No.

In the Supreme Court of the United States

MAURA LEE WALBERG, INDIVIDUALLY AND AS TRUSTEE OF THE GREVER-BURKE TRUST AGREEMENT U/A/D DECEMBER 30, 1996, AS AMENDED,

Petitioner,

v.

ROY GREVER,

Respondent.

On Petition for a Writ of Certiorari to the Second District Court of Appeal for the State of Florida

PETITION FOR A WRIT OF CERTIORARI

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October 21, 2021

QUESTION PRESENTED

Does the Full Faith and Credit Clause permit a state court refuse to give a sister state's judgment full faith and credit based on its belief that the sister state's judgment was procured through purported fraud that was intrinsic, not extrinsic?

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

RELATED CASES

Grever v. *Wahlberg*, No. 15-CA-1491, Circuit Court for the Twelfth Judicial Circuit in and for Manatee County, Florida. Judgment entered July 2, 2019.

In re The Grever-Burke Trust u/a/d December 30, 1996, No. 16-CA-2841, Circuit Court for the Twelfth Judicial Circuit in and for Manatee County, Florida. Judgment entered June 28, 2016.

Wahlberg v. *Grever*, Nos. 2D19-2903 & 2D19-4778, District Court for the Second District Court of Appeal for the State of Florida. Judgment entered April 7, 2021; rehearing denied May 24, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Maura Lee Walberg, individually and as Trustee of the Grever-Burke Trust Agreement u/a/d December 30, 1996, as amended, respectfully petitions for a writ of certiorari to review the judgment of the Second District Court of Appeal for the State of Florida.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) is unreported.

JURISDICTION

The court of appeals filed its opinion on April 7, 2021. Pet. App. 1a–2a. It denied on the merits a timely motion for panel rehearing and rehearing *en banc* on May 24, 2021. Pet. App. 3a. On July 19, 2021, by administrative order, this Court continued to extend the deadline for all certiorari petitions seeking review of judgments or orders entered before July 19, 2021 by 60 days. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 1 of the United States Constitution, which provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1.

STATEMENT

This case raises a fundamentally important question regarding the extent to which a state court can

refuse to give full faith and credit to a sister state's judgment based on its belief that the sister state's judgment was procured through purported fraud that was intrinsic, not extrinsic.[1]

This was a trust litigation. The trust had only one asset: a waterfront home in Florida. The dispute was between respondent, Roy Grever (a beneficiary), and petitioner, Maura Lee Walberg (a trustee and beneficiary). Like many trust litigations, it was somewhat complex and involved many facts and legal arguments. *See* Pet. App. 36a–82a (initial brief); 83a–130a (answer brief); 131a–145a (reply brief). Still, for present purposes, the litigation boils down to one relatively straightforward constitutional question.

During the trust litigation, the Florida trial court held a temporary injunction hearing in a companion case styled *In re The Grever-Burke Trust u/a/d December 30, 1996*, No. 16-CA-2841 (Fla. 12th Cir. Ct.). In that companion case, respondent had agreed to a sale of the waterfront home, but sought to enjoin petitioner from reimbursing herself or her husband for $450,000 in claimed expenses. Ultimately, the Florida trial court entered an order in the companion case that permitted the sale but authorized petitioner to reimburse no more than $50,000 to her husband for past expenses. The order specified it was without

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[1] Intrinsic fraud is "[d]eception that pertains to an issue involved in an original action," such as "the use of fabricated evidence, a false return of service, perjured testimony, and false receipts or other commercial documents." *Black's Law Dictionary*, *intrinsic fraud* (7th ed. 1999). In contrast, extrinsic fraud is "[c]ollateral to the issues being considered in the case," such as "convincing a litigant not to hire counsel or answer by dishonestly saying the matter will not be pursued." *Id.*, *extrinsic fraud*.

prejudice to allowing respondent to contest the expenses. In particular, the Florida trial court stated:

> This order applies to the approximate $450,000.00 claimed owed as reimbursement to the Burkes [*i.e.*, petitioner and her husband]. No further such reimbursements shall be made w/o court order or agreement of the parties.

After that order was entered, petitioner's husband, Kevin Burke, filed a lawsuit in Connecticut seeking to collect on a $750,000 loan he had previously made to the Grever-Burke Trust. Pet. App. 47a. To resolve that Connecticut litigation, petitioner entered into a stipulated judgment with Mr. Burke in Connecticut. Pet. App. 47a. Petitioner, in her capacity as trustee, subsequently paid the Connecticut judgment with the trust's funds. Pet. App. 47a.

When respondent discovered the stipulated judgment through discovery, he filed a motion to hold petitioner in indirect contempt for purportedly violating the companion case's order. Granting that motion after a hearing at which petitioner wasn't always present (Pet. App. 4a–35a), the Florida trial court ruled it didn't need to give full faith and credit to the Connecticut judgment (Pet. App. 21a–24a).

In particular, the Florida trial court indicated the companion case's order that prohibited any "reimbursement" to Mr. Burke "for past expenses" beyond $50,000 "could not be more clear [*sic*]," even though that order never mentioned any prohibition against repaying a loan. Pet. App. 21a. Overlooking the distinction between repaying a loan and reimbursing expenses, it then ruled the litigation that produced the Connecticut judgment was therefore the most "underhanded, outrageous, and contemptuous violation of a

clear and unequivocal court order in this Court's 17-year history on the bench." Pet. App. 23a.

Instead of affording the Connecticut judgment the full faith and credit it was due, the Florida trial court just rejected it as the product of *intrinsic* fraud:

> Simply because [petitioner and her husband] went to the lengths of hiring attorneys and got a stipulated judgment, a judgment between the two people who would directly benefit from the so-called loan, a stipulation that obviously the Florida court was not made aware of does not make the so-called loan and its repayment legitimate. It is indeed the opposite of legitimate.
>
> There is no judge in the world that would find this level of deceit and self-dealing a reasonable and appropriate exercise of trustee discretion. There is no judge in the world that would not find this entire so-called loan and repayment issue a breach of her fiduciary duty. This is not a close call.

Pet. App. 24a. As a result, the Florida trial court held petitioner in indirect contempt. Pet. App. 5a–6a.

That contempt ruling had significant consequences for petitioner. Ordinarily, trust litigants in Florida are entitled to recover attorney fees only with respect to breach-of-trust claims; in contrast, fees incurred litigating claims other than breaches of trust are not recoverable. *Levine* v. *Stimmel*, 272 So. 3d 847, 848–49 (Fla. 5th DCA 2019). To remedy the contempt, however, the Florida trial court ordered petitioner to pay *all* of respondent's attorney fees, including otherwise unrecoverable fees incurred in the action to approve the sale of the home, the probate proceedings, the probate appeal, and the appeal below. Pet. App. 6a, 82a.

On appeal to the Second District, the litigants argued, *inter alia*, for and against that contempt ruling. Pet. App. 78a–80a, 123a–127a, 142a–144a The court of appeals affirmed without opinion. Pet. App. 1a–2a. Petitioner now petitions this Court.[2]

REASONS FOR GRANTING THE PETITION

I. When the Florida trial court treated the Connecticut judgment as illegitimate due to intrinsic fraud, it ignored the Full Faith and Credit Clause's exacting requirements

With respect to judgments, "the full faith and credit obligation is exacting." *Baker* v. *GM Corp.*, 522 U.S. 222, 233 (1998). "A final judgment in one State, if rendered by a court with adjudicatory authority over the

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[2] It was jurisdictionally impossible to seek further appellate review in the Florida Supreme Court because the Second District issued a *per curiam* decision without opinion. *See The Florida Star* v. *B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988) ("This Court does not … have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation."). For that reason, it's appropriate for petitioner to seek further appellate review directly from this Court. *See, e.g.*, 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari."); *see also Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 139 & n.4 (1987) (noting Florida petitioner had successfully obtained writ of certiorari from *per curiam* decision without opinion, considering appeal, and reversing state district court's judgment); *Brown* v. *Texas*, 443 U.S. 47, 50 (1979) (county court's rejection of petitioner's constitutional claims was a decision by highest state court "'in which a decision could be had'" because Texas law forbade further appellate review unless fine exceeded $100 (citations omitted)); *Thompson* v. *City of Louisville*, 362 U.S. 199, 202 & n.4 (1960) (certiorari issued to local police court whose decisions were not otherwise appealable within the state court system).

subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Id.*

Thus, a "State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits." *V.L.* v. *E.L.*, 577 U.S. 404, 407 (2016). Instead, "the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940).

There are only two exceptions. First, states aren't required "to afford full faith and credit to a judgment rendered by a court that 'did not have jurisdiction over the subject matter or the relevant parties.'" *V.L.*, 577 U.S. at 407 (quoting *Underwriters Nat'l Assurance Co.* v. *N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 (1982)). "'Consequently, before a court is bound by [a] judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree.'" *Id.* But that jurisdictional inquiry "is a limited one." *Id.* "[I]f the judgment on its face appears to be a 'record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.'" *Id.* (citations omitted).

Second, extrinsic fraud—whether it goes to the question of jurisdiction, *Staedler* v. *Staedler*, 78 A.2d 896, 901 (N.J. 1951); *Klaiber* v. *Frank*, 86 A.2d 679, 683 (N.J. 1952), or prevented a party from fully and fairly presenting his case, *Britton* v. *Gannon*, 285 P.2d 407 (Okla. 1955)—can result in a denial of full faith and credit. *Mueller* v. *Payn*, 352 A.2d 895, 902 (Md. 1976). On the other hand, intrinsic fraud that concerns the merits of an action "must be raised in the court where

the judgment is rendered." *Id.* But such intrinsic fraud, even if proven, does not permit denial of full faith and credit. *Id.* (citing *Oldham* v. *McRoberts*, 258 N.Y.S.2d 424 (Ct. App. 1965); *Perkins* v. *Benguet Consol. Mining Co.*, 132 P.2d 70 (Cal. App. 1942).

When it elided the distinction between intrinsic and extrinsic fraud, the Florida trial court disregarded the limitations imposed by the Full Faith and Credit Clause. Instead, because it believed the loan was a fraudulent transaction that served merely as an end run around the vague order in the companion case, it treated the Connecticut judgment as the illegitimate product of intrinsic fraud (*i.e.*, a sham transaction) and held petitioner in indirect contempt. But the power to reject a sister state's judgment as the product of intrinsic fraud wasn't one the Constitution conferred upon the Florida trial court. For that reason, the Florida trial court's contempt ruling resting on petitioner's compliance with a Connecticut judgment cannot constitute contempt.[3]

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[3] Relatedly, petitioner's compliance with the Connecticut judgment did not violate the plain terms of the companion case's order. As noted, the order prohibited reimbursing petitioner's husband without a "court order." It didn't confine its terms to a *Florida* court order. The Connecticut judgment was a court order.

Under Florida law, one cannot be convicted of indirect criminal contempt for violating a court order unless the order is "clear and precise" and the person "clearly violated" it. *Haas v. State*, 196 So. 3d 515, 523 (Fla. 2d DCA 2016); *accord United States* v. *Straub*, 508 F.3d 1003, 1010 (11th Cir. 2007). Thus, indirect criminal contempt cannot be based on what was intended by an order; it can only be based on violation of the order's express terms. *Haas*, 196 So. 3d at 523; *Reder v. Miller*, 102 So. 3d 742, 744 (Fla. 2d DCA 2012) (reversing contempt order; while party's actions "may have violated the 'spirit' or 'intent' of the trial court's orders, a finding of contempt requires the violation of the

That's because the Florida trial court's ruling rests on an impermissible premise: that the Connecticut judgment was invalid. The Florida trial court repeatedly questioned the merits of the Connecticut proceedings and the validity of the judgment entered. *See* Pet. App. 78a (describing Florida trial court's repeated challenges to the validity of loan, settlement, and judgment). In other words, each supposed fraud the Florida trial court identified involved conduct related to the formation of the loan contract itself and not to the obtaining of the judgment—*i.e.*, those purported frauds were intrinsic, not extrinsic.

But the Florida trial court couldn't ignore the Connecticut judgment or readjudicate its merits. *See V.L.*, 577 U.S. at 407. That's because "the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action." *Milliken*, 311 U.S. at 462.

The Full Faith and Credit clause is "exacting"; if a judgment is entered by a court with adjudicatory authority it "qualifies for recognition throughout the land." *Baker*, 522 U.S. at 233. Under the Constitution, a final judgment cannot be the subject of a collateral attack by a third party or a court in another state. *Kelley v. Kelley*, 147 So. 3d 597, 601–04 (Fla. 4th DCA 2014). The trial court's contempt ruling indisputably hinged on its assessment of the merits of the Connecticut proceedings. That was error.

The issue is in important one, because it involves a core federalism principle that's supposed to produce a

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letter of an order—not its spirit"). Consistent with her attorney's advice, petitioner's payment to her husband under a Connecticut judgment could not, as a matter of law, support a finding of criminal contempt. *See id.*

"nationally unifying force." *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 439 (1943). If states are allowed to question whether sister states' judgments were produced by intrinsic fraud, that would quickly become an exception that swallows the rule. The issue arises frequently because states are often called upon to enforce or construe judgments from sister states. And this case presents a good vehicle for its adjudication because it arises from a final judgment after a full-blown merits appeal and is dispositive as to respondent's purported entitlement to attorney fees.

In sum, the contempt order against petitioner was procedurally flawed and substantively wrong. The Court should grant certiorari to consider it.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 21, 2021

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

Nos. 2D19-2903 & 2D19-4778 (consolidated)

L.T. No. 15-CA-1491

MAURA LEE WAHLBERG, individually and as Trustee of The Grever-Burke Trust Agreement u/a/d December 30, 1996, as amended,

Appellant,

v.

ROY GREVER,

Appellee.

Appeal from the Circuit Court for Manatee County; Edward Nicholas, Judge.

Opinion filed April 7, 2021.

Appeal from the Circuit Court for Manatee County; Edward Nicholas, Judge.

Kristin A. Norse and Stuart C. Markman of Kynes, Markman & Felman, P.A., Tampa (withdrew after briefing), for Appellant.

Maura Lee Wahlberg, individually, *pro se*.

Andrea M. Johnson of Law Office of Andrea M. Johnson, P.A., Bradenton, for Appellee.

PER CURIAM.

Affirmed.

SILBERMAN, LUCAS, and LABRIT, JJ., Concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

Nos. 2D19-2903 & 2D19-4778 (consolidated)

L.T. No. 15-CA-1491

MAURA LEE WAHLBERG, individually and as Trustee of The Grever-Burke Trust Agreement u/a/d December 30, 1996, as amended,

Appellant,

v.

ROY GREVER,

Appellee.

Appeal from the Circuit Court for Manatee County; Edward Nicholas, Judge.

Order filed May 24, 2021.

BY ORDER OF THE COURT:

Appellant's motion for rehearing and for written opinion is denied; to the extent the motion seeks rehearing en banc, it is facially insufficient and stricken.

APPENDIX C

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA

Case No. 15-CA-1491

ROY GREVER,

Plaintiff,

vs.

MAURA LEE WAHLBERG, individually and as Trustee of The Grever-Burke Trust Agreement u/a/d December 30, 1996, as amended,

Defendant.

ORDER ON RULE TO SHOW CAUSE

THIS CAUSE having come on for hearing conducted on January 23, February 25 and June 5–7, 2019, pursuant to the Plaintiffs Fifth Amended Order to Show Cause Why Defendant Should Not be Held In Indirect Criminal Contempt, said Order to Show Cause having been filed on April 5, 2019, and the Court having considered the testimony of the witnesses called by the Plaintiff and the Defendant, the exhibits introduced into evidence at the trial, and the argument of counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Defendant, MAURA LEE BURKE, as Trustee of the Grever-Burke Trust Agreement u/a/d December 30, 1996, as

amended, is, indeed, in indirect criminal contempt for her willful and blatant disregard of Judge Charles Williams' Order dated June 28, 2016, in case number 2016 CA 2841, that prohibited her from reimbursing Kevin Burke more than $50,000.00 from the Trust. The bench ruling pronounced in open court on June 7, 2019, and read into the record is hereby incorporated and adopted in its entirety in this Order as though fully set forth herein. A true and accurate copy of the transcript of the aforesaid June 7, 2019 bench ruling is attached hereto as Exhibit A.

As indicated in that oral ruling, Judge Williams prohibited the Defendant from reimbursing her husband, Kevin Burke, more than $50,000.00 from trust assets. In fact, his Order specifically stated that Ms. Burke was prohibited from reimbursing "the approximate $450,000.00 claimed owed as reimbursement to the Burkes. No further reimbursement shall be made without court order or agreement of the parties". As indicated in this Court's oral ruling, the Defendant, in violation of said Order, paid her husband $416,228,23. She did so after personally paying for her husband's attorney to sue herself, in her home state of Connecticut. The Defendant never provided a copy of Judge Williams' order to the Connecticut judge or otherwise advised the Connecticut court that such an order existed. As indicated in this Court's oral ruling, the Defendant never advised the Florida court that she had provided her husband with such a large sum of trust funds. Obviously, the Defendant never sought permission of the Manatee County Court to reimburse her husband more than $50,000.00. As indicated in this Court's oral ruling, it was clear that the Defendant did exactly what Judge Williams had unequivocally ordered that she not do. As indicated in this Court's oral

ruling, this Court has never seen such a direct, underhanded, outrageous and contemptuous violation of a clear and unequivocal court order in this Court's seventeen-year history on the bench. As indicated in this Court's oral ruling, Ms. Burke a/k/a Wahlberg's egregious violation is the very definition of contempt.

As a sanction for the clear and obvious contemptuous behavior, she is immediately removed as Trustee of the Trust. As an additional sanction, she will be responsible for paying Mr. Grever's attorneys fees and the costs associated with bringing this action. The Court will reserve jurisdiction to determine the amount of the fees and costs she will be obligated to pay and for all purposes according to law.

DONE AND ORDERED in Bradenton, Manatee County, Florida, this 31st day of October, 2019.

EDWARD NICHOLAS, Circuit Judge.

APPENDIX D

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA

Case No. 15-CA-1491

ROY GREVER,

Plaintiff,

vs.

MAURA LEE WAHLBERG, individually and as Trustee of The Grever-Burke Trust Agreement u/a/d December 30, 1996, as amended,

Defendant.

TRANSCRIPT OF HEARING OF JUNE 7, 2019

THE COURT: We are back on the record in case number 2015-CA-1491. A few things before I begin.

I want to compliment the attorneys for their professional and effective and clear presentation of the evidence and for making an otherwise difficult and challenging case a little less so. Well done to both of the attorneys.

As to my final judgment, I'm going to put on the record what I reviewed, the case law: *Landau vs. Landau*, 230 So.3d 1271 *McCormick vs. Cox*, 118 So.3d 980; *Barnett vs. Barnett*, 340 So.2d 584; *Kritchman vs. Wolk*, 152 So.2d 628; *in the Estate of Morris Feldstein*, 292 So.2d 4041 *Brigham vs. Brigham*, 11 So.3d 374.

Obviously, I reviewed section 518.11 of Florida Statutes and I spent a good time—good bit of time reviewing section 736 of the Florida Statutes relating to trusts and estates.

Now, as to the final judgment. I was up quite late last night finishing it, putting it into the best form that I could. Did not get a great deal of sleep, but I felt it was important to attempt to resolve this case today, if I could.

A, it's been going on quite some time and I felt it was somewhat of an urgency to attempt to resolve it expeditiously. B, there is a need for resolution here. Ms. Grever died now it will be eight years ago. And it's time that this process neared the finish line.

And finally, you know, Ms. Baird, you are in town. Your parties were—your clients were in town. So I thought it was appropriate to attempt to resolve this now, if I could. But it is in somewhat rough form so please understand that it wasn't rushed, but I didn't have a great deal of time last night to put this in the form that I otherwise would have preferred.

What I'm going to do is I'm going to provide you a copy of a final judgement in a case that I tried last week. Somewhat complicated construction litigation case, non-jury. And the reason I'm providing you the final judgment is it may provide at least a bit of a template for the final judgment here.

And what I mean by that is the introduction to the final judgment in that case says, this cause came to be heard before the Court in a non-jury trial conducted May 20th, 21st, and 22nd raised under the claims pled in the plaintiff's complaint and the defendant's amended counterclaim.

Based upon the pleadings of record in this action, the answers and affirmative defenses of the parties, the testimony of the witnesses called by plaintiff and defendant, the exhibits introduced into evidence in the trial, and the argument of counsel, and with the Court being otherwise fully advised of the premises, it is hereby ordered and adjudged as follows.

And this was the relevant language that I kind of like from this order: One, the bench rulings pronounced orally in open court on May 24, 2019 and read into the record by the Honorable Edward Nicholas, Circuit Court Judge, are hereby incorporated and adopted in their entirety in this final judgment as though fully set forth herein.

Now, that paragraph continues to say, a true and correct copy of the transcript of the aforesaid May 24, 2019 bench ruling is hereby attached as Exhibit A. I'll leave that up to you whether that's necessary. I don't want to spend any additional expense here.

My ruling is going to be on the record if there's an appeal here, but—so I'm going to provide both of you a copy of this final judgment because I like that language, if you don't want to take what I'm saying here and put it into the form of a somewhat lengthy final judgment, if that makes sense.

You certainly can if you want to take what I'm going to recite here and put it into a final judgment. That's fine. But there obviously will be some costs associated with that. I am obviously going to request some assistance from the attorneys in preparing this final judgment.

So based upon all the testimony and evidence over this—the course of this multi-day trial, we start with the trust. The trust clearly established that should

any beneficiary die without "lineal descendants," the spouse will receive the spouse's share as beneficiary. Payment was to be made within four years. Obviously, the plaintiff was not paid on or about August 13, 2015, four years after Reenie Graver's death.

The trust owned a residential home on West Moreland Drive. It was 1.1 acres on bayfront property encompassing a 5,000 square foot home. The evidence established that evidently within the first six months after Reenie's death, the relationship between the plaintiff and Ms. Wahlberg appeared amicable.

Both discussed the trust, that the plaintiff was to be paid within four years, and that the house would be sold. According to the plaintiff's testimony, Ms. Wahlberg acknowledged that the plaintiff was entitled to his share and that the goal was to maximize his share when it sold.

The property was listed for sale through Michael Saunders with the plaintiff signing the listing agreement. Although the fact that the plaintiff had to sign the listing agreement does not definitively establish his entitlement to a share after its sale, it certainly should have put the defendant on notice that he was likely to receive a portion of the sale proceeds. Why else would he be required to sign the listing agreement?

In approximately December of 2012 through February 2013, apparently with the addition of Kevin Burke to the management of the property and to the e-mail chain, the relationship began to deteriorate.

On February 4, 2013, Mr. Burke sent an e-mail, "You are a fucking idiot. The insurance on the house is now in force and we don't need a fuck-up like you screwing things up again. I've spoken with Bob and

Andy and have once again sorted this out. Just focus on paying the electric bill on time, Kevin Burke."

On February 5, 2013, he sent an e-mail to the plaintiff. "Fuck you, Roy, and such a fucking pussy. Hoping that MLW will fight your battles. Such a fucking cunt. Better check your tampon, asshole."

On May 5, 2013 at 12:06, he sent an e-mail to the plaintiff. "Loser, you should commit suicide and spare us your loser ways."

Although Mr. Burke attempted to minimize the relation—the adversarial relationship he had with the plaintiff and although he called his attitude towards him neutral, these e-mails speak for themselves.

As an aside, the plaintiff was evidently paying the electric bills, utilities, and maintenance expenses on the property and the trust was paying the property taxes.

On May 27, 2011, the trust received a check in the amount of $37,954 from Southern Oak Insurance Company for damage as a result of a tropical storm. The trust never properly accounted for this check, at least not according to the evidence.

In 2013—in 2013—in August of 2013, there was a $1 million offer on the home. The offer was cash and was "as-is." The testimony indicated that the listing agent considered it to be a "great offer" and recommended it be accepted. The house was in significant disrepair at the time, was sitting empty, and because Reenie had died two years earlier, needed to be sold.

The defendant and I use the word defendant and trustee and Ms. Wahlberg somewhat interchangeably here and I know what the distinction is, but just for the sake of ease, I oftentimes say the defendant. The

defendant rejected the offer and apparently made no counter offer. Ms. Wahlberg and Mr. Burke's response—reasons for rejecting the offer were weak and unpersuasive.

During long periods of time, the defendant provided little or no information to the plaintiff regarding the status of the trust, what monies were being spent—and what monies were being spent. She did virtually nothing that could be considered consistent with section 736.0810.

The plaintiff filed a lawsuit in March 2015 seeking an accounting. The defendant filed a counterclaim. In that counterclaim, plaintiff heard for the first time that the defendant was seeking $176,410.21 in reimbursement for repairs, maintenance, and taxes. The counterclaim did not contest that the plaintiff was Reenie's lawful husband, nor that he was entitled to receive her share as beneficiary.

Nowhere in the counterclaim did the defendant reference a loan from the trust to Mr. Burke. During the discovery, there appeared to be no dispute that the plaintiff was a lawful beneficiary of his wife's share, nor did there appear to be any reference to a loan agreement between the defendant and her husband.

Defendant's attorney at the time acknowledged the plaintiff was a 50 percent beneficiary, nor did he dispute the fact that he was the surviving spouse.

It is significant that the plaintiff was never provided an accounting with an outline of expenses, even after the relationship deteriorated. And it became clear that he was eager to receive more detailed information about the trust, its status, any expenses that were allegedly paid by the trust.

It appears, however, that despite not providing any type of accounting after Reenie's death, the defendant later claimed an entitlement to a $30,000 annual fee for administration of the trust.

The plaintiffs claim—the plaintiff claimed that he never agreed to, nor even knew about a $30,000 administration fee. The plaintiff also was not aware that Kevin Burke was seeking reimbursement for his time making repairs at the home.

In 2016, the plaintiff learned about a sales contract on the home in the amount of 1.3 million. In the defendant's answer and amended counterclaim, the plaintiff learned for the first time that Kevin Burke was seeking to receive in excess of $400,000 from the trust pursuant to a loan agreement.

Note that the revolving loan agreement was dated August 15, 2011, two days after Reenie's death wherein Mr. Burke was allegedly loaning $750,000 from the to the trust.

Mr. Grever claimed that the defendant was with him in Ohio at August 15, 2011, assisting him with the details of the services and the aftermath of the -- his wife's affairs.

Inexplicably, the loan agreement says that the defendant signed the loan on that very day. The defendant claims that she signed the loan agreement on that date in Connecticut at her brother's office. Public records, however, indicate that he bought that building two hours—two years later.

The rushed nature of the so-called loan agreement executed two days after the terrible death of the dear wife and sister when there were truly no urgencies at that time only adds to the suspicious nature of this deceitful deal.

