THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Appellate Case No. 2015-002417

Tommie Rae Brown,.....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, Deanna Brown Thomas, Yamma Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown,

of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, is the.....Appellant

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APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Appellant David C. Sojourner, Jr., Esquire, in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown, and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000 ("Appellant"), by and through his undersigned counsel, hereby responds to Respondent Tommie Rae Brown's ("Respondent") Motion to Dismiss the Appeal, filed on or about January 12, 2016.

Respondent cites two grounds for dismissal: (i) the lower court's order denied Appellant's Motion for Summary Judgment and is therefore interlocutory and not appealable;

and (ii) the lower court's order granting Respondent's Motion for Summary Judgment merely determined Respondent had "standing" to bring an omitted spouse and elective share claim and an order finding a party to have standing is interlocutory and not immediately appealable. Both of these grounds lack merit and should be rejected by this Court.

ARGUMENTS

I. THE ORDERS ON APPEAL, IN PART, GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Respondent argues the Orders on Appeal merely denied the LSA's Motion for Summary Judgment, and, as such, are interlocutory and not immediately appealable. *See* Respondent's Motion at p. 2 (citing *Silverman v. Cambpell*, 326 S.C. 208, 486 S.E.2d 1 (1997)).

It is undisputed the Orders on Appeal, *granted* Respondent's own Motion for Summary Judgment. The January 1, 2015 order granted affirmative relief to Respondent by determining her to be, as a matter of law, Decedent's "surviving spouse." Although the lower court's order did not provide complete relief to Respondent on the entirety of her two claims, the court's conclusion is a decision "affecting the merits" of Respondent's case, chiefly because she must prove she is a surviving spouse as the primary element of her omitted spouse and elective share claims. Because the Orders on Appeal "finally determined a substantial matter forming a part of [Respondent's case]" the orders therefore constitute orders "involving the merits" which are appealable pursuant to S.C. Code Ann. § 14-3-330. *See Baldwin Constr. Co., Inc. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004).

The Supreme Court has affirmed "[a] summary judgment ruling . . . fits within" the "definition" of an order which "determines 'some substantial matter forming the whole or a part of some cause of action or defense.'" *Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 6, 393

S.E.2d 176, 179 (1990) (quoting *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988)). Because the Orders on Appeal grant affirmative relief to Respondent by determining a substantial matter forming a part of her causes of action, the orders are immediately appealable.

II. THIS COURT HAS DISCRETION TO CONSIDER THE COURT'S ORDER DENYING THE LSA'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE SAME ORDER GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE SAME APPEALABLE ISSUE AND RULING ON THE DENIAL ORDER WILL AVOID UNNECESSARY LITIGATION.

In general, the denial of a motion for summary judgment is not immediately appealable, *Osborne v. Allstate Ins. Co.*, 319 S.C. 479, 462 S.E.2d 291 (Ct. App. 1995), because "it does not finally determine anything about the merits or strike a defense," *Watson v. Underwood*, 407 S.C. 443, 457, 756 S.E.2d 155, 162 (Ct. App. 2014). Rather, it "simply decides the case should proceed to trial." *Ballenger v. Bowen*, 313 S.C. 467, 443 S.E.2d 379 (1994). Because a denial of a motion for summary judgment "does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for directed verdict," it does not generally "affect the merits." *Id.*

Despite the general rule foreclosing an appeal from an order denying summary judgment, our appellate courts have reviewed such orders where they are integrally tied with orders granting cross-motions for summary judgment on the same issue(s), as is the case in this appeal. For example, in this Court's recent decision in *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014), it indicated "an order that is not directly appealable will *nonetheless be considered* if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation." *Id.* at 459, 756 S.E.2d at 163 (citing *Hite v. Thomas & Howard Co.*, 305

S.C. 358, 360, 409 S.E.2d 340, 341 (1991) (emphasis added), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995)). This Court has held it will "review[] interlocutory orders when they contain other appealable issues." *Id.* (quoting *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002)).

