RECEIVED
Jan 10 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 20-CP-22-00600
Case No. 20-CP-22-00601
Appellate Case No. 2022-000291

Sunset Lodge, LLC, and Franklin D. Beattie, as trustee of The Franklin D. Beattie Preservation Trust, and M. Baron Stanton, Plaintiffs,

v.

Town of Pawleys Island, Defendant,

Of which Sunset Lodge, LLC and Franklin D. Beattie, as trustee of the Franklin D. Beattie Preservation Trust are the ……Appellants,

and

Town of Pawleys Island is the…… Respondent.

REPLY OF RESPONDENT IN SUPPORT OF MOTION TO STRIKE PORTION OF APPELLANTS' REPLY BRIEF

William C. Dillard, Jr. (SC Bar No. 78986)
Belser & Belser, P.A.
Post Office Box 96
Columbia, South Carolina 29202
(803) 929-0096

Attorneys for Respondent

Respondent Town of Pawleys Island ("Town") hereby submits its Reply in support of its motion to strike Section II of the Appellants' Initial Reply Brief ("Section II").

a.) Contrary to Appellants' Return (p.19-21), judicial estoppel is not exempt from the requirement that an argument be raised in an initial brief. Appellants argue that judicial estoppel can be raised any time or asserted *sua sponte* by the Court. Appellants do not cite to any South Carolina authority for these propositions. While Appellants cite to cases from other jurisdictions for the proposition that judicial estoppel may be asserted by the Court *sua sponte*, not all jurisdictions follow that approach.[1] While South Carolina has apparently not specifically addressed the discrete issue of whether judicial estoppel can be raised for the first time in an appellate reply brief, the Court of Appeals has held, in an opinion that was affirmed as modified, that the judicial estoppel argument can be "relinquished" (i.e., waived). Hawkins v. Bruno Yacht Sales, Inc., 342 S.C. 352, 367, 536 S.E.2d 698, 705 (Ct. App. 2000) (aff'd as modified, 353 S.C. 31, 577 S.E.2d 202 (2003)) ("We believe the defendants relinquished any right to assert judicial estoppel against Hawkins when counsel for all parties agreed, on the record before the master, that Hawkins in fact owned the [boat] at the time of the tax sale."). The S.C. Supreme Court, affirming the Court of Appeals holding, similarly noted that "after hearing the arguments for judicial estoppel . . . the Master appears to have proceeded on the basis that everyone agreed that Hawkins was the real party in interest." 353 S.C. at 43, 577 S.E.2d at 209. *See also* Boykin v. Prioleau, 255 S.C. 437, 441, 179 S.E.2d 599, 601 (1971) ("The defense of judicial estoppel has not been raised, and the facts appearing here would not support it.").

Judicial estoppel is fundamentally distinct from a question of subject matter jurisdiction,

[1] See, e.g., CVS/Caremark Corp. v. Washington, 121 So. 3d 391, 398 (Ala. App. 2013) (judicial estoppel is an affirmative defense and may be waived if not asserted); In re Est. of Araguz, 443 S.W.3d 233, 249 (Tex. App. 2014) (judicial estoppel is an affirmative defense and may be waived if not asserted).

which may not be waived and, therefore unsurprisingly, can be raised even if not preserved or invoked *sua sponte*. See In re Bluffton Town Council Election, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009).

Furthermore, even if judicial estoppel could be raised *sua sponte* by the Court based upon the record properly before it (i.e., after the parties have properly exchanged notice of designation of matter to be included in the record), that does not permit an appellant to raise it for the first time, along with a broad request for judicial notice of filings in other litigation, in a reply brief that affords the respondent no opportunity to respond. In this situation, the Town would have no opportunity to designate its own matter in the record related to the newly raised issue and no opportunity to brief its responsive arguments to the Court.[2] Simply put, Appellants have not offered any persuasive authority in support of their position that judicial estoppel should be treated as a rare exception to rules of issue presentation in appellate briefing procedure. The limited South Carolina caselaw touching on the issue and persuasive authority from other jurisdictions are contrary to Appellants' position.

