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SC Court of Appeals

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

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

And

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

FINAL RESPONSE BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

This appeal challenges an award of attorney's fees and costs made to Appellant-Respondent after litigation below lasting some twenty months (including a four-day bench trial) concerning the management of a testamentary trust worth roughly $20 million to $30 million. Appellant-Respondent was one of three trustees of the trust and was the only independent, non-beneficiary trustee. He brought this action after an impasse resulted among the trustees over the speed at which the trust should diversify assets.

While Appellant-Respondent did not ultimately prevail on his claims, the trial judge specifically recognized – on multiple occasions – that Appellant-Respondent had brought the action "in good faith out of [his] desire to appropriately manage the Trust's assets," that the action had "resulted in the Trustees developing comprehensive, long-term plans for the management of the Trust's assets," and that those plans "are certainly beneficial to the Trust and its beneficiaries." (R. p. 80)

Appellant-Respondent does not argue that the case below proceeded without error. His own appeal makes clear there were in fact many errors that require this Court reverse the lower court's decision on other points. But in this appeal, the only issues are narrow ones:

1. Did the trial judge appropriately exercise her considerable discretion pursuant to the South Carolina Trust Code to award reasonable fees and costs to an independent, non-beneficiary trustee whose action was brought in good faith and benefitted the Trust?

2. Did the trial judge appropriately determine that the Will creating the Trust further authorized the award of reasonable fees and costs to an independent, non-beneficiary trustee under these same circumstances?

3. Did the trial judge set a reasonable fee that appropriately considered the relevant factors and recognized the beneficial results for the Trust that Appellant-Respondent obtained through his action?

4. Did the trial judge provide the parties sufficient opportunity to address the award of attorney's fees, and is the contention of Respondent-Appellants to the contrary waived because it was not raised in their motion to alter or amend?

STATEMENT OF THE CASE

Appellant-Respondent Rigdon H. Boykin ("Rigdon") adopts generally the Statement of the Case set forth in his Final Brief, and offers the following summary and supplement to that Statement concerning relevant procedural background to the issues presented here.

In this appeal Respondent-Appellants Mary Deas Wortley ("Wortley") and Alice B. Belger ("Belger") challenge two of the three awards of attorney's fees and costs the trial judge determined appropriate in this matter. Specifically, Wortley and Belger appeal the award made to Rigdon and a separate, smaller award made to Respondents Lemuel Whitaker Boykin, III ("Whit") and May Cantey Boykin ("May"). The trial judge made a third award in this case to Wortley and Belger themselves totaling $729,614.06 – an amount almost $30,000 ***greater*** than the ***sum*** of the two awards made to Rigdon and Whit and May. All three awards, of course, came only after extensive litigation below and entry of a Final Order that followed a four-day bench trial.

As recounted in greater detail in Rigdon's Final Appellant Brief, Rigdon, Wortley, and Belger were the three original trustees of the Lemuel Whitaker Boykin II Residuary Trust (the "Trust"). Rigdon was the only one of the three trustees who was independent and had no personal financial stake in the operation of the Trust. Wortley and Belger, in contrast, are two of the four income beneficiaries of the Trust and have children who stand to inherit the assets remaining in the Trust when the last of the income beneficiaries dies. The other two income beneficiaries, Respondents Whit and May, have no children and at no time served as trustees of the Trust.

Rigdon commenced this litigation on August 23, 2017, after a protracted period of paralysis resulting from the trustees' disagreement over whether and how to liquidate Trust real estate in order to diversify the Trust and provide cash for distribution to the income beneficiaries. His Petition asked the court to resolve the trustees' impasse by determining various questions arising

from the administration of the Trust and by instructing the trustees in the discharge of their fiduciary duties. (R. pp. 83-130) Rigdon amended his Petition on May 7, 2018, adding claims for modification of the Trust and for removal of Wortley and Belger as Trustees. (R. pp. 298-345) Respondents Whit and May filed an Answer admitting the material allegations of Rigdon's Petition and asserting cross-claims against Respondent-Appellants Wortley and Belger for negligence and breach of fiduciary duty, and also requesting Wortley and Belger be removed as trustees. (R. pp. 151-164)

In their original and amended Answers to Rigdon's Petition, Wortley and Belger denied the material allegations of the Amended Petition, asserted various affirmative defenses, and alleged a counterclaim for removal of Rigdon as trustee. (*See* R. pp. 216-227; R. pp. 686-700; R. pp. 810-823)

After the case was designated complex in January 2018 and assigned to Acting Circuit Court Judge Jean H. Toal, the court held a hearing on January 24, 2018, to address several motions then before it, including Rigdon's motion to allow Trust assets to fund the fees and costs of his counsel and consultants.[1] In her order granting that motion, Judge Toal held:

> The attorney's and consultant's fees incurred by Petitioner have been occasioned by his attempt to manage and operate the Trust, and therefore those are valid fees chargeable to the Trust. While the Court finds that the fees of Petitioner's counsel should be paid by the Trust, the Court makes no determination at this time regarding the amount or reasonableness of such fees. [T]he Court shall defer making a ruling as to the reasonableness of any fees incurred … so that the Court may consider any allegations that the fees incurred to date have been improper. ***However, nothing in the record indicates that Petitioner has done anything to benefit himself, or that***

[1] Shortly after commencing the litigation, Rigdon filed a motion for his fees and costs to be funded from the Trust's assets. As a disinterested and independent trustee, Rigdon wanted to be certain as soon as he could that he would not be personally liable merely for doing his fiduciary duty for the Trust. This concern was especially acute because Wortley and Belger had declared they would not permit the Trust to pay these fees despite the prior advice of the Trust's counsel, Karen Thomas, that the Trust should pay the fees.

> ***the efforts resulting in attorney's and consultant's fees have been for any purpose other than to benefit the Trust.***

(R. p. 5 (bullets omitted) (emphasis added); *see also* R. pp. 165-178)

The trial of this matter started in July 2018, and was originally scheduled to take two days. However, it ended up spanning several months after Wortley and Belger's counsel indicated that they were unable to finish presentation of their case in the time allotted and that certain of their witnesses were unavailable, forcing the trial court to schedule an additional two days of trial in September 2018. (*See e.g.,* R. p. 1486)

On multiple occasions during the trial, Judge Toal referenced the good faith efforts of all the parties before her, including Rigdon, and the regrettable dispute that had torn apart the family and resulted in the litigation. For example, at the close of the first day, the court explained:

> I respect all of you more than I can say. I respect the trustees on all sides of this matter, as I do the family members. This is a sad situation that disagreements have brought you into a courtroom at odds with each other. . . . You're just good people trying to perform your duties as you see it, and protect your interest as you see them for yourself and future generations. And I well understand and respect all that.

(R. pp. 1490-91) Similarly, at the end of the trial's second day, the court stated: "Well, again, great respect for all of you. This has been a good day. This has been very excellent information offered by both sides and good insights by the attorneys on all sides of this matter." (R. p. 1770) And at the trial's close in September, the Court observed:

> My heart breaks for this family. I am from a very large family of my own. . . . I don't think there is on either side of this trust[] terrible disagreement or impasse. I don't think there is an underlying sinfulness or desire to hurt or hate. ***I think it's a profound disagreement about how to manage*** [the trust assets] and it manifest[s] itself sometimes in tough ways because people don't nearly often enough say I was wrong or I'm sorry, ***and that applies to everybody in this controversy***.

