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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
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,. . . . . Respondent.

FINAL BRIEF OF RESPONDENT ATTORNEY GENERAL

ALAN WILSON
Attorney General

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

J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

Post Office Box 11549
Columbia, SC 29211
(803) 734-3680
(803)734-3677 (Fax)
esmith@scag.gov

Counsel for Respondent
Attorney General

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STATEMENT OF ISSUES

1. Whether the circuit court properly found that the Attorney General did not receive Appellant's FOIA request, and therefore, that the court lacked subject matter jurisdiction of this case and Appellant had failed to state a cause of action.

2. Even if *arguendo*, the Attorney General had received the request, whether this case is moot when the Office of the Attorney General has supplied Appellant with the only documents that could be considered responsive to her request.

3. Whether the Attorney General must produce any documents held by the Sweeny, Wingate Barrow law firm.

4. Whether the Attorney General must produce any documents held by the former Legacy Trust and whether Appellant properly raised and preserved that issue.

5. Whether Appellant properly included her Argument VI in her amended initial brief when she did not include it in her original brief, and whether a document and news article referenced therein are properly before this Court.

6. Whether Appellant has been denied the due process of law.

7. Whether the Attorney General argued discovery exemptions following the remand of this case.

8. Whether Appellant is entitled to attorney's fees and whether she has properly documented her claim.

9. Whether Appellant's affidavits should be struck or disregarded for reasons set forth in Respondents' Motions to Strike including irrelevance and hearsay.

STATEMENT OF THE CASE

Appellant brought this action by a Complaint filed in Newberry County on August 3, 2011. Record (R.) VI, p. 43. The Complaint requested, in part, that the Court declare public documents that she sought by a June 30, 2011, Freedom of Information Act request and that they be made available for inspection and copying. *See* Statement of Facts, *infra.* The Respondent Attorney General (AG) filed a Motion to Dismiss and Alternative Motion to Strike the Affidavit of Appellant attached to the Complaint. R. VI, p. 80. Under SCRCP, Rules 12(b)(3) and (8), the Motion contended that venue was improper and that it should be in Richland County where the related litigation was pending. *Bauknight etc. v. Pope,* 2010-CP-40-4900. The Motion also contended that another action was pending between the parties, *Bauknight, supra,* and that Appellant was pursuing through the instant suit the same discovery issues pending in case 4900.

Appellant filed a Motion for Summary Judgment dated September 29, 2011. R. VI, p. 112. She filed numerous affidavits that were the subject of several Motions to Strike filed by the Appellant. R. VI, pp. 80, 110, 121, 123, 126, 248 and 250 (Affidavits in Record addressed by Motions to Strike of 9-2-11, 9-14-11, 9-27-11, 10-13-11, 1-9-12, 3-28-12, 3-29-12).

On October 24, 2011, the Attorney General filed an affidavit of Senior Assistant Attorney General Tracy Meyers stating that records of the Office of the Attorney General (OAG) did not show that the letter had ever been mailed or delivered to that Office. R. VII, pp 515-517. The affidavit and the failure to mail or deliver were among the grounds of the Attorney General's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed January 11, 2012. R. VII, p. 606.

Following a hearing, the circuit court issued a Form 4 Order on January 11, 2012,

transferring venue of this case to Richland. R. VI, p. 10. On February 1, 2012, the Respondent AG moved to consolidate this case with case 4900. R. VI, p. 178.

On December 20, 2012, the Respondent AG moved to amend his Motion to Dismiss to assert lack of subject matter jurisdiction and to drop improper venue. R. VI, p. 160. The lack of subject matter jurisdiction ground was based upon Appellant's failed to accomplish mailing or delivery of her FOIA request as required by §30-4-30(c) and because the items requested were exempt from disclosure under FOIA because they are subject to the rules regarding discovery in the Rules of Civil Procedure for which Appellant was seeking the documents. *Id.* The Respondent AG maintained the Rule 12(b)(8) ground for dismissal in the original Motion and the motion to strike therein.

