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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LISA MORGAN-PERALES,

Plaintiff and Respondent,

v.

BONI SAVAGE, as Trustee, etc.,

Defendant and Appellant.

G052317

(Super. Ct. No. 30-2014-00698431)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Leusebrink, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part, and remanded for further proceedings.

Law Firm of David Dunlap Jones and David D. Jones for Defendant and Appellant.

Fullerton, Lemann, Schaefer & Dominick and Thomas W. Dominick for Plaintiff and Respondent.

* * *

Defendant and appellant Boni Savage (Boni),¹ as trustee of the Savage Family Trust (Trust), appeals from a judgment that (1) surcharged her interest in the Trust \$195,200 based on her failure to pay rent during a six-year period her family lived in the home that was the Trust's primary asset; (2) awarded her a diminished portion of the compensation she sought for acting as the Trust's trustee and as her father's agent under a durable power of attorney; (3) awarded plaintiff and respondent Lisa Morgan-Perales attorney fees for challenging Boni's performance as trustee; and (4) denied Boni the attorney fees she incurred in defending this lawsuit.

We reverse in part, affirm in part, and remand for the trial court to conduct further proceedings. We reverse the court's decision to surcharge Boni \$195,200 and direct the court to amend the judgment to reduce the surcharge to \$88,050. Boni had no obligation to pay rent while living in the home during her father's lifetime. The obligation to pay rent arose only after Morgan-Perales's interest in the home vested upon the death of Boni's father.² As explained below, we affirm the award of trustee compensation to Boni because the court acted within its discretion in reducing the amount she requested.

We reverse Morgan-Perales's attorney fee award because insufficient evidence supports her fee request. Finally, we reverse the trial court's decision denying Boni attorney fees and remand for the court to reconsider her request. The factors the court considered in denying Boni's request necessarily included the court's rent surcharge against Boni's interest in the Trust and the court's attorney fee award to

¹ We refer to Boni and other members of her family by their first names to avoid any confusion based on their shared surname. No disrespect is intended.

² The trial court also surcharged Boni's interest in the Trust \$36,738 because she used Trust funds to pay utilities, maintenance, and home repairs while she lived in the residence. As explained below, Boni forfeited any challenge to this surcharge by failing to address the issue in her opening brief.

Morgan-Perales. Based on our decision to overturn those determinations, the court must reconsider Boni's request based on the totality of the circumstances as they exist following this opinion.

I

FACTS AND PROCEDURAL HISTORY

Richard and Virginia Savage were the settlors and original trustees of the Trust. The assets they placed in the Trust included their family home located on Huntridge Avenue in Santa Ana, California (Huntridge Property), their personal property, their investments, and their bank accounts. Richard and Virginia had four children: Gary Glen Savage, Jacquelyn Lynn Savage, Boni Savage, and Daniel Richard Savage.

Richard became the Trust's sole trustee when Virginia died in December 2006, and Jacquelyn succeeded Richard as trustee when Alzheimer's disease incapacitated him during 2007. Gary predeceased Virginia and both Jacquelyn and Daniel died on the same day in March 2008, leaving Boni as the only surviving child of Richard and Virginia. Upon Jacquelyn's death, Boni succeeded her as the Trust's trustee, and she also became Richard's agent under a durable power of attorney. Gary and Daniel never had any children, but Jacquelyn was survived by her only child, Morgan-Perales.

When Jacquelyn and Daniel died, they lived with Richard in the Huntridge Property and had done so for several years without paying any rent. Following those deaths, Boni moved Richard into her nearby home because she did not want him to be alone. In April 2008, she moved Richard into Sunflower Gardens, a home and care facility for patients with Alzheimer's disease. After Boni moved Richard out of the Huntridge Property, it sat vacant until December 2008 when Boni's son moved into the home. In March 2009, Boni, her husband, and their other children also moved into the Huntridge Property after Boni lost her job. They lived at the property until the Trust sold it in March 2015. Boni paid the Trust \$500 in rent in April 2009, but made no other

rental payments during the time she lived at the Huntridge Property because of “money problems.”

Boni frequently visited Richard at Sunflower Gardens and twice a week she would take him on drives to San Diego where they enjoyed picnic lunches. Boni also kept in regular contact with Richard’s doctors and caregivers, made most decisions regarding his health and welfare, and picked up Richard’s prescriptions for him. As trustee, Boni prepared tax returns for Richard, paid his bills, interacted with his investment professionals, made trips to the bank and ran other errands, and helped improve the Huntridge Property. Boni hoped eventually to move Richard back into the Huntridge Property, but he was never able to do so. Richard died in May 2012.

When Richard died, the Trust’s assets included the Huntridge Property valued at approximately \$600,000, an Orange County Credit Union account with a balance of nearly \$99,000, a Bank of America account with a balance of nearly \$25,000, and an automobile and miscellaneous personal property valued at approximately \$5,000. Under the Trust’s terms, a 50 percent interest in this property passed to Boni as Richard and Virginia’s only surviving child, and a 50 percent interest passed to Morgan-Perales as the only child of Richard and Virginia’s children who predeceased Richard.

A few days after Richard’s death, Boni distributed \$50,000 from the Orange County Credit Union account to Morgan-Perales as her share of that account, but did not divide any other Trust assets or otherwise inform Morgan-Perales about the Trust’s status. For example, in July 2012, Boni received a nearly \$8,000 tax refund for Richard, but she did not provide any of those funds to Morgan-Perales or otherwise notify her about the refund.

