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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

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

And

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

APPELLANT-RESPONDENT'S RETURN IN OPPOSITION TO MOTION TO STRIKE

Appellant-Respondent Rigdon H. Boykin ("Rigdon") submits this Return in Opposition to Respondent-Appellants' Motion to Strike (the "Motion"). The Motion seeks to exclude from the

Record on Appeal certain highly relevant materials reflecting the actions and inactions of the Trust at the center of this lawsuit over the final six months of 2019 (the "Materials"), as well as arguments containing references to those Materials in Rigdon's brief to this Court. The Trust's actions and inactions are but the latest chapter in the multi-year saga that led to this litigation and continued for two additional years while the lawsuit was pending below. And – most critically for purposes of resolving this Motion – all of the Materials were presented in full to the trial court.[1] Accordingly, the Materials satisfy the only two requirements of the South Carolina Appellate Court Rules for contents of the record – they are "relevant to the appeal," SCACR 209(b), and they were "presented to the lower court," SCACR 210(c). Further, the Materials are all matters of public court record, and thus may be judicially noticed by this Court. As such, the Materials are properly before this Court, both in the Record on Appeal and as discussed in Rigdon's brief. Accordingly, Respondent-Appellants' Motion to Strike is meritless and should be denied.

[1] The only portion of the Materials not presented to the trial court below is a motion to dismiss filed in related litigation initiated by the Trust against Rigdon last year, before notices of appeal were even filed in this case. That motion is part of the public record, filed in the courts of this State, and this Court may take judicial notice of it. *See Cox v. Fleetwood Homes of Ga., Inc.,* 329 S.C. 157, 159 n.2, 494 S.E.2d 463, 463 n.2 (Ct. App. 1997) (taking judicial notice of matters of public record); *see also* 5 AM. JUR. 2d *Appellate Review* § 413 ("Notwithstanding the general rule precluding consideration by a reviewing court of matters not in the record, the court may in a proper case take judicial notice of certain facts and evidence, including events occurring after the appeal has been taken."). Under these circumstances, inclusion of the motion to dismiss in the record on appeal in this matter seems sensible for the convenience of this Court. Nevertheless, Rigdon's counsel offered, during the parties' Rule 11 consultations before the Motion was filed, to remove the motion to dismiss from the designation of matter if that action would satisfy Respondent-Appellants and thereby avoid forcing the parties and the Court to spend time and effort addressing this Motion to Strike. Respondent-Appellants refused this overture.

BACKGROUND

This case arises from a dispute over the management of the Lemuel Whitaker Boykin, II ("Mr. Boykin") Residuary Trust (the "Trust"). Each of Mr. Boykin's four children is an income beneficiary of the Trust, and their children (Mr. Boykin's grandchildren) inherit the assets remaining in the Trust when the last of Mr. Boykin's children dies. Two of the four income beneficiaries are Respondent-Appellants, and both of them have children. Respondent-Appellants are also two of the three trustees of the Trust. The other two income beneficiaries are not trustees, are both childless and, due to their age, will not have children.

Other than Respondent-Appellants, the only other trustee of the Trust was Rigdon. Neither a child of Mr. Boykin nor a beneficiary of the Trust, Rigdon was the only trustee who was independent and disinterested. He brought this litigation after an extended period of impasse resulting from the Trustees' disagreement over whether and how to liquidate Trust real estate in order to diversify the Trust and provide cash for distribution to the income beneficiaries.

One of the principal issues in this case is the inherent conflict of interest that exists between Respondent-Appellants, who have an interest in preserving Trust assets for the benefit of their children, and the other two income beneficiaries of the Trust, who have no children. Each side presented arguments below about whether and how Trust assets should be diversified (Respondent-Appellants for years resisted any diversification), as well as plans to accomplish this diversification. In general, Rigdon supported a more aggressive plan to sell real estate and generate cash for income distributions, and Respondent-Appellants supported a much more gradualist approach of selling only 16% of real estate holdings over a five-year period.

The trial court addressed the existing impasse among the trustees by removing Rigdon as a trustee, but it did nothing to address the underlying conflict at the heart of the Trust between the

beneficiaries with children (both of whom have power as trustees) and those without children (who are not trustees).

The trial court also adopted the Trust management plan presented by Respondent-Appellants, which required the sale of certain Trust assets, despite the court's deep concern, as stated in the Final Order now on appeal, that it "maintained some reservations about whether [Respondent-Appellants] are capable of executing the management plan presented at trial" given that this plan required "the sale of properties that their family has held dear for decades."[2] The trial court further cautioned Respondent-Appellants that it was "imperative" they "implement the management and investment plan presented by their counsel and consultants" and that this plan "cannot simply be lip service to appease the Court." Final Order at 49.

