PETITION APPENDICES: SECTION A

RECENT APPELLATE RECORD

September 11, 2019 through January 3, 2020

Pet. App. No. 1 (Recent Appellate Record)
NMSC *Order Denying Motion for Rehearing*
Filing Date and Time: January 3, 2020 at 3:43 PM

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. S-1-SC-38001
RICHARD A. VAN AUKEN, Trustee and
RICHARD A. VAN AUKEN, Beneficiary,
Plaintiff-Petitioner,

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; and
KAREN AUBREY, ESQ.,
Defendants-Respondents.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing, and the Court having considered said motion and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Michael E. Vigil, and Justice C. Shannon Bacon concurring;

NOW THEREFORE, IT IS ORDERED that the motion for rehearing is DENIED; and

IT IS FURTHER ORDERED tht the Court of Appeals may proceed in Van Auken v. Catron, Ct. App. No. A-1-CA-35704 in accordance with the Rules of Appellate Procedure.

IT IS SO ORDERED
WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 3rd day of January, 2020.
[signed by Joey D. Moya]
Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

Pet. App. No. 2 (Recent Appellate Record)
NMSC *Order Denying Petition*
Filing Date and Time: December 6, 2019 at 9:13 AM

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. S-1-SC-38001

RICHARD A. VAN AUKEN, Trustee and
RICHARD A. VAN AUKEN, Beneficiary,
Plaintiff-Petitioner,

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; and
KAREN AUBREY, ESQ.,
Defendants-Respondents.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari filed under Rule 12-502 NMRA, and the Court having considered the foregoing and being sufficiently advised, Chief Justice Judith K. Nakamura, Justice Michael E. Vigil, and Justice C. Shannon Bacon concurring;

NOW THEREFORE, IT IS ORDERED that the petition for writ of certiorari is DENIED

IT IS FURTHER ORDERED tht the Court of Appeals may proceed in Van Auken v. Catron, Ct. App. No. A-1-CA-35704 in accordance with the Rules of Appellate Procedure.

IT IS SO ORDERED

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of

New Mexico, and the seal of said Court this 27th day of November, 2019.

Joey D. Moya, Clerk of Court
Supreme Court of New Mexico

[signed by Madeline Garcia]
Chief Deputy Clerk

Pet. App. No. 3 (Recent Appellate Record)
N.M. Court of Appeals *Order Denying Motion for Rehearing*
Filing Date and Time: October 8, 2019 at 10:50 AM

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. A-1-CA-35704

RICHARD A. VAN AUKEN, Trustee and
RICHARD A. VAN AUKEN, Beneficiary,
Plaintiff-Appellants,

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; and
KAREN AUBREY, ESQ.,
Defendant-Appellees.

ORDER DENYING MOTION FOR REHEARING

Ths matter is before the Court on Appellant's motion for rehearing. The original panel of judges has considered the motion.

THE COURT ORDERS THAT the motion **IS DENIED.**

[signed]
[M. Monica Zamora]
COURT OF APPEALS JUDGE

Pet. App. No. 4 (Recent Appellate Record)
N.M. Court of Appeals *Memorandum Opinion*
Filing Date and Time: September 11, 2019 at 11:12 AM

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. A-1-CA-35704

RICHARD A. VAN AUKEN,
Trustee, and Richard A.
Van Auken, Beneficiary,
Plaintiffs-Appellants,
v.
FLETCHER R. CATRON,ESQ.;
PETER F. WIRTH, ESQ.; and
KAREN AUBREY, ESQ.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
David K. Thomson, District Judge

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for Appellant

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Andrew G. Schultz
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for Appellee Peter F, Wirth

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Gerald G. Dixon
Taylor M. Lueras
Albuquerque, NM
for Appellee Karen Aubrey, Esq.

MEMORANDUM OPINION

M. ZAMORA, Chief Judge.

{1} Plaintiff Richard Van Auken, in his capacity as third successor trustee and in his capacity as beneficiary of the Seton Family Trust Contract (Trust) appeals the district court's order denying his Rule 1-060 NMRA motions to set aside the district court's March 31, 2011 order dismissing this case in its entirety. Concluding that the order appealed from was a final, appealable orderm and that the motions to reconsider were properly denied, we affirm.

{2} Because this is a memorandum opinion and the parties are familiar with the extensive procedural history, we include additional background information only where relevant to the analysis.

I. The District Court's Order was a Final Appealable Order

{3} Plaintiff argues that the district court's June 7, 2016 order from which he appeals is not a final, appealable order because although it denied his Rule 1-060(B)(6) motion to set aside the March 31, 2011 order, it did not consider his two pending Rule 1-059(E) NMRA motions to reconsider the March 31, 2011 order. However, Defendant Catron argues that the Rule 1-060(B)(6) was withdrawn from the record and thus, the only motions the district court needed to consider were the Rule 1-059(E) motions

{4} "In determining whether an order is final, this Court looks to the substance rather than the form of the order." *See Los Ranchos de Albuquerque v. Shively,* 1989-NMCA-095, ¶ 12, 110 N.M. 15, 791 P. 2d 466. This Court gives the order a practical rather than a technical construction. *Id.* "The test of whether a judgment is final so as to permit the

taking of an immediate appeal lies in the effect the judgment has upon the rights of some or all of the parties." *Id.* " A decision which terminates the suit, or puts the case out of court without an adjudication on the merits, is a final judgment." *Id.*.

{5} Based on our review of the record, we conclude that the order appealed from is a final, appealable order because it considered and disposed of Plaintiff's arguments on the Rule 1-059 motions to reconsider, despite the nomenclature in the final order referencing Rule 1-060. There are three reasons for our conclusion. First, the district court partially denied Plaintiff's motion for leave to file a Rule 1-060 motion to set aside the March 31, 2011 order. In light of its partial denial, the district court considered the proposed Rule 1-060 motion to set aside to be withdrawn from the record. The district court granted, in part, Plaintiff's motion for leave to file a Rule 1-060 motion, "as it applies to the [Rule 1-059(E)] motions that were to reconsider Judge Singletons' March 31st, 2011 order." The district court went on to say, " I will hear, at that time, those motions to reconsider and then take under advisement the remaining portion of Plaintiff's motion for leave to file . . . Rule [1-0]60 motion until I've made a determination on the – what I see as , at this point, just a limited [Rule 1-059(E)] motion to reconsider Judge Singleton's [order]." Further, the district court explained, "I will deny it as to the remainder [with regard to the attached motion and Rule [1-0]60(B) motion] without prejudice. I will revisit that issue once I make a decision as to . . . Judge Singleton['s] ruling."

{6} Second, the district court correctly denied the motion for leave to file the Rule1-060 motion to set asde on the grounds that, in a related matter, Plaintiff was permanently enjoined from

> filing any pleading or paper in any existing action [against Defendant Catron] in any such [state or federal][court, unless he is represented by an attorney licensed to practice law in the State of New Mexico and a court in the State of New Mexico grants such counsel permission to file such action, pleading or paper, after notice and an opportunity to be heard on counsel's application has been provided to [Defendant] Catron.

Seton Family Trust Interests ex rel. Van Auken, No. D-101-CV-2011-01917, Order Granting Injunctive Relief (Nov. 1, 2011); *See also Van Auken v. Catron,* No. A-1-CA-31961, memo. Op. At *4 (N.M. Ct. App. Jan 7, 2013) (non-precendential) (affirming permanent injunction and dismissal of 2011 declaratory action, and acknowledging that there was a pending motion to reconsider in the matter underlying the current appeal). However, the district court acknowledged that Plaintiff's two pending Rule 1-059(E) motions were filed in April 2011, prior to the November 2011 injunction against Plaintiff, and therefore, Plaintiff was entitled to a hearing on those issues.

{7} Third, notwithstanding the fact that the final order indicates a denial of Plaintiff's Rule 1-060(B)(6) motion to set aside, the district court also included language in its order regarding the standard for reviewing a motion for reconsideration. *See Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.,* 2007-NMSC-051, ¶10, 142 N.M. 527, 168 P. 3d 99 ("[A] motion challenging a judgment filed within ten

days of the judgment, should be considered a Rule 1-059(E) motion to alter or anmend a judgment. Nomenclature is not controlling." (alteration, internal quottion marks, and citation omitted)). Moreover, at the hearing, the district court confirmed that the parties were present to argue the merits of Plaintiff's Rule 1-059(E) motion to reconsider, and counsel for both Plaintiff and Defendant Catron confirmed that no other matters were pending. Plaintiff does not otherwise respond to Defendant Catron's argument that the order is a final appealable order. As such we proceed with a consideration of the merits of Plaintiff's appeal.

II. The Motion to Reconsider Was Properly Denied

A. Backgound

{8} Plaintiff alleges Defendants engaged in probate fraud in violation of NMSA 1978,§ 454-1-106(A) (1975) and attorney collusion or decits in violation of NMSA 1978, Section 36-2-17(1) (1909) when they allegedly misrepresented to the first successor trustee, Burr E. Lee Jr, and the beneficiaries (including Plaintiff) that Mr. Lee could transfer a Trust asset out of the Trust to a family hospice nurse in violation of the terms of the Trust. This Court noted in the prior appeal affirming the injuction that Plaintiff filed four separate lawsuits and appeals against Defendant Catron, and other third parties between 2006 and 2011, all involving the interpretation of the Trust, and sometimes as a pro se litigant. *See also Van Auken,* No. A-1-CA-31961, memo. op. at *7, 9. This Court further noted that Plaintiff persisted in attempting to represent the Trust despite repeated rulings that he could not do so because he was not an attorney, and otherwise

representing the trust amounted to the unauthorized practice of law. *ID.* At *7; *see also Lee v. Catron,* 2009-NMCA-018, ¶¶ 4-5, 145 N.M. 573, 203 P. 3d 104 (affirming dismissal of Van Auken's case against Catron because a non-attorney trustee cannot represent a trust unless he is the sole beneficiary); *Seton Family Trust Interrests ex rel. Van Auken v. Wirth,* No. A-12-CA-30215, mem. Op. at *1 (N/M/ Ct. App. Aug. 18, 2010) (non-precedential) (affirming dismissal of Van Auken's suit against Catron and others because Van Auken could not represent the trust pro se).

{9} Plaintiff on behalf of the Trust (as trustee) and personally (as beneficiary) is seeking to recover an asset – the house referred to as the Timberwick Property – for the Trust so that it can be distributed to himself as beneficiary.

{10} Defendants Aubrey, Wirth, and Sawtell (who were legal counsel for various parties in the 2002 probate distribution of the first successor trustee's assets), were dismissed as Defendants in the action with prejudice on the grounds that Plaintiff could not represent the Trust as a non-lawyer. Although the "individual claims of [Plaintiff] against [Defendant] Catron remain[ed,]" the district court dismissed the attorney collusion or deceit claim under Section 36-2-17 such that only the probate fraud claim remained.

{11} The district court also denied Plaintiff's motion for partial summary judgment on the terms of the Trust, and noted the ambiguity of the language at Section 1, Paragraph 2, Sunsection A which provides: "The trustee shall continue to pay income and such sums of principal to the survivor *as requested.*" (Emphasis added.) The court reasoned that the

meaning of that phrase went to the the intent of the parties, which was a question of fact to be addressed at trial. Plaintiff appealed those determinations. This Court dismissed Plaintiff's appeal of those dismissals with prejudice, concluding that the effect on remand was that the district court should consider whether the case, with the Trust, should be dismissed in its entirety for failure to join an indispensible party (the Trustee on behalf of the Trust) under Rule 1-018 NMRA. *See Van Auken v. Catron et al.*, No. A-1-CA-27554, memo op. at *6-7 (N.M. Ct. App., June 27, 2008) (non-precendential).

{12} After the remand and mandate from this Court, Defendant Catron, the sole remaining Defendant, filed a motion to dismiss the entire case for failure to join an indispensable party, while at the same time, Plaintiff filed a (renewed) motion to intervene as Trustee on behalf of the Trust. The district court denied the motion to intervene in its July 30, 2010 order, concluding that it was untimely because Plaintiff had still not secured counsel for himself as Trustee, and that equity weighed in favor of dismissal given the amount of time Plaintiff had to secure counsel and repeated warnings about the consequences of failing to obtain counsel. Plaintiff moved the district court to reconsider and in its October 29, 2010 order, the district court denied Plaintiff's motion to reconsider the July 30, 2010 order. Accordingly, the district court granted Defendant Catron's Rule 1-019 motion to dismiss the case in its entirety with prejudice for failure to join an indispensable party (the Trustee, on behalf of the Trust) in its March 31, 2011 order. Plaintiff filed two Rule 1-059 motions to reconsider the March 31, 2011

order, one in his capacity as beneficiary and the other in his capacity as trustee, pursuant to Rule 1-059(E).

B. The Motions to Reconsider Were Properly Denied

{13} We review district court rulings resolving motion to reconsider for an abuse of discretion. *Rivera v. Trujillo*, 1999-NMCA-129, ¶ 16, 128 N.M. 106, 990 P.2d 219. In *Rivera*, the district court declined to consider information presented by the plaintiff in a motion to reconsider its granting of summary judgment in the defendants favor. *Id.* ¶ 17. The court reasoned that counsel failed to timely bring the information to the court's attention and exercised its discretion not to consider the untimely presented depostion testimony. *Id.* ¶ 19. The same is true for the Rule 1-059 motions in this case. The district court did not see any reason to reverse its prior decision dismissing the action with prejudice, and Plaintiff fails to point this Court to any identifiable legal or factual justification in support of his theory. *See Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed."). We therefore conclude that the district court did not abuse its discretion.

III. Plaintiff's Remaining Issues Are Without Merit

{14} Plaintiff argues that the district court erred in denying his Rule 1-060 motion to set aside based on cumulative abuses of discretion over fifteen years of litigation, and error in not making a final determination of the meaning of ambiguous language in the Trust. To the extent Plaintiff argues that the district court committed reversible error in the 2002 probate matter, 2003 post-probate matter, or 2011

declaratory matter, or that this Court committed error in the 2009 opinion, Plaintiff does not provide us with any reference to authority granting this Court the jurisdiction to review issues raised reagarding distrct court error in these matters. We therefore assume none exists. *Curry v. Great Nw. Ins., Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists.").

{15} We further decline to consider Plaintiff's remaining arguments seeking a declaration of injury, and to determine the meaning of the language in the trust because this Court is not a fact finding court. *See VanderVossen v. City of Espanola*, 2001-NMCA-016, ¶ 26, 130 N.M. 287, 24 P.3d 319 (explainning that this Court exercising appellate jurisdiction is not a fact finding body).

CONCLUSION

{16} For the foregoing reasons we affirm the district court's order denial Plaintiff's motion to reconsider.

{17} IT IS SO ORDERED.

M. MONICA ZAMORA, Chief Judge

WE CONCUR:
J. MILES HANISEE, Judge
BRIANA H. ZAMORA, Judge

Pet. App. No. 5 (Recent Appellate Record)
Plaintiff-Appellants' *Motion for Rehearing*
Filing Date and Time: September 26, 2019 at 2:43 PM

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

No. A-1-CA-35704

RICHARD A. VAN AUKEN, Trustee and
RICHARD A. VAN AUKEN, Beneficiary,
Plaintiff-Appellants,

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; and
KAREN AUBREY, ESQ.,
Defendant-Appellees.

An Appeal from the District Court of the First Judicial District
Santa Fe County, New Mexico
No. D-0101-CV-2006-01509
Honorable David K. Thomson

Plaintiff-Appellants' Motion for Rehearing

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September 25, 2019

The Plaintiff-Appellant, Trustee, Richard A. Van Auken in his capacity as the third successor trustee under the Seton Family Trust Contract, and Plaintiff-Appellant, Beneficiary, Richard A. Van

Auken in his capacity as one of seven living beneficiaries named in this same Trust Contract, hereby submit this *Motion for Rehearing* pursuant to NMRA Rule 12-404.

On September 11, 2019, this Court released its *Memorandum Opinion* affirming the District Court dismissal of Plaintiff-Appellants Rule 1-060(B)(6) Motion based on separate findings in three parts: (Part I) that the District Court order dismissing the Rule 1-060(B)(6) Motion was a final, appealable order, (Part II) that two Rule 1-059(E) motions to reconsider separately filed by Plaintiff-Appellant, Trustee (as trustee) and Plaintiff-Appellant, Beneficiary (as beneficiary) were properly denied, and (Part III) that all other issues raised by Plaintiff-Appellants in their 53-page *Brief-In-Chief* filed October 6, 2017 are "irrelevant."

Plaintiff-Appellants set forth in this *Motion for Rehearing* two bases for suspending the September 11, 2019 *Memorandum Opinion* of the this Court until further review is undertaken to produce an amended final determination:

1. Legal Basis: In Plaintiff-Appellants' opinion, this Court has failed to understand and act on its legal powers and duties under the law to resolve a central issue in this Case, namely, the meaning of language in the six-page Seton Family Trust Agreement of 1978 and

2. Factual Basis: In Plaintiff-Appellants opinion, this Court in its *Memorandum Opinion* of September 11, 2019 has misapprehended or misconstrued several items in the procedural history of this Case that underlie Plaintiff-Appellants' October 6, 2017 *Brief-in-Chief.*

Plaintiffs-Appellants set forth below their points of law and facts associated with these two bases, pointing out certain facts to correct and challenge the Court's analysis set forth in its *Memorandum Opinion.*

I. LEGAL POWERS UNDER DECLARATORY JUDGMENT ACT

The Court's *Memorandum Opinion* states in Part III the following on p. 9, lines 11-14:

> "Plaintiff argues that the district court erred in denying his Rule 1-060 motion to set aside based on cumulative abuses of discretion over fifteen years of litigation, and error in not making a final determination of the meaning of ***ambiguous*** language in the Trust;" *(emphasis added)*

Plaintiff-Appellants' *Brief-in-Chief* had requested the following at page 47, lines 4-9:

> *"Arrange Final Determination of Language in Trust Contract*: Without further delay, a judicial review of the meaning of language in the six-page Trust Contract should be arranged in one or two steps. First, this Court should act to determine the ***unambiguous character and meaning of the language as affirmed by New Mexico trust expert James F. Beckley***. Second, if needed, a mandate should be returned to the District Court to promptly proceed with a *Mark V* evidentiary review of the language." *(emphasis added)*

None of the parties in this Case argued that the language in Seton Family Trust Agreement is ambiguous and a top New Mexico trust expert, James F. Beckley, Esq., has testified in a ten-page

affidavit that the language is unambiguous.[1] [RP 0565] Mr. Beckley also testified that Defendant-Appellee Catron's two-page written opinion of March 15, 2000 that held sway in the 2002 Probate Case is sufficiently far enough from the true meaning of the language to invoke the probate fraud statute. [RP 0565]

It is an established power of the New Mexico Court of Appeals to render final legal opinions on the meaning of contract language under the Declaratory Judgment Act,. NMSA §44 *et seq.* and its inherent authority. "Where evidence is documentary, this court is in as good a position as was the trial court to determine the facts and is not bound by the trial court's findings." Lowe v. Bloom, 1991- NMSC-058, ¶ 8, 112 N.M. 203, citing to House of Carpets Inc. v. Mortgage Inv. Co., 85 N.M. 560, 514 P.2d 611 (1973). This Court has the authority to review the language in the six-page Seton Family Trust Agreement on a de novo basis – not to determine the meaning of some predetermined ambiguity, but to establish its unambiguous meaning if possible. Seventeen years of litigation come down to this one job that this Court has the power – and also the duty – to perform.