In June 2013, Morgan-Perales asked Boni about the Trust’s status and proposed several options for disposing of the Huntridge Property, including selling the property to a third party, Boni purchasing Morgan-Perales’s interest, and Boni paying Morgan-Perales half the fair market rental value until the property was sold. Boni did not

respond. In July 2013, Morgan-Perales hired an attorney who wrote Boni and asked for an accounting for her administration of the Trust, including all receipts and other source documents. Boni did not provide the requested accounting, but a few weeks later she distributed half of the remaining balance from the Bank of America account to Morgan-Perales. In August 2013, Morgan-Perales's attorney again wrote Boni and asked for an accounting of the Trust. In October 2013, Boni responded by providing the Trust's bank statements and some receipts, but she did not provide an accounting. Throughout this period, Boni repeatedly asked Morgan-Perales to come to the Huntridge Property to claim her mother's belongings and help clean out the property, but Morgan-Perales did not do so.

In January 2014, Morgan-Perales filed the underlying petition seeking (1) Boni's removal as the Trust's trustee; (2) appointment of a new trustee; (3) an accounting; and (4) damages for Boni's breach of the Trust. Morgan-Perales alleged Boni breached the Trust by failing to provide an accounting, failing to distribute the Trust's assets, failing to make the Huntridge Property productive, using the Huntridge Property for her own and sole benefit, and misappropriating the remaining Trust assets. When she filed this action, Morgan-Perales also recorded a lis pendens against the Huntridge Property.

Boni answered Morgan-Perales's petition and filed an accounting for the trust covering the period from March 31, 2008 to May 31, 2014. The accounting reported the Trust had assets valued at \$865,000, including (1) the Huntridge Property that was valued at \$750,000; (2) \$110,000 in cash that already had been distributed equally; and (3) \$5,000 in personal effects that the Trust continued to hold. The accounting requested \$97,500 in trustee compensation for Boni based on 1,300 hours she expended as trustee and a \$75 hourly rate. Finally, the accounting reported Boni had used Trust funds to pay a variety of personal expenses that she characterized as Trust loans, but she also had used her personal funds to pay certain Trust expenses. Boni claimed she had repaid some of

the loans she took from the Trust and the net result of these transactions was a credit in her favor. Morgan-Perales filed objections to Boni's accounting.

In March 2015, the trial court conducted a one-day bench trial regarding the petition, accounting, and objections. At the start of trial, Morgan-Perales withdrew her request for an accounting and to replace Boni as the Trust's trustee because Boni had provided an accounting and the sale of the Huntridge Property to a third party was in escrow. The parties agreed the only remaining issues for the court concerned the amount of rent Boni should pay for the time her family lived at the Huntridge Property and the amount of Boni's trustee compensation.

The parties also stipulated to the following facts: (1) the fair market rental value for the Huntridge Property from December 1, 2008 to March 1, 2015 was \$195,200; (2) Morgan-Perales was entitled to half of the tax refund received in July 2012; (3) Boni borrowed \$10,800 from the Trust for personal expenses, and repaid \$1,850; (4) Boni paid \$18,000 in Trust expenses from her own funds, including \$2,150 in maintenance and repairs for the Huntridge Property, \$3,000 in property taxes, \$450 in homeowners insurance, \$9,500 in income taxes for Richard, and \$3,000 in attorney fees for the Trust; and (5) the Trust paid \$46,000 in expenses associated with the Huntridge Property during the period Boni and her family lived there, including \$7,900 in utilities, \$28,000 in maintenance and repairs, \$5,400 in property taxes, and \$4,600 in homeowners insurance. At trial, Boni for the first time argued she was entitled to compensation for services she rendered as Richard's agent under his durable power of attorney in addition to compensation as the Trust's trustee.

Following trial, both sides submitted proposed judgments and objections to the other side's proposed judgment, but no one requested a statement of decision. After taking the matter under submission, the trial court entered the following judgment:

(1) Boni's interest in the Trust shall be surcharged \$195,200 as the fair market rent for the Huntridge Property during the time her family occupied it; (2) Boni's interest in the

Trust shall be surcharged \$36,738 for the utilities, maintenance, and repairs on the Huntridge Property that were paid with Trust funds during the time Boni and her family lived there;³ (3) Morgan-Perales shall recover her attorney fees and costs from the Trust and the amount shall be fixed by noticed motion; (4) the Trust shall reimburse Boni \$9,120, representing \$18,069 in Trust expenses Boni paid out of pocket, less \$10,783 she borrowed from the Trust, plus \$1,834 she repaid for those loans; (5) Boni shall recover \$5,200 as reasonable compensation for the services she rendered as the Trust's trustee during the period covered by her accounting; and (6) the court approved \$3,000 in attorney fees Boni incurred as trustee for the Trust's benefit during the period covered by her accounting.

On Morgan-Perales's posttrial motion, the trial court set \$35,289.25 as the amount of attorney fees the Trust must pay for Morgan-Perales bringing this action.⁴ This appeal followed.

II

DISCUSSION

A. *We Infer the Trial Court Made All Necessary Findings Supported by Substantial Evidence Because the Parties Did Not Request a Statement of Decision*

“Upon a party's timely and proper request, [Code of Civil Procedure] section 632 requires a trial court to issue a statement of decision following “the trial of a question of fact by the court.” The statement must explain “the factual and legal basis for

³ The trial court limited this surcharge to utilities, maintenance, and repairs. It did not surcharge Boni for the property taxes and homeowners insurance that she paid with Trust funds during the period she lived at the Huntridge Property. Unfortunately, the amounts to which the parties stipulated as the amount of Trust funds Boni used to pay utilities, maintenance, and repairs do not add up to the amount of the court's surcharge. It is unknown how the court arrived at the amount it surcharged Boni.

⁴ The trial court also awarded Morgan-Perales \$2,468.54 in costs.

