STATE OF SOUTH CAROLINA
In the 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

Appellant 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. 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, Respondents.

v.

Adele J. Pope, Defendant,

Of whom Adele J. Pope is Appellant.

FINAL BRIEF OF APPELLANT

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Statement of the Case

This is an appeal from the dismissal of the Attorney General of South Carolina ("AG") as a Plaintiff in a lawsuit he and others filed against Appellant and Robert Buchanan, Jr. in 2010.[1] [R.pp. 176-188; R.p. 1617] Appellant also appeals certain rulings issued prior to the dismissal. [R.pp. 1-2; R.pp. 19-24; R.pp. 33-38; R.pp. 51-53; R.pp. 59-60]

From November 20, 2007, until May 26, 2009, Buchanan and Appellant served as personal representatives under the will of entertainer James Brown dated August 1, 2000 (the "Will") and as trustees of Brown's 2000 Irrevocable Trust ("PR/Trustees").[2] [R.pp. 181-182; R.p. 1617; R.pp. 1378-1386; R.pp. 1464-1503; R.p. 1322; R.pp. 380-382A]

a. Order Granting Plaintiffs' Motion to Set Aside Default

Respondents' Complaint was filed in Richland County on May 19, 2010.[3] [R.pp. 176-188] The Complaint asserts that by appealing a settlement brokered by the AG in 2008, and other acts, Buchanan and Appellant caused tens of millions of dollars damage to the financial legacy of entertainer James Brown. [R.pp. 178-188]

The AG's settlement referenced in the Complaint was approved by the circuit court on May 26, 2009. [R.p. 178] An appeal of the AG's settlement was pending when this

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[1] At the time the suit was filed the Honorable Henry Dargan McMaster was AG. In January 2011 the Honorable Alan McCrory Wilson became AG. [R.p. 688; R.pp. 592-595; R.pp. 708-711]

[2] Buchanan was a party to this suit until July 2012. [R.p.1520; R.pp. 1338-1340; R.pp. 386-389; R.pp. 495-497; R.pp. 580-583; R.pp. 585-591; R.p. 68; R.pp. 1579-80; R.pp. 1108-1139; R.p. 93; R.pp. 72-73]

[3] The case was filed in the Richland County Probate Court, and removed to circuit court. It was assigned to the Honorable L. Casey Manning. [R.p. 178]

suit was filed. [R.pp. 178, 196; R.pp. 2000-2004]

In their Answer and Counterclaim Buchanan and Pope deny all wrongdoing. [R.pp. 337-350] They assert that the AG's settlement and other actions by Respondents have damaged them and James Brown's estate and 2000 Trust. [R.pp. 350-369] The counterclaim seeks actual and punitive damages and offset against Respondents for abuse of process; interference with contract; civil conspiracy; and violations of S.C. Code Ann. § 62-1-106 (2013) of the South Carolina Probate Code ("SCPC"). [R.pp. 364-370]

On November 10, 2010, after Respondents failed to timely respond to Buchanan's and Pope's counterclaims, an Affidavit of Default was filed. [R.pp. 1513-1515]

On November 16, 2010, Respondents served a Motion to Set Aside Entry of Default. [R.pp. 373-375; R.pp. 376-378; R.pp. 577-579] They also served a proposed Response to Buchanan's and Pope's counterclaim. [R.pp. 380-382A; R.pp. 51-53]

On December 17, 2012, a hearing was held on the Motion to Set Aside Entry of Default. [R.p. 52; R.pp. 558-560; R.pp. 485-488; R.pp. 1579-1580; R.pp. 481-484] By order dated October 13, 2015, the circuit court granted Respondents' Motion to Set Aside Entry of Default. [R.pp. 51-53]

b, Order Declining to Disqualify Respondents' Counsel or Enjoin Bauknight

On May 18, 2011, Buchanan and Pope filed a motion to disqualify the law firm of Kenneth Wingate, Esq., from serving as sole counsel of record to the AG while serving as counsel to all remaining Respondents. [R.pp. 477-480; R.pp. 1617-1633; R.pp. 1581-1601; R.pp. 1689-1743; R.pp. 481-484] The motion also sought to enjoin Russell L. Bauknight from purporting to act as agent for the AG and State of South

Carolina. [R.pp. 481-484; R.pp. 1634-1665; R.pp. 1689-1691; R.pp. 493-494; R.pp. 1744-1748; R.pp. 606-07; R.p. 1605; R.pp. 471-473]

The motion was based in part on a May 4, 2011, Inventory of James Brown's assets filed by Bauknight valuing James Brown's music empire at $4,697,736. [R.pp. 478-79] The motion asserted that the approximately $4.7 million value was less than 1/ 12 the actual fair market value of Brown's music empire. [R.p. 478]

