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. 2016-001373

Russell L. Bauknight, in his capacity as Personal Representative of the Estate of James Brown and Trustee of the James Brown Irrevocable Trust Agreement u/a/d August 1, 2000, 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, 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,

v.

Terry Brown and Darryl Brown of whom Terry Brown is the ..... Appellant.

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

FINAL BRIEF OF RESPONDENT DAVID C. SOJOURNER, JR., IN HIS CAPACITY AS LIMITED SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES BROWN AND LIMITED SPECIAL TRUSTEE OF THE JAMES BROWN IRREVOCABLE TRUST U/A/D AUGUST 1, 2000

John F. Beach (S.C. Bar No. 595)
Lyndey Ritz Zwingelberg (S.C. Bar No. 100804)
Adams and Reese LLP
1501 Main Street, 5th Floor
Columbia, South Carolina 29202
(803) 254-4190

Attorneys for Respondent David C. Sojourner, Jr., Limited Special Administrator of the Estate of James Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000

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. 2016-001373

Russell L. Bauknight, in his capacity as Personal Representative of the Estate of James Brown and Trustee of the James Brown Irrevocable Trust Agreement u/a/d August 1, 2000, 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, 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,

v.

Terry Brown and Darryl Brown of whom Terry Brown is the ..... Appellant.

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

FINAL BRIEF OF RESPONDENT DAVID C. SOJOURNER, JR., IN HIS CAPACITY AS LIMITED SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES BROWN AND LIMITED SPECIAL TRUSTEE OF THE JAMES BROWN IRREVOCABLE TRUST U/A/D AUGUST 1, 2000

John F. Beach (S.C. Bar No. 595)
Lyndey Ritz Zwingelberg (S.C. Bar No. 100804)
Adams and Reese LLP
1501 Main Street, 5th Floor
Columbia, South Carolina 29202
(803) 254-4190

Attorneys for Respondent David C. Sojourner, Jr., Limited Special Administrator of the Estate of James Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

RESTATEMENT OF ISSUES ON APPEAL

1. Whether the lower court erred in authorizing the Estate and Trust's fiduciaries to enter into binding settlement agreements with some of Decedent's children and grandchildren which fully resolved and disposed of certain will and trust challenges initiated against the Estate and Trust in 2007.

STATEMENT OF THE CASE

This Court is well-versed in the lengthy procedural and substantive posture of the Estate of James J. Brown, Jr. Decedent died on December 25, 2006, leaving a Last Will and Testament and Irrevocable Trust Agreement, both dated August 1, 2000.[1] On January 18, 2008, an Application for Informal Probate of Will and Appointment of Personal Representative was filed in Aiken County. (R. p. 191-234.) Since then, lengthy and protracted litigation has ensued, numerous challenges and creditors' proof of claims have been consolidated, separated, removed from the probate court to the circuit court, consolidated and bifurcated again, and numerous personal representatives and trustees have been appointed and removed. The multifaceted and complex issues involved in the cases which comprise the "Estate proceedings" have been carefully managed by the Honorable Doyet A. Early, III. As this Court is aware, numerous appeals on various issues have come before the appellate courts in the last few years.[2] A complete statement of the case would use up nearly all of this Respondent's allotted fifty (50) pages.

The specific appeal before the Court involves estate challenges pursued by certain children and grandchildren of Decedent, including Tonya Brown, Vanisha Brown, Larry Brown, Deanna Brown Thomas, Jason Brown Lewis, Yamma Brown Lumar, Sydney Lumar, and Carrington Lumar, Tonya Brown, and Daryl Brown[3] ("Petitioners"). Petitioners filed and/or joined in Petitions to Set Aside the Informal Probate of the Last Will and Testament and the Trust Agreement on December 26, 2007, one year following

---

[1] Decedent also executed a Last Will and Testament and Irrevocable Trust Agreement dated June 15, 1999, which is not at issue in this appeal.

[2] *See* Appellate Cases 2009-142286, 2012-212917, 2013-1649, 2013-2582, 2014-0794, 2014-250, 2014-2222, 2015-00186, and 2015-002417; *see also* U.S. Supreme Court Appellate Case 2014-1031.

[3] Daryl Brown withdrew his challenge to the Will and Trust on March 26, 2014.

Decedent's death. (R. pp. 171-190.) On January 24, 2008, Petitioners filed Amended Petitions to Set Aside Informal Probate and Decedent's Trust Agreement. (R. pp. 191-234.) Petitioners asserted the 2000 Will and Trust should be set aside on grounds including: (i) Decedent was unduly influenced; (ii) the Will and Trust are the product of fraud exerted on Decedent; (iii) Decedent lacked testamentary capacity; and (iv) the Trust is illusory. (Id.)

From January 2008 to May 2013, the parties became embroiled in several substantive and procedural disputes, including the validity of a settlement agreement entered by the parties and the South Carolina Attorney General on August 10, 2008 and approved by the lower court in May 2009 (the "2008 Compromise Agreement"). The legal question regarding the validity of the parties' prior settlement culminated in a now well-known decision by our State Supreme Court in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).

In the *Wilson v. Dallas* decision, the Supreme Court held, among other rulings, even if the compromise resolved bona fide challenges to Decedent's will, evidence in the record did not support a finding that the 2008 Compromise Agreement was just and reasonable because it significantly altered the terms of Decedent's estate plan. *Id.* at 443, 743 S.E.2d at 764.

> The compromise orchestrated by the [Attorney General] in this case destroys the estate plan Brown had established in favor of an arrangement overseen virtually exclusively by the [Attorney General]. The result is to take a large portion of Brown's estate that Brown had designated for charity and to turn over these amounts to the family members and purported family members who were, under the plain terms of Brown's will, given either limited devises or excluded.
>
> Even if a good faith controversy had existed, the remedy more appropriately would have been the reformation of the documents to

> provide for any monies payable, not the total dismemberment of Brown's carefully-crafted estate plan and its resurrection in a form that grossly distorts his intent.

Id. The Court's decision resulted in a remand of the entire proceeding to the lower court on May 8, 2013. *Id.* at 451, 743 S.E.2d at 768.

Following remand, the lower court appointed Respondent Russell Bauknight (the "PR") to serve as Personal Representative of the Estate and Trustee of the Trust. (R. p. 23, ¶ 1; *see also* R. pp. 136-141 (collectively the "Appointment Orders").) The lower court had previously appointed Mr. Bauknight in January 2009 to serve as Special Administrator for the Estate and Special Trustee of the Trust for the limited purpose of providing input and recommendations to the court regarding the prior compromise agreement. The Appointment Orders also appointed Respondent David C. Sojourner, Jr. ("LSA") to act as the Estate's Limited Special Administrator and the Trust's Limited Special Trustee. (R. p. 23 at ¶ 2; p. 141 ¶ 1.) The LSA was empowered only to defend challenges to the validity of the Will and Trust and certain other claims against the Estate, including the Petitions at issue in this case (collectively, the "Will and Trust Challenges"). (*Id.*)

Between October 2013 and early 2015, the parties conducted written discovery and took certain key depositions, including the video deposition of H. Dewain Herring, Jr., a former attorney who represented Decedent during his lifetime and prepared Decedent's 1999 and 2000 estate plans. Mr. Herring's deposition was conducted on November 18 and December 9, 2015. (R. pp. 756-826.)

