IN THE FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

CASE NO. 4DCA13-3796
L.T. CASE NO. 502011CP005095XXXXSB

JASON HALLE,

Appellant,

v.

PETER HALLE,

Appellee.
_____ /

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

Jason Halle ("Appellant") commenced this action on November 4, 2011 (the "Original Complaint") (R.1) In the nearly twenty-eight months that have elapsed since the filing of the original complaint, Appellant amended his complaint five (5) times. (R.779-80)[1] Appellant's Original Complaint contained four counts, the First Amended Complaint expanded to 11 counts. (R.165) His Second and Third Amended Complaints increased that number to 14. (R.182, 253) After being warned by the trial court that his Third Amended Complaint failed to state a cause of action (R.777), Appellant again sought and was granted leave to amend and file a Fourth Amended Complaint. (R.629) Appellant's Fourth Amended Complaint contained just three counts. (R. 631) Prior to the hearing on the motion to dismiss the Fourth Amended Complaint, Appellant sought leave to amend his complaint yet again – which would have been his sixth complaint. (R. 711, 713) At each amendment, Appellee, Peter Halle, was required to prepare and file a motion to dismiss.

[1] R. 779-780 contains a chart showing the various iterations at Appellant's six complaints.

Appellant elected to proceed in this matter pro se and has pursued an endless course of vexatious litigation against his brother designed to cause Peter Halle to expend well over $100,000 thousand dollars in legal fees to time and again respond to Appellant's ever changing complaints, shifting theories of liability, and fanciful causes of action, none of which have stated a claim upon which relief could be granted. (R.SUPP.935, ¶33) As stated in Peter Halle's motion to dismiss the Fourth Amended Complaint,

> The Trust at issue is of modest value but [Appellant's] pro se litigation tactics threaten to consume the entire corpus due to his misguided efforts to use the Court as a lever to extract a "pound of flesh" from his brother. Neither the Fourth Amended Complaint, not the multiple complaints that preceded it, focus on resolving the underlying dispute, but on fanciful claims for damages for imagined slights and insults. The latest iteration seeks a windfall for emotional harm. Each time [Appellant] is faced with a motion to dismiss, he amends. At some point these abusive litigation tactics must stop.
>
> While [Appellant] plays the innocent victim, he holds hostage a pile of personal property from his Mother's trust, which he has refused to distribute to [Peter] Halle unless he is paid windfall damages to do so. [Appellant] has failed to provide annual accountings for the property he holds in trust. There are two sides to every story.

(R.683)

PROCEDURAL HISTORY

Appellant filed his original complaint on November 4, 2011, which contained four causes of action: (1) breach of fiduciary duty, (2) failure to give accounting, (3) waste, and (4) gross breach of duty (the "Original Complaint"). (R.1) Peter Halle responded to the Original Complaint with what turned out to be his first of many motions to dismiss. (R.41) Prior to the scheduled hearing on that motion, Appellant sought and was granted a continuance to engage in jurisdictional discovery. As part of that continuance, the Court helpfully pointed out to Appellant that under Rule 1.190(a), Appellant had a right to amend his complaint once as a matter of course without seeking leave of Court. (R.163)

Thereafter, Appellant served his First Amended Complaint ("1st AC") on February 19, 2012 in which Appellant alleged 11 purported separate causes of action. (R.165) Peter Halle served a second motion to dismiss that 1st AC on February 29, 2012. (R.177) Without seeking leave of court, Appellant served a Second Amended Complaint ("2nd AC") on March 3, 2012 (R.182) Peter Halle moved to strike the 2nd AC for failure to obtain leave, which motion was granted on May 2, 2012. (R.246, 248)

Appellant then sought leave to file a Third Amended Complaint ("3rd AC") on May 8, 2012 accompanied by a proposed 3rd AC. (R.249. 253) This time Peter Halle agreed to the proposed amendment and served his motion to dismiss the 3rd AC on June 19, 2012. (R.377, 396, 409) Ultimately, on March 20, 2013, a hearing was conducted on the merits of Appellant's 3rd AC, specifically, the lack of personal jurisdiction over Peter Halle. The Court denied the motion to dismiss for lack of personal jurisdiction (R.651), but again helpfully cautioned the Appellant about proceeding to a further hearing on the motion to dismiss the 3rd AC because his complaint was still insufficient:

