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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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

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

———

FINAL RESPONSE BRIEF OF RESPONDENT-APPELLANTS

———

James Y. Becker
Robert L. Reibold
Mary Cothonneau Eldridge
P.O. Box 11889
Columbia, SC 29211-1889
(803) 779-3080

ATTORNEYS FOR RESPONDENT-APPELLANTS

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COUNTERSTATEMENT OF THE CASE

Appellant-Respondent Rigdon H. Boykin ("Boykin") appeals from the Circuit Court's May 24, 2019 Final Order and Judgment in litigation involving certain trusts created by the Last Will and Testament of Lemuel Whitaker Boykin, II ("Will" and the "Testator"). (Final Order and Judgment dated May 24, 2019, R. p. 9.) Boykin filed suit against his Co-Trustees, Respondent-Appellants Mary Deas Wortley ("Wortley") and Alice Belger ("Belger"). His original and amended petitions sought to force his Co-Trustees to sell all or virtually all of the family property owned by the trusts, or, failing that, to end Wortley and Belger's opposition to such a sale by removing them as trustees. The trial court ruled against Boykin on all claims, and moreover, granted Wortley and Belger's request that Boykin himself be removed as a trustee.

Boykin initially sued in the Probate Court for Kershaw County on August 23, 2017. (*See generally* Boykin Petition for Attorney's Fees, Trustee Fees and Declaratory Judgment, R. p. 83.) Boykin's Petition sought recovery of attorney's fees and a declaration he should be entitled to exercise preeminent authority over Wortley and Belger, regarding Residuary Trusts A and B (collectively "Residuary Trust" or "Trust") established by the Will. (*Id.*) The Petition's main goal was to require the Trust to sell substantially all of the land in its portfolio, although the Testator had expressed a strong preference for preserving family land. (*Id.*) The Honorable Debra Branham, Judge of the Probate Court for Kershaw County, removed the matter to Circuit Court on September 1, 2017.

On September 8, 2017, Lemuel Whitaker Boykin, III, and May Cantey Boykin ("Cross-claimants") answered Boykin's Petition, asserted cross claims for removal, and sought damages against Wortley and Belger for breach of fiduciary duty and negligence. (*See generally* Answer and Cross claim of Lemuel Whitaker Boykin, III and May Cantey Boykin, dated September 8, 2017, R. p. 151.)

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

On May 7, 2018, Boykin amended his Petition. (Amended Petition, R. p. 298.) He asserted two new claims: (1) a claim to modify the Trust to require that his Co-Trustees follow the prudent investor rule, which Boykin believed required the trustees to diversify the Trust portfolio by selling Trust property and investing the proceeds in the stock market, and (2) a claim to remove Wortley and Belger as trustees. (*Id.* R. pp. 314-318, ¶¶ 60-77.) Wortley and Belger counterclaimed for removal of Boykin as a trustee. (Amended Answer and Counterclaim to Amended Petition at R. pp. 693-699, ¶¶ 48-75, and Second Amended Answer and Counterclaim to Amended Petition at R. pp. 817-822, ¶¶ 48-73.)

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

The trial court issued its Final Order and Judgment on May 24, 2019. (Final Order and Judgment, R. p. 9) The Order rejected Boykin's claim to be vested with pre-eminent authority over his Co-Trustees or to be appointed a special fiduciary, finding that the claim had "no basis in law or fact" (*Id*. R. p. 36); it rejected Boykin's request to modify the Trust (*Id.* R. p. 69); it rejected Boykin's request that Wortley and Belger be removed as trustees (*Id.*); and it granted Wortley and Belger's petition to remove Boykin as a trustee. (*Id.*)

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

FACTS

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

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

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

disproportionately large share of the Trust assets to be invested in land as opposed to other investments. (Final Order and Judgment at R. 16, Will Item XIV, B, R. p. 19.)

Mrs. Boykin died on August 8, 2016. (Final Order and Judgment at R. p. 20.) The assets of the marital trust poured into the Residuary Trust at that time. Boykin and Wortley were already trustees of the Residuary Trust, and Belger succeeded Mrs. Boykin as the third trustee of the Residuary Trust. (*Id.* 12-13, R. pp. 20-21.) On the very day Mrs. Boykin died, Boykin told Wortley and Belger he was unwilling to follow the Testator's desire to preserve family legacy property and that the Trustees should sell approximately 85% of the Trust's real property and invest the proceeds in the stock market. (*Id.* R. p. 21.) Both Wortley and Belger thereafter voted to sell some of the Trust's real property, but not the family legacy property. (*Id*.)

A formal management and investment plan for the Trust could not be made until appraisals of the Trust property were complete and the value of the Trust property obtained. (*Id.* R. pp. 23, 45.) Date of death appraisals for the Trust were not complete until November 7, 2017. (*Id.* R. p. 23.) In a March 12, 2017 Trustee Meeting, Wortley and Belger nonetheless took steps to produce an investment plan, and asked a Chartered Financial Analyst to present a summary of issues and a proposal for development of an Investment Policy Statement and Trust management plan. (*See* Pet. Tr. Ex. 145, Minutes of May 12, 2017 Trustee Meeting, at R. pp. 4033-4034; Pet. Tr. Ex. 120, Transcript of May 12, 2017 Trustee Meeting, R. pp. 3397-3418.) Boykin initially accepted and complimented this proposal (*id.*), but shortly thereafter rejected this proposal. Wortley and Belger then made plans to create their own investment plan for Trust assets ("Wortley Belger Plan" or "Plan").

Beginning with Mrs. Boykin's death on August 8, 2016, (Final Order and Judgment at R. pp. 20-21), and acting against the advice of the Trust's tax counsel, Karen Thomas, Esq., Boykin

began pursuing numerous avenues to sell Trust property, including family legacy property, without delay. (*See generally* Wortley Tr. Ex. 56 at R. pp. 5043, 5046, 5047, 5059-5060.) Among other things, he pursued an anonymous option agreement to purchase the most treasured family legacy property – the Boykin Millpond and surrounding acreage, including Downtown Boykin. Boykin informed Wortley and Belger that an undisclosed potential purchaser would pay for an option to later purchase this Trust property. (Respondents' Motion to Vacate Confidentiality Order dated June 26, 2018 at R. p. 574.) Boykin actively concealed the identity of the potential purchaser from his Co-Trustees, their counsel, and the Trust's tax counsel. (*Id*.) He stated only that he had "preliminary conversations" with conservation-minded organizations and individuals he had previously worked with in New York through his service as a purported board member and chairman of the Westchester Land Trust, who were allegedly interested in purchasing the property. (Pet. Tr. Ex. 121, Transcript of October 13, 2017 Trustee Meeting at R. pp. 3609, 3611-3612.) Boykin also formed, or caused to be formed, a Delaware limited liability company, Boykin Millpond Conservation, LLC, whose name was listed as the potential purchaser on various versions of the option agreement. (Respondents' Motion to Vacate Confidentiality Order at R. p. 574; Ex. 2 to Boykin Deposition, R. p. 2431.)

Meanwhile, the appraisals of the Trust's real property were finally completed, and Wortley and Belger testified under oath that they believed they had a duty to diversify, and planned on selling some Trust property, but not the legacy tracts, and investing the proceeds in the stock market. (Belger Dep. at R. p. 2539, line 18-p. 2544, line 25 and p. 2564, lines 17-25; Wortley Dep. at R. p. 2700, lines 8-14.) A summary of the Wortley Belger Plan for management of Trust assets was provided to Boykin on April 6, 2018. (*See generally* J. Becker email to J. Toal dated 4/24/2018, attached as Ex. C to Respondents' Brief in Opposition to Petitioner's Motion to Name

Untimely Rebuttal Witness, R. p. 2445.) This draft of the Plan includes a commitment to sell real property, to diversify the Trust's assets, and to pay reasonable income beneficiary distributions and Trustee's fees. (*Id.*) This Plan was discussed at a Trustee meeting which occurred on April 12, 2018. (Pet. Tr. Ex. 152, Minutes of April 12, 2018 Trustee Meeting at R. p. 4061.) A copy of the Plan was provided to the Court by email on April 24, 2018. (*See* Becker email to J. Toal dated 4/24/2018, with attachment, R. p. 2445.)

