90763

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

RECEIVED
SEP 04 2019
SC Court of Appeals

Case No. 2010-CP-40-4900

Appellate Case No. 2018-002229

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.

MOTION TO STRIKE

In the amended Initial Brief of Appellant filed on August 5, 2019, Appellant ("Pope") has included new references and made various substitutions for other references. In Pope's

Amended Designation of Matter to be Included in the Record on Appeal also filed on August 5, 2019, Pope included additional designations. However, inclusion of several references and designations appear to violate the South Carolina Appellate Court Rules and this Court's Order filed on July 26, 2019, which granted Respondents' motion to strike Appellant's initial brief and designation of matter.

The Office of the Attorney General has filed a motion to strike dated today, September 4, 2019. All other Respondents hereby join with the Attorney General's said motion, as if made by them also, and incorporate by reference the Attorney General's arguments and requests.

This Court's Order filed on July 26, 2019, provides generally that "Appellant shall serve and file an amended initial brief and an amended designation of matter in compliance with Rules 208 and 209(b) of the South Carolina Appellate Court Rules ...." Pope's amended filings remain noncompliant in connection with the arguments made in Respondents' motion to strike filed on May 24, 2019 (attached hereto as Exhibit A and incorporated herein by reference), specifically as follows:

I. Pope's purported Statement of the Case in her amended initial brief contains pervasive contested matters in violation of Rule 208(b)(1)(C), SCRCP.

II. Pope's amended initial brief contains pervasive statements that are self-supported by Pope's pleadings and/or affidavits.

II. Pope's initial brief contains pervasive irrelevant matter.

In Respondents' motion to strike filed on May 24, 2019, the legal standard concerning matter included in an appeal was stated citing the South Carolina Appellate Court Rules, South Carolina case law, and other jurisdictions' case law. The legal standard cited therein from the South Carolina Appellate Court Rules is as follows:

> 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.

CONCLUSION

Despite Pope including twenty-five Orders in her Notice of Appeal, Pope has limited her initial brief to address only (1) Judge Manning's Order Denying Motion to Dismiss filed on November 9, 2010 (and Judge Manning's related Order filed on January 12, 2011, denying Pope's motion pursuant to Rule 59(e), SCRCP); (2) Judge Early's Order Granting Plaintiffs' Motion for Summary Judgment as to Defendant's Counterclaims filed on July 8, 2017 (and Judge Early's related Order Denying Defendant/Counter-Claim Plaintiff's Motion to Alter, Amend, Reconsider and/or Vacate Order Granting Plaintiffs' Motion for Summary Judgment filed on November 26, 2018); and (3) purportedly certain Orders dated and/or filed after May 29, 2013.

Pope has specifically abandoned her appeal of the pre-May 29, 2013 Orders listed in her Notice of Appeal as numbers 20, 21, 22, 23 (as it relates to an Order denying Pope's motion to change venue) and 24, because "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. Further, arguably Pope has abandoned her appeal of the post-May 29, 2013 Orders listed in her Notice of Appeal as numbers 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, because Pope fails to argue any discussion and citations of authority (as required in Rule 208(b)(1)(E), SCACR).

Though not every statement of the case or the facts—as purported by Pope—nor Pope's argument are included in this motion to strike (or in Respondents' motion to strike filed on May 24, 2019), such non-inclusion is in no way an acceptance of those statements or arguments. The brief of Respondent will address those statements and arguments.

Appellant's contested matters included in her purported Statement of the Case should be stricken because of the violation of Rule 208(b)(1)(C), SCACR.

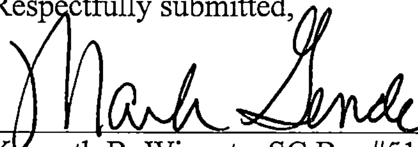
Appellant's statements that are only self-supported by Pope's pleadings and/or affidavits, included in her amended initial brief should be stricken because of the failure to adhere to Rules 208(b)(1)(E) and 208(b)(4), SCACR. Appellant's self-supporting pleadings and affidavits should be stricken from her Designation to the extent such documents provide the only support for a statement included in the initial brief.

