THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Jean Hoefer Toal, Acting Circuit Court Judge

Case No. 2017-CP-28-00831
Appellate Case No. 2019-001632

IN THE MATTER OF:
LEMUEL WHITAKER BOYKIN, II, deceased

Rigdon H. Boykin, as sole disinterested Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B.....Appellant-Respondent

v.

Mary Deas Wortley, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, Co-Trustee of the Lemuel Whitaker Boykin Marital Deduction Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; Alice B. Belger, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; Lemuel Whitaker Boykin, III; and May Cantey Boykin, of whom

Of whom **Mary Deas Wortley** and **Alice B. Belger** are ..... Respondent-Appellants

And

Lemuel Whitaker Boykin, III and **May Cantey Boykin** are ..... Respondents.

INITIAL REPLY BRIEF OF RESPONDENT-APPELLANTS WORTLEY AND BELGER TO RESPONSE BRIEF OF APPELLANT-RESPONDENT BOYKIN

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ATTORNEYS FOR RESPONDENT-
APPELLANTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

ARGUMENT IN REPLY

Wortley and Belger appealed the trial court's decision to award Appellant-Respondent Rigdon Boykin ("Boykin") attorney's fees and costs, or, alternatively, its excessive award of fees. It was an abuse of the trial court's discretion to make its fee award to Boykin for many reasons. In the case below, Boykin:

- harassed and threatened his Co-Trustees and their counsel;
- took actions not out of a desire to genuinely perform his duties as a trustee, but to interfere with his Co-Trustees' ability to manage the trust;
- set out to sell the bulk of the Trust's real property, in direct opposition to the Testator's expressed desire to preserve the family property if at all possible. Preservation of this property was one of the core purposes of the Trust;
- filed this suit to seize control of the Trust and force his Co-Trustees to sell the property, and, in doing, so, filed claims without proper legal and factual basis; and
- lost on every single claim he asserted, and was himself removed as a trustee.

In response, Boykin submitted a brief containing an argumentative Statement of the Case and a Statement of the Facts which can only be described as wishful thinking. He makes sweeping assertions not supported by the record. For example, he states as fact that his requests for an investment plan were "ignored," but the record indicates that Wortley and Belger were actively working on an investment plan. Boykin does not contest the trial court's finding that it was not possible to develop an investment strategy until the property appraisals were complete. He even acknowledges that Wortley and Belger prepared and submitted an investment policy statement before he filed suit. (Boykin Brief at p. 21.)

The record confirms that Wortley and Belger sought advice from numerous professional advisors on how to manage Trust assets and develop a management plan, including: Karen Thomas, Esq., an attorney and trusts and estates and tax specialist with Sojourner Caughman & Thomas, LLC; Jimmy LaFrage, a registered forester with Forest Land Management, Inc.,

regarding timber and forestry management practices; Jane Peacock, an accounting and tax specialist with Sheheen Hancock and Godwin, LLP; Whit Bundy, a Chartered Financial Analyst regarding preparing an investment policy statement and plan; John Helms, a certified forester and real estate appraiser with Milliken Forestry Company, Inc., regarding land and timber values and investment planning; and Steve Nichols of Newkirk Environmental, Inc. regarding environmental mitigation bank credits for the Boykin Millpond.

Boykin also states, as fact, that Wortley and Belger refused to hold Trust meetings, paralyzing the Trust. The trial court termed this assertion "specious." In fact, the Trust averaged one face to face meeting per month for the two year period prior to Boykin's suit. Even during the summer of 2018, when a personal situation of Trust counsel delayed meetings, the Trust continued to do business via phone and email. Boykin's attempt to rewrite history as he wishes it had occurred must be rejected.

Boykin's legal argument similarly lacks substance. Boykin failed to address many of the legal arguments raised by Wortley and Belger. At times, Boykin's only rebuttal to Wortley and Belger's appeal is to note that the trial court concluded otherwise. This approach might have merit if the findings on which Boykin relies had not been appealed. In many cases, however, Boykin's only defense is to rely on a finding of the trial court which itself is under appeal. He makes no attempt to address Wortley and Belger's showing that these findings are not supported by the Record.[1] In other cases, Boykin mischaracterizes Wortley and Belger's arguments to construct straw man arguments. These arguments should be rejected.

[1] Interestingly, Boykin himself notes that reliance on findings on appeal is improper. In a footnote, he states that he disputes certain portions of Wortley and Belger's argument to the extent that they incorporate findings which he has contested on appeal. (Boykin Brief at p. 9, n. 2.)

I. The trial court improperly awarded fees under S.C. Code Ann. § 62-7-1004.

S.C. Code Ann. § 62-7-1004 has not yet been explored or interpreted in any detail by South Carolina courts. Wortley and Belger urge the Court to follow the lead of the federal courts and other state courts to incorporate prevailing party concepts and other factors when considering a fee award pursuant to this statute and to vacate Boykin's fee award, or, in the alternative, to substantially reduce the fee award.

A. A party's degree of success on the merits is a relevant factor in awarding attorney's fees and costs under S.C. Code Ann. § 62-7-1004.[2]

Boykin frames the question before the Court as whether § 62-7-1004 limits "an award only to prevailing parties." (Boykin Brief at p. 14.) However, this characterization is misleading. Wortley and Belger do not argue that an award of fees under § 62-7-1004 can only be made to a prevailing party, candidly stating in their initial brief that "§ 62-7-1004 does not expressly limit recovery of attorney's fees to prevailing parties." (Wortley and Belger Initial Brief at p. 16.) Boykin's mischaracterization of Wortley and Belger's argument and subsequent attack on this