(R. pp. 2254-55 (emphasis added))

Near the close of trial the court also addressed a question from Wortley and Belger's counsel on whether the court "had a preference on how to go about handling" the issue of

attorney's fees, and whether the parties should "submi[t] an affidavit or otherwise." (R. p. 2216) The court responded by indicating a preference to "handle that by dealing with proposed orders on the substance of the issue," noting that with the proposed orders, each side could submit "expert's cost and the other things you have in mind." (R. pp. 2216-17) Judge Toal reasoned she would then "have the whole thing in front of [her] by the time [she] prepare[d] the final order." (R. p. 2217) When Wortley and Belger's counsel suggested the court would need to consider beneficial results as one factor in making awards and that counsel could not address and argue that before the Final Order came out, Judge Toal pointed out that she would know how the case was going to turn out when drafting the order. She added that while it "may well be the easier thing" would be to "reserve the matter of attorney's fees for after the substantive award has been made," each side was still to "submit your affidavits for up to date attorney's fees" with the proposed orders and then she would "give some consideration" to whether it would be "more orderly" to deal with the issue of attorney's fee awards in her final order or to schedule a later hearing. (R. pp. 2218-19)

Following the Court's instructions, the Parties submitted affidavits and proposed orders. Rigdon's proposed order addressed case law on the award of attorney's fees and costs to trustees in trust litigation. Wortley and Belger did not address the award of attorney's fees and costs in their proposed order but did submit a separate motion for payment of their attorney's fees and costs, together with supporting affidavits. (R. pp. 827-838)

The Court issued its Final Order and Judgment on May 24, 2019. In essence, the Final Order adopted the management plan for the Trust put forward by Wortley and Belger's expert witness and ordered the removal of Rigdon as a trustee. In particular, the Court found that "all the beneficiaries would be better served and protected by diversifying the Trust's portfolio of assets" and issued a stern warning to Wortley and Belger, noting the Court maintained "some reservations"

about whether they could execute on the management and investment plan they presented at trial, and cautioning them it was "imperative" they implement that plan and not simply treat it as "lip service meant to appease the Court." (R. p. 57)

While the Court did not grant judgment in favor of Rigdon on his claims, it did reiterate its prior holding that "[p]ayment of a trustee's attorney's fees and expenses out of trust assets is appropriate where such expenses were incurred in good faith, and for the benefit or preservation of the trust," and explicitly recognized that "the attorneys' and consultants' fees incurred ***by all the parties in this case*** have been occasioned by their attempt to manage and operate the Trust, and therefore those are valid fees chargeable to the Trust." (R. pp. 64-65 (emphasis added))

In finalizing the three awards of fees and costs to the parties, the court found broad authority to make awards in South Carolina Trust law, citing S.C. Code Ann. §§ 62-7-1004 ("Attorney's fees and costs"), 62-7-709(a) ("Reimbursement of expenses"), and 62-7-816(15) ("Specific powers of a trustee"), and cited provisions of the Will itself. The Court also cited and analyzed the six factors recognized in *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991) for determining the reasonableness of an attorney's fee. (R. pp. 62-63)

As for Rigdon's award, the Court did reduce the amount he sought for his attorney's fees by 20% given the court's conclusion that consideration of "the beneficial results obtained" did not warrant "the full amount of fees sought." (R. p. 66) The court also reduced by 50% the fees sought for one of Rigdon's consultants, James Hardin, due to the court's view that his fees were "excessive in light of his contribution to the development of this action." (R. p. 66)

Wortley and Belger filed an Amended Motion to Alter or Amend on June 3, 2019, arguing – for ***only*** two specified reasons – that the award of attorney's fees and costs to Rigdon should be stricken or reduced. First, they argued his suit was "not taken in good faith administration of the

Trust" and, second, that his suit "did not benefit the Trust." (R. pp. 907-909) Wortley and Belger also argued the award of fees to Mr. Hardin should have been more substantially reduced than it already was. Most critically, Wortley and Belger ***did not raise*** (i) any objection to the procedure the court used to award fees; or (ii) any suggestion that Rigdon – and not the Trust – should be liable for the fees and costs of Wortley and Beliger; or (iii) any argument that an award to Rigdon must be denied because he was not successful on the merits of his claims, all of which arguments Wortley and Belger now raise for the first time in this appeal. (R. pp. 911-915)

Rigdon filed his opposition to Wortley and Belger's Motion to Alter or Amend on June 11, 2019, arguing the award of his fees and costs was proper. (Supp. R. pp. 5789-5800)

The Court issued its order denying Wortley and Belger's Motion to Alter or Amend on August 28, 2019, making clear, once again, that Rigdon had acted in good faith in bringing the lawsuit and that his actions had benefitted the Trust. The Court stated:

> [T]he Court has repeatedly noted its belief that while Petitioner's action ultimately failed under the prevailing law and applicable terms of the Will, this action was nevertheless brought in good faith out of Petitioner's desire to appropriately manage the Trust's assets. The Court further notes that the action resulted in the Trustees developing comprehensive, long-term plans for the management of the Trust's assets. These plans are certainly beneficial to the Trust and its beneficiaries. The Court stands by its prior decision to award attorney's fees and to reduce those fees pursuant to the *Glasscock* factors as laid out in the Final Order.

(R. p. 80)

Rigdon filed his Notice of Appeal on September 25, 2019. (R. pp. 5776-79) Wortley and Belger filed a Notice of Cross Appeal on September 30, 2019. (R. pp. 5780-5783)

STATEMENT OF THE FACTS

The factual background to this matter is recounted in considerable detail in Rigdon's own Final Appellant Brief to this Court, including the Statement of Facts in that brief, and this background will not be re-hashed in full again here but is adopted for purposes of this brief. Nevertheless, a number of points merit particular emphasis in order to frame the issues before the Court in this appeal.[2]

First, Rigdon was the only one of the three original trustees of the Trust who had no financial stake in the administration or operation of the Trust, or the manner and timing of distributions from it. Unlike Wortley and Belger, Rigdon was not a beneficiary of the Trust, nor did any of his heirs stand to inherit the Trust's assets. He was also the only Trustee with any significant education or experience in the management and operation of Trusts. *See generally* Rigdon's Final Appellant Brief at 8-9.

Second, at the very heart of the administration of this Trust is an inherent conflict of interest. The Trust has four income beneficiaries who are the children of the settlor, Respondent-Appellants Wortley and Belger and Respondents Whit and May, and is a "one-generation" trust, meaning the Trust will terminate and all its assets will be distributed to the children of the income beneficiaries once the last income beneficiary dies. Wortley and Belger have children, and Whit and May do not (nor likely will they, given their ages). Wortley and Belger also have two of the

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[2] Beyond the points addressed in this Statement of Facts, Rigdon specifically disputes the assertions at the end of Respondent-Appellants' Statement of Facts that he "became increasingly hostile to his own Co-Trustees" and "belittled" them, "refused to consent to tax-planning strategies to gain leverage" over his co-trustees, and "planned to sell most of the Trust's real property holdings, by whatever means necessary." Resp-App Br. at 10. Rigdon has in fact contested these and related findings of fact in his appeal, and recounts the full background to these matters in his own initial brief. *See* Rigdon's Final Appellant Brief at 36-45.

three seats at the Trust's administrative table, and Whit and May have no seat. Thus, Wortley and Belger have both (a) ***an interest*** in preserving as much of the Trust's assets as possible for their children by limiting Trust distributions to the income beneficiaries, and (b) ***the power*** as Trustees not only to effectuate that interest but also to make up for the effect of such minimal distributions by paying a handsome Trustees' fee to themselves, but not to Whit and May. *See generally* Rigdon's Final Appellant Brief 7-8. For this reason, Rigdon argues in his appeal that the best long-term solution for the problems that beset the Trust (and continue to divide the family) is for this Court to split the trust in two or, in the alternative, to appoint independent trustees to replace Wortley and Belger. *See id.* 23-29.

