THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Nov 13 2020

S.C. SUPREME COURT

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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. 2020-001383

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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. II; Daryl J. Brown, individually and on behalf of his minor child Janise B.; Lindsey Delores Brown; Deanna J. Brown Thomas; Jason Brown-Lewis; Yamma N. Brown, individually and on behalf of her minor child Sydney L. and Carrington L.; Tonya Brown; Venisha Brown; Larry Brown; and Terry Brown

And

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

v.

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

Of whom Adele J. Pope is the Appellant.

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# RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

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## Counter-statement of Issues Before the Court

Petitioner Adele J. Pope has petitioned for certiorari, asking this Court to review the decision of the Court of Appeals issued on September 16, 2020 (*Bauknight, et al. v. Pope*, Op. No. 2020-UP-216, filed July 15, 2020, withdrawn, substituted, and refiled on September 16, 2020). Petitioner seeks to put before this Court her contention that the straightforward rulings issued by the Court of Appeals are erroneous. Respondents assert that the Court of Appeals ruled correctly on each issue. Thus, the question for this Court is whether these rulings, hereinafter referred to as "Issues (1), (2), (3), and (4)," are correctly decided:

> (1) Dismissing—as not immediately appealable—Petitioner's appeal of the trial court's order granting Respondents relief from default as to Petitioner's counterclaims, because Petitioner has an outstanding Rule 59(e) motion that has not yet been ruled upon by the trial court;
>
> (2) Dismissing—as not immediately appealable—Petitioner's appeal of the trial court's order refusing to disqualify Respondents' counsel from representing the Attorney General's Office and refusing to enjoin Respondent Bauknight, because Petitioner has an outstanding Rule 59(e) motion that has not yet been ruled upon by the trial court;
>
> (3) Dismissing—as interlocutory and not immediately appealable—Petitioner's appeal of the trial court's order holding that Attorney General Alan Wilson cannot be deposed in the underlying action, because it is a discovery order of the sort that does not affect a substantial right and is therefore not immediately appealable; and
>
> (4) Affirming the trial court's decision to allow the Attorney General to withdraw from the case pursuant to SCRCP 21.

*See Bauknight, et al. v. Pope*, 2020-UP-216, *supra*. The Court of Appeals ruled correctly as to each. Therefore, Respondents respectfully request that Petitioner's Petition for a Writ of Certiorari (hereinafter "Petition") be denied.[1]

[1] The undersigned counsel for Respondents addresses only Issues (1) and (2). Separate counsel for Respondent Attorney General addresses Issues (3) and (4).

## Counter-statement of the Case

In the interests of brevity, Respondents refer to their Statement of the Case in their Brief. (*See* Final Brief of Respondents, at pp. 1-7.)

## Standard of Review

"Certiorari is not a matter of right, but a matter of sound judicial discretion . . ." SCACR 242(b). Certiorari is granted "only where there are special and important reasons," including but not limited to circumstances:

(1) Where there are novel questions of law.
(2) Where there is a dissent in the decision of the Court of Appeals.
(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
(4) Where substantial constitutional issues are directly involved.
(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

SCACR 242(b), 242(b)(1)-(5). Further, "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." SCACR 242(d)(2). Finally, "[a]t the same time the petition is filed, the petitioner *shall* also file two (2) copies of the Appendix with the Clerk of the Supreme Court." SCACR 242(e) (emphasis added); *see also* SCACR 242(e)(1)-(4) (setting forth required contents of Appendix).

## Arguments Regarding Each Issue

The Petition raises several insufficient arguments in support of Petitioner's Petition. Further, Petitioner claims that this Petition satisfies three of the five Rule 242(b) criteria for a grant of certiorari.[2] Petitioner is incorrect, and certiorari should be denied accordingly.

### I. THE COURT OF APPEALS CORRECTLY RULED THAT ISSUES (1) AND (2) ARE NOT RIPE FOR APPEAL.

[2] Petitioner does not contend that SCACR 242(b)(2) or (5) are applicable to her Petition.

