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**Jul 29 2020**

**SC Court of Appeals**

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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**Appellate Case No.: 2017-001899**

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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.

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**APPELLANT'S PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING *EN BANC***

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Appellant Adele J. Pope respectfully petitions this Court for rehearing pursuant to Rule 221, SCACR, and in light of the important issues in this case related to the Attorney General, she suggests pursuant to Rule 219, SCACR, that the Court rehear this matter *en banc*.

**Summary of Grounds for Rehearing and Consideration *en Banc***

This Court's unpublished July 15, 2020 opinion (No. 2020-UP-216) overlooks a critical fact: **On May 19, 2010, the South Carolina Attorney General sued Robert L. Buchanan, Jr., and Appellant for money damages based on alleged torts.** The Opinion herein appears to treat the AG as a nominal party, citing cases which acknowledge the AG's role in monitoring and protecting charitable trusts. In this action, however, the AG is a plaintiff against two individual citizens in a tort suit and a defendant on counterclaims pending since 2010. Appellant submits that the Opinion effectively holds that the AG need not play by the rules governing all litigants, in contravention of existing caselaw. Further, the Opinion in this matter is in direct conflict with a recent opinion of this Court on the function of Rule 21, and the full Court should rehear this matter to resolve the inconsistency.

The Opinion further finds several important Orders unappealable because of Rule 59(e) motions which the Circuit Court declined to hear or decide. These orders were rendered final (at least as to the AG) by the circuit court's dropping the AG as a party<sup>1</sup> and, further, are unlikely to be able to be heard by the Circuit Judge assigned to these cases 5+ years after the original hearings.

For these reasons, as set out in more detail below, Appellant respectfully asks that this Court grant rehearing on this matter and reverse the orders appealed from. For the reasons set out herein, she submits that this case should be reheard *en banc*.

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<sup>1</sup> In addition, shortly after dropping the AG as a party, the circuit court granted summary judgment to the AG and all other Plaintiffs/Respondents on Appellant's counterclaims. This was an effective denial of the Rule 59(e) motions.

## **Background**

The following abbreviated chronology highlights certain facts which appear to have been overlooked in the Opinion herein. Appellant incorporates and relies on the more complete facts and arguments in her briefs and the record herein.

On August 10, 2008, AG McMaster brokered a settlement agreement which gave approximately half of James Brown's assets to a group of family members and claimed family members who had made claims "of dubious validity" against his Estate and Trust. *Wilson v. Dallas*, 403 S.C. 411, 441, 743 S.E.2d 746 (2013).

After the circuit court approved the settlement, Appellant and Robert L. Buchanan, Jr. appealed the order, asserting in part that the AG had overstepped his authority in entering into the 2008 settlement. *Id.*

During the course of that appeal, on May 18, 2010, the AG and other Plaintiffs engaged Sweeny, Wingate and Barrow, P.C. ("Wingate") to sue Buchanan and Appellant for, among other alleged torts, having appealed the settlement. (R. 182-186, 1235-53) The case was filed the next day, with Wingate as sole counsel for all Plaintiffs, including the AG and Russell Bauknight "on behalf of" the AG. (R. 176-177)

Appellant and Buchanan answered and counterclaimed against all Plaintiffs, including the AG, for abuse of process, civil conspiracy, intentional interference with contract, violation of S.C. Code Ann. §62-1-106, and attorneys' fees and costs. (R. 337-369). Plaintiffs defaulted on the counterclaims and moved for relief from their default in November 2010. (R. 373-379). That motion was not decided until October 2015, and the circuit court never decided Appellant's motion to alter or amend its order. (R. 49). Appellant and Buchanan also moved to enjoin private firm Wingate and Russell L. Bauknight from speaking for the AG. (R. 477) Over a year later, the circuit

court denied that motion. (R. 59). Again, the circuit court never took up Appellant’s timely Rule 59(e) motion.

