

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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MAR 09 2018

SC Court of Appeals

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

Appellate Case No.2017-001899

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.; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., and 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.; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown - Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., And Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown  
..... Respondents,

v.

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

Of whom Adele J. Pope is the Appellant . . . . Appellant.

**REPLY TO RETURN TO  
MOTION OF ATTORNEY GENERAL TO STRIKE  
INITIAL BRIEF AND DESIGNATION OF APPELLANT  
AND REQUEST TO STAY BRIEFING**

Appellant's 36 page Return to the Attorney General's Motion to Strike illustrates the very problems with her brief. The Return is riddled with page after page of statements of a purportedly factual nature without any citation to any document in the record before the Judge and without any relevance to the issues before the Court in this appeal. She also continues her practice of referring to documents not in the record and to other cases, including ones to which she was not even a party. In these writings, Appellant creates a fog of irrelevant allegations and purported facts that she fails to document. Therefore, her brief and her Return are mishmashes that violate the Appellate Court rules and misdirect and distract from the arguments on appeal.

The scope of relevant parts of the record is instead narrow as to the two orders in this one case that she has appealed. The Order of Judge Early of September 21, 2016, granted a protective order as to the taking of the Attorney General's deposition primarily on the ground that the "*Morgan* rule and its progeny and related cases protect against depositions of high-ranking public officials except under extraordinary circumstances not present here." Order at p. 6.<sup>1</sup> The Order of Judge Early of May 31, 2017, filed June 12, 2017, granted the Attorney General's Motion to be Dropped as a Party including as a defendant to the counterclaims because no need existed for him to remain in this action and because he is immune from suit as to the counterclaims against him. Appellant gives scant attention to those matters as she rambles through her undocumented version of the history of the numerous James Brown / Adele Pope cases and other cases to which she is not even a party.

Perhaps nowhere is Appellant's failure to follow the Appellate Court rules more evident than in her statement that the "record has not closed in this matter." Return at p. 4. Of course

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<sup>1</sup> The Order also included the grounds that he lacked personal knowledge of all or most matters at issue, that all or most questions would be subject to privileges, and that the deposition would likely be time consuming.

the record is closed for purposes of the appeal. Rule 210(c). (“The Record shall not. . . include matter which was not presented to the lower court or tribunal. . . .”). Only documents presented to the lower court as to the Orders on appeal before the notice of appeal was filed may be included in the Record and referenced in briefs and other appellate documents provided that they are relevant to the issues.

Various parts of Appellant’s Return are addressed below with headers corresponding to the Return.

**APPELLANT’S SUMMARY OF OBJECTIONS TO MOTION TO STRIKE IS UNSUPPORTED WITH CITATIONS TO THE RECORD AND DRAWS ON MATTERS OUTSIDE THE RECORD**

This summary is filled with irrelevant, accusatory statements without any citation to the record before the Judge to support them. For example, she has two paragraphs of her characterizations of statements purportedly of Henry McMaster without citation to supporting authority. His deposition was not filed with the lower Court until after this appeal was taken and is not properly before this Court.

In another example, Appellant refers to two FOIA suits that have been dismissed and are under separate appeals before this Court. Those suits are completely irrelevant to the Order granting the Motion to be Dropped and the Protective Order as to the taking of Attorney General Wilson’s deposition and were under appeal when the Court issued those Orders. She should not be arguing about different cases under separate appeals including one involving counsel not participating in the present action. She is patently wrong in stating that “[a]ided by the Wingate firm and Bauknight, the AG was successful in having one FOIA suit consolidated with this case . . . .” The Wingate firm did not represent the Attorney General in that suit, and the Attorney General did not file a motion to consolidate the cases. The Judge consolidated the cases. Order,

of the Honorable Frank Addy, November 22, 2011, pp. 1 and 6. As Appellant recognizes, the second FOIA suit was not consolidated.

**APPELLANTS BACKGROUND IS FILLED WITH UNDOCUMENTED STATEMENTS AND REFERENCES TO MATTERS OUTSIDE THE RECORD**

Appellant contends “[t]hat the actual background consists of hundreds of filings by the AG and other Res[p]ondents, together with a large number of filings by Appellant and Buchanan.” The problem is that most filings have no relevance to the issues before this Court on appeal, and Appellant makes numerous representations, assertions and accusations without any references to any document in the record to support them. Appellant contends that the lower court took “free judicial notice” of other cases including a “voluminous record” of a United States District Court case, but she sets forth no citations to record showing that he did so or that such records were filed with the Court.<sup>2</sup> The Court’s orders on appeal do not rely on records in other cases. Several examples of her errors are noted below.

