

THE 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
Trial Court Case No. 2010-CP-40-4900

RECEIVED

JAN 11 2019

SC Court of Appeals

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. 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 and Robert L. Buchanan, Jr., Defendants,

Of whom Adele J. Pope is the Appellant.

FINAL BRIEF OF RESPONDENTS

Kenneth B. Wingate, S.C. Bar No. 8004
Mark V. Gende, S.C. Bar No. 72835
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street (29201)
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233
kbw@swblaw.com
mvg@swblaw.com
Attorneys for Respondents

THE 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
Trial Court Case No. 2010-CP-40-4900

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. 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 and Robert L. Buchanan, Jr., Defendants,

Of whom Adele J. Pope is the Appellant.

FINAL BRIEF OF RESPONDENTS

Kenneth B. Wingate, S.C. Bar No. 8004
Mark V. Gende, S.C. Bar No. 72835
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street (29201)
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233
kbw@swblaw.com
mvg@swblaw.com
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS

A. Statement of Relevant Facts..... 1

B. Facts Relevant to Issue One: Setting Aside the Default 4

C. Facts Relevant to Issue Two: Disqualification of Counsel and Enjoining Mr. Bauknight)..... 6

ARGUMENT 7

I. The Amended Initial Brief of Appellant contains vast amounts of material that is irrelevant to the issues on appeal, and the irrelevant material should be stricken from her appeals or her appeals should be dismissed with prejudice. 7

A. The legal standard concerning matter included in an appeal..... 7

1. South Carolina Appellate Court Rules..... 7

2. South Carolina case law 9

3. Other jurisdictions’ case law 10

B. A listing of the extensive amount of irrelevant matter included in the Amended [Initial] Brief of Appellant 12

C. All irrelevant matter should be stricken or her appeals dismissed with prejudice..... 14

II. The Circuit Court did not abuse its discretion when it granted Respondents’ motion to set aside entry of default..... 15

A. The appellate standard of review for Rule 55(c) motions is “abuse of discretion”. 15

B. The Circuit Court properly exercised its discretion in granting Respondent’s motion to set aside entry of default..... 16

1. The Court considered and accepted Respondents’ explanation of “good cause.” 16

2. The Circuit Court correctly rejected Appellant’s arguments against a finding of good cause..... 19

3. The Circuit Court properly considered all of the factors set forth in Wham v. Shearson Lehman Bros. 21

a. The Circuit Court concluded that Respondents had acted promptly in response to the notification of default..... 21

b.	The Court concluded Respondents presented evidence of a meritorious defense.	22
c.	The Circuit Court concluded there was no prejudice to Appellant in setting aside the default.	23
4.	The Circuit Court also articulated additional grounds for setting aside the default.	25
a.	Respondents were otherwise defending under Rule 55(a), SCRCF.....	25
b.	The Attorney General was not in default under Rule 55(e), SCRCF.....	26
C.	Therefore, the Circuit Court did not abuse its discretion, and its Order setting aside the default must not be overturned.	26
III.	The Court did not err in denying Appellant’s motion to disqualify Sweeny, Wingate & Barrow, P.A., from representing the Attorney General and to enjoin Bauknight from purportedly speaking on behalf of the Attorney General, and Appellant makes only conclusory statements about the same, with no support from the law or the record and, therefore, has abandoned her appeal on these issues.	27
A.	Conclusory statements lacking support of the law or the record require the appellate court to conclude that Appellant has abandoned her appeal of these issues.	27
B.	Should Appellant not be deemed to have abandoned these issues, Respondents rely on their arguments outlined in their Memorandum of Law in Opposition, <i>inter alia</i> , to Disqualify Sweeny, Wingate, and Barrow, to Enjoin Russell Bauknight.	28
	CONCLUSION.....	29

TABLE OF AUTHORITIES

Cases

<u>Cooley v. S.C. Tax. Comm'n</u> , 204 S.C. 10, 28 S.E.2d 445 (1943).....	29
<u>Ex Parte Condon v. State</u> , 354 S.C. 634, 583 S.E.2d 430 (2003)	26
<u>First Sav. Bank v. McLean</u> , 314 S.C. 361, 444 S.E.2d 513 (1994)	27
<u>Hallum v. Bowens</u> , 318 S.C. 1, 428 S.E.2d 894 (Ct. App. 1993)	27
<u>Harbor Island Owners' Ass'n v. Preferred Island Prop., Inc.</u> 369 S.C. 540, 633 S.E.2d 497 (2006).....	15
<u>Henning v. Kaye</u> , 307 S.C. 436, 415 S.E.2d 794 (1992)	9
<u>Inter-City Prods. Corp. v. Willey</u> , 149 F.R.D. 563 (M.D.Tenn.1993)	20
<u>Jackson v. Davis</u> , 153 So.3d 820 (2014).....	12
<u>In re Maxton</u> , 325 S.C. 3, 478 S.E.2d 679 (1996)	10
<u>McClurg v. Deaton</u> , 380 S.C. 563, 671 S.E.2d 87 (1996).....	22
<u>Pilgrim v. Miller</u> , 350 S.C. 637, 567 S.E.2d 527 (2002), vacated April 25, 2003	19
<u>R & G Constr., Inc. v. Lowcounty Reg'l Transp. Auth.</u> 343 S.C. 424, 540 S.E.2d 113 (Ct.App. 2000)	28
<u>Richardson v. PV, Inc.</u> , 383 S.C. 610, 682 S.E.2d 263 (2009).....	15, 20, 21
<u>Roberson v. S. Fin. of South Carolina, Inc.</u> , 365 S.C. 6, 615 S.E.2d 112 (2005)	15
<u>Roche v. Young Brothers, Inc., of Florence</u> , 318 S.C. 207, 456 S.E.2d 897 (1995).....	20
<u>South Carolina v. Eli Lilly and Co.</u> , Case No. 07-CP-42-1855, Order dated September 22, 2009	28, 29
<u>Stark Truss Co., Inc. v. Superior Const. Corp.</u> , 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004)	19, 22, 23, 25
<u>Sundown Operating Co. v. Intedge Indus., Inc.</u> , 383 S.C. 601, 681 S.E.2d 885 (2009)....	16
<u>Walters v. Rodriguez</u> , 2011 IL App (1st) 103488, 356 Ill.Dec. 103, 960 N.E.2d 1226 (2011).....	10, 11, 12

<u>Wham v. Shearson Lehman Bros., Inc.</u> , 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)	16, 21
<u>Wilder v. Blue Ribbon Taxicab Corp.</u> , 396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011)	16
<u>Williams v. Vanvolkenburg</u> , 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994)	16
<u>Wilson v. Dallas</u> , 403 S.C. 411, 743 S.E.2d 746 (2013).....	2, 4, 6, 23

Statutes

S.C. Code Ann. §62-7-405(c).....	29
----------------------------------	----

Rules

Rules 208-212, SCACR.....	7, 8, 13
Rule 260(a), SCACR	15
Rule 269(a), SCACR	8, 15
Rule 12(b)(6), SCRCPP	25
Rule 55(a), SCRCPP	18, 25
Rule 55(c), SCRCPP	15, 16, 20
Rule 55(e), SCRCPP	26
Rule 59(e), SCRCPP	7
Rule 60(b)(1), SCRCPP	20

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ABUSE ITS DISCRETION WHEN IT GRANTED RESPONDENTS RELIEF FROM ENTRY OF DEFAULT?
2. DID THE CIRCUIT COURT ERR IN DENYING APPELLANT'S MOTION TO DISQUALIFY COUNSEL FROM REPRESENTING THE ATTORNEY GENERAL OF SOUTH CAROLINA AND TO ENJOIN MR. RUSSELL L. BAUKNIGHT FROM ALLEGEDLY ACTING ON BEHALF OF THE ATTORNEY GENERAL?
3. DID THE CIRCUIT COURT ERR IN RULING THAT THE SITTING ATTORNEY GENERAL CANNOT BE DEPOSED IN CASE NO. 2010-CP-40-4900 (CASE 4900), WHICH WAS BROUGHT BY HIS PREDECESSOR?
4. DID THE CIRCUIT COURT ERR IN DISMISSING THE ATTORNEY GENERAL AS A PARTY PURSUANT TO RULE 21 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE?

