With this, Beesley fired Van Doren and hired new counsel, who had

---

[25]Beesley v. Van Doren, 873 P.2d 1280 (Alaska 1994).
[26]Id. at 1281.
[27]The similarities between Beesley and Lee cannot be understated. Lee signed a Mediator's Proposal when she did not want to settle and Beesley signed a check when he did not want to settle.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

the task of trying to undo the settlement. Beesley's new counsel was promptly faced with a motion for summary judgment arguing that by signing the check the case had resolved due to the legal principle of accord and satisfaction. The trial court agreed and dismissed the case. The trial court's decision was appealed and litigated for four more years, with the case eventually settling. About five years after endorsing the settlement check, Beesley filed a legal malpractice claim against Van Doren.

The issue facing the U.S. District Court for the District of Alaska in Beesley was whether the statute of limitations began to run when Van Doren failed to tell Beesley that his claim would be settled if he signed the check, or when the trial court granted the motion for summary judgment dismissing the case based on accord and satisfaction, or after all of the appeals ran their course. Judge Holland ruled that the statute of limitations began to run when the trial court granted the motion for summary judgment, which is when it should have been obvious to Beesley that there was a viable legal malpractice claim, but because there were some jurisdictions that had differing decisions on the issue, he certified the question to the Alaska Supreme Court.[28]

The Alaska Supreme Court reviewed the facts and the policy implications and ruled that the statute of limitations began to run when the trial court initially dismissed the case on the basis of accord and satisfaction.[29] The Court went on to rule that a "client need not suffer all of the damages caused by his or her attorney's malpractice before the statute of limitations begins to run," but only some damages.[30] The Court

[28] Id.
[29] Id. at 1282.
[30] Id.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

also rejected the "exhaustion of appeals" rule by refusing to toll the statute of limitations until all of the client's appeals are exhausted, ruling instead that the statute of limitations runs while the case is on appeal.[31] Ultimately, the legal malpractice claim against Van Doren was dismissed because it was filed more than three years after Beesley suffered some actual damages, which would have been when he signed the check, or at the very latest when the trial court granted summary judgment.

Applying Beesley to the case at hand, it is clear that the statute of limitations would have run at the moment that Lee signed the Mediator's Proposal (December 1, 2015), or at the latest, at the time the trial court rejected all of Brecht's efforts to undo the settlement (August 3, 2016). Using either date, Lee's lawsuit would be time-barred because it was filed after August 3, 2019, which is the latest a complaint could have been filed.

Lee is sure to argue that the statute of limitations should not begin to run until all of her appeals had run their course. She hints at this argument in her complaint, when she states as follows:

> [Lee's] claims against [Sheldon] were not finally resolved until February 14, 2018, when the Alaska Supreme Court issued its decision in the appeal of that case. [Lee's] damages as a result of [BHBC's] malpractice were not a certainty until the Alaska Supreme Court issued its decision in that case.[32]

However, that is not the applicable standard. Beesley absolutely rejected the notion that the statute of limitations does not begin to run until all the appeals run their course. Beesley was clear to reject the "exhaustion of appeals" rule, finding instead that

---

[31] Id. at 1283.

[32] See Complaint, ¶ 8.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

the statute of limitations runs while the underlying case is still on appeal. In addition, the statute of limitation does not start to run when the damages are "certain," as Lee seems to suggest; instead, Beesley made clear that the statute of limitation runs even in a situation where only some of the damages were incurred. The limitations period does not wait for the damages to be certain.

Another case that is on point is Preblich v. Zorea.[33] In that case, Preblich hired Zorea to represent her in a bankruptcy proceeding. At several points during the proceedings, Preblich realized that Zorea was not fully protecting her interests. Eventually, Preblich retained a new lawyer who advised her that Zorea made certain mistakes. Preblich, however, waited a number of years before filing a legal malpractice claim against Zorea. Because Preblich waited too long, the trial court dismissed the case. The Alaska Supreme Court affirmed the dismissal on the basis that Preblich was certainly on notice of her claims against Zorea when her new lawyer was hired. In applying the discovery rule, which provides that the statute of limitations begins to run when a plaintiff has sufficient information to alert them of a potential malpractice claim, the court ruled that the legal malpractice case was untimely and properly dismissed.[34] When the holding in Preblich v. Zorea is applied to the case at hand, it becomes obvious that at the moment Lee retained the services of Brecht (December 29, 2015), who then tried to undo the settlement, Lee was on notice of a possible claim. Just like Preblich's new lawyer told her that certain things needed to be undone, so too did Brecht tell Lee that things needed to be undone, specifically, the settlement agreement achieved at the

[33] Preblich v. Zorea, 21 P.3d 1265 (Alaska 2001).
[34] Id. at 735-736.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

mediation. With this, from the moment Lee retained Brecht to help her avoid the settlement agreement, Preblich dictates that the statute of limitations began to run and it ran out on December 29, 2018, well before Lee filed her legal malpractice action.

Considering the Alaska Supreme Court's decisions in Beesley and Preblich, this Court has no choice but to conclude that the statute of limitations began to run on the day when Lee signed the Mediator's Proposal (December 1, 2015) or the day when Lee retained the services of Brecht to try to undo the settlement agreement (December 29, 2015), or at the very latest the date when the trial court rejected Lee's motion for reconsideration finding that the settlement was binding and enforceable (August 3, 2016). This outcome is required because Lee was both on notice of a malpractice claim, and had started suffering actual damages as a result, more than three years earlier. With this in mind, Lee was required to file her legal malpractice claim before December 1, 2018 or December 29, 2018, or August 3, 2019, at the latest. Here, because Lee elected to wait until February 11, 2020 to file her complaint, it is untimely as a matter of law. The statute of limitations dictates that this case must be dismissed.

III. CONCLUSION

It is undisputed that Lee filed her legal malpractice complaint more than three years after her claim accrued. The three-year statute of limitations applies and requires that Lee's complaint be dismissed with prejudice.

CASHION GILMORE LLC
Attorneys for Defendants

DATE 3/20/20

Chester D. Gilmore
Alaska Bar No. 0405015

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was faxed/mailed/hand-delivered/emailed on the 30th day of March, 2020 to:

Holly Sheldon Lee
P.O. Box 1
Talkeetna, AK 99676

CASHION GILMORE, LLC

By: _____
Jennifer Witaschek

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLLY SHELDON LEE & SHELDON AIR SERVICE Plaintiffs, v. ROBERT DONALD SHELDON, Individually and as the Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, Defendant.	)	Case No. 3AN-15-05117 CI

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

A beneficiary of a trust brought suit against the trustee for failing to faithfully administer the trust. The title of the pertinent clause in the trust and the clause itself are in conflict. The plaintiff moved for summary judgment asking the court to order the trustee to distribute ownership shares in a limited liability company to her, and the defendant cross-moved for summary judgment, claiming that the plaintiffs' suit triggers the trust's no contest clause. The defendant provided extrinsic evidence regarding the meaning of the disputed clause. The plaintiff did not. Do disputed issues of material fact exist, or may the court grant summary judgment?

II. FACTS AND PROCEEDINGS

The parties to this case are children of the renowned bush pilot Donald Sheldon and Roberta Reeve Sheldon.[1] In 1966 Donald built a structure on an outcropping of rock in the Ruth Gorge near Denali called the Mountain House.[2] The structure is only accessible by air.[3] Guests pay a fee to stay at the Mountain House.[4] Donald died in 1975, leaving all of his assets, including the Mountain House, to his wife Roberta.[5] Before her death in 2014, Roberta created a trust that upon her death would assume control over all of her assets, including ownership of the Mountain House LLC, the limited liability company that owns the Mountain House.[6] The trust named Robert Sheldon trustee and named the children, Robert Sheldon, Kate Sheldon, and Holly Lee Sheldon beneficiaries.[7]

The relevant part of the trust sets out a four-step process for the distribution of Roberta's assets.[8] The first step allocated specific parcels of real property to the beneficiaries.[9] Three properties were distributed to Robert and Kate Sheldon as tenants-in-common.[10] A fourth parcel was distributed to Holly

---

[1] Reply in Supp. of Pls.' Mot. for Summ. J. and Opp'n to Cross-Mot. for Partial Summ. J. 2, Aug. 19, 2015.
[2] *Id.*
[3] *Id.* at 2-3.
[4] *Id.* at 2.
[5] Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Partial Summ J. 1, Aug. 3 2015.
[6] *Id.* at 2.
[7] *Id.* at 2. Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust Declaration § 7.5 [hereinafter Trust].
[8] *See* Trust § 7.6.
[9] *Id.* § 7.6(A).
[10] *Id.*

as sole owner.[11] The second provision titled "Items of Nominal Value" required the trustee to distribute personal effects of nominal value to family and friends and to liquidate or contribute to a charitable organization any remaining effects.[12]

The third provision titled "Election to Receive Personal Effects" allows any child of Roberta to elect to receive any "personal property asset" distributed to him or her and to have the value of that asset credited against his or her distributive share of the trust.[13] The provision also grants the trustee the power to decide which child will receive the asset if more than one elects the same asset.[14]

The fourth provision provides for the distribution of the "Residuary Estate."[15] The residuary estate includes any lapsed gifts as well as other "assets" not defined by the trust.[16] The trustee is directed to liquidate the residuary trust assets in "a reasonable time frame," but upon election of a specific asset, a beneficiary may purchase the asset from the trust.[17] Alternatively, with the trustee's approval, the beneficiary may apply the value of their portion of the trust to purchase the asset.[18] If any assets are left after the

---

[11] *Id.*
[12] *Id.* § 7.6(B).
[13] *Id.* § 7.6(C).
[14] *Id.*
[15] *Id.* § 7.6(D).
[16] *Id.*
[17] *Id.* §§ 7.6(D)-(1).
[18] *Id.* § 7.6(D)(1).

second election process, the trustee is to liquidate the remainder and distribute the value to the three beneficiaries: Holly, Robert, and Kate.[19]

Holly brought suit against Robert individually and as trustee of Roberta's trust for breach of contract, replevin, and breach of fiduciary duty owed to the beneficiaries of the trust.[20] Holly then moved for summary judgment on part of her breach of fiduciary duty claim, asking the court to interpret the trust to require Robert to distribute ownership shares in the Mountain House LLC equally among the trust's three beneficiaries.[21] Holly claims that Robert has breached his fiduciary duty by not distributing the Mountain House LLC as required by the trust, and instead retaining it in the trust and developing it for later sale.[22] Holly further contends that upon distribution of the Mountain House LLC she is to receive a one-third ownership share pursuant to the election process defined in the "Residuary Estate" provision.[23]

Robert brought a cross-motion for summary judgment, claiming that the Mountain House LLC is a "personal property asset" and should be distributed in accordance with the election process defined in the "Election to Receive Personal Effects" provision.[24] Importantly, that provision gives the trustee sole discretion to decide which child receives an elected asset.[25] Robert also claims that the trust specifically allows him to retain trust assets and develop them at

---

[19] *Id.* § 7.6(D)(2).
[20] Compl. ¶¶ 35-50 Feb. 18, 2015.
[21] Mem. in Supp. of Pls.' Mot. for Summ. J Jul. 1, 2015.
[22] *Id.* at 4.
[23] *Id.*
[24] Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Partial Summ. J. 6.
[25] *See* Trust § 7.6(C).

his discretion.[26] Lastly, he asks the court to find that Holly's lawsuit triggers the trust's *en terrorem* clause, barring her from inheriting anything from the trust.[27]

III. APPLICABLE LAW

An Alaskan court grants summary judgement where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law:

> [A] party seeking summary judgment has the initial burden of proving, through admissible evidence, that there are no [genuine] disputed issues of material fact and that the moving party is entitled to judgment as a matter of law. Once the moving party has made that showing, the burden shifts to the non-moving party to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists.[28]

When interpreting a trust document the court may examine "the language of the disputed provisions, the language of other provisions, relevant extrinsic evidence, and case law interpreting similar provisions."[29]

IV. DISCUSSION

A. Construction of Sections 7.6(C) and 7.6(D)

At the heart of this dispute is the construction of two sections of Roberta's trust: section 7.6(C), "Election to Receive Personal Effects;" and

---

[26] Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Partial Summ. J. 7.
[27] *Id.* at 13.
[28] *Christensen v. Alaska Sales & Service, Inc.*, 335 P.3d 514, 517 (Alaska 2014) (internal quotes and citations omitted).
[29] *See St. Paul Church, Inc. v. Bd. Of Trs. of the Alaska*, 145 P.3d 541, fn 56 (Alaska 2006) (citing *Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc.*, 99 P.3d 553, 562 (Alaska 2004)).

section 7.6(D)(1), "Distribution of the Residuary Estate." Holly contends that the title of section 7.6(C) precludes its use as the mechanism to distribute the Mountain House LLC because it refers to "personal effects," and the Mountain House LLC, whatever it may be, is not a personal effect.[30] Holly did not submit any evidence of Roberta's intent with her motion for summary judgment.[31]

In response Robert claims that 7.6(C) should be governed by the text of 7.6(C), which refers to "personal property assets," and not the title.[32] In support Robert cites Alaska law defining a limited liability company as personal property.[33] He further claims that it was Roberta's intent to ensure that Holly could not jointly own anything with her siblings unless Robert approved.[34] In support of his claims of Roberta's intent, Robert submitted the affidavit of Frank Nosek, the attorney that prepared the trust for Roberta.

In his affidavit, Nosek affirmed that Roberta intended the Mountain House LLC to be treated as personal property pursuant to 7.6(C).[35] He further affirmed that the purpose of 7.6(C) was to allow Holly the possibility of joint ownership in the Mountain House LLC, or any other property, but with Robert's sole discretion.[36] Section 7.6(D), Nosek claimed, was intended for property that was not elected through 7.6(C).[37] It is section 7.6(D), Nosek and

---

[30] Mem. in Supp. of Pls.' Mot. for Summ. J. 4.
[31] *See id.*
[32] Def.'s Reply Regarding Cross-Mot. for Partial Summ J. 9, Sep. 15, 2015.
[33] *Id.* at 11. *See* AS 10.50.370.
[34] *Id.* at 8.
[35] Aff. of Francis J. Nosek in Supp. of Reply on Cross-Mot for Summ J.¶ 6, Sep. 15, 2015.
[36] *Id.* at ¶ 7.
[37] *Id.*

Roberta agreed, where Holly could have gained sole ownership of the Mountain House LLC if neither of her siblings had elected the asset pursuant to 7.6(C).[38]

Nosek's claim that Roberta did not want Holly to own anything jointly with her siblings except at Robert's discretion is corroborated by section 7.6(A). Section 7.6(A) distributed three properties to Kate and Robert to be owned in common and one property to Holly as sole owner.[39] The provision clearly excluded Holly from joint ownership with her siblings and indicates Roberta's aversion to yoking Holly and her siblings together through common ownership of her assets.

When deciding a motion for summary judgment the court must determine if the moving party has met their burden to show that there are no genuine material facts at issue and that the non-moving party has not pointed to any admissible evidence that would reasonably dispute the movant's evidence.[40] Here Robert has met this burden. Robert has provided extrinsic evidence of Roberta's intent that clarifies an ambiguity in the trust.[41] Holly has not pointed to any evidence that would reasonably dispute the claims made by Mr. Nosek.[42] Without such a showing, Holly cannot maintain her claim that the Mountain House LLC should be distributed according to 7.6(D)(1), allowing her to elect to be a joint owner of the company. Rather, the Mountain House LLC is

---

[38] *Id.* at ¶ 8.
[39] Trust § 7.6(A).
[40] *Christensen*, 335 P.3d at 517.
[41] *See* Aff. of Francis J. Nosek in Supp. of Reply on Cross-Mot. for Summ. J.
[42] *See* Mem. in Supp. of Pls.' Mot. for Summ. J.; Reply in Supp. of Pls.' Mot. for Summ. J. and Opp'n to Cross-Mot. for Partial Summ. J.

to be distributed in accordance with 7.6(C) because all three siblings have elected to own the asset. Importantly, while 7.6(C) refers to the authority of the trustee to determine which *child* will receive the asset if more than one child elects it, the trust in section 14.3 states that "[t]he singular number shall include the plural . . . ."[43] Read together with 7.6(C), the trust permits the trustee to grant ownership of an asset to more than one child at his discretion.

In addition, the trust is more coherent if Robert's interpretation is given effect. The first three sections of 7.6 are constructed to distribute assets to the beneficiaries of the trust. The first section distributes specific parcels of real property to the beneficiaries.[44] The second section distributes nominal property to the beneficiaries, and the third section distributes personal property to the beneficiaries.[45] The fourth section, section 7.6(D) however, is constructed to liquidate assets and distribute the proceeds of the sale of those assets to the beneficiaries.[46] For instance, 7.6(D) states "[t]he residuary estate assets (including any lapsed gifts from above) shall be liquidated into cash or its equivalent by my Trustee within a reasonable time frame."[47] Subsection (1) of 7.6(D) allows for a distributee to elect to *purchase* a residuary asset from the trust, and only at the trustee's *discretion* may the distributee credit the value of the asset against the cash to be received from the trust.[48]

---

[43] *See* Trust § 7.6(c). *Id.* § 14.3.
[44] Trust § 7.6(A).
[45] *Id.* §§ 7.6(B)-(C).
[46] *Id.* § 7.6(D).
[47] *Id.*
[48] *Id.* § 7.6(D)(1) (emphasis added).

The structure of section (D) indicates that its primary purpose is to reduce assets to cash that will then be distributed among the beneficiaries. Section (D) requires the trustee to *liquidate* the remaining assets, and subsection (1) gives distributees the right to *purchase* those assets, furthering the goal of section (D) to liquidate the remaining assets in the trust and distribute cash proceeds to the beneficiaries.[49] The trust makes clear that payment for the asset by a credit to the beneficiary's share of the trust is discretionary—not a right.[50] While distributees are given the first chance to purchase assets from the trust, the purpose of section (D) is to reduce assets to cash, not to distribute ownership of them.[51] Section (C), contrarily, specifically provides for transferring ownership of the asset from the trust to the beneficiary by crediting the value of the asset against the beneficiary's eventual share of the trust—a more direct process than purchasing the asset from the trust.[52]

The court therefore finds that section 7.6(C) governs the distribution of the Mountain House LLC because all three siblings have elected to own the Mountain House LLC. Pursuant to sections 7.6(C) and 14.3, Robert is permitted, as trustee, to determine which child or children will receive ownership in the company.

---

[49] *Id.* §§ 7.6(D)-(1).
[50] *Id.* § 7.6(D)(1).
[51] *See id.*
[52] *See id.* § 7.6(C).

B. Distribution of the Mountain House LLC

Holly next claims that the trust requires Robert to distribute the Mountain House LLC immediately.[53] In response Robert contends that the trust allows him to expand and develop the Mountain House structure to improve its value for eventual distribution.[54]

There are no facts at issue in this claim. The court needs only to look to the trust document to resolve this issue. Upon reviewing the trust document the court finds that Robert is not required to distribute the Mountain House LLC immediately.

Schedule B of the trust defines the trustee's powers.[55] It states that the trustee's power is commensurate with the power an individual exerts over his or her own property.[56] It further states that the trustee has the power to 1) "retain for any period of time cash or other productive property;" 2) "expend money or other property in order to . . . manage, conserve, or administer any property . . . in order to improve . . . equip, develop, furnish . . . alter, extend, or add to any such property;" and 3) "do all things . . . desirable to conduct the affairs of any corporation; to act as officer, director, attorney, or employee."[57]

The parties do not dispute that Robert has not distributed the Mountain House LLC, nor do they dispute that he has initiated a development

---

[53] Mem. in Supp. of Pls.' Mot. for Summ. J. 4. Although not specifically stated, Holly likely only wanted to force the distribution of the company if she stood to receive an ownership stake and not just the equivalent value.
[54] Def.'s Opp'n to Pls.' Mot. for Summ J. and Cross-Mot. for Partial Summ. J. 13.
[55] *See* Trust § 8; *id.* Schedule B.
[56] *Id.* Schedule B.
[57] *Id.* §§ 2, 8, 15.

plan for the Mountain House structure in lieu of distributing the company.[58] The court finds that there is nothing in the trust that requires Robert to distribute the Mountain House LLC immediately.

C. The *En Terrorem* Clause

Section 10 of Roberta's trust includes an *en terrorem* or "no contest" clause. The clause revokes a beneficiary's interest in the trust if that beneficiary seeks to void or set aside the trust or any provision of the trust.[59] In his cross-motion for summary judgment, Robert claims that Holly has violated the trust's *en terrorem* clause by filing this lawsuit, and is therefore foreclosed from receiving any value from the trust.[60] Holly, in response, claims that she is only trying to enforce the trust—not void it.[61]

The State of Alaska considers *en terrorem* clauses enforceable[62], but there is no Alaskan case law that addresses the proper construction and scope of an *en terrorem* clause. The court therefore looks to other jurisdictions for guidance.

Violations of an *en terrorem* clause carry severe penalties for the offending beneficiary. Courts therefore construe these clauses strictly.[63] It appears to be a nearly universal maxim that *en terrorem* clauses do not apply

---

[58] *See* Mem. in Supp. of Pls.' Mot. for Summ. J.; Def.'s Opp'n to Pls.' Mot. for Summ J. and Cross-Mot. for Partial Summ. J.
[59] Trust § 10.
[60] Def.'s Opp'n to Pls.' Mot. for Summ J. and Cross-Mot. for Partial Summ. J. 13.
[61] Reply in Supp. of Pls.' Mot. for Summ J. and Opp'n to Cross-Mot. for Partial Summ J. 15.
[62] AS 13.36.330.
[63] *See Estate of Strader*, 132 Cal. Rptr. 2d 649, 653 (Cal Ct. App. 2d 2003); *Girard Trust Co. v. Schmitz*, 20 A.2d 21, 27 (N.J. Ch. 1941).

to beneficiaries seeking to obtain an interpretation of the document or enforce his or her rights under that document, unless the document specifically states that the clause will apply to such suits.[64] When a beneficiary of a will or trust seeks only to enforce his or her rights under the instrument or secure an interpretation of the instrument, the intent of the grantor is not frustrated but rather accurately discerned or effected.[65]

Section 10 of the trust document states in pertinent part:

> If any . . . beneficiary . . . contests the validity of this Trust or any of its provisions . . . or seeks otherwise to nullify, or set aside this trust . . . or any of [its] provisions, or shall file a claim of any nature against this Trust . . ., then that person shall have no right to take an interest under this Trust . . ., and such contestant shall not benefit in any way under this Trust . . . and shall not receive any distribution whatsoever.[66]

Here Holly has advanced a reasonable interpretation of the trust in light of an ambiguity. Section 7.6(C) is titled "Election to Receive *Personal Effects*" while the text of the clause refers to "*personal property assets.*"[67] Holly therefore reasonably, albeit ultimately incorrectly, asserts that the Mountain House LLC could not be distributed pursuant to 7.6(C) because it is not a personal effect. Assuming *arguendo* Holly's position, the only other provision in the trust that could govern the distribution of the Mountain House LLC is section 7.6(D)(1). Fairly read, 7.6(D)(1) allows any child or multiple children to

---

[64] *See Estate of Strader*, 132 Cal. Rptr. 2d 653-54; *Marx v.* Rice, 60 A.2d 61, 62 (N.J. Ch. 1948); *Wells v. Menn*, 28 So. 2d 881, 885 (Fla. 1946); Griffin *v. Sturges*, 40 A.2d 758, 760 (Conn. 1944).
[65] *See Estate of Stader*, 132 Cal. Rptr. 2d 655.
[66] Trust § 10.
[67] Trust § 7.6(C) (emphasis added).

elect to purchase any asset that has not already been distributed. Accordingly, Holly wishes to purchase a one-third share of the Mountain House LLC and have it distributed to her.[68] While the court ultimately finds her interpretation unsupported, Holly has not sought to "void," "nullify," or "set aside" the trust; she simply asserts a reasonable interpretation of the trust document in an effort to enforce her rights thereunder.[69] It would be manifestly unjust to require Holly to forfeit her right to inherit from the trust for seeking a judicial forum to clarify and enforce the trust.

V. ORDER

The court DENIES Holly's motion for partial summary judgment with regard to her interpretation of the trust, and GRANTS Robert's cross-motion for partial summary judgment with regard to his interpretation of the trust, and DENIES Robert's cross-motion for partial summary judgment on his counterclaim that Holly's lawsuit violates the *en terrorem* clause.

DATED at Anchorage, Alaska this 2nd day of November, 2015.

Pamela Scott Washington
Superior Court Judge

I certify that on 11-2-15 a copy of the above was mailed to each of the following at their addresses of record:
David Karl Gross
Kevin G. Clarkson
Mary Brault - Judicial Assistant

[68] *See* Mem. in Supp. of Pls.' Mot. for Summ. J.
[69] *See Morrison v. Reed*, 70 A.2d 799, 803 (N.J. Super. Ct. Ch. Div. 1950).

MEDIATOR'S PROPOSAL
Mediation December 1, 2015

1. The parties to that certain case entitled *Sheldon Lee v. Sheldon*, Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.

2. The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today. Counsel for Robert Sheldon will prepare and circulate a draft of that document.

3. Upon the execution of the Settlement Agreement and Mutual Release of All Claims as referenced in Paragraph 2 above, the parties will have their attorneys execute and file a stipulation to dismiss with prejudice, all parties bearing their own costs and attorney's fees.

4. Robert Sheldon, as Successor Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, will transfer to Holly Lee Sheldon a one-third non-voting interest in the Mountain House, LLC.

5. Holly Lee Sheldon acknowledges that the attached Operating Agreement is the controlling Operating Agreement of the Mountain House, LLC. Holly will not sign the Operating Agreement or any form related to that Operating Agreement, but will instead sign only this document and the Settlement Agreement and Mutual Release of All Claims that will be drafted to consummate the Settlement reached in the conclusion of the mediation.

6. As a non-voting member of the Mountain House, LLC, Holly Sheldon Lee shall have periodic access to the historic original Mountain House structure ("Mountain House") solely for personal use, and not for commercial use. Holly's access shall be the same as any other LLC member and shall be based upon availability that does not conflict with the LLC's commercial use of the Mountain House for serving customers. Availability shall be determined by a request to Robert Sheldon for available dates within the two-week window immediately following the request. If there are dates in the two-week window following a member's request in which the Mountain House is not booked by LLC customers, then the member, including Holly Sheldon Lee as a non-voting member, may reserve from 1-5 of those available days. Members shall reserve available dates as described above on a first come first serve basis.

7. Holly Sheldon Lee and other LLC members may use the method described in Paragraph 6 above for reserving dates for personal use of the Mountain House for any total number of days per year, with no more than 5 days being consecutive days, again so long as no days conflict with LLC customer reservations.

8. From the personal property and residuary of the Trust, Holly Sheldon Lee will receive and accept as her full and complete entitlement as a Trust beneficiary, the following items:

a. one-third non-voting share of the Mountain House, LLC pursuant to the terms of the Paragraphs set forth above;
b. the entirety of the contents of the Talkeetna Warehouse owned by the Trust, except for up to 50 items of no more than $2,000 of total combined value as determined by the Trustee--which items will not include the Super Cub/Taylor Craft skis;
c. Pottery collection of bowls and plates (the "glazed bowls" which Holly Sheldon Lee

Ex. ____
Page 42 of ____

EXHIBIT 2
Page 1 of 4

already possesses, taken at or after the August, 2014 family meeting)

d. Small painting of Anaktuvik Pass by Don Sheldon;
e. Two Jeanne Laurence Flower Paintings;
f. The Long Lulu Painting by Johnson;
g. One trapper cabin chair of rustic construction (this is the hand hewn chair that Don gave to Roberta and collected from the Dutch Hills Cabin, which Holly already possesses);
h. Winter Dog Mushing Scene painting by Henne;
i. Landscape Scene painting by Henne;
j. Mount McKinley in Winter painting by Wagner;
k. Lone Alaska Lady Ziegler poster print;
l. Four "Ski Hill" feathers in frame;
m. Spirit Mask unframed 8 x 16 by Wieland;
n. All additional items already distributed to Holly Sheldon Lee;
o. Family North Coast Native Artifacts;
p. With the exception of personal and financial records, the right to make single use facsimiles of all non-personal and/or financial Roberta Sheldon historical records and photographs (the personal archive) solely for display in a museum;
q. The Caribou Portrait by Goodale
r. Seascape by McDaniel (Holly Sheldon Lee already possesses)
s. Moose hide chair (the one that needs a new replacement hide and is not on display at the museum)

9. All items listed above will be distributed within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims and the filing of the stipulation to dismiss, whichever is later;

10. Holly Sheldon Lee will pay into the Mountain House, LLC the sum of $25,000, within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims, and prior to the distribution of the items listed above.

11. Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders.

Dated this 1st day of December, 2015.

Robert Sheldon

Kevin Clarkson

6:00 P.M.

Exh. 43
Page 43 of ____

EXHIBIT 2
Page 2 of 4

MEDIATOR'S PROPOSAL
Mediation December 1, 2015

1. The parties to that certain case entitled *Sheldon Lee v. Sheldon*, Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.

2. The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today. Counsel for Robert Sheldon will prepare and circulate a draft of that document.

3. Upon the execution of the Settlement Agreement and Mutual Release of All Claims as referenced in Paragraph 2 above, the parties will have their attorneys execute and file a stipulation to dismiss with prejudice, all parties bearing their own costs and attorney's fees.

4. Robert Sheldon, as Successor Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, will transfer to Holy Lee Sheldon a one-third non-voting interest in the Mountain House, LLC.

5. Holly Lee Sheldon acknowledges that the attached Operating Agreement is the controlling Operating Agreement of the Mountain House, LLC. Holly will not sign the Operating Agreement or any form related to that Operating Agreement, but will instead sign only this document and the Settlement Agreement and Mutual Release of All Claims that will be drafted to consummate the Settlement reached in the conclusion of the mediation.

6. As a non-voting member of the Mountain House, LLC, Holly Sheldon Lee shall have periodic access to the historic original Mountain House structure ("Mountain House") solely for personal use, and not for commercial use. Holly's access shall be the same as any other LLC member and shall be based upon availability that does not conflict with the LLC's commercial use of the Mountain House for serving customers. Availability shall be determined by a request to Robert Sheldon for available dates within the two-week window immediately following the request. If there are dates in the two-week window following a member's request in which the Mountain House is not booked by LLC customers, then the member, including Holly Sheldon Lee as a non-voting member, may reserve from 1-5 of those available days. Members shall reserve available dates as described above on a first come first serve basis.

7. Holly Sheldon Lee and other LLC members may use the method described in Paragraph 6 above for reserving dates for personal use of the Mountain House for any total number of days per year, with no more than 5 days being consecutive days, again so long as no days conflict with LLC customer reservations.

