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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Stephen Foster

v.

Gary D. Foster

**Appeal from Shelby Circuit Court
(CV-13-382)**

SELLERS, Justice.

Gary D. Foster and Stephen Foster are brothers who dispute the management of the "Foster Family 1989 Trust" ("the Trust"). Gary filed a "complaint" in the Shelby Circuit Court ("the trial court"), seeking an accounting and an inventory of

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the Trust and, subsequently, seeking to remove Stephen as the trustee of the Trust. The trial court entered a final judgment in favor of Gary and assessed damages. Stephen appeals.¹ We affirm.

I. Facts and Procedural History

In 1989, Howard E. Foster and Dorothy A. Foster (hereinafter referred to collectively as "the Fosters") executed the Trust in the State of California. In 1996, the Fosters amended the Trust to establish themselves as the trustees and their sons Gary and Stephen as successor cotrustees. Howard died in 1997, and Dorothy became the sole trustee. Dorothy thereafter executed a "Certification of Trust," naming Stephen as first successor trustee and Gary as his successor. Dorothy died in March 2013; at the time of her death she was residing in Shelby County. Upon her death, Gary and Stephen cooperated and made joint decisions as cotrustees. However, after the brothers received an opinion from an

¹Gary amended his complaint to add Calvert, LLC, and Foster Investments, LLC, as respondents in the action. Although those parties were named in the notice of appeal, Gary notes in his brief and the record reflects that, after filing an answer, neither entity participated further in the action.

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attorney that the certification of trust named Stephen the sole trustee, Stephen began acting as sole trustee; thereafter, their relationship deteriorated.²

On November 25, 2013, Gary filed his complaint, seeking a full inventory and an accounting of the Trust.³ At that time, the assets of the Trust included a 49% interest in Calvert, and Foster Investments owned the other 51% interest in Calvert. Calvert owns a commercial building in Atlanta, Georgia (hereinafter "the Calvert property"). Stephen was the managing member of Calvert; he was the sole owner of Foster Investments.

On May 14, 2014, Gary and Stephen executed a "Memorandum Agreement," which they filed with the trial court. That agreement provided, among other things, that Stephen would

²During the proceedings below, Gary and Stephen filed cross-motions for a summary judgment, arguing whether the certification of trust could, under California law, change the terms of the Trust with respect to the order of their designation as trustees. The trial court deemed that issue moot because it ultimately ordered Stephen removed as trustee of the Trust.

³Section 10.19 of the Trust, "Accounting by Trustee," waives the trustee's duty to render accounts, except for "accounts at the termination of the trust and on a change of trustees, to the persons and in the manner required by law."

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keep Gary apprised on a current basis of all expenses for Calvert's operation "by providing all appropriate documentation to support such expenses as they are paid."

On May 20, 2014, the trial court issued a temporary consent order ("TCO"), providing, in relevant part:

"1. That Stephen is restrained and enjoined from making any further disbursement from any trust account, whether designated for Stephen, Gary or otherwise, for personal expenses without specific agreement in writing signed by both parties or their counsel, or by further order of this court.

"2. That the Trust shall continue to be responsible for the payment of the usual and customary expenses for the operation of the Calvert property ... without necessity of prior authorization.

"3. Stephen shall keep Gary apprised on a current basis of all such usual and customary expenses [of Calvert] as they are paid."

On September 9, 2015, following a hearing, the trial court found that Stephen had violated the TCO in several respects as it related to the Calvert property. The trial court entered an order removing Stephen as trustee; appointing Gary as trustee; ordering a forensic accounting of the Trust; and enjoining Stephen from taking any further action with respect to the Trust property, including the Trust bank accounts. Stephen and Gary entered into a joint stipulation

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allowing the trial court to appoint Forensic Strategic Solutions ("FSS") to conduct a forensic accounting of the financial transactions of the Trust during Stephen's tenure as trustee.

On April 28, 2016, following a hearing, the trial court entered an order finding Stephen in willful contempt of the September 9, 2015, order because Stephen had, among other things, transferred Trust funds into his personal account in violation of the order.⁴ The trial court also found it necessary to expand the forensic accounting to include an examination of Calvert's financial records. Accordingly, it ordered the parties to cooperate with FSS and its staff to provide any documentation necessary to explain any questionable transactions identified by FSS.

