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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.

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

In an astonishing example of her repeated attempts to distract the Court from the main issues in this case, Pope has filed a 220 page response to the Attorney General's less than 6 page motion to strike just a few pages of her brief. The Response consists of a nine page memorandum, a 31 page hearsay ridden affidavit never filed in this case previously, and reams of exhibits, many of which were never presented to the circuit court. She claims that the motion to strike is trying to keep out embarrassing information. This is a ridiculous charge because she has repeated the same baseless accusations over and over and over in repeated filings in this case and in the numerous affidavits she has filed. The legal issue is simple and meritorious as found by the Honorable

Clifton Newman. The Attorney General's office never received the FOIA request at issue and therefore the circuit court that lacked subject matter jurisdiction complaint of this case, and Appellant failed to state a cause of action. That Appellant feels the need to file a 220 page response to the slightly more than five page Motion to Strike demonstrates that she lacks a good defense to the Motion or supporting argument for her appeal.

Respondent Attorney General would move to strike Appellant's affidavit and exhibits but does not want to set off another round of a response and reply. Instead, he asks that this Court disregard Pope's Response but take into account how she continues to overburden the parties and this Court with voluminous, irrelevant writings that fail to follow case law, the Rules of Appellate Procedure and the Rules of Evidence.

This Reply addresses below her arguments as to the parts that the Attorney General requests to be struck followed by brief discussion of the affidavit.

1. Reliance on Motion to Alter or Amend for statements of purported facts

Appellant argues that she can rely on the Appellate Court Rules 208(b)(4) and 210(c) to sidestep the admonition in *Harper v. Bolton*, 239 S.C. 541, 562, 124 S.E.2d 54, 64 (1962) that "statements of counsel in an argument are not evidence but are merely the expression of his individual view" These rules do not permit her to transform argument and rhetoric magically into support for purported factual statements. Rule 208(b)(4) requires the brief to "contain references to material . . . to support the salient facts alleged." (emphasis added), Argument and rhetoric do not support "salient facts." The Attorney General's Motion shows that Appellant cites mere argument in her Motion Alter to support purported factual statements. This bootstrapping conflicts with the Appellate Court rules and *Harper, supra*.

2. Last paragraph on p. 9 – Appellant sets forth no reason why the cited documents support the following statement in her brief.:

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. As with her improper reliance on allegations in her Motion to Alter, Appellant cites documents that do not properly support the accusations she makes.

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

Appellant says that the Rules do not require that every sentence must contain a citation to the record, and that this sentence is simply a “bridge between statements.” She misapplies these concepts. Rule 208(b)(4) says that the brief must contain citations to materials in the Record that support “the salient facts alleged.” Her allegation that “the AG is still withholding 8 months of public documents” is an alleged salient fact that must be supported. It is not.

4. The referenced parts of the brief include new issues and matter not raised in Appellant’s opening brief or in Respondent’s brief:

Appellant contends that she is only barred from raising new “issues.” She is wrong. Although some of her statements do raise new issues as referenced in this ground for the Attorney General’s Motion, others bring up new matters which are also barred. As quoted in our Motion to Strike, Toal, Walker & Baker, “Appellate Practice in South Carolina”, (3d ed., 2016), p. 436 makes clear that “new arguments” are barred. *Bochette v. Bochette*, 300 S.C. 109, 112, 386

S.E.2d 475, 477 (Ct. App. 1989) quotes authority that bars new matters: "*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.')" Therefore, the referenced new matters should be struck.

Relief as to Motion to Strike

As noted previously, the above parts of the brief may be struck without the necessity of striking the entire brief and rewriting it. These parts, which total no more than several pages, 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.

ALTERNATIVE REQUEST LEAVE FOR SUPPLEMENTAL DESIGNATION AS TO PART 6d

Appellant does not oppose this request.

