

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP2303

Cir. Ct. No. 2015PR131

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARGARETE MARTHE MILLIETTE 1997 IRREVOCABLE TRUST:

GARY MILLIETTE AS TRUSTEE AND PERSONALLY,

APPELLANT,

V.

MARGARETE MARTHE MILLIETTE,

RESPONDENT.

APPEAL from an order of the circuit court for Walworth County:
DANIEL STEVEN JOHNSON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. From 1997 until 2016, Gary Milliette served as trustee of the Margarete Marthe Milliette 1997 Irrevocable Trust (the Trust), which was established by Gary’s mother, Audrey Milliette, for the benefit of his sister, Margarete Marthe Milliette.¹ In April 2016, the circuit court removed Gary as trustee; terminated the Trust; ordered the distribution of the Trust’s assets to Margarete; and ordered Gary, personally, to pay Margarete \$100,000. In November 2017, the court incorporated these rulings into a final order, which also determined the value of the Trust’s assets and ordered Gary to reimburse the Trust for \$10,282.80 in attorney fees. Gary now appeals, apparently challenging only the court’s rulings regarding the \$100,000 payment to Margarete and reimbursement of the Trust’s attorney fees.² We reject Gary’s arguments and affirm.

BACKGROUND

¶2 Audrey created the Trust on May 2, 1997, for the benefit of Margarete’s health, education, welfare, and support, and for the educational needs of Margarete’s children. Gary was named trustee. On the same day, Audrey also created the Milliette Family Limited Partnership (the LP) and the Audrey Fasel

¹ For ease of reading, we refer to Gary, Audrey, and Margarete by their first names throughout the remainder of this opinion.

² These are the only rulings Gary expressly asks us to reverse in the “Conclusion” section of his brief-in-chief. Gary expressly states that he is not asking us to reverse the order for distribution of the Trust’s assets or the order determining the value of those assets. In addition, Gary does not develop any argument on appeal that the circuit court erred by terminating the Trust. Although some of the arguments in Gary’s appellate briefs could be construed as implicitly challenging the court’s decision to remove him as trustee, any arguments regarding that issue are moot, given Gary’s voluntary resignation as trustee on April 28, 2016. See *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (“An issue is moot when its resolution will have no practical effect on the underlying controversy.”).

Milliette 1997 Revocable Trust (the AFM Trust). Audrey gifted a thirty-percent interest in the LP to the Trust and a sixty-percent interest to Gary. Audrey retained a ten-percent interest in the LP, through the AFM Trust.

¶3 At all times relevant to this case, the Trust’s sole asset was its thirty-percent interest in the LP. The LP’s “main asset,” in turn, was a property located on Wrigley Drive in Lake Geneva, situated across the street from the lake. Audrey operated a bed and breakfast—known as the Eleven Gables Inn (the Inn)—on that property.³ The Inn consisted of two buildings: a “boutique inn” containing six rooms, and a “cottage” containing two two-bedroom suites. The Wrigley Drive property also included a greenhouse and a two-car garage.

¶4 Between 1997 and 2003, the Inn was operated by the LP, of which Audrey was the general partner. During that time period, all of the Inn’s gross revenue flowed to the LP. In 2003, Gary formed a limited liability company known as Bankai, LLC, to operate the Inn. Gary was Bankai’s managing (and only) member. Bankai leased the Inn from the LP pursuant to a “triple net lease,” which commonly requires the lessee to pay all of the property’s ordinary expenses, including taxes, utilities, and maintenance. *See Brenner v. Amerisure Mut. Ins. Co.*, 2017 WI 38, ¶2 n.1, 374 Wis. 2d 578, 893 N.W.2d 193. Under the lease, Bankai was required to pay the LP ten percent of the Inn’s gross revenue as rent. From 2003 on, those rent payments were the LP’s only income.

³ Although the Inn is situated across the street from Lake Geneva, it looks out over the lake and has a pier for lake access.

