

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas

The Honorable Jean Hoefer Toal, Acting Circuit Court Judge

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Case No. 2017-CP-28-00831  
Appellate Case No. 2019-001632

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IN THE MATTER OF:  
LEMUEL WHITAKER BOYKIN, II, deceased

**Rigdon H. Boykin**, as sole disinterested Co-Trustee of the Lemuel  
Whitaker Boykin, II Residuary Trusts A and B.....Appellant-Respondent

v.

Mary Deas Wortley, individually, as Co-Trustee of the Lemuel  
Whitaker Boykin, II Residuary Trusts A and B, Co-Trustee of the  
Lemuel Whitaker Boykin Marital Deduction Trusts A and B, and as  
Co-Personal Representative of the Estate of Alice S. Boykin; Alice  
B. Belger, individually, as Co-Trustee of the Lemuel Whitaker  
Boykin, II Residuary Trusts A and B, and as Co-Personal  
Representative of the Estate of Alice S. Boykin; Lemuel Whitaker  
Boykin, III; and May Cantey Boykin, of whom

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

And

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

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**INITIAL REPLY BRIEF OF RESPONDENT-APPELLANTS WORTLEY AND  
BELGER TO BRIEF OF RESPONDENTS LEMUEL WHITAKER BOYKIN,  
III, AND MAY CANTEY BOYKIN**

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## ARGUMENT IN REPLY

Respondents Lemuel Whitaker Boykin, III, and May Cantey Boykin (“Cross-Claimants”) filed a single brief in response to both Appellant-Respondent Rigdon Boykin’s (“Boykin”) Initial Brief and Respondent-Appellants Mary Deas Wortley (“Wortley”) and Alice Belger’s (“Belger”) Initial Brief. This Reply Brief will therefore address all of the Cross-Claimants’ arguments on both subjects.

In response to Boykin’s appeal, Cross-Claimants ask the Court to split the Trust and grant all other relief requested by Boykin. Cross-Claimants’ request should be denied. They did not file an appeal of their own, and are not entitled to seek affirmative relief of any kind. Moreover, Cross-Claimants do not actually respond to Wortley and Belger’s arguments; they simply endorse Boykin’s position.

In response to Wortley and Belger’s appeal, which challenges the trial court’s award of attorney’s fees and costs to Cross-Claimants, Cross-Claimants apparently make two arguments. First, they argue that their intervention in the underlying suit was necessary to give Cross-Claimants an independent voice. Second, they rely, without any argument in support thereof, on the trial court’s finding that the litigation benefitted the Trust. These arguments are flawed.

The record wholly contradicts Cross-Claimants’ argument that they were forced to intervene in the case below to ensure that they had an independent voice. Before suit was ever filed, Cross-Claimants joined forces with Boykin. They helped draft Boykin’s initial complaint and planned to assert cross claims against Wortley and Belger. After suit was filed, Cross-Claimants joined in every motion filed by Boykin and opposed every motion filed by Wortley and Belger. At trial, Cross-Claimants abandoned all of their own claims. Cross-claimants were anything but independent and certainly were not required to, and did not, intervene in the case below.

Additionally, Cross-Claimants' reliance on the trial court's finding that the litigation benefitted the Trust because it resulted in the creation of the Wortley Belger Investment Plan ("Wortley Belger Plan") is misplaced. This finding is, of course, itself a subject of Wortley and Belger's appeal. Cross-Claimants essentially argue that the trial court's finding that the litigation benefitted the Trust should be affirmed because the trial court found that the litigation benefitted the Trust. This is circular logic.

Furthermore, Wortley and Belger have conclusively demonstrated in their initial brief that the litigation did *not* result in the creation of the Wortley Belger Plan. Boykin's goal at trial, and that of the Cross-Claimants', was not to force Wortley and Belger to produce the Investment Plan ultimately adopted by the trial Court. Rather, their goal was to squash the very plan they now claim as the benefit of their efforts. Boykin and Cross-Claimants opposed the Wortley Belger Plan at every juncture of the case below.

Moreover, the timeline of events demonstrates that the Wortley Belger Plan was under development before suit was ever filed and a written version of the plan was submitted to Boykin and Cross-Claimants' before trial. There was no causal relationship. In any event, Cross-Claimants cannot take credit for benefitting the Trust. That benefit, if a benefit at all, was achieved by Boykin. Cross-Claimants did little more in the case below than say "me too" when Boykin spoke.