> The Court: [To Appellee's counsel] . . . How do you want to handle this multifarious complaint that has – that's pled insufficiently to state causes of action on various different counts?
>
> * * *
>
> Appellant: Your Honor, if the complaint is deficient, would the Court give me permission to re-amend the complaint?
>
> The Court: Well, sir, I can tell you this. The Court is always bound to give liberal amendments as long as I find that there is a justification to do so and that's your burden.
>
> Here again, I'm forewarning you. You work at your own risk, and so forth, representing yourself. That's your prerogative. You have every right to

> do that and I will respect that. But here again, you're going to be bound just in the same laws and procedures and rules of evidence that the attorneys are so just be forewarned.
>
> * * *
>
> I can tell you right now, it's just there are many, many causes of action in there that are just not specified enough, and then they fail to [state a] cause of action.

(R.SUPP. 979-980, 982) (emphasis added)

Following the admonition from the Court, Appellant sought leave of Court to file a Fourth Amended Complaint ("4th AC"), in an attempt to cure the pleading deficiencies present in his 3rd AC. (R.629) Leave to amend was agreed to by Peter Halle and an Order was entered on April 16, 2013. (R.671) Peter Halle moved to dismiss the 4th AC on May 10, 2013. (R.682)

Incredibly, on May 24, 2013, following his receipt of Peter Halle's latest motion to dismiss directed at the 4th AC, Appellant served a motion seeking leave to file a Fifth Amended Complaint ("5th AC") –which would be his sixth attempt to plead one or more valid causes of action against his brother. (R.711) This proposed 5th AC sought to allege nine causes of action – six more than that were contained in the 4th AC – including counts previously abandoned by the filing of the 4th AC. (R.713) Peter Halle

moved to strike Appellant's motion for leave to amend, and requested that the trial court proceed with a hearing on Peter Halle's motion to dismiss the 4th AC. (R.26). The court granted Peter Halle's motion to strike and denied Appellant's motion to amend. (R.781)

On August 28, 2013, the trial court conducted a hearing on Peter Halle's motion to dismiss the 4th AC. (R.682) After considering the memoranda filed by both sides and hearing argument of counsel and from Appellant appearing pro se, the trial court granted the motion to dismiss with prejudice. (R.864) At that hearing, the trial court succinctly stated the factual and legal basis for his ruling:

> Let me explain something to you a little bit because, you know, I understand your frustration and I understand from your point of view it appears that you're not being treated fairly, but that's not the way the courts have to look at things.
>
> We look at the documents, we look at the four corners of those documents and we try to make the determination, one, what was the settlor's intent, and at the same token we look at the complaint and we're really not able or shouldn't go outside of those four corners of that complaint.
>
> And the district courts and the supreme court have made that very clear to judges like me no matter where our sympathies lie – may or may not lie – we have to be like a horse with blinders coming

around the straightaway and not looking at all the peripheral stuff.

* * *

All right. That being the case, you have had numerous chances to try and get this right and I have bent over backwards because – and maybe it's not what I should do – but because you are who you are and the fact that you are pro se, I've given you great latitude.

But there has to be some finality in these matters and we can't allow these cases to just go on, otherwise as backed up as we are – and we are backed up, sir. Believe me when I tell you that – we could never get anything done.

All right. Aside from that, this is – there's no question that this is a defective complaint. Legally it cannot stand. It's as simple as that. I've read your memo even as long as – and again, it's only supposed to be ten pages, but again, giving you the deference of your particular situation, I've done that, gone beyond that, tried to appreciate not only your position, but the other side's.

