IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 17, 2015 Session

IN RE ESTATE OF JANE KATHRYN ROSS ET AL.

Appeal from the Probate Court for Davidson County
No. 10P-837 Randy Kennedy, Judge

No. M2014-02252-COA-R3-CV – Filed July 28, 2015

The dispositive issue in this appeal is whether the terms of an attorney-client retainer agreement preclude the attorneys from recovering any fees for representation of the decedent's estate in an action to recover assets from the decedent's son. Prior to her death, the decedent commenced an action against her son to recover the value of a new home she constructed on her son's property, which was prior to the engagement of the attorneys whose fees are at issue. After the decedent's death, the administrator continued to pursue the action, but subsequently concluded that the estate did not have sufficient assets to continue prosecuting the claim; thus, the administrator agreed to a settlement with the decedent's son. When the motion seeking court approval of the settlement was filed, the decedent's daughter opposed the settlement. Following discussions, the administrator, the decedent's daughter, and her attorneys entered into an agreement stating, in pertinent part, that the daughter's attorneys would "at no cost to the estate, prosecute this matter to trial" and that "all [of the attorneys'] fees and expenses shall be the responsibility of [the daughter]." The attorneys prosecuted the matter to trial, and the estate prevailed; however, the son appealed the judgment, and we reversed and remanded for a new trial. The estate prevailed on remand, and the son appealed again. While the second appeal was pending, the son filed a petition for bankruptcy, a bankruptcy trustee was appointed, and the probate court allowed the trustee to be substituted for the son. Thereafter, the attorneys who represented the estate in the trial of the underlying action and both appeals filed a motion for fees and expenses. The administrator for the estate did not file an objection to the fees based on the retainer agreement or inform the probate court or the trustee of the existence of the retainer agreement. Following a hearing, the trial court awarded $178,598 in attorneys' fees and expenses and assessed all of the fees against the estate. Soon thereafter, the bankruptcy trustee learned of the retainer agreement. Based on this new information, the trustee filed a Tenn. R. Civ. P. 59.04 motion to set aside the order assessing the attorneys' fees against the estate. The administrator supported the trustee's motion, taking the position for the first time that the parties to the retainer agreement intended for the daughter to be responsible for all of the attorneys' fees. Conversely, the attorneys seeking the fees insisted that the retainer

agreement only relieved the estate of liability for the fees incurred through the trial, which concluded on August 15, 2012. The attorneys' position was supported by the administrator's prior counsel who negotiated the terms of the retainer agreement on behalf of the estate. She stated that it was not the intent of the parties to preclude the new attorneys from recovering fees for services rendered on behalf of the estate after trial. She also stated that it would be "highly inequitable" for the estate to not be responsible for the fees incurred after the trial because the resulting judgment benefited the estate. Following a hearing on the trustee's motion, the trial court ruled that it was the intent of the parties for the daughter to be solely responsible for attorneys' fees and expenses "up to trial," but all reasonable and necessary fees and expenses incurred after that trial were the responsibility of the estate. Thus, the court assessed the attorneys' fees incurred through August 15, 2012 to the daughter and all fees incurred thereafter to the estate. This appeal followed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which RICHARD R. DINKINS and W. NEAL MCBRAYER, JJ., joined.

James G. Stranch, III, and Michael J. Wall, Nashville, Tennessee, for the appellant, David G. Rogers, Trustee for the Bankruptcy Estate of Paul T. Sorace.

Eugene N. Bulso, Jr., and Paul J. Krog, Nashville, Tennessee, for the appellees, Estate of Jane Kathryn Ross and Joan Wildasin.

John D. Kitch, Nashville Tennessee, for the appellee, Peggy D. Mathes.

OPINION

This is the third appeal arising from a dispute between the Estate of Jane Kathryn Ross and her son, Paul Sorace. *See In re Estate of Ross*, No. M2012-02228-COA-R3-CV, 2013 WL 3346717 (Tenn. Ct. App. June 27, 2013) (*"Ross I"*); *In re Estate of Ross*, No. M2013-02218-COA-R3-CV, 2014 WL 2999576 (Tenn. Ct. App. June 30, 2014), *appeal denied* (Nov. 21, 2014) (*"Ross II"*). The relevant facts giving rise to the underlying civil action, as stated in *Ross I*, are as follows:

> Jane Kathryn Ross was the mother of Paul Sorace and Joan Wildasin. In June 1991, Mr. Sorace purchased property on Old Charlotte Pike in Pegram, Tennessee consisting of about seven acres with a small farmhouse. In 1998, Ms. Ross executed a will that left most of her estate to her two children in equal portions. Ms. Ross executed a durable power of attorney to Ms. Wildasin in 2000.

