

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

S.C. SUPREME COURT

The Honorable Doyet A. Early, III, Circuit Court Judge
The Honorable L. Casey Manning, Circuit Court Judge
Trial Court Case 2010CP4004900

Appellate Case No. 2020-001383

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 Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., and 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 Vanisha Brown; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown - Lewis; Yamma N. Brown, individually and on behalf of her minor children, Sydney L., Carrington L., And 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 Petitioner

**RETURN OF ATTORNEY GENERAL TO
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF ISSUES

1. Whether the Court of Appeals properly affirmed the dropping of the Attorney General as a party to this case for reasons that include his no longer being needed as a party?
2. Whether Petitioner has abandoned any challenge to the Circuit Court's finding of immunity of the Attorney General by failing to argue the issue in her brief on appeal, whether his immunity is now the law of the case, and whether she is precluded from arguing immunity now?
2. Whether the Court of Appeals properly determined that the issue of taking the Attorney General's deposition is interlocutory?
4. Whether the Court of Appeals properly dismissed the appeals of the order granting relief from entry of default and denying the Motion to Disqualify because the Rule 59, SCACR, motions were still pending?
5. Whether Petitioner has failed to preserve constitutional issues by failing to raise them in her Petition for Rehearing and also whether she has shown that they are substantial for the purposes of Rule 242, SCACR.

STATEMENT OF THE CASE

This action was filed initially in Probate Court on May 19, 2010. R. V. I, p. 178 (Complaint, p. 1). The Plaintiffs were the Court appointed trustee and personal representative, Russell Bauknight, and "Beneficiary Plaintiffs" of the Trust and Estate of the late singer James Brown including Henry McMaster in his capacity then as Attorney General. *Id.* p. V.I, p. 179, ¶(3). The Complaint alleged that the Attorney General had intervened in other Circuit Court actions to represent the interests of the charitable beneficiaries of the Brown Trust. *Id.*,p. 181. The Complaint alleged causes of action against Petitioner /Defendant Pope and Defendant Buchannan for breach of trust and negligence as personal representatives and trustees of the Will

and Trust. *Id.* at pp. 182 - 188. They had been appointed by the Court on August 10, 2007 when the former representatives and trustees resigned, and they were removed by the Court on May 26, 2009. *Id.* at pp. 181-182, ¶¶ 14 & 15. That 2009 Order also approved a settlement among the Beneficiary Plaintiffs ending litigation between them. The Supreme Court later set aside the settlement, but affirmed the removal of Pope from her fiduciary roles for cause. *Wilson v. Dallas*, 403 S.C. 411, 450, 743 S.E.2d 746 (2013).

On September 30, 2010, Petitioner and Defendant Buchanan filed an Answer and Counterclaim. R. V. I, p. 337. The Counterclaims were for abuse of process for allegedly bringing this action for the ulterior purpose of forcing them to abandon or dismiss their appeal of the May 26, 2009 Order approving the settlement, and civil conspiracy to further their own interests and harm the Defendants. *Id.* Petitioner and Mr. Buchanan also alleged “cause[s] of action” for intentional interference with Contract and violation of S.C. Code Ann. §62-1-106. The Respondents filed an Answer to the Counterclaim dated November 16, 2010. R. V. I, p. 380. They also filed a November 26, 2010, Motion to Lift the Entry of Default as to the Counterclaim along with an affidavit of Ken Wingate dated November 16, 2010, and a Memorandum dated April 11, 2012. R, V. I, pp. 373 & 376, and R. V. IV, p. 1666. The Honorable Casey Manning granted that Motion and set aside the default by Order dated October 13, 2015. R. V. I, p. 51. Following a hearing in 2012, by Order dated July 5, 2015, Judge Manning had also denied Petitioner’s Motion to Disqualify Sweeney Wingate and Barrow from representing the Attorney General. R. p. V. I, p. 59; *see also*, Memorandum in Opposition to that Motion to Disqualify dated April 11, 2012. R. V. IV, p. 1673.

