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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
Doyet A. Early, III, Circuit Court 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.

FINAL BRIEF OF RESPONDENT ATTORNEY GENERAL

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11. Whether venue change was within the discretion of the circuit court?

STATEMENT OF THE CASE

Appellant brought this action by a Complaint filed in Newberry County on August 3, 2011. Record (R.), Volume (V.) I, p. 16. 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.V. I, p. 53. 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. Supp., p. 1. She filed numerous affidavits that were the subject of several Motions to Strike filed by the Respondent. (R. V. I, pp. 33, 53, 85, 87, 89, 91, 93, 95, 229, 231; V. II, p. 299, 316, 334, 368, 395, 404, 406).

Following a hearing, the circuit court issued a Form 4 Order on January 11, 2012, transferring venue of this case to Richland. R. V. I, p. 13. On February 1, 2012, the Respondent AG moved to consolidate this case with case 4900. R. V. I, p. 103.

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. V. I, p. 135. 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, and added the defense of lack of subject matter jurisdiction because Appellant 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. R. V. I. p. 159. 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. 411743 S.E.2d 746 (2013). R. V. I, pp. 166, 175, 176. The Respondent AG also filed a Motion for Judgment on the Pleadings on March 7, 2013. R. V. I. p. 210.

The Supreme Court gave the Honorable Doyet Early, III, jurisdiction of this case by Order dated March 24, 2016. Counsel for Respondent AG had written letters and sent emails to the previously assigned Judge, expressing a willingness for this case to be heard. R. V. II. pp. 484, 505, 515 and 517; R. Supp. p. 10. (letter, Smith to Judge, 3.28.13; emails, 5.8.13; 10.13.14; 11.13.14; 1.29.15)

Judge Early heard pending motions in this case on May 17, 2016. R.V. I, p. 9. (Order of June 14, 2016, p. 1.). He issued an Order dated June 14 dismissing this case. R. V. I., p. 9. He

found that the documents at issues are potentially discoverable in pending litigation in Richland / Aiken counties and will 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 Appellant's Motion to Alter or Amend (R. V. I., p 3) by Form 4 Order dated August 11, 2011. This appeal then followed.

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":

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, which Appellant had referenced in a motion in another case, and that if she would forward the request a response would be expedited. R. V. I. p. 170. According to Ms. Meyers' affidavit of October 20, 2011, records of the OAG did not show that the letter had ever been mailed or delivered to that Office. R. V. I. p. 168.[1] Without proper

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1 As stated in Ms. Meyers' Affidavit (R. p. 168):

> 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

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 . . .").

The instant action is directly related to *Bauknight* case 4900. Appellant's complaint and other documents frequently refer to that suit, and she acknowledges that she is the defendant in that Richland County suit. Appellant contends that the Richland suit alleges that she caused millions of dollars in damage to the Legacy Trust and that her and her co-defendant's valuation of the trust was incorrect and improper. The Court issued a ruling in case 4900 that stated that venue of that case was proper in Richland County because it was the principal place of administration of the trusts at issue in that case. R. V. I. p. 57 (Order, The Honorable L. Casey Manning, November 8, 2010). Appellant seeks information about Brown trusts in this FOIA suit, and the documents requested in the FOIA request at issue in the instant appeal were the subject of pending Motions in case 4900 as Appellant acknowledges. R. V. I., pp. 82 (¶6) (Plaintiff's Return to Motion to Dismiss, p. 2, ¶6; *See, also,* R. V. I., pp. 33-34 (Exhibit D to Complaint, ¶2b [signed copy of James Brown Trust]); R. Supp., p. 12 (MTD Exhibit F [Motion to Compel, including "the James Brown Legacy Trust under which Bauknight asserts status in the complaint"]); R.V. I., p. 66 (MTD Exhibit B, Motion to Compel, p. 3, ¶ 3, June 7, 2011 ["[a]ny and all documents which support any position you may have as to the value of the James Brown assets as of December 25,

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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.

