THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Oct 26 2020
SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge
Case No. 2013-CP-02-1337

Appellate Case No. 2020-000967

Adele J. Pope, ……..……Appellant,

v.

Estate of James Brown and The James Brown
2000 Irrevocable Trust, ... Respondents

**RETURN IN OPPOSITION TO MOTION
TO SUPPLEMENT RECORD ON APPEAL**

The Estate of James Brown and The James Brown 2000 Irrevocable Trust (individually, the "Estate" and the "Trust"; collectively, "Respondents"), pursuant to Rules 212(b) and 240(e), SCACR, hereby file this Return in Opposition to Appellant Adele Pope's Motion to Supplement the Record on Appeal ("Motion to Supplement" or "Motion").

The Motion should be denied. First, it is procedurally improper because the Court has already dismissed this appeal on the grounds that it is interlocutory. Second, the materials with which Ms. Pope seeks to supplement the record were never presented to the circuit court, as required by Rule 210(c), SCACR ("The Record shall not . . . include matter which was not presented to the lower court or tribunal."). Third, the materials are not relevant to either

appealability or the merits, as required by Rule 209(b), SCACR ("A party shall not include any matter in his Designation which is not relevant to the appeal.").

For these reasons, the Court should deny the Motion to Supplement should be denied.

BACKGROUND

On June 30, 2020, Ms. Pope filed a notice of appeal related to an order filed February 26, 2020, and an amended order filed June 18, 2020 (collectively, the "Deposit Order"), granting Respondents' motion to deposit with the circuit court the amount awarded to Ms. Pope for her services as Special Administrator of the Estate, plus accrued interest ("SA fees"). The Deposit Order was entered in the Aiken County Court of Common Pleas case in which the SA fees were awarded, *Pope v. The Estate of James Brown, et al.*, C/A No. 2013-CP-02-1337 ("Aiken 1337"). The SA fees are subject to setoff in the event Respondents obtain a judgment against Ms. Pope in an action for breach of fiduciary duty currently pending in the Richland County Court of Common Pleas, *Bauknight, et al. v. Pope*, C/A No. 2010-CP-40-04900 ("Richland 4900"). In both its original and amended forms, the Deposit Order describes Richland 4900 as a "companion case" to Aiken 1337.

On August 10, 2020, Respondents moved to dismiss the appeal as interlocutory. Respondents explained that the Deposit Order merely granted a form of preliminary relief, preventing any potential waste of Estate assets pending the resolution of Richland 4900. As such, it was not appealable as a final order, nor did it fall into any category of appealable interlocutory order under S.C. Code Ann. § 14-3-330.

This Court entered an order dismissing the appeal on October 14, 2020. Ms. Pope filed the Motion to Supplement on the same day.

ARGUMENT

Ms. Pope seeks to supplement the record on appeal[1] with materials consisting of an affidavit filed in federal litigation to which she is not a party (Motion, Ex. A) and documents produced by the Office of the Attorney General pursuant to the South Carolina Freedom of Information Act ("FOIA"). (Motion, Ex. B-H). Ms. Pope contends that supplementation is appropriate because these materials refute the proposition that Richland 4900 is a "companion case" to Aiken 1337.

A. The Motion to Supplement Is Improper Because the Appeal Has Already Been Dismissed

As noted *supra*, this Court entered an order dismissing this appeal on October 14, 2020. Because the appeal has been dismissed as interlocutory, the Motion to Supplement is moot. The dismissal of the appeal means that no record on appeal will be filed. Consequently, there is nothing to supplement. This procedural posture is, by itself, sufficient grounds to deny the Motion to Supplement.

B. The Materials Were Not Presented to the Lower Court

Aside from being procedurally improper, the Motion should be denied because a record on appeal cannot be supplemented with materials that were never presented to the lower court. "[A] party desiring to supplement the Record on Appeal must move the appellate court for leave to do so." Rule 212(b), SCACR. However, "Rule 212(b), SCACR, must . . . be read in conjunction with Rule 210(c), SCACR, which declares that the record cannot include matter that was not presented to the lower court or tribunal." Jean H. Toal, *et al.*, Appellate Practice in South Carolina at 261

[1] Since the Court dismissed the appeal prior to briefing, no record on appeal has been filed. Technically, therefore, Ms. Pope's Motion seeks to supplement a document (the record on appeal) that does not exist.

(2d ed. 2002); *see* Rule 210(c), SCACR (providing that a party cannot add material to the Record that was not "presented to the lower court or tribunal").

The materials attached to Ms. Pope's Motion were never presented to the circuit court. Ms. Pope filed her notice of appeal on June 30, 2020. She now seeks to supplement the record with an affidavit dated September 2, 2020 (*see* Motion Ex. A, at 2) and FOIA documents produced by the Office of the Attorney General "for the first time in October 2020." (Motion, at 1.) Since the materials were not presented to the circuit court—indeed, they could not have been—they are not proper subjects of a motion to supplement under Rule 212(b).

