

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Oct 19 2020

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Jean Hoefer Toal, Acting Circuit Court Judge

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

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

And

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

RESPONDENT-APPELLANTS' MOTION TO STRIKE

Respondent-Appellants Mary Deas Wortley and Alice Belger (“Wortley and Belger”) hereby move to strike certain improper and irrelevant material from Appellant-Respondent Rigdon Boykin’s (“Boykin”) Reply Brief. The Reply Brief contains improper and irrelevant material --

matters that were not presented to and ruled upon by the trial court. Instead, the matters referred to occurred either after final judgment was issued in the circuit court action which gives rise to this appeal, or in a separate and pending case in which the trial judge has not presided. The material is irrelevant to the appeal because it did not affect the decision below. Much of the material improperly included in the Reply Brief is material that this Court *previously struck* when Boykin attempted to include it in his Initial Brief.

Specifically, Wortley and Belger move to strike the following portions of Boykin's Reply Brief:

- Page 2, that portion of the first sentence of the 2nd paragraph which follows "Wortley and Belger's cross appeal," and begins "and (iii) that Wortley and Belger themselves have filed";
- Page 4, the first full paragraph which begins "[t]he third basis . . ." and ends on Page 5, with the words "vacate in this appeal";
- Footnote 3 on page 11;
- Page 15, that portion of the last paragraph which begins with the second sentence of the paragraph ("They argue that") and continues onto p. 16 and ends with the words "at the time of this briefing."

This motion is made pursuant to Rules 208, 209, and 210, SCACR, and is supported by the memorandum of law filed herewith. This motion is also based on Wortley and Belger's prior motion to strike many of these same items, and this Court's order granting that motion, which are attached hereto respectively as Exhibits A and B.

I certify that I consulted with opposing counsel before filing this motion, but that the parties were unable to resolve this matter.

[signature on following page]

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/James Y. Becker

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

And

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

BRIEF IN SUPPORT OF RESPONDENT-APPELLANTS' MOTION TO STRIKE

Respondent-Appellants Wortley and Belger previously filed a motion to strike certain designations of matter to be included in the Record on Appeal and portions of Boykin's initial

appellant's brief. Boykin sought to include and discuss matter relating to: (1) a separate case subsequently filed by Wortley and Belger and others against Boykin, which is entitled *Holland, et al. v. Boykin*, Case No. 2019-CP-28-01015; and (2) a Motion for a Status Conference which was filed in this case in the trial court months after the trial court issued its final ruling in this case, and two months after Boykin filed his notice of appeal. The motion for a status conference referred to *Holland* as well as to alleged issues regarding sales of Trust land and distributions to the Trust's income beneficiaries which arose only after the trial court's final decision below. This Court granted this motion, struck the improper matters, and required Boykin to submit an amended brief.

Boykin has now filed his Reply Brief. Unfortunately, the Reply Brief once again refers to and discusses *Holland* and allegations regarding the post-judgment activities of the Trust – *the very same matters which the Court previously struck*. Wortley and Belger believed this issue had been decided, but, of necessity, move to strike these matters from Boykin's Reply Brief. As explained below, and in Wortley and Belger's first motion to strike, these matters are improper and irrelevant. They involve matters which occurred after judgment was entered and which were not presented to the trial court.

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

Rule 210(h), SCACR, precludes consideration by the Court of the post- judgment matters which Boykin seeks to introduce in his Reply Brief. Except in certain circumstances not applicable here, this rule provides that “the appellate court will not consider any fact which does not appear in the Record on Appeal.” Rule 210(h), SCACR. 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).

However, the post-judgment matters which Boykin discusses in his Reply Brief will not be contained in the Record on Appeal. They are not contained in any matter which has been designated to be included in the Record on Appeal.¹ In any event, post-judgment matters are not properly included in the Record on Appeal. Rule 210(c), SCACR (the “Record shall not, however, include matter which was not presented to the lower court or tribunal”). 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).

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. A brief should not waste the Court’s time discussing facts or matters which the Court cannot consider.

II. Boykin’s Reply Brief contains 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.

¹ As discussed above, Boykin originally designated matter for inclusion in the Record on Appeal which related to these matters, but the Court struck this designation, and Boykin has not attempted to re-designate this material.

Boykin's Reply Brief discusses material which did not exist prior to September 3, 2019, and which was not considered by the trial court before it issued its filing rulings in this case. Specifically, the Reply Brief contains discussion of: (1) a new case subsequently filed by Wortley and Belger and others against Boykin, which is entitled *Holland, et al. v. Boykin*, Case No. 2019-CP-28-01015; and (2) alleged issues regarding sales of Trust land and distributions to Trust income beneficiaries which occurred or arose only after the trial court's final decision below and the commencement of this appeal.

The *Holland* case was not filed in the Kershaw County Probate Court until October 1, 2019. It did not exist when the record below closed or even when then the case below was appealed. Moreover, 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). Any reference to *Holland* constitutes improper post-judgment material.

In addition, Boykin's Reply Brief states that the Trust is "still holding onto property that they represented to the trial court would be liquidated." (Boykin Reply Brief at p. 15) (emphasis in original). It also states that Wortley and Belger have not made distributions to Whit and May (income beneficiaries) that they promised would be made. *Id.* The Reply Brief finally states, "[t]o our knowledge, this state of affairs *continues as of the time of this briefing.*" *Id.* at p. 16 (emphasis added). Boykin's Reply Brief was filed on October 12, 2020, more than a year after this case was appealed. These references obviously describe improper post-judgment material.

III. Conclusion.

The Court should not countenance Boykin's repeated attempt to include and discuss improper and irrelevant material in his appellate submissions – especially after the Court has

previously stricken these very same matters. Boykin should be required to submit a new Reply Brief which omits these improper matters.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/James Y. Becker

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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 documents listed below to be served via email, to the parties of record listed below
at their email addresses as listed in the Attorney Information System.


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

Parties of Record

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HAYNSWORTH SINKLER BOYD, P.A.

October 19, 2020
Columbia, South Carolina

By: 
Amanda Willoughby
Paralegal