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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000263-MR
AND
NO. 2006-CA-000297-MR

DAVID R. HARROD, INDIVIDUALLY AND AS TRUSTEE OF THE WILLIAM R. HARROD IRREVOCABLE TRUST UNDER AGREEMENT DATED DECEMBER 28, 1992 AND AS GUARDIAN FOR JOHN WILLIAM HARROD; HARROD CONCRETE AND STONE COMPANY; STUART HARROD, INDIVIDUALLY AND AS GUARDIAN FOR DENVER REED HARROD AND TYLER STUART HARROD; MARGARET ELIZABETH BARRETT, INDIVIDUALLY AND AS GUARDIAN FOR EMILY BARRETT AND CATHERINE J. HARROD; AND EILEEN M. HARROD — APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 01-CI-01500

JOAN M. HARROD, INDIVIDUALLY AND AS TRUSTEE OF THE WILLIAM R. HARROD IRREVOCABLE TRUST UNDER AGREEMENT DATED DECEMBER 28, 1992 FOR THE BENEFIT OF JOAN M. HARROD — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND VACATING IN PART

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: David R. Harrod, individually and as trustee of the Harrod Family Trust, Margaret Elizabeth H. Barrett, Stuart R. Harrod, and Harrod Concrete and Stone Company (the Company) appeal from an order and opinion entered by the Franklin Circuit Court on January 7, 2005, in which the trial court granted summary judgment in favor of Joan M. Harrod. In the trial court's order and opinion, it held that David, as trustee, breached his fiduciary duty owed to the beneficiaries of the Harrod Family Trust (the Trust) when he overcompensated the Company by reimbursing it for all the premiums it had paid regarding a life insurance policy owned by the Trust. As a result, the trial court ordered the Company to reimburse the Trust $305,923.00. On appeal, David argues that the Company was entitled to be reimbursed for all the premiums it paid. Finding no error, we affirm the trial court's decision on this issue.

Additionally, Joan M. Harrod has filed a cross-appeal from the trial court's order and opinion and from the trial court's order of January 4, 2006, in which it denied Joan's Motion to Alter, Amend or Vacate the trial court's order and opinion. In its order and opinion, the trial court granted summary judgment in David's favor holding that he had no fiduciary duty to notify Joan of her withdrawal rights pursuant to *Crummey v. C.I.R.,* 397 F.2d 82 (9th Cir. 1968); that David had no fiduciary duty to disburse the interest and dividends accumulated by the Harrod Family Trust to the trust established for Joan's benefit which was known as “Joan's Trust”; that the Harrod Family Trust was entitled to be reimbursed $85,616.41 by Joan because David, as trustee, had erroneously

overpaid Joan's Trust. On cross-appeal, Joan argues that the trial court erred when it denied her motion to alter, amend or vacate because it failed to construe her initial complaint liberally to include a claim that David breached his fiduciary duty for failing to direct the Settlor of the Trust, William R. Harrod, to notify her of her *Crummey* withdrawal rights.

Joan argues that the trial court erred when it denied her motion to alter, amend, or vacate because the Company should reimburse the Trust even more than $305,923.00 regarding the premium payments because the contract in which the Trust agreed to reimburse the Company was a contributory plan. Joan claims the trial court erred when it denied her motion because the Trust was entitled to prejudgment interest regarding the $305,923.00 because those damages were liquidated. Joan claims the trial court erred when it granted summary judgment and held that David was not required to disburse the interest and dividends accumulated by the Trust to Joan's Trust and that she was required to reimburse the Trust. According to Joan, a provision in the Trust Instrument stated that Joan's Trust was entitled to receive the remainder of the net death benefits, and Joan argues that this provision constituted a specific bequest allowing Joan's Trust, as beneficiary, to receive the accumulated interest and dividends from the time of William R. Harrod's death until the time David, as trustee, disbursed the Trust's assets.

Finding that the trial court did not adequately address the issue of prejudgment interest, we vacate that portion of the trial court's order and remand. Concluding that the trial court misconstrued the terms “death benefits” and “net death

benefits" used in the Trust Instrument, we reverse in part, vacate in part and remand. We affirm the remainder of the trial court's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

William R. Harrod, who was the sole shareholder and president of the Harrod Concrete and Stone Company, died on August 17, 2000. Prior to William's death, he devised an estate plan to care for his wife, Joan M. Harrod, and his children from a prior marriage, David Harrod, Margaret Elizabeth H. Barrett, Stuart R. Harrod and Catherine J. Harrod. To that end, William executed, on December 28, 1992, a trust instrument (the Trust Instrument) that established an irrevocable trust for his family (the Harrod Family Trust or the Trust). Between 1992 and 1997, William originally funded the Harrod Family Trust with gifts of shares of voting common stock in the Company.

When William drafted the Trust Instrument, he included a provision giving Joan the right to withdraw the first $10,000.00 of each gift received by the Trust pursuant to *Crummey,* 397 F.2d at 82.[1] According to the Trust Instrument, once the Trust received a gift, "[t]he trustee or the Settlor shall promptly after a power of withdrawal shall become effective notify each person having a withdrawal power of the existence of the power."

In 1993, William contrived to fund the Trust with a life insurance policy from the Valley Forge Life Insurance Company (the Valley Forge Policy). The Valley Forge Policy had a face value of $3,000,000.00, and it insured William's life. The

[1] The other beneficiaries were also given withdrawal rights, but their withdrawal rights were each limited to a fraction of any gift received by the Trust.

Company purchased the Valley Forge Policy in December 1987, and, from that time onward, it consistently paid all of the policy's premiums. From 1987 to 1993, the Company owned the Valley Forge Policy, but, on May 20, 1993, the Company assigned its ownership interest in the policy to William. On May 21, 1993, William assigned his ownership interest in the policy to the Harrod Family Trust.

