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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Doyet A. Early, III, Circuit Court Judge
The Honorable L. Casey Manning, Circuit Court Judge

Supreme Court Appellate Case No. 2022-001713

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

And

Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown, Plaintiffs,

Of whom Russell L. Bauknight, as Trustee of the James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

And

Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown are Respondents,

v.

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

Of whom Adele J. Pope is the Petitioner.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In *Brown v. Sojourner*, 430 S.C. 474, 498, 846 S.E.2d 342, 354 (2020), this Court asked if the Estate of legendary entertainer James Brown (d. 2006) has been able to issue the educational scholarships that were the chief aim of his estate plan. The parties to that action had to respond in the negative. *Id.* By denying the instant Petition for Writ of Certiorari, this Court will remove one of the final obstacles to realizing Mr. Brown's noble estate plan goal, which has been bogged down for over a decade in part because of Petitioner's unsupportable counterclaims.

This Petition must be denied, because (1) it is filed in violation of several Appellate Court Rules and (2) the Court of Appeals' rulings in the underlying opinion were correctly decided.

I. PETITIONER'S PETITION VIOLATES SEVERAL APPELLATE COURT RULES.

A. Rule 242(b)

Rule 242(b) provides a non-exhaustive but nonetheless thorough list of factors to be considered in determining whether a writ of certiorari should issue:

> (1) Where there are novel questions of law.
>
> (2) Where there is a dissent in the decision of the Court of Appeals.
>
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> (4) Where substantial constitutional issues are directly involved.
>
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b)(1)-(5), SCACR.

Petitioner does not argue criteria (2) or (5). In support of criteria (1) and (4), Petitioner obliquely claims that "novel and constitutional issues" exist concerning the Attorney General's actions. (*See, e.g.*, Pet. at pp. 18-19, 22-23.) Any such claim is moot. *See* Discussion, Section

IV.C., *infra*; *see also* n.3, *infra.* The Attorney General has not been a party for years, and the Court of Appeals (and by extension, this Court, *see* n.3 *infra*) have recognized that the circuit court correctly concluded that the current personal representative, Russell Bauknight, is representing appropriately the Attorney General's lawful interest in protecting charitable beneficiaries. Therefore, there was no reason for the Attorney General to stay in the case, and the Attorney General has since departed with the permission of the circuit court, the Court of the Appeals, and this Court. Any arguments concerning the Attorney General or its counsel are nothing more than Petitioner beating the proverbial "dead horse." *See Wilson v. Dallas*, 403 S.C. 411, 449 n. 30, 743 S.E.2d 746, 767 n. 30 (2013) ("[h]owever, the AG has recently informed this Court . . . that he is now withdrawing as a party [to Case 4900] and his office will maintain a monitoring role.").

In support of criterion (3), Petitioner alleges that the underlying opinion of the Court of Appeals conflicts with this Court's rulings in *Edge v. State Farm Mut. Auto. Ins. Co*., 366 S.C. 511, 623 S.E.2d 387 (2005), and *Wilson v. Dallas*, *supra.* (*See, e.g.*, Pet. at pp. 18, 21.) Respondents note there is no conflict between *Edge* and the Court of Appeals' opinion in this case, as the rule from *Edge* (concerning the hearing of an appeal of an otherwise non-appealable order if there is also an appealable order on appeal) is discretionary and the Court of Appeals exercised its discretion, albeit in a manner inconsistent with Petitioner's wishes. *See* Discussion, Section IV.A., *infra*. There is also no conflict between the Court of Appeals' ruling and *Wilson v. Dallas*. Petitioner claims that it was improper for the Court of Appeals to apply the doctrine of collateral estoppel based upon "a single paragraph from this Court's decision in *Wilson*." (Pet., at p. 21.) Petitioner claims that *Wilson* made "*no* findings about the filing of this case and, further, made no finding that Pope . . . had caused any damage to Respondent. (*Id.* (emphasis in original)). Petitioner's argument conflates the issue before this Court—whether *Wilson* precludes Petitioner's

counterclaims—with the merits of Respondents' claims against Petitioner, which are not before the Court. Respondents look to *Wilson* to preclude Petitioners' counterclaims against Respondents, not to establish the amount of damages or any other element of Respondents' claims.[1] "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. Carolina 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.* "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." *Id.* In dispensing with the mutuality requirement, our courts have applied collateral estoppel only when the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue. *Id.* at 555, 684 S.E.2d at 782. Under the doctrine of issue preclusion, if an issue of fact or law was actually litigated and determined and necessary to a valid and final judgment, the determination is conclusive in a subsequent action on that claim or a different claim. *Laughon v. O'Braitis*, 360 S.C. 520, 526, 602 S.E.2d 108, 111 (Ct. App. 2004).

