THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
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SC 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 the Motion to Strike (the "Motion") of Respondent-Appellants Wortley and Belger ("Wortley and

Belger"). Having challenged Rigdon's standing to bring this appeal in their Response Brief, Wortley and Belger now seek to pull the curtain over one of three primary grounds for standing Rigdon articulates in his Reply Brief – an entirely new lawsuit filed by Wortley and Belger against Rigdon last year. In that new lawsuit, Wortley and Belger assert that certain factual findings Rigdon challenges in this appeal are binding upon him pursuant to principles of collateral estoppel and/or res judicata.

Wortley and Belger cannot have it both ways: having flung the door wide open to an argument about the justiciability of Rigdon's appeal, they cannot block Rigdon from articulating all the grounds for why this appeal is justiciable, including grounds that arise from post-judgment events that are part of the public court record. Put differently, Wortley and Belger cannot argue to this Court that Rigdon has no standing to vacate certain erroneous factual findings while simultaneously arguing to another court that he is bound by those same findings. The Motion should be denied. Alternatively, if Wortley and Belger's motion to strike is granted, then in fairness the Court should also strike their standing argument or else rule that Rigdon is not bound in the new lawsuit by the findings of fact at issue in this appeal.

BACKGROUND

I. Origin of the Case and Proceedings Below

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 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 of the Trust are Wortley and Belger, and both of them have children. Wortley and Belger 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 Wortley and Belger, 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. Approximately 90% of the Trust's value was (and remains) invested in real estate.

One of the principal issues in this case is the inherent conflict of interest that exists between Wortley and Belger, 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 (Wortley and Belger 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 Wortley and Belger 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, and in so doing the court made a number of erroneous and unsupported factual findings that Rigdon now challenges in this appeal. Among these was a finding that Rigdon opposed a tax strategy that one of the Trust's attorneys allegedly suggested in 2012 in preparation for possible changes in tax laws. The Trust ultimately did not follow the strategy, and Congress ultimately never enacted the change in the law. In his appeal Rigdon argues extensively that the trial court's findings of fact concerning this issue (and numerous others) are wrong. *See* Rigdon's Initial Brief 38-39; Reply Brief 16-18.

Beyond its erroneous findings of fact against Rigdon, the court below also adopted the Trust management plan presented by Wortley and Belger, despite the court's deep concern, as stated in the Final Order now on appeal, that it "maintained some reservations about whether [Wortley and Belger] 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." Final Order at 49. The trial court further cautioned Wortley and Belger that it was "imperative" they "implement the management and investment plan presented by their counsel and consultants" and warned this plan "cannot simply be lip service to appease the Court." *Id.* In addition to the promise in their plan to liquidate certain Trust real estate holdings, Wortley and Belger also proposed that distributions of at least $125,000 would be made annually to each of the income beneficiaries.

II. Wortley and Belger File a New Lawsuit, and Ignore the Administrative and Management Plan They Promised to Follow at Trial

After the trial court issued its Final Order and Judgment in May 2019 – and while the parties were actively engaged in settlement negotiations – Wortley and Belger, together with the new trustee appointed to replace Rigdon, Cheryl Holland, filed a brand new lawsuit against Rigdon in Kershaw County. That lawsuit, styled *Cheryl R. Holland, as Co-Trustee of the L.W. Boykin Residuary Trust et al. v. Rigdon H Boykin*, Case No. 2019-CP-2801015 (the "New Lawsuit") asserts a claim against Rigdon for breach of trust stemming from allegations about his involvement in the 2012 tax strategy and seeks to pin Rigdon with liability for over $600,000 in alleged lost tax savings. Complaint, *Holland et al. v. Boykin* ¶ 43.[1] In the New Lawsuit, Wortley and Belger allege that Rigdon "is bound . . . under the doctrines of collateral estoppel and/or res judicata" by

[1] Rigdon filed a motion to dismiss the New Lawsuit, arguing that the claim was a compulsory counterclaim in this case and that even if it had not been a compulsory counterclaim, it was merged into the counterclaim that Wortley and Belger did assert. After requesting the parties submit proposed orders, the trial court in the New Lawsuit denied Rigdon's motion to dismiss, issuing a Form 4 order on August 18, 2020.

the trial court's findings in this case about Rigdon's alleged involvement in the tax strategy. *Id.* ¶ 37.