APPELLANT'S AFFIDAVIT AND EXHIBITS SHOULD BE DISREGARDED

The affidavit and exhibits are not responsive to the Motion to Strike, and the affidavit includes Appellant's unsupported view of the history of the case including numerous purported factual statements and hearsay. Examples abound throughout the affidavit:

Pages 3 & 4, list of unsupported fact statements

Page 6, ¶8 Characterization of ruling in separate lawsuit not involving the Attorney

General

Page 8 ¶¶ 15 and 16 unsupported statements about matters involving other litigation

Page 9, ¶22 – reference to Motion filed in other case that may not filed in circuit court in instant case.

Page 10, ¶¶22 & 23 and Exhibit H – apparently not filed in circuit court in instant case

Page 11, ¶27 and Ex. K – document and quote apparently not filed in circuit court in instant case

Page 11, ¶28 and Ex. L - document and quote apparently not filed in circuit court in instant case

Page 12, ¶¶ 36 & 37, and Ex. P – referenced document and Exhibit apparently not filed in circuit court in instant case.

Pages 13 & 14 , ¶¶41 - 46 - referenced document and Exhibit apparently not filed in circuit court in instant case.

Page 14 & 15, ¶¶ 48 49, & Exhibits G & U – exhibits apparently not filed in circuit court in instant case.

Page 15, ¶ 51 – Statement of Appellant about facts at issue in instant case not filed in circuit court.

Page 18, ¶64 – oral argument quotations not filed in circuit court in instant case

Page 21, ¶ 76 – hearsay

Pages 21 & 22 – Hearsay statement. Exhibit AC not filed in circuit court in instant case.

Page 22, ¶¶ 78 & 79 – hearsay

Pages 23 & 24, ¶¶ 87 & 88 quotations and referenced exhibits apparently not presented to circuit court in instant case.

Page 24, fn 3 – invitation to court to review public record in separate case and discussion of

it – not presented to circuit court in instant case

Page 25, ¶ 91 – hearsay

Page 26, ¶¶ 92 & 93 – quotations, return and report apparently not presented to circuit court
in instant case

Page 26, fn. 5 – hearsay

Page 27, ¶ 97 – hearsay

Page 28, ¶101 – reference to order in different case not of record in instant case.

Page 29, ¶102 – Apparent reference to other case not presented to court in instant case

Page 29, ¶ 104 – Apparent reference other case not presented to court in instant case

At least the following exhibits, including those noted above, do not appear to have been filed in the circuit court in this case, are not responsive to the Motion to Strike and should not be considered by this Court: A, E-I, L, M, O , Q, S-V, AD – AG.

This affidavit and the exhibits constitute an attempt, in effect, to re-brief this case and remake the Record. Doing so is inconsistent with the Appellate Court rules. Although Rule 240(c)(3) allows parties to “file affidavits and other documents in support of their positions” when the facts are not in the record, the affidavit and exhibits are not responsive to the narrow issues in the Motion to Strike which involve the Reply Brief’s making unsupported statements, introducing new matters, and relying on a motion for statements of purported facts. Appellant should not be permitted to introduce to this Court now over 200 pages of exhibits and an affidavit when they are irrelevant to the narrow Motion to Strike. Those filings should be disregarded.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that his Motion to Strike be granted. If, *arguendo*, the Motion is not granted, he respectfully requests that the Court grant his unopposed request to make supplemental designations.

Respectfully submitted,

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s/ J. EMORY SMITH, JR.
Deputy Solicitor General
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CERTIFICATE OF SERVICE

I hereby certify that I have served the Attorney General's Reply to Return to Motion to Strike Reply Brief, etc. by emailing it to counsel for the Appellant at the email address below this July 14, 2022 (Copy of email attached):

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

s/ J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General
esmith@scag.gov

Counsel for the Attorney General

Emory Smith

From: Emory Smith
Sent: Thursday, July 14, 2022 11:39 AM
To: Adam Silvernail
Subject: RE: Pope v. Wilson, Case No. 2021-000518
Attachments: Reply to Response to MTS (03044322xD2C78).PDF

Adam:

Attached is our Reply.

Emory

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