* * *

It's done. It's over. You've been given plenty of opportunity to do what you had to do. You've now received the documents, at least the reasonable documents, so you have an idea of what's going on. The administration of the trust is strictly left up to the trustee and the settlor's intents and so forth and that's the way that works.

You haven't stated a cause of action. I'm dismissing the complaint with prejudice. All right.

(R.884-888)

Appellant's Initial Brief seeks to divert attention from his repeated failure to state a cause of action after many opportunities to do so, by attacking Peter Halle's counsel, John G. "Jay" White, III by claiming Mr. White "blatantly lied before the Honorable Court." (IB.8) Appellant cites to Mr. White's representation that Appellant "keeps filing lawsuits, they keep getting dismissed, ….." as part of his request for a dismissal with prejudice. Mr. White did not "lie," as Appellant alleges in his *ad hominem* attack. Mr. White was referring to – as everyone except the Appellant seemed to understand – the five separate complaints, culminating with his fourth amended complaint that Appellant filed, and the sixth version Appellant sought to file. Whether or not dismissed pursuant to court orders, the prior complaints were, at minimum, withdrawn and superseded by the Appellant in response to each of the motions to dismiss filed on behalf of Peter Halle and the trial court's indications to Appellant that his complaint failed to state a cause of action. (R.SUPP.979-980, 982) Appellant's response to each motion to dismiss essentially conceded that he was facing a dismissal on his then current complaint, and sought to avoid entry of such an order by preemptively amending his complaint.

Following the hearing on the 4th AC and order of dismissal, this appeal followed. Importantly, Appellant does not challenge the trial court's ruling that dismissed the 4th AC for failure to state a cause of action or properly plead causes of action. Appellant's Initial Brief focuses exclusively on the trial court's dismissal with prejudice and denial of Appellant's request to amend his complaint for a sixth time.

STANDARD OF REVIEW

The Appellant has the burden on appeal of making any reversible error clearly, definitely, and fully" apparent to the appellate court. *E & I, Inc. v. Excavators, Inc.*, 697 So. 2d 545, 547 (Fla. 4th DCA 1997). Notably, Appellant has not sought to appeal the grounds for dismissal of his 4th AC; he concedes that his complaint failed to state a cause of action. Instead, Appellant appeals only that part of the trial court's order dismissing his complaint with prejudice.

While "[g]enerally, the standard of review of an order dismissing a complaint with prejudice is de novo" *Stubbs v. Plantation Gen. Hosp. Ltd. Partnership*, 988 So. 2d 683, 684 (Fla. 4th DCA 2008) (quoting *Palumbo v.*

Moore, 777 So. 2d 1177, 1178 (Fla. 5th DCA 2001))[2], that standard should not apply when the Appellant does not challenge the trial court's determination as to whether the complaint stated a cause of action. A "trial judge in the exercise of sound discretion may deny further amendments where a case has progressed to a point that liberality ordinarily to be indulged has diminished." *Alvarez v. DeAguirre*, 395 So. 2d 213, 216 (Fla. 3d DCA 1981).

The standard of review applicable to a motion to amend a complaint is abuse of discretion. *G.B. Holdings, Inc. v. Steinhauser*, 862 So. 2d 97, 99 (Fla. 4th DCA 2003). *See also Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 181 (Fla. 3d DCA 2010)("a trial court's decision whether to grant a motion to amend a complaint is reviewed for abuse of discretion"). Refusal to allow an amendment is an abuse of the trial court's discretion "unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *Dieudonne v. Publix Super Markets, Inc.*,

[2] See also *MEBA Med. & Benefits Plan v. Lago*, 867 So. 2d 1184, 1186 (Fla. 4th DCA 2004)(The standard of review of orders granting motions to dismiss with prejudice is de novo)

994 So.2d 505, 507 (Fla. 3d DCA 2008) (quoting *Gilbert v. Florida Power Light Co.*, 981 So. 2d 609, 612 (Fla. 4th DCA 2008))(emphasis added).

