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 No. 2008-CP-02-01647

Appellate Case No. 2016-001373

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

The Estate of James Brown; James Brown Irrevocable Trust Agreement, u/a/d August 1, 2000, by and through its fiduciaries Russell L. Bauknight, Personal Representative and Trustee, and David C. Sojourner, Jr., Limited Special Administrator and Limited Special Trustee, Respondents, and

Tonya Brown a/k/a Sarah LaTonya Brown, Vanisha Brown, Larry Brown, Deanna J. Brown Thomas, Jason Brown Lewis and Yamma N. Brown Lumar, individually and on behalf of her minor children, Sydney Lumar and Carrington Lumar, Respondents, and

Daryl Brown and Terry Brown, Respondents below,

Of whom Terry Brown is the Appellant.

INTIAL REPLY BRIEF OF APPELLANT

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Without restating the issues or making redundant arguments that have been thoroughly set forth in Appellant's opening brief, Appellant offers the following points of clarification and rebuttal to the arguments raised by the LSA, as the sole Respondent.

I. RESPONDENTS' TONYA BROWN A/K/A SARAH LATONYA BROWN, VANISHA BROWN, LARRY BROWN, DEANNA J. BROWN THOMAS, JASON BROWN LEWIS AND YAMMA N. BROWN LUMAR, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN, SYDNEY LUMAR AND CARRINGTON LUMAR FAIL TO PROVIDE EVIDENCE SHOWING PROBABLE CAUSE REFUTING THEIR GROUNDLESS UNDUE INFLUENCE CLAIMS.

This case has been ongoing for almost nine years.[1] Respondents Tonya Brown, a/k/a Sarah LaTonya Brown, Vanisha Brown, Larry Brown, Deanna J. Brown Thomas, Jason Brown Lewis, and Yamma N. Brown Lumar, individually and on behalf of her minor children, Sydney Lumar and Carrington Lumar (collectively "Challenging Children and Heirs") filed a multi-million dollar legal battle that deprived a generation of countless, nameless, faceless, needy children from receiving assistance in pursuing a college education while providing no actual probable cause other than mere accusations of their undue influence claims against the Estate of James J. Brown ("Estate") and the James Brown Irrevocable Trust Agreement, u/a/d August 1, 2000 ("Trust"). If there is ever a case that a clear, plain and unambiguous in terrorem clauses should be enforced, this is it. The settlement agreements the lower court approved in this matter allowed the Challenging Children and Heirs to avoid the application of the in terrorem clauses. This directly altered the distribution scheme by allowing the Challenging Children and Heirs to receive an interest in the Estate and Trust even though the challenged the estate plan.

[1] See. Brief of Appellant Terry Brown, p. 5

Appellant Terry Brown, on the other hand, was the only child of the many children identified throughout the litigation who has bravely stood in the line of fire and did not file a complaint to destroy his father's testamentary intent. By all accounts, the Personal Representative, Trustee and Limited Special Administrator ("LSA") somehow should be embracing Appellant as their most ardent supporter of what their role should be, but to the contrary, they engage in secretive settlements with the Challenging Children and Heirs. Based on Appellant's support of his father's testamentary intent, Appellant should not even have had the need to hire legal counsel had the LSA properly performed his fiduciary duty. The Personal Representative, Trustee and LSA would have done their jobs by invoking the clear and unambiguous in terrorem clauses, which reflect James J. Brown's intent, and pressed the case by filing summary judgment and demanding attorneys' fees. This is the breach of duty Appellant has already argued in his initial brief.[2] Instead, the Personal Representative, Trustee and LSA suggest Appellant is greedy and selfish, when, in fact, he simply demands they perform their duty as fiduciaries as the plain and clear language in the documents requires.[3]

As is clearly necessary in accordance with S.C. Code Ann. § 62-3-905 and S.C. Code Ann. § 62-7-605 and admitted to by Respondents,[4] that in order to avoid the application of an in terrorem clause, the Challenging Children and Heirs must prove that they had probable cause to bring an undue influence claim at the time of initiating the action. The South Carolina Supreme Court has already affirmed that the Challenging Children and Heirs failed in this evidentiary requirement in their first attempt to settle

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[2]Brief of Appellant Terry Brown, p. 13-25.
[3]Brief of Respondent David C. Sojourner, Jr., pp. 31-32.
[4]Brief of Respondent David C. Sojourner, Jr., pp. 26-27.