8. From the personal property and residuary of the Trust, Holly Sheldon Lee will receive and accept as her full and complete entitlement as a Trust beneficiary, the following items:

a. one-third non-voting share of the Mountain House, LLC pursuant to the terms of the Paragraphs set forth above;
b. the entirety of the contents of the Talkeetna Warehouse owned by the Trust, except for up to 50 items of no more than $2,000 of total combined value as determined by the Trustee–which items will not include the Super Cub/Taylor Craft skis;
c. Pottery collection of bowls and plates (the "glazed bowls" which Holly Sheldon Lee

already possesses, taken at or after the August, 2014 family meeting)

d. Small painting of Anaktuvik Pass by Don Sheldon;
e. Two Jeanne Laurence Flower Paintings;
f. The Long Lulu Painting by Johnson;
g. One trapper cabin chair of rustic construction (this is the hand hewn chair that Don gave to Roberta and collected from the Dutch Hills Cabin, which Holly already possesses);
h. Winter Dog Mushing Scene painting by Henne;
i. Landscape Scene painting by Henne;
j. Mount McKinley in Winter painting by Wagner;
k. Lone Alaska Lady Ziegler poster print;
l. Four "Ski Hill" feathers in frame;
m. Spirit Mask unframed 8 x 16 by Wieland;
n. All additional items already distributed to Holly Sheldon Lee;
o. Family North Coast Native Artifacts;
p. With the exception of personal and financial records, the right to make single use facsimiles of all non-personal and/or financial Roberta Sheldon historical records and photographs (the personal archive) solely for display in a museum;
q. The Caribou Portrait by Goodale
r. Seascape by McDaniel (Holly Sheldon Lee already possesses)
s. Moose hide chair (the one that needs a new replacement hide and is not on display at the museum)

9. All items listed above will be distributed within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims and the filing of the stipulation to dismiss, whichever is later;

10. Holly Sheldon Lee will pay into the Mountain House, LLC the sum of $25,000, within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims, and prior to the distribution of the items listed above.

11. Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders.

Dated this 1st day of December, 2015.

Holly Sheldon Lee

David Gross

6:00 P.M.

From: holly@sheldonairservice.com
Sent: Friday, December 18, 2015 4:37 PM
To: David Gross; Mara Michaletz
Cc: Trina Marshall
Subject: RE: releases for your signature

David and Mara,

David and I are unsettled with the mediator's proposal and have determined that obtaining a second opinion from a law firm that we can trust would be beneficial to us, as we are unsure of your recommended course of action.

We are considering hiring outside counsel to conduct a comprehensive review of our file to determine if there are any legal avenues we have not yet explored. Our objective is to ensure that our case is being handled as prudently and efficiently as possible.

We believe that Tonja Woelber of Woelber, Jacobson, and Passard, LLC, Attorneys at Law, has the knowledge and experience to address all of our legal concerns. Ms. Woelber has agreed to review the details of our case and will provide us with a neutral opinion and comments as to what could be and could have been done differently, more cost effectively, and going forward, how can we minimize fees, time and as importantly, stress.

We would like you to consider working with Ms. Woelber. Please let us know at your earliest convenience if this is possible.

Holly

From: David Gross
Sent: Wednesday, December 30, 2015 12:34 PM
To: holly@sheldonairservice.com
Cc: cbrecht@bgolaw.pro; Trina Marshall; Mara Michaletz; Kathryn Black
Subject: Strategy Moving Forward
Attachments: SETTLEMENT AGREEMENT RELEASE (00490382).DOCX; LTR CLARKSON RE AGREEMENT (00490471).DOCX

Holly:

This email follows our phone conference yesterday, which included David and attorney Chris Brecht (who I have copied on this email).

There were a number of topics discussed that require me to memorialize our conversation. First, there was the suggestion that Judge Eric Sanders ("Sanders") had a conflict of interest that influenced his conduct at the mediation. A conflict was suggested on the basis that he may be an investor in the Mountain House, LLC ("MHLLC") and secondly that he may be good friends with Marny (not sure of the spelling), who is Robert's wife. This belief was prompted by a few comments made by Sanders over the course of the day.

In this regard, I recall Sanders saying that he would never be an investor in the Mountain House. I believe this comment was made as a way to communicate to us that Sanders did not agree with the decisions Robert was making. In particular, I remember Sanders saying that the improvements Robert was making, such as adding a kitchen for a chef, would never result in profits because chefs that would work at a remote cabin are inherently unreliable. I recall him telling us about another camp where the chef had a weekend off, drank too much, and never returned. I do not think this comment was meant to communicate that he was thinking of investing in the MHLLC, or that he had invested in the MHLLC, but instead it was just a way to commiserate with our objections to what Robert was doing.

My only recollection regarding Marny is when I said that I was shocked that Marny was married to Robert because she seemed so nice and reasonable, while Robert is the polar opposite. I do not think that Sanders was in the room when I made this comment (it was just you, Mara, and I). In fact, I have no recollection at all of Sanders saying anything about Marny. I am confident that Sanders would have shared this information with me. I am equally confident that the mediation was the first time Sanders had ever met Robert, based on some of his comments regarding Robert's mannerisms and appearance.

With the above in mind, I do not believe that Sanders had a conflict. I have known Sanders as a judge and a lawyer and have enormous respect for him. He is an honest and straightforward person. I will ask him about these two potential conflicts when he is back in town next week and will report back, but again, I highly doubt there is any conflict that we can use to try to unwind the settlement.

Next, there was a suggestion that the settlement was made under duress. What this means to me is that you were forced to enter into a settlement. Duress can come in a variety of forms such as physical duress or economic duress. The classic "law school example" is a person signing a contract with a gun to their head. If I recall correctly, a defense based on duress requires a showing by clear and convincing evidence that the party had no reasonable alternative to signing the agreement. While the day was an emotional

Exh
Page 47 of

EXHIBIT 4
Page 1 of 3
000354

one, as many mediations are, I do not believe you signed the mediator's proposal under duress. In fact, I remember a few times where Sanders told you that you could walk away at any time.

To the extent that you want to take the position that the settlement was entered into under duress, I would be unable to represent you as I cannot in good faith support such an argument. In addition, I would be a witness to this defense and I cannot be both a lawyer and a witness. I think it is important that you obtain an independent opinion regarding the possibility of winning on a duress defense since I would not be the best person to express such an opinion. Perhaps this is something you and Chris can talk about privately.

During our call, there was also a lengthy discussion regarding the appropriateness of the judge's ruling on summary judgment. Chris and I largely agreed that the judge made a variety of errors in relation to the proper mechanisms for administrating the Trust. Chris pointed out that had we filed in the Probate Court things may have turned out better for us. However, at the time of filing, because we were asserting both a breach of contract claim and claims related to the administration of the Trust, we elected superior court and were actually quite pleased when we drew Judge Suddock, who would have likely sided with us. However before oral argument, Judge Washington took Suddock's place, and well, the rest is history.

There was a discussion about filing some papers with the court in an effort to get Washington to change her mind. Chris and I agreed that the best way to do this would be to file a motion under Civil Rule 60(b), which allows the court to reconsider a previous ruling when new evidence is discovered. Chris and I also agreed that the best way to conjure up new evidence would be to obtain an expert report on the interpretation of the Trust document, although an expert interpreting a document may invade the province of the court and not be allowed. We then discussed the timing of such a motion, whether we file now or after the court rules on our effort to unwind the settlement. Chris indicated that the cost of such an expert would be in the ballpark of $4,000. You were going to think about whether you wanted to spend this money. Until that decision is made, we can table this issue for now.

The other approach that was discussed was to write to Clarkson and state that we had a narrower interpretation of the settlement agreement. Specifically, we will ask that we reserve the right to seek further redress in terms of the administration of the Trust. If he agrees, we now have an avenue to raise additional issues related to the Trust. Specifically, Chris can file an action in Probate Court. If Clarkson disagrees, he will likely file a motion to enforce the settlement. We will oppose such an effort by arguing that there was a mistake as to the scope of the settlement and we will either win or lose. If we win, we will either have a narrower interpretation allowing Chris to file in Probate Court or the settlement will be thrown out, leaving us back in court, whereby we will have to discuss where to go from there. If we lose, we can discuss taking this case to the Alaska Supreme Court, which would also give us a platform to address the court's order on the proper mechanisms for administration of the Trust.

Assuming that you want to employ this latter approach, attached is a letter I can send to Clarkson with a revised settlement agreement. Please review both documents carefully, as I want to make sure we get this right, to the extent we decide to go in that direction. Please understand that if we do this, you will have to agree to the settlement, just in a limited scope. I would ask Chris to sign off on this approach as well.

Holly, before we head down this road, I would be remiss if I did not tell you that, in my opinion, we have a valid and enforceable settlement. At the end of the mediation, Sanders came into the room and explained that you had two options, you could accept the settlement (and have it over with) or you could reject the offer (and fight on). Because it was a mediator's proposal, Sanders made clear that it was a "take it or leave it offer," and that you were free to walk away. In my estimation, Sanders did not pressure you one

way or the other. In fact, he suggested that rejecting the offer was an acceptable approach, in part, because he did not think Robert would take the deal. You thought it over and accepted the deal, thereafter signing the written proposal. I signed as well based on your decision to accept the deal. Two days later you sent me a text saying that you felt better about the settlement. Based on this, trying to undo this settlement is going to be very difficult because you did agree to the deal and you did sign the proposal. I am truly sorry that you are having second thoughts, but that's the reality of where we are. From the beginning on this case, I have worked hard to try to maneuver you through a difficult situation and will continue to do so, but you should be clear that we face an uphill battle that could result in an award of fees against you.

Please let me know if you have any questions and please let me know if I have misstated anything in this email.

David Gross

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLLY SHELDON LEE and SHELDON AIR SERVICE, LLC,	)	
Plaintiffs,	)	
ROBERT DONALD SHELDON, individually and as the Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust,	)	
Defendant.	)	Case No. 3AN-15-05117 CI

RESPONSE REGARDING TERM SHEET[1]

Holly Sheldon Lee ("Holly") and Sheldon Air Service LLC ("SAS"), by and through Bankston Gronning O'Hara, P.C. hereby submits this response to Kevin Clarkson's January 19, 2016 letter submitted on behalf of Robert Sheldon ("Robert") regarding the list of disputed terms in connection with the "Mediator's Proposal" dated December 1, 2015" (the "Term Sheet").[2]

I. PRELIMINARY STATEMENT

It is undisputed that Holly, in her individual capacity, signed the Term Sheet on December 1st after approximately nine hours of mediation. She was not feeling well during the day and threw up shortly after signing the Term Sheet. She believed that document was merely a proposal (as the title of the document expressly states) and that her signature would not result in a binding agreement. Moreover, as of December 1st, Holly lacked sufficient information concerning the assets and liabilities of the Trust and Robert's conduct as Trustee to make an informed decision whether to settle her claims as beneficiary. Holly was not asked to sign the Term Sheet on behalf of SAS nor did she have the authority to do so without the approval of her husband David J. Lee ("David L."), who is the co-manager and President of SAS. For the foregoing reasons, no

[1] This response is submitted within the context of mediation. Any statements contained herein (including but not limited to the verification of factual allegations on page 7) and/or any statements made in connection with the same are advanced in an effort to reach an amicable resolution. All privileges and evidentiary exclusions, including but not limited to Alaska Evidence Rule 408, apply.

[2] Holly and SAS reserve all rights as to whether the issues raised herein are subject to arbitration.

Bankston Gronning O'Hara, P.C.
Attorneys at Law
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

enforceable settlement resulted from the December 1st mediation. Nevertheless, Holly has requested that the mediation be reconvened to address all disputes.

II. DISCUSSION

A. HOLLY'S CLAIMS AGAINST THE TRUSTEE AND CLAIM FOR BENEFICIAL INTEREST HAVE NOT BEEN SETTLED.

Robert argues that Holly's claims against Robert as Trustee for breach of fiduciary duty have been fully settled and that her beneficial interest is satisfied by reason of the Term Sheet. These arguments are without merit. Due to Robert's failure to comply with his fiduciary duty to account and his intentional withholding of material information regarding the assets and liabilities of the Trust, Holly was not in a position to make an informed decision at the mediation regarding any settlement with respect to the Trust or Robert.

Under Alaska's Uniform Probate Code, Robert had (and continues to have) a duty to "keep the beneficiaries of the trust reasonably informed of the trust and its administration."[3] The foregoing duty is ongoing in nature, and compliance is mandatory regardless whether a beneficiary requests an accounting or not. In addition, upon reasonable request from a beneficiary, Robert as Trustee was required to provide a statement of account of the Trust and, at a minimum, an annual accounting.[4] Failure to comply with the above-referenced statutory duties constitutes a breach of the Trustee's fiduciary duty.

In the context of a trust settlement, the omission or withholding by the trustee of information relevant to the beneficiary's decision to release of the trustee or settle claims against the trust (as was the case here) may support a claim for fraud in the inducement and in any event vitiates the beneficiary's consent.[5] The burden is on the trustee to disclose.[6] A transaction

---

[3] AS 13.36.080(a).

[4] AS 13.36.080(a)(3). Robert has taken the position that he is required to provide an annual accounting report only upon the request of the beneficiary and that no other accounting is required. Such belief is inconsistent with the plain language of AS 13.36.080(a) in which the Legislature made clear that the Trustee must keep the beneficiaries reasonably informed and "in addition" provide information to the beneficiaries upon request.

[5] *See In re Estate of Hunter*, 739 N.Y.S.2d 916, 920 (Surrogate's Court, Westchester County, New York 2002) (setting aside waiver and release and vacating decree approving accounting where trustee failed to meet his duty of disclosure to beneficiary)(highlighted copy attached as **Exhibit 1**); *see also* (continued . . .)

Bankston Gronning O'Hara, P.C.
Attorneys at Law
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

between a trustee and beneficiary is subject to close scrutiny especially where the fiduciary stands to benefit from the beneficiary's release or settlement of claims.[7] When a beneficiary has signed a waiver or release but has not been provided with an accounting of the trust assets (as is the case here), the waiver or release may be revoked or rescinded by the beneficiary.[8]

Holly requested a Trust accounting on September 8, 2014 (letter attached as **Exhibit 3**). No formal accounting was ever provided by Robert. On or about October 24, 2014, Robert provided the beneficiaries with a list of assets dated October 21, 2014 (attached as **Exhibit 4**) which estimated the value of Trust assets at $1,440,825.76, of which approximately $1,054,832 was then held in cash and securities.[9] Robert has provided no accounting in the more than fifteen months since. By letters dated January 7 and 15, 2016 (attached as **Exhibit 5**), Holly again requested a complete accounting of the Trust. Upon information and belief, such accounting will not be made available for another 10 days. By that time, the information which Holly needed at the December 1st mediation in order to make an informed decision as a beneficiary will be two months late.

Holly had a right to review the accounts of the Trust (including the then current assets and liabilities) prior to and/or during the mediation. The balance of cash and securities held by the Trust as of December 1st was material because Holly was being asked to agree to waive claims as against Robert and, based on Robert's construction of the Term Sheet, to waive her rights as to

---

(. . . continued)

Janowiak v. Tiesi, 402 Ill.App.3d 997, 1006-07 & 1017 (Ill. Ct. App. 2010)(noting well established principle that a trustee's failure to provide a full and frank disclosure of all relevant information in the trustee's possession may support claim to set aside a settlement and release) (highlighted copy attached as **Exhibit 2**).

[6] *In re Estate of Hunter*, 739 N.Y.S.2d at 920-21; *Janowiak*, 402 Ill.App.3d at 1005-07.

[7] *Id.*

[8] *Id.*; *see also* AS 13.12.213 (Alaska's Uniform Probate Code requires a full and fair disclosure of assets prior to a surviving spouse signing a waiver of her right of election, homestead allowance, exempt property, and family allowance in order for the waiver to be enforceable).

[9] Noteworthy is that the asset list distributed by Robert on October 24, 2014 to the beneficiaries contained a list of tangible personal property that each beneficiary was to receive from the Trust. Such list is more detailed than the excerpt appearing in the Term Sheet. Holly reserves all rights in the tangible personal property which she was to receive by reason of the prior distribution agreement among beneficiaries.

Bankston Gronning O'Hara, P.C.
Attorneys at Law
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

any assets not listed on the Term Sheet (including Holly's one-third interest in the cash and securities held by the Trust at the time of Roberta Reeve Sheldon's death).[10] Due to the fact that Robert as Trustee withheld material information from Holly prior to and during the mediation, Holly's consent to the Term Sheet is void or voidable. Holly hereby provides notice of her revocation of her signature (and any consent implied thereby).

Alternatively, by reason of Robert's failure to timely account and inform, any waiver of claims as against Robert would be limited to the information actually disclosed on October 21, 2014 and only to the extent such information was accurate.[11] The scope of any such release would not include conduct occurring after October 21, 2014 for which Robert has yet to account.[12] Moreover, on its face, the Term Sheet does not insulate Robert from liability arising from future acts or undisclosed violations of his fiduciary duty. Robert will continue to owe fiduciary duties to Holly and to Kate Sheldon as Trustee until the Trust is terminated.

As discussed above, the Term Sheet is not enforceable as to Holly's claims as a beneficiary. Holly remains willing to continue the mediation in the effort to resolve all disputes involving the Trust once Robert has provided the Trust accounting previously requested.

B. SAS' CLAIMS AGAINST ROBERT HAVE NOT BEEN RESOLVED.

For two reasons, SAS does not fall within the scope of the release described in the Term Sheet (or in the draft Settlement Agreement and Mutual Release of Claims prepared by Robert's counsel—attached as **Exhibit 7**)("Draft Release"). First, SAS is a manager-managed LLC, and

[10] Pursuant to Section 7.6(D)(2), of The Roberta Reeve Sheldon 2014 Trust Declaration (attached as **Exhibit 6**), the residue of the Trust (including cash and securities totaling $1,054,832 as of October 21, 2014) were to be divided evenly among Holly and her siblings. Any transfer of cash or securities from the Trust to MHLLC may constitute self-dealing and a further breach of Robert's fiduciary duty.

[11] *See e.g.*, AS 13.16.100 which establishes varying statutes of limitations applicable to claims against trustees based on the adequacy of the report provided to the beneficiary disclosing potential claims. Holly reserves all rights to challenge the values ascribed to the tangible personal property.

[12] In addition, because Robert later took the position that Holly was not entitled to a one-third membership interest in MHLLC (and the Term Sheet provides for less than this), any information introduced in the October 21, 2014 materials or at the October 24, 2014 meeting regarding projected costs and return on investment to each beneficiary may be rendered false or misleading. Holly reserves all rights and claims in this regard under the Alaska Securities Act, AS 45.55.010 *et seq.*

Bankston Gronning O'Hara, P.C.
Attorneys at Law
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

the Board of Managers did not approve and will not approve the Term Sheet. Second, no consideration has been offered to SAS to support the release of SAS' claims against Robert.

At all relevant times, the members and managers of SAS have been and remain Holly and David L.[13] The Complaint references the involvement of both Holly and David L. in negotiations with Robert.[14] It is the company's practice to require the consent of both managers for any decision of significance. Pursuant to Article V, paragraph E of SAS' Operating Agreement, certain actions on behalf of the company (including but not limited to confessing judgment on behalf of the company and selling, assigning, or transferring any interest in property) require the consent of two-thirds of the member interests.[15] A compromise of the claims asserted by SAS against Robert would result in the transfer of an interest in property and in a judgment dismissing claims. As such, approval of the Term Sheet required the consent of two-thirds of the member interests. David L. was not present at the mediation. He has since reviewed the Term Sheet and indicated that he will not approve it because it does not provide for the resolution of SAS' claim for monetary damages or guarantees SAS access to fly SAS clients to the Mountain House.

C. SAS' CLAIMS AGAINST MHLLC HAVE NOT BEEN RESOLVED.

In recent correspondence, the undersigned provided notice that claims held by SAS as against Mountain House, LLC ("MHLLC") remain unresolved.[16] Robert has characterized such observations as a breach of the purported settlement. This characterization is inaccurate.

The Term Sheet addresses claims asserted against parties in the pending litigation. MHLLC is not currently a party to the litigation. Noteworthy is that no reference to MHLLC appears in the Draft Release prepared by Robert's counsel. Such omission confirms that none of the parties contemplated that MHLLC would be included in the scope of the release. In any event, because SAS has not approved the Term Sheet, the inclusion or exclusion of MHLLC in any

[13] **Exhibit 8** (2015 Biennial Report for SAS).
[14] **Exhibit 9**, at 3, 4, 10 (Paragraphs 11, 14, 39).
[15] **Exhibit 10**, at 5.
[16] Indeed, SAS may have claims against K-2 Adventures, Inc. d/b/a K-2 Aviation for tortious interference with contract or tortious interference with prospective advantage and reserves all rights to pursue such claims absent an agreement to the contrary.

Bankston Gronning O'Hara, P.C.
Attorneys at Law
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

purported settlement or release is academic. Upon reconvening the mediation, SAS would be willing to consider a release of claims as against MHLLC, provided SAS is guaranteed the right to fly SAS customers to the Mountain House.

Respectfully submitted, this 26th day of January, 2016.

BANKSTON GRONNING O'HARA, P.C.
Attorneys for Holly Sheldon Lee and Sheldon Air Service LLC

By: _____
Christopher M. Brecht
Alaska Bar No. 0611089

Bankston Gronning O'Hara, P.C.
Attorneys at Law
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

EXHIBIT 5
000362

Exh. ___
Page 55 of ___

VERIFICATION

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Holly Sheldon Lee, in my individual capacity and as member and co-manager of Sheldon Air Service LLC say on oath or affirm that I have read the foregoing document entitled *Response Regarding Term Sheet* and, insofar as I have personal knowledge of the same, believe that, for purposes of this mediation and said Response, all statements contained therein are true.

Holly Sheldon Lee

SWORN TO AND SUBSCRIBED before me this 25th day of January, 2016 by Holly Sheldon Lee.

[Seal] STATE OF ALASKA NOTARY PUBLIC Christopher M. Brecht My Commission Expires Feb 1, 2020

Notary Public in and for Alaska
My Commission Expires: 2/1/2020

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, David J. Lee, as member and co-manager of Sheldon Air Service LLC say on oath or affirm that I have read the foregoing document entitled *Response Regarding Term Sheet* and, insofar as I have personal knowledge of the same, believe that, for purposes of this mediation and said Response, all statements contained therein are true.

David J. Lee

SWORN TO AND SUBSCRIBED before me this 25th day of January, 2016 by David Lee.

[Seal] STATE OF ALASKA NOTARY PUBLIC Christopher M. Brecht My Commission Expires Feb 1, 2020

Notary Public in and for Alaska
My Commission Expires: 2/1/2020

Bankston Gronning O'Hara, P.C.
Attorneys at Law
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

HOLLY SHELDON LEE and SHELDON AIR SERVICES, LLC, Plaintiffs, vs. ROBERT DONALD SHELDON, Individually and as the Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, Defendant.	)	Case No. 3AN-15-05117 CI

RESOLUTION OF DISPUTED TERMS

The parties in Case No. 3AN-15-05117 participated in a mediation on December 1, 2015, and accepted all the terms of my written proposal. Paragraph 11 of the proposal stated: "Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders."

Pursuant to paragraph 11, the parties have identified certain disputes which I must resolve. I have considered all relevant information,[1] including the briefs and exhibits submitted by the plaintiffs and the defendant.

The argument that Holly's claims against Robert[2] were not settled when she executed the Mediator's Proposal is meritless. She accepted all the terms in the written proposal and must comply with those terms and conditions.

---

[1] This information includes the plaintiff's November 25, 2015 confidential mediation brief and a three-page letter from Holly Sheldon Lee which was furnished before the mediation.

[2] Any reference to claims against Robert includes claims against Robert Sheldon individually and as the Trustee of the Trust.

The contention that SAS' claims against Robert were not resolved because David Lee or the Board of Managers did not consent to the terms is rejected. There is compelling proof that Holly had apparent authority, and exercised that authority, on behalf of SAS, before and during the mediation. Consequently, SAS must comply with the settlement terms that Holly executed.

Finally, SAS' avers that its claims against Mountain House, LLC ("MHLLC") remain unresolved. Robert disagrees.

Paragraphs 1 and 2 of the proposal that the parties executed state:

> 1. The parties to that certain case entitled *Sheldon Lee v. Sheldon*, Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.
>
> 2. The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today. Counsel for Robert Sheldon will prepare and circulate a draft of that document.

Because MHLCC was not a party in Case No. 3AN-15-05117 CI, a strict interpretation of the terms would not lead to the conclusion that SAS intended to settle any claim it may have against MHLLC. The legal significance of the plaintiffs' release of any claim arising from Robert's conduct, "personally and in his official capacity as the Trustee,"[3] is outside my purview. But SAS' right to assert a claim against MHLLC was not settled on December 1, 2015.

The parties are directed to execute a mutual release which is consistent with this decision.

DATED this 26th day of February, 2016.

Eric T. Sanders, Mediator

[3] *See* paragraph 6 of the Complaint.

Certificate of Service
I hereby certify that a true and correct copy of the foregoing **Resolution of Disputed Terms** was served by mail / email / hand delivery on:

David Gross
Birch Horton Bittner & Cherot
1127 West 7th Avenue
Anchorage, AK 99501
dgross@bhb.com

Kevin Clarkson
Brena Bell & Clarkson
810 N Street, Suite 100
Anchorage, AK 99501
kclarkson@brenalaw.com

Christopher Brecht
Brankston Gronning O'Hara
601 West 5th Avenue, Suite 900
Anchorage, AK 99501
cbrecht@bgolaw.pro

By _____
Date 2/29/2016

Christopher M. Brecht, Esq.
Bankston Gronning O'Hara, P.C.
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Telephone: 907-276-1711
cbrecht@bgolaw.pro

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLLY SHELDON LEE and SHELDON AIR SERVICE, LLC,

Plaintiffs,

vs.

ROBERT DONALD SHELDON, as Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust,

Defendants.

Case No. 3AN-15-05117 CI

HOLLY SHELDON LEE'S MOTION AND MEMORANDUM FOR PARTIAL RECONSIDERATION[1]

Holly Sheldon Lee ("Holly"), by and through Bankston Gronning O'Hara, P.C., and pursuant to Alaska Civil Rule 77(k), hereby moves this Court for partial reconsideration and/or clarification of its Order Granting In Part Defendant's Motion to Enforce and Denying Plaintiff's Motion to Continue, dated June 24, 2016 but distributed on June 27, 2016 (the "Order"). For the reasons discussed below, partial reconsideration is warranted.

Pursuant to Alaska Civil Rule 77(k)(1)(i) and (ii), reconsideration is appropriate where the Court has overlooked, misapplied, or failed to consider a statute, decision or principle of law or where the Court has overlooked or misconceived a material fact or proposition of law. Reconsideration is warranted here because the Court applied the incorrect legal test to determine whether Holly had a right as a trust beneficiary to revoke any consent that she may

[1] Holly respectfully submits that the Court appropriately denied the Trustee's request for ruling that the *in terrorem* clause was triggered by reason of recent filings in this matter. As such, Holly does not seek reconsideration of this issue.

have provided to the December 1st Mediator's Proposal. It is respectfully submitted that the Court erred when it applied the test for fiduciary fraud articulated in *Cummings v. Sea Lion Corporation*, 924 P.2d 1011 (Alaska 1996). Nothing on the face of the *Cummings* decision suggests that it applies in the context of a dispute between a trustee and a beneficiary. Noteworthy is that *Cummings* did not involve or implicate a trustee-beneficiary relationship. Indeed, there are no reported decisions from the Alaska Supreme Court applying the fiduciary fraud test articulated in *Cummings* in the context of a trust dispute. The question whether and under what circumstances a trust beneficiary has a right to revoke consent to a release or purported settlement is an issue of first impression in Alaska.

At page 12 of the Order, the Court comments that Holly has offered no argument as to why two more recent decisions from Illinois and New York, *Janowiak v. Tiesi*, 402 Ill.App.3d 997 (Ill. Ct. App. 2010) and *In re Estate of Hunter*, 739 N.Y.S.2d 916, 920 (Surrogate's Court, Westchester County, New York 2002), respectively, should apply in this context in light of the fact that there is test for fiduciary fraud in *Cummings*. Respectfully, the arguments supporting application of these decisions were addressed in Holly's Reply to Robert Sheldon's Memorandum Regarding Term Sheet (attached as Exhibit 6 to Holly's Limited Opposition to Motion to Quash filed on February 18, 2016 and incorporated by reference therein).[2] Moreover, during oral argument, it is the undersigned's recollection that he addressed this very same question for the Court (arguing that the more specific authority governing trustees would apply given that there were no decisions from the Alaska Supreme Court on point) and even went so far as to read from the *Janowiak* decision which also provides in relevant part:

> Thus it can be said that a trustee is held to an even more intense duty of loyalty than in any other fiduciary relationship. We find no support for the

[2] At page 9 of her Motion and Memorandum to Continue Trial and Reopen Pretrial Deadlines, filed on March 8, 2016, Holly incorporated by reference all the briefing that she submitted to the mediator, Retired Superior Court Judge Eric T. Sanders.

BANKSTON GRONNING O'HARA, P.C.
Attorneys at Law
601 W. 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

assertion that a trustee would not be subject to the same, if not more intense, duties of loyalty and disclosure of information as other fiduciaries.[3]

In addition pages 15 through 17 of Holly's Opposition to Defendant's Cross-Motion for Enforcement specifically addresses why the burden to prove adequate disclosure squarely falls on the Trustee in this context. Such discussion addresses at length the parallel disclosure requirements imposed under the common law pertaining to trustees and under Alaska's Uniform Probate Code. Not only does the *Cummings* decision not involve trustees or Alaska's Uniform Probate Code, the Court's application of said decision in this case results in impermissibly shifting the burden to prove full and fair disclosure away from the party seeking enforcement of the waiver or release. Respectfully, such ruling is not in harmony with the Uniform Probate Code or the common law governing trustees.[4]

For the above reasons, Holly respectfully submits that the Court erred in applying *Cummings* to determine whether she has the right to revoke any consent she may have provided in connection with the Mediator's Proposal.[5] As such, Holly requests reconsideration of the Court's ruling that she did not validly exercise her right to revoke any consent she may have provided to the Mediator's Proposal. If reconsideration on this point is granted, the Court would also need to reconsider its ruling as to whether the dispute concerning the Mediator's Proposal was subject to arbitration based on the reasoning set forth

---

[3] *Janowiak,* 402 Ill.App.3d at 1009. A highlighted copy of the foregoing decision was submitted to the Court along with the briefing prior to oral argument on Defendant's Motion for Enforcement and Plaintiff's Motion to Continue Trial and Reopen Pretrial Deadlines.