#### **I. Reply to Cross-Claimants Response to Boykin's Appeal**

Cross-Claimants request that the Court grant all relief requested by Boykin and specifically ask the Court to split the Residuary Trust. The Court need not consider these arguments because Cross-Claimants failed to appeal the trial court's decision, including its refusal to split the Trust, and are therefore not entitled to seek affirmative relief on appeal. Additionally, and in any event, Cross-Claimants' arguments are conclusory and repetitive. Cross-Claimants largely echo

arguments previously made by Boykin.

**A. Cross-Claimants are not entitled to affirmative relief.**

A party intending to appeal must serve and file a notice of appeal within thirty days after receipt of written notice of the entry of judgment. Rules 203(a) and (b), SCACR. Respondents such as Cross-Claimants may institute an appeal by serving a notice of appeal either within this time frame or within five days after receipt of the appellant's notice of appeal. Rule 203(c), SCACR. The failure to do so is jurisdictional. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008). If a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal. *Id.*

Accordingly, an appellate court generally cannot grant a respondent affirmative relief unless the respondent files his or her own notice of appeal. *See Sanders v. S.C. Dep't of Corr.*, 379 S.C. 411, 418, 665 S.E.2d 231, 234 (Ct. App. 2008) (Court of Appeals does not address argument made by respondent because respondent failed to cross appeal); *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 187, 512 S.E.2d 123, 129 (Ct. App. 1999) (same); *Smoke v. City of Seattle*, 902 P.2d 678 (Wash. App. 1995), *rev'd on other grounds*, 937 P.2d 186 (1997); 5 C.J.S. *Appeal and Error* § 892.

Here, Cross-Claimants ask this Court to split the Residuary Trust and grant all “relief requested” in Boykin’s appeal. However, these requests and the arguments advanced by Cross-Claimants in support of the requests are not before the Court. Cross-Claimant May Cantey Boykin initially filed a notice of appeal. This notice, however, was later withdrawn. Cross-Claimants therefore have not appealed the trial court’s order. They are bound by the trial court’s findings, and cannot seek affirmative relief of any kind in this appeal.

**B. Cross-Claimants’ arguments lack merit.**

Cross-Claimants state that, in their opinion, an inherent conflict of interest exists on the part

of Wortley and Belger as trustees of the Residuary Trust because Wortley and Belger have children who are remainder beneficiaries of the Trust. They therefore ask the Court to take evidence and divide the Trust between the competing trustees and beneficiaries. This request should be denied because, as explained above, Cross-Claimants did not file an appeal and are not entitled to affirmative relief and also because splitting the Trust would directly contradict the Testator's wish to keep the lands intact for future generations.

This request should also be denied for other reasons. First, the trial court ruled that Wortley and Belger neither had an impermissible conflict of interest nor improperly balanced their duties to the various beneficiaries, including Cross-Claimants. The trial court also ruled that the request to split the Trust came too late and was not properly before it. These rulings have not been appealed by Boykin or Cross-Claimants<sup>1</sup> and therefore constitute the law of the case. *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 232, 329, 730 S.E.2d 282, 285 (2012) (unchallenged ruling, right or wrong, is the law of the case).

Second, Cross-Claimants bear the burden of demonstrating error in the trial court's findings. *See Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011). Cross-Claimants did not even attempt to meet this burden. Their brief contains no explanation of why they believe the trial court's ruling was in error. They do not address in any fashion the reasoning employed

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<sup>1</sup> As discussed at length in Wortley and Belger's response brief to Boykin's appeal, Boykin did not challenge the trial court's ruling that there was no impermissible conflict of interest in his statement of issues on appeal and only addresses the ruling in a cursory fashion in his initial brief. Rule 208(b)(1)(B), SCACR ("[o]rdinarily no point will be considered which is not set forth in the statement of issues on appeal"); *Allen v. Pinnacle Healthcare Systems, LLC*, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011) (finding issue not preserved for appeal when not included in statement of issues on appeal); *State v. Crocker*, 366 S.C. 394, 399 n. 1, 621 S.E.2d 890, 893 n. 1 (Ct. App. 2005) (brief or conclusory arguments are insufficiently preserved for appellate review and deemed abandoned). Additionally, Boykin failed to properly raise the issue of splitting the trust in the trial court. Cross-Claimants filed no appeal of their own.

by the trial court or the facts on which the trial court relied.

Finally, Cross-Claimants' remaining claims with respect to splitting the Trust are fully addressed in Wortley and Belger's response brief to Boykin's appeal, and Wortley and Belger expressly incorporate by reference their arguments as set forth in that brief.