On May 7, 2018, rather than embracing the Wortley Belger Plan, Boykin amended his petition and asserted new and additional claims to modify the Trust to force the sale of family legacy land and to remove Wortley and Belger as Trustees. (Amended Petition at R. pp. 314-318, ¶¶ 60-77.)

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

STANDARD OF REVIEW

Disputes involving the administration of a trust sound in equity. *Floyd v. Floyd*, 365 S.C. 56, 93, 615 S.E.2d 465, 485 (Ct. App. 2005) (overturned due to legislative action). Appellate

review in equity matters is *de novo*. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011). Wortley and Belger therefore agree with Boykin that many of the issues on appeal will be decided under this *de novo* standard of review, but write separately to address Boykin's construction of this standard and his misplaced reliance on it.

Boykin believes that he is entitled to a clean slate and a new trial in the appellate court. He even asks the Court to engage in fact finding or appoint a special referee to do so in order to split the Trust, something the trial court declined to do. However, this appeal is not a new trial. An appellate court cannot ignore the crucial reality that the trial court was in a better position to evaluate the credibility of the witnesses who testified during the trial. *Wilson v. Gandis*, Opinion No. 27980 (S.C.Sup.Ct. filed June 3, 2020); *Lewis v Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 651–52 (2011) *(de novo* review in equity does not require the court to disregard the findings of the trial judge who was in a superior position to make credibility determinations). Additionally, Boykin retains the burden of demonstrating error in the trial court's findings of fact. *Lewis*, 392 S.C. at 385; 709 S.E.2d at 652; *see Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965).

ARGUMENT

Boykin has long desired to conduct a fire sale of the Trust's real property and invest the proceeds in the stock market. He told others he planned to sell Trust property even before Mrs. Boykin's death. He told his Co-Trustees that he wanted to sell virtually all of the Trust property the day after Mrs. Boykin died. Wortley and Belger opposed selling so much Trust real property, and particularly family legacy tracts, because doing so was against their father's wishes, as plainly expressed in his Will.

Boykin then began a campaign to remove their resistance. He became angry and yelled at trustee meetings. He threatened to sue Trust advisors for malpractice and to report them to the

IRS for fraud. He withheld his consent to recommended tax-saving and payment strategies to force the Trust into a position of illiquidity, so that it would have to sell its real property.

When Wortley and Belger continued to resist, he filed this case. Boykin asked the trial court to declare that he had preeminent authority over his Co-Trustees or to be appointed a special fiduciary, or, in other words, that he could overrule Wortley and Belger's objection to the sale of family property. He asked the trial court to modify the Trust to require Wortley and Belger to diversify the Trust by selling land and investing the proceeds in stocks and bonds. Finally, he asked the trial court to remove Wortley and Belger as trustees, so that there would no longer be an obstacle to sale.

Boykin lost on every claim. Indeed, the trial court expressly ruled that there was no basis in law or fact for Boykin's claim to preeminent authority and no basis in fact to modify the Trust. Moreover, the trial court actually removed Boykin as a trustee.

Yet Boykin still attempts to force his will on the Trust. He filed this appeal, and, relying on the Court's *de novo* standard of review, essentially asks the Court to conduct a second trial, as if the underlying case had not occurred.

Boykin's appeal should be denied in its entirety because he lacks standing to maintain it. He has no personal standing and lost any standing he might have as a trustee when he failed to appeal his removal. Boykin also failed to preserve many, if not all, of the issues raised in this appeal. He complains because the trial court did not expressly make an ultimately unnecessary finding of fact. Boykin failed to establish a basis for splitting the Trust or vacating any of the trial court's findings of fact. His memory of the evidence at trial is selective. He credits only his own testimony, and ignores the substantial evidence submitted at trial which contradicts his claims.

I. Boykin's appeal should be dismissed because he lacks standing to appeal.

Only a party "aggrieved by an order [or] judgment may appeal." Rule 201(b), SCACR. The word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation. *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). Accordingly, a party cannot appeal from a decision which does not substantially affect his or her interest. *Shaw v. City of Charleston*, 351 S.C. 32, 36, 567 S.E.2d 530, 532 (Ct. App. 2002). "As a general rule, to have standing, a litigant must have a *personal stake* in the subject matter of the litigation. One must be a real party in interest, i.e., a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 445, 665 S.E.2d 237, 241 (Ct. App. 2008) (citing *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006)) (emphasis added).

Boykin has no personal stake in his appeal, which attacks the trial court's rulings regarding management of the Trust. Boykin is not a Trust beneficiary. He emphasized this fact in the lower court, even referring to himself as a "disinterested" trustee in the caption of his pleadings. (Boykin Petition, R. p. 85.) Boykin's Statement of the Case in this appeal reaffirms that he "was the only one of the three original trustees who had *no personal stake in the operation or financial results of the Trust* or the manner or timing of distributions from it." (Amended Initial Brief of Appellant-Respondent at p. 4) (emphasis added). Boykin refers to himself as the "non-beneficiary trustee" in his Statement of Facts. (*Id.* at p. 4.)

Instead, Boykin's right to seek judicial relief with respect to the Trust stemmed solely from his status as a trustee. Trustees generally have standing to seek certain types of legal relief regarding a trust. *E.g.*, S.C. Code Ann. § 62-7-809 (2014) ("[a] trustee shall take *reasonable* steps to take control of and protect the trust property") (emphasis added); S.C. Code Ann. § 62-7-811

(2014) ("[a] trustee shall take *reasonable* steps to enforce claims of the trust and to defend claims against the trust") (emphasis added). The Will also vests Trustees with the ability to pursue certain types of trust litigation in appropriate circumstances.

However, Boykin's tortured tenure as a trustee ended on May 24, 2019, when the trial court removed him "as a Trustee of the Residuary Trust *effective immediately*." (Final Order and Judgment at R. p. 57 (emphasis added).) The trial court also specifically held that disputes about modification of the Trust were moot because Boykin "is no longer a trustee or beneficiary and has no standing to pursue modification." (*Id.* R. p. 61.)

Boykin has not appealed either his removal or the trial court's finding that, after his removal, he lacked standing to pursue relief related to the Trust. Because an unchallenged ruling, right or wrong, becomes the law of the case, *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012), Boykin lacks standing to seek judicial relief regarding the Trust, including the pursuit of his appeal. The contingent possibility that Boykin might regain standing if his removal as a Trustee were reversed, which would ordinarily support standing to appeal, does not exist in this case, *because Boykin did not appeal his removal*.

Boykin's lack of standing is dispositive of every issue raised by Boykin, and his appeal should be denied in all respects.

II. Many of the issues in Boykin's appeal are not properly before the Appellate Court.

Because South Carolina does not employ the plain error rule for appeals, parties are required to preserve issues for appellate review. 15 S.C. Jur., *Appeal and Error,* § 71 (March 2020 Update). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and to provide [the appellate court] with a platform for meaningful appellate review." *Herron v. Century BMW,* 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). They "prevent a party from keeping an ace card up his [or her] sleeve – intentionally or by chance – in the hope that an

appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *Id*. at 470, 719 S.E.2d at 645 (citing *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 406, 526 S.E.2d 716, 724 (2000)).

Boykin's appeal demonstrates a fundamental ignorance of preservation requirements. Boykin failed to set forth a number of issues in his Statement of Issues on Appeal. He failed to appeal an order of the trial court which was necessary to preserve certain arguments. Boykin also failed to properly file a post-trial motion. Other issues were discussed only in a brief and cursory manner. Cumulatively, these failures dispose of a large portion of Boykin's Appeal.

A. Boykin failed to set forth all matters raised in his brief in his statement of issues on appeal and discusses many arguments in only a brief, cursory fashion without citation to authority.