The AG continued as a Plaintiff represented by Wingate for seven (7) years. The AG first raised the issue of being removed from this case by motion filed March 25, 2013. (R. 790). This coincided closely with the *Wilson* decision, which the AG cites in his motion as a basis for his desire to exit this case. (R. 791). It is unsurprising that the AG wished to be “dropped” from this extraordinary tort suit, in which Appellant and Buchanan had raised several constitutional issues related to the AG’s participation and representation by private counsel. Among a number of negative holdings about the AG in *Wilson*, the Supreme Court held:

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. The result is to take a large portion of Brown's estate that Brown had designated for charity and to turn over these amounts to the family members and purported family members who were, under the plain terms of Brown's will, given either limited devises or excluded.

...  
We find the compromise proposed here is fundamentally flawed because the entire proposal is based on an unprecedented misdirection of the AG's authority in estate cases. *Wilson* at 443.

After being chastised by the Supreme Court for overstepping its bounds in a case which *did* involve enforcement of a charitable trust, the AG was understandably eager to remove himself from this case, in which he sought damages against Buchanan and Appellant, who had sought to enforce the charity.<sup>2</sup> The circuit court ultimately granted the AG’s motion.<sup>3</sup> (R. 19). The circuit court also found that Plaintiff could not depose AG Alan Wilson in this action. (R. 33)

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<sup>2</sup> Further, as shown in the complaint by which Respondents are bound under *The Kitchen Planners v. Friedman*, S.C. Ct.App. Op. No. 5738 (July 1, 2020), the purpose of Richland 4900 was to enforce the dismembering of a charity.

<sup>3</sup> Between 2013 and when it was dropped as a party four years later, the AG actively participated in Richland 4900, including in discovery and seeking consolidation of a second FOIA case with Richland 4900. (R. 575-576)

On July 15, 2020, this Court issued its Opinion affirming the AG's dismissal from this case and finding that the orders granting Plaintiffs relief from default, denying Appellant's motion to disqualify and enjoin Wingate and Bauknight for speaking for the State, and denying Appellant's right to depose AG Wilson are unappealable.

### **Argument**

#### **I. The Court's Analysis of Rule 21 Overlooks the AG's status as a Plaintiff and Counterclaim Defendant herein, and further Conflicts with this Court's Own Previous Holding.**

In the Opinion, this Court finds no error in the circuit court's dropping of the AG as a party, a finding supported by citations to the lower court's ability to *realign* parties under Rule 21, SCRPC, and noting the AG's traditional role in *enforcing* charitable trusts. This case involves the dismissal of a party to a case which has nothing to do with enforcement of a charitable trust.

Respectfully, Appellant submits that this Court's finding that the cases cited justify dismissing the AG from a tort suit in which it is a Plaintiff and a Counterclaim Defendant conflicts with this Court's recent holding in *Farmer v. CAGC Ins. Co.*, 819 S.E.2d 142 (Ct.App. 2018). In that case, this Court found that the circuit court erred in dismissing a corporate defendant (CompTrust) from a lawsuit because it was defunct. "It appears the circuit court was persuaded CompTrust was misjoined not because CompTrust had no connection to the factual or legal issues in the action, but because it had been dissolved." *Id* at 146. This Court reversed, finding that Rule 21 was a mechanical rule which allows the court to realign parties or remove inadvertently added parties with "no connection to the factual or legal issues in the action." This Court found that CompTrust was not misjoined, because the Plaintiff had asserted claims against it. The AG's connection to this case is even stronger. Its involvement began when it filed the suit as a Plaintiff and was increased when Appellant and Buchanan asserted multiple defenses and counterclaims in

this action relating directly to the AG's participation in this case.

The Court further finds that the circuit court "correctly determined that the Attorney General's interest in protecting the charitable beneficiaries was being served by Bauknight as the current Trustee and representative." (Op. at 5). This finding demonstrates a clear misapprehension of this extraordinary case. At the time Richland 4900 was filed, Bauknight was acting under an appointment as Trustee which was thereafter voided by the Supreme Court in *Wilson*. By contrast, Appellant and Buchanan, while having been replaced by Bauknight, were not managing the assets of the Trust but were actively protecting the James Brown's estate plan and charity during Bauknight's 4-year void appointment. The AG, the Legacy Trust and numerous private individuals, brought this case against Buchanan and Appellants, South Carolina citizens, seeking money damages for the James Brown Legacy Trust and its beneficiaries, not for the benefit of the charity. The AG was never a "nominal" or monitoring party to this case; it is a named Plaintiff, represented by private counsel shared with private resident and non-resident Plaintiffs. No amendment to the complaint has ever been sought or granted. For those reasons, this case is entirely distinguishable from the cases cited in the Opinion to support this Court's holding.