On November 2, 2017, Gary filed a second verified motion for contempt, alleging that Stephen had continued to violate the TCO by refusing to apprise him on an ongoing basis of Calvert's expenses and further alleging that Stephen had sold

⁴Stephen appealed the contempt judgment. This Court affirmed that judgment without an opinion. See Foster v. Foster (No. 1151137, May 12, 2017), 251 So. 3d 5 (Ala. 2017) (table).

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the Calvert property without his knowledge. The case proceeded to a bench trial.

On January 10, 2019, the trial court entered a final judgment that, among other things, (1) ordered Stephen to pay Gary, as trustee of the Trust, \$244,080.72, together with prejudgment interest at the rate of 6% from February 18, 2014; (2) ordered Stephen to pay Gary, individually, the sum of \$234,465 for Gary's 24.5% interest in Calvert, together with prejudgment interest at the rate of 6% from August 21, 2015; and (3) ordered Stephen to pay Gary, as trustee of the Trust, the sum of \$75,526 for attorney fees.⁵ Stephen appealed.

II. Standards of Review

"The ore tenus rule affords a presumption of correctness to a trial court's findings of fact based on ore tenus evidence, and the judgment based on those findings will not be disturbed unless those findings are clearly erroneous and against the great weight of the evidence. Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000). It is grounded upon the principle that when a trial court hears oral testimony it has an

⁵The trial court also found Stephen in contempt of both the TCO and the September 9, 2015, order, noting that Stephen could purge himself of the contempt by paying all sums ordered within 14 days of the entry of the judgment. The trial court also noted that, upon payment of all sums due, the Trust would be dissolved and Gary would be discharged of his duties as trustee.

opportunity to evaluate the demeanor and credibility of the witnesses. Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986). The ore tenus rule does not cloak a trial court's conclusions of law or the application of the law to the facts with a presumption of correctness. Kennedy v. Boles Invs., Inc., 53 So. 3d 60 (Ala. 2010)."

Allsopp v. Bolding, 86 So. 3d 952, 958 (Ala. 2011). "The ore tenus standard of review extends to the trial court's assessment of damages." Edwards v. Valentine, 926 So. 2d 315, 325 (Ala. 2005). The trial court's determination as to the availability of prejudgment interest is a question of law, which appellate courts review de novo. Jernigan v. Happoldt, 978 So. 2d 764, 767 (Ala. Civ. App. 2007). The existence of subject-matter jurisdiction is a question of law, which this Court reviews de novo. Ex parte Terry, 957 So. 2d 455, 457 (Ala. 2006).

III. Discussion

A. Subject-Matter Jurisdiction

Stephen asserts that the Trust is governed by California law and that California law provides only one avenue for seeking a court-ordered accounting from a trustee.⁶ Because,

⁶See Cal. Prob. Code § 17200(b)(7)(C) (providing that a beneficiary may petition the court to compel the trustee to "[a]ccount to the beneficiary ... if the trustee has failed to

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Stephen says, Gary did not comply with the prerequisites of the applicable California probate statute, Stephen asserts Gary lacked "standing" to file this action from the outset, thus depriving the trial court of subject-matter jurisdiction. We disagree that California law governs the Trust in all respects and, more specifically, the administration of the Trust.

Stephen represents that the Trust "explicitly states it is governed by California law." The Trust does not state that it is "governed" by California law. Rather, it states that the Trust "is to be construed according to California law." (Emphasis added.) Issues concerning the "meaning" of trust terms and the legal effects thereof are matters of construction. See Restatement (Second) Conflicts of Law § 224, comment e (1971) (noting that "construction is a process for giving meaning to an instrument in areas where the intentions of the parties would have been followed if these intentions had been made clear"). Conversely, matters pertaining to the administration of a trust include "those matters which relate

submit a requested account within 60 days after written request of the beneficiary and no account has been made within six months preceding the request").

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to the management of the trust. Matters of administration include those relating to the duties owed by the trustee to the beneficiaries." Id. § 271, comment a. Administrative matters relating to a trust, then, are not "construed," making it unnecessary to resolve choice-of-law conflicts for ministerial issues.

