SUMMARY
March 31, 2022

2022COA38

No. 20CA2067, *Herbst v. Univ. of Colo. Found.* — Trusts — Charitable Trusts — Uniform Prudent Management of Institutional Funds Act; Jurisdiction of Courts — Standing — Special Interest Standing; Government — Department of Law — Powers and Duties of the Attorney General

A division of the court of appeals holds that a charitable trust subject to the Uniform Prudent Management of Institutional Funds Act, sections 15-1-1101 to -1110, C.R.S. 2021, may be sued for mismanagement of its investments only by the Attorney General or a person with a special interest in the trust. The plaintiffs in this case, a donor to and former trustee of the University of Colorado Foundation, graduate of the University of Colorado, and creator of programs at the University; two graduates of the University; and a current student at the University, do not have a special interest in the Foundation's management of its investments. The plaintiffs

therefore lack standing to bring this lawsuit in which they challenge the Foundation's investment decisions.

COLORADO COURT OF APPEALS **2022COA38**

Court of Appeals No. 20CA2067
City and County of Denver District Court No. 20CV32403
Honorable Robert L. McGahey, Jr., Judge

Clarence Herbst, Gerald Miller, Jerome Young, and Emmanuel Alfaro,

Plaintiffs-Appellants,

v.

University of Colorado Foundation and Board of Directors of the University of Colorado Foundation,

Defendants-Appellees,

and

Board of Regents of the University of Colorado,

Intervenor-Defendant-Appellee.

JUDGMENT AFFIRMED

Division III
Opinion by JUDGE J. JONES
Lipinsky and Gomez, JJ., concur

Announced March 31, 2022

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¶ 1 The University of Colorado Foundation (Foundation) is a nonprofit charitable corporation. Its stated purposes are to receive, manage, and prudently invest private donations for the benefit of the University of Colorado (CU) and to support CU's philanthropic endeavors through donor stewardship. Plaintiffs aren't happy with the Foundation's return on its investments since at least 2009. Plaintiffs are Clarence Herbst, a CU graduate, donor to the Foundation and to CU, and Trustee Emeritus of the Foundation; Gerald Miller, a CU graduate; Jerome Young, a CU graduate; and Emmanuel Alfaro, a student at CU's Colorado Springs campus. They sued the Foundation and its governing board of directors (the Board), on behalf of themselves and a class of similarly situated persons, asserting claims for violation of the Uniform Prudent Management of Institutional Funds Act (the Act), sections 15-1-1101 to -1110, C.R.S. 2021, and breach of fiduciary duty.

¶ 2 The gist of plaintiffs' amended complaint is that the Board has (1) imprudently (indeed, "unlawfully") invested the Foundation's funds by using "actively managed accounts" rather than "passive

index funds";[1] (2) overpaid its investment advisors (because the advisors should have put most or all the Foundation's investments in passive index funds); and (3) failed to renegotiate or terminate its contracts with its investment advisors since 2008 or 2009. All this, plaintiffs allege, has cost the Foundation over $1 billion in unrealized revenue — money which, they argue, could have been used to reduce tuition, "increase faculty salaries," "provide more educational resources to CU students and faculty," and "build more world-class educational facilities to improve the academic experience at CU for its students and its faculty."[2]

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[1] In the reply brief and at oral argument, plaintiffs' counsel tried to disclaim the assertion of any duty to invest in passive index funds or renegotiate investment advisor agreements. But plaintiffs' amended complaint expressly and repeatedly alleges such duties. For example, paragraph 45 of the amended complaint alleges that "[t]here is an avalanche of additional information in the public domain that was available to Defendants to learn that index fund investing was their duty."

[2] We pause to observe that, despite plaintiffs' assertions as to how these unrealized funds could have been used, their primary requested remedy is disbursement of this "approximately $1 billion" not to CU, but to themselves and the class members. And plaintiffs don't request any injunctive relief directing the Foundation and the Board to invest the Foundation's funds in any particular way, even though it is the failure to invest the funds in the manner plaintiffs contend is required that is at the heart of their amended complaint.

¶ 3 On defendants' motion, the district court dismissed the amended complaint in a two-sentence order devoid of any explanation of the reasons for dismissal. It appears, however, that the court accepted defendants' arguments that none of the plaintiffs has standing and that the amended complaint fails, for various reasons, to state a claim on which relief can be granted.

¶ 4 We conclude that none of the plaintiffs has standing. This is so because under the Act, as at common law, only the Attorney General or a person with a special interest in a charitable trust has standing to sue for mismanagement, and none of the plaintiffs has the requisite special interest.

¶ 5 We therefore affirm the judgment.

