2012 IL App (4th) 110983-U

Filed 9/27/12

NO. 4-11-0983

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|---|---|---|
| EMILY MUELLER and FRANK MUELLER, Individually, as Contingent Remaindermen of the FREDERICK L. MUELLER Trust No. 1397, Dated March 4, 1966; the MICHAEL R. MUELLER Trust No. 1398, Dated March 4, 1966; the PHILIP M. MUELLER Trust No. 1399, dated March 4, 1966; and Trust No. 1970, Dated August 20, 1971, Plaintiffs-Appellees and Cross-Appellants, | ) | Appeal from Circuit Court of Macon County No. 07CH226 |
| v. | ) | |
| PNC BANK, a National Banking Association, Trustee, Successor to NATIONAL CITY BANK, a National Banking Association, as Trustee of Said Trusts, Defendants-Appellants and Cross-Appellees. | ) | Honorable Thomas E. Little, Judge Presiding. |

JUSTICE APPLETON delivered the judgment of the court.
Justice McCullough concurred in the judgment.
Justice Cook dissented.

## ORDER

¶ 1 *Held*: (1) Regardless of whether the purchase of a certain asset was, objectively speaking, a sound investment and regardless of the trustee's good faith, if the purchase violated the terms of the trust, it is a breach of trust, and unless the beneficiaries elect to retain the asset, the trustee must place the trust in the condition it would have been in had the trustee never purchased the asset.

(2) Contingent beneficiaries may bring an action for breach of trust.

(3) Other contingent beneficiaries are not necessary parties to such an action for breach of trust.

(4) Considering that the trust instrument directed the trustee to buy term life insurance, ordinary life insurance, or both, the trustee breached the trust by buying

variable universal life insurance, which was neither term life insurance nor ordinary life insurance.

(5) The trial court did not make a finding that was against the manifest weight of the evidence when it found the breach of trust to be unaccompanied by wantonness, malice, oppression, willfulness, or any other aggravating circumstance that might justify punitive damages.

¶ 2 Plaintiffs, Emily Mueller and Frank Mueller, are contingent beneficiaries of the Frederick L. Mueller Trust, No. 1397, dated March 4, 1966. Defendant, PNC Bank, is the trustee. Plaintiffs brought this action against defendant, seeking an accounting and alleging that defendant had breached the trust by buying a variable universal life insurance policy on the life of Frederick L. Mueller. After hearing evidence in a bench trial, the trial court found that the purchase of this policy was indeed a breach of trust not only because the purchase of the policy was a waste of trust assets but because, more fundamentally, variable universal life insurance was not among the types of life insurance that the trust instrument directed the trustee to buy. The court imposed a surcharge on defendant in the amount of $1,420,887.40, staying the judgment, however, so as to give defendant an opportunity to sell the policy and make the trust whole with the sale proceeds. Defendant appeals pursuant to Illinois Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010).

¶ 3 We affirm the trial court's judgment because (1) the purchase of variable universal life insurance was, *ipso facto*, a breach of the terms of Trust No. 1397, which directed the trustee instead to buy "ordinary insurance or term insurance," and (2) the trial court crafted a remedy reasonably calculated to place the trust in the position it would have occupied, at the present date, had the breach never occurred. Given that the purchase of this type of life insurance was in itself a breach of trust, we need not address the issue of whether the purchase was economically imprudent.

¶ 4 In addition, plaintiffs cross-appeal from the trial court's denial of punitive damages.

We affirm the judgment in that respect as well because wantonness, malice, oppression, or willfulness is not clearly evident from the record. This is simply a garden-variety case of breach of trust, and a reasonable trier of fact could be unconvinced by plaintiffs' efforts to portray it as something more sinister. Therefore, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 A. Creation of the Trusts

¶ 7 1. *Trust Nos. 1397, 1398, and 1399*

¶ 8 Frank H. Mueller, whom we will call "the grantor," was the grandson of the founder of Mueller Manufacturing Company in Decatur. (The grantor is not to be confused with his own grandson Frank Mueller, one of the plaintiffs in this case.) The grantor owned stock in the company, and on March 4, 1966, he created three trusts, funding them with company stock. He named these trusts after his three children: the "Frederick L. Mueller Trust, No. 1397"; the "Michael R. Mueller Trust, No. 1398"; and the "Philip M. Mueller Trust, No. 1399." The purpose of these trusts was to transfer approximately equal amounts of the grantor's assets, most notably company stock, not to the grantor's children but to the descendants of his children. The trusts had substantially similar provisions except that, upon the death of the oldest child, Philip, the trustee was to distribute a specific number of company shares, or their equivalent cash value, from Trust No. 1399 to Trust Nos. 1397 and 1398 so that those two remaining trusts would have a quantity of shares of approximately equal value.

¶ 9 The grantor hoped that his Mueller Manufacturing Company stock would stay in the family after he and his children died, and the trusts were specially designed to further that objective. The trusts forbade the trustee to sell or exchange any company stock except if (1) an exchange was part of a merger or consolidation affecting the majority of company stock or (2) the namesake of the trust sold his personal holdings of company stock, in which case the trustee could sell a proportionate amount of company stock. The primary function of each of the three trusts was to buy life insurance on each of the three children of the grantor so that when they died, their children would not be forced to sell company stock in order to pay estate taxes.

¶ 10 For example, article III, section 1, of Trust No. 1397 (the Frederick L. Mueller Trust, with which we are concerned in this case) directs the trustee to "use *** accumulated income, together with any unrestricted principal and contributed funds, to purchase a policy or policies of ordinary insurance or term insurance, or both, on the life of [Frederick L. Mueller], in the maximum amount which the accumulated income, unrestricted principal, contributed funds and anticipated net income of the trust estate permits," with the trustee as the named beneficiary in each such policy. It was "the Grantor's intention," section 1 says, "that the net income and unrestricted principal of the trust estate, so far as feasible, *** be devoted exclusively to purchasing and maintaining in force the maximum amount of *such* insurance on the life of [Frederick L. Mueller]"—that is, ordinary insurance term insurance, or both—"which, in the sole judgment of the Trustee, the net income, unrestricted principal of the trust estate and contributed funds [would] permit." (Emphasis added.)

¶ 11 Section 2 of article IV provides that, upon Frederick L. Mueller's death, the trustee shall collect the proceeds of the insurance policies and distribute the trust estate, including the insurance proceeds, to "the then living descendants of the Grantor, except that no portion of the trust shall be distributed to or for the benefit of the Grantor's sons, MICHAEL R. MUELLER or PHILIP M. MUELLER, but instead shall be distributed to the then acting Trustee of the trust *** bearing such son's name and shall be added to and become a part of such trust." If there are no living descendants of the grantor when Frederick L. Mueller dies, the trust estate is to be distributed to the grantor's wife, Della W. Mueller, if she is living. If she is not living, the trust estate goes to the grantor's nieces and nephews if they are living or, if they not living, to their descendants. If there are no living nieces or nephews of the grantor and no living descendants of the nieces and nephews, the trust estate goes to the Decatur and Macon County Hospital Association.

¶ 12 Trust Nos. 1398 and 1399 have similar provisions regarding the purchase of life insurance and the distribution of the trust estate upon the respective brothers' deaths. For example, Trust No. 1398 provides that, upon Michael R. Mueller's death, the assets of that trust shall go to his living descendants.

¶ 13 Michael, age 65, is alive, and plaintiffs are his children.

¶ 14 Frederick, age 61, is alive and currently has no children. He is confined to a wheelchair and has significant health problems.

¶ 15 Philip died in November 2011 and had no children.

