

IN THE COURT OF APPEALS OF IOWA

No. 6-146 / 04-1319

No. 6-161 / 05-0946

Filed May 24, 2006

**IN THE MATTER OF THE ESTATE OF
ELMER VITALIS RESIDUARY TRUST
(UNDER WILL),**

SHERRY NURMELA and DENNIS VITALIS,
Appellants.

SHERRY NURMELA and DENNIS VITALIS,
Plaintiffs-Appellants,

vs.

**ELEMER VITALIS RESIDUARY TRUST
(UNDER WILL), IOWA STATE BANK,
LUELLE VITALIS, LARRY STEVENS,
VITALIS TRUCK LINES, INC. and
VITALIS TRUCK LINES, LLC,**
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Karen A. Romano (probate proceeding) and Michael D. Huppert (civil proceeding), Judges.

Remainder beneficiaries of a trust appeal from a district court order approving an annual report and accounting and extraordinary fees and expenses in a probate proceeding, and from a district court summary judgment ruling that dismissed the breach of fiduciary duty claims they made in a separate civil proceeding against the trust, the trustees, and a company for which the trust was the sole shareholder. **AFFIRMED ON BOTH APPEALS.**

Kathryn Barnhill of Barnhill & Associates, P.C., West Des Moines, for appellants.

Eric Hoch and Jack Hilmes of Finely, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellees.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

This opinion addresses two separate appeals filed by Sherry Nurmela and Dennis Vitalis, remainder beneficiaries under the Elmer Vitalis Residuary Trust (Under Will). They appeal from a district court order in a probate proceeding, TR 2416, that approved the “Ninth Annual Report and Accounting” and awarded extraordinary fees and expenses. They also appeal from a district court summary judgment ruling in a separate civil proceeding, CE 48852, which dismissed their claims of breach of fiduciary duty against the trust, the trustees, and a company for which the trust was the sole shareholder. We affirm both the order in the probate proceeding and the summary judgment ruling in the civil proceeding.

I. Background Facts and Proceedings.

Elmer Vitalis died in 1991. Sherry Nurmela and Dennis Vitalis are two of Elmer’s children. Luella Vitalis is Elmer’s surviving spouse. Elmer’s will created the Elmer Vitalis Residuary Trust. The trust was funded by the residue of Elmer’s estate, which specifically included all stock in a number of companies owned by Elmer during his life. One of those companies was Vitalis Truck Lines, Inc., an S-corporation (VTL). Iowa State Bank (ISB) was named corporate trustee, and Luella Vitalis and Larry Stevens, a VTL employee, were named co-trustees.

The will provides, in relevant part:

- A. During the life of [Luella]:
 1. My trustee shall pay the entire net income of this trust . . . to [Luella]
 2. In addition to the net income, my trustee shall pay to [Luella] such sums from the principal as my

corporate trustee deems advisable for her health, care, support, maintenance, comfort and financial or personal welfare.

....

B. At the death of [Luella] . . . my trustee shall distribute the RESIDUARY TRUST, together with property received from any other source, . . . [25% to each of my three children and 12.5% to each of my two stepchildren].

....

IX

The Trustee shall have all powers necessary for the proper administration of this trust which shall be in addition to those powers provided by the Iowa Probate Code. In extension but not in limitation of any power otherwise possessed by the Trustee, it shall have, without the necessity of notice to or approval of any court or person, the following powers:

....

C. To determine, in the discretion of the Corporate Trustee, what is principal and what is income of my estate and [the] trust and to allocate or apportion receipts and expenses between principal and income

A. *Probate Proceeding—TR 2416.* In 1993 a probate proceeding, TR 2416, was instituted to administer the trust. ISB was appointed trustee, and Luella and Stevens were appointed co-trustees. Consistent with the terms of the will, Luella and Stevens had also been elected as officers and directors of VTL.¹ The will provided that the trustee was not required to account to the court or the remainder beneficiaries and made approval by the income beneficiary binding on the remainder beneficiaries.² Nevertheless, between 1993 and 2001 eight

¹ The will granted the trustees the power “[t]o continue . . . any business which I may own or be financially interested in at the time of my death . . . [and t]o elect any one or more of the trustees as officers or directors of such business.”

² The will provided, in relevant part, that [t]he Trustee shall not account to any court; instead, the Trustee shall render an annual written account of the administration of the trust to the beneficiary . . . currently eligible to receive income from the trust. The approval of the Trustee’s accounting by the income beneficiary . . . shall be binding and conclusive as to all persons . . . who are or may become entitled to share in the income or principal of the trust. . . .

annual reports and accountings were filed with the court. Each time that a report was filed, notice was served on all trust beneficiaries. No objections were made to any of the first eight reports and accountings, and all were approved by the district court.

The “Ninth Annual Report and Accounting” (Ninth Report) was filed in 2002. It stated that the total value of the trust at the close of the report period was \$5,863,611.01. It also stated that VTL had sold business assets and that the net proceeds of the sale were \$449,000. The asset statement indicated the current book and market value of VTL stock was in excess of \$4 million. The transaction statement detailed numerous cash receipts and disbursements by the trust, including \$440,000 in income cash dividends received from VTL and a corresponding \$440,000 in income cash distributions made to Luella.