[the court’s] decision as to each of the principal controverted issues at trial. . . .”””
(*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 995 (*Nellie Gail*); see Probate Code § 1000 [rules of practice and procedure applicable to civil actions apply to proceedings under Probate Code unless otherwise stated]; *Estate of Duncan* (1969) 1 Cal.App.3d 212, 215 [statement of decision rules apply in proceedings under Probate Code].)⁵

“If the parties fail to request a statement of decision, the trial court is not required to provide one. [Citation.] [¶] ‘A party’s failure to request a statement of decision when one is available has two consequences. First, the party waives any objection to the trial court’s failure to make all findings necessary to support its decision. Second, the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings supported by substantial evidence. [Citations.] This doctrine “is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error.””” (*Nellie Gail, supra*, 4 Cal.App.5th at p. 996.)

Here, it is undisputed the trial court conducted a bench trial on Morgan-Perales’s petition, Boni’s accounting, and Morgan-Perales’s objections to the accounting. Similarly, no one disputes the parties did not request, and the trial court did not prepare, a statement of decision. We therefore infer the court made all factual findings necessary to support its decision, and we review the record to determine whether substantial evidence supports those findings. (*Nellie Gail, supra*, 4 Cal.App.5th at p. 996.) We more fully address the specific standard of review applicable to each of Boni’s challenges in our discussion below.

⁵ All statutory references are to the Probate Code unless otherwise stated.

B. *The Trial Court Erred in Surcharging Boni the Huntridge Property's Fair Market Rental Value for the Entire Period Her Family Lived at the Property*

Boni contends the trial court erred by surcharging her interest in the Trust \$195,200 as the Huntridge Property's fair market rental value during the entire six-year period Boni and her family lived at the property. According to Boni, the court should have surcharged her only for the 21-month period that started one year after Richard's death and ran through the date the Trust sold the Huntridge Property. We agree the court erred in surcharging Boni for the entire six-year period, rather than limiting the surcharge to the period after Richard's death.

The Probate Code establishes a trustee's duties in administering a trust. (*Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 888 (*Uzyel*)). These duties include (1) a duty of loyalty, requiring the trustee to "administer the trust solely in the interest of the beneficiaries" (§ 16002); (2) a duty of impartiality, requiring the trustee to deal impartially with all beneficiaries when a trust has more than one beneficiary (§ 16003); (3) a duty to avoid conflicts of interest, requiring the trustee "not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust" (§ 16004); (4) a "duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property" (§ 16006); (5) a "duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust" (§ 16007); (6) a duty to exercise reasonable skill, care, and prudence in administering the trust (§ 16040, subd. (a)); and (7) a "duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration" (§ 16060). (See *Uzyel*, at p. 888; *Estate of Gump* (1991) 1 Cal.App.4th 582, 595-596 (*Gump*)).

The trustee's violation of any duty owed to the beneficiaries is a breach of trust. (§ 16400; *Uzyel, supra*, 188 Cal.App.4th at p. 888.) The Probate Code provides a trust beneficiary with a broad range of remedies to address an actual or threatened breach of trust. (*Estate of Giralдин* (2012) 55 Cal.4th 1058, 1068; see § 16420, subd. (a).)

Those remedies include compelling the trustee to perform its duties, enjoining the trustee from breaching the trust, removing the trustee, setting aside the trustee's acts, reducing or denying the trustee's compensation, and "compel[ing] the trustee to redress a breach of trust by payment of money or otherwise." (§ 16420, subd. (a).) The reference to payment of money in the last of these remedies "is comprehensive and includes liability that might be characterized as damages, restitution, or surcharge." (*Giraldin*, at p. 1068.)

A trial court has broad discretion to select the appropriate remedy for a trustee's breach of duty, and we may not disturb the exercise of that discretion absent abuse. (*Gump, supra*, 1 Cal.App.4th at p. 610.) But we review the factual findings on which the trial court based its exercise of discretion under the substantial evidence standard. (See *Estate of Fain* (1999) 75 Cal.App.4th 973, 991-992; see also *Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538, 544 (*Tire Distributors*) ["Even under [the abuse of discretion] standard, there is still a substantial evidence component. We defer to the trial court's factual findings so long as they are supported by substantial evidence, and determine whether, under those facts, the court abused its discretion"].)

Here, Morgan-Perales contends Boni's failure to pay rent during the six years her family lived at the Huntridge Property breached Boni's duties to make the property productive, to treat all beneficiaries impartially, and to refrain from using trust property for her own profit or any other purpose unconnected with the Trust. Based on the absence of a statement of decision, we assume the trial court relied on each of these duties in surcharging Boni for the Huntridge Property's fair market rental value, and we examine the record to determine whether substantial evidence supports the finding Boni breached these duties.⁶

⁶ We do not consider the other duties Morgan-Perales contends Boni breached, including the duties to make an accounting, distribute the Trust's assets, and refrain from borrowing the Trust's funds, because there is no causal connection between

In reviewing the record, we must distinguish between the duties Boni owed before Richard died and the duties she owed after he died. Before Richard's death, Boni owed her duties as the Trust's trustee to Richard because he was the Trust's sole beneficiary at that time. Under the Trust's terms, Boni and Morgan-Perales did not become beneficiaries until Richard died, and therefore the trustee (Boni) owed no duties to anyone other than Richard during his lifetime. (See *Giraldin, supra*, 55 Cal.4th at pp. 1070-1072.) Although Morgan-Perales has standing to assert a claim that Boni breached the duties she owed Richard as the Trust's trustee to the extent the breach harmed Morgan-Perales's interest in the Trust (*id.* at pp. 1068, 1076), that claim is based on the duties Boni owed Richard during his lifetime, not the duties Boni owed Morgan-Perales after Richard died and she became one of the Trust's beneficiaries.