Anticipating that the Trust would be primarily funded by at least one life insurance policy, William, the Settlor of the Trust included in the Trust Instrument the following,

> 2.3 Upon the death of the Settlor this trust shall end and its remaining balance (which includes all property, if any, passing to the trustee under Settlor's will or otherwise by reason of Settlor's death) shall be distributed as follows:
> (a) The net death benefits from all insurance policies received by the trust on Settlor's life, after all payments on any loans by this trust against them at Settlor's death and all payments to any company pursuant to a split-dollar life insurance agreement against them at Settlor's death, shall be distributed as follows:
> (1) If Settlor's spouse shall be married to Settlor at Settlor's death and shall not renounce Settlor's will, the first $1,000,000 of those net death benefits shall be distributed outright to Settlor's spouse.
> (2) The next $300,000 of those net death benefits shall be held pursuant to Paragraph 2.4 for Settlor's daughter, CATHERINE J. HARROD, if she shall then be living, or, if not, this bequest shall be null and void.
> (3) If Settlor's spouse shall be married to Settlor at Settlor's death and shall not renounce Settlor's will, the remainder of those net death benefits shall be held, administered and distributed upon the following trusts, terms and conditions, as "JOAN'S TRUST"[.]
> . . .
> (d) The rest and residue of this trust at Settlor's death shall be divided into as many equal shares as there are the following

> named children of Settlor then living and the following named children then living and the following named children of Settlor then deceased, but leaving issue then living: MARGARET ELIZABETH H. BARRETT, DAVID R. HARROD and STUART R. HARROD.

Contemporaneously with William's transfer of the Valley Forge Policy to the Harrod Family Trust, the Company, by and through William as its president, and the Trust, by and through David as trustee, entered into a split-dollar insurance plan (the Insurance Plan) which established the Company's and the Trust's shared responsibility to pay the policy's premiums. According to the Insurance Plan,

> (a) Each annual premium on the policy shall be paid as follows:
> (1) The Owner -
> (A) Shall pay a portion of each premium equal to the current term rate for the Insured's [William's] age multiplied by the excess of the current death benefit over the Company's current Policy Interest. Here, the "current term rate" shall mean the lesser of the Insurer's annual term insurance rate or the rates specified in Revenue Rulings 64-328 and 66-110.
> (2) The Company shall pay all premium amounts not paid by the Owner.

So, pursuant to the Insurance Plan, the Trust was responsible for paying a portion of the Valley Forge Policy's premiums, and the Company was responsible for paying "all premium amounts not paid by" the Trust. Additionally, the Company and the Trust included in the Insurance Plan that, "[i]n exchange for the Company's payment of its premium contribution . . ., the Owner agrees to return to the Company the amount of its Premium Advance on the . . . Insured's [William's] death." According to the Insurance Plan, "[t]he Company's Premium Advance shall be an amount equal to the cumulative

total of its share of premiums paid on the Policy." It is undisputed that the Trust never paid any portion of the policy's premiums and that the Company continued to pay the full amount of each premium as it did when it owned the policy prior to the execution of the Insurance Plan.

In addition to the Valley Forge Policy, the Trust acquired, on October 27, 1999, a $1,000,000.00 life insurance policy from the Northwestern Mutual Life Insurance Company (Northwestern Policy) on William's life to further fund the Trust. William made the first and only premium payment of $46,479.97 for the Trust. Although William made this premium payment, it is undisputed that neither he nor the Company ever owned this subsequent policy. Furthermore, the Northwestern Policy was not subject to the prior Insurance Plan nor was it subject to any other split-dollar agreement.

As previously stated, William died on August 17, 2000. After William's death, the Harrod Family Trust received $3,000,000.00 in proceeds pursuant to the Valley Forge Policy and $13,147.98 in interest that had accrued on the policy's proceeds from the date of William's death until the date the insurance company paid off the policy. In addition, the Trust received $1,000,000.00 in proceeds from the Northwestern Policy, $4,392.61 in *postmortem* dividends and $9,041.31 in reimbursement for the unused portion of the initial premium payment. After the Trust received these funds, David, as trustee, disbursed the following: $691,651.75 to the Company reimbursing it for all the premiums it paid on the Valley Forge Policy ($305,923.00 represents the amount of premiums the Company paid prior to execution of the Insurance Plan); $50,000.00 to

Joan for spousal support pursuant to an agreement between the Trust and Joan; $300,000.00 to the trust established by the Trust Instrument for Catherine Harrod; $1,000,000.00 to Joan outright and $2,043,963.66 to "Joan's Trust". After David made these disbursements, the Trust had a remaining balance of $17,153.74 that David had not disbursed.

On November 5, 2001, Joan filed a complaint with the Franklin Circuit Court against David Harrod, individually and as trustee of the Harrod Family Trust, and against Harrod Concrete and Stone Company. In her complaint, Joan alleged that David, as trustee, had breached his fiduciary duty when he failed to notify her of her *Crummey* withdrawal rights. Joan alleged that David, as trustee, had breached his fiduciary duty when he paid the Company $691,651.75 as reimbursement for all of the premiums it had paid on the Valley Forge Policy, and she sought reimbursement for the Trust for the entire sum of $691,651.75. According to Joan, even though the Insurance Plan provided that the Trust would reimburse the Company for its share of the premiums that it had paid since the Insurance Plan was executed, the Trust was not obligated to reimburse the Company for any amount because the Company and the Trust had both ignored the Insurance Plan. Lastly, Joan alleged that David had breached his fiduciary duty when he failed to transfer the Trust's remaining balance of $17,153.74 to Joan's Trust. Joan argued that the Trust's remaining balance was interest earned on the death benefits received by the Trust from the two insurance policies and thus were part of the net death benefits from the policies. Because the Trust Instrument provided that Joan's Trust would

receive the remainder of the net death benefits, Joan alleged that her trust was entitled to the remaining $17,153.74.

On December 14, 2001, David, individually and as trustee, and the Company filed answers to Joan's complaint. David, in his capacity as trustee of the Harrod Family Trust, filed a counterclaim against Joan alleging that he had paid to Joan's Trust an amount in excess of the remainder of the net death benefits received by the Trust, and he asked for the Trust to be reimbursed for this unspecified but excessive amount. In addition, David asked for the remaining beneficiaries to be joined as defendants, pursuant to the Kentucky Rules of Civil Procedure (CR) 13.08 and 19.01.