## **II. Reply to Cross-Claimants Response to Wortley and Belger Appeal**

Cross-Claimants have not responded to the following arguments made by Wortley and Belger with respect to the attorney fee award made to Cross-Claimants:

- that the trial court applied an incorrect standard in determining whether the fee award was appropriate under S.C. Code Ann. § 62-7-1004 (Supp. 2014);
- that when the correct factors are applied, no award of fees was appropriate; and
- that justice and equity do not require an award to Cross-Claimants because they failed to achieve any degree of success on the merits – they abandoned all claims they originally asserted and lost on the one copycat claim they actually submitted to the trial court.

Cross-Claimants' attempt to incorporate by reference certain arguments made by Boykin does not cure this omission with respect to the second and third issues listed above. Boykin did not attempt to carry the Cross-Claimants' water. He did not address or contest any of the arguments made by Wortley and Belger which were specific to the Cross-Claimants.

Cross-Claimants do argue that: (1) in order for Cross-Claimants to have a voice and "independent representation," it was necessary for them to "intervene" in the case below; and (2) an award of attorney's fees to Cross-Claimants was appropriate because, they assert, their efforts benefitted the Trust. These arguments are fundamentally flawed.

### **A. Cross-Claimants were not independent.**

Cross-Claimants were anything but "independent." As their own brief states, Cross-Claimants "supported *Rigdon's* position" "throughout" the underlying case. (Cross-Claimants' Brief at p. 1) (emphasis added). Cross-Claimants worked hand in glove with Boykin from the

outset.

On August 2, 2017, before suit was even filed, James Hardin, an expert retained by Boykin's counsel, participated in a conference call with Boykin, Boykin's counsel *and* Mr. Tetterton, counsel for Cross-Claimants, regarding a "draft Petition and matters to be plead." (August 31, 2017 Invoice at p. 2, attached as Ex. 1 to Respondents' Motion in Limine, R. at \_\_\_\_.) Several days later, and again before suit was filed, Hardin discussed potential cross-claims by May and Whit Boykin with Rigdon's counsel. (August 31, 2017 Invoice at p. 3, attached as Ex. 1 to Respondents' Motion in Limine, R. at \_\_\_\_.) And on the day that Boykin filed his Petition, Boykin's counsel forwarded a conference call agenda to Hardin, Boykin, and Tetterton, which agenda included discussing a cross-claim strategy on behalf of Whit and May. (August 24, 2017 email from L. Duffy to R. Boykin et al., attached as Ex. 7 to Respondents' Motion in Limine, R. at \_\_\_\_.) In summary, counsel for Cross-Claimants was personally involved in producing Boykin's initial pleading, and planned with Boykin to assert cross-claims which would help Boykin achieve his goals before suit was even filed.

Cross-Claimants' involvement with Boykin's litigation team continued throughout the case. Not only did Cross-Claimants' counsel strategize with Boykin's counsel, he allowed Boykin to exert control over Cross-Claimants' case. For instance, after Wortley and Belger's counsel forwarded a proposed settlement offer to Cross-Claimants' counsel, copying Boykin, Wortley, and Belger on the communication, *Boykin* forwarded the communication to his counsel, Hardin, and to Tetterton with the comment that the offer was "not even close." (February 7, 2018 email from R. Boykin to L. Duffy et al., attached as Ex. 17 to Respondents' Motion in Limine, R. at \_\_\_\_.) Moreover, Boykin's expert and counsel continued to share work product with Cross-Claimants' counsel in the months leading up to trial. (March 2, 2018 email from J. Hardin to L. Duffy et al.,

attached as Ex. 18 to Respondents' Motion in Limine, R. at \_\_\_\_.)

At the trial, Cross-Claimants abandoned all pretense of separation from Boykin. They dropped all of the claims ostensibly asserted on their own behalf and joined in Boykin's claim to remove the Respondent Trustees. Even the trial court recognized that "counsel for Cross-claimants largely adopted the positions taken by [Boykin]." (Final Order and Judgment at 60, R. at \_\_\_\_.)

Coordination between Boykin and Cross-Claimants continues to this day. Cross-Claimants' response brief makes multiple references to Boykin's brief in response to Wortley and Belger's initial brief addressing the attorney's fee award in case below. For example, Cross-Claimants incorporate statements made about the Trust "[a]s detailed in Rigdon's *briefs*," and arguments concerning a benefit to the trust also "[a]s detailed in Rigdon's *briefs*." (Cross-Claimants' Brief at pp. 1 and 2) (emphasis added). These statements indicate continuing coordination between the two camps because Cross-Claimants filed their initial Respondent's brief *before* Rigdon filed his. Cross-Claimants could not have referred to an unfiled brief from Boykin unless Cross-Claimants' counsel had advance access to Boykin's brief.