Sherry and Dennis objected to the Ninth Report on the following bases:

- a. The Trust is the sole shareholder of Vitalis Truck Lines, Inc.
- b. . . . Luella Vitalis and Larry Stevens[] are also the sole officers and directors of Vitalis Truck Lines. . . .
- c. The assets of Vitalis Truck Lines have been dissipated [T]he entire truck line operation and the entire commercial real estate division of Vitalis Truck Lines have been dismantled and sold off piecemeal by Luella Vitalis and Larry Stevens. There are virtually no assets left in the trust.
- d. . . . Luella Vitalis and Larry Stevens[] have engaged in self dealing, approved illegal dividends, wasted and mismanaged assets and have otherwise breached their fiduciary duties in the operation of th[is] company[y].[³]
- e. Iowa State Bank, acting as Trustee, colluded in these actions and approved and consented to these actions in breach of its fiduciary duty to the trust beneficiaries. All this was done to

³ Sherry and Dennis also objected to the handling of assets of two other companies. However, it appears that their claims on appeal relate only to VTL.

circumvent the terms of Elmer Vitalis' will which charged Iowa State Bank with independent oversight of the trust assets.

f. Nonetheless, the Trustees (and specifically Iowa State Bank) have continued to report the assets of the Trust to the beneficiaries and the Court as \$6,000,000.00, more or less. Iowa State Bank specifically benefited by continuing to collect its trust fees based on the trust value of \$6,000,000.00 despite its actual knowledge that these assets were gone and this value was not true. Legal fees also have been overstated.

Numerous filings and hearings followed, including two supplements to the Ninth Report, and Sherry and Dennis's January 2003 acceptance of the Ninth Report which was "expressly limited to the numerical accuracy of the accounting." The acceptance specifically reserved

any claims [Sherry and Dennis] may have regarding management of the Trust or the underlying corporate assets of the Trust or the conduct of the Trustee both as Trustee and as the sole shareholder of Vitalis Trust [sic] Line, Inc. and of the corporate officers.

In February 2003 each side prepared a proposed order approving the Ninth Report. However, in March 2003 the probate court was advised that Sherry and Dennis had filed suit against ISB, Luella, and Stevens in a case docketed as CL 92110. The petition in CL 92110 contained two counts. Count I alleged the defendants, as directors and officers, and as sole shareholder of VTL, had breached a duty of care and loyalty to the corporation. Count II alleged the defendants had breached a fiduciary duty to the plaintiffs. The probate court entered an order directing that the Ninth Report "be transferred to the District Court for consideration with []CL 92110."⁴

In August 2003 the trustees filed their "Tenth Annual Report and Accounting" (Tenth Report) in the probate proceeding, and requested

⁴ This law action was eventually transferred to equity and assigned a new case number. However, for the sake of clarity, we will refer to it only as CL 92110.

extraordinary fees. Sherry and Dennis filed a motion to transfer the Tenth Report to CL 92110. Attachments to their motion indicated CL 92110 now stated only a claim for breach of fiduciary duty by the trustees; Count I had been dismissed by the district court for lack of standing. The probate court granted the motion and ordered the Tenth Report “transferred for the consideration of the Court in connection with CL 92110” The court awarded ordinary fees and expenses, but “deferred” the setting of extraordinary fees related to the Ninth and Tenth Reports. The court directed extraordinary fees would “be determined either in the pending matters addressed in CL 92110 or by the Probate Court at a later date.”

In May 2004 ISB filed, in the probate proceeding, a reapplication for an order approving the Ninth Report and for extraordinary fees and expenses. The reapplication noted that Sherry and Dennis had dismissed CL 92110. In June 2004 Sherry and Dennis filed an objection which restated their initial objections to the Ninth Report and noted that, while they had dismissed CL 92110, they had also filed new petition on June 3, 2004, in a case docketed as CE 48852, “to add new parties and new claims.” Sherry and Dennis accordingly requested that the Ninth Report “be consolidated with . . . CE 48852.”

The trustees filed a motion to strike the objection. They relied on Sherry and Dennis’s January 2003 acceptance of the Ninth Report, and an April 2004 partial summary judgment ruling in CL 92110, to support their contention that Sherry and Dennis had not raised any valid objections to the Ninth Report. The motion to strike set forth the bases of the partial summary judgment ruling.

The request for approval of the Ninth Report and for extraordinary fees and expenses came before the district court in June 2004. In a July 2004 order, filed in TR 2416, the district court approved the Ninth Report. It also approved the request for extraordinary trustee and attorney fees and expenses related to the trustees' response to Sherry and Dennis's objections to the Ninth Report and their defense of Sherry and Dennis's claims in CL 92110. In addition, noting that CL 92110 had been dismissed, the district court ordered that "this matter is returned to the associate probate court for any further proceedings."