Third, in the year prior to initiating this lawsuit, Rigdon raised again and again his concerns about lack of diversification in the Trust (given that 90% of the Trust's assets were illiquid and invested in real estate) and the ability of the Trust to meet its financial obligations, including expenses and distributions to the income beneficiaries. Early agreement among the Trustees to address these concerns with the sale of certain Trust real estate to Wortley and Belger later dissolved when Belger realized she would have to purchase the land for fair market value and not at a discount. *See id.* 12-13. Belger then withdrew her consent both to sales to family members and sales to any third-parties.[3]

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[3] Wortley and Belger's Statement of Facts contains numerous mischaracterizations of Rigdon's efforts to explore land sales for the Trust in 2017 and 2018. Among these is the suggestion, Resp-App Br. 8, that he "pursued an anonymous option agreement" for the purchase and subsequent donation to a conservation group of the Boykin Millpond and surrounding watershed property, which Wortley and Belger characterize as the "most treasured legacy property," and "actively concealed the identity of the potential purchaser from his Co-trustees."

First, the truth of this matter is that the ***original*** idea for a sale of the Boykin Millpond property and surrounding land and donation of the property to a conservation group came not from Rigdon but from Wortley and Belger, who proposed the idea in 2016. (R. pp. 5255-56 ¶¶ 6-8)

Fourth, beginning in April 2017, and in response to Wortley and Belger's opposition to any land sales, Rigdon began requesting from them a plan for how the Trust might meet its present and future obligations given its lack of liquidity. Rigdon's requests were ignored, however, even as it became clear the Trust would have little to no income available for expenses and beneficiary distributions. From May through October 2017, Wortley and Belger even called off trustee meetings, refusing to meet and rendering the Trust paralyzed. *See id.* 13-18.

Last, not only did Wortley and Belger ignore Rigdon's requests for a plan prior to the lawsuit, they continued to ignore those requests even after the lawsuit was filed – and even while the Trust continued to suffer from lack of liquidity and could barely pay its expenses – until finally producing a plan in April 2018, ***eight months*** after Rigdon filed his Petition and ***only two months*** before the start of trial. *See id.* 17-18.

STANDARD OF REVIEW

"The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. School Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). "This form of review is highly deferential to the trial court," JEAN H. TOAL ET AL. APPELLATE PRACTICE IN SOUTH CAROLINA 224 (3d ed. 2016), and

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Second, Worley's and Belger's criticisms of Rigdon's keeping the identity of the potential purchaser confidential are completely unfounded given the undisputed desire of the purchaser, the Haile Gold Mine, to keep the deal from being leaked publicly. (R. pp. 230-31 ¶ 5); (R. pp. 1387-88) As Haile's CEO, David Thomas, explained to the trustees at a meeting in March 2018, he was insistent upon "confidentiality and secrecy" because of Haile's prior experiences with "opportunists" hearing of a potential mitigation transaction and attempting to block or impact it. (R. p. 3874) Rigdon's caution in this respect proved well-founded, given that Haile eventually withdrew its offer when faced with threats from Belger's lawyer to derail a sale by appealing any judicial decision on Rigdon's motion to authorize it. For further background on this matter, *see generally* Rigdon's Final Brief at 43-44 & n.10 and R. pp. 5254-60.

accordingly this Court is "obligated to give great deference to the trial court's judgment," *State v. Lyles*, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008).

An abuse of discretion occurs only "when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012). Put differently,

> An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or, when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). When an appellate court is in agreement with the trial court's ruling, or even "mildly in disagreement," the trial judge has not abused her discretion. *Rish v. Rish*, 296 S.C. 14, 15, 370 S.E.2d 102, 103 (Ct. App. 1988). Only when the appellate court is in "substantial or violent disagreement" has an abuse of discretion occurred. *Id.* at 16, 370 S.E.2d at 103.

ARGUMENT

Summary of Argument

From the beginning of her involvement in this case until the very end, Judge Toal never doubted the good faith and good intentions of Rigdon in bringing this lawsuit or that his actions were taken with the intent of benefitting the trust. She made this clear in the first order she entered and the very last. She also made this clear throughout the trial, which stretched over multiple months. She went a step further in the Final Order and the Order Denying the Motion to Alter or Amend, recognizing not only that Rigdon's actions were taken with the intent of benefiting the Trust, but also that those actions ***had benefitted the Trust***, in that they had finally forced Wortley

and Belger to adopt a management and investment plan for the Trust to diversify its assets, after years of delay while the Trust stagnated in financial crisis.

All these determinations of Judge Toal remained unchanged ***despite*** her ultimate decision to remove Rigdon and make certain findings adverse to his litigation position. Rigdon vigorously disputes the correctness of Judge Toal's ultimate decision on the merits and the factual underpinnings of that decision, and has filed his own appeal to address these errors, but for purposes of this appeal, Judge Toal's key findings about Rigdon's motives for this lawsuit and the beneficial effect it had on the Trust are determinative in analyzing the award of fees and costs to him. That award was well within Judge Toal's discretion, and second-guessing it for the dubious reasons articulated by Wortley and Belger is unfounded.

Accepting Wortley and Belger's arguments would in fact radically re-shape South Carolina Trust law concerning awards of attorney's fees to trustees, imposing a new, unprecedented success-on-the-merits standard and chilling trustees – particularly independent trustees – from bringing claims to protects trusts and their beneficiaries. As a practical matter of policy, that sort of system is neither desirable nor in the best interest of beneficiaries.

In short, there are solid foundations for the trial court's decision in various provisions of the South Carolina Trust Code, in South Carolina case law, and in the Decedent's Will (the "Will") itself, and in setting the actual amount of that fee, the trial court appropriately cited and analyzed the factors recognized in this State. Finally, the procedure the trial court used to make the fee awards was both proper and within the court's discretion, and Wortley and Belger's objections to that procedure in their appeal were not made below and come too late now.

I. The Trial Judge Properly Exercised Her Discretion in Awarding Fees and Costs to Rigdon Under the South Carolina Trust Code § 62-7-1004.

The trial court correctly found that an award of attorney's fees and costs to Rigdon was appropriate under S.C. Code Ann. § 62-7-1004. The plain language of that statute and case law interpreting it and parallel provisions from other states support the court's decision.

A. The plain language of Section 62-7-1004 permits the award and does not require "success on the merits."

The plain language of § 62-7-1004 permits an award of fees and costs to Rigdon, as the trial court recognized. That section provides

> 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***.