The Court will find this loan agreement suspicious, poorly contrived, disingenuous, and indeed fraudulent. This so-called loan agreement is yet another clear violation of Ms. Wahlberg's fiduciary duty. The Court will address this so-called loan in more detail throughout this order.

The Court will find Mr. Burke's complaint against the trust wherein he requests repayment of $575,000 from the trust to be suspicious as well. The settlement agreement wherein she paid her husband $416,228.23 from the trust on December 7th of 2016 is the definition of self-dealing.

It appears to be the—it appears to the Court to be an ineffective and fraudulent effort on the part of the defendant and her husband to circumvent the intentions of the trust and to keep the vast majority of the money proceeds, the property sale proceeds for themselves.

Of significance is the fact that it appears that Maura Wahlberg wrote the check to the attorney who was suing herself on behalf of her husband in the amount of $2,500. How could it not be considered suspicious that the defendant paid the lawyer to sue herself so that her husband could later receive over $400,000 from the trust?

This so-called loan agreement and bogus settlement between husband and wife is as fraudulent and underhanded as it gets. This is clearly one of the most poorly conceived, mendacious, and yes, I will say it, fraudulent transactions that this Court has ever seen.

This loan agreement is as fraudulent as the so-called trustee invoices in the amount of $30,000 per year for the administration of the trust. This so-called loan agreement and the so-called loan trustee invoices are

as fraudulent and disingenuous as the defendant's effort to reopen and vacate Judge Economou's order of discharge for lack of subject jurisdiction by the defendant in the Maura Grever estate case.

Finally, the defendant's claim very late in the litigation that the plaintiff may not even be the beneficiary of the trust was bizarre, disingenuous, and consistent with what this Court considers to be the defendant's pattern of repeatedly hostile, vindictive, and unlawful response to the plaintiff's clear—clear claim of entitlement.

The plaintiff called Joseph Bell, the property real estate agent with Michael Saunders who listed the subject property. We learned—Mr. Bell learned from the defendant that the house had been left to her and her sister.

She asked that he maximize the profit on the sale as her brother-in-law, the plaintiff, had been so good to her sister, especially during her illness. According to Mr. Bell, Ms. Wahlberg spoke about the plaintiff receiving his portion of his wife's estate share when it sold.

As indicated, an offer of $1 million was made. Mr. Bell considered it to be "a very good offer" and recommended that she accept it. Long-time family attorney Robert Johnson who represented the trust at one time strongly recommended that she accept it.

The Court will read Mr. Johnson's letter because it's significant. Maura Lee, I have attached a contract for $1 million on West Moreland. Joe has busted his chops to get this and I do not believe you will ever see more. I am very concerned about your understanding of your duties as trustee.

If you do not receive a better contract that you—you could be liable for a surcharge for loss of value. There are numerous Florida cases your lawyer can research on the issue. Contrary to your opinion that I have a conflict, I have never given Roy one indication of anything but what is in your best interest as trustee.

I've also included in this attachment some Florida law on trustees. You do not like Roy, but you have a fiduciary duty to him as an equal beneficiary. I strongly suggest you see your lawyer immediately and discuss your role as duty—and duties as trustee.

As to the closing date in the contract, I am certain the buyer will extend that. An e-mail approval to Joe would bind the contract. As a trustee, you have a duty to respond to the offer directly.

Clearly, Mr. Johnson was trying to warn Ms. Wahlberg that her rejection of the offer was a violation of her duties as trustee. Obviously, the defendant rejected the offer. Again, I use the word defendant and Ms. Wahlberg and trustee interchangeably. You know who I'm talking about.

It appears that she made no counteroffer. Mr. Bell said that she rejected the offer quickly. This rejection was particularly unusual given the very poor condition of the home. The Court will find that a rejection of the $1 million offer and her failure to make a counteroffer was a clear violation of her fiduciary duties as trustee.

The Court will find that her rejection of the offer was more based upon her hostility towards the—on her hostility towards the plaintiff and her eagerness to delay or more accurately prevent the plaintiff ability to recover his 50 percent portion as beneficiary. It

certainly was not consistent with the sound fiduciary duty of a trustee.

As happens in many family law cases, the defendant let her emotion dictate her decision-making. When she rejected that offer, she did so at her own peril as trustee. She was a fiduciary first and foremost, not just a beneficiary.

As the trustee, she was required to do an updated market analysis before rejecting such an offer, particularly where, as in here, there was a requirement that Mr. Grever be paid within four years from his wife's death.

This is yet another example of her clear and unequivocal violation of her duty pursuant to 736.

As an aside, an important aside however, because Ms. Wahlberg's rejection of the $1 million offer and the failure to make a counteroffer was a violation of the trust, any expenses paid after August 2013 when the property should have been sold were not properly paid.

Said another way, any alleged expenses paid after August 2013 will not be authorized by this Court and any monies paid after that date by this trust must be reimbursed to the trust to the extent those monies were paid, except those paid to Robert Johnson in August 2013 and January 2014 for legal fees.

Let me repeat that. That's important. Because of Ms. Wahlberg's rejection of the $1 million offer and the failure to make a counteroffer was a violation of the trust, any expense paid after August '13 when the property should have been sold were not properly paid.

As an aside, as indicated previously, many of these so-called expenses, including but not limited to the $30,000 annual administration fee and the alleged repairs paid—made by Mr. Burke are suspicious and double-dealing to the point of being fraudulent.

The plaintiff called Kelley Corbridge. He was a practicing attorney for many years, roughly since 1990—1981, was board-certified in wills and trusts since 2008.

The record established that he has a great deal of experience in the area of trust administration with a good deal of advanced training as well as significant work history in the area of wills, trusts, and estates. He was a trust officer at SunTrust Bank for roughly 21 years acting as a trustee for the bank and overseeing all trust operations.

He is well qualified to testify as to the trustee duties—as to trustee duties and the standard of care that attaches to proper trust administration. Again, his expertise in this area is well established.

He has testified five times previously in court as an expert in the area of trust administration, trust duties, and the proper role of a fiduciary—a fiduciary. He received all the relevant documents in this case related to the Graver-Burke Trust Agreement that was created on December 30, 1996. It was Mr. Corbridge's opinion that Ms. Wahlberg's rejection of $1 million offer and her failure to make a counteroffer was a violation of her fiduciary duty as trustee. This Court agrees.

He also opined that she violated her fiduciary duty when she entered into the loan agreement with her husband, violating her duty of loyalty and her duty to avoid a conflict of interest. This Court agrees.

He further opined that she failed in her duty as a fiduciary when she entered into the settlement agreement wherein her husband received over $400,000. This Court agrees.

He testified that in his opinion, the defendant violated her duty when she failed to provide an annual accounting of the expenses on the property from 2011 going forward. This Court agrees. This is even after Mr. Grever had a lawyer, Mr. Snyder, send Ms. Burke—Ms. Wahlberg a letter asking that she comply with the requirements—that she comply with the requirements as to her annual yearly accounting responsibilities as trustee.

While there was some question as to whether Ms. Wahlberg actually received the letter, there is no question that Ms. Wahlberg should have been aware that she had a duty to provide an annual accounting and routinely did not do so.

Section 736 mandates, among other things, that the trustee shall administer the trust in good faith and act impartially. That a trustee must administer the trust as a prudent person would. That a trustee must incur only expenses that are reasonable that are reasonable and shall act in the interest of the beneficiaries. Ms. Wahlberg did none of those things.

736 requires the trustee to inform an account. Ms. Wahlberg did not. As we explain later in more detail, Ms. Wahlberg breached this trust in numerous and significant ways.

Mr. Corbridge testified that in his opinion, the defendant violated Judge Williams' order of June 28, 2016, when she entered into the loan agreement with her husband while the Manatee County litigation was

ongoing. This Court agrees. This Court will address this issue in great detail throughout this order.

His list of violations of her fiduciary duty include—included but are not limited to, one, failed to provide annual accounting or any accounting, two, failed to distribute the 50 percent share within four years to the plaintiff1 three, failed to incur only reasonable expenses for the property; four, failed to act reasonably as it relates to the alleged loan from her husband and her failure to defend the "lawsuit" that he brought against her as trustee, five, failed to accept the $1 million offer and her—and failed to make a counteroffer. As indicated above, this Court agrees this is not a close call.

As an aside, Ms. Wahlberg while trustee never prepared anything that looks similar to Exhibit No. 58 or Exhibit No. 77, an accounting of expenses for the property that was for the property.

Exhibit No. 77, which show reimbursements for things like pest control, FPL, utilities, pool care, et cetera, is what Ms. Wahlberg should have been preparing annually, not during the discovery after litigation had begun and after the failure to provide an annual accounting was part of the claims here.

Exhibit No. 14 prepared by Mr. Burke in September 2016 was too little too late. Ms. Wahlberg had violated her fiduciary duty as trustee long before then.

Also as an aside, the defendants claim that Ms. Grever Mr. Grever is not entitled to 50 percent of the trust -- trust, but rather 45.1 percent because Ms. Wahlberg personally owns 20 percent of the house, alleged for the first time during the pendency of the litigation, is not persuasive.

This is yet another example of the defendant's ongoing and aggressive efforts to deny the plaintiff his rightful claim. This example is similar to the claim that the plaintiff was not lawfully married to Ms. Wahlberg's sister and, therefore, should get nothing. It is disingenuous, specious, and given no weight by this Court.

This example is similar to the claim that the defendant should receive $30,000 per month as trustee for a trustee fee. It is deceptive, mendacious, self-dealing, and patently ridiculous. While there was some cross-examination of Mr. Corbridge by the defense, it certainly didn't significantly challenge or in any meaningful way impact his ultimate conclusion that Ms. Wahlberg violated her fiduciary duty as trustee. His conclusion was largely unimpeached.

He never saw any documents that indicated that there was ever an annual accounting done. He never saw any documents that indicated that there was ever a separate trust account that was opened and used exclusively for property expenses for trust expenditures.

As to Judge Williams' order, let me read it. The motion is denied. Maura Burke as trustee has authorized to reimburse no more than $50,000 to Kevin Burke for past expenses without further order or payment—or payment of the parties. This order applies to the approximate $450,000 claimed owed as reimbursement to the Burkes. No further such reimbursement shall be made.

Judge Williams how is Judge Williams' order of June 28, 2016, prohibiting Ms. Wahlberg from distributing approximately $450,000 to her husband for claimed expenses unclear? Is there any reasonable

reading of that order that would permit such a payment?

Obviously, in June of 2016 there was a dispute as to whether that $450,000 so-called loan was legitimate. Obviously, Judge Williams did not want any disbursements or any payments beyond $50,000 to be made by the trust. And he clearly did not want her to pay the over $450,000 to her husband. Again, the order could not be more clear.

Mr. Bald, attorney for the defendants from 2015 through 2017, although called by the defense, certainly did not help their case. He testified that he never advised them to make the $400,000—approximate $400,000 repayment in violation of Judge Williams' order. In fact, he represented to Judge Williams that the Burkes had "no intention of, quote, reimbursing themselves" the $450,000 prior to the end of this cause.

Significantly and contemptuously, Mr. Burke stated unequivocally at that hearing that "I will not reimburse more than $50,000 and I promise I won't go to Brazil."

Although Mr. Bald had suggested to Mr. Burke that he had a may have a valid claim to reimbursement on the loan, again, he represented to Judge Williams with Mr. Burke in the hearing room that "they have no intention of reimbursing themselves, but to—or anywhere close to that amount of money."

The transcript of the hearing is at page 18, 1ine 23. Mr. Burke stated on page 32, 1ine 16—what's that exhibit number?

MS. JOHNSON: Transcript is 39, I believe. 29. I'm sorry.

THE COURT: Mr. Burke stated on page 32, line 16, I'm not—I'm taking $50,000 maximum—wait, let me start again. I'm talking $50,000 maximum that I would take. I'm more than happy to leave the rest behind until this issue is resolved.

The fact is they did exactly what they told Judge Williams unequivocally that they would not do. Indeed, this Court has never seen such an underhanded, outrageous, and contemptuous violation of a clear and unequivocal court order in this Court's 17-year history on the bench.

Just because Mr. Dent told Mr. Burke that he may have a legitimate claim to reimbursement of the loan does not mean that he was permitted to violate Judge Williams' order. This is not a close call. This contempt is so egregious and so direct that I would have considered incarcerating Ms. Wahlberg if that sanction was a possibility here based upon the outrageous violation if that sanction was available. Ms. Wahlberg is in contempt.

The giving of her husband $450,000 of trust account monies in direct contravention of judge's order and never not—notifying the Florida court that they did so is the definition of contempt.

One more thing about this so-called loan between husband and wife. Now, I know the loan is not between husband and wife, but come on, it's obviously between husband and wife.

Ms. Wahlberg claims she told Mr. Grever that her husband was loaning the trust over $700,000. The Court does not believe that testimony. The Court believes the testimony of Mr. Grever, which is corroborated by the other evidence when he testified that he

only learned of the existence of the so-called loan well after the litigation began.

Mr. Burke testified as to this alleged "1oan." He testified that he sued the trust, in effect his wife, to protect his interest in the so-called loan. This Court finds his testimony—found his testimony as to this issue not credible and not persuasive. As indicated previously, the entire issue of the so-called loan is contrived, disingenuous, and contemptuous.

Simply because they went to the lengths of hiring attorneys and got a stipulated judgment, a judgment between the two people who would directly benefit from the so-called loan, a stipulation that obviously the Florida court was not made aware of does not make the so-called loan and its repayment legitimate. It is indeed the opposite of legitimate.

There is no judge in the world that would find this level of deceit and self-dealing a reasonable and appropriate exercise of trustee discretion. There is no judge in the world that would not find this entire so-called loan and repayment issue a breach of her fiduciary duty. This is not a close call.

Speaking of Mr. Burke's testimony generally, because of his obvious and visible bias, the significant level of self-dealing here, the failure to account for any expenses prior to the commencement of the litigation, the fraudulent nature of the so-called loan agreement that he himself drafted, the rejection of Judge Economou's ruling in the probate case despite overwhelming evidence to support that decision, his creation of the completely bogus trustee administration fee invoices, and his unwillingness to even admit that Mr. Grever is a lawful beneficiary of this trust, and his overall disingenuous and duplicitous testimony, this

Court did not give Mr. Burke's testimony a great deal of weight.

At times he indicated that he was minimally involved in the trust activities and at other times indicated that he took control of virtually all activities of the trust.

His abject hostility and animosity toward Mr. Grever is palpable. It is deep-seeded and has largely driven his behavior and decision-making since approximately February 2013. Again, this Court did not find Mr. Burke's testimony persuasive or convincing. This Court gave it little weight.

There was a good bit of cross-examination of Mr. Grever as to his claims and as to Ms. Wahlberg's counterclaims. In this Court's opinion, however, it was largely of little consequence.

Said another way, the lengthy cross-examination did little to impeach Mr. Grever or his allegations that Ms. Wahlberg failed in her fiduciary duty with regard to this trust.

For instance, there was a great deal of cross-examination suggesting that Mr. Grever did not actually divorce his first and/or second wife. Ultimately, however, this cross amounted to nothing. It appears to this Court to be a complete waste of time and a disingenuous and specious argument. All it did was evidence the defendant's—both of the defendants' abject and unreasonable hostility toward the plaintiff.

There was also a lot of—again, I know they're not both defendants. There was also a lot of cross-examination regarding the deposit of rent checks into the plaintiff's account and the expense payments made therefrom. Ultimately, it amounted to very little as well.

Said another way, despite extensive cross-examination of Mr. Grever, there was little in any way that significantly impeached him or his claim that the defendant failed miserably as the trustee of the Grever-Burke Trust, nor did it establish in any meaningful way any improprieties by the plaintiff as it relates to his receipt of rent on the property or his payment of expenses on the property.

Finally, the extensive cross-examination did not establish anything that could remotely be considered civil theft. There were some minor discrepancies in the records over the years beginning around 2008 or 2009, but nothing that could remotely be considered civil theft.

Another example of a large1y de minimis and irrelevant cross-examination of Mr. Grever was the lengthy questioning of Mr. Grever regarding a tax judgment out of Hamilton, Ohio in roughly October 2013. Although defense counsel seemed to suggest that the tax issue somehow provided a motive for a theft of trust funds, Mr. Grever's explanation of the Defendant's Exhibit No. 7—37 was completely reasonable.

The Court will find that the defendant's argument that this document somehow supported the theory that he was motivated to steal from the trust due to his alleged tax judgment is wholly unsupported by the evidence and is specious and disingenuous and the Court gave it no weight.

Again, there was no civil theft by Mr. Grever here. Mr. Grever did nothing, I repeat nothing that could remotely be considered theft. Similarly, there was no interference by Mr. Grever in the trust, at least in any significant or consequential way.

Although there was some conflict over homeowner's insurance between Mr. Grever and Mr. Burke, although there was an issue with an unpaid Florida highway—FPL bill, and as the re1ationship deteriorated, conf1ict between them escalated, Mr. Grever did not interfere here.

Because of Ms. Wahlberg's complete and utter abdication of her duties and responsibilities as a reasonable trustee, because of her clear and multiple violations of section 736, Mr. Grever's behavior and requests between 2013 and 2015 were reasonable and appropriate. He was not attempting to be a co-trustee or take over the trust, he was simply acting as a reasonable and appropriate beneficiary.

Beyond the reference of the checks made out to the plaintiff by Mr. Newman, which the Court will address later, all the defense provided to support their claim of civil theft by the plaintiff was suspicion. Their suspicion, not the Court's.

The so-called "accounting," the color-coded chart labeled number 58 that Ms. Wahlberg prepared, and that was provided to the plaintiff on the eve of trial, is little more than a self-serving, contrived, and wholly unpersuasive effort to support their misguided and unproven civil theft claim.

Defendant's 58 simply does not do what the defendant claims that it does and that is to prove that Mr. Grever committed anything that could remotely be considered to be a theft from this trust between 2009 and 2011.

There is no credible or persuasive evidence of civil theft here, certainly nothing approaching the burden necessary to prove such a claim. The trustee's claim

that Mr. Grever stole $31,000 from the trust is unsupported by the evidence and is patently ridiculous.

The Court heard from Steve Newman. Mr. Newman moved into the West Moreland home in 2011 and moved out in approximately February of 2012. The testimony of Mr. Newman was largely insignificant. He said he wrote six or seven rent checks to

Mr. Grever and wrote one rent check to Ms. Wahlberg during the eight or so months that he stayed in the home.

Although the defense attempted to make an issue over these six or seven rent checks, of significance is the fact that he testified that Ms. Wahlberg never told him to stop sending the rent checks to Mr. Grever and to send them to her.

As was the case with many of the defendant's answers and counterclaims, the issue of the rent checks and whether the plaintiff should have been getting them or whether the trust should have been getting them is of no contest.

According to Mr. Newman, Ms. Wahlberg never told Mr. Newman to stop sending the checks to the plaintiff. Ms. Wahlberg herself testified that she knew that the Newman checks were going to Mr. Grever and never changed that arrangement—changed that arrangement. She said she just "let it go."

How could Mr. Graver's receipt of six or seven checks from Mr. Newman be considered theft when Ms. Wahlberg knew that he was receiving them and never did anything to stop the checks from going to the plaintiff?

Obviously, Mr. Newman would have started sending the checks to Ms. Wahlberg if she had asked. She

simply never did. Again, the rental check issue is a complete non-issue.

Finally, the Court heard from Maura Lee Wahlberg. Although less abjectly hostile and duplicitous than her husband, her testimony did little to suggest in any meaningful way that she administered this trust pursuant to section 736 Florida Statutes.

She testified, "I am an accountant and everything I do is perfection." As it relates to the administration of her mother's trust, however, nothing could be further from the truth.

One, she did not act impartially in violation of 736.0803. Two, she did not take reasonable steps to protect the trust asset in violation of 734.809. Three, she did not perform her duties to account and inform in violation of 736.0813.

Four, she failed to take reasonable steps to defend against the fraudulent and self-dealing so-called loan against the trust in violation of 736.0810. Five, she failed to manage the asset and distribution requirements of a trust in violation of 518.11. Six, she has consistently failed to administer the trust in good faith in violation of 736.801.

Seven, she failed to administer the trust solely in the interest of the beneficiaries of which there are two, not one, in violation of 736.0802. Eight, she failed to administer the trust as a prudent person would in violation of 736.0804. At risk of being repetitious, this is not a close call. The Court will not repeat the litany of violations of 736. Again, the Court has outlined in great deal.

However—however, they include, but are not limited to, one, her failure to provide any statutory annual accounting. Two, her failure to provide—to

properly account for the $37,000 insurance check. Three, her obvious delegation of the trust duties to her husband who clearly was so adversarial to the other trust beneficiary.

Four, her failure to defend against the fraudulent and mendacious—her failure to—her failure to make any effort to defend the fraudulent and mendacious lawsuit brought by her husband.

Five, her failure to accept the $1 million offer, make a counteroffer, or obtain an updated market analysis and thus delayed the distribution to the plaintiff.

Six, for taking out the so-called loan for her husband and subsequent repayment of the so-called loan in violation of Judge Williams' order. Seven, her failure to make any reasonable analysis of the costs necessary to support the home while the—while the—seven, failure to make any reasonable analysis of the cost to support the home before it sold.

Eight, the failure to make an appropriate analysis to determine whether renting the home was a reasonable alternative to preserve the trust. Nine, her inexplicable decision to attempt to take a $30,000 trust administration fee from a trust that she had managed so poorly.

Ten, her complete unawareness of the requirements of section 736. I don't think she's ever even read it. Eleven, her failure to obtain any real proof, any documentation from her husband to justify the repayment of the large sum from her husband pursuant to the so-called loan. Twelve, her bizarre and unsupported claim that somehow she has a 20 percent ownership interest in the sale proceeds.

Thirteen, her inexplicable, ill-fated effort to reopen and set aside her sister's probate estate. Fourteen, her

payment of $2,500 from her own account to pay for her husband's attorney to sue the trust. To her credit, she didn't even try to offer an explanation for why she would write a check to pay the attorney to sue herself. The Court will stop at fourteen. There are more, but fourteen seems to be enough.

Ms. Wahlberg said something very telling while on the stand. She said that her parents "didn't believe in in-laws," saying that they, meaning in-laws, could get money from their own family. I will repeat that because it's significant.

Ms. Wahlberg said something very telling while on the stand. She said that her paints "didn't believe in in-laws," saying that they, meaning in-laws, could get money from their own families.

The Court believes that this—that it's this underlying belief, said almost as a slip of the tongue, her belief, not her parents, that in-laws shouldn't get her family's money has driven virtually all her decision-making as trustee.

Despite what the trust says, despite the clear language of the trust, and its award of her sister's share to the plaintiff, she was motivated by this underlying belief that in-laws shouldn't get her parents' money. That statement puts all her obfuscation, her delay, her imprudent decisions, and her inexplicable hostility toward Mr. Grever into context.

Let me conclude by making a prediction and a request. This does not have to be included in the final judgment, obviously. The prediction is this: Mr. Burke and Ms. Wahlberg will absolutely appeal this decision.

Now, they have an absolute right to do so. Let me be clear. They have an absolute right to do so. This Court makes mistakes. This Court has over the last 17 years

been overturned. Appellate review is an important part of our system.

But they will not appeal this ruling because they think I am wrong. They will appeal only to continue their aggressive and ongoing efforts to either completely thwart or unnecessarily delay Mr. Graver's entitlement to his fair share of the trust assets.

Once their relationship broke down in 2013, the defendants again, I know we're not talking about defendants but Mr. Burke and Ms. Wahlberg's one and only mission has been to deny Mr. Grever his rightful share, to deny this in-law their parents' money.

And if they think an appeal will accomplish that goal, they will do so. And they will lose that appeal. As I've said many times, this is not a close call. This is one of the most obvious and egregious violations of section 736 that I have ever seen.

Ms. Wahlberg did nothing that a reasonable, appropriate trustee should do. Her level of deceit, self-dealing, and poor managements of the trust is unprecedented.

But they will likely appeal and they will lose, but they will delay Mr. Graver's recovery for yet another year or so to keep the family money from going to the in-law. And to them, that will be worth it.

As an aside, if they do appeal, this—they will end up paying all of Mr. Grever's appellate attorney's fees, as they will pay all of Mr. Graver's attorney's fees at this trial level. Now a request. I request that the defendants let this go. They have fought an aggressive fight, they have had a fine advocate in Ms. Baird who argued their positions, but just like what happened in front of Judge Economou, they did not have the facts to support them.

I urge them to think about the impact of their health that the stress of this litigation has had on them. Is it worth it? Is it really worth it? I urge them to let it go.

Back to the final judgment. Based upon the foregoing, in light of the many breaches and because she was such an imprudent, irresponsible, deceitful, and self-serving trustee, Ms. Wahlberg is immediately removed.

No further disbursements of payments—she is to make no further disbursements of payments. She is to sign any and all documents presented to her to effectuate the distribution of the trust asset within 48 hours of receipt.

Mr. Roy Grever, the plaintiff, is hereby immediately appointed as trustee. Judgment is entered on behalf of Mr. Grever against the trust and against Ms. Wahlberg individually in the amount of $450,000.

The $387,000 that is currently being held in the trust account will immediately be released to the plaintiff. A judgment will be entered against the trustee and Ms. Wahlberg individually for the difference between the amount held in the trust account and that award of $450,000, approximately $63,000. I don't know what the exact amount is being held in trust, but whatever it is from the $450,000 is what the remaining judgment is.

The trustee's answers and counterclaims as discussed previously have not been proven and the trust will take nothing in this cause. As to the order to show cause, as indicated, Ms. Wahlberg is hereby held in contempt.

Her outrageous, deceitful, willful, self-serving, and mendacious violation of Judge Williams' order is uncontroverted. It is the definition of contempt. As a

sanction for her contempt, Ms. Wahlberg will pay all of Mr. Grever's attorney's fees in this cause. The Court will reserve jurisdiction for purposes of determining what they consist of.

Ms. Wahlberg is warned not to attempt to move any money out of any accounts or otherwise make any efforts to attempt to thwart this Court's award of attorney's fees or the approximate $60,000 judgment.

I repeat, Ms. Wahlberg is warned not to attempt to move money out of any accounts or otherwise make any efforts to thwart this Court's award of attorney's fees for the approximate 60—$63,000 judgment. Such behavior could result in a second finding of contempt and further sanctions against her, including potentially incarceration could be imposed.

Ms. Johnson, any questions?

MS. JOHNSON: Your Honor, regarding the signing over of the documents within 48 hours, is that 48 hours from today or when the judgment is signed?

THE COURT: 48 hours from the time that they are presented to her. She's got 48 hours to review them and then she needs to sign them within 48 hours, so—

MS. JOHNSON: So the Court's order is effective at this moment?

THE COURT: Right.

MS. JOHNSON: And Mr. Grever needs to obtain whatever documents from the financial institution to sign those over?

