

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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The Honorable Doyet A. Early, III, Circuit Court Judge FEB 12 2020
Case No. 2013-CP-02-1337

SC Court of Appeals

Appellate Case No. 2019-000362

Adele J. Pope, Appellant,

v.

Estate of James Brown and The James Brown 2000
Irrevocable Trust, Respondents.

INITIAL BRIEF OF RESPONDENTS

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COUNTER-STATEMENT OF THE CASE

This is an appeal from the circuit court's order of January 16, 2019, determining that Appellant Adele Pope ("Ms. Pope")¹ is not entitled to a fee for her work as personal representative and trustee ("PR/Trustee") for Respondents, the Estate of James Brown and the James Brown 2000 Irrevocable Trust.² The circuit court set forth its ruling in a meticulously detailed, 60-page order (the "Fee Order") that reviews the testimony and evidence presented by the parties during 13 days of testimony and evidence, plus an additional day of closing arguments. (R. p. __ (Fee Order, at 14).) Ultimately, the circuit court concluded that "any benefits Ms. Pope provided to the Estate and Trust [were] overwhelmed and surpassed by the detriment she caused" and, consequently, she was "not entitled to a fee." (R. p. __ (Fee Order, at 60).)

I. RELEVANT FACTS

The only question presented by this case is the amount, if any, of compensation Ms. Pope should receive for her work as PR/Trustee of the Estate and Trust between November 20, 2007 and May 26, 2009. Accordingly, the relevant facts are those concerning Ms. Pope's appointment as PR/Trustee, her conduct while serving in that capacity, and

¹ Throughout the record, Appellant is variously referred to as "Pope," "Mrs. Pope," and "Ms. Pope." Respondents will refer to Appellant throughout this brief as "Ms. Pope," including in quoted passages, unless the circumstances dictate a different form of reference.

² Russell L. Bauknight is PR/Trustee for the Estate and Trust.

her eventual removal. The Statement of Facts in Ms. Pope's Brief of Appellant ("Pope Br."), however, contains numerous allegations regarding matters that have no bearing on the issue of Ms. Pope's compensation.³

A. Ms. Pope's Appointment as PR/Trustee of the Estate and Trust

The Estate and Trust are established by James Brown's will and an irrevocable trust agreement, both executed on August 1, 2000. (R. pp. ___ (Pl. Ex. 3 – Will); (R. pp. ___ (Pl. Ex. 2 – Trust).) The Will devises Mr. Brown's personal and household effects to six named children and pours over the remainder of Estate into the Trust. (*Id.*) The Trust divides into (1) the Brown Family Education Trust, intended to pay the educational expenses of certain of Mr. Brown's grandchildren, and (2) the James Brown "I Feel Good" Trust, a charitable trust intended to provide "tuition, educational expenses, and financial assistance" for "qualified and deserving" children in South Carolina and Georgia. (R. p. ___ (Trust, at 4-5).)

Mr. Brown died on December 25, 2006. (R. p. ___ (Fee Order, at 1).) The Will was

³ Moreover, most of the factual allegations in Ms. Pope's brief—including even those that are relevant to the appeal—are either unsupported or are supported only by citation to Ms. Pope's motion to alter or amend the Fee Order, rather than by citations to the trial transcript, exhibits, or other materials properly included in the record on appeal, as required by Rule 208(b)(1)(D), SCACR. *See Forner v. Butler*, 319 S.C. 275, 276 n.1, 460 S.E.2d 425, 426 n.1 (Ct. App. 1995) (chastising parties for failing to include "matter in the record to support [their] factual assertion[s]"); *see also* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the record on appeal.").

filed with the probate court and admitted to informal probate, on January 18, 2007. (R. p. __ (Fee Order, at 1-2).) Albert Dallas, David Cannon, and Alfred Bradley, who were already serving as co-Trustees pursuant to the terms of the Trust, were appointed to serve as co-personal representatives of the Estate. (R. p. __ (Fee Order, at 2).) Thereafter, all matters related to the Estate and Trust were removed to the Aiken County Court of Common Pleas, where they were presided over by the Honorable Doyet A. Early, III, Circuit Judge.⁴

Ms. Pope's involvement with the Estate and Trust began in March 2007, when the circuit court appointed her and Robert L. Buchanan as special administrators/special trustees ("SA/STs") for the Estate and Trust, directing them to "monitor, investigate, and oversee the performance" of Dallas, Cannon, and Bradley, "and present to the Court any appropriate issues regarding same." (R. p. __ (Fee Order, at 3).) The circuit court appointed Ms. Pope and Mr. Buchanan in response to petitions filed by certain of Mr. Brown's children and grandchildren and by Tommie Rae Hynie Brown,⁵ each of which alleged that Dallas, Cannon, and Bradley had conflicts of interest and/or were mismanaging Mr. Brown's home and personal property. (R. p. __ (*Id.*))

⁴ Judge Early recently retired. All South Carolina James Brown cases are now assigned to the Honorable Clifton Newman, Circuit Judge.

⁵ The South Carolina Court of Appeals recently affirmed a ruling of the circuit court recognizing Ms. Brown as Mr. Brown's wife at the time of his death. *See In re Estate of Brown*, 424 S.C. 589, 818 S.E.2d 770 (Ct. App. 2018). The Supreme Court of South Carolina granted a writ of certiorari, and its decision is pending.

On June 22, 2007, Ms. Pope and Mr. Buchanan filed a "First Report of Special Administrators to Personal Representatives." (R. pp. __ (Def. Ex. 10, "First Report").) The First Report identified "issues raised to date which are expected to occupy the PRs and the SAs in the coming months," particularly regarding "preservation and management of the James Brown royalties and songs, and the preservation and protection of Mr. Brown's image and persona." (R. p. __ (First Report, at 1).) Such issues included ascertaining the assets of the Estate and Trust and filing the estate tax return. (R. pp. __ (*Id.* at 7-8).)

A month later, Ms. Pope and Mr. Buchanan sought Mr. Cannon's removal as PR/Trustee based on documents indicating he had misappropriated funds belonging to Mr. Brown. (R. p. __ (Fee Order, at 5).) At a hearing on August 10, 2007, Mr. Cannon resigned as PR/Trustee. The same day, the circuit court entered an order confirming Mr. Cannon's resignation. (*Id.*) The August 10 order also noted that Messrs. Dallas and Bradley, as the remaining co-PR/Trustees, were responsible for filing 2006 income tax returns for Mr. Brown, the Trust, and several entities. (R. p. __ (Fee Order, at 5-6).)

Following further challenges to their mismanagement of the Estate and Trust, Messrs. Dallas and Bradley resigned during a hearing on November 19, 2007. (R. p. __ (Fee Order, at 7).) The court then appointed Ms. Pope and Mr. Buchanan as successor

PR/Trustees.⁶ (R. p. ___ (Order 11/20/07).)

B. The 2008 Settlement and Ms. Pope's Removal

The South Carolina Attorney General moved to intervene in the Estate and Trust proceedings on September 20, 2007 (prior to Ms. Pope's appointment as PR/Trustee), asserting his statutory and common law authority with respect to charitable trusts.⁷ (R. p. ___ (Fee Order, at 6).) Following her subsequent appointment as PR/Trustee, Ms. Pope explicitly sought the Attorney General's assistance in resolving some of the disputes swirling around the Estate and Trust. In a "First Semi-Annual Report" issued in May 2008, Ms. Pope included a section titled, "**REQUEST THAT ATTORNEY GENERAL AND FAMILY EXPLORE SETTLEMENT.**" (R. p. ___ (Pl. Ex. 9, at 7-8 (bold caps in original)).) This section reported that "[t]he PR/Trustees are currently participating in at least 9 lawsuits for the benefit of the Estate/Trust," including "[d]efense of Will/Trust contest (Will/Trust/Heirs proceeding)."⁸ (R. p. ___ (Pl. Ex. 9, at 7).) The Report concluded with a request:

While the PR/Trustees are occupied with these necessary suits and the defense of [Ms.] Brown's Estate Plan, *they urge the Family*

⁶ Mr. Buchanan settled all disputes with the Estate and Trust in 2012, at which time he renounced any claim to compensation for his work as PR/Trustee. (R. p. ___ (Fee Order, at 3 n.1).) From this point forward, therefore, Respondents will refer to Ms. Pope as though she were the sole PR/Trustee, unless the context requires otherwise.

⁷ The Attorney General of Georgia also intervened at that time but later withdrew from the proceedings.

⁸ When the Report was filed, Ms. Brown and the children named in the Will (with the exception of Terry Brown) had filed petitions to set aside the Will and Trust.

Members and the Attorney General to work toward a reasonable resolution of the issues in dispute.

(R. p. ___ (Pl. Ex. 9, at 8 (emphasis added).)