Appellant submits that allowing the AG to simply exit this case, effectively dissolving the counterclaims against it after 7 years, allows the State to play by different rules from other litigants. The Supreme Court held in *State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000), "[a]s a party to the lawsuit, the Attorney General, acting as an embodiment of the State, becomes subject to the authority of the court. Once the State subjects itself to the jurisdiction of the court, the court has [] authority" over it. This Court's opinion overlooks the AG's status as a Plaintiff/Counterclaim Defendant herein in allowing it to walk away from the claims against it under a procedural rule.

Further, this Court has recently held that a party cannot take action contrary to its own

pleadings. In *The Kitchen Planners v. Friedman*, S.C. Ct.App. Op. No. 5738 (July 1, 2020), this Court summarized that principal as follows:

"[I]t is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)); *see also Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) ("Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions."); *Postal*, 308 S.C. at 387, 418 S.E.2d at 323 ("The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.").

The AG, in addition to being a Plaintiff, is defined in his own Complaint herein as a "Beneficiary Plaintiff," just like the dozen-or-more other individual Plaintiffs in this case. (R. 178, ¶3(a)). The Plaintiffs' never-amended prayer seeks no enforcement of a charity, but simply asks for "a judgment against" Buchanan and Appellant. (R. 188). Only after the issuance of the *Wilson* decision chastising the AG for grossly overstepping his authority in that case did the AG seek to be dropped from this case.<sup>4</sup> Appellant submits that bringing this case through private counsel shared with private individuals is a more extraordinary overstepping of the AG's authority than its actions giving rise to *Wilson*.

The Supreme Court in two decisions<sup>5</sup> has said that James Brown's estate plan should be upheld.<sup>6</sup> The purpose of the never-amended Complaint in Richland 4900, by which the AG is bound under *The Kitchen Planners, supra*, was to dismember James Brown's estate plan, and the

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<sup>4</sup> The AG, while seeking to be dropped, continued to actively participate in discovery in this case, even obtaining summary judgment on the counterclaims.

<sup>5</sup> Buchanan and Appellant have consistently raised Constitutional arguments related to the AG's participation in this case and representation by shared private counsel Wingate, beginning with their Motion to Dismiss on June 22, 2010. (R. 193-203).

<sup>6</sup> *Wilson and Brown v. Sojourner*, S.C. Sup.Ct. Op. No. 27982 (June 17, 2020).

AG should not be allowed to escape liability for its part in Richland 4900.

**II. The Remaining Orders on Appeal are Ripe for Review by this Court and should be Reversed.**

The South Carolina Supreme Court held in *Brown v. Sojourner*, S.C. Sup.Ct. Op. No. 27982 (June 17, 2020), issued less than a month prior to this Court's Opinion herein:

The ongoing litigation since Brown's passing has thwarted his expressed wish that his estate be used for educational purposes, a fact confirmed by the parties in this case, who acknowledged that no scholarships have been paid for students to date, a point we find both extraordinary and lamentable.

...  
... [T]he circuit court shall promptly proceed with the probate of Brown's estate in accordance with his estate plan.

Appellant submits that in light of the Supreme Court's observations and directives, as well as the principles of judicial economy<sup>7</sup>, this Court should not have declined to review the circuit court's orders relieving Plaintiffs from their default on the counterclaims and denying Appellant's motion to enjoin Sweeney, Wingate and Barrow, P.C. and Russell L. Bauknight from continuing to purport to speak for the State because pending Rule 59(e) motions had never been decided by

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<sup>7</sup> See *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (entertaining a discretionary appeal of a motion to dismiss in the interest of judicial economy because a related issue in a cross-appeal was properly before the court); *Brown v. County of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (holding that interlocutory orders may be considered on appeal when they are companion to reviewable issues, but finding the motions to dismiss unreviewable because they lacked a sufficient nexus or companionship" to justify the exercise of immediate appellate review); *Morris v. Anderson County*, 349 S.C. 607, 610-11, 564 S.E.2d 649, 651 (2002) (holding that the appellate court may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation, but declining to address the appeal based on concerns of creating an impermissible advisory ruling); *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 511-12 (Ct. App. 2002) (entertaining an appeal from a denial of summary judgment because it was so closely connected with other issues properly before the court).

the circuit court.

