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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NORTHSHORE UNIVERSITY HEALTHSYSTEM) Appeal from the
) Circuit Court of
Plaintiff-Appellee,) Cook County.
)
v.) No. 10 CH 01529
)
EDWARD T. GRAHAM,) Honorable
) Kathleen M. Pantle,
Defendant-Appellant.) Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

HELD: Trial court failed to make factual finding as to whether defendant's conduct was willful or whether other aggravating factors existed to justify an award of punitive damages.

¶ 1 This appeal arises as a result of an order entered by the circuit court granting summary judgment in favor of plaintiff NorthShore University Health System (NorthShore) against

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defendant, Edward Graham, successor trustee of the Ruth M. Stafford Trust (Trust), finding that Graham breached his fiduciary duty to NorthShore, a beneficiary of the Trust. As part of its ruling, the circuit court indicated that Graham personally, as opposed to the Trust, was responsible to NorthShore for its attorneys fees of \$98,768.29 and costs of \$3,867.76 because of the breach. For the following reasons, we reverse and remand.

¶ 2 BACKGROUND

¶ 3 The following facts were gleaned from the trial court's written order granting summary judgment in favor of Northshore.

¶ 4 Graham is the trustee of the Trust. Ruth M. Stafford created the Trust on August 29, 1997, and died on March 14, 2009. The Trust provided for a distribution of 15% of the remainder of the Trust to "Evanston Hospital and Glenbrook Hospital."

¶ 5 NorthShore is a tax-exempt healthcare system comprised of research, medical, and hospital facilities located in the northern suburbs of Chicago. NorthShore's hospital facilities include Evanston Hospital and Glenbrook Hospital, which are not currently organized as separate legal entities but are functioning hospital facilities owned by NorthShore.

¶ 6 Graham sent a letter to NorthShore on June 24, 2009, which explained that Evanston Hospital and Glenbrook Hospital are named as residuary beneficiaries in the Trust and that he would complete delivery of the gift in the amount of \$93,750.00 after NorthShore executed a release, which would indemnify Graham personally and as trustee. NorthShore responded on July 16, 2009, by requesting from Graham a copy of the Trust language pertinent to the distribution to Evanston Hospital and Glenbrook Hospital and a review of a final accounting of

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the Trust assets. Graham, in a letter dated July 17, 2009, replied that the information provided to NorthShore in his June 24, 2009, letter was the full extent to which he was authorized to inform NorthShore regarding the Trust and that he would deliver the gift to the donees once NorthShore executed the release. Graham subsequently sent another letter to NorthShore on July 20, 2009, which sought evidence "satisfactory to [Graham]" that NorthShore is the appropriate donee of the gift provided by the Trust.

¶ 7 NorthShore responded to Graham by letter dated August 31, 2009, and enclosed documents that purportedly confirmed that it was the successor entity to Evanston Hospital and Glenbrook Hospital. Included in those documents was an Annual Non Profit Hospital Community Benefits Plan Report, which was executed by NorthShore on March 30, 2009, and listed Evanston and Glenbrook Hospitals as hospitals included in the report.

¶ 8 Attached to a subsequent letter dated December 16, 2009, NorthShore also provided Graham with the following documents: 1) letters from the Internal Revenue Service to NorthShore and NorthShore Foundation recognizing them as exempt from federal income tax; 2) a certificate issued by the Illinois Secretary of State's (Secretary of State) office on November 2, 1981, recognizing that Evanston Hospital filed an amendment to its Articles of Incorporation changing its name to Evanston Hospital Corporation; 3) a certificate issued by the Secretary of State's office on October 1, 1996, recognizing that Evanston Hospital Corporation filed another amendment, changing its name to Evanston Northwestern Healthcare Corporation; 4) a September 5, 200, letter issued by the Secretary of State recognizing that Evanston Northwestern Healthcare Corporation filed an amendment, changing its name to NorthShore University

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HealthSystem; and NorthShore's Organization Profile and Corporate Fact Sheet, which demonstrated that Evanston Hospital and Glenbrook Hospital were part of NorthShore's health system.

¶ 9 On December 2, 2009, Matthew D. Shapiro, an Illinois Assistant Attorney General, sent Graham a letter, indicating that because the Trust is a charitable trust for purposes of the Charitable Trust Act (Act) (760 ILCS 5/1 *et seq.* (West 2008)), it must be registered and annual financial reports filed with the Attorney General's Office. Additionally, Shapiro indicated that it was clear that NorthShore was the entity legally entitled to the bequest to Evanston Hospital and Glenbrook Hospital.

