STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of The Hughes Revocable Trust.

JENNIFER HUGHES TAYLOR,

Petitioner-Appellee,

v

PATRICIA SHIPLEY, DENNIS SHIPLEY, and DENISE SHIPLEY,

Respondent-Appellants.

UNPUBLISHED
September 22, 2005

No. 255928
Allegan Probate Court
LC No. 02-52898-CZ

Before: Zahra, PJ, and Cavanagh and Owens, JJ

PER CURIAM.

Respondents appeal as of right an amended opinion and order granting petitioner's MCR 2.116(C)(10) motion for summary disposition and denying respondents' motion. This case arose when, shortly before his death in 2002, Patricia's brother and Jennifer's father Eric Hughes, and his wife Gladys Hughes, executed various estate planning documents. We affirm.

On June 17, 1996, Gladys executed a durable power of attorney designating Eric as her attorney in fact and her step-daughter Jennifer Hughes Taylor as a successor attorney in fact. The durable power of attorney gave Gladys' attorney in fact the power to, among other things, conduct real property, personal property, and estate transactions, and to make gifts and transfer assets into any trusts Gladys had established or that had been established on her behalf. It also nominated the attorney in fact to act as the guardian of her estate if one was to be appointed.

Tanya Sheridan, Eric's and Patricia's niece, stated that attorney Ronald Runkle refused to prepare new estate planning documents in 2001 because he felt Gladys was not mentally capable of understanding what she was signing. When it became apparent that Eric could no longer care for himself and Gladys, the two of them moved to Michigan about August 4, 2002, and lived with Patricia and Dennis in their mobile home. According to Janet Taylor, who appeared to be respondents' neighbor in Michigan, Gladys appeared quite childlike, not fully cognizant of timeframes and distances, and incapable of taking care of herself. Tanya Sheridan testified that Gladys was confused and did not always remember Tanya's name in August 2002. She did not think Gladys could have gone grocery shopping on her own or understood what she was doing. According to Denise, in August 2002, Gladys was in touch with her surroundings at times and

confused at times. Patricia stated that Eric and Gladys lived with Dennis and her from August 4, 2002, until Eric's death.

During the month of August, Eric became aware that he did not have long to live. Eric met with attorney Philip Sheridan on August 15, 2002. According to Sheridan, the purpose of the meeting was to discuss preparation of estate planning documents. Eric informed him that Gladys had "Alzheimer's" and was often confused, but had good days and bad days. The Shipleys informed him that Gladys "was sometimes confused and sometimes she kind of appeared to know what was going on. Gladys did not talk during the meeting. Eric wanted to (a) exclude his children from inheriting his estate, (b) use his assets to provide for Gladys' care after he died, (c) give Patricia Shipley authority to care for Gladys after he died, and (d) establish Patricia or her heirs as residuary beneficiaries after Gladys died.

Sheridan stated Eric informed him that Runkle had estate planning documents. He received the documents from Runkle on August 20, 2002, or August 21, 2002. However, Runkle did not send him the June 17, 1996 durable power of attorney signed by Gladys, and Sheridan was not aware it existed. Estate planning documents, including the Hughes Revocable Trust, a general assignment to the trust, and a quit claim deed conveying the Illinois property into the trust, were signed by Eric and Gladys on August 21, 2002. The quit claim deed was signed as a precaution in case the sale of the Illinois property did not close. Patricia stated that the primary asset to be placed in the trust was the proceeds from the sale of the Illinois home. Gladys again did not talk.

Tanya Sheridan testified that five days before the August 30, 2002 sale of the Illinois house, Eric became bedridden. Patricia stated that Eric set up a joint bank account in her name and his name to manage the proceeds of the Illinois sale. According to Patricia, on September 10, 2002, Eric received a check for $215,810.99 in his name only from the Illinois sale; he gave $2000 to Patricia and Dennis, $2000 to Denise and her family, and deposited $210,000 in the joint bank account. On September 12, 2002, a transfer of $100,000 was made from the joint account in Patricia's and Eric's name to a joint account in Patricia's and Denise's name. Patricia claimed Eric did this to ensure his daughters could not claim the money.

