

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-694

Filed 2 January 2024

Wake County, No. 20 CVS 14098

LINDA F. JOHNSON, as Successor, Trustee of the LUTHER AND SHIRLEY WARNER CHARITABLE TRUST, Plaintiff,

v.

JEFFREY C. BUTLER, Defendant.

Appeal by defendant from order entered 28 January 2022 by Judge A. Graham Shirley, II, in Superior Court, Wake County. Heard in the Court of Appeals 29 November 2023.

*Narron Wenzel, P.A., by M. Kemp Mosley and Samantha Richardson, for plaintiff-appellee.*

*Law Offices of Stephen R. Paul, by Taylor S. Hastings, for defendant-appellant.*

ARROWOOD, Judge.

Jeffrey Butler (“defendant”) appeals from the trial court’s order granting summary judgment in favor of Linda F. Johnson, successor trustee of the Luther and Shirley Warner Charitable Trust (“plaintiff”). Defendant contends the trial court erred in granting summary judgment because a genuine issue of material fact

remained in controversy. For the following reasons, we affirm the trial court's order.

I. Background

This case is centered on a series of trusts, including the Luther and Shirley Warner Charitable Trust ("Charitable Trust"). Defendant, acting as Shirley Warner's agent under power of attorney, created the Charitable Trust via signed declaration on 29 July 2016. According to defendant, the Charitable Trust "was designed to enable the maintenance and management of real property belonging to the Family Trust." Shirley Warner was suffering from late-stage Alzheimer's disease or dementia when the Charitable Trust was created.

The Charitable Trust's signed declaration established defendant as the trustee, Shirley T. Warner ("Mrs. Warner") as the recipient beneficiary, and Macedonia United Methodist Church of Cary, North Carolina ("the Church") as the remainder beneficiary. With respect to trustee compensation, the declaration specified the following:

**16.1. Fee Entitlements.** Any Trustee shall be entitled to reasonable compensation for services rendered in connection with this trust, which is agreed to be one percent (1.0%) of the net fair market value of the trust assets valued as of the Valuation Date for each taxable year paid to the Trustee, in equal quarterly installments at the end of each quarter of such year.

....

**16.3. Accounting for Fees.** Any fees to be paid pursuant to Paragraph 16.1 or any other provision of this Trust Declaration shall be charged to income first; but if income

JOHNSON V. BUTLER

*Opinion of the Court*

is insufficient, to principal.

The record tends to show the following facts. In defendant's capacity as trustee, he sold eighteen parcels of Charitable Trust real property. Plaintiff alleges that based on the \$2,670.00 excise tax of these transactions, the sale price for the eighteen parcels totaled approximately \$1,335,000.00. In another transaction, defendant also sold a 50% undivided interest in other Charitable Trust property. Plaintiff alleges that based on the \$1,398.00 excise tax for this transaction, the sale price was approximately \$349,000.00.

Plaintiff also alleges that during defendant's trusteeship, defendant made a series of five transactions to himself totaling \$40,975.69.<sup>1</sup> These transactions included: (1) a 21 February 2018 transfer of \$6,142.77; (2) another 21 February 2018 transfer of \$12,285.53; (3) a 3 April 2019 transfer of \$8,554.30; (4) a 2 January 2020 transfer of \$12,255.85; and (5) a 23 June 2020 transfer of \$1,737.24.

Conversely, defendant claims he received compensation totaling \$31,818.73 "in accordance with the rate of compensation permitted under North Carolina law for charitable unitrusts and applicable provisions of the [Luther and Shirley Warner] Charitable Trust instrument." Yet, when testifying, defendant stated that plaintiff's accounting spreadsheet, which included the \$40,975.69 in transfers, "look[ed] correct."

---

<sup>1</sup> According to her affidavit, plaintiff created an independent accounting for the time in which defendant served as the Charitable Trust's trustee.

JOHNSON V. BUTLER

*Opinion of the Court*

When asked if he had provided a formal accounting for his time as trustee, defendant testified, “I don’t know if I did a formal accounting, no, sir.” Additionally, when asked about a particular series of transfers he made to himself on 2 January 2020, including the \$12,255.85 transfer from the Charitable Trust, defendant testified, “I was back paying myself for times that I had nursed Shirley, which was not part of my trustee duties.”