It is a well-established principle of law that only an "aggrieved" party may appeal. *See* SCACR 201(b). Petitioner cannot claim to be aggrieved by the Court of Appeals' decision with respect to Issues (1) and (2) because the Court of Appeals simply remanded those to the trial court for consideration of *Petitioner's own Rule 59(e) motions*. *See Bauknight, et al. v. Pope*, 2020-UP-216, *supra*. In other words, upon remand, the parties will be awaiting a final ruling—requested by Petitioner herself—from the trial court as to Issues (1) and (2). Pope's appeal to the Court of Appeals was premature, and therefore Pope's Petition is likewise premature. *See Hudson v. Hudson,* 290 S.C. 215, 216, 349 S.E.2d 341, 341-42 (1986) (dismissing an appeal as untimely because a 59(e) motion was pending); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 20 n. 2, 602 S.E.2d 772, 778 n. 2 (2004) (same); *see also Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 317, 368 S.E.2d 456, 456 (1988) (noting that the grant or denial of a motion to set aside entry of default is not directly appealable under S.C. Code Ann. § 14-3-330 (1976)); *EnerSys Delware, Inc. v. Hopkins*, 401 S.C. 615, 619, 738 S.E.2d 478, 480 (2013) (order refusing to disqualify attorney is not immediately appealable).

## II. PETITIONER PRESENTS NO NOVEL QUESTION OF LAW.

Though the Court of Appeals ruled that Petitioner's appeals of Issues (1) and (2) were not immediately appealable, *see* Section I, *supra*, in the event this Court finds they are appealable, Respondents note that these issues do not present any novel questions of law. Therefore, certiorari is not warranted on the basis of Rule 242(b)(1).

Indeed, Issue (1) relates to the setting aside of entries of default, which stems from a body of law so well-established that it has its own colloquialism amongst the bench and bar: the "*Wham*" factors. *See Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). The decision to set aside an entry of default is left to the sound discretion of the trial court. *See Roberson v. S. Fin. of South Carolina, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005).

As discussed in Respondents' Brief, incorporated by reference herein, the arguments related to Issue (1) are garden-variety applications of Rule 55(c), the *Wham* factors, and the trial court's correct discretionary decision to set aside the entries of default. There is no novel issue that warrants certiorari with respect to Issue (1).

Issue (2) relates to the circuit court's decision to not disqualify Respondents' counsel from representing the Attorney General's Office in the underlying lawsuit, and to not enjoin Respondent Bauknight. Contrary to Petitioner's assertions, there is nothing "novel" about the Attorney General's Office retaining outside counsel. Indeed, as noted in Respondents' Brief, it is well-established in South Carolina that the Attorney General's Office may retain outside counsel:

> [T]here is no question that the Attorney General has authority to hire legal counsel to protect the State's interests . . . the South Carolina Supreme Court has recognized that the Attorney General, as the State's chief legal officer, possesses the authority to appoint and approve private counsel to represent the State.
>
> Courts have almost universally recognized that Attorneys General possess broad authority to appoint private attorneys as special counsel on a contingent fee basis to assist in the representation of the public interest.

*South Carolina v. Eli Lilly & Co.*, 2007-CP-42-01855, Order of Judge Couch, Sept. 22, 2009 (included at R. pp. 96-133), citing *Cooley v. S.C. Tax Comm'n.*, 204 S.C. 10, 28 S.E.2d 445 (1943) (private counsel engaged by Attorney General to assist State in tax collection matter); *see also* R. pp. 1673-1688 ([Respondents'] Mem. In Opp. to [Petitioner's] Mot. Disqualify/Enjoin and sources cited therein). Additionally, there is nothing "novel" about Respondent Bauknight, as trustee of a charitable trust, working alongside the Attorney General's Office to protect the charitable trust. S.C. Code Ann. § 62-7-405(c) (1976) ("[t]he settlor of a charitable trust, the trustee, and the Attorney General, among others, may maintain a proceeding to enforce [a charitable trust]"). There is no novel issue with respect to Issue (2) that warrants certiorari.

