

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

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

FINAL BRIEF OF RESPONDENT-APPELLANTS

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ATTORNEYS FOR RESPONDENT-
APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. **Did the trial court err in ordering the Trust to pay an award of attorney's fees and costs to Boykin and the Cross-claimants under S.C. Code § 62-7-1004, where neither party prevailed on any claim asserted?**
2. **Did the trial court err in awarding attorney's fees and costs to Boykin under S.C. Code § 62-7-709 when the trial court itself rejected all of Boykin's claims and specifically found that the claims Boykin asserted had no basis in law or fact?**
3. **Did the trial court err in awarding attorney's fees and costs to Boykin under S.C. Code § 62-7-816?**
4. **Did the trial court err in concluding that the Testator's Will provides a basis for its award of attorney's fees and costs in addition to or in lieu of applicable statutory provisions?**
5. **Did the trial court abuse its discretion by awarding excessive attorney's fees and costs to Boykin and the Cross-claimants?**
6. **Did the trial court abuse its discretion in failing to hold Boykin personally responsible for the attorney's fees Wortley and Belger incurred?**
7. **Did the trial court err in failing to give the parties notice and an opportunity to adequately address the award of attorney's fees?**

STATEMENT OF THE CASE

This appeal is from the Circuit Court's May 24, 2019 Final Order and Judgment in litigation involving trusts created by the Last Will and Testament of Lemuel Whitaker Boykin, II ("Will" and the "Testator"). (Final Order and Judgment dated May 24, 2019, R. p. 9.) The trial court ruled for Respondent-Appellants Mary Deas Wortley ("Wortley") and Alice Belger ("Belger") on all claims and against Appellant-Respondent Rigdon H. Boykin ("Boykin") on all claims. (*Id.* R. pp. 69-70.) However, the court also required the trusts to pay Boykin and certain other unsuccessful parties \$700,221.73 in attorney's fees and costs. (*Id.* R. p. 70.) This appeal concerns the propriety of that attorney's fee award, the trial court's failure to order the losing litigants to reimburse the trust for Wortley's and Belger's fees and costs, and the trial court's failure to provide Wortley and Belger an opportunity to submit additional information and briefing on attorney's fees after the ruling on the merits.

Boykin initially sued in the Probate Court for Kershaw County on August 23, 2017. (*See generally* Boykin Petition for Attorney's Fees, Trustee Fees and Declaratory Judgment, R. p. 83.) Boykin's Petition sought recovery of attorney's fees and a declaration he should be entitled to exercise preeminent authority over his Co-Trustees, Wortley and Belger, regarding the Residuary Trusts A and B (collectively "Residuary Trust" or "Trust") established by the Will. (*Id.*) The Petition's main goal was to require the Trust to sell substantially all of the land in its portfolio, although the Testator had expressed a strong preference for preserving family land. (*Id.*) Boykin was originally represented by Richard Rosen, Esq., and Liam Duffy, Esq. (*Id.*)

The Honorable Debra Branham, Judge of the Probate Court for Kershaw County, removed the matter to Circuit Court on September 1, 2017. Before any party answered the Petition, Boykin moved to force the Trust to pay attorney's fees and costs he incurred in the litigation. (Motion for Fees and Appointment of Trust Counsel dated September 6, 2017 at R. p. 131.)

On September 8, 2017, Lemuel Whitaker Boykin, III, and May Cantey Boykin (“Cross-claimants”) answered Boykin’s Petition, asserted cross claims for removal, and sought damages against Wortley and Belger for breach of fiduciary duty and negligence. (*See generally* Answer and Crossclaim of Lemuel Whitaker Boykin, III and May Cantey Boykin, dated September 8, 2017 at R. p. 151.) The Cross-claimants were represented by William Tetterton, Esq. (*Id.* R. p. 164.)

On October 3, 2017, Boykin moved for complex case designation. The Chief Administrative Judge for the Fifth Judicial Circuit later designated the case as complex and assigned it to the Honorable Jean Hoefer Toal on January 8, 2018.

On February 16, 2018, the trial court entered an order granting Boykin’s motion to authorize the payment of attorney’s fees and costs from the Trust, but deferred ruling on the amount of fees to be paid. (Order on Motion for Attorney’s Fees dated February 16, 2018 at R. p. 4.)

On May 7, 2018, Boykin amended his Petition. (Amended Petition, R. p. 298.) He asserted new and additional claims to modify the Trust to force the sale of family land and to remove Wortley and Belger as Trustees. (*Id.* R. pp. 314-318 ¶¶ 60-77.) Wortley and Belger counterclaimed for removal of Boykin as a trustee. (Amended Answer and Counterclaim to Amended Petition at R. pp. 693-699 ¶¶ 48-75; Second Amended Answer and Counterclaim to Amended Petition at R. pp. 817-822 ¶¶ 48-73.)

Trial occurred in two phases. The first phase took place on July 9 and 10, 2018. At the end of the first phase, the Cross-claimants dropped their claims at law and for monetary damages (other than attorney’s fees) against Wortley and Belger and elected to proceed on a single claim for removal under the South Carolina Trust Code, which mirrored the claim asserted by Boykin. The second phase of trial took place on September 27 and 28, 2018.

At the conclusion of trial, the trial court instructed the parties to submit proposed orders and affidavits which set forth attorney's fees incurred to that point so the trial court would have some idea of the amount of fees claimed by the parties. (Trial Tr. Sept. 28, 2018 at R. p. 2217, line 7-p. 2219, line 17.) The parties argued that the trial court's decision on the merits would affect both the entitlement to and amount of attorney's fees which the court might award, and, in response, the trial court promised that it would defer a ruling on attorney's fees awarded until after its decision on the merits. (*Id.*)

Wortley and Belger moved for recovery of attorney's fees with accompanying affidavits on January 17, 2019. (Wortley and Belger Motion for Payment or Reimbursement of Attorney's Fees, R. p. 827.) Petitioner and Cross-claimants submitted affidavits at the same time. (Rosen Affidavit for Attorney's Fees and Costs filed 1/17/2019, R. p. 5682; Tetterton Affidavit for Attorney's Fees filed 1/17/2019, R. p. 5690.)

The trial court issued its Final Order and Judgment on May 24, 2019. (Final Order and Judgment, R. p. 9.) The Order rejected Boykin's claim to be vested with pre-eminent authority over his Co-Trustees, finding that the claim had "no basis in law or fact." (*Id.* R. p. 36.) It rejected Boykin's request to modify the Trust. (*Id.* R. p. 69.) It rejected Boykin's request that Wortley and Belger be removed as trustees. (*Id.*) It granted Wortley's and Belger's petition to remove Boykin as a trustee. (*Id.*) However, despite the complete failure of Boykin and the Cross-claimants to prevail on their claims and the trial court's promise to defer ruling on attorney's fees until after its decision on the merits, the Final Order and Judgment also required the Trust to pay Boykin and the Cross-claimants \$700,221.73 in attorney's fees and costs. (*Id.* R. p. 70.)

Boykin initially requested \$828,126.52 in attorney's fees and costs. (Rosen Aff. at R. p. 5689 ¶ 26.) Of this amount, \$289,247.40 was attributable to services provided by James C. Hardin,

III, a probate and estate specialist whom Boykin and/or his attorneys had retained for this case. (*Id.* R. p. 5688 ¶ 22.) Hardin originally charged \$600 per hour for his time, but in 2018 raised his rate to \$650 per hour. (*Id.*) Hardin testified at trial, but only as a fact witness, not an expert witness. (July 9, 2018 Trial Tr. at R. 1417, lines 18-20.) The trial court cut the fees claimed by Boykin’s attorneys by 20% to account for the lack of beneficial results obtained, cut the fees claimed by Hardin by 50%, but awarded Boykin all of his other costs and expenses in full. (Final Order and Judgment at R. pp. 66-67.) The trial court found that Mr. Hardin’s fees were “excessive in light of his contribution to the development of this action.” (*Id.* R. p. 66) The trial court also stated that Mr. Hardin’s testimony was limited and that “much of his advice to [Boykin] runs completely contrary to the Court’s interpretation of the applicable law.” (*Id.* R. p. 67)

The Cross-claimants initially requested that the Trust pay their legal fees and costs of \$212,687.06. (Tetterton Affidavit filed 1/17/2019, R. p. 5690.) Regarding these claimed fees, the trial court found they were “excessive in light of the limited role that counsel played in this action.” (Final Order and Judgment, R. p. 68.) It noted that counsel for the Cross-claimants “largely adopted the positions taken by [Boykin], and was “unable to obtain any significant beneficial results on behalf of his clients.” (*Id.*) The trial court therefore reduced the fees claimed by the Cross-claimants by half, to \$106, 343.53. (*Id.* R. pp. 69-70)

Boykin and Wortley and Belger each filed motions to alter or amend the Final Order and Judgment. The trial court denied these motions by written order dated August 28, 2019. (Order Denying Motions to Alter or Amend, August 28, 2019, R. p. 72.) Boykin timely filed a Notice of Appeal on September 25, 2019. (Notice of Appeal, R. p. 5776.) Wortley and Belger filed a Notice of Cross Appeal on September 30, 2019. (Notice of Cross Appeal, R. p. 5780.)

FACTS

The Testator, Lemuel Whitaker Boykin, II, died on December 19, 1989, approximately three months after Hurricane Hugo struck South Carolina. (Final Order and Judgment, R. pp. 14, 17.) When he died, the Testator owned several thousand acres of real property in Kershaw and Sumter Counties. (*Id.* R. p. 14.) The Testator considered certain tracts, including the Boykin Millpond and Millway Plantation, to be family legacy properties. (*Id.* R. pp. 14-15.)

