

FOURTH DIVISION  
June 15, 2017

No. 1-16-2018

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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SUSAN HARMON, individually and as Trustee of the Susan Harmon Trust,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10 CH 1665
	)	
HOWARD NUSBAUM, individually and as Trustee under the Howard Nusbaum Trust and as Trustee under the Milton S. Nusbaum 2002 Living Trust, as amended, ANDREA NUSBAUM, individually and as Trustee under the Andrea Nusbaum Trust,	)	
	)	
	)	Honorable
	)	Franklin Ulyses Valderrama,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the judgment of the circuit court of Cook County granting defendants' cross-motion for summary judgment and denying plaintiff's motion for summary

judgment; where no genuine issue of material fact exists that plaintiff released defendants from all claims for a breach of fiduciary duties related to an account as part of the general release executed by the parties to effectuate distribution of a trust among the beneficiaries, defendants were entitled to judgment as a matter of law on plaintiff's claim that defendants breached their fiduciary duties by failing to distribute to plaintiff her share of an account used to manage a family farm that was part of the trust.

¶ 2 Plaintiff, Susan Harmon, individually and as Trustee of the Susan Harmon Trust, filed a second amended complaint (hereinafter "the complaint") against defendants, Howard Nusbaum, individually and as Trustee of the Howard Nusbaum Trust and as Trustee of the Milton S. Nusbaum 2002 Living Trust as amended, and Andrea Nusbaum, individually and as Trustee of the Andrea Nusbaum Trust, alleging fiduciary fraud (count I), breach of fiduciary duty (count II), and common law fraud (count III) based on the administration of the Milton S. Nusbaum 2002 Living Trust. Susan, Howard, and Andrea are siblings and Milton S. Nusbaum, deceased, is their father. The circuit court of Cook County granted defendants' motion to dismiss counts I and III of the complaint, and the parties filed cross-motions for summary judgment on count II. The trial court granted defendants' motion for summary judgment and denied plaintiff's motion for summary judgment. Defendants' counterclaims against plaintiff remained pending, and the court entered an order that there was no just reason to delay enforcement of the order granting summary judgment in favor of defendants and against plaintiff on count II of the complaint.

¶ 3 For the following reasons, we affirm the trial court's judgment.

¶ 4 **BACKGROUND**

¶ 5 Plaintiff's complaint alleged that plaintiff, Howard, and Andrea are the beneficiaries of the Milton S. Nusbaum 2002 Living Trust (hereinafter "the trust" or "the Milton Trust"). The trust owned, among other items, an income-producing farm in Illinois. The complaint states that the farm was part of a "Release Indemnification, Receipt and Refunding Agreement" (release), a copy of which was attached to the complaint. Plaintiff signed the release on December 21, 2007.

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Howard (both individually and as trustee of the Milton Trust) and Andrea also signed the release. The release states that Howard entered into the release agreement “individually and as designated Executor of the Estate of Milton S. Nusbaum and as Trustee of the Milton S. Nusbaum 2002 Living Trust.” The release states that each of the beneficiaries’ individual trusts is entitled to receive a distribution from the trust in the amount of one-third of the residue of the trust. A recital in the release states that the beneficiaries acknowledge that Howard “has provided them with account statements and other requested information for the Trust from the period beginning on Milton S. Nusbaum’s death through the date of this [release]” and he supplied copies of these documents to plaintiff’s former or present counsel. The release states that the farm is worth \$1,230,680, that plaintiff does not wish to continue to own the farm, and Howard and Andrea wish to retain the farm. The release goes on to state that Howard’s and Andrea’s trusts are purchasing from plaintiff’s trust plaintiff’s interest in the farm for \$410,227, and that plaintiff directs the trustee, Howard, to then distribute plaintiff’s interest in the farm to Howard’s and Andrea’s individual trusts. The balance of the assets was to be allocated *pro rata* among the beneficiaries’ trusts.

¶ 6 As it pertains to this appeal, the release states that the parties agreed as follows:

“2. To release and forever discharge [Howard] individually and as Fiduciary<sup>1</sup> [(trustee)] and to release the Fiduciary’s attorney, Stephanie H. Denby and Burke, Warren, MacKay & Serritella, P.C., in each case from any and all manner of liability, actions, claims, causes of action, suits, debts, sums of money, accounts, reckonings, covenants, controversies, agreements, promises, variances,

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<sup>1</sup> The release referred to Howard in his capacities as executor of his father’s estate and as trustee of the trust as the “Fiduciary.” For purposes of this appeal to avoid confusion we will simply refer to Howard in these capacities as “Howard” or “trustee.”

trespasses, damages, judgments, execution of claims and demands, whatsoever, in law or equity based on facts or circumstances occurring through the date hereof as well as all acts contemplated in connection with this [release] and in particular, but without limiting the generality of the release, any liability that could have arisen in and or during the administration of the Estate of Milton S. Nusbaum (the “Estate”) or the administration of the Trust whether known or unknown, anticipated or unanticipated, suspected or claimed, fixed or contingent and whether or not damages have yet resulted.”

