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

RECEIVED
MAY 04 2020
SC Court of Appeals

Case No. 2017-CP-28-00831

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

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RESPONDENT-APPELLANTS' REPLY TO RETURN IN OPPOSITION TO MOTION TO STRIKE

Respondent-Appellants Mary Deas Wortley and Alice B. Belger ("Wortley and Belger") hereby reply to Appellant-Respondent Rigdon H. Boykin's ("Boykin") return to the pending motion to strike. Wortley and Belger moved to strike the following material from the Record on Appeal and any discussion of this material in Boykin's initial brief:

1. Boykin's Motion for a Status Conference and its contents. The motion was filed in this case on December 17, 2019, more than three months after the case had been tried, finally decided, and closed on September 13, 2019; and

2. Boykin's Motion to Dismiss filed on December 18, 2019 in *Holland, et al. v. Rigdon H. Boykin*, Case No. 2019-CP-28-01015, and its contents, which pertain to a separate pending case in which the trial judge has not presided.

These materials are improper and irrelevant because they were created either (a) *after* final judgment was issued in the circuit court action below or (b) in a *separate* pending case in which the trial judge has not presided, and, in the case of the Motion to Dismiss, both. Neither document has been reviewed and considered by the trial court in this case. Boykin's inclusion of these materials appears to be primarily an attempt to engage in collateral character assassination.

In response to Wortley and Belger's motion, Boykin doubled down. His return, however, is troubling, because it contains misleading statements of fact and material misrepresentations of cited authority. In contrast to the statements made in Boykin's brief:

- the materials were not *presented* to the trial court; rather they were only filed with the clerk of court;
- the materials are not relevant to this appeal because they were not considered by the trial court and did not influence the orders on appeal;
- South Carolina law clearly does *not* permit post judgment materials not considered by the trial court to be included in the Record on Appeal; and
- judicial notice is simply not applicable to *the contents of* these materials.

I. The materials were not presented to the trial court; rather they were only filed with the clerk of court.

Boykin emphatically states "most critically for purposes of resolving this Motion – <u>all of the Materials were presented in full to the trial court</u>." (Return at p. 2) (emphasis in original). Presentation to the trial court is, of course, critical to the resolution of this motion because the appellate court rules state that the record shall not "include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. While Boykin's Motion for a Status Conference

was filed with the clerk of court (after the case was closed), it was never presented "in full" to the trial court.[1] Boykin never placed the materials before Judge Toal for consideration, let alone consideration "in full." Judge Toal is likely completely unaware that the Motion for Status Conference has even been filed, because the case was already concluded when it was filed.

Filing the materials with the clerk of court is simply not equal to presenting the materials to the trial court. For matters to be presented to the trial court in the context of the appellate record, they must actually have been submitted to and considered by the trial court. *Naser Jewelers, Inc. v. City of Concord, N.H.*, 538 F.3d 17, 19 n. 1 (1st Cir. 2008) (documents were attached to a motion to exclude expert testimony, but they were never before the trial court as part of the motion for summary judgment on review, and, as result, were not properly before the appellate court); *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 994 (8th Cir. 2003) (denying motion to supplement record on appeal and striking portions of appellant's brief because they contained evidence that was not before the district court at the time it granted summary judgment); *National Wildlife Federation v. Burlington Northern R.R., Inc.*, 23 F.3d 1508, 1511 n.5 (9th Cir. 1994) (stating evidence tendered on appeal concerning an event occurring two years after the district court's decision was not considered and "[f]acts not presented to the district court are not part of the record on appeal").

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[1] Boykin notes in footnote 1 of his Return that his counsel previously offered to remove the Motion to Dismiss, but not the Motion for Status Conference, from his designation of matter for this appeal, if that action would resolve Wortley and Belger's Motion to Strike. This was a hollow gesture, because the Motion for Status Conference contains as Exhibit I, the summons and complaint in the *Holland* case to which the Motion to Dismiss is directed. Nothing in the Motion to Dismiss or the case in which it was filed was ever *presented to* the trial court, in *this* case. The motion to Dismiss was filed in *another* case, over which the trial court has not presided, and which was commenced after final judgment in this case. The only connection between the Motion to Dismiss and this case is that Boykin attached the summons and complaint from the *Holland* case to his Motion for Status Conference in this case and discussed them therein.

It is, thus, disingenuous that Boykin chose to underline his statement that the post-judgment materials he seeks to include in the Record were presented "in full" to the trial court, because the statement is misleading, if not wholly inaccurate.