The motion asserts Respondents' counsel cannot simultaneously represent the AG, who has a duty to protect Brown's private foundation, while representing Respondent Terry Brown ("Terry"), who is seeking to purchase the music empire. [R.pp. 478-79] The motion asserts that a sale to Terry at $5 million would reduce Brown's "I Feel Good" charity from its correct $80 million value to less than $1 million. [R.pp. 478-79; R.pp. 1581-1588; R.pp. 1634-1655; R.pp. 1617-1633]

The motion also asserts that the Wingate contract with the AG is void and violates Buchanan's and Pope's Due Process[4] and First Amendment[5] rights. [R.pp. 478-480; R.pp. 1581-1588; R.pp. 1634-1665; R.pp. 1689-1691]

Based on Bauknight's May 4, 2011 Inventory, Buchanan and Appellant also sought to enjoin Bauknight from purporting to act as agent for the AG or the State of South Carolina. [R.pp. 478-480; R.pp. 1581-1588; R.pp. 1689-1691; R.pp. 1634-1665; R.pp. 552-557]

A hearing was held on the motion on April 12, 2012. [R.pp. 59-60] On July 5,

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[4] U.S. Const., amend 1; U.S. Const., amend. XIV § 1.

[5] U.S. Const., amend 1; U.S. Const., amend. XIV § 1.

2012, the circuit court denied the relief sought in the motion. [R.pp.59-60; R.pp. 618-627]

c. Protective Order as to Deposition of Attorney General Wilson

In 2016 AG Wilson filed a motion to bar the taking of his deposition in this case. [R.p. 33] The AG asserted that he was not AG when this lawsuit was instituted; that he lacked personal knowledge of all or most of the matters at issue in this suit; that all or most of the questions which might be asked would be subject to privilege; and that the deposition would interfere with his duties as AG. [R.pp. 33-34; R.pp. 1996, 2008-2019]

On August 29, 2016 a hearing was held on the AG's motion. [R.p. 33; R.pp. 1177, 1200-1212] By order dated September 21, 2016 the circuit court directed that the deposition of the AG not be taken in this case. [R.pp. 33-38]

d. Order Granting AG Alan Wilson's Motion to Be Dropped as Party

On March 25, 2013, following the South Carolina Supreme Court's first decision in *Wilson v. Dallas,* filed February 27, 2013, the AG filed a motion under Rule 21, *South Carolina Rules of Civil Procedure* (" SCRCP") to be dropped as a party to this suit. [R.p. 20; R.pp. 1800-1803; R.pp. 961-963; R.pp. 787-789; R.pp. 59-60; R.pp. 1749-1750; R.pp. 596-601; R.pp. 54-56; R.pp. 1755-1764]

On May 10, 2013 Respondents' counsel filed a Motion to be Relieved as Counsel for the AG. [R.pp. 810-811; R.p. 855] Counsel also sought a stay of all matters in this case. [R.pp. 1798-1799; R.p. 1802; R.pp. 794-799]

On April 22, 2014 the AG and other Respondents filed a written motion to stay this case. Appellant opposed the motion. [R.pp. 812-813; R.pp. 1808-1813]

On March 2, 2016, the circuit court issued a stay in this case pending further order

of the court. [R.p. 1897] Appellant objected to the stay. [R.pp. 841-845; R.pp. 1897-1910] The stay was lifted. [R.p. 44]

On June 7, 2016, Respondents' counsel filed a Notice Withdrawing Motion to be Relieved as Counsel to the AG. [R.pp. 854-855]

In 2016 and 2017 the AG and other Respondents, though counsel, were involved in substantial discovery. [R.pp. 839-840; R.pp. 846-847; R.pp. 1931-1938; R.pp. 42-43; R.pp. 943-945; R.pp. 946-948; R.pp. 1924-1930; R.pp. 851-853; R.pp. 848-850; R.pp. 1177-1218; R.pp. 25-26; R.pp. 31-32; R.pp. 1808-1813; R.pp. 2100-2210; R.pp. 2094-2096; R.pp. 949-952; R.pp. 27-28; R.p. 2227 (Under Seal); R.pp. 31-32; R.pp. 956-963; R.pp. 25-26; R.pp. 969-974; R.pp. 1939-1995]

In 2016 the AG and other Respondents filed a Motion for Partial Summary Judgment as to Appellant's counterclaims.[6] [R.pp. 1177, 1206-1232; R.pp. 983-1053]

On August 29, 2016, a hearing was held on the AG's motion to be dropped as a party under Rule 21. [R.pp. 1177-1214, 1217-1233; R.p. 20]

By order dated May 31, 2017, the AG's motion to be dropped as a party under Rule 21 was granted. [R.p. 20]

On August 2, 2017, Appellant's motion to alter, amend or vacate the order dismissing the AG as a party was denied. [R.pp. 1-2] Appellant received it on August 14, 2017.

