NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0950

IN THE MATTER OF THE LUCY E. CRUMHOLT TRUST

Judgment Rendered: JUL 24 2013

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 525,217

The Honorable Kay Bates, Judge Presiding

* * * * *

Thomas M. Lockwood Baton Rouge, Louisiana	Attorney for Plaintiffs/Appellees, Elizabeth Ann Herrington Crumholt, Freda Wayne Crumholt Mayahi, and Elizabeth Ann Crumholt
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Walton J. Barnes, II Greenwell Springs, Louisiana	Attorney for Defendant/Appellant, Gillie Clifton Crumholt, III

* * * * *

BEFORE: PARRO, WELCH, AND KLINE,[1] JJ.

[1] Judge William F. Kline, Jr., retired, serving *ad hoc* by special appointment of the Louisiana Supreme Court.

Parro, J. concurs without reasons by WFK

KLINE, J.

Gillie Clifton Crumholt, III ("Cliff Crumholt") was appointed the trustee of a trust set up by his mother, Lucy E. Crumholt, naming herself as sole lifetime beneficiary, with her four children as secondary beneficiaries. Plaintiffs, numerous beneficiaries, filed suit against Cliff Crumholt for his failure to provide an accounting, breach of trust, conversion, and for monetary damages. This matter proceeded to a jury trial and judgment was rendered against him. Cliff Crumholt now appeals. We amend the judgment and affirm, as amended.

FACTS AND PROCEDURAL HISTORY

On September 29, 1981, Lucy E. Crumholt ("Lucy") formed a corporation known as LEC Minerals & Investments, Inc. ("LEC"). On May 5, 1982, Lucy formed a trust known as the "Lucy E. Crumholt Trust" (the "Trust" or "Trust Agreement"). Lucy was the sole beneficiary of the Trust during her lifetime. The secondary beneficiaries of the Trust were Lucy's four children, Freddy Wayne Crumholt,[2] Totsy Joy Crumholt Lyons, Grace Jo Ann Crumholt Shipp, and Cliff Crumholt. Upon Lucy's death, the secondary beneficiaries were entitled to take and receive from the Trust, in which event the co-trustees were to divide the principal equally with one share for each secondary beneficiary. The Trust Agreement also provided that should any of her four children predecease her, their descendants should represent their ancestor. Cliff Crumholt and John Butler, an accountant for Lucy, were named as co-trustees of the Trust.

On October 10, 1985, Freddy predeceased his mother, Lucy. On October 3, 1986, Lucy amended the Trust to substitute as beneficiaries Lenora Margaret

[2] Throughout the record, "Freddy" is interchangeably spelled as "Freddie." The original Trust Agreement spells his name "Freddy," which this court will use.

Crumholt, Elizabeth Ann Crumholt, and Freda Wayne Crumholt Mayahi,[3] children of Freddy. Lucy also delivered to the Trust 1000 shares of no par value stock in LEC and any and all mineral interests in a described 238 acres of land and a described 640 acres of land.

Totsy also predeceased her mother,[4] leaving her five surviving children, John A. Chelette, Jr., Michael Dean Chelette, Paul A.C. Lyons, Lisa Lyons Landers, and Cynthia Jill Lyons Hubbard. The five children of Totsy became beneficiaries to the Trust by operation of the provisions of the Trust.

Lucy died on September 13, 1990. John Butler eventually resigned his duties as co-trustee, leaving Cliff Crumholt as the sole trustee.

PROCEDURAL BACKGROUND

On October 4, 2004, Freda and Elizabeth Ann[5] filed suit against Cliff Crumholt seeking to have the court remove him as trustee, claiming that he did not submit the proper accountings for all periods after October 31, 2000, as required by the Trust, and that he did not make any distributions of income or principal as required by the purpose of the Trust. On December 10, 2008, the plaintiffs filed a supplemental and amending petition adding as plaintiffs, Lenora Crumholt (daughter of Freddy), Sheila Shipp Wall (daughter of Grace Jo Ann),[6] Michael Dean Chelette, Lisa Lynn Lyons, Jill Lyons Hubbard, and Paul A. Lyons (children

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[3] The amendment lists "Freddie Wayne" as a child of "Freddie Wayne." From the petition and other evidence contained in the record, the child of Freddie Wayne is "Freda Wayne Crumholt Mayahi."

[4] While the record contains no date of death for Totsy, her estate was admitted to Judgment of Possession on May 12, 1988.

[5] Elizabeth Ann Herrington Crumholt, surviving spouse of Freddy, was also an original plaintiff, but was removed by a supplemental and amending petition.

[6] Grace Jo Ann did not predecease her mother, Lucy, but is currently deceased. At her death, Grace Jo Ann left three daughters, one of whom has since died. Only one of Grace Jo Ann's heirs is a party to this suit.

of Totsy).[7] The supplemental and amending petition also added Julie C. Hubert, daughter of Cliff Crumholt, as a defendant. All of the plaintiffs claimed a breach of fiduciary duty owed to the Trust by Cliff Crumholt and Julie Hubert. Plaintiffs sought a money judgment for funds used by the defendants for their own personal use and for the rental income from certain immovable property that was never deposited into the Trust. Plaintiffs also sought interest on the value of the funds that should have remained in the Trust had the disbursements not been used for Cliff Crumholt's and Julie Hubert's personal purposes.

Cliff Crumholt and Julie Hubert filed exceptions of prescription and peremption with regard to all plaintiffs and an exception of no right of action with regard to the children of Totsy: Michael Dean Chelette, Lisa Lynn Lyons, Jill Lyons Hubbard, and Paul A. Lyons. Julie Hubert filed a motion for summary judgment claiming she owed no duty to the plaintiffs. The trial court denied the exceptions of prescription and peremption on the basis that the time periods provided in La. R.S. 9:2234 had not been triggered by an accounting rendered and delivered by the trustee, as no such accounting had been provided by the trustee. The motion for summary judgment and exception of no right of action were also denied.