¶5 Audrey passed away in August 2014. Upon her death, Gary's interest in the LP increased from sixty to seventy percent. Gary also succeeded Audrey as the LP's general partner.

¶6 In July 2015, Margarete petitioned the circuit court to remove Gary as trustee of the Trust, to terminate the Trust, and to distribute its assets to Margarete. As grounds for her petition, Margarete alleged Gary had violated his duties as trustee in various ways. For instance, Margarete cited Article III of the Trust, which provides in relevant part:

Until MARGARETE MARTHE MILLIETTE attains the age of fifty (50) years, the Trustee shall distribute all of the income of MARGARETE's share to MARGARETE MARTHE MILLIETTE at least quarter annually. The Trustee shall distribute so much of the principal as the Trustee, in its sole discretion, deems appropriate for the health, education, welfare and support of MARGARETE MARTHE MILLIETTE and for the educational needs of the issue of MARGARETE MARTHE MILLIETTE.

Margarete asserted that, contrary to this provision, she had not received any distributions of the Trust's income since the Trust's inception. Margarete further asserted that neither she nor her two sons had received any distributions of the Trust's principal.

¶7 Margarete also cited the following additional language from Article III of the Trust:

When MARGARETE MARTHE MILLIETTE attains the age of fifty (50) years the Trustee shall annuitize the then remaining assets of MARGARETE's share over the then life expectancy of MARGARETE MARTHE MILLIETTE as determined by reference to the appropriate Internal Revenue Code actuarial tables. The Trustee shall make monthly payments to MARGARETE MARTHE MILLIETTE of said annuity amount.

Margarete asserted she had turned fifty on September 26, 2007. She contended she had not received any monthly payments since that time “reflecting the annuitization of the assets of the Trust.”

¶8 Margarete also cited Article V of the Trust, which requires the trustee to maintain “proper books of account which shall accurately reflect the true financial condition of the Trust estate.” Article V further provides that those books of account “shall at all reasonable times be open for the inspection or audit of the beneficiaries.” Article V also requires the trustee to “make a written financial report, at least annually, to each beneficiary of the Trust who is or could be entitled to receive a present income distribution.” Margarete alleged she had never received any financial reports from Gary regarding the Trust.

¶9 The circuit court, the Honorable Kristine E. Drettwan presiding, held an evidentiary hearing on Margarete’s petition on October 23, 2015. On April 6, 2016, Judge Drettwan entered an order removing Gary as trustee; terminating the Trust; ordering the distribution of the Trust’s assets to Margarete; and ordering Gary, personally, to pay Margarete \$100,000. In support of these rulings, Judge Drettwan concluded Gary had breached his duties as trustee in four ways: (1) by failing to “create[] books or accountings for the Trust or provide[] any financial information to Margarete”; (2) by participating in the creation of Bankai “and in doing so divert[ing] 90% of [the LP’s] income to himself (via Bankai)”; (3) by failing, before Margarete’s fiftieth birthday, to pay her “any income from the Trust at least quarterly, as required, or make distributions as needed for her health, education, welfare, and support of her two children”; and (4) by failing to make any efforts after Margarete’s fiftieth birthday to “annuitize the assets of the Trust to make monthly payments to her over the expected term of her life.”

¶10 Margarete subsequently filed a motion alleging that, on January 9, 2016, Gary had taken \$10,282.80 from the Trust and used that money to pay attorney fees he had incurred to defend against Margarete’s petition. Margarete asked that the court order Gary to reimburse the Trust for those attorney fees. Judge Drettwan entered an order granting Margarete’s motion on July 18, 2016.