Pursuant to the legal standard concerning matter included in an appeal set forth above in this motion to strike and in Respondents' motion to strike filed on May 24, 2019, all irrelevant matter included by Appellant in this appeal should be stricken from Appellant's Designation and amended initial brief.

All matter in Appellant's initial brief and Designation which was not presented to the lower court in connection with any of the orders in this appeal, should be stricken.

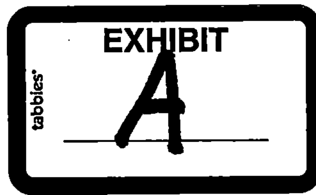
Alternatively, pursuant to the legal standard concerning matter included in an appeal set forth above in this motion to strike and in Respondents' motion to strike filed on May 24, 2019, and Appellant's substantial noncompliance with the Rules, Appellant's appeal should be dismissed pursuant to Rule 260(a), SCACR, and/or Rule 269, SCACR.

Respectfully submitted,



Kenneth B. Wingate, SC Bar #5135
Mark V. Gende, SC Bar #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

September 4, 2019



898602

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAY 24 2019
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Doyet A. Early, III, Circuit Court Judge
The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2010-CP-40-4900

Appellate Case No. 2018-002229

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.

MOTION TO STRIKE STATEMENTS IN THE INITIAL BRIEF AND DESIGNATION OF MATTER OF APPELLANT

Respondents reserve the right pursuant to Rule 208(b)(2), SCACR to include their own statement of the case, so that they shall not be bound by the matters stated or alleged in Appellant's statement of the case. Numerous sections of the initial brief of Appellant ("Pope") should be stricken due to the following particulars:

A. Pope's purported Statement of the Case contains pervasive contested matters in violation of Rule 208(b)(1)(C), SCRCP.

B. Pope's initial brief contains pervasive statements that are either unsupported by any reference to the Record on Appeal or are only self-supported by Pope's pleadings and/or affidavits.

C. Pope's initial brief contains pervasive irrelevant matter.

Despite Pope including twenty-five Orders in her Notice of Appeal, Pope has limited her initial brief to address only (1) Judge Manning's Order Denying Motion to Dismiss filed on November 9, 2010 (and Judge Manning's related Order filed on January 12, 2011, denying Pope's motion pursuant to Rule 59(e), SCRCP); (2) Judge Early's Order Granting Plaintiffs' Motion for Summary Judgment as to Defendant's Counterclaims filed on July 8, 2017 (and Judge Early's related Order Denying Defendant/Counter-Claim Plaintiff's Motion to Alter, Amend, Reconsider and/or Vacate Order Granting Plaintiffs' Motion for Summary Judgment filed on November 26, 2018); and (3) purportedly certain Orders dated and/or filed after May 29, 2013.

Pope has specifically abandoned her appeal of the pre-May 29, 2013 Orders listed in her Notice of Appeal as numbers 20, 21, 22, 23 (as it relates to an Order denying Pope's motion to change venue) and 24, because "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. Further, arguably Pope has

abandoned her appeal of the post-May 29, 2013 Orders listed in her Notice of Appeal as numbers 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, because Pope fails to argue any discussion and citations of authority (as required in Rule 208(b)(1)(E), SCACR).

I. Pope's purported Statement of the Case contains pervasive contested matters in violation of Rule 208(b)(1)(C), SCACR.

Rule 208(b)(1)(C), SCACR, provides:

> **Statement of the Case.** The statement shall contain a **concise history** of the proceedings, **insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters** and shall contain, as a minimum, the following information: the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court, jury, master, or administrative tribunal; the date(s) of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of the service of the notice of appeal; the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal; and any changes made in the parties by death, substitution, or otherwise. Any matters stated or alleged in appellant's statement shall be binding on appellant.

(emphasis added)

In the first three paragraphs (p. 1) of Pope's Statement of the Case ("SOTC"), she attempts to summarize *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). In the fourth paragraph (p. 1) of the SOTC, Pope impermissibly includes contested matters in her statements as follows: "In one of many attempts to thwart [Pope and Buchanan's] efforts, Respondents threatened to sue Buchanan and Pope unless they dropped their appeal of the trial court's approval of the settlement." "When the appeal was not dropped, this case (Richland 4900) was filed on May 19, 2010 …."

