

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

Appellate Case No. 2019-000362

Adele J. Pope,Appellant,

v.

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

**MOTION TO STRIKE INITIAL REPLY BRIEF AND ALTERNATIVE
REQUEST FOR LEAVE TO FILE SURREPLY BRIEF**

Russell Bauknight, as Personal Representative and Trustee of Respondents, the Estate of James Brown and the James Brown 2000 Irrevocable Trust, moves to strike Appellant Adele J. Pope’s Initial Reply Brief or, in the alternative, for leave to file a surreply brief. This Motion is necessitated by the numerous new matters improperly introduced in the Initial Reply Brief, as well as many unsupported and blatantly false factual claims.

It is deeply regrettable that this Motion is necessary. Respondents are acutely aware that while this appeal and other lawsuits continue, scholarships are not being awarded and the goals of James Brown’s estate plan are not being fulfilled. But

Appellant's flouting of the South Carolina Appellate Court Rules leaves Respondents little choice, since there is no other means by which they can effectively respond to Appellant's improper briefing.

In her Initial Reply Brief, Appellant violates the Appellate Court rules in three ways: (1) she makes arguments in support of reversal that were not raised in her opening brief; (2) she makes factual allegations without citing any support in the record; and (3) she raises irrelevant matters from other cases.

BACKGROUND

This appeal arises from proceedings in the Aiken Court of Common Pleas before the Hon. Doyet A. Early, III, for the determination of whether Appellant should receive some \$2.4 million in compensation for her 18-month stint as Co-Personal Representative and Co-Trustee ("PR/Trustee") of the Estate and Trust. Following a 13-day bench trial involving numerous witnesses and nearly 200 exhibits, Judge Early – who presided over litigation related to James Brown's estate from its inception in early 2007 until his retirement in 2019 – denied Appellant's claim on the basis of his finding that "any benefits Mrs. Pope provided to the Estate and Trust are overwhelmed and surpassed by the detriments she caused." Order (Jan. 16, 2019), at 60 ("Fee Order"). The core issue in this appeal, therefore, is whether the Fee Order is supported by the evidence and correct in the law.

ARGUMENT

I. Appellant's Reply Brief Improperly Asserts New Arguments Not Raised in Her Initial Opening Brief

"It is axiomatic that an issue cannot be raised for the first time in a reply brief." *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011); see *Jones ex rel. Jones v. Enter. Leasing Co.-Se.*, 383 S.C. 259, 269, 678 S.E.2d 819, 824 (Ct. App. 2009) ("[N]o new issues may be raised to this court by the appellant in the reply brief."). The prohibition on raising new issues in a reply brief fosters the orderly development and presentation of the issues to the Court and ensures that the respondent has a fair opportunity to respond to all grounds asserted for reversal of the lower court's ruling. When an appellant raises new issues for the first time in a reply brief, this orderly process is disrupted and the respondent is deprived of the ability to challenge the newly raised arguments. Reflecting the importance of this rule, South Carolina appellate courts routinely refuse to consider arguments raised for the first time in a reply brief.¹

Appellant's Initial Reply Brief violates this clear and well-settled rule by asserting

¹ See, e.g., *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992) (refusing to consider issue raised for the first time in reply brief); *Harbin v. Williams*, 429 S.C. 1, 9, 837 S.E.2d 491, 495 (Ct. App. 2019) ("We decline to address this issue because it was raised for the first time in the reply brief."); *Wilson v. S.C. Dep't of Motor Vehicles*, 419 S.C. 203, 209, 796 S.E.2d 541, 544 (Ct. App. 2017) (finding argument not preserved because it was first raised in the reply brief); *Divine v. Robbins*, 385 S.C. 23, 44 n.4, 683 S.E.2d 286, 297 n.4 (Ct. App. 2009) (declining to address an issue raised for the first time in reply brief); *Spivey ex rel. Spivey v. Carolina Crawler*, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005) (refusing to consider issues first raised in the reply brief); *Hunter v. Staples*, 335 S.C. 93, 103, 515 S.E.2d 261, 267 (Ct. App. 1999) (finding appellant was precluded from asserting an argument for the first time in its reply brief); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("[A]n appellant may not use the reply brief to argue issues not argued in his brief in chief.").

many new issues.² Ironically, Appellant chastises *Respondents* for not raising these issues. (Init. Reply Br. at 1.) But the burden of identifying the issues on appeal rests on the appellant. See Rule 208(b)(1)(B), SCACR.

