

80019

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

RECEIVED
JUN 24 2016
SC Court of Appeals

Case Nos. 2013-CP-02-02849, 2013-CP-02-02850

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, Deana 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.

RESPONDENT'S MOTION TO STRIKE FROM INITIAL BRIEF OF APPELLANTS ALL REFERENCES TO DOCUMENTS WHICH WERE NOT PRESENTED TO OR CONSIDERED BY THE LOWER TRIBUNAL AT OR BEFORE THE NOVEMBER 24, 2014 HEARING RESULTING IN THE JANUARY 13, 2015 ORDER BEING APPEALED IN THIS CASE OR AT OR BEFORE THE JUNE 30, 2015 HEARING RESULTING IN THE OCTOBER 26, 2015 ORDER BEING APPEALED IN THIS CASE

AND

RESPONDENT'S MOTION TO REQUIRE APPELLANTS TO AMEND AND RE-FILE THEIR INITIAL BRIEFS SO AS TO DELETE ANY AND ALL REFERENCES TO ALL DOCUMENTS WHICH WERE NOT PRESENTED TO OR CONSIDERED BY THE COURT OF COMMON PLEAS IN REACHING ITS DECISION IN THE ORDER NOW UNDER APPEAL

AND

MOTION TO STAY AND EXTEND TIME LIMITS FOR RESPONDENT
TO FILE AND SERVE HER INITIAL BRIEF OF RESPONDENT AND RESPONDENT'S
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent Tommie Rae Brown, by and through her undersigned counsel, hereby moves for an Order of this Court striking from Appellants Terry Brown, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, David C. Sojourner, in his capacity as Limited Special Administrator of the Estate of James Brown, Daryl Brown, and Michael Deon Brown's¹ Initial Briefs all references to certain documents² which are not properly part of the record in this case.

Respondent also moves for an Order of this Court requiring Appellants Terry Brown, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, David C. Sojourner, in his capacity as Limited Special Administrator of the Estate of James Brown, Daryl Brown, and Michael Deon Brown to serve and file an amended or new Initial Brief deleting all references to those documents.

The grounds for this Motion are as follows:

1. Rule 208(b), SCACR, governs the content of the Initial Brief and provides in pertinent part:

(b)(1)(D) Argument. . . . A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contention. (emphasis added).

2. Rule 210(c), SCACR, governs the content of the Record on Appeal and provides in pertinent part:

¹ Daryl Brown and Michael Deon Brown both adopt the brief of Appellant David Sojourner, and in the alternative adopt all briefs previously filed by Terry Brown. Neither one references the diaries in their own briefs, but by adopting the LSA's brief, and in the alternative Terry Brown's brief, they are indirectly also referencing the diaries and would also need to file amended initial briefs adopting either the LSA's amended or new initial brief, or in the alternative Terry Brown's new or amended initial brief.

² The specific document(s) referenced are Respondent's diary(ies), which were not admitted into evidence in the lower court and were not considered by that court when it made its ruling.

(c) **Content.** The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal (emphasis added).

3. Rule 210(h), SCACR, expressly prevents the court from considering any fact which is not part of the appellate record. "[T]he appellate court will not consider any fact which does not appear in the Record on Appeal." *Id.* (emphasis added).

4. Rule 210(h) means what it says. "An appellate court may not consider a fact which does not appear in the record." *Spreeuw v. Barker*, 385 S.C. 45, 68, 682 S.E.2d 843, 854 (Ct. App. 2009); *see also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 85 n.4, 749 S.E.2d 139, 148 n.4 (Ct. App. 2013) (same); *Danley Williams v. Moore*, 400 S.C. 90, 105, 733 S.E.2d 224, 231 (Ct. App. 2012) (same); *Sheppard v. State*, 357 S.C. 646, 657 n. 3, 594 S.E.2d 462, 469 n. 3 (2004) (refusing to consider the State's failure to produce a witness's prior statements because the statements were not included in the record).