Eric died September 14, 2002. Shortly after Eric's death, Patricia used the money from the sale of the house in Illinois to pay Eric's debts and buy a house for Gladys in Michigan. She paid $23,000 to a hospital in Illinois for Eric's medical treatment and entered into a purchase agreement for a house in Michigan for Gladys on September 19, 2002. According to Denise, Gladys' confusion became much worse after Eric died, but that it got much better in October. The purchase of the Michigan house closed on October 2, 2002. Because Gladys was listed as the grantee on the deed, Patricia had Gladys convey the house to her as trustee on October 14, 2002. Patricia executed another quit claim deed as Gladys' attorney in fact to herself as trustee on November 15, 2002. Patricia and Dennis moved in with Gladys to care for her. Petitioner petitioned to invalidate the 2002 trust, to remove trustees, and to require a full accounting. Attorney Christopher Antkoviak reported on December 6, 2002, that when he met with Gladys, it quickly became apparent that she suffered severe memory loss, and it was his opinion that she suffered some form of dementia. Both parties moved for summary disposition. The court granted petitioner's motion and denied respondents' motion.

Respondents first appear to argue that the court erroneously granted summary disposition to petitioner because it was outraged at respondents' attorney's conduct in having Gladys sign the documents. We disagree.

A trial court's grant of summary disposition is reviewed de novo. *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2002). In its amended opinion and order, the court, citing MRPC 1.14, stated that it was an attorney's responsibility to assess his client's mental capacity. Respondents argue that the court construed MRPC 1.14 too narrowly. The only authority respondents cite to support their position is MRPC 1.14 and the comment to the rule. However, the staff comment accompanying a rule of professional conduct is not authoritative. *Attorney Gen v Public Service Comm*, 243 Mich App 487, 503; 625 NW2d 16 (2000), citing MRPC 1.0(c).

Moreover, case law does not support their position. In *Persinger, supra* at 503, this Court noted that legal documents must be signed by mentally competent persons. It stated, "An attorney has a duty to act as an attorney of ordinary learning, judgment, or skill under the circumstances using reasonable professional judgment." *Id.* at 509. Although the Court determined that the defendant attorney had not committed legal malpractice in that case, it did so because it found that the attorney had made a reasonable inquiry into his client's ability to understand the nature and effect of the document she was signing, and it noted that the case was not one where the attorney had actual knowledge that his client was incompetent or the client exhibited signs that would lead the attorney to conclude she was incompetent. *Id.*

In contrast here, Sheridan specifically acknowledged that Eric told him "Gladys was often confused, but had good times and bad times." This indicated Sheridan was at least on notice that Gladys may not have been competent. He also stated that in both meetings with Eric and Gladys, Eric did all the talking while Gladys said nothing. By not talking to Gladys, Sheridan made no effort to determine whether she was competent, or even to determine that she approved of the proposed plan for her care. The court did not interpret MRPC 1.14 too narrowly.

To the extent respondents' argument could be characterized as bias on the judge's part, "A trial judge is presumed to be fair and impartial and any litigant who would challenge this presumption bears a heavy burden to prove otherwise." *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). In its opinion and order denying respondents' motion for reconsideration, the court stated in response to the very same argument raised here that the reason it did not give the 2002 documents any legal effect was because overwhelming evidence indicated Gladys was not mentally competent to sign the documents in her personal capacity. Given that comments indicating criticism of counsel are generally insufficient to establish bias, *Schellenberg v Rochester Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998), a disfavorable ruling is insufficient to establish bias, *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001), and a person must be mentally competent to sign legal documents, *Persinger, supra* at 503, respondents have failed to establish that the judge in the instant case was biased.

