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

Case No. 2010-CP-40-4900

Appellant Case No.: 2017-001899

RUSSELL L. BAUKNIGHT, as Trustee of The James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. And Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

And

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown, Respondents.

v.

Adele J. Pope, Defendant and Robert L. Buchanan, Jr. Defendants

Of whom Adele J. Pope is Appellant.

APPELLANT'S REPLY BRIEF TO RESPONDENT ATTORNEY GENERAL

W. H. Bundy, Jr., Esq.
M. Brent McDonald, Esq.
Bundy McDonald, LLC
1516 Old Trolley Road, 2nd Floor
Summerville, South Carolina 29485
888-552-1559
walter@bundymcdonald.com
brent@bundymcdonald.com

and

Adam T. Silvernail
Law Office of Adam T. Silvernail, LLC
Post Office Box 7995
Columbia, South Carolina 29202
Telephone: (803) 779-1770
adam@silvernaillawfirm.com

Attorneys for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INCORPORATION

Respondents have filed two separate Briefs in this Court. Each Brief states that it incorporates the other. As such, Appellant incorporates its Reply to the Brief of Respondents filed by Sweeny, Wingate and Barrow, P.A. as if fully stated herein. Appellant also relies upon her Final Brief in responding to the arguments made by Respondents and expressly rejects any of the Respondent's arguments not expressly agreed to herein.

PRELIMINARY STATEMENT

Contrary to Respondent Attorney General's ("Respondent AG") assertions that "[t]his appeal presents narrow legal issues regarding only four decisions of the Circuit Court, this case is complex, expansive and presents facts wherein the State of South Carolina, by and through Respondent AG, brought a civil cause of action, along with other private citizens, for monetary damages against private citizens of South Carolina. At its core are issues of due process, constitutionality, and legality of such an action by Respondent AG—especially in light of the fact that Respondent AG claims it did not authorize itself to be a Plaintiff in the action. *See* R.pp. 985-986; *See* also 2006 FN4. Appellant is not aware of any other case in the nation where such a case has been prosecuted by an Attorney General in a manner such as this against private citizens.[1]

---

[1] *In the Matter of the United Effort Plan Trust*, 296 P.3d 742, 727 Utah Adv. Rep. 33 (Utah 2013), though not analogous to the present case, is an example of a State's Attorney General petitioning a State Court to remove trustees rather than bringing a private action with other private individuals seeking monetary damages from private citizens. It is this private action as a Plaintiff seeking damages that makes the present action offensive. As Chief Justice Toal found in her concurring opinion in *Wilson v. Dallas*:

"The AG has taken unprecedented action in this case. After effecting a total takeover of Mr. Brown's estate by excluding its trustees and banding together with parties who stand only to gain from the invalidation of the testator's devise, the AG disposed of the court-appointed trustees, created a new settlement entity, and inserted himself into the day-to-day operations of a newly created charitable trust, the Legacy Trust.

****

Moreover, having brought this civil case, Respondent AG asks this Court to apply the South Carolina Rules of Civil Procedure in a manner which allows Respondent AG to engage in private civil litigation under a different set of rules. This is, of course, not the law of this State. See *Ex Parte Condon*, 583 S.E.2d 430, 354 S.C. 634 (2003)("this Court has never held that the Attorney General's authority...[to protect the public interest] is unlimited or somehow uniquely exempts him from acting in accordance with the Rules of Civil Procedure.").

REPLY TO RESPONDENT AG's STATEMENT OF THE CASE

Respondent AG is named in this action as a Plaintiff. *See* 176-188. Respondent AG, along with other private citizens, brought causes of action against Appellant[2] for breach of fiduciary duty, breach of trust, and negligence—all seeking monetary damages. Id. At the time of the filing of this action the Attorney General was Henry D. McMaster. *Id.*

One of the main factual claims brought by Respondent AG alleged that Appellant damaged it by "taking improper adversarial positions to the settlement entered into by the beneficiaries of the Estate and Trust and approved by the Circuit Court." (R.p. 183) The settlement was approved by the Circuit Court on May 26, 2009. (R.p. 182) The facts surrounding the settlement and Appellant's challenge to the settlement are issues at the heart of the current action in both the Plaintiffs' causes of action and the Appellant's counterclaims.

