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OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

CONSERVE COMMUNITY, LLC, JULIE LEIZERMAN, PATRICIA A. LINS, LAWRENCE SUTTER, ALICE L. ACKERMAN, TIMOTHY P. ACKERMAN, JUELY K. BARTHOLOMEW, TIMOTHY J. BARTHOLOMEW, JOAN KRULL, KENNETH ALAN BUSSART, ROBERT COLME BOURGEOIS, SHARON KYLE BOURGEOIS, MARY HERMES, SARAH WEITZ KLAMMER, JOHN S. KLAMMER, THOMAS KORINEK, DAWN KORINEK, COLIN CRAWFORD, DEB CRAWFORD, MARY ELIZABETH BOSWELL, STEVE DANELSKI, MICHAEL MACY, MARGUERITE MACY, WILLIAM R. MEIER, JR., KATRINA MARIA BILLIN, JEFFREY LEE BILLIN, VERONICA FLORES, NICHOLAS FLORES, JEFF R. DOHL, ANGELA P. DOHL, CHARLES SAUTER and DENISE SAUTER, Plaintiffs, J.B. VAN HOLLEN, in his capacity as the Attorney General of the State of Wisconsin, Plaintiff-Intervenor-Counter-Defendant, v. CONSERVE SCHOOL TRUST, JAMES RINN and STEFAN ANDERSON, in his official capacity as Conserve School Headmaster, Defendants, JOHN F. CALHOUN, MICHAEL J. SULLIVAN, RONALD V. KAZMAR, CHRISTOPHER RODGERS and MICHAEL X. CRONIN, Defendants-Respondents,	Appeal No. 2009-AP-2134, On Appeal From Final Judgment Of The Circuit Court For Vilas County, Case No. 09-CV-54, Honorable Neal A. Nielsen, III, Presiding.

CONSERVE SCHOOL CORPORATION,

Defendant-
Cross-Claim-Defendant-
Respondent,

THE CULVER EDUCATIONAL FOUNDATION,

Defendant-Intervenor-
Cross-Claim-Plaintiff-
Counter-Claimant-
Appellant.

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STATEMENT OF ISSUES

1. Do the clear and unambiguous terms of the Trust Instrument of James R. Lowenstine permit the Conserve Defendants to operate the Conserve School as a semester-away program for students who are regularly enrolled in other schools, without triggering the alternate distribution plan specified in the Trust Instrument?

Answered by the trial court: Yes.

2. In the alternative, are the terms of the Trust Instrument, at a minimum, ambiguous as to whether the Conserve Defendants are permitted to operate the Conserve School as a semester-away program for students who are regularly enrolled in other schools, without triggering the alternate distribution plan specified in the Trust Instrument?

Answered by the trial court: No.[1]

3. Should Culver be permitted to obtain extrinsic evidence of the Trust Instrument's meaning?

Answered by the trial court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Culver Educational Foundation ("Culver") does not request oral argument. Its brief fully presents and meets the issues on appeal and fully develops the theories and legal authorities so that oral argument would be of such marginal value that it does not justify the additional expenditure of

[1] As discussed below, to the extent that the trial court answered this question, its answer was itself highly ambiguous. Because the trial court did not issue a finding that the Trust Instrument was ambiguous, however, the trial court could fairly be said to have answered this question, if at all, with a "no."

court time or cost to the litigants. *See* Wis. Stat. § 809.22(2)(b).

Culver respectfully requests that this Court's opinion be published. The Court's opinion will decide a case of substantial and continuing public importance. *See* Wis. Stat. § 809.23(1)(a)(5).

STATEMENT OF THE CASE

I. The Trust Instrument

James R. Lowenstine, deceased, established the Trust while he was a resident and citizen of the State of Illinois. (R.122, Ex. A, A-App-268; R.122, Ex. B at ¶7.) He executed and published a Second Restatement of the Trust on September 19, 1995 (the "Trust Instrument"). (R.122, Ex. A at p. 30, A-App-297; R.122, Ex. B at ¶7.) Mr. Lowenstine died on January 4, 1996. (R.122, Ex. B at ¶8.) The Trust Instrument "and all dispositions" under it "shall be governed by and interpreted in accordance with the laws of the State of Illinois." (R.122, Ex. A at Art. IX, ¶B, A-App-297.)

At and since the time of Mr. Lowenstine's death, the Trust has owned a majority of the voting shares of Central Steel and Wire Company ("CSW"). (R.122, Ex. B at ¶9.) At all relevant times, the principal asset held by the Trust has been shares of the voting stock of CSW. *Id.*

The Trust Instrument provides that after Mr. Lowenstine's death and so long as the Trust owns a controlling interest in CSW, those individuals who serve from time to time as directors of CSW (with the specific exclusion of one director of CSW), shall, by virtue of such status, also

serve as the Trustees of the Trust. (R.122, Ex. A at Art. VII, ¶F, A-App-286.)

The Trust Instrument provides for certain specific pre-residuary distributions upon the death of Mr. Lowenstine to named beneficiaries, which distributions are not at issue in this action. (R.122, Ex. A at Art. IV-V, A-App-269-73.) The Trust Instrument further provides that after the aforementioned distributions are made, the balance of the Trust is to be held by the Trustees in a separate trust, known as the Conserve School Trust. (R.122, Ex. A at Art. VI, A-App-273-84.)

In the Trust Instrument, Mr. Lowenstine provided a distribution plan and an alternate distribution plan for the Conserve School Trust. Under the distribution plan, the Trust Instrument directs that, if certain conditions are met, the Conserve School Trust income and some Conserve School Trust principal could be used to establish and operate a school that would be named the Conserve School and built on Lowenwood, a large spread of property that Mr. Lowenstine owned in Land O'Lakes, Wisconsin. (R.122, Ex. A at Art. VI, ¶¶A-M, A-App-273-81.) The Trust Instrument directs in Article VI, Paragraph B(10) that the Conserve School is to be for "the regular enrollment of students beginning with the seventh grade, and extending, in the discretion of the trustees, through high school." (R.122, Ex. A at Art. VI, ¶B(10), A-App-274.)

The Trust Instrument addresses the issue of access to the Conserve School by students who are regularly enrolled in other schools. The Trust Instrument provides that such

students are not permitted to attend the Conserve School or its programs during regular school hours. (R.122, Ex. A at Art. VI, ¶K, A-App-276-77.) Specifically, under Article VI, Paragraph K, "students who are enrolled in other private schools or public schools may be permitted to enroll in the Conserve School to receive tutorial instruction after such students' regular school hours or on Saturdays and school holidays, and during summer vacations." *Id.*

The Trust Instrument makes clear that Mr. Lowenstine envisioned two different types of students who could attend the Conserve School. Pursuant to Article VI, Paragraph B(10), Mr. Lowenstine intended a "regular enrollment" of full-time students in the Conserve School. Pursuant to Article VI, Paragraph K, Mr. Lowenstine also intended that students who were regularly enrolled in other private schools and public schools may also attend the Conserve School on a more limited basis. In particular, those students would receive "tutorial instruction" at the Conserve School, and only after school hours, or on Saturdays, holidays or summer vacations. (R.122, Ex. A at Art. VI, ¶K, A-App-276-77.)

II. The alternate distribution plan

The Trust Instrument directs in Article VI, Paragraph M the implementation of an alternate distribution plan "if for any . . . reason the trustees determine at any time that it is legally impossible or otherwise impractical to operate the Conserve School . . . ." (R.122, Ex. A at Art. VI, ¶M, A-App-277-81.) Under the alternate distribution plan, the Trustees are directed to sell the shares of CSW that are owned by the Conserve School Trust, and then, subject to certain

conditions, to distribute a specified sum to Rush University Medical Center and then distribute the balance of the Conserve School Trust's assets to Culver. (R.122, Ex. A at Art. VI, ¶¶M-N, A-App-277-82.) Mr. Lowenstine was a graduate of the four-year Culver Military Academy high school. (R.122, Ex. B at ¶17.)