The breadth of the issue preclusion afforded to Respondents by the foregoing authorities and *Wilson* is simple: Petitioner is presumed conclusively to have committed maladministration, and therefore Petitioner can maintain no action against Respondents for their filing of suit against her to redress the maladministration. *See* Discussion, Section IV.B.1., *infra.* The dollar amount to

[1] Respondents reserve the right to argue the preclusive effect of *Wilson* as to Respondents' claims at an appropriate time in the circuit court proceedings.

which Respondents are entitled will be established by the trial court, and so it is error for Petitioner to twist the meaning of the issue preclusion afforded to Respondents in her effort to defeat this preclusion.

In sum, Petitioner has failed to satisfy any of the criteria set forth in Rule 242(b), SCACR.

B. Rule 242(d)(2)

Pursuant to Rule 242(d)(2), questions presented for review must be "expressed in the terms and circumstances of the case but without unnecessary detail." Petitioner's Questions Presented for Review, *see* Pet. at p. 2, are full of unnecessary (and inaccurate) detail. Further, "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR. Petitioner's Questions Presented for Review in the instant Petition bear little resemblance to the questions posed to the Court of Appeals in the briefing and in the petition for rehearing. (*Compare* Pet. at p. 2 *with* Petitioner's Pet. for Reh'g. and Suggestion for Reh'g. at p.2 (Case No. 2017-002229 filed Sept. 9, 2022) *and* Petitioner's 2d Am. Final Br. at p. iv. (Case No. 2017-002229 filed Sept. 25, 2020).) Clearly, Petitioner is deploying a "kitchen sink" approach to this Petition, which contravenes Rule 242(d)(2)'s requirement for focused, accurately stated "questions presented." The Petition should be denied on this basis alone.

C. Rule 242(d)(4)

Pursuant to Rule 242(d)(4), the "[f]ailure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Rule 242(d)(4), SCACR. The instant Petition is the perfect example of why this Rule exists. The first eighteen pages are nothing more than Petitioner's manifesto-style vitriolic attacks against

Respondents and their counsel. (*See* Pet., at pp. 1-18.) *Nothing about the Petition is accurate, brief, or clear*. The Petition should be denied on this basis alone.

II. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply the well-settled rule in South Carolina that the denial of a motion to dismiss is not immediately appealable?

2. Did the Court of Appeals correctly affirm summary judgment in Respondents' favor concerning Petitioner's counterclaims, because Petitioner is collaterally estopped from asserting those counterclaims and, in the alternative, has failed to produce evidence supporting the counterclaims?

3. Did the Court of Appeals correctly conclude that Petitioner has stated no claim for due process violation, because she has abandoned this issue and/or failed to present any evidence of an alleged violation?

III. COUNTERSTATEMENT OF THE CASE

The underlying action, Case No. 2010-CP-40-04900 ("Case 4900"), is a breach of fiduciary duty action against Petitioner Adele Pope alleging that during her period of service as personal representative of the Estate of world-famous entertainer James Brown (hereinafter the "Estate") and trustee of the James Brown 2000 Irrevocable Trust (hereinafter the "Trust"), she failed to properly administer the affairs of the Estate and Trust resulting in significant financial damages.[2] (R. pp. 215-227; Compl. ¶ 28 (May 19, 2010)).

The primary goal of James Brown's estate plan is the provision of college scholarships to needy and deserving students in South Carolina and Georgia. *See Brown v. Sojourner*, 430 S.C. 474, 498, 846 S.E.2d 342, 354 (2020). Petitioner, via the alleging of spurious counterclaims

[2] Robert L. Buchanan, Esquire (hereinafter "Buchanan") also was a named defendant in Case 4900, but Respondents and Buchanan settled all claims in July 2012. Thereafter, the court entered an order of dismissal of all claims between Respondents and Buchanan. (R. pp. 125-126; Order of Dismissal of Def. Robert L Buchanan Jr. (July 13, 2012)). Buchanan has not been a party to Case 4900 since that time, and he is not a party to this appeal.

against the Estate, has thwarted this goal for nearly thirteen years. Since the gravamen of the instant Petition concerns the dismissal of Petitioner's counterclaims against the Estate, *see* Pet. at p. 2 Questions Presented II-IV, this Court can redress that wrong by denying this Petition. If this Petition is denied, Case 4900 will revert to what it always should have been: the Estate's opportunity to recover against Pope, with Estate assets unencumbered by Petitioner's specious counterclaims.