On October 27, 2003, Joan filed a motion and memorandum in support of summary judgment. On December 3, 2003, David and the Company filed a response to Joan's motion for summary judgment, and David sought a partial summary judgment on his counterclaim.

On January 7, 2005, the Franklin Circuit Court entered its order and opinion resolving the parties' motions for summary judgment. Regarding Joan's claim that David breached his fiduciary duty by failing to notify her regarding her *Crummey* withdrawal rights, the trial court turned to the Trust Instrument which stated unequivocally that "the trustee or the Settlor shall promptly . . . notify . . ." the beneficiaries. The trial court noted that a trustee's powers and duties are either mandatory or discretionary, and, if the settlor authorized the trustee to perform or not perform an act or authorized the trustee to exercise his judgment regarding how or when a power should

be utilized then the trustee's obligation or power is discretionary as opposed to mandatory. The trial court held

> [t]he Settlor relieved the Trustee of a mandatory duty to notify when he used the disjunctive particle "or" to express an alternative or option to act or not to act. This Court will not upset the decision of the Trustee not to perform this discretionary duty to the Plaintiff when the decision appears to have been made in good faith.

Even though David and the other defendants had not requested summary judgment regarding this issue, the trial court determined that all the facts necessary to decide the issue were before it, so it granted summary judgment in David's favor.

Regarding Joan's claim that David had breached his fiduciary duty when he paid $691,651.75 to the Company reimbursing it for each and every premium it had paid on the Valley Forge Policy, the trial court looked to the recital contained in the Insurance Plan, and it determined that the plan was prospective only; it did not contemplate reimbursing the Company for premium payments it had made when it had owned the Valley Forge Policy prior to the execution of the Insurance Plan. Therefore, the trial court granted summary judgment in Joan's favor and ordered the Company to repay the Trust $305,923.00 representing the amount of the premium payments that the Company had made prior to the execution of the Insurance Plan.

Regarding Joan's claim that David breached his fiduciary duty by failing to transfer the Trust's remaining balance of $17,153.74 to Joan's Trust, the trial court noted that Joan argued that the insurance policies' death benefits included the return of any premium payment and any interest or dividend accrued. However, the trial court

determined that the drafters of the Trust Instrument had used the conventional meaning for the term "death benefits" which was the face amounts of the Valley Forge Policy and the Northwestern Policy. The trial court noted that the Trust Instrument required the Trust to reimburse the Company for its premium payments from the death benefits and required the Trust to pay any loans against the policies from the death benefits. The Trust Instrument also required that the remaining amount, the "net death benefits," was to be distributed to Joan, to Catherine Harrod's Trust and to Joan's Trust. However, the trial court held the death benefits from the two policies did not include the return of the unused portion of the Northwestern Policy's premium payment nor did it include the interest and dividends that had accrued since William's death. The trial court held that these assets should have been distributed according to the residuary clause found in the Trust Instrument; thus, the trial court held that David had breached the fiduciary duty that he owed to the beneficiaries pursuant to the residuary clause when he transferred "an amount that exceeded the face amount of the policies" to Joan's Trust. Consequently, the trial court determined that the Trust was entitled to recover that excess amount from Joan. Thus, it granted summary judgment in David's favor regarding Joan's last claim and granted summary judgment in David's favor regarding his counterclaim. The trial court ordered Joan to reimburse the Trust in the amount of $85,616.41. This amount represented the $50,000.00 that David had paid Joan in spousal support and $35,616.41 in interest, dividends and a premium refund regarding the Northwestern Policy.

On January 18, 2005, Joan filed a preliminary motion to alter, amend or vacate pursuant to the Kentucky Rules of Civil Procedure (CR) 54.02, 56.03 and 59.05. Then, on October 11, 2005, Joan filed a memorandum in support of her motion to alter, amend or vacate. In her memorandum, Joan requested that the trial court clarify its opinion regarding the issue of her right to be notified of her *Crummey* withdrawal rights. Joan did not argue that the trial court erred in its decision, but she contended that the Trust Instrument clearly provided that she was to receive notice. She argued that the trial court should modify its opinion and order to clarify that it did not address whether or not she received notice and that the trial court's judgment did not preclude a claim to enforce her *Crummey* withdrawal rights.

In Joan's memorandum, she agreed with the trial court's decision that the Insurance Plan only required the Trust to reimburse the Company for the premiums it paid after the execution of the the Insurance Plan. However, she argued that the Company was not entitled to reimbursement for the full amount of each premium it paid subsequent to the execution of the plan but was only entitled to be reimbursed for a portion of each premium. Joan acknowledged that the Trust was responsible for paying a portion of the Valley Forge Policy's premiums, and she acknowledged that the Trust never paid any portion of the policy's premium. In support of her argument, Joan pointed out that the Insurance Plan was a split-dollar plan. However, she claimed that not only was the Insurance Plan a split-dollar plan, but it was also a collateral assignment plan. Furthermore, not only was the Insurance Plan a collateral assignment plan, but it was also

a PS-58 offset plan, also known as a contributory plan. According to Joan, because the Insurance Plan was such a plan and because the Insurance Plan defined the Company's "Premium Advance" as "the cumulative total of its *share* of premiums paid," the Court should have concluded that the Company was not entitled to reimbursement for the full amount of each premium payment but only for a portion, and it should have recalculated and increased the amount the Company owed the Trust.

In Joan's motion to alter, amend or vacate, she raised for the first time the issue of prejudgment interest. Agreeing with the trial court that David overcompensated the Company for its premium payments, Joan claimed that the amount that David overpaid the Company represented an amount of liquidated damages. Joan argued that, because the damages were liquidated, the trial court was bound to award prejudgment interest as a matter of course. Moreover, Joan argued that if the overpayment represented unliquidated damages, then it would be within the trial court's sound discretion whether or not to award prejudgment interest. According to Joan, because David breached his fiduciary duty when he overcompensated the Company, equity demanded that the trial court award prejudgment interest regarding that amount.

