THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Trial Court Case Nos. 2013-CP-02-02849 and 2013-CP-02-02850
Appellate Case No. 2015-002417 (Court of Appeals)
Appellate Case No. 2018-001990 (Supreme Court)

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

Tommie Rae Brown.....Respondent,

v.

David C. Sojourner, Jr., in his capacity as Limited
Special Administrator and Limited Special Trustee,
Deanna Brown-Thomas, Yamma Brown, Venisha Brown,
Larry Brown, Terry Brown and Daryl Brown ..... Respondents below,

Of whom Deanna Brown-Thomas, Yamma Brown, and Venisha Brown
are the ..... Petitioners.

PETITIONERS' RETURN TO RESPONDENT'S MOTION FOR LEAVE TO SUPPLEMENT PURSUANT TO RULES 212 AND 240, SCACR

Petitioners oppose Respondent's Motion for Leave to Supplement Pursuant to Rules 212 and 240, SCACR (the "Motion"), because it has no foundation under South Carolina law, is inaccurate and highly misleading, and perhaps most improperly, it implies that this Court would base its decision as to Respondent's spousal status on something other than the law. Respondent claims she is premising her Motion upon a need to "clarify" an answer given during oral argument, but the Motion is gratuitous. This Court's question regarding scholarships was simple:

Have any been given? Respondent's answer was equally simple: No. The true intent of Respondent's Motion could not be more transparent. Respondent seeks to sway this Court with misleading extra-record statements (unsupported by citations) regarding federal copyright law, James Brown's music and Estate, Respondent's purported settlement agreement and her sudden charitable intent—all after briefing and oral argument have concluded. Specifically, Respondent's Motion: (1) far exceeds the scope of Rule 212, SCACR; (2) wholly misstates applicable copyright law and its effect upon this Estate; and (3) once again seeks to mislead a judicial tribunal by touting "the" settlement agreement, while concealing the true terms of her complete agreement with the Estate from the Court.

For all of these reasons, and as more fully explained below, Respondent's Motion must be denied. If this Court grants Respondent's Motion, then Petitioners hereby designate the entire agreement between Respondent and the Estate/Trust, not the partial agreement proffered by Respondent, pursuant to Rule 212(c), SCACR. Petitioner would also designate all communications between Respondent and the Estate/Trust relating to the settlement agreement, as well as the transcript from the hearing on Petitioner's Motion to Compel Disclosure of Settlement heard in the lower court on October 31, 2016, and expressly reserves the right to make additional arguments and additional briefing after such disclosure.

I. RESPONDENT'S MOTION IS PROCEDURALLY IMPROPER AND LACKS ANY FOUNDATION UNDER SOUTH CAROLINA LAW.

Respondent characterizes her Motion as falling under Rule 212, SCACR, but Rule 212 contemplates supplementing the record only with materials that were presented to the lower court: "Because any supplemental material becomes part of the record, a party may not seek to include material not previously presented to the lower court or administrative tribunal." Jean Hoefer Toal, Amelia Waring Walker, and Margaret E. Baker, Appellate Practice in South

Carolina 418 (2016). This simple principal is based upon the clear language of Rule 210(c), SCACR, which provides that the record "shall not . . . include matter which was not presented to the lower court or tribunal." *Id*; *see also Jones v. Builders Inv. Group, LLC*, 415 S.C. 321, 330 at n. 7, 781 S.E.2d 737 (Ct. App. 2015) (noting motion to supplement record under Rule 212, SCACR, was denied when proposed supplement was not part of the record below).

This Court's decision in *Williamsburg Rural Water and Sewer Co., Inc. v. Williamsburg Cnty. Water and Sewer Auth.*, 367 S.C. 566, 627 S.E.2d 690 (2006), is particularly instructive here. In *Williamsburg*, the respondent attached a new, never-before-submitted affidavit to a petition for rehearing by the Court of Appeals, and the Court of Appeals considered that affidavit in deciding to grant the petition and in ultimately issuing a new opinion. Reversing, the *Williamsburg* Court rejected the error made by the Court of Appeals for two reasons that are both present here.