The Testator's Will created two trusts: (1) a marital trust to provide income and support to his wife, Alice Shoolbred Boykin ("Mrs. Boykin"), during her lifetime; and (2) the Residuary Trust. (*Id.* R. p. 15.) Wortley, Belger, and the Cross-claimants are the four children of the Testator and the income beneficiaries of the Residuary Trust. (*Id.*) The four children of Wortley and Belger are remainder beneficiaries of the Residuary Trust. (*Id.*)

While the Trust was designed in part to financially assist its beneficiaries, another purpose of the Trust was to preserve and protect family legacy property. (*Id.* R. p. 16.) The Will specifically directs that "[i]t is my desire, but I do not direct, that certain tracts or parcels of real property" consisting of Millway Plantation, the Laney Tract, Broadview Plantation and others "shall to fullest extent possible be preserved for the benefit of or transferred to my children or their issue." (*Id.* R. p. 16; Will Item X, R. pp. 114-116.) To fulfill this objective, the Will required that no property could be sold without the unanimous consent of the trustees (*id.* R. p. 115) and vested the trustees with discretion to retain real property whether or not it required a disproportionately large portion of the Trust assets to be invested in land as opposed to other investments. (Final Order and Judgment at R. p. 16; Will Item XIV, B, R. p. 119.)

Mrs. Boykin died on August 8, 2016. (Final Order and Judgment at R. p. 20.) The assets of the marital trust poured into the Residuary Trust at that time. Boykin and Wortley were already trustees of the Residuary Trust, and Belger succeeded Mrs. Boykin as the third trustee of the

Residuary Trust. (*Id.* R. pp. 20-21.) On the very day Mrs. Boykin died, Boykin told Wortley and Belger he was unwilling to follow the Testator's desire to preserve family legacy property and that the Trustees should sell approximately 85% of the Trust's real property and invest the proceeds in the stock market. (*Id.* R. p. 21.) Both Wortley and Belger thereafter voted to sell some of the Trust's real property, but not the family legacy property. (*Id.*)

A formal management and investment plan for the Trust could not be made until appraisals of the Trust property were complete and the value of the Trust property obtained. (*Id.* R. pp. 23 and 45.) Date of death appraisals for the Trust were not complete until November 7, 2017. (*Id.* R. p. 23.) In a March 12, 2017 Trustee Meeting, Wortley and Belger nonetheless took steps to produce an investment plan, and asked a Chartered Financial Analyst to present a summary of issues and a proposal for development of an Investment Policy Statement and Trust management plan. (*See* Pet. Tr. Ex. 145, Minutes of May 12, 2017 Trustee Meeting, R. pp. 4033-4034.) Boykin initially accepted and complimented this proposal (*id.*), but shortly thereafter rejected this proposal. Wortley and Belger then made plans to create their own investment plan for Trust assets ("Wortley Belger Plan" or "Plan").

Beginning with Mrs. Boykin's death on August 8, 2016, (Final Order and Judgment, R. pp. 20-21), and acting against the advice of the Trust's tax counsel, Karen Thomas, Esq., Boykin began pursuing numerous avenues to sell Trust property, including family legacy property, without delay. (*See* generally, Wortley Tr. Ex. 56 at R. pp. 5043, 5046, 5047, 5059-5060.) Among other things, he pursued an anonymous option agreement to purchase the most treasured family legacy property – the Boykin Millpond and surrounding acreage, including Downtown Boykin. Boykin informed Wortley and Belger that an undisclosed potential purchaser would pay for an option to later purchase this Trust Property. (Respondents' Motion to Vacate Confidentiality Order at R. p.

574.) Boykin actively concealed the identity of the potential purchaser from his Co-Trustees, their counsel, and the Trust’s tax counsel. (*Id.*) He stated only that he had “preliminary conversations” with conservation-minded organizations and individuals he had previously worked with in New York through his service as a purported board member and Chairman of the Westchester Land Trust, who were allegedly interested in purchasing the property. (Pet. Tr. Ex. 121, Transcript of October 13, 2017 Trustee Meeting 108:3-109:7, 114:21 – 121:5, R. pp. 3609, 3611-3612.) Boykin also formed a Delaware limited liability company, Boykin Millpond Conservation, LLC, whose name was listed as the potential purchaser on various versions of the option agreement. (Respondents’ Motion to Vacate Confidentiality Order, Ex. 2 to Boykin Deposition, R. pp. 574, 2431-2444.)¹

¹ After Boykin’s deposition was noticed, Boykin moved for a protective order to prevent questioning regarding the identity of the owners of Boykin Millpond Conservation, LLC. (*See generally* Petitioner’s Motion for Protective Order and for Expedited Hearing, R. p. 228.) Boykin represented that if the option were exercised, the potential purchaser or “Donor” would donate the property for conservation purposes. (*Id.* R. p. 229.) Importantly, the basis on which Boykin told the trial court confidentiality was needed was that:

[t]he Donor has expressed to [Boykin] that it would be extremely detrimental to the Donor’s interest if its identity were disclosed. In short, the Donor is rightfully fearful that if its identify is disclosed, it will become inundated with requests from other landowners to instead have the Donor purchase other property (as opposed to the Boykin Millpond and Downtown Boykin properties), a situation the Donor has a strong desire to avoid.

(*Id.* R. p. 230.) Boykin also argued that the “only way to ensure a sale remains viable is to protect the identity of the Donor.” (*Id.* R. p. 229.) Contrary to Boykin’s argument, and unbeknownst to Respondents and the trial court, counsel for Cross-claimants was at the time engaged in email communications between Boykin and the Donor’s counsel. (Respondents’ Motion to Vacate Confidentiality Order, R. p. 574.) Based on Boykin’s representations, the trial court entered two confidentiality orders. (*See generally*, Wortley Motion to Vacate Confidentiality Orders, R. 573.)

In Boykin’s deposition, the alleged altruistic donor was revealed to be the Haile Gold Mine (“Gold Mine”). (*See generally* Respondents’ Motion to Vacate Confidentiality Order, R. p. 573; Final Order and Judgment at R. p. 32.) Dave Thomas, the executive officer who testified on behalf of the Gold Mine, contradicted Boykin in key respects, including the following:

Meanwhile, the appraisals of the Trust's real property were finally completed, and Wortley and Belger testified under oath they believed they had a duty to diversify and planned on selling some Trust property, excluding the legacy tracts, and investing the proceeds in the stock market. (Belger Dep. At R. p. 2539, line 18-p. 2544, line 25 and p. 2564, lines 17-25; Wortley Dep. at R. p. 2700, lines 8-14.) A summary of the Wortley Belger Plan for management of Trust assets was provided to Boykin on April 6, 2018. (*See generally* J. Becker email to J. Toal dated 4/24/2018, attached as Ex. C to Respondents' Brief in Opposition to Petitioner's Motion to Name Untimely Rebuttal Witness, R. p. 2445.) This draft of the Plan includes a commitment to sell real property, to diversify the Trust's assets, and to pay reasonable income beneficiary distributions and Trustee's fees. (*Id.*) This Plan was discussed at a Trustee meeting which occurred on April 12, 2018. (Pet. Tr. Ex. 152, Minutes of April 12, 2018 Trustee Meeting at R. p. 4061.) A copy of the Plan was provided to the Court by email on April 24, 2018. (*See* Becker email to J. Toal dated 4/24/2018, with attachment, R. p. 2445.)

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- he had no idea that the Gold Mine's identity was being withheld from Wortley and Belger (Thomas Dep. attached as Ex. G to Respondents' Motion to Vacate Confidentiality Order, R. at pp. 630-31; Final Order and Judgment at R. p. 32);
 - there was no need for the degree of secrecy sought by Boykin regarding the Gold Mine's interest in the property (Thomas Dep., attached as Ex. G to Respondents' Motion to Vacate Confidentiality Order, R. p. 616; Final Order and Judgment at R. p. 32);
 - he had no interest in concealing the Gold Mine's identity from Wortley and Belger (Thomas Dep., attached as Ex. G to Respondents' Motion to Vacate Confidentiality Order, R. pp. 617, 618; Final Order and Judgment at R. p. 32);
 - the Gold Mine had never in its history concealed its identity or used a surrogate [the proposed Boykin Millpond Conservation, LLC] to purchase property (Thomas Dep., attached as Ex. G to Respondents' Motion to Vacate Confidentiality Order, R. pp. 626, lines 15-22); and
 - it was Boykin, not the Gold Mine, who requested that the Gold Mine set up a separate LLC to conceal the purchaser's identity from his Co-Trustees and the trial court (*Id.* R. pp. 629, line 24-p. 630, line 7).

On May 7, 2018, rather than embracing the Wortley Belger Plan, Boykin amended his petition and asserted new and additional claims to modify the Trust to force the sale of family land and to remove Wortley and Belger as Trustees. (Amended Petition, R. p. 298.)

As Wortley and Belger continued to resist Boykin's plan to sell family legacy property, he became increasingly hostile to his own Co-Trustees and their retained advisors. Boykin belittled Wortley and Belger and their attorneys. (Final Order and Judgment at R. pp. 22-29.) He threatened to report the Trust's tax attorney, Karen Thomas, to the Internal Revenue Service, an action which he later admitted was improper. (*Id.* R. pp. 24-25.) He refused to consent to tax planning strategies recommended by Trust advisors to gain leverage to force his Co-Trustees to sell family land in violation of the Testator's expressed desire. (*Id.*) He continually maintained that he would not follow the precatory terms of the Testator's Will regarding preservation of family property, but instead planned to sell most of the Trust's real property holdings, by whatever means necessary. (*Id.* R. pp. 29, 49.)