Petitioner was appointed personal representative of the Estate and trustee of the Trust on November 20, 2007. (R. pp. 215-227; Compl. ¶ 14). Petitioner was removed for cause as personal representative of the Estate and trustee of the Trust on May 26, 2009. (R. pp. 215-227; Compl. ¶ 15). After an appeal, this Court upheld Petitioner's for-cause removal. The Court outlined some of the concerns that formed the basis of its opinion:

> Further, all of the settling parties petitioned the circuit court for Petitioners' removal well in advance of the hearing, thus providing adequate notice. In addition, the circuit court found an irreconcilable conflict existed between Petitioners and the settling parties because Petitioners had expressed continuing opposition to their actions. Thus, the circuit court *had cause* to remove them and replace them with a professional fiduciary.
>
> ***
>
> We are also aware that Petitioners have sought $5 million in fees for their services as fiduciaries for a relatively short interval of time. In addition, Petitioners 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 Petitioners' own attorneys' fees. Petitioners 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 Petitioners 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 Petitioners' 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 (emphasis added).

The Case 4900 Complaint was filed in May of 2010 and alleges breach of fiduciary, breach of trust, and negligence against Petitioner in her capacity as personal representative of the Estate and trustee of the Trust. (R. pp. 221-226; Compl. ¶¶ 18-29). As is evident, the Complaint's allegations parallel the concerns recognized by this Court in *Wilson v. Dallas*. (*Compare id.* at ¶ 18 e., h., and p. *with Wilson v. Dallas*, *supra*.)

A. Counterstatement of the Case: Question One

The Complaint was served upon Petitioner on May 24, 2010. (R. p. 1625; Aff. of Service of Summons and Compl. on Adele Pope (May 24, 2010)). In lieu of an answer, Petitioner filed a ten-count motion to dismiss (R. pp. 231-269; Motion to Dismiss of Def. Robert L. Buchanan, Jr. and Adele J. Pope (June 22, 2010)) and a motion to change venue (R. pp. 273-355; Motion to Transfer Venue (August 2, 2010)).

Subsequent to a hearing in August 2010, on November 9, 2010 Judge Manning issued an Order Denying Motion to Dismiss. (R. pp. 91-98; Order Denying Defs.' Mot. To Dismiss (November 8, 2010)). On November 19, 2010, Petitioner filed a Notice of Motion and Motion Pursuant to [SCRCP] 59(e) to Alter or Amend Order Denying Motion to Dismiss. (R. pp. 404-406; Def.'s Mot. Alter, Amend and/or Vacate Order Den. Def.'s Mot. to Dismiss (November 19, 2010)). Judge Manning issued an Order (filed on January 12, 2011) denying Petitioner's Rule 59(e), SCRCP, motion. (R. pp. 105-106; Order Den. 59(e), SCRCP, Mot. (filed January 12, 2011)).

On February 16, 2011, Petitioner filed a Notice of Appeal in the South Carolina Court of Appeals attempting to appeal the Order Denying Motion to Dismiss and the Order denying the related Rule 59(e), SCRCP, motion. (R. p. 1468; Defs.' Notice of Appeal (February 16, 2011)). The Court of Appeals found that "the orders challenged on appeal are not immediately appealable" and dismissed the appeal. (R. pp. 107-109; S.C. Ct. App. Order filed on March 16, 2011).

Petitioner petitioned the Court of Appeals to rehear the dismissal of the appeal, but the Court of Appeals concluded, "[a]fter careful consideration, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing or reinstating the appeal." (R. pp. 110-111; S.C. Ct. App. Order filed on May 31, 2011). Petitioner did not file a Petition for Certiorari after the issuance of the May 31, 2011 Order of the Court of Appeals, and the appeal was "remitted to the Clerk of Court for Richland County." (R. pp. 112-113; Remittitur filed on July 26, 2011).

Via the commencement of the instant appeal on December 17, 2018, Petitioner again sought premature appellate review of the denial of her Motion to Dismiss. (*See* Pet. for Writ of Cert., at p. 2 "Question I.") The Court of Appeals was correct to make short work of this improper "re-appeal." *See Bauknight, et al. v. Pope*, Op. No. 2022-UP-346 at Section I (S.C. Ct. App. filed Aug. 24, 2022) ("[a]s noted above, Pope previously appealed this order in 2011… [w]e find the order denying Pope's motion to dismiss is *still* not appealable) (emphasis added).

B. Counterstatement of the Case: Question Two

On May 19, 2016, Respondents filed a Motion for Summary Judgment as to All of the Counterclaims of Defendant Pope (R. pp. 1753-1755; Pls.' Mot. for Summ. J. as to All of the Countercl. Of Defs. (May 19, 2016)). After extensive briefing, on August 29, 2016 a hearing was held on the motion for summary judgment. (R. pp. 188-203; Order Grant. Pls.' Mot. for Summ. J.as to Defs.' Countercl. (filed on July 8, 2017)). On June 23, 2017, Judge Early issued an Order Granting Plaintiffs' Motion for Summary Judgment as to Defendant's Counterclaims. (R. pp. 188-203; Order Grant. Pls.' Mot. for Summ. J. as to Defs.' Countercl. (filed on July 8, 2017)). Petitioner then filed Defendant/Counterclaim Plaintiff Adele J. Pope's Motion to Alter, Amend, Reconsider and/or Vacate Order Granting Plaintiffs' Motion for Summary Judgment as to Counterclaims. (R.

pp. 914-940; Def./Countercl. Pl. Pope's Mot. to Alter, Amend, Recons., and/or Vacate Order (filed on July 14, 2017)). On November 25, 2018, Judge Early signed an Order Denying Defendant/Counterclaim Plaintiff's Motion to Alter, Amend, Reconsider and/or Vacate Order Granting Plaintiffs' Motion for Summary Judgment. (R. pp. 211-214; Order Den. Def./Countercl. Mot. to Alter, Amend, Recons., and/or Vacate (filed on November 26, 2018)).

