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SC Court of Appeals

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**Appeal from Richland County
Court of Common Pleas**

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

Adele J. Pope..... Appellant,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina, and
James Brown Legacy Trust, by Russell Bauknight, its Trustee..... Respondents.

**REPLY BRIEF OF APPELLANT
TO BRIEF OF ATTORNEY GENERAL**

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Argument on Reply¹

I. Appellant's FOIA rights are not affected by civil discovery in a separate civil action.

Respondent Alan Wilson, in his capacity as Attorney General for South Carolina ("Respondent AG") argues that dismissal was appropriate, because potentially similar documents are being sought in a 2010 Richland County tort suit brought by Respondent AG, Respondent Legacy Trust and others against Appellant nearly 7 years ago. Appellant has presented her argument and supporting authority in her brief-in-chief and will not recite the same on reply.

Respondent AG supports his argument primarily by citation to the a 2002 circuit court order in *Lominack v. Myers*, Case No. 2002-CP-32-1890 (October 25, 2002). The *Lominack* order is related to a criminal case; has never been reviewed by an appellate Court; and contains minimal legal analysis in reaching its conclusion. *Lominack* dealt with a FOIA request for documents related to an ongoing criminal matter, which are specifically exempted by a provision of FOIA not at issue in this case.

Respondent AG also relies on *Evening Post Pub. Co. v. City of N. Charleston*, 363 S.C. 469, 409 S.E.2d 404 (1991), in which the Supreme Court found that the entity making a FOIA request was entitled to receive material which was available through discovery to the parties to a criminal matter. Although, as Respondent AG

¹ Appellant incorporates the arguments made in her Brief.

acknowledges, that case is not on point with this one, Appellant submits that the implied logic for the decision therein would support *Appellant's* argument.

The remainder of Respondent AG's argument regarding discovery is composed of citations to authority on the trial court's discretion and control over discovery matters. Simply put, these authorities are red herrings in this case, where the lower court was tasked simply with deciding FOIA claims. The lower court did not undertake any analysis of the discoverability of any document requested, although Respondent AG's argument would appear to require the FOIA court to analyze and determine that issue. Further, the fact that discovery in Respondent AG's 2010 case has been pending for more than 6 years makes clear the inconsistency of civil discovery and the purposes of FOIA.

The lower court did not endeavor to look further than its finding that the documents requested might also be exchanged in discovery in this long-ago-filed civil tort suit, instead dismissing Appellant's FOIA claims on that basis alone.

Appellant submits that FOIA and the discovery process are separate and distinct, even when documents might be obtainable through either or both. This matter should therefore not have been dismissed. The delays in the AG's civil suit confirm its inconsistency with the purposes of FOIA.

II. Respondent AG never disputed that it is a public body under FOIA, and Appellant is entitled to rely on that admitted fact.

Respondent AG argues that it never raised the defense that it is not a public body, and Appellant may not raise that fact on appeal. Beyond that general statement, Respondent AG proceeds to address at length its various motions to strike affidavits filed by Appellant during the course of this matter.

Respondent AG admitted in its answer that it is a public body, and Appellant is unable to discern how the lack of controversy regarding this fact could preclude her from relying on it in her argument. Because Respondent AG's argument on this point appears to focus exclusively on motions to strike affidavits, Appellant responds to the subject matter of Respondent AG's argument.

Appellant presented her own affidavits, as well as affidavits from members of the press and the community in support of her positions below. Respondent AG moved to strike nearly every affidavit filed herein, but none of those motions was ever decided by the lower court. Each affidavit cited by Appellant thus remained before the lower court at the time it rendered its decision. As set out in Appellant's brief-in-chief, however, the complaint stated sufficient facts to overcome dismissal under Rule 12(b)(6) or Rule 12(c).

III. Appellant did raise constitutional arguments to the lower court, and her argument on appeal should be considered.

Respondent AG argues that Appellant did not address violations of her due process and equal protection rights below, but the record contradicts Respondent AG's assertion. Appellant's Motion to Alter, Amend or Vacate the dismissal order sets forth in plain terms her argument that the lower court violated her constitutional rights in dismissing the case. (Mot. Alter/Amend, dtd. 6/28/16, ¶11)

IV. The lower court did not consider or determine the reasonableness of Appellant's attorneys' fees and costs, and Respondent AG's argument is irrelevant to this appeal.

Although Appellant should be granted attorneys' fees and costs for this action, the issue of the amount or reasonableness thereof is not before this Court. At the hearing on Respondent AG's motion to dismiss, the AG took issue with the claim for

attorneys' fees. When Appellant's counsel suggested that was a matter to be taken up after the lower court's ruling on the FOIA claims, the circuit court agreed. (Trp. 5/17/16, p. 11).

Because the lower court did not consider the amount or reasonableness of attorneys' fees and costs, that issue should be taken up by the lower court if and when this matter is remanded. Respondent AG's harsh argument on this point does not advance the analysis of the important principles before the Court in this FOIA matter.

V. Respondent AG undisputedly received Appellant's FOIA request no later than August 2011, and continued his refusal to respond.

Respondent AG argues as an additional sustaining ground that his office did not receive the FOIA request Appellant sent in June 2011. The AG was undisputedly served with the complaint herein in August 2011, which included a copy of the FOIA request. (Complaint, Ex. A) The AG nonetheless answered and refused to produce any documents for more than a year after this action was commenced.

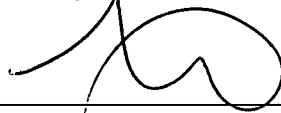
Only in 2013 did Respondent AG deliver some of the responsive documents in its possession. (Answer, Exhibits)

Had the AG appeared after the filing of this suit and immediately produced the responsive documents, his alleged non-receipt of the FOIA request might have been relevant to avoidance of attorneys' fees. Instead, the AG refused to release any documents for more than a year, still insisting that his production was subject to his claim that Appellant had no right to request documents under FOIA. (Answer, Exhibits)

Conclusion

For the reasons set out above, Appellant asks that this Court to reverse the dismissal orders of the lower court; remand the case to the circuit court for entry of summary judgment in favor of Appellant; and direct that all relief sought in the complaint be granted. The lower court should also be directed to determine and direct an award of reasonable attorney's fees and costs against both Respondents for Appellant's pursuit of this FOIA suit and the appeal for more than five years.

Respectfully submitted,



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February ²¹~~22~~, 2017

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James Brown Legacy Trust, by Russell Bauknight, its Trustee..... Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief to Brief of Attorney General on Respondents by mailing a copy of same on February 21, 2017, addressed to his attorney of record as follows:

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February 21, 2017

By Hand-delivery:

The Honorable Jenny Abbott Kitchings
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Re: *Pope v. Wilson (James Brown Legacy Trust)*
Appellate Case No. 2016-001727

Dear Ms. Kitchings:

Delivered herewith are the original and one copy of the Appellant's Reply Brief to the Brief of Attorney General and Proof of Service.

I would appreciate your filing the originals and returning the file-stamped copies to me. By copy of this letter, I am serving these documents on all other counsel of record.

Thank you for your assistance with this matter.

Sincerely,



Adam T. Silvernail

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