In July 2015, following nearly two years of discovery and legal proceedings, the Estate and Trust began settlement negotiations with Petitioners Vanisha Brown, Larry

Brown, Deanna Brown Thomas, Jason Brown Lewis, Yamma Brown Lumar, Sydney Lumar, and Carrington Lumar, through their legal counsel, Louis Levenson. Unlike the LSA, who was appointed in October 2013, Mr. Levenson has represented Petitioners since their earliest appearance in the Estate proceeding in December 2007. Following successful negotiations with Mr. Levenson, in October 2015, the Estate and Trust began separate settlement negotiations with Petitioner Tonya Brown, through her counsel of record, William Barr, Ittriss Jenkins, and Vera Gilford (all settling parties, collectively, the "Settling Parties"). The Estate and Trust's negotiations culminated in two separate settlement agreements, resolving all claims of the Settling Parties, with effective dates of November 13 and 17, 2015 (the "Settlement Agreements"). (R. pp. 371-410.)

On December 7, 2015, the Settling Parties and the LSA (collectively the "Moving Parties") jointly moved to confirm the LSA's and PR's authority to enter the Settlement Agreements on behalf of the Estate and Trust. (R. pp. 363-432.) Appellant Terry Brown filed an opposition to the Joint Motion on December 30, 2015. (R. pp. 433-461.) Daryl Brown also filed an opposition on December 31, 2015.

A hearing on the Joint Motion was conducted on January 14, 2016. (R. pp. 238-343.) The Estate and Trust offered legal arguments and Petitioners presented testimony to support the Joint Motion to Authorize Settlements. (*See id.*) Mr. Levenson, counsel for the Settling Children, offered testimony evidencing the existence of probably cause for the Settling Petitioners to challenge the will and trust when the Petitions were filed and thereafter. (R. p. 278, line 18 - p. 334, line 20.)

During the hearing, the Moving Parties informed the lower court they anticipated extensive additional discovery, including depositions of the parties and other potential

witnesses. (R. p. 248, line 5 - p. 249, line 4.) The Moving Parties further informed the court additional discovery would be time-consuming and expensive and such burdens would fall entirely upon the residual beneficiaries of Estate and Trust. The Estate and Trust indicated an additional benefit of the Settlements was resolving challenges to the validity of the Will and Trust asserted by "the children . . . [who] [a]rguably, . . . knew James Brown best[;] [who] were with him from birth through the time of his passing [and] who, for the most part, have maintained a connection with the community . . . ." (R. p. 247, lines 4-18.)

On February 24, 2016, the lower court authorized the Estate and Trust to enter the Settlement Agreements and notified the parties via electronic mail of its decision. The court's order was filed March 7, 2016. (R. pp. 142-167.) Upon receiving notice of the court's decision, but before the order was filed, Appellant Terry Brown filed a Motion to Alter, Amend, and Reconsider the court's order under Rule 59(e), S.C. R. Civ. P. (R. pp. 462-556.) The LSA opposed Appellant's Motion to Reconsider by memorandum dated April 15, 2016. (R. pp. 557-569.) No other parties moved to reconsider the lower court's order or opposition brief.

The lower court heard oral argument on Appellant's Motion to Reconsider on May 16, 2016. (R. pp. 344-362.) Following consideration of the briefs and oral arguments, the lower court denied Appellant's Motion to Reconsider by order filed May 31, 2016. (R. pp. 168-170.) A notice of appeal appealing both the March 7, 2016 and May 31, 2016 orders was timely filed by Terry Brown on June 29, 2016. Daryl Brown did not appeal the lower court's orders.

LEGAL STANDARD

The ruling of a lower court, if based upon the exercise of its discretion as to a matter that is within its discretion, will not be disturbed on appeal unless it reflects an abuse of discretion. *Johnson v. Standard Oil Co.*, 155 S.C. 179, 152 S.E. 176 (1930); *Univ. of S. Cal. v. Moran,* 365 S.C. 270, 274-75, 617 S.E.2d 135, 137 (Ct.App.2005). Upon appeal of approval of a compromise agreement in an estate controversy, "[t]he question [for an appellate court] is did the [ruling] court abuse its discretion in approving the compromise?" *Wilson v. Dallas*, 403 S.C. at 425, 743 S.E.2d at 754 (quoting *In re Estate of Horton,* 11 Cal.App.3d 680, 90 Cal.Rptr. 66, 68–69 (1970)).

The abuse of discretion standard is highly deferential to the trial court. *Jeter v. South Carolina Dept. of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 145 (2006) ("the error must be so opposed to the trial judge's sound discretion as to amount to a deprivation of the legal rights of [a] party"). Abuse of discretion means a court's ruling was without reasonable factual support, resulted in prejudice to the rights of a party, and therefore amounted to an error of law. *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014); *Wilson v. Dallas*, 403 S.C. at 425, 743 S.E.2d at 754; *Hueble v. South Carolina Dept. of Natural Resources*, 416 S.C. 220, 785 S.E.2d 461 (2016).

In *In re Goodwin*, 279 S.C. 274, 305 S.E.2d 578 (1983), and *Mauro v. Clabaugh*, 299 S.C. 184, 383 S.E.2d 244 (Ct. App. 1989), this Court and the Supreme Court confirmed an alleged abuse of discretion must be clear in order to justify reversal. *See also Knox v. Bogan*, 322 S.C. 64, 472 S.E.2d 43 (Ct. App. 1996) ("[T]he court's findings of fact have the same force and effect as a jury verdict unless the court committed some error of law leading it to an erroneous conclusion or unless the evidence is reasonably

susceptible only of a conclusion opposite of those reached by the court."). In *Edens v. Cole*, 261 S.C. 556, 201 S.E.2d 382 (1973), the Supreme Court held reversal in certain instances must be based on an abuse that is "manifest." *Jeter*, 369 S.C. at 438, 633 S.E.2d at 146 (citing *Graham v. Beverly*, 235 S.C. 222, 110 S.E.2d 923 (1959)).

The lower court's ruling, as enunciated in its orders filed March 7 and May 31, 2016, was supported by reasonable factual support, did not result in prejudice to the rights of any party, and did not amount to an error of law. This Court should affirm.

ARGUMENTS

I. THE ESTATE AND TRUST'S FIDUCIARIES HAVE FULL AUTHORITY TO SETTLE LITIGATION AND BIND THE ESTATE AND TRUST THROUGH THE SETTLEMENT AGREEMENTS.

The Appointment Orders filed October 1 and 10, 2013 appointed Mr. Bauknight as Personal Representative of the Estate and Trustee of the Trust and granted unto Mr. Bauknight "full, absolute, and exclusive authority to carry out the Estate's administration and the Trust's administration, and all business and matters related thereto . . . ." (R. p. 23 at ¶ 1; R. p. 141 ¶ 2.) The Appointment Orders granted Mr. Bauknight "the authority and power to act on behalf of, and bind, the Estate and Trust for all purposes, except as limited by the appointment of the Limited Special Trustee and Limited Special Administrator . . . ." (*Id.*)

The Appointment Orders similarly appointed Mr. Sojourner as Limited Special Administrator of the Estate and as Limited Special Trustee of the Trust Agreement and specifically authorized Mr. Sojourner to "defend[] the Trust and the Estate against the claims made in the Will and Trust Challenges until final resolution thereof." (R. p. 23 at ¶ 2; pp. 140-141.) "This interim appointment [was] made with the requirement that Mr.