III. The Trustees admit that the Trust Instrument requires them to operate the Conserve School, if at all, as a school of regular enrollment — *i.e.*, a school that offers full-time instruction throughout the academic year to students who are not regularly enrolled in other schools.

The Trustees spent over $60 million of the Conserve School Trust's assets to build the Conserve School so that it could accommodate 400 students. (R.122, Ex. B at ¶19; R.122, Ex. C at Exhibit C.) The school has nine major buildings, including five dormitories, a recreation center with a gymnasium, a technology center, and the James R. Lowenstine Academic Building, which includes 22 classrooms, a 500-seat auditorium, and a library with a collection of 25,000 books. (R.122, Ex. D; R. 122, Ex. E; R. 122, Ex. F.)

In August 2002, the Conserve School commenced formal instruction of students, and until very recently, it was a four-year college preparatory boarding school for students in grades nine through twelve. (R. 122, Ex. B at ¶20.)

The Trustees repeatedly acknowledged in documents filed with the Internal Revenue Service, in the Conserve School's governing documents, in the Trustees' internal documents, in the media, and through other actions that the

Trust Instrument establishes that Mr. Lowenstine intended the Conserve School to be operated, if at all, as a traditional school of regular enrollment for students who are not regularly enrolled in other schools. For example:

- Managing Trustee Ronald V. Kazmar told the Indiana newspaper the *Pilot News* in a June 6, 2007 article: "It was Mr. Lowenstine's desire to set up a college preparatory boarding school for gifted students much like Culver." (R.122, Ex. I, A-App-299; R.122, Ex. B at ¶21(d).)

- The Conserve School Corporation's October 27, 2008 Board of Directors Report poses the question: "What programs might Conserve School offer beyond a *traditional school*?" It then answers: "[Article VI, Paragraph K] authorizes the school to expand its programs beyond a *traditional school* program. This is realized in a variety of ways including summer programs and potentially through School Visits." (R.122, Ex. J, at p. 14 (emphasis added); R.122, Ex. B at ¶21(e).)

- In a 2008 memorandum, Managing Trustee Ronald V. Kazmar suggested to his fellow Trustees that "the establishment of a 6-12 grade day school in conjunction with the semester program" would "serve to better align the school with the provisions of the Trust." (R.122, Ex. K.)

- According to the Conserve School Corporation's 2007 Form 990, which was filed with the Internal Revenue Service on November 4, 2008, the Conserve School is "a nonsectarian, independent, coeducational boarding school (grades 9-12) . . . ." (R.122, Ex. M, Form

990, "Statement," at p. 7 (capitalization omitted); R.122, Ex. B at ¶21(c).)

The Trustees likewise recognized that the provisions of Article VI, Paragraph B(10) are mandatory directions regarding the type of school that could be operated with the assets of the Conserve School Trust:

- The Conserve School Corporation's Form 1023, which was filed with the Internal Revenue Service in March 1998, states: "The By-laws of the [Conserve School] Corporation incorporate the relevant portions of the Trust, which *direct* that the [Conserve] School is to be for the *regular enrollment of students* beginning with the 7th grade and extending, in the discretion of the trustees, through high school." (R.122, Ex. C at Exhibit C, at p. 1 (emphasis added); R.122, Ex. B at ¶21(a).)

- Section 1.2 of the Conserve School Corporation's By-Laws states that the purpose of the Conserve School Corporation is "to establish and administer a school to be known as Conserve School, in a manner that carries out . . . *the instructions* given by James R. Lowenstine to his trustees *in paragraphs A through L of Article VI* of the James R. Lowenstine Trust . . . ." (R.122, Ex. L, at p. 1 (emphasis added); R.122, Ex. B at ¶21(b).)

IV. The Trustees decide to close the Conserve School and replace it with a semester-away program for students who are regularly enrolled in other schools.

On January 30, 2009, the Trustees and the headmaster of the Conserve School notified the Conserve School's students and their parents that, due to the impact of the

economic downturn, the Trustees had decided that the Conserve School would cease to exist as a four-year boarding school beginning in the 2009-2010 academic year. (R.122, Ex. B at ¶22; R. 122, Ex. G.) Instead, beginning in the 2009-2010 academic year, the Trustees would use the Conserve School Trust's assets to operate the Conserve School as a semester-away program for high school juniors who are regularly enrolled in other schools. (R.122, Ex. G.) Stated differently, there will be no regularly enrolled students at the Conserve School, as every single student will now be regularly enrolled elsewhere.

As a result of the Trustees' decision to close the Conserve School and replace it with a semester-away program for high school juniors who are regularly enrolled in other schools, the student body is expected to drop from approximately 150 students to 30-45 students each semester (R.122, Ex. B at ¶23; R.122, Ex. G), and 32 of the Conserve School's 50 faculty and staff members were terminated as of June 30, 2009 (R.122, Ex. H).

V. Proceedings in the Trial Court

This litigation was initiated by a group of parents of Conserve School students and an entity that they created, Conserve Community LLC.[2] (R.1.) In that action, the parents sought to enjoin the Trustees from transforming the four-year boarding school into a semester-away program that would be open only to high school juniors. (R.1:9-16.) The

[2] Because they are not at issue in its appeal, Culver will not specifically address the claims brought by Conserve Community LLC, individual Conserve parents, or the Attorney General.

Conserve School Trust, its Trustees and treasurer, the Conserve School Corporation, and the Conserve School's headmaster were named as defendants. (R.1.) The trial court ultimately dismissed the parents' claims, finding that the parents lacked standing. (R.113:31-40.) The trial court, however, allowed Culver to intervene in order to assert claims against the defendants, as Culver was a designated contingent beneficiary under the Trust Instrument. (R.114:28-38.)

On April 24, 2009, Culver filed an Amended Cross-Claim and Counterclaim for Declaratory Relief and Damages. (R.77.) Culver's Amended Cross-Claim was filed against the Conserve School Corporation and the Trustees of the Conserve School Trust (the "Conserve Defendants").[3] *Id*. Count I of that pleading requested a declaratory judgment that: (i) the "Trustees' decision to close the Conserve School as a school of regular enrollment and to open a semester away program for students enrolled at other schools violates Article VI, Paragraph B and/or Article VI, Paragraph K of the Trust Instrument;" (ii) "it has become legally impossible or otherwise impractical to operate the Conserve School;" and (iii) the "Trustees are legally obligated to implement the terms of the alternate distribution plan set forth in the Trust Instrument . . . ." (R.77:9.) Count II, which asserted a claim for breach of fiduciary duty, and Count III, which asserted a claim for breach of the Trust Instrument, were likewise premised upon the Trustees' decision to replace the Conserve

[3] The Trustees of the Conserve School Trust were also sued in their capacity as trustees of the James R. Lowenstine Trust Dated August 17, 1981. *Id.*

School with a semester-away program for students who are regularly enrolled in other schools. (R.77:9-11.)

A. Hearing of April 21, 2009

Culver immediately requested the production of attorney files in the possession of Schiff Hardin LLP, the law firm that drafted the Trust Instrument for Mr. Lowenstine, in order to obtain evidence of Mr. Lowenstine's intent. (R.68:2.) When the Conserve Defendants objected to such discovery, Culver moved to compel the production of the attorney files. *Id*. The trial court considered Culver's motion during a telephonic hearing on April 21, 2009. (R.115, A-App-101.) Near the outset of the hearing, the trial court posed the following questions:

> How much of this case revolves around this Court making a determination as to Mr. Lowenstine's intent as expressed through the document? . . . But is the issue in this case whether the Trustees are remaining true to his vision, or whether the Trustees are acting outside of the scope of authority that's provided in the Trust?