South Carolina appellate court rules provide that "[o]rdinarily no point will be considered which is not set forth in the statement of issues on appeal." Rule 208(b)(1)(B), SCACR. The statement of issues on appeal must be concise and direct. *Id.* Issues which are not clearly set forth in the statement of issues on appeal are therefore not preserved for review. *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 review where it was not included in statement of issues on appeal). Additionally, arguments that are brief, conclusory, and without citation to authority are insufficiently preserved for appellate review and deemed abandoned. *State v. Crocker*, 366 S.C. 394, 399 n. 1, 621 S.E.2d 890, 893 n. 1 (Ct. App. 2005).

Boykin included only the following three issues in his statement of issues on appeal:

1. Did the trial judge err by failing to adopt the resolution of splitting the Trust in two?
2. Did the trial judge err by failing to determine the net asset value of the Trust?

3. Did the trial judge err in making certain findings of fact which were, according to Boykin, not supported by the evidence?

(Amended Initial Brief of Appellant-Respondent at pp. 1-2.)

However, Boykin's Brief raises the following additional arguments which are not encompassed by these stated issues:

- The trial court erred by replacing Boykin as a trustee with Cheryl Holland or that this Court itself should replace Holland with an independent trustee. (Amended Initial Brief of Appellant-Respondent at pp. 22 and 29);[1]

- Wortley and Belger, as trustees, have, according to Boykin, an impermissible inherent conflict of interest. (*Id.* at pp. 23 and 27-28);

- Wortley and Belger's insistence of preserving family property was a violation of the Will as a matter of law. (*Id.* at p. 24-25 and p. 25 n. 5);

- The trial court erred in failing to remove Wortley, Belger, and Holland, as trustees, and the appellate court should do so now. (*Id.* at p. 26-27);

- Modification of the Trust is appropriate because of Hurricane Hugo and/or appreciation in the value of Trust property. (*Id.* at pp. 28-29); and

- This Court should restore Boykin's full attorney's fee award. (*Id.* at pp. 29.)

These arguments are therefore not properly before the Court. Rule 208(b)(1)(B), SCACR.

Boykin makes these arguments in a brief and cursory fashion, though he does repeat two of these allegations in more detail—namely, that Wortley and Belger suffer from an impermissible conflict of interest, and that changed circumstances of Hurricane Hugo and appreciation in the value of land justify modification of the Trust. What Boykin does not do is address the many reasons why the trial court rejected these exact arguments, address the authorities the trial court cited in support of its conclusions (*see* Final Order and Judgment at R. at 42, 52-57), or explain

[1] Boykin also failed to appeal a separate order the by the trial court confirming Holland's appointment as a trustee.

why Boykin feels the trial court's reasoning was incorrect. Boykin has failed to preserve these arguments for review.

B. Boykin's failure to properly file a motion to alter or amend precludes review of his argument regarding valuation of the Trust.

A motion to alter or amend must be filed to preserve an issue for appellate review if the issue was raised to the trial court, but not ruled upon. *State Farm Mutual Automobile Insurance Co. v. Goyeneche*, 429 S.C. 211, 226, 837 S.E.2d 910, 918 (Ct. App. 2019), reh'g denied (Feb. 20, 2020). Boykin's argument regarding the value of the Trust falls squarely within this rule. He argues that the parties raised this issue, but that the trial court failed to rule on the value of the Trust. A motion to alter or amend was therefore needed to preserve the issue. Boykin failed to file an effective motion to alter or amend, and, as a result, Boykin's contention that the trial court failed to determine the value of the Trust is not preserved for review.

The trial court issued its Final Order and Judgment on May 24, 2019. The trial court adjudicated the claims asserted by the parties before the court. The order is a final order under Rule 54(b), SCRCP. The only avenue provided by South Carolina's Rules of Civil Procedure to request that a court reconsider a final written order lies in Rules 52 and/or 59, SCRCP. *Norris v. Heyward*, 312 S.C. 67, 69, 439 S.E.2d 264, 265 (1993).

Under either rule, a request for reconsideration must be made no later than ten days after receipt of written notice of entry of the order. Rule 52(b), SCRCP ("[u]pon motion of a party made not later than 10 days after receipt of written notice of entry or judgment the court may amend its finding or make additional findings and may amend the judgment accordingly."); Rule 59(e), SCRCP ("[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of entry of the order"). These deadlines are "absolute." *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018). Trial courts lose jurisdiction when the

time to file post-trial motions has elapsed. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006).

Petitioner filed a *pro se* motion within this ten day time limit, and later refiled the same motion with an attorney's signature after the ten day period had expired. However, the trial court ruled that these motions were not properly filed. (Order Denying Motions to Alter or Amend Final Order and Judgment at R. pp. 74-75.) The trial court concluded that Boykin's *pro se* motion was improper because he was acting in a representative capacity and was not a licensed South Carolina attorney. (*Id.*) The court further concluded the subsequent re-filing of the motion signed by counsel failed to cure the defect, because it came after the ten day period for such motions, and was therefore untimely. (*Id.*)

Boykin has not appealed these rulings, and they are the law of the case. Boykin's contention that the trial court improperly failed to determine the value of the Trust is not preserved for review. *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding that the court should not address an issue which was not explicitly ruled on by the trial court or brought to the trial court's attention in a motion to alter or amend).

III. The trial court correctly denied Boykin's untimely request to split the Trust.

Boykin argues that the trial court erred in refusing to split the Trust for two reasons. First, he argues that, contrary to the trial court's ruling, the matter was properly before the trial court. Second, he argues that splitting the Trust is the best solution to the issues facing the Trust. Boykin asks this Court to take the extraordinary step of either reviewing the record and ordering a split of the Trust based on its own assessment of the properties and interests involved, or appointing a special referee to undertake a split of the Trust properties. Each of these positions is fundamentally flawed.

A. Boykin's request to modify the Trust by splitting it in two was not properly before the trial court.

Counterstatement of Standard of Review: The question of whether the trial court correctly ruled that an action to split the Trust was not properly before it is reviewed for an abuse of discretion. *Johnston v. Standard Oil Co. of New Jersey*, 155 S.C. 179, 179, 155 S.E. 176, 179 (1930) (the trial court's ruling, if exercised in the court's discretion based on a matter that falls within its discretion, will not be disturbed on appeal unless the ruling reflects an abuse of that discretion); *see also Berry v. McLeod*, 328 S.C. 435, 449-50, 492 S.E.2d 794, 802 (Ct. App. 2010) (the decision to permit or refuse an amendment is reviewed for an abuse of discretion). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).

The trial court ruled that splitting the Trust was not properly before it because Boykin had not asserted a claim to split the Trust in his pleadings, Wortley and Belger had not consented to trial of this issue, and Boykin never moved to amend his pleadings to conform to the evidence. (Final Order and Judgment at R. p. 59.) Boykin does not directly challenge these specific findings, but nevertheless argues he properly raised the issue in the proceedings below, and that, even if he failed to expressly do so, a liberal construction his pleadings permits a claim to split the Trust to be asserted. He is mistaken on both counts.

Boykin did not place the question of whether, and if so, how to divide the Trust before the trial court until his closing argument. Boykin identifies the following references to a split of the Trust during the proceedings below which he contends properly raised splitting the Trust to the trial court: (1) discussions at trustee meetings; (2) his motion to authorize sale of Trust property and his affidavit in support of this motion; (3) the Petition to establish an annual income distribution and Boykin's affidavit in support of this motion; (4) Boykin's memorandum in opposition to summary judgment; and (5) citations to certain parts of Boykin's own trial testimony. These references do not support Boykin's contention. They demonstrate only that Boykin informed the trial court that he had attempted to settle the controversy between himself and

Wortley and Belger by proposing a split of the Trust in out of court trustee meetings, not that he sought such a modification of the Trust from the trial court.