5. The Initial Briefs of Appellants Terry Brown, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, and David C. Sojourner have referenced the content of certain diaries, allegedly written by Mrs. Brown, which are not included in the Record on Appeal and were not presented to or considered by the Common Pleas Court in making the decision appealed from.

6. Mrs. Brown and James Brown were living together at the time of his death. There is no dispute about this. Unfortunately, at the time Mr. Brown passed away, Mrs. Brown was not in South Carolina. When she returned to her home, she discovered that she was intentionally locked out by the former fiduciaries of Mr. Brown's estate and was unable to retrieve her belongings, including her diaries, from her home. After almost a year of litigation on that issue, Mrs. Brown was allowed to retrieve her possessions, only to discover that her diaries had been illegally taken by a fiduciary, who has admitted taking the diaries.

7. The lower court correctly issued an Order protecting Mrs. Brown's diaries. The diaries were in the possession of a number of lawyers in this case. All counsel were under an Order not to release or publicize the diaries. Despite the lower court's Order, someone allegedly sent an "anonymous" letter to a "reporter."

8. At the time Judge Early agreed to hear the motions for summary judgment, he had not lifted the protective order regarding the diaries. The motion for summary judgment had nothing to do with Mrs. Brown's diaries. The diaries were not considered by the court when it granted summary judgment in Mrs. Brown's favor.

9. The diaries were never introduced in evidence *and they are clearly not part of the record in this case.*

10. If the appellants wanted this court to consider the diaries, they had the burden to convince the trial court to admit the diaries into evidence and include them in the record. "The appellant has the burden of presenting an appellate court with an adequate record." *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 453, 772 S.E.2d 544, 554 (Ct. App. 2015).

11. Because the diaries are clearly not part of the record, they cannot be considered by this court, and the court should strike all references to the diaries in appellants' briefs. Appellants should not be permitted to quote or claim to quote from material which is not part of the record.

12. Not only are Appellants improperly referring to material which is not contained in the appellate record, they are also referring to that material selectively and misleadingly. Despite the contention of Appellants, within the diaries Mrs. Brown regularly refers to Mr. Brown as her husband, showing that she believed the marriage was valid.

13. The Appellants have cherry-picked various language and entries from the diaries that they believe support their position; however, there are a number of other entries that support Respondent's position. Nonetheless, Mrs. Brown's numerous and varied diary entries were not before the lower court in the motion for summary judgment. The motion for summary judgment was based on affidavits filed with the court and on agreed stipulations of fact.

14. Specifically, Respondent moves to strike the following references to Mrs. Brown's diaries, which are not part of the record on appeal, and therefore are not properly before this Court:

a. Initial Brief of Appellant Terry Brown, pp. 1-2

- i. Respondent moves to strike the last two sentences in the Statement of the Case. Specifically: "At a hearing on the LSA's Motion ('March 31, 2014 Hearing') Ms. Hynie's³ attorneys argued against producing her Diaries became publically available on Facebook."

b. Initial Brief of Appellant Terry Brown, p. 36

- i. Respondent moves to strike the "2" statement under the fourth section, which states, "the corroborating needs of the Diaries . . . made in such documents[.]"

c. Initial Brief of Appellant Terry Brown, pp. 37-38

- i. Respondent moves to strike the entire fifth section of Section III A. of the brief, titled "Ms. Hynie has made admissions against her interest that must be considered as evidence supporting the denial of her motion for summary judgment." This entire section specifically references and discusses content in

³ Appellants continue to refer to Mrs. James Brown by her maiden name even though her counsel has requested that they refer to her by her actual name.

the diaries which was not presented to or considered by the lower court when it issued its January 13, 2015 Order or its October 26, 2015 Order.

d. Initial Brief of Appellants Deanna Brown-Thomas, Yamma Brown, Venisha Brown, p. 33

i. Respondent moves to strike the first full paragraph on page 33 which states, "The circuit court also sealed . . . Hynie and to use her Diaries." This paragraph specifically discusses the alleged content of the diaries, which was not considered by the lower court.

e. Initial Brief of Appellant David C. Sojourner, Jr., as LSA, pp. 1-2

i. Respondent moves to strike the references to the diaries and the allegation that the LSA could have used the diaries to undermine Respondent's will and trust challenges. Neither the diaries nor the content of the diaries was considered by the lower court.