(R.115:11, A-App-111.) Culver's counsel argued in response that "the goal is to achieve his [*i.e.*, Mr. Lowenstine's] vision and intent," and that Culver should be allowed to take "full discovery on that issue." (R.115:12, A-App-112.) Later in the same hearing, however, the trial court expressed doubt as to whether it was being asked to interpret the Trust Instrument:

> The issue here that you raise may have some interest if this was a case about the interpretation of a Trust. And I am really not sure that that is the focus of what this litigation is all about. It seems to me, it maybe [*sic*] more of a peripheral consideration. . . . [I]t seems to me that fundamentally, I am not being asked to declare what this Trust says, or how the Trustees should administer it. I am being asked to determine whether the Trustees have breached a duty, and violated the terms of the Trust.

> And aren't those really separate issues? Or are they so inextricably woven together that we can't get from one to the other?

(R.115:16, A-App-116.)

* * *

> But the question is not what he [*i.e.*, Mr. Lowenstine] may have intended but how much authority did he give his Trustees to act in their own discretion regarding the creation of that vision that we're talking about, based on circumstances, and so forth?

(R.115:20, A-App-120.)

The court ultimately denied Culver's motion because there was no evidence that the Trustees had seen the attorney files:

> But I think for purposes of what the Court is being asked to examine and accomplish, that those communications would not be particularly relevant, because they haven't been ─ there is no shred of evidence that they have been communicated to the Trustees.

(R.115:25-26, A-App-125-26.)

B. Hearing of April 23, 2009

The parties appeared before the trial court on April 22, 2009. (R.113.) On that date, the Conserve Defendants indicated that they would answer Culver's pleading and move for summary judgment. (R.112:5-6, A-App-134-35.) Culver then renewed its motion to compel production of the attorney files during a telephonic hearing on April 23, 2009. (R.112.) Once again, the trial court denied Culver access to the attorney files, because "the record indicates that none of the Trustees have relied on any extrinsic information." (R.112:12, A-App-141.) Further explaining its decision, the trial court stated that, in its view, evidence of Mr. Lowenstine's intent was not relevant:

> It really is, I think, only for the potential to have further evidence, or more concrete evidence of Mr. Lowenstine's intent. And that's not something that is relevant here. Because, again, regardless of what intent may have been, the Trustees did not have this information at the time that they took ─ under the Trust document, and used that document as the basis for making their decisions.
>
> Now, when they use that same document to turn the course of the School, the question doesn't become whether it's violative of Mr. Lowenstine's intent. The question is, is it violative of the terms of the Trust?

(R.112:15, A-App-144 (emphasis added).) The trial court "reserve[d] the right to revisit the ruling in the event that [it] were to make a determination of ambiguity" after reviewing the parties' summary judgment motions. (R.112:18, A-App-147.) By order dated May 4, 2009, the trial court set a briefing schedule on the parties' anticipated summary judgment motions and set a trial date in the event that the summary judgment motions were denied. (R.81.)

C. Hearing of June 8, 2009

The Conserve Defendants moved for summary judgment on Counts I through III of Culver's Amended Cross-Claim, and Culver filed a cross-motion for summary judgment on those counts. (R.84; R.87.) Those cross-motions for summary judgment were considered by the trial court at a hearing on June 8, 2009. (R.117:67-111, A-App-215-59.) During this hearing, Culver and the Conserve Defendants agreed that the central issue was Mr. Lowenstine's intent, as reflected in the language of the Trust Instrument. Culver argued that Mr. Lowenstine's intent, as reflected in the language of the Trust Instrument, required the Conserve School to be operated, if at all, as a traditional

school of regular enrollment. (R.117:73, A-App-221.) The Conserve Defendants, on the other hand, argued that Mr. Lowenstine did not intend to "prescribe a particular form for the School." (R.117:88-89, A-App-236-37.) Nevertheless, the trial court framed the issue this way:

> The issue before the Court today is whether or not there has been a breach of the Trust. But so long as the Trustees act in good faith, and from proper motives, and within the bounds of reasonable judgment under the terms and conditions of the Trust, then the Court has no right to interfere. That's Estate of Fillzen(sp), 252 Wisconsin 322. "It's only when they act outside the bounds of reasonable judgment, or are guilty of an abuse of discretion, or when they act dishonestly or improperly that the Court may interfere."

(R.117:35, A-App-183.) The trial court continued to draw a distinction between Mr. Lowenstine's intent and the requirements of the Trust Instrument. For example, the court asked, "Is the issue here what Mr. Lowenstine intended, or what the Trust requires? Where does the distinction lie there?" (R.117:78, A-App-226.)

At one point, the trial court explicitly sought clarification about whether it was being asked to interpret the Trust Instrument:

> [THE COURT:] During the course of these proceedings, both Conserve and Culver have taken the position that the Trust document is unambiguous. And that this is not a case in which the Court is being asked to interpret the document, but apply it and enforce it.
>
> And yet, it seems to me, that we're coming pretty darn close to the concept that someone's got to make a determination of what's meant by these paragraphs, does that affect our status today in anyway, from your perspective?
>
> MR. HORWITCH [Counsel for Culver]: No, your Honor, we're asking you to interpret the document and enforce it. . . .

(R.117:84-85, A-App-232-33.) The trial court, however, attempted to decide the scope of the Trustees' authority under the Trust Instrument without considering Mr. Lowenstine's intent, as reflected in the Trust Instrument:

> The issue today is really not his vision. Because as everyone indicates, I am not being asked to determine Mr. Lowenstine's intent. This is not a petition for instruction. This is a case of whether a particular action taken by the Trustees is authorized, or not authorized by the Trust. . . . And so even if the Court were to agree with the Trustees determination [*sic*] that the four-year boarding high school was the vision of Mr. Lowenstine, the question here is not whether the Trustees are failing to follow that vision, but whether they are legally authorized by the Trust to adopt some other form of school in light of the reality that's now on the ground.

(R.117:96-97, A-App-244-45.)

With respect to Article VI, Paragraph B(10)'s requirement that the Conserve School must be operated as a "school for the regular enrollment of students," the trial court stated, "I don't know that the Court does find ambiguity in this situation." (R.117:103, A-App-251.) The trial court made several remarks suggesting that it considered the Trust Instrument to be at least somewhat ambiguous, but never expressly found the Trust Instrument to be ambiguous. (*See* R.117:92-105, A-App-240-53.)

The trial court ultimately found that the semester-away program did not violate Paragraph B(10) on the theory that the students who participate in the semester-away program will be regularly enrolled in the Conserve School even though they will also be enrolled in other schools. (R.117:103-04, A-App-251-52.) With respect to the criteria in Paragraph K for the provision of tutorial instruction to students who are regularly enrolled in other schools, the trial court stated,

"Paragraph (K) does not lead me to an alternate conclusion. Language there is clearly not mandatory, it's precatory if you will, wishful . . . ." (R.117:104, A-App-252.) The trial court found that "dual enrollment" is not "something that trips up the ability of the Trustees to do this." (R.117:105, A-App-253.) The trial court commented on the "extraordinary latitude" that the Trust Instrument, in its view, gave to the Trustees. (R.117:102, A-App-250.) The court then found that the semester-away program was not prohibited by the Trust Instrument. (R.117:106, A-App-254.) The trial court therefore awarded summary judgment to the Conserve Defendants. (R.117:108, A-App-256.)

D. Final Judgment Order

The trial court entered an order granting the Conserve Defendants' Motion for Summary Judgment as to Counts I through III of Culver's Amended Cross-Claim, and denying Culver's Cross-Motion for Summary Judgment. (R.104, A-App-261.) A final judgment order was filed on August 5, 2009. (R.107, A-App-266.)

STANDARD OF REVIEW

I. Standard of Review on the Trial Court's Award of Summary Judgment to the Conserve Defendants

The trial court's summary judgment rulings are subject to *de novo* review. *See Milwaukee Partners v. Collins Engineers, Inc.*, 169 Wis.2d 355, 361, 485 N.W.2d 274, 276 (Wis. Ct. App. 1992). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." *See* Wis. Stat. § 802.08(2).