> In 2004, Ms. Ross was living in a house she owned on Golf Club Lane in Nashville. Mr. Sorace was living in the small farmhouse in Pegram. Although the precise nature of their arrangement is in dispute, Ms. Ross and Mr. Sorace agreed that she would build a home on the Old Charlotte Pike property and they would live there together.
>
> On June 29, 2005, Ms. Ross sold her house on Golf Club Lane; she made a net gain of $395,719 on this sale. She moved into the farmhouse with Mr. Sorace and, on July 6, 2005, she and Mr. Sorace signed a construction contract to build a new house on the Old Charlotte Pike property. Ms. Ross and Mr. Sorace both signed the construction contract as owners. By the time the project was completed in June 2006, Ms. Ross paid a total of $433,064.68 to construct the new home; Mr. Sorace contributed $15,979.16 in expenses related to the new house.

Ross I, 2013 WL 3346717, at *1.

Ms. Ross and Mr. Sorace moved in the new home when it was completed, and they were the only residents until April 2007 when Mr. Sorace, who had been a bachelor, married Kacie Cheshire. *Id.* Ms. Cheshire and her five-year-old son from a previous relationship then resided in the home with Mr. Sorace and Ms. Ross. Thereafter, Paul and Kacie Sorace added twin sons to the household. *Id.*

Prior to the marriage, Mr. Sorace was requested to put his mother's name on the deed. He agreed to do so as soon as he could see an attorney to accomplish the task; however, Ms. Ross's name was never put on the deed. *Id*. at *3.

Ms. Ross's health deteriorated to the extent that, in November 2008, Ms. Wildasin moved her mother to California to live with her. *Id.* at *2. Four months later, in March 2009, Ms. Wildasin, acting as her mother's next friend, commenced this action against Mr. Sorace seeking a judgment for, inter alia, a constructive trust or unjust enrichment. *Id*. at *1. Ms. Ross died one year later, her estate was substituted as plaintiff, and the case was transferred to the Seventh Circuit Court for Davidson County, which has exclusive probate jurisdiction as well as circuit and chancery court jurisdiction. *Id*. Because the underlying civil action was essentially a dispute between the two beneficiaries of the estate, Ms. Ross's two adult children, the probate court appointed attorney Peggy Mathes, Public Administrator for Davidson County, as the administrator of Ms. Ross's estate. In an amended complaint, the estate asserted claims against Mr. Sorace and his wife for a resulting trust, a constructive trust, unjust enrichment, rent, conversion and financial exploitation, and violation of the Adult Protection Act. *Id*.

Christina Norris of Norris & Norris, PLC, was initially retained to represent Ms. Ross in the action filed on her behalf by Ms. Wildasin. After Ms. Ross's death, Ms.

Mathes, in her capacity as the Administrator of the estate, retained Ms. Norris to represent the estate in that action; thus, Ms. Norris continued to prosecute the claims against Mr. Sorace.

Over the next several months, Ms. Mathes concluded that the estate lacked the financial resources to continue prosecuting the case against Mr. Sorace. Instead of abandoning the action, Ms. Mathes negotiated a settlement with Mr. Sorace, which required court approval. When Ms. Norris filed a motion on behalf of the estate to obtain court approval of the settlement, Ms. Wildasin opposed the settlement.

In the interim, Ms. Wildasin retained attorney Eugene Bulso and the firm of Leader, Bulso & Nolan, PLC to represent her interests as a beneficiary in the probate proceedings. When Ms. Wildasin objected to her brother settling the estate's claims against him for a sum she deemed inadequate, Ms. Wildasin's attorneys offered to prosecute to trial the pending case against Mr. Sorace on a contingent fee basis at no out-of-pocket expense to the estate. In response to that offer, Ms. Norris, in her capacity as counsel for the Administrator of the estate, sent Mr. Bulso an email on February 3, 2012, stating in pertinent part:

> . . . Peggy Mathes [the administrator of the estate] will agree to your proposal contingent upon a written agreement stating her fee as Administrator, court costs, and fees and expenses of Norris & Norris . . . will be paid "off the top" of any recovery you obtain. That is, the items described above must have priority for payment ahead of your fees and expenses and ahead of any distribution to Ms. Wildasin. The agreement should be signed by you for your firm, by your Client, and by Ms. Mathes.
>
> If these terms are acceptable, please draft a proposed Agreement and I'll send it to Ms. Mathes for her final approval.