Subject to his pending Motions, the Respondent AG filed an Answer dated March 7, 2013. The Answer included the defenses asserted in the Motion to Dismiss and Motion to Amend Motion to Dismiss. R. VI, p. 190. The Answer also included the defense that the Office of the Attorney General had no documents that could be considered responsive to the FOIA request except for a draft of the Legacy Trust attached thereto and included in the Record on Appeal in *Wilson v. Dallas,* 403 S.C. 411, 743 S.E.2d 746 (2013). R. VI, pp. 187, 206, 207. The Respondent AG also filed a Motion for Judgment on the Pleadings on March 7, 2013. R. VI, p. 241.

The Supreme Court gave the Honorable Doyet Early, III, jurisdiction of this case by Order dated March 24, 2016. Judge Early heard pending motions in this case on May 17, 2016. He issued an Order dated June 14 dismissing this case. R. VI, p. 19. He found that the documents at issue were potentially discoverable in pending litigation in Richland / Aiken counties and would

be governed by the Rules of Civil Procedure. He found that the documents were exempt from disclosure under FOIA for this reason and that FOIA could not be used to bypass civil discovery. The Court denied Plaintiff's Motion to Alter or Amend by Form 4 Order dated July 22, 2016. R. VI, p. 22. Plaintiff appealed the above 2016 Orders.

The Court of Appeals reversed the circuit court's order dismissing Complaint and remanded for further proceedings on the basis of its conclusion in its Opinion in *Pope v. Wilson*, 427 S.C. 377, 389, 831 S.E.2d 442, 448, (Ct. App., 2019) which included the statement that "[i]f the government invokes the exemption in section 30-4-40(a)(4), '[m]atters *specifically* exempted from disclosure by statute or law,'[footnote omitted; emphasis as added by Court of Appeals] to seek protection under discovery rules, it must point to the specific language of a discovery rule that expressly prohibits disclosure of a particular type of record." The Court of Appeals found that the case was not moot because Plaintiff challenged the claim that the Attorney General had given her all the documents responsive to her request. The Court did not address the Attorney General's additional sustaining grounds including that the Court lacks subject matter jurisdiction because the Attorney General never received Appellant's FOIA request.

Following remand, a hearing was held on remaining issues before the Honorable Clifton Newman on November 19, 2020. The parties filed memoranda before the hearing. R. VII, p. 749 (Memorandum of AG). The Attorney General's Memorandum argued that the Court lacked jurisdiction when Appellant's FOIA request was not received by mail or delivery, that the AG had supplied all documents responsive to the FOIA request and that his Motions to Strike should be granted. *Id.* The Attorney General filed a Response in Opposition to Appellant's Proposed Order, Supplemental Memorandum and Affidavit. (R. VII, p. 834).

Judge Newman entered an Order on April 1, 2021, granting the Attorney General's Amended Motion to Dismiss and Motion for Judgment on the Pleadings because he never received the written FOIA request by mail or delivery. R. VI, p. 16. Appellant filed a Motion to Alter or Amend (R. VI, p. 327) which the Court denied by Order of April 23, 2020. R. VI, p. 41.

STATEMENT OF FACTS

Appellant asked for the following documents in a June 30, 2011, letter addressed to the "Custodian of Records of the Office of the Attorney General" (R. VI, p. 52) but never received by the Office:

1. The final and all drafts, signed and unsigned, of the James Brown Legacy Trust.

2. All correspondence, email and/or other communications between any member of the Office of the . . . Attorney General and Russell L. Bauknight between August 1, 2010, and May 4, 2011 related to the value of the assets of the Estate of James Brown and / or the James Brown 2000 Irrevocable Trust.

Tracy Meyers of the Office of the Attorney General (OAG) wrote Appellant on August 5, 2011, that the Office had not received that request. R. VII, p. 475. The letter said that Civil Division attorneys notified her that Appellant had "refer[ed] to a request dated June 30, 2011 in a motion filed by [her] in a . . . circuit court case." The letter did not say that Appellant had attached her request to that Motion, and Appellant has not produced a document showing that she had. In fact, Ms. Meyers' letter said that if Appellant had made such a request, "if you will forward it to me with the next five (5) business days, I will expedite a response to it." Appellant did not forward the request. According to Ms. Meyers' affidavit of October 20, 2011, and filed with the Court four days later, records of the OAG did not show that the letter had ever been mailed

or delivered to that Office. R. VII, pp. 515 & 516[1]. Without proper mailing or delivery of the FOIA request to the OAG, the requirements of FOIA were never triggered. §30-4-30(c) ("[e]ach public body, upon written request for records made under this chapter shall within fifteen days . . . of the receipt of any such request notify the person making such request of its determination . . ."). (emphasis added).

