**[Cite as *Holdren v. Garrett*, 2011-Ohio-1095.]**

**[Please see original opinion at 2010-Ohio-6295.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|---|---|---|
| Charles A. Holdren, Trustee of the Cecil W. Garrett Trust, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 09AP-1153 |
| | : | (Prob. No. 523179A) |
| Wesley L. Garrett, Individually and as Former Trustee of Cecil W. Garrett Trust, | : | (REGULAR CALENDAR) |
| Defendant/Third-Party Plaintiff-Appellant, | : | |
| v. | : | |
| Patricia Westfall et al., | : | |
| Third-Party Defendants-Appellees. | : | |

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D E C I S I O N

Rendered on March 10, 2011

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*Snider, Barrett, Easterday, Cunningham & Eselgroth LLP, Jeffrey A. Easterday* and *Troy A. Callicoat*, for plaintiff-appellee.

*Stebelton, Aranda & Snider*, and *Daniel J. Fruth*, for defendant-appellant.

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ON MOTION FOR RECONSIDERATION

DORRIAN, J.

**{¶1}** This case comes before this court following a motion for reconsideration filed by defendant-appellant, Wesley L. Garrett ("appellant"). Appellant sought reconsideration of our decision of December 21, 2010, *Holdren v. Garrett*, 10th Dist. No. 09AP-1153, 2010-Ohio-6295, which reversed in part the trial court's denial of appellant's motion for summary judgment and remanded for further proceedings related to that motion. For the reasons that follow, we grant the motion for reconsideration and affirm as to appellant's third assignment of error.

**{¶2}** Appellant's motion for reconsideration directs this court's attention to the third assignment of error. The initial appeal presented three assignments of error for this court's review:

> Appellant's First Assignment of Error:
>
> The Trial Court erred to the prejudice of Appellant, Wesley Garrett, individually and as Trustee of the Cecil W. Garrett Trust, as a matter of law, in denying Appellant's Motion for Summary Judgment as the applicable statute of limitations bars the Plaintiff's claims herein.
>
> Appellant's Second Assignment of Error:
>
> The Trial Court erred to the prejudice of Appellant, Wesley Garrett, individually and as Trustee of the Cecil W. Garrett Trust, in its award and calculation of damages.
>
> Appellant's Third Assignment of Error:
>
> The Trial Court erred to the prejudice of Appellant, Wesley Garrett, individually and as Trustee of the Cecil W. Garrett Trust, by not ruling upon and/or implicitly denying Appellant's Motion for Summary Judgment on his claim for declaratory relief.

**{¶3}** This court's prior decision sustained the first assignment of error to the extent that a factual determination was necessary with respect to the statute of limitations defense. The court remanded the case for further proceedings on that issue. The court also concluded that disposition of the first assignment of error rendered moot the remaining assignments of error. *Holdren* at ¶19.

**{¶4}** A motion for reconsideration is permitted under App.R. 26. "The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for reconsideration that either was not considered or was not fully considered when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143.

**{¶5}** Appellant's first two assignments of error are related to appellees' claims[1] against appellant. The third assignment of error, by contrast, is related to appellant's counterclaim/third-party claim for declaratory relief. Although all of these claims relate to rights and obligations under the trust agreement, appellant's counterclaim/third-party claim is distinct and unique from the appellees' claims. As explained below, appellees' claims involve alleged violations of appellant's duties as a trustee. Appellant's counterclaim/third-party claim relates to interpretation of a specific clause in the trust agreement and a right created by that clause. Appellant's counterclaim/third-party claim does not depend on the success or failure of his defenses against appellees' claims. Further, none of the appellees asserted that the statute of limitations for appellant's counterclaim/third-party claim had expired. Therefore, we find that remanding for further

[1] Ralph Westfall, Patricia Westfall's husband, is the successor trustee who originally filed this action. During the course of litigation, Ralph was removed as trustee and replaced by his and Patricia's son, Charles Holdren. Third-party defendants-appellees Patricia Westfall, Virginia Westfall and Cecilia Garrett, and plaintiff-appellee Charles Holdren are referred to collectively herein as "appellees."

proceedings on the appellant's statute of limitations defense against appellees' claims does not moot appellant's assignment of error related to his declaratory relief claim. The motion for reconsideration is granted because appellant's third assignment of error was not fully considered when it should have been.