STATEMENT OF THE CASE

Appellant seeks review of five lower court orders — one order each for Issues One, Two and Three, and two orders for Issue Four — of two circuit court judges in Case No. 2010-CP-40-4900 (hereinafter, “Case 4900”). Counsel for Respondents are responding to Issues One and Two. The Office of the Attorney General of South Carolina is responding to Issues Three and Four. Counsel for Respondents hereby incorporate into this brief the entire brief of the Office of the Attorney General.

A. Statement of Relevant Facts

Case 4900 is a breach of fiduciary duty action against Appellant alleging that during her period of service as personal representative and trustee in connection with the Estate of James Brown (hereinafter “The Estate,”), the iconic entertainer, she failed to properly administer the affairs of Mr. Brown’s estate resulting in significant financial damages. (R. pp. 187-188) Compl. ¶ 28 (May 19, 2010).

Robert L. Buchanan, Esq. was a named defendant in Case 4900, but Respondents and Mr. Buchanan settled all claims in July 2012. Thereafter, the court entered an order of dismissal of

all claims between Respondents and Mr. Buchanan. (R. pp. 57-58) Order of Dismissal of Def. Robert L Buchanan Jr. (July 13, 2012). Mr. Buchanan has not been a party to Case 4900 since that time, and he is not a party to this appeal.

Appellant was appointed personal representative and trustee in connection with The Estate on November 20, 2007. (R. pp. 181-182) Compl. ¶ 14. Appellant was removed for cause as personal representative and trustee in connection with The Estate on May 26, 2009. (R. p. 182) Compl. ¶ 15.

Appellant appealed her removal as personal representative and trustee in connection with The Estate, among other issues not relevant to the instant appeals. (R. p. 186) Compl. ¶ 19. Ultimately the South Carolina Supreme Court upheld Appellant's for cause removal. Our Supreme Court outlined some of the concerns that formed the basis of its opinion:

Further, all of the settling parties petitioned the circuit court for Appellants' removal well in advance of the hearing, thus providing adequate notice. In addition, the circuit court found an irreconcilable conflict existed between Appellants and the settling parties because Appellants 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 Appellants have sought \$5 million in fees for their services as fiduciaries for a relatively short interval of time. In addition, Appellants 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 Appellants' own attorneys' fees. Appellants 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 Appellants 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 Appellants' continued service as fiduciaries is not in the best interests of the estate.*

Wilson v. Dallas, 403 S.C. 411, 448-49, 743 S.E.2d 746, 766-767 (2013) (emphasis added).

Respondents filed the Case 4900 Complaint on May 19, 2010 with causes of action for breach of fiduciary duty, breach of trust, and negligence. (R. pp. 182-188) Compl. ¶ 16-29.

Allegations of the alleged breaches and negligence include:

- a. Failing to properly manage the estate and trust;
- b. Failing to engage necessary advisors and appropriate assistance to manage the estate and trust, causing, upon information and belief, millions of dollars of lost opportunities for the estate and trust;
- c. Failing to use due diligence in pursuing business opportunities for the estate and trust;

- e. Mishandling an auction of personal property at great cost to the estate and trust;

- h. Engaging in self-dealing by paying themselves hundreds of thousands of dollars in fees, which left the estate and trust with a solvency crisis;

- o. Being unequipped and/or unwilling to conduct the administration of the estate, as they admitted by seeking the appointment of a special administrator to handle the administration because the estate was in an “emergency” situation, as further demonstrated by such breaches as:
 - i. Failing to understand the fundamentals of the operation of the music business, which constitutes the essential value of the trust and estate, and failing to obtain proper advice, under the pretext of not being able to afford such advice despite paying themselves hundreds of thousands of dollars in fees;
 - ii. Failing to understand the basic operation of federal copyright law and its impact on the estate and its valuation, including but not limited to tax valuation;
 - iii. Failing to timely conduct due diligence, as demonstrated by their own testimony under oath that “2009 was the year of due diligence.”
- p. Engaging in conflicts of interest, such as
 - i. Paying themselves hundreds of thousands of dollars in fees while leaving the estate and trust virtually insolvent;
 - ii. Serving as both Personal Representatives and Trustees while a significant issue in the administration of the trust and estate was whether the trust or the estate owned certain assets.

- iii. Continuing to conduct a vicious attack on the proposed settlement, upon information and belief, for the purpose of padding their own fees, which they claim to be \$5 million.

- u. Artificially inflating the reported value of the estate, without any substantiation, and without any consistency, for the purpose of justifying their claim for approximately \$5 Million in fees.

(R. pp. 182-188) Case 4900 Compl. ¶ 18-29.

Some of the Complaint's allegations parallel the concerns ultimately recognized by our Supreme Court, *compare* Complaint at paragraphs e, h, and p (i) with Wilson v. Dallas, *supra*.

B. Facts Relevant to Issue One: Setting Aside the Default

Case 4900 was served upon Appellant on May 24, 2010. (R. p. 190) Aff. of Service of Summons and Compl. on Adele Pope (May 24, 2010). In lieu of an Answer, Appellant filed a motion to dismiss, (R. pp. 193-331) (Motion to Dismiss of Def. Robert L. Buchanan, Jr. and Adele J. Pope (June 22, 2010)), and a motion to change venue (R. pp. 332-334) (Motion to Transfer Venue (August 2, 2010)). After extensive briefing by both sides, hearings regarding both motions were held before the Honorable L. Casey Manning, Jr., on August 30, 2010. Proposed orders on the motions were due to Judge Manning on October 1, 2010. Appellant and Respondent each submitted proposed orders on that day. *See* (R. pp. 79-86; pp. 87-92; p. 1510; pp. 2213-2215) Orders on Motion to Dismiss and Motion to Transfer Venue, dated November 8, 2010, and letters from counsel dated October 1, 2010.

On September 30, 2010, one day before proposed orders were due, and while Respondents' counsel were in the midst of drafting and preparing their substantial proposed orders, and while both sides were exchanging other documents related to the proposed orders, Appellant unexpectedly served an Answer with counterclaims on Respondents' counsel. (R. pp.

337-370) Answer and Counterclaim of Robert L. Buchanan, Jr. and Adele J. Pope (September 30, 2010). This Answer was hand-delivered to Respondents' counsel's office. (R. p. 370) (Proof of Service of Answer).

Appellant was well aware, due to the ongoing, extensive briefing, that two lawyers were working the case for Respondents, Kenneth B. Wingate and Everett A. Kendall, II. Appellant's proof of service listed both attorneys, however, Appellant served only one copy of the Answer by leaving it at the office reception desk. The Answer was forwarded to Wingate. Wingate does not deny receiving the pleading, but has no recollection of doing so and believes it may have been inadvertently misidentified, since many documents related to the pending orders had been exchanged between the parties. Admittedly, the Answer was filed within the counsel's office and not responded to. (R. pp. 376-379) (Wingate Affidavit.)