On March 25, 2013, the Attorney General filed a Motion to be Dropped as a Party. R. p. V. II, p. 790. The Motion stated that it was based upon the May 18, 2010, letter from Attorney

General McMaster to Russell Bauknight confirming that Bauknight would be retaining the firm of Sweeney, Wingate and Barrow to bring this action against Petitioner and Mr. Buchanan on behalf of the beneficiaries of the Estate and Trust including the charitable interests. *Id.* at p. 800. The letter noted that the Office of the Attorney General has a duty to protect charitable trusts. Also attached to the Motion was the Attorney General's Petition for Rehearing in *Wilson v. Dallas* which stated his intent to withdraw from this suit. R. V. II, pp. 791 and 874. The Supreme Court noted in its Opinion in that case that "the AG has recently informed this Court, in petitions filed after this Court's initial opinion, that he is now withdrawing as a party in that lawsuit and his office will maintain a monitoring role." *Wilson v. Dallas*, 743 S.E.2d at 767. The Motion was not heard by the Court until 2016.

On March 24, 2016, the Supreme Court issued an Order in this case giving the Honorable Doyet Early "exclusive jurisdiction to hear and dispose" of it. R. V. I, p. 46.

On August 11, 2016, the Attorney General filed a notice of special appearance for the purpose of arguing and handling all matters related to the 2013 Motion to be Dropped. R. V. II, p. 861. He attached to that Notice an October 4, 2007, Order in various Brown actions, allowing the Attorney General's intervention to protect the interests of the beneficiaries of any charitable trust created by the Brown Will and Trust, and the Order of Judge Early of October 30, 2013, allowing the Attorney General to withdraw from those suits. R. V. II, pp. 864 and 866 (Orders). The 2013 withdrawal Order stated that withdrawal was appropriate in light of the *Wilson* opinion, the appointment of Bauknight as Special Trustee and Special Administrator, and "the Attorney General's desire, pursuant to his statutory and common law authority, to have a monitoring role in this matter." *Id.* at p. 866.

Following argument of the Motion to be Dropped on August 29, 2016, the Attorney General filed a Supplemental Memorandum in Support of that Motion dated April 3, 2017, (R. V. V, p. 2088) and a Reply to Plaintiff's Return dated April 7, 2017 (R. V. II, p. 964). The Supplemental Memorandum and Reply contended that the Attorney General was absolutely protected by prosecutorial / quasi-judicial immunity from suit as to the counterclaims herein. Judge Early granted that Motion by Order dated May 31, 2017, (R. V. I, p. 19) because "there is no need for the Attorney General to remain in this action, [and] he is also immune from suit by the counterclaims." *Id.* p. 23. Petitioner moved for reconsideration under Rule 59, SCRCF on July 19, 2017, and the Attorney General submitted a letter to Judge Early in return to the Motion dated July 26, 2017. R. p. V, p. 2097 . Judge Early denied that Rule 59 Motion by Order filed August 7, 2017. R. V. I. p. 1.

Before the Attorney General was dropped as a party, Petitioner noticed his deposition. The Attorney General moved for a protective order on July 18, 2016, and filed a memorandum in support of that motion dated August 26, 2016. The Motion and Memorandum contended that the deposition would be an undue burden because he was not Attorney General when this suit was initiated, because all or most questions he might be asked would be subject to attorney client and work product privileges and the deposition would be likely to be time consuming and interfere with his handling of the duties of his Constitutional Office. R. V. II, p. 856; V. V, p. 2059. The Memorandum contended that these grounds fit with the often called *Morgan* rule that limits the taking of depositions of high ranking government officials. *United States v. Morgan*, 313 U.S. 409, 422 (1941). R. V. V, p. 2060. The Motion was argued on August 29, 2016, and the Court granted the Motion by Order dated September 21, 2016, for reasons that included the application of the *Morgan* rule and its progeny. (R. V. I, p. 33).

Petitioner appealed the referenced Orders to the Court of Appeals. In an Opinion dated July 15, 2020, decided without oral argument, that Court found as follows as to the Order dropping the Attorney General as a party:

We find the trial court correctly determined the Attorney General's interest in protecting the charitable beneficiaries was being served by Bauknight as the current trustee and representative. *See Wilson v. Dallas*, 403 S.C. 411, 431, 743 S.E.2d 746, 757 (2013) (“[W]here the trust involves charitable entities, the trustee has a duty to defend the trust, and the [Attorney General] has the duty to represent the unspecified charitable beneficiaries.”); *id.* at 449 n.30, 743 S.E.2d at 767 n.30 (noting the Attorney General was withdrawing from another James Brown case and maintaining a monitoring role); *cf.* *Epworth Children's Home v. Beasley*, 365 S.C. 157, 163-64, 616 S.E.2d 710, 713-14 (2005) (noting the trustees wished to terminate the trust in a manner that was violative of the settlor's intent, and the attorney general intervened to protect the charitable trust from destruction); *Furman v. McLeod*, 238 S.C. 475, 482-83, 120 S.E.2d 865, 868 (1961) (finding the attorney general was made a party to protect the public interest when trustees sought to deviate from the technical terms of the trust).