Boykin also argues that the timing of his motion for a status conference, filed almost three months *after* his notice of appeal on September 25, 2019, is immaterial because the trial court retains the authority to "proceed[] with matters not affected by the appeal." Rule 205, SCACR. This argument lacks merit for several reasons. First, the motion for status conference is completely improper, even in the trial court. Status conferences are governed by Rule 16(e), SCRCP, entitled "Status Conferences." It provides that "the trial judge may hold an informal conference *before trial* to dispose of any remaining matters, including disposition of any pending motions and consideration of settlement." Rule 16(e), SCRCP (emphasis added). As the italicized words state, status conferences are held before trial, not after trial.

Second, there are simply no pending motions or other matters remaining before the trial court that are not affected by this appeal. The order denying both parties Rule 59(e) motions to alter or amend the trial court's final order and judgment was filed on August 28, 2019. At that time, there was only one motion remaining for decision by the trial court, and it was resolved by the trial court's Order Compelling Consent to the IRC 2032A Election, filed 16 days later on September 13, 2019. No party sought reconsideration or appeal of this order, so it became final 30 days later on October 14, 2019. As of that day, there was no issue, motion, or other matter left pending before the trial court; the case was thus closed and the trial court no longer had any jurisdiction, other than to "entertain petitions for writs of supersedeas" which the Motion for Status Conference clearly is not. Rule 205, SCACR.

Additionally, and in any event, Boykin in his Motion for Status Conference most assuredly asked the trial court to reconsider again the issues already decided and to take action which would have affected the matters on appeal. Boykin asked the trial court to assess Wortley and Belger's alleged failure to comply with the trial court's order and to "urgently intervene" in the ongoing administration of the Trust. (Motion for a Status Conference at pp. 2-4). What is the point of asking the trial court to assess and inquire into these matters if Boykin was not seeking relief from the trial court which no longer has jurisdiction?

Finally, the nature of appellate review requires that the proceedings below end and the record become final before review by the appellate court. Were this Court to allow Boykin to perpetrate a post judgment document dump by filing extraneous materials with the clerk of court after a case has been appealed, it would undermine the very finality upon which appellate court review depends. *In re Adoption of Willow*, 745 N.E.2d 330, 337 (Mass. 2001) ("[t]o take into account information concerning post-trial events would diminish finality and efficiency, interests that are important in [appellate] proceedings"). At some point, the record for consideration and decision must close.

The materials designated by Boykin for the record on appeal and discussed in his initial brief were only filed with the clerk of court. They were <u>not</u> presented to the trial court "in full." The trial court has never considered or ruled on the materials Boykin attempts to shoehorn into this appeal; indeed, it lacks the jurisdiction to do so.

II. The materials are not relevant to this appeal because they did not influence the orders on appeal.

Boykin insists the materials with which he wishes to contaminate the record are "highly relevant," but Boykin does not account for the fact that this matter is before the appellate court rather than trial court. The question is not, as Boykin supposes, whether the materials would have

been relevant in the underlying case.[2] The question is whether the post judgment matters Boykin wishes to include in the record on appeal are relevant to the appeal. The answer to this question is that they are not. "The general rule is that an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." *In re Elise K.*, 33 Cal. 3d 138, 149, 654 P.2d 253, 261 (1982), see also 5 Am. Jur. 2d *Appellate Review* § 413 (2010). Because these materials were not considered by the trial court, they did not affect the trial court's final decision in any manner. They are therefore irrelevant to the appeal. *In re Brittany H.*, 243 Cal. Rptr. 763, 775 (Cal.App. 1988), *decision modified on denial of reh'g* (Mar. 8, 1988) (matters occurring after the entry of judgment are ordinarily irrelevant and should not be entertained by the appellate court).

III. South Carolina law does not permit post judgment materials not considered by the trial court to be included in the Record on Appeal.

Boykin argues that it is black letter law that matters which occur after judgment may be included in the appellate record. (Return at p. 6). Boykin also argues that there is binding South Carolina precedent that post-judgment material may be so included. *Id.* at p. 8. Boykin's presentation of the law is misleading at best.

Boykin's citation to 5 C.J.S., Appeal *and Error*, § 860 is incomplete. Boykin presented the following quote: "[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." (Return at p. 6). He did not inform this Court that the actual holding of § 860, which appears in bold type above the text of the quoted language reads:

> **[w]hile under some circumstances matters subsequent to the appealed judgment may be considered, *ordinarily, in determining the correctness of a***

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[2] The post judgment events are of questionable relevancy even in the trial court.

judgment, postjudgment matters will not be considered.

