

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUL 11 2016
SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

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 REPLY TO APPELLANTS' RETURN TO MOTION TO STRIKE FROM INITIAL BRIEF OF APPELLANTS ALL REFERENCES TO DOCUMENTS WHICH WERE NOT PRESENTED TO OR CONSIDERED BY THE LOWER TRIBUNAL, TO REQUIRE APPELLANTS TO AMEND AND RE-FILE THEIR INITIAL BRIEFS, AND TO STAY AND EXTEND TIME LIMITS FOR RESPONDENT TO FILE AND SERVE HER INITIAL BRIEF AND HER DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent Tommie Rae Brown, by and through her undersigned counsel, as and for her Reply to Appellants' Returns, respectfully shows this Court as follows:

1. It is undisputed in all of the Returns to Respondent's Motion to Strike that the contents of Tommie Rae Brown's diaries were not before the lower court when it ruled on the

Motion for Summary Judgment. Appellant Sojourner's Return correctly points out that the LSA made no reference to the content of the diaries but merely quoted from a transcript of a hearing before Judge Early about dissolving the protective order related to the diary at some time in the future. *See* Memorandum of Law in Opposition to Tommie Rae Brown's Motion to Strike at p. 2. The LSA further concedes that the content of the diaries "was not included within the Joint Stipulation of Facts submitted to the lower court." *See id.* at p. 3. Actually the only facts before the lower court were in the Joint Stipulation of Facts and several affidavits, none of which contained any reference to the diaries.

2. The Return of Appellant Terry Brown signed by John A. Donsbach also concedes that the contents of the diaries were not before court. Indeed this Appellant also concedes that the matter before the court centered on the LSA "seeking access to the diaries mentioned in Appellants' briefs to be used as evidence in this matter. The lower court was clearly aware of their existence" *See* Appellant Terry Brown's Return, at pp. 6-7 (emphasis added). This is a bizarre statement as, of course, the court was "aware" of the diaries but decided to hold the issue of the discovery of the diaries in abeyance pending the Motion for Summary Judgment, which was based on a matter of law and a stipulation of facts.

3. Mr. Beach, counsel for the LSA, correctly quotes what happened in the court on March 31, 2014 in his Return at pp. 3-5:

The Court: I [am] [going] [to] hold this motion in abeyance for 30 days, giving [Mrs. Brown] an opportunity . . . to file a motion for summary judgment, and if it's strictly a legal question, that may be dispositive. If it involves factual issues, obviously I would not rule on it; I will say you have to have an opportunity to complete discovery before I rule to determine whether or not there were genuine issues of material fact in dispute.

Clearly the court did not consider the diaries. Yet Appellant Terry Brown (and the other Appellants) want this Court to do so anyway.

4. The Motion for Summary Judgment was granted on January 13, 2015 and the Order allowing access to the diaries was granted on September 14, 2015, so obviously (again) the diaries could not have been before the lower court.

5. Appellant Terry Brown's statement that "[t]hese issues were squarely before the Court" is misleading, if not thoroughly disingenuous. It is undisputed that the lower court never read the diaries and granted summary judgment on the Joint Stipulation of Facts which Mr. Donsbach signed and stipulated to and affidavits. *See* Exhibit "A" attached. These stipulations contain no mention of the diaries.

6. Appellant Terry Brown's brief in particular is a blatant, intentional violation of the Rules of this Court. Rule 208(b), SCACR, requires counsel for any appellant to reference the Record on Appeal in his brief. Rule 210(c), SCACR, clearly states that the Record should not include matters which were not presented to the lower court. Appellant Terry Brown's position is that these Rules do not apply to him. He can violate them with impunity and this Court is powerless to enforce its own Rules. Obviously his argument is absurd, not to mention impertinent.

7. As to the procedural argument advanced by Appellant Terry Brown, clearly the South Carolina Rules of Civil Procedure do not apply to the appellate courts in this state. The South Carolina Appellate Court Rules govern the "practice and procedure in appeals, petitions, and motions in the Supreme Court and the Court of Appeals." Rule 101, SCACR. Respondent's Motion was properly before the Court under Rule 240, SCACR, and the grounds for that motion, were based on Appellants' violation of Rules 208 and 210, SCACR.

8. The issue before the Court is whether Appellants have violated Rule 208(b) and Rule 210(c), SCACR, and have included things that were not considered by the lower court and

are not in the record on appeal. This Court has the authority to grant motions to enforce its own rules. Rule 240(a), SCACR.

