
PARTIES/ATTORNEYS

Plaintiff	Elizabeth Alexandra Gorbett-Frost, Trustee of the John Cavanaugh Waddle Trust, dated July 11, 2018	Davis Toft, APC Thomas P. Davis Nicole C. Toft
Defendant	Margaret Smith Waddle	Amber Simmons

TENTATIVE RULING

For all the reasons discussed below, the motion to strike the complaint under Code of Civil Procedure section 425.13 is granted to the extent it requests the allegation that plaintiff was “hit with a lawsuit by the executor of John’s Estate less than two (2) months after John passed away” be stricken from paragraph 32 of the cross-complaint as it forms the basis of an element of the intentional infliction of emotional distress cause of action and thus arises from protected activity. The remainder of the motion to strike is denied.

The demurrer is sustained with leave to amend as to the 1st (breach of fiduciary duty) and 2nd (intentional infliction of emotional distress) causes of action, except as to the allegation identified above.

The demurrer is sustained with leave to amend as to the 3rd cause of action for declaratory relief with caution to the cross-complainant to carefully consider continued pursuit of this cause of action and not to re-allege it without substantive change.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See [Remote Appearance \(Zoom\) Information | Superior Court of California | County of Santa Barbara.](#))

John Cavanaugh Waddle executed a trust on July 11, 2018. On May 7, 2022, he married defendant Margaret Smith Waddle. He remained trustee until he passed away on November 29, 2023, at which point his sister, Elizabeth Alexandra Gorbett-Frost, became the trustee. On January 1, 2024, Gorbett-Frost as trustee filed a complaint for financial elder abuse against Waddle. She alleges that decedent suffered from substantially limited cognitive ability in the last years of his life, that Waddle took decedent’s assets for wrongful use, and that she exerted

undue influence upon him to change his beneficiary designations for his life insurance, retirement account, checking and savings accounts, and investment accounts from the Trust as the beneficiary to Waddle as the beneficiary.

On July 8, 2025, Waddle filed a cross-complaint alleging that on December 19, 2023, Gorbett-Frost sent her a letter demanding that Waddle sign a lease to begin paying rent to stay at the home she resided in with decedent. Waddle did not sign the lease and instead moved out in January 2024. She alleges causes of action for breaches of fiduciary duty, intentional infliction of emotional distress, and for declaratory relief regarding her status as an omitted spouse.

There are two matters on calendar, filed by cross-defendant Gorbett-Frost, both challenging the cross-complaint. The first is a demurrer, challenging all causes of action. The second is an anti-SLAPP motion pursuant Code of Civil Procedure section 425.16. Oppositions and replies have been filed. All briefing has been considered.

While not addressed by the parties, the court wishes to address the confusion in the case law about which motion should be decided first when an anti-SLAPP motion to strike and a demurrer are filed contemporaneously, as is the case here. (Compare *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland* (2020) 54 Cal.App.5th 738, 750-751 [trial court did not err in deferring ruling on defendant's special motion to strike where court has previously sustained defendant's demurrer with leave to amend] with *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 629 ["Trial courts should either grant or deny [anti-SLAPP motions]. . . . without leave to amend, prior to ruling on any pending demurrers. A proper ruling on the anti-SLAPP motion would, in most cases, obviate the need to rule on the demurrer at all or, at the very least, in its entirety"].) Rather than adopt or adhere to any bright-line approach, the court finds it better to pursue a middle ground – it has discretion to decide which motion should be assessed first, based on the circumstances. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967 [" "It is beyond dispute that 'Courts have inherent power ... to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.' [Citation.]' " "].)

Here, given the possibility the anti-SLAPP motion might dispose of the complaint in its entirety, the court will assess its merits first and then review the merits of the demurrer. Each motion will be addressed separately.

Legal Standards Applicable to Anti-SLAPP Motions

The legal standards under the anti-SLAPP scheme are settled. “A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted . . . section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055–1056 [internal citations omitted].) “A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (Code Civ. Proc., § 425.16, subd. (b)(1).)