2006."](attachments to Motion omitted)); R. V. I, pp. 70, 74, and 76 (MTD Exhibit C, Motion for Protective Order and including Exhibits D [appraisals] & E [objections to appraisals] thereto (exhibits B & C (including Exhibits D & E)).

Although the OAG never received the FOIA request and the matters sought therein were subject to case 4900 motions, Respondent AG's Answer to the Complaint reserved its defenses and attached the only document that could be responsive to Appellant's Request No. 1, *supra,* the unsigned Legacy Trust draft. R. pp. 175 – 193 and 194 – 209. As to Request 2, the Order of January 16, 2015, in the *Summer v. Wilson* FOIA case in Newberry County, (R. V. I. p. 257), concluded that the OAG did not have to produce the appraisal because it did not have it. *See also* R. V. I. p. 173, (Answer Exs. p 6, item 4) (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. V. I. p. 174 (Exs. p. 7(July 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, and subject to Respondent's Motion to Strike, Ms. Summer executed an affidavit about the same matter which Appellant filed in the instant case. R.V. I. p. 95 and R. Supp. p. 17 (Aff. of Summer, January 5, 2012, Motion to Strike dated January 9, 2012). In other words, Appellant already had access to the same information provided by the referenced attachments to the Answer before receiving the Answer. Finally, the appraisal Appellant seeks herein 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).

Therefore, although Appellant's FOIA request was never received by mail or delivery by

the Respondent AG so as to require a response, Appellant received the only document that could be considered responsive, and she had had access to that document and others through other means.

ARGUMENT

The circuit court properly dismissed this case because it found that Appellant could not use her FOIA request to bypass the discovery process in related litigation governed by the Rules of Civil Procedure. Nevertheless, she was provided the only document responsive to her request and would have access to the others even though Appellant's FOIA request was never received by mail or delivery so as to trigger a duty to respond under that law.

Appellants brief includes numerous irrelevant statements and baseless accustions about or related to the James Brown litigation, in which she is a party, and in most instances fails to include citations to the record. Respondent AG does not attempt to reply to all of those statements because they are distractions not pertinent to the issues in this case.

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. Subject to all of our pending motions and defenses including lack of receipt of the FOIA request, the OAG has responded to the request 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*, exhibits attached to Answer. The other exhibits to the Answer, which are of record in another suit, make clear that the OAG does not have documents responsive to the other documents at issue. Although the OAG has responded to the FOIA, this

case must be dismissed for other reasons that deprive this Court of subject matter jurisdiction. FOIA must be applied in accordance with the law, and that law, as explained below, exempts documents that are governed by the Rules of Civil Procedure such as those at issue here which are subject to pending judicial proceedings in, *Bauknight v. Pope*, 2010-CP-40-4900, and the discovery process in that case. Under FOIA and the Rules of Civil Procedure, Appellant cannot use FOIA in this case to make an end-run around discovery procedure in other ongoing litigation.

I

THE CIRCUIT COURT PROPERLY DISMISSED THIS FOIA CASE BECAUSE IT SEEKS DOCUMENTS SUBJECT TO CIVIL DISCOVERY

The circuit court properly dismissed this case for reasons that included the following: "[t]hese documents [that Appellant seeks] are potentially discoverable documents under pending litigation in Richland /Aiken counties and will be governed by the South Carolina Rules of Civil Procedure. FOIA is not a tool that may be used to bypass civil discovery in a pending case." R. V. I., p. 10 (Order at p. 2).