In approving the Ninth Report, the court limited its consideration to Sherry and Dennis's previously-made, timely objections. The court concluded that because Sherry and Dennis had approved the numerical accuracy of the Ninth Report, their objections that VTL's assets had been dissipated, that there were "virtually no [trust] assets left," and that the trustees had inaccurately reported trust assets, were no longer valid. The court also concluded Sherry and Dennis's remaining objections—that Luella and Stevens had breached their fiduciary duties in the operation of VTL and that ISB had colluded in these actions—were no longer valid in light of the partial summary judgment ruling in CL 92110.

The partial summary judgment ruling had not specifically determined the viability of Sherry and Dennis's breach of fiduciary duty claims to the extent those claims relied on events and transactions reflected in the Ninth and Tenth Reports.⁵ It did, however, address issues closely related to Sherry and Dennis's

⁵ The actual holding of the partial summary judgment ruling was that Sherry and Dennis were "barred from asserting breach of fiduciary duty on the basis of any events and transactions occurring . . . in the Trust that were reflected in" the first eight annual reports and accountings.

contentions in both TR 2416 and CL 92110: that Luella and Stevens, in their roles as corporate officers and directors, engaged in self dealing by selling assets of VTL then illegally and illicitly identifying the sale proceeds as dividend income rather than principal; and that ISB failed to exercise independent judgment in determining what was income and what was principal of the trust. In relevant part, the district court noted that, in dismissing Count I, it had already determined Luella and Stevens, in their capacity as corporate officers and directors, did not owe a duty to Sherry and Dennis. It further concluded that Sherry and Dennis did not have standing to sue VTL and had alleged no facts to support their contention that the cash dividends paid by VTL were illegal. The court also determined that there were no genuine issues of disputed material fact regarding Sherry and Dennis's claim that ISB failed to exercise its judgment in determining what was income and what was principal of the trust. It noted the asset of the trust was not VTL itself but VTL stock; there was no evidence the principal, i.e., the stock, was invaded; and as VTL's sole shareholder any corporate dividends paid to the trust were trust income.

Sherry and Dennis appealed from the order approving the Ninth Report. They also filed a motion to transfer the Tenth Report to CE 48852. The probate court subsequently transferred the Tenth Report, the now-filed "Eleventh Annual Report and Accounting" (Eleventh Report), and objections to the Tenth and Eleventh Reports to the district court "to be combined for hearing with matters pending in CE 48852."

B. Civil Proceeding—CE 48852. The petition filed by Sherry and Dennis in CE 48852 alleged the trust, ISB, Luella, Stevens, and VTL⁶ had breached a fiduciary duty they owed to the plaintiffs, and that a breach of this duty proximately damaged both the trust and Sherry and Dennis’s interest in the trust. It contended Luella and Stevens had “engaged in self-dealing,” and that ISB and VTL “colluded and acquiesced in this conduct.”

The defendants filed a motion for summary judgment, which was granted by the district court. The claim against VTL was dismissed on the basis that there was no fiduciary relationship between the plaintiffs and VTL. The court also dismissed the plaintiffs’ breach of fiduciary duty claims against ISB, Luella, and Stevens in their roles as trustees, which the court cast as claims “that the trustees have failed to properly allocate principal and interest and improperly engaged in self-dealing, which has resulted in excessive distributions and a dissipation of the trust assets” The court noted Elmer’s will authorized ISB to exercise its discretion to determine what is trust income and what is trust principal and to allocate or apportion receipts between principal and income, and determined the record did not contain any disputed issue of material fact regarding the contention that ISB had abused its discretion in distributing income and principal. Sherry and Dennis also appeal from this ruling.

⁶ The petition also named Vitalis Truck Lines, LLC, the limited liability company that resulted from VTL’s 2003 reorganization. For the sake of clarity, we refer to only VTL.

II. Issues on Appeal.

On appeal from the order approving the Ninth Report entered in TR 2416, Sherry and Dennis assert it was legal error and an abuse of discretion to approve the Ninth Report because (1) they had established a per se breach of trust that precluded approval as a matter of law and (2) the Ninth Report was “the subject of a pending lawsuit,” specifically CE 48852. Sherry and Dennis further assert the district court abused its discretion by awarding extraordinary trustee and attorney fees because (1) they had established a per se breach of trust, (2) Luella had a personal interest in the litigation and engaged in self-dealing and bad faith, and (3) the trustees’ actions did not benefit the trust but were a matter of self-interest and self-preservation.

In addition, Sherry and Dennis assert the district court erred when it dismissed Count I of CL 92110 and granted partial summary judgment on Count II of CL 92110. However, Sherry and Dennis did not file a notice of appeal from any order or ruling entered in CL 92110. Rather, they raise these claims in the context of their appeal from the order approving the Ninth Report.

On appeal from the partial summary judgment ruling entered in CE 48852, Sherry and Dennis assert the district court erred in granting the defendants’ motion for summary judgment and dismissing their claims. They contend the record contains disputed issues of material fact regarding whether the trustees breached their fiduciary duty.