Under the statute, an “‘act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (Code Civ. Proc., § 425.16, subd. (e).)

To determine whether a cause of action (or complaint) should be stricken under the anti-SLAPP statute, section 425.16 establishes a two-part test:

- Under the first part, the party bringing the motion has the initial burden of showing that the cause of action arises from an act in furtherance of the right of free speech or petition—i.e., that it arises from a protected activity. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.)
- Once the moving party has met its burden, the burden shifts to the other party to demonstrate a probability of prevailing on the cause of action. (*Ibid.*)

Only a cause of action that satisfies both parts of the anti-SLAPP statute—i.e., that ***arises*** from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

In determining whether defendant has sustained its initial burden, the court considers the pleadings, declarations, and matters which may be judicially noticed. (*Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324, 329.)

Here, Gorbett-Frost asserts that she engaged in “protected activity” when she filed her complaint with this court. “The constitutional right to petition ... includes the basic act of filing litigation or otherwise seeking administrative action.” (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 22.) To prevail on the first step, defendants must identify all allegations of protected activity and all claims for relief supported by those allegations. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.) Here, Gorbett-Frost seeks to strike the entirety of the cross-complaint.

“A claim arises from a protected activity when that activity underlies or forms the basis for the claim.” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062.) Courts must “consider the elements of the challenged claims and what actions by defendant supply those elements and ... form the basis for liability.” (*Laker v. Bd. of Trustees* (2019) 32 Cal.App.5th 745, 771.) The protected activity must “supply elements of the challenged claim” such that “but for” the defendant's “alleged actions taken in connection with” the protected activity, the plaintiff's claim would have no basis. (*Park, supra*, 2 Cal.5th at 1063-64.) The “mere fact that an action was filed after protected activity took place does not mean the action arose from that activity ...” (*Id.* at 1063.) If the protected activity supplies only “evidence of the parties' disagreement,” merely leads to the liability creating activity, or provides only evidentiary support for the plaintiff's claim, the allegation is not subject to attack under CCP §425.16. (*Id.* at 1064.) Thus, allegations that are “‘merely incidental’ or ‘collateral’ are not subject to” a special motion to strike. (*Ibid.*) If a claim is supported by both protected and unprotected activities, the court disregards the unprotected activity at this stage. (*Id.*) Defendants must then show that the challenged claim arises out of the allegations of protected activity and that the allegations of protected conduct are not merely incidental or included to provide context or background. (*Id.*; see also *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1012.) Gorbett-Frost highlights three allegations that support her claim the cross-complaint arises from the filing of the complaint:

- “On December 19, 2023, Gorbett-Frost sent a letter demanding that Margaret sign a lease and begin paying Gorbett-Frost \$2,750 per month in rent to stay at the Home. Margaret did not sign a lease and was forced to move out of the home in January 2024 – less than 60 days after John’s death. ***Gorbett-Frost then filed the underlying complaint against Margaret on January 25, 2024—still less than two (2) months after John’s death***” (Cross-Complaint, ¶ 17 [emphasis added].)
- “Gorbett-Frost acted with reckless disregard that Margaret would suffer emotional distress from being ... ***hit with a lawsuit by the***

executor of John's Estate less than two (2) months after John passed away." (Cross-Complaint, ¶ 32 [emphasis added].)

- Gorbett-Frost used "her position as executor of John's Estate and trustee of John's Trust to harass and harm Margaret," by among other things, *filing the instant lawsuit* (See Cross-Complaint, ¶ 26 [emphasis added].)

Gorbett-Frost concludes with: "As can be seen by the italicized text, each of the three causes of action state claims involving allegations related to the filing the lawsuit against Ms. Waddle. Thus, each of these causes of action *arises from* conduct constituting protected activity." (Motion, p. 10, ll. 14-16.)

