

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

The Honorable L. Casey Manning, Circuit Court Judge

Appellate Case No.: 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.; 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.; 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 Appellant.

**RETURN AND MEMORANDUM IN OPPOSITION TO MOTION OF ATTORNEY
GENERAL TO STRIKE AMENDED INITIAL BRIEF OF APPELLANT**

Appellant submits this return and memorandum in opposition to the motion of the Honorable Alan Wilson, Attorney General of South Carolina (AG) to strike the amended brief of Appellant.¹ The motion should be denied for one, more or all of the following reasons:

1. Appellant's brief and designations are proper and in compliance with the SCACR, and matters raised and cited are relevant and appropriate.
 2. Respondent AG's reliance on the E-filing index and a court clerk is misplaced.
 3. This Court has resolved the AG's objection in Appellate Case No. 2017-01899.
 4. Numerous documents not in the E-filing system were presented to the lower by the Attorney General and others, and judicial notice taken by the court.
 5. The AG's consolidation of this case with a Newberry FOIA case; attempt to consolidate a second Newberry FOIA case; and attempts to consolidate discovery in Richland 4900 and Aiken County Case 2013-CP-02-1337 have complicated and exponentially expanded the matters presented to the lower court in Richland 4900.
 6. Many documents dated before the Richland 4900 complaint were presented to the lower court and are part of the first record on appeal from this case.
 7. The ROA in 2016-001708 and 2017-001899 refute the Arguments of the AG.
 8. The Attorney General's continued support for the Legacy Trust's Beneficiary Plaintiffs violates its public duty and its representations to the Court in *Wilson v. Dallas*
 9. The AG's motion continues its retaliation against Buchanan and Pope for their successful appeal in *Wilson v. Dallas* of the 2008 settlement brokered by the AG.
- 1. Appellant's brief and designations are proper and in compliance with the SCACR., and matters raised and cited are relevant and appropriate.**

This is the third pre-trial appeal in Richland County Case 2010-CP-40-4900 (Richland 4900), which was filed against Robert Buchanan, Jr. and Adele Pope nearly 9 ½ years ago by the Attorney General, the James Brown Legacy Trust over which he has both effective control and

¹ AG Wilson previously filed a similar motion related to Appellant's original brief and designation herein, and Sweeny, Wingate and Barrow, P.C. filed a motion to strike at the same time as AG Wilson's most recent motion. Appellant incorporates both her Return to Wingate's motion and her return (filed May 31, 2019) to AG Wilson's earlier motion herein.

50% voting control; and by Russell Bauknight, as trustee of the AG's Legacy Trust, "on behalf of the Attorney General of South Carolina," and on behalf of Tommie Rae Hynie Brown and other "Beneficiary Plaintiffs" of the AG's Legacy Trust. Complaint, Richland 4900², ROA2017-1899 176 -188. A brief chronology of the matters presented to the lower court and development and expansion of the record follows:

May 18, 2010	AG McMaster does not sign Wingate contract to sue Buchanan & Pope.
May 19, 2010	AG, Bauknight "on behalf of" AG, Legacy Trust sue Buchanan & Pope.
Early 2011	S.C. Court of Appeals Dismisses Buchanan and Pope's early challenge to constitutionality of Richland 4900 at request of AG and others.
January 2011	Legacy Trust amended and Terry Brown's share given to Forlando.
August 2011	Pope files 2 Newberry FOIA suits for Wingate Contract, Legacy Trust Amendments, and claimed \$4.7 million value of estate.
2011 and 2012	Richland 4900 Plaintiffs and/or Bauknight moved to intervene in Newberry FOIA suits; transfer to Richland County; consolidate with Richland 4900. Both are transferred, one consolidated.
By 2012- 2016	AG attempts to consolidate second FOIA Suit (Legacy Trust) w/ Richland 4900.
March 2013	AG tells Supreme Court in <i>Wilson v. Dallas</i> that it is getting out of Richland 4900 and hopes to conclude FOIA cases shortly.
May 8, 2013	Supreme Court acknowledges AG's representations in <i>Wilson v. Dallas</i> .
May 10, 2013	AG, through Richland 4900 counsel, tells Richland 4900 Court: ...the [Supreme] court no longer puts any primacy or priority on any court hearing these matters...