Mrs. Warner passed away on 17 January 2020, leaving the Church as the Charitable Trust’s sole beneficiary. Following Mrs. Warner’s death, the Church filed petitions to remove defendant as trustee. On 30 June 2020, the trial court entered a consent order accepting defendant’s resignation as trustee and appointing plaintiff as successor trustee.

On 1 December 2020, plaintiff sued defendant, alleging the following claims: breach of fiduciary duty and breach of trust; constructive fraud; conversion and trover; restitution and unjust enrichment; and accounting. Defendant filed an answer denying liability for all claims on 1 March 2021. On 27 August 2021, plaintiff filed a motion for summary judgment, which was heard in Superior Court, Wake County, on 8 November 2021. The trial court entered an order granting partial summary judgment in favor of plaintiff on 28 January 2022 for (1) breach of fiduciary duty and breach of trust, and (2) constructive fraud, in the amount of \$40,975.69. Plaintiff voluntarily dismissed the remaining claims on 1 February 2022. Defendant filed a notice of appeal on 23 February 2022.

II. Discussion

Defendant argues that plaintiff failed to meet her burden regarding the claims for breach of fiduciary duty and constructive fraud. Defendant also argues that, because he was entitled to the compensation under the terms of the Charitable Trust, he did not confer a benefit other than what the trust terms allowed, which raises a genuine issue of material fact as to plaintiff's claims. We disagree.

A. Standard of Review

“Our standard of review from an order granting summary judgment is de novo.” *Bryan v. Kittinger*, 282 N.C. App. 435, 437 (2022) (citing *Forbis v. Neal*, 361 N.C. 519, 524 (2007)). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c) (2023). Additionally, “all inferences of fact must be drawn against the movant and in favor of the party opposing the motion.” *Forbis*, 361 N.C. at 524 (cleaned up).

This Court has held that “[a]n issue is ‘genuine’ if it can be proven by substantial evidence and a fact is ‘material’ if it would constitute or irrevocably establish any material element of a claim or a defense.” *In re Alessandrini*, 239 N.C. App. 313, 315 (2015). Further, “[a] party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party’s claim

is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim.” *Id.* “Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.” *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85 (2000).

B. Breach of Fiduciary Duty

“To establish a claim for breach of a fiduciary duty, claimants are required to produce evidence that (1) defendants owed them a fiduciary duty of loyalty; (2) defendants violated their fiduciary duty; and (3) this breach of duty was a proximate cause of injury to plaintiffs.” *French Broad Place, LLC v. Asheville Sav. Bank, S.S.B.*, 259 N.C. App. 769, 787 (2018) (cleaned up).

“Fiduciary relationships are characterized by confidence reposed on one side, and resulting domination and influence on the other.” *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014) (cleaned up). Such characteristics are “readily apparent” in trustee-beneficiary relationships. *Id.*; see N.C.G.S. § 32-2(a) (2023) (defining “fiduciary” as “a trustee under any trust, expressed, implied, resulting or constructive . . . or any other person acting in a fiduciary capacity for any person, trust or estate.”).

A trustee owes duties of good faith, loyalty, and prudent administration. See N.C.G.S. §§ 36C-8-801, 802, 804 (2023). Trustees must “maintain complete loyalty to

JOHNSON V. BUTLER

*Opinion of the Court*

the interests of their beneficiaries.” *Fox v. Fox*, 283 N.C. App. 336, 348 (2022) (cleaned up). “Should there be any self-interest on the trustee’s part in the administration of the trust which would interfere with this duty of complete loyalty, a beneficiary may seek the trustee’s removal.” *In re Wills of Jacobs*, 91 N.C. App. 138, 143 (1988) (citation omitted). In addition to this longstanding common law rule, a trustee’s duty of loyalty is also prescribed by statute. Specifically:

- (a) A trustee shall administer the trust solely in the interest of the beneficiaries.
- (b) [A] sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account, or that is otherwise affected by a conflict between the trustee’s fiduciary and personal interests, is voidable by a beneficiary affected by the transaction, without regard to whether the transaction is fair to the beneficiary, unless:
  - (1) The terms of the trust authorized the transaction; [or]
  - (2) The court approved the transaction[.] . . .

N.C.G.S. § 36C-8-802(a)–(b) (2023).