Sojourner, in his limited capacity, shall remain independent from Mr. Bauknight [and] shall act with sole and absolute authority in his limited capacity . . . ." (R. p. 23.)

The Appointment Orders do not expressly list the power to settle claims as one of the powers given to the Estate or Trust. However, such power is inherent and is supported by South Carolina law. Specifically, S.C. Code Ann. § 62-3-715(8) (Supp. 2014), authorizes a personal representative to "settle claims" against the estate.[4] The South Carolina Trust Code contains a similar provision in S.C. Code Ann. § 62-7-816(14) (Supp. 2014) (granting trustees with the power to "pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust").

Consistent with this statutory authority, Decedent's Irrevocable Trust Agreement authorizes the trustee, in its fiduciary discretion, to "compromise, adjust, mediate, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the Trust Estate as the Trustee shall deem best." (R. p. 975 at Article X(19).)

The Estate and Trust, through its fiduciaries thus had inherent and direct legal authority to enter into the Settlement Agreements which fully resolved Petitioner's challenges against Decedent's Will and Trust. As seen through the Settlement Agreements, the terms did not vary the distribution scheme of either the Will or Trust, but rather, fully, finally, and completely resolved pending litigation between the parties and resulted in a dismissal with prejudice of Petitioners from the Estate Proceeding. (R. pp. 371-410.) The lower court's orders which found the Fiduciaries to be so authorized

[4] *See also* S.C. Code Ann. § 15-51-42(A) ("Only a duly appointed personal representative, as defined in Section 62-1-201(30), shall have the authority to settle wrongful death or survival actions.").

was supported by factual and legal conclusions, did not result in prejudice to the rights of any party, and did not amount to an error of law.

II. THE LOWER COURT DID NOT ERR IN APPLYING STATUTORY LAW TO AUTHORIZE THE SETTLEMENT AGREEMENTS.

The Moving Parties sought confirmation under S.C. Code Ann. § 62-3-105 (Supp. 2014). This statutory provision enables "[p]ersons interested in decedents' estates," including personal representatives and trustees, to request rulings which assist in the administration of estates and trusts. *See* S.C. Code Ann. § 62-3-105 (Supp. 2014); *see also* S.C. Code Ann. § 62-1-201(20). Under this section, the Fiduciaries appropriately sought the lower court's ruling they were authorized and empowered to enter into the Settlement Agreements with Petitioners. The Orders Authorizing the Settlement were, therefore, supported by reasonable facts and a correct application of the law, and do not constitute an abuse of discretion.

Contrary to Appellant's suggestion, the Moving Parties were not seeking to have the lower court approve a "private settlement agreement" under S.C. Code Ann. § 62-3-912 (Supp. 2014). That statutory provision only applies when "successors . . . agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent." *Id.* As outlined in the Settlement Agreements the Moving Parties merely settled pending litigation and did not "alter the interests, shares, or amounts" to which Petitioners "are entitled under the will of the decedent." *Id.* Petitioners (and Appellant) remain entitled to their original inheritance under Decedent's Will, including a portion of Decedent's personal and household effects. (R. p. 958 at Item I.) All other assets of the Estate, as intended by Decedent, poured into a separate

trust to provide financial assistance for the education of Decedent's grandchildren and disadvantaged youths. (R. p. 958. at Item II.)

Case law interpreting Section 62-3-912 supports the LSA's position. In *Osterneck v. Osterneck*, 374 S.C. 573, 649 S.E.2d 127 (Ct. App. 2007), this Court considered the validity of "a family agreement" under Section 62-3-912. The agreement at issue "exchange[d] Father's estate's half interest in the marital home for Mother's interest in a certificate of deposit." *Id.* at 578-79, 649 S.E.2d at 130. In *Parker v. Shecut*, 340 S.C. 460, 481, 531 S.E.2d 546, 558 (Ct. App. 2000), *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002), this Court recognized that Section 62-3-912 applied to a settlement agreement entered by the parties which "alter[ed] that which they are entitled to from [the] estate."

In sharp contrast to the present Settlement Agreement, the 2008 Compromise Agreement materially changed, and effectively rewrote, Decedent's estate plan and therefore strayed from Decedent's testamentary intentions. First, the 2008 Compromise Agreement purported to settle *all* will and trust challenges, including those filed by alleged heirs of Decedent not acknowledged in the Will or Trust. The Settlement Agreements only resolve actions filed by children and grandchildren of Decedent directly acknowledged in his Will. (R. p. 958 at Item I.) Further, the 2008 Compromise Agreement purported to establish Tommie Rae Hynie Brown as Decedent's "surviving spouse," contradicting Decedent's estate documents which did not identify Ms. Brown as a surviving heir and expressly disclaimed all persons not named in the Will. (R. p. 958.[5])

[5] "Except as otherwise provided in this Will and corresponding instruments, I have intentionally failed to provide for any other relatives or other persons, whether claiming, or to claim, to be an heir of mine or not. Such failure is intentional and not occasioned by accident or mistake."

In addition, the 2008 Compromise Agreement called for the creation of a wholly new trust designed to "receive, hold, manage and be authorized to sell the James Brown Assets."

As recognized by the Supreme Court in *Wilson v. Dallas*:

> Although the stated justification for the compromise was to avoid the potential of a substantial threat to the charitable beneficiaries occasioned by Respondents' claims, the compromise condoned by the AG here results in an outright gift of half of the estate to the family members and purported family members who challenged Brown's will and trust based on tenuous claims. ... Based on all the circumstances, we do not believe the effect of the compromise is just and reasonable, and we cannot condone its approval.

Id. at p. 447, 743 S.E.2d at 766.

Respondent's position that Section 62-3-912 only applies where the parties seek to alter the distributional interests of the estate plan is further supported by public policy. Because an agreement which alters, amends, or modifies the Decedent's intended distribution terms, it would be fair and equitable to require all beneficiaries of the estate to consent. *See* S.C. Code Ann. § 62-3-912 (Supp. 2014) (requiring the agreement to be "executed by all who are affected by its provisions"). However, when a settlement agreement only settles pending litigation, there is no effect on the distributional interests under the estate plan and the decedent's testamentary intent remains unchanged.

South Carolina law does not require parties to obtain the consent or approval of all litigants to settle claims. Such a requirement would dramatically impede the settlement of claims in pending litigation, contradicting sound public policy recognized by our courts. *See Darden v. Witham*, 258 S.C. 380, 188 S.E.2d 776 (1972) ("[C]ourts favor settlements and agreements amongst litigants, and regard as commendable efforts by the parties to settle their differences without the courts' intervention or

assistance...."); *Univ. of S. Cal. v. Moran*, 365 S.C. at 281, 617 S.E.2d at 141 ("[F]amily settlements are favored by the courts.") (quoting *Dibble v. Dibble*, 248 S.C. 165, 171, 149 S.E.2d 355, 358 (1966)); *Wilson v. Dallas*, 403 S.C. at 445, 743 S.E.2d at 765 ("The law generally favors an agreement of compromise among family members to avoid a will contest or promote the settlement and distribution of an estate.") (citing *Duncan v. Alewine*, 273 S.C. 275, 255 S.E.2d 841 (1979); *Dibble, supra*; *In re Estate of Yeley*, 959 N.E.2d 888, 894 (Ind. Ct. App. 2011) ("[T]he settlement agreement is a contractual agreement to transfer and distribute property among the parties so as to avoid litigation.")).