[2] Boykin asserts that Wortley and Belger waived their argument that Boykin's fee award should be eliminated or reduced because Boykin achieved no success of any kind. They state that the record below is "devoid of any indication" that Wortley and Belger argued that an award would be improper because Boykin was unsuccessful on the merits. (Boykin Brief at p. 14 n. 4.) Initially, it was impossible for Wortley and Belger to raise this issue at trial because the trial court did not inform the parties of its decision on the merits before issuing its award of attorney's fees. In any event, Boykin simply ignores parts of Wortley and Belger's Rule 59(e) motion for reconsideration addressing his lack of success. The Motion states that: (1) the general criteria for determining the amount of fees required by "justice and equity" under S.C. Code Ann. § 62-7-1004 include "the result obtained by the litigation and prevailing party concepts;" and (2) the relevant criteria, including prevailing party concepts, "do not support an award of attorney's fees" because, among other things, "Plaintiff's suit was wholly unsuccessful," and he "obtained no relief of any kind." (Amended Motion to Alter or Amend at p. 9, R. at __.) Finally, this issue was preserved even in the absence of a Rule 59 motion. The trial court stated that the "results obtained by counsel for Petitioner [Boykin] do not warrant the full award of fees being sought," that "Petitioner was unsuccessful in each of his causes of action," and "[i]nstead, Petitioner is now being removed as a Trustee." (Final Order and Judgment at p. 58, R. at ___.) A motion was not required to preserve review of these findings.

mischaracterization is a classic straw man argument.

What Wortley and Belger do argue is that while prevailing party status is not required, prevailing party concepts remain relevant, if not predominant, in determining whether "justice and equity" require a fee award. This position is hardly novel or controversial. The results obtained have traditionally been considered as a crucial factor in determining fee awards in South Carolina. *Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (successful results obtained are "a factor essential to determining whether an attorney's fee should be awarded"); *Heins v. Heins*, 344 S.C. 146, 161, 543 S.E.2d 224, 231 (Ct. App. 2001) (reversing attorney's fees awards where no success was obtained by the party seeking fees); *see also Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (courts awarding fees should consider "beneficial results obtained").

A South Carolina federal court has construed § 62-7-1004 in exactly this manner. *Brown v. Pope*, No. 3:08CV00014-WOB, 2014 WL 12622445 (D.S.C. Mar. 28, 2014). *Brown* was one of many suits involving the estate of the legendary performer James Brown. In that case, trustees of Mr. Brown's estate sought an award of fees pursuant to § 62-7-1004. The court rejected this request, stating:

> [d]efendants' final counterclaim is based on S.C. Code § 62-7-1004, which states: In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy . . . [trustees] have not shown that an award of attorney's fees would be required by "justice and equity." *They have prevailed on none of their counterclaims* and, while it did take plaintiff four years to dismiss his claims against defendants, *the American Rule is that each party generally pays its own attorney's fees.*

Id. at *7-8 (emphasis added).

Cases from other jurisdictions with counterparts to § 62-7-1004 also confirm that the

degree of success obtained by the party seeking fees is relevant. *E.g.*, *Skyline Potato Co., Inc. v. Hi-Land Potato Co., Inc*., 188 F. Supp. 3d 1097, 1160 (D.N.M. 2016) ("results obtained by the litigation and prevailing party concepts" are a factor in determining whether justice and equity require an award of fees); *In re Trust No. T-1 of Trimble*, 826 N.W.2d 474, 491 (Iowa 2013) (same); *Atwood v. Atwood*, 25 P.3d 936, 947 (Okla. App. 2001) (same).

States which eschew prevailing party concepts in fee awards under the trust code have done so with express statutory language. *E.g.*, U.C.A. § 75-7-1004 (Utah); AZ ST § 12-11004 (Arizona); MI ST § 700.7904 (Michigan). Utah's statute, for example, states that a trustee may be awarded fees "whether successful or not." South Carolina's statute does not repudiate prevailing party concepts in this or any other manner.

Wortley and Belger argue that the trial court did not appropriately consider Boykin's lack of success on the merits. A fee award is unwarranted where there is not at least *some* degree of success, even if not on all claims or causes of action. *See Ruckelhaus v. Sierra Club*, 463 U.S. 680 (1983).[3] The trial court awarded fees and costs to Boykin when he obtained *no* success and was in fact himself removed as a trustee. In such circumstances, the trial court should have either wholly denied fees to Boykin or reduced the fees sought by far more than 20%.

B. Boykin cannot rely on the trial court's finding that its fee award was appropriate.

After knocking down his straw man, Boykin notes that the trial court concluded that justice and equity support its award of fees because Boykin's litigation benefitted the Trust. Boykin's reliance on this finding is misplaced. The finding is itself a subject of Wortley and Belger's appeal.

[3] Boykin takes issue with Wortley and Belger's citation to *Ruckelhaus*, but they did not cite *Ruckelhaus* because it is a trust case on all fours with the matter before the Court. Rather, they cited the case because it illustrates the position of federal courts that, even where an attorney fee statute does not restrict fee awards to a prevailing party, at least some degree of success remains necessary to justify a fee award.

It is not binding on this Court, which is permitted to take its own view of the evidence on this issue. Moreover, Wortley and Belger have amply demonstrated both here, and in their initial brief, that this finding is against the weight of the evidence and should be reversed.[4]

C. Public policy does not support the award of fees to Boykin.

Boykin argues that public policy supports an award of attorney's fees because a trustee should not be personally responsible "for litigation expenses associated with the proper exercise of his official duties." (Boykin Brief at p. 17.) However, Boykin's suit was not conducted in the *proper* exercise of his official duties. He asserted claims with no legal or factual basis to seize control of the Trust so that he could conduct a fire sale of Trust property – a goal in direct conflict with the Testator's stated desire to preserve the family property if at all possible.

Furthermore, an award of fees where, as here, a trustee fails on all claims and is himself removed is contrary to public policy. If a trustee bears no risk in instituting litigation, then litigation itself becomes a tool of oppression against co-trustees, at a significant cost to innocent beneficiaries. In this case, for example, Boykin and Cross-Claimants claimed in excess of $1,000,000 in fees and costs. The threat that the corpus of the Trust could be depleted in this manner by the suit of one trustee, *whether or not successful*, gives a trustee enormous leverage to bend co-trustees to his will.