This matter proceeded to jury trial and a judgment was signed dismissing all claims against Julie Hubert[8] and rendering judgment against Cliff Crumholt for Seven Hundred Thirty-Three Thousand and No/100 Dollars ($733,000). The judgment also removed Cliff Crumholt as trustee of the Trust. Cliff Crumholt filed a motion for new trial, remittitur, and judgment notwithstanding the verdict, which were all denied by the trial court. This appeal followed.

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[7] John A. Chelette, Jr., Totsy's son, is not a party to these proceedings.

[8] No appeal has been taken regarding the dismissal of all claims against Julie Hubert.

ASSIGNMENTS OF ERROR

Cliff Crumholt assigned numerous errors allegedly made by the trial court, which are summarized as follows:

(1) In finding any evidence of ownership interest in the Trust by Michael Dean Chelette, Lisa Lyons, Paul Lyons, and Jill Lyons Hubbard;

(2) In denying the exception of no right of action relative to the claims of Michael Dean Chelette, Lisa Lyons, Paul Lyons, and Jill Lyons Hubbard;

(3) In awarding any sums in favor of plaintiffs who did not testify at trial;

(4) In awarding any damages;

(5) In awarding damages despite a lack of evidence as to elements of damages sustained and entitlement thereto, and, alternatively, in awarding excessive damages;

(6) In finding evidence of mismanagement or loss justifying damages;

(7) In awarding damages for conversion;

(8) In denying post-judgment relief and not granting a directed verdict at the conclusion of plaintiffs' case;

(9) In overruling the exceptions of prescription and peremption.

STANDARD OF REVIEW

Cliff Crumholt seeks to reverse the judgment that found he had breached his fiduciary duty to the Trust and converted funds from the Trust. It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. *Rosell v. ESCO,* 549 So.2d 840, 844 (La. 1989); *Boyd v. Boyd,* 10-1369 (La. App. 1 Cir. 2/11/11), 57 So.3d 1169, 1174. In order to reverse a fact finder's determination of fact, an appellate court must find from the record that a reasonable factual basis does not exist for the finding and that the record establishes that the finding is clearly wrong. *Stobart v. State through Dept. of Transp. and Development,* 617 So.2d

880, 882 (La. 1993); *Denton v. Vidrine,* 06-0141 (La. App. 1 Cir. 12/28/06), 951 So.2d 274, 287, *writ denied,* 07-0172 (La. 5/18/07), 957 So.2d 152.

Cliff Crumholt also seeks to reverse the damages awarded by the jury. Special damages are those which generally refer to specific expenses, which may be quantified, arising out of the consequences of the defendant's behavior. *Coxe Property Management and Leasing v. Woods,* 09-1729 (La. App. 4 Cir. 8/11/10), 46 So.3d 258, 260. The findings of the trier of fact regarding special damages are subject to the manifest error standard of review. *Fleniken v. Entergy Corporation,* 00-1824, 00-1825 (La. App. 1 Cir. 2/16/01), 780 So.2d 1175, 1195, *writs denied,* 01-1268, 01-1305, 01-1317 (La. 6/15/01), 793 So.2d 1250, 1253, and 1254.

Based on our review of the record before us, and mindful of the great deference we must afford the trier of fact, we find no manifest error in the jury's finding that Cliff Crumholt breached his fiduciary duty to the Trust and converted funds from the Trust, and that he is liable for the total damages caused by his breach; however, we do find that the judgment must be amended for reasons hereinafter expressed.

LAW AND ANALYSIS

Cliff Crumholt has assigned numerous errors of law but many are duplicative and will be discussed together accordingly.

Right of Action by some Plaintiffs

Cliff Crumholt assigns as his first and second errors that the heirs of Totsy, namely, Michael Dean Chelette, Lisa Lyons, Paul Lyons, and Jill Lyons Hubbard (referred to hereinafter collectively as the "heirs"), have no right of action since they have no ownership interest in the Trust. After the death of Totsy, her heirs incurred tax liabilities, which resulted in the seizure by the Internal Revenue Service ("IRS") of all property of the heirs including the interests owned by them

in the Trust. At separate tax sales on August 7, 1997, LEC purchased all right, title, and interest in and to the Trust then owned by the heirs. Cliff Crumholt claims that as a result of LEC's purchase of the heirs' interests in the Trust, the heirs have no ownership in the Trust and no right of action in these proceedings.

The amendment to the Trust on October 3, 1986, placed LEC in the Trust along with the mineral interests of certain properties. Mr. Butler, an original co-trustee, testified that LEC was an investment account in which stocks were purchased and sold. He specifically stated, "The stock of L.E.C. Minerals and Investments were transferred to the Trust sometime in '86, or sometime in that period of time. So, the Trust owned L.E.C. Minerals and Investments." Therefore, LEC is owned solely by the Trust and the purchase of the heirs' interests was added to the corpus of the Trust.

(1) A Trustee and Beneficiary Cannot Alter or Amend a Trust

To reiterate, Cliff Crumholt claims that the heirs had no interest in the Trust as LEC had purchased their shares in 1997. As the Louisiana Supreme Court stated in *Albritton v. Albritton,* 600 So.2d 1328, 1331-32 (La. 1992):

> The trust would hardly be a stable device for the transmission of property if the beneficiaries and trustees could make agreements that could modify the settlor's fundamental intent in setting up the trust. We believe such modifications are contrary to the rules expressed in the trust code in La. R.S. 9:2021 and 9:2025:
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> > § 2021. General rule; modification
> >
> > The settlor may modify the terms of the trust after its creation *only to the extent he expressly reserves the right to do so.* (Emphasis added).
> >
> > § 2025. Delegation of right to terminate or to modify administrative provisions
> >
> > A settlor may delegate to another person the right to terminate a trust, or to modify the administrative provisions of a trust, *but the right to modify other provisions of a trust may not be delegated.* (Emphasis added).