II. Standard of Review on the Trial Court's Failure to Find that the Trust Instrument Is, at a Minimum, Ambiguous as to the Issue Presented

"[W]hether an ambiguity exists is a question of law." *In re Marriage of Spencer*, 140 Wis.2d 447, 450, 410 N.W.2d 629, 630 (Wis. Ct. App. 1987). "An appellate court must decide questions of law independently without deference to the trial court's decision." *Id.*

III. Standard of Review on the Trial Court's Denial of Culver's Motions to Compel Production of Attorney Files

Because discovery rulings are "addressed to the discretion of the trial court," they "will be upheld on review when the trial court applies the relevant law to facts of record using a process of logical reasoning." *Franzen v. Children's Hosp. of Wis., Inc.*, 169 Wis.2d 366, 376, 485 N.W.2d 603, 606 (Wis. Ct. App. 1992). "Basing a decision upon an error of law," however, "is an abuse of discretion." *Id.* "Abuse of discretion need not involve an arbitrary or capricious misuse of discretion. The trial court abuses its discretion when it bases its decision on an error of law." *Dyson v. Hempe*, 140 Wis.2d 792, 799-800, 413 N.W.2d 379, 382 (Wis. Ct. App. 1987). "[W]hether the circuit court applied the proper legal standard is a question of law we review independently of the circuit court but benefiting from its analysis." *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶13, 312 Wis.2d 1, 13, 754 N.W.2d 439, 444 (Wis. 2008). The trial court's application of

the legal standard therefore presents a legal question that is subject to *de novo* review.

ARGUMENT

The Trustees chose to scrap the Conserve School, close the school's doors to the students it had already enrolled, and laid off nearly three dozen faculty and staff members in the midst of a severe national recession. This was, at the very least, a radical change in direction. Up until that drastic shift, the Trustees had publicly admitted on numerous occasions that Mr. Lowenstine intended the Conserve School to be a traditional, college preparatory boarding school. This drastic change in the Conserve School's structure, format and mission is prohibited by the Trust Instrument.

The trial court's award of summary judgment to the Conserve Defendants should be reversed because the Conserve Defendants' new semester-away program violates the clear and unambiguous terms of the Trust Instrument. In granting summary judgment against Culver, the trial court improperly focused on whether the Trustees acted in good faith and with proper motives. The trial court should instead have analyzed whether the new semester-away program complied with the settlor's intent, as reflected in the clear and unambiguous terms of the Trust Instrument. Because the semester-away program is prohibited by the Trust Instrument, the trial court's decision should be reversed.

Alternatively, the trial court's judgment should be reversed because the trial court failed to find that the Trust Instrument, at a minimum, is ambiguous as to whether the

Trustees may replace the Conserve School with a semester-away program for students who are regularly enrolled in other schools. The trial court likewise erred when it denied Culver's repeated request for the production of documents that could have revealed the settlor's intent. The trial court denied Culver's requests because, again, it chose to address whether the Trustees' actions were undertaken in good faith, instead of whether those actions were consistent with the settlor's intent and authorized by the Trust Instrument.

I. The trial court erred in finding that the Trustees are authorized to close the four-year boarding school and replace it with a semester-away program for high school juniors who are regularly enrolled in other schools.

A. The trial court expressly did not give effect to Mr. Lowenstine's intent.

Under Illinois law, which governs the Trust Instrument (R.122, Ex. A at Art. IX, ¶B, A-App-297), it is "axiomatic that the limits of a trustee's powers are determined by the instrument which creates the trust." *See Stuart v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 68 Ill.2d 502, 523, 369 N.E.2d 1262, 1271 (Ill. 1977); *see also Cowles v. Morris & Co.*, 330 Ill. 11, 24-25, 161 N.E. 150, 156 (Ill. 1928) ("A trustee is required to perform the trust he has undertaken in accordance with its provisions . . . ."). In other words, the Trust Instrument sets the metes and bounds of the Trustees' authority. Wisconsin law is in accord. *See Saros v. Carlson*, 244 Wis. 84, 88, 11 N.W.2d 676, 679 (Wis. 1943) ("It is a trustee's paramount duty to preserve the estate and to comply with the terms of the trust"). Therefore, in order to determine

whether the Trustees complied with the terms of the Trust, the trial court was obligated to interpret the Trust Instrument.

The "purpose of judicial construction of a trust agreement is to ascertain and give effect to the settlor's intent." *In re Estate of Bork*, 145 Ill. App. 3d 920, 928, 496 N.E.2d 329, 334 (Ill. App. Ct. 1986). "[T]he terms employed" in a trust instrument "are servants and not masters of an intent, and are to be interpreted so as to subserve, and not to subvert, such intent . . . ." *Vournazos v. Vournazos*, 71 Ill. App. 3d 672, 676, 390 N.E.2d 19, 22 (Ill. App. Ct. 1979) (*quoting U.S. Trust Co. of N.Y. v. Jones*, 414 Ill. 265, 271, 111 N.E.2d 144, 147 (Ill. 1953)); *see also First Illini Bank v. Pritchard*, 230 Ill. App. 3d 861, 864, 595 N.E.2d 728, 730 (Ill. App. Ct. 1992) ("the challenge is to find the settlor's or testator's intent and, provided that the intention is not against public policy, to give it effect"). Wisconsin law is in accord. *See In re Estate of Barr*, 78 Wis.2d 254, 258, 253 N.W.2d 901, 903 (Wis. 1977) ("in construing trusts . . . the language thereof should be construed so as to give effect to the subjective intent of the settlor"); *see also In re Fortwin Trust*, 57 Wis.2d 134, 138, 203 N.W.2d 711, 714 (Wis. 1973) ("This court has consistently held that the donor's subjective intent is determinative in interpreting a will or trust"); *Kuolt v. Kaufer*, 164 Wis. 136, 143, 159 N.W. 806, 809 (Wis. 1916).

Accordingly, "[t]he purposes of the trust and the powers of the trustee must be read together. When the settlor has a particular purpose in mind, it would be improper for us to ignore that purpose by concluding that the trustee could do whatever he wanted." *Peck v. Froehlich*, 367 Ill. App. 3d

225, 231, 853 N.E.2d 927, 933 (Ill. App. Ct. 2006). In short, the settlor's intent, as reflected in the language of the Trust Instrument, sets the limits of the Trustees' authority.

Despite these settled principles, on which Culver and the Conserve Defendants agreed, the trial court repeatedly stated that the settlor's intent was irrelevant:

- The trial court stated that "the question is not what he [*i.e.*, the settlor] may have intended . . . ." (R.115:20, A-App-120.)
- Referring to "Mr. Lowenstine's intent," the trial court stated, "[T]hat's not something that is relevant here." (R.112:15, A-App-144.) The "question," in the trial court's view, "doesn't become whether it's violative of Mr. Lowenstine's intent." *Id.*
- The trial court stated that the "issue today is really not his [*i.e.*, the settlor's] vision," and the trial court did not believe it was "being asked to determine Mr. Lowenstine's intent." (R.117:96, A-App-244.)

The trial court thus believed that the appropriate inquiry was whether the Trustees had acted in good faith. In doing so, the trial court expressly relied upon the following *dicta* from *In re Estate of Filzen*, 252 Wis. 322, 326, 31 N.W.2d 520, 522 (Wis. 1948), in which the Wisconsin Supreme Court stated:

> So long as trustees act in good faith and from proper motives and within the bounds of a reasonable judgment under the terms and conditions of the trust, the court has no right to interfere. It is only when they act outside the bounds of a reasonable judgment, or are guilty of an abuse of discretion, or when they act dishonestly and improperly that the court may interfere.

(R.117:35, A-App-183.)[4] The trial court's reliance on *Filzen* was misplaced. First, the trial court erred in using Wisconsin case law to interpret the Trust Instrument. The Trust Instrument is governed by Illinois law. (R.122, Ex. A at Art. IX, ¶B, A-App-297.) Second, *Filzen* addressed a fundamentally different issue. In that case, the petitioner claimed only that the trustees had "acted arbitrarily and unreasonably." *See Filzen*, 252 Wis. at 325, 31 N.W.2d at 522. In this case, by contrast, Culver argues that the Trustees' actions, although perhaps undertaken in good faith and with pure motives, violate the restrictions set forth in the Trust Instrument. Culver does not claim and need not prove that the Trustees acted in bad faith or from improper motives, but need only prove that the semester-away program violates the criteria set forth in the Trust Instrument. *Filzen* therefore has no application to this case.