On February 7, 2012, Ms. Mathes, Mr. Bulso, and Ms. Wildasin signed a retainer letter agreeing to the following:

> 1. Peggy Mathes, the administrator ad litem, will withdraw the Motion to Approve Settlement filed with the Court.
>
> 2. Leader, Bulso & Nolan, PLC will, at no cost to the estate, prosecute this matter to trial. All fees and expenses of Leader, Bulso & Nolan, PLC shall be the responsibility of Joan Wildasin.
>
> 3. The following fees and expenses shall be paid first out of any recovery in this action, and shall be paid in the following order:

a. Fees and expenses of the Administrator ad litem;
b. Court costs;
c. Fees and expenses of Norris & Norris, PLC.

4. Joan Wildasin understands that the outcome of this litigation is uncertain, and that there is no guarantee that she will ultimately recover more from a trial of this matter than she would have recovered under the proposed settlement.

Mr. Bulso successfully prosecuted the case, and the probate court established a resulting trust for the amount of the claim. Mr. Sorace appealed, and this court found that a resulting trust was not an available remedy under the facts of the case and remanded for further proceedings. *Ross I*, 2013 WL 3346717 at *7 (citing *In re Estate of Jones*, 183 S.W.3d 372, 379 (Tenn. Ct. App. 2005); *Estate of Queener v. Helton*, 119 S.W.3d 682, 687 (Tenn. Ct. App. 2003) (holding that, "[i]n accordance with the general rule discussed above, our courts have generally denied resulting trusts based upon improvements to real property")). Upon remand, the trial court entered a money judgment for unjust enrichment totaling $417,000 in favor of the estate.

Mr. Sorace filed a timely notice of appeal and, soon thereafter, filed a petition for Chapter 7 bankruptcy. David Rogers was appointed the Bankruptcy Trustee, and Mr. Rogers (hereinafter "the Trustee") was substituted in place of Mr. Sorace in the probate proceedings and in the second appeal.

On January 21, 2014, with leave of the bankruptcy court, Mr. Bulso's firm executed on the unjust enrichment judgment against Mr. Sorace and purchased the property on behalf of the estate at a sheriff's sale. Six months later, this court ruled on the second appeal. We affirmed the trial court after concluding that the evidence did not preponderate against the trial court's finding that "Ms. Ross's contributions to the construction of the new house enhanced the value of Mr. Sorace's property by $417,000." *Ross II*, 2014 WL 2999576, at *5. The Supreme Court denied the Trustee's application for permission to appeal on November 21, 2014; thus, the unjust enrichment judgment is now a final, non-appealable judgment. *Id.*

On February 28, 2014, during the pendency of the second appeal, Mr. Bulso's firm filed a motion in the probate court seeking approval of attorney's fees and expenses incurred in the representation of the estate in the amount of $178,598.35. The Trustee, unaware of the retainer agreement, filed a timely response opposing the motion solely on the ground of the pendency of the second appeal. The Administrator did not file an objection based upon the retainer agreement nor did she inform the court of the existence of the retainer agreement or its terms prior to or during the hearing on the motion for fees; she did, however, oppose the amount being sought. Following a hearing on March 14, 2014, the probate court awarded Mr. Bulso's firm the entirety of the fees sought and

assessed the fee against the estate. The court also granted the Administrator's motion for fees at the same hearing.

Two weeks later, on March 28, the probate court heard Ms. Norris's motion for fees based on services she rendered on behalf of the estate.[1] During this hearing a dispute arose between the Administrator and Mr. Bulso regarding the scope of his representation. Particularly, the Administrator stated to the court that Mr. Bulso was not authorized to purchase Mr. Sorace's property at the sheriff's sale on behalf of the estate; Mr. Bulso responded, insisting the action had been authorized. Other differences were aired at the hearing as well, with the Administrator and Mr. Bulso each contradicting most of what the other had to say.