Nothing in FOIA, the Rules of Civil Procedure or the Court system of this State would permit Appellant to make and enforce a FOIA request outside a pending judicial proceeding involving discovery related to many of the same documents. *See* exhibits referenced, *supra.* Clearly she was attempting to use FOIA as a discovery tool because the Complaint contains her account of the pending Richland litigation from her perspective, and she attaches a motion in the Richland litigation seeking some of the same documents. R. V. I. pp. 18 and 33. She cannot avoid the Rules of Civil Procedure regarding discovery by this process, and the Court lacks subject matter of this action

Even if discovery motions were not pending in Richland, legal authority suggests that Appellant would not be permitted to use FOIA as a discovery tool regarding those proceedings. The Order of the late Marc Westbrook submitted by the Respondent AG (*Lominack v. Myers,* 2002-CP-32-1890, October 25, 2002 stated that "it is well settled case law that the FOIA is not intended as a substitute for discovery and was not enacted to provide procedures for obtaining information during litigation or to benefit private litigants." R. p. 260. Although our Supreme Court has not expressly addressed the issue in the civil context, it has recognized that FOIA is not to be used to bypass limits on discovery in criminal proceedings. *State v. Robinson*, 305 S.C. 469, 476-77, 409 S.E.2d 404, 409 (1991); *Evening Post Pub. Co. v. City of N. Charleston*, 363 S.C. 452, 459, 611 S.E.2d 496, 500 (2005). Moreover, our Supreme Court has also noted that "[i]n construing the federal FOIA, the United States Supreme Court has held that the FOIA does not supplement or displace the applicable rules of discovery. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989)[2]; *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978)." *State v. Robinson*, 305 S.C. 469, 476-77, 409 S.E.2d 404, 409 (1991). Although *Robinson* involved criminal proceedings, the State Supreme Court's recitation of the federal rule suggests that it would apply the same limitation on the use of FOIA as a discovery tool as Judge Westbrook did.

Moreover, FOIA, itself, exempts matters covered by the Rules of Civil Procedure via S.C. Code Ann. §30-4-40 which states, in part, that "(a) [a] public body may but is not required to

2 "[A] court must be mindful of this Court's observations that the FOIA was not intended to supplement or displace rules of discovery. *See Robbins Tire*, 437 U.S., at 236-239, 242; *id.*, at 243, . . . (STEVENS, J., concurring). *See also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-802 (1984). Indeed, the Court of Appeals acknowledged that this was not a principal intention of Congress. 850 F.2d, at 108." *Id.*

exempt from disclosure the following information: . . . (4) [m]atters specifically exempted from disclosure by statute or law." (emphasis added). These exemptions under law would include discovery which is strictly controlled by the Rules of Civil Procedure because court rules of procedure are "law." *Magnuson v. Billings*, 152 Ind. 177, 52 N.E. 803, 804 (1899)[3]; *United States v. Hvass*, 355 U.S. 570, 575 (1958)[4]; *State ex rel. Beacon Journal Publ'g Co. v. Waters*, 67 Ohio St. 3d 321, 323, 617 N.E.2d 1110, 1113 (1993).[5] These rules include limitations on the scope of discovery in Rule 26(b) to "matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."

To allow a FOIA request to bypass the Rules of Civil Procedure would be contrary to §30-4-40(a)(4) and Rule 26(c), SCRCP, which provide for judicial involvement in the discovery process through protective orders and discovery conferences. "It is well-settled that 'the scope and conduct of discovery are within the sound discretion of the trial court . . . .'" *Palmetto Alliance, Inc. v. S. Carolina Pub. Serv. Comm'n*, 282 S.C. 430, 436, 319 S.E.2d 695, 698 (1984). "Our judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law." *In re Anonymous Member of S. Carolina Bar*, 346

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3 "[Rules of court] have the force and effect of law, and are obligatory upon the court, as well as upon parties to causes pending before it. . . A rule of court is a law of practice, extended alike to all litigants who come within its purview, and who, in conducting their causes, have the right to assume that it will be uniformly enforced by the court, in conservation of their rights . . . ," *Id.*

4 "The phrase 'a law of the United States,' as used in the perjury statute, is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base . . . ." *Id.*

5 "[E]xception [under Ohio discovery statute] for other "state law" may include procedural court rules, and does include [Ohio] Crim.R. 6(E)." *Id.*

S.C. 177, 194, 552 S.E.2d 10, 18 (2001). To allow a FOIA request to escape this authority would tie the hands of the Court from controlling the discovery process including permitting a party to bypass scheduling orders and motions hearings. FOIA was not intended to work this way nor were our Rules of Civil Procedure intended to be so limited.

