Rel: May 21, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190682

Jeremy K. Hon

v.

Kevin Duane Hon, individually and as trustee of the Jeremy K. Hon Irrevocable Family Trust, Emily Louise Hon Castellanos, and Jason Jeremy Hon

Appeal from Madison Circuit Court
(CV-18-900351)

WISE, Justice.

Jeremy K. Hon, the plaintiff below, appeals from a summary judgment entered by the Madison Circuit Court as to his claims against Kevin Duane Hon, individually and as trustee of the Jeremy K. Hon Irrevocable Family Trust ("the Trust"), Emily Louise Hon Castellanos, and Jason Jeremy Hon, the defendants below. We affirm.

Facts and Procedural History

Jeremy K. Hon and Lynda L.B. Hon were married and had three children -- Kevin Duane Hon, Emily Louise Hon Castellanos, and Jason Jeremy Hon. On January 19, 2012, the plaintiff signed an agreement ("the Trust agreement") creating the Trust. Over time, the plaintiff transferred assets to the Trust, including his and Lynda's principal residence in Madison County; a condominium in New York, New York; his 50% interest in L&L Enterprises LLC; and over $1,000,000 in cash and securities. Lynda died on July 30, 2017, and Kevin succeeded her as the sole trustee of the Trust.

On February 19, 2018, the plaintiff filed a complaint in the Madison Circuit Court against Kevin, individually and as trustee of the Trust, Emily, and Jason. The complaint included claims for rescission of the

Trust agreement (count I), rescission of transfers to the Trust (count II), reformation of the Trust agreement (count III), recoupment of money paid on the behalf of the Trust (count IV), and alleging that the Trust had been unjustly enriched (count V). In the complaint, the plaintiff alleged that he had signed the Trust agreement based on "his mistaken understanding of the effects thereof"; that he had "transferred assets to the Trust based on his mistaken understanding of the effects of the Trust Agreement"; and that, "due to mistake, the Trust Agreement does not accomplish his intent." He also alleged that he had paid amounts on behalf of the Trust that "the Trust, in equity and good conscience, should be required to repay" to him and that the Trust "has received and retained an improper benefit ... and has been unjustly enriched."

On July 13, 2018, the defendants filed an answer in which they denied that the plaintiff was entitled to relief. They also asserted several affirmative defenses. Finally, the defendants filed a counterclaim alleging that the plaintiff had converted funds belonging to the Trust. On August 3, 2018, the plaintiff filed a reply to the defendants' counterclaim.

On August 16, 2018, the defendants filed a motion for a summary judgment and a brief in support of the motion. They supported their motion with deposition and affidavit testimony, among other things.

In his deposition, the plaintiff stated that he may have "skimmed" parts of the Trust agreement, but he admitted that he did not read the Trust agreement thoroughly before signing it. He admitted that, when he signed the Trust agreement, he saw that it was irrevocable, but he stated that he did not think about it that way. The plaintiff stated that he never discussed the Trust with Jackson Burwell, the attorney who drafted the Trust agreement, before he signed the Trust agreement and that Burwell never told him that assets that were transferred to the Trust would be beyond his reach and control. He also stated that he does not remember Burwell saying that he would not be able to use the assets that were transferred to the Trust during his lifetime.

The plaintiff stated that his understanding of the Trust was as follows:

> "What I understand is I will ... I would distribute some money to my children. I think at that time was -- the purpose was tax saving. There was some law changes. And I have no

problem distributing the money to my children. And [Lynda] urge[d] me to do it and -- because at that time I foresaw the -- the potential that I may accumulate more than the government allow, have to pay tax. Okay? So you got to do something about it and that's for the tax purposes. The things I didn't realize is that this will be taken away from me right in front of me and I -- even I have all the intention to give to my children, but I have -- the Trust name is -- my name is there, that it is not exercise after my death. That's absolutely not my understanding.

"My understanding was at least -- I don't know whether Jack Burwell explain to me. In my mind, I thought when anything pass on to your children, it's after your death. This is not the case. This is right pick it up in front of me. And I was a little shocked because I had been paying all the bills of the condo, things like that and suddenly I lost the ability. I was not identify as one of the owner, which I understand that's the way it is, but I totally shocked that -- my understanding was for inheritance, you pass to somebody else, is after your death, not right in front of you while you are still alive and active. And that was a shock to me. That was a mistaken understanding. Have no concept. All I understand for anything if you want to pass along, whatever name you call it, is after your death. And I didn't know about it, I was not informed about it.

"....

"The Trust will -- will -- will carry out all the duties after my death. That was my understanding. Maybe misunderstanding and there was no clarification.

"....

> "My understanding is because usually the people, when you pass money to your children, it's after your death. That's -- that's common knowledge. That's my understanding. That was the way it was supposed to be. And you can now say that I was wrong because I didn't read all the detail. I did not read the Trust. Okay? I was told to sign it.
>
> "During the briefing I was not told that after certain person is gone, like my -- after Lynda is gone, that this thing will totally disappear from me out of my control. I did not know that."

The plaintiff stated that he did not remember the details regarding his signing the Trust agreement but that he did recall Burwell asking him to sign it really quickly. He also stated that he does not have any recollection of what Burwell told him when he signed it. Rather, he stated that he was busy with his medical practice and was thinking about his patients and that he trusted Lynda and Burwell.

The plaintiff testified that he thought he would have access to assets transferred to the Trust even after he transferred them. He stated that his belief was based on what his business partner had told him about having a trust and still having access and control over assets in the trust even though he did not own them. He admitted, however, that he had not

asked Burwell about whether he would have such access and control over assets after he transferred them to the Trust.

The plaintiff stated that he had received telephone calls from a bank that managed certain assets and from the firm that managed his condominium in New York indicating that his children had taken control of those assets and had told the bank and the firm that he did not have access to or control over those assets. He also stated that his children had told him he would have to pay rent or buy his house back from them if he wanted to live in it after he had placed it in the Trust. In this regard, he explained:

> "So I assumed that will be like you -- you and you, when you pass it on, you still can use it. But when one of my children told me that you have to pay the rent or you buy it back from me, now, that really hurt. Disrespectful and betrayal. That really one of the reason that I have to have this lawsuit, is that look, here is the things. I have all the intention to give them everything except I did not understand that they can take it away."

The plaintiff testified that he felt anger and a sense of betrayal because of the lack of trust shown by his children. He also testified that his anger and feeling of betrayal were the "impetus" for his lawsuit against the

defendants, and he stated that he wants his children to respect him more.

The plaintiff remembered Burwell telling him, at some point, that the Trust would save taxes on his estate. He also admitted that he had been concerned enough about estate taxes that he had bought an insurance policy in the amount of approximately $2,225,000 to help cover those taxes. However, he stated that he had decided not to renew it when the problems started with his children.

The plaintiff testified that, even after transferring the assets to the Trust, he still had assets in his name that were worth over $10,000,000 at the time of the transfer and at least $18,000,000 to $20,000,000 at the time of his deposition. He also testified that he wants to have control of the assets in the Trust now and to decide who to give them to later because of the way he feels he has been mistreated by his children.

The defendants presented an affidavit from Burwell, in which he stated, in relevant part:

> "4. Since 1980, after receiving my Master's in Taxation, I have written hundreds of wills and trusts for clients and have advised many clients about tax issues and related matters.

"5. I have lectured on estate planning and taught courses in several areas of law and tax planning.

"6. In the Summer of 2011, I represented Jeremy Hon ('Mr. Hon') and his late wife, Lynda Hon ('Mrs. Hon') for estate planning purposes. Both Mr. and Mrs. Hon received medical degrees, but to avoid confusion, I refer to them herein as Mr. and Mrs.

"7. In the Summer of 2011, based on information provided to me by Mr. and Mrs. Hon, Mr. and Mrs. Hon maintained a considerable net worth (Mr. Hon holding the vast majority of such net worth) that exceeded the then-effective Federal estate and gift tax exemption amount of five million dollars ($5,000,000), which, while effective for 2011 and 2012, was by law set to expire on December 31, 2012 and revert to one million dollars ($1,000,000).

