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

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' REPLY TO BOYKIN'S RETURN TO MOTION TO STRIKE

On March 23, 2020, Respondent-Appellant Wortley and Belger filed a motion to strike certain portions of Appellant-Respondent Boykin's Designation of Matter to Be Included in the

Record on Appeal and Initial Brief. Boykin had attempted to discuss irrelevant, post-trial events which were not before the trial court when it rendered its decision. Specifically, Boykin referenced: (1) certain matters relating to a subsequent law suit, *Holland, et al v. Boykin*, and (2) criticisms of the post-trial management of the trust. The Court granted Wortley and Belger's motion and struck these improper materials.

Boykin, cognizant of the deficiencies in his own appeal, again reaches for *the same* improper evidence. He recycles arguments this Court has already rejected – requesting that the Court take judicial notice of post-trial events which have not been litigated and repeating incomplete citations to treatises which were taken out of context. The only new argument Boykin makes is that Wortley and Belger purportedly "opened the door" to submission of post-trial evidence by arguing that Boykin lacked standing to appeal in the first instance. He contends that he should be permitted to introduce post-trial evidence in this appeal to rebut Wortley and Belger's standing argument.

This argument is simply incorrect. "Opening the door" is an evidentiary rule applied at trial, not on appeal. Even if it were possible to open the door to new evidence on appeal, and it is not, Wortley and Belger have not opened the door to submission of evidence which was not presented to the trial court. Wortley and Belger's argument that Boykin lacks standing to appeal is based upon the law of the case. Boykin did not appeal his removal as a trustee or the trial court's specific finding that he lacked standing with respect to trust matters. Wortley and Belger did not rely on or cite to any evidence of post-trial matters, nor could any post-trial event change the fact that Boykin failed to challenge rulings which were essential to maintaining his appeal.

I. The doctrine of "opening the door" does not apply in appellate matters.

The doctrine of "opening the door" is an "evidentiary doctrine" which holds that, in the event one party presents inadmissible information to the finder of fact at trial, the opposing party may right the wrong by being allowed to rebut such information with evidence that was formerly inadmissible, but which becomes admissible for the sole purpose of countering this information. 164 Am. Jur. Trials 479 (originally published in 2020); *Stansbury v. Commonwealth*, 454 S.W.3d 293 (Ky. 2015) (when one party introduces improper evidence, the party opens the door for the other party to introduce improper evidence in rebuttal whose only claim to admission is that it explains or rebuts the prior inadmissible evidence); *see State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008) ("[w]hether a person opens the door to the admission of otherwise inadmissible evidence *during the course of a trial* is addressed to the sound discretion of the trial judge") (emphasis added). Evidentiary doctrines have no application to the content of the Record on Appeal or the content of a parties' briefs.

These matters are instead controlled by the South Carolina Appellate Court Rules, and, in particular, Rule 210(h), SCACR. Under Rule 210(h), an appellate court may not consider any fact which does not appear in the Record on Appeal, "[e]xcept as provided by Rule 212 and Rule 208(b)(1)(C) and (2)." Rule 212 addresses the creation of a supplemental record. Rules 208(b)(1)(C) and 208(b)(2) discuss the Statement of the Case; however, none of the matters at issue in this motion are contained in the Statement of the Case. These exceptions to Rule 210(h) are not applicable here. Boykin has not sought a supplemental record, nor would a supplemental record permit inclusion of the improper matters in Boykin's supplemental brief. Like the Record on Appeal, a supplemental record is limited to matter which "was before the lower court." Rule

212(a), SCACR. Additionally, none of the matter which is the subject of this motion appears in Boykin's Statement of the Case, making Rule 208 irrelevant.

There is no basis on which to depart from the rule that an appellate court will not consider any matter which does not appear in the Record on Appeal. *Ravan v. Greenville Cty*., 315 S.C. 447, 459–60, 434 S.E.2d 296, 304 (Ct. App. 1993); *Vacation Time of Hilton Head Island, Inc. v. Lighthouse Realty, Inc.*, 286 S.C. 261, 270, 332 S.E.2d 781, 786 (Ct. App. 1985). Boykin's Reply brief contains matters which do not, and cannot, appear in the Record on Appeal.

II. Wortley and Belger did not open the door.

Boykin's argument reflects a misunderstanding of what it means to open the door. The underlying basis for "opening the door" is that where one party offers inadmissible evidence, which is received, the opponent may then offer similar facts whose only claim to admission is that they negate, explain or counterbalance the prior inadmissible evidence, presumably upon the same fact, subject matter or issue. Wortley and Belger, however, did not refer to or rely on post-trial evidence. As a result, even if it were possible to open the door on appeal, Wortley and Belger did not open the door to post-trial evidence.

III. The post-trial evidence which Boykin seeks to inject into this appeal is irrelevant.

The post-trial evidence which Boykin seeks to introduce – the filing of a subsequent lawsuit and matters concerning post-trial administration of the trust – is not relevant. This information was obviously not represented to the trial court. Additionally, the argument that Boykin lacked standing to appeal rests upon Boykin's failure to appeal: (1) his removal as a trustee; and (2) the trial court's specific ruling that, after his removal, he lacked standing to prosecute matters related to the trust. These rulings are now the law of the case, and Boykin lacks standing to appeal the

trial court's order. No post-trial event can cure Boykin's failure to challenge rulings which were essential to maintaining his appeal.