Appellant contends that the Attorney General did not raise this defense in his Motion to Dismiss. He did not do so because that Motion was based upon the limited grounds of improper venue and the pendency of another action between the parties under Rules 12(b)(3) and (8). R. VI, p. 80 Contrary to Appellant's statement that the Attorney General did not raise this issue of non-receipt until December 20, 2012, he raised the issue in October 2011, when he filed the Meyers affidavit, *supra*, and raised the defense in opposition to Plaintiff's Motion for Summary Judgment filed January 17, 2012. (R. VII, p. 618). Of course, since the non-receipt deprives the Court of subject matter jurisdiction, it could be raised at any time.

The Attorney General's Answer to the Complaint reserved his defenses, including lack of receipt of the FOIA request, and attached the only document that could be responsive to Appellant's Request No. 1, *supra,* the unsigned Legacy Trust draft. R. VI, pp. 187, 206-240.

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1 As stated in Ms. Meyers' Affidavit (R. VII, p. 516):

> 3. She never received from Ms. Pope the June 30 letter Ms. Pope claims to have sent to the Office of the Attorney General. She requested checks of Office mail logs, none of which showed that the letter had been mailed or delivered to the Office of the Attorney General by Ms. Pope or her attorney which is necessary to require a response from this Office under FOIA.
> 4. Attachment of the June 30, 2011 letter to the complaint in the [instant] suit does not constitute a request under FOIA to which the Office of the Attorney General must respond.

and 27 -42). As to Request 2 for correspondence between the OAG and Russell Bauknight regarding value of assets, the Office of the Attorney General had nothing responsive. The Order of January 16, 2015, in the *Summer v. Wilson* FOIA case in Newberry County, (R. VII, p. 861), concluded that the OAG did not have to produce the appraisal because it did not have it. *See also* R. VI, p. 203, (Ms. Summer's June 10, 2012, request for "any documents related to the $4.7 million at-death valuation of James Brown's music empire") and R. VI, p. 204 5July 10, 2012, response stating that "[t]here are no documents responsive" to that request). Appellant would have access to the filings in the *Summer* case through the Court. Finally, the appraisal Appellant has sought is confidential pursuant to a Court order in a Federal case involving her, but she would have access to it through that proceeding. *Brown v. Pope*, 3:08-cv-14-WOB (D.S.C., November 15, 2013, the Honorable J. Gregory Wehrman, Magistrate Judge).

STANDARD OF REVIEW

The Court granted the Amended Motion to Dismiss and Motion for Judgment on the Pleadings for lack of subject matter jurisdiction and failure to state a cause of action on the sole ground that the Attorney General never received the written FOIA request by mail or delivery. R. VI, p. 36.

> "It is well-settled that issues relating to subject matter jurisdiction may[ ]be raised at any time." *Bardoon Props., NV v. Eidolon Corp*., 326 S.C. 166, 168, 485 S.E.2d 371, 372 (1997). "Whether a court has subject matter jurisdiction is a question of law we review de novo."

Sanders v. Savannah Highway Auto. Co., 432 S.C. 328, 334, 852 S.E.2d 744, 747 (Ct. App. 2020), reh'g denied (Jan. 21, 2021), cert. granted (Nov. 10, 2021). Therefore, this standard governs the review of Judge Newman's conclusion that the lack of receipt of Appellant's FOIA request

deprived the Court of subject matter jurisdiction.

To the extent that the Court wishes to review the conclusion of Judge Newman that the lack of receipt also constituted a failure to state a cause of action, the following standards apply:

> In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Id*.
>
> In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, state any valid claim for relief.

HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 631–32, 699 S.E.2d 699, 703 (Ct. App. 2010).

> "Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP. When considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). "On review of the motion, the court may not consider matters outside the pleadings." *Id*. In evaluating a Rule 12(c) motion, the court must consider that "a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties." *Id*. at 287, 533 S.E.2d at 353 (quoting *Russell v. City of Columbia,* 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)).

Pope v. Wilson, 427 S.C. 377, 384, 831 S.E.2d 442, 445–46 (Ct. App. 2019).