While no one disputes the propriety of the AG's initial intervention amidst allegations of fraud by the original trustees, once the court appointed Pope and Buchanan as fiduciaries, the AG's involvement was no longer necessary to stave off maladministration of the Charitable Trust. At that point, the AG should have assumed a more passive role.

****

Thus, the AG impermissibly crossed 'the line between oversight and management' in this case."

743 S.E.2d at 769-772.

[2] Robert Buchanan was also a named defendant/counterclaim plaintiff and participated in this action until his dismissal in 2012.

The terms of the settlement were that all of the assets of the Estate of James Brown and the James Brown 2000 Irrevocable Trust were to be transferred to a new Trust created by Respondent AG known as the James Brown Legacy Trust. See *Wilson v. Dallas*, 403 S.C. 411, 421-422, 743 S.E.2d 746, 752 (2013). The James Brown Legacy Trust is a Plaintiff in this action and a Respondent to this appeal. *See* R.pp. 176-188. Though Respondent AG argues in its brief that the James Brown Legacy Trust never actually existed, it is a party and plaintiff to this very action and it is affirmatively bringing causes of action against Appellant. Brief of Respondent AG, p. 19.

Appellant filed an Answer and Counterclaims on September 30, 2010. (R.pp. 337-370) All Respondents failed to timely respond to the Counterclaims. On November 10, 2010, an Affidavit of Default was filed by Appellant's counsel. (R.pp. 1513-1515) On November 16, 2010, Respondents moved to be relieved from the entry of default. (R.pp. 373-375) This Motion was not ruled upon by the Circuit Court for almost five (5) years.

During this time, Appellant also sought to obtain the fee agreement between Respondents and their counsel through both discovery and a separate FOIA action that was filed and ultimately consolidated with this case. *See* R.pp. 552-555; Wilson *v. Dallas*, 743 S.E.2d 746 at FN 30. Respondent AG refused to produce the fee agreement. Id.

On July 19, 2012, Appellant filed an offer of judgment seeking to agree to have Respondent AG dismissed from this action. (R.pp. 687-689) On August 13, 2012, Respondent AG, by and through counsel, filed a Motion to Strike the offer of judgment. Id.

The settlement referenced in the Complaint was ultimately voided by the South Carolina Supreme Court in *Wilson v. Dallas* by way of an initial decision filed on February 27, 2013 and a

substituted decision filed on May 8, 2013—nearly four years after the approval of the settlement by the Circuit Court in May of 2009. The Supreme Court found, in part, as follows:

"In our view, the evidence does not support the finding that the compromise was just and reasonable. The compromise orchestrated by the AG in this case destroys the estate plan Brown had established in favor of **an arrangement overseen virtually exclusively by the AG.**" 743 S.E.2d at 764 (emphasis supplied).

The Supreme Court went on to find as follows:

"In granting the AG's Motion to Intervene, to which no objections were interposed, the circuit court ruled the AG was authorized to intervene pursuant to his *parens patriae,* statutory, and common law authority. The AG undoubtedly has the authority to intervene to protect the public interest of a charitable trust. **However, the AG has no authority to become completely entrenched in an action that began here as one to set aside a will and for statutory shares, direct the settlement negotiations, and then fashion a settlement that discards Brown's will and his 2000 Irrevocable Trust and replaces them with new trusts, only to give himself sole authority to select the managing trustee. By so doing, the AG has effectively obtained control over the bulk of Brown's assets and has given his office unprecedented authority to oversee the affairs of the parties that has not heretofore been recognized in our jurisprudence.**" 743 S.E.2d at 765 (emphasis supplied).

At the time of the *Wilson v. Dallas* decision the Attorney General was Alan Wilson ("Respondent AG Wilson"). In petitions filed on March 14, 2013, after the initial decision in *Wilson v. Dallas*, Respondent AG informed the South Carolina Supreme Court that it would be "withdrawing" from this action and would only maintain a "monitoring role." *Wilson v. Dallas*, 743 S.E.2d 746 at FN 30. On March 25, 2013, Respondent AG made a motion to be dropped from the case pursuant to Rule 21, SCRCP. However, on March 27, 2013, instead of "withdrawing" from the action where counterclaims remained pending against Respondent AG and where Respondent AG was still in default as to the counterclaims, all Respondents sought to stay the case. *See* R.pp. 1798-1799. On May 10, 2013, Sweeny, Wingate and Barrow moved to withdraw as counsel for Respondent AG. See Motion to Withdraw as Counsel.