Moreover, appellate courts have wide discretion in deciding to consider even a purely interlocutory appeal, even one which does *not* affect the merits. For example, in *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E.2d 333 (Ct. App. 2007), this Court held it would consider the merits of a mother's appeal from a family court order granting emergency temporary custody of the parties' child to father. The Court held the family court's order had a "practical effect" of a final order affecting the mother's substantial rights. *Id.* at 85, 620 S.E.2d at 338. The Court's ruling was based, in part, on its conclusion that "the issues raised by Mother on appeal have been the subject of much contention in this case. They will inevitably be raised to the family court again in the future and, because they have been fully briefed by the parties, we find that it would be in the interest of judicial economy to decide the matters now." *Id.* at 85, 620 S.E.2d at 339 (*citing Southern Bell Tel. and Tel. Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (deciding an issue on appeal in the interests of judicial economy).

This Court can and should exercise discretion and consider on appeal the lower court's order denying the LSA's and others' motions for summary judgment because such issues were inextricably intertwined with Respondent's Motion for Summary Judgment, which was granted and is therefore immediately appealable. Here, a single order disposed of Respondent's Motion for Summary Judgment and the LSA's cross Motion for Summary Judgment. Only one issue was before the lower court in both motions: Whether Respondent is Decedent's "surviving spouse," as required by S.C. Code Ann. §§ 62-2-201 and 62-2-301 as a prerequisite to

Respondent's claims, as a matter of law.

Respondent relies solely upon an unexplained three-page, single-spaced block quote from this Court's decision in *Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001), to support its position the denial of the LSA's Motion for Summary Judgment is not presently appealable. *Hedgepath* is procedurally distinguishable and therefore not dispositive of the subject appeal. *Hedgepath* involved three different state court environmental pollution cases, *Banyard*, *Hedgepath*, and *Sharpe*, which the lower court had consolidated as a complex case. *Id.* at 348, 559 S.E.2d at 332. The trial court issued an order granting summary judgment against the Banyard Plaintiffs in favor of both Defendants, Nassau and Gaston Copper, based upon a finding that the applicable statutes of limitation had run. However, the court denied summary judgment to Nassau in the *Hedgepath* case[1] based upon application of the equitable estoppel doctrine raised by the Hedgepath Plaintiffs in response to Nassau and Gaston Copper's motions for summary judgment, similarly based upon the applicable statutes of limitations. *Id.* at 362, 559 S.E.2d at 340.

On appeal, this Court held it had jurisdiction to consider the lower court's order to the extent it granted summary judgment against Banyard and Sharpe, but declined to review the part of the order denying summary judgment in *Hedgepath*. *Id.* at 348-350, 559 S.E.2d at 332-333. Nassau argued the appellate court had jurisdiction to consider the lower court's order denying summary judgment in *Hedgepath* because there was "an appealable issue before the court, i.e., the grant of summary judgment in the *Banyard* case." *Id.* at 363, 559 S.E.2d at 340.

The facts and procedural history of *Hedgepath* are long and extremely involved. Fortunately, it is unnecessary to go into that to conclude *Hedgepath* does not govern the

[1] The court did dismiss Gaston Copper, based on a finding that it did not have any contact with the Hedgepath family. *Id.* at 362, 559 S.E.2d at 339.

appealability of the trial court's denial of the LSA's Motion for Summary Judgment. The crucial distinction is, in *Hedgepath*, the lower court issued three different rulings in the single order on appeal – applying a different set of salient facts to each summary judgment analysis: whether the statutes of limitation should be tolled based upon the Plaintiffs' arguments of equitable estoppel. The facts leading the trial court to grant summary judgment in *Banyard* were wholly different and distinct from those that lead the trial court to deny summary judgment in *Hedgepath* even though all three cases were consolidated by the lower court.

Here, the facts and law the trial court applied to grant Respondent's Motion for Summary Judgment were identical to those the trial court applied to deny the LSA's Motion for Summary Judgment. The two motions, and arguments contained therein, were legally and factually two sides of the same coin. The granting and denial of the cross motions are not matters that are capable of separation by this Court.