The references identified by Boykin are discussed below:

- Trustee meetings. Any discussions in trustee meetings obviously occurred out of court;
- Motion to Authorize Sale of Trust Property. This motion sought to force a sale of certain Trust property; it did not so much as hint at a court-ordered split of the Trust. (See generally Boykin Motion to Authorize the Sale of Trust Property, R. p. 179.) Boykin's supporting affidavit provides only that the sale would provide liquidity which might enable a split as a potential future "compromise." (Affidavit of Rigdon H. Boykin, dated January 16, 2018, attached as Ex. 2 to Boykin Response and Mem. in Opposition to Respondents' Motion for Partial Summary Judgment, R. p. 372, ¶ 19(c));
- Motion to Establish Income Distribution. This motion did not mention a split of the Trust. Boykin's affidavit in support of this motion noted only that Boykin had previously proposed a split of the Trust as a compromise or settlement. (Affidavit of Rigdon H. Boykin dated April 20, 2018 at p. 5, attached as Ex. 1 to Boykin Response and Mem. in Opposition to Respondents' Motion for Partial Summary Judgment, R. p. 364, ¶ 14);
- Opposition to Summary Judgment. Boykin's memorandum in opposition to summary judgment states only that Boykin had previously offered to split the Trust as a means of resolving the dispute between the trustees. (Boykin Response and Mem. in Opposition to Respondents' Motion for Partial Summary Judgment at p. 3, R. p. 348);
- Boykin Trial Testimony. Boykin's July 9, 2018 trial testimony was that he made prior offers to split the Trust and that he believes splitting the Trust is the best option. (July 9, 2018 Trial Tr. at R. p. 1362, line 14-p. 1363 line 13.) His references to the September 2018

trial transcript are references to the closing argument, the first time at which Boykin requested that the trial court split the Trust;

- Trial Exhibits. The exhibits to which Boykin refers are transcripts or agendas from out of court trustee meetings in which Boykin mentioned splitting the Trust as a way of solving the dispute between the trustees. (Petitioner's Exs. 123, 129 and 161, R. pp. 3656, 4004, 4077.)

Prior to closing argument, Boykin did nothing more than mention that he had previously proposed a split of the Trust as a means of compromise. He never offered any particular proposed split of the Trust directly to the trial court. He did not submit exhibits outlining or depicting a proposed split. He did not elicit any witness or expert testimony on what might constitute an equitable split of the Trust.

The trial court did not abuse its discretion in ruling that Boykin had not properly or timely raised the matter, and that, because evidence and testimony had not been presented on this question, the trial court was not in a position to grant such relief.

B. Liberal construction of pleadings does not save Boykin's request to split the Trust.

To avoid the trial court's ruling, Boykin argues, in a footnote, that his pleadings should be liberally construed to include a claim for splitting the Trust. (Amended Initial Brief of Appellant-Respondent at pp. 25, n. 6.) He further argues that the trial court is empowered to award any relief appropriate to the pleadings and the evidence without regard to the form of the prayer for relief. (*Id.*) Boykin is of course correct that South Carolina's Rules of Civil Procedure do not elevate form over substance, *see* Rules 8(f) and 54(c), SCRCP, but Boykin's argument stretches these rules too far.

The rules do not provide that pleadings should be construed to afford substantial justice to the *plaintiff*; rather, they state that "[a]ll pleadings shall be so construed as to do substantial justice to *all parties*." Rule 8(f), SCRCP (emphasis added). Rule 8(f) requires that pleadings be construed to equally protect the interest of both the plaintiff and the defendant. Moreover, "[i]t is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." *Shirley's Iron Works, Inc. v. City of Union,* 403 S.C. 560, 574 743 S.E.2d 748, 785 (2013) (quoting *S.C. Nat'l Bank v. Joyner,* 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986)).

Boykin's pleadings simply cannot be read to put Wortley and Belger on notice that Boykin was seeking a court ordered split of the Trust. The only time the word "split" appears in Boykin's pleadings is to describe the prior, historic split of the Residuary Trust into Residuary Trusts A & B in 1991. While Boykin's Amended Petition asserts a claim for modification of the Trust, it specifically sets forth the modifications sought, none of which are splitting the Trust. Boykin has in fact previously admitted that his pleadings do not assert a cause of action for splitting the Trust. (Boykin Mem. in Opposition to Summary Judgment at R. p. 348.)[2] Construing Boykin's pleadings to assert a claim for court ordered modification of the Trust works a substantial injustice on Wortley and Belger. Wortley and Belger and their counsel were legitimately surprised when Boykin's counsel asked the trial court to split the Trust in closing argument.

[2] Boykin equates the concepts of splitting the Trust and a formal "decanting" pursuant to S.C. Code Ann. § 62-7-816A, and concedes that he has not pleaded a cause of action for a decanting. He does, however, assert that his request that the trial court instruct the trustees regarding their fiduciary duties is broad enough to encompass a decanting. This argument is yet another example of Boyin's twisted logic. A decanting is an out of court process. S.C. Code Ann. § 62-7-816A(a). It requires court approval only if forbidden by the terms of the trust, a circumstance which does not apply here.

Similarly, Boykin cannot seek solace in the trial court's power to award relief supported by the pleadings and the evidence even if such relief has not specifically been sought. Rule 54(c), SCRCP provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," but the rule is subject to certain limitations. First, only the prevailing party can make use of the rule. Rule 54(c), SCRCP (every final judgment shall grant the relief to which "the party in whose favor it is rendered" is entitled); *Old Republic Ins. Co. v. Employers Reinsurance Corp*., 144 F.3d 1077, 1080 (7th Cir. 1998) (Rule 54(c) does not allow a trial court to award relief to a party that has not prevailed). Boykin did not prevail at trial, and cannot make use of Rule 54(c).

Second, "a party will not be given relief not specified in the complaint where the failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief." *Cooper v. General American Life Ins. Co.*, 827 F.3d 729, 732 (8th Cir. 2016) (quoting *Baker v. John Morrell & Co*., 382 F.3d 816, 831 (8th Cir. 2004); *see North Carolina Nat'l Bank v. Carter*, 322 S.E.2d 180, 183 (N.C. Ct. App. 1984) (relief under Rule 54(c) should be denied when the relief demanded was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial). Boykin did not assert a claim to split the Trust in his pleadings, and did not introduce evidence regarding what might be an equitable or practicable division of the Trust. Boykin categorically failed to appropriately request a split of the Trust before the trial court, and he cannot now manufacture such a claim from his general prayer for relief.

C. The appellate court should not serve as a forum for a second trial for splitting the Trust.

Boykin does not ask this Court to remand the case to the trial court to determine an appropriate division of the Trust. Boykin instead asks this Court itself to wade into the evidence and sort through the various attributes of each tract of land owned by the Trust in order to equitably

split the Trust. He alternatively asks the Court to appoint a special referee to take evidence and determine an equitable split.

The Court need not reach this request. It is relevant only if the Court were to conclude that the trial court abused its discretion in concluding that an action to split the Trust was not properly before it. If the trial court's ruling on that issue is affirmed, then Boykin's request that the Court engage in equitable division is moot.

In any event, Boykin's request is wholly inappropriate. The Court is free to find facts in accordance with its own view of the preponderance of the evidence under its equity standard of review, but the appellate court is not a forum in which to conduct a new trial. The role of the appellate court is to correct errors in the proceedings below. Boykin cites no authority other than the general standard of review in support of his contention that the Court should act in this manner.

D. Boykin failed to establish a legitimate justification for such an extreme modification to the Trust.[3]

Boykin devotes substantial time to arguing that a split of the Trust is the best solution to the issues facing the Trust. As discussed above, Boykin failed to preserve for review his arguments that Trust modification is necessary, i.e., because an impermissible conflict of interest exists, Hurricane Hugo unforeseeably damaged Trust property, L. Whitaker Boykin, III failed to produce a male child, and the value of Trust property unforeseeably appreciated. Boykin also failed to appeal the trial court's ruling that the diversification of Trust assets is not required because the Will alters the general rule, and, even under the Prudent Investor Act, trustees are permitted to consider the desire to continue a family business and the family's special attachment to the Trust property in making any decision regarding diversification. (Final Order and Judgment at R. p. 41.)

[3] Again, a claim to split the Trust was not before the trial court.

These rulings are adverse to Boykin and are the law of the case. Boykin cannot establish a justification for Trust modification.