On April 23, 2014, all Respondents again filed a motion to stay this action. See Motion to Stay the Action. Upon Appellant's attempts at conducting discovery, Respondents, including

Respondent AG, moved to quash all depositions of the Plaintiffs citing "uncertainty" caused by the *Wilson v. Dallas* decision and their motion to stay. (R.pp. 812-813)

The motion to be relieved as counsel for Respondent AG was withdrawn on June 15, 2016. *See* R.p. 854.

On October 12, 2015, the Circuit Court granted all Respondents' Motion to be Relieved from Default. (R.pp. 51-53) Appellant filed a Motion to Alter or Amend the Order on October 20, 2015. (R.pp. 829-833) This Motion was never ruled upon by the Circuit Court.

On February 18, 2016, Respondents filed another Motion for Protective Order seeking to prevent Appellant from engaging in discovery. (R.pp. 836-838) Respondents argued that the Circuit Court had their motion to stay under advisement, and, as such, no discovery could take place. Id.

On March 2, 2016, the Circuit Court stayed the action until further notice from the Court. (R.pp. 47-48) On April 13, 2016, an Order lifting the stay was entered and directed discovery to begin anew. (R.p. 45) On July 20, 2016, after Appellant attempted to begin discovery "anew" as directed in the Order lifting the Stay, Respondent AG filed a Motion for Protective Order seeking to prevent the deposition of Respondent AG Wilson. (R.pp. 856-858) On August 11, 2016, Respondent AG again filed its Rule 21 Motion to be Dropped. (R.pp. 861-863) On October 3, 2016, the Court granted the Motion for Protective Order and prevented the deposition of Respondent AG Wilson. (R.pp. 33-38) Respondent AG, through its private counsel, did participate in written discovery. Respondent AG's Responses to Interrogatories (R.pp. 1523-1531)

On June 12, 2017, the Circuit Court granted Respondent AG's Rule 21, SCRCP Motion to be Dropped from this action—effectively dismissing Respondent AG from the action. (R.pp. 19-24) On July 19, 2017, Appellant timely filed a motion to alter, amend or vacate the Rule 21,

SCRCP, Order Dropping Respondent Ag from the action. (R.pp. 1054-1107) The Circuit Court entered an Order denying Appellant's Motion to Alter or Amend on August 7, 2017. (R.pp. 1-2)

REPLY ARGUMENT

I. It was error for the Circuit Court to Drop Respondent AG from this action pursuant to Rule 21, SCRCP.

Dismissing Respondent AG from this action pursuant to Rule 21, SCRCP is reversible error. Procedural Rule 21, SCRCP has no application to the present situation in this case. This Court has recently had the chance to discuss Rule 21, SCRCP in detail. In *Farmer v. CAGC Ins. Co.*, 2016-000192 (Op. No. 5562)(S.C.Ct.App. filed May 23, 2018)[3], this Court stated as follows:

> We next consider the propriety of using Rule 21, SCRCP, to dismiss CompTrust. A motion to dismiss a party under Rule 21, SCRCP, is addressed to the court's discretion. *Demian v. S.C. Health & Human Servs. Fin. Comm'n*, 297 S.C. 1, 5, 374 S.E.2d 510, 512 (Ct. App. 1988). Rule 21, SCRCP, provides:
>
> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.
>
> Because few South Carolina decisions have interpreted our Rule 21, and none to any degree pertinent here, we look to federal cases construing their almost identical Rule 21. **Like many of the Federal Rules of Civil Procedure, Rule 21 was designed to remove the traps of common law pleading, where a slight procedural misstep like misjoinder could doom the entire action.** 7 Wright & Miller, *Federal Practice and Procedure* § 1681 (3d ed.). **Rule 21 should be viewed by the company it keeps; its neighbors, Rules 17, 19, and 20, are provisions that also tell us who are proper parties. Taken together, these rules "'evidence the general purpose . . . to eliminate the old restrictive and inflexible rules of joinder designed for a day when formalism was the vogue and to allow joinder of interested parties liberally to the end that an unnecessary multiplicity of actions thus might be avoided.'"** *Id.* (quoting *Soc'y of European Stage Authors & Composers v. WCAU Broad. Co.*, 1 F.R.D. 264, 266 (E.D. Pa. 1940)). **Although Rule 21 does not define misjoinder, "[t]he cases make it clear that parties are misjoined when they fail to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a)."** 7 Wright & Miller, *Federal Practice and Procedure* §1683 (3d ed.). As to joining parties as defendants, Rule 20(a), SCRCP, states: "All persons may be joined in one action as defendants if there is asserted against them . . . any right to relief in respect of or arising out of the same transaction, occurrence . . . and if any question of law or fact common to all defendants will