their claims for undue influence.[5] Instead of presenting evidence that probable cause exists thereby giving them a good faith basis to settle, the Challenging Children and Heirs continually fail their evidentiary burden. In the almost nine years since the case began and three years since the decision in Wilson v. Dallas, they fail to present any additional evidence in the limited discovery that has occurred.[6] The lack of probable cause means there is no consideration to support the settlement agreements because the in terrorem clause should be enforced where there is no good faith challenge to surrender that would constitute consideration for the settlement. The Supreme Court of South Carolina made this clear in the prior ruling in this case in Wilson v. Dallas when it stated:

> In general, a threat to contest a will must be made in good faith in order for the surrender of the right to constitute consideration for a family settlement, and if it is made in bad faith to extort a settlement, or if the claim is known to be frivolous and without foundation, then it is not in good faith.

Wilson v. Dallas, 403 S.C. 411, 435 (S.C. 2013).

The LSA argues that probable cause is unnecessary to settle the claim.[7] As noted in the above quote, this is not at all what the South Carolina Supreme Court stated. They specifically noted that a good faith (i.e. probable cause) claim had to exist to provide consideration for the settlement.

The Respondents presented no evidence with the filing of the Joint Motion to Authorize Settlement that led to this appeal.[8] The evidence they ultimately presented, at

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[5]Wilson v. Dallas, 403 S.C. 411, 437-440 (2013); Brief of Appellant Terry Brown, pp. 23-24.

[6]Brief of Appellant Terry Brown, p. 32-40.

[7]Brief of Respondent David C. Sojourner, Jr., pp. 24-25

[8]Joint Motion to Authorize Settlement of Brown Children's Undue Influence Cases and to Dismiss Cases with Prejudice, filed December 7, 2015.

the hearing, was ambush, surprise, inadmissible hearsay testimony,[9] which even if admitted as evidence on behalf of the Challenging Children and Heirs, does not prove undue influence, and was the sole evidence presented and relied upon by the lower court in its order. The LSA attempts to imply that there is more evidence in the form of several depositions that were taken by Louis Levenson and the Challenging Children and Heirs.[10] Those depositions, or excerpts from them, however, have never been quoted or supplied as proof of probable cause. Then, when it came time to support their evidence of probable cause by responding to Appellant's Motion to Alter, Amend and Reconsider, only the LSA responded and argued at the May 16, 2016 hearing.[11] In fact, the Challenging Children and Heir's counsel was not even present.[12] The Challenging Children and Heirs also did not find it necessary to file a brief before this Court.

After nine years of pursuing this matter and three years after the instructional ruling of Wilson v. Dallas on the evidence necessary to supply probable cause to create enough consideration to settle the Challenging Children and Heirs claim of undue influence, they present nothing. In fact, they could not even muster enough evidence to present a response to Appellant's Statement of the Case which emphatically states: "[i]t is these Contesting Children and Heirs, that now jointly motion for settlement, who filed **groundless** undue influence challenges to the Will and Trust of the decedent."[13] The LSA did not respond to this statement either, but instead chose to argue that probable

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[9]Brief of Appellant Terry Brown, pp. 30.
[10]Brief of Respondent David C. Sojourner, Jr., pp. 24-25.
[11]May 16, 2016 Hearing Transcript
[12]Id.
[13]Brief of Appellant Terry Brown p. 6

cause was unnecessary.[14] SCACR 208(b)(2) makes it clear what this Court's ruling should be with regard to the issue of probable cause and the Challenging Children and Heirs groundless undue influence claims when it states: "[i]f a Respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case." The Contesting Children and Heirs and the LSA have mustered no response to this clear, uncontested and now indisputable statement. The Contesting Children and Heirs have openly agreed to be bound before this Court with the statement that they filed groundless claims. Their nine years of lack of evidence and conduct do nothing to refute this statement. This Court should reverse the judgment of the lower court and find that the Challenging Children and Heirs lacked probable cause to file the undue influence claims thereby triggering enforcement of the in terrorem clauses in the Will and Trust.