¶ 16 Consequently, as of now, plaintiffs are the only descendants of the grantor, other than Michael and Frederick, who take nothing under the trusts, and unless the family composition changes, plaintiffs will receive all the assets of Trust Nos. 1397 and 1398 after Frederick and Michael die.

¶ 17 2. *Trust No. 1970*

¶ 18 On August 20, 1971, the grantor created a fourth trust, Trust No. 1970, which he also funded with company stock. Trust No. 1970 directs the trustee to pay into Trust Nos. 1397, 1398, and 1399 such amounts as the trustee believes necessary or desirable to pay premiums on insurance policies held by those trusts. The funds of Trust No. 1970 may be used only for that purpose.

¶ 19 Trust No. 1970 also contains some equalizing provisions, which take effect as brothers die. Upon the death of the first of the three brothers, the trustee is to determine the net value of the assets in Trust Nos. 1397, 1398, and 1399, taking into account the face value of the insurance policies, the cash, and the other investments but excluding the company stock. The trustee then is to distribute, from Trust No. 1970 to the trust bearing the name of the first brother to die, whatever amount is needed to make the value of that trust equal to one-third of the total combined value of all the trusts.

¶ 20 Upon the death of the second brother, the trustee is to determine the net value of the assets in Trust No. 1970, the assets in the trust bearing the name of the second brother to die, and the assets in the trust bearing the name of the remaining living brother. Again, the insurance policies are to be valued at their face value. The trustee then is to distribute from Trust No. 1970 an amount that will make the value of the remaining two trusts equal.

¶ 21 B. The Successive Trustees

¶ 22 The four trust instruments name Citizen's National Bank of Decatur as trustee. Later, National City Bank became the successor trustee, and still later, defendant became the successor in interest by merger with National City Bank.

¶ 23 C. Whole-Life Insurance Policies for Trust Nos. 1397, 1398, and 1399

¶ 24 From 1967 to the present, the trustee has bought two whole-life policies on the life of each of the three brothers. The whole-life policies in Trust No. 1399 have a total face value of $311,720, those in Trust No. 1398 have a total face value of $321,135, and those in Trust No. 1397 have a total face value of $334,617.

¶ 25 D. The Sale of Mueller Manufacturing Company

¶ 26 In 1986, because of a problem with estate taxes in another branch of the Mueller family, Mueller Manufacturing Company was sold. The trustee of the four trusts received cash for all the company stock held in the trusts. The trustee invested the sale proceeds, maintained the whole-life policies already in force, and—until 1999—refrained from buying any additional life insurance.

¶ 27 E. Frederick L. Mueller's Poor Health

¶ 28 In 1984, Frederick L. Mueller suffered a severe head injury in a car accident. He was in a rehabilitation facility for some seven years, until 1991.

¶ 29 In 2005, Frederick L. Mueller suffered a relapse and he again became quite infirm. His speech was slurred. He was eating only sporadically. He refused to bathe, sitting in his own urine and feces. He was diagnosed as suffering from continued brain problems as manifested by generalized atrophy, small-vessel white-matter ischemic changes in the brain, and ataxia (loss of muscle control in his extremities). He was confined to a motorized wheelchair or scooter. He continued to struggle with alcoholism in addition to being a heavy smoker (up to four packs a day). Because of the relapse, he went into a rehabilitation facility again and spent almost a year there, from 2005 to 2006.

¶ 30 In a letter dated April 20, 2010, Frederick L. Mueller's attorney, Michael Volpe, wrote that Frederick L. Mueller was still confined to his motorized wheelchair, that he was losing the use of his arms, and that he needed constant assistance for the ordinary tasks of daily life.

¶ 31 Defendant's trust officer, Robert Witner, visited Frederick L. Mueller in Volpe's office in October 2010 and observed that Frederick L. Mueller still was confined to a wheelchair, that he was pale, that his speech was slurred, and that he had limited use of his arms.

¶ 32 Volpe testified at trial that he visited Frederick L. Mueller once a month and that, in 2005, his health did not seem greatly changed. "[O]ther than personal hygiene and matters of that nature," Volpe said, "he seemed to be about the same as he was in the years before that."

¶ 33 F. The Purchase of the Lincoln Policy for Trust No. 1397

¶ 34 In 1997, Volpe wrote to Andrew Mihm, who at the time was the bank officer responsible for Trust No. 1397, requesting that the trustee consider buying a life insurance policy on Frederick L. Mueller's life with a face value of at least $3 million. Volpe wrote that although Frederick L. Mueller previously had insurability problems, he now had been determined to be insurable. Mihm replied that he would consider Volpe's suggestion, and he requested Volpe to obtain three quotes from different insurers for similar coverage.

¶ 35 About two years later, on July 23, 1999, after National City Bank became the successor trustee, Volpe wrote Gregory Perkins (Mihm's replacement) that after applying to four different insurance companies, Frederick L. Mueller's advisors had succeeded in obtaining a commitment from Lincoln National Life Insurance Company to issue a policy in the face amount of $10 million on Frederick L. Mueller's life. We will call this policy "the Lincoln policy." Volpe enclosed a partially competed application for the Lincoln policy and requested Perkins to sign and return the application along with the first planned annual premium of $162,819. Trust No. 1397, the Frederick L. Mueller Trust, had $1.747 million in assets at the time.

¶ 36 According to his testimony, Perkins reviewed the application, the terms of the proposed Lincoln policy, and the illustrations the insurer had provided, and he checked on the insurer to make sure it was a solid, reputable company. After consulting with another bank employee, Richard Morris, an estate-planning officer knowledgeable about insurance, Perkins decided to buy the Lincoln policy. He filled out the application Volpe had sent him, and he returned it along with the first annual premium, a check in the amount of $162,819 drawn on Trust No. 1397. After buying the Lincoln policy, Perkins consulted Chad Welborn, an investment officer, to decide in which mutual funds to invest, among those the insurer offered under the policy.

¶ 37 No documentation was prepared of Perkins's discussions with Morris and Welborn. It appears that Perkins's testimony is the only evidence that he consulted with those two persons. Both Perkins and Mary Etrick, a senior vice-president of National City Bank, testified it was not customary at the bank to document such face-to-face discussions.

¶ 38 Perkins did not insist on actually seeing quotations from other insurance companies before he bought the Lincoln policy, although he had requested Volpe to obtain three quotations. He admitted he bought the policy because it was "pushed" by Volpe. He did not consider buying comparable life-insurance policies for Trust Nos. 1398 and 1399. It never occurred to him to document, for the trust file, any particular reasons he had for buying the Lincoln policy; nor was he aware of any bank policy to generate such explanatory documentation. In 1999, when he bought the policy, he had no concerns or reservations about the ability of Trust No. 1397 to pay for it.

¶ 39 G. The Essential Features of the Lincoln Policy

¶ 40 The Lincoln policy is a flexible-premium variable universal life insurance policy. In this type of insurance, the owner pays a planned annual premium, which has two components. One component of the premium pays for the cost of the insurance along with the insurer's administrative fees and expenses. The other component of the premium is the investment component. The insurer provides a group of mutual funds, in which the owner of the policy may invest, using the investment portion of the planned annual premium. The investments and their returns comprise the cash value of the policy. The accumulated cash value is applied toward the cost of the insurance. As the insured ages, the cost of the insurance keeps going up, and to the extent that the chosen investments in the policy do well, they offset that steady increase in the cost of the insurance.