[4] *See* AS 13.12.213 (provision of Alaska's Uniform Probate Code which mandates full and fair disclosure of assets prior to a surviving spouse signing a waiver of her right of election, homestead allowances, exempt property, and family allowance in order for the waiver to be enforceable) and AS 13.36.100 (containing varying statutes of limitation applicable to claims against trustees in connection with trust administration based on the adequacy of the report or disclosure). The undersigned is not aware of any decision from the Alaska Supreme Court addressing the burden of proof to show full and fair disclosure of all material facts. As another issue of first impression the Court may look to the discussion in the *Janowiak* decision in support of why the trustee has the burden of proof. *Janowiak*, 342 Ill.App.3d at 1005.

[5] In light of the Court's observation that no arguments were provided supporting application of *Janowiak* and *In re Estate of Hunter*, it is possible that the Court may have overlooked or failed to fully consider the briefing on this issue. On that basis, reconsideration may also be warranted.

BANKSTON GRONNING O'HARA, P.C.
Attorneys at Law
601 W. 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

in the Order. For the reasons already discussed in the briefing and at oral argument, Holly respectfully submits that her revocation is effective as to all terms set forth in the Mediator's Proposal and the Trustee has failed to meet his burden to show otherwise.

In addition, there are several factual allegations and/or conclusions contained in the Order which are inconsistent with the record before the Court and which warrant reconsideration and/or clarification. For example, at pages 3 and 4 of the Order, the Court made several references to an accounting report provided by the Trustee in "early January 2016." No doubt, the references to January are typographical errors given that no accounting report was provided by the Trustee until February 4, 2016.

In addition, at page 8 of the Order, the Court noted that Holly "did not present any evidence that she was not capable of consenting to a settlement" on December 1, 2015. The foregoing statement suggests that the Court may have overlooked the Affidavit of Holly Sheldon Lee, dated April 4, 2016 (filed on April 4, 2016). In paragraphs 8-10, Holly introduced evidence that she was sick, nauseous, confused during the nine hour ordeal and in fact threw up twice toward the end of the day (once toward the end of the mediation and once again on the drive back to Talkeetna).[6] It is respectfully submitted that there is evidence in the record that supports the conclusion that Holly's illness impaired her ability to consent to the Mediator's Proposal and that she reasonably believed that the Mediator's Proposal was just that - a proposal and not a final settlement.

At page 8 of the Order, the Court observed that Holly engaged Eric Sanders "to arbitrate the dispute" concerning the Mediator's Proposal. Respectfully, the Court's observation is incorrect. Noteworthy in this regard are footnotes 1 and 2 to Holly's Response Regarding Term Sheet dated January 26, 2016 in which Holly made clear that her participation was voluntary and in the context of the ongoing mediation not an arbitration. A copy of the foregoing response was attached as Exhibit 6 to Holly's Limited Opposition to Motion to Quash filed on February 18, 2016.

[6] A copy of Holly's First Set of Discovery Requests dated February 5, 2016 was attached to her Opposition to Defendant's Cross-Motion for Enforcement of No Contest Clause, or Arbitration Decision, or Settlement Agreement filed April 4, 2016 and is already part of the Court record.

BANKSTON GRONNING O'HARA, P.C.
Attorneys at Law
601 W. 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

At page 6 of the Order, the Court commented that neither Holly nor her counsel directly addressed Holly's desire to reopen the discovery deadlines. It is axiomatic that the Trustee has an affirmative duty to account to beneficiaries regardless whether there is a pending lawsuit and independent of any other requirements imposed under the Civil Rules.[7] As was explained during oral argument, when it became clear that the Trustee would not comply with his fiduciary duty to provide such information to Holly, formal discovery requests (*i.e.*, as prescribed under the Civil Rules) were served on Trustee's counsel. In response, the Trustee took the position that he did not have to respond to such requests because the time for serving formal discovery had passed.[8] Hence, Holly requested that pretrial deadlines be reestablished so that there would be a mechanism to compel the Trustee to comply with his duties as a fiduciary.[9] These matters were fully addressed at oral argument and in the briefing.

Nevertheless, in the abundance of caution, reconsideration and/or clarification of the Order is necessary to confirm that Holly is free to pursue her right to information as a beneficiary and all rights flowing therefrom. Alternatively, if it was the Court's intention to relieve the Trustee of his fiduciary duty to account and provide information to Holly, notwithstanding the ongoing Trustee-beneficiary relationship, Holly respectfully requests that the Court issue an order confirming as much so that the record is clear on this point.

CONCLUSION

For the reasons discussed above, reconsideration of the Court's Order Granting in Part Defendant's Motion to Enforce should be granted and Defendant's Motion to Enforce denied in total.

---

[7] *See* authority cited on pages 15, 16, and 17 of Holly's Opposition to Defendant's Cross-Motion for Enforcement, filed on April 4, 2016.

[8] A copy of Holly's First Set of Discovery Requests dated February 5, 2016 and the response from Trustee's counsel are included in Exhibit 2 to Holly's Opposition to Defendant's Cross-Motion for Enforcement and are already part of the Court record.

[9] Indeed the Trustee's refusal to comply with his duty to account and respond to reasonable requests for information from Holly as beneficiary (which continues through the date of this filing) is at the heart of the present dispute and accounts for the vast majority of the litigation from January 2016 to present.

BANKSTON GRONNING O'HARA, P.C.
Attorneys at Law
601 W. 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

DATED at Anchorage, Alaska this 7th day of July, 2016.

BANKSTON, GRONNING, O'HARA, P.C.
Attorneys for Holly Sheldon Lee

By: _____
Christopher M. Brecht
Alaska Bar No. 0611089

BANKSTON GRONNING O'HARA, P.C.
Attorneys at Law
601 W. 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

Christopher M. Brecht, Esq.
Bankston Gronning O'Hara, P.C.
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Telephone: 907-276-1711
cbrecht@bgolaw.pro

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLLY SHELDON LEE and SHELDON AIR SERVICE, LLC, Plaintiffs, vs. ROBERT DONALD SHELDON, as Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, Defendant.	Case No. 3AN-15-05117 CI

ORDER GRANTING HOLLY SHELDON LEE'S MOTION FOR PARTIAL RECONSIDERATION

The Court has reviewed Holly Sheldon Lee's Motion for Partial Reconsideration timely filed on July 7, 2016 and Defendant's opposition thereto. Holly Sheldon Lee seeks partial reconsideration of this Court's Order Granting in Part Defendant's Motion to Enforce and Denying Plaintiff's Motion to Continue. For the reasons discussed in Holly Sheldon Lee's motion, reconsideration is granted.

IT IS HEREBY ORDERED that Defendant's Cross-Motion for Enforcement of No-Contest Clause, or Arbitration Decision, or Settlement Agreement is DENIED.

IT IS FURTHER ORDERED Holly Sheldon Lee's Motion to Continue Trial and Reopen Pretrial Deadlines is GRANTED. By separate order the Court will set on a scheduling conference to select a new trial date or hear argument regarding the nature and form of future proceedings.

DATED: _____

_____
Hon. Pamela S. Washington
Superior Court Judge

S4712\01\PLEADINGS\ORDrecon

Christopher M. Brecht, Esq.
Bankston Gronning O'Hara, P.C.
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Telephone: 907-276-1711
cbrecht@bgolaw.pro

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLLY SHELDON LEE and SHELDON AIR SERVICE, LLC,	)	
Plaintiffs,	)	
ROBERT DONALD SHELDON, individually and as the Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust,	)	
Defendant.	)	Case No. 3AN-15-05117 CI

PROOF OF SERVICE BY MAIL

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Karen Burgess, being first duly sworn, depose and state:

1. That I am employed by the law firm of Bankston Gronning O'Hara, P.C.

2. That on the 7th day of July, 2016, I caused to be mailed true and correct copies of the PLAINTIFF'S MOTION AND MEMORANDUM FOR PARTIAL RECONSIDERATION; [proposed] ORDER GRANTING HOLLY SHELDON LEE'S MOTION FOR PARTIAL RECONSIDERATION; and this PROOF OF SERVICE BY MAIL to each of the following:

Kevin G. Clarkson, Esq. Brena, Bell & Clarkson, P.C. 810 N Street, Suite #100 Anchorage, Alaska 99501	David Karl Gross, Esq. Birch Horton Bittner & Cherot 1127 West 7th Avenue Anchorage, Alaska 99501

Bankston Gronning O'Hara, P.C.
Attorneys at Law
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

by depositing copies thereof in the United States mail at Anchorage, Alaska, enclosed in properly addressed, postage prepaid envelopes.

DATED this 7th day of July, 2016.

Karen Burgess

Karen Burgess

SUBSCRIBED AND SWORN to before me this 7 day of July, 2016.

[Seal]

STATE OF ALASKA
NOTARY PUBLIC
Charlene F. Vozar
My Commission Expires March 7, 2019

Notary Public in and for Alaska
My Commission Expires 3-7-19

Bankston Gronning O'Hara, P.C.
Attorneys at Law
601 West 5th Avenue, Suite 900
Anchorage, Alaska 99501
Tel. (907) 276-1711 - Fax (907) 279-5358
www.bgolaw.pro

S4712\1\PLEADINGS\AFFmail 7-7-16

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLLY SHELDON LEE and SHELDON AIR SERVICE, LLC,	)	
Plaintiffs,	)	
v.	)	
ROBERT DONALD SHELDON, individually and as Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust,	)	
Defendant.	)	
	)	Case No. 3AN-15-05117 CI

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiff Holly Sheldon Lee requests that the court reconsider its June 24, 2016 Order denying Holly's motion to reopen discovery deadlines and set a new trial date. The court held: 1) Holly had agreed to settle her claims and arbitrate any future dispute between her and Defendant Robert Sheldon; 2) Robert did not fraudulently induce Holly to settle her claims; and 3) the arbitration decision of Eric Sanders is binding and enforceable.

Holly insists that the court applied the incorrect legal standard, made a typographical error concerning the month when Robert disclosed certain information, overlooked Holly's claim that she was sick during settlement negotiations, and erroneously held that Holly submitted to arbitration before Eric Sanders.

According to Alaska Rule of Civil Procedure 77(k) reconsideration is warranted where a court has "overlooked, misapplied or failed to consider a statute, decision or principle *directly controlling*; or [t]he court has overlooked or misconceived some *material* fact or proposition of law."[1]

Holly maintains that two cases from other jurisdictions should supply the legal test for this case. The cases are *Janowiak v. Tiesi*[2] from a mid-level appellate court in Illinois and *In re Estate of Hunter*[3] from a surrogate court in Westchester County, New York. Holly argues that this court's statement that she did not supply an argument for why these two cases should apply to this case when the Alaska Supreme Court has defined fiduciary fraud is unfounded. She claims that she supplied an argument in her briefing to Eric Sanders in preparation for arbitration of her settlement agreement and incorporated it by reference in her briefing to this court in her motion to reopen discovery deadlines.

When considering Holly's initial motion, the court reviewed her briefing both to this court and to Eric Sanders. In neither submission does she provide an affirmative argument for why two cases from other jurisdictions should be considered *controlling* where the Alaska Supreme Court has already defined fiduciary fraud. The briefing simply assumes that these two cases apply extra-jurisdictionally because they happen to address fiduciary fraud in the context of a trustee. While the briefing does include a cursory argument for why these

[1] Alaska R. Civ. P. 77(k)(1)(i-ii) (emphasis added).
[2] 932 N.E.2d 569 (Ill. App. Ct. 2010).
[3] 739 N.Y.S.2d 916 (Sur. Ct. 2002).

cases, if they were adopted, might bolster the merits of her argument, the briefing ignores the initial issue of whether the cases are applicable in Alaska at all and if so, why case law from the Alaska Supreme Court should be disregarded in favor of only persuasive authority.

The court would also like to note that reconsideration is only proper where the court has "overlooked, misapplied or failed to consider a statute, decision or principle *directly controlling*." Case law from Illinois and New York is not "directly controlling." In fact, the cases cited by Holly are not even "directly controlling" on all the courts in their own jurisdictions.

Next, Holly correctly notes that the court erroneously stated that Robert revealed the trust's costs in January 2016. Robert apparently did not reveal the trust's costs until February 2016. This point is completely immaterial to the court's decision and therefore is not a basis for reconsideration.

Holly also argues that the court overlooked her argument that she was nauseated and vomited during and after settlement negotiations with Robert. The court was aware of this argument, but did not address it because it is completely immaterial to Holly's ability to consent to settle her claims. She was not incapacitated in any legal sense, cited no case law that compels a finding that nausea is a basis for incapacity, and had competent counsel with her throughout the negotiations.

Holly next contends that the court erroneously stated that she arbitrated her dispute with Robert before Eric Sanders when in fact she stated in a footnote in her brief to Eric Sanders that her participation was "voluntary and

in the context of ongoing mediation." This argument attempts to assail the court's ultimate decision that Holly agreed to arbitrate any dispute between her and Robert concerning the settlement of her claims. The issue of whether Holly agreed to arbitration when she signed the settlement agreement was one of the dispositive issues raised in her motion and ultimately addressed by the court. The court determined that Holly agreed to arbitrate any future dispute and did so when one arose. Accordingly, the court did not overlook a material fact or a directly controlling principle of law.

Holly's last argument escapes the court. She states "[a]t page 6 of the Order, the Court commented that neither Holly nor her counsel directly addressed Holly's desire to reopen discovery deadlines." Holly appears to interpret this statement as a finding by the court that Robert did not have a duty to disclose trust information except through discovery.

The court made no such determination. Indeed, the court explicitly found that Robert has a statutory duty to disclose information about the trust to beneficiaries. The court's statement concerning discovery was a summary of the topics addressed during oral argument. As noted in the court's Order, at oral argument Holly did not address the remedy she initially sought in her motion—reopen discovery deadlines and set a new trial date—instead she argued for the first time that the case should be transferred to probate court. The Order merely restated the arguments raised at oral argument, nothing more. Consequently, Holly has not asserted any grounds for reconsideration.

Holly's Motion for Reconsideration also appears to request a clarification of whether, in light of the court's Order, Holly may still pursue additional claims she has against Robert. That issue may only be addressed by Eric Sanders through arbitration. The court's Order did not make any determination about the scope or the content of the settlement agreement. The court's decision was limited to addressing whether Holly agreed to arbitrate disputes with Robert. The court found that she agreed to arbitrate her disputes and therefore Eric Sanders' decision is binding and enforceable. Any dispute concerning the content of the settlement agreement or its scope may only be brought before Eric Sanders.

ORDER

Holly's Motion for Reconsideration is DENIED.

DATED at Anchorage, Alaska this 2ND day of August, 2016.

Pamela Scott Washington
Superior Court Judge, *pro tem*

I certify that on 8.3.16
a copy of the above was mailed
to each of the following at their
addresses of record:
Chris Brecht
David Gross
Kevin Clarkson

Mary Brault - Judicial Assistant

Exhibit 73 of
Page

EXHIBIT 9

(EXHIBIT 9 WILL BE FILED AS
A SUPPLEMENTAL EXHIBIT)

THE SUPREME COURT OF THE STATE OF ALASKA

HOLLY SHELDON LEE and SHELDON AIR SERVICE, LLC,	Supreme Court Nos. S-16442/16471
Appellants and Cross-Appellees,	Superior Court No. 3AN-15-05117 CI
v.	OPINION
ROBERT DONALD SHELDON, individually and as Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust,	No. 7285 – August 31, 2018
Appellee and Cross-Appellant.	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Pamela Scott Washington, Judge pro tem, and William F. Morse, Judge.

Appearances: Robert John, Law Office of Robert John, Fairbanks, for Appellants and Cross-Appellees. Kevin G. Clarkson and Matthew C. Clarkson, Brena, Bell & Clarkson, P.C., Anchorage, for Appellee and Cross-Appellant.

Before: Stowers, Chief Justice, Winfree, Maassen, Bolger, and Carney, Justices.

BOLGER, Justice.

I. INTRODUCTION

Following mediation, a trust beneficiary and a trustee signed a document purporting to settle bitter family litigation and referring future disputes to the mediator for resolution. The beneficiary subsequently denied that she had settled and asked the mediator to resolve the issue, and the mediator concluded that the parties had reached a binding settlement. The beneficiary tried to resurrect this issue in the superior court, but the court concluded that the mediator's decision was within the scope of the authority conferred by the parties. We conclude that the superior court did not err by confirming the mediator's decision. We also conclude that the court did not err by denying the beneficiary's petition to review the trustee's compensation, or by awarding Alaska Civil Rule 82 attorney's fees to the trustee. We therefore affirm the superior court's judgment.

II. FACTS AND PROCEEDINGS

A. Creation Of Mountain House, LLC And Roberta Sheldon's Trust

In the 1960s, famed Alaska bush pilot Don Sheldon built a cabin — known as the Mountain House — at the head of Ruth Glacier in Mount McKinley National Park (now Denali National Park). Following Don's death in 1975, his wife Roberta Sheldon assumed control of the Mountain House. In 2006 Roberta created Mountain House, LLC to own and manage the cabin.

In early 2014 Roberta conveyed Mountain House, LLC and other assets into a newly created revocable trust. The trust names the Sheldons' three children Holly, Robert, and Kate[1] as beneficiaries and designates Robert as successor trustee. It establishes procedures for distribution of real and personal property among the beneficiaries. It also includes a penalty clause designed to dissuade the beneficiaries from contesting the trust's terms. The clause provides that persons who contest the trust

---

[1] Kate Sheldon is not involved in this dispute.

or its provisions "shall not benefit in any way under this Trust . . . and shall not receive any distribution whatsoever."

Following Roberta's death in June 2014, Robert became trustee. Holly requested an accounting of trust assets in September, and Robert provided a list of assets the following month. In December, Robert — acting in his capacity as trustee — drafted an operating agreement appointing himself as manager of Mountain House, LLC. The agreement provided that membership shares in the LLC would be distributed equally among Holly, Robert, and Kate "[a]t such time as the Trustee deems suitable for both this LLC and the Trust."

B. Initial Litigation

Over the following months, disagreements arose between Holly and Robert concerning his administration of the trust. Holly claimed that Robert had failed to adequately respond to her request for an accounting and that he also had failed to distribute trust assets that she had requested and that he had stated he would provide.

In February 2015 Holly and her company, Sheldon Air Service, LLC (SAS),[2] filed a lawsuit against Robert individually and in his capacity as trustee. Holly argued that Robert had "unlawfully detained . . . Trust assets without regard to the beneficiaries' distribution rights" and that he had breached his fiduciary duties "[b]y refusing to timely distribute Mountain House, LLC to the beneficiaries."[3] She moved for summary judgment, asking the superior court to rule that Robert was required "to immediately distribute the Mountain House, LLC, to its three, equal owners." Robert

---

[2] SAS is a limited liability company owned by Holly and her husband David Lee.

[3] Holly's complaint also alleged breach of contract; she argued that Robert had violated a previously existing agreement granting SAS unrestricted rights to transport Mountain House guests.

brought a cross-motion for summary judgment, arguing that Holly had "no right to distribution, immediate or otherwise, of an in-kind membership in the Mountain House, LLC" and that Holly's complaint and litigation violated the trust's penalty clause.

In November 2015 the superior court ruled that under the terms of the trust, Robert was entitled to determine which children would receive membership interests in Mountain House, LLC. It also found that Robert was not obligated to immediately distribute Mountain House, LLC. However, the court rejected Robert's argument that Holly's litigation had triggered the trust's penalty clause. Noting that attempts to enforce rights or "secure an interpretation of [an] instrument" generally do not trigger penalty clauses, the court held that Holly had "advanced a reasonable interpretation of the trust in light of an ambiguity." Though the court "[found] her interpretation unsupported," it concluded that Holly had merely sought to "clarify and enforce the trust," not void it, nullify it, or set it aside.

C. Mediation And Subsequent Disputes

Robert and Holly participated in mediation conducted by retired superior court judge Eric Sanders in December 2015. Following the mediation, the parties signed a document titled "Mediator's Proposal" (Proposal). Under the terms of the Proposal, Holly would pay $25,000 into Mountain House, LLC. She would receive a one-third, non-voting interest in the LLC as well as various personal effects from the trust's corpus, and she would be granted periodic access to the Mountain House. The Proposal stated that the parties had "reached an agreement to the settlement of all claims of all parties" and would "execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached." Lastly, paragraph 11 of the Proposal provided that "[a]ny disputes concerning [the Proposal's] terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders."

Per the Proposal's terms, Robert sent Holly a draft settlement agreement to review. In response Holly sent a "Response Regarding Term Sheet" (Response) to Sanders arguing that the Proposal had not settled her claims against Robert. She argued that at the time she signed the Proposal, she "believed [the] document was merely a proposal . . . and that her signature would not result in a binding agreement." She also claimed that she "lacked sufficient information concerning the assets and liabilities of the Trust" to make an informed decision during the mediation and that Robert's failure to provide this information "vitiate[d] [her] consent" to any settlement. Lastly, she argued that even if she and Robert had reached a settlement, SAS had separate claims that had not yet been resolved. Holly "requested that the mediation be reconvened to address all disputes." She also indicated that her Response was "submitted within the context of mediation" and that she "reserve[d] all rights as to whether the issues raised herein are subject to arbitration."

In response Robert submitted an "Arbitration Memorandum Regarding Settlement Existence, Scope, Noncompliance, and Enforcement" (Arbitration Memorandum) to both Holly and Sanders. Robert argued that the parties had agreed to a settlement when they signed the Proposal, that Holly had all the information she needed to make an informed decision regarding settlement, and that SAS's claims against Robert, the trust, and Mountain House, LLC had been resolved. Robert attached an accounting, which disclosed payments made for repair and renovation of the Mountain House and legal fees related to the ongoing litigation.

After both documents had been submitted to Sanders, the parties exchanged a series of emails discussing the nature of their dispute. Robert sought to clarify that "this is an arbitration at this point" and that the parties were no longer "mediating at this time." Holly stated that she did "not agree with Robert's position but would like to see all issues resolved to avoid further litigation expense" and that the parties would "have

to agree to disagree on this point." In response to a question about subpoenas, Robert stated that he was "under the impression that [the parties were] waiting for . . . Sanders to issue a decision as an arbitrator under paragraph 11 of the Mediator's Proposal." Holly replied that she wanted to take Robert's deposition, stating, "I do not have any objection to rescheduling the depo until after [Sanders] has reviewed the matter." In response Robert again noted, "We are awaiting . . . [Sanders's] decision regarding the existence and scope of the settlement that was reached at the December 1, 2015, mediation." And Holly again confirmed that she was anticipating that Sanders would issue a decision on the issues she had raised: "[P]lease confirm whether Robert is willing to agree to reschedule the deposition until after [Sanders] has issued his decision."

Sanders issued a decision in February 2016. He stated that the parties had identified disputes to be resolved "[p]ursuant to paragraph 11" of the Proposal. He concluded that Holly had settled her claims against Robert when she had executed the Proposal and that she "must comply with [its] terms and conditions." He further concluded that the Proposal had settled SAS's claims against Robert but not its claims against Mountain House, LLC. Sanders directed the parties to "execute a mutual release which is consistent with this decision."

D. Motions To Continue And Enforce

In March 2016 Holly filed a motion to continue the trial scheduled in the superior court. She again contended that the December 2015 mediation had not resulted in a binding settlement; in the alternative, she argued that fraud and fiduciary misconduct on Robert's part vitiated her consent to any settlement that may have occurred. Holly denied that the parties had already submitted these issues to arbitration, characterizing her earlier Response as a request for "assistance" presented to Sanders "in the context of the mediation." She sought a continuance to investigate "facts surrounding the Trustee's various breaches of fiduciary duty." In response Robert filed a motion to

enforce, arguing that the parties had already submitted these issues to arbitration and that Sanders's decision directing Holly to comply with the terms of the Proposal constituted a binding arbitration award. In the alternative, he argued that the court should enforce the terms of the Proposal even if it concluded that Sanders's decision was not the product of arbitration. Robert also argued that Holly had violated the trust's penalty clause by filing her motion to continue.

The superior court issued an order denying Holly's motion to continue and granting in part Robert's motion to enforce. The court explained that Holly had asked Sanders to determine whether the Proposal constituted a binding settlement agreement and that she now sought to overturn both Sanders's arbitration decision and the underlying settlement agreement. The court concluded that the Proposal was "not a proposal" but rather a settlement agreement; the court reasoned that "given the wording of the document, the presence of Holly's attorney, and her signature," it was a "near certainty" that Holly understood she was settling her claims. The court further concluded that Holly's reliance on Robert's diligence in reporting trust costs was not "justifiable": Holly "knew the trust had costs, knew that she did not know the precise value of the costs, and knew Robert had a duty to disclose the costs but had not done so." Therefore, Holly's fraud claim could not vitiate her consent to the terms of the Proposal — including paragraph 11, the provision providing for arbitration of subsequent disputes.

In light of these conclusions, the court denied Holly's motion to continue and granted Robert's motion to enforce "in so far as it [sought] enforcement of the arbitration decision." The court noted, however, that "the remedy sought in Holly's motion" was "a new trial date and further discovery" rather than nullification of any trust provisions. Accordingly, the court denied Robert's motion as it related to the penalty clause. Having concluded that the parties had settled all claims, the court entered final judgment.

E. Post-Judgment Motions And Attorney's Fees

Robert subsequently moved for attorney's fees under Rule 82. Holly opposed and petitioned the superior court to review Robert's compensation and attorney's fees under AS 13.36.055. The court denied Holly's petition on the basis that she had "settled the case without insisting that [Robert] provide more of an accounting than he already had before and during the course of the litigation." Concluding that Holly's post-mediation litigation conduct had been vexatious, the court awarded enhanced attorney's fees to Robert.[4]

III. DISCUSSION

Holly appeals the superior court's enforcement of Sanders's arbitration decision, the court's denial of her petition to review Robert's compensation and attorney's fees, and the court's award of attorney's fees to Robert. Robert cross-appeals the superior court's ruling that Holly did not violate the trust's penalty clause, but asks that we address his cross-appeal only if we do not affirm the superior court's enforcement of the arbitration decision.

A. The Superior Court Did Not Err By Confirming Sanders's Decision.

Holly challenges the superior court's conclusion that Sanders's February 2016 decision constituted an enforceable arbitration award.[5] She contends that

---

[4] *See* Alaska R. Civ. P. 82(b)(3).

[5] Holly frames the issue differently and incorrectly, arguing that the superior court erred in finding the Proposal to be an enforceable settlement agreement. But as Robert points out, the court did not just find the Proposal to be an enforceable settlement agreement; "[r]ather, the superior court enforced *an arbitration decision* that determined" that the Proposal was an enforceable settlement agreement. (Emphasis added.) Thus, the pertinent question is not whether the Proposal was enforceable but rather whether the superior court properly confirmed Sanders's determination that the Proposal was enforceable.

the question Sanders addressed — whether the Proposal was a binding settlement agreement — cannot be resolved by an arbitrator. Robert responds that Holly challenged Sanders's authority "only after Sanders ruled against her" and that Holly therefore waived this challenge.

We have not previously addressed whether a party waives an attack on an arbitrator's authority to decide an issue by submitting the issue to the arbitrator for decision. However, other jurisdictions have answered this question in the affirmative.[6] A recent Illinois appellate decision, *Advocate Financial Group v. Poulos*, is representative.[7] The appellants in that case challenged an arbitration award on the ground that the contract containing the arbitration provision had expired before the arbitration commenced.[8] The court concluded that the appellants had forfeited this argument.[9] It noted that the appellants had been "notified in writing that plaintiff intended to proceed to arbitration under the agreement" but had neither moved the court

---

[6] *See Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980); *Paige Elec. Co. v. Davis & Feder, P.A.*, 231 So. 3d 201, 205-06 (Miss. App. 2017) ("[P]articipation in arbitration proceedings waives the right to object to an arbitrator's authority."), *cert. denied*, 229 So. 3d 122 (Miss. 2017); *Adams v. Barr*, 182 A.3d 1173, 1179 (Vt. 2018) ("[A]t some point prior to the actual arbitration hearing a party who participates in an arbitration proceeding without objecting to the validity of the arbitration agreement may waive the ability to make that objection."); *Welty v. Brady*, 123 P.3d 920, 928 (Wyo. 2005) ("[W]hen an issue appears to be submitted to arbitration by the parties and there is no objection to the arbitrator's consideration of a particular issue, a later claim the arbitrator exceeded its authority by considering that claim is waived.").

[7] 8 N.E.3d 598 (Ill. App. 2014).

[8] *Id.* at 609.

[9] *Id.*

to stay the arbitration proceeding nor filed any motion before the arbitrator arguing that the claims were not subject to arbitration.[10] Instead, having "unilaterally decided that their position was correct," the appellants had "made a calculated decision . . . to do nothing in response" to the notice of arbitration.[11] The court thus held that the appellants had failed to "object in a timely manner."[12]

The waiver rule adopted in Illinois and other jurisdictions is compatible with the relevant provisions of Alaska's Revised Uniform Arbitration Act.[13] Alaska Statute 09.43.500 indicates that a court must vacate an arbitration award if there was no agreement to arbitrate — but only if the appellant "rais[ed] the objection under AS 09.43.420(c) not later than the beginning of the arbitration hearing."[14] Furthermore, while the Act provides that "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate,"[15] AS 09.43.340 indicates that the party disputing the existence of an enforceable agreement to arbitrate is responsible for raising the issue in court.[16] These provisions are consistent with a

---

[10] *Id.* at 609-10.

[11] *Id.* at 610.

[12] *Id.* at 609; *see also id.* ("A party cannot 'sit silent, wait until an adverse award [is] issued, and then first argue that the arbitrator did not have the authority even to hear the claim.' " (alteration in original) (quoting *First Health Grp. Corp. v. Ruddick*, 911 N.E.2d 1201, 1213 (Ill. App. 2009))).

[13] AS 09.43.300-.595.

[14] AS 09.43.500(a)(5); *see* AS 09.43.420(c) (providing that a party to an arbitration proceeding may object to "lack or insufficiency of notice").

[15] AS 09.43.330(c).

[16] *See* AS 09.43.340(b) ("On application of a person alleging that an (continued...)

conclusion that a party objecting to an arbitrator's authority bears the burden of presenting a timely objection in arbitration or in court — and that failure to do so may result in forfeiture of the objection on appeal.

In light of both persuasive authority from other jurisdictions and Alaska statutes governing arbitration proceedings, we hold that a party to arbitration can waive objections to the arbitrator's authority by failing to raise them in a timely manner. We next address whether this rule bars Holly from asserting on appeal that Sanders could not resolve the parties' dispute over the enforceability of the Proposal.