On November 9, 2010, Judge Manning issued orders denying Appellant's motion to dismiss and motion to change venue. (R. pp. 79-86; pp. 87-92) (Order Denying Defs.' Mot. To Dismiss (November 8, 2010); Order Denying Defs.' Mot. To Change Venue (November 8, 2010)). Respondents' counsel then sent an email to Appellant's counsel stating, "I look forward to receiving your Answer on or before November 29, 2010." (R. p. 379) (Plaintiff's Motion to Set Aside Entry of Default, Ex. to Wingate Affidavit.) On November 15, 2010 Respondents' counsel received, via U.S. Mail, Appellant's Affidavit of Default, which had been filed on November 10, 2010. (R. pp. 1512-1522) (Letter from Pope's counsel (November 10, 2010); Affidavit of Default (November, 10, 2010)). The next day, November 16, 2010, Respondents filed an answer to the counterclaims, (R. pp. 380-382A) (Pls.' Answer to Countercl. (November 16, 2010)), and a motion to set aside the entry of default pursuant to Rule 55(c), SCRCF, (R. pp. 373-379, 382B) Pls.' Mot. To Set Aside Entry of Default (November 16, 2010).

On December 17, 2012, Judge Manning heard oral arguments on Respondents' motion to set aside entry of default. (R. p. 52) (Order Granting Pls.' Motion to Set Aside Entry of Default (October 12, 2015)). On December 17, 2012, Respondents submitted for the court's consideration supplemental material concerning its meritorious defense. (R. pp. 769-774) (Suppl. To Pls.' Mot. to Set Aside the Entry of Default (December 17, 2012)). On October 13, 2015, Judge Manning issued an order granting Respondents' motion to set aside the default. (R. pp. 51-53) (Order Granting Pls.' Motion to Set Aside Entry of Default (October 13, 2015)). Appellant filed a Motion to Alter, Amend and/or Vacate Order Granting Plaintiffs' Motion to Set Aside Default, on October 20, 2015. (R. pp. 829-833) Motion (October 20, 2015). Appellant's motion to alter, amend, or vacate has not yet been ruled on.

C. Facts Relevant to Issue Two: Disqualification of Counsel and Enjoining Mr. Bauknight)¹

On May 19, 2011, Appellant filed a motion seeking, among other things, to disqualify the law firm of Sweeny, Wingate & Barrow, P.A., for representing the Attorney General in Case 4900 and to enjoin Mr. Russell Bauknight from purportedly speaking on behalf of the Attorney General. (R. pp. 477-480) Def. Adele J. Pope's Motion to Disqualify and/or Enjoin Sweeny, Wingate & Barrow From Representing State of S. Carolina or Att'y General; to Enjoin Russell Bauknight; to amend Answer Following Dep. And to Set Deps. If Required (May 18, 2011). After briefing and oral argument, Judge Manning denied Appellant's motion. (R. pp. 59-60) Order (July 5, 2012).

¹ Bauknight, who is a professional fiduciary, was appointed by the Court on May 26, 2009, to replace Appellant as the personal representative and trustee in connection with The Estate. Following our Supreme Court's decision in Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013), Bauknight was reappointed as personal representative and trustee of The Estate, and he serves in that capacity to this day.

On July 30, 2012, Appellant filed a Rule 59(e) motion seeking reconsideration of Judge Manning's denials. The Court has yet to rule on Appellant's 59(e) motion. Despite having no ruling on her 59(e) motion, Appellant filed the instant appeal on September 12, 2017. Notice of Appeal (September 12, 2017).

ARGUMENT

I. The Amended Initial Brief of Appellant contains vast amounts of material that is irrelevant to the issues on appeal, and the irrelevant material should be stricken from her appeals or her appeals should be dismissed with prejudice.

A. The legal standard concerning matter included in an appeal

1. South Carolina Appellate Court Rules

The matter to be included by the parties in an appeal is encompassed in the briefs and the Record on Appeal. In general, Rules 208 – 212, SCACR, provide the specifications for all written material and documentation that the appellate court will consider. Those Rules mandate the interconnection of the briefs and the Record on Appeal.

Regarding the briefs, Rule 208(b)(1)(D), SCACR, provides that “[a] party may also include a separate statement of facts *relevant to the issues presented for review, with reference to the record on appeal*, which may include contested matters and summarize the party's contentions. (emphasis added) Rule 208(b)(4), SCACR, further provides that “[t]he brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [*see* Rule 210(c)] to support the salient facts alleged.”

The Record on Appeal is preceded by the parties service, along with an initial brief, of a Designation of Matter to be Included in the Record on Appeal. Rule 209(a), SCACR. Rule 209(b), SCACR, sets forth two important limitations on matter included in the Designation. One is that “the Designation may only propose to include portions of the transcript, pleadings, orders,

exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)].” (The limiting provision of Rule 210(c) is that “[t]he Record shall not ... include matter which was not presented to the lower court or tribunal.) The other limitation is that “[a] party shall not include any matter in his Designation which is not relevant to the appeal.” (emphasis added)

In an appeal, the inclusion by the parties of only relevant matter is critical to an efficient review by the appellate court of the issues. Rule 209(c), SCACR, requires a certificate signed by a party’s counsel of record “that the Designation contains no matter which is irrelevant to the appeal.” Because of the mandatory interconnection of the briefs and the Record on Appeal, the briefs also shall not contain any matter which is not relevant to the appeal.

Subject to a few limited exceptions, Rule 210(h), SCACR, specifies that “the appellate court will not consider any fact which does not appear in the Record on Appeal.” Implied is that any fact appearing in the Record on Appeal must be relevant to be considered by the appellate court.

Finally, to emphasize the importance of the parties including only relevant matter to the appeal, Rule 269, SCACR, allows “such sanctions as the circumstances of the case and discouragement of like conduct in the future may require” for an appeal that “is frivolous or taken solely for the purposes of delay, *or is not in compliance with these Rules.*” (emphasis added) Arguably a minor noncompliance with the Rules would not result in sanctions, but a substantial noncompliance for which such conduct in the future should be discouraged would necessitate sanctions.

2. South Carolina case law

Because the South Carolina Appellate Court Rules are abundantly clear that the parties shall include only relevant matter to the appeal, there is minimal applicable South Carolina case law addressing the issue of noncompliance with the Rules.

In Henning v Kaye, 307 S.C. 436, 415 S.E.2d 794 (1992), the respondents moved to dismiss the appeal claiming that the appellant's initial brief failed to comply with the then applicable appellate court rules (which were similar to the current Rules) and that appellant's Designation was insufficient. The court found:

Appellant's brief fails to comply with the [then applicable appellate court rules] in the following particulars: the components of the brief are incorrectly organized and labeled, the issues are not distinctively headed, the table of authorities is not alphabetized or referenced to the body of the brief, the statement of the case contains contested matter and omits required information, and the arguments contain no citations to the record or to the cases listed in the table of authorities.

Counsel is advised that the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.

Henning, 307 S.C. 436, 437, 415 S.E.2d 794. The court ruled that “[a]lthough this Court would be completely justified in dismissing this appeal based on appellant’s numerous violations of the Rules, we decline to do so and deny the motion to dismiss.” Id. at 437, 415 S.E.2d at 794. The court instead ordered the appellant to serve and file an initial brief that complied with the then applicable appellate court rules, but that “[n]o changes shall be made to appellant’s arguments except that appellant may add citations to the cases listed in the current table of authorities and references to the record” Id. at 438, 415 S.E.2d at 794. The court also allowed appellant to serve and file an amended Designation subject to its compliance with then applicable appellate court rules. Id. at 438, 415 S.E.2d at 794, 795.

In re Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996), involved an appeal by an inmate who had submitted sixty four *pro se* petitions over a three-year period. The court indicated that “[e]ach petition submitted by petitioner has been frivolous and dismissed” In re Maxton at 4, 478 S.E.2d 679. The court ruled:

Despite the fact that petitioner has been informed numerous times that it is not appropriate to raise these matters before this Court, he has continued to file these petitions in an increasing number. More often than not, these petitions attempt to raise claims identical to ones previously dismissed by this Court. Further, the filing of these repetitive and frivolous petitions has wasted this Court's time and resources and has interfered with the fair administration of justice.