THE COURTs Right. And once he does, whatever documents are prepared to effectuate the distribution of the assets. If she has to sign anything, perhaps she doesn't, but if she does, she has 48 hours to review them and return them to the plaintiff.

MS. JOHNSON: And I guess we need the name of the financial institution any assets are held. There's been talk about being Merrill Lynch, but I'm not certain that's where the assets are held.

THE COURT: That was before my time. I wasn't involved in that portion of it. But wherever they are held, they will be released.

Ms. Baird, obviously somebody knows where the money is. Roughly 387,000.

Ms. Johnson, any additional questions?

MS. JOHNSON: I don't think so, your Honor.

THE COURT: Ms. Baird, any questions?

MR. MOHAMMADBHOY: No, your Honor, thank you.

THE COURT: Okay. If you work on that order, I'll be happy to sign it.

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

Nos. 2D19-2903 & 2D19-4778 (consolidated)

L.T. No. 15-CA-1491

MAURA LEE WAHLBERG, individually and as Trustee of The Grever-Burke Trust Agreement u/a/d December 30, 1996, as amended,

Appellant,

v.

ROY GREVER,

Appellee.

Appeal from the Circuit Court for Manatee County; Edward Nicholas, Judge.

Initial brief of appellant

STATEMENT OF THE CASE AND OF THE FACTS

Introduction

This appeal involves a dispute over a family trust. The trust was created for Myra Wahlberg to pass an interest in a waterfront home—the trust's only asset—to her two daughters, Maura Lee Wahlberg and

Noreen (Rene) Grever. During her lifetime, Myra covered the costs of maintaining the home, either personally or by paying rent to Rene, the acting trustee, to pay utilities, services, taxes, and insurance. Unfortunately, Myra died in 2011 and Rene died two months later.

After her mother and sister died, Maura Lee became trustee. Rene's spouse, Roy Grever, was the beneficiary of her share and the trust was required to pay him that share within four years. Maura Lee and Roy agreed to put the home up for sale. But because there was no source of income, Maura Lee had to personally invest time and money to maintain the property and obtain a fair price. From 2011 until the home sold in 2016, Maura Lee invested personal funds, borrowed large amounts from her husband, and spent significant time and labor on the home. Those efforts resulted in the property selling for $100,000 over the original asking price.

Roy filed this suit in 2015 before the home sold or his share was due. He sought an accounting and removal of Maura Lee as trustee. Maura Lee counterclaimed regarding Roy's receipt and personal use of trust funds. The core issue was the proper accounting of trust funds, including the amount owed to Maura Lee for preserving the property.

The trial court failed to resolve the accounting. Instead and over objection, the court permitted Roy to press a claim against Maura Lee for indirect criminal contempt and his case-in-chief while Maura Lee was unavailable because she was being treated for a life-threatening condition. When Maura Lee was later able to appear and present her defenses and claims, the court excluded and ignored critical evidence. It decided the case based on an erroneous belief the trust

lacked the funds to pay Roy. Without performing an accounting, the court awarded Roy $450,000— an amount that is not supported by the evidence. It also made rulings against Maura Lee that were contrary to the law and facts; entered a "final judgment" that was not final; and appointed Roy as trustee even though Roy never requested that relief.

When Maura Lee appealed, this Court ruled the judgment was not final and directed the trial court to hold an evidentiary hearing on the amount of funds in trust. The trial court did not do that. It entered an amended judgment that did not address the trust balance. It also entered an erroneous order holding Maura Lee in indirect criminal contempt and an erroneous fee judgment that awarded Roy the rest of the trust funds and a judgment against Maura Lee personally for over $84,000.

In the end, Roy received all the trust's funds. Maura Lee—for whose benefit the trust was created and without whose efforts the trust would have lost considerable value—received no funds and has a large judgment against her. The trial court's errors require reversal for a new trial.

Myra Wahlberg creates a trust for her daughters, Maura Lee and Rene.

In 1996, Myra Wahlberg set up a trust to preserve assets for her children. R453–54, 3538–41. One asset was a waterfront home in Manatee County. R465–66. The home had 5000 square feet, a pool, and a dock. It was on an acre of land that could be subdivided. R4644–45, 5645. Myra placed the home in her trust. R3555.

Myra wanted to convey an interest in the home to her two daughters, Maura Lee and Rene. R5819. In

1996, Myra's attorney, Bob Johnson, set up a separate trust, the Grever-Burke Trust, for Maura Lee and Rene. R5–9, 5798. Both daughters were the trust's settlors, trustees, and beneficiaries. R5–9.

The trust stated it was "expressly established as a Family Trust" and that "no sale" of the property could be made unless a majority of the shares in the trust agreed. R6–7. It required the trustees to "maintain the property in good repair, pay real property taxes, ... and pay such other ordinary and customary expenses related to" the home. R5. And it provided the beneficiaries would be assessed their share of the property's expenses "pro-rata to any partial ownership." R5.

Once the Grever-Burke Trust was created, Attorney Johnson set up a series of transactions to transfer a 20-percent interest in the home from Myra's trust to the Grever-Burke Trust each year for four years. R3852–54, 3866–3910. The trust had no other assets. R4753. Myra's trust retained a 20-percent interest in the home. R3852–54, 3866–3910. Myra lived in the home seven months of the year and paid the Grever-Burke Trust rent for those months. R1338, 4754–55. The rent was to cover the taxes, insurance, utilities, pest control, and lawn and pool care. R4754–55. Myra paid any other expenses. R4754–56.

While Rene is acting trustee, she and her husband Roy receive trust rents that are intended to pay the home's expenses.

During Myra's lifetime, Rene was the acting trustee. R5799. Myra sent the rent to Rene who was responsible for paying the trust's share of the home's expenses. R4754–55. The sisters handled the trust informally. Rene never provided an accounting to Maura Lee for the rent received or the expenses paid. R5816. At one

time, Myra mistakenly paid a few years' worth of rent instead of seven months. R1078, 5646–47. The overpayment was never accounted for. R1078, 5646–47.

The events that led to this lawsuit began in 2009, after Rene was diagnosed with cancer. R497, 4638–39. Around the same time, Myra opened a separate account with over $200,000 that was intended to pay the rent on the home. R4757. Maura Lee was helping Myra pay bills and had check-writing authority on the account. R2176, 4756–57. From March 2009 forward, Maura Lee signed all but one of the checks that Myra paid to the trust. R3206-08. Maura Lee typically made the checks payable to "Roy and Rene Grever" and asked the Grevers to keep track of expenses. R3206–08, 3199. The Grevers deposited the checks into various accounts that were held either solely by Roy or by Roy and Rene jointly. R3209–3464. From 2009 to 2011, the Grevers received $54,200 from this account. R3206–08.

When Myra and Rene die, Maura Lee becomes sole trustee and has to handle all the upkeep for the home until it can be sold.

In June 2011, Myra died. R5796. Rene died two months later. R4760. Under the terms of the Grever-Burke Trust, Maura Lee, who is an accountant, became sole trustee. R7, 5793. Rene's husband Roy became a beneficiary of her share, but the trust had to pay out his share within four years—by August 13, 2015. R6, 4643. To that end, Maura Lee and Roy agreed to list the home for sale for $1,275,000. R3460-64. Because Myra's separate trust owned 20 percent of the home, Maura Lee's brothers—Myra's trustees—were also listed as sellers. R3460, 5821.

Roy did not provide Maura Lee with any trust funds or documents to account for the trust funds he and Rene had previously received. R5585, 5560. Instead, Maura Lee and Roy agreed to settle accounts when the house sold. R5028.

In the meantime, the parties agreed to rent the home to a family friend, Steve Newman. Newman paid $700 per month in rent and took care of the home while the parties tried to sell it. R4666, 4998. He maintained the home, readied it for showings, and installed new carpet and curtains at his own expense. R4998, 5633, 5804. He sent his first rent check to Maura Lee. R5837. But Roy told Newman to send the checks to him and he did so for the seven months he lived there. R4212-18, 4994.

Shortly before Rene's death, Maura Lee learned Rene and Roy had not paid the property taxes for the previous two years and the home was scheduled for auction. R3845-51, 5814. The situation was dire. R5055–56. Maura Lee, who was visiting Rene in Ohio, rushed home to Connecticut to have a check sent by express mail. R5814. She borrowed the $15,030 needed to pay the 2009 and 2010 taxes and penalties from her husband. R3845–51, 5814.

From that point forward, the burden of maintaining the home fell on Maura Lee, with the exception of a few bills that Roy paid. R2108-66, 3168-83, 3465-70. Maura Lee tried but could not get a mortgage to cover expenses until the house sold. R5727. So she paid the expenses from her personal funds and with money borrowed from her husband, Kevin. R5810–15, 5895–96. In the first two years, starting with her payment of the overdue property taxes in July 2011 and continuing until September 2013, Maura Lee and Kevin

spent a minimum of about $75,000 to $85,000 to maintain the property. R2110-12, 2128-30, 2141–45.

On August 24, 2013, an offer was made to purchase the property "as-is" for $1 million. R2069–83. The offer was open for four days and called for a September 20, 2013 closing. R2069. The realtor and Attorney Johnson, who now represented Roy, thought Maura Lee should accept the offer. R1593–94, 2084–85. Johnson even told Maura Lee that she could be "liable for a surcharge" as trustee if she did not "receive a better contract" later. R2084. Maura Lee rejected the offer because she thought it was too low and the deposit was insufficient. R2069–83, 3091, 5630. At trial, Maura Lee and Roy gave conflicting testimony on whether Roy agreed with Maura Lee at the time. R2104, 4664–65.

Maura Lee and Kevin redoubled their efforts to maintain and improve the property. Kevin repaired the footings and rebuilt the dock with the help of friends. R5571–74. Maura Lee and Kevin replaced landscaping. They re-plastered the pool, replaced pipes, repaired the seawall, tented the home for termites, installed attic fans, replaced the hot water heater, replaced lighting, repaired moldings, worked on plumbing, and more. R5625–43. They hired contractors to perform some maintenance and repairs, but they also personally handled any projects they could to limit costs. R5621–22, 5625–43, 5647, 5811. They took turns traveling to Florida every two months or so to manage the upkeep, except for once when they both went. R5628–29. They documented their efforts with pictures, receipts, checks, and bank statements. R2664–2819, 2974–3028, 3667–3844.

The relationship between Maura Lee and Roy deteriorates and Roy files suit for an accounting; Maura Lee counterclaims and presents affirmative defenses.

Maura Lee and Roy remained close at first. They communicated by phone or text and spoke often in the first six months about Rene's death, the details of the trust, and selling the property. R2102, 4646. In December 2011, they spent time at the home together, and Roy stayed there again in December 2012. R5052, 5725. In April 2012, Roy emailed he heard "great reports on the upkeep." R2062.

The parties' relationship frayed in early 2013 when Roy and Maura Lee's husband, Kevin, had a dispute over property insurance. The emails Kevin sent during this dispute became a feature of the trial court's ruling after Roy presented them on the first day of trial, out of context. R2065–68, 4473–74, 4658–61. The dispute started when Roy was working with an insurance agent to secure insurance on the home. R5035–37. The agent had taken a payment and applied for insurance but then withdrew the application without refunding the money. R3652. Roy forwarded his emails with the agent to Maura Lee and Kevin and said he'd "never had this much trouble" on a policy. R3652. Maura Lee was having health issues, so Kevin responded that Roy should get a different agent. R3652, 3655.

The delay resulted in a renewal penalty. R3654–58. Upset the home was uninsured during hurricane season and that the agent was making unnecessary demands, Kevin emailed Roy that he would get the insurance through a different broker. R3659–61, 5674–76. When Roy continued to press forward with the first agent, Kevin emailed him to "stand down." R3662. In a continued exchange, Kevin noted he was

the one paying the bills and Roy responded that he did not want Kevin to do that. R2064, 3663. When Roy copied the realtor on his email, Kevin became irate. He called Roy an "idiot" and expressed frustration that he had to cover expenses and still face criticism from Roy. R2064.

Less than a week later, Kevin wrote a conciliatory email to Roy—one Roy left out of his submission at trial. R2065-68, 3664. Kevin said the agent brought "the worst out" in him, and he did not want Roy to think he was angry with him. R3664.

The issue resurfaced weeks later. Roy told the new agent the trust was "being redrawn" and that the policy should be written in a certain way. R1745. The agent copied Kevin and complained he was receiving "conflicting decisions." R1805. At that point, Kevin lost his temper. He sent four offensive emails that evening and the next morning that personally attacked, insulted, and repeatedly cursed Roy with vulgar language. R2065–66. Maura Lee did not authorize those emails. R5943.

This dispute subsided. At trial, Roy testified he spoke with Maura Lee about the emails and she explained Kevin wrote them under extenuating personal circumstances. R4670. Roy and Maura Lee continued to talk through 2014. R5003.

Though the parties were still talking, Roy had an attorney send a letter to Maura Lee in October 2014 stating he wanted accountings of the trust. R3201, 4670. The letter was sent to the wrong address so Maura Lee did not receive it. R2102, 4974–75. Roy and Maura Lee spent time together at the home again in December 2014, but after that their communication broke down. R2102, 4671, 5893–94.

Roy filed this suit in March 2015 before the distribution date set in the trust. R1010–20. The operative amended complaint, filed in 2018, sought (1)an accounting under section 736.0813, Florida Statutes (2011), (2) removal of Maura Lee as trustee and appointment of "an independent trustee" for 16 alleged breaches of trust; (3) a declaration that his share of the trust was not reduced by his failure to contribute to trust expenses, and (4) damages. R1010-20.

Maura Lee counterclaimed and alleged Roy committed civil theft, misrepresentation, and conversion because he used trust rent payments for personal expenses. R1046–56. Her affirmative defenses argued, among other things, that Roy's payout had to be offset by the rent he misappropriated and reduced for his failure to pay a 2015 assessment for expenses. R1031–45. Maura Lee also explained that 20 percent of the home was not part of the Grever-Burke Trust. R1044–45.

Maura Lee sells the home for $1,375,000 but the court orders that she and her husband cannot be reimbursed for funds they spent to maintain the property absent a subsequent court order.

In 2016, Maura Lee accepted an as-is, cash offer to purchase the home for $1,375,000—$100,000 more than the original asking price. R2839–50. Roy refused to approve the sale. R2832, 2851. Maura Lee filed an emergency petition for an order approving the sale. R2831–33.

Just before the hearing on June 28, 2016, Roy agreed to the sale but objected to Maura Lee using any proceeds to repay what she and Kevin had spent on trust expenses. R2855, 2861. Roy acknowledged that Florida required reimbursement of legitimate trust

expenses before beneficiaries were paid and that Maura Lee had provided him proof of expenses. R2852–56, 2864–66. But Roy argued the amount was in dispute. R2852–56, 2864–66. The court asked if Roy could stipulate to some amount of expenses owed to Maura Lee. R2884. He would not. R2884.

Maura Lee responded that she and Kevin had spent significant funds to maintain the property and but for their efforts the sale would not have occurred. R2873–75. The court asked if the proceeds could be held in escrow to ensure Maura Lee did not take them and "go[] to Brazil." R2886. Kevin testified this would create a hardship because he had depleted his liquid assets and needed $50,000 to pay credit cards he used to cover expenses related to the sale. R2887-88. Kevin stated, "I will not reimburse more than $50,000. And I promise I won't go to Brazil." R2890.

The parties agreed to an order and the trial court signed it. R2893–94. It stated: "Maura Burke, as trustee, is authorized to reimburse no more than $50,000 to Kevin Burke for past expenses without further order of court or agreement of the parties. This order applies to the approximately $450,000 claimed owed as reimbursement to the Burkes. No further such reimbursement shall be made w/o court order or agreement of the parties." R2857.

The home sold on June 28, 2016. R3553–54. Maura Lee and Kevin spent additional sums emptying the house of its contents and paying outstanding utility and service bills. R651, 2943. There were over $100,000 in closing costs, including a commission on the sale and 2015 real estate taxes. R2944–51. Maura Lee signed a warranty deed as trustee transferring the home to the buyer. R3553–54. The net amount received was $1,269,147. R2944–51. Maura Lee placed

most of the sale proceeds in an income-producing investment account and a smaller amount in a checking account for ongoing trust expenses. R537–38, 650–51, 2943, 2952.

In August 2016, Roy sought a partial distribution of $400,000. R105–07. He admitted again that Maura Lee had provided "documentation ... evidencing payment of legitimate expenses" and there was an unspecified amount "to which he no longer object[ed]." R106–07. The court denied the request. R146. But in response, Kevin filed suit in Connecticut to collect money he loaned the trust for expenses. R2954.

Roy claims Maura Lee should be held in indirect criminal contempt and that claim is set for the same date as the trial.

Roy took Maura Lee's deposition in December 2017. R440. Roy questioned Maura Lee about a loan agreement she had produced in discovery showing Kevin loaned money to the trust. R475. Maura Lee explained the loan had been repaid under a Connecticut judgment and on advice of counsel. R475, 524–26.

Roy moved to have Maura Lee held in indirect criminal contempt. R686–91. He alleged Maura Lee stipulated in the Connecticut lawsuit that the trust owed Kevin $416,228.23 and paid Kevin that amount under a Connecticut judgment approving the stipulation. R689. Roy asserted this violated the June 28, 2016 order prohibiting reimbursement of over $50,000 "w/o court order." R686–91. The trial court entered an order to show cause why Maura Lee "should not be held in indirect criminal contempt" for "disobeying th[e] Court's order dated June 28, 2016." R753–55.

Maura Lee filed a defense to the show cause order. R2022–33. She explained she had relied on advice of

prior counsel and that her actions did not violate the June 28, 2016 order. R2025–26. She attached an email from her prior counsel, sent in response to the allegations of contempt. That email stated Maura Lee "did not violate the Court's Order by virtue of the proceedings in CT" and that another "important point" he "fully discussed at the time" was that the repayment of Kevin's loan would not prejudice Roy because there were still enough trust funds remaining after the loan satisfaction to distribute Roy's full share of the trust. R2032.

The show cause was set for two weeks before an April 2018 trial. R753, 807. But both proceedings had to be continued after Maura Lee was hospitalized. R807-11, 822–26. As part of this continuance, the parties agreed to freeze $387,500 in trust assets without prejudice to either party's claims. R825, 1003–04.

Shortly after this, the proceedings were stayed because Maura Lee filed a motion to reopen her sister's probate estate based on allegations of fraud. R1001–02, 3102–05. The probate court later ruled against Maura Lee. R3155–56. Her appeal was unsuccessful. R3157–60, 5709. In the meantime, Roy moved for partial summary judgment on Maura Lee's claims of civil theft, but his motion was denied. R837–45, 1878.

Trial was scheduled for January 2019. RLII. Unfortunately, Maura Lee was hospitalized again, and her doctors ordered a battery of tests to be performed that same month. R1908–11. She presented her medical schedule to the court and asked for another continuance. R1909. The court denied her motion, set trial for January 23 to 25, 2019, and ordered the indirect criminal contempt issue would be heard at the same time as the trial. R1939–41, 1973–74. The court suggested

Maura Lee could participate by electronic means. R1973, 2043.

Despite a doctor's letter she cannot participate, the trial court denies Maura Lee's request to continue the contempt proceedings and trial.

The day before the scheduled proceedings, Maura Lee filed an emergency motion for continuance. R2042–48. She attached a letter from her doctor stating she had a "complex medical problem" with "alarming symptoms" that were "potentially life-threatening" and so "should be excused from any participation in litigation." R2049. Maura Lee also noted she had a right to be physically present at the criminal contempt proceeding. R2040.

On the day of the scheduled proceedings, Maura Lee's counsel appeared and explained Maura Lee remained at the Mayo Clinic in Minnesota. R4601, 4610. Counsel reiterated that Maura Lee had a right to be present for the criminal contempt proceedings. R4602. She also explained that because Roy's allegations in the trust proceedings were intertwined with his allegations of contempt, both proceedings should be continued. R4602-03. Roy objected and told the court it could "bifurcate" the proceedings. R4608. Over the objection of Maura Lee's counsel, the court said it would proceed with the trial as scheduled but "bifurcate the order to show cause" and Maura Lee's defense and counterclaim to a later date. R4609, 4617, 4619.

There was no bifurcation. Roy presented all the evidence that formed the basis for his criminal contempt claim on the first day of trial. R4628, 4689-93, 4696–4714. That included Roy's testimony, Maura Lee's deposition, and evidence Roy contended undermined the validity of the loan agreement that Maura Lee and

Kevin signed and that the Connecticut court enforced. R4696–4719. Roy also plucked from context and presented the profanity-laced emails Kevin sent him. R2063-68, 4651-–60. At the end of the day and despite his earlier ruling to bifurcate the contempt charge, the trial judge admitted he had heard testimony and taken "copious notes" related to the show-cause issue. R4900, 4902. That evidence became the feature of the trial court's later ruling on both the trust and contempt claims.

When the trial court held the later hearing with Maura Lee present, her attorney expressed confusion about the criminal contempt proceeding. R5459. The court said for the first time that it believed the contempt proceeding was "within the trial." R5459. It stated it had "already started the hearing on indirect criminal contempt" when Maura Lee was not there and it was not "a separate matter." R5462.

The parties' present evidence on the management of the trust and an accounting of trust funds.

The proceedings focused on three things: (1) a proper accounting of the trust; (2) whether Maura Lee should be removed as trustee and an independent trustee appointed based on Roy's allegations of breach of trust; and (3) whether Maura Lee violated the June 28, 2016 order and could be held in indirect criminal contempt.

Roy had two alternative theories on the amount he was owed from the trust. First he argued Maura Lee breached her duty as trustee when she did not sell the home in 2013 for $1 million. R4723–24. Under that theory, Roy claimed he was entitled to his share of the trust as if Maura Lee had accepted that offer and after crediting her for reasonable expenses incurred until such a sale. R4723, 6268. Roy's second theory was that

his share should be calculated as of August 13, 2015—the four-year anniversary of Rene's death—and that Maura Lee should be credited for reasonable expenses incurred up to that date. R6268–69.

Maura Lee's position was that the trial court should do an accounting based on the trust's 80-percent interest in the home, credit her for reasonable expenses incurred, and award her a trustee's fee. She also asked the court to recognize Roy's share had been reduced under the terms of the trust when he declined to contribute to 2015 expenses, and to offset from Roy's share the trust funds he had improperly received and used for personal purposes, trebled for civil theft. R5616–17, 5679–80.

The following evidence was presented regarding the key disputes at trial:

A. The evidence on trust accountings.

It was undisputed the sisters handled the trust informally. R4975, 5815–16. Rene never provided an accounting and Roy did not turn over any trust income or records when she died. R5002–03, 5096. Roy testified he and Maura Lee "understood between both of us [] that we would keep tabs of the ... expenses" and "reconcile" the amounts when the house sold. R5028. Likewise, the attorney who created the trust explained to Roy and Maura Lee that "When the residence is sold the trustee must make an accounting under Florida law and divide the proceeds according to ownership." R1754, 5070.

B. The evidence on reasonable trust expenses paid by Maura Lee.

Roy submitted in evidence the spreadsheet Maura Lee prepared detailing all the expenses she paid on behalf of the trust from 2009 to 2015. R2108–74,

4683–84. Maura Lee had records of the trust expenses she paid including invoices, payment information, bank statements, and more. R2664–2829, 2974–3034, 3942–4327.

Roy acknowledged Maura Lee had to be reimbursed for reasonable expenses but objected to four categories: (1) payments before Myra's death; (2) airfare for anyone other than Maura Lee; (3) charges for Kevin's labor; and (4) interest on amounts paid. R4685–87, 4723–24. Roy's objections were based solely on his opinion; his trust expert did not say any of the expenses were improper. R4849, 4868, 4888. As noted, Roy argued expenses should be calculated until (a) a hypothetical sale under the August 2013 offer; or (b) the distribution date in the trust, August 13, 2015. R4723–24. Roy never explained either calculation. When questioned, he said he had "gone through that exercise" but could not recall the details. R5085. He said regardless of the date chosen, he should receive "approximately half a million dollars." R4723–24. In closing, Roy's attorney estimated a 2013 sale would have "netted approximately $900,000" so Roy should get $450,000. R6252.

Maura Lee explained it was impossible to calculate Roy's claim without knowing which "snapshot" in time should be applied. R4784–85. But the spreadsheet she had prepared had dates, amounts, and descriptions from which a calculation could be made from any date chosen. R2108–74, 3163–83.

C. The evidence on trust funds received by Roy.

Evidence showed that as of April 2009, Rene had an account for trust funds that had a positive balance. R3482. After April 2009, this account lay dormant.

R3482-3510. Roy said he did not believe the trust balance "was ever zero." R4958.

From April 2009 until June 2011, Maura Lee sent checks totaling $54,200 to Roy and Rene from the account Myra set up to pay the rent on the home. R3987–89. Roy did not deny the checks were received and deposited into personal accounts. R4956, 4988. Roy also received the rent checks Newman paid from July 2011 to January 2012, totaling $4,900. R4212–18. Bank account records showed all of these deposits were commingled and used to pay some trust expenses but also personal expenses like mortgage payments and credit cards. R3209–3459, 3233–35, 3431–33.

Roy admitted he and Rene did not keep trust records. R4967–68. In an attempt to account for trust monies he received after April 2009 and expenses he paid for the home, Roy prepared a chart based on old bank statements. R3646–51, 4970–71. Despite his testimony the trust balance was never zero, Roy's chart showed no opening balance. R3646, 4958. Roy also admitted there was at least one other account he did not produce that had received trust fund deposits. R5533.

Roy excluded from his calculation $20,000 of the $54,200 that he and Rene received between April 2009 and June 2011. R3646–51. According to Roy, one check for $10,000 was a gift from Myra and another for $10,000 was to reimburse trust expenses he and Rene paid before April 2009. R4983, 5507–09. But Roy had no documentation to support his claim that a $10,000 check, written by Maura Lee, was a gift. Nor did he have any documents to account for $10,000 in past trust expenses. R4984.

Roy's chart had other errors. It omitted a $700 rent check and had a duplicate entry of $581.03. R3646–

51, 5518. It also included $2,773.75 in legal fees to Robert Johnson, even though Johnson was Roy's attorney and stated he did not do any work for Maura Lee, who was the sole trustee. R1754, 5538–39.

Maura Lee presented evidence that trust rents the Grevers had received had not been accounted for. R5745, 5901–23. She compared Roy's chart with the bank statements he provided and prepared a spreadsheet showing the flow of trust income in and out of Roy's accounts. R4328–34, 5901–23. Maura Lee testified that the available documents showed Roy had wrongfully taken $31,000 in trust funds and used them for personal purposes. R5929–30, 6013–14.

D. The evidence on renting the property.

One of Roy's claims was that Maura Lee breached her duty as trustee because she did not rent the home. R1012–13. But the realtor who listed the home for sale— Roy's own witness—testified he "absolutely" would have told Maura Lee not to rent the home while trying to sell because it would interfere with the sale efforts. R4733–34. Roy's trust expert also testified there were downsides to renting a property when trying to sell it and did not fault Maura Lee's decision not to rent it. R4858–60, 4887.