D. The *Atwood* factors are a proper framework for awards of attorney's fees and costs under S.C. Code Ann. § 62-7-1004.

The Oklahoma case of *Atwood v. Atwood* sets forth five non-exhaustive factors for determining whether justice and equity require an award of attorney's fees in cases involving the administration of trust. Boykin argues that no South Carolina court has adopted this test. On this point, Boykin is correct. His observation, however, does not end the inquiry. There has been

[4] See section I.F of this Brief, *infra*.

virtually no construction of § 62-7-1004 by South Carolina appellate courts.[5] This Court will essentially be writing on a blank slate.

The *Atwood* factors have been favorably received by other states. Wortley and Belger argue that these factors should have been utilized by the trial court and formally adopted in South Carolina for two reasons: (1) they best approximate the considerations a court must weigh in arriving at a just and equitable result in cases involving the administration of a trust; and (2) § 62-7-1004 should be construed in a manner which is consistent with the construction given it by other states, as required by S.C. Code Ann. § 62-7-1101 (Supp. 2014) ("[i]n applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact its provisions").[6] Boykin wholly failed to address these arguments.

E. Application of the *Atwood* factors would require reduction or elimination of the fee award to Boykin.

Boykin argues that application of the *Atwood* factors would not have changed the outcome below. Boykin's argument is flawed. Each *Atwood* factor will be addressed below.

Reasonableness of the parties' claims, contentions, or defenses. Boykin argues that Wortley and Belger cherry picked rulings that were adverse to Boykin, but fail to acknowledge that his overall goal of diversifying the Trust assets was endorsed by the trial court.[7] In this way,

[5] Boykin contends that this Court interpreted § 62-7-1004 in *Deborah Dereede Living Trust dated Dec. 18, 2013 v. Karp.*, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019), *cert. denied* (Mar. 12, 2020). While *Dereede* does address an award of fees under § 62-7-1004, its discussion of the fee award consists of three sentences. It did not address or construe the terms "justice and equity" or consider adoption of the *Atwood* factors.

[6] The question of whether the *Atwood* factors should be used in cases involving § 62-7-1004 is not reviewed for abuse of discretion; it is a question of law. *Hueble v. South Carolina Dept. of Natural Res.*, 416 S.C. 220, 228, 785 S.E.2d 461, 465 (2016) (statutory interpretation is a question of law subject to de novo review).

[7] Wortley and Belger supported diversification, just not to the degree Boykin wished.

he sidesteps discussion of the many adverse findings made below. His failure to confront these findings is telling. For in this case, it has been conclusively established that:

- There was no basis in law or fact for Boykin's claim that he be vested with preeminent authority over his Co-Trustees or to be appointed a special fiduciary with superior authority over his Co-Trustees.[8] (Final Order and Judgment at p. 28, R. at ___) (emphasis added);

- Boykin's argument that the Residuary Trust should be modified because the Testator could not have anticipated the devastating effects of Hurricane Hugo "lacks merit." (*Id.* at 34, R. at ___);

- It was Boykin, not Wortley and Belger, who failed to cooperate with his Co-Trustees in the administration of the trust (*Id.* at 39, R. at ___); and

- Certain of Boykin's positions "*were not taken out of genuine concern for the Trust and its beneficiaries, but rather in an attempt to intentionally frustrate Respondents' attempts to administer the Trust and [to] manipulate the actions of his Co-Trustees*." (*Id.* at 40, R. at ___) (emphasis added).

These findings would ordinarily subject Boykin to Rule 11 sanctions. Under Rule 11, SCRCP, a party may be sanctioned for filing a frivolous proceeding or making frivolous arguments. *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008); Rule 11(a), SCRCP. A frivolous claim is defined as one that has no legal basis or merit. CLAIM, Black's Law Dictionary (11th ed. 2019). The trial court found that there was no basis in law or fact for Boykin's claim that he be vested with preeminent authority over the Trust, placing it squarely within the definition of frivolous.

Not only did this claim have no basis in law or fact, it was not asserted for a valid purpose. Boykin testified in his March 2018 deposition that he never actually wanted preeminent authority over the Trust. The applicable deposition excerpt is set forth below:

> Q: Okay. But just – just to finish this issue up. In the -- in Paragraph Fifty-Nine, you ask for a Declaratory Judgment declaring that among other things, "As sole disinterested non-beneficiary Trustee of the Residuary Trust, Petitioner is entitled to exercise preeminent authority among the three Co-Trustees of the Residuary Trust including the authority to appoint Trust counsel or otherwise be appointed as a special fiduciary under S.C. Code 67-

7-1001(b)5. I guess I would like to focus right now on your understanding of what preeminent authority would be. What – what would that impose?

A: Don't know.

Q: You don't know?

A: No.

Q: Okay. But – as you sit here today, *you're not asking for the authority to sell real estate without the three Trustees' signature*?

A: Or a court direction.

Q: *And are you looking for a Court direction that, going forward, any real estate can be sold as long as you agree to sell it; it doesn't matter –*

A: *No.*

Q: -- if the other two Trustees ---

A: *No, I'm not looking for that at all*.

Q: All you ---

A: *I never said I was.*

(Boykin Dep., at 203:2-204:3, R. at ___.) (emphasis added).

If Boykin never sought preeminent authority over his Co-Trustees, as this testimony indicates, then this testimony poses several important questions: (i) why did he plead a cause of action seeking exactly that relief? (ii) why did he oppose submission of the claim to the Court on cross-motions for summary judgment? (iii) why did he not simply dismiss the claim? and (iv) why did he oppose the motion for directed verdict on the claim? The simple answer to these questions is that the validity of the claim did not matter to Boykin as long as it provided a cudgel he could use to bend his Co-Trustees to his will. Boykin's claims were patently unreasonable.