II. ERRORS IN PROCEDURAL HISTORY OF MEMORANDUM OPINION

Over the seventeen years of litigation that has occurred in six separate actions, numerous

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[1] The only finding of ambiguity was produced in a District Court Order by Judge James Hall dated February 6, 2007, the effect of which was, on appeal according to Judge Alarid of this Court, to make all of Judge Hall's orders of February 6, 2007 "non-final."

arguments, documents, findings and orders have been added to the case record. It is easy to pick a particular item and report it incorrectly with regard to content or context. Plaintiff-Appellants believe there is sufficient error in the procedural history of the September 11, 2019 *Memorandum Opinion* of this Court to warrant suspending its effect until a complete and correct understanding of the procedural history of this Case can be incorporated into the final determination by this Court based on further review of the issues presented in the *Brief-in-Chief.*

The following eleven erroneous or misconstrued parts of the procedural history presented in Parts I and II of the *Memorandum Opinion* stand out and should be addressed in a rehearing of this Case:

1. Final Appealable Order (*Memorandum Opinion*, p.1, lines 18-21): In preparing the *Brief-in-Chief*, Plaintiff-Appellants never argued that District Court dismissal of the Rule 1-060(B)(6) Motion was not a final appealable order. Plaintiff-Appellee Catron argued that in his response pleading.

2. Injunctive Relief Order (*Memorandum Opinion.*, p. 4, lines 8-23): No final determination of the issues in this appeal is possible without understanding the background of the November 1, 2011 *Order for Injunctive Relief*, an order that should be declared null and void because of the issuing judge who ruled in the 2011 Declaratory Case, a case filed by attorney David Standridge on behalf of all seven beneficiaries named in the Seton Family Trust Agreement to support probate fraud claims arising from a corrupted probate proceeding. Then-Judge (now Justice) Barbara J. Vigil issued the injunction in the

Declaratory Case, and was the presiding judge in the corrupted probate proceeding, *In Re Burr E. Lee Jr.*, D-101-PB-2002-0163. Plaintiffs-Appellants contend this was a violation of NMRA Rule 21-102 which requires that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."

3. Probate Fraud Claim Details (*Memorandum Opinion,* p. 6, lines 1-4): Plaintiff-Appellants never alleged that any of the beneficiaries (including Plaintiff-Appellants) along with "first successor trustee Burr E. Lee Jr" were told by a Defendant-Appellee that "Mr. Lee could transfer a Trust asset out of the Trust to a family hospice nurse in violation of the terms of the Trust." That the first successor trustee Burr E. Lee Jr. was told anything about the trust agreement by Defendant-Appellee Catron was kept from all beneficiaries as a deep, dark secret during the entire 2002 Probate Case. Mr. Catron's role as attorney to the first successor trustee was not generally known during the Probate Case when he and Defendant-Appellee Wirth were unbeknownst to the beneficiaries at the time, representing the interests of the hospice nurse against the interests of the second successor trustee, a former client, in direct violation of the Rules of Professional Conduct.[2]

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[2] NMRA §16-109(C) **Former representation.** A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client

Plaintiff-Appellants only learned about Mr. Catron's role as attorney for the first successor trustee during the 2003 Post-Probate Case and did not come into possession of Mr. Catron's two-page opinion letter of March 15, 2000 [RP 0407-8] pertaining to language in the trust contract until January 2007 during the 2006 Probate Fraud Case.

4. *Pro Se* Representation Details (*Memorandum Opinion,* p. 6, lines 8-17): In noting "that Plaintiff persisted in attempting to represent the Trust despite repeated rulings that he could not do so because he was not an attorney" the *Memorandum Opinion* completely ignores the following ten important facts:

(i) that there were only four such "repeated" rulings, three by Judge Hall of the District Court and one by Judge Alarid of this Court;

(ii) that three of the rulings, Judge Hall's first two (in February 2007 and March 2008 and Judge Alarid's one (in June 2008) were overturned by the *Opinion* of Judge Sutin of this Court in the Attorney Malpractice and Fraud Case, *Lee v. Catron et al.* (in September 2008);

(iii) that Plaintiff-Appellant had correctly argued for more than two years that there was no legal trust entity (like an LLC) in this Case;

(iv) that, unprompted by any of the parties to the *Lee v. Catron, et al.* appeal, Judge Sutin set forth a new legal basis for requiring that Plaintiff-Appellant litigate through a licensed attorney, namely, that as a fiduciary the trustee is representing others (the beneficiaries) and is therefore practicing law without a license in acting for these others;

(v) that Judge Hall's third and final ruling, the last of the four "repeated" rulings, came in March 2009 when he used Judge Sutin's then published case law, *Lee v. Catron*, 2009-NMCA-018, to dismiss all of the claims in the Fraud and Conspiracy Case, *Seton et al. v. Wirth* et al, 2008 (filed *pro se* before the Sutin ruling in *Lee*);
(vi) that the claims dismissed by Judge Hall on the basis of *Lee v. Catron*, 2009-NMCA-018 properly included the claims of the Plaintiff-Appellant, Trustee (brought as trustee *pro se*) but quite inexplicably also included the claims of the Plaintiff-Appellant, Beneficiary (brought as beneficiary *pro se)* for which *Lee*, a case involving only the trustee, had no application whatsoever;
(vii) that in 2009 Plaintiff-Appellant, Trustee petitioned the United States Supreme Court (USSC) for certification of an appeal of the new case law *Lee v. Catron*, 2009-NMCA-018 on the basis that the case law was *ad hoc*, conflicted, and in violation of the Fifth and Fourteenth Amendments to the United States Constitution;
(viii) that when the USSC denied certification in October of 2009, Plaintiff-Appellant, Trustee petitioned for a rehearing;
(ix) that when the petition for rehearing was denied by the USSC on November 30, 2009, attorney David Standridge was retained and entered this Case less than a week later;
(x) that *Lee v. Catron*, 2009-NMCA-018 is current case law in New Mexico which affects any unwitting *pro se* fiduciaries in conflict with the interests of licensed attorneys.

5. Nature of Claims in this Case (*Memorandum Opinion,* p.6, lines 18-20): Plaintiff-Appellants have always sought money damages in this Case[3] and have never sought to "recover an asset – the house referred to as the Timberwick Property- for the Trust so that it can be distributed to himself as beneficiary." This erroneous characterization of the claims in this Case first appeared in 2008 in the two Preliminary Disposition Notices issued by Judge Alarid of this Court.

6. Status of Claims in this Case (*Memorandum Opinion,* p.7, lines 1-8): The status of Plaintiff-Appellants' original claims in this Case as described in the *Memorandum Opinion* are incorrect. The correct status is described in Section II, B, 1 of the *Brief-in-Chief* (pp. 16-20). In summary, Judge Alarid of this Court established in the consolidated appeal of Judge Hall's five orders (i) that, until a final determination of the meaning of the language in the trust contract is established, every order is non-final since all claims are "inextricably linked" to whether or not the trust contract was breached and (ii) that dismissal of the claims of the trustee would be sustained on the basis that the "Trust" was a legal entity that needed to be represented by a licensed attorney – a basis that was subsequently overturned by the finding by Judge Sutin of this Court in *Lee v. Catron et al.* that there is no trust entity in this Case. The meaning of language in the trust contract still remains undetermined and, since the failure of the *Lee* appeal to get certification from the United

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[3] Under NMSA §45-1-106(A), Probate fraud, and NMSA §36-2-17, Attorney deceit or collusion

States Supreme Court, two separate licensed attorneys have generally represented Plaintiff-Appellants.

7. This Court's Remand by Judge Alarid (*Memorandum Opinion,* p.7, lines 15-20): There is an assumption implicit in the *Memorandum Opinion* that the *Mandate* delivered to the District Court in September of 2008 is a valid instruction from this Court. What the effect on a Mandate of having the basis for the underlying opinion overturned on a subsequent appeal is an unaddressed issue. The June 28, 2008 *Opinion* and subsequent Mandate appear to have no authority or force of law. Even though Judge Sutin sustained the need for a trustee to be represented by an attorney, Plaintiffs-Appellants had been arguing correctly for over two years that there was no trust entity and that turned out to be the case. Based on this ruling, Judges Hall and Alarid turned out to be wrong. This Court, during a rehearing of this appeal, should address the question of what effect a new rule created by this Court has on the status of claims filed over two years earlier.

8. Plaintiff-Appellants' Attorney on July 30, 2010 (*Memorandum Opinion,* p.7, lines 4-8): The *Memorandum Opinion* states that as of July 30, 2010, Plaintiff-Appellant, Trustee had "still not secured counsel for himself as Trustee." This is not correct. Attorney David Standridge entered this Case in early December 2009, filed the Motion to Intervene that was at issue in July of 2010, attended the March 17, 2011 hearing that resulted in the dismissal of claims, filed the 2011 Declaratory Case, and had an on-going attorney-client relationship with Plaintiff-Appellants until the first part of 2012

when he withdrew to pursue running for Judge, at which time attorney Charles Lakins entered appearance.

9. Failure to Join an Indispensible Party (*Memorandum Opinion,* p.8, lines 10-13): The decision about whether or not to join an indispensible party was not discretionary to Judge Singleton in her March 17. 2011 dismissal of all claims in this Case. The Trustee was present in court appearing through licensed counsel so there was no legal obstacle to joinder. No other factors need to be considered to see that this was an incorrect ruling and contrary to law.

10. Rule 1-059(E) Motions (*Memorandum Opinion,* p. 9, lines 1-9): The *Memorandum Opinion* states that the request for a final determination of language in the trust contract contained in Plaintiff-Appellants Rule 1-059(E) motions for reconsideration of Judge Singleton's dismissal orders were somehow untimely and properly dismissed. To the extent that these motions are requesting a final determination of language in the trust contract, these motions are timely even today, eight years later. The long-standing obstruction of review of trust contract language by the Defendents-Appellees and the failure of the judiciary to have conducted a review, when required under *Mark V., Inc. v. Mellekas,* 1993-NMSC-001, ¶ 13, 114 N.M. 778, shows that the fundamental relief sought by Plaintiffs-Appellants was never factually addressed. The Plaintiff-Appellants have been denied access to **the one fact needed to prove all of the original claims in this Case**. There has been "thrown sand in the workings of the New Mexico judicial system." This Court should address this issue in a rehearing process in this Case.

11. This Court and Trust Contract Language Review (*Memorandum Opinion,* p.9, lines 1-9): To underscore how simple yet crucial this question of trust contract language actually is, Plaintiff-Appellants reproduce, in the following lines, argument and language facts presented by the Plaintiff-Appellant, Trustee in his NMRA 1-059(E) motion titled *Plaintiff-Trustee's Motion to Reconsider Dismissal* dated April 11, 2011 [RP 1169, § 9, pages 3 and 4]:

> [9.] From evidence developed during this Case, it has become apparent that the transfer of family property to the hospice nurse was part of a multi-year professional fraud planned years before the loss of family property became known to Plaintiff-Trustee after the death of Burr E. Lee, Jr.. One piece of evidence stands out from all the others in stark clarification of the central deceit at the center (sic) of this fraud. Embedded in a letter written to the first successor trustee by Defendant Catron on March, 15, 2000 prior to drafting, witnessing and filing the Warranty Deed that transferred the family home to the hospice nurse is the following statement of legal opinion regarding the language in the trust agreement:
>
> **"As I read the language, you may not amend or revoke the trust "in regard to successor beneficiaries." This means that you may amend and modify the trust as you want <u>except</u> that the successor beneficiaries must not be altered." [Catron, 3/15/00]**

The deceit in this opinion becomes clear when compared with the original language from the trust agreement:

> **"Upon the death of BURR E. LEE, JR. or RUTH C. LEE, this trust may not be revoked or amended in regard to successor beneficiaries." (Trust Agreement, 5/9/79]**
>
> The correspondence between the defendants during the probate proceeding showed how this deceit was used to avoid or evade judicial review or any other legal scrutiny of the family trust agreement.

A professional assessment of this language and all other key language in the six-page Seton Family Contract can be found in the ten-page affidavit prepared by top New Mexico trust expert James F. Beckley in April 2007. [RP 0565] However, even simple understanding of the English language is enough to show that it is the trust contract that can be *revoked* (all or nothing) and the list of successor beneficiaries that can be *amended* (changes made). This language is the overarching issue to be addressed in a rehearing; it is within the powers of this Court and it is the duty of this Court to deal with this question of legal interpretation.

CONCLUSION

Plaintiff-Appellants contend the complete procedural history shows that

(i) undisputedly title to valuable family property legally held by the Plaintiff-Appellant, Trustee for the beneficial interest of the Plaintiff-Appellant, Beneficiary and six other family member beneficiaries was transferred to someone who was not named in the language of the Seton Family Trust Contract;

(ii) there is substantial authoritative evidence on the record that this property transfer was done in breach of the terms of this Trust Contract;

(iii) no final determination of the meaning of the language in this Trust Contact has been provided by any New Mexico Court in spite of repeated formal legal requests to do so;

(iv) Defendant-Appellees interposed a defense against the *pro se* claims of the Plaintiff-Appellant, Trustee that an attorney was needed to represent the trustee because they argued there was some sort of legal entity involved under the Trust Contract;

(v) Judge Hall of the District Court issued an *Order Dismissing the Claims of the Trustee* on this trust-as-legal-entity basis and Judge Alarid of this Court issued a *Memorandum Opinion* sustaining this dismissal of the trustee's claims on the same trust-as-legal-entity basis and then, based on his *Memorandum Opinion*, issued a *Mandate* back to the District Court to review whether the claims of Plaintiff-Appellant, Beneficiary should be dismissed without the presence of the trustee;

(vi) Judge Sutin then overturned the trust-as-legal-entity basis of all of the previous activity on dismissal of the trustee's claims with an *Opinion*, subsequently published as *Lee v. Catron*, 2009-NMDA-018, establishing that there was no legal entity involved and that the trustee was the correct person to sue and be sued - admitting in the *Opinion* that Plaintiff-Appellant, Trustee had been arguing correctly for more than two years and that Defendant-Appellees and Judges Hall and Alarid had been wrong;

(vii) Judge Sutin then included in his *Opinion* that Plaintiff-Appellant, Trustee still needed to have an attorney because of his status as a fiduciary and in *pro se* representation of the interest of others (the beneficiaries) a trustee is practicing law without a license;

(viii) Plaintiff-Appellant, Trustee appealed this new *Lee v. Catron* case law up to the U.S. Supreme Court as *ad hoc*, conflicted and unconstitutional;

(ix) as soon as the *Lee* appeal was exhausted, attorney David Standridge entered this Case representing both Plaintiff-Appellants;

(x) Judge Singleton of the District Court, acting under the flawed *Mandate* from Judge Alarid, denied the joinder of the trustee that had been requested by Mr. Standridge even though such joinder was mandatory under the law, dismissed all claims in this Case for lack of a trustee, and suggested that Mr. Standridge could still obtain a final determination of the meaning of trust language in a new case;

(xi) in a new Declaratory Case filed by Mr. Standridge on behalf of all seven living beneficiaries under the trust contract, Judge Barbara J. Vigil summarily dismissed the case and issued an *Order for Injunctive Relief* against Plaintiff-Appellants; and

(xii) under the severe restrictions imposed by Judge Vigil's injunction, the five-year long effort on the Rule 1-060(B)(6) Motion to reverse Judge Singleton's dismissals on the basis of "extra-ordinary circumstances" became the subject of this appeal after it was denied by the District Court.

The Plaintiffs-Appellants submit that the New Mexico Courts should deliver a final determination of the meaning of language in the Seton Family Trust Contract. Doing so would be consistent with the statutory intent of the New Mexico Legislature and the clear obligation of the judiciary.

WHEREFORE, Plaintiffs-Appellants respectfully request the New Mexico Court of Appeals suspend the effect of its September 11, 2019 *Memorandum Opinion* and undertake further review of the current Appeal in this Case using the legal and factual particulars presented above to produce an amended final determination (i) that the District Court has erred, (ii) that overturns the Order denying Plaintiff-Appellant's Rule 60 Motion, and (iii) that enters such further consistent and appropriate relief.

Respectfully Submitted,
[signed]
Lakins Law Firm, P.C.
Charles N. Lakins, Esq.
PO Box 91357
Albuquerque, NM 87199

Certificate of Service

I, Charles N. Lakins, Esq. do hereby certify that on the 25th day of September 2019, I served a copy of this *Motion fir Rehearing* to all counsel of record utilizing the Odyssey e-file and serve system.
[signed]
Charles N. Lakins, Esq.

Pet. App. No. 6 (Recent Appellate Record)
Plaintiff-Appellants' *Petition for a Writ of Certiorari*
Filing Date: November 7, 2019

Supreme Court No. _____
Court of Appeals No. A-1-CA-35704

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RICHARD A. VAN AUKEN, Trustee and
RICHARD A. VAN AUKEN, Beneficiary
Plaintiffs-Petitioners,

v.

FLETCHER R. CATRON, ESQ.,
PETER F. WIRTH, ESQ., and
KAREN AUBREY, ESQ.
Defendant-Respondents.

PETITION OF THE PLAINTIFF-TRUSTEE AND THE PLAINTIFF-BENEFICIARY FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Richard A. Van Auken, *pro se*
Plaintiff-Trustee-Petitioner and
Plaintiff-Beneficiary-Petitioner
223 North Guadalupe Street; #605
Santa Fe, New Mexico 87501
sftrustcase@swcp.com
917/216-0523

INDEX TO PETITION AND ATTACHMENTS

I. DATE OF DECISION

The Court of Appeals entered a Memorandum Opinion in this matter on September 11, 2019. Acting through the law firm of Charles Lakins, Esq., Plaintiffs-Petitioners Richard A. Van Auken, Trustee and Richard A. Van Auken, Beneficiary filed a timely motion for rehearing on September 26, 2019 that was denied on October 8, 2019. The Memorandum Opinion, Motion for Rehearing, and Order denying rehearing are each attached to this Petition.