Beyond the litigious turn they took in filing the New Lawsuit, Wortley and Belger have shown a complete unwillingness to pursue the new path they promised for the Trust. The facts demonstrate they have done nothing to implement the management and investment plan they presented to the trial 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. Rigdon brought these matters to the attention of the trial court by filing a motion for a status conference on December 17, 2019 (the "Motion for Status Conference"). The Motion for Status Conference, which was supported by an affidavit and numerous documents, detailed how Trust land that Wortley and Belger had promised to sell was still not listed on the websites of selling agents, and did not even have "For Sale" signs posted. The Motion for Status Conference also included a communication dated September 12, 2019, from the Trust's newest trustee, Cheryl Holland, predicting that the Trust would likely have no net fiduciary income to distribute to the income beneficiaries in 2020.

III. Wortley and Belger File an Initial Motion to Strike, Objecting to Materials Rigdon Proposed to Include in the Record on Appeal

After Rigdon submitted his Initial Brief and Designation of Matter, Wortley and Belger filed a motion to strike, arguing that pleadings from the New Lawsuit and the Motion for Status Conference were improper to include in the Record on Appeal, and that Rigdon's references to these materials in his Initial Brief were improper. The parties briefed these issues, with Rigdon pointing out that the materials he sought to include in the record and refer to in his briefs were "relevant to the appeal," SCACR 209(b), and had been "presented to the lower court," SCACR 210(c), thereby satisfying the only standards in our appellate rules for content of the record. In a

three-sentence order, this Court granted the motion to strike, citing as the sole rationale Rule 210, SCACR, alongside a parenthetical notation, "providing the record on appeal shall not include any matter that was not presented to the lower court." (Exhibit B to Motion)

As Rigdon stated in his Amended Initial Brief, he respectfully contends this Court's determination on the initial motion to strike was error. *See* Amended Initial Brief at 3. Particularly given that both the Motion for Status Conference and the New Lawsuit are all public court filings, reference to these matters in Rigdon's brief is, at a minimum, proper. Nor has this Court yet had an opportunity to review the briefs and record in full in order to evaluate the significance of the current state of the Trust and the New Lawsuit to the issues discussed in this appeal.

IV. Wortley and Belger Open the Door to Discussion of the New Lawsuit by Attacking Rigdon's Standing

After the Court resolved the initial motion to strike, Rigdon filed an Amended Initial Brief in compliance with this Court's order, and Wortley and Belger filed their Response Brief. In their Response Brief, Wortley and Belger raised a threshold argument about the justiciability of Rigdon's appeal, attacking Rigdon's very standing to appeal. According to Wortley and Belger, Rigdon lacked any "personal stake" in his appeal, given that he was no longer a trustee and was not a Trust beneficiary. Wortley and Belger Response Br. 9. They further argued Rigdon did not meet the standard of Rule 201(b), SCACR, which provides that only a party "aggrieved by an order or judgment may appeal," and that Rigdon's appeal should therefore be dismissed. *Id.*

In his Reply, Rigdon articulated three separate grounds for why he had standing and met the standard of Rule 201(b), SCACR. Reply Br. 2-5. One of these referenced the New Lawsuit. Rigdon pointed out that because the New Lawsuit asserts that he is bound by the very findings of fact concerning the alleged 2012 tax strategy that he seeks to vacate in this appeal, he clearly has standing to pursue this appeal and seek to have those findings vacated. *Id.* 4-5.

After Wortley and Belger's counsel notified Rigdon that they intended to file this Motion to Strike, Rigdon's counsel proposed a reasonable compromise that would have spared this Court from having to consider this Motion. Specifically, Rigdon proposed that if Wortley and Belger would agree to file a stipulation in the New Lawsuit that the findings of fact in this case were not binding on Rigdon in the New Lawsuit, then Rigdon would remove references to the New Lawsuit in his Reply Brief. Counsel for Wortley and Belger never responded to this offer and instead filed this Motion.

ARGUMENT

I. To Demonstrate Standing, Rigdon May Refer to Events that Occurred after Appeal Was Taken, and this Court May Take Judicial Notice of Them.

Wortley and Belger's efforts to exclude Rigdon's references to the New Lawsuit in his Reply Brief are baseless. Wortley and Belger themselves called into question a threshold issue of justiciability in their response brief to Rigdon's appeal, questioning Rigdon's standing to appeal and asserting Rigdon lacked any "personal stake" in the litigation because he was not a beneficiary of the Trust and had been removed as a trustee. Wortley and Belger Response Brief 9-10. Their argument in this Motion ignores blackletter law and ample case law, both from this jurisdiction and others, demonstrating that post-judgment events that touch on questions of justiciability *are appropriate to consider on appeal*, and a this Court may take judicial notice of them.

