

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
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 Russell L. Bauknight, et al, )  
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 Plaintiffs, )  
 )  
 v. )  
 )  
 Adele Pope, )  
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 Defendant, )  
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 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

No. 2010-CP-40-4900

**ORDER GRANTING  
 MOTION FOR PROTECTIVE ORDER  
 AS TO DEPOSITION OF  
 ATTORNEY GENERAL**

RICHLAND COUNTY  
 FILED  
 2016 OCT -3 PM 3:26  
 JEANETTE W. HOBBDE  
 C.C.P. & G.S.

This matter has come before this Court pursuant to the Motion for Protective Order of Attorney General Alan Wilson to bar the taking of his deposition in this case. After reviewing the memoranda of counsel concerning this Motion and considering the arguments about it in Bamberg on August 26, 2016, this Court grants this Motion because the taking of the Attorney General's deposition would pose an undue burden under Rule 26(c), SCRCP. for the following reasons

1. Alan Wilson, who took Office in January, 2011, was not the Attorney General when this suit was initiated and, therefore, lacks personal knowledge of all or most of the matters at issue in the suit. Defendant has deposed the former Attorney General who was in Office when this suit was brought.
2. All or most of any questions Attorney General Wilson might be asked would be subject to attorney client and work product privileges
3. Questioning of the Attorney General with objections thereto would likely take a



day or more of his time. Depositions of two lawyers on his staff in a related proceeding took nearly five days. A deposition of former Attorney General Henry McMaster took approximately four hours or more. Such a time consuming deposition would interfere with the Attorney General's handling of the important duties of his Constitutional Office.

The above concerns fit squarely within the often called *Morgan* rule that is well recognized by the Federal Courts and other states that have considered it. Under that rule or related authority, depositions should not be taken of high ranking government officials unless the party noticing the deposition shows that the information sought is essential, that it is not obtainable elsewhere, and that the deposition of the official would not interfere with his government responsibilities. *See* discussion below. Defendant cannot make such a showing for a deposition of the Attorney General for these reasons. The Attorney General did not witness the events that are the subject of the Complaint nor did he make the decision to institute suit. Questions related to the continuation of the suit since he took Office would be barred by attorney client and work product privileges. Therefore, a deposition of the Attorney General would be an unproductive, time consuming exercise that would be an undue burden on him in his execution of his responsibilities as a State Constitutional Officers.

The above referenced *Morgan* rule is based on a United States Supreme Court decision (*United States v. Morgan*, 313 U.S. 409, 422 (1941)), that is widely accepted throughout the Federal Courts, including the Fourth Circuit Court of Appeals, and has been adopted by a number of states. *See below*. As stated 27 years ago by the Supreme Court of Vermont, "[t]he federal courts have uniformly held that a highly-placed executive branch governmental official should not be called upon personally to give testimony by deposition, at least unless a clear

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showing is made that such a proceeding is essential to prevent prejudice or injustice to the party requesting it. The few states that have had occasion to reach this question have adopted this standard as well." *Monti v. State*, 563 A.2d 629, 631, 151 Vt. 609, 611-12 (Vt.,1989) (emphasis added).

Although apparently not all of the Federal cases have based the *Morgan* rule on Rule 26(c), FRCP, our State court rule is similar and would empower the Circuit Court to apply the rule based upon the undue burden that the deposition would impose on the Attorney General. The *Morgan* doctrine is certainly consistent with our Supreme Court's decision applying a similar rule to testimony of judges.

The modern trend of courts [is of] not allowing a judge to testify regarding a case in which he previously presided unless the testimony is: 1) critical; and 2) can be obtained by no other means. *See United States v. Dowdy*, 440 F.Supp. 894 (W.D.Va.1977); *Commonwealth v. Ellis*, 10 Mass. L. Rptr. 333 (Mass.1999) available at 1999 WL 855196; *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 482 P.2d 775 (Wash.1971); *Helmbrecht v. St. Paul Ins. Co.*, 117 Wis.2d 74, 343 N.W.2d 132 (Wis.Ct.App.1983. . . which he previously presided). . . ."

*In re Whetstone*, 580 S.E.2d 447, 448, 354 S.C. 213, 216 (2003). Defendant contends that the *Morgan* rule predates the South Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure, but the rule, its progeny and related cases has been applied in numerous jurisdictions since then<sup>1</sup>, and *Whetstone*, although dealing with judicial testimony, is consistent. This Court finds that the *Morgan* rule should be followed in this case.

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<sup>1</sup> *Bogan v. City of Boston*, 489 F.3d 417, 423-24 (C.A.1 (Mass.),2007)(deposition of Defendant mayor); *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211-12 (C.A.4,1991)(deposition of Director of Defendant Office of Thrift Savings); *In re McCarthy*, 636 Fed.Appx. 142, 143 (C.A.4,2015)(Deposition of EPA Administrator in suit against EPA); *In re U.S.* 197 F.3d 310, 313-14 (C.A.8,1999) (deposition of Attorney General Reno in a Federal prosecution).