In this case, although the Trust provides that it is to be construed according to California law, it does not expressly indicate the Fosters' intent regarding which state's law should apply to matters of trust administration. The use of the term "construed" in reference to the use of California law, rather than specifically referencing the administration of the Trust, indicates that the Fosters did not intend to designate that a particular state's law governed the administration of the Trust and, more specifically, an accounting of the Trust.⁷ See, e.g., Dahl v. Dahl (Aug. 27,

⁷Section 10.19 of the Trust, "Accounting by Trustee," waives the trustee's duty to render accounts, except for "accounts at the termination of the trust and on a change of trustees, to the persons and in the manner required by law." (Emphasis added.) In other words, Section 10.19 does not state that it is governed by California law. Conversely, other sections of the Trust do expressly provide for the application of California law, see, e.g., Section 2.3, stating that "[c]ommunity property which we transfer to the trust shall

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2015), 2015 UT 79, ___ P.3d ___ (Utah 2015) (the trust agreement provided that the "validity, construction and effect of the provisions of this Agreement in all respects shall be governed and regulated according to and by the laws of the State of Nevada. The administration of each Trust shall be governed by the laws of the state in which the Trust is being administered"); see also In re Estate of Mullin, 169 N.H. 632, 634, 155 A.3d 555, 557 (2017) (construing a trust agreement that provided that California law governed the "validity, construction, and administration of [the] Trust, except that all matters relating to real property shall be governed by the laws of the situs of that real property"). Accordingly, jurisdiction over the Trust was proper under Ala. Code 1975, § 19-3B-202, and the trial court was not required to consult

retain its community property character under all the applicable laws of California"; Section 5.1, stating that "[p]ayment of debts ... shall be charged ... in accordance with California law"; Section 5.2, stating that the trustee "shall consider giving notice to creditors described in California Probate beginning with Section 19000"; Section 8.8, stating that, in the absence of beneficiaries, the legal heirs "shall be determined according to the laws of succession of the State of California"; and Section 11.2, stating that "the determination of all matters with respect to what is principal and income of the trust estate ... shall be governed by the provisions of the California Revised Uniform Principal and Income Act."

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California law to determine the propriety of Gary's request for an accounting.

B. Moneys Owed the Trust

The trial court ordered Stephen to repay Gary, as trustee of the Trust, \$244,080.72, together with prejudgment interest at the rate of 6% from February 18, 2014. That judgment represented the net amount of personal expenses Stephen improperly paid himself while acting as trustee of the Trust. Stephen argues that the trial court erred in ordering him to repay the \$244,080.72 because, he says, the judgment cannot be reconciled with the findings of fact set forth in the final judgment. Contrary to Stephen's argument, the trial court did not base the judgment on its own calculations or findings. Rather, the trial court based its judgment on the forensic audit performed by FSS, the final report of that audit, and the testimony of FSS representatives. Based on that evidence, the trial court determined that the final FSS report accurately reflected the amount Stephen owed the Trust. The weight to be afforded such evidence was a matter for the trial court. The trial court's judgment in this respect was neither

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clearly erroneous nor against the great weight of the evidence. Allsopp.

Stephen also argues that the trial court erred in awarding prejudgment interest on the \$244,080.72. Stephen specifically argues that prejudgment interest was not appropriate because, he says, the judgment amount was not certain in that FSS submitted several reports, each of which, he says, varied significantly from the final report. See Martin v. Tolson, 562 So. 2d 217, 219 (Ala. 1990) (noting that, "[g]enerally, prejudgment interest is not awarded unless a sum is certain or capable of being made certain"). To this extent, Stephen also challenges the trial court's acceptance of FSS's report as reliable. We find this argument to be without merit. The FSS reports varied due solely to Stephen's failure to cooperate with the forensic audit as ordered:

"Despite being ordered by this Court on at least two occasions to cooperate with FSS as the agreed upon Court-appointed forensic accountants, Stephen failed to turn over various financial documents to them on a timely basis. At one point, through a vulgar email, he even accused FSS of conspiring against him. He also forbade his attorney at the time ... from turning over any more information. On the eve of the first date of trial on December 7, 2017, Stephen produced some additional records to FSS which affected the final report by reducing his liability to a small degree. Even so, he had still

not supplied FSS with all of the documents that they had requested. In contrast, Gary has fully cooperated with the forensic investigation and has turned over to FSS all documents requested on a timely basis. Due to Stephen's failure to cooperate and his inordinate delay in producing documents that had been requested by FSS over a period of two years, the Court FINDS that it would be inequitable for Stephen to benefit from whatever reduction these documents would have on his total liability to the Trust, however small that may be. Accordingly, the Court accepts the most recent report and findings of FSS constitutes its final report.