Lastly, Joan asked the trial court to reconsider its decision that the death benefits did not include the interest and dividends that had accrued on the Trust's assets. In support of this argument, Joan averred that the Trust Instrument stated that the remainder of the net death benefits were to be transferred to Joan's Trust. Joan insisted that this provision constituted a specific bequest. Joan pointed out the beneficiary of a

specific bequest was entitled to receive any accumulations and additions that accrued on the bequest asset from the time the testator died until such time the asset was distributed. Therefore, because the remainder of the net death benefits was a specific bequest, she was entitled to any interest or dividends that had accrued. Thus, not only was she entitled, by and through Joan's Trust, to the $35,616.41 in interest, dividends and premium refund but she was also entitled to the $17,153.74 that David had failed to distribute.

On January 4, 2006, the trial court summarily denied Joan's motion to alter, amend or vacate without addressing any of the issues raised therein. As previously stated, David, as trustee, filed a direct appeal from the trial court's order granting summary judgment regarding the amount he overcompensated the Company for its premium payments. Joan filed a cross-appeal regarding all the issues set forth in her motion to alter, amend or vacate.

II. DAVID HARROD'S DIRECT APPEAL

A. STANDARD OF REVIEW

When we review a trial court's decision to grant summary judgment, we must determine whether the circuit court correctly found that no genuine issue of material fact exists and that, as a matter of law, the moving party was entitled to judgment in its favor. *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996). Because the findings of fact are not in issue, we review the trial court's decision *de novo*. *Id*.

Regarding David's direct appeal, when the trial court granted summary judgment in Joan's favor, it did so by interpreting the language found in the Insurance Plan. It is well established in the Commonwealth that the construction and interpretation of contracts, such as the Insurance Plan, involve questions of law. *First Commonwealth Bank of Prestonsburg v. West,* 55 S.W.3d 829, 835-836 (Ky. App. 2000). We review questions of law *de novo* and are not bound to defer to the lower court's interpretation. *Cinelli v. Ward,* 997 S.W.2d 474, 476 (Ky. App. 1998).

B. ANALYSIS

On appeal, David argues that the Franklin Circuit Court ignored the plain language contained in the Insurance Plan regarding the Company's right to be reimbursed for all of the premiums it paid on the Valley Forge Policy. According to David, when a trial court construes a contract, it must determine the intent of the parties by considering the purpose and the subject matter of the contract and the situation and circumstances of the parties. *McHargue v. Conrad,* 312 Ky. 434, 227 S.W.2d 977, 979 (Ky. 1950). In addition, the trial court must determine the logical and reasonable meaning of the language used in the contract. *Reynolds Metal Co. v. Glass,* 302 Ky. 622, 195 S.W.2d 280, 283 (Ky. 1946).

According to David, the Insurance Plan stated that "the Owner agrees to return to the Company the amount of its Premium Advance[.]" David avers that the Insurance Plan defines the term "Premium Advance" as "an amount equal to the cumulative total of its share of the premiums paid on the Policy." Furthermore, David

points out that, according to the *Merriam-Webster Collegiate Dictionary*, the word "cumulative" means "increasing by successive additions." Based on this definition, David insists that because the word "cumulative" was used in the definition for "Premium Advance," William Harrod, the decedent, clearly and unambiguously intended for the Company to be reimbursed for all premium payments it made on the Valley Forge Policy including those payments made prior to the execution of the Insurance Plan.

The parties to the Insurance Plan, the Harrod Family Trust and the Harrod Concrete and Stone Company, stated in the Plan that "[i]n exchange for the Company's payment of its premium contribution . . ., the Owner agrees to return to the Company the amount of its Premium Advance on the . . . Insured's [William's] death." Thus, the Company was contractually entitled to be reimbursed for its "Premium Advance." In the Plan, the parties agreed that "[t]he Company's Premium Advance shall be an amount equal to the cumulative total of its share of premiums paid on the Policy." We agree with David that these provisions are clear and unambiguous. However, we disagree with David's conclusion that these provisions entitled the Company to be reimbursed for the premiums it paid prior to the execution of the Insurance Plan.

> In the interpretation of writings . . . the primary factor to be considered is to determine the intent of the maker, . . . which in turn is to be determined by the language employed. If that language is plain and unambiguous its meaning should be upheld as so expressed, uninfluenced by any unwise or unusual result that might follow the upholding of the plainly expressed writing . . . which is but following frequent expressions of courts to the effect that the intention to be gathered from employed language is the one that it plainly expresses, and not the one that may have been in the mind of

> the composer, but which he failed to express. In other words, the intention is gathered from what the writers of such documents . . . actually said and not from what they may have intended to but did not say.

Reynolds Metal Co. v. Glass, 302 Ky. 622, 195 S.W.2d 280, 283 (Ky. 1946) (quoting *Department of Revenue v. McIlvain,* 302 Ky. 558, 195 S.W.2d 63, 64-65 (Ky. 1946)). So, while the word "cumulative" may mean "increasing by successive additions,"[2] this definition does not logically compel David's conclusion that the Trust and the Company intended for the Company to be reimbursed for the premium payments that it had made prior to the execution of the Plan.

The parties defined the term "Premium Advance" by stating it "**shall** be an amount equal to the cumulative total of its share of premiums paid on the Policy." (Emphasis added.) In his reply brief, David insists that "shall" is merely a mandatory word of command that means "must." However, we agree with the Second Circuit regarding the meaning of "shall" as follows:

> There is no doubt that "shall" is an imperative, **but it is equally clear that it is an imperative that speaks to future conduct**. Even the most demanding among us cannot reasonably expect that a person "shall" do something yesterday.

