

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417

In Re: The Estate of James Brown a/k/a James Joseph Brown,

Tommie Rae Brown.....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited
Special Administrator and Limited Special Trustee,
Deanna Brown-Thomas, Yamma Brown, Venisha Brown,
Larry Brown, Terry Brown and Daryl Brown Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as
Limited Special Administrator and Limited Special Trustee,
Deanna Brown-Thomas, Yamma Brown, Venisha Brown,
Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

**APPELLANTS' RETURN TO RESPONDENT'S MOTION TO STRIKE FROM
APPELLANTS' INITIAL BRIEFS, MOTION TO REQUIRE APPELLANTS TO
AMEND AND RE-FILE THEIR INITIAL BRIEFS, AND MOTION TO STAY AND
EXTEND TIME LIMITS FOR RESPONDENT TO FILE HER INITIAL BRIEF**

Appellants Deanna Brown-Thomas, Dr. Yamma Brown, and Venisha Brown
hereby submit this Return to Respondent Tommie Rae Brown's Motion to Strike from
Appellant's Initial Briefs, Motion to Require Appellants to Amend and Re-file Their
Initial Briefs, and Motion to Stay and Extend Time Limits for Respondent to File Her
Initial Brief (collectively, "Motions"). Respondent's Motions should be denied.

ARGUMENT

I. The References to the Diaries Are Not Improper and Should Not be Stricken.

Respondent Tommie Rae Brown a.k.a. Hynie (“Respondent” or “Hynie”) asks this Court to require Appellants to strike from their Initial Briefs any mention of Respondent’s hand-written diaries (the “Diaries”) and refile redacted Initial Briefs deleting such references. This is an extraordinary and wholly unwarranted request, for which Respondent offers no applicable supporting authority. Respondent’s Motions mischaracterize Appellants’ limited references to the Diaries and misapprehend the purpose for which Appellants mentioned the Diaries in the first place.

Appellants referenced the Diaries in support of their fifth Issue on Appeal and solely for the purpose of demonstrating that the trial court erred in barring Appellants from taking discovery of Hynie, including as to her Diaries, prior to granting her summary judgment. (Appellants’ Initial Brief, p. 3, 33–34.) That the contents of the Diaries were *not* considered by the trial court is precisely the point of Appellants’ objection. Whereas Appellants’ objection is to a procedural issue, a brief description of the Diaries was necessary to give this Court a preliminary understanding of their relevance.

“Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *BPS, Inc. v. Worthy*, 362 S.C. 319, 329, 608 S.E.2d 155, 161 (Ct. App. 2005). Thus, in order for this Court to have a complete understanding of why Appellants argue they improperly were denied the opportunity to

conduct discovery prior to the granting of summary judgment in Respondent's favor, this Court must consider the existence and importance of the Diaries to the case.¹

Appellants did not and do not ask this Court to rely upon the *contents* of the Diaries as to the merits of Hynie's spousal claim. Instead, Appellants simply are asking this Court to consider the existence and relevance of the Diaries that Appellants were barred from using in discovery and on summary judgment. This issue properly was raised to the trial court and therefore properly is before this Court. (*See* Appellants' Motion to Alter or Amend Judgment and/or for Reconsideration, p. 2; LSA's Motion to Alter, Amend and Reconsider, dated Jan. 26, 2015, p. 3.)

The Diaries are also relevant to Appellants' contention that the trial court erred in relying upon facts not in evidence in granting Respondent's motion for summary judgment (Appellants' Initial Brief, p. 15–21), and this issue clearly was raised before the trial court in Appellants' motions to reconsider (Appellants' Motion to Alter or Amend Judgment and/or for Reconsideration, p. 2; LSA's Motion to Alter, Amend or Reconsider, p. 3).