Blackletter law is clear that, "[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. In particular, this Court may take judicial notice of "facts that are necessary to determine whether the appellate court has jurisdiction of the appeal. *Id.* (emphasis added); *accord* 4 C.J.S. Appeal and Error § 680; 4 C.J.S. Appeal and Error § 691 (appellate court

"generally may take judicial notice of . . . facts that are necessary to determine whether the appellate court has jurisdiction of the appeal").

These blackletter principles are widely recognized. In *Apple Inc. v. Franchise Tax Board*, 132 Cal. Rptr. 3d 401 (Cal. Ct. App. 2011), for example, the California Court of Appeals took judicial notice of documents in a separate administrative proceeding in order to determine the appellant before the court was a "party aggrieved" and therefore had standing to appeal. *Id.* at 412 and n.17. The Texas Supreme Court applied the same principle in *Freedom Communications, Inc. v. Coronado*, 372 S.W.3d 621, 623-24 (Tex. 2012), taking judicial notice of a plea agreement in another case to determine whether there was appellate jurisdiction in the case before it. *See also id.* at 624 ("As a general rule, appellate courts take judicial notice of facts outside the record only to determine jurisdiction over an appeal or to resolve materials ancillary to decisions which are mandated by law."). In *Lantana Ridge Property Owners Association, Inc. v. SJWTX, Inc.*, No. 03-19-00303-CV 2020 WL 1880975 (Tex. Ct. App. April 16, 2020), the Texas Court of Appeals took judicial notice of an appellant's articles of amendment filed with the secretary of state in order to determine the appellant had standing on appeal. To the respondent's objection that judicial notice was improper because it would add "adjudicative facts . . . not before the trial court," the Court of Appeals explained

> the fact for which [the appellant] requests judicial notice goes to the jurisdictional inquiry; it is not an adjudicative fact going to the merits. We take judicial notice of undisputed facts when they impact our jurisdictional inquiry.

Id. at *4; *see also Kaho'ohanohano v. State*, 162 P.3d 696 (Haw. 2007) (taking judicial notice of public reports of retirement system in order to determine a party was suffering a continuing injury and therefore had standing, where the issue of standing was raised for the first time on appeal).

South Carolina precedent recognizes the same principle. In *Grant v. Osgood*, 241 S.C. 104, 127 S.E.2d 202 (1962), for example, the Supreme Court considered questions of justiciability arising from an underlying appeal from probate court to circuit court. After a testatrix died and named her daughter and son as executors and testamentary trustees, the daughter filed the will together with a rule to show cause against her brother, arguing he was not fit to serve in the capacities named in the will. After hearing considerable testimony, the probate court held the son was not qualified and he appealed. The circuit court reversed, and refused to consider a notice challenging the validity of the will which had been filed by the son after the probate court ruled. The Supreme Court held this was error, and recognized that a "fact occurring after the decision" is "properly includable" on appeal where it "throws light upon the . . . question involved" and is necessary to a "proper understanding and disposition" of that question. 241 S.C. at 108, 127 S.E.2d at 204. The notice had the effect, the Court explained, of mooting the circuit court's order, as the son was seeking to invalidate the very instrument under which he was also seeking an appointment, and if he was successful in his will contest, the issue on appeal would be moot.

Permitting consideration of post-judgment facts in order to address a question of justiciability, as the cases above all recognize, is a necessary corollary to the principle that "attorneys, including appellate attorneys, should <u>always reflect</u> on whether the case or appeal is justiciable – or whether it represents an <u>active case or controversy</u>." Jean H. Toal et al., APPELLATE PROCEDURE IN SOUTH CAROLINA 125 (3d ed. 2017) (citing numerous cases).

II. Rigdon's Reference to the Current Condition of the Trust Is Also Proper.

Not only is Rigdon's reference to the New Lawsuit proper, but so too is his reference to the current (desperate) condition of the Trust, and the facts that Wortley and Belger are <u>still</u> holding on to property that they represented to the circuit court would be liquidated, and are failing to make the income distributions that they promised in their experts' plan would be made. Again, Wortley

and Belger flung the door wide open to these points being raised in reply by wrongfully suggesting the trial court's adoption of their plan over Rigdon's demonstrates that their decision not to diversify Trust assets and hold on to property through trial was appropriate and did not reflect their conflict of interest.

The truth is that Wortley and Belger were not merely holding on to property pending trial, their holding on to property (and refusal to diversify) predated the lawsuit, led to the lawsuit, continued while the lawsuit was pending, and continues to this day. Rigdon's reference to Wortley and Belger's undisputable post-judgment conduct merely corroborates what is already abundantly clear from the record. Passing references to behavior for which there is record evidence below continuing unabated or remaining unaddressed are commonplace in appellate briefs, and consistent with our appellate court rules.