## III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRIOR SUPREME COURT RULINGS.

Though the Court of Appeals ruled that Petitioner's appeals of Issues (1) and (2) were not immediately appealable, *see* Section I, *supra*, in the event this Court finds they are appealable, Respondents note that Court of Appeals' rulings do not present any conflict with prior Supreme Court rulings. Indeed, with respect to the merits of the Court of Appeals' ruling on Issues (1) and (2), Petitioner does not even allege a Supreme Court precedent has been violated. Therefore, certiorari is not warranted on the basis of Rule 242(b)(3).

## IV. PETITIONER PRESENTS NO SUBSTANTIAL CONSTITUTIONAL ISSUES.

Though the Court of Appeals ruled that Petitioner's appeals of Issues (1) and (2) were not immediately appealable, *see* Section I, *supra*, in the event this Court finds they are appealable, Respondents note that Court of Appeals' rulings do not present any substantial constitutional issues. Rather, the trial court's and the Court of Appeal's rulings with respect to Issues (1) and (2) are straightforward applications of South Carolina procedural law, common law, and statutory law. *See* Discussion, Sections I-III, *supra.*

Further, as Respondents noted in their Brief at pp. 26-27, Petitioner has abandoned any alleged constitutional arguments concerning Issues (1) and (2) by failing to cite appropriately to any law that would support her position. *See, e.g., First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (conclusory, unsupported arguments are deemed abandoned). In Petitioner's Brief, as well as her Petition, Petitioner makes only vague reference to "due process" and "separation of powers," along with general citations to the First and Fourteenth Amendments to the U.S. Constitution and Article I § 8 of the South Carolina Constitution. Petitioner has failed to expound upon her contentions, and thus has abandoned them. Therefore, certiorari is not warranted on the basis of Rule 242(b)(4).

## V. PETITIONER'S PETITION IS DEFECTIVE IN OTHER RESPECTS.

### a. Petitioner's 59(e) Motions Are Not "Effectively Denied" Such That This Court Must Ignore a Well-Established Principle of Appellate Practice.

Petitioner concedes, as she must, that her Rule 59(e) motions with respect to Issues (1) and (2) were not ruled upon by the trial court. (*See* Petition at p. 3.) As described in Section I, *supra*, it is the law of South Carolina that an appeal is premature when a Rule 59(e) motion is outstanding. Petitioner seeks to avoid this rule by arguing that the trial court's granting of summary judgment—in Respondents' favor—as to Petitioner's counterclaims serves to be an "effective denial" of Petitioner's Rule 59(e) motions regarding Issues (1) and (2). (*See* Petition at p. 3 n. 1.) Petitioner cites no law to support her newly created doctrine of "effective denial."[3] Further, Petitioner omits the fact that the grant of summary judgment to Respondents is before the Court of Appeals on a separate appeal, and that appeal has not yet been decided. *See* Appellate Case No. 2018-002229 ("Case 2229"). If that appeal were to be ruled upon in Petitioner's favor, then the trial court on remand would have no problem addressing her 59(e) motions related to Issues (1) and (2).

Of course, Petitioner is the party bringing the appeal in Case 2229, as well as this appeal. If the appellate posture of the various trial court rulings from the underlying action is in a

[3] Petitioner also cites to interests of "judicial economy" as a reason to overlook the fact that there are outstanding 59(e) motions before the circuit court related to Issues (1) and (2). However, in Respondents' Brief, Respondents pointed out to the Court of Appeals that Petitioner had outstanding 59(e) motions on both Issues (1) and (2). (*See* Final Brief of Respondents at p. 6-7.) In Petitioner's Reply Brief, Petitioner did not address Respondents' contention. Now, Petitioner seeks to correct this omission by citing to cases which allow for appeals of interlocutory orders in rare circumstances. (*See* Petition at p. 13 n. 11.) Petitioner has waived this argument by failing to include it in the Reply Brief she submitted to the Court of Appeals. Further, none of the cases cited by Petitioner in footnote 11 appear to address the presence of a not-yet-ruled-upon 59(e) motion.

confusing state, Petitioner has no one to blame but herself. Petitioner was the one who decided to file this premature appeal, thereby creating the very problem she complains of.