In the first paragraph on page 2 of the SOTC, Pope continues with her inclusion of contested matters ("Despite Respondents' threat …") and attempts to make an inaccurate connection between *Wilson v. Dallas* and the continuation of a breach of fiduciary duty case

(Case No. 2010-CP-40-4900, hereinafter "Richland 4900") six years after *Wilson v. Dallas*. The inclusion of this highly contested matter is additionally improper, because, though *Wilson v. Dallas* contained a clear finding that "the circuit court had cause to remove [Pope and Buchanan] and replace [Pope and Buchanan] with a professional fiduciary," *Wilson v. Dallas* did not directly address the breach of fiduciary duty claims against Pope which the Respondents continue to pursue in Richland 4900. Richland 4900 began and continues now due to Pope's improper actions while serving in fiduciary capacities in connection with the Estate and Trust of James Brown.

In the fourth paragraph on page 2 of the SOTC, Pope continues her inclusion of contested matters by failing to directly recognize Russell L. Bauknight ("Bauknight") as the Trustee of the James Brown 2000 Irrevocable Trust and as Personal Representative of the Estate of James Brown. She also improperly includes contested matters regarding the James Brown Legacy Trust by intentionally excluding the application of *Wilson v. Dallas* from the context. Pope similarly continues to improperly include contested matters regarding the James Brown Legacy Trust beginning at the last paragraph on page 2 of the SOTC and continuing through the third full paragraph on page 3 of the SOTC.

The first paragraph on page 4 of the SOTC is a continuation of improperly including contested matters regarding the James Brown Legacy Trust.

The third full paragraph (beginning with "On October 1, 2010 ...") on page 6 of the SOTC clearly included contested matters when Pope states that "[t]he affidavit provided the Court with Buchanan's complete accountings through May 26, 2009; showed that they had brought in $7.83 million; and showed that on May 27, 2009 they had (reserving all rights)

delivered assets valued at more than $99 million to Bauknight." All or portions of this statement of Pope remain issues to be determined in Richland 4900.

The third paragraph on page 7 through the third paragraph on page 9 of the SOTC, as a whole, do not contain a concise history of the proceedings, inasmuch as they are unnecessary to an understanding of this appeal—a limited appeal (discussed *supra*) of only certain Orders addressed in her initial brief.

In the fourth paragraph on page 7 of the SOTC, Pope's inclusion that "Buchanan and [Pope] were not reinstated ..." is a significant understatement, because a concise history would have instead included the *Wilson v. Dallas* clear finding of the South Carolina Supreme Court that "the circuit court had cause to remove [Pope and Buchanan] and replace [Pope and Buchanan] with a professional fiduciary." 403 S.C. 411, 448, 743 S.E.2d 746, 766 (2013).

In the first paragraph on page 10 of the SOTC, Pope's statement that "[c]ounsel for Plaintiffs Tommie Rae Brown and eleven Richland 4900 Plaintiffs advised [Judge Early] of their intention to disregard *Wilson* and reinstate the AG's 2008 settlement" is something she alone states often (with no support from the record) and is an improper inclusion of a contested matter. Also, whether or not "[t]he AG expressed pleasure that Bauknight had been appointed" is irrelevant to this appeal and is in no way authorized by Rule 208(b)(1)(C), SCACR, for inclusion in a statement of the case.

In the fifth paragraph (beginning with "In October 2013, the Aiken Court ...") on page 10 of the SOTC, Pope's statement that "[Judge Early] orally approved Buchanan's service, all of which is joint with [Pope]; ruled that no disgorgement was appropriate under *Wilson*; and left open the possibility of Buchanan's re-entry into Richland 4900" is something else she alone states often (with no support from the record) and is an improper inclusion of a contested matter.

II. Pope's initial brief contains pervasive statements that are either unsupported by any reference to the Record on Appeal or are only self-supported by Pope's pleadings and/or affidavits.

For authority to include a statement of facts in an initial brief, Rule 208(b)(1)(E), SCACR, provides: "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." Rule 208(b)(4), SCACR, also provides: "The 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."