9. In fact, in Appellant Terry Brown's Return to Respondent's Motion, he concedes that the diaries were not before the lower court and are therefore not in the record on appeal. Specifically, Terry Brown states, "[w]ith regard to Section Five, Pages 37-38, Appellant Terry Brown makes the argument that additional evidence is available which has not been considered." *See* Appellant Terry Brown's Return, p. 8. This "additional evidence" not considered by the lower court is the diaries.

10. Appellant Terry Brown's Reply Memorandum dated October 31, 2014, which he attached as Exhibit "A" to his Return clearly supports Respondent's position that the diaries were not before the lower court when it granted summary judgment. In that memorandum, Appellant Terry Brown discusses Mrs. Brown's diary and refers the court to a footnote which states: "It is [Terry Brown's] understanding that the use of this piece of evidence is currently being held in abeyance." The diaries were "held in abeyance," meaning they were not considered by the lower court in its grant of summary judgment. The lower court did not need that evidence in reaching its decision which was based on the law and a stipulation of fact.

11. Appellant Terry Brown's references to the diary and his argument in his Return is designed to put the diaries into evidence before this Court so that this Court can consider evidence that was not considered by the lower court. The Return essentially says as much: ". . . the issues raised by Respondent should be addressed in her responses brief . . ." *See* Appellant Terry Brown's Return, p. 4. Thus, Appellant Terry Brown wants to waste this Court's time with lengthy discussions of evidence not in the record and not considered by the lower court. Respondent declines this invitation.

12. Appellant Terry Brown's argument is that because there is no rule expressly permitting a motion to strike, such a motion is improper. The implied but necessary premise to this argument is that the rules prohibit all motions they do not allow. This premise is wrong and the argument is frivolous. Rule 240(a), SCACR, provides as follows:

This Rule governs all motions or petitions filed in the appellate court, including **but not limited to**: motions for extensions of time, motions to reinstate, petitions for rehearing, motions to be relieved as counsel or for substitution of counsel, petition for supersedeas, motions to remand or dismiss and petitions for hearing en banc.

(emphasis added). The key phrase "but not limited to" suggests that the list of motions in the rule was never intended to be complete, and therefore that many motions not expressly referenced in the rules are nevertheless allowed.

13. Under Rule 210(c), SCACR, "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal." It is therefore clearly improper to include in an appellate brief matter which is not properly before the court. If parties were permitted to refer freely to matters outside the record and there is no such method of enforcement (i.e., granting a motion to strike), it would be very easy for such matter to be considered on appeal, in a manner which directly violates Rule 210(c), SCACR.

14. As to the rather intemperate and indeed peculiar decision of Judge Easterbrook in *Custom Vehicles v. Forest River Inc.*, 464 F.3d 725 (7th Cir., 2006), it may very well be the policy of the Seventh Circuit Court of Appeals to allow lawyers to run amok and put anything in the record on appeal and make any argument they wish based on matters not in the record.¹ That is a matter for the judges of that court. This Court, however, has rules and has remedies available to enforce those rules. It has been the policy of this Court to require counsel to comply

¹ Judge Easterbrook seems to be a special case to say the least. He has a reputation for chastising attorneys for procedural mistakes. See David Lat, *Benchslap of the Day: Judge Easterbrook Benchslaps Biglaw*, ABOVE THE LAW (Feb. 8, 2012, 1:24 PM), <http://abovethelaw.com/2012/02/benchslap-of-the-day-judge-easterbrook-benchslaps-biglaw/>

with the South Carolina Rules of Appellate Procedure.

15. Indeed *Custom Vehicles* has not been cited in a published Court of Appeal decision outside the Seventh Circuit. The First, Ninth, Tenth, and Eleventh Circuits have all granted motions to strike all or part of a brief, without any suggestion that the motion was improperly filed. See *Smith & Wesson, Div. of Bangor Punta Corp. v. United States*, 782 F.2d 1074, 1084 (1st Cir. 1986) (“The Army’s motion to strike pages 1-30 of the reply brief and pages 35-42 of its addendum is granted.”); *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1145 n.2 (10th Cir. 2000) (“ARCO has also filed a motion seeking to strike an amicus curiae brief we grant ARCO’s motion.”); *Tallahassee Mem’l Reg’l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n.16 (11th Cir. 1987) (“[T]he Appellees’ motion to strike the brief is granted.”); *McClain v. Boeing Co.*, 444 F. App’x 980, 982-83 (9th Cir. 2011) (“We grant the Union’s motion to strike”).