Id. at 4, 478 S.E.2d at 679. The court required the petitioner to pay “a filing fee for any future petitions of this type from petitioner” and to accompany any such petition with a proper affidavit certifying “that the matter raised in the petition is nonfrivolous.” Id. at 5, 478 S.E.2d at 679, 680.

3. Other jurisdictions' case law

Pursuant to research of cases in other State jurisdictions addressing the issue of noncompliance with appellate rules regarding an appellant's inclusion of irrelevant matter to an appeal, some States have few or no contemporary, applicable cases and other States provide several.

Walters v. Rodriguez, 2011 IL App (1st) 103488, 356 Ill.Dec. 103, 960 N.E.2d 1226 (2011), is an Illinois case which addressed issues of noncompliance with appellate rules by an appellant. The Appellate Court of Illinois provides a comprehensive analysis and ruling:

We begin by addressing defendants' argument that plaintiffs' statement of facts should be disregarded for their failure to comply with our supreme court rules. We note that “[a] reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.” (Internal quotation marks omitted.) Gandy v. Kimbrough, 406 Ill.App.3d 867, 875, 346 Ill.Dec. 771, 941 N.E.2d 329 (2010)

(quoting *In re Marriage of Auriemma*, 271 Ill.App.3d 68, 72, 207 Ill.Dec. 662, 648 N.E.2d 118 (1995)). Supreme Court Rule 341(h)(6) and (7) require a statement of the facts, with citation to the record, necessary for an understanding of the case and a clear statement of contentions with supporting citation of authorities and pages of the record relied on. Ill. S.Ct. R. 341(h)(6), (h)(7) (eff. July 1, 2008). These rules are not merely suggestions, but are necessary for the proper and efficient administration of the courts. *First National Bank of Marengo v. Loffelmacher*, 236 Ill.App.3d 690, 691–92, 177 Ill.Dec. 299, 603 N.E.2d 80 (1992).

We will not sift through the record or complete legal research to find support for this issue. The burden of a sufficient record falls on the appellant. *Foutch v. O'Bryant*, 99 Ill.2d 389, 391–92, 76 Ill.Dec. 823, 459 N.E.2d 958 (1984). Issues that are ill-defined and insufficiently presented do not satisfy the rule and are considered waived. *Express Valet, Inc. v. City of Chicago*, 373 Ill.App.3d 838, 855, 311 Ill.Dec. 951, 869 N.E.2d 964 (2007). In fact, for these violations, this court may not only strike portions of the brief or consider arguments waived, but strike a brief in its entirety and dismiss the matter. *Marengo*, 236 Ill.App.3d at 692, 177 Ill.Dec. 299, 603 N.E.2d 80. Where the record is not complete, any doubts which might arise from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill.2d at 392, 76 Ill.Dec. 823, 459 N.E.2d 958. Further, “the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law.” *Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 157, 298 Ill.Dec. 201, 839 N.E.2d 524 (2005).

We agree with defendants that plaintiffs' recitation of the facts is wholly deficient and should be disregarded. As noted, plaintiffs have repeated the entirety of their recitation of facts and analysis concerning their arguments on *res judicata* and collateral estoppel from their memorandum below. Almost all citations to the record in their brief pertain to the federal court record and not the record before this court. Plaintiffs do repeat their footnote from their trial memorandum that explained to the trial court, and now this court, that the federal exhibits and docket entries can be produced, upon request by the court. As expressed in the case law above, it is not for this court to request a record and conduct research for the parties, but for the parties to prepare and submit a complete record and provide citation to the record and authority in support of its arguments.

Plaintiffs have completely failed to comply with Rule 341 by not only citing predominantly to the federal record, but by providing incorrect citations. Plaintiffs provided some citations to the record before this court in the introduction and conclusion of their facts and in some portions of their analysis. Unfortunately, the majority of these citations are to pages of the record unrelated to plaintiffs' statements and contentions. It is of further disappointment that we are also without the benefit of a reply brief to provide any explanation or discussion of this issue and defendants' analysis. Therefore, plaintiffs' facts are disregarded and the

unsupported arguments are considered waived. Accordingly, we have not been presented any reason to overcome the presumption under Foutch and Corral that the trial court correctly ascertained the facts of the case and followed the law in granting defendants' motion to dismiss and we affirm that ruling.

Walters, 356 Ill.Dec. 103, 105, 106, 960 N.E.2d 1226, 1228-1229.

Jackson v. Davis, 153 So.3d 820 (2014), is an Alabama case in which the Court of Civil Appeals of Alabama addressed a motion to strike portions of a brief containing facts in a brief and attachments to a brief not in or part of the record.

“As we have stated on many prior occasions, ‘[a]n appellate court is confined in its review to the appellate record, that record cannot be “changed, altered, or varied on appeal by statements in briefs of counsel,” and the court may not “assume error or presume the existence of facts as to which the record is silent.” ’ Beverly v. Beverly, 28 So.3d 1, 4 (Ala.Civ.App.2009) (quoting Quick v. Burton, 960 So.2d 678, 680–81 (Ala.Civ.App.2006)).”

Dreading v. Dreading, 84 So.3d 935, 937 (Ala.Civ.App.2011). Further, “ “[a]ttachments to briefs are not considered part of the record and therefore cannot be considered on appeal.” ” ’ Roberts v. NASCO Equip. Co., 986 So.2d 379, 385 (Ala.2007) (quoting Morrow v. State, 928 So.2d 315, 320 n. 5 (Ala.Crim.App.2004), quoting in turn Huff v. State, 596 So.2d 16, 19 (Ala.Crim.App.1991)). Accordingly, the tenant's motion to strike is granted, and neither the attachments nor any references to the additional facts not included in the record have been considered in the disposition of this matter.

Jackson, 153 So.3d 820, 829.

B. A listing of the extensive amount of irrelevant matter included in the Amended [Initial] Brief of Appellant

Listed below delineates irrelevant matter included by Appellant in this appeal in connection with numbers I and II set forth in Appellant’s Statement of Issues on Appeal in her Amended Initial Brief. Irrelevant matter included by Appellant in this appeal in connection with numbers III and IV set forth in Appellant’s Statement of Issues on Appeal in her Amended Initial Brief is addressed by Respondent Attorney General and incorporated herein by reference.

1. Page 1, first paragraph of Statement of the Case, the reference to “Affidavit of Adele J. Pope (AJP) dated 8/1/11, p.1.”

2. Page 1, footnote 4, every reference following the initial reference to “Answer and Counterclaim of Buchanan and Pope, dated & filed 9/30/2010.”

3. Page 1, second paragraph, carrying over to page 2, of Statement of the Case, every reference following the initial reference to “Complaint, pp. 4,5.”

4. Page 2 (in section **a. Order Granting Plaintiffs’ Motion to Set Aside Default**), second sentence of first paragraph. Said sentence also violates Rule 208(b)(1)(C) by including contested matters. The included contested matters appear to be intentionally subjective and argumentative and, therefore, not a concise history of the proceedings necessary to an understanding of the appeal.

5. Page 2, second sentence of second paragraph, the reference “Memorandum in Support, dated & filed 8/29/16, pp. 5-9.”

6. Page 3, first sentence of first paragraph, the reference to “Defendant Pope’s Return and Memorandum Opposing Relief from Default dated 4/10/12 and filed 4/12/12.”

7. Page 3, the phrase “proposed Response” in the second sentence of the first full paragraph. Said phrase also violates Rule 208(b)(1)(C) by including contested matters. The included contested matters appear to be intentionally subjective and argumentative and, therefore, not a concise history of the proceedings necessary to an understanding of the appeal.