The *Morgan* rule, its progeny and related cases apply similar requirements for the showing of “extraordinary circumstances,” (*Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211–12 (C.A.4,1991), *supra*) to depose a high ranking official such as the Attorney General. It makes clear that the burden is on the party seeking the deposition to make such a showing. At a minimum, the Defendant must show that the testimony is “critical” (*Whetstone. supra*), “can be obtained by no other means” (*Id.*), and will not interfere with his other responsibilities (*McNamee v. Massachusetts*, 2013 WL 1285483, at \*3 (D.Mass.,2013), *supra*)(.). As stated in *McNamee*, a deposition will not be allowed unless the party seeking the testimony shows that “(1) the information sought is essential (not merely relevant) to the case, (2) the information sought is not obtainable elsewhere, and (3) provision of the testimony will not interfere with the official's government responsibilities. . . .”

The Defendant has not shown extraordinary circumstances to justify the taking of Attorney General Wilson's deposition. The information sought is not “essential” or “critical,” under the first criteria, *supra*, because Attorney General Wilson did not take Office until the year

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*In re F.D.I.C.*, 58 F.3d 1055, 1060- 1062 (C.A.5 (Tex.),1995)(Depositions of three FDIC directors in action in which the FDIC was not a party but deposition had already been quashed of them in an action in which the FDIC was a party); *McNamee v. Massachusetts*, 2013 WL 1285483, at \*3 (D.Mass.,2013)(deposition of former chief of staff of legislator); *U.S. v. Northside Realty Associates, Inc.*, 324 F.Supp. 287, 295 (D.C.Ga. 1971) (deposition of Attorney General in suit initiated by him on behalf of United States); *Hyland v. Smollok*, 349 A.2d 541, 543, 137 N.J.Super. 456, 460 (N.J.Super.A.D. 1975)(deposition of Plaintiff New Jersey Attorney General); *Johnson v. Clark*, 21 A.3d 199, 210, 199 Md.App. 305, 323 (Md.App.,2011)(deposition of county executive of county defendant); *State, Dept. of Health and Rehabilitative Services v. Brooke*, 573 So.2d 363, 371 (Fla.App. 1 Dist.,1991)(Deposition sought of Secretary of Defendant Department of Health and Rehabilitative Services); *Department of Agriculture and Consumer Services v. Broward County*, 810 So.2d 1056, 1058 (Fla.App. 1 Dist.,2002)(Deposition of agency head in challenge to agency rule); *State ex rel. Paige v. Canady*, 475 S.E.2d 154, 160, 197 W.Va. 154, 160-162 (W.Va.,1996)(deposition of Secretary / Tax Commissioner in FOIA action apparently against him); *State Board of Pharmacy v. Superior Court*, 78 Cal.App.3d 641, 644-45 (Cal.App.1.Dist)(deposition of California Attorney General regarding appropriate attorney's fees to be awarded against a state agency and the impact of the case). The Attorney General's Memorandum includes lengthy quotations from these cases.



after this suit was brought and lacks personal knowledge of the circumstances when this action was initiated. Defendant points to steps in the litigation of this case since then, but those matters involve the progression of the litigation rather than the evidence upon which the case is based. The Defendant has not shown that "the information sought is not obtainable elsewhere" under the second criteria. She has taken the deposition of former Attorney General McMaster who was holding Office when this suit was brought, and she has also taken the depositions of Senior Assistant Deputy Attorney General Sonny Jones and Assistant Deputy Mary Frances Jowers in a related case. This summer, she has served on the Attorney General requests to admit the authenticity of documents, interrogatories and production requests in this case. For these reasons, Defendant cannot show that the information sought "can be obtained by no other means" (*Whetstone*). She also cannot show that the "provision of the testimony will not interfere with the [the Attorney General's] government responsibilities . . ." (*McNamee*). The Jones and Jowers depositions took nearly five days and the questioning of former Attorney General McMaster took nearly four hours. Given that all or most questions would be subject to objection as going to privileged matter about litigation decisions, the deposition would be very unproductive and an undue burden. Under the *Morgan* rule all of these criteria must be met before a deposition of a high ranking official can be taken, and Defendant has not satisfied any of the criteria.

### CONCLUSION

The *Morgan* rule and its progeny and related cases protect against depositions of high-ranking public officials except under extraordinary circumstances not present here. This deposition would be an undue burden for this reason and those others noted above. Therefore,



this Court issues a protective order barring the taking of the deposition of Attorney General Wilson in this case.

Therefore, THIS COURT ORDERS that the Motion of the Attorney General be granted and ORDERS that his deposition not be taken in this case.

AND IT IS SO ORDERED.

Sept 21, 2016

Bamberg, South Carolina

DOYET A. EARLY, III

DOYET A. EARLY, III  
Circuit Court Judge