> Thus, under the scheme of the trust code, even the settlor has no power to modify the trust he has created unless he expressly reserves the power to do so. More importantly for our purposes, the trust code *prohibits* the delegation of the power to modify provisions of the trust other than the administrative provisions. Oppenheim & Ingram, 11 *Louisiana Civil Law Treatise-Trusts* § 294 (1977). Likewise, La. R.S. 9:2028 sets forth a concept of trust indestructibility:
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> > The consent of all settlors, trustees and beneficiaries shall not be effective to terminate the trust or any disposition in trust, unless the trust instrument provides otherwise.
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> We have held this concept of trust indestructibility is "inherent in our Louisiana trust law." *Richards* [*v. Richards*], 408 So.2d [1209] at 1210 [(La. 1981)]. Taken as a whole, we believe these rules set forth a public policy of protecting the trust instrument from any modification or termination contrary to the settlor's clearly expressed intent. These are imperative rules of public order, and any violation of these rules is an absolute nullity. *See Badon's Employment, Inc. v. Smith,* 359 So.2d 1284 (La.1978); *E.L. Burns Co. v. Cashio,* 302 So.2d 297 (La.1974).

Section III of the Trust Agreement permitted only Lucy, the settlor, to alter or amend the Trust up until the time of her death, with the concurrence of the co-trustees. After the death of Lucy, the co-trustees had no authority to alter or amend the Trust. Parties at interest are forbidden to break up the trust in violation of the terms by consent between or by themselves. *In re Guidry Trust,* 97-1210 (La. App. 3 Cir. 5/6/98), 713 So.2d 631, 634.

In the present case, the IRS seized the beneficial interests of the heirs and sold those interests at a public auction. At that public auction, LEC purchased the beneficial interests being sold by the IRS. Cliff Crumholt claims that, in connection with that sale, the heirs lost all their rights to the Trust, as well as any claims against him. A beneficiary has no right to sell, mortgage, lease, or in any other respect dispose of the property, which also means a beneficiary would have no right to "return" the property to the settlor. *Guidry,* 713 So.2d at 636. A trust cannot be terminated by consent, even with the unanimous consent of all parties at interest, that is, the settlor, the beneficiary, and the trustee, unless otherwise

provided for by the terms of the trust agreement. *See McLendon v. First National Bank of Shreveport,* 299 So.2d 407, 410 (La. App. 2 Cir. 1974).

We agree with the trial court that Cliff Crumholt, as trustee, could not unilaterally remove the heirs as beneficiaries of the Trust or consider them removed by operation of law. According to Section V of the Trust Agreement, the term of the Trust was to be "[t]wenty-one years after the date of death of the last surviving secondary beneficiary," which, in this case, is twenty-one years after the death of Cliff Crumholt, who is currently alive.

A high standard of conduct for a trustee is codified in several Trust Code provisions. Cliff Crumholt, the trustee, had an obligation to administer the Trust "solely in the interest of the beneficiary." La. R.S. 9:2082. Prior to its revision by 2001 La. Acts, No. 520, § 1, La. R.S. 9:2090 provided that "[a] trustee in administering a trust shall exercise such skill and care as a man of ordinary prudence would exercise in dealing with his own property." Louisiana Revised Statute 9:2085 prohibits the trustee from buying or selling trust property directly or indirectly from or to himself, his relative, his employer, employee, partner, or other business associate. Louisiana Revised Statute 9:2091 provides that "[a] trustee is under a duty to a beneficiary to take reasonable steps to take, keep control of, and preserve the trust property." *Albritton v. Albritton*, 622 So.2d 709, 713 n.8 (La.App. 1Cir. 1993).

(2) Effect of the Internal Revenue Service's Seizure and Sale of the Heirs' Interests in the Trust Property

Even though the trustee and beneficiaries were unable to amend or alter the Trust, was the IRS able to seize and sell the property interests of the heirs? A trust in Louisiana is defined by the Louisiana Trust Code as the "*relationship* resulting from the transfer of title to property to a person to be administered by him as a

fiduciary for the benefit of another." La. R.S. 9:1731 (emphasis added). The trustee is vested with title to the trust property, which he must administer as a fiduciary. *See* La. R.S. 9:1781. This court has recognized the distinction between the legal status of a trustee and that of a trust beneficiary. *Succession of Scott,* 05-2609 (La. App. 1 Cir. 11/03/06), 950 So.2d 846, 849, *writ denied,* 06-2813 (La. 1/26/07), 948 So.2d 176. Under Louisiana law, title to the trust property vests in the trustee alone, and a beneficiary has no title to or ownership interest in trust property, but only a civilian "personal right" vis-à-vis the trustee, to claim whatever interest in the trust relationship the settlor has chosen to bestow. *Bridges v. Autozone Properties, Inc.,* 04-0814 (La. 3/24/05), 900 So.2d 784, 796-97.

The case of *Read v. United States, Dep't of Treasury*, 169 F. 3d 243 (5th Cir. 1999) (applying Louisiana law) involved an IRS lien and a Louisiana trust. The Fifth Circuit held that the claims of creditors, including the IRS, against a beneficiary's interest "affect only [the debtor's] interest in the Trust and do not attach directly to the trust estate." *Id.* at 254. "The only thing the court may authorize [a beneficiary's creditor] to seize is the beneficiary's personal right—his interest in the trust relationship." *Id.* at 250. This is an expectancy of distribution under the Trust.