E. The evidence regarding the 2013 offer.

Under the terms of the trust, the home could not be sold unless a majority of the shares of the trust agreed. R6. Despite that, Roy alleged it was a breach of trust for Maura Lee to reject the August 2013 offer to purchase the home for $1 million. R1015. That offer was $275,000 less than the listed sale price the parties had agreed on. R2069–83, 3460–64. And Maura Lee was concerned the buyer had only offered a small deposit and there would be significant expenses to ready

the property for sale that would be lost if the buyer backed out. R5630–31.

As noted, the realtor and Roy's attorney thought Maura Lee should accept the offer. R1593–94, 2084–85. At trial, Roy testified he thought it was a good offer and Maura Lee rejected it without discussing it with him. R4662–65. Maura Lee testified Roy had agreed at the time the offer was too low. R5849. In the end, Maura Lee was able to get $375,000 more in 2016. R5704.

Roy presented the testimony of an attorney with experience in trust administration. But that witness did not opine it was a breach of trust not to sell the property in 2013. R4858–60. Rather, the attorney testified Maura Lee should have done an updated marketing analysis to weigh the possibility of getting a better offer against the cost of maintaining the property. R4841–47, 4860. Maura Lee presented evidence that she did consider the factors the attorney identified, including a best- use analysis. R5643–45, 5697, 5701–02, 5776. As anticipated, the 2016 sale of the property was for $375,000 more. R2944–46.

F. The evidence regarding the trust's 80-percent interest in the home.

Roy's claim was based on his status as a beneficiary of the trust. The undisputed evidence was that when Myra and Rene died, the Grever-Burke trust held an 80-percent interest in the home and Myra's separate trust held the other 20-percent interest. R3607. Later, a May 20, 2013 warranty deed conveyed the 20-percent interest from Myra's trust to "MAURA LEE BURKE a married woman and NOREEN S. GREVER, a married woman as Tenants in Common[.]" R3140–42. Rene was not alive to receive this

transfer. R4760. The 20-percent interest held by Myra's trust was never placed into the Grever-Burke Trust. R3852–54.

G. The evidence regarding the reduction in Roy's share of the trust.

The Grever-Burke Trust provided that beneficiaries could be assessed for their share of trust expenses. R5. From 2011 until 2015, Maura Lee and her husband bore the brunt of the expenses for maintaining the home without requesting an assessment. R2108-74, 3163-83. But in January 2016, Maura Lee provided Roy proof of 2015 expenses and asked him to pay his share. R2664. Roy did not do that. R2820–21, 4681. Under the terms of the trust, failure to pay an assessment results in a proportionate reduction in a beneficiary's share. R5, 2820–21.

H. The Southern Oak Insurance check.

While Myra and Rene were both alive, Southern Oak Insurance Company issued a check payable to Myra, Rene, and Maura Lee for $37,954.57 to cover storm damage to the home's pool cage. R2652. Roy made no claim regarding this check. R1010-20. When Roy mentioned the check at trial, Maura Lee tried to offer testimony as to what happened to those funds. R5781. Roy successfully objected the testimony was not relevant because there was "no relief sought" regarding the check. R5781. Despite the concession and lack of any claim pertaining to the check, the trial court's subsequent rulings against Maura Lee included findings she had not accounted for the check. R5154.

I. The request for trustee's fees.

Maura Lee never took any fee for her services as trustee. R5868. At trial she sought an annual fee of 3

percent of the estimated trust value. R2659–63, 5868, 5954–55. She included it as a proposed accrued expense in her accounting. R5717.

J. The indirect criminal contempt.

Roy urged Maura Lee should be held in indirect criminal contempt for violating the June 28, 2016 order that authorized her "to reimburse no more than $50,000 to Kevin Burke for past expenses without further order of court or agreement of the parties." R2857. Roy presented evidence that after the order was entered, Kevin sued the trust in Connecticut and Maura Lee agreed the trust owed him $416,228.23. R2954–63. The Connecticut proceeding resulted in a judgment in Kevin's favor against the trust. R708. Maura Lee paid the amount ordered. R4706.

As shown, Maura Lee was not present when Roy offered his evidence on criminal contempt due to her medical condition. R4595–4610. When she later appeared at the continued trial, she presented the testimony of her former counsel. That attorney testified he talked to Kevin and Maura Lee before the Connecticut lawsuit was filed and told Kevin "he had a valid claim in Connecticut under the loan agreement" and could "bring suit in Connecticut." R5483. The attorney explained that in his view, Kevin was not seeking "reimbursement"—the term used in the June 2016 order—but rather payment of a loan. R5484. When the trial court asked if this discussion included "any reference to Judge Williams' order," the attorney confirmed that it did. R5495. The attorney stated that notwithstanding the order he advised Kevin he could sue on the loan agreement in Connecticut because there was "no defense to it." R5496.

The trial court awards Roy the amount he requested without any calculation.

The trial court orally announced its ruling. R4405-47. Its focus—36 pages of the 40-page transcript of the ruling—was to make numerous findings and express anger over what it ruled were breaches of trust. R4405–47. It began by reading the explicit emails Kevin had sent Roy. R4409–13. The court next found Maura Lee never "properly accounted for" the Southern Oak Insurance check received before Myra's death even though Roy had made no claim regarding it. R4413, 4439. The trial court went on to make other findings against Maura Lee and Kevin that treated them both as "defendants." R4429–30, 4433–34, 4443. It later stated it "kn[e]w they're not both defendants," but continued to conflate their actions. R4429-30, 4433–34, 4443. The court found Maura Lee had breached her trust duties and removed her as trustee. R4444. But rather than appoint an independent trustee as Roy had requested, it immediately appointed Roy to replace her. R4444.

The court then ruled "[j]udgment is entered on behalf of Mr. Grever against the trust and against Ms. Wahlberg individually in the amount of $450,000." R4444–45. The court acknowledged it did not know how much was in the trust but stated it thought it was about $387,000. R4445. In truth, that was just an amount the parties had agreed to freeze, not the amount in the trust. R1003–04. Based on its belief that Maura Lee had allowed the trust funds to be reduced below the amount awarded, the court said judgment would be entered against her individually for any shortfall. R4445. The court also held her in contempt and said it would require her to pay all of Roy's attorneys' fees as a sanction. R4445.

The court entered a written "final judgment" that merely incorporated its oral rulings and permitted Roy to pay himself from the trust. R4465–4509. Maura Lee moved for a stay and explained the trust had additional funds that should be held by an independent trustee. R4399–4401. The court denied the motion. R4402.

When Maura Lee appealed, this Court ruled the judgment was not final. It relinquished jurisdiction to the trial court "to enter an amended final judgment memorializing its oral rulings." R5150. This Court also directed the trial court that if its ruling on the balance of the trust was not accurate, it "should hold an additional evidentiary hearing, or accept a stipulation from the parties, before entering an amended final judgment" and "before addressing attorney's fees." R5150.

Contrary to this Court's directive, the trial court entered an amended final judgment without a hearing. R5153–5203. Alerted the trust funds exceeded the $450,000 it awarded Roy, the trial court ruled Roy could pay himself $450,000 from the trust "as his share of trust assets" and that the remaining funds should be held in trust "until further order of the Court." R5156. The amended final judgment listed 14 reasons for Maura Lee's removal as trustee, many of which held no evidentiary support, and denied Maura Lee's counterclaims. R5154–55. The court entered a separate written order holding Maura Lee in indirect criminal contempt for violating the June 28, 2016 order. R5204–05. The court removed her as trustee and ruled she would pay Roy's fees and costs. R5205.

The trial court awards Roy all the attorneys' fees he requests.

Roy moved for attorneys' fees "[a]s a sanction for indirect criminal contempt." R4522–24. Roy also filed a motion for an "alternative" award of fees under section 736.1004, Florida Statutes (2019), which permits fees in actions for breach of trust. R4531–34. The motions sought fees in the amount of $139,324.50 and taxable costs of $22,991.12. R4522–34. Roy presented the fee records of the two attorneys who had represented him in the trust proceedings. R6031-6122. The records included time spent on the probate proceedings, the probate appeal, and the petition filed to sell the home. R6068, 6090, 6096–6103, 6109–11, 6118–19.

Maura Lee objected and pointed out that the Second District's order required a hearing on the trust balance before fees were decided. R5266–70. The trial court stated it would not proceed that way. R6168–69. Roy testified the "current balance" of the trust was $78,059.32, but the trial court would not permit Maura Lee to question him about the trust funds which had been in an income-producing account. R6190–93. Maura Lee also presented case law that attorneys' fees could not be awarded for indirect criminal contempt. R6174–75. Finally, she objected to any award for fees incurred in other proceedings. R6218.

The court granted Roy $162,315.62, every penny he requested, for fees and costs as a sanction for indirect criminal contempt and under section 736.1004. R5328–30, 6225. It took Roy's word that the trust balance was $78,059.32, and ordered that amount paid to Roy. R5328–30, 6225–26. Judgment was entered against Maura Lee individually for the remaining $84,256.30. R5328–30.

SUMMARY OF THE ARGUMENT

This suit arose out of a request for an accounting of a trust. But at the end of the case, the trial court did not perform the accounting the law required. It entered a final judgment that was not final and awarded an amount to one beneficiary, Roy, that was not supported by the evidence. It declined to hold a hearing on trust funds even after this Court directed it to do so. Its rulings and amended final judgment contain numerous errors of fact and law.

The errors in the amended final judgment are linked to procedural and substantive errors the court made when it granted Roy's request to hold Maura Lee in indirect criminal contempt. The court did not follow the procedures required for criminal contempt. Instead, it heard Roy's evidence on criminal contempt as part of the civil trial on the trust when Maura Lee could not be present due to critical medical treatment and in violation of her constitutional rights. Its order finding Maura Lee in contempt is also error because it rests on the court's disagreement with a Connecticut judgment that was entitled to full faith and credit. And its finding that Maura Lee violated a court order is not supported by the plain language of the order at issue.

The trial court also improperly appointed Roy trustee despite a conflict of interest and when he had only requested an independent trustee. And it entered a fee judgment based on an invalid premise and erroneously awarded fees not incurred in this proceeding. These errors require reversal of the orders on appeal and a new trial.

ARGUMENT

I. The trial court did not perform the trust accounting the law required and its award is not supported by the evidence.

Standard of review: A trial court's legal rulings in a nonjury trial are reviewed de novo. *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008). Its factual findings are reviewed for competent, substantial evidence. *Id.*

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The gravamen of this case was Roy's claim for an accounting. Roy pleaded damages for alleged breaches of trust, but at trial he only sought and was awarded what he claimed was owed under the trust. R1014, 5264, 6268-69. In this regard, the trial court's task was straightforward: To perform an accounting of trust funds.

Roy acknowledged a proper accounting had to credit Maura Lee for reasonable expenses she paid to maintain the trust's sole asset—a waterfront home that needed ongoing maintenance so it could be sold for market value. R4723–24; *Sheaffer v. Trask*, 813 So. 2d 1051, 1052 (Fla. 4th DCA 2002) (trustee entitled to payment for reasonable expenses incurred managing trust assets). The trial court performed no such accounting. Inflamed by evidence it heard on the first day of trial when Maura Lee was absent due to medical treatment—evidence on criminal contempt and offensive emails her husband sent to Roy—the trial court resolved the case based on emotion rather than the law and the facts. It erroneously declined to consider the latest information on the trust, R5605, and made an award to Roy of $450,000 without performing the calculation the law requires. It entered a "final judgment" against both the trust and Maura Lee

without determining the balance of the trust and then ignored this Court's directive to determine the balance of the trust before it entered an amended final judgment. The balance of the trust was never determined. This case should be reversed and remanded for a new trial.

A. The trial court erred when it entered a judgment without an accounting and did not comply with this Court's directive to hold an evidentiary hearing on the trust balance.

An action for an accounting is a two-step proceeding. *A-1 Truck Rentals, Inc. v. Vilberg*, 222 So. 2d 442, 444 (Fla. 3d DCA 1969). First the court must determine if there is a basis for an accounting, and second, it must perform "the actual accounting" and make "a final determination" to "render a comprehensive final judgment." *Id.*; *see also Cassedy v. Alland Invs. Corp.*, 128 So. 3d 976, 978 (Fla. 1st DCA 2014) (court must determine appropriate amount and enter money judgment in that amount). Here, there was no dispute that Roy was entitled to an accounting on the sale of the home. The trial court had to perform the actual accounting.

When performing an accounting, a court is required to "balance the equities, adjust the accounts of the parties, and render complete justice between them." *F.A. Chastain Constr., Inc. v. Pratt*, 146 So. 2d 910, 913 (Fla. 3d DCA 1962). If a court "fails to take a comprehensive view of the transactions between the parties," reversal is required. *Id.* (reversing accounting that did not "completely and equitably" resolve accounts between parties); *Cassedy*, 128 So. 3d at 979 (accounting that fails to address propriety of expenditures is erroneous). Reversal is also required when it cannot be determined whether the trial court considered the parties' respective claims or how it arrived at

the judgment amount. *Tatum Bros. Real Estate & Inv. Co. v. Shenk*, 221 F. 182, 186 (5th Cir. 1915) (accounting judgment reversed when trial court did not state the account, what items were allowed or rejected, or how it arrived at balance due); *Technical Acoustics, Inc. v. Enterprise Nat'l Bank of Jacksonville*, 672 So. 2d 596, 597 (Fla. 1st DCA 1996) (reversing in part accounting judgment that did not address claim for set-off).

The trial court here did not perform the accounting the law required. Instead, it spent 36 pages of a 40-page oral ruling detailing what it found were breaches of trust. It then orally declared it was entering judgment in favor of Roy and against Maura Lee as trustee and individually for $450,000 without explaining how it arrived at that number. R4405–47. The court mistakenly believed the balance of the trust was only about $387,000. R4445. It ordered the trust to "immediately" release that amount to Roy and ruled the difference would be a judgment against Maura Lee, personally. R4444. The court then entered a "final judgment" that merely attached and incorporated its oral rulings. R4465–4509.

In short, rather than perform the "actual accounting" of both parties' claims the law requires, the court awarded Roy the amount he requested in closing argument. That was reversible error. *See Pratt*, 146 So. 2d at 913 (error to enter accounting judgment without taking comprehensive view to resolve all accounts between parties); *Shenk*, 221 F. 182 at 186 (error to enter accounting judgment without explaining how court arrived at balance due); *Technical Acoustics*, 672 So. 2d at 597 (error to enter accounting judgment that did not address claim for set-off).

The trial court erred again when it declined to follow this Court's directions. When Maura Lee appealed, this Court relinquished jurisdiction and told the trial court that before it entered an amended final judgment or addressed attorneys' fees, it had to hold an evidentiary hearing or accept a stipulation on the amount in trust. R5150. The trial court did not do that. Alerted by the parties' filings that there was more in trust than it awarded, the court sua sponte entered an "amended final judgment" that ordered Roy, as trustee, to immediately pay himself the full $450,000. R5153-5203. Because its failure to account for the trust funds meant its judicial labor was still not complete, the amended judgment was not "final" either. The court erred when it treated it as such. *See East Avenue, LLC v. Insignia Bank*, 136 So. 3d 659, 665–66 (Fla. 2d DCA 2015) (court departs from essential requirements of law by entering executable judgment if judicial labor is incomplete).

At the later hearing on fees, the court declined to allow evidence regarding the trust balance. It accepted Roy's unsubstantiated statement that the amount in trust that day was $78,059.32. R5329. It did not permit Maura Lee to ask what happened to the trust's income-producing funds after Roy was appointed trustee. R6193. The trial court did not have the option of declining to conduct the evidentiary hearing this Court ordered. When a circuit judge "receive[s] a clear directive from the district court of appeal exercising appellate jurisdiction over the matter before him, the circuit judge [i]s legally obliged to do it; indeed he [i]s powerless to do otherwise." *McGlade v. State*, 941 So. 2d 1185, 1189 (Fla. 2d DCA 2006). Notably, in McGlade, this Court vacated an order by the same circuit judge who tried this case for failing to follow its

directions. *Id.* at 1190 ("recalcitrance" exhibited by "errant judge" in refusing to comply with Second District's directive undermines judicial processes). The judgment in this case should likewise be reversed.

B. The trial court's $450,000 award is not supported by evidence.

Roy's trust expert reviewed Maura Lee's expenses but did not testify that any of them were improper. R4848–49, 4868–70. For his part, Roy said he objected to certain types of expenses but never specifically identified or quantified them. Nor did he calculate the amount he claimed he was owed based on the evidence under either of his alternative theories. In opening, he asked the court to award him the $387,500 that had been frozen and unspecified "remaining damages." R4632-33. When asked to identify what he considered unreasonable expenses, Roy demurred and said he would have to "review the exhibits" to be more specific. R5085. Instead, Roy closed by demanding $450,000 based on his "approximat[ion]" of what a 2013 sale would have netted after proper expenses. R6252.

Roy's refusal to provide a specific accounting of what he claimed was owed him under the terms of the trust did not excuse the trial court from having to follow the evidence and the law to make that determination. But the trial court never performed the calculation. At one point it suggested it would determine what expenses were paid before or after the 2013 offer, but in the end it entered judgment in the amount Roy requested without addressing the reasonableness of claimed expenses. R4483, 4506. The evidence shows that if the court performed the accounting the law requires, it could not have found Roy was entitled to $450,000.

For at least three reasons, that amount is not supported by the evidence.

1. The award did not take into account undisputed expenses.

Even if the trial court accepted all of Roy's arguments as well as his view of the facts, no evidence supports its $450,000 award. The August 2013 offer for $1 million on which the trial court based the award called for a September 20, 2013 sale and payment of closing costs by the seller. R2069–83. Had the home sold for $1 million, a six-percent commission, $60,000, would have to be paid under the listing agreement. R3460–64, 4649. Closing costs would have included at least a proportionate share of the 2013 property taxes of $12,424 ($9,069 based on the closing date) as well as a .7 percent tax ($7,000). R2114, 2944–46. Even if nothing more than these minimal costs are taken into account, the sale would net $923,931. And evidence at trial showed there were expenses incurred in the 2016 closing and to prepare the home for closing that were even more. R2943, 2944–46.

Roy put in evidence the accounting Maura Lee had provided for trust expenses. R2108–74, 3171–73. He testified he objected to expenses paid before Myra's death, airfare for persons other than Maura Lee, charges for Kevin's labor, and interest (even though the trust provided for nine percent interest). R5, 4685–87. Based on the accounting he submitted, the expenses Maura Lee paid beginning with her July 2011 payment of delinquent property taxes and continuing through the proposed September 20, 2013 sale date were at least $73,491.07 to $86,334.31 and do not appear to include the type of expenses Roy opposed. R2110–12, 2157–61, 3171–73. Using even the lower figure, a 2013 sale would have left about $850,000 to

distribute, not the $900,000 the court used for its award. In sum, the trial court's award gave Roy at least $25,000 more than his own arguments and evidence could support—but as shown below it was even more.

2. The award did not take into account the fact that the trust owned only an 80-percent interest in the home.

The trial court had to account for the fact that 20 percent of the interest in the home was not owned by the trust. R3852–54. As a matter of law, Roy's interest in the trust was limited to his proportionate share of the 80-percent the trust owned.

Undisputed evidence showed that when Myra and Rene died, the property was owned 80 percent by the Grever-Burke Trust and 20 percent by Myra's trust. R3852–54, 3866–3910. The 20-percent interest in Myra's trust was never transferred into the Grever-Burke Trust. R3852-54. Instead, the title to the 20-percent interest was transferred from Myra's trust in 2013 to Maura Lee and Rene as tenants in common. R3140–42. But because Rene was deceased in 2013, any conveyance to her was void as a matter of law. *Cf. Belcher Ctr. LLC v. Belcher Ctr., Inc.*, 883 So. 2d 338, 339 (Fla. 2d DCA 2004) (deed to nonexistent entity is a nullity); Fla. Jur. 2d Deeds § 29 (deed to deceased person is void). The invalidity of the transfer to Rene did not, however, invalidate the transfer to Maura Lee. *See Clemons v. Thornton*, 993 So. 2d 1054, 1056 (Fla. 1st DCA 2008) (invalidity of part of deed's conveyance did not affect interest that could be validly conveyed); *Moore v. Bailey*, 14 Pa. D. & C. 3d 417, 418 (Pa. Ct. Common Pleas 1980) ("surviving grantee" of deed conveying property to two grantees when only one was living "is eligible to take under the deed");

Handy v. Handy, 115 S.E. 114 (Ga. 1992) (deed conveyance void as to deceased grantee but valid as to living grantees).

Roy sought his share of the Grever-Burke Trust. R1019–20. Roy's interest was limited to his share of the 80 percent of the property the trust held. The trial court expressed hostility that Maura Lee pointed out that fact. It said her argument was "disingenuous," "perfidious," and "unsupported." R4488, 5348. But the evidence the trust never owned 20 percent of the home is undisputed. As a matter of law, the court could not award Roy funds that were neither part of the trust nor subject to this litigation. *Cf. Vaughan v. Boerckel*, 963 So. 2d 915, 918–21 (Fla. 4th DCA 2007) (administration of trust includes only assets legally transferred into trust).

Roy's argument that his award should be based on 100 percent of the home's value despite the fact the trust had only an 80-percent interest was based on estoppel. According to Roy, Maura Lee was estopped from asserting that 20 percent of the property was not trust property because when she sold the property, she signed the deed conveying it to the purchaser only in her capacity as trustee. R5709.

Roy's argument fails. The capacity in which Maura Lee signed a deed to the purchaser does not support a claim of estoppel by Roy. To prove estoppel, Roy had to show Maura Lee made a representation on which he relied and changed his position. *See Watson Clinic, LLP v. Verzosa*, 816 So. 2d 832, 834 (Fla. 2d DCA 2002) (no equitable estoppel when parties had "equal knowledge" and no showing of detrimental reliance). He cannot do that. He knew 20 percent of the property was not in the trust at the time of the sale, which means there was no reliance or a change in position.

R778–79, 800, 3607. And Maura Lee's mistake in signing the deed only in her capacity as trustee did not prevent a valid transfer to the bona fide purchasers. *See Commercial Credit Co. v. Parker*, 132 So. 640, 642 (Fla. 1931). The doctrine of equitable estoppel does not apply here.

Under the law, the trust, and Roy's theory that his share of the trust should be calculated based on a hypothetical 2013 sale, Roy was entitled to a 40 percent share of the proceeds from the sale of the home reduced by his share of reasonable expenses. A proper valuation—again, even under Roy's theory and ignoring Maura Lee's other claims—would yield a maximum award of approximately $337,000. That is what Roy would have received under the minimal estimates of closing costs and expenses and attributing to Roy 40 percent of the proceeds minus 40 percent of the unobjected-to expenses. The court awarded $113,000 more.

3. The court did not account for Roy's personal use of trust funds.

As noted, to perform a proper accounting, the trial court had to take a "comprehensive view" and fairly consider Maura Lee's claims under the trust. *See Pratt*, 146 So. 2d at 913. It did not do that. It not only failed to look at the totality of the trust before entering judgment (while under the misimpression the trust had been fully depleted), it also made a cluster of errors, addressed in issue II below, that show its rulings were based on an erroneous assessment of the evidence or the law.

Had the trial court viewed the evidence comprehensively as the law requires, it had to consider Maura Lee's claims and evidence related to the accounting.

For example, evidence showed Roy received but did not account for over $30,000 in trust funds. R3987–89, 4328–34, 5901–23. Roy made a chart of expenses he claimed to have paid since 2009. R3646–51. But unlike Maura Lee, he lacked documentation to substantiate his claims. It was his burden to show the trust funds he received were properly spent and credited. *Cf. Beck v. Beck*, 383 So. 2d 268, 270-71 (Fla. 3d DCA 1980) (burden to show expenses properly spent on person claiming entitlement; failure to keep records raises presumption against allowance). Instead, bank records showed he commingled trust and personal funds; transferred funds between accounts; used trust funds to pay his mortgage, credit cards, and personal expenses; and failed to maintain records of trust expenses. R3209–3459, 3233–35, 3431–33. As a result, he could not meet his burden. Despite this evidence, the court did not believe Roy's use of trust funds constituted civil theft. At the same time, it acknowledged discrepancies in Roy's chart. R4434. Still, it never attempted to reconcile the discrepancies or account for Roy's receipt of unaccounted-for trust funds. Had it done so, Roy's share would have been further reduced.

The trial court entered judgment in Roy's favor for $450,000 in contravention of the law and the specific directive of this Court. The award lacks evidentiary support. This case should be reversed and remanded.

II. Breaches of trust that are recited in the judgment are unsupported by the law and facts.

As shown, rather than conduct an accounting of the trust, the trial court focused its oral ruling and judgment on identifying breaches of trust. At least six of the supposed breaches the court identified were unsupported by the facts or the law.

First, the court erred when it ruled Maura Lee breached her duties as trustee because she did not perform annual accountings under section 736.0813(d). R5348. Section 736.0813(d) only requires annual statutory accountings for irrevocable trusts. *See also Hilgendorf v. Estate of Coleman*, 201 So. 3d 1262, 1264-65 (Fla. 4th DCA 2016). The Grever-Burke Trust is not irrevocable. R7. It expressly permits the beneficiaries to revoke the trust if a majority of the shares approve. R7. There was no statutory duty to perform an annual accounting.

In addition, the evidence—including Roy's own testimony and an email from his prior counsel—showed the parties agreed to track trust expenses until the home was sold and then account for those expenses. R1754, 5028, 5070. Having agreed to and benefitted from this mutual decision to refrain from actions not required by law, Roy could not show the lack of accountings was a breach of trust. *See Brent v. Smathers*, 547 So. 2d 683, 685-86 (Fla. 3d DCA 1989) (trustee ordinarily not under duty to furnish information absent specific request and beneficiary who concurs in actions of trustee cannot later object). The trial court erred when it ruled it was.

Second, the trial court erred when it found Maura Lee breached the trust by failing to properly account for a Southern Oak Insurance check. R5262. Roy not only never claimed a breach of trust related to this check, at trial he expressly disavowed any such claim. R1010-20, 5781. Based on that disavowal, Roy blocked Maura Lee from presenting evidence on this point. R5781. That Roy made no claim is no surprise. The check was received before Myra or Rene died and before Maura Lee became trustee and was made payable to all three of the women. R2652. The trial court erred

when it sua sponte found a breach that was not only never alleged or proved but was also waived. *See S. Fla. Coastal Elec., Inc. v. Treasures on Bay II Condo Ass'n*, 89 So. 3d 264, 266 (Fla. 3d DCA 2012) (judgment must be based on "claim or defense that was either properly pled or tried by consent of the parties").