¶11 Further proceedings then took place to determine the value of the Trust’s thirty-percent interest in the LP. The circuit court, the Honorable Daniel S. Johnson presiding, ultimately held an evidentiary hearing on that issue. On November 14, 2017, Judge Johnson issued a final order that: (1) incorporated Judge Drettwan’s April 6, 2016 order; (2) reiterated that Gary, personally, was required to pay Margarete \$100,000; (3) reiterated that Gary was required to reimburse the Trust for \$10,282.80 in attorney fees; and (4) determined that the value of the Trust’s thirty-percent interest in the LP was \$207,000. Gary now appeals, challenging only the court’s rulings requiring him to pay Margarete \$100,000 and to reimburse the Trust’s attorney fees. *See supra* n.2.

DISCUSSION

I. \$100,000 payment to Margarete

¶12 As noted above, the circuit court concluded Gary had breached his duties as trustee in four ways. Based on that conduct, the court removed Gary as trustee. However, the court determined a “further remedy” was necessary because Gary’s “actions and derelictions of duty as Trustee ... caused great harm to Margarete: she lost her home, has no health insurance, receives public assistance, and cannot afford rent for an apartment.” The court therefore ordered the termination of the Trust, and the distribution of its assets to Margarete.

¶13 The circuit court concluded, however, that even the distribution of the Trust’s assets would be insufficient to make Margarete whole, given that Gary “intentionally did not provide any monies or income from the Trust to Margarete over the term of the Trust, despite a clear duty to do so and a clear need by Margarete for the money.” The court cited WIS. STAT. § 701.1001 (2015-16),⁴ which states that, to remedy a trustee’s breach of duties owed to a beneficiary, a court may “[c]ompel the trustee to redress [the] breach of trust by paying money, restoring property, or other means,” or may “[o]rder any other appropriate relief, whether provided elsewhere in this chapter, available at common law, or under equity principles.” *See* Sec. 701.1001(1), (2)(c), (2)(j). Based on this statutory authority, the court ordered Gary to pay Margarete \$100,000 as compensation for the distributions that Gary should have—but failed to—pay Margarete over the life of the Trust.

¶14 We agree with Margarete that the circuit court properly ordered Gary to pay her \$100,000 as a remedy for Gary’s breaches of his duties as trustee. The court’s factual findings regarding Gary’s conduct are supported by ample evidence and are not clearly erroneous. *See* WIS. STAT. § 805.17(2). Based on those findings, the only reasonable conclusion is that Gary breached duties he owed Margarete under the Trust. *See Nottelson v. DILHR*, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763 (1980) (whether the facts fulfill a particular legal standard is a question of law).

⁴ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶15 First, Article III of the Trust required Gary to distribute the Trust’s income to Margarete “at least quarter annually” until her fiftieth birthday. The circuit court found that Gary failed to do so. That finding is supported by Gary’s concession during the October 23, 2015 hearing that he did not distribute any trust income to Margarete before her fiftieth birthday. Margarete similarly testified that she did not receive any distributions of trust income before that time.

¶16 Although Gary testified he did not distribute any trust income to Margarete because there was “no income to distribute,” the circuit court found his testimony on that point incredible. *See Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998) (“When the [circuit] court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness’s testimony.”). The court noted Gary was essentially contending the Inn had made no profit between the Trust’s creation in 1997 and Margarete’s fiftieth birthday in 2007. However, the court observed Gary had “failed to keep any books or accountings, as he was required to do, to verify that assertion,” nor had he “provided financial information for the [LP] or Bankai.”⁵ Based on the court’s factual findings, it is clear Gary violated his duty under the Trust to distribute trust income to Margarete at least quarterly until her fiftieth birthday.

⁵ As noted above, Article V of the Trust required Gary to maintain “proper books of account which shall accurately reflect the true financial condition of the Trust estate” and to “make a written financial report, at least annually, to each beneficiary of the Trust who is or could be entitled to receive a present income distribution.” Gary admitted during the October 23, 2015 hearing that he did not comply with either of those requirements. The first accounting he provided to Margarete was a single-page “financial report” that he sent to Margarete’s attorney on September 1, 2015—over one month after Margarete filed the instant lawsuit.