16. In addition, a Seventh Circuit case decided after *Custom Vehicles* actually struck a brief. See *Abner v. Scott Mem’l Hosp.*, 634 F.3d 962, 964 (7th Cir. 2011). The Seventh Circuit therefore appears to believe that it does have the power to strike a brief.

17. In any event, Appellant Terry Brown’s use of a Seventh Circuit opinion is not applicable to this Court. South Carolina law has traditionally permitted motions to strike material improperly included in an appellate brief. In *Bilton v. Best W. Royal Motor Lodge*, 282 S.C. 634, 321 S.E.2d 63 (Ct. App. 1984), the Court of Appeals found:

For our initial consideration is a motion filed by respondents to strike portions of the appellant’s reply brief as being in violation of Supreme Court Rule 8, Section 7 matters not appearing in the Transcript of Record. In their return to motion, Best Western and Aetna claim their violation of this rule is in response to matters outside the record appearing in the respondents’ brief. **We have examined the alleged errors and find both the respondents’ brief and the appellants’ reply brief to be in violation.**

.....

The fact that one party has violated Supreme Court Rules does not give the other party the right to do so. While we may consider such evidence as a matter of grace, *State v. Orr*, 225 S.C. 369, 82 S.E. (2d) 523 (1954), we decline to do so. Each sides' version of the testimony is different, the witnesses are unavailable to testify or to be deposed, and permission to insert this extraneous matter was never requested nor received. Accordingly, **the facts improperly stated in both parties' briefs are not considered.** *Becker v. Uhe*, 221 S.C. 334, 70 S.E. (2d) 346 (1952).

282 S.C. at 638-39, 321 S.E.2d at 66 (emphasis added).

The South Carolina Supreme Court stated that “[m]otion was made by respondent to strike certain matters from appellant’s brief. These matters were irrelevant and have not been considered.” *Parker v. S. Carolina Pub. Serv. Comm’n*, 281 S.C. 215, 218, 314 S.E.2d 597, 599 (1984). Both the *Bilton* and *Parker* opinions decline to consider matters which were not properly present in briefs.

There is not the slightest suggestion in any South Carolina case that a motion to strike material from a brief is procedurally improper. Such motions have sometimes been granted, sometimes been denied, and sometimes not been ruled upon at all. But no court in this state has ever suggested such a motion cannot be filed.

The Motion to Strike in this case clearly should be granted.

Respectfully submitted,

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Charleston, SC
July 7, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF AIKEN)
)
 Tommie Rae Brown,)
)
 Petitioner,)
)
 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,)
)
 IN RE:)
)
THE ESTATE OF JAMES BROWN)
A/K/A JAMES JOSEPH BROWN)
)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT
 C/A Nos. 2013-CP-02-02849, 2013-CP-02-02850

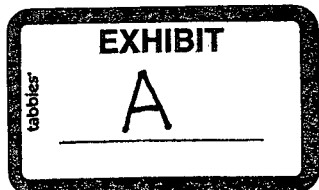
JOINT STIPULATION OF FACTS

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 AIKEN COUNTY
 CLERK OF COURT

Petitioner Tommie Rae Brown ("Petitioner"), Respondent David C. Sojourner, Jr., in his capacity as Limited Special Administrator and Limited Special Trustee ("LSA"), and Respondents Deanna Brown Thomas, Yamma N. Brown, Venisha Brown, Larry Brown, Terry Brown, and Daryl Brown hereby jointly stipulate to the facts set forth herein.

The Parties entered into this Joint Stipulation while preserving their respective arguments that any or all of the matters contained herein are inadmissible, irrelevant, and/or immaterial to whether the Petitioner is Decedent's surviving spouse and/or any other issue in this or related litigation.

On November 27, 2001 Petitioner and James Joseph Brown ("Decedent") purportedly executed a purported Prenuptial Agreement. All Parties retain their right and ability to assert



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Petitioner, through the Prenuptial Agreement, waived her right to claim as Decedent's surviving spouse under S.C. Code Ann. §§62-2-301 (omitted spouse) and 62-2-201 (elective share) or otherwise, and Petitioner retains her right to deny the enforcement, validity and authenticity of the same.

