

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

JAMES H. JACKSON, <i>et al.</i>	:	
	:	
	:	
v.	:	Civil No. CCB-08-3048
	:	
	:	
MERCANTILE SAFE DEPOSIT & TRUST COMPANY	:	

**MEMORANDUM**

Beneficiaries of a trust established in 1935 by Felix Walton Jackson sued the former trustee, Mercantile Safe Deposit and Trust Company (“Mercantile”), for mismanagement of the trust. As set forth in the court’s November 15, 2012 memorandum (ECF No. 181), Mercantile is liable for breaches of its fiduciary duty as trustee. The court determined that Mercantile’s failures began in 1975 when the trustee decided to invest the trust’s funds almost exclusively in Mercantile-created common investment funds. Accordingly, the court requested that the beneficiaries’ expert, John Rodgers, calculate an appropriate amount needed to restore the trust based on a starting date of January 1, 1975. Mercantile objected to the beneficiaries’ proposed calculation and submitted an affidavit setting forth its expert’s own alternative calculation, which the beneficiaries have moved to strike. The beneficiaries also separately filed a motion for an award of attorney’s fees and costs. As explained below, judgment will be entered based largely on the beneficiaries’ calculation and their motion to strike will be denied. The court will deny the beneficiaries’ motion for attorney’s fees without prejudice.

**I. Damages**

In its findings of fact and conclusions of law, the court recognized that this matter concerned allegations of mismanagement between 1935 and 2007, but found that Mercantile did

not breach its fiduciary duty as trustee until 1975. (*See* ECF No. 181 at 6-7; 12). In response to the court's request, the beneficiaries submitted a new affidavit from their expert, which included three trust revaluation calculations based on three start dates between 1969 and October 1974 and, appropriately, ending dates of 2007. The court previously accepted Rodgers's methodology, finding him credible and reliable, and the court will use as the basis for the amount needed to restore the trust his calculation beginning in October 1974.

Mercantile objects to Rodgers's calculation on three grounds. First, Mercantile objects to his use of an October 1974 start date, which the beneficiaries alleged was the only available valuation date in the record close to the court's requested January 1, 1975 start date. But, even if the court were to use Mercantile's own calculation beginning in January 1975, based on information that was apparently available in the record, the difference in value between October 1974 and January 1975 was only around \$4,000. The court finds this difference immaterial. Second and third, Mercantile objects to Rodgers's disregard of capital gains taxes and use of an improper "tipping point" for rebalancing the trust's assets. Although these factors, if included, may have affected the ultimate calculation, the court can neither expect nor demand a calculation down to the exact dollar, as this entire action seeks, at most, a reasonably estimated revaluing of the trust in light of Mercantile's breaches. In light of the court's findings on liability, and its credibility determinations, Rodgers's estimate of \$1,430,028.04 is, thus, the most appropriate basis for the amount needed to restore the trust.<sup>1</sup>

On one minor point, however, Mercantile correctly points out that this amount should not include, separately, the addition of the \$27,673 in attorney's fees that Mercantile inappropriately

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<sup>1</sup> The court will deny the beneficiaries' motion to strike the objections and affidavit Mercantile filed in response to its damages calculation. Although Mercantile's submissions may have exceeded the scope of, in general, post-trial filings, given the nature of the court's request it was not inappropriate for Mercantile to raise the arguments it did.

took from the trust assets in its action to resign as trustee. Because Rodgers's estimate calculates the expected value of the trust in 2007 as if it had been properly managed all along, and does not include a deduction of the amount of the attorney's fees, there is no need to add that amount at the end of his calculation. The value he estimated minus the actual value of the trust, along with his separate calculation of lost payments for the income beneficiaries, appropriately captures the amount of money the beneficiaries and trust are owed.

Accordingly, the court will enter judgment in favor of the plaintiffs in the amount of \$1,402,355.04. The beneficiaries also have submitted a proposed division of this award between the trust corpus and three surviving income beneficiaries, who are entitled to equal shares. The beneficiaries' proposed ratio is 75% allocated to the trust and 25% distributed amongst the beneficiaries, which appears reasonable. Therefore, \$1,051,766.28 will be allocated to the trust and \$350,588.76 will be allocated to the income beneficiaries.

## **II. Attorney's Fees**

Whether the court may award attorney's fees in this case is an open question under Maryland law. While there appear to be several arguments in favor of granting attorney's fees in this particular type of action, there is no Maryland case that has been cited or found directly addressing this issue, although some provide a framework for the following discussion.

First, in Maryland, remedies for a breach of fiduciary duty vary depending on the specific type of breach alleged. *Kann v. Kann*, 690 A.2d 509, 519 (Md. 1997). Under longstanding principles of trust law, "equity has original and complete jurisdiction over trusts and will enforce the rights of a beneficiary because they arise out of a trust." *Id.* at 516 (quoting *Bogert, The Law of Trusts and Trustees* § 870). Because of their exclusively equitable nature, the remedies for beneficiaries where a trustee has breached its duty are distinct from traditional damages at law.

*Id.* at 520. Such remedies include “compel[ling] the trustee to perform his duties as trustee; . . . enjoin[ing] the trustee from committing a breach of trust;” and, as awarded here, “compel[ling] the trustee to redress a breach of trust[.]” *Id.* (quoting *Restatement (Second) of Trusts* § 199). Where a trust beneficiary is entitled to such redress, “[t]he court is not confined to a limited list of remedies, but will rather mold the relief to protect the rights of the beneficiary according to the situation involved.” *Stone v. Stone*, 186 A.2d 590, 594-95 (Md. 1962). Here, an award of the costs associated with redressing Mercantile’s breaches would seem to be necessary to provide the beneficiaries with “a remedy which will put [them] in the position in which [they] would have been if the trustee had not committed the breach of trust.” *Restatement (Second) of Trusts* § 205 comment a.