One week later, Mr. Bulso filed a motion on behalf of Ms. Wildasin to have Ms. Mathes removed as the administrator of the estate, alleging negligence in the administration of the estate and misrepresentation of facts to the court during the March 28th hearing. Because the scope of Mr. Bulso's representation was disputed in the earlier hearing, Mr. Bulso referred to the retainer agreement in an affidavit filed in support of the motion to remove the administrator. Ms. Mathes responded to the motion in two ways. By letter dated April 25, 2014, she terminated Mr. Bulso's firm as counsel for the estate, and she filed a response in opposition to his motion and attached a copy of the retainer agreement. Copies of the motion, response, and retainer agreement were also served on the Trustee.

Within a week of receiving a copy of the retainer agreement, the Trustee filed a Tenn. R. Civ. P. 59.04 motion seeking to vacate the order assessing Mr. Bulso's fees against the estate, insisting that the retainer agreement prohibited assessing any of Mr. Bulso's fees against the estate. Ms. Mathes supported the Trustee's motion stating that Mr. Bulso's fees "were not to be paid from the estate, only the portion inherited by [Ms.] Wildasin." Mr. Bulso's firm filed a response in opposition to the motion and attached to the response the email from Ms. Norris to Mr. Bulso discussing the proposed representation. Ms. Norris also filed a response in opposition to the Trustee's motion stating it was not the parties' intention to charge post-trial fees to Ms. Wildasin; Ms. Norris also affirmed the statements made in her email to Mr. Bulso regarding the agreement.

In the interim, on August 21, 2014, and after Ms. Mathes had terminated her agreement with Mr. Bulso's firm, Mr. Bulso filed a second and final motion for attorney's fees and expenses, seeking an award for fees and expenses incurred after the

[1] Ms. Norris filed her motion for fees on March 13, 2014, the day before the hearing on Mr. Bulso's motion and the Administrator's motion for fees.

filing of the first motion. The Trustee and the Administrator filed responses objecting to the second motion for fees, relying on the retainer agreement.

At the hearing on the Trustee's motion, the probate judge stated that he was not aware of the retainer agreement when the court granted Mr. Bulso's motion and assessed all of his fees against the estate. The judge then stated, "While the retainer agreement of February 7, 2012, is silent as to the payment of fees that might result in favor of the Bulso firm, it suggests to me that it was intended for fees that might result from an ultimate recovery to be paid subsequent to the trial of this matter from the recovery itself." The judge further stated that he could not read the retainer agreement "in a vacuum," and he considered the email from Ms. Norris to Mr. Bulso, as well as the parties' conduct and actions following the signing of the agreement. The probate judge then concluded that "it would be not only highly inequitable . . . but unconscionable for this Court to award all of Mr. Bulso's fees only against Ms. Wildasin."

Based on these and other findings, the probate court concluded that the retainer agreement reflected that only those fees incurred after the August 15, 2012 trial would be assessed against the estate and that the fees incurred from August 1 through August 15 were the sole responsibility of Ms. Wildasin. As a result, the probate court granted in part and denied in part the Trustee's motion to alter the prior fee order by assessing $55,132 in attorney's fees and expenses incurred between August 1 and 15, 2012 to Ms. Wildasin and reducing the original award of fees assessed against the estate to $123,666.35. At the same time, the probate court granted the firm's final motion for attorney's fees and awarded an additional $28,788.75, which the court assessed against the estate.

The Trustee appeals both fee awards contending that the retainer agreement unambiguously states that "all fees and expenses of Leader, Bulso & Nolan shall be the responsibility of Ms. Wildasin." Ms. Wildasin also appeals, contending that the Trustee's Rule 59.04 Motion to Alter or Amend was not properly supported; alternatively, she contends that the retainer agreement, the email, and Ms. Norris's response in opposition to the motion reveal that the parties intended for Mr. Bulso's fees to be paid out of the judgment recovered from Mr. Sorace.

STANDARD OF REVIEW

The matters at issue on appeal arise from a written retainer agreement. The interpretation of a written agreement is a question of law, *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); accordingly, our review of the agreement is de novo with no presumption of correctness accorded to the decisions of the courts below. *Id.* With regard to findings of fact by a trial court, we review the record de novo and presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d).

ANALYSIS

I. MOTION TO ALTER OR AMEND

Ms. Wildasin contends the trial court should have dismissed the Trustee's Motion to Alter or Amend because it failed to present an appropriate basis for relief under Tenn. R. Civ. P. 59.04.