S.C. Code Ann. § 62-7-1004 (emphasis added). The only restriction in the statute on a trial judge's discretion to award fees and costs to any party is that the award should be made "as justice and equity may require." Interpreting this same statute, this Court has placed no additional requirements beyond those in the plain language, holding that "[t]he Trust Code empowers trial courts to order attorney's fees in trust administration cases 'as justice may require,'" and recognizing that this Court "must affirm a trial court's fee award ***if any evidence supports it***." *Deborah Dereede Living Trust dated Dec. 18, 2013 v. Karp*, 427 S.C 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019) (emphasis added).

Contrary to the argument of Wortley and Belger, therefore, S.C. Code Ann. § 62-7-1004 does not limit an award only to prevailing parties. *See* Respondent-Appellants' Brief ["Resp-App Br."] at 16-19.[4] Instead, the plain language of that statute, which is adopted from the Uniform

[4] The record below is devoid of any indication that Wortley and Belger argued that an award to Rigdon would be (or was) inappropriate if (or because) he was unsuccessful on the merits. No such argument was made at trial, nor is this argument briefed in connection with Wortley and Belger's Amended Motion to Alter or Amend. Consequently, it is waived. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue cannot be raised for the first time

Trust Code (UTC), makes clear an award can be made "to any party." Numerous courts from other jurisdictions have agreed, interpreting exactly the same language in their state trust codes. For example, the Missouri Court of Appeals explained that under that state's § 1004 a probate court had been within its discretion to award attorney's fees to "'to any party' ***regardless of whether that party prevailed in the lawsuit***" provided the litigation has been "brought and defended in good faith and there were issues raised which could only have been settled via judicial determination." *In re Gene Wild Revocable Trust*, 299 S.W.3d 767,783 (Mo. Ct. App. 2009) (emphasis added); *see also Matter of Caswell Silver Family Trust*, 2012 WL 13013061, * 3 (D.N.M. Jan. 5, 2012) (observing that corresponding New Mexico statute "would grant the Court authority to award fees to any party, payable by any party of by the trust, as might be just and equitable, and the Court will not be limited by a simple determination as to who should prevail on the merits"). Likewise, the Texas Court of Appeals, interpreting a provision in the Texas Trust Code allowing for "attorney's fees as may seem equitable and just," held that state's statue "is not a prevailing party statute" and "therefore an award of attorney's fees . . . is not dependent on a finding that a party 'substantially prevailed.'" *Hachar v. Hachar*, 153 S.W.2d 138, 143 (Tex. Ct. App. 2004); *cf.* GEORGE G. BOGERT ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 970 (June 2020) (observing that UTC § 1004 grants the court discretion to award attorney's fees to trust beneficiary ***even when the beneficiary did not prevail in the proceeding*** (emphasis added)).

The cases that Wortley and Belger rely on to argue for a success-on-the-merits standard, Resp-App Br. 16-18, are inapposite and ripped from an entirely different context than trust law. For example, in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the Supreme Court was

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on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

construing section 7067(f) of the Clean Air Act. The Supreme Court rejected claims to attorney's fees from two environmental organizations that had lost their challenges to an EPA decision to promulgate regulations. Key to the Court's reasoning was its observation that the fee award would be against the federal government – which normally has immunity except to the extent it is waived – and that "virtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on *some* success by the claimant." 463 U.S. at 684-85. Similarly, in *Eagle Bluff, L.L.C. v. Taylor*, 237 P.3d 173, 180 (Okla. 2010), the Oklahoma Supreme Court was addressing a state statute specifically limiting fee awards to a prevailing party in actions to recover payment for labor and services. The context of Trust law and the unique situation of trustees is entirely different from the circumstances addressed in *Ruckelshaus* or *Eagle Bluff.*

As for when "justice and equity may require" an award under § 62-7-1004, even cases cited by Wortley and Belger – notably *Atwood v. Atwood*, 25 P.3d 936 (Okla. Ct. App. 2001) – have observed that UTC § 1004 "does not state specific guidelines or criteria for use by a trial court or for use by a reviewing court," but instead the phrase "connotes fairness and invites flexibility in order to arrive at what is fair on a case by case basis." *Id.* at 947; *see also In re Estate of Philip Roseman*, No. M201900218COAR3CV, 2019 WL 5078722, at *4 (Tenn. Ct. App. Oct. 10, 2019) (noting "the determination of what constitutes justice and equity is a case-by-case determination, based on the facts and presentation of evidence."). And in exercising its discretion, a court "need not adhere to a rigid analysis." *Fisher v. Fisher*, 221 P.3d 845, 852 (Utah Ct. App. 2009).

The dispositive inquiry in determining entitlement to fees and costs under the statute is whether there is any reasonable basis, grounded in equity, that justifies an award of fees. *See e.g.*, *Shelton v. Tamposi*, 62 A.3d 741, 751 (N.H. 2013); *In re Gene Wild*, 299 S.W.3d at 783 (award of fees and costs appropriate where litigation is brought in good faith and issues were raised that

could be settled only through litigation). One court has even observed that the language of § 1004 "does not limit awards only to trustees or others whose actions benefitted a trust. . . [but] . . . [i]nstead, it leaves the award to the trial court's determination of what 'equity and justice' require." *Rouner v. Wise*, 446 S.W.3d 242, 260 (Mo. 2014).

Here, of course, Judge Toal found abundant reason grounded in justice and equity for an award of fees and costs to Rigdon. This action, the court repeatedly explained, was "brought in good faith out of Petitioner's desire to appropriately manage the Trust's assets" and "resulted in the Trustees developing comprehensive, long-term plans for the management of the Trust's assets." (R. p. 80) In its Final Order the Court specifically recognized as well that "all the beneficiaries would be better served and protected by diversifying the Trust's portfolio of assets," which was the same point that drove Rigdon to bring the lawsuit in the first place. (R. p. 57)

The policy grounds for awarding fees and costs to Rigdon in these circumstances are compelling. As the Wyoming Supreme Court observed in *Garwood v. Garwood*, 233 P.3d 977, 985 (Wyo. 2010), "a trustee should not be personally responsible for litigation expenses associated with the proper exercise of its official duties." Similarly, the Missouri Court of Appeals explained in *Klinkerfuss v. Cronin*, 289 S.W.3d 607 (Mo. Ct. App. 2009), that if fees and costs are not awarded "the trustee would have to personally bear the expense for performing his duty to the trust." But a trustee's numerous duties do not include "act[ing] as a guarantor for the trust." *In re. Trust No. T-1 of Trimble*, 826 N.W.2d 474, 493 (Iowa 2013). Such policy considerations are even more compelling in the situation, presented here, of a trustee who is not a beneficiary of the trust. If success on the merits is a prerequisite to recover attorneys' fees, such a trustee will never bring suit to challenge a breach of duty or mismanagement by other trustees, as it would be a no-win situation for the non-beneficiary trustee personally. A non-beneficiary stands to gain nothing

from winning, as was the case with Rigdon; and if he is not successful, then he would have to bear the entire burden of his attorneys' fees under the rule advocated by Wortley and Belger. Under that approach, independent beneficiaries would be strongly dissuaded from bringing legal action to protect the trust. This is bad policy and should not be the law in South Carolina.