Consistent with Ms. Pope's recommendation in the First Semi-Annual Report, the Attorney General participated in a mediation on August 10, 2008. (R. p. ___ (Fee Order, at 9).) The mediation also involved Ms. Brown and five of the six children named in the Will. The mediation resulted in a settlement (the "2008 Settlement") that was accepted by all parties present. (*Id.*) Terry Brown, who was named in the will but had not participated in the mediation, later joined the 2008 Settlement. (*Id.*)

The settling parties agreed (1) to dismiss their challenges to the Will and Trust; (2) to recognize Tommie Rae Hynie as Mr. Brown's surviving spouse, in exchange for which she would dismiss her spousal claims; and (3) that the six children named in the Will were Mr. Brown's children. The 2008 Settlement further provided for creation of a new entity (the "Settlement Entity") that would contain all of Mr. Brown's probate and non-probate assets as well as the settling parties' copyright termination rights. Ownership of the Settlement Entity was divided between the charitable beneficiaries, who owned a 47.5 percent interest, and the other settling parties, including Terry Brown, who collectively owned 52.5 percent. (R. p. ___ (Fee Order, at 10).) Lastly, the 2008 Settlement provided that Ms. Pope and Mr. Buchanan would be removed and replaced by a professional fiduciary. (*Id.*)

Despite having urged the Attorney General to facilitate a settlement, Ms. Pope

opposed the 2008 Settlement. (R. p. ___ (Fee Order, at 10).) The circuit court appointed Mr. Bauknight as special administrator for “the sole purpose of reviewing the settlement agreement and advising the [circuit court] as to whether it was fair and reasonable.” (R. p. ___ (Trial Tr. 869).) The circuit court conducted a settlement-approval hearing over seven non-consecutive days in January, March, and April 2009. (R. p. ___ (Fee Order, at 10).) Ms. Pope testified in opposition to the settlement agreement and presented the testimony of a tax law expert. (*Id.*) She did not present the testimony of an expert in copyright law or termination rights, nor did she not present testimony from an expert in entertainment law or the entertainment business. (*Id.*)

On May 26, 2009, the circuit court entered an order approving the 2008 Settlement pursuant to S.C. Code Ann. § 62-3-1102. (R. p. ___ (Order 5/26/09).) The court found that the agreement (1) resolved multiple good-faith controversies, and (2) was fair, equitable, and reasonable. The court directed Ms. Pope to execute the Settlement and appointed Mr. Bauknight, a professional fiduciary, as PR/Trustee. (R. p. ___ (Order 5/26/09, at 44-45).) The court then found that she should be removed for cause. Ms. Pope appealed the order approving the Settlement.

On May 8, 2013, the Supreme Court reversed the circuit court's approval of the settlement, but affirmed the removal of Ms. Pope as PR/Trustee. *See Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). The Supreme Court specifically noted that even though it agreed with Ms. Pope that the 2008 Settlement should be undone, her removal for cause

was, nevertheless, justified:

[Ms. Pope and Mr. Buchanan] have sought \$5 million in fees for their services as fiduciaries for a relatively short interval of time. In addition, Appellants sought and obtained permission from the circuit court to sell iconic assets from Brown's estate in order to raise funds, and a large portion of the amount raised went first to pay Appellants' own attorneys' fees. Appellants also unsuccessfully attempted to sell Brown's GRAMMY award at auction; the process was halted only because officials from the National Academy of Recording Arts and Sciences reclaimed the award after informing Appellants that it was a longstanding policy that the award could not be sold by recipients or anyone acting on their behalf. These actions and the extreme discord between the parties convince us that Appellants' continued service as fiduciaries is not in the best interests of the estate.

Wilson, 403 S.C. at 448-49, 743 S.E.2d at 766-67. The Court remanded the case with instructions for the circuit court "upon proper application, to appoint fiduciaries to oversee these matters in accordance with the provisions of Brown's estate and trust documents, *and to evaluate the propriety of all fees ... that are related to this case.*" *Id.* at 450-51, 743 S.E.2d at 768 (emphasis added). As a result, the litigation returned to the Aiken County Court of Common Pleas.

II. PROCEDURAL HISTORY

In July 2009, while the appeal of the 2008 Settlement was pending, Ms. Pope filed a "Protective Statement and Notice of Creditor's Claim" seeking "[f]ull PR/Trustees' commissions in the amount of \$4,993,151" for her and Mr. Buchanan's 18 months' service. (R. p. __ (Pl. Ex. 5, at 1).) No action was taken on the claim while the appeal was ongoing. (R. p. __ (Fee Order, at 11).)

On May 29, 2013; following issuance of the remittitur in *Wilson*, the Estate served

Ms. Pope with a notice of disallowance of her creditor's claim, stating as follows:

... During the period of approximately 18 months that you served as [co-PR/Trustee], there is no way that \$4,993,151.00 in fees and commissions could have been legitimately earned. The affidavits you submitted to substantiate your claim describing the hours you spent in these roles confirm this. Further, your claim is based on an overinflated, unsubstantiated and self-serving valuation of the probate estate as of the date of Mr. Brown's death.

...

This claim is disallowed on the basis that the requested fees and commissions were not earned and therefore are not due and owing, and further that the Estate is entitled to an offset for any damages suffered as a result of any maladministration during your service as [co-PR/Trustee].

(R. p. ___ (Notice of Disallowance).)

On June 8, 2013, Ms. Pope instituted this action by filing a 63-page, 289-paragraph complaint. (R. pp. ___ (Complaint).) Ms. Pope's complaint was not limited to her claim for compensation. She also asked the circuit court to: (1) remove Mr. Bauknight from "all fiduciary positions" with the Estate and Trust and "requir[e] him to account and/or disgorge as appropriate"; (2) appoint a special administrator/special trustee "on an emergency basis" to protect the Estate and Trust "from further damage by" Mr. Bauknight; and (3) "conclude the [Estate and Trust's] involvement in" various lawsuits, including "Richland 4900," an action against Ms. Pope for breach of her fiduciary duty as PR/Trustee. (R. p. ___ (Complaint, at 63).) The circuit court subsequently granted

Respondents' motion to dismiss all parts of the complaint other than Ms. Pope's claim for compensation. (R. p. __ (Order 1/7/14).)⁹

Following discovery, a bench trial commenced on September 5, 2017. The circuit court heard testimony and received evidence in separate sessions over a period of several months, concluding with closing arguments on July 25, 2018. Thirteen witnesses presented live testimony, six witnesses testified via deposition designations, and the court admitted roughly 200 exhibits. (R. p. __ (Fee Order, at 14).)

On January 16, 2019, the circuit court issued a memorandum opinion and order denying Ms. Pope's claim for compensation. (R. pp. __ (Fee Order).) The circuit court summarized the task before it as "an inquiry into the quality of [Ms. Pope's] service during [her] partial administration" of the Estate and Trust, with respect to a

⁹ Ms. Pope appealed. When the Supreme Court affirmed the partial dismissal, it also had before it several other appeals filed by Ms. Pope in other James Brown-related matters. Attempting to stem the tide of litigation, the Supreme Court entered a separate order providing:

[Ms.] Pope is hereby prohibited from filing any further motions or appeals in actions involving the Estate and Trust of James Brown ... in which she clearly has no standing. We caution Pope that continued attempts to involve herself in the resolution of the Estate and Trust may result in contempt charges.

Ex parte: Adele J. Pope, Appellate Case No. 2013-001649, 2014-000250, 2014-001279, 2009-142286, Supreme Court Order, June 10, 2015.

Unfortunately, Ms. Pope has continued to interfere with the Estate and Trust. Judge Clifton Newman is in the process of sending transcripts of recent proceedings to the Supreme Court for a determination of whether Ms. Pope shall be held in contempt for violating the June 2015 Order.

PR/Trustee's duty to "marshal, preserve, and manage the assets ... in a prudent and expeditious manner." (R. p. __ (Fee Order, at 23).) In reaching its decision to deny compensation, the circuit court noted that Ms. Pope was appointed "with the enthusiastic support of almost all involved in the James Brown estate" and the expectation that her "reputation as an estate and trust practitioner would translate into her acting as a prudent and competent fiduciary." (*Id.*) The court found, however, that these expectations were not met:

The evidence and testimony demonstrated that Ms. Pope failed in her obligations to marshal, preserve, and manage the assets and to do so in a prudent and expeditious manner. ...

... Her prior work as a Special Administrator [for the Estate and Trust] demonstrates to the Court that Ms. Pope was well aware of what was required of her as a PR/Trustee. ... Because Ms. Pope was appointed PR/Trustee after serving as a Special Administrator for eight months, in addition to the other reasons discussed herein, I find that Ms. Pope's failure to undertake basic functions of a PR/Trustee compel a no fee award.

(R. pp. __ (Fee Order, at 23-24).)