The only thing the IRS could seize in the present case was the heirs' interests in the Trust, not the property held by the Trust. The IRS attempted to seize and sell "any and all of the right, title, and interest [of each heir of Totsy] ... in his capacity as a beneficiary of the Lucy E. Crumholt Trust." The IRS then held a tax sale and "sold" that "right, title, and interest" to LEC. However, until a distribution was made to each of the heirs, the only thing that the IRS could seize was each heir's personal right. *See Wilson v. United States, Internal Revenue Service,* 140 B.R. 400, 404 (Bankr.N.D. Tex. 1992). The only thing the heirs had

at the time the IRS seized their property was an expectancy of distribution from the trust. At the time of the seizure and sale, the heirs had no title to the trust property as there had not been any distributions to the heirs.

On August 7, 1997, the IRS issued a "Certificate of Sale of Seized Property" purporting to sell several rights belonging to **each of the heirs** which included:

> (1) the "right, title, and interest of and/or any and all demands, claims, or causes of action of any kind or nature ... in [each heir's] capacity as a beneficiary of the Lucy E. Crumholt Trust ...."
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> * * *
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> (3) Any and all of the demands, claims, and/or causes of action in the nature of allegation of breach of fiduciary responsibilities that [each heir] has or may have, individually and/or in his capacity as beneficiary of the Lucy E. Crumholt Trust, in and/or against (1) Gillie Clifton Crumholt, III individually and/or in his capacity as trustee of the Lucy E. Crumholt Trust and/or (2) John D. Butler individually and/or in his capacity as trustee of the Lucy E. Crumholt Trust.

The IRS issued a separate deed for each of the heirs claiming that property was seized from the heirs pursuant to 26 USCA §6331 and offered for sale at public auction on August 7, 1997. At that auction, LEC purchased certain property, some of which was contained in the Trust. LEC purported to purchase the "property" listed in the Certificate of Sale of Seized Property and the Deed.

26 USCA §6331 provides:

> **(a) Authority of Secretary.**--If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property ... belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.
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> * * *
>
> **(b) Seizure and sale of property.**--The term "levy" as used in this title includes the power of distraint and seizure by any means. ... [A]

> levy shall extend only to property possessed and obligations existing at the time thereof....

Texas Commerce Bank Nat'l Ass'n v. United States, 908 F.Supp. 453 (S.D. Tex. 1995), involved an attempt by the IRS to levy upon the interest of a beneficiary in a trust in which payments to her were left to the sole discretion of the trustee until a certain year. The discretionary nature of the trustee's power meant that the beneficiary had no property or rights to property to which the levy could attach when it was imposed. *Id.* at 459. At the time the IRS imposes its levy, a right to future income distributions is a "clearly contingent, non-vested, and non-determinable right." *Id.* "[A] levy extends only to property possessed and obligations which exist at the time of the levy." 26 C.F.R. § 301.6331-1(a). "[A]n IRS levy will not reach a taxpayer's claim to receive payments in the future where the taxpayer does not, at the time of the levy, have a fixed and determinable right to those payments." *Id.* (quoting *In re Hawn,* 149 B.R. 450, 457 (Bankr.S.D. Tex. 1993)). "[T]he IRS has ruled that a levy will not reach unvested, contingent rights to future payments." *Id.*

These cases establish that the "purchase" of the "right, title, and interest" by LEC of the heirs' interests in the Trust is an absolute nullity, because the heirs' rights to future payments were not fixed and determinable when the IRS levy effected their seizure of those interests. *See Albritton,* 600 So.2d at 1332 (stating that an extension of a trust agreement contrary to the settlor's intent is an absolute nullity). Furthermore, the sale by the IRS, to the extent it purported to alter any portion of the Trust, is also an absolute nullity. *Albritton* held that the "consent of all settlors, trustees, and beneficiaries shall not be effective to terminate the trust or any disposition in trust, unless the trust instrument provides otherwise." *Id.* A violation of this rule is an absolute nullity. *Id.* Only the settlor, Lucy, had the

authority to terminate the interests of the beneficiaries, not Cliff Crumholt, the trustee, and not LEC, a corporation solely owned by the Trust. *See* La. R.S. 9:2021 and 9:2025.

An agent who acquires his principal's property, or one who otherwise acts in a fiduciary capacity, bears the burden of establishing that the transaction was an arm's-length affair. This means that the agent or fiduciary must handle the matter as though it were his own affair. It also means the agent or fiduciary may not take even the slightest advantage, but must zealously, diligently, and honestly guard and champion the rights of his principal against all other persons whomsoever, and is bound not to act in antagonism, opposition, or conflict with the interest of the principal to even the slightest extent. The reason for the rule is obvious. *Noe v. Roussel,* 310 So.2d 806, 818-19 (La. 1975).

There is no evidence in the record to establish that LEC's purchase of the heirs' interests in the Trust, and the return of those interests to the Trust, were arms-length transactions. Cliff Crumholt had absolutely no authority to divest the heirs of their interests in the Trust or to terminate the Trust for certain beneficiaries prior to the time set in the Trust. The legal authority reviewed by this court simply does not support the conclusion that the beneficiaries of a trust forfeit their status as beneficiaries when their interests are seized by a creditor and sold at public auction. The trial court correctly held that the purchase of the interests of the heirs did not divest them of their interests in the Trust. Cliff Crumholt's first and second assignments of error relative to the ownership interests of the heirs and the exception of no right of action are without merit.

Lack of Evidence as to Damages or Excessiveness

For various reasons, Cliff Crumholt asserts in assignments of error three through six that the plaintiffs are not entitled to the damages awarded.

The Louisiana Trust Code, Revised Statutes Title 9, §§ 2081 *et seq.*, establishes the duties of the trustee. Louisiana Revised Statute 9:2090 sets forth the following standard for administration of a trust:

> A. A trustee shall administer the trust as a prudent person would administer it. In satisfying this standard, the trustee shall exercise reasonable care and skill, considering the purposes, terms, distribution requirements, and other circumstances of the trust.
>
> B. A trustee who has special skills or expertise, or has held himself out as having special skills or expertise, has a duty to use those special skills or expertise.