II. QUESTIONS PRESENTED FOR REVIEW

1. Whether New Mexico courts properly have the option of not making a final determination of the meaning of disputed language in an express trust contract when asked to do so by a trustee and/or beneficiary named in the instrument.

2. Whether, in a New Mexico court proceeding, a court order against a party's claims or cause that is issued by a judge who has a clear or self-evident conflict of interest with regard to these claims or cause can be properly seen as null.

3. Whether New Mexico case law entitled Lee v. Catron, NMCA-2009-018 has, (i) in two paragraphs overturning a district court finding that an express trust is a legal entity, been properly applied to earlier court actions taken in this 2006 case now under appeal and is, (ii) in two paragraphs finding that a trustee (or any fiduciary) acting on behalf of another person's beneficial interests is "practicing law," legal and valid.

III. STATEMENT OF MATERIAL FACTS

General Facts About Case

This is the second appeal in a thirteen-year-old probate fraud and attorney deceit or collusion Case brought in 2006 by a family member trustee who is one of seven family beneficiaries against three licensed New Mexico attorneys for their actions in a corrupted probate proceeding involving approximately $1 million of Santa Fe real property formerly owned by the family member's great uncle, New Mexico naturalist Ernest Thompson Seton.

Whereas the first appeal filed in 2007 involved two issues – the meaning of language in the family trust agreement and the ability of a pro se trustee to act in a New Mexico court – in an initial round of claim dismissals; this second appeal initiated in 2016 involves just one issue – the extraordinary repeated abuse of the equity powers of New Mexico Courts by several district and appellate judges - in a full dismissal of all claims against all defendants.

The first set of general facts that have emerged in this Case involve three generations of Seton family members and a confluence of predatory interests in the legal, healthcare and judicial communities of New Mexico that acted together over many years to "redirect" or "take" family property being transferred to the current generation through a family trust agreement, a common law express trust, facts that include the following:

- the actions of a licensed New Mexico hospice nurse, Marie Harrison, directly linked by sworn testimony to Defendant-Respondent Peter F. Wirth, Esq., who violated her nursing ethics by entering into a long

term personal relationship with the first successor trustee and co-settlor after completing her work during the death of his wife, the other co-settlor and Seton grand-niece, and then got the successor trustee to sign over to the Seton property in the family trust estate;

- the actions of Defendant-Respondent Fletcher R. Catron, Esq. in providing, as counsel to the first successor trustee, a secret legal opinion (withheld from trust beneficiaries) that allowed transfer of family property from the trust estate to the hospice nurse; in creating and filing a Warranty Deed transferring the Seton family home and adjacent property to the hospice nurse; in creating a new Will naming the hospice nurse as his personal representative after his death; and in filing the probate case for the estate of the first successor trustee (where the claims in this Case originate) for the personal representa-tive against the interests of his former client the trustee (the newly established second successor trustee and Seton great-grand-niece);
- the actions of Defendant-Respondent Peter F. Wirth, Esq. in his probable contact with the hospice nurse during the time of her improper personal engagement with the first successor trustee and, as one of the three attorneys in control of the probate proceeding representing the personal interests of the hospice nurse in retaining ownership of Seton property improperly taken from the trust estate; in his use of Mr. Catron's secret opinion as part of her defense; and in his defense of the hospice nurse in a post probate proceeding; and

- the actions of Defendant-Respondent Karen Aubrey, Esq., as one of three attorneys in control of the probate proceeding representing the interests of the trustee and beneficiaries, in her recitation of the key element of Mr. Catron's secret opinion as part of her correspondence with her clients; in failing to advise her clients that an enforceable trust contract had possibly been breached; and in withdrawing from the probate proceeding rather than pursuing this breach.

This first set of facts demonstrates clear corruption of the probate proceeding presided over by Judge (now Justice Barbara J. Vigil, a deceitful legal opinion authored by Defendant-Respondent Fletcher R. Catron and collusion between the three attorneys involved in the probate proceeding to use this interpretation of trust contract language provided by Mr. Catron to suppress any review of the Seton Family trust contract, an enforceable instrument, during the probate proceeding.

The second set of general facts that have emerged in this Case involve the actions of a series of New Mexico judges that uniformly opted to suppress the Seton family trust contract and to not address determination of the meaning of its language in spite of several requests to do so. A brief summary of this second set of general facts include the following:

- the decision of Judge (now Justice) Barbara J. Vigil to allow the withdrawal of Seton family attorney Karen Aubrey from the probate proceeding without explanation eliminating thereby any further discussion of the trust contract language during that proceeding;

- the decisions of Judge Carol Vigil in the post-probate proceeding (i) to allow the entry by attorney Peter Wirth of expert testimony from attorney Fletcher Catron pertaining to the meaning of language in the trust contract after she had signed an order barring such expert testimony-that had become available from New Mexico trust expert James F. Beckley, Esq. - until the court had made a determination of language ambiguity and then (ii) to dismiss the claims against the hospice nurse in that proceeding with prejudice without ever having reviewed the trust contract language;
- the decisions of Judge Hall in the early months of this probate fraud case (i) to issue a non-final finding of language ambiguity in the trust contract, (ii) to opt out of any further review of the language after the entry of an authoritative affidavit on the subject was submitted from New Mexico trust expert James F. Beckley stating that the language was unambiguous and directly contradicted the "secret" legal opinion of Mr. Catron, and, ultimately (iii) to step down from the bench without any further review of the trust language with regard to possible non-ambiguity or in a Mark V fact finding review to determine the meaning from extrinsic testimony outside the language;
- the decisions of Judge Sarah Singleton in the middle years of this probate fraud proceeding (i) to deny the re-entry of the trustee into this case even though there was no impediment to such entry and in spite of the fact that the trustee never should have been removed in the first place because Judge Hall used a "trust-as-entity" legal principle that was determined to be invalid on appeal in a

subsequent related case and (ii) to dismiss all claims in this probate fraud case for lack of a trustee opting to avoid any further consideration of the language in the trust contract while recommending that then-counsel for plaintiffs, David Standridge, Esq., could pursue the meaning of trust language in a separate declaratory action;

- the decisions of Judge (now Justice) Barbara J. Vigil in the middle years of this probate fraud proceeding (i) to assign herself as the presiding judge in a new declaratory action filed by Mr. Standridge (on behalf of the trustee and all seven beneficiaries) in spite of the obvious conflict with her earlier role in the corrupted probate proceeding; (ii) to dismiss the declaratory judgment case based on the earlier non-final finding of "ambiguity" by Judge Hall; and (iii) to enter an Order for Declaratory Relief against Plaintiffs-Petitioners for continuing to pursue declaratory and other relief;
- the decision of Judge David K. Thompson during the recent years covered by consideration of Plaintiff-Appellants Rule 60 Motion to deny a request through counsel to depose attorney William Joost of Wisconsin, the author of and witness to the six-page Seton Family Trust Contract in 1978, a legal request to preserve the testimony of this person with personal knowledge of the circumstances under which Seton property was placed into a trust estate in the event that, following judicial review of the Beckley testimony that the language is unambiguous, such extrinsic evidence should be needed.

This second set of facts demonstrates the repeated opting out of any effort to determine the meaning of language in the trust contract by five successive district court judges.

Appellate Review in this Case, Van Auken v. Catron et al. (2006)

The current appeal of the district court ruling in a Rule 60 motion is the second appeal made by Plaintiffs-Petitioners in this Case. The first appeal made in 2007 was reviewed by Appellate Judge Alarid who, in a first Proposed Summary Disposition stated that the ambiguity finding by Judge Hall was a non-final (unappealable) order and since all other issues were "inextricably linked" to the meaning of language in the trust contract, all of the dismissal orders issued by Judge Hall were also non-final (and unappealable). After argument from opposing counsel, Judge Alarid issued a second Proposed Summary Disposition stating that the consolidated appeal would be dismissed because the entire case turned on the standing of the trustee and the pro se appearance of the trustee voided all his claims because the trust was an entity like a Limited Liability Company and needed to appear in court through an attorney. Although this "trust-as-entity" ruling was overturned in a related case just three months later, the Mandate resulting from this appellate action went forward as if nothing had happened.

This current appeal, started in 2016, addresses the actions of judges rather than the claims against attorneys that are in the original Complaint. There has been, as documented in the Brief in Chief, repeated abuse of discretion by district and appellate judges in

opting to avoid any determination of the meaning language in the trust contract.

The choice of avoiding any appellate review of the language in the trust contract has been built into the procedures used in each of the two appeals in this Case. The 2007 appeal was put on the Summary Calendar of the appellate court where it stayed even though Plaintiffs-Appellants argued for a transfer to the Legal Calendar that would focus on review of the language in the trust contract, already at that time (twelve years ago) the central issue in this Case.

Unlike the first appeal, in the current appeal, the appellate procedures placed this Case on the General Calendar, a much more costly and lengthy process of review involving all papers and transcripts over many years. In making this General Calendar election, the appellate court didn't use the Legal Calendar opting again to avoid the central issue in the Case in favor of a process that might further blur or bury any review of language.

IV. BASIS FOR GRANTING THE WRIT

Rule of Law

The first basis for granting this petition rests in the rule of law and in the judicial enforcement of civil contracts. The initially secret legal opinion of March 15, 2000 regarding the meaning of language in the Seton Family Trust contract as expressed by Defendant-Respondent Fletcher R. Catron has been allowed to stand for nearly twenty years as the legal basis for actions regarding valuable Seton family property taken from the trust estate. During this period Plaintiffs-Appellants have repeatedly to no avail asked for a judicial determination of what the

language in the trust contract actually means. For most of these requests the authoritative affidavit of New Mexico trust expert James F. Beckley has been available to the court with with an opinion that is opposed to that of Mr. Catron. If the rule of law is to have any meaning in New Mexico, the judiciary must act to enforce civil contracts resolving the differences between different opinions.

Due Process

Another equally important basis for granting this petition is the Constitutional guarantee of "due process" in the taking of property that is expressed in Amendments Five and Fourteen. Plaintiffs-Appellants have not received due process in the taking of property from the trust estate because the New Mexico Courts have been unable or unwilling to provide a final determination of the meaning of language in the trust contract that governs such property transfers.

An alternative way of viewing this due process deficiency is as fraud on the court, a still actionable condition that arises when the normal operation of judicial considerations are thwarted by the intentional withholding by one or more parties of facts essential to due process. It should be apparent to all by this time that a judicially determined meaning of the language in the Seton Family Trust Contract provides the only basis for sustaining the claims made in the Case. It is as if one or more parties have intentionally "thrown sand in the judicial machinery" applied to this Case to prevent it from functioning as it should.

V. ARGUMENT

Appellate Failure to Review Language in Trust Contract

On page 9 of the September 11, 2019 Memorandum Opinion, the Court of Appeals correctly recognized Plaintiffs-Appellants' argument that there was "cumulative abuse of discretion over fifteen years of litigation" but incorrectly characterized the argument as based on "not making a final determination of the meaning of ambiguous language in the Trust." The Memorandum Opinion went on to point out that the Court of Appeals is not a fact-finding body and cannot resolve a legal ambiguity with extrinsic evidence.

Appellate Judge M. Zamora joined many other judges identified in this appeal who over the years have opted to use arbitrary and often incorrect reasons for avoiding the need to determine the meaning of language in the trust contract. This is not the same as determining the meaning of "ambiguous language." New Mexico trust expert James F. Beckley did not find the language to be ambiguous. Neither did Defendant-Respondent Catron. How does the Court rule on this?

Glaring Conflict of Interest in Order for Injuncontive Relief

If one looks up the case records of the 2002 probate proceeding that gave rise to all these years of litigation, one find the name of the presiding judge entered at the very top of the public record to be Judge (now Justice) Barbara J. Vigil. How could she possible be assigned – or allow herself to be assigned to the 2011 Declaratory Case where the central feature of this Case and the corrupted aspect of the probate case was to be reviewed.

The conflict of interest in this instance is so stark that all of Judge (now Justice) Vigil's actions in this Case should be regarded as null.

Ad Hoc and Conflicted Case Law in Lee v. Catron

In the summer of 2008 not satisfied with simply overturning the earlier "trust-as-entity" finding used by Judges Hall and Alarid in earlier dismissals, Judge Jonathan B. Sutin attempted to provide a legal fix for the current Case. He determined that the Trustee – or any fiduciary for that matter – while acting on behalf of the beneficial interests of others, is "representing" these "others" in the same manner as an attorney would represent a client. Accordingly, any fiduciary who argues his legal interests in a New Mexico court must either be a licensed attorney or hire one to represent him or face charges of "practicing law without a license."

The attorney client relationship is nothing like that which exists between a trustee and those in whose beneficial interest he works.

VI. RELIEF

Plaintiff-Petitioners, Trustee and Beneficiary respectfully ask this Court to provide relief for all parties by granting this Petition and ordering a competent authority within the New Mexico Courts to resolve the differences between the legal opinions of Defendant-Respondent Fletcher R. Catron - as expressed in his two-page letter to the first successor trustee of March 15, 2000 [RP0407] - and New Mexico trust expert James F. Beckley - as expressed in his ten-page affidavit of April 2, 2007 [RP0565] - and to make a final determination of the meaning of the language in the Seton Family Trust Contract

[RP0013-0018] under the provisions of the New Mexico Declaratory Judgment Act

Respectfully submitted,
[signed]
Richard A. Van Auken
Plaintiff, Trustee-Beneficiary-Petitioner, pro se
223 North Guadalupe St. #605
Santa Fe, NM 87501
sftrustcase@swcp.com
Telephone: (917) 216-0523

Certification of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed this 7th day of November 2019 to John M. Brant (for Defendant Catron), Andrew G. Schultz (for Defendant Wirth), and Gerald G. Dixon (for Defendant Aubrey)
[signed]
Richard A. Van Auken

Pet. App. No. 7 (Recent Appellate Record)
N.M. Supreme Court *Notice of Filing*
Filing Date and Time: November 7, 2019 at 11:32 AM

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. S-1-SC-38001

RICHARD A. VAN AUKEN, Trustee and
RICHARD A. VAN3 AUKEN, Beneficiary,
Plaintiff-Petitioner,

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; and
KAREN AUBREY, ESQ.,
Defendants-Respondents.

NOTICE

To: Clerk of the New Mexico Court of Appeals

NOTICE is hereby given, in accordance with Rule 12-502 NMRA of the Rules of Appellate Procedure,m that a petition for a writ of certiorari has been filed in the above entitled cause. Please recall any mandate which you may have issued in the case of Van Auken v. Catron, Ct. App. No. A-1-CA-35704.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 7th day of November, 2019.

Joey D. Moya, Clerk of Court
Supreme Court of New Mexico
[signed]
[Zelda Abeita]
Deputy Clerk

Pet. App. No. 8 (Recent Appellate Record)
N.M. Supreme Court Notice of Filing
Filing Date and Time: November 27, 2019 at 11:34 AM

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. S-1-SC-38001

RICHARD A. VAN AUKEN, Trustee and
RICHARD A. VAN3 AUKEN, Beneficiary,
Plaintiff-Petitioner,

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; and
KAREN AUBREY, ESQ.,
Defendants-Respondents.

NOTICE OF RECUSAL

WHEREAS, this matter came on for consideration upon notice of recusal filed by Justice Barbara J. Vigil;

NOW THEREFORE, the parties hereby are notified of the rcusal of Justice Barbara J. Vigil.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 27th day of November, 2019.

Joey D. Moya, Clerk of Court
Supreme Court of New Mexico

[signed]
[Madeline Garcia]
Chief Deputy Clerk

Pet. App. No. 9 (Recent Appellate Record)
N.M. Supreme Court Notice of Filing
Filing Date and Time: November 27, 2019 at 11:42 AM

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. S-1-SC-38001

RICHARD A. VAN AUKEN, Trustee and
RICHARD A. VAN3 AUKEN, Beneficiary,
Plaintiff-Petitioner,

v.

FLETCHER R. CATRON, ESQ.;
PETER F. WIRTH, ESQ.; and
KAREN AUBREY, ESQ.,
Defendants-Respondents.

NOTICE OF RECUSAL

WHEREAS, this matter came on for consideration upon notice of recusal filed by Justice David K. Thomson;

NOW THEREFORE, the parties hereby are notified of the rcusal of Justice David K. Thomson.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 27th day of November, 2019.

Joey D. Moya, Clerk of Court
Supreme Court of New Mexico

[signed]
[Madeline Garcia]
Chief Deputy Clerk

Pet. App. No. 10 (Recent Appellate Record)
Plaintiff-Appellants' Motion for Rehearing
Filing Date: December 21, 2019

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. S-1-SC-38001

RICHARD A. VAN AUKEN, Trustee and
RICHARD A. VAN AUKEN, Beneficiary
Plaintiffs-Petitioners,

v. **Ct. App. Case No. 35,704**

FLETCHER R. CATRON, ESQ.,
PETER F. WIRTH, ESQ., and
KAREN AUBREY, ESQ.
Defendant-Respondents.

MOTION FOR REHEARING, WHEN APPROPRIATE, THE PETITION OF THE PLAINTIFF-TRUSTEE AND THE PLAINTIFF-BENEFICIARY FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Richard A. Van Auken, *pro se*
Plaintiff-Trustee-Petitioner and
Plaintiff-Beneficiary-Petitioner
223 North Guadalupe Street; #605
Santa Fe, New Mexico 87501
sftrustcase@swcp.com
917/216-0523

I. PROCEDURAL BASIS FOR REHEARING MOTION

Plaintiffs-Petitioners Richard A. Van Auken, Trustee and Richard A. Van Auken, Beneficiary acting jointly *pro se* filed a timely *Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico* on November 7, 2019 and subsequently filed a *Motion to Amend* the petition on November 24, 2019. On December 6, 2019, the Chief Justice of the Supreme Court of the State of New Mexico, Judith K. Nakamura, issued (i) a *Notice of Recusal* for Justice Barbara J. Vigil and (ii) a *Notice of Recusal* for Justice David K. Thomson. Also on December 6, 2019 the Chief Justice with Justices Michael E. Vigil and C. Shannon Bacon concurring issued (iii) an *Order* granting the *Motion to Amend*, and (iv) an *Order* denying the *Petition*. This *Motion for Rehearing, When Appropriate* is timely filed by Plaintiffs-Petitioners on Monday, December 23, 2019, the first business day following the expiration of the fifteen-day period for filing under NMRA 12-404(A).