The trial court thus applied the wrong legal standard. It erroneously believed that, in order to find that the Trustees were prohibited by the Trust Instrument from replacing the Conserve School with a semester-away program, it first had to find that the Trustees were acting in bad faith. (R.117:35, A-App-183.) The trial court did not consider the possibility that a good-faith decision by the Trustees could nevertheless fail to meet the Trust Instrument's criteria. This was reversible error. As recognized even in *Filzen*, the "discretion

[4] The trial court made this statement in an exchange with counsel for the Attorney General's office, but the trial court was addressing the same legal issue that underlies Culver's claims ─ *i.e.*, whether the Trustees "have the authority" under the Trust Instrument to replace the Conserve School with a semester-away program. (R.117:35, A-App-183.)

of trustees is not absolute and unlimited," and in addition to acting in good faith, trustees must exercise their authority "under the terms and conditions of the trust . . . ." *See Filzen*, 252 Wis. at 325-26, 31 N.W.2d at 522. Mr. Lowenstine's intent, as outlined in the Trust Instrument, prohibits the Trustees from operating the Conserve School only as a semester-away program for high school juniors who are regularly enrolled in other schools. The trial court was required to consider Mr. Lowenstine's intent in order to resolve the issues before it. The trial court instead focused on whether the Trustees acted in good faith, which was simply irrelevant.

B. The Trust Instrument unambiguously prohibits the Trustees from operating the Conserve School as a semester-away program for students who are regularly enrolled in other schools.

1. The plain and unambiguous language of the Trust Instrument prohibits the semester-away program.

If the settlor's intent is brought into focus, as Illinois law requires, it then becomes abundantly clear that the Trust Instrument does not authorize the new semester-away program. Pursuant to Article VI, Paragraph B(10), if the Trustees elect to spend Trust income or principal on the Conserve School, the school must be "for the regular enrollment of students beginning with the seventh grade, and extending, in the discretion of the trustees, through high school." (R.122, Ex. A at Art. VI, ¶B(10), A-App-274.) Thus, under Article VI, Paragraph B(10), the Trustees must

operate the Conserve School, if at all, as a school of "regular enrollment."

The phrase "regular enrollment of students" in Article VI, Paragraph B(10) has a plain and unambiguous meaning: The Conserve School must be the primary, or regular, school of an enrolled population of students. This meaning is confirmed by Paragraph B(10)'s reference to an enrollment of students "beginning with the seventh grade, and extending, in the discretion of the trustees, through high school." In other words, Mr. Lowenstine intended the Conserve School to provide the "regular enrollment of students" at least a full "grade" of education. In Paragraph B(10), Mr. Lowenstine clearly and unambiguously expressed his intent that the Conserve School would provide education in full "grade" level increments. Paragraph B(10) does not mention, much less authorize, semester-length programs for students who are enrolled in other schools. The new semester-away program is prohibited by Paragraph B(10) because the Conserve School is no longer the primary or regular school of any students, and because it now gives no students a full "grade" of education.

Culver's interpretation of Paragraph B(10) is fully supported by the overall structure of the Trust Instrument, which contrasts the population of students that are the subject of Article VI, Paragraph B(10) with the separate population of students that are the subject of Article VI, Paragraph K. Put another way, the Trust Instrument draws a distinction between those students who are regularly enrolled in the Conserve School and those who are regularly enrolled in public or other private schools. Specifically, in Article VI,

Paragraph K, Mr. Lowenstine provided that "students who are enrolled in public or other private schools may be permitted to enroll in the Conserve School to receive tutorial instruction after such students' regular school hours or on Saturdays and school holidays, and during summer vacations." (R.122, Ex. A at Art. VI, ¶K, A-App-276-77.) That population of students must be distinct from the "regular enrollment" referenced in Paragraph B(10). Unlike the population that is referenced in Paragraph B(10), which clearly can receive at least a full "grade" of education at the Conserve School, the population that is referenced in Paragraph K may receive only "tutorial instruction" at the Conserve School, and only outside of regular school hours.

While Paragraph K authorizes the provision of limited "tutorial instruction" to students who are enrolled in other schools, Paragraph B(10) makes clear that if the Conserve School is operated with the Conserve School Trust's assets, it must, at a minimum, provide instruction to a "regular enrollment of students." The new semester-away program is prohibited by the Trust Instrument because it eliminates the "regular enrollment of students" at the Conserve School.

These provisions of the Trust Instrument reflect Mr. Lowenstine's clear intent that the Conserve School would primarily serve students who were regularly enrolled there, and would perhaps also serve a secondary population of students who would be eligible only for "tutorial instruction," and only outside of normal school hours. The new semester-away program turns Mr. Lowenstine's intent on its head by eliminating the required primary population of students who

are regularly enrolled in the Conserve School, and providing instruction only to students who are regularly enrolled elsewhere. Under Illinois law, the Trustees cannot deviate from Mr. Lowenstine's intent as reflected in the language of the Trust Instrument. The trial court's judgment, which permitted this new semester-away program, therefore cannot stand.

Culver's designation as the ultimate beneficiary of the alternate distribution plan confirms that Mr. Lowenstine intended the Conserve School to be a school of regular enrollment, and not merely a semester-away program. (R.122, Ex. A at Art. VI, ¶M, A-App-277-81.) Culver is a four-year college preparatory boarding school. (R.122, Ex. B at ¶¶3 and 17.) Mr. Lowenstine, a Culver alumnus, was familiar with, and evidently approved of, Culver's overall structure and organization. The manifest purpose of designating an alternate plan is to achieve some approximation of the primary goal, in the event that the primary goal becomes unattainable. Culver, therefore, is at least an approximation of what Mr. Lowenstine wanted the Conserve School to become.

As the trial court correctly found, Mr. Lowenstine "was greatly enamored of the Culver Academy," and "that's clear from the fact that it is the primary alternate beneficiary." (R.117:95, A-App-243.) The same cannot be said of the novel semester-away program, which bears no resemblance either to Culver or to the Conserve School that Mr. Lowenstine intended.

When the trial court eventually did contemplate the settlor's intent, it overlooked the language of the Trust Instrument. Near the end of the June 8th hearing, the trial court speculated:

> What did Mr. Lowenstine want? He wanted people to experience Lowenwood. He wanted people to have the opportunity to spend time at a facility there. To be engaged with nature as part of an education. To enjoy outdoor sports and be instructed in them. To develop a love for ecology and ecosystems. All of that can be accomplished by a semester program.

(R.117:107-08, A-App-255-56.) But the question is not whether the semester-away program gives students an opportunity to "be engaged with nature as part of an education." The question is whether the semester-away program complies with Mr. Lowenstine's intent for a school of "regular enrollment." Because it does not, the trial court's judgment should be reversed.

As the trial court acknowledged, Mr. Lowenstine wanted people to experience Lowenwood "in a particular way." (R.117:94, A-App-242.) That "particular way" is reflected in the Trust Instrument, and Mr. Lowenstine set forth a detailed alternate distribution plan if it were impractical to establish a school at Lowenwood that met his particular requirements. It should come as no surprise that Mr. Lowenstine had specific requirements for the format and structure of the school that was to be built on his property and operated with his money. Those mandatory requirements are specified in the clear and unambiguous terms of the Trust Instrument, and under fundamental principles of Illinois and Wisconsin law, they must be given effect.