The trustee must administer the trust "solely in the interest of the beneficiary," La. R.S. 9:2082; must "invest and manage trust property as a prudent investor," La. R.S. 9:2127; and, unless the trust instrument provides otherwise, is prohibited from lending funds to himself, or to his employer, partner, or other business associate, La. R.S. 9:2084. Moreover, a trustee has a duty to: (1) "take reasonable steps to take, keep control of, and preserve the trust property," La. R.S. 9:2091; (2) defend actions that may result in a loss to the trust estate unless such defense is unreasonable under the circumstances, La. R.S. 9:2093; and (3) keep the trust property separate from his own individual property and separate from other, non-trust property, La. R.S. 9:2094. In addition to providing an annual accounting, *see* La. R.S. 9:2088, the trustee must furnish "complete and accurate information" whenever a beneficiary requests information regarding the trust. La. R.S. 9:2089.

Any violation of a duty owed to a beneficiary by the trustee is defined as a breach of trust. La. R.S. 9:2081. The liability of a trustee who commits a breach of trust is set forth in La. R.S. 9:2201, which provides:

> If a trustee commits a breach of trust he shall be chargeable with:
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> (1) A loss or depreciation in value of the trust estate resulting from a breach of trust; or
>
> (2) A profit made by him through breach of trust; or

(3) A profit that would have accrued to the trust estate if there had been no breach of trust.

The statutory provisions relative to the responsibilities of a trustee are rigid and hold the trustee to an even higher fiduciary responsibility to his beneficiary than that owed by a succession representative to heirs. The very word "trustee" implies the strongest obligation on the part of the trustee to be chaste in all dealings with the beneficiary. *Albritton,* 622 So.2d at 713 (citing *Succession of Dunham,* 408 So.2d 888, 900 (La.1981)). A trustee is required to administer the trust solely in the interest of the beneficiaries. La. R.S. 9:2082. Failure to do so is considered a breach of the duty of loyalty. *See* La. R.S. 9:2082, Revision Comment (c). The duty of loyalty is the fundamental duty owed by a trustee as a fiduciary. Because of that fact, even an exculpatory provision in the trust instrument is not effective to relieve the trustee from liability for breach of the duty of loyalty to a beneficiary. *See* La. R.S. 9:2206 B; *Albritton,* 622 So.2d at 713.

Cliff Crumholt claims that the trial court should not have awarded any damages to any plaintiff who did not testify at trial. As mentioned above, an appellate court may not set aside a trial court's finding of fact in the absence of clear or manifest error. *See Lewis v. State, through Dep't of Transp. and Dev.,* 94-2370 (La. 4/21/95), 654 So.2d 311. A plaintiff is required to prove special damages by a preponderance of the evidence. *Fleniken,* 780 So.2d at 1195. There is no requirement that the reliable evidence be in the form of plaintiff's own testimony.

In *Welch v. Willis-Knighton Pierremont,* 45,554 (La. App. 2 Cir. 11/17/10), 56 So.3d 242, 257, *writs denied,* 11-0075, 11-0109 (La. 2/25/11), 58 So.3d 457, 459, the defendant moved to dismiss the case of a plaintiff who did not appear at trial. The court held that it is well-settled that an appearance by a party for trial

may be either personal or through his counsel of record. *Id.* Another case, *Simmons v. Christus Schumpert Medical Center,* 45,908 (La. App. 2 Cir. 6/15/11), 71 So.3d 407, *writs denied,* 11-1591, 11-1592 (La. 10/7/11), 71 So.3d 317 and 318, involved two plaintiffs who did not testify. The court held that the testimony of other witnesses was sufficient to support the award of damages to the two children of the decedent who could not appear at trial. *Id.* at 428-29.

Cliff Crumholt also complains that damages were not proven at trial due to lack of proof as to the plaintiffs' interests in the Trust or their identities as beneficiaries. As determined and for the reasons discussed above, the heirs of Totsy were entitled to be classified as beneficiaries of the Trust. The record contains evidence of the creation of the Trust which established Lucy as the sole beneficiary until her death. After her death, her four children, Freddy, Totsy, Grace Jo Ann, and Cliff Crumholt, the named secondary beneficiaries, were to be beneficiaries of the Trust. The Trust also provided that should any of her children predecease her, that child's share of the Trust was to go to the descendants of the deceased child.

The record contains sufficient information for the jury to have determined the identities of the plaintiffs and their entitlement to damages. Julie Hubert, daughter of Cliff Crumholt, testified that her uncle, Freddy, had passed away leaving her cousins, Freda, Elizabeth Ann, and Lenora. There is also evidence in the record that Freddy predeceased Lucy and that his children were substituted as beneficiaries. Julie Hubert further testified that her aunt, Grace Jo Ann, has since passed away leaving three daughters, Cheryl Ann, Sheila, and Carla Charmane (who has also passed away). Julie finally testified that the children of her aunt Totsy who were involved in the suit were Michael, Paul, Jill, and Lisa. The record

also contains documentary evidence as to the identities of the beneficiaries of the Trust.

A review of the record further reveals sufficient evidence of a breach of fiduciary duty and damages. The record is replete with evidence of Cliff Crumholt's use of the funds of the Trust for his own personal use, including but not limited to: purchases of gas for his vehicle, groceries, and clothing; entertainment, restaurants, and ordinary living expenses; and travel expenses incurred on trips taken in the United States and abroad. Cliff Crumholt gave no explanation for any of the expenses he charged to the Trust other than the fact that he was the trustee, so he felt he could pay some of his personal expenses with Trust funds.

Section IV of the Trust Agreement provides that the trustee was to divide the principal of the Trust into sufficient equal shares to create one share for each child of Lucy upon her death. Cliff Crumholt admitted that he did not comply with this requirement of the Trust. The Trust was set up with the purpose of providing "care, comfort, maintenance, support, education, and advancement in life" to the beneficiaries. There is no evidence in the record that the trustee, in order to fulfill the purpose of the Trust, delivered any funds from the Trust to any of the beneficiaries other than to himself.