This Court should not apply principles in *Hedgepath* and should instead be guided by its analysis in *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (2014). *Watson* involved competing motions for summary judgment regarding issues of enforceability of an irrevocable trust. *Id.* at 452, 756 S.E.2d at 160. Although this Court refused to exercise jurisdiction over the lower court's order denying summary judgment to Watson, even though there was a competing motion for summary judgment which was granted to Underwood, the reason it denied jurisdiction to hear the appeal was because the two orders were underscored by more than one legal question. *Id.* The Court explained: "[T]his court has declined to consider interlocutory issues even when accompanied by an appealable order, such as the grant of summary judgment, when the court found the issue to be *novel* and relating to the sufficiency of the allegations, *which the trial court had not had the opportunity on which to rule*." *Id.* at 459, 756 S.E.2d at

164 (citing *Pruitt v. Bowers*, 330 S.C. 483, 448, 499 S.E.2d 250, 253 (Ct. App. 1998)) (emphasis added).

Here, the issue of whether Respondent is Decedent's surviving spouse is not novel and the trial court had the opportunity to consider and rule upon the issue and in fact ruled in favor of Respondent which is now the subject of the instant appeal. As the record will reveal, the parties submitted more than 1,000 pages of legal analysis to the lower court. It is undisputed that legal issues contained in all parties' cross motions will be raised again in the future, and because they have all been briefed by the parties, it would be in the interest of judicial economy for the appellate courts to decide the matters at this stage.

The lower court's denial of the LSA's motion and grant of Respondent's motion both involved a single issue, based upon the same facts and same law. The lower court's findings and conclusions in the Orders on Appeal are purportedly based on the Joint Stipulation of Facts. The findings and conclusions in the Orders on Appeal and are equally applicable to both the court's granting and denial of the cross motions for summary judgment. For these reasons, the Court should find that it has jurisdiction to consider the Orders on Appeal in their entirety.

III. THE ORDERS ON APPEAL DID NOT GRANT OR DENY A RULE 12(B)(6), SCRCP, MOTION AND DID NOT RULE UPON RESPONDENT'S "STANDING" TO BRING THE OMITTED SPOUSE AND ELECTIVE SHARE CLAIMS.

Respondent bases her motion to dismiss upon an assertion the Orders on Appeal denied a party's motion to dismiss for "lack of standing," much in the nature of a Rule 12(b)(6) motion to dismiss. *See* Respondent's Motion at p. 6 ("The issue of the validity of Respondent's marriage to Brown was injected into the case only in the context of standing when the Appellants challenged Respondent's standing to bring her claims for elective share and omitted spouse's

share."). Respondent's characterization of the lower court's ruling is simply incorrect.[2]

The Orders on Appeal pertain to extensively-briefed and argued cross-motions for *summary judgment* brought by *all parties, including Respondent*, pursuant to Rule 56, SCRCP. The lower court's order filed January 1, 2015 granted Respondent's Motion for Summary Judgment and denied the LSA's cross Motion for Summary Judgment on the issue of whether Respondent was Decedent's "surviving spouse." The lower court definitively and finally ruled upon that primary statutory element of Respondent's claims pursuant to S.C. Code Ann. §§ 62-2-201 (elective share) and 62-2-301 (omitted spouse): whether Respondent was Decedent's "surviving spouse."

At the risk of stating the obvious, "[t]he purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quotation omitted); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986) ("One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses...."). Summary judgment may be granted in whole or in part. *See* S.C. R. Civ. P. 56(a). Where a party cannot prove an essential element of their claim or defense, summary judgment is appropriate. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552 ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

Both Section 62-2-201 and 62-2-301 of the South Carolina Probate Code set forth the primary requirement that a successful claimant be the decedent's "surviving spouse." *See* S.C.

[2] The LSA notes that there is not one single reference to "standing" in the context of *Respondent's standing* to bring the elective share and omitted spouse claims in any of the motions or legal memoranda submitted to the lower court or the transcripts from oral argument presented to the court.