The Notice of Appeal was served and filed on September 12, 2017.

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[6] Appellant had previously moved for summary judgment as to the AG and others. [R.pp. 787-789]

Statement of Facts[7]

On May 8, 2013 the South Carolina Supreme Court issued its final decision in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). [R.p. 20] By May 10, 2013, Bauknight had been temporarily reinstated as Brown's fiduciary. He continues to be Trustee of Respondent Legacy Trust. [R.p. 179]

On May 29, 2013, counsel for Tommie Rae Brown ("Tommie Rae"), Deanna Brown Thomas ("Deanna") and other Respondents announced to Judge Early their intention to reinstate the AG's settlement the Supreme Court had just voided. [R.p. 1079, ¶142 – 146]

On June 13, 2013, at the request of Tommie Rae and other Respondents, Judge Early issued orders excluding Buchanan and Pope from participating in any Aiken County case except their own claims cases. [R.pp. 1079-1080; R.p. 1044]

In August 2013, Tommie Rae and Respondent James B. filed Termination Notices with the U.S. Copyright Office. They were seeking to secure, between 2015 and 2023, U.S. royalties from more than 90 of the 900 copyrights James Brown gave his "I Feel Good" Charity [R.pp. 1091-1093]

In his August 2013 deposition, Bauknight was questioned about the $4.7 million at-death valuation of Brown's music empire (Schedule F, Estate Tax Return) prepared by Philpott, Ball and Werner ("PBW"). [R.pp. 2103-2106] Bauknight identified Peter Afterman as the only "person familiar with the estate and the music industry and commonsense view of business and popular culture" he could recall who had consulted

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[7] Appellant incorporates the Statement of the Case in this Statement of the Facts.

with PBW. [R.pp. 2103-2104]

In 2015 Tommie Rae was paid $1 million dollars for what she described as the sale of three of Brown's 900 copyrights. [R.p. 2011]

On October 13, 2015, the circuit court granted Respondents' November 2010 Motion for Relief From Default. [R.pp. 51-53]

In deposition testimony in 2016, the Honorable Henry McMaster, now Governor of South Carolina ("Governor McMaster") testified that he had not authorized this suit to be brought in the name of the AG, and did not authorize Bauknight to bring this suit on behalf of the AG. [R.pp. 1055-1058]

In 2016 the AG, Legacy Trust, and other Respondents moved to consolidate discovery in this case with discovery in Aiken County Case 2013-CP-02-1337 ("Aiken 1337"). [R.pp. 846-847; R.pp. 31-32]

On May 17, 2016 the AG and others moved for summary judgment as to the counterclaims raised by Buchanan and Pope. [R.p. 984]

In 2016, Respondent James B. was awarded approximately $700,000 in legal and GAL fees from James Brown's estate. [R.pp. 2011-2012]

At the request of AG and other Respondents, Appellants' 139 boxes of documents compiled in this case were made available for inspection and copying by Respondents' counsel the week of May 1, 2017. [R.p. 30]

On March 9, 2017, at the request of the AG and other Respondents, the circuit court issued an order requiring all affidavits filed by Appellant to be filed under seal, and sealing, without review, an Affidavit of Appellant. [R.pp. 27-28]

On March 27, 2017 Appellant's valuation expert Richard B. Alexander, was

deposed by Bauknight's counsel in Aiken 1337. [R.pp. 2178-2191]

In March 2017, Respondents' Termination Rights expert Roger Miller confirmed that James Brown's music catalog was "solid gold," and that $45 million to $60 million would be expected for the value of copyrights at his death in 2006. [R.pp. 995-996; R.pp. 2109-2110; R.pp. 1104-1105]

On April 10, 2017 Appellant's expert Wallace K. Lightsey, Esq. was deposed in Aiken 1337. [R.pp. 2157-2176]

On April 11, 2017 Thomas Pope, Esq., was deposed in Aiken 1337. [R.pp. 2191-2208]

On April 14, 2017, Respondents' expert Ellison Thomas, CPA, was deposed. [R.pp. 2145-2156]

On April 20, 2017, Respondent Tommie Rae stated in a filing in this case:

> Ms. Pope's ill-considered appeal of the 2008 settlement agreement cost the charitable trust tens of millions of dollars. In that agreement, as the court is well-aware, Mrs. Brown and the Brown children contributed approximately 50% of all the termination right proceeds to the charitable trust. Because Ms. Pope succeeded in destroying the settlement agreement, the charitable trust lost the right to these tens of millions of dollars of termination rights proceeds. Because Mrs. Brown has now agreed to contribute 65% of her share of the termination rights proceeds, the charitable trust will benefit immensely. It appears, however, that the Brown children's share of the termination rights proceeds will remain irretrievably lost to the charitable trust – thanks to Ms. Pope's appeal. [R.p. 972, footnote1]

By 2017 some Respondents had asserted that Tommie Rae was not Brown's spouse, thus having no Termination Rights. [R.p. 1048; R.pp. 2118, 2133]

Argument

I. The lower court erred in granting the Attorney General and other Respondents relief from default as to Buchanan's and Pope's counterclaims.