Unnecessarily prolonging litigation. Boykin unnecessarily prolonged the litigation, because, if, as Bokyin repeatedly insists, the goal of his suit was to cause Wortley and Belger to

promulgate an investment plan, that goal was achieved before suit was filed, and at worst, before trial began. Trial was therefore unnecessary unless, as Wortley and Belger contend, Boykin's goal had nothing to do with causing Wortley and Belger to produce an investment plan, but instead was driven by Boykin's desire to take control of the Trust and sell family legacy property. Control was Boykin's real goal.

To distract the Court from this truth, Boykin points a finger at Wortley and Belger's trial preparations, but the suggestion that they were unprepared for trial is false. The trial court initially allotted two days for trial. Cross-Claimants did not conclude their case until mid-morning on the second day, after which motions for directed verdict were argued. Court broke for lunch. After lunch, Wortley and Belger began their presentation of evidence. The suggestion that Wortley and Belger delayed trial because they were unable to complete their case in chief in the approximately three to four hour period after lunch on the second day of trial is ridiculous.

Relative ability to bear financial burden. The evidence at trial was that Boykin is a man of means, but Boykin correctly notes that specific information regarding his assets or income is absent from the record. Of course, Wortley and Belger were not permitted to gather or submit such evidence because the trial court denied them that chance by ruling on the amount of fees to be awarded at the same time it ruled on the merits of the case.

Boykin avoids any real discussion of the last two factors: (4) results obtained and prevailing party concepts and (5) whether a party has acted in bad faith or for oppressive reasons in the bringing or conduct of the litigation. He states only that these issues were addressed by the trial court in Boykin's favor. However, Boykin cannot take refuge in these findings. They themselves are the subject of appeal. Moreover, these findings are against the weight of the evidence. They cannot be reconciled with other undisputed and conflicting facts and findings. This conflict is

addressed elsewhere, but for the convenience of the Court, matters related to the final two *Atwood* factors are summarized below.

Result obtained by the litigation and prevailing party concepts. Boykin lost on every claim he asserted and, instead of seizing control of the Trust, he was personally removed as a Trustee. The trial court itself acknowledged that Boykin was wholly unsuccessful. (Final Order and Judgment at p. 58, R. at ___.) Boykin's argument that the trial court resolved this factor in his favor borders on delusional.

Whether a party has acted in bad faith or for oppressive reasons in the bringing or conduct of the litigation. Boykin relies on the trial court's finding that he brought suit in good faith and his actions benefitted the Trust. But he ignores the many findings and other evidence which undermine these assertions. As discussed above, the trial court ruled that there was no basis in law or fact for Boykin's cause of action seeking that he be vested with preeminent authority over his Co-Trustees or to be appointed a special fiduciary with superior authority over his Co-Trustees; that Boykin failed to cooperate with his Co-Trustees, and that some of his positions "*were not taken out of genuine concern for the Trust and its beneficiaries, but rather in an attempt to intentionally frustrate Respondents' attempts to administer the Trust and [to] manipulate the actions of his Co-Trustees*." (Final Order and Judgment at p. 40, R. at ___) (emphasis added).

Evidence and other rulings by the trial court also demonstrate that Boykin acted in bad faith and for oppressive reasons, including the following:

- Boykin took positions which were intended to force his Co-Trustees to submit to him, including refusing to consent to §§ 6166 and 2032 tax elections, and investigating the possibility that Whit Boykin could adopt children to deprive Wortley and Belger's own children of a portion of the Trust;

- Boykin disrespected and belittled his Co-Trustees and trust counsel; and

- Boykin improperly withheld the identity of the Haile Gold Mine from his Co-Trustees and the court below.

In summary, had the *Atwood* factors been properly considered, the result below would have changed.

F. The litigation did not benefit the Trust.

Boykin argues that his actions benefitted the Trust because they resulted in the Wortley Belger Investment Plan ("Wortley Belger Plan" or "Plan"), which was adopted by the trial court. Wortley and Belger counter that the litigation did not benefit the Trust for three reasons. First, Boykin lost on all claims, and therefore achieved none of the goals discussed in his pleadings. Second, in their initial brief, Wortley and Belger set forth a detailed timeline of events which demonstrates that they agreed to sell property to diversify trust assets at the outset, began formulating an investment policy statement and plan *before* Boykin filed suit, and in fact produced a detailed plan before trial. And third, Boykin did not actually seek adoption of the Wortley Belger Plan – he fought to prevent it from being adopted and presented a competing plan at trial.[9] (*See, e.g.*, Trial Brief of Petitioner and Respondents Whit Boykin and May Boykin, at pp. 9-17, R. at __; Petit. Trial Ex. 172, Boykin Investment Plan, R. at ___; Trial Transcript, July 9, 2018, at 204:7-210:3, R. at __.) So resolute was Boykin in preventing the adoption of the Wortley Belger Plan that sought leave to name a rebuttal expert witness after Phase 1 of the trial concluded and months after he was presented with the Wortley Belger Plan. (*See, e.g.*, Petitioner's Motion for Leave to Name Rebuttal Expert Witness, R. at __; Trial Transcript September 28-29, 2018, at 272:19-280:5, R. at __.) These facts are undisputed.

Boykin also accuses Wortley and Belger of refusing to diversify trust assets or produce an

[9] Boykin did not respond to the third argument, which is understandable. It is the height of hypocrisy for Boykin to claim that suit was necessary to produce the very plan he sought to quash.

investment plan but, Boykin views the facts through tinted glasses. The examples he cites are not examples of a refusal to diversify or produce an investment plan; they are occasions on which Wortley and Belger refused to conduct a fire sale of Trust property, including family legacy property. Boykin, as he has always done, conflates adherence to the Testator's desire to preserve family property if at all possible with strict opposition to any type of diversification. The two are not the same.