Code Ann. § 62-2-201(a) (stating only a "surviving spouse has a right of election to take an elective share")[3]; S.C. Code Ann. § 62-2-301 (providing for a right to an intestate share of a probate estate to a "surviving spouse who married the testator after the execution of the will"). "Surviving spouse" is defined in Section 62-2-802.

Upon satisfactory proof that a petitioner is a "surviving spouse" as a matter of law, a petitioner may proceed to prove other statutory elements of her claim and/or overcome any remaining statutory hurdles to recovery. For instance, to succeed in an elective share claim, after establishing petitioner is decedent's surviving spouse, the petitioner must show she did not waive or release her right to recover and/or that any such waiver was invalid. S.C. Code Ann. § 62-2-204; *see also* 32 S.C. Jur. Wills § 211 ("The right of election of a surviving spouse may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure."). To succeed on an omitted spouse claim, the petitioner must show her omission from the testator's will was unintentional and that the testator did not provide for the petitioner outside of the will. *See* S.C. Code Ann. § 62-2-301(a)(1)-(2).

Respondent acknowledged before the lower court that certain legal issues—such as the enforceability of the parties' prenuptial agreement, whether Decedent intentionally omitted Respondent from his will, and whether Decedent provided for Petitioner outside of the will with the intent that such transfer be in lieu of a testamentary gift—are "obviously" not "even relevant unless [she] is first determined to be [Decedent's] surviving spouse." *See* Respondent's Memorandum of Law in Support of Motion for Summary Judgment, filed September 12, 2014, at p. 12. It is implicit in Respondent's acknowledgement that, should she fail to establish the first element of her claim, that she is Decedent's "surviving spouse," she would be barred from

[3] Because the elective share statute is a "statute of creation, . . . strict compliance with its terms is mandatory in order to exercise [such right]." *Simpson v. Sanders*, 314 S.C. 415, 445 S.E.2d 93, 94 (1994).

recover, making the remaining elements irrelevant.

Respondent explicitly contended before the lower court that the issue of whether she was Decedent's "surviving spouse," was one "of law and not subject to factual dispute," using a Rule 56, SCRCP, analysis. *See* Respondent's Memorandum of Law in Support of Motion for Summary Judgment, filed September 12, 2014, at p. 43. Based on this standard, Respondent contended she was "entitled to summary judgment [finding] she is the surviving spouse of [Decedent]." *Id.* at p. 43. It is disingenuous for Respondent to assert on appeal that these issues regard her "standing" to file her claims. She is bound by her arguments below wherein she contended she was entitled to partial summary judgment through an order finding she was Decedent's "surviving spouse" as a matter of law.

Respondent contends in her Motion: "Quite obviously, the purpose of Respondent's actions filed in the Probate Court and removed to Circuit Court was not to establish the validity of her marriage to Brown . . . ." *See* Respondent's Motion at p. 6. The LSA agrees. However, the lower court has jurisdiction to determine, and, indeed, must determine, whether a petitioner in an omitted spouse and/or elective share case constitute, as a matter of law, the decedent's "surviving spouse." The LSA contends this is precisely what the lower court determined in the Orders on Appeal. Where a party fails to prove an essential element of his or her claim, summary judgment, not dismissal, is appropriate because there can be no genuine issue as to any material fact related to that element of proof. *See Celotex*, 477 U.S. at 322 ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the *existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.*") (emphasis added).

Moreover, Respondent's position that the Orders on Appeal related solely to her "standing" to bring an action for elective share and an omitted spouse claim distort fundamental legal tenets. Standing is a threshold determination a court makes as a prerequisite to the petitioner's ability to bring a legal action. As this Court has reflected:

> The lynchpin of [any standing] analysis is that the plaintiff must have a personal stake in the litigation, meaning he is the real party in interest. [Citing *Sea Pines Ass'n for the Prot. Of Wildlife, Inc. v. S.C. Dept't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 297, 291 (2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). In other words, the party seeking relief must have a real, material, or substantial interest in the litigation, not merely a nominal or technical one. *Id.* "Moreover, the injury must be of a personal nature to the party bringing the action, not merely of a general nature which is common to all members of the public."