¶ 7 The release also contains the following acknowledgement by the beneficiaries:

“10. The Beneficiaries each acknowledge receipt of cash, marketable securities and other property \*\*\* pursuant to the plan of distribution constituting a complete discharge of his or her respective interest under the Trust subject to the Holdback (defined below). The [trustee] is holding back cash in the amount of \$80,000 in anticipation of additional expenses including the Trust’s 2006 and 2007 income tax liability (“Holdback”). Upon [Howard’s] determination that all known expenses are paid and no other expenses are likely to arise, he will distribute one-third of the remaining Holdback to each Beneficiary’s respective trust. The parties all agree that the Holdback is *de minimis* and waive all claims relating to the administration of this Holdback after the date of the Agreement, in the absence of fraud or gross negligence by the [trustee].”

¶ 8 Plaintiff’s complaint alleged the release “contained Howard’s representations as to the entire value of Susan’s one-third share of the trust assets as well as certain expenses that would be deducted from Susan’s share of the estate.” The release also provided representations of the

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farm's value and plaintiff's share. Plaintiff alleged that Howard never provided a formal accounting of the trust assets, and that after plaintiff signed the release, plaintiff learned in April 2009 that Howard had been receiving rent from the farm and that this rent was never disclosed and was omitted from plaintiff's one-third share. The complaint also alleged that an "\$80,000 hold back" was omitted from plaintiff's share of the trust and that, on information and belief, the Holdback has been paid to Howard's attorneys. Count II of the complaint alleged that by virtue of "these negligent omissions and misrepresentations Howard has: 1) breached his duty to fully account for all trust assets; 2) fraudulently induced [plaintiff] to execute [the release] by understating the value of her share as a beneficiary and concealing the true value from her; and/or 3) potentially wrongfully benefitted himself with respect to trust assets distributed to himself." Plaintiff requested an order to Howard to pay her "the exact amount owed to her for her one-third share of the trust," an accounting of the trust, and a judgment in her favor for any sums found due to plaintiff from the trust.

¶ 9 Defendants filed an answer, affirmative defenses, and counterclaims to plaintiff's complaint. Defendants asserted as an affirmative defense that plaintiff's claims are barred by the release (first affirmative defense). The first affirmative defense alleged that plaintiff's first attorney representing plaintiff as to her rights and interests in and to the estate and trust "had full access to and was provided with materials, tax returns and account statements relating to all assets of Milton S. Nusbaum and/or the [trust,] including [the] family farm." Plaintiff's first attorney ceased his representation and plaintiff acquired new counsel. The affirmative defense alleged plaintiff's second attorney also "had full access to and was provided with materials, tax returns and account statements relating to all assets of Milton S. Nusbaum and/or the [trust]." The affirmative defense alleged on information and belief that both attorneys were actively

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involved in discussions regarding all assets of the estate and trust, spoke “directly and extensively with the farm manager,” and reviewed appraisals for the valuation of the farm and spoke with the appraiser as to those valuations. The affirmative defense further alleged on information and belief that before advising plaintiff to execute the release plaintiff’s second attorney confirmed with plaintiff that by executing the release plaintiff was “releasing and forever giving up any claims to any assets of the [estate or trust] and/or against Howard as executor of the Estate [and] trustee of the Trust.” “Thus, [plaintiff] knowingly and voluntarily surrendered all claims against Howard in these capacities by executing the [release] and is hence barred from asserting the sole remaining claim in her Second Amended Complaint.” Defendants alleged that by the terms of the release, plaintiff “has released Howard and Andrea of all liability associated with the administration of the Estate and the [trust].”

¶ 10 Defendants’ second affirmative defense was waiver. Defendants argued plaintiff executed the release, particularly the salient portions of the two provisions cited above, after being “fully apprised and advised” by her attorneys as to her rights and interest in, and the assets, liabilities, income, and expenses of the estate and the trust. Defendants asserted that by her “informed actions and conduct,” plaintiff waived any right to an accounting. Defendants argued that plaintiff “waived any right she had to seek additional amounts from the Milton Trust and/or the Estate and to any ‘accounting’ beyond that which she, including acting through [her attorneys,] might have been entitled, had [plaintiff] not elected to enter into the Release Agreement, under all of the circumstances surrounding its execution.”