First, the *Williamsburg* Court emphasized that "[n]othing in the appellate court rules permits a party to unilaterally add after-created evidence to the record." Here, Respondent's entire Motion is based upon just such after-created evidence: The conclusory Affidavit of Peter Afterman, executed October 27, 2019, more than 5 years after the summary judgment order on appeal was entered (and even longer after it was argued before the trial judge). Mr. Afterman's Affidavit has never been presented to the trial court or even the Court of Appeals, nor has Mr. Afterman ever been disclosed to Petitioners as a fact witness or purported expert witness, much less have Petitioners been afforded the opportunity to depose him.[1] Likewise, "the" settlement

[1] Moreover, the affidavit is inappropriate inasmuch as (1) Mr. Afterman purports to be an "expert" in "copyright law" without being a lawyer or having laid any foundation for qualification as an expert; (2) the affidavit includes sworn statements regarding the law, which is not the appropriate subject of an expert affidavit; and (3) the factual statements are conclusory and lack any foundation.

agreement was never presented to the lower tribunals in their consideration of Respondent's spousal claim. Because all of the information that Respondent seeks to "supplement" has never been considered by any lower tribunal, Rule 212, SCACR, does not permit such supplementation and Respondent's Motion must therefore be denied.

Moreover, the *Williamsburg* Court faced the same situation, where a party was attempting to persuade the court to rule a particular way based upon factors other than applicable law. The after-created affidavit at issue in the *Williamsburg* decision described plans and programs already underway in the context of a lawsuit determining whether development rights were exclusive, and indicated that a finding of exclusivity would compromise the expectations of others. The *Williamsburg* Court sharply rejected the Court of Appeals's inappropriate consideration of such expectations: "We know of no authority for the proposition that a court should construe a statute not by its terms, but rather by weighing competing interests."

Likewise, here the notion that federal copyright law is somehow applicable to the question of whether Respondent is a surviving spouse under South Carolina marital law is meritless, and instead highlights that Respondent attempts to pander and sway this Court's ruling by making false and misleading statements regarding the Trust's purported "competing interest." As more fully explained below, Respondent's recitation of the application and effect of copyright law on the Trust is wholly inaccurate. Even if it were not, it is not relevant to the simple question before this Court: whether Respondent is the surviving spouse of James Brown, after obtaining a marriage license and engaging in a marriage ceremony with her first husband and failing to annul her first marriage (instead, concealing it) before improperly obtaining a second marriage license and engaging in a marriage ceremony with Mr. Brown. Like the *Williamsburg* Court, this Court must deny Respondent's Motion and uphold the rule of law.

II. RESPONDENT MISREPRESENTS THE NATURE AND EFFECT OF COPYRIGHT TERMINATION RIGHTS.

Respondent's representations as to the nature and effect of termination rights under the U.S. Copyright Act, 17 U.S.C. §§ 304(c), 203(a), are false and very misleading.[2] First and foremost, as Respondent must admit, James Brown long ago "assigned to music publishers" the copyrights to his musical compositions ("Composition(s)") "as is typical in the industry."[3] Thus, these Composition copyrights were never part of James Brown's Estate or Charitable Trust to begin with and could never be. Accordingly, the potential future recovery of such copyrights by his children under the Copyright Act cannot deprive the Estate/Trust of such copyrights previously signed away.

Second, to set up her parade of horribles, Respondent repeatedly misrepresents (again, without citation) that "all of James Brown's ... songs will be terminable within the next 6 years," that "[t]he rights to income from most of James Brown's valuable songs can be terminated within six years" and that this would purportedly "redirect most of the annual royalty income" to the intestate heirs.[4] This is demonstrably false.

As to such pre-1978 works and grants, the earliest U.S. copyrights can be recovered is 56 years after the copyright is secured by registration or publication, whichever is earlier. 17 U.S.C. § 304(c). The exercise of termination rights by statutory Notice of Termination can be no less than 2 years nor greater than 10 years in advance. In deceptive wordplay, Respondent conflates

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[2] From the start, Respondent exhibits a willful misunderstanding of statutory termination rights. For instance, she repeatedly references the assignment of termination rights to the Estate when (a) the termination right is inalienable and persists "notwithstanding any agreement to the contrary" 17 U.S.C. §§ 304(c)(5), 203(b)(5) and (b) an advance grant to a third party of any interest in a terminated copyright prior to the actual date of copyright reversion is also void. *Id.*, §§ 304(c)(6)(D), 203(b)(4).

[3] Resp. Br., Ex. B. Affidavit of Peter Afterman at 3, ¶ 2.