¶ 41 Offsetting the cost of the insurance with skillful investments is supposedly one of the advantages of variable universal life insurance. In fact, this type of insurance is regarded as having three advantages that we can ascertain from the testimony and the briefs. First, the premiums are flexible. Situations could arise in which one might prefer not to pay the full planned annual premium. For example, if the insured contracts a terminal illness and has only a few months left to live, it might not make sense to continue pouring money into the policy; it might be better to let the accumulated cash value of the policy cover the cost of the insurance and the administrative expenses, and then, when the insured died, the beneficiary would collect the face amount—say, $10 million. In whole-life insurance, by contrast, one must invariably and without fail pay a fixed premium at specified intervals of time, or be in default. Second, the planned annual premium in a variable universal life insurance policy generally is less than that in whole-life policies with the same face amount. Third, the owner, rather than the insurer, controls the investment portion of the premium. The insurer provides a range of proprietary mutual funds, and the owner decides in which specific mutual funds to invest.

¶ 42 This third advantage is, of course, a double-edged sword. Assuming control of the investments means assuming the risk of the investments—the risk is on the owner of the policy. In whole-life insurance, by contrast, the risk is on the insurer: the insurer decides how to invest the investment portion of the premium, and the policy will eventually have a certain, promised cash value. You could lose your investment with a variable universal life insurance policy, but it is unlikely that you will not lose your investment with a whole life policy.

¶ 43 H. The Trustee Stops Paying the Planned Annual Premium

¶ 44 From the issuance of the Lincoln policy in 1999 until 2003, the trustee paid the planned annual premium of $162, 819, which, again, was comprised of the cost of the insurance, an administrative fee, and investments inside the policy, *i.e.*, investments in mutual funds selected by the trustee (with Welborn's advice) from among the assortment of mutual funds offered by the insurer. The investments inside the policy did well up through July 2001, and then the market went sour, and the value of the investments fell. For that matter, the value of the investments the trust had made outside the policy fell as well.

¶ 45 In 2002, the successor trust officer, Robert Witner, decided to stop paying the planned annual premium on the Lincoln policy. Consequently, the insurer began collecting the cost of the insurance solely out of the accumulated cash value of the policy: that is, out of the value of the investments already made—investments that no longer were being replenished with fresh infusions of cash. Witner made this decision in consultation with Welborn, who believed that the trustee could do better with investments outside the policy than with those available inside the policy. So, the trustee paid nothing into the Lincoln policy during the years 2002, 2003, and 2004. In 2005, the trustee made a partial payment of the cost of insurance. In 2006, the trustee began paying the full cost of the insurance month by month. To this day, the trustee is paying into the Lincoln policy only the monthly cost of the insurance.

¶ 46 As of the date of trial (June 2011), the total value of the assets held by Trust No. 1397, exclusive of the Lincoln policy, was $972,713.

¶ 47 I. The Trustee Explores Its Options

¶48 From June 2005 through at least June 2007, the trustee requested various hypothetical illustrations from Lincoln Financial Group in order to explore its options with regard to the Lincoln policy. According to the illustrations that Lincoln Financial Group provided, no matter what reasonable assumptions one made as to the interest that the trust investments would earn, the Lincoln policy would not reach maturity and would fail before Frederick L. Mueller's life expectancy. (Because he would be 99 when the policy matured and because it is rare to live to that age, the maturity date has little practical significance. Instead, the important consideration is his life expectancy, of which there are differing estimates, as we soon will discuss.)

¶49 The trustee considered reducing the death benefit of the Lincoln policy so as to reduce the cost of the insurance. Dennis Moore of the Lincoln Financial Group explained to the trustee, however, that even if the death benefit were reduced to $3.2 million, the "maximum payments allowed" under "federal guidelines" (evidently, income-tax law) would not enable the policy to "carry through maturity."

¶ 50 In early 2006, Witner provided one of the brothers, Michael R. Mueller, with calculations pertaining to the Lincoln policy. By the trustee's calculations, Trust No. 1397 would become fully depleted around 2016 if it continued paying the cost of the insurance on the Lincoln policy, and if after the depletion of Trust No. 1397, Trust No. 1970 took up the burden of paying the cost of the insurance, it, too, would be depleted by 2028. At the time Witner prepared these calculations, Frederick L. Mueller was 55.

¶ 51 In August 2006, Witner and Volpe discussed the very real possibility that Trust No. 1397 would go broke if it continued paying the increasing cost of the insurance on the Lincoln policy for more than 10 or 11 years into the future. In a letter of August 18, 2006, to Witner, Volpe recounted several options the trustee had been considering, including letting the Lincoln policy lapse, buying a new policy with a reduced face amount, Frederick L. Mueller's contributing toward the policy payments, and his buying the Lincoln policy outright from the trustee.

¶ 52 On April 3, 2007, the trustee offered to sell the Lincoln policy to Frederick L. Mueller for $623,457 plus any further monthly premiums the trustee had paid to the date of sale. Frederick L. Mueller declined. At that point, the Lincoln policy had zero cash value.

¶ 53 After plaintiffs filed suit in this case, defendant decided to maintain the status quo, paying only the monthly cost of the insurance out of the assets of Trust No. 1397.

¶ 54 J. The Expert Testimony

¶ 55 In the bench trial, plaintiffs called two expert witnesses: John Malachowski, an insurance producer who sold life insurance policies, and Daniel McGuire, a certified public accountant.

¶ 56 Defendant likewise called two expert witnesses: Joseph Kizer, an insurance consultant and investment advisor for trust-owned life insurance policies, and Jerold Horn, an attorney specializing in estate planning and taxation.

¶ 57 1. *John Malachowski*

¶ 58 a. His Understanding of the Term "Ordinary Insurance"

¶ 59 In John Malachowski's opinion, buying the Lincoln policy was a bad idea not only because the policy was unaffordable but because this type of life insurance was unauthorized under the terms of the trust instrument. In addition to failing to foresee that the amount of assets that Trust No. 1397 had in 1999—$1.747 million—would be insufficient to pay the planned annual premium of $162,819 throughout Frederick L. Mueller's life expectancy, the trustee erred, in Malachowski's opinion, by buying a type of insurance that failed to conform to the description of "ordinary insurance or term insurance," the only kinds of life insurance that the trust instrument allowed the trustee to buy. Variable universal life insurance was not "term insurance"—on that, the parties agreed—and in Malachowski's view, it was not "ordinary insurance" either. Variable universal life insurance was a type of "permanent insurance" (as opposed to term insurance) that came onto the market in the 1990s, and given its flexible premiums and variable cash value, it was not "ordinary insurance."

¶ 60 Malachowski contradicted himself, however, on cross-examination. In response to the question of whether the insurance industry considered variable life insurance policies to be whole life insurance, he testified: "They're a form of ordinary insurance." He also testified that the terms "ordinary insurance" and "permanent insurance" could "be used interchangeably."

¶ 61 Nevertheless, on redirect examination, Malachowski reaffirmed his opinion that variable universal life insurance was not ordinary insurance. The two types of insurance differed in was that variable universal life insurance, unlike ordinary insurance, had flexible premiums and a cash value that varied with the market. He explained:

> "There are two basic types of insurance. Term insurance and permanent insurance. Permanent insurance generally is cash value type—cash value insurance. We'll throw term insurance out of the discussion for a minute because term insurance is not, I guess, being discussed here. Ordinary insurance generally refers to whole life insurance where there is a fixed premium and a fixed cash value. There are types of permanent insurance that have flexible premiums

and varying cash values, and the Lincoln policy in question, is one of those types. So it is a form of permanent insurance, but I do not believe it is a form of ordinary insurance."