¶ 11 Defendants filed a motion to dismiss plaintiff’s second amended complaint. On November 4, 2013, the trial court granted defendants’ motion in part and denied the motion in part. The court dismissed count I of the complaint with prejudice, and dismissed count III

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without prejudice with leave given for “one final opportunity to plead a claim for common law fraud.” (Plaintiff did not attempt to replead count III.) The court denied defendants’ motion to dismiss count II, but the court struck the relief plaintiff sought “to the extent plaintiff seeks an accounting.”

¶ 12 In October 2015 plaintiff filed a motion for summary judgment on the second amended complaint. Plaintiff’s motion states that the release is not in dispute, and that Howard testified in a deposition that in making the distribution to plaintiff, “he [(Howard)] omitted what we have been referring to as the farm account, which was an account in Milton Nusbaum’s name.” Plaintiff’s motion for summary judgment states: “A farm manager deposited farm income and paid farm expenses out of the [farm] account. The [farm] account was not distributed to [plaintiff] and there was discussion about distribution of [plaintiff’s] share years after the rest of [plaintiff’s] share was distributed, which was also an acknowledgement that she was entitled to a third of that account.” Plaintiff states the release never mentioned the farm account directly, and claims that Howard admitted at his deposition that he “erred in not distributing [plaintiff’s] share when, instead, he transferred the balance [of the farm account] from Milton Nusbaum to a new entity owned by himself and Andrea.” Plaintiff asserts the burden shifted to Howard to explain this, which he has failed to do.

¶ 13 Plaintiff’s motion for summary judgment argues that correspondence between plaintiff’s attorney and Howard’s attorney constitutes an admission that plaintiff’s share of the farm account was never paid to plaintiff. In a letter from plaintiff’s attorney to Howard’s attorney, plaintiff’s attorney asked for certain information about the farm account and the Holdback. In response, Howard’s attorney wrote, in part: “The [farm] account balance on the date closest to December 21, 2007 [(the date plaintiff signed the release)] was \$65,724.27 on December 15,

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2007, leaving Susan with a share equal to \$19,717.81. We will want a Release in conjunction with any distribution.”

¶ 14 Plaintiff additionally argues that Howard’s breach of duty in failing to pay plaintiff her share of the farm account “negates any right that Howard has to any of the \$80,000 holdback.” In support, plaintiff points to Howard’s attorney’s deposition testimony where the attorney stated that the Holdback was not distributed to the beneficiaries because the Holdback was retained to pay legal fees arising from plaintiff’s suit. Plaintiff’s motion for summary judgment argues Howard could not use the Holdback for attorney fees because of the breach of duty in failing to pay plaintiff her share of the farm account.

¶ 15 Plaintiff also cites portions of Howard’s deposition testimony and concludes his testimony amounts to an admission that he omitted the farm account from the distribution of plaintiff’s one-third share “because he was focused on distributing the other assets.” Howard testified he was not aware the farm manager had transferred the farm account to a new entity: Nusbaum Farm Properties, LLC. (Howard and Andrea formed the new entity to hold ownership of the farm when he and Andrea bought out plaintiff.) He then testified that “Optimum” was instructed to divide certain securities equally into thirds and distribute them to the beneficiaries, but he did not actually make the allocation himself. Howard testified his attorney told Optimum that the division had to be done, and then they did that process. Howard was then asked the following questions and gave the following answers:

“Q. So pretty much the new farm account you wouldn’t have even thought of it, is that correct?”

A. Right.

Q. Because that would not have gone with Optimum at all?



A. No, that wouldn't have gone with Optimum.”

Plaintiff cites the foregoing testimony as evidence Howard did not distribute the farm account because he was focused on the securities, and argues in her motion for summary judgment that without an explanation from Howard, this “negligent omission” of the farm account from the distribution is presumed to have been intentional. Plaintiff argues that additional evidence of a breach of fiduciary duty is that the farm manager “backed out” crop sales for 2007 from the farm account statements with no explanation. In an affidavit Howard averred that was solely the farm manager's decision and Howard does not know why it was done. Plaintiff prayed for a finding that the allegations in the second amended complaint were proven.