Appellant is correct that the presentation of affidavits may convert a Rule 12(b)(6) motion to one for summary judgment. In this instance, the Court did not rule on the motions to strike Appellant's numerous affidavits, but it cited only the Meyers Affidavit re non-receipt. To the extent that, *arguendo*, the motion is deemed converted to one for summary judgment, the following standard applies:

> "In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the [circuit] court under Rule 56(c), SCRCP." *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). "Pursuant to Rule 56(c), SCRCP, summary judgment may be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id.*

Progressive Direct Ins. Co. v. Groves, 431 S.C. 203, 209, 847 S.E.2d 114, 117 (Ct. App. 2020), reh'g denied (Sept. 10, 2020), cert. granted (Apr. 19, 2021). Attachment of exhibits does not convert the Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction to a motion for summary judgment. Therefore, review of the Rule 12(b)(1) dismissal is de novo under *Sanders, supra*.

ARGUMENT

The Respondent Attorney General strongly supports the Freedom of Information Act, and his Office and his predecessors have a long history of advocating the importance of that law; however, this case has failed because Appellant did not meet the notification requirements of FOIA.

This appeal presents the simple issue of whether the Circuit Court had jurisdiction to hear this case when the Office of the Attorney General never received by mail or delivery the FOIA request at issue. The answer to that question is no, the Circuit Court did not have jurisdiction. Rather than focus on that question, which is the only issue that Judge Newman addressed, Appellant clutters her brief with 22 pages of her characterization of the history of this case, and also other James Brown litigation, to which she is a party and another FOIA case (*Summers*) to which she is not a party. Rather than focusing on the simple issue in this case, she recites her irrelevant litany of complaints about the multiple lawsuits in which she has been involved.

Respondent Attorney General does not attempt to reply to all of those statements because they are distractions not pertinent to the issues in this case.

The only question addressed by the Circuit Court is the above jurisdictional issue. Nevertheless, should this Court want to review other matters, the Attorney General discusses such issues briefly, below, following the jurisdictional argument.

I

APPELLANT HAD NO CLAIM UNDER FOIA, AND THE CIRCUIT COURT HAD NO SUBJECT MATTER JURISDICTION BECAUSE HER REQUEST WAS NOT RECEIVED BY MAIL OR DELIVERY

The Record is quite clear that the Office of the Attorney General never received the FOIA request at issue in this case. Appellant never filed an affidavit to counter the Meyers affidavit that the Office had not received the request. She never mailed her FOIA request to the OAG after receipt of the Meyers letter noting non-receipt. She never showed that other counsel in the Office of the Attorney General received the actual request from other litigation.[2] Appellant never attempted to conduct discovery on the point. Therefore, Appellant has never shown that the Meyers affidavit is incorrect. Her rhetoric and speculation is insufficient to defeat a sworn affidavit.

Section 30-4-30(c) is very plain in limiting duties to respond to FOIA requests to receipt of a written request. ("(c) Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the

2 Ms. Meyer's letter of August 5, 2011 stated that she had been "notified by attorneys in the Civil Division of the . . . Office of the Attorney General . . . that [Appellant] refer[red] to a request dated June 30, 2011 in a motion filed by [her] in a South Carolina circuit court case." R. VII, p. 475. Referral is not receipt.

receipt of any such request notify the person making such request of its determination and the reasons therefor." (emphasis added). As recounted above in the Statement of Facts, the Office of the Attorney General never received the FOIA request by mail or delivery. Attaching the request to this lawsuit over alleged failure respond to the request, is not sufficient to require a response under FOIA.

Appellant says that the Attorney General admitted that a copy of the letter was mailed to Sweeny Wingate and Barrow, but his Answer denied that doing so was compliant with the statute which requires that the agency receive the letter. Although Plaintiff refers to a "Wingate Contract [that] requires Wingate to notify the AG of a FOIA request and respond to it," she does not cite to or apparently designate any signed "Contract" Moreover, such a "Contract" would not apply because the letter was addressed only to the "Custodian of Records" at the Office of the Attorney General. Furthermore, SWB was not authorized to receive and respond to FOIA requests directed to the Attorney General.[3]

The authority to sue under FOIA is limited to actions "to enforce the provisions of this chapter in appropriate cases . . . ." §30-4-100. Therefore, no basis exists for enforcement when no "receipt of written request" has occurred (§30-4-30(c)), and subject matter jurisdiction is lacking. *Gasparutti v. U.S.*, 22 F.Supp.2d 1114, 1116 (C.D.Cal.,1998).