The record does not support a finding Boni breached her duties to Richard by living at the Huntridge Property without paying rent during his lifetime. The evidence shows the house sat vacant for several months after Richard moved into Sunflower Gardens. In December 2008, Boni's son moved into the house followed by Boni and the rest of her family in March 2009, when Boni lost her job. The undisputed evidence showed Richard and Virginia allowed their adult children and even grandchildren to live in the house without paying rent when they were out of work. Morgan-Perales's mother, Jacquelyn, lived in the house without paying rent for the nearly 10 years that preceded her death, and Morgan-Perales's uncle, Daniel, lived in the house without paying rent for more than 30 years before he died.⁷ Morgan-Perales also lived in the house for

the breach of those duties and the damage to the Trust based on Boni's failure to pay rent. (See § 16440; Cal. Trust & Probate Litigation (Cont.Ed.Bar 2011) Breach of Trust, § 21.65, p. 767.)

⁷ Jacquelyn paid rent to Richard and Virginia when she lived in the house during the 1980's and had a fulltime job, but not when she moved back later in life.

approximately 20 years, from approximately 8 to 29 years of age, and did not pay any rent when she became an adult.

Morgan-Perales points out that Richard also lived in the house when Jacquelyn and Daniel lived there the last several years of their lives, and she speculates “[i]t is possible” they took care of Richard during those years. This contention ignores that Boni took care of Richard during the time she lived in the home even though he was at Sunflower Gardens. She ran errands for him, helped coordinate his health care, and took him on day trips twice each week. Moreover, there is no evidence Boni lived in the house as an adult before Richard moved into Sunflower Gardens as all of Boni’s siblings had.

The evidence also showed Boni performed work to fix up and maintain the Huntridge Property, which was in “horrible” condition when she moved in. Boni testified she intended to move Richard back into the Huntridge Property when he was able and she took steps to make that possible, including repairing the home and interviewing homecare workers. On one occasion, Boni even brought Richard home, but he was reluctant to get out of the car because of his Alzheimer’s disease. Moreover, Boni testified all of Richard and Virginia’s belongings were stored at the Huntridge Property, and she would have needed to rent a storage facility if she rented the home to another family. Morgan-Perales fails to cite any evidence to support the conclusion Richard intended for Boni to rent out the Huntridge Property or pay rent for staying there during his lifetime.

Once Richard died, however, Boni’s duties changed. Boni and Morgan-Perales became equal owners of the Huntridge Property at that point, and Richard’s intent regarding the property no longer governed how it was used. Boni acknowledges she had a duty to pay rent once Richard died; she simply contends that duty did not arise until one year after Richard’s death. Boni provides no authority or explanation to justify this delay, and we cannot conceive of any. Morgan-Perales’s 50 percent interest in the Huntridge Property vested upon Richard’s death, and she

became entitled to the benefit of that interest. Boni then had a duty to make the property productive and avoid any conflict of interest in her use of the property. Boni breached those duties by continuing to live at the residence without paying rent.

Although we conclude the trial court erred in surcharging Boni for the fair market rental value of the Huntridge Property during the entire six years her family lived there, we need not remand this matter to the court to determine the appropriate surcharge.⁸ As explained above, Boni breached her duties and the court should have surcharged her for failing to pay rent from the date Richard died at the end of May 2012 until the beginning of March 2015 when Boni moved out and sold the property. The parties stipulated to the monthly fair market rental value for the Huntridge Property during each year Boni lived there. Based on the 33 months Boni lived at the property following Richard's death and the monthly rent to which the parties stipulated, Boni should have been surcharged \$88,050. We therefore direct the trial court to modify the judgment accordingly.⁹

Finally, Boni's opening brief challenges the trial court's decision to surcharge her \$36,738 for the utilities, maintenance, and repairs on the Huntridge Property that Boni paid with Trust funds while she lived there. Unfortunately, Boni does not provide any argument or explanation why or how the court erred in surcharging her this amount. In her reply brief, Boni for the first time argues the trial court erred in surcharging this amount and requiring her to pay rent for the entire six years because

⁸ Our conclusion the trial court erred by surcharging Boni for rent during Richard's lifetime also eliminates the need to address Boni's additional contention that the doctrine of laches barred Morgan-Perales's claim for rent covering that same period.

⁹ This total is calculated based on 6 months at \$2,500 per month for the period June 1 to November 30, 2012 (\$15,000), 12 months at \$2,650 per month for the period December 1, 2012 to November 30, 2013 (\$31,800), and 15 months at \$2,750 for the period December 1, 2013 to March 1, 2015 (\$41,250). Adding \$15,000, \$31,800, and \$41,250 leads to the sum of \$88,050.

tenants would not pay these particular expenses. Her reply brief, however, concedes we should overturn this surcharge only if we require her to pay rent for the entire six-year period. Boni does not challenge this surcharge if the rent she must pay is limited to the period after Richard's death. We therefore treat any challenge to this surcharge as forfeited based on Boni's failure to address it in her opening brief, and her acceptance of the surcharge if the amount of rent is reduced. (See *People v. Clark* (2016) 63 Cal.4th 522, 552 [argument forfeited because appellant failed to raise it in opening brief]; *C.M. v. M.C.* (2017) 7 Cal.App.5th 1188, 1200, fn. 5 [appellant forfeited claim of error because "she has not provided any argument or citations to authority or to the record in support"].)

C. *The Trial Court Acted Within Its Discretion in Awarding Boni Reduced Compensation*

Boni contends the trial court erred in limiting her compensation as the Trust's trustee to \$5,200, and denying her compensation for services she rendered as Richard's agent under his durable power of attorney. According to Boni, substantial evidence supports an award of \$96,720. We find no abuse of discretion.