Ms. Pope timely filed a motion to alter or amend the Fee Order, which the circuit court denied on February 7, 2019. (R. p. ____ (Order 2/7/19).) Ms. Pope timely filed her notice of appeal.

SUMMARY OF ARGUMENT

“The basic purpose of administration of an estate is to effect a transmission of a decedent’s wealth without essential diminution.” *In re Estes’ Estate*, 654 P.2d 4, 10 (Ariz. Ct. App. 1982). The Fee Order explains, in great detail, the numerous ways in which Ms. Pope failed to meet that fundamental goal. The circuit court’s decision is amply supported by the evidence, and it should be affirmed. *See infra*, Part I.

Ms. Pope challenges several evidentiary rulings of the circuit court. Some of these issues were not preserved for appellate review, and all of them are meritless. *See infra*, Part II.

Ms. Pope disputes the circuit court’s authority to reconsider previous rulings. These challenges are without merit. *See infra*, Part III.

Finally, Ms. Pope claims the circuit court was impermissibly biased against her. This claim is both unpreserved and meritless. *See infra*, Part IV.

ARGUMENT

Ms. Pope's conduct as PR/Trustee was governed by the South Carolina Probate

Code:

A personal representative is a fiduciary who *shall observe the standards of care described by Section 62-7-804*. A personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and this code, and as *expeditiously* and *efficiently* as is *consistent with the best interests of the estate*.

S.C. Code Ann. § 62-3-703(a) (emphasis added). S.C. Code Ann. § 62-7-804, a provision of the South Carolina Trust Code, establishes the "prudent person" standard, under which a PR/Trustee must "administer the [estate and trust] as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the [estate and trust]. In satisfying this standard, the [PR/Trustee] shall exercise reasonable care, skill, and caution."

Removal of a personal representative may provide grounds for denial of compensation. *See, e.g., In re Manville's Will*, 111 N.Y.S.2d 267, 269 (N.Y. Surr. Ct. 1952) ("Ordinarily, any conduct which would justify removal from office is an adequate ground for the denial of commissions."); *In re Estate of Stone*, 768 P.2d 334, 336 (Mont. 1989) ("[W]hen a personal representative's negligence causes harm to the estate, he or she may be deprived of all or part of their fee."); *In re Gould's Estate*, 547 S.W.2d 863, 869 (Mo. Ct. App. 1977) (stating where attorney's conduct as executor is improper and his conduct as attorney is wrong, he is properly removed from those positions and denied all

compensation). This principle is reflected in the South Carolina Probate Code, which provides, "The probate court may set fees for less than the stated limits." S.C. Code Ann. § 62-3-719, comment.

Consistent with the decisions of courts in other states, the South Carolina Supreme Court has recognized that under the probate code, courts have authority to deny a PR's claim for compensation. In *Franklin v. Chavis*, 371 S.C. 527, 640 S.E.2d 873 (2007), for example, challengers to a will claimed the preparer engaged in the unauthorized practice of law and should not be entitled to a fee under § 62-3-719. The Supreme Court agreed with the challengers, finding that due to the preparer's unauthorized practice of law, he should "not receive any fee as personal representative of the ... estate and [should] disgorge any fee received thus far." *Id.* at 534, 640 S.E.2d at 877.

I. THE EVIDENCE SUPPORTS DENIAL OF MS. POPE'S COMPENSATION CLAIM

Ms. Pope challenges specific rulings of the circuit court but does not directly contend that the testimony and evidence presented during trial fails to support the circuit court's conclusion that she should not receive any compensation for her work as PR/Trustee. For the avoidance of any doubt, Respondents believe it is important to set forth the evidentiary support for the circuit court's conclusion that Ms. Pope failed, in multiple ways, to meet the standard of care required of a South Carolina fiduciary.

A. Loss of Impartiality

As PR/Trustee, Ms. Pope was required to act impartially as between beneficiaries

of the Trust, and certainly as between herself and the Estate and Trust. (R. p. __ (Trial Tr. 1750-51)); see *First Union Nat'l Bank of S.C. v. Cisa*, 293 S.C. 456, 461, 361 S.E.2d 615, 618 (1987) (“A trustee must exclude all selfish interest in his dealings on behalf of the beneficiaries of the trust.”). She failed to do so.

As an initial matter, it is clear that Ms. Pope devoted virtually her entire professional life to the responsibilities of a PR/Trustee for James Brown’s Estate and Trust, as she perceived those responsibilities. Ms. Pope as PR/Trustee, Ms. Pope devoted an “almost ... super human” amount of time to the Estate and Trust. (R. p. __ (Trial Tr. 1566).) On average, Ms. Pope billed over 200 hours per month.¹⁰ (*Id.*)

It is also clear that Ms. Pope lost the neutrality required of a fiduciary, perhaps because of her intense involvement with the Estate and Trust. It seemed to attorney and former probate judge Tiffany Provence, who testified as an expert in fiduciary administration, “that at times Ms. Pope felt *she* was the estate.” (R. p. __ (Trial Tr. 1601 (emphasis added)).) Ms. Provence continued:

[Ms. Pope] did not work towards the best interest of everyone that was involved. ... [I] fear that it became difficult for her to look at the best interest of the estate because *she became personally invested*, both professionally by closing her office and making this her sole source of income as well as by advocating for or against various parties within the estate. *She lost her neutrality.*

¹⁰ However, Ms. Pope “block-billed” her time, *i.e.*, she listed all activities for a day along with the total hours worked that day, making it impossible to discern how much time was spent on each task on the list. (R. p. __ (Trial Tr. 1567).)

(R. pp. __ (Trial Tr. 1601-02 (emphasis added)).)

As the circuit court noted, Ms. Pope initiated litigation almost immediately after being appointed as PR/Trustee. (R. p. __ (Fee Order, at 7-8).) During Ms. Pope's tenure as SA/ST, there was a clear awareness of an urgent need to complete certain tasks vital to the proper administration of the Estate and Trust. For example, Ms. Pope noted in her first report as PR/Trustee that "the former PR/Trustees *had no accurate records of assets, liabilities and/or income and expenses* of the Estate or the 2000 Trust, and have *never prepared appropriate accountings* of their acts as PR/Trustees." (R. p. __ (Pl. Ex. 9, at 2 (emphasis added)).) These tasks remained undone under Ms. Pope's administration. In particular, Ms. Pope never bothered to catalog the copyrights, "so the biggest asset of the estate, there was no documentation pulled together that would tell you what was in that group of assets." (R. p. __ (Trial Tr. 767).) Another urgent matter was the need to file the estate tax return and the 2006 income tax returns for Mr. Brown, the Trust, and certain entities affiliated with Mr. Brown. (R. p. __ (Fee Order, at 5-6).) When he took over as PR/Trustee, Mr. Bauknight "found no evidence whatsoever of Ms. Pope filing any income tax returns." (R. p. __ (Trial Tr. 822).)

Instead of responding to these pressing concerns, "[o]ne of Ms. Pope's first orders of business as a fiduciary was to commence a lawsuit ... against every heir and claimed heir of Mr. Brown." (R. p. __ (Fee Order, at 7-8).) The declaratory judgment action filed by Ms. Pope was, apart from Ms. Brown's elective-share claim, the first lawsuit related to

the Estate. (*Id.*) Ms. Pope also “immediately set out to start litigation” by denying creditors’ claims, even though there was no immediate need to do so. (R. p. __ (Trial Tr. 1760 (“Creditor’s claims may sit in a file until the estate is ready to close.”).))

Ms. Pope’s myopic focus on litigation, rather than on administering the Estate and Trust, had numerous deleterious effects. One such effect was a failure to address the ongoing deterioration of the Beech Island home. The dire need for repairs was well known to Ms. Pope “as early as her service as a Special Administrator,” because the failure to take care of the house was one of the reasons given for the prior PR/Trustees’ removal. (R. p. __ (Fee Order, at 43).) And yet, when Mr. Bauknight took over in late May 2009, he found that nothing had been done:

It was leaking. The roof leaked. The plumbing leaked. There were a lot of structural issues ... mainly caused by water.

[T]here’s a structure that I refer to as the pool house next to Mr. Brown’s pool that contained a lot of business/personal property such as band uniforms, some instruments, lots of costumes, lots of posters advertising concerts, and that type of material. In ... the pool house, which had no working heating or air, the roof and the ceiling, you could stand in that structure and look up and see the sky. It had holes all the way through and there was mold growing on the property that was in that structure.

Mr. Washington [the caretaker], part of his daily tasks that were assigned to him were to wipe down the walls of the home itself because the home did not have properly working heating and air and the structure was in the summertime too hot and the humidity too high that mold would grow on the walls. So his task every day was to -- to remove that and take care of the property inside.