In sum, S.C. Code Ann. § 62-7-1004 provides for a flexible standard of "justice and equity" left to the sound discretion of the trial court, there is no requirement for success on the merits, and the standard was met here.

B. The *Atwood* factors are not recognized in South Carolina and regardless, application of them does not yield a different result.

Wortley and Belger wrongly argue both that the trial court "failed to apply the proper legal standard" for an award under § 62-7-1004, (Resp-App Br. 12-13), and that when the "proper standard" is used, no award is warranted, (Resp-App Br. 13-16). They premise this argument on the five-factor test used by the Oklahoma Court of Appeals in *Atwood v. Atwood*, 25 P.3d 936, 947 (2001).

As to the procedural point, first, no South Carolina appellate court has ever adopted the five-factor test used in *Atwood,* still less made application of those factors mandatory in awards of fees and costs pursuant to § 62-7-1004. Quite the opposite. This Court explained just last year that § 1004 "empowers trial courts to order attorney's fees in trust administration cases 'as justice may require'" and imposed no other limits or tests. *Deborah Dereede Living Trust*, 427 S.C at 346, 831 S.E.2d at 441. Second, in arguing for a supposed "requirement" that a trial court rigidly apply the five factors set out in *Atwood*, Wortley and Belger ignore the very holding of that case that § 1004 "***does not state specific guidelines or criteria*** for use by a trial court or for use by a reviewing court," that the statutory language "connotes fairness and invites flexibility in order to arrive at what is fair on a case by case basis," and that the five factors suggested by that court are but

"general criteria" and provide "nonexclusive guides." 25 P.3d at 947 (emphasis added). The absence, therefore, of any express acknowledgement in the trial court's order of the *Atwood* factors, or any rigid application of the same, is not reversible error.

Nonetheless, application of the five *Atwood* factors does not yield a different conclusion than that reached by the trial court. As to the first factor, "reasonableness of parties' claims, contentions, or defenses," Wortley and Belger cherry-pick certain holdings in the trial court's Final Order that went against Rigdon, Resp-App Br. 14, many of which he specifically challenges in his appeal. But the essence of his litigation position was that Trust was in financial crisis and that a plan had to be adopted to diversify the Trust's assets and rectify that crisis. That overall contention prevailed, even if Rigdon's particular claims did not. *See* R. p. 57 (Final Order at 49 (recognizing the Trust would be "better served and protected" by diversifying assets and cautioning Wortley and Belger that it is "imperative that they implement the management and investment plan" for the Trust and that this plan "cannot simply be lip service meant to appease the Court")).

As to the second factor, "unnecessarily prolonging the litigation," this matter came to trial less than a year after Rigdon filed his Petition, and it was Wortley and Belger, not Rigdon, who were unprepared for trial when it began in July 2018 and forced the trial court to extend the trial into September. (R. p. 1486) What is more, it was Wortley and Belger, not Rigdon, who continually delayed production of a plan for the Trust until nearly the eve of trial, and long after Rigdon filed his Petition. The truth is that this matter proceeded with relative haste and was not delayed by Rigdon, and that those delays that did have an effect on the proceedings were caused solely by the antics of Wortley and Belger.

As to the third factor, the "relative ability to bear the financial burden," Wortley and Belger rely on some scant evidence in the record concerning Rigdon's career and real estate holdings to

suggest he has "the ability to finance his own litigation." Resp-App Br. 15. Actual evidence of Rigdon's financial position and the liquidity of any assets would be needed before this Court or any other could reach a conclusion regarding this factor. That evidence is ***not*** in the record and would, moreover, need to be overwhelmingly compelling before responsibility for hundreds of thousands of dollars in legal bills could be imposed on an independent trustee who had no financial stake in the Trust at issue, who was doing his fiduciary duty as he saw fit, and who acted throughout, as the trial court found, in good faith.

The fourth and fifth factors – the results obtained in the litigation and "whether a party acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation" – were specifically addressed by the trial court and count in Rigdon's favor. As already noted, Judge Toal consistently found that Rigdon was acting in good faith and determined at the end of this litigation that his actions had benefitted the Trust. Wortley and Belger's contentions to the contrary[5] are misguided.

In arguing for a strenuous application of the *Atwood* factors, Wortley and Belger also conveniently ignore that the trial court *did* determine the reasonableness of the attorney's fee award with reference to the factors in *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991), one of which is the "beneficial results obtained." Based upon that factor, the trial court reduced Rigdon's fee award by 20% and the consultant fees of Mr. Hardin by 50%. In other words, in setting the fee award, the record demonstrates the trial court considered Rigdon's lack of success

[5] In making this argument Wortley and Belger repeat again their assertion that Rigdon "misled his Co-Trustees" and others regarding "the prospective purchaser/optionor for the Boykin Millpond Property." Resp-App Br. 16. That erroneous contention has already been addressed at *supra* p. 10 n.3, and in Rigdon's Final Brief at 44-45.

on his claims and reduced the fees he sought in a measured exercise of discretion, but the court still found an award was appropriate under basic principles of justice and equity.

C. This action unquestionably benefitted the Trust.

In arguing against the fee award to Respondents Whit and May, Wortley and Belger make the untenable assertion that the action did not benefit the Trust and that the development of the management and investment plan adopted by the trial court "cannot be attributed to this litigation." (Resp-App Br. 19-26) Not so.

First, the record is clear that Wortley and Belger often gave lip service to the concept of diversification, but when it came down to taking any meaningful action they procrastinated and equivocated – and continue to do so to this day. In particular, while Wortley and Belger initially (in 2016) supported the concept of selling real estate to remedy the cash-starved situation of the Trust, they later reversed course when Belger learned (in early 2017) that she would not be allowed to buy Trust property for herself at prices substantially below market. (R. pp. 1365-67; R. pp. 5256-58 ¶¶ 10-15) At that time, Belger withdrew her consent to market properties for sale ***to any third-parties, including family members***. (*See* R. pp. 4017-18 (authorizing sale); R. pp. 4024-26 (summarizing 3/2/17 meeting and stating "Alice is withdrawing her consent to sell at this time."))

In response to their opposition to sell, Rigdon repeatedly requested from Wortley and Belger a written formulation for how the Residuary Trust might meet its present and future financial obligations given the Residuary Trust's lack of liquidity. (R. p. 3264; R. p. 4030-31); *see also* (R. pp. 3282-84)

Notwithstanding these repeated entreaties, Wortley and Belger did not propose a plan or even an approach to diversifying the assets of the Trust until the eve of trial.[6] Their appellate brief makes much of an "Investment Policy Statement" that they developed and presented in May of 2017 (Resp-App. Br. at 22), and it is true that Rigdon was complimentary of this "Investment Policy Statement," but in no sense can it be characterized as a plan for the management of Trust Assets – it was merely an aspirational statement of general investment policies. This fact was acknowledged in the depositions of Belger and Wortley taken in 2018, where they testified that they were still "planning" to put forward a management plan. (R. p. 2564; R. p. 2700) An actual plan was not presented until June of 2018, ten months after Rigdon brought suit and only one month before trial was to commence.