¶17 Second, Article III of the Trust required Gary to “annuitize” the Trust’s remaining assets following Margarete’s fiftieth birthday and “make monthly payments to [Margarete] of said annuity amount.” Again, the evidence supports the circuit court’s finding that Gary failed to comply with this requirement and, in fact, made no effort to do so. Gary conceded during the October 23 hearing that he did not “do anything” to annuitize the Trust’s assets when Margarete turned fifty. He acknowledged he did not consult with a financial advisor or an attorney about how he could annuitize the assets, nor did he seek guidance from the court. While Gary claimed during the October 23 hearing that the Trust had “no assets to annuitize,” the circuit court correctly rejected that assertion on the basis that “the Inn is an asset.”

¶18 Third, the circuit court found that Gary “participated in the creation of, and is the sole member of, Bankai, and in doing so diverted 90% of the [LP’s] income to himself (via Bankai).” The record supports these findings. Gary does not dispute that he participated in the creation of Bankai and is its sole member. He conceded during the October 23 hearing that, before Bankai was formed, all of the Inn’s gross revenue flowed to the LP. He further conceded that, under the subsequent lease with Bankai, the LP received only ten percent of the Inn’s gross revenue.

¶19 In addition, Gary estimated during the October 23 hearing that Bankai paid the LP between \$8,000 and \$12,000 per year in rent. Based on that estimate, it appears Bankai was leasing a Lake Geneva bed and breakfast containing six bedrooms and two two-bedroom suites, with lake access, for less than \$1,000 per month in rent. Gary admitted during the October 23 hearing that he did nothing to determine whether the lease between Bankai and the LP was at an appropriate market rate. The relatively small amount of rent the LP was

receiving under the Bankai lease, in conjunction with the evidence cited in the preceding paragraph, amply supports the circuit court's finding that Gary diverted income from the Trust to himself by virtue of his creation and operation of Bankai. By doing so, Gary clearly breached his duty of loyalty to Margarete. *See* WIS. STAT. § 701.0802(1) ("A trustee shall administer the trust solely in the interests of the beneficiaries."); *see also Dick & Reuteman Co. v. Doherty Realty Co.*, 16 Wis. 2d 342, 348, 114 N.W.2d 475 (1962) ("It is a fundamental principle of the law of trusts that the trustee is under a duty of undivided loyalty to the beneficiaries of the trust.").

¶20 Gary argues he did not actually breach his duties as trustee; however, his arguments in this regard are meritless. With respect to the requirement that he pay Margarete trust income before her fiftieth birthday, Gary asserts that: (1) Audrey was the LP's general partner until her death in 2014; (2) Audrey therefore had exclusive control of the LP's earnings; and (3) Gary asked Audrey to contribute funds to the Trust prior to her death, but she refused to do so. In essence, Gary contends that, even though the Trust required him to make disbursements of income to Margarete before her fiftieth birthday, he had no ability to do so because the Trust's only asset was its thirty-percent interest in the LP, and Audrey exercised total control over the LP's finances.

¶21 This argument fails because, as Margarete observes, the LP's partnership agreement contained an express requirement that the LP distribute its "Available Net Cash Flow" to its partners on an annual basis. As noted above, the LP's lease with Bankai was a triple net lease, requiring Bankai to pay for expenses such as taxes, utilities, and maintenance. Thus, even if the LP's only income during the relevant time period was the rent it received from Bankai, the LP should have had funds available to distribute to its partners. We agree with

Margarete that, “to the extent Audrey ... refused to distribute those funds, she was breaching the partnership agreement and violating her own fiduciary duties to the limited partners, including the Trust.” Under those circumstances, Gary had an obligation, as trustee, to pursue a claim against Audrey to collect the funds the LP owed the Trust. *See* RESTATEMENT (THIRD) OF TRUSTS § 76(2)(b) & cmt. d (AM. LAW INST. 2007) (discussing a trustee’s duty to collect and protect trust property, which includes taking reasonable steps to enforce claims held by the trust). At a minimum, Gary should have sought guidance from the court as to how to comply with his duties as trustee, in light of Audrey’s apparent breach of her own fiduciary duties. It is undisputed that Gary failed to do so.