"In addition to being contumacious, Stephen's dilatory behavior unduly protracted this litigation and required multiple court appearances by Ralph Summerford and his staff as FSS attempted to comply with its mandate and provide this Court with reports of their analysis of the financial transactions of the Trust. Because Stephen failed to cooperate, Gary, through his counsel, was compelled to obtain many of these records through the discovery process which, again, delayed the case and increased the Trust's expenses, including attorney's fees. This Court finds that these tactics resulted in several significant revisions to FSS's final report as the financial records trickled in. Stephen points to these changes as evidence that FSS employed an improper methodology in its approach to the forensic accounting ordered by this Court. However, as the testimony of Mr. Summerford and his associate, Lindsay Gill, demonstrated, the use of multiple accounts, the commingling of Trust and personal funds and the lack of cooperation by Stephen all contributed to the evolution of the final report. All three versions of FSS's reports contained a

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caveat that the report would be updated upon receipt of additional documentation."⁸

(Capitalization in original; emphasis added.)

Based on the foregoing, the trial court did not err in awarding prejudgment interest on the \$244,080.72 because that amount was readily ascertainable beginning February 18, 2014, the time at which Stephen began misappropriating Trust funds, up until FSS's final report. Further, the trial court did not err in accepting FSS's final report as reliable. As indicated, Gary and Stephen mutually agreed that FSS, a neutral forensic-accounting firm, would conduct the forensic accounting. Stephen then hired his own accounting expert, David Sawyer, who submitted a report indicating that the Trust owed Stephen \$119,957. The trial court rejected that report on the basis that it was diametrically opposed to the final report submitted by FSS and, thus, incapable of being reconciled with the FSS report. The trial court's judgment, based on ore tenus findings, is entitled to considerable

⁸The trial court further noted in note 4 of its judgment that Stephen had also caused further delays and unnecessary expenses to the Trust by filing two unsuccessful petitions for a writ of mandamus, an unsuccessful appeal of the contempt finding, and an unsuccessful petition in bankruptcy, and by hiring and firing multiple attorneys.

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weight. And, because the trial court's judgment was neither clearly erroneous nor against the great weight of the evidence, we must accept that FSS's report was a reliable basis for its judgment. Allsopp.

C. Calvert

The trial court ordered Stephen to pay Gary, individually, the sum of \$234,465 for Gary's 24.5% interest in Calvert, together with prejudgment interest at the rate of 6% from August 21, 2015. Stephen first argues that the trial court erred in finding that he violated the TCO by disbursing the sales proceeds of the Calvert property to himself. On August 7, 2015, Gary and Stephen executed an agreement in which they divested the Trust of its interest in Calvert; they each received a 24.5% interest in Calvert. On August 21, 2015 (a mere 14 days later), Stephen sold the Calvert property in its entirety. Stephen neither provided Gary with notice of the sale, nor did he pay Gary for his 24.5% interest in Calvert. Rather, Stephen testified that he used sales proceeds for the payment of various promissory notes he had executed to himself on behalf Calvert, with interest at the rate of 12%. The trial court found:

"Because Stephen violated the Temporary Consent Order of May 20, 2014, by disbursing the Calvert proceeds to himself and violated the September 9, 2015, order by paying attorney's fees to various attorneys for representation of the Trust and for himself individually, the Court FINDS that Stephen owes Gary \$234,465.00 for Gary's interest in Calvert in addition to what he must pay to the Trust. The Calvert proceeds could not have been properly paid to Stephen for any trust-related work performed after he was removed as Trustee and, therefore, could only be attributed to (a) personal reimbursements for management fees; (b) attorney's fees incurred for his individual defense of claims of impropriety; (c) the payment of promissory notes, plus 12% interest, made by Stephen to himself; or (d) attorney's fees for the defense of Calvert. In any case, not only were these transactions improper under the terms of Calvert's Operating Agreement, they were clearly not 'usual and customary expenses' related to the operation of Calvert requiring Gary's consent or Court approval under the Temporary Consent Order."