In her Opening Brief, Appellant asserted specific challenges to the Fee Order: that Judge Early erred in admitting or excluding certain evidence (Issues I, II, and IV); made findings that conflict with the Supreme Court's opinion in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013) (Issue III); and was biased against Appellant (Issue V). Appellant's Initial Reply Brief asserts numerous additional issues for the first time:

- On pages 1-3 of her Initial Reply Brief, Appellant lists 11 issues that she contends "[t]he record ... shows." (Init. Reply Br. at 1.) To the extent these issues are relevant to this appeal (many are not, as discussed *infra* Part III), they are raised for the first time in the Initial Reply Brief:
 - Whether Appellant is "entitled to her unpaid ... SA fee";
 - Any issue related to Buchanan's alleged entitlement to any amounts beyond what he received when he settled his claims;
 - Whether Appellant is entitled to a discretionary commission; and
 - Whether Appellant should be reimbursed for costs advanced in the *Wilson* appeal.
- The Status Report Judge Early submitted to the South Carolina Supreme Court in May 2015 contains inaccuracies. (Init. Reply Br. at 5, 7.)
- Judge Early issued discovery and confidentiality orders that "had the effect of limiting Appellant's access to information or declaring public documents confidential." (Init. Reply Br. at 7.)
- Judge Early improperly ruled that the case would be tried non-jury. (Init. Reply Br. at 7.)

² As discussed *infra* Part III, many of the newly raised issues are entirely irrelevant to this appeal.

- Judge Early erred in concluding he “was ‘not required to turn a blind eye’” to evidence regarding Appellant’s conduct developed since 2009. (Init. Reply Br. at 8.)
- Documents associated with Appellant’s rebuttal deposition designations (*e.g.*, deposition exhibits) were properly admitted by Judge Early (Appellant’s Opening Brief argues only that the deposition designations were properly admitted). (Init. Reply Br. at 9-10.)
- Judge Early erred in excluding or disregarding testimony from several witnesses. (Init. Reply Br. at 14.)
- The testimony of defense expert Ellison Thomas failed to account for \$7.83 million in royalties allegedly brought in by Appellant, and Thomas was not given sufficient factual information regarding the case. (Init. Reply Br. at 15-16.)
- Other defense experts were not provided with sufficient factual information. (Init. Reply Br. at 16-17.)
- Defense expert Tiffany Provence’s testimony regarding the duty of neutrality was incorrect. (Init. Reply Br. at 17.)

Appellant’s assertion of numerous new issues in her Initial Reply Brief is a blatant violation of longstanding and well-known norms of appellate practice. In most cases, the Court can simply disregard issues newly raised in a reply brief. In this case, however, Appellant’s Initial Reply Brief is so saturated with new issues and arguments that identifying improper material requires a paragraph-by-paragraph, if not line-by-line, analysis. This imposes an unreasonable burden on the Court’s limited resources and unfairly prejudices Respondents.

II. Appellant’s Initial Reply Brief Is Rife with Unsupported (and Unsupportable) Factual Claims

The South Carolina Appellate Court Rules require that factual allegations in a brief “shall” be supported by “references to the transcript, pleadings, orders, exhibits, or other

materials which may be properly included in the Record on Appeal.” Rule 208(b)(4); *see State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) (“[A] brief must reference the Record on Appeal to support the facts alleged.”). As noted *infra* Part III, Appellant’s Initial Reply Brief contains numerous claims and allegations regarding matters that are wholly irrelevant to this appeal. But even when Appellant makes assertions regarding factual matters that are at least arguably relevant to this appeal, they are unsupported by references to the record. For example:

- “Testimony of the Governor, Solicitor General and AG, along with others, supports Appellant’s position that the \$4.7 million valuation was fabricated without basis to damage Buchanan and Pope ...” (Init. Reply Br. at 10.)
- “The record shows that before they became PR/Trustees Buchanan and Pope had read, understood, and negotiated an agreement with TIAA over an event of default related to TIAA funds Cannon took in 2006.” (Init. Reply Br. at 13.)
- The TIAA debt was “\$15 million after a \$2 million escrow” (*i.e.*, \$17 million) at the time of James Brown’s death. (Init. Reply Br. at 13.)
- “The testimony of Respondents’ experts Roger Miller and Laura Woolley ... fully support Buchanan and Pope’s \$99 million value of Brown’s music empire.” (Init. Reply Br. at 14.)
- Mr. Bauknight and Peter Afterman “shift[ed] ... 31% of the assets from the charity to family[.]” (Init. Reply Br. at 16.)
- Mr. Bauknight and the accountant for the Estate and Trust “fail[ed] ... to file proper income tax returns after the [Attorney General] gave 50% of the income to private individuals, not the charity.” (Init. Reply Br. at 16.)
- Mr. Bauknight made a “\$5 million overstatement of debts and deductions to the IRS which resulted in a claimed ‘refund.’” (Init. Reply Br. at 16.)
- “In sworn depositions as early as 2013 Bauknight had virtually no memory of actions taken within the estate.” (Init. Reply Br. at 19.)
- “‘Found no evidence’ and ‘did not see’ became the hallmarks of Respondents and their experts.” (Init. Reply Br. at 19.)