Although the Diaries were not in evidence, the contents of the Diaries already had been made public, and the parties and the Court all were aware of the contents of those writings. (*See* Terry Brown's Motion to Alter, Amend or Reconsider, dated Feb. 2, 2015, p. 28, ¶ 27.) Furthermore, the transcript of the hearing regarding the LSA's motion to modify the protective order relating to the Diaries was before the trial court when the

¹ The facts contained in the parties' Joint Stipulations were sufficient to grant *Appellants'* motion for summary judgment. Appellants stressed, however, that to the extent *Respondent's* motion for summary judgment raised factual issues, as it did, the parties should be allowed to proceed with discovery. *See* March 31, 2014 hearing transcript at 57:22–64:15, attached as Exhibit 1 to the LSA's Memo in Support of Motion for Summary Judgment.

motions for summary judgment were heard, and properly is before this Court. (March 31, 2014 hearing transcript at 57:22–64:15, attached as Exhibit 1 to the LSA’s Memo in Support of Motion for Summary Judgment.) Accordingly, Appellants duly cite in their Initial Brief to the March 31, 2014 hearing transcript that is to be included in the Record on Appeal and explain to the Court why the Diaries are relevant to the trial court’s erroneous summary judgment rulings. (Appellants’ Initial Brief, p. 33–34.)

It is important to remember that the Diaries themselves do not need to be part of the Record on Appeal in order for the Appellants to reference them in their argument. Respondent has offered no applicable authority—either in case law or in the South Carolina Appellate Court Rules (the “Rules”)—to support her contention that Appellants should be required to file a redacted Initial Brief to remove any reference to the Diaries.

Under the guise of a motion to strike, Respondent’s motion improperly seeks to prevent Appellants from advancing their legitimate fifth Issue on Appeal as to whether the trial court erroneously barred Appellants from taking discovery of Respondent prior to summary judgment, including as to her Diaries. Respondent’s interpretation of the Rules would prevent a party from ever mentioning on appeal any fact or circumstance that was not considered by the trial court. Such an interpretation is absurd because it would prevent appellants from raising arguments exactly like the one made in this appeal: that the trial court erred in failing to consider or allow discovery of material evidence or facts. And yet, our appellate courts routinely remand cases for that very reason. *See e.g., Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002) (affirming the Court of Appeals’ order to remand where summary judgment

was granted before opposing party was allowed to have discovery of potentially relevant facts), *aff'g as modified* 338 S.C. 343, 348, 526 S.E.2d 253, 255 (Ct. App. 2000).

The Rules contemplate that parties to an appeal will by necessity refer to facts and circumstances outside of the Record on Appeal. Rule 210(h), SCACR, states in its entirety:

Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.

(Emphasis added.) Rule 212, SCACR, allows the Court to require and the parties to request to supplement the Record on Appeal prior to oral argument. Rule 208(b)(1)(C) explains the purpose and contents of the Statement of the Case section of an initial brief, and Rule 208(b)(2) provides the requirements for a respondent's initial brief.

Appellants' first reference to the Diaries is contained in their Statement of the Case. (Appellants' Initial Brief, p. 3.) According to the Rules, the Statement of the Case section shall contain "a concise history of the proceedings, insofar as necessary to an understanding of the appeal" and "shall not contain contested matters." Rule 208(b)(1)(C), SCACR.

The Diaries are integral to Appellants' fifth Issue on Appeal, thus the history and some substance needed to be explained for a proper understanding of the issue presented. Because the Statement of the Case shall not contain contested matters, Appellants presented their argument as to the Diaries in the Argument section of their brief. The existence of the Diaries and the fact the trial court refused to allow discovery regarding the Diaries prior to granting Respondent's summary judgment motion is a significant part of Appellants' fifth Issue on Appeal. Requiring Appellants to strike from their brief any references to the Diaries would be inequitable and manifestly unjust as it would

hamstringing Appellants' ability to present effectively this important appellate issue to the Court.

Finally, Appellants should not be required to bear the time and expense of filing redacted Initial Briefs. Even if this Court were to determine that some reference to the Diaries exceed the bounds of permissible content under the Rules, this Court is more than capable of ignoring any extraneous content. This Court often receives briefs *with fully briefed issues* that are not preserved for appeal. Instead of requiring those parties to amend and re-file, the Court simply refuses to consider and rule upon any issues or facts not properly before it. *See State v. Wright*, 416 S.C. 353, 785 S.E.2d 479, 488 (Ct. App. 2016) (finding an issue unpreserved for appellate review and therefore not ruling on the merits of the issue); *Lyons v. Fid. Nat. Title Ins. Co.*, 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015), *reh'g denied* (Jan. 21, 2016).