In the first paragraph on page 14 of Pope's Statement of the Facts ("SOTF"), Popes cites *Wilson v. Dallas* to support the purported facts stated. There is no mention of the first two sentences in *Wilson v. Dallas*. And the third sentence—as stated—is not fully supported by *Wilson v. Dallas*, because the third sentence does not take into account both that "Brown's estate planning documents indicate Brown intended the bulk of his wealth to be used to support the Charitable Trust"[1] (*Wilson*, 403 S.C. 411, 417, 743 S.E.2d 746, 750 (2013)) and the "**intellectual property rights** to Brown's music or persona **created under federal copyright laws or laws for heirs**" (*Id.*, 403 S.C. 411, 421, 743 S.E.2d 746 752 (2013)) automatically provided to heirs of James Brown apart from his intent.

---

[1] "Charitable Trust" in *Wilson* means "The James Brown "I Feel Good" Trust ("Charitable Trust"), which Brown declared "shall be used solely for the tuition, educational expenses, and financial assistance of . . . poor and financially needy children, youth, or young adults (Who are both qualified and deserving) who seek and have need of such assistance to obtain and further their education at the many educational entities and/or institutions available in the States of South Carolina and Georgia."" *Wilson*, 403 S.C. 411, 417, 743 S.E.2d 746, 750 (2013).

In the first sentence of the first paragraph on page 15 of Pope's SOTF, not only is the statement merely self-supported by Pope's own pleading but the pleading referenced does not support all that she states.

In the first sentence of the fourth paragraph on page 15 of Pope's SOTF, there is no reference to the record on appeal for what Pope states. The remaining sentences of such paragraph – characterizing that Cannon and Dallas sought and received help from the Attorneys General of Georgia and South Carolina – are not supported by the reference Pope cites.

In the first sentence of the fifth paragraph on page 15 of Pope's SOTF, Pope relies on her own self-supporting affidavit and the affidavit referenced does not support all that she states.

In the second sentence of the first paragraph on page 16 of Pope's SOTF, Pope's statement about Senior Assistant AG Havird "Sonny" Jones is not supported by her references.

In the second paragraph on page 16 of Pope's SOTF, Pope's statement—"The open attacks would continue for years."—is not supported by her references.

In the third paragraph on page 16 of Pope's SOTF, Pope's statement that other Court Orders "approved virtually all of [Pope's] actions" is not supported by her references.

In the fourth paragraph on page 16 of Pope's SOTF, Pope's statements are not supported by her references.

In the section entitled "The Contract with the Acknowledged Family and Tommie Rae" beginning on page 16 and ending on page 18 of Pope's SOTF, Popes' statements about what the family of James Brown knew, the characterizations of such purported knowledge, and the actions taken by the family of James Brown in connection with such purported knowledge, are not supported by her references.

In the section entitled "The James Brown Legacy Trust is Funded and Terry Brown Joins the Settlement" beginning on page 18 and ending on page 19 of Pope's SOTF, Popes' statements about James Brown Legacy Trust are not supported by her reference. Pope relies on her own self-supporting affidavit in her statement about Forlando's purported specific testimony "that offers of $150 million were available for [James Brown's] music empire"; she then bootstraps that statement to general phrasing of Respondents' designated expert witness, Roger Miller (referencing Miller's deposition but also referencing another person's deposition and another person's affidavit which are unrelated to Pope's statements). Pope's statement about filing James Brown's estate tax return and that such filing "showed ... that Brown's music empire was worth $84 million, $99 million less a $15 million debt" is not supported by her references and is incorrect due to the position of the Internal Revenue Service (which position Pope grossly mischaracterizes in the first paragraph of page 25 of her SOTF). Pope relies on her own self-supporting affidavit in her statements about the estate tax return she prepared being "reviewed in detail in a November 2008 Federal Court hearing in Forlando's suit" and her characterization of Terry's interest in the Legacy Trust. Finally, in the last paragraph of this section (the first paragraph on page 19), Pope's statement about Russell Bauknight is not only a gross mischaracterization but is not supported—as stated—by her reference.