Appellant tries to distinguish *Gasparutti* and claims that the Attorney General and Judge Newman relied on the decision. They cited the decision, but the Order in this case is based upon

3 Appellant's FOIA Request does not reference case 4900, and she opposed consolidation of that case with this one. Appellant's Brief at p. 4. She cannot, therefore, claim that SWB had any authority to respond to FOIAs for the Attorney General based upon the firm's work in case 4900.

the facts of this case and the statute. *Gasparutti* is simply consistent. Contrary to Appellant's suggestion, that decision's applicability here is not based upon exhaustion of administrative remedies. *Gasparutti* dismissed that FOIA suit because the Plaintiff had "failed to allege a request, refusal and exhaustion of his administrative remedies." *Id.* (emphasis added). Specifically, he had "failed to make a formal request for documents from the IRS pursuant to FOIA prior to filing this action . . . ." As that Order found:

> In order to maintain a judicial action under FOIA, a plaintiff must first request documents from an administrative agency and if his request for documents is refused must exhaust his administrative remedies before filing a court action. *U.S. v. Steele,* 799 F.2d 461, 465–66 (9th Cir.1986) ("The complainant must request specific information in accordance with published administrative procedures and have the request improperly refused before that party can bring a court action under the FOIA."). Where a plaintiff has not complied with these procedures, district courts lack jurisdiction over the claim under the exhaustion doctrine and will dismiss the claim for lack of subject matter jurisdiction. *Id.* at 466.

The decision is entirely consistent with the circuit court's order and a plain reading of South Carolina's FOIA. Appellant jumbles various irrelevant arguments in an effort to avoid *Gasparutti* but fails. South Carolina law requires that the FOIA request be received, and it was not in this instance.

Ignoring the Meyers affidavit and without any contrary evidence, Appellant says that " it is undisputed that the AG received the June 30, 2011 FOIA request more than ten (10) years ago . . . ." Of course, that statement is incorrect. What is undisputed in the Record is that the Attorney General never received the FOIA request pursuant to South Carolina's statute. Attaching it to a lawsuit is not compliant with the statute, and the court lacked subject matter jurisdiction of this case.

II

THIS CASE IS MOOT, AND APPELLANT IS NOT ENTITLED TO DOCUMENTS HELD BY THE SWB FIRM AND THE FORMER LEGACY TRUST

Subject to the jurisdictional ground above and other defenses, the Office of the Attorney General has responded to the FOIA at issue in this case by providing copies of the only documents that could be considered responsive to that request which are unsigned draft of the Legacy Trust which have long been of public record in *Wilson v. Dallas, supra*, a case in which Appellant was a party. *See,* Statement of Facts, *supra.* Therefore, this case is moot. *Sloan v. Friends of Hunley, Inc*., 630 S.E.2d 474, 478, 369 S.C. 20, 26 (2006)(case moot when requested documents provided).[4]

Although Appellant complains that the above production was belated, she points to no documents that have not been provided other than any that might be held by the Sweeny, Wingate and Barrow law firm or the Legacy Trust.[5] She contends that any documents held by SWB are "owned by the State/ AG" under the "Litigation Retention Agreement" and §30-4-20(c), but she has not designated any signed "Agreement." [6] Plaintiff is not entitled to SWB documents under

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4 In the first appeal in this case, this Court found that Appellant's suit was not moot because she challenged the claim that the Attorney General had supplied her with all the responsive documents. *Pope v. Wilson,* No. 2016-001727, 2019 WL 2524420, at *3 (S.C. Ct. App. June 19, 2019). In this second appeal, this Court may now find this case moot because Appellant does not contest that the Attorney General had supplied her with all of the documents and focuses instead on the Sweeny, Wingate and Barrow documents. Because, as discussed in the next paragraph, Appellant's request does not reach SWB documents, this Court may find this case moot.

5 In a memorandum she filed for the November 2, 2020 hearing in this case (R. VII, p. 682, Memo at page 2), Appellant referred to a redacted letter and an email as being responsive, but they were not responsive as explained in the Attorney General's memorandum for the same hearing (R. VII, p. 750 (Memo at page 6).