Salahuddin v. Mead, 174 F.3d 271, 274-275 (2d Cir. 1999) (emphasis added.). Furthermore, while *Merriam-Webster's Collegiate Dictionary* 1072 (10th ed. 2001) defines "shall" as "must", it also defines "shall" as a word "used to express what is inevitable or seems likely to happen in the **future**," and as a word "used to express

[2] This is only one of many definitions for the word "cumulative" found in the *Merriam-Webster Collegiate Dictionary*.

simple **futurity**." (Emphasis added.) In addition, the word "advance," which the parties used as a noun in the term "Premium Advance," means "a moving forward," or "progress in development," or "a progressive step," or "a provision of something (as money or goods) before a return is received." So, in addition to the word "shall," the word "advance" connotes futurity. Considering the entire definition for "Premium Advance" and giving it its most natural construction, we agree with the trial court that the Insurance Plan expresses that the Company was only entitled to be reimbursed for the cumulative total of those premiums it paid subsequent to the execution of the Plan.

In the alternative, David argues that the language in the Insurance Plan was ambiguous regarding the Company's reimbursement. Because the language in the contract was ambiguous, he argues the trial court should have considered the extrinsic evidence that David presented regarding his father's intent. David avers that William Harrod's accountant, William Johnson, and William Harrod's attorney, Martin Weinberg, both testified that all of the Company's premium payments were to be repaid by the Trust. In addition to this evidence, David avers that William Harrod stated in certain hand-written notes that, "The co. will be paid back the premiums it had paid. ($52,000 per year) out of death proceeds." Based on this evidence, David alleges that his father, William Harrod, intended for the Company to be reimbursed for all the premiums. According to David, if the trial court had considered this evidence, it would have surely ruled in his favor because his evidence was undisputed.

When a court interprets a contract, its primary objective is to enforce the parties' intentions. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District,* 174 S.W.3d 440, 448 (Ky. 2005) (citing *Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.,* 94 S.W.3d 381, 384 (Ky. App. 2002)).

> **When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine the parties' intentions.** *Hoheimer v. Hoheimer,* 30 S.W.3d 176, 178 (Ky. 2000). "The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms." *Cantrell,* 94 S.W.3d at 385.

3D Enterprises Contracting Corp., 174 S.W.3d at 448 (emphasis added.). In the present case, the Franklin Circuit Court found no ambiguity within the Insurance Plan; thus, it had no need to look beyond the four corners of the Plan to consider the extrinsic evidence presented by David regarding his father's alleged intentions concerning the Company's reimbursement. As we have previously held that the Plan contained no ambiguity regarding this issue, we agree with the trial court's decision and conclude that it did not err when it refused to consider David's extrinsic evidence.

III. JOAN HARROD'S CROSS-APPEAL

A. ANALYSIS

1. The Franklin Circuit Court erred when it decided that the Company was entitled to be reimbursed for the full amount of the each premium it paid on the Valley Forge Policy.

On cross-appeal, Joan acknowledges that the trial court was correct when it ruled that the Insurance Plan did not entitle the Company to be reimbursed for the

premium payments it made on the Valley Forge Policy prior to the execution of the Plan. However, Joan insists that the trial court erred when it decided that the Company was entitled to be reimbursed for the full amount of each premium it paid pursuant to the Plan. According to Joan's interpretation of the Insurance Plan, the Company was only entitled to be reimbursed for its "share" of the premiums paid because the Insurance Plan defined the term "Premium Advance" as "the cumulative total of *its share* of the premiums paid on the Policy." (Emphasis added by Cross-Appellant.) Joan contends that the parties to the Insurance Plan intended for the word "share" used in the definition of "Premium Advance" to mean the amount of the premiums paid by the Company minus the current term rate paid by **or attributed to** the Trust because the Trust never actually paid any portion of any of the premiums after the execution of the Plan. Joan reasons that the Company was not entitled to be reimbursed for the full amount of each premium payment it made subsequent to the execution of the Insurance Plan but was only entitled to be reimbursed for its "share."

According to Joan, the parties intended the word "share" to mean the amount of the premiums paid by the Company minus the current term rate attributed to the Trust because the Insurance Plan was a split-dollar insurance agreement. According to Joan, the Insurance Plan was not just a split-dollar plan, but it was also a particular type of split-dollar plan known as a "collateral assignment plan." These plans exist within the context of an employer-employee relationship and are characterized by who owns the life insurance policy in question and by who funds it. Joan avers that with a

collateral assignment plan the employee owns the policy and has authority to name the beneficiary of the policy. While the employee owns said policy, the employer pays the premiums on behalf of the employee; furthermore, the premiums paid by the employer are deemed to be a series of loans from the employer to the employee. In exchange for these loans, the employee assigns an interest in the policy's cash value to the employer for the amount of the "loans," i.e., the premium payments it has made on behalf of the employee.

In addition, Joan claims that not only was the Insurance Plan a collateral assignment plan, but it was also a specific type of collateral assignment plan known as a PS-58 offset plan, also known as a contributory plan. Joan explains with a contributory plan, the employee owns the insurance policy, and he pays that portion of the policy's premium equal to the PS-58 rate. The employer will then pay the balance of the policy's premium. However, Joan points out that with some contributory plans, the employer also pays the employee's portion, the PS-58 portion, of the premium. If the employer does so then it may expense and deduct the employee's portion of the premium as compensation to the employee. So when the employee dies, the employer will be reimbursed for the amounts it has paid toward the policy's premiums that exceeded the PS-58 rate, but the employer will not be reimbursed for the PS-58 portion that it paid on the employee's behalf. Joan asserts that the Insurance Plan was a PS-58 offset/contributory plan, because, in the Insurance Plan, the parties stated that the Trust was responsible for paying a portion of each premium payment that was "equal to the

current term rate for the Insured's age multiplied by the excess of the current death benefit over the Company's current Policy Interest." Joan claims that this provision set the Trust's premium obligation at the PS-58 rate. Thus, the Company was only responsible for paying that portion of each premium which exceeded the PS-58 rate. So, even though the Company paid the entire amount for each premium, she concludes that the Insurance Plan expressly limited the Company to only recovering the amounts it paid in excess of the PS-58 rate because the parties used the word "share" in the definition for the term "Premium Advance." Because the parties used the word "share," Joan speculates that the parties must have been referring to the amounts in excess of the PS-58 rate; otherwise, the word "share" would be superfluous.