¶ 16 In December 2015 defendants filed a cross-motion for summary judgment and response to plaintiff's motion for summary judgment. Defendants incorporated by reference into their cross-motion for summary judgment their response to plaintiff's motion for summary judgment. Defendant's cross-motion argues that their evidence warranted summary judgment on plaintiff's allegations of wrongdoing by Howard, any claims based on an accounting have been waived, and plaintiff released Howard from any claims. The “undisputed facts” defendants claim support their cross-motion for summary judgment include that plaintiff's lawyers were provided with full information as to the assets of the trust and the estate including information about disbursements from the farm account. Howard stated that he could and did request the farm manager to distribute funds from the farm account to the trust. Howard stated those funds were kept in an account—which was referred to as the University account—that was used for trust administration purposes.

¶ 17 The parties signed a “prior release” before executing the release at issue in this appeal. The prior release contained substantially the same terms as the release. Distribution of the trust

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assets under the prior release, including the payment for plaintiff's share of the family farm, was delayed by an attorney's lien filed by plaintiff's former counsel. Plaintiff resolved the lien, according to defendants, by agreeing to have the lien paid pursuant to an updated release agreement (the release at issue here). The release states that "since signing the [prior release,] [plaintiff] wishes to resolve a dispute between [plaintiff] and her former attorney \*\*\* and to authorize [Howard] to pay [her former attorney] \*\*\* from [plaintiff's] Trust." As it pertains to defendants' argument, defendants assert that the former attorney's billing records show discussions with plaintiff "as to the farm appraisals, an independent farm appraisal, account statements and the "Farm Management Account," and conditions of disposing of the Family Farm."

¶ 18 Defendants argue that other evidence of plaintiff's knowledge of the farm account comes in the form of emails between plaintiff, plaintiff's new attorney, and Howard's attorney. In those emails plaintiff raised questions based on there being money in the farm checking account, and later, asked about the annual farm income and the minimum that must be left in the farm account to run the farm. Defendants attached a copy of plaintiff's deposition to their motion, including exhibits to plaintiff's deposition. The exhibits to plaintiff's deposition include a request by plaintiff's attorney to Howard's attorney for, *inter alia*, "bank statements, cancelled checks, tax returns, brokerage statements, etc. covering all the entities, including the farm, in lieu of a formal accounting." In an email from plaintiff to one of her attorneys, plaintiff wrote: "if I retain farm property will the annual income of now, almost two years since my dads [sic] death (\$36,000 a year) = 70,000 total be divided up now? Also, and what about the 150,000 in the farm checking will that be divided up now also except for leaving 55,000 for the annual farm operating costs?"

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In a later email plaintiff referenced there being “so much money \*\*\* in the farm checking account.”

¶ 19 Defendants argue plaintiff’s emails also prove that she reviewed the release and was advised by counsel that by signing she would be releasing all claims against Howard. In a separate email plaintiff wrote to her attorney with several questions, including the following: “I did not receive any of the annual income which the farm made over the last two years which according to Howard comes to around 80,000 (37,000 or so each year) so I should get my share for the last two years (something like 25,000), will that be in cash also?” In that same email plaintiff also asked a question about the release. Plaintiff’s attorney wrote back, stating as follows:

“I have a few changes that I want made, but basically, by signing this you will be agreeing to the plan of distribution and releasing any and all claims against Howard. There will be no going back once this is signed, so be sure you have no claims that you intend to pursue. I understand from [Howard’s attorney] that [plaintiff’s former attorney] did some work to verify the accuracy of the information given to you and/or him. Obviously, I know nothing about that, and you cannot rely on me for identification of any claims you may have against Howard or the estate/trust.”

In her deposition, plaintiff testified that she was aware that the farm was appraised in connection with the decision to sell it. She also recalled that the appraisals were updated closer to the date the release was signed to confirm the value she would receive for her one-third interest. Finally, defendants state that after funding the disbursements in the release, the funds in the farm account were less than the minimum required to be held in the farm account for operations.

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¶ 20 Defendants argue the release included anything related to the farm because the farm and any related claims were in plaintiff's contemplation when she signed the release. According to defendants, plaintiff claims Howard procured the release by fraud because plaintiff was not provided substantive information; however, defendants note that plaintiff did not pursue her fraud claim after the trial court dismissed it without prejudice. Defendants further argue that plaintiff and her lawyers were aware of the farm and farm account both when plaintiff signed the prior release and the release, and plaintiff released Howard in his capacities as executor and trustee of the estate and trust; thus, plaintiff released Howard in his fiduciary roles from any claims in any way related to his administration of the estate and trust. Defendants argue plaintiff "knew of whatever she complains of." Defendants also argue that whether or not the release specifically mentions the farm account is irrelevant because the question is what was in plaintiff's contemplation when she signed the release. Finally, defendants' argue plaintiff waived all claims related to the administration of the Holdback and, regardless, the Holdback was used for administrative expenses and to defend plaintiff's litigation, not for Howard's or Andrea's personal benefit.