6 Plaintiffs' Complaint referred only to the form retention agreements and not any with the SWB firm. R. VI, p. 47 (Complaint, ¶¶ 20 and 22).

any provision of law because her FOIA request is directed solely to the "Custodian of Records" at the Office of the Attorney General. The FOIA request, itself, does not ask for SWB documents. Therefore, her Complaint's request that "the AG should direct the Wingate firm and all special counsel to comply with their FOIA duties with respect to the Legacy Trust" is not supported by her FOIA request. Moreover, SWB would not have any documents as to her second request, *supra*, "for correspondence, email and/or other communications between any member of the Office of the . . . Attorney General and Russell L. Bauknight related to . . . the value of assets . . . ."[7] The Attorney General would be the party to any such documents if they existed, and the Office of the Attorney General does not have any.

For the first time, Appellant appears to request that the Attorney General produce documents held by the former Defendant Legacy Trust. See Appellant's Brief at page 36. This argument is not properly before this Court as it was not raised in the Complaint, was not the subject of a ruling by Judge Newman and was not raised in Appellant's Motion to Alter or Amend. Therefore, having not raised and preserved this issue below, it is not properly the subject of this appeal. *Garrison v. Target Corp*., 435 S.C. 566, 588, 869 S.E.2d 797, 810 (2022)("*Foster v. Foster,* 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011) ('In order to preserve an issue for appellate review, a party must both raise that issue to the trial court and obtain a ruling.')*; I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ('If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to

7 Appellant cites a June letter from SWB counsel to her attorney as showing "that documents sought in this FOIA case related to the $4.7 million appraisal do exist." That letter was from counsel for multiple parties and does not show that the Office of the Attorney General had such documents.

alter or amend the judgment in order to preserve the issue for appellate review.')).” Appellant's FOIA request did not even raise this issue as it was directed to the Custodian of Records of the Office of the Attorney General, and she did not request that he produce records held by the Legacy Trust. Instead, she sent a separate FOIA request to the “Custodian of Records of the Legacy Trust” (R. VII, p. 480), and that party was dismissed from this case by this Court's Opinion in the first appeal.

III

THE ATTORNEY GENERAL DID NOT ASSERT DISCOVERY EXEMPTIONS ON REMAND

Appellant asserts that, on remand, at the hearing in this case in November, 2020, the Attorney General argued that pending discovery motions exempted production of the requested documents in the instant case. He did not. Appellant is confusing this case with the remand in the FOIA case consolidated with case 4900, *Bauknight v. Pope*, 2010CP4004900. On remand in the instant case, the Attorney General did not assert such grounds. *See.,* R. VI, p. 745 (Memorandum of AG for 11-2-20).

IV

APPELLANT'S DUE PROCESS / FOIA DENIAL CLAIM HAS NO MERIT WHATSOVER AND HER ARGUMENT VI SHOULD NOT HAVE BEEN INCLUDED IN HER AMENDED BRIEF

In her Argument VI, Appellant appears to contend that she was denied the due process of law because she was allegedly denied “an opportunity to be heard on the merits or “in a meaningful manner” prior to a court denying such rights based on “ the Court's finding that it lacked jurisdiction.” Her position is not correct. The size of the record in this case with

innumerable filings by Appellant and full hearings on remand regarding issues on the merits and on her motion to alter or amend demonstrate that Appellant has been given an exceedingly full opportunity to be heard on the merits as well as on the issue of the lack of receipt of the documents. See, *eg,* R. VI, p. 20, l. 23 – p. 21, l. 4 (Tr. Transcript, 11-19-20); R. VII, p. 681 (Plaintiff's Brief Regarding Issues for 11/2/20 hearing). Appellant's FOIA rights were not denied due to Judge Newman's finding that the Attorney General's Office never received her FOIA request. Contrary to her assertion, the Office of the Attorney General never received the request, and therefore, that Office had no duty to respond to it.

Appellant also includes argument about the public importance of her FOIA request although it is irrelevant. Even if her FOIA request had been received, all that would be relevant to her request is whether she is entitled to the documents at issue under the terms of FOIA. That statute does not contain standards of disclosure based upon alleged importance or need. S.C. Code Ann. §§30-4-30 through 30-4-50.