Additionally, the one Respondent who actually bothered to respond to Appellant's brief, the LSA, also fails to point to any other evidence of undue influence either, but instead reiterates the same hearsay testimony.[15] Then, The LSA goes several steps further and argues that the testimony of the drafting attorney, H. Dewain Herring, is irrelevant to the instant action. He claims that because the deposition was taken after the filing of the action it should not be used to prove or disprove probable cause and that such testimony is not relevant to the issue of probable cause.[16] The LSA also argues that Levenson testified at length regarding the existence of probable cause before the lower court, even though such testimony never actually proves any aspect of an undue influence

[14]Brief of Respondent David C. Sojourner, Jr., pp. 24-25.
[15]Brief of Respondent David C. Sojourner, Jr., p. 26-28.
[16]Id.

claim. With a final gasp regarding the evidence presented to the lower court, the LSA states that the lower court had the right to judge the credibility of Louis Levenson as a witness.[17] This is incorrect. The lower court should not have allowed the testimony at all. As an attorney representing a client in this matter, he stood before the court in violation of Rule 3.7, RPC, Rule 407, SCACR and offered to testify over the repeated objection of Appellant's counsel.[18] The lower court should never have allowed or considered Louis Levenson's surprise, ambush, hearsay testimony and such action was a complete violation of due process and an abuse of discretion by the lower court. Further, the testimony was nothing more than a self-serving, last gasp attempt to create probable cause in a matter where none clearly exists.

As further defense for the Challenging Children and Heirs actions, the LSA attempts to argue that Hanahan v. Simpson,[19] is analogous to this situation for the purpose of analyzing the probable cause standard. It is not. The Hanahan case is distinguishable in that the South Carolina Supreme Court in that matter denoted that the individual filing the claim had supplied evidence in support of her claim in the form of two expert witnesses opining that the testator was incapacitated.[20] Unlike in Hanahan, the LSA and Challenging Children and Heirs have certainly not supplied any expert witnesses or any other evidence of undue influence to show probable cause to avoid enforcement of the in terrorem clauses.

This Court must seriously question who the LSA is representing and whether the LSA is carrying out his fiduciary duties. The LSA does not seem to fully appreciate and

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[17]Id. at p. 29.
[18]January 14, 2016 Hearing Transcript, p. 41.
[19]Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997).
[20]Hanahan at 158, footnote 9.

understand his duty of impartiality required of a Trustee under South Carolina law and the duty of an Administrator to follow the clear and unambiguous terms of the Will and Trust.[21] Questioning the admissibility of the drafting attorney's testimony, arguing for probable cause in this matter while relying on inadmissible hearsay testimony, and arguing that the lower court could judge the credibility of an attorney testifying in a matter that he is also counsel, can only be classified as an effort to support the Challenging Children and Heirs in an amazing breach of the duty of impartiality.

The LSA should not care who ultimately receives the property under the documents. It is not the LSA's job to make these arguments. It is the burden of the Challenging Children and Heirs, who are conspicuously absent before this Court. The LSA should focus on ensuring that his duties are appropriately exercised and that the terms of the Will and Trust are properly enforced. The LSA should not be attempting to present evidence of probable cause (even though there is none). This is the role left to counsel for the Challenging Children and Heirs, who apparently did not feel they had any evidence to support their claims, as they have presented no arguments on appeal. As argued by the Appellant in his initial brief, the LSA's actions have breached such duties and now, unfortunately, the arguments in his brief continue such conduct and add to it the further breach of his duty of impartiality.

It should also be questioned why the LSA refused to file for summary judgment when the Wilson v. Dallas opinion laid the ground work, and the Challenging Children and Heirs failed to provide any proof of probable cause of their claims of undue influence other than mere accusations. The burden of proof was on the Challenging Children and

[21] See S.C. Code Ann. §62-7-803; S.C. Code Ann. § 62-3-703.

Heirs. The Personal Representative, Trustee, and LSA now attempt to lay the burden of proof on Appellant.[22] The South Carolina statutes provide that the time at which probable cause must exist, to avoid the application of an in terrorem clause, is at the time of institution of the proceedings.[23] Further, the terms of the Will and Trust in this matter make it clear that it is the LSA's job to enforce them. The last sentence of Item X of the Will provides: "[a]ny such alleged claim shall be considered an affront to my wishes and **shall be challenged as such by my fiduciaries.**" The last sentence of Item XXI of the Irrevocable Trust states: "[a]ny such alleged claim shall be considered an affront to Grantor's wishes and **shall be vigorously challenged as such by his fiduciaries.**" The documents give clear, plain, ordinary and unambiguous directions and instructions to the LSA, yet he has failed to follow them.