[3] The *Farmer* opinion was published after the Appellant's Initial Brief was filed.

arise in the action." Misjoinder therefore "occurs when there is no common question of law or fact or when . . . the events that give rise to the plaintiff's claims against defendants do not stem from the same transaction." *DirectTV, Inc. v. Leto,* 467 F.3d 842, 844 (3d Cir. 2006); *see also Demian,* 297 S.C. at 6, 374 S.E.2d at 512 (finding no abuse of discretion when the circuit court denied a defendant's motion to be dismissed for misjoinder when a common question of law applied to all defendants).

(emphasis supplied).

Here, Respondent AG is a named Plaintiff. There are no allegations that it misjoined itself or that there was no common question of law or fact related to the claims of Respondent AG or the counterclaims of Appellant. There simply was no allegation of misjoinder. It is an abuse of discretion to "drop" a party from an action pursuant to Rule 21, SCRCP where there are no allegations of misjoinder and there are pending counterclaims against the party seeking to be dropped. Respondent AG bases its entire argument on the notion that it informed the Supreme Court in *Wilson v. Dallas* that it would be withdrawing from this action. Respondent AG's representation to the Supreme Court has no relevance to Rule 21, SCRCP.

Federal Courts that have interpreted Rule 21, FRCP have found an abuse of discretion where a party seeks dismissal under Rule 21, and such a dismissal results in "gratuitous harm" to a party. Under FED. R. CIV. P. 21, "[m]isjoinder of parties is not a ground for dismissing an action." Instead, Rule 21 provides two remedial options: (1) misjoined parties may be dropped on such terms as are just; or (2) any claims against misjoined parties may be severed and proceeded with separately. See *DirecTV, Inc. v. Leto,* 467 F.3d 842, 845 (3d Cir. 2006), *Carney v. Treadeau,* No. 07-CV-83, 2008 WL 485204, at *2 (W.D. Mich. Feb. 19, 2008), *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.,* 539 F. Supp.2d 924, 940 (E.D. Mich. 2008); see also *Michaels Bldg. Co. v. Ameritrust Co., N.A.,* 848 F.2d 674, 682 (6th Cir. 1988) ("Parties may be dropped . . . by order of the court . . . of its own initiative at any stage of the action and on such terms as are just."). "Because a district court's decision to remedy misjoinder by dropping and

dismissing a party, rather than severing the relevant claim, may have important and potentially adverse statute-of-limitations consequences, the discretion delegated to the trial judge to dismiss under Rule 21 is restricted to what is 'just.'" *DirecTV,* 467 F.3d at 845. At least three judicial circuits have interpreted "on such terms as are just" to mean without "gratuitous harm to the parties." *Strandlund v. Hawley,* 532 F.3d 741, 745 (8th Cir. 2008) (quoting *Elmore v. Henderson,* 227 F.3d 1009, 1012 (7th Cir. 2000)); *see also DirecTV, Inc.,* 467 F.3d at 845. Such gratuitous harm exists if the dismissed parties lose the ability to prosecute an otherwise timely claim, such as where the applicable statute of limitations has lapsed, or the dismissal is with prejudice. *Strandlund,* 532 F.3d at 746; *DirecTV,* 467 F.3d at 846-47; *Michaels Building Co.,* 848 F.2d at 682.

The South Carolina Supreme Court has held also that removing a defendant as a party serves to deprive the plaintiff of "its substantial right to name its defendant." *Neeltec Enterprises, Inc. v. Long.* 397 S.C. 563, 725 S.E.2d 926 (2012).