Finally, Boykin also falls back on previously failed arguments, claiming again that Wortley and Belger failed to conduct trustee meetings – an argument addressed above.

II. S.C. Code Ann. § 62-7-709(a) does not authorize an award of fees to Boykin.

Boykin also argues that § 62-7-709 supports the fee award made to him, yet Boykin's own argument undercuts his position. He notes that reimbursement of fees under § 62-7-709 is appropriate when expenses are incurred "by a trustee in defending an action." (Boykin Brief at p. 24, citing Reporter's Comment to S.C. Code Ann. § 62-7-709). He further states that much of the fees he claims were incurred in defense of Wortley and Belger's counterclaim. The converse of this statement is that some portion of Boykin's fees were not incurred in defense of Wortley and Belger's counterclaims, and is therefore not supported by § 62-7-709.[10]

Boykin also attacks Wortley and Belger's argument that a fee award under § 62-7-709 is premature because Boykin has not actually paid the expenses for which he seeks reimbursement.[11] He claims that there is no support for this proposition. This statement is incorrect. In their initial brief, Wortley and Belger discussed the statutory provisions which indicate prior payment is

[10] The question of whether an award of fees is authorized for an *unsuccessful* defense of the counterclaim for his removal is discussed *infra*.

[11] Boykin emphasizes that the trial court did not rely "***only***" on § 62-7-709 but also premised its decision on the other statutes discussed in this appeal. (Boykin Brief at p. 24) (emphasis in original). He thus tacitly admits that § 62-7-709 alone is an insufficient basis on which to award fees.

needed before a right to reimbursement arises under § 62-2-709. Boykin did not address this argument. Wortley and Belger also submit the following additional authorities:

- Bogert, in his The Law of Trusts and Trustees, states:

  > [g]enerally, the trustee is entitled to be credited on its accounting with sums paid from trust funds, and *sums advanced by the trustee from its own funds,* when such payments or advances were reasonable and made in the proper exercise of its powers.

Bogert's The Law of Trusts and Trustees § 971, Credits to trustee on accounting; legal fees of trustee (emphasis added); and

- The Restatement of Trusts provides:

  > [t]he trustee's right of indemnification . . . entitles the trustee either to pay proper expenses directly from the trust estate (exoneration) *or to obtain reimbursement from the trust when the trustee has personally paid those expenses.*

Restatement (Third) of Trusts § 88 TD No 4 (2005) (emphasis added).

As these authorities indicate, a sitting trustee ordinarily has two options under § 62-2-709: (1) pay an expense directly from the trust; or (2) pay the expense personally and be reimbursed from the trust. The first option is now unavailable to Boykin because he is no longer a sitting trustee, and previously, he needed the consent of his Co-Trustees to pay attorney's fees. If Boykin wishes to potentially use § 62-2-709 to recover attorney's fees incurred in this case, he must pay those expenses first.

Boykin also states that he has already addressed Wortley and Belger's argument that the fees claimed do not fall under § 62-7-709 because they were not taken in the proper good faith administration of the Trust. In fact, he has completely avoided this argument. Boykin's brief does not tackle the import of the trial court's findings that there was no basis in law or fact for Boykin's cause of action seeking that he be vested with preeminent authority over his Co-Trustees; that he failed to cooperate with his Co-Trustees; that he took positions to intentionally frustrate his Co-

Trustees attempts to administer the trust; that he improperly withheld the identity of the Haile Gold Mine from his Co-Trustees and the court below, and so on.

Nor does Boykin address the argument that his actions conflicted with one of the express purposes of the Trust – to preserve family land if possible. Boykin's attempts to sell the bulk of Trust real property, including family legacy property, violated his duty to act in accordance with the purposes of the Trust. S.C. Code Ann. § 62-7-105(b)(2). Boykin is simply not entitled to any award of fees for this conduct. *See Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp*, 427 S.C. 336, 345-46, 831 S.E.2d 435, 441 (Ct. App. 2019), cert. denied (Mar. 12, 2020) (a trustee who departs from the trust instrument is liable for any loss occasioned thereby); *see also Shriners Hosps. for Children v. First N. Bank of Wyoming*, 373 P.3d 392, 419 (Wyo. 2016) (plaintiff trustee responsible for payment of fees and costs where actions were taken with disregard for the settlor's intentions).

Boykin's only response is to again fall back on the trial court's finding that his actions were undertaken in the proper administration of the Trust, a finding which itself is subject to this appeal.

Boykin's final argument regarding the unjust enrichment requirement of § 62-2-709 misses the point. Reimbursement under § 62-2-709 is only available to the extent that a trust would be unjustly enriched if reimbursement were not paid. The benefit allegedly achieved by Boykin is the creation of the Wortley Belger Plan, and assuming arguendo, that the Plan would not have been created but for Boykin's litigation, the value of this Plan is the limit of what can be awarded under § 62-2-709. This value bears no relation to the amount of fees awarded.[12]

III. S.C. Code § 62-7-816 does not authorize an award of fees to Boykin.

[12] John Helms, the registered appraiser and forester who produced the Wortley Belger Plan charged only $25,000 for his services. (Affidavit of James Y. Becker, in Support of Wortley, et al., Motion for Payment or Reimbursement of Attorney's Fees, Ex. 2 to Wortley, et al., Motion for Payment or Reimbursement of Attorney's Fees, R. at __.)

Wortley and Belger argued that, with respect to an award of attorney's fees in cases involving the administration of a trust, § 62-7-816 is subsumed by either §62-7-1004 or § 62-7-709. Boykin did not respond to this argument.