In the section entitled "The Aiken Court Approves the Plan to Dismember Brown's Estate Plan" beginning and ending on page 19 of Pope's SOTF, Popes' statements about the South Carolina Attorney General and members of the Office of Attorney General are not only gross mischaracterizations and not supported—as stated—by her reference, but Pope relies solely on her own self-supporting affidavit for support of such statements. The remainder of this section are simply not statements of the facts in this case; these are—yet again—gross

mischaracterizations, not supported by her references, and most are stated in reliance on Pope's own self-supporting filings.

In the section entitled "The AG's Stipulation of Heirs Stops the Trust's Termination Rights Plan" beginning and ending on page 19 of Pope's SOTF, Popes' statements are not facts but her criticism of the fact that all the parties in this case rejected her involvement with the termination rights, which were not part of the James Brown Estate or the 2001 Irrevocable Trust. To this day Pope believes she had a foolproof plan to determine James Brown's heirs and then "split heirs" in order to work only with a majority of the heirs to "minimize the impact of termination rights." The parties did not buy in to Pope's oft-stated plan, and Pope blames everyone but herself for that. Pope asserts *Wilson v. Dallas* often as her attempt to bootstrap the opinion as an endorsement of her plan, yet she often needs reminding that the Supreme Court in Appellate Case Nos. 2013-001649, 2014-000250, 2014-001279 and 2009-142286 (which is *Wilson v Dallas*) did not in any way endorse her plan, but provided:

> Pope is hereby prohibited from filing any further motion or appeals in actions involving the Estate and Trust of James Brown, such as the above actions, in which she clearly has no standing. We caution Pope that continued attempts to involve herself in the resolution of the Estate and Trust may result in contempt charges.

Pope's purported statements of the facts in this section are gross mischaracterizations, not supported by her references, and many are stated in reliance on her own self-supporting filings. Her closing sentence in this section is often stated by Pope in various and similar ways, but—as here—is not supported at all.

Also, Appellant's Argument section of the initial brief contains numerous instances of purported statements of facts which are unsupported by any reference to the Record on Appeal.

One of many examples is Appellant's argument entitled "Fraud Under §62-1-106" which is an egregious failure to adhere to Rules 208(b)(1)(E) and 208(b)(4), SCACR.

III. Pope's initial brief contains pervasive irrelevant matter.

In the section entitled "The $79 Million Devaluation and Richland 4900" beginning on page 21 and ending on page 29 of Pope's SOTF, Popes' statements make it extremely difficult to identify any facts among her diatribe as to what she claims everyone else has done, or is doing, wrong. Pope's statements fall into one of two categories:

- statements that are either unsupported by any reference to the Record on Appeal or are only self-supported by Pope's pleadings and/or affidavits; and/or
- statements containing irrelevant matter.

The following fall into the first category (statements that are either unsupported by any reference to the Record on Appeal or are only self-supported by Pope's pleadings and/or affidavits):

1. The first paragraph of this section beginning on page 21 carrying over to page 22, with the exception of the last sentence in the paragraph.
2. The remaining paragraphs on page 22 including footnotes, with the exception to all Pope's statements reflecting that Respondents claimed Pope mishandled tax matters.
3. The second and remaining paragraphs on page 23.
4. All paragraphs on page 24 including footnotes.
5. All paragraphs on page 25.
6. All of page 26.

7. All of page 27 with the exception that the lower court did bar Pope from participating in cases in which she had no standing.

8. All of page 28 carrying over to the first line on page 29 with the exception that the Attorney General was dropped as party to Case 4900, and summary judgment was granted to Plaintiffs as to Pope's counterclaims.

The following fall into the second category (statements containing irrelevant matter):

1. The last paragraph on page 23

2. All of page 24.

3. All of page 25.

4. All of page 26.

5. All of page 27 with the exception that the lower court did bar Pope from participating in cases in which she had no standing, and the Status Report of Judge Early speaks for itself.

6. The first five paragraphs of page 28.

7. The two full paragraphs on page 29 (prior to Pope's Argument section).

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.

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.

IV. Appellant's Designation of Matter to be Included in the Record on Appeal contains irrelevant matter and matter which was not presented to the lower court.