II. POINTS OF LAW AND FACT MISAPPREHENDED BY THE COURT

1.Equity Theft Schemes in New Mexico: In early 2000 Defendant-Appellee Fletcher Catron, Esq., using his own legal opinion dated March 15, 2000 as sufficient justification, created a new will and warranty deed for the first successor trustee of the Seton Family Trust that had the effect of removing valuable family property from the family trust upon the death of the trustee. A probate proceeding filed by Mr. Catron and a post-probate proceeding filed by the second successor trustee both concluded without general awareness of Mr. Catron's underlying legal opinion

by the second successor trustee or by any of the seven beneficiaries of the family trust. In January 2007, six months after the filing of the present Case, *VanAuken v. Catron et. al* (2006) by the Petitioners-Plaintiffs, the full text of Mr. Catron's March 15, 2000 legal opinion was revealed in the form of a two page letter to the first successor trustee. Shortly thereafter, in April 2007, New Mexico trust expert James F. Beckley, Esq. prepared a sworn statement that called Mr. Catron's March 15, 2000 legal opinion into question, noted that the removal of family property from the Seton Family Trust should have been approved by a court of competent authority, and asserted that the probate fraud statute, NMSA §45-1-106(A), would apply to the 2002 probate proceeding (filed by Mr. Catron) for the estate of the first successor trustee.

Mr. Beckley's affidavit clearly states that Mr. Catron's March 15, 2000 legal opinion that allowed the removal of valuable family property from the family trust did not adhere to the language in the trust instrument and, furthermore, that Mr. Catron should not have acted as he did to remove property from the family trust.

Mr. Catron acted to breach the family trust and then filed the probate proceeding to cover up the breach. In other words, Mr. Catron acted as an "equity thief" improperly taking family property from members of the Seton Family to whom the property was to be transferred.

With the publication two years ago in the Albuquerque Journal of the sordid details of a similar equity theft scheme involving the Darnell Family trust and the testimony given at hearings

held by the Adult Guardianship Study Commission created by this Court in response to those Albuquerque Journal articles, it is fully apparent that equity theft is not unique to this Case. It has surfaced in a great many New Mexico cases past and present and it has revealed predatory attorneys, corrupt judges and legislative protection for what is apparently a very lucrative and growing business.

The seventeen-year history attached to this Case provides an excellent record of how end-of-life equity contracts such as family trusts can be subverted (breached) and equity rights to valuable property stolen before the intended recipients can take legal title and, in some cases, even before they are aware that they possess such valuable equity rights.

Petitioner-Plaintiffs suggest in this *Motion for Rehearing, When Appropriate* that this Court has significantly under-appreciated the significance of addressing the very real equity theft issues raised in this appeal as presented in the *Brief in Chief*.

Two justices of this Court named in the *Brief*, Barbara J. Vigil and David K. Thomson, are now recused in this Case and two of the justices concurring in the *Orders* issued, Michael E. Vigil and B. Shannon Bacon, should also be recused as they are similarly conflicted in judicial review of equity theft (i) in this Case where appellate judge Michael E. Vigil "rubber-stamped" district judge Barbara J. Vigil's conflicted dismissal and injunction and (ii) in the Darnell case where district judge Bacon entered a last minute, no-notice recusal in the current Darnell probate case. Such recusals, however, would leave no possibility now for a three-justice review of this *Motion*.

2. *Failure to Resolve a Contractual Dispute*: The optics of the equity theft schemes now becoming public in New Mexico are bad, but actual judicial performance in legal review in equity theft cases is far worse. In this Case, there can be no excuse for the seventeen year failure - of multiple judges in district and appellate courts - to render a final determination of the meaning of language in a six-page family trust agreement to resolve the difference in legal opinions now on the record of this Case from Mr. Catron and Mr. Beckley. (The primary difference turns on a single 27-word sentence.) It isn't as if these judges haven't been asked to make such a determination. They simply are unable or unwilling to do so.

Petitioner-Plaintiffs suggest in this *Motion for Rehearing, When Appropriate* that this Court has misapprehended the overall effect of failing to deliver a final Catron-vs-Beckley determination after seventeen years of costly litigation. The New Mexico Judicial Branch has delivered a costly failure in one of its most important functions: contract interpretation.

3. *Alternative Means of Relief*: By shutting down the possibility of relief in this Case and in the current appeal, Petitioner-Plaintiffs are left with just two further options: a further appeal to the U.S. Supreme Court and an entirely new case for fraud on the court, a due process violation, where the State of New Mexico is among the defendants.

Petitioner-Plaintiffs suggest in this *Motion for Rehearing, When Appropriate* that this Court has misapprehended the extent to which the failure to perform its contract interpretation duty in equity

theft cases puts the general public in the State of New Mexico at risk for damages.

III. CONCLUSION

Plaintiff-Petitioners, Trustee and Beneficiary respectfully ask this Court to grant this *Motion for Rehearing, When Appropriate* by extending the time to make this decision until two new justices unconflicted in review of equity matters are appointed or elected to the Court providing, thereby, the necessary three-justice panel for review of this *Motion* and the *Petition*.

Respectfully submitted,
Richard A. Van Auken
Plaintiffs-Petitioners, Trustee and Beneficiary, *pro se*
223 North Guadalupe St. #605, Santa Fe, NM 87501

[A true and correct copy of the foregoing pleading was mailed this 21st day of December 2019 to John M. Brant (for Defendant Catron), Andrew G. Schultz (for Defendant Wirth), and Gerald G. Dixon (for Defendant Aubrey)

PETITION APPENDICES: SECTION B

SETON FAMILY TRUST Agreement
"Burr E. Lee Jr. and Ruth C. Lee
Self-Declaration of Trust No. 10331J"

Pet. App. No. 11 (Seton Family Trust Agreement)
Trust Contract: Burr E. Lee, Jr. and Ruth C Lee Self-Declaration of Trust No. 10331J
Date of Execution: May 9, 1979

******* (Trust Agreement - Page One) *******

State of Illinois:

County of Cook: SS (Sworn Statement)

BURR E. LEE, JR. and RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J

TRUST DECLARATION: We, BURR E. LEE, JR. and RUTH C. LEE, as settlors, herewith transfer to ourselves as trustee the sum of Ten ($10.00) Dollars and declare said sum to be held by ourselves as trustee in trust for and upon the uses set out in this Declaration of Trust. We state that in addition, it is our intention to take title to other property, both real and personal, as trustee in the name of this trust. All such property and additions thereto are herein referred to as the "trust estate" and shall be held upon the following trusts.

SECTION ONE: TRUST BENEFICIARIES:

1. During our lifetimes the income from the trust shall be paid to us in convenient installments or otherwise as we may from time to time direct and also such sums of principal as we may request.

In the event of a successor corporate trustee said requests shall be made in writing. If at any time or times a beneficiary shall be under a legal disability or by reason of illness or mental or physical disability be, in the opinion of the trustee, unable properly to manage his affairs, the trustee may use sums from the income and principal of the

trust estate as the trustee deems necessary or advisable for the care, support and comfort of the beneficiary, or for any other purpose the trustee considers to be for the best interests of the beneficiary, adding to principal any income not so used.

2. a. Commencing with the death of either BURR E. LEE, JR. or RUTH C. LEE, the trustee shall pay all of the estate expenses, costs of administration, estate taxes and inheritance taxes for the deceased, and after payment of same shall continue to hold or distribute the trust estate for the survivor of BURR E. LEE, JR. and RUTH C. LEE. The trustee shall continue to pay income and such sums of principal to the survivor as requested.

b. Commencing with the death of both BURR E. LEE, JR. and RUTH C. LEE, the trustee shall pay all of the estate expenses, costs of administration, estate taxes and inheritance taxes for the deceased, and after payment of same shall continue to hold or distribute the trust estate in the following manner:

i. If the trust estate includes a 2.5 acre parcel in Timberwick, New Mexico, and said parcel is not improved with a residence, said parcel shall be distributed to GRETCHEN VAN AUKEN. Said parcel of real estate shall be evaluated as of the date of death of the survivor of BURR E. LEE, JR. and RUTH C. LEE. If it is equal to one-seventh (1/7) or more of the trust estate, it shall be distributed outright to GRETCHEN VAN AUKEN

as her distribution under the trust. If it is less than one seventh (1/7), she shall share in the distribution

of the remainder of the trust estate so that she receives one seventh (1/7) of the trust estate

If said parcel in Timberwick, New Mexico, is improved with a single-family residence at the time of distribution, it shall not be distributed to GRETCHEN VAN AUKEN, but shall be distributed with the total trust estate and GRETCHEN VAN AUKEN shall share in said distribution to the extent of one-seventh (1/7) of the total trust estate.

ii. The remainder of the trust estate, after distribution in accordance with subparagraph 2.b.i above, shall be distributed equally among RICHARD A. VAN AUKEN, SUSAN L. VAN AUKEN, JUDITH G. VAN AUKEN, BURR JEFFREY LEE, CAROL L. BOYKE and ELIZABETH M. LEE. Said distribution shall take into account the provisions of subparagraph 2.b.i above in regard to distribution to GRETCHEN VAN AUKEN.

iii. In the event any of the aforementioned beneficiaries are deceased at the death of both BURR E. LEE, JR. and RUTH C. LEE, but leave descendants surviving them, then the trustee shall hold or distribute the share of the deceased beneficiary for the benefit of the descendants of the deceased beneficiary, dividing the same into equal shares, per stirpes. In the event any of the aforementioned beneficiaries predecease BURR E. LEE, JR. and RUTH C. LEE not leaving descendants surviving them at their death, then their share shall be held or distributed among the other surviving beneficiaries or their descendants in equal shares, per stirpes.

iv. If any descendants of a predeceased beneficiary share under the terms of this trust then we direct our trustee as follows:

a) The share of each descendant shall immediately vest subject to postponement of possession.

b) As to each share of the trust estate which is distributable to a descendant who has not reached the age of twenty-one (21) the trustee may (1) establish therewith a custodianship for the descendant under a Uniform Gifts to Minors Act or (2) retain possession of the share as a separate trust until the descendant reaches majority, meanwhile paying to him or her so much or all of the income and principal of the share as the trustee deems necessary or advisable from time to time for his or her needs, best interests, education and welfare, and adding to the principal any income not so paid.

c) Distribution of a descendant's share shall be at age twenty-one (21)

SECTION TWO: SUCCESSOR TRUSTEES:

1. In the event of the death of BURR E. LEE, JR. or RUTH C. LEE, the survivor shall act as the successor trustee under this trust.

2. In the event of the death, resignation or inability of both BURR E. LEE, JR. and RUTH C. LEE to act as trustee, the second successor trustee under this trust shall be CITIZENS BANK AND TRUST

COMPANY of Park Ridge, Illinois.

A determination as to whether any trustee is unable to act shall be made by a physician and any successor trustee may rely upon written notice of that determination.

SECTION THREE: ADMINISTRATIVE PROVISIONS

The following provisions shall apply to the trust estate and to each trust under this Declaration:

1. Construction: The law of the state in which the trust property shall from time to time have its situs for administration shall govern the validity and interpretation of the provisions of this trust declaration. Initially this state shall be the State of Illinois. The administrative provisions of this trust shall be construed literally to incorporate any provisions set forth in any deed in trust conveying the real property subject to terms of this trust.

2. Indemnification of depositories and transfer agents: Any institution in which trust funds are invested or deposited or any stock transfer agent may act upon the signature of the successor trustee, or signature of the co-trustees, co-successor trustees, as applicable; to effect deposits, transfers or other actions with respect to the deposit or stock, bond, etc. as our successor shall determine. The institutions that may deal with said accounts or stocks, etc., shall not be responsible to inquire as to the authority of the trustee or follow the application of said funds, and we herewith indemnify and hold them harmless from so acting upon directions from any successor trustee hereunder.

3. Facility of Payment: Income or discretionary amount of principal payable to a beneficiary who is incapacitated or under a legal disability may be paid

by the trustee to the beneficiary, to his or her legal representative or custodian under a Uniform Gifts to Minors Act or to a relative or friend for his or her benefit, or may be expended by the trustee directly for the needs and best interests of the beneficiary.

4. Spendthrifts: The interest of beneficiaries in principal or income shall not be subject to the claims of any creditor, any spouse for alimony or support, or other, or to legal process, and may not be voluntarily or involuntary alienated or encumbered. This provision shall not limit the exercise of any power of appointment.

5. Common Funds: For convenience of administration or investment, the trustee may hold the several trusts as a common fund, dividing the income proportionately among them, assign undivided interests to the several trusts and make joint investments of the funds belonging to them. The trustee may consolidate any separate trust with any other trust with similar provisions for the same beneficiary or beneficiaries created by us or any member of our family.

6. Accrued Income: Income received after the last income payment date and undistributed at the termination of any estate or interest shall, together with any accrued income, be paid by the trustee as income to the persons entitled to the next successive interest in the proportions in which they take that interest.

7. Compensation: The corporate trustee shall render an account of his receipts and disbursements at least annually to us if living, otherwise to each adult income beneficiary. The trustee shall be

reimbursed for all reasonable expenses incurred in the management and protection of the trust any successor trustee shall receive fair compensation. A trustee's regular compensation shall be charged half against income and half against principal, except that the trustee shall have full discretion to charge a larger portion or all against income.

8. Perpetuity Savings: No trust created hereby , or by exercise of a power of appointment hereunder, shall continue for more than 21 years after the death of the last to die of ourselves and the beneficiaries in being at our deaths. Any property still held in trust at the expiration of that period shall immediately be distributed to the persons then entitled to receive or have the benefit of the income therefrom in the proportions in which they are entitled thereto, or if their interests are indefinite, then in equal shares.

9. Additions: We or any other person may transfer, devise or bequeath additional property to the trustee to be held under this declaration and may designate the trust to which the addition shall be made. If the addition is made by Will, the trustee may accept the statement of the legal representative that the assets delivered to the trustee constitute all of the property to which the trustee is entitled, without any duty to inquire into the representative's administration or accounting.

10. Powers: The trustee shall hold, manage, care for and protect the trust property and shall have the following powers and, except to the extent inconsistent herewith, those now or hereafter conferred by Illinois law:

(a) To retain any property (including stock of any corporate trustee hereunder or of a parent or affiliate company) originally constituting the trust or subsequently added thereto, although not of a type, quality or diversification considered proper for trust investments.

(b) To invest and reinvest the trust property in bonds, stocks, mortgages, notes or other property of any kind, real or personal, suitable for the investment of trust funds;

(c) To cause any securities or other property, real or personal, belonging to the trust to be held or registered in the trustee's name or in the name of a nominee or in such other form as the trustee deems best without disclosing the trust relationship;

(d) To vote in person or by general or limited proxy, or refrain from voting, any corporate securities for any purpose; to exercise or sell any subscription or conversion rights; to consent to and join in or oppose any voting trusts, reorganizations, consolidations, mergers, foreclosures and liquidations and in connection therewith to deposit securities and accept or hold other securities or property received therefor;

(e) To lease trust property for any period of time though commencing in the future or extending beyond the term of the trust;

(f) To borrow money from any lender, including a trustee hereunder individually, extend or renew any existing indebtedness and mortgage or pledge any property in the trust.

******** *(Trust Agreement - Page Five)* *********

(g) To sell at public or private sale, contract to sell, convey, exchange, transfer and otherwise deal with the trust property and any reinvestments thereof from time to time for such price and upon such terms as the trustee sees fit;

(h) to employ agents, attorneys and proxies and to delegate to them such powers as the trustee considers desirable, and to designate a deputy for a safe deposit box;

(i) To compromise, contest, prosecute or abandon claims in favor of or against the trust;

(j) To divide or distribute the trust property in undivided interests or in kind, or partly in cash and partly in kind, and to sell any property in order to make division or distribution;

(k) To deal with, purchase assets from, or make loans to, the fiduciary of any trust made by us or any member of our family or a trust or estate in which any beneficiary under this declaration has an interest, though the trustee hereunder is such fiduciary, and to retain any property so purchased;

(l) To establish out of income and credit to principal reasonable reserves for depreciation, obsolescence and depletion;

(m) To transfer the situs of any trust property to any other jurisdiction as often as the trustee deems it advantageous for the trust, appointing a substitute trustee to himself to act with respect thereto; and in connection therewith, to delegate to the substitute trustee any or all of the powers given to the trustee, who may elect to act as advisor to the substitute trustee and shall receive reasonable compensation for so acting; and to remove any acting

substitute trustee and appoint another, or reappoint himself, at will;

(n) To perform other acts necessary and appropriate for the proper administration of the trust, execute and deliver necessary instruments and give full receipts and discharges;

(o) To resign without order of court upon notice being given to those beneficiaries entitled to receive the income of the trust estate.

SECTION FOUR: REAL PROPERTY: As to any real estate conveyed to this trust, the interest of any beneficiary hereunder shall consist solely of the right to receive earnings, avails and the proceeds from rentals and from mortgages, sales or other disposition of said property, to manage and control said property as hereinafter provided, and to direct the trustee in its dealings with the title to said property as hereinafter provided. The said right in the avails of said property shall be deemed to be personal property and may be assigned and transferred as such; that in case of the death of any beneficiary hereunder during the existence of the trust, his or her right and interest shall pass under the terms of this trust; and that no beneficiary now has , and that no beneficiary hereunder at any time shall have any right, title or interest in or to any portion of said real estate as such, either legal or equitable, but only an interest in the earnings, avails and proceeds aforesaid.

******** *(Trust Agreement - Page Six)* ********

The trustee shall deal with the real estate and with any cash or other property or assets of any kind

on the written direction of the then existing beneficiaries.

SECTION FIVE: TRUST AMENDMENTS: WE, BURR E. LEE, JR. and RUTH C. LEE, reserve the right at any time or times during both our lifetimes to amend, alter or revoke this Declaration in all or part. However, upon the death of BURR E. LEE, JR. or RUTH C. LEE, this trust may not be revoked or amended in regard to successor beneficiaries. The right to revocation is personal to the beneficiaries and may not be exercised involuntarily. All amendments or revocations shall be in writing.

IN WITNESS WHEREOF, we have signed this Declaration this 9th day of May, 1979."

signature - BEL Burr E. Lee, Jr.

signature - RCL Ruth C. Lee

STATE OF ILLINOIS:

COUNTY OF COOK: SS (sworn statement)

I, WILLIAM J. JOOST, notary public, hereby certify that BURR E. LEE, JR. and RUTH C. LEE, personally known to me to be the same persons whose names are signed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed the instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 9th day of May 1979

signature - WJJ

Notary Public

My commission expires 5-7-81

Pet. App. No. 12 (Seton Family Trust Agreement)
Trust Language Advice in *Letter to Trustee*
Issued by Fletcher Catron, Esq.: March 15, 2000
Entered into Public Court Record: January 30,2007

Catron, Catron & Sawtell, A Professional Association

March 15, 2000

Mr. Burr Lee
14 Timberwick Road
Santa Fe, New Mexico 87505

Dear Mr. Lee:

I have received your letter of March 13. It seems to me that the differences of opinions you have received relate to the interpretation of the language you underline in Section 5 of the trust. I read it literally; the other attorneys seem not to do so.