² Appellant, for the convenience of the Court, has indicated the location of the Richland 4900 Complaint and certain other documents in the ROA in Appellate Case 2017-001899, an earlier appeal from this Case.

Therefore the Case 4900 Plaintiffs and Proposed FOIA Intervenors request that Case 4900 be held in abeyance in its entirety until all the underlying issues related to the Plaintiffs are resolved by the Aiken Court.

Ltr. to Jg. Manning, Gende, May 10, 2013. [Exhibit A ROA 248-50]

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|--------------|--|
| May 10, 2013 | AG helps Tommie Rae and Levenson reinstate Bauknight, who retains position as trustee of the AG's Legacy Trust., with 75% management control by Tommie Rae and the AG, and the AG's right to remove and replace at will. |
| May 29, 2013 | Tommie Rae and Levenson announce to the Honorable Doyet A. Early, III, in open court the intention to disregard <i>Wilson v. Dallas</i> and reinstate the 2008 settlement brokered by the AG. |
| 2015 | Judge Early fails to advise Supreme Court of announced intention to disregard <i>Wilson v. Dallas</i> when questioned about settlement. |
| 2016 | Two Newberry/Richland FOIA cases assigned to Judge Early. He dismisses them. [App. Case No. 2016-001708; 2016-1727] |
| 2016 | AG simultaneously moves to consolidate discovery in Richland 4900 and Aiken 1337 and 2d FOIA case, and to be dismissed. |
| 2016-2017 | Judge Early allows Wingate firm to attend Aiken 1337 depositions of AG's staff to protect interest of Richland 4900 Plaintiff AG, a Wingate client. |
| 2017 | AG dismissed as a party to Richland 4900. (2017- 001899) |
| 2018 | AG granted partial summary in Richland 4900 (2018-002229) |

The already voluminous record in this case was made more so by the AG's efforts beginning in 2011 to consolidate it with two FOIA cases; his effort in 2016 to consolidate discovery with a 2013 Aiken County case; and other actions of the AG, including the claim that the James Brown Legacy Trust over which he has had effective control since 2009 does not exist. Despite this, the amended initial brief properly cites the record and does not contain any improper material.

2. Respondent AG's reliance on the E-filing index and a court clerk is misplaced.

The Richland County e-filing system has not been in place for most of the existence of this case. It does not contain many of the matters presented to the lower court. As a single example, on March 9, 2017 the lower court issued an order striking an affidavit of Appellant, dated January 17, 2017 without review of that document. The Court further directed that "all further affidavits filed by Defendant will be filed under seal." The original Affidavit does not appear in the Record. In addition, there does not seem to be any indication in the record of the consolidated Newberry FOIA case. This is also true of the letter to Judge Manning which is Exhibit A. Nor should the AG rely on an undocumented consultation with Richland County staff.

Additionally, direct communications with the Court, including documents handed up during hearings, often do not appear in the Court's online database. Appellant submits that the AG's focus on what is or is not in the electronic file is a red herring, where SCACR Rule 210(c) only requires that matter be "presented" to the lower court in order to be included in the record on appeal.

3. This Court has resolved the AG's objection in Appellate Case No. 2017-001899

This Court resolved many of the issues raised by the AG in favor of Appellant in its Order dated December 10, 2018 in Case 2017-001899. The AG does not address whether the documents about which he complains are located within the ROA in that appeal.

4. Numerous documents not in the E-filing system were presented to the lower court by the Attorney General and others, and judicial notice taken by the court.

The Attorney General fails to take into account the judicial notice the lower court took in the orders which are the subject of this appeal, and voluminous direct contact with the Richland 4900 Court by counsel, such as Exhibit A, over its long history.

5. Many documents dated before the Richland 4900 complaint were presented to the lower court and are part of the first record on appeal from this case.

The Attorney General takes issue with documents dated before the date of the complaint, but scores of documents in this record predate the 2010 complaint. The allegations of both the complaint and the counterclaims relate directly to dozens of previous cases involving the Estate of James Brown, and many documents from those previous cases have been filed, presented and/or introduced as exhibits or attachments to various filings over the nearly 9 ½ years this matter has been pending.

6. The ROA in 2016-001727 and 2017-001899 refute the Arguments of the AG.

A majority of the documents designated in this appeal are already included in the records on appeal in the above-noted cases, both of which arose from this case. Notably, both of those records also include many documents (which were presented to the lower court in this case) which predated the complaint herein and/or were previously filed in other cases.