The office of Rule 59.04 motions is "to provide the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005). As such, they must rest upon (1) an intervening change in the law, (2) the discovery of previously unavailable evidence, or (3) a manifest error of law in the court's reasoning. *Id*. Ms. Wildasin argues that the Trustee's motion fits none of these categories, while the Trustee argues that it qualifies as a motion introducing previously unavailable evidence, specifically, the retainer agreement.

In order to sustain a motion to alter or amend under Rule 59.04 based on newly discovered evidence, "it must be shown that the new evidence was not known to the moving party prior to or during trial and that it could not have been known to him through exercise of reasonable diligence." *Seay v. City of Knoxville*, 654 S.W.2d 397, 399 (Tenn. Ct. App. 1983) (internal citations omitted). Moreover, when a party files a Rule 59 motion seeking to alter or amend a judgment and attempts to present additional evidence in support of such a motion, the trial court should consider: the moving party's effort to obtain the additional evidence that the moving party seeks to present; the moving party's explanation for failing to offer the evidence earlier in the proceedings; the importance of the new evidence to the moving party's case; the unfair prejudice to the non-moving party; and any other relevant consideration. *Stovall v. Clark*, 113 S.W.3d 715, 721 (Tenn. 2003); *see also Linkous v. Lane*, 276 S.W.3d 917, 924 (Tenn. Ct. App. 2008).

Ms. Wildasin argues that the retainer agreement was not "previously unavailable" because the Trustee could have obtained the information regarding the retainer agreement before Mr. Bulso's motion for fees was heard. While this may be true, the Trustee, who stood in the shoes of a beneficiary of the estate and the defendant in the civil action, had no reason to believe an agreement existed that might relieve the estate of liability for the fees of the attorneys who represented the estate in the action against Mr. Sorace. More importantly, the personal representative of an estate has an affirmative duty of undivided loyalty to the estate, and personal representatives must deal with the beneficiaries in the utmost good faith; part of this duty includes "incurring only those expenses that are reasonably necessary for the proper administration of the estate." *In re Estate of Wallace*, 829 S.W.2d 696, 705 (Tenn. Ct. App. 1992). Accordingly, if Ms. Mathes believed the retainer agreement relieved the estate of any liability for the law firm's fees or expenses, it was her affirmative duty to file a timely objection to the firm's initial fee request for the benefit of the beneficiaries, which included the Trustee. For reasons unexplained by this

record, Ms. Mathes did not object to the fee application on the basis of the retainer agreement prior to or during the hearing on the fee application. Thus, the Trustee had no reason to believe that an exculpatory provision in a retainer agreement existed. Also significant is that the probate court was unaware of the exculpatory language in the retainer agreement until two weeks after the fee was approved.

For the reasons stated above, the Trustee stated an appropriate basis for seeking relief pursuant to Rule 59.04 and the trial court did not err when it considered the motion to alter or amend. Accordingly, we turn our attention to the retainer agreement.

II. INTERPRETATION OF ATTORNEY-CLIENT AGREEMENT

The Trustee contends the trial court erred by assessing any of the attorney's fees against the estate because the retainer agreement unambiguously states that "all fees and expenses of Leader, Bulso & Nolan shall be the responsibility of Ms. Wildasin."

The cardinal rule of contract interpretation is that the court must attempt to ascertain and give effect to the intention of the parties. *Winfree v. Educators Credit Union*, 900 S.W.2d 285, 289 (Tenn. Ct. App. 1995); *Breeding v. Shackelford*, 888 S.W.2d 770, 775 (Tenn. Ct. App. 1994); *Rainey v. Stansell*, 836 S.W.2d 117, 118 (Tenn. Ct. App. 1992). In attempting to ascertain the intention of the parties, the court must examine the language of the contract, giving each word its usual, natural, and ordinary meaning. *Guiliano*, 995 S.W.2d at 95; *Rainey*, 836 S.W.2d at 119. The court's initial task in construing the retainer agreement at issue is to determine whether the language is ambiguous. *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002). When the language of the contract is plain and unambiguous, the court must determine the parties' intention from the four corners of the contract, interpreting and enforcing it as written. *Koella v. McHargue*, 976 S.W.2d 658, 661 (Tenn. Ct. App. 1998) (citing *Book-Mart of Florida, Inc. v. National Book Warehouse, Inc.*, 917 S.W.2d 691 (Tenn. Ct. App. 1995).