8. Page 3, first sentence of second paragraph, every reference following the initial reference to “Order dated and filed 10/13/15, p.2.”

9. Page 3 (in section **b. Order Declining to Disqualify Respondents’ Counsel or Enjoin Bauknight**), there are two problems. First, the first paragraph, which carries over to page 4, improperly and argumentatively states Petitioner sought to disqualify “the law firm of Kenneth Wingate, Esq,” when the motion actually references the law firm of “Sween[y], Wingate & Barrow.” This violates Rule 208(b)(1)(C). Second, in the paragraph which carries over to page 4, every reference in the first sentence following “Defendant AJP’s Motion to Disqualify, etc. dated 5/8/11 and filed 5/19/11” and every reference in the second sentence (page 4) following “Motion dated May 18, 2011,” are irrelevant. None of those references (following the initial references) are included by Appellant to support the very basic “Statement of the Case” sentences preceding them, but are merely being dumped on the appellate court as a depository for Appellant’s irrelevant affidavits, pleadings, and attachments.

10. Page 5, beginning in the second line and through the end of the paragraph which carries over from page 4, every reference following “Motion dated 5/18/11, pp. 2, 3.”

11. Page 5, in the first full paragraph, the various references following “Motion dated 5/18/11, pp. 2-4.”

12. Page 5, in the second full paragraph, the various references following “Motion dated 5/18/11, pp. 2-4.”

13. Page 15, fourth full paragraph.

14. Page 15, fifth paragraph which carries over to page 16.

15. Page 17, second, third and fourth full paragraphs, and footnote 9. Also, in the last sentence of the said fourth full paragraph, it is not apparent from any matter included in Appellant’s Designation that she has raised a jurisdictional argument in connection with this issue, and, if she has done so pursuant to her Designation or brief, it is inapplicable to this appeal and therefore irrelevant.

16. Page 18, second, third and fourth paragraphs.

17. All affidavits filed by Appellant in Case 4900 in the lower court, which she has referenced in her initial brief, included in her Designation of Matter to be Included in the Record of Appeal, and attached to pleadings (referenced in her initial brief or included in her Designation of Matter to be Included in the Record of Appeal). A determination has not yet been made as to any such affidavits as to whether they will be allowed. See Judge Early’s Order Concerning Plaintiffs’ Motion to Strike January 17, 2017 Affidavit of Defendant, dated March 9, 2017, and filed on March 15, 2017. Respondent Bauknight has filed motions to strike most, if not all, affidavits filed and/or submitted by Appellant.

18. Any and all drafts or final version of a purported article by Appellant titled “Private Foundations, Copyright Heirs and Musical Millionaires: or Why the James Brown “I Feel Good” Trust doesn’t ...” (and any variation of that title), whether referenced in Appellant’s initial brief, included in her Designation of Matter to be Included in the Record of Appeal, or attached to pleadings (referenced in her initial brief or included in her Designation of Matter to be Included in the Record of Appeal).

19. A purported “Opinion/Affidavit of William Jeffrey Smith, dated & filed 07/14/17” whether referenced in Appellant’s initial brief, included in her Designation of Matter to be Included in the Record of Appeal, or attached to pleadings (referenced in her initial brief or included in her Designation of Matter to be Included in the Record of Appeal).

C. All irrelevant matter should be stricken or her appeals dismissed with prejudice.

Pursuant to the legal standard concerning matter included in an appeal set forth in subsection A above, all irrelevant matter included by Appellant in this appeal should be stricken from Appellant’s Designation and brief.

Alternatively, pursuant to the legal standard concerning matter included in an appeal set forth in subsection **A** above and Appellant's substantial noncompliance with the Rules (as set forth in subsection **B** above and in the incorporated brief of the Attorney General), the Appellant's appeal should be dismissed pursuant to Rule 260(a), SCACR, and/or Rule 269, SCACR.

II. The Circuit Court did not abuse its discretion when it granted Respondents' motion to set aside entry of default.

A. The appellate standard of review for Rule 55(c) motions is "abuse of discretion".

Our Supreme Court has held that "[t]he decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge [and] will not be disturbed on appeal absent a clear showing of an abuse of that discretion." Roberson v. S. Fin. of South Carolina, Inc., 365 S.C. 6, 9 615 S.E.2d 112, 114 (2005); Harbor Island Owners' Ass'n v. Preferred Island Prop., Inc. 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). *See also*, Richardson v. P.V., Inc. 383 S.C. 610, 614, 682 S.E.2d 265 (2009). While nominally referencing the correct standard, Appellant's argument in actuality asks the court to conduct an improper *de novo* review of the circuit court's decision. The applicable standard of review, however, is the abuse of discretion standard. Moreover, Appellant fails to make any showing, and certainly not a "clear showing", that the circuit court abused its discretion when it granted Respondents' motion to set aside entry of default. In fact, the Record shows the Court followed the correct law and considered ample evidence in exercising its discretion. Therefore, the circuit court's decision must not be disturbed on appeal.

B. The Circuit Court properly exercised its discretion in granting Respondent's motion to set aside entry of default.

According to Rule 55(c) of the South Carolina Rules of Civil Procedure, “[f]or good cause shown the court may set aside an entry of default” Rule 55(c), SCRCP. The Court of Appeals has explained that the “good cause” standard “requires a party seeking relief from an entry of default . . . to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.” Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 144-45, 719 S.E.2d 703, 706 (Ct. App. 2011) (quoting Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009)). Once a satisfactory explanation is provided, “the trial court must also consider [the Wham factors]: (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 145, 719 S.E.2d at 706 (quoting Sundown Operating Co. at 607-608, 681 S.E.2d at 888) (reciting the factors taken from Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)). The trial court need not make specific findings of fact regarding each factor, “if there is sufficient evidence in the record to support the trial court’s decision. Id. (citing Sundown Operating Co. at 608, 681 S.E.2d at 888). Finally, “[t]he decision whether to set aside an entry of default is within the sound discretion of the trial court.” Id. (citing Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994)).

1. The Court considered and accepted Respondents’ explanation of “good cause.”

The threshold for the analysis of good cause under Rule 55(c) is for “a party seeking relief from an entry of default . . . to provide an explanation for the default and give reasons why

vacation of the default entry would serve the interests of justice.” Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 144-45, 719 S.E.2d 703, 706 (Ct. App. 2011).

In determining the existence of “good cause,” the trial court considered Respondents’ explanation for the failure to file its answer to Appellant’s counterclaims. This explanation is outlined in the Affidavit of Kenneth B. Wingate, (R. pp. 373-379) (Pls.’ Motion to Set Aside Entry of Default, Ex. attached), explained more fully in Respondents’ memorandum in support of its motion for relief from default, (R. pp. 1666-1672 [pp. 2219-2226; pp. 376-379]) (Pls.’ Mem. In Support to Mot. to Set Aside Entry of Default (April 11, 2012)), and further elaborated in Respondents’ oral argument at the hearing on the motion to set aside the default (R. p. 1145, line 21 – p. 1161, line 10) (Tr. Of Hr’g on Mot. to Set Aside Default (p. 19, l. 21 – p. 35, l. 10, December 17, 2012)).

In brief summary, the trial considered the following multi-tiered explanation of good cause and found that good cause did exist.

First, that Appellant’s Answer and Counterclaim was served during a period when the parties were engaged in significant briefing, arguments, and drafting of proposed orders regarding Appellant’s motions to dismiss and to change venue, which she had originally served in lieu of an Answer. Appropriately, Respondents’ counsel were not expecting Appellant to serve an Answer *while* her motion to dismiss was pending and was being actively litigated through hearings, briefing, and orders. (R. pp. 1666-1672 [pp. 2219-2226; pp. 376-379]; p. 1151, lines 9-19) Plaintiffs’ Memorandum of Law in Support of the Motion to Set Aside Entry of Default, and Transcript of Hearing, p. 25.