III. Preliminary Matters.

Before we turn to the merits of the appeals, we find it necessary to address three issues: First, we have before us a motion filed by ISB, Luella, and

Stevens, requesting this court to strike portions of the appendix filed in the appeal from the probate proceeding. The appellees assert the appendix contains numerous documents, filed primarily in CL 92110, that were never made part of the record in TR 2416. Second, appellees assert that several of the issues Sherry and Dennis have raised on appeal either were not properly preserved or have been waived. Third, the appellees assert the propriety of the dismissal order and partial summary judgment ruling in CL 92110 are not properly before this court on appeal. We address each contention in turn.

A. Motion to Strike Portions of the Appendix in TR 2416. The appellees contend the appendix in TR 2416 contains documents that are outside the record and must accordingly be stricken. As the appellees note, the record on appeal is limited to "[t]he original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket and court calendar entries prepared by the clerk of the district court" Iowa R. App. P. 6.10(1). Thus, an appellate court cannot consider materials that were not before the district court when the district court entered its order or judgment. *Alvarez v. IBP, Inc.*, 696 N.W.2d 1, 3 (Iowa 2005).

At issue are several filings and rulings made in CL 92110 that were not filed in TR 2416.⁷ The appellants assert these materials are part of the record in

⁷ The appellees also assert we must strike from the appendix (1) a transcript from CE 48852, because it is not part of the record in TR 2416 and (2) the first eight annual reports and accountings and the orders approving those reports, because they are immaterial. As to the first contention, we note the disputed transcript was captioned in both CE 48852 and TR 2416, and was in fact a transcript of the hearing on the trustees' reapplication to approve the Ninth Report. It is therefore part of the record in TR 2416. As to the second contention, while we agree the appendix should be limited to relevant filings and opinions, see Iowa R. App. P. 6.15, the reports and orders are part of the

TR 2416 because the probate court's transfer of the Ninth Report to CL 92110 effectively consolidated the two actions. Even a cursory review of the file in TR 2416 reveals that this assertion is without merit. It is clear, based upon not only the probate court's orders but the appellants' own filings, that TR 2416 remained a separate proceeding. However, this fact alone does not mandate striking all contested portions of the appendix.

The record reveals the partial summary judgment ruling in CL 92110, while not made a part of the file in TR 2416, was nevertheless considered and relied upon by the district court in its order approving the Ninth Report. While it is improper for a district court to consider or take judicial notice of filings in another district court proceeding without the parties' agreement, *see Troester v. Sisters of Mercy Health Corp.*, 328 N.W.2d 308, 311 (Iowa 1982), here the appellees not only consented to consideration of but urged reliance upon the partial summary judgment ruling. Under such circumstances, we conclude the partial summary judgment ruling was before the district court and should be considered by this court on appeal. However, the remaining filings from CL 92110 were not made a part of the file in TR 2416 and, unlike the partial summary judgment ruling, there is no indication that these other filings were before the district court by agreement of the parties. They are accordingly stricken.

B. Error Preservation and Waiver in TR 2416 and CE 48852. Our rules of error preservation and waiver are well established. Before an issue may be raised and determined on appeal, it must have been raised before and decided

record in TR 2416 and are relevant to placing the issues on appeal in context. We accordingly decline to strike them from the appendix.

by the district court. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). If the district court fails to rule on an issue properly raised by a party, that party must file a post-ruling motion bringing the omission to the court's attention. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). If the party fails to do so, error will not be preserved. *Id.*

In addition, parties are expected to comply with our rules of appellate procedure. Among those rules is the requirement that a party support its argument with citation to authority and pertinent parts of the record. Iowa R. App. P. 6.14(1)(f). For each issue raised a party must also state how the issue was preserved for review, and refer to portions of the record that reveal where the issue was raised and decided by the district court. *Id.* Failure to do so is sufficient to waive the issue. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 866 (Iowa 2001). Moreover, failure by a party to state, argue or cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 6.14(1)(c). We are not bound to consider a party's position when their brief fails to comply with our rules of appellate procedure. *Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct. App. 2002).

The appellees contend Sherry and Dennis's briefs raise serious error preservation and waiver issues. Sherry and Dennis respond that all issues they have raised in these appeals were consistently and repeatedly raised before the district court, and have always been at the heart of their contentions. However, with regard to several of the issues they have raised on appeal, Sherry and Dennis have failed to direct us to parts of the record that would demonstrate the issues were in fact raised before the district court.

Our appellate courts have, from time to time, made the effort necessary to decide an appeal despite the failure of the appellant to comply with applicable rules of appellate procedure. See *Hanson*, 652 N.W.2d at 843. We decline to do so, however, when a party's failure to comply with the rules of appellate procedure requires us to assume a partisan role and undertake a party's research and advocacy. See *id.* We believe this to be such a case. Moreover, even if an exhaustive review of the rather voluminous records in these matters were to reveal that some of these issues were in fact raised before the district court, it is clear they were never ruled on by the court, and Sherry and Dennis filed no post-ruling motions bringing these failures to the district court's attention. Accordingly, error would not be preserved on those claims. See *Meier*, 641 N.W.2d at 537. With some limited exceptions, we decline to address the merits of those claims upon which error has not been preserved, or has been waived.