2. The Trustees have made compelling admissions regarding the Trust Instrument's requirements.

As discussed above (*supra* at 5-7), the Trustees have admitted in the media, in the Conserve School's governing documents, and in documents filed with the Internal Revenue Service that the Trust Instrument requires them to operate the Conserve School, if at all, as a school of regular enrollment. For example, the Managing Trustee admitted to a newspaper that "[i]t was Mr. Lowenstine's desire to set up a college preparatory boarding school for gifted students much like Culver." (R.122, Ex. I, A-App-299; R.122, Ex. B at ¶21(d).) Likewise, the Conserve School Corporation's By-Laws acknowledged that the provisions of Article VI, Paragraphs A-L of the Trust Instrument are "instructions," and not merely suggestions. (R.122, Ex. L, at p. 1 (emphasis added); R.122, Ex. B at ¶21(b).) The Conserve School Corporation's Form 1023 similarly acknowledged that the Trust Instrument's relevant provisions "direct" ─ and do not merely suggest ─ that the Conserve School must be operated "for the regular enrollment of students . . . ." (R.122, Ex. C at Exhibit C, at p. 1 (emphasis added); R.122, Ex. B at ¶21(a).)

The Trustees' admissions regarding their interpretation of the Trust Instrument are relevant and compelling. As one court has explained, "when parties act under a written instrument, they show by their conduct their interpretation of that instrument and are bound thereby. They should not be permitted to later change their mind and complicate and hinder the administration of a trust created under such an

instrument." *See In re Estate of Whitman*, 221 Iowa 1114, 1127, 266 N.W. 28, 35 (Iowa 1936).

In addition, the very fact that the Trustees spent $60 million to construct a school to accommodate 400 students, which includes five dormitories, 22 classrooms, a 500-seat auditorium, and a library with 25,000 books demonstrates that, when they built the school, the Trustees could not have seriously interpreted the Trust Instrument as potentially allowing them to operate the Conserve School only as a semester-away program. The Trustees clearly did not build facilities for a population of only 30-45 students ─ the contemplated population in the semester-away program. Instead, they built a massive school for a much larger population of students who would presumably live and study at the Conserve School throughout the standard academic year. The large campus structures and vacant dormitories on the Conserve School campus speak volumes about the Trustees' own interpretation of the Trust Instrument.

C. The trial court's interpretation of the Trust Instrument is erroneous.

1. The trial court's interpretation would render language in the Trust Instrument superfluous.

The most fundamental criteria for the Conserve School's structure and format are set forth in Article VI, Paragraph B(10), which provides:

> As soon after my death as is reasonably possible, and from time to time thereafter, the trustees may also use net income and principal of the Conserve School Trust: . . .
> (10) to open the school *for the regular enrollment of students beginning with the seventh grade, and*

> *extending, in the discretion of the trustees, through high school.*

(R.122, Ex. A at Art. VI, ¶B(10), A-App-273-74 (emphasis added).) In other words, the Trustees "may" use the trust funds to operate a school "for the regular enrollment of students . . . ." Nothing in the Trust Instrument authorizes the Trustees to use trust funds to operate a school for the special or temporary enrollment of students in a semester-away program.

Nevertheless, the trial court ultimately determined that it was permissible for the Trustees to operate the Conserve School exclusively as a semester-away program for high school juniors who are regularly enrolled in other schools. (R.117:92-111, A-App-240-59.) The trial court's interpretation of the Trust Instrument would render much of the Trust Instrument superfluous. Under well established Illinois law, no language in the Trust Instrument may be deemed superfluous. "If possible, the court should construe the will or trust so that no language used by the testator is treated as surplusage or rendered void or insignificant." *Harris Trust & Sav. Bank v. Donovan*, 145 Ill.2d 166, 172-73, 582 N.E.2d 120, 123 (Ill. 1991).

The trial court's interpretation would render Article VI, Paragraph K of the Trust Instrument superfluous. That paragraph provides:

> I further request that if, after due consideration, the trustees deem it feasible, *students who are enrolled in public or other private schools* may be permitted to enroll in the Conserve School *to receive tutorial instruction after such students' regular school hours or on Saturdays and school holidays, and during summer vacations.*

(R.122, Ex. A at Art. VI, ¶K, A-App-276-77 (emphasis added).) Paragraph K specifically states that students who are regularly enrolled elsewhere may receive only *tutorial* instruction at the Conserve School, and only at limited times. Paragraph K would have been totally unnecessary if Article VI permitted the Conserve School to offer nothing but temporary instruction to students who are regularly enrolled in other schools. This paragraph was written on the assumption that the students who attend the Conserve School during normal school hours would not be enrolled in other schools.

In other words, Paragraph K makes clear that the Conserve School may offer part-time tutorial instruction only *in addition to* a program for regularly enrolled students. As the trial court acknowledged, Paragraph K presupposes the existence of two populations of students: (i) students who are regularly enrolled in the Conserve School; and (ii) students "who weren't normally there, that were outside of Conserve's regular programming . . . ." (R.117:104, A-App-252.) If the Trustees have discretion to eliminate regular enrollment at the Conserve School, and to offer only special semester-away programs, Paragraph K would serve no purpose. Indeed, the trial court freely admitted that, under its interpretation, Paragraph K is merely "precatory if you will, wishful . . . ." (R.117:104, A-App-252.)

Under the new semester-away program, there will be no regularly enrolled students at Conserve, as every single student will now be regularly enrolled elsewhere. By any measure, this violates Paragraphs B(10) and K, and therefore

violates Mr. Lowenstine's clearly stated intent. *See Harris Trust & Sav. Bank v. Donovan*, 145 Ill.2d 166, 172, 582 N.E.2d 120, 123 (Ill. 1991) ("The intention of the settlor is to be ascertained by examining the entire trust and by giving to the words employed their plain and ordinary meaning").

The trial court's interpretation would also render the alternate distribution plan superfluous. The alternate distribution plan provides that if it is "impractical to operate the Conserve School," then a specific legacy must be made to Rush University Medical Center, and then the remainder of the trust assets must be distributed to Culver. (R.122, Ex. A at Art. VI, ¶¶M-N, A-App-277-82.) If the Trust Instrument did not set any requirements for the Conserve School's form and structure, there would be no need for an alternate distribution plan, as the Trustees could simply create whatever type of school could possibly exist at Lowenwood. The fact that Mr. Lowenstine created a detailed alternate distribution plan ─ to be implemented if the Conserve School could not practically be operated in compliance with the terms of the Trust Instrument ─ demonstrates that, in fact, there are binding requirements for the Conserve School's structure and format. They are set forth in Paragraphs B(10) and K of Article VI of the Trust Instrument.

2. The trial court misinterpreted Article VI, Paragraph K of the Trust Instrument.

The trial court found that Article VI, Paragraph K was "precatory." (R.117:104, A-App-252.) The trial court misunderstood that provision, which states as follows:

> I further request that if, after due consideration, the trustees deem it feasible, students who are enrolled in public or other private schools may be permitted to enroll in the Conserve School to receive tutorial instruction after such students' regular school hours or on Saturdays and school holidays, and during summer vacations.

(R.122, Ex. A at Art. VI, ¶K, A-App-276-77.)

Paragraph K is precatory, if at all, only in the sense that the Trustees are not required to offer *any* instruction to "students who are enrolled in public or other private schools . . . ." The restrictions in Paragraph K are clearly not precatory. If the Trustees choose to offer instruction to this population of students, they are authorized *only* to offer "tutorial instruction," and *only* "after such students' regular school hours or on Saturdays and school holidays, and during summer vacations." The seemingly precatory language refers only to the Trustees' decision *whether* to offer limited instruction to a secondary population of students. While the Trustees are not obligated to offer any instruction to students who are regularly enrolled elsewhere, they are bound to comply with Paragraph K's restrictions once they choose to do so.

The trial court's interpretation of Paragraph K overlooked the maxim *expressio unius est exclusio alterius* ("the expression of one is the exclusion of another"), which applies to the interpretation of trust instruments. *See Corn Belt Bank v. Hankins*, 50 Ill. App. 3d 773, 777, 365 N.E.2d 1114, 1117 (Ill. App. Ct. 1977) (applying the maxim of *expressio unius* to the construction of a trust instrument). When Mr. Lowenstine chose to authorize only "tutorial instruction" for the second population of students, and only

outside of the ordinary school day, he implicitly prohibited programs that would exceed those restrictions, such as the new semester-away program.