"8. In the Summer of 2011, based on the then-effective tax laws and Mr. and Mrs. Hon's considerable net worth, I discussed with Mr. and Mrs. Hon the idea of adopting an estate planning technique that would allow Mr. and Mrs. Hon to mitigate the potential effect of taxes on their respective estates, pass assets and appreciation thereon to their children that would be unaffected by estate taxes, and remain financially secure for the remainder of their lives.

"9. Following the discussion described above in Paragraph 8, Mr. and Mrs. Hon expressed to me that they desired to adopt an estate plan that achieved the goals described above in Paragraph 8.

"10. In the Summer of 2011, I proposed to Mr. and Mrs. Hon that I believed that one avenue to achieve the estate planning goals described in Paragraph 8 herein was through

a plan that required (1) Mr. Hon to establish and transfer assets to an irrevocable trust that would operate for the sole benefit of Mrs. Hon during her lifetime and then, at Mrs. Hon's death, operate for the benefit of Mr. and Mrs. Hon's children (the 'Jeremy K. Hon Irrevocable Family Trust') and (2) Mrs. Hon to establish and transfer assets to an irrevocable trust that would operate for the benefit of Mr. Hon (if he exhausted his other assets) and Mr. and Mrs. Hon's children during his lifetime and then, at Mr. Hon's death, operate for the benefit of Mr. and Mrs. Hon's children (the 'Lynda Hon Irrevocable Family Trust') (collectively, the 'Irrevocable Family Trusts').

"11. Mr. and Mrs. Hon informed me that they wished to adopt the estate plan described in Paragraph 10 herein.

"12. Prior to execution of the Irrevocable Family Trusts, I informed Mr. Hon on more than one occasion that to achieve the estate planning goals outlined in Paragraph 8 herein, he would have to give away assets during his lifetime to the Jeremy K. Hon Irrevocable Family Trust and that said trust and the assets contained therein would not be for his benefit or under his control.

"13. Prior to execution of the Jeremy K. Hon Irrevocable Family Trust, Mr. Hon and I discussed that his own financial security would be protected after the establishment of the Irrevocable Family Trusts as he would retain ownership of assets that, by Mr. Hon's own estimate, were worth many millions of dollars and that if he ever exhausted such retained assets that he would have the benefit of the assets that Mrs. Hon transferred to the Lynda Hon Irrevocable Family Trust.

"14. Prior to the execution of the Irrevocable Family Trusts, I created drafts of the Jeremy K. Hon Irrevocable Family Trust (the 'Draft Jeremy K. Hon Irrevocable Family

Trust') and the Lynda Hon Irrevocable Family Trust (the 'Draft Lynda Hon Irrevocable Family Trust') and mailed said drafts to Mr. and Mrs. Hon's residence for their review.

"15. On August 11, 2011, Mrs. Hon, as grantor, and Mr. Hon, as trustee, executed the Lynda Hon Irrevocable Family Trust in my office.

"16. The version of the Lynda Hon Irrevocable Family Trust that Mr. and Mrs. Hon executed on August 11, 2011 was the same as the Draft Lynda Hon Irrevocable Family Trust.

"17. Prior to execution of the Jeremy K. Hon Irrevocable Family Trust, Mr. Hon and I met together in person on at least two occasions to discuss the details and effect of the proposed estate plan described in Paragraphs 8, 10, 12, and 13 herein.

"18. On January 19, 2012, Mr. Hon, as grantor, and Lynda Hon, as trustee, executed the Jeremy K. Hon Irrevocable Family Trust at my office.

"19. The version of the Jeremy K. Hon Irrevocable Family Trust that Mr. and Mrs. Hon executed on January 19, 2012 was the same as the Draft Jeremy K. Hon Irrevocable Family Trust with a minor modification that increased Mrs. Hon's benefit from the Trust.

"20. It is my belief that when Mr. Hon executed the Jeremy K. Hon Irrevocable Family Trust on January 19, 2012, he understood that he would no longer have the benefit or control of any asset that he transfeired to the Jeremy K. Hon Irrevocable Family Trust.

"21. The provisions of the Jeremy K. Hon Irrevocable Family Trust reflect Mr. Hon's intent as of January 19, 2012 as I understood it.

"22. I would not have drafted the Jeremy K. Hon Irrevocable Family Trust and counseled Mr. Hon to sign it and subsequently transfer assets thereto if I believed the provisions contained therein did not reflect Mr. Hon's intent.

"23. Following Mrs. Hon's death on July 30, 2017, Mr. Hon and his children came into conflict with one another because Mr. Hon had reconnected with Leiru Wang ('Ms. Wang'), a former fiancee from Mr. Hon's past, and intended to marry her, but Mr. Hon's children did not approve of Mr. Hon's intent to marry Ms. Wang since Ms. Wang was then married to someone else.

"24. Based on the conflict described in Paragraphs 23, Mr. Hon indicated to me that he wanted to stop his children from receiving any assets as a result of Mrs. Hon's death.

"25. After Mr. Hon indicated to me that he wanted to stop his children from receiving any assets as a result of Mrs. Hon's death, I reminded Mr. Hon that he had a limited power of appointment over the assets in the Lynda Hon Irrevocable Family Trust but that his children were the beneficiaries of the assets held in the Jeremy K. Hon Irrevocable Family Trust as of Mrs. Hon's death.

"26. After the discussion described in Paragraph 25, I informed Mr. Hon that in my opinion the Irrevocable Family Trusts carried out Mr. and Mrs. Hon's intent as of 2011 and 2012.

> "27. On December 13, 2017, Mr. Hon indicated to me in an email that he regretted establishing the Jeremy K. Hon Irrevocable Family Trust because he was unable to change it in a way to make his children show him proper respect.
>
> "28. Following the discussion described in Paragraph 25, Mr. Hon asked me to find a way to dissolve the Irrevocable Family Trusts in light of his ongoing conflict with his children.
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> "29. I refused to honor the request described in Paragraph 28.
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> "30. Mr. Hon fired me a few weeks after I refused to honor the request described in Paragraph 28."

On August 27, 2019, the plaintiff filed a response in opposition to the defendants' motion for a summary judgment. He relied on his own deposition testimony and his own affidavit, among other things. In his affidavit, the plaintiff stated, in relevant part:

> "4. Around 2011-2012, Lynda hired Jackson Burwell ('Burwell') to do some estate planning work for our family. Burwell told Lynda that we needed to set up some trusts in order to reduce estate taxes after our death. I thought that was a good idea.
>
> "5. My belief was that the purpose of the estate plan was to ensure that my children did not have to pay a high amount of estate taxes after my death and to provide assets to my children after my death.

"6. Burwell strictly communicated with Lynda about the estate plan. At the direction of Lynda, Burwell drafted the Jeremy K. Hon Family Trust (the 'Jeremy Hon Trust') which named Lynda as the sole trustee and Kevin as successor trustee. I am the grantor of the Jeremy Hon Trust. I had no involvement with the drafting of the Jeremy Hon Trust.

"7. I believed that Burwell drafted the Jeremy Hon Trust in a way that would leave my assets to Lynda or my children, if Lynda predeceased me, at my death. I trusted Burwell to create such an estate plan. I had every intention of passing my assets to my children at my death.

"8. Before signing the Jeremy Hon Trust, I briefly skimmed the provisions. Burwell did not explain to me that I would not have access or control over the assets in the Jeremy Hon Trust during my lifetime. I was under the mistaken belief that I would still be able to live in my principal residence without having to pay the Jeremy Hon Trust rent or purchase my home from the trust.

"9. Based on this belief, I signed the Jeremy Hon Trust and took the necessary steps to transfer my assets into the Trust.

"10. Lynda passed away from cancer on July 30, 2017. Only then did I realize that Burwell did not draft the Jeremy Hon Trust in conformity with my intentions and that the Jeremy Hon Trust and the Lynda L.B. Hon Irrevocable Family Trust (the 'Lynda Hon Trust') were unequal.

"11. I relied on Burwell to explain the differences between my Trust and the Lynda Hon Trust and believed that he created an estate plan that benefitted both myself and Lynda equally.