¶ 62 b. Time Lines for the Depletion of the Trust Assets

¶ 63 Malachowski testified that in 1999 when the trustee bought the Lincoln policy, Frederick L. Mueller was 48 and that, with a standard rating, he had a life expectancy of 27.04 more years. (Using more recent life expectancy tables, Malachowski testified that Frederick L. Mueller was expected to live until age 80—again, with a standard rating.) Given the beginning balance of $1.747 million in Trust No. 1397 in 1999 and assuming a 9% rate of return on trust assets and the payment of an annual premium in the amount of $162,819, Malachowski calculated that Trust No. 1397 would be depleted in 26 years after 1999. Assuming different rates of return ranging from 5% to 8%, he calculated the trust would be depleted in 14 to 21 years after 1999. He therefore concluded that, at the time the trustee bought the Lincoln policy, it should have been apparent that Trust No. 1397 lacked sufficient assets to pay the planned annual premium throughout the life of the policy or even throughout Frederick L. Mueller's life expectancy.

¶ 64 Malachowski admitted, however, that his calculations of when Trust No. 1397 would run out of funds did not take into account any other funds that might become available to the trustee, such as funds from Trust No. 1970, funds from Trust No. 1399 (should Philip die), and the accumulated cash value that would be built up by investing the excess over the cost of insurance in mutual funds inside the policy for 26 years. (At this point in time, the Lincoln policy was devoid of cash value; nevertheless, the germane question was what sources of funding the trustee might reasonably have considered in 1999.)

¶ 65 c. The Cumulative Cost of the Insurance Compared to the Cumulative Premiums

¶ 66 Malachowski opined that if the guaranteed maximum cost of insurance for the Lincoln policy were imposed, the cumulative cost of the insurance would exceed the cumulative planned annual premium in 2016, when Frederick L. Mueller was 65. If the cost were 90% of the guaranteed maximum, the cumulative cost of the insurance would exceed the cumulative premiums in 2022, when he was 71. If the cost were 80% of the guaranteed maximum, the cumulative cost of the insurance would exceed the cumulative premiums in 2024, when he was 73.

¶ 67 Malachowski criticized the trustee's decision to allow the insurer to use the accumulated cash value of the Lincoln policy to pay the cost of the insurance from 2003 onward. According to Malachowski, this decision defeated the entire purpose of a variable universal life insurance policy. The investment portion of the planned annual premium was supposed to be invested in mutual funds of the owner's choice so that the cash value of the policy would accumulate and in later years reduce the cost of the insurance as the insured grew older. Absent any accumulated cash value, the cost of the insurance would keep going up with nothing to offset it.

¶ 68 2. *Daniel McGuire*

¶ 69 Daniel McGuire, a certified public accountant and certified valuation analyst, testified as plaintiffs' damages expert. He offered a method for determining the value that Trust No. 1397 would have had if the Lincoln policy had never been purchased. Because the trustee had similar investment outlooks in Trust Nos. 1398, 1399, and 1970, McGuire took the value of the trusts at the end of 1998 (the year's end before the year the Lincoln policy was purchased) and subtracted the value of the life insurance in each trust to arrive at the value that had been invested in the market.

He then calculated a percentage growth index for the trusts to show their performance from December 31, 1998, through April 29, 2011, which was the most current date for which he had records. He then multiplied the growth index by the value of Trust No. 1397 as of December 31, 1998, and consequently determined that Trust No. 1397 would have had a value of approximately $2,262,956.26 had the Lincoln policy never been purchased. In comparing this amount to the actual balance of funds on hand in Trust No. 1397 as of April 29, 2011, McGuire concluded that there was a shortfall of $1,420,887.40 due to the purchase of the Lincoln policy. The trial court found McGuire's method for determining damages to Trust No. 1397 to be reasonable and therefore assessed a surcharge in the amount of $1,420,887.40.

¶ 70 3. *Joseph Kizer*

¶ 71 a. His Understanding of "Ordinary Insurance"

¶ 72 Joseph Kizer testified that, in his experience in the insurance industry, a variable universal life insurance policy was "a cash accumulating policy that would be considered an ordinary form of insurance."

¶ 73 b. Justifications for Buying the Lincoln Policy

¶ 74 Kizer testified that, in the 1990s, it was common for trustees to buy variable universal life insurance policies because such policies offered a higher death benefit than other kinds of life insurance and also because trustees could manage the funding of the policies by paying less than the planned annual premium and making up the difference through better-performing investments outside the policies. (This type of life insurance could backfire, and most of Kizer's clients were trustees facing potential liability for variable universal life insurance policies that had become financially unmanageable.) Also, for another advantage, if the insured's health declined, the trustee had the option of only minimally funding the policy by paying just the cost of the insurance. Then, upon the insured's death, the trustee would collect the death benefit even though, as of late, the trustee had been paying less for it in view of the insured's terminal illness. The trustee would not have received the accumulated cash value anyway when the insured died.

¶ 75 In addition to this flexibility in the payment of premiums, the Lincoln policy afforded flexibility in another way: the amount of the death benefit. Buying, at the outset, a policy with a large face amount was an effective strategy for guaranteeing insurability, because the amount of the death benefit could always be reduced if circumstances so warranted but it could not necessarily be increased. In other words, by locking the insurer into a death benefit of $10 million before Frederick L. Mueller's health took a downward turn, the trustee effectively kept its options open from $10 million down. An overly timid choice at the outset might have precluded the trustee from obtaining, later on, what would turn out to be the maximum affordable death benefit. Kizer recommended reducing the face value of the Lincoln policy to $7.5 million—as the guardian *ad litem* likewise recommended.

¶ 76 c. The Life Settlement Market

¶ 77 In his testimony, Kizer mentioned the "life settlement market," and at the trial court's request, defendant's attorney elicited further information from him regarding this market. The life settlement market consists primarily of institutional investors, such as pension funds. These investors buy insurance policies for less than the face value. Then they pay the premiums and hold the policy until the death of the insured, hoping to make a 5% to 35% return.

¶ 78 One consideration in valuing a policy on the life settlement market is the health of the insured, *i.e.*, how much longer the insured is expected to live. Obviously, the shorter his or her life expectancy, the more valuable the policy is. On the basis of the latest available medical information—namely, the information from Frederick L. Mueller's stay in the rehabilitation clinic from 2005 to 2006—Kizer estimated that his life expectancy ranged from 9.67 years (age 71) to 14.16 years (age 75). Given this life expectancy, Kizer predicted that the Lincoln policy would fetch $1 million to $1.6 million on the life settlement market.

¶ 79 Malachowski disputed Kizer's estimation of Frederick L. Mueller's life expectancy because Kizer assumed a severe deterioration in his health after 1999. Having reviewed the medical records from 2005 to 2006, Malachowski was under the impression that Frederick L. Mueller's medical condition was unchanged from 1999, when Lincoln National Life Insurance Company gave him a standard rating. Malachowski admitted on cross-examination, however, that Frederick L. Mueller did not have permanent atrophy and small-vessel white-matter ischemic changes in his brain in 1999, that he was not confined to a wheelchair in 1999, that he was not suffering a progressive loss of the use of his extremities in 1999, and that he did not have a cognitive disorder in 1999. Malachowski further agreed that these new medical conditions could change how an insurance company would have rated Frederick L. Mueller in 2005 and that they might have made him uninsurable if he had sought to buy new insurance.

¶ 80 d. The Probabilities That the Trust Would Collect Various Amounts of a Death Benefit

¶ 81 Considering the funds available from Trust Nos. 1399 and 1970 and assuming Frederick L. Mueller's shortest life expectancy, age 71, Kizer calculated there was a 99.73% probability that Trust No. 1397 would receive a payment on the Lincoln policy if its face amount were reduced to $5 million, in which case the net recovery (after payment of premiums) would be

$3.6 million. He calculated a 96.71% probability of collecting a death benefit if it were reduced to $7.5 million, in which case the net recovery would be $5.5 million. He calculated a 90.93% chance of collecting a death benefit of $10 million, in which case the net recovery would be $7.8 million.