Third, the court's finding that Maura Lee breached trust by "failing to make an appropriate analysis to determine whether renting the home was a reasonable alternative" also has no support in the pleadings or evidence. R5347. Roy alleged Maura Lee breached her duty by "[f]ailing to rent the real property." R1012–13. But at trial, Roy's own witness—the realtor he and Maura Lee hired—said he "absolutely" would have told Maura Lee not to rent it. R4733–34. And Roy's trust expert acknowledged the downsides to renting property and did not testify Maura Lee breached any duty in this regard. R4858-60, 4887. On its own, the trial court recharacterized Roy's claim from "failing to rent" to "failing to make an appropriate analysis" on renting. R1012–13, 5347. But the record shows no analytical breach either. The realtor's testimony was consistent with Maura Lee's unrefuted testimony that she considered renting the home but was advised not to. R5949-50.

Fourth, the trial court's finding that Maura Lee committed a breach of trust when she rejected the $1 million offer in 2013 cannot be squared with the terms of the trust or the fact that thanks to that rejection, she later sold the home for $1.375 million. The trust stated the home could only be sold if the beneficiaries agreed. Maura Lee was permitted under the terms of the trust to reject the offer. R6; *Nelson v. Nelson*, 206 So. 3d 818, 819 (Fla. 2d DCA 2016) (plain language of trust controls). Even assuming a duty to sell could

exist even if the trust did not require it, there could be no breach of trust when the trustee procured a later sale for $375,000 more. *Cf. Ortmann v. Bell*, 100 So. 3d 38, 40–45 (Fla. 2d DCA 2012) (reversing finding trustee breached duty when she failed to get beneficiary's approval for sale of property yet sold it for $275,000 more than price beneficiary had agreed to).

Fifth, the trial court's finding that Maura Lee breached a duty merely by seeking a trustee fee is unsupported by the law, the pleadings, and the facts. A trustee is "entitled to compensation that is reasonable under the circumstances." § 736.0708(1), Fla. Stat. (2019). A court must consider several factors to determine what is reasonable under the facts of a case. *Robert Rauschenberg Found. v. Grutman*, 198 So. 3d 685, 687 (Fla. 2d DCA 2016) (court must consider assets, income, wages for like work, success of administration, skill, fidelity or disloyalty, risk, time, value of services, etc.). While it is true that a court may reduce or deny a trustee compensation to remedy a breach of trust, § 736.1001(2)(h), Fla. Stat. (2019), it is also true that a flat denial of a fee is error if it is not reasonable under the circumstances. *See Ortmann*, 100 So. 3d at 45-46 (reversing order denying any trustee fee despite evidence trustee improperly paid herself fee of over $500,000). In any event, no case holds the mere request for a trustee fee is a breach of trust.

Maura Lee indisputably expended significant money and labor at great personal risk to sell the property for $100,000 more than its initial listing price and $375,000 more than the 2013 offer. Roy objected to the fee Maura Lee sought but never alleged the request for a fee was a breach of trust. Despite that, the trial court found Maura Lee was in breach of the trust for an "inexplicable, self-dealing decision to attempt to

take an annual $30,000.00 trust administration fee, when such fee was not authorized by the Trust, from a trust that she had so poorly managed." R5154. It appears the trial court may have believed Maura Lee actually withdrew a fee but the undisputed evidence was that she had not. R5868. And its suggestion that no trustee fee was permitted because the trust did not expressly authorize one is another error of law. Trustees are entitled to compensation even when a trust does not provide for it. § 736.0708(1); *Osius v. Miami Beach First Nat. Bank*, 74 So. 2d 779, 780 (Fla. 1954). The court should have fairly considered Maura Lee's request and awarded her some fee because absent her substantial contributions—including payment of delinquent property taxes and penalties to save the home from auction—the trust could have lost all value. *Cf. Ortmann*, 100 So. 3d at 45-46 (error to deny trustee any fee even though trustee paid herself excessive amount).

Sixth and finally, the trial court erred when it held Maura Lee committed a breach of trust when she claimed she had an individual ownership interest in 20 percent of the property. R5155. The court described her claim as "unsupported" and "perfidious." R4488, 5348. But as shown, the undisputed evidence showed 20 percent of the interest in the home was never placed in the trust. R3852-54.

The trial court made other findings of breach of trust that had some support in the evidence. But cumulatively, the court's errors require reversal of the amended final judgment and fee judgment. They demonstrate that rather than apply the law to the evidence presented, the trial court put on blinders. It declined to consider relevant evidence and took a results-oriented approach that cannot be squared with

the law or facts. The breach-of-trust errors, the failure to account for trust funds despite this Court's directive, and the errors discussed below involving the indirect criminal contempt and attorneys' fees cast doubt as to the fairness of the proceedings. Collectively harmful and pervasive errors merit a new trial on all issues. *See Manhardt v. Tamton*, 832 So. 2d 129, 131-33 (Fla. 2d DCA 2002) (reversing because "combination of errors and improprieties casts doubt on the integrity of the proceedings"); *Harrison v. Gregory*, 221 So. 3d 1273, 1278 (Fla. 5th DCA 2017) (reversing because it could not be shown cumulative errors were harmless).

III. The trial court erred as a matter of law when it denied Maura Lee her due process rights and held her in indirect criminal contempt.

A. The court improperly heard Roy's indirect criminal contempt claim in Maura Lee's absence.

Indirect criminal contempt proceedings are governed by Florida Rule of Criminal Procedure 3.840. The rule guarantees due process rights including arraignment, plea, hearing, verdict, judgment, and sentence. Courts must "scrupulously follow[]" these procedures. *Martinez v. State*, 976 So. 2d 1222, 1223 (Fla. 4th DCA 2008). In addition, the indirect criminal contempt process requires all procedural aspects of the criminal justice process be accorded a defendant. *Mayo v. Mayo o/b/o M.O.M.*, 260 So. 3d 497, 500 (Fla. 2d DCA 2018) (quoting *Haeussler v. State*, 100 So. 3d 732, 734 (Fla. 2d DCA 2012)). This includes the right to remain silent. *Korn v. Korn*, 180 So. 3d 1122, 1124-25 (Fla. 4th DCA 2015).

The due process rights of a criminal defendant also include the right to be present at all critical stages of

the trial. *Hillsman v. State*, 159 So. 3d 415, 418 (Fla. 4th DCA 2015); Fla. R. Crim. P. 3.180(a) (criminal defendant "shall be present" when evidence is presented). The right to be present is also critical because it ensures the defendant's right to face-to-face confrontation of her accuser. *Cf. Harrell v. State*, 709 So. 2d 1364, 1367–68 (Fla. 1998) (confrontation clauses in U.S. and Florida Constitutions guarantee right of face-to-face confrontation).

In this case, the trial court failed to conduct the indirect criminal contempt proceedings in accordance with rule 3.840 and Maura Lee's constitutional rights. Maura Lee could not appear on the date scheduled for the order to show cause and the civil trial because of a medical crisis. She sought a continuance and presented a letter from her doctor that explained she was being treated for a "complex medical problem" and "should be excused from any participation in litigation" due to "unresolved medical problems which are potentially life-threatening." R2049, 4601.

Despite that and over Maura Lee's objection that proceeding with the trial would violate her Fifth Amendment rights and her right to be present for any evidence related to the criminal contempt, the court refused to continue the trial. R4602-19. Instead, it stated it would "bifurcate the order to show cause" and hear it at a later date. R4617-19. Despite its ruling, the trial court heard all the evidence on the criminal contempt charge the first day of trial in Maura Lee's absence. R4628, 4689-93, 4696–4714. In fact, at the reconvened hearing, the trial court acknowledged it had already taken evidence regarding criminal contempt and declared the contempt proceedings were "within" the trust trial, not separate from it. R5459 The trial court rolled the indirect criminal contempt

proceedings into the civil proceedings and did not follow the criminal procedural safeguards of rule 3.840.

The criminal proceedings held in Maura Lee's absence violated her right to be present and require reversal. *See C.D.C. v. State*, 211 So. 3d 357, 360 (Fla. 4th DCA 2017) (error to examine witness without criminal defendant present). The trial court did not—and given the doctor's note could not—find Maura Lee willfully failed to appear. Even if it had, going forward would have been reversible error. See Hillsman, 159 So. 3d at 419 (criminal defendant's willful failure to appear is addressed by capias and postponement of trial, not trial in absentia).

The trial court's ruling also violated Maura Lee's Fifth Amendment rights. While a trial court has discretion to decide if a civil case should proceed despite a pending criminal charge that may require a defendant to invoke their right to remain silent, no case has been found that permits a trial court to proceed with both a civil and criminal case simultaneously. The criminal contempt order should be reversed.

B. Evidence did not support holding Maura Lee in indirect criminal contempt.

In any event, the evidence did not support a conviction for indirect criminal contempt. At bottom, the court's contempt holding rests on Maura Lee's compliance with a Connecticut judgment. That cannot constitute contempt for two reasons.

First, the trial court's ruling rests on an impermissible premise—that the Connecticut judgment was not valid. The trial court repeatedly questioned the merits of the Connecticut proceedings and the validity of the judgment entered. R5204–05, 5218–20, 5230–34, 5241–43 (challenging validity of loan, settlement,

and judgment). But the court could not ignore the Connecticut judgment or re-adjudicate its merits. *See Ledoux-Nottingham v. Downs*, 210 So. 3d 1217, 1223 (Fla. 2017) ("state may not disregard the judgment of a sister state" even if it "deems it to be wrong"). That is because "the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action...." *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 462 (1940)). The Full Faith and Credit clause is "exacting"; if a judgment is entered by a court with adjudicatory authority it "qualifies for recognition throughout the land." *Ledoux-Nottingham*, 210 So. 3d at 1222–23 (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998)). Under the Constitution, a final judgment cannot be the subject of a collateral attack by a third party or a court in another state. *Kelley v. Kelley*, 147 So. 3d 597, 601-04 (Fla. 4th DCA 2014). The trial court's contempt ruling indisputably hinged on its assessment of the merits of the Connecticut proceedings. That was error.

Second, Maura Lee's compliance with the Connecticut judgment did not violate the plain terms of the June 28, 2016 order. As noted, the order prohibited reimbursing Kevin without a court order. R2857. It did not confine its terms to a Florida court order. The Connecticut judgment was a court order. This Court has explained that one cannot be convicted of indirect criminal contempt for violating a court order unless the order is "clear and precise" and the person "clearly violate[s]" it. *Haas v. State*, 196 So. 3d 515, 523 (Fla. 2d DCA 2016). Thus, indirect criminal contempt cannot be based on what was intended by an order; it can only be based on violation of the order's express terms. *Id.*; *Reder v. Miller*, 102 So. 3d 742, 744 (Fla. 2d DCA 2012) (reversing contempt order; while party's actions

"may have violated the 'spirit' or 'intent' of the trial court's orders, a finding of contempt requires the violation of the letter of an order—not its spirit"). Consistent with her attorney's advice, Maura Lee's payment to Kevin under a Connecticut judgment could not, as a matter of law, support a finding of criminal contempt. *See id.*; R5843–84, 5496–96.

In sum, the contempt order against Maura Lee is procedurally flawed and substantively wrong. It must be reversed. Moreover, the record reflects that this flawed procedure—which resulted in a one-sided presentation of evidence on criminal contempt on the first day of trial when Maura Lee could not attend—tainted the entire proceedings. It led to numerous erroneous rulings discussed in this brief that find no support in the pleadings, facts, or law. The amended final judgment, fee judgment, and order removing trustee must also be reversed for a new trial.

IV. The trial court erred when it appointed Roy trustee because the only relief requested was appointment of an independent trustee.

A court cannot order relief neither party requests. *See Abbott v. Abbott*, 98 So. 3d 616, 617-18 (Fla. 2d DCA 2012). Roy sought the removal of Maura Lee and the appointment of an "independent" trustee, but the trial court removed Maura Lee and appointed Roy trustee. R1016, 4444. That was error because Roy never requested that relief and Maura Lee never had a chance to dispute it. *See Abbott*, 98 So. 3d at 617-18. Even Roy's own expert stated that when a trustee has a conflict of interest and a claim against trust funds, an independent trustee should serve. R4857. Roy's failure to account for trust funds in the past and at the fee hearing confirms he should not have been

appointed trustee. R4967-68, 5901-23, 6190-93. The order appointing him trustee should be reversed.

V. The trial court erred when it awarded attorneys' fees for a reason the law does not permit and for fees not incurred in this proceeding.

A. Attorneys' fees cannot be awarded for indirect criminal contempt.

"[A] criminal contempt proceeding is between the public and the defendant," not private litigants. *S. Dade Farms, Inc. v. Peters*, 88 So. 2d 891, 899 (Fla. 1956). A judgment for criminal contempt cannot "inure to the benefit of a private individual." *Routh v. Routh*, 565 So. 2d 709, 710 (Fla. 5th DCA 1990). As a result, "an award of attorney's fees for another party ... in a criminal contempt proceeding is improper." *Fredericks v. Sturgis*, 598 So. 2d 94, 96 (Fla. 5th DCA 1992); *see also Lamb v. Fowler*, 574 So. 2d 262, 263 (Fla. 1st DCA 1991). Despite the settled law cited at the fee hearing, the trial court awarded Roy fees and costs as a sanction against Maura Lee for indirect criminal contempt. The fee judgment is error and should be reversed.

B. The fee judgment cannot be supported under section 736.1004.

As shown, the trial court committed a number of errors and granted fees based on a legally unsupportable basis. The fee judgment should be reversed for those reasons. In addition, the fee judgment is also error even under Roy's alternative basis for fees, section 736.1004. A party seeking fees under section 736.1004 "ha[s] the burden to demonstrate what portion of the attorneys' efforts were expended on claims for which section 736.1004 authorized attorney's fees." *Levine v. Stimmel*, 272 So. 3d 847, 848 (Fla. 5th DCA 2019).

Section 736.1004 permits an award of fees incurred only in "actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers." Fees incurred litigating claims other than breaches of trust are not recoverable. *Levine*, 272 So. 3d at 848-49. And fee statutes like section 736.1004 must be strictly construed. *Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278 (Fla. 2003).

The trial court did not limit the fees awarded to Roy to fees incurred in this case. Instead, the award includes fees Roy incurred in the action to approve the sale of the home, the probate proceedings, and the probate appeal. R6068, 6090, 6096–6103, 6109–11, 6118–19. Section 736.1004 does not permit awarding fees in those non-breach-of-trust matters; such an award is error. See Levine, 272 So. 3d at 848–49. Nor can Roy collect fees based on an appeal unless the appellate court authorized the award. *See Bartow HMA, LLC v. Kirkland*, 146 So. 3d 1213, 1215–16 (Fla. 2d DCA 2014). No order authorizing appellate fees in this case was provided and none exists. The fee judgment should be reversed.

CONCLUSION

The criminal contempt order should be reversed and Maura Lee discharged. The amended final judgment, the order removing trustee, and the fee judgment should be reversed, the trust assets should be restored, and a new trial ordered.

APPENDIX F

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

Nos. 2D19-2903 & 2D19-4778 (consolidated)

L.T. No. 15-CA-1491

MAURA LEE WAHLBERG, individually and as Trustee of The Grever-Burke Trust Agreement u/a/d December 30, 1996, as amended,

Appellant,

v.

ROY GREVER,

Appellee.

Appeal from the Circuit Court for Manatee County; Edward Nicholas, Judge.

Answer brief of appellee

PRELIMINARY STATEMENT

Appellee, Roy Grever, shall be referred to as "Roy." The Grever-Burke Trust shall be referred to as "Trust." Appellant, as Trustee of the Trust, shall be referred to as "Trustee" or "Appellant." Citations to the Record on Appeal shall be "R: ___."

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts offered by Appellant omits relevant information and includes "facts" that were either not established or rejected by the trial court. Roy provides this Statement of the Case and Facts for clarity and context.

Roy inherited his wife's 50% share of the Trust after Rene's death on August 13, 2011 and was to be paid within four years. R: 2055, 4644. Appellant never paid Roy. R: 4645. Although Rene and Appellant handled the trust informally while they both were settlors and cotrustees of the Trust, the trial below concerned Appellant's duties as trustee to Roy after Rene's death. R: 1010-1020.

The significant asset of the Trust was Westmoreland, an older home built in 1960. R: 4644, 4729. Myra Wahlberg, Appellant and Rene's mother, transferred all but 20% to the Trust. The Trust eventually owned 100% of Westmoreland after acquiring the remaining 20% after Myra Wahlberg's death when it was declared her homestead and all eight children, including Maura Lee Wahlberg, deeded the 20% homestead interest to the Trust. R: 3126, 3911-3926. A later unexplained deed attempted to transfer the 20% homestead interest to Appellant and Rene, but it was after the Trust already owned 100%. R: 3911-3926, 3927-3929.

Roy continued paying some expenses from the rent monies after Rene's death and attempted to stay involved with Westmoreland. R: 4646-4651. He and Appellant agreed they both wanted to sell the property as soon as possible after dealing with the grief of Rene's death. R: 4646. The trustee-beneficiary relationship deteriorated after Appellant failed to

communicate with Roy, and Kevin Burke, Appellant's husband, became involved. R: 4650-4953, 4669-4672. Roy told Kevin

Burke not to incur expenses without Roy's consent. R: 2064, 4654.

The relationship worsened in February 2013 after Roy emailed and asked Appellant about the Trust. Appellant saw Roy's email and was annoyed. R: 5942. Kevin Burke intercepted the email and sent a series of offensive, expletive-laced responses and suggested that Roy commit suicide. R: 2065-2068, 4658. Roy was not kept informed of expenses. He believed cash assets of $40,000, which included the Southern Oaks check, was available to cover expenses and that the Trust had a positive cash balance at the time. R: 4661. Appellant did not prepare statutory

accountings, and Roy did not waive his right to accountings. R: 4671-4672, 4790. Westmoreland was listed for sale in August 2012. Two years into the four-year distribution deadline, in August 2013, the Trust received an "as is" $1 million cash offer with no contingencies or inspection. R: 2069-2083. Realtor Joe Bell sent the offer to Appellant by email and advised her it was a "great offer" and should be accepted. R: 2085, 4475, 4735. Kevin Burke was included on the email. R: 2085. Attorney Robert Johnson advised Appellant to accept the offer and cautioned her on trustee duties. R: 2084, 4735. Roy also expressed that the offer should be accepted. R: 4664. At the time, Westmoreland was in significant disrepair and the dock needed to be rebuilt. R: 3664, 4475, 4665, 4739, 5704-5706, 5953.

Appellant quickly rejected the offer because "her and Kevin have decided not to [accept it]" because it

was not enough money R: 4665, 4739. Westmoreland's assessed value was $483,000. R: 2085. An appraisal valued Westmoreland at $825,000. R: 5643. Appellant valued the property at the exact amount of the offer—$1 million. R: 2661. Appellant made no attempt to negotiate, make a counteroffer, analyze the offer, obtain updated market information, or analyze costs and expenses. R: 3161, 4665-4666, 4739-4741, 5949, 5952-5953.

Roy advised Appellant in 2014 that he hired an attorney because she was not providing information. Appellant promised to improve communications. R: 4669- 4670. By January 2015, Appellant was still not communicating and Roy sued to compel her to prepare statutory accountings and remove her as trustee. R: 2086- 2097, 4671. Appellant counter-sued for conversion and fraud claiming Roy stole rent monies. In Count IV, Appellant counter-sued for a judicial declaration of the amount she could reimburse herself and her husband, alleging they had "advanced" $176,410.21 for Trust expenses. R: 2096. Roy was unaware of the expenses incurred until the counterclaim. R: 4673-4674, 4684. There was no allegation of a written loan agreement between Kevin Burke and the Trust. R: 2090-2097. Appellant never sued Rene's Estate or Roy for an accounting. R: 2090-2097. Appellant failed to pay Roy by August 2015 and sold Westmoreland in June 2016. R: 2898-2899.

Roy did not object to the sale of Westmoreland when the Trust received an offer 11 months after the four-year distribution deadline. R: 2832, 2861. From Appellant's counterclaim in 2015 through the sale in June 2016, Appellant increased the expenses she claimed from $176,410.21 to over $400,000. R: 2864, 2874. Roy requested an injunction to prevent

Appellant from reimbursing herself or her husband. R: 2852-2856. Appellant produced multiple and differing charts of expenses that her husband created during the lawsuit that lists "payors" of Trust expenses as Myra Wahlberg, Appellant, and Kevin Burke. R: 2108-2174, 5694, 5944-5945. Kevin Burke participated in decisions to incur expenses. R: 5944-5945. The charts reflect travel, transportation, and hotel expenses, including limousine services for Kevin Burke. R: 2109-2123, 3023, 4284-4285. The chart includes labor for Kevin Burke, interest, car expenses, legal fees, trustee fees, and significant repairs and maintenance on Westmoreland after August 2013. R: 2108-2174.

At the hearing on the injunction, Judge Williams had Appellant removed from the courtroom because she was "making faces and sounds this entire hearing" and threatened to remove Kevin Burke R: 2890, 2892. The hearing related to the injunction, not approval of the sale. R: 2858-2897. Kevin Burke requested partial reimbursement of $50,000 and twice stated that neither he nor his wife would reimburse more than $50,000. R: 2889-2890. Appellant's first attorney in the case, Doug Bald, agreed and represented that no further reimbursements would be made until the end of Roy's case. R: 2875, 2893. To resolve the injunction, the parties agreed to an order entered on June 28, 2016 that allowed the Trust to reimburse Kevin Burke no more than $50,000. R: 2857. After the sale of Westmoreland, Roy requested but was denied a partial distribution pending the outcome of the litigation. R: 146, 2898-2899, 2944. After Roy requested a partial distribution, Appellant sought leave to amend to sue him for civil theft. R: 105-107, 112-136.

On August 25, 2016, Kevin Burke sued the Trust in Connecticut for $575,000 of expenses he claimed was

paid under a written loan agreement. R: 2954-2956. Prior to filing the Connecticut lawsuit, Kevin Burke consulted with Appellant's attorney in this case, Doug Bald, to sue the Trust. R: 5469. There was no answer or defenses filed by the Trust in the Connecticut lawsuit, and Appellant paid $2,500 to her husband's attorney who sued the Trust. R: 2953, 4710, 4770, 4776, 5979. Kevin Burke, though he had sued the Trust in Connecticut, also actively participated on behalf of the Trust in this case. R: 1984, 5685.

Without knowing the Trust had been sued in Connecticut, Roy amended his complaint for additional breaches including Appellant's failure to pay him in four years. R: 2900-2906, 4706-4707. Appellant amended her counterclaim to include civil theft and excluded Count IV, which sought a judicial declaration on reimbursable Trust expenses. R: 2911, 2954. As a result of dropping Count IV, Appellant was no longer seeking to have the court declare the appropriate amount of Trust expenses that she could reimburse her or her husband. R: 2911-2934.

Appellant entered into a settlement agreement with her husband in the Connecticut lawsuit, after Count IV was no longer part of the pleadings, agreeing the Trust owed him $416,228.23. R: 2957. Appellant did not know the exact amount of expenses she had incurred over the years until she paid her husband. R: 4778. Appellant did not know of any documentation her husband submitted to support his lawsuit but says she reviewed some documents on her computer. R: 4786, 4788. When asked in an interrogatory and document request, submitted as evidence at trial, to identify the expenses and documents used to calculate the $416,228.23 amount, Appellant said "[p]reviously provided in spreadsheets" referring to the chart of

expenses. R: 2965, 3067, 3071. Appellant paid her husband a total of $416,228.23 from the Trust. R: 4768-4770.

Appellant did not advise the Connecticut judge of the June 28, 2016 Order. R: 4771, 5740. Appellant did not seek permission in the court below prior to paying her husband. R: 5740. Appellant did not tell Roy about the Connecticut lawsuit or that she paid her husband $416,228.23. R: 4704, 4706-4707, 4770. When asked why she did not tell Roy, Appellant testified she was not communicating with him and said: "[i]t was all-out war." R: 5987.

Months after the payment to Kevin Burke, but before Roy discovered it, Appellant's second attorney in this case produced a document identifying expenses paid from the sales proceeds showing the Trust had over $1.1 million. The document did not disclose payment of $416,228.23 to Appellant's husband. R: 2943, 4711- 4715. Appellant's second attorney later filed a motion to withdraw. R: 282-284. The trial was originally scheduled for December 11, 2017 but Appellant was granted a continuance to allow substitution of her third attorney. R: 192, 282, 289-292, 296- 303. Appellant requested seven continuances and three stays over the following year, which included requests based on Appellant's medical condition. The trial court indicated that Appellant should consider taking a deposition in lieu of trial testimony if her medical condition necessitated. R: 826. A total of six trial dates were scheduled. R: 292, 721-731, 770-772, 777, 807-809, 825-826, 827-836, 1001-1002, 1234-1239, 1294, 1908-1912, 1973-1974, 3187-3188.

Roy learned during Appellant's deposition about the Connecticut lawsuit and payment to her husband. R: 4704. When explaining why she paid him, Appellant

stated in her deposition, which was read into evidence at trial: "[Kevin Burke] was to get paid or we were going to end up on the street." "I just want to make sure that my husband gets what he is entitled to because we are going to be on the street." R: 4786. Appellant was concerned about a "wacko judge" that may not have allowed the reimbursements and "was seriously concerned about the court system [in Manatee County]." R: 4777. The court later entered an Order to Show Cause Why Defendant Should Not Be Held in Indirect Criminal Contempt for violating the June 28, 2016 Order. R: 753-755. The contempt proceedings were scheduled for April 4, 2018 but were also rescheduled multiple times at Appellant's request. R: 822-824, 1939-1941, 3189-3191, 3514-3516.

On March 12, 2018, Appellant filed an application in her sister's estate, which had been closed for five years, to overturn the probate of Rene's 1/8 interest in Myra Wahlberg's 20% homestead interest. R: 3102-3105. Appellant believed that the trial court would lose jurisdiction over Roy's case if the probate was set aside. R: 1220, 3099. One of the issues litigated in that proceeding is the same raised on appeal that the Trust did not own 100% of Westmoreland. R: 3148-3153. Appellant lost that argument, her application was denied, and the probate court's order was affirmed on appeal. R: 3155-3156. Burke v. Grever, 273 So. 3d 974 (Fla. 2d DCA 2019).

Roy later amended and supplemented his complaint for additional breaches, including failure to accept the $1 million offer, pursuing efforts to set aside Rene's estate, entering into a loan agreement with her husband, failing to defend the Trust in the Connecticut lawsuit, paying her husband in violation of the June 28, 2016 Order, and claiming a 20% ownership

interest. R: 1010-1020. Appellant amended her pleadings to include new defenses and a cause of action against Roy for tortious interference with the Trust. Appellant did not plead an action for an accounting. R: 1046-1056, 3087-3101.