Two months prior to filing her complaint for undue influence seeking to dismantle the Will and Trust, Deanna supported the contents of Mr. Brown's Will and Trust. Deanna's deposition, taken October 31, 2007, less than two months prior to challenging her father's Will and Trust for undue influence, paved the way for summary judgment against the Challenging Children and Heirs. Her testimony was as follows:

Q. Do you believe that the last will and testament that you saw in December of 2006 does fulfill what he represented to you that you and the other children would be taken care of?

A. Yes[24]

* * *

Q. Let's just say what do you want to see the Trust to be doing right now?

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[22]Brief of Respondent David C. Sojourner, Jr., pp. 22-24.
[23]S.C. Code Ann. § 62-3-905 and S.C. Code Ann. § 62-7-605.
[24]Deanna Depo, p. 65: 14-18.

A. Providing the educational money for his grandchildren and a criteria put into place for needy children.[25]

Further, the contention by the LSA that the drafting attorney's evidence is irrelevant and not admissible to determine probable cause is clearly wrong.[26] Louis Levenson testified that he interviewed the drafting attorney, H. Dewain Herring, in 1997, prior to filing the Challenging Children and Heirs claim for undue influence.[27] Therefore, such evidence is directly relevant to probable cause because the Challenging Children and Heirs knew what his testimony was going to be prior to filing and presumably based their filing on these facts. Louis Levenson indicated that he took notes regarding his meeting with H. Dewain Herring, the drafting attorney.[28] Mr. Levenson specifically characterized the drafting attorney's position as follows: "though in fairness to Mr. Herring, he was emphatic, from when I talked to him, that Mr. Brown knew what he was doing. Mr. Herring was not equivocal about that."[29] This statement makes it clear that the testimony of H. Dewain Herring is not only relevant but bears directly on the issue of probable cause, and, in fact, proves emphatically that there was no undue influence. Further, even though Louis Levenson's testimony, in just about every other respect, is inadmissible hearsay, this particular statement is an admission of a party opponent proving that probable cause to claim undue influence did not exist.[30] Finally, the testimony of H. Dewain Herring is absolutely admissible and necessary to this proceeding because it reflects directly on the intent of James J. Brown. The foundation

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[25]Id. at 155: 7-12.
[26]Brief of Respondent David C. Sojourner, Jr., pp. 26-29.
[27]January 14, 2016 Hearing Transcript, pp. 74:16-25, 75:1-14.
[28]Id., p. 87:7-10
[29]Id.
[30]SCRE 801(d)(2).

that all fiduciaries in South Carolina should base their actions is on the intent contained in the documents. Settling with the Challenging Children and Heirs, prior to even obtaining this testimony[31], shows that the LSA either failed to understand his duties under the law of interpreting and enforcing the Will and Trust or simply chose to ignore them.

What is probably this most telling and disturbing aspect of this case is the lack of evidence. The lower court determined Respondents had probable cause. However, no evidence of undue influence has been submitted that supports probable cause. Further, none has been argued to this Court. The LSA glosses over all the things that were done in discovery in his brief (i.e. depositions, interrogatories, etc.), but does not show this Court any actual evidence supportive of probable cause allowing the Challenging Children to bring a claim for undue influence. The Respondents act as if some voluminous level of evidence is available to prove it. Yet, not one piece of evidence supporting probable cause, much less enough evidence to actually prove a claim for undue influence, has been placed in the record. The Appellant, on the other hand and even though it is not his burden to do so, has on numerous occasions in the lower court proceedings, his initial brief and now this reply brief specifically pointed to actual items of evidence that directly prove that undue influence did not exist. So, after nine years of trying, Respondents have no evidence. Three years after being given a roadmap in Wilson v. Dallas on what was necessary to settle this claim, Respondents have no evidence. In a last gasp effort, Respondents' counsel, Louis Levenson, attempted to improperly place evidence in the record at the January 14, 2016 hearing in this matter. Even after this effort, Respondents have no evidence. Enough is enough.

[31]Brief of Respondent David C. Sojourner, Jr., pp. 3-4.

Based on the foregoing and all admissible evidence presented at any level in this proceeding, the Challenging Children and Heirs fail to provide any evidence of probable cause at the time of filing their undue influence claims. It is time for this nine year charade to end. The lower court should be reversed and the Challenging Children and Heirs removed from the estate plan as a result of violating the in terrorem clauses.

II. THE LSA BREACHED HIS DUTY WHEN HE SETTLED BECAUSE HE FAILED TO OBSERVE THE PARMOUNT RULES OF WILL AND TRUST CONSTRUCTION IN SOUTH CAROLINA.