As noted above, this appeal followed on December 17, 2018. The Court of Appeals found that the counterclaims must fail as a matter of law. *See* Op. No. 2022-UP-346, at Section II ("[W]e find Pope's counterclaims fail as a matter of law and the circuit court properly granted Respondents' motion for summary judgment."). The basis for the Court of Appeals' decision concerning the counterclaims is collateral estoppel from *Wilson v. Dallas* and, in the alternative, lack of evidence and/or fatal defect regarding each counterclaim. *Id.*

C. Counterstatement of the Case: Question Three

Peppered throughout Petitioner's deceptively worded "Questions Presented for Review" are references to the conduct of the Attorney General at the beginning of Case 4900, as well as references to Respondents' counsels' representation of the Attorney General's Office and/or the current Personal Representative's alleged relationship with the Attorney General's Office at the outset of the case.[3] (*See, e.g.,* Pet. at p.2 Questions I and IV.) Respondents assert that this is nothing more than a back-door attempt by Petitioner to revive the due process arguments that were

[3] The Attorney General, an original party plaintiff in Case 4900, was dismissed as a party by the trial court in May of 2017, nearly *six* years ago. *See Bauknight, et al. v. Pope*, Op. No. 2020-UP-216 (S.C. Ct. App. re-filed Sept. 16, 2020) (affirming the dropping of the Attorney General as a party and holding that "the trial court correctly determined the Attorney General's interest in protecting the charitable beneficiaries was being served by [the current Personal Representative, Russell Bauknight]), *cert. denied*, Appellate Case No. 2020-001383 (S.C. S. Ct. Order filed April 21, 2021); *see also* R. pp. 180-185, Order Dropping Attorney General as a Party (signed May 31, 2017 and filed June 12, 2017); *see also* Discussion, Section I.A., *supra*. If ever there were a moot issue, this is it.

dismissed summarily by the Court of Appeals in the underlying opinion. *See* Op. No. 2022-UP-346 at Section III ("[e]ven if Pope had not abandoned this issue, we would find no due process violation"); *see also* n. 3, *supra.* As will be seen, the Court of Appeals correctly handled this issue in an expedient fashion.

IV. ARGUMENT

A. The Denial of the Motion to Dismiss is Not Immediately Appealable.

Petitioner's first Question Presented argues the circuit court erred in dismissing her appeal of the denial of the Motion to Dismiss. Petitioner's argument flies in the face of the well-settled law concerning the non-appealability of the denial of a motion to dismiss.

"Currently, this Court does not allow immediate appellate review of the *denial* of any Rule 12(b), SCRCP motion." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000); *see also Moyd v. Johnson*, 289 S.C. 482, 347 S.E.2d 97 (1986) (holding denial of a Rule 12(b)(6) motion is not directly appealable). "Although there are no cases addressing appealability in the context of a Rule 12(b)(7) motion, the appellate courts generally do not allow immediate appellate review of the denial of Rule 12(b) motions." Jean Hoefer Toal, *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA 149 (3d ed. 2016). Further, "the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994). In issuing its ruling, the Court of Appeals relied upon these well-settled rules. *See* Op. No. 2022-UP-346 at p. 5 (citing, *inter alia*, *Breland,* Toal *et al.*, and *McLendon*). The Court of Appeals held: "[h]ere, the circuit court's order denying Pope's motion to dismiss does not establish the law of the case, affect a substantial right, or prevent Pope from raising her defenses at an appropriate stage of the litigation." *Id.*

Petitioner cites an exception to the general rule, noting that an unappealable order may be considered on appeal if there is an otherwise appealable issue before the court, or if appellate consideration of the unappealable order furthers judicial economy. (*See* Pet. at pp. 18, 20 n.23.) Petitioner, however, ignores the discretionary nature of the exception to the general rule of non-appealability.