[4] Resp. Ltr. at 2, Resp. Br. at 2 and n.3.

the 10-years-advance notice of termination with the actual date of copyright recovery in stating that most "songs will be terminable within the next six years" (emphasis added). In other words, in 2026, the statutory heirs could give 10-years-advance notice that copyrights will revert in 2036. James Brown wrote or co-wrote over 1,100 Compositions.[5] To date, based on the Compositions' dates of registration/publication, only about 42 Composition copyrights are subject to recovery (the last being "They Are Saying" registered on October 4, 1963 and recovered by statutory heirs 56 years later on October 5, 2019). *Id.*

The truth about "the next 6 years" is that a total of 247 (of approximately 1,100) Composition copyrights are recoverable (the last is "With Your Sweet Lovin' Self" registered on October 30, 1969 and recoverable on October 31, 2025). *Id.* Of these, only a handful could be considered James Brown's most valuable songs. For instance, the Composition copyrights to hits like "Sex Machine", "Make It Funky" "Get Up", and "Soul Power" first published in the mid-to-late 1970s, are not recoverable under the Copyright Act until mid-to-late 2036, and so on until mid-2043. *Id.* Respondent's desperate mischaracterizations of immediacy are belied by the facts and law.

Respondent makes other misstatements, but a correct understanding of the law undermines her conclusory arguments:

(a) As the Copyright Act has no extra-territorial application, statutory termination has *no effect* on the Compositions' foreign copyrights and the Estate's substantial foreign revenues in the form of royalties from these foreign copyrights. *Update Art, Inc. v. Modiin Pub., Ltd.,* 843 F.2d 67, 72 (2d Cir. 1988; 3 Melville Nimmer and David Nimmer, *Nimmer on Copyright* § 11.02[B][2] at 11-19.

[5]https://www.discogs.com/artist/12596-JamesBrown?limit=500&filter_anv=0&subtype=Writing Arrangement& type = Credits& page=1.

(b) Respondent vaguely refers to "songs", however, the statutory terminations she refers to cover the copyrights to James Brown's Compositions, not his master recordings, which notwithstanding such terminations remain the property of his Estate/Trust or his/their grantees.

(c) Statutory termination also does not prevent the exploitation by the Estate/Trust of prior derivative works (e.g., James Brown's recorded songs) before the effective dates of any terminations under what is known as the "derivative works exception", because such music recordings were created by James Brown long before any statutory termination. *See* 17 U.S.C. §§ 304 (c)(6)(a), 203(b)(1).

(d) Because the copyrights to James Brown's Compositions were long ago signed away by him (*see* above), he and therefore his Estate retained what is commonly known as the "Writer's Share" of music publishing royalties. The Estate has consistently maintained that such royalties are wholly unaffected by statutory termination, and—notwithstanding initial notices of terminations regarding Brown's earliest Compositions—the Estate continues to be paid its Writer's Share by the leading collection agencies, BMI and ASCAP.

The way statutory copyright terminations legally function, Respondent's unsupported, transparently manipulative argument that the federal termination rights of James Brown's children will prevent Trust scholarships if she is not crowned his surviving spouse is completely spurious.

III. RESPONDENT MISREPRESENTS HER REAL SETTLEMENT AGREEMENT WITH THE ESTATE AND TRUST.

Touting charitable intentions, Respondent misrepresents to this Court the actual terms of her settlement with the Estate and Trust, just as she did to the trial court and Court of Appeals. One cannot forget, however, that immediately after James Brown died, Respondent filed suit to set aside his will and charitable Trust—suing for an elective share or omitted spouse's share of

Brown's entire Estate and tying up his Estate and Trust for over a decade. Represented by four law firms/lawyers, Respondent sought millions of dollars notwithstanding her binding pre-nuptial agreement and her promise in the Consent Order to never even claim to be Brown's common-law wife.[6]

In March 2017, Respondent suddenly announced and filed with the Court of Appeals what she represented to be "the settlement agreement" with the Estate and Trust—the same purported "Settlement Agreement" she now seeks to file in this Court.[7] That agreement was as suspect then as it is now: After years of financially motivated litigation, Respondent therein purports to assign financial proceeds to the Estate for no discernable consideration, inasmuch as this appeal of her spousal order would continue unabated.