16. Until such time as this Court rules upon the question of whether or not the documents referenced in the Initial Briefs of Appellants Terry Brown, Deanna Brown-Thomas, Yamma Brown, Venisha Brown, and David C. Sojourner, in his capacity as Limited Special Administrator of the Estate of James Brown, which have been objected to by Respondent Tommie Rae Brown in this motion, Respondent cannot properly prepare her Initial Brief or her Designation of Matter to be Included in the Record on Appeal. Respondent does not know and cannot currently know, to any degree of certainty, if she will need to respond to arguments in the Initial Briefs of the Appellants based on documents ". . . which [were] not presented to the lower court or tribunal."⁴

⁴ Rule 210(c), SCACR

17. Based upon the foregoing, Respondent Tommie Rae Brown respectfully requests that this Court hold the time limits for her serving and filing her Initial Brief of Respondent and her Respondent's Designation of Matter to be Included in the Record on Appeal in abeyance until such time as the Court rules upon Respondent's Motions set forth above and then reset those time limits when an Order ruling upon those Motions is entered.

18. Counsel for Defendant certifies that he has attempted in good faith to resolve the matters contained in the motion or, in the alternative that consultation would serve no useful purpose, or could not be timely held or there was no duty of consultation pursuant to Rule 11, SCRPC.

Respectfully submitted,

ROSEN LAW FIRM, LLC



Robert N. Rosen (Bar No. 4918)
Erin C. Casey (Bar No. 101935)
18 Broad Street, Suite 201
Charleston, South Carolina 29401
843-377-1700 (office)

S. Alan Medlin
1713 Phelps Street
Columbia, SC 29205

T. Heyward Carter, Jr.
Andrew W. Chandler
M. Jean Lee
Evans, Carter, Kunes & Bennett
115 Church Street
P.O. Box 369
Charleston, SC 29402

David L. Michel
Michel Law Firm, LLC
15 State Street
Charleston, SC 29401

Arnold S. Goodstein
Goodstein Law Firm, LLC
P.O. Box 2350
Summerville, SC 29484-2350

Charleston, SC
June 21, 2016

ATTORNEYS FOR RESPONDENT
TOMMIE RAE BROWN

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

RECEIVED

JUN 24 2016

Case Nos. 2013-CP-02-02849, 2013-CP-02-02850

SC Court of Appeals

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, Deana 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.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Respondent's Motion to Strike from Initial Brief has been served on all counsel of record by depositing a copy of same in the United States Mail, postage prepaid on June 21, 2016, and addressed as follows:

Robert C. Byrd, Esq.
Amber B. Carter, Esq.
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, SC 29201
*Attorneys for Appellants Deanna Brown-Thomas,
Yamma Brown, and Venisha Brown*

David B. Bell, Esq.
David Bell Law Firm
619 Greene Street
Augusta, GA 30903
*Attorney for Daryl Brown,
Michael Deon Brown and Lisa
Sims*

Matthew Day Bodman, Esq.
Matt Bodman, PA
1500 Calhoun Street
Columbia, SC 29201
*Attorney for Daryl Brown,
Michael Deon Brown and Lisa Sims*

Louis Levenson, Esq.
Levenson & Associates
125 Broad Street, SW
Atlanta, GA 30303
Attorney for Larry Brown

Scott Keniley, Esq.
Keniley Kumar LLC
Two Ravinia Drive, Suite 500
Atlanta, GA 30346
Attorney for Terry Brown and Forlando Brown