(R. pp. ____ (Trial Tr. 774-75).)¹¹ Mr. Bauknight did not find, in records received from Ms. Pope, any indication of a plan to deal with the issues. (R. p. __ (Trial Tr. 775).) He ultimately spent more than \$500,000 to repair the home and preserve its contents. (R. p. ____ (Trial Tr. 776).)

B. Financial Mismanagement

Ms. Pope's failure to address the deterioration of the Beech Island home was one manifestation of a systemic problem, namely, her failure to deal effectively with the cash-poor condition of the Estate. During trial, Ms. Pope frequently resorted to the Estate's lack of available cash as an excuse for her failure to retain qualified professionals to assist with the administration of the Estate and Trust. But a PR/Trustee's fiduciary obligations are the same regardless of the amount of available cash. Moreover, the evidence showed that the lack of available cash resulted, in large part, from Ms. Pope's decision to pay herself, Mr. Buchanan, and their lawyers before allocating cash to other needs.

First, as to Ms. Pope's duties as a fiduciary for a cash-poor estate, defense experts testified without contradiction that a lack of available cash is a common problem in the estates of celebrities and non-celebrities alike. Attorney Jonas E. Herbsman, who

¹¹ At the same time, the Estate was paying far too much to insure the home. Mr. Bauknight discovered, shortly after assuming the PR/Trustee role, that Ms. Pope had paid the previous year's home insurance on the basis of a value nearly \$1 million higher than the appraised value of the home. (R. p. ____ (Trial Tr. 772).) Mr. Bauknight was able to negotiate a substantially reduced premium based on the appraised value of the home. (*Id.*)

represents the estates of John Lennon, Jimmy Hendrix, and Roy Orbison, among others, testified for the defense as an expert in the fiduciary management of musicians' estates. (R. p. ___ (Trial Tr. 1066); R. p. __ (Trial Tr. 1069).) The circuit court found his testimony "credible and instructive." (R. p. __ (Fee Order, at 24).)

Mr. Herbsman testified that it is common for celebrities' estates to be cash-poor and for there to be multiple family members battling for their piece of the pie. (R. pp. ___ (Trial Tr. 1085, 1105-06).) Despite such difficulties, the fiduciary still must perform the basic, expected functions needed to properly manage the estate. This testimony by Mr. Herbsman was echoed by attorney and former probate judge Tiffany Provence, who testified for the defense as an expert in fiduciary administration, including compensation and litigation. (R. p. __ (Trial Tr. 1531).) Ms. Provence testified that a lack of cash in an estate does not alleviate a fiduciary's duties and that Ms. Pope failed to meet the standard for a fiduciary in South Carolina. (R. p. ___ (Trial Tr. 1554).) Based on this testimony, the circuit court found that Ms. Pope's fiduciary obligations was not diminished by the poor financial condition of the Estate and Trust. (R. p. __ (Fee Order, at 24-26).)

Second, the evidence showed that Ms. Pope played a role the Estate's lack of available cash. W. Ellison Thomas, a CPA and forensic accountant, provided expert testimony regarding the flow of money into and out of the Estate's accounts, based on his review of probate accountings filed by Ms. Pope. (R. pp. __ (Trial Tr. 650-51).) The Estate had approximately \$151,000 in the bank when Ms. Pope was appointed in November

2007. (R. p. ___ (Trial Tr. 654).) Over the next 18 months, additional funds flowed into the account, resulting in total funds of \$855,430 being received by the Estate during Ms. Pope's tenure. Disbursements from the Estate totaled \$843,038. (*Id.*) The largest share of disbursements--\$458,624, or about 54%—were to Ms. Pope (\$159,438), Mr. Buchanan (\$153,000), and their attorneys (\$145,185). (R. pp. ___ (Trial Tr. 654-55); *see* R. pp. __ (Def. Ex. 28, slides 23, 32).)

As a consequence, the Estate and Trust were effectively insolvent when Mr. Bauknight took over as PR/Trustee: the amount of cash on hand (\$12,300) was less than the amount owed on bills that were due and payable. (R. p. __ (Trial Tr. 771).) Mr. Bauknight had to take out an unsecured personal loan “to allow me to have a little bit of cash to be able to pay the bills and protect the estate assets.” (R. pp. __ (Trial Tr. 771-72).) The money disbursed to Ms. Pope, Mr. Buchanan, and their lawyers was money that was not used to repair the Beech Island home, to pay estate taxes, or to retain expert advisors to help Ms. Pope administer the Estate and Trust.

C. Failure to Obtain Professional Advice

Ms. Pope admitted that she lacked experience with the music business. (R. p. __ (Trial Tr. 2216).) However, instead of seeking out the assistance of professionals with relevant expertise who were willing to work on a deferred-pay basis, Ms. Pope attempted to do nearly everything herself, or she sought to assistance from friends and acquaintances. The consequences of Ms. Pope's reliance on herself and her friends, rather

than on qualified professionals, are aptly demonstrated by two particular failures of her administration of the Estate and Trust: (1) Ms. Pope's failure to obtain a professional analysis of the Pullman Bond, and (2) her mismanagement of clearance requests.

1. *Failure to Obtain Professional Analysis of the Pullman Bond*

At the time of his death, revenues from Mr. Brown's song catalog were pledged to pay down the outstanding debt of approximately \$18.4 million on a Pullman Bond.¹² (R. p. __ (Fee Order, at 32).) Until the bond was paid off, none of this cash flow could go to the Estate. "Accordingly, the Pullman Bond was *the albatross* of this Estate." (R. p. __ (Fee Order, at 32-33 (emphasis in original)).) Despite the enormity of the debt, and the Estate's pressing need for cash, Ms. Pope made no attempt to have the Bond reviewed by a financial professional. (R. p. __ (Fee Order, at 33).) Instead, she "allowed the Pullman Bond to operate on autopilot," so long as payments were being made on time. (*Id.*)

Mr. Bauknight took a different, and far more successful, approach. He had the bond analyzed by professionals, who discovered approximately \$485,000 held in an escrow account should have been credited as part of the incoming money to pay the interest, principle, and expenses of the bond. (R. pp. __ (Trial Tr. 779-91).) Armed with this information, Mr. Bauknight negotiated with music publishers for reduced

¹² Named after David Pullman, a Pullman Bond is "a financial vehicle that permits an artist to realize, as a lump sum, the value of a stream of royalty revenues accruing over time." *Holland v. Fahnstock & Co.*, 210 F.R.D. 487, 491 (S.D.N.Y. 2002) (internal quotation marks omitted).

commissions and recouped unpaid sampling revenues, resulting in funds of approximately \$5.2 million that could be used to reduce the principle of the Pullman Bond without incurring prepayment penalties. If Ms. Pope had performed these tasks during her tenure, \$643,848.18 less in interest would have been paid on the Pullman Bond, funds that would have, instead, funded the Trust. (R. p. __ (Fee Order, at 34).)

2. *Mismanagement of Clearance Requests*

Clearance requests (short-term licenses to use a song in an advertisement, TV show, or movie) were a key source of revenue for the Estate, but the evidence showed that they were substantially mismanaged during Ms. Pope's tenure. Ms. Pope claims that during the 18 months of her administration, she "approved 200 clearances and brought in \$7 million, substantially more than \$4 million a year. This was more than the \$3.5 – \$4 million brought in by Bauknight from 2009 – 2018." Pope Br. at 26. The trial evidence, however, showed that Ms. Pope was far less successful than she claimed to be. (R. p. __ (Fee Order, at 34-35).)

Two email communications introduced as evidence demonstrated Ms. Pope's failure to effectively respond to clearance requests. On December 10, 2008, a music publisher emailed regarding two outstanding clearance requests that were "becoming quite urgent." (R. p. __ (Def. Ex. 9).) Ms. Pope responded the following day, stating, "We are simply unable to deal with this until January." (*Id.*) The other email is from Ms. Pope to the music publisher requesting "any summary of 2008 approvals you could send us,"

indicating Ms. Pope had failed to keep records of clearance requests and approvals. (R. p. __ (Def. Ex. 8).) The responding email from the publisher listed six “dead issues,” one of which explicitly noted that due to a lack of response from the PR/Trustees to the clearance request, the advertiser “moved on to another song.” (*Id.*)

Testimony from defense expert Bradley Sharp provided hard numbers showing Ms. Pope’s failure to properly manage the clearance process. Analyzing the clearance activity from January 1, 2008 through mid-2009, Mr. Sharp found that the approval rate for clearance requests was about 60 percent in 2008 and declined significantly in 2009, before increasing to “north of 80 percent” during Mr. Bauknight’s tenure. (R. p. __ (Trial Tr. 936).) Mr. Sharp also testified that the number of clearance requests increased significantly after Ms. Pope was removed as PR/Trustee. Mr. Sharp attributed the rise in clearance requests to the fact that Mr. Bauknight had retained a professional, Peter Afterman, to handle clearance requests. (*Id.*)

Unsurprisingly, the increased number of clearance requests and the higher approval rate resulted in an increased revenue stream. In 2008, under Ms. Pope’s mismanagement, the Estate received “around a million” dollars in clearance revenue. (R. p. __ (Trial Tr. 938). In 2010, clearance revenue jumped to approximately **\$9 million**. (*Id.*) The circuit court found, based on the evidence, that Ms. Pope’s mismanagement of clearance requests was due to her “preoccupation with challenging the settlement, and not having professionals in place to manage the musical assets.” (R. p. __ (Fee Order, at

35).¹³

Ms. Pope testified that she consulted attorney Ray Gonzalez on some clearance requests but generally did not do so due to lack of funds. For those clearance requests that were approved, Ms. Pope simply accepted the terms offered, reasoning that since they were short-term deals it couldn't "hurt" to accept them. (R. pp. ___ (Trial Tr. 2215-17.) However, Mr. Herbsman provided expert testimony that a music publisher has different goals than a musician's estate, so it is unwise to simply accept the terms offered. (R. p. __ (Trial Tr. 1080-81).)