I. Standing

¶ 6 If a plaintiff doesn't have standing to sue, the court lacks jurisdiction to decide the case. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004); *see Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 7. To establish standing under Colorado law, a plaintiff must show that (1) he suffered an injury in fact and (2) the injury was to a legally protected interest. *Reeves-Toney v. Sch. Dist. No. 1*, 2019 CO 40, ¶ 22; *Barber v. Ritter*, 196 P.3d 238, 245 (Colo.

2008). "[T]he standing requirement distinguishes 'those particularly injured by . . . government action,' who may present their controversy for resolution by the courts, from members of the general public, whose interests are more remote and who 'must address their grievances against the government through the political process.'" *Reeves-Toney*, ¶ 22 (quoting *Barber*, 196 P.3d at 255 (Eid, J., concurring in the judgment)).

¶ 7 We review de novo whether a particular plaintiff has standing to sue. *Barber*, 196 P.3d at 245.

¶ 8 This case involves the management of a charitable trust. Defendants argue that the law of charitable trusts bears on the standing analysis. Plaintiffs disagree. Defendants have the better of the argument. Colorado courts frequently consider the law applicable to the claims at issue when determining standing to assert those claims. *E.g.*, *Kim v. Grover C. Coors Tr.*, 179 P.3d 86, 89-90 (Colo. 2007) (shareholder claim against corporate directors); *Nicholson v. Ash*, 800 P.2d 1352, 1356-57 (Colo. App. 1990) (same).

¶ 9 Indeed, in *Anderson v. Suthers*, 2013 COA 148, ¶¶ 14, 19, the division considered the common law of charitable trusts in determining whether members of the public had standing to

challenge the Attorney General's approval of a sale of a nonprofit's interest in a health care provider based on their "close and lengthy association with the [seller]" as "former board members and volunteers." In holding that they did not, the division recognized the long-standing common law rule that "no private citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefited by the trust and will receive charitable or other benefits from the operation of the trust." *Id.* at ¶ 16 (quoting Ronald Chester et al., *The Law of Trusts and Trustees* § 414 (3d ed. 2005)).

¶ 10 This limitation on standing exists because, "[i]n the case of a charitable trust, the beneficiary is the unspecified, indefinite general public to whom the social and economic advantages of the trust accrue[]." *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1125 (Colo. 2007); *see* Restatement (Second) of Trusts § 364 cmt. a (Am. L. Inst. 1959); 5 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 37.3.10, at 2431 (5th ed. 2008). And, "[a]s a consequence, the responsibility for public supervision of charitable trusts traditionally has fallen to the state's Attorney General . . . ." *Denver Found.*, 163 P.3d at 1125-26; *accord Anderson*, ¶ 16; *The*

Law of Trusts and Trustees § 411; *Scott and Ascher on Trusts* § 37.3.10, at 2431-35; *see Ireland v. Jacobs*, 114 Colo. 168, 170-71, 179, 163 P.2d 203, 204-05, 208 (1945) (proposed trust to create a college scholarship fund was a public trust which the Attorney General could enforce); § 15-1-1005, C.R.S. 2021 (recognizing the authority of the Attorney General with respect to charitable trusts); § 24-31-101(2), C.R.S. 2021 (recognizing and reaffirming that the Attorney General has the powers conferred by statute and common law "regarding all trusts established for charitable, educational, religious, or benevolent purposes"); Restatement (Second) of Trusts § 364 cmt. a, § 391 cmt. c.[3]

¶ 11 Does this limitation apply to suits against institutions, like the Foundation, covered by the Act? Yes. As noted, section 24-31-101(2) "recognizes and reaffirms" the Attorney General's power at common law with respect to charitable trusts. And the Prefatory Note to the Act acknowledges that "the attorney general continues

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[3] "If everyone were entitled, as a matter of right, to seek to enforce charitable trusts, charitable trusts would be subject to repetitious and harassing, and perhaps often baseless, litigation." 5 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 37.3.10, at 2449 (5th ed. 2008).

to be the protector both of the donor's intent and of the public's interest in charitable funds." Tit. 15, art. 1, pt. 11, Prefatory Note, C.R.S. 2021 ("Like the [Uniform Trust Code] provisions, [the Act's] modification rules preserve the historic position of attorneys general in most states as the overseers of charities."); § 15-1-1106 cmt. on subsec. (b), C.R.S. 2021 ("Consistent with the doctrine of deviation under trust law, the institution must notify the attorney general [of a proposed equitable deviation of the means of carrying out the donor's intent] who may choose to participate in the court proceeding. The attorney general protects donor intent as well as the public's interest in charitable assets.").[4]

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[4] Plaintiffs argue that this language in the Prefatory Note is limited to situations in which the trust seeks to modify restrictions on the use of charitable funds. But we believe that, although this portion of the Prefatory Note discusses such proposed modifications, the reference to the Attorney General's protective role reflects merely that this sort of issue isn't outside the Attorney General's historically recognized purview. Indeed, that position is reflected in the drafting history of the predecessor to the Act. *See* Unif. Mgmt. of Institutional Funds Act 6 (Unif. L. Comm'n 1972), https://perma.cc/D2HG-QUG3 ("The particular recipient of the aid of a charitable organization is not a 'beneficiary' in the sense of a beneficiary of a private trust; only the Attorney General or similar public authority may enforce a charitable trust.").

