

Exhibit Z

**STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND**

RUSSELL L. BAUKNIGHT, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Henry Dargan McMaster, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James Brown II; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children Sydney Lumar and Carrington Lumar; Tonya Brown; Venisha Brown Larry Brown; and Terry Brown

and

HENRY DARGAN MCMASTER, in his capacity as Attorney General of the State of South Carolina; TOMMIE RAE BROWN, individually and on behalf of her minor child, JAMES BROWN II; DARYL J. BROWN, individually and on behalf of his minor child JANISE VANISHA BROWN; LINDSEY DELORES BROWN; DEANNA J. BROWN THOMAS; JASON BROWN-LEWIS; YAMMA N. BROWN, individually and on behalf of her minor children SYDNEY LUMAR and CARRINGTON LUMAR; TONYA BROWN; VENISHA BROWN; LARRY BROWN; and TERRY BROWN,

Plaintiffs

v.

Adele J. Pope and Robert L. Buchanan, Jr.,
Defendants

**IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT**

Civil Action No. 2010-CP-40-4900

CHRISTOPHER M. MCDONNELL
CLERK OF COURT

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RICHLAND COUNTY
FILED

**ORDER DENYING MOTION TO
DISMISS**

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SC Court of Appeals

This matter is before the Court upon Defendant's Motion to Dismiss, filed in lieu of an Answer on June 22, 2010. A hearing was held on August 30, 2010 at which counsel for all parties were present. After hearing from both sides, reviewing the Memoranda and Affidavits submitted by both sides, and considering the matter thoroughly, I find that the Motion should be DENIED.

In this lawsuit, Plaintiffs seek redress for the alleged injury done to the Estate and certain trusts created by the late James Brown. This injury is alleged to be the result of acts and omissions of Defendants Adele Pope and Robert J. Buchanan, Jr., the former Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust.

Defendants assert ten bases for dismissal in their Motion to Dismiss. While not explicitly stated, most of these defenses arise under Rule 12(b)(6), (7) or (8) of the South Carolina Rules of Civil Procedure. Defendants also include certain affirmative defenses

Rule 12(b)(6) Motions

Bases 1 and 9 of the Motion to Dismiss are essentially grounded in Rule 12(b)(6), failure to state a claim. "In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

In basis 1, Defendants contend that Plaintiffs' suit should be dismissed because it is not accompanied by an expert witness affidavit required under S.C. Code Ann. § 15-36-100 (1976, as amended). This code section is inapplicable because Plaintiffs have not alleged professional

malpractice by Defendants. The Complaint alleges “Defendants provided services to the Estate and Trust apart from, and in addition to the requirements for the administration of the Estate and Trust. In doing so, Defendants were obligated to provide such services in a reasonable manner, consistent with the applicable standard of care.” (Complaint at Para. 26.)

While Plaintiffs do make reference to the fact that both Defendants are attorneys, these allegations are under the heading of “Venue and Jurisdiction” and are appropriate in that context. (See Complaint at Paras. 7-8). Nowhere in the Complaint do Plaintiffs allege that the Defendants were engaged to provide or committed malpractice in providing legal services. Construing the allegations in the light most favorable to the Plaintiffs, I find that the pleadings are sufficient to support the causes of action alleged and therefore deny the Motion to Dismiss.

In basis 9, Defendants contend that they are not liable for injuries to the Plaintiffs because they have never served in a fiduciary capacity to the “Legacy Trust.” A review of the Complaint shows that this fact was neither alleged nor necessary. Defendants have been sued as a result of their fiduciary relationships to the James Brown Estate and the James Brown 2000 Irrevocable Trust. Plaintiffs allege that they have interests derived from the Estate and Trust and that they have been injured as a result of the acts or omissions of the Defendants. Thus, construing the allegations in the light most favorable to the Plaintiffs, I find that the pleadings are sufficient to support the causes of action alleged and therefore deny the Motion to Dismiss.

Rule 12(b)(7) Motions

Basis 6 asserts a failure to join indispensable parties. Though not stated, this is presumably based on SCRPC 12(b)(7). Defendants contend that the failure to join Forlando and Romunzo Brown and the failure to secure the appointment of *guardians ad litem* (GALs) for the minor parties is fatal to this matter. I disagree.

Rule 12(b)(7) incorporates Rule 19, which defines an indispensable party as:

(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action . . . if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Defendants' position reflects a mischaracterization of the nature of this action. According to the Complaint, the parties-plaintiff in this matter are the participants in a settlement entity created as a result of a private settlement among them and approved by Judge Early. The claims being pursued arise out of alleged injury to the assets each member of the settlement group is contributing to the settlement entity. None of the claims affect the rights or claims of those who did not participate in the settlement. I find that all members of the settlement entity are parties to this action.

Whether others should be members of the settlement entity, or whether GALs are required is an issue that has already been litigated and decided by Judge Early in his Order of May 26, 2009. (This Order has been placed in the record and is referred to herein as the "Settlement Order.") This Court is without authority to entertain a collateral attack on that decision.