D. Failure to Identify and Preserve Estate Assets

Mr. Herbsman identified several basic tasks that must be undertaken as soon as possible by the fiduciary for a musician's estate, including the following:

- Gather all contracts and agreements and understand all obligations and responsibilities the performer has, to identify rights that are (or are not) exploitable;
- Catalog all unreleased or archived recordings and any content that may be in the hands of third parties;
- Conduct a trademark review, secure social media accounts, and secure internet domain names;
- Develop a plan to release new material over time so the fan base does not dissipate. In particular, Mr. Herbsman noted the importance of actively managing clearance requests.

¹³ This evidence flatly contradicts Ms. Pope's assertion that she approved 200 clearance requests, resulting in revenue of \$7 million. Pope Br. at 25-26. In fact, Mr. Sharp testified that Ms. Pope actually approved only 125 clearance requests, resulting in \$1 million in revenue. (R. p. __ (Trial Tr. 971-72).)

(R. pp. __ (Trial Tr. at 1069-1079).) Mr. Herbsman found no indication that Ms. Pope had performed any of these tasks during her time as PR/Trustee.

Ms. Pope was plainly aware that these tasks had not been accomplished when she became PR/Trustee. In May 2008, Ms. Pope issued a "First Semi-Annual Report" regarding the Estate and Trust. (R. pp. __ (Pl. Ex. 9 – Report).) The Report identified several challenges facing the Estate and Trust upon Ms. Pope's appointment as PR/Trustee on November 20, 2007. In particular, Pope stated:

PR/Trustee Cannon resigned on August 10, 2007, and PR/Trustees Dallas and Bradley resigned on November 20, 2007 leaving the Estate/Trust in a deplorable financial condition and the Tangible Personal Property unprotected. These problems were exacerbated by the fact that the former PR/Trustees had *no accurate records of assets, liabilities and/or income and expenses of the Estate or the 2000 Trust*, and have never prepared appropriate accountings of their acts as PR/Trustees.

(R. p. __ (Pl. Ex. 9, at 2 (emphasis added)).)

Despite the importance of these tasks, Ms. Pope left them undone throughout her 18 months as PR/Trustee. (R. p. __ (Fee Order, at 55).)

E. Mismanagement of the Christie's Sale

Ms. Pope's failure to appropriately administer the Estate and Trust, including by not obtaining professional advice, resulted in financial and reputational harm to the Estate and Trust. In particular, this failure negatively impacted the auction of James Brown's personal property conducted by Christie's in July 2008 (the "Christie's Sale").

(R. p. __ (Fee Order, at 38-39).)

From the earliest days of her involvement with the Estate and Trust, while she was still SA/ST, Ms. Pope began recommending an auction of the tangible personal property (“TPP”) of the estate as a means of raising funds. (R. p. __ (Def. Ex. 13, at 2).) In February 2008, at Ms. Pope’s behest, the circuit court entered an order finding that “[b]ased on ... the deplorable condition of the Estate/Trust ... emergency action is necessary to preserve and protect the assets of the Estate/Trust,” and approving the sale of some of Mr. Brown’s tangible personal property (“TPP”) at auction. (R. p. __ (Order of 2/20/08, at 5).)

The circuit court’s approval of the Christie’s Sale was “based upon the recommendation of [Ms.] Pope” who, “unbeknownst to the Court at the time ... did not consult a qualified professional in making this decision.” (R. p. __ (Fee Order, at 38).) The circuit court concluded:

[Ms.] Pope had a fiduciary duty to make a threshold determination whether it was in the best interest of the Estate and Trust to sell the iconic personal property. She failed to consult with anyone who had the experience to advise her, and in doing so breached her duty of prudence.

(R. p. __ (Fee Order, at 39).) In short, the circuit court’s approval of the auction did not alleviate Ms. Pope’s fiduciary duty to prudently oversee and manage the auction. (R. p. __ (Fee Order, at 39).)

Based on the evidence presented at trial, the circuit court found that the Christie’s Sale was mismanaged from the outset, resulting in poor sales results and embarrassment

to the Estate.¹⁴ (R. p. ___ (Fee Order, at ___).) For example, Ms. Pope was aware of the long lead time necessary for a successful auction, and yet “caused the sale to occur with insufficient time to obtain maximum value.” (R. p. ___ (Fee Order, at 55).) Due to the lack of lead time, the auction catalog was inadequately prepared. (R. p. ___ (Trial Tr. 1353).) Many items lacked any kind of description or story about when they were worn or used by James Brown; this information would have increased their value at auction. (R. pp. ___ (Trial Tr. 1335-36, 1359-60).) Additionally, the auction was conducted in July, an off-season for auctions. (R. p. ___ (Trial Tr. at 1363).) These serious missteps in planning and executing the sale resulted in disappointing results that were widely reported in the media. *See, e.g., Godfather of Soul James Brown Disappoints At Auction*, MCCLATCHY NEWSPAPERS (July 18, 2008) (“But the \$857,688 brought in from the more than 300 items sold was on the short end of the auction house’s pre-sale estimates.”); Guy Trebay, *More Tag Sale Than Tribute*, NEW YORK TIMES (July 20, 2008) (“[A] two-session sale ... despite some curious highlights, brought disappointing results[.]”).

One of the more glaring missteps related to the Christie’s Sale auction was the misguided attempt to sell Mr. Brown’s GRAMMY® award. As the Supreme Court explained:

“[Ms. Pope] also unsuccessfully attempted to sell Brown’s GRAMMY award at auction; the process was halted only because

¹⁴ Ms. Pope’s argument that the circuit court was collaterally estopped from making this finding is addressed in Part III(A), *infra*.

officials from the National Academy of Recording Arts and Sciences reclaimed the award after informing [Ms. Pope] that it was their longstanding policy that the award could not be sold by recipients or anyone acting on their behalf.

Wilson, 403 S.C. at 448–49, 743 S.E.2d at 767.

After the auction, Ms. Pope failed to use the proceeds for their intended purposes. Prior to the auction, on March 24, 2008, Ms. Pope filed a “Hardship Request for Extension to Pay Estate Taxes,” in which she informed the IRS, under penalty of perjury, that “[t]he PR/Trustees intend to make a substantial deposit toward the Estate Taxes when the net proceeds of the Christie’s sale are received.” (R. p. __ (Def. Ex. 14, at 6).) However, “upon receipt of the auction proceeds, Ms. Pope paid \$10,000 to the IRS as estate taxes, *and a substantially larger sum to herself.*” (R. p. __ (Fee Order, at 38 n.8 (emphasis added)).) The payment Ms. Pope made to herself was one of the reasons the Supreme Court removed her for cause. *See Wilson*, 403 S.C. at 448–49, 743 S.E.2d at 767.

F. Unsupported Valuation of the Estate

One large issue throughout this litigation has been whether Ms. Pope appropriately valued the Estate for purposes of the estate tax return, IRS Form 706 (the “Return”). After several extensions, Ms. Pope filed the Return on September 24, 2008, attributing a value of approximately \$84 million (\$100 million total value, minus the amount owed on the Pullman Bond) to the Estate. (R. p. ____.) Ms. Pope has steadfastly defended the \$100 million valuation for many years. However, the circuit court found

“no evidence to support Ms. Pope’s valuation.”¹⁵ (R. p. __ (Fee Order, at 46).)

The evidence at trial showed that the \$100 million value was a fabrication concocted by Buddy Dallas and Terry Cox. Mr. Cox testified that Mr. Dallas directed him to draft a sham letter of intent to purchase the James Brown estate for \$100 million. (R. p. __.) Mr. Dallas picked \$100 million for the value of Mr. Brown’s estate based on the fact that Elvis Presley’s estate had recently sold for a value in that range. (R. p. __.) The sham letter of intent was then used as the basis for an “Inventory and Appraisal,” which wrongly characterized the letter as a “firm offer.” (R. p. __.)