¶ 12 We also find support for this position in the decisions of courts in other jurisdictions. The Act is, as the title says, a uniform act. Many states have adopted it. And courts in such states have held that, subject to specific exceptions (one of which we discuss below), only the attorney general has standing to protect the public interest in a trust subject thereto because the uniform act leaves room for application of the common law rule. *E.g.*, *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 997-1002 & nn.3, 4 (Conn. 1997); *Matter of Lindmark Endowment for Corp. Bus. Ethics Fund*, No. A19-0229, 2019 WL 5546205, at **5-9 (Minn. Ct. App. Oct. 28, 2019) (unpublished opinion); *Siebach v. Brigham Young Univ.*, 2015 UT App 253, ¶¶ 15-21. We don't see any reason to go down a different path. *See* § 15-1-1110, C.R.S. 2021 ("In applying and construing [the Act], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.").

¶ 13 But that doesn't end our analysis. "Parties with special interests in the benefits of a charitable trust have been accorded standing to enforce the trust, but only when they are 'entitled to benefits different from those to which members of the public are

entitled generally.'" *Anderson*, ¶ 19 (quoting *Scott and Ascher on Trusts* § 37.3.10); *see Siebach*, 361 P.3d at 138. To put a finer point on it, "[t]he mere fact that a person is a possible beneficiary is not sufficient to entitle him to maintain a suit for the enforcement of a charitable trust." Restatement (Second) of Trusts § 391 cmt. c; *accord Warren v. Bd. of Regents of Univ. Sys. of Ga.*, 544 S.E.2d 190, 193 (Ga. Ct. App. 2001). Rather, "[s]pecial standing applies only where 'the claim has arisen from a personal right that directly affects the individual member' of a charitable organization." *Harvard Climate Just. Coal. v. President & Fellows of Harvard Coll.*, 60 N.E.3d 380, 382 (Mass. App. Ct. 2016) (quoting *Weaver v. Wood*, 680 N.E.2d 918, 923 (Mass. 1997)); *see also Scott and Ascher on Trusts* § 37.3.10, at 2440-47 (discussing examples of such interests); Restatement (Second) of Trusts § 391 cmt. c.

¶ 14 Applying these principles, we examine whether any of the plaintiffs have "special interest" standing, keeping in mind that the plaintiffs assert an interest in the management of the Foundation —

that is, in selecting investment advisors and choosing investment options.[5]

¶ 15 Herbst argues that he has a special interest by virtue of having "created special academic programs at the University."[6] But this is merely a form of the "close and lengthy association" argument rejected in *Anderson*. And this is merely an allegation that such programs would benefit from better financial performance by the Foundation, which is insufficient to create standing. *See Anderson*, ¶ 16; *The Law of Trusts and Trustees* § 414.

¶ 16 Herbst's status as a donor to the Foundation and CU is likewise insufficient to give him standing.[7] Where a donor isn't

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[5] Plaintiffs assert that the "special interest" requirement doesn't apply to them because, unlike some of the cases applying this requirement, they aren't seeking to "enforce" the trust. But they don't cite any authority recognizing that distinction and don't explain why we should do so. And we observe that in *Harvard Climate Just. Coal. v. President & Fellows of Harvard Coll.*, 60 N.E.3d 380 (Mass. App. Ct. 2016), for example, the court applied the special interest requirement to students who objected to how the university's endowment funds were being invested and held that the students didn't have standing.

[6] The amended complaint alleges that Herbst created an ethics program, academic centers, and a scholarship program at CU.

[7] At oral argument, plaintiffs' counsel disclaimed any assertion that Herbst has standing because he has donated to the Foundation. The amended complaint, however, emphasizes Herbst's status as a

seeking to enforce some condition attendant to his donation (with an express reservation of the right to do so) or claiming to have been misled into making the donation, his mere status as a donor confers upon him no special status vis-a-vis the trust. *Carl J. Herzog Found.*, 699 A.2d at 998-1002 (no such standing at common law or under the uniform act); *Matter of Lindmark Endowment*, 2019 WL 5546205, at **9-10 (no exception under the uniform act for donors); *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133, 138-39 (Mo. Ct. App. 2009) (donors didn't have standing under the uniform act to enforce restrictions on their gift); *Siebach*, 361 P.3d at 135-38 (donors had no special interest absent express retention of a reversionary interest in the funds; donors had traditional standing as to claims that their donations were fraudulently induced). Herbst makes no such claim; he claims a right to challenge the Foundation's investment and management decisions. In sum, Herbst lacks special interest standing.[8]

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donor, so we address donor standing in the interest of covering all the bases.