ARGUMENT

South Carolina follows the American Rule regarding attorney's fees. *Judy v. Judy*, 403 S.C. 203, 209, 742 S.E.2d 672, 676 (Ct. App. 2013). Under this rule, a party is responsible for his or her own attorney's fees. *Id.* Authority to award attorney's fees generally derives only from a statute or contract. *Harris-Jenkins v. Nissan Car Mart. Inc.*, 348 S.C. 171, 177, 557 S.E.2d 708, 710 (Ct. App. 2001). Because statutes allowing attorney's fees are in derogation of the common law, they are strictly construed. *Dowaliby v. Chambless*, 344 S.C. 558, 562, 544 S.E.2d 646, 648 (Ct. App. 2001).

The trial court premised its award of attorney's fees on three statutes and the Will itself. The trial court cited: (1) S.C. Code § 62-7-1004; (2) S.C. Code § 62-7-709; and (3) S.C. Code § 62-7-816. However, these statutes provide no basis for the trial court's award. They do not apply

in some cases and prerequisites have not been satisfied in others. Finally, no award is appropriate where, as here, a trustee sues to wrest control of the Trust away from Co-Trustees, loses every claim asserted, and is removed as a trustee. No evidence supports the trial court's award of attorney's fees and costs to Boykin and the Cross-claimants. Assuming an award is permitted, which Wortley and Belger deny, the award of fees to Boykin and the Cross-claimants constitutes an abuse of discretion because it is grossly excessive. Finally, the process by which the parties were forced to litigate the issue of attorney's fees was procedurally deficient and deprived the parties of due process and the opportunity to present additional evidence and briefing on the issue.

Defending against Boykin's claims significantly depleted the Residuary Trust, and the trial court awarded \$700,221.73 in fees to the losing trustee and beneficiaries over and above these expenses. In fact, Boykin should be required to reimburse Wortley and Belger or the Trust for the litigation fees and expenses he caused them to incur to defend against his claims.

I. The trial court erred in awarding attorney's fees and costs to Boykin and the Cross-claimants under S.C. Code § 62-7-1004.

South Carolina adopted the Uniform Trust Code provision addressing the award of attorney's fees in suits arising from the administration of a trust. S.C. Code Ann. § 62-7-1004 (Supp. 2014). Section 62-7-1004 provides that:

[i]n 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.

Id.; see *Unif. Trust Code* at § 1004 (2000). This statute was the primary basis for the trial court’s award of fees to Boykin and the Cross-claimants. (See Order Denying Motions to Alter or Amend at R. pp. 78-81.)²

Under this statute, an award of fees is appropriate only as “justice and equity may require.” Since there is no South Carolina authority directly on point with respect to this language, decisions construing this uniform provision of a uniform act are authoritative in construing the South Carolina statute. *Prevatte v. Asbury Arms*, 302 S.C. 413, 416, 396 S.E.2d 642, 644 (S.C. Ct. App. 1990). As found by numerous other courts, the limitation above is a real one and “serves two functions, first as a criterion for entitlement, and second, as a measure of the size of the award.” *Atwood v. Atwood*, 25 P.3d 936, 947 (Okla. Civ. App. 2001) (discussing identical provision of Oklahoma Trust Code); see also *Skyline Potato Co., Inc. v. Hi-Land Potato Co., Inc.*, 188 F. Supp. 3d 1097, 1152 (D.N.M. 2016) (discussing § 1004 of the Uniform Trust Code); *In re Trust No. T-1 of Trimble*, 826 N.W.2d 474, 491 (Iowa 2013) (adopting *Atwood* analysis); *Garwood v. Garwood*, 233 P.3d 977, 986 (Wyo. 2010) (same). Here, justice and equity do not permit, much less require, an award of attorney’s fees to Boykin or the Cross-claimants.

A. The trial court failed to apply the proper legal standard for an award under S.C. Code § 62-7-1004.

Standard of Review (Sections IA, IIA, III): Statutory interpretation is a question of law subject to de novo review. *Hueble v. South Carolina Dept. of Natural Res.*, 416 S.C. 220, 228, 785 S.E.2d 461, 465 (2016).

South Carolina has not addressed the proper construction of § 62-7-1004, but courts in other states have addressed the identical provision of the Uniform Trust Code. These court have applied a five factor analysis to awards of attorney’s fees. *E.g.*, *Atwood*, 25 P.3d at 947; *Trimble*,

² Section 62-7-1004 is the only fee statute cited by the trial court after Wortley and Belger objected to the award.

826 N.W.2d at 491; *Garwood*, 233 P.3d at 986. The five factors are: (a) reasonableness of the parties' claims, contentions, or defenses; (b) unnecessarily prolonging litigation; (c) relative ability to bear the financial burden; (d) result obtained by the litigation and prevailing party concepts; and (e) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation. *Atwood*, 25 P.3d at 947.

The trial court should have applied these factors in awarding fees under § 62-7-1004 for two reasons. First, 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. Second, the South Carolina Trust Code provides that “[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.” S.C. Code Ann. § 62-7-1101 (Supp. 2014); *see also Prevatte*, 302 S.C. at 416, 396 S.E.2d at 644. The trial court should therefore have construed § 62-7-1004 in a manner consistent with constructions rendered by other states. The trial court did not do so. This failure constitutes an error of law.

B. When the proper standard is used, no award of fees and costs is warranted.

Standard of Review (Sections IB-D, IIB-C, III, V, VI): A trial court's decision to award or deny attorneys' fees is reviewed for an abuse of discretion. *Heath v. Cty. of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). “An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).

Application of the *Atwood* factors does not support an award of fees to Boykin or the Cross-claimants. Each factor is addressed separately below:

Reasonableness of the parties' claims, contentions, or defenses. The claims asserted by Boykin and the Cross-claimants were unreasonable and unfounded, as evidenced by these findings of the trial court:

- “[T]here is *no basis in law or fact* to grant [Boykin’s] request 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.” (Final Order and Judgment at R. p. 36) (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,” because “[n]atural disasters are not inherently unforeseeable. Moreover, *Hurricane Hugo struck three months prior to the Testator’s death*. Not only could the Testator have foreseen that a natural disaster, such as a hurricane or fire, could damage the timber tracts he owned, *the Testator had actual knowledge of Hurricane Hugo prior to his death*.” (*Id.* R. p. 42 (emphasis added));
- In response to Boykin’s argument that Wortley and Belger should be removed for failure to cooperate, the trial court stated that “[t]he Court agrees with [Boykin] that there has been a lack of cooperation among the Trustees of the Residuary Trust with respect to the issue of the sale of Trust property for purposes of diversification; however, *the Court concludes that [Boykin], not [Wortley or Belger] is guilty of a failure to cooperate*.” (*Id.* R. p. 47 (emphasis added)); and
- In discussing Boykin’s failure to cooperate, the trial court found that: (i) “[Boykin] has attempted to use his position as a Trustee to impose the will of the minority upon the majority”; (ii) “[Boykin] has belittled and threatened trust advisors”; (iii) some 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.* R. p. 48 (emphasis added)).

The Cross-claimants admitted that they did not know of the matters alleged in their cross claim and never asked Wortley or Belger about the allegations made in the pleadings before suing. (July 10, 2018 Trial Transcript at R. p. 1505, line 17-p. 1506, line 20; p. 1508, line 5-p. 1509, line 5; p. 1510, line 20-p. 1511, line 25; p. 1523, lines 1-19.) The trial court found that the record did not support the Cross-claimants’ contention that Wortley and Belger were unwilling to sell any Trust property and diversify the Trust’s investment assets. (Final Order and Judgment at R. p. 30.) Ultimately, the Cross-claimants abandoned their claims at trial and simply joined in Boykin’s request for removal of Wortley and Belger as trustees. (*Id.* R. P. 13; July 10, 2018 Trial Transcript at R. p. 1530, line 6-p. 1531, line 12.)

Unnecessarily prolonging litigation. Boykin argues that the litigation was commenced to force Wortley and Belger to agree to diversify Trust assets and to produce a written management and investment plan. To the contrary, this litigation was part of Boykin's campaign to force his Co-Trustees to sell virtually all of the Trust property as soon as possible, in direct violation of the Testator's desire to preserve the Trust property. The facts demonstrate that Boykin unnecessarily prolonged the litigation long after Wortley and Belger had agreed to diversify and had proposed a method for developing a management plan and strategy.

Relative ability to bear the financial burden. Boykin was a partner in various New York law firms for many years (R. Boykin Depo. at R. p. 933, line 1-p. 942, line 10) and served as Chairman and CEO of Kimbrell's, a chain with over 50 retail furniture stores in North and South Carolina, for three years after he retired from law practice in 2005. (July 9, 2018 Trial Tr. at R. p. 1334, line 17-p. 1335, line 9; R. Boykin Depo. at R. p. 1052, lines 5-15.) Boykin also worked as an energy consultant in Alaska, and owns substantial real estate in Kershaw County. (R. Boykin Depo. at R. p. 1052, lines 15-19; p. 1114, line 16-p. 1116, line 13.) Thus, Boykin clearly had the ability to finance his own litigation.

Result obtained by the litigation and prevailing party concepts. This factor weighs strongly against an award to Boykin or the Cross-claimants. Neither Boykin nor the Cross-claimants had *any* success on the merits. As the trial court stated, "[Boykin] was unsuccessful in each of his causes of action. Instead, [Boykin] is now being removed as Trustee." (Final Order and Judgment at R. p. 66.) As discussed in detail below, this factor alone should be dispositive.

Whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation. This factor also weighs heavily against an award of attorney's fees to Boykin and the Cross-claimants. The pleadings and the facts established in the

trial court's final order show that the litigation was prosecuted to force Wortley and Belger to bend to Boykin's will, and, failing that, to remove them as trustees. (*See generally* Boykin Amended Petition, R. p. 298; Answer and Crossclaims of L.W. Boykin, III and May C. Boykin, R. p. 151; Final Order, R. p. 9; Wortley Trial Ex. 56, R. p. 5036.)