Respondents next argue that the court impermissibly engaged in factfinding with respect to Gladys' competency at the time of the Illinois sale, a transaction that was not relevant or

material to the case.[1] Because we find that respondents failed to establish an issue of material fact with respect to the power of attorney given to the Illinois attorney, we reject respondents' argument.

Summary disposition may not be granted when an issue of material fact exists. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988). A judge may not make findings of fact when deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 15 (1994). Respondents argue that an issue of material fact existed with respect to Gladys' competence at the time of the Illinois transaction. They further argue that it was unknown whether Gladys signed any documents regarding the Illinois transaction, and Eric could have signed all the documents using the 1996 durable power of attorney. To support their claim that an issue of material fact existed regarding Gladys' competency, respondents cite the deposition testimony of Sheridan and Denise.

Sheridan testified that he was informed by respondents that Gladys "was sometimes confused and sometimes she kind of appeared to know what was going on. She was – kind of an in-and-out thing." However, while this might be relevant to show its effect on the listener, i.e., that Sheridan was on notice that Gladys might not have been mentally competent, see *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995), it could not be used to demonstrate an issue of material fact regarding Gladys' state of mind because Sheridan had no personal knowledge of her actual competence, MRE 602; MCR 2.119(B)(1)(a), it was hearsay, MRE 801(c), hearsay is inadmissible unless otherwise provided, MRE 802, and there was no applicable exception to the hearsay rule. Deposition testimony may only be considered to the extent it would be admissible at trial. MCR 2.116(G)(6).

Denise testified Gladys was in touch with her surroundings at times and confused at times in August 2002. This testimony was equivocal at best. It could just as easily have indicated that Gladys was incompetent as competent. Moreover, being in touch with one's surroundings does not necessarily indicate that one has sufficient mind and memory to comprehend the nature and effect of the business in which one is engaged, which is the standard for granting a deed in Illinois. *McGlaughlin v Pickerel*, 381 Ill 574, 580; 46 NE2d 368 (1943); *Estate of Cunningham v Watson*, 207 Ill App 3d 72, 77-78; 565 NW2d 301 (1990).[2]

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[1] With respect to respondents' relevancy argument, respondents stated that the major asset of the trust was the proceeds from the Illinois transaction. They argued that even if the documents signed on August 21, 2002 were invalid as they pertained to Gladys, Eric had the power to create a trust individually, and he had the authority and power to transfer the proceeds of the sale, including Gladys' interest, to the trust by virtue of the 1996 durable power of attorney. Because the proceeds of the sale were the major asset, the legality of the sale was relevant and, therefore, so was Gladys' capacity at the time of the sale.

[2] Respondents argue that testimony regarding a grantor's intent must be judged by the law of the state in which the land is located. Petitioners do not contest this assertion and, in fact, cite Illinois authority with respect to this issue. Case law supports respondents' position. *Duffy v White*, 115 Mich 264, 270; 73 NW 363 (1897) (the law of the state in which the land is situated governs the legal status of the parties); *Taylor v Taylor*, 310 Mich 541, 548; 17 NW2d 745

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In contrast, Tanya stated that Runkle refused to prepare the documents in 2001 because he felt Gladys was not mentally capable of understanding what she was signing. According to Tanya, Gladys was an elderly person who was confused; Gladys was much more comfortable in her own home, but Tanya had to reintroduce herself to Gladys every time she visited in 2001 and in August 2002. She did not think Gladys could have gone grocery shopping on her own and understood what she was doing. Janet Taylor stated Gladys appeared quite childlike, not fully cognizant of timeframes and distances, and incapable of taking care of herself. Moreover, Antkoviak concluded Gladys suffered severe memory loss and some form of dementia in December 2002. Therefore, petitioner presented evidence before, during, and after the Illinois sale that indicated Gladys did not have the mental capacity to convey a deed. *McGlaughlin, supra* at 580.