**B. Cross-Claimants did not intervene.**

As is clear from the discussion above, Cross-Claimants did not intervene in the trial below. Instead, they participated in drafting Boykin's initial complaint, were named as original Defendants in the suit filed by Boykin, and as planned, filed cross-claims against Wortley and Belger. Cross-Claimants sought not only to suspend or remove Wortley and Belger as trustees, but also for an award of actual and punitive damages against them in their personal capacities. (Cross Claim of Lemuel Whitaker Boykin, III and May Cantey Boykin, filed September 8, 2017, R. at \_\_\_\_.) Cross-Claimants' actual pleading speaks for itself and they cannot now rewrite

history.<sup>2</sup> They simply did not intervene in the prior action to ensure that they had an independent voice and representation.

Cross-Claimants argument that they intervened in the case below in order to have an independent voice is wholly contradicted by the record.

### **C. Cross-Claimants' actions did not benefit the trust.**

Cross-Claimants argue they are entitled to the attorney fee award made to them by the trial court because their actions benefitted the Trust. Whether the Cross-Claimants' actions benefitted the Trust is a crucial factor in determining whether they are entitled to any award of fees. The only statute which could possibly authorize an award to Cross-Claimants is S.C. Code Ann § 62-7-1004 (Supp. 2014).<sup>3</sup> However, the comments to this code section reveal that it has limited application to fee awards to beneficiaries. The comments state:

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

S.C. Code Ann. § 62-7-1004, Comment (emphasis added). In the absence of a benefit to the Trust as a result of the Cross-Claimants' actions, no award of fees to Cross-Claimants can be made.

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<sup>2</sup> Cross-Claimants cannot contend that they intervened in the suit for another reason. Their brief omits a statement of the case. They are therefore bound by the statement of the case contained in Wortley and Belger's brief, which correctly recites Cross-Claimants' role in the underlying proceeding. *See* Rule 208(b)(2), SCACR (“[i]f a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case”).

<sup>3</sup> The other statutes cited by the trial court in awarding fees apply only to trustees, not trust beneficiaries like Cross-Claimants. *E.g.*, S.C. Code Ann. §§ 62-7-709 and 62-7-816. Additionally, the Will makes no provision for an award of attorney's fees to beneficiaries.

Cross-Claimants' argument regarding a benefit conferred on the Trust is cursory at best. Wortley and Belger extensively discussed the many reasons why Cross-Claimants' actions did not benefit the Trust in Section I(D) of their initial brief,<sup>4</sup> including the following:

- Cross-Claimants filed suit to pursue their personal objective, which was to require a minimum annual distribution by the Trust to the Cross-Claimants as remainder beneficiaries;
- Cross-Claimants obtained no relief whatsoever and simply depleted Trust assets; and
- Cross-Claimants added nothing to the litigation, and simply parroted the positions advanced by Boykin in the underlying case.

Cross-Claimants addressed *none* of these arguments. Instead, Cross-Claimants refer to Boykin's brief, which also failed to address many of these arguments, and simply state that the "matter was . . . beneficial to [the] Trust, as it resulted in "comprehensive, long-term plans [the Wortley Belger Plan] for the management of the Trust's assets." (Cross-Claimants' response brief at p. 2.) Cross-Claimants' argument lacks merit. The trial court's finding that the litigation resulted in a comprehensive long-term plan for the Trust is against the clear weight of the evidence. Additionally, even if the trial court were correct, and it is not, the question is not whether the *matter* benefitted the Trust, as Cross-Claimants propose, but whether Cross-Claimants' actions benefitted the Trust. They cannot bootstrap their claim for fees to a benefit purportedly achieved by another party. Cross-Claimants suit played no role in the development of the Wortley Belger Plan.

### **1. The litigation did not result in the creation of the Wortley Belger Plan.**

Cross-Claimants' conclusion that they benefitted the Trust because their actions resulted in the creation of the Wortley Belger Plan ultimately adopted by the trial court relies on a distorted view of the facts.

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<sup>4</sup> Wortley and Belger hereby incorporate this discussion by reference.