The LSA attempts to argue that he had full authority to settle this matter without obtaining the support of all the heirs to the estate or court approval.[32] Specifically, he claims that the settlements did not "alter the interests, shares, or amount to which Petitioner's 'are entitled under the will of the decedent.''[33] This is a patently unreasonable statement in the context of in terrorem clauses. In terrorem clauses are placed in wills and trusts to do exactly what the LSA claims would not occur with the settlement of such clauses in this matter. The in terrorem clauses in this matter specifically alter the interest, share or amount that the Challenging Children and Heirs are entitled to under the Will and Trust. For the LSA to attempt to make the argument that settling the in terrorem clauses does not in any form or fashion alter the shares in the estate is not only disingenuous, but ignores the extreme prejudice it causes to the Appellant. Claiming that the settlement with the Challenging Children and Heirs does not affect the estate plan[34] is an effort to gloss over the extreme breach of the LSA's duty that has occurred in this matter by ignoring the actual, clear, plain and unambiguous

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[32] Id., pp. 7-20.
[33] Id., p. 9.
[34] Id. pp. 9-10.

language in the documents[35] and intent of James J. Brown as stated by H. Dewain Herring. Mr. H. Dewain Herring, the drafting attorney, testified:

> The Witness: Yes, sir. A – a contest was a contest, was an affront to Mr. Brown's wishes, and if someone chose to do that they had a choice. You could contest it. If it were possible for you to be – to prevail the law would speak to that. If you did not prevail obviously you would forfeit. And part of the intent was that if you even contested it, period, from the get-go, I mean, initially, that said, okay, I'm going to file this document to this will and I'm out. It was an automatic exclusion, if you will. That was the intent.[36]

Again, the LSA seems to misunderstand one of his paramount directives under the South Carolina Probate Code which is the duty to enforce the intent of James J. Brown. He specifically states that "[n]o South Carolina law requires a fiduciary to bring an action to enforce an in terrorem clause."[37] This is a complete misstatement of the law in South Carolina and misunderstanding of the paramount duties of a Personal Representative and Trustee to enforce the intent of a decedent through clear and unambiguous documents. S.C. Code Ann. § 62-1-102 states:

> (a) This Code shall be liberally construed and applied to promote its underlying purposes and policies.
> (b) The underlying purposes and policies of this Code are:
> ...
> (2) to discover and make effective the intent of a decedent in the distribution of his property;

"The paramount rule of will construction is to determine and give effect to the testator's intent."[38] "The cardinal rule of will construction, as well as the primary inquiry of the appellate court, is the determination of the testator's intent."[39] "While there are certain rules of construction to be followed in seeking the intention of the testator, they are all

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[35]See. Item X of the Will and Item XXI of the Irrevocable Trust.
[36]Depo, H. Dewain Herring dated December 9, 2015, p. 524:20-25.
[37]Brief of Respondent David C. Sojourner, Jr., p. 23.
[38]Holcombe-Burdette v. Bank of Am., 371 S.C. 648, 655 (S.C. Ct. App. 2006).
[39]Id. at 656.

subservient to the paramount consideration of determining what the testator meant by the terms used."[40] "In construing the language of a will, the appellate court must give words their ordinary, plain meaning unless it is clear the testator intended a different sense, or unless such a meaning would lead to an inconsistency with the testator's declared intention."[41] Further, S.C. Code Ann. § 62-7-112 states:

> The rules of construction that apply in this State to the interpretation of an disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

The Will and Trust emphatically use the word shall[42] when they define the LSA's requirement to enforce the in terrorem clauses, not settle if you think it is financially reasonable, as the LSA argues.[43] The Merriam-Webster Dictionary defines "shall" as "will have to" or "must." It is used to "express a command or exhortation" or states that when "used in laws, regulations, or directives to express what is mandatory." The Trust takes its language a step further and requires the challenge to be "vigorous." The Merriam-Webster Dictionary defines vigorous as "healthy and strong" and "done with great force and energy." The LSA's enforcement of the Will and Trust can only be described as an apathetic refusal which could not be more antonymic from what is required by the clear and unambiguous language of the Will and Trust. He argues financial imposition and injury to the charitable remainder beneficiary.[44] These issues do not matter in the context of interpreting the clear intent of the documents. The documents