The record also supports the claim of the plaintiffs that no accountings were made as required by Section IX of the Trust Agreement. Although Cliff Crumholt asserted at trial that he had provided the financial statements of LEC on at least three occasions, we agree with the trial court that none of those satisfied the accounting requirements of the Trust. Louisiana Revised Statute 9:2088 provides that "[e]ach annual account shall show in detail all receipts and disbursements of cash and all receipts and deliveries of other trust property during the year, and shall

set forth a list of all items of trust property at the end of the year." The financial statements of LEC did not fulfill the requirements of La. R.S. 9:2088, and therefore, no accounting was ever made by Cliff Crumholt.

Furthermore, even if some of the beneficiaries told Cliff Crumholt that they did not need an accounting, he could not thereby be relieved of his duty to provide such accounting as required by the Trust. No one other than Lucy, until her death, had the authority to alter or amend the Trust.

Ralph Stevens, an expert in the field of tax and forensic accounting, testified at trial on behalf of the plaintiffs. Mr. Stevens reviewed all of the records of the Hancock Bank checking account for LEC, which was owned by the Trust, as well as LEC's brokerage account at Smith Barney. Mr. Stevens testified as to the amounts withdrawn from the Smith Barney account, deposits into the Hancock Bank account, and checks written from the Hancock Bank account. The only signators on that account were Cliff Crumholt and Julie Hubert. The record contains hundreds of documents of all of these transactions, which were made available to the jury. These documents evidence numerous disbursals for items that appear to be personal, rather than management-related.

To reiterate, there is no evidence in the record of any distributions made to any of the other beneficiaries. Cliff Crumholt testified that he thought a distribution was made in the 1990s, but provided no evidence that it was actually made. There is also evidence that on one occasion when a beneficiary requested a small distribution for needed dental work, the request was denied by Cliff Crumholt. It appears from all the testimony and documents that only Cliff Crumholt ever received any distribution from the Trust.

Whether Cliff Crumholt breached his fiduciary duty to the Trust and the extent of that breach are findings of fact. A court of appeal may not set aside a

jury's findings of fact absent manifest error or unless it is clearly wrong. *Rosell,* 549 So.2d at 844. The issue to be resolved by the appellate court is not whether the trier of fact was right or wrong, but rather to determine whether the fact finder's conclusion was reasonable. *Stobart,* 617 So.2d at 882. The reviewing court must remember that if the trial court or jury's findings are reasonable, the court of appeal may not reverse. *Id.* at 882-83. In light of the degree of deference afforded to the fact finder, we cannot say that the jury's decision to award damages to the plaintiffs was clearly wrong.

Alternatively, Cliff Crumholt contends that the damages awarded to the plaintiffs were excessive. On appeal, one of the issues raised by Cliff Crumholt is whether "the jury verdict can be interpreted as the loss due to the Trust, rather than damages to the individual [plaintiffs.]" Specifically, he argues that the amount awarded was "obviously rendered ... based upon the entirety of the Trust [loss] rather than the interest of the parties who are ... [p]laintiffs." He further argues that the plaintiffs "have no conceivable interest in the interest of beneficiaries" who have not filed suit. He maintains that a " review of the numbers on the [j]ury [v]erdict form indicates that the jury awarded an amount based upon what they perceived as the entire loss to the [T]rust, rather than prorating the damages suffered by the particular plaintiffs." Accordingly, he asserts that the damages awarded to the plaintiffs are excessive, "taking into consideration the ownership interest[s] in the Trust held by the [p]laintiffs."

While we agree that the monetary damages awarded to the particular plaintiffs herein exceeded their respective interests, we do not agree that the plaintiffs in this matter had no right or cause of action to compel Cliff Crumholt to redress the total amount of Trust loss due to his breach of trust.

Clearly, any beneficiary[9] of a trust may institute an action to compel a trustee to redress a breach of trust. La. R.S. 9:2221(3). Pursuant to La. R.S. 9:2201, a trustee who commits a breach of trust shall be chargeable with: (1) a loss or depreciation in value of the trust estate resulting from a breach of trust; or (2) a profit made by him through breach of trust; or (3) a profit that would have accrued to the trust estate if there had been no breach of trust. Thus, under the Trust Code, a beneficiary has **alternative remedies or options** which he may pursue against a trustee for his breach. *See* La. R.S. 9:2201, Official Comment (b) and Restatement (Second) Trusts, § 205, comment (a.)[10] Moreover, to the extent that the Trust Code does not address a particular circumstance, resort shall be had to provisions of the Civil Code or other laws. *See* La. R.S. 9:1724.

In their petition, the plaintiffs prayed for, and the jury verdict and subsequent judgment awarded, monetary damages to the plaintiffs, rather than to the Trust, without any objection from Cliff Crumholt. Likewise, on appeal, Cliff Crumholt neither raises as an assignment of error, nor does he contest in any fashion, the fact that monetary damages were awarded to the plaintiffs as opposed to the Trust. **Certainly, a beneficiary may seek to have damages caused by a trustee's breach awarded to the trust.** *See In re Donald E. Bradford Trust*, 524 So.2d 1213 (La. App. 1st Cir. 1987), *writ granted*, 526 So.2d 785 (La. 1988), *aff'd*

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[9] It is not necessary for all beneficiaries of a trust to join in such an action. *See, e.g., In re Donald E. Bradford Trust*, 524 So.2d 1213, 1214 n.2 (La. App. 1st Cir. 1987), *writ granted*, 526 So.2d 785 (La. 1988), *aff'd in pertinent part*, 538 So.2d 263 (La. 1989).