A. This Court's Standard of Review for Lower Court Order Setting Aside Entry of Default

A court may set aside an entry of default if good cause is shown. Rule 55(c), SCRCP. Whether good cause is established is left to the sound discretion of the lower court. *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). An abuse of discretion arises if the lower court's decision is controlled by an error of law or is without evidentiary support. *Bage, LLC v. Se. Roofing Co. of Spartanburg, Inc.*, 373 S.C. 457, 471, 646 S.E.2d 153, 160 (Ct. App. 2007). A failure to exercise discretion amounts to an abuse of that discretion. *Samples v. Mitchell,* 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997). When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred. *Balloon Plantation, Inc. v. Head Balloons, Inc.,* 303 S.C. 152, 155, 399 S.E.2d 439, 441 (1990). In determining whether to set aside an entry of default, the factors the lower court "should consider are: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Bage* at 472, 646 S.E.2d at 161.

B. Discussion

In an order dated October 13, 2015, the lower court set aside the entry of default as to all Plaintiffs under Rule 55 SCRCP. The court held that the Attorney General was never in default, and that Respondents had shown good cause for such relief. The court relied on Rule 55 (c) SCRCP , which states in relevant part that "[f]or good cause shown the court

may set aside an entry of default..."

The court also relied on *Wham v Shearson Lehman Bros.* 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989).

In 2015 our Supreme Court reiterated the standard for a party seeking relief from an entry of default. In *White Oak Manor, Inc., v. Lexington Insurance Company*, 407 S.C. 1, 753 S.E.2d 587 (2014), our Supreme Court ruled as follows:

> The standard for granting relief from an entry of default under Rule 55(c) is "mere good cause." 'This standard requires a party seeking relief from entry of default under Rule 55 (c) to provide an explanation for the default and give reasons why vacation of the entry of the default would serve the interests of justice." *Sundown Operating Co., v. Intedge Indus., Inc.* 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).
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> 'Once a party has put forth a satisfactory explanation for the default, the trial court must consider: (1) the timing of the motion for relief: (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the Plaintiff if relief is granted.' *Id.* at 607-608, 681 S.E.2d at 888. [Emphasis supplied].

Respondents did not meet the first prong of the test. Buchanan's and Appellant's Answer and Counterclaim was timely served on Respondents' counsel at his proper address by hand-delivery. [R.pp. 1513-1515; R.pp. 373-375] Counsel does not recall receiving the Answer and Counterclaim, but his file contains a copy with his own handwritten notation. [R.pp. 1535-1537]

As explained in *White Oak Manor*, id., a determination of "good cause" under Rule 55, SCRCP, requires first that the defaulting party must provide a justifiable explanation for the default and give reasons why vacation of the default would serve the interests of justice. Respondents' motion does not meet that test.

In *Roche v. Young Brothers, Inc.* 318 S.C. 207, 456 S.E.2d 897 (1995), the Supreme

Court ruled that "losing a summons and complaint within the corporation" was not a ground to set aside default. *Id* at 212, 456 S.E.2d at 900. In that case the Supreme Court reinstated the entry of default and remanded the case for a damages hearing.

In *Richardson v. PV, Inc.,* 383 S.C. 610, 682 S.E.2d 263 (2009), the Supreme Court held that the insurance company's negligence in failing to timely answer was imputed to the insured, and was not "good cause." The courts have consistently held that "the negligence of an attorney or an insurance company is imputable to a defaulting litigant." *Richardson*, 682 S.E.2d at 267, citing *Roberts v. Peterson,* 292 S.C. 149, 355 S.E.2d 280 (Ct.App. 1987).

Respondents presented no evidence with the filing or at the hearing of a meritorious defense. [R.pp. 1535-1537]

Had the AG and other Respondents met all other criteria for relief for default, the degree of prejudice to Buchanan and Pope should still have precluded a grant of relief from default.