¶ 21 Defendants' response to plaintiff's motion for summary judgment argues that plaintiff's motion is not supported by evidence, sought relief on issues not raised by the second amended complaint, that the trial court determined that the "failures attributed to Howard" have been waived, and plaintiff did not and cannot establish damages. Specifically, defendants' argue the alleged omission of the farm account from plaintiff's distribution is not an issue or theory raised in the second amended complaint. Defendants argue that even if it is, plaintiff's claim is refuted by evidence. Defendants argue plaintiff failed to shift the burden to them by failing to establish a breach of a fiduciary duty with regard to plaintiff's share of the farm account. Defendants argue

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plaintiff's theories as to the farm account fail because (1) the sale of the farm to Howard and Andrea was a voluntary transaction in which they all agreed to the purchase price; (2) there is no presumptive breach of fiduciary duty because Howard understood the farm account to be included in the appraisal of the farm and plaintiff received fair value for her share based on the appraisal; and (3) after the plaintiff received her distribution (after the release was funded) the balance in the farm account was less than what was needed to be maintained for operational purposes.

¶ 22 Defendants deny that Howard's statement was an admission that he omitted plaintiff's share of the farm account from her distribution and supported that assertion with Howard's affidavit clarifying the remarks on which plaintiff relied. Defendants also deny that the communications between the attorneys was an admission "of the amount or validity of any claim" as to the farm account, characterizing their attorney's statements in her letter as "an offer of compromise" making it a protected settlement communication. Defendants also argue that even if the burden shifted they met their burden to overcome the presumption of fraud on behalf of a fiduciary because Howard disclosed all of the information pertaining to the farm to plaintiff and her attorneys, plaintiff received fair value based on an appraisal of the farm, and the farm account contained no excess cash after the release was funded. Defendants argue neither Howard nor Andrea benefitted in any way that plaintiff did not.

¶ 23 Defendants argue plaintiff's claims about "backed out" crop sales are not an issue in the second amended complaint. If they were such an issue, plaintiff failed to show that Howard or Andrea received any benefit from the complained of transaction. Plaintiff provided no evidence that defendants did anything improper—it is undisputed the farm is managed by a third party and Howard and Andrea had nothing to do with the transactions. Finally, defendants argue it is

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undisputed the Holdback was used to pay trust administration expenses and defend plaintiff's suit. Defendants argue that under paragraph 10 of the release, plaintiff "waived any claim relating to the Holdback, in the absence of fraud or gross negligence," which plaintiff failed to prove. Defendants also state they did not benefit personally from the Holdback.

¶ 24 Plaintiff filed a response to defendants' cross-motion for summary judgment, and defendants' filed a reply to plaintiffs' response. Plaintiff also filed a reply to defendants' response to plaintiff's motion for summary judgment. On June 6, 2016, following argument on the motions, the trial court entered an order that read as follows: "1) Plaintiff's motion for summary judgment is denied, including for reasons set forth on the record; and 2) Defendant's cross-motion is granted including for reasons set forth on the record." On July 11, 2016, the court entered an order pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that read as follows:

"On the oral motion of defendants, without objection by plaintiff, the court finds that there is no just reason for delaying either enforcement or appeal of this court's June 6, 2016, order granting summary judgment in favor of defendants as to the sole remaining count (count II) of plaintiff's third [*sic*] amended complaint alleging breach of fiduciary duty."

¶ 25 This appeal followed.

¶ 26 ANALYSIS

¶ 27 Before reaching the merits of the appeal, we must address two preliminary issues. The first issue is defendants' argument this court lacks jurisdiction to consider plaintiff's appeal. Defendants filed a motion to dismiss the appeal for lack of jurisdiction. We denied that motion, but defendants assert we may revisit the issue and dismiss for lack of jurisdiction at any time.

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Defendants argue this court lacks jurisdiction because the trial court's Rule 304(a) finding only made its judgment granting defendants' cross-motion for summary judgment final and appealable, making that the only issue over which this court has jurisdiction. Defendants take issue with plaintiff's statement of the issues presented for review as required by Illinois Supreme Court Rule 341(h)(3) (eff. Jan. 1, 2016). Plaintiff's statement of the issues reads as follows:

“Whether a trustee may be excused from not distributing to a beneficiary a rightful share of an account titled in the name of the deceased settlor, and instead distributing those funds in part to himself, absent clear and convincing evidence showing that the trustee had no duty to distribute the asset, and whether the trustee may pay funds from the trust for his attorneys defending him from the alleged breach of fiduciary duties?”