> "12. I would not have transferred my assets to the Jeremy Hon Trust if I had known that I would not have access to the assets, particularly my residence, during my lifetime."

On October 23, 2019, the defendants filed a reply to the plaintiff's response in opposition to their motion for a summary judgment. They prefaced their reply by stating that they had made a prima facie showing that the plaintiff could not prove entitlement to relief on his claims under a theory of unilateral mistake, and they added that the plaintiff had not presented substantial evidence to rebut their evidence.

On November 1, 2019, the trial court conducted a hearing on the defendants' motion for a summary judgment. Thereafter, that court entered the following judgment granting the motion:

> "This matter came to be heard on November 1, 2019 before the honorable Judge Chris Comer, Circuit Judge for Madison County, Alabama, upon the Defendants' Motion for Summary Judgment ('Motion'). The Plaintiff, Dr. Jeremy K. Hon responded in opposition to the Motion ('Response in Opposition').
>
> "Both the Plaintiff and counsel for Plaintiff failed to appear before the Court in the hearing on the Motion and Response in Opposition. Despite the absence of Plaintiff and/or his counsel, the Court conducted a full hearing on the substance of the Motion. The Court, after hearing statements

> from Defendants' counsel on the arguments and authorities set forth in the Motion and the Response in Opposition, in a ruling from the bench, found the Defendants' arguments persuasive.
>
> "Based on the pleadings, the argument of Defendants' counsel, the arguments and authorities set forth in the Motion and Response in Opposition, and the entire record of this cause, the Court finds that the Motion is well-taken and is therefore GRANTED.
>
> "Based on the foregoing, as well as the entire record of this cause, it is hereby ORDERED, ADJUDGED and DECREED that the Defendants' Motion for Summary Judgment is hereby GRANTED. Costs are taxed as paid."

(Capitalization in original.)

On November 19, 2019, the plaintiff filed a motion to alter, amend, or vacate the summary judgment in favor of the defendants. On November 20, 2019, the defendants responded. The plaintiff's postjudgment motion was denied by operation of law. The parties filed a "Joint Stipulation of Dismissal of Defendants' Counterclaim," and the trial court entered an order dismissing the counterclaim on May 18, 2020. This appeal followed.

Standard of Review

> "'"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut.

> Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)." '
>
> "Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004))."

Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

> " 'The role of this Court in reviewing a summary judgment is well established -- we review a summary judgment de novo, " 'apply[ing] the same standard of review as the trial

court applied.' " ' Horn v. Fadal Machining Ctrs., LLC, 972 So. 2d 63, 69 (Ala. 2007) (quoting Stokes v. Ferguson, 952 So. 2d 355, 357 (Ala. 2006), quoting in turn Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038 (Ala. 2004)). ' "If the movant meets [its] burden of production by making a prima facie showing that [it] is entitled to a summary judgment, 'then the burden shifts to the nonmovant to rebut the prima facie showing of the movant.' " ' Horn, 972 So. 2d at 69 (quoting American Gen. Life & Accident Ins. Co. v. Underwood, 886 So. 2d 807, 811-12 (Ala. 2004), quoting in turn Lucas v. Alfa Mut. Ins. Co., 622 So. 2d 907, 909 (Ala. 1993)).

> " ' " '[T]he manner in which the [summary-judgment] movant's burden of production is met depends upon which party has the burden of proof ... at trial.' " Ex parte General Motors Corp., 769 So. 2d 903, 909 (Ala. 1999) (quoting Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989) (Houston, J., concurring specially)). If ... " 'the movant has the burden of proof at trial, the movant must support his motion with credible evidence, using any of the material specified in Rule 56(c), [Ala.] R. Civ. P. ("pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits").' " 769 So. 2d at 909. " 'The movant's proof must be such that he would be entitled to a directed verdict [now referred to as a judgment as a matter of law, see Rule 50, Ala. R. Civ. P.] if this evidence was not controverted at trial.' " Id. In other words, "when the movant has the burden [of proof at trial], its own submissions in support of the motion must entitle it to judgment as a matter of law." Albee Tomato, Inc. v. A.B. Shalom Produce Corp., 155 F.3d 612, 618 (2d Cir. 1998) (emphasis added). See also Equal

> Employment Opportunity Comm'n v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49 (1st Cir. 2002); Rushing v. Kansas City Southern Ry., 185 F.3d 496 (5th Cir. 1999); Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986); Calderone v. United States, 799 F.2d 254 (6th Cir. 1986).'
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> "Denmark v. Mercantile Stores Co., 844 So. 2d 1189, 1195 (Ala. 2002). Moreover, we review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986).
>
> "....
>
> " 'In order to overcome a defendant's properly supported summary-judgment motion, the plaintiff bears the burden of presenting substantial evidence as to each disputed element of [its] claim.' Ex parte Harold L. Martin Distrib. Co., 769 So. 2d 313, 314 (Ala. 2000)."

White Sands Grp., L.L.C. v. PRS II, LLC, 32 So. 3d 5, 10-11 (Ala. 2009).

Discussion

I.

The plaintiff argues that the trial court erred in granting a summary judgment in favor of the defendants on the ground that he did not have standing, as to the grantor or settlor, to bring claims to rescind and/or to reform the Trust agreement. With regard to standing, in their motion for

a summary judgment, the defendants argued that the plaintiff could not show any set of facts that would support his claims for rescission and/or reformation of the Trust agreement. Specifically, they contended that Alabama law does not allow him, as the grantor or settlor of the Trust, to pursue a claim for rescission or reformation. In this regard, the defendants asserted:

> "Pursuant to the AUTC [the Alabama Uniform Trust Code ('the AUTC'), Sec. 19-3B-101 et seq., Ala. Code 1975], a noncharitable irrevocable trust may only be terminated, modified, or reformed under the provisions set forth in sections 19-3B-411 - 19-3B-416 of the AUTC. However, a proceeding to terminate, modify, or reform a trust under such sections of the AUTC cannot be brought by just anyone. Specifically, section 19-3B-410(b) of the AUTC ('Section 19-3B-410(b)') provides that 'a proceeding to approve or disapprove a proposed modification or termination' of a noncharitable irrevocable trust under sections 19-3B-411 - 19- 3B-416 of the AUTC 'may be commenced by a trustee or beneficiary,' while the Grantor of a charitable trust 'may maintain a proceeding to modify the trust under section 19-3B-413 [of the AUTC],' which pertains to the doctrine of cy pres. Ala. Code 1975, § 19-3B-410(b) (emphasis added). Accordingly, the AUTC specifically vests the trustee or a beneficiary of a trust, not the Grantor, with the authority to move the court to modify or terminate a trust such as the one at issue here. Id.
>
> "The 2013 Restated Comments to Section 19-3B-410(b) (the 'Comments') provide clear guidance as to who exactly has standing to pursue court action for termination, modification,

or reformation of a trust under sections 19-3B-411 - 19-3B-417 of the AUTC. The Comments note that Section 19-3B-410(b) 'specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or division ... and makes the settlor an interested person with respect to a judicial proceeding brought by the beneficiaries under Section 411 to terminate or modify a trust.' Ala. Code 1975, § 19-3B-410, Restated 2013 Comments. To further emphasize the fact that the common law serves only as supplement to the AUTC and not an override thereof, the Comments specifically state that Section 19-3B-410(b) operates contrary to Restatement (Second) of Trusts § 391 (1959) in that Section 19-3B-410(b) specifically grants a Grantor the power to petition the court under section 19-3B-413 of the AUTC to apply cy pres to modify a charitable trust. Id.

"....