Second, Appellant specifically designated her Answer as “subject to [her] Motion to Dismiss and any Motion filed or to be filed for a change of venue” (R. p. 337) Answer and

Countercl. of Robert L. Buchanan Jr. and Adele J. Pope (September 30, 2010). Therefore, Respondents' counsel would not have recognized the pleading as an Answer containing counterclaims to which a response was required *at that time*. (R. pp. 1666-1672 [pp. 2219-2226; pp. 376-379]; p. 1150, line 7 – p. 1151, line 8) Plaintiffs' Memorandum of Law in Support of the Motion to Set Aside Entry of Default, and Transcript of Hearing, pp. 24-25.

Third, Appellant strategically chose to hand-deliver a single copy of her Answer and Counterclaim to counsel's office (despite knowing two attorneys were actively working the case) during an exceptionally busy period when counsel was thoroughly engaged in preparing proposed orders concerning her motions for dismissal of the Compliant and change of venue, and to do so only one day before substantial drafts of the proposed orders were due to the Court. This timing and method “smacks of a litigation tactic intended to take advantage of the circumstances.” (R. pp. 1666-1672 [pp. 2219-2226; pp. 376-379]) Pls.' Mem. of Law In Support of the Motion to Set Aside Entry of Default (April 11, 2012). Respondents argued to the trial court that the timing and method of service amounted to a “dirty trick” litigation tactic, intended to catch counsel off guard at a time an Answer and Counterclaim would not be expected, in order to spring a “gotcha” trap on Respondents. (R. pp. 1666-1672 [pp. 2219-2226; pp. 376-379]; p. 1146, line 17 – p. 1148, line 8; p. 1151, lines 14-19) Id.

Fourth, Respondents argued that they cannot be in default because they were “otherwise defend[ing]” within the meaning of Rule 55(a), which states that a default may be entered against a party that has “failed to plead or *otherwise defend as provided by these rules* ... (emphasis added).” Respondents argued that all of the substantial briefing, oral argument, and drafting of proposed orders related to Appellant's motions to dismiss and change venue constitute

“otherwise defend[ing].” (R. pp. 1666-1672 [pp. 2219-2226; pp. 376-379]; p. 1146, line 17 – p. 1147, line 6; p. 1148, line 21 – p. 1149, line 5) Id.

In reviewing the court's exercise of discretion, the issue before the appellate court is not whether it believes good cause existed to set aside the default, “but rather, whether the [trial judge's] determination is supportable by the evidence and not controlled by an error of law.” Pilgrim, 350 S.C. at 640-41, 567 S.E.2d at 528. Stark Truss Co., Inc. v. Superior const. Corp. 360 S.C. 503, 510, 602 S.E.2d 99, 103 (Ct. App. 2004).

Next, the trial court found that setting aside the default would serve the interests of justice. (R. p. 52) Order Granting Plaintiffs’ Motion to Set Aside Entry of Default, ¶ 6.

Respondents argued that vacating the default would serve the interests of justice because the substantial overlap between Respondents’ claims and Appellant’s counterclaims created the strong possibility that allowing the default to stand could create inconsistent judicial outcomes on similar matters (R. pp. 1666-1672 [pp. 2219-2226; pp. 376-379]) (Pls. Mem. of Law in Support of the Motion to Set Aside Entry of Default p. 4). For example, if the Respondents were held in default on either Appellant’s abuse of process or civil conspiracy counterclaims and the Appellant was found to have breached her fiduciary duty to Respondents resulting in damages, there would be an inconsistent judicial outcome, because the finding that Appellant breach her fiduciary duty *ipso facto* negates her claims for abuse of process or civil conspiracy in Respondents bringing Case 4900.

2. The circuit court correctly rejected Appellant’s arguments against a finding of good cause.

Appellant has argued that default should be entered because she believes it was due to negligence on the part of the Respondent’s counsel, which is then attributable to the Respondent. By finding that good cause existed, the trial court rejected any finding of “negligence.” Even so,

Appellant's Amended Initial Brief continues to argue that Roche v. Young Brothers, Inc., of Florence 318 S.C. 207, 456 S.E.2d 897 (1995) and Richardson v. PV, Inc. 383 S.C. 610, 682 S.E.2d 263 (2009) should control and for the proposition that the negligence of Respondents' counsel in not recognizing the Answer and Counterclaim should be imputed to the clients, and the default should be reinstated. Appellant's confidence is misplaced in both instances.

Initially, Roche does not stand for the proposition the Appellant has offered. The question in Roche was principally whether service of process was sufficient under Rules 4 and 5, SCRPC. The default referred to was a default *judgment* entered after the defendant was not provided notice of the damages hearing. The trial court had found "that the default was not the result of inadvertence or excusable neglect." Id. at 900.² The Supreme Court agreed, but reversed the judgment, because the defendant had not been given notice of the damages hearing. Thus, the "entry of default" was reinstated so that a proper damages hearing could be conducted. Roche does not specifically discuss the applicable standard for setting aside either an entry of default or a default judgment. However, the language "inadvertence" and "excusable neglect" are taken from Rule 60(b)(1), which constitute a higher standard than Rule 55(c) good cause standard. Thus, Roche is not applicable to this case.

² Appellant correctly cites the wording of Roche that "[l]osing a summons and compliant within the corporation is not a ground to set aside a default judgment." However, for that proposition our Supreme Court relies on Inter-City Prods. Corp. v. Willey, 149 F.R.D. 563 (M.D.Tenn.1993), a United States District Court order from the Sixth Circuit. The Roche opinion parenthetically summarizes the Inter-City order with the words, "no error in not setting aside default judgment based on filing or clerical error which resulted in failure of in-house counsel to discover service of process and make appearance on behalf of corporation." Roche, 456 S.E.2d at 900. But when examined, this foreign jurisdiction's opinion does *not* contain the referenced language. Moreover, the opinion does not deal with setting aside a default. It deals only with motions to strike, to dismiss, and issues concerning personal jurisdiction. The order says nothing about grounds for setting aside a default.

Similarly, Appellant relies on Richardson for the proposition that the negligence of an attorney is imputed to the defaulting litigant, and that failure to timely file an answer is not good cause to set aside a default. Likewise, Richardson involves setting aside a default *judgment* under Rule 60(b) and is, thus, not applicable here. Moreover, Appellant, does not inform the Court of the entire basis for the ruling in Richardson. There, in addition to failing to timely answer, the defaulting party waited over two months to file to set aside the default, did not assert a meritorious defense, and did not argue lack of prejudice if the default were lifted, all required elements to lift a default. *Id.* at 267. Therefore, Richardson is easily distinguished from the instant appeal, where a default judgment was never entered, and where Respondents filed their motion to set aside the default one day after learning of the entry of default, asserted a meritorious defense, and argued lack of prejudice if the default was lifted.

The circuit court heard, assessed, and ultimately ruled in its discretion on Respondents' explanation of good cause and found that Respondents had made an adequate explanation of good cause and that the interests of justice would be served by setting aside the default, stating, "Plaintiffs have demonstrated good cause for setting aside the entry of default," and "the record in this case demonstrates that the Plaintiffs have shown good cause for failing to serve an answer on or before November 1, 2010 and the interests of justice will be served by vacating any entry of default." (R. p. 52) Order Granting Pls.' Motion to Set aside Entry of Default at 5-6.

3. The Circuit Court properly considered all of the factors set forth in Wham v. Shearson Lehman Bros.

a. The Circuit Court concluded that Respondents had acted promptly in response to the notification of default.