Here, in addition to the absence of any misjoinder, "dropping" Respondent AG from the action results in harm and prejudice to Appellant and deprives her of a substantial right to prosecute her counterclaims. Inexplicably, the Circuit Court disregarded the analysis of what is "just" as to the Appellant and found only that there would be no prejudice "to any other Plaintiff." (R.p. 23) This is an abuse of discretion. Had Respondent AG moved for its own dismissal under Rule 41(a)(2), SCRCP, the existence of the counterclaims would have prevented any dismissal. The use of the procedural Rule 21, SCRCP in the manner in which the Respondent AG argues it can be used not only amounts to prejudice to Appellant but significantly prevents her entitlement to due process. *S.C. Const., art. 1, 5.* Simply put, Respondent AG asks this Court to slam the proverbially round peg in a square hole based upon representations it unilaterally made to the

Supreme Court. The Circuit Court was in error by dismissing Respondent AG pursuant to Rule 21, SCRCP and the order should be reversed.

Respondent AG then goes on to argue that this Court should disregard the plain language of Rule 21, SCRCP and allow the dismissal because it alleges that it has the protections of "sovereign immunity." Sovereign immunity has nothing to do with Rule 21, SCRCP. Sovereign Immunity is an affirmative defense upon which Respondent AG was both required to plead and carries the burden of proof. In *Tanner v. Florence City-County Building Commission*, 333 S.C. 549, 511 S.E.2d 369 (Ct.App. 1998), the Court of Appeals succinctly stated the law as follows:

"Historically, the common law doctrine of sovereign immunity insulated governmental entities from liability for torts committed by their employees. In South Carolina, total sovereign immunity was abolished by the decision in *McCall v. Batson,* 285 S.C. 243, 329 S.E.2d 741 (1985). Reacting to *McCall,* the legislature adopted the South Carolina Tort Claims Act. S.C.Code Ann. § 15-78-10 to -200 (Supp.1998). That act waives sovereign immunity for torts committed by the State of South Carolina, its political subdivisions, and governmental employees acting within the scope of their official duties. The act, however, lists numerous exceptions to the waiver of immunity. S.C.Code Ann. § 15-78-60 (Supp.1998)."

****

"This court has held that under the South Carolina Tort Claims Act '[t]he burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense.' *Niver v. South Carolina Dep't of Highways & Public Transp.,* 302 S.C. 461, 463, 395 S.E.2d 728, 730 (Ct.App.1990). **The decision of our supreme court in the case of *Washington v. Whitaker,* 317 S.C. 108, 451 S.E.2d 894 (1994), put to rest any remaining question about the necessity of pleading sovereign immunity as an affirmative defense. In *Washington,* the court said 'we overrule the antiquated rule that sovereign immunity is a jurisdictional bar and, accordingly, cannot be waived. We join those jurisdictions which hold that sovereign immunity is an affirmative defense that must be pled.'** *Id.* at 114-15, 451 S.E.2d at 898 (citations omitted); *see also Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs.,* 326 S.C. 6, 11 n. 14, 482 S.E.2d 768, 773-74 n. 14 (1997) (reversing a trial court order to the extent it was based on sovereign immunity as no answer had been filed in case and sovereign immunity, as an affirmative defense, must be pled)."

333 S.C. at 552 (emphasis supplied).

Respondent AG did not plead sovereign immunity as an affirmative defense and waived any such immunity by bringing the action as a Plaintiff. As such, immunity is not an issue in this case. It certainly does not allow Rule 21, SCRCP to be something it is not. Respondent AG argues that Appellant has abandoned any challenge to dismissal pursuant to Rule 21, SCRCP on the basis of immunity. This argument has no merit. Respondent AG first raised the issue of the unpled affirmative defense of sovereign immunity in the context of Rule 21, SCRCP in a supplemental brief after the Circuit Court had its hearing on the Rule 21, SCRCP motion. Appellant objected and filed a supplemental response stating that sovereign immunity was not pled as an affirmative defense. Respondent AG has made no motion to amend its pleadings to add the affirmative defense. Appellant has vigorously objected to the use of Rule 21, SCRCP to dismiss Respondent AG at all levels of this action. The Circuit Court was in error by dismissing Respondent AG pursuant to Rule 21, SCRCP and the order should be reversed.