There may be excellent reasons for Paragraph K's restrictions. Perhaps Mr. Lowenstine was afraid that visiting students who were regularly enrolled elsewhere would be more inclined to misbehave, or to treat Lowenwood more like a vacation spot than a long-term home. Perhaps he wanted the Conserve School to be a traditional school like Culver, his *alma mater* and the ultimate beneficiary of his alternate distribution plan. Perhaps he was wary of a program that would give all of its students, at best, a fleeting and superficial relationship with the Northwoods. Or perhaps he was simply uncomfortable with the possibility that students who did not owe their undivided loyalty to the Conserve School would nevertheless be allowed to stay on his property. Whatever his reasons, Mr. Lowenstine wanted students who were enrolled elsewhere to receive only limited "tutorial instruction" at the Conserve School, and only outside of normal school hours. That restriction presupposes the existence of a separate population of students who call the Conserve School, and only the Conserve School, their *alma mater*. The most radical aspect of the Trustees' new program is its elimination of that primary population of students.

Furthermore, the trial court failed to interpret Paragraph B(10) in light of the context provided by Paragraph K. Paragraph K illustrates the meaning of Paragraph B(10) by demonstrating that Mr. Lowenstine envisioned two populations of students who could receive instruction at the

Conserve School. When Paragraph B(10) speaks of the "regular enrollment" of students, it does so in contrast to the other population of students who, as described in Paragraph K, would receive only "tutorial instruction" at the Conserve School, and only outside of normal school hours. Because it considered Paragraph B(10) in isolation from Paragraph K, the trial court misunderstood both provisions.

Finally, the trial court opined that Paragraph K exists because Mr. Lowenstine "wanted the facility to be able to provide additional benefits to other people who weren't normally there . . . ." (R.117:104, A-App-252.) Even assuming that is true, it does not provide a basis for ignoring the restrictions in Paragraph K, nor does it provide a justification for eliminating the Conserve School's population of regularly enrolled students, as the Trustees have done.

3. Article VI, Paragraph B(10) of the Trust Instrument was not intended merely to track Section 170 of the Internal Revenue Code.

During the proceedings in the trial court, the Conserve Defendants claimed that the provisions of Article VI, Paragraph B(10) were "not mandatory." (R.16:7-8.) Based upon this perceived discretionary power, the Conserve Defendants argued that they were permitted to fundamentally alter the mission of the Conserve School, eliminate its regular enrollment of 150 high school students, and transform the school into a semester-away program that would provide instruction to 30-45 visiting students who are regularly enrolled in other schools.

But the Conserve Defendants also argued to the trial court that the semester-away program will, in fact, be a school of "regular enrollment" as that term is used in Paragraph B(10). (R.83:6-9.) The Conserve Defendants were unable to identify anything in the Trust Instrument that deems a semester-away program to be a school of "regular enrollment." Instead, the Conserve Defendants pointed to Section 170(b)(1)(A)(ii) of the Internal Revenue Code and associated IRS revenue rulings from the 1960s and 1970s interpreting that provision of the Internal Revenue Code. *Id*. Specifically, the Conserve Defendants claimed that in using the term "regular enrollment of students" in Article VI, Paragraph B(10), Mr. Lowenstine intended only to make the school tax-exempt pursuant to Section 170(b)(1)(A)(ii) of the Internal Revenue Code. *Id*. The Conserve Defendants, however, produced no evidence to suggest that Paragraph B(10) was intended merely to adopt Section 170 or associated revenue rulings.

More fundamentally, the language chosen by Mr. Lowenstine in Paragraph B(10) does not even track the language of Section 170 of the Internal Revenue Code. The relevant subsection of Section 170 refers to:

> an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

See 26 U.S.C. § 170(b)(1)(A)(ii).

Accordingly, Paragraph B(10) does not use the same language as Section 170 of the Internal Revenue Code. Therefore, there is no basis for the Conserve Defendants'

claim that it was Mr. Lowenstine's intent to incorporate that Code section and the associated revenue rulings in Paragraph B(10). If the only purpose of Paragraph B(10) was to track the statutory language, surely Mr. Lowenstine or his counsel would have tracked all of that language, especially in light of the potential consequences of drafting the Trust Instrument sloppily. The Conserve Defendants' interpretation therefore must fail.

For all of the reasons stated above, the trial court erred when it awarded summary judgment to the Conserve Defendants on Counts I through III of Culver's Amended Cross-Claim. Culver therefore respectfully requests that this Court reverse the trial court's Order of July 2, 2009, granting the Conserve Defendants summary judgment on Counts I through III of Culver's Amended Cross-Claim and denying Culver's Cross-Motion for Summary Judgment, and that this Court enter an order directing the trial court to enter judgment in favor of Culver on its Cross-Motion for Summary Judgment.

II. In the alternative, the trial court should have determined that the Trust Instrument is, at a minimum, ambiguous.

Paragraph B(10) of Article VI authorizes the Trustees "to open the school for the *regular enrollment of students* . . . ." (R.122, Ex. A at Art. VI, ¶B(10), A-App-274 (emphasis added).) At a minimum, Culver has shown that the language of Paragraph B(10) is reasonably or fairly susceptible to an interpretation that does not authorize the Conserve School to be operated exclusively as a semester-away program for high

school juniors who are regularly enrolled in other schools. As demonstrated above, the Trustees themselves believed until recently that the Trust Instrument required the Conserve School to be operated as a traditional school. Paragraph B(10) is therefore, at a minimum, ambiguous.

The trial court acknowledged that it had to decide whether the Trust Instrument was ambiguous: "I think we look then at the language itself, and determine, is there ambiguity in it." (R.117:102-03, A-App-250-51.) But the trial court's resolution of that question was ambiguous itself: "I don't know that the Court does find ambiguity in this situation." (R.117:103, A-App-251.) Indeed, the trial court never issued a clear finding as to whether the Trust Instrument was ambiguous. The trial court instead dropped various hints on that question:

- Considering some subparts of Article VI, Paragraph B of the Trust Instrument, the trial court found that a few of the subparts were "clearly discretionary," while another was "arguably . . . a mandatory provision," and yet another "tends to look like mandatory language." (R.117:99-101, A-App-247-49.)
- Referring to Culver's argument that students who are regularly enrolled in other schools cannot attend the Conserve School during regular school hours, the trial court said, "I am not certain that that's true. And I am not certain that even if it was true, that that would prevent the concept of being enrolled at Conserve." (R.117:103, A-App-251.)

Having found that the Trust Instrument did not unambiguously support Culver's interpretation, the trial court

should have found that the Trust Instrument is, at the very least, ambiguous as to whether the Trustees are authorized to operate the Conserve School only as a semester-away program for students who are regularly enrolled in other schools.

Under Illinois law, "[a]mbiguity can be found if the language is reasonably or fairly susceptible to more than one interpretation." *Peck v. Froehlich*, 367 Ill. App. 3d 225, 232, 853 N.E.2d 927, 934 (Ill. App. Ct. 2006); *see also Goddard v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 177 Ill. App. 3d 504, 511, 532 N.E.2d 435, 439 (Ill. App. Ct. 1988) ("[W]e cannot agree with the trial court's finding that the settlor's intent is unambiguous. In other words, we believe the trust provisions are capable of more than one meaning . . . ."); *Harris Trust & Sav. Bank v. MacLean*, 186 Ill. App. 3d 882, 888, 542 N.E.2d 943, 947 (Ill. App. Ct. 1989). At a minimum, Paragraph B(10) is ambiguous, because Culver's interpretation is at least a reasonable alternative to the interpretation offered by the Conserve Defendants.