¶ 82 For Frederick L. Mueller's longest life expectancy, age 75, Kizer calculated a 93.35% probability of receiving a death benefit of $5 million, with a net recovery of $2.8 million; an 80.08% probability of receiving a death benefit of $7.5 million, with a net recovery of $5.2 million; and a 68.03% probability of receiving a death benefit of $10 million, with a net recovery of $7.8 million.

¶ 83 4. *Jerold Horn*

¶ 84 Jerold Horn testified that Trust No. 1397 was a typical irrevocable insurance trust. He opined that the trustee would act in good faith by relying on the language in the trust instrument that unrestricted funds should be used "exclusively to purchas[e] and maintain[] in force the maximum amount of such insurance on the life of the said FREDERICK L. MUELLER, which, in the sole judgment of the Trustee, the net income, unrestricted principal of the trust estate and contributed funds will permit." Horn saw no provision in the trust instrument that changed that purpose once all the stock in Mueller Manufacturing Company was sold. He opined that defendant had acted in good faith by maintaining the status quo after plaintiffs filed suit in 2007.

¶ 85 Horn admitted, however, that he had not exhaustively reviewed all the trustee's actions in the management of the Lincoln policy. He also admitted he did not know all the facts and circumstances of the case and that he had not reviewed either the prior testimony of the trustee or the trustee's files.

¶ 86 K. The Trial Court's Decision

¶ 87 The trial court found that the purchase of the Lincoln policy was a breach of trust not only because the policy failed to conform to the description of "term insurance" or "ordinary insurance" but also because the purchase was a waste of trust assets. Even so, the court found no aggravating circumstances warranting the imposition of punitive damages.

¶ 88 After entering a judgment surcharging defendant in the amount of $1,420,887.40, the trial court stayed the enforcement of the judgment and directed defendant to do the following: (1) seek Frederick L. Mueller's consent to a current physical examination; (2) offer him the opportunity to buy the Lincoln policy; (3) if he declines to buy the Lincoln policy, hire a broker to attempt to sell the policy to a third party, with either the current medical information from Frederick L. Mueller or such medical information as is available; (4) if any *bona fide* offers are made to buy the Lincoln policy, present such offers to the court for approval; (5) apply the proceeds of any sale of the policy toward restoring funds to Trust No. 1397 and reducing the amount of the surcharge against defendant; (6) if the policy cannot be sold, seek direction from the court as to whether to allow the policy to lapse; and (7) continue paying the cost of the insurance on the Lincoln policy until further order of the court.

¶ 89 II. ANALYSIS

¶ 90 A. Is the Surcharge Premature and Speculative?

¶ 91 Defendant argues that, even if one assumed, for the sake of argument, that the purchase of the Lincoln policy was imprudent, the surcharge in the amount of $1,420,887.40 is premature and speculative, considering that Frederick is still alive and the Lincoln policy is still in force. Essentially, defendant makes three points in this argument.

¶ 92 1. *The Possibility That Frederick L. Mueller Could Become a Father*

¶ 93 First, defendant observes that "[i]f Frederick has children, natural or adopted, then

Plaintiffs will have no interest in the 1397 Trust even if they survive him." This is just another way of saying that plaintiffs are contingent, not vested, beneficiaries of Trust No. 1397. Hence, defendant raises a question of law, which we will answer *de novo* (*In re Marriage of McGrath*, 2012 IL 112792, ¶ 10): Do contingent beneficiaries of a trust have a right to obtain a monetary remedy, payable to the trust, for breach of the trust? (For it must be remembered that the surcharge will be payable to the trustee of Trust No. 1397, not to plaintiffs. See Restatement (Third) of Trusts § 100 cmt. a(2), at 63 (2012).)

¶ 94 The supreme court has held that contingent beneficiaries of a trust do indeed have a right to bring an action against the trustee for breach of the trust insomuch as the action is "necessary to protect [their] possible eventual interest," that is, to "protect and preserve the trust *res*." *Burrows v. Palmer*, 5 Ill. 2d 434, 440 (1955). "A trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest in so far as necessary for the protection of the contingent beneficiary's right in the trust property." *Id.* See also *Giagnorio v. Torkelson Trust*, 292 Ill. App. 3d 318, 323 (1997).

¶ 95 Those with a vested interest in the trust and those with a contingent interest are, alike, beneficiaries of the trust. "The beneficiaries of a trust include any person who holds a beneficial interest, present or future, vested or contingent." Restatement (Third) of Trusts § 94 cmt. b, at 6 (2012). "A suit against a trustee of a private trust to *** redress breach of trust *** may be maintained *** by a beneficiary" (*id.* § 94(1), at 4), which, again, is defined to include contingent beneficiaries (*id.* § 94 cmt. b, at 5-6). "A breach of trust is a failure by the trustee to comply with any duty that the trustee owes, as trustee, to the beneficiaries ***." *Id.* § 93, at 1. One of those fiduciary duties is to administer the trust "in accordance with the terms of the trust." *Id.* § 76(1), at

68. See also *Bank of America, N.A. v. Carpenter*, 401 Ill. App. 3d 788, 801 (2010). Thus, the possibility that Frederick L. Mueller could someday become a father, thereby divesting plaintiffs of their contingent interest in Trust No. 1397, or at least making the contingent interest more remote (the child could predecease both him and plaintiffs), does not preclude plaintiffs, as contingent beneficiaries, from seeking a remedy for breach of trust with respect to the failure to administer the trust in accordance with its terms.

¶ 96 2. *The Possibility That Frederick L. Mueller Will Die While the Lincoln Policy Is in Force*

¶ 97 Defendant contends that "[i]f Frederick dies while the policy is still in force, the Plaintiffs will not suffer any damages because the face amount of the policy, less the cost of the insurance paid for it, will exceed the amount of the surcharge and any possible return which could be expected on that amount for many years." Defendant points out that the infliction of damages is an essential element of a claim of breach of fiduciary duty; even if the trustee breached a fiduciary duty, there is no cause of action without damages resulting from the breach. *Bank of America*, 401 Ill. App. 3d at 801; *Chicago City Bank & Trust Co. v. Lesman*, 186 Ill. App. 3d 697, 701 (1989). Defendant reasons that the element of damages has not been proved in this case, because if Frederick L. Mueller dies while the Lincoln policy is in force, the insurer will be contractually obligated to pay the face value of the policy, $10 million—and even subtracting what this insurance has cost, the $10 million will far exceed the surcharge of $1,420,887.40 together with any amount that the surcharge would earn over several years.