¶22 As for his failure to annuitize the Trust’s assets after Margarete turned fifty, Gary argues he could not have complied with that requirement because the LP’s partnership agreement “prohibited [him] from taking action with [the Trust’s thirty-percent interest in the LP] that would create the liquidity necessary to make such payments.” Specifically, Gary asserts § 16.2 of the partnership agreement prohibited any sale, assignment, transfer, pledge, encumbrance, or other disposal of a limited partner’s interest in the LP without the express written consent of the general partner. Gary contends that Audrey, who was the LP’s general partner, would not have permitted any transfer of the Trust’s interest in the LP.

¶23 Gary inaccurately paraphrases § 16.2 of the partnership agreement. That section actually provides:

No Partner shall sell, assign, transfer, pledge, encumber or otherwise dispose of, or permit to be sold, assigned transferred, pledged, encumbered or otherwise disposed of, either voluntarily or by operation of law, all or any of his or her interest in the Partnership, *except in accordance with*

the express terms of Section 16 or with the express written consent of the General Partners

(Emphasis added.) Section 16.8, in turn, delineates a process by which a partner may sell his or her interest in the partnership without obtaining the general partner's consent. Gary could have used that process to sell the Trust's interest in the LP, and he could have then used the proceeds of the sale to purchase an annuity for Margarete, as required by the Trust. Again, it is undisputed Gary did not do so.

¶24 Gary next attempts to excuse his self-dealing in connection with the Bankai lease by asserting that Audrey dictated the lease's terms. We agree with Margarete that, even assuming Gary was not involved in negotiating the lease, his argument "begs an obvious and damning question[:] Who represented the Trust's interests in this transaction as a minority owner of 30% of the [LP]? The answer is ... nobody." Given Gary's fiduciary duties as trustee, and the fact that the Trust's only asset was its thirty-percent interest in the LP, Gary should have sought the advice of independent counsel regarding the terms of the lease between the LP and Bankai. Instead of doing so, Gary accepted lease terms that diverted a substantial portion of the Inn's income away from the Trust and toward himself, as Bankai's sole member. Under these circumstances, Gary's acceptance of the lease was a clear violation of his fiduciary duties as trustee.

¶25 For all the foregoing reasons, we reject Gary's argument that the circuit court erred by concluding he breached his duties as trustee. We further conclude the evidence supports the court's order that Gary pay Margarete \$100,000 in damages as a result of those breaches. The court made a number of factual findings in support of that award, none of which are clearly erroneous.

¶26 First, the circuit court observed it was difficult to determine Margarete’s damages, given Gary’s failure to keep or provide financial records regarding the Trust. Based on that failure, the court stated it had “no way of knowing the actual income” that should have been distributed to Margarete. However, the court “note[d]” that Lake Geneva “is a thriving and busy resort area in Walworth County, with countless visitors annually.” The court reasoned a bed and breakfast “located right on the lake with a pier, undoubtedly does good business.” On appeal, Gary does not dispute the court’s finding that he failed to provide financial records for the Trust, or its finding that a lakefront inn in Lake Geneva “undoubtedly does good business.”

¶27 In light of Gary’s failure to provide financial documentation, the circuit court relied on his testimony that, since 2003, Bankai had paid the LP between \$8,000 and \$12,000 in rental income each year. Based on those figures, the court found that the Trust’s thirty-percent share of the LP’s rental income for the years 2003 to 2015 would have been \$43,200.⁶ However, the court observed that amount was “only a fraction” of what the Trust should have received because, absent the lease to Bankai, the LP would have received one-hundred percent of the Inn’s gross revenue.⁷ The court also observed that its estimate of \$43,200 did not account for “the period of 1997-2003 (before Bankai was formed) during which no distributions were made [to the Trust], but during which presumably rents were

⁶ The circuit court apparently calculated thirty percent of \$12,000 in order to determine that the Trust’s yearly share of the LP’s rental income from Bankai was \$3,600. The court appears to have then multiplied that amount by twelve to determine the total rental income the Trust should have received between 2003 and 2015.