"The sentence structure of Section 19-3B-410(b) shows that the legislature clearly contemplated a Grantor's role in commencing actions to terminate, modify, or reform a trust under the AUTC and chose to specifically limit such role to reformation under Section 19-3B-413 of the AUTC. Section 19-3B-413 of the AUTC is inapplicable to this matter. The first sentence of Section 19-3B-410(b) states that a proceeding to approve or disapprove a proposed modification or termination of a trust pursuant to Sections 19-3B-411 through 19-3B-416 of the AUTC may be brought by a trustee or beneficiary. The very next sentence of Section 19-3B-410(b) modifies the previous sentence by providing the caveat that a Grantor may commence a proceeding to modify a charitable trust pursuant to Section 19-3B-413 of the AUTC. If the legislature intended to permit Grantors to pursue an action to terminate, modify, or reform a trust under Sections 19-3B-411 through 19-3B-416

> of the AUTC and not just under Section 19-3B-413 of the AUTC, then there would be no need to ever include the second sentence of Section 19-3B-410(b) because it would be unnecessary.
>
> "Accordingly, this Court should read Section 19-3B-410(b) to authorize only the trustee or a beneficiary to bring a claim for modification, termination, or reformation of the Trust. As the Plaintiff is the Grantor and not a trustee or beneficiary of the Trust, he is not permitted to maintain an action for termination, modification or reformation of the Trust."

Therefore, the defendants argued that they were entitled to a summary judgment as to the counts seeking rescission (count I) and reformation (count III) of the Trust agreement.

In his response in opposition to the defendants' motion for a summary judgment, the plaintiff argued that, as the grantor or settlor of the Trust, he had standing to bring suit to rescind or reform the Trust agreement. He relied on § 19-3B-415, Ala. Code 1975, which provides:

> "The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by mistake of fact or law, whether in expression or inducement."

In the alternative, the plaintiff argued that, if § 19-3B-410(b), Ala. Code 1975, applies, as argued by the defendants, the plain language of that statute does not explicitly prohibit a grantor or settlor from maintaining an action to modify or terminate a trust. Therefore, he contended that he had the capacity to bring the suit to reform the Trust pursuant to § 19-3B-415.

In their reply to the plaintiff's response in opposition to the motion for a summary judgment, the defendants argued as follows:

> "The Plaintiff's argument is that while Section 19-3B-410(b) states that a trustee or beneficiary 'may' bring a suit under the AUTC to modify or terminate a trust, the use of the word 'may' means that the list of persons in Section 19-3B-410(b) who have the authorization to bring such a suit is not limited to only a trustee or beneficiary of a trust. In other words, if the Section 19-3B-410(b) used the word 'shall' instead of 'may,' then the list of persons in Section 19-3B-410(b) who have the authorization to sue to modify or terminate a trust under the AUTC would be limited to only a trustee or beneficiary of a trust. The Plaintiff's argument is paradoxical and proposes a seemingly impossible construction of the statute.
>
> "Alabama has clear rules of statutory construction that apply to the present issues raised by the Plaintiff:
>
> > " '(1) Permissive words in a statute may be construed as being mandatory in those cases where

> the public interest and rights are concerned and where the public or third persons have a claim de jure.
>
> " '(2) A statute must be considered as a whole and every word in it made effective if possible.'

"Ala. State Bd. of Health ex rel. Baxley v. Chambers Cty., 335 So. 2d 653, 654-55 (Ala. 1976) (internal citations omitted). Starting with (1) above, 'permissive words in a statute may be construed as being mandatory in those cases where ... third persons have a claim de jure.' In the present case, Section 19-3B-410(b) establishes a 'claim de jure' for third persons -- trustees and beneficiaries. Therefore, the word 'may' can be considered to be mandatory in such a context because it is intended to establish a claim de jure. Moving onto (2) above, 'a statute must be considered as a whole and every word in it made effective as possible.' The second sentence of Section 19-3B-410(b), which the Plaintiff ignores, is one which establishes a right in the settlor of a trust to pursue judicial modification of a charitable trust under Section 19-3B-413. This sentence permits a settlor, in conjunction with a trustee or beneficiary, to pursue a modification of a charitable trust. This begs the question of why have a distinction made by the legislature with regards to a settlor being able to pursue an action to modify a trust under Section 19-3B-413 and not any of the other sections for modifying or terminating a trust covered by Section 19-3B-410(b)?

"The legislature clearly had the settlor in mind when it adopted its version of Section 410(b) of the Uniform Trust Code ('UTC') as it states that a trustee or beneficiary may commence an action under Sections 19-3B-411 through 19-3B-417 and that a settlor may bring an action to modify a trust under Section 19-3B-413. A plain and unforced reading of the statute

reveals that the legislature did not intend for a settlor to be permitted to bring an action for modification or termination under any section of the AUTC other than 19-3B-413. The context of the Section 19-3B-410(b) provides a simple expression and implication that the parties specifically mentioned alongside a named statute are those that are authorized to bring actions under such statutes.

"The official comments to Section 19-3B-410(b) support such a plain language reading:

> " 'Persons who have standing to seek approval of proposed trust modifications.
>
> " 'Subsection (b) specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or divisions. An approval or disapproval may be sought for an action that does not require court permission, including a petition questioning the trustee's distribution upon termination of a trust under $50,000 (Section 414), and a petition to approve or disapprove a proposed trust division or consolidation (Section 417). Subsection (b) makes the settlor an interested person with respect to a judicial proceeding brought by the beneficiaries under Section 411 to terminate or modify a trust. Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (b) grants a settlor standing to petition the court under Section 413 to apply cy pres to modify the settlor's charitable trust.'

"Ala. Code § 19-3B-410(b), cmt. (emphasis added). This uniform comment, which has been included by the legislature,

makes clear that the parties specifically mentioned in Section 19-3B-410(b) are the individuals who have standing to seek court approval to terminate or reform a trust. It is interesting to note that the uniform comment mentions that the settlor is an interested party in a action under Section 19-3B-411 to modify or terminate a trust, but still does not say that the settlor is authorized to maintain an action. Accordingly, in light of the plain language of Section 19-3B-410(b) and the official comment thereto, trustees and beneficiaries are the only parties who have standing to maintain an action to terminate or reform a non-charitable irrevocable trust under the AUTC.

"Such a plain reading of Section 19-3B-401(b) is not an anomaly. The uniform comments to Section 19-3B-410(b) further state that, 'Section 410 is the same as Section 410 of the Uniform Trust Code (2001).' Ala. Code § 19-3B-410, cmt. Along with Alabama, the vast majority of states have adopted the UTC. The Restatement (Third) of Trusts comments on the scope of Section 19-3B-401(b) of the UTC and notably adopts a plain reading of Section 19-3B-410(b) that does not infer that a settlor may also bring a petition to modify or terminate a trust under Sections 19-3B-411 through 19-3B-417 of the UTC (other than Section 19-3B-413). See Restatement (Third) of Trusts § 994, fn.3.

"Despite the broad and wide adoption of the UTC, there is an absence of significant discussion of the scope of UTC Section 410(b). As such, Alabama is not alone in its lack of case law concerning this section. However, the state of Ohio adopted the UTC and the Ohio Court of Appeals has specifically addressed the intended scope of Section 410(b), including the use of the word 'may' therein. In fact, the Ohio Court of Appeals entertained the exact same argument that the Plaintiff now makes: because Section 410(b) does not

explicitly provide that 'only' a trustee or beneficiary may bring claims within the scope of Section 410(b), nor does it expressly provide that other persons do 'not' have the authority to bring such claims, Section 410(b) was not intended to limit such claims to only trustees and beneficiaries of trusts. Kryder v. Kryder, 2012 Ohio 2280 [(No. 25665, May 23, 2012)] (Ohio App. 9 Dist. 2012)....

"The Kryder Court noted that Ohio's Trust Code was modeled after the UTC and provides through its version of Section 410 of the UTC that 'proceedings to modify or terminate trusts "may be commenced" by a trustee or beneficiary.' Id. The court then highlighted the uniform comments to Ohio's version of Section 410 of the UTC, which state that the language of said section 'specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combination, or divisions.' Id. It should be noted that Ohio's and Alabama's version of Section 410(b) of the UTC and the official comments thereto are the same. The Ohio Court of Appeals construed Ohio's version of Section 410 of the UTC according to the rules of grammar and common usage and the maxim expressio unis est exclusio alterius (meaning 'the express inclusion of requirements in the law implies an intention to exclude other requirements not so included'). The Kryder Court ultimately held that Ohio's version of Section 410, by explicitly identifying a 'trustee' and a 'beneficiary' as those who 'may' bring causes of action to modify or terminate a trust under the Ohio Trust Code, was intended to exclude all other persons from having authority to pursue those statutory claims.