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[40] Id.
[41] Id. at 657.
[42] "Any such alleged claim shall be considered an affront to my wishes and **shall** be challenged as such by my fiduciaries." (last sentence Item X of Will); "Any such alleged claim shall be considered an affront to Grantor's wishes and **shall** be **vigorously** challenged as such by his fiduciaries." (last sentence Item XXI of Trust).
[43] Brief of Respondent David C. Sojourner, Jr., pp. 12-13.
[44] Brief of Respondent David C. Sojourner, Jr., pp. 30-31.

require enforcement of the in terrorem clause, unless the **Challenging Children and Heirs** can prove probable cause. This is what the Doolittle[45] decision indicated when it stated:

> The trust agreements in Whittlesey and Terry did not contain an explicit directive to the trustee to defend claims challenging the validity of the amendment at the trust's expense, as does the trust instrument in the present case. To avoid application of the holding in Whittlesey, such a provision has been recommended in authoritative form books. These sources suggest inclusion in a trust or will of an optional provision reading, in the case of a trust: "The trustee is authorized to defend, at the expense of the trust estate, any contest or other attack of any nature on this trust or any of its provisions." According to the Continuing Education of the Bar (CEB) book on drafting revocable trusts, "Drafters may want to authorize the trustee to defend a contest or an attack on the trust. ... Without such a clause, the trustee might be hesitant to defend the trust because a court may rule that an attorney who represents the trustee in an unsuccessful defense of a trust contest is not entitled to have fees paid from the trust." **The authorization to defend in the documents before us is even more expansive than the provision suggested by the CEB, leaving no doubt as to the intention of the amendment's drafters.** (Citations omitted and emphasis added.)

The LSA attempts to twist the ruling and language of Doolittle by cherry picking certain quotes and language from the opinion out of context.[46] The Doolittle case supports Appellant's position and reinforces South Carolina law on the issue of document construction in that the clear, plain, ordinary and unambiguous intent of the testator should be enforced.

The language in the Will and Trust are clear, ordinary, plain and unambiguous. The LSA argues that Appellant has "interjected a breach of fiduciary duty claim into this matter through his opposition to the settlement" and that Appellant is required to provide evidence of his breach.[47] There is no need. The LSA created the breach of fiduciary duty claim by filing the settlement in direct contradiction to the directives and requirements of

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[45]Doolittle v. Exchange Bank, 241 Cal. App. 4th 529, 534, 2015 Cal. App. LEXIS 922, *5
[46]Id., pp. 22-24.
[47]Id., pp. 22, 30-31.

the Will and Trust. The first chance that Appellant had to actually address such breach was in his opposition filing to the Joint Motion to Authorize Settlement because this was the first time Appellant even knew that the settlements had occurred. The LSA provides the evidence necessary to prove the breach of fiduciary duty claim all on his own. He settled the matter and refused to enforce the in terrorem clauses in direct violation of his paramount directives in the Will and Trust. He sealed his fate when he filed the Joint Motion to Authorize Settlement with the Challenging Children and Heirs without any evidence of probable cause to avoid the application of the in terrorem clauses. The filing admitted, in open court, to the violation of his paramount directive and breach of his duty. The LSA's argument that he had authority to settle completely misses the point. He did not have the authority to settle because there was no probable cause. More importantly, the issue is not whether he has authority to settle, but whether he should have settled based on his fiduciary and paramount duty to uphold James J. Brown's intent in the Will and Trust. Failure to follow the intent in the documents by enforcing the in terrorem clauses is a clear and indefensible breach of the LSA's fiduciary duty as plainly and specifically required by the Will and Trust. When the evidence that exists in this matter is coupled with the language of the Will and Trust, this Court can reach but one conclusion. Appellant was prejudiced and significantly harmed by the LSA's failure to perform his paramount and clear duties under the Will and Trust.

III. A SHOWING OF PROBABLE CAUSE WAS NECESSARY FOR THE LSA TO AVOID BREACHING HIS DUTY UNDER THE CLEAR AND UNAMBIGUOUS WILL AND TRUST.

The LSA argues that proving probable cause was unnecessary for him to enter into the settlement agreements because the distributional interests were not altered or

modified.[48] It is the LSA's argument that is a red herring and not Appellant's. As has already been established, the whole purpose of an in terrorem clause is to alter or amend the distribution of certain beneficiaries' shares under a will and trust should they choose to challenge an estate plan. As a result, the only way to settle the matter was through a private settlement under S.C. Code § 62-3-912 with all heirs consent or with court approval and notice to all beneficiaries under S.C. Code Ann. § 62-3-1101 and the procedures under S.C. Code Ann. § 62-3-1102.[49] Neither of these occurred in this matter.[50] Further, as established under Section II of this Reply Brief, the LSA was required to enforce the in terrorem clauses. In fact, the only way the LSA could have settled this matter is to have the Challenging Children and Heirs prove they had probable cause.