When this suit was filed, the devaluation to $4.7 million was already in progress. [R.pp. 1996-2020; R.pp. 997-998] In addition, Respondent James B. had already filed a Petition for Review of Compensation in Aiken. [R.pp. 193-203; R.pp. 383-385; R.pp. 87-92] The only basis for this suit was to damage Buchanan and Pope in order to derail the appeal, which became *Wilson.*

The prejudice to the careers of two lawyers when the State's highest legal officer, for seven years, has claimed they have committed the federal felony of overstating the value of the assets of a world-renowned entertainer in sworn IRS filings for the

improper purpose of securing a $5 million commission cannot be overstated.[8] [R.pp. 814-823; R.pp. 1852-1854]

The finding that the AG was never in default is erroneous. When the AG elects to enter a proceeding, he must abide by the Rules of Civil Procedure. *Ex Parte Condon v. State*, 354 S.C. 634, 583 S.E.2d 430 (2003). [R.pp. 1842-1851]

The Order Granting Relief From Default should be reversed. The matter should be remanded for a determination of damages.

II. The lower court erred in failing to disqualify Respondents' counsel from representing the Attorney General and failing to enjoin Bauknight from acting on behalf of the Attorney General.

A. This Court's Standard of Review for the Order Denying Motion to Disqualify and Injunction

A circuit court's ruling on a motion to disqualify a party's attorney is reviewed for an abuse of discretion. See *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 347–48, 450 S.E.2d 66, 75 (Ct. App. 1994) (finding no abuse of discretion in the circuit court's ruling disqualifying an attorney from acting as an advocate but allowing the attorney to act as a witness). "An abuse of discretion occurs when the [circuit] court's ruling is based on an error of law or is not supported by the evidence." *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 225, 781 S.E.2d 548, 556–57 (2015).

"Actions for injunctive relief are equitable in nature." *Shaw v. Coleman*, 373 S.C. 485, 492, 645 S.E.2d 252, 256 (Ct. App. 2007). When reviewing actions in equity, this Court may "correct errors of law and may find facts in accordance with its own view of the

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[8] In 2017 the AG began taking the position that he is protected for his acts in this suit by prosecutorial immunity. [R.pp. 2088-2092]

preponderance of the evidence." *Blackmon v. Weaver*, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005).

B. Discussion

This is the first case known to Appellant within the State, and perhaps within the nation, where the State/AG, through a private law firm, has joined with private non-residents of the State, including minors without GALs, to bring a tort suit against fiduciaries protecting a 501(c)(3) charity, for the benefit of the individuals. [R.pp. 1308-1310; R.pp. 1337-1338; R.pp. 178-180]

Although the AG is not an attorney in the proceeding, the office of the AG – and not the State's general fund – will receive 10% of the legal fees payable to Respondents' counsel related to the charity. [R.pp. 1060-1061]

Allowing Respondents' counsel to wield the power of the State against Defendants in this case under these facts is inconsistent with all notions of Due Process under the U.S. and South Carolina Constitutions, as well as the separation of powers provisions of the South Carolina Constitution.[9] Because the issue is jurisdictional, it may be raised at any time. *Hallums v. Bowens*, 318 .S.C 1, 3, 428 S.E.2d 894 (Ct. App. 1993).

> In the two-page order issued on July 5, 2012, the lower court declined to disqualify Respondents' counsel from being sole counsel to the State/AG, and Bauknight from purporting to act "on behalf of the Attorney General of South Carolina." [R.pp. 59-60]

It was improper in 2012 for the private Sweeny, Wingate & Barrow, PA to represent the AG while carrying out its duty to Tommie Rae and others seeking to

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[9] U.S. Const., amend. I and amend. XIV, S.C. Constitution, Article 1, § 8.

dismember Brown's "I Feel Good" charity. In 2013, after *Wilson*, it was patently improper.

It is unconstitutional and a violation of the State's Separation of Powers Clause for a private law firm to represent the State/AG in a suit over which the AG does not exercise appropriate control; is not named as counsel on the pleadings; but will get ten percent of the fee taken from trustees protecting a charity the AG has a duty to protect. That is the case here. [R.pp. 337-341, 349, 360-361; R.pp. 1335-1338; R.pp. 1539-1557]

It is also improper for a private person, without legal written authorization of any kind, to bring and continue for almost eight years a tort suit "on behalf of the Attorney General of South Carolina."

The Order of July 5, 2012, should be reversed. The Wingate Firm should be disqualified from representing the AG in this case. Bauknight should be enjoined from purporting to speak on behalf of the AG. The caption of the case should be adjusted accordingly.

III. The lower court erred in ruling that Attorney General Wilson cannot be deposed in a tort suit the Attorney General brought in 2010.

A. This Court's Standard of Review for the Order Preventing Deposition of Attorney General Wilson

"The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion.... An abuse of discretion occurs when there is no evidence to support the trial judge's factual conclusion or when the ruling is based upon an error of law." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001) (internal citations omitted). This standard of review should be coupled

with the law related to discovery that "[t]he gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct.App.2003). "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required." *Downey v. Dixon* 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct.App. 1987).