Moreover, in the months preceding this litigation, Wortley and Belger refused to hold Trustee meetings, adopting a posture of simply saying no to any proposal from Rigdon that would have resulted in efforts to diversify Trust assets or sell land. (R. pp. 1370-71; R. pp. 5257-58 ¶ 15) They also simply ignored his requests to produce a plan to diversify and manage the Trust's assets. When they finally did come up with a plan, it was in direct response to the litigation and would not have been produced in the absence of the litigation.

Given this pattern of inaction by Wortley and Belger and their "prior reluctance to sell Trust properties," the trial court understandably noted in the Final Order that it "maintain[ed] reservations" about whether they were really "capable of executing the plan presented at trial," as it "requires the sale of properties that their family has held dear for decades." (R. p. 57) And the

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[6] Wortley and Belger contend, for example, that "date of death appraisals for the property owned by the Trust" were not completed until November 2017 and any formal plan would have had to wait on these, Resp-App Br. 22, but that still does not explain their delay in producing a plan for a further eight months.

court found it necessary to "caution both of them that it is imperative that they implement the management and investment plan" and not simply treat it as "lip service meant to appease the court." (*Id.*) Such cautionary statements by the trial judge would hardly have been necessary if the development of the plan ultimately approved by the court were wholly the result of Wortley and Belger's initiative, as they would have this Court believe.

II. Rigdon's Award was Appropriately Grounded in Other Provisions of the South Carolina Trust Code and in South Carolina Case Law.

The trial court correctly grounded its award of fees and costs to Rigdon not only in S.C. Code Ann. § 62-7-1004 but also found support in two other provisions of the Trust Code, S.C. Code Ann. §§ 62-7-709(a) and 62-7-816(15), and South Carolina case law. (R. pp. 62-63)

Section 62-7-709(a) provides that "[a] trustee is entitled to be reimbursed out of the trust property" for "expenses that were properly incurred in the administration of the trust," and Section 62-7-816(15) provides a trustee may "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."

Consistent with these provisions and § 62-7-1004, South Carolina case law recognizes that a trustee is entitled to employ attorneys in trust litigation and have their fees paid from the assets of the trust. In *Rembert v. Gressette*, 318 S.C. 519, 458 S.E.2d 552 (Ct. App. 1995), for example, the circuit court held for the trustees in connection with certain beneficiaries' actions against the trustees for alleged breach of fiduciary duty and mismanagement. In affirming the judgment of the circuit court, this Court approved of the trustees' having engaged an attorney to assist them and upheld the trustees' payment of the fees of trust counsel from the assets of the trust as well as the amount of those fees.

While no South Carolina case law exists construing § 62-7-709(a), the plain language allows for "reimbursement of expenses" that were "properly incurred," and the Reporter's

Comment observes that "reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action." The Reporter's Comment goes on to explain that "a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust." In point of fact, of course, much of Rigdon's fees and costs in this action were incurred in defending against Wortley and Belger's counterclaims, and while the court did make certain findings adverse to Rigdon's position, the court did not find him responsible for a breach of trust but concluded instead he had acted in good faith. *See Cohen v. Minneapolis Jewish Fed'n*, 346 F. Supp. 3d 1274, 1288 (W.D. Wis. 2018) (finding a trustee committed a breach of duty is inconsistent with a finding of good faith). Consequently, an award of fees and costs to Rigdon is squarely within the ambit of § 62-7-709(a).

In criticizing the trial court's reliance on § 62-7-709(a), Wortley and Belger first allege that an award under this section is "premature" because it addresses only "reimbursement" and "there is no evidence here" that Rigdon has paid the attorney's fee claimed. Resp-App Br. 27-28. First of all, it bears emphasis that the trial court did not rely ***only*** on § 62-7-709(a) but instead cited it alongside two other provisions of the Trust Code, the Will, and principles of case law for the conclusion that awards of attorney's fees and costs to all the parties (including Rigdon) were appropriate. Second, even if § 62-7-709(a) is limited to reimbursement, there is no support for the proposition that a trustee may not seek reimbursement for legal expenses that he has incurred but not yet paid. Indeed, Respondent-Appellants cited § 62-7-709(a) in their own motion for attorney's fees and costs, despite the fact that they did not provide evidence that all the costs and fees they sought had been paid either. (R. p. 828)

As for Wortley and Belger's assertions that Rigdon's fees and costs do not fall under § 709(a) because they were "not properly undertaken" and were incurred through an action

"commenced in bad faith to interfere with the Trust" and which "did not benefit" the Trust, Resp-App Br. 28-29, Rigdon has already addressed in detail why the trial court rightly concluded otherwise. *See, e.g., supra* pp. 3-8 & 21-23.

In making their argument concerning § 709, Wortley and Belger otherwise address §709(a)(2), which provides for compensation of a trustee to prevent unjust enrichment of the trust, and which the trial court neither quoted nor specifically cited in its Final Order,[7] and two cases with fact patterns completely dissimilar to this one, *Whittlesey v. Aiello*, 128 Cal. Rptr. 2d 742 (2002), and *Nickas v. Capadalis*, 954 S.W.2d 735 (Tenn. App. 1997). Both involved disputes as to who had beneficial rights to a trust's assets, not whether trust assets were being properly managed, as was disputed here. At most these cases stand for the proposition that an award of attorney's fees is appropriate when litigation "inure[s] to the benefit of the entire estate" as opposed to only "one or more of the individuals interested in the trust." *Nickas*, 954 S.W.2d at 741. That standard is met here.

Wortley and Belger's criticisms of the trial court's reference to S.C. Code Ann. § 62-7-816 are similarly meritless. Their primary objection to the court's citation of this statute, *see* Resp-App Br. 30-31, stems from their assertion that when Rigdon employed his attorneys and brought this litigation, he did not first obtain the consent of Wortley and Belger. And for a trust with three trustees, their argument goes, "at least two would have had to vote to employ or compensate employees or agents of the Trust."[8] That is ridiculous. Disputes among trustees concerning

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[7] Rigdon agrees with Wortley and Belger that § 709(a)(2) does not apply here, but for a different reason. It applies only to expenses "not properly incurred in the administration of the trust." Rigdon's expenses were incurred in good faith and benefitted the trust, and therefore fall outside the scope of § 709(a)(2).

[8] Wortley and Belger's related argument concerning the exercise of powers granted the trustees under the Will is addressed below at *infra* pp. 27-29.

administration of a trust necessarily involve a lack of unanimity and the formation of majority and minority parties among the trustees. The courts have an interest in seeing these disputes resolved, for the good of trustees, beneficiaries, and the trust itself. A rigid rule requiring a majority (or unanimous) vote before one trustee (or a minority group of trustees) hires attorneys or commences litigation would be contrary to basic common sense and fly in the face of the primary duty of trustees, which is to act as a fiduciary for the benefit of the trust and its beneficiaries.

In addition, it bears emphasizing – yet again – that § 816 was but one of three provisions of the Trust Code cited in the trial court's discussion of the fee and cost awards, and that discussion recognized that the awards were also grounded in the language of the Will and principles of South Carolina case law. In other words, the award to Rigdon does not stand or fall solely on the applicability of § 62-7-816, which clearly supports the general proposition that a trustee like Rigdon may properly employ agents to act on behalf of the Trust. That is all. The trial court's fee award to Rigdon is supported by all of the Trust Code provisions cited, as well as South Carolina case law, and Wortley and Belger fail to adduce any proper legal ground for its reversal.