"The Defendants appreciate that the Kryder case is an unreported Ohio Court of Appeals case. However, it is provided to the Court as the only national example of consideration of the specific issue raised by the Plaintiff. As Section 410(b) in

Ohio and Alabama was adopted from the UTC, uniformity of interpretation and application of the UTC would seem to be desirable. The Alabama Legislature and drafters of the AUTC recognized this in Section 19-3B-1201 of the AUTC: 'In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.' Ala. Code § 19-3B-1201. Accordingly, although this Court is certainly not bound by decisions of an Ohio court, the Kryder decision should be considered persuasive as Ohio and Alabama have both adopted the same UTC and uniformity of law is a stated goal among such adopting states.

"The Court, even excluding consideration of the Kryder case, can clearly see that the legislature (as evidenced by their highly relevant comments) intended for Section 19-3B-410(b) to empower trustees and beneficiaries as the only parties with standing to bring a claim to rescind or reform a trust. Basic common sense tells us that no reasonable reader can undertake a plain, straightforward reading of Section 19-3B-410(b) and conclude that the legislature intended to grant settlors a power to pursue actions under the AUTC to modify or terminate a trust (unless such action is brought pursuant to Section 19-3B-413). Using the Plaintiff's logic, because Section l9-3B-410(b) does not specifically exclude any person from bringing a suit to modify or reform a trust under Sections 19-3B-411 through 19-3B-4l7, then any person has standing to bring such a suit no matter how far removed he, she, or it is in relation to the trust. The Plaintiff's reading of Section 19-3B-410(b) strains the bounds of reason.

"Accordingly, in light of the plain language of Section 19-3B-410(b) and the official comment thereto, a trustee or beneficiary are the only parties who have standing to maintain an action to terminate or reform a non-charitable irrevocable

> trust. As the Plaintiff is not a trustee or beneficiary of the Trust Agreement, he does not have standing to maintain an action to terminate or reform the Trust Agreement under the AUTC. Because the Plaintiff does not have standing to maintain such an action, the Defendants respectfully request that this Court enter an order granting their Motion for Summary Judgment with respect to Counts I and III of the Complaint."

In his response to the motion for a summary judgment, the plaintiff also argued that he had a common-law right to seek rescission or reformation of the Trust agreement that was not displaced by the Alabama Uniform Trust Code ("the AUTC"), Sec. 19-3B-101 et seq., Ala. Code 1975. Specifically, he referenced Restatement (Third) of Trusts § 62 cmt. b. (Am. Law Inst. 2003), which provides:

> "Even if the will or other instrument creating a donative testamentary or inter vivos trust is unambiguous, the terms of the trust may be reformed by the court to conform the text to the intention of the settlor if the following are established by clear and convincing evidence: (1) that a mistake of fact or law, whether in expression or inducement affected the specific terms of the document; and (2) what the settlor's intention was. ..."

In their reply, the defendants asserted that the common law does not allow the plaintiff standing to seek rescission and reformation of the Trust agreement, arguing as follows:

"The Plaintiff further argues that even if the AUTC does not allow him to maintain his claims for rescission and reformation of the Trust Agreement, the common law supplements the AUTC to the extent that it allows him to override the provisions of the AUTC and maintain such claims. Respectfully, Plaintiff has misread and misinterpreted the law pertaining to the application of the common law to the AUTC.

"Plaintiff's argument ignores the fact that the AUTC 'applies to ... all judicial proceedings concerning trusts commenced on or after January 1, 2007.' Ala. Code § 19-3B-1204(a)(1) and (2). Further, the plain language of Section 19-3B-106 states that while the common law of trusts and principles of equity do supplement the AUTC, such common law and principles of equity do not override the statutory language of the AUTC where the AUTC has modified such common law and principles of equity. See Ala. Code § 19-3B-106 ('The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.') (emphasis added). In other words, the provisions of the AUTC apply to all judicial proceedings concerning the Trust Agreement, even if the action is brought pursuant to common law; and, if the AUTC conflicts with the common law of trusts and principles of equity in such action, the language of the AUTC controls. Accordingly, an analysis as to whether Plaintiff has the right to seek rescission or reformation of the Trust Agreement must begin with the application of the AUTC. Only if the AUTC is intentionally silent on the issue is it then proper to look for supplementation of the AUTC by common law. Plaintiff's claims to rescind, or in the alternative, reform the Trust Agreement are under the purview of the AUTC and therefore consideration of supplanted common law is not proper.

"Plaintiff then argues that even if the AUTC operates with respect to the common law in the way Defendants describe and the Defendants are correct that Section 19-3B-410(b) allows only trustees and beneficiaries to only have standing to pursue actions to modify or terminate the Trust Agreement, he still has standing to pursue his claims under the common law because they are not subject to Section 19-3B-410(b). The basis for Plaintiff's argument is that his claims are for 'rescission' and 'reformation' of the Trust Agreement and Section 19-3B-410(b) is inapplicable because it only applies to actions for 'termination' and 'modification' of trusts like that of the Trust Agreement. The Plaintiff has failed to explain how 'rescission' differs from 'termination' or how 'reformation' differs from 'modification.' At any rate, a plain reading of the statute reveals the critical flaw in Plaintiff's argument.

"Section 19-3B-410(b) is as follows:

> " 'A proceeding to approve or disapprove a proposed modification or termination under Section 19-3B-411 through 19-3B-416, or trust combination or division under Section 19-3B-417, may be commenced by a trustee or beneficiary. The settlor of a charitable trust may maintain a proceeding to modify the trust under Section 19-3B-413.'

"Ala. Code § 19-3B-410(b). A careful review of the AUTC Sections 19-3B-411 through 19-3B-417 reveals that the Alabama Legislature supplanted all common law claims for rescission or reformation within these sections. Section 19-3B-411 of the AUTC applies to modifications or terminations of noncharitable irrevocable trusts by consent among the parties. Section 19-3B-412 applies to actions to modify or terminate a trust because of unanticipated

circumstances or inability to administer the trust effectively. Section 19-3B-413 applies to actions concerning charitable trusts and the application of the cy pres doctrine thereto. Section 19-3B-414 applies to modifications or terminations of uneconomic trusts. Section 19-3B-415 applies to actions to reform trusts to correct mistakes. Section 19-3B-416 applies to actions to modify a trust to achieve a settlor's tax objectives, and Section 19-3B-417 applies to actions to combine or divide trusts. Accordingly, Plaintiff's actions to rescind or reform the Trust Agreement are within the governance of Section 19-3B-410(b) because all possible common law claims for rescission or reformation have been supplanted by the AUTC, including, but not limited to, Plaintiff's claim for unilateral mistake, which would fall under Section 19-3B-411. Thus, Section 19-3B-410(b) governs the question of legal standing in this case.

"Although the Plaintiff argues that he has standing under the common law to pursue his claims, the Plaintiff has not cited a single case in Alabama that confirms that, since the passage of the AUTC, a settlor of a trust holds a common law right, in derogation of the AUTC language, to maintain an action for rescission or reformation of an irrevocable, noncharitable trust. While the Plaintiff does cite to Alabama cases in his response to the Defendants' argument that a settlor may not maintain an action to reform or rescind the Trust Agreement, every single one of those cases concerns only reformation of an instrument of conveyance, and not reformation or rescission of a trust. As the Plaintiff's Complaint does not seek reformation of any deed or other instrument of conveyance, such cases are wholly irrelevant in this case. Rather, the Plaintiff's only support with respect to his ability to pursue claims for rescission and reformation of a trust comes from secondary sources: Mary F. Radford, George Gleason Bogert & George Taylor Bogert, The Law of Trusts

and Trustees § 991 (2017 update) and Restatement (Third) of Trusts § 333 cmt. e. But, again, while the AUTC does permit supplementation of the AUTC by the common law of trusts and principles of equity, the AUTC does not permit consideration of such common law or principles of equity when there has been abrogation by the AUTC. Such abrogation has occurred in not only Sections 19-3B-410(b) through 19-3B-417, but plainly appears in Section 19-3B-406 as well, which directly relates to rescission or reformation of a trust and specifically addresses whether Section 333 of the Restatement of Trusts has been adopted or otherwise incorporated into the AUTC.