Bauknight as Tr. of James Brown 2000 Irrevocable Tr. v. Pope, No. 2017-001899, 2020 WL 3989494, at *2 (S.C. Ct. App. July 15, 2020). The Court found that the Order ruling that the Attorney General could not be deposed was not immediately appealable because it was a discovery order. The Court found that the Orders relieving the Respondents from default and denying the Petitioner's Motion to Disqualify Sweeney Wingate and Barrow from representing the Attorney General were not immediately appealable because of the pendency of Rule 59, SCACR, motions to alter or amend. Petitioner filed a petition for rehearing and Respondents filed a motion to correct a scrivener's error. The Court issued an Order dated September 16, 2020, denying Petitioner's Motion and granting Respondents' Motion which it treated as a Petition for Rehearing. The Court substituted and refiled its Opinion on September 16 which corrected the scrivener's error.

ARGUMENT

SUMMARY

The Court of Appeals properly affirmed the circuit court's order dropping the Attorney General as a party to this suit. The Court correctly determined that his interest in protecting the charitable beneficiaries was being served by the current trustee and representative, Russell Bauknight. The Court of Appeals did not reach another dispositive ground for the Motion which was that the counterclaim against him is barred by his absolute immunity from suit, and Petitioner has abandoned any challenge to the immunity finding. The law authorizes the Attorney General to take action to protect the interests of charitable beneficiaries, as he did here without being subject to suit for his actions.

The Court of Appeals properly determined that the other orders were not appealable at this stage because the order barring the taking of the Attorney General's deposition is a discovery matter and the Orders finding no default by the Attorney General and relieving the other parties from default were subject to pending Rule 59(e) motions.

Appellant refers to this matter as "extraordinary." Her Petition certainly is not. It challenges one order as to which she abandoned a principal issue, and questions three other orders that are not subject to review now. Her Petition should be dismissed.

I

THE COURT OF APPEALS PROPERLY AFFIRMED THE CIRCUIT COURT ORDER DROPPING THE ATTORNEY GENERAL AS A PARTY

A

The Circuit Court Properly Exercised Its Discretion to Drop the Attorney General

The Court of Appeals properly decided this issue as follows:

Pope argues the trial court erred in granting the Attorney General's motion to withdraw as a party under Rule 21, SCRPC. Trial judges have the authority to realign parties at any stage of an action and such decisions will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice. *Branham v. Ford Motor Co.*, 390 S.C. 203, 243, 701 S.E.2d 5, 26 (2010). We find the trial court correctly determined the Attorney General's interest in protecting the charitable beneficiaries was being served by Bauknight as the current trustee and representative. *See Wilson v. Dallas*, 403 S.C. 411, 431, 743 S.E.2d 746, 757 (2013) ("[W]here the trust involves charitable entities, the trustee has a duty to defend the trust, and the [Attorney General] has the duty to represent the unspecified charitable beneficiaries."); *id.* at 449 n.30, 743 S.E.2d at 767 n.30 (noting the Attorney General was withdrawing from another James Brown case and maintaining a monitoring role); *cf. Epworth Children's Home v. Beasley*, 365 S.C. 157, 163-64, 616 S.E.2d 710, 713-14 (2005) (noting the trustees wished to terminate the trust in a manner that was violative of the settlor's intent, and the attorney general intervened to protect the charitable trust from destruction); *Furman v. McLeod*, 238 S.C. 475, 482-83, 120 S.E.2d 865, 868 (1961) (finding the attorney general was made a party to protect the public interest when trustees sought to deviate from the technical terms of the trust).

Petitioner argues that the Court of Appeals decision is inconsistent with that Court's ruling in *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 586, 819 S.E.2d 142, 146 (Ct. App. 2018), reh'g denied (Oct. 18, 2018), cert. dismissed (Apr. 25, 2019), but Petitioner noted that case in her Petition for Rehearing, and the Court of Appeals was not persuaded that it was applicable to her appeal. *Farmer* recognized that a motion to dismiss a party under Rule 21, SCRPC, is addressed to the court's discretion. 424 S.C. at 585, 819 S.E.2d at 145. Although the Court stated that it did "not believe it was within the court's discretion to answer this question of first impression with no factual record while ruling upon a Rule 21 motion," the Record in the instant case was already voluminous when the circuit court granted the motion to drop the Attorney General.