Respondents filed an Answer to Appellant's counterclaims, along with a motion with set aside the entry of default, one day after being served Appellant's affidavit of default. The trial

court concluded, and there can be no reasonable doubt, that a one day response constituted acting promptly. (R. p. 52) Id. at 2.

b. The Court concluded Respondents presented evidence of a meritorious defense.

A party seeking relief from default must present evidence of a meritorious defense. Stark at 510, 602 S.E.2d 102. Evidence of a meritorious defense may be contained in the pleadings or be made by affidavit or by other evidence. McClurg v. Deaton 380 S.C. 563, 575, 671 S.E.2d 87, 94.

Respondents produced evidence of a meritorious defense in (1) their memorandum of law in support of their motion to set aside the default (R. pp. 1666-1672 [pp. 2219-2226; pp. 376-379]) (Pls.' Mem. of Law in Support of the Motion to Set Aside Entry of Default (April 11, 2012)); (2) at oral argument during the hearing on their motion (R. p. 1151, line 22 – p. 1152, line 4) (Transcript of Hearing at p. 25-26); and (3) in a supplemental filing with the Court following oral argument (R. p. 769-774) (Suppl. To Pls.' Motion to Set Aside the Entry of Default (December 17, 2012)). The meritorious defense is anchored in Respondents' affirmative claims against the Appellant. Respondents argued to the circuit court that their causes of action in the Complaint were meritorious defenses to Appellant's counterclaims, because if these primary claims prevail in part or in whole, Appellant could not logically succeed in her counterclaims, which all have their gravamen in the allegation that Respondents' Complaint was improper. (R. pp. 1670-1671) Pls.' Mem. of Law in Support of the Motion to Set Aside Entry of Default.

Respondents also argued that their Answer to Appellant's counterclaims, denying the factual assertions of Appellant's counterclaims, also constituted a meritorious defense. (R. pp. 1670-1671) Id.

Respondents also submitted a supplement to its oral argument in which it provided deposition testimony of Mr. Buddy Dallas, a former fiduciary of the Estate, who testified that during the period in which Appellant served as fiduciary, The Estate lost millions of dollars through poor management, further establishing a meritorious defense to Appellant's counterclaims. (R. p. 773, lines 3-21; p. 774, lines 5-6) Deposition Testimony of Albert "Buddy" Dallas, Esq. pp. 35:3-21, 35:19-21, and 36:5-6.

Finally, and perhaps most importantly, Respondents asserted the defense of *res judicata*/collateral estoppel as a meritorious defense, (R. p. 1670) Pls.' Mem. of Law in Support of the Motion to Set Aside Entry of Default, and Respondents ultimately secured summary judgment against Appellant on all of her counterclaims on the basis of collateral estoppel based on the South Carolina Supreme Court's decision in Wilson v. Dallas, conclusively demonstrating that collateral estoppel truly was a meritorious defense. (R. pp. 3-18) Order Granting Plaintiffs' Motion for Summary Judgment as to Defendant's Counterclaims.

Therefore, the record contains sufficient evidence for the trial court to conclude Respondents "presented evidence of a meritorious defense to the Counterclaims." (R. pp. 51-53) Order granting Pls. Motion to Set Aside Entry of Default (October 13, 2015).

c. The Circuit Court concluded there was no prejudice to Appellant in setting aside the default.

The circuit court must also consider the degree of prejudice to the non-defaulting party in setting aside the default. Stark at 510, 602 S.E.2d at 102.

Respondents argued that since discovery in Case 4900 was ongoing that Appellant would have ample opportunity to develop the facts needed to establish her counterclaims. (R. p. 1671) Pls. Memorandum of Law in Support of the Motion to Set Aside Entry of Default (April 11, 2012).

Appellant argues in her brief that she would suffer sufficient prejudice to preclude setting aside the default, because she alleges, without any support, that the Respondents' suit was initiated to damage her reputation by alleging she committed a federal felony in overstating the date of death value of The Estate to the Internal Revenue Service in seeking to secure a \$5,000,000 commission. This is a conclusory argument based on no facts in the record. Respondents have never accused Appellant of committing any crime, state or federal, and have stated many, many times in other hearings and filings that they are not accusing her of a crime. (R. p. 1152 [incorrect reference]) Transcript of Hearing on Motion to Set Aside Entry of Default, p. 26. Appellant is being accused only of negligence and breach of fiduciary duty. Appellant's protest that she is being accused of a felony is a fabrication entirely of her own making and is a bad faith representation of what is in the pleadings, memorandum, and the record of Case 4900. She has no factual basis for this allegation. *See* Appellant's Initial Brief at 15-16.

Also, the impact on reputation that she suggests, if any, is a function of the allegations of the Complaint, not anything relating to the lifting of default on her counterclaims. Whether or not her reputation is impacted as a result of Case 4900 is not a function of prejudice, but of the merits of Case 4900. It is the unavoidable nature of a professional negligence action to have the potential to reflect negatively on the professional being sued. Furthermore, Appellant cites no authority for her contention that reputational damage constitutes unfair prejudice; thus, her claim fails for lack of legal foundation.

Based upon the above, which are adequately documented in the record, the circuit court, in its discretion, concluded that Appellant was "not prejudiced by this Court setting aside the default." (R. p. 52) Order Granting Pls. Motion to Set Aside Entry of Default ¶ 4.

4. The Circuit Court also articulated additional grounds for setting aside the default.

a. Respondents were otherwise defending under Rule 55(a), SCRPC.

As an additional ground to set aside the default, Respondents argued that although they did not timely answer Appellant's counterclaims, by virtue of the extensive motions practice that was ongoing, they were "otherwise defend[ing] as provided by these rules ..." within the meaning of Rule 55(a), SCRPC, and, therefore, should not be held in default. (R. p. 52) Order Granting Pls. Motion to Set Aside Entry of Default ¶ 7. The construction of this phrase appears to be a matter of first impression. However, the matter is dealt with in footnote number 2 in Stark, which says, "The words 'otherwise defend' refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading." Stark Truss Co., Inc. v. Superior Const. Corp., 360 S.C. 503, 512, fn2, 602 S.E.2d 99, 104, fn2 (Ct. App. 2004).

The plain meaning of the Rule should control. Appellant filed a motion to change venue and a motion to dismiss in lieu of an answer to Respondents' Complaint. Respondents were "otherwise defend[ing]" against these motions "as provided by these rules." Therefore, Respondents were not ignoring the litigation, had not failed to make an appearance, or simply refusing to participate in the legal proceedings. Instead, Respondents were actively engaged in defending Appellant's efforts to ward off their case at the 12(b)(6) stage or relocate the fight to what she apparently believed would be a more favorable venue, and the Respondents were defending under the rules. Therefore, in its discretion the circuit court was correct to cite as an additional ground for lifting the default that Respondents were otherwise defending and not subject to default. (R. pp. 51-53) Order Granting Pls. Motion to Set Aside Entry of Default.

b. The Attorney General was not in default under Rule 55(e), SCRPC.

Appellant makes a conclusory statement that “[t]he finding that the AG was never in default is erroneous.” Appellant’s Amended Initial Brief, p. 16. She relies on Ex Parte Condon v. State, for the proposition that when the Attorney General enters a proceeding he must abide by the Rules of Civil Procedure. She cites to no specific portion of this case to support her proposition of error. However, the Attorney General is abiding by the Rules. The plain language of Rule 55(e) protects the Attorney General from a default judgment; thus, the Attorney General cannot be in default, for obvious public policy reasons. However, in the event that Rule 55(e) does not protect the Attorney General from default in this matter, the court’s order found that the same analysis supporting relief from default for all other Respondents also applies to the Attorney General.

