

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Jean Hofer Toal, Acting Circuit Court Judge

RECEIVED
MAR 24 2020
SC Court of Appeals

Case 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

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

BRIEF IN SUPPORT OF RESPONDENT-APPELLANTS' MOTION TO STRIKE

Respondent-Appellants Wortley and Belger hereby submit their brief in support of their Motion to Strike portions of Appellant-Respondent Boykin's Designation of Matter and Initial Brief. Boykin has designated and discussed improper and irrelevant matter which was not presented to the trial court before it issued its final order and judgment. These matters should be

stricken from Boykin's Designation of Matter for the Record on Appeal, the Record on Appeal itself, and from Boykin's Initial Brief.

I. A Record on Appeal or Brief should not include matters or events which occurred after judgment and were not considered by the trial court before final judgment.

South Carolina's appellate court rules limit the content of the Record on Appeal. For example, the Record should not include irrelevant matter. See Rule 209(b), SCACR ("[a] party shall not include any matter in his Designation which is not relevant to the appeal"). The record on appeal is "the source of [the court's] information as to what occurred *in the trial of the case below*; its very object is to inform the Court authoritatively of the legal questions contested below and of the facts pertaining thereto." *South Carolina State Highway Department v. Meredith*, 241 S.C. 306, 311, 128 S.E.2d 179, 181 (1962) (emphasis added). Thus, "an effective record on appeal must include everything that could assist the appellate court in resolving the issues on appeal while leaving out extraneous information." Hoefler et al., *APPELLATE PRACTICE IN SOUTH CAROLINA* 76 (2d ed. 2002).

Additionally, the Record should not include matter which was not presented to the trial court before entry of final judgment. Rule 210(c), SCACR (the "Record shall not, however, include matter which was not presented to the lower court or tribunal"). A party's brief, in turn, should only contain references to matters "which may be properly included in the Record on Appeal." Rule 208(b)(4), SCACR. As one authority provides:

[s]ince the record generally closes at the date of the judgment appealed from, nothing happening subsequent to that time can properly be made a part of it. Matters occurring after the filing of the notice of appeal are not properly part of the record. Only material in the trial court record should be included in the record on appeal. The appellate record is limited to the record which was before the trial court at the time of the judgment or order appealed from.

4 C.J.S., *Appeal and Error*, § 566 (Feb. 2020 Update); see also 4 C.J.S., *Appeal and Error*, § 861

(an appellate court will not ordinarily consider matters not offered or introduced in evidence in the lower court and not judicially noticed).

II. Boykin's Designation of Matter and Initial Brief contain improper material.

In this case, the Court entered its Final Order and Judgment on May 24, 2019. It ruled on all Rule 59(e) post-trial motions on August 29, 2019. It ruled on the last outstanding pre-trial motion on September 3, 2019. At that point, the record below was closed. Boykin filed his notice of appeal with the South Carolina Court of Appeals on September 25, 2019.

Boykin has designated and discussed material which did not exist prior to September 25, 2019, and which was not considered by the trial court before it issued its filing rulings in this case. Specifically, Boykin designated the following matters for inclusion in the Record on Appeal: (1) Boykin's Motion to Dismiss filed in *Holland, et al. v. Boykin*, Case No. 2019-CP-28-01015; and (2) Boykin's Motion for a Status Conference.

Boykin filed the Motion to Dismiss in *Holland* on December 18, 2019, more than *three months* after the case below was concluded. Moreover, Boykin filed the Motion to Dismiss in a *separate* case, to which the trial judge in this case has not been assigned. The trial court has thus never presided in this separate action, has never considered the Motion to Dismiss, and indeed, is likely unaware of the existence of the separate action. Simply put, the Motion to Dismiss falls into even the most conservative definition of "extraneous information" and is improper for inclusion in the record on appeal. Boykin's Initial Brief discusses the motion and other matters asserted in the separate action. These matters should neither be included in the Record on Appeal nor considered by this Court. Evidence from one case cannot be included in the record on appeal for another case. *See, e.g., Young v. Martin*, 254 S.C. 50, 60, 173 S.E.2d 361, 366 (1970) (finding that evidence from husband's case against motorist for damages arising from automobile collision in

which wife was injured should not have been included on appeal from judgment in wife's separate case).