**{¶6}** This action arises out of a revocable inter vivos trust ("the Trust") established by Cecil W. Garrett ("Cecil"), through a trust agreement entered on September 17, 1980 ("the Trust Agreement"). The Trust was funded with real property, consisting primarily of a family farm. Cecil's wife, Alice A. Garrett ("Alice"), was the income beneficiary of the trust during her lifetime, and appellant and his sisters, Cecilia Garrett ("Cecilia"), Patricia Westfall ("Patricia"), and Virginia Westfall ("Virginia") were designated as beneficiaries upon Alice's death. When created, the Trust named The Huntington National Bank as trustee. The Trust was amended on January 21, 1985, and William Owens was designated as trustee. The trust was amended again on May 2, 1985 ("the May 1985 amendment"). Cecil died on February 28, 1986, and on October 26, 1989, with Alice's consent, appellant was appointed trustee. Alice died on December 1, 2004.

**{¶7}** The Trust Agreement included a clause providing appellant with a two-year option to purchase the farm from the Trust ("the purchase option clause"). The purchase option clause was part of the original Trust Agreement and was modified by the May 1985 amendment. Interpretation of the purchase option clause forms the heart of appellant's third assignment of error. On November 30, 2006, within two years after Alice's death, appellant sought to exercise the option to purchase the farm. Cecilia, Patricia, and

Virginia responded by asserting that appellant's option to purchase the farm expired in 1988, two years after Cecil's death.

**{¶8}** On or about December 5, 2006, appellant was removed as trustee. On June 20, 2007, a successor trustee filed a complaint against appellant requesting a trust accounting and alleging breach of trust and/or fiduciary duty, breach of loyalty and/or good faith, and conversion/concealment of assets. Appellant filed an answer and asserted a counterclaim against the successor trustee and third-party claims against Cecilia, Patricia, and Virginia. The counterclaim/third-party claim sought declaratory judgment that the purchase option clause was triggered by the death of the last to die of Cecil or Alice and that appellant's attempt to exercise the option in November 2006 was sufficient under the terms of the Trust Agreement. Cecilia, Patricia, and Virginia answered the third-party complaint and asserted counterclaims consistent with the successor trustee's original claims against appellant.

**{¶9}** This case was heard before a magistrate of the Franklin County Court of Common Pleas, Probate Division, on August 15, 18, and 19, 2008. Prior to the trial, on July 11, 2008, appellant filed a motion for summary judgment asserting that appellees' claims were barred by the statute of limitations, that appellees lacked standing to make their claims, and that appellant was entitled to judgment as a matter of law on his counterclaim/third-party claim for declaratory relief. The magistrate did not rule on appellant's motion for summary judgment prior to trial, and the magistrate's decision made no reference to appellant's motion for summary judgment. Additionally, the magistrate's decision did not include a ruling on appellant's counterclaim/third-party claim.

Appellant filed objections to the magistrate's decision, including failure to rule on and failure to grant his motion for summary judgment.

**{¶10}** Consistent with this court's precedent, the trial court concluded that appellant's motion for summary judgment had been implicitly overruled. See *Am. Business Mtge. Servs., Inc. v. Barclay*, 10th Dist. No. 04AP-68, 2004-Ohio-6725, ¶8. The trial court held that the magistrate had not erred by implicitly denying the motion for summary judgment. (Oct. 19, 2009 Decision at 13.) However, the trial court proceeded to consider the merits of appellant's declaratory relief claim. The trial court concluded that declaratory relief was not appropriate and that appellant's counterclaim/third-party claim "should be dismissed." (Decision at 14.) This decision was incorporated into the trial court's final judgment entry, issued on November 16, 2009. The court subsequently issued an amended judgment entry on December 2, 2009, which made changes related to the amounts awarded for interest, attorney fees, and costs, but contained no changes related to appellant's counterclaim/third-party claim. Appellant filed this appeal, seeking, in part, review of the denial of summary judgment on his counterclaim/third-party claim for declaratory relief.