As discussed above, Boykin intentionally misled his Co-Trustees, their counsel, the Trust's tax counsel, and the trial court regarding the identity of the prospective purchaser/optionor for the Boykin Millpond property. He made material misstatements or omissions in his communications with his Co-Trustees and their counsel, in his sworn deposition, and in his submissions to the court. He acted in bad faith and for oppressive reasons in the conduct of this litigation. The Cross-claimants, through their counsel, knew of this deceptive scheme. (Respondents' Motion to Vacate Confidentiality Order at R. p. 575.)

For these reasons, every factor weighs against an award to Boykin and the Cross-claimants, and the trial court abused its discretion in awarding fees under S.C. Code § 62-7-1004.

C. Justice and equity do not permit an award of attorney's fees under S.C. Code § 62-7-1004 because Boykin and the Cross-claimants achieved no success on the merits.

Boykin and the Cross-claimants were wholly unsuccessful at trial. Whether or not recovery of fees under § 62-7-1004 is analyzed using the *Atwood* factors, failing to obtain even some success is fatal to their claims for attorney's fees. Justice and equity do not countenance an order requiring the Trust, and, in the end, the Trust beneficiaries, to shoulder the costs of unsuccessful litigation by Boykin and the Cross-claimants. The losers should not be able to collect their fees from the winners.

Although S.C. Code § 62-7-1004 does not expressly limit recovery of attorney's fees to prevailing parties, prevailing party concepts apply. In *Ruckelhaus v. Sierra Club*, 463 U.S. 680 (1983), the United States Supreme Court discussed the role of prevailing party concepts when

dealing with a facially broad attorney's fee shifting statute like the one found in § 62-7-1004. *Ruckelshaus* involved a fee award under the Clean Air Act, which provides: "[i]n any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." 42 U.S.C. § 7607(f). A statute permitting a court to award attorney's fees where "appropriate" is functionally identical to a statute permitting a court to award attorney's fees where "justice and equity require."

In *Ruckelshaus*, the U.S. Supreme Court stated:

[fee-shifting statutes] reflect one consistent, established rule: *a successful party need not pay its unsuccessful adversary's fees*. The uniform acceptance of this rule reflects, at least in part, intuitive notions of fairness to litigants. Put simply, ordinary conceptions of just returns reject the idea that a party who wrongly charged someone with violations of the law should be able to force the defendant to pay the costs of the wholly unsuccessful suit against it.

Ruckelshaus, 463.U.S. at 684 (emphasis added). The Court noted that prevailing party status was not expressly required by the fee shifting provision in the Clean Air Act, but also that Congress easily could have clarified an intent to depart from these traditional principles of fair play, but did not do so. *Id.* at 684-94. The Court concluded, therefore, that a fee claimant *must* establish "some" degree of success before fees may be awarded. *Id.* at 694.

Oklahoma's Supreme Court expressed a similar sentiment in *Eagle Bluff L.L.C. v. Taylor*, 237 P.3d 173 (Ok. 2010). In *Eagle Bluff*, the court stated the "American Rule is firmly established," and that:

statutes authorizing the award of attorney's fees must be strictly construed, and exceptions to the American Rule are carved out with great caution because *liberality of attorney's fees awards against the non-prevailing party have a chilling effect on open access to the courts*.

Id. at 179 (emphasis added). Like Oklahoma, South Carolina narrowly construes attorney’s fee statutes which depart from the American Rule. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001). Section 62-7-1004 should be narrowly construed, and nothing in the statute reflects an intent to abandon prevailing party concepts.

States permitting fee awards under § 1004 of the Uniform Trust Code, even where a claimant is wholly unsuccessful, have done so by including language in the statute to that effect. *E.g.*, U.C.A. § 75-7-1004 (Utah); AZ ST § 14-11004 (Arizona); MI ST § 700.7904 (Michigan). Utah’s counterpart to § 62-7-1004 is similar to the South Carolina code section, but contains an important additional provision relating solely to trustees, providing:

(2) If a trustee defends or prosecutes any proceeding in good faith, *whether successful or not*, the trustee is entitled to receive from the trust the necessary expenses and disbursements, including reasonable attorney’s fees, incurred.

U.C.A. § 75-7-1004 (emphasis added). Arizona’s counterpart to § 62-7-1004 provides that a trustee is entitled to reimbursement for the trustee’s reasonable attorney’s fees and costs, “that arise [from] the good faith defense or prosecution of a . . . dispute resolution proceeding involving the administration of the trust, *regardless of whether the defense or prosecution is successful.*” AZ ST § 14-11004 (emphasis added). Michigan’s fee statute, mirroring Utah’s, also authorizes attorney’s fees, whether a trustee is “successful or not,” provided that the trustee’s participation was in good faith. MI ST § 700.7904. The absence of express language negating prevailing party concepts in South Carolina’s statute should be dispositive of the analysis here.

The South Carolina Supreme Court has held that successful results obtained are “a factor *essential* to determining whether an attorney’s fee should be awarded.” *Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (emphasis added). This Court has also reversed attorney’s fees awards where no success was obtained by the party seeking fees. *Heins v. Heins*, 344 S.C. 146, 161, 543 S.E.2d 224, 231 (Ct. App. 2001).

Boykin and the Cross-claimants were wholly unsuccessful. Boykin was not merely unsuccessful – he was removed as a trustee. In other words, Boykin not only lost the automobile race he entered, he lost his license to drive. An award of attorney’s fees to Boykin and the Cross-claimants offends principles of justice and equity. If the Trust pays the trial court’s award to Boykin and the Cross-claimants, the Trust beneficiaries ultimately shoulder the burden of that award. Boykin is not a beneficiary, and, if the fee award to him stands, he will be the *only* party in the litigation who suffered no adverse consequence.

Justice and equity do not require the Trust to pay the fees of wholly unsuccessful litigants, and particularly Boykin. Instead, they require that the unsuccessful litigants bear the burden of their own actions. Accordingly, the trial court abused its discretion in awarding fees to these parties under S.C. Code § 62-7-1004.

D. No fees can be awarded to the Cross-claimants under S.C. Code § 62-7-1004 because their actions did not benefit the Trust.

The Cross-claimants face an additional hurdle to recover fees under § 62-7-1004 based on the Reporter’s Comment to that section which indicates that the statute’s application to beneficiaries is limited.³ The comment states:

[t]he court may award a party its own fees and costs from the trust. The court may also charge a party’s costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party’s own fees, Section 62-7-709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. *The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust.*

³ Section 62-7-1004 is the only statute under which an award of fees could be made to the Cross-claimants. The other statutes cited by the trial court, S.C. Code §§ 62-7-709 and 62-7-816 apply solely to *trustees*. Because the Cross-claimants are not trustees, they cannot avail themselves of statutes other than § 62-7-1004. In addition, the Will does not authorize beneficiaries to incur expenses chargeable to the trust.

S.C. Code Ann. § 62-7-1004 at cmt. (emphasis added). As the italicized language indicates, an award of litigation costs to a beneficiary may be appropriate *only if* the litigation is deemed beneficial to the trust. This rule functions as a deterrent. If beneficiaries may recover fees, even for litigation that did not benefit the trust, then beneficiaries would have every incentive to resort to litigation. For this reason, allowing attorney's fee awards from the trust for unsuccessful trust beneficiaries would create a profound moral hazard and unnecessarily promote beneficiary litigation in South Carolina.

Here, the action by the Cross-claimants did not benefit the Trust for many reasons, including, but not limited to:

- They pursued personal objectives. The Cross-claimants pursued their claims not to the benefit of the Trust but for their personal benefit. They sought to increase the annual income they would receive from the Trust despite the consequences an increase might impose on the remainder beneficiaries and the Trust's ability to meet its other expenses and obligations.⁴
- They obtained no relief and improperly depleted Trust assets. The Cross-claimants voluntarily abandoned their claims at trial, and their efforts on the remaining claims were wholly unsuccessful. The trial court found that counsel for the Cross-claimants was "unable to obtain any significant beneficial results on behalf of his clients." (Final Order and Judgment at p. 60, R. p. 68.) In fact, he obtained *no* beneficial result for his clients. Instead, the Cross-claimants harmed the Trust. Wortley and Belger were forced to spend Trust funds and trustee time defending the abandoned and meritless claims. The litigation has been a colossal drain on trust resources.
- Their suit was unnecessary. The Cross-claimants and their counsel added nothing to the litigation. The trial court concluded that counsel for the Cross-claimants largely adopted the positions taken by Boykin. (*Id.*) Ultimately, the Cross-claimants abandoned their claims at trial and asked the trial court to remove all three Trustees, including Boykin.

⁴ Indeed, the record contains numerous communications between Petitioner, his counsel, his retained expert Jim Hardin, and Cross-claimants' counsel where the sole focus is directed at securing attorney's fees, trustee fees, removing Respondents Wortley and Belger as Co-Trustees, and establishing a mandatory minimum distribution amount to increase Cross-claimants' distribution sizes. (*See generally* Respondents' Motion in Limine, R. p. 701.)

The trial court nevertheless awarded fees for two reasons: (1) if the Cross-claimants had to pay their own fees, they might seek assistance from the Trust to pay the debt; and (2) according to the trial court, the litigation benefitted the Trust because it resulted in developing a long-term management plan for Trust assets, the Wortley Belger Plan. (Order on Motions to Alter or Amend at R. p. 79-80.) These reasons are insufficient and factually incorrect.

Concern that the Cross-claimants may seek assistance to pay attorney's fees in the future is speculative and irrelevant to whether suit by the Cross-claimants benefitted the Trust. The trial court abused its discretion in considering this factor in its decision to award Cross-claimants' attorney's fees.