(Capitalization in original; footnote omitted.)

Stephen points out that, as of August 7, 2015, the Trust was divested of all of its interest in Calvert. To this extent, he argues that, when he sold the Calvert property on August 21, 2015, there was no evidence indicating that any Trust moneys were being expended for Calvert. Stephen, however, fails to acknowledge that the parties' August 7, 2015, agreement by which the Trust was divested of its interest in Calvert expressly states that the parties "remain

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subject to the terms of the Temporary Consent Order," requiring, among other things, that Stephen keep Gary apprised on an ongoing basis of all usual and customary expenses of Calvert as those expenses are paid. Stephen also fails to acknowledge that the TCO specifically states that it was to remain in effect pending further order of the trial court. Although the Trust did not technically own any interest in Calvert after its divestiture on August 7, 2015, Stephen remained under a court-ordered, affirmative duty to inform Gary about the sale and disbursement of the proceeds from the sale of the Calvert property. Thus, it is disingenuous for Stephen to assert that he could unilaterally sell the Calvert property without disclosing not only the terms of the sale, but also that the sales proceeds were to be used to satisfy the promissory notes he had executed to himself. Accordingly, the trial court did not err in finding that Stephen violated the TCO by disbursing the proceeds from the sale of the Calvert property to himself. The trial court's findings of fact, based on ore tenus evidence, are entitled to considerable weight. Allsopp.

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Stephen also argues that the trial court committed reversible error in awarding prejudgment interest on the \$234,465 because, he says, that amount is not certain or capable of being made certain. See Martin, supra. Stephen appears to argue that the amount of the judgment is not certain because FSS submitted several reports, each of which differed from its final report. However, the trial court, in its final judgment, noted that "FSS's analysis of Calvert's financial transactions was limited to the time period that the Trust was a 49% owner of Calvert. Thus, their [final] report does not cover the disposition of the proceeds from the sale of Calvert." Rather, the trial court determined, as a matter of law, that the sale of the Calvert property resulted in the net sales proceeds of \$957,000. Gary had a 24.5% interest in Calvert, which, by simple math, means that Gary was due \$234,465 as proceeds from the sale of the Calvert property. Because the amount Stephen owed Gary was certain when Stephen sold the Calvert property on August 21, 2015, the trial court did not err in awarding prejudgment interest on that amount.

Stephen finally argues that the trial court erred in failing to enforce the promissory notes he had executed to

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himself on behalf of Calvert because, he says, there is a presumption under the law that the notes were prima facie evidence of sufficient consideration for the execution thereof. Merchants Bank v. Head, 161 So. 3d 1151, 1156 (Ala. 2014). We find this argument to be without merit. It is apparent that the trial court did not err in failing to enforce the promissory notes because Stephen's payments of those notes to himself was a violation of the TCO. Further, because the loan amounts evidenced by the notes could not be substantiated and their discharge resulted in Stephen benefiting himself to Gary's disadvantage, the trial court properly determined that the notes were not given for adequate consideration and could not be enforced according to their terms.

D. The Stonegate Property

The Stonegate property, a condominium in Atlanta, Georgia, was held jointly by Stephen and his mother, Dorothy, as tenants in common. When Dorothy died, her undivided one-half interest automatically vested in her estate, which, pursuant to the terms of her will, was to become part of the res of the Trust. Stephen, however, used the Stonegate