Moreover, the Court should disregard the entirety of Argument VI of her brief as it is a new argument not included in her previous initial brief.[8] Amended Brief of Appellant at pages 39-41. This argument was not included in Appellant's original initial brief, and was added to the Statement of the Issues in the Amended Brief. Argument VI and the Table of Authorities includes cites to cases and the due process clause that were omitted previously and references to two documents not in the record. The December Order herein granted Respondent's Motion to

8 The Attorney General moved to strike this argument, including the citations to a document and news article referenced below, in Appellant's Amended Brief. Although the Court denied that Motion, it made no specific ruling on whether the argument was properly included in the brief. Therefore, to the extent that the Court may consider this issue of the inclusion of this argument, the Attorney General respectfully requests that the Court disregard Appellant's Argument VI.

Strike Appellant's first brief, and did not authorize Appellant to include new issues and arguments in her amended brief. The instructions were to "serve and file an amended initial brief that shall not include references to the stricken matters." Appellant did not move to include new issues and arguments in her brief.

Appellant suggests that the argument was necessary to present a complete and coherent brief, and that she had mentioned due process in her original brief. These arguments are specious. The original brief's passing, short references to the terms "due process" related to other cases such as *Bauknight v. Pope*, 2010CP1004900. She did not cite the due process clause in her Table of Authorities in that brief. Argument VI is, instead, a three page argument about due process focused on this appeal. It is a new argument with a new issue in her brief, and it is completely unnecessary to comply with the Order striking the original brief. The term "due process" is not even referenced in her Complaint in this case. Appellant's including Argument VI is an inappropriate use of the privilege of being permitted to file an amended brief. It is neither contemplated by the Order striking her brief nor the Appellate Court rules. As noted, she did not move to include the new argument in her amended brief.

Appellant also references a document in Argument VI which is not in the Record. In her response to Respondent's Motion to Strike her Amended Brief, she admitted that her Return to Motion for Extension in *Wilson v. Dallas* was not presented to the Circuit Court and not designated. Instead, she said she included quotes from the Return in other filings below, but her brief does not refer to the documents in which they are contained. This citation and the related sentence should be disregarded.

She also cites a news article cited in footnote 12 of her brief to support an allegation that the

value of James Brown's assets are of public importance today. According to the footnote, the article references the sale of James Brown's music catalog. That information was not presented to the Circuit Court, and Appellant provides no authority to support her assertion that judicial notice should be taken. Consideration of the article is barred by the authority cited by the State in its motion which Appellant does not rebut. *Masters v. Rodgers Dev. Grp*., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984)("[O]riginal judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable . . appellate courts, limited to the 'cold' record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge."). *Id.*

Appellant's Argument VI and the above referenced citations should be disregarded.

V

APPELLANT IS NOT ENTITLED TO ATTORNEY'S FEES

If Judge Newman's Order is affirmed, Appellant is not entitled to attorney's fees. If the Order is remanded for further proceedings, as stated in the earlier Opinion of this Court in this case, "the question of attorney's fees is premature." *Pope v. Wilson*, No. 2016-001727, 2019 WL 2524420, at *4 (S.C. Ct. App. June 19, 2019)

VI

AS AN ADDITIONAL SUSTAINING GROUND, THE MOTIONS TO STRIKE SHOULD BE GRANTED

Although not reached by the circuit court judge, should this Court reach Appellant's other issues, the following additional sustaining ground warrants striking Appellant's numerous affidavits.

Respondent Attorney General moved to strike at least 14 affidavits filed by Appellant in

this case, one of which is attached to the Complaint, and some of which are attached to other affidavits, and some related exhibits of Appellant. R. V. I pp. 80, 110, 121, 123, 126, 126, 162, 248, 250 (motions). At least six of these affidavits were executed by Appellant, herself, and many of her affidavits contain vitriolic and baseless speculation. All of the affidavits should be struck because they are irrelevant and also because many of them are not based upon personal knowledge, contain hearsay, and are speculative. Examples abound of these violations by Appellant of the basic rules for affidavits some of which are set forth below:

1. Affidavit attached to Complaint

R. VI, p. 60 (p.2, ¶ 5) "agent [of party not involved in instant proceeding] advised that if Bob and I did not drop a pending James Brown appeal AG . . . [note omitted] would to[sic] sue us . . . ." [hearsay, irrelevant]