SUMMARY OF ARGUMENT

"There is simply a point in litigation when defendants are entitled to be relieved from the time, effort, energy and expense of defending themselves against seemingly vexatious claims." *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d DCA 1992). Appellant here sought and was granted leave of court to file five versions of his complaint. Indeed, in response to every motion to dismiss filed by Peter Halle, Appellant sought leave to amend his complaint and cure the defects pointed out in the motion to dismiss. Appellant has proposed, dropped, recharacterized, and realleged and tried to concoct as many as fourteen separate causes of action over the course of his efforts to plead a viable complaint. (R.779-780) The complaint dismissed by the trial court with prejudice was Appellant's fourth amended complaint – his fifth opportunity to plead viable causes of action.

Florida law is very clear that pro se parties are held to the same standard as are parties represented by counsel. *Kohn,* 611 So. 2d at 539. This Court, and other Florida courts have repeatedly held that "dismissal of a complaint that is before the court on a third attempt at proper pleading is

generally not an abuse of discretion." *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999). Appellant has had five attempts to plead a viable cause of action against Peter Halle and was given fair warnings by the trial court after he filed his 3rd AC that he had failed to plead a cause of action. Thus it was not unfair for the trial court to dismiss Appellant's 4th AC with prejudice when he again failed to allege a cause of action in any of its three counts.

ARGUMENT

I. THE TRIAL COURT EXERCISED SOUND DISCRETION IN DISMISSING APPELLANT'S FOURTH AMENDED COMPLAINT WITH PREJUDICE

The trial court exercised sound discretion in dismissing with prejudice Appellant's fifth iteration of his complaint for yet again failing to state a claim upon which relief could be granted. It is well-settled "that as an action progresses, the privilege of an amendment progressively decreases to the point that the trial judge does not abuse his discretion in dismissing with prejudice." *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d DCA 1992). "Pro se litigants are not immune from the rules of civil procedure." *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999).

> The Rules of Civil Procedure are adopted to establish an orderly and efficient judicial procedure to handle cases. An individual is entitled to represent himself or herself in a civil proceeding but he or she must not proceed without regard to the rules of procedure. Although our courts have been uniformly liberal in permitting pro se procedure, it can reach a point that it is an abuse of the judicial process, properly subjecting the complaint to a dismissal with prejudice.

Id. (quoting *Thomas v. Pridgen*, 549 So. 2d 1195, 1196-97 (Fla. 1st DCA 1989)).

Appellant cites numerous cases where the appellate courts found that the trial court abused its discretion in dismissing a complaint with prejudice and denying leave to amend. (IB, p. 13-17) However, what Appellant overlooks are the legion of cases – and the analysis contained in the very cases Appellant cites – that support dismissal with prejudice where the privilege to amend has been abused. In *Moore v. Liberty Mut. Ins. Co.*, 988 So. 2d 1285, 1286 (Fla. 2d DCA 2008), the court noted that leave to amend should be granted "unless the privilege of amendment has been abused or it is clear that the complaint cannot be amended to state a cause of action." (emphasis added). *See also Eagletech Communications, Inc. v. Bryn Mawr Inv. Group, Inc.*, 79 So. 3d 855, 866 (Fla. 4th DCA 2012)("It is not the

number of amendments which determine when a complaint should be dismissed with prejudice, but rather the number of 'ineffective attempts to state the same causes of action; which must be considered."); *Town of Micanopy v. Connell*, 304 So. 2d 478, (Fla. 1st DCA 1974)(liberality of Rule 1.190 is "generally interpreted to allow a plaintiff to amend his complaint one time in an attempt to state a cause of action").