¶ 98 The fallacy of this reasoning is that it regards damages merely as a future possibility whereas, in actuality, damages began to be inflicted in 1999, when defendant paid the first premium for the Lincoln policy—assuming (as defendant invites us to assume for the time being) that the purchase of the Lincoln policy was a breach of trust. Again, as we have explained, "[a] breach of trust is a failure by the trustee to comply with any duty that the trustee owes, as trustee, to the beneficiaries" (Restatement (Third) of Trusts § 93, at 1 (2012)), and one such fiduciary duty is to "carry out the trust according to its terms" (internal quotation marks omitted) (*Bank of America*, 401 Ill. App. 3d at 801). A trustee has a duty to administer the trust not only "diligently and in good faith" but "in accordance with the terms of the trust." Restatement (Third) of Trusts § 76(1), at 68 (2007). "The intent of the settlor," as manifested in the terms of the trust, "is the initial question to be addressed before determining the secondary issue of whether the trustees acted in good faith." (Internal quotation marks omitted.) *Bank of America*, 401 Ill. App. 3d at 801. Thus, even if, in entering into a transaction, the trustee acted in good faith and even if, from a purely economic point of view, the transaction was a risk well worth taking, the law affords a remedy for breach of trust if the transaction violates the terms of the trust. The grantor has the prerogative of deciding the particular types of risks the trustee may take in administering the trust. In administering a trust, the trustee has the responsibility of "ascertaining the duties and powers of the trusteeship," and if the trust instrument directs the trustee to buy Policy A or Policy B and if, instead of buying either of those two specified policies, the trustee spends the trust assets on Policy C, the trustee's good-faith belief, even if objectively well-founded, that Policy C is economically the wisest choice will not save the trustee from liability for breach of trust. See Restatement (Third) of Trusts § 76(2)(a), at 68 (2007). For "breach of trust" is defined as "a failure by the trustee to comply with *any* duty that the trustee owes, as trustee, to the beneficiaries" (emphasis added) (*id*. § 93, at 1), and one of those duties is to administer the trust "in accordance with the terms of the trust" (*id.* § 76(1), at 68).

¶ 99 A trustee who breaches a trust—such as by administering it contrary to its terms—"is chargeable with *** the amount required to restore the values of the trust estate *** to what they would have been if the portion of the trust affected by the breach had been properly administered." Restatement (Third) of Trusts § 100(a), at 62 (2012). The surcharge in the amount of $1,420,887.40 (stayed for the time being) was calculated to make Trust No. 1397 and its beneficiaries whole by restoring to the trust the assets it would have had if the trust had been properly administered, according to its terms, in the manner that the other trusts had been administered, *i.e.*, by not buying the ten-million-dollar variable universal life insurance policy. See *Id.* § 100 cmt. b(1), at 65 ("[T]he projected returns on indefinite hypothetical investments during the surcharge period may appropriately be based, inter alia, on *** average return rates of portfolios *** of a representative selection of other trusts having comparable objectives and circumstances ***.").

¶ 100 3. *The Possibility of Ameliorative Measures*

¶ 101 Defendant argues that some courses of action could be taken to either lessen the economic burden of the Lincoln policy or to enhance the desirability of the policy. Defendant says:

> "[I]f Frederick agrees to a current medical examination (a matter of continued negotiation between [defendant] and Frederick's attorney) it may result in increasing the value of the Lincoln policy in the life settlement market such that the sale price of the policy would exceed the amount of the surcharge. In addition, depending on Frederick's current medical condition, the prudent course of action may be to reduce the face amount of the policy to $7.5 million or $5 million, as the trustee contemplated five years ago, immediately prior to the

filing of this lawsuit."

¶ 102 The trial court's order allows for the possibility that the Lincoln policy could be sold on the life settlement market. The court ordered defendant to hire an insurance broker and "attempt[] to market the Lincoln policy in the life settlement market." If and when the broker receives a *bona fide* offer to purchase the Lincoln policy, defendant is to file a motion with the court setting forth the terms of the offer, and then the court will conduct a hearing with notice to all interested parties.

¶ 103 As for keeping the Lincoln policy and reducing its face value to $5 million or $7.5 million so as to make the premiums more affordable, it would be up to the beneficiaries whether to take that course of action, and plaintiffs evidently say no. "If the trustee purchases with trust funds property which it is not his duty to purchase, the beneficiary can at his election reject the purchase or affirm it." Restatement (Second) of Trusts § 210 cmt. b, at 477 (1959). From what they say in their brief, it appears that plaintiffs have elected to reject the Lincoln policy.

¶ 104 B. Was the Decatur and Macon County Hospital Association a Necessary Party?

¶ 105 If the grantor of Trust No. 1397 has no nieces or nephews and if plaintiffs predecease Frederick L. Mueller without descendants and if he likewise dies without descendants, the assets of Trust No. 1397 will pass to Decatur and Macon County Hospital Association. Defendant contends, therefore, that the association was a necessary party, the nonjoinder of which necessitates the vacation of the trial court's judgment and the remand of this case for further proceedings, with the joinder of the association.

¶ 106 The association is a contingent beneficiary, and according to some of the cases that defendant cites in its brief, contingent beneficiaries are not necessary parties. Most notably, for example, the supreme court says in *Oglesby v. Springfield Marine Bank*, 385 Ill. 414, 422 (1944):

"The rule in chancery pleading and practice is that all persons who are legally and equitably interested in the subject matter and the result of the suit must be made parties. The interest, however, must be a present substantial interest as distinguished from a mere expectancy or future contingent interest." Likewise, in another case that defendant cites, the appellate court says: "[T]o be a necessary party, the individual or entity involved must have a present substantial interest, as opposed to a mere expectancy or future contingency ***." (Internal quotation marks omitted.) *Safeco Insurance Co. of Illinois v. Treinis*, 238 Ill. App. 3d 541, 546 (1992). The association has merely a future contingent interest in Trust No. 1397 and, therefore, according to authorities that defendant itself cites, the association is not a necessary party.

¶ 107 Defendant, as trustee, represents the contingent beneficiaries. See *Temple v. Scott*, 143 Ill. 290, 298 (1892). Surely, defendant does not mean to imply that it is inadequate for that purpose.

¶ 108 C. Is Variable Universal Life Insurance "Ordinary Insurance"?

¶ 109 The Illinois Department of Insurance has promulgated a regulation requiring life insurers to provide all applicants a "Buyer's Guide" before accepting from them the first premium. 50 Ill. Adm. Code 930.50(a) (2012). The "Buyer's Guide" is an easy-to-understand brochure on life insurance, drafted by the Department, using, among other sources, material prepared by the National Association of Insurance Commissioners. 50 Ill. Adm. Code 930. Exhibit A (2012). Failure of an insurer to provide the "Buyer's Guide" is tantamount to "misrepresent[ing] the benefits, advantages, conditions or terms of an insurance policy." 50 Ill. Adm. Code 930.90 (2012).

¶ 110 According to the "Buyer's Guide," " 'ordinary life' insurance," also called " 'straight life' " insurance, is a kind of "whole life insurance," for which "you pay the same premiums for as long as you live." 50 Ill. Adm. Code 930. Exhibit A (2012).

¶ 111 In short, ordinary life insurance is "the archetypal whole life policy." Robert H. Jerry III, *What Is Insurance?, in* 1 New Appleman on Insurance Law Library Ed. § 1.08[2][b][iii] at 1-72 (Francis J. Mootz III et al. ed 2011) (hereinafter, Appleman on Insurance). (Appelman describes a couple of other variations on whole life insurance: " 'limited-payment life' " and " 'single premium life,' " which the insured may purchase if "the insured desires to pay *** for the policy on an accelerated basis," and " '[e]ndowment life insurance,' " in which "the insured pays premiums until some specified age at which time an 'endowment' exists—the policy's cash value equals the face value" and then "the insured may have the option either to take the entire cash value in a lump sum or to have the cash value paid back in the form of an annuity." *Id.*)

¶ 112 "Unlike whole life, with universal life the policyholder may vary the death benefit, may vary the premium and the timing of the premium payments, and may make partial withdrawals from cash value." *Id.* § 1.08[2][b][iv] at 1-73. Thus, universal life insurance is not whole life insurance. And if universal life insurance is not whole life insurance, variable universal life insurance is not whole life insurance, either. (Variable universal life insurance is a hybrid of universal life insurance and variable life insurance. As Malachowski testified on cross-examination, it "combines the premium flexibility of universal life insurance with a death benefit that varies as in variable life insurance.") And if variable universal life insurance is not whole life insurance, it is not ordinary life insurance, which is the archetypal whole life insurance. See *Lasley v. New England Variable Life Insurance Co.*, 126 F. Supp. 2d 1236, 1238-39 (N.D. Cal. 1999) ("[The] complaint as it is now pleaded does not solely relate to ordinary policies. The complaint also involves variable policies[,] [which, unlike ordinary policies, are 'covered securities' under the

Securities Litigation Uniform Standards Act].").