Section 62-7-816 does not authorize an award of fees and expenses to Boykin's attorneys because Boykin did not have the consent of his Co-Trustees to incur this expense. Boykin rejects this argument as "ridiculous," arguing that a rigid rule requiring a majority or unanimous vote before another trustee hires or commences litigation runs against common sense. This is yet another straw man argument.

Wortley and Belger do not argue that a minority trustee must have approval of his or her co-trustees before commencing litigation. They instead argue that before Boykin *may be awarded expenses under § 62-7-816* for hiring attorneys, those attorneys must be employees and agents, not of Boykin himself, but of the Trust. This result is compelled by the language of the § 62-7-816 itself, which provides in pertinent part that:

> [w]ithout limiting the authority conferred by Section 62-7-815, a trustee may . . . (15) pay taxes, assessments, compensation of the trustee and of employees and agents *of the trust*, and other expenses incurred in the administration of the trust.

S.C. Code Ann. § 62-7-816(15) (emphasis added). When trusts have more than one trustee, they act by majority vote, or, if the trust instrument so provides, by unanimous vote. It is undisputed that Wortley and Belger were not willing to vote to allow the Trust to engage Boykin's attorneys to sue his Co-Trustees or the trust's beneficiaries. Boykin's attorneys are therefore not employees and agents "of the trust." They are employees and agents of Boykin. Section 62-7-816 does not support an award of fees to Boykin.[13]

[13] The absence of a vote authorizing employment of attorneys is not a rigid bar to *all* fee requests as Boykin claims. Its impact is limited to claims under § 62-7-816 and the Will because of the language of the statute and trust document.

IV. The Will does not authorize an award of fees to Boykin.

Wortley and Belger argued that the Will does not authorize an award of attorney's fees to Boykin because the Will expressly only authorizes expenses incurred in the "proper" management or administration of the Trust, and Boykin's actions were not taken in the proper administration of the Trust. In response, Boykin simply incorporates by reference other portions of his brief, which have been addressed elsewhere. Those arguments fail for the same reasons discussed above. Boykin cannot be considered to have acted in good faith in administering the Trust when, among other things, he pursued frivolous and meritless claims and took positions not for the benefit of the Trust, but to interfere with his Co-Trustees' ability to manage the Trust, and misled his Co-Trustees and the trial court.

Wortley and Belger also argued that the Will does not authorize an award of fees to Boykin because the Will requires majority or unanimous vote, and Boykin acted unilaterally. Boykin characterizes this argument as hyper technical, but even he concedes that Wortley and Belger's argument tracks the express language of the Will.

Boykin's only real contention appears to be that, if a unanimous vote is required, then not only were Boykin's fees not authorized by the Will, so were Wortley and Belger's, *i.e.* "what is good for the goose is good for the gander." This argument rests on a false equivalency. The Will permits actions not involving the sale of real property to be taken by majority vote.[14] Wortley and Belger, two of the three trustees, obviously had the support of the majority of trustees. Unlike Boykin, they were entitled to fees and expenses under the Will because they were defending against Boykin's lawsuit to usurp the Testator's desire to retain family legacy property. Moreover,

[14] Trustees are authorized "with respect to any real property, by unanimous vote, or any personal property, by majority vote" to undertake the actions set forth in subsections A through O. (Item XIV, Last Will and Testament of Lemuel Whitaker Boykin, II, at pp. 13-14, R. at ___.)

Boykin's lack of knowledge of trust activities occurring after his removal prevents him from arguing that payment of fees incurred by Wortley and Belger was *not* authorized by a unanimous vote when made. Finally, limitations on payment of fees arising from the majority and/or unanimous voting requirements apply only to awards of fees under § 62-7-816 and the Will itself. They are not an obstacle to an award of fees to Wortley and Belger under § 62-7-1004.[15]

V. The award of costs and fees to Boykin was unreasonable.

The trial court reduced fees to Boykin by 20% and to Mr. Hardin by 50% because the beneficial results obtained did not warrant the full amount of fees sought, citing *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (courts awarding fees should consider a number of factors including "beneficial results obtained"). Boykin makes the curious statement that Wortley and Belger did not challenge this ruling. This statement is belied by Boykin's own brief, which later acknowledges that Wortley and Belger argue that the trial court's award of fees did not sufficiently account for Boykin's lack of success. (Boykin Brief at p. 30.)

Rather than address his lack of success on the merits, Boykin again attempts to misdirect the Court. He compares the fees awarded to him to the fees awarded to Wortley and Belger. This comparison is invalid. The amount awarded to Wortley and Belger in no way supports or legitimizes the fee award to Boykin. Wortley and Belger do not argue that Boykin's counsel churned the file or billed Boykin for unnecessary services.[16]

The challenge to the excessiveness of Boykin's fee award is based on Boykin's lack of success on the merits and bad faith and oppressive conduct. From this perspective, Wortley and Belger approached the trial court from a very different position than did Boykin. Wortley and

[15] Boykin argues that the trial court did not rely solely upon the Will, but on other statutory provisions, and, again, tacitly admits that the Will is not a proper basis on which to award fees.
[16] Inquiry into this subject and others was foreclosed by the trial court's abbreviated process below.

Belger did not commence litigation, they were forced to defend against it. They followed the Testator's desire to preserve family legacy property if at all possible. Boykin sought to frustrate that desire. Wortley and Belger successfully defended against every claim Boykin filed, including Boykin's attempt to remove them as trustees. Boykin failed on every claim he asserted, and was himself removed as a trustee.

Addressing Wortley and Belger's contention that the award of fees to Boykin was excessive because it included fees incurred in unsuccessfully defending against his removal, Boykin argues that the authorities cited by Wortley and Belger stand only for the proposition that a trustee should be denied fees if he has committed a breach of trust. He then argues that the trial court did not find Boykin breached the trust, but instead that Boykin acted in good faith. As a result, he contends, his unsuccessful defense of the removal claim against him need not be considered in determining the fee award.

