IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the John B. Fenner
Revocable Living Trust, u/a/d August 5, 1998.

Roberta L. FENNER,
in her capacity as a beneficiary of the
John B. Fenner Revocable Living Trust,
u/a/d August 5, 1998,
Appellant,

v.

Hillary H. FENNER,
in her capacity as a beneficiary of
the John B. Fenner Revocable Living
Trust, u/a/d August 5, 1998;
Robert Dorszynski, in his capacity as
Trustee of the John B. Fenner Revocable
Living Trust, u/a/d August 5, 1998;
Grace Hartwick Fenner, in her capacity as a
beneficiary of the John B. Fenner Revocable
Living Trust, u/a/d August 5, 1998;
and John Buhl Fenner, in his capacity as a
beneficiary of the John B. Fenner Revocable
Living Trust, u/a/d August 5, 1998,
Respondents.

Benton County Circuit Court
0810354; A158787

David B. Connell, Judge.

Argued and submitted March 8, 2016.

Matthew Whitman argued the cause and filed the briefs for appellant.

Jan K. Kitchel argued the cause for respondent Hillary H. Fenner. With him on the brief was Cable Huston LLP.

No appearance for respondents Robert Dorszynski, Grace Hartwick Fenner, and John Buhl Fenner.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Vacated and remanded.

ARMSTRONG, P. J.

Roberta Fenner appeals a limited judgment dismissing her petition for declaratory relief that she filed in the probate case involving her father's trust. Roberta sought a declaration that her sister, Hillary Fenner, had forfeited her interest in their father's trust under the trust's no-contest clause by filing a petition that included a request for a declaration that the sixth amendment to the trust was void. On successive motions for summary judgment, the trial court dismissed Roberta's petition, concluding that Hillary's petition had not triggered the no-contest clause. We also conclude that Hillary's petition did not trigger the no-contest clause as alleged by Roberta in her petition for declaratory relief for the reason that Hillary did not seek to set aside the trust agreement. However, the trial court's dismissal of Roberta's petition for declaratory relief was not the proper disposition of the case. We therefore vacate the judgment and remand for the trial court to enter a judgment that declares the rights of the parties consistent with this opinion.

"When, as here, the facts are not in dispute, we review rulings on cross-motions for summary judgment to determine whether either party is entitled to judgment as a matter of law." *Busch v. Farmington Centers Beaverton*, 203 Or App 349, 352, 124 P3d 1282 (2005), *rev den*, 341 Or 216 (2006). We take the following undisputed facts from the affidavits and documents submitted with the parties' motions for summary judgment, as supplemented by the pleadings in the case.

John Fenner created the John B. Fenner Revocable Living Trust dated August 5, 1998 (the trust). John has two children—Roberta and Hillary—both of whom were designated beneficiaries of trust property upon John's death. John served as co-trustee of the trust until 2007, when a stroke rendered him unable to serve as a trustee. On May 1, 2008, John's cotrustee, Schaefer, filed a petition in probate court seeking to be allowed to resign as a trustee and for the court to appoint a new trustee. Schaefer alleged that, under the terms of the trust, John was "disabled," and the people entitled to appoint a successor trustee for him had failed to

do that. Schaefer's petition initiated the probate case from which this appeal comes to us.

Roberta objected to the court appointing a trustee for the trust on the ground that the sixth amendment to the trust, dated May 7, 2008, had appointed her as the sole trustee. Hillary objected to Roberta serving as trustee, and both Schaefer and Hillary called into question the validity of the sixth amendment to the trust. The court promptly approved Schaefer's resignation, effective June 1, 2008, but did not appoint a successor trustee.

In January 2010, by stipulation of the parties, the court appointed a successor trustee; however, that named trustee ultimately declined to serve. On March 7, 2011, the court appointed Robert Dorszynski as successor trustee of the trust. In the meantime, John had died on August 15, 2010. In 2012 and 2013, Dorszynski began the process of obtaining approval to distribute trust assets. As part of that effort, Dorszynski stated that between June 1, 2008, and March 7, 2011, it was unclear who, if anyone, was the lawful trustee of the trust, but that, during that time, Roberta had held herself out as the trustee and had taken control of some, but not all, of the trust assets. As a result, he sought to have Roberta treated as the trustee for that time period and an order requiring her to provide an accounting of trust property.

As the proceedings in the probate case continued, on November 7, 2013, Hillary filed a separate petition solely against Roberta, which initiated a new matter. In that petition, Hillary alleged claims against Roberta for breach of trust, declaratory relief, intentional interference with prospective inheritance, and accounting of trust assets. The claim for declaratory relief alleged:

> "30. Pursuant to ORS 28.010, 28.020, and 28.040, [Hillary] seeks a declaration of the rights of the parties presently before the court, including specifically that the Amendment No. 6 is void.
>
> "31. [Roberta] engaged in acts constituting undue influence inasmuch as she secured [John's] signature on Amendment No. 6 after he had been deemed incapacitated

> and/or disabled in accordance with the express terms of the Trust.
>
> "32. [Roberta] engaged in such wrongful conduct during a period of time when she was apprised that [John's] capacity had been determined in accordance with the Trust.
>
> "33. Had [Roberta] refrained from her wrongful conduct, the subject monies would not have been diverted and would be available for distribution to [Hillary].
>
> "34. [Hillary] contends that Amendment No. 6 is void, for, among other causes, lack of capacity, [Roberta's] intentional interference with petitioner's economic advantage, and [Roberta's] undue influence on [John]. On information and belief, [Roberta] denies such contentions."