Petitioner vaguely suggests that the Attorney General did not participate in this case for the protection of a charity, but he clearly did participate for the benefit of the charitable beneficiaries of the Brown estate and trust. The Complaint alleges that Petitioner breached her fiduciary duty to the Brown estate and trust "and the beneficiaries of each" which would include the charitable beneficiaries. R. p. * Complaint at ¶17. As the Court of Appeals stated

above, “[w]e find the trial court correctly determined the Attorney General's interest in protecting the charitable beneficiaries was being served by Bauknight as the current trustee and representative. *See Wilson v. Dallas*, 403 S.C. 411, 431, 743 S.E.2d 746, 757 (2013) (‘[W]here the trust involves charitable entities, the trustee has a duty to defend the trust, and the [Attorney General] has the duty to represent the unspecified charitable beneficiaries.’)” The circuit court recognized this role of the Attorney General in the quotations below.

Judge Early summarized his conclusion in his Order of May 31, 2017, as follows including addressing the counterclaims:

The Attorney General moved to be dropped as a party pursuant to Rule 21, SCRPC, which states that “[p]arties 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.” The Attorney General’s Motion to be Dropped is consistent with Rule 21 and the language in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013). Following the South Carolina Supreme Court’s decision in *Wilson v. Dallas*, 2013 WL 697042 (filed February 27, 2013)[Footnote 2 at omitted], the Attorney General filed a Petition for Rehearing wherein he advised the Supreme Court that he would shortly be moving to have himself removed as a party to the 4900 case and that any further action in the case to protect the charitable beneficiaries could be pursued by the new Trustee. *See* Petition for Rehearing, page 26-27 [R. V. II, pp. 899 & 900]. The Supreme Court acknowledged the Attorney General’s desire to withdraw in its opinion of May 2013, stating as follows in footnote 30: “[T]he AG has recently informed this Court, in petitions filed after this Court's initial opinion, that he is now withdrawing as a party in that lawsuit and his office will maintain a monitoring role.” The Attorney General’s role in this matter is to protect the charitable beneficiaries, and with the appointment of Russell Bauknight (Bauknight), as the trustee, that is being handled to the satisfaction of the Attorney General. Accordingly, there is no need for the Attorney General to remain in this action. He is also immune from suit by the counterclaims as set forth later in this order.

R. V. I, pp. 20 and 21 (Order at pp. 2 & 3).

The Circuit Court further explained its decision as follows:

As the Supreme Court explained in *Wilson v. Dallas*, “[I]t is axiomatic that a trustee is always under the direction and guidance of the court. . . .” (*Id.* (citing *Kingdom v. Saxbe*, 161 N.E.2d 461, 466 (Ohio, Ashtabula County Prob. Ct.

1958)). In addition to the Attorney General, it is also appropriate for an individual Trustee to protect the charitable trust, as explained in S.C. Code Ann. § 62-7-405. Because of the actions of Bauknight, who is under the direction and guidance of the Court, there is no need for the Attorney General to be involved. In *Wilson v. Dallas*, the Court explained that “[a]lthough the AG certainly has duties in regards to charitable trusts, if he believed Petitioners, as trustees, were not good stewards, the remedy would be to seek their removal and replacement.” The Attorney General has no concerns with the appointment of Bauknight and believes that the charitable beneficiaries will be protected while he is trustee.

* * *

This is a civil case, with causes of action including breach of fiduciary duty, breach of trust, and negligence. The Attorney General is a Plaintiff in the action to protect the interests of the charitable beneficiaries. Because Bauknight, as Trustee, is protecting these same interests, there is no need for the Attorney General to be a party and allowing him to be dropped will not prejudice any other Plaintiff.

R. Vol I, pp. 22 & 23 (Order at pp. 4 & 5). Therefore, because he found that the Attorney General was no longer needed as a party, Judge Early properly dropped him as a party.

