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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge
Case No. 2013-CP-02-1337

Appellate Case No. 2019-000362

Adele J. Pope, ……..……Appellant,

v.

Estate of James Brown and The James Brown 2000 Irrevocable Trust, ... Respondents

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RETURN TO APPELLANT'S MOTION TO SUPPLEMENT THE RECORD OR TAKE JUDICIAL NOTICE

Russell Bauknight, as Personal Representative and Trustee of Respondents, the Estate of James Brown and the James Brown 2000 Irrevocable Trust, respectfully submits this Return to the Motion to Supplement the Record or Take Judicial Notice ("Motion") filed by Appellant Adele Pope. In connection with her petition for rehearing or rehearing en banc, Ms. Pope asks the Court to take judicial notice of (1) a *New York Times* article from December 2021 discussing the sale of the James Brown Estate; and (2) the entire record of Appellate Case No. 2020-000967, which was dismissed in October 2020. (Motion, at 1.) Because these materials are not proper subjects of judicial notice and because the request for supplementation or judicial notice is untimely, the Motion should

be denied.

BACKGROUND

Appellant's Motion requests supplementation or judicial notice of two separate items: (1) a *New York Times* article from December 2021 regarding the sale of Estate assets to Primary Wave Music; and (2) the record in Appellate Case No. 2020-00967.

A. *New York Times* Article

On December 13, 2021, the *New York Times* published an article regarding the sale of James Brown's Estate to Primary Wave Music. Appellant quotes a portion of the article stating that "'[t]he deal with Primary Wave ha[d] been in the works for nearly four years' in December 2021." Motion, at 3. For purposes of responding to the Motion, Respondents will assume that Appellant is asking the Court to take judicial notice that the sale of the Estate to Primary Wave Music was negotiated over a period of four years.

II. Appellate Case No. 2020-000967

Appellant also seeks supplementation or judicial notice of "[t]he record in this Court of *Adele J. Pope vs. Estate of James Brown and the James Brown 2000 Irrevocable Trust*, Case No. 2020-000967." (Motion, at 1.) In that matter, Appellant appealed an order of the circuit court granting Respondents' motion for leave to deposit into court the amount of the award granted to Appellant for her services as special administrator of the Estate ("SA fees"). This Court dismissed the appeal as interlocutory on October 14, 2020, and the South Carolina Supreme Court subsequently denied Appellant's petition for a writ of certiorari. Appellant's Motion does not identify any specific fact in the appellate record that are relevant to her request for supplementation, nor does she specify the fact or facts

for which she seeks judicial notice.

ARGUMENT

Appellant's Motion requests alternative forms of relief, either supplementation of the appellate record or judicial notice. The Court should deny both requests.

I. The Motion Is Untimely

The *New York Times* article was published in December 13, 2021 and the proceedings in No. 2020-000967 were concluded when this Court issued its remittitur on June 1, 2021. Appellant could have filed this Motion six months ago—long before the Court issued its order affirming the circuit court on May 25, 2022—but she waited until June 9, 2022, the same day she filed her petition for rehearing. Appellant provides no explanation or justification for the delay. If the information were a proper subject of supplementation or judicial notice (it is not, as explained *infra*), it should at least have been provided before the Court rendered its decision. Appellant's unexplained delay in filing the Motion is a sufficient basis for its denial.

II. Supplementation Is Improper Because the Materials Were Not Presented to the Circuit Court

Appellant's request for supplementation of the record is improper because a record on appeal cannot be supplemented with materials that were never presented to the lower court. "[A] party desiring to supplement the Record on Appeal must move the appellate court for leave to do so." Rule 212(b), SCACR. However, "Rule 212(b), SCACR, must . . . be read in conjunction with Rule 210(c), SCACR, which declares that the record cannot include matter that was not presented to the lower court or tribunal." Jean H. Toal,

et al., Appellate Practice in South Carolina at 261 (2d ed. 2002); see Rule 210(c), SCACR ("The Record shall not . . . include matter which was not presented to the lower court or tribunal").

The materials with which Appellant seeks to supplement the record were never presented to the circuit court. Accordingly, they are not proper materials for a motion to supplement.

III. Judicial Notice Is Improper

The category of facts subject to judicial notice is a narrow one. "For a fact to be subject to judicial notice, it must be so notorious that the court may properly assume its existence without proof." *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984); *see Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171–172, 470 S.E.2d 397, 401 (Ct. App.1996) ("A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability.").