II. It was error for the Circuit Court to Prevent the Deposition of a Named Plaintiff/Counterclaim Defendant, Attorney General Wilson.

Respondent AG argues that Appellant should have been prevented from taking the deposition of Respondent AG Wilson in this case because he did not make the "decision to institute suit," was not in office when the suit was brought and lacks personal knowledge of the circumstances when the suit was filed. Respondent AG Brief, pp. 15 and 17. This argument ignores that a claim for abuse of process focuses on improper use of the process after it has been issued. See *Scott v. McCain*, 275 S.C. 599, 274 S.E.2d 299 (1981). It is the continuation of the suit—rather than the institution of the suit that is at the heart of one of Appellant's counterclaims. Therefore, the argument that Attorney General Wilson was not the Attorney General when the suit was instituted does not support the order preventing the Appellant from deposing Attorney General Wilson as a named Plaintiff/Counterclaim Defendant.

Respondent AG then argues that the so-called federal *Morgan* rule operates to allow Respondent AG Wilson, as a named Plaintiff/Counterclaim Defendant in this private civil litigation, to enjoy significantly different discovery rules in South Carolina. This is not and should not be the case. Respondent AG argues that the test for discovery as it relates to defending claims it has brought in a private action is not the fundamental standard of Rule 26(b), SCRCP, — "reasonably calculated to lead to the discovery of admissible evidence"—but instead a significantly heightened standard of "extraordinary circumstances." This places Appellant in a position of being required to know what the party bringing the action is going to say prior to their saying it. This turns the fundamental reasons of a discovery deposition on its head. "Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses." *Brown v. South Carolina State Board of Education,* 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)); *see South Carolina Department of Social Services v. Holden,* 319 S.C. 72, 459 S.E.2d 846 (1995) (right to confrontation applies in civil context); *S.C. Const., art. 1, 5.*

Indeed, Respondent AG Wilson was named as a witness by both parties in written discovery in this action. *See* R.pp. 1539-1540; *See* also R.pp. 1523-1531. Respondent AG Wilson as a Plaintiff/Counterclaim Defendant and named witness by all parties is subject to the same discovery rules as everyone else in this State. See *Ex Parte Condon,* 583 S.E.2d 430, 354 S.C. 634 (2003). If and when this case proceeds to trial, Respondent AG will be required to prove its case and meet its burden on the claims it has brought against Appellant. Appellant is entitled to present a defense at that trial. It would be fundamentally unfair and in violation of her rights to due process to require Appellant to present her defense with significant restrictions on her ability to conduct pre-trial discovery. *S.C. Const., art. 1, 5.*

Respondent AG argues that the James Brown Legacy Trust that it created does not exist today and it should not be considered for the purposes of justifying the deposition of Respondent AG Wilson. The James Brown Legacy Trust, however, is a Plaintiff in this action and continues to prosecute whatever claim it has in this action.

Perhaps most importantly, the Supreme Court found in *Wilson v. Dallas* that it was the AG who effectively controlled all aspects of the James Brown trusts and estate. This would have been from at least May 26, 2009 (the date of the approval of the settlement) until May 8, 2013 (the date the Supreme Court voided the settlement). Since damages are sought related to assets controlled by Respondent AG Wilson, it is critical to the defense of the action to understand that period of time from the individual that was in control and while he was "virtually exclusively" overseeing the trusts and estate. *Wilson v. Dallas*, 743 S.E.2d at 765.

The order preventing Appellant from taking the deposition of Respondent AG Wilson was an abuse of discretion and should be reversed.

III. It was error for the Circuit Court to Rule that Respondent AG was not in Default under Rule 55(e) and that Respondent AG should be relieved from Default.

Respondent AG argues, and the Circuit Court found, that it "was not in default" under Rule 55(e), SCRCP. Respondent AG Brief, p. 22. This argument and finding is completely contrary to the South Carolina Rules of Civil Procedure. First, Respondent AG was in default as it failed to timely respond to the counterclaims of Appellant. Nothing under Rule 55, SCRCP prevents the entry of default against Respondent AG. Rule 55(e), SCRCP applies to a default judgment. The entry of default and a default judgment are two different things. See *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). Federal Courts that have addressed the issue have found that although default judgment may not be entered summarily

against the United States, the default itself may be. *Federal Civil Rules Handbook*, Baiker-McKee, Janssen, and Corr (2016), p. 1156 citing *Alameda v. Sec. of Health, Ed., and Welfare*, 622 F.2d 1044, 1048 (1st. Cir. 1980).