If, however, the words in a contract are susceptible to more than one reasonable interpretation, the contract is ambiguous, and the parties' intent cannot be determined by a literal interpretation of the language. *Planters*, 78 S.W.3d at 890. When a contractual provision is ambiguous, a court is permitted to use parol evidence, including the contracting parties' statements regarding the disputed provision and pre-contract negotiations, as well as their conduct, to guide the court in construing and enforcing the contract. *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 612 (Tenn. 2006) (citing *Memphis Housing Auth. v. Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001)).

When interpreting a contract, courts must "impose a construction that is fair and reasonable." *Stephenson v. The Third Co.*, 2004 WL 383317, at *4 (Tenn. Ct. App. 2004). Specifically, when the language of an agreement is contradictory or ambiguous, or

where its meaning is doubtful so that it is susceptible to two constructions, "one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred." *Wilkerson v. Williams*, 667 S.W.2d 72, 79 (Tenn. Ct. App. 1983). Moreover, "[i]f the conduct of the parties subsequent to a manifestation of intention indicates that all of the parties placed a particular interpretation on it, that meaning is adopted if a reasonable person could attach it to the manifestation." *Hamblen Cnty. v. City of Morristown*, 656 S.W.2d 331, 335 (Tenn. 1983) (quoting Restatement of Contracts § 235).

These general rules of contract law also apply to contracts between attorneys and clients. *Alexander v. Inman*, 903 S.W.2d 686, 694 (Tenn. Ct. App. 1995). An attorney-client agreement, however, is subject to a higher level of scrutiny by the courts. *Silva v. Buckley*, No. M2002-00045-COA-R3-CV, 2003 WL 23099681, at *2 (Tenn. Ct. App. Dec. 31, 2003). Attorneys must deal with their clients in the utmost good faith. *Alexander v. Inman*, 974 S.W.2d 689, 694 (Tenn. 1998). "This level of good faith is significantly higher than that required in other business transactions where the parties are dealing at arm's length." *Id.*

In this case, the probate court determined that the retainer agreement could not be read "in a vacuum." As a result, the court considered the parties' conduct and actions following the signing of the agreement, as well as the email between Ms. Norris and Mr. Bulso, which stated that Ms. Norris's fees, Ms. Mathes's fees, and court costs "must have priority for payment ahead of [Mr. Bulso's] fees and expenses and ahead of any distribution to Ms. Wildasin." The probate court then found that the parties intended that Ms. Wildasin would be responsible for those fees incurred to trial and that the estate would be responsible for those fees incurred thereafter.

The Trustee contends it was error to consider anything other than the express language in the retainer agreement because the agreement clearly and unambiguously states that the firm will try the lawsuit "at no cost to the estate" and that "all fees and expenses of Leader, Bulso & Nolan shall be the responsibility of Joan Wildasin." Accordingly, the Trustee contends that Ms. Norris's email and her statement to the court concerning the intentions of the parties should have been excluded under the parol evidence rule.

We agree that the contract is clear and unambiguous as to those fees and costs incurred "to prosecute this matter to trial"; however, the retainer agreement does not clearly or unambiguously state the parties' intentions regarding payment for the attorneys' services *after* the trial. In fact, the contract is completely silent regarding services rendered after trial. Moreover, after stating that those fees incurred "to trial" shall be Ms. Wildasin's responsibility, the agreement then states that the Administrator's

fees, court costs, and the fees and expenses of Ms. Norris "shall be paid first out of any recovery in this action." We find this additional language significant for it would be wholly unnecessary if, in fact, Ms. Wildasin was responsible for all of the firm's fees and expenses, including those incurred after the trial. These two discordant provisions in the retainer agreement create uncertainty as to the intention of the parties concerning who would be responsible for fees incurred after trial. Realizing that contractual language is ambiguous when it is "of uncertain meaning and may fairly be understood in more ways than one," *Farmers–Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975), we have concluded that the retainer agreement is ambiguous concerning who is responsible for the attorney's fees incurred *after* trial.