When Respondent and the Estate were asked by James Brown's children to either (a) represent that this document contained all terms of her settlement or (b) disclose any side agreement relating to their settlement, they refused to do either. Thereafter, at an October 2017 trial court hearing regarding their settlement, Respondent and the Estate even refused to answer

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[6] R. pp. 349-350, Joint Stipulation Exhibit 19. Respondent also suggests that the Estate's funds have been drained by the Children's opposition to her surviving spouse claim, but the facts belie her attempt to deflect her own responsibility. For years, the Estate vigorously contested Respondent's surviving spouse claim and stood adverse to her during the entirety of the lower court litigation. It was only when the surprise settlement agreement was announced, after briefing was complete in the Court of Appeals, that the Estate abandoned its long-fought position that Respondent was not the surviving spouse of James Brown.

[7] Appx. pp. 57, 190-191, Petition for Rehearing at 5, Reply in Support of Petition for Rehearing at 10-11. Respondent's continued intimations or suggestions that Petitioners have refused to engage in settlement discussions with the Estate are false and misleading. Petitioners were wholly unaware that any settlement negotiations were taking place, much less that any agreement had been reached, until the day they were served via U.S. Mail with Respondent and the Estate's Joint Motion to Stay Appeal Pending Consummation of Settlement. The fact that Petitioners were kept in the dark is yet another reason why Petitioners suspect that the full and complete agreement between Respondent and the Estate is detrimental to their interests, despite the fiduciary obligations owed by the Estate representatives to Petitioners.

the court's direct question as to whether such a side agreement existed, all but admitting their concealment of key settlement terms.[8]

James Brown's children thereafter filed suit in the District Court of South Carolina because Respondent's evasion and tacit admissions indicated a concealed side-agreement(s) (the "Concealed Agreement") aimed at diluting their federal copyright interests in exchange for significant undisclosed compensation to Respondent.[9] In the federal action, the defendants have stonewalled disclosure of their Concealed Agreement at every turn, never denying its existence, arguing it was a "confidential settlement agreement" that should not be produced, even under a stipulated protective order.[10] This willful concealment is all the more troubling given that in *Wilson v. Dallas,* 403 S.C. 411, 743 S.E.2d 746 (2013), this Court voided the 2009 Settlement Agreement (in which the Estate gifted Respondent a net 23.75% of its assets) for lack of consideration. Respondent's current secret agreement may well be an end-run around that decision. Accordingly, this Court should order the immediate production of the Concealed Agreement Respondent now places at issue.

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[8] *Se Deanna Brown-Thomas, et al v. Tommie Rae Hynie, et al* (Case no. 1: 18-cv-02191-JMC), DE 59, Declaration of Robert C. Byrd, Ex. 5 at 10:22-11:24 (more fully describing factual events and attaching relevant transcript) and *In re: Estate of James Brown,* Appellate Case No. 2018-000104 (same).

[9] *Deanna Brown-Thomas, et al v. Tommie Rae Hynie, et al* (Case no. 1: 18-cv-02191-JMC).

[10] *See Deanna Brown-Thomas, et al v. Tommie Rae Hynie, et al* (Case no. 1: 18-cv-02191-JMC), DE 185, Order and Opinion ("Here, the court observes that during the multiple hearings on the pending Motions to Dismiss, Defendants have never denied the existence of these alleged, secret agreements, which directly undermines any argument that Plaintiffs' claims are 'conjectural or hypothetical.' (ECF Nos. 144, 180.)"); *See also, e.g.,* DE 103 at 11-12, Defendants Tommie Rae Brown and James Brown II's Memorandum of Law in Opposition to Plaintiff's Motion for Jurisdictional Discovery; DE 104 at 11-12, Defendant Russell L. Bauknight's Memorandum for the Estate and Trust in Opposition to Expedited Jurisdictional Discovery; DE 105, Defendant David C. Sojourner Jr.'s Memorandum in Opposition to Plaintiff's Motion to Oppositional Discovery.

Petitioners respectfully request that the Court deny Respondent's Motion for Leave to Supplement Pursuant to Rules 212 and 240, SCACR, and decide this case based upon the record presented to the lower court, South Carolina law, and South Carolina's long-standing public policy against bigamy.

Respectfully submitted,

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November 7, 2019

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PROOF OF SERVICE

The undersigned hereby certifies that on November 7, 2019, s/he has caused a copy of PETITIONERS' RETURN TO RESPONDENT'S MOTION FOR LEAVE TO SUPPLEMENT PURSUANT TO RULES 212 AND 240, SCACR, to be served upon all parties of record by mailing a copy of PETITIONERS' RETURN TO RESPONDENT'S MOTION FOR LEAVE TO SUPPLEMENT PURSUANT TO RULES 212 AND 240, SCACR addressed as follows:

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