Appellant mistakenly cites to *Shapiro v. Tulin*, 60 So. 3d 1166, 1168 (Fla. 4th DCA 2011) for the proposition that "when a plaintiff asks for leave to amend at a hearing on a motion to dismiss and there has been no responsive pleading filed, the Plaintiff must be afforded leave to amend." (IB, 14) The facts and amendment history of *Shapiro* are far different from those here. The plaintiff in *Shapiro* had not yet amended his complaint, the amendment sought was his first such request when faced with a motion to dismiss. *Id.* at 1167. The trial court in *Shapiro* also erred by looking beyond the four corners of the complaint in granting the dismissal. *Id.* Here, there is no allegation that the trial court looked beyond the "four corners" and the Appellant had sought and obtained leave to amend his complaint on multiple prior occasions; the complaint the trial court dismissed with prejudice was Appellant's fourth amended complaint. Moreover, the trial court dismissed

the 4th AC only after gratuitously advising Appellant that his 3rd AC was defective and granting him leave to file the 4th AC.

Here it is clear that Appellant has abused the privilege to amend. Rather than permit the trial court to rule on his prior complaints, Appellant voluntarily repleaded in response to the valid arguments raised by Peter Halle in his motions to dismiss and in response to the trial court's warnings. Instead of curing deficiencies, Appellant persisted in his efforts to plead invalid and legally insufficient causes of action that ultimately led to the trial court's dismissal with prejudice. Appellant cannot abuse the judicial system's liberality in allowing amendments by continually amending without curing the pleading defects raised in the motions to dismiss. It should come as no surprise that after allowing multiple amendments, the trial court finally ruled on Appellant's complaint, dismissed it with prejudice, and denied leave to further amend.

This Court, in *Kozich v. Kozokoff*, affirmed a dismissal with prejudice of the second amended complaint filed by a pro se plaintiff. 945 So. 2d 533 (Fla. 4th DCA 2006). The pro se plaintiff in *Kozich*, like the Appellant here, continued to submit lengthy complaints with attachments before the trial court dismissed the cause with prejudice. *Id.* at. 533. Here, Appellant filed

five (5) lengthy complaints containing ever shifting causes of action in an effort to state a claim upon which relief can be granted. The original complaint contained 4 counts; the 1st AC contained 11 counts; the 2nd and 3rd AC's contained 14 counts each; the 4th AC cut back to only 3 counts; and the proposed 5th AC sought to allege 9 counts, many of which duplicated counts dropped from earlier complaints because they were not well pleaded. (R.779-780) Instead of using the opportunities granted to him to cure defects, Appellant persisted in pleading defective claims.

This Court, in *Barrett v. City of Margate*, recognized the latitude generally afforded to pro se litigants, but held that they are not immune from the rules of procedure. 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999). In upholding the dismissal of the pro se plaintiffs' complaint with prejudice, this Court noted that the plaintiffs were granted leave to amend on two separate occasions and the trial court tried to provide plaintiffs with some direction regarding acceptable pleading standards. *Id.* at 1161. However, despite multiple attempts to correct the defects in the complaints, 'the appellants' pleadings never improved." *Id.* at 1162. While this court recognized that dismissal with prejudice is not proper unless a plaintiff has been given an opportunity to amend, *Id.*, here, Appellant has had attempted

five times to state a cause of action upon which relief can be granted and failed each time. This Court noted that,

> In Florida, every cause of action whether derived from statute or common law is comprised of necessary elements which must be proven for the plaintiff to prevail. It is a cardinal rule of pleading that a complaint be stated simply, in short and plain language. The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged.
>
> * * *
>
> It is insufficient to plead opinions, theories, legal conclusions or argument. ... While it would be improper to dismiss a complaint for failure to state a cause of action solely because it failed to state the claim in short and plain statements, it is not improper to dismiss a complaint, with prejudice, for repeated refusal to comply with the rules of pleadings.

Id. at 1162-63.

In the matter *Gladstone v. Smith*, the trial court dismissed a pro se's complaint with prejudice after multiple attempts to plead a cause of action. 729 So. 2d 1002 (Fla. 4th DCA 1999). In dismissing, the court cited to *Kohn* for the proposition that

> [w]hile there is no magical number of amendments which are allowed, we have previously observed that with amendments beyond the third attempt,

> dismissal with prejudice is generally not an abuse of discretion.