[10] Comment (a.) to section 205 of Restatement (Second) Trusts provides:

> *Alternative remedies for breach of trust.* If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust."

in pertinent part, 538 So.2d 263 (La. 1989)(affirming the court of appeal's judgment ordering that the loss suffered by the trust as a result of the trustee's breach of trust was to be reimbursed by him to the trust). **However, that does not preclude the possibility of damages being awarded to the plaintiffs-beneficiaries in this case. Courts have previously recognized that monetary damages may be awarded to a beneficiary for a trustee's breach of trust.** *See Brown v. Schwegmann,* 05-0830 (La.App. 4 Cir. 4/25/07), 958 So.2d 721, *writ denied,* 07-1094 (La. 9/21/07), 964 So.2d 333 (awarding monetary damages to a beneficiary for trustee's breach of trust). As noted above, the law provides alternative remedies to a beneficiary. Therefore, there is no error in that aspect of the judgment which awards damages to the plaintiffs.

Nevertheless, the facts alleged by the plaintiffs in their petition as well as the evidence presented by the plaintiffs and considered by the jury at trial pertained to amounts suffered by the Trust itself, and not solely to the specific plaintiffs' losses based on their proportionate interests in the Trust. Even on appeal, the plaintiffs' brief only references amounts purportedly lost by the Trust and fails to mathematically account for their proportionate interests in the Trust. Even so, the jury verdict and the judgment awarded damages exclusively "to the plaintiffs." The plaintiffs herein only possess interests in the Trust totaling 53.33%, whereas the non-plaintiff beneficiaries possess the remaining 46.67%.[11]

After an exhaustive review of the record, we are compelled to conclude that the amount awarded by the judgment to "the plaintiffs" was not limited to their

[11]As to the plaintiffs' respective interests in the Trust, Freda, Elizabeth, Lenora, and Sheila possess 8.333% each, and Jill, Michael, Lisa, and Paul each possess 5%. Thus, the plaintiffs' total interest is 53.333%. As to the non-plaintiff beneficiaries, Cliff Crumholt possesses 25%, John A. Chelette, Jr. possesses 5% and Grace Jo Ann's remaining descendants possess 16.666%, making a total of 46.666%.

respective interests in the Trust, but was awarded based on the total Trust loss.[12] Simply put, there was insufficient evidence presented at trial to establish that the amount of loss to the Trust was such that its reduction by 46.67% would support the amount awarded to the plaintiffs. **However, while this finding affects the amount of monetary damages that plaintiffs are entitled to receive, it does not reduce the amount of damages that the jury concluded that Cliff Crumholt is liable for as a result of his breach of trust.**

Pursuant to the Louisiana Code of Civil Procedure's system of fact pleading, as long as facts constituting a claim are alleged, a final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contains no prayer for general and equitable relief. *See* LSA-C.C.P. art. 862; *Lieux v. Mitchell,* 06-0382 (La.App. 1st Cir. 12/28/06), 951 So.2d 307, 317, *writ denied,* 07-0905 (La. 6/15/07), 958 So.2d 1199. In their petition, plaintiffs alleged facts regarding Cliff Crumholt's improper use of property belonging **to the Trust** and in no way limited their allegations regarding Cliff Crumholt's breach merely as it pertained to their interests in the Trust. **They further specifically alleged that Cliff Crumholt breached his duty to the "Trust" and to them "as its beneficiaries," by improperly taking money from the Trust to use for his own purposes "and/ or for purposes otherwise inconsistent with the purposes of the Trust."**

[12] The jury essentially concluded that a total of $408,000 of Trust property had been taken or converted by Cliff Crumholt, as the remaining portion of the award was for the loss of interest that would have accrued. For this amount to correspond to the plaintiffs' interests in the Trust, the evidence would have to demonstrate that at least $765,048 had actually been taken from the Trust. Some of the money plaintiffs claimed was "taken" was simply moved from one LEC account to other LEC accounts, and thus did not constitute a taking. Assuming, solely for the sake of argument, that the jury found **all** of the expenditures were improper, that would only be proof that a maximum of $744,579 had been taken. Thus, despite viewing the evidence in a light most favorable to the plaintiffs, the record fails to establish that the amount awarded to the plaintiffs was based solely on their interests in the Trust.

Moreover, twice in their petition, the plaintiffs prayed for "any and all other relief, legal or equitable, available." Clearly, under the law, the plaintiffs had a right to seek redress on behalf of the Trust for Cliff Crumholt's breach of trust as well as damages based on their respective interests in the Trust.

Therefore, considering the foregoing, we conclude that the judgment must be amended to provide that the plaintiffs are only entitled to receive monetary damages equaling 53.33% of the total amount awarded, while the remaining 46.67%, the amount attributable to the non-plaintiff beneficiaries, is to be returned to the Trust. In essence, the remedies authorized by law, the pleadings, and the character of the evidence relative to the diminution of the Trust support and afford the relief granted herein.

Damages for Conversion

Cliff Crumholt assigns as error number seven that the jury improperly awarded damages for conversion and that this award duplicated the other damages. Even though Cliff Crumholt does not express this objection as relating to the verdict form, he is essentially assigning as error the fact that the verdict form allowed damages for both breach of fiduciary duty and conversion. There is nothing in the record evidencing that any objection was made as to the nature of the verdict form or to any portion of the jury verdict form. We note that the law requires a contemporaneous objection. The failure to make a contemporaneous objection to the jury instructions or to the jury verdict form precludes the issues from being raised for the first time on appeal. *See* La. C.C.P. art. 1793; *Robinson v. Astra Pharmaceutical Products, Inc.,* 98-0361, 98-0362 (La. App. 1 Cir. 3/31/00), 765 So.2d 378, 383, *writ denied,* 00-1225 (La. 6/2/00), 763 So.2d 607. Therefore, this assignment of error is without merit.