This brings us to another baffling issue, which is why the LSA did not file summary judgment in this matter. This would have resolved the problem in the same fashion and would have forced the Challenging Children and Heirs to produce evidence in support of their contention that they had probable cause in this matter, which they have

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[48]Id. at p. 24.

[49]The LSA attempts to argue in his brief that the situation in this case is analogous to that of University of Southern California v. Moran, 365 S.C. 270, 617 S.E.2d 153 (Ct. App. 2005), but this matter is not. In the University of Southern California case a petition was actually filed under S.C. Code Ann. § 62-3-1101 and § 62-3-1102 (which the LSA has made clear was not done here or contends was unnecessary). The beneficiary tried to object to the settlement through this process. Unlike the previous settlement in this matter in Wilson v. Dallas and this current matter at hand, the court in the University of Southern California case found a good faith controversy with a settlement agreement that was just and reasonable. The court basically said that a beneficiary could not block a just and reasonable settlement agreement. That is contrary to what has happened here. No petition was filed in accordance with the statue and the proposed settlement agreement here is certainly not just and reasonable to Appellant.

[50]Had either of these occurred the LSA would not have breached his duty because he would have had either had the consent and approval of all of the heirs or court approval as required by the probate code. Unfortunately for the LSA, neither of these occurred.

failed to do. Instead, we end up with a secretive end run on the Appellant in an attempt to settle with the Challenging Children and Heirs, a breach of fiduciary duty by the LSA, and a lower court hearing that violated due process, the professional rules of conduct with an attorney testifying while acting as counsel in the matter, the rules of evidence, and the rules of procedure. This whole mess could all have been avoided had the LSA simply done his job based on the clear and unambiguous language contained in the Will and Trust.

IV. RESPONDENTS FAIL TO ADDRESS MANY OF THE ISSUES RAISED BY APPELLANT IN HIS INITIAL BRIEF.

The Challenging Children and Heirs did not even file a brief in an effort to refute any of Appellant's claims. Additionally, the LSA fails to address the following issues raised in Appellant's initial brief:

1) That Rule 6, SCRCP was violated by the testimony of Louis Levenson because no affidavits were filed;

2) That the testimony and evidence presented at the January 14, 2016 hearing was inadmissible hearsay which was then relied on in the lower court's order to "determine" that probable cause existed even though such evidence does not actually prove undue influence occurred;

3) The testimony of Louis Levenson was a violation of the South Carolina rules of professional conduct and should not have been allowed;

4) The testimony of Louis Levenson was a violation of Rule 43(h), SCRCP;

5) That signing a settlement agreement was not a violation of the in terrorem clauses by Appellant; and

6) Allowing a party with no standing to participate in the proceeding was an error and abuse of discretion by the lower court.

Arguably, the Respondents have conceded these arguments because they had no legal or evidentiary support to argue.

V. APPELLANT IS ABSOLUTELY PREJUDICED BY THE SETTLEMENT.

Appellant was prejudiced when the LSA failed to perform his fiduciary duty in accordance with the clear, plain, ordinary and unambiguous terms of the Will and Trust. The LSA alleges that it is somehow Appellant's responsibility to file a challenge or enforce the documents.[51] In fact, it is the Challenging Children and Heir's responsibility to prove that they had probable cause to bring undue influence claims. Not the LSA's. Not the Appellant's. Further, it is the LSA's duty to enforce the in terrorem clauses. The Will and Trust specifically state that it is the fiduciaries' responsibility to enforce them, not the Appellant's.[52] Both the LSA and Challenging Children and Heirs have failed in their respective burdens thereby prejudicing the Appellant. The LSA has failed in his fiduciary duty to Appellant when he refused to enforce the in terrorem clause in accordance with the plain meaning of the Will and Trust and settled with the Challenging Children and Heirs. Placing the Challenging Children and Heirs back in the same position in the Will and Trust, as if they never challenged the Will and Trust after nine years of litigation, creates extreme prejudice. Telling Appellant that he will now receive only one-sixth of the personal property under the Will, even though he did not file a challenge, rather than all of the personal property, is extreme prejudice. Appellant's request is not selfishness or greedy, he is simply asking what he has been asking for almost nine years. He asks this Court to require the LSA, as the plain and unambiguous terms of the Will and Trust require, to, please, enforce my father's intent. Nine years to

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[51]Brief of Respondent David C. Sojourner, Jr., pp. 32-33.