The Settlement Agreements do not alter, modify, or amend the terms or distribution scheme of Decedent's Will or Trust. (*Compare* Proposed Settlement Agreements, R. p. 371-410 *and* Last Will and Testament, R. pp. 958-963.) The Settlement Agreements do not purport to resolve Will and Trust Challenges pursued by non-settling parties and do not alter the Decedent's testamentary intent. *Contra, Wilson v. Dallas*, 403 S.C. at 451, 743 S.E.2d at 768 ("The compromise orchestrated by the [Attorney General] in this case destroys the estate plan Brown had established in favor of an arrangement overseen virtually exclusively by the [Attorney General]."). Rather, the Settlement Agreements resolve pending challenges to set aside Decedent's estate plan through the Estate and Trust's payment of "nuisance value" settlements. (R. p. 249, lines 4-23 ("[A] settlement of $37,500 per claim for these five claims is very reasonable. And one might view it as simply very easily justified by the costs that are going to be saved for it, let alone the fact that it eliminates risk to the Estate that they may prevail and that the estate might end up being set aside."))

Further, the Settlement Agreements leave wholly intact Decedent's testamentary plan to devise all of his tangible personal property to certain named heirs, including Petitioners, Appellant, and Daryl Brown. In Item I of Decedent's Last Will and Testament, he specifically gave and bequeathed "all . . . personal and household effects of every kind . . . to my children surviving[6] me in approximately equal shares." (R. p. 958 at Item I.) The Settlement Agreements do not disturb Decedent's express intention of pouring over *all remaining Estate assets* into a trust designed to help educate his grandchildren and qualified poor and financially needy children in Georgia and South Carolina. (R. p. 958 at Item II; at R. pp. 964-984.) The Settlement Agreements do not prevent Appellant, Daryl Brown, or any of the Decedent's other named children and their legitimate heirs (Petitioners), from receiving their one-sixth interest of Decedent's tangible personal property, as distributed through Decedent's Will.

Appellant's argument that the distribution scheme in Decedent's Will and Trust was "alter[ed], modif[ied], or amend[ed]," because the settlements enabled Petitioners "to receive an interest in the Estate after challenging the plan," and "avoid the application of the in terrorem clause" (R. p. 962 at Item X) (Appellant's Brief at pp. 9, 11), is not supported by any legal citation or logic. As a preliminary matter, Appellant's argument falsely assumes the in terrorem clauses in Decedent's Will and Trust would be enforceable against Petitioners. An action to enforce an in terrorem clause is only appropriate *after* a court has first determined the underlying challenges to the validity of the will or trust lack merit. *Doolittle v. Exchange Bank*, 241 Cal. App.4th 529, 543 (Cal.

[6] Decedent's "surviving children" are defined as "Deanna J. Brown Thomas; Yamma N. Brown; Vanisha Brown; Daryl J. Brown; Larry Brown; and Terry Brown," including "their legitimate issue who shall also be lineage issue of mine," including Tonya Brown a/k/a Sarah Latonya Brown, Jason Brown Lewis, Sydney Lumar, and Carrington Lumar. (R. p. 958.)

App. 2015) ("[An in terrorem clause] need not and cannot be enforced until it known whether the contest has merit.").

Courts in South Carolina, along with a majority of other jurisdictions, have recognized a "good faith challenge" exception to the general rule that *in terrorem* or "no-contest" clauses are valid and enforceable. Under South Carolina law, a no contest clause is unenforceable if the challenger has probable cause for challenging the testamentary instrument. S.C. Code Ann. § 62-3-905 (Supp. 2014); *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006); *see also Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853, 856 (N.C. 1952) (holding no contest clause unenforceable against a person who in good faith and with probable cause challenges the validity of a will). Whether probable cause exists is a question of fact for the jury. *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 629 S.E.2d 642 (2006); *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 129 (2014); *see also Hamel v. Hamel*, 299 P.3d 278 (Kan. 2013).

Appellant's argument that the "good faith challenge exception" to enforcement of no contest clauses is not available for challenges to irrevocable trust agreements, (Appellant's Brief at p. 21), attempts to draw a line where none logically exists. Under existing case law, an in terrorem clause in either a will or trust agreement, regardless of whether revocable or irrevocable, is unenforceable where there is probable cause to challenge the instrument. *See Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 633 S.E.2d 722 (2006); *Haynes v. First Nat. State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981); *Hamel*, 299 P.3d at 290; *In re Estate of Stan*, 839 N.W.2d 498, 502 (Mich. Ct. App. 2013); 23 A.L.R.4th 369 ("Validity and enforceability of provision of will *or trust*

instrument for forfeiture or reduction of share of contesting beneficiary") (emphasis added).

The public policy supporting enforcement of no contest clauses–and the good faith exception to their enforcement–applies equally to wills and trusts, whether revocable or irrevocable. "As with a will, the primary consideration in construing a trust is to discern the settlor's intent." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005) (citing *Bowles v. Bradley*, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995)). The purpose of a no contest clause is to dissuade beneficiaries from challenging gifts made in the instrument. If a suit is brought to thwart the decedent's intention, a forfeiture clause should be effectuated to uphold the intention of the decedent. *See Russell v. Wachovia Bank, N.A.*, 370 S.C. at 12, 633 S.E.2d at 725-26 (stating such clauses are "designed to penalize beneficiaries for contesting a will or instituting other proceedings relating to the estate"). However, where the challenger seeks to set aside the estate plan on the basis that the decedent was unduly influenced, lacked capacity, or otherwise did not intend the effects of the testamentary instrument, the testator's "intent" is the core issue of the challenge. A good-faith challenger actually seeks to further the legitimate intentions or expectations of the decedent, rather than thwart such desires.

Appellant asserts no probable cause exception to the enforcement of an in terrorem clause exists in South Carolina for irrevocable trusts. (Appellant's Brief at p. 21.) Appellant cites S.C. Code Ann. § 62-7-605 (Supp. 2014) for this proposition. (*See id.*) That code provision states:

> A provision in a revocable trust purporting to penalize any interested person for contesting the validity of the trust or instituting other proceedings relating to the trust is unenforceable if probable cause exists for instituting proceedings.

Id. Appellant asserts because there is no similar provision in the South Carolina Code for irrevocable trusts, South Carolina law *requires* the Estate to pursue actions against the Settling Petitioners asserting violation of the Trust's in terrorem clause and *prohibits* the Estate from settling with the Settling Petitioners *on any terms*. (Appellant's Brief, pp. 21-22.)