The circuit court found Petitioner's Motion to Dismiss was raised pursuant to Rules 12(b)(6), (7), and (8). (R. pp. 91-98; Order Den. Defs.' Mot. to Dismiss at 2 (November 8, 2010)). Further, the circuit court found several of Petitioner's alleged bases for dismissal were actually affirmative defenses. (R. pp. 91-98; *Id.* at 7). The court determined affirmative defenses raised in pre-answer Motions are not appropriate to consider because "consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint." (R. pp. 91-98; *Id.* (quoting *Spence v. Spence*, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006))). When this issue reached the Court of Appeals, that Court held that "the circuit court's order denying Pope's motion to dismiss does not … prevent Pope from raising her *defenses* at an appropriate stage of the litigation." Op. No. 2022-UP-346 at Section I (emphasis added). If Petitioner wanted the Court of Appeals to exercise its discretion to consider whether to hear an appeal of the denial of the motion to dismiss, the Court of Appeals did so. Petitioner simply does not like the result reached by the Court of Appeals.

It is well-settled law in South Carolina that the denial of a motion to dismiss is not immediately appealable absent extraordinary circumstances, which are not present here.

B. Summary Judgment in Favor of Respondents is Correct.

Petitioner's Second, Third, and Fourth Questions Presented all relate to whether the Court of Appeals correctly granted summary judgment to Respondents on Petitioner's counterclaims.

(*See* Pet. at p. 2 Questions II-IV.) Petitioner's wording of the Questions and her arguments in support of her position ignore the real reasons the Court of Appeals affirmed the circuit court. Petitioner litigated *Wilson v. Dallas* and is bound by the result, and as an additional sustaining ground she presented no evidence in support of her counterclaims and/or the counterclaims have fatal defects.

1. The Application of Collateral Estoppel is Proper.

Summary judgment is appropriate in this matter because Petitioner's counterclaims fail as a matter of law because of this Court's decision in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). The grounds for Respondents' underlying motion are based on the contention that *Wilson v. Dallas* conclusively establishes the facts which preclude—as a matter of law—at least one required element of each of Petitioner's counterclaims. Importantly, the Supreme Court found "the circuit court did not violate the statutory provisions regarding the removal of personal representatives. *Notice and a hearing were provided*, *and the court had cause to remove Petitioner as it was in the best interests of the estate*." *Id.* at 448, 743 S.E.2d at 766 (emphasis added). Additionally, this Court cited specific examples of Petitioner's maladministration, to include claiming excessive fees for a short period of administration, selling Estate assets to pay her own fees, and improperly attempting to sell a GRAMMY. *Id.* at 448-49, 743 S.E.2d at 766-67; *see also* block quote, *supra* p. 6. Thus, the elements for collateral estoppel have been met because Petitioner's removal for cause was (1) actually litigated in *Wilson v. Dallas*; (2) directly determined by the court in that action; and (3) necessary to support the prior judgment. *See Carolina Renewal, Inc. v. S.C. Dep't. of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (reciting the foregoing elements of collateral estoppel). As a matter of law and logic, Respondents cannot be liable to Petitioner for any of the four counterclaims, because Petitioner's maladministration

has been established via a published opinion of this Court. Therefore, Petitioner's counterclaims fail as a matter of law and the circuit court properly granted Respondents' Motion for Summary Judgment.

Petitioner argues Respondents' Motion for Summary Judgment as to her counterclaims was not ripe because allegedly, she intended additional depositions and discovery needed to be taken, which would have been material to her argument to defeat the Motion for Summary Judgment. As Respondent argued in Plaintiff's Revised Memorandum in Support of Motion for Summary Judgment as to Defendant's Counterclaims and at the August 29, 2016 hearing:

> Summary judgment is appropriate in this matter because each of the counterclaims alleged by Defendant Pope fails as a matter of law as a result of the South Carolina Supreme Court's decision in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). To emphasize, the grounds for this motion are found solely in the *Wilson v. Dallas* opinion, and are based on the contention that *Wilson v. Dallas* conclusively establishes facts which preclude Defendant Pope's counterclaims as a matter of law. *Thus, summary judgment is ripe in this matter and there is no legal or equitable need for discovery prior to the Court ruling on the Plaintiffs' Motion for Summary Judgment as to Defendant Pope's Counterclaims.*

Pl.'s Revised Mem. in Supp. of Mot. for Summ. J. at 3 (R. pp. 1587-1603) (emphasis added); *see also* Tr. of Hr'g on Pl. Mot. for Summ. J. on Aug. 29, 2016 (R. pp. 1089-1192).

2. Lack of Evidence and/or Fatal Defects with Each Counterclaim.

a. Civil Conspiracy

"[A] plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021). The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the

primary purpose or object of the combination is to injure the plaintiff." *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

"[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987 Mere speculation is insufficient to sustain a claim for civil conspiracy. *See Gordon*, 397 S.C. at 136, 723 S.E.2d at 831 (Ct. App. 2011) (upholding a directed verdict on a claim for civil conspiracy where the record contained no evidence, only speculation, that any of the parties conspired with each other for the purpose of harming the decedent or her estate).