B

Petitioner Has Abandoned Any Challenge To The Court’s Dropping The Attorney General On The Ground Of Immunity, And Petitioner Is Barred From Addressing Immunity Now

Petitioner contends that the Attorney General could not be dropped because a counterclaim was pending against him.¹ Judge Early, as noted above and below, ruled that the Attorney General was immune from the counterclaims, and Petitioner abandoned the immunity issue on appeal by failing to address the issue in her opening brief.

¹ Throughout her Petition, Petitioner sprinkles in her characterizations of the *Wilson v. Dallas* decision as to the Attorney General. She fails to mention that the Supreme Court found that the circuit “court had cause to remove [her and the Defendant Buchanan as personal representatives] as it was in the best interests of the estate.” 403 S.C. 411, 448, 743 S.E.2d 746, 766 (2013).

Petitioner also states that the Attorney General continued to actively participate in discovery and obtained summary judgment on the counterclaims while seeking to be dropped. She fails to note that the Motion to be Dropped was filed over four years before the Motion was granted (R. V. I, p. 20 and that it was argued on the same day as the Motion for Summary Judgment. R. V. I, pp. 2 and 20 during which time the Attorney General remained a party to the case.

The Court specifically found that “the Attorney General's being a counterclaim defendant does not preclude his being dropped as a party because he is immune from suit as to those counterclaims for reasons set forth in his Supplemental Memorandum submitted herein.” R. V. I, p. p.23 p (Order at p. 5; Supplemental Memorandum(R. V. V, p. 2088); V. II, p. 964).; Reply to Supplemental Return to Motion to Be Dropped). Petitioner never referred to immunity as a ground in her Brief on Appeal regarding the Order dropping her as a party. She only mentions immunity in passing, without counterargument, in her argument regarding default. Petitioner’s Brief at page 16, note 8. This ground of immunity is a key to the circuit court’s decision.

The Supreme Court and this Court have made quite clear that failure to argue a ground on appeal abandons it. *See, eg, Woodson v. DLI Properties, LLC*, 406 S.C. 517, 529, 753 S.E.2d 428, 434 (2014);² *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993)(“Failure to argue is an abandonment of the issue and precludes consideration on appeal. S.C.A.C.R. Rules 207(b)(1)(B), (D) and 210(b).”). Therefore, because of Petitioner’s failure to argue the issue in her opening, brief, the immunity of the Attorney General is now the law of the case. *Dreher v. S.C. Dep’t of Health & Env’tl. Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015)(“Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case.”). Furthermore, Petitioner’s misguided attempt to argue against immunity in her reply brief on appeal came too late because “[i]t is well settled Petitioners may not make new arguments for reversal in their reply brief.” *State v. Hewins*, 409 S.C. 93, 118, 760 S.E.2d 814, 827 (2014).

² “We find Petitioners have abandoned the negligent misrepresentation claim by failing to set forth an argument on the issue in their brief. See Rule 208(b), SCACR (stating that, for appellate review of an issue to occur, the issue must be set forth in a statement and argument); *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (stating that a party's failure to argue an issue constitutes abandonment of the issue and precludes consideration on appeal).” *Woodson, supra*.

Moreover, she mischaracterized the immunity as “sovereign immunity” when instead it is rooted in immunities akin to prosecutorial immunity as explained below.

C

Subject To And Without Waiving The Abandonment Argument, The Attorney General Is Absolutely Immune From The Counterclaims Against Him

Subject to the above abandonment / law of the case argument, case law has extended the immunity of Attorneys General to civil actions undertaken by them such as enforcement of the charities laws here and would bar the counterclaims that Petitioner has brought against him in this action. The Attorney General is given specific enforcement authority as to public charities in the State including breaches of trust. S.C. Code Ann. §1-7-130. He is absolutely immune from the counterclaims against him. Judge Early cited the cases discussed below and *Williams v. Condon*, 347 S.C. 227, 250, 553 S.E.2d 496, 509 (Ct. App., 2001)(absolute immunity of prosecutor /quasi-judicial immunity) for the application of immunity. R. V. I, pp. 23 & 24 (Order at 5 & 6).