Appellant refers on page 8 of her Return to an article she wrote without showing that it was ever filed with the lower court.

In footnote 4 on page 9, in response to the Motion to Strike’s focus on her statement that “no court has been told” of income tax generated, Appellant references only the Brown will and trust without any citation to support her statement about income tax.

The problems with Appellant’s Return are well illustrated by her references to FOIA actions which have no bearing on this appeal including one to which she was not even a party. In doing so, she not only brings in matters not properly before this Court, she makes incorrect assertions about them.

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<sup>2</sup> In the Order of May 31, 2017, dropping the Attorney General as a party, the Court only referred to other James Brown cases from which the Attorney General withdrew, and cited the Supreme Court Opinion in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).

- In the first full paragraph on page 9, she refers to a FOIA case that is not before this Court or consolidated with this action.
- She does quote on page 9 excerpts from the Attorney General's Motion to Dismiss one of Appellant's FOIA actions, but on page 10 again incorrectly states that the Attorney General moved to consolidate.
- On page 11, Appellant references a FOIA case to which she was not even a party. She is absolutely wrong in stating that the Attorney General sought to have that case consolidated with the instant case.
- At the bottom of page 13 and on page 17, Appellant refers to the FOIA case that was not consolidated with the instant case.

Appellant, on page 15, refers to purported testimony in the depositions of the Attorney General, Robert Cook and John McIntosh in case Aiken case 1337, but they were not filed with and before the Court in case 4900 or now on appeal. Even if they were properly before the Court, Appellant fails to cite to the page and line of the testimony to which she refers in violation of Rule 208(b)(4), SCACR.

On page 16, Appellant refers to the lower Court's Order granting the Motion for Summary Judgment as to her Counterclaims, but that Order is not the subject of this appeal and before the Appellate Court. She says that the Court relied on *Wilson v. Dallas* and the "massive record" in *Brown v. Buchanan and Pope*, a United States District Court case, but the lower court order merely cited the order in the Federal case, and the Supreme Court decision in *Wilson*.

**REPLY TO APPELLANT’S RESPONSE TO ARGUMENT OF ATTORNEY GENERAL  
IN SECTIONS I, IV & VI OF THE MOTION TO STRIKE**

Appellant’s statement at the top of page 18 that the Attorney General “is asking the Court to enforce a stay so that the summary judgment order will not be finalized” is patently wrong. He made no such request. In fact, Appellant acknowledges this point on page 4 of the Return in noting that the AG’s staff counsel asserted he was no longer a party “while the Wingate firm counsel continued to . . . oppose a lifting of the stay.” Appellant’s counsel were copied on undersigned counsel’s letter to Judge Early on November 13, 2017, stating that, because the Attorney General had been dropped as a party, he was “not required to respond to the Plaintiff’s Motion to Lift the Stay and does not take a position regarding it in this filing.”

The statement that the Attorney General “obtained – after his dismissal – a partial summary judgment order” suggests that the motion was made and argued after the Attorney General was dismissed. Instead, the motion was argued well before the Attorney General was dismissed. The Order granting the Motion to Drop was signed on May 31, 2017 and entered on June 12, and the Order granting the Motion for Summary Judgment as to the Counterclaims was signed on June 23, 2017, and entered on July 10. Both Orders note that they were argued on August 29, 2016.

In the second full paragraph on page 18, Appellant confusingly says, “[w]ere the record now closed, some of the matters would surely be the proper subjects of motions to supplement the record by judicial notice. This is true of the . . . . recently filed 2016 accounting by Bauknight.” The record IS closed now and has been since this appeal was taken. Matters not presented to the lower court cannot be introduced on appeal. Rule 210(c). The Bauknight accounting was not filed with the lower court and Appellant may not refer to it on appeal. *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984)

(“original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.”). Instead, Appellant uses this accounting to draw her own conclusions and make assertions which are irrelevant to this appeal. For the same reasons, this Court may not take judicial notice of Appellant’s reference to allegations in a California suit.

Appellant then proceeds into a series of assertions against the Attorney General without any citation to the record. She seems to blame him for continuing to be involved in this case until he was dropped as a party while ignoring that he filed his Motion to be Dropped on March 25, 2013, and the Court did not rule on it for over four years. The Attorney General had a right to participate in this litigation while the Motion was pending.

On page 20, Appellant contends that the Attorney General and other Respondents filed some documents relating to other James Brown cases as attachments to a motion but that Motion requested guidance from the Court about Pre-trial Publicity. The news articles attached to the Motion obviously were not offered as evidence regarding substantive issues pertinent to the Orders under appeal.

On page 20, Appellant oddly states that summary judgment matters are at the heart of this appeal, but the Order granting summary judgment as to the counterclaim is not under appeal. Appellant’s Rule 59 Motion regarding that Order remains pending.

Appellant contends that everything in the case is relevant, but it is not. The matters in the record and the arguments in the briefs must relate to the issues on appeal. Appellant’s brief has stepped well beyond the reasonable scope of relevance in her brief and designations. Moreover, she has failed to document her allegations in her brief with citations to the record. She has referenced matters that were never part of the record in this case including other cases to which she was not even a party.

## II

### **Affidavit of Pope Date November 8, 2017**

Appellant fails to address the fact that this affidavit was filed in the lower court after she filed her Notice of Appeal. Therefore, it was not before the lower court as to the orders on appeal. It must be struck from matter designated for the record along with any parts of the brief that rely on it.

## III

### **Opinion / Affidavit of William Smith**

Appellant fails to show that this 2017 affidavit may be included in the Record on Appeal. She says it provides nothing new regarding a 2011 affidavit and article of Pope and William Smith that Respondents filed in apparently one of the FOIA cases<sup>3</sup>, but she must show that the 2017 affidavit is independently appropriate for the record. She cannot do so. Appellant fails to address these points in the Motion to Strike:

The Smith document is not in the designation and may not be referenced in the Brief for that reason alone. Rule 210(h). Moreover, the Smith document is irrelevant and not properly before the Court as to the orders under appeal because it was filed in support of Appellant's Rule 59 Motion as to the lower court's order granting Respondents' Motion for Summary Judgment as to Appellant's counterclaim. That summary judgment order is not under appeal and not pertinent to the issues in the instant appeal (Rule 210(b) and *Appellate Practice*). Furthermore, Appellant may not rely on an affidavit not presented to the Court until she filed her Rule 59 motion. "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 456–57, 392 S.E.2d 481, 482 (Ct. App. 1990).

She says that Judge Early took judicial notice of every filing in all James Brown cases, but she fails to document this statement. Moreover, "[a] judicially noticed fact must be one not subject

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<sup>3</sup> On page 22, she says that the affidavit and article were made part of this case in 2011 when filed by the Attorney General and other Respondents, but does not cite the filing, and no such filing appears to be in the record.

to reasonable dispute . . . .” Rule 201, South Carolina Rules of Evidence. Appellant has not made such a showing. Moreover, Appellant’s statement that the 2017 affidavit provides nothing new is completely wrong. The 111 page affidavit contains lengthy quotations from depositions taken in 2017 and in other cases years after the 2011 affidavit. Appellant cannot attempt to bootstrap her appeal by relying on this Rule 59 affidavit and her own post-appeal 2017 affidavit discussed above.

## V

### **Documents Presented to the Lower Court**

Appellant contends, once again, that “Judge Early was asked to take judicial notice of every filing in all James Brown cases, and he did so.” She fails to support this statement with any citation to such a ruling by Judge Early. She says that filings are unnecessary as though the judge could peruse the files of other cases which is, of course, absurd. In fact, generalized judicial notice would conflict with Rule 201, SCRE, *supra*, because a noticed fact “must be one not subject to reasonable dispute.” She broadly claims that the summary judgment order and others make clear that Judge Early considered many matters outside the record of case 4900. The summary judgment order is not on appeal. If Judge Early gave judicial notice to such a document in one of the orders on appeal, then Appellant may cite to such a document. The mediation order has nothing to do with judicial notice.

Appellant contends that her referring to statements of Attorney General Wilson and Governor McMaster are appropriate. She is wrong unless she can point to statements in the record and show that they are relevant to the issues on appeal which she has failed to do. She says that this action is “now known to be an unauthorized tort suit against South Carolina citizens” (page 22), but no Court has made such a finding nor is this argument relevant to this

appeal.<sup>4</sup> She again tries to prop up her arguments with the statement that “the lower court in this case took liberal notice of all James Brown cases,” but fails to cite any such finding of the Court. She says that we seek to prevent this Court from reviewing the “sworn testimony” of the Attorney General and the Governor, but she did not file the McMaster deposition until October, 2017, after this appeal was taken, and never filed the Wilson deposition which was taken in another case.

#### **DOCUMENTS ADDRESSED IN SCHEDULES A and B**

Appellant addresses items on Schedules A and B to the Motion to Strike but fails to overcome the objections made in that Motion. Most of her responses are covered by the above discussion. The following points discussed above and in the Motion to Strike apply to Appellant’s itemized responses and show how her brief violates the Appellate Court rules:

- Appellant may not bring in matter from other cases such as other James Brown cases or the FOIA cases not filed with the lower court.
- She may not refer to other documents never presented to the Court.
- She may not make statements of a purportedly factual nature without citing to documents presented to the lower court.
- She may not make sweeping statements that matter is in the record without citing supporting documents.
- She may not properly ask this Court to take judicial notice of facts not presented to the lower court unless indisputable.
- Appellant may not make arguments about and refer to documents irrelevant to the Orders

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<sup>4</sup> The Attorney General does not address the merits of the argument that the suit was unauthorized because it is not before this Court, but would vigorously argue to the contrary if the issue were properly presented.

on appeal simply because they were filed below. The Attorney General had a right to participate in this litigation while his Motion to Drop was pending, but his doing so does not make any documents filed relevant to this appeal unless they relate to the orders before this Court. He is not proceeding in the lower court now because proceedings there are stayed, and he has been dropped as a party.

- The Record does not remain open for purposes of this appeal.
- The McMaster deposition is not before this Court because it was not filed with this Court until after this appeal was taken. The authorization of this suit is irrelevant to the Orders under appeal. See footnote 4, *supra*.
- The designated matters on Schedule B should be struck for the reasons set forth in the Motion to Strike.

### CONCLUSION

The sheer number of problems with Appellant's brief and this return must be rectified. Leaving them to be addressed in responsive briefs is not appropriate because these errors bring in arguments that are not supported by citations to the record, or are based on documents never presented to the lower court including documents from other cases. In addition to violating the Appellate Court rules, these errors would make responding to such a scattershot, undocumented brief extremely time-consuming and distracting as to the arguments properly in the brief. The irrelevance of Appellant's arguments further complicates the problems of unsupported statements and reliance on matters outside the record. If not corrected, the problems will resurface in Appellant's reply brief when no responsive brief is permitted. Therefore, Appellant's brief and designation should be brought into compliance now and not left for

responsive briefing or counter-designations.

Respectfully submitted,

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Attorney General

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BY: 

March 9, 2018

ATTORNEYS FOR THE ATTORNEY GENERAL

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Appellate Case No.2017-001899

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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.; Daryl J. Brown, individually and on behalf of his minor child Janise Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., and Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown,

And

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..... Respondents,

v.

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

Of whom Adele J. Pope is the Appellant . . . . Appellant.

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**CERTIFICATE OF SERVICE**

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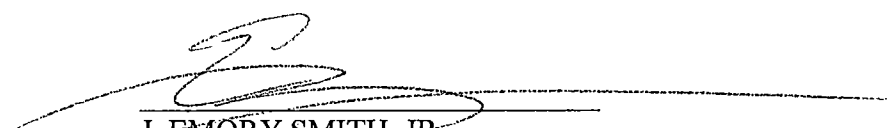
I hereby certify that I have served the Reply to the Return to the Motion to Strike of the

Attorney General upon counsel for the other parties by mailing copies to them at the addresses  
below via the United States Mail this March 9, 2018:

Adam T. Silvernail, Esquire  
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ALAN WILSON  
ATTORNEY GENERAL

March 9, 2018

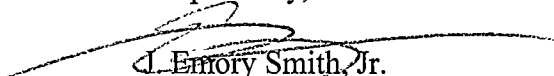
The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
HAND DELIVERY

Re: Bauknight v. Pope, Appellate Case No. 2017-001899  
Reply to Return to Motion to Strike Initial Brief and Designation

Dear Ms. Kitchings:

Enclosed for filing with your Office are the original and six copies of the above Reply together with a certificate of service. Thank you for assistance.

Respectfully,

  
J. Emory Smith, Jr.  
Deputy Solicitor General  
Counsel for the Attorney General

cc: Walter H. Bundy, Jr., Esquire  
M. Brent McDonald, Esquire  
Adam T. Silvernail, Esquire  
Kenneth B. Wingate, Esquire  
Mark V. Gende, Esquire  
Everett A. Kendall, II, Esquire