C. Order and Ruling in CL 92110. The appellees contend Sherry and Dennis have failed to preserve error on their claims that the district court, in CL 92110, erred in dismissing Count I for lack of standing and erred in granting partial summary judgment on Count II. We must agree. As previously noted, TR 2416 was not consolidated with CL 92110. Nor is CE 48852 a continuation of CL 92110. Although Sherry and Dennis might wish it were so, one action is not a continuation of another merely because it was filed by the same plaintiffs, against some of the same defendants, and asserts essentially the same claim.

In order to preserve alleged error stemming from rulings in CL 92110, Sherry and Dennis were required to file an appeal in that action. See Iowa Rs. App. P. 6.1, 6.2, 6.5-6 (setting forth requirements for taking appeal). They did

not do so, and they cannot escape the consequences of this decision by mounting a collateral attack in a wholly separate appeal. Accordingly, the propriety of the order and ruling in CL 92110 are not before us.

We now turn to the merits of the separate appeals filed by Sherry and Dennis.

IV. Appeal in TR 2416 (Probate Proceeding).

A. Scope and Standards of Review. With certain exceptions inapplicable to this case, proceedings in probate are in equity. Iowa Code § 633.33 (2003). As such, our review is de novo. Iowa R. App. P. 6.4; *In re Anne Hamilton Killian Trust for Benefit of Hunter*, 519 N.W.2d 409, 411 (Iowa Ct. App. 1994). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). We also afford the district court considerable discretion in awarding fees. *In re Estate of Wulf*, 526 N.W.2d 154, 156 (Iowa 1994).

B. Discussion. Turning to the merits of the probate appeal, we easily dispose of Sherry and Dennis's contention that the district court erred in approving the Ninth Report because it "was the subject of a pending lawsuit," specifically CE 48852. As the record in all three proceedings readily demonstrates, the Ninth Report was transferred only to CL 92110, and was never made a part of CE 48852. We consequently reject this assignment of error.

We therefore turn to Sherry and Dennis's remaining contention: that the Ninth Report should not have been approved because they established a per se breach of trust. This claim relates to their objection that ISB colluded in, approved, and consented to Luella and Stevens's actions as officers and

directors of VTL “in breach of [ISB’s] fiduciary duty to the trust beneficiaries,” in order to “circumvent the terms of Elmer Vitalis’ will which charged [ISB] with independent oversight of the trust assets.”⁸ Sherry and Dennis assert that the \$440,000 paid to Luella were proceeds from the sale of VTL assets, that under Iowa Code chapter 637 (2003) and Iowa case law the cash received from the sale of VTL assets must be allocated as trust principal, and that by disregarding this mandatory allocation ISB breached its fiduciary duty. We believe this claim suffers from two fatal flaws.

First, there is no indication, in TR 2416, that Sherry and Dennis asserted ISB’s breach of trust was based on a violation of chapter 637, or that such a contention was considered and rejected by the district court before it approved the Ninth Report. As we have previously noted, we normally do not address on appeal a claim that has not been presented to or passed on by the district court. See *Benavides*, 539 N.W.2d at 356. Second, even if we were to assume that the issues before the district court were broad enough to encompass the current claim, that claim is simply without merit.

Sherry and Dennis rely on various provisions in chapter 637, the Uniform Principal and Income Act, to support their contention that, as a matter of law, the \$440,000 received from VTL must be allocated to principal because it was cash received from either the partial liquidation of VTL or the sale or liquidation of a

⁸ To the extent the “per se breach of trust” claim is meant to address the objection that Luella and Stevens “breached their fiduciary duties in the operation of” VTL, the claim does not contain any creditable argument, authority, or factual support for the proposition that actions by Luella and Stevens, taken in their capacity as officers and directors of VTL, stand as a bar to approval of the Ninth Report.

principal asset. See Iowa Code §§ 637.401, .410. In factual support of this claim they refer to only the Ninth Report.⁹ However, nothing in the Ninth Report indicates that the \$440,000 received as “dividend[s]” or a “income tax estimated dividend” from VTL and paid to Luella as “income distribution[s]” in fact originated as proceeds from the sale of VTL assets. Sherry and Dennis merely surmise the \$440,000 is “really the fraudulently disguised proceeds of sales of principal assets” of VTL because it is “almost the exact the amount” of the \$449,000 in proceeds VTL netted from the sale of some corporate assets.

Moreover, while chapter 637 “applies to every trust or decedent’s estate on and after July 1, 2000, except as otherwise expressly provided in the will, the terms of the trust, or this chapter,” Iowa Code § 637.701, it also requires trustees to act in accord with will and trust provisions even if those provisions are contrary to the terms of chapter 637:

1. In allocating receipts and disbursements to or between principal and income, . . . a fiduciary shall do all of the following:

a. Administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter.

b. Administer a trust or estate by the exercise of a discretionary power of administration given the fiduciary by the terms of the trust or the will, although the fiduciary may exercise that power in a manner different from a provision of this chapter.

Iowa Code § 637.103(1).