Additionally and alternatively, these specific arguments should be rejected for the reasons set forth in the trial court's Final Order and Judgment, which are incorporated herein by reference. (*See id.* R. pp. 38-43.)

IV. The trial court correctly denied Boykin's untimely request to remove all three trustees.

Like Boykin's request to split the Trust, Boykin's request that the trial court replace all trustees, including himself, was first made in closing argument. The trial court concluded that the request for relief was not properly before the Court. While Boykin included this issue in his Statement of Issues on Appeal, he has not actually challenged the trial court's ruling. Boykin has not identified any instances in the Record in which this request was mentioned prior to his closing argument. It is not mentioned in his pleadings, and, in many ways, is wholly inconsistent with the causes of action actually asserted in Boykin's petitions. Boykin has abandoned this argument. *Bluffton Towne Center, LLC v. Gilleland-Prince*, 412 S.C. 554, 573, 772 S.E.2d 882, 892 (Ct. App. 2015) (an issue is abandoned if the argument in an appellate brief is not supported by authority or is only conclusory).

V. The trial court correctly denied Boykin's request to determine the value of the Trust.

Even if the Court were to conclude that the absence of a specific finding on the value of the Trust is preserved for review, Boykin's appeal of this issue should be denied. The trial court was not required to make a finding regarding the value of the Trust. Additionally, reversal or remand serves no purpose. A finding, whatever it might be, would have no effect on the outcome of this appeal or the administration of the Trust.

A. The trial court did not have to determine the value of the Trust.

Rule 52, SCRCP instructs a court sitting without a jury to find facts specially and separately state its conclusions of law. Rule 52(a), SCRCP. Our Supreme Court addressed this rule in *Noisette*, explaining that:

> [t]his Court has previously determined this requirement [to make findings of fact] to be directory and that noncompliance would not form the basis for invalidating a judgment. Rather, where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding.

304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991); *see also Borg Warner Acceptance Corp. v. Darby*, 296 S.C. 275, 279, 372 S.E.2d 99, 102 (Ct. App. 1988) (requirement is directory only and not basis for invalidating a judgment). South Carolina trial courts have never been required "to set out findings on all the myriad factual questions arising in a particular case." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). A trial court's findings of fact are sufficient if they allow an appellate court to properly review the underlying case. *Id.* (findings must be sufficient to allow an appellate court to ensure the law is faithfully executed below).

Here, this Court can readily determine whether to affirm or reverse the rulings challenged by Boykin without a specific finding regarding the value of the Trust. The value of the Trust plays no role in review of the other issues raised in Boykin's Statement of Issues on Appeal. Boykin spends approximately seven pages of his Brief arguing that the trial court should have split the Trust or removed all three trustees, but nowhere in this discussion does Boykin even mention the value of the Trust. The Trust's value does not bear on the trial court's refusal to modify the Trust. Similarly, the Trust's value is irrelevant to whether the Record supports the other unrelated findings of fact challenged by Boykin. Because this Court can properly review this case in the absence of a finding regarding the value of the Trust, the absence of such a finding does not warrant reversal.

B. It was not appropriate for the trial court to determine a specific value.

The trial court correctly declined to make a specific finding regarding the value of the Trust. This case did not involve, for example, a divorce in which the value of the Trust had to be determined on a specific date, or a claim for damages which required a calculation of the value of the Trust. The court denied Boykin's motion to set a minimum income distribution – a ruling which Boykin has not appealed.[4]

The trial court was also cognizant of the fact that Trust value may change over time. (Final Order and Judgment at R. p. 52.) As a result, a determination of the value of the Trust at any particular point in time, such as the date of the trial court's Final Order and Judgment, has little utility.

Against this backdrop, it was proper for the trial court to decline to interfere in the management of the Trust by finding, as a fact, that the Trust had a particular net asset value. *See Wannamaker v. South Carolina State Bank*, 176 S.C. 133, 179 S.E. 896, 903 (1935) (courts of equity may interfere with trust administration, "however, such power should be exercised only in cases of real necessity"); *Sarlin v Sarlin*, 312 S.C. 27, 31, 430 S.E.2d 530, 533 (Ct. App. 1993) (same); *see also Estate of Stevens v. Lutch*, 365 S.C. 427, 431, 617 S.E.2d 736, 738 (Ct. App. 2005) (the mere fact that if the discretion had been conferred upon the court, it would have exercised the power differently is not a sufficient reason for interfering with the exercise of the power by the trustee).

[4] To the extent that a finding of the value of the Trust may have been relevant to Boykin's motion to establish a minimum annual distribution to the income beneficiaries, no finding of fact was necessary. *Kinghorn v. Sakakini*, 426 S.C. 147, 151, 825 S.E.2d 748, 750 (Ct. App. 2019) (Rule 52, SCRCP, does not require the court to make findings of fact on any motion except one for involuntary dismissal under Rule 41).

VI. Ample evidence supports the trial court's findings of fact.

Boykin requests that this Court vacate *all* of the findings of fact made by the trial court because, he contends, *some* of the findings are against the weight of the evidence. Boykin identifies findings which he argues are against the weight of the evidence, but also suggests that there are other errors which he has not identified.

The Court should not indulge Boykin in this manner. The challenged findings are supported by ample evidence. Vacating the findings which Boykin has expressly challenged also serves no purpose. None of these findings were critical to the trial court's ultimate decision to enter judgment against Boykin on all claims – and Boykin has not appealed the trial court's decision to remove him as a trustee. Stated differently, if the Court were to determine that any of the challenged findings were against the weight of the evidence, the hypothetical error by the trial court in making that finding would be harmless. *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997) ("An error not shown to be prejudicial does not constitute grounds for reversal."). Finally, as for the alleged errors which Boykin declined to identify, this Court has no obligation to comb the record in search of such matters. *Watson v. Underwood*, 407 S.C. 443, 452 n.9, 756 S.E.2d 155, 160 n.9 (Ct. App. 2014) (appellants have the responsibility to identify errors on appeal, not the court).

Boykin leans heavily on the *de novo* standard of review, and suggests that this Court should view the evidence as if it were the trial court in the first instance. However, a *de novo* standard of review does not relieve an appellant from demonstrating error in the trial court's findings of fact. *Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011). This Court is not required to ignore that the trial court saw and heard the witnesses and was in a better position to evaluate their credibility. *Id.* at 385, 709 S.E.2d at 652. Boykin failed to carry his burden that the challenged factual findings are against the weight of the evidence.

The ample evidence supporting each challenged finding of fact is detailed below:

A. Boykin imprudently planned to sell all or virtually all of the Trust real estate as quickly as possible.

Trust counsel Karen Thomas testified that Boykin called for the sale of 85% of Trust property and pressed for sale as soon as possible, because he believed there was a real estate bubble in Kershaw County. (Sept. 27-28, 2018 Trial Tr. at R. p. 1935, line 18-p. 1936, line 4.) Boykin made this intention clear in the very first trustee meeting, and on multiple occasions thereafter. (*Id.* R. p. 1907, line 15-p. 1908, line 2.) Thomas further testified that Boykin did not consider that it would take considerable time to sell the 5,900 acres, and that selling this property in short order might negatively affect sale prices. (*Id.* R. p. 1977, line 15-p. 1978, line 3.) Daisy Heimbach testified that Boykin believed that all but 15% of the Trust real property should be sold as quickly as possible, with the proceeds to be invested in stocks. (*Id*. R. p. 2127, lines 1-6.) The trial court's finding is not against the weight of the evidence.

B. Boykin opposed the 2012 transfer of assets to Alice Boykin that Trust counsel George Bailey proposed to take advantage of the generation skipping tax exemption, and insisted that no more than 20% be transferred.