Defendants argue this court lacks jurisdiction because “the purported issues [plaintiff] raises do not arise from the circuit court's granting of Defendants' motion for summary judgment on [plaintiff's] breach of fiduciary duty claim; rather, this court's jurisdiction is limited to the trial court's judgment on defendants' cross-motion for summary judgment based on the release.”

Plaintiff responds that defendants' assertion that his court “may only consider the granting of [defendants' cross-motion for summary judgment] is absurd and unfounded.” Plaintiff argues the order granting defendants' cross-motion was likewise a judgment denying plaintiff's motion for summary judgment.

¶ 28 We adhere to our prior ruling denying defendants' motion to dismiss plaintiff's appeal. In *Wofford v. Tracy*, 2015 IL App (2d) 141220, ¶ 23, cited by defendants, the court held that “where the trial court's Rule 304(a) finding is made only with respect to the dismissal with prejudice of some counts but not others, the reviewing court lacks jurisdiction over the counts

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with respect to which the trial court did not issue a Rule 304(a) finding.” *Wofford*, 2015 IL App (2d) 141220, ¶ 23. *Wofford* is inapposite because here we are not dealing with summary judgment on some counts but not others, and plaintiff is not attempting to appeal nonfinal interlocutory orders on separate counts of her complaint. *Cf. id.* ¶ 20. This appeal involves a judgment granting defendants’ cross-motion for summary judgment on count II of the complaint made appealable pursuant to Rule 304(a). We recognize that the judgment on the cross-motions for summary judgment did not “entirely dispose[] of the litigation.” See *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 358 (1999) (“When the lower court grants one party’s summary judgment motion as to all issues and denies the other party’s summary judgment motion as to the same issues, the resulting order is final and appealable because it entirely disposes of the litigation.”). Nonetheless, we hold that the rule stated in *Arangold* applies when the appeal involves orders that are appealable pursuant to Rule 304(a). See *United Services Automobile Ass’n v. Dare*, 357 Ill. App. 3d 955, 963 (2005) (holding, where summary judgment order was appealable pursuant to Rule 304(a), exception to general rule stated in *Arangold* did not apply because “these motions for summary judgment involved separate claims”). The cross-motions for summary judgment in this case involved the same claim, and plaintiff’s statement of the issues, though marginally argumentative, addresses the propriety of that judgment; therefore, this court has jurisdiction of the issues raised in plaintiff’s appeal.

¶ 29 The second issue is defendants’ motion to strike plaintiff’s brief for failure to comply with Illinois Supreme Court Rules. We ordered defendants’ motion taken with the case for disposition with our judgment on appeal. Defendant argues the statement of facts in plaintiff’s opening brief is argumentative in violation of Rule 341(h)(6) (eff. Jan. 1, 2016). Rule 341(h)(6) also requires the statement of facts to include “appropriate reference to the pages of the record on



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appeal.” *Id.* Defendant notes, however, that in plaintiff’s “ten-page Statement of Facts, she cites to the record less than ten times.” Defendant also argues that plaintiff’s statement of facts, and in fact her entire brief, “is directed entirely at issues over which this Court lacks jurisdiction.” We have determined that this court has jurisdiction over the matters raised in appellant’s brief. We also note that “striking an appellate brief, in whole or in part, is a harsh sanction and is appropriate only when the violations of procedural rules hinder our review. [Citation.]” (Internal quotation marks omitted.) *Miller v. Lawrence*, 2016 IL App (1st) 142051, ¶ 18.

Defendants tell us our review has been hindered because plaintiff has “sent the Court on a fishing expedition \*\*\* to determine the actual issue on appeal.” Our review of the issues in the appeal has not been hindered by plaintiff’s statement of facts. We note parenthetically that, although not a substitute for citation to the pages of the record on appeal, plaintiff cited extensively to her appendix filed with her brief (see Ill. S. Ct. R. 341(h)(6)), which contains voluminous “materials from the record which are the basis of the appeal or pertinent to it.” Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005). Nor do we find plaintiff’s statement of facts onerously argumentative. Defendants’ motion to strike plaintiff’s opening brief is denied.