When viewed in light of the entire Trust Instrument, including Paragraphs K and M of Article VI, the Trust Instrument's reference to the "regular enrollment of students" in Paragraph B(10) of Article VI may at least be reasonably understood as referring only to the type of traditional school that the Trustees built and operated until recently. Paragraph K demonstrates that Mr. Lowenstine contemplated two populations of students who would receive distinct types of instruction at the Conserve School, and even at different times. The alternate distribution plan specified in Paragraph

M demonstrates that Mr. Lowenstine intended the Conserve School to be a traditional boarding school for full-time students, like Culver. The trial court therefore erred when it interpreted the phrase "regular enrollment" in a vacuum, instead of interpreting it within the broader context provided by Paragraphs K and M. Under Illinois law, the "provisions of the instrument are not to be read in isolation, and in ascertaining intent, a court must not limit its consideration to the language of a particular paragraph, phrase, sentence or clause." *In re Halas*, 104 Ill.2d 83, 92, 470 N.E.2d 960, 964 (Ill. 1984); *see also Durdle v. Durdle*, 223 Ill. App. 3d 964, 968, 585 N.E.2d 1171, 1174 (Ill. App. Ct. 1992); *In re Ierulli*, 167 Ill. App. 3d 595, 600, 521 N.E.2d 654, 658 (Ill. App. Ct. 1988). Because the Trust Instrument must be interpreted as a whole, without isolating any words or phrases from the rest of the Trust Instrument, the trial court's interpretation cannot stand.

Finally, the trial court's tentative and uncertain statements about the Trust Instrument disprove any claim that the Trust Instrument unambiguously forecloses Culver's interpretation. Referring to Culver's interpretation, the trial court said, "I am not certain that that's true." (R.117:103, A-App-251.) On the question of ambiguity, the trial court said, "I don't know that the Court does find ambiguity in this situation." *Id*. If the Trust Instrument unambiguously foreclosed Culver's interpretation, one would expect the trial court's findings to be decisive and unequivocal.

The trial court made several additional remarks suggesting the presence of ambiguity. For example, the trial

court observed with respect to the traditional four-year boarding school that the Trustees operated until recently, "[T]here is an inference I think throughout the document that would certainly lead us to believe that was his [*i.e.*, Mr. Lowenstine's] vision for Conserve." (R.117:96, A-App-244.) The trial court also suggested, "[W]e probably all wish that there had been perhaps one more iteration" of the Trust Instrument. (R.117:92, A-App-240.) The "last iteration of the Trust that we might all welcome," in the trial court's imagination, would have clearly delineated which subparts of Paragraph B were discretionary and which were mandatory. (R.117:99, A-App-247.) Such a revision "would have eliminated a lot of the concern that's here." *Id.* The trial court also acknowledged that "Culver has been placed in a terrible situation . . . partly by the draftsmanship of the Trust, by someone who cared about it in a very positive way." (R.117:105, A-App-253.)

In short, the trial court's remarks reveal that it struggled with a difficult choice between competing interpretations of the Trust Instrument. Culver's interpretation is, at a minimum, a reasonable alternative. Therefore, the trial court should have determined that the term "regular enrollment of students" in Article VI, Paragraph B(10) of the Trust Instrument was, at a minimum, ambiguous, and it should have allowed discovery and held an evidentiary hearing to determine its intended meaning.

III. The trial court should have permitted Culver to obtain extrinsic evidence of the Trust Instrument's meaning.

A. Culver was entitled to discover the attorney files because they were relevant to a determination of the settlor's intent.

Culver sought and was denied access to the files of the attorney who drafted the Trust Instrument for Mr. Lowenstine. (R.68.) As provided in Wis. Stat. § 804.01(2)(a):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Wis. Stat. § 905.03(4)(b) further provides that "[t]here is no privilege under this rule" with respect to "a communication relevant to an issue between parties who claim through the same deceased client . . . ." Because the files of the attorney who drafted the Trust Instrument are highly relevant to a determination of Mr. Lowenstine's intent, they should have been produced at Culver's request. *See In re Fortwin Trust*, 57 Wis.2d 134, 140-41, 203 N.W.2d 711, 715 (Wis. 1973) (holding that trial court erred in finding a trust instrument to be unambiguous and in refusing to admit extrinsic evidence of the donor's intent); *In re Estate of Boerner*, 46 Wis.2d 183, 192, 174 N.W.2d 457, 461 (Wis. 1970) ("The trial court must be affirmed in holding that extrinsic evidence, including the testimony of the attorney who drafted the will, was admissible as to the intent of the testator"); *In re Estate of*

Brzowsky, 267 Wis. 510, 514-17, 66 N.W.2d 145, 146-48 (Wis. 1954).

If this Court finds that the Trust Instrument is, at a minimum, ambiguous with respect to the settlor's intent, then extrinsic evidence is admissible to interpret the Trust Instrument. *See Peck v. Froehlich*, 367 Ill. App. 3d 225, 232, 853 N.E.2d 927, 934 (Ill. App. Ct. 2006) ("Extrinsic evidence may be admitted to aid interpretation of a trust instrument only if the document is ambiguous and the settlor's intent cannot be obtained"); *see also In re Marriage of Spencer*, 140 Wis.2d 447, 450-54, 410 N.W.2d 629, 630-32 (Wis. Ct. App. 1987) (finding that the relevant document was ambiguous, and therefore reversing the trial court and remanding "to allow the parties to present evidence . . . .").

The trial court denied Culver access to the attorney files because it erroneously believed that Mr. Lowenstine's intent was irrelevant.[5] (R.115:20, A-App-120; *see also* R.112:15, A-App-144.) When the trial court denied Culver the requested discovery, however, it "reserve[d] the right to revisit the ruling in the event that [it] were to make a determination of ambiguity." (R.112:18, A-App-147.) Therefore, if this matter is remanded to the trial court for an evidentiary hearing, the trial court should be directed to compel the production of this extrinsic evidence.

[5] Because the trial court's denials of Culver's motion to compel and renewed motion to compel were based upon this error of law, they are subject to *de novo* review, as explained above. Culver submits, however, that these discovery rulings could not withstand even a deferential standard of review.

B. Despite denying Culver access to the attorney files, the trial court speculated about the strategy of the attorney who drafted the Trust Instrument.

In its summary judgment ruling, the trial court speculated that the attorney who drafted the Trust Instrument must have considered Section 170 of the Internal Revenue Code. (R.117:93-94 and 102, A-App-241-42 and 250.) The trial court suggested, for example, that "the draftsman of this document could hardly have been expected to sit down and write it without having cracked the Internal Revenue Code, and taken at least a peek at Section 170 . . . ." (R.117:102, A-App-250.) Nevertheless, Culver was denied an opportunity to obtain the files of that attorney and thereby learn what the attorney actually did consider when he drafted the Trust Instrument. Those files may have revealed the instructions that the attorney received from Mr. Lowenstine. The attorney files were therefore highly relevant and should have been produced. On remand, the trial court should be directed to compel the production of the attorney files to Culver.

CONCLUSION

Culver respectfully requests that this Court reverse the trial court's Order of July 2, 2009, granting the Conserve Defendants summary judgment on Counts I through III of Culver's Amended Cross-Claim and denying Culver's Cross-Motion for Summary Judgment, and that this Court enter an order directing the trial court to enter judgment in favor of Culver on its Cross-Motion for Summary Judgment. In the alternative, Culver respectfully requests that this Court remand this case to the trial court for further proceedings,

including but not limited to an evidentiary hearing and a trial if necessary, with the direction that the trial court order the production of the documents requested in Culver's motion to compel and renewed motion to compel, and reverse the trial court's rulings of April 21, 2009 and April 23, 2009 denying Culver's motion to compel and renewed motion to compel, respectively. Culver further respectfully requests that this Court award such further and additional relief as the Court deems just and proper under the circumstances.

Dated this _____ day of October, 2009.

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CERTIFICATE OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,964 words.

Dated this ____day of October, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been filed with the paper copies of this brief with the court and served on all opposing parties.

Dated this 23rd day of October, 2009.

_____
Sven W. Strutz

Subscribed and sworn to before me
this 23rd day of October, 2009.

_____
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My commission expires: _____

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