Moreover, the development of the Wortley Belger Plan cannot be attributed to this litigation by either the Cross-claimants or Boykin. This lawsuit was unnecessary, as Wortley and Belger were always willing to diversify Trust assets by selling real estate and investing the proceeds in financial assets, such as stocks and bonds. Wortley and Belger proposed developing a management plan and took steps to initiate such a plan months before Boykin filed his lawsuit. (*See, e.g.*, Pet. Tr. Ex. 145, Minutes of May 12, 2017 Trustee Meeting, at R. pp. 4033-4034 (summarizing Trustees'—notably, Petitioner's—positive reception of memorandum of investment issues prepared by Chartered Financial Analyst retained by Respondents).) Boykin simply was not compelled to sue to obtain a management plan – the trial court itself concluded that Boykin sued before it was even possible for a management plan to be prepared. (Final Order and Judgment at R. pp. 22-23.)

The record in this case, including facts taken directly from the trial court's order, contradicts the trial court's conclusion that suit was necessary to achieve, or resulted in,

diversification and development of the Plan and also demonstrates that Boykin sued for other purposes and unnecessarily prolonged the litigation. By way of illustration:

- In August 2016, shortly after Mrs. Boykin’s death, and more than a year before Boykin sued, Wortley and Belger voted with Boykin to sell some of the Trust’s real property (Final Order and Judgment at R. p. 21);
- On May 12, 2017, at a meeting of the Trustees, Wortley and Belger, through their counsel, proposed the preparation of an “Investment Policy Statement,” informed by the Trust documents, “that provides details on the return and risk objectives of the trust, as well as any constraining factors for buying or selling assets,” which, in turn, would “guide the decisions that lead to the ‘optimal’ portfolio for the Trust.” (Pet. Tr. Ex. 120, Transcript of May 12, 2017 Trustee Meeting at R. pp. 3397-3418.) Wortley and Belger also presented a list of forest management and planning consultants who might assist in conducting such an evaluation and preparing cash flow projections for all of the Trust’s real property and timber assets and formulating an investment planning and diversification strategy (*Id.*);
- According to the meeting minutes prepared by Trust counsel Karen Thomas:

[Wortley and Belger] recommended the Trust enter into a written investment policy and statement of purpose. The Trustees agreed. The Trustees agreed that Jimmy LaFrage’s cruise and 15 year timber analysis should be used in this investment analysis. . . . The presentation prepared by Whit [Bundy] and presented by Bill [Bundy] was well received by all; Rigdon complemented Whit a number of times on his suggestions and presentation. The Trustees also “requested [for Trust counsel] to start a draft of a Request for a Proposal for professional investment advice and circulate to all.” (Pet. Tr. Ex. 145, Minutes from May 12, 2017 Trustee Meeting at R. pp. 4033-4034.);
- Shortly thereafter, Boykin changed his position and refused to cooperate with Wortley and Belger in preparing an investment plan and strategy. Wortley and Belger later decided to work with John Helms of Milliken Forestry Company, who was preparing the estate tax appraisals for the property owned by the Trust;
- Boykin filed suit against his co-Trustees on August 23, 2017;
- Date of death appraisals for the property owned by the Trust were not complete until November 7, 2017. (Final Order and Judgment at R. p. 23.) A timber survey and the appraisals were necessary to obtain the data needed to ascertain the value of the Trust’s assets and to create an informed investment plan (*id.*) *so the process of creating a formal plan could not have begun until late 2017;*
- In Trustee meetings beginning in August 2016 through January 2018, Wortley and Belger had voted to approve the sale of substantial Trust property, which had an estimated value of \$3,803,638 (Alice Belger Aff. Jan. 24, 2018 at R. p. 5275 ¶ 8.);

- In Alice Belger’s February 26, 2018 deposition, she testified that she had a duty to diversify and that she would fund the obligation to diversify by selling land and timber and investing in stocks. (Belger Dep. at R. p. 2539, line 18-p. 2544, line 25.) She was planning on putting forward a management plan that would generate income from stocks and bonds (*Id.* R. p. 2564, lines 17-25.);
- Mary Deas Wortley was deposed three weeks later. She testified that she was committed to a general investment strategy which she described in the following manner:

“I think we do need to diversify further. . . . I think we do need to protect the treasured tracts. I think we need to sell some [of] our assets and then invest them in the stock market. But I think we have to do it carefully and prudently. We cannot rush into dumping a whole lot of land on the market. . . . It would . . . drive [prices] down. I think we need the luxury of time to manage our timber resources and sell what we can and see how it goes.” (Wortley Dep. at R. p. 2700, lines 8-14.)
- A summary of the draft Wortley Belger Plan (“Plan” or “Wortley Belger Plan”) was provided to Boykin on April 6, 2018. (*See generally* J. Becker email to J. Toal dated 4/24/2018, attached as Ex. C to Respondents’ Brief in Opposition to Petitioner’s Motion to Name Untimely Rebuttal Witness, R. p. 2445.) This draft of the Plan includes a commitment to sell real property, to diversify the Trust’s assets, and to pay reasonable income beneficiary distributions and Trustee’s fees;
- The Plan was discussed at a Trustee meeting on April 12, 2018 (Pet. Tr. Ex. 152, Minutes of April 12, 2018 Trustee Meeting at p. 5, R. at 4061);
- A copy of the Plan was provided to the trial court by email on April 24, 2018 (J. Becker email to J. Toal dated 4/24/2018 with attachment, R. p. 2445);
- Even after receipt of the Plan and sworn testimony from Wortley and Belger that they would seek diversification, Boykin refused to accept the Plan. Rather, Boykin continued and amplified the litigation. On May 7, 2018, he amended his complaint to introduce *new* claims for modification of the Trust and removal of his Co-Trustees (Amended Petition at R. pp. 314-318 ¶¶ 60-77);
- On June 1, 2018, Wortley and Belger provided to the trial court and all parties copies of the final report from John Helms, of Milliken Forestry Company, providing his evaluation and investment planning spreadsheet and discussion of the Trust’s extensive real estate holdings (J. Becker email to J. Toal dated 06/01/2018, attached as Ex. D to Respondents’ Brief in Opposition to Petitioner’s Motion to Name Untimely Rebuttal Witness, R. p. 2447);
- On June 18, 2018, Wortley and Belger provided to the trial court and all parties an updated Plan including: a proposed Trust management plan; a list of all Trust assets, along with the value of the assets from the most recent appraisals; a spreadsheet/schedule with the projected income and expenses under the proposed Trust management plan (J. Becker

email to G. Cooper law clerk dated 6/18/2018; *see also* Wortley Tr. Ex. 2, Investment Plan and Strategy, R. p. 5366, 4383.); and

- The trial of this case did not begin until July 9, 2018.⁵

The facts as found by the trial court and established in the record conclusively demonstrate that Wortley and Belger were amenable to diversification. They had proposed creation of an investment policy statement and management plan for Trust assets as early as May 2017. The Wortley Belger Plan was completed in the ordinary course of business promptly after obtaining the necessary information (a timber survey and real estate appraisals). The final version of the Plan was presented to Boykin and the Court well prior to the trial of this case. Wortley and Belger did not change their position because of this suit, nor did they develop a plan for Trust management because of this litigation.⁶

Additionally and importantly, the Wortley Belger Plan was not the result of efforts by Boykin and/or the Cross-claimants. The Plan was adopted and later approved by the Court *despite* Boykin's and the Cross-claimants' best efforts to oppose it. From the outset, Boykin opposed Wortley's and Belger's proposed strategy, later documented in their Plan, to retain family legacy property and sell other portions of Trust property for investment in a manner which maximized their value. At a trustee meeting in January of 2018, Boykin stated that the strategy proposed by Wortley and Belger called for the sale of the "wrong land" and was not an appropriate strategy for a trust the size of the Residuary Trust. (Wortley Tr. Ex. 54, Minutes of January 9, 2018 Trustee Meeting at R. p. 5032.) In an email dated January 14, 2018, Boykin stated "I furthermore reiterate

⁵ That Boykin has appealed the trial court's substantive ruling even after the Plan was developed and approved by the trial court demonstrates that Boykin did not file suit to compel the generation of an investment plan or a commitment to diversify, but for other, improper reasons.

⁶ Boykin cannot credibly argue that his claims for modification of the trust and removal of his Co-Trustees benefitted the trust by causing the development of the Plan – he reviewed and rejected this plan *before* he asserted these claims and before trial.

my belief that the plan set forth by [Wortley and Belger] is *not responsible*.” (Wortley Tr. Ex. 55 at R. p. 5035 (emphasis added).)

Boykin produced his own competing and more aggressive plan. (Final Order and Judgment at R. p. 29.) Notably, Boykin did not submit his plan to an expert for review or otherwise engage any expert to assist him in creating the plan, but relied on his own expertise. (*Id.*) This starkly contrasts with the Wortley Belger Plan, which was supported by extensive expert testimony from John Helms, a registered forester and certified real estate appraiser, and Cheryl Holland, a certified financial planner. At all times, Boykin urged the trial court to reject the Wortley Belger Plan and to endorse his proposal. Toward the end of trial and for the first time, Boykin retained the services of a real estate expert, Mr. William Harrison, whose sole purpose was to criticize the Plan. Specifically, Mr. Harrison stated that the Plan failed to include a proper assessment of the fair market value of the Trust properties or to account for the highest and best use of the properties. (Harrison Dep. at R. p. 2302, lines 4-18 and p. 2305, lines 15-22.)

Neither Boykin nor the Cross-claimants can claim that their efforts resulted in the Plan. Their efforts were aimed directly at preventing the adoption of the Plan.⁷ Ultimately, the trial court completely rejected Boykin’s proposed plan and found that the Plan “is a wise approach to the management of the Trust.” (Final Order and Judgment at R. p. 58.)

