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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

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

APPELLANT DAVID C. SOJOURNER, JR.'S MOTION
TO EXCLUDE IRRELEVANT DOCUMENTS FROM RECORD ON APPEAL

TO: THE HONORABLE CHIEF JUDGE AND THE ASSOCIATE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rules 240, 209, and 210 of the *South Carolina Rules of Appellate Procedure*, 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"), through his undersigned counsel, moves for an order excluding from the Record on Appeal certain documents designated by Respondent.

BACKGROUND

On October 10, 2016, Respondent filed her Initial Brief and Designation of Matter to be Included in the Record on Appeal. In her Designation, she indicated she wished to include these documents:

> 6. Joint Motion to Authorize Settlement of Brown Children Undue Influence Cases, filed December 7, 2015, with Settlement Agreement and Release, dated November 17, 2015.
>
> 7. Amended Affidavit of Tommie Rae Brown in Support of Her Motion for Summary Judgment, dated November 15, 2007, filed December 26, 2007.

See Respondent's Designation of Matter to be Included in the Record on Appeal, filed October 10, 2016 at ¶¶ 6-7. These documents were not presented to or considered by the lower court in deciding the orders on appeal. Respondent's designated documents are irrelevant, potentially prejudicial, and should be excluded from the Record.

ARGUMENT

Under Rule 209, SCACR, all parties have an affirmative obligation "to serve . . . a Designation of Matter to be Included in the Record on Appeal which shall set forth with specificity those parts of the transcript, pleadings, orders, exhibits, or other materials which he proposes to include in the record on appeal." Rule 209(a), SCACR. "[T]he Designation may only propose to include portions . . . which may be properly included in the Record on Appeal." Rule 209(b), SCACR (citing Rule 210(c), SCACR). "A party shall not include any mater in his Designation which is not relevant to the appeal. *Id.* Rule 210(c), SCACR, specifically provides "[t]he Record shall not . . . include matter

which was not presented to the lower court or tribunal." The appealing party bears the financial obligation to prepare and file the final Record on Appeal. *See* Rule 210(a), SCACR.

As Respondent acknowledges in her Initial Respondent's Brief: "Under the well-settled rule, facts not appearing in the record as agreed upon, and referred to only in an exception, will not be considered on appeal." Initial Brief of Respondent at p. 61 (quoting *Jackson v. Jackson*, 256 S.C. 127, 129, 181 S.E.2d 266, 267-68 (1971)). This Court has repeatedly held that it cannot 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); *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 85 n. 4, 749 S.E.2d 139, 148 n. 4 (Ct. App. 2013); *Danley Williams v. Moore*, 400 S.C. 90, 105, 733 S.E.2d 224, 231 (Ct. App. 2012); *Sheppard v. State*, 357 S.C. 646, 657 n. 3, 594 S.E.2d 462, 469 n. 3 (2004).

A. The Joint Motion to Authorize Settlement, and underlying settlement agreement, between the Estate and certain heirs of Decedent, should not be included in the Record on Appeal.

Respondent seeks to include a Joint Motion to Approve a Settlement Agreement, and the underlying settlement agreement entered between the Estate and certain heirs of James Brown. *See* Respondent's Designation of Matter to be Included in the Record on Appeal at ¶ 6. That settlement, which was solely between the Estate and those certain heirs, resolved those heirs' challenges to the validity to the Will and Trust. The settlement agreement and joint motion to authorize the settlement was not presented to or considered by the lower court in ruling upon the cross motions for summary judgment at issue in this appeal. The lower court's order in this appeal was entered on January 13, 2015, almost a year before the Estate's settlement with Decedent's heirs on November

17, 2015. Reconsideration of the January 2015 order was denied on October 27, 2015, three weeks before the Estate settled with the Brown Children, and almost a month and a half before the Joint Motion to Authorize Settlement of Brown Children Undue Influence Cases was filed. These documents should be excluded from the Record on Appeal as they are wholly irrelevant to the appeal and were not presented to or considered by the lower court with respect to the issues in this appeal.

Further, inclusion of settlement documents from these related but separate Will and Trust challenges could be potentially prejudicial to the Estate and the settling children, some of whom are appellants in this appeal. There is a long-standing and recognized public policy that offers to compromise and compromise agreements are to be excluded from evidence. *See* Rule 408, SCRE; *Hunter v. Hyder*, 236 S.C. 378, 114 S.E.2d 493 (1960); *Woodward v. Southern Railway*, 88 S.C. 453, 70 S.E. 1060 (1911). There is no rational explanation for including these settlement agreements in this appeal. Their only effect would be to potentially prejudice the Court against the Estate and the settling heirs, who are Appellants in this appeal.

B. Respondent's Amended Affidavit should not be included in the Record on Appeal because it was not considered by the lower court.