It is beyond dispute that neither Cross-Claimants nor Boykin filed suit to cause Wortley and Belger to create their investment plan. In fact, the purpose of the litigation was quite the opposite – it was to prevent Wortley and Belger from implementing on behalf of the Trust the type of plan they put forth. At all times, Cross-Claimants and Boykin opposed the Wortley Belger Plan and took every conceivable action to suppress it. (*See* Trial Brief of Petitioner and Respondents Whit Boykin and May Boykin, at pp. 9-17, R. at \_\_\_; Trial Transcript, July 10, 2018, at 8:16-9:10, R. at \_\_\_; Trial Transcript, September 28, 2018, at 457:7-469:24, R. at \_\_\_\_.) The argument that Cross-Claimants’ and Boykin’s action benefited the Trust because the trial court adopted the investment plan they *opposed* is the height of hypocrisy.

Additionally, and in any event, Wortley and Belger’s initial brief set forth a detailed timeline of events which demonstrated that Wortley and Belger were amenable to diversification and were discussing preparation of an investment analysis for the Trust *before* Boykin filed suit, and, therefore, before Cross-Claimants asserted their claims in the case. The timeline also demonstrates that Wortley and Belger produced a formal, written plan *in advance of trial*. Trial itself and all post-trial activities could not have played a role in the creation of plan which predated the trial.

Wortley and Belger extensively discussed the many reasons why Cross-Claimants’ actions did not benefit the Trust in Section I(D) of their initial brief. Wortley and Belger expressly incorporate this discussion by reference. Again, Cross-Claimants failed to respond to any of these arguments.

**2. Even if the litigation can be viewed as benefitting the Trust, Cross-Claimants cannot take credit for the actions of others.**

Assuming the litigation can somehow be viewed as having produced the Wortley Belger Plan, Cross-Claimants are nevertheless not entitled to fees. Their actions did not result in the

creation of the Plan. Instead, as discussed above, Cross-Claimants did little more than join in the positions and arguments advanced by Boykin. Cross-Claimants admit that they “supported *Rigdon’s* position” “throughout” the underlying case. (Cross-Claimants’ Brief at p. 1) (emphasis added). The trial court itself recognized that “counsel for Cross-claimants largely adopted the positions taken by [Boykin].” (Final Order and Judgment at 60, R. at \_\_\_\_.) In fact, Cross-claimants *abandoned* all of their own claims at trial and simply joined in Boykin’s request that Wortley and Belger be removed. Cross-Claimants were passengers in Boykin’s vehicle and cannot claim credit for arriving at the destination.

### **III. Conclusion**

Cross-Claimants’ suit failed on every claim, and their actions did not benefit the Trust. Cross-Claimants did not directly respond to any of the arguments raised by Wortley and Belger’s appeal. The Court should eliminate or substantially reduce the award of fees and costs to Cross-Claimants.

HAYNSWORTH SINKLER BOYD, P.A.

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October 12, 2020

THE STATE OF SOUTH CAROLINA  
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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY  
Court of Common Pleas

The Honorable Jean Hoefer Toal, Acting Circuit Court Judge

C.A. No.: 2017-CP-28-00831  
Appellate Case No. 2019-001632

IN THE MATTER OF:  
LEMUEL WHITAKER BOYKIN, II, deceased

**Rigdon H. Boykin**, as sole disinterested Co-Trustee of the Lemuel  
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v.

Mary Deas Wortley, individually, as Co-Trustee of the Lemuel  
Whitaker Boykin, II Residuary Trusts A and B, Co-Trustee of the  
Lemuel Whitaker Boykin Marital Deduction Trusts A and B, and  
as Co-Personal Representative of the Estate of Alice S. Boykin;  
Alice B. Belger, individually, as Co-Trustee of the Lemuel  
Whitaker Boykin, II Residuary Trusts A and B, and as Co-Personal  
Representative of the Estate of Alice S. Boykin; Lemuel Whitaker  
Boykin, III; and May Cantey Boykin, of whom

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

And

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

**PROOF OF SERVICE**

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I  
have caused the documents listed below to be served via email, to the parties of record listed below  
at their email addresses as listed in the Attorney Information System.

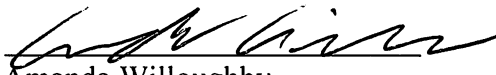
1. **Initial Reply Brief of Respondent-Appellants Wortley and Belger to Response Brief of Appellant-Respondent Boykin**
2. **Initial Reply Brief of Respondent-Appellants Wortley and Belger to Brief of Respondents Lemuel Whitaker Boykin, III, and May Cantey Boykin**
3. **Additional Designation of Matter to be Included in the Record on Appeal**

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**HAYNSWORTH SINKLER BOYD, P.A.**

October 12, 2020  
 Columbia, South Carolina

By:   
 Amanda Willoughby  
 Paralegal