[8] Herbst also alleges that he is a former member of the Board and is a Trustee Emeritus. But he doesn't argue that either status gives him standing. And for good reason. While some courts have

¶ 17 Miller and Young (CU graduates) and Alfaro (a current CU student) assert special interest standing as the "intended beneficiaries" of the Foundation. But again, one's status as a member of the class to be benefited by a trust doesn't confer standing on such a person to enforce a trust. *Anderson*, ¶ 16; *The Law of Trusts and Trustees* § 414. And we fail to see how that status should give someone standing to challenge the investment decisions and management of a trust. In *Harvard Climate Justice Coalition*, the court held that students objecting to Harvard's endowment fund's investment decisions lacked special interest standing because they "fail[ed] to show that they have been accorded a personal right in the management or administration of Harvard's endowment that is individual to them or distinct from the student body or public at large." 60 N.E.3d at 382-83; *see also*

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recognized that a trustee may have standing to challenge actions of a trust, we aren't aware of any authority supporting the notion that a former trustee or one holding an honorary position has standing. *See Anderson v. Suthers*, 2013 COA 148, ¶ 19 (former board members lacked special interest standing); *see also Morris v. Thomas*, 589 S.E.2d 419, 422-23 (N.C. Ct. App. 2003) (former directors of charitable trust lacked standing to bring a derivative action on behalf of the trust challenging their removal as directors).

Russell v. Yale Univ., 737 A.2d 941, 946 (Conn. App. Ct. 1999) (students lacked standing to challenge reorganization of a divinity school funded by a charitable trust). Miller, Young, and Alfaro likewise fail to assert any such individualized or distinct interest in the Foundation's investment and management decisions. It follows that they, too, lack special interest standing.[9]

¶ 18 The cases on which plaintiffs rely in arguing for a contrary conclusion are easily distinguishable. *Branson School District RE-82 v. Romer*, 958 F. Supp. 1501 (D. Colo. 1997), *aff'd*, 161 F.3d 619 (10th Cir. 1998), involved a question of standing under *federal* law to bring an action under the Supremacy Clause, article VI, clause 2 of the United States Constitution. *Brotman v. East Lake Creek Ranch, L.L.P.*, 31 P.3d 886 (Colo. 2001), concerned the standing of

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[9] Plaintiffs also argue that faculty members have special standing to assert the claims in the amended complaint. But none of the named plaintiffs is a CU faculty member. In any event, one's status as a faculty member doesn't confer special interest standing. *See Warren v. Bd. of Regents of the Univ. of Ga.*, 544 S.E.2d 190, 192-94 (Ga. Ct. App. 2001) (faculty members who contributed to a charitable trust establishing an endowed chair and who might have been eligible to be named to the endowed chair lacked special interest standing to challenge the selection decision; faculty members were merely potential beneficiaries).

an entity to challenge an agreement entered into by the State Board of Land Commissioners, which holds land in trust not for the benefit of taxpayers at large, but for Colorado's public schools. Nothing in either case sheds light on the standing issue in this case.[10]

¶ 19 For the foregoing reasons, we conclude that the named plaintiffs lack standing to pursue their claims against the Foundation and the Board.[11] The district court therefore correctly dismissed the amended complaint. *Freedom from Religion Found.*, ¶ 7.[12]

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[10] The class of potential beneficiaries of the Foundation isn't as narrow as plaintiffs assert. The Foundation clearly benefits not only current students, faculty members, administrators, and staff of CU, but the public at large.

[11] Because the plaintiffs individually lack standing, they lack standing to sue on behalf of a class. *See Friends of Chamber Music v. City & Cnty. of Denver*, 696 P.2d 309, 314-16 (Colo. 1985); *Cottrell v. City & Cnty. of Denver*, 636 P.2d 703, 711 (Colo. 1981); *Kreft v. Adolph Coors Co.*, 170 P.3d 854, 856-58 (Colo. App. 2007). Indeed, this follows from plaintiffs' allegation that they and the putative class members are "similarly situated."

[12] Because we conclude that plaintiffs lack standing, we don't need to consider any other basis for affirming the district court's ruling.

II. Defendants' Attorney Fees

¶ 20 Defendants request an award of their attorney fees incurred on appeal. But they don't explain the legal and factual basis for such an award as required by C.A.R. 39.1. So we deny their request. *See Mountain States Adjustment v. Cooke*, 2016 COA 80, ¶ 47; *In re Marriage of Wells*, 252 P.3d 1212, 1216 (Colo. App. 2011).

III. Conclusion

¶ 21 The judgment is affirmed.

JUDGE LIPINSKY and JUDGE GOMEZ concur.