Butz v. Economou, 438 U.S. 478, 516 (1978) is a basis for the numerous cases extending immunity beyond criminal prosecutions. The United States Supreme Court held that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision. Applying *Butz* and other authority, the Fourth Circuit Court of Appeals in *Vosburg v. Department of Social Services*, 884 F.2d 133, 138 (C.A.4 ,1989) held that “Virginia State

social workers are absolutely immune from liability resulting from their decision to file a removal petition.” *See also, Ostrzenski v. Seigel*, 177 F.3d 245, 251 (C.A.4, 1999).³

Mathis v. McDonough, 2014 WL 3894133, at *11 (D.Md.,2014) outlined much of the authority for applying absolute immunity outside of criminal prosecutions and found the Maryland Attorney General, a Maryland Assistant Attorney General and the Maryland Secretary of State absolutely immune for a TRO motion regarding production and distribution of a primary election campaign sample ballot. Citing *Butz*, *Vosburg* and *Ostrzenski*. the District Court held that “courts have found absolute immunity to apply to advocates in a number of other contexts beyond traditional criminal prosecutions, including where government attorneys pursue civil enforcement actions analogous to the proceeding at issue”

Metro Charities, Inc. v. Moore, 748 F.Supp. 1156, 1163–64 (S.D.Miss.,1990) is directly on point in finding absolute immunity of the Attorney General and a Special Assistant Attorney General from Plaintiff’s suit against them for initiating a state civil action seeking to enjoin bingo games conducted by Plaintiffs.

Absolute immunity is afforded those charged with the civil enforcement of state laws. The attorney general is, under Mississippi law, the chief legal officer and adviser for the state, both civil and criminal and is charged with managing all litigation on behalf of the state.... He shall have the powers of the attorney general at *1164 common law and is given the sole power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest. Miss.Code Ann. § 7–5–1 (1972). At common law, the state attorney general was vested with “the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the state, the preservation of order and protection of public rights.” *Capitol Stages, Inc. v. State of Mississippi*, 157 Miss. 576, 128 So. 759, 763 (1930) (citing 2 R.C.L. §§ 4 and 5, at 915–17). The state

³ “In sum, a physician requested by the Board to conduct a peer review performs a function analogous to a prosecutor reviewing evidence to determine whether charges should be brought. As such, absolute immunity is necessary to foster an atmosphere in which the peer reviewer can exercise his professional judgment without fear of retaliation.” *Ostrzenski*

court action was, therefore, a civil enforcement proceeding of the type for which absolute immunity applies.

* * *

Thus, regardless of their motivation in bringing the action, so long as defendants were performing a prosecutorial function, they enjoy absolute immunity from plaintiffs' claims relative to the civil proceeding. And in the court's view, it is manifest that in proceeding with the civil litigation before the chancery court, Moore and Warren were acting in their prosecutorial capacities on behalf of the state.

Metro Charities, Inc. v. Moore, 748 F.Supp. 1156, 1163–64 (S.D.Miss.,1990)

In *State v. Superior Court In and For County of Maricopa*, 921 P.2d 697, 700, 186 Ariz. 294, 297 (Ariz.App. Div. 1,1996), the Court applied absolute prosecutorial immunity to claims against the Attorney General for abuse of process and malicious prosecution for civil actions taken against the Plaintiff as to an adult care facility. See also, *Dinsdale v. Com.*, 675 N.E.2d 374, 377, 424 Mass. 176, 180 (1997) (“absolute immunity [extends] to government attorneys in their conduct of civil litigation as well”).

These cases make clear that immunity applies to the Attorney General as to the counterclaims against him. In addition, Judge Early further found that this defense was properly raised:

Immunity is an affirmative defense under South Carolina case law, but as discussed in the Attorney's General's Reply to Plaintiffs Memorandum [R. V. II, p. 966], cases indicate that it may be covered by the affirmative defense of failure to state a claim or cause of action or raised in a later pleading after the answer. See, *Plyler v. Burns*, 647 S.E.2d 188, 195, 373 S.C. 637, 649 (2007); *Ramsey v. City of Forest Park*, 418 S.E.2d 432, 433, 204 Ga.App. 98, 99 (Ga.App.,1992); *Baker v. Sudo*, 240 Cal.Rptr. 38, 42, 194 Cal.App.3d 936, 942 (Cal.App. 4 Dist.,1987).

R. V. I, p. 23, fn. 4. The Attorney General raised the defense of failure to state a claim in his Answer to the counterclaims in 2010, R. V. I, p. 382.

Under the above authority from the United States Supreme Court, the Fourth Circuit Court of Appeals and numerous other courts, absolute immunity clearly extends to the Attorney

General in this action so as to bar the counterclaims against him. Judge Early properly dropped the Attorney General as a party to this case.