**{¶11}** As an introductory matter, we must determine whether this court has jurisdiction over an appeal related to appellant's counterclaim/third-party claim. Even when jurisdiction is not raised by the parties, an appellate court may consider the issue on its own motion. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544, 1997-Ohio-366. The judgment entry below incorporates the trial court's decision on the objections to the magistrate's decision, in which the trial court determined that appellant's counterclaim/third-party claim "should be" dismissed. However, the judgment

entry does not contain an express denial or dismissal of the counterclaim/third-party claim. Although the text of the decision indicates that the trial court intended to dismiss the counterclaim/third-party claim, the court failed to include this relief in the judgment entry. "A decision announces what the judgment will be. The judgment entry unequivocally orders the relief." *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 216. Here, the judgment entry does not dispose of appellant's counterclaim/third-party claim and, therefore, it does not constitute a final appealable order with respect to the counterclaim/third-party claim. See, e.g., *Gooden v. Anderson*, 9th Dist. No. 24419, 2009-Ohio-1983, ¶7 (finding no appealable order as to a counterclaim where a trial court overruled defendant's objection to a magistrate's decision on the primary claim and adopted the magistrate's decision as to that claim, but failed to address the counterclaim in its decision).

**{¶12}** Despite the fact that the judgment entry does not constitute a final appealable order with respect to appellant's counterclaim/third-party claim, this court has jurisdiction over the third assignment of error as presented. Appellant does not appeal from the court's judgment entry but, rather, from the implicit denial of his motion for summary judgment. The trial court concluded that the magistrate had implicitly denied appellant's motion for summary judgment, and by adopting the magistrate's decision the trial court adopted this denial of appellant's motion. Denial of a motion for summary judgment is generally not a final appealable order. *Carter v. Complete Gen. Constr. Co.*, 10th Dist. No. 08AP-309, 2008-Ohio-6308, ¶8, citing *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89. However, "an appellate court may review a denial of a motion seeking summary judgment on a pure question of law regardless of the movant's lack of success

at trial." *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶14. Interpretation of a written instrument, such as the Trust Agreement, is a matter of law. See *McCoy v. AFTI Properties, Inc.*, 10th Dist. No. 07AP-713, 2008-Ohio-2304, ¶8.

**{¶13}** *Capella III* involved a claim that the trial court erred in denying a motion for summary judgment. This court noted that despite the general rule that denial of summary judgment is not a final appealable order, "error in the denial of a summary-judgment motion that presents a purely legal question is not rendered harmless by a subsequent trial on the merits." *Capella III* at ¶14, citing *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 158. In that case, as in the present appeal, the motion for summary judgment was based on a legal issue and did not depend on disputed issues of material fact. Therefore, the court proceeded to consider the argument that the trial court should have granted summary judgment.

**{¶14}** "Appellate review of summary-judgment motions is de novo." *Capella III* at ¶16, citing *Andersen v. Highland House Co.* (2001), 93 Ohio St.3d 547, 548. "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶9 (internal citations omitted). Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Cappella III* at ¶16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

**{¶15}** The purchase option clause at issue in the original Trust Agreement provided as follows:

> I direct my Trustee to give my son, Wesley Garrett, the exclusive right and option to purchase all or part of the farm lands and farm equipment formerly owned by me at the appraisal price in my estate, and the portion of the farm that is held by the trust by reason of my spouse's death shall be set at the value appraised in my estate. It is my intent that my son shall have the exclusive right and option to purchase said real estate and equipment at the above stated value and he shall have two (2) years following my death to exercise this option.

(Trust Agreement at 20.)

**{¶16}** The May 1985 amendment added the language emphasized below to the Trust Agreement:

> I direct my Trustee to give my son, Wesley Garrett, the exclusive right and option to purchase all or part of the farm lands and farm equipment formerly owned by me at the appraisal price in my estate, and the portion of the farm that is held by the trust by reason of my spouse's death shall be set at the value appraised in my estate. *Notwithstanding the fact that my spouse may predecease me,* it is my intent that my son shall have the exclusive right and option to purchase said real estate and equipment at the above stated value and he shall have two (2) years following my death to exercise this option.

(Emphasis added.) (Second Amendment to Trust Agreement at 4-5.)