¶ 30 In an argument similar to that in support of defendants’ motion to dismiss, defendants argue plaintiff “waived the sole issue on appeal” by failing to address the trial court’s judgment granting summary judgment on defendants’ cross-motion for summary judgment. Defendant claims plaintiff failed to identify any error in the trial court’s judgment and instead made conclusory statements that the trial court’s judgment lacked a factual basis. Rule 341(h)(7)

“provides that an appellant’s brief shall contain ‘[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on.’ Ill. S. Ct. R. 341(h)(6). ‘Bare

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contentions in the absence of argument or citation of authority do not merit consideration on appeal and are deemed waived.’ [Citations.]” *Hollenbeck v. City of Tuscola*, 2017 IL App (4th) 160266, ¶ 27.

Nonetheless, “the waiver rule is a limitation on the parties and not on the courts. [Citation.]” *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 1048 (2000). Although plaintiff’s arguments are not a model of appellate court brief draftsmanship, we find that the issues have been adequately addressed in the briefs filed with this court and therefore choose to proceed to the merits of the appeal.

¶ 31 Turning to the merits of the appeal, plaintiff argues she is entitled to summary judgment because the record evidence proves that Howard admitted he failed to distribute one-third of the farm account to plaintiff and he has not offered a defense to that act, which constitutes a breach of his fiduciary duty to plaintiff. Plaintiff also argues that payment of legal fees related to this suit from the Holdback was “not the stated purpose in the Release.” As to defendants’ cross-motion, plaintiff argues defendants are not entitled to summary judgment because there are no facts to establish that plaintiff waived her right to one-third of the farm account. Defendants respond the evidence shows that plaintiff released defendants from any breach of fiduciary duty claims regarding the farm and farm account. Although the farm account is not specifically listed in the release, defendants argue the undisputed facts show that plaintiff was aware of her claims related to the farm and farm account when she entered the release, thereby releasing defendants from any claims with respect to the farm account.

“Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

[Citation.] When parties file cross-motions for summary judgment, the court is invited to decide the issue on summary judgment as a matter of law, but summary judgment is nonetheless inappropriate if there exist factual questions about a material issue. [Citation.] We review *de novo* an order granting summary judgment. [Citation.]” *West Bend Mutual Insurance Co. v. Athens Construction Co.*, 2015 IL App (1st) 140006, ¶ 18.

¶ 32 Plaintiff’s breach of fiduciary duty claim in count II of the second amended complaint is based on Howard’s alleged failure to distribute one-third of the farm account and the Holdback to plaintiff after the parties executed the release. In this appeal plaintiff has not challenged the validity of the release except to the extent it does not specifically list the farm account. The release specifically lists the Holdback, and states the “parties \*\*\* waive all claims relating to the administration of this Holdback after the date of the Agreement, in the absence of fraud or gross negligence by the [trustee.]” Plaintiff has not alleged Howard committed fraud or gross negligence in the administration of the Holdback. Plaintiff’s only allegation in the complaint concerning the Holdback is that on information and belief Howard paid his attorneys (as trustee) from the Holdback.<sup>2</sup> The release stated that the Holdback was being held in anticipation of additional expenses, and the expenses were not specifically limited to tax expense. Plaintiff’s claim regarding the Holdback falls within the release provision for “claims relating to the administration of this Holdback.” *Greenspan v. Mesirov*, 138 Ill. Ap. 3d 294 (1985), cited by plaintiff, is inapposite, where that court applied Delaware corporate law to a dispute over

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<sup>2</sup> Count II of plaintiff’s second amended complaint incorporates paragraphs one through five of count I. In count 8, plaintiff alleged Howard intentionally, recklessly, or negligently failed to account for the funds in the Holdback or any interest earned. In her deposition, plaintiff confirmed that paragraph 8 contains the “ways in which Howard breached his fiduciary duties.” If we were to assume plaintiff intended to incorporate those allegations into count II, this is still not an allegation of fraud or “gross negligence.”

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payment of litigation expenses from a family trust. *Greenspan*, 138 Ill. App. 3d at 299. Also inapposite is *Herget National Bank of Pekin v. Lampitt*, 133 Ill. App. 3d 418 (1985), also cited by plaintiff, where a trustee was surcharged for the devaluation in the trust holdings upon a finding the trustee breached the standard of care to the beneficiaries of the trust. *Lampitt*, 133 Ill. App. 3d at 419-20. Accordingly, we affirm the trial court's judgment granting summary judgment in favor of defendants on count II of plaintiff's second amended complaint to the extent count II alleges a breach of fiduciary duty based on the way Howard used the Holdback funds.