The Parties therefore stipulate as follows:

1. On February 12, 1997, Petitioner and Javed Ahmed obtained a marriage license in the State of Texas, a true copy of which is attached as **Exhibit 1**.

2. On February 17, 1997 Petitioner participated in a marriage ceremony with Javed Ahmed in Harris County Texas.

3. On June 11, 2001 Petitioner's son, James Joseph Brown, II, was born in Las Vegas, Nevada, and a true copy of his birth certificate is attached as **Exhibit 2**. The LSA filed a Motion to Acquire DNA Samples from James Brown, II on March 10, 2014 in the pretermitted child action, Case No. 2013-CP-02-02851. All parties agreed that the child should submit to a DNA test to help determine if he is in fact the child of Decedent. All parties approved a consent order to that effect, and said consent order was filed on May 14, 2014. On June 11, 2014, James Joseph Brown, II, in accordance with this order, submitted to a DNA test at the LabCorp office located at 7751 West Flamingo Road, Suite B 102, Las Vegas, Nevada 89147. The results of the DNA test show that "the probability of paternity is 99.99%." See LabCorp DNA Test Results, attached herein as **Exhibit 3**. The parties stipulate that **Exhibit 3** is a true and authentic copy of the test and is admitted into evidence without objection. Respondents reserve the right to move the court for another DNA test should additional evidence become available that challenges the validity of the LabCorp DNA Test Results.



4. On December 10, 2001, Petitioner and Decedent obtained a marriage license in the State of South Carolina, a true copy of which is attached as **Exhibit 4**.

5. On December 14, 2001 Decedent and Petitioner participated in a marriage ceremony in Beech Island, South Carolina.

6. From the February 17, 1997 marriage ceremony between Petitioner and Javed Ahmed through the December 14, 2001 marriage ceremony between Petitioner and Decedent, no order of any court or other occurrence of which Plaintiff is aware at this time ended or caused to end any marriage that certain parties assert existed between Petitioner and Javed Ahmed.

7. On December 15, 2003, Petitioner filed a family court action in Charleston County South Carolina seeking an annulment of her marriage to Javed Ahmed (*Tommie Rae Hynie, a/k/a Tommie Rae Brown v. Javed Ahmed*, 2003-DR-10-4609) (the "Ahmed Annulment Action", attached herein). The parties agree that the following documents were filed in that case and true and correct copies of each are attached hereto as the following Exhibits:

Exhibit 5 - Tommie Rae Brown's Summons & Complaint for Annulment, filed December 15, 2003;

Exhibit 6 - Ronald Pannel's Affidavit of Attempted Service filed February 4, 2004;

Exhibit 7 - Affidavit of Tommie Rae Brown filed February 4, 2004;

Exhibit 8 - Order of Publication filed February 4, 2004;

Exhibit 9 - Affidavit of Marcia F. Jones filed April 15, 2004;

Exhibit 10 - Affidavit of Publication filed April 15, 2004;

Exhibit 11 - Order of Continuance filed March 24, 2004;

Exhibit 12 - Final Order filed April 15, 2004.

8. A true copy of the transcript of a hearing held on April 15, 2004 in the Ahmed Annulment Action is attached as **Exhibit 13** ("Ahmed Annulment Action Transcript").



9. Except as may be contained in the Ahmed Annulment Action Transcript and the Family Court documents attached herein as **Exhibits 5-13**, Petitioner at this time can identify no documents or other tangible evidence evidencing Javed Ahmed was married to another person when Petitioner and Javed Ahmed participated in the February 17, 1997 marriage ceremony.

10. Except as may be contained in the Ahmed Annulment Action Transcript, Petitioner at this time can identify no person (except Javed Ahmed and the wives to whom he was allegedly married) who can testify that Javed Ahmed was married to another person when Petitioner and Javed Ahmed participated in the February 17, 1997 marriage ceremony.

11. On April 15, 2004 the Charleston County Family Court issued the Final Order in the Ahmed Annulment Action, a true copy of which is attached as **Exhibit 12**.

12. Decedent was not a named party in the Ahmed Annulment Action.

13. James Brown gave Tommie Rae Brown the funds to pay the legal fees for the Ahmed Annulment litigation.

14. James Brown was aware of the Ahmed Annulment litigation as his attorney received a copy of the Summons and Complaint in February 2004 and the Final Order of Annulment in April 2004, a true copy of both communications attached as **Exhibits 14**.