As noted above, when a contractual provision is ambiguous, the court may consider parol evidence, including the parties' conduct and statements regarding the disputed provision and pre-contract negotiations, in construing the contract. *Allstate Ins. Co.*, 195 S.W.3d at 612; *Memphis Housing Auth.*, 38 S.W.3d at 512. Accordingly, the probate court did not err by considering the parties' conduct, or Ms. Norris's email and statement to the court in response to the Trustee's motion, to ascertain the intent of the parties regarding fees incurred after trial.

We have concluded that the parties' intent is clearly evident from the conduct of the Administrator, who did not object to the law firm's initial fee request based on the purportedly exculpatory language in the retainer agreement. We acknowledge that the Administrator informed the trial court at that hearing on the initial motion for fees that she did not support the firm's first fee request; however, she did not object to any of the firm's fees being assessed against the estate. More importantly, the Administrator did not inform the court that a retainer agreement existed that purportedly relieved the estate of liability for Mr. Bulso's fees or expenses in any amount.[2]

In fact, there is nothing in the record indicating that the Administrator objected to the initial fee request on the ground it was precluded by the retainer agreement. Instead, she objected to the fees generally but not on the basis that they were precluded by the retainer agreement, at least not until after the Trustee filed his Rule 59.04 motion to set

[2] None of the parties' briefs state that the Administrator made any objection, formal or informal, to Mr. Bulso's initial motion for attorney's fees. Furthermore, the trial court's order from that hearing does not reflect that the Administrator made any objection to Mr. Bulso's initial motion for attorney's fees. However, in the transcript from the September 3, 2014 hearing on the Trustee's motion to set aside the initial fee award and Mr. Bulso's final motion for attorney's fees, Mr. Bulso stated that "Ms. Mathes opposed my firm's motion back then; the record is clear about that. She has never supported our motion for either the interim or the fees or for a final award." Nevertheless, based upon our review of the record, the Administrator did not file any objection to the initial motion based on the retainer agreement, and there is nothing to indicate that she objected to the fee request based on the retainer agreement until after the Motion to Remove Administrator was filed.

aside the fee award based on the retainer agreement. We find this conduct by the Administrator most significant because:

> [e]xecutors, as fiduciaries, owe a duty of undivided loyalty to the estate and must deal with the beneficiaries in the utmost good faith. *Mason v. Pearson*, 668 S.W.2d 656, 663 (Tenn. Ct. App. 1984); *In re Cuneo's Estate*, 63 Tenn. App. at 515, 475 S.W.2d at 676; *Baker v. Baker*, 24 Tenn. App. 220, 240, 142 S.W.2d 737, 750 (1940). Part of this duty includes incurring only those expenses that are reasonably necessary for the proper administration of the estate.

In re Estate of Wallace, 829 S.W.2d 696, 705 (Tenn. Ct. App. 1992). As such, if the Administrator believed the retainer agreement relieved the estate of any liability for the law firm's fees or expenses, then she had the affirmative duty to file a timely objection to the firm's initial fee request.

We also find it significant that Ms. Norris stated in her response in opposition to the Trustee's Motion to Alter or Amend that she and the Administrator had agreed with Mr. Bulso that his firm's fees would be paid from the recovery *after* the administrator's fees, Ms. Norris's fees, and court costs were paid. Ms. Norris stated, in pertinent part:

> Regarding the fee request of the Leader, Bulso firm, all of the allegations by Mr. Bulso regarding the facts surrounding his engagement are correct. The terms of engagement stated in my email to Mr. Bulso had been approved by Ms. Mathes and were offered to Mr. Bulso by me as her counsel. In addition, at the time Mr. Bulso's services were engaged, it was not contemplated that this case would require two trips to the Court of Appeals, which ultimately benefited this estate. It would be highly inequitable for the fees of the Leader, Bulso firm to be charged solely to Ms. Wildasin and that was not the intent of the parties, which is stated in my email, presented to the Court by Mr. Bulso. The work performed by the Leader, Bulso firm benefited this estate and should be charged to the estate under the conditions stated in the email presented to the Court.

Based on a thorough review of the record, we find the evidence does not preponderate against the trial court's findings of fact, the trial court identified and correctly applied the applicable principles of law, and the court's decision creates a construction that is "fair and reasonable." *Stephenson*, 2004 WL 383317, at *4. Accordingly, we affirm the trial court's decision holding the estate liable for the law firm's reasonable and necessary fees and expenses incurred after the August 15, 2012 trial.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the Estate of Jane Kathryn Ross.

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FRANK G. CLEMENT, JR., JUDGE