The Materials Respondent-Appellants now seek to exclude demonstrate that they have indeed paid but "lip service" to the court below, have done nothing to implement the management and investment plan they presented to that court, and have taken little to no action to sell Trust assets or diversify the Trust, as the court below required. Consequently, the Trust now has little to no net income and will likely not have any in the near future. In addition, rather than pursue a lasting reconciliation between the various parties and family members torn apart by this litigation, the Trust (which has continued to be dominated by Respondent-Appellants) has become even more litigious, filing a separate lawsuit against Rigdon based on an alleged series of events that occurred seven years ago and involved the Trust. Rigdon has moved to dismiss that action on the ground that any such claim should have been pleaded in this litigation, and thus was *res judicata*.

[2] Respondent-Appellants' management plan also promised annual distributions to each of the income beneficiaries of $125,000. As the Materials demonstrate, this promise too has not been honored.

These facts, which were presented to the court below by way of a motion from Rigdon for a status conference (the "Motion for Status Conference") are highly relevant to the issues now on appeal. It is perhaps understandable Respondent-Appellants are taking pains to exclude these facts and the Materials supporting them, because they fully support Rigdon's argument to this Court that the court below erred in failing to adopt the most equitable and lasting resolution of splitting the Trust in two – one for Respondent-Appellants and their children, and one for the two income beneficiaries without children – which would have eliminated the conflict of interest inherent in Respondent-Appellants' position. That conflict of interest has continued unabated over the last six months of 2019, as evidenced in the record of inaction set out in the Materials, including in particular the exhibits attached to the Motion for Status Conference.

Rigdon also argues on appeal that the court below erred in failing to remove Respondent-Appellants as trustees and appoint a full slate of three independent trustees, and this contention too is supported by the Materials and the record of Respondent-Appellants' failure to follow the directives of the court below that the Trust take action to sell Trust assets and generate income.

STANDARD

In South Carolina, material may be included in a record on appeal if it is "relevant to the appeal," SCACR 209(b), and if it has been "presented to the lower court or tribunal," Rule 210(c) SCACR. Material that "aids [a] proper understanding of the questions involved on appeal" is properly included in a record on appeal. *Mauro v. Clabaugh*, 299 S.C. 184, 187, 383 S.E.2d 244, 246 (Ct. App. 1989); *see also Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (material properly included in record on appeal where such material was necessary to an understanding of the issues on appeal). Material may be included in a record on appeal where "it does not materially encumber the record, and no prejudice by reason of its inclusion has been

shown." *Peoples Nat. Bank of Greenville v. Manos Bros.*, 226 S.C. 257, 289, 84 S.E.2d 857, 873 (1954). It is furthermore blackletter law that "[u]nder some circumstances, matters subsequent to the ruling complained of, including matters subsequent to the taking of the appeal, may be shown to an appellate court for the purpose of having complete justice done." 5 C.J.S. *Appeal and Error* § 860.

A party's brief "shall contain references to …materials which may be properly included in the Record on Appeal" in accordance with Rule 210(c) SCACR. *See* Rule 208(b)(4) SCACR. Moreover, "[n]otwithstanding the general rule precluding consideration by a reviewing court of matters not in the record, the court may in a proper case take judicial notice of certain facts and evidence, including events occurring after the appeal has been taken." 5 AM. JUR. 2d *Appellate Review* § 413.

ARGUMENT

I. The Materials are highly relevant to the issues on appeal.

Respondent-Appellants provide no support, in either law or fact, for their conclusory assertions that the Materials are "irrelevant" to this appeal. On the contrary, as demonstrated above, the Materials speak to the very heart of the issues now on appeal to this Court. The Materials demonstrate Respondent-Appellants' continued non-compliance with the lower court's order following trial and are critical to assessing the trial court's failure to remedy the dire underlying condition of the Trust, including the conflict of interest at the heart of the Trust's administration. To say that the Materials are "irrelevant" is untrue; their inclusion fits squarely within the requirements of Rule 209(b), SCACR ("[a] party shall not include any matter in his Designation which is not relevant to the appeal").

II. The Materials were presented to the lower court.

Respondent-Appellants' assertions that the Materials were not "presented to the trial court" and thus may not be considered by this Court are likewise unfounded and unsupported by both persuasive legal authority and the facts of this matter. Respondent-Appellants' related assertion that a record on appeal "closes" automatically upon entry of a court's final order or judgment finds no support either.

The Materials were presented in the context of Rigdon's Motion for a Status Conference, which was filed with the trial court on December 17, 2019.[3] Contrary to Respondent-Appellants' protestations, the fact that this date fell after the trial court's Order of Judgment does not automatically bar the Motion for a Status Conference, or its exhibits, from being made a part of the Record on Appeal to this Court. Respondent-Appellants rely only on vague generalizations and a seventy-year-old Kentucky Court of Appeals case in arguing otherwise. Notably absent in their argument is any binding authority on this Court.