Respondents' suit for breach of fiduciary duty against Petitioner is not an "unlawful enterprise." Respondents have numerous good faith grounds for bringing this lawsuit, which is confirmed by the Supreme Court's finding in *Wilson v. Dallas* that Petitioner was properly removed for cause. By virtue of this ruling, Respondents' pursuit of this lawsuit is unquestionably "lawful" because Respondents have a right of action against Pope for damages she caused while acting as a fiduciary.

Even if no unlawful enterprise exists, the tort of civil conspiracy can arise where one party to the alleged conspiracy has justifiable grounds for an action, but others join in the act who do not have the same justification. *See Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719, 724 (1942) (nothing that "where an act done by an individual, though harmful to another, is not actionable because justified by his rights, yet the same act becomes actionable when committed in pursuance of a combination of persons actuated by malicious motives and not having the same justification as the individual"). Petitioner's assertion that some or all of the Respondents were unjustified in

participating in this suit is unpersuasive. At the time this action was commenced, all Plaintiffs, as parties to the settlement agreement between the litigants to the various Brown Estate will contest matters, had the same justification for bringing this suit against Petitioner. While the Supreme Court's opinion ultimately abrogated the settlement agreement, at the time of the filing of this suit, all Plaintiffs had the same justification for suing Petitioner.

After having been validly removed for cause, Petitioner cannot now claim damage resulting from efforts to remove her from her role which the Supreme Court has held she was carrying out improperly, at least to some extent, even if multiple parties desired that goal. Petitioner has produced no evidence of a civil conspiracy. Therefore, Petitioner's counterclaim for civil conspiracy fails as a matter of law.

b. Abuse of Process

The essential elements of abuse of process are (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the conduct of the proceeding. *Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions*, 388 S.C. 394, 403, 697 S.E.2d 551, 556 (2010). "Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required." *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process. However, there is no liability when the process has been carried to its authorized conclusion, even though with bad intentions." *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 74–75, 451 S.E.2d 907, 914 (Ct. App. 1994).

In order for Petitioner to succeed on her counterclaim for abuse of process, Respondents must have maintained an ulterior purpose for filing this suit against Petitioner and committed some willful act not proper in the regular course of the proceeding. Petitioner has presented no evidence

in support of her claim. As the Court of Appeals observed, at oral argument Pope was unable to identify any evidence demonstrating Respondents had an ulterior purpose, "[o]ther than Pope's own conclusory allegations." Op. No. 2022-UP-346, at Section II.B. Petitioner argues Respondents' "ulterior purpose was not to replace Buchanan and [Petitioner], who had been replaced, but to use the mighty power of the State/Attorney General, through Bauknight and the McMaster Legacy Trust, to so damage their reputations and careers with false, fabricated accusations that they would be forced to abandon their duty to appeal a settlement which dismembered The James Brown "I Feel Good" Charity." Petitioner's Br. at 44 (Case No. 2018-002229 filed September 25, 2020). Notably, Petitioner makes no citation to the Record in the foregoing quotation.

Further, and contrary to Petitioner's argument, Respondents have numerous legitimate reasons for suing Petitioner for breach of her fiduciary duties. Pursuant to the *Wilson v. Dallas* decision, the issue of Petitioner's proper removal for cause is conclusively established as a matter of law. Specifically, the Supreme Court cited multiple specific examples of Petitioner's malfeasance, as quoted above. These findings by the Supreme Court coincide with the allegations in Respondents' complaint. *Wilson v. Dallas* establishes, at a minimum, that Respondents had legitimate grounds upon which to sue Petitioner. *Wilson v. Dallas* justifies the Respondents' decision to seek judicial redress for the activities noted in the court's opinion determining Petitioner's removal for cause. Petitioner's counterclaim for abuse of process fails as a matter of law due to complete lack of evidentiary support.

c. Fraud

Petitioner also brought a counterclaim is for fraud and evasion under section 62-1-106 of the South Carolina Code (2009 & Supp. 2018). Section 62–1–106 of the South Carolina Code (2009) provides:

> Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Petitioner's claim under section 62-1-106 fails because it is not her claim to assert following her removal for cause, and it is barred by the statute of limitations. Petitioner ceased to be a fiduciary of the Brown Estate on May 26, 2009. Petitioner filed her counterclaims on September 10, 2010. (R. pp. 362-394; Answer and Counterclaim of Robert L. Buchanan, Jr. and Adele J. Pope (September 30, 2010)). Petitioner was not a fiduciary of the Brown Estate at the time her counterclaim was filed, and thus could not bring a claim on behalf of the Brown Estate. Furthermore, Petitioner alleges fraudulent representations by Respondents that have caused injury to the Brown Estate, Trust, and to the Defendants in the underlying action. To the extent Petitioner maintains this counterclaim on behalf of the Brown Estate, her actions are also in direct contravention of the Supreme Court's June 2015 Order. (R. pp. 136-140; Sup. Ct. Order dated June 2015). The Supreme Court admonished Petitioner to cease her involvement in the affairs of the Brown Estate and Trust. (R. pp. 136-140; *Id*.).