Boykin suggests in his brief that the court's finding in this regard is "non-sensical," and questions why "if things transpired as Judge Toal found, there would have been nothing to document it." (Amended Initial Brief of Appellant-Respondent at p. 38.) This assertion ignores the ten different trial exhibits devoted exclusively to this topic, starting with George Bailey's original November 26, 2012 recommendation to Alice S. Boykin to identify various legacy properties under the Will for transfer from Marital Trust B to Alice S. Boykin, individually, and then to Residuary Trust A, so that Alice Boykin and all other Trust beneficiaries could benefit through fully utilizing the then $5.12 million unified estate and gift tax credit and generation skipping tax exemption, which was set to drop to $1.0 million as of December 31, 2012. (Wortley

Trial Ex. 28, R. p. 4933.) The very next exhibit is an email between George Bailey and Boykin discussing the recommendation. (Wortley Trial Ex. 29, R. p. 4935.) The exhibits progress from the pleadings and orders filed with the probate court for court approval of the transfer to emails and letters from Mr. Bailey to the various parties, including Boykin, notifying them of court approval and providing a consent form for all of the Testator's children to approve the transfer. (Wortley Trial Exs. 28-37, R. pp. 4933-4954).

Boykin's assertion that the trial court's factual finding is "non-sensical" also ignores George Bailey's unwavering testimony on direct- and cross-examination that Boykin essentially said "I don't like it" and, if Bailey attempted to transfer more than 20%, then May Cantey Boykin would not consent to any transfer. (Sept. 27-28, 2018 Trial Tr. R. p. 1821, line 20-p. 1825, line 16; p. 1837, lines 18-19.) The evidence and testimony further reveals that Boykin complained that the appraisals obtained to value the property were too low, when lower values were more advantageous for minimizing estate and generation skipping taxes. (*Id.*) Boykin, a lawyer and a Trustee, also stated to Mr. Bailey that he "represented" May Cantey Boykin, even though Ms. Boykin is a beneficiary of the Trust. (*Id.*) This reveals a profound conflict of interest and breach of Boykin's duties as a trustee.

Boykin's suggestion that Mr. Bailey "was somewhat confused about exactly what happened in this connection in 2012" (Amended Initial Brief of Appellant-Respondent at p. 38) is wishful thinking on his part and an attempt to white-wash the record. On cross-examination, Mr. Bailey was asked whether Boykin's and May Boykin's real objection was to a possible transfer of a conservation easement to the Congaree Land Trust, not the proposed transfer of properties to Alice Boykin. Mr. Bailey reiterated his testimony on direct that May Boykin, acting through her "representative," Rigdon Boykin, would not consent to a transfer of more than 20% of the property

to Alice Boykin. As for the conservation easement, Mr. Bailey testified that "the family as a whole [] was not in agreement with the conservation easement concept, so we abandoned it." (Sept. 27-28, 2018 Trial Tr. R. p. 1836, line 23-p. 1838, line 18.) Furthermore, if the proposed conservation easement was, in fact, the primary objection, then Boykin failed to offer any such evidence or testimony at trial in his reply case.

Boykin's argument that Mr. Bailey "could have continued to ask for [Boykin's] cooperation in 2013, 2014, and 2015" after Congress extended the $5.12 million tax exemption is completely self-serving and beside the point. (Amended Initial Brief of Appellant-Respondent at p. 38.) As Bailey testified "given the timeframe we were working under, any bump in the road would have put us past 2012. So, basically, you had to go along or get nothing accomplished." (Sept. 27-28, 2018 Trial Tr. at R. p. 1822, lines 13-16.) The transfer of a 20% interest in the identified properties had already occurred in 2012. (*Id.* R. p. 1824, line 24-p. 1825, line 2.) And if Boykin had indeed been willing to reconsider his opposition to any transfer of more than 20%, he certainly could have offered to do so in 2013, 2014, or 2015. Again, Boykin failed to offer any such evidence at trial in his reply case.

The trial court's finding that Boykin opposed the transfer of 100% of the identified properties in order to fully utilize the then available $5.12 million unified estate and gift tax credit and generation skipping tax exemption is supported by an overwhelming preponderance of the evidence.

C. Boykin's argument that Wortley and Belger failed to conduct regular trustee meetings is specious.

As a preliminary matter, this statement by the trial court is a legal conclusion, not a finding of fact. Were it to be considered a finding of fact, however, the trial court's conclusion is wholly supported by the evidence submitted at trial. It was undisputed that the trustees held 24 meetings

during the 24 month time period in question. (July 9, 2018 Trial Tr. at R. p. 1418, line 24-p. 1419, line 23; p. 1469, lines 13-18.) In other words, the trustees averaged one in person meeting per month.

Trust counsel Karen Thomas testified that the gap in meetings in the summer of 2017 was primarily caused by issues with her schedule. She personally had a scare with skin cancer, and another partner in her firm had another form of cancer. (Sept. 27-28, 2018 Trial Tr. at R. p. 1960, line 17-p. 1961, line 19.) In fact, it was Wortley who had to suggest to Thomas that it was time to resume in person meetings. (*Id.*) Wortley and Belger were not to blame.

Finally, it was also undisputed that even during the gap in face to face meetings, trustees continued to do business by phone and email. (July 9, 2018 Trial Tr. at R. at p. 1232, lines 19-25, p. 1309, lines 5-7, p. 1469, lines 18-25; Sept. 27-28, 2018 Trial Tr. at R. p. 1960, line 17-p. 1961, line 19.) Karen Thomas testified that she frequently spoke to Boykin on the phone during this period of time. (Sept. 27-28, 2018 Trial Tr. at R. p. 1960, line 17-p. 1961, line 19.)

The trial court correctly ruled that Boykin's argument that Wortley and Belger had breached their fiduciary duty by failing to conduct trustee meetings during this period of time was specious. The evidence admits of no other conclusion.

D. Boykin took positions that were intended to manipulate his Co-Trustees into acquiescing to his approach.[5]

The evidence supports the trial court's finding that Boykin took actions not for the good of the Trust but to gain leverage to force his Co-Trustees to sell family legacy property. Thomas testified that Boykin told her he opposed the 6166 tax election because, if the Trust did not receive additional time to pay its tax obligations, it would have to sell property immediately to generate

[5] Boykin also challenges separate findings by the trial court that he refused to consent to section 6166 and 2032 to gain leverage over his Co-Trustees. Because these findings overlap substantially, they will all be addressed in this section of the Brief.

cash. (Sept. 27-28, 2018 Trial Tr. at R. p. 1953, line 8-p. 1954, line 22.) The trial court also observed that Boykin's actions were a tactic to put pressure on his Co-Trustees. (*Id.*)

Moreover, Thomas testified that Boykin requested that she research whether an adopted grandchild could inherit under the terms of Mr. Boykin's Will, so as to use the threat of an adopted child inheriting property that would have otherwise gone to Belger's daughter, the principal remainder beneficiary, as "leverage" against Belger. (*Id.* R. p. 1925, line 20-p. 1928, line 20.) Boykin's actions arose from Belger's "resistance" to Boykin's suggestion that Belger purchase certain Trust properties for $1.5 million. (*Id.*) Such actions clearly demonstrate that Boykin took actions that had no justifiable purpose other than forcing his Co-Trustees to acquiesce to his demands.

E. Boykin treated his Co-Trustees and Trust counsel Karen Thomas with disrespect and frequently belittled them.

Boykin's assertion that this finding is against the weight of the evidence borders on frivolous. Thomas testified that Boykin's attitude and demeanor toward her changed and became "hurtful" because "of his disrespect of [Thomas]," in Trust meetings. (Sept. 27-28, 2018 Trial Tr. at R. p. 1967, lines 2-12.) Boykin told Thomas that Trust votes were illegal and that she should notify her insurance carrier because he was going to sue her. (*Id.* R. p. 1967, lines 17-22.) Thomas testified that Boykin threatened her and his Co-Trustees "a lot." (*Id.* R. p. 1967, lines 23-25) She stated that in thirty years of law practice, she had never encountered someone so disrespectful of his trust advisors and Co-Trustees. (*Id.* R. p. 1968, lines 1-11.)

Boykin also threatened to report Thomas to the IRS for fraud. (*Id.* R. p. 1968, line 21-p. 1969, line 2; *see also* Wortley Trial Ex. 50, May 4, 2017 e-mail from R. Boykin to K. Thomas, at R. p. 5053.) Upon questioning from the trial court, Boykin admitted making this threat because

he was "madder than the devil," and that his behavior was terrible and totally wrong. (Sept. 27-28, 2018 Trial Tr. at R. p. 2186, line 23-p. 2188, line 17.)