Ms. Pope has repeatedly touted the sham letter of intent as a firm offer. The circuit court found, however, that “[t]he letter of intent was never an offer, and Ms. Pope should have known it.” (R. p. __ (Fee Order, at 48).) In fact, the evidence at trial showed that Ms. Pope was aware, after she became PR/Trustee, that the \$100 million valuation was overstated and that the real value was probably closer to \$35 to \$65 million. (R. p. __.)

Ms. Pope also claimed that her valuation was supported by a formula submitted to the circuit court in November 2007:

- 1) 1 year royalties based on 5 yr. M&T Average
- 2) PLUS 50% of Gross known Performance Contract from 2006
- 3) X – a figure recommended by accountant within range of 12.5 – 14
- 4) LESS payoff amount due M&T Bank as of date of death

¹⁵ Ms. Pope’s argument that the circuit court was precluded from making this finding is addressed in Part III(D), *infra*.

5) EQUALS date-of-death value of Royalties, Image, Name and Persona.

(R. p. __ (Def. Ex. 13).) Ms. Pope provided only a vague explanation of where this formula came from:

Well, it was from everything that Judge Buchanan and I have learned from Mr. Dallas, Mr. Cannon, and other inquiries and other statements that were made for the entire period up to November 15, 2007. It was from all of the financial information that had come to us since August 10. And it was from essentially everything we had been able to put our hands on as of that date. And there was a lot of talk, just talk, about twelve times royalties was the industries standard, but James Brown was not just a regular guy. He was a special guy.

(R. p. __ (Trial Tr. 256).) The circuit court concluded that Ms. Pope had never offered a credible explanation of the origin of the formula, nor had she offered any expert testimony to support it.¹⁶ This conclusion was supported by the expert testimony of Bradley Sharp, who stated that he had never seen such a valuation. (R. p. __ (Trial Tr. 913).)

In contrast, the circuit court determined that the evidence did support Mr. Bauknight's valuation of the Estate, which resulted from a professional valuation by Philpott Ball & Werner. (R. p. __ (Fee Order, at 52).) Moreover, this valuation was independently vetted by various teams with the IRS (who, as the circuit court noted, had every incentive to support a higher value).

¹⁶ The circuit court excluded the testimony of Ms. Pope's proffered valuation expert, R. B. Alexander, based on its conclusion that he was not qualified. (R. pp. __ (Trial Tr. 1984-89).) Ms. Pope has not appealed that ruling.

G. Ill-Informed, Self-Interested Opposition to the 2008 Settlement

The evidence also supports the circuit court's finding that Ms. Pope's opposition to the 2008 Settlement was ill-informed and at least partly self-interested.¹⁷

First, Ms. Pope acknowledged that she was only "vaguely familiar" with the notion of termination rights at the time of the settlement hearings. (R. p. __ (Trial Tr. 505).) But rather than retain an entertainment law attorney with experience in termination rights, Ms. Pope attempted to make herself an "expert" in this esoteric field. As a result of her inexperience, Ms. Pope failed to understand that the 2008 Settlement did have certain advantages with respect to termination rights. The circuit court credited the expert testimony of Roger Miller, who explained the advantages of a settlement that combined the termination rights and contributed them to the Estate and Trust. (R. p. ____ (Fee Order, at 40-41).)

Second, Ms. Pope's opposition to the 2008 Settlement "was linked, at least in part, to its removal of her as a PR/Trustee." (R. p. __ (Fee Order, at 42).) In particular, the court

¹⁷ Ms. Pope contends that it was improper for the circuit court to conclude that she breached her fiduciary duty in opposing the 2008 Settlement, given that her opposition was vindicated by the decision in *Wilson*. Pope Br. at 41-43. In making this argument, Ms. Pope misses the point of the circuit court's reasoning. The circuit court recognized that *Wilson* "is the law of the case for this proceeding." (R. p. __ (Fee Order, at 42).) However, the issue before the circuit court was not whether Ms. Pope's opposition to the 2008 Settlement was ultimately vindicated but rather whether she exercised the diligence and care required of a fiduciary in deciding to oppose the Settlement. The evidence amply supports the circuit court's finding that she did not.

noted that Ms. Pope's offer to settle her challenge to the 2008 Settlement was conditioned on her being reappointed as a trustee. (R. p. __ (Def. Ex. 34).) Thus, while Ms. Pope's settlement offer did include provisions that would have improved the situation of the Estate and Trust, her insistence on her own reappointment violated her fiduciary duty of impartiality and showed that she was placing her interests before the interests of the Estate and Trust. (R. p. __ (Fee Order, at 42-43).)

II. THE CIRCUIT COURT DID NOT ERR IN ITS ADMISSION OR EXCLUSION OF EVIDENCE

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017) (quoting *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011)). "Determining whether prejudice exists 'depends on the circumstances[,] and 'the materiality and prejudicial character of the error must be determined from its relationship to the entire case.'" *Id.* (quoting *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998)). "Prejudice in this context means 'there is a reasonable probability the ... verdict was influenced by the wrongly admitted or excluded evidence.'" *Id.* (quoting *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005)). None of the evidentiary errors asserted by Ms. Pope warrants reversal under this standard.

A. The Circuit Court Properly Excluded Ms. Pope's Rebuttal Deposition Designations

Ms. Pope first contends that the circuit court failed to consider all of the evidence presented in her rebuttal case, arguing that "the record ... shows that Appellant offered testimony from more than a dozen witnesses by deposition on rebuttal." Pope Br. at 35-36. This argument fails for two reasons. First, Ms. Pope failed to preserve the error. Second, the proffered deposition designations were properly excluded from Ms. Pope's rebuttal case.

1. *This Issue Is Not Preserved*

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Moreover, "an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." *Id.* Ms. Pope's claim of error regarding the deposition designations is not preserved for appellate review because the admissibility of any particular portion of those designations was never raised to, and ruled on, by the circuit court.

Ms. Pope contends that the circuit court "accepted [the designations]. No ruling was issued to exclude any of this testimony." Pope Br. at 36 (citing Trial Tr. 2005-11). The trial transcript is clear, however, that the circuit court refused to admit the designations into evidence *en masse*. Rather, the court accepted Ms. Pope's *proffer* of the designations but stated that it would rule on their admissibility only if and when Ms. Pope attempted

to use them as evidence:

MR. BUNDY: Your Honor, before I call a witness I'd like to enter -- we want to put in some deposition designations. ...

THE COURT: Any objection?

MR. NEWSOME: Yes, Your Honor. We've already moved to exclude some of these depositions. We would extend that motion to these additional depositions that have just been presented to us. ...

...

... We believe that the plaintiff is seeking to submit documents that are well outside the scope of reply. ... They aren't relevant to this case.

...

THE COURT: All right. Here's what I'm going to do. I'm going to allow him to offer it, but I'm not going to rule on it one way or the other presently until I've had a chance to see what it is.

...

MR. BUNDY: Okay. All right. So I understand, these -- you have accepted those designations --

THE COURT: I have not -- *I have not accepted them as evidence*. I'm taking them -- they're given to me this morning. It's a wealth of material and ... *I can't rule on it en masse. If something individually comes up, make your objection, I'll rule on it.*

(R. pp. ___ (Trial Tr. 2005-10 (emphasis added)).)

Thus, the circuit court plainly did not admit the deposition designations into evidence but rather stated that he would rule on their admissibility only as they were raised in the course of Ms. Pope's rebuttal testimony. Ms. Pope's brief does not identify any rulings by the circuit court regarding any specific designation. Consequently, the issue is not preserved for appeal.

2. *The Proffered Designations Are Irrelevant*

In addition to being unpreserved, this claim of error is meritless. “The admission of reply testimony is within the sound discretion of the trial judge[.]” *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). “[R]eply testimony should be limited to that which refutes or rebuts testimony presented by the defendant.” *State v. Prather*, 422 S.C. 96, 105, 810 S.E.2d 419, 423 (Ct. App. 2017); see *McGaha v. Mosley*, 283 S.C. 268, 276, 322 S.E.2d 461, 466 (Ct. App. 1984) (“Reply testimony should be limited to rebuttal of matters raised in defense; it should not be used to complete plaintiff’s case in chief.”).

Ms. Pope claims that the designated testimony was necessary “to rebut the testimony of Bauknight that he and Peter Afterman had benefitted Brown’s 2000 trust” and to show that she and Mr. Buchanan “brought far greater experience” and “provided greater benefits” to the Estate and Trust, at less cost, than Bauknight. Pope Br. at 36-37. To the extent Mr. Bauknight’s performance has any bearing on Ms. Pope’s claim for compensation, the proffered designations are irrelevant. They included testimony by now-Governor McMaster “that he did not sue [Ms. Pope] in Richland 4900” and by current Attorney General Wilson “that he provided no oversight of Bauknight.” *Id.* at 36. Such testimony has no bearing on whether the Estate and Trust benefitted under Bauknight’s administration (the ostensible purpose of the designation), and has even less to do with the question of whether Ms. Pope should receive any compensation for her work as PR/Trustee.