"Specifically, Section 19-3B-406 of the AUTC states that, 'a trust is void to the extent its creation was induced by fraud, duress, or undue influence.' Ala. Code § 19-3B-406. Further, the uniform comment to Section 19-3B-406 of the AUTC states as follows, 'This section is a specific application of Restatement (Third) of Trusts § 12 and Restatement (Second) of Trusts § 333, which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 415....' Ala. Code § 19-3B-406, cmt. ('The statutory text of the Uniform AUTC is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation.' Ala. Code § 19-3B-106, cmt.). The plain reading of this uniform comment to Section 19-3B-406 is that the AUTC adopts the common law approach to rescission of a trust on the grounds of duress, fraud, and mistake, but has specifically rejected the common law approach to rescission on the basis of mistake. The only envisioned remedy for mistake under the AUTC is reformation under Section 19-3B-415, which is subject to the standing considerations expressed in

> Section 19-3B-410(b) that do not permit a settlor to bring an action for such remedy. ...
>
> > "Through Section 19-3B-406 and Sections 19-3B-410 through 19-3B-417 of the AUTC, the Alabama Legislature codified the permissible methods for judicial rescission or reformation of a trust instrument. As such, a common law cause of action for the Plaintiff that acts as a 'supplementation' to the AUTC does not exist. Accordingly, as the Alabama Legislature made clear in Section 19-3B-410(b) of the AUTC, both in the plain language of the provision itself as well as through the official comments to said section, only a trustee or beneficiary of the Trust Agreement has standing to maintain an action to rescind or reform the Trust Agreement. ... As the Plaintiff is not a trustee or beneficiary of the Trust Agreement, he does not have standing [to] maintain his claims to rescind and reform the Trust Agreement. Because the Plaintiff does not have standing to maintain his claims to rescind and reform the Trust Agreement, the Defendants respectfully request that this Court grant the Defendants' Motion for Summary Judgment with respect to Counts I and III of the Complaint."

The defendants thoroughly set forth statutes and caselaw that appear to have established a prima facie case that the plaintiff did not have standing, under either the AUTC or the common law, to pursue a claim for rescission or reformation. The plaintiff presented arguments to support his position to the contrary, but the defendants addressed the plaintiff's contentions and set forth arguments and authority that clearly refuted the plaintiff's assertions. Accordingly, to the extent the trial court

entered the summary judgment on the ground that the plaintiff did not have standing to pursue claims for rescission and reformation, it correctly concluded that the defendants had established that the plaintiff did not have standing to pursue those claims.

II.

Even if the trial court did not base the summary judgment on the conclusion that the plaintiff did not have standing to pursue his claims for reformation or rescission of the Trust agreement, the plaintiff still failed to establish that he is entitled to relief. In his brief to this Court, the plaintiff argues that the trial court erred in entering a summary judgment in favor of the defendants on the basis that he failed to present clear and convincing evidence as to his mistaken understanding of the terms of the Trust agreement.

In their motion for a summary judgment, the defendants addressed the plaintiff's claims that he executed the Trust agreement and made transfers to the Trust under a mistaken understanding that he could benefit from and control the Trust assets because he allegedly was not informed of the actual effect of the Trust agreement:

> "The Plaintiff is not only literate, but is tremendously gifted intellectually; he fluently speaks and reads in two languages: English and Chinese (in both the Cantonese and Mandarin forms); received a bachelor's degree in pharmaceutical studies from Samford University; received a doctorate of medicine from the University of Alabama at Birmingham School of Medicine; completed a residency in internal medicine at the University of Texas Health Science Center in Houston, Texas; received a fellowship in oncology/hematology at the University of Texas Health Science Center in San Antonio, Texas; is a board certified oncologist and internist who currently practices medicine in Huntsville, Alabama and has done so since 1985; and has co-authored at least twelve (12) medically based publications, the titles to some of which take some real concentration to pronounce (e.g., 'Community-Based Phase II Trial of Peniostatin, Cycolphosphamide, and Rituxmah (PCR) Biochemotherapy in Chronic Lymphocytic Leukemia and Small Lymphocytic Lymphoma,' 'Zoledronic Acid is Superior to Pamidronate in the Treatment of Hypercalcemia of Malignancy: A Pooled Analysis of Two Randomized, Controlled Clinical Trials,' and 'Patient-Reported Neuropathy and Taxane-Associated Symptoms in a Phase 3 Trial of nab-Paclitaxel Plus Carhoplatin versus Solvent-Based Paclitaxel Plus Carhoplatin for Advanced Non-Small-Cell Lung Cancer')."

The defendants asserted: "Had the Plaintiff taken the time to read only page one (1) of the Trust prior to signing it, the provisions contained thereon would have informed him that the Trust did not allow him to benefit from or control the Trust assets." They then cite Item One and

Item Three that are included on page one of the Trust agreement. With regard to creation of the Trust, Item One of the Trust agreement provided:

> "I contemplate that I will also transfer, set over, convey or assign additional property to be held in trust in conformity with this instrument; and upon any such transfer, conveyance or assignment from time to time made, my Trustee shall have all the interest, rights, powers, options, incidents of ownership, advantages, titles, benefits and privileges which I now have or hereafter may have in and to said property."

Item Three of the Trust agreement provided:

> "The Trust shall be irrevocable, and I shall have no right to alter, amend, revoke or terminate this Trust or any provision hereof. After the execution of this Trust, I shall have no right, title or interest in the income or principal of this Trust, and I shall have no interest, right, power, option, incident of ownership, advantage, title, benefit or privilege in any property constituting a part of this Trust fund. In no event shall the income or principal of this Trust be used to pay my legal obligations or my debts. In no event shall my estate or I have any reversionary or similar type interest in this Trust or in the property contained herein. Furthermore, notwithstanding any other provision in this document, I am disqualified to serve as Trustee of any Trust found within this document."

The defendants also pointed out that Burwell had testified that, before the plaintiff signed the Trust agreement, he had told the plaintiff on more than one occasion that the Trust assets would not be for his

benefit or under his control. In contrast, they noted that the plaintiff had stated that the only things he remembers from his conversations with Burwell about the Trust agreement were that the Trust would mitigate the effect of estate taxes on his estate and that the Trust was a way to transfer assets to Lynda and their children; that he did not recall whether Burwell had told him that he could not use the Trust assets or whether Burwell had explained the key provisions of the Trust to him; and that he had stated that it was not his testimony that Burwell had never told him that the Trust assets would be beyond his reach. Therefore, the defendants concluded that, because the plaintiff did not fulfill his duty to read the Trust agreement before signing it and because he could not show that Burwell had not informed him that he would not be able to benefit from or control the Trust, he could not support his claims to the contrary and, thus, that the defendants were entitled to a summary judgment as to all counts included in the complaint.

The defendants also specifically argued that the plaintiff could not sufficiently support a claim for rescission of the Trust agreement and transfers of property to the Trust under a theory of unilateral mistake.

Specifically, citing Gray v. Bain, 164 So. 3d 553 (Ala. 2014), they contended that "the only way the Plaintiff can maintain an action for rescission of the Trust and transfers thereto due to a unilateral mistake is if said mistake was the result of some fraud or misrepresentation, was known to Lynda, and was unmixed with negligence." However, they then asserted that the plaintiff had admitted that the only basis for his belief that he could benefit from and control the assets of the Trust was a conversation the plaintiff had had with a nonlawyer partner in his medical practice, who had told him that he had a trust of his own that allowed him to control the trust assets even though he was no longer the owner of those assets; that the plaintiff had negligently assumed that his Trust would function in the same way; and that, before signing the Trust, he did not ask Burwell any questions "to confirm whether his assumption as to the effect of the Trust matched the actual effect of the Trust." The defendants also asserted that the plaintiff had not alleged that either Lynda or Burwell had made any representations that had led him to believe that he could benefit from or control the Trust. Further, they alleged:

> "[T]he undisputed facts establish that the Plaintiff's alleged unilateral mistaken understanding was born entirely out of his own negligence. The Plaintiff specifically admitted that he: did not read the Trust before signing it; voluntarily remained completely uninvolved in the drafting process leading up to the execution of the Trust because he did not have time to be involved; based his understanding that he could continue to benefit from and control the Trust assets entirely on statements made by a non-lawyer, business partner in a conversation about how said business partner's own trust functions; did not ask Mr. Burwell whether the actual effect of the Trust conformed to his own understanding thereof; did not ask Mr. Burwell to explain the effect of the Trust to him; and did not ask for more time to read the Trust because he felt that he did not need it because he simply assumed that the Trust allowed him to benefit from and control the assets. In particular, ... the Plaintiff's grossly negligent failure to read the Trust before signing it means, as a matter of law, that his request for rescission of the Trust and transfers thereto due [to] his unilateral mistake is dead on arrival."