C. The Materials Are Not Relevant

Even if the materials had been presented to the lower court, supplementation would still be improper because the materials are not relevant. Just as Rule 212(c) must be read in conjunction with Rule 210(c), it must also be read in conjunction with Rule 209(b), SCACR. Rule 209(b) provides that "[a] party shall not include any matter in his Designation [of Matter to be Included in the Record on Appeal] which is not relevant to the appeal." Ms. Pope cannot show that the materials are relevant to either the appealability or the merits of the Deposit Order. Her inability to satisfy Rule 209(b) is a third, independent basis for denial of the Motion to Supplement.

Ms. Pope contends that the materials because they "directly refute Respondents' claim to the lower court and in this appeal that . . . Richland 4900 is a 'companion case' to Aiken 1337." (Motion, at 8.). This argument fails for two reasons. First, the materials say nothing at all about whether Richland 4900 is a "companion case" to Aiken 1337. Second, neither the appealability nor the merits of the Deposit Order depend on whether Richland 4900 is correctly described as a "companion case" to Aiken 1337.

1. The Materials Do Not Show that Richland 4900 Is Not a Companion Case to Aiken 1337.

Ms. Pope's contention that the materials show that Richland 4900 is not a "companion case" to Aiken 1337 cannot withstand even mild scrutiny. According to Ms. Pope, the materials show that counsel of record in Richland 4900, the law firm of Sweeny, Wingate & Barrow, P.A. ("Wingate firm"), never represented the Attorney General's office and "had no authority whatsoever to act on behalf of the State/AG in Richland 4900." (Motion, at 2.) As an initial matter, the materials do not show this. At most, they indicate the existence of a dispute regarding the Wingate firm's representation of the Attorney General's office—a dispute which appears to be more about the Attorney General's reluctance to pay the Wingate firm's fees than about the Wingate firm's authority to pursue the litigation. (*See* Motion Ex. G.) Moreover, the Motion to Supplement lacks any coherent reasoning to bridge the chasm between Ms. Pope's premise (that the Wingate firm lacked authority to act on behalf of the Attorney General's office) [2] and her conclusion (that Richland 4900 is not a companion case to Aiken 1337).

Richland 4900 is clearly a "companion" to Aiken 1337 in the ordinary sense of a companion as a thing "that accompanies another" or "that is closely connected with something similar." *See* https://www.merriam-webster.com/dictionary/companion (last visited Oct. 25, 2020). Aiken 1337 primarily concerned Ms. Pope's creditor's claim for more than $2.8 million in PR/Trustee fees, which was based on her contention that her services as PR/Trustee substantially benefited the

[2] To the extent Ms. Pope is suggesting that *no one* gave the Wingate firm authority to pursue Richland 4900, she is plainly wrong. As Attorney General McMaster made clear in a letter dated May 18, 2010, Mr. Bauknight retained the Wingate firm to pursue Richland 4900 against Ms. Pope and Mr. Bauknight. (**Exhibit A**.) There is no question that Mr. Bauknight, in his capacity as Personal Representative and Trustee, had authority to engage counsel to pursue claims on behalf of the Estate and Trust.

Estate and Trust.[3] Judge Early denied her claim based on his determination that, to put it bluntly, Ms. Pope did more harm than good. In Richland 4900, the Estate and Trust are seeking to recover damages from Ms. Pope for the same harms that persuaded Judge Early to deny her claim in Aiken 1337. Thus, the two cases are "companions" in the highly relevant sense that they are both concerned with Ms. Pope's performance of her duties as PR/Trustee.

2. Whether Richland 4900 Is a "Companion Case" to Aiken 1337 Is Irrelevant to the Appealability and Merits of the Deposit Order

For the reasons set forth above, the materials do not show that Richland 4900 is not a "companion case" to Aiken 1337. But even if they did, they would still be irrelevant because whether Richland 4900 is correctly described as a "companion case" to Aiken 1337 has no bearing on either the appealability or the merits of the Deposit Order.

As Respondents explained in detail in their motion to dismiss this appeal, the Deposit Order is neither a final order nor an appealable interlocutory order. It is not a final order because it leaves something more to be done, namely, a determination of who (as between Ms. Pope and Respondents) is ultimately entitled to receive the deposited funds. It is not an appealable interlocutory order because it does not involve the merits, does not affect substantial rights, was not entered in a special proceeding or on a summary application, and does not involve a grant, denial, or modification of injunctive relief. *See* S.C. Code Ann. § 14-3-330. No part of this analysis depends on whether the circuit court correctly described Richland 4900 is a "companion case" to Aiken 1337. Excising the reference to Richland 4900 as a companion case from the Deposit Order would not transform an interlocutory order in to a final one, nor would it transform an order that

[3] The evidence presented at trial on Ms. Pope's creditor's claim for PR/Trustee fees included her September 2017 offer to settle Aiken 1337 *and* Richland 4900 for a combined total of $19 million—further showing the close relationship of the two cases.

does not fall into any category under § 14-3-330 into one that does.