In her Brief, Appellant cites *North v. Walsh*, 881 F. 2d 1088 (D.C. Cir. 1988) and *Hoover v United States*, 611 F. 2d 1132 (5th Cir. 1980) for the proposition that Federal Freedom Information Act rights are not controlled by discovery limitations. *North* does not apply here because it addressed a limitation related to records compiled for law enforcement purposes under 5 U.S.C. §552 (b)(7). *Hoover*, is inapplicable because it considered a federal FOIA exception for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." §552(b)(5). Neither federal exemption is similar to the exemption at issue in the instant case nor does the federal FOIA (§552(b)) appear to contain such a limitation. S.C. Code Ann. § 30-4-10(a)(4) ("(a) [a] public body may but is not required to exempt from disclosure the following information: . . . (4) [m]atters specifically exempted from disclosure by statute or law"). As explained above, this exemption under South Carolina law would include discovery which is strictly controlled by the Rules of Civil Procedure because court rules of procedure are law. Moreover, a more recent United States Supreme Court decision cited by our own South Carolina Supreme Court (*State v. Robinson*, 305 S.C. 469, 476-77, 409 S.E.2d 404, 409 (1991)) and quoted by the Fourth Circuit Court of Appeals (*Neely v. F.B.I.*, 208 F.3d 461, 464 (4th Cir. 2000)) supports a broader limitation on the use of federal FOIA as to matters related to ongoing litigation. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) ("a court must be mindful of this Court's observations that

the FOIA was not intended to supplement or displace rules of discovery").

The above authority strongly supports the circuit court's ruling. Its dismissal of this case should be affirmed.

II

APPELLANT RAISES ISSUES THAT ARE IRRELEVANT TO THIS APPEAL OR NOT BEFORE THE COURT AND SHE IS NOT ENTITLED TO SUMMARY JUDGMENT

A

The Public Body Definition Was Not Raised As A Defense, Appellant Is Not Entitled to Summary Judgment, And Her Affidavits Should Be Disregarded

Appellant argues that judgment should have been granted because she contends that the Attorney General is a public body under FOIA. The Attorney General did not raise that defense in the circuit court so it has no application to this appeal.

Appellant weaves into this "public body" argument her claim that she is entitled to summary judgment. Instead, she has failed to show that she is entitled to judgment as a matter of law under Rule 56, SCRCP, for the reasons set forth above and for the other reasons discussed below including the additional sustaining grounds. Her affidavits in support of her motion should be disregarded for reasons set forth in Respondent AG's Motions to Strike including irrelevance, hearsay, speculation and lack of basis in personal knowledge. R. V. I pp. 53, 85, 87, 89, 91, 93, 95.

Respondent AG 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. 53, 85, 87, 89, 91, 93, 95. 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

   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]

   p. 3, ¶ 7 Augusta Chronicle cite [hearsay]

   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]

   p. 1, ¶2 "public documents, which, I believe, will tell the scandalous story" [lack of personal knowledge, irrelevant, speculative]

   p. 4, ¶28, "I still wonder, and believe the public documents AG . . . is withholding will tell me" [lack of personal knowledge, irrelevant, speculative, hearsay]

   p. 4, ¶30, "I believe the public documents will show . . . . " [lack of personal knowledge; speculative]

p. 3, ¶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

Directed to earlier affidavit applying to other Defendant

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

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

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

p. 8, ¶¶15 and 16 speculation about what requested documents will show.