There is no dispute that both parties signed the Proposal, paragraph 11 of which states that "[a]ny disputes concerning [the Proposal's] terms or the execution of these terms . . . shall be resolved finally and completely by Eric Sanders." Thereafter, Holly invoked this mechanism — albeit implicitly — when she requested that Sanders determine whether a valid settlement agreement existed between her and Robert and whether her signature on the Proposal was induced by fraud. She stated that she "reserve[d] all rights" as to whether these two issues were "subject to arbitration," and, in a subsequent filing, she stated that she "view[ed] the . . . process as part of the mediation." However, she did not affirmatively state that resolution of either issue would exceed Sanders's authority. And Robert raised the same issues in his Arbitration Memorandum, which he submitted to Sanders and served upon Holly. This document referred to Sanders as an "Arbitrator," and, in correspondence exchanged following submission of the Arbitration Memorandum, Robert explicitly asserted that the parties were engaged in "an arbitration . . . under paragraph 11 of the . . . Proposal."

---

[16](...continued)
arbitration proceeding has been initiated or threatened but that there is not an agreement to arbitrate, the court shall proceed summarily to decide the issue.").

Upon learning that Robert believed arbitration proceedings had been initiated, Holly could have informed Sanders of her disagreement. In the alternative, she could have applied to the superior court, "alleging that an arbitration proceeding [had] been initiated or threatened but that there [was] not an agreement to arbitrate."[17] The court would then have "summarily . . . decide[d] the issue."[18] But rather than take any action to address the dispute, Holly elected to await Sanders's decision on whether the Proposal was an enforceable settlement agreement, while "agree[ing] to disagree" with Robert on the issue whether that decision would constitute a binding arbitration award. Like the appellants in *Advocate Financial Group*, Holly was aware that Sanders was likely to issue an arbitration decision on the issues that had been submitted to him, but she "necessarily made a calculated decision . . . to do nothing."[19] She therefore forfeited her argument that Sanders exceeded his authority when he concluded that the Proposal was a binding and enforceable settlement agreement.

Because we hold that Holly failed to assert her objections to the arbitrator's authority in a timely manner, we need only decide whether the superior court erred by confirming Sanders's arbitration award. We review a superior court's decision confirming an arbitration award de novo.[20] "An arbitrator's decision is accorded great deference," which "extends to both the arbitrator's factual findings and the arbitrator's interpretation and application of the law."[21]

---

17 *Id.*

18 *Id.*

19 *Advocate Fin. Grp. v. Poulos*, 8 N.E.3d 598, 609-10 (Ill. App. 2014).

20 *McAlpine v. Priddle*, 321 P.3d 345, 348 (Alaska 2014).

21 *State v. Alaska Pub. Emps. Ass'n*, 199 P.3d 1161, 1162 (Alaska 2008); *see* (continued...)

Here, the parties signed the Proposal following a lengthy mediation session. The Proposal outlines the terms of an agreement and states that "[t]he parties . . . have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in [the] mediation." Holly was represented by counsel during the mediation, and her counsel signed the Proposal. And the mediation and settlement process was overseen by neutral party Sanders. Accordingly, we conclude that there is adequate record support for Sanders's conclusion that the Proposal was a valid, enforceable settlement agreement.

We reach the same conclusion regarding Holly's claim that Robert fraudulently induced her acquiescence to the Proposal's terms. Holly argued to Sanders that Robert "withheld material information from [her] prior to and during the mediation." But in order to prove that the parties' agreement was voidable, Holly would need to establish that she justifiably relied on Robert's representations concerning the trust.[22] Holly was aware at the time she signed the Proposal that Robert had incurred costs while managing the trust and that Robert had not provided all the information she wanted regarding trust expenditures.[23] She nonetheless participated in the mediation and agreed to settle the dispute. Therefore, "the course of dealings between the parties before and

---

[21](...continued)
also Moore v. Olson, 351 P.3d 1066, 1071 (Alaska 2015) ("An 'arbitrator's findings of both fact and law . . . receive great deference.' " (omission in original) (quoting *OK Lumber Co. v. Alaska R.R. Corp.*, 123 P.3d 1076, 1078 (Alaska 2005))).

[22] *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981).

[23] *Indus. Commercial Elec., Inc. v. McLees*, 101 P.3d 593, 601 (Alaska 2004) ("Whether reliance is justified in a given case seems to us more likely to turn on the course of dealings between the parties before and during the dispute.").

during the dispute" adequately supports Sanders's conclusion that Holly's decision to settle her claims was not procured through fraud.[24]

The record thus supports Sanders's determination that the parties had settled their claims and that Holly must comply with the Proposal. The superior court did not err when it confirmed Sanders's arbitration decision.[25]

B. The Superior Court Did Not Err By Refusing To Consider Holly's Petition Regarding Trustee Compensation And Attorney's Fees.

Holly argues that the superior court should have considered her petition under AS 13.36.055 for review of Robert's compensation and attorney's fees before awarding him enhanced attorney's fees. Robert responds that the court's earlier entry of final judgment precluded Holly's petition for a review.

We conclude that the superior court did not err by refusing to consider Holly's petition. By the time Holly filed her petition, the superior court had already issued a final judgment "[c]onfirming and enforcing" Sanders's arbitration award, which in turn had confirmed and enforced the parties' settlement agreement, the Proposal.[26] The Proposal had "settle[d] . . . all claims of all parties," including the claims raised in the complaint. Thus, as the superior court explained in rejecting Holly's petition, "[t]his case [had] ended." Although the superior court may have had authority to consider

---

[24] *Id.*

[25] Further, because the Proposal settled "all claims of all parties," no claims remained to be decided at trial and there was no need for additional discovery. We thus reject Holly's argument that the superior court erred in denying her motion to continue the trial.

[26] *See Richard v. Boggs*, 162 P.3d 629, 633 (Alaska 2007) ("A 'final' judgment is one that disposes of the entire case and ends the litigation on the merits." (quoting *Mattfield v. Mattfield*, 133 P.3d 667, 673 (Alaska 2006))).

Holly's petition in the present proceeding,[27] Holly does not explain why it was an abuse of discretion for the court to instead require that she bring her petition "in a separate proceeding."[28]

C. The Superior Court Did Not Abuse Its Discretion By Awarding Enhanced Attorney's Fees For The Post-Mediation Litigation.

Holly argues that the superior court erred by awarding Robert enhanced attorney's fees under Rule 82. She contends that Robert was not the "prevailing party" in the suit and was thus not entitled to recover a percentage of reasonable attorney's fees. In the alternative, she argues that the court erred by characterizing her litigation conduct as "vexatious."

Rule 82 includes a schedule of default fee awards to be granted to the "prevailing party" in a civil suit.[29] However, a court may deviate from the default schedule upon consideration of factors outlined in subsection (b)(3), including whether either party engaged in "vexatious or bad faith conduct" during litigation.[30] "[I]n general, a trial court has broad discretion to award Rule 82 attorney's fees in amounts exceeding those prescribed by the schedule of the rule, so long as the court specifies in

---

27 *See Marshall v. First Nat'l Bank Alaska*, 97 P.3d 830, 836 (Alaska 2004) (approving, in dictum, beneficiary's filing of AS 13.36.055 petition for review following judgment on beneficiary's petition for substitution of trustee, explaining that this "was far more efficient than commencing a new proceeding"). We do not decide whether the reasoning in *Marshall* — a probate matter — would apply in the present case.

28 The superior court left open the question whether the present case would have "res judicata effect" on any subsequent litigation involving AS 13.36.055. We likewise decline to address the question as it is not ripe for review.

29 *See* Alaska R. Civ. P. 82(b).

30 Alaska R. Civ. P. 82(b)(3)(G).

the record its reasons for departing from the schedule."[31] "We review awards of attorney's fees for abuse of discretion and will reverse 'if the award is arbitrary, capricious, manifestly unreasonable, or improperly motivated.' "[32] "The determination of which party is the prevailing party is . . . subject to the trial court's discretion and is reviewable only for abuse of discretion."[33]

The prevailing party in a civil suit is the party who "prevails on the main issues."[34] Here, as the superior court noted, the parties' litigation can be divided into two phases: the first "preceded the expected execution of a settlement agreement and dismissal of the litigation," while the second "followed [Holly's] refusal to abide by the mediation agreement." The court based its award of enhanced attorney's fees on the costs incurred during the second, post-mediation phase. Holly argues that she should be "deemed the prevailing party" in the post-mediation litigation because she received "significant information . . . concerning Robert's actions and expenditures as Trustee" over the course of the proceedings.[35] However, Holly's suggestion that she "achieve[d] the goals of [her] litigation" is unconvincing.[36] Holly first unsuccessfully attempted to dispute the finality of the parties' settlement. She then sought to proceed to trial, at

---

[31] *Kollander v. Kollander*, 400 P.3d 91, 95 (Alaska 2017) (quoting *Kollander v. Kollander*, 322 P.3d 897, 907 (Alaska 2014)).

[32] *Id.* (quoting *Roderer v. Dash*, 233 P.3d 1101, 1106 (Alaska 2010)).

[33] *Fink v. Municipality of Anchorage*, 379 P.3d 183, 188 (Alaska 2016).

[34] *Kollander*, 400 P.3d at 97 (quoting *Alaska Constr. & Eng'g, Inc. v. Balzer Pac. Equip. Co.*, 130 P.3d 932, 935-36 (Alaska 2006)).

[35] *See DeSalvo v. Bryant*, 42 P.3d 525, 530 (Alaska 2002) ("Even without formal judicial relief, many plaintiffs achieve the goals of their litigation.").

[36] *Id.*

which point the superior court enforced Sanders's arbitration decision and ended the litigation. Robert prevailed at every stage of post-mediation litigation; accordingly, the superior court did not abuse its discretion in concluding that he was the prevailing party.

The superior court based its decision to enhance the attorney's fees award largely on one factor: the vexatious nature of Holly's post-mediation litigation. After signing the Proposal, Holly argued that it did not constitute a binding settlement agreement — a claim "soundly rejected" by Sanders. The superior court noted that Sanders had overseen the parties' mediation and was thus well-situated to "gauge [Holly's] understanding of the various counterproposals and participation in the discussions that led to the agreement." After Sanders issued his decision, Holly "ignored the result that she did not like" and attempted to "restart the trial process." While Holly contends that "the record evidences that [she] litigated reasonably and in good faith," she neither cites evidence to support this contention nor disputes the evidence the superior court relied upon in arriving at its decision to enhance attorney's fees. Because the record adequately supports the superior court's rationale, we conclude that the decision to enhance attorney's fees was not an abuse of discretion.[37]

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the superior court.

---

[37] Holly also argues that Rule 82 is inapplicable to suits in which a beneficiary seeks construction and enforcement of a trust document. We have not previously articulated such a rule, and the authorities Holly cites do not support this proposition. *See, e.g., Barber v. Barber*, 915 P.2d 1204, 1209-10 (Alaska 1996) (holding that it was error to award attorney's fees to trustee where "trustee was [not] sued for breach of fiduciary duty" but was instead "a neutral party, seeking to establish in advance that a particular course of action was . . . in the best interests of all the beneficiaries"). We thus decline to address Holly's argument.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

HOLLY SHELDON LEE,

Plaintiff,

vs.

BIRCH HORTON BITTNER, INC., an Alaska Professional Corporation, DAVID KARL GROSS and MARA E. MICHALETZ,

Defendants.

Filed in the Trial Courts
State of Alaska Third Judicial District
At Palmer
MAR 25 2020
Clerk of the Trial Courts
By _____ Deputy

Case No. 3PA-20-1219CI

DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT #1

Defendants, Birch Horton Bittner, Inc., David Gross and Mara Michaletz, by and through counsel Cashion Gilmore, LLC, and pursuant to Alaska Rule of Civil Procedure 56, seek summary judgment against Plaintiff. This motion is supported by the attached memorandum of law.

CASHION GILMORE LLC
Attorneys for Defendants

DATE 3-20-20

Chester D. Gilmore
Alaska Bar No. 0405015

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was faxed/mailed/hand-delivered/emailed on the 23rd day of March, 2020 to:

Holly Sheldon Lee
P.O. Box 1
Talkeetna, AK 99676

CASHION GILMORE, LLC

By: _____
Jennifer Witaschek

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

HOLLY SHELDON LEE,

Plaintiff,

vs.

BIRCH HORTON BITTNER, INC., an Alaska Professional Corporation, DAVID KARL GROSS and MARA E. MICHALETZ,

Defendants.

Case No. 3PA-20-1219CI

MEMORANDUM IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT #2

I. INTRODUCTION

In this case, Holly Sheldon Lee ("Lee") voluntarily and knowingly entered into a settlement agreement at a mediation before retired Superior Court Judge Eric Sanders ("Judge Sanders"). About a week later, Lee began having second thoughts about whether she wanted to settle. When her attorneys, from the law firm of Birch Horton Bittner & Cherot ("BHBC"), explained that the settlement was final, Lee hired a new lawyer to try to undo the settlement, and still another lawyer to appeal the trial court's finding that the case had settled. Lee has now filed a legal malpractice complaint against BHBC on the basis that she did not want to settle, despite signing the mediator's proposal, which spelled out the terms of the settlement.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

Lee's legal malpractice claim is defective and should be dismissed for the following three reasons. First, Lee's lawsuit was filed over a year after the statute of limitations had run (see First Motion for Summary Judgment). Second, the allegations in the complaint alleging that BHBC failed to explain the terms of the settlement agreement cannot, as a matter of law, state a viable claim for legal malpractice because the language in the mediator's proposal was clear and unambiguous. Third and finally, the allegations in the complaint suggesting that Lee signed the mediator's proposal under duress cannot, as a matter of law, state a valid claim for legal malpractice because Lee cannot demonstrate that she was actually under duress. For these reasons, Lee's complaint must be dismissed.

II. FACTUAL AND PROCEDURAL BACKGROUND

Lee initially hired BHBC to act as an advocate on her behalf as a beneficiary to her mother's Trust. Eventually, BHBC filed a lawsuit against Robert Sheldon ("Sheldon"), who was Lee's brother and the Trustee of the Trust. The lawsuit sought clarification on the scope of the Trustee's powers. Most of the issues in the lawsuit were resolved when the court denied Lee's motion for summary judgment and granted Sheldon's cross-motion for summary judgment in an order dated November 2, 2015.[1] This precipitated the parties desire to hold a mediation in an effort to resolve the remaining issues.

[1] *See* Exhibit 1.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

The mediation took place on December 1, 2015 before Judge Sanders. During the course of the day, BHBC repeatedly discussed with Lee the settlement offers that were being exchanged and the progress that was being made.[2] BHBC answered all of Lee's questions to her apparent satisfaction.[3] Up to that point, Lee has been very active in the litigation and was fully aware of the issues being discussed.[4] There was nothing unusual about the mediation.[5]

At the end of the day, Judge Sanders came into the room and explained that he was going to make a mediator's proposal. With a mediator's proposal, the mediator will set forth what he thinks a fair settlement should be. The mediator then asks both the plaintiff and the defendant separately whether they would agree to the terms proposed by the mediator. If either the defendant or the plaintiff decides not to accept the mediator's proposal, there is no settlement. Only if both sides agreed to the terms of the proposal would there be an enforceable settlement. Here, the mediator's proposal was a two-page document that provided that Lee would obtain a one-third non-voting share of the Mountain House, LLC;[6] Lee would have access to the Mountain House for her own personal use, as long as it did not interfere with paying guests; and Lee would obtain various personal property items from her

[2] See Exhibit 2.
[3] Id.
[4] Id.
[5] Id.
[6] The Mountain House is a cabin located on a glacier in Denali National Park. Adventurers would stay at the cabin. The cabin itself was owned by a limited liability company called "Mountain House, LLC." The Mountain House was by far the largest asset in the Trust.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

mother's Trust, above and beyond what she had already received.[7] The mediator's proposal also required Lee to pay the Mountain House, LLC, $25,000 to cover some of the attorney's fees incurred by the Trust during the litigation.[8]

The mediator's proposal was absolutely clear that if both parties accepted the proposal, the case would be over and there would be nothing left to resolve. The existence of a final and enforceable settlement was made clear in several sections of the mediator's proposal, including the following:

> The parties to [the] case entitled Sheldon Lee v. Sheldon, Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.
>
> The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today.[9]

The mediator's proposal also made clear that if there were any disputes related to the meaning, scope, or enforcement of the agreement, all such disputes would be resolved by the mediator, Judge Sanders, and not the trial court.[10]

After considering the matter, reading the document, and discussing it over with her lawyers and Judge Sanders, Lee agreed to the mediator's proposal.[11] Her agreement was finalized when she signed the mediator's proposal on the space

---

[7] See Exhibit 3.
[8] Id. at 1.
[9] Id.
[10] Id. at 2.
[11] See Exhibit 2.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

provided for on the second page and initialed each page.[12] David Gross, one of Lee's lawyers who attended the mediation, also signed the agreement, which made clear that Lee had the ability to discuss the mediator's proposal before it was signed.[13] As it turned out, Sheldon also agreed to the mediator's proposal, which meant that there was a binding and enforceable settlement.

On her way home from the mediation, Lee sent a text message to BHBC thanking them for their efforts.[14] Lee also said that she was "very sick to her stomach about [having] to pay [Sheldon] $25,000."[15] The next day, Lee sent another text message to BHBC, asking that Sheldon agree to take some of the personal property items she was awarded in the settlement, instead of the $25,000 cash payment.[16] This request made clear that she understood there was a binding and enforceable settlement agreement in place.

On December 12, 2015, BHBC sent Lee a copy of the "official" settlement agreement. In response, she stated, "I want to think about it and I am not ready to sign yet."[17] On December 18, 2015, Lee sent an email to BHBC indicating that Lee was thinking about trying to avoid the settlement agreement.

> [I am] unsettled with the mediator's proposal and have determined that obtaining a second opinion from a law firm that we can trust would be beneficial to us, as we are unsure of your recommended course of action.

---

[12] See Exhibit 3 at 2.
[13] See Exhibits *2 and 3.*
[14] See Exhibit 4.
[15] Id.
[16] Id.
[17] See Exhibit 5.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

> We are considering hiring outside counsel to conduct a comprehensive review of our file to determine if there are any legal avenues we have not yet explored. Our objective is to ensure that our case is being handled as prudently and efficiently as possible.[18]

Soon thereafter, Lee hired the services of Chris Brecht ("Brecht") to try to undo the settlement. On December 30, 2015, BHBC sent Lee an email memorializing a conversation that took place the day before between Lee, Brecht, and BHBC.[19] Part of the email makes clear that BHBC thought there was an enforceable contract in place and that trying to argue duress was not going to work, considering that Lee had signed the mediator's proposal with her own free will.

> [In our call] there was a suggestion that the settlement was made under duress. What this means to me is that you were forced to enter into a settlement. Duress can come in a variety of forms such as physical duress or economic duress. The classic "law school example" is a person signing a contract with a gun to their head. If I recall correctly, a defense based on duress requires a showing by clear and convincing evidence that a party had no reasonable alternative to signing the agreement. While the day was an emotional one, as many mediations are, I do not believe you signed the mediator's proposal under duress. In fact, I remember a few times where [Judge] Sanders told you that you could walk away.[20]

This email also discussed Lee's new litigation strategy aimed at trying to break the settlement agreement that was achieved at the mediation, a strategy that BHBC was not in favor of.

> Holly, before we head down this road, I would be remiss if I did not tell you that, in my opinion, we have a valid and enforceable settlement. At the end of the mediation, Sanders came into the room and explained

---

[18] See Exhibit 6; (Emphasis added).
[19] See Exhibit 7; (Emphasis added).
[20] Id.; See *also* Exhibit 2.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

> that you had two options, you could accept the settlement (and have it over with) or you could reject the offer (and fight on). Because it was a mediator's proposal, [Judge] Sanders made clear that it was a "take it or leave it offer," and that you were free to walk away. In my estimation, [Judge] Sanders did not pressure you one way or the other. In fact, he suggested that rejecting the offer was an acceptable approach, in part, because he did not think [Sheldon] would take the deal. You thought it over and accepted the deal, thereafter signing the written proposal. I signed as well based on your decision to accept the deal.[21]

Lee did not respond to this email, nor did she dispute that it was an accurate memorialization of the conversation the day before, but instead, Lee started communicating more and more through her new lawyer, Brecht.

In the days that followed, Brecht tried to convince Judge Sanders to undo the settlement, to no avail.[22] Brecht then tried to convince the trial court to undo the settlement, which it also would not do.[23] He then filed a motion for reconsideration, which the court denied.[24] The trial court then found that Lee's post-mediation conduct in trying to avoid the settlement was vexatious and done in bad faith, awarding Sheldon enhanced attorney's fees.[25] Lee then found another lawyer to appeal the trial court's orders. The appeal was denied and the court concluded that

---

[21] Id.; (Emphasis added).
[22] See Exhibit 8.
[23] See Exhibit 9.
[24] See Exhibit 10.
[25] See Exhibit 11. Due to the current COVID-19 outbreak, the defendants have not obtained a copy of this order in time for the filing of the motion. It will be filed as a supplemental attachment when obtained. In any event, the plaintiff presumably has a copy of this document, which is publicly available.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

there was a valid and enforceable contract.[26] Now, Lee has filed this malpractice action against BHBC and the two lawyers at BHBC who assisted Lee with her case.

III. DISCUSSION

A motion for summary judgment, such as this, will be granted if a defendant can show that he or she is entitled to judgment, and where there are no disputed issues of material fact.[27] Once a defendant makes out a *prima facie* case for dismissal, the burden then switches to the plaintiff to prove that there is a material fact in dispute that would preclude entry of judgment.[28] In reviewing a motion for summary judgment, all reasonable inferences must be made in favor of the non-moving party.[29] However, the evidence presented by the non-moving party must not only be admissible, but conclusory statements are not sufficient to defeat summary judgment.[30]

The first basis for summary judgment is that Lee failed to file her complaint in the time allotted, which is dealt with in BHBC's First Motion for Summary Judgment. As demonstrated below, there are two additional grounds justifying dismissal. First, because the language in the mediator's proposal was clear and unambiguous, Lee

---

[26] See Exhibit 12.
[27] Christensen v. Alaska Sales & Service, Inc., 335 P.3d 514, 516-517 (Alaska 2014).
[28] Id. at 517.
[29] Shade v. Co. & Anglo Alaska Service Corp., 901 P.2d 434, 437 (Alaska 1995).
[30] Radcliff v. Surety National Bank, 670 P.2d 1139, 1142 n. 6 (Alaska 1983).

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

cannot maintain a legal malpractice claim on the basis that BHBC failed to explain to her what the agreement provided (Section A below). Second, Lee will be unable to demonstrate, as a matter of law, that she was under duress when she signed the mediator's proposal (See Section B below). For these reasons, Lee's entire complaint should be dismissed.

A. The clear language of the mediator's proposal makes Lee's legal malpractice claim untenable.

In her complaint, Lee claims that BHBC engaged in malpractice because it "failed to make sure [Lee] understood the legal consequences" of signing the mediator's proposal; it failed to explain what Lee would be giving up if she signed; and it failed to make clear to Lee that the mediator's proposal spelled out all of the items that she would obtain from her mother's Trust.[31] Put another way, Lee's malpractice claim is based on the notion that BHBC should have explained, line-by-line, the contents of the mediator's proposal. It would appear, that Lee wanted BHBC to read the mediator's proposal to her out loud and explain to her the meaning of the words. However, such an expectation is unreasonable.

A lawyer is obligated to use the care and skill expected of a reasonable lawyer in the same or similar circumstances.[32] This would include making recommendations as to the settlement value of a case, maneuvering a case though the court system, and explaining possible outcomes. A lawyer's role is to assist the

[31] See Complaint at Paragraph 7.
[32] Shaw v. State, Department of Administration, 816 P.2d 1358, 1361 n.5 (Alaska 1991).

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

client with legal-related issues that may be foreign to the average person. A lawyer is not, however, required to assist a client with items that are readily understood by an average person. For example, if a lawyer is representing a client who was arrested for driving under the influence, the client should understand that they are not permitted to drink and drive again. If the client gets charged a second time for driving under the influence, the client cannot sue his lawyer for not telling him that he was not allowed to drink and drive. Some things the client is responsible for understanding on their own, like not driving while intoxicated.

A lawyer must assess each client's ability to read and comprehend English independently, but in absence of any indication to the contrary, BHBC was reasonable to assume that its client was capable of understanding a document which used plain terms of the English language. (Indeed, this Court may all but take judicial notice of that, given Ms. Lee's signature to her Complaint.) In this situation, BHBC acted reasonably in assuming that Holly could read and understand the mediator's proposal. BHBC is also entitled to rely on the notion that when a client signs a document, they understand the contents of the document. It is never a defense to a breach of contract claim, that the contents of the document were not read. Put another way, a party cannot avoid a contract by simply stating that they did not read the contract before it was signed. A signature is significant, in that it tells everyone, including one's lawyer, that they understood and agreed to the document.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

In this instance, Lee read and signed the document. There is no dispute about that. As such, BHBC is entitled to assume that she understood the contents of the document and that she, by signing, agreed to the terms set forth therein. With this in mind, Lee's legal malpractice claim must be dismissed, at least in terms of the assertion that BHBC failed to explain to her what the mediator's proposal provided for.

This exact issue was discussed in Muhammad v. Strassburger McKenna, Messer, Shilobod and Gutnick.[33] In that case, a law firm represented parents in a medical negligence claim involving the death of their child. A settlement offer was made, which the parents accepted.[34] Some point thereafter, the parents called the law firm and expressed dissatisfaction with the amount of the settlement. The law firm explained there was nothing they could do to undo the settlement now that it was signed and approved by the court. Thereafter, the parents filed a legal malpractice claim against the law firm on the basis that the settlement amount was not enough. The law firm filed a motion seeking a dismissal. In granting a dismissal, the court held that "an action should not lie against an attorney for malpractice. . . when the client has agreed to the settlement.[35] The court based its decision, in part, on the "chaos" that would follow if lawyers were to blame when a client wants more.

[33] 587 A.2d 1346 (Penn. 1991).
[34] Id. at 544-545.
[35] Id. at 546.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

> The primary reason we decide today to disallow negligent breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients is that to allow them will create chaos in our civil litigation system.[36]

The court also noted that if clients were allowed to sue their lawyers simply because they wanted more money after the settlement was agreed to, lawyers would be reluctant to settle cases, which is contrary to the public policy in favor of settlement.[37] The court, therefore, ruled that where a client agrees to a settlement, they cannot blame the lawyer later if they decide the settlement was not enough.

This same issue was discussed in Hudson v. Windholz.[38] In that case, a lawyer represented a client regarding a harassment claim.[39] The lawyer was able to secure a settlement offer, which was communicated to the client. The client accepted the offer, but thereafter, filed a legal malpractice claim because the client wanted more from the settlement.[40] The court, however, dismissed the client's case because it found that where the client signed the settlement agreement, they cannot then later claim that they did not understand what was in the settlement agreement. In reaching this conclusion, the court stated as follows:

> There are few rules of law more fundamental than that which requires a party to read what he signs and to be bound thereby. This rule has particular force when the party is well educated and laboring under no disabilities. To hold otherwise is to create the potential for malpractice litigation in every contract dispute.[41]

---

[36] Id. at 548.
[37] Id. at 549.
[38] 416 S.E.2d 120 (Ga.App. 1992).
[39] Id. at 123.
[40] Id. at 123-124.
[41] Id. at 124. (Citations omitted).

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

The court concluded by saying that if a settlement agreement is "plan, obvious, and requires no legal explanation" there can be no legal malpractice claim on the basis that the settlement was unintended.

When considering the holdings in Muhammed and Hudson, it makes sense that a client should not be able to blame his or her lawyer for a settlement that they read, signed, and agreed to. In this case, Lee read, signed, and agreed to the mediator's proposal. She should not now be entitled to blame her lawyers simply because she wanted more after the fact.

In seeking such a dismissal, BHBC is not suggesting that a lawyer is not required to explain certain things to their clients or to describe to their clients the legal implications of certain decisions. It is clearly the responsibility of a lawyer to advise their clients as to legal consequences and outcomes. But here, the mediator's proposal did not represent a sophisticated or complex instrument such that it required further legal explanation; Indeed, language of the proposal itself serves as *ipso facto* evidence that it was drafted so that each party – Robert Sheldon and Holly Sheldon Lee – would be able to comprehend its terms. BHBC believes that reading the mediator's proposal would have answered all of Lee's questions. It clearly states that by signing the mediator's proposal the case would be over; it specified what items of personal property Lee would get which would be her "full and complete entitlement as a Trust beneficiary;" and it specified the scope of her

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

ownership interest in the Mountain House, LLC.[42] Because of the detail and clarity of the mediator's proposal, and because it uses common easily-understood language, BHBC was not responsible for reiterating what was spelled out therein. With this, as a matter of law, BHBC did not engage in malpractice for not explaining to Lee what the mediator's proposal said.[43]

B. Sheldon cannot base her legal malpractice claim on the assertion that she signed the mediator's proposal under duress.

Part of Lee's legal malpractice complaint appears to be the assertion that BHBC sat by and allowed Judge Sanders to coerce her into signing the mediator's proposal. Specifically, her complaint provides as follows:

> During the mediation, [BHBC] allowed [Lee] to be pressured, bullied and coerced over a period of many hours into signing a document that was labeled as a "Mediator's Proposal.". . [BHBC] failed to protect [Lee] from the pressure, bullying and coercion that was applied to her during the nine hours of that mediation proceeding.[44]

The only way such a claim can succeed is if Lee demonstrates that she did, in fact, sign the agreement under duress. Because Lee cannot, as a matter of law, make such a showing, her legal malpractice claim should be dismissed, at least in terms of the assertion that she was forced into signing the mediator's proposal.

---

[42] See Exhibit 3 (mediator's proposal).

[43] In dismissing the portion of Lee's complaint alleging that BHBC failed to explain the mediator's proposal, the court need only rely on the fact that Lee signed the mediator's proposal and that, on its face, the mediator's proposal was clear and unambiguous. No other factual basis is needed. The facts above discussing what transpired during the mediation were provided for clarity and context and not necessary as proof that Lee's complaint should be dismissed.