⁷ The court acknowledged that, absent the Bankai lease, the LP would have been responsible for various expenses associated with the Inn. However, the court observed there was no evidence in the record regarding those expenses.

received by the [LP].” Based on these additional factors, the court estimated Margarete had sustained \$100,000 in damages as a result of Gary’s failure to make the distributions required by the Trust, along with his self-dealing in connection with the Bankai lease.

¶28 Sufficient evidence supports the circuit court’s determination regarding damages. The court based its award, in large part, on Gary’s own testimony regarding the amount of rent the LP received under its lease with Bankai. As Margarete notes, Gary’s estimate that Bankai paid the LP between \$8,000 and \$12,000 in yearly rent suggests that the Inn’s gross revenue was between \$80,000 and \$120,000 per year. We agree with Margarete that, absent the Bankai lease, it is “eminently reasonable to estimate that at least \$100,000 of those revenues should have been provided to the Trust for the benefit of Margarete and her children” during the life of the Trust. We further agree with Margarete that “any uncertainty in calculating damages in this case was caused entirely by Gary’s own misconduct—his failure to keep and provide business records for the Inn.” A defendant who “caused the uncertainty of proof” is “precluded from demanding a more precise measure of damages.” *Novo Indus. Corp. v. Nissen*, 30 Wis. 2d 123, 133, 140 N.W.2d 280 (1966).

¶29 Gary argues the circuit court’s award of \$100,000 to Margarete was improper because, although the court credited Margarete’s testimony that she lost her home, had no health insurance, received public assistance, and could not afford to rent an apartment, Margarete failed to prove *when* any of those events occurred. Gary also argues Margarete presented no evidence to establish that the distributions she should have received from the Trust would have made a difference with respect to her overall financial situation. These arguments miss the point. Before Margarete’s fiftieth birthday, the Trust expressly required Gary

to distribute the Trust's income to Margarete at least "quarter annually." After her fiftieth birthday, the Trust required Gary to "annuitize" the Trust's assets and pay Margarete the "annuity amount" each month. The required payments were not conditioned on Margarete's financial hardship. It is undisputed that Gary did not comply with these requirements. As a result, Margarete did not receive funds to which she was entitled under the Trust's express terms. The circuit court had authority to order Gary to repay Margarete those amounts as damages for Gary's breaches of his duties as trustee. *See* WIS. STAT. § 701.1001(2)(c), (j).

¶30 In addition, we observe that Margarete testified regarding her financial difficulties during the October 23, 2015 hearing. When Gary's attorney asserted on cross-examination that Margarete had "no idea" whether receiving "any income" from the Trust would have improved her financial situation, Margarete responded, "Absolutely any income would have made a huge difference." When asked whether she was simply "guessing" that receiving money from the Trust "would have helped," Margarete answered, "Of course, it would have helped." The circuit court clearly found Margarete's testimony credible, and Gary provides no basis for this court to upset that credibility determination. *See Lessor*, 221 Wis. 2d at 665.

¶31 Finally, Gary argues the circuit court improperly ordered him to pay Margarete \$100,000 as punitive damages. However, the record clearly shows that the award was compensatory, not punitive. Margarete did not request punitive damages, and the circuit court never mentioned punitive damages in its April 6, 2016 order. Moreover, the court's written explanation for the \$100,000 award unquestionably demonstrates that the court awarded Margarete that amount to compensate her for Gary's failure to make the distributions required by the Trust. As noted above, the court had authority to make the award under WIS. STAT.

§ 701.1001(2)(c) and (j). Accordingly, there is no basis in the record to support Gary's claim that the court improperly awarded Margarete punitive damages.