III. The Will Itself Authorizes Rigdon's Fees and Costs to Be Paid from the Trust.

Not only is an award to Rigdon appropriate under the South Carolina Trust Code and case law, but the Will creating the Trust authorizes an award too, as the trial court acknowledged. (*See* R. p. 65) Specifically, the trial court pointed to Item XIV, Paragraph J, which gives the trustees power

> to employ and compensate, out of the principal or income or both as to the . . . trustee shall seem proper, agents, accountants, brokers, attorneys-in-fact, attorney-at-law, tax specialists . . . deemed needful for the proper managing, handling and administration of the estate or trust, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided he was selected and retained with reasonable care.

(R. p. 2465) The trial court also cited Item XIV, Paragraph N, which provides:

> In addition to the powers, authority and discretion herein conferred or conferred by law, the . . . trustee shall have the authority to do all things and the right to exercise all powers reasonably necessary or incidental to the proper management of the estate or trust and the . . . trustee shall not be liable for any loss to the estate or trust occasioned by his acts in good faith, nor for honest errors in judgment.

(R. p. 2466)

Wortley and Belger first contend, Resp-App Br. 32, that neither provision is applicable here because both require the powers granted be used only for the "proper management" of the Trust but Rigdon's actions were not taken in proper administration of the trust. This argument is but a variation on a theme. As has already been discussed at *supra* pp. 3-8 and 21-23, the trial court concluded with good cause that Rigdon brought this action in good faith and that the action benefitted the trust.

Wortley and Belger's second argument is hyper-technical and points back to some preliminary language in Item XIV of the Will which provides that exercises of trustee power "with respect to any real property" should be "by unanimous vote" and "with respect to personal property" should be by "majority vote." (*Id.* p. 14) Because Rigdon made "unilateral" decisions to retain counsel and pursue litigation, they suggest, Resp-App Br. 33, he was not acting pursuant to Item XIV, Paragraphs J and N, and cannot be awarded fees and costs. Not so.

As a preliminary matter, it is worth recalling that the practical implications of the "unanimous vote" language in Item XIV[9] are a large part of the reason the Trust proved difficult to administrate and the trustees were forced to resort to litigation to work out their differences. *See*

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[9] Item XIV contains numerous ambiguities related to the unanimous vote language. For example, the grant of power in Paragraph O to "dedicate any portion of the real property to a conservation easement" must be "by unanimous consent," but that language is obviously superfluous if the requirement of unanimity in the preliminary language applies to all the paragraphs in Item XIV, including Paragraph O.

generally Rigdon's Final Appellant Brief at 10-11 (noting the Will's requirement of unanimous consent to sell ***or retain*** certain properties creates a logical impossibility whenever there is disagreement among the Trustees). Further, if a unanimous vote was really the prerequisite for the trustees to legitimately retain counsel and consultants in this dispute over whether and how the Trust should undertake sales of real property, then the logical conclusion of that premise is that Wortley and Belger's retention of their counsel and consultants was not authorized under these provisions either, because Rigdon did not vote in favor of those decisions.[10]

Next, the Will makes quite clear that its grant of powers in Item XIV is "in addition to any other rights, powers, authority, and privileges granted by any other provision of this Will ***or by statute or general rule of law***." (R. p. 2462) As has already been recognized, the Court grounded its award to Rigdon not only in the language of the Will but also in several provisions of the South Carolina Trust Code, in case law from this State and other states interpreting that law, and in the common law of this State (*e.g. Rembert*, 318 S.C. at 526, 458 S.E.2d at 556).

Finally, and as already noted in Section II, disputes among trustees concerning administration of a trust necessarily involve a lack of unanimity and the formation of majority and minority parties. It would be unworkable in the extreme to require one trustee to gain consent of his other trustees before bringing a suit against them for breach of fiduciary duty. Ultimately, a trustee's primary duty is "to act in good faith and in accordance with the purposes of the trust,"

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[10] Wortley and Belger cite S.C. Code § 62-7-703 for the premise that co-trustees who are unable to reach a unanimous decision may act by majority decision. That principle, of course, is but the default rule, and only applies "except as otherwise provided in the terms of the trust." S.C. Code § 62-7-105(a). In other words, if a rule of unanimity in the Will binds Rigdon, it also binds Wortley and Belger. What is good for the goose is good for the gander.

and no provision of a trust document can supersede, cabin, or reduce that duty. S.C. Code Ann. § 62-7-105(b)(2).

As the trial court found, Rigdon acted in good faith throughout this matter, and his acts included his proper retention of counsel and consultants. The Will expressly allows a trustee to do these things, and provides that he may be compensated "out of the principal, or the income or both." (R. p. 2465) The trial court's award to Rigdon is appropriate under the Will.

IV. The Award of Fees and Costs to Rigdon Was Reasonable and Any Argument He Should Be Held Liable for Fees and Costs of Other Parties Has Been Waived.

In setting Rigdon's fee award, the trial court appropriately acknowledged and analyzed the six-factor test established in *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991), for determining a reasonable fee. Specifically, the court observed that Rigdon's legal team consisted of Richard Rosen and Liam D. Duffy, both of whom are "experienced, skilled attorneys, of high professional standing in the community and in good standing with the Bar of this State." (R. p. 66) The hourly fees they charged, the court explained, were "those customarily charged in the locality for similar legal services." The billing records submitted were "properly detailed" and the court found that "the time and labor spent by Petitioner's counsel" was "both reasonable for the effort required to litigate this case and was not duplicative." The court added that this case was

> of complex nature, involving nuanced and novel legal issues related to fiduciary management, prudent investment, appropriate beneficiary distributions, conflicts of interest, powers of a disinterested trustee, and other matters made even more challenging by the highly contentious nature of this litigation.

(R. p. 66) The court nevertheless reduced the attorney's fee sought by some 20% and the fee sought from Rigdon's consultant Mr. Hardin by 50%. For the attorney's fee, the court explained this was because "the beneficial results obtained . . . do not warrant the full award of fees being sought," and for the consultant's fee, the court found the fee sought was "excessive in light of [the consultant's] contribution to the development of this action." (R. p. 66)

Wortley and Belger do not challenge any of the above particular findings on the *Glasscock* factors but still propound that the award sought by Rigdon, Whit, and May was "enormous," and that the amount actually awarded was "manifestly excessive and shocking." Resp-App Br. 33-34. They fail to acknowledge, however, that ***the sum*** of the awards made to Rigdon, Whit, and May was some $30,000 ***less*** than the award they themselves received. At a minimum, the amount of the fee awarded Wortley and Belger in this complicated dispute provides some indication that the amount awarded to Rigdon was reasonable.

As to reasons why they contend the award was excessive, Wortley and Belger argue the court did not "sufficiently account" for Rigdon's lack of success on his claims. Resp-App Br. 35. But the record shows the court did consider his lack of success, and accordingly reduced his fee award by 20% (and his consultant's fee by 50%) in a measured exercise of discretion. This is precisely the type of fine tuning that the "abuse of discretion" standard of review leaves to the trial judge.