Boykin's Co-Trustees, Wortley and Belger, testified in their depositions that Boykin was disrespectful in Trust meetings.[6] Belger testified that every time she talked to Boykin at Trust meetings, Boykin was angry. (Belger Dep. at R. p. 2628, lines 16-22.) Belger also testified that Boykin was bitter and yelled at her. (*Id.* R. p. 2636, lines 3-10.) Boykin told Wortley that she was not allowed on his property, even if he should die. (Wortley Dep. at R. p. 2802, lines 6-11.) Wortley testified that Boykin would get very angry if she did not agree with him, and that Boykin said angry things in trustee meetings. (*Id.* R. p. 2829, lines 13-22.)

F. There is no evidence that Wortley and Belger improperly balanced their loyalties.

Boykin argues that Wortley and Belger possessed an inherent conflict of interest between their duties to the remainder beneficiaries and the income beneficiaries, and that the trial court erred in concluding that Wortley and Belger had not improperly balanced their loyalties. This argument fails. The trial court ruled that no improper inherent conflict of interest existed, and that the Will favored remainder beneficiaries over income beneficiaries. Boykin failed to properly appeal these rulings. They do not appear in his statement of issues on appeal. He characterizes these rulings as findings of fact, when they are in fact conclusions of law, and he has failed to address the reasoning and authorities cited by the trial court in support of these conclusions. These rulings are the law of the case, and defeat Boykin's argument.

Out of an abundance of caution, Wortley and Belger will address Boykin's specific arguments. He argues that Wortley and Belger improperly balanced their loyalties between income and remainder beneficiaries by: (1) refusing to conduct trustee meetings; (2) blocking

[6] Wortley and Belger's complete deposition transcripts were admitted in evidence.

Boykin's efforts to sell the bulk of Trust property and invest those proceeds in the stock market; (3) by failing to provide information to the Cross-claimants; (4) with respect to Belger, by being interested in purchasing property from the Trust; and (5) filing a motion to amend their Answer to reflect the evidence that the value of the Trust property was less than the parties had originally estimated. (Amended Initial Brief of Appellant-Respondent at p. 40-41.)

These arguments are seriously flawed. Most of these arguments are irrelevant because they do not bear on the finding actually challenged by Boykin – that Wortley and Belger did not improperly favor remainder beneficiaries over income beneficiaries.

Additionally, Boykin's arguments suffer from individual failings. The argument that trustees failed to conduct meetings is, as discussed above, specious. Boykin's argument regarding Wortley and Belger's refusal to sell the bulk of Trust property fails in light of the trial court's rulings favoring the Wortley and Belger Investment Plan over Boykin's proposal and rejecting Boykin's argument that the prudent investor rule required them to diversify by selling land – rulings which Boykin has not appealed. Finally, it is difficult to imagine how seeking to amend one's pleadings to conform to the evidence, i.e., that the value of Trust property was lower than previously expected, could be considered a breach of fiduciary duty.

Boykin simply ignores other evidence in the Record which showcases Wortley and Belger's attempts to accommodate all parties to whom they owed a duty of loyalty. Six of the eight beneficiaries supported Wortley and Belger's actions. (Final Order and Judgment at R. p. 56.) Additionally, Wortley and Belger repeatedly offered to reduce the income they would receive from the Trust, as income beneficiaries, so that Cross-claimants could receive a greater distribution. (*See, e.g.*, Wortley Trial Ex. 2 at R. pp. 4389-4390, ¶ 6.b.; Wortley Dep. (Belger and Wortley would be willing to "give up [their] part" if necessary) R. p. 2785, lines 5-17.)

G. The Will expresses a preference for the interest of the remainder beneficiaries over those of the income beneficiaries.

Counterstatement of Standard of Review: The construction of a will is an action at law. *Estate of Gill v. Clemson Univ. Foundation*, 397 S.C. 419, 425, 725 S.E.2d 516, 520 (Ct. App. 2012). The Court of Appeals reviews questions of law de novo. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 569, 776 S.E.2d 397, 402 (Ct. App. 2015). In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Estate of Gill*, 397 S.C. 419, 425, 725 S.E.2d 516, 520 (Ct. App. 2012).

Boykin argues that this statement by the court is a "gross factual error." (Amended Initial Brief of Appellant-Respondent at p. 41.) Of course, this statement is not a finding of fact at all, but a legal conclusion reached in the construction of a written instrument, the Will. The trial court concluded that the Will expresses a preference for the interest of the remainder beneficiaries over the income beneficiaries because the Will waives the underproductive property rule, thereby allowing the Trustees to retain land whether or not it produces income for the income beneficiaries; and the Will instructs the Trustees to consider what other economic resources an income beneficiary might possess in determining distributions. (Final Order and Judgment at R. at 56.)

Boykin does not address in any way the provisions of the Will upon which the trial court relied. Instead, he points to language in the Will in which the Testator declared that, with respect to distributions among income beneficiaries, the distributions should be as equitable as possible, and that the Trustees are empowered to invade the principal to provide for income beneficiaries if needed. The first provision Boykin cites, Item VIII(1) is concerned with equality *among income beneficiaries*, and does not speak to the status of remainder beneficiaries as compared to income beneficiaries. And Boykin misinterprets the second provision he cites. He points to Item VIII(2) as demonstrating that the "trustees could invade principal (to the detriment of the remainder beneficiaries) if necessary to provide for the comfort of one of the income beneficiaries "as the need arises." Boykin fails to point out that this power to distribute principal to income

beneficiaries is discretionary with the Trustees, not mandatory. Also, this discretionary trust benefit of receiving distributions of principal also applies for "the issue of a deceased child," which would be a remainder beneficiary. Thus, this provision does not demonstrate, as Boykin argues, that the Will "is quite clear that the trustees are to give equal if not greater consideration to the income beneficiaries as to the remainder beneficiaries." (Amended Initial Brief of Appellant-Respondent at p. 41). This provision of the Will is, for Boykin, at best neutral.

H. Boykin refused to consent to use the irrevocable life insurance trust loan for the payment of estate taxes.

There is ample evidence that Boykin refused to consent to allowing insurance funds to be used for the payment of estate taxes. Karen Thomas testified that she prepared a memo for Wortley and Boykin outlining the proposal to use the insurance funds in this manner. (Sept. 27-28, 2018 Trial Tr. at R. p. 1942, line 17-p. 1943, line 18; Wortley Tr. Ex. 56 at R. p. 5046.) Wortley voted to do so, but Boykin voted no. (Sept. 27-28, 2018 Trial Tr. at R. p. 1942, line 17-p. 1943, line 18.)[7] He was not willing to let the funds be used in that manner at that time. (*Id.*) Indeed, Boykin's argument does not deny these facts; instead, he attempts to justify his refusal by explaining the reasons he voted no. (Amended Initial Brief of Appellant-Respondent at pp. 41-42.) That Boykin later relented does not change the fact that, for a long period of time, he refused to consent – just as the trial court found.

I. Boykin delayed the date-of-death appraisals and required appraisers to employ a unique valuation method that caused the properties to have inaccurate, higher values.

Again, Boykin simply ignores the evidence which supports the trial court's finding of fact. There is no dispute that registered forester Jimmy LaFrage was hired to perform timber appraisals for the various tracts of land owned by the Trust, after Mrs. Boykin died, for purposes of preparing

[7] Wortley and Boykin were the only Trustees of the irrevocable life insurance trust.

the estate tax return. (July 9, 2018 Trial Tr. at R. p. 1429, line 8-p. 1430 line 8; Pet. Exs. 20-22, 24, R. pp. 3037-3040, 3045.) It is also undisputed that LaFrage was forced to delay this work at Boykin's request. In an email from LaFrage to Karen Thomas and the Trustees, LaFrage stated that:

> I basically stopped all operations I had going to complete selected tracts at Rigdon's request as fast as possible to a prospective sale of land . . . I was asked to do select pieces of properties (parts of large properties) due to perspective [sic] buyers of land and completed those.