¶ 33 All that remains is plaintiff's allegation Howard breached his fiduciary duty by failing to distribute one-third of the funds in the farm account when the parties executed the release.<sup>3</sup> If plaintiff released this claim for breach of fiduciary duty against Howard, defendants are entitled to summary judgment, and we need not decide whether plaintiff established that there is no genuine issue of material fact that Howard did not distribute one-third of the farm account to plaintiff. See *Board of Library Trustees of Village of Midlothian v. Board of Library Trustees of Posen Public Library District*, 2015 IL App (1st) 130672, ¶¶ 24, 42; *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 343 (2008) (filing of cross-motions for summary judgment invites the court to decide the issue as a question of law based on the record). Plaintiff argues there is no evidence in the record that the farm account was within the scope of the release or that she intended to include the farm account in the farm assets. Plaintiff also argues that to find the farm account within the scope of the release would require "clear and

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<sup>3</sup> The allegation in plaintiff's second amended complaint is specifically that plaintiff did not learn until after the release was signed that "Howard had been receiving rent from the farm and that this rent was never disclosed and was omitted from [plaintiff's] one-third share." Howard testified that income from the farm was kept in the farm account until he ordered a distribution, and plaintiff's argument, as confirmed by her deposition testimony, is that her claim is based on the farm account.

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convincing evidence that [plaintiff] had agreed that the farm account was part of the farm itself.” Plaintiff states: “We have absolutely nothing in the Release to show that the farm account went with the sale of [plaintiff’s] share of the farm itself.”

¶ 34 Plaintiff’s arguments that to find in favor of defendants requires a finding that the farm account was part of the “farm itself” is only relevant if plaintiff did not release any claims of breach of fiduciary duty against Howard. Then, the issue would become whether Howard did breach his fiduciary duty, and whether the account was “part of the farm” may be relevant to that determination. However, if plaintiff released all claims for breach of fiduciary duty related to administration of the trust, even if Howard breached his duties by failing to distribute one-third of the farm account to plaintiff, her claim would be barred and defendants would be entitled to summary judgment. “A release is a contract whereby a party abandons a claim to the person against whom the claim exists.” *Loberg v. Hallwood Realty Partners, L.P.*, 323 Ill. App. 3d 936, 941 (2001).

“The intention of the parties controls the scope and effect of a release, and this intent is discerned from the language used and the circumstances of the transaction. [Citation.] A release cannot be construed to include claims not within the contemplation of the parties. [Citations.] [N]o form of words, no matter how all encompassing, will foreclose scrutiny of a release [citation] or prevent a reviewing court from inquiring into surrounding circumstances to ascertain whether it was fairly made and accurately reflected the intention of the parties. [Citation.] Where there are words of general release in addition to recitals of specific claims, the words of general release are limited to the particular claim to which reference is made. [Citation.] Where there are only

words of general release, the courts will restrict the release to the thing or things intended to be released and will refuse to interpret generalities so as to defeat a valid claim not then in the minds of the parties. [Citations.] A general release is inapplicable to an unknown claim. [Citation.] Even where the parties intend to release a specific claim, the release of that claim will not be enforced if there has been fraud, duress, mutual mistake, or, at least in some cases, unconscionability.” (Internal quotation marks omitted.) *Carlile v. Snap-on Tools*, 271 Ill. App. 3d 833, 838-39 (1995).

“[I]t is well established that a general release will be given effect where the parties knew of an additional claim at the time of the signing of the release. [Citation.] Our supreme court has explained:

‘Where the releasing party was unaware of other claims, Illinois case law has restricted general releases to the specific claims contained in the release agreement. [Citation.] However, where both parties were aware of an additional claim at the time of signing the release, courts have given effect to the general release language of the agreement to release that claim as well.’ [Citation.]”  
*Badette v. Rodriguez*, 2014 IL App (1st) 133004, ¶ 20.

¶ 35 There is ample evidence in the record that plaintiff was aware of a claim Howard failed to include the farm account in the distribution of the trust assets. The evidence is that plaintiff was aware the farm had an income, she was provided statements for that account, and plaintiff knew the amount in the farm account. Plaintiff was also provided the appraised value of the farm, and knew that the appraisal formed the basis of her share of the farm she would receive upon execution of the release. Therefore, there is no genuine dispute of fact that plaintiff was aware

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whether the appraised value of the farm on which her share was based did not include the farm account. Accordingly, we will give effect to the general release language to release plaintiff's claim Howard breached his fiduciary duty by failing to distribute one-third of the funds in the farm account to plaintiff. Both parties were aware of the existence of the remaining claim in plaintiff's second amended complaint at the time that the release was executed. Accordingly, the language of the release operates to bar that claim, and the trial court did not err in granting summary judgment in favor of defendants. See *Lawrence*, 2016 IL App (1st) 142051, ¶ 30.

¶ 36

#### CONCLUSION

¶ 37 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 38 Affirmed.