¶ 113 It is true that ordinary life insurance and variable life insurance are both forms of permanent insurance (as opposed to term insurance), but it does not follow that variable universal life insurance is ordinary life insurance. Variable universal life insurance "offer[s] flexible premiums, adjustable death benefits, investment choices, and the ability to borrow against the account value." Appleman on Insurance, 1-74. Whole life insurance, by contrast, which Black's Law Dictionary regards as synonymous with "ordinary life insurance," has fixed premiums. Black's Law Dictionary 808 (7th ed. 1999) ("whole life insurance" as a subdefinition of "insurance"); see also *Stevens v. Commissioner of Internal Revenue*, 439 F.2d 69, 72 n.5 (2d Cir. 1971) ("Unlike the level premiums of an ordinary life policy, term insurance premiums include no increment by which a reserve accumulates with the insurance company."); 44 C.J.S. *Insurance* § 14 (2007) ("Where the insurance is on a level or flat-rate plan, that is, where for a fixed premium, payable, without condition, at stated intervals, a sum certain is to be paid on death, without condition, it is known variously as 'general insurance,' 'ordinary insurance,' 'old-line insurance,' or 'level-premium insurance' ***."); Robert L. Arone et al., *Life Insurance and Estate Planning*, *in* 1 A Practical Guide to Estate Planning in Massachusetts § 7.1.3(b) (Massachusetts Continuing Legal Education, Inc. 2011), *available at* Westlaw EPI MA-CLE 7-1 ("The most common type of whole life insurance is 'straight life' or 'ordinary life' insurance, which generally has the following characteristics: [(1)] level (fixed) periodic premiums payable for the life of the insured, [(2)] a fixed death benefit, and [(3)] a guaranteed schedule of minimum cash surrender values that increase year by year."); Jonathan G. Blattmachr, *Selected Aspects of Taxation Relating to Life Insurance and Deferred Compensation*, *in* Income Taxation of Estates and Trusts 1985, at 244 (PLI Tax Law and Estate Planning Course

Handbook Series, Estate Planning and Administration, PLI Order No. D4-5175), *available at* Westlaw 155 PLI/Est 237 ("With straight or ordinary life, a fixed premium is payable over the insured's entire lifetime."); Comment, *Cost and Coverage of Industrial Life Insurance*, 61 Yale L.J. 46, 47 (1952) (in "ordinary life insurance," "policy amounts determine fixed premium charges"). It appears that courts first began using the term "ordinary insurance" to distinguish level-premium insurance from "assessment insurance," a type of mutual insurance in which policyholders were assessed as losses were incurred and in which extra assessments could become necessary to cover the losses. See *Mattero v. Central Life Insurance Co.*, 215 S.W. 750, 751 (Mo. Ct. App. 1919); *Rosenfeld v. Boston Mutual Life Insurance Co.*, 110 N.E. 304, 306 (Mass. 1915); *Fawcett v. Supreme Sitting of Order of Iron Hall*, 29 A. 614, 620 (Conn. 1894); *Gunther v. New Orleans Cotton Exchange Mutual Aid Ass'n*, 5 So. 65, 67 (La. 1888).

¶ 114 Not all permanent insurance is level-premium insurance, and therefore not all permanent insurance is ordinary insurance. Defendant represents that "permanent insurance" is just another name for "ordinary insurance." Actually, different kinds of insurance fall into the broad category of "permanent insurance." Just because variable universal life insurance and ordinary insurance are both forms of permanent insurance—that is to say, not term insurance—it does not logically follow that variable universal life insurance is ordinary insurance. By analogy, eggs and butter are both dairy products, but it does not follow that eggs are butter. Because the Lincoln policy is, as the policy says, a "*Flexible Premium* Variable Life Insurance Policy" (emphasis added) and because the cash value of the policy can vary, depending on the performance of the investments, the policy is not an ordinary life insurance policy.

¶ 115 Acquiring the Lincoln policy was a breach of trust because the trust instrument directed the trustee to purchase term insurance, ordinary insurance, or both and because the Lincoln policy was neither term insurance nor ordinary insurance. As the American Law Institute says:

> "The terms of the trust may limit the trustee's investment authority in various ways. Authority is sometimes narrowed in a general manner, through *** directions that govern investment objectives, policies, and techniques. Other restrictions are more specific in character. These usually either forbid the retention or acquisition of certain investments or types of investments, or they require that certain property or types of property be retained or acquired for the trust estate." Restatement (Third) of Trusts § 91 cmt. e, at 391 (2007).

By directing the trustee to buy certain types of life insurance, *i.e.*, term insurance or ordinary insurance, the trust instrument impliedly restricted the trustee to the purchase of those types of insurance. To use an analogy, when a trust instrument specifically directs the trustee to invest in interest-bearing securities, the trustee lacks authority to invest in common stocks, which do not bear interest. M.L. Cross, Annotation, *Authorization By Trust Instrument of Investment of Trust Funds in Nonlegal Investments*, 78 A.L.R. 2d 7 § 29, at 62 (1961). Otherwise, the reference to "interest-bearing securities" would be superfluous. Similarly, if we interpreted Trust No. 1397 to allow the trustee to buy any kind of life insurance whatsoever, the grantor's specification of "term insurance" and "ordinary insurance" would be superfluous. "If possible, the court should construe the will or trust so that no language used by the testator is treated as surplusage or rendered void or insignificant." *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991).

¶ 116 D. Did the Trial Court Have To Award Punitive Damages in This Case?

¶ 117 The trial court found that the trustee had "failed to exercise due diligence before approving the purchase of the Lincoln policy." The court also found that the trustee had "failed to fulfill its[] duty of investing and managing the trust assets by the exercise of reasonable skill, care, and caution." The court found, however, no aggravating circumstances that would justify an award of punitive damages. The court said: "The court *** finds that the evidence does not support a finding that the Trustee acted in a grossly negligent manner or that it acted with reckless indifference. The court also finds that the Trustee did not act maliciously and did not conspire against Plaintiffs. Therefore Plaintiffs' request for punitive damages is denied."

¶ 118 In their cross-appeal, plaintiffs contend that the trial court erred in two ways: (1) by finding that the trustee did not act in a grossly negligent manner or with reckless indifference and (2) by denying punitive damages.

¶ 119 A trial court can, but does not have to, award punitive damages for a breach of fiduciary duty. *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1148 (2004). The mere fact of a breach of fiduciary duty would not justify punitive damages. There must be something more. Punitive damages "will be awarded only where the defendant's conduct is willful or outrageous due to evil motive or a reckless indifference to the rights of others." *Id.* at 1137. Because the law does not favor punitive damages, they are available only if the wrongful conduct—in this case, the breach of fiduciary duty—"is characterized by wantonness, malice, oppression, willfulness, or other circumstances of aggravation." *Id.*

¶ 120 In a bench trial, the trial court has the prerogative of deciding whether such aggravating circumstances are present. The court either finds willfulness or wantonness or does not find it, and on appeal, we ask whether the finding is against the manifest weight of the evidence. *Id.*

at 1137-38. This standard of review is deferential. The court's finding is against the manifest weight of the evidence only if the opposite conclusion is "clearly evident" from the evidence at trial (internal quotation marks omitted) (*In re A.W.*, 231 Ill. 2d 92, 102 (2008)): only if "all reasonable and unbiased persons would agree" that the aggravating circumstances "clearly" exist (internal quotation marks omitted) (*Kankakee County Board of Review v. Property Tax Appeal Board*, 2012 IL App (3d) 110045, ¶ 12).