First, the fact that the Motion for a Status Conference was filed after the notice of appeal was taken is irrelevant, contrary to Respondent-Appellants' apparent suggestion, relegated in part to a footnote, (Memo in Support of Motion at 4 n.1) that this timing somehow matters. Respondent-Appellants note that under Rule 205, "the circuit court is divested of jurisdiction" upon the filing of a notice of appeal, but Rule 205 actually provides that "Nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." The Motion for a Status Conference did not ask the Court to do anything it lacked the power to do because of the pendency of the appeals. It simply requested, on the basis of the trial court's familiarity built over

[3] Again, the only portion of the Materials not presented in the Motion for Status Conference was the motion to dismiss filed in related litigation, *Holland et al. v. Rigdon H. Boykin*¸ Case No. 2019-CP-28-01015. Concerning this motion to dismiss, see footnote 1 *supra.*

the course of the litigation, that the court hold a status conference "to assess the current, deteriorating situation of [the Trust] and assist in getting the parties on track to a productive path forward." The lower court had (and has) power to do that. *See Metts v. Mims*, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009) (holding that when a matter before the circuit court is unaffected by an issue on appeal, the circuit court may proceed); *Tillman v. Oakes*, 398 S.C. 245, 256, 728 S.E.2d 45, 51 (Ct. App. 2012) (holding that lower court could proceed to hear a visitation petition where "the petition did not seek relitigation of any factual findings in the order on appeal"); *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 112, 576 S.E.2d 191, 197 (Ct. App. 2003) (holding that lower court had jurisdiction to rule on claimant's motion to compel payments despite appeal, noting that "[t]he motion to compel payments [was] a separate issue from the propriety of awarding them in the first place).

Next, and very tellingly, Respondent-Appellants' contention that the Record "should not include matter which was not presented to the trial court *before entry of final judgment*" (Memo in Support of Motion at 2) contains a gloss (shown in italics here) entirely of Respondent-Appellants' making. The authority they cite for this proposition, SCACR 210(c), does not support the italicized gloss. That rule says only that matters in the record must have been presented to the court below; it says nothing about *when* those materials have to have been presented. In this case, the Materials were presented to the court below.

Last, binding law in South Carolina supports the proposition that post-judgment material may be included in the record on appeal. In *Grant v. Osgood,* 241 S.C. 104, 127 S.E.2d 202 (1962), the Supreme Court considered procedural questions arising from an underlying appeal from probate court to circuit court. On his initial appeal to the circuit court, the appellant in *Grant* proposed to include in his statement of the case a reference to a notice filed after the probate court

judge had issued a final order in the case. The circuit judge refused to allow inclusion of the reference. When the Supreme Court considered the matter, it found the circuit judge in error, and ruled that the circuit court should have permitted the reference. The Court observed that "[t[he . . . language [referencing the notice] was, in our opinion, properly includable . . . *even though it referred to a fact occurring after the decision of the case*" because it "threw light upon" the question involved in the appeal and was "necessary to a proper understanding and disposition of that question." *Grant,* 241 S.C. at 107–08 (emphasis added).[4]

That standard from *Grant* is met by the Materials at issue here. The Materials "throw light upon" the issues before the Court in this appeal, they are highly relevant to Rigdon's appellate arguments, and they were presented to the Court below. This is sufficient for them to be included in the Record on Appeal.

As an additional note, the Materials may be cited and discussed in Rigdon's brief not only as proper inclusions in the Record on Appeal, but because this Court may, and should, take judicial notice of them. As outlined in blackletter law, "[n]otwithstanding the general rule precluding consideration by a reviewing court of matters not in the record, the court may in a proper case take judicial notice of certain facts and evidence, including events occurring after the appeal has been taken." 5 AM. JUR. 2d *Appellate Review* § 413. Because the Materials are highly relevant to this appeal and are matters of public record, the Court may take judicial notice of them for the purpose

[4] While the court in *Grant* assessed post-judgment materials in the context of mooting an appeal, the case, including specifically the language cited in this Return, has been applied and cited to in other contexts for the general principles that it articulates. *See Mauro v. Clabaugh*, 299 S.C. 184, 187, 383 S.E.2d 244, 246 (Ct. App. 1989)(citing to the same *Grant* language in the context of the assessing lower court's conditioning its decision on a party's payment of attorney costs).

of their inclusion in Rigdon's brief. *See Cox*, 329 S.C. at 159 n.2. Therefore, Respondent-Appellants' request that these portions of the brief be struck are improper and should be denied.

CONCLUSION

The Materials are relevant to this appeal and were filed and presented to the trial court. Their inclusion in the record on appeal, and reference to them in Rigdon's brief, is proper under the South Carolina Appellate Court Rules, and there is no authority in this State demonstrating otherwise. Respondent-Appellants' Motion to Strike should be denied.

Respectfully Submitted,

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PROOF OF SERVICE

The undersigned counsel for Appellate-Respondent certifies that a copy of the Return in Opposition to Motion to Strike has been served upon all counsel of record by depositing copies of the same in the U.S. mail, first-class postage prepaid, addressed as follows:

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This 21st day of April, 2020.

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