[44] See Complaint, at Paragraph 7.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

There are two basic types of duress. First, there is the most common type of duress, which is where a person threatens bodily harm in order to force a person to sign an agreement, or where a person actually takes the hand of another and physically forces them to sign a document,[45] which clearly did not happen here. The second type of duress is call "economic duress." To prove a claim of economic duress, a plaintiff must show by clear and convincing evidence that (1) the plaintiff involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) the circumstances were the result of coercive acts by the other party.[46]

While there would be a factual dispute with regard to the first element, as it is subjective, Lee did not allege, and will be unable to show, as a matter of law, and by clear and convincing evidence, that she had no other alternatives, but to sign the mediator's proposal. She also did not allege and cannot prove that Judge Sanders engaged in "coercive acts," as that term is defined.

As a starting point to the analysis, the second element needed to prove economic coercion requires Lee to make a showing that there were no other alternatives, but to sign the mediator's proposal. This element was explored by the Alaska Supreme Court in Totem Marine & Barge, Inc v. Alyeska Pipeline Service

---

[45] Totem Marine Tug & Barge, Inc v. Alyeska Pipeline Service Co., 584 P.2d 15, 21 (Alaska 1978); where the court held that "at early common law, a contract cold ne avoided on the grounds of duress only if a party could show that the agreement was entered into for fear of loss of life of limb." Citing 13 Williston on Contracts, §1601 (3rd Ed. Jaeger 1970).

[46] Helstrom v. North Slope Borough, 797 P.2d 1192, 1197 (Alaska 1990).

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

Co.[47] In that case, Alyeska was intentionally withholding a large payment knowing that Totem was on the verge of bankruptcy.[48] In other words, if Totem did not receive the payment from Alyeska right away, it would be required to file for bankruptcy because it did not have the funds to pay its bills. The court found that this was a sufficient showing to avoid summary judgement. In another case, the court found that a company's refusal to allow someone to get on a plane to leave Barrow in order to visit his sick daughter, could also be sufficient to show the lack of other alternatives.[49] However, the Alaska Supreme Court has been very clear that when there are options, such as the ability to pursue or continue a legal action, there cannot be economic duress.[50]

In this case, there is no evidence demonstrating that Lee did not have alternatives to signing the mediator's proposal. She certainly could have walked out of the mediation at any time. It would defy credulity for Lee to contend that she was trapped in the conference room where the mediation was taking place and that Judge Sanders was not letting her leave until she signed the agreement. Of course, no such allegation is made in Lee's complaint, because such an assertion would not only be false, but it would be ridiculous, especially considering the stellar reputation of Judge Sanders. In addition, she could have simply refused to sign the mediator's proposal and continued on with the case. One way or the other, Lee had alternatives

---

[47] 584 P.2d 15, 21 (Alaska 1978).
[48] Id. at 23-24.
[49] Helstrom at 1198.
[50] Northern Fabrication, Co. v. UNOCAL, 980 P.2d 958, 961 (Alaska 1999).

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

and she cannot present evidence to support the concept that no other options were available to her, other than signing the mediator's proposal.

The third element needed to prove economic duress, requires that a plaintiff show that there were "coercive acts," which has been defined as "wrongful acts or threats."[51] The term "wrongful acts" is generally understood to mean "criminal, tortious, or morally representable conduct."[52] There is also the requirement that there be a link between the wrongful conduct and the duress.[53] For example, the Alaska Supreme Court in Hawken Northwest, Inc. v. State, Department of Administration,[54] found that there mere fact the State took advantage of Hawken's poor financial condition in driving a hard bargain, did not mean that there was economic coercion because the State had no role in Hawken's economic distress. The same outcome was found in Zeilinger v. SOHIO Alaska Petroleum, Co., where the court held that the mere fact an employee found herself in a difficult financial condition when being asked to sign an employment release, does not mean that her employer is liable for economic duress.[55] Instead, there needs to be a clear showing that the defendant had a role in creating the economic duress.

Again, Lee's complaint is void of any explanation as to how she was suffering economic duress. To the extent that she contends that she was in a poor financial

---

[51] Totem at 22.
[52] Id.
[53] Zeilinger v. SOHIO Alaska Petroleum, Co., 823 P.2d 653, 658 (Alaska 1992).
[54] 76 P.3d 371 (Alaska 2003).
[55] Zeilinger at 658.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

condition, that would not be sufficient to show economic duress because Judge Sanders would have had no role in putting her in a difficult financial condition. To the extent that Lee tries to contend that Judge Sanders was hard on her and that Judge Sander's opinion that the settlement would be a good deal for her does not qualify as a "wrongful act." Therefore, as a matter of law, Lee cannot show that there were "coercive acts" causing her to sign the mediator's proposal.

When looking at Lee's complaint, the only thing she alleges is that "she was bullied and coerced," that she was at the mediation for nine hours, and that BHBC did not specifically tell her that she could get up and walk away.[56] These assertions, even if treated as true, come nowhere near proving that she had no other alternatives or that Judge Sanders engaged in conduct which forced Lee into signing the mediator's proposal. Therefore, the complaint must be dismissed, at least in terms of the assertion that she was forced into signing the agreement.

IV. CONCLUSION

Based on the reasons set forth above, BHBC asks the court to dismiss Lee's complaint in terms of the assertion that BHBC failed to explain to Lee the contents of the mediator's proposal, as she was fully capable of reading and understanding the agreement on her own. BHBC also requests that Lee's complaint be dismissed in terms of the assertion that she signed the mediator's proposal due to duress or coercion. With the dismissal of these two issues, no viable allegations remain. In

[56] See Answer at Paragraph 7.

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

other words, Lee's complaint is made up solely of these two assertions. Therefore, the entire complaint must be dismissed.

CASHION GILMORE LLC
Attorneys for Defendants

DATE March 25, 2020

s/*Chester Gilmore*
Chester D. Gilmore
Alaska Bar No. 0405015

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed on the 25th day of March, 2020 to:

Holly Sheldon Lee
P.O. Box 1
Talkeetna, AK 99676

CASHION GILMORE, LLC

By: *s/Jennifer Witaschek*
Jennifer Witaschek

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLLY SHELDON LEE & SHELDON AIR SERVICE Plaintiffs, v. ROBERT DONALD SHELDON, Individually and as the Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, Defendant.	Case No. 3AN-15-05117 CI

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

A beneficiary of a trust brought suit against the trustee for failing to faithfully administer the trust. The title of the pertinent clause in the trust and the clause itself are in conflict. The plaintiff moved for summary judgment asking the court to order the trustee to distribute ownership shares in a limited liability company to her, and the defendant cross-moved for summary judgment, claiming that the plaintiffs' suit triggers the trust's no contest clause. The defendant provided extrinsic evidence regarding the meaning of the disputed clause. The plaintiff did not. Do disputed issues of material fact exist, or may the court grant summary judgment?

II. FACTS AND PROCEEDINGS

The parties to this case are children of the renowned bush pilot Donald Sheldon and Roberta Reeve Sheldon.[1] In 1966 Donald built a structure on an outcropping of rock in the Ruth Gorge near Denali called the Mountain House.[2] The structure is only accessible by air.[3] Guests pay a fee to stay at the Mountain House.[4] Donald died in 1975, leaving all of his assets, including the Mountain House, to his wife Roberta.[5] Before her death in 2014, Roberta created a trust that upon her death would assume control over all of her assets, including ownership of the Mountain House LLC, the limited liability company that owns the Mountain House.[6] The trust named Robert Sheldon trustee and named the children, Robert Sheldon, Kate Sheldon, and Holly Lee Sheldon beneficiaries.[7]

The relevant part of the trust sets out a four-step process for the distribution of Roberta's assets.[8] The first step allocated specific parcels of real property to the beneficiaries.[9] Three properties were distributed to Robert and Kate Sheldon as tenants-in-common.[10] A fourth parcel was distributed to Holly

---

[1] Reply in Supp. of Pls.' Mot. for Summ. J. and Opp'n to Cross-Mot. for Partial Summ. J. 2, Aug. 19, 2015.
[2] *Id.*
[3] *Id.* at 2-3.
[4] *Id.* at 2.
[5] Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Partial Summ J. 1, Aug. 3 2015.
[6] *Id.* at 2.
[7] *Id.* at 2. Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust Declaration § 7.5 [hereinafter Trust].
[8] *See* Trust § 7.6.
[9] *Id.* § 7.6(A).
[10] *Id.*

as sole owner.[11] The second provision titled "Items of Nominal Value" required the trustee to distribute personal effects of nominal value to family and friends and to liquidate or contribute to a charitable organization any remaining effects.[12]

The third provision titled "Election to Receive Personal Effects" allows any child of Roberta to elect to receive any "personal property asset" distributed to him or her and to have the value of that asset credited against his or her distributive share of the trust.[13] The provision also grants the trustee the power to decide which child will receive the asset if more than one elects the same asset.[14]

The fourth provision provides for the distribution of the "Residuary Estate."[15] The residuary estate includes any lapsed gifts as well as other "assets" not defined by the trust.[16] The trustee is directed to liquidate the residuary trust assets in "a reasonable time frame," but upon election of a specific asset, a beneficiary may purchase the asset from the trust.[17] Alternatively, with the trustee's approval, the beneficiary may apply the value of their portion of the trust to purchase the asset.[18] If any assets are left after the

---

[11] *Id.*
[12] *Id.* § 7.6(B).
[13] *Id.* § 7.6(C).
[14] *Id.*
[15] *Id.* § 7.6(D).
[16] *Id.*
[17] *Id.* §§ 7.6(D)-(1).
[18] *Id.* § 7.6(D)(1).

second election process, the trustee is to liquidate the remainder and distribute the value to the three beneficiaries: Holly, Robert, and Kate.[19]

Holly brought suit against Robert individually and as trustee of Roberta's trust for breach of contract, replevin, and breach of fiduciary duty owed to the beneficiaries of the trust.[20] Holly then moved for summary judgment on part of her breach of fiduciary duty claim, asking the court to interpret the trust to require Robert to distribute ownership shares in the Mountain House LLC equally among the trust's three beneficiaries.[21] Holly claims that Robert has breached his fiduciary duty by not distributing the Mountain House LLC as required by the trust, and instead retaining it in the trust and developing it for later sale.[22] Holly further contends that upon distribution of the Mountain House LLC she is to receive a one-third ownership share pursuant to the election process defined in the "Residuary Estate" provision.[23]

Robert brought a cross-motion for summary judgment, claiming that the Mountain House LLC is a "personal property asset" and should be distributed in accordance with the election process defined in the "Election to Receive Personal Effects" provision.[24] Importantly, that provision gives the trustee sole discretion to decide which child receives an elected asset.[25] Robert also claims that the trust specifically allows him to retain trust assets and develop them at

---

[19] *Id.* § 7.6(D)(2).
[20] Compl. ¶¶ 35-50 Feb. 18, 2015.
[21] Mem. in Supp. of Pls.' Mot. for Summ. J Jul. 1, 2015.
[22] *Id.* at 4.
[23] *Id.*
[24] Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Partial Summ. J. 6.
[25] *See* Trust § 7.6(C).

his discretion.[26] Lastly, he asks the court to find that Holly's lawsuit triggers the trust's *en terrorem* clause, barring her from inheriting anything from the trust.[27]

III. APPLICABLE LAW

An Alaskan court grants summary judgement where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law:

> [A] party seeking summary judgment has the initial burden of proving, through admissible evidence, that there are no [genuine] disputed issues of material fact and that the moving party is entitled to judgment as a matter of law. Once the moving party has made that showing, the burden shifts to the non-moving party to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists.[28]

When interpreting a trust document the court may examine "the language of the disputed provisions, the language of other provisions, relevant extrinsic evidence, and case law interpreting similar provisions."[29]

IV. DISCUSSION

A. Construction of Sections 7.6(C) and 7.6(D)

At the heart of this dispute is the construction of two sections of Roberta's trust: section 7.6(C), "Election to Receive Personal Effects;" and

---

[26] Def.'s Opp'n to Pls.' Mot. for Summ. J. and Cross-Mot. for Partial Summ. J. 7.
[27] *Id.* at 13.
[28] *Christensen v. Alaska Sales & Service, Inc.*, 335 P.3d 514, 517 (Alaska 2014) (internal quotes and citations omitted).
[29] *See St. Paul Church, Inc. v. Bd. Of Trs. of the Alaska*, 145 P.3d 541, fn 56 (Alaska 2006) (citing *Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc.*, 99 P.3d 553, 562 (Alaska 2004)).

section 7.6(D)(1), "Distribution of the Residuary Estate." Holly contends that the title of section 7.6(C) precludes its use as the mechanism to distribute the Mountain House LLC because it refers to "personal effects," and the Mountain House LLC, whatever it may be, is not a personal effect.[30] Holly did not submit any evidence of Roberta's intent with her motion for summary judgment.[31]

In response Robert claims that 7.6(C) should be governed by the text of 7.6(C), which refers to "personal property assets," and not the title.[32] In support Robert cites Alaska law defining a limited liability company as personal property.[33] He further claims that it was Roberta's intent to ensure that Holly could not jointly own anything with her siblings unless Robert approved.[34] In support of his claims of Roberta's intent, Robert submitted the affidavit of Frank Nosek, the attorney that prepared the trust for Roberta.

In his affidavit, Nosek affirmed that Roberta intended the Mountain House LLC to be treated as personal property pursuant to 7.6(C).[35] He further affirmed that the purpose of 7.6(C) was to allow Holly the possibility of joint ownership in the Mountain House LLC, or any other property, but with Robert's sole discretion.[36] Section 7.6(D), Nosek claimed, was intended for property that was not elected through 7.6(C).[37] It is section 7.6(D), Nosek and

---

[30] Mem. in Supp. of Pls.' Mot. for Summ. J. 4.
[31] *See id.*
[32] Def.'s Reply Regarding Cross-Mot. for Partial Summ J. 9, Sep. 15, 2015.
[33] *Id.* at 11. *See* AS 10.50.370.
[34] *Id.* at 8.
[35] Aff. of Francis J. Nosek in Supp. of Reply on Cross-Mot for Summ J.¶ 6, Sep. 15, 2015.
[36] *Id.* at ¶ 7.
[37] *Id.*

Roberta agreed, where Holly could have gained sole ownership of the Mountain House LLC if neither of her siblings had elected the asset pursuant to 7.6(C).[38]

Nosek's claim that Roberta did not want Holly to own anything jointly with her siblings except at Robert's discretion is corroborated by section 7.6(A). Section 7.6(A) distributed three properties to Kate and Robert to be owned in common and one property to Holly as sole owner.[39] The provision clearly excluded Holly from joint ownership with her siblings and indicates Roberta's aversion to yoking Holly and her siblings together through common ownership of her assets.

When deciding a motion for summary judgment the court must determine if the moving party has met their burden to show that there are no genuine material facts at issue and that the non-moving party has not pointed to any admissible evidence that would reasonably dispute the movant's evidence.[40] Here Robert has met this burden. Robert has provided extrinsic evidence of Roberta's intent that clarifies an ambiguity in the trust.[41] Holly has not pointed to any evidence that would reasonably dispute the claims made by Mr. Nosek.[42] Without such a showing, Holly cannot maintain her claim that the Mountain House LLC should be distributed according to 7.6(D)(1), allowing her to elect to be a joint owner of the company. Rather, the Mountain House LLC is

---

[38] *Id.* at ¶ 8.
[39] Trust § 7.6(A).
[40] *Christensen*, 335 P.3d at 517.
[41] *See* Aff. of Francis J. Nosek in Supp. of Reply on Cross-Mot. for Summ. J.
[42] *See* Mem. in Supp. of Pls.' Mot. for Summ. J.; Reply in Supp. of Pls.' Mot. for Summ. J. and Opp'n to Cross-Mot. for Partial Summ. J.

to be distributed in accordance with 7.6(C) because all three siblings have elected to own the asset. Importantly, while 7.6(C) refers to the authority of the trustee to determine which *child* will receive the asset if more than one child elects it, the trust in section 14.3 states that "[t]he singular number shall include the plural . . . ."[43] Read together with 7.6(C), the trust permits the trustee to grant ownership of an asset to more than one child at his discretion.

In addition, the trust is more coherent if Robert's interpretation is given effect. The first three sections of 7.6 are constructed to distribute assets to the beneficiaries of the trust. The first section distributes specific parcels of real property to the beneficiaries.[44] The second section distributes nominal property to the beneficiaries, and the third section distributes personal property to the beneficiaries.[45] The fourth section, section 7.6(D) however, is constructed to liquidate assets and distribute the proceeds of the sale of those assets to the beneficiaries.[46] For instance, 7.6(D) states "[t]he residuary estate assets (including any lapsed gifts from above) shall be liquidated into cash or its equivalent by my Trustee within a reasonable time frame."[47] Subsection (1) of 7.6(D) allows for a distributee to elect to *purchase* a residuary asset from the trust, and only at the trustee's *discretion* may the distributee credit the value of the asset against the cash to be received from the trust.[48]

---

[43] *See* Trust § 7.6(c). *Id.* § 14.3.
[44] Trust § 7.6(A).
[45] *Id.* §§ 7.6(B)-(C).
[46] *Id.* § 7.6(D).
[47] *Id.*
[48] *Id.* § 7.6(D)(1) (emphasis added).

The structure of section (D) indicates that its primary purpose is to reduce assets to cash that will then be distributed among the beneficiaries. Section (D) requires the trustee to *liquidate* the remaining assets, and subsection (1) gives distributees the right to *purchase* those assets, furthering the goal of section (D) to liquidate the remaining assets in the trust and distribute cash proceeds to the beneficiaries.[49] The trust makes clear that payment for the asset by a credit to the beneficiary's share of the trust is discretionary—not a right.[50] While distributees are given the first chance to purchase assets from the trust, the purpose of section (D) is to reduce assets to cash, not to distribute ownership of them.[51] Section (C), contrarily, specifically provides for transferring ownership of the asset from the trust to the beneficiary by crediting the value of the asset against the beneficiary's eventual share of the trust—a more direct process than purchasing the asset from the trust.[52]

The court therefore finds that section 7.6(C) governs the distribution of the Mountain House LLC because all three siblings have elected to own the Mountain House LLC. Pursuant to sections 7.6(C) and 14.3, Robert is permitted, as trustee, to determine which child or children will receive ownership in the company.

---

[49] *Id.* §§ 7.6(D)-(1).
[50] *Id.* § 7.6(D)(1).
[51] *See id.*
[52] *See id.* § 7.6(C).

B. Distribution of the Mountain House LLC

Holly next claims that the trust requires Robert to distribute the Mountain House LLC immediately.[53] In response Robert contends that the trust allows him to expand and develop the Mountain House structure to improve its value for eventual distribution.[54]

There are no facts at issue in this claim. The court needs only to look to the trust document to resolve this issue. Upon reviewing the trust document the court finds that Robert is not required to distribute the Mountain House LLC immediately.

Schedule B of the trust defines the trustee's powers.[55] It states that the trustee's power is commensurate with the power an individual exerts over his or her own property.[56] It further states that the trustee has the power to 1) "retain for any period of time cash or other productive property;" 2) "expend money or other property in order to . . . manage, conserve, or administer any property . . . in order to improve . . . equip, develop, furnish . . . alter, extend, or add to any such property;" and 3) "do all things . . . desirable to conduct the affairs of any corporation; to act as officer, director, attorney, or employee."[57]

The parties do not dispute that Robert has not distributed the Mountain House LLC, nor do they dispute that he has initiated a development

---

[53] Mem. in Supp. of Pls.' Mot. for Summ. J. 4. Although not specifically stated, Holly likely only wanted to force the distribution of the company if she stood to receive an ownership stake and not just the equivalent value.
[54] Def.'s Opp'n to Pls.' Mot. for Summ J. and Cross-Mot. for Partial Summ. J. 13.
[55] *See* Trust § 8; *id.* Schedule B.
[56] *Id.* Schedule B.
[57] *Id.* §§ 2, 8, 15.

plan for the Mountain House structure in lieu of distributing the company.[58] The court finds that there is nothing in the trust that requires Robert to distribute the Mountain House LLC immediately.

C. The *En Terrorem* Clause

Section 10 of Roberta's trust includes an *en terrorem* or "no contest" clause. The clause revokes a beneficiary's interest in the trust if that beneficiary seeks to void or set aside the trust or any provision of the trust.[59] In his cross-motion for summary judgment, Robert claims that Holly has violated the trust's *en terrorem* clause by filing this lawsuit, and is therefore foreclosed from receiving any value from the trust.[60] Holly, in response, claims that she is only trying to enforce the trust—not void it.[61]

The State of Alaska considers *en terrorem* clauses enforceable[62], but there is no Alaskan case law that addresses the proper construction and scope of an *en terrorem* clause. The court therefore looks to other jurisdictions for guidance.

Violations of an *en terrorem* clause carry severe penalties for the offending beneficiary. Courts therefore construe these clauses strictly.[63] It appears to be a nearly universal maxim that *en terrorem* clauses do not apply

---

[58] *See* Mem. in Supp. of Pls.' Mot. for Summ. J.; Def.'s Opp'n to Pls.' Mot. for Summ J. and Cross-Mot. for Partial Summ. J.
[59] Trust § 10.
[60] Def.'s Opp'n to Pls.' Mot. for Summ J. and Cross-Mot. for Partial Summ. J. 13.
[61] Reply in Supp. of Pls.' Mot. for Summ J. and Opp'n to Cross-Mot. for Partial Summ J. 15.
[62] AS 13.36.330.
[63] *See Estate of Strader*, 132 Cal. Rptr. 2d 649, 653 (Cal Ct. App. 2d 2003); *Girard Trust Co. v. Schmitz*, 20 A.2d 21, 27 (N.J. Ch. 1941).

to beneficiaries seeking to obtain an interpretation of the document or enforce his or her rights under that document, unless the document specifically states that the clause will apply to such suits.[64] When a beneficiary of a will or trust seeks only to enforce his or her rights under the instrument or secure an interpretation of the instrument, the intent of the grantor is not frustrated but rather accurately discerned or effected.[65]

Section 10 of the trust document states in pertinent part:

> If any . . . beneficiary . . . contests the validity of this Trust or any of its provisions . . . or seeks otherwise to nullify, or set aside this trust . . . or any of [its] provisions, or shall file a claim of any nature against this Trust . . ., then that person shall have no right to take an interest under this Trust . . ., and such contestant shall not benefit in any way under this Trust . . . and shall not receive any distribution whatsoever.[66]

Here Holly has advanced a reasonable interpretation of the trust in light of an ambiguity. Section 7.6(C) is titled "Election to Receive *Personal Effects*" while the text of the clause refers to "*personal property assets.*"[67] Holly therefore reasonably, albeit ultimately incorrectly, asserts that the Mountain House LLC could not be distributed pursuant to 7.6(C) because it is not a personal effect. Assuming *arguendo* Holly's position, the only other provision in the trust that could govern the distribution of the Mountain House LLC is section 7.6(D)(1). Fairly read, 7.6(D)(1) allows any child or multiple children to

---

[64] *See Estate of Strader*, 132 Cal. Rptr. 2d 653-54; *Marx v.* Rice, 60 A.2d 61, 62 (N.J. Ch. 1948); *Wells v. Menn*, 28 So. 2d 881, 885 (Fla. 1946); Griffin *v. Sturges*, 40 A.2d 758, 760 (Conn. 1944).
[65] *See Estate of Stader*, 132 Cal. Rptr. 2d 655.
[66] Trust § 10.
[67] Trust § 7.6(C) (emphasis added).

elect to purchase any asset that has not already been distributed. Accordingly, Holly wishes to purchase a one-third share of the Mountain House LLC and have it distributed to her.[68] While the court ultimately finds her interpretation unsupported, Holly has not sought to "void," "nullify," or "set aside" the trust; she simply asserts a reasonable interpretation of the trust document in an effort to enforce her rights thereunder.[69] It would be manifestly unjust to require Holly to forfeit her right to inherit from the trust for seeking a judicial forum to clarify and enforce the trust.

V. ORDER

The court DENIES Holly's motion for partial summary judgment with regard to her interpretation of the trust, and GRANTS Robert's cross-motion for partial summary judgment with regard to his interpretation of the trust, and DENIES Robert's cross-motion for partial summary judgment on his counterclaim that Holly's lawsuit violates the *en terrorem* clause.

DATED at Anchorage, Alaska this 2nd day of November, 2015.

Pamela Scott Washington
Superior Court Judge

I certify that on 11-2-15
a copy of the above was mailed
to each of the following at their
addresses of record:
David Karl Gross
Kevin G. Clarkson
Mary Brault - Judicial Assistant

[68] *See* Mem. in Supp. of Pls.' Mot. for Summ. J.
[69] *See Morrison v. Reed*, 70 A.2d 799, 803 (N.J. Super. Ct. Ch. Div. 1950).

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

HOLLY SHELDON LEE, Plaintiff, v. BIRCH HORTON BITTNER, INC., DAVID KARL GROSS and MARA E. MICHALETZ, Defendants.	Case No. 3PA-20-01219 CI

AFFIDAVIT OF DAVID KARL GROSS

I, David Karl Gross, having first been duly sworn upon my oath, hereby state and allege as follows:

(1) I am the managing shareholder of the law firm of Birch Horton Bittner & Cherot ("BHBC"). I have been with BHBC for almost 20 years and have been practicing law for over 23 years.

(2) I represented Holly Sheldon Lee ("Lee") in relation to a dispute she was having with the Trustee of her mother's Trust, who happened to be her brother. Because we were unable to work out the dispute informally, I filed a lawsuit against the Trustee on Lee's behalf.

(3) After the court denied Lee's motion for summary judgment and granted the Trustee's cross-motion for summary judgment, the parties agreed to a mediation using retired Superior Court Judge Eric Sanders ("Sanders"). The mediation was scheduled to take place on December 1, 2015.

(4) I explained to Lee what a mediation was, what would happen during the mediation, and that the goal of the mediation was to achieve a settlement. I also explained that the mediation was non-binding and may not result in a settlement.

(5) Prior to the mediation, BHBC prepared a mediation brief, which outlined the case and the remaining issues. Lee participated in the drafting of the brief and provided comments. Lee also prepared a separate submission for the mediator to consider.

(6) On the day of the mediation, Lee first met with me at BHBC to discuss strategy, after which we headed off to the mediation, which was taking place about 3 blocks away. During the course of the mediation, I had numerous conversations with Lee about the prospects of settlement. She would ask questions, which I would answer. Lee was fully engaged in the process and was actively working towards a settlement. Because Lee had been so active in the litigation, she was aware of the issues involved and knew what she wanted in terms of an outcome.

(7) At no time was Lee ever put under duress or pressured to do anything. I recall telling her several times that she was free to walk away at any time and that she did not have to settle if she did not want to.

(8) Sanders also told her that she did not have to settle and could walk away at any time. I remember one occasion when Sanders used an example from the gameshow, Let's Make a Deal. He told Lee that she could pick what was behind "door number 1" or what was behind "door number 2." Sanders told Lee that door number 1 was a settlement, which would end the case. Door number 2 was not a settlement, which would mean the case goes on. Sanders told Lee that she could pick either door.

(9) At the end of the day, Sanders presented Lee with a written mediator's proposal. Sanders again told her that she could take it or leave it and that it was her choice, and her choice alone.

(10) After reading the document, Lee turned to me and asked for my recommendation. I told her that it was my professional opinion that she should accept the mediator's proposal, as I thought that it was a good settlement and that she would not do any better if we proceeded forward towards trial.

(11) After a few minutes of thinking it over, Lee then told Sanders that she had decided to sign the mediator's proposal and to settle the case. She then signed the mediator's proposal in front of Sanders and myself and initialed each page. Because I was confident that Lee wanted to settle, and that she was fully informed regarding the settlement, I also signed the mediator's proposal.

(12) Before Sanders left the room, he told us that he was not optimistic about the case settling because he did not think that the Trustee would agree to the terms in the mediator's proposal. Sanders left the room to present the mediator's proposal to the other side. A short time later, Sanders returned and told us that the Trustee has also accepted, meaning that we had a settlement.

(13) Afterwards, I discussed with Lee how nice it will be for her to have this matter off her back and that she no longer had to worry about the litigation. I recall Sanders also telling her that she could now get on with her life without the hassle of the litigation hanging over her head.

(14) We then left the mediation room and walked back to BHBC. Lee thanked me for a job well done. She got in her car and headed home.

(15) Exhibits 1 and 3-10, and 12 attached to the Second Motion for Summary Judgment are true, correct, and accurate copies of the originals.

FURTHER AFFIANT SAYETH NAUGHT

David Karl Gross

SUBSCRIBED AND SWORN to before me, this 24th day of March, 2020.

OFFICIAL SEAL
NOTARY PUBLIC
State of Alaska
Virginia S. Fontanez

Virginia S. Fontanez
Notary Public for Alaska
My Commission expires: 7-21-21

MEDIATOR'S PROPOSAL
Mediation December 1, 2015

1. The parties to that certain case entitled *Sheldon Lee v. Sheldon,* Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.

2. The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today. Counsel for Robert Sheldon will prepare and circulate a draft of that document.

3. Upon the execution of the Settlement Agreement and Mutual Release of All Claims as referenced in Paragraph 2 above, the parties will have their attorneys execute and file a stipulation to dismiss with prejudice, all parties bearing their own costs and attorney's fees.

4. Robert Sheldon, as Successor Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, will transfer to Holly Lee Sheldon a one-third non-voting interest in the Mountain House, LLC.

5. Holly Lee Sheldon acknowledges that the attached Operating Agreement is the controlling Operating Agreement of the Mountain House, LLC. Holly will not sign the Operating Agreement or any form related to that Operating Agreement, but will instead sign only this document and the Settlement Agreement and Mutual Release of All Claims that will be drafted to consummate the Settlement reached in the conclusion of the mediation.

6. As a non-voting member of the Mountain House, LLC, Holly Sheldon Lee shall have periodic access to the historic original Mountain House structure ("Mountain House") solely for personal use, and not for commercial use. Holly's access shall be the same as any other LLC member and shall be based upon availability that does not conflict with the LLC's commercial use of the Mountain House for serving customers. Availability shall be determined by a request to Robert Sheldon for available dates within the two-week window immediately following the request. If there are dates in the two-week window following a member's request in which the Mountain House is not booked by LLC customers, then the member, including Holly Sheldon Lee as a non-voting member, may reserve from 1-5 of those available days. Members shall reserve available dates as described above on a first come first serve basis.

7. Holly Sheldon Lee and other LLC members may use the method described in Paragraph 6 above for reserving dates for personal use of the Mountain House for any total number of days per year, with no more than 5 days being consecutive days, again so long as no days conflict with LLC customer reservations.