Thus, Joan concludes that the trial court erred when it determined that the Company was entitled to be reimbursed for the entire amount of the premiums paid after the execution of the Insurance Plan because the Plan is clear that the Company was only entitled to be reimbursed for the amounts it paid in excess of the PS-58 rate. Thus, Joan reasons that we should reverse the trial court's judgment and direct it to increase the amount the Company is required to pay the Trust, $305,923.00, by another $72,135.00, representing the PS-58 rate.

According to AMERICAN JURISPRUDENCE, 2d,

> [a] "split-dollar life insurance arrangement" is any arrangement between a life insurance contract "owner" and a "non-owner" under which:
>
> • either party to the arrangement pays, directly or indirectly, all or any portion of the premiums on the life insurance

> contract, including a payment by means of a loan to the other party that is secured by the life insurance contract; and
>
> • at least one of the parties to the arrangement paying premiums is entitled to recover, either conditionally or unconditionally, all or any portion of those premiums, and the recovery is to be made from, or is secured by, the proceeds of the life insurance contract.

33A AM. JUR. 2D *Federal Taxation* § 8351 (2007) (citations omitted.). Considering this definition, it is painfully obvious, based on the language found in the Insurance Plan, that the parties to the Plan, the Harrod Family Trust and the Harrod Concrete and Stone Company, intended for the Plan to be a split-dollar insurance arrangement. None of the parties to this current case dispute this, and we certainly agree.

However, Joan claims that the Plan was not just a split-dollar arrangement but that it was specific type of split-dollar arrangement known as a collateral assignment plan. Regarding collateral assignment plans, AMERICAN JURISPRUDENCE, 2d, states that

> payments by the sponsor (i.e., the party providing life insurance benefits to the other party under the split-dollar arrangement) generally would have been treated as a series of loans to the benefited party, **where the employee was designated as the contract owner** (commonly called a collateral assignment split-dollar plan). In this case, **premiums paid by the employer would have been treated as a series of loans by the employer to the employee if the employee was obligated to repay the employer**, whether out of contract proceeds or otherwise.

33A AM. JUR. 2D *Federal Taxation* § 8359 (emphasis added.).

Furthermore, Joan claims that not only was the Plan a collateral assignment plan but it was also a specific type of collateral assignment plan known as a PS-58

offset/contributory plan. However, according to Joan's definition for a collateral assignment plan and the explanation found in AMERICAN JURISPRUDENCE, 2d, a split-dollar arrangement can only qualify as a collateral assignment plan, and, therefore, as a contributory plan, if an **employee** owns the life insurance policy in question, and his or her **employer** pays part or all of the policy's premiums. According to the record, the Company purchased the Valley Forge Policy in December 1987 and owned the policy from that time until, on May 20, 1993, when it transferred the policy to William Harrod, the Settlor of the Harrod Family Trust. Less than twenty-four hours later, on May 21, 1993, William transferred ownership of the policy to the Harrod Family Trust. In fact, the Insurance Plan states clearly and unambiguously that the owner of the Valley Forge Policy was the Harrod Family Trust. So when the Trust and the Company executed the Insurance Plan, the owner of the policy, the Trust, was not an *employee* of the Company. In fact, the Trust was never an employee of the Company, and the record contains no evidence to suggest otherwise. Collateral assignment plans and PS-58 offset/contributory plans by their very nature only exist where an employee owns the policy and the employer pays the premiums, either in whole or in part. So, while the Insurance Plan may superficially resemble a collateral assignment plan and may superficially resemble a PS-58 offset/contributory plan, it does not meet the critical criterion: an employer-employee relationship between the owner of the policy and non-owner who pays the premiums, to qualify as either. Joan's long and overly complicated argument fails based on her own definitions. Consequently, we find no error with the trial court's denial of her

motion to alter, amend or vacate regarding this issue.

2. The Franklin Circuit Court erred when it failed to award prejudgment interest.

In Joan's motion to alter, amend or vacate the trial court's judgment, she asked the trial court to award the Harrod Family Trust prejudgment interest on the amount the Company was required to pay the Trust due to David's overcompensating the Company regarding its premium payments. The trial court summarily denied Joan's motion without addressing any of Joan's specific issues. Now, on appeal, she argues that the trial court erred when it failed to award prejudgment interest.

Where an award of damages is for a liquidated amount, then prejudgment interest is required. *Nucor Corp. v. General Electric Co.,* 812 S.W.2d 136, 141 (Ky. 1991). A "liquidated amount" is one that can be determined by simple calculation, can be determined with reasonable certainty, can be determined pursuant to fixed rules of evidence or can be determined by well-established market values. *3D Enterprises Contracting Corp.,* 174 S.W.3d at 450. Joan argues that the amount the Company should repay to the Trust is readily ascertainable; thus, it is a liquidated amount that requires an award of prejudgment interest.

In the alternative, Joan concedes that the amount of the overpayment may be an unliquidated amount. If so, she acknowledges the decision to award prejudgment interest falls within the trial court's sound discretion. *Nucor Corp.,* 812 S.W.2d at 141. However, she argues that David, as trustee of the Harrod Family Trust, ignored the language found in the Insurance Plan and overcompensated the Company for its premium

payments which was detrimental to the Trust and its beneficiaries. She, therefore, insists that equity demands that the Trust be made whole, and the only way to do that is for the trial court to award prejudgment interest.

> "Liquidated damages" are damages the amount of which has been made certain and fixed either by the act and agreement of the parties or by operation of law to a sum which cannot be changed by the proof. Liquidated damages are the sum which a party to a contract agrees to pay if he or she fails to perform and which, having been arrived at by good-faith effort to estimate actual damages that will probably ensue from breach, is recoverable as agreed-upon damages should breach occur. They are also defined as damages the amount of which has been ascertained by judgment or by the specific agreement of the parties or which are susceptible of being made certain by mathematical calculation from known factors. The term applies when a specific sum of money has been expressly stipulated by the parties to a contract as the amount of damages to be recovered by either party for a breach of the contract by the other. The sum must be stipulated and agreed upon by the parties at the time they enter their contract, and such clauses are permissible where they are neither unconscionable nor contrary to public policy.
>
> By contrast, "unliquidated damages" are damages that have been established by a verdict or award but cannot be determined by a fixed formula so they are left to the discretion of the judge or jury. In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict.