Accordingly, the defendants concluded that, because the plaintiff's mistake "was unilateral, unknown to the other party to the Trust, not the result of fraud or misrepresentation, and not unmixed with negligence," he cannot maintain his claims for rescission of the Trust agreement and transfers of property to the Trust under count I and count II of the complaint.

Finally, the defendants argued that the Trust agreement is not subject to rescission or reformation because the provisions of the Trust agreement carry out the intent and purpose for which the Trust was created. Specifically, they contend that the plaintiff and Burwell both consistently stated that the purpose or goal of the Trust was to reduce the taxes on the plaintiff's estate and to allow the plaintiff to give assets to Lynda and their children. The defendants asserted that the plaintiff had stated that he had not intended to control the Trust and that he had not intended to benefit from the Trust. Finally, they asserted:

> "The Trust is not subject to rescission or reformation because the undisputed facts establish that the Trust provisions manifest the Plaintiff's intent and purpose of the Trust. Because the Trust manifests the Plaintiff's intent, the Plaintiff's transfers to the Trust did not result in the Trust receiving an improper benefit and that any payment that the Plaintiff made on behalf of the Trust was not improper. Because the undisputed facts establish as much, the Defendants respectfully request that this Court enter an Order granting their Motion for Summary Judgment with respect to all Counts set forth in the Complaint."

In his response, the plaintiff argued that his claim for rescission was viable based on his unilateral mistake or misunderstanding of the Trust's effects. He also argued that he could rescind or modify the Trust

agreement because he did not receive any consideration for the conveyances made pursuant thereto and that, further, he was not required to show that a mutual mistake occurred during the drafting and execution of the Trust agreement because he did not receive any such consideration.

Finally, the plaintiff argued that there was a genuine issue of material fact as to whether he understood the full effects of the Trust agreement because he allegedly "did not understand or appreciate the intricacies" of the Trust agreement before he executed it and because he relied on Burwell "to educate him on the trust provisions and to create a fair and equitable estate plan for himself and Lynda." Specifically, he contended that, although the defendants argued that the Trust carries out his intent, he did not understand that creating the Trust for tax purposes "would strip him of access to his personal assets, including his principal residence" and that "he mistakenly believed that that tax benefits of creating the [Trust] would not deprive him of his right to enjoyment of the assets during his lifetime." The plaintiff further argued:

> "The Jeremy Hon Trust provides that Dr. Hon does not own or have a right to enjoyment of the assets and that upon Lynda's death, Kevin becomes trustee and that the assets then flow

> into three separate ... trusts for the children. ... Dr. Hon's testimony indisputably establishes that this was not his intent and that he did not want to lose access to his personal assets during his lifetime."

In their reply, the defendants addressed the plaintiff's contentions as follows:

> "In their Motion, the Defendants highlighted the Alabama Supreme Court's ruling that a unilateral mistake is not grounds for rescission and reformation under a theory of unilateral mistake unless such unilateral mistake was the result of fraudulent or inequitable conduct on part of the other party to the instrument and was known to the other party to the instrument. Doc. 125 at p. 20 (citing Gray v. Bain, 164 So. 3d 553, 564 (Ala. 2014)). Further, the Defendants established in their Motion that a party's claim for rescission or reformation under a theory of unilateral mistake is extinguished if such party's unilateral mistake was mixed with his own negligence. ... Finally, the Defendants cited the long-standing and well-settled rule that a person who signs an instrument without reading it, when he can read, has committed gross negligence and cannot, in the absence of a showing of fraud, deceit, or misrepresentation on the part of the other party to the instrument, avoid the effect of his signature by claiming that he was not informed of the effect thereof. Doc. 125 at p. 16 (citing Brown v. St. Vincent's Hosp., 899 So. 2d 227, 242 (Ala. 2004); Mitchell Nissan, Inc, v. Foster, 775 So. 2d 138, 140 (Ala. 2000)).
>
> "The Plaintiff's Response does not contain any legal authority disputing the application of the aforementioned legal principals to the Plaintiff's claims for rescission and reformation. In fact, the Plaintiff explicitly concedes in Section

II of his Response that an instrument may not be reformed under a theory of a unilateral mistake unless there is fraud or inequitable conduct on the part of the other party to the instrument. Doc. 131 at p. 7. Further, while the Plaintiff's Response cites to legal authorities supporting his ability to bring a claim for rescission of an instrument on the basis of a unilateral mistake, it fails to cite to any authority concerning how to prove such a claim.

"Although the Plaintiff argues in Section II of his Response that the Trust Agreement may be rescinded under Alabama law upon a showing that the Trust Agreement was created with gifts of property, the legal support offered in support thereof concerns only situations involving reformation of the instruments conveying the property, id. at pp. 7-8 (citing McClung v. Green, 80 So. 3d 213 (Ala. 2011), a case explicitly concerning reformation of a deed; Pullum v. Pullum, 58 So. 3d 752 (Ala. 2010), a case explicitly concerning reformation of a deed). As the Plaintiff is seeking rescission of the instruments at issue in this case, not their reformation, these cases are irrelevant. Notably, the Plaintiff's Response is completely devoid of any authority as to the Plaintiff's ability to both bring and prove a claim for rescission of the transfers to the Trust Agreement under a theory of unilateral mistake. Finally, while the Plaintiff argues in his Response that all he has to do to survive summary judgment is show evidence that the Trust Agreement does not reflect his true intention due to his misunderstanding as to the effect thereof, he fails to provide any legal support for such a statement. Id. at p. 8. Accordingly, while the Plaintiff's Response contains a number of legal authorities concerning the Plaintiff's ability to bring a claim for rescission of instruments under a theory of a unilateral mistake, it fails to contain any legal authority concerning how to prove such a claim.

"In other words, it is undisputed that the Plaintiff can only maintain his claims for rescission and reformation of the Trust Agreement and rescission of the transfers to the Trust Agreement under a theory of a unilateral mistake if he can sufficiently show that his mistake was the result of fraudulent or inequitable conduct of the other party to the instrument (e.g., Lynda Hon), was known to the other party to the instrument (e.g., Lynda Hon), and was unmixed with his own negligence. Gray v. Bain, 164 So. 3d 553, 564 (Ala. 2014). It is further undisputed that if the Plaintiff signed the Trust Agreement without reading it, he will be deemed to have committed gross negligence and cannot, in the absence of a showing of fraud, deceit, or misrepresentation on the part of the other party to the instrument (e.g., Lynda Hon), avoid the effect of his signature by claiming that he was mistaken as to the effect thereof because he was not informed of such effect. Brown v. St. Vincent's Hosp., 899 So. 2d 227, 242 (Ala. 2004); Mitchell Nissan, Inc. v. Fasten, 775 So. 2d 138, 140 (Ala. 2000).

"....

"In light of the aforementioned controlling law, the Defendants highlighted the fact that (1) the Plaintiff cannot produce any evidence showing that Lynda Hon (the other party to the Trust Agreement) committed any fraudulent or inequitable conduct that resulted in the Plaintiff's alleged unilateral mistaken understanding or was aware of the Plaintiff's alleged unilateral mistaken understanding, and (2) the Plaintiff's alleged mistaken understanding was mixed with his own negligence. Doc. 125 at pp, 16, 21. Specifically as to the fact that Plaintiff's unilateral mistake was mixed with his negligence, the Defendants noted that the Plaintiff admitted in his deposition that he did not read the Trust Agreement prior to signing it (defined as 'gross negligence' by the Alabama

Supreme Court in Mitchell 775 So. 2d at 140); based his mistaken understanding of the Trust Agreement solely on a conversation with his business partner, who was, and is, not a lawyer and never saw or read the Trust Agreement; never asked Mr. Burwell any questions about the Trust Agreement prior to signing it; and, when asked as to why he took such a hands-off approach in the process of the establishment of the Trust Agreement, said he had 'no time to deal with it.' Doc. 125 at pp. 16, 21-22.