Respondents also argue there was no evidence that Gladys signed the limited power of attorney giving Illinois attorney Adelman authority to sell the Illinois house, and Eric might have signed the Illinois power of attorney using his authority as Gladys' agent pursuant to the 1996 durable power of attorney. However, respondents stated in the supplemental brief in support of their motion for summary disposition that Adelman "had a limited power of attorney from Eric and Gladys." A court must consider admissions of a party when deciding a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This statement suggested that Gladys signed the Illinois power of attorney.

Moreover, petitioner met her burden of establishing that the 2002 documents were invalid because Gladys was incompetent. Once the proponent of a motion for summary disposition has met the required burden of proof, the burden shifts to the party opposing the motion to establish that an issue of material fact exists. *In re Handelsman Est*, 266 Mich App 433, 436; ___ NW2d ___ (2005). Because respondents did not provide the court with the Illinois power of attorney, they failed to establish an issue of material fact whether Eric exercised his authority as Gladys' agent in signing the power of attorney. *Id.* When a party fails to establish a material fact with admissible evidence, summary disposition is appropriate. *Id.* at 437. Therefore, even if the court granted summary disposition for the wrong reason, the correct result was reached, and reversal is not required. See *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005).

Respondents next argue the court erred in ruling that the Illinois sale was unlawful because in Illinois, a deed executed by an incompetent grantor is voidable rather than void, a voidable deed may be ratified, Eric ratified the sale when he deposited the proceeds in the bank, and Eric had the authority to act on Gladys' behalf. Respondents' argument appears to be that because the deed was presumed valid and the court affirmed the sale, the sale was not unlawful. Respondents' argument is essentially that the end justifies the means. The court indicated it was affirming the sale of the Illinois home and the purchase of the Michigan home, even though the

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(1945) (when determining a grantor's intent, the parties' knowledge, and the scrivener's knowledge, the laws of the state in which the circumstances occurred should be considered). Moreover it would be improper to apply Michigan law when there was no indication that the purchasers of the Illinois property had significant contacts with Michigan. *Sutherland v Kennington Truck*, 454 Mich 274, 286-287; 562 NW2d 466 (1997).

transactions were illegal, to benefit Gladys. As a result of Eric's actions in August and September 2002, Gladys lost ownership of the home she owned before her marriage to Eric – a house worth $215,810.99. In its place she was provided the use of a house worth $35,000 less, which, if the 2002 documents were to be given effect, would pass to respondents upon her death. Moreover, she lost the possessions contained in her home because Eric apparently gave them to Denise Shipley. These results did not comport with Gladys' last known competent wishes. It would have been well within the court's power to declare the deeds void. *In re Robertson Estate,* 144 Ill App 3d 701, 711; 494 NE2d 562 (1986).

Respondents next argue the court found that the August 21, 2002 trust was valid, and the court had no legal authority to declare the proceeds tainted or to conclude that Eric could not transfer the Illinois sale proceeds. The entire premise of respondents' argument is that the court found Eric did not have the authority to authorize the sale and to transfer the proceeds of the sale to the trust. The court did not, however, find that Eric lacked the legal authority; rather, the court found that Eric did not recognize or exercise his authority. Because respondents have failed to address the basis for the trial court's ruling, we will not grant the relief they seek. *Joerger v Gorden Food, Inc,* 224 Mich App 167, 175; 568 NW2d 365 (1997), citing *Roberts & Son Contracting, Inc v North Oakland Dev Corp,* 163 Mich App 109, 113; 413 NW2d 744 (1987).

Respondents next argue that Patricia intended the Michigan house to be held in trust, the title company erred in conveying it to Gladys, the subsequent quit claim deeds were intended to correct the error, and the mistake in the deed should have been reformed to title the house in the name of the trust. We disagree.