B. Discussion

The lower court order issued on September 21, 2016, states in part:

> 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. . .
> ...THIS COURT ORDERS that the Motion of the Attorney General be granted and ORDERS that his deposition not be taken in this case. [R.pp. 33-38]

The order states that *United States v. Morgan,* 313 U.S. 409, 313 U.S. 409 (1941) is consistent with *In re Whetstone*, 580 S.E.2d 447, 354 S.C. 213 (2003) which held that the modern trend of courts is not to allow 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. [R.pp. 1996-2020]

This case is clearly distinguishable from *Whetstone*, in which the judge played a neutral role in the earlier case. In this case, since January 2011, AG Wilson has had direct personal control over his own tort claims; those of Bauknight as his claimed agent; and those of the Legacy Trust he controls through Bauknight.

The AG is directly seeking a tort recovery for the benefit of the Legacy Trust, which he claims is private. [R.pp. 176-188; R.pp. 1883-1891; R.pp. 780-782; R.pp. 824-826; R.pp. 783-784; R.pp. 834-835] His office is seeking ten percent of legal fees in a case in which he asserts he is not participating. [R.pp. 985-986] *Morgan* and its progeny are distinguishable because the public officials whose depositions were prohibited had not assumed the direct, personal role the AG has assumed here. [R.pp. 1883-1891; R.pp. 780-782; R.pp. 824-826; R.pp. 783-784; R.pp. 834-835]

Governor Henry McMaster testified in depositions in 2016. [R.p. 985] Together, McMaster and AG Wilson exercised, through Bauknight, effective control over the James Brown's music empire from 2009 until 2013. [R.pp. 1852-1855] Today AG Wilson controls this litigation by his control over Bauknight. AG Wilson has control over the Legacy Trust through his 50% vote and his right to remove and replace Bauknight at will. [R.p. 985] These actions bear no relation to *Morgan.*

Even if *Morgan* were applicable it would be appropriate to depose AG Wilson, a "highly placed executive branch official." Appellant has made a clear showing that the AG's testimony is essential to prevent prejudice or injustice to Appellant, the party requesting the deposition.

Since 2011 AG Wilson has placed the power of the State behind a lawsuit his predecessor AG says he did not authorize. [R.p. 985] He and Tommie Rae, today, hold 75% voting control of Respondent Legacy Trust. AG Wilson has the absolute right to remove and replace the Trustee. He is responsible for condoning the $4.7 million value Bauknight used in IRS filings, and the resulting damage. AG Wilson has used FOIA to prevent release of the handwritten admissions of Tommie Rae that she was married;

living with her husband; and possibly pregnant before her bigamous ceremony with James Brown. [R.p. 1066, ¶ 80]

AG Wilson does not dispute that on March 6, 2013, Pope met with him; advised him of the disastrous tax consequences and loss to the needy students of the $4.7 million value and Bauknight's IRS filings. [R.p. 1013] He does not deny that after the first *Wilson* decision he was advised both by Appellant and Adam Silvernail, Esq. that the damage to the "I Feel Good" charity by the problematic IRS filings could have been solved by any trustee except Bauknight.

Solicitor General Robert Cook, who was deposed in Aiken 1337, attended the March 2013 meetings. [R.pp. 1002, 1031]

No testimony other than that of AG Wilson will explain the essential issues of this case. Why did the State/AG begin and continue, with this lawsuit, a relentless attack on PR/Trustees who were conducting a reasonable appeal to protect James Brown's "I Feel Good" Trust as well as his private trust for seven grandchildren? Why did the AG, with no investigation, continue to sue Buchanan and Pope claiming they committed serious tax fraud? Why did the AG continue the attack after March 6, 2013, when the problems caused by the Bauknight/Afterman valuation were personally explained to the AG, his Chief Deputy and the Solicitor General? Why did the AG not take steps to appoint a trustee who, as a result of the *Wilson* decision, could have easily and inexpensively corrected the IRS filings; paid the relatively small estate taxes due; and prevented putting 1/3 of Brown's "I Feel Good" Trust's assets into a trust that will ultimately go to the charity, but be taxed for more than twenty years?

Increasingly more important is the question of why the AG has continued to be

aligned with Tommie Rae. Why has he praised Bauknight while Bauknight, who allowed Afterman to help Tommie Rae take royalties from the "I Feel Good" charity with defective Termination Notices? And why has the AG allowed Bauknight to spend millions of dollars in legal fees to defeat the claims of Buchanan and Pope while allowing James B. to secure a $700,000.00 legal and GAL fee? [R.pp. 983-1053]

The AG and Tommie Rae have disparaged Buchanan's and Pope's reputations, careers and standing in the legal community since 2010. He is a Plaintiff in this case. He is the only person who controls the Legacy Trust, the primary beneficiary of the claims stated in the Complaint. [R.pp. 178-189]

The order directing that the AG not be deposed should be reversed. He should be deposed at a mutually convenient time.