"Accordingly, to survive summary judgment, the Plaintiff's Response must produce 'substantial evidence' showing that there is a dispute of material fact as to whether (1) the Plaintiff's alleged mistaken understanding was the result of Lynda Hon's fraudulent or inequitable conduct, (2) Lynda Hon knew of the Plaintiff's mistaken understanding, and (3) the Plaintiff's alleged mistaken understanding was mixed with his own negligence. Lee v. City of Gadsden, 592 So. 2d 1036, 1038 (Ala. 1992). 'Substantial evidence' is 'evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assurance Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989) (emphasis added). The Plaintiff's Response failed to produce such 'substantial evidence.'

"First, the Plaintiff failed to produce any evidence showing that Lynda Hon undertook any fraudulent or inequitable action that resulted in the Plaintiff's alleged unilateral mistaken understanding or was aware of Plaintiff's alleged unilateral mistaken understanding. Second, while the Plaintiff did offer some 'evidence' in rebuttal of the Defendants' evidence that the Plaintiff's unilateral mistake was mixed with his own negligence, it is insufficient to allow him to survive summary judgment.

"The Plaintiff's only evidence offered to rebut the Defendants' evidence of the Plaintiff's negligence is in response to the Defendants' highlighting the Plaintiff's admission that he did not read the Trust Agreement before signing it. Specifically, the Plaintiff's evidence is a statement in his supporting affidavit that he 'briefly skimmed the provisions' of the Trust Agreement before signing it. ... This statement is simply a further admission that the Plaintiff did not read the Trust Agreement before signing it.

"If this Court is inclined to treat 'briefly skimming' as the equivalent to 'reading,' ... the Plaintiff failed to provide 'substantial evidence' showing that his alleged mistaken understanding was not mixed with his own negligence.

"Instead of producing 'substantial evidence' showing that his alleged unilateral mistaken understanding was not mixed with his own negligence, was the result of Lynda Hon's fraudulent or inequitable conduct, or was unknown to Lynda Hon, the Plaintiff relies solely on his own statement in his supporting affidavit that his unilateral mistaken understanding was due solely to Mr. Burwell's alleged failure to explain the Trust Agreement to him. ... In fact, the Plaintiff goes so far to say in his supporting affidavit that he never actually had any discussion with Mr. Burwell about the Trust. ... But, for two reasons, these statements are insufficient to allow the Plaintiff to survive summary judgment.

"First, the Plaintiff is precluded as a matter of law from claiming that his alleged mistaken understanding of the effect of the Trust Agreement was due [to] him allegedly not being informed of the actual effect of the Trust Agreement because he (1) failed to show any evidence that his mistaken understanding was due to Lynda Hon's fraudulent or inequitable action, (2) failed to show any evidence that Lynda

> Hon was aware of the Plaintiff's alleged mistaken understanding, and (3) failed to read the Trust Agreement before signing it. Mitchell Nissan, Inc. v. Foster, 775 So. 2d 138,140 (Ala. 2000).
>
> "Second, this Court cannot actually consider the Plaintiff's statement that Mr. Burwell failed to inform him of the effect of the Trust Agreement as sufficient to preclude summary judgment because the Plaintiff cannot create an issue of material fact by providing a statement in a supporting affidavit that contradicts, without explanation, his prior deposition testimony. Robinson v. Hank Roberts, Inc., 514 So. 2d [958,] 961 (Ala. 1987). The Plaintiff testified during his deposition that Mr. Burwell did in fact brief him on the Trust Agreement prior to signing it (consistent with Mr. Burwell's sworn testimony that he informed the Plaintiff about the Trust Agreement prior to its execution), but that he simply could not recall, and that nothing could help him recall, whether or not Mr. Burwell actually explained the details of the Trust Agreement to him. ... In fact, the Plaintiff further testified in his deposition that it was actually not his testimony that Mr. Burwell never told him that the assets held under the Trust Agreement would be beyond his reach .... The Plaintiff also recalled in his deposition that Mr. Burwell told him prior to signing the Trust Agreement that the Trust Agreement would serve to reduce taxes against the Plaintiffs estate and pass assets to the Plaintiffs children. ... However, the Plaintiff's unequivocal statements in his affidavit that he never communicated with Mr. Burwell about the Trust Agreement and that Mr. Burwell never explained the effect of the Trust Agreement to him directly contradict his deposition testimony, without explanation. Thus, this Court cannot consider Plaintiff's statements in his affidavit that Mr. Burwell failed to inform him as to the effect of the Trust Agreement.

> "Accordingly, because the Plaintiff failed to provide 'substantial evidence' showing that (1) his alleged mistaken understanding was due to Lynda Hon's fraudulent or inequitable action, (2) Lynda Hon knew of his mistaken understanding, and (3) his alleged mistaken understanding was not mixed with his own negligence, he cannot prove his claims for rescission and reformation of the Trust Agreement and rescission of the transfers to the Trust Agreement under a theory of unilateral mistake. As the Plaintiff is unable to prove such claims, they cannot survive summary judgment. Therefore, the Defendants respectfully request that this Court enter an Order granting the Defendants' Motion for Summary judgment."

The defendants thoroughly set forth evidence and authority that established a prima facie case that the plaintiff was not entitled to relief based on his alleged unilateral mistaken understanding of the provisions of the Trust agreement. In particular, they presented testimony from Burwell that he did advise the plaintiff that he would not have control over and access to any assets that were transferred to the Trust. They also presented evidence indicating that the plaintiff had admitted that he could not say that Burwell had not advised him about the Trust agreement and its provisions; that the plaintiff had admitted that he had not asked Burwell any questions about the Trust agreement before he signed it; that the plaintiff had admitted that he had not read the Trust

agreement before he signed it; and that the plaintiff had admitted that, instead, he had relied on statements his business partner had made about his own trust. Finally, the defendants presented evidence indicating that the plaintiff's primary reason for filing the complaint was that he was angry because, he believed, his children had been disrespectful, had betrayed him, and had shown a lack of trust with regard to him.

The burden then shifted to the plaintiff to present substantial evidence to overcome the defendants' summary-judgment motion. Ex parte Harold L. Martin Distrib. Co., 769 So. 2d at 314. The plaintiff presented evidence indicating his understanding of what he thought the Trust agreement provided. However, he did not present any evidence, much less substantial evidence, to establish that Lynda had engaged in any fraudulent or inequitable conduct that resulted in his alleged misunderstanding, and he did not present any evidence indicating that Lynda had been aware of his alleged misunderstanding. Also, the plaintiff did not present substantial evidence to establish that the mistake was not mixed with his own negligence. Rather, by his own testimony, the plaintiff admitted that he did not read the Trust agreement before he

signed it; that he might have skimmed the Trust agreement; that he did not ask Burwell any questions about the provisions of the Trust; and that he instead relied on comments made by his business partner about the effects of his own separate trust. Finally, the plaintiff does not cite any authority to support his contention that he had to show only that the Trust agreement does not reflect his true intention due to his misunderstanding of the effects of the Trust agreement. The defendants' arguments and authority clearly refuted the plaintiff's assertions and establish that any misunderstanding by the plaintiff was the result of his own negligence. Therefore, the trial court correctly concluded that the defendants' arguments established that the plaintiff was not entitled to relief based on his claims as to a unilateral mistake regarding the provisions of the Trust agreement.

Conclusion

For the above-stated reasons, the trial court properly granted a summary judgment in favor of the defendants. Accordingly, we affirm the trial court's judgment.

AFFIRMED.

Bolin, Sellers, and Stewart, JJ., concur.

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