22 AM. JUR. 2D *Damages* § 489 (2007) (citations omitted.). According to the Supreme Court of Kentucky, to determine whether damages are liquidated or unliquidated, the trial court "must look at the nature of the underlying *claim*, not the final award." *3D Enterprises Contracting Corp.,* 172 S.W.3d at 450. Because the trial court summarily

denied Joan's claim for prejudgment interest, we have no insight to the lower court's reasoning regarding this issue. The trial court made no determination regarding the nature of Joan's claims and whether the damages awarded were liquidated or unliquidated. And, assuming that the trial court did determine that the damages were unliquidated, we have no way of reviewing whether or not the lower court correctly exercised its discretion because it made no findings of facts or conclusions of law to review. Therefore, we vacate that part of the trial court's order regarding prejudgment interest and remand for it to reconsider the issue and to enter findings of fact and conclusions of law on this issue.

3. The Franklin Circuit Court erred when it failed to order the Trustee to distribute the interest that had accrued on the Trust's assets to Joan's Trust.

In her third assignment of error, Joan argues that the trial court erred when it failed to order the interest that had accrued on the Trust's assets to be distributed to Joan's Trust. In support of this argument, Joan points out that, according to the Trust Instrument, Joan's Trust is entitled to receive the remainder of the net death benefits. According to Joan, this provision in the instrument constituted a specific bequest as opposed to a pecuniary bequest. Joan argues that the beneficiary of a specific bequest is entitled to the accumulations and additions to the bequest asset from the time the testator died until the asset is disbursed, even if it has changed form. *In re Gykllstom's Will,* 172 Misc. 655, 15 N.Y.S.2d 801, 809 (N.Y. Sur. 1939).

According to Joan, the Trust Instrument's provision that the remainder of the net death benefits goes to Joan's Trust does not use the words “an amount equal to” or

"the sum of," which are words that indicate that a bequest is pecuniary, so she concludes that the provision is a specific bequest. In addition, Joan argues that there is no reason to treat the proceeds from a life insurance policy differently from securities because an insurance policy is a type of security. *Ruh's Ex'r v. Ruh,* 270 Ky. 792, 110 S.W.2d 1097, 1104-1104 (Ky. 1937). And, she notes that a gift of stock is considered a specific bequest. Accordingly, she concludes that the remainder of the death benefits qualifies as a specific bequest entitling Joan's Trust to receive the interest and dividends that have accrued on the proceeds of the two life insurance policies since William Harrod's death. She argues, therefore, that the trial court erred when it ordered her to refund $85,616.41 to the Harrod Family Trust, and it erred when it refused to order David to disburse the remaining $17,153.74 of the Trust's assets to Joan's Trust.

The resolution of this issue does not turn upon whether or not this provision constitutes a specific versus pecuniary bequest; rather, it turns upon what the Settlor, William Harrod, meant by the terms "death benefits" and "net death benefits." The question then becomes did William Harrod intend for the "death benefits" and "net death benefits" to include the interest and dividends that have accumulated on the face amounts of the life insurance policies.

In the Trust Instrument, the Settlor did not define the term "death benefits"; however, BLACK'S LAW DICTIONARY 406 (7th ed. 1999) defines that term as "[a]n amount paid to a beneficiary on the death of an insured." This definition strongly suggests that

the term "death benefits," ordinarily, refers to the proceeds a beneficiary receives from one or more life insurance policies. According to AMERICAN JURISPRUDENCE, 2d,

> In the case of the death of an insured within the risk and conditions of a life insurance policy, few questions arise as to the extent of the insurer's liability. Ordinarily, the amount payable, except for the deduction of the insured's indebtedness to the insurer, or the payment of interest by the insurer, is the face amount of the policy.

44 AM. JUR. 2D *Insurance* § 1448 (2007) (citations omitted.). So, usually, the proceeds from a life insurance policy, that is the "death benefits," constitute the face amount of the policy plus interest. Regarding such interest, AMERICAN JURISPRUDENCE, 2d, states that in general, "interest is chargeable against an insurer under a life insurance policy, payable on proof of death, from the time such proof was furnished and accepted." 44 AM. JUR. 2D *Insurance* § 1450 (2007) (citations omitted.). So, using the ordinary meaning of the term "death benefits," it would include any interest that accrued from the time that the insurance company received proof of the insured's death to the time that the insurance company accepted that proof. Based on this construction, we conclude that William used the term "death benefits" in the Trust Instrument to refer to the face amounts of the policies plus any interest that accrued from the time the Trust submitted proof of his death to the time the insurance companies accepted that proof.

Regarding the term "net death benefits," the pertinent part of the Trust Instrument reads that

> [t]he net death benefits from all insurance policies received by the trust on Settlor's life, after all payments on any loans by this trust against them at Settlor's death and all payments

> to any company pursuant to a split-dollar life insurance agreement against them at Settlor's death, shall be distributed[.]

Based on the natural construction of this provision, the "net death benefits" consisted of the "death benefits." In other words, it is the face amount of the life insurance policies plus the applicable interest as discussed *supra*, minus the payoff of all of the Trust's outstanding loans less the Company's reimbursement for the premiums it paid pursuant to the Insurance Plan.

According to the Trust Instrument, Joan's Trust was entitled to receive the *remainder* of the net death benefits, that is the "net death benefits" as defined *supra*, minus the $1,000,000.00 that the trustee was directed to disburse to Joan outright and $300,000.00 that the trustee was directed to distribute to the Catherine Harrod Trust. As the recipient of the remainder of the net death benefits, Joan's Trust was not entitled, as Joan insists, to the return of the unused portion of the Northwestern Policy's premium or to the interest and dividends that accrued on the Harrod Family Trust's assets from the time of William's death until the time David, the trustee, disbursed those assets. Based on the natural construction of the term "death benefits" considering the Trust Instrument as a whole, Joan's Trust was only entitled to receive the interest that accrued on the face amounts of the policies from the time the Trust submitted proof of William's death to the insurance companies to the time the insurance companies accepted that proof.