A trial court's decision whether to grant equitable relief is reviewed de novo. *Olsen v Porter,* 213 Mich App 25, 28; 539 NW2d 523 (1995). Reformation will be granted when there is clear and convincing evidence that the parties reached an agreement but, because of mutual mistake, the instrument does not express the parties' true intent. *Mate v Wolverine Mut Ins Co,* 233 Mich App 14, 24; 592 NW2d 379 (1998). Reformation should only be granted with utmost caution. *Olsen, supra* at 28. It will not be granted if the instrument was drawn as intended. *Id.* at 29. The party claiming mutual mistake bears the burden of proof. *Gortney v Norfolk & W R Co,* 216 Mich App 535, 542; 549 NW2d 612 (1996).

A party is not entitled to reformation when the party had access to all the necessary information, and the claim of mistake is predicated on the party's own carelessness or lack of due diligence. *Farm Bureau Mut Ins Co of Michigan v Buckallew,* 471 Mich 940-941, citing 3 Longhofer, Michigan Court Rules Practice (5th ed), p 507; *Lark v Detroit Edison Co,* 99 Mich App 280, 283; 297 NW2d 653 (1980). See also *Dombrowski v City of Omer,* 199 Mich App 705, 710; 502 NW2d 707 (1993) (failure to read a document before signing it cannot be the basis for mutual mistake). The documents generated at the time of the transaction clearly indicated that the home was conveyed to Gladys. Thus, respondents failed to establish anything more than their failure to read the documents or perform due diligence. Because they failed to establish mutual mistake by clear and convincing evidence, reformation was not required.

Respondents next argue that the court should have imposed a constructive trust to correct the mistake in titling the Michigan house, and the court erred when it refused to do so on the grounds that respondents had unclean hands when respondents did nothing wrong. We conclude that respondents failed to establish the grounds for imposition of a constructive trust. The party

seeking to have a constructive trust imposed bears the burden of establishing fraud, misrepresentation, concealment, undue influence, duress, or some other circumstance that would make it inequitable for the holder of legal title to retain the property. *Kammer Asphalt v East China Twp*, 443 Mich 176, 188; 504 NW2d 635 (1993). A constructive trust is imposed when "'property has been acquired in such circumstances that the holder of legal title may not, in good conscience, retain the beneficial interest.'" *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958), quoting *Beatty v Guggenheim Exploration Co*, 225 NY 380, 386; 122 NE 378 (1919). As previously indicated, respondents failed to establish mutual mistake, and respondents did not raise any other circumstance that would justify the imposition of a constructive trust.[3] Therefore, whether respondents had unclean hands is moot. *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004).

Respondents next argue the court erroneously refused to allow payment of their attorney fees from Gladys' estate but charged the estate with petitioner's attorney fees. We disagree.

A court's decision to award attorney fees is reviewed for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). Attorney fees generally may not be recovered unless a statute, court rule, judicial exception, or contract specifically provides for recovery. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). Fees for legal services rendered to a trustee in prosecuting an action for the benefit and protection of a trust are properly chargeable to the trust, *Detroit Trust Co v Blakely*, 359 Mich 621, 633; 103 NW2d 413 (1960), as are fees for legal services to a fiduciary in defending against a petition for removal when the petitioner failed to prove wrongdoing. *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996), citing MCL 700.334(v).[4]

Attorney fees incurred by a nonfiduciary in a probate court proceeding may be charged against the estate of a ward where the ward's estate is benefited. *In re Martin*, 200 Mich App 703, 722; 504 NW2d 917 (1993), rev'd on other grounds 450 Mich 204 (1995), citing *Becht v Miller*, 279 Mich 629, 638; 273 NW 294 (1937). Legal services confer a benefit on an estate if they either increase or preserve estate assets. *In re Sloan Estate*, 212 Mich App 357, 362; 538 NW2d 47 (1995). As a result of attorney Verde's services, Gladys' last known intentions were

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[3] Although respondents argue that "constructive trusts are imposed to correct mistakes in the titling of real estate," none of the cases cited by respondents support this argument. *Arndt v Vos*, 83 Mich App 484, 487; 268 NW2d 693 (1978) (defendant obtained title to the property through misrepresentation and fraud); *In re Davies Estate*, unpublished opinion of the Court of Appeals, issued 8/3/04, at 2-3 ("oral agreement to reconvey plus the confidence and trust of the family relationship provides sufficient grounds for imposing a constructive trust"); *Kent*, *supra* at 654-655 (Property deeded to sister to be held for the benefit of her incompetent brother); *Kammer*, *supra* at 189 (defendant assured plaintiff that it was protected by payment bonds and provided copies of the bonds).