b.) Contrary to Appellants' Return (p.10-12), their Initial Brief did not raise the "Section II" judicial estoppel argument. Appellants argue in their Return that they did in fact raise the judicial estoppel argument in the Initial Brief, but they do not cite to any language that actually made the argument. As noted in the Town's Motion, the reference to judicial estoppel on page 32, fn.14 of the Initial Brief relates to a distinct issue (i.e., the Town's argument in the separate Challenge 2 cases that attorney fee provisions disincentivize the government from using "multiplicity of litigation" to gain leverage over a landowner in condemnation). This did not raise or provide notice of the argument in Section II of Appellants' Reply Brief, which instead relates to Town's arguments regarding the specific types of relief sought in the separate condemnation actions. Appellants do not claim that there

[2] Unlike, e.g., a situation where an appellant's reply brief makes new counterarguments in response to issue preservation arguments first raised in a respondent's initial brief, where the respondent has therefore already had the opportunity to designation relevant matters in the record.

was any other reference to judicial estoppel or, under any other name or description, the theory that the Court should preclude the Town from taking certain positions in this appeal. Likewise, references in the Initial Brief to what the Appellants describe as the Town's "inconsistency, fictionalizing and self-contradiction" do not assert the actual Section II argument. Neither the Court nor the Town could have understood the Initial Brief to be setting forth the Section II argument. See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (for issue preservation purposes, "an objection must be sufficiently specific to inform the trial court of the point being urged by the objector").

c.) Contrary to Appellants' Return (p.12-13), striking the relevant section of the Reply Brief would not strike other properly presented argument. Section II of the Reply Brief, as clear from its section heading and text, is a request for judicial estoppel. Discussion within Section II of the nature of the Town's positions and a request for "judicial notice" are in support of that request for judicial estoppel. See Rule 208(b)(1)(E), SCACR ("The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type . . ."). Accordingly, the Town's Motion to Strike is properly calibrated and is not overly broad in requesting that Section II be stricken in its entirety.

d.) Contrary to Appellants' Return (p.13-16), Appellants could have raised any properly preserved judicial estoppel argument in their Initial Brief. The matters that Appellants seek to have judicially estopped are not new arguments raised for the first time in the Town's Initial Brief, such as issue preservation arguments or additional sustaining grounds. As discussed in the Motion, Town took the same positions at the circuit court level and the circuit court order specifically agreed with those positions. Appellants could have raised any properly preserved Section II argument in their Initial Brief. The case law Appellants cite from other jurisdiction has no bearing here, as South Carolina law clearly provides that new arguments cannot be raised for the first time in a reply brief.

e.) <u>Contrary to Appellants' Return (p.16-18), the Town's Motion was not in effect a "surreply" brief and the Town is prejudiced by the Appellants' raising a new issue in their Reply Brief</u>. The Town's Motion to Strike focuses on establishing that the Appellants could have but did not raise the Section II argument in their Initial Brief. Other than in a brief reference included to offer the Court context,[3] the Town's Motion does not address the merits of the Section II arguments (as would instead be appropriate in an appellate brief). The Town has certainly not "fully responded" as argued in the Return (p.16). The Town would very much be prejudiced by Appellants being allowed to make the arguments where, as here, the Town is not permitted to file a responsive brief.

f.) <u>Town disputes Appellants' extensive discussion of the merits of Section II</u>. In this Reply, the Town does not seek to address the merits of the Section II judicial estoppel arguments. However, given that Appellants' Returns spends considerable time discussing the merits of the issue, Town notes here that it strongly disagrees with Appellants' claims that it has taken contradictory positions, "presented a false state of facts to the Challenge II judge" (p.5, fn.5), and "argued that 'permanent substantive relief' was not sought in this Challenge I case" (p.19), among many other things. The Town also denies the Appellants' claim that the language they cite properly preserved the actual Section II judicial estoppel argument at the circuit court level (Return p.8-10).

Respectfully submitted,

<u>s/ William C. Dillard, Jr.</u>
William C. Dillard, Jr. (S.C. Bar No. 78986)
BELSER & BELSER, P.A.
Post Office Box 96
Columbia, SC 29202
(803) 929-0096
will@belserpa.com

ATTORNEYS FOR RESPONDENT
TOWN OF PAWLEYS ISLAND

January 10, 2023

[3] Specifically, footnote 1 on page 2 of the Motion offers a brief general explanation of why the Town's positions were not contradictory.