¶ 10 Graham responded to Shapiro via letter on December 3, 2009. In the letter, Graham disputed Shapiro's characterization of the Trust as charitable, and maintained that NorthShore was not a beneficiary of the Trust and that it held no direct interest in the Trust. Graham subsequently sent a letter to NorthShore dated December 21, 2009, in which he stated that the issue is whether the gift to Evanston Hospital and Glenbrook Hospital is void or lapsed.

¶ 11 NorthShore filed an amended complaint on or around June 7, 2010. The Amended Complaint contained four counts: 1) seeking a declaratory judgment that Graham must make a distribution from the Trust to NorthShore; 2) seeking a declaratory judgment that Graham must provide NorthShore with information about the Trust; 3) seeking an accounting of Trust assets from the date of Stafford's death through the date of the Court's order; and 4) a claim that Graham breached his fiduciary duty as trustee.

¶ 12 Both NorthShore and Graham filed cross motions for summary judgment. NorthShore

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contended that it was the proper beneficiary to receive the gift to Evanston and Glenbrook Hospitals. In support of its argument, NorthShore argued that such a gift was identical to the purpose contemplated by Stafford as Evanston and Glenbrook Hospitals remain at their original locations and continue to serve substantially the same population with their hospital services. NorthShore also sought payment of its attorneys fees and costs pursuant to section 55/16(a) of the Act (760 ILCS 55/16(a) (West 2008).

¶ 13 Conversely, Graham contended that NorthShore was not a beneficiary of the Trust as the Trust did not specifically name Northshore as a residual beneficiary. Additionally, Graham contended that because NorthShore was not a hospital but a "corporate healthcare conglomerate," a gift to NorthShore would not satisfy Stafford's intent.

¶ 14 The trial court found that the Trust was a charitable trust and subject to the provisions of the Act. The court noted that it had previously directed Graham to register the Trust with the Attorney General's office. The court then construed the trust by attempting to discover the settlor's intent as of the time the instrument was executed. The court found there to be no genuine issue of material fact regarding NorthShore's status as the proper beneficiary of the gift to Evanston and Glenbrook Hospitals. Even though the hospitals no longer function as separate legal entities, the court found that both entities are operating as hospitals in the same locations as when Stafford created the Trust.

¶ 15 Graham argued before the trial court that he exercised the discretionary authority provided to him by the Trust and determined that the bequest to Evanston and Glenbrook Hospitals was void *ab initio*. Additionally, he averred that Stafford did not intend to make a

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bequest to NorthShore or its predecessors, Evanston Hospital Corporation or Evanston Northwest HealthCare Corporation, as Stafford's intent was to limit the bequest to hospitals and not a health care conglomerate. Graham requested that his attorneys' fees and costs be paid for from the Trust.

¶ 16 The trial court disagreed, finding that Graham breached his fiduciary duties as trustee by failing to recognize NorthShore as a beneficiary, failing to provide NorthShore with sufficient information to inform NorthShore of the nature and extent of its beneficial interest, failing to provide an accounting to NorthShore, and wasting the Trust's resources. Additionally, the court found that Graham abused his discretion and deviated from the terms of the Trust when he determined that the bequest was void *ab initio* based on his determination that the settlor's intent could not be carried out because NorthShore, the owner and operator of Evanston and Glenbrook Hospitals, is not a hospital. The court further found that Graham breached his fiduciary duties as trustee by failing to provide NorthShore with an accounting and by failing to disclose all material facts relating to dealings with the Trust because NorthShore is a proper beneficiary.

¶ 17 With respect to the issue of attorneys' fees and costs, the trial court denied Graham's request for attorneys' fees and costs, and found that he was personally responsible to pay NorthShore's costs and attorneys' fees. The court found that Graham's conduct necessitated litigation, which otherwise would not have been necessary if he had acted in good faith. The court noted that if Graham legitimately questioned NorthShore's claim to the Trust gift, he "had a duty as trustee to file an interpleader action to avoid acting at his own peril. [See *Northern Trust Co. v. Heuer*, 202 Ill. App. 3d 1066, 1070-1071 (1990).]" The court concluded that because

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Graham breached his duty to administer the Trust according to its terms and breached his fiduciary duties to NorthShore, he is personally responsible for NorthShore's reasonable attorneys' fees and costs that it was forced to incur to enforce its interest under the Trust. This timely appeal followed.