Wortley and Belger also argue that the award to Rigdon was excessive because it included fees and costs he incurred in unsuccessfully defending claims against him, Resp-App Br. 36-37, and they cite the RESTATEMENT (THIRD) OF TRUSTS § 88 for the proposition that a trustee who is found "to have committed a breach of trust" is ordinarily not entitled to be indemnified.[11] Rigdon, of course, was not found responsible for a breach of trust. To the contrary, the court concluded that he had acted in good faith. Wortley and Belger's argument otherwise relies on *Allard v. Pacific Nat. Bank*, 663 P.2d 104 (Wash. 1983), which in fact recognizes that when awarding fees in trust litigation, "[t]he court's underlying consideration must be whether the litigation and the

[11] As with many of Wortley and Belger's other arguments, this one too appears nowhere below, and is thus waived.

participation of the party seeking attorney fees caused a benefit to the trust." *Id.* at 112. In *Allard* the court did reverse an award to a trustee found to have breached its fiduciary duties, but again that scenario is not applicable here, as there was no finding of a breach and any insinuation to that effect is precluded by the court's repeated holdings that Rigdon acted in good faith.

Wortley and Belger's related argument that Rigdon should actually be liable for their attorney's fees and costs, Resp-App Br. 37-39, has unquestionably been waived. They did not raise this argument during trial, they did not brief it in their proposed order, and they did not address it in any of their memoranda concerning their motion to alter or amend. "[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Even if this argument is somehow preserved, it is meritless. Wortley and Belger premise it first on the contention that "justice and equity" require Boykin be charged with his own fees and costs so that those amounts are not "suffered" by the Remainder Beneficiaries, who are the children of Wortley and Belger and who are, in Wortley and Belger's view, "completely innocent" in this matter. Resp-App Br. 38. The response to this nonsense is wrapped up in the court's sound conclusion that this litigation was beneficial to the trust, as it resulted in a plan for the Trust that will diversify its assets and provide for its long-term growth. (*See* R. p. 57 ("the Court finds that ***all the beneficiaries*** would be better served and protected by diversifying the Trust's portfolio of assets" (emphasis added))) The benefits of the litigation, in other words, will redound to all the beneficiaries over time, including the Remainder Beneficiaries, as the financial condition of the Trust improves with real estate sales and diversification (provided that Wortley and Belger actually carry out the plan that the court directed them to follow).

In further support of their argument for fee shifting to Rigdon, *see* Resp-App Br. at 39, Wortley and Belger otherwise repeat certain of their themes that are premised on factual findings Rigdon is challenging in his own appeal. These have already been addressed above, *see supra* p. 9, n.2, and in Rigdon's Final Appellant Brief.

In short, the record demonstrates the fee award to Rigdon was reasonable under *Glasscock*, and there is no basis for shifting responsibility for Wortley and Belger's fees to him, a claim that they have failed to preserve for appeal in any event.

V. The Trial Court Chose an Efficient Procedure to Finalize the Awards, and Wortley and Belger Have Waived Any Argument Objecting to this Procedure.

The procedure the trial court used to award attorney's fees to Rigdon and the other parties was appropriate, and Wortley and Belger failed to raise any issue about this in their Rule 59(e) motion. This argument has therefore been waived, *see Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 (issue must be raised and ruled upon to be preserved), but is meritless regardless.

Wortley and Belger quote a short selection of the trial transcript to suggest Judge Toal was obligated or "promised" to hold a hearing on attorney's fee awards, *see* Resp-App Br. 4 & 40, but a fuller picture of the actual colloquy between court and counsel reveals Judge Toal's primary concern was that whatever process she chose be fair and efficient. It was. When the issue of how to handle attorney's fees was initially raised, the court indicated its preference was to "handle that by dealing with proposed orders on the substance of the issue," noting that with the proposed orders, each side could submit "expert's cost and the other things you have in mind." (R. pp. 2216-17) She added that she would then "have the whole thing in front of [her] by the time [she] prepared the final order" and that this seemed "the best way to do it." (R. p. 2217)

When Wortley and Belger's counsel suggested the court would need to consider beneficial results as one factor in making awards and that counsel could not address and argue that before

the Final Order came out, Judge Toal pointed out that she would know how the case was going to turn out and could account for that when drafting the order. (R. pp. 2218) She added that while it "***may*** well be the easier thing" would be to "reserve the matter of attorney's fees for after the substantive award has been made," each side was still to "submit your affidavits for up to date attorney's fees" with the proposed orders and then she would "give some consideration" to whether it would be "more orderly" to deal with the issue of attorney's fee awards in her final order or to schedule a later hearing. (R. pp. 2218-19) She also observed that she doubted any objections at a future hearing would "change very much for either side, depending on who prevails or thinks they prevailed or halfway prevailed" and that she expected both sides were "going to be fined based on what has been spent or what has been billed," but that she "could be wrong." (R. p. 2218) It was only then Judge Toal suggested that she would "defer" a final ruling on attorney's fee awards "until the substantive order is issued." (R. pp. 2219)

What is clear is that upon further reflection in the months after trial, Judge Toal reverted to her initial position that the most orderly and efficient way to handle the matter of fee awards was to address them in the Final Order itself, rather than requiring further briefing and a hearing. It is ironic that Wortley and Belger, who complain throughout their appeal about the costs of this litigation to the Trust and the size of the fee awards, are advocating for a position in this instance that would have ***stretched out*** the litigation, ***required more*** attorney time for briefing and a hearing, and resulted in ***increased*** awards to all the parties. These facts doubtless motivated Judge Toal to proceed in the efficient way she did, rather than call all the parties back together and demand

additional briefing and argument after the Final Order came out in May 2019 – some eight months after the trial itself concluded in September 2018.[12]

At any rate, if Wortley and Belger wanted to object to the procedure used, they had an opportunity to do so in their Rule 59(e) motion, and they did not. The excuses they appear to offer are that they "had insufficient time to analyze the trial court's order" and that they were "surprised by this unusual and unexpected action." Resp-App Br. 41. Concerning the latter, the law of this state is clear that "[p]ost-trial motions are also utilized to raise issues that could not have been raised at trial," such as "when the trial court grants relief not requested or rules on an issue that was never raised." TOAL, APPELLATE PRACTICE 189. That principle clearly encompasses a trial court's use of a procedure that certain parties, for whatever reason, did not anticipate.

There is solid policy behind the rule that an issue must be raised and ruled upon to be preserved. This and other issue preservation rules "are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Wortley and Belger's excuses are not grounds for any exception to be made here.

The trial judge chose an efficient way to make the awards without requiring additional investment of attorney time and Trust resources. That was appropriate and a legitimate exercise of her discretion. Having failed to object to the process in their Rule 59(e) motion, Wortley and Belger are precluded from doing so now.

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[12] The trial record was held open until December 2018 to allow for one further deposition.

CONCLUSION

Rigdon should not be saddled with fees and costs that resulted from his doing his fiduciary duty as a trustee and looking out for the best interest of the trust and its beneficiaries. He had nothing personally to gain by bringing the litigation and did so only out of a sense of duty. That litigation unquestionably benefitted the Trust. The trial court acted well within its discretion in awarding fees to Rigdon and in setting the amount of the award. This Court should affirm that part of the trial court's judgment.

Respectfully Submitted,

s/Wallace K. Lightsey

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January 19, 2021

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

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

And

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Response Brief of Appellate-Respondent complies with Rule 211(b), SCACR.

Dated: January 19, 2021

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