In her prayer for relief, Hillary requested in connection with that claim "a declaration that Amendment No. 6, dated May 7, 2008, is void, *ab initio*, and of no further effect." On December 11, 2013, before Roberta had filed a responsive pleading, Hillary filed an amended petition that retained only her breach of trust claim against Roberta.

In response, Roberta filed both a motion to dismiss Hillary's amended petition and a separate petition for declaratory relief in the probate case. Roberta asserted in her motion and petition that Hillary had forfeited her interest in the trust under Article 15, section 3, of the trust when she filed her original petition against Roberta. Article 15, section 3, of the trust contains a "no-contest clause," which provides, in part:

> "If anyone, other than me, shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this agreement, including any amendments thereto, or commences or prosecutes any legal proceedings to set this agreement aside, then in such event such person shall forfeit his or her share, cease to have any right or interest in the trust property, and shall be deemed to have predeceased me."

Roberta alleged in her petition that "[b]y filing the Complaint, Objector/Cross-Petitioner Roberta contends that Hillary commenced a legal proceeding to set aside an amendment of the Trust and, consequently, Hillary triggered the no

contest provision of the Trust, thereby forfeiting her share of the Trust property." Based on that allegation, Roberta sought the following declarations:

> "2. Declaring that Hillary H. Fenner triggered the Trust's no contest provision when she filed a Complaint in Benton County Circuit Court, Case No. 1310664 on November 7, 2013; [and]
>
> "3. Declaring that Hillary H. Fenner has no right or interest in the John B. Fenner Revocable Trust and/or any of its assets[.]"

Roberta also filed a motion for summary judgment on her petition for declaratory relief. In her motion, Roberta argued that Hillary had triggered the no-contest clause by filing her original petition because that action fell within the clause language that applies to a beneficiary who "commences *** any legal proceedings to set this agreement aside." Roberta's entire argument focused on the meaning of the word "commences" and whether Hillary's petition fell within that meaning, even though Hillary had filed an amended petition that had removed the allegations about the validity of the sixth amendment to the trust.

In response, Hillary argued that (1) her original petition had no force and effect because it had been superseded by her amended petition, and, thus, could not trigger the no-contest clause, and (2) her declaratory relief claim was a moot and untimely challenge to the sixth amendment, and, thus, could not trigger the no-contest clause.

After briefing was complete in both cases on Roberta's motions, which raised identical issues, the trial court consolidated the proceedings based on a joint motion of the parties to do that. The court then denied Roberta's motion for summary judgment, ruling as follows:

> "After reviewing all the information submitted to the Court and also considering the arguments of the parties the Court concludes that by Hillary Fenner filing the First Amended Petition prior to any responsive pleadings being filed in this case has the effect that the original Petition having been amended no longer has the status of a pleading in this action. The original Petition is totally superseded by the First Amended Petition. Therefore the Petition that had

> been filed by Hillary Fenner does not violate the Contest Clause of the John B. Fenner Revocable Living Trust u/a/d August 5, 1998. The intent of the Trustor was not thwarted by the actions of Hillary Fenner. The Court considers this result consistent with ORS 130.235 in that by filing the First Amended Petition prior to any responsive pleadings being filed the beneficiary was not challenging the Trust. Further this conclusion is consistent with the language of the Trust and the intent of the Trust. Therefore the Court denies Roberta Fenner's Motion For Summary Judgment."

Hillary then moved for summary judgment on Roberta's petition based on the court's letter opinion. In opposing that motion, Roberta solely relied on her previously filed motion and reply. The trial court granted Hillary's motion and entered a limited judgment dismissing Roberta's petition. Roberta appeals that limited judgment.

On appeal, Roberta relies on the argument that she asserted below that Hillary's original petition "commenced" an action to set aside the trust, triggering the no-contest clause. She also asserts that the entire no-contest clause has to be read "together and organically." Read that way, Roberta asserts that Hillary's petition triggered the no-contest clause because the clause indicates that John "wanted the greatest possible deterrent to any action to question his desires, expressed in the Trust or its amendments."

To address the arguments raised by Roberta on appeal, we must construe the meaning of the no-contest clause in the trust. In construing trusts, "our goal is to determine and give effect to the intent of the trustor, if possible." *Frakes v. Nay*, 254 Or App 236, 246, 295 P3d 94 (2012), *rev den*, 353 Or 747 (2013) (citing ORS 42.420). Although no-contest provisions are valid and enforceable, we strictly construe them and do not extend them beyond their express terms. *Id.* at 247-48. Consequently, if there exists an ambiguity about the scope of a no-contest clause, we will not presume to expand the sweep of the clause beyond what the text provides. *Id.*

Again, as relevant, the no-contest clause in the trust provides:

> "If anyone, other than me, shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this agreement, including any amendments thereto, or commences or prosecutes any legal proceedings to set this agreement aside, then in such event such person shall forfeit his or her share, cease to have any right or interest in the trust property, and shall be deemed to have predeceased me."