Petitioner argues the Attorney General has joined with Forlando Brown and Terry Brown to defraud the court regarding the valuation of the Brown Estate. "It is well settled that an issue may not be raised for the first time in a post-trial motion." *S.C. Dep't Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). "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." *Id.* (internal citations omitted). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the Petitioner, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Id.* at 302, 641 S.E.2d at 907 (internal citations omitted). Petitioner did not raise this part of her argument to the circuit court and the circuit court did not determine whether the Attorney General defrauded the court based on the valuation of the Brown Estate. Therefore, the Court of Appeals correctly found that Petitioner failed to preserve this issue for appellate review.

Petitioner claims the Attorney General failed to address certain issues regarding the correct heirs to the Brown Estate in Aiken County Case 2008-CP-02-0872. Petitioner brought this claim on September 10, 2010, more than two years after the Attorney General entered into an agreement on August 10, 2008. This cause of action also fails as a matter of law due to the two-year statute of limitations set forth in section 62-1-106 of the South Carolina Code (2009 & Supp. 2018). Therefore, the Court of Appeals correctly held that Petitioner's claim for fraud fails as a matter of law.

d. Intentional Interference with Contract

To establish a cause of action for tortious interference with contractual relations, a plaintiff must show: 1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages. *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). To establish a cause of action for intentional interference with prospective contractual relations, a plaintiff must show: 1) intentional interference with prospective contractual relations; 2) for an improper purpose or by improper methods; and 3)

resulting in injury. *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007).

The Court of Appeals held that Petitioner "failed to present any evidence demonstrating Respondents intentionally procured the breach of a contract (*i.e.*, Pope's appointment by court order) without justification" Op. No. 2022-UP-346, at Section II.D. As a matter of law, because her appointment as Personal Representative and Trustee was made pursuant to statute, Petitioner's dispute in this regard does not sound in contract. *See* S.C. Code Ann. § 62-3-701, 613; § 62-7-701, 812 (2009 & Supp. 2018). Similarly, the Court's January 8, 2008 Order awarding her fees was grounded in South Carolina law, citing *Donahue v. Donahue*, 299 S.C. 353, 384 S.E.2d 741 (1989). (R. pp. 3-6; Order Directing Payment of Fees and Costs of Special Administrators and Other Relief at 2 (January 8, 2008)). Thus, both Petitioner's tenure as a fiduciary of the Estate and Trust and the court's Order awarding her attorney's fees are unquestionably not contractual in nature but rather are grounded in the Court's authority pursuant to statute and case law regarding attorney's fees.

Petitioner's argument that her fee claim is contractual in nature is further forestalled by the observation of our Supreme Court that "[c]ourts cannot create contracts for the parties," *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 472, 377 S.E.2d 343, 347 (Ct. App. 1988). S*ee also Terminix Int'l, Inc. v. Rice*, 904 So. 2d 1051, 1057 (Miss. 2004) ("A scheduling order is not a contract between the parties, but rather an order of the court."); *Boston Prop. Exch. Transfer Co. v. Iantosca*, 720 F.3d 1, 12 (1st Cir. 2013) (holding that an order assigning one party's legal claims to another "was not a contract" where the compelled assignor "did not bargain for, offer, or accept the assignment order, which was imposed on it over its strong objection."); *Lueck's Home Imp., Inc. v. Seal Tite Nat., Inc.*, 142 Wis. 2d 843, 848, 419 N.W.2d 340, 342 (Ct. App.1987) ("[A]

restitution consent order is not a contract"); *Goldberg v. Trakas*, 206 F. Supp. 867, 869 (D.S.C. 1962) ("[A]n order of the Court issued by consent of the parties is not to be deemed a contract"); *Ketab Corp. v. Mesriani Law Grp.*, No. CV1407241RSWLMRWX, 2016 WL 911816, at 2 (D. Cal. Mar. 7, 2016) (dismissal of contract claims including intentional interference with contractual relations was appropriate where the claims were based on a settlement order because a "Settlement Order is a court order, and not a contract.").

Petitioner's appointment by the court did not create a "contract" based on an attorney-client relationship. Ordinarily, the relationship between the attorney and client is one of contract, either express or implied. However, courts have differentiated between a traditional contractual attorney-client relationship and one based upon court appointment. *See e.g., Am. Mut. Liab. Ins. Co. v. Superior Court*, 113 Cal. Rptr. 561, 570 (1974) ("*Save where appointed by court*, the relationship of attorney and client is created by contract.") (emphasis added).

