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Jun 24 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
Circuit Court Case No. 2012CP4000350

The Honorable Clifton B. Newman, Circuit Court Judge

Appellate Case No.2021-000518

Adele J. Pope.....Appellant,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina Appellant.

**MOTION OF ATTORNEY GENERAL TO
STRIKE REPLY BRIEF, ALTERNATIVE REQUEST TO SUPPLEMENT
DESIGNATIONS, AND REQUEST TO STAY FILING OF RECORD
AND FINAL BRIEFS**

The Attorney General respectfully moves as follows:

MOTION TO STRIKE

Attorney General Wilson moves to strike portions of Appellant Pope's Initial Reply Brief because those parts of the brief violate the Appellate Court Rules. He regrets having to file this Motion, but it is necessary due to the errors identified below in the Brief

- 1. Page 2, ¶3; p. 12, 1st sentence; p. 12, note 5; and p. 13, ¶d - Reliance on Motion to Alter or Amend for statements of purported facts**

At page 2, paragraph 3, Appellant states the following:

The AG again asks the Court, as it asked the lower court, to overlook the fact that the AG has refused since 2011 to release under FOIA multiple public James Brown documents which it owns; which it has used for 11 years to falsely accuse Robert Buchanan, Esq. (“Buchanan”) and Appellant of a federal felony; and which it has retained and controlled for that entire period. [Mot. Alter, dtd. 4/13/21]

In the first sentence on page 12 and footnote 5 thereon, she cites the Motion for factual support as follows:

In refusing to release the 2010 \$4.7 million valuation, the AG relied on an ill-gotten confidentiality order Bauknight had secured in 2013. [footnote]5 [Mot. Alter, 4/13/21, p. 11]

Footnote 5: She cites the Motion for Support for most of this note. The Afterman documents she also cites do not appear to be supportive. Her affidavit does not appear to support the last sentence.¹

Her paragraph d on page 13 about Tommie Rae Hynie cites only the Motion to Alter as support.

This paragraph should also be struck as new matter. *See*, Part 4, *infra*.

The cited motion in these passages is a 21 page argumentative document. “Every trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual view” *Harper v. Bolton*, 239 S.C. 541, 562, 124 S.E.2d 54, 64 (1962). Appellant may not rely on this argumentative motion for factual support of these passages. All of the above statements should be struck. *See* also, Part 4 *infra*.

2. Last paragraph on p. 9 - The cited documents do not support the following statement therein:

¹ The Attorney General objected to the affidavit as irrelevant, untimely and a rehash of her version of history that she has recounted in her numerous affidavits that are already subject to motions to strike. Response of Attorney General, January 19, 2021. The circuit court never ruled on the objections and did not rely on the affidavit in his Order.

In 2012 AG Meyers, other AG staff, Wingate and Bauknight became deeply involved in preventing release of public documents under FOIA that would undermine the AG's position in the Wingate Suit and parallel representations the AG and Bauknight were making to the Supreme Court in *Wilson v. Dallas*. [Ltr. Wingate [firm] to AG, AG Meyers, others, 1/20/12; Mot. Consolidate]

The letter is from Mark Gende of the Wingate (SWB) firm. It does not support that Meyers and other AG staff were "deeply involved in preventing the release of public documents" nor does the cited Motion to Consolidate.

- 3. Second sentence on p. 14 has no cited support** ("In 2022, the AG is still withholding more than 8 months of public documents . . .").

This sentence should be struck pursuant to Rule 208(b)(4), SCACR (brief must contain references to materials that may be included in the ROA).

- 4. The following parts of the brief include new issues and matter not raised in Appellant's opening brief or in Respondent's brief:**

- a. P. 7 & 2d paragraph, p. 8 - the matter of the September 9 FOIA request which is not the request at issue in this proceeding. .
- b. P. 10, 1st & 2d full paragraphs re release of the "Wingate agreement." Production of the Wingate agreement is not the subject of the FOIA request at issue in this case and not at issue in the briefing before the Reply
- c. P. 10, 3d full paragraph. New matter re *Wilson v. Dallas*.
- d. P. 11, 1st full paragraph. This argument regarding a "*de facto* stay" is new. Moreover, the AG did not request a stay of this FOIA case and instead said it should proceed. See letter of March 28, 2013 to Judge Manning ("[the] hearing of motions involving the Attorney General [in the FOIA cases] should not be slayed and should be heard" and email of undersigned counsel 5-8-13 ("the FOIA cases should not be held in abeyance . . ."); see also emails of 2014 & 2015 and *infra*.2 alternative request to file supplemental designations. The Wingate letter did not reference the instant FOIA case.
- e. P. 11, 2d full paragraph. Plans of some parties to reinstate the 2008 settlement.