Here, Elmer Vitalis’s will expressly granted ISB, as corporate trustee, the discretion to “determine . . . what is principal and what is income of . . . [the] trust

⁹ Other portions of the appendix referred to by Sherry and Dennis either (1) relate to the first eight annual reports and accountings, which have been approved by the district court, were not appealed from, and are not at issue in this appeal, or (2) are portions of the record in CL 92110 that have been stricken from the appendix.

and to allocate or apportion receipts and expenses between principal and income” Thus, under chapter 637, the decision of how to allocate the proceeds from the sale of VTL assets was a matter within ISB’s discretion. None of the cases cited by Sherry and Dennis support a departure from this conclusion.

Sherry and Dennis contend ISB failed to exercise the discretion it was given under the will, and instead of making an independent and reasoned determination to allocate the \$440,000 to income, simply deferred to Luella and Stevens’s categorization of the funds as “dividends.” We agree that, if ISB in fact failed to exercise independent judgment, it would have abused the discretion it was granted under the will. However, Sherry and Dennis have provided no persuasive evidence that this was in fact the case. Nothing in the Ninth Report establishes ISB failed to exercise its discretion in the apportionment and allocation of income and principal. There mere fact that ISB’s allocation did not differ from Luella and Stevens’s categorization is not tantamount to proof that ISB failed to exercise independent judgment.

We conclude the record does not contain evidence that supports rejection of the Ninth Report. We accordingly turn to Sherry and Dennis’s contention that the district court erred when it awarded extraordinary fees to ISB for trustee services, and extraordinary attorney fees incurred as a result of the trustees’ defense against Sherry and Dennis’s objections in TR 2416 and their claims in CL 92110.

Trustee and attorney fees are authorized under section 633.200. ISB, as a trustee, is entitled to compensation for its services “unless peculiar

circumstances deprive [it] of that right.” *In re Trust of Gabeline*, 288 N.W.2d 341, 343 (Iowa 1980). Whether the trustees are entitled to indemnification for attorney fees “turns on whether [their] defense of the litigation is for [their] personal protection against claims of malfeasance or for expenses properly incurred to defend the management of the trust.” *See In re Trust of Killian*, 459 N.W.2d 497, 503 (Iowa 1990).

Sherry and Dennis contend extraordinary fees should not be awarded in this case because the trustees’ actions did not benefit the estate, but were purely for the trustees’ self-protection and motivated by the trustees’ self-interest.¹⁰ However, the expenses at issue were incurred in seeking approval of the Ninth Report, defending against Sherry and Dennis’s unsubstantiated objections to the Ninth Report, and in defending against claims brought by Sherry and Dennis that, for all relevant intents and purposes, were decided adversely to them CL 92110.

Under the record properly before us on appeal, we see no basis for concluding that the fees incurred were for matters of personal interest to the trustees, or that the trustees were acting to preserve the interest of one beneficiary at the expense of others. Rather, we conclude the fees were incurred in defense of management of the trust. We accordingly affirm the district court’s award of extraordinary fees.

¹⁰ Sherry and Dennis also assert that extraordinary fees should not be awarded because ISB failed to comply with chapter 637, and that the trustees, in particular Luella, engaged in self dealing and acted fraudulently and in bad faith. As previously noted, the first contention is without merit. The second contention is a bare allegation, made without reference to factual support in the record. Moreover, we will not presume bad faith and self dealing by Luella merely because she is a trustee, corporate officer and director, and a trust beneficiary.

V. Appeal in CE 48852 (Civil Proceeding).

A. Scope and Standards of Review. Summary judgment rulings are reviewed for correction of errors at law. Iowa R. App. P. 6.4; *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 276 (Iowa 1996). Where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Iowa R. Civ. P. 1.981(3); *City of West Branch v. Miller*, 546 N.W.2d 598, 600 (Iowa 1996). The court reviews the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *City of West Branch*, 546 N.W.2d at 600. All facts are viewed in the light most favorable to the party opposing summary judgment. *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915, 917 (Iowa 1997). However, a party resisting a properly supported summary judgment motion may not simply rely upon the pleadings, but must “set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.” Iowa R. Civ. P. 1.981(5).

B. Discussion. Sherry and Dennis assert the record contains numerous issues of disputed material fact that preclude summary judgment of their claim that the trust, ISB, Luella, Stevens, and VTL breached a fiduciary duty to them. Before we address these contentions, we find it helpful to more fully set forth the summary judgment record.

1. *Procedural Background.* Similar to previous proceedings, the petition in CE 48852 referred to the will provision that gave ISB discretion to determine what was income and principal and to allocate receipts between the two, alleged that Luella and Stevens had engaged in self dealing, and alleged that ISB (as

well as the trust and VTL) had “colluded and acquiesced in this conduct.” In support of their summary judgment request to dismiss the petition, the defendants asserted, in relevant part, that allocation and distribution decisions were within ISB’s discretion, and there was no evidence ISB had abused its discretion or allowed anyone to exercise the discretion on its behalf; and that the plaintiffs did not have a fiduciary relationship with either VTL or its corporate officers and directors.