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property as his personal residence, and he never transferred title of the property to the Trust. Stephen argues that the trial court erred in ruling that Stonegate never became an asset of the Trust. We decline to consider this argument. It is undisputed that Gary and Stephen entered into a "Memorandum Agreement" on May 14, 2014, providing, in relevant part, that "Stephen Foster shall forthwith disclose all of the expenses reimbursed to Stephen Foster associated with the operation of the [Stonegate] condominium in Atlanta, Georgia, since the death of Dorothy Foster and shall repay to the Trust any expenses associated with the condominium which have been paid by the Trust." The trial court incorporated that memorandum agreement into its May 20, 2014, TCO and, based on that agreement, ordered Stephen to repay the Trust all expenses he had paid on behalf of Stonegate. It was only logical and consistent for the trial court to maintain that the Stonegate property was not a Trust asset given Dorothy's interest in the property was never properly transferred by deed to the Trust and given Stephen's treatment of Stonegate as belonging to him exclusively--almost as if the deed had vested title in him as a surviving joint tenant. The trial court's finding that the

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Stonegate property was not an asset of the Trust was neither clearly erroneous nor against the great weight of the evidence. Allsopp.

E. Attorney Fees

Stephen finally argues that the trial court exceeded its discretion in ordering him to pay Gary, as trustee of the Trust, attorney fees in the amount of \$75,526 because, he says, neither Gary nor the trial court cited any statutory or contractual basis on which the fees could have been founded. See Advertiser Co. v. Auburn Univ., 579 So. 2d 645, 647 (Ala. 1991) (noting that "a prevailing litigant is not entitled to have attorney's fees paid by the opposing party, absent a contractual or statutory right or recognized ground of equity"). Stephen fails to acknowledge, however, that in Reynolds v. First Alabama Bank of Montgomery, N.A., 471 So. 2d 1238 (Ala. 1985), this Court recognized an equitable exception that allows attorney fees in the absence of a contractual or statutory right, i.e., when a defendant has committed fraud, willful negligence, or malice or otherwise has acted in bad faith, the trial court may, in its discretion, shift the cost of attorney fees to the successful party. In this case, the

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trial court concluded that Stephen was responsible for the attorney fees incurred by the Trust because of "misfeasance of his fiduciary duties" when he was trustee of the Trust, his failure to cooperate with the court-ordered forensic accounting, and his conduct in unduly protracting the litigation. Accordingly, we conclude that the trial court was justified in holding Stephen responsible for the attorney fees incurred by the Trust in this litigation.

IV. Conclusion

Based on the foregoing, we affirm the judgment of the trial court.

AFFIRMED.

Bolin, Wise, and Stewart, JJ., concur.

Parker, C.J., concurs in part and concurs in the result.

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PARKER, Chief Justice (concurring in part and concurring in result).

I concur with all parts of the main opinion except the first two paragraphs of Part III.C. Stephen Foster's sale of the property owned by Calvert, LLC ("the Calvert property"), and disbursement of the proceeds, without notice to Gary D. Foster, did not violate the temporary consent order ("TCO"). The relevant portion of the TCO provided:

"2. ... [T]he Trust shall continue to be responsible for the payment of the usual and customary expenses for the operation of the Calvert property

"3. Stephen Foster shall keep Gary Foster apprised on a current basis of all such usual and customary expenses as they are paid."

(Emphasis added.) "Such" in paragraph 3 clearly referred to the expenses described in paragraph 2. Thus, the TCO required Stephen to apprise Gary only of payment by the Trust of the usual and customary expenses for the operation of the Calvert property, not all financial transactions of Calvert, LLC. The sale of the Calvert property and disbursement of the proceeds were not payment by the Trust of the usual and customary expenses for the operation of the Calvert property. Therefore, the sale and disbursement did not violate the TCO.

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Further, the TCO was in the nature of a preliminary injunction, mandatory in character. As required by law, the TCO was "specific in terms" and "describe[d] in reasonable detail ... the act or acts sought to be restrained" (or, in this case, to be required). Rule 65(d)(2), Ala. R. Civ. P. An act that is not reasonably within the specific mandatory or prohibitory language of an injunction cannot be a basis for finding a violation of that injunction, i.e., a finding of contempt. See Carr v. Howard, 777 So. 2d 738, 741 (Ala. Civ. App. 2000). Here, Stephen's sale of the Calvert property and disbursement of the proceeds did not violate the specific mandatory language of the TCO. Accordingly, although I concur in the result regarding the award of damages to Gary, I believe the circuit court erred in finding that Stephen violated the TCO in that instance.