Nothing in Rule 55(e), SCRCP prevents the entry of default against Respondent AG. The Rule simply provides a further layer of protection prior to a default judgment against the State or Respondent AG in that it requires the moving party to establish his claim "to relief by evidence satisfactory to the Court" prior to a default judgment. Rule 55(e), SCRCP. Appellant was never given this opportunity. Instead, the Circuit Court erroneously ruled that Respondent AG was never in default and could never be in default pursuant to Rule 55(e). This was an abuse of discretion and an error of law.

Respondent AG then argues that even without Rule 55(e), the Circuit Court properly relieved Respondent AG from Default because it was "otherwise defending" this matter. Respondent AG Brief, p. 22. This argument is misplaced. Rule 55, SCRCP applies to counterclaims. Rule 55(d), SCRCP. Respondent AG was not "otherwise defending" anything as it did not respond to the counterclaims. If the prosecution of the case it brought constituted "otherwise defending," then a Plaintiff could never be in default for failing to respond to a counterclaim and the language of Rule 55(d) would be read out of the Rule.

Given the foregoing, the proper analysis was for the Circuit Court to determine whether or not Respondent AG was able to show "good cause" in failing to timely respond to the counterclaims. The standard for granting relief from an entry of default under Rule 55(c) is "good cause." Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory

explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *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 for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.,* 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App.1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalnaker,* 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994). Importantly, the first inquiry in a "good cause" analysis requires first that the defaulting party must provide a justifiable explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E.2d 587 (2014).

In an attempt to meet its burden under Rule 55(c), SCRCP, Respondent AG and all other Respondents submitted the affidavit of Kenneth Wingate, Esq. *See* R.pp. 1535-1537. The affidavit simply establishes that the Answer and Counterclaims were received and that there was not a timely response. The facts stated in the affidavit do not meet the "good cause" standard for relief from default. See *White Oak Manor, Inc.*, 753 S.E.2d 587 (no good cause where a defaulting party's insurance agent was negligent in failing to answer the complaint); *Roche v. Young Bros., Inc.*, 318 S.C. 207, 456 S.E.2d 897 (1995)(losing complaint within corporation was not ground to set aside default); *Richardson v. PV, Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009)(negligence of an attorney for an insurance company is imputable to a defaulting litigant); *Sundown Operating Co.*, 681 S.E.2d 885 (negligence of insurance agent was not good cause).

The affidavit states that "I can only surmise that this document was among others that were being exchanged at or about this time, that I did not recognize it as a counterclaim, and simply sent

it to be filed." (R. p. 1536) This does not amount to "good cause." *Ledford v. Pennsylvania Life Ins., Co.*, 267 S.C. 671, 677, 230 S.E.2d 900, 903 (1976)(counsel's misinterpretation of documents in the file does not excuse default "where even a cursory examination" of the documents in the file "would have disclosed the fallacy of the assumption which he made."). The pleading in this case was entitled "Answer and Counterclaim." Even a cursory review of the caption would have alerted anyone that a counterclaim was asserted.

Even if this Court were to conclude that simply failing to read the pleading and timely respond to the counterclaims amounts to good cause, which it does not, the affidavit of Kenneth Wingate, Esq. does not state what, if any, the meritorious defense would be for each of the Plaintiffs/Counterclaim Defendants. The untimely Answer filed on November 16, 2010 is a general denial with four conclusively pled affirmative defenses. This pleading does not establish a meritorious defense for each of the Plaintiffs/Counterclaim Defendants—all represented by the same counsel in this action.

In an attempt to establish grounds for a meritorious defense, Respondents filed a Supplement to Plaintiffs' Motion to Set Aside the Entry of Default on December 17, 2012—in excess of two years after the Affidavit of Default. (R.pp. 769-774) Attached to the Supplement was a sworn statement of Albert "Buddy" Dallas, Esq.[4] dated July 20, 2012. Id. A plain reading of the sworn statement, however, does not establish a meritorious defense by each Plaintiff/Counterclaim Defendant to any of the counterclaims asserted for abuse of process, civil conspiracy, intentional interference with contractual relations, violation of Section 62-1-106, or attorneys' fees.