Id. at 1004 (quoting *Kohn*, 611 So. 2d at 539). Appellant has submitted five versions of his complaint, and "[t]here is simply a point in litigation when defendants are entitled to be relieved from the time, effort, energy and expense of defending themselves against seemingly vexatious claims." *Kohn*, 611 So. 2d at 539. Pro se litigants "should not be held to a lesser standard than a reasonably competent attorney because applying a lesser standard would only encourage continued frivolous litigation." *Id.* at 539-540.

Here, Appellant has been afforded multiple opportunities to draft a complaint that properly pleads causes of action that state a claim upon which relief can be granted. In every instance, either through his own voluntary decision to retract the then pending complaint and amend, or following admonishment from the trial court that the complaints were not well-pleaded, Appellant failed to plead one or more viable causes of action. In dismissing with prejudice, the trial court aptly noted that "there has to be some finality in these matters and we can't allow these cases to just go on." (R.886) Peter Halle had been required to expend extraordinary sums in

defending against Appellant's constantly changing complaints and theories of liability over the last two years. As a pro se plaintiff, Appellant has no economic reason to behave reasonably; he bears little to no out of pocket cost in vexatiously prosecuting this matter. Appellant's actions strain an already strained judicial system, which is why trial courts are given broad latitude to determine when the privilege to amend has been abused. The trial court did not abuse its discretion when it dismissed, with prejudice, Appellant's Fourth Amended Complaint for failure to state a cause of action.

II. TRIAL COURT WAS CORRECT IN DISMISSING COUNTS I, II AND III OF APPELLANT'S FOURTH AMENDED COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION

Appellant does not challenge the propriety of the trial court's dismissal of his 4th AC for failure to state a cause of action. The present appeal focuses solely on whether the trial court abused its discretion in dismissing the 4th AC with prejudice. Nevertheless, the arguments presented to the trial court supporting the dismissal are briefly repeated herein.

Count I for "breach of trust, breach of fiduciary duties and failure to invest prudently" did not state a viable cause of action under Rule 1.110(b) as it lumped together separate but inconsistent claims within a single cause

of action. Count II for an Accounting was subject to dismissal as the Edward Halle Trust unambiguously waived the right to an accounting. Count III was properly dismissed as Appellant cannot state a cause of action for intentional infliction of emotional distress arising out of the facts alleged in the Fourth Amended Complaint. Not only was dismissal of all these claims proper for the reasons that follow, but the trial court correctly dismissed the Fourth Amended Complaint with prejudice. The order dismissing the fourth amended complaint with prejudice should be affirmed.

A. The Trial Court Correctly Dismissed Count I for Improperly Co-Mingling Multiple Inconsistent Causes of Action

Florida Rule of Civil Procedure 1.110 requires that "[a] pleading which sets forth a claim for relief... must state a cause of action." Fla. R. Civ. P. 1.110(b). The comments to Rule 1.110 explain that a cause of action must "clearly and adequately inform the judge and the opposing party . . . of the position of the pleader. The arrangement should be designed to make an orderly and effective presentation." Fla. R. Civ. P. 1.110(b) cmt. The comments to Rule 1.110 further caution that "vague and loose pleading will not be permitted," and requires that "[t]he complaint must show a legal liability by stating the elements of a cause of action; must plead factual

matter sufficient to apprise the adversary of what he is called upon to answer so that the court may determine the legal effect of the complaint." Fla. R. Civ. P. 1.110 cmt *citing Messana v. Maule Indus.*, 50 So. 2d 874 (Fla. 1951); *Kislak v. Kreedian*, 95 So. 2d 510 (Fla. 1951).

Count I was dismissed because it did not comply with the requirements of Rule 1.110. In this Count, Appellant attempts to allege a claim for "breach of trust, breach of fiduciary duties, and failure to invest prudently." Leaving aside the fact that Appellant's Count I improperly co-mingled two separate but inconsistent causes of action within a single cause of action, something that the trial court warned Appellant about previously (R.SUPP. 979-980, 982), Count I fails to comply with Rule 1.110 because it does not allege the necessary elements for either cause of action. *See* Fla. R. Civ. P. 1.110(b) cmt. Accordingly, the trial court properly dismissed Count I for failure to state a cause of action.