This argument collapses under scrutiny. While a trustee is properly denied fees where he has breached the trust, other types of misconduct may also warrant a denial of fees. "[A] trial court abuses its discretion when it awards attorney's fees to a trustee for litigation caused by the trustee's misconduct." 76 Am.Jur.2d, *Trusts*, § 664 Attorney's Fees, Discretion of Court (2019 Update); Restatement (Third) of Trusts § 88 TD No 4 (2005) ("[t]he right of indemnification applies even though the trustee is unsuccessful in the action, *as long as the trustee's conduct was not imprudent* or otherwise in violation of a fiduciary duty") (emphasis added*); Pub. Serv. Co. of Colorado v. Chase Manhattan Bank, N.A.*, 577 F. Supp. 92, 110-11 (S.D.N.Y. 1983) ("[f]ees are rarely awarded to a trustee who is unsuccessful in defending charges that it negligently managed the trust"); *In re Trusteeship of Williams*, 591 N.W.2d 743, 748-49 (Minn.App. 1999) ("where a trustee has acted

in bad faith or has been guilty of fraud or inexcusable neglect that has caused loss to the estate, the trustee may be denied attorney fees").

The court in *Lattuca v. Robsham*, 812 N.E.2d 877 (Mass. 2004) rejected Boykin's argument. There, the trustee argued that because there was no finding that he had willfully breached his fiduciary duties he was entitled to indemnity for attorney's fees. In response, the court stated: "[w]e disagree. The test for awarding attorney's fees includes a determination whether the trustee was at fault." *Id.* at 882-83. Here, the trial concluded that it was Boykin who had failed to cooperate with his Co-Trustees, that he had taken positions not out of concern for the Trust, but to interfere with management of the Trust by his Co-Trustees, and that he had asserted claims with no basis in law or fact.

Boykin is guilty of misconduct which caused Wortley and Belger to seek his removal. Moreover, it is difficult for Boykin to argue that his defense of the removal action against him somehow benefitted the Trust. Any award to Boykin should not have included an award of fees and expenses he incurred in his unsuccessful defense of the removal action.

VI. Boykin should be required to pay fees awarded to Wortley and Belger.

Wortley and Belger argue that Boykin should be personally responsible for the fees awarded to them by the trial court. Stated differently, they argue that Boykin, not the Trust, should bear the responsibility of pursuing claims which the trial court found to have "no basis in law or fact." Requiring the Trust to pay Boykin's fees allows Boykin to escape responsibility for his actions. Boykin started this controversy, and pursued it relentlessly through trial, all in likely violation of Rule 11, as discussed *supra.* He continues his vexatious and unwarranted litigation assault on the Trust through his appeal seeking to now split the Trust. And if the trial court's order awarding fees to Boykin stands, the suit Boykin instigated and pursued, in concert with the Cross-Claimants, Whit and May Boykin and their counsel, will have drained the Trust of more than

$1,500,000 to the detriment of all income beneficiaries, including Wortley and Belger, and all remainder beneficiaries. Boykin, who is not a beneficiary of the Trust, will be the only person who does not bear some portion of the financial burden of this case.

Boykin makes two arguments in response. First, he argues that this argument was waived because Wortley and Belger raised it for the first time on appeal. Second, he argues that he should not be required to reimburse the Trust for fees the trial court awarded to Wortley and Belger because the trial court reached "a sound conclusion" that the litigation was beneficial to the Trust. Boykin's first argument is flatly contradicted by the record and his reliance on the trial court's finding that that litigation benefited the Trust is misplaced.

A. Wortley and Belger did not waive their argument that Boykin should be personally responsible for the fees they incurred.

Boykin asserts that Wortley and Belger raise the issue of his personal responsibility for fees for the first time on appeal. The record belies this argument. Wortley and Belger moved below for an award of attorney's fees to be paid by Boykin himself. The very first sentence of their motion for attorney's fees states in pertinent part that:

> Respondents Mary Deas Wortley and Alice B. Belger . . . hereby move for an order directing *either* the L.W. Boykin II Residuary Trusts A &B (collectively the "Trust") *or the Petitioner* [Boykin] or Cross-Claimants, *or any of them, as appropriate*, to pay or reimburse certain attorney's fees and other costs which Respondents . . . have incurred in the administration of the Trust and in defending and prosecuting various claims in the above-captioned action.

(Motion for Payment or Reimbursement of Attorney's Fees and Other Costs at p. 1, R. at ____) (emphasis added). When the trial court ordered all fees to be paid by the Trust it implicitly denied this request that Boykin personally pay a fee award. (Final Order and Judgment at p. ___, R. at ___.) Nothing further was needed to preserve this issue for appeal. *Pryor v. Nw. Apartments, Ltd.*, 321 S.C. 524, 528 n.2, 469 S.E.2d 630, 633 n.2 (Ct. App.1996) (issue preserved when court implicitly ruled on and rejected respondent's argument).

B. Boykin cannot rely on the trial court's finding that the litigation benefitted the Trust to escape personal liability for his actions.

Boykin responds to Wortley and Belger's argument that he should be held responsible for his own actions, by returning to the familiar refrain that the trial court found that the "litigation was beneficial to the trust," as it resulted in a plan for the Trust that will diversify assets and provide for long term growth. Boykin essentially asserts that his argument is correct because the trial court says it was. As before, Boykin's reliance on a finding by the trial court which itself has been appealed is misplaced. This finding is not binding on the parties and is subject to a *de novo* standard of review. Moreover, Boykin has *not* rebutted the factual showing made by Wortley and Belger that this finding is against the weight of the evidence.

VII. The procedure used by the trial court to award attorney's fees was flawed.

Wortley and Belger were denied due process when the trial court used a flawed process to award attorney's fees. The trial court told the parties that a decision on attorney's fees would be made *after* the trial court notified the parties of its decision on the merits of the case. This procedure would have enabled Wortley and Belger to gather pertinent fee evidence and to factor Boykin's degree of success of the merits into their fee request. The trial court changed this procedure without notice. It ruled on the fees to be awarded at the same time it ruled on the merits of the case, and without a hearing on the fee issue.