8. From the personal property and residuary of the Trust, Holly Sheldon Lee will receive and accept as her full and complete entitlement as a Trust beneficiary, the following items:

a. one-third non-voting share of the Mountain House, LLC pursuant to the terms of the Paragraphs set forth above;
b. the entirety of the contents of the Talkeetna Warehouse owned by the Trust, except for up to 50 items of no more than $2,000 of total combined value as determined by the Trustee--which items will not include the Super Cub/Taylor Craft skis;
c. Pottery collection of bowls and plates (the "glazed bowls" which Holly Sheldon Lee

already possesses, taken at or after the August, 2014 family meeting)

d. Small painting of Anaktuvik Pass by Don Sheldon;
e. Two Jeanne Laurence Flower Paintings;
f. The Long Lulu Painting by Johnson;
g. One trapper cabin chair of rustic construction (this is the hand hewn chair that Don gave to Roberta and collected from the Dutch Hills Cabin, which Holly already possesses);
h. Winter Dog Mushing Scene painting by Henne;
i. Landscape Scene painting by Henne;
j. Mount McKinley in Winter painting by Wagner;
k. Lone Alaska Lady Ziegler poster print;
l. Four "Ski Hill" feathers in frame;
m. Spirit Mask unframed 8 x 16 by Wieland;
n. All additional items already distributed to Holly Sheldon Lee;
o. Family North Coast Native Artifacts;
p. With the exception of personal and financial records, the right to make single use facsimiles of <u>all</u> non-personal and/or financial Roberta Sheldon historical records and photographs (the personal archive) solely for display in a museum;
q. The Caribou Portrait by Goodale
r. Seascape by McDaniel (Holly Sheldon Lee already possesses)
s. Moose hide chair (the one that needs a new replacement hide and is <u>not</u> on display at the museum)

9. All items listed above will be distributed within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims and the filing of the stipulation to dismiss, whichever is later;

10. Holly Sheldon Lee will pay into the Mountain House, LLC the sum of $25,000, within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims, and prior to the distribution of the items listed above.

11. Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders.

Dated this 1st day of December, 2015.

Robert Sheldon

Kevin Clarkson

6:00 p.m.

MEDIATOR'S PROPOSAL
Mediation December 1, 2015

1. The parties to that certain case entitled *Sheldon Lee v. Sheldon*, Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.

2. The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today. Counsel for Robert Sheldon will prepare and circulate a draft of that document.

3. Upon the execution of the Settlement Agreement and Mutual Release of All Claims as referenced in Paragraph 2 above, the parties will have their attorneys execute and file a stipulation to dismiss with prejudice, all parties bearing their own costs and attorney's fees.

4. Robert Sheldon, as Successor Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust, will transfer to Holly Lee Sheldon a one-third non-voting interest in the Mountain House, LLC.

5. Holly Lee Sheldon acknowledges that the attached Operating Agreement is the controlling Operating Agreement of the Mountain House, LLC. Holly will not sign the Operating Agreement or any form related to that Operating Agreement, but will instead sign only this document and the Settlement Agreement and Mutual Release of All Claims that will be drafted to consummate the Settlement reached in the conclusion of the mediation.

6. As a non-voting member of the Mountain House, LLC, Holly Sheldon Lee shall have periodic access to the historic original Mountain House structure ("Mountain House") solely for personal use, and not for commercial use. Holly's access shall be the same as any other LLC member and shall be based upon availability that does not conflict with the LLC's commercial use of the Mountain House for serving customers. Availability shall be determined by a request to Robert Sheldon for available dates within the two-week window immediately following the request. If there are dates in the two-week window following a member's request in which the Mountain House is not booked by LLC customers, then the member, including Holly Sheldon Lee as a non-voting member, may reserve from 1-5 of those available days. Members shall reserve available dates as described above on a first come first serve basis.

7. Holly Sheldon Lee and other LLC members may use the method described in Paragraph 6 above for reserving dates for personal use of the Mountain House for any total number of days per year, with no more than 5 days being consecutive days, again so long as no days conflict with LLC customer reservations.

8. From the personal property and residuary of the Trust, Holly Sheldon Lee will receive and accept as her full and complete entitlement as a Trust beneficiary, the following items:

a. one-third non-voting share of the Mountain House, LLC pursuant to the terms of the Paragraphs set forth above;
b. the entirety of the contents of the Talkeetna Warehouse owned by the Trust, except for up to 50 items of no more than $2,000 of total combined value as determined by the Trustee–which items will not include the Super Cub/Taylor Craft skis;
c. Pottery collection of bowls and plates (the "glazed bowls" which Holly Sheldon Lee

Exhibit ___
Page 132 of ___

already possesses, taken at or after the August, 2014 family meeting)

d. Small painting of Anaktuvik Pass by Don Sheldon;
e. Two Jeanne Laurence Flower Paintings;
f. The Long Lulu Painting by Johnson;
g. One trapper cabin chair of rustic construction (this is the hand hewn chair that Don gave to Roberta and collected from the Dutch Hills Cabin, which Holly already possesses);
h. Winter Dog Mushing Scene painting by Henne;
i. Landscape Scene painting by Henne;
j. Mount McKinley in Winter painting by Wagner;
k. Lone Alaska Lady Ziegler poster print;
l. Four "Ski Hill" feathers in frame;
m. Spirit Mask unframed 8 x 16 by Wieland;
n. All additional items already distributed to Holly Sheldon Lee;
o. Family North Coast Native Artifacts;
p. With the exception of personal and financial records, the right to make single use facsimiles of all non-personal and/or financial Roberta Sheldon historical records and photographs (the personal archive) solely for display in a museum;
q. The Caribou Portrait by Goodale
r. Seascape by McDaniel (Holly Sheldon Lee already possesses)
s. Moose hide chair (the one that needs a new replacement hide and is not on display at the museum)

9. All items listed above will be distributed within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims and the filing of the stipulation to dismiss, whichever is later;

10. Holly Sheldon Lee will pay into the Mountain House, LLC the sum of $25,000, within 30 days of the signing of the Settlement Agreement and Mutual Release of All Claims, and prior to the distribution of the items listed above.

11. Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders.

Dated this 1st day of December, 2015.

Holly Sheldon Lee

David Gross

6:00 P.M.

Exl
Page 134 of

●●●●○ AT&T LTE 12:29 PM @ ⏰ ✱ 89%

< Messages **Group** Details

To: Holly, +1 (907) 947-8432

Tue, Dec 1, 7:15 PM

I need to tell you guys thank you and one more thing To discuss later. I am very sick to my stomach about have to pay $25k. Why cannot come out of my alotment. I threw up and after the beating paying that I don't get it. Can't live with it

Stay strong, the judge was right: it was a good deal. We can talk more tomorrow.

Wed, Dec 2, 8:13 AM

EXHIBIT 4
Page 1 of 5

Exh
Page 135 of

●●●●○ AT&T LTE 12:29 PM @ ⏰ ᛒ 89%

< Messages **Group** Details

To: Holly, +1 (907) 947-8432

Wed, Dec 2, 9:19 AM

Holly Sheldon Lee

Hi. I'll try not to bother you anymore after this. Our internet is down or I would email this - while I have it in mind:

I need clarkson to know that I do not have access to cash, am in debt and will pay the 25k from items I was awarded that were appraised 25k.

We need copy of clarkson bill to see that it is $75k

4 things unclear about:

Ext
Page 13 of

●●●●○ AT&T LTE 12:29 PM @ ⏰ ✱ 89%

< Messages **Group** Details

To: Holly, +1 (907) 947-8432

4 things unclear about:
1. where did my
1/3 of 2 pieces of land
go? I want the land
2. I want to run moms
book business. Did he
say no even if he keeps
the money?
2. Does it matter that
there is a $50k diff in
what Fouse appraised
paintings at compared to
what robert documented
what they are worth?
3. I totally have to have
Repeater spot access @
MH
4. I need new password
to Dropbox please help
me get.

Exh
Page 137 of

●●●●○ AT&T LTE 12:29 PM @ ⏰ ✱ 89%

< Messages **Group** Details

To: Holly, +1 (907) 947-8432

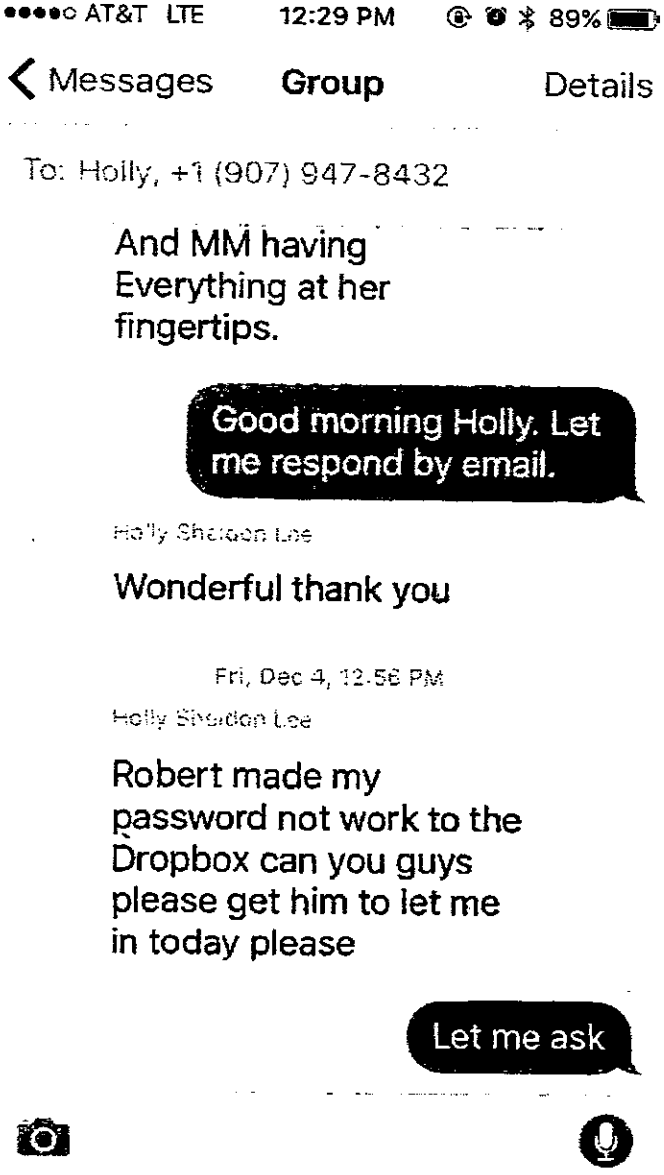
Thank you

Standouts from yesterday that really helped me:
DG saying "Stay strong"
The last thing ES said to me "you are a wonderful person"
CM saying "you have a lot more life to live"
And MM having Everything at her fingertips.

Good morning Holly. Let me respond by email.

Holly Sheldon Lee

Wonderful thank you


●●●●○ AT&T LTE 12:29 PM @ ⏰ ✱ 89%
Messages
Group
Details
To: Holly, +1 (907) 947-8432
And MM having Everything at her fingertips.
Good morning Holly. Let me respond by email.
Holly Sheldon Lee
Wonderful thank you
Fri, Dec 4, 12:56 PM
Holly Sheldon Lee
Robert made my password not work to the Dropbox can you guys please get him to let me in today please
Let me ask

David Gross

From:	holly@sheldonairservice.com
Sent:	Tuesday, December 15, 2015 8:05 AM
To:	Mara Michaletz
Cc:	David Gross
Subject:	RE: releases for your signature

Mara,

I want to think about it and I am not ready to sign yet.

Holly

On 2015-12-14 14:56, Mara Michaletz wrote:
> Hi Holly,
>
> I re-scanned this, so hopefully the attachment works; if not, let me
> know and we'll work on a different way to get it to you.
>
> The settlement calls for your notarized signature as well as David's,
> so let me know if locating a notary in Talkeetna is an issue.
>
> Let me know if you have any questions or want to schedule a time to
> discuss the terms in the next day or two. The sooner we get this to
> Robert's attorney, the sooner the wheels will start turning with
> regards to the Trust distributions, so we're looking for your
> attention to this as soon as possible.
>
> Thanks Holly.
>
> Mara
>
> ----------
>
> MARA E. MICHALETZ
>
> BIRCH HORTON BITTNER & CHEROT
>
> 1127 West 7th Ave | Anchorage AK 99501
>
> Tel 907.263.7242 | Main 907.276.1550
>
> mmichaletz@bhb.com | www.birchhorton.com [1]
> Bio [2] | vCard [2]
>
> This transmittal may be a confidential attorney-client communication
> or may otherwise be privileged or confidential. If you are not the

From: holly@sheldonairservice.com
Sent: Friday, December 18, 2015 4:37 PM
To: David Gross; Mara Michaletz
Cc: Trina Marshall
Subject: RE: releases for your signature

David and Mara,

David and I are unsettled with the mediator's proposal and have determined that obtaining a second opinion from a law firm that we can trust would be beneficial to us, as we are unsure of your recommended course of action.

We are considering hiring outside counsel to conduct a comprehensive review of our file to determine if there are any legal avenues we have not yet explored. Our objective is to ensure that our case is being handled as prudently and efficiently as possible.

We believe that Tonja Woelber of Woelber, Jacobson, and Passard, LLC, Attorneys at Law, has the knowledge and experience to address all of our legal concerns. Ms. Woelber has agreed to review the details of our case and will provide us with a neutral opinion and comments as to what could be and could have been done differently, more cost effectively, and going forward, how can we minimize fees, time and as importantly, stress.

We would like you to consider working with Ms. Woelber. Please let us know at your earliest convenience if this is possible.

Holly

From: David Gross
Sent: Wednesday, December 30, 2015 12:34 PM
To: holly@sheldonairservice.com
Cc: cbrecht@bgolaw.pro; Trina Marshall; Mara Michaletz; Kathryn Black
Subject: Strategy Moving Forward
Attachments: SETTLEMENT AGREEMENT RELEASE (00490382).DOCX; LTR CLARKSON RE AGREEMENT (00490471).DOCX

Holly:

This email follows our phone conference yesterday, which included David and attorney Chris Brecht (who I have copied on this email).

There were a number of topics discussed that require me to memorialize our conversation. First, there was the suggestion that Judge Eric Sanders ("Sanders") had a conflict of interest that influenced his conduct at the mediation. A conflict was suggested on the basis that he may be an investor in the Mountain House, LLC ("MHLLC") and secondly that he may be good friends with Marny (not sure of the spelling), who is Robert's wife. This belief was prompted by a few comments made by Sanders over the course of the day.

In this regard, I recall Sanders saying that he would never be an investor in the Mountain House. I believe this comment was made as a way to communicate to us that Sanders did not agree with the decisions Robert was making. In particular, I remember Sanders saying that the improvements Robert was making, such as adding a kitchen for a chef, would never result in profits because chefs that would work at a remote cabin are inherently unreliable. I recall him telling us about another camp where the chef had a weekend off, drank too much, and never returned. I do not think this comment was meant to communicate that he was thinking of investing in the MHLLC, or that he had invested in the MHLLC, but instead it was just a way to commiserate with our objections to what Robert was doing.

My only recollection regarding Marny is when I said that I was shocked that Marny was married to Robert because she seemed so nice and reasonable, while Robert is the polar opposite. I do not think that Sanders was in the room when I made this comment (it was just you, Mara, and I). In fact, I have no recollection at all of Sanders saying anything about Marny. I am confident that Sanders would have shared this information with me. I am equally confident that the mediation was the first time Sanders had ever met Robert, based on some of his comments regarding Robert's mannerisms and appearance.

With the above in mind, I do not believe that Sanders had a conflict. I have known Sanders as a judge and a lawyer and have enormous respect for him. He is an honest and straightforward person. I will ask him about these two potential conflicts when he is back in town next week and will report back, but again, I highly doubt there is any conflict that we can use to try to unwind the settlement.

Next, there was a suggestion that the settlement was made under duress. What this means to me is that you were forced to enter into a settlement. Duress can come in a variety of forms such as physical duress or economic duress. The classic "law school example" is a person signing a contract with a gun to their head. If I recall correctly, a defense based on duress requires a showing by clear and convincing evidence that the party had no reasonable alternative to signing the agreement. While the day was an emotional

one, as many mediations are, I do not believe you signed the mediator's proposal under duress. In fact, I remember a few times where Sanders told you that you could walk away at any time.

To the extent that you want to take the position that the settlement was entered into under duress, I would be unable to represent you as I cannot in good faith support such an argument. In addition, I would be a witness to this defense and I cannot be both a lawyer and a witness. I think it is important that you obtain an independent opinion regarding the possibility of winning on a duress defense since I would not be the best person to express such an opinion. Perhaps this is something you and Chris can talk about privately.

During our call, there was also a lengthy discussion regarding the appropriateness of the judge's ruling on summary judgment. Chris and I largely agreed that the judge made a variety of errors in relation to the proper mechanisms for administrating the Trust. Chris pointed out that had we filed in the Probate Court things may have turned out better for us. However, at the time of filing, because we were asserting both a breach of contract claim and claims related to the administration of the Trust, we elected superior court and were actually quite pleased when we drew Judge Suddock, who would have likely sided with us. However before oral argument, Judge Washington took Suddock's place, and well, the rest is history.

There was a discussion about filing some papers with the court in an effort to get Washington to change her mind. Chris and I agreed that the best way to do this would be to file a motion under Civil Rule 60(b), which allows the court to reconsider a previous ruling when new evidence is discovered. Chris and I also agreed that the best way to conjure up new evidence would be to obtain an expert report on the interpretation of the Trust document, although an expert interpreting a document may invade the province of the court and not be allowed. We then discussed the timing of such a motion, whether we file now or after the court rules on our effort to unwind the settlement. Chris indicated that the cost of such an expert would be in the ballpark of $4,000. You were going to think about whether you wanted to spend this money. Until that decision is made, we can table this issue for now.

The other approach that was discussed was to write to Clarkson and state that we had a narrower interpretation of the settlement agreement. Specifically, we will ask that we reserve the right to seek further redress in terms of the administration of the Trust. If he agrees, we now have an avenue to raise additional issues related to the Trust. Specifically, Chris can file an action in Probate Court. If Clarkson disagrees, he will likely file a motion to enforce the settlement. We will oppose such an effort by arguing that there was a mistake as to the scope of the settlement and we will either win or lose. If we win, we will either have a narrower interpretation allowing Chris to file in Probate Court or the settlement will be thrown out, leaving us back in court, whereby we will have to discuss where to go from there. If we lose, we can discuss taking this case to the Alaska Supreme Court, which would also give us a platform to address the court's order on the proper mechanisms for administration of the Trust.

Assuming that you want to employ this latter approach, attached is a letter I can send to Clarkson with a revised settlement agreement. Please review both documents carefully, as I want to make sure we get this right, to the extent we decide to go in that direction. Please understand that if we do this, you will have to agree to the settlement, just in a limited scope. I would ask Chris to sign off on this approach as well.

Holly, before we head down this road, I would be remiss if I did not tell you that, in my opinion, we have a valid and enforceable settlement. At the end of the mediation, Sanders came into the room and explained that you had two options, you could accept the settlement (and have it over with) or you could reject the offer (and fight on). Because it was a mediator's proposal, Sanders made clear that it was a "take it or leave it offer," and that you were free to walk away. In my estimation, Sanders did not pressure you one

way or the other. In fact, he suggested that rejecting the offer was an acceptable approach, in part, because he did not think Robert would take the deal. You thought it over and accepted the deal, thereafter signing the written proposal. I signed as well based on your decision to accept the deal. Two days later you sent me a text saying that you felt better about the settlement. Based on this, trying to undo this settlement is going to be very difficult because you did agree to the deal and you did sign the proposal. I am truly sorry that you are having second thoughts, but that's the reality of where we are. From the beginning on this case, I have worked hard to try to maneuver you through a difficult situation and will continue to do so, but you should be clear that we face an uphill battle that could result in an award of fees against you.

Please let me know if you have any questions and please let me know if I have misstated anything in this email.

David Gross

HOLLY SHELDON LEE and
SHELDON AIR SERVICES, LLC,

Plaintiffs,

vs.

ROBERT DONALD SHELDON,
Individually and as the Trustee of the
Roberta Reeve Sheldon 2014 Grantor
Controlled Revocable Trust,

Defendant.

Case No. 3AN-15-05117 CI

RESOLUTION OF DISPUTED TERMS

The parties in Case No. 3AN-15-05117 participated in a mediation on December 1, 2015, and accepted all the terms of my written proposal. Paragraph 11 of the proposal stated: "Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders."

Pursuant to paragraph 11, the parties have identified certain disputes which I must resolve. I have considered all relevant information,[1] including the briefs and exhibits submitted by the plaintiffs and the defendant.

The argument that Holly's claims against Robert[2] were not settled when she executed the Mediator's Proposal is meritless. She accepted all the terms in the written proposal and must comply with those terms and conditions.

[1] This information includes the plaintiff's November 25, 2015 confidential mediation brief and a three-page letter from Holly Sheldon Lee which was furnished before the mediation.

[2] Any reference to claims against Robert includes claims against Robert Sheldon individually and as the Trustee of the Trust.

The contention that SAS' claims against Robert were not resolved because David Lee or the Board of Managers did not consent to the terms is rejected. There is compelling proof that Holly had apparent authority, and exercised that authority, on behalf of SAS, before and during the mediation. Consequently, SAS must comply with the settlement terms that Holly executed.

Finally, SAS' avers that its claims against Mountain House, LLC ("MHLLC") remain unresolved. Robert disagrees.

Paragraphs 1 and 2 of the proposal that the parties executed state:

1. The parties to that certain case entitled *Sheldon Lee v. Sheldon*, Case No. 3AN-15-05117 Civ., have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015, with Mediator Eric Sanders.

2. The parties will execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached today. Counsel for Robert Sheldon will prepare and circulate a draft of that document.

Because MHLCC was not a party in Case No. 3AN-15-05117 CI, a strict interpretation of the terms would not lead to the conclusion that SAS intended to settle any claim it may have against MHLLC. The legal significance of the plaintiffs' release of any claim arising from Robert's conduct, "personally and in his official capacity as the Trustee,"[3] is outside my purview. But SAS' right to assert a claim against MHLLC was not settled on December 1, 2015.

The parties are directed to execute a mutual release which is consistent with this decision.

DATED this 26th day of February, 2016.

Eric T. Sanders, Mediator

[3] *See* paragraph 6 of the Complaint.

Certificate of Service
I hereby certify that a true and correct copy of the foregoing **Resolution of Disputed Terms** was served by mail / email / hand delivery on:

David Gross
Birch Horton Bittner & Cherot
1127 West 7th Avenue
Anchorage, AK 99501
dgross@bhb.com

Kevin Clarkson
Brena Bell & Clarkson
810 N Street, Suite 100
Anchorage, AK 99501
kclarkson@brenalaw.com

Christopher Brecht
Brankston Gronning O'Hara
601 West 5th Avenue, Suite 900
Anchorage, AK 99501
cbrecht@bgolaw.pro

By _____
Date 2/29/2016

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLLY SHELDON LEE and SHELDON AIR SERVICE, LLC,

Plaintiffs,

v.

ROBERT DONALD SHELDON, individually and as Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust,

Defendant.

Case No. 3AN-15-05117 CI

ORDER GRANTING IN PART DEFENDANT'S MOTION TO ENFORCE AND DENYING PLAINTIFF'S MOTION TO CONTINUE

I. INTRODUCTION

Plaintiffs filed suit against Defendant for, among other things, various alleged breaches of his fiduciary duty as trustee. The parties attempted to settle the dispute through mediation and ultimately agreed to the terms of a settlement, including an agreement to arbitrate any dispute arising from the settlement. Plaintiff Holly Lee subsequently challenged the agreement on a theory of fraud in the inducement, but the arbiter denied Holly's allegations. Holly now brings a motion with this court requesting a continuation of trial so that she could prepare new claims against Defendant. Implicit in her motion is a request to find that by failing to disclose information about the trust of which he is the trustee, Defendant committed fraud in the inducement of the settlement agreement, and the arbiter's decision and the underlying settlement

should be set aside. Defendant opposes Holly's motion and brings a motion of his own requesting the court enforce the trust's *en terrorem* clause or, in the alternative, enforce the arbiter's decision or the settlement agreement.

A trustee breaches a fiduciary duty when he or she does not keep the beneficiaries of a trust reasonably informed, but it does not follow that breach of that duty alone gives rise to a valid fraud in the inducement claim. For the reasons stated herein, Holly's Motion is DENIED and Defendant's Motion is GRANTED in part and DENIED in part.

II. FACTS AND PROCEEDINGS

Plaintiff Holly Sheldon Lee in her own capacity and as an officer of Sheldon Air Service (SAS) filed suit in early 2015 against her brother Robert Sheldon in his individual capacity and as the trustee of their mother's trust. Their mother, Roberta Reeve Sheldon, was the wife of fabled bush pilot Don Sheldon. According to Roberta's will, upon her death all of her assets would be distributed to a trust with her three children, Holly, Robert, and Kate named as the beneficiaries and Robert named as the trustee.

In her suit, Holly claimed that Robert breached his fiduciary duty as trustee because he was not abiding by the terms of the trust instrument. SAS claimed that Robert had breached a contract SAS made with the Mountain House LLC[1] to permit passengers on SAS tours to land at the Mountain House.

[1] The Mountain House LLC is an entity wholly owned by the trust of which Holly is a beneficiary. The Mountain House LLC's primary asset is the Don Sheldon Mountain House located near the Ruth Glacier adjacent to Denali.

In late 2015 both parties filed summary judgment motions. This court found that the trust instrument did not require Robert to distribute the shares of the Mountain House LLC. Rather the trust gave him sole authority to decide which children would be eligible to receive shares from the trust. The court also found that Robert as the trustee was not obligated to distribute the ownership shares in the Mountain House LLC immediately. Robert was permitted to retain the Mountain House LLC in the trust and to implement his redevelopment plan for the Mountain House. Lastly, the court found that Holly did not violate the trust's "no contest" or *en terrorem* clause because she was simply attempting to determine the proper interpretation of a somewhat ambiguous provision of the trust instrument.

Importantly, Holly received an accounting of the trust's assets in October 2014. At that time the trust had a value of approximately $1.44 million with approximately $1 million in cash and securities. The remainder was real property and the Mountain House LLC. Holly did not receive another accounting until January 2016.

The Mediation and Arbitration

On December 1, 2015, the parties entered mediation with retired Superior Court Judge Eric Sanders. Holly and SAS were represented by counsel, as were Robert and the trust. Holly was supplied with the valuation of the Mountain House LLC either before or during the mediation. At the close of the mediation, the parties appear to have reached an agreement. Sanders presented the parties with a document titled "Mediator's Proposal." The

document recites that it settles all claims between Holly, SAS, and Robert. Moreover, the document states that any dispute concerning the settlement should be decided through binding arbitration in front of Sanders.[2] Both Holly and her counsel signed the document, as did Robert and his counsel. The terms of the "Mediator's Proposal" gave Robert's counsel the task of creating a settlement agreement and a mutual release of claims in accord with the terms in the "Mediator's Proposal."

In early January 2016, Robert provided Holly with an accounting of the trust assets and liabilities which included $91,699.15 paid to Robert as fiduciary compensation, attorney's fees of $115,303.64, $185,751.49 paid to the Mountain House LLC for the redevelopment of the Mountain House, and $29,574.54 in general trust administration costs. After Holly learned of the expenses incurred by the trust, she refused to sign the settlement agreement and the release of claims.

Holly then retained new counsel. SAS did not seek new counsel and continues to be represented by Holly's previous counsel. Holly claimed that Robert withheld material information (the costs of the trust) which he was obliged to disclose to Holly in accord with his fiduciary duty to the beneficiaries of the trust. And because he did not reveal this information, Holly contended that she could revoke her consent to the terms of the mediation settlement.

[2] The "Mediator's Proposal" states: "Any disputes concerning these terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders." Although the paragraph does not explicitly use the word "arbitration" the intent of the parties to use Sanders as a final and binding arbiter of future disputes is unmistakable.

Holly also claimed that SAS was not bound by any agreement made at the mediation because in order to bind SAS, the corporate bylaws required consent of both co-owners (Holly and her husband). Holly applied to Sanders to resolve the dispute.

Sanders rejected all of Holly's claims, finding that she accepted the terms of the mediation and must comply with those terms. He also found that SAS's claims were settled even if its bylaws require both co-owners to consent because Holly presented herself at the mediation as the representative of SAS with decision-making power, and thus had apparent authority to bind SAS. Lastly, Sanders found that SAS's claims against the Mountain House LLC were not resolved by the mediation because Mountain House LLC was not a party to this case nor was it a party to the mediation.

The Motions to Continue Trial and Enforce the Arbitration Decision

Holly now seeks to overturn the arbitration and the underlying settlement agreement. She asserts the same arguments she presented to Sanders and adds additional arguments. First, she argues that no settlement was reached because Robert intentionally withheld material information from her in order to fraudulently induce her to settle SAS's and her claims against the trust. Thus, she maintains that the agreement is void and unenforceable. She alternatively claims, for the same reasons, that the settlement agreement is voidable and she has withdrawn her consent to the agreement. Holly also contends that the "Mediator's Proposal" was just that—a proposal—and did not impose any duty to arbitrate. Holly further contends that if any of these

arguments succeed, the agreement to binding arbitration should be nullified and the arbitrator's decision should be disregarded along with the underlying agreement.

Holly's initial motion requested that the trial, which was set for May 2, 2016, be continued until she could further develop her new breach of fiduciary duty claims related to Robert's non-disclosure of trust costs and misuse of trust funds. In late April the court vacated the trial date in order to resolve the current dispute. Accordingly and upon a favorable outcome, Holly hopes to reopen discovery and set a new trial date, leaving enough time for her to develop her new claims.

Robert opposes Holly's Motion to Continue Trial and filed a motion to enforce the *en terrorem* clause in the trust, enforce the arbitration decision, or enforce the settlement agreement. He argues that her new claims violate the trust's *en terrorem* clause, and thus Holly should be disinherited. Or alternatively, he contends that because Holly agreed to the mediation terms, including the requirement to submit all disputes to binding arbitration, the arbitration clause should be enforced

During oral argument Holly modified her desired remedy for the current dispute. She argued that if this court were to decline to enforce the "Mediator's Proposal" and the arbitration decision, the court should transfer the entire case to probate for further litigation. Holly did not directly address her desire to reopen the discovery deadlines and bring new claims in the case in its current

form. Holly's request to transfer the case to probate court was not briefed, and therefore the court will not consider it in this order.[3]

III. DISCUSSION

The document titled "Mediator's Proposal" was not a proposal. It was an agreement between the parties to settle their claims according to the terms in the document. The settlement terms reached in the "Mediator's Proposal" are enforceable and Holly's claims of fraud are unfounded. Accordingly, Sanders' arbitration decision is binding and enforceable. Lastly, Holly's new motion does not violate the trust's *en terrorem* clause.