That clause has two disjunctive provisions that set out two different ways a person can trigger a forfeiture of the person's interest in trust property: If anyone, other than John, (1) "shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this agreement, including any amendments thereto," or (2) "commences or prosecutes any legal proceedings to set this agreement aside."

As noted, on appeal, Roberta argues that we should not read those two provisions separately but should read them "together and organically" so that the no-contest clause can be given its broadest sweep, which is what Roberta asserts was John's intention. We reject that argument as contrary to how we read no-contest clauses. As explained in *Frakes*, 254 Or App at 247-48, we read no-contest clauses strictly and will not expand such a clause beyond its express terms. In addition, in this case, the express terms of the no-contest clause are the only evidence presented of John's intentions with respect to that clause. Thus, we reject Roberta's assertion that we should read the no-contest clause in any manner other than according to its express terms. We thus turn to the application of those express terms.

In her petition for declaratory relief, Roberta alleged only that Hillary's petition violated the second of the provisions in the no-contest clause—*viz.*, that Hillary's petition violated the clause because she "commence[d] *** [a] legal proceeding[] to set this agreement aside." We conclude that Hillary's petition did not violate that provision of the no-contest clause. In her petition, which was brought directly against Roberta and not against the trust, Hillary sought damages against Roberta for her actions with respect to trust property during the time that Roberta held herself out as trustee. As part of that effort, Hillary included a claim to declare void the sixth amendment to the trust—which

purported to make Roberta the sole trustee of the trust—because the amendment had not been validly obtained by Roberta. In her petition, Hillary did not seek to have the trust agreement set aside. *See, e.g.*, *Black's Law Dictionary* 1376 (7th ed 1999) (defining "set aside" as "(Of a court) to annul or vacate (a judgment, order, etc.)").

Roberta argues that the second provision in the no-contest clause should be read to include an action to set aside any amendment to the trust, because that understanding is included in the first provision of the no-contest clause. We reject that argument because it strays from the express terms of the no-contest clause. As noted, the no-contest clause contains two disjunctive provisions. The first provision provides that forfeiture is triggered if anyone, other than John, "shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this agreement, including any amendments thereto." The second provision, in contrast, provides that forfeiture is triggered if anyone, other than John, "commences or prosecutes any legal proceedings to set this agreement aside." By its express terms, forfeiture is triggered under the second provision only if the person seeks to set aside the entire trust agreement. If John had intended that provision to apply to an action that challenged a single amendment to the trust, then the no-contest clause would have so provided, as it did in the first provision.

Having concluded that Hillary's petition did not trigger forfeiture under the second provision of the no-contest clause, we turn briefly to the first provision of that clause. As set forth earlier, Roberta alleged in her petition for declaratory relief only that "Hillary commenced a legal proceeding to set aside an amendment of the Trust and, consequently, Hillary triggered the no contest provision of the Trust, thereby forfeiting her share of the Trust property." In accordance with that allegation, Roberta formulated arguments below based *only* on the second provision of the no-contest clause. Because Roberta neither alleged in her petition nor argued in her summary judgment motion that Hillary's petition fell within the first provision of the no-contest clause, we do not address it on appeal. *See, e.g.*, *Hucke v. BAC Home Loans Servicing, L.P.*, 272 Or App 94, 114, 355 P3d 154 (2015) ("Where plaintiff pleaded and pursued claims for

declaratory relief to a trial on the merits, he cannot seek to prevail on appeal by pursuing an entirely different claim as a basis for declaratory relief that was never pleaded or raised below."). That Roberta set out in her prayer for relief in her petition a request for a declaration that Hillary had triggered the no-contest clause and not, specifically, the second provision in that clause, does not change our conclusion. "A prayer may be relevant to explain the nature of a cause of action alleged in a body of the complaint, *Finch v. Miller, Credithrift*, 271 Or 271, 275, 531 P2d 893 (1975), but it cannot supply otherwise nonexistent allegations." *Green v. Cox*, 44 Or App 183, 185 n 1, 605 P2d 1198 (1980); *see also* *Brown v. Brown*, 206 Or App 239, 249, 136 P3d 745, *rev den*, 341 Or 449 (2006) ("In short, in a proceeding for declaratory relief, the claimant's pleading must allege a cognizable theory of relief, which if proved, would support the declaration sought.").

Accordingly, we affirm the trial court's grant of Hillary's motion for summary judgment and denial of Roberta's motion for summary judgment. "However, because the trial court dismissed [Roberta's] declaratory judgment action instead of entering a judgment that declared the parties' respective rights, we vacate and remand for entry of a judgment that includes a declaration of the parties' rights that is consistent with this opinion." *Bell v. City of Hood River*, 283 Or App 13, 20, 388 P3d 1128 (2016).

Vacated and remanded.