[52]"Any such alleged claim shall be considered an affront to my wishes and **shall** be challenged as such by my **fiduciaries**." (last sentence Item X of Will); "Any such alleged claim shall be considered an affront to Grantor's wishes and **shall** be **vigorously** challenged as such by his **fiduciaries**." (last sentence Item XXI of Trust).

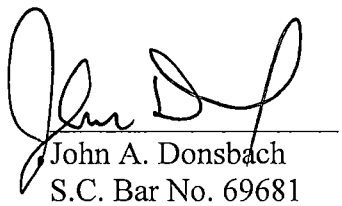
accomplish this simple request is too long. This Court has the ability to right a wrong and should do so immediately. This Court should reverse the lower court and declare the LSA in breach of his paramount duties to enforce the Will and Trust. If ever a case cried out for the enforcement of an in terrorem clause, this is it. Should this Court fail to require this result, it sends a clear message to testators in South Carolina which is that the plain, ordinary and unambiguous intent in their estate plans does not matter and can be changed at the whim of fiduciaries or recalcitrant heirs.

CONCLUSION

For reasons stated above, the Appellant respectfully requests that this Court reverse the lower court's approval of the settlement agreement and void the same. It should be determined that the lower court abused its discretion and erred in the application of law, evidence and procedure when it allowed the LSA to disregard his clear and unambiguous paramount fiduciary duty under the Will and Trust to enforce the in terrorem clauses and placed Challenging Children and Heirs, who have no evidence of probable cause to avoid application of the in terrorem clauses, back into the estate plan. The Appellant was severely prejudiced and injured by the abuse of discretion of the lower court and breach of the LSA's clear fiduciary duties. The Court should further find that after nine years of litigation and three years since the Wilson v. Dallas decision that the Challenging Children and Heirs have failed to present any evidence of probable cause in this matter and that they should be disinherited from the Estate and Trust of James J. Brown. Further, due to the extreme prejudice and injury to Appellant, the Court should consider remanding with a directive that Appellant be awarded fees and costs for having

to perform the duties and make the arguments that should have been performed and made by the LSA from the very beginning.

This 23rd day of November, 2016.



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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
Trial Court Case No. 2008-CP-02-01647

Appellate Case No. 2016-001373

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

The Estate of James Brown; James Brown Irrevocable Trust Agreement, u/a/d August 1, 2000, by and through its fiduciaries Russell L. Bauknight, Personal Representative and Trustee, and David C. Sojourner, Jr., Limited Special Administrator and Limited Special Trustee, Respondents, and

Tonya Brown a/k/a Sarah LaTonya Brown, Vanisha Brown, Larry Brown, Deanna J. Brown Thomas, Jason Brown Lewis and Yamma N. Brown Lumar, individually and on behalf of her minor children, Sydney Lumar and Carrington Lumar, Respondents, and

Daryl Brown and Terry Brown, Respondents below,

Of whom Terry Brown is the Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on November 23, 2016, he has caused a copy of the INITIAL REPLY BRIEF to be served on all counsel in this matter by depositing a copy of it in the United States Mail, postage prepaid, addressed to the following:

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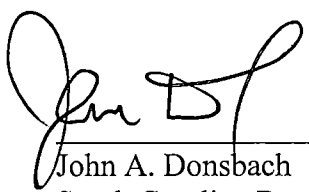

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November 23, 2016

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

Re: Estate of James Brown a/k/a James Joseph Brown
Appellate Case No. 2016-001373
Civil Action No.: 2008-CP-02-1647
C/M No.: 2497/1

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of Reply Brief of Appellant and Proof of Service in the above-referenced case. Please file the original and return a time-stamped copy to me in the enclosed self-addressed, stamped envelope. If you have any questions, please feel free to contact me. Thank you.

Sincerely,

John A. Donsbach

JAD/djg

Enclosures

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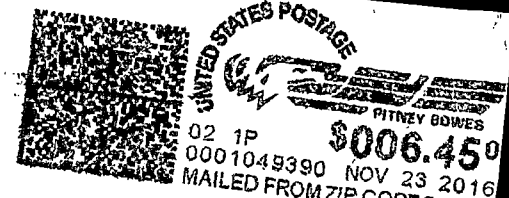

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