2 Respondent will provide the letter and emails if the Court would like to see them.

- f. P. 11, 3^d and 4th full paragraphs. Arguments related to Summer Order including references to a Hynie document.
- g. P. 12, fn. 5, last sentence re production of the Wingate document. This issue is not the subject of the FOIA at issue in this case and not at issue in the briefing before the Reply
- h. P. 13, ¶d. New matter re Hynie. An additional ground for striking this Paragraph is that the Motion cited in support cannot be used to support purported factual allegations. *See* Point 1, *supra*.
- i. P. 13, last paragraph. Communications with the Supreme Court about *Wilson v. Dallas*. *See*, item 4c, *supra*.
- j. P. 14, 1st sentence re release of the Wingate document. *See* Point 4b, *supra*.

These new matters are not properly included in the Reply Brief. As stated in Toal, Walker & Baker, *Appellate Practice in South Carolina*, (3d ed., 2016), p. 436:

Some attorneys view the reply brief as a chance to offer new arguments. This is a mistaken notion. No new issues may be raised by the appellant in the reply brief. *See McClurg v. Deaton*, 395 S.C. 85, 716 S.E. 2d 887 (2011) (“it is axiomatic that an issue cannot be raised for the first time in a reply brief.”); *Divine v. Robbins*, 385 S.C. 23, 683 S.E. 2d 286 (Ct. App. 2011)(Concluding appellant used the reply brief to argue issues for the first time): *Glasscock, Inc. v. I. S. Fid. & Guar. Co.*, 248 S.C. 76, 557 S.E. 2d 689 (Ct. App. 2001)(finding an issue abandoned when addressed in the reply brief but not in the initial bief). (Emphasis added)

Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) also provides important guidance:

Mr. Bochette attempted to advance in oral argument before this court and in his reply brief other contentions concerning transmutation not argued in his appellant's brief; however, we need not consider these contentions, even though they were embraced by an exception. An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief. *See Animal Protection Society of Durham, Inc. v. State of North Carolina*, 95 N.C.App. 258, 382 S.E.2d 801 (1989) (a reply brief cannot be used to raise new matters); *5 C.J.S. Appeal & Error Sec. 1324(1)* at 329 (1958) (“A matter raised for the first time in oral argument or in the reply brief will not be considered by the appellate court.”)

Appellant has raised new issues, arguments and matters for the first time in briefing. The above

limitations include new “arguments” and “matters” as well as issues that might be listed in the Statement of Issues. Appellant’s new matters are not responsive to the Attorney General’s arguments. Having these new matters inserted for the first time on reply is highly prejudicial to the Attorney General because he does not have an opportunity to respond. Under the above authority, these parts of the brief must be struck.

Relief as to Motion to Strike

The above parts of the brief may be struck without the necessity of striking the entire brief and rewriting it. These parts may be excised from the brief without disrupting the remaining arguments therein. They are in an unlabeled section that is listed in the Table of Contents as a Statement of Facts, and none of the above parts are relevant to this Court’s deciding the issues in this appeal.

Undersigned counsel has conferred with counsel for Appellant about the above points, and he opposes amendment of the Reply Brief and this Motion to Strike.

ALTERNATIVE REQUEST LEAVE FOR SUPPLEMENTAL DESIGNATION AS TO PART 6d

If, *arguendo*, this Court denies the request to strike the first full paragraph of page 11 regarding staying the proceedings below (Part 5d, *supra*), the Attorney General respectfully requests leave to respond to that new matter by a supplemental designation of his letter to the Honorable Casey Manning of March 28, 2013, and his emails to the Judge of May 8, 2013 (with attached strings), May 7, 2014, November 13, 2014 and January 29, 2015. These documents demonstrate that the Attorney General did not request a stay of hearings in this case, noted the availability of his counsel and in fact, opposed holding this case in abeyance. They were not previously designated because Appellant did not raise the issue of a stay until her reply brief.

REQUEST TO STAY TIME FOR FILING RECORD ON APPEAL AND FINAL BRIEFS

Because of the effect that this motion may have on the compilation of the Record on Appeal and the Final Briefs, the Attorney General respectfully requests that the time for filing these documents be stayed or held in abeyance until the Court decides this Motion.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that this Motion be granted.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

s/ J. EMORY SMITH, JR.
Deputy Solicitor General
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June 24, 2022

ATTORNEYS FOR THE ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that I have served the Attorney General's Motion to Strike Reply Brief, etc.
by emailing it to counsel for the Appellant at the email address below this June 24, 2022 (Copy of
email attached):

Adam T. Silvernail, Esquire
Law Office of Adam T. Silvernail
adam@silvernailfirm.com

s/ J. EMORY SMITH, JR.
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Counsel for the Attorney General

Emory Smith

From: Emory Smith
Sent: Friday, June 24, 2022 3:34 PM
To: Adam Silvernail
Subject: Pope v. Wilson - Appellate case 2021-000518
Attachments: Motion to Strike Reply Brief for efileing (03021727xD2C78).PDF

Adam,

Attached is our Motion to Strike, etc.

Emory

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