5. Affidavit and exhibits attached to Motion for Summary Judgment

p. 3, ¶¶ 7-9 speculation about documents and other matters [lack of personal knowledge, speculative, irrelevant]

Exhibit F to MSJ, p. 15 quotations from persons not involved in the instant suit [hearsay, irrelevant]

6. Affidavit of Summer, December 8, 2011, attached to Smith affidavit, December 9, 2011

¶¶ 16 – 18 references to what others have said in readings or elsewhere [hearsay, lack of personal knowledge]

7. Affidavit of Summer, January 5, 2012

¶25 "Dallas informed me" (hearsay)

¶28 "Brown told me" (hearsay)

8. Affidavit of Smith, December 9, 2011

¶6, attachment of draft article [hearsay]

9. Affidavit of Pope, January 6

p. 3 "Bauknight secretly tells IRS" [hearsay]

"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[6] 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. All that is relevant to her request is whether Appellant 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 30-30-4-50, *et seq.* Appellant's lack of entitlement to the

6 *Trustees of Erskine Coll. v. Cent. Mut. Ins. Co.*, 241 S.E.2d 160, 162-63 (1978).

documents is discussed *infra* regarding her motion for summary judgment, but those grounds have nothing to do with the alleged need for or importance of the documents.

B

Appellant Did Not Raise And Preserve Any Constitutional Claims And Is Not Entitled To Relief Based Upon Allegations Of Delay

Appellant complains of delays in this suit. The Office of the Attorney General is not responsible for the time taken to decide this case. The OAG regularly informed the court below that its motions were ready to be heard (*see* Statement of the Case, *supra*) and ultimately prevailed.

Appellant, herself, contributed to the time frame of this case by filing numerous irrelevant affidavits containing hearsay or other inappropriate matter which required the filing of Motions to Strike them. Her memoranda were similarly filled with irrelevant arguments based upon other James Brown related litigation rather than the simple issues in this FOIA case. Appellant claims violations of due process and equal protection as a result of the time taken to decide this case, but she did not amend her complaint to raise such claims so as to preserve them for judicial review now. *McGee v. Bruce Hosp. System*, 468 S.E.2d 633, 637, 321 S.C. 340, 346 (1996)("issue was not raised below and is procedurally barred."). She did not raise those constitutional claims in her Motion to Alter or Amend, so they are not before this Court now for that reason. *Degenhart v. Knights of Columbus*, 420 S.E.2d 495, 497, 309 S.C. 114, 118 (1992) ("[a]n issue on which the master-in-equity never ruled and which was not raised in post-trial motions is not properly before this Court.")

C

Venue Change Was Within The Discretion Of The Court

Appellant complains of the change of venue to Richland County but cites no error of law or abuse of discretion. "A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent a manifest abuse of discretion." *Mathis v. Brown & Brown of South Carolina, Inc.*, 698 S.E.2d 773, 784, 389 S.C. 299, 321 (2010). Although the trigger for the change of venue in the instant case was the Motion to Dismiss rather than a motion to change venue, the same standard would apply to the change in this instance. Appellant has failed to show any basis for setting aside the venue change.

D

Appellant Is Not Entitled To Attorneys Fees

Appellant has no right to attorney's fees. Under FOIA, such fees are awarded only to the prevailing party, and Appellant did not prevail. §30-4-100(b). Even if she had prevailed, she seeks fees at the shockingly high and unsupported respective amounts of $30,950 and $1128.10 and fails to document her claims.[7] A fee "award . . . must be reasonable and supported by adequate findings." *Burton v. York County Sheriff's Dept.*, 594 S.E.2d 888, 898, 358 S.C. 339, 357-58 (Ct. App.,2004). Appellant's claims are certainly not reasonable, and in fact, are so high as to shock the conscience of this Court and warrant barring fees altogether under substantial

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7 Appellant filed a conclusory affidavit on January 9, 2012, which does not appear to have been updated, asking for $9,000.00 in attorney's fees for this case at a rate of $100.00 per hour and $300.00 in costs. These amounts undermine her more than tripling that attorney's fee claim, including the now $250.00 hourly rate, and her nearly quadrupling her costs. Moreover, she cannot testify by affidavit as to the hours expended by her attorney. Only he can do so.

Federal precedent.[8] She also could not claim time for the numerous irrelevant, inadmissible affidavits that she has filed and arguments that she has made. She is the party that has turned a simple case into one filled with the numerous, unnecessary documents that she has filed.