IV. The lower court erred in dismissing the Attorney General as a party under Rule 21 SCRCP.

A. This Court's Standard of Review for Order Dropping Attorney General as a Party Pursuant to Rule 21, SCRCP.

"Rule 21 deals with situations where the absence of a necessary party or the misjoinder of parties in the action would warrant the dismissal of the suit." *Valentine v. Davis*, 319 S.C. 169, 460 S.E.2d 218 (Ct. App. 1995) citing *Mendelsohn v. Whitfield*, 312 S.C. 17, 430 S.E.2d 524 (Ct.App.1993), modified, 312 S.C. 226, 439 S.E.2d 845 (1994). "Trial judges in South Carolina have the authority to realign parties. Beyond a court's inherent authority to manage and conduct a trial, our Rule 21, SCRCP, regarding joinder of parties is identical to the federal rule, Rule 21, FRCP." See *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010). Federal courts rely on Rule 21 as authority to realign parties. *Id* citing *In-Tech Mktg. Inc. v. Hasbro, Inc.*, 685 F.Supp. 436, 442 n. 19

(D.N.J.1988) (noting that Rule 21 "permits [the District] Court, *sua sponte* to re-align *any* party at *any* time"); *First Nat'l Bank of Shawnee Mission v. Roeland Park State Bank & Trust Co.,* 357 F.Supp. 708, 711 (D.Kan.1973) (noting that the District Court "may order a realignment of the parties 'on such terms as are just'" pursuant to Rule 21).

The South Carolina Supreme Court has recognized the authority of a trial court to realign parties "at any stage of the action." *Branham,* 701 S.E.2d 5. "The decision whether to realign the parties lies within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice." Id.

The issue in the present case is that the Rule 21, SCRCP, the Rule relied upon by the lower court, standard of review is inapplicable because Rule 21, SCRCP does not provide any authority for the relief sought by the Respondent.

B. Discussion

Since May 19, 2010 the AG, with others, has used this case as the launch pad to attack the two James Brown fiduciaries who challenged the AG's claimed right to take personal control of James Brown's assets; give $20 million of Brown's assets to Tommie Rae; and declare her Brown's spouse, dismembering the plan to protect Brown's "I Feel Good" charity from dissipation by the improper exercise of Termination Rights under Sections 203 and 304 of the Copyright Act. [R.pp. 1539-1577; R.pp. 704-705; R.pp. 687-689; R.pp. 1798-1799; R.pp. 1306-1321; R.pp. 984-1052]

The AG's complaint asserts that Buchanan and Pope are both greedy and incompetent. [R.pp. 179-189] It asserts they did not understand Termination Rights or tax issues facing Brown's estate and 2000 Trust. [R.pp. 181-188] It even accuses

Buchanan and Pope of the federal felony of overstating the value of Brown's assets to the IRS for the purpose of obtaining a $5 million commission. [R.p. 186]

Since May 2013 this lawsuit has continued to be the AG's platform to discredit Buchanan and Pope as Tommie Rae and the Will contestants seek to reinstate the AG's 2008 settlement. [R.pp. 1798-1799; R.pp. 810-811; R.p. 854; R.pp. 984-1052]

In April 2011, in response to the AG's announcement of the devaluation of Brown's assets to $12 million, Smith and Pope wrote *Private Foundations, Copyright Heirs and Musical Millionaires: why the James Brown "I Feel Good" Trust doesn't...*[10] [R.pp. 1335-1338; R.pp. 1581-1600]

Private Foundations demonstrated how the combination of the AG's incorrect heirs determination and Bauknight's devaluation to $12 million would leave the "I Feel Good" charity with almost nothing. It also discussed general strategies for charities owning copyrights to follow to protect themselves from attempts by claimed heirs to exercise Termination Rights. [R.pp. 1589-1600] Since 2011 the AG and Bauknight have worked together to prevent release in discovery or under FOIA of the documents, which show the damage caused by the AG to Brown's charity, and to Buchanan and Pope in this suit. [R.pp. 1808-1827]

In 2012 the AG supported vicious attacks on Appellant when she sought to void 2008 *ex parte* gag orders preventing discussion or release of copies of Tommie Rae's handwritten admissions that she was not married to Brown. [R.p. 704, R.pp. 744-749]

In October 2012, the AG's Chief Deputy John W. McIntosh, C. H. Jones, Esq.,

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[10] *Private Foundations* was based on the AG's initial claim of a $12 million value. [R.pp. 1335-1338]

and Mary Frances Jowers, Esq., attended the first mediation in this case. [R.p. 768]