The pending Rule 59(e) motions were filed July 27, 2012 (Denying injunction/disqualification, R. 618) and October 20, 2015 (Relief from Plaintiffs' default, R. 829). These motions were presented to the Honorable L. Casey Manning, who was then assigned to the case. Despite the fact that Judge Manning remained assigned to this case until March 2016 (R. 46), his Honor never heard or decided the Rule 59(e) motions. The case was then assigned to the Honorable Doyet A. Early, III, who retired in February 2019, and is now assigned to the Honorable Clifton B. Newman. Under Rule 63, SCRPC, Judge Manning would now be under a "disability" to hear this case. *See Ness v. Eckerd Corp.*, 350 S.C. 399, 566 S.E.2d 193 (Ct.App. 2002). The Rule provides, "The successor judge *may* proceed upon certifying familiarity with the record and determining that the proceedings may be completed *without prejudice to the parties*" [emphasis supplied]. As stated above, the grant of summary judgment, if not the dismissal of the AG, effectively denied the Rule 59 motions. Even if it did not, Appellant submits that a different judge cannot give a meaningful review of these motions 5+ years after the underlying orders were issued. These orders should be considered final and appealable, and this Court should reverse them for the reasons stated in Appellant's briefs.

The Court also found that the circuit court order denying Appellant the opportunity to depose Alan Wilson, the current AG, was not immediately appealable.<sup>8</sup> Pursuant to S.C. Code Ann. §14-3-430, intermediate Orders involving the merits of a case may be reviewed along with a final, appealable Order. The Supreme Court has found that for an order to involve the merits of a case, it "must finally determine some substantial matter forming the whole or a part of some cause

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<sup>8</sup> Further, prior to the filing of this appeal, AG Wilson had actually submitted to and completed a deposition in Aiken County Case No. 2013-CP-02-1337, a case which the AG was seeking to consolidate with Richland 4900.

of action or defense." *Mid-State Distribs., Inc.*, 310 S.C. at 334, 426 S.E.2d at 780 (quoting *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988)).

In this extraordinary case, the order denying Appellant the right to take Mr. Wilson's deposition, especially in conjunction with his dismissal as a party, affects the merits of the action. Appellant's ability to depose the current AG regarding these matters is a substantial right.

The order should be reviewed and reversed for the reasons set forth in Appellant's briefs. The counterclaims in this case, including abuse of process, relate to the actions of the AG and others in bringing and maintaining this case.

### **CONCLUSION**

For the reasons set forth above, Appellant respectfully asks that the Court grant rehearing in this matter and suggests that rehearing *en banc* is appropriate and warranted. For the reasons set out in Appellant's briefs herein, she asks that this Court reverse the orders appealed from and remand this case for further proceedings.

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Respectfully submitted,

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v.

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

Of whom Adele J. Pope is Appellant.

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**PROOF OF SERVICE**

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The undersigned counsel for Appellant certifies that he has served a copy of the Petition for Rehearing and Suggestion for Rehearing *en Banc on* all Respondents on the date shown below, by emailing a copy of the same to their counsel, addressed as follows:

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July 29, 2020



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**Bauknight, et al v. Pope, Appellate Case No. 2017-1899**

1 message

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Wed, Jul 29, 2020 at 2:39 PM

To: "Ken B. Wingate" &lt;kbw@swblaw.com&gt;, "Mark V. Gende" &lt;MVG@swblaw.com&gt;, Emory Smith &lt;ESmith@scag.gov&gt;

Cc: Charles Carpenter &lt;charlie@carpenterappeals.com&gt;, Daryl Williams &lt;dwilliams@gertzandmoore.com&gt;, Jeff Smith &lt;wjstv@mindspring.com&gt;, Adele Pope &lt;adele@popelawfirm.com&gt;

Counsel:

Attached and served upon you is our Petition for Rehearing, with POS. I also attach a courtesy copy of Return and POS which were served on you all by mail yesterday.

A copy of this email will be filed with the proof of service.

Adam

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