(Pet. Ex. 24, R. p. 3045.) In the midst of this delay, and at great expense to the Trust, Boykin retained Charleston Appraisals to perform appraisals of properties that he believed Belger and Wortley should purchase from the Trust. (Wortley Tr. Ex. 56, Letter of K. Thomas to J. Becker, at R. p. 5036.) Thomas noted that the appraisals were "not of the values as the date of death," but "were of lines [Boykin] had the appraisers *imagine* were drawn in the properties." (*Id.* R. p. 5048 (emphasis added).) Thomas further noted that she received "numerous calls from the appraisers as to this odd concept and how difficult it was for them to prepare an analysis." (*Id.*) In addition, John Helms extensively discussed the adverse issues with the methods used by Charleston Appraisal in his testimony at trial. (July 10, 2018 Trial Tr. at R. p. 1650, line 9-p. 1656, line 3.)

J. Boykin opposed the Section 6166 tax election to gain leverage over the other Co-Trustees.

Boykin completely fails to disprove the overwhelming documentary and testimonial evidence presented at trial (including his own email message) that he did, in fact, oppose the 6166 election to cause the Trust to be illiquid so that his Co-Trustees would have to sell Trust real property. (Sept. 27-28, 2018 Trial Tr. at R. p. 1951, line 10-p. 1955, line 1; Wortley Tr. Ex. 50, R. p. 5022.) Indeed, a principal reason that he "fired" the Trust's tax counsel, Karen Thomas, and threatened to report her to the IRS for fraud, was because she assisted Wortley and Belger, the co-

personal representatives of the estate of Alice Boykin, in claiming the election for the estate tax return. (*Id*. R. p. 1950, line 12-p. 1951, line 1; p. 2031, line 7-p. 2032, line 12.)

Boykin erroneously complains that the "Final Order even goes so far as to say that Rigdon 'admitted error' in refusing to consent to the Section 6166 tax election . . . which is a blatant mis-statement of his testimony." (Amended Initial Brief of Appellant-Respondent at p. 42.) The trial transcript directly contradicts this assertion. Boykin's actual words on the witness stand were "[a]nd, perhaps, I was [i]n error, Your Honor." (Sept. 27-28, 2018 Trial Tr. at R. p. 2182, lines 1-14.)

K. Boykin opposed the Section 2032(a) tax election to gain leverage over the other Co-Trustees. (Final Order at R. pp. 25-26.)

Boykin selectively cites only his own testimony to support his assertion that *Karen Thomas agreed with him* that Alice Boykin's "operation of the Trust's assets" did not qualify for the Section 2032(a) election. (Sept. 27-28, 2018 Trial Tr. at R. p. 2178, line 9-p. 2179, line 18.) Ms. Thomas's full testimony directly contradicts this assertion. She testified that after she discussed the issue early on with Mr. Bailey, and Mr. Siddons, another tax specialist who briefly represented Alice Belger, they all agreed this "seemed like an ideal estate" to use the election "since we have the precatory language in the [Will] to please keep these properties." (*Id*. R. p. 1896, lines 7-12; p. 1900, lines 9-18.) Thomas also testified that in her professional opinion the estate had a greater than 50% likelihood of qualifying for the election. (*Id*. R. p. 1915, lines 4-13.)

Boykin also erroneously claims, based on a February 2018 email which was not admitted into evidence, that Thomas never planned on or wanted to use the 2032(a) election if it would commit the Trust to stay in a business. (Amended Initial Brief of Appellant-Respondent at 43-44.) In response to a request on cross-examination to "clear up" the issue, Thomas testified: "[t]here is no way we could have made that decision because [Rigdon] would not allow us to discuss it.

What [Rigdon] told me is he wouldn't allow it, so how could we even investigate doing it?" (Sept. 27-28, 2018 Trial Tr. R. p. 2018, line 20-p. 2019, line 5; see also *id*. R. at p. 1914, line 20-p. 1917, line 25; p. 2030, line 22-p. 2031, line 25.)

This testimony alone supports the trial court's conclusion that "Petitioner refused to consent to or even to allow the Trust to investigate whether it could qualify for the Section 2032A election," and demonstrates his obvious willingness "to forego potential estate and generation skipping tax savings to gain additional leverage in his attempts to force his Co-Trustees to immediately sell the Trust's real estate holdings." (Final Order & Judgment at R. pp. 25-26.)

L. Boykin caused the bank to freeze the Trust accounts.

Again, Boykin cites only his own testimony to support his assertion that the trial court's finding is "directly contrary to the evidence." The trial court's conclusion is amply supported by other evidence and testimony in the record. (Wortley Tr. Ex. 56 at R. pp. 5058-5059; Sept. 27-28, 2018 Trial Tr. at R. p. 2131, line 4-p. 2132, line 8.)

M. Boykin improperly withheld the identity of the Haile Gold Mine.

Boykin once again ignores the compelling evidence below which does not support his contention that he had a good-faith basis for withholding the identity of the Haile Gold Mine. Dave Thomas, an executive for the Haile Gold Mine, was deposed, and his deposition was submitted into evidence by agreement. He was questioned about the need for secrecy regarding the Gold Mine's identity, and stated all of the following:

- he had no idea that the Gold Mine's identity was being withheld from Wortley and Belger (Thomas Dep. at R. pp. 630-31; Final Order and Judgment at R. p. 32);
- there was no need for the degree of secrecy sought by Boykin regarding the Gold Mine's interest in the property (Thomas Dep. at R. p. 616; Final Order and Judgment at R. p. 32);
- he had no interest in concealing the Gold Mine's identity from Wortley and Belger (Thomas Dep. at R. p. 617, 618; Final Order and Judgment at R. p. 32); and

- the Gold Mine had never in its history concealed its identity or used a surrogate [the proposed Boykin Millpond Conservation, LLC] to purchase property (Thomas Dep. at R. p. 618).

Notably, after Dave Thomas's deposition was taken, the prior confidentiality order which protected the identity of the Haile Gold Mine was vacated by the trial court with the consent of all parties.

There was no need for secrecy regarding the identity of the Gold Mine and Boykin actively misled both his Co-Trustees and the trial court on this issue. The trial court's finding is not against the weight of evidence.

VII. Conclusion

Boykin's appeal should be dismissed or denied because he:

- lacks standing to maintain this appeal;
- failed to preserve many of his arguments for review;
- failed to appeal other rulings which are the law of the case and handicapped his arguments;
- failed to demonstrate that this Court should act on its own to split the Trust in two;
- failed to establish that the trial court was required to determine the value of the Trust or that such a finding affected the judgment below; and
- failed to show that the trial court's other findings of fact were against the weight of the evidence.

HAYNSWORTH SINKLER BOYD, P.A.

s/ James Y. Becker
James Y. Becker (SC Bar No. 64991)
Robert L. Reibold(SC Bar No. 9284)
Mary C. Eldridge (SC Bar No. 102698)
P.O. Box 11889
Columbia, South Carolina 29211-1889
(803) 779-3080
jbecker@hsblawfirm.com

Attorneys for Respondent-Appellants

January 27, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Jean 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 Whitaker Boykin, II Residuary Trusts A and B.....Appellant-Respondent

v.

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

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

And

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

PROOF OF SERVICE

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

1. **Final Response Brief of Respondent-Appellants**

Parties of Record

Wallace K. Lightsey, Esquire Wade S. Kolb, III Post Office Box 728 Greenville, SC 29602 wlightsey@wyche.com wkolb@wyche.com *Attorneys for Appellant Rigdon H. Boykin*	William S. Tetterton Post Office Box 530 Camden, SC 29021 wstmail@bellsouth.net *Attorney for Respondents Lemuel Whitaker Boykin, III; and May Cantey Boykin*

HAYNSWORTH SINKLER BOYD, P.A.

January 27, 2021
Columbia, South Carolina

By: _____
Amanda Willoughby
Litigation Paralegal