Far from benefitting the Trust and its beneficiaries, the actual result of Boykin and the Cross-claimants’ litigation is that the Trust was *harmed*. Under the trial court’s order, the Trust

⁷ Even if the trial court’s conclusion regarding a benefit to the trust were correct, the Cross-claimants cannot benefit from it. In the trial court’s own words, the Cross-claimants played a “limited role” in this action, and “largely adopted the positions taken by [Boykin].” (Final Order and Judgment at R. p. 68.) Stated differently, the Cross-claimants’ strategy was to say “me too.” They cannot legitimately take credit for any alleged benefit to the trust.

has now been charged with total legal fees of \$1,429,835.79.⁸ This amount is approximately 8.75% of the net asset value of the entire Trust. Saddling the Trust with this enormous expense harms the innocent beneficiaries in a tangible way. Distributions to income beneficiaries are determined based on the net income of the Trust or its net asset value. Because both measures will decrease due to the attorney's fee awards, income beneficiaries will receive lower distributions. Remainder beneficiaries also suffer. This is particularly unsettling because Boykin consulted none of the remainder beneficiaries before initiating this costly litigation. (Final Order and Judgment at R. p. 26-27.) This result should not be allowed to stand.

II. The trial court erred in awarding attorney's fees under S.C. Code § 62-7-709.

The trial court also justified the award of attorney's fees and costs for Boykin under S.C. Code § 62-7-709, which provides, in pertinent part:

A trustee is entitled to be reimbursed out of the trust property, with interest at the legal rate as appropriate, for:

- (1) expenses that were properly incurred in the administration of the trust; and
- (2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

S.C. Code Ann. § 62-7-709(a)(1) and (2).

As a preliminary matter, Boykin's claim for attorney's fees is not governed by § 62-7-709 but by § 62-7-1004, discussed above. The factors governing an award of fees under § 62-7-709, whether the trustee's actions were taken in good faith and for the proper administration of the trust, are subsumed in the § 62-7-1004 analysis. Section 62-7-1004 specifically addresses the award of attorney's fees *in a judicial proceeding involving administration of a trust*, while § 62-7-709 does not. Section 62-7-1004 is the more specific statute, and therefore governs over the more general

⁸ This amount may increase as a result of Boykin's appeal.

§ 62-7-709. *See Bruning v. SCDHEC*, 418 S.C. 537, 545, 795 S.E.2d 290, 294 (Ct. App. 2016) (generally a specific statute prevails over a more general one); *Garwood*, 233 P.3d at 985-86 (section 1004 of the Uniform Trust Code addressing attorney’s fees is more specific and therefore controls).

If § 62-7-709 remains a source of authority for awarding attorney’s fees in judicial proceedings involving the administration of the trust, its requirements are not satisfied here. There is no evidence here that Boykin has actually paid the attorney’s fees claimed, making any request for reimbursement under § 62-7-709 premature. And in any event, a trustee may only be reimbursed under this section for: (1) expenses properly incurred in the administration of the trust; or (2) expenses *not* properly incurred in the administration of the trust, *but which actually benefitted the trust*. Neither situation is present here.

A. A claim for reimbursement under S.C. Code § 62-7-709 is premature.

Section 62-7-709 (“Reimbursement of expenses”) deals with claims for reimbursement of expenses paid by a trustee. Section 62-7-709(a) discusses the circumstances in which a trustee is “entitled to *be reimbursed* out of the trust property, with interest at the legal rate.” S.C. Code Ann. § 62-7-709(a) (emphasis added). Section 62-7-709(b) grants a trustee a lien to secure reimbursement when a trustee has made an advance of the trustee’s own funds. S.C. Code Ann. § 62-7-709(b).

Black’s Law Dictionary defines reimbursement as “repayment.” Black’s Law Dictionary (11th ed. 2010). Accordingly, § 62-7-709 is triggered where a trustee has expended his or her own funds and seeks to be repaid by the trust. Any doubt that the statute is intended to address this situation can be resolved by reference to § 62-7-709(a). This subsection not only grants the trustee the right to be reimbursed, it authorizes the trustee to receive “interest at the legal rate.” *Id.* The award of interest compensates the trustee for the loss of use of his or her own funds spent on trust

business, and, naturally, contemplates a situation in which the trustee has in fact lost the use of his or her own funds by prior payment of legal expenses.

Here, Boykin had paid only a nominal amount of the attorney's fees and litigation expenses claimed when the trial court issued its judgment. (See Rosen Affidavit of Attorney's Fees filed 1/17/2019 (\$20,000 retainer), (\$18,300.36 in litigation costs), (\$18,000 to consultant William Harrison), R. pp. 5687 ¶ 15, 5688 ¶¶ 21, 23.) A claim for reimbursement under S.C. Code § 62-7-709 is therefore premature, or appropriate only in the amount actually paid. The trial court thus erred in awarding Boykin almost \$600,000 in fees under this section.

B. The litigation was not properly undertaken in the administration of the Trust.

Section 62-7-709(a)(1) requires that an expense be "properly incurred in the good faith administration of the trust" to warrant reimbursement. *Id.*; *see also* S.C. Code Ann. § 62-7-105(b)(2) (Supp. 2014) (trustee has duty to act in good faith); *In re Estate of Klarnar*, 113 P.3d 150, 157 (Colo. 2005) (trustee permitted reimbursement for seeking instruction from court where the trustee acted in good faith). The trial court erroneously concluded that Boykin sued in good faith out of a desire to manage the Trust (Order Denying Motions to Alter or Amend at R. p. 80), because no evidence supports this conclusion.

Frustrated by his inability to control the Trust because he was only one of three Co-Trustees, Boykin's Petition and Amended Petition sought: (1) a declaration that he had preeminent authority over his Co-Trustees; (2) his appointment as a special fiduciary with authority over his Co-Trustees; (3) modification of the Trust to prevent Wortley and Belger from relying on the express provisions of the Will which indicated the Testator's desire to preserve family legacy property; and (4) removal of Wortley and Belger as trustees. (*See generally* Boykin Amended Petition, R. at 298). This action was commenced in bad faith to *interfere* with administration of

the Trust by his Co-Trustees under the Testator's Will and to thwart one of the express goals of the Will, the preservation of family legacy property.

Boykin had a duty to act in good faith "*in accordance with the purposes of the trust.*" S.C. Code Ann. § 62-7-105(b)(2) (emphasis added). Therefore, his attempts to work directly against one of the primary purposes of the Trust cannot be considered to have been properly undertaken in its good faith administration. The trial court's findings conclusively demonstrate that Boykin was attempting, by whatever means necessary, to wrest control of the Trust from his Co-Trustees and force the sale of substantially all of the Trust property, including family legacy property. (See Final Order and Judgment at R. pp. 16, 21-22, 25-26, 29, 47-49, 51.) The trial court concluded there was no basis in law or in fact for the claims Boykin asserted. For this reason, Boykin is not entitled to reimbursement for attorney's fees under § 62-7-709(a)(1), and the trial court abused its discretion in awarding fees under this section.

C. The litigation did not unjustly enrich the Trust.

Section 62-6-709(a)(2) allows a trustee reimbursement for expenses not properly incurred in the administration of a trust, but only to the extent necessary to prevent unjust enrichment of the trust. S.C. Code Ann. § 62-7-709(a)(2) (2005 and Supp. 2014). As the Reporter's Comment to this section states, the purpose of this provision is not to ratify the improper conduct of the trustee, but to prevent unjust enrichment of the trust. *Id.* at cmt. This section reflects the generally applicable rule that a trustee may not have reimbursement for expenses which did not benefit the trust. *See id.*; *see also Whittlesey v. Aiello*, 128 Cal.Rptr.2d 742, 748 (Cal. Ct. App. 2002) (no basis for trustee to recover expenses if litigation does not benefit trust); *Nickas v. Capadalis*, 954 S.W.2d 735, 741 (Tenn. App. 1997) ("Unless some benefit is contributed to the preservation of the trust estate, however, an award of attorney's fees is not permitted from the trust fund,

notwithstanding the rule that a trust estate should bear the expense of the administration of the trust”).

As discussed above, Boykin’s lawsuit harmed the Trust. As a result, there is no basis for an award of attorney’s fees and expenses to Boykin under § 62-7-709(a)(2).

III. The trial court erred in awarding attorney’s fees and costs to Boykin under S.C. Code § 62-7-816.

As a preliminary matter, it is unclear whether § 62-7-816 utilizes an analysis which differs from § 62-7-709, discussed above. The Reporter’s Comments to § 62-7-816 indicate that questions regarding the propriety of an award of attorney’s fees incurred in a judicial proceeding should be resolved under § 62-7-709. The comment provides that:

[p]aragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney’s fees and other expenses of an action or judicial proceeding, see Section 62-7-709 and Comment. *See also* Section 62-7-811 (duty to defend actions).

Section 62-7-816 therefore either may not address an award of attorney’s fees incurred in judicial proceedings or it may incorporate by reference the analysis used under § 62-7-709. In either case, the trial court erred in awarding attorney’s fees to Boykin.

And in any event, § 62-7-816 does not authorize an award of fees and costs to Boykin. The trial court cited S.C. Code Ann. § 62-7-816 (15) to support its award of attorney’s fees and expenses to Boykin. (Order on Motion for Attorney’s Fees dated Feb. 16, 2018 at R. p. 4; Final Order and Judgment at R. p. 63.) Section 62-7-816 is entitled “Specific powers of trustee,” and provides an extensive list of trustee powers. Subsection 15 authorizes a trustee to pay “employees and agents of the trust.” S.C. Code Ann. § 62-7-816(15) (Supp. 2014). As explained in the next section of this Brief, because this Trust had three trustees, at least two Trustees would have had to vote to employ and compensate employees or agents of the Trust. Boykin never obtained the consent of another of his Co-Trustees to employ and pay his attorneys, so Boykin’s attorneys and

consultants were not “employees and agents of the trust,” they were employees and agents of Boykin alone. *See generally* S.C. Code Ann. § 62-7-703 (providing “co-trustees who are unable to reach a unanimous decision may act by majority decision,” and co-trustees may not act unilaterally except in limited circumstances).