In addition to irrelevant matter in Appellant's Designation of Matter to be Included in the Record on Appeal which corresponds to Appellant's irrelevant statements discussed above in Section III, Appellant also includes matter in her initial brief and Designation which was not presented to the lower court in connection with any of the orders in this appeal. Two specific documents are an "Affidavit to Lift Stay" dated 11/8/2017 and an "Affidavit[] Supporting Supplemental Motion to Lift Stay" dated 12/17/2018.

CONCLUSION

Though not every statement of the case or the facts—as purported by Pope—nor Pope's argument are included in this motion to strike, such non-inclusion is in no way an acceptance of those statements or arguments. The brief of respondent will address those statements and arguments.

Appellant's contested matters included in her purported Statement of the Case should be stricken because of the violation of Rule 208(b)(1)(C), SCACR.

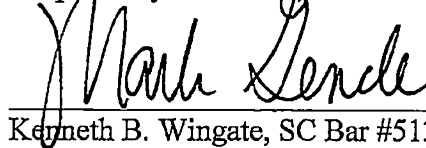
Appellant's statements that are either unsupported by any reference to the Record on Appeal or are only self-supported by Pope's pleadings and/or affidavits, included in her initial brief should be stricken because of the failure to adhere to Rules 208(b)(1)(E) and 208(b)(4), SCACR. Appellant's self-supporting pleadings and affidavits should be stricken from her Designation to the extent such documents provide the only support for a statement included in the initial brief.

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

All matter in Appellant's initial brief and Designation which was not presented to the lower court in connection with any of the orders in this appeal, should be stricken.

Alternatively, pursuant to the legal standard concerning matter included in an appeal set forth above and Appellant's substantial noncompliance with the Rules, Appellant's appeal should be dismissed pursuant to Rule 260(a), SCACR, and/or Rule 269, SCACR.

Respectfully submitted,



Kenneth B. Wingate, SC Bar #5135
Mark V. Gende, SC Bar #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

May 24, 2019

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

RECEIVED
SEP 04 2019
SC Court of Appeals

Case No. 2010-CP-40-4900

Appeal Tracking 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.

PROOF OF SERVICE

I certify that I have served the **MOTION TO STRIKE** by depositing a copy of it in the United States Mail, postage prepaid, on September, 2019, addressed to the following attorneys of record:

Adam T. Silvernail, Esquire
Law Office of Adam T. Silvernail LLC
1905 Marion Street (29201)
P. O. Box 7995
Columbia, SC 29202

Daryl L. Williams, Esquire
Gertz & Moore, LLP
1416 Laurel Street (29201)
Post Office Box 456
Columbia, SC 29202

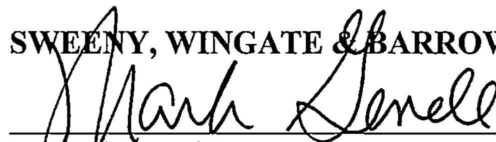
William Jeffrey Smith, Esquire
1216 Crenshaw Street
Newberry, SC 29108

Charles E. Carpenter, Jr., Esquire
Carpenter Appeals & Trial Support, LLC
4825 Portobello Road
Columbia, South Carolina 29206
Attorneys for Appellant

The Honorable J. Emory Smith, Jr.
Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Attorney for Respondent Attorney General

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.



Kenneth B. Wingate
Mark V. Gende
Everett A. Kendall, II
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211
(803) 256-2233
Attorneys for Respondents

September 4, 2019

SWEENY WINGATE & BARROW P.A.

September 4, 2019

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x7121
mvg@swblaw.com

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
SEP 04 2019
SC Court of Appeals

RE: Russell L. Bauknight, et al. v. Adele J. Pope
Appellate Case No. 2018-002229
Our File: 4077-7389

Dear Ms. Kitchings:

Enclosed please find the original and copies of Respondents' amended initial brief, amended designation of matter, motion to strike, and two separate proofs of service, in the above-referenced matter. Also enclosed is the filing fee for the motion to strike in the amount of $50.00. I would appreciate your filing the originals and returning filed copies to me by the courier.

Should you have any questions or concerns, please do not hesitate to give me a call.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

Mark V. Gende

MVG/pdk
Enclosures
cc: Counsel of record (with copies of enclosures)