II. Respondent's Motion To Toll the Time to File Her Initial Brief Should be Denied.

Respondent's request to toll the time limits for serving her Initial Brief and Designation of Matter to be Included in the Record on Appeal while the Court considers her motions likewise should be denied.²

Respondent previously requested, and without opposition from Appellants was granted, a total of sixty (60) days from the service of the last Appellant's initial brief to file her own Initial Brief. (Court of Appeals Order dated May 18, 2016, attached for the

² Generally, motions filed in the appellate courts do not stay the time limits under the Rules. Rule 240(b), SCACR states:

Stay of Time Limits. Unless otherwise provided by these Rules, or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition. A motion to dismiss an appeal or a motion to relieve counsel shall, however, automatically stay the time limits for perfecting the appeal until the motion is decided.

(Emphasis in original.) Therefore, only an order of this Court can stay the time for Respondent to file her Initial Brief.

convenience of the Court.) Respondent already has been given ample additional time to craft her responsive arguments, and any contention that she cannot prepare her Initial Brief until this Court rules on her motions is disingenuous. Before the Court is a detailed seven-page memorandum presenting Respondent's view of the factual and legal significance of the Diaries, and yet she asserts that she "cannot properly prepare her Initial Brief or Designation of Matter." Her memorandum itself demonstrates her ability to address the issue of the Diaries as they relate to the summary judgment on appeal.

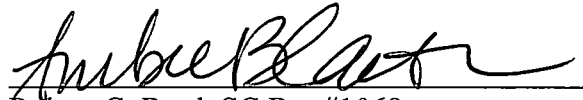
Respondent has presented no sufficient reason to deviate from the Rules and to toll or extend the time limits in this appeal. An additional extension is unnecessary and serves only to delay the timely adjudication of Appellants' appeal. Accordingly, this Court should deny Respondent's unjustified request to extend further the time for Respondent to file her Initial Brief and Designation of Matter to be Included in the Record on Appeal.

CONCLUSION

Respondent's motion to strike any mention of her Diaries, to require Appellants to amend and re-file their Initial Briefs, and to stay the time limits for Respondent to file and serve her Initial Brief should be denied. Appellants have requested this Court to simply note the existence and relevance of the Diaries in connection with their fifth Issue on Appeal. The existence and relevance of the Diaries properly was before the trial court and properly is before this Court. Finally, Respondent has proven herself capable of responding to all assertions relating to the Diaries and she offers no sufficient reason to further delay the filing and service of her Initial Brief. For these reasons, Appellants respectfully request this Court deny Respondent's motions.

July 1, 2016

Respectfully submitted,



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Doyet A. Early, III, Circuit Court Judge

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In Re: The Estate of James Brown a/k/a James Joseph Brown,

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v.

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Larry Brown, Terry Brown and Daryl Brown Respondents below,

Of whom David C. Sojourner, Jr., in his capacity as
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Deanna Brown-Thomas, Yamma Brown, Venisha Brown,
Terry Brown, Michael Deon Brown and Daryl Brown are the Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on July 1, 2016, s/he has caused a copy of the Return to Respondent Tommie Rae Brown's Motion to Strike from Appellant's Initial Briefs, Motion to Require Appellants to Amend and Re-file Their Initial Briefs, and Motion to Stay and Extend Time Limits for Respondent to File Her Initial Brief to be served upon all parties of record by mailing a copy of the Return in Opposition to Respondent Tommie Rae Brown's Motion to Strike from Appellant's Initial Briefs, Motion to Require Appellants to Amend and Re-file Their Initial Briefs, and Motion to Stay and Extend Time Limits for Respondent to File Her Initial Brief addressed as follows:

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July 1, 2016

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SC Court of Appeals

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

Re: *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

Dear Ms. Kitchings:

Enclosed for filing please find an original and one copy of Appellants' Return to Respondent Tommie Rae Brown's Motion to Strike from Appellant's Initial Briefs, Motion to Require Appellants to Amend and Re-file Their Initial Briefs, and Motion to Stay and Extend Time Limits for Respondent to File Her Initial Brief in the above-referenced appeal. Also enclosed please find the Proof of Service.

By copy of this letter, we are serving all parties of record with a copy of the Return. Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Amber B. Carter

Enclosures

cc: Robert N. Rosen, Esq.
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T. Heyward Carter, Jr., Esq.
Andrew Chandler, Esq.
M. Jean Lee, Esq.
David L. Michel, Esq.
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