7. The Attorney General's continued support for the Legacy Trust's Beneficiary Plaintiffs Violates its public duty and its representations to the Court in *Wilson v. Dallas*.

Judicial estoppel bars Wingate from purporting to speak on behalf of the Legacy Trust. Since 2013 Wingate has been on notice of the claim of the James Brown Legacy Trust that it does not exist, which has been presented to both the lower court and this court.³ Both Wingate and its trustee, Russell Bauknight, have resisted all effort to make the successors in interest to the Legacy Trust, the primary Plaintiff/Respondent in this action, parties.

³ See Appellate Case No. 2016-01727, *Pope v. Wilson, et al.*

The Legacy Trust is currently claiming in this Court in another appeal that it does not exist. The lower court in that matter accepted the Legacy Trust's assertion that it does not exist, and Wingate is therefore judicially estopped from purporting to speak on its behalf. *See Cothran v. Brown*, 350 S.C. 352, 566 S.E.2d 548 (Ct.App. 2002). That should not be allowed. If Wingate does not make the successors, including Tommie Rae, the AG's (New) Charity, Forlando, Venisha's Estate, and other Plaintiff/Counterclaim Defendants/Respondents, the Court should dismiss their claim; reverse the summary judgment; and allow the counterclaims to proceed against the termination rights proceeds owned by the Legacy Trust since 2009.

8. The AG's motion continues its retaliation against Buchanan and Pope for their successful appeal in *Wilson v. Dallas* of the 2008 settlement brokered by the AG.

The AG's motion, especially considering that Wingate has additionally filed a motion seeking the same relief on behalf of all Respondents, is a continuation of the AG's pattern of moving to strike nearly every filing by Appellant in multiple cases. This burdensome habit, along with other conduct of the AG since *Wilson v. Dallas* was decided in Appellant's favor, appears to be retaliation by the AG for Appellant's and Buchanan's successful appeal of AG McMaster's 2008 settlement which dismantled James Brown's estate plan.

CONCLUSION

For the foregoing reasons, as well as those set out in documents incorporated above, Appellant submits that this Court should deny the motion to strike any portion of the amended brief or designation herein.

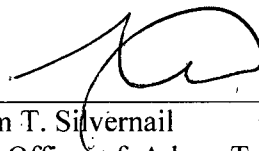
Respectfully submitted,

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Attorneys for the Appellant

September 10, 2019

Exhibit A

S·W·B

SWEENEY WINGATE & BARROW P.A.

May 10, 2013

Reply to: Main Office

Mark V. Gende
(803) 256-2233 x121
mvg@swblaw.com

VIA EMAIL AND U.S. MAIL

Honorable L. Casey Manning, Jr.
Circuit Court Judge
Richland Judicial Center
1701 Main Street, Room 214 (2nd Floor)
Post Office Box 192
Columbia, SC 29202-0192

RE: Russell L. Bauknight, et al. v. Adele J. Pope
Civil Action No.: 2010-CP-40-04900
Our File: 4077-7389

Dear Judge Manning:

Please accept this letter as Richland County Case 4900 Plaintiffs' and Proposed FOIA Intervenor's assessment why all matters in Case 4900 should be held in abeyance pending the outcome of all James Brown Estate matters that the Supreme Court has now unequivocally remanded to Aiken County.

On Wednesday, May 8, 2013 the South Carolina Supreme Court denied all petitions for rehearing and took a significant additional step. The Court substituted a new and revised opinion for its prior decision in the James Brown Estate matter. This new opinion is lengthy and makes certain additions and deletions to the prior, replaced opinion. This new opinion has significant bearing on the continued progress of Case 4900.

First, the new Supreme Court opinion creates significant uncertainty as to what persons or entities constitute the plaintiffs group. The new opinion voids the Section 1102 settlement agreement that had bound the plaintiff's group together. The new opinion also voids the appointment of Russell Bauknight as personal representative and trustee of the James Brown Trust and Estate, but expressly allows Mr. Bauknight the right to reapply and, potentially, be

May 10, 2013

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reappointed as a fiduciary of the Trust and Estate. Therefore, until the individual family members' position with reference to the Trust and Estate is finally determined by the Aiken Court and until fiduciaries are installed for the Trust and Estate, my firm has substantial uncertainty on what basis each named plaintiff will continue in Case 4900. We believe these matters can and will be resolved as each Aiken County matter is resolved.