II

THE COURT OF APPEALS PROPERLY DISMISSED THE APPEAL OF THE PROTECTIVE ORDER AS TO THE TAKING OF THE ATTORNEY GENERAL'S DEPOSITION

Petitioner contends that the Protective Order barring the taking of the Attorney General's deposition⁴ may be considered on appeal under S.C. Code Ann. §14-3-430, which provides that "[u]pon an appeal under item (3) of Section 14-3-330 the court may review any intermediate order involving the merits and necessarily affecting the order appealed from." The Court of Appeals concluded that the discovery order was not immediately appealable quoting *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) which stated that "discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right." (quoted also in *Sanders v. Savannah Highway Auto. Co.*, No. 2018-000171, 2020 WL 6154305, at *3 (Ct. App. Oct. 21, 2020)). Petitioner contends that the deposition affects the merits, but it does not "involve the merits" as required by §14-3-330 nor does it affect the grounds for the decision of the circuit court to drop the Attorney General.

⁴ The circuit court granted Attorney General Wilson's Motion for Protective Order (R. V. II, p. 856) based upon his application of the *Morgan* rule. R. p. V. I, p. 33 (Order of September 21, 2016). *United States v. Morgan*, 313 U.S. 409, 422 (1941). The *Morgan* rule is well recognized by the Federal Courts and other states that have considered it. Under that rule or related authority, depositions should not be taken of high ranking government officials unless the party noticing the deposition shows that the information sought is essential, that it is not obtainable elsewhere, and that the deposition of the official would not interfere with his government responsibilities.

III

THE REMAINING ORDERS ARE NOT APPEALABLE NOW

The Court of Appeals properly relied on authority of this Court in concluding that “because Pope’s Rule 59(e) motion to reconsider the denial of her motions to disqualify the law firm and enjoin Bauknight has not been ruled upon by the trial court, we find this issue is not immediately appealable and dismiss the appeal of the July 5, 2015 order denying Pope’s motion to disqualify Sweeny, Wingate & Barrow Law Firm from representing the Attorney General and to enjoin Bauknight from purporting to speak for the Office of the Attorney General.” 2020 WL 3989494, at *2. This Court has been quite clear in stating that appeals will be dismissed if pending motions under Rule 59, SCRCP, have not been addressed by the circuit court. As stated in *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004), note 2: “We are aware that a party may attempt to file both a Rule 59 motion and a notice of appeal. If this does occur, one or the other will be inappropriate depending on whether the motion is both timely under Rule 59 and permissible under our ruling today. *Cf. Hudson v. Hudson* 290 S.C. 215, 349 S.E.2d 341 (1986), (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature).” Petitioner includes a confusing argument that only Judge Manning could hear the Motions because they were originally pending before him, but she cites no motion by her to refer the motions back to him after the case was assigned to Judge Early. That Order of assignment expressly stated that “Judge Early has exclusive jurisdiction to hear and dispose [of this case and] shall decide all matters pertaining to this case” Order, March 24, 2016.

IV

PETITIONER’S CONSTITUTIONAL ISSUES ARE NOT PRESERVED FOR THIS PETITION

The Court of Appeals did not address any constitutional issue in its Opinion which Petitioner acknowledges. Nevertheless, Petitioner’s Petition for Rehearing does not assert “with particularity” or otherwise that the Court of Appeals “overlooked or misapprehended” addressing a constitutional issue as required by Rule 221, SCACR to preserve the issue for review.⁵ *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993). (“The Court of Appeals did not address this issue nor did Camp petition for rehearing for the court to consider it. We therefore decline to address this issue.”). Therefore, those issues were not properly raised in her Petition for Rehearing and are not preserved for review in this Petition. Even her Petition for Writ of Certiorari, itself, only refers to constitutional issues generally and fails to show that they are “substantial” pursuant to Rule 242 (b)(4) SCACR.

CONCLUSION

As noted above, Petitioner fails to present issues that warrant consideration on certiorari. The Opinion affirming the dropping of the Attorney General was properly decided, and Petitioner abandoned any challenge to the circuit court’s determination that her counterclaim was barred by the Attorney General’s immunity from suit. The Court of Appeals correctly determined that the other orders are not appealable now. Therefore, the Attorney General respectfully requests that this Petition be denied.

⁵ Petitioner included only two general references to constitutional issues she has raised previously neither of which specify error by the Court of Appeals. Petition for Rehearing at pp. 4 and 7, n. 5.

Respectfully submitted,

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