- “Expert James Hardin III, testified that the factors used by Buchanan and Pope to arrive at the \$99 million (less \$15 million in TIAA debt) value were those typically used in a professional appraisal.” (Init. Reply Br. at 20.)
- “Bauknight ... devalued Brown’s assets by \$79 million to get away with sullyng Buchanan and Pope.” (Init. Reply Br. at 20.)

Rule 210(h), SCACR, provides, “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.” Moreover, “the appellant has the burden of providing an adequate record on appeal.” *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 214, 723 S.E.2d 597, 608 (Ct. App. 2012). Appellant evidently expects this Court to go hunting in the seven-volume, 3,000+ page Record on Appeal to see if it can find any support for the unsupported factual allegations in the Initial Reply Brief.

III. Appellant’s Initial Reply Brief Is Permeated with Irrelevant Issues and Arguments

Under the South Carolina Appellate Court Rules, an appellant’s opening brief must include “[a] statement of each of the issues presented for review.” Rule 208(b)(1)(B), SCACR. “[B]y requiring an appellant to preface the brief with a statement of the questions involved, irrelevant matters are excluded from consideration, the issues are limited, and the court and opposing counsel are readily advised in concise form of the questions presented for decision.” *Brown v. Mims*, 250 S.C. 546, 549, 159 S.E.2d 247, 248 (1968).

As Respondents have already shown, *supra* Part I, Appellant’s Initial Reply Brief is replete with issues related to this case that were raised for the first time on reply. Additionally, Appellant’s Initial Reply Brief contains numerous issues and arguments that, in addition to being raised for the first time on reply, are irrelevant to the issues in

this case. The irrelevant matters asserted by Appellant in her Initial Reply Brief include the following:

- No fewer than seven times in a span of five pages (Init. Reply Br. at 2-6), Appellant refers to a purported “announced plan,” during a status conference on May 29, 2013, to reinstate the 2008 settlement that was vacated by *Wilson v. Dallas*. None of these statements is supported by a reference to a transcript or other document. In fact, Appellant’s counsel concedes that he does not have a transcript of the May 29, 2013 status conference. (**Exhibit 1.**)
- Appellant repeatedly references the supposed “devaluation” of the date-of-death value of the Estate from \$84 million (Appellant’s figure) to \$4.7 million. Although the evidence amply supports the accuracy of the lower figure, the salient point for purposes of these proceedings is whether Appellant acted reasonably and prudently in adopting the \$84 million valuation.
- Appellant contends that the issues in this case include whether a breach of fiduciary duty action, pending against her in Richland County, was brought in retaliation for appealing the 2008 settlement. (Init. Reply Br. at 2, 3, 10.)
- The Attorney General’s office and others have interfered with Appellant’s attempts to obtain public documents through FOIA requests. (Init. Reply Br. at 2, 3, 21.)

CONCLUSION

“[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.” *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). Appellant’s Initial Reply Brief flagrantly violates these Rules. Knowing that Respondents would be unable to refute her claims, Appellant has filled her Initial Reply Brief with wild accusations and wholly irrelevant issues. This Court should either strike Appellant’s Initial Reply Brief and direct her to file a brief that complies with the South Carolina

Appellate Court Rules, or it should grant Respondents leave to file a surreply brief.

Respectfully submitted,



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Kirsten E. Small, SC Bar No. 75681
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April 7, 2020

*Attorneys for Russell L. Bauknight as Personal
Representative of Respondent the James Brown
Estate and as Trustee of Respondent the James
Brown 2000 Irrevocable Trust*

EXHIBIT 1

From: "Black, David" <DBlack@nexsenpruet.com>
Date: March 18, 2020 at 5:07:06 PM EDT
To: Adam Silvernail <adam@silvernailfirm.com>
Cc: Adele Pope <adele@popelawfirm.com>
Subject: Re: Appellate Case No. 2019-00362 - Record on Appeal

Adam,

We are trying to track down the referenced documents. Please send us a draft of the index for the ROA for our review before it goes to print.