The Trust provides the trustee shall be entitled to "reasonable compensation." (See § 15680, subd. (a) ["if the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument"].) Similarly, section 4204 states, "An attorney-in-fact is entitled to reasonable compensation for services rendered to the principal as attorney-in-fact and to reimbursement for reasonable expenses incurred as a result of acting as attorney-in-fact."

"Allowance of compensation [to a trustee] rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in [the] absence of a manifest showing of abuse." (*Gump, supra*, 1 Cal.App.4th at p. 597; see *Finkbeiner v. Gavid* (2006) 136 Cal.App.4th 1417, 1422.) As explained above, the abuse of discretion standard of review includes a substantial evidence component when the review examines

the factual basis on which the trial court exercised its discretion. (*Tire Distributors, supra*, 132 Cal.App.4th at p. 544.)

“Compensation may be reduced or denied where the trustee acts negligently or in breach of the trust.” (*Gump, supra*, 1 Cal.App.4th at p. 597.) Indeed, the statutory remedies available to a beneficiary for a trustee’s breach of trust include a reduction or denial of the trustee’s compensation. (§ 16420, subd. (a)(7); *Gump*, at p. 598.)

Here, the accounting Boni filed sought \$97,500 in trustee compensation based on 1,300 hours of service at \$75 per hour. She explained she spent “4 to 6 hours a week, or approximately 260 hours a year, for approximately 5 years.” The accounting did not mention any fees for services she performed as Richard’s agent under his durable power of attorney, nor did the accounting provide any documentation to support the number of hours Boni sought or the hourly rate. In her trial brief, Boni sought \$96,720 in trustee compensation based on “four to eight hours a week performing Trustee services” and a \$65 hourly rate. Again, Boni did not mention agent fees under the durable power of attorney, nor did she explain the changes in her request.

At trial, Boni submitted her handwritten notes about the care and services she provided for Richard. These notes documented 351 hours of service, and Boni testified the notes reflected only about 25 percent of the time she spent. Trial was the first time Boni offered her theory that she was entitled to compensation under Richard’s durable power of attorney. In opposition, Morgan-Perales argued the trial court should deny Boni compensation based on her numerous breaches of the Trust, including her failure to pay rent, failure to provide an accounting, failure to timely distribute the Trust’s assets, and obtaining improper loans from the Trust. Alternatively, Morgan-Perales argued much of the time for which Boni sought compensation was not time spent as either trustee or Richard’s agent, but rather noncompensable time spent with her father. According to Morgan-Perales, Boni spent no more than an average of one hour per week performing true trustee services over the relevant five-year period, and she should be

compensated at a bookkeeper rate of \$20 per hour because she had no special training or experience to justify the much higher hourly rate she sought. Based on these arguments, Morgan-Perales suggested compensation of \$5,200 for 260 hours at \$20 per hour.

The trial court apparently agreed with Morgan-Perales and awarded Boni \$5,200 “for her services as trustee of the Trust during the period of the first account[ing].” The court did not award Boni any compensation under Richard’s durable power of attorney. Boni complains the trial court did not provide any findings or explanation to support this award, but the trial court was not required to provide any findings or explanation because she failed to request a statement of decision. As explained above, that failure requires us to infer all necessary findings supported by substantial evidence in the record.

The record and the trial court’s broad discretion in setting a trustee’s compensation support this award. Boni had no documentation for the vast majority of the hours she allegedly spent rendering services as the Trust’s trustee. The task she allegedly spent the most time performing—up to eight hours a week—was taking Richard on drives down the coast to San Diego. It was well within the trial court’s discretion to conclude this was not compensable time under the Trust, but rather time spent together as father and daughter. Similarly, Boni provided no evidence to support her request of \$65 as her hourly rate.

Moreover, substantial evidence supports the conclusion that Boni breached the Trust in a number of ways. As explained above, she failed to pay the Trust rent for living at the Huntridge Property after Richard died. The record also shows she failed to provide an accounting, despite repeated requests, until Morgan-Perales filed this lawsuit, she failed to timely distribute the Trust’s assets after Richard’s death, and she used Trust funds to pay personal expenses without keeping accurate records, and then classified the payments as loans. These breaches of the Trust also support the trial court’s decision to significantly reduce Boni’s compensation as trustee.

The record also supports the trial court’s decision to deny Boni compensation under Richard’s durable power of attorney. She never asserted this basis for compensation until trial. Indeed, not even Boni’s trial brief or the parties’ joint pretrial statement identified compensation under the durable power of attorney as a contested issue. Moreover, as with the trustee compensation, Boni failed to adequately document the services she provided, and many of the services she rendered—such as spending time with Richard—are not compensable under the durable power of attorney.

Boni contends substantial evidence showed she was entitled to \$96,720 in trustee and agent fees, but this contention reveals her fundamental misunderstanding of the governing standard of review. First, whether and how much compensation to award is vested in the trial court’s discretion and we may not reverse the exercise of that discretion unless a manifest abuse of that discretion is shown. (*Gump, supra*, 1 Cal.App.4th at p. 597.) “An abuse of discretion may be found only if “no judge could have reasonably reached the challenged result. [Citation.] “[A]s long as there exists “a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be . . . set aside”””” (*O’Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245, 269.) We may not substitute our exercise of discretion for that of the trial court, and provided the trial court properly applied the law, we may reverse the trial court’s exercise of its discretion only when the facts required the trial court to reach a different result. (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881-882; see *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.) Boni made no such showing.

Moreover, the substantial evidence standard of review requires an appellate court to determine whether substantial evidence supports the court’s decision, not the decision Boni contends the court should have made. It is irrelevant that substantial evidence, or even the weight of the evidence, may have supported a different decision. As long as substantial evidence supported the trial court’s decision, we must affirm it.

(*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 429-430, fn. 5.) As explained above, we conclude substantial evidence supports the court's decision on Boni's compensation.