Though not mentioned in the trial court’s Final Order, S.C. Code § 62-7-816(24) also authorizes a trustee to “prosecute or defend an action, claim, or judicial proceeding . . . *to protect trust property and the trustee in the performance of the trustee’s duties.* (Emphasis added). Again, as only one of three Co-Trustees, Boykin did not have the consent of another of his Co-Trustees to prosecute any legal proceeding. And Boykin’s suit was brought to force the sale of Trust property, not for the protection of Trust property. Finally, Boykin’s litigation was not prosecuted to protect him in the performance of his duties, it was prosecuted to wrest control of the Trust from his Co-Trustees.

On its face, § 62-7-816 does not authorize an award of fees and costs to Boykin. The trial court erred in relying on this statutory provision.

IV. The trial court erred in concluding that the Will provides a separate basis for the award of attorney’s fees and costs.

Standard of Review: The construction of a will is a question of law. 6 C.J.S. *Wills* § 901 (2011) (“Generally, the interpretation or construction of a will, or so much thereof as is applicable to the case under consideration, is a question of law for the court and not one of fact for the jury ...); *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). Questions of law may be decided with no particular deference to the trial court. *S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008).

The trial court concluded that Items XIV(J) and XIV(N) in the Will authorized it to award Boykin attorney’s fees and costs. (Final Order and Judgment at R. p. 65.) Item XIV(J) provides in pertinent part that trustees are authorized “with respect to any real property, by unanimous vote, or personal property, by majority vote”:

[t]o employ and compensate, out of the principal or the income or both as to the Personal Representative or trustee shall seem proper, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, realtors, and other assistants, advisors and a manager or of the assets, which manager may also be one of the Trustees, deemed needful for the proper management, handling and administration of the estate or trust . . .

(Last Will and Testament of Lemuel Whitaker Boykin, II, at R. p. 122.) Item XIV(N) is the standard, general grant of authority to trustees to do things “reasonably necessary or incidental to the proper managements of the estate or trust.” (*Id.*) The trial court’s construction of these provisions is incorrect as a matter of law because it overlooked two key textual limitations.

A. Boykin’s claimed legal fees and costs were not properly incurred in the administration of the Trust.

Both Item XIV(J) and XIV(N) of the Will contain an important additional limitation on the authority they grant to trustees. The authority granted in these subsections can only be exercised in the “proper” management or administration of the trust. Item XIV(J) specifically provides that the discretion granted trustees is to “employ . . . attorneys-at-law . . . deemed needful for the *proper management, handling, and administration* of the estate or trust.” (Last Will and Testament of Lemuel Whitaker Boykin, II, at R. p. 122 (emphasis added).) Item XIV(N) is a general grant of authority to trustees to do things “reasonably necessary or incidental to the *proper management* of the estate or trust.” (*Id.* (emphasis added).) As discussed at length above, Boykin’s actions were not taken in the proper administration of the Trust. He therefore lacked authority to incur the legal fees and expenses claimed under the Will.

B. The powers enumerated in Item XIV of the Will can only be exercised by majority or unanimous vote.

Powers of the trustees are described in Item XIV of the Will. Item XIV provides that Trustees are authorized in their discretion “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. (Last Will and Testament of Lemuel Whitaker Boykin, II, at R. pp. 118-119.) Subsection J of Item XIV authorizes Trustees to employ and compensate attorneys, and subsection N is a general grant of authority, but like all subsections in Item XIV, the powers described in the subsections must be exercised either by unanimous vote or majority vote depending on the nature of the action. The Will does not authorize any individual trustee to act unilaterally.

Boykin's unilateral retention of counsel to commence litigation to force the Trust to sell real property required a majority vote, and possibly, a unanimous vote, of the trustees. It is undisputed that Wortley and Belger opposed Boykin's efforts. Boykin was therefore not authorized by the Will to incur the attorney's fees he seeks to charge to the Trust, and the Will provides no basis on which an award of such fees can be made. For these reasons, the trial court erred as a matter of law in determining that the Will provided a basis for its award of attorney's fees to Boykin.

V. The trial court's award of attorney's fees and costs to Boykin and the Cross-claimants was grossly excessive.

Standard of Review: "[T]he specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Horton v. Jasper County School District*, 423 S.C. 325, 330, 815 S.E.2d 442, 444 (2018).

A. The trial court abused its discretion in awarding an excessive amount of attorney's fees and expenses to Boykin and the Cross-claimants.

The attorney's fees and expenses claimed by Boykin and the Cross-claimants were enormous. Boykin sought recovery of \$448,097.50 in attorney's fees and \$380,029.02 in expert fees and costs, for a total recovery \$828,126.52. (*See generally* Rosen Affidavit on Attorney's Fees, R. p. 5682.) The Cross-claimants claimed \$188,823.36 in attorney's fees and \$11,931.85 in

costs. (*See generally* Tetterton Affidavit on Attorney's Fees, R. p. 5690.) Together, Boykin and the Cross-claimants sought to charge the Trust \$1,028,881.73.

The trial court reduced the fees and expenses claimed by these parties to some extent. It cut the fees and expenses sought by Boykin's counsel by 20% and the fees requested by James Hardin, III by 50%. (Final Order and Judgment at R. pp. 67-68.) The trial court otherwise approved all fees and expenses Boykin requested. The trial court awarded only 50% of the attorney's fees the Cross-claimants requested, but awarded all of their litigation costs. (*Id.* R. p. 69.) After these adjustments, the award of attorney's fees and expenses to these parties totaled \$700,221.73. Given the equities, this amount is manifestly excessive and shocking.

As discussed above, Boykin and the Cross-claimants embarked on a campaign to seize control of the Trust so most of the Trust's land, including family legacy property, could be sold as soon as possible. This campaign was directly contrary to the Testator's expressed intention that the property be preserved. They filed claims which had no basis in law or fact. Boykin misled the trial court during the litigation, abandoned claims and perhaps most importantly – *they lost on every claim asserted*. They forced the Trust to defend these actions, costing the Trust more than \$700,000 in its own legal fees and costs.

The guideposts for an award of attorney's fees under § 62-7-1004 are "justice and equity." These guideposts serve not only as criterion for entitlement to fees, but also as a measure of the size of the award. *Atwood*, 28 P.3d at 947. Given the above, the amount of fees and expenses awarded by the trial court in this case offends traditional notions of justice and equity and results in an abuse of discretion.

The award is inconsistent with general South Carolina precedent regarding attorney's fees. *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991) (requiring courts to consider the

following factors in attorneys fee awards: (1)the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services). Of these factors, the beneficial results obtained is the most critical. *See Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (“the most critical factor’ in determining the reasonableness of a fee award ‘is the degree of success obtained’”) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

If the fee award is measured by the *Glasscock* factors, the trial court abused its discretion when it did not sufficiently account for the complete lack of success achieved by Boykin and the Cross-claimants. The trial court acknowledged that “the beneficial results obtained by counsel for [Boykin] do not warrant the full award of fees being sought. [Boykin] was unsuccessful in each of his causes of action. Instead, [Boykin] is now being removed as Trustee.” (Final Order and Judgment at R. p. 66.)

The trial court’s order, however, woefully underestimated the significance of this crucial factor in determining the amount of recovery. The trial court reduced fees and expenses (other than fees incurred by James Hardin, III) awarded to Boykin by a mere 20%. (*Id.*) Stated differently, the trial court allowed 80% of the attorney’s fees sought in a case where the degree of success was 0.0%. Permitting recovery of 80% of the fees and 100% of the expenses claimed (other than fees claimed by James Hardin, III) constitutes an abuse of discretion.

B. Any fees awarded should not exceed the amount of unjust enrichment to the Trust, if any.

To the extent this Court determines that an award of fees is appropriate under § 62-7-709(a)(2), the fees awarded should not exceed the unjust enrichment, if any, received by the Trust because of Boykin’s efforts. Where, as here, the trustee’s actions were not taken in the proper administration of the trust, a trustee may be reimbursed for expenses only “to the extent necessary

to prevent unjust enrichment of the trust.” S.C. Code Ann. § 62-7-709(a)(2). The only alleged benefit to the Trust identified by the trial court was the development of the Wortley Belger Plan. However, the value of this Plan is reflected in the amounts Wortley and Belger actually paid for its development. This amount bears no relationship to the attorney’s fees Boykin incurred. If the Court concludes that Boykin may have reimbursement for legal expenses under § 62-7-709 although his actions were not undertaken in the proper administration of the Trust, this matter should be remanded to the trial court with instructions to ascertain the value of the Wortley Belger Plan and cap Boykin’s recovery of fees accordingly.

C. The trial court’s award is excessive because it improperly includes fees and expenses Boykin incurred unsuccessfully defending the claim to have him removed as trustee.

The trial court’s award also includes items which are not chargeable to the Trust. A trustee is not entitled to reimbursement for fees and expenses in the unsuccessful defense of claims against the trustee for his or her own misconduct. “[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); *see also Allard v. Pacific Nat’l Bank*, 663 P.2d 394, 407 (Wash. 1983) (same); *Restatement Third of Trusts* § 88 (2019 Update) (“[t]o the extent the trustee is successful in defending against charges of misconduct, the trustee is normally entitled to indemnification for reasonable attorney’s fees and other costs; to the extent the trustee is found to have committed a breach of trust, indemnification is ordinarily unavailable.”).