The Motion for a Status Conference was actually filed in the case below – *but not until December 17, 2019*. The motion therefore came more than three months after the trial court issued its final ruling in this case, and two months after Boykin filed his notice of appeal on September 25, 2019. Additionally, the Motion for a Status Conference has never been heard or ruled upon by the trial court.¹ It is “a fundamental rule of appellate practice that after a final judgment has been rendered in the circuit court no additions to the record can be made of matters which were not before the trial court when the judgment was rendered.” *Fortney v. A.J. Elliott's Administrator*, 273 S.W.2d 51, 52 (K.Y. Ct. App. 1954). Because the Motion for a Status Conference was not before the trial court when judgment was rendered, and indeed was not filed until more than three months after that event, the motion and its content are not properly before this Court and must be stricken.

III. Conclusion.

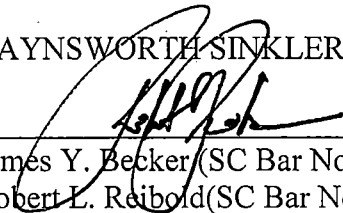
The Court should not countenance Boykin's attempt to include and discuss improper and irrelevant material in his appellate submissions. These matters should be stricken, and Boykin should be required to submit a new Designation of Matter and Initial Brief which omit these improper matters, and Wortley and Belger should be permitted additional time to respond to Boykin's Initial Brief as appropriate.

[signature on following page]

¹ Once a notice of appeal has been filed, the circuit court is divested of jurisdiction over the case. Rule 205, SCACR. For this reason, the trial court no longer has the *power* to hear the motion for a status conference.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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March 23, 2020

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The Honorable Jean Hoefler Toal, Acting Circuit Court Judge

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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**.....Respondents

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have caused the foregoing to be served via U.S. mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the addresses shown below.

1. **Respondent-Appellants' Motion to Strike**
2. **Breif in Support of Motion to Strike**

Parties of Record

Wallace K. Lightsey, Esquire Wade S. Kolb, III Post Office Box 728 Greenville, SC 29602 <i>Attorneys for Appellant Rigdon H. Boykin</i>	William S. Tetterton Post Office Box 530 Camden , SC 29021
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HAYNSWORTH SINKLER BOYD, P.A.

By: Reeve H. Ballew
Reeve H. Ballew

March 23, 2020
Columbia, South Carolina

**HAYNSWORTH
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March 23, 2020

The Hon. Jenny Abbot Kitchings
Clerk of Court, Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: In the Matter of Lemuel Whitaker Boykin II
Civil Action No. 2017CP2800831
Appellate Case No. 2019-001632
HSB File No. 39944.0001

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Dear Ms. Kitchings:

Enclosed for filing, please find the original and one (1) copy of the following:

1. Respondent-Appellants' Motion to Strike;
2. Brief in Support of Motion to Strike; and
3. Proof of Service

in the above-referenced matter, together with our Proof of Service of same. Also, enclosed is a firm check in the amount of \$50.00 for the filing fee. Once filed, please return a clocked copy to me in the enclosed self-addressed, stamped envelope.

If you have any questions, please give me a call.

Thank you for your assistance in this matter.

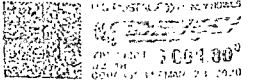
Sincerely,

HAYNSWORTH SINKLER BOYD, P.A.


Robert L. Reibold

**HAYNSWORTH
SINKLER BOYD**

Cc: Wallace Lightsey, Esq.
Wade S. Kolb, III, Esq.
William S. Tetterton, Esq.



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