Furthermore, the Attorney General, for whom Sweeny, Wingate & Barrow, PA is counsel of record in Richland Case 4900, has independently filed a motion to withdraw from the case and made various other representations and filings in related matters. Consequently, Sweeny, Wingate & Barrow, PA today is filing a motion to be relieved as counsel for the Attorney General.

Second, the new Supreme Court opinion upholds the for-cause removal of the Case 4900 Defendant, Mrs. Adele Pope, as a fiduciary of the James Brown Estate. In upholding her for-cause removal, the court relies on some of the very same allegations made by the Case 4900 Plaintiffs against Mrs. Pope. Mrs. Pope is afforded no opportunity to reapply for any fiduciary position with the Trust or Estate. Because of her for-cause removal, she can have no further part in the Estate and Trust.

Third, the Supreme Court, in substituting the new opinion has completely eliminated Footnote 29 of the prior opinion. Footnote 29, while only dicta in the now replaced opinion, addressed, among other items, the FOIA matters and called for them to be heard "in the first instance" without any clear definition of what that meant. Such language is totally absent from the new order. While the court does recognize that the Attorney General is contesting releasing some documents pursuant to FOIA, the court no longer puts any primacy or priority on any court hearing these matters. We believe that such a position is entirely appropriate, because the documents requested under FOIA are subject to a claim of privilege which is the subject of a motion for protective order before this court in Case 4900. The claim of privilege must be decided before any court can make a determination of the application of any FOIA claim.

In summary, all of the uncertainty that your honor recognized at the last status conference still exists, and possibly a bit more. With the Supreme Court now having said all it is going to say on the matters that were before it, it is now abundantly clear that all matters related to the James Brown Estate cases must now be heard and decided by the Aiken Court. How the Aiken Court rules on a number of issues across a number of cases will then determine the posture of the group of plaintiffs or individual plaintiffs who will continue on with Case 4900.

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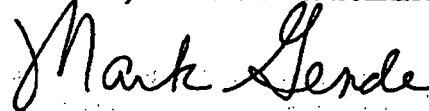
May 10, 2013
Page 3 of 3

Therefore, Case 4900 Plaintiffs and Proposed FOIA Intervenors respectfully request that Case 4900 be held in abeyance in its entirety until all the underlying issues related to the Plaintiffs are resolved by the Aiken Court. Should you deem it best for Plaintiffs to make a formal motion for stay, I would be pleased to do so.

As always, I am available to provide the court any further information it requires in order to fully consider this matter.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Mark V. Gende

MVG/lda

cc: Adam T. Silvernail, Esquire
Daryl L. Williams, Esquire
J. Emory Smith, Jr., Esquire

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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

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SEP 10 2019
SC Court of Appeals

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 Appellant.

PROOF OF SERVICE

I certify that on I have served Return and Opposition of Appellant to Respondent Attorney General's Motion to Strike by hand delivery on counsel listed below:

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Deputy Solicitor General
Office of the Attorney General
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Law Office of
ADAM T. SILVERNAIL
LLC

September 10, 2019

By U.S. Mail:

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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SFP 10 2019

SC Court of Appeals

Re: *Bauknight, et al, and Wilson, et al, v. Pope*
Appellate Case No. 2017-002229

Dear Ms. Kitchings:

In connection with the above-referenced appeal, I enclose an original and seven copies of each of the following:

1. Return and Opposition of Appellant to Motion of Respondents to Strike and
2. Return and Opposition of Appellant to Motion of Respondent Attorney General to Strike.

Also enclosed are an original and one copy of the Proofs of Service for these documents.

I also write to bring to the Court's attention that on May 31, 2019, we filed a motion which, among other relief, sought an Order allowing the filing of only six (6) copies of the Record on Appeal in this matter. Although other matters addressed in that filing were ruled upon, the request to file a reduced number of copies does not appear to have been decided to date.

Thank you for your attention to this matter.

Sincerely,



Adam T. Silvernail

cc: C. Havird Jones, Esquire
J. Emory Smith, Esquire
Kenneth B. Wingate, Esquire
Mark V. Gende, Esquire
Charles E. Carpenter, Jr., Esquire
Daryl L. Williams, Esquire
W. Jeffrey Smith, Esquire
Adele J. Pope, Esquire