**b. Petitioner's "Questions Presented" Improperly Differ from her "Statement of Issues on Appeal."**

A petition for writ of certiorari is limited to the questions presented to the Court of Appeals in both the initial appeal and the petition for rehearing. *See* SCACR 242(d)(2). In this case, Petitioner's Petition improperly argues and expands the original statement of issues on appeal included in her Brief. (*Compare* Petition, Questions Presented, at p. 4 *with* Final Brief of Appellant, Statement of Issues on Appeal, at p. V.) The parties originally briefed—and the Court of Appeals considered—the aforementioned 4 issues. The Questions Presented in the Petition are improperly argumentative and even go so far as to *add* a fifth issue:

| Final Brief of Appellant, p. V. | Petition for Writ of Certiorari, p. 4 |
|---|---|
| Did the lower court err in granting the Attorney General and other Respondents relief from default as to Buchanan's and Pope's counterclaims? | May the AG and private Plaintiffs be relieved from default on the counterclaims against them in this case, where no satisfactory explanation for the default has been given; no good cause for relief from default has been shown; and they have no meritorious defense to the claims against them? |
| Did the lower court err in failing to disqualify Respondents' counsel from representing the Attorney General and in failing to enjoin Bauknight from acting on behalf of the Attorney General? | May a single, private law firm co-represent the Attorney General and more than a dozen private Plaintiffs in a tort suit for money damages, where no member of the Attorney General's staff is counsel of record? |
| Did the lower court err in ruling that Attorney General Wilson cannot be deposed in a tort suit the Attorney General brought in 2010? | May the Attorney General avoid being deposed in this tort suit he brought jointly with Tommie Rae Hynie and others in 2010, where the AG and its counsel have taken multiple and conflicting positions as to it participation in the case? |
| Did the lower court err in dismissing the Attorney General as a party under Rule 21 SCRCP? | Where the Attorney General is a named Plaintiff in a lawsuit; is subject to counterclaims; and has actively participated in the case for seven (7) years, |

| | |
|---|---|
| | may it be excused summarily under Rule 21 based on its allegation that it was misjoined? |
| ---- | Did the court of appeals err in failing to address the substantive and constitutional issues raised and preserved by Petitioner and by remanding this case, which is a continuation of the AG's exceeding its authority as addressed by this Court in *Wilson*, and by allowing this case to proceed indefinitely without final appellate review of the issues presented above. |

(Petition at p. 4; Brief of Appellant at p. V.) The fifth question was not presented to the Court of Appeals on the briefs, and should not be included in this Petition.[4] Further, the questions presented in Petitioner's Petition that actually were presented to the Court of Appeals were not presented in Petitioner's argumentative, full-of-assumptions manner. The Petition should be denied on this basis alone. *See* SCACR 242(d)(4) ("[f]ailure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition").

**c. The Court of Appeals Did Not "Overlook a Critical Fact."**

Petitioner proclaims that the Court of Appeals' opinion in this case "overlooks a critical fact: On May 19, 2010, the South Carolina Attorney General, joining and sharing private counsel with Tommie Rae Hynie Brown, Terry Brown, and dozen other private plaintiffs, sued . . . Petitioner Adele J. Pope for money damages based on alleged torts." (Petition, at p. 3.) Respondents fail to grasp what is so "critical" about this fact, or how it bears upon this Petition. The underlying lawsuit is an action against Petitioner by Respondents, sounding in breach of

[4] *See also* Discussion of waiver of constitutional arguments, Section IV, *supra.*

fiduciary duty, breach of trust, and negligence. R. pp. 186, *et seq.* Certainly, the Court of Appeals did not overlook this "fact," because the underlying Complaint is included in the Record on Appeal, as are Petitioner's counterclaims against all Respondents. *Id.*; R. pp. 337, *et seq.* Petitioner's addition of sensationalized language to her Petition does not add legal merit where there is none.