R. VI, p. 61 (p. 3, ¶ 7) Augusta Chronicle cite [hearsay]

R. VI, p. 61 (p. 3, ¶8) " I believe the Retention Agreement will show whether AG McMaster . . . was in fact acting to punish Bob and me . . . . ;" [lack of personal knowledge; speculation]

2. Affidavit Opposing MTD, September 6, 2008 [sic]

R. VII, p. 880 (¶2) "public documents, which, I believe, will tell the scandalous story" [lack of personal knowledge, irrelevant, speculative]

R. VII, p. 803 (¶28), "I still wonder, and believe the public documents AG . . . is withholding will tell me" [lack of personal knowledge, irrelevant, speculative, hearsay]

R. VII, p. 803 (¶30) "I believe the public documents will show . . . . " [lack

of personal knowledge; speculative]

R. VII, p. 802 (¶16) On April 30, 2010, . . . attorney for Brown's companion . . . threatened that . . . had already hired contingency-fee lawyer" [hearsay, irrelevant]

3. Supplemental Affidavit, September 16, 2011

R. Supp., p. 902 (p. 3, ¶5) quotations from The Enquirer which she acknowledges in paragraph 6 is not entirely accurate [lack of personal knowledge, hearsay, irrelevant]

4. Affidavit in Further Support, October 6, 2011

R. VII, p. 500 (p. 4, ¶10) speculation about what requested documents will show [speculative, lack of personal knowledge, irrelevant]

R. VII, p. 500 (p. 4, ¶11) chronology including some hearsay such as April 10 statement of agent for person not involved in instant litigation[hearsay, irrelevant]

R. VII, p. 504 (p. 8, ¶¶15 and 16) speculation about what requested documents will show.

5. Affidavit and exhibits attached to Motion for Summary Judgment

R. 2d Supp. p. 945 (p. 3, ¶¶ 7-9) speculation about documents and other matters [lack of personal knowledge, speculative, irrelevant]

R. 2d Supp. p. 959 (Exhibit F to MSJ, p. 15) quotations from persons not involved in the instant suit [hearsay, irrelevant]

6. Affidavit of Summer, January 5, 2012

R. Supp. p. 917 (¶¶ 16 – 18) references to what others have said in readings or elsewhere [hearsay, lack of personal knowledge]

7. Affidavit of Summer, January 5, 2012

R. Supp. p. 918 (¶25) "Dallas informed me" (hearsay)

R. Supp. p. 918 (¶28) "Brown told me" (hearsay)

8. Affidavit of Smith, December 9, 2011

R. VII, p. 520 (¶6) attachment of draft article [hearsay]

9. Affidavit of Pope, January 6, 2012

R. VII, p. 562 "Bauknight secretly tells IRS" [hearsay]

10. Affidavit of Williams, January 6, 2012

R. VII, p. 558. Irrelevant reference to another case and another FOIA request.

"The rule governing summary judgment provides that '[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" Rule 56(e), SCRCP (emphasis added). *Dawkins v. Fields*, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003). Because all of the affidavits appear to be directed to summary judgment, they must meet this standard of Rule 56(e) rather than Rule 11(c) which provides that affidavits and verifications may include matters stated on information and belief.

In numerous respects, the affidavits clearly fail to meet standards of being based upon personal knowledge and containing admissible evidence. They contain inadmissible hearsay and

refer to news articles which are not admissible. In particular, all of the affidavits are irrelevant. Many of them contain Appellant's account of litigation related to the James Brown estate and the Legacy Trust and allegations about why she needs the documents, but all of those statements are irrelevant to whether she is entitled to the documents under FOIA. *See supra*, Argument V. All of the affidavits should be struck.

CONCLUSION

For the foregoing reasons, Respondent Attorney General respectfully requests that the decisions of Judge Newman be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

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

s/ J. Emory Smith, Jr.
J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

ATTORNEYS FOR RESPONDENT
ATTORNEY GENERAL

October 3, 2022

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 . . . . . Respondent.

CERTIFICATE OF COMPLIANE WITH RULE 211(b)

I hereby certify that the Final Brief of the Respondent complies with Rule 211(b), SCACR.

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

Counsel for the Attorney General