As the Charitable Trust’s designated trustee, defendant unquestionably was a fiduciary as defined in § 32-2(a). Therefore, defendant was required to “maintain complete loyalty to the interests of his beneficiaries”—here, Mrs. Warner and the Church. *See Fox*, 283 N.C. App. at 348. Yet, during his trusteeship, defendant transferred funds from the Charitable Trust to his personal account on multiple occasions. Under our statutes, such transactions were thus distinctly ones that were

“entered into by [defendant] for [defendant’s] own personal account[.]” § 36C-8-802(b). Consequently, the transactions were voidable by the Church, who was “a beneficiary affected by the transaction[s.]” *Id.*

Defendant argues these transactions fall under the exception in § 36C-8-802(b)(1) because the declaration’s terms authorized the transactions. Indeed, section 16.1 of the trust declaration specifies that defendant was “entitled to reasonable compensation for services rendered in connection with this trust,”—specifically, “one percent (1.0%) of the net fair market value of the trust asset[.]” However, we find this argument unpersuasive because defendant provided no evidence indicating that the transactions were ever in harmony with section 16.1. In fact, defendant seemingly admitted in sworn testimony that during his trusteeship no formal accounting was done.

The absence of specific accounting is also problematic in that plaintiff accounted for transactions totaling \$40,975.69—an amount \$9,156.96 more than what defendant claims he paid himself. Moreover, because he testified that plaintiff’s accounting “look[ed] correct[.]” defendant’s claim that his compensation was only \$31,818.73—and that such compensation was in accordance with section 16.1—is even more dubious.

Lastly, defendant testified that the series of transfers made on 2 January 2020, which included \$12,255.85 from Charitable Trust property, were to “back pay[ ] myself for times that I had nursed Shirley, which were not part of my trustee duties.”



Thus, defendant expressly acknowledged that he used Charitable Trust property to pay himself for something that was not authorized by section 16.1 or any other trust provisions.

Because defendant, as the nonmoving party, failed “to produce a forecast of evidence demonstrating specific facts, as opposed to allegations” that he did not violate his fiduciary duty of loyalty under § 36C-8-802(b), the trial court did not err in granting plaintiff’s motion for summary judgment for breach of fiduciary duty. *See Gaunt*, 139 N.C. App. at 784.

C. Constructive Fraud

“Although the elements of constructive fraud and breach of fiduciary duty overlap, each is a separate claim under North Carolina law.” *Chisum v. Campagna*, 376 N.C. 680, 706 (2021) (cleaned up). Constructive fraud requires

proof of circumstances (1) which created the relation of trust and confidence (the ‘fiduciary’ relationship), and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty.

*Bogovich v. Embassy Club of Sedgefield, Inc.*, 211 N.C. App. 1, 8 (2011) (cleaned up).

Thus, “[t]he primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself.” *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 294 (2004).

“When . . . the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred.” *Bogovich*, 211 N.C. App. at 9 (citing *Forbis*, 361 N.C. at 528–29). “Once the presumption arises, the alleged fiduciary may rebut the presumption by showing . . . that the confidence reposed in him was not abused.” *Forbis*, 361 N.C. at 529 (citation and internal quotation marks omitted); see also *Est. of Smith By & Through Smith v. Underwood*, 127 N.C. App. 1, 17 (1997) (“Once a plaintiff establishes a prima facie case of breach of fiduciary duty, the burden shifts to the defendant to show he acted in an open, fair and honest manner.”).

As discussed in II.B., defendant “obtain[ed] a possible benefit through the alleged abuse of the . . . fiduciary relationship[.]” See *Bogovich*, 211 N.C. App. at 9. Consequently, plaintiff “is entitled to a presumption that constructive fraud occurred.” *Id.* Further, because defendant failed “to show he acted in an open, fair and honest manner” by transferring Charitable Trust property to himself—e.g., by producing evidence that the transactions accorded with the terms of the trust—defendant did not rebut plaintiff’s presumption. See *Underwood*, 127 N.C. App. at 17. Accordingly, the trial court did not err in granting plaintiff’s motion for summary judgment for constructive fraud.

### III. Conclusion

For the foregoing reasons, there was no genuine issue of material fact, and the

JOHNSON V. BUTLER

*Opinion of the Court*

trial court properly granted plaintiff's motion for summary judgment. We affirm the trial court's order.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).