Before the mediation, the AG moved to strike, and filed, Offers of Judgment made to the AG, some minors, and others, to let them out of this suit. [R.pp. 687-689]

On March 6, 2013, after the first *Wilson* decision, the AG met with Pope. The serious problems and damage to needy students of the Bauknight $4.7 Million value and need to correct IRS filings were discussed. [R.pp. 2012-2013] On May 29, 2013, Tommie Rae's lawyer and Levenson announced to Judge Early their intention to reinstate the AG's settlement. With Bauknight, they asked that Buchanan and Pope not be allowed to participate in James Brown hearings. [R.p. 1002] On October 22, 2015, the Chief Deputy and three Assistant AGs attended the second mediation in this case. [R.pp. 834-835]

In 2016 the AG and Respondents tried to consolidate discovery in this case with Appellant's claims case. [R.pp. 953-955] The AG, with others, moved for partial Summary Judgment. [R.pp. 983-1053] The AG's motion seeking partial summary judgment and his motion seeking to be dropped as a Plaintiff under Rule 21 SCRCP were heard the same day. [R.pp.1177, 1209-1213, 1217-1223]

Rule 21, in relevant part, states:

> Rule 21
> MISJOINDER AND NON-JOINDER OF PARTIES
>
> ...Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

At the time the AG was dismissed, discovery was proceeding. [R.pp. 820-823] The AG was seeking partial summary judgment as to Appellant's counterclaims against him.

[R.pp. 984-1052]

Rule 21 SCRCP deals with situations where the absence of a necessary party or misjoinder of parties in the action would warrant dismissal of the suit. *Mendelsohn v. Whitfield,* 312 S.C. 17, 430 S.E.2d 524 (Ct. App. 1993), modified, 312 S.C. 226, 439 S.E. 2d 845 (1994). That is not the case in this suit.

As stated in *Valentine v. Davis,* 460 S.E.2d 218 (1995), the rules of civil procedure should not be tortured in such a way as to correct misjudgments in strategic positions. In 2010 the AG, with others, made the strategic decision to file this suit and attack Buchanan and Pope to try to stop the *Wilson* appeal.

In a sharp 2010 memorandum opposing Buchanan's and Pope's Motion to Dismiss, the AG claimed he was a proper party to help "seek redress for the substantial injury done to the financial legacy of one of South Carolina's most famous and generous icons, the late James Brown." [R.p. 1306] He claimed the damage caused by Buchanan and Pope "could be in the tens of millions of dollars", and that Buchanan's and Pope's damage "threatens the fulfillment of the very legacy they were charged with protecting." [R.p. 1307]

The AG claimed that this Richland County case was not substantially similar to the four James Brown cases then pending in Aiken. [R.pp. 1310-1313]

The AG challenged Buchanan's and Pope's "general contention that the AG is exceeding his statutory and constitutional authority by being a plaintiff in a private tort suit." [R.pp. 1313-1317] The AG said Judge Early, in approving the settlement, "plainly ruled that the Attorney General has the very authority and standing that Defendants seek to deny." [R.p. 1314]

The Attorney General characterized Buchanan's and Pope's assertion that

Bauknight was an improper agent for the AG as part of their "tireless effort to prevent the approval of the Settlement Agreement," an argument, they asserted, Buchanan and Pope , "pursued and lost." [R.pp. 1313-1314]

The AG asserted that his right to engage the Wingate firm had been resolved in his favor by *South Carolina v. Eli Lilly and Co.* Circuit Court case no.07-CP-42- 1855.

For more than seven years, the AG has allowed the State's mighty power to be applied to damage Buchanan and Appellant in this suit. The AG has participated in or condoned the devaluation of Brown's music empire to $4.7 million. He has failed to correct tax filings. [R.pp. 994-1004]

The lower court misapplied Rule 21 when it dismissed the AG as a Plaintiff and counterclaim Defendant in this suit. Even if Rule 21 could be read to apply, dismissal in this case would be unjust. The order dismissing the AG as a Party should be reversed.

Conclusion

For the reasons stated herein, the Court should reverse the lower court's order dismissing the AG as a Plaintiff; reverse the order granting Respondents relief from default; disqualify the Wingate firm as counsel for the AG; enjoin Bauknight from asserting that he is acting on behalf of the AG and State; and remand the matter to the circuit for action consistent with these rulings.

Respectfully submitted,

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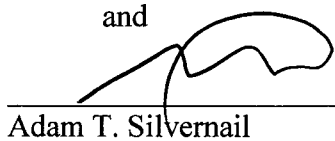

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December 4, 2018

STATE OF SOUTH CAROLINA
In the 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

Appellant 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. 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, Respondents.

v.

Adele J. Pope, Defendant,

Of whom Adele J. Pope is Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR

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December 4, 2018