5 C.J.S., *Appeal and Error*, § 860 (emphasis added). Section 860 actually stands for the proposition that post judgment matters *should not be considered* on appeal.

Moreover, the authorities cited in § 860 for the language Boykin quotes and relies on for his contentions are extremely limited. Section 860 cites only three cases in support of the idea that there are circumstances under which post judgment material may be considered on appeal: (i) *In re Brittany H.*, *supra*; (ii) *Simington v. Parker*, 250 P.3d 351, 357 (Ok.App. 2011); and (iii) *Cheetah Lounge, Inc. v. Sarasota Cty.*, 387 S.W.3d 10, 13–14 (Tenn. Ct. App. 2012).

These cases do not support Boykin's argument. In *Brittany H.*, the court reiterated the general rule that an appellate court should not find facts based upon post judgment matters "absent exceptional circumstances." *In re Brittany*, 243 Cal.Rptr. at 775. Both of the other cases cited held that an appellate court may consider post judgment matters which moot an appeal. *Simington,* 250 P.3d at 357; *Cheetah Lounge, Inc.*, 387 S.W.3d at 13–14. Consideration of such materials is necessary to avoid wasting judicial resources, not to deciding whether error occurred in the lower court. For Boykin to suggest that this C.J.S. section and the cited cases supports his argument is disingenuous.

Boykin's statement that *Grant v. Osgood*, 241 S.C. 104, 127 S.E.2d 202 (1962) constitutes binding South Carolina precedent permitting use of post judgment materials on appeal is similarly flawed. *Grant* was decided in 1962, when the materials considered by the appellate court were compiled in a far different manner than today. For example, the trial court, with input from the parties, compiled the statement of the case submitted to the appellate court. *Id.* at 107-08, 127 S.E.2d at 204. The issue decided in *Grant* was not whether post judgment matters could be included in the Record on Appeal, but whether a post judgment event could be mentioned in the

statement of the case. Boykin correctly notes that in *Grant* the Supreme Court did permit reference to a post judgment event, but only because "[i]t threw light upon the only question involved in the principal appeal and [was] necessary to a proper understanding and disposition of that question." *Grant v. Osgood, 241 S.C. 104, 108, 127 S.E.2d 202, 204 (1962).* This is not true for any of the post-judgment material Boykin proposes to include in this record on appeal.

Moreover, Boykin fails to mention that the decision in *Grant* was decided under the then existing Supreme Court Rule 4, Section 3. This former Supreme Court rule provided that "nothing should be omitted from the transcript of record that is necessary to a proper understanding and decision of the questions to be decided." *S.C. State Highway Dept. v. Meredith*, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962). Former Supreme Court Rule 4, Section 3, was replaced with current Rule 210, SCACR, in 1990, and Rule 210 does not retain the language of the prior rule on which *Grant* was based. In fact, Rule 210 takes a contrary position. It states expressly that "*[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal*" *Id.* (emphasis added). *Grant* is not binding precedent on the matters raised by this motion, and the current appellate court rules stand as a firm obstacle to Boykin's attempt to pollute the record.[3]

Interestingly, in the very same brief in which Boykin presents an incomplete picture of applicable law, Boykin accuses Wortley and Belger of adding a gloss of their own making to Rule 210, SCACR. (Return at p. 8). Wortley and Belger stated that the Record on Appeal should not contain materials which were not presented to the trial court before entry of final judgment. They cited Rule 210, SCACR. Boykin is of course correct that the text of Rule 210 does not contain the

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[3] For the same reason, Boykin's citation to *Peoples Nat. Bank of Greenville v. Manos Bros.*, 226 S.C. 257, 289, 84 S.E.2d 857, 873 (1954) for the proposition that "[m]aterial 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,'" is misconstrued. (Return at pp. 5-6.)

phrase "before entry of final judgment." But Boykin is incorrect in asserting that Wortley and Belger altered or changed the requirement contained in Rule 210. The requirement that materials be presented to the trial court before entry of final judgment is implicit in Rule 210. For example, 5 Am. Jur. 2d *Appellate Review* § 413, which was cited by Boykin, provides that:

> [a] reviewing court must generally consider only those issues that the record shows were presented and considered by the district court in deciding the matter before it, *and is limited to consideration of the evidence in the record, as it existed at the time the trial court rendered its judgment.*

5 Am. Jur. 2d *Appellate Review* § 413 (2010) (emphasis added); *see also Meriwether*, 326 F.3d at 994 (portions of the appellant's brief and appendix were stricken because they contained or referred to evidence that was not before the district court at the time it granted summary judgment to the appellee). *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) (we have previously held that '[p]apers submitted to the district court *after* the ruling that is challenged on appeal should be stricken from the record on appeal.') (emphasis in original). For materials to be "presented" to the trial court, they must be submitted for the trial court's consideration before the court rules on the matter appealed.