William Joseph Barr, Esq.
Barr Law LLC
108 N. Academy Street
Kingstree, SC 29556-3422
*Attorney for Tonya Brown a/k/a Sara
LaTonya Brown-Fegan, Jeanette Mitchell
and Ciara Pettitt and Cherquarius Williams
for LaRhonda Pettitt*

A. Peter Shahid, Jr., Esq.
Shahid Law Office
89 Broad Street
Charleston, SC 29401
*Attorney for Guardian ad Litem,
Stephen M. Slotchiver*

John F. Beach, Esq.
Lyndey Ritz Zwing, Esq.
Adams and Reese LLP
1501 Main Street, Fifth Floor
P.O. Box 2285 (29202)
Columbia, SC 29201
*Attorneys for the Appellant Limited
Special Administrator and Limited
Special Trustee David C. Sojourner, Esq.*

John A Donsbach, Esq.
Donsbach & King, LLC
504 Blackburn Drive
Augusta, GA 30907
*Attorney for Terry Brown and Forlando
Brown*

Itriss Jenkins, Esq.
Itriss J. Jenkins, LLC
215 E. Bay Street, Suite 203
Charleston, SC 49401
*Attorney for Tonya Brown a/k/a Sara
LaTonya Brown-Fegan, Jeanette Mitchell
and Ciara Pettitt and Cherquarius
Williams for LaRhonda Pettitt*

Vera Gilford, Esq.
Post Office Box 12553
Miami, Florida 33101
*Attorney for Tonya Brown a/k/a Sara
LaTonya Brown-Fegan, Jeanette Mitchell
and Ciara Pettitt and Cherquarius
Williams for LaRhonda Pettitt*

ROSEN LAW FIRM, LLC



Robert N. Rosen (Bar No. 4918)
Erin C. Casey (Bar No. 101935)
18 Broad Street, Suite 201
Charleston, South Carolina 29401
843-377-1700
ATTORNEYS FOR RESPONDENT
TOMMIE RAE BROWN

ROSEN LAW FIRM, LLC

ATTORNEYS AND COUNSELORS AT LAW

THE PEOPLES BUILDING

P.O. BOX 1840 (29402)

18 BROAD STREET, SUITE 201

CHARLESTON, SOUTH CAROLINA 29401

www.rosen-lawfirm.com

ERIN C. CASEY
ATTORNEY-AT-LAW
ecasey@rosen-lawfirm.com

PHONE (843) 377-1700

FAX (843) 377-1709

June 21, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
JUN 24 2016
SC Court of Appeals

Re: Estate of James Brown a/k/a James Joseph Brown
Tommie Rae Brown, Respondent v. David C. Sojourner, Jr., et al.
Appellate Case No. 2015-002417

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondent Tommie Rae Brown's **Motion to Strike from Initial Brief** and the accompanying **Proof of Service** in the above-referenced matter. Please file the original and six copies and return the extra clocked copy of the Motion and Proof of Service in the enclosed prepaid envelope. Our check in the amount of \$25.00 is enclosed to cover the filing fee.

Thank you for your assistance, and please feel free to contact our office if you have any questions.

Sincerely,

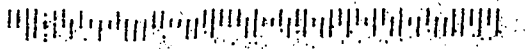


Erin C. Casey

Enclosures

cc:

All Counsel of Record (via email and U.S. Mail, w/ enclosures)
Tommie Rae Brown



TRACKING #



9114 9999 4431 3214 3736 91

LAB400R Aug. 2013
7690-17-000-0669



UNITED STATES
PITNEY BOWES
02 1P \$ 006.45⁰
0000870782 JUN 21 2016
MAILED FROM ZIP CODE 29401

ROSEN LAW FIRM, LLC

ATTORNEYS AND COUNSELORS AT LAW

THE PEOPLES BUILDING

P.O. Box 1840 (29402)

18 BROAD STREET, SUITE 201

CHARLESTON, SOUTH CAROLINA 29401

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

JUN 21 2016

SC Court of Appeals