Appellant's argument hinges on the faulty premise that the *absence* of a similar statutory provision for irrevocable trusts means no contest clauses in irrevocable trusts must be enforced even if probable cause exists. (*See id.*) The plain and unambiguous language of the South Carolina Trust Code precludes Appellant's argument. In Section 62-7-106, the Legislature stated: "The common law of trusts and principles of equity supplement this article, except to the extent modified by this article or another statute of this State." S.C. Code Ann. § 62-7-106 (Supp. 2014). In the Reporter's Comments it is noted: "The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in the exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts."

Article X of the Will and Article XXI of the Trust contain functionally identical in terrorem clauses. Only the first sentence of these clauses would theoretically apply to Petitioners because the remainder of the applicable clauses apply only to "any person not provided for in the [Irrevocable Trust or the Will] . . . ." (R. p. 962 at Item X; p. 981 at Article XXI.) Petitioners are all either specifically named as children in the Will and Trust or are "their legitimate issue." (R. p. 958 at second introductory clause; R. p. 981 at Article XXII.)

The relevant sentence from the Trust reads as follows[7]:

> Should any beneficiary under this Irrevocable Trust or Grantor's Will . . . become an adverse party in a proceeding for the probate of Grantor's Will or in any manner contest the validity of Grantor's irrevocable Trust, such beneficiary shall forfeit his or her entire interest thereunder and such interest shall pass to such other beneficiaries as would be entitled to take as if such beneficiary predeceased Grantor.

(R. p. 981 at Article XXI.)

Appellant admits South Carolina's Probate Code expresses a probable cause exception for enforcement of the in terrorem clause in the Decedent's *Will*. (See Appellant's Brief, pp. 15, 22; S.C. Code Ann., § 62-3-905.) Section 62-3-905 states:

> A provision in a will purporting to penalize any interested person for contesting the validity of the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

S.C. Code Ann. § 62-3-905 (Supp. 2014). This statute (which is a codification of the common law applying to both wills and trusts) prohibits enforcement of an in terrorem clause in the Will if the Petitioners had probable cause for challenging the validity of the Will. Appellant apparently acknowledges this. (*See* Appellant's Brief, pp. 15, 22)

Appellant's assertion that Section 62-7-605 *requires* the LSA, to institute and pursue an action seeking forfeiture of the Petitioners' interest in the Will, at all costs and regardless of the validity of their claims, directly conflicts with Section 62-3-905, and therefore would wholly negate it.

> In the absence of a showing to the contrary, all laws are presumed to be consistent with each other. Where it is possible to do so, it is the duty of the courts, in construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions.

---

[7] The Will is functionally identical.

73 Am. Jur. 2d., *Statutes* § 254; *Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) ("[T]he statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction."). "A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 23-24, 579 S.E.2d 334, 336 (Ct. App. 2003) (citation omitted). To harmonize Sections 62-7-605 and 62-3-905, Section 62-7-605 must be interpreted to express the probable cause exception for revocable trusts and *not preclude* application of the probable cause exception to irrevocable trusts.

Appellant's asserted distinction between the enforcement of in terrorem clauses in wills and revocable trusts on the one hand and irrevocable trusts on the other, does not exist. Our Supreme Court has clarified "the law relating to discerning the drafter's intent is identical for wills and trusts." *Epworth Children's Home*, 365 S.C. at 166, 616 S.E.2d at 715 (citing *All Saints Parish, Waccamaw v. Protestant Episcopal Church*, 358 S.C. 209, 224 n. 10, 595 S.E.2d 253, 262 n. 10 (Ct. App. 2004)). To the extent there is no South Carolina case precedent for application of the "good faith challenge" exception to enforcement of an in terrorem clause in an irrevocable trust, this Court should find that such an extension of applicable law would be appropriate.

Appellant contends the Court should have heard and approved of the settlement under S.C. Code Ann. § 62-3-1101 and -1102. (Appellant's Brief at p. 8.) Appellant's view of the law was rejected by this Court in *University of Southern California v. Moran*,

365 S.C. 270, 617 S.E.2d 135 (Ct. App. 2005).[8] There, Alexandria Anderson and her husband, Thomas Anderson, executed a joint revocable trust into which both of their estates, other than tangible personal property, poured over. *Id.* at 273, 617 S.E.2d at 136. Mr. Anderson died first and Mrs. Anderson died shortly after, leaving $4,436,000 to be distributed through the trust. *Id.* The personal representative informed the Andersons' nieces and nephews they would receive $10,000 in distributions from the Anderson Trust. *Id.* at 273, 617 S.E.2d at 137.

Two of the Andersons' nieces and nephews, Louis and Michael Chubiz, threatened to contest Mrs. Anderson's will and the Anderson trust on the ground the documents were the product of undue influence. *Id.* Based on this threat, the personal representatives and the Chubizes negotiated a compromise in which Mrs. Anderson's estate agreed to pay both Chubizes $175,000. *Id.* The Chubizes filed a petition seeking approval of the agreement under S.C. Code Ann. §§ 62-3-1101 and -1102. The University of Southern California, a residual beneficiary of the Anderson Trust, received notice of the proposed compromise agreement and moved to oppose it. *Id.*

"Under the University's interpretation of section 62-3-1102," similar to Appellant's view in the instant appeal, "one of many trust beneficiaries could exercise veto power over an attempted compromise under section 62-7-1102." *Univ. of S. Cal. v. Moran*, 365 S.C. at 281, 617 S.E.2d at 141. However, this Court found that such a view would encourage protracted litigation rather than a reasonable settlement. "The better approach is to vest the trustee, who has a fiduciary obligation to administer the trust in

[8] *See* Appellant's Brief at p. 10 ("The Moving Parties were aware that they did not have Appellant Terry Brown's consent to any of these settlements, as he was not contacted and did not sign them. Further, Appellant contends that they did not seek it because they knew he would not consent....").

the best interests of the trust beneficiaries, with the power to enter into the compromise on behalf of the trust." *Id.* The Court concluded "[i]ndeed both the Anderson Trust and the Probate Code give the trustee the power to enter into settlements." *Id.*

There is no statutory law or case authority requiring that litigants in an estate case opt to enter a private settlement agreement, under S.C. Code Ann. § 62-3-912, which would require agreement by all heirs, or seek court approval under Sections 62-3-1101 and 1102. The Estate and Trust's fiduciaries have authority under S.C. Code Ann. § 62-3-105 (Supp. 2014), to seek "orders in formal proceedings" so long as such orders are "within the court's jurisdiction." *Id.* Here, the moving parties requested the lower court to authorize and empower the Fiduciaries to enter into the Settlement Agreements which would resolve pending litigation before the court. Such a request was within the lower court's jurisdiction and therefore, the court's determination that the Joint Motion to Authorize Settlement was not filed under S.C. Code Ann. §§ 62-3-1101 and 1102 (Supp. 2014) was not an abuse of discretion or error of law.

III. THE ESTATE AND TRUST'S FIDUCIARIES ARE NOT OBLIGATED TO ENFORCE THE IN TERROREM CLAUSES IN THE WILL AND TRUST.

Appellant's opposition is based on the flawed and wholly unsupported assumption that fiduciaries of an estate are required, *at all costs*, to enforce in terrorem clauses against all challengers, including those who may have probable cause to contest the estate plan. (Appellant's Brief at pp. 13-20.)[9] Nothing in applicable statutory law, case

[9] *See also* Motion to Alter, Amend, and Reconsider at R. p. 464 ("The Personal Representative and Trustee have a duty to enforce the in terrorem clauses and act impartially among the beneficiaries. Failure to do so rewards the bad acts of the contesting children, their heirs, and alleged spouse who challenged the Will and Trust. ... The Personal Representative and Trustee have a duty of impartiality and fiduciary duty not to favor or injure beneficiaries of the Estate or

precedent, or estate documents provides such an unyielding directive.