The record in this case does not reveal if such interest accrued and, if so, how much. Therefore, we reverse that part of the trial court's judgment in which it held

that the term "death benefits" only included the face amounts of the life insurance policies and remand with instructions for the trial court to hold an evidentiary hearing to determine if interest accrued on the face amounts of the insurance policies from the time that the Trust submitted proof of William's death to the insurance companies to the time the companies accepted such proof. If interest did accrue, then the trial court should determine how much accrued. Because this amount is presently unknown, once determined, it may impact the amount of money to which Joan's Trust was entitled. Therefore, we vacate that portion of the trial court's judgment in which it determined that Joan was liable to refund $85,616.41 to the Harrod Family Trust. Depending upon how much interest accrued as discussed above, Joan may be liable for an amount less than $85,616.41.

However, we note that she is still liable to refund $50,000.00 to the Trust, representing the amount of spousal support she received from the Trust. We instruct the trial court to re-examine this issue once it has determined the amount of interest that accrued on the face amounts of the life insurance policies as discussed *supra*.

Finally, because Joan's Trust was only entitled to the interest that accrued on the face amounts of the insurance policies from the time that proof of William's death was submitted to the time the companies accepted such proof, the trial court was correct that Joan's Trust was not entitled to the remaining $17,153.74. Therefore, we affirm that part of the trial court's judgment.

4. The Franklin Circuit Court erred when it failed to fully address Joan's claims regarding her *Crummey* withdrawal rights.

Finally, on cross-appeal, Joan claims that the trial court erred by failing to fully address her claims regarding her withdrawal rights pursuant to *Crummey,* 397 F.2d at 82. Joan claims that she agrees with the trial court's decision that David's obligation to notify her and the other beneficiaries regarding their *Crummey* withdrawal rights was discretionary. However, she argues that the trial court should have construed her complaint liberally to allow her to pursue an additional claim against David, as Trustee, for breach of his fiduciary duty because he failed to direct the Settlor, William Harrod, to notify her of her withdrawal rights. According to Joan, William Harrod was either a co-trustee or an agent of the Trust. Either way, she argues that David, as Trustee, was responsible for William's alleged failure to notify her.

In Count I of Joan's complaint which she labeled as "Breach of Fiduciary Duty by Failure to Give Notice of Trust Withdrawal Rights," she claimed that she

> was never given a copy of the Trust Agreement until sometime after Mr. Harrod's death and had no knowledge of her beneficial interest in the Harrod Family Trust while her husband was living. As a beneficiary of the Harrod Family Trust during the life of Mr. Harrod, she never received an accounting of the trust and was never contacted by David R. Harrod, as Trustee, to ascertain her needs with respect to discretionary distributions of income or corpus. With respect to each and every one of the gifts or "additions" made to the Harrod Family Trust by Mr. Harrod . . . , Mrs. Harrod was never notified of the additions or of her right to withdraw the first $10,000.00 thereof. As a result, David R. Harrod, as Trustee, breached his fiduciary duty to Mrs. Harrod and should be adjudged liable to her for the value of the additions

> which she could have withdrawn from the trust had she been notified of them.
>
> According to the Supreme Court of Kentucky,
>
> [w]hile it is true that the Rules of Civil Procedure with respect to stating a cause of action should be liberally construed and that much leniency should be shown in construing whether a complaint on which a default judgment is based states a cause of action, this Court cannot read away the requirement of Civil Rule 8.01 which requires ". . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." There must be maintained some minimum standard in the art of pleading which must be met. *Pike v. George,* Ky., 434 S.W.2d 626 (1968); *Johnson v. Coleman,* Ky., 288 S.W.2d 348 (1956).

Morgan v. O'Neil, 652 S.W.2d 83, 85 (Ky. 1983). In Joan's complaint, she clearly and unequivocally alleged that David, as trustee of the Harrod Family Trust, had breached his fiduciary duty to her by failing to notify her of her *Crummey* withdrawal rights. She never mentioned in her complaint that William Harrod as the Settlor of the Harrod Family Trust also had a duty to notify her. And, she never alleged that David, as trustee, was responsible for William's alleged failure to notify her. No matter how liberally we construe Joan's complaint, we cannot read into it a claim that simply was never there in the first place. Thus, the trial court did not err when it denied Joan's motion to alter, amend or vacate, and we affirm the trial court's order regarding this issue.

IV. CONCLUSION

A. DAVID'S DIRECT APPEAL

Regarding David's argument that the trial court erred when it determined that the Company was not entitled to be reimbursed for the premiums it paid on the

Valley Forge Policy prior to the execution of the Insurance Plan, the Franklin Circuit Court's order and opinion is AFFIRMED.

B. JOAN'S CROSS-APPEAL

Regarding Joan's first assignment of error that the trial court erred when it decided that the Company was entitled to be reimbursed for the full amount of each premium it paid on the Valley Forge Policy after the execution of the Insurance Plan, the Franklin Circuit Court's order denying Joan's motion to alter, amend or vacate and its order and opinion are AFFIRMED.

Regarding Joan's second assignment of error that the trial court erred when it failed to award prejudgment interest, the trial court's order denying Joan's motion to alter, amend or vacate is VACATED IN PART and REMANDED with instructions set forth *supra*.

Regarding Joan's third assignment of error that the trial court erred when it failed to order the Trustee to distribute the interest that had accrued on the Trust's assets to Joan's Trust, the trial court's order denying Joan's motion to alter, amend or vacate and its order and opinion are REVERSED IN PART, VACATED IN PART and REMANDED with instructions as explained *supra*.

Regarding Joan's final assignment of error that the trial court failed to fully address her claims regarding her *Crummey* withdrawal rights, the trial court's order denying Joan's motion to alter, amend or vacate and its opinion and order are AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-APPELLEES:

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