¶ 18 ANALYSIS

¶ 19 On appeal, Graham contends that the trial court improperly shifted litigation expenses, including attorneys fees and costs, to him personally without any evidence of wrongdoing. He also contends that his conduct was executed in good faith and consistent with Illinois law at all times.

¶ 20 Here, the trial court granted NorthShore's request for attorneys' fees and costs to be assessed against Graham personally. As a general rule, Illinois courts look with disfavor upon assessing fees against a losing party and will not do so unless the fees are specifically authorized by statute or provided for by contract between the parties. *McCormick v. McCormick*, 180 Ill. App. 3d 184, 212 (1988).

¶ 21 The record does not reveal any claim that the fees requested in this case were provided for by contract between the parties. However, in its motion for summary judgment, NorthShore requested attorneys' fees and costs pursuant to section 55/16(a) of the Act. Section 55/16(a) provides as follows:

"(a) Any person who, intentionally and in breach of fiduciary duty with malice, misuses charitable assets is subject to punitive damages in an appropriate amount upon a trial on the issue." 760

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ILCS 55/16(a) (West 2008).

¶ 22 Our review of the record does not reveal a basis for application of this statute. In support thereof, NorthShore contended in its summary judgment motion that punitive damages were available under section 55/16(a) because Graham did not believe NorthShore to be a proper beneficiary under the Trust, because Graham did not provide a requested accounting to NorthShore pursuant to section 5-11(b) of the Act, and because Graham requested attorneys' fees and costs for defending against NorthShore's complaint.

¶ 23 We first note that NorthShore is incorrect in its assertion that it was required to receive an accounting upon demand from Graham as trustee. The right to demand an accounting is not an absolute right, but is one which may be asserted on equitable principles, and such a claim must include allegations that the circumstances make an accounting necessary and proper, that the party asked for and was denied access to the trust records, or that those records were inadequate, and that the party made a demand for an accounting and that accounting was refused. *Chicago City Bank and Trust Co. v. Lesman*, 186 Ill. App. 3d 697, 701 (1989). There must also be allegations of wrongdoing or impropriety other than the trustee's failure to voluntarily provide an accounting. *Chicago City Bank*, 186 Ill. App. 3d at 701. No such allegations were made here. Additionally, we note that section 5/11(b) of the Act only requires a trustee to furnish a final account "on termination of the trust." See 760 ILCS 5/11(b) (West 2008).

¶ 24 With regard to Graham's request for attorneys' fees and costs, they are generally chargeable to the trust where there is an honest difference of opinion as to the language of the trust instrument. *Northern Trust Co. v. Heuer*, 202 Ill. App. 3d 1066, 1073 (1990). Graham's

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belief that NorthShore was not a proper beneficiary under the Trust would ordinarily entitle him as trustee to request fees and costs payable from the Trust's assets. However, where a trustee breaches its duty to administer the trust according to its terms and performs in a manner which favors one beneficiary over another, the trustee is not entitled to attorney fees and costs even though the breach is technical in nature, done in good faith, and causes no harm. *Heuer*, 202 Ill. App. 3d at 1071. The question of attorney fees rests within the sound discretion of the trial court. *Lampe v. Pawlarczyk*, 314 Ill. App. 3d 455, 464 (2000). Here, the trial court determined that Graham was not entitled to attorneys' fees and costs payable from the Trust's assets because he breached his duty to administer the trust according to its terms, a decision well within the court's discretion. This determination, however, does not rise to the level of misuse of charitable assets to support a punitive damage award under section 55/16(a). Based on the foregoing, we conclude that punitive damages were not available against Graham personally under section 55/16(a) of the Act.

¶ 25 We must therefore turn our inquiry to case law to determine whether the award of attorneys fees and costs against Graham personally, which are akin to punitive damages, was properly awarded in the case at bar.