As fiduciaries of an estate and trust, Messrs. Bauknight and Sojourner have the fiduciary obligation to act in the best interests of Estate and Trust beneficiaries. *See* S.C. Code Ann. §§ 62-1-201, 62-7-703, 62-7-802; *Yates v. Yates*, 292 S.C. 49, 354 S.E.2d 800 (Ct. App. 1987); S.C. Code Ann. §§ 62-7-301, 62-7-305; *Ex parte Wheeler v. Estate of Green*, 381 S.C. 548, 673 S.E.2d 836 (Ct. App. 2009); S.C. Code Ann. § 62-7-803. However, nothing about such duty compels the Fiduciaries to assert the in terrorem clause against beneficiaries who challenge the estate plan turning a blind eye to the facts, circumstances, and discovery developed during litigation.

Here, in concluding the Settlement Agreements were in the best interest of the Estate and Trust, the Fiduciaries determined the costs of continued litigation against Petitioners, including enforcement of the in terrorem clauses, would be born directly by the residual beneficiary of Decedent's Estate and Trust, the James Brown "I Feel Good" Charitable Trust.[9] But even though these costs would fall entirely on the shoulders of the residual beneficiaries, any potential benefit of continuing such "wasteful litigation"[10] would inure only to Appellant and Daryl Brown. South Carolina law is clear fiduciaries have an obligation to consider *all beneficiaries* of the Estate, not just one or two. *See* S.C. Code Ann. § 62-3-703(a)(2009) (stating "[a] personal representative is a fiduciary" and must "use the authority conferred upon him ... for the best interests of successors to the estate").

Trust. Failing to enforce the in terrorem clauses in this matter, breaches both of these duties and unfairly punishes the only beneficiaries that have not challenged the Will and Trust.").

[10] Terry Brown acknowledges the wasteful nature of continuing the Will and Trust Challenges in his Motion to Alter, Amend, and Reconsider. (R. p. 471.)

Appellant further argues the Estate's failure to enforce the in terrorem clause "was a breach of fiduciary duty that the lower court should have remedied by requiring enforcement of the same." (Appellant's Brief at pp. 13-25.) Appellant's attempt to inject a breach of fiduciary duty claim into this matter through his opposition to a settlement agreement was procedurally inappropriate and insufficient to preclude the settlements with Petitioners. To succeed on such an assertion, Appellant was required to prove a breach of the Fiduciaries' obligations based on evidence submitted to the lower court. *See Turpin v. Lowther*, 404 S.C. 581, 745 S.E.2d 397 (Ct. App. 2013). Any such finding by the lower court was required to be supported by evidence. *Jordan v. Holt*, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005) (trial court's findings in a breach of fiduciary duty action will be upheld unless they are "without evidentiary support."). Appellant presented no testimony or other evidence during the hearing that the Fiduciaries breached their legal duties, although the lower court never precluded him from doing so.

Case law cited in Appellant's brief, including *Doolittle v. Exchange Bank*, 241 Cal. App.4th 529 (Cal. 2015), does not support his position. (Appellant's Brief at pp. 15-17.) Rather, it supports an affirmance by this Court of the lower court's orders in favor of settlement. Appellant represents to the Court that *Doolittle* held a Trustee is under a duty to enforce an in terrorem clause in a trust when such duty is specifically required by the trust language until such time as a party challenging meets the burden of proof that they had probable cause to bring the claim. (Brief of Appellant at p. 16.)

Instead of purporting to require a fiduciary to enforce an in terrorem clause at all costs, the *Doolittle* court recognized: "Under the conventional understanding of a no-contest clause—as a provision removing or reducing what is otherwise given to the

contesting party—the provision *need not and cannot be enforced* until it is known whether the contest has merit." 241 Cal. App.4th at 543 (emphasis added). The court did not compel the trustee to enforce an in terrorem clause against the challenging party. Instead, it held that such a clause *could only be enforced* after it was determined (presumably through trial of the challenge itself) that the underlying challenge lacked merit. *See id.*

The *Doolittle* decision is long and detailed, addressing many topics related to estate and trust contests. However, contrary to Appellant's assertions, the decision *does not* discuss whether a fiduciary must enforce an in terrorem clause. Rather, the case addressed a trust beneficiary's contention the trust could only pay the trustee's legal fees for defending a beneficiary's challenge to the trust *after* the Court had determined the beneficiary's challenge lacked merit and was brought without probable cause. The *Doolittle* court disagreed with the beneficiary, finding:

> If on the other hand, the directive to the trustee to defend the challenge were construed as a no-contest clause, which could be enforced only after it was determined that the underlying challenge lacked merit and was brought without probable cause, the trustee would have no means of knowing whether the instruction should be observed prior to resolution of the merits of the underlying controversy. The trustee would be unable to comply with the directive until after the litigation had been concluded, rendering the directive meaningless.

Id. at 543-544.

No South Carolina law requires a fiduciary to bring an action to enforce an in terrorem clause. Case law from this jurisdiction does, however, recognize the authority of *beneficiaries* to directly seek enforcement of in terrorem clauses.[11] Here, while

[11] *See Russell*, 370 S.C. at 10, 633 S.E.2d at 725 ("Following remittitur, the Williams Children filed a motion for summary judgment seeking to enforce the no-contest clauses appearing in

Appellant alleges Petitioners breached the in terrorem clauses in Decedent's Will and Trust, he failed to take action to directly enforce these clauses himself, action authorized by law. *Russell v. Wachovia Bank, N.A.*, 370 S.C. at 10, 633 S.E.2d at 725 (recognizing beneficiaries, including a decedent's child, can enforce a no-contest clause appearing in a will and trust). That Appellant himself could have directly sought to enforce the in terrorem clause and did not, negates his assertion the LSA breached a purported fiduciary duty to expend funds otherwise reserved for the Estate's charitable beneficiaries to pursue that same action.

Appellant's contention Fiduciaries cannot enter the Settlement Agreements because that would violate their fiduciary duty to enforce the in terrorem clauses against all parties challenging the Will and Trust has no support. The lower court's orders authorizing the Estate and Trust to enter into the Settlement Agreements and dismissing the Petitions with prejudice should accordingly be affirmed.

IV. A SHOWING OF PROBABLE CAUSE WAS NOT REQUIRED FOR THE ESTATE AND TRUST TO ENTER INTO THE SETTLEMENT AGREEMENTS.

Based on the Estate and Trust's inherent authority to enter settlement agreements to resolve pending litigation against the Estate and Trust, so long as the distributional interests are not altered, modified, or changed, there is no need for a showing of probable cause to support the Settlement Agreements. The probable cause issue is a red herring in this appeal, raised entirely by Appellant in opposition to the court's approval of the settlements. Appellant's injection of probable cause in his opposition to the Joint Motion

---

Testator's will and revocable trust. Wachovia intervened, making similar arguments.")

to Authorize Settlement necessitated the moving parties' presentation of opposing evidence during the lower court's hearing.