Moreover, standing to appeal must exist at the time the appeal is filed. Rule 201 provides that "[o]nly a party *aggrieved* by an order, judgment, sentence or decision may appeal." Rule 201(b), SCACR (emphasis added). The term "aggrieved" connotes a present or past injury. *See* AGGRIEVED, Black's Law Dictionary (11th ed. 2019) ("*having* legal rights that are adversely affected; *having been harmed* by an infringement of legal rights") (emphasis added). The harm or injury done by the order or judgment on appeal must have been inflicted before a right to appeal arises. Furthermore, Rule 203, SCACR, imposes an outer limit by which appeals must be filed.

Boykin argues in his Return that he is aggrieved because the *Holland* suit might be affected by the outcome of the appeal. He fears that certain findings made by the trial court in this case may be used against him in the *Holland* suit under the doctrines of res judicata or collateral estoppel. The *Holland* suit, however, was not filed until well after Boykin filed his notice of appeal and the time for an appeal under Rule 203 had run. As a result, any alleged harm or injury Boykin claims to suffer in connection with the *Holland* suit was neither present when Boykin filed his appeal nor at any time during the 30 day period in which Boykin's appeal had to be filed. Boykin cites no authority indicating that a subsequent event can cure a party's lack of standing at the time of filing an appeal.[1]

[1] Boykin's argument also rests on a flawed premise. An appeal does *not* affect the finality of the judgment below for preclusion purposes, nor does the subsequent suit affect the appeal. The majority rule is that an appeal is not effective to defeat preclusion. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4433, *See also* 48 Am.Jur.2d, *Judgments* § 587. A final judgment retains all of its res judicata consequences pending a decision on appeal. Wright, Miller & Cooper, Federal Practice and Procedure Jurisdiction § 4433 *citing Deposit Bank v Frankfort,* 24 S Ct 154, 191 U S 499, 48 L Ed 276 (1903).

IV. Judicial notice is not appropriate.

Boykin asks the Court to take judicial notice of the *Holland* suit and his allegations regarding post-trial management of the trust. This request should be denied. As discussed above, these matters were not before the trial court, are not contained in the Record on Appeal in this case, and are irrelevant to this appeal.

In arguing for judicial notice, Boykin relies heavily on what he terms "blackletter law." What Boykin presents as blackletter law, however, is not South Carolina opinions or rules, but select passages from general treatises which, taken in isolation as Boykin presents them, are misleading. For example, Boykin cites American Jurisprudence for the proposition that it is proper for courts to take judicial notice of certain events occurring after the appeal has been taken. (Boykin Return to Motion to Dismiss at p. 7). Boykin, however, failed to inform the Court of the following language contained in the very same section on which he relies:

- An appellate court will not take into account evidence presented for the first time on appeal, and will not consider new facts, testimony, exhibits, or other factual materials relating to the merits of an appeal that were not presented to the trial court and included in the trial court record. 5 Am. Jur. 2d Appellate Review § 413;

- An appellate court is limited to the record that is before it on appeal and generally may take judicial notice only of (1) facts that could have been properly judicially noticed by the trial judge, or (2) facts that are necessary to determine whether the appellate court has jurisdiction of the appeal. *Id.*

It may of course be proper for an appellate court to take judicial notice of post-trial events to determine whether some subsequent event has mooted an appeal. That situation is not present here. Boykin makes no argument that the *Holland* suit or the post-trial management of the trust renders the appeal moot.

It may also be proper for an appellate court to take judicial notice of post-trial events to ascertain whether it has jurisdiction over the appeal. That situation, however, is also not present

here. Wortley and Belger did not argue that Boykin's appeal should be dismissed for lack of jurisdiction. Instead, they argue that Boykin lacks standing. Standing and jurisdiction are separate concepts. Standing concerns an individual's "sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008).

While older South Carolina cases indicated that a party's lack of standing as a real party in interest deprived a court of subject matter jurisdiction, the South Carolina Supreme clarified more than twenty years ago that the right of a party to maintain suit goes to the party's right to relief rather than to the jurisdiction of the court. *Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 169–70, 485 S.E.2d 371, 373 (1997). The issue of whether a party is a "real party in interest" does not involve subject matter jurisdiction. *Id.* at 170–71, 485 S.E.2d 371, 373–74. The materials which are the subject of Boykin's request for judicial notice do not relate to the jurisdiction of the Court.

Finally, and in any event, judicial notice on appeal is inappropriate unless matters are indisputable. As this Court has previously held:

> [a]ppellate 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., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct.App.1984) (citations omitted). The allegations in the *Holland* suit and Boykin's contentions regarding post-trial administration of the trust are disputed, making judicial notice improper.

V. Boykin's alternative request that Wortley and Belger be precluded from arguing that he lacks standing to appeal should be denied.

Boykin states that he proposed a "reasonable" compromise which would have eliminated the need for this motion. What Boykin sought was a stipulation that the findings of fact made in this case would not be binding in the *Holland* action. (Boykin Return to Motion to Strike at p. 7). In other words, Boykin asked Wortley and Belger to waive the res judicata and collateral estoppel doctrines which may play a role in the outcome of the *Holland* case. In basketball terms, Boykin proposed to stop committing technical fouls in the second half of the game in return for an agreement to set the score back to zero. This is not a reasonable request, but an example of pure gamesmanship. Boykin's alternative request that, if the Court grants Wortley and Belger's motion to strike the improper material discussed by Boykin in his Reply Brief, it should also preclude Wortley and Belger from arguing that Boykin lacks standing to maintain the appeal, is more of the same. The Court should not countenance Boykin's attempt to use a violation of the appellate court rules to negotiate for tactical advantage.

VI. Conclusion

Wortley and Belger respectfully request that their Motion to Strike be granted.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

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November 16, 2020

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

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

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' Reply to Boykin's Return to Motion to Strike**

Parties of Record

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HAYNSWORTH SINKLER BOYD, P.A.

November 16, 2020
Columbia, South Carolina

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