Wortley and Belger sought Boykin’s removal for his own misconduct. He defended this suit and lost. As discussed more fully above, the trial court found that the problems which had occurred in administration of the Trust were Boykin’s fault and ordered him removed as trustee. (*See* Final Order and Judgment at R. pp. 22-25, 29, 47-48.) The Trust should not have to pay fees

or expenses Boykin incurred in unsuccessfully defending against removal for his own misconduct and those fees and expenses should be deducted from the trial court's award.⁹

VI. The trial court abused its discretion in failing to hold Boykin liable for attorney's fees and costs incurred by Wortley and Belger.

Wortley and Belger sought "an order directing . . . [Boykin] . . . to pay or reimburse certain attorney's fees and other costs" they had incurred in the litigation. (Wortley, et al, Motion for Payment or Reimbursement of Attorney's Fees and Other Costs, filed, January 17, 2019 at R. p. 827.) S.C. Code § 62-7-1004 provides that the court "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." (Emphasis added). The Reporter's Comment to § 62-7-1004 states that "[t]he court may also charge a party's costs and fees against another party to the litigation."

The trial court denied Wortley's and Belger's request and directed that their attorney's fees and costs should be paid or reimbursed by the Trust. This denial was an abuse of discretion. Justice and equity require that Boykin either directly pay or reimburse the Trust for the attorney's fees and costs incurred by Wortley and Belger for two reasons: (1) innocent Trust beneficiaries will otherwise bear the burden of Boykin's wholly unsuccessful attempt to force the sale of family legacy property; and (2) Boykin's bad faith and egregious conduct warrants such an award.

A. Justice and equity require that Boykin be charged with some or all of Wortley's and Belger's litigation expenses to prevent loss to innocent Trust beneficiaries.

Litigation expenses in trust proceedings have traditionally been chargeable against another party in cases of egregious, bad faith conduct. S.C. Code Ann. § 62-7-1004 at cmt. While

⁹ Because of the unusual procedure used, discussed below, Wortley and Belger never had access to evidence reflecting to what extent fees claimed included costs incurred in the unsuccessful defense of the removal petition.

Boykin's conduct here certainly rises to that level, the trial court's authority to charge fees against a party under this section is not limited to such circumstances. *Matter of Mayette E. Hoffman Living Trust U/A Dated August 4, 1997*, 812 S.E.2d 401, 405 (N.C.App. 2018) (discussing N.C. Gen. Stat. § 36C-10-1004). In *Hoffman*, the court acknowledged that the Official Comments to § 1004 state “[g]enerally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud,” but specifically rejected the argument that this language limits fee awards to cases involving egregious conduct. *Id.*¹⁰ It concluded that the court may fashion its fee award to fit both the nature and gravity of the trustee's actions “*and the consequences to the beneficiaries and the trustee.*” *Id.* at 404 (citing *Belk v. Belk*, 728 S.E.2d 356 (N.C. 2012) (emphasis added)). The requirements of “justice and equity” generally are determinative, not solely the conduct of the at-fault party.

The trial court's order required the payment of Wortley's and Belger's fees from the Trust. It thereby reduced the amount of income or principal, or both, that will be available for distribution to the beneficiaries by over \$700,000. The remainder beneficiaries are completely innocent parties. They should not suffer the consequences of Boykin's unsuccessful litigation. Justice and equity require that Boykin be charged with some or all of the attorney's fees and costs incurred by Wortley and Belger to protect the interests of the innocent beneficiaries. *See Klinkerfuss v. Cronin*, 289 S.W.3d 607, 618 (Mo. Ct. App. 2009) (award of attorney's fees against unsuccessful plaintiff was warranted under Missouri's counterpart to § 1004 because “[o]therwise . . .the innocent beneficiary, who had no part in the litigation, would find her share of the trust depleted due to her sister's vexatious litigation”).

¹⁰ The Reporter's Comments to S.C. Code § 62-7-1004 contain the identical statement.

B. Boykin’s egregious, bad faith conduct requires that fees incurred by Wortley and Belger be charged against him.

Additionally and alternatively, justice and equity require that fees incurred by Wortley and Belger be charged to Boykin based on Boykin’s conduct. Boykin had a statutory obligation of good faith to act in “accordance with the purposes of the trust.” S.C. Code Ann. § 62-7-105(b)(2). One purpose of the Trust was to preserve family legacy property if at all possible. Rather than obey his duty of good faith to *preserve* family legacy property Boykin acted in bad faith to *divest* the Trust of its family legacy property as soon as possible.

As set forth above, Boykin embarked on a campaign to vitiate a core purpose of the Trust. In doing so, he threatened and berated his Co-Trustees and their advisors. He refused to accept and act on tax advice from advisors which would have benefited the Trust not because of a disagreement, but to gain leverage to force Wortley and Belger to sell Trust property. He misled Wortley and Belger (and later the trial court) about the identity of a potential purchaser for the most treasured family legacy tracts to trick Wortley and Belger into selling. As the trial court expressly found, Boykin acted to intentionally frustrate and manipulate his Co-Trustees. Given these facts, the trial court’s ruling regarding payment of fees incurred by Wortley and Belger should be reversed, and Boykin should have to pay or reimburse Wortley and Belger or the Trust for the fees they incurred defending this action.

VII. The manner in which the trial court conducted the attorney’s fee inquiry deprived the parties of procedural due process.

Procedural due process imposes constraints on governmental decisions which deprive individuals of a protected property interest. *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). The requirements of due process not only include notice, but also include an opportunity to be heard in a meaningful way, and judicial review. *Universal Benefits, Inc. v. McKinney*, 349 S.C 179, 183, 561 S.E.2d 659, 661 (Ct.App. 2002)

(citing *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”); *S.C. Dep’t of Soc. Servs. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995)).

Here, the trial court informed the parties they would have an opportunity to address claims for attorney’s fees *after* the trial court rendered its decision on the merits. The trial court instructed the parties:

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 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 Tr. Sept. 28-29, 2018 at R. p. 2216, line 15-p. 2219, line 17.) Wortley and Belger relied on these statements from the trial court, and refrained from additional discovery or investigation of the attorney’s fee issue before the trial court’s ruling. This opportunity was crucial because, as Wortley and Belger have argued herein, the parties’ respective success on the merits and the findings made by the trial court regarding Boykin’s conduct bear strongly on the propriety of a fee award.

After the ruling on the merits, Wortley and Belger expected to brief and present additional evidence on the issue of attorney’s fees, including evidence regarding how Boykin and the Cross-claimants complicated and prolonged the litigation. However, the trial court instead issued the

award of attorney's simultaneously with its decision on the merits. (Final Order and Judgment at R. at 62-69.) Wortley and Belger were surprised by this unusual and unexpected action.

Because the trial court ruled on the attorney's fee issue in its Final Order and Judgment, the only procedural vehicle Wortley and Belger could use to challenge the fee award was a motion under Rule 59(e), SCRCP; *Norris v. Heyward*, 312 S.C. 67, 69, 439 S.E.2d 264, 265 (1993). Such a motion must be made no more than ten days after receipt of the trial court's order, and a party cannot ordinarily use a Rule 59(e) motion to present an issue the party failed to raise before judgment. *Anderson Memorial Hosp., Inc. v. Hagen*, 313 S.C. 497, 498, 434 S.E.2d 399, 400 (Ct. App. 1994). Finally, new or additional evidence cannot ordinarily be submitted by way of a Rule 59(e) motion. *See id.*

Because of these limitations, Wortley and Belger were substantially prejudiced in their ability to challenge the fee award. Specifically, they:

- had no ability to obtain or inspect actual time records from counsel for Boykin or the Cross-claimants;
- were deprived of the opportunity to submit additional evidence which might bear on the fee award, e.g., evidence of improper actions taken by Boykin during the litigation;
- had insufficient time in which to analyze the trial court's 62 page order and the attorney's fee submissions from Boykin and the Cross-claimants to identify potential errors in the award.

Wortley and Belger were also denied an ordinarily available layer of judicial review. Rule 59(e) is intended to and does provide litigants with an *additional* opportunity for judicial review. The purpose of a Rule 59 motion is to allow the court to reevaluate the basis for its decision. *Rouse v. Nielsen*, 851 F.Supp. 717, 734 (D.S.C. 1994). Parties ordinarily make their arguments before final judgment is rendered, and then, following final judgment, they have a second opportunity to address the court under Rule 59(e). They can ask a trial court to reconsider or amend its judgment for perceived error. They can also use the Rule 59 motion to preserve matters for appellate review.

Because the Rule 59 motion was the parties' *first* chance to address the fee award and because there is no additional procedural mechanism for review by the trial court following a Rule 59 motion, Wortley and Belger were denied the second opportunity for review typically afforded by the South Carolina Rules of Civil Procedure. If this Court does not reverse the award of fees to Boykin and the Cross-claimants *in toto*, or if it cannot properly determine the correct amount of attorney's fee to be awarded from the evidence before it, Wortley and Belger respectfully request that the matter be remanded to the trial court to allow for full development of argument and evidence on this attorney's fee issue.

CONCLUSION

For the reasons stated above, Wortley and Belger respectfully request that the Court reverse the trial court's award of attorney's fees and costs to Boykin and the Cross-claimants, or, in the alternative, reduce the award to an appropriate level or remand this action to the trial court with express instructions for the entry of an amended attorney's fee award. Wortley and Belger also request that the Court order Boykin to pay or reimburse the Trust for the fees they incurred defending this litigation and obtaining Boykin's removal as a Trustee.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ James Y. Becker

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January 27, 2021

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Jan 27 2021

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 Hoefler 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.

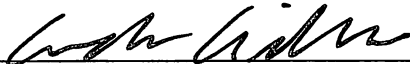
1. Final Brief of Respondent-Appellants

Parties of Record

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January 27, 2021
Columbia, South Carolina

HAYNSWORTH SINKLER BOYD, P.A.

By: 
Amanda Willoughby
Litigation Paralegal