While Rigdon's Reply Brief does not refer to his Motion for Status Conference, which substantiates Rigdon's references to the post-judgment conduct of Wortley and Belger, it would certainly be appropriate for this Court to take judicial notice of that document as well, given that it is a public record. *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). As discussed above, the Motion for Status Conference was presented to the court below and concerns matters highly relevant to this Court's consideration of this appeal. Furthermore, under the standards of *Grant*, the Motion for Status Conference unquestionably "throw[s] light upon" a question involved in this appeal and is necessary "to a proper understanding and disposition of that question." *Grant*, 241 S.C. at 107-08.

III. This Court's Prior Order on Wortley and Belger's Initial Motion to Strike is Not Dispositive

In their Motion, Worley and Belger wrongly appear to suppose that the Court's prior order on the initial motion to strike compels a similar decision here. It does not, for several reasons.

First, as noted above, Wortley and Belger have opened the door to discussion of the New Lawsuit and the current state of the Trust by the arguments they make in their own Response Brief. That Response Brief was not before the Court when it resolved the prior motion. This matter is now at a different stage. The parties would not be dealing with this Motion had Wortley and Belger not included a threshold attack on the justiciability of Rigdon's appeal, thereby inviting this Court to consider all the bases for Rigdon's standing, one of which is the factual findings he seeks to vacate here and that Wortley and Belger argue are binding upon him in the New Lawsuit.

Second, the prior motion to strike was primarily concerned with what matter should and should not be included in the record on appeal. The contents of the record are not now in question in this Motion, only whether Rigdon may refer to matters that are part of the public record and capable of judicial notice, and which are directly responsive to arguments that have been advanced by Wortley and Belger in this appeal.

Third, the prior motion was not addressing a question of justiciability. As noted above, information outside the record, or facts occurring after judgment, may well impact whether an appeal is justiciable or not, and appellate courts will commonly consider them.

IV. Alternatively, if the Motion To Strike Is Granted, the Court Should Likewise Strike Wortley and Belger's Standing Argument or Rule that Rigdon Is Not Bound in the New Lawsuit by the Findings of Fact at Issue Here.

Notwithstanding the above, if this Court should grant the motion to strike, then it would be patently unfair to allow Wortley and Belger to continue to assert their argument that Rigdon does not have standing or that, in the New Lawsuit, he is bound by the findings of fact he seeks to

overturn in this appeal. Wortley and Belger should not be allowed to have it both ways. In fairness, they cannot be allowed to argue, on the one hand, that Rigdon does not have a sufficient stake in this appeal to have standing to pursue in the appeal, but then on the other hand argue that he is bound in separate litigation by the very findings of fact he seeks to challenge in this appeal.

This consideration also raises a more fundamental question for this Court to address: Does it makes sense for an appellate court to entertain motions to strike by one party to an appeal before the court has even had the opportunity to review the briefs and record in their entirety? Such a precedent will inexorably lead – as it has here – to skirmishes between the parties over what should and should not be argued in the other side's appellate briefs. This is a fight that should be left for resolution on the merits after the court has had a full opportunity to consider the question in view of the totality of the record, the parties' briefs, and oral argument – not in the premature and truncated context presented here.

CONCLUSION

This Court deserves to have all the relevant facts before it in resolving the weighty issues in this appeal. For the reasons discussed above, the Motion should be denied.

Respectfully Submitted,

s/Wallace K. Lightsey
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November 9, 2020

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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.

PROOF OF SERVICE

This is to certify that I have this date caused to be served a true and correct copy of the foregoing ***Appellant-Respondent's Return in Opposition to Motion to Strike*** and ***Proof of***

Service on counsel in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

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William S. Tetterton
P.O. Box 530
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This 9th day of November, 2020.

s/Wallace K. Lightsey

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November 9, 2020

BY EMAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals, Clerk of Court
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Columbia, South Carolina 29201

Re: ***Rigdon H. Boykin, as sole disinterested Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B 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***
Appellate Case No. 2019-001632

Dear Ms. Kitchings:

Enclosed please find for filing with the Court, a copy of Appellant-Respondent's Return in Opposition to Motion to Strike and Proof of Service for the same.

By copy of this letter, we are serving the same on all parties to this appeal.

If you have any questions, please do not hesitate to contact our office.

With highest regards,

s/Wallace K. Lightsey
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Enclosures

cc: James Y. Becker, Esq. – *via Email*
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