[4] The enactment of the Estates and Protected Individuals Code, MCL 700.1203 provides that general legal and equitable principles supplement the act unless displaced by specific provisions of the act. MCL 700.334(v) was the predecessor to MCL 700.3715(w). MCL 700.3715(w) applies to a personal representative's powers under a will. MCL 700.7401(v)-(x), which apply to the powers of a trustee, contain substantially the same language as MCL 700.3715(v)-(x).

reinstated, and her individual estate was restored. Given that Sheridan's actions essentially extinguished Gladys' individual estate, at a time when she was not competent to prevent it, the court properly charged the estate with fees for Verde's services and precluded Sheridan's fees.

Respondents next argue the court erred when it refused to impose sanctions pursuant to MCR 2.114, MCR 2.625(A)(2), and MCL 600.2591. We disagree.

A trial court's decision whether a claim was frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). Clear error is found where, although there is evidence to support the finding, the reviewing court is left with a definite and firm conviction that the trial court made a mistake. *Id.* at 661-662. Because respondents did not prevail, they were not entitled to sanctions pursuant to MCR 2.625 or MCL 600.2591.

Under MCR 2.114(D), the signature of an attorney certifies that the attorney has read the legal document; the attorney has made a reasonable inquiry and believes the document is both factually supported and either is permitted by existing law or warrants a change in the law; and the attorney is not filing the document to harass, cause unnecessary delay, or needlessly increase the cost of litigation. MCR 2.114(E) provides that the court must impose an appropriate sanction for violation of the rule. Whether a claim is frivolous is determined by the circumstances at the time the claim was asserted. *Jerico Constr v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). As noted by the trial court, Eric did not recognize or exercise his authority under the 1996 durable power of attorney. Hence, because Eric did not exercise his authority, petitioner's allegation that Gladys' incapacity rendered the 2002 documents invalid was both factually and legally supported. See *Groening v McCambridge*, 282 Mich 135, 141; 275 NW 795 (1937) (plaintiffs' claim that the trust was void because of the settlor's incapacity was amply supported by testimony).[5]

Respondents next argue that because Gladys was never added as a party, the court lacked authority to enter orders with respect to her. MCR 2.116(C)(1) provides that summary disposition may be granted when a court lacks jurisdiction over a person or property. However, the probate court had exclusive jurisdiction to determine the validity or termination of the trust as well as to declare the rights of the individuals involved. MCL 700.1302(b). Because the rights of Gladys were the crux of the instant case, the court had jurisdiction. *Id.* Moreover, its reference to "Gladys' estate" was not erroneous. "'Estate' includes the property of the decedent,

[5] To the extent that respondents argue they are entitled to sanctions because of the statement in the original petition that the 1996 durable power of attorney did not give Gladys' agent the power to establish a trust, petitioner's amended petition did not include this statement. "Unless otherwise indicated, an amended pleading supersedes the former pleading." MCR 2.118(A)(4). Although the court noted that petitioner failed to file the amended petition within fourteen days or seek the court's leave or respondents' consent, the court found that the error was harmless because respondents had ample opportunity to respond to the pleadings. MCR 2.118(A)(2) provides that the court should freely grant leave to amend when justice requires. Therefore, we cannot conclude that the court committed clear error when it denied respondents' motion for sanctions.

trust, or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration." MCL 700.1104(b).

Respondents also seek remand to a different judge. Because we affirm the probate court's ruling, this issue is moot. *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens