

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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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

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Appellate Case No.2017-001899

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**RECEIVED**  
SEP 05 2018  
SC Court of Appeals

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.

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**MOTION OF ATTORNEY GENERAL TO STRIKE  
INITIAL REPLY BRIEF AND DESIGNATION OF APPELLANT  
AS TO ATTORNEY GENERAL**

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Attorney General Wilson moves for this Court to strike Appellant Pope's initial Reply brief and Counter - Designation of matter for the record as to Respondent Attorney General<sup>1</sup>. Appellant's Reply brief violates the Appellate Court rules by making new arguments and arguing matters that are not properly supported. Appellant incorporates by reference her Reply to the Brief of the other Respondents. Therefore, to the extent that those Respondents move to strike that Reply brief and related designations, the Attorney General concurs in their legal arguments. As explained below, two of Appellant's Counter-Designations should be struck because they were not presented to the circuit court before this appeal was taken.

### **REPLY BRIEF**

The following parts of Appellant's Initial Reply Brief should be struck.

#### **Preliminary Statement (p. 1)**

The following statement should be struck from Appellant's "Preliminary Statement": "Respondent AG claims it did not authorize itself to be a Plaintiff in the action. See Rule 59(e), Motion citing Deposition of Henry McMaster, pp. 4-5 (R. p. \*); see also Memorandum in Support of Deposition of Attorney General, p. 11 FN 24 (R. p. )." Respondent Attorney General makes no such claim in this action, and it is irrelevant to the issues before this Court. Appellant's Rule 59 motion references without attaching a brief excerpt of former Attorney General Henry McMaster's deposition in another case, but that deposition itself was not filed in the instant case. She also cites to a footnote in a memorandum she filed in which she characterizes the McMaster deposition without including it as an exhibit. Appellant's statement referencing the McMaster deposition should be struck because her characterization of it is

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<sup>1</sup> The Office of Attorney General has checked its mail logs and does not believe that it has ever received by mail Appellant's reply and counter-designation, but undersigned counsel did receive these documents by email. Therefore, we are not requesting that the brief and designation be struck for failure to serve. Instead, we request that they be struck for the other reasons herein.

hearsay, and that deposition was not filed in this case. Rule 1002 (requirement of original); *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 282, 486 S.E.2d 742, 746 (1997)(best evidence rule “provides that when the contents of a writing are sought to be proved, the original document must be produced unless some reason can be shown for its unavailability.”). Appellant’s references are also inconsistent with this Court’s Order of August 26, 2018 that Appellant should not list or refer to documents not presented to the circuit court before this appeal. Appellant cannot avoid that Order by relying on hearsay references to documents not presented to the Circuit Court. She even contradicts herself regarding the Attorney General’s role in this case with her references to the bringing of the civil action by the Attorney General.

Footnote 1 on page 1 of the Preliminary Statement should also be struck because it does not support the sentence to which it is attached, and quotes from a concurring opinion in another case.

### **Reply To Statement Of The Case**

Appellant steps well outside the Rules of Appellate Procedure in replying to the Attorney General’s Statement. The Statement of the case “shall contain a concise history of the proceedings . . . [and] shall not contain contested matters.” Rule 208(b)(1)(C), SCACR. The Attorney General’s Statement complied with this rule in setting forth a concise history of this case. After having already included a Statement of the Case in her initial brief, where it belongs under the rules, Appellant rewrites her previous Statement for purposes of her Reply brief. The Rules of Appellate Procedure do not provide for a Statement of the Case in Reply. Appellant’s new statement contains argument about contested matters and cites documents not appropriate for a statement such as a discovery motion, a FOIA action under separate appeal, and an offer of judgment none of which are the subject of the instant appeal. This entire Reply Statement should

be struck.

### **Immunity (pp. 9 -11)**

As asserted in Respondent Attorney General's initial brief, Appellant abandoned any issue as to the Attorney General's immunity from the counterclaim by failing to argue the issue in her initial brief. Initial Brief of Attorney General at p. 10. Accordingly, immunity is the law of the case and Appellant may not argue the issue on reply. *Id.* As stated in former Chief Justice Toal's book, Toal, Walker, Baker, Appellate Practice in SC, 3d ed., p 436:

No new issues may be raised by the appellant in the reply brief. *See McClurg v. Deaton*, 395 S.C. 85, 716 S.E. 2d 887 (2011) ("It is axiomatic that an issue cannot be raised for the first time in a reply brief." ; *Divine v. Robbins*, 385 S.C. 23, 683 S.E. 2d 286 (Ct. App. 2011)(concluding appellant used the reply brief to argue issues for the first time); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E. 2d 689 (Ct. App. 2001 (finding an issue abandoned when addressed in the reply brief but not in the initial brief).)

Ignoring this authority, Appellant proceeds to argue immunity claiming that she did not abandon the issue in circuit court.<sup>2</sup> Instead, this appeal is the point when Appellant abandoned the issue, and she does not address her abandonment on appeal. She clearly abandoned immunity on appeal and her entire argument regarding it in her Reply brief should be struck.

### **The Second Paragraph Of Argument IV Re Motion To Disqualify**

This paragraph relies on a "fee agreement" that was an exhibit to the August 8, 2016 McMaster deposition. That deposition was not filed below before this appeal was taken. Under this Court's Order of April 26, 2018, Appellant was directed not to list or refer to documents not presented to the circuit court as part of this case prior to this appeal. Therefore, Appellant may

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<sup>2</sup> She claims that the Attorney General waived "sovereign immunity" below by not pleading it as an affirmative defense, but the Attorney General instead argued absolute immunity below (R. pp. \* (Supplemental Memo re Motion to Be dropped) and in his initial brief). Moreover, the circuit court noted that cases indicated that that immunity may be covered by the affirmative defense of failure to state a claim or cause of action or raised in a later pleading after the answer. R. p. \* (Order, p. 5, note 4).

not rely on that deposition exhibit, and this Court should strike that paragraph and the designation of that exhibit.

### **APPELLANT'S COUNTER DESIGNATIONS**

Designation 3, Respondent AG's Response to Appellant's Interrogatories, should be struck as it does not appear to have been filed with the Court in this this case. In accordance with this Court's Order of April 26 of this year, *supra*, it should be struck.

As set forth above regarding the Exhibit 6 to the McMaster deposition, the Exhibit should be struck.

### **CONCLUSION**

The Attorney General respectfully requests that the Court strike the above parts of Appellant's initial Reply brief and counter-designation and that they be refiled without those parts and without additional argument. Because this motion is to strike, the Attorney General does not address otherwise the merits of Appellant's arguments, but reasserts the arguments that he made in his initial brief.

Respectfully submitted,

ALAN WILSON  
Attorney General

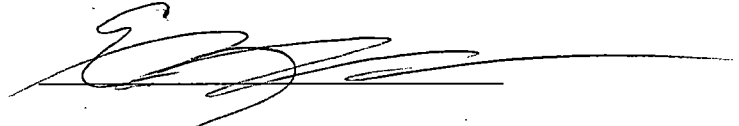
ROBERT D. COOK  
Solicitor General  
S.C. Bar No. 1373

J. EMORY SMITH, JR.  
Deputy Solicitor General  
S.C. Bar No. 5262

[Signature block continues next page]

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Email: [esmith@scag.gov](mailto:esmith@scag.gov)

BY:

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

ATTORNEYS FOR THE ATTORNEY GENERAL

September 5, 2018

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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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  
Trial Court Case 2010CP4004900

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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

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.

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**CERTIFICATE OF SERVICE**

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I hereby certify that I have served the Attorney General's Motion to Strike Appellant's Reply Brief and Counter-Designations upon counsel for the other parties by mailing copies to them at the addresses below via the United States Mail this September 5, 2018:

Adam T. Silvernail, Esquire  
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P.O. Box 7995  
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Deputy Solicitor General  
S.C. Bar No. 5262  
Counsel for the Attorney General



ALAN WILSON  
ATTORNEY GENERAL

September 5, 2018

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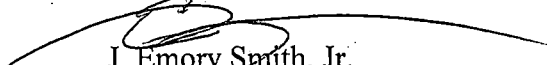
The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
HAND DELIVERY

Re: Bauknight v. Pope, Appellate Case No. 2017-001899

Dear Ms. Kitchings:

I am enclosing for filing with your Office the Motion of the Attorney General to Strike Appellant's Initial Reply Brief and Counter-Designation together with a certificate of service. Thank you for your assistance.

Sincerely,

  
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