In *Wilson v. Dallas*, the Supreme Court addressed what it perceived as a lack of evidence as it related to the ability of Petitioners to invoke the good faith, probable cause exception to enforcement of in terrorem clauses in Decedent's Will and Trust. 403 S.C. at 437-440, 743 S.E.2d at 760-762. The Supreme Court stated:

> Although proof of a claim is not required, we believe something more than a subjective belief or a mere allegation is necessary to avoid the potential for collusion among disinherited or disgruntled family members who wish to dispose of the testator's estate plan and substitute it with one more to their liking.

Id. at 436, 743 S.E.2d at 760. The Supreme Court further defined its analysis:

> However, it is universally acknowledged that full proof of the asserted claims is not required because the *reason d'etre* for the [family settlement] statute is to dispense with the necessity of litigating the case on the merits. The circuit court's duty was not to decide the ultimate question of the merits of the undue influence and other claims; rather, the statutory standard is *whether the proposed compromise agreement resolves a good faith controversy and whether the agreement is just and reasonable.* (citations omitted. Emphasis added.).

Id.

The Supreme Court's analysis in *Wilson v. Dallas* focused on whether a good faith controversy existed sufficient to justify a settlement "that seeks to vitiate the decedent's entire estate plan." *Id.* at 440, 743 S.E.2d at 762 (citations omitted). The standard for approval of the 2008 Compromise Agreement, as addressed in *Wilson v. Dallas*, is higher than the standard for the Court to grant the present motion.

V. THE SETTLEMENT AGREEMENTS WERE REASONABLE AND WERE EXECUTED IN FURTHERANCE OF THE BEST INTERESTS OF THE ESTATE AND TRUST.

It was unnecessary for the lower court to consider whether probable cause existed for Petitioners' undue influence challenges to authorize the settlements. However, even if a "probable cause" showing were required to sustain the Settlement Agreements, reasonable factual support exists in the record indicating the lower court's finding of probable cause should be affirmed. Appellant contends "no evidence presents of probable cause" (Brief of Appellant at pp. 15, 17), but this contention could not be further from the truth.

Appellant contends the deposition testimony of H. Dewain Herring "points to a complete and utter lack of undue influence and clear and convincing intent as it relates to [enforcement] of the in terrorem clauses." (Appellant's Brief at p. 20.) Mr. Herring's deposition was conducted on November 19 and December 9, 2015. (R. pp. 756-826.) This argument lacks merit, primarily because the effective dates of the Settlement Agreements, November 13 and 17, 2015, filed predate the initiation of Mr. Herring's deposition. (R. pp. 371-410.)

Moreover, although Mr. Herring's deposition testimony may create a genuine issue of material fact regarding undue influence, it is wholly irrelevant to Petitioners' required burden of proof regarding probable cause. In *In re Estate of Stewart*, 386 P.3d 1089 (Ariz. Ct. App. 2012), the Arizona Court of Appeals held "probable cause" is defined, in pertinent part, as "the existence, *at the time of the initiation of the proceeding*, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be

successful." *Id.* at 1094 (quoting Restatement (Second) of Property: Donative Transfers § 9.1 cmt. j (1983)) (emphasis added); *see also In re Miller Osborne Perry Trust*, 831 N.W.2d 251, 255 n. 1 (Mich. App. 2013) ("[T]he issue whether probable cause existed necessarily turns on the evidence that the challenging party had at the time he or she instituted the challenge....").

It is likely that the same standard applies in South Carolina as the Legislature strongly suggests that the determination of probable cause is made as of the date of filing of the will contest or challenge. *See* S.C. Code Ann. § 62-3-905 (Supp. 2014) (stating no contest clause is "unenforceable if probable causes exists *for instituting proceedings*") (emphasis added); S.C. Code Ann. § 62-7-605 (Supp. 2014) (same); *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. at 12, 633 S.E.2d at 726 ("no-contest clause is unenforceable against a person who *in* good faith and *with* probable cause *challenges* the validity of a will") (citation omitted). Existing South Carolina law also implies evidence adduced during discovery, after initiation of the proceeding, may bolster the existence of probable cause at the time of filing. In *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), the Supreme Court held a party could not be sanctioned for initiating a frivolous proceeding where "the person initiating litigation 'reasonably believes under the facts that claim may be valid under existing or developing law.'" *Id.* at 157, 485 S.E.2d at 912. In that case, the Supreme Court recognized the party who initiated the litigation

"clearly submitted evidence supporting her claims" for "undue influence and lack of testamentary capacity." *Id.* at 157-58, 485 S.E.2d at 912.[12]

For these reasons, Mr. Herring's deposition testimony taken in 2015, almost eight years after Petitioners filed their will contest claims in December 2007, which Appellant contends supports the notion that Decedent was not unduly influenced and had an appropriate level of mental capacity at the time he executed the 2000 Will and Trust, is likely irrelevant to a determination of whether Petitioners had probable cause at the time they filed the Petitions. Although Mr. Herring's deposition testimony may create a genuine issue of material fact regarding undue influence, and Petitioner's ability to succeed on the merits of their claim, it is likely irrelevant the question of probable cause.

The lower court's orders finding Petitioners had probable cause to file the Petitions were reasonably supported by evidentiary facts. Mr. Louis Levenson offered testimony during the lower court's hearing on the Joint Motion to Authorize Settlement. (R. p. 278, line 18 - p. 334, line 20.) Mr. Levenson testified at length regarding the extensive work he undertook before filing the Petitions on Petitioners' behalf in 2007 to establish the existence of probable cause to support Petitioners' claims. (Id.) For nearly five pages of the lower court's order authorizing the Settlement Agreements, Mr. Levenson's testimony is used to support the conclusion that Petitioners had probable cause to initiate their will and trust challenges. (R. pp. 151-156.)

Even if Mr. Herring's testimony were relevant, that the lower court did not base its decision largely on Mr. Herring's testimony, as Appellant would prefer, does not make

[12] The *Hanahan* case was later modified by amendments to the Frivolous Civil Proceedings Sanctions Act (FCPSA). *See Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (referencing the modified FCPSA, S.C. Code Ann. § 15–36–10 (2005), effective eight years after the *Hanahan* decision).

the lower court's order an abuse of discretion. Under the applicable appellate review standard, appellate courts give significant deference to a lower court's determination on weight and credibility of testimonial evidence. This Court has held, under the applicable abuse of discretion standard, that in reviewing a lower court's decision it is "obligated to give great deference to the trial court's judgment." *State v. McLeod*, 362 S.C. 73, 81-82, 606 S.E.2d 215, 220 (Ct. App. 2004) (citation omitted). "Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003).