In resistance, the plaintiffs agreed this matter was limited to “a claim for breach of fiduciary duty by the trustees . . . during 2002 and 2003 which are reported in the 10th and 11th Annual Reports respectively.” The plaintiffs contended the record contained disputed material facts as to whether “the trustees breached their fiduciary duty to preserve trust property in 2002 and 2003 and if so, by how much was the principal reduced” In support of this contention the plaintiffs recited provisions of chapter 637 and Iowa case law regarding allocation of principal and income. They also attached documents that they believed demonstrated a substantial decrease in the value of the trust’s principal assets in 2002 and 2003, and discrepancies between the sale prices of two VTL assets and the actual value that was eventually transferred to the trust.

In reply the defendants noted various faults in the plaintiffs’ calculations, and asserted that proper calculations demonstrated there had not in fact been any significant reduction in the value of trust principal. They also attached an affidavit from a senior trust officer at ISB that explained the apparent discrepancies between the sale price and transferred value of the two VTL assets. Subsequent filings and exhibits by both sides addressed whether, in fact,

the trust principal had been substantially depleted, and the propriety of certain actions taken by Luella and Stevens in their corporate capacity.

The plaintiffs also filed a motion for summary judgment, which largely mirrored their resistance to the defendant's summary judgment motion. Once again relying on asset values and sales figures found in various trust and corporate documents, the plaintiffs alleged that Luella and Stevens had engaged in "[s]elf dealing and dissipation of principal" and had failed to comply with the requirements of chapter 637, and that ISB "at all times acquiesced to the breach of trust perpetrated by" Luella and Stevens.

In a May 2005 ruling, the district court granted the defendants' summary judgment motion. The court noted the only issue before it was "the viability of the claims against the defendants for breach of fiduciary duty (the only theory pled) arising out of the management of the trust as represented by the tenth and eleventh annual reports." It "easily disposed of" the claims against VTL, given there was no evidence of a fiduciary relationship between VTL and Sherry and Dennis. The court also dismissed the remaining claim that "the trustees have failed to properly allocate principal and interest and improperly engaged in self-dealing, which has resulted in excessive distributions and a dissipation of the trust assets"

The district court determined, consistent with our conclusions in the probate appeal, that the will placed income and principal allocation and distribution decisions within ISB's discretion, and that the will provision controlled over chapter 637. The court recognized that the parties had provided competing affidavits and documents on the question of whether trust assets had been

dissipated or wasted, but determined they did not create any disputed issues of material fact. The court concluded the plaintiffs' disputed material facts were nothing more than conclusory assertions without adequate factual support, and that the plaintiffs had "offered nothing . . . to create a factual issue on the proper standard, i.e., whether Iowa State Bank as the corporate trustee abused the discretion afforded to it in the will of Elmer Vitalis in distributing income and principal." It also denied the plaintiffs' summary judgment motion, as "the essence of the motion . . . has been dealt with in this court's ruling on the defendants' motion."

2. *Claims on Appeal.* The plaintiffs first assert that the record contains disputed issues of material fact as to whether ISB breached its duty to keep the remainder beneficiaries reasonably informed about trust administration and necessary material facts, to use appropriate accounting methodology, and to use its "special skills or expertise" in relation to the Tenth Report. However, the plaintiffs have not directed us to portions of the record demonstrating that these specific complaints were raised before the district court, and our review of the record indicates that they were neither raised to nor ruled on by the court. As such, they are not preserved for our review, and even if preserved have been waived. See *Channon*, 629 N.W.2d at 866; *Benavides*, 539 N.W.2d at 356.

The plaintiffs next assert there are material facts in dispute as to whether ISB breached its fiduciary duty to "administer the trust according to its terms and make a determination of the advisability to invade principal before paying principal to" Luella. Once again, the plaintiffs fail to indicate how error was preserved on this issue, and this claim does not appear to have been addressed

by the district court in its summary judgment ruling. Thus, we need not address it on appeal. See *id.* In addition, the plaintiffs do not refer this court to any disputed issue of material fact sufficient to send this claim to a jury.

The only portion of the record relied on by Sherry and Dennis is the affidavit of Ron Hintz, a certified public accountant, which they assert demonstrates that ISB “had actual knowledge that the money it received from VTL [as reported on the Tenth and Eleventh Reports] included proceeds from the sale of principal assets.” However, when viewed in the light most favorable to Sherry and Dennis the Hintz affidavit is, at most, evidence that Luella and Stevens liquidated in excess of \$1.2 million in VTL assets, which VTL then disbursed to the trust as “ordinary income.”¹¹ The affidavit presupposes principal trust assets have been depleted by \$1.2 million because it assumes the \$1.2 million received from VTL was required to be allocated to trust principal rather than trust income.