The court disagrees. The allegations do not form the basis for the claims alleged. The first cause of action is for breach of fiduciary duty, First, the court notes that paragraph 26 does not, in fact, contain the language emphasized in Gorbett-Frost's motion. It states in full:

"At all times relevant herein and as described above, Gorbett-Frost breached her fiduciary duties to Margaret by failing to notify Margaret of her rights as an omitted spouse under Probate Code Section 21610; failing to notify Margaret of her right to stay in the Home after John's death through a probate homestead pursuant to Probate Code Sections 6520-6527; failing to account for John's Estate; failing to provide required notices to beneficiaries of John's Estate, specifically including but not limited to Margaret; and taking actions and using her position as executor of John's Estate and trustee of John's Trust to harass and harm Margaret."

(Cross-Complaint, ¶ 26.)

Gorbett-Frost would presumably have this court infer that Waddle's intention was to assert that one of the actions Gorbett-Frost took to harass and harm her was to file the instant lawsuit. She provided no authority for doing so. The court will not make any such inference. Thus, the bases for the breach of fiduciary cause of action do not include the filing of the complaint.

The second cause of action is for intentional infliction of emotional distress. The alleged conduct that forms the bases for that cause of action is the same conduct on which the breach of fiduciary duty is based. (Cross-complaint, ¶ 31—"Gorbett-Frost's herein-described conduct was outrageous and exceeds the bound of what is acceptable in a civil society.") In addition, Waddle must allege that defendant intended to cause the harm or acted with reckless disregard to the probability that plaintiff would suffer emotional distress. (CACI, No. 1600.) Here, Waddle alleged: "Gorbett-Frost acted with reckless disregard that Margaret would

suffer emotional distress from being forced out of the Home within weeks of her husband's death and hit with a lawsuit by the executor of John's Estate less than two (2) months after John passed away." (Complaint, ¶ 32.) These two actions—being forced out of the home within weeks of decedent's death *and* the filing of the lawsuit, thus form a basis for liability and create mixed question for the court.

As noted above, "[w]hen relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.)

Here, it is indisputable that the cause of action for intentional infliction of emotional distress arose at least in part out of the filing of the lawsuit. The burden thus shifts to Waddle to demonstrate a probability of prevailing on the cause of action. Waddle's opposition falls woefully short, asserting: "The MTS is a reiteration of Frost's concurrently filed Demurrer to Cross-Complaint ("Demurrer"). For the sake of judicial economy, Margaret expressly incorporates herein by reference her concurrently submitted opposition to the Demurrer." (Opposition, p. 2, ll. 1-3.) No evidence was submitted to demonstrate a probability of prevailing on the allegation that Gorbett-Frost's conduct acted with reckless disregard to the probability that plaintiff would suffer emotional distress. Thus, the allegation must be stricken.

Declaratory relief cause of action is based on the same alleged breaches of conduct that form the basis for the fiduciary duty cause of action. Thus, it does not arise from the protected conduct.

The motion is granted to the extent that the language in paragraph 32 - "hit with a lawsuit by the executor of John's Estate less than two (2) months after John passed away" – must stricken as it forms the basis of an element of the intentional infliction of emotional distress cause of action and thus arises from protected activity. This leaves the unprotected activity associated with the breach of fiduciary duty as the basis for this cause of action. Accordingly, the remainder of the motion to strike is denied.

Demurrer

“In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.’” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

“The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. ... [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Gregory v. Albertson’s, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Request for Judicial Notice

Gorbett-Frost requests the court take judicial notice of the complaint in this action as well as a grant deed recorded in the county registrar. No opposition has been filed and the court grants the request.

1st (Breach of Fiduciary Duty) Cause of Action

In this cause of action, Waddle alleges that Gorbett-Frost breached her fiduciary duty by failing to notify Waddle of her rights as an omitted spouse under Probate Code section 21610 and her right to designate the home as a probate homestead pursuant to Probate Code section 6250-6257, as well as failing to account for the estate and to provide required notices to beneficiaries of the estate. Gorbett-Frost demurs, arguing that because Waddle is not a beneficiary of the trust or the estate of the decedent, no fiduciary duty exists.