Appellant sought a continuance two weeks before trial, which was denied. R: 1908-1912, 1973-1974. The day before trial, Appellant filed another request for continuance because of scheduled medical appointments. R: 1983-1989. The trial court denied the continuance because of prior continuances being granted, the non- emergency nature of Appellant scheduling medical appointments knowing of the trial date, and because her medical issues were long-standing. R: 4616-4618.

Appellant did not show up for the first day of trial and did not appear for the order to show cause. R: 4595. Roy presented his direct testimony (R: 4634-4725), the testimony of realtor Joe Bell (R: 4726-4744), Appellant's deposition testimony (R: 4745-4793, 4821), and the expert testimony of Kelley Corbridge who opined on Appellant's actions that fell below the standard of care for trustees. R: 4821-4896. Roy submitted 62 exhibits into evidence. R: 2054-3160.

The trial resumed a month later to accommodate Appellant for her presentation of the case. R: 4615-4622. Kevin Burke appeared for the Trust, but Appellant again did not appear for trial or the order to show cause. R: 3189, 4919. Appellant's counsel re-called Roy as Appellant's witness, and the entire day of trial was Roy's testimony. R: 4917-5118. The trial was continued to June 5-7 and Appellant appeared on day three of the trial but excused herself for portions of the trial. R: 5595. Her husband was permitted to stay in the courtroom because he was a representative of the

Trust. R: 5464. Roy's testimony continued and Appellant and her husband testified. R: 5498, 5581, 5792. Appellant did not present any expert testimony that her actions as trustee were appropriate. R: 4917-5118, 5454-5652, 5653-5754, 5755-5932.

During closing arguments, Roy requested damages of $450,000 for breach of trust—the amount he would have received if the Trustee had accepted the $1 million offer in August 2013, less expenses up to that point taking into consideration the un- accounted for Southern Oaks check. Alternatively, he requested damages at the latest of the four-year deadline to be paid. R: 6268. Neither Roy nor Appellant requested the trial court to conduct an accounting. R: 6244-6306. The trial court found that Appellant breached numerous duties as trustee that warranted her being removed and awarded $450,000 in damages to Roy. The trial court ruled in favor of Roy and against Appellant on all issues. R: 4465-4506.

The trial court found the reasons for Appellant rejecting the $1 million offer "weak and unpersuasive" and that because the property was in significant disrepair and sitting empty, it should have been sold. R: 4475. The court found that because the property should have been sold, all expenses past August 2013 were not valid. R: 4483. The court found Roy's expert, Kelley Corbridge, was well qualified and credible. The court found that the rejection of the offer and failure to make a counteroffer was a clear violation of Appellant's duties as trustee. R: 4482, 4485.

The trial court stated that it did not give much weight to Kevin Burke's testimony because of his "obvious and visible bias, [and] the significant level of self- dealing" and that his testimony was not persuasive or convincing. R: 4493-4494. The court stated that

Appellant's testimony was "less abjectly hostile" than her husband but that she "did little to suggest in any meaningful way" that she administered the Trust properly. R: 4499. The court further stated about Appellant: "This is one of the most obvious and egregious violations of section 736 that I have ever seen." "Ms. Wahlberg did nothing that a reasonable, appropriate trustee should do. Her level of deceit, self-dealing, and poor management[] of the trust is unprecedented." R: 4504. The court found that Appellant did not establish any improprieties in Roy's handling of the rent monies, that Roy did not interfere with the Trust, and that Appellant did not prove any of her counterclaims. R: 4495-4496.

Roy did not receive the entire Trust. Of the approximate $1.2 million in net sales proceeds, Appellant depleted $700,000 in three years by paying her husband and spending the rest on attorney's fees, trustee fees, and other unknown expenses. R: 2108-2174, 2957, 4768-4770. The Trust's approximate balance of $525,000 after Appellant was removed was used to pay Roy the $450,000 in damages and partial award of fees and costs. R: 4505-4506, 5328-5330.

STANDARD OF REVIEW

Roy agrees with Appellant's standard of review. Further, a review of the appropriateness of an award of attorney's fees is abuse of discretion. *First Union National Bank v. Turney*, 839 So. 2d 774, 777 (Fla. 1st DCA 2003).

SUMMARY OF THE ARGUMENT

The gravamen of this case related to Appellant's extensive breaches of trust that led to Roy not being paid his wife's 50% share within four years. Appellant seeks a new trial under the guise of requiring the trial

court to conduct an accounting of Trust expenses, but the issue was not raised in Appellant's pleadings or requested at trial. Roy was awarded damages based upon the value his trust distribution would have been had Appellant not committed a breach in August 2013 by both rejecting the $1 million offer, not making any attempt to counter the offer, and making no reasonable analysis of the offer. The measure of damages is consistent with section 736.1002(1)(a), Florida Statutes, and no accounting was required. This Court did not order an accounting, and even if one is required, the trial court's findings should be deemed sufficient to have met this requirement.

The competent, substantial evidence supports the trial court's findings of Appellant's fourteen breaches of trust and eight violations of trustee duties. The findings are presumed correct. Appellant attempts to have this Court reweigh the evidence and credibility determinations, which is impermissible. In addition, several of the issues were not pled or raised by Appellant.

Any alleged error in the procedure for criminal contempt does not affect Roy's judgment for damages. Appellant waived her right to appear because she twice failed to appear under two show-cause orders after five continuances and one stay were previously granted. If any error occurred, it was cured because Appellant re-called Roy as her witness an entire day of trial, Appellant cross-examined all other witnesses, and Appellant testified at trial. Appellant clearly violated the June 28, 2016 Order. The overwhelming evidence shows that the written loan agreement between Kevin Burke and the Trust did not exist until after the Trust received the sales proceeds. Appellant and her husband fraudulently schemed to pay him

$416,228.23 because they were in financial difficulty. The contempt should stand.

The trial court had broad discretion to remedy Appellant's breaches by appointing Roy as trustee under section 736.1001(2)(j), Florida Statutes. Appellant was on notice of the relief being sought to remove her as trustee, and no harmful error occurred in Roy paying the judgments from the Trust. The award of attorney's fees was appropriate as a sanction but even if an error occurred, an alternative basis for fees under section 736.1004, Florida Statutes, exists to support the award. Finally, the court did not abuse its discretion in awarding attorney's fees and costs to Roy for all breaches committed by Appellant under section 736.1004. Rene's probate case and the June 28, 2016 Order were specifically alleged as breaches in Roy's pleadings, proven at trial to be breaches, and were inextricably intertwined in this case. The attorney's fees were caused as a result of breaches Appellant committed as trustee and were properly awarded in this action for breach of trust.

ARGUMENT

I. The trial court properly calculated damages, which did not require an accounting, and the issue was not raised below and is waived.

This case was about Roy's damages for breach of trust, not an accounting of Trust expenses.[1] A trustee is liable for damages in the amount required to restore the value of the trust distribution to what it would have been if the breach had not occurred.

[1] Roy also sued to compel Appellant, not the court, to prepare accountings, which was separate relief from a claim for breach of trust and damages. R: 1019-1020.

§736.1002(1)(a), Fla. Stat. The amount of damages is permitted to be paid from the Trust. §736.1001(3)(a), Fla. Stat. Roy's presentation of evidence focused on the extensive breaches committed by Appellant. R: 2054-3160, 4634-4724, 4726-4741, 4746-4793, 4821-4860, 4895-4896. Roy's cross-examination of Kevin Burke and Appellant related to her breaches of trust and defenses to the counterclaim, not an accounting. R: 5862-5753, 5783-5791, 5936-6010.

Roy argued in closing for damages of $450,000. R: 6252-6253, 6268. Roy requested either a judgment be entered against Appellant or that he be paid damages from the Trust, which is the relief the trial court ordered. R: 1012-1014, 4505-4506, 5261. The $450,000 in damages was measured based on the value of Roy's share if Appellant had not rejected the $1 million offer in August 2013. R: 4474, 4475, 4480- 4485, 4501. (The specific mathematical calculation is set forth in Section (B) on Pages 20 & 21). The measure of damages was properly calculated under section 736.1002(1)(a), Florida Statutes.

Appellant attempts to piecemeal testimony out of context that related to Roy's damages, or the amount the Trust was seeking from Roy on its counterclaims, in an effort to assert now on appeal that this case was about an accounting. The evidence on Trust expenses was not for an accounting or to determine the present value of Roy's 50% share, but to prove the value of his trust distribution if Appellant had accepted the $1 million offer in August 2013. R: 6252-6253, 6268. Appellant committed numerous and distinct breaches over the years, and Roy provided alternative time periods for the trial court to measure damages depending on when the court determined a breach occurred. R: 4723-4724. Contrary to the assertion on Page 28 of

the Initial Brief, Roy did not request the trial court perform an accounting and never asked that he be awarded "what he claimed was owed under the Trust" as of the current Trust value. Appellant ignores Roy's exact testimony that he should have received half of the $1 million offer, less expenses (R: 4723-4724), but inclusive of the assets available to pay expenses at that time. R: 4655-4657.

A. An accounting of Trust expenses was not pled, nor required.

If a matter is not presented by the pleadings, it cannot be considered on appeal. *Lipe v. City of Miami*, 141 So. 2d 738, 743 (Fla. 1962). Appellant lost on all her defenses and counterclaims. The entire argument in Section I is an about-face attempt to reframe the trial into an accounting, which it was not. Appellant did not plead an accounting for Trust expenses, and the issue cannot be considered on appeal. Id. R: 1046-1056, 3087-3101.

A party is also not permitted to maintain an inconsistent position on appeal. *Fuller v. Palm Auto Plaza, Inc.*, 683 So. 2d 654, 655 (Fla. 4th DCA 1996). Appellant now claims that the trial court should have accounted for Trust expenses yet she dropped Count IV, seeking a judicial declaration on reimbursable Trust expenses, from her counterclaim in August 2018. Count IV was dropped after Westmoreland sold, after the Trust received $1.2 million in net sales proceeds, and after Kevin Burke sued the Trust in Connecticut. R: 1046-1056, 2095-2096. When Count IV was no longer part of the pleadings, Appellant, albeit fraudulently and contrary to the June 28, 2016 Order, paid her husband $416,228.23 in the Connecticut lawsuit. R: 2957-2959, 4776-4778. Appellant cannot drop a cause of action, pay her husband, then assert on

appeal it was error for the trial court not to determine expenses. Id.

Even if this Court reviews the issue, there was no error because an accounting is not required in an action for breach of trust. §736.1002(1)(a), Fla. Stat. An accounting is not a condition precedent to entering a judgment for damages under section 736.1002 based upon evidence presented at trial. *Id.* A trustee is liable for the value of the trust distribution had the breach not occurred. *Id.* Here, the $450,000 factored in the deduction of expenses up to the date of breach. Roy gave Appellant the benefit of the doubt on alleged expenses up to August 2013 to determine the value of his trust distribution. The current value of the Trust and expenses incurred after August 2013 was irrelevant to measure Roy's damages. Id.

The cases cited by Appellant do not support reversal because they involved common-law actions for equitable accountings, not damages for breach of trust. *Cassedy v. Alland Invs. Corp.*, 128 So. 3d 976, 978 (Fla. 1st DCA 2014) (involving propriety of business expenditures); *Chastain Constr., Inc. v. Pratt*, 146 So. 2d 910 (Fla. 3d DCA 1962) (involving contractual relationship between developers); *A-1 Truck Rentals, Inc. v. Vilberg*, 222 So. 2d 442 (Fla. 3d DCA 1969) (involving equitable accounting). The two-step accounting process set forth in those cases is inapplicable because the trustee-beneficiary relationship is governed by Chapter 736, Florida Statutes. §736.1002, Fla. Stat. The court in Cassedy even noted the distinction between a claim for breach of fiduciary duty from an accounting. *Cassedy*, 128 So. 3d at 977-978. Further, Appellant did not sue Rene's Estate or Roy for an accounting. R: 1046-1056, 3087-3101.

If this Court determines the trial court should have performed an accounting, then the trial court should be deemed to have done so based on its findings. Expenses prior to August 2013 were already deducted from half of the $1 million offer. The court found, in Appellant committing a breach by rejecting the $1 million offer, that expenses incurred after August 2013 were invalid. R: 4483. As to the counterclaims that Roy stole rent monies, the court also found that there were no improprieties of Roy's handling of the rent monies. R: 4495-4496. Based on the findings and award of damages, there is nothing left to account.

Finally, this Court did not require an accounting. The October 24, 2019 Order related to the finality of the judgment, not Trust expenses. The trial court responded with the Amended Final Judgment stating that $450,000 was to be released to Roy if it had not already been transferred. R: 5261-5265. In rejecting Appellant's argument that an evidentiary hearing was necessary, the court stated there was no need because the remaining Trust assets were frozen until further court order. R: 5147-5149, 6168. Appellant again sought relief in this Court for an evidentiary hearing on the Trust balance, but this Court denied it by Order dated November 5, 2019 and continued to exercise jurisdiction. The trial court later released the balance of the Trust to Roy as partial payment for attorney's fees and costs. R: 5328-5330.

B. The trial court's award of $450,000 in damages for breach of trust is supported by competent, substantial evidence.

Appellant asserts there was no proof that paying her husband $416,228.23 for expenses was improper. The problem in addressing this issue is threefold: (1) Appellant dropped Count IV from her counterclaim for a

judicial declaration on Trust expenses, so the issue was not part of the trial and not preserved for this Court's review; (2) Appellant actually paid her husband after dropping Count IV, contrary to the June 28, 2016 Order; and (3) Appellant attempts to shift the burden of proof on an unpreserved issue when it would have been Appellant's burden as trustee, not Roy's, to demonstrate at trial that the already-paid Trust expenses to her husband were appropriate. §736.0805, Fla. Stat.; Barnett v. Barnett, 340 So. 2d 548, 550 (Fla. 1st DCA 1977). A trustee, not beneficiary, must prove the reasonableness of Trust expenses. Id. Even if properly pled, which it was not, Appellant did not prove at trial that the $416,228.23 for expenses were reasonable or appropriate. R: 4483.

Appellant misstates the trial court's findings, as the court never stated it would later determine expenses. In context, those statements relate to the court awarding $450,000 in damages and identifying the breaches committed by Appellant. The court determined that because Appellant breached by rejecting the $1 million offer when Westmoreland should have been sold, the expenses after August 2013 were invalid. R: 4483, 4506. The court further found that the alleged expenses to her husband were "suspicious and double-dealing to the point of being fraudulent." R: 4483. These findings, in relation to Appellant's breaches, refute any assertion that the trial court would make a future determination on expenses.

1. The $450,000 calculation was correct and deducted expenses

"When reviewing a judgment rendered after a non-jury trial, the trial court's findings of fact come to the appellate court with a presumption of correctness and will not be disturbed unless they are clearly

erroneous." *Stone v. BankUnited*, 115 So. 3d 411, 412 (Fla. 2d DCA 2013). When a trial judge is both the trier of fact and law, the judge may "determine the weight of the evidence, evaluate conflicting evidence, and determine the credibility of the witnesses, and such determinations may not be disturbed on appeal" unless the determinations are unsupported by competent, substantial evidence. *Jockey Club, Inc. v. Stern*, 408 So. 2d 854, 854 (Fla. 3d DCA 1982). A trial court's findings are given all reasonable inferences that can be drawn from the evidence, and an appellate court is prohibited from reevaluating the evidence or substituting its judgment for the finder of fact. *Kellar v. Kellar*, 257 So. 3d 1044, 1045 (Fla. 4th DCA 2018).

The competent, substantial evidence supports the calculation of $450,000 and is consistent with section 736.1002(1)(a), Florida Statutes, that damages be measured based on the value of the trust distribution had the Trustee not committed a breach. §736.1002(1)(a), Fla. Stat. The calculation is as follows:

$1,000,000: sales price

-$60,000: realtor commission to be paid from sale

-$7,000: documentary stamps based on $1 million sales price

-$221.50: remaining closing costs per closing statement (excluding 2015 taxes and Appellant's attorney's fee that would not have existed in the 2013 sale)

-$69,344.56: expenses from Appellant's chart through August 2013 (excluding expenses paid by Myra Wahlberg; excluding disputed travel expenses)

+$37,954.57: Southern Oaks check that was a Trust asset

=$901,388.51: Net to the Trust in August 2013

R: 2069-2083, 2110-2112, 2652-2653, 2945, 3460-3464. Roy's 50% share of the Net to the Trust in August 2013 was $450,694.25, and Roy rounded the $694.25 down and conceded $450,000 for ease of reference.

The value of the offer was in evidence. R: 2069-2083. Roy's testimony that he was seeking half of the $1 million offer was in evidence. R: 4723. The closing statement for the 2016 sale supporting a calculation of closing costs for 2013 was in evidence. R: 2944-2951. Appellant's chart was in evidence showing the alleged expenses up to August 2013. The chart further showed the amounts paid by Myra Wahlberg and travel expenses to exclude from the calculation. R: 2108-2110. The Southern Oaks check of $37,954.57 was in evidence along with testimony that it was available to pay Trust expenses. R: 2652-2653, 4694, 4649-4650, 4661. The trial court's finding of $450,000 as the value of Roy's Trust distribution if Appellant accepted the $1 million offer in August 2013 is supported by competent, substantial evidence and presumed correct. Kellar, 257 So. 3d at 1045.

2. The Trust owned 100% of Westmoreland

When conflicting evidence exists, an appellate court should affirm the findings of fact that resolve such conflicts. *Lindquist v. Freberg*, 752 So. 2d 1, 1 (Fla. 2d DCA 1999); *Passiatore v. Hartford Life & Accident Company*, 394 So. 2d 1132, 1133 (Fla. 4th DCA 1981); *Watson v. Division of Administration*, 287 So. 2d 142, 143 (Fla. 1st DCA 1973). The evidence on Westmoreland's ownership was not undisputed. Initially after Myra Wahlberg's death in June 2011, the Trust owned 80% and Myra Wahlberg's trust owned 20%. An Order to Determine Homestead Real Property was entered in the Estate of Myra C. Wahlberg, Manatee

County case no. 2011-CP-2313, that found the 20% interest in Westmoreland constituted her homestead, which vested equally in her eight children. R: 3126-3127. The entire 20% homestead interest was later deeded to the Trust by Myra Wahlberg's children, including Maura Lee Wahlberg, and the Trust then owned 100% of Westmoreland. R: 3911-3926. Maura Lee Wahlberg had even signed a contract that she would deed her 1/8 of 20% homestead interest to the Trust and signed the deeds along with the other heirs conveying it to the Trust. R: 3130, 3135, 3923-3924. Appellant does not even acknowledge this evidence in her Initial Brief.

Court orders remain valid until vacated, quashed, or reversed. *Jackson v. State*, 193 So. 2d 231, 232 (Fla. 2d DCA 1966). The Order to Determine Homestead Real Property in Myra Wahlberg's estate from 2013 that declared the 20% homestead interest vested in her eight children is presumptively valid and effectual. Id. Maura Lee Wahlberg never sought to set aside the homestead order, never sought to set aside the eight deeds transferring the 20% homestead interest to the Trust, and never filed an action to quiet title. R: 1046-1056, 3087-3101, 5707.

The Trust already owned 100% of Westmoreland at the time of the unexplained deed (R: 3923-3924) relied upon by Appellant to assert that Maura Lee Wahlberg owns 20%. The unexplained deed was after the homestead order and after all of Myra Wahlberg's seven living children, including Maura Lee Wahlberg, and Roy, on behalf of Rene's interest, signed deeds in January 2013 transferring the 20% homestead interest to the Trust. R: 3126-3127, 3911-3926. The deeds from the heirs to the Trust were recorded in May 2013. R: 3911-

3926. The unexplained deed was not recorded until June 10, 2013. R: 3929.

The evidence at trial showed that the 11th hour assertion that Maura Lee Wahlberg owned 20% was contrary to all of Appellant's actions until she hired her third attorney. R: 192-193, 194, 282-284, 289-291, 296-297, 298-302, 303, 2090-2097, 2097-2910, 2911-2934, 3087-3101, 1046-1056. Appellant's position is contrary to the contract she signed, individually, agreeing to an equal ownership with her deceased sister and the promise to deed her mother's homestead interest to the Trust, which she did. R: 3130, 3135, 3923-3924. Roy alleged in his original complaint that the Trust owned the property, and Appellant admitted that allegation. R: 2086, 2090. The $1 million offer was made to the Trust. R: 2069. While there are various names on the listing agreement, the ultimate seller of the property in 2016 was solely the Trust. R: 3864-3865. When Appellant later sought court approval for the 2016 sale, only the Trust was the petitioner. R: 2831-2833. The Trust was the only grantor on the deed selling Westmoreland. R: 2898-2899. The closing statement identified only the Trust as the seller. R: 2944. The net sales proceeds of $1.2 million were received by the Trust. R: 2934, 2944. The evidence showed that Appellant acknowledged Roy was a 50% beneficiary and never mentioned Maura Lee Wahlberg as a co-owner with the Trust. R: 2664, 2820-2821, 2822-2823. Appellant later charged 100% of alleged expenses to the Trust that she improperly paid her husband. R: 4768-4770. Appellant never asserted in the Connecticut lawsuit, if she believed that she owned 20% individually, that the Trust was not liable for 100% of the expenses. R: 4710, 4770.

The trial court made credibility determinations, rejected Appellant's argument, and stated the following: "This is yet another example of the defendant's aggressive efforts to deny [Roy] his rightful claim. This example is similar to the claim that [Roy] was not lawfully married to Ms. Wahlberg's sister and, therefore, should get nothing. It is disingenuous, specious, and given no weight by this Court." R: 4488. The trial court resolved any evidentiary dispute that the Trust owned 100% of Westmoreland in favor of Roy, and the finding is supported by the competent, substantial evidence and should be affirmed. *Lindquist*, 752 So. 2d at 1; *Passiatore*, 394 So. 2d at 1133; *Watson*, 287 So. 2d at 143.

Finally, Appellant raised this same issue and lost in Rene's Estate. R: 3148- 3152, 3155-3156. The probate court rejected, among other issues, Appellant's argument that Maura Lee Wahlberg owned 20%. R: 3155-3156. The decision was affirmed on appeal. *Burke v. Grever*, 273 So. 3d 974 (Fla. 2d DCA 2019).

3. There was no claim for an accounting against Roy, and Appellant lost on all counterclaims.

The allegation that Roy personally used Trust assets was the basis for Appellant's counterclaims for civil theft, conversion, and fraud. Appellant did not sue Roy for an accounting of the rent monies, but is attempting to raise the issue on appeal as an end-run around the adverse rulings on her counterclaims. R: 1031-1045, 3087-3101, 1046-1056, 6270-6304. As an action for an accounting of Roy's alleged personal use of the rent monies was not raised in the pleadings, this Court cannot review the issue on appeal. *Secrist v. National Service Industries, Inc.*, 395 So. 2d 1280, 1284 (Fla. 2d DCA 1981); *Lipe*, 141 So. 2d at 743.

Counterclaims are separate causes of action, and the burden of proof is on the defendant. *Grandway Credit Corp. v. Brow*n, 295 So. 2d 714, 715 (Fla. 3d DCA 1974). The burden was not on Roy to negate the allegations of the counterclaims as Appellant maintains. Id. The trial court found that Appellant did not "establish in any meaningful way any improprieties by [Roy] as it relates to his receipt of rent on the property or his payment of expenses on the property." R: 4434. The trial court's reference to "discrepancies" only related to the ruling on civil theft that requires proof, by clear and convincing evidence, of criminal intent to steal. §772.11(1), Fla. Stat.; *St. John v. Kuper*, 489 So. 2d 833, 833 (Fla. 3d DCA 1986). The trial court found that even with minor discrepancies, no actions of Roy "could remotely be considered civil theft." R: 4434-4435. The evidence further showed that Roy overpaid about $10,000 personally for Trust expenses. R: 3651.

The trial court ruling against Appellant on her counterclaims is supported by competent, substantial evidence. Rene primarily handled the payment of expenses for Westmoreland until her cancer treatments. R: 4988, 5499. Roy and Rene had previously paid for Trust expenses from their personal accounts at times when Myra Wahlberg was not paying rent. When rent resumed, Appellant knowingly wrote the checks payable to Rene, or Rene and Roy, that were deposited into their personal account but used to pay Trust expenses. R: 5503, 5504. The personal account was used for the rent monies informally because it was the process of how Rene paid the Trust expenses when Myra Wahlberg was not paying rent. R: 5510-5511. Appellant knew the checks were being deposited into a personal account and had no objection. R: 5522-5523.

Appellant knew about the Steven Newman checks being sent to Roy. R: 5784-5785. The trial court found that the sending of rental checks by Steven Newman to Roy was a non-issue because Appellant knew it was happening and did not request it to stop. R: 4499.

Roy unequivocally testified that he and Rene used all rent payments from the Myra Wahlberg checks and the Steven Newman checks for Trust expenses, that he never stole any of the money, and that he never had an intent to steal. R: 4986-4987, 4993-4998, 5517, 5500-5501, 5522, 5498. Roy explained how two checks were not for rent but one was a gift and the other for prior reimbursements. R: 4985, 5508- 5509. Roy even prepared a chart identifying all the Trust expenses that were paid from the rent monies. R: 3646-3651. Roy testified that in connection with producing that chart during the lawsuit, he provided supporting backup documents, bates labeled, for each of the corresponding expenses. R: 1295-1302, 5514-5516, 5521.

The trial court gave no weight to Appellant's untimely produced exhibit that attempted to show theft. R: 4496. The trial court found it was only Appellant's suspicion, that her evidence was unpersuasive, and the allegation that Roy stole rent money was "ridiculous." R: 4497. These findings, because they are supported by competent, substantial evidence and based on credibility determinations, must be affirmed on appeal. Appellant did not prove her counterclaims, and this Court cannot substitute its own judgment for how it may have ruled. *Lindquist*, 752 So. 2d at 1; *Passiatore*, 394 So. 2d at 1133; Watson, 287 So. 2d at 143.

II. The findings of Appellant's breaches of trust are supported by competent, substantial evidence.

Much of the argument under Section II relates to findings based on disputed evidence and credibility determinations, and Appellant is simply trying to have this Court reweigh the evidence. The trial court properly formed mental impressions and opinions of witnesses to make credibility determinations. *Graham v. Randolph Constr. Group, Inc.*, 294 So. 3d 363, 363 (Fla. 4th DCA 2020). The trial court's findings that Appellant committed the following breaches are presumed correct, the findings must be given the benefit of all reasonable inferences, and the evidence cannot be reevaluated by this Court:

> "(1) Failure to provide statutory accountings; (2) Failure to account for a $37,000 insurance check; (3) Improper delegation of trustee duties to her husband; (4) Failure to defend [the Trust] against the fraudulent and mendacious lawsuit brought by her husband; (5) Failure to accept the $1 million offer, make a counteroffer, or obtain an updated market analysis; (6) Taking out the "so-called" loan for her husband and subsequent repayment of the "so-called" loan in violation of Judge Williams' order; (7) Failure to make any reasonable analysis of the cost to support the home before it sold; (8) Failure to make an appropriate analysis to determine whether renting the home was a reasonable alternative to preserve the Trust; (9) Her decision to take a $30,000 trustee administration fee from a trust that she had managed so poorly; (10) Her complete unawareness of the requirements of Chapter 736; (11) Her failure to obtain any real proof, any documentation from her husband to justify the repayment of the large sum from her husband pursuant to the "so-called" loan; (12) Her bizarre and unsupported claim that somehow she has a 20% ownership interest in

the sales proceeds; (13) Her inexplicable, ill-fated effort to reopen and set aside her sister's probate estate; and (14) Her payment of $2,500.00 from her own account to pay for her husband's attorney to sue the Trust." R: 4438-4441.

Stone, 115 So. 3d at 413; *Kellar*, 257 So. 3d at 1045.

Credibility determinations of witnesses should likewise not be disturbed on appeal. *Bergeron v. State*, 583 So. 2d 790, 792 (Fla. 2d DCA 1991). Appellant argues that the trial court based its decision on emotion and attempts to downplay the expletive-laced emails of Kevin Burke. Appellant did not object to the introduction of this evidence at trial and cannot now object for the first time on appeal. R: 4658- 4659; *Aillis v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010). Further, at the time of the emails, Appellant testified she had seen Roy's email, was annoyed and furious with Roy, that she could not deal with Roy, and that her husband needed to help and that he could speak for himself. R: 5942-5943.

The trial court found Roy acted as a reasonable and appropriate beneficiary. R: 4497. The court further found that Appellant's cross-examination of Roy was ineffective, disingenuous, and at times wasteful and irrelevant. R: 4494-4495. The court did not give much weight to Kevin Burke's testimony and found him disingenuous due to bias, self-dealing, and the fraudulent nature of the loan, among other issues. "At times he indicated he was minimally involved in the trust activities and at other times indicated that he took control of virtually all activities of the trust." R: 4493. "His abject hostility and animosity toward [Roy] is palpable." R: 4494. The court found Appellant was unreasonably hostile to Roy. R: 4494. "Despite what the trust says, despite the clear language of the trust, and

its award of her sister's share to [Roy], she was motivated by this underlying belief that in-laws shouldn't get her parents' money. That statement puts all her obfuscation, her delay, her imprudent decisions, and her inexplicable hostility toward [Roy] into perspective." R: 4503.

Appellant presented no expert testimony that her actions as trustee were appropriate. Roy's expert, Kelley Corbridge, has been a practicing attorney since 1981 and board certified in wills and trusts. He is a certified Trust and Financial Advisor and was a trust officer, administrator, and manager for SunTrust Bank for 21 years prior to his law practice. R: 4822-4826, 4834. He has previously testified as an expert on trust administration and trustee duties and his testimony has never been rejected. R: 4835-4836.

The trial court found Mr. Corbridge's testimony was credible. R: 4482, 4485.

He testified about the prudent actions required of a trustee. R: 4841-4851. The expert identified the following actions of Appellant that fell below a trustee's standard of care: failure to provide accountings, failure to use trustee's special skills of accounting, failure to distribute the Trust within four years, failure to prudently administer the Trust considering the distribution requirements, no attempt to analyze the $1 million offer and compare it to costs to continue maintenance and capital expenditures, failure to make a counteroffer to the $1 million offer, failure to act as a prudent investor, entering into a loan agreement with her husband, settling the Connecticut lawsuit, paying her husband Trust expenses, and claiming a 20% interest in the sales proceeds. R: 4857-4860. The trial court's credibility determinations should be affirmed. *Bergeron*, 583 So. 2d at 792.

Failure to provide statutory accountings

Appellant did not assert as a defense to the failure to provide accountings that Roy was not entitled to accountings because the Trust was revocable. R: 1031-1045. The issue is waived, and this Court cannot address it for the first time on appeal. Secrist., 395 So. 2d at 1284; Lipe, 141 So. 2d at 743. Appellant also contradicts herself because in her original counterclaim she admitted the Trust was irrevocable and cannot now take an inconsistent position on appeal. R: 19, 2094, 3087-3101; *Fuller*, 683 So. 2d at 655. Further, in the same breath Appellant argues in this section that Roy was not entitled to an accounting because the Trust was revocable, she asserted on Page 29 of her Initial Brief that "there was no dispute Roy was entitled to an accounting on the sale of the home," which contradicts her argument that the Trust was revocable and therefore no accountings were required.

Even if the Court reviews the issue, the Trust was irrevocable, not revocable, and Appellant should have prepared yearly accountings. A revocable trust is defined by the ability of the settlor, not beneficiary, to revoke a trust. §736.0103(17), Fla. Stat. A trust is considered revocable if the settlor can amend or revoke it. Florida National Bank of Palm Beach County v. Genova, 460 So. 2d 895, 897 (Fla. 1984). Although there was a right to amend reserved in the Trust, Roy was not a settlor and his interest irrevocably vested on the death of Rene and he was entitled to yearly accountings. *Id.*; §§736.0103(17), 736.0813, Fla. Stat.; *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. 4th DCA 2008). The failure to provide accountings constitutes a breach. *McCormick v. Cox*, 118 So. 3d 980, 987 (Fla. 3d DCA 2013). A beneficiary can only waive the right to an accounting in writing.

§736.0813(2), Fla. Stat. Roy did not waive his right to an accounting, either verbally or in writing. R: 4671-4672, 5689, 5940. Roy requested information from Appellant but was not kept informed. R: 4662, 4671-4672, 4790, 5689. Roy's expert testified that a trustee has a duty to keep beneficiaries informed and account yearly. He opined that Roy was entitled to accountings and that the failure to provide accountings fell below the standard of care for trustees. R: 4838, 4853-4855, 4858.

Appellant's cases do not support reversal. *Hilgendorf v. Estate of Coleman*, 201 So. 3d 1262, 1263 (Fla. 4th DCA 2016), involved a beneficiary requesting pre-death accountings at a time when the beneficiary's interest had not vested. Here, Roy's interest vested on Rene's death. R: 2055. *Brent v. Smathers*, 547 So. 2d 683, 685 (Fla. 3d DCA 1989), is likewise not applicable. Unlike Roy, who requested information and was denied, the beneficiary in Brent was also a co-trustee and had information about the transaction and was estopped from asserting any claim as a beneficiary. Id. at 686. Roy was not a co-trustee and Appellant did not assert estoppel as a defense. R: 1041-1045. Finally, even if this Court reverses the finding, such reversal does not affect the $450,000 awarded to Roy. Therefore, any error is harmless. §59.041, Fla. Stat.; *Rosenson v. City of Miami*, 377 So. 2d 749, 750 (Fla. 3d DCA 1979).

Failure to account for the Southern Oaks check

A matter need only be sufficiently alleged in the pleadings for the trial court to hear testimony on an issue. *See generally, Jones v. Weaver*, 374 So. 2d 1175, 1177 (Fla. 1st DCA 1979). Roy alleged Appellant breached by failing to account and failing to provide yearly accountings. R: 1111-1113. These allegations

were sufficient for the trial court to hear testimony about the check. R: 6252-6253.

Even if this Court determines it was not sufficiently raised in the pleadings, an issue is deemed to have been tried by consent if there is no objection. *Paul Gottlieb & Co. v. Alps South Corp.*, 985 So. 2d 1, 5 (Fla. 2d DCA 2007). The Southern Oaks check was relevant to prove the amount of Trust assets available to pay expenses, when calculating Roy's damages. Appellant was cotrustee at the time she received the check, and the evidence proved that Appellant did not account for the check. R: 5694, 5793. Appellant never objected when Roy testified about the check being available to pay Trust expenses (R: 4655-4657, 4661) or during Kevin Burke's cross examination when asked about the check not being accounted for on the chart of expenses. R: 5694. Appellant, herself, admitted the check was available to pay Trust expenses and there was no objection to this cross examination. R: 5943. The check was admitted into evidence without objection. R: 2652-2653, 4634-4635, 4655-4656. Appellant failed to object, the issue was tried by consent, and the court properly ruled on the issue. Id.

Contrary to Appellant's assertion that evidence was blocked from being presented about the Southern Oaks check, both Appellant and Kevin Burke testified that Appellant received the check and it was used for Trust expenses and Myra Wahlberg's funeral. R: 5779, 5943. The testimony was received without objection, and the objection was only raised when Appellant attempted to inquire into an irrelevant life-insurance policy of Myra Wahlberg. R: 5780. Roy's counsel reiterated that no monetary damages were sought against Appellant relating to the Southern Oaks check but it related to the Trust account. R: 5781.

Roy's counsel also argued in closing the relevance of the check was that it was available to pay Trust expenses when calculating Roy's damages and there was no objection. R: 6252-6253. Of note, Appellant's evidence claiming that the Southern Oaks check received in April 2011 was used for Trust expenses is inconsistent with Appellant's assertion that she had to borrow money from her husband to pay the real-estate taxes three months later because there was no money in the Trust. R: 2110, 5779, 5814.

Failure to conduct an analysis on making the property productive

As stated previously, a matter need only be sufficiently alleged in the pleadings for the trial court to hear testimony on an issue. *Jones*, 374 So. 2d at 1177. Roy alleged Appellant breached by failing to accept the $1 million offer and failing to rent the property to generate income while incurring extensive expenses. R: 1013-1014. The matter was sufficiently pled for Roy's expert to opine on making the property productive.

Roy's expert opined that if there is no income generated from real estate, a prudent trustee would determine if the property could be made productive, such as renting. Appellant did not object to this testimony and, in fact, cross-examined the expert. R: 4842, 4887. Appellant failed to object and preserve the issue for appeal and is deemed to have tried the issue by consent if the Court finds it was not sufficiently pled. *Aillis*, 29 So. 3d at 1108; *Paul Gottlieb*, 985 So. 2d at 5.

The trial court did not error in its finding because the failure to rent trust property for four years to obtain income for the trust constitutes a breach. *Estate of Feldstein*, 292 So. 2d 404, 404 (Fla. 3d DCA 1974).

Although Joe Bell testified he prefers the property vacant to effectuate a sale, the testimony of the realtor is not the standard of a prudent trustee. Further, Appellant's own actions contradict her argument on appeal because she had family and guests stay at Westmoreland, and she had eventually rented Westmoreland in 2016. R: 2170-2172, 4666-4668. Finally, even if an error occurred in finding it constituted a breach, it was harmless because Roy was awarded the value his share would have been in August 2013 if Appellant had not rejected the $1 million offer. The award was based on the $1 million offer, not potential rental income over the years. Therefore, reversal is not warranted. §59.041, Fla. Stat.; *Rosenson*, 377 So. 2d at 750.

Appellant committed a breach of trust by rejecting the $1 million offer

The trial court's finding that Appellant committed a breach by failing to accept the $1 million offer is presumed correct. *Project Development Enterprise v. Elka Holdings, LLC*, 280 So. 3d 504, 506 (Fla. 3d DCA 2019). The finding is given all reasonable inferences that can be drawn from the evidence, and this Court is prohibited from reweighing the evidence. *Kellar*, 257 So. 3d at 1045. Based on the law and competent, substantial evidence, the finding should be affirmed.

A trustee has a duty to invest and manage trust assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of a trust. §518.11, Fla. Stat. A trustee is required to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries. §736.0801, Fla. Stat. A trustee shall exercise reasonable care, skill, and caution in administering a trust. §736.0804, Fla. Stat. The

failure to carry out the terms of a trust constitutes breach of trust for which a trustee is liable. *Kritchman v. Wolk*, 152 So. 3d 628, 632 (Fla. 3d DCA 2014).

Roy was to be paid within four years of Rene's death and Appellant did not pay him. R: 2055. Roy's receipt of his share was never conditioned upon the sale of Westmoreland. R: 2057-2061, 5939. The $1 million offer was received two years into the four-year distribution deadline. R: 2084. The evidence before the trial court was that Roy wanted to accept the $1 million offer. R: 4663-4664. Joe Bell, the realtor and listing agent, advised Appellant it was a "great offer" and recommended it be accepted. Joe Bell considered it to be a good selling price considering the condition of the home. R: 2085, 4737. Attorney Robert Johnson said it was a "very good offer" and cautioned Appellant on her duties as trustee. He said: "I am very concerned about your understanding of your duties as Trustee...you do not like Roy but you have a fiduciary duty to him as an equal beneficiary." R: 2084, 4735.

A reasonable inference is that Westmoreland was worth no more than $1 million at the time, and the offer should have been accepted. Appellant had a 2011 appraisal that valued the property at $825,000. R: 5643. Appellant, herself, valued Westmoreland at $1 million at the time she received the offer and continued to value it at $1 million for the next two years, yet she called the potential buyers who made the $1 million offer "bottom feeders." R: 2661-2663, 4665. The $1 million offer came after Appellant had rejected three offers from buyers ranging from $500,000.00-$800,000. R: 2105, 4781. Appellant decreased her opinion of Westmoreland's value in April 2016 to $882,000. R: 2821. Appellant rejected the "as is"/no contingencies/no inspection offer in documentary

stamps alone were not competent, substantial evidence to support a finding of breach. Ortmann involved the buyer "flipping" the property after the trustee sold it, and the beneficiaries mistakenly believed the trustee sold it for the higher "flipped" price. The case does not hold that a finding of breach will be reversed if the property sold for more than the listing price. Id. at 40-44.

Appellant seeks to be applauded for the ultimate sales price, but there is no caselaw that excuses Appellant's breach based on the property selling above the listing price almost a year after the four-year deadline for Roy to be paid. Appellant, herself, depleted the net sales proceeds from $1.2 million to $525,000, so Roy never benefitted from the higher sales price. R: 2108-2174, 2957, 4768-4770. Appellant did not comply with the terms of the Trust, violated sections 518.11, 736.0801, 736.0804, Florida Statutes, and is liable for breach. Kritchman, 152 So. 3d at 632. The trial court's findings and conclusions of law should be affirmed.

Appellant was not entitled to trustee fees

A party cannot assert error on appeal for a ruling the party invited the court to make. *Fuller*, 683 So. 2d at 65. The issue of trustee fees was not in Appellant's pleadings, but she requested fees at trial. Appellant invited the court to rule on the issue and she was unsuccessful. Under the invited-error rule, Appellant cannot ask the court to rule on trustee fees and then complain when the court finds that Appellant committed a breach for actually taking a trustee fee in the hopes of more money in the future knowing the property was in significant disrepair and the dock needed to be rebuilt. Most alleged expenses were incurred after August 2013. R: 5704-5706, 5953-5954.

Appellant quickly rejected the offer, did not obtain any updated appraisals or comparative market analysis, did no cost-benefit analysis of the offer with the anticipated costs to maintain the property, did no capital-expense repair analysis compared with the expected return on sale, did not analyze the offer with market conditions, and did not negotiate or make a counteroffer. R: 3161, 4665-4666, 4739- 4741, 5700, 5949, 5952-5953, 5696, 5702. Appellant did not know the amount of expenses she had spent up to that point, but she knew significant capital expenditures would be needed. R: 4778, 5953. Appellant knew Westmoreland was in deteriorating condition. R: 5953.

Roy's expert testified that upon receiving the $1 million offer, a prudent trustee—two years into the four-year distribution deadline—would re-appraise the property or obtain a market analysis. The prudent trustee would analyze the terms of the offer and balance it against the distribution deadline and cost to maintain the property to determine to accept, reject, or make a counteroffer. The prudent trustee would obtain a comparative market analysis and consider the time horizon for payment and take into consideration the "as is" nature of the offer. R: 4843-4847.

The expert testified that a trustee cannot hold on to property after the four- year deadline in the hopes of receiving greater value. R: 4848. The expert opined that Appellant fell below the standard of care in administering the Trust by not making Roy's distribution within four years, not prudently administering the Trust, failing to administer the Trust in good faith, failing to analyze the $1 million offer, failing to consider the terms and purposes of the Trust, and failing to act as a prudent investor among other breaches. R: 4857-4859. He further opined that a prudent

trustee would make a counteroffer if the decision was made not to accept the offer. R: 4844-4845, 4895.

In no way does *Ortmann v. Bell*, 100 So. 3d 38 (Fla. 2d DCA 2011), hold that a trustee is not liable for breach of trust if a property sells above the listing price. Id. at 39. This was not the holding or any issue decided in the case. Ortmann also did not involve a trust with a four-year distribution deadline. Rather, this Court held that documentary stamps alone were not competent, substantial evidence to support a finding of breach. Ortmann involved the buyer "flipping" the property after the trustee sold it, and the beneficiaries mistakenly believed the trustee sold it for the higher "flipped" price. The case does not hold that a finding of breach will be reversed if the property sold for more than the listing price. Id. at 40-44.

Appellant seeks to be applauded for the ultimate sales price, but there is no caselaw that excuses Appellant's breach based on the property selling above the listing price almost a year after the four-year deadline for Roy to be paid. Appellant, herself, depleted the net sales proceeds from $1.2 million to $525,000, so Roy never benefitted from the higher sales price. R: 2108-2174, 2957, 4768-4770. Appellant did not comply with the terms of the Trust, violated sections 518.11, 736.0801, 736.0804, Florida Statutes, and is liable for breach. Kritchman, 152 So. 3d at 632. The trial court's findings and conclusions of law should be affirmed.

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invited the court to rule on the issue and she was unsuccessful. Under the invited-error rule, Appellant cannot ask the court to rule on trustee fees and then complain when the court finds that Appellant committed a breach for actually taking a trustee fee. Id.

A trustee may forfeit fees for committing breaches or engaging in bad faith or misconduct. §736.1001(2)(h), Fla. Stat.; *Ortmann*, 100 So. 3d at 45-46. Appellant invoiced herself a yearly fee. R: 2659-2663. Kevin Burke testified that he created the invoices; Appellant testified she created the invoices. R: 5717-5719, 5955. Although Appellant asserts in her Initial Brief that she did not actually take a fee, Appellant's chart of expenses shows approximately $60,000 was paid in trustee fees on September 16, 2016 for "Trustee fees 08.2015-07.2016" and "Trustee fees 08.2016-07.2017." R: 2173, 5944. Appellant's own document shows she paid herself a fee. The competent, substantial evidence supports the trial court refusing to award a trustee fee and finding it a breach for Appellant to invoice and pay herself trustee fees. *McCormick*, 118 So. 3d at 987. Finally, even if an error occurred, it was harmless because no damages were awarded to Roy for this breach. Therefore, reversal is not warranted. §59.041, Fla. Stat.; *Rosenson*, 377 So. 2d at 750.

Asserting an ownership interest in Trust assets is a conflict of interest

A trustee has a duty to act impartially, in the interests of all beneficiaries, and administer the trust as a prudent person and in good faith. §§518.11, 736.0801, 736.0802(1), 736.0803, 736.0804. A trustee shall administer the trust solely in the interests of the beneficiaries. §736.0802(1), Fla. Stat. A trustee's transfer of trust assets to herself is a conflict of interest.

§736.0802(2); *Brigham v. Brigham*, 11 So. 3d 374, 382-386 (Fla. 3d DCA 2009); *Bailey v. Leatherman*, 615 So. 2d 810, 811 (Fla. 3d DCA 1993).

Roy's expert testified that it is a conflict of interest to assert an ownership interest in Trust assets and that a prudent trustee would either resign, seek court approval, or obtain beneficiary consent. R: 4850, 4856-4857, 5724-5725. He opined that it was a conflict of interest for Appellant to claim a 20% ownership interest in the Trust asset. R: 4860. The competent, substantial evidence supports the trial court's findings that Appellant breached, while serving as trustee, to assert an individual ownership interest in the Trust. Further, even if an error occurred, it was harmless because no damages were awarded to Roy for this breach. Therefore, reversal is not warranted. §59.041, Fla. Stat.; *Rosenson*, 377 So. 2d at 750.

III. Appellant was not denied any due process rights.

Maura Lee Wahlberg, individually, did not timely appeal any of the judgments entered on July 2, 2019, November 1, 2019, and November 19, 2019 that are the subject of this appeal. Appellant appealed only as trustee. R: 4517, 4535, 5343, 6156. More than three and seven months after the deadlines to appeal, Appellant filed a Fourth Amended Notice of Appeal on February 19, 2020 attempting to add her individual capacity and changing the caption. The below matters relating to her individual interests were not timely appealed and should not be considered.

A. The trial court properly heard Roy's case-in-chief.

Appellant's argument solely relates to the finding of criminal contempt, not the civil trial, and any ruling on this issue does not require reversal of the Amended Final Judgment. If the finding of contempt is

reversed, the award of $450,000 and section 736.1004 attorney's fees in favor of Roy is not affected.

The right to be present at trial can be waived by a criminal defendant. *Baker v. State*, 979 So. 2d 453, 454 (Fla. 2d DCA 2008). Appellant was subject to two orders to show cause that ordered her to appear and she did not appear the first or second day of trial. R: 1939, 3189, 4595, 4919. Appellant's actions waived her right to be present because she decided when she was going to attend the proceeding, not when a court ordered her to do so.

While Appellant did not appeal the order denying her last-minute request to continue, so the issue is waived on appeal, the trial court did not abuse its discretion in denying a continuance. Appellant requested a total of seven, and was granted five, continuances and one stay during the litigation, several of which related to her medical condition. R: 282, 292, 726, 770, 804, 807, 825-826, 827, 1234, 1908, 1973-1974, 1983. Appellant did not have a medical emergency the day of trial but scheduled medical appointments during a time that she knew trial was to begin. Appellant's medical condition was an issue during the entire litigation, was the subject of prior continuances, and the trial court would have allowed Appellant to appear electronically. R: 1973, 4616-4618. She declined. R: 4595, 4919.

The same day Appellant sought the continuance, she filed her supplemental witness list for the civil trial and her defense and witness and exhibit list for the contempt proceeding, which shows she was able to communicate with her attorney. R: 1995, 2022, 2034. The next day, even though Appellant did not appear for the first day of trial, Appellant's counsel appeared and cross examined Joe Bell and Kelley Corbridge. R:

4742, 4860, 4896. Appellant's counsel also introduced evidence on the first day of trial. R: 3161-3183. In February when the second day of trial resumed to accommodate Appellant, she still did not appear but Kevin Burke appeared for the Trust. R: 4919. Appellant's counsel re-called Roy as a witness. Roy was Appellant's witness the entire day, a month after his case-in-chief testimony in which Appellant would have had an opportunity to review the transcript. R: 4917-5096. When Appellant finally showed up for trial in June, she testified and subjected herself to cross examination. R: 5792-5931, 5936-6021. Appellant's actions constitute a sufficient waiver, and if any error occurred, it was cured by Appellant's trial participation and there was no deprivation of her due process rights.

B. Fraudulent judgments are not entitled to full faith and credit, and Appellant clearly violated the June 28, 2016 Order.

The Full Faith and Credit Clause does not protect judgments procured by fraud. *Trauger v. A.J. Spagnol Lumber Co.*, 442 So. 2d 182, 183 (Fla. 1983). The trial court found that the Connecticut lawsuit was fraudulent. R: 4478-4479. Therefore, the Full Faith and Credit Clause does not support reversing the trial court's finding of contempt. Id.

The evidence overwhelmingly showed that Appellant and her husband created the written loan agreement after the Trust received the sales proceeds and then schemed a fraudulent "friendly lawsuit" to pay Kevin Burke because they needed the money. Appellant was in Ohio with Roy making burial arrangements on August 15, 2011—two days after Rene's death—the day she claims the loan was signed. Appellant's testimony that she drove home from Ohio to

Connecticut was not credible to the trial court. R: 4477-4478. Appellant's brother did not own the building, where she says the loan was signed, until 2013—two years later. R: 2938, 2939-2942, 4697-4703.

Prior to receiving the sales proceeds, in Count IV of Appellant's initial counterclaim, she sought a judicial declaration of reimbursable Trust expenses, which is inconsistent with the existence of a loan. R: 2095-2096. Appellant routinely stated that both her and her husband "advanced" money, not that Kevin Burke, alone, paid expenses under a loan. R: 2064, 2096, 2104, 2664, 2888. If the loan existed, Appellant's own charts created during the lawsuit that identified Myra Wahlberg, Appellant, or Kevin Burke as the "payor" of Trust expenses does not make sense. R: 2109-2112. Appellant would not identify "payors" on the chart if there was a loan. Kevin Burke asserted the loan was created after he paid real-estate taxes in July 2011. R: 5720. However, Appellant's chart shows that she paid the taxes, not Kevin Burke. R: 2110, 5656. Kevin Burke's own words refute the existence of a written loan agreement because he told Roy in a December 2012 email, after the loan supposedly existed, that he "flipped" $30,000 for the house—not that he lent money under a loan. R: 2064. Of note, Appellant's chart created after-the-fact more than tripled the amount of alleged expenses, in the same timeframe, from the amount Kevin Burke told Roy that he had "flipped." R: 2064, 2111.

The terms of the loan provided that Kevin Burke would lend up to $750,000 for five years, yet when he was seeking a partial reimbursement in 2016, he testified he was "absolutely, totally illiquid." R: 2888, 2935. The entire request for a partial reimbursement of $50,000 is contrary to the existence of a loan.

Appellant's first attorney, Doug Bald, testified that he had not seen the written loan agreement until after Westmoreland sold, and it was not produced in discovery until after Westmoreland sold. R: 4695-4696, 5484. At no point did Kevin Burke or Mr. Bald discuss a written loan agreement during the injunction hearing. R: 2858-2897. If the loan existed for $750,000 in August 2011, Appellant could have paid Roy's 50% share by August 2015, but the terms suspiciously state that the funds could not be used to buy out a beneficiary's share in the Trust. R: 2935. Further, if the loan existed, Appellant would not have demanded Roy pay half the expenses, and Kevin Burke would have paid the 2015 real-estate taxes rather than those taxes being delinquent and paid at closing. R: 2664, 2945.

Appellant paid $2500 to her husband's attorney who sued the Trust, and she had no explanation why she paid him. R: 2953, 5979. Appellant did not obtain a Connecticut judgment after trial and adjudication. Appellant never defended the Trust but simply asked the Connecticut court to approve the agreement between husband and wife. R: 4771. The Connecticut judge was not told about the June 28, 2016 Order, and Appellant never advised nor asked the court in this case permission to pay her husband. R: 4771, 5740. The lawsuit was not disclosed to Roy, and Appellant lied about the amount of money in the Trust during discovery to conceal the $416,228.23 payment to her husband. R: 2943, 4706-4707, 4711-4715, 4770.