C. Therefore, the Circuit Court did not abuse its discretion, and its Order setting aside the default must not be overturned.

Respondents presented each of these arguments to the circuit court, the circuit expressly considered each argument, and then exercised its discretion and made its ruling to set aside the default. (R. pp. 51-53) Order Granting Pls. Motion to Set Aside Entry of Default. Because there is no evidence that the circuit court abused its discretion, and because Appellant makes no persuasive argument that the circuit court abused its discretion (she merely argues that she disagrees with the results of the court’s decision), the court’s order setting aside the default cannot be disturbed by an appellate court and must stand.

III. The Court did not err in denying Appellant's motion to disqualify Sweeny, Wingate & Barrow, P.A., from representing the Attorney General and to enjoin Bauknight from purportedly speaking on behalf of the Attorney General, and Appellant makes only conclusory statements about the same, with no support from the law or the record and, therefore, has abandoned her appeal on these issues.

Appellant argues the circuit court erroneously denied her motion to disqualify Sweeny, Wingate and Barrow, P.A., from representing Respondents and to enjoin Bauknight from purportedly speaking for the Attorney General. Appellant claims it is a constitutional violation of due process, under both the United States and South Carolina Constitutions, and the separation of powers, for the Attorney General to engage a private law firm on a contingency fee basis in this matter. Appellant further claims that Bauknight is somehow acting on behalf of the Attorney General, and that for some unarticulated reason this is improper.

Appellant makes no attempt to support her contentions with legal authority. She makes one footnote reference to the First and Fourteenth Amendments of the United States Constitution and Article One Section Eight of the South Carolina Constitution. However, she makes no effort to cite the sections of these documents she believes to be applicable or to make any legal argument from any another authority based upon these sections. Furthermore, her one legal reference in the body of her brief on this argument is to Hallum v. Bowens, 318 S.C. 1, 428 S.E.2d 894 (Ct. App. 1993). However, Hallum deals with jurisdictional issues and has nothing to do with the claims Appellant makes against Sweeny, Wingate and Barrow, P.A., or Bauknight. Appellant's arguments on these points are conclusory at best.

A. Conclusory statements lacking support of the law or the record require the appellate court to conclude that Appellant has abandoned her appeal of these issues.

An Appellant is deemed to have abandoned an issue if she makes only conclusory arguments or fails to provide any argument or supporting authority. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). Furthermore, an issue is abandoned if argument

in appellate brief is only conclusory. R & G Constr., Inc. v. Lowcounty Reg'l Transp. Auth. 343 S.C. 424, 540 S.E.2d 113 (Ct.App. 2000). A simple review of Appellant's brief on these issues, as noted above, reveals that she has argued in a conclusory fashion without support of any applicable legal authority. Therefore, she must be deemed to have abandoned these issues.

B. Should Appellant not be deemed to have abandoned these issues, Respondents rely on their arguments outlined in their Memorandum of Law in Opposition, *inter alia*, to Disqualify Sweeny, Wingate, and Barrow, to Enjoin Russell Bauknight.

Respondents incorporate by reference into this brief their arguments made by memorandum in opposition to Appellant's motion to disqualify Sweeny, Wingate, and Barrow and enjoin Bauknight, a copy of which is made a part of the designation of matter for this appeal. (R. pp. 1673-1688; pp. 96-133) Pls. Memo in Opposition to Defs.' Motion to Disqualify.

First, the Attorney General's use of special counsel is expressly allowed by the law and there is no conflict of interest for Plaintiffs' counsel. In South Carolina v. Eli Lilly and Co., case no. 07-CP-42-1855, the defendant pharmaceutical company moved to disqualify the special counsel appointed by the Attorney General to prosecute the case on behalf of the State, arguing that the employment of special counsel violated the separation of powers doctrine and the due process clauses of the United States and South Carolina Constitutions. *See* (R. pp. 96-133) Order of Judge Couch Denying Motion to Disqualify Special Counsel, p. 3, Sept. 22, 2009. In Eli Lilly, Judge Couch ruled that it is within the boundaries of the Attorney General's authority to hire private counsel, even counsel retained on a contingent fee basis:

[T]here is no question that the Attorney General has authority to hire legal counsel to protect the State's interests . . . the South Carolina Supreme Court has recognized that the Attorney General, as the State's chief legal officer, possesses the authority to appoint and approve private counsel to represent the State.

Courts have almost universally recognized that Attorneys General possess broad authority to appoint private attorneys as special counsel on a contingent fee basis to assist in the representation of the public interest.

Order of Judge Couch, p. 7-8 (citing Cooley v. S.C. Tax. Comm'n, 204 S.C. 10, 28 S.E.2d 445 (1943)). (R. pp. 1675-1680) Plaintiffs' Memorandum of Law in Opposition to Defendant Pope's Motion to Disqualify Sweeny, Wingate, & Barrow, to Enjoin Russell Bauknight, *inter alia*, at 3-8.

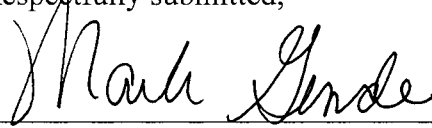
Furthermore, Defendant Pope takes issue with the "agency" relationship she alleges to exist between Plaintiff Bauknight and the Attorney General's office, and wishes to have Mr. Bauknight enjoined from "speaking for" the State. Mr. Bauknight is doing no such thing as "speaking for" the State. Plaintiffs' counsel speaks for the Plaintiffs, both governmental and individual, in this litigation. Furthermore, Mr. Bauknight is simply the court-appointed successor trustee of two charitable trusts, trusts in which the Attorney General has an interest that arises as a matter of law. As such, the relationship between Mr. Bauknight, the Attorney General's office, and Plaintiffs' counsel in this case is simply patterned according to the appropriate statutory scheme for enforcing charitable trusts. *See* S.C. Code Ann. § 62-7-405(c) (1976) (emphasis added) ("The settlor of a charitable trust, the trustee, and the Attorney General, among others may maintain a proceeding to enforce [a charitable trust]"). (R. pp. 1680-1684) Id. at 8-12.

CONCLUSION

In light of the arguments above, Respondents respectfully request this Court to hold that the circuit court did not abuse its discretion when granting the motion to set aside entry of default as to Respondents and to hold that the circuit court did not err when it denied Appellant's motion to disqualify Sweeny, Wingate & Barrow from representing the Office of the Attorney General and enjoining Mr. Russell Bauknight from purportedly speaking for the Attorney General.

January 10, 2019

Respectfully submitted,



Kenneth B. Wingate, S.C. Bar No. 8004

Mark V. Gende, S.C. Bar No. 72835

Sweeny, Wingate & Barrow, P.A.

1515 Lady Street (29201)

Post Office Box 12129

Columbia, South Carolina 29211

(803) 256-2233

kbw@swblaw.com

mvg@swblaw.com

Attorneys for Respondents

THE 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
Trial Court Case No. 2010-CP-40-4900

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. 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 and Robert L. Buchanan, Jr., Defendants,

Of whom Adele J. Pope is the Appellant.

RECEIVED

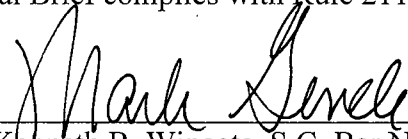
JAN 11 2019

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 11, 2019



Kenneth B. Wingate, S.C. Bar No. 8004

Mark V. Gende, S.C. Bar No. 72835

Sweeny, Wingate & Barrow, P.A.

1515 Lady Street (29201)

Post Office Box 12129

Columbia, South Carolina 29211

(803) 256-2233

kbw@swblaw.com

mvg@swblaw.com

Attorneys for Respondents