A trustee’s duties are set forth in Probate Code sections 16000 – 16015. As applies here, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to Division 9 of the Probate Code (Prob. Code, § 16000), which requires the giving of notice to beneficiaries in various circumstances (Prob. Code, §16061.7). The trustee has a duty to administer the trust solely in the interest of the beneficiaries (§ 16002) and owes each a duty of impartiality. (§ 16003.) Except as otherwise provided, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or

principal is required or authorized in the trustee's discretion to be currently distributed. (Prob. Code, § 16062, subd. (a).)

Notably, these duties are generally owed to a beneficiary of the trust. Waddle alleges that she is owed these duties because she is a “statutory beneficiary” of the trust under Probate Code section 21610. Because it is the policy of California that spouses are to provide for one another, a person's failure to provide for their surviving spouse in their testamentary instruments is strongly disfavored and thus generally presumed to be the product of oversight, accident, mistake or unexpected change of condition rather than intent. (*Reich v. Reich* (2024) 105 Cal.App.5th 1282, 1288–1289.) Thus, under § 21610, an omitted spouse who married the decedent after the execution of all of the decedent's testamentary instruments is entitled to receive a share of the decedent's estate unless certain exceptions apply. (§ 21610.)¹

While Waddle may qualify as an omitted spouse, it does not follow that the trustee owes her the same duties as is owed a beneficiary of the trust. “Beneficiary” is defined by the Probate Code as “a person to whom a donative transfer of property is made ..., and: [¶] ... [¶] (c) As it relates to a trust, means a person who has any present or future interest, vested or contingent.” (Prob. Code, § 24, subd. (c).) Here, it is indisputable that she is not a person to whom a “donative transfer” was made. If she were, she would not need to rely on § 21610 to determine her share. Thus, she is not a “statutory beneficiary” of the trust and is not owed the duties otherwise owed to a trust beneficiary. Even if she were owed the same duties, it is unclear how the trustee can be charged with advising a beneficiary of their legal rights as an omitted spouse or the right to stay in the home through a probate homestead election, as is alleged in paragraph 26. This would violate the general rule against practicing law without a license. (See *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 70.)

No other argument was offered in support of her entitlement to a fiduciary duty. The court nevertheless recognizes that Waddle may be owed a fiduciary duty under some other principle of law. Thus, the demurrer to this cause of action is sustained with leave to amend.

2nd (Intentional Infliction of Emotional Distress) Cause of Action

“A cause of action for intentional infliction of emotional distress exists when there is (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and

¹ Gorbett-Frost asserts that Waddle received statutory notice under Probate Code § 16061.7 in December 2023 and failed to timely bring a contest within the 120-day period, suggesting her claim of omitted-spouse status is therefore barred. This fact does not appear on the face of the complaint or any judicially noticed documents. Thus, the court cannot consider it.

proximate causation of the emotional distress by the defendant's outrageous conduct." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1609 [cleaned up]; *Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 780.)

In the court's view, plaintiff's allegations are insufficient as a matter of law to establish outrageous conduct. For conduct to be considered outrageous for purpose of tort liability, it "must be so extreme as to exceed all bounds of that usually tolerated in a civilized society." (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.) "Generally, conduct will be found to be actionable where the 'recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"' " (*KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028.) The fact that conduct might be termed outrageous is not itself sufficient. "The tort calls for intentional, or at least reckless conduct—conduct intended to inflict injury or engaged in with the realization that injury will result." (*Davidson, supra*, 32 Cal.3d at p. 210.) The conduct must be of a nature that is especially calculated to cause mental distress of a very serious kind. (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 165, fn. 5.)