Post-Judgment Relief, Directed Verdict, and Denial of Exceptions

Cliff Crumholt assigns as error number eight that the trial court erred in denying his motions for post-judgment relief and for a directed verdict. At the close of the plaintiffs' case, Cliff Crumholt moved for a directed verdict seeking dismissal of the plaintiffs' case. After the trial, Cliff Crumholt filed a motion for new trial, remittitur, and judgment notwithstanding the verdict ("JNOV").

In ruling on a motion for a directed verdict under La. C.C.P. art. 1810 or for JNOV under La. C.C.P. art. 1811, the trial court employs the following legal standard for granting such a motion: whether "after considering the evidence in the light most favorable to the party opposed to the motion, the trial court finds that it points so strongly and overwhelmingly in favor of the moving party that reasonable minds could not arrive at a contrary verdict on that issue." *Hammons v. St. Paul,* 12-0346 (La. App. 4 Cir. 9/26/12), 101 So.3d 1006, 1010. Thus, a trial court may only grant a directed verdict or a JNOV when the evidence overwhelmingly points to such a conclusion. *Id.* If there is substantial evidence opposed to the motion of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion must be denied. *Petitto v. McMichael,* 588 So.2d 1144, 1147 (La. App. 1 Cir. 1991), *writ denied,* 590 So.2d 1201 (La. 1992); *Barnes v. Thames,* 578 So.2d 1155, 1169 (La. App. 1 Cir.), *writs denied,* 577 So.2d 1009 (La. 1991). Further, a new trial should be granted, only upon contradictory motion of a party, if the verdict or judgment appears contrary to the law and evidence. La. C.C.P. art. 1972(1). A trial court also has discretionary power to grant a new trial under certain circumstances. *See* La. C.C.P. art. 1973.

Based on our review of the record, we agree with the trial court that there was sufficient evidence presented to the jury. We find that there was substantial

evidence opposed to the motion for directed verdict and JNOV and that this evidence was of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach the conclusion that Cliff Crumholt had breached his fiduciary duty and converted property belonging to the Trust. Likewise, we find no mandatory basis upon which the trial court was required to grant the motion for new trial, nor do we find any abuse of the trial court's discretion in its ruling denying the motion for a new trial. Accordingly, we affirm the trial court's denial of the motions for directed verdict, JNOV, and new trial.

Cliff Crumholt's assignment of error number nine is that the trial court erred in failing to grant his exceptions of prescription and peremption. The trial court denied these exceptions. Plaintiffs correctly assert that their claims are not prescribed or preempted, because they never received accountings sufficient to trigger the running of the peremptive periods in the Louisiana Trust Code. Louisiana Revised Statute 9:2234 requires that an action for damages by a beneficiary against a trustee be brought within two years of the date the trustee renders an accounting for the accounting period in which the alleged act, omission, or breach of duty occurred. Furthermore, it requires that all actions shall be filed, even as to the actions within two years of disclosure, within three years of the date the trustee renders an accounting for the accounting period in which the alleged act, omission, or breach of duty occurred. Thus, the issue is whether the trustee rendered an accounting sufficient to meet the requirements of La. R.S. 9:2088 B, which provides as follows:

> Each annual account shall show in detail all receipts and disbursements of cash and all receipts and deliveries of other trust property during the year, and shall set forth a list of all items of trust property at the end of the year.

The burden is on the trustee to show when he made an accounting sufficient to trigger the commencement of the time periods provided by La. R.S. 9:2234. *See Boyd,* 57 So.3d at 1175. As in *Boyd,* there is no evidence in the record of any accounting sufficient to meet the requirements of the Louisiana Trust Code. We find no manifest error in the trial court's finding that Cliff Crumholt never rendered an accounting to the plaintiffs sufficient to trigger the commencement of the peremptive period. These assignments of error are without merit.

Judgment

As previously stated, we find that due to the nature of the pleadings, as well as the evidence adduced at trial and considered by the jury, the judgment must be amended to specify that the monetary damages are to be split with 53.33% of the award going to the plaintiffs and 46.67% of the award going to the Trust. In addition, we note that the judgment contains a mathematical error. Whereas the jury verdict form indicates that the total amount the jury awarded was $733,500, the judgment only awards $733,000. Accordingly, we amend the judgment to reflect an award to the plaintiffs in the amount of $391,175.55 (representing 53.33% of $733,500) and to the Trust in the amount of $342,324.45 (representing 46.67% of $733,500). Moreover, because the plaintiffs had varying interests in the Trust, that portion of the judgment awarding damages to the plaintiffs in the amount of $391,175.55 must be further amended to reflect those interests as follows: plaintiffs Lenora Margaret Crumholt, Elizabeth Ann Crumholt, Freda Wayne Crumholt, and Sheila Shipp Wall, each having a 1/12 interest in the Trust, are each entitled to 15.62% of the $391,175.55, and plaintiffs Michael Dean Chelette, Lisa Lynn Lyons, Jill Lyons Hubbard, and Paul A. Lyons, each having a 1/20 interest in the Trust, are each entitled to 9.38% of the $391,175.55.

CONCLUSION

For all of the foregoing reasons, we amend the judgment to award damages to the plaintiffs in the amount of $391,175.55 and to the Lucy E. Crumholt Trust in the amount of $342,324.45. We further amend the judgment to provide, that with respect to the award to the plaintiffs of $391,175.55, plaintiffs Lenora Margaret Crumholt, Elizabeth Ann Crumholt, Freda Wayne Crumholt, and Sheila Shipp Wall are each entitled to 15.62% of that amount, and plaintiffs Michael Dean Chelette, Lisa Lynn Lyons, Jill Lyons Hubbard, and Paul A. Lyons are each entitled to 9.38% of that amount. The judgment, as amended, is affirmed. Cliff Crumholt is cast with all costs of this appeal.

JUDGMENT AMENDED; AFFIRMED AS AMENDED.