B. The Trial Court Correctly Dismissed Count II as the Edward Halle Trust Unambiguously Waives the Right to an Accounting

Count II sought to "compel[] [Peter Halle] to comply with both Florida Statutes 736.08135 and 736.0813 and account for all of the Trust since August 15, 2007 to present." (R.634, ¶¶ 20-22; R.637, Wherefore

Clause (b)). Article VII, Paragraph D of the Edward Halle Revocable Trust states that the requirement for accounting under Chapter 737 "as it exists or may hereafter be amended" is waived "to the extent such waiver is permitted by law." (R.15) In 2006, the Florida Legislature repealed Chapter 737 of the Florida Statutes and created a new Chapter 736 to serve as the Florida Trust Code effective July 1, 2007. *In re Amendments to the Florida Probate Rules*, 964 So. 2d 140 (2007). By virtue of this statutory amendment, the waiver of the requirement for an accounting in Article VII, Paragraph D of the Edward Halle Trust now applies to accountings pursuant to Florida Statute Chapter 736. Since the trust unambiguously waived the requirement for trust accountings pursuant to Chapter 736, Appellant cannot state a claim for failure to provide accountings.[3]

C. The Trial Court Correctly Dismissed Count III for Failure to State a Cause of Action for Intentional Infliction of Emotional Distress for Failure to Disburse Funds

Finally, Appellant failed to state a claim for intentional infliction of emotional distress because he is unable to allege that "(1) The wrongdoer's conduct was intentional or reckless, that is, he intended his behavior when he knew or should have known that emotional distress would likely result;

[3] Nevertheless, complete accountings were provided to Appellant. (R.682)

(2) The conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community; (3) The conduct caused emotional distress; and (4) The emotional distress was severe." *Stewart v. Walker*, 5 So. 3d 746, 749 (Fla. 4th DCA 2009).

In *Metropolitan Life Insurance Co. v. McCarson*, the Florida Supreme Court set forth the stringent standard that a Plaintiff must meet in order to allege extreme and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the Plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

467 So. 2d 277, 278-79 (Fla. 1985). The standard against which the conduct is measured is not the subjective standard of the alleged recipient of such conduct, "[r]ather, the court must evaluate the conduct as objectively as is

possible to determine whether it is 'atrocious, and utterly intolerable in a civilized community'." *Liberty Mutual Ins. Co. v. Steadman*, 968 So. 2d 592, 595 (Fla. 2d DCA 2007). As Section 46, Restatement (Second) of Torts acknowledges, "major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." *Id.*, at 595-96, quoting comment "f" to section 46 of the Restatement (Second) of Torts (1965). The level of necessary outrage to satisfy this standard is a question of law, and not a question of fact. *Id.* at 595.

Indeed, the threshold to state an intentional infliction of emotional distress claim is so high that Florida courts have systematically dismissed claims as a matter of law. *See, e.g., Byrd v. BT Foods, Inc.*, 948 So. 2d 921 (Fla. 4th DCA 2007) (finding that the teasing of plaintiff about her medical condition was not outrageous enough to sustain a claim for intentional infliction of emotional distress); *LeGrande v. Emmanuel*, 889 So. 2d 991, 995 (Fla. 3d DCA 2004)(finding a parishioner's statements to a congregation that the minister stole money from the church to buy a car as legally insufficient to form the basis of a claim for intentional infliction of emotional distress.); *Williams v. Worldwide Flight SVCS, Inc.*, 877 So. 2d

869 (Fla. 3rd DCA 2004) (finding a supervisor's actions in: (i) repeatedly calling an African American employee a "nigger" and "monkey," in front of other employees, over the "walkie talkie," and over the work radio; (ii) repeatedly telling the employee that he did not want the employee's "black ass" working there; and (iii) instructing another supervisor, to "create a record" of false disciplinary related incidents for the employee so as to justify the employee's subsequent termination, "did not rise to the level that may be reasonably regarded as so extreme and outrageous so as to permit [the employee] to recover in an action for intentional infliction of emotional distress.").