**d. Petitioner's Reference to a Motion to Supplement the Record Is Improper.**

In her Petition, Petitioner references her contemporaneously filed Motion to Supplement the Record. (*See* Petition at p. 8 n. 5.) Respondents object Petitioner's mention of this improper motion and believe it should have no bearing on this Petition. Respondents have responded separately in opposition to this Motion to Supplement.

**e. Petitioner Criticizes the Assigned Circuit Judge without Evidence.**

As an additional reason for certiorari, Petitioner claims that the Petition must be granted because the original assigned circuit judge, the Honorable L. Casey Manning, is no longer assigned to the case, and the successor assigned circuit judge, the Honorable Doyet A. Early, III has retired. Currently, the assigned circuit judge is the Honorable Clifton B. Newman. According to Petitioner's logic, the issues raised in her outstanding 59(e) motions should be considered "final and appealable" because a new-to-the-case circuit judge "cannot give a meaningful review of those motions 5+ years after the underlying orders were issued." (*See* Petition at p. 14.) Respondents disagree with Petitioner's argument suggesting, without evidence, that a successor circuit judge will not be able to "certify[] familiarity with the record and determin[e] that the proceedings may be completed without prejudice to the parties" in accordance with SCRCP 63. There is no reason that a successor circuit judge cannot rule on Petitioner's 59(e) motions. Indeed, the *Ness* case cited by Petitioner actually supports

*Respondents'* contention that there is no issue with a different judge ruling upon a 59(e) motion where the prior judge is under a "disability:" "[w]e construe the language 'other disability' to include disqualification of the trial judge. Therefore, the Rule 59(e) motion should have been heard by another circuit judge." *Ness v. Eckerd Corp.*, 350 S.C. 399, 403, 566 S.E.2d 193, 196 (Ct. App. 2002).

## VI. PETITIONER FAILED TO SERVE THE REQUIRED APPENDIX.

Petitioner was required to file an Appendix alongside her Petition, *see* SCACR 242(e), but Petitioner did not do so, filing only her Petition and an accompanying Motion to Supplement the Record. The Appendix is required to contain: "1) a copy of the Record on Appeal and brief(s)… 3) a copy of the decision of the Court of Appeals on which certiorari is sought… [and] 4) a copy of the petition for hearing or reinstatement filed in the Court of Appeals and the Court's ruling on that petition." SCACR 242(e)(1), (3), and (4). Petitioner included none of these items. Therefore, Petitioner has violated the *South Carolina Appellate Court Rules* and this Court should dismiss her Petition.[5] *See* SCACR 260(a).

## Conclusion

For the foregoing reasons, Respondents respectfully request that the Court deny Petitioner's Petition for a Writ of Certiorari. The Court of Appeals' Op. No. 2020-UP-216 was correctly decided, and nothing contained in that opinion rises to the level of "special and important reasons" necessary for a grant of certiorari.

*Signature block on following page.*

[5] Petitioner has repeatedly shown disregard for the *Appellate Court Rules* in this appeal and the Case 2229 appeal. In the Case 2229 appeal, Petitioner's first Initial Brief, first Designation of Matter, first Record on Appeal (5 volumes), and first Final Brief were stricken due to various rules violations. *See* Orders of the Court of Appeals, Case No. 2018-002229, dated July 26, 2019, May 21, 2020, and August 21, 2020. In this appeal, Petitioner's first Initial Brief and First Designation of Matter were stricken due to rules violations. *See* Order of the Court of Appeals, Case No. 2017-001899, dated April 26, 2018.

Respectfully submitted,

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