As I read the language, you may not revoke or amend the trust "in regard to successor beneficiaries." That means that you may amend and modify the trust however you want except that the successor beneficiaries must not be altered. You will notice that my draft of this trust, although completely restated, kept the original beneficiaries. I did this because of this section in the original trust.

As we discussed when we first met, my intention was to alter the ownership of your assets to keep in the trust those items which you wanted to go to Ruth's children, and to remove from the trust those items (only your house) that you did not want to have go upon your death to her children. In this way, you did not alter the trust with respect to successor beneficiaries, although the successor beneficiaries of the trust would not necessarily obtain 100% of your assets.

I have no doubt that all of your assets, including the trust assets, can be used now by you, in any way you wish during your lifetime. If all those assets are left to Ruth's children, as the trust dictates, there will be absolutely no problem, no matter what you have done in the past. If, though, some of your assets do not go to Ruth's children, then I believe that you open your estate up to the possibility of some sort of litigation. This is after your death, of course.

I believe I discussed with you fully the possibility that you would transfer the house out of the trust and into joint tenancy between you and your friend. This would give your friend the house upon your death, and it would avoid its being held in trust (and thus subject to beneficiary requirements) at the time of your death. If the transfer of the house into joint tenancy were simply a gift to your friend, I would have additional concerns, but our discussion was that it would be held in joint tenancy in consideration of your friend's obligation to care for you during your lifetime. I think that your wife's children can hardly complain if you make a transfer of the real estate in exchange for fair value.

At the same time, I felt that the different provisions of "The Burr Trust" may cause some problems. That is why I suggested that you transfer your condominium units from the Burr Trust back to the Burr and Ruth Trust. If, upon your death, you are left with a single trust, with the original beneficiary provisions, and nothing else, then you should not have a problem. If, though, some of your property has been transferred out of the trust, clearly for the purpose of trying to avoid the provisions of the trust with respect to beneficiaries, you may have problems. Of course, you have to remember that all these problems would come about only after your death; you will not be faced with them personally. Nevertheless, I think you

consider these matters in arranging your affairs at the present time.

If you think we need to discuss this any further, please give me a call.

Sincerely,
[S I G N E D]
Fletcher R. Catron

FRC:mme

Pet. App. No. 13 (Seton Family Trust Agreement)
Warranty Deed Transferring Seton Family Property
Held by Trustee to Ruth Lee's 1992 Hospice
Nurse, Marie Harrison
Prepared and filed by Fletcher Catron, Esq.
Signed by Burr E. Lee, Jr. on June 12 2000

WARRANTY DEED #1775675

BURR E. LEE, JR., an unmarried man, and BURR E. LEE, JR., Trustee of the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 100331J, grant to BURR E. LEE, Jr. and MARIE HARRISONB, as joint tenants with right of survivorship, whose address is 14 Timberwick Road, Santa Fe, New Mexico 87505, the following described real estate in Santa Fe County, New Mexico:

Commencing at an iron stake which is the beginning point and which is on the east side of "South Fork" entrance and exit road for Timberwick Village and which is identical with the Southwest corner of the Amended South Portion Tract 4 "Plat of Timberwick Village" as amended by Walter G. Turley, April 16 1947 and October 19, 1949; Thence from said beginning point and along the South Fork Road toward the Las Vegas Highway N. 27° 14' E. 95.8 ft. to an iron stake, the Northwest corner of this tract, and labeled "Theodore P. Newitts 1.0 acre South Portion Tract 4" on the plat referred to hereafter; thence S. 64° 24' E. 449.2 ft. to an Iron stake marking the Southeast corner of property owned by H.H. Pattison; thence S. 24° 22' W. 53.1 ft. to an iron stake; thence S. 5° 38' W. 40.16 ft. to a point from whence the Center of the Leisher Ell bears N. 45° E. 2.4 ft.; thence S. 5° 38' W. 106.58 ft. to an iron stake; thence S. 27° 56' W. 228.45 ft. (identical with

Samuel P. Davalos survey April 8, 1963); thence along a new line S. 27° 6' W. 150.68 ft. to an iron stake set in the Southern line of the Davalos survey and lying N. 65° 31' W. 28.33 ft. from the South end of said line as surveyed by Jack Horne; thence N. 64° 24' W. 586.45 ft. along the original Southern line of the Davalos survey, to an iron stake, the Southwest corner of this tract, a point on the East side of the South Fork Road; thence along the East side of the South Fork Road N. 39° 23' E.326 ft. to an iron stake; thence continuing along the East side of said South Fork Road N. 27° 14' E. 164.9 ft. to the point and place of beginning; all as shown upon "Plat Showing Survey of Properties for Theodore P. Newitts, Constance Mary Newitts, Portion of E.T. Seton Lands, Timberwick Village, within the Sebastian De Vargas, Section 20, T 16 N. R. 10 E., Santa Fe County, New Mexico", by Samuel P. Davalos from the survey of May 1946, 8 April 1963, and 18 June 1965, containing 7 acres more or less, after partition by Jack Horne 27 Oct. 1977.

with warranty covenants.

This deed amends and replaces the deed previously recorded to Book 1750 at page 959 of the records of Santa Fe County, New Mexico, dated day of April 20, 2000.

Executed this 12th day of June 2000.

[S I G N E D] BURR E. LEE, JR.

STATE OF NEW MEXICO)
COUNTY OF SANTA FE) ss:

The foregoing instrument was acknowledged before me this 12th day of June 2000 by Burr E. Lee, Jr., individually and as trustee.

[S I G N E D]

[FLETCHER R. CATRON],

Notary Public

[S E A L]

FLETCHER R. CATRON NOTARY PUBLIC
My commission expires: June 2002

[S E A L] -

COUNTY CLERK REBECCA BUSTAMANTE
SANTA FE COUNTY
Recorded: 12 day of June 2000 at 3:01 PM
[S I G N E D]

Pet. App. No. 14 (Seton Family Trust Agreement)
Letter Describing Probate Representation
Issued by Fletcher Catron, Esq.: September 25, 2002

Catron, Catron & Sawtell, A Professional Association

September 25, 2000

Karen Aubrey, Esq.
Post Office Box 8435
Santa Fe, New Mexico 87504-8435

Dear Karen:

You are correct that I represent Marie Harrison in her fiduciary capacity and not in her individual capacity. I have forwarded you letter to her, and I have suggested to her that she retain personal counsel. As attorney for the estate, I note your Demand for Notice and will comply with it, of course. With respcect to the Claim Against the Estate, you should know that your clients and the other children are getting *all* the estate assets through the trust, with the exception of some tangible personal property of insignificant value. There is therefore nothing left in the estate for your clients to claim against.

I think I should also mention that, while Burr Lee certainly felt close to Ms. Harrison and felt grateful to her for her companionship and assistance, I am not at all sure their relationship was as you have described it; Burr Lee, certainly, never described Marie as his "paramour," his partner, or anything other than his friend.

Sincerely,
[S I G N E D]
Fletcher R. Catron

FRC:ps
cc: Marie Harrison
RECEIVED [Karen Aubrey]

Pet. App. No. 15 (Seton Family Trust Agreement)
District Court *Order* on Extrinsic Evidence in related case
Issued by Judge Carol Vigil on April 11, 2004

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

Case No. D-0101-CV-2003-01861

JUDITH ALEXANDER, GRETCHEN VAN AUKEN,
SUSAN VAN AUKEN, RICK VAN AUKEN and BETSY LEE JOPPE
Plaintiffs

v.

MARIE ANTOINETTE HARRISON,
Defendant

Stipulated Order Regarding Extrinsic Evidence

THIS MATTER having come before the Court on the stipulation of the parties, the Court having been advised that one of the issues in dispute is the scope of the former trustee's authority to make distributions under the terms of the Burr and Ruth Trust and the Burr Trust,

IT IS THEREFORE ORDERED that until such time as the Court conducts a *Mark V* analysis and determines whether the Trust documents are ambiguous, no parol or extrinsic evidence shall be submitted to the Court as part of any pleadings, motions or otherwise, for purposes of interpreting the meaning of any of the Trust documents.

Dated April 9, 2004
ORIGINAL SIGNED BY JUDGE CAROL J. VIGIL
Carol J. Vigil, First Judicial District Court Division III

Pet. App. No. 16 (Seton Family Trust Agreement)
Affidavit of Fletcher Catron on Attorney-Client Relationship with Trustee
Filed by: Peter F. Wirth for Defendant Marie Harrison
Excerpts: from pleading entered on July 10, 2004
First Judicial District Court
Alexander et al. v. Harrison (2004)

Defendant's Response to Plaintiff's Rule 1-056 Motion for Summary Judgment That Transfers Were Unlawful

AFFIDAVIT OF FLETCHER R. CATRON

A. Trust and Estate Credentials: p. 1, ¶1

1. My name is Fletcher R. Catron. I am an attorney licensed to practice law in the State of New Mexico. My practice over the last thirty years has focused primarily on estate planning, probate and real estate law. 1997-98 I served as the chair of the State Bar section on probate and real property.

B. Attorney-Client Relationship with Trustee: p. 1, ¶2

2. On or around August 29, 1999, Burr E. Lee, Jr. first came to my office to have me review his estate plan. As part of this review, he brought copies of his will dated May 9, 1979, the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J ("the Burr and Ruth Trust"), and the Burr E. Lee, Jr. Living Trust.

C. Legal Opinion on Trust Instrument: p. 2, ¶5

5. Regarding the issue of whether the Burr and Ruth Trust was irrevocable after Ruth Lee's death, I advised Mr. Lee that the only irrevocable provision addressed the beneficiaries.

D. Transfer of Trust Property: p. 2, ¶9

9. Subsequently, I prepared a deed transferring 14 Timberwick to Burr E. Lee, Jr. and Marie Harrison as joint tenants and prepared a new will for Mr. Lee to remove the article leaving 14 Timberwick to Marie Harrison at death.

Pet. App. No. 17 (Seton Family Trust Agreement)
District Court *Order* on Trust Ambiguity
Issued by Judge James A. Hall on February 8, 2007

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE
Case No. D-0101-CV-200601509
RICHARD A. VAN AUKEN
Plaintiff
vs.
FLETCHER R. CATRON, et al.
Defendants

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter having come before the Court upon Plaintiff's Rule 1-056 Motion for Summary Judgment That Trust Terms Were Violated by Property Removal, and the Court having considered written and oral argument of counsel and *pro se* party, and the Court being otherwise informed in the premises;

The Court FINDS that the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331J, executed in 1979, is ambiguous and open to more than one plausible interpretation. The foregoing Finding constitutes a genuine issue as to a material fact necessary to Plaintiff's Motion.

Therefore, it is hereby ORDERED that Plaintiff's Rule 1-056 Motion for Summary Judgment That Trust Terms Were Violated by Property Removal be and hereby is denied.

[S I G N E D] James A. Hall, District Judge
Submitted by: CATRON, CATRON & POTTOW, P.A.
Attorneys for Defendant Catron
P.O. Box 788, Santa Fe, New Mexico 87504-0788

Pet. App. No. 18 (Seton Family Trust Agreement)
Expert *Affidavit* on Trust Language
By James F. Beckley, Esq,, N.M. Trust Authority
Filed on April 2, 2007 by Willam Gilstrap, Esq.

AFFIDAVIT

STATE OF NEW MEXICO)
)ss.
COUNTY OF BERNALILLO)

JAMES F. BECKLEY, Esq., being duly sworn, deposes and says that:

1. I am an attorney licensed by the Supreme Court of the State of New Mexico;

2. I have been actively engaged in the private practice of law in the State of New Mexico since September 1969;

3. My practice focuses on estate planning, trusts, wills, estates, probate, and trust administration;

4. I have been a Fellow of the American College of Trust and Estate Counsel since 1993;

5. I have been a Legal Specialist in Estate Planning, Trusts, and Probate Law certified by the New Mexico Board of Legal Specialization since July 1, 1999;

6. I continue to maintain an "AV" rating by Martindale Hubbell;

7. I am listed in the Best Lawyers in Amewrica, 2007 edition, under the heading *"Trusts and Estates*;"

8. I have taught numerous legal education courses for lawyers, accountants, and trust officers since 1990 in the legal subjects of wills, trusts, estate planning, probate, and trust administration;

9. During my law career I have drafted and/or analyzed numerous trusts for clients including revocable

trusts similar to the BURR E. LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J under trust agreement dated May 9, 1979;

10. The controlling consideration in determining the meaning of a donative document is the donor's intention and the donor's intention is given effect to the maximum extent allowed by law (Restatement of the Law, Third, *Property - Wills and Other Donative Transfers*, Section 10.1, Comment *b.*);

11. The text of a donative document must be read in its entirety (Restatement of the Law, Third, *Property - Wills and Other Donative Transfers*, Section 10.2., Comment *b.*);

12. I have read and have become familiar with the terms of the BURR C. *[sic]* LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST 10331J under trust agreement dated May 9, 1979;

13. The pertinent sections of the BURR E. LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST 10331J under trust agreement dated May 9, 1979, are as follows:

(A) TRUST DECLARATION: We, BURR E. LEE, JR. and RUTH C. LEE, as settlers, herewith transfer to ourselves as the trustee the ***SUM*** (emphais added) of Ten ($10.00) Dollars ...

(B) SECTION ONE: TRUST BENEFICIARIES

1. During our lifetimes, the income from the trust shall be paid to us in convenient installments or otherwise as we may from time to time direct and also such ***SUMS*** (emphasis added) of principal ...

2.a. Commencing with the death of either BURR E. LEE, JR. or RUTH C. LEE ..... The trustee

shall continue to pay income and ***SUCH SUMS*** (emphasis added) of principal to the survivor as requested;

(C) SECTION FOUR: REAL PROPERTY: As to any real estate conveyed to this trust, the interest of ***ANY*** beneficiary hereunder shall consist ***SOLELY*** of the ***RIGHT TO RECEIVE EARNINGS, AVAILS***, and the ***PROCEEDS*** from rentals and from mortgages, sales, other disposition....and to direct the trustee in its dealings with the title to said property ***AS HEREINAFTER PROVIDED*** and that no beneficiary hereunder at any time shall have any right title or interest in to *[sic]* any portion of said real estate as such, either legal or equitable, but only an interest in the earnings, avails, and proceeds aforesaid. The trustee ***SHALL*** deal with the real estate and with any cash or other property or assets of any kind on the ***WRITTEN DIRECTION OF THE THEN EXISTING BENEFICIARIES*** (emphasis added);

(D) SECTION FIVE: TRUST AMENDMENTS: However, upon the death of BURR E. LEE, JR. or RUTH C. LEE, this trust may not be ***REVOKED*** (emphasis added) or amended in regard to successor beneficiaries;

14. The language of the BURR E. LEE, JR. AND RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J under trust agreement dated May 9, 1979 (hereinafter referred to as the "Trust"), is unambiguous;

15. During the joint lifetimes of BURR E. LEE, JR. and RUTH C. LEE, they were the trustees and the income beneficiaries of the Trust;

16. During the joint lifetimes of BURR E. LEE, JR. and RUTH C. LEE, they retained the power to revoke and amend the Trust;

17. RUTH C. LEE died in August of 1992;

18. SECTION FIVE specifically states that, upon the death of either BURR E. LEE, JR. or RUTH C. LEE, the Trust may not be revoked;

19. Upon the death of RUTH C. LEE, BURR E. LEE, JR. continued to serve as the sole trustee, BURR E. LEE, JR. was the sole income beneficiary, and RICHARD A. VAN AUKEN, SUSAN L. VAN AUKEN, JUDITH G. VAN AUKEN, GRETCHEN VAN AUKEN, BURR JEFFREY LEE, CAROL L. BOYLE, AND ELIZABETH M. LEE became vested remainder beneficiaries;

20. Pursuant to SECTION ONE, Paragraph 2.a. of the Trust, BURR E. LEE, JR. was only entitled to income and such sums of principal from the Trust as he requested following the death of RUTH C. LEE;

21. SECTION FOUR of the Trust specifically limits a beneficiary's right in regards to any real property owned by the Trust to the earnings, avails, or proceeds attributable to any such real property;

22. SECTION FOUR of the Trust specifically states that "the interest of any beneficiary hereunder shall consist solely of the right...to direct the trustee in its dealings with the title to said property as *hereinafter provided*;"

23. The last sentence of SECTION FOUR of the Trust states "the trustee shall deal with the real estate and with any cash or other property or assets of any kind on the *written direction* of the then existing *beneficiaries*;"

25. *[sic]* Upon the death of RUTH C. LEE, the Trust became irrevocable;

26. The intention of the settlers of the Trust, i.e. BURR E. LEE, JR. and RUTH C. LEE, is clear from the document known as the BURR C. *[sic]* LEE, JR. and RUTH C. LEE SELF-DECLARATION OF TRUST NO. 10331J under trust agreement dated May 9, 1979;

27. Such intent was to provide for the benefit of both BURR E. LEE, JR. and RUTH C. LEE during their joint lifetimes, to provide for the survivor upon the death of either of them, and to distribute the assets of the Trust, including real poroerty located in Timberwick, New Mexico, to the vested remainder beneficiaries;

28. The terms of the Trust mean what they say;

29. The phrase "*such sums of principal*," as set forth in SECTION ONE, Paragraph 2.a. of the Trust, only entitled BURR E. LEE, JR., during his lifetime following the death of Ruth C. Lee, to distributions of cash and not to distributions of assets in kind, especially in light of the use of the word "*sum*" in the preamble of the Trust which refers to the settlers transferring the sum of "Ten ($10.00) Dollars to themselves as trustee;

30. The terms of the Trust specifically preclude a trustee from distributing any interest in any real property owned by the Trust outright to any beneficiary, e.g., BURR E. LEE, JR., as the trustee, could not transfer the real estate located in Timberwick, New Mexico, to himself as the sole income beneficiary during his remaining lifetime following the death of Ruth C. Lee without violating the terms of the Trust;

31. The terms of the Trust specifically preclude a trustee from dealing in any manner with any asset of the Trust, including real property, without the written direction of ALL of the beneficiaries, e.g., BURR E. LEE, JR., as the trustee could not distribute the real estate located in Timberwick, New Mexico, to himself as the sole income beneficiary during his remaining lifetime following the death of Ruth C. Lee without first obtaining the written direction of BURR E. LEE, JR., RICHARD A. VAN AUKEN, SUSAN L. VAN AUKEN, JUDITH G. VAN AUKEN, GRETCHEN VAN AUKEN, BURR JEFFREY LEE, CAROL L. BOYLE, and ELIZABETH M. LEE;

32. The transfer of the real property located in Timberwick, New Mexico, from the Trust to BURR E. LEE, JR. and MARIE ANTOINETTE HARRISON, revoked the Trust as it related to the vested interests of the remainder beneficiaries in said real property;

33. Fletcher Catron, Esq. knew that the transfer referenced above in Paragraph 32 was problematic as evidenced by his letter to Burr E. Lee, Jr. dated March 15, 2000, which is attached as Exhibit 1 to the Affidavit of Fletcher R. Catron, Dated January 30, 2007 which is attached to Defendant Catron's Memorandum Brief in Support of Motion For Summary Judgment which is attached to Defendant Catron's Motion For Summary Judgment. Such letter in pertinent part states the following:

(A) "It seems to me that the differences of opinions you have received relate to the interpretation of the language you underline in Section Five of the trust;"

(B) If, though, some of your assets do not go to Ruth's children, then I believe that you open your estate up to the possibility of some sort of litigation. This is after your death, of course;"

35. *[sic]* Fletcher R. Catron, Esq., by agreeing to represent Burr E. Lee, Jr. as the sole successor Trustee of the Trust, assumed responsibilities and owed duties to the vested remainder beneficiaries. See e.g., "We agree with the California courts that when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law," *Charleston v. Hardesty* 839 P.2d 1303 (Nev. 1992);

36. Fletcher R, Catron, breached the duty of care and the fiduciary duties owed to the vested remainder beneficiaries of the Trust by assisting Burr E. Lee, Jr. with the transfer of the real property located in Timberwick, New Mexico, from the Trust to Burr E. Lee, Jr. and Marie Antoinette Harrison, in violation of the clear and unambiguous terms of the Trust;

37. Fletcher R. Catron, Esq., knowing that the transfer of the real property located in Timberwick, New Mexico, from the Trust to Burr E. Lee, Jr. and Marie Antoinette Harrison was problematic, should have sought the consent of all of the vested remainder beneficiaries to such transfer, and absent the unanimous consent of all such beneficiaries to such transfer, he should have requrested that a court of competent jurisdiction resolve the issue with notice of such request being provided to all interested parties.