Boykin contends that: (1) the trial court did not actually agree to provide the parties with notice and an opportunity to be heard on fees after its decision on the merits; and (2) even if it did, Wortley and Belger failed to preserve this issue for appeal. These arguments lack merit.

A. The trial court promised one procedure, but used another.

According to Boykin, the trial court did not state that it would provide the parties' an opportunity to be heard on the question of attorney's fees after it reached a decision on the merits.

He recounts parts of the trial transcript in which the parties and the trial court discussed various options for handling the attorney's fees issue. However, the record is clear that the trial court's final statement on the matter was that it would defer its ruling on attorney's fees until after its decision on the merits. The transcript provides in pertinent part as follows:

> THE COURT: Here's what I say. I say you are to submit your affidavits for up to date attorney's fees when you send in the proposed orders [on the merits]. I'll give some consideration as to whether it's more orderly to deal with the that, to hold those motions for attorney's fees until after I have issued the substantive order[,] and we can schedule a hearing on that. I want to be sure that [the parties] get all the [chance] you need to fully explore the issue and not get it clouded up in the merits.
>
> MR. DUFFY: Yes.
>
> THE COURT: All right. So submit [fee affidavits] so I have some idea what they are, *but let's have an understanding amongst each other that [I will] defer a final ruling on those [attorney's fee] matters until [after] the substantive order is issued. Does that suit everybody?*
>
> MR. DUFFY: Yes, thank you, Your Honor.

(Trial Transcript, September 28-29, 2018 at p. 444:15-447:10, R. at ____) (emphasis added).

Even Boykin ultimately acknowledges that the trial court's final statement on the matter is exactly as Wortley and Belger have presented it. His brief states that the trial court discussed various options, and, then, after this discussion, stated that it would inform the parties of its decision on the merits prior to an award of attorney's fees. (Boykin Brief at p. 33) ("[i]t was only then Judge Total suggested that she would 'defer' a final ruling on attorney's fee awards "until the substantive order issued").

There was no uncertainty in the procedure to be used to address attorney's fees. The trial court was to defer any ruling on fees until after a decision on the merits so that the parties could fully present their arguments on fees. The trial court then completely surprised the parties by ruling on fees at the same time as its decision on the merits. Wortley and Belger were denied a

proper opportunity to present their arguments in opposition to an award of fees to Boykin. Boykin himself admits that the trial court changed the procedure for fee requests. (Boykin Brief at p. 33) ("in the months after trial, Judge Toal reverted to her initial position that . . . the way to handle the matter of fee awards was to address them in the Final Order itself"). This change to her "initial position" came with no notice whatsoever to the parties.

B. Wortley and Belger did not waive their due process rights.

Boykin next argues that Wortley and Belger waived deficiencies in the process below by failing to raise them in their Rule 59 motion. Boykin, however, construes Wortley and Belger's Rule 59 motion far too narrowly. Their position on this issue was clear. In the post-trial motion for fees, Wortley and Belger stated:

> [b]ecause the Court has decided to reserve any ruling on an award of attorneys' fees and other costs until after a final order on the substantive factual and legal issues in this case and a hearing before the Court, the Court requested that the parties submit a brief accounting of their fees and costs along with proposed final order. Respondents' . . . affidavits are this submitted with this motion. Respondents . . . also reserve and request the opportunity to submit additional information and briefing, as necessary, to fully present and support their request for fees and costs.

(Motion for Payment or Reimbursement of Attorney's Fees at p. 2, R. at ____.) In their Amended Rule 59 motion, Wortley and Belger highlighted the very parts of the transcript in which the trial court discussed the applicable procedure. They quoted the trial court's statement that "let's have an understanding amongst each other that [I will] defer a final ruling on those matters until [after] the substantive order is issued." (Amended Rule 59 motion at p. 3, R. at ____.) They even submitted to the trial court a copy of the trial transcript containing this statement by the court. *Id.* Boykin cannot credibly argue that the Wortley and Belger did not call the change in procedure to the trial court's attention.

VIII. Conclusion.

For all of the reasons argued herein, the award of attorney's fees and expenses to Boykin should be eliminated or substantially reduced.

HAYNSWORTH SINKLER BOYD, P.A.

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October 12, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Jean Hoefer Toal, Acting Circuit Court Judge

C.A. No.: 2017-CP-28-00831
Appellate Case No. 2019-001632

IN THE MATTER OF:
LEMUEL WHITAKER BOYKIN, II, deceased

Rigdon H. Boykin, as sole disinterested Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B.....Appellant-Respondent

v.

Mary Deas Wortley, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, Co-Trustee of the Lemuel Whitaker Boykin Marital Deduction Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; Alice B. Belger, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; Lemuel Whitaker Boykin, III; and May Cantey Boykin, of whom

Of whom **Mary Deas Wortley** and **Alice B. Belger** are ..... Respondent-Appellants

And

Lemuel Whitaker Boykin, III and **May Cantey Boykin** are Respondents.

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have caused the documents listed below to be served via email, to the parties of record listed below at their email addresses as listed in the Attorney Information System.

1. **Initial Reply Brief of Respondent-Appellants Wortley and Belger to Response Brief of Appellant-Respondent Boykin**
2. **Initial Reply Brief of Respondent-Appellants Wortley and Belger to Brief of Respondents Lemuel Whitaker Boykin, III, and May Cantey Boykin**
3. **Additional Designation of Matter to be Included in the Record on Appeal**

Parties of Record

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HAYNSWORTH SINKLER BOYD, P.A.

October 12, 2020
Columbia, South Carolina

By: _____
Amanda Willoughby
Paralegal