¶ 121 Not *all* reasonable and unbiased persons necessarily would agree that the breaches of trust in this case were more than ordinary breaches of trust, more than ordinary mismanagement and waste, such that one could infer an "evil motive" on the trustee's part or "reckless indifference" to the rights of the beneficiaries. *Franz*, 352 Ill. App. 3d at 1137. At trial, even plaintiff's own insurance expert, Malachowski, became confused about the meaning of "ordinary insurance." As for the sale of all the Mueller Manufacturing Company stock in 1986, the trust instrument does not say to desist from buying any further insurance when that happens. Instead, the trust instrument tells the trustee to buy and maintain the "maximum amount" of life insurance that, in the trustee's judgment, the trust can afford. And while it might have been impractical and ill-advised to buy and attempt to maintain a ten-million-dollar variable universal life insurance policy on Frederick L. Mueller, something can be said on the positive side: the potential payoff is huge. This particular insurance strategy might ultimately be unworkable—and even that is unclear, given Frederick L. Mueller's health problems—but arguably it was not *reckless indifference* to plaintiffs' rights to be overzealous or unrealistically ambitious in arranging for them to receive an additional $10 million someday.

¶ 122 III. CONCLUSION

¶ 123 For the foregoing reasons, we affirm the trial court's judgment.

¶ 124 Affirmed.

¶ 125 JUSTICE COOK, dissenting.

¶ 126 I disagree with the majority's conclusion that the trustee's purchase of a variable universal life insurance policy was a breach of the terms of the trust. I would reverse the decision of the trial court.

¶ 127 Article III, section 1 of the Frederick L. Mueller Trust (Trust No. 1397) directs the trustee:

> "*** to purchase a policy or policies of ordinary insurance or term insurance, or both, on the life of the Grantor's son, FREDERICK L. MUELLER, in the maximum amount which the accumulated income, unrestricted principal, contributed funds and anticipated net income of the trust estate permits."

¶ 128 Frederick L. Mueller has had significant health problems, which may have affected the trustee's ability to purchase life insurance policies.

Article III, section 1 continues:

> "The Trustee may, in its sole judgment and discretion, use any net income and unrestricted principal not so used, to purchase and maintain in force additional amounts of such insurance on the life of the said FREDERICK L. MUELLER, or to convert any term insurance on his life to ordinary insurance, it being the Grantor's intention that the net income and unrestricted principal of the trust estate, so far as feasible, shall be devoted exclusively to purchasing and maintaining

> in force the maximum amount of such insurance on the life of the said FREDERICK L. MUELLER, which, in the sole judgment of the Trustee, the net income, unrestricted principal of the trust estate and contributed funds will permit."

¶ 129 This language is not restrictive. It covers all forms of life insurance, from one extreme to the other. At one end, "term insurance" covers the insured for only a specified period. The insurer, in setting premiums, is concerned only with the risk that the insured will die during that period. If the insured survives, all the premiums are retained by the insurer. At the other end, "ordinary insurance," often referred to as "whole life insurance," is not limited to a term, but covers the insured for life. The insurer will eventually have to pay the policy benefits and the premiums must anticipate not only the risk of premature death but the accumulated value of the premiums in the event the insured has a customary life expectancy. Black's Law Dictionary 1010 (9th ed. 2009) defines "ordinary life insurance" as "[l]ife insurance having an investment-sensitive cash value, such as whole life insurance or *universal life insurance*." (Emphasis added.) Various policies may have additional features, but the phrases "term insurance" and "ordinary insurance" cover the full range of life insurance, from one end to the other.

¶ 130 As the majority points out, when a trust instrument specifically directs the trustee to invest in certain assets, the trustee lacks authority to invest in other assets. *Supra* ¶ 115 (citing M.L. Cross, Annotation, *Authorization By Trust Instrument of Investment of Trust Funds in Nonlegal Investments*, 78 A.L.R.2d 7, § 29 (1965)). That is not what we have here. The trust instrument does not prohibit investments; instead it broadly authorizes investments in order to attain a certain objective, in the "sole judgment and discretion" of the trustee. The majority's argument is only that "the trust instrument *impliedly* restricted the trustee to the purchase" of policies other than variable universal life insurance. (Emphasis added.) *Supra* ¶ 115. The majority cites authority discussing ordinary life insurance, " 'which *generally* has the following characteristics:' " fixed premiums, fixed death benefits, and a cash surrender value. (Emphasis added.) *Supra* ¶ 113. The absence of one or more of those characteristics would not prevent a policy from being an ordinary life insurance policy. Characteristics which make an ordinary life policy more like a term life policy do not violate the terms of the trust. The definition of "ordinary life insurance" is not written in stone. Even plaintiff's own insurance expert was confused about the meaning of "ordinary insurance." *Supra* ¶ 121.

¶ 131 The language of the trust does not indicate that the settlor intended to limit the discretion of the trustee to particular life insurance policies. Instead, the settlor wanted policies in the maximum amount possible. Nor was the settlor concerned about the present cash value of the policies. Term life insurance, specifically mentioned in article III, section 1, has no cash value. Rather, the settlor was concerned with the policy benefit amount, "the maximum amount of such insurance on the life of the said FREDERICK L. MUELLER, which, in the sole judgment of the Trustee, the net income, unrestricted principal of the trust estate and contributed funds will permit." The trial court erred in imposing a surcharge based on the estimated value of the trust if the life insurance policy had not been purchased. Maintaining the cash value of the trust was not the settlor's intent. An investment strategy may take a toll on the principal of the trust, but that is not improper if the investment strategy is consistent with the settlor's intent in creating the trust. *Carter v. Carter*, 2012 IL App (1st) 110855 ¶ 26, 965 N.E.2d 1146. It further appears that funds were available from various sources, such as Trust No. 1970, which would prevent the life insurance policy in question from lapsing. Also reductions in the policy benefits were possible.

¶ 132 The general rule is that a trustee is presumed to have acted in good faith and to have performed his duties under the trust. The burden of proving his breach of trust rests upon the one asserting it. *Elmhurst National Bank v. Glos*, 99 Ill. App. 2d 74, 80, 241 N.E.2d 121, 125 (1968). That is especially true in this case, given the broad discretion afforded the trustee in the language of the trust. The exercise of discretion by a trustee is not subject to interference by the court absent proof of fraud, abuse of discretion, or bad faith. Absent actions by the trustee that are outside the bounds of reasonable judgment, a court cannot substitute its judgment for the trustee's judgment. *Brown Brothers Harriman Trust Company, LLC v. Bennett*, 357 Ill. App. 3d 399, 410, 827 N.E.2d 1101, 1111 (2005).

¶ 133 Apparently, the purpose of these trusts was to buy life insurance on each of the three children of the grantor so that when they died, their children would not be forced to sell Mueller Manufacturing Company stock in order to pay estate taxes. It is true Mueller Manufacturing Company had been sold at the time the life insurance policy in question was purchased. However, estate taxes may still have been a concern, and the sale of the company did not eliminate the specific directions and broad discretion given the trustee. I agree with the majority that the trust agreement does not say to desist from buying any further insurance if Mueller Manufacturing Company is sold.