Ms. Pope also contends that deposition testimony of attorney Wallace Lightsey supports her testimony “regarding intellectual property matters” and “refutes the claims of Bauknight,” though she provides no explanation of how. Lastly, Ms. Pope contends that the deposition testimony of attorneys David Sojourner and Rita Caughman show that Ms. Pope, “with a small number of highly-qualified and efficient attorneys and experts,” brought great benefits to the Estate and Trust, at low cost. Pope Br. at 36-37. However, neither Mr. Sojourner nor Ms. Caughman offered any testimony regarding these matters.

B. Ms. Pope’s September 2017 Settlement Demand Was Properly Admitted

Ms. Pope next contends that the circuit court abused its discretion by admitting into evidence a settlement demand she made in September 2017, offering to settle this case and Richland 4900 for a total of \$19 million, of which \$10 million would go to a charitable foundation and the remainder would go to Ms. Pope. (R. p. __ (Def. Ex 87).) She maintains that the offer should have been excluded under Rule 408, SCRE.

As an initial matter, Ms. Pope has waived her objection. She objected to admission of the settlement demand when it was introduced during trial. (R. p. __ (Trial Tr. 2300).) However, Ms. Pope subsequently filed a motion for directed verdict, in which she discussed the demand, how it could have been funded, and how the settlement funds would have been distributed. (R. p. __ (Mot. for Directed Verdict, at 10-11.)) By making use of the settlement demand after it was admitted over her objection, Ms. Pope waived

any further challenge. *Cf. Burke v. AnMed Health*, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) (“When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.”).

Regardless of waiver, the September 2017 settlement demand was properly admitted. Rule 408, SCRE, provides that a settlement demand “is not admissible to prove liability for or invalidity of the claim or its amount,” but the rule “does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.” *Id.* Rather, evidence regarding settlement negotiations is admissible when “offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” *Id.*

Ms. Pope’s September 2017 settlement demand was not admitted into evidence to invalidate her claim or its amount, but rather in response to her claim that Respondents had unduly delayed the resolution of this matter. (R. p. ___ (Fee Order, at 16).) Ms. Pope made the September 2017 settlement demand in response to the circuit court’s “request that the parties consider global settlement of this matter and [Richland] 4900.” (R. p. ___) Moreover, Ms. Pope’s testimony established that she made the September 2017 unwillingly. (R. p. ___ (Trial Tr. 2378 (“I offered to settle because my lawyer said you have got to make a global settlement offer.”)).) The outrageousness of the \$19 million demand

supports the circuit court's finding that Ms. Pope "has caused undue delay through unreasonable settlement demands and that her actions required [Respondents] to resolve this case through a trial." (R. p. __ (Fee Order, at 16).)

The September 2017 settlement demand is also relevant as evidence of Ms. Pope's continuing efforts to involve herself in the administration of the Estate and Trust. *Cf. Winrose Homeowners' Ass'n, Inc. v. Hale*, 428 S.C. 563, 837 S.E.2d 47, 52 n.10 (2019) (holding settlement demand admissible to show "as evidence of ... manipulation of a foreclosure procedure to engage in strong-arm tactics"). Between first being questioned about the demand on May 9, 2018 and her continued testimony on June 4, 2018, Ms. Pope created an exhibit purporting to explain what she would have done with the \$19 million, had the demand been accepted, which the circuit court admitted into evidence. (R. p. __ (Pl. Ex. 73); R. p. __ (Trial Tr. 2460).) According to Ms. Pope's testimony and Exhibit 73, \$10 million of the settlement amount—which inevitably would have come out of the Estate and Trust—would have been used to fund scholarships in James Brown's name—the very same purpose for which the James Brown "I Feel Good" Trust was created.

C. The Circuit Court Did Not Err with Respect to the Billing Records

On December 15, 2017, the circuit court asked the parties to submit briefs regarding "the duty of a PR *vis à vis* the duty to defend the estate plan and balancing the duty to defend with responsibilities concerning the cost of the defense versus settling." (R. p. __ (Trial Tr. 1134).) The court also asked Respondents to submit, under seal,

documentation regarding attorneys' fees and expenses for litigation since Mr. Bauknight's appointment as PR/Trustee. (*Id.*) Pursuant to the latter request, Respondents submitted, *in camera*, a detailed synopsis of the billing records for this matter that included attorney-client privileged information. Subsequently, the circuit court informed the parties that it would not consider the materials and should not have asked for them:

I received it. I gave it a cursory examination ... basically just reading the cover letter and I've since decided I don't need that, should not have asked for it, not going to consider it. I have shredded it and that's my ruling[.]

(R. p. __ (Trial Tr. 1924).)

Ms. Pope now contends that the circuit court's "receipt and review" of the billing records violated her due process right "to be aware of and refute the evidence against the merits of his case." Pope Br. at 46 (internal quotation marks omitted). To begin, it was entirely proper for the circuit court to receive materials containing attorney-client privileged information on an *ex parte* basis. See *Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 578, 582 S.E.2d 405, 407 (2003). More importantly, Ms. Pope's argument ignores the circuit court's plain statement that it "reviewed" only the cover letter, not the documents, before deciding it should not have requested the documents and shredding them. Moreover, the submission is not discussed anywhere in the circuit court's 60-page Fee Order. Since the circuit court neither reviewed the submission nor considered its contents in the Fee Order, Ms. Pope's due process rights were not violated.

III. THE CIRCUIT COURT'S PRIOR ORDERS DO NOT PRECLUDE ITS FINDINGS IN THIS PROCEEDING

Ms. Pope contends that in the Fee Order, the circuit court improperly disregarded its own prior rulings, made during her tenure as PR/Trustee. According to Ms. Pope, "every detail of the administration of [the Estate and Trust] was scrutinized in open court" and is no longer open to scrutiny. Pope Br. at 39. To the contrary, in ruling on Ms. Pope's claim for compensation, the circuit court was required to evaluate her conduct as PR/Trustee in light of subsequent events and, even more importantly, in light of facts then existing but unknown to the circuit court. The necessity of this inquiry is reinforced by the Supreme Court's clear instruction in *Wilson*:

[T]he circuit court shall also *review the propriety of all fees, including attorneys' fees and trustees' fees, paid in relation to this action, and shall order all unearned fees or unapproved fees to be disgorged and returned* to Brown's estate.

Wilson, 403 S.C. at 450, 743 S.E.2d at 767.

A. Collateral Estoppel Does Not Bar the Circuit Court's Finding that Ms. Pope Mishandled the Christie's Sale

Ms. Pope contends that the doctrine of collateral estoppel barred the circuit court from finding that she breached her duty of prudence in the conduct of the Christie's Sale. Pope Br. at 40-41. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting

collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.*

First, collateral estoppel does not apply because the issues are not the same. The 2008 orders on which Ms. Pope relies decided, at most, the question of Ms. Pope's authority to conduct the Christie's Sale. The issue in this litigation is whether Ms. Pope exercised that authority with the prudence required of a fiduciary. None of the 2008 orders on which Ms. Pope relies addressed or decided that issue.

Second, even if the issues were the same, they were not "actually litigated" in 2008. As the circuit court noted, it authorized the Christie's Sale based on unchallenged representations made to the court by Ms. Pope in her capacity as a fiduciary for the Estate and Trust. The February 2008 order authorizing the sale, from which all subsequent orders followed, was not the product of adversarial testing and was not appealed. Consequently, the circuit court did not know that the recommendation to conduct the sale was not the result of consultation with a disinterested professional. Rather, the recommendation was based on consultations with Mr. Dallas and Mr. Cannon, who were guilty of misconduct and outright theft, and the auction houses themselves, which could hardly be considered disinterested. (R. p. ___ (Fee Order, at 39).)

Third, the particular circumstances of this case counsel strongly against the application of collateral estoppel. As the Court of Appeals recognized in *Carolina Renewal*,

"[t]he doctrine of collateral estoppel should not be rigidly or mechanically applied." 385 S.C. at 555, 684 S.E.2d at 782. "[E]ven if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *Id.* In this case, Ms. Pope is seeking PR/Trustee compensation of more than \$2 million, out of an estate that is intended primarily for charitable beneficiaries. In these circumstances, considerations of fairness and public policy would weigh against the application of collateral estoppel, even if its requirements had been met (which they were not). To the extent there is any doubt about this, it should be resolved by the Supreme Court's order in *Wilson v. Dallas*, directing the circuit court to "evaluate the propriety of *all fees* ... that are related to this case." *Wilson*, 403 S.C. at 451, 743 S.E.2d at 768 (emphasis added).