Thanks, David

On Mar 18, 2020, at 12:51 PM, Adam Silvernail <adam@silvernailfirm.com> wrote:

{EXTERNAL EMAIL}

David:

Don't have 5/29/13 hearing transcript Also, it appears that we will be producing the section of the record with the missing exhibits as early as Friday, so I hope you can locate those shortly. Thanks.

Adam

On Tue, Mar 17, 2020 at 12:22 PM Black, David <DBlack@nexsenpruet.com> wrote:

Thanks Adam. We will take a look. **Please send us a copy of the 5/29/13 hearing transcript.**

J. David Black

Member: Admitted in SC, DC

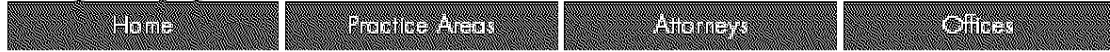
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<image002.png>



From: Adam Silvernail <adam@silvernailfirm.com>
Sent: Tuesday, March 17, 2020 7:58 AM
To: Black, David <DBlack@nexsenpruet.com>
Cc: Adele Pope <adele@popelawfirm.com>
Subject: Appellate Case No. 2019-00362 - Record on Appeal

{ EXTERNAL EMAIL }

David:

We are working on the RoA, and there are certain documents we cannot locate. As you know, my illness took me out of most of the trial, so some of my files on this are incomplete. Could you please provide the following documents (and/or clarifications) from your designation:

Defendants' Exhibits

Ex. 3 - Interim Accounting #1A -- confirm date and whether you want all pages

Ex. 4: Is this the October 12 Letter from TJBL (you say "Campbell"); Ct. Reporter says only 10/12 Letter

Exs 8 & 9 - you say emails, plural, for both. Ct. Reporter says email 1/22/09 (8) and 1/23/09 (9). Please provide what you want.

Exhibit 28 - Please provide sheets 28 and 32 of Thomas to avoid confusion

Ex. 29 - Valuation (Bridge) Analysis.

Ex. 34: Offer of Compromise

Ex. 56 -- Entire Supplemental I&A?

Exhibit 59 -- Auction Catalog. Do you want the entire Christie's catalog?

NOTE: the court reporter lists 59 as Email, 1/11/08

Thanks in advance.

Adam

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

Appellate Case No. 2019-000362

Adele J. PopeAppellant,

v.

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

PROOF OF SERVICE

I certify that on April 7, 2020, I served a copy of **Motion To Strike Initial Reply Brief And Alternative Request For Leave To File Surreply Brief** addressed as follows and notified opposing counsel of this service via electronic mail as follows:

Adam T. Silvernail, Esquire
Law Office of Adam T. Silvernail, LLC
1905 Marion Street
Columbia, South Carolina 29201
adam@silvernailfirm.com



NEXSEN PRUET, LLC

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Apr 07 2020

SC Court of Appeals

J. David Black
Member
Admitted in SC, DC

April 7, 2020

VIA FACSIMILE (803) 734-1839 and U.S. MAIL

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

**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 **Motion To Strike Initial Reply Brief And Alternative Request For Leave To File Surreply Brief** in the above-referenced matter. Pursuant to the Supreme Court of South Carolina's March 20, 2020 Order regarding the Operation of the Appellate Courts During the Coronavirus Emergency, no additional copies are included. Please return a copy, clocked-in to me in the envelope provided. I have also enclosed a check for the \$50.00 filing fee.

By copy of this letter and as evidenced by the attached Proof 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

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FAX TRANSMISSION

RECEIVED

Apr 07 2020

SC Court of Appeals

To: CourtofAppeals
FAX No.: 803-734-1839
FROM: Joyce
PHONE:
FAX:
DATE: 4/7/2020
RE: 2019-000362 Filing of Motion [IWOV-NPCOL1.FID1033932]

NUMBER OF PAGES WITH COVER PAGE: 1

Message:

Attached please find a Motion for filing with the Court today. We tried hand-delivering but the Court was closed. We are putting the original with check in the mail.

Please let us know if you need anything further.

Joyce Richardson
Legal Practice Assistant to
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J. David Black
Travis C. Wheeler
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CONFIDENTIALITY NOTE

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PLEASE CALL THE APPROPRIATE OFFICE (ABOVE) AS SOON AS POSSIBLE.**