In this cause of action, Waddle asserts that Gorbett-Frost's failure to advise her of her legal rights as an omitted spouse or the right to stay in the home through a probate homestead election was outrageous conduct. While these issues are generally ones for the trier of fact to decide, the court must determine in the first instance whether defendants' conduct is so extreme and outrageous to result in recovery. (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1265 [it is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery].) Many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law. (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235 [citing cases].) "Whether particular conduct is 'outrageous' can best be determined in light of holdings in earlier cases dealing with particular types of conduct." (*Id.* at 233.)

Here, the alleged conduct simply does not rise to the level of outrageousness that supports intentional infliction of emotional distress, as determined by prior case law. (*Crouch v. Trinity Christian Center of Santa Ana* (2019) 39 Cal.App.5th 995, 1007 [plaintiff's grandmother was officer of defendant organization; grandmother's tirade directed at 13-year-old plaintiff who had been drugged and raped by defendant's employee, including statement that attack was her fault, was extreme and outrageous]; *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1613 [defendants engaged in outrageous conduct when they aggressively rushed toward and confronted plaintiff, made rude comments, expressly threatened both plaintiff and the family dog, and made a veiled threat against plaintiff's wife while he was standing on his side of the property line photographing the fence].) While plaintiff implies she was abused during her time of grief, there are no allegations that she

was forcibly removed from the home. (Compare *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1046—landlord changed the locks at the request of their tenant, Mobile Medical, on apartment occupied by plaintiff after her employment was terminated and just days after she returned home after reconstructive surgery due to an industrial injury with her arm in a cast.)

Moreover, the alleged distress has not been adequately alleged. The element of “[s]evere emotional distress” is not mild or brief; it must be so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it.” (CACI 1604; *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397.) The cross-complaint alleges: “As a direct and proximate result of Gorbett-Frost’s herein-described wrongful conduct, Margaret has suffered damages in an amount according to proof at trial.” (Cross-Complaint, ¶ 34.) Our high court has expressly indicated that assertions of emotional distress involving discomfort, worry, anxiety, upset stomach, concern, and agitation are insufficient to show “emotional distress of such substantial quality or enduring quality that no reasonable person in a civilized society should be expected to endure it. (*Hughes, v. Pair* (2009) 46 Cal.4th 1035, 1051.) It follows that the allegations here, which are entirely bereft of the type of distress experienced, also fail to satisfy this “high” pleading bar. It is for the court to determine whether on the allegations advanced severe emotional distress can be found, and, if so, for the jury to determine whether, on the evidence, it in fact exists. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376.) Severe emotional distress cannot rest on the allegations pled.

The demurrer to this cause of action is sustained with leave to amend (except as to allegations that involve the filing of the instant action as a basis for the distress).

3rd (Declaratory Relief) Cause of Action

This cause of action alleges that there is an actual dispute and controversy between Waddle and Gorbett-Frost as to Waddle’s status as an omitted spouse under Probate Code Section 21610 and beneficiary of the trust; the duties and actions Gorbett-Frost owes to Waddle as an omitted spouse and beneficiary of John’s Estate; and the “(im)propriety” of Gorbett-Frost’s actions towards Waddle. (Cross-Complaint, ¶ 38.) Gorbett-Frost challenges this cause of action and Waddle has offered no opposition to the challenge. The demurrer will be sustained, without leave to amend.

Civil Code section 1060 provides:

“Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or

duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract.”

None of the identified controversies trigger application of Civil Code section 1060. Waddle’s status as an omitted spouse or beneficiary of the trust must be determined by statutory interpretation, not by a written instrument or a contract, which in any event excludes a trust or will. The duties owed will likewise be determined by statute or common law, as will be the propriety of her actions (assuming she is found to be a fiduciary). The declaratory relief cause of action does not allege a declaration of rights over property or the location of a natural channel or watercourse. Thus, a declaration is not appropriate in these circumstances.

The demurrer to this cause of action is sustained with leave to amend, with caution to the cross-complainant to carefully consider continued pursuit of this cause of action and not to re-allege it without substantive change.