38. In my opinion, a court would not have authorized the transfer of the real property located in

Timberwick, New Mexico, from the Trust to Burr E. Lee, Jr. and Marie Antoinette Harrison over the objections of any of the vested remainder beneficiaries without adequately protecting the interests of such vested beneficiaries;

39. One of the purposes of the Uniform Probate Code of New Mexico is to discover and make effective the intent of a decedent in the distribution of his property (Section 45-1-102(B)(2) N.M.S.A. 1978);

40. Fletcher R. Catron, Esq., by breaching his duties owed to the vested remainder beneficiaries of the Trust in assisting Burr E. Lee, Jr. in transferring real property in clear violation of the terms of the Trust, by failing to adequately advise the successor trustee of the vested remainder beneficiaries of the Trust of the violation of the terms of the Truist as a result of the transfer of the real property located in Timberwick, New Mexico, and by failing to correct such violation during the probate administration of the Estate of Burr E. Lee, Jr. deceased, engaged in fraud that avoided or circumvented the purposes of the Uniform Probate Code of New Mexicoso as to implicate the application of Section 45-1-106 N.M.S.A. 1978;

41. Karen Aubrey, Esq. failed to preserve the claims of the Trust in the probate proceeding by failing to file a petition for allowance of claim after such claim was denied by Fletcher R. Catron, Esq.;

42. On September 23, 2002, Karen Aubrey, Esq. on behalf of Gretchen Van Auken, Susan Van Auken, Judith Alexander, Betsy Lee Joppe, and Richard Van Auken, filed a Demand for Notice and Claim Against the Estate of Burr E. Lee, Jr. alleging that the Estate was liable to the claimants in an

undetermined amount as successor beneficiaries of the Trust;

43. On October 9, 2002, Fletcher R. Catron, Esq. on behalf of Marie Antoinette Harrison, the duly appointed Personal Representative of the Estate of Burr E. Lee, Jr., filed a Notice of Disallowance of Claim that disallowed the claim filed by Karen Aubrey, Esq.;

44. Section 45-3-806(A) N.M.S.A. 1978 states that "Every claim that is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the district court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance;"

45. Pursuant to Section 45-3-806(A), Karen Aubrey, Esq. had until December 8, 2002, to file a petition for allowance of the claim that she filed on September 23, 2002, and that was disallowed by Fletcher R. Catron, Esq. on October 9, 2002; and

46. Karen Aubrey, Esq. failed to file a petition for allowance of the claim that she filed, and she moved to withdraw as counsel for Gretchen Van Auken, Susan Van Auken, Judith Alexander, Betsy Lee-Joppe, and Richard Van Auken as beneficiaries for the Trust, which the Court granted by order filed on March 5, 2003;

47. The failure of Karen Aubrey, Esq. to inform the vested remainder beneficiaries of the Trust of her failure to file a petition for allowance suggests that she falsely represented a matter of fact by concealment of that which should have been

disclosed so as to implicate the application of Section 45-1-106(A) N.M.S.A. 1978; and

48. The failure of Karen Aubrey, Esq. to "flag any specific violations of the Trust and without mentioning any responsibility for the Timberwick transfer which might rest with Catron" (see Paragraph 7 of Complaint for Damages and Other Relief From Probate Fraud (§45-1-106(A), Attorney Deceit, and Collusion (§36-2-17)) suggests that she falsely represented a matter of fact by concealment of that which should have been disclosed so as to implicate the application of Section 45-1-106(A) N.M.S.A. 1978;

Further Affiant Sayeth Not.

Dated: April 2, 2007 By: [S I G N E D]
James F. Beckley, Esq.
Attorney at Law

STATE OF NEW MEXICO) ss.
COUNTY OF BERNALILLO)

On April 2, 2007, before me, the undersigned, a Notary Public in and for the County of Bernalillo, State of New Mexico, personally appeared James F. Beckley, Esq., personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in the is *[sic]* certificate first above written.

[S E A L] [S I G N E D] [KATRINA VOTH] Notary Public
State of New Mexico My Commission Expires 01-30-10

Pet. App. No. 19 (Seton Family Trust Agreement)
Supporting *Affidavit* on Trust Language
By William J. Joost, author and witness to 1979 Trust
Filed on October 31, 2008 by Richard A. Van Auken, *pro se*

AFFIDAVIT

STATE OF WISCONSIN)
) ss
COUNTY OF VILAS)

WILLIAM JOOST, Attorney at Law, being duly sworn, deposes and says that:

1. I am an attorney licensed by the Supreme Court of the State of Wisconsin.

2. I have been actively engaged in the practice of law in the State of Wisconsin since 1986 and, prior to that, in the State of Illinois beginning in 1969.

3. My areas of practice in Illinois and Wisconsin were and are probate, wills, estate planning, real estate, business and commercial law, condo conversions and bankruptcy.

4. In 1979 I prepared and witnessed the execution of a trust instrument, the "Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust No. 10331 J."

5. I have recently reviewed a copy of this six-page trust instrument as it was executed on May 9, 1979 by Ruth C. Lee and Burr E. Lee in my law office in Park Ridge, Illinois.

6. I have also recently examined a seven-page affidavit made on April 2, 2007 by James F. Beckley, Esq. of Albuquerque, New Mexicvo, which affidavit addresses the language in this 1979 trust instrument.

7. I find Mr. Beckley's affidavit to be accurate and correct in the several paragraphs which analyze the meaning of the language in the trust instrument. See ¶¶ 13-16, ¶¶ 18-26, and ¶¶ 28,29 of Mr. Beckley's affidavit.

8. Given that Ruth Lee died in 1992 as stated in ¶ 17 of the affidavit and that certain real property ("Timberwick") was held in trust as implied in ¶ 27 of the affidavit, I also find as accurate and correct Mr. Beckley's analysis of the effect of trust language contained in ¶¶ 30-32 of his affidavit.

9. I agree with Mr. Beckley that the language of the trust instrument does not permit the surviving co-settlor to invade the principal of the trust estate through property transfer absent written approval from the seven Van Auken/Lee children who were named as beneficiaries and whose interests, after the death of Ruth Lee, had become vested.

10. After Ruth Lee's death, Burr Lee did not have the power to revoke or amend the trust instrument without written approval of the seven beneficiary children.

11. From my re-reading of the trust instrument and from my personal recollection of the circumstances of its execution nearly thirty years ago, there was no expressed intent to allow the surviving co-settlor an unlimited ability to invade the principal of the trust estate, especially the real property placed in trust which was to become the inheritance of the Lee and Van Auken children.

12. My recollection of the circumstances is as follows:

A. I had prior dealings with Burr Lee since he was a real estate salesman in Park Ridge, Illinois.

B. The trust was drafted with the understanding that this was a second marriage for Burr Lee and Ruth Lee.

Further Affiant Sayeth Not.
Dated this 23rd October 2008
[S E A L] [S I G N E D] William Joost, Attorney at Law

Subscribed and sworn to before me This 23rd day of October, 2008, Amy M. Franzen, Notary Public, Vilas County, Wisconsin, My Commission expires: 07/25/10

PETITION APPENDICES: SECTION C
SATUTORY AND CONSTITUTIONL PROVISIONS

Pet. App. Nos. 18 through 24
(Statutory and Constitutional Provisions)

Pet. App. No. 18

U.S. Code, Judiciary and Judicial Procedure

28 U.S.C. §1654, Appearance personally or by counsel
Current as of: May 29, 2020 and January 3, 2007

§1654. *Appearance personally or by counsel.* In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Pet. App. No. 19

New Mexico Statutes Annotated (1978): Attorneys

Chapter 36, Article 2
Current as of: May 29, 2020 and January 3, 2007

§36-2-17. *Attorney deceit or collusion*: If an attorney is guilty of deceit or collusion or consents thereto with intent to deceive the court, judge or party, he shall forfeit to the injured party, treble damages to be recovered in a civil action, and may, if in the opinion of the board of bar examiners such conduct warrants it, be disbarred.

Pet. App. No. 20

New Mexico Declaratory Judgment Act:

Chapter 44, Article 6
Current as of: May 29, 2020 and January 3, 2007

§44-6-2. *Scope*: In cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory

judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and shall have the force and effect of a final judgment or decree.

§44-6-4. *Power to construe*: Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

§44-6-14. *Construction*: The Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] is declared to be remedial. The act's purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.

Pet. App. No. 21

New Mexico Probate Code:

§45-1-101 NMSA 1978 et seq.

Current as of: May 29, 2020 and January 3, 2007

§45-1-102(B) *Purposes of Act*: The underlying purposes and policies of the [Uniform] Probate Code are:

(2) to discover and make effective the intent of a decedent in distribution of his property;

(4) to facilitate use and enforcement of certain trusts.

Pet. App. Nos. 18 through 24 (continued)
(Statutory and Constitutional Provisions)

§45-1-106(A) *Effect of Fraud or Evasion*: If fraud has been perpetrated in connection with any proceeding or in any statement filed under the [Uniform] Probate Code [45-1-101 NMSA 1978] or if fraud is used to avoid or circumvent the provisions or purposes of the code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud including restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not. Any proceeding must be commenced within two years after the discovery of the fraud. No proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud.

Pet. App. No. 22

New Mexico Trust Code:

NMSA §46A-3-303, et seq.
Representation by fiduciaries and parents,
subsection (D) representation by trustee
Current as of: May 29, 2020 and January 3, 2007

§46A-3-303. Representation by fiduciaries and parents.

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

D. a trustee may represent and bind the beneficiaries of the trust;

E. a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

Pet. App. Nos. 18 through 24 (continued)
(Statutory and Constitutional Provisions)

Pet. App. No. 23

U.S. Constitution, Amendment XIV, Section 1:

Equal protection and due process

Enacted: July 9, 1868

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pet. App. No. 24

U.S. Constitution, Amendment V: Due process

Enacted: December 15, 1791

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process.

PETITION APPENDICES: SECTION D
MISCELLANEOUS ITEMS

Pet. App. No. 25 (Miscellaneous Items)
N.M. Court of Appeals *Memorandum Opinion*
(by Judge A. Joseph Alarid)
Entered: June 27, 2008

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

RICHARD A. VAN AUKEN
Plaintiff-Appellant,

v.

NO. 27,554
Consolidated with
27,555; 27,556;
27,557; 27,558

FLETCHER R. CATRON,
KAREN AUBREY,
PETER F. WIRTH, and the
ESTATE OF WILLIAM A.
SAWTELLE, [sic] JR.,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF
SANTA FE COUNTY
James A. Hall, District Judge

Richard A. Van Auken
Santa Fe, NM, Pro Se Appellant

Sawtell, Wirth & Biedscheid, P.C.
W. Anthony Sawtell, Santa Fe, NM

Rodey, Dickason, Sloan, Akin & Robb, P.A.
John M. Brant, Albuquerque, NM

Catron, Catron & Sawtell, P.A.
Michael T. Pottow, Santa Fe, NM
Gerald G. Dixon, Albuquerque, NM

For Appellees

MEMORANDUM OPINION

ALARID, Judge

In No. 27554, Plaintiff appeals from the order denying Plaintiff's motion for partial summary judgment entered on February 8, 2007. [RP 443] In No. 27555, Plaintiff appeals from the order dismissing claims of trustee entered on February 8, 2007 [RP 4412], which took effect on March 5, 2007, and then again on October 4, 2007, pursuant to orders of the district court entered as a result of this Court's Order on Limited Remand entered on July 31, 2007. In No. 27556, Plaintiff appeals from the district court's order dismissing claims against Peter F. Wirth with prejudice entered on February 8, 2007. [RP 438] In No. 27,577 Plaintiff appeals from the district court order granting summary judgment dismissing claims against the Estate of William A. Sawtell, Jr. entered on February 8, 2007. [RP 436] In No. 27558, Plaintiff appeals from the order granting a motion to dismiss with prejudice Plaintiff's claims against Defendant Karen Aubrey entered on February 8, 2007. [RP 445]

This Court entered an Order consolidating the appeals under Ct. App. No. 27,554. In addition, this Court has filed two calendar notices proposing to dismiss the appeals. The parties have responded with memoranda in opposition. Unpersuaded, we dismiss the appeals and remand to the district court for further proceedings consistent with this opinion.

DISCUSSION

The record proper indicates that Plaintiff Richard A. Van Auken, pro se, is the successor trustee and the sole remaining beneficiary of the Burr E. Lee, Jr.

And Ruth C. Lee Self-Declaration of Trust No. 10331J (the Trust). [RP 38] All of the consolidated appeals arise out of Plaintiff's allegations that Defendants-Attorneys are responsible for probate fraud, attorney deceit, and collusion on the Trust and Plaintiff himself as remaining sole beneficiary, for allowing and facilitating Burr E. Lee, Jr. during his lifetime as survivor of Ruth C. Lee, to transfer a house, which had been a Trust asset, out the Trust to an individual, Marie Harrison, in consideration for her care of him for the rest of his lifetime. [Id.] The district court dismissed Plaintiff's claims against Defendants Peter Wirth, Karen Aubrey, and the Estate of William Sawtell with prejudice. [RP 438, 436, 445] These orders of dismissal were apparently made on the merits of Defendants' motions to dismiss. [Id.] The orders were entered, however, at a time when Plaintiff, a pro se individual, had all along been improperly asserting the rights of himself and the Trust, an artificial entity, pro se in the complaint as amended and in all pleadings and responses to Defendants' motions. It is, therefore, unclear what final effect these orders of dismissal have with regard to all of the claims asserted against the Defendants in the complaint as amended by the Plaintiff as the Trust and as an individual.

After the orders of dismissal, Plaintiff briefly obtained counsel for the Trust and himself "as their interests may result." [RP 604, 698] Pursuant to the District Court's October 4, 2007 Orders, however, counsel was allowed to withdraw, and the Trust's motion to intervene, therefore, was properly denied on this basis. See *Martinez v. Roscoe*, 2001-NMCA-083, ¶¶ 5, 7, 14-15, 131 N.M. 137 P.3d 887

(dismissing an artificial entity's claims on appeal as being improperly filed pro se). Plaintiff on behalf of the Trust, which is not a party, is seeking to recover an asset for the Trust so that it can be distributed to himself as beneficiary. [RP 698] As such, the claims of Plaintiff individually cannot proceed without Plaintiff as Trustee recovering the Trust asset sought to be distributed to Plaintiff as individual beneficiary.

In the first calendar notice, we proposed to dismiss the appeals on the basis that the orders were not final. [Ct. App. File, CN1] In the second calendar notice, we proposed not to reach the issue of finality, because we proposed to dismiss all of the appeals on the basis that the Trust, whose interests are paramount to and interwoven with Plaintiff's interests as beneficiary of the Trust, is required to be and is not represented by counsel. *See Martinez v. Roscoe*, 2001-NMCA-083, ¶¶ 15, 131 N.M. 137, 33 P.3d 887 (dismissing an artificial entity's appeal as improperly filed pro se through an individual, because the individual and the entity were separate legal entities and the legal entity may not file pro se pleadings through its manager who is not a licensed attorney in New Mexico, even when the issue of finality is not resolved)(citing *Sunwest Bank v. Nelson*, 1998-NMSC-12, ¶ 9, 125 N.M. 170, 958 P.2d 740 (accepting jurisdiction to review an order of dismissal without prejudice for improper venue because the order disposed of the case to the fullest extent possible in the court in which it was filed)).

The parties' memoranda in opposition to the second calendar notice do not persuade us that it is appropriate for this Court, as the reviewing Court, to

make, in the first instance, the determinations we set out in the second calendar notice and in the opinion below, for the district court to make on remand. Moreover, we are not persuaded by the out-of-state case law cited by Plaintiff in his memorandum. As we discussed in the first and second calendar notices, under New Mexico law the Trust may ot appear before this Court through Plaintiff, an individual, acting pro se. Finally, we deny Plaintiff's request for permission to submit amicus briefs/memoranda.

Accordingly, based on the analysis set forth in the second calendar notice, we dismiss the appeals. The result of the dismissal of the appeals is that the cases return to the district court to determine, in light of the October 4, 2007, orders allowing counsel for the Trust to withdraw and denying the Trust's motion to intervene, whether, under Rule 1-019(B) NMRA, the case can continue in the district court with the parties before the court, or whether, without the Trust, the entire case should be dismissed. *See, e.g. Srader v. Verant*, 1998-NMSC-025, ¶ 19, 125 N.M. 521, 964 P.2d 82 (discussing that the district court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable).

The factors to be considered by the district court include: first, to what extent a judgment rendered in the absence of the Trust might be prejudicial to it or to those already parties; second, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment

rendered in the absence of the Trust will be adequate; fourth, whether Plaintiff will have an adequate remedy if the action is dismissed for non-joinder. *Id.*

In making the indispensable party determination in this case, the district court may also consider that joinder of the Trust while arguably feasible, has not been accomplished despite the order of the district court [RP 441; *see also* Rule 1-041(B) NMRA]. In addition, the district court may consider that the district court has given Plaintiff notice of the consequences of failing to obtain counsel for the Trust [RP 441], has ruled that the Trust may not intervene without counsel, and has given Plaintiff ample time to obtain counsel for the trust. [Id.] Finally, the district court may consider that Defendants should not be required to remain in the lawsuit indefinitely. *See, e.g.* Rule 1-041(B); *and see Roscoe*, 2001-NMCA-083, ¶ 14 (dismissing the entity's pro se appeal does not violate the entity's due process rights).

For the reasons discussed above, we dismiss all of the appeals and remand the cases to the district court.

IT IS SO ORDERED

[S I G N E D]

A. JOSEPH ALARID, JUDGE

WE CONCUR:
[SIGNED] **MICHAEL D. BUSTAMANTE, Judge**
[S I G N E D] **CYNTHIA A. FRY, Judge**

Pet. App. No. 26 (Miscellaneous Items)
N.M. Court of Appeals Published *Opinion* in *Lee v. Catron*, 2009-NMCA-018
(by Judge Johathan B. Sutin)
Opinion Date: September 16, 2008
Publication Date: March 23, 2009
Certiorari Denied, No. 31,410, December 30, 2008

FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

NO. 28,590

BURR E. LEE, JR. and RUTH C. LEE SELF-DECLARATION OF TRUST, by and through itself and/or by and through RICHARD A. VAN AUKEN, trustee,
Plaintiffs-Appellants,

v.

CATRON, CATRON & POTTOW, P.A., FLETCHER R. CATRON, and KAREN AUBREY,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
James A. Hall, District Judge

Richard A. Van Auken, Santa Fe, NM
Pro Se Appellant

Law Office of Jack Brant, P.C.
Albuquerque, NM
for Appellees Catron, Catron & Pottow, P.A., and Fletcher R. Catron

Dixon, Scholl & Bailey, P.A., Albuquerque, NM
Gerald G. Dixon and Jennifer M. Rozzoni
for Appellee Karen Aubrey

OPINION

SUTIN, Chief Judge.

{1} Richard Van Auken, Trustee of the Burr E. Lee, Jr. and Ruth C. Lee Self-Declaration of Trust (the Trust), appeals pro se from an order of the district court dismissing without prejudice the complaint filed by the Trust. Defendants moved to dismiss this appeal on the basis that Van Auken could not represent the Trust on appeal. In our calendar notice, we proposed to dismiss the appeal. Both parties have responded. We have considered the arguments made by the parties and dismiss the appeal.

{2} In our calendar notice, we pointed out that we had previously required that the Trust be represented by counsel. In so doing, we relied on *Martinez v. Roscoe*, 2001-NMCA-083, ¶¶ 7, 15, 131 N.M. 137, 33 P.3d 887, where we required a limited liability company to be represented by counsel. The basis of the holding in *Martinez* was that an artificial entity could not be represented in court by a person who is not a licensed attorney. *Id.* ¶¶ 5, 7.

{3} Van Auken argues that there is no basis on which to conclude that a trust is a legal entity that must be represented by counsel. He quotes treatise language stating that a trust is not an entity. *Loring: A Trustee's Handbook* 13 (2006 ed.). He also quotes out-of-state authorities supporting the notion that a trust is not a legal entity, but rather a fiduciary relationship that acts solely through the trustee. It is true that a trust is not a legal entity and that the trustee is the proper person to sue or be sued on behalf of the trust. *See* NMSA 1978, § 46A-8-816(X) (2003) (describing trustee's power to prosecute or

defend action to protect trust property). However, simply because a trust is not a legal entity that can sue or be sued apart from its trustee does not mean that the trustee can represent the trust pro se.

{4} Whether or not a trust is a legal entity does not answer the question. The answer turns upon the trustee himself. It is clear that the trustee is to administer the trust "solely in the interests of the beneficiaries." NMSA 1978, §46A-8-802(A) (2003) (amended 2007). Thus, a trustee is acting on behalf of others who are beneficiaries of the Trust property. Van Auken argues that the beneficiaries have no title to, power over, or duty to the Trust property. That is true. However, Van Auken, as trustee, manages the Trust properties for the benefit of the beneficiaries. When he acts for the Trust, he acts for others than himself.

{5} Our case law is clear that "[t]he practice of law is usually interpreted to entail the representation of others." *United States v. Martinez*, 101 N.M. 423, 423, 684 P.2d 509, 509 (1984). The representation of parties before judicial or administrative bodies constitutes the practice of law. *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 526, 514 P.2d 40, 45 (1973). One who is not a licensed attorney cannot represent others in court. *See Chisholm v. Rueckhaus*, 1997-NMCA-112, ¶ 6, 124 N.M. 255, 948 P.2d 707. Because there are beneficiaries of the Trust other than Van Auken himself, his representation of the Trust results in him representing the interests of others, which is the unauthorized practice of law. *See C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987); *Zeigler v. Nickel*, 75 Cal. Rptr. 2d 312, 314-15

(Dist. Ct. App. 1998). Where one is acting as a fiduciary for the benefit of others, he may not present arguments to a court pro se. *See Steele v. McDonald*, 202 S.W.3d 926, 928 (Tex App. - Waco 2006). It is only where a trustee is the sole beneficiary that the trustee may represent a trust or an estate pro se. *See Tradewinds Hotel, Inc. v. Cochran*, 799 P.2d 60, 66 (Haw. Ct. App. 1990).

{6} Van Auken argues that in this case an attorney would be unable to properly represent the Trust. He apparently bases this argument on his past experiences with attempts to retain counsel. He argues that licensed attorneys as a class in New Mexico refuse to represent him and the Trust against other attorneys who he alleges permitted Trust property to be improperly removed from the Trust. He argues that that refusal acts as a defense against his complaints, preventing him from exercising his duty of loyalty to the Trust. However, simply because Van Auken has been unable to find counsel to represent him does not allow him to engage in the unauthorized practice of law.

{7} For the reasons stated herein and in the notice of proposed disposition, the appeal is dismissed.

{8} IT IS SO ORDERED.

JONATHAN B. SUTIN, Chief Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CELIA FOY CASTILLO, Judge

Pet. App. No. 27 (Miscellaneous Items)
District Court *Hearing Transcript*
(Dismissal Hearing by Judge Sarah Singleton)
Hearing Date: March 17, 2011

STATE OF NEW MEXICO COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT
RICHARD A. VAN AUKEN, Plaintiff,
vs. NO. D-0101-CV-200601509
FLETCHER R. CATRON, et al., Defendant.

TRANSCRIPT OF PROCEEDINGS

On the 17th day of March 2011, at approximately 11:00 a.m., this matter came on for hearing on a MOTION TO DISMISS before the HONORABLE SARAH M. SINGLETON, Judge of the First Judicial District, State of New Mexico, Division II.

The Plaintiff appeared by Counsel of Record, DAVID A. STANDRIDGE, THE STANDRIDGE LAW FIRM, Attorneys at Law, 1516 San Pedro Drive, N.E., Albuquerque, New Mexico 87110.

The Defendants appeared by Counsel of Record, JACK BRANT, LAW OFFICE OF JACK BRANT, P.C., Attorneys at Law, 202 Tulane Drive, S.E., Albuquerque, New Mexico 87106; and GERALD G. DIXON, DIXON, SCHOLL & BAILEY, Attorneys at Law, P.O. Box 26746, Albuquerque, New Mexico 87125; and ANDREW SCHULTZ, RODEY, DICKASON, SLOAN, AKIN & ROBB, Attorneys at Law, P.O. Box 1888, Albuquerque, New Mexico 87103.

At which time the following proceedings were had:

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THE COURT: Let me call the matter of *Richard A. Van Auken vs. Fletcher R. Catron*, D-0101-CV-200601509. Counsel, enter your appearances for the record.

MR. STANDBRIDGE: David Standbridge for the Plaintiff, Richard Van Auken.

THE COURT: For the Defendants?

MR. BRANT: Jack Brant on behalf of Fletcher Catron.

MR. DIXON: Jerry Dixon on behalf of Karen Aubrey,

MR. SCHULTZ: Andrew Schultz for Defendant Peter Wirth.

THE COURT: We're here on Mr. Catron's Motion to Dismiss, that was joined by Peter Wirth, and made some additional points, and by Karen Aubrey, who joined Catron's motion. So who's arguing it?

MR. BRANT: I am going to start, Your Honor. May it Please the Court. Your Honor, this is a Motion to Dismiss under Rule 19 for failure to join an indispensable party, that being the Trust or Trustee of the Burr E. Lee Trust, which is the subject of the lawsuit. I won't spend too much time on the indispensable party issue because I think it's set out clearly in the briefs. And I would argue that it ought even to be a controversial issue, that issue itself, because the lawsuit seeks to determine the nature of the Trust and whether

Mr. Catron, Ms. Aubrey, and others violated duties to the Trustee. And if you don't have the Trust or Trustee as a party, I think it's clear that, No. 1, the interests of the Trust and the Trustee could be affected. So that's one of the prongs under Rule 19 to determine whether a case should go forward if a necessary party isn't there.

The other prong is that the Defendants, my client, Fletcher Catron, could certainly be subjected to further lawsuits. He can't get complete relief

because a determination as to whether he breached duties or whether the Trust said what it said or what the Plaintiffs claim it said wouldn't be binding on the Trust and the Trustee. And, therefore, I think --

THE COURT: Let me ask you more about that. Let's say this case didn't join the Trust and went to judgment, and the judgment was in favor of Mr. Catron. So then the day after that judgment is entered, the Trust comes along and files suit, Trust vs. Catron. Wouldn't the trust be in privity with the Plaintiff in this case?

MR. BRANT: I don't think so. He's sued as a beneficiary of the Trust, and I think the Court of Appeals -- I mean, that's what cued us to file the motion in the first place. I think the Court of Appeals clearly said that they didn't think that the beneficiary necessarily had standing to bind the Trust or the Trustee. It might work the other way around. I think it probably would work the other way around. I don't know that a beneficiary is an agent of a Trustee and, therefore, is in privity or capable of binding the Trustee. So I don't think that it would bar the Trust. In fact, Mr. Van Auken has proved through his actions that he doesn't necessarily think that's true. He has brought other lawsuits on the basis of being a beneficiary. He tried to bring another lawsuit as a Trustee, which also got dismissed. So, I mean, we know from history that it's not going to stop somebody from coming back and filing another lawsuit. So I would argue this is a pretty classic paradigm case for a Rule 19 situation and otherwise -- I don't know whether the Court is concerned about the effect on Mr. Van Auken and whether this would be an unfair result if this lawsuit were dismissed on that basis denying him his day in

Court or whatever. I can talk to the Court about the whole history of this if you want to hear it, but I don't want to burden you with it, if that's not an issue for you.

THE COURT: The fourth element, it seems to me, is whether Plaintiff will have an adequate remedy if the action is dismissed for nonjoinder, so maybe you best address that.

MR. BRANT: The history of this matter is that it goes clear back to 2000. Mr. Van Auken had a remedy with regard to what Mr. Burr Lee did with the property, which was in a probate proceeding. He hired Karen Aubrey. When he didn't like the advice that she gave him, he fired her. Then they sued the woman who received the property and settled with her. So arguably, they have gotten a chance at a remedy there. Then they began filing these lawsuits, three of them now. This is the first one, the one we're here on now, and it was dismissed because Mr. Van Auken didn't have Counsel. He was given by Judge Hall time to get Counsel, failed to get Counsel. The case was dismissed. He filed the second lawsuit by Counsel, and then because he wouldn't take the advice of that Counsel, they withdrew. We know that because Mr. Van Auken put the reasons for their withdrawal into the record in the case even though that would have been otherwise confidential information. Then he filed another lawsuit and has taken us all the way up to the U.S. Supreme Court and back; Motions for Reconsideration again, stubbornly refusing to abide by the Court's ruling that he needs Counsel to proceed in the case.

And so, finally, in this case the Court affirmed that decision again and told Mr. Van Auken that he needed to have Counsel. It came back to this Court,

sat here for over a year, didn't get Counsel. We moved to dismiss the case, and on the eve of the hearing is when Mr. Standbridge finally appeared and moved in.

THE COURT: Who is Mr. Standbridge appearing for? I guess I should ask him.

MR. STANDBRIDGE: The only Plaintiff, as far as I am aware, is Mr. Van Auken, as beneficiary.

THE COURT: They didn't tell me he had to get Counsel in his own right. The Trust has to have Counsel.

MR. BRANT: Right. He came along and attempted to have the Trust intervene in the lawsuit, and that's the motion that Your Honor denied as being untimely. I know Mr. Van Auken is Pro Se. I would argue that he's had the full measure of due process throughout this procedure. Judge Hall bent over backward to accommodate him, the Courts of Appeal have done so, the rulings have been clear and well-founded. It's really not fair for our clients, for Mr. Catron and Ms. Aubrey, to have been required to continue to deal with these claims over and over and over again, given the way that Mr. Van Auken has conducted himself. He's been a perfect gentleman, and he has been very professional to me, but he doesn't seem to listen to the Court's instructions.

So I think it's well within this Court's discretion to demonstrate that he's had his chance at adequate remedies and hasn't taken advantage of them. It's certainly time to end this. It's been going on for ever and ever and ever. That's my argument, Your Honor. I think Mr. Dixon would like to address the Court as well, if you'll permit him.

THE COURT: Yes.

MR. DIXON: May it Please the Court. I think at the outset I would simply say we are in a bit of a quandary because the Court of Appeals was unclear in sending the case back to the Court as to whether Ms. Aubrey -- and I think Mr. Schultz would argue the same for his client -- were still part of this scope of questions that had to be answered by the Court. So out of an abundance of caution, we have joined in this motion. If this Court agrees with us that Ms. Aubrey is out of this case, then I'll sit down. Otherwise --

THE COURT: I don't remember making that determination as to Ms. Aubrey. I sort of remember making it as to Mr. Wirth. I don't remember Ms. Aubrey asking me to decide that so far.

MR. DIXON: Okay. With respect to this motion, it seems clear that not only is the Trustee an indispensable party, perhaps the only party that can assert the claims that Mr. Van Auken is attempting to assert individually as a beneficiary. He wasn't a client of any of the attorneys here; and arguably, his claim is against the Trustee, if anything at all. So for this action to proceed, we believe the Trustee has to be a party. That issue has been determined, although I don't believe Mr. Van Auken's individual claim would go forward. To buttress what Mr. Brant has said, Mr. Van Auken, in his role as Trustee, has had at least three bites at the apple against these Defendants. He's pursued other claims through the probate, and separate action against the person who did receive the assets from the trust. And those issues have all been litigated and settled, and this case has been well briefed and decided by numerous Courts. We believe it's time for this case to end, and the motion ought to be granted. Thank you.

THE COURT: Mr. Schultz, do you have anything to say?

MR. SCHULTZ: Your Honor, briefly, I think you are aware Mr. Meiering has been handling this case and now he's had the good fortune to retire.

THE COURT: I didn't know that.

MR. SCHULTZ: But before he walked out the door, Your Honor, he indicated that he was still a bit unsure. His recollection was that this Court had determined that Mr. Wirth was out of this case, but since that time, Your Honor, we continue to get notices and continue to have motions that are addressed to us. I'm here, Your Honor, truly out of an abundance of caution. We would like to have restated that Mr. Wirth is out of this case, and that we have no need to further participate in any of the proceedings in this case. Otherwise, we fully join Mr. Brant in his motion.

THE COURT: Just like you act out of an abundance of caution, so does my assistant. If somebody appeared once, she'll probably be sending notices not only after they retired, but probably after I retired. No matter what I rule, I can't guarantee you will not get notices. I get your point.

Mr. Standbridge, before you start, let me say there was some observation about being kind to Pro Se litigants, which is, in fact, something I try to do. But we are having a hearing today in this matter out of an attempt to be kind at a Pro Se litigant, because if I had just gone on the papers that were filed, I would have granted the motion because the paper that was filed didn't address any of the issues raised in the motion. So I am giving you an opportunity to make the argument on behalf of the Plaintiff, even

though the Pro Se paper you filed was inadequate, in my opinion.

MR. STANDBRIDGE: I understand, and I appreciate that. If I may, I have a copy of the rule and the cases that we are relying upon.

THE COURT: All right.

MR. STANDBRIDGE: To properly address the Motion to Dismiss under Rule 19, I don't want to belittle the issues, but it's important to address some procedural history. On June 27, 2008, the Court of Appeals issued their Memorandum Opinion indicating that Mr. Van Auken's claims were properly dismissed because he couldn't represent the Trust Pro Se. Then this Motion to Dismiss under Rule 41 and under Rule 19, I believe, were filed on October 7, 2009. My client then filed a motion in an attempt, as already referenced, to intervene as Trustee on December 7, 2009, which this Court denied as being untimely. On December 30, 2009, this Court denied the Motion to Dismiss under Rule 41, but left open this issue under Rule 19. And from what we understand, we are here to address this Rule 19 request to dismiss.

THE COURT: Which is really based on the Court of Appeals' Opinion.

MR. STANDBRIDGE: Correct, the mandate from the Court of Appeals. I'm in agreement because what's really been requested in the Motion to Dismiss, which was filed after the Court of Appeals obviously issued the Memorandum Opinion, was to dismiss this case because in the words of the motion, "The Trust is a necessary party under Rule 19." The old saying goes, "The devil is in the details," and I certainly think that's the situation in this case; because under the Court of Appeal's Memorandum

Decision, which was entered prior to the reported decision of Lee vs. Catron, which provide to the Courts, at 145 New Mexico 573, "We agree that the Defendant correctly cited in the Motion to Dismiss the Court of Appeals' Memorandum Decision in the case." However, the important development between the Court of Appeals' Memorandum Decision in this case and the filing of the Motion to Dismiss under Rule 19 is that Lee vs. Catron case that we cite to. The reason it's important is because in that Lee vs. Catron case, it says the Trust is not a legal entity and cannot be sued or sue. That's important when we are doing an analysis under Rule 19, because under Rule 19 the very first paragraph says, "Persons to be joined if feasible. A person who is subject to service of process shall be joined," and then it goes on to describe the different rules.

My client's contention in this situation is that with the advent of Lee vs. Catron falling after the Court of Appeals' Memorandum Decision, and the Court can look at the Memorandum Decision in this case and throughout, there is no mention of Trustee. It is a complete mention of the Trust being joined as a necessary party in this litigation. The Motion to Dismiss under Rule 19 filed by the Defendant in this case also references joining the Trust as a necessary party because that's what the Court of Appeals said. However, under Rule 19, since our Court of Appeals said a Trust cannot sue and be sued, it is our contention under Rule 19, therefore, is not subject to service of process, and the Court would have to deny this request under the Rule 19 request.