15. Decedent did not intervene as a party in the Ahmed Annulment Action.

16. Decedent was not Robert Rosen's client in the Ahmed Annulment Action.

17. The Charleston County Family Court found that Javed Ahmed was properly served by publication and notified of the hearing. Javed Ahmed failed to appear, answer the complaint or otherwise plead within the time required, participate in or otherwise defend himself in the Ahmed Annulment Action.



18. In the Ahmed Annulment Action, Petitioner's testimony was the only evidence before the court that Javed Ahmed was married at the time Petitioner and Javed Ahmed participated in the February 17, 1997 marriage ceremony.

19. On January 29, 2004, Decedent brought an annulment action against Petitioner in Aiken County and Petitioner counterclaimed for a divorce. The following documents were filed in that case with the Aiken County Family Court and true and correct copies of each are attached hereto as the following Exhibits:

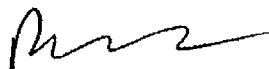
- Decedent's Summons and Complaint for Annulment filed January 29, 2004, **Exhibit 15**;
- Decedent's Amended Complaint for Annulment filed May 6, 2004, **Exhibit 16**;
- Petitioner's Answer and Counterclaim filed June 14, 2004, **Exhibit 17**;
- Decedent's Reply to Counterclaim filed July 6, 2004, **Exhibit 18**; and
- Consent Order of Dismissal filed August 16, 2004, **Exhibit 19**.

20. Decedent died on December 25, 2006.

21. The parties could not reach an agreement as to other facts but agree this Court can take judicial notice, as it deems appropriate, of the files, pleadings, transcripts of hearings, briefs and oral arguments in this Court, the Court of Appeals and the Supreme Court along with the Record on Appeal from the Court of Appeals and Supreme Court, in all cases concerning or related to Petitioner's elective share and omitted spouse claims.

On behalf of our clients, we so stipulate.

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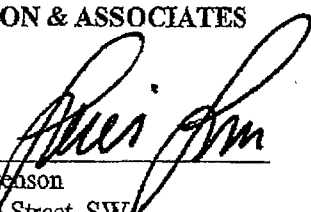
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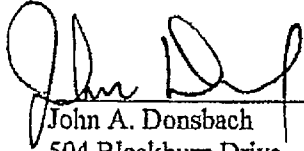
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August 11, 2014.

TABLE OF CONTENTS OF EXHIBITS TO JOINT STIPULATION OF FACTS

Exhibit 1	Petitioner and Javed Ahmed' marriage license dated 2/12/97
Exhibit 2	True copy of James Brown II's birth certificate dated 6/11/01
Exhibit 3	True copy of LabCorp DNA Test Results for James Brown II dated 6/11/14
Exhibit 4	Petitioner and Decedent's marriage license dated 12/10/01
Exhibit 5	Tommie Rae Brown's Summons & Complaint for Annulment, filed 12/15/03
Exhibit 6	Ronald Pannel's Affidavit of Attempted Service filed 2/4/04
Exhibit 7	Affidavit of Tommie Rae Brown filed 2/4/04
Exhibit 8	Order of Publication filed 2/4/04
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Exhibit 11	Order of Continuance filed 3/24/04
Exhibit 12	Final Order filed 4/15/04
Exhibit 13	Transcript of Hearing of Ahmed Annulment Action dated 4/15/04
Exhibit 14	Letters to Decedent's attorney dated 2/5/04 and 4/16/04 with Summons and Complaint and Final Order of Annulment
Exhibit 15	Decedent's Summons and Complaint for Annulment filed 1/29/04
Exhibit 16	Decedent's Amended Complaint for Annulment filed 5/6/04
Exhibit 17	Petitioner's Answer and Counterclaim filed 6/14/04
Exhibit 18	Decedent's Reply to Counterclaim filed 7/6/04
Exhibit 19	Consent Order of Dismissal filed 8/16/04

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

JUL 11 2016

Doyet A. Early III, Circuit Court Judge

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.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Respondent's Reply to Appellants' Return to 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 July 8, 2016, and addressed as follows:

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July 7, 2016

RECEIVED

JUL 11 2016

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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

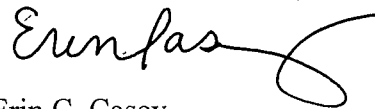
Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondent Tommie Rae Brown's **Reply to Appellants' Return to Motion to Strike** 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.

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

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