II. Reimbursement of attorney fees paid by the Trust

¶32 It is undisputed that, on January 9, 2016, Gary used funds from the Trust to pay \$10,282.80 in attorney fees, which he had incurred to defend against Margarete's petition. Gary argues, for two reasons, that the circuit court erred by ordering him to reimburse the Trust for those attorney fees. We reject both of Gary's arguments.

¶33 First, Gary cites a provision of the Trust granting the trustee authority to "employ ... legal counsel" and to "remunerate them and pay their expenses." Gary apparently believes that, because this provision empowered him to hire an attorney to defend against Margarete's petition and to compensate that attorney using the Trust's funds, the circuit court had no authority to order him to reimburse the Trust's attorney fees. However, the circuit court rejected this argument, citing WIS. STAT. § 701.0105(2)(k), which provides that the terms of a trust "prevail over any provision of this chapter except for ... [t]he power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice." Based on § 701.0105(2)(k), the court concluded its authority to order the reimbursement of attorney fees under WIS. STAT. § 701.1004 superseded any contrary language in the Trust. Gary does not address this aspect of the court's analysis. An appellant's failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity. See *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶34 Second, Gary argues the circuit court improperly ordered him to reimburse the Trust's attorney fees under WIS. STAT. § 701.1004.

Section 701.1004(2) states that, “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 fees, incurred.” However, § 701.1004(2) “does not preclude a court from ordering another party to reimburse the trust for these expenses and disbursements as provided in sub. (1).” Subsection (1), in turn, provides: “In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.” Sec. 701.1004(1).

¶35 The circuit court concluded Gary was not entitled to use the Trust’s funds to pay the attorney fees he had incurred to defend against Margarete’s petition because his defense was not “in good faith.” *See* WIS. STAT. § 701.1004(2). In support of that conclusion, the court incorporated by reference its April 6, 2016 decision, which outlined the ways in which Gary had breached his duties as trustee. The court characterized Gary’s violations as “egregious” and “blatant,” stating he had failed to meet “straightforward[]” requirements set forth in the Trust and statutes.

¶36 The circuit court also observed that Gary had paid the disputed attorney fees “shortly before” the court was originally scheduled to issue its decision on Margarete’s petition, and he did so without providing any notice to Margarete. The court therefore concluded Gary had violated WIS. STAT. § 701.1004(3)(b), which states, “If a claim or defense based upon a breach of trust is made against a trustee ... the trustee shall provide notice to each qualified beneficiary ... of the trustee’s intention to pay costs or attorney fees incurred in the proceeding from the trust prior to making payment.” Finally, the court

observed that Gary had “paid more to his attorney to defend his indefensible actions than he paid out to [Margarete]” over the entire life of the Trust. For all of these reasons, the court concluded Gary’s payment of attorney fees using the Trust’s funds was “not warranted and not just, not equitable, and contrary to statute.”

¶37 On this record, the circuit court did not erroneously exercise its discretion by ordering Gary to reimburse the Trust’s attorney fees.⁸ The court considered the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a reasonable conclusion. *See LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. Gary argues the court erred by concluding he breached his duties as trustee, and, based on that erroneous conclusion, it wrongly determined that his defense against Margarete’s petition was not “in good faith.” *See* WIS. STAT. § 701.1004(2). However, we have already determined that the court properly concluded Gary breached his duties as trustee. *See supra* ¶¶14-25. In light of Gary’s breaches, the court appropriately concluded Gary’s defense against Margarete’s petition was not in good faith. We therefore reject Gary’s argument that the court erred by ordering him to reimburse the Trust’s attorney fees under § 701.1004.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁸ *See Mullany v. Massie*, No. 2015AP318, unpublished slip op. ¶15 (WI App Jan. 18, 2017) (stating a circuit court has “broad authority” under WIS. STAT. § 701.1004(1) to personally surcharge a party in trust proceedings “as justice may require”).