Whether Richland 4900 is correctly described as a "companion case" to Aiken 1337 is equally irrelevant to the merits of the Deposit Order. Respondents sought to deposit the unpaid SA fees with the court, rather than paying them to Ms. Pope, because of the substantial likelihood that Richland 4900 will result in a large monetary judgment against her. In that event, Respondents would be entitled to a setoff of the unpaid SA fees. Respondents argued, and the circuit court agreed, that depositing the SA fees with the court was a commonsense, interim measure to preserve disputed funds pending the outcome of ongoing litigation. Fundamentally, the Deposit Order is based upon the relationship between the parties in the two cases: in Aiken 1337, Ms. Pope is the plaintiff and Respondents are the defendants, while in Richland 4900 the roles are reversed. How this relationship is described—whether as a "companion case" or something else—has no bearing on the reality that Respondents may ultimately be awarded more in damages than they owe Ms. Pope in SA fees.

D. The Court Should Not Take Judicial Notice of the Materials

As an alternative to supplementing the record, Ms. Pope urges the Court to take judicial notice of the materials. (Motion, at 1.) The Court should deny this request.

Appellate judicial notice is disfavored. As this Court has explained:

> Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons ***we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.***

Masters v. Rodgers Dev. Grp., 283 S.C. 251, 256–57, 321 S.E.2d 194, 197 (Ct. App. 1984)

(citations omitted; emphasis added).

Ms. Pope's request for judicial notice is improper because the fact she seeks to establish—that Richland 4900 is not a companion case to Aiken 1337—is anything but indisputable. As explained above, the materials do not support Ms. Pope's allegation that the Wingate firm lacked authority to pursue Richland 4900. Even if they did, the relationship between the Wingate firm and the Attorney General has no bearing on whether Richland 4900 is a companion case to Aiken 1337. In short, the materials do not establish *any* facts, much less facts that are indisputable and subject to appellate judicial notice.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Supplement the Record on Appeal.

Respectfully submitted,

J. David Black, SC Bar No. 68499
Kirsten E. Small, SC Bar No. 75681
NEXSEN PRUET, LLC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
(803) 771-8900
dblack@nexsenpruet.com
ksmall@nexsenpruet.com

Attorneys for Russell L. Bauknight as Personal Representative of Respondent the James Brown Estate and as Trustee of Respondent the James Brown 2000 Irrevocable Trust

October 26, 2020
Columbia, South Carolina

EXHIBIT A

HENRY McMASTER
ATTORNEY GENERAL

May 18, 2010

Mr. Russell Bauknight
Bauknight, Pietras & Stormer, P.A.
1517 Gervais Street
Post Office Box 1330
Columbia, South Carolina 29202

Re: James Brown Litigation

Dear Mr. Bauknight:

I have met with Ken Wingate and Everett Kendall of Sweeney Wingate & Barrow of Columbia, South Carolina, regarding the action to be filed against Adele J. Pope and Robert L. Buchanan, Jr., in the Richland County Probate Court in connection with the James Brown Estate and Trust. I am writing to confirm our understanding that you will be retaining Mr. Wingate and Mr. Kendall to file this action on behalf of the beneficiaries of the James Brown Estate and Trust, including the charitable interests. As you know, by law this office has a duty to protect charitable trusts. Also, per your conversation with Senior Assistant Attorney General C.H. Jones, Jr., in connection with the charitable trust portion of this matter, you have agreed to use the terms and conditions as outlined in the attached "Agreement for Legal Services" which references and incorporates the Attorney General's standard Litigation Retention Agreement. Of course, this office has no authority over your agreement with Messrs. Wingate and Kendall concerning the other portions of this matter.

Yours very truly,

Henry McMaster

Enclosures

HMcM/mfj

REMBERT C. DENNIS BUILDING · POST OFFICE BOX 11549 · COLUMBIA, S.C. 29211-1549 · TELEPHONE 803-734-3970 · FACSIMILE 803-253-6283

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge
Case No. 2013-CP-02-1337

Appellate Case No. 2020-000967

Adele J. Pope, ……..……Appellant,

v.

Estate of James Brown and The James Brown
2000 Irrevocable Trust, ... Respondents

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, I served the foregoing **Return to Motion to Supplement the Record on Appeal** pursuant to Supreme Court Order 2020-03-20-01 § g(3) by transmitting a copy of it to the AIS email address for Appellant Adele Pope, who is self-represented, as listed below:

Adele Pope
Adele@popelawfirm.com

J. David Black, SC Bar No. 68499