The written loan agreement and Connecticut lawsuit were a fraudulent end- run around the June 28, 2016 Order because Appellant and Kevin Burke were in financial trouble. R: 4704. In her own words, she wanted her husband to get paid "or we were going to

end up on the street." "I just want to make sure that my husband gets what he is entitled to because we are going to be on the street." R: 4786. Appellant testified at trial that her personal home was "mortgaged to the hilt." R: 5896. She expressed concern about the Manatee County court system and that a "wacko judge" may not have allowed the reimbursements. R: 4777.

Appellant did not successfully prove her "advice of counsel" defense. Attorney Doug Bald did not testify that he advised Appellant to make any reimbursements but that he thought her husband had a valid claim for a loan. R: 194, 5483-5484. The trial court found this a significant distinction particularly since Mr. Bald represented to Judge Williams at the injunction hearing that his client would not reimburse more than $50,000. R: 4490-4491. Further, it was Kevin Burke, not Appellant, who discussed with Mr. Bald suing the Trust in Connecticut before the Connecticut lawsuit was filed. R: 5469, 5475-5476. Mr. Bald testified he had no direct communications with Appellant about the Connecticut settlement and 95% of his communication was through Kevin Burke, not Appellant. R: 5469, 5484. The January 12, 2018 email, while referenced in a pleading, was not admitted into evidence, and the email was after Appellant paid her husband, not before. R: 2032, 3665, 5469-5472.

As the trial court stated, "[h]er outrageous, deceitful, willful, self-serving, and mendacious violation of Judge Williams' order is uncontroverted. It is the definition of contempt." R: 4506. "The fact is they did exactly what they told Judge Williams unequivocally that they would not do." R: 4491. As such, the criminal contempt should be upheld, but even if it is reversed, it does not reverse the Amended Final Judgment or

Final Judgment for Attorney's Fees and Costs in favor or Roy.

IV. The trial court had authority to appoint Roy as successor trustee.

Courts have wide latitude in remedying breaches of trust. §§736.0706, 736.1001(2)(j), Fla. Stat. Subsection (2)(j) provides authority in the court's discretion to order "any other appropriate relief" not already identified in the statute. The statute does not limit the court's discretion, which shows the broad authority for a court to award appropriate relief to remedy a breach. Id.

Appellant was on notice that Roy was seeking to have her removed. R: 1014-1016. While Roy asked for an independent trustee, Roy did plead generally for "such other and further relief as the [c]ourt deems appropriate." R: 1014-1016. A reasonable inference of the trial court appointing Roy was to expedite his receipt of the $450,000 judgment rather than requiring a third party complete the payment, and the court had broad authority to appoint him to remedy Appellant's breaches. §736.1001(2)(j), Fla. Stat.

Moreover, this Court can affirm a trial court's decision if the error is harmless. §59.041, Fla. Stat. Kellar, 257 So. 3d 1044 at 1045. If an error occurred, such error is harmless because Appellant was removed as trustee. There was no harm in the payments being made by Roy. The $450,000 has already been paid and the remaining balance used to pay a portion of the Final Judgment for Attorney's Fees and Costs. R: 4505-4506, 5328-5330. Any error in appointing Roy was harmless.

IV. The trial court properly awarded attorney's fees and costs.

A. The trial court's sanction does not affect the award of fees under section 736.1004, Florida Statutes.

An appellate court can affirm a trial court's decision if there is an alternative basis to justify it or if the error is harmless. *Malu v. Security Nat. Ins. Co.*, 898 So. 2d 69, 73 (Fla. 2005) (applying "tipsy coachman rule"); Kellar, 257 So. 3d at 1045. Even if the trial court committed error, Roy filed and was granted an alternative motion for fees under section 736.1004, Florida Statutes, for breach of trust. R: 4531-4534, 5328-5330. Roy has not benefited from the sanction because a separate legal basis exists to recover fees even without the sanction. §736.1004, Fla. Stat.

Further, the law on fees as sanctions is not well settled. The only case relied upon by *Lamb v. Fowler*, 574 So. 2d 262, 263 (Fla. 1st DCA 1991), was *Routh v. Routh*, 565 So. 2d 709 (Fla. 5th DCA 1990). The dissent in *Routh* argued that private individuals are not benefitted with an award of fees because they are being reimbursed for assisting in the criminal prosecution of contempt. *Id.* at 711. The Fifth District Court of Appeal must have receded from *Routh* because it held in *Powell v. Washington*, 233 So. 3d 1156, 1157 (Fla. 5th DCA 2017), that attorney's fees could not be awarded unless the proper procedure for prosecution of criminal contempt was followed. The court did not state that attorney's fees were inappropriate but that the proper procedure had to be followed. *Id.* Thus, there appears to be recent authority in the Fifth District Court of Appeal to award fees as a sanction for criminal contempt.

B. The trial court did not abuse its discretion in awarding all fees.

A party is entitled to fees in an action for breach of trust. §736.1004(1)(a), Fla. Stat. Roy alleged in his pleadings, referenced by case numbers, that Appellant's breaches included her actions in Rene's probate case and violating the June 28, 2016 Order. R: 1013. While those matters had separate case numbers, Roy successfully proved that Appellant's actions in those cases constituted breaches in this case. Appellant pursued Rene's probate case for the sole purpose of Roy losing subject-matter jurisdiction in this case, which was a breach. R: 2055, 3099. The probate case was the reason Appellant was granted a stay in this case. R: 827-835 1001-1002. Roy's attorney-fee expert opined that Rene's probate was inextricably intertwined with this case and the trial court agreed. The trial court also stated that the June 28, 2016 Order was a component of this case. This case was specifically referenced during the injunction hearing and the June 28, 2016 Order related to the Trust assets, which Appellant paid her husband. R: 2863, 6209, 6222. Essentially, all matters involved and related to the same case and litigation. Finally, Roy's timesheets reflect that the fees were generated on invoices for this case, not separate matters. R: 6068-6119. Absent a breach of trust by Appellant, Roy would not have incurred the attorney's fees in those cases, which all related to this trust litigation, and the trial court did not abuse its discretion in awarding all fees for Appellant's breaches that Roy proved under section 736.1004, Florida Statutes.

CONCLUSION

Appellee, ROY GREVER, respectfully requests that the Amended Final Judgment, Final Judgment for Attorney's Fees and Costs, and Order Confirming

Removal of Trustee and Appointment of Successor Trustee be affirmed.

APPENDIX G

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

Nos. 2D19-2903 & 2D19-4778 (consolidated)

L.T. No. 15-CA-1491

MAURA LEE WAHLBERG, individually and as Trustee of The Grever-Burke Trust Agreement u/a/d December 30, 1996, as amended,

Appellant,

v.

ROY GREVER,

Appellee.

Appeal from the Circuit Court for Manatee County; Edward Nicholas, Judge.

Reply brief of appellant

ARGUMENT

I. The trial court did not perform the trust accounting the law required.

A. The trial court did not do an accounting.

Roy's complaint sought to "compel a trust accounting" in one count and "damages" for alleged breaches of trust in another. R1012-20. But the damages Roy claimed were based on the same calculation his request for accounting required. He sought "the trust distribution that he is entitled to." R6270; R4622, 4624. And the trial court said its award of $450,000 was Roy's "share of trust assets." R5264.

On appeal, Roy disavows the relief he sought and the trial court awarded. To avoid the law on accountings and any examination of the trust income he spent and could not account for, he now argues he didn't really seek an accounting and the trial court didn't have to conduct one. AB15-18. Roy's efforts to recast his claims on appeal fails. As his own brief admits, his damages were based on the distribution he would have received under the terms of the trust. AB16-17. The trial court's award had to be based on an accounting of trust funds. It never performed that accounting.

The trial court's rulings were also tainted by its mistaken belief the trust lacked the funds to pay Roy when, in fact, it had them. And Roy cannot explain the court's failure to follow this Court's explicit directive to "hold an additional evidentiary hearing" or "accept a stipulation" on the actual balance of the trust before entering an amended final judgment. R5150. Roy controlled the substantial, income producing trust assets from July 2019 until the amended final judgment was entered in November, but the trial court prohibited Maura Lee from questioning him or discovering the actual balance. R5266-70, 6168-69, 6190-93. Instead, it took Roy's word on the balance, released it to Roy, and entered a judgment against Maura Lee for the remainder. R5329, 6193. The trial court erred when it failed to follow this court's directive. See *McGlade v.*

State, 941 So. 2d 1185, 1189 (Fla. 2d DCA 2006) (vacating order by same judge for refusing to follow appellate directive).

B. The trial court's $450,000 award is not supported by evidence.

Rather than begin by addressing whether the trial court's award of $450,000 to Roy was supported by evidence, Roy sidesteps to argue Maura Lee didn't prove the payment to her husband of $416,228.23 was for proper trust expenses. That is neither here nor there. Maura Lee produced an accounting of all trust expenses from 2011 to 2016 paid by her or her husband. R2108-74, 3171-73. The total exceeded $416,228.23—the amount she borrowed from her husband and repaid under the Connecticut judgment. R2108-74, 3171-73. But no matter how the evidence on trust expenses is viewed, the award of $450,000 to Roy finds no support in the record.

1. The award does not account for undisputed expenses.

Roy's theory was that his share of the trust should be half the amount the trust would have netted in a 2013 sale of the home after expenses, excluding some travel expenses or ones paid by Myra. R4723, 6368. There was no evidence the travel expenses were improper, but even if every one of Roy's arguments were adopted (despite the facts and law to the contrary), there is still no evidence to support the $450,000 award. In fact, Roy's brief confirms this. The calculation on page 20—one he never presented at trial—assumes all legal issues and evidence in his favor but cannot account for the $450,000 the trial court awarded without including the Southern Oaks insurance check of $38,000. At trial, Roy disavowed any

claim to that check. R5781. Roy's brief even concedes that "no monetary damages were sought against Appellant relating to the Southern Oaks check." AB33-34.

Roy's calculation also fails to account for the property taxes that would have been paid in a 2013 sale. Roy says he omitted 2015 taxes from his calculation because they "would not have existed in a 2013 sale." AB20. But 2013 property taxes existed and had to be paid. Based on the 2013 closing date, a proportional $9,069 of the 2013 taxes of $12,424 would have been paid. R2114, 2944-46.

Roy cannot justify the damages awarded by stating the Southern Oaks check was properly included in the damages in one part of his brief but conceding in another part that he sought no damages related to the check. Nor can he omit undisputed taxes that had to be paid under his theory. Removing the Southern Oaks check from Roy's calculation and deducting the $9,069 in 2013 property taxes results in net proceeds of $854,374.94, and Roy's share would be no more than $427,187.47. The award of $450,000 is not supported by any competent evidence.

2. The trust owned only an 80-percent interest in the home.

When Myra and Rene died, the Grever-Burke Trust owned 80 percent of the property and Myra's trust owned 20 percent. R3852-54, 3866-3910. On May 20, 2013, Myra's trust transferred its 20-percent interest to Maura Lee and Rene as tenants in common. R3140-42. Roy does not dispute that because Rene had died, any conveyance to her was void but the transfer to Maura Lee was valid. IB35.

To try to avoid this result, Roy argues the May 20, 2013 deed does not matter. He contends the 20-percent interest that Myra's trust owned was transferred into the Grever-Burke Trust before the May 20, 2013 deed from Myra's trust to Maura Lee and Rene. AB21-23. Roy stakes his argument on some quit claim deeds and an order determining homestead rights. Tellingly, he omits the dates of those documents. Also telling is that Roy never made this argument in the trial court, and for good reason. It is refuted by a subsequent court order and the law.

The quit claim deeds Roy relies on were signed in January 2013 by the Wahlberg children to transfer any interest they had in the property to the Grever-Burke Trust. R3913-29. But the children had no interest in the property at that time; 80 percent of the property was in the Grever-Burke Trust and 20 percent was in Myra's trust. R3852-54. "[I]t is well established that a quitclaim deed only conveys such title or interest as possessed by the grantor at the time of the making of the deed." Florida E. Coast Ry. v. Patterson, 593 So.2d 575, 577 (Fla. 3d DCA 1992). The children did not acquire any interest in the property until at least two months later when a March 1, 2013 order ruled that homestead rights to 20 percent of the property would vest in the children. R1901-02. The January 2013 quit claim deeds to the Grever-Burke Trust conveyed no interest. And no later deeds were executed.

Instead, and in direct conflict with the March 2013 order determining homestead, the same circuit court entered a later and different order. R3138-39. That April 17, 2013 order found that Myra's trust and a contract among interested persons required Myra's trustees to convey the property from Myra's trust to her daughters directly. It ordered Myra's trustees "to

convey the real property" to "NOREEN S. GREVER and MAURA LEE WAHLBERG, as tenants in common." R3138. That was the basis for the May 20, 2013 warranty deed that transferred Myra's trust's remaining interest in the home to Rene and Maura Lee individually. R3140-41.

When, as here, there are two conflicting judgments involving the same rights of the same parties, the one that is later in time prevails. *See Nichols v. Nichols*, 648 P.2d 780, 784-85 (NM 1982) (collecting cases). The later April 2013 order acknowledging Myra's trust owned the interest in the property and directing her trustees to convey it to Maura Lee and Rene controls over the conflicting earlier March 2013 order determining Myra's children had a homestead interest in the same property. The Grever-Burke Trust owned only 80 percent of the property.

Roy suggests the ownership of the 20-percent interest was a factual dispute rather than a legal one. AB21-23. Not so. The controlling documents were not in dispute. In fact, Roy first filed the deeds, orders, and related documents and asked the court to take judicial notice of them. R778-803. The interpretation and legal effect of the documents is a question of law. *See, e.g.*, *City of Clearwater v. BayEsplanade.com, LLC*, 251 So. 3d 249, 253 (Fla. 2d DCA 2018) (interpretation of deed presents legal question); *Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So. 3d 1034, 1040 (Fla. 2d DCA 2013) (application of law to undisputed facts presents question of law). And Roy does not dispute that his claim against the trust could only seek his share of what the trust actually owned.

Roy argues alternatively but without citing legal authority that Maura Lee waived this legal issue either (a) by signing the quit claim deed and contract among

interested persons before the entry of the April 2013 order, or (b) in her early pleadings. That argument fails. The April 2013 order and May 2013 deed superseded the prior documents and court orders. There is no evidence Maura Lee waived the rights she received to the property under the May 2013 deed. And Maura Lee's answer to Roy's second amended complaint raised the affirmative defense that the trust did not own 20 percent of the interest in the property. R1044-45.

Finally, Roy contends Maura Lee "raised this same issue and lost" in litigation regarding Rene's probate estate. AB24 (citing R3148-52, 3155-56). That is incorrect and Roy's record citations do not support his argument. The probate court ruled Maura Lee lacked standing and her challenge to the discharge order in Rene's estate was time-barred. R3155-56. It also ruled the probate of Rene's estate was not fraudulent because the March 2013 homestead order provided a legal basis to open the estate. R3156. But the probate court was never asked to rule and did not rule on the legal effect of the subsequent April 2013 order or the May 2013 deed transferring the remaining 20-percent interest in the property to Maura Lee and Rene. R3145-52, 3155-56. That issue was presented in this litigation, and the trial court erred when it ruled the trust owned all the property rather than an 80-percent interest in it.

3. The court did not account for Roy's personal use of trust funds.

Roy's brief does not dispute the trial court found "discrepancies" in his attempt to account for trust income he received and spent, yet did not take those discrepancies into account when it calculated the amount due to Roy under the trust. IB37-38; AB 25-27. Roy

tries to duck the issue by recasting his claims as only seeking damages and not an accounting. But as shown, Roy sought both and both counts required the court to perform the same calculation. The trial court erred when it failed to address trust income Roy received and could not properly account for. II. Breaches of trust recited in the judgment are unsupported by law or fact.

Six of the trial court's rulings are unsupported by the evidence or the law.

First, the trial court's finding that Maura Lee had a duty to perform annual accountings was error because that duty applies only to irrevocable trusts. *See* § 736.0813(d), Fla. Stat. (2011). The Grever-Burke Trust is revocable.

Roy cites Maura Lee's initial pleadings to contend this issue is not preserved. AB30. But in the operative pleadings, Maura Lee denied Roy was entitled to formal accountings and alleged he orally waived any accounting under section 736.0813. R1019, 1037, 1043. Roy suggests Maura Lee's brief is inconsistent when it states there was no right to a formal accounting but admits Roy was entitled to an accounting when the home sold. AB30-31. There is no inconsistency. Roy and Maura Lee agreed to account for all funds when the home sold. R1754, 5028, 5070. Roy alternatively argues the trust was irrevocable. He suggests a trust can only be "revocable" if it is revocable "by the settlor." AB31-32. The authorities Roy cites do not say that and do not involve the circumstances here. The trust states it can be terminated by "the majority of representative shares" and that a beneficiary or successor in interest like Roy is "entitled [to] represent that proportionate share." R3. The trust is not irrevocable because Maura Lee and Roy had the power to

revoke it. And Roy's expert's opinion cannot supplant what the law actually requires. *Luckman v. Wills*, No. 3D19-453, 2020 WL 4341883, at *3 (Fla. 3d DCA July 29, 2020) (questions of law are "outside the scope of expert opinion").

Second, the trial court erred when it found Maura Lee breached trust by failing to account for the Southern Oak Insurance check. As shown, Roy expressly disavowed any claim regarding the check. R5781. His argument that this issue was "tried by consent" blinks reality. He blocked Maura Lee from presenting evidence at trial by stating there was "no relief sought" regarding the check. R5781.

Third, the trial court's finding that Maura Lee breached trust by "failing to make an appropriate analysis to determine whether renting the home was a reasonable alternative" has no support in the pleadings or evidence. R5347. Roy's brief admits his complaint alleged Maura Lee breached her duty by "[f]ailing to rent the real property"—an allegation his own witnesses refuted—but the trial court recharacterized the claim to "failing to make an appropriate analysis on renting." AB34-35. Roy identifies no evidence to support the trial court's finding that Maura Lee did not make an appropriate renting analysis. Unrefuted testimony from Maura Lee and the realtor Roy called as a witness showed Maura Lee did make a proper analysis and was advised not to rent the home while trying to sell it. R5949-50.

Fourth, the trial court's finding that Maura Lee committed a breach of trust when she rejected a $1 million offer to sell the home is refuted by the terms of the trust, which Roy does not address. The trust states "no sale may be made to any entity or person" unless a "majority of the shares of th[e] trust" approve." R6-7.

The plain language of the trust controls. Nelson v. Nelson, 206 So. 3d 818, 819 (Fla. 2d DCA 2016). The facts and law Roy relies on are irrelevant given the trust's terms.

Fifth, the trial court's finding that Maura Lee breached a duty by seeking a trustee fee is unsupported by the law, the pleadings, and the facts. Roy does not deny a trustee is permitted to seek a fee. Instead, he argues Maura Lee's chart of expenses shows a fee "was paid." AB40 (citing R2173, 5944). Not so. Maura Lee's chart listed expenses that were paid and identified the person who paid them and from which account. R2108-74. The chart noted the requested trustee fee separately and without payment information. R2124, 3166. That was consistent with the unrefuted testimony that no trustee fee was paid, only requested. R5717, 5868. It is not a breach of trust to request a fee, and Roy does not argue otherwise. To the contrary, a trustee like Maura Lee should typically be awarded some fee for their services to a trust. *See Ortmann v. Bell*, 100 So. 3d 38, 45-46 (Fla. 2d DCA 2012).

Sixth and finally, the trial court erred when it held Maura Lee committed a breach of trust when she claimed she had an individual ownership interest in part of the property. As explained, undisputed evidence showed 20 percent of the interest in the home was never placed in the trust. R3852-54. Roy's sole response is to argue that Maura Lee's claim created a conflict of interest that required her to resign or seek court approval. AB41. But that is not the breach the court found. R5155.

Roy's fall-back argument is to summarily claim all the trial court's errors did not affect the damages awarded and so are harmless. But as shown, the

damages were not supported by the evidence either. The trial court's erroneous view of the evidence and law not only caused it to blindly accept Roy's request for $450,000 in damages but also affected its rulings on contempt and attorneys' fees. Collectively harmful and pervasive errors merit a new trial on all issues. Manhardt v. Tamton, 832 So. 2d 129, 131-33 (Fla. 2d DCA 2002). Roy cannot show there is no reasonable possibility the trial court's many errors contributed to its rulings. *See Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014) (beneficiary of error bears burden to show there is no reasonable possibility it contributed to verdict).

III. The trial court erred when it held Maura Lee in criminal contempt.

A. The court held contempt proceedings in Maura Lee's absence.

Without citing any authority, Roy argues the Court should dismiss any appeal by Maura Lee because her first notices of appeal referred to her role as trustee and not as an individual. But Roy admits Maura Lee filed an amended notice of appeal on February 19, 2020, that clarified her intent to appeal both as trustee and individually. Roy did not object to the amendment. And Roy fails to mention the on- point law that defeats his argument. Florida Rule of Appellate Procedure 9.040(d) permits an appellate proceeding to be amended so that it may be disposed of on its merits and permits a court to disregard procedural defects that do not affect a party's substantial rights. The supreme court holds that when a party has received notice that an appeal from an appealable order is intended and no prejudice is shown from any ambiguity over who is taking it, the dismissal of the appeal is

error. *Milar Galleries, Inc. v. Miller*, 349 So. 2d 170, 171 (Fla. 1977). Roy claims no prejudice.

Roy also contends Maura Lee waived her right to be present at the criminal contempt proceedings because she failed to appear. AB42 (citing *Baker v. State*, 979 So. 2d 453, 454 (Fla. 2d DCA 2008)). Baker supports reversal, not affirmance. Baker holds it is error to hold restitution proceedings in the absence of a defendant absent a showing of a knowing and voluntary waiver of the right to be present. *Id.* at 454. This Court also holds that when a defendant represents their failure to appear is due to a hospitalization and no evidence contradicts that, a knowing and voluntary waiver is not shown. *Miller v. State*, 833 So. 2d 318, 319 (Fla. 2d DCA 2003). While Roy downplays Maura Lee's medical condition, he does not dispute her doctor said her condition was "potentially life threatening" and required treatment that prevented her from appearing. R2049, 4601. Even if there were a willful failure to appear—and there was not—the remedy is postponement and a capias, not trial in absentia. *Hillsman v. State*, 159 So. 3d 415, 419 (Fla. 4th DCA 2015).

The rest of Roy's arguments treat this as a civil proceeding, not a criminal one. No case has been found in which a court tried a civil and criminal case simultaneously, and here the process undeniably confused both the parties and the court. R5459. It was error to permit Roy to present his entire case-in-chief on criminal contempt against Maura Lee in her absence.

B. Evidence did not support holding Maura Lee in criminal contempt.

The trial court's ruling on contempt improperly rested on its disputing the validity of a Connecticut judgment that was entitled to full faith and credit.

IB46-37. Roy's only response is to assert: "The Full Faith and Credit Clause does not protect judgments procured by fraud." AB43 (citing *Trauger v. A.J. Spagnol Lumber Co.*, 442 So. 2d 182, 183 (Fla. 1983)). But the statement in Trauger is dicta, not a holding.

This Court holds (a) full faith and credit must be given to a sister state's judgment unless there was a lack of jurisdiction or extrinsic fraud; and (b) the issue is governed by the law of the sister state. *In re Estate of O'Keefe*, 833 So.2d 157, 160 (Fla. 2d DCA 2002). Connecticut law holds that under the law regarding full faith and credit, a party can only challenge a foreign judgment if it is "jurisdictionally flawed" or if the sister court's "jurisdiction resulted from an extrinsic fraud." *Segal v. Segal*, 863 A.2d 221, 234 (Conn. Ct. App. 2004) (emphasis added). Here, all of Roy's allegations of contempt involved alleged intrinsic fraud—questioning the evidence presented to the Connecticut court. That is not a basis for denying full faith and credit to the Connecticut judgment. *See also Baker v. Gen. Motors Corp.*, 522 U.S. 222, 242 (1998) (Scalia, J., concurring) (explaining Supreme Court precedent holds sister state's judgments are not "reexaminable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties"). The trial court's contempt ruling indisputably hinged on its assessment of the merits of the Connecticut proceedings. That was error.

Roy's criminal contempt argument hinged entirely on the validity of the Connecticut judgment. He does not dispute that Maura Lee's compliance with the Connecticut judgment did not violate the plain terms of the June 28, 2016 order that only prohibited reimbursing Kevin in the absence of a court order. R2857.

And the flawed criminal contempt ruling contributed to the trial court's other rulings.

IV. The trial court erred when it appointed Roy trustee.

There is no dispute the trial court awarded Roy a remedy he did not seek—his own appointment as a trustee. R1016, 4444. Roy's own expert testified that when a person like Roy has a claim against trust funds, it presents a conflict of interest for him to serve as trustee. R4857. Roy claims any error was harmless because he was ordered to pay himself all the money in the trust anyway. But as explained, that was error. Additional harm occurred because Roy refused to account for the trust funds from July 2019 when he gained control of them until November, when the court took Roy's word for the balance and fashioned a fee judgment against Maura Lee personally based on that figure. The order appointing Roy trustee should be reversed. V. The trial court erred when it awarded Roy attorneys' fees.

On-point case law holds a private party cannot be awarded attorneys' fees incurred in a criminal contempt proceeding. *Fredericks v. Sturgis*, 598 So. 2d 94, 96 (Fla. 5th DCA 1992). Roy suggests this case law is "not well settled" because of the Fifth District's decision in *Powell v. Washington*, 233 So. 3d 1156, 1157 (Fla. 5th DCA 2017). But *Powell* did not involve a criminal contempt proceeding. *Id.* at 157-58. Neither Powell nor any other case permits a private party to recover fees for pursuing an action for criminal contempt.

Roy's fall-back argument claims the fee award is proper under section 736.1004, Fla. Stat. (2011). But because the trial court's award is based in part on an

unlawful premise, the fee judgment should be reversed. *Wilson v. Wilson*, 827 So. 2d 401, 403 (Fla. 2d DCA 2002). And the alternative award is also error. Roy does not mention the law that prohibits him from recovering fees under section 736.1004 unless those fees were incurred in the breach of trust action. *See Levine v. Stimmel*, 272 So. 3d 847, 848 (Fla. 5th DCA 2019). Nor does he mention the law that prohibits him from collecting fees incurred in an appeal that were not authorized by the appellate court. *See Bartow HMA, LLC v. Kirkland*, 146 So. 3d 1213, 1215- 16 (Fla. 2d DCA 2014). No case supports Roy's attempt to create an "inextricably intertwined" exception to this law. And Roy's assertion that "timesheets reflect that the fees were generated on invoices for this case, not separate matters," AB50, is flat wrong or dissembling. The invoices detail time spent on the probate proceedings and an appeal, including record review, brief drafting, and oral argument. R6104, 6109- 11, 6119. The fee judgment should be reversed.

CONCLUSION

The criminal contempt order should be reversed and Maura Lee discharged. The amended final judgment, the order removing trustee, and the fee judgment should be reversed, the trust assets restored, and a new trial ordered.