¶ 26 Punitive damages are penal in nature. *Embassy Auto Leasing Co. v. C.A.R. Leasing, Inc.*, 155 Ill. App. 3d 427, 431 (1987). Their purpose is to deter the defendant and others from committing the same offense in the future. *Embassy Auto Leasing*, 155 Ill. App. 3d at 431. The objectives of punitive damages, therefore, are the same as in the criminal law, punishment and deterrence. *Embassy Auto Leasing*, 155 Ill. App. 3d at 431-32. "Such damages will be awarded

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only where the defendant's conduct is willful or outrageous due to evil motive or a reckless indifference to the rights of others.' " *Tully v. McLean*, 409 Ill. App. 3d 659, 670 (quoting *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 68 (2009)). Not favored in the law, punitive damages are available only in cases where the alleged wrongdoing " 'is characterized by wantonness, malice, oppression, willfulness, or other circumstances of aggravation.' " *Tully*, 409 Ill. App. 3d at 670 (quoting *Gambino*, 398 Ill. App. 3d at 68). The court must determine (1) whether punitive damages are available as a matter of law for the cause of action; (2) whether the facts show willfulness or other aggravating factors; (3) whether punitive damages should be awarded under the facts at bar; and (4) the amount of the punitive damage award. *Tully*, 409 Ill. App. 3d at 670.

¶ 27 Availability

¶ 28 On appeal from a bench trial, we first review *de novo* the court's determination that punitive damages were available as a matter of law for plaintiff's cause of action. *Tully*, 409 Ill. App. 3d at 670. Although the trial court did not make a specific determination, punitive damages are available as a matter of law for a breach of fiduciary duty. *Tully*, 409 Ill. App. 3d at 670. See also *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 379-80 (1994).

¶ 29 Factual Determination

¶ 30 We review the court's factual determination that defendant acted willfully and that aggravating factors exist under the manifest-weight standard of review. *Tully*, 409 Ill. App. 3d at 670. A ruling is against the manifest weight of the evidence if it is arbitrary, unreasonable, arbitrary and not based on the evidence, or when the opposite conclusion is clearly evident from

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the record. *Tully*, 409 Ill. App. 3d at 670.

¶ 31 Our review of the record and the trial court's written order does not reveal any factual finding with regard to whether Graham's conduct was willful or whether any aggravating factors existed. The trial court appeared to base its award of punitive damages solely on Graham's breach of fiduciary duties and cited to *Heuer* in support of its assessment.

¶ 32 A trustee must use care and diligence in the discharge of his powers and duties, is held to a high standard of conduct, and must exercise the utmost or highest good faith in the administration of the trust. *Rennacker v. Rennacker*, 156 Ill. App. 3d 712, 715 (1987). The trustee must keep in mind the beneficiaries' interests irrespective of the trustee's good or bad faith. *Rennacker*, 156 Ill. App. 3d at 715. A trustee owes a fiduciary duty to the trust's beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and good faith. *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1009 (2010).

¶ 33 Here, in denying Graham's request for attorney fees and costs and granting NorthShore's request for attorney fees and costs from Graham personally, the trial court cited to *Heuer* for support of its findings. Specifically, the trial court found, under *Heuer*, that Graham was required to file an interpleader action to avoid acting at his own peril and that breach of fiduciary duty entitled NorthShore to attorney fees. We disagree.

¶ 34 With respect to filing an interpleader action, *Heuer* states "when there are conflicting claims to trust funds, a trustee is not required to make a determination as to the rights of the prospective claimants but should file an interpleader action to avoid acting at its own peril." *Heuer*, 202 Ill. App. 3d at 1070-71. Contrary to the trial court's assertion, Graham was not

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required to file an interpleader action in this case.

¶ 35 Moreover, *Heuer* does not stand for the proposition that breach of fiduciary duty requires an award of attorney fees and costs personally against a trustee. *Heuer* states "where a trustee breaches its duty to administer the trust according to its terms and performs in a manner which favors one beneficiary over another, the trustee is not entitled to attorney fees and costs even though the breach is technical in nature, done in good faith and causes no harm." *Heuer*, 202 Ill. App. 3d at 1071. This refers to whether a trustee can receive attorney fees and costs from the trust's assets, but makes no mention of whether attorney fees and costs can be assessed personally against a trustee. In fact, our research has yielded no case which assessed attorney fees and costs against a trustee personally for breach of fiduciary duty. As such, we conclude that there was no basis for a punitive damage award of attorney fees and costs against Graham personally under *Heuer*.

¶ 36 Because the record is silent as to the factual basis for the trial court's determination that punitive damages were warranted against Graham, we therefore reverse and remand to the circuit court for a factual determination of whether Graham acted willfully and that aggravating factors existed to justify a punitive damage award.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court of Cook County awarding attorney fees and costs in favor of NorthShore and against Graham personally is reversed and remanded for further proceedings consistent with this decision.

¶ 39 Reversed and remanded.