As we have previously noted, however, regardless of how VTL categorizes its disbursements to the trust, it is ISB, and not Luella and Stevens, that possesses the discretion to make allocations to income and principal. Moreover, Sherry and Dennis point to no evidence in the record that would

¹¹ The affidavit states Hintz’s opinion that Luella and Stevens characterized unspecified distributions to the trust as “ordinary income when the distributions were actually distributions of principal,” that the first nine reports “did not reflect this depletion of principal because the trustees always reported the trust value as the ‘book value’ of the Trust assets” which “effectively concealed the individual trustees’ depletion of principal from VTL,” and that depletion of principal by Luella and Stevens was not apparent until a supplement to the Ninth Report “reported the current value of the trust assets . . . in addition to the ‘book value[.]’ of the trust assets.” Hintz concludes that, based on the difference between the value of the trust stated in the supplement to the Ninth Report and the value of the trust stated in the Eleventh Report, Luella and Stevens “depleted \$1,226,966.31 from VTL.”

substantially support a determination ISB failed to exercise its discretion in making such an allocation, or that it made a distribution from principal without first determining that such a distribution was “advisable for [Luella’s] health, care, support, maintenance, comfort and financial or personal welfare.” The mere fact the summary judgment record does not affirmatively demonstrate an exercise of discretion does not create a disputed issue of material fact as to whether the discretion was indeed exercised.

The plaintiffs next assert the record contains disputed issues of material fact as to whether Luella and Stevens “breached both their fiduciary duty of loyalty and their duty to inform and account.” The contention that Luella and Stevens breached a duty of loyalty appears to be two-fold: that they engaged in transactions in which they had a conflict of interest or which involved self dealing and that they failed to comply with chapter 637 regarding the allocation of principal and interest. However, Sherry and Dennis have once again failed to state how error was preserved on either claim, and we could deem the claims waived on this basis alone. *Channon*, 629 N.W.2d at 866. Moreover, upon our independent review of the record, it does not appear Sherry and Dennis asserted a breach of the duty “to inform and account” before the district court, and the court’s ruling contains no indication it considered such a claim. Thus, error has not been preserved as to this claim. *Benavides*, 539 N.W.2d at 356.

In contrast, a review of the record indicates the breach of a duty of loyalty claim was raised before the district court, and a rejection of the claim is inherent in the district court’s ruling. Thus, error on this claim has been preserved. Having reviewed the claim, however, we find it to be without merit.

Sherry and Dennis correctly note that “trustees have a duty of loyalty to the trust they are administering and to its beneficiaries, and must act in good faith in all actions affecting the trust,” and that they “are prohibited from engaging in self-dealing transactions with the trust and from obtaining personal advantage from their dealings with trust property.” *Harvey v. Leonard*, 268 N.W.2d 504, 512 (Iowa 1978). We also recognize that Luella’s roles as co-trustee, corporate officer and director of VTL, and income beneficiary, at least arguably give rise to a potential for a conflict of interest. However, such potential is clearly contemplated by Elmer’s will, which named Luella as the income beneficiary and one of three trustees, and allowed the trustees to elect VTL’s corporate officers and directors. Moreover, the fact remains that Sherry and Dennis have pointed to no evidence substantially supporting a conclusion that Luella or Stevens engaged in self dealing or acted in bad faith, thereby breaching a fiduciary duty as a co-trustee.

Sherry and Dennis’s claim that Luella and Stevens breached duty of loyalty by failing to comply with chapter 637 presents a slightly more complex issue. The chapter 637 claim, as resolved by the district court, involved the same issue addressed and resolved previously in this opinion: Luella and Stevens had no authority to make allocations between trust income and trust principal, ISB was the only trustee authorized to make such allocations, and there is no evidence that ISB breached its duty in this regard.

Sherry and Dennis, however, assert Luella and Stevens were nevertheless required to comply with chapter 637 in their operation of VTL, and when reporting the sale of VTL assets to the trust. They rely on Iowa Code

section 637.403 which provides that, when a trustee conducts a business that is a trust asset, and sells business assets other than in the ordinary course of the business, the trustee must “account for the net amount received as principal in the trust’s general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.” We have reviewed chapter 637 in its entirety. Even if we assume Sherry and Dennis were governed by section 637.403 in their operation of VTL, we find nothing in chapter 637 that supersedes the fact that, under the terms of Elmer’s will and trust, ISB had the sole discretion to make allocation to income and principal.

Finally, Sherry and Dennis contend “the Trustees breached their fiduciary duty of impartiality in distributing \$1.3 million of principal to the income beneficiary” This claim is supported by the bare assertion that “[t]here are material facts in dispute as to whether the cumulative payment of \$1,300,000.00 to [Luella] based without any notice to the remainder beneficiaries and without any inquiry by [ISB] into the advisability to make such payments is arbitrary and capricious.” Once again, we are faced with a procedurally defective claim. Sherry and Dennis do not state how error was preserved on this issue, nor do they support it by citation to the record. Accordingly, the issue is waived. Iowa R. App. P. 6.14(1)(c), (f); *Channon*, 629 N.W.2d at 866.

Sherry and Dennis have raised a number of claims in this appeal. We have considered them all, whether or not specifically discussed. Upon our review of assigned errors for those claims properly raised and preserved, we determine the record does not contain a disputed issue of material fact sufficient

to send the Sherry and Dennis's claims of breach of fiduciary duty to the jury. Accordingly, the district court's summary judgment ruling is affirmed.

AFFIRMED ON BOTH APPEALS.