In *State v. Johnson*, 413 S.C. 458, 776 S.E.2d 367 (2015), the Supreme Court recognized:

> Credibility findings are treated as factual findings, and therefore, the appellate inquiry is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record. *See, e.g., State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006) (stating that in preliminary evidentiary matters, appellate court review is limited to reviewing whether the trial court's factual findings are supported by any evidence in the record). Moreover, it is well-established under South Carolina law that credibility determinations are entitled to great deference. *See e.g., State v. Cutro*, 332 S.C. 100, 117, 504 S.E.2d 324, 333 (1998) (Toal, J., dissenting) ("On appeal, [the appellate court is] to ascertain whether the trial court abused its discretion in admitting the evidence. Our task is not to engage in a de novo review of the evidence. Nor are we to usurp the authority of the trial court by attempting to judge the credibility of witnesses. The determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity." (citations omitted)); *Sumpter v. State*, 312 S.C. 221, 224, 439 S.E.2d 842, 844 (1994) ("Because the trial court's findings ... rest largely on his evaluation of demeanor and credibility, those findings are given great deference.").

Id. at 467-68, 776 S.E.2d at 371-72.

Evidence submitted by the Moving Parties to support the lower court's authorization of the Settlement Agreements provides adequate support for the lower court's orders which are now on appeal before this Court. As the record reflects, significant discovery was conducted, including the Estate's written discovery propounded to Petitioners and non-parties including Tommie Rae Hynie Brown, Decedent's purported surviving spouse. As Mr. Levenson testified, Petitioners participated in the depositions of Joseph Lizzio on September 21, 2007 and Forlando Brown on October 31, 2007, and interviewed H. Dewain Herring, the Will and Trust drafting attorney prior to his deposition being scheduled and taken in late 2015. (R. p. 278, line 18 - p. 34, line 20.)

The Settlement Agreements fully resolve pending claims brought by Petitioners that, if successful, would significantly alter or invalidate Decedent's estate plan. The Settlement Agreements are in the best interest of the Estate and Trust as they secure a prompt resolution of the Petitioners' challenges to the validity of the Will and Trust, save potential time, expenses, and resources of the Estate and Trust, and reduce the expenditure of judicial time and resources.

In contrast to the 2008 Compromise Agreement addressed by the Supreme Court in *Wilson v. Dallas*, the Settlement Agreements do not rewrite or modify any term of Decedent's estate plan. Rather, the Settlement Agreements simply require Petitioners to voluntarily dismiss their Will and Trust challenges in exchange for relatively minimal monetary payments.

Appellant, instead, asserts he is entitled to:

- force the Settling Petitioners and the Estate to abandon their settlements,

- force the Petitioners to continue to expend resources to litigate their challenges,
- force the Estate and Trust to defend those challenges through a final trial on the merits and then, if the LSA succeeds,
- force the LSA to litigate through a second trial asserting breaches of the in terrorem clause,
- all entirely at the expense of the Estate's residual, charitable beneficiaries.

Such an absurd result would serve no useful purpose other than to unnecessarily prolong costly litigation. It would be unjust and harmful to the Estate and Trust, going directly against the Decedent's testamentary intentions to benefit the Will's residual beneficiaries.

The effect of the Settlement Agreements is just and reasonable and, for the reasons presented to the lower court, the Settlement Agreements are in the best interest of the Estate and Trust. This Court should affirm the lower court's orders filed March 7 and May 31, 2016, which authorized the settlements and dismissed the Petitions with prejudice.

VI. THERE IS NO PREJUDICE TO APPELLANT AS A RESULT OF THE LOWER COURT'S ORDERS.

Under the applicable standard of review, the lower courts orders must be affirmed unless they resulted in prejudice to the rights of a party. *See Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014); *Wilson v. Dallas*, 403 S.C. at 425, 743 S.E.2d at 754; *Hueble v. South Carolina Dept. of Natural Resources*, 416 S.C. 220, 785 S.E.2d 461 (2016). Despite the numerous legal arguments and issues Appellant has asserted on appeal, upon closer inspection, it is clear Appellant is simply attempting to take a larger portion of Decedent's Estate for himself. In *Hospitality Management Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 591 S.E.2d 611 (2004), the Supreme Court

agreed with the view that "[m]ere disagreement with the terms of a settlement cannot provide grounds for a collateral attack." *Id.* (quoting *Fine v. Am. Online, Inc.*, 743 N.E.2d 416, 423 (Ohio App. 2000)).

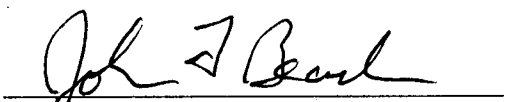
The lower court's approval of the Settlement Agreements caused no prejudice to the rights of any party, including Appellant, and Appellant must show prejudice in order to prevail. Appellant attempts to manufacture prejudice by arguing his "rights relative to the personal property of the estate were changed by failing to enforce the in terrorem clauses against [Petitioners]." (Brief of Appellant at pp. 11, 12.) Appellant's claimed "rights relative to the personal property" are wholly speculative and unenforceable. His claimed "rights relative to the personal property" only exist if the Petitioners had no probable cause to support their challenges against the Estate and Trust. "[M]ere speculation . . . cannot, by itself, satisfy [a party's] burden of showing prejudice." *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998) (quotation omitted).

The Supreme Court's decision in *Russell v. Wachovia Bank, N.A.*, 370 S.C. at, 10, 633 S.E.2d at 725, reveals that beneficiaries, including a decedent's child such as Appellant, can enforce a no-contest clause appearing in a will and trust. Appellant's failure to directly seek enforcement of the in terrorem clause establishes he was not prejudiced by the LSA's decision to settle with the Settling Petitioners, but rather, was prejudiced by his own inaction. This Court should reject Appellant's selfish efforts to force the LSA to pursue a continued, wasteful course of litigation against Petitioners, with that litigation financed solely by funds otherwise reserved for the Estate's charitable beneficiaries.

CONCLUSION

For the above-stated reasons, the LSA respectfully requests this Court affirm the lower court's order, dated March 7, 2016, and order denying Appellant's Motion to Alter, Amend, and/or Reconsider, dated May 31, 2016, authorizing the LSA and Personal Representative/Trustee to enter into the Settlement Agreements with Petitioners and dismissing, with prejudice, the Petitions and all related claims filed by Petitioners on December 26, 2007, as amended on January 24, 2008.

Respectfully submitted,



John F. Beach
Lyndey Ritz Zwingelberg
Adams and Reese LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29201
(803) 254-4190

Attorneys for Respondent David C. Sojourner, Jr., Limited Special Administrator of the Estate of James Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000

January 6, 2017.

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. 2016-001373

Russell L. Bauknight, in his capacity as Personal Representative of the Estate of James Brown and Trustee of the James Brown Irrevocable Trust Agreement u/a/d August 1, 2000, 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, 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,

v.

Terry Brown and Darryl Brown of whom Terry Brown is the ..... Appellant.
In Re: The Estate of James Brown a/k/a James Joseph Brown

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Respondent David C. Sojourner, Jr., Limited Special Administrator of the Estate of James Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000 complies with Rule 211(b), SCACR.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

John F. Beach (S.C. Bar No. 595)
Lyndey Ritz Zwingelberg (S.C. Bar No. 100804)
Adams and Reese LLP
1501 Main Street, 5th Floor
Columbia, South Carolina 29202
(803) 254-4190

Attorneys for Respondent David C. Sojourner, Jr., Limited Special Administrator of the Estate of James Brown and Limited Special Trustee of the James Brown Irrevocable Trust, u/a/d August 1, 2000

January 9, 2017