Georgetown County League of Women Voters v. Smith Land Co., Inc., 393 S.C. 350, 358, 713 S.E.2d 297, 291-92 (2011).

Any effort by the LSA or other party to assert Respondent "lacked standing" to bring her omitted spouse and elective share claims would have been patently without merit. There is no dispute between any of the parties that Respondent and Decedent participated in a ceremonial marriage on December 14, 2001 in Aiken County, South Carolina, and that, at least for some period of time, Decedent believed himself to be married to Respondent.[4] However, as evidence in the record will reflect, what was unknown to Decedent at the time of the purported marriage ceremony to Respondent was Respondent's prior marriage to another man on February 12, 1997.[5] Also unknown to Decedent at the time of his purported marriage to Respondent was the fact that Respondent and Mr. Ahmed never obtained a divorce.[6] These stipulated facts render

[4] *See* Joint Stipulation of Facts, filed on September 5, 2014.

[5] *See* Joint Stipulation of Facts.

[6] *Id.*

Decedent's purported "marriage" to Respondent insufficient as a matter of law. *See Day v. Day,* 216 S.C. 334, 58 S.E.2d 83 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable").

The LSA would have had no reason in law or fact to assert Respondent did not have any "personal stake" in the probate of Decedent's Estate or the subsequent litigation. *See Georgetown County League of Women Voters*, 393 S.C. at 358, 713 S.E.2d at 291. It is clear that although she may lose as a matter of law, Respondent had a "real, material, or substantial interest in the litigation, not merely a nominal or technical one" which was of a "personal nature" to Respondent. *Id.*

For these reasons, Respondent's second argument, that the Orders on Appeal are non-appealable because they merely relate to Respondent's "standing" to bring the claims asserted in the underlying action, are entirely misplaced and should be summarily rejected by this Court.[7]

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this honorable Court deny Respondent's Motion to Dismiss the Appeal.

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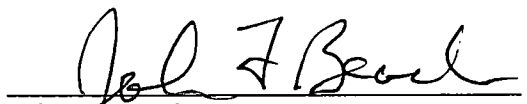
[7] Respondent's reliance on North Carolina law—concluding, in part, "[a] trial court's denial of a Rule 12(b)(6) motion to dismiss . . . does not affect a substantial right."—is not only not binding on this Court, but it is also wholly inapplicable in this context for the reasons previously stated.

Respectfully submitted,



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January 22, 2016.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
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Doyet A. Early III, Circuit Court Judge

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of whom David C. Sojourner, Jr., in his capacity as Limited Special Administrator of the Estate of James Brown, a/k/a James Joseph Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000, is the .....Appellant

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PROOF OF SERVICE

The undersigned hereby certifies that she has served the foregoing Appellant's Return to Respondent's Motion to Dismiss Appeal by depositing a copy of same in the United States Mail, postage prepaid on January 22nd, 2016 and addressed as follows:

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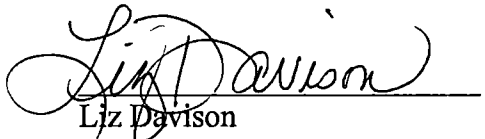

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January 22, 2016

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
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In Re: The Estate of James Brown a/k/a James Joseph Brown
Tommie Rae Brown v. David C. Sojourner, Jr., et al.
Appellate Case No. 2015-002417
A&R File No. 022853-000001

Dear Ms. Kitchings:

Enclosed for filing are an original and seven (7) copies of the Appellant's Return to Respondent's Motion to Dismiss Appeal in the above-referenced matter together with a Proof of Service. Please file the original and six copies and return the extra clocked-in copy with our courier.

By copy of this letter, I am serving a copy of these documents on all attorneys of record.

Thank you for your assistance in this matter. Please contact me with any questions or concerns.

Sincerely,

John F. Beach

JFB/lbb

Enclosures

cc: David C. Sojourner, Jr.
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