Rule 12(b)(8) Motions

In bases 2 and 3, Defendants contend that this suit should be dismissed because "the matters alleged in this action are substantially the same as matters alleged in other cases pending in the State Court or the South Carolina Court of Appeals." (Mot. Dismiss, p. 3) Defendants do

not cite Rule 12(b)(8), SCRCF in their Motion to Dismiss, but the Court assumes it to be the basis for their motion.¹

Defendants are unable to satisfy the requirements of Rule 12(b)(8) as interpreted by our Supreme Court.

In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. . . . [W]e interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8).

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 105-106, 674 S.E.2d 524, 531-32 (Ct.App.2009) (internal citations omitted). Very recently, the Court of Appeals, applying this precedent, overturned the trial court's ruling on a 12(b)(8) motion. See Cricket Cove Ventures, LLC v. Gilland, ___ S.E.2d ___, 2010 WL 3396829 (Ct. App. Aug. 25, 2010). In doing so, the court clarified that suits where a person is sued in his individual capacity and in another in his representative capacity are not suits against the same party.

Comparing the allegations of the Complaint to the other proceedings relied on by the Defendants, I find that precise or substantial similarities to the present parties or claims are absent. In their Motion, Defendants contend that four cases are substantially similar to this case:

McMaster v. Dallas, et al, 2009-CP-02-1647 ("Case 1647");
McMaster v. Brown, et al, 2009-CP-02-1810 ("Case 1810");
Thomas, et al v. Bradley, et al, 2007-CP-02-0122 ("Case 122"); and
Brown, et al v. Pope, et al, 2008-CP-02-0872 ("Case 872").

First, it should be noted that none of these cases are currently pending. These cases were resolved by way of the Settlement Order. In their Supplemental Memorandum in Support, Defendants make reference to decisions reached by other courts that allegedly dispose of the

¹ To the extent that basis 3 actually relies on doctrines of collateral estoppel and *res judicata*, these are affirmative defenses and are incorporated in the analysis below.

issues raised in this suit. Again, because these other lawsuits are not currently pending, they are not relevant to a 12(b)(8) motion.² But even if they were, the “dispositive” orders have not been provided to this Court for comparison.

Second, although scores of captioned documents have been provided to the Court,³ Defendants have not provided the Complaint/Petition relating to any of these matters from which the Court can determine the parties or the claims. However, the Settlement Order refers to these other pending matters and some inferences can be drawn therefrom. A review of this Order indicates that these cases are not similar in any significant respect to the case at bar. Not one of the lawsuits brought in relation to this Estate concerns the breaches of fiduciary duty by Adele Pope and Robert Buchanan in the management of the Estate.

Third, to the extent other claims were made, they were brought against Defendants in their representative capacity as P.R. or Trustee, while the claims in this case were brought against the Defendants individually.

Although other actions were pending that may have involved some of the same parties and appear to involve some of the same facts, there is nothing that indicates that either the parties or the claims are precisely or substantially the same.

Defendants submit that a series of Circuit Court and Appellate Court orders ratify the acts of Defendants in their service as administrators. I find that they do not. As referenced above, Defendants have not provided sufficient documentation to this Court to determine the precise nature of the claims brought in each of the lawsuits. In this closely related argument, Defendants have not provided information about the motions at issue giving rise to the various orders. In

² The doctrines of collateral estoppel and *res judicata* have not been raised by the Defendants.

³ None of the documents have been properly certified or authenticated.

some instances, the context of the order bears no apparent relationship to the claims made in this suit.

Affirmative Defenses

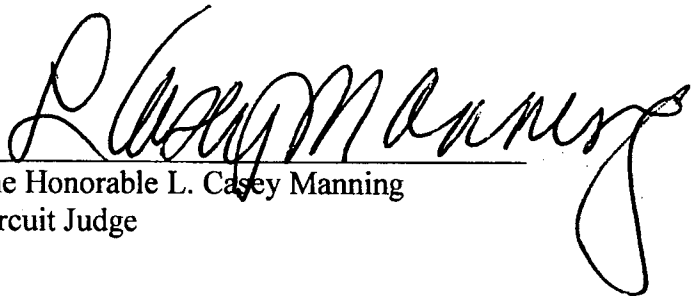
In addition to 12(b) Motions, Defendants have included the following affirmative defenses in their Motion: standing of the parties (bases 4, 5, and 8); statute of limitations (basis 7); and charitable immunity (basis 10).

Affirmative defenses are generally not appropriate for consideration in pre-answer Motions. Spence v. Spence, 368 S.C. 106, 123 628 S.E.2d 869, 878 (2006). “This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial.” Id., citing 5 Wright and Miller, Federal Practice and Procedure Civil 3d, § 1277 (2004). This has been found to apply specifically to statute of limitations and lack of standing defenses. See Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 138 fn2 (1999). This same analysis applies to the defense of charitable immunity.

Because the allegations of the Complaint do not on their face compel the application of these defenses, the Motion to Dismiss on these bases must be denied.

CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss is DENIED.



The Honorable L. Casey Manning
Circuit Judge

Columbia, South Carolina
October 2010