D. *The Trial Court Erred in Awarding Morgan-Perales Attorney Fees From the Trust*

Boni contends the trial court erred in awarding Morgan-Perales her attorney fees for bringing this action and challenging Boni's accounting. The court failed to specify the legal basis for the award. At trial, Morgan-Perales argued the court could award her attorney fees under either section 17211, subdivision (b), or the common fund doctrine. Boni contends neither of those apply on the facts of this case and we must reverse the award in its entirety. We agree.¹⁰

1. Section 17211, Subdivision (b)

"Trust beneficiaries must ordinarily pay their own attorney fees in challenging the trustee's conduct, even when they are successful." (*Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1595 (*Leader*)). Section 17211, subdivision (b), provides an exception to this rule by "giv[ing] the probate court discretion to award attorney fees to a trust beneficiary who 'contests the trustee's account,' if the court determines the trustee's opposition to the contest was 'without reasonable cause and in bad faith.'"¹¹

¹⁰ Boni contends the trial court erred by awarding Morgan-Perales \$37,757.79 in attorney fees, but the court only awarded Morgan-Perales \$35,289.25 in attorney fees. The court awarded the remaining \$2,468.54 as costs, and Boni does not challenge the court's cost award. Accordingly, although we reverse the court's attorney fee award, we do not disturb its cost award.

¹¹ In its entirety, section 17211, subdivision (b), states, "If a beneficiary contests the trustee's account and the court determines that the trustee's opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant the costs of the contestant and other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded shall be a charge against the compensation or other interest of the trustee in the trust. The trustee shall be personally liable and on the bond, if any, for any amount that remains unsatisfied."

(*Leader*, at p. 1591, italics added.) This subdivision is “[a] remedial statute [that] “‘must be liberally construed ‘to effectuate its object and purpose, and to suppress the mischief at which it is directed.’”” (*Id.* at p. 1598.)

“[R]easonable cause to oppose a contest of an account requires an objectively reasonable belief, based on the facts then known to the trustee, either that the claims are legally or factually unfounded or that the petitioner is not entitled to the requested remedies. Conversely, there would be no reasonable cause to oppose a contest of an account *only* if all reasonable attorneys would have agreed that the opposition was totally without merit, or, in other words, no reasonable attorney would have believed that the opposition had any merit.” (*Uzyel, supra*, 188 Cal.App.4th at p. 927, italics added.) “[R]easonable cause in this context does not require an objectively reasonable belief, based on the facts then known to the trustee, that the trustee would be completely exonerated.” (*Ibid.*) Reasonable cause for a trustee to oppose a beneficiary’s objections to the trustee’s accounting is a low threshold. (*Ibid.*)

The existence of reasonable cause is a legal question for the trial court that we review de novo. The facts known to the trustee at the time he or she opposed the contest is a factual question for the trier of fact that we review for substantial evidence, but if there is no dispute about the facts known to the trustee, then the existence of reasonable cause is a pure question of law that we review de novo. (*Uzyel, supra*, 188 Cal.App.4th at p. 927.)

Whether the trustee opposed an accounting in bad faith is a separate inquiry under section 17211, subdivision (b), and requires the court to evaluate the trustee’s subjective state of mind, but the court cannot infer bad faith from the absence of reasonable cause alone. (*Uzyel, supra*, 188 Cal.App.4th at p. 926, fn. 47.) Whether the trustee acted in bad faith is a factual question for the trier of fact that we review under the substantial evidence standard. (See *Leader, supra*, 182 Cal.App.4th at pp. 1599-1600; *Uzyel*, at p. 926, fn. 47 [analogizing bad faith requirement to malice requirement on

malicious prosecution claims]; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 874-875 [malice element on malicious prosecution claim is question of fact reviewed under substantial evidence standard].)

Here, Boni had reasonable cause to oppose Morgan-Perales's objections to the accounting and her other challenges to Boni's administration of the Trust. The parties had a legitimate dispute about the amount of rent Boni owed for living at the Huntridge Property as demonstrated by our conclusion the trial court erred in surcharging Boni for the entire six-year period, rather than only the two and a half years that followed Richard's death. Similarly, the parties had a legitimate dispute about Boni's compensation as demonstrated by the trial court's award of some compensation despite Morgan-Perales's contention Boni was entitled to none. These were the two principal issues before the court. (*Uzyel, supra*, 188 Cal.App.4th at pp. 927-928 [no lack of reasonable cause when portions of opposition to contest presented "at least arguable" questions on liability and measure of damages]; *Estate of Bonaccorsi* (1999) 69 Cal.App.4th 462, 473 (*Bonaccorsi*) [no lack of reasonable cause when appellate court reversed substantial part of surcharge on which trial court relied to make attorney fee award].)

That Morgan-Perales may have prevailed on other claims, such as Boni's failure to distribute the tax refund and the improper loans she took from the Trust, does not support an award in a lesser amount because Morgan-Perales made no attempt to allocate her attorney fees among the various objections and breaches of trust she raised. (*Bonaccorsi, supra*, 69 Cal.App.4th at p. 473.) Moreover, assuming Boni lacked reasonable cause to oppose some of Morgan-Perales's objections to the accounting, Morgan-Perales failed to identify—and our review of the record failed to disclose—any evidence showing Boni acted in bad faith by opposing Morgan-Perales's objections.

Section 17211, subdivision (b), therefore does not support the trial court's attorney fee award to Morgan-Perales.

2. The Common Fund Doctrine

The common fund doctrine is an equitable exception to the American Rule that each party to a litigation must bear his or her own attorney fees. (*Baker v. Pratt* (1986) 176 Cal.App.3d 370, 378 (*Baker*); *Estate of Gump* (1982) 128 Cal.App.3d 111, 118.)