In *Moore v. McComsey*, 313 Pa. Super. 264, 269, 459 A.2d 841, 844 (Pa. Super. Ct. 1983), the Superior Court of Pennsylvania held that an inmate could not bring a breach of contract claim against his court-appointed public defender because "there was no contract of employment between [inmate] and trial counsel, for counsel had been court appointed." Similarly, in *Grand Blanc Landfill, Inc. v. Swanson Environmental, Inc.*, 200 Mich. App. 642, 647, 505 N.W.2d 46, 48–49 (Mich. Ct. App. 1993), the court held the court's act of appointing an expert did not give rise to a contract because the required contractual elements were not met.

In the present case, Petitioner cannot prevail on an intentional or tortious interference with a contract claim because no contract was created between Petitioner and the Brown Estate. Analogous to the *Moore* case, Petitioner was appointed by the court; therefore, the relationship between Petitioner and the Brown Estate was not contractual. *See Moore*, 313 Pa. Super. at 264,

459 A.2d at 841. Additionally, like the expert in *Grand Blanc Landfill*, Petitioner's court-appointed status and the court order concerning fees do not adequately satisfy the elements required to form a valid contract. *See Grand Blanc Landfill*, 200 Mich. App. at 643, 505 N.W.2d at 47. As a result, Petitioner did not have a contractual relationship with the Brown Estate.

Finally, even if Petitioner's brief service as a fiduciary is characterized as a contractual relationship with the Brown Estate, she has not presented evidence that the Respondents interfered with the contract. Petitioner's removal as PR/Trustee by the circuit court was affirmed in *Wilson v. Dallas*. Therefore, Petitioner's counterclaim for intentional interference with contract fails as a matter of law.[4]

C. Petitioner's Due Process Claim is Abandoned and/or Meritless.

The Court of Appeals concluded that Petitioner has abandoned any due process violation arguments. *See* Op. No. 2022-UP-346, at Section III (citing Rule 208(b)(1)(E), SCACR; *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)). In the alternative, the Court of Appeals reviewed the Record and concluded no due process violation has occurred. *Id.* (citing *Moore v. Moore*, 376 S.C. 467, 472-73, 657 S.E.2d 743, 746 (2008)). Respondents assert that these rulings are correct, for the reasons stated in their Brief. (*See* Br. of Respondents, at pp. 43-45 (Case No. 2018-002229 filed July 2, 2020).)

The alleged due process violation stems from Petitioner's oft-repeated contention that "the Attorney General and the circuit court violated her due process rights" by denying a level playing field to Petitioner. Op. No. 2022-UP-346 at Section III. In this Petition, Petitioner improperly

[4] Petitioner's separate petition for writ of certiorari concerning the circuit court's and Court of Appeals' denial of her claim for a personal representative's fee is pending before this Court as Case No. 2022-001195.

seeks to revive this unfounded due process claim by splitting it up and redistributing it in bits-and-pieces throughout her "Questions Presented for Review." (*See, e.g.*, Pet. at p. 2 Question I ("[w]hether the 2010 complaint in Richland 4900 should have been dismissed where SWB, a private law firm, served as sole counsel for the Attorney General…," *et cetera*); *id.* at Question III ("[w]hether the panel should have affirmed summary judgment to Respondents as to the counterclaims before considering the issues remanded by the Court of Appeals in 2019 and 2020"); *id.* at Question IV ("whether SWB should be disqualified and [current PR] Bauknight should be enjoined from acting on behalf of the Attorney General").) Petitioner (intentionally) fails to recognize that she has no due process violation claims, as courts at every level in South Carolina have affirmed the current personal representative's interest in protecting the Attorney General's interest, i.e. the interest of as-yet-unknown charitable beneficiaries. *See Bauknight, et al. v. Pope*, Op. No. 2020-UP-216 (S.C. Ct. App. re-filed Sept. 16, 2020) (affirming the dropping of the Attorney General as a party in Case 4900 and holding that "the trial court correctly determined the Attorney General's interest in protecting the charitable beneficiaries was being served by [the current Personal Representative]), *cert. denied*, Appellate Case No. 2020-001383 (S.C. S. Ct. Order filed April 21, 2021); Op. No. 2022-UP-346, at "Facts and Procedural History," ("[w]e also found the circuit court correctly recognized the Attorney General's interest in protecting the charitable beneficiaries."); *see also* R. pp. 180-185, Order Dropping Attorney General as a Party in Case 4900 (signed May 31, 2017 and filed June 12, 2017). Despite the volume of ink spilled by Petitioner on this "issue," this issue is over.

CONCLUSION

The Petition fails to set forth any convincing argument that this case meets any of the Rule 242(b) thresholds for the issuance of a writ of certiorari, nor does the Petition comply with Rules

242(d)(2) or (d)(4). Further, the Court of Appeals' opinion is thorough, well-reasoned, and correct.

For the reasons stated herein, Petitioner's Petition must be denied.

Respectfully submitted,

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