The "Mediator's Proposal" Was an Agreement to Settle Claims

Holly insists that it was her belief that the "Mediator's Proposal" was only a proposal to settle claims and not an agreement to settle her claims in accord with the terms of the agreement. Although the document is styled as a "Mediator's Proposal," the document's contents reveal it to be an agreement to settle the claims between Holly, SAS, and Robert.

A court's "duty is to ascertain and give effect to the reasonable intentions of the contracting parties."[4] To determine the parties' reasonable intentions, the court resorts to "the language of the disputed provision[s] and other provisions, relevant extrinsic evidence, and case law interpreting similar provisions."[5]

---

[3] *See Nenana City Sch. Dist. v. Coghill*, 898 P.2d 929, 934 (Alaska 1995) (finding arguments waived when they are inadequately briefed).
[4] *Estate of Polushkin ex rel. Polushkin v. Maw*, 170 P.3d 162, 167 (Alaska 2007) (quoting *W. Pioneer, Inc. v. Harbor Enters., Inc.*, 818 P.2d 654, 656 (Alaska 1991)).
[5] *Id.* (quoting *W. Pioneer*, 818 P.2d at 656).

The first paragraph of the "Mediator's Proposal" recites: "The parties to that certain case entitled *Sheldon Lee v. Sheldon* . . . have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in a mediation held on December 1, 2015 . . . ." The rest of the document states which property and other assets Holly will receive from the trust in exchange for the release of her claims. The last paragraph memorializes the parties' agreement to arbitrate any dispute arising from the settlement agreement and release of claims. During the entire mediation, Holly was represented by competent counsel. Holly did not present any evidence that she was not capable of consenting to a settlement that day. Nor did she present any extrinsic evidence supporting her belief that the "Mediator's Proposal" was not a settlement agreement.

At the end of the document Holly, Holly's then-counsel (who is still counsel for SAS), Robert, his counsel, and Sanders signed the document. After the document was signed, both parties acted as if the "Mediator's Proposal" was a binding agreement. Robert's counsel, consistent with the terms of the "Mediator's Proposal," prepared a settlement agreement and a release of claims for Holly and her counsel to review. And upon finding the settlement agreement to be deficient, Holly engaged Sanders to arbitrate the dispute.

It is a near certainty given the wording of the document, the presence of Holly's attorney, and her signature at the bottom alongside her attorney's that Holly understood the document she signed to be an agreement to settle her claims and arbitrate any future dispute. As such, she agreed to settle her

claims in accord with the "Mediator's Proposal" and submit any disputes to binding arbitration.

Holly's Fiduciary Fraud Claim Fails Because of Lack of Reliance

Holly next argues that even if the "Mediator's Proposal" was a settlement agreement the agreement is either void or voidable because Robert fraudulently induced her to sign the "Mediator's Proposal" by withholding material information about the trust and its expenditures. And, Holly claims, Sanders' arbitration decision is not binding because she revoked her consent to the agreement which included her consent to arbitrate the dispute before Sanders. Accordingly, Holly claims, Sanders' decision is not binding nor is the underlying agreement enforceable.

In order for this court to have jurisdiction over the agreement reached in the "Mediator's Proposal," Holly must demonstrate that her consent to arbitrate disputes arising from the settlement was improperly procured. She may do this by showing that the agreement which contains the arbitration clause was procured by fraud. In Alaska, when an arbitration agreement contained in a larger agreement is contested on grounds of fraud in the inducement, the Alaska Revised Uniform Arbitration Act compels a court to examine the entire agreement.[6] If the entire agreement is judged to be invalid because of fraud, the arbitration agreement is also unenforceable.[7]

---

[6] *See* AS 09.43.330(b). Notably this procedure differs from the Uniform Arbitration Act, the predecessor in Alaska to the Revised Uniform Arbitration Act and common law of other states and the federal courts. According to the Uniform Arbitration Act as well as common law from the federal courts and other states, a claim of fraud in the inducement of an entire agreement containing an arbitration clause is arbitrable. Only where the claim was directed at the specific

Holly alleges that Robert committed fiduciary fraud by withholding the costs of the trust and his fraud induced her to settle her claims. Thus, she argues the entire agreement was procured by fraud and is voidable.

Holly correctly argues that Robert has an ongoing duty to keep the beneficiaries of the trust "reasonably informed of the trust and its administration."[8] And it is arguable that Robert did not keep the beneficiaries reasonably informed. Nevertheless, to commit the tort of fiduciary fraud, Robert must have done more than fail to keep the beneficiaries reasonably informed. The tort has seven elements: 1) the fiduciary concealed or failed to disclose information; 2) the information concealed or not disclosed was susceptible of knowledge at the time the fiduciary represented to the beneficiary; 3) the information concealed or not disclosed was material; 4) the beneficiary actually formed and relied upon a false and misleading understanding created by the fiduciary's concealment or non-disclosure; 5) the beneficiary's reliance on its false or misleading understanding was justifiable; 6) as a result of the beneficiary's reliance, the beneficiary suffered some damage or injury; and 7) that when the fiduciary concealed or failed to disclose the material information he or she was aware of the information not disclosed.[9]

---

arbitration clause could the claim be brought in court. *See* AS 09.43.010 (Alaska's codified version of the Uniform Arbitration Act); *see also, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (interpreting the federal arbitration act); *Johnson Mobile Homes of Ala., Inc. v. Hathcock*, 855 So. 2d 1064 (Ala. 2003); *Duffens v. Valenti*, 161 Cal.App.4th 434 (Cal. Ct. App. 2008); *St. Fleur v. WPI Cable Sys./Mutron*, 879 N.E.2d 27 (Mass. 2008).

[7] AS 09.43.330(b).

[8] AS 13.36.080(a).

[9] *Cummings v. Sea Lion Corp.*, 924 P.2d 1011, 1021-22 (Alaska 1996).

The parties do not dispute that the information that Holly claims was not disclosed was not available to her either before or during the mediation. Nor do the parties dispute that Robert had access to this information. Nonetheless, Holly's fraud claim fails for lack of justifiable reliance on a false understanding of the state of the trust.

Even assuming all the facts alleged in Holly's motion are true, Holly did not justifiably rely on the non-disclosure of the trust costs. Taking Holly's assertions as they appear, Holly requested a full accounting of the trust from Robert numerous times but never received it. Nonetheless, without a full accounting of the trust assets, Holly elected to attempt to settle her claims through mediation. At that time Holly knew the trust was incurring significant attorney's fees related to the litigation, she knew that Robert was drawing a fee from the trust, and she knew, from the litigation of her summary judgment motion, that Robert had initiated an expensive redevelopment of the Mountain House—all costs incurred by the trust.

Armed with that imprecise information, lacking a full accounting of the trust's assets and costs, and represented by counsel, Holly chose to settle her claims with Robert. Holly does not allege that she was compelled in any way to settle her claims, or that Robert made any representations about the costs of the trust—he simply failed to disclose them. Instead, it appears that at the time of settlement neither Holly nor her counsel believed the accounting, whatever it might have revealed, was important to her decision to settle her claims. Holly

therefore cannot demonstrate that she relied on the absence of the accounting to settle her claims.

And if she did rely on the absence of the accounting, she cannot demonstrate that her reliance was justifiable in light of the fact that she knew the trust had costs, knew that she did not know the precise value of the costs, and knew Robert had a duty to disclose the costs but had not done so.

Holly therefore cannot maintain a claim of fiduciary fraud. Accordingly, her consent to arbitrate any dispute arising from the settlement of her claims was valid and cannot be revoked on the grounds of fraud in the inducement. Sanders' decision is final and binding on the parties.

Holly disputes the application of the elements of fiduciary fraud, as defined by the Alaska Supreme Court, to this case. Holly contends that two cases from New York[10] and Illinois[11] follow the correct legal rule to apply to fraud claims directed at a trustee. Holly, however, does not supply an argument for why two out-of-state cases should apply while controlling precedent from this state's own Supreme Court should be ignored.

Where there is controlling precedent from the Alaska Supreme Court, this court is legally bound to apply it. The Supreme Court has specifically defined fiduciary fraud.[12] Holly claims that Robert, a fiduciary, committed fraud in the inducement. Accordingly, this court must apply the Supreme Court's definition of fiduciary fraud. Upon proper presentation to the Supreme

[10] *In re Estate of Hunter*, 739 N.Y.S.2d 916 (Sur. Ct. 2002).
[11] *Janowiak v. Tiesi*, 932 N.E.2d 569 (Ill. App. Ct. 2010).
[12] *See Cummings v. Sea Lion Corp.*, 924 P.2d 1011, 1021-22 (Alaska 1996).

Court, it may ultimately add an additional species of fraud concerning trustees of a trust, but it is not the province of this court to fashion from whole cloth a new legal principle distinct from the Supreme Court's firmly established precedent.

Holly's fiduciary fraud claim fails for lack of reliance and therefore her agreement to arbitrate any dispute arising from her agreement to settle the case is valid and enforceable.

The En Terrorem Clause Was Not Triggered by Holly's Motion

Robert's first request in his Motion to Enforce seeks enforcement of the trust's *en terrorem* or "no contest" clause. Robert contends that Holly's argument that Robert must distribute shares in the Mountain House LLC equally in both proportion and voting rights violates the *en terrorem* clause. Robert also claims that Holly's opposition to the development of the Mountain House violates the *en terrorem* clause.

Section 10 of Roberta's trust includes an *en terrorem* or "no contest" clause. The clause revokes a beneficiary's interest in the trust if that beneficiary seeks to void or set aside the trust or any provision of the trust.

The State of Alaska considers *en terrorem* clauses enforceable,[13] but there is no Alaskan case law that addresses the proper construction and scope of an *en terrorem* clause.

Violations of an *en terrorem* clause carry severe penalties for the offending beneficiary. Courts therefore construe these clauses strictly.[14] It

[13] AS 13.36.330.

appears to be a nearly universal maxim that *en terrorem* clauses do not apply to beneficiaries seeking to obtain an interpretation of the document or enforce his or her rights under that document, unless the document specifically states that the clause will apply to such suits.[15] When a beneficiary of a will or trust seeks only to enforce his or her rights under the instrument or secure an interpretation of the instrument, the intent of the grantor is not frustrated but rather accurately discerned or effected.[16]

Section 10 of the trust document states in pertinent part:

> If any . . . beneficiary . . . contests the validity of this Trust or any of its provisions . . . or seeks otherwise to nullify, or set aside this trust . . . or any of [its] provisions, or shall file a claim of any nature against this Trust . . ., then that person shall have no right to take an interest under this Trust . . ., and such contestant shall not benefit in any way under this Trust . . . and shall not receive any distribution whatsoever.

Addressing Holly's first argument that Robert, if he is going to distribute shares in the Mountain House LLC to all three beneficiaries, he must do so equally (meaning all shares must have the same rights and value). Holly claims, but provides no evidence, that her non-voting shares are worth less than the same number of shares with voting rights, and Robert has no legitimate basis to distribute the shares unequally. Holly relies on the trustee's duty of impartiality codified at AS 13.36.250 for her claim.

---

[14] *See Estate of Strader*, 132 Cal. Rptr. 2d 649, 653 (Cal Ct. App. 2003); *Girard Trust Co. v. Schmitz*, 20 A.2d 21, 27 (N.J. Ch. 1941).
[15] *See Estate of Strader*, 132 Cal. Rptr. 2d at 653-54; *Marx v.* Rice, 60 A.2d 61, 62 (N.J. Ch. 1948); *Wells v. Menn*, 28 So. 2d 881, 885 (Fla. 1946); Griffin *v. Sturges*, 40 A.2d 758, 760 (Conn. 1944).
[16] *See Estate of Stader*, 132 Cal. Rptr. 2d at 655.

Notwithstanding AS 13.36.250, Holly agreed to the distribution scheme she now challenges. The agreement to distribute a one-third non-voting share to Holly in the Mountain House LLC was reached during the mediation in front of Sanders. Robert did not decide the distribution scheme by himself.

Turning to the *en terrorem* clause, Robert claims that according to this court's summary judgment order, Robert has the authority to determine which beneficiary, if any, receives a distribution of the ownership shares in the Mountain House LLC, and Holly's claim contradicts this authority, thus triggering the *en terrorem* clause.

Holly did not violate the *en terrorem* clause. Her claim that she is entitled to the same type of shares as Robert and Kate attempts to vindicate her rights as a beneficiary of the trust and enforce Robert's correlative duties as trustee. She is not attempting to nullify or set aside the trust.

Moreover, the remedy sought in Holly's motion is for a new trial date and further discovery. Presumably Holly only included the argument about the LLC shares to bolster her claim that the settlement agreement and subsequent arbitration decision cannot be enforced. Holly has not argued that the trust itself should be nullified or set aside.

Lastly, although Robert claims that Holly opposes or is obstructing Robert's authority to improve the Mountain House, it is not apparent from her briefing that Holly has made this argument in this round of litigation. The claim that most plausibly implicates the Mountain House LLC is Holly's allegation that Robert misused trust funds by capitalizing the Mountain House

LLC with $185,000 from the trust and paid himself a salary for supervising the Mountain House LLC with trust funds. Holly's allegations, however, are only indirectly related to the remedy she now seeks. They were likely included in her briefing to bolster her claim that the settlement agreement and arbitration decision need to be set aside.

Moreover, those allegations do not implicate Robert's authority. Rather, they implicate his duty to act as a fiduciary. Holly's claims relate to her rights granted by the trust and state law as a beneficiary and do not attempt to nullify the trust. Accordingly, Holly's most recent motion does not violate the *en terrorem* clause.

IV. ORDER

Holly's Motion to Continue is DENIED. Robert's Motion to Enforce is GRANTED in so far as it seeks enforcement of the arbitration decision and DENIED as to his request to enforce the *en terrorem* clause. Robert's request to enforce the settlement agreement is thus rendered MOOT.

DATED at Anchorage, Alaska this 24th day of June, 2016.

Pamela Scott Washington
Superior Court Judge, *pro tem*

I certify that on 6-27-16 a copy of the above was mailed to each of the following at their addresses of record:
Chris Brecht
David Karl Gross
Kevin Clarkson

Mary Braun - Judicial Assistant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLLY SHELDON LEE and SHELDON AIR SERVICE, LLC,

Plaintiffs,

v.

ROBERT DONALD SHELDON, individually and as Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust,

Defendant.

Case No. 3AN-15-05117 CI

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiff Holly Sheldon Lee requests that the court reconsider its June 24, 2016 Order denying Holly's motion to reopen discovery deadlines and set a new trial date. The court held: 1) Holly had agreed to settle her claims and arbitrate any future dispute between her and Defendant Robert Sheldon; 2) Robert did not fraudulently induce Holly to settle her claims; and 3) the arbitration decision of Eric Sanders is binding and enforceable.

Holly insists that the court applied the incorrect legal standard, made a typographical error concerning the month when Robert disclosed certain information, overlooked Holly's claim that she was sick during settlement negotiations, and erroneously held that Holly submitted to arbitration before Eric Sanders.

Ext. ___ Page 1/3 of ___

According to Alaska Rule of Civil Procedure 77(k) reconsideration is warranted where a court has "overlooked, misapplied or failed to consider a statute, decision or principle *directly controlling*; or [t]he court has overlooked or misconceived some *material* fact or proposition of law."[1]

Holly maintains that two cases from other jurisdictions should supply the legal test for this case. The cases are *Janowiak v. Tiesi*[2] from a mid-level appellate court in Illinois and *In re Estate of Hunter*[3] from a surrogate court in Westchester County, New York. Holly argues that this court's statement that she did not supply an argument for why these two cases should apply to this case when the Alaska Supreme Court has defined fiduciary fraud is unfounded. She claims that she supplied an argument in her briefing to Eric Sanders in preparation for arbitration of her settlement agreement and incorporated it by reference in her briefing to this court in her motion to reopen discovery deadlines.

When considering Holly's initial motion, the court reviewed her briefing both to this court and to Eric Sanders. In neither submission does she provide an affirmative argument for why two cases from other jurisdictions should be considered *controlling* where the Alaska Supreme Court has already defined fiduciary fraud. The briefing simply assumes that these two cases apply extra-jurisdictionally because they happen to address fiduciary fraud in the context of a trustee. While the briefing does include a cursory argument for why these

[1] Alaska R. Civ. P. 77(k)(1)(i-ii) (emphasis added).
[2] 932 N.E.2d 569 (Ill. App. Ct. 2010).
[3] 739 N.Y.S.2d 916 (Sur. Ct. 2002).

cases, if they were adopted, might bolster the merits of her argument, the briefing ignores the initial issue of whether the cases are applicable in Alaska at all and if so, why case law from the Alaska Supreme Court should be disregarded in favor of only persuasive authority.

The court would also like to note that reconsideration is only proper where the court has "overlooked, misapplied or failed to consider a statute, decision or principle *directly controlling.*" Case law from Illinois and New York is not "directly controlling." In fact, the cases cited by Holly are not even "directly controlling" on all the courts in their own jurisdictions.

Next, Holly correctly notes that the court erroneously stated that Robert revealed the trust's costs in January 2016. Robert apparently did not reveal the trust's costs until February 2016. This point is completely immaterial to the court's decision and therefore is not a basis for reconsideration.

Holly also argues that the court overlooked her argument that she was nauseated and vomited during and after settlement negotiations with Robert. The court was aware of this argument, but did not address it because it is completely immaterial to Holly's ability to consent to settle her claims. She was not incapacitated in any legal sense, cited no case law that compels a finding that nausea is a basis for incapacity, and had competent counsel with her throughout the negotiations.

Holly next contends that the court erroneously stated that she arbitrated her dispute with Robert before Eric Sanders when in fact she stated in a footnote in her brief to Eric Sanders that her participation was "voluntary and

in the context of ongoing mediation." This argument attempts to assail the court's ultimate decision that Holly agreed to arbitrate any dispute between her and Robert concerning the settlement of her claims. The issue of whether Holly agreed to arbitration when she signed the settlement agreement was one of the dispositive issues raised in her motion and ultimately addressed by the court. The court determined that Holly agreed to arbitrate any future dispute and did so when one arose. Accordingly, the court did not overlook a material fact or a directly controlling principle of law.

Holly's last argument escapes the court. She states "[a]t page 6 of the Order, the Court commented that neither Holly nor her counsel directly addressed Holly's desire to reopen discovery deadlines." Holly appears to interpret this statement as a finding by the court that Robert did not have a duty to disclose trust information except through discovery.

The court made no such determination. Indeed, the court explicitly found that Robert has a statutory duty to disclose information about the trust to beneficiaries. The court's statement concerning discovery was a summary of the topics addressed during oral argument. As noted in the court's Order, at oral argument Holly did not address the remedy she initially sought in her motion—reopen discovery deadlines and set a new trial date—instead she argued for the first time that the case should be transferred to probate court. The Order merely restated the arguments raised at oral argument, nothing more. Consequently, Holly has not asserted any grounds for reconsideration.

Holly's Motion for Reconsideration also appears to request a clarification of whether, in light of the court's Order, Holly may still pursue additional claims she has against Robert. That issue may only be addressed by Eric Sanders through arbitration. The court's Order did not make any determination about the scope or the content of the settlement agreement. The court's decision was limited to addressing whether Holly agreed to arbitrate disputes with Robert. The court found that she agreed to arbitrate her disputes and therefore Eric Sanders' decision is binding and enforceable. Any dispute concerning the content of the settlement agreement or its scope may only be brought before Eric Sanders.

ORDER

Holly's Motion for Reconsideration is DENIED.

DATED at Anchorage, Alaska this 2ND day of August, 2016.

Pamela Scott Washington
Superior Court Judge, *pro tem*

I certify that on 8.2.16 a copy of the above was mailed to each of the following at their addresses of record:
Chris Brecht
David Gross
Kevin Clarkson

Mary Brault - Judicial Assistant

EXHIBIT 11

(EXHIBIT 11 WILL BE FILED AS A SUPPLEMENTAL EXHIBIT)

THE SUPREME COURT OF THE STATE OF ALASKA

HOLLY SHELDON LEE and SHELDON AIR SERVICE, LLC,	Supreme Court Nos. S-16442/16471
Appellants and Cross-Appellees,	Superior Court No. 3AN-15-05117 CI
v.	OPINION
ROBERT DONALD SHELDON, individually and as Trustee of the Roberta Reeve Sheldon 2014 Grantor Controlled Revocable Trust,	No. 7285 – August 31, 2018
Appellee and Cross-Appellant.	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Pamela Scott Washington, Judge pro tem, and William F. Morse, Judge.

Appearances: Robert John, Law Office of Robert John, Fairbanks, for Appellants and Cross-Appellees. Kevin G. Clarkson and Matthew C. Clarkson, Brena, Bell & Clarkson, P.C., Anchorage, for Appellee and Cross-Appellant.

Before: Stowers, Chief Justice, Winfree, Maassen, Bolger, and Carney, Justices.

BOLGER, Justice.

I. INTRODUCTION

Following mediation, a trust beneficiary and a trustee signed a document purporting to settle bitter family litigation and referring future disputes to the mediator for resolution. The beneficiary subsequently denied that she had settled and asked the mediator to resolve the issue, and the mediator concluded that the parties had reached a binding settlement. The beneficiary tried to resurrect this issue in the superior court, but the court concluded that the mediator's decision was within the scope of the authority conferred by the parties. We conclude that the superior court did not err by confirming the mediator's decision. We also conclude that the court did not err by denying the beneficiary's petition to review the trustee's compensation, or by awarding Alaska Civil Rule 82 attorney's fees to the trustee. We therefore affirm the superior court's judgment.

II. FACTS AND PROCEEDINGS

A. Creation Of Mountain House, LLC And Roberta Sheldon's Trust

In the 1960s, famed Alaska bush pilot Don Sheldon built a cabin — known as the Mountain House — at the head of Ruth Glacier in Mount McKinley National Park (now Denali National Park). Following Don's death in 1975, his wife Roberta Sheldon assumed control of the Mountain House. In 2006 Roberta created Mountain House, LLC to own and manage the cabin.

In early 2014 Roberta conveyed Mountain House, LLC and other assets into a newly created revocable trust. The trust names the Sheldons' three children Holly, Robert, and Kate[1] as beneficiaries and designates Robert as successor trustee. It establishes procedures for distribution of real and personal property among the beneficiaries. It also includes a penalty clause designed to dissuade the beneficiaries from contesting the trust's terms. The clause provides that persons who contest the trust

---

[1] Kate Sheldon is not involved in this dispute.

or its provisions "shall not benefit in any way under this Trust . . . and shall not receive any distribution whatsoever."

Following Roberta's death in June 2014, Robert became trustee. Holly requested an accounting of trust assets in September, and Robert provided a list of assets the following month. In December, Robert — acting in his capacity as trustee — drafted an operating agreement appointing himself as manager of Mountain House, LLC. The agreement provided that membership shares in the LLC would be distributed equally among Holly, Robert, and Kate "[a]t such time as the Trustee deems suitable for both this LLC and the Trust."

B. Initial Litigation

Over the following months, disagreements arose between Holly and Robert concerning his administration of the trust. Holly claimed that Robert had failed to adequately respond to her request for an accounting and that he also had failed to distribute trust assets that she had requested and that he had stated he would provide.

In February 2015 Holly and her company, Sheldon Air Service, LLC (SAS),[2] filed a lawsuit against Robert individually and in his capacity as trustee. Holly argued that Robert had "unlawfully detained . . . Trust assets without regard to the beneficiaries' distribution rights" and that he had breached his fiduciary duties "[b]y refusing to timely distribute Mountain House, LLC to the beneficiaries."[3] She moved for summary judgment, asking the superior court to rule that Robert was required "to immediately distribute the Mountain House, LLC, to its three, equal owners." Robert

---

[2] SAS is a limited liability company owned by Holly and her husband David Lee.

[3] Holly's complaint also alleged breach of contract; she argued that Robert had violated a previously existing agreement granting SAS unrestricted rights to transport Mountain House guests.

brought a cross-motion for summary judgment, arguing that Holly had "no right to distribution, immediate or otherwise, of an in-kind membership in the Mountain House, LLC" and that Holly's complaint and litigation violated the trust's penalty clause.

In November 2015 the superior court ruled that under the terms of the trust, Robert was entitled to determine which children would receive membership interests in Mountain House, LLC. It also found that Robert was not obligated to immediately distribute Mountain House, LLC. However, the court rejected Robert's argument that Holly's litigation had triggered the trust's penalty clause. Noting that attempts to enforce rights or "secure an interpretation of [an] instrument" generally do not trigger penalty clauses, the court held that Holly had "advanced a reasonable interpretation of the trust in light of an ambiguity." Though the court "[found] her interpretation unsupported," it concluded that Holly had merely sought to "clarify and enforce the trust," not void it, nullify it, or set it aside.

C. Mediation And Subsequent Disputes

Robert and Holly participated in mediation conducted by retired superior court judge Eric Sanders in December 2015. Following the mediation, the parties signed a document titled "Mediator's Proposal" (Proposal). Under the terms of the Proposal, Holly would pay $25,000 into Mountain House, LLC. She would receive a one-third, non-voting interest in the LLC as well as various personal effects from the trust's corpus, and she would be granted periodic access to the Mountain House. The Proposal stated that the parties had "reached an agreement to the settlement of all claims of all parties" and would "execute a Settlement Agreement and Mutual Release of All Claims between the parties as a result of the full and complete settlement reached." Lastly, paragraph 11 of the Proposal provided that "[a]ny disputes concerning [the Proposal's] terms or the execution of these terms and the Settlement and Release shall be resolved finally and completely by Eric Sanders."

Per the Proposal's terms, Robert sent Holly a draft settlement agreement to review. In response Holly sent a "Response Regarding Term Sheet" (Response) to Sanders arguing that the Proposal had not settled her claims against Robert. She argued that at the time she signed the Proposal, she "believed [the] document was merely a proposal . . . and that her signature would not result in a binding agreement." She also claimed that she "lacked sufficient information concerning the assets and liabilities of the Trust" to make an informed decision during the mediation and that Robert's failure to provide this information "vitiate[d] [her] consent" to any settlement. Lastly, she argued that even if she and Robert had reached a settlement, SAS had separate claims that had not yet been resolved. Holly "requested that the mediation be reconvened to address all disputes." She also indicated that her Response was "submitted within the context of mediation" and that she "reserve[d] all rights as to whether the issues raised herein are subject to arbitration."

In response Robert submitted an "Arbitration Memorandum Regarding Settlement Existence, Scope, Noncompliance, and Enforcement" (Arbitration Memorandum) to both Holly and Sanders. Robert argued that the parties had agreed to a settlement when they signed the Proposal, that Holly had all the information she needed to make an informed decision regarding settlement, and that SAS's claims against Robert, the trust, and Mountain House, LLC had been resolved. Robert attached an accounting, which disclosed payments made for repair and renovation of the Mountain House and legal fees related to the ongoing litigation.

After both documents had been submitted to Sanders, the parties exchanged a series of emails discussing the nature of their dispute. Robert sought to clarify that "this is an arbitration at this point" and that the parties were no longer "mediating at this time." Holly stated that she did "not agree with Robert's position but would like to see all issues resolved to avoid further litigation expense" and that the parties would "have

to agree to disagree on this point." In response to a question about subpoenas, Robert stated that he was "under the impression that [the parties were] waiting for . . . Sanders to issue a decision as an arbitrator under paragraph 11 of the Mediator's Proposal." Holly replied that she wanted to take Robert's deposition, stating, "I do not have any objection to rescheduling the depo until after [Sanders] has reviewed the matter." In response Robert again noted, "We are awaiting . . . [Sanders's] decision regarding the existence and scope of the settlement that was reached at the December 1, 2015, mediation." And Holly again confirmed that she was anticipating that Sanders would issue a decision on the issues she had raised: "[P]lease confirm whether Robert is willing to agree to reschedule the deposition until after [Sanders] has issued his decision."

Sanders issued a decision in February 2016. He stated that the parties had identified disputes to be resolved "[p]ursuant to paragraph 11" of the Proposal. He concluded that Holly had settled her claims against Robert when she had executed the Proposal and that she "must comply with [its] terms and conditions." He further concluded that the Proposal had settled SAS's claims against Robert but not its claims against Mountain House, LLC. Sanders directed the parties to "execute a mutual release which is consistent with this decision."

D. Motions To Continue And Enforce

In March 2016 Holly filed a motion to continue the trial scheduled in the superior court. She again contended that the December 2015 mediation had not resulted in a binding settlement; in the alternative, she argued that fraud and fiduciary misconduct on Robert's part vitiated her consent to any settlement that may have occurred. Holly denied that the parties had already submitted these issues to arbitration, characterizing her earlier Response as a request for "assistance" presented to Sanders "in the context of the mediation." She sought a continuance to investigate "facts surrounding the Trustee's various breaches of fiduciary duty." In response Robert filed a motion to

enforce, arguing that the parties had already submitted these issues to arbitration and that Sanders's decision directing Holly to comply with the terms of the Proposal constituted a binding arbitration award. In the alternative, he argued that the court should enforce the terms of the Proposal even if it concluded that Sanders's decision was not the product of arbitration. Robert also argued that Holly had violated the trust's penalty clause by filing her motion to continue.

The superior court issued an order denying Holly's motion to continue and granting in part Robert's motion to enforce. The court explained that Holly had asked Sanders to determine whether the Proposal constituted a binding settlement agreement and that she now sought to overturn both Sanders's arbitration decision and the underlying settlement agreement. The court concluded that the Proposal was "not a proposal" but rather a settlement agreement; the court reasoned that "given the wording of the document, the presence of Holly's attorney, and her signature," it was a "near certainty" that Holly understood she was settling her claims. The court further concluded that Holly's reliance on Robert's diligence in reporting trust costs was not "justifiable": Holly "knew the trust had costs, knew that she did not know the precise value of the costs, and knew Robert had a duty to disclose the costs but had not done so." Therefore, Holly's fraud claim could not vitiate her consent to the terms of the Proposal — including paragraph 11, the provision providing for arbitration of subsequent disputes.

In light of these conclusions, the court denied Holly's motion to continue and granted Robert's motion to enforce "in so far as it [sought] enforcement of the arbitration decision." The court noted, however, that "the remedy sought in Holly's motion" was "a new trial date and further discovery" rather than nullification of any trust provisions. Accordingly, the court denied Robert's motion as it related to the penalty clause. Having concluded that the parties had settled all claims, the court entered final judgment.