Under the doctrine, ““when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney’s fees out of the fund.” [Citation.] Among the bases of the equitable rule which permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, are: ‘fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; [and] *correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery*’” (*Baker, supra*, 176 Cal.App.3d at p. 378, italics added; see *Estate of Korthé* (1970) 9 Cal.App.3d 572, 575 (*Korthé*); *Estate of Lagersen* (1962) 210 Cal.App.2d 788, 795 (*Lagersen*)). The common fund doctrine may apply in trust litigation. (*Estate of Reade* (1948) 31 Cal.2d 669, 671-672; *Copley v. Copley* (1981) 126 Cal.App.3d 248, 293.)

The common fund doctrine’s rationale therefore “applies only where a single beneficiary undertakes the risk and expense of litigation while the remaining beneficiaries sit on their hands.” (*Korthé, supra*, 9 Cal.App.3d at p. 575.) Indeed, “Where the other interested parties all retained counsel, the equitable rule of paying from the general fund does not apply. An allowance of attorneys’ fees for one party to be charged on the general fund is justified only where the other parties have stood without counsel and would reap the benefits of the services rendered by the attorney conducting the proceedings.” (*Lagersen, supra*, 210 Cal.App.2d at p. 796; see *Estate of Bullock* (1955) 133 Cal.App.2d 542, 547.)

In *Korthe*, for example, several beneficiaries hired separate counsel to challenge a will revoking an earlier version of the will. After some litigation, the parties negotiated a settlement, and the counsel for one of the beneficiaries successfully moved for attorney fees under the common fund doctrine. (*Korthe, supra*, 9 Cal.App.3d at pp. 573-574.) The Court of Appeal reversed, explaining the rationale for the doctrine did not apply because “substantially all of the beneficiaries sought counsel and joined in the litigation[, and therefore] no unfair advantage flows to the beneficiaries not represented [by the attorney to whom the trial court made the award].” (*Id.* at p. 575.)

Similarly, *Baker* involved a shareholder derivative action brought by one shareholder accusing the only other shareholder of misappropriating corporate assets. The Court of Appeal explained the successful plaintiff could not recover his attorney fees under the common fund doctrine because “[i]t is clear [the plaintiff’s] ‘ultimate objective [was] not to secure or preserve a common fund but to establish personal adverse interests therein. . . . There are no ‘passive beneficiaries’ of [the plaintiff’s] action which he can claim should be made to bear their fair share of the litigation costs.” (*Baker, supra*, 176 Cal.App.3d at pp. 378-379.)

Because it is an equitable doctrine, the common fund doctrine’s application “depends upon all of the circumstances of the case. [Citation.] Whether to grant or deny such an award depends largely on the discretion of the trial court whose decision should not be reversed unless that discretion was abused.” (*Estate of Ott* (1979) 99 Cal.App.3d 605, 614.) But whether the conditions for the trial court to exercise this equitable discretion exist is a question of law we review de novo.¹² (See *Estate of Marré* (1941)

¹² Under the abuse of discretion standard, we would reach the same conclusion that the common fund doctrine does not apply to the facts of this case. A trial court abuses its discretion when it applies an incorrect legal standard (*In re R.T.* (2015) 232 Cal.App.4th 1284, 1301), and applying the common fund doctrine when the conditions for its application do not exist is an incorrect application of the legal standards governing the doctrine.

18 Cal.2d 191, 192 [deciding doctrine’s application without reference to trial court’s discretion]; *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 878-879 [same].)

Here, the common fund doctrine does not apply and therefore cannot support the trial court’s attorney fee award to Morgan-Perales. The Trust had just two beneficiaries—Boni and Morgan-Perales—and they were both parties to this action and represented by separate counsel. Boni is not a passive beneficiary to which an unfair advantage will flow if Morgan-Perales is required to pay her own attorney fees. To the contrary, this action does not benefit Boni because Morgan-Perales brought this lawsuit to establish her right to receive a greater portion of the Trust’s assets by surcharging Boni’s portion. This action was a simple dispute between two parties to which the common fund doctrine does not apply. Morgan-Perales was limited to recovering her fees under section 17211, subdivision (b), but that section also does not apply for the reasons discussed above.

E. *The Trial Court Acted Within Its Discretion By Denying Boni Further Attorney Fees*

Boni contends the trial court erred in denying her request for the Trust to pay the attorney fees she incurred in defending her actions as trustee. Boni argues she is entitled to her attorney fees because she acted in good faith to preserve the Trust’s assets even if she was not completely successful. Boni misstates the governing legal standard, but we nonetheless reverse and remand for the trial court to reconsider Boni’s attorney fee request because our decision on other issues has altered the underlying circumstances on which the court necessarily relied in deciding whether to award Boni attorney fees.

“A trustee is entitled to the repayment out of the trust property for the following: [¶] (a) Expenditures that were properly incurred in the administration of the trust. [¶] (b) To the extent that they benefited the trust, expenditures that were not

properly incurred in the administration of the trust.” (§ 15684; see *Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1226 (*Whittlesey*)).

“‘[A]mong the ordinary powers and duties of a trustee of a private trust are those of doing all acts necessary and expedient to collect, conserve and protect the property of the trust, to maintain and defend the integrity of the trust for the benefit of the beneficiaries and to employ such assistants as may be necessary for said purposes.’

[Citation.] ‘[W]here litigation is necessary for the preservation of the trust, it is both the right and duty of the trustee to employ counsel in the prosecution or defense thereof, and the trustee is entitled to reimbursement for his expenditures out of the trust fund.’

[Citation.] ‘If the trustee acts in good faith, he has the power to employ such assistants and to compensate such assistants out of the assets of the trust even though he may not ultimately succeed in establishing the position taken by him as such trustee.’”