B. The January 8, 2008 Order Is Not a "Contract"

Shortly after being appointed as PR/Trustee, Ms. Pope submitted a proposed order concerning her compensation as SA/ST and as PR/Trustee. The circuit court entered the order on January 8, 2008. (R. pp. ___ (Order 1/8/08).) The Order provided, with respect to PR/Trustee fees, that Ms. Pope could "continue to receive fees and costs on an hourly basis, *as a deposit only*," toward "any full commission to which [she] may be entitled" for her work as PR/Trustee. (*Id.* (emphasis added)) Ms. Pope contends that the January 8, 2008 Order is a binding "contract" that required the circuit court to award her full claim for compensation. Pope Br. at 43-44. The circuit court correctly rejected this argument.

First, Ms. Pope's argument is directly contradicted by the text of the January 8 Order. The word "contract" appears nowhere in the order, nor is there any mandatory language (such as "shall," "must," or "will") in relation to the contemplated payment of PR/Trustee compensation. Rather, the language is plainly conditional. The Order states that Ms. Pope and Mr. Buchanan are allowed to bill on a time-plus-cost basis "*as a deposit only*" toward any commission "to which they *may* be entitled." (R. p. __.) Further, while recognizing the PR/Trustees' authority "to make a reasonable allocation, at the appropriate time, of their commission," any such allocation was subject to review by the court. (R. p. __ (Order, at 4).) The January 8, 2008 Order plainly was not a contract.

Second, and as the circuit court noted, "the Order was written under the assumption that [Ms.] Pope would (1) properly manage the Estate and Trust and (2) close the Estate." (R. p. __ (Fee Order, at 27).) In making this point, the circuit court reiterated the conditional language of the Order and, further, noted that Ms. Pope "never made any deposit of fees during her administration." (*Id.*) Even if she had done so, the court had authority to order reimbursement of previously paid fees. (*Id.* (citing *In re Estate of Kay*, 423 S.C. 476, 484-87, 816 S.E.2d 542, 547-48 (2018)).)

Ms. Pope's only response to the plain text of the January 8 Order and the circuit court's reasoning is to state that the Order was "unappealed" and was "issued more than a decade ago." Pope Br. at 43. But neither of these facts changes the text of the Order, which plainly does not create a contractual obligation.

C. The Circuit Court Was Not Barred from Finding that Ms. Pope Vastly Overvalued the Estate

Since her appointment as PR/Trustee in November 2007, Ms. Pope has insisted that the date-of-death value of James Brown's estate was \$100 million. Following the trial in this matter, however, the circuit court found "no evidence to support [this] valuation." (R. p. __ (Fee Order, at 46).) The only source for the \$100 million value "was an opinion expressed by Mr. Dallas unsupported by any professional appraisal." (*Id.*) Moreover, Ms. Pope never obtained a professional appraisal of the value of the estate at the date of death. (*Id.*).

Ms. Pope now contends that the \$100 million valuation was immutably fixed on November 15, 2007, when her proposed formula for valuing the estate was accepted by the court. Pope Br. at 44-45. According to Ms. Pope, the circuit court's "2019 criticism of Buchanan's and Appellant's estate tax return ... is irreconcilable with the very same judge's 2007 direction that a professional *not* be engaged and that the valuation formula was adequate." *Id.* at 45. Yet again, Ms. Pope would have the circuit court, and this Court on appeal, disregard the testimony and documentary evidence presented during trial, which revealed substantial information not available to the circuit court in 2007, as discussed *supra*.

Ms. Pope's position, essentially, is that once the circuit court adopted the \$100 million valuation on November 15, 2007—*before* she was appointed as PR/Trustee—she never had any duty, even after becoming a fiduciary of the Estate and Trust, to make sure

that valuation was correct. But, as an initial matter, Ms. Pope misreads the transcript of the November 15 hearing. Rather than establishing that the circuit court set in stone her valuation formula of the intellectual property of James Brown, the transcript demonstrates that Ms. Pope merely presented a *proposal* for the valuation, while expressing her concern that “there’s not a whole lot of precedent on how to do it.” (R. p. __ (Hrg. Tr. 11/15/07, at 307-08).) The circuit court encouraged the parties to get together and attempt to arrive at a consensus on how to value the Estate. (R. p. __ (Hrg. Tr. 11/15/07, at 310).) Thus, the record does not support Ms. Pope’s contention that the date-of-death value was established during the November 15 hearing.

Even if a value had been established on November 15, Ms. Pope received information during her term as PR/Trustee that should have caused her to question the accuracy of that value. As a fiduciary, Ms. Pope’s duty was to correctly value the assets of the Estate—not to cling to an unsupportably high value.

IV. THERE IS NO EVIDENCE OF BIAS TOWARD MS. POPE

Ms. Pope contends that the circuit court was biased against her, as shown by its “harsh tone and findings regarding her service.” Pope Br. at 48. Further, she complains that the circuit court wrongly chastised her for engaging in personal attacks, when in fact “personal attacks had been lodged by Cannon, Dallas, staff of the Attorney General and settling parties against [her] and Buchanan for a decade.” *Id.* at 47. Ms. Pope argues that the circuit court’s bias deprived her of a “level playing field” at trial, thereby violating

her right to due process. The Court should reject this argument, which is both unpreserved and unfounded.

First, Ms. Pope has failed to preserve this issue for appellate review. A litigant complaining of judicial bias must first raise the issue to the trial court in a motion to recuse. *See Butler v. Sea Pines Plantation Co.*, 282 S.C. 113, 122–23, 317 S.E.2d 464, 470 (Ct. App. 1984) (“Generally, where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision.”). Ms. Pope appears not to have done so.

Second, the claim of bias is without merit. “A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he has a personal bias or prejudice against a party.” *Koon v. Fares*, 379 S.C. 150, 156, 666 S.E.2d 230, 234 (2008). However, a mere allegation of bias is insufficient; “a party seeking disqualification ... must show some evidence of bias or prejudice. If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal.” *Id.* (citations omitted). Moreover, simply ruling against a litigant does not demonstrate bias, “even if it is later held the judge committed error in his rulings.” *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996).

Ms. Pope is, no doubt, unhappy with the circuit court’s decision. Nevertheless, it

is fully supported by the evidence in the record.¹⁸ *See supra* Part I.

CONCLUSION

Ms. Pope's duty as PR/Trustee was to administer and manage the Estate and Trust, including by engaging competent professionals with relevant expertise. Instead of obtaining such assistance, Ms. Pope assigned to herself the role of sole champion and savior of James Brown's estate plan. The deleterious effects of such self-reliance are well detailed in the circuit court's Fee Order. The circuit court properly determined that Ms. Pope was not entitled to any compensation as PR/Trustee. Accordingly, this Court should affirm.

¹⁸ Ms. Pope also argues that "the Court's failure to conduct hearings and dismissal of the action to remove Bauknight and grant related relief continue the State's violation of [her] Due Process and First Amendment rights." Pope Br. at 48. However, Ms. Pope cites no legal authority in support of this argument, and therefore, it is abandoned on appeal. *See Mulherin-Rowell v. Cobb*, 362 S.C. 588, 600-01, 608 S.E.2d 587, 593-94 (Ct. App. 2005); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998).

Respectfully submitted,



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February 12, 2020

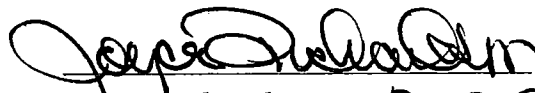
Greenville, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Initial Brief of Respondents has been served on counsel of record for Appellant Adele Pope by depositing the same in the U.S. Mail, postage prepaid, addressed to her counsel of record as listed below, and via email to the email addresses listed below:

Adam Tremain Silvernail
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RECEIVED
FEB 12 2020
SC Court of Appeals


Joyce Richardson 2.12.20

J. David Black
Member
Admitted in SC, DC

February 12, 2020

VIA HAND DELIVERY

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

RECEIVED

FEB 12 2020

SC Court of Appeals

**RE: Adele J. Pope v. Estate of James Brown and The James Brown 2000
Irrevocable Trust / Appellate Case No. 2019-00362**

Dear Ms. Kitchings:


Enclosed for filing with the Court is an original and one copy of the Initial Brief Of Respondents and Respondents' Designation Of Matter To Be Included In The Record On Appeal in the above-referenced matter.

By copy of this letter and as evidenced by the attached Certificate of Service, we are serving counsel of record with a copy of the above.

Thank you for your assistance in this matter.

With kind regards, I remain

Very truly yours,



J. David Black

JDB/hjr

Enclosure

cc w/encl.: Adam Tremain Silvernail, Esquire

- Charleston
- Charlotte
- Columbia**
- Greensboro
- Greenville
- Hilton Head
- Myrtle Beach
- Raleigh