[4] Albert "Buddy" Dallas was an original Trustee and Personal Representative of the James Brown 2000 Irrevocable Trust and under the will of James Brown. He resigned from that position on November 20, 2007.

The sworn statement only references the first twelve (12) months after Mr. Brown's death. (R.pp. 773-774) Mr. Brown passed away on December 25, 2006. (R.p. 179) Appellant was appointed personal representative and trustee on November 20, 2007. (R.pp. 181-182) Nothing in the sworn statement specifically refers to the thirty-five (35) day period between November 20, 2007 and December 25, 2007. Indeed, the sworn statement was taken after the event of default. As such, the sworn statement provides no basis upon which the Circuit Court could conclude that the Plaintiff/Counterclaim Defendants had a meritorious defense to the counterclaims.

The Circuit Court erred and abused its discretion in granting the Motion to Set Aside entry of Default on Appellant's counterclaims. The order should be reversed.

IV. It was error for the Circuit Court to deny Appellant's Motion to Disqualify Sweeny Wingate and Barrow, P.A. from representing Respondent AG.

The issue related to the Order on the Motion to Disqualify Sweeny, Wingate and Barrow is not moot because that firm still represents Respondent AG in this action. Though a motion to be relieved as counsel was filed in this action by Sweeny, Wingate and Barrow in 2013, the motion was withdrawn in 2016. *See* R.pp. 854-855. Therefore, the issue remains an actual controversary and this Court can grant effectual relief.

Respondent AG also argues that it will not receive 10% of the legal fees payable to Respondent's counsel in this case. This is contrary to the fee agreement in this case which provides that Respondent AG "shall retain 10% of Special Counsel's fees" related to the charitable interest. (R.p. 1243) The fee agreement also says that Respondent AG will have "final authority" in the litigation. *Id.*

V. Appellant's Statement of Issues is compliant with the Appellate Court Rules.

Respondent AG argues that Appellant's Statement of Issues is non-compliant with Rule 208(b)(1)(B) because they are overly broad. Appellant's Statement of Issues speak for themselves and are entirely as concise as required by the Appellate Court Rules.

CONCLUSION

For the reasons stated herein and in Appellant's Final Brief, the Orders of the Circuit Court should be reversed and this matter remanded to the Circuit Court.

Respectfully submitted,

W. H. Bundy, Jr., Esq.
M. Brent McDonald, Esq.
Bundy McDonald, LLC
1516 Old Trolley Road, 2nd Floor
Summerville, South Carolina 29485
888-552-1559
walter@bundymcdonald.com
brent@bundymcdonald.com

and

Adam T. Silvernail
Law Office of Adam T. Silvernail, LLC
1905 Marion Street (29201)
Post Office Box 7995
Columbia, South Carolina 29202
Telephone: (803) 779-1770
adam@silvernaillawfirm.com

Attorneys for the Appellant

December 4, 2018

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2010-CP-40-4900

Appellant Case No.: 2017-001899

RUSSELL L. BAUKNIGHT, as Trustee of The James Brown 2000 Irrevocable Trust and the James Brown Legacy Trust, as Personal Representative of the Estate of James Brown, and on behalf of Alan Wilson, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child, Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. And Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

And

ALAN WILSON, in his capacity as Attorney General of the State of South Carolina; Tommie Rae Brown, individually and on behalf of her minor child, James B. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown, Respondents.

v.

Adele J. Pope, Defendant,

Of whom Adele J. Pope is Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Appellant's Reply Brief to Respondent Attorney General complies with Rule 211(b), SCACR

W. H. Bundy, Jr., Esq.
M. Brent McDonald, Esq.
Bundy McDonald, LLC
1516 Old Trolley Road, 2nd Floor
Summerville, South Carolina 29485
888-552-1559
walter@bundymcdonald.com
brent@bundymcdonald.com

and

Adam T. Silvernail
Law Office of Adam T. Silvernail, LLC
Post Office Box 7995
Columbia, South Carolina 29202
Telephone: (803) 779-1770
adam@silvernaillawfirm.com
Attorneys for the Appellant

December 4, 2018