Second, while Maryland courts have applied the ordinary American Rule requiring each party to bear its own costs and expenses to some actions related to breaches of fiduciary duties, *see Bresnahan v. Bresnahan*, 693 A.2d 1, 10 (Md. App. 1997) (quoting *Hess Constr. Co. v. Bd. of Educ.*, 669 A.2d 1352, 1354 (Md. 1996)) (brackets omitted), there appear to be no cases addressing this issue in the context of a breach and mismanagement of a trust by a trustee. In fact, Maryland recognizes “[e]xceptions to the American Rule . . . premised on underlying equitable or policy considerations which support the need for such recovery.” *Garcia v. Foulger Pratt Development, Inc.*, 845 A.2d 16, 31-32, 37 (Md. App. 2003) (“As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.”) (quoting *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 166-67 (1939)). Other jurisdictions have noted that one “well-recognized exception to [the American] rule” occurs in cases where beneficiaries bring suit related to mismanagement of a trust “or to require distribution of a trust fund.” *Wolff v. Calla*,

288 F. Supp. 891, 894 (E.D. Pa. 1968). “In such situations . . . the trustee individually may be charged with these costs[,]” at least where the trustee’s conduct has been “unjustifiable.” *Id.*; see also *Allard v. Pacific National Bank*, 663 P.2d 104, 112 (Wash. 1983).

Furthermore, although “[t]he American Rule applies to all actions which, prior to [Maryland’s] 1984 procedural merger of law and equity, were considered to be actions ‘in equity,’ as well as to actions ‘at law[,]” *Hess*, 669 A.2d at 1357, Maryland continues “to recognize the long established principles of trust law,” *Kann*, 690 A.2d at 520, which necessarily includes the discretionary power of the court to make trust beneficiaries whole by awarding direct and consequential damages for breaches. See *Zimmerman v. Frailey*, 17 A. 560, 561 (Md. 1889) (“[A] trustee should suffer the results of his own errors and mistakes of judgment[.]”); *Bogert, The Law of Trusts and Trustees* § 701 (“The extent of liability in [actions for a trustee’s breach of its duty] is determined by the general rule that the object of damages is to make the injured party whole. . . . Costs, counsel fees and expenses of litigation . . . are granted by the courts in their discretion when they deem the breach has been the cause of their being incurred.”).

Accordingly, the American Rule does not necessarily bar courts from awarding attorney’s fees and costs, where, as here, such an award is required to adequately redress a breach of trust. See *Dardovitch v. Haltzman*, 190 F.3d 125, 145 (3d Cir. 1999) (“In suits to enforce the rights of trust beneficiaries the court exercises its discretion as to the allowance of attorney fees and costs, either from the trust estate or from other sources.”) (quoting *Bogert, The Law of Trusts and Trustees* § 871); see also, e.g., *Heller v. First Nat. Bank of Denver, N.A.*, 657 P.2d 992, 999-1000 (Colo. App. 1982); *Allard*, 663 P.2d at 112 (“Where litigation is necessitated by the inexcusable conduct of the trustee, however, the trustee individually must pay those expenses.”); *Feinberg v.*

*Adolph K. Feinberg Hotel Trust*, 922 S.W.2d 21, 27 (Mo. App. 1996); *In re Niles*, 823 A.2d 1, 8-10 (N.J. 2003).

On the other hand, a party successfully taking action to preserve or benefit a trust or fund is usually entitled to recover attorney's fees and costs from the trust fund itself. *See Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975); *Saulsbury v. Denton Nat. Bank*, 335 A.2d 199, 201-02 (Md. App. 1975); *see also Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 28 F.2d 233, 240-41 (8th Cir. 1928). Although neither party has submitted any Maryland case law addressing a trustee's responsibility to reimburse a trust for expenses it has improperly caused the trust to incur, such an order has been entered in other jurisdictions requiring a trustee to reimburse a trust for the trustee's own legal expenses where the defense was not successful. *See, e.g., Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 487 (11th Cir. 1990); *Garwood v. Garwood*, 233 P.3d 977, 982-83, 986-87 (Wyo. 2010); *Hamilton ex rel. Slate-Hamilton v. Connally*, 959 So.2d 640, 641-42 (Ala. 2006). Here, a reduction in the amount the trust recovers in this action to pay for the beneficiaries' attorney's fees needed to attain the recovery would appear to be a cost for which the trustee could be required to reimburse the trust, having wrongly caused the beneficiaries on behalf of the trust to incur such expenses.

In the absence of any Maryland case law supporting this position, however, it is more appropriate to certify the question to the Maryland Court of Appeals. *See United Pacific Ins. Co. v. East*, 250 F.3d 234, 236 (4th Cir. 2001) (where the court is "unaware of any controlling decisions of the Maryland state courts on . . . determinative questions, . . . they are properly subject to review by the Maryland Court of Appeals on certification") (citing Md. Code Ann.,

Cts. & Jud. Proc., § 12-603). Such a certification will be undertaken as soon as there is a final disposition of any appeal that may be taken to the Fourth Circuit on the merits of this case.

**CONCLUSION**

For the reasons stated above, the court will enter a separate order awarding the \$1,402,355.04 necessary to restore the trust to its proper value and denying without prejudice the motion requesting an award of attorney's fees directly against the trustee.

August 8, 2013  
Date

/S/  
Catherine C. Blake  
United States District Court