E. Post-Judgment Motions And Attorney's Fees

Robert subsequently moved for attorney's fees under Rule 82. Holly opposed and petitioned the superior court to review Robert's compensation and attorney's fees under AS 13.36.055. The court denied Holly's petition on the basis that she had "settled the case without insisting that [Robert] provide more of an accounting than he already had before and during the course of the litigation." Concluding that Holly's post-mediation litigation conduct had been vexatious, the court awarded enhanced attorney's fees to Robert.[4]

III. DISCUSSION

Holly appeals the superior court's enforcement of Sanders's arbitration decision, the court's denial of her petition to review Robert's compensation and attorney's fees, and the court's award of attorney's fees to Robert. Robert cross-appeals the superior court's ruling that Holly did not violate the trust's penalty clause, but asks that we address his cross-appeal only if we do not affirm the superior court's enforcement of the arbitration decision.

A. The Superior Court Did Not Err By Confirming Sanders's Decision.

Holly challenges the superior court's conclusion that Sanders's February 2016 decision constituted an enforceable arbitration award.[5] She contends that

---

[4] *See* Alaska R. Civ. P. 82(b)(3).

[5] Holly frames the issue differently and incorrectly, arguing that the superior court erred in finding the Proposal to be an enforceable settlement agreement. But as Robert points out, the court did not just find the Proposal to be an enforceable settlement agreement; "[r]ather, the superior court enforced *an arbitration decision* that determined" that the Proposal was an enforceable settlement agreement. (Emphasis added.) Thus, the pertinent question is not whether the Proposal was enforceable but rather whether the superior court properly confirmed Sanders's determination that the Proposal was enforceable.

the question Sanders addressed — whether the Proposal was a binding settlement agreement—cannot be resolved by an arbitrator. Robert responds that Holly challenged Sanders's authority "only after Sanders ruled against her" and that Holly therefore waived this challenge.

We have not previously addressed whether a party waives an attack on an arbitrator's authority to decide an issue by submitting the issue to the arbitrator for decision. However, other jurisdictions have answered this question in the affirmative.[6] A recent Illinois appellate decision, *Advocate Financial Group v. Poulos*, is representative.[7] The appellants in that case challenged an arbitration award on the ground that the contract containing the arbitration provision had expired before the arbitration commenced.[8] The court concluded that the appellants had forfeited this argument.[9] It noted that the appellants had been "notified in writing that plaintiff intended to proceed to arbitration under the agreement" but had neither moved the court

---

[6] *See Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980); *Paige Elec. Co. v. Davis & Feder, P.A.*, 231 So. 3d 201, 205-06 (Miss. App. 2017) ("[P]articipation in arbitration proceedings waives the right to object to an arbitrator's authority."), *cert. denied*, 229 So. 3d 122 (Miss. 2017); *Adams v. Barr*, 182 A.3d 1173, 1179 (Vt. 2018) ("[A]t some point prior to the actual arbitration hearing a party who participates in an arbitration proceeding without objecting to the validity of the arbitration agreement may waive the ability to make that objection."); *Welty v. Brady*, 123 P.3d 920, 928 (Wyo. 2005) ("[W]hen an issue appears to be submitted to arbitration by the parties and there is no objection to the arbitrator's consideration of a particular issue, a later claim the arbitrator exceeded its authority by considering that claim is waived.").

[7] 8 N.E.3d 598 (Ill. App. 2014).

[8] *Id.* at 609.

[9] *Id.*

conclusion that a party objecting to an arbitrator's authority bears the burden of presenting a timely objection in arbitration or in court — and that failure to do so may result in forfeiture of the objection on appeal.

In light of both persuasive authority from other jurisdictions and Alaska statutes governing arbitration proceedings, we hold that a party to arbitration can waive objections to the arbitrator's authority by failing to raise them in a timely manner. We next address whether this rule bars Holly from asserting on appeal that Sanders could not resolve the parties' dispute over the enforceability of the Proposal.

There is no dispute that both parties signed the Proposal, paragraph 11 of which states that "[a]ny disputes concerning [the Proposal's] terms or the execution of these terms . . . shall be resolved finally and completely by Eric Sanders." Thereafter, Holly invoked this mechanism — albeit implicitly — when she requested that Sanders determine whether a valid settlement agreement existed between her and Robert and whether her signature on the Proposal was induced by fraud. She stated that she "reserve[d] all rights" as to whether these two issues were "subject to arbitration," and, in a subsequent filing, she stated that she "view[ed] the . . . process as part of the mediation." However, she did not affirmatively state that resolution of either issue would exceed Sanders's authority. And Robert raised the same issues in his Arbitration Memorandum, which he submitted to Sanders and served upon Holly. This document referred to Sanders as an "Arbitrator," and, in correspondence exchanged following submission of the Arbitration Memorandum, Robert explicitly asserted that the parties were engaged in "an arbitration . . . under paragraph 11 of the . . . Proposal."

---

[16](...continued)
arbitration proceeding has been initiated or threatened but that there is not an agreement to arbitrate, the court shall proceed summarily to decide the issue.").

Upon learning that Robert believed arbitration proceedings had been initiated, Holly could have informed Sanders of her disagreement. In the alternative, she could have applied to the superior court, "alleging that an arbitration proceeding [had] been initiated or threatened but that there [was] not an agreement to arbitrate."[17] The court would then have "summarily . . . decide[d] the issue."[18] But rather than take any action to address the dispute, Holly elected to await Sanders's decision on whether the Proposal was an enforceable settlement agreement, while "agree[ing] to disagree" with Robert on the issue whether that decision would constitute a binding arbitration award. Like the appellants in *Advocate Financial Group*, Holly was aware that Sanders was likely to issue an arbitration decision on the issues that had been submitted to him, but she "necessarily made a calculated decision . . . to do nothing."[19] She therefore forfeited her argument that Sanders exceeded his authority when he concluded that the Proposal was a binding and enforceable settlement agreement.

Because we hold that Holly failed to assert her objections to the arbitrator's authority in a timely manner, we need only decide whether the superior court erred by confirming Sanders's arbitration award. We review a superior court's decision confirming an arbitration award de novo.[20] "An arbitrator's decision is accorded great deference," which "extends to both the arbitrator's factual findings and the arbitrator's interpretation and application of the law."[21]

---

17 *Id.*

18 *Id.*

19 *Advocate Fin. Grp. v. Poulos*, 8 N.E.3d 598, 609-10 (Ill. App. 2014).

20 *McAlpine v. Priddle*, 321 P.3d 345, 348 (Alaska 2014).

21 *State v. Alaska Pub. Emps. Ass'n*, 199 P.3d 1161, 1162 (Alaska 2008); *see* (continued...)

Here, the parties signed the Proposal following a lengthy mediation session. The Proposal outlines the terms of an agreement and states that "[t]he parties . . . have reached an agreement to the settlement of all claims of all parties based upon discussions and negotiations in [the] mediation." Holly was represented by counsel during the mediation, and her counsel signed the Proposal. And the mediation and settlement process was overseen by neutral party Sanders. Accordingly, we conclude that there is adequate record support for Sanders's conclusion that the Proposal was a valid, enforceable settlement agreement.

We reach the same conclusion regarding Holly's claim that Robert fraudulently induced her acquiescence to the Proposal's terms. Holly argued to Sanders that Robert "withheld material information from [her] prior to and during the mediation." But in order to prove that the parties' agreement was voidable, Holly would need to establish that she justifiably relied on Robert's representations concerning the trust.[22] Holly was aware at the time she signed the Proposal that Robert had incurred costs while managing the trust and that Robert had not provided all the information she wanted regarding trust expenditures.[23] She nonetheless participated in the mediation and agreed to settle the dispute. Therefore, "the course of dealings between the parties before and

---

[21](...continued)
also Moore v. Olson, 351 P.3d 1066, 1071 (Alaska 2015) ("An 'arbitrator's findings of both fact and law . . . receive great deference.' " (omission in original) (quoting *OK Lumber Co. v. Alaska R.R. Corp.*, 123 P.3d 1076, 1078 (Alaska 2005))).

[22] *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981).

[23] *Indus. Commercial Elec., Inc. v. McLees*, 101 P.3d 593, 601 (Alaska 2004) ("Whether reliance is justified in a given case seems to us more likely to turn on the course of dealings between the parties before and during the dispute.").

during the dispute" adequately supports Sanders's conclusion that Holly's decision to settle her claims was not procured through fraud.[24]

The record thus supports Sanders's determination that the parties had settled their claims and that Holly must comply with the Proposal. The superior court did not err when it confirmed Sanders's arbitration decision.[25]

B. The Superior Court Did Not Err By Refusing To Consider Holly's Petition Regarding Trustee Compensation And Attorney's Fees.

Holly argues that the superior court should have considered her petition under AS 13.36.055 for review of Robert's compensation and attorney's fees before awarding him enhanced attorney's fees. Robert responds that the court's earlier entry of final judgment precluded Holly's petition for a review.

We conclude that the superior court did not err by refusing to consider Holly's petition. By the time Holly filed her petition, the superior court had already issued a final judgment "[c]onfirming and enforcing" Sanders's arbitration award, which in turn had confirmed and enforced the parties' settlement agreement, the Proposal.[26] The Proposal had "settle[d] . . . all claims of all parties," including the claims raised in the complaint. Thus, as the superior court explained in rejecting Holly's petition, "[t]his case [had] ended." Although the superior court may have had authority to consider

---

[24] *Id.*

[25] Further, because the Proposal settled "all claims of all parties," no claims remained to be decided at trial and there was no need for additional discovery. We thus reject Holly's argument that the superior court erred in denying her motion to continue the trial.

[26] *See Richard v. Boggs*, 162 P.3d 629, 633 (Alaska 2007) ("A 'final' judgment is one that disposes of the entire case and ends the litigation on the merits." (quoting *Mattfield v. Mattfield*, 133 P.3d 667, 673 (Alaska 2006))).

Holly's petition in the present proceeding,[27] Holly does not explain why it was an abuse of discretion for the court to instead require that she bring her petition "in a separate proceeding."[28]

C. The Superior Court Did Not Abuse Its Discretion By Awarding Enhanced Attorney's Fees For The Post-Mediation Litigation.

Holly argues that the superior court erred by awarding Robert enhanced attorney's fees under Rule 82. She contends that Robert was not the "prevailing party" in the suit and was thus not entitled to recover a percentage of reasonable attorney's fees. In the alternative, she argues that the court erred by characterizing her litigation conduct as "vexatious."

Rule 82 includes a schedule of default fee awards to be granted to the "prevailing party" in a civil suit.[29] However, a court may deviate from the default schedule upon consideration of factors outlined in subsection (b)(3), including whether either party engaged in "vexatious or bad faith conduct" during litigation.[30] "[I]n general, a trial court has broad discretion to award Rule 82 attorney's fees in amounts exceeding those prescribed by the schedule of the rule, so long as the court specifies in

---

[27] *See Marshall v. First Nat'l Bank Alaska*, 97 P.3d 830, 836 (Alaska 2004) (approving, in dictum, beneficiary's filing of AS 13.36.055 petition for review following judgment on beneficiary's petition for substitution of trustee, explaining that this "was far more efficient than commencing a new proceeding"). We do not decide whether the reasoning in *Marshall* — a probate matter — would apply in the present case.

[28] The superior court left open the question whether the present case would have "res judicata effect" on any subsequent litigation involving AS 13.36.055. We likewise decline to address the question as it is not ripe for review.

[29] *See* Alaska R. Civ. P. 82(b).

[30] Alaska R. Civ. P. 82(b)(3)(G).

the record its reasons for departing from the schedule."[31] "We review awards of attorney's fees for abuse of discretion and will reverse 'if the award is arbitrary, capricious, manifestly unreasonable, or improperly motivated.' "[32] "The determination of which party is the prevailing party is . . . subject to the trial court's discretion and is reviewable only for abuse of discretion."[33]

The prevailing party in a civil suit is the party who "prevails on the main issues."[34] Here, as the superior court noted, the parties' litigation can be divided into two phases: the first "preceded the expected execution of a settlement agreement and dismissal of the litigation," while the second "followed [Holly's] refusal to abide by the mediation agreement." The court based its award of enhanced attorney's fees on the costs incurred during the second, post-mediation phase. Holly argues that she should be "deemed the prevailing party" in the post-mediation litigation because she received "significant information . . . concerning Robert's actions and expenditures as Trustee" over the course of the proceedings.[35] However, Holly's suggestion that she "achieve[d] the goals of [her] litigation" is unconvincing.[36] Holly first unsuccessfully attempted to dispute the finality of the parties' settlement. She then sought to proceed to trial, at

---

[31] *Kollander v. Kollander*, 400 P.3d 91, 95 (Alaska 2017) (quoting *Kollander v. Kollander*, 322 P.3d 897, 907 (Alaska 2014)).

[32] *Id.* (quoting *Roderer v. Dash*, 233 P.3d 1101, 1106 (Alaska 2010)).

[33] *Fink v. Municipality of Anchorage*, 379 P.3d 183, 188 (Alaska 2016).

[34] *Kollander*, 400 P.3d at 97 (quoting *Alaska Constr. & Eng'g, Inc. v. Balzer Pac. Equip. Co.*, 130 P.3d 932, 935-36 (Alaska 2006)).

[35] *See DeSalvo v. Bryant*, 42 P.3d 525, 530 (Alaska 2002) ("Even without formal judicial relief, many plaintiffs achieve the goals of their litigation.").

[36] *Id.*

which point the superior court enforced Sanders's arbitration decision and ended the litigation. Robert prevailed at every stage of post-mediation litigation; accordingly, the superior court did not abuse its discretion in concluding that he was the prevailing party.

The superior court based its decision to enhance the attorney's fees award largely on one factor: the vexatious nature of Holly's post-mediation litigation. After signing the Proposal, Holly argued that it did not constitute a binding settlement agreement — a claim "soundly rejected" by Sanders. The superior court noted that Sanders had overseen the parties' mediation and was thus well-situated to "gauge [Holly's] understanding of the various counterproposals and participation in the discussions that led to the agreement." After Sanders issued his decision, Holly "ignored the result that she did not like" and attempted to "restart the trial process." While Holly contends that "the record evidences that [she] litigated reasonably and in good faith," she neither cites evidence to support this contention nor disputes the evidence the superior court relied upon in arriving at its decision to enhance attorney's fees. Because the record adequately supports the superior court's rationale, we conclude that the decision to enhance attorney's fees was not an abuse of discretion.[37]

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the superior court.

---

[37] Holly also argues that Rule 82 is inapplicable to suits in which a beneficiary seeks construction and enforcement of a trust document. We have not previously articulated such a rule, and the authorities Holly cites do not support this proposition. *See, e.g.*, *Barber v. Barber*, 915 P.2d 1204, 1209-10 (Alaska 1996) (holding that it was error to award attorney's fees to trustee where "trustee was [not] sued for breach of fiduciary duty" but was instead "a neutral party, seeking to establish in advance that a particular course of action was . . . in the best interests of all the beneficiaries"). We thus decline to address Holly's argument.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

HOLLY SHELDON LEE,

Plaintiff,

vs.

BIRCH HORTON BITTNER, INC., an Alaska Professional Corporation, DAVID KARL GROSS and MARA E. MICHALETZ,

Defendants.

Case No. 3PA-20-1219CI

DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT #2

Defendants, Birch Horton Bittner, Inc., David Gross and Mara Michaletz, by and through counsel Cashion Gilmore, LLC, and pursuant to Alaska Rule of Civil Procedure 56, seek summary judgment against Plaintiff. This motion is supported by the attached memorandum of law.

CASHION GILMORE LLC
Attorneys for Defendants

DATE March 25, 2020

s/*Chester Gilmore*
Chester D. Gilmore
Alaska Bar No. 0405015

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed on the 25th day of March, 2020 to:

Holly Sheldon Lee
P.O. Box 1
Talkeetna, AK 99676

CASHION GILMORE, LLC

By: *s/Jennifer Witaschek*
Jennifer Witaschek

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

Exh. U
Page 187 of ___

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

HOLLY SHELDON LEE,

Plaintiff,

vs.

BIRCH HORTON BITTNER, INC., an Alaska Professional Corporation, DAVID KARL GROSS and MARA E. MICHALETZ,

Defendants.

Case No. 3PA-20-1219CI

ORDER GRANTING DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT #2

MAR 26 2020

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

This is a legal malpractice action whereby Plaintiff Holly Sheldon Lee ("Lee") makes two independent claims, both arising out of a mediation taking place with retired Superior Court Judge Eric Sanders. First, she asserts that Defendants Birch Horton Bittner & Cherot, David Gross, and Mara Michaletz (Collectively "BHBC") failed to advise her as to the consequence of signing a "mediator's proposal," which set forth the terms of a settlement. Second, Lee claims that BHBC created an environment at the mediation whereby she was forced to sign the mediator's proposal as a result of economic duress. BHBC filed a motion for summary Judgment, seeking a dismissal of both of Lee's claims.

Lee's first claim is that BHBC should have more fully explained to her the consequences of signing the mediator's proposal. For the purposes of summary judgment, the court must construe all inferences in favor of the non-moving party, which

Exh. ___
Page 188 of ___

would be Lee. Therefore, the court must assume that BHBC did nothing to explain the consequences of signing the mediator's proposal, but let Lee fend for herself. However, even with this assumption, it is undisputed that Lee signed the document. It is a fundamental principle in law and commerce that when a party signs a document, they are communicating to all concerned that they read and understood the contents of document. It is not a defense to a breach of contract claim to assert that a person signed the document, but did not read it. Therefore, BHBC acted reasonably, and in conformance with the applicable standard of care, in assuming that by signing the mediator's proposal, Lee read and understood the contents of that document. With this, Lee's claim that BHBC was required to explain to her the meaning of the words in the mediator's proposal, fails as a matter of law and must be dismissed.

In Lee's second claim she asserts that BHBC put her in an environment where Judge Sanders was allowed to coerce her into signing the mediator's proposal by putting her under economic duress. Again, for the purposes of summary judgment, the court must view all inferences in Lee's favor. Therefore, the court will accept as true the inference that BHBC stood by while Judge Sanders pressured Lee into signing the mediator's proposal. However, even with this inference, this claim must also fail. This is true because Lee has not, and cannot, demonstrate that she had no other reasonable alternatives, but to sign the agreement. She also has not, and cannot, show that Judge Sanders engaged in "coercive acts." Because she cannot make the showing needed to prove economic duress, she cannot as a matter of law prevail on her claim that BHBC created an environment that left her with no other option but to sign the mediator's

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

proposal. When reading Lee's complaint, it is clear that there are only two claims being asserted, which are the two claims discussed above. Therefore, as a matter of law, Lee's entire complaint must be DISMISSED with prejudice.

IT IS SO ORDERED.

Date:_____

_____
Hon. Kristen C. Stohler
Superior Court Judge

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT PALMER

HOLLY SHELDON LEE,

Plaintiff,

vs.

BIRCH HORTON BITTNER, INC., an Alaska Professional Corporation, DAVID KARL GROSS and MARA E. MICHALETZ,

Defendants.

Case No. 3PA-20-1219CI

THIRD SET OF DISCOVERY REQUESTS TO PLAINTIFF

COME NOW Defendants, Birch Horton Bittner & Cherot, David Karl Gross, and Mara Michaletz (collectively referred to herein as "BHBC"), by and through undersigned counsel of record, and pursuant to Alaska Rules of Civil Procedure 26, 33, 34 and 36, propound the following discovery requests to Plaintiff, responses to which are required within thirty (30) days after the due date for initial disclosures required by Alaska Rule of Civil Procedure 26 and the Court's Pretrial Order. The "Instructions" set forth in Defendants' First Interrogatories to Plaintiff, dated March 3, 2020, are incorporated herein to the same extent as if fully set forth.

INTERROGATORIES

INTERROGATORY NO. 14: Please describe in detail all of the ways in which you were "pressured, bullied, and coerced" as alleged in your complaint at

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

Paragraph 7. In responding to this Interrogatory, please include who pressured, bullied, and coerced you; at what point during the mediation did this happen; what was your response to this conduct; how Mara Michaletz was specifically involved in this conduct; and all other such information.

ANSWER:

INTERROGATORY NO. 15: Please describe in detail the factual basis for the assertion that BHBC "failed to make sure that Sheldon Lee fully understood the legal consequences that would follow if she signed the document" as alleged in your complaint at Paragraph 7. In responding to this Interrogatory, please include what portion of the Mediator's Proposal you did not understand; what specific legal consequences followed that you were unaware of; why you signed the document if you did not understand the contents of the document; what questions you asked your lawyers to help clear up any confusion; your understanding of what it means to sign a document; and all other such information.

ANSWER:

INTERROGATORY NO. 16: Please describe in detail the factual basis for the assertion that BHBC "failed to advise Sheldon Lee that she would be giving up important legal and economic rights and protections if she signed that document" as

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

alleged in your complaint at Paragraph 7. In responding to this Interrogatory, please include what legal rights you gave up; what economic rights you gave up; what portion of the Mediator's Proposal you did not understand in this regard; why you signed the document if you did not understand the legal and economic consequences of signing; what questions you asked your lawyers to help clear up any confusion; and all other such information.

ANSWER:

INTERROGATORY NO. 17: Please describe in detail the charges you incurred for legal services as a result of the dispute with the Trust. In responding to this interrogatory, please confirm that the invoices attached hereto as Exhibit 1 are all of the invoices that were sent to you by BHBC; please indicate how much you have paid so far for these invoices; indicate how much is still owed; and set forth when you intend to pay the balance due.

ANSWER:

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 12: Please produce all of the documents related to the cost of the legal services provided by BHBC, including, but not limited to all of the invoices you received from BHBC; any correspondence

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

(including emails) regarding the payment of these invoices; any checks you wrote to pay for these services; and all other such documents.

RESPONSE:

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 18: Please admit that the charges set forth in the invoice for work done in September 2014, as set forth in Exhibit 1 at pages 1-2, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 19: Please admit that you paid the charges set forth in the invoice for work done in September 2014, as set forth in Exhibit 1 at pages 1-2, by making three payments of $1,000, $1,000, and $60. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 20: Please admit that the charges set forth in the invoice for work done in October 2014, as set forth in Exhibit 1 at pages 3-4, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 21: Please admit that you paid the charges set forth in the invoice for work done in October 2014, as set forth in Exhibit 1 at pages 3-4, by making a payment of $1,300. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 22: Please admit that the charges set forth in the invoice for work done in January 2015, as set forth in Exhibit 1 at pages 5-6, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 23: Please admit that you paid the charges set forth in the invoice for work done in January 2015, as set forth in Exhibit 1 at pages 5-6, by making two payments of $2,500 and $2,537.41. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 24: Please admit that the charges set forth in the invoice for work done in February 2015, as set forth in Exhibit 1 at pages 7-9,

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 25: Please admit that you paid the charges set forth in the invoice for work done in February 2015, as set forth in Exhibit 1 at pages 7-9, by making a payment of $4,211.03. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 26: Please admit that the charges set forth in the invoice for work done in March 2015, as set forth in Exhibit 1 at pages 10-12, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 27: Please admit that you paid the charges set forth in the invoice for work done in March 2015, as set forth in Exhibit 1 at pages 10-12, by making a payment of $2,752.89. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

REQUEST FOR ADMISSION NO. 28: Please admit that the charges set forth in the invoice for work done in April 2015, as set forth in Exhibit 1 at pages 13-15, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 29: Please admit that you paid the charges set forth in the invoice for work done in April 2015, as set forth in Exhibit 1 at pages 13-15., by making a payment of $3,559.50. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 30: Please admit that the charges set forth in the invoice for work done in May2015, as set forth in Exhibit 1 at page 16, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 31: Please admit that you paid the charges set forth in the invoice for work done in May 2015, as set forth in Exhibit 1 at page 16, by making a payment of $227.50. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 32: Please admit that the charges set forth in the invoice for work done in June 2015, as set forth in Exhibit 1 at pages 17-18, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 33: Please admit that you paid the charges set forth in the invoice for work done in June 2015, as set forth in Exhibit 1 at pages 17-18, by making a payment of $3,676.14. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 34: Please admit that the charges set forth in the invoice for work done in July 2015, as set forth in Exhibit 1 at pages 19-21, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 35: Please admit that you paid the charges set forth in the invoice for work done in July 2015, as set forth in Exhibit 1 at

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

pages 19-21, by making payments of $1,000, $1,000, $500, $250, $250, $200, $200, and $100, which left a credit of $79.79 to apply to the next invoice. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 36: Please admit that the charges set forth in the invoice for work done in August 2015, as set forth in Exhibit 1 at pages 22-24, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 37: Please admit that you partially paid the charges set forth in the invoice for work done in August 2015, as set forth in Exhibit 1 at pages 22-24, by making numerous payments totaling $1,354.79. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 38: Please admit that you have not yet paid for all of the charges set forth in the invoice for work done in August 2015, as set forth in Exhibit 1 at pages 22-24. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 39: Please admit that you have a legal obligation to pay for the remaining charges totaling $2,204.65 in the invoice for work done in August 2015, as set forth in Exhibit 1 at pages 22-24. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 40: Please admit that you will pay for the remaining charges set forth in the invoice for work done in August 2015, as set forth in Exhibit 1 at pages 22-24. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 41: Please admit that the charges set forth in the invoice for work done in September 2015, as set forth in Exhibit 1 at pages 25-26, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 42: Please admit that you have not yet paid for the charges for work done in September 2015 totaling $3,684.51, as set forth

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

in Exhibit 1 at pages 25-26. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 43: Please admit that you have a legal obligation to pay for the charges set forth in the invoice for work done in September 2015, as set forth in Exhibit 1 at pages 25-26. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 44: Please admit that you will pay for the charges set forth in the invoice for work done in September 2015, as set forth in Exhibit 1 at pages 25-26. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 45: Please admit that the charges set forth in the invoice for work done in October 2015, as set forth in Exhibit 1 at pages 27-28, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

REQUEST FOR ADMISSION NO. 46: Please admit that you have not yet paid for the charges for work done in October 2015 totaling $1,553.22, as set forth in Exhibit 1 at pages 27-28. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 47: Please admit that you have a legal obligation to pay for the charges set forth in the invoice for work done in October 2015, as set forth in Exhibit 1 at pages 27-28. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 48: Please admit that you will pay for the charges set forth in the invoice for work done in October 2015, as set forth in Exhibit 1 at pages 27-28. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 49: Please admit that the charges set forth in the invoice for work done in November 2015, as set forth in Exhibit 1 at pages 29-30, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 50: Please admit that you have not yet paid for the charges for work done in November 2015 totaling $5,370, as set forth in Exhibit 1 at pages 29-30. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 51: Please admit that you have a legal obligation to pay for the charges set forth in the invoice for work done in November 2015, as set forth in Exhibit 1 at pages 29-30. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 52: Please admit that you will pay for the charges set forth in the invoice for work done in November 2015, as set forth in Exhibit 1 at pages 29-30. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 53: Please admit that the charges set forth in the invoice for work done in December 2015, as set forth in Exhibit 1 at

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

pages 31-32, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 54: Please admit that you have not yet paid for the charges for work done in December 2015 totaling $3,735, as set forth in Exhibit 1 at pages 31-32. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 55: Please admit that you have a legal obligation to pay for the charges set forth in the invoice for work done in December 2015, as set forth in Exhibit 1 at pages 31-32. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 56: Please admit that you will pay for the charges set forth in the invoice for work done in December 2015, as set forth in Exhibit 1 at pages 31-32. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

REQUEST FOR ADMISSION NO. 57: Please admit that the charges set forth in the invoice for work done in January 2016, as set forth in Exhibit 1 at pages 33-34, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 58: Please admit that you have not yet paid for the charges for work done in January 2016 totaling $2,675, as set forth in Exhibit 1 at pages 33-34. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 59: Please admit that you have a legal obligation to pay for the charges set forth in the invoice for work done in January 2016, as set forth in Exhibit 1 at pages 33-34. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 60: Please admit that you will pay for the charges set forth in the invoice for work done in January 2015, as set forth in Exhibit 1 at pages 33-34. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 61: Please admit that the charges set forth in the invoice for work done in February 2016, as set forth in Exhibit 1 at page 35, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 62: Please admit that you have not yet paid for the charges for work done in February 2016 totaling $1,200, as set forth in Exhibit 1 at page 35. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 63: Please admit that you have a legal obligation to pay for the charges set forth in the invoice for work done in February 2016, as set forth in Exhibit 1 at page 35. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 64: Please admit that you will pay for the charges set forth in the invoice for work done in February 2015, as set forth in

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

Exhibit 1 at page 35. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 65: Please admit that the charges set forth in the invoice for work done in March 2016, as set forth in Exhibit 1 at pages 36-37, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 66: Please admit that you have not yet paid for the charges for work done in March 2016 totaling $1,055, as set forth in Exhibit 1 at pages 36-37. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 67: Please admit that you have a legal obligation to pay for the charges set forth in the invoice for work done in March 2016, as set forth in Exhibit 1 at pages 36-37. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

REQUEST FOR ADMISSION NO. 68: Please admit that you will pay for the charges set forth in the invoice for work done in March 2016, as set forth in Exhibit 1 at pages 36-37. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 69: Please admit that the charges set forth in the invoices for work done in April, May, June and July 2016, as set forth in Exhibit 1 at pages 38-41, were fair and reasonable. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 70: Please admit that you have not yet paid for the charges for work done in April, May, June, and July 2016 totaling $1,350, as set forth in Exhibit 1 at pages 38-41. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 71: Please admit that you have a legal obligation to pay for the charges set forth in the invoices for work done in April, May, June, and July 2016, as set forth in Exhibit 1 at pages 38-41. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

RESPONSE: Admit or Deny

REQUEST FOR ADMISSION NO. 72: Please admit that you will pay for the charges set forth in the invoices for work done in April, May, June, and July 2016, as set forth in Exhibit 1 at pages 38-41. [Please circle "Admit" if the statement made is true, or circle "Deny" if the statement made is false.]

RESPONSE: Admit or Deny

CASHION GILMORE LLC
Attorneys for Defendants

DATE April 1, 2020

s/*Chester Gilmore*
Chester D. Gilmore
Alaska Bar No. 0405015

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed on the 1st day of April, 2020 to:

Holly Sheldon Lee
P.O. Box 1
Talkeetna, AK 99676

CASHION GILMORE, LLC

By: s/ Jennifer Witaschek

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

VERIFICATION

STATE OF ALASKA)
) ss:
THIRD JUDICIAL DISTRICT)

I, Holly Sheldon Lee, the Plaintiff herein, being first duly sworn, depose and state: I am the person above named. I have reviewed the above Answers to Interrogatories and have knowledge of the facts pertaining thereto. The answers are correct to the best of my knowledge, information and belief.

_____
Holly Sheldon Lee

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2020.

_____
Notary Public for Alaska
My Commission expires: _____

Cashion Gilmore LLC
1007 W. 3rd Ave., Suite 301
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938