THE COURT: I could just put in the word "Trustee" and I think all the rules remain the same. The Trustee still has to, based on the cases that I

have looked at, still has to be represented by Counsel and can't appear Pro Se.

MR. STANDBRIDGE: Right. I will address that if the Court says you are going to do that. My client does have a position on that. Essentially, under Rule 19, one of the reasons for Rule 19 is to avoid the inefficiency that could result from piecemeal litigation. In fact, in the Motion to Dismiss, the Defendant raises this, essentially, on page five: "This case cannot proceed without affecting the Trust's ability to protect its interest and without possibly subjecting Mr. Catron to multiple or conflicting exposures." So if the Court were to essentially interject Trustee in there, as opposed to Trust, which we believe is an important distinction, we think that under Rule 19 there is a three-part analysis. We gave the Court Armijo vs. Pueblo of Laguna, a 2010 Court of Appeals Decision that outlined a three-part analysis. The first question is if the questioned party is necessary to the litigation. The second question is if that party is necessary, the Court must determine if joinder is possible. The third question is, third and finally, if the party cannot be joined, the Court decides whether in equity and good conscience that party is indispensable to that litigation.

THE COURT: You are looking at Armijo?

MR. STANDBRIDGE: Correct. The first point under that three-part analysis is whether or not the Trustee -- again, if the Court substitutes the language of Trust for Trustee. The Trustee, we contend, is not necessary. The determination that a party is necessary, and this is according to the Armijo case, involves a functional analysis of the effects of the person's absence upon the existing

parties, the absent person, and the judicial process itself. On its face, we would agree the Trustee appears to be necessary, but a deeper analysis shows a Trustee is not necessary in this situation. The amended complaint that was filed on May 11, 2007, alleges facts that arise from an incident in 2004. That's in my client's Second Amended Complaint Revised, if I'm not mistaken. Anyway, the reason I address that is because I think it's clear, and it was raised as an affirmative defense by the Defendant in their answer, that the statute of limitations would be prohibitive on the Trustee bringing another action. The statute of limitations was an affirmative defense raised in this case. And certainly we believe that the effect of the Trustee in this situation has no bearing because any future claim, a new lawsuit in this situation, would be barred by the statute of limitations claim. Therefore, I don't believe that the Defendant would be suffering the possibility of multiple effects of litigation or having inconsistent results. And, therefore, it is our contention that because a new lawsuit by the Trustee could not happen, the Trustee, therefore, being barred from bringing anything, that the Trustee in this situation would not be necessary.

THE COURT: Wouldn't a Trustee have an interest in how the trust documents are interpreted? It's my understanding that that's what your client really wants, is an interpretation of the trust documents. Doesn't the Trustee, on behalf of the Trust, have an interest in how the documents should be interpreted?

MR. STANDBRIDGE: Absolutely. I would agree with the Court. But, on its face, it appears it would be necessary. However, let's play that out. If

my client is in a situation where the Court grants this Motion to Dismiss, the Trustee can't file a new lawsuit. They could, but the possibility of going anywhere is unlikely similarly because the statute of limitations will bar any future actions by the Trustee in this situation.

THE COURT: Why couldn't the Trust bring a declaratory action day after tomorrow asking a Court to interpret the Trust documents?

MR. STANDBRIDGE: Well, the claims that are raised in the complaint, I mean, the first analysis, if we get beyond this, is we have asked the Court to bifurcate the issue. We do agree the first analysis is interpreting that Trust language, assuming that language is interpreted, one way or the other, that we get to the heart of the matter in the complaint for damages for negligence and a slew of other things that have been filed in the Second Amended Complaint. So the mere fact of having the Trust interpreted isn't going to get us to the point of a recoverable damage that my client is seeking, based upon the situation and conduct and actions of the Defendant. So a recoverable action will not be able to go forward if this matter is dismissed with a Trustee.

THE COURT: But won't the interpretation bind the Trust in terms of future actions?

MR. STANDBRIDGE: In terms of future actions, but the complaint is alleged upon actions from 2004. So there is nothing left in the Trust essentially, so it's really things that have been removed from the Trust that my client contends were removed improperly.

THE COURT: Let's play this out. Let's say I interpret the Trust in such a way that those

transactions get set aside. They're brought back into the Trust, right?

MR. STANDBRIDGE: Actually, my client didn't ask for that relief.

THE COURT: What else can happen? If it's only the Trust that can do this, it seems that at least temporarily it has to go back into the Trust.

MR. STANDBRIDGE: The property has been sold, so I don't think that would be feasible; but what my client asked for was an action for fraud, collusion and --

THE COURT: Whatever. It would belong to the Trust, not your client as an individual. That's my point. My point was I wasn't thinking about specific performance or revocation of a deed. The Trust is going to have to distribute it based on some terms which could be interpreted in the course of this litigation, couldn't it?

MR. STANDBRIDGE: I would respectfully disagree because my client's position is that what they are after is a lawsuit against the attorney who gave advice on removal of the place of the Trust. So although the language in the Trust is important, that's not the heart of what this lawsuit is about. Again, I contend that even if the Court dismisses this under Rule 19, the Trustee could bring an action to interpret the Trust, but the nature of what this lawsuit is, the Trustee will be barred under the statute of limitations.

THE COURT: An action against that particular attorney might be barred, is what I think you are saying, but they could, in my opinion, bring an action to interpret the Trust. What happens if that action comes up with a different interpretation than the interpretation that I come up in this case?

MR. STANDBRIDGE: Well, I think if we play that out, and assuming the Court came up with a different interpretation, the question becomes what lawsuits are available to the Trustee and/or the beneficiary, and that could be obviously this Defendant, which we contend would be barred by the statute of limitations. It would also be against Ms. Aubrey, which I would contend is barred by the statute of limitations. So I think any future action, regardless of what the Trust means outside of this litigation, will leave the Trustee in a point of not being able to pursue relief because of statute of limitations. So even if the Court does indicate the Trustee is necessary, we contend that under Rule 19, joinder is possible. I would assert, on behalf of my client, it's not discretionary under Rule 19, particularly under subparagraph A to B. It says in the middle of the paragraph, "If he has not been so joined, the Court shall order that he be made a party."

THE COURT: I think the argument is two-fold. I don't believe they say it would be impossible to join the Trust or Trustee, but your client has frankly screwed around so long, he shouldn't be allowed to at this time.

MR. STANDBRIDGE: I understand that. I agree. I think in the motion I was going to raise the sole obstacle raised by the Defendant, is lack of Trustee being represented. That obstacle, we contend, is no longer in existence because I stand here ready to represent the Trustee. I know the Court had denied that motion, but our position is under Rule 19, joinder is possible and, in fact, not discretionary --

THE COURT: You have to remind me what motion you are talking about.

MR. STANDBRIDGE: Sure. I apologize. We had filed, back in December 7, 2009, a motion to allow the Trustee to intervene, and the Court denied that motion as being untimely. The denial of that motion was in an Order dated July 30, 2010.

THE COURT: I thought you said I denied your motion to be attorney for the Trust, and I didn't remember doing that.

MR. STANDBRIDGE: No, I didn't mean to imply that. Under Golden Oil Company, 128 New Mexico 526, the Court of Appeals stated, "We observed that joinder is formally feasible, however, it may become unfeasible if it is somehow precluded by jurisdictional barriers." We contend there are no jurisdictional barriers that would preclude the joinder of the Trustee in this litigation. We think that by the filing of this motion under Rule 19, we think joinder can happen, and that, in fact, the Court shall order that the Trustee be appointed. I think the Defendant's Motion to Dismiss raises the fact that the Court is now in a position where we do need to join the Trustee. And the Court -- our suggestion is not discretionary, but is obligated to join the Trustee. We would contend also, Your Honor, that if the Court goes on to make whether or not the party is indispensable, we would contend the Trustee is not indispensable to this litigation. I will not belittle the points that we have raised, but there is absolutely no other remedy that would be available because of the statute of limitations, should this matter be dismissed under Rule 19. I think the Defendant, the sole reason they raise their concern under Rule 19, is because they are afraid of multiple potential

outcomes. I don't think that argument has merit in this situation, and that even a judgment in this situation without the Trustee would be adequate, given the current state of law of what it says about a Trust and that not being a legal entity to sue or be sued.

So, my client is asking the Court to deny the Motion to Dismiss under Rule 19, particularly because we do believe that Rule 19 indicates the Trust cannot be made a party to this lawsuit, particularly in light of Lee vs. Catron. And if the Court does say that the Court of Appeals meant Trustee and not using that language, then we would contend that Rule 19 is not invoking this situation because the Trustee is not necessary and that joinder is possible in this situation. If we look at it from a realistic perspective, should this lawsuit be dismissed, this lawsuit effectively goes away because of the timing of the situation, and my client, up until we filed our Motion to Intervene as Trustee has been pursuing. I don't agree with everything that's been done, and I am not going to say I took this case based on what he did, but we are trying to move this case forward to get the final meaning of that Trust. Thank you.

THE COURT: Mr. Brant, you need to address Trust versus Trustee distinction, please.

MR. BRANT: In that case that Mr. Standbridge cited, Lee vs. Catron, 2009 NMCA 18, the Court goes on, after saying technically the trust is not a legal entity, it says, "Whether or not a Trust is a legal entity does not answer the question. The answer turns upon the Trustee himself. It is clear that the Trustee is to administer the Trust solely in the interest of the beneficiaries. Plus, a Trustee is

acting on behalf of others who are beneficiaries of the Trust property. Thus, a Trustee is acting on behalf of others who are beneficiaries of the Trust property. Van Auken argues that the beneficiaries have no title to power over or duty to the Trust property. That is true. However, Van Auken, as Trustee, manages the Trust properties for the benefit of the beneficiaries when he acts for the Trust. He acts for others than himself." I think what the Court basically said there is what you just said, which is, technically speaking, maybe a trust is not an entity, and the word should be Trustee; but I don't think that's a reasonable distinction to deny this motion.

THE COURT: So you wouldn't object if I interpreted your motion to say the Trustee was a necessary party?

MR. BRANT: Not at all. In fact, I thought I had used the term Trust/Trustee. I did use it in my argument because I think they are essentially identical. I don't think that would be inappropriate at all. I would agree with that.

Two other points that he makes: One, I frankly don't understand if the statute of limitations has run as to the Trustee. How could the beneficiary who is basically bringing this on behalf of the Trust or on behalf of the Trustee still have a viable cause of action? That lost me.

THE COURT: Because he filed before the statute ran. And if the Trustee files a new suit, he's not going to get the benefit of the relation back doctrine. He's going to be filing as of, you know, March 18, 2011, not whenever this case was filed. That's my understanding.

MR. BRANT: I will admit, honestly, that I am buffaloed by that whole argument. And I can't figure it out, but I'm sure with time I would be able to.

The third point I would make is he says the Trust could be joined. They moved to intervene; you denied their motion. I wanted to remind the Court that they moved to reconsider that decision, and you denied their Motion for Reconsideration. So you have twice before said, "I am not going to allow them to come back in." So I think that you have ruled, and you have considered it. It has been fully briefed, it's been argued. Basically they're asking you for a third time to reconsider your decision. I would request that you not do that. I think you've already made that decision. It was a well-founded decision, and it was fully within your discretion, and that ought to be the Court's ruling on that.

MR. STANDBRIDGE: May I reply?

THE COURT: Not really.

MR. STANDBRIDGE: Okay.

THE COURT: I'm looking at my Order of July 2010 where I denied the Motion to Intervene; Is that right?

MR. STANDBRIDGE: Correct.

MR. BRANT: There was also an Order of October 29, 2010, denying the Motion to Reconsider. That's the July 30th Order.

THE COURT: Mr. Schultz, by the way, the Order of October 29, 2010 is where I said the claims against your client were dismissed with prejudice. I might have been wrong, but that is what I said.

MR. SCHULTZ: Thank you, Your Honor.

THE COURT: And I didn't make the same statement about Ms. Aubrey. So I have, all along, thought she was still involved in the matter.

Well, on the issue of whether or not the Trustee, and I am going to construe the motion as being one which says the Trustee is a necessary party, so on that issue I am going to rule that it is a necessary party. To me, at least one important aspect of the current case is how to interpret the Trust documents. I believe that the Trust has an inherent interest in how that is done, so I do believe that it is not possible to protect the Trust's interests if it's not a party, at least its interest in how the Trust's documents are construed.

As to whether or not the statute of limitations would bar any subsequent suit by the Trustee on the claims of damages that are made in this case, while it offhandedly strikes me they might be barred, there are too many ways of getting around the statute of limitations for me to feel secure in saying that would be a basis for determining, as a matter of law, that there is no chance of an inconsistent verdict or judgment as it would relate to the Defendants who are left in this case. So, for those reasons, I believe that the criteria are met. I don't think that the lead case is setting forth that many different -- not lead, it's the Armijo case -- really setting forth that many different things than what I have been asked by the Court of Appeals to look at; but to the extent that it did set forth something different, I find that the criteria set forth in Armijo have been met.

And then looking at what the Court of Appeals in this case said, in which I was mandated to follow, in the absence of a Trust, might a judgment be prejudicial to the Trust or to those who are already parties, I think I have answered that one in the affirmative. To what extent could protective measures in the judgment lessen the prejudice, I

don't believe, if the Trustee is not a party, that he would, in fact, be bound by something done in this action by the beneficiary. I think Mr. Brant is right that, in essence, the Court has already said that the beneficiary doesn't have standing to bind the Trust or the Trustee.

The third criteria was whether a judgment rendered in the absence of the Trust will be adequate. If we have a judgment entered, and if the Trust were later to come in and argue for a different interpretation of the Trust document, since the beneficiary's argument can't bind the Trustee and the Trust, it would seem to me that the judgment in this case would be inadequate because no one would have any assurance that the interpretation would be given lasting effect.

Fourth, whether Plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Well, here, I do believe the Plaintiff has had numerous opportunities to get recompense for the wrong that he seeks, so I think the fourth criteria has been met. So I believe that the Trustee is a necessary party.

Let's talk about whether or not the Trustee should be joined. I don't believe there is any legal impediment to joining the Trustee. It's not like the Indian tribes that were involved in the Armijo case or Laguna case. The only impediment to joining the Trustee would be the prior orders that I think have been issued by Judge Hall. All of them are based essentially on the same principal, that it was probably in 2006 when Plaintiff was first told he needed to get a lawyer to represent the Trust/Trustee, and he refused to do it. I know that was something that concerned me when I issued the

motion on reconsideration because it just seems as though it was pigheadedness not to do it. I mean, you are given a direction by a Court, and it's easy to comply with, and he doesn't do it. And here we are, not quite five years but more than four years after the date when that Order was first given. At some point, I think you have to weigh the equities here. Who do the equities favor in this case? Well, in my opinion, they favor the Defendants because of the way the Plaintiff has conducted himself. He has refused to follow Court Orders in a timely fashion for reasons that don't seem to bear rational scrutiny. So for that reason, I am granting the Motion to Dismiss. Who wants to draft the Order?

MR. BRANT: I will, Your Honor.

THE COURT: Mr. Brant, draft the Order. Circulate it to all Counsel. How long do you need to do that?

MR. BRANT: A week.

THE COURT: In a week, circulate it. If everybody can sign off on it as to form, go ahead and get it to me. If you can't sign off on it as to form, then anyone who declines to sign it, what I want to have happen is two weeks from today, I want Mr. Brant to file his Notice of Filing of Proposed Order with his proposed Order attached indicating who has approved it. Anyone who has not approved it at the same time, that's two weeks from today, will file either objections to the proposed Order alerting me to what they think is wrong with it, or they will file their own Notice of Filing of Counterproposal as to form. If you wouldn't mind filing those with the Clerk's office and e-mailing them to me, then I would appreciate it. I don't think there is anything further that we need to do in this case.

MR. DIXON: This is a dismissal with prejudice?

THE COURT: Yes. We'll be in recess.

(Note: Court in recess at 12:00 p.m.)

STATE OF NEW MEXICO)) ss.
COUNTY OF SANTA FE)

I, BRENDA CASIAS, Official Court Reporter for the First Judicial District of New Mexico, hereby certify that I reported, to the best of my ability, the proceedings in D-0101-CV-200601509; that the pages numbered TR-1 through TR-27, inclusive, are a true and correct transcript of my stenographic notes, and were reduced to typewritten transcript through Computer-Aided Transcription; that on the date I reported these proceedings, I was a New Mexico Certified Court Reporter.

April 2011.

Dated at Santa Fe, New Mexico, this 25th day of

_____

BRENDA CASIAS New Mexico CCR No. 119 Expires: December 31, 2011

Total cost of this transcript is: $91.41 [26 pgs @ $3.25 per page plus NMGRT @ 8.1875%]

Pet. App. No. 28 (Miscellaneous Items)
District Court *Order Granting Injunctive Relief*
(Issued by Judge Barbara J. Vigil)
Date Entered: November 1, 2011

FILED IN MY OFFICE DISTRICT COURT CLERK
11/1/2011 11:42:48 AM STEPHEN T. PACHECO MRN

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

CASE NO. CV-2011-01917

SETON FAMILY TRUST INTERESTS by
TRUSTEE, Richard A. Van Auken; and
JUDITH ALEXANDER, Beneficiary,
CAROL LEE DOEDEN, Beneficiary,
BETSY LEE JOPPE, Beneficiary,
JEFF NEUMAN-LEE, Beneficiary,
GRETCHEN VAN AUKEN, Beneficiary,
SUSAN VAN AUKEN, Beneficiary, and
RICHARD A. VAN AUKEN, Beneficiary;
Plaintiffs,

vs.

FLETCHER R. CATRON, ESQ.;
Defendant.

ORDER GRANTING INJUNCTIVE RELIEF

This matter having come before the Court upon Defendant Fletcher Catron's Motion for Injunctive Relief; the Court having reviewed the motion, the response, and the reply thereto; having considered the arguments of counsel for the parties at the hearing held in this matter on October 6, 2011; and being fully advised in the premises,

IT IS HEREBY ORDERED that Mr. Catron's Motion for Injunctive Relief is granted; and plaintiff Richard Van Auken is hereby permanently enjoined from (1) filing any civil or criminal action against Fletcher R. Catron in any state or federal court in the State of New Mexico, or (2) filing any pleading or paper in any existing action in any such court, unless he is represented by an attorney licensed to practice law in the State of New Mexico and a court in the state of New Mexico grants such counsel permission to file such action, pleading or paper, after notice and an opportunity to be heard on counsel's application has been provided to Fletcher R. Catron.

[S I G N E D]
The Honorable Barbara J. Vigil

Submitted by:

/s/ Electronic Transmission
John M. Brant
Counsel for Fletcher R. Catron

Approved as to form:

via email 10/31/11
David A. Standridge
Counsel for Richard Van Auken