**{¶17}** Appellant asserts that one goal in forming the Trust Agreement was to ensure that appellant had an opportunity to purchase the family farm after his parents' death. Specifically, appellant claims that the intention animating the purchase option clause was to allow appellant to purchase the farm within two years of the death of Cecil or Alice, whichever occurred later. In opposition, appellees argue that the language of the purchase option clause, specifically the use of the phrase "my death," indicates that the

option was to be effective during the two years after Cecil's death and therefore expired in 1988.

**{¶18}** "The fundamental tenet for construction of a will or trust is to ascertain, within the bounds of the law, the intent of the grantor or settlor." *Ruscilli v. Ruscilli* (1993), 90 Ohio App.3d 753, 757, citing *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, paragraph one of the syllabus. When the language in a trust is unambiguous, the grantor's intent can be determined from the express terms of the trust itself. Id. When a trust agreement is unambiguous, no judicial construction or interpretation is required unless the purpose of the trust is illegal or against public policy. *Ohio Home Builders Assn. v. Homes of Tradition, Inc.* (Mar. 31, 1992), 10th Dist. No. 91AP-863.

**{¶19}** First, we will consider whether the purchase option clause is ambiguous. Appellant asserts that the language of the purchase option clause creates ambiguity and that the clause should be construed to mean that the death of his last surviving parent triggered the two-year option period. If appellant's interpretation prevails, then it appears that his attempt to exercise the option in November 2006 would have been timely. Appellant argues that the structure of the Trust Agreement, the language used within the Trust Agreement, and the stated intentions of Cecil and Alice, as evidenced by conversations with their banker, reflect an intent to ensure that appellant would have an opportunity to purchase the farm.

**{¶20}** "Language is ambiguous if the words of a writing are 'susceptible to two or more reasonable interpretations.' " *Davidson v. Davidson* (Nov. 19, 1998), 10th Dist. No. 98AP-324, quoting *Dorsey v. Contemporary Obstetrics & Gynecology* (1996), 113 Ohio App.3d 75, 84. " 'Common words appearing in a written instrument will be given their

ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.' " Id., quoting *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, at paragraph two of the syllabus.

**{¶21}** In *Davidson*, this court addressed a distribution clause in a trust agreement providing, in relevant part, that the assets were to be distributed among the members of a specified class who were "entitled" to income. The trial court concluded that this clause was unambiguous and that all individuals named in the class were entitled to income payments at the trustee's discretion. The appellant challenged the trial court's reading of the clause, arguing that "entitled" meant only those who had a right to receive distribution from the trust and a right to sue for distribution from the trust. This court affirmed the trial court, noting that the ordinary meaning of the word "entitle" was broader than the appellant's "limited and constrained definition." Id.

**{¶22}** The key language in the purchase option clause is the phrase "my death." Appellant's position requires this phrase to effectively be read as "the later of my death or my spouse's death." In contrast to *Davidson*, appellant seeks a much broader reading of the relevant term, but in both cases we look to the ordinary meaning of the disputed phrase. "My death" is a common term and is commonly understood to mean the death of the speaker or writer of the words. See, e.g., *In re Estate of Evans* (1956), 165 Ohio St. 27, paragraph two of the syllabus (holding that a bequest of "all cash in the box on the desk in the back room of my home" is unambiguous and refers to whatever cash was in the box located on the desk in the testator's home at the time of his death). Because the

term "my death" is only susceptible to one reasonable interpretation, we find that the purchase option clause is unambiguous.

**{¶23}** Next, we consider whether some other meaning that is "clearly evidenced from the face or overall contents" of the Trust Agreement requires us to construe the purchase option clause to mean that the purchase option was to be effective upon the later of the death of Cecil or Alice.

**{¶24}** Appellant asserts that the placement of the purchase option clause supports his interpretation. The clause is located under Article VI of the Trust Agreement, which governs what shall occur "[u]pon the death of the Grantor's spouse, or upon the death of the Grantor if said spouse shall have predeceased the Grantor." Appellant argues that if the purchase option was to be triggered only by Cecil's death, it should have been placed under Article V of the Trust Agreement, governing events "[u]pon the death of the Grantor survived by Grantor's spouse." However, it could just as plausibly be argued that using the term "my death" and placing the purchase option clause in Article VI meant that appellant would only have an option to purchase the farm following Cecil's death on the condition that Cecil must have survived Alice (i.e., "upon the death of the Grantor if said spouse shall have predeceased the Grantor"). While we agree with the trial court that the placement of the purchase option clause is odd and does not contribute to clarity, we cannot conclude that it provides clear evidence that the term "my death" should be given a broader meaning than those words would normally have.