IV. The post judgment materials which Boykin seeks to include in the Record on Appeal are not matters subject to judicial notice.

As a final, alternative argument, Boykin suggests that the Court should take judicial notice of the post judgment materials he seeks to include in the record. This argument rests on a misunderstanding of the rules governing judicial notice. An appellate court can of course take judicial notice of its own records, files, and proceedings, *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct.App. 1984), but the matters at issue are not matters which occurred in the appellate court.

In all other circumstances, appellate courts are generally reluctant to notice adjudicative facts, even when those facts may be absolutely reliable. *Masters v. Rodgers Dev. Grp.*, 283 S.C.

251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984). "Original judicial notice of adjudicative findings at the appellate level should be limited to matters which are indisputable." 30 S.C. Jur. *Evidence* § 10 (March 2020 Update). In *Masters*, for example, this Court was asked to take judicial notice of the contents of a deed. *Masters,* 283 S.C. at 255, 321 S.E.2d at 196. The Court declined explaining that:

> [t]he recitals in Stevenson's deed do not constitute "indisputable matter" subject to judicial notice in this Court. Whether Stevenson paid valuable consideration is not "common or general knowledge." While the existence of recitals in the deed may be verified by resort to the public records, mere recitals in a deed do not establish, as against strangers, facts recited there. The recitals would not be conclusive of whether Stevenson was a purchaser for value.

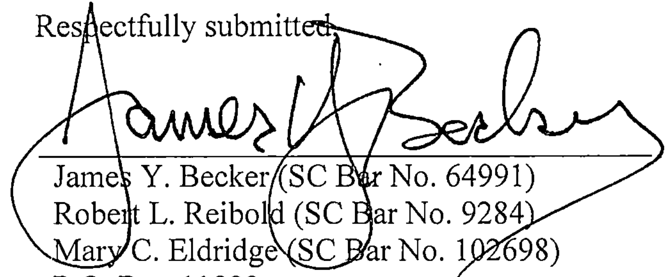
Id. at 256-57, 321 S.E.2d at 197 (internal citations omitted).

Accordingly, judicial notice in this case would be limited to the fact that a motion for a status conference and a separate action were filed. The *contents* of these filings are not proper subjects of judicial notice. The truth of the matters expressed therein has not been established. Boykin should not be permitted to discuss post judgment events on appeal as if they were adjudicated matters only because he himself referred to them in a filing which was not before the trial court when it rendered final judgment and was made months after the notice of appeal had been filed.

Wortley and Belger respectfully request that the motion to be strike be granted.

[signature on following page]

Respectfully submitted,



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May 1, 2020

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

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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

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**..........................Respondents

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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 email, to all parties of record at their email addresses as listed in the Attorney Information System.

1. **Respondent-Appellants' Reply to Return in Opposition to Motion to Strike**

Parties of Record

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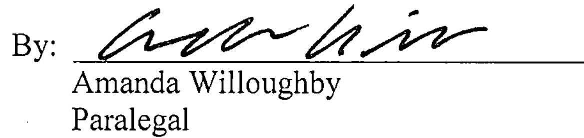
By: 
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May 1, 2020

The Hon. Jenny Abbot Kitchings
Clerk of Court, Court of Appeals
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MAY 04 2020
SC Court of Appeals

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

Dear Ms. Kitchings:

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

1. Respondent-Appellants' Reply to Return In Opposition to Motion to Strike

in the above-referenced matter, together with our Proof of Service of same. Once filed, please return a clocked copy to me in the enclosed self-addressed, stamped envelope.

If you have any questions, please let me know.

Thank you for your assistance in this matter.

Sincerely,

HAYNSWORTH SINKLER BOYD, P.A.

James Y. Becker

JYB/rhb

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

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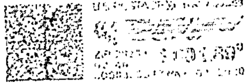

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39944.0008
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