The allegations contained in the Fourth Amended Complaint hardly qualify as extreme and outrageous, and certainly cannot meet the high threshold to state a claim for intentional infliction of emotional distress. No "extreme and outrageous" conduct is alleged here. This is a routine dispute between two family members about a Trust established by their parents, Appellant's claims of various pre-existing ailments notwithstanding. (R.634-636, ¶¶23 – 28) These ailments were <u>not</u> caused by Peter Halle.

Appellant alleges that Peter Halle acted with "intent and malice toward the [Appellant] by "using his deep pockets and expert legal

knowledge to emotionally assault the [Appellant] who has limited financial resources, suffers from poor health, has limited energy and limited knowledge of the law." (R.636, ¶27) Appellant's allegations fail to satisfy the Florida Supreme Court's standard as even conduct characterized by "malice" is not enough. *See Metro. Life Ins. Co.*, 467 So. 2d at 278. Even where, as here, Appellant alleges that Peter Halle knew of Appellant's medical condition, a dispute about the interpretation of the trust document cannot be deemed as "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" as required to state a cause of action. *See id.* at 279 (holding that plaintiff could not state a cause of action for intentional infliction of emotional distress where insurance company allegedly failed to disburse funds pursuant to an insurance policy to cover medical expenses for an ailing insured).

Furthermore, under Florida law there can be no recovery for mental pain and anguish arising out of an alleged breach of contract. *Industrial Fire & Cas. Ins. Co. v. Romer*, 432 So. 2d 66 (1983). Where, as here, "the gravamen of the proceeding is breach of contract, even if such breach be willful and flagrant, there can be no recovery for mental pain and anguish resulting from such breach." *Henry Morrison Flagler Museum v. Lee*, 268

So. 2d 434, 636-67 (Fla. 4th DCA 1972). This principle is equally applicable to claims for intentional infliction of emotional distress.

In *Baker v. Florida National Bank*, an ailing beneficiary sued a trustee for intentional infliction of emotional distress and breach of the trust arising out of the bank's alleged mismanagement and improper investment of trust assets. 559 So. 2d 845, 285 (Fla. 4th DCA 1990). The beneficiary alleged that his "emotional distress" was caused by the bank's poorly managed investments of his liquid assets, his belief that the bank had taken advantage of their relationship, abused its fiduciary relationship for its own benefit, and refused to return his assets. *Id.* at 285. This Court upheld the trial court's dismissal of the beneficiary's claim for intentional infliction of emotional distress since "there can be no recovery for mental pain and anguish (emotional distress) unconnected with physical injury." *Id.* at 287-228 (parenthetical in original).[4]

[4] The Fourth District Court of Appeal also held that the trial court correctly concluded that the bank's alleged conduct did not rise to the level of "extreme and outrageous." *Id.* at 287.

Below, Appellant's Count III sought "general compensatory damages for the pain, suffering and emotional distress [Peter Halle] has inflicted on the [Appellant]" because Peter Halle has allegedly "deprived the [Appellant] of the inheritance from his father, has made the financial future uncertain and has deprived him of his piece of mind." (R. 634-636, ¶¶29, 23) Accordingly, Count III for intentional infliction of emotional distress was properly dismissed with prejudice because Appellant may not premise a claim for emotional distress on an alleged breach of contract.

CONCLUSION

For the foregoing reasons, Appellee, Peter Halle, respectfully requests that this Court affirm the trial court's order of September 25, 2013 dismissing Appellant's Fourth Amended Complaint with prejudice.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing *Answer Brief* has been furnished via electronic mail to: **Jason Halle**, 209 NW 21st Court, Wilton Manors, FL 33311, jason@jasonhalle.com, this 21st day of .

By: _____
MICHAEL J. NAPOLEONE

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing Answer Brief was prepared using Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210.

By: _____
MICHAEL J. NAPOLEONE