During a preliminary hearing on March 31, 2014, relating to the Estate's motion to obtain access to Respondent's diaries, Respondent's counsel indicated the diaries were irrelevant because the lower court could render a final decision, partial summary judgment, in either party's favor, regarding whether Mrs. Brown was James Brown's surviving spouse. *See* Hearing Transcript, March 31, 2014 at p. 54, lines 3-12. At that time, Respondent's counsel stated:

> There are motions to limit the discovery in this case. You know, seven years ago, [on December 26, 2007], I filed a motion for summary judgment [and filed a supporting affidavit of Tommie Rae Brown]. And my position then and my position now is the same; she's either married to James Brown or she isn't. And that's a decision for you to make and maybe ultimately for the Supreme Court to make. **Whether she's married or not really depends on the law and not the facts. It doesn't really matter what anybody says.**

Id. at p. 54, lines 3-12 (emphasis added). As a result of Respondent's arguments, the lower court issued an order on March 31, 2014, staying all discovery in the case. The effect of this stay was, among other things, to bar the parties from deposing Tommie Rae Brown – an event that has never occurred in these actions.

On September 5, 2014, the parties submitted a Joint Stipulation of Facts which they believed would be all the lower court needed to consider in order to address the pending cross motions for summary judgment. *See* Joint Stipulation of Facts. During a November 24, 2014 hearing before the lower court, the Estate contested any use of Respondent's self-serving affidavit containing speculative and hearsay statements. *See* Hearing Transcript, November 24, 2014 at p. 44, lines 16-21, p. 65, lines 4-14 ("there's no evidence to that effect; there's an affidavit, but it's hearsay. So – and so we haven't seen a particle of evidence to that effect."). The Estate argued:

> [I]n light of [Mrs. Brown's], I will call it relentless insistence, that there's no need for additional discovery here. They got an order from the Judge back on March 31st that stayed all discovery because they said it was unnecessary for the Court to rule on this question. The Court could take them at their word there, find that there's no material issue of fact with relationship to the validity of this marriage, and the Court could not only rule against the ... motion, but could rule, and we would argue should rule, in favor of the [Estate] finding that [Mrs. Brown] is not the decedent's surviving spouse....

Id. at p. 65, lines 4-24.

Other parties agreed Respondent's affidavit should not be considered by the lower

court with respect to its determination on the cross motions for summary judgment. *See id.* at p. 70, line 22 – p. 71, line 4. These parties argued that if the Court considered the affidavit, it should also allow the parties to conduct additional discovery, which the Court had stayed at Respondent's request, giving the parties an opportunity to rebut and/or contest the statements in Respondent's affidavit. *See id.* In response, Respondent's counsel stated: "We've talked a lot about some factual issues, affidavits, issues about prenups and the focus about the diary. **But again, we argue that none of that matters today; we think we can get a ruling on the law.**" *Id.* at p. 113, lines 10-14.

On June 30, 2015, the lower court heard additional oral argument from the parties. *See* Hearing Transcript, June 30, 2015. At the hearing, the lower court asked whether its order could be based *solely* upon application of the undisputed facts, presented through the filed Joint Stipulation of Facts, dated September 5, 2014, and the appellate court decisions in *Lukich v. Lukich*, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006) ("*Lukich I*"), *modified* 379 S.C. 589, 666 S.E.2d 906 (2008) ("*Lukich II*"). *Id.* at p. 54, lines 2-5, 10-13; p. 55, lines 7-15; p. 67, line 15 – p. 68, line 4; p. 87, line 24 – p. 88, line 9. The parties agreed additional briefing limited solely to application of the undisputed facts of this case to the *Lukich* decisions would be useful to the lower court's decision. The parties agreed Respondent's affidavit would not be considered.

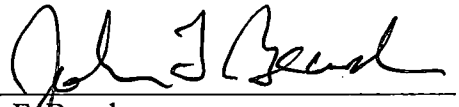
Respondent has insisted throughout proceedings before the lower court that factual evidence was irrelevant to the lower court's decision on the cross motions for summary judgment. Accepting Respondent's contention, the Court stayed discovery on March 31, 2014, and the parties entered into a Joint Stipulation of Facts on September 5, 2014, and argued their positions based solely on the law. Respondent should be stopped

from introducing and relying upon her affidavit in this appeal. It would be inequitable and prejudicial to allow Respondent to include her self-serving affidavit, replete with hearsay evidence, in the Record on Appeal, particularly because of the parties' inability to depose Respondent and question her on the affidavit's allegations. Further, it is irrelevant as all parties have stipulated that such affidavit was *not* considered by the lower court with respect to its decisions.

CONCLUSION

For the reasons stated, the Court should exclude the documents referenced in Respondent's Designation of Matter to be Included in the Record on Appeal, filed October 10, 2016. These documents are irrelevant to this Court's determination of the issues on appeal and have the potential to unfairly prejudice all Appellants

Respectfully submitted,



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November 7, 2016.

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 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.

PROOF OF SERVICE

The undersigned hereby certifies that she has served the foregoing Appellant David C. Sojourner, Jr.'s Motion to Exclude Irrelevant Documents from Record of Appeal, by depositing a copy of same in the United States Mail, postage prepaid on November 9, 2016 and addressed as follows:

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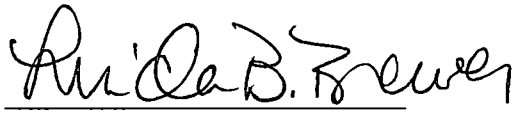

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November 9, 2016