**{¶25}** Appellant also asserts that the May 1985 amendment, which added the phrase "[n]otwithstanding the fact that my spouse may predecease me" to the purchase option clause, proves that Cecil recognized the ambiguity in the Trust Agreement and

sought to cure it by amendment. However, we note that the May 1985 amendment appears to further clarify that the purchase option clause would be triggered by Cecil's death, not Alice's death. Adding the phrase "[n]othwithstanding the fact that my wife may predecease me" acknowledges that Alice might die before Cecil, and yet the purchase option would still be triggered by "my [i.e., Cecil's] death." This amendment seems to provide that if Alice died before Cecil, appellant would not have the right to purchase the farm until Cecil's subsequent death. The amendment does nothing to clarify what was to result if Cecil predeceased Alice, which is what actually occurred.

**{¶26}** Moreover, the fact that the purchase price under the purchase option clause was set at the appraisal price in Cecil's estate suggests that the purchase option was to be triggered by Cecil's death. It would be reasonable to maintain the value set in Cecil's estate for two years after Cecil's death. If the purchase option was triggered by Alice's death at some point after Cecil's death, however, this would potentially skew the value of the property because Alice could survive any number of years beyond Cecil—as actually occurred in this case. Appellant's reading of the purchase option clause would dictate that he could purchase the farm in 2006 at the value set following Cecil's death 20 years earlier. Such a reading would potentially create a windfall for appellant, and is not consistent with the otherwise generally equal treatment afforded to appellant and his sisters under the Trust Agreement—e.g., the provision that, after the death of both parents, the Trust was to be divided into as many equal trust funds as there were then-living or deceased children of Cecil. (Trust Agreement at 21.)

**{¶27}** Thus, we conclude that the purchase option clause is unambiguous and was intended to be triggered by Cecil's death. We find no support for appellant's position clearly evidenced from the face or overall contents of the Trust Agreement.

**{¶28}** Appellant asserts that the preference for construing a trust to ensure that the settlor's intent is achieved is so strong that the General Assembly empowered probate courts under R.C. 5804.15 to reform the terms of a trust, even if they are unambiguous, to achieve the settlor's intent. (Appellant's amended brief at 24.) However, this statute requires clear and convincing proof of both the settlor's intent and that "the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." R.C. 5804.15. "[A] mistake of fact exists when one understands a fact to be different than it actually is." *In re Estate of Werner* (1985), 25 Ohio App.3d 31, 34. "A mistake of law occurs where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect." *Nationwide Life Ins. Co. v. Myers* (1980), 67 Ohio App.2d 98, 102-03, quoting *Am. Oil Serv., Inc. v. Hope Oil Co.* (1965), 233 Cal.App.2d 822, 830. Appellant has shown no evidence of any mistake of fact or law in the use of the term "my death" as the trigger for the purchase option clause.

**{¶29}** Finally, appellant offered extrinsic evidence to support his theory that the purchase option clause was tied to the death of the later of Cecil or Alice, in the form of testimony from a banker who worked with Cecil and Alice. Based on our finding that the purchase option clause is unambiguous, we confine our review to the express terms of the Trust Agreement itself. See *Ruscilli* at 757.

**{¶30}** For the foregoing reasons, we find that appellant was not entitled to judgment as a matter of law on his declaratory relief claim. Therefore, the third assignment of error is overruled, and the denial of appellant's motion for summary judgment on his counterclaim/third-party claim is affirmed. This court's prior decision, *Holdren v. Garrett*, 10th Dist. No. 09AP-1153, 2010-Ohio-6295, remains in force as to the first and second assignments of error, and the action is remanded for further proceedings in accordance with law and consistent with that decision as to the first assignment of error. The matter is also remanded for clarification of the judgment entry with respect to a final ruling on appellant's counterclaim/third-party claim.

*Motion to reconsider granted; judgment reversed in part and affirmed in part; cause remanded.*

FRENCH and CONNOR, JJ., concur.

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