III

THE FOLLOWING ADDITIONAL SUSTAINING GROUNDS ALSO SUPPORT THE CIRCUIT COURT'S DISMISSAL OF THIS CASE

Although not reached by the circuit court judge, the following additional sustaining grounds support the court's decision.

A

Appellant Had No Claim Under FOIA Because Her Request Was Not Received By Mail Or Delivery

Section 30-4-30(c) is quite 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 receipt of any such request notify the person making such request of its determination and the reasons therefor." 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.

The authority to sue under FOIA is limited to actions "to enforce the provisions of this

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8 *Fair Hous. Council of Greater Washington v. Landow*, 999 F.2d 92, 96 (4th Cir. 1993), citing *Sun Pub. Co. v. Mecklenburg News, Inc.*, 823 F.2d 818, 819 (4th Cir. 1987), (a request for attorneys' fees, which is so exorbitant as to shock the conscience of the court, may be denied . . . .); *Plunkett v. Stephens*, No. C.A. 3:93-0304-19, 1997 WL 907958, at *1 (D.S.C. Dec. 18, 1997)(denying fee request in its entirety quoting *Landow* and *Sun Publishing*).

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).[9]

B

This Case Is Moot Because The OAG Has Supplied Appellant With The Only Document Responsive To Her Request

Subject to all of the other grounds above, 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). Of course, as noted above, the FOIA request at issue was not received by mail or delivery by the Office of the Attorney General. Accordingly, the OAG had no duty to respond to a request it did not receive, and therefore, Appellant is not entitled to attorneys fees when the documents were supplied during the course of this litigation.[10]

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9 "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 . . . . 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." *Gasparutt, suprai*

10 In *Sloan v. Friends of Hunley, Inc.*, 711 S.E.2d 895, 898, 393 S.C. 152, 158 (2011). In that case Plaintiff "Sloan's complaint prompted [Defendant] Friends to do what a series of FOIA letter-requests could not accomplish—produce the requested documents. Accordingly, Sloan prevailed and is entitled to an award of attorney's fees." *Hunley* does not apply to this case when the Attorney General's Office never received the FOIA request.

C

Another Action Is Pending Among The Same Parties

Another action is pending among the same parties as to the same or substantially the same claim under Rule 12(b)(8).[11] *Bauknight, etc., et al, supra.* Although the claims in the complaints are not identical, that suit is the subject of a number of allegations in and a lengthy exhibit to the instant complaint. *See, eg.* R. pp. 17, 18 and 33 (Complaint at paragraphs, 7-11 and Exhibit D to Complaint (all references to this exhibit are subject to Motion to Strike, *infra*)). Moreover, the documents requested in the Freedom of Information Act request of the Attorney General are the subject of pending Motions in case 4900, as set forth above. Appellant is essentially pursuing through the instant suit the same discovery issues that are pending before the Court in Case 4900. Therefore, this case is subject to dismissal under Rule 12(b)(8).

11 The Newberry County Court of Common Pleas has ruled against application of Rule 12(b)(8) in the similar *Pope* case 2011-CP-36-379 (Order filed November 30, 2011), now consolidated with case 4900, dismissed on other grounds and now pending on appeal. That decision is not binding on this Court.

CONCLUSION

For the foregoing reasons, Respondent Attorney General respectfully requests that the decision of the circuit court be affirmed.

Respectfully submitted,

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BY: 

ATTORNEYS FOR RESPONDENT
ATTORNEY GENERAL

February 3, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas
Doyet A. Early, III, Circuit Court Judge

RECEIVED
APR 12 2017
SC Court of Appeals

Appellate Case No. 2016-001727

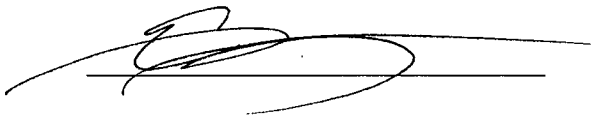
Adele J. Pope. . . . . Appellant,

v.

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

CERTIFICATE OF COMPLIANCE WITH RULE 211 (b)

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



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April 12, 2017