(*Whittlesey, supra*, 104 Cal.App.4th at pp. 1226-1227.)

“The foregoing rules, of course, presuppose that the litigation was for the benefit of the trust estate. [Citation.] For example, the defense of a lawsuit that has the potential for depleting trust assets would be for the benefit of the trust, justifying the employment of counsel. However, litigation seeking to remove or surcharge a trustee for mismanagement of trust assets would not warrant the trustee to hire counsel at the expense of the trust. Such litigation would be for the benefit of the trustee, not the trust.”

(*Whittlesey, supra*, 104 Cal.App.4th at p. 1227; see *Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 269-270 (*Donahue*); *Metzenbaum v. Metzenbaum* (1953) 115 Cal.App.2d 395, 399.)

“In determining compensation for trustee and attorney fees the court has the right to consider actions of the trustee in improper use of trust funds. [Citation.] An estate may not be charged with fees incurred in unsuccessfully contesting a trustee’s surcharge.” (*Estate of Cassity* (1980) 106 Cal.App.3d 569, 572 (*Cassity*); see *Gump, supra*, 1 Cal.App.4th at p. 605.) On the other hand, “[i]t is established that attorney fees

and litigation costs incurred in the trustee's *successful defense* of an action brought by the beneficiary are recoverable." (*Gump*, at p. 604.)

"The fact that some surcharges were assessed against the trustee is not, in itself, grounds for completely denying him compensation and expenses." (*Cassity*, *supra*, 106 Cal.App.3d at p. 574.) A trustee is entitled to defend against unjust surcharge claims, and his or her efforts and expenditures in defending against such claims properly may be charged to the trust even if the trustee is surcharged for other actions. (*Ibid.*) For example, in *Cassity*, the Court of Appeal reversed a trial court decision that suggested any surcharge required the court to deny all attorney fees and other compensation. The record revealed that the trustee successfully defended against the majority of all claims made against him and the surcharges the trial court imposed represented only a small percentage of the amount the beneficiary sought. The *Cassity* court therefore remanded the matter for the trial court to apportion the attorney fees and other compensation the trustee sought among the beneficiary's claims. (*Ibid.*)

"A court sitting in equity is vested with wide discretion in awarding counsel fees for services to a trust and its findings will not be disturbed in the absence of a showing of a palpable abuse of such discretion." (*Estate of Vokal* (1953) 121 Cal.App.2d 252, 260; see *Donahue*, *supra*, 182 Cal.App.4th at p. 268; *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1461.) "In reviewing whether the trial court abused its discretion, 'we are mindful that "[t]he underlying principle which guides the court in allowing costs and attorney[] fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust.'"" (*Donahue*, at p. 270.)

Here, we reverse and remand for the trial court to reconsider whether the Trust should pay all, some, or none of the attorney fees Boni incurred in defending against this lawsuit. The court necessarily based its decision to deny Boni all of her attorney fees on its determination that Boni was required to pay rent for the entire six years her family lived at the Huntridge Property, and also the determination the Trust

must pay Morgan-Perales's attorney fees. As explained above, the trial court erred in reaching those conclusions. Boni's actions therefore have preserved some of the Trust's assets by overturning the trial court's determination that the Trust must pay more than \$35,000 for Morgan-Perales's attorney fees. Moreover, the severity of Boni's breach of trust by failing to pay rent has been reduced.

We note Boni still breached the Trust by failing to pay rent for living at the Huntridge Property for nearly three years after Richard's death. The record also reveals Boni may have breached the Trust in other ways, including retaining Richard's entire tax refund, delaying the distribution of the Trust's assets, failing to provide an accounting until well after Morgan-Perales commenced this action, and paying personal expenses with Trust funds that she later characterized as loans. The trial court must consider the totality of all these circumstances in deciding whether to award Boni attorney fees, and if so, how much. We express no opinion on whether the trial court should award all of Boni's attorney fees, deny all of her attorney fees, or award only a portion of her attorney fees. That determination is for the trial court to make in the first instance.

In reconsidering Boni's attorney fee request, the trial court also should clarify the amount it previously awarded Boni. The parties stipulated that the amount of Trust expenses Boni paid with her personal funds included \$3,000 in attorney fees that Boni paid through the date of her accounting. By crediting Boni for the expenses she paid on the Trust's behalf, the court necessarily awarded Boni these attorney fees. The court's judgment also includes the following statement: "Attorney's fees incurred by Boni Savage as trustee of the Trust in the amount of \$3,000 are hereby approved and Boni Savage is ordered and directed to pay that sum to David D. Jones for services rendered on behalf of the Trust during the period of the first account current." The parties express confusion whether this statement merely approves the \$3,000 in fees Boni already paid on the Trust's behalf or whether it awards Boni an additional \$3,000 in fees, bringing the total award to \$6,000. This should be clarified on remand.

III
DISPOSITION

The judgment is reversed in part, affirmed in part, and remanded for further proceedings. The judgment is reversed as to the \$195,200 surcharge against Boni's interest in the Trust for the fair market rental value of the Huntridge Property during the entire six-year period her family lived at the property. The trial court is directed to amend the judgment and reduce the amount of this surcharge to \$88,050. The judgment is affirmed as to the surcharge against Boni's interest in the Trust for the utilities, maintenance, and repairs the Trust paid during the period Boni's family lived at the Huntridge Property.

The judgment is affirmed as to the award of \$5,200 in compensation for the services Boni rendered. The judgment is reversed as to the award of attorney fees to Morgan-Perales. Finally, the judgment is reversed as to the trial court's denial of Boni's request for attorney fees and remanded for the court to reconsider that request based on the changes in the judgment made by this decision.

In the interest of justice, the parties shall bear their own costs on appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.