Judicial notice is even more narrowly circumscribed in appellate proceedings. "Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable" for the simple reason that doing so may prejudice the adverse party and may "violate the general principle that appellate review should be limited to the record." *Masters*, 283 S.C. at 255, 321 S.E.2d at 195. Also, "appellate courts, limited to the 'cold' record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge." *Id.* For all of these reasons, this Court has held that "original judicial

notice of adjudicative facts at the appellate level should be limited to matters which are indisputable." *Id.* Unless the fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability, it is not subject to judicial notice." *Id.*

A. The Facts in the *New York Times* Article Are Not Indisputable

Appellant's Motion quotes the article as stating that the sale of the estate to Primary Wave Music had been "in the works" for four years prior to December 2021. (Motion, at 3.) However, a fact is not subject to judicial notice simply because it appears in a newspaper. "[W]hile it may be appropriate to take judicial notice of the fact that a website or newspaper published something, it is inappropriate to take judicial notice of the truth of the matters asserted within the publication." *Sunrise Coop., Inc. v. United States Dep't of Agric.*, 261 F. Supp. 3d 850, 859 (N.D. Ohio 2017), rev'd on other grounds, 891 F.3d 652 (6th Cir. 2018); *see Cofield v. Alabama Pub. Serv. Comm'n*, 936 F.2d 512, 517 (11th Cir. 1991) ("That a statement of fact appears in a daily newspaper does not of itself establish that the stated fact is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." (internal quotation marks omitted)).

From the context of the Motion, it appears that Appellant may be suggesting the Court should draw an inference regarding the value of the Estate or the truthfulness of Mr. Bauknight's trial testimony from the "fact" that the deal with Primary Wave was "in the works" for four years. However, courts may not take judicial notice of facts inferred from other facts. *See, e.g.*, *Miesen v. Hawley Troxell Ennis & Hawley LLP*, No. 1:10-cv-404,

2022 WL 1422942, at *9 (D. Idaho May 5, 2022) (refusing to take judicial notice of inferred facts); *Julius v. Luxury Inn & Suites, LLC*, 535 F. Supp. 3d 600, 607 (S.D. Miss. 2021) (same).

B. The "Record" in Appellate Case No. 2020-000967 Is Not an "Adjudicative Fact"

Appellant asks this Court to take judicial notice of "the record" in No. 2020-000967. (Motion, at 1.) But an appellate record is not an "adjudicative fact"; it is a collection of documents filed by the parties and the Court.[1] The narrow confines of judicial notice do not allow the Court to rifle through an appellate record in search of relevant facts that are indisputable and subject to judicial notice. Appellant's failure to identify the particular facts for which she seeks judicial notice is sufficient grounds to deny the request. *See Spartanburg Sanitary Sewer Dist. v. City of Spartanburg*, 283 S.C. 67, 82, 321 S.E.2d 258, 266 (1984) ("Counsel should make clear . . . what facts are to be judicially noticed and should refer the Court to the evidence supporting its position, particularly when counsel requests the courts . . . to consider facts in another appeal.").

CONCLUSION

For the foregoing reasons, Respondents respectfully urge the Court to deny Appellant's Motion.

[1] The *existence* of an appellate record, as opposed to the content of the record, may be an adjudicative fact subject to judicial notice. *See* 31A C.J.S. *Evidence* § 96. That is beside the point, however, because Appellant's Motion does not ask the Court to take judicial notice of the mere existence of the record in No. 2020-000967.

Respectfully submitted,

s/J. David Black

J. David Black, SC Bar No. 68499
Kirsten E. Small, SC Bar No. 75681
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
(803) 771-8900
dblack@nexsenpruet.com
ksmall@nexsenpruet.com

Attorneys for Russell L. Bauknight as Personal Representative of Respondent the James Brown Estate and as Trustee of Respondent the James Brown 2000 Irrevocable Trust

June 20, 2022

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2022, I served the foregoing **Return to Appellant's Motion to Supplement the Record or Take Judicial Notice** by transmitting a copy of it to the AIS email address for Appellant's counsel, as listed below:

Adam T. Silvernail
Adam@Silvernaillawfirm.com

s/J. David Black

J. David Black, SC Bar No. 68499
Kirsten E. Small, SC Bar No. 75681
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
(803) 771-8900
dblack@nexsenpruet.com
ksmall@nexsenpruet.com

Attorneys for